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# REPORT OF THE COMMISSION TO PROMOTE SPAIN AS A SEAT OF INTERNATIONAL ARBITRATION

cea
Club Español del Arbitraje

# REPORT OF THE COMMISSION TO PROMOTE SPAIN AS A SEAT OF INTERNATIONAL ARBITRATION

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# A

# EXECUTIVE SUMMARY

# A. EXECUTIVE SUMMARY

The Commission to Promote Spain as a Seat of International Arbitration is a consequence of the Agreement of Executive Committee of Spanish Club of Arbitration –Club Español del Arbitraje–, hereinafter CEA, adopted at a meeting held on 21 September 2017.

The main objective of this Commission was to produce a Report that identifies the reasons why Spain is not a major international arbitration centre –despite possessing the conditions to be one– and to make the necessary proposals for Spain to achieve that status.

The Commission has studied Spain as an international arbitration seat from different perspectives so as to analyze this "product/service" from different angles (macro and micro economics, educational, geopolitical, among others). It has done so in order to obtain an answer as to whether this "product/service" is sufficiently developed to be considered mature or whether it needs further development to achieve maturity.

The Report, has taken into consideration the potential deficiencies and contains a set of proposals which are classified as follows: proposals that must be implemented, as Spain is currently lacking in these areas; proposals that should be developed, as they affect existing attributes that are not sufficiently developed; and proposals related to aspects that, while existent and are sufficiently developed, should be promoted in the international arbitration arena.

From a temporal perspective, this Report will refer to the estimated deadline for the implementation, development or promotion of the proposals, distinguishing between short, medium and long term deadlines. Nevertheless, we must be aware that the objective addressed in this Report, Spain as a seat of international arbitration, is a long term objective.

With regards to who will be responsible for carrying out the proposals contained in the Report, the Commission identifies who is/are most suitable to carry out each task. In several cases, there will be numerous people responsible for the execution of the proposals; however, among them, there will be always one institution or authority which must assume the leadership, and is identified in the Report.

Regarding the working method used by the Commission, it has first analyzed the parameters that, traditionally and from an international perspective, allow a country/city to be considered as a good seat of international arbitration. The parameters used have been the following: Legislation, Regulation, Judicial Support,

Arbitral Institution of Reference, *"Arbitration practitioners"*, Training, Country-Advantage and Promotion.

Thereafter, these attributes have been compared, from a Spanish perspective, with those of the main seats for arbitration, whether or not they were within our geographical region. The work of this Commission is clearly intended to be conducted with a global perspective, without being limited to any geographical area.

Once these factors were identified, in order to achieve a better analysis and study, they were gathered and distributed among three Subcommissions established within the Commission.

Finally, for the analysis of these parameters and its comparison, the Commission was assisted by all those "*Arbitration practitioners"* who have decided to collaborate with it. CEA has provided sufficient information to the Spanish arbitral community about the existence of this Commission so that all those who were interested could participate in its development.

The involvement of these volunteers has generated a blended, brilliant, and aligned team that, one year following the establishment of the Commission, submits this Report.

J. Félix de Luis
**President**
Commission to Promote Spain as a Seat
of International Arbitration
Madrid, January 2019

# 1

# PREAMBLE

# 1. PREAMBLE

## 1.1 ORIGIN OF THE COMMISSION.

Among the ADR –Alternative Dispute Resolution– (or "MASC -Métodos de Solución de Conflictos" in Spanish) arbitration has been consecrated as the main method for the resolution of international commercial disputes and disputes between States and foreign investors.

Arbitration, as a private method for dispute resolution, is chosen by the parties as an effective mechanism to put an end to their differences without appealing to the judicial process.

Act 60/2003 of 23 December on Arbitration –hereinafter "Act on Arbitration" or "Act 60/2003"–, following the monist doctrine, establishes a single regime for arbitration, regardless of its national or international character. It also, however, defines in its Article 3.1 a set of circumstances to determine when arbitration should be considered international:

**i)** At the time when the arbitration agreement is concluded, the places of business of the parties thereto are located in different States;

**ii)** Any of the following are located outside the State in which the parties have their places of business: the place of the arbitration, or the place where a substantial portion of the obligations of the legal relationship from which the dispute stems are to be performed; or the place to which the subject matter of such dispute is most closely related.

**iii)** The legal relationship from which the disputes stems affects the interests of international trade.

The preamble of Act 60/2003 highlights that one of its objectives is to foster international arbitration and the promotion of Spain as a seat of international arbitrations.

Despite the good intentions of the Arbitration Act, the reality is that, since its enactment 15 years ago, there has not been significant increase in international arbitration cases where the parties have chosen Spain as the seat to solve their disputes.

CEA Executive Committee agreed in its meeting on 21 September 2017 to establish a Commission whose purpose would be to analyze and promote Spain as a

seat of arbitration.[1]

The mission of this Commission has been twofold:

i) To analyze the reasons why legal provisions have had less of an impact than what was expected in relation to international arbitration and;

ii) To propose measures and strategies to correct this situation.

The agreement adopted by CEA can be framed within the context of a classical civil society initiative, which may end up producing important effects that could affect Spain, the Spanish brand, and the image projected into the international arbitration practice.

It has traditionally been thought that the development of international arbitration as a dispute resolution mechanism parallels the progress of the economy of a country. Regardless of Spain's economic characteristics, however the development of international arbitration and, more importantly, the possibility of our country of becoming a relevant seat of international arbitration, does not match our economic profile.

From a macroeconomic perspective, Spain is the fourth economy of the Euro zone and the fifth economy of the European Union.[2] Currently, it is the fourteenth economy worldwide.

Spain relies on an important presence in certain geographical areas of the world. Latin America is a prime example, where Spain is the second investor or perhaps third investor following the explosion of Chinese investment in the continent. Furthermore, Spain is the ninth largest economy in terms of inward FDI stock in the World ($ 721.879 billion, amounting to 2.8% of the total) and the eleventh investor in terms of outward FDI stock in the World (US$ 673.989 billion, 2.6% of the total global amount).

Additionally, Spain is an open economy. It is the sixth most open country in the world according to the degree of internationalization of its economy;[3] the eighteenth largest exporter of goods, amounting to 1.7% of the world's total; the ninth largest exporter of services, amounting to 3.1% of the global total and the fourth largest exporter within the European Union; and the ninth most open country

1 Annex I: Agreement of CEA Executive Committee 21 September 2017.

2 Source UNCTAD, IMF.

3 Foreign exposure (Foreign Trade + FDI), amounts to 166% of the GDP. This figure is higher than France, and similar to Germany.

to Foreign Investment, according to the FDI Regulatory Restrictiveness Index – OECD, 2014. Goods and Services Exports account for 32.1% of its GDP and its total degree of openness represents 65% of its GDP.[4] Spain´s Inward Foreign Investment equals 51% of its GDP and Spain's outward Foreign Investment equals 46% of its GDP. In 2014, Spanish companies were awarded abroad contracts for a total value of €52.700 M.

Spanish language has a rising importance in business. Spanish is the second most spoken native language in the world, with over 500 million speakers; it is the second most used language for international communication and the second most used language for internet communications; it is the second most studied foreign language and it is estimated that by 2050, the United States will be the foremost Spanish speaking country in the world. The "Spanish GDP" in the world is 4.5 billions of dollars.[5] Based on this data, there is a potential environment which may be described as "friendly" for the Spanish speakers in the world of international arbitration.

From a microeconomic viewpoint, the fact that a country or a city may become an important seat of arbitration, especially international arbitration, is not something to be ignored. As an example, we may quote a study carried out on the impact that arbitration and international arbitration had on the city of Toronto (Canada): "*In summary, we estimate the total impact of arbitration on the economy of the City of Toronto to be $256.3 million in 2012, growing to $273.3 million in 2013*".[6]

Furthermore, Spain also enjoys the support of CEA, a non-profit association de-

4 Degree of openness = X+M of BB&SS/GDP.

5 Source: Spanish Ministry of Foreign Affairs, European Union and Cooperation and Directorate-General for International Economic Relations.

6 The report made by Charles Rivers Associates in 2012 highlighted the following:

*"The availability of these facilities and resources is likely to encourage increase arbitration activity in Toronto. In this report, we provide what we believe to be the first available estimates of the magnitude of arbitration activity in Toronto, and a forecast of its future economic significance for the city. Second, we estimate numerous benefits that arbitration activity provides for the Toronto economy more broadly. Third, we assess the economic importance of arbitration to the Toronto economy, and the potential economic benefit that attracting increased arbitration activity may have for Toronto and the surrounding area. To our knowledge, this is the first report to quantify the economic impact of a city's arbitration activity.*

*Arbitration activity contributes to a city's economy in multiple ways, including by means of the following:*

*• Directly generating work for legal counsel, expert witnesses and providers of support services (document management, reporting and transcription, translation and interpretation, and so on) retained by parties in the arbitration; • Directly generating work for arbitrators; • Generating spending on facilities, including hearing facilities and hotels, restaurants, shops, and service providers that support them; • In the case of international arbitration, bringing counsel and arbitrators from outside of the local area to hearings and meetings, with attendant benefits to the local economy arising from spending on accommodation, local transportation, food and beverage, and other visitor expenditures; • Indirectly, raising the profile and reputation of the city, particularly with businesses internationally; and • Attracting legal counsel, experts, business people, arbitrations, and others, all of whom serve to enhance the local economy directly and indirectly".*

voted to promote the use of arbitration as a dispute resolution method and to develop arbitrations procedures in Spanish or Portuguese as well as arbitrations procedures with an Ibero-American element. Established in 2005 by a group of professionals specialized in international arbitration, CEA has more 1,000 members from 40 countries in Europe, America, Asia and Africa, all of them experts in arbitration, who contribute to the consolidation of an international arbitration community in the Spanish and Portuguese language.

CEA promotes the achievement of its objectives through its 30 International Chapters in Europe, America, and Asia, with additional Chapters currently in the process of incorporation.

Recent studies in Spain find that arbitration, as a dispute resolution mechanism, is a valid option for 47% of the companies consulted. Furthermore, in the context of international arbitration, it is considered the ideal method for 87% of the consulted companies as a mechanism for resolving disputes that possess some international element.[7]

Despite of all the above data, the reality is that international arbitration in Spain has not reached the level of development that suits as a country, and Spain is not, presently, the main seat of international arbitration that it could be.

When we address international arbitration in this Report, we do it from a double perspective.

On one hand, we refer to those disputes that may affect Spanish companies vis-à-vis foreign companies –or disputes between Spanish companies that, pursuant to Act 60/2003, could be considered as international arbitration–.

On the other hand, we consider conflicts between two or more foreign companies, which have agreed on establishing Spain as the seat for arbitration.

As to the former group, it is utopian to expect that 100% of these conflicts will choose Spain as the seat to solve their disputes through international arbitration. However, between this utopian aspiration and the current reality, there is an important gap that we intend to analyze in this Report.

Regarding the latter group, even though as we will see, there are clearly market niches for which Spain may appear as a very interesting alternative and neutral forum, the reality is that the gap in this area is important.

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7 First Arbitration Study in Spain, headed by Ms. Marlen Estévez. Universidad Pontificia de Comillas, *Association of Corporate Counsel*, Roca Junyent Abogados.

In several areas that we analyze in this Report, we may assert *a priori* that Spain is well positioned –in fact, very well positioned– to be a potential seat of international arbitration. Thus, this should lead us to reflect on the reasons why, despite that potential, Spain still has not achieved this goal to date.

The Arbitration Act highlights in its Preamble the following:

> *"Spain has always been sensitive to the calls for harmonising legal provisions on arbitration, in particular in connection with international trade (...) Act 36/1998 of 5 December on Arbitration contributed to reaching that aspiration, explicitly mentioned in Royal Decree 1988 of 22 May, and paved the way for international commercial arbitration. According to that decree, "the strengthening of international trade, particularly with Latin America, and the lack of suitable arbitration services for international trade in Spain has led the business community in that area to resort to arbitration techniques whose roots lie in institutions with a different cultural and language background. The outcome, the severance of links with those countries in a matter of such growing common interest, can only have adverse effects for Spain". The present act intensifies that sensitivity and that aspiration, with every intention of bringing about significant qualitative change (...) The Model Law strikes a subtle compromise between continental European and Anglo-Saxon legal tradition, the outcome of an exhaustive exercise in comparative law. Consequently, its terms are not wholly in keeping with the traditional canons of Spanish law, but they do facilitate application of the law by actors working out of economic areas where Spain maintains active and growing commercial relations. The greater certainty about the content of the legal provisions on arbitration in Spain acquired by economic agents in those areas will favour and even encourage the conclusion of arbitration agreements that define this country as the place of arbitration (...)*

Latin America is a political, social and economic priority for Spain.[8] With regards to the trade relations, Spanish exports have been observing an upward trend, in particular, regarding capital goods, automobiles and food supplies, as well as the import of commodities, though there has been a recent decrease, mainly as a consequence of the drop in oil prices. The foregoing allowed, for the first time in several years, a positive trade balance in 2015. In 2016, it returned to negative values, but remained very close to neutral.

As far as investment is concerned, traditionally, Latin America has always been a priority for Spanish companies. In 2014, the last year available for the Foreign Direct Investment (FDI) stock, Latin America was the destination/recipient of one third of the Spanish FDI abroad, with roughly 125 billion euros. However, the flow rates show a detectable decrease in recent years, in line with the global trend of reducing investment in emerging countries, even though this reduction is con-

8 Source: Spanish Ministry of Industry, Trade and Tourism – Secretary of State of Trade. March 2017.

centrated to a few sectors and from a small number of large companies. On the other hand, Latin American investments in Spain represent less than a tenth of our incoming FDI stock, and even these are very limited as to their origin, with Mexico and Brazil together representing almost 90% of them.

Fifteen years have elapsed since the enactment of the Act on Arbitration and the data is not positive. The aim of Act 60/2003 that Spain would become a seat of international arbitration, with particular impact from Latin America, has not been fulfilled.

The applicable metric is easy: the number of international arbitration proceedings with a seat in Spain. Here we see that Spanish Arbitral Institutions lack relevance in the international arbitration arena, based on the number of international arbitrations that they have administered.

This Report was drafted, additionally, with suitable "*momentum*". On one hand, we have access to enough historical perspective since year 2003, to enable us to assess the reasons why, currently, Spain is not the seat of international arbitration that it could be and which we all desire.

On the other hand, there is an unending stream of potential competitors able to position themselves in the international arbitration market with the intention of covering all the markets niches that are not yet properly addressed. Spain cannot be left out of this pursuit for its position in the international arbitration market.

## 1.2. COMPOSITION OF THE COMMISSION.

To develop their work, the Commission has enjoyed the collaboration of the *"Arbitration practitioners"* [9] who have voluntarily participated. The participation in the work of the Commission has been opened to all those who have decided to participate since its establishment.

CEA has sufficiently publicized the existence and purposes of this Commission.

The Commission, whenever it has deemed appropriate, has contacted those persons and entities that could have contributions with special value.

The creation of this Commission follows the configuration of a blended, brilliant and aligned team which has produced this Report. The participation of distin-

9 *"Arbitration practitioners"*, Anglicism difficult to translate into Spanish. The literal translation "usuarios del arbitraje" or "operadores del arbitraje" –both terms in Spanish- is not apt as they are both considered much more restrictive.

guished Professors within this team, whose contributions are reflected in this Report, must be highlighted.[10] With the aim of simplifying the objectives of the Commission, its work have been divided between three Subcommissions. Each Subcommission was headed by a Chairman whose initial mission was to coordinate the work of its members and to produce a presentation, with varying levels of detail depending on the cases, with the support of the President of the Commission, Mr. J. Félix de Luis and his Secretaries, Mr. Luis Fernando Rodríguez and Mr. Víctor Bonnín. Subcommission 1, "Regulation and Judicial Aspects" was chaired by Ms. Pilar Perales Viscasillas. Subcommission 2, "Spanish Arbitral Institution of Reference at International Level and *"Arbitration practitioners"*, was chaired by Mr. Félix J. Montero. Subcommission 3, "Country-advantage and Promotion", was chaired by Mr. Alberto Fortún.

The complete list of the members of this Commission is included in Annex II to this Report.

10 Ms. Pilar Perales Viscasillas, Professor of Commercial Law at Universidad Carlos III in Madrid; Mr. José Carlos Fernández Rozas, Professor of Private International Law at Universidad Complutense in Madrid and Mr. Rafael Illescas, Professor of Commercial Law at the Universidad Carlos III in Madrid.

# 2

# INTRODUCTION TO THE REPORT

# 2. INTRODUCTION TO THE REPORT

This Report will analyze the reasons why Spain is not, at present, a reference as a seat of international arbitration, when it has the potential to be one.

The purpose of this Report is to analyze Spain as a seat of international arbitration considered from the perspective of a "product/service". It has done so with the aim of obtaining an answer as to whether this "product/service" is sufficiently developed to be considered mature or whether it needs further amendments to achieve such a position.[11]

The Report, pursuant to the situation of the parameters which will be analyzed later, contains a set of proposals that are classified as follows:

**i)** First, proposals that **must be implemented**, as Spain currently needs them;

**ii)** Second, proposals that **must be developed**, as they affect some current existing aspects which are not sufficiently developed;

**iii)** Finally, proposals related to certain parameters that, even if they exist and are sufficiently developed, **must be promoted** in the international arbitration arena.

Thereafter, the proposals are classified in the Report from two perspectives:

**i)** From a **temporal perspective**, this Report will refer to the estimated deadline for its implementation, development or promotion, making the distinction among the short, medium or long term goals.

From a temporal perspective, we must be aware that, although some concrete proposals could be executed in the short or medium term, the objective provided in this Report –Spain as a seat of international arbitration– is a long term objective.

Moreover, the result of the implementation of the proposals in this Report will not be appreciated, in several cases, in the short or medium term. We have to be aware that though we play in the medium-long term, execution is feasible. None-

11 Throughout this Report we will refer to "*Spain as a Seat of International Arbitration*" as a product or as a service interchangeably. It is referred to as a product since all arbitral proceedings usually finish with an award. It is referred to as a service as in order to obtain an award arbitral proceedings must be conducted.

theless, some results might be measurable in the short-medium term.[12]

ii) With regard to who will be **responsible for carrying out the proposals** contained in this Report, reference will be made to those –person, entity, or institution– considered to be the most suitable **to implement**, **develop**, or **promote** each proposal. In several cases, there will be numerous persons responsible for the execution of the proposals contained in this Report. However, in these instances, the Report identifies, when possible, the one responsible who should assume a leadership role.

Furthermore, with regard to whom will be responsible for carrying out the proposals contained in this Report, considering the timeline for some of them, in particular those of medium-long term, CEA must achieve a level of undisputed prominence, either as a promoter for their execution or to monitor implementation of the proposals.

12 As references, Hong-Kong International Arbitration Centre-HKIAC, founded in the year 1985, and Singapore International Arbitration Centre-SIAC, founded in 1991, have positioned themselves –and have positioned Hong Kong and Singapore– in the relative short-medium term, 30 and 25 years respectively, as a reference in international arbitration. The HKIAC and SIAC should be used as an example, and not only from a temporal perspective, as explained later in this Report.

# 3

# WORKING METHOD

# 3. WORKING METHOD

The Commission used the following working method in the project.[13]

First, we have started with an analysis of the parameters that, traditionally and from an international perspective, make a country/city a good seat of international arbitration.

The analyzed factors were the following:

- **i)** Legislation;
- **ii)** Regulation;
- **iii)** Judicial Support;
- **iv)** Spanish Arbitral Institution of Reference at International Level;
- **v)** "*Arbitration Practitioners*";
- **vi)** Training;
- **vii)** Country-Advantage;
- **viii)** Promotion.

These factors were compared, from a Spanish perspective, with those of the main traditional seats of arbitration without regard to geographical proximity. The work of this Commission was intended to be carried out with a clear global perspective, without being limited to any geographical area. There are recent notable models of success in the field of international arbitration, which though geographically distant are useful for analysis and as references.

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13 The Commission to Promote Spain as a Seat of International Arbitration has followed a working method used in similar contexts and situations.

- A first precedent is the "*Comisión Especial para la determinación, estudio y propuesta de solución de los problemas planteados en la aplicación del Ordenamiento Jurídico-Económico"* established through an Agreement of the Cabinet Council of 13 January 1995; functionally attached to the Spanish Secretariat of Economy, within the Ministry for Economic Affairs and Finance. The Secretary of this Commission was Mr. J. Félix de Luis.

- Another precedent that can be highlighted and which has used a similar working method is the one described in the case "*Fundación del Teatro Lírico: Teatro Real*", February 2014 –IESE, Business School, Universidad de Navarra–, which analyzed how an opera house, which is currently a clear reference globally, was rehabilitated.

The working method in both cases was similar and consisted of consultation of all those bodies directly affected:

- In the case of the "*Comisión Especial para la determinación, estudio y propuesta de solución de los problemas planteados en la aplicación del Ordenamiento Jurídico-Económico"* the economic bodies –large, medium and small companies grouped pursuant to different sectors and activities– were consulted as to what changes to the *"Ordenamiento Jurídico-Ecnómico"* were needed, in order to facilitate and/or to promote the development of the economic activity in Spain.

- In the case of the "*Fundación del Teatro Lírico: Teatro Real*", all the potential users, in a general sense, of the Royal Theatre of Madrid were consulted about the features they deemed necessary for the theatre to reach the recognition which it enjoys today as one of the best, and a model example in its specialty.

Once identified, in order to achieve a better analysis and study, these factors have been grouped and distributed among three Subcommissions.

Subcommission 1 analyzed the following factors:

**i)** Legislation;
**ii)** Regulation;
**iii)** Judicial Support.

Subcommission 2 analyzed the following factors:

**i)** Spanish Institution of reference;
**ii)** *"Arbitration practitioners".*

Subcommission 3 analyzed the following factors:

**i)** Training;
**ii)** Country-advantage;
**iii)** Promotion.

Once the factors were defined and distributed among the three Subcommissions, the *"Arbitration practitioners"* who voluntarily decided to participate in the Subcommissions worked on their analyzes and comparisons.

Each Subcommission proposed different initiatives in some cases in writing, and in others, orally. The initiatives were analyzed and discussed in different meetings; either within a limited group of practitioners or by email when deemed appropriate. Not all the proposals presented were incorporated in this Report, but all of them have been sufficiently evaluated and analyzed.

Once the works of each Subcommission was deemed sufficiently debated, a draft Report was elaborated, with varying degrees of detail, depending on the cases. These were thereafter included in this Report.

The President and the Secretaries of the Commission adopted a very active role in the development of its work. They proposed different initiatives in each Subcommission, stimulated debates and participated in all deliberations. They also attended all meetings that took place. Finally, they drafted several drafts reports for the three Subcommissions as well as the present Report.

The analysis of each of the parameters and its placement in the present Report is done consecutively and indeed has a sequential character. Therefore, we may highlight that to be considered as an important seat of international arbitration it is necessary for Spain to have appropriate legislation and proper judicial support,

under the terms explained in the chapter corresponding to Subcommission 1.

Once the appropriate legislation and the proper judicial support are guaranteed, Spain requires a Spanish Arbitral Institution of Reference at the International Level –hereinafter Spanish Institution of Reference–, which should undoubtedly assume a clear leadership role, as explained in the chapter corresponding to Subcommission 2.

Lastly, once there is a model Spanish Institution of Reference, promotion of Spain as a seat of international arbitration must be implemented, as explained in this Report. Some of these proposals may be implemented in the short term, while other proposals will require continuous work. This will be mainly assumed by the Spanish Institution of Reference, as explained in the chapter corresponding to Subcommission 3.

4

# **SUBCOMMISSION 1:** REGULATION AND JUDICIAL ASPECTS

# 4. SUBCOMMISSION 1: REGULATION AND JUDICIAL ASPECTS

Subcommission 1 analyzed questions which, in the context of this Commission, are included under the parameter of "**Regulation and Judicial Aspects**". This is comprised of i) Legislation, ii) Regulation and iii) Judicial support, the parameter of which are explained later, always from an international arbitration perspective.

## 4.1. LEGISLATION.

The Commission considers that Spain, *a priori*, –apart from the proposed amendments that are made further below– has a good Act on Arbitration.

Act 60/2003 is in force and revokes the previous Act 36/1988, of 5 December. It is a general law applicable both, to the national and international arbitration.

The arbitration regulation is monist and uses the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) of 1985 as its main model –hereinafter "Model Law"–. Even considering that the Model Law was developed for international commercial arbitration, its inspiration and solutions are perfectly valid, in the large majority of the cases, for domestic arbitration as well.

It is not that both types of arbitration, national and international, are fully synchronized. While there are few provisions where international arbitration needs a different regulation, on many occasions the distinction is a response to different commercial requests, such as the possibility of selecting the law governing the substance of the dispute in international arbitration.

Traditionally, there has been a certain tendency to treat the relations between Judge and Arbitrator differently depending on the domestic or an international character of the arbitration. The interest that a State has in submitting arbitration to mandatory laws and the control of Judges has been more intense in strictly domestic disputes than in international disputes, but even in these instances it does not reach a level of total differentiation.

The monist approach, except for very specific matters, allows national and international arbitration to rest on the same provisions, even though such a solution may leave some loose ends.

Countries with a strong arbitration tradition, such as France or Switzerland, which have opted for a dualist regulation, have relied on case law to convert their territories into safe seats for the institution. In some cases, to determine the international character of the arbitration, the relation of the subject matter with international trade is used; in other cases, the subjective criteria prevails; and in still others, the application of these same standards prevent the designation of an international character meaning the loss of applicability for international provisions.

Regarding the contrast between domestic and international arbitration, Act 60/2003 was enacted in the context of a legislative trend in favour of monist regulation for both national and international arbitration as an alternative to a dualist regulation, under which international arbitration is regulated, fully or to a large extent, by different provisions. The monist regulation, except for very specific matters, allows national and international arbitration to rest on the same provisions. In addition, Act 60/2003 gives a detailed answer to the key issues deemed specific to international arbitration, and it does so in terms favourable to its development.

The regulation of the Act on Arbitration has not only introduced a definition of international arbitration in its Article 3, but has also resolved some international arbitration questions:

**i)** Article 9.6 includes an alternative conflict rule to favour the validity of the arbitration agreement and the arbitrability of the dispute, when is justified only by the presence of a foreign element.[14]

**ii)** The possibility of freely selecting the applicable law for the merits of the dispute is one of the important new features of Act 60/2003. Article 34.2 in relation to international arbitration entitles the parties to choose the legal rules applicable, which constitutes a notable change, considering that this article uses the concept "rules of law" instead of "law", as was provided in the previous Act on Arbitration 36/1988.[15]

**iii)** Article 39.5 extends the deadline to correct, clarify, complement, and rectify the award.[16]

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14 Article 9.6 of Act 60/2003, determines that "*[i]n international arbitration, the arbitration agreement will be valid and the dispute arbitrable if the requirements laid down in any of the following are met: the legal rules chosen by the parties to govern the agreement; the rules applicable to the substance of the dispute; or the rules laid down in Spanish law*".

15 Article 34.2 of Act 60/2003 determines that "*in international arbitration, the arbitrators will decide the dispute in accordance with such rules of law as are chosen by the parties*".

16 Article 39.5 of Act 60/2003 determines that "*In international arbitration, the 10- and 20-day time limits established in the preceding items will be extended to 1- and 2-months, respectively*".

Furthermore, Act 60/2003 is a general law, fully applicable to all arbitrations not subject to special regulation. Act 60/2003 is also alternatively applicable to arbitrations that do have a special regulation, except in cases that are contrary to its application and where there is a provision expressly providing that it is inapplicable, as noted in the Preamble.

Additionally, Spain is party to the most important treaties on arbitration:

- New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, hereinafter NYC of 1958;
- Geneva Convention on the Execution of Foreign Arbitral Awards of 1927;
- Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.

Spain has also signed bilateral agreements for the recognition and execution of foreign decisions, including arbitral awards, and has a large number of bilateral investment treaties that include arbitration clauses.

The Commission **CONCLUDES** that Act 60/2003 currently in force is a good law, valid and consistent with the international standards of countries with ambition to become seats of international arbitration.

Therefore, from the "Legislation" perspective as a parameter broadly used in this Report, Spain is deemed to be in a good situation to potentially be a strong seat of international arbitration.

Nevertheless, the Commission has analyzed and discussed different amendments of Act 60/2003 taking two premises into consideration:

**i)** On one hand, being aware that any amendment must be performed under a principle of caution;

**ii)** On the other hand, the reflection about the convenience of a monist regulation for international and domestic arbitration remains. It is so despite the fact that a dualist regulation could approximate our system to those of France and Switzerland, for instance, which are very competitive and active in the international arbitration arena. The Commission is aware that a dualist regulation presents a task of a magnitude that surpasses its initial objective. In any case, this does not prevent the recommendation of some distinctive changes to the existing Act on Arbitration beyond those present in the Act in force, in relation to the regulation of both national and international arbitration.

Regardless of the fact that the Commission looks positively on Act 60/2003, it now formulates two proposals to the legal text:

The first refers to a group of several proposals to update Act 60/2003 in order to bring it in line with the 2006 version of the Model Law.

The second focuses on certain amendments related to fostering Spain´s competitiveness as a seat of international arbitration.

### 4.1.1. Proposals to update Act 60/2003.

Despite considering that Spain has a good legislation on the topic –in the moment of its publication, Act 60/2003 was considered as making significant great progress from the previous Act 30/1988–, we should be aware that the current Act 60/2003 has already been in force for fifteen years, whereby it may be convenient to, at least, update it.[17]

Act 60/2003 has become part of our arbitral culture. However, its inspiration, the Model Law of 1985, was revised in 2006, a revision which necessitates that we update our Act on Arbitration.

The need to update Act 60/2003 to take into account the amendments introduced in the Model Law in 2006 does not seem to require excessive justification, especially when in 2003, the legislator itself highlighted in the Preamble that:

> *"Spain has always been sensitive to the calls for harmonising legal provisions on arbitration, in particular in connection with international trade, to further the use of this tool and the consistency of criteria in its application. That attitude is informed by the conviction that greater uniformity in the laws governing arbitration will enhance its effectiveness as a means of settling disputes.*
>
> *(...) the underlying criterion is to base Spanish legal provisions on arbitration on the Model Law adopted by the United Nations Commission on International Trade Law on 21 June 1985 (UNCITRAL Model Law). That text was recommended by the General Assembly in its Resolution 40/72 of 11 December 1985, "in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". This new Spanish legislation follows the United Nations recommendation, taking the Model Law as a point of departure. It has regard as well to the subsequent work performed by the Commission to include*

17 Similarly situated countries, with regulations inspired by the Model Law, have recently proceeded with updating their own regulations.

Is the case of Austria (SchiedsRAG 2013); Belgium (Arbitration Act of 2013) or Ireland (Arbitration Act of 2010).

*technical advances and attend to new needs arising in arbitration practice, particularly as regards the requirements of the arbitration agreement and the adoption of interim measures".*

All these topics are, to a great extent, the ones that were subject to the important reforms to the Model Law made in 2006 and which came following the adoption of Act 60/2003.

Therefore, the proposals to update the Act 60/2003 in relation to the Model Law are not difficult to carry out and need little explanation to be adopted. Considering both laws in parallel –Act 60/2003 and the version of the Model Law– the proposals are almost fully self-explanatory.

#### 4.1.1.1. Rules of interpretation.

With regard to the rules of interpretation, following Articles 2 and 2A of the Model Law, the proposal is to include a subparagraph 2 and 3 in Article 4 of Act 60/2003. This would serve as an important warning call for certain *"Arbitration practitioners"* in the context of international arbitration –Judges, Magistrates, Counsels and even Arbitrators– to bear in mind the need to interpret the law in uniform, international and autonomous terms, excluding any interpretation that is subsidiary or analogous to the Spanish Civil Procedure Law, a practice which sometimes occurs.

The proposed update, besides highlighting the freedom to establish the procedure to be followed, something inherent to any arbitral procedure, is also a caution against the trend of excessive formalism and the lack of flexibility of judicial procedure.

**Provisions in force of Act 60/2003.**

*Article 4. Rules of interpretation.*

*When a provision of this act:*

*a. leaves the parties free to decide on a certain issue, such freedom includes the right of the parties to authorise a third party, including an arbitral institution, to adopt that decision, except in the circumstances envisaged in Article 34;*

*b. refers to the arbitration agreement or any other inter-party agreement, such agreement will be understood to include any arbitration rules to which the parties have submitted;*

*c. refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim, except in the circum-*

*stances envisaged in Article 31, item a) and Article 38, sub-item 2.a).*

**Proposed amendment of Act 60/2003.**

*Article 4. Rules of Interpretation. International Origin and general principles.*

1. *Where a provision of this Act:*
   *a), b) and c), without changes.*

2. *In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.*

3. *Questions related to the materials that are governed by the present Law that are not expressly resolved herein will be resolved in conformity with those general principles on which the present Law is based.*

4. *In pursuing the objectives of paragraphs 2 and 3, the statutes, the precedent, the practice, the principles or the existing procedural rules from domestic arbitration should not be used or considered, except where expressly provided by this Law.*

### 4.1.1.2. Definition and form of the arbitration agreement.

Article 7 of the 2006 amended Model Law offers two options related to the definition and form of the arbitration agreement: an extensive one, Option I, and a brief one, Option II.

Despite having considered that the brief option (Option II) might be, at least from the perspective of the legislative technique, more appropriate, the Commission recommends the adoption of the Option I, i.e., the more extensive option. Indeed, the adaptation of Article 9 of Act 60/2003 as currently drafted to that option is more realistic.

With this proposal, the decisions of some High Courts of Justice in Spain would be valued, in particular the one from Catalonia, which was the first, even globally, to recognize the importance of the UNCITRAL 2006 Recommendation in relation to the interpretation of the NYC.[18]

18 Article II.2 of the NYC provides that the arbitration agreement must be an "*agreement in writing*" which must include an "*arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*". The "*Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1*" of the NYC recommended a flexible and open interpretation of this article II.2 NYC, in order to allow the conclusion of arbitration agreements through electronic means of communication (for example, an exchange of e-mails). The Spanish High Court of Catalonia has quoted

**Provision in force of Act 60/2003.**

*Article 9. Form and content of the arbitration agreement.*

1. *The arbitration agreement, which may adopt the form of either a separate agreement of an arbitration clause in a broader contract, must express the parties' willingness to submit to arbitration all or certain disputes arising between them in respect of a given legal relationship, whether contractual or otherwise.*

2. *If the arbitration agreement is contained in an adhesion contract, its validity and interpretation will be governed by the rules applicable to such contracts.*

3. *The arbitration agreement must be in writing, in a document signed by the parties or an exchange of letters, telegrams, telexes, faxes or other telecommunication methods that ensure a record of the agreement is kept. Where an arbitration agreement is accessible for subsequent reference on electronic, optical or other media, it will be regarded as compliant with this requisite.*

4. *An arbitration agreement consisting of a document exchanged by the parties in any of the formats established in the preceding item will be regarded as included in the contract between the parties.*

5. *An arbitration agreement will be regarded to exist if in an exchange of statements of claim and defence the existence of an agreement is alleged by one party and not denied by the other.*

6. *In international arbitration, the arbitration agreement will be valid and the dispute arbitrable if the requirements laid down in any of the following are met: the legal rules chosen by the parties to govern the agreement; the rules applicable to the substance of the dispute; or the rules laid down in Spanish law.*

**Proposed amendment of Act 60/2003.**

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

1. *An arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

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this Recommendation to maintain this informality standard on several occasions: Ruling of the Spanish High Court of Catalonia of 15 March 2012; Ruling of the Spanish High Court of Catalonia of 29 March 2012 or more recently, Ruling of the Spanish High Court of Catalonia of 6 June 2016.

2. *The arbitration agreement shall be in writing.*

3. *An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*

4. *The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.*

5. *Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.*

6. *The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.*

7. *If the arbitration agreement is contained in an adhesion contract, its validity and interpretation will be governed by the rules applicable to such contracts.*

8. *In international arbitration, the arbitration agreement will be valid and the dispute arbitrable if the requirements laid down in any of the following are met: the legal rules chosen by the parties to govern the agreement; the rules applicable to the substance of the dispute; or the rules laid down in Spanish law.*

#### 4.1.1.3. Interim measures.

The Commission has deemed it advisable to adopt the complete legal regime of the Model Law into Act 60/2003 –which is regulated as the new Chapter IV "Interim Measures and Preliminary Orders"– while it has considered that it can, at this moment, modulate the regime of "Preliminary Orders" and fully admit the interim measures *inaudita altera parte*.

Likewise, the Commission has considered it appropriate to include a specific provision on the recognition and execution of the awards of the emergency arbitrator, in line with the incorporation of this procedure in the Arbitration Rules of the

main Spanish and international Arbitral Institutions.[19]

**Provision in force of Act 60/2003.**

TITLE IV. Arbitrator jurisdiction.

*Article 22. Arbitrator competence to rule on their jurisdiction.*

*Article 23. Arbitrators' power to order interim measures.*

1. *Subject to any contrary agreement by the parties, the arbitrators may, at the request of a party, grant any interim measures deemed necessary in connection with the object of the dispute. The arbitrators may require the claimant to furnish sufficient security.*

2. *Irrespective of the form adopted by arbitral decisions on interim measures, the rules on setting aside and enforcement of awards will apply thereto.*

**Proposed amendment of Act 60/2003.**

TITLE IV. The Jurisdiction of the Arbitrators and interim measures.

*First Section. Jurisdiction of the Arbitrators.*

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

*Second Section. Interim measures.*

*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, grant interim measures.*

2. *An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitrators order a party to:*

    a. *Maintain or restore the status quo pending determination of the dispute;*

    b. *Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;*

19 This instrument is provided, among others, in the Annex I of the Arbitration Rules of Civil and Commercial Court of Arbitration (CIMA) (2015); Annex II of the Rules of the Court of the Chamber of Commerce and Industry of Madrid (2015) and Article 15 of the Rules of the Spanish Court of Arbitration (2011).

*c. Provide a means of preserving assets out of which a subsequent award may be satisfied; or*

*d. Preserve evidence that may be relevant and material to the resolution of the dispute.*

*3. The arbitrators may require any party to disclose promptly any material change in the circumstances on the basis of which the measure was requested or granted.*

*4. The arbitrators may modify, suspend or terminate an interim measure they have granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitrators' own initiative.*

*5. The party requesting an interim measure shall be liable for any costs and damages caused by the measure to any party if the arbitrators later determine that, in the circumstances, the measure or the order should not have been granted. The arbitrators may award such costs and damages at any point during the proceedings.*

*Article 23 bis. Requirements for the adoption of interim measures.*

*1. The party requesting an interim measure under the sub-paragraphs a), b), or c), of paragraph 2) of Article 23 shall satisfy the arbitrators that:*

*a. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*

*b. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitrators in making any subsequent determination.*

*2. With regard to a request for an interim measure under the sub-paragraph d) of paragraph 2) of Article 23, the requirements in sub-paragraphs a) and b) of paragraph 1) of this article shall apply only to the extent the arbitrators consider appropriate.*

*3. The arbitrators may require the party requesting an interim measure to provide appropriate security in connection with the measure.*

*Article 23 ter. Application for interim measure without notice to the other party and conditions for it to be granted.*

1. *Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure.*

2. *The arbitrators may grant an interim measure provided they consider that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.*

3. *The conditions defined under Article 23 bis apply to any interim measure, provided that the harm to be assessed under sub-paragraph a) of paragraph 1) of Article 23 bis, is the harm likely to result from the order being granted or not.*

4. *Immediately after ruling on an application for an interim measure, the arbitrators shall notify all parties about the application and, where appropriate, of the interim measure granted, as well as all the communications related to it.*

*Article 23 quater. Recognition and enforcement.*

1. *An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court.*

2. *The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.*

3. *The rules on setting aside and enforcement of awards will apply to the arbitral decisions on interim measures, regardless of their form.*

4. *The court to which the recognition and enforcement is requested cannot carry out a revision of the content of the interim measure.*

5. *This provision will be also applicable to the decisions rendered by the emergency arbitrator who acted before the appointment of the arbitrators who will resolve the dispute between the parties, provided the request for enforcement before the competent court is made before their appointment.*

#### 4.1.1.4. Recognition and execution of the awards.

This proposal follows the new Article 35. 2 of the Model Law, modified in 2006. Effectively, it introduces in Act 60/2003 the possibility of presenting documents and written statements in English, a common language in the international arbitration

context, without the need of previous translation to Spanish, as has begun to be allowed in similar jurisdictions, including those that already possess a wider scope.

The use of documents in languages that are not official in the host country, essentially in English, without the need for prior translation is becoming an increasingly accepted practice in surrounding countries. This factor has an unquestionable importance in the context of international arbitration with seat in Spain and it will be an additional factor to help us become a more competitive seat.[20]

Likewise, it must be kept in mind that, by applying the NYC, the competent court needs to take into consideration the Recommendation related to the interpretation of the Article II (2) and the Article VII (1) of the NYC, adopted by UNCITRAL during its Thirty-Ninth Session on 7 July 2006.

**Provision in force of Act 60/2003.**

TITLE IX. Exequatur of foreign awards.

*Article 46. Foreign status of award. Applicable rules.*

1. *A foreign award is defined to be one delivered outside Spain.*

2. *Exequaturs for foreign awards will be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958, without prejudice to the provisions of other more favourable international conventions, and the requisite procedural steps will be performed as set out in the Civil Procedure Rules for sentences delivered by foreign courts.*

**Proposed amendment of Act 60/2003.**

TITLE IX. The Recognition of Foreign Awards.

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

1. and 2. *Without changes.*

3. *The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in Spanish, the court may request the party to supply a translation thereof into such language.*

20 In 2018, France has launched off a "*Chambre internationale du tribunal de commerce de Paris"* and a "*Chambre internationale de la cour d'appel de Paris*" to solve commercial disputes, before which, with prior agreement by the parties, presenting documents in English with no need for translation will be possible.

*4. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards will govern the recognition and enforcement of arbitral interim measures, excluding preliminary orders.*

*5. An ex novo interim measure may be also requested from the Spanish courts, using as evidence of its relevance the arbitral award adopting interim measures.*

#### 4.1.1.5. Rules applicable to the dispute.

This proposal aims to clarify, and also facilitate, the possibility that Arbitrators, in addition to being able to rely on the terms of the contract and the applicable usages, may be able to rely on the UNIDROIT Principles on international commercial contracts.

**Provision in force of Act 60/2003.**

TITLE VI. Making of award and termination of proceedings.

*Article 34. Rules applicable to substance of dispute.*

*1. and 2. Without changes.*

*3. In all cases, the arbitrators will decide in accordance with the terms of the contract, having regard to standard practice in connection with the transaction.*

**Proposed amendment of Act 60/2003.**

TITLE VI. The Making of the Award and the Termination of the Proceedings.

*Article 34. Rules Applicable to Substance of Dispute.*

*1. and 2. Without changes.*

*3. In all cases, the arbitrators shall decide in accordance with the terms of the contract and take into account the applicable usages. Further, the arbitrators may take into consideration the UNIDROIT Principles of International Commercial Contracts.*

**Responsible for the implementation of the proposals:**

Spanish Ministry of Justice is the one, in principle, responsible for leading this initiative of updating Act 60/2003, as a draft Law needs to be adopted as first step.

CEA Executive Committee shall promote and follow up this initiative.

**Execution deadline:**

Short-medium term.

It is a measure whose execution may be adopted in the short-medium term.

The Commission is aware that the adoption of any draft Law entails several formalities. However, it is also aware that with appropriate impetus and monitoring it may be executed in the short-medium term.

Other jurisdictions, such as Singapore and Hong-Kong, are again examples in this regard. In a period of only one year, they have lifted a prohibition of more than three hundred years on the use of Third Party Funding, overcoming a traditional limitation of the common law systems.[21]

### 4.1.2. Proposals to amend Act 60/2003 in order to foster Spanish competitiveness as a seat of internatonal arbitration.

The Commission considers the following proposals for amending Act 60/2003 as a way to foster Spain's competitiveness as a seat of international arbitration.

As a starting point, we must be aware that without clear and predictable judicial reasoning, capable of providing security and certainty regarding the awards that are rendered in arbitral proceedings seated in Spain, we cannot expect our country to become a seat of international arbitration.

The following proposals are made with the objective of being able to have a system aligned with those of our surrounding countries. Spain cannot be pulled away from the European mainstream that increasingly uses international arbitration as a dispute resolution mechanism.

The existence of a specific judicial control regime for overseeing the arbitral award and the results of its application are, undoubtedly, essential elements underlying the choice of a seat of international arbitration. Those elements are often used as a promotional and advertising strategy to strengthen the country's status as an indisputable place of arbitration. For many years, Paris, Geneva, London, Brussels and New York –all models to follow in international arbitration– have

21 On 14 June 2017, "*The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance No. 6 of 2017 (the Amendment Ordinance)*" was approved by the Legislative Council of Hong Kong, entering into force on 20 June 2017 and legalizing the use of Third Party Funding for the arbitration and mediation in Hong Kong.

On 24 February 2017, the "*Government Gazette"* of Singapore published "*Civil Law (Third Party Funding), Regulations 2017, Civil Law Act 43*" that established the framework for the use of Third Party Funding in that country solely for arbitration. On 1 March 2017 it entered into force.

been judicially monitoring arbitral awards through diverse means, including even the designation of a specialized body within their judicial structure for annulling arbitral awards. With this measure, they strengthen a doctrine that guarantees legal certainty and, not only fosters the development of national arbitration but also attracts international arbitration.

In all arbitration seats in the world, it is possible to set awards aside. This is not a cause for concern if the set aside proceedings have enough legal and jurisprudential support and a high degree of predictability, even if some decisions are not accepted unanimously by "*Arbitration practitioners*".

Of course, such control must not be understood as a threat to or an assault on the arbitral proceeding, since the intervention of a judicial body is decisive when the arbitral award is to be executed. Therefore, to contribute to the effectiveness of the arbitration, it is very important to determine the competent forum to carry out this function and the rules applicable to the action of setting aside an award, hereinafter, "annulment action". Indeed, this is one of the essential elements to take into consideration when selecting a seat of the international arbitration.

Related to annulment actions, on 3 May 2018, CEA established a Commission with the objective of performing an in-depth analysis of Spanish case law on the annulment of awards and to consider the implications for the development of international arbitration choosing Spain as a seat. The conclusions that will be made by that Commission will easily be used to measure the level of judicial support in the execution of awards rendered in the context of international proceedings seated in Spain.

Notwithstanding the above, this present Commission intends to make the following considerations in relation to the action to set aside an award and its consequences in the context of international arbitration. In particular, this Commission is considering a partial amendment of the provisions that are currently most problematic: specifically, an amendment of the provisions of Title VII of Act 60/2003 that retains its monist character while abandoning any intention of creating a dualist regulation, as explained above.

The Commission considers that the said amendment proposal affects three relevant factors arising out of the annulment action, which could foster the competitiveness and strength of Spain as a seat of international arbitration:

**i)** The possibility to waive the annulment action;

**ii)** The delimitation of the grounds for annulment, preventing the action from converting into a second instance proceeding resulting from a misapplication of the public policy doctrine and;

**iii)** The achievement of a harmonized jurisdictional doctrine in matters that could conflict with the doctrine by any High Court of Justice.

#### 4.1.2.1. Waiver of the anulment action.

Reinforcing Spain as a seat of international arbitration leads the Commission to propose incorporating into Act 60/2003 one legal option that exists in the many pro-arbitration national Laws in our region and applicable solely to international arbitration: allowing parties to waive the annulment action or limiting this action to certain grounds.[22]

Some sectors of arbitral practice deem jurisdictional control contrary to the essence of arbitration itself, as there is a trend that is favourable to the possibility of waiving annulment actions under certain conditions and types of arbitration.

During the debate of this question over the last few years it has been argued that such a waiver is not feasible as it would mean the abandonment of the law to judicial protection. It cannot be surprising that those who have weighed in on this topic are extremely cautious, claiming that the waiver should/will be admissible only if it does not exclude mandatory laws.

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22 France, Switzerland, Belgium and Sweden are the most cited examples for these purposes.

France, in its "*Décret N. 2011-48 portant réforme du droit de l'arbitrage",* has substantially amended the Book IV of the Civil Procedural Code. The new redaction of the article 1522 determines that:

*"By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside.*

*Where such right has been waived, the parties nonetheless retain their right to appeal an enforcement order on one of the grounds set forth in Article 1520.*

*Such appeal shall be brought within one month following notification of the award bearing the enforcement order. The award bearing the enforcement order shall be notified by service (signification), unless otherwise agreed by the parties."*

Switzerland expressly contemplates the possibility of waiving the action to set aside in international arbitrations in its Article 192.1 of the Federal Statute on Private International Law dated 18 December 1987, establishing the conditions for the waiver to occur: i) the arbitration shall be international and ii) the parties challenging the award shall not have the any relation with the country seat of the arbitration. The waiver will be valid always and when there is no territorial connection between the parties and Switzerland at the time of the waiver. In any case, if the question is brought before a Judge, prior to the admission, he should restrictively examine the scope of the waiver and request a clear wording that reflects the will of the parties to waive any challenge to the award. The waiver cannot be indirect, it must be part of the arbitration agreement or of a subsequent written agreement; it cannot be part of a pre-existing document that the parties refer to. The simple choice of a set of arbitration rules that contain a waiver to the annulment appeal does not seem to be sufficient. On the other hand, the mere inclusion in the arbitration agreement that the award is final and not subject to appeal does not constitute a waiver of the right to challenge the award.

Belgium contemplates a similar situation in its Article 1717.4 of its Judicial Code.

Sweden, in Article 51 of its 1999 Act on Arbitration, allows waiver of annulment in arbitrations where the parties are not nationals or parties domiciled in those countries.

The most radical position on waiver of annulment actions understands that if, in the process of reducing and adjusting the grounds of annulment, the grounds of public policy, which is the principal ground, would be eliminated, then it is better to set concrete pathways to be able to waive an annulment action completely, and leave it to the parties themselves to decide whether or not they desire to be protected by the control instrument offering the annulment.

Thus, there would be cases that could give rise to the possibility of waiving the appeal i.e. the exercise of the annulment action of the international arbitral award, with the objective of freeing the result of the arbitration proceeding from a part of the judicial control at a later stage.

Considering that the advantages of allowing the annulment waiver are linked to international arbitration, the favourable arguments are, firstly, for purposes of effectiveness, to avoid defensive strategies such as pre-constructing convoluted grounds for annulment, to prevent the eventual violation of public policy and to avoid delaying tactics once the award is known.

Thereby, with the agreement to waive the annulment action, the parties may concentrate on defending their positions during the arbitral proceedings while avoiding the need to contemplate eventual strategies for safeguarding a potential annulment that weigh as a sword of Damocles in the course of the arbitral actions.

By all means, the waiver is accepted by many Arbitrators who recognize the possibility of keeping their reputation intact by limiting revisions to the appropriate correction of the awards. Lastly, the waiver avoids the inconvenience related to the "double control" of the awards.

In any case, these advantages of full or partial waiver of the annulment action in international arbitrations have not led Spanish commentators to accept it unanimously. There are several authors who deem this possibility –the waiver of the annulment action– a violation of the Spanish Constitution. Thus, despite the potential of such a measure to foster the establishment of Spain as a seat of international arbitration, the Commission considers that a concrete proposal in such matter must be preceded by an in-depth debate on its validity.

Therefore, the Commission considered that before making any concrete proposal for regulation, this issue should be carefully considered even if the waiver of the annulment action is a proposal that would clearly foster Spanish competitiveness as a seat of international arbitration, especially for those conflicts where the parties have no connection with our country. In any case, the regulation should be included in Act 60/2003 in force, in its Article 40, which regulates the annulment action.

#### 4.1.2.2. Regulation of the annulment action in international arbitration.

Modern arbitration regulations have stopped equating awards to judicial decisions, as far as the actions and appeals against them are concerned, thereby reducing the deadlines –frequently very extensive– to exercise the challenge, as well as the extensive lists of causes of action which widely differ from one legal system to another.

The reason for this is the exclusion of the control of the merits of the award and its finality from the moment that it is rendered.

The Model Law has optimized that situation of legislative specificity. Therefore, it allows only one type of appeal, excluding any others established in the procedural law of the respective State.

The second measure for improvement proposed in this Report relates to the annulment action, with the aforementioned objective of fostering Spanish competitiveness as a seat of international arbitration, is the creation of an exhaustive list of grounds under which the award may be set aside.

This list must take into consideration the traditional distinction between errors *in iudicando* and errors *in procedendo*. If the latter set of errors plays a main role in arbitration, there is no doubt that the allegation of public policy is included. It would also be included in the former set of errors, even if with a very restricted character. Hence, the annulment consists of an external judgement which will lead to a decision to either dismiss the challenge or to set aside the award that has violated the legal assumptions of its configuration or the submission of the arbitrator to the agreed limits, but in no case the decision on the merits.

The proposal made in this Report follows Article 34.2 of the Model Law in as much as it sets out two types of grounds. The first set of grounds must be proved by the party presenting the appeal.[23] The second set of grounds takes effect, always at the request of the court or a party, in very specific cases.[24] This list of grounds is

23 *"(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal 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 Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law".*

24 *"(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State."*

very similar to that of Article V of the NYC of 1958.[25]

This parallelism between the grounds to annul an award and the grounds set out in the Article V of the NYC for refusal to recognize and enforce was already adopted in the Geneva Convention of 21 April 1961.[26]

The basis for this *numerus clausus* lies on the nature of the annulment action, where by the dismissive nature of the *res judicata* inherent to the arbitral award cannot be abstractly established as this would unequivocally create a situation of legal uncertainty. In other words, challenging the award cannot be based on any ground that, at the discretion of the appellant, has the effect of invalidating the results of arbitral proceedings, but rather the annulment must necessarily rest on the possibilities that are enumerated in the Act on Arbitration. Therefore, awards can only be set aside in the cases expressly provided for in Act 60/2003, when the appeal is presented within the established time limit.

Hence, the Commission proposes to abandon the list enumerated in the current article of Act 60/2003, returning instead to the universal scheme proposed by the Model Law and essentially following Article V of the NYC.

Applying this doctrine to arbitration in Spain highlights the "exceptional" character of the public policy ground as a ground for setting aside the award, with special focus on international arbitrations. The objective is to define, within the concept of public order, a narrower and more easily understood ground, which would be applicable to those cases in which the award had been rendered abroad or in the context of the international arbitration. This public policy ground will only succeed as ground for setting aside an award when there is a violation of particularly essential principles.

The implementation of this proposal will confer a reduced role to the public policy ground and will, coherently with its nature, limit its operability to the truly exceptional cases. Thus, the Judge should only control the result of the award,

25 Article V of the NYC provides that "*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought*": (a) the parties were under some incapacity to enter into the arbitration agreement, or the said agreement is not valid; (b) a party was not served with proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law; (e) the subject matter of the dispute is not capable of settlement by arbitration or (f) the award would be contrary to the public policy, which also includes serious violations of the due process.

26 According to its Article IX, the decision of a foreign state to set aside an award based on a different ground from the ones set out in the its text, will not serve as a cause to refuse the execution of the award, pursuant to the Article V of the NYC.

verifying if the arbitrators were aware that there was a public policy issue, without examining its reasoning and without needing to analyze how the problem was solved. In other words, the notion of public policy cannot give rise to an examination of the accuracy of the reasoning of the award by the Judge. Hence, public policy cannot be used as a wildcard to set aside the award, with the support of eventual mistakes by the Arbitrator or to decline certain grounds. The action to set aside an award is not, and neither should it be, a "second request" in the sense of a higher body rendering a new decision to amend the decision of the Arbitrators.

**Provision in force of Act 60/2003.**

*Article 41. Grounds.*

1. *An award may be set aside only if the applicant alleges and furnishes proof:*

   a. *that the arbitration agreement does not exist or is not valid;*

   b. *that the applicant 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 award contains decisions on questions not submitted to arbitration;*

   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 an imperative provision of this act, or, failing such agreement, was not in accordance with this act;*

   e. *that the subject-matter of the dispute is not apt for settlement by arbitration;*

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

2. *The existence of the circumstances listed in sub-items 1.b), 1.e) and 1.f) may be determined by the court hearing the case for setting aside the award on its own initiative or at the request of the Public Prosecutor in connection with interests whose defence is legally attributed thereto.*

3. *In the instances envisaged in sub-items 1.c) and 1.e), only the decisions in the award on questions not submitted to the arbitrators or not subject to arbitration will be set aside, providing they can be separated from the others.*

4. *An application for setting aside an award must be made within 2 months of the date of notification thereof or, in requests made for correction, interpretation or an additional award, of the date of notification of the decision thereon, or of the*

*deadline for such notification.*

**Proposed amendment of Act 60/2003.**

*Article 41. Grounds.*

1. *The award may be set aside only if:*

    1. *The applicant alleges and furnishes proof:*

        a. *That the arbitration agreement does not exist or is not valid.*

        b. *That the applicant 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 an imperative provision of this Act, or, failing such agreement, was not in accordance with this Act.*

        e. *That the award lacks any reasoning, fails to state the date in which has been rendered or the name of the arbitrator or the arbitrators, does not include their signatures, or has not been rendered with the majority of the votes.*

    2. *Ex officio, solely when the award is manifestly contrary to public policy.*

2. *In the cases of subparagraph c) of the paragraph 1, or if the award is deemed contrary to public policy insofar as it solves questions not capable of settlement by arbitration, the setting aside shall affect only the determinations of the award on such questions, provided that they can be separated from the remainder.*

3. *The court will reject the application for setting aside an award when its presentation is extemporaneous, or the grounds invoked do not correspond to the ones listed in the first paragraph of this article.*

4. *The court application for setting aside an award will not address, under any circumstances, the merits of the dispute, neither will it clarify or amend the criteria, reasoning, evaluation of the evidence, or interpretations made by the arbitral tribunal in the award.*

5. *An application for setting aside an award must be made within two months of the date of notification of the award or, in requests made for correction, interpretation or an additional award, of the date of notification of the decision thereon, or of the deadline for such notification.*

#### 4.1.2.3. Appeal in the interest of the law.

With the objective of unifying the eventual doctrine that may result from the seventeen different High Courts of Justice in our country that may decide the proceedings to set aside arbitral awards, the Commission proposes to use the mechanism that currently regulates the Civil Procedural Law of 2000 in its Chapter VI of Title IV in Book II, Articles 490 to 493, as it regulates the "Appeal in the interest of the Law".

It is a legal instrument that has its antecedents in the also-named appeal in the interest of the Law regulated by the previous Civil Procedural Law of 1881 and assumes, apparently, an analogous function to this one, as its one purpose is to unify the jurisprudential doctrine about controversial legal issues, without affecting the legal particular situations that were resolved by the decision that is the object of the appeal.

With this amendment, the Commission proposes to widen the material scope of the decision, a scope which has been reduced to homogenizing the discrepant criteria on the interpretation of the legal rules and due process, and on the discrepancy regarding the interpretation of the grounds of the annulment.

This action is not intended to repair the burden that the party affected by the content of the decision of the High Court of Justice may have suffered, but rather that the particular situations resolved and derived from what was decided in the appeal for procedural violation would, in any case, remain intact, and future situations could be saved.

**Provision in force of Act 60/2003.**

*Article 42. Procedure.*

*[...]*

2. *The court's sentence will not be appealable.*

**Proposed amendment of Act 60/2003.**

*Article 42. Procedure.*

*[...]*

2. *The court's sentence will not be appealable, except in the interest of the law under Articles 490 and 493 of the Law of Civil Procedure.*

**Provision in force of the Spanish Civil Procedure Act 1/2000, of 7 January.**

*Article 490. Decisions subject to appeal in the interest of the law*

1. *An appeal in the interest of the law may be lodged for the coherence of jurisprudence regarding judgements which resolve extraordinary appeals for a breach of procedural law when the Civil and Criminal Chambers of the High Courts of Justice hold opposing criteria as regards the interpretation of procedural rules.*

**Proposed amendment of the Civil Procedure Act 1/2000, of 7 January.**

*Article 490. Decisions subject to appeal in the interest of the law*

1. *An appeal in the interest of the law may be lodged for the coherence of jurisprudence as regards:*

   *1.- Judgements which resolve extraordinary appeals for a breach of procedural law when the Civil and Criminal Chambers of the High Courts of Justice hold opposing criteria as regards the interpretation of procedural rules.*

   *2.- Judgements which resolve application to set aside arbitral awards when the Civil and Criminal Chambers of the High Courts of Justice hold opposing criteria on the interpretation of the grounds for annulment included in Article 41 of the Act on Arbitration 60/2003, 23 December.*

**Provision in force of the Spanish Civil Procedure Act 1/2000 of 7 January.**

*Article 491. Standing for appealing in the interest of the law.*

*In any case the Public Prosecution Service and the Ombudsman may appeal in the interest of the law. Furthermore, legal persons under public law may lodge this appeal due to the activities they carry out and the functions attributed to them, and in relation to the procedural questions involved in the appeal, and they accredit legitimate interest in the coherence of jurisprudence in such questions.*

**Proposed amendment of the Civil Procedure Act 1/2000, of 7 January**

*Article 491. Standing for appealing in the interest of the law.*

1. *The Public Prosecution Service and the Ombudsman may, in any case, appeal in the interest of the law.*

2. *Furthermore, this appeal may be lodged:*

   *1st. Under Article 490.1 1o, by legal persons under public law that, due to their activities and functions, and in relation to the procedural questions involved in the appeal, show a legitimate interest in the harmonization of the jurisprudence on such questions.*

   *2nd. Under Article 490.1 2o.*

   a. *By the public-law corporations and the public entities that, according to their regulatory standards, may carry out arbitral functions.*

   b. *By the non-profit associations and entities whose articles of association provide arbitration services.*

**Responsible for the implementation of the proposals:**

The Spanish Ministry of Justice is the one, in principle, who must lead the initiative of amending Act 60/2003 and Act 1/2000, as a draft Law needs to be adopted as a first step.

CEA Executive Committee shall promote and follow up this initiative.

**Execution deadline:**

Short-medium term.

It is a measure whose execution may be adopted in a short-medium term.

The Commission is aware that the adoption of any draft law entails several formalities. However, it is also aware that with appropriate impetus and monitoring it may be executed in a short-medium term.

## 4.2. REGULATION.

**i)** Article 21.1 of Act 60/2003, *"Liability of arbitrators and arbitral institutions. Provisioning funds"* sets out in its second paragraph, after regulating the liability of the arbitrators, that *"[a]rbitrators or arbitral institutions on their behalf will be bound to take liability insurance or equivalent security for the amount established in the rules. Public entities and arbitral systems integrated in or under the aegis of governmental authorities are exempted from this obligation".*

In spite of this provision, the civil liability insurance or equivalent guarantee in the arbitration context has not been legally developed, which contrasts to what happened in the mediation context. Thereby, the Commission recommends the adoption of a Regulation that develops Act 60/2003 in this sense and that solves this question in relation to arbitration. All this is recommended in relation with the objective of generating security and certainty in arbitration, both international and national.[27]

**ii)** Apart from the previous proposal, the Commission considers that the use of the parameter Regulation, arising out of the international arbitration context as explained at the beginning of this Report, covers different aspects of the Spanish arbitration practice that should be explained in the international ground, with a clear objective of diffusion and promotion.

This would entail the use of soft law technique –which, considering Spanish legal technique strictly speaking, would not even be a regulation *per se*– in certain aspects of the arbitral practice with a Spanish element and in relation to international arbitration, with a compilation character and, in other aspects, with an informative character, as has occurred in other contexts.[28]

An example in the Spanish arbitration context is the Best Practices Code that CEA is developing, which would be a complement to the technique of soft law.

Hence, under this parameter of Regulation, the following aspects could be included:

- Third Party Funding, and the possibility of its use in Spain.[29]

27 The Royal Decree 980/2013, 13 December, which develops certain aspects of Act 5/2012, of 6 July, of mediation in civil and commercial matters, in its Chapter IV, Articles 26 to 29, regulates the civil liability insurance or equivalent guarantee of the mediators and mediation institutions.

28 The example which may be highlighted as a precedent is the use, by the Spanish Securities Exchange Commission, CNMV, in the use of soft law technique through its well-known "Cartas-Circulares".

29 CEA has established a Commission that is currently analyzing the use of Third Party Funding in Spain. It will be an example of how, after an appropriate analysis, its result in the form of a Report may be transferred to the international arbitration community with an informative character.

- Expedited procedures, its regulation and use in Spain.
- Early dismissal, its regulation and use in Spain.
- Policies to control the time and cost of arbitral proceedings conducted in our country, its recommendation and use in Spain.
- "*Arbitration practitioners*" and their situation in Spain.

In **CONCLUSION**, as far as the parameter "Regulation" is concerned, the Commission considers that its use as a way to promote Spain as a seat of international arbitration could be very interesting in order to communicate many of the characteristics and advantages of our country to the international arbitral community. The Commission deems that until now, this instrument was only scarcely used by the Spanish arbitral community.

**Responsible for the implementation of the proposals:**

The development of the regulation of Article 21.1 of Act 60/2003 corresponds to the Spanish Ministry of Justice.

The execution of the proposals of Regulation should correspond to the "Spanish Institution of Reference", in close collaboration with CEA. This collaboration would be a clear example of the alignment advocated in this Report between these two entities.

**Execution deadline:**

Short-medium term.

It is a measure whose execution may be adopted in a short-medium term.

## 4.3. JUDICIAL SUPPORT.

Appropriate judicial support is viewed, in the context of international arbitration, as an essential element to enable a country to be, or to become, an important seat of international arbitrations.

The lack of this support, in the following terms, may seriously hinder the achievement of the objective of promoting Spain as a seat of international arbitration.

The judicial system in our country must therefore be familiarized with, and have an appropriate knowledge, of alternative dispute resolution methods and decisive-

ly support its use and consequences. We must be aware that judicial support needs members of the judiciary who are talented, efficient and with sufficient knowledge and experience in international arbitration matters to be able to generate sufficient trust to their potential users, starting from the nationals, but especially the foreign *"Arbitration practitioners"*. Generally speaking, this requirement does not receive the attention it deserves.

Multi-tiered arbitration clauses are increasingly common, in particular Mediation-Arbitration, under which the parties must try to settle their dispute in a step preceding arbitration. These clauses may present jurisdictional issues whereby the judicial system must have a clear understanding of the extent of their enforceability.

For instance, it is important that the judicial system effectively protects the confidentiality of the assisted negotiations and/or mediation previous or parallel to the arbitration. This is also key for the recognition of the execution of the parties' agreement, thanks to these processes that occur prior to arbitration.

The Commission considers that the judicial support should cover the following aspects:

**i)** Appointment of Arbitrators;

**ii)** Adoption of interim measures;

**iii)** Assistance in the production of evidence;

**iv)** Recognition and enforcement of the arbitral agreements, orders and awards;

**v)** Setting aside the award;

**vi)** Admission of documents and written submissions preferably in English, without the need to translate into Spanish.

Precedents in this context are lacking in Spain, due to the past poor development of international arbitration practice in our country. Consequently, this Commission has not been able to obtain much data on the judicial support in the context of international arbitration.

The point of departure is that nowadays it is not necessary to have a dual regulation that differentiates national arbitration and international arbitration. Hence, the current monist regulation and, more importantly, the practice that has been produced in the domestic context with respect to the judicial support to date, may

be transferred to international arbitration without problem.

Thereby, the Commission presented a question for its members as to whether the "*Arbitration practitioners*" are satisfied with the judicial support that has been provided to national arbitration to date.

*A priori*, we may highlight that, in the context of national arbitration, the Commission has not noted any alarming signs on the lack of judicial support in relation to the diverse questions posed before.

The Commission has not obtained negative feedback regarding the lack of judicial support to national arbitration that could make us doubt of its effectiveness if transferred to the international arbitration context and which would justify new proposals to make it stronger. This is separate from proposals that we have made previously about the admission of documents and written submission in languages other than Spanish, preferably in English, and the different measures identified to foster Spanish competitiveness as a seat of international arbitration.

We will add a last consideration related to the parameter "Judicial Support". The complexity of international arbitration demands and makes desirable that the Judges and Magistrates have access news and other developments that are continuously produced in this context, especially regarding the interpretation and application of laws.

To achieve a case law of quality in line with the needs of international arbitration, and in order to make more attractive the selection of Spain as a seat for international arbitration, we propose the necessary coordination between CEA with the General Council of the Judiciary in the context of the Judicial School –or any other forum deemed appropriate–, so that Judges and Magistrates immediately receive information regarding any development that is produced in relation to the international arbitration.

Presently, there is a team of Magistrates in the General Council of the Judiciary that carries out the work related to the developments arising out of the Court of Justice of the European Union and the European Court of Human Rights that may serve as clear precedent to do the same in the context of international arbitration.[30]

This information could also be supplied to the seventeen High Courts of Justice

30 The Judicial School, established as a centre for the selection and formation of Judges and Magistrates, dependent on the General Counsel of the Judiciary, is focused on providing a comprehensive, specialized and high-quality preparation to the members of the Judicial Career, as well as the ones who intend to join it. The Judicial School carries out the coordination and delivery of the initial training, as well as the continuous formation, under the terms set out in the Article 433 bis (Article 307.1 of the

that exist in Spain, as well as all the future Magistrates that promote to the High Courts of Justice in the future.

CEA Executive Committee could offer to Magistrates Associations the opportunity to participate in conferences and events on international arbitration and the procedural practice related with it.[31]

In **CONCLUSION**, in relation to the parameter "Judicial Support", the Commission concludes that what is provided for the domestic arbitration should be also valid and applicable for the international arbitration, as it conforms to the international standards and the practice of the countries around us. Thereby, from the standpoint of this parameter as analyzed in this Report, Spain is deemed to be in a good situation to become, potentially, a good seat of international arbitration.

Notwithstanding the above, the Commission considers that it would be convenient for the Spanish arbitral community to spread this situation of appropriate "Judicial Support" to the international arbitration community.

**Responsible for the implementation of the proposals:**

The "Spanish Institution of Reference" in collaboration with CEA –this collaboration being a clear example of the alignment advocated in this Report between these two entities– shall be responsible for the promotion to the international arbitral community of the existence of an appropriate "Judicial Support" in Spain.

CEA is responsible for the necessary coordination with the General Counsel of the Judiciary for the Judges and Magistrates to immediately receive any news that is produced in relation to the international arbitration.

**Execution deadline:**

Short-medium term.

It is a measure whose execution may be adopted in a short-medium term.

Judiciary Organic Act 6/1985, 1 July). www.poderjudicial.es/cgpj/es

31 Some events are being realized with this in mind. On 25-26 October 2018, CEA and the Foundation for the Judiciary carried out a joint activity in A Coruña that gathered Judges, Magistrates and "*Arbitration practitioners*". This event addressed questions related to the situation of the arbitration in Spain.

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# **SUBCOMMISSION 2:** SPANISH ARBITRAL INSTITUTION OF REFERENCE AT INTERNATIONAL LEVEL AND *"ARBITRATION PRACTITIONERS"*

# 5. SUBCOMMISSION 2: SPANISH ARBITRAL INSTITUTION OF REFERENCE AT INTERNATIONAL LEVEL AND *"ARBITRATION PRACTITIONERS"*

Subcommission 2 analyzed the issues that within the scope of this Commission have been included under the parameters of i) **Spanish Arbitral Institution of Reference at International Level** (Spanish Institution of Reference, hereinafter) and; ii) ***"Arbitration practitioners"***. It analyzed these parameters from an international arbitration perspective.

The Commission addressed these parameters considering the need of having a Spanish Institution of Reference on the international arbitration grounds and the treatment that the *"Arbitration practitioners"* receive in our country.

## 5.1. SPANISH ARBITRAL INSTITUTION OF REFERENCE AT INTERNATIONAL LEVEL ("SPANISH INSTITUTION OF REFERENCE").

The Commission highlights the unquestionable fact that Spain currently lacks a Spanish Institution of Reference for international arbitration.

The Commission analyzed the reasons for this situation. Although this is not its task, it considers that, a brief analysis of the reasons could help to better address this situation.

The Commission considers that the absence of a Spanish Institution of Reference is the consequence of several factors, among which the following stand out:

**i)** Prevalence of ordinary jurisdiction for the resolution of conflicts in our country, a situation that in some ways and in relation to some aspects is maintained at present.[32]

**ii)** Historical delay in the regulation of arbitration institutions in Spain. The

32 In the area of sports, for example, the situation in Spain is clearly different from neighboring countries, such as France, where there is a preference for arbitration.

first Act on Arbitration of 1953 did not mention them, and Act 36/1988 scarcely did it.[33] It was not until the enactment of Act 60/2003 that a qualitative leap took place in this sense.

**iii)** Lack of economic resources of the Spanish Arbitration Institutions in the great majority of cases, which has made the availability of material resources and personnel to reach a professional management in a competitive field, such as international arbitration, difficult. This implies, as we will see in this Report, a deficit in the promotion of Spain as a seat for international arbitration.

**iv)** Close presence in our geographical region of Arbitration Institutions with their own very powerful international scope and projection.

**v)** Little judicial support and assistance, until recent times, in the field of arbitration, and sometimes the presence of excessive interventionism.

**vi)** Predominant domestic orientation of the legal professionals in Spain, who only after 1985, as a consequence of the increase of foreign investment in our country, started to establish an international perspective.

**vii)** Finally, we have to mention the lack of a Spanish tradition in the field of international arbitration.

This situation has determined that, at present, Spain offers the following landscape in relation to its Arbitration Institutions:

**i)** Existence of a large number of Arbitral Institutions. According to CEA data, up to 46 Arbitration Institutions exist in Spain. Other sources refer to more than 58 Arbitration Institutions, 51 of them linked to the Chambers of Commerce, Industry and Navigation of Spain.[34] The great majority of them lack a minimum of activity in the field of national arbitration, and in the field of international arbitration, in many cases, their presence is insignificant, close to null.

**ii)** Lack of differentiated offerings by Arbitral Institutions. The vast majority offer a non-specialized service by subject, sector or profile. They focus geographically on capital cities with a certain economic weight.

**iii)** Low annual volume of arbitration in Spain, the majority concentrated in

33 Act on Arbitration 22 December 1953, regulating Private Arbitration.

34 Cf. http://www.garrigues.com/es_ES/noticia/demasiadas-instituciones-arbitrales-en-espana

the three main Arbitration Institutions located in Madrid: Civil and Commercial Court of Arbitration (CIMA), Spanish Court of Arbitration and Arbitration Court of the Chamber of Commerce and Industry of Madrid.

There is an estimate –the confidentiality inherent in arbitration prevents us from being more precise– that the number of international cases out of the total number of cases that take place in Spain may be around 20%.

**iv)** Remarkable disparity regarding the content of the rules of the Arbitration Institutions in Spain.

An analysis of the rules of the three above-mentioned Arbitral Institutions shows that their wording follows a "mixed" model, in which elements of institutional control and autonomy of party are combined.

**v)** Absence of Spanish Arbitral Institutions in the field of international arbitration. Despite the fact that some assert that they have carried out various promotional actions at an international level, the results are limited.[35] The metrics again are not positive: the result of this activity continues to be very poor, so that the international arbitration cases that choose to establish its seat in Spain are scarce.

In these circumstances, as we have already said, only the three main Spanish Arbitration Institutions –all of them based in Madrid– have managed to stand out in the national arbitration market. However, none of them can be considered a clear reference point at an international level.

The Commission considers that the signing on 18 December 2017, a MOU (Memorandum of Understanding) among the three previously mentioned main Arbitration Institutions already mentioned (Civil and Commercial Court of Arbitration (CIMA), Spanish Court of Arbitration and Arbitration Court of the Chamber of Commerce and Industry of Madrid), with the aim of creating a single entity in the field of international arbitration, may be the embryo of this Spanish Institution of Reference that is demanded.

This preliminary MOU simply reflects the intention to create a commission that will work to establish the basis of the project. Integration so far is limited, at least in the initial stage, to the field of international arbitration.

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35 These actions, according to Spanish Arbitration Institutions are the typical approaches used in the field of promotion in international arbitration.

The Committee has not obtained sufficient and detailed information enabling it to provide further information in this respect.

This unification project is currently being negotiated by the three Arbitration Institutions mentioned above, in a completely autonomous manner, without the intervention of this Commission or CEA, although both have high expectations for this initiative.

The unification project will, undoubtedly, attract other Arbitration Institutions which, when appropriate, could decide to join this project. This is the case of the Court of Arbitration of the ICAM,[36] which has already expressed its interest in joining this project.

It is not disputed in this Report, nor has it been questioned during the work of the Commission, that Spain has at present Arbitral Institutions capable of providing their services in the field of international arbitration in an efficient manner. This has never been doubted. However, practically all the "*Arbitration practitioners*" participating in the works of this Commission consider it essential for our country to have a Spanish Institution of Reference in the field of international arbitration.

The existence of a Spanish Institution of Reference is considered an essential requirement, from the international arbitration perspective, to present our country as an attractive seat, even a first level seat in the near future, capable of hosting any arbitration procedure.

In any case, the Commission believes, in accordance with the opinions expressed by the "*Arbitration practitioners*" who have participated in its works, that the Spanish Institution of Reference should have characteristics similar to those of any other international courts in our region. There are a large number of Arbitral Institutions throughout the world and new ones are continually emerging.

But the factors that the parties, or their Lawyers, usually take into consideration when choosing an Arbitration Institution, that we would like to transfer now to the Spanish Institution of Reference, are equivalent in the following terms:

**i)** To prepare and to project an appearance of **impartiality**.

**ii)** To have a **certain degree of permanence**, or at least to be able to generate enough confidence in the arbitral body –we all know that, sometimes, arbitration procedures can last several years and the arbitration clause is also agreed upon years in advance in the vast majority of cases–.

Otherwise, the arbitration clause would be "ineffective or inapplicable" according to the 1958 NYC.

36 ICAM: Bar Association of Madrid.

**iii)** To have **proper internal governance mechanisms**, in line with the models of the Arbitral Institutions of our international neighbors or in line with the most recent successful models,[37] so that an adequate professionalization of its management is used in terms of (a) internal governance; (b) promotional activity; and (c) true international character, both for the people who work at the Court and for its projection.

**iv)** To have **modern arbitration rules** that are able to be adapted promptly to the changes taking place in the globalized world of international arbitration. These rules should have the following characteristics:

- To follow a procedure according to international standards, moving away from any procedure inherited from the Spanish procedural tradition, in such a way that the procedure does not represent an entry barrier for potential users of our various market niches, as will be seen below. In addition, to incorporate the latest existing trends in international arbitration, gathering the opinion of the main "*Arbitration practitioners*".

- To draft the regulations, the recommended arbitration clause and its web page in Spanish, English as well as in the other languages of our environment, such as French and Portuguese.[38]

- To allow arbitration proceedings to be conducted in languages other than Spanish. Similarly, it should contemplate arbitration proceedings based on both *civil law* and *common law* systems.

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37 *Hong Kong International Arbitration Centre*, HKIAC, was founded in 1985. In 2015, it celebrated its 30th anniversary. It can be considered as an independent, neutral, non-profit Arbitration Court. Its Board of Directors consists of 25 members, with local and international profiles.

The secretariat of HKIAC is international and multilingual. They are able to handle proceedings in English, Chinese, Korean, Hindi, Spanish, among other languages; and deal with arbitration proceedings based on conflicts affecting both the common law and civil law systems.

*Singapore International Arbitration Centre*, SIAC, was founded in 1991. It has already celebrated its 25th anniversary. In 2013, it adopted a new governance structure. On the one hand, it establishes the Board of Directors, made up of lawyers and experts in the corporate field with a clear international focus. This Board of Directors has as its functions the supervision, the establishment of the business strategy and development of SIAC and all matters affecting the corporate governance of the entity.

On the other hand, the Court of Arbitration itself, made up of 16 eminent international Arbitrators, whose functions include appointing Arbitrators in the proceedings, analyzing their possible challenges as well as supervising the development of the arbitration procedure.

38 On 17 January 2018 Kluwer Arbitration Blog published an article named *"Arbitration Institutions: "Five things your website must do to attract cases"* which can be summarized as follows: *"i) Names and relevant information about the leaders of the institution and/or its arbitration court; ii) List of arbitrators; iii) Quality assurance: appointment of arbitrators, the conduct of proceedings and the drafting of the arbitral award; iv) Data on case load: how many cases the institution has administered in recent years, the general nature of the dispute; v) Major initiative in the field of International Arbitration"*.

- To consider other options apart from international commercial arbitration. In this Report, we have addressed, in general, international arbitration basically from the perspective of commercial arbitration. However, we would like to mention that this new institution, the Spanish Institution of Reference, should also consider investment arbitration as another service to be offered to its potential clients.[39]

**v)** To have a **qualified staff**. The Arbitral Institutions assist the Arbitrators and the parties in the development of the proceedings and in the achievement of its objective: to resolve the controversy by means of an Award. Management in this area must be carried out in accordance with the highest standards of professionalism, with an international perspective and with respect to all the people who are part of it, especially its Secretariat.

Within the scope of CEA, a Subcommission has been set up with the aim of drawing up a new *Code of Good Governance for Arbitral Institutions*.

This Commission is aware of the importance of the Report which is being prepared by that Subcommission and in no way purports to interfere with its work. Nevertheless, it wishes to state that some suggestions have been made by the "*Arbitration practitioners*" in relation to the issue of the Good Governance of Arbitration Institutions in Spain with respect to their legal system and funding; choice of Arbitrators; publication of annual reports that reflect their activity related to the administration of arbitrations, suggestions which are just mentioned in this Report in order not to interfere in the work of that Subcommission.

Finally, the issue of the activities to be carried out by the Spanish Institution of Reference and the necessary leadership that it shall assume in the field of promoting Spain as a seat for international arbitration will be addressed by the Subcommission 3 of this Report.

The Commission **CONCLUDES,** in relation to the analysis of the parameter "Spanish Institution of Reference", that its existence is an essential element for the achievement of the objective that our country becomes an important international arbitration venue. The Spanish Institution of Reference is the potential and suitable recipient of international arbitrations that choose Spain as the seat of the arbitration. In addition, it has a very important role in promoting Spain as a venue for international arbitration.

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39 *China International Economic and Trade Arbitration Commission*, CIETAC, is an example of an Arbitration Institution that has recently begun to offer its services in the field of investment arbitration. On 12 September 2017, it adopted new Regulation on this subject: "*International Investment Arbitration Rules*". Investment arbitration is something that is not unknown to Spanish *"Arbitration practitioners"*, as a consequence of the recent claims that the Kingdom of Spain has suffered in this matter that has provided many practitioners with sufficient practice in this field.

The absence of this Spanish Institution of Reference at present significantly deprives Spain from being a great venue for international arbitration.

**Responsible for the implementation of the proposals:**

The existence of a Spanish Institution of Reference is considered a basic and urgent need for our country to become, in the field of international arbitration, a first level seat.

CEA Executive Committee has a clear role to play in helping to achieve this Spanish Institution of Reference. Once it has been established, both entities must be aligned on the terms explained in this Report with respect to several of the proposals.

The Commission notes that in executing this task, each and every one of the "*Arbitration practitioners*" who carry out their activity in Spain must collaborate in order for this reality to be true and effective.

With regards to the project for the unification of the three main Spanish Arbitration Institutions described above, the Commission observes this project with great enthusiasm and hopes that it will lead to what is really demanded: a Spanish Institution of Reference in the field of international arbitration.

**Execution deadline:**

Short term.

The achievement of this measure must be reached within a short period of time.

This measure is already in progress, if we consider the project of unification of the Arbitration Institutions previously mentioned as the embryo of the Spanish Institution of Reference that it is expected to be completed in a short period of time.

## 5.2. HOST COUNTRY AGREEMENT BETWEEN THE PERMANENT COURT OF ARBITRATION (PCA) AND THE KINGDOM OF SPAIN REGARDING THE SEAT.

Closely connected to the issue of the need for a Spanish Institution of Reference, this Commission has been involved in another exciting project that shows that Spain can be a good option as a seat for international arbitration: the eventual signing of a Host Country Agreement between the Permanent Court of Arbitration (PCA) and the Kingdom of Spain.[40]

40 Information extracted from the PCA website: https://pca-cpa.org/en/relations/host-country-agreements/

Dispute resolution mechanisms administered by the PCA include Arbitration, Mediation, Conciliation, as well as Commissions of Inquiry. To make these mechanisms more accessible, the PCA enters into "Host Country Agreements" with States that are contracting parties to the 1899 and 1907 *Conventions for the Pacific Settlement of International Disputes*.

By signing the "Host Country Agreements", the host State, Spain in our case, and the PCA establish a legal framework in which future administered proceedings can be more easily conducted in the territory of the host State. The "Host Country Agreement" allows Arbitrators, Mediators, Conciliators or members of a Commission of Inquiry, the staff of the PCA itself, and participants in such proceedings to perform their functions under conditions similar to those guaranteed by the "*Host Country Agreement of the PCA with the Kingdom of the Netherlands*".

The "Host Country Agreement" normally ensures the provision and concession by the host State of services and facilities necessary for the proceedings it administers, offices and meeting rooms or secretarial services, and regulates the privileges and immunities that the host State may be able to grant to participants in proceedings administered by the PCA, such as certain tax exemptions or immunities, under certain conditions.[41]

To date, the PCA has signed Host Agreements with Argentina, Chile, China, Costa Rica, India, Malaysia, Mauritius, Singapore, South Africa and Vietnam.

The draft "Host Country Agreement" is seen as a great opportunity for the objectives of this Commission: that Spain gains visibility in the field of international arbitration and may become in the near future an important seat for international arbitration.

In fact, several members of this Commission and other members of the CEA are making every effort to facilitate the signing of a "Host Country Agreement" between the Kingdom of Spain and the PCA.

The signing of a "Host Country Agreement" could be excellent news for the Spanish arbitration community. The fact that this project is underway shows that Spain, potentially, may attract the attention of important actors in the field of international arbitration.

The "Host Country Agreement" between the Kingdom of Spain and the PCA would provide great benefits to our country, the countries with which Spain has a closer

41 The content of the "Host Country Agreement" is not uniform in all cases. It is normally the result of a negotiation process between the two parties: the PCA and the host State.

relationship and, of course, the parties to the disputes.[42] Among other advantages, the following benefits that would be created by signing of a "Host Country Agreement" could be mentioned:[43]

i) To attract international arbitrations to Spain that otherwise would be based in another country.

ii) To raise Spain's international profile as a seat for international arbitration.

iii) To increase knowledge of arbitration and other methods of dispute resolution of the PCA.

iv) To promote and create a pull effect for the use of arbitration institutions in Spain.

v) To strengthen cooperation between the PCA and Spanish Arbitral Institutions, as well as to facilitate the exchange of information and experience.

vi) To increase the accessibility of the dispute resolution mechanisms administered by the PCA.

The signing of a "Host Country Agreement" between the Kingdom of Spain and the PCA could have, in the event that it is finally successfully concluded, a clear "pull effect" for other foreign Arbitral Institutions. The advantages of Spain as a potential seat for international arbitration are clear, as set out in this Report, and it is also clear that they are not adequately promoted, as discussed below.

The signing of a "Host Country Agreement" cannot be seen as a case of unfair competition for the Spanish Arbitration Institutions. On the contrary, the Commission considers that the fact that the PCA wishes to sign such a "Host Country Agreement" with the Kingdom of Spain is an expression of the possibilities and the huge potential we have to act in the competitive field of international arbitration.

**Responsible for the implementation of the proposals:**

Spanish Institutions potentially involved in the signing of the "Host Country Agreement": Ministry of Foreign Affairs, European Union and Cooperation; Ministry of Justice; Ministry of Finance, Ministry of Industry, Trade and Tourism.

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42 Latin America and Spain's special relationship with the countries of this continent is one of the reasons, among many others, why the PCA presumably wants to sign a "Host Country Agreement" with the Kingdom of Spain.

43 Information obtained from the PCA's web page: https://pca-cpa.org/en/relations/host-country-agreements/

Permanent Court of Arbitration (PCA).

CEA Executive Committee, which is collaborating to facilitate the signing of the "Host Country Agreement".

**Execution Deadline:**

Short term.

This initiative is currently being developed. It is estimated that its implementation can be completed in a short period of time.

## 5.3. *"ARBITRATION PRACTITIONERS".*

The concept of "*Arbitration practitioners*" is used by the Commission to cover all those professionals who contribute, participate –from any perspective– and support the system of dispute resolution through arbitration.

The practice of international arbitration involves not only Arbitrators and Lawyers of the parties, but also many other professionals from different areas, such as experts in various fields, companies providing administrative services, experts in different branches of law, personnel from private institutions and public bodies, translators, etc. All of them allow the international arbitration system as a whole to be possible.

This Report has used the concept of "*Arbitration practitioners*", coming from the Anglo-Saxon world, to refer to all professionals working in international arbitration. It is a broader concept than its literal translation in Spanish of "*usuarios del arbitraje*" or "*operadores del arbitraje*".[44]

The Commission has analyzed the activities carried out by the *"Arbitration practitioners",* from a broad perspective paying special attention to the existence of any hypothetical lock or obstacles that make it difficult in order to recommend their elimination.

We can anticipate that, fortunately, there are no roadblocks or obstacles in our country regarding the arbitration practice. Therefore the *"Arbitration practitioners"* in Spain enjoy a favorable legal framework that allows them to exercise their function.

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44 "*Users of arbitration*" or "*operators of arbitration*" respectively.

## 5.4. EXERCISE OF THE ARBITRAL FUNCTION.

### 5.4.1. Immunity of foreign Arbitrator's actions in Spain.

The issue of immunity of foreign arbitrators for their actions in Spain has not generated particular concern within the Commission.

The immunity of Arbitrators is guaranteed by Act 60/2003, and is therefore applicable both to Arbitrators participating in national proceedings and to those participating in international arbitration proceedings, either Spaniards or foreigners, when they act in Spain, provided that their actions have been in good faith.

Act on Arbitration is clear to this effect; Article 21.1 restricts the liability of Arbitrators to "*any damages resulting from bad faith, recklessness or mens rea"*.[45]

The Supreme Court's case law has clarified that arbitrators are liable only for damages caused "*intentionally or by means of gross negligence.*"[46]

In light of this case law, it must be understood that the immunity (or at least, lack of liability) of both Spanish and foreign Arbitrators, for actions carried out in good faith related to arbitration proceedings seated in Spain, is ensured and comparable to that of the countries of our environment.

### 5.4.2. Exercise of the lawyer's function.

The Lawyer's function in arbitration proceedings based in Spain can be analyzed in two ways:

**i)** On one hand, Spain has a large number of Lawyers specialized in arbitration, both national and international, with experience and good qualifications, capable of providing quality services to national and foreign clients, and with sufficient expertise, prestige and practical experience –beyond just accreditations– to be able to compete in the field of international arbitration.[47]

These Lawyers are part of Law Firms of all kinds, including Spanish firms and

45 Article 21.1 of Act 60/2003 provides that *"Acceptance requires arbitrators and, as appropriate, the arbitral institution, to comply with their commission in good faith. If they fail to do so, they will be liable for any damages resulting from bad faith, recklessness or mens rea. In arbitration commissioned from an institution, the damaged party may file suit directly against it, irrespective of any action for indemnity lodged against the arbitrators".*

46 In particular, Judgments of the Supreme Court dated 2 June 2009 and the recent Judgment dated 15 February 2017 (RJ 2017\400).

47 The above statement is supported by the ranking of *Chambers & Partners* -and similar- that identifies the Spanish Lawyers specialized in International Arbitration.

foreign firms based in Spain, Law firms of a variety of sizes, including what is known as *"Boutique Law Firms"* specialized in arbitration.

Any foreign party that considers Spain as the seat of international arbitration has a significant variety of options from which to choose its Lawyer.

Spanish law, in general, does not present any obstacle that would prevent Lawyers from providing their services in all types of national and international arbitration proceedings.

**ii)** On the other hand, foreign parties may use the legal representation they deem appropriate, without limitations.

Any legitimate party in an international arbitration procedure seated in Spain may appoint any foreign Lawyer it deems appropriate as its representative, by means of powers of attorney or direct designation, without any type of limitation. The only limitation would be specifications or regulations set forth by the Arbitral Institutions to which the parties submit the dispute.

Therefore, there are no limitations in appointing any kind of representation in international arbitration proceedings with seat in Spain, except for those which might arise due to conflicts of interest, cause for abstention, or cause for challenge.

In order to promote Spain as a seat of international arbitration, the free appointment of foreign Arbitrators and Lawyers, both by the parties and by the future Spanish Institution of Reference, should be facilitated. In this area, to promote Spain as an attractive seat for international arbitration, necessary prudence must be exercised to avoid imposing restrictions or limitations that generally do not exist in the international arbitration practice.

### 5.4.3. Tax issues.

The Commission also has analyzed tax issues concerning international arbitration and the conclusion is that it did not have any concerns about them.

The tax issues to be addressed by "*Arbitration practitioners*" focus on two taxes: Personal Income Tax (IRPF, in Spain) and Value Added Tax (IVA, in Spain).

These are two taxes that are present in most developed countries and in neighbouring countries.

No legal limitations or problematic issues have been identified that could, from a fiscal perspective, affect the actions of foreign Arbitrators when they act in Spain as with the rest of the "*Arbitration practitioners*".

### 5.4.4. Issues regarding the free movement of "*Arbitration practitioners*".

The Commission is not concerned about the free movement of "*Arbitration practitioners*", i.e. Arbitrators who come to provide services in Spain and any other person who provides services in connection with the international arbitration proceedings.

No problems have been detected that could make it difficult for people to enter our country, or for the introduction of documents or information, as long as it is done in the exercise of their functions.

Notwithstanding the foregoing, the Commission considers it advisable that CEA Executive Committee makes an arrangement with the Spanish Ministry of Foreign Affairs, the European Union and Cooperation so that the Spanish Consulates abroad are informed, either by Circular Order or by any other system that might be deemed appropriate, of the existence of the occasional offering of arbitration services in Spain by foreign nationals, with the aim to facilitate and expedite the granting of visas in the cases where this may be necessary, when it is proven that the entrance into our country is motivated by their participation in an international arbitration procedure.

As a **CONCLUSION** in relation to the analysis of the *"Arbitration practitioners"* parameter, the Commission determines that the activities they perform are not subject to any obstacle when they carry out their work in Spain or from abroad in international arbitration proceedings seated in Spain.

However, the Commission considers that it is highly desirable that this fact should be widely publicized and promoted in the field of international arbitration.

To this effect, the Commission recommends that CEA Executive Committee promotes and informs about all these advantages in relation to the *"Arbitration practitioners"*. To this end, it could use the methods set out in the section on Subcommission 1.

**Responsible for the implementation of the proposals:**

The specially qualified members of CEA Executive Committee should carry out the arrangement before the Spanish Ministry of Foreign Affairs, European Union and Cooperation, about the convenience of promoting the facilitation and speeding up of granting visas in cases where they are necessary, either by Circular Order or by any other appropriate means.

**Execution deadline:**

Short term.

This is an action whose implementation can be adopted in a short period of time. Its effects could also be seen in the short term.

6

# **SUBCOMMISSION 3:** COUNTRY-ADVANTAGE AND PROMOTION

# 6. SUBCOMMISSION 3: COUNTRY-ADVANTAGE AND PROMOTION

Subcommission 3 has analyzed the issues that, within the scope of the Commission, have been included under the parameter **"Country Advantage and Promotion"** that includes everything related to i) Training, ii) Country-Advantage and iii) Promotion. As in the previous cases, they are analyzed from the perspective of international arbitration.

The Commission has addressed these three factors with the following approach:

**i)** The need for adequate training in the field of international arbitration, with a comprehensive focus that would affect all potential "*Arbitration practitioners*";

**ii)** Country-Advantage, in the sense of analyzing what advantages, if any, Spain has from an international arbitration perspective, and;

**iii)** Once the Country-Advantage points have been defined, to what extent they have been adequately promoted in the international arbitration arena.

It is necessary to indicate at the outset that the proposals listed in this section of the Report, would be insufficient on their own to achieve the objective of promoting Spain as major seat for international arbitration. It is necessary to develop the proposals that have been previously mentioned in this Report and that are considered essential ones before approaching the proposals in this section.

The proposals mentioned below to promote Spain as a seat for international arbitration are not the only ones that could be carried out. Indeed, there might be many other proposals not mentioned here that can be developed. However, the participants of the Commission have considered that reaching at least an adequate level of promotion is essential to develop Spain as a strong seat for international arbitration; without such promotion, which should be carried out in a professional and continuous manner, it will difficult to achieve the overall objective.

## 6.1. TRAINING.

The Commission concludes that Spain, at present and unlike other neighbouring countries, does not have adequate training in the field of arbitration and, in par-

ticular, in the field of international arbitration.

The Commission also believes that training should start as soon as possible and should involve the vast majority of potential *"Arbitration practitioners"*.

Training should be considered as a set of activities intended on explaining everything related to arbitration as a means for resolving conflict, with a special emphasis on international arbitration. This training should cover its characteristics, its advantages, and its costs among other aspects in order to reach a critical mass of sufficient arbitration culture.

The Commission considers that training in the field of international arbitration could be addressed in the following areas:

### 6.1.1. Users of international arbitration.

The growing internationalization of the Spanish economy means that more and more Spanish companies have undertaken projects abroad. It is not only big companies that operate abroad; but also, as a result of the recent economic crisis among other factors, small and medium Spanish companies are increasingly launching international projects.

The warning that any business project undertaken outside Spain must have an arbitration clause to solve future disputes is unfortunately still not a widespread practice, which is almost inexcusably today.

This implies that there are more than a few problems that Spanish companies have to face when these conflicts arise as a consequence of international commercial relations.

But, more importantly, it is a clear proof of the lack of adequate information on international arbitration, and its advantages, in the Spanish business environment.

It is a responsibility of all Spanish business organizations –CEOE, CEPYME, Chambers of Commerce, Employers Organizations, among others– to promote international arbitration as a method for the resolution of conflicts and to provide sufficient means of information and/or training to their affiliates. This should be done not because this is the way to attract international arbitration to Spain, but because it is a measure that will clearly benefit our companies.

In addition to training in the business field, the training of counsels should be undertaken. In particular Law Firms, especially those of medium/small size, who are largely unaware of what arbitration is and its advantages.

This training, which, in short, is a part of the promotion of international arbitration, must be aimed at ensuring that these potential users, companies and Law Firms act as drafters of arbitration clauses for international disputes that include Spain as a seat.

**Responsible for the implementation of the proposal:**

CEA Executive Committee, in collaboration with CEOE, CEPYME, Chambers of Commerce, Bar Associations, among other institutions.

This action affects a large number of entities and associations. CEA Executive Committee, must promote its implementation.

**Execution deadline:**

Short term.

This is a proposal whose implementation can be adopted in a short period of time. Its effects could be appreciated in the medium-long term.

### 6.1.2. University studies in the field of international arbitration.

There are currently few Spanish universities that incorporate an arbitration course in their law degree, which means that students, not only from Law School, as a general rule barely know about this institution when they finish their studies.

Today's students are the future entrepreneurs, in-house Counsels or Lawyers who will draft contracts and who can act as drafters of international arbitration clauses with seat in Spain. In order to be able to rely on arbitration in the future, it is necessary to train them in this field today. For this reason, it would be adequate for Spanish Universities, not only Law Schools, to include an optional arbitration course, with special emphasis on international arbitration.

Practically all the countries around us follow this policy of training students, especially at Law Schools, in the field of international arbitration. A good example is the case of Switzerland: in almost all Law Schools there is an arbitration course in their Law degree program, with special focus on international arbitration.

But teaching international arbitration cannot be limited to the strictly University level. It is necessary to extend it, for example, to the "Master of access to the legal profession", which is compulsory in Spain since 2014.

**Responsible for the implementation of the proposal:**

Spanish Ministry of Education, Culture and Sport, Council of Spanish Universities, Spanish Universities, both Public and Private and CEA Executive Committee.

This measure affects a large number of entities. CEA Executive Committee must promote its execution.

**Execution deadline:**

Short term.

This is a measure whose implementation can be adopted in a short period of time. Its effects could be appreciated in the medium-long term.

### 6.1.3. Training programme, Master's degree or course in the field of international arbitration.

At present, Spain does not have a training programme, Master´s degree or a model course on international arbitration –the name does not matter– with sufficient quality for the training of *"Arbitration practitioners"* and to attract reputed professionals in international arbitration to teach in Spain.

The vast majority of cities in our region have a training program, Master's degree or course on international arbitration, and some of them have become leaders in this area. Thus is the case of Geneva (*Master in International Dispute Settlement, MIDS*[48]), which in barely 10 years has become a reference in international arbitration; London (*School of International Arbitration* of the prestigious Queen Mary University of London, which offers several programs on international arbitration[49]) or Paris (*LLM in International Arbitration and Dispute Resolution* of the SciencesPo faculty[50]) among other examples.

In Spain, there have been attempts to obtain a Master's degree that could have achieved a status similar to that of the aforementioned courses.[51]

48 http://www.mids.ch/mids

49 http://www.arbitration.qmul.ac.uk/

50 http://www.sciencespo.fr

51 This is the case of the Masters degree program, which was scheduled to begin at the end of 2018, headed by Mr. Antonio Hierro, Honorary President of the CEA and Central Government Attorney, carried out with the collaboration of Columbia Law School, US-New York and ISDE.

ISDE: Instituto Superior de Derecho y Economía, based in Madrid, Barcelona and New York. http://www.isdemasters.com/es.

Counting on a training program, Master or course on international arbitration of reference, would allow Spain to position itself as a source of professionals of reference in this field. In addition, it would make it possible for Spain to act as a place to promote works, studies, essays, projects, and new ideas about international arbitration with worldwide consequences in the academic world. These measures would help to place Spain on the map of international arbitration.

The Commission emphasizes other training programmes, Masters or courses related to international arbitration developed in neighbouring countries, sometimes with a clear geographical specialisation and aimed to a public with a clear experience in this field. This could serve as an example for us to carry out something similar in areas of the world in which we aspire to develop our expertise in international arbitration.[52]

**Responsible for the implementation of the proposals:**

This is an initiative that clearly falls within the scope of private initiative.

CEA Executive Committee must promote and support its implementation.

**Execution deadline:**

Short term.

This is a measure whose implementation can be adopted in a short period of time. Its effects could be appreciated in the medium-long term.

The Commission **CONCLUDES**, in relation to the parameter "Training" that there is a huge deficit in Spain. There are training initiatives in the field of international arbitration, as the ones described before, but also there are other initiatives on domestic arbitration that we have not mentioned. In any case, the Commission would like to emphasize that a significant training activity should be developed. This could only bring advantages to Spain in the process of becoming a great seat of international arbitration.

## 6.2. COUNTRY-ADVANTAGE.

During the development of the work of the Commission, different data has been

52 ICC has recently launched the "*ICC Advanced Arbitration Academy for Asia*". It is a two-year course, divided into eight one-day face-to-face modules, to be held in five cities throughout Asia. It is a course in the field of international arbitration for "*Arbitration practitioners*" with proven experience in the field. The aspect of the network of contacts that it offers is highlighted as one of its assets to promote the participation of all those who develop, or intend to develop, their activity in that part of the world.

identified that make Spain, potentially, a good seat for international arbitration.

In the Preamble of this Report we referred to the economic characteristics of Spain, from a macroeconomic and microeconomic perspective, which shows the potential of Spain as a seat for international arbitration.

In this part of the Report we shall refer those other advantages which, from a comparative perspective, clearly make Spain competitive as a seat for international arbitration.

These advantages, as we will also see later, will define our potential market niches in the field of international arbitration.[53]

We analyze them below.

**i)** From a macroeconomic perspective, as explained in the Preamble to this Report, Spain is the fourth economy in the Euro zone and the fifth economy in the European Union.[54] But more importantly, Spain's membership in the European Union and its economic strength which is comparable to that of countries such as Germany or France –or even the UK despite its probable future and immediate exit from the EU– which are often chosen as seats of international arbitration, offers a framework of legal certainty and economic development that could attract international arbitrations to Spain. What is more important, as a member of the EU, Spain has direct access to all European Union countries.[55]

In addition, Spain is viewed by foreign companies, mostly European and increasingly also Asian companies, as a springboard for doing business in Latin America and vice versa, i.e. for Latin American companies to get into European markets through Spain. This makes Spain a potential "natural forum" for international arbitration between Latin American and European countries.

**ii)** Spain has a number of advantages to set itself up as a seat of international in arbitration of reference for disputes containing a Latin American connection.

For historical, cultural, linguistic and legal reasons, among others, Spain has enjoyed a special relationship with Latin America for more than 500 years. Thus, Spain is in a good position to act as an independent seat to resolve disputes be-

53 Market Niche: A marketing term used to refer to a portion of a given market segment, in our case, international arbitration. It is configured by different circumstances such as proximity and geographical position, historical, cultural, linguistic circumstances, similarity of legal systems, etc.

54 Source UNCTAD, IMF.

55 Source "Invest in Spain". http://www.investinspain.org/invest/wcm/idc/groups/public/documents/documento

tween Latin American companies or between Latin American companies and Asian parties or companies from the rest of Europe or North America.[56]

In short, Spain can play a triangle role in the field of international arbitration between Latin America and Europe, on the one hand, and between Latin America and Asia, on the other.[57]

**iii)** Spain has become a strategic place for the management of various multinationals companies in their expansion into the markets of Europe and Latin America.

Several European and Asian companies (Wincor Nixdorf, British Telecom, Huawei, among many others) have established their headquarters in Spain for everything related to Latin America.

Conversely, many large Latin American companies (Cemex, Pemex, Votorantim, among many others) have also chosen Spain for their headquarters for everything related to their operations in Europe.[58]

The fact that these companies establish "branches" in Spain may also encourage them to choose Spain as a seat of international arbitration for their disputes.

**iv)** From the point of view of **Private Law**, in particular Contract Law, one of the aspects that may affect the choice of a seat of international arbitration is the applicable substantive law. Very often when the parties negotiate a contract and decide on the application of a certain Law, they choose the seat in a city of the same country of the applicable law for the merits. Therefore, the accessibility of a certain substantive law to a foreign Lawyer can play an indirect role in the choice of seat.

Spain currently has the advantage that its Contract Law is inspired by the French tradition and, at the same time, Spanish Contract Law has also inspired the Law

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56 Spanish is the official language in more than 20 countries in America. Spanish is the second spoken language in the United States. Altogether there are more than 500 million Spanish speakers in the world.

57 In 2015, Mr. J. Felix de Luis organized the first "*Spanish Arbitration Day*" Seminar held in Hong-Kong, within the framework of the "*Hong-Kong Arbitration Week*". In 2016, a new Seminar called "*Spanish Arbitration Day*" was held in Beijing, on the occasion of the 60th anniversary of the foundation of one of the first Arbitration Institutions in the world, CIETAC. A year later, in 2017, another Seminar was held in Beijing on the occasion of its *"Arbitration Summit"*, the *"Spanish Arbitration Day with LATAM: Brazil, Chile and Mexico"* with *"Arbitration practitioners"* from these three countries. This Seminar was later replicated in Hong-Kong.In 2018, again during the CIETAC "*Arbitration Summit"*, a "*Spanish Arbitration Day with LATAM: Latest Developments*" was held in Beijing. A similar seminar will be held this year.

On all occasions the main idea of the event has been to explain the role that Spain can play regarding the conflicts to be resolved through international arbitration, in the relations established between companies from Asian countries, especially China, and companies from Latin American countries.

58 Source "Invest in Spain". http://www.investinspain.org/invest/wcm/idc/groups/public/documents/documento

of other countries, especially in Latin America. This makes Spanish Contract Law easily accessible and comprehensible for jurists from certain countries, mainly those in Latin America.[59]

This similarity regarding Contract Law, may stimulate the selection of Spanish people as Arbitrators and would allow Spanish Law to be considered as a "neutral" law, a possibility that could indirectly promote Spain as the seat of international arbitration, in such a way that the combination of Law and seat of arbitration could strongly attract international arbitrations in the future.

**v)** The **geographical position of Spain**, as well as its flight connections with Latin America, particularly with cities such as Madrid and Barcelona, is certainly an important factor especially in those cases which may affect Latin America with Europe, Africa and even Asia.[60]

**vi)** The **cost of services and logistical activities** related to international arbitration is lower in Spain than in other traditional international arbitration venues, both in our region and beyond, in cities such as London, Paris, Miami, Geneva or Singapore.[61]

This is true regarding the fees of the legal services that Law Firms can offer to their clients, as well as the rest of the services that are used during the arbitration procedure, especially those related to the holding of hearings, services such as hotel accommodation, translation and interpretation, recording and transcription, among others.

To conclude this section it is worth noting the guide to arbitration venues recently

59 Some countries have now a modern and detailed legislation on obligations and contracts. A classic example is the Swiss Code of Obligations, which makes it accessible to Lawyers from all over the world. Unlike the Swiss example, Spanish Law, though it may be familiar in some jurisdictions, could also be considered as antiquated.

There are several authoritative voices in the field of international arbitration proposing the modernization of Spanish Contract and Obligations Law taking as a basis for some international questions the *Unidroit Principles*, well known to jurists engaged in international arbitration. Such a change would lead to Spanish Law being chosen more frequently with inertia increasing the number of cases in which the seat of international arbitration would be established in Spain.

60 Spain's privileged geographical situation, combined with magnificent airport infrastructures (far over the infrastructure networks of "proximity" trains, motorways, etc.), although this is not a distinctive indicator with respect to other venues in our environment, means that Spain can be considered an air hub for Latin America.

Spain has daily direct connections with all the Latin American capitals and, in the great majority of cases, with the rest of the main cities of this continent.

61 CEA, in a Report prepared in 2008, compared Spain, specifically Madrid, with the main international arbitration venues such as Geneva, London, Miami, New York, Paris, Singapore and Zurich. It reached the conclusion that, from a cost perspective, our country was extraordinarily competitive, and in some cases it could be half the cost of the aforementioned venues.

drawn up by DELOS along with its regulation. This guide determines a list of "reliable" venues for international arbitration. Fortunately, the list includes a Spanish city: Madrid.[62]

**vii) Spain's geographical proximity to the markets of North Africa and the Middle East** completes its unique area of influence and may favour the promotion of Spain as an international arbitration venue.

Although it is obvious that Spain does not have the same linguistic or cultural affinities with Africa as it does with Latin America, its geographical position would allow it to play the role of a neutral country as a venue for international arbitration for conflicts between European and African companies, especially with the Maghreb.[63]

**viii)** Finally, **Spain is a tourist power of the very first order**.[64]

In the same way, it is a **cultural power**. These two advantages need no further explanation.

**Spain's weather is exceptional** in comparison to certain countries of our region, especially those in northern Europe.

All these factors together make us attractive in an intangible way, so that Spain can opt to be chosen as an international arbitration venue.

All these data, which we have presented as "Country-Advantage", clearly identify and define our potential market niches for promoting Spain as an international arbitration seat:

- **i)** Latin America, in a double manner, as a seat for disputes between parts of this continent or between them and European companies;
- **ii)** Europe, especially at EU level;
- **iii)** North Africa, especially, and the Middle East;

62 https://delosdr.org/index.php/gap/

63 In the case of the Autonomous Community of the Canary Islands, its geographical proximity to mainland Africa –barely 97 km from the Fuerteventura Island– has led it to consider an initiative to promote its territory as a venue for international arbitration for conflicts with an African component.

64 Source Spanish Ministry of Foreign Affairs, European Union and Cooperation.

Spain is a world power in tourism. Some data support this assertion: We are the second country by income from tourism at world level; the first European destination for tourism; the third most visited country in the world and the first in vacation tourism. 82% of tourists who visit Spain repeat. Spain is number one in the Competitiveness Index in Travel and Tourism (WEF), among other data.

**iv)** Asia, in relation to the triangular role that Spain can play for conflicts between that part of the world and Latin America.

Spain can also be an interesting alternative forum to seats close to us and a neutral and strategic forum for international arbitration.

The Commission **CONCLUDES**, in relation to the "Country-Advantage" parameter, that Spain has enormous and varied assets which would allow it to position itself very easily as a great seat of international arbitration. At the same time, the characteristics mentioned in relation to this parameter define our market niches.

Notwithstanding the above, the Commission finds that, as we shall see later, promotional activity is scarce and our market niches are clearly under-utilized.

## 6.3. PROMOTION.

Once the important advantages of Spain as a potential international arbitration venue have been explained, the next question to be addressed is whether these advantages are promoted and if so, whether this promotion is executed adequately and sufficiently.

We must begin by pointing out that this attitude of promoting Spain as the seat of international arbitration must be carried out by all *"Arbitration practitioners"*, starting with those who are supposed to have adequate training in the field of international arbitration, from large Law Firms, whether Spanish or foreign with headquarters in our country, to the smallest Law Firms which, as we previously explained, might have hardly any training in this field. The same applies to the rest of *"Arbitration practitioners"* in its broadest sense.

Practically all the participants in this Commission made the assessment that the promotion of Spain as an international arbitration seat has been done in a very inadequate manner: either promotion was not carried out at all or it was clearly insufficient.

This situation is considered to be largely a consequence of the lack of a Spanish Institution of Reference in the field of international arbitration, which would be at large responsible for leading the activity of promotion.

Spain has, undisputedly, an adequate "brand" at the global level: "Marca España".[65]

65 Marca España: Is a State policy that aims to improve the image of the country abroad and among Spanish people themselves. The highest representative of the Spain Brand is the High Commissioner, who plans, drives and coordinates the actions of all public and private bodies aimed at promoting the

It also has a "brand" in the field of international arbitration. It has also CEA,[66] which organizes an Annual Congress that can be considered a model of success.[67]

However, it cannot be said that Spain has, in the field of international arbitration, an adequate "brand" that makes it sufficiently attractive to be designated as a seat of international arbitration. Once again, the metric does not allow any debate: the number of international arbitrations that establish their seat in Spain is small.

CEA has International Chapters abroad, but it is also true that during the past years, the marketing activity they have engaged in regarding the advantages of Spain as a seat of international arbitration has not been enough, mostly because it was a function that they did not have to undertake directly.

Within this Commission, different proposals have been collected from its participants, "*Arbitration practitioners*" not strictly limited to Lawyers and Arbitrators, who have considered it necessary to address the issue of promotion.

Many of these proposals are aimed at defining Spain as a seat for international arbitration, focusing on areas such as having adequate facilities for holding hearings in the capital of Spain.

Other proposals are tied to carrying out typical promotional activities for Spain as a seat of international arbitrations. However typical *outbound marketing* actions, which may take different forms, and as explained below, may be carried out through different channels in the scope of the various market niches where Spain would be well positioned.[68]

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image of Spain. https://marcaespana.es

At present, Royal Decree 1271/2018, 11 October, changes the name of "Marca España" to "España Global" –"Global Spain"– which, with the rank of Secretary of State, is the highest body directly responsible for adopting measures to improve the image of Spain abroad.

66 Spanish Arbitration Club-CEA: Private Association whose purpose is to promote the use of arbitration as a method of conflict resolution, as well as to develop arbitration in Spanish and Portuguese or with an Ibero-American element.

67 The Twelfth Annual Congress of the Spanish Arbitration Club was held in 2018 and was attended by 420 people, 123 of whom were foreigners.

68 *Inbound marketing*: Methodology that combines non-intrusive marketing and advertising techniques in order to contact the user at the beginning of his "purchase" process and accompany him to the final transaction. With *Inbound marketing* potential customers find the company through different channels such as blogs, search engines and social networks.

Unlike traditional marketing or *Outbound marketing*, *Inbound marketing* does not need to make an effort to attract the attention of potential customers because, by creating content designed to address the problems and needs of their ideal customers, it will attract them and generate trust and credibility. *Inbound marketing* could be carried out through the activities developed by its International Chapters of CEA through the rest of its activities.

This set of proposals, in the Commission's view, ultimately demonstrates two main aspects:

i) The need for the promotion of Spain as a seat of international arbitration to be carried out in a professional manner, through the preparation of an appropriate and correct business plan, in which different milestones can reflect its development, from both a temporary and objective perspectives.

ii) The need for the leadership in the elaboration of this business plan, its execution, and its follow-up has to correspond to Spanish Institution of Reference, which we currently lack.

All these comments are made with the aim of achieving a Spanish brand as a venue for international arbitration, which pursues the following objectives:

i) Our **differentiation**, especially with respect to those seats that due to geographical proximity and other factors can be considered our direct competitors;

ii) **Relevance**, for the purposes of the service sector of Spain being accepted as an international arbitration venue that can satisfy the needs and values of our potential clients;

iii) **Confidence**, in the sense that the Spanish brand as seat for international arbitration meets expectations and is capable of attracting disputes of different kinds as described in this Report and, finally;

iv) **Recognition**, in such a manner that Spain can be repeatedly selected as an international arbitration seat by our potential clients.

The following is a list of some of the suggestions made by the participants of the Commission regarding promotion. As we have said previously, one can carry out these proposals or any others that are not raised here, however, the participants in the Commission consider that inactivity in the field of promotion altogether is unacceptable. All of this is dealt with below.

### 6.3.1. Facilities for holding hearings.

In Spain, the three main Arbitration Institutions –based in Madrid– have facilities to hold hearings. Their facilities are in line with those of other arbitration institutions in other countries

Other Arbitration Institutions, especially those linked to provinces, Bar Associations and Chambers of Commerce, may also, in some cases, have facilities for holding hearings.

But if we want to attract arbitration proceedings to our country in a consistent manner, it would be necessary to have facilities at the levels offered by other important arbitration venues in our region.[69]

Therefore, it would be necessary to have physical spaces that would allow the holding of hearings without necessarily being linked either to the aforementioned Arbitration Institutions or to the Bar Associations.

To this end, we can take as an example the rehabilitation of the "Palacio de Exposiciones y Congresos" in Madrid, in Paseo de la Castellana, in a premium and emblematic area of the capital of Spain– it is located opposite of the mythical Santiago Bernabéu Football Stadium, widely known internationally– that will be undertaken shortly. A contact should be made with the entity that is awarded the tender that the Spanish Ministry of Industry, Trade and Tourism is planning to carry out, in order to recommend that a sufficient number of square metres in this rehabilitation project should be reserved for multipurpose facilities that could serve as hearing rooms for international arbitrations procedures.

The proposal above is just an example. But any similar action could be carried out in order to achieve this goal of having sufficient facilities for holding hearings within the scope of the arbitration proceedings that establish the seat in Spain.

**Responsible for the implementation of the proposals:**

Spanish Ministry of Industry, Trade and Tourism and CEA Executive Committee.

**Execution deadline:**

Short term.

This is a measure whose implementation must be adopted within a short period of time. It would be necessary to immediately contact the winner of the tender to be convened by the Spanish Ministry of Industry, Trade and Tourism. Its effects may also be appreciated in the short term.

69 This is the case of the ICC or ICSID in Paris, the LCIA, CIArb or ICR in London.

### 6.3.2. Building a website to promote Spain as a seat for international arbitration.

Spain does not have any source of basic information where foreign companies and Lawyers, who potentially wish to choose Spain as a seat of international arbitration, can turn.

Therefore, it is necessary to have a tool that provides "*online*" information, in several languages, that details and explains the advantages and conditions of Spain as a potential seat for international arbitration.

At the same time, this website could be used to publicize outside news both in favour of arbitration (for example, case law favourable to the development of arbitration) and to respond to developments –either from inside or outside Spain– that could damage the image of Spain as a venue for international arbitration, providing clear explanations of potentially negative judgments.

The action proposed in this section is to create a website in Spanish, English and some more languages under the name **"SPAIN AS A SEAT OF INTERNATIONAL ARBITRATION"** ("ESPAÑA COMO SEDE DE ARBITRAJE INTERNACIONAL") taking as an example the website of other venues in our region.[70]

In terms of content, such a website should incorporate the most relevant legal texts such as the Act on Arbitration in several languages; a list of "Frequently Asked Questions" (FAQs) regarding international arbitration seated in Spain and Arbitration Institutions based in Spain; as well as any links to training programs, such as Master's programs or other courses on international arbitration to study in Spain; among other topics.

In order to facilitate the holding of hearings in Spain, the website could include a section that provides options for the different services necessary for a hearing to take place, such as hotels, courtrooms, experts, translators, computer experts, and transcribers.

Furthermore, with an ambitious approach, this website could have a mechanism that estimates the cost of these services. This feature would be extremely relevant as the lower cost is a factor that makes Spain especially competitive in the field of international arbitration.

The website **"SPAIN AS A SEAT OF INTERNATIONAL ARBITRATION"** ("ESPAÑA SEDE DE ARBITRAJE INTERNACIONAL") should incorporate the above

70 Paris Home of International Arbitration: http://parisarbitration.com/en/

content following the model of other websites that offer similar services.[71]

Such a website requires constant maintenance, along with a manager to administer it who can quickly resolve any issues and questions that might be created by the use of the website. The search for sponsors is considered an essential aspect of this initiative. If this website had a sufficient number of sponsors, the cost of implementation and maintenance of this initiative could be close to zero.

**Responsible for the implementation of the proposals:**

CEA Executive Committee and Spanish Institution of Reference.

**Execution deadline:**

Short term.

This is a measure whose implementation can be adopted in a short period of time. Its effects could also be seen in the short term.

### 6.3.3. Holding the ICCA conference: 2024-Madrid.

The ICCA Congress is the reference international arbitration congress and the most important of its kind in the world.[72] It is held every two years and easily attracts more than one thousand professionals from the world of international arbitration from all over the world at each of its congresses.[73]

In 2009, the IBA (International BAR Association) Annual Conference was held in Madrid and was an unprecedented success in organizing and in promoting Spain, and the city of Madrid, in the legal sector. There is nothing to prevent us from replicating this success and once again organizing an event of this nature focused on the field of international arbitration.

To this end, it is proposed that the steps to be taken to ensure that Madrid can host the celebration of this Congress in 2024, as the ideal date. In 2020 the ICCA Congress will be held in Edinburgh (UK) and in 2022 it will be held in Hong Kong (China). The city of Edinburgh has appeared on the ICCA website as the future venue for its 2020 Congress. Hong-Kong has also been listed as the future venue for the 2022

71 Association Suisse de l´Arbitrage: www.arbitration-ch.org

72 ICCA: The ICCA Congress is the largest regular conference devoted to international arbitration. It takes place every two years, on each occasion in a different city. https://www.arbitration-icca.org

73 The latest ICCA Congresses was held in Sydney in 2018, Mauritius in 2016, Miami in 2014 and Singapore in 2012.

conference since 2016. Spain must aspire to hold the 2024 ICCA Congress.

The holding of such a Congress transcends CEA, its Executive Committee, and the Spanish Institution of Reference. Indeed, it is an event whose organization should be coordinated with all the institutions of our country, from the Highest Head of the State, HM King Felipe VI, through the Government of Spain, Autonomous Community of Madrid and Madrid City Council.

In spite of the fact that organizing and hosting this event is an arduous task, empirically speaking, it can be shown that the cities that have recently hosted it, such as Singapore and Miami, have achieved remarkable visibility in the field of international arbitration.

The proposal is that CEA Executive Committee initiates a first round of contacts with the authorities that are considered most suitable for leading this initiative in its initial stage ("Madrid Excelente" Foundation –non-profit foundation in the sphere of the Autonomous Community of Madrid– could be an option). This organization would assume the leadership of the proposal of Madrid's candidacy as the venue for a forthcoming ICCA congress. Once this initiative has been launched, we have no doubt that the rest of the Authorities and Institutions mentioned above will join to achieve this objective.

**Responsible for the implementation of the proposals:**

CEA Executive Committee and "Madrid Excelente" Foundation-CAM-, in a first phase.

**Execution deadline:**

Short term.

This is a measure whose implementation must be adopted within a short period of time. Its effects may be assessed in the medium term.

### 6.3.4. Making of an events plan.

As stated before, there is no coordinated plan to promote Spain as an international arbitration seat abroad.

It is therefore proposed that, within CEA, in collaboration with the Spanish Institution of Reference, a joint plan of events should be established, with a clear global focus, to be developed both in Spain and abroad (some proposals are explained later) and in collaboration with key institutions in the world of international arbitration.

It should be considered that the language to be used, apart from Spanish, could also be English.

We must be aware that no Spanish city is on the calendar or circuit of the main events of international arbitration.

The Annual Congress of CEA, which is the most international event and a clear case of success, is very focused on the Portuguese and Latin American markets.

The "MOOT Madrid", another success in the field of international arbitration in Spain, has potential to engage *"Arbitration practitioners"* though participants are not yet active participants in the field given their age. The United Nations Commission on International Trade Law UNCITRAL/UNCITRAL is a co-organizer, bringing the best possible seal of excellence to the "MOOT Madrid". The direction and coordination of the "MOOT Madrid" has been entrusted entirely to the Carlos III University of Madrid since its inception in 2008.[74]

That is why it is necessary to establish events, especially in Madrid, that attract the attention of the international arbitration community, without forgetting our essence and the use of the Spanish language. Such events could be held after the Annual Congress of CEA.

The participants of the Commission propose the elaboration of the following events.

#### 6.3.4.1. LATIN AMERICAN ARBITRATION DAY with IPBA.

The organization of a Seminar called "LATIN AMERICAN ARBITRATION DAY with IPBA" is proposed, to take place in Madrid, in collaboration with IPBA and aimed at both Latin American and Asian audiences.[75]

74 The Moot Madrid is an international legal competition in commercial law and international commercial arbitration that simulates a real arbitration procedure. The competition takes place in Madrid and in Spanish. The participating teams, at least four times in general rounds, have to represent the two procedural positions in the arbitration (plaintiff and defendant) through the process of writing a complaint and answer, as well as orally arguing the case before different arbitral tribunals composed of three arbitrators who are recognized professionals in the world of law.

The Moot Madrid aims to bring the tradition of the best legal debate to the Spanish-speaking university culture and, while extending the use of Spanish as an international legal language, promote Madrid (and ultimately Spain) as a venue for international arbitration, along with ensuring that students receive comprehensive training in uniform international trade law and international commercial arbitration of eminent practical character. Not in vain does the competition simulate what a real arbitration would be like. www.mootmadrid.es

75 IPBA: *The Inter-Pacific Bar Association, IPBA, is an international association of business and commercial lawyers with a focus on the Asia-Pacific region. Members live in, or otherwise have a strong interest in, the Asia-Pacific Region (sometimes referred to as the "Region"). It was established in April 1991 at an organizing conference held in Tokyo. Currently has over 1.500 members from over 65 jurisdictions worldwide.*

The objective of this Seminar is clear: to put "*Arbitration practitioners*" in contact with two potential market niches in Spain, as we have previously explained.

As of publication of this Report, the IPBA has agreed to the organization of this event, and preparatory work has begun.

The Seminar will be organized in Madrid. It will be organized during the same week as the Annual Congress of CEA –at the margins of the Congress and in the days following the Congress´ conclusion– in a manner that attendees can independently choose to participate in one event or the other, while making use of the possibility of attending both to make the events more attractive.

The hosting of this Seminar, which may be recurrent either annually or biannually, could be carried out in collaboration with arbitral entities based in Asia, in order to attract as participants connected with these entities that have a Latin American connection.

This seminar will be conducted in English.

**Responsible for the implementation of the proposals:**

CEA Executive Committee.

**Execution deadline:**

Short term.

This is a measure whose implementation will be adopted in a short period of time, 19 June 2019, following the holding of the XIV International Congress of CEA.

#### 6.3.4.2. ANNUAL GAR LIVE-MADRID.

It is proposed to hold an "ANNUAL GAR LIVE" in Madrid.

This Seminar should be organized in collaboration with the GAR and offer the opportunity to hold an annual day of arbitration with this institution in Madrid, as is done in other cities such as New York, London, Dubai, Hong Kong, among others.[76]

These conferences, which take the form of Seminars, are single day events of extraordinary quality, which carry very strong on-line coverage on GAR´s website itself.

76 GAR: Is the world´s leading source of commercial arbitration news, work-flow tools and events. https://globalarbitrationreview.com

It is proposed to organize this seminar during the same week as CEA Annual Congress, following the aforementioned "LATIN AMERICAN ARBITRATION DAY with IPBA".

This seminar will be conducted in English.

**Responsible for the implementation of the proposals:**

CEA Executive Committee.

**Execution deadline:**

Short term.

This is a measure whose implementation can be adopted in a short period of time, 20 June 2019, following the holding of the XIV International Congress of CEA.

### 6.3.5. Road shows and designing of a brochure to promote Spain as a seat of international arbitration.

As previously mentioned, in international fora no Spanish Arbitration Institution or any other institution in our country promotes Spain as a venue for international arbitration, apart from some occasional initiatives.

Among the traditional methods of promotion in the field of international arbitration there are two that we can highlight:

i) The making of presentations, commonly known as "*Road Shows*", which are made on a recurring basis by the main International Arbitration Institutions;

ii) The preparation of a brochure "**SPAIN AS A SEAT OF INTERNATIONAL ARBITRATION**" describing the characteristics of the place of arbitration being promoted, its advantages and the reasons to choose it as a place of arbitration.

With this aim of promotion, the Spanish Institutions of Reference, in collaboration with other Spanish organizations with an international orientation, and with the support of all "*Arbitration practitioners*" –especially Arbitrators from Spain and Law Firms with specialisation in this matter– should organize a series of presentations –"*Road Shows*"– outside Spain, with increased frequency in those parts of the world that we have previously pointed out as our potential market niches, in order

to present Spain as a seat for international arbitration.[77]

All International Arbitration Institutions recurrently carry out this activity over time, when they want to promote themselves before the international arbitration community and in a specific country.

In addition to the previous activity, it would also be very suitable to prepare a brochure, "**SPAIN AS A SEAT OF INTERNATIONAL ARBITRATION**", in Spanish and English at least, describing the advantages of establishing the seat of international arbitration procedures in our country, along with its characteristics and other notes that define us as a venue. This brochure could be distributed, at an international level, by Spanish Embassies and Commercial Offices of Spain abroad.[78]

**Responsible for the implementation of the proposals:**

CEA Executive Committee, especially by those members with special qualifications in the matter concerning the distribution of the brochure, Spanish Ministry of Foreign Affairs, European Union and Cooperation, Chamber of Commerce of Spain, Spanish Institutions of Reference, Embassies and Commercial Offices of Spain abroad.

**Execution deadline:**

Short term.

This is a measure whose implementation can be adopted in a short period of time. Its effects could also be seen in the short term.

### 6.3.6. *"COMMUNITY MANAGERS".*

International arbitration operates in a globalized world, so that its practice is increasingly homogeneous in almost all countries. Indeed, any hint of localism that seeks to differentiate a country that hopes to occupy a relevant position in the world of international arbitration is usually rejected.

Similarly, the increasing presence of "*Arbitration practitioners*", especially Lawyers and younger Arbitrators, suggest that functions such as "*Community Manager*" should be developed in order to promote, from a global perspective, international

77 ICEX, integrated in the General Administration of Spain; Madrid Excelente, integrated in the CAM; Chamber of Commerce of Spain, among others.

78 In other jurisdictions, the seat is promoted through videos that explain the advantages of the country as a venue for international arbitration. It is an alternative to these proposals or, as the case may be, a complement to them.

arbitration seated in Spain.[79]

The figure of the "*Community Manager*", who would have to act in the orbit of the CEA or, alternatively, in that of the Spanish Institution of Reference, could have an impact in a short period of time on the promotion of Spain as a venue for international arbitration.

Recently, we have seen how "*Community Managers*" have positioned institutions online in ways that at first, we might not have expected. Such is the case of the National Police of Spain, which has achieved very notable results in a very short period of time, as well as millions of followers.[80]

**Responsible for the implementation of the proposals:**

CEA Executive Committee and/or Spanish Institution of Reference.

**Execution deadline:**

Short term.

This is a measure whose implementation can be adopted in the short term. Its effects could also be seen in the short term.

The Commission **CONCLUDES** that the activity carried out in Spain from the point of view of the "Promotion" parameter is frankly deficient, and fails to transmit to the international arbitration community all the advantages that the seat of international arbitration in Spain may entail.

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79 *Community Manager -Online Community Manager-:* Professional responsible for building, managing and administering the online community around a brand on the Internet, creating and maintaining stable and lasting relationships with their customers, their fans and, in general, any user interested in the brand Spain as a seat of International Arbitration in our case. Position within social media marketing.

CEA has a group formed in 2006, the CEA -40, a group of *young practitioners* that brings together all members with 40 years or less. Its more than 400 members (about half of the members of the CEA) are professionals and users of arbitration in Spanish and Portuguese. It is one of the under 40 most active arbitration groups in Europe and regularly organizes meetings, seminars, round tables and meetings with speakers of recognized prestige in the arbitration world.

The "*Arbitration practitioners*" who are members of the aforementioned "MOOT Madrid" is another segment with members of less than 40 years of age.

80 The *Community Manager* of the National Police of Spain, D. Carlos Fernández Guerra, has after six years in this position converted the account "@policia" into the most-followed account by a Spanish Institution, as well as the police body with the most followers globally (more than 1.75 million Twitter followers). In 2015, he left the National Police of Spain to join IBERDROLA, S.A. His successor, Inspector Carolina González, in three years has achieved a noteworthy increase in the number of followers, reaching a current level of 3,180,000 followers. A few weeks ago, she left her National Police of Spain to become the *Community Manager* of Moncloa, in the Government of Spain of D. Pedro Sánchez Pérez-Castejón.

The participants of this Commission have made several proposals regarding the promotion of Spain as a seat for international arbitration.

The proposals made in this Report may be carried out, as well as other additional actions not discussed here. In any case, it is believed that without adequate promotional activity the results that could be obtained for international arbitration proceedings to choose Spain as a seat would be poor. The participants in this Commission were unanimous in condemning inactivity and the current promotional deficit.

Within the activity of "Promotion," which would correspond to all the "*Arbitration practitioners*," as we have explained, the role of CEA stands out, notably through techniques of "*Inbound marketing*" within the field.

But even more important is the role of the Spanish Institution of Reference, which should have professional and qualified staff, probably integrated into its General Secretariat, with its own specific budget and an on-going operation aimed at promoting Spain as a seat for international arbitration.

# 7

# CONCLUSIONS

# 7. CONCLUSIONS

In this Report we have presented the potential of Spain to become a major international arbitration seat, as well as the reasons why it has not currently this status. Different proposals have been put forward in order to help to achieve this desired status.

We have explained how Spain occupies, in the field of international arbitration, a position that does not match the characteristics of our country from different points of view, including the economic character of our country.

We have also explained how positioning Spain as an international arbitration seat can affect, in a very positive way, the Spanish Brand –Marca España–, and how the potential benefits will affect the whole country.

We summarize the main conclusions drawn in this Report:

1. From the point of view of the different parameters used, we must point out that their explanation has been done deliberately, reflecting that in the case of some, such as "**Legislation**" and "**Judicial Support**", a degree of quality is considered to be an essential and indispensable assumption to continue analyzing the rest of parameters.

   Spain must have a "**Legislation**" that can be considered adequate and in accordance with international standards, and it must have an adequate "**Judicial Support**", in the sense that our judicial system should be considered in the international arbitration field as "arbitration friendly".

   Without the concurrence of these two factors and, most importantly, if Spain is not able to convey to the international arbitral community that these two parameters exist and are in accordance with both the international standards and standards of surrounding countries, we will have no place, in the field of international arbitration, as a seat.

2. From the point of view of the parameter "**Spanish Arbitral Institution of Reference at International Level**" ", the Commission notes that, at present, we do not have a "Spanish Institution of Reference". This is another factor that the Commission considers essential in order to occupy a relevant position in the field of international arbitration.

   The lack of a "Spanish Institution of Reference", is a great obstacle for our country to become a seat for international arbitrations, for two reasons:

**i)** Not having a "Spanish Institution of Reference" prevents international procedures to select Spain as a seat. The "Spanish Institution of Reference" should be the natural receiver of international arbitration procedures that would like to select Spain as a seat.

**ii)** The lack of a "Spanish Institution of Reference" implies that the leadership role, especially in the field of promotion, relating to various aspects related to international arbitration, is absent.

In order to create a "Spanish Institution of Reference", each and every one of the "*Arbitration practitioners*" who carry out their activity in Spain, as well as the CEA, must provide support and assistance.

The Commission considers that it is urgent to establish a "Spanish Institution of Reference" and the draft merger of the three main Spanish Arbitral Institutions in the field of international arbitration, could form the embryo of such a "Spanish Institution of Reference".

The fact that other international arbitration institutions, such as the Permanent Court of Arbitration, wish to sign a Hosting Agreement with the Kingdom of Spain is a reflection of our country's potential as an international arbitration seat.

**3.** In relation to other parameters, such as ***"Arbitration practitioners"***, the Commission believes that Spain is very well positioned from the international arbitration perspective.

The Commission concludes that the activities that foreign "*Arbitration practitioners*" carry out, or may carry out, in our country are not subject to any obstacles or hurdles in relation to international arbitration proceedings whose seat is in Spain.

However, the Commission considers it highly desirable that this good situation should be promoted in an appropriate manner within the international arbitration community.

**4.** With regards to the "**Country-Advantage**" parameter, the Commission considers that Spain is extremely well positioned and has enormous and a variety of assets that should allow it to compete, in the field of international arbitration, with the advantage of being able to position itself as a major venue for international arbitration.

Characteristics such as those described above (geographical position, language, legal system, communications, special relationship with Latin Ameri-

ca, among others) define our potential market niches. Among them, Latin America stands out, along with the triangular position that we could reach between this continent and the countries of the European Union, and also in relation to some Asian countries that are acquiring great prominence as investors in Latin America.

Unfortunately, as a result of the limited promotional activity that we are currently carrying out, our potential market niches are not being properly used and we run the risk that they will be occupied by more active foreign Arbitral Institutions.

**5.** It is in the field of "**Promotion**" that the Commission considers that the activity carried out by Spain is very deficient. This is surely a consequence of the absence of a "Spanish Institution of Reference" which, to a large extent, will have to assume leadership in this matter. Another reason for this deficiency would be our country's lack of tradition in the field of international arbitration.

This promotion deficit means that Spain has not managed to transfer to the international arbitration community all the advantages of establishing the seat of international arbitration procedures in our country.

The Commission is also aware that the promotional activity, apart from the leadership that we previously attributed to the "Spanish Institution of Reference", must be carried out by all the members of the Spanish arbitration community, that is, the "*Arbitration practitioners*". This responsabilitiy falls as well on the CEA, and to a different degree to other bodies, entities and institutions of the Spanish Public Administration which should be counted on, not only to carry out promotional activities, but also for many other actions.

The participants of this Commission have made various proposals regarding the promotion of Spain as a seat for international arbitration. These proposals, or any others, can be carried out. In any event they must be done with adequate professionalism. The Commission wishes to highlight that without sufficient promotional activity, it will be difficult to achieve the desired result of Spain becoming an important seat for international arbitration proceedings.

**6.** There is one last conclusion we would like to highlight.

From a temporal perspective, we have employed throughout this Report the use of short-medium-long term time frames.

We must be aware that the achievement of an objective of this magnitude, Spain as a seat of international arbitration, is a task that can only be attained in the long term, in a range of 25-30 years.

Although certain milestones can be achieved in a short-medium term, the ultimate goal is long term. Examples used in this Report of other countries and places that have recently managed to position themselves very favourably in the field of international arbitration are evidence of this. But at the same time they demonstrate that the achievement of the objective contemplated in this Report is feasible.

# ANNEX I

# ANNEX I

## COMMISSION TO PROMOTE SPAIN AS A SEAT OF INTERNATIONAL ARBITRATION

### Mandate of the Commission

Madrid, 26 October 2017

1. The meeting of the Executive Committee of 21 September 2017 discussed and agreed on the creation of a Commission for the promotion of Spain as a seat for arbitration.

2. The Act on Arbitration has already defined as one of its objectives:

> *"to facilitate and encourage the conclusion of arbitration agreements in which our country is established as the place of arbitration".*

3. Despite the good intentions, the reality is that in the 15 years since the enactment of the Act on Arbitration Act, there has not been a significant increase in arbitrations in which foreign parties have chosen Spain as their seat.

4. The Commission's mission is to analyze the reasons why legal foresight has had less impact than expected, and to develop a series of proposals and medium- and long-term strategies to correct the situation.

5. The Commission shall define its own lines of action and working methodology, including the appointment of a *rapporteur* and a secretary for the performance of its administrative tasks.

6. It will give an account and reasoning of its progress at each meeting of the Club's Executive Committee, and will present its final conclusions and proposals before the summer of 2018.

7. The plenary of the Commission is initially formed by the following members of the Executive Committee, which may be joined by other members (...)

# ANNEX II

# ANNEX II

## LIST OF PARTICIPANTS OF THE COMMISSION

| | |
|---|---|
| Mr. J. Félix de Luis | Chairman |
| Mr. Víctor Bonnín | Secretary |
| Mr. Luis Fernando Rodríguez | Secretary |
| Ms. Pilar Perales | Chairman of the Subcommission 1 |
| Mr. Félix J. Montero | Chairman of the Subcommission 2 |
| Mr. Alberto Fortún | Chairman of the Subcommission 3 |

### Members

Ms. Ana Armesto
Mr. Gabriel Bottini
Mr. Fernando Bedoya
Mr. David Cairns
Mr. Juan Carlos Calvo
Mr. Juan Pablo Correa
Mr. Ignacio Delgado
Mr. Adolfo Díaz-Ambrona
Ms. Marlen Estévez
Ms. Urquiola de Palacio
Mr. José Carlos Fernández Rozas
Mr. Joseph Frölingsdorf
Mr. Francisco García-Ortells
Mr. Julio González Soria
Mr. Clifford Hendel
Mr. Rafael Illescas
Mr. Fernando Lanzón
Mr. Santiago Martínez Lage
Ms. Maria Milburn
Mr. Juan Ramón Montero
Mr. Miguel Moscardó
Mr. Simón Navarro
Mr. Dámaso Riaño
Mr. Fernando Sales
Mr. Antonio Sánchez Pedreño
Ms. Patrizia Sangalli
Mr. Juan Serrada
Mr. Miguel Ángel Serrano
Ms. Nazareth Romero

cea

Club Español del Arbitraje