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2025

Madrid, the emerging arbitration hub

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Summary

IN SUMMARY

The world of arbitration is undergoing significant transformation and Spain is no exception. Over the past year, key developments in all perspectives – institutional, regulatory and technological – have taken place. These improvements, combined with its language and connections with Ibero-America, offer clear advantages for Madrid to become a recognised arbitration venue globally. Clyde & Co's arbitration team in Spain, with extensive experience in both domestic and international arbitration, analyses how these issues are shaping this practice.

DISCUSSION POINTS

- The position of arbitration in Madrid, Spain: significant progress and considerable opportunities ahead
- Spanish arbitration institutional perspective: arbitration work groups, MIAC-CIAR alliance and arbitration rules
- Increasing the duty to disclose conflict of interest situations
- Artificial intelligence: the new horizon of arbitration in Spain

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THE POSITION OF ARBITRATION IN MADRID, SPAIN: SIGNIFICANT PROGRESS AND CONSIDERABLE OPPORTUNITIES AHEAD

The substantial progress made in recent years in Spain in the arbitration practice, as a result of the vast support of the arbitration community, the new doctrine applied by the Constitutional Court according to which the criteria for examining arbitral awards based on public order are highly restrictive,[1] as well as the experience acquired in regulatory, technological and institutional arbitration terms, have encouraged the growth and development of this alternative dispute resolution (ADR) method and the emerging competitiveness of Madrid as an arbitration hub to be taken into consideration.

In 2021, Madrid entered the 'top 10' list of arbitration venues preferred by Latin American and Caribbean regions, according to the survey by the School of International Arbitration of Queen Mary University of London. In line with this, statistics from some of the most prominent European arbitration courts in the past couple of years have shown a significant rise in Madrid's position in the arbitration rankings. Specifically, in 2023,[2] Madrid ranked among the 10 most chosen venues in arbitrations administered by the ICC, with 18 cases held in this city.

Further, in the same year, Spanish was the second most used language for arbitral awards (43) and Spanish law was the applicable law in 33 cases. It should also be pointed out that the Spanish nationality of the parties was ranked in fourth place globally and in second place at European level (following Germany closely). As for the Spanish nationality of the arbitrators, we are also within the 'top 10' with 60 arbitrators of Spanish nationality resolving the cases administered by the ICC.

The above confirms not only that arbitration practice is well established in Madrid but also that the number of arbitration disputes with Spanish features (laws, location, parties and arbitration) that are being discussed abroad is significant, so all these disputes with Spanish profile could be perfectly submitted to arbitration in Madrid or administered by Spanish arbitration courts (ie, there is a lot of room for improvement to be explored here yet).

SPANISH ARBITRATION INSTITUTIONAL PERSPECTIVE: ARBITRATION WORK GROUPS, MIAC-CIAR ALLIANCE AND ARBITRATION RULES

In recent times, Spanish arbitration courts have been striving to consolidate their standing and collaborate with one another, including forming cross-border partnerships, with the ultimate goal of establishing Madrid as a prominent forum for arbitration.

In this area, it is worth mentioning the Madrid International Arbitration Center (MIAC), which is the result of the merger in 2020 of its founding courts for the administration of international arbitration: the Madrid Arbitration Court (CAM), the Civil and Commercial Arbitration Court of Madrid (CIMA) and the Spanish Court of Arbitration (CEA), with the Court of Arbitration of the Madrid Bar Association (ICAM) also joining as a strategic partner.

Thus, MIAC exclusively handles international disputes arising by direct designation of the arbitration agreement or by automatic referral from the individual founding courts in those cases where the arbitration clause is from 1 January 2020 onwards.

In this context, MIAC's statistics for 2023,[3] in line with the above, show the gradual growth of international disputes submitted to arbitration based in Madrid in recent years. Since MIAC was established in 2020, the number of international arbitrations received by MIAC to administer each year has increased from two in this first fiscal year to 15 in 2023.

Currently, according to its statistics, MIAC is administering 35 cases in which the nationality of the parties is 60 per cent European and 20 per cent Latin American. Further, the nationality

of their arbitrators is 30 per cent Spanish, followed by almost 20 per cent Colombian and 15 per cent Peruvian. In other words, more than 50 per cent of the parties and arbitrators are of Spanish or Latin American nationality.

In the past two years, CAM and CEA have administered a number of arbitrations in the region of 110–130 for the former[4] and of 30–60 for the latter,[5] despite the referral of their international arbitrations to MIAC; additionally, there has also been a noticeable increase in the value of the administered cases.

In light of the above, it seems to be quite clear that arbitration in Spain is more than well established, growing and evolving. The number of both national and international arbitrations taking place in Madrid and being administered by Spanish arbitration courts is on the rise, with a majority of the participants being of Spanish or Latin American origin, but also including other nationalities and international disputes.

This growth can be attributed to the support of the Spanish courts in upholding the awards rendered, as well as the efforts of the Spanish arbitration community. In 2024, the various initiatives undertaken by MIAC, as outlined below, are particularly noteworthy.

Arbitration Work Groups

One of the initiatives taken by MIAC is the creation of working groups, formed by professionals and experts, of different industry sectors, as follows: marine, construction and engineering, defence and security, digital economy, energy, tourism and hotels, loss adjusters and insurance, inversion and states, banking and corporate.

In this respect, the insurance working group, created by MIAC-CIAR, organised on 5 March 2024 an event to discuss the relevance of arbitration in insurance and reinsurance, specially in order to introduce its final report[6] on the taxonomy of the most frequent insurance disputes referred to arbitration, which was released in January 2024. On this matter, the report addresses the common issues discussed in this sector, such as the subrogation of the insurers in the position of the insured when it comes to an arbitration clause agreed with a third party.

The study tends to promote this ADR process, particularly considering the complexity of the disputes, the confidentiality needed mainly in the reinsurance area and when it comes to the different legal systems and, therefore, disparity of resolutions to similar cases.

It is worth mentioning that, for those who normally intervene in this sector, we have already observed the increasing number of arbitration agreements, according to which the disputes are submitted to arbitration in Madrid.

MIAC-CIAR Alliance

In March 2024, MIAC signed a strategic alliance with the Ibero-American Arbitration Center (CIAR) so that both arbitrators now act as one, being renamed as MIAC-CIAR.[7] Through this alliance, CIAR integrates its activity into MIAC-CIAR, including its resources and the transfer of all its arbitration activity, with its main office in Madrid, while maintaining its respective offices in Costa Rica and SãoPaulo.

This alliance responds to the clear connection between Spain and Ibero America, due to their common language (second most used language, spoken by 800 million people), as well as to their similar law system. Likewise, this union is in line with the increasing number of disputes of this nature being submitted to arbitration, particularly because of the decision

of the construction and renewable industries of these regions to submit their disputes to arbitration. Approximately 25 per cent of arbitrations involve Ibero-American parties, some of which are already being resolved in Madrid, as a venue that offers legal certainty and stability.

The focus of the Ibero-American arbitration community and, specially, of MIAC-CIAR to support and grow these connections in these regions was reflected as well in the participation in the Arbitration Open in Lima,[8] held on 10 July 2024, within two months of the 10th anniversary of the Madrid Arbitration Open, which already included the intervention of Latin American arbitration professionals. These events are a clear example of the expansion and scope of Madrid's arbitration capabilities to reach the rest of the world, especially Ibero-America.

All the above anticipates a potential increase in the number of arbitrations with Ibero-American parties and arbitrators in Madrid in the years to come.

MIAC-CIAR Arbitration Rules

The latest initiative taken by this arbitration court was the release in 2023 of its new Arbitration Rules, which entered into force on 1 January 2024, and which are known as the MIAC-CIAR Arbitration Rules, following the alliance.

These new Rules were presented in an exercise of transparency through a webinar by MIAC-CIAR on 4 July 2024, in which it was explained that they are the result of work from both sides of the Atlantic by the arbitration communities, with the aim of incorporating the best possible practices, particularly in the case of arbitrations with legal systems of Ibero-American origin and resulting in some even more modern Arbitration Rules.

Among the modifications adopted, there is a clear optimisation of what was perceived as excessive regulation of the arbitral procedure and which could, to some extent, limit the free autonomy of the parties in regulating the arbitral procedure. In this sense, certain articles on the instruction of the procedure have been removed from the body of the regulation and introduced in Annex III with a reference procedure, which also incorporates a reference to the IBA Rules on the representation of parties and a basic regulation of document production.

The new Rules also complement some of the industries that usually submit their disputes to arbitration. For example, as a result of the marine work shop proposal, a new type of procedure has been added, so that, together with the ordinary procedure, the abbreviated procedure for disputes of less than €1 million, there is a highly expedited procedure (article 54), which does not depend on the amount but on the express written request of both parties to resolve their dispute in this way in a very short period of time (approximately four months).

As mentioned, this new procedure responds to the needs of different industries, such as the transport industry, to see their disputes over contracts in international trade resolved without delay. To this end, a process is proposed in which, in parallel to the constitution of the arbitral tribunal, the parties submit their written statements. After the submission of the pleadings, the appointed arbitral tribunal has three months to issue an award and, with broad powers, a decision simply based on documentary evidence.

Further, in order to encourage those parties who are wary of arbitration due to the absence of a second instance, and following a process already provided for by some specific arbitration courts (eg, the Civil and Commercial Arbitration Court of Madrid), these new Arbitration Rules provide a new regulation of the optional challenge of the award (Annex IV), subject to the

agreement of the parties before the acceptance of any arbitrator. In this way, the benefits that arbitration guarantees of confidentiality, speed and specialisation are preserved, but at the same time this optional challenge ensures the possibility of having two instances, with two arbitration tribunals reviewing the dispute.

This procedure is configured in such a way that, to avoid the annulment period of the Spanish Arbitration Law[9] (article 41.4), the principal arbitral tribunal shall issue a draft of award, without signature and date. Subsequently, if this draft award is not challenged, it becomes definitive; however, if it is challenged through the 'challenge tribunal', an arbitral tribunal of three arbitrators appointed by MIAC-CIAR can (1) dismiss the challenge so that the definitive award would be signed and dated by the principal arbitral tribunal or (2) admit in full or in part the challenge and issue the challenge award.

The purpose of this possibility to challenge the award is so that an arbitral tribunal can review possible manifest errors in the assessment of the evidence or in the applicable law, although the court of appeal cannot order the taking of new evidence as it is limited to assessing the previous evidence. All of this, moreover, takes place within a short period of time.

In this respect, as the issue of time is key in arbitration, the new Rules have tried to avoid any potential delays. Among other modifications in this respect, we can address the new regulation for setting up the arbitration tribunal, particularly during the process of designating and appointing arbitrators (Annex I), for example, when it comes to the time period for allegations of the parties when an arbitrator is appointed with respect to the conflict of interests, the requested independence or impartiality. In this regard, it should be noted that according to MIAC-CIAR statistics for 2023, the total duration of its proceedings has been one year and three months.

Further, although in practice it was already adopted, and specifically contemplated in the case of witnesses that they could appear 'through any means of communication that makes their presence unnecessary' (previously article 32, now Annex IV), following the technological advances, the new Rules have expressly established the possibility for parties to appear 'telematically' (ie, remotely) and that hearings, if held in person, may take place at any location other than the seat of arbitration.

Finally, the new Rules[10] (Annex II) establish that, from the start of the arbitration, a fixed cost of the arbitration procedure will be confirmed to the parties. However, MIAC-CIAR reserves the possibility of increasing or reducing the arbitrators' fees by 30 per cent, depending on the complexity of the case or the arbitrators' compliance with their functions (such as issuing an award within the stipulated time). Similarly, the 'cost calculator' available to the court has been unified, equalising the scale for the three procedures, in order to simplify these procedures, and bearing in mind the guidelines for the quantification of claims also available to the court.

INCREASING THE DUTY TO DISCLOSE CONFLICT OF INTEREST SITUATIONS

The 2023 approval of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, along with the February 2024 amendment to the IBA Guidelines on Conflicts of Interest, has heightened the focus on the ethical standards required of arbitrators concerning their disclosures.

The UNCITRAL Code of Conduct, which was finally approved in June 2023 after a period of review and amendments, aims to be the benchmark for assessing conflicts of interest

that may arise in investment arbitration proceedings before ICSID by introducing a list of mandatory disclosure situations in article 11, as well as guidelines for action in cases of doubt as to the appropriateness of disclosure.

Similarly, the IBA Guidelines on Conflict of Interest, updated in 2024 to reflect a decade's worth of changes in international arbitration, remain a crucial soft law tool to assess potential conflicts of interest during arbitrations.

Both instruments share an increased requirement to disclose potentially conflicting situations. This is not a mere coincidence. Today's arbitration practice reflects the growing interconnectedness of the modern world, which makes conflicts of interest more common.

In response to this context, the arbitration community has, in recent years, intensified its concern for greater transparency and clarity in the resolution of potentially conflicting situations. Indeed, the growth of the Orange List of the revised IBA Guidelines on conflicts of interest highlights the complexity and nuances of these conflicts, underscoring the need for comprehensive disclosure.

While not every situation implies a 'significant risk' of bias, the number of circumstances that will give rise to the existence of a duty of disclosure on the part of the arbitrator is increased. This ensures that parties can make fully informed decisions about any potential impacts on the arbitrator's impartiality. Consequently, the duty of disclosure serves as a safeguard for both the arbitrator and the arbitral institution itself.

Among the features introduced by the updated Guidelines, special attention has been given to the arbitrator's publications in social networks, as highlighted in paragraph 3.4.2 of the Orange List. This section states: 'The arbitrator has publicly advocated a position on the case, whether in a published paper, or speech, through social media or on-line professional networking platforms, or otherwise.'

In this regard, one might question whether the duty of disclosure applies equally to information that is publicly available on social media and to information that is less accessible to the parties involved in arbitration.

In General Standard 4(a), the concept of 'reasonable enquiry' has been reintroduced – which, although already included in the wording of the 2004 Guidelines, was removed in the 2014 version – implying that the parties are expected to be aware of any circumstances concerning the arbitrator that could be discovered through a reasonable enquiry.

Nonetheless, the updated Guidelines emphasise the relevance of the arbitrator's publications, whether in scholarly articles or on social media. Therefore, while it is undeniable that the reference to 'reasonable enquiry' introduces some ambiguity, the inclusion of this circumstance in the Orange List underlines that parties are not expected to be aware of each publication made by the arbitrator. This shifts the responsibility of the arbitrator to disclose their publications.

The issue of an arbitrator's friends or contacts in social networks differs from the matter of their published content. Prior to the recent reform of the IBA Guidelines, questions had already been raised in this matter and there are examples of international case law rejecting the bias of an arbitrator on this ground.[11]

In this regard, the new IBA Guidelines continue to categorise these situations within the Green List (section 4.3.1), alongside other situations where the arbitrator is a member of the same

professional association as another arbitrator or party to the arbitration. A case that could be included was resolved in the judgment of the High Court of Justice of Catalonia of 20 July 2022, which rejected the existence of partiality in relation to the membership of an arbitrator and the lawyer as lecturers of one of the parties to the same university.[12]

Another major novelty of the Guidelines is General Rule 6, which includes, on the one hand, the issue of conflicts arising with law firms (General Rule 6(a)) and, on the other hand, goes deeper into the issue of conflicts with third-party funding (TPF) (General Rule 6(b)).

In relation to law firms, General Standard 6(a) specifically deals with conflicts arising from associations with law firms, including those where the arbitrator is employed. However, the commentary to General Standard 6(a) clarifies that simply being part of the same law firm does not in itself imply the existence of a conflict of interest. Instead, it emphasises that each case should be assessed based on the following factors: (1) the activities of the arbitrator's law firm or employer; (2) the law firm's or employer's organisational structure and practices; and (3) the nature of the arbitrator's relationship with the law firm or employer.

Thus, the application of this rule will be greatly influenced by the size of the law firm. Indeed, when arbitrators belong to law firms comprising numerous partners and lawyers operating in several countries, it is considerably complex for the arbitrator to disclose information that they may not even be aware of. In this regard, the expression 'Chinese walls' has become popular to refer to the fictitious barriers that exist within the different departments and practice areas of law firms.[13] Nevertheless, disclosure of the information available to the arbitrator is required.

As for TPF contracts, which have been a part of international arbitration for some time, there is a growing expectation that the ethical standards for impartiality and independence should be extended to the connections that the arbitrator may have with the TPF.

The updated Conflicts of Interest Guidelines reflect this expectation by expanding the scope of economic interests that may impact the dispute and increasing the duty to disclose any involvement with TPFs. The revised version of General Standard 6(b) now states: 'Any legal entity or natural person having controlling influence on a party, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be deemed to bear the identity of such party.'

However, the increased requirement of a duty to disclose the existence of a TPF contract has faced criticism, primarily for two reasons. On the one hand, part of the doctrine is reluctant to require the disclosure of a TPF since this circumstance obliges the financed party to reveal its financial weakness to the opposing party in the arbitration.[14] On the other hand, there is a debate about whether disclosing the existence of a TPF contract should be mandatory in all cases, regardless of the specifics. By way of example, it is questioned whether disclosure is necessary when the TPF does not require repayment of funds.

Given these concerns, it is reasonable to impose limits on the disclosure duty. For example, in Spain, the Code of Good Arbitration Practices of the Spanish and Ibero-American Arbitration Club (CEA) imposes in its seventh recommendation the duty to disclose the existence of a TPF contract.[15] However, this recommendation only requires disclosure of the contract's existence, leaving the parties free to request any additional information they deem necessary.

ARTIFICIAL INTELLIGENCE: THE NEW HORIZON OF ARBITRATION IN SPAIN

Nowadays, we are fully aware that artificial intelligence (AI) is transforming virtually all areas of our lives. Gradually, its incorporation into the world of arbitration has demonstrated unparalleled utilities. However, alongside the benefits, certain concerns have also emerged.

As a starting point, the AI revolution demands a regulatory framework that fits the circumstances. In this regard, European regulation is at the forefront with the approval of the Artificial Intelligence Act (the AI Act), which establishes supervisory entities and classifies AI levels according to their risk, setting control levels and different requirements based on their potential impact in various areas.

The introduction of the AI Act is also an important milestone in the digital transformation of arbitration, as it sets a deadline of until 2025 for a complete digitalisation of these practices. In addition, under articles 52, 59 and 65, the adoption of essential digital processes, such as the electronic filing of documents and the administration of hearings, is likely to take place. This transition not only promises to improve operational efficiency but also presents challenges related to the privacy of digital tools, security and reliability in legal contexts.

Further, at the domestic level, Spain approved the AI Strategy in 2024, which aims to boost AI in both the public and private sectors, among other issues, as well as Royal Decree-Law 6/2023, of 19 December, approving urgent measures for the implementation of the Recovery, Transformation and Resilience Plan for the public service of justice, civil service, local government and patronage, which, although it does not directly address the implementation of AI, introduces the regulation on the automation of processes in the Spanish judicial system.

The global data collected on AI implementation in arbitration over recent years are absolutely revealing about the intensification of this phenomenon. In 2018, a study conducted by Queen Mary University of London (School of International Arbitration) confirmed that, at that time, only 5 per cent of users frequently used AI in their arbitrations.

The same question was surveyed three years later in a new poll and by 2021 – even before the disruption of ChatGPT – 13 per cent of users already frequently used AI in their arbitrations. This is more than double those who claimed to use it in the 2018 survey.[16] Further, a 2023 study revealed that 28 per cent of users use ChatGPT in professional contexts and 30 per cent use some form of AI for document review and generation.[17]

AI's applicability in arbitration covers all phases and stages of the arbitral process: selection of arbitrators, document management, drafting of arbitration clauses and even drafting the contract prior to the dispute. Further, the applicability of AI in discovery or disclosure processes could save costs and time, speeding up the evidentiary phase of arbitration.

Examples of widely used tools in arbitration include Arbitrator Intelligence, which supports the arbitrator selection process by analysing the types of decisions made in previous procedures or predictive analysis platforms like Dispute Resolution Data or, in the case of Spain, Jurimetría. Although it has greater applicability in judicial disputes, Jurimetría also allows the analysis of the outcomes of similar disputes resolved under Spanish substantive law.

The cost and time reductions offered by AI in the arbitral process not only affect the development of arbitration itself but are also of particular interest to the parties in terms of: choosing the arbitration venue based on the jurisdiction's AI regulatory development; selecting the arbitration centre if opting for institutional arbitration, based on the efficiency AI

can offer in managing the process; or even choosing the law firm responsible for the defence based on the technological tools they have available.

At the same time, the implementation of AI in arbitration brings about a series of risks. On the one hand, the risk that AI hallucinations might go unnoticed relates to the need for thorough human oversight of AI implementation.[18] On the other hand, an inevitable question when reflecting on the application of AI in arbitration procedures is: how can AI affect the decision-making process of the award? In this regard, concerns arise not only about the potential biases of a decision based on a machine learning algorithm but also about the reliability and legitimacy of the decision itself.[19]

In this sense, other jurisdictions have already advanced in the implementation of AI for dispute resolution. For instance, in China, certain low-complexity disputes have been resolved by an AI system called 'Xiao Xhi 3.0' since 2019. However, this has not yet occurred in Spain.

The analysis of AI intervention in dispute resolution in Spain necessarily requires differentiating between its implementation in judicial disputes and in ADR. It appears that AI implementation in the Spanish judicial system will be slower than in ADR systems, such as arbitration, though inevitable in both.

As mentioned above, Royal Decree-Law 6/2023 of 19 December, which has brought one of the most profound reforms to the Spanish judicial system in recent years, introduces, as part of the regulation of digital and procedural efficiency measures for public justice service, a general data-oriented principle (article 35.1), primarily in three areas: data management; electronic procedures and automated actions; and support for the judicial function.

Regarding support for the judicial function, article 35.1.k highlights 'the application of artificial intelligence techniques for the aforementioned purposes or others that support the judicial function, the processing, where applicable, of judicial procedures, and the definition and execution of public policies related to the Administration of Justice'. However, although the possibility of AI supporting the judicial function is mentioned, it has not yet been regulated whether the support will affect the decision-making process of disputes.

In any event, given the development of an increasingly favourable regulatory framework for the implementation of new technologies in all justice-related matters in Spain, it is most likely that their greater use and implementation could be driven by ADR, which is increasingly common in this country, especially for domestic disputes.

Specifically, in the case of arbitration being governed by the principles of free disposition of the matter and the will of the parties, it would be possible for the parties to agree that arbitrators could use AI systems as support for their decision-making, as well as for arbitration institutions to offer users the possibility to process and manage arbitrations with these systems. All this would, of course, be subject to the external limits of arbitration, such as subsequent judicial control of the award and respect for Spanish and international public order in the recognition and enforcement of foreign awards.

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