

**IURA NOVIT CURIA AND COMMERCIAL  
ARBITRATION IN SPAIN**

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## IURA NOVIT CURIA AND COMMERCIAL ARBITRATION IN SPAIN

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**I. INTRODUCTION. II. LEGAL FRAMEWORK. 1. International Conventions. 2. National Statutes. A. Arbitration. B. Civil Procedure. C. Application of Foreign Law. 3. Arbitration Rules. III. IURA NOVIT CURIA IN CIVIL PROCEEDINGS BEFORE ORDINARY COURTS. IV. JUDICIAL REVIEW OF THE POWERS OF ARBITRATORS WITH REGARD TO PARTIES' PLEADINGS: GENERAL TRENDS. 1. Applicability of iura novit curia to arbitration. 2. Arbitrators' power to determine the applicable rules. V. VALIDITY AND ENFORCEMENT OF AWARDS. 1. Fair Hearing. 2. Procedural irregularity. 3. Excess of power. VI. CONDUCT OF ARBITRAL PROCEEDINGS. 1. Burden of Proof. 2. Impartiality. 3. Default awards. VII. APPLICATION OF THE LAW BY THE ACTORS INVOLVED. VIII. CONCLUSION.**

### I. INTRODUCTION

The *iura novit curia* doctrine plays a considerable role in civil proceedings before Spanish courts. Its prominent position as a principle of civil procedure law has very much influenced its increasing significance in the practice of Spanish courts reviewing arbitral decisions. Particularly in the context of actions brought for setting aside awards, it has become almost commonplace by Spanish courts to make express references to the *iura novit curia* principle as the cornerstone of the leeway that arbitrators enjoy when exercising their powers to decide a dispute. Therefore, even if the scholarly discussion on the implications of the *iura novit curia* maxim to arbitration remains limited in Spain<sup>1</sup>, case-law is particularly abundant and repetitive in this respect.<sup>2</sup>

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<sup>1</sup> L. Gómez-Iglesias Rosón, *Iura novit curia y principio de contradicción: su aplicación en el arbitraje en España*, 9 Arbitraje (Revista de arbitraje comercial y de inversiones) (2016), 45-95.

<sup>2</sup> As it will be discussed in Sections IV to VI *infra*, it is now common that Spanish courts refer to the application of the *iura novit curia* principle to arbitration when reviewing arbitration proceedings. All judgments by the Spanish Supreme Court (*Tribunal Supremo*), the Regional High Courts of Justice (*Tribunales Superiores de Justicia*) and the Appeal Courts (*Audiencias Provinciales*) referred to in this paper may be accessed at <http://www.poderjudicial.es/search/indexAN.jsp>; the judgments of the Spanish Constitutional

In order to analyse the situation in Spain in the context of the current global debate on this issue<sup>3</sup> it seems appropriate to begin with an overview of the current legal framework, including international conventions binding on Spain, the relevant national legislation and arbitration rules (section II, *infra*). Since the *iura novit curia* principle is only laid down as such in the general rules on civil procedure and the case law on the interpretation of such rules has decisively influenced the application of the principle to arbitration proceedings, it seems appropriate to continue with a discussion of the main characteristics of the application of the *iura novit curia* principle in civil proceedings before ordinary courts (section III). The basic features of the trend by Spanish courts to consider that *iura novit curia* is applicable to arbitration are further presented (section IV). Three grounds of annulment or non-recognition of awards deserve particular attention as limits to the recourse by arbitrators to *iura novit curia* in the light of the judicial review of arbitral awards by Spanish courts: fair hearing, excess of power and, to a lesser degree, procedural irregularity (section V). Furthermore, the implications of certain rules regarding the conduct of arbitral proceedings on the arbitrators' leeway resulting from the *iura novit curia* doctrine are also discussed (section VI). Finally, some remarks on the main factors influencing the interpretation of the *iura novit curia* principle to arbitration proceedings by the different actors involved are presented (section VII).

## II. LEGAL FRAMEWORK

### 1. *International Conventions*

Spain is a contracting State to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>4</sup> The application of the Convention in Spain is not subject to reciprocity and hence it is not limited to the recognition and enforcement of awards made only in the territory of another contracting state since Spain made no use of the declaration envisaged in Article 1(3) of the Convention. Act 60/2003

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Court (*Tribunal Constitucional*) may be accessed at <http://hj.tribunalconstitucional.es/>. Furthermore, the judgments of the Court of Justice of the European Union (CJEU) are available at <http://curia.europa.eu/>; and those of the European Court of Human Rights (ECtHR) may be accessed at <http://hudoc.echr.coe.int/>.

<sup>3</sup> G. Cordero-Moss, *The Arbitral Tribunal's Power in respect of the Parties' Pleadings as a Limit to Party Autonomy On Jura Novit Curia and Related Issues*, in F. Ferrari (ed.), *Limits to Party Autonomy in International Commercial Arbitration*, (Juris, 2016), pp. 289-330.

<sup>4</sup> 330 UNTS 3.

of 23 December on Arbitration (SPAA)<sup>5</sup> supports the view that the scope of application of the New York Convention in Spain renders unnecessary any domestic rules on the issues covered by the Convention. Title IX of the Arbitration Act, which regulates the exequatur of foreign awards, consists only of article 46. In addition to defining foreign award as one delivered outside Spain, it merely refers to the application of the 1958 New York Convention. Therefore, as regards judicial review of arbitrators' leeway on the basis of *iura novit curia*, it is noteworthy that the grounds for refusing recognition or enforcement of a foreign award are those of the New York Convention whether or not the award was delivered in a State party to the Convention.<sup>6</sup>

Furthermore, Spain is a party to the European Convention on International Commercial Arbitration of 21 April 1961 (Geneva Convention).<sup>7</sup> The provisions of the European Convention are of limited significance with regard to *iura novit curia*. As to the law to be applied by the arbitrators to the substance of the dispute, Article VII of the Geneva Convention opts for an indirect approach in the absence of choice, leading to the application of the proper law under the rule of conflict that the arbitrators deem applicable. By contrast, the SPAA is based on a direct approach in that respect.

## **2. National Statutes**

### **A. Arbitration**

Arbitration is governed in Spain by the SPAA which entered into force on 26 March 2004 and has been amended in 2009 (Act 13/2009) and 2011 (Act 11/2011). The Act aims to be generally applicable to all arbitration that is not subject to special rules. It is based on the 1985 UNCITRAL Model Law and one of its main features is that it opts for unified regulation of domestic and international arbitration. Therefore, the SPAA is based on the so-called monistic approach since there is a single legal regime and the same provisions apply to both international and domestic arbitration.<sup>8</sup> Its legal framework for the annulment of awards, and particularly the annulment grounds based on the

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<sup>5</sup> Official State Gazette (*Boletín Oficial del Estado*) No. 309, of 26 December 2003.

<sup>6</sup> See, e.g., J.C. Fernández Rozas, *Arbitraje comercial internacional*, in J.C. Fernández Rozas, R. Arenas García & P.A. De Miguel Asensio, *Derecho de los negocios internacionales* (Iustel, 5th ed 2016), at 737.

<sup>7</sup> 484 UNTS 349.

<sup>8</sup> See, e.g., C. Esplugues Mota, *Artículo 1*, in S. Barona Vilar (ed.), *Comentarios a la Ley de arbitraje*, 2nd. ed., (Civitas, 2011), at 98-100; and C. González Bueno (ed.), *The Spanish Arbitration Act (A Commentary)* (Dykinson, 2016), p. 23.

UNCITRAL Model Law, apply to domestic or non-international awards and to international awards, provided that they are made in Spain. Two separate regimes are established for annulment and recognition but the grounds of control are basically the same as a result of the application of the New York Convention and the influence of the UNCITRAL Model Law.

In line with Article 18 of the Model Law, Article 24(1) of the Spanish Act establishes that the parties shall be treated with equality and each party shall be given full opportunity to present his case. Concerning the determination of the procedure, Article 25 SPAA is also directly influenced by Article 19 of the Model Law. First, it grants freedom to the parties to agree on the procedure to be followed by the arbitrators in conducting the proceedings. In the absence of such agreement, it allows arbitrators to conduct the arbitration in such manner as they deem appropriate. The parties' choice includes the freedom to authorize an arbitral institution to adopt the relevant decisions further to the arbitration rules agreed by the parties.

However, the wording of Article 25(2) of the Spanish Act is broader than Article 19(2) of the Model Law concerning the scope of the power conferred upon the arbitral tribunal. The Model Law states that it includes "the power to determine the admissibility, relevance, materiality and weight of any evidence" and the Spanish Act adds "the power to determine the taking of evidence, including on the arbitrators' own motion".<sup>9</sup> The Preamble of the SPAA stresses that when regulating arbitration proceedings the Act stands on the premise of free choice by the parties and subjects it and the exercise of the arbitrators' powers to only two limitations, defined as the fundamental values of arbitration procedure: the parties' right to defence and the principle of equality.<sup>10</sup>

In regard the law applicable to the substance of the dispute, Article 34 of the Spanish Act shows certain differences with respect to Article 28 of the Model Law. Both provisions allow the parties to expressly authorize the arbitrators to decide *ex aequo et bono*. Moreover, the parties may choose the rules of law to be applied by the arbitrators. However, in the absence of choice, the Spanish Act adopts a direct approach allowing arbitrators to apply the rules they deem appropriate<sup>11</sup>, and therefore deviates from the

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<sup>9</sup> V. Guzmán Fluja, *Artículo 25*, in Barona Vilar (ed.) *supra* note 8, p. 1178.

<sup>10</sup> See Section VI of the Preamble.

<sup>11</sup> S. Sánchez Lorenzo, *Derecho aplicable al fondo de la controversia en el arbitraje comercial internacional*, LXI Revista española de Derecho internacional (REDI) (2009) 39, 55.

Model Law that rests on an indirect approach that leads the arbitral tribunal to apply the law determined by the conflict of laws rules which it considers applicable.<sup>12</sup> At any rate, under both texts the arbitrators are required in all cases to decide in accordance with the terms of the contract and to take into account the usages of the trade applicable to the transaction.

Article 41 SPAA draws its inspiration from Article 34 of the UNCITRAL Model Law in order to establish the grounds for setting aside the award. The list of grounds available for annulment are based on the Model Law and therefore they are very similar to the grounds for non recognition of foreign awards laid down in Article V of the New York Convention. It is generally accepted that the grounds for annulling awards listed in Article 41 SPAA are deemed exclusive<sup>13</sup> and are to be construed in a narrow manner<sup>14</sup>, since court intervention in arbitration proceedings should be kept to a minimum and no court should intervene except where so provided in the SPAA.<sup>15</sup> A review of the arbitrators' decision on the merits is not allowed. It falls on the party challenging the award to allege and furnish proof that one of the grounds for setting it aside applies.<sup>16</sup> However, the grounds concerning the denial of adequate opportunity to present its case, lack of arbitrability and public policy may be determined by the court hearing the case for setting aside the award on its own initiative.

Courts in the context of annulment proceedings are not allowed to review possible infringements of the applicable law by the arbitral tribunal.<sup>17</sup> Under no circumstances may a foreign award be reviewed as to its substance and hence the factual and legal characterization made by arbitrators can not be reviewed. As already noted, the Spanish

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<sup>12</sup> On the comparison between those approaches, see J.F. Poudret & S. Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd ed., 2007), 574-607; L. Silberman & F. Ferrari, *Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong* in F. Ferrari & S. Kröll (eds.), *Conflict of Laws in International Arbitration* (Sellier, 2011), 277-305; and G. Born, *International Commercial Arbitration* (Kluwer, 2nd ed. 2014), pp. 2637-2656.

<sup>13</sup> See M.V. Cuartero Rubio, *El recurso de anulación contra el laudo arbitral en el arbitraje comercial internacional* (Eurolex, 1997), pp. 50-51.

<sup>14</sup> See Judgments of the Constitutional Court 62/1991 of 22 March (ECLI:ES:TC:1991:62), 174/1995 of 23 November (ECLI:ES:TC:1995:174) and 176/1996 of 11 November (ECLI:ES:TC:1996:176).

<sup>15</sup> See, e.g., Judgments of the High Court of Justice of Madrid of 3 December 2013 (ECLI:ES:TSJM:2013:18439) and of 24 March 2015 (ECLI:ES:TSJM:2015:3275).

<sup>16</sup> González Bueno *supra* note 8, p. 252.

<sup>17</sup> See, e.g., in the context of international commercial arbitration, Judgment of the High Court of Justice of Catalonia of 14 July 2014 (ECLI:ES:TSJCAT:2014:9122).

Arbitration Act does not regulate the grounds for refusing recognition or enforcement of a foreign award since the New York Convention applies in Spain whether or not the award was rendered in a State party to the Convention. Therefore, the grounds for annulment and for refusing recognition are basically the same.

Pursuant to Article 8 of the SPAA, the High Court of Justice (*Tribunal Superior de Justicia*) of the region where the award is delivered is competent to rule on the application for setting it aside. Additionally, according to Article 73.1.a) of Organic Law 6/1995 on the Judiciary<sup>18</sup> the competence for recognition of foreign arbitral awards is also incumbent upon the High Court of Justice (*Tribunal Superior de Justicia*) of the region where the party against whom recognition is sought or where the person affected by it has his residence; and subsidiarily at the place of enforcement of the award or where it is to carry legal consequences. Judgments of a regional High Court of Justice in these proceedings are not subject to any appeal (Article 42.2 SPAA). Therefore, the recent case-law on the limits of the arbitrators' power and the *iura novit curia* principle discussed in the present contribution mainly emanates from such courts.

## 2. Civil Procedure

Unlike the arbitration statute, the general legislation concerning proceedings in civil and commercial matters -contained in Law 1/2000, of 7 January, on Civil Procedure (Civil Procedure Act or CPA)<sup>19</sup>- specifically refers to the *iura novit curia* principle. Among the most relevant provisions of the CPA for the purposes of interpretation of the *iura novit curia* principle by Spanish courts a reference is to be made to Articles 216 and 218, which are considered to establish such principle and to set certain limitations to its application. When discussing the scope of *iura novit curia* and the rule *da mihi factum dabo tibi ius*, articles 216 and 218 CPA are regarded by the courts of law<sup>20</sup> as closely related to some provisions of the Spanish Constitution<sup>21</sup>, particularly the prohibition of arbitrary action of public authorities (Article 9.3) and the right to effective judicial protection and that in no case may there be a lack of defense, as established in Article

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<sup>18</sup> Official State Gazette (*Boletín Oficial del Estado*) No. 157, of 2 July 1985, as amended by Organic Law 5/2011.

<sup>19</sup> Official State Gazette (*Boletín Oficial del Estado*) No. 7, of 8 January 2000.

<sup>20</sup> See Judgment of the Spanish Supreme Court (Civil Chamber) 14 January 2014 (ECLI:ES:TS:2014:49), with further references.

<sup>21</sup> Official State Gazette (*Boletín Oficial del Estado*) No. 311, of 29 December 1978.

24(1) of the Constitution. The right to effective judicial protection is also enshrined in Article 47 of the Charter of Fundamental Rights of the European Union<sup>22</sup> in line with Article 6(1) of the European Convention of Human Rights (ECHR)<sup>23</sup> on the right to a fair trial.

Article 216 CPA lays down the so-called principle of justice at the request of a party. Pursuant to Article 216 CPA, civil courts shall resolve on the matters by virtue of the submission of facts, evidence and claims of the parties, unless the law establishes otherwise in certain special cases. The idea that it is the responsibility of the court to establish the content of the rules applicable to the dispute, as an essential element of the *iura novit curia* principle, is to be found with certain restrictions in Article 218 CPA. According to the second indent of Article 218(1): "The court, without deviating from the basis of the claim or availing itself of factual grounds or fundamental points of law different from those the parties had the intention to assert, shall resolve in accordance with the rules applicable to the case, even if they have not been correctly mentioned or alleged by the litigants." On the interpretation of these provisions, see Section III, *infra*.

### C. Application of Foreign Law

Significant differences can be identified between the position of arbitrators and that of national courts concerning the ascertainment of the law in international disputes. In fact in arbitration the distinction between local law and foreign law does not apply as such.<sup>24</sup> However, the comparison between arbitrators and national courts in those situations seems of interest, particularly considering the lack of specific provisions concerning arbitration. Unlike Spanish statutory law, foreign law falls within the subject of evidence under the general rules on civil procedure. Art 12(6) of the Spanish Civil Code<sup>25</sup> requires courts to determine that the situation at hand involves a conflict of laws

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<sup>22</sup> Charter of Fundamental Rights of the European Union of 18 December 2000, [2000] OJ C 364/1, (consolidated version 2012/C 326/02, [2012] OJ C 326/391).

<sup>23</sup> European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221.

<sup>24</sup> See, e.g., ILA Committee on International Commercial Arbitration, *Final Report. Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, Rio de Janeiro, 2008, p. 12.

<sup>25</sup> According to the text of Decree 1836/1974, of 31 May, Official State Gazette (*Boletín Oficial del Estado*) No. 163, of 9 July 1974, as amended by the CPA.



and to apply the relevant choice- of- law rule at their own motion. However, the obligation is not imposed on courts to ascertain ex officio the content of the foreign applicable law.<sup>26</sup>

Application of foreign law by judicial authorities is addressed in Article 281(2) CPA. This provision is very much influenced by the nature of civil procedure as a system in which parties have to provide the facts to the judge and the consideration of foreign law as a tertium genus, different from Spanish law and from facts. Pursuant to Article 281(2) CPA, foreign law must be proved in regard its content and validity, and courts may use any means of verification they consider to be necessary for its implementation. As to the initiative of evidence activity, Article 282 CPA establishes that evidence shall be examined by courts at the request of the party. In principle, the party invoking foreign law must prove it. However, the court may agree ex officio that certain evidence be examined or that documents, opinions or other means of evidence and instruments be provided when this is stipulated by law.

Another provision dealing with the proof of foreign law in court proceedings is now to be found in Article 33 of Law 29/2015, of 30 July, on International Legal Cooperation in Civil Matters<sup>27</sup>, which basically refers to the rules of the CPA on evidence. Additionally, Spain is a contracting party to the European Convention on information on foreign law of 7 June 1968<sup>28</sup>, and the Inter-American Convention of 8 May 1979 on proof of and information on foreign law<sup>29</sup>, which can be helpful in providing the means of evidence to proof foreign law. Under these conventions, a request for information shall emanate from a judicial authority (art. 3 of the European Convention and art. 4 of the Inter-American Convention).

### **3. Arbitration Rules**

The most significant arbitration institutions in Spain have adopted Arbitration Rules which are consistent with the Spanish Arbitration Act but are also very much

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<sup>26</sup> See P. De Miguel Asensio, "Spain" in J. Basedow, G. Rühl, F. Ferrari y P. De Miguel Asensio (eds.), *Encyclopedia of Private International Law*, vol. III, Cheltenham, Edward Elgar, 2017, vol. III, in the press.

<sup>27</sup> Official State Gazette (*Boletín Oficial del Estado*) No. 182, of 31 July 2015.

<sup>28</sup> 720 UNTS 147.

<sup>29</sup> 1439 ILS 111.

influenced by the UNCITRAL Arbitration Rules<sup>30</sup> and the Rules of prominent international arbitration institutions such as ICC that are also directly applicable to a significant number of arbitration proceedings seated in Spain. In order to discuss to what an extent Arbitration Rules of Spanish arbitral institutions contain provisions that have direct bearing on the principle *iura novit curia*, particular attention shall be paid to the Procedural Rules of the Spanish Court of Arbitration (that came into force on March 15th 2011)<sup>31</sup>, the Arbitration Rules of the Civil and Commercial Arbitration Court (CIMA) (applicable from January 1, 2015)<sup>32</sup> and the Rules of Arbitration of the Court of Arbitration of Madrid (in force since 25 July 2014)<sup>33</sup>. None of these Rules contain an express reference to the *iura novit curia* principle.

### **III. IURA NOVIT CURIA IN CIVIL PROCEEDINGS BEFORE ORDINARY COURTS**

The main limitations related to the power of a court to establish the content of the rules applicable to the disputes in civil proceedings not dealing with public policy issues may be found in the wording of Article 218 CPA itself which lays down the *iura novit curia* principle. The duty of the court to resolve in accordance with the rules applicable to the dispute, even if they have not been correctly invoked by the litigants, does not allow the court to deviate from the bases of the parties' claims. Therefore, the court may not have recourse to factual grounds or fundamental points of law different from those asserted by the parties. According to the case-law of the Spanish Supreme Court, an infringement by a judgment of the so-called non *extra petita* principle not supported by the *iura novit curia* principle takes place to the extent that a court alters the basic facts or the bases of the parties' claims when determining or interpreting the rules applicable to the dispute.<sup>34</sup> To take into consideration new relevant facts which modify the object of the proceedings and the cause of action is deemed an infringement of the principle of

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<sup>30</sup> See, e.g., P. Sala Sánchez in F. Ruiz Risueño & J.C. Fernández Rozas (eds.), *Comentarios al Reglamento de Arbitraje de la Corte Civil y Mercantil de Arbitraje* (CIMA, 2016), p. 33.

<sup>31</sup> <correespanolaarbitraje.es>.

<sup>32</sup> www.arbitrajecima.com

<sup>33</sup> http://www.arbitramadrid.com.

<sup>34</sup> See, with further references, Judgment of the Spanish Supreme Court (Civil Chamber) of 16 January 2013 (ECLI:ES:TS:2013:1152).

congruency laid down in Article 218 LEC.<sup>35</sup> The *iura novit curia* maxim does not empower the court to have recourse to new factual elements not alleged by the parties or to alter the cause of action. However, it allows courts to develop its own reasoning regarding questions of law even based on provisions that were not deemed applicable by the parties.<sup>36</sup>

In this connection, the Spanish Supreme Court has also acknowledged that the distinction between the legal (not factual) element of the basis of the claim and the possibility of the judge to establish the applicable rules is not always precise. Therefore, the Supreme Court has established that the *iura novit curia* principle allows courts to make their own legal inferences from the facts alleged by the parties. Hence, courts are not bound by the legal characterization of the facts made by the parties. If a court finds that the parties erred in this respect, it may make its own legal inferences from the facts alleged by the parties and order the remedies that result from its legal reasoning and are consistent with the parties' claims and requests since courts can not rule on issues beyond such requests. The ECtHR has also acknowledged that by virtue of the *iura novit curia* principle the Court "is master of the characterisation to be given in law to the facts of the case"<sup>37</sup>.

The CPA does not provide for a specific hearing to the parties in this context. The lack in the CPA of such a hearing allowing the parties to comment on the legal inferences made by the court on the basis of *iura novit curia* has been regarded as a deficiency of the CPA which may undermine the adversarial principle.<sup>38</sup> The case law of the Supreme Court on the *iura novit curia* principle considers necessary to check that the parties had the possibility to comment on the relevant facts and in no case may there be a lack of defense.<sup>39</sup> Furthermore, the requirement that a judgment is adequately reasoned and provides sufficient grounds receives particular attention in this context to guarantee

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<sup>35</sup> To the extent that the change in the object of the proceedings prevents any of the parties to comment on the relevant issues the Constitutional Court has noted that a violation of the right to a fair trial may also arise in these situations, *see* Judgment of the Constitutional Court 30/2011 of 14 February (ECLI:ES:TC:2011:3), with further references.

<sup>36</sup> Judgments of the Spanish Supreme Court (Civil Chamber) of 22 April 2013 (ECLI:ES:TS:2013:3123) and of 21 October 2014 (ECLI:ES:TS:2014:4077).

<sup>37</sup> *See, e.g.*, Judgments of the ECtHR of 5 April 2011, *Nelissen v. The Netherlands*, 5, at para. 62, and of 10 January 2012, *G.R. v. The Netherlands*, , at para. 36, with further references.

<sup>38</sup> Gómez-Iglesias Rosón *supra* note 1, at pp. 71-75.

<sup>39</sup> *See* Judgments of the Spanish Supreme Court (Civil Chamber) of 18 June 2008, (ECLI:ES:TS:2008:4750) and 14 January 2014 (ECLI:ES:TS:2014:49).

respect to the rule of law and the right to a fair trial.<sup>40</sup> The reasoning shall include the legal grounds of the judgment on the basis of the rules applicable to the dispute.<sup>41</sup>

Cross-border litigation raises the issue of the relationship of the *iura novit curia* principle with the procedural treatment of foreign law by state courts. The development of common choice of law rules within the EU has so far left aside the adoption of common standards on the application of foreign law by the Member States' judicial and non-judicial authorities.<sup>42</sup> As previously noted in relation to Articles 12(6) of the Civil Code and Article 281 CPA, in Spain the *iura novit curia* maxim applies with regard to the choice-of-law rules but does not extend to the applicable foreign law. Although Spanish courts may assist the parties in ascertaining and proving foreign law, in typical civil proceedings governed by the so-called principle of justice at the request of a party at least one of the parties must take the initiative and show a certain level of diligence in order to prove foreign law. Under these circumstances, courts should support the parties and use the means of ascertainment at their disposal to prove foreign law.<sup>43</sup> In case foreign law is not sufficiently proved in the proceedings, Spanish law shall be applied to the merits. According to Article 33(3) of Law 29/2015, on International Legal Cooperation in Civil Matters, the application of Spanish law as a default solution should be exceptional under those circumstances. However, a dismissal of the claim brought before the court merely on the ground that the foreign applicable law has not been sufficiently proven is not acceptable and would infringe the fundamental right of access to justice.<sup>44</sup>

Therefore, the application of Spanish Law as *lex fori* is common in situations where foreign law has not been proved. Application of foreign law by authorities performing non-judicial functions, such as public notaries and registrars, is based on a much more flexible approach. These authorities are allowed to apply foreign law on the basis of their own personal knowledge. Therefore, it is not necessary in these situations

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<sup>40</sup> Judgment of the Spanish Supreme Court (Civil Chamber) of 9 May 2013, (ECLI:ES:TS:2013:1916).

<sup>41</sup> Judgments of the Constitutional Court 23/1987, of 23 February (ECLI:ES:TC:1987:23) and 112/1996, of 24 June (ECLI:ES:TC:1996:112).

<sup>42</sup> See C. Esplugues, J.L. Iglesias & G. Palao (eds.), *Application of foreign law*, (Sellier, 2011), p. 5.

<sup>43</sup> Judgment of the Spanish Constitutional Court 10/2000, of 17 January 2000 (ECLI:ES:TC:2000:10).

<sup>44</sup> Judgments of the Spanish Constitutional Court 155/2001, of 2 July 2001 (ECLI:ES:TC:2001:155), and 33/2002, of 11 February 2002 (ECLI:ES:TC:2002:33).

that the content and validity of the applicable foreign law have previously been proved in the relevant proceedings.

#### **IV. JUDICIAL REVIEW OF THE POWERS OF ARBITRATORS WITH REGARD TO PARTIES' PLEADINGS: GENERAL TRENDS**

##### ***1. Applicability of iura novit curia to arbitration***

The rules of the CPA concerning the *iura novit curia* principle in civil proceedings before ordinary courts are not directly applicable to arbitration. Given the lack of specific provisions in the Arbitration Act, additional uncertainties arise with regard to arbitration and the significance of *iura novit curia* in situations where Spanish law is *lex arbitri*. The case-law of Spanish courts on this issue in the context of the judicial review of arbitration proceedings, particularly concerning applications to set aside awards, has come to be remarkably important.

In recent years it has become more and more common by Spanish courts to make express references to the *iura novit curia* principle when reviewing arbitration proceedings. Such references are based on the generally accepted assumption that the principle also applies to arbitration proceedings even in the absence of a specific provision on the issue in the Spanish Arbitration Act. Therefore, the view constantly held by courts is that on the basis of the *iura novit curia* principle arbitrators are empowered to resolve in accordance with the rules applicable to the dispute even if they have not been correctly invoked by the parties.<sup>45</sup> Furthermore, it is generally accepted that in application of the *iura novit curia* principle arbitrators are empowered to make their own legal inferences from the facts presented by the parties<sup>46</sup> and to order remedies on the basis of the arbitrators' own reasoning regardless of the legal basis invoked by the party seeking relief provided that the factual basis of the claim is not altered.<sup>47</sup> This approach is also affirmed

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<sup>45</sup> See, e.g., Judgments of the High Court of Justice of Madrid of 3 December 2013 (ECLI:ES:TSJM:2013:18439), 5 July 2016 (ECLI:ES:TSJM:2016:8114) and 18 May 2016 (ECLI:ES:TSJM:2016:6182).

<sup>46</sup> See, e.g., Judgments of the High Court of Justice of Madrid of 7 July 2015 (ECLI:ES:TSJM:2015:8492) and of 10 February 2016 (ECLI:ES:TSJM:2016:1540).

<sup>47</sup> See, e.g., Judgments of the High Court of Justice of Madrid of Madrid of 9 June 2015 (ECLI:ES:TSJM:2015:7700) and of 5 July 2016 (ECLI:ES:TSJM:2016:8114).

with regard to proceedings in which arbitrators are empowered to decide *ex aequo et bono* or as *amiables compositeurs*.<sup>48</sup>

However, such a view is compatible with the possibility that the parties agree otherwise. The parties enjoy ample freedom to agree on the procedure to be followed by the arbitrators in conducting the proceedings. Therefore, within the limits of their autonomy the parties may agree that *iura novit curia* does not apply to their arbitration proceedings, but such an agreement is not common in practice.<sup>49</sup>

To the extent that the parties have not agreed on the procedural issues of the arbitration, under Article 25 SPAA arbitrators are empowered to conduct the proceedings in such a manner as they deem appropriate. As already noted, Article 25(2) SPAA is broader than Article 19(2) of the Model Law concerning the scope of the powers conferred upon the arbitral tribunal and states that they also comprise the power to determine the taking of evidence on the arbitrators' own motion. The SPAA does not include a provision as Section 34 of the English Arbitration Act 1996 stating that it shall be for the arbitral tribunal to decide whether and to what extent it should take the initiative in ascertaining the facts and the law,<sup>50</sup> but it is generally assumed that arbitrators have such power under the SPAA.

On the basis of the broad discretion granted to arbitrators concerning the conduct of the proceedings, it can be argued that arbitrators under the SPAA are not in all cases under an obligation to establish the content of the rules applicable to the dispute if they have not been alleged by the litigants. Their wide discretionary powers regarding procedure seem to extend to this issue. Concerning international commercial arbitration, it is noteworthy that even in state court proceedings the duty to resolve in accordance with the rules applicable even if not pleaded by the parties pursuant to Article 218 CPA, does not apply with respect to foreign law. As regards the law applicable to the substance of

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<sup>48</sup> Judgment of the High Court of Justice of Catalonia of 9 March 2015 (ECLI:ES:TSJCAT:2015:3081).

<sup>49</sup> Gómez-Iglesias Rosón *supra* note 1, at p. 51.

<sup>50</sup> On the comparison of these provisions, see J.D.M. Lew, *Iura Novit Curia and Due Process*, Queen Mary University of London, Legal Studies Research Paper No. 72/2010, pp. 9-10, available at <http://ssrn.com/abstract=1733531>.

the dispute in international commercial arbitration it is widely accepted that there is no *lex fori* in the proper sense.<sup>51</sup>

Therefore, the idea that arbitrators not only have the possibility but are also under a duty to resolve in accordance with the rules applicable even if not pleaded by the parties could be deemed as going even further than the reach of the *iura novit curia* principle before ordinary Spanish courts adjudicating international disputes, which are under such an obligation only with respect to Spanish law. However, the lack of *lex fori* in arbitration has also been invoked as an argument to support that an active role by arbitrators to ascertain the content of the applicable rules may be more necessary than in those situations where Spanish ordinary courts have to apply foreign law. It is argued that in case foreign law is not sufficiently proved in the proceedings ordinary courts shall apply Spanish law to the merits, but such a default rule is not available in arbitration proceedings because of the lack of *lex fori*.<sup>52</sup> Moreover, while reviewing arbitral awards it is common by Spanish courts to refer to *iura novit curia* as a principle supporting the view that arbitral tribunals are bound to apply *ex officio* the legal rules governing the dispute. At any rate, when considering the practical implications of such an approach it may be noted that the application of substantive rules by arbitrators usually falls beyond judicial control.<sup>53</sup>

## ***2. Arbitrators' power to determine the applicable rules***

The view that arbitrators have wide discretionary powers in this regard has to be balanced with the idea that in exercising such powers they are required to make every effort to issue an award which is enforceable at law. The need to respect public policy and to apply certain provisions having a mandatory nature are closely linked to the arbitrator's duty to make his best efforts to render a valid and enforceable award.<sup>54</sup> In line with international standards, as shown in Article 41 of the ICC Rules, under the Rules of

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<sup>51</sup> See, e.g., Y. Derains, *Foreword*, in F. Bortolotti & P. Mayer (eds.), *The Application of Substantive Law by International Arbitrators* (ICC, 2014), 5.

<sup>52</sup> Gómez-Iglesias Rosón *supra* note 1, at pp. 64-65.

<sup>53</sup> T. Giovannini, *International arbitration and iura novit curia*, in M.A. Fernandez-Ballesteros and S. Arias, *Liber Amicorum Bernardo Cremades*, (La Ley, 2010), 495, 500.

<sup>54</sup> Judgment of the High Court of Justice of Catalonia of 14 July 2014 (ECLI:ES:TSJCAT:2014:7773). From a comparative perspective, see ILA Committee on International Commercial Arbitration, *supra* note 24, p. 21; and D. Moura Vicente, *La aplicación del principio iura novit curia en el arbitraje internacional*, 10 Arbitraje (Revista de arbitraje comercial y de inversiones) (2017), 31-32.

Spanish arbitral institutions arbitrators shall endeavour to issue awards capable of legal enforcement. Relevant examples in this regard are Article 43(7) of the Arbitration Rules of the Civil and Commercial Arbitration Court (CIMA) and Article 1(4) of the Procedural Rules of the Spanish Court of Arbitration.

In the absence of choice of the applicable rules by the parties, recourse to the direct method under Article 34 SPAA may also grant ample discretion to arbitrators when selecting the applicable rules to international disputes. The law applicable to the substance is also key to establish the kinds of relief available.<sup>55</sup> In principle the determination of the rules applicable to the substance and the significance of the *iura novit curia* principle when assessing the content of such rules are two separate issues. However, in practice the distinction may become blurred in certain situations, particularly to the extent that the power of arbitrators to determine the rules applicable to the substance in the absence of choice may allow them to have recourse to legal sources beyond the parties' pleadings. This idea has been acknowledged in the Rules of certain arbitral institutions in Spain. Article 20(2) of the Procedural Rules of the Spanish Court of Arbitration states that the arbitral procedure may be driven ahead *ex officio* and establishes that in the absence of "...rules chosen by the parties, it shall be the arbitrators' responsibility to apply those which they consider to be most appropriate in view of the nature and object of the dispute under consideration as well as the pleas and causes of action inferred by them".

Courts have deemed that on the basis of *iura novit curia* arbitrators have the power to apply to the substance of the dispute the rules they consider appropriate even if not invoked by the parties. The judgment of the High Court of Madrid of 21 April 2015<sup>56</sup> provides an example of this approach in the context of an application for setting aside an award. The Court expressly supported the power of the arbitral tribunal to apply trade usages independently from the parties' pleadings. Such power was derived from the *iura novit curia* principle and Article 34.3 of the SPAA, which as UNCITRAL Model Law, directs arbitrators in all cases to decide in accordance with the terms of the contract having regard to the usages of the trade applicable to the transaction. As a further element to

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<sup>55</sup> D. Ramos Muñoz, *Los árbitros y el poder para dictar condenas no pecuniarias*, 3, Arbitraje (Revista de arbitraje comercial y de inversiones) (2008), 659, 701.

<sup>56</sup> ECLI:ES:TSJM:2015:4055.



support such a view the High Court of Madrid invoked a provision of the Rules of the relevant arbitral institution similar to Article 34.3 SPAA.

## V. VALIDITY AND ENFORCEMENT OF AWARDS

### 1. *Fair Hearing*

Article 41.1.b) SPAA on the setting aside of awards and Article V.1.b) of the New York Convention refer, among others, to arbitral proceedings where a party was unable to present its case as a ground for annulment or refusal of recognition. In line with international practice, it is generally accepted in Spain that an award may be subject to annulment or non recognition on the basis of this ground in situations where a denial of the right to be heard or the right to equal treatment implies a serious procedural unfairness. The refusal to permit a party to present argument or evidence and rendering a decision based on facts not advanced by the parties are among the recurrent issues covered by that ground, which are of particular relevance with regard to the application of the *iura novit curia* maxim in arbitration proceedings.<sup>57</sup> Moreover, the Spanish Constitutional Court has held that the concept of "public policy" comprises the infringement of constitutionally protected fundamental rights, such as those that are part of the right to a fair trial under article 24 of the Constitution, including the fundamental procedural right to be heard, equality of arms and the contradictory principle.<sup>58</sup> Procedural public policy is understood in similar terms with regard to domestic and international arbitrations.<sup>59</sup>

The power by an arbitral tribunal to make its own legal inferences from the facts alleged by the parties on the basis of the maxim *iura novit curia* must be exercised in compliance with the parties' rights to be heard and to adversarial proceedings. The principle that both parties must be heard is a general principle of procedure which has been acknowledged as a fundamental right under the European Convention of Human

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<sup>57</sup> See Born *supra* note 12, at 3243-3245, 3249-3253 and 3515-3519.

<sup>58</sup> See Judgments of the Constitutional Court 43/1986 of 15 April (ECLI:ES:TC:1986:43) 132/1991 of 17 June (ECLI:ES:TC:1991:132). Furthermore, in the context of the judicial review of arbitral awards, see Judgment of the High Court of Justice of Catalonia of 9 March 2015 (ECLI:ES:TSJCAT:2015:3081) and Judgment of the High Court of Justice of Madrid of 18 May 2016 (ECLI:ES:TSJM:2016:6182).

<sup>59</sup> Judgment of the High Court of Justice of the Basque Region of 19 June of 2012 (ECLI:ES:TSJPV:2012:1220).

Rights (ECHR)<sup>60</sup>, EU law and the Spanish Constitution. The SPAA and the rules of the most prominent arbitration institutions in Spain establish the adversarial principle as one of the foundations of arbitration proceedings. In this connection, Article 24(1) SPAA provides that each party shall be given full opportunity to present his case, including the rebuttal of the arguments made by the other party. The right of the parties to be heard is highlighted as a basic principle of arbitration proceedings, as illustrated by Article 29 of the CIMA Rules and Article 16 of the Rules of the Spanish Court of Arbitration.

Case-law on the formulation of the relevant procedural standards in the context of the judicial review of arbitration proceedings most frequently addresses the annulment of awards made in Spain, but the prevailing view is that standards are very similar to those applicable to the recognition of foreign awards, in line with the approach adopted in Article IX of the 1961 Geneva Convention.<sup>61</sup> That position is reinforced by the widespread acceptance that basic fair hearing principles that apply to civil proceedings before ordinary courts should also be respected in arbitral proceedings, since the need for those basic principles to be respected emanates from the Spanish Constitution.<sup>62</sup> Such basic hearing principles should be distinguished from mere rules on procedures in domestic legislation. Even when primarily referred to ordinary courts, basic hearing principles applicable in Spain are to a great extent established at international or supranational level, as evidenced by the significance of the case-law of the ECtHR and the CJEU.

The concept of a fair trial in Article 6 § 1 ECHR includes the fundamental right to adversarial proceedings. It also comprises the principle of equality of arms, which implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis the other party.<sup>63</sup> Moreover, the ECtHR has established that if observations submitted to the court are not communicated to either of the parties there

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<sup>60</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, 213 UNTS 221.

<sup>61</sup> S. Barona Vilar, *Artículo 41*, in Barona Vilar (ed.), *supra* note 8, p. 1701.

<sup>62</sup> See the text extracts from judgments by Spanish courts on this issue collected in E. Verdura Tuells, J.C. Fernández Rozas, J.M. Beneyto Pérez & G. Stampa Casas, *Jurisprudencia Española de Arbitraje (60 años de aplicación del arbitraje en España)*, (Aranzadi, 2013), pp. 465-477.

<sup>63</sup> See Judgment of the ECtHR *Dombo Beheer B.V. v. the Netherlands*, of 27 October 1993, para. 33.

will be no infringement of equality of arms as such, but rather of the broader fairness of the proceedings.<sup>64</sup>

As regards the parties' right to adversarial proceedings, the ECtHR has established that it grants in principle the opportunity for the parties to civil proceedings to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision.<sup>65</sup> Only restrictions which are strictly necessary are compatible with article 6 §1 ECHR. Moreover, the adversarial principle requires that parties in civil proceedings are given the opportunity to comment on all those issues influencing the court decision even if raised *ex officio*. To prevent a violation of Article 6 § 1 of the ECHR, parties should not be caught unaware by the fact that the court has based its decision on an issue raised *ex officio*.<sup>66</sup> Therefore, it has been established that the adversarial principle is infringed where courts base their judgments on issues of fact or of law that have not been subject to discussion in the proceedings and influence the dispute to an extent that a diligent party could not anticipate.<sup>67</sup>

The right to be heard has also been regarded by the CJEU as a fundamental right which applies to proceedings even if there are no specific rules<sup>68</sup> and requires that the party concerned must have been afforded the opportunity to make known its views on the facts, circumstances and documents on which a decision has been based.<sup>69</sup> Moreover, it has been noted that the requirements of an adversarial process call for particular judicial attention when a failure to observe them results in the breach of the fundamental right to

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<sup>64</sup> See, e.g., Judgments of the ECtHR, *Nideröst-Huber v. Switzerland*, of 18 February 1997, paras. 23-24; and *Clinique des Acacias and Others v. France*, of 13 October 2005, paras. 36-37.

<sup>65</sup> See, e.g., Judgments of the ECtHR *Vermeulen v. Belgium*, of 20 February 1996, para. 33; *Van Orshoven v. Belgium*, of 30 May 1997, para. 41; *Nideröst-Huber v. Switzerland*, of 18 February 1997, para. 24; and *K.D.B. v. The Netherlands* Judgment of 27 March 1998, para. 44; *Kress v. France* Judgment of 7 June 2001, para. 74.

<sup>66</sup> See Judgments of the ECtHR *Clinique des Acacias et autres v. France* Judgment, of 13 October 2005, para. 43; and *Liga Portuguesa de Futebol Profissional v. Portugal*, of 17 May 2016, paras. 59 and 62.

<sup>67</sup> *ČEPEK v Czech Republic*, Judgment of 5 September 2013, para. 48; and *Liga Portuguesa de Futebol Profissional v. Portugal* Judgment of 17 May 2016, para. 59.

<sup>68</sup> See Judgments of the CJEU of 10 July 2001, and Case C-315/99 P, *Ismeri* (ECLI:EU:C:2001:391) para. 28.

<sup>69</sup> See Judgments of the CJEU of 10 July 2008, C-413/06, *P Bertelsmann and Sony Corporation of America v Impala* (ECLI:EU:C:2008:392) para 61.

a fair hearing.<sup>70</sup> Pursuant to the case law of the CJEU the right to be heard implies that every party to proceedings is entitled to be apprised of the elements on which the court is to base its decision and has the opportunity to discuss them, including the issues confined to matters of law raised by the court by its own motion.<sup>71</sup> The CJEU has acknowledged that the principle of *audi alteram partem* is an element of the protection of the rights of defence that can be regarded as a basic principle of the domestic judicial systems of the Member States. Therefore, the CJEU has concluded that where a court finds of its own motion that there are grounds for invalidity of a term in the contract between the parties it is, as a general rule, required to inform the parties to the dispute of that fact and to invite each of them to set out their views on that matter, with the opportunity to challenge the views of the other party.<sup>72</sup>

Where an arbitral tribunal makes its own legal inferences from the facts alleged by the parties and deviates from the legal characterization of the facts made by the parties, the principle of *audi alteram partem* may require the tribunal to inform the parties to the dispute of that fact and to invite them to comment on that matter, with the opportunity to challenge the views of the other party. To guarantee respect of the adversarial principle, the arbitral tribunal should invite the parties to comment on new facts that are relevant in the framework of the arbitrators' reasoning. On the basis of *iura novit curia* it is acknowledged that arbitrators enjoy ample discretion to determine the legal implications of facts submitted by the parties on the basis of the rules they deem appropriate and there is no requirement that the parties be specifically heard on this regard, unless the award is based on rules or arguments that were not addressed in the arbitral proceedings and the parties could not have foreseen. An award may be annulled or refused recognition where a party was deprived of the opportunity to comment on all relevant facts or to present evidence or argument on relevant issues.

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<sup>70</sup> See Opinions of Advocate General Cruz Villalón in cases Case C-480/99, *Plant*, para. 35 (ECLI:EU:C:2001:359) and C-466/00, *Arben Kaba* (ECLI:EU:C:2002:447) para. 93.

<sup>71</sup> See Judgments of the CJEU of 10 January 2002, C-480/99 P, *Plant*, (ECLI:EU:C:2002:8) paras. 25-34; and Judgment of 2 December 2009, C-89/08 P, *European Commission v. Ireland and others* (ECLI:EU:C:2009:742) paras. 55 and 56.

<sup>72</sup> Judgment of 21 February 2013, C-472/11, *Banif Plus Bank*, paras. 31 and 33 (ECLI:EU:C:2013:88).

Application of the *iura novit curia* principle allows arbitrators to make its own characterization of the facts presented by the parties but the fair hearing principle requires that the parties are given the opportunity to comment on the arbitrators' position on which the award is going to be based if it has not been raised by the parties. A finding that a party was unable to present its case may be established to the extent that the parties were not granted an opportunity to express themselves on all the matters of fact and of law on which the arbitral tribunal based its award. This applies also with regard to issues concerning the applicable rules of law raised by the arbitral tribunal of its own motion and that determine the outcome of the proceedings.<sup>73</sup> For instance, recourse to the doctrine of *rebus sic stantibus* by an arbitral tribunal *ex officio* and absent a proper allegation by any party of such doctrine led to the annulment of an award on the basis that the right to a fair hearing was infringed since the parties did not have the possibility to contest the arbitrators' position and to submit evidence on that issue.<sup>74</sup> However, under the restrictive interpretation of the annulment grounds by Spanish courts, not giving the parties the possibility to comment on a document referred to by the arbitrators *ex officio* in the award is not deemed as a breach of the contradictory principle if the party bringing the annulment claim does not prove that such a document influenced the outcome of the proceedings.<sup>75</sup>

Accordingly, surprise decisions by arbitrators may lead to an award being annulled by Spanish courts. An example is provided by an annulment decision regarding a case where in the arbitration proceedings one party claimed the termination of a complex business sale as a single legal transaction that had allegedly been breached by the defendant. Both parties pleaded on the assumption that the business sale was a single legal transaction, but the arbitrator considered that only the termination of one of the deals that formed part of that transaction was intended. The court found that such theory introduced by the arbitrator in the award as a key element in his ruling led him to render

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<sup>73</sup> Sánchez Lorenzo *supra* note 11, at 72.

<sup>74</sup> Judgment of the Court of Appeal of Madrid of 27 November 2006 (ECLI:ES:APM:2006:16418). On this judgment, *see* Giovannini *supra* note 53, p. 507.

<sup>75</sup> Judgment of the High Court of Justice of Madrid of 5 July 2016 (ECLI:ES:TSJM:2016:8114).

a surprise decision since he did not provide the parties the possibility to comment on that theory. Therefore, the award was annulled.<sup>76</sup>

Concerning those situations where the rules applicable to the substance are uncertain, it is noteworthy that modern arbitration rules tend to include provisions aimed at facilitating respect for the adversarial principle. For instance, the CIMA Arbitration Rules establish that the request for arbitration shall include an indication of the legal rules applicable to the merits of the dispute –Article 6.1.i)-, the response to such requests shall include comments on the legal rules applicable to the merits of the dispute proposed in the request for arbitration –Article 7.2.g)-. Furthermore, the minimum content of the Terms of Reference to be prepared by the arbitral tribunal shall include the identification of the substantive and procedural legal rules applicable to the dispute –Article 24.1.d)-.<sup>77</sup>

As it will be later discussed, arbitral tribunals are not empowered to decide issues which have not been raised by the parties. It has been established that to the extent that parties are not given the opportunity to comment on the new issues such practice would infringe not only the *non extra petita* principle but also the principles of fair hearing, proper defence and of *audi alteram parte*.<sup>78</sup>

## **2. Procedural irregularity**

Article 41.1.d) SPAA is modelled on Article 34.2.a)iv) of the UNCITRAL Model Law and hence this ground for annulment is very similar to Article V.1.d) of the New York Convention on the refusal of recognition and enforcement if the arbitral procedure was not in accordance with the law of the country where the arbitration took place.<sup>79</sup> In practice these grounds are of limited significance to challenge an award. The case-law of Spanish courts has constantly established that not all procedural breaches may lead to the annulment of an arbitral award, that an annulment court can not review the correct

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<sup>76</sup> Judgment of the Court of Appeal of Barcelona (15 sect.) of 29 October 2009 (ECLI:ES:APB:2009:12326). See Verdura Tuells, Fernández Rozas, Beneyto Pérez & Stampa Casas, *supra* note 61, p. 779.

<sup>77</sup> Fernández Rozas, *supra* note 30, p. 264.

<sup>78</sup> Judgment of the High Court of Justice of the Canary Islands of 15 November 2012 (ECLI:ES:TSJICAN:2012:2996).

<sup>79</sup> See Born *supra* note 12, pp. 3270-3271.

application of substantive law to the merits of the dispute and that the public policy check is exceptional.<sup>80</sup>

Only serious violations affecting the principles of equality of arms, the right to be heard or the contradictory principle which result in a lack of defence are deemed as grounds for the annulment of an award even with regard to domestic arbitration proceedings. Those situations are typically covered by Article 41.1.b) SPAA on the setting aside of awards and Article V.1.b) of the New York Convention, as previously discussed. This position is consistent with the prevailing international view that procedural irregularity should only be a ground to annul and refuse enforcement of an award if it severely undermines due process.<sup>81</sup> Allegations by a party that it had no possibility to submit certain documents as proofs since the arbitrator decided on its own motion that a contract was null and void is not regarded a procedural breach where that party had the opportunity in the arbitral proceedings to contest the claim by the other party that the contract was against the law.<sup>82</sup>

Article V.1.d) of the New York Convention and Article 41.d) of the SPAA do not seem in principle applicable to situations where the arbitrators' applied non-State law of its own motion, given the wide flexibility that the SPAA grants arbitrators concerning the determination of the applicable rules to the substance of the dispute. Article 34 SPAA is based on a direct approach which, failing any indication by the parties, empowers arbitrators to apply the rules they deem appropriate and courts have expressly supported the power of arbitral tribunals to apply trade usages independently from the parties' pleadings.<sup>83</sup> Therefore, the unsolicited application of transnational rules by arbitrators consistent with Article 34 SPAA may not qualify under Spanish law as a procedural irregularity for the purposes of Article V.1.d) of the New York Convention or Article 41.1.d) SPAA.

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<sup>80</sup> See Judgment of the Constitutional Court 43/1988, of 16 March (ECLI:ES:TC:1988:43); and Order of the Constitutional Court 259/1993, of 20 July (ECLI:ES:TC:1993:259<sup>a</sup>). More recently, *see, e.g.*, Judgment of the High Court of Justice of Catalonia of 26 September 2016 (ECLI:ES:TSJCAT:2016:8266).

<sup>81</sup> Cordero-Moss *supra* note 3, at 303.

<sup>82</sup> Judgment of the High Court of Justice of Catalonia of 17 July 2014 (ECLI:ES:TSJCAT:2014:7775).

<sup>83</sup> Judgment of the High Court of Madrid of 21 April 2015 (ECLI:ES:TSJM:2015:4055).

Pursuant to Article 37.4 of the SPAA, awards shall state the grounds upon which they are based, except for awards delivered on agreed terms where the parties settle the dispute during arbitral proceedings. However, annulment of awards as a result of an infringement of such an obligation remains rare and does not play a significant role in case law regarding the review of arbitrators' powers under *iura novit curia* which focuses on challenges based on the infringement of fair hearing and excess of power. Courts have held that an award complies with the obligation to provide reasons when it states the essential legal standards on which the decision is based even if it does not address in detail all issues raised by the parties.<sup>84</sup>

### **3. Excess of power**

Excess of power by the arbitral tribunal is established as a ground for annulment in Article 41.1.c) SPAA, which refers to awards containing decisions on questions not submitted to arbitration. That provision parallels Article V.1.(c) of the New York Convention that establishes excess of power as a ground for non recognition of foreign awards. Claims concerning excess of power on the basis that the arbitral tribunal decided on matters outside the scope of parties' submissions are not rare in international practice<sup>85</sup> and have become particularly significant before Spanish courts regarding the control of the application of the *iura novit curia* principle to arbitration proceedings.

Spanish courts have constantly held that arbitrators do not have the power nor duty to decide issues related to the controversial legal relationship which have not been raised by the parties and hence to decide *extra petita* or *ultra petita*. Pursuant to the so-called congruency principle, the ruling should not exceed the subject-matter of the action as delimited by the parties to the dispute. The distinction between excess of power as a result of the award granting more than has been requested in the *petitum* (*ultra petita*) or something different or decided on a different basis (*extra petita*) tends to be blurred to the extent that decisions rendered *ultra petita* may be considered as a subgroup that also infringe the broader non *extra petita* principle.<sup>86</sup>

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<sup>84</sup> See Verdura Tuells, Fernández Rozas, Beneyto Pérez & Stampa Casas, *supra* note 62, at p. 1087, referring in particular to a Supreme Court (Civil Chamber) Order of 1 March 1997.

<sup>85</sup> See Born *supra* note 12, pp. 3289-3293 and 3545-3546.

<sup>86</sup> See, e.g., Judgment of the Constitutional Court 30/2011 of 14 February (ECLI:ES:TC:2011:3); and S. Barona Vilar, *supra* note 61, 1701.



To determine if an award exceeds the issues and claims presented to the arbitrators by the parties in the context of an annulment claim based on Article 41(c) of the SPAA the reviewing courts tend to adopt as a starting point the domestic civil procedure principles regarding Article 218 CPA, although the terms of the submission to arbitration are an additional factor to be considered in the interpretation of article 41.1.c) SPAA.<sup>87</sup> Therefore, the basic approach is that the *iura novit curia* principle allows arbitrators to develop its own reasoning regarding questions of law even based on provisions that were not deemed applicable by the parties, but arbitrators are not empowered to have recourse to new factual elements not alleged by the parties or to alter the cause of action. However, Spanish courts have established that arbitrators enjoy a broader flexibility than state courts under Article 218 CPA with respect to the non extra petita principle, which allows them to have more elasticity to deem that certain closely related issues are covered by the arbitration agreement.<sup>88</sup>

Such broader flexibility is further supported by the fact that Article 39 of the SPAA allows arbitrators to correct or supplement the award not only regarding claims presented in the proceedings and omitted from the award (in line with Article 215 CPA with respect to ordinary courts), but also to rectify a partial overextension of the proceedings in an award covering questions not submitted to the arbitrators or questions on a matter not subject to arbitration.<sup>89</sup> Moreover, in the context of annulment proceedings, courts have founded such greater flexibility in the application of the congruency principle by referring to section VI of the Preamble to the SPAA. Particularly, the Preamble notes that procedural constraints characteristic of court proceedings are not present under the same terms in arbitration, inasmuch as the object of the dispute is determined gradually within the scope of the arbitration agreement. The Preamble stresses that the purpose of the claim and the respective defence is merely to inform the arbitrators of the object of the dispute, without prejudice to subsequent arguments.

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<sup>87</sup> See, e.g., Barona Vilar, *supra* note 61, p. 1663.

<sup>88</sup> In recent practice see, e.g., Judgment of the High Court of Justice of Catalonia of 29 April 2013 (ECLI:ES:TSJCAT:2013:5324); Judgment of the High Court of Justice of Madrid of 17 February 2015 (ECLI:ES:TSJM:2015:1787); Judgment of the High Court of Justice of Madrid of 9 June 2015 (ECLI:ES:TSJM:2015:7700).

<sup>89</sup> E.g. Judgments of the High Court of Justice of Catalonia of 25 November 2013 (ECLI:ES:TSJCAT:2013:11562) and 26 September 2016 (ECLI:ES:TSJCAT:2016:8266).

Moreover, it is highlighted that arbitral proceedings are designed very flexibly and that the rules that govern court proceedings in connection with claim and defence do not come into play here.<sup>90</sup> Therefore, the award may –or shall- address all those issues which are a logical consequence of the claims raised by the parties not only in the claim and defence, their amendments and supplements but also those raised in the parties' pleadings during the proceedings.<sup>91</sup> Furthermore, the congruency of the award is assessed with respect to the substance of the claims of the parties and not the express wording of their pleadings.<sup>92</sup> In line with the prevailing view on the interpretation of the provisions on invalidity and unenforceability of awards rendered beyond the scope of authority of an arbitral tribunal in the New York Convention and the UNCITRAL Model Law<sup>93</sup>, a restrictive understanding prevails under Spanish law regarding excess of power. Therefore, only the factual elements and the object of the dispute are significant to find excess of power, but not the arguments or the rules invoked by the parties.

The flexibility that arbitrators enjoy in this respect allows them to make an extensive interpretation not only of the scope of the submission to arbitration but also when determining the subject-matter of the dispute in order to include all those issues which are instrumental or arise from the main controversy.<sup>94</sup> It is widely accepted that arbitrators enjoy significant discretion when assessing the scope of their mandate on the basis of the arbitration agreement and the parties' pleadings. Such result is supported by the strict interpretation of the annulment grounds in Article 41 SPAA, the minimum court review of arbitral proceedings and the scope of the maxim *iura novit curia* in such proceedings.<sup>95</sup> Article 41.1.c) does not allow to challenge an award on the basis that arbitrators adopted an interpretation of the law different from the ones advocated by the parties. Under the *iura novit curia* principle arbitrators have the power to decide in

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<sup>90</sup> *E.g.* Judgment of the High Court of Justice of Catalonia of 24 October 2011 (ECLI:ES:TSJCAT:2011:10797).

<sup>91</sup> *E.g.* Judgment of the High Court of Justice of the Canary Islands of 12 December 2012 (ECLI:ES:TSJICAN:2012:2995); and Judgment of the High Court of Justice of Catalonia of 26 September 2016 (ECLI:ES:TSJCAT:2016:8266).

<sup>92</sup> *See, e.g.*, Judgments of the High Court of Justice of Madrid of 9 June 2015 (ECLI:ES:TSJM:2015:7700), 8 July 2015 (ECLI:ES:TSJM:2015:8677) and 17 May 2016 (ECLI:ES:TSJM:2016:6179).

<sup>93</sup> *See, e.g.*, Cordero-Moss *supra* note 3, at 301.

<sup>94</sup> Judgment of the High Court of Justice of Madrid of 1 July 2014 (ECLI:ES:TSJM:2014:10353).

<sup>95</sup> Judgment of the High Court of Justice of Madrid of 24 March 2015 (ECLI:ES:TSJM:2015:3275).

accordance with the rules they deem applicable, are not bound by the legal characterization of the facts made by the parties and are empowered to make their own legal inferences from the facts presented to them.<sup>96</sup>

In general terms the arbitral tribunal can not be regarded as exceeding its powers when it raises of its own motion pleas concerning issues of public policy. Arbitrators are empowered to declare null and void a contract on the basis of public policy rules even if such rules have not been invoked by the parties.<sup>97</sup> From the international perspective, this case-law seems to support the view that arbitrators are empowered to apply public policy provisions even in disregard of the law of the contract chosen by the parties, at least to the appropriate extent with a view to render an enforceable award. Additionally, the respect of public policy or overriding mandatory provisions of Spanish and EU law may be regarded as a duty to the extent necessary to guarantee their application to the situations falling within the scope of such provisions.<sup>98</sup>

Furthermore, in this context Spanish courts accept the power of arbitrators to order the remedies that derive from the legal sources they consider applicable even in situations where the party seeking relief invoked a different legal basis. For instance, in the framework of annulment proceedings the *iura novit curia* principle has been singled out as the element supporting the grant by an arbitral tribunal of interests for late payment on the basis of a rule different from the one invoked by the party seeking relief.<sup>99</sup> The court noted that by exercising such power on the basis of *iura novit curia* the arbitral tribunal did not alter the relevant facts submitted by the parties or the object of the action, which was the claim of interests for late payment. No challenge is available based on excess of power provided that the relief granted by the arbitral tribunal is reasonably related to that requested by a party.

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<sup>96</sup> See, e.g., Judgment of the High Court of Justice of Madrid of 7 July 2015 (ECLI:ES:TSJM:2015:8492).

<sup>97</sup> Judgment of the High Court of Justice of Catalonia of 17 July 2014 (ECLI:ES:TSJM:2014:7775) which relates to consumer protection rules but its reasoning refers in general to public policy rules.

<sup>98</sup> See N. Voser, *Mandatory rules of law as a limitation on the law applicable in international commercial arbitration*, 7 AM .REV. INT'L ARB. (1996) 319, 341-342; and P.A. De Miguel Asensio, *The Rome I and Rome II Regulations in International Commercial Arbitration*, in F. Ferrari (ed.), *The Effect of EU Law on International Commercial Arbitration* (Juris, 2017), 177, 231.

<sup>99</sup> Judgment of the High Court of Justice of Madrid of 5 July 2016 (ECLI:ES:TSJM:2016:8114).

On the basis of the application of the *iura novit curia* principle by arbitrators, Spanish courts have repeatedly refused claims to annul awards allegedly rendered in excess of power. However, such restrictive approach in the application of the ground for annulment in Article 41.1.c) SPAA, has not prevented Spanish courts to annul awards in situations where it has been found that the arbitral tribunal ruled on matters outside the scope of the parties' submissions. In particular, this situation arises where the arbitral tribunal grants relief not sought by any of the parties. For instance, an arbitral award was annulled on the basis that the arbitral tribunal exceeded its powers because it ordered to a debtor in default the payment of the legal interest since the beginning of the arbitral proceedings although such interest had not been requested by either party. In annulling the award the court noted that even if pursuant to Article 1108 of the Spanish Civil Code the claimant could be entitled to such interests the award was rendered in excess of power –*ultra petita*- since the party had not requested such interests that can not be granted *ex officio*.<sup>100</sup> Another example where an excess of power led to the annulment of an award involves a situation in which the claim referred to a liquid and specific amount but the award ordered the payment of a different amount and certain sums that had not been claimed. The court concluded that the arbitral tribunal had breached the non extra petita principle and annulled the award.<sup>101</sup>

Article 39 SPAA on the correction and rectification of the award is a further element restricting the scope of the judicial review of the respect to the non extra petita principle in arbitral awards. A trend has developed in case law establishing that an application to set aside an award on the basis of Article 41.1.c) SPAA may not succeed if the parties have not made use of the possibility granted to them by Article 39.1.d) SPAA of applying to the arbitrators for rectification of partial overextension of the proceedings in an award covering questions not submitted to the arbitrators or questions on a matter not subject to arbitration.<sup>102</sup> Under this interpretation Spanish courts require that the possibilities to object have been fully exhausted by the party in the framework of the arbitration proceedings, including the application for a rectification of the award within

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<sup>100</sup> Judgment of the Court of Appeal of Madrid (sect. 11) of 2 February 2007 (ECLI:ES:APM:2007:1255).

<sup>101</sup> Judgment of the Court of Appeal of Guipúzcoa (sect. 2) of 28 May 2009 (ECLI:ES:APSS:2009:490).

<sup>102</sup> See, e.g., Judgments of the High Court of Justice of Madrid of 18 May 2016 (ECLI:ES:TSJM:2016:6180) and 5 July 2016 (ECLI:ES:TSJM:2016:8114).

ten days of notification of the award. Otherwise, an annulment action based on Article 39.1.c) will not be admissible unless the party's right of defence has been infringed. This approach is related to the provision on the tacit waiver of objection to awards in Article 6 SPAA, directly inspired by UNCITRAL the Model Law, which requires the parties to file immediate and timely claim against any violation of rules from which the parties may derogate.

## **VI. CONDUCT OF ARBITRAL PROCEEDINGS**

### ***1. Burden of Proof***

Arbitrators are not bound by the provisions on burden of proof laid down in Article 217 CPA but they may have recourse to them even to reinforce their margin of appreciation on the basis of Article 217(7). Pursuant to this provision when implementing the rest of Article 217 on burden of proof, a court shall take into account the availability of evidence and the ease of proving it corresponding to each of the parties to the litigation.<sup>103</sup>

In line with Article 27 UNCITRAL Rules, the rules of some Spanish arbitral institutions establish the principle of burden of proof. As an example, according to Article 31(3) of the CIMA Rules, each party shall bear the burden of proving the facts relied on to support its claims. Therefore, the claimant has the burden of proving the facts upon which he relies and the respondent has the burden of proving its own allegations. The UNCITRAL Rules do not address the standard of proof<sup>104</sup> and it is widely accepted that arbitrators enjoy ample discretion to assess the evidence in light of the relevant circumstances.

Consistent with the broad wording of the SPAA as regards the power of arbitrators to determine the taking of evidence, including on the arbitrators' own motion –Article 25(2) SPAA-, arbitration rules usually empower arbitrators to decide on the use of evidence that they deem appropriate for correctly resolving the dispute. Such power includes the possibility to request that the parties provide relevant additional information

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<sup>103</sup> On the significance of the recourse to this provision by arbitrators when assessing the evidence, *see* Judgment of the High Court of Justice of Madrid of 9 June 2015 (ECLI:ES:TSJM:2015:7700).

<sup>104</sup> D.D. Caron & L.M. Caplan, *The UNCITRAL Arbitration Rules (A Commentary)* (Oxford University Press, 2nd ed., 2013), p. 558.

or proof in their possession or whose use depends on them.<sup>105</sup> Furthermore, the arbitral tribunal may on its own motion appoint experts to report to it on specific issues and call upon any of the parties to furnish the expert with all relevant information and documents (Article 32 SPAA).<sup>106</sup>

Parties' and arbitrators' ample freedom and flexibility regarding the evidence-taking stage of arbitration is limited in the SPAA by the right to defence and the principle of equality. The assessment of the evidence by the arbitrators can not be reviewed by a court in the framework of an action for setting aside or proceedings for enforcement of a foreign award unless the court finds that the arbitrariness is manifest. Only in those circumstances a violation of public policy may be established and therefore a restrictive interpretation prevails in this respect.<sup>107</sup> Public policy violations are limited to exceptional situations, such as the admission of evidence obtained unlawfully or where in the taking the right to defence or the principle of equality has been infringed.<sup>108</sup>

In principle neither the concept of public policy nor procedural irregularity as a ground to annul an award -Article 41.1.d) SPAA- or to refuse its recognition and enforcement -Article V.1.d) of the New York Convention- comprise situations where the arbitral tribunal requests additional information to the parties to be able to develop its own reasoning on the basis of *iura novit curia*, provided that the parties' right to be heard is respected.<sup>109</sup> This view is further supported by the wide discretionary powers that arbitrators enjoy regarding procedural issues.

## ***2. Impartiality***

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<sup>105</sup> See, e.g., Article 23(2) of the Rules of the Spanish Court of Arbitration.

<sup>106</sup> Article 31(7) of the CIMA Rules states that "the Arbitral Tribunal may request from the parties information about the dispute, inviting them to disclose, provide or submit in the proceeding or to the experts, evidence in their possession or under their control or identify sources of relevant evidence of which they have knowledge. In all these cases, the Arbitral Tribunal shall identify, with reasonable precision, the evidence required and justify the reasons for its disclosure, provision or submission, such as their evidential relevance in relation to the determination of the dispute."

<sup>107</sup> Judgments of the High Court of Justice of Madrid of 9 June 2015 (ECLI:ES:TSJM:2015:7700) and 5 July 2016 (ECLI:ES:TSJM:2016:8114).

<sup>108</sup> Judgment of the High Court of Justice of Catalonia of 14 July 2014 (ECLI:ES:TSJCAT:2014:9122).

<sup>109</sup> Judgment of the High Court of Justice of Catalonia of 9 March 2015 (ECLI:ES:TSJCAT:2015:3081).

The SPAA and the relevant arbitration rules concur on stating that arbitrators' impartiality is essential, as evidenced by the references to impartiality in Section IV of the Preamble and Article 17 SPAA, Article 18 CIMA Rules, Article 13 of the Rules of the Spanish Court of Arbitration. Furthermore, the principle of equality of the parties is acknowledged as a basic standard guiding arbitration proceedings. It requires arbitrators to treat the parties with equality and give each party full opportunity to present his case (Article 24 SPAA, Article 1.5 CIMA Rules and Article 16 of the Rules of the Spanish Court of Arbitration).

Lack of impartiality by the arbitrators or the arbitral institution administering arbitration proceedings is regarded as one of the situations that may lead to find that public policy has been infringed. However, lack of impartiality is only established in very limited situations, such as those in which a special connection is found between the arbitral institution and the legal counsel to one of the parties.<sup>110</sup>

As discussed earlier, the verification by the arbitrators of their own motion of the allegations of a party and the request that a party presents additional information or proof are acts that fall within the powers granted to arbitrators. Therefore, it is generally accepted that the arbitral tribunal can request of its own motion documents that it considers essential and make the appropriate inferences from the parties' refusal to provide them.<sup>111</sup>

The flexibility granted to arbitrators to develop its own reasoning and to request additional information favours the view that it seems unlikely that an arbitrator may be regarded as partial merely by requesting information to the parties or inviting them to comment on a new legal issue that was not raised by any of them, particularly where such requests are specific. In line with the prevailing view in comparative perspective<sup>112</sup> and the previous discussion on validity and enforcement of awards under Spanish law, the basic limitations to such power of the arbitral tribunal are to be found in the respect to the fair hearing and non extra-petita principles, as previously discussed. Even those

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<sup>110</sup> See, e.g., Judgment of the High Court of Justice of Catalonia of 10 May 2012 (ECLI:ES:TSJCAT:2012:5856).

<sup>111</sup> See, e.g., B.M. Cremades, *The Use and Abuse of Due Process in International Arbitration*, 9 Arbitraje (Revista de arbitraje comercial y de inversiones), (2016), 661, 669.

<sup>112</sup> A. Dimolitsa, *The Raising Ex Officio of New Issues of Law*, in Bortolotti & Mayer (eds.) *supra* note 51, at 23; and Moura Vicente, *supra* note 54, pp. 35-37.

advocating a very restrictive approach as regards arbitrators' initiatives to obtain factual and legal evidence consider that only in extreme cases the exercise by the arbitral tribunal of its discretion in this regard may infringe the arbitrators' duty to treat the parties equally. Such an infringement should be excluded in situations where the arbitrator can argue that he would have acted in the same way whichever party were to have benefited.<sup>113</sup>

### **3. Default awards**

The SPAA and the rules of Spanish arbitral institutions establish that the arbitral proceedings may continue even if one of the parties refuses or fails to participate at any stage of the arbitration, in line with Article 25 UNCITRAL Model Law and Article 30 UNCITRAL Rules. Pursuant to Article 31 SPAA, unless otherwise agreed by the parties, if the claimant fails to communicate his statement of claim within the time limit, the arbitrators will terminate the proceedings unless the defendant expresses his intention to apply for relief or remedy.<sup>114</sup> However, in case the defendant fails to communicate his statement of defence within the time limit, the arbitrators will continue the proceedings.<sup>115</sup> Moreover, Article 31 SPAA establishes that in case any party fails to appear at a hearing or to produce evidence, the arbitrators may continue the proceedings and make the award on the evidence before them.<sup>116</sup>

As to the implications of a party's default, Article 31 SPAA establishes that the failure of the defendant to present his statement of defence shall not be treated as an admission of the facts alleged by the claimant. Similarly, under Article 38(3) of the CIMA Rules and Article 21(2) of the Rules of the Spanish Court of Arbitration such failure shall not in itself be considered an acceptance of the claimant's allegations.<sup>117</sup> Therefore, the

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<sup>113</sup> P. Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, 28 ARB. INT.'L. (2012) 175, 191.

<sup>114</sup> The same rule may be found in Article 21(1) of the Rules of the Spanish Court of Arbitration. According to Article 38(2) of the CIMA Rules, "In cases where the claimant fails to submit its substantive claims within the time period..., the Arbitral Tribunal shall order the termination of the proceedings, unless there are issues whose decision is imperative for the Arbitral Tribunal".

<sup>115</sup> A similar provision may be found in Article 38(3) of the CIMA Rules, Article 21(2) of the Rules of the Spanish Court of Arbitration and Article 35(2) Rules of Arbitration of the Court of Arbitration of Madrid.

<sup>116</sup> The same approach may be found in Article 38(4) of the CIMA Rules and Article 35(3) of the Rules of Arbitration of the Court of Arbitration of Madrid.

<sup>117</sup> Moreover, pursuant to Article 32(7) of the CIMA Rules, the arbitral tribunal may make such inferences as are appropriate from the lack of cooperation of any party in connection with the appearance of witnesses.



arbitral tribunal is empowered to freely assess the facts and causes of action alleged by the claimant and the evidence before it. The loss of the adversarial nature of the proceedings as a result of the refusal or failure of a party to participate is deemed to impose on the arbitrators an additional duty to ascertain that the claims and allegations of the participating party are duly founded.<sup>118</sup> Courts have confirmed that a party's default may not result in particular negative implications for any of the parties but in all cases the claimant bears the burden of proving the facts relied on to support its claims.<sup>119</sup>

## VII. APPLICATION OF THE LAW BY THE ACTORS INVOLVED

Pursuant to Article 1(1) of the Civil Code, the sources of the Spanish legal system are statutes, customs and general legal principles. Customs play almost no role as a source of law concerning the development of arbitration proceedings. General legal principles apply in the absence of statute or custom, without prejudice to their role in shaping the legal system (art 1(4) Spanish CC). As it has already been noted in the previous sections, in the absence of specific provisions on arbitrations proceedings, domestic civil procedure principles and the case law on their interpretation are usually considered as the starting point by the reviewing courts when discussing the significance and extent of the *iura novit curia* principle in commercial arbitration.

Moreover, since some of the most significant limits to the arbitrators' leeway in this respect are closely connected to procedural public policy provisions, domestic and international standards on principles of civil procedure play a prominent role. That is particularly the case, with regard to the need to respect the adversarial principle and the principle of *audi alteram partem*. The standards developed by the Spanish Constitutional Court, the CJEU and the ECtHR concerning the essential features of the right to be heard are key to establish the limits to arbitrators' discretion in this regard.

The leading role of Spanish civil procedural law as the relevant source to provide standards to supplement the lack of specific provisions on *iura novit curia* in arbitration proceedings has to be combined with the widespread assumption that domestic civil procedural law is not directly applicable as such to those situations. For instance, when

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<sup>118</sup> G. Stampa, *Artículo 38* in Ruiz Risueño & Fernández Rozas (eds.), *supra* note 30, p. 376.

<sup>119</sup> Judgment of the High Court of Justice of the Valencia Region of 26 April 2012 (ECLI:ES:TSJCV:2012:3914).

analysing excess of power as a limit to the arbitrators' leeway based on the *iura novit curia* maxim, Spanish courts, particularly in the context of annulment proceedings, insist that arbitrators enjoy broader flexibility than ordinary courts with regard to the application of the congruency or non extra-petita principle.<sup>120</sup> The delimitation of the object of the arbitration dispute is not subject to similar restrictions to those applying to civil proceedings before state courts governed by the CPA. The peculiar "pacifying function" of arbitrators is invoked as a factor giving a more ample discretion to them as to what issues are regarded as comprised within the subject-matter of the dispute. Such discretion is especially affirmed in situations where arbitrators are empowered to decide *ex aequo et bono*<sup>121</sup>, but it also applies to arbitration at law provided that mandatory provisions are respected.<sup>122</sup> The flexible approach that restricts the possibility to establish an infringement of the congruency or *non-extra petita* principle is applied in similar terms to annulment proceedings concerning domestic and international arbitration<sup>123</sup> as well as with regard to the recognition and enforcement of foreign awards.<sup>124</sup>

Case-law is not one of the legal sources as such of the Spanish legal system. However, Article 1(6) of the Spanish Civil Code establishes that case-law shall complement the legal system by means of the doctrine repeatedly upheld by the Supreme Court in its interpretation and application of statutes, customs and general legal principles. Traditionally the role of the Supreme Court and its case-law in the field of arbitration has been significant, particularly during the time exequatur proceedings fell within its competence. Due to the lack of specific provisions on *iura novit curia* in arbitration and the gaps of statutory arbitration law in this regard, case-law has become the main source of guidance in this field. Moreover, it has become commonplace in judgments rendered in annulment of awards and exequatur proceedings not only to refer but also to copy

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<sup>120</sup> *E.g.* Judgments of the High Court of Justice of Madrid of 15 October 2013 (ECLI:ES:TSJM:2013:15971), 3 December 2013 (ECLI:ES:TSJM:2013:18439) and 24 March 2015 (ECLI:ES:TSJM:2015:3275).

<sup>121</sup> Judgment of the Supreme Court (Civil Chamber) of 17 June 1987 (ECLI:ES:TS:1987:4254).

<sup>122</sup> Judgment of the High Court of Justice of Madrid of 5 July 2016 (ECLI:ES:TSJM:2016:8114) and Judgment of the High Court of Justice of Catalonia of 25 November 2013 (ECLI:ES:TSJCAT:2013:11562).

<sup>123</sup> Judgment of the High Court of Justice of Catalonia of 14 July 2014 (ECLI:ES:TSJCAT:2014:9122); and Judgment of the High Court of Justice of the Basque Region of 19 June of 2012 (ECLI:ES:TSJPV:2012:1220).

<sup>124</sup> Order of the High Court of Justice of Catalonia of 30 May 2012 (ES:TSJCAT:2012:272A).

significant portions of previous judgments, particularly on the significance of *iura novit curia* in arbitration proceedings. In fact, Spanish case-law in this area is characterized by its repetitive content.

Scholarly writings, particularly domestic, may receive significant attention as a source of authority in the parties' pleadings where they are usually invoked. Moreover, doctrinal writings and scholars have traditionally had significant influence on the legislator when drafting arbitration statutory law. However, doctrinal writings are not sources of law and specific authors are rarely quoted as such in judgments, even if they may significantly influence case-law. General references to the dominant position among scholars to support the position of the court are more frequent. Similarly, sources of soft law are more usually used as guidance in parties' pleadings and arbitral awards than court judgments. However, an increasing trend to refer to those sources may also be found in the case-law of Spanish courts on the review of arbitration proceedings where express references to Guidelines adopted by practitioners' bodies, such as the Club Español del Arbitraje, may be found.<sup>125</sup>

Spanish legislation on arbitration is based on a monistic approach which is characterised by establishing a single legal regime that applies to domestic and international arbitration. Under this approach the application of national rules does not depend on the domestic or international nature of the dispute. For instance, a restrictive interpretation of public policy also prevails when applying Article 41.f) SPAA to actions to set aside awards in domestic disputes. The prevailing view is that even in those situations public policy is a narrow concept which does not comprise all mandatory provisions<sup>126</sup>. However, even if case-law stresses its restrictive understanding of public policy, in practice it considers good faith and fair dealing as basic principles of contract law that belong to public policy.<sup>127</sup> It is widely accepted that the principle of minimum

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<sup>125</sup> See, e.g., Judgment of the High Court of Justice of Madrid of 13 November 2014 (ECLI:ES:TSJM:2014:14692), making reference to the CEA Code of Good Practice for Arbitration, when assessing the lack of impartiality of an arbitral institution.

<sup>126</sup> Judgments of the High Court of Justice of Madrid of 17 February 2015 (ECLI:ES:TSJM:2015:1787); and 21 April 2015 (ECLI:ES:TSJM:2015:4055).

<sup>127</sup> See Judgment of the High Court of Justice of Madrid of 21 April 2015 (ECLI:ES:TSJM:2015:4055) with an express reference to Article 1:201 of The Principles of European Contract Law (PECL). In several recent cases it has been criticized that Spanish courts may have adopted a different approach and disregarded the no review on the merits principle when annulling domestic awards on the basis of an infringement of economic public policy, but such criticism only affects a very limited number of isolated decisions not concerning procedural

judicial intervention in commercial arbitration must be enhanced in the context of international arbitration as compared to domestic arbitration even if the Spanish system is based on a monistic approach.<sup>128</sup> Therefore, the restrictive interpretation of the annulment grounds should be reinforced with regard to awards concerning international disputes in line with the approach applicable to the exequatur of awards rendered abroad.<sup>129</sup>

### VIII. CONCLUSION

Spanish courts have steadily held the view that based on the *iura novit curia* maxim arbitrators have the power to decide in accordance with the rules they deem applicable. Arbitrators are not bound by the legal characterization of the facts made by the parties, are empowered to make their own legal inferences from those facts and may order remedies on the basis of the arbitrators' own reasoning provided that the factual basis of the claim is not altered. The main limitations to such powers of arbitral tribunals derive from the fair hearing and non extra-petita principles. First, such powers must be exercised by arbitrators in compliance with the parties' rights to be heard and to adversarial proceedings. Therefore, parties should be granted an opportunity to express themselves on all the matters of fact and of law on which the arbitral tribunal based its award. Claims concerning excess of power on the basis that the arbitral tribunal decided on matters outside the scope of parties' submissions are not rare before Spanish courts. A restrictive understanding prevails and only the factual elements and the object of the dispute are significant to find excess of power, but not the arguments or the rules invoked by the parties. The well-established position is that arbitrators enjoy a broader flexibility than state courts in this regard and enjoy significant discretion when assessing the scope of their mandate on the basis of the arbitration agreement and the parties' pleadings.

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irregularity and not undermining the general trend supporting a restrictive interpretation of public policy as an annulment ground. See J.C. Fernández Rozas, *Contravención al orden público como motivo de anulación del laudo arbitral en la reciente jurisprudencia española*, 9, Arbitraje (Revista de arbitraje comercial y de inversiones), (2016) 823, 846.

<sup>128</sup> S. Sánchez Lorenzo, *El principio de mínima intervención judicial en el arbitraje comercial internacional*, 9, Arbitraje (Revista de arbitraje comercial y de inversiones), (2016), 13, 15.

<sup>129</sup> Cuartero Rubio *supra* note 13, 47.