Spain and Commercial Arbitration

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I. INTRODUCTION

A. Historical Background

Although the thirteenth century *Siete Partidas* contemplated arbitration, the regulation of arbitration in contemporary Spanish law has its roots in the French Revolution and the ensuing codification movement.\(^1\)

Spanish regulation of arbitration is both substantive and procedural. The Civil Code of 1889, still in force in Spain, deals with the substantive elements of arbitration in Chapter II of Title XIII of Book IV. Chapter II deals with obligations and contracts, and the substantive rules for arbitration are listed under the heading "On Settlements and Submissions" (*Transacciones y Compromisos*) (Articles 1809 to 1821). Chapter II is comprised solely of Articles 1820 and 1821. The first of these provisions establishes that the legal capacity required to submit a dispute to arbitrators (*comprometer*)\(^3\) is the same as that required to settle (*transigir*) legal questions. Article 1821 provides that the rules concerning settlements apply to submissions to arbitration, and refers to the 1881 Code of Civil Procedure (*Ley de Enjuiciamiento Civil*) for the procedural aspects and effects of the submission.

The procedural aspects of arbitration were established in the Code of Civil Procedure of 1881. Title IV of Book II dealt with proceedings before the arbitrators and *amiables compositeurs.*

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1. The *Siete Partidas* is a code of laws reportedly promulgated by King Alfonso X. The code was later promulgated as supplementary law by King Alfonso XI in the *Ordenamiento de Alcalá.* The *Siete Partidas* has the main features of a legal encyclopedia. *Diccionario de Historia de España* 180 (1979).

2. The *Ordenamiento de Alcalá* embodied the principle that "one remains bound in any manner one may choose to be bound." This lays the foundation for the possibility of two parties referring to an arbitrator for settlement of a dispute.

3. The Civil Code uses the term submission (*compromiso*) in referring to arbitration.
Despite the efforts undertaken to encourage arbitration, these rules failed to promote arbitration as a socially accepted method of conflict resolution. The dual regulation of substantive and procedural aspects of arbitration was inconsistent; this did not encourage the use of arbitration as a procedure for the settlement of disputes.⁴

B. Current Regulation

These circumstances led to the December 22, 1953 promulgation of a special statute dealing with arbitration, the Private Arbitration Law of 1953 (the “Law of 1953”). This statute, which constituted the backbone of Spanish arbitration until 1988, repealed the procedural norms contained in the Code of Civil Procedure.

The Law of 1953 led to rigidity in the arbitration process. With the passage of time, the need to reform the regulation of private arbitration became clear. The arbitration law promulgated on December 5, 1988⁵ established a new era for commercial arbitration in Spain.⁶

II. THE PRIVATE ARBITRATION LAW OF 1953

A. Scope

The scope of the Law of 1953 is restricted to the settlement of private law disputes. This is expressly established in Article 1 which reads: “The use of arbitration prescribed by the rules of public law, whether international, corporate, labor or of any other character, will continue to be governed by the rules which are presently in force.” Article 1 also states that the statute replaces the substantive, as opposed to procedural, rules on arbitration contained in the Civil Code, the Commercial Code, and the Code of Civil Procedure. The Law of 1953 refers to procedural rules. The Law of 1953 also replaces all other “rules of the same nature” dealing with arbitration. This broad clause was chosen by the legislature as a safeguard, supplanting all those provisions dealing with

⁴ For a study of Spanish legal arbitration from an historical perspective, see A. Merchán, El Arbitraje: Estudio Histórico Jurídico (1981).
⁶ Although the Arbitration Act of 1988 supercedes the Arbitration Law of 1953, the latter provides a useful base from which to examine arbitration law in Latin American countries, and to understand the changes introduced by the Act of 1988.
arbitration that could be found in special statutes. The comprehensiveness of the Law of 1953 is reinforced by the categorical terms of the final clause.\(^7\)

Strictly speaking, in spite of the broad language of Article 1, the Law of 1953 was intended to address the solution of disputes within the context of civil law (derecho civil). The narrow scope of the Law of 1953 is reflected in the absence of provisions dealing with the settlement of disputes arising from commercial transactions.

**B. Concept, Nature and Features of Arbitration**

Article 2 of the Law of 1953 defines arbitration as “the institution by which one or more persons settle a dispute raised by others who had previously agreed to accept the decision.”\(^8\) This concept embodies the approach that arbitration is an institution of a jurisdictional nature, as opposed to an institution of a contractual nature. Whereas the jurisdictional approach emphasizes the need for judicial confirmation of the arbitration agreement, the contractual approach underscores the prominent role of the will of the parties to submit a dispute to arbitration.

One implication of this jurisdictional, as opposed to contractual, perception of arbitration is that the essential purpose of arbitration is the settlement of disputes that have arisen in the past. Accordingly, Article 2 provides that “the intervention of a third party for purposes other than settling a pending dispute shall not be considered as arbitration, but rather as the completion or integration of a legal relation not yet totally defined.” Thus, the submission to arbitration is an agreement between the parties to submit an existing dispute to arbitration. If there is no controversy at the time the parties enter into the submission agreement, the agreement is null and void.

In Spanish arbitration, contractual and procedural features coexist. The coexistence of these two components has led to the characterization of arbitration as an institution of “conventional juris-

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7. “Those provisions that regulate private arbitrations are repealed and their texts are fully replaced by the provisions of this Law.” Supra note 4, at 11.

8. The fact that the parties agree to accept the decision of an arbitrator prior to the decision being rendered differentiates arbitration from simple mediation, in which the parties remain free to accept the decision once it has been rendered. L. Díez-Picazo, Estudios Sobre la Jurisprudencia Civil 465 (1973).
 Arbitration has a contractual nature to the extent that it arises from an agreement of the parties leading to another contractual relationship that is established between the parties and the arbitrators. Arbitration also has a jurisdictional or procedural component because the legal system equates the effects of arbitration awards with those of judicial decisions.

The arbitration regulated in the Law of 1953 is “proper” or “formal.” Accordingly, Article 3 of the Law of 1953 provides that “arbitration, in order to be effective, must be subject to the provisions of this Law.”

The main features of arbitration can be summarized as follows:

1) Arbitration is an institution in which elements of substantive law coexist with elements of procedural law arising from the underlying contractual relationship.

2) Arbitration presupposes the existence of a dispute between the parties, the settlement of which is to be arrived at through arbitration.

3) The parties voluntarily submit their disputes to the decision of one or more arbitrators.

4) The parties bind themselves to accept the decision of the arbitrators as to those issues which were submitted to arbitration.

5) Arbitration represents a form of voluntary jurisdiction which is accorded the same legal effects as those granted judicial decisions, provided that the formalities and requirements established by law are observed.

C. Types of Arbitration

While there are numerous distinctions among different types


12. Arbitration is distinguished from conciliation, in which the decision of the third person is a mere proposal without any binding force. See J. Guasp, 2 Comentarios a la Ley de Enjuiciamiento Civil 1148 (1950).
SPANISH ARBITRATION

of arbitration, the Law of 1953 recognizes two main types of private arbitration. The distinction between the two types is based on the criteria that must be followed by the arbitrators to pass judgment on a dispute which has been submitted to them. Thus, arbitration will be de jure (arbitraje de derecho) when the award is to be rendered pursuant to rules of law, and arbitration will be an amiable composition (arbitraje de equidad) when the award is to be rendered in accordance with the arbitrators’ personal knowledge and understanding (con sujeción a su saber y entender).

The existence of both types of arbitration has been acknowledged by the Spanish Supreme Court (Tribunal Supremo) in several decisions. In the decision of October 9, 1984, the Spanish Supreme Court stated:

[T]he State, by granting the parties the freedom to dispose of their economic interests, allows them to settle their disputes in which no public interest is at stake. The dispute can be referred by the parties to an extraofficial institution known as arbitration. There are two types of criteria according to which the arbitrators are to decide. The arbitrators may decide in accordance with the law or according to the best of their knowledge and understanding.

The selection of one type of arbitration over the other is left to the parties. However, if they have not specified the type of arbitration in the agreement, Article 4 provides that it will be presumed that they have chosen de jure arbitration.

D. Differences Between the Preliminary Contract or Arbitral Clause and the Submission

Arbitration cannot take place unless the parties have previously entered into a submission (compromiso de arbitraje), defined in Article 12 as a contract in which “two or more parties stipulate that a specific dispute existing between them shall be settled by an arbitrator or arbitrators appointed with their consent and to whose decision they expressly submit.”

It is important to bear in mind that a submission must not be confused with an arbitral clause (cláusula compromisoria), a stipulation included in a contract whereby the parties agree to submit to arbitration any dispute that may arise in the future in connec-
tion with the contract.\textsuperscript{13}

An arbitral clause, by its very nature, is entered into prior to the submission. The arbitral clause is referred to in the Law of 1953 as a preliminary contract (\textit{contrato preliminar de arbitraje}), even though in practice it is better known as an arbitral clause (\textit{cláusula compromisoria}).\textsuperscript{14} The preliminary arbitration contract indicates the parties' willingness to later enter into a submission.\textsuperscript{15}

\section*{E. The Preliminary Arbitration Contract or Arbitral Clause}

\subsection*{1. Requirements and Content}

Article 7 provides that the requirements of a preliminary contract are those established for contracts in the Civil Code.\textsuperscript{16} This is only logical given the contractual nature of the preliminary contract.\textsuperscript{17} The content of the preliminary contract is minimal. The parties stipulate that they agree that any dispute which may arise will be submitted to arbitration. The appointment of the arbitrators need not be specified. Thus, the preliminary contract is a preparatory arbitration contract in which the parties assume an obligation to submit to arbitration.\textsuperscript{18}

\subsection*{2. Judicial Confirmation of the Submission}

In contrast to a submission, a preliminary arbitration contract is not a prerequisite for the existence of arbitration. It is up to the parties to conclude an arbitral clause. If they do, the Law of 1953 acknowledges the binding force of this preliminary contract. If one

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\item \textsuperscript{13} Gonzalez Campos, \textit{Sobre el Convenio de Arbitraje en el Derecho Internacional Privado Español}, 2 \textit{Anuario de Derecho Internacional} 5 (1975).
\item \textsuperscript{14} Regarding the preliminary arbitration contract, see Armienta, \textit{Perspectivas de Futuro de la Cláusula Compromisoria Arbitral}, 2 \textit{Revista Juridica de Catalunya} 49-75 (1984).
\item \textsuperscript{15} Thus, it amounts to a pre-contract, or a promise to contract. See J. Guasp, \textit{El Arbitraje en el Derecho Español} 82 (1956).
\item \textsuperscript{16} According to Article 1.261 of the Civil Code, the requirements are: consent of the parties; a certain object that is material to the contract; and the cause (\textit{causa}) of the obligation that is established.
\item \textsuperscript{17} A detailed examination of the capacity of the parties and the requirements of consent, object, and cause of the preliminary contract can be found in L. Martínez, \textit{La Cláusula Compromisoria en el Arbitraje Civil} 61-123 (1984).
\item \textsuperscript{18} The content of such obligations are established in Article 9 of the Law, which states that "the party to a preliminary arbitration contract shall remain bound to undertake those acts which are necessary in order for the arbitration to be realized, in particular, the appointment of the arbitrators and the identification of the disputed issue."
\end{itemize}
of the parties refuses to execute the submission, or does not agree to the terms provided for in the preliminary contract, the other party may petition the judge to enforce the agreement to arbitrate. This judicial enforcement is known as the judicial confirmation of the submission (formalización judicial del compromiso), a special procedure regulated by Article 10 of the Law of 1953. If a preliminary arbitration contract exists and one of the parties fails to execute a submission, or refuses to enter into a submission, and neither party requests judicial confirmation of the submission, then the preliminary arbitration contract is terminated.

F. The Submission

1. Requirements

A submission presupposes the existence of a dispute. Article 15 provides that "if a dispute does not exist, either because it never arose or because it has been settled by a judgment or has been extinguished by any other act, the submission shall be null and void" (principio de conservación de las acciones procesales). For a submission to be valid, the subject matter of the agreement, the legal capacity of the parties, and the form of the submission must meet certain requirements.

The subject matter of the submission may comprise any area of private law. Therefore, those areas which the law has not exclusively reserved for judicial settlement may be subject to arbitration. Where an arbitrable matter is inseparably linked to a matter that may not be submitted to arbitration, Article 14 provides that neither may be submitted to arbitration.

In general, the legal capacity required to enter into a submission is the same legal capacity required to dispose of property (enajenar). Within this general rule, the legal capacity to dispose of property must be measured in light of the nature of the property that is involved in the dispute submitted to arbitration.

19. In such a case, the judge before whom the preliminary arbitration contract is confirmed will indicate the issues to be settled by arbitration. Judgment of the Spanish Supreme Court, March 4, 1985.

20. If, as a result of such procedure, the judge refuses to confirm the agreement, the party entitled to request the judicial confirmation may reinstate his claim in ordinary proceedings (juicio ordinario). Even if the judge proceeds to confirm the preliminary arbitration agreement, the other party may still challenge the validity of such preliminary contract by filing appeals against the award rendered as a result of the agreement.
2. Form

The submission must be drawn up in a public deed attested to by a notary. The Law of 1953 thus establishes the solemn form of the document as a constitutive requirement for the validity of the submission. If the parties have formalized the submission in a private document without notarization, the submission is invalid. However, any of the parties to the agreement may petition for judicial confirmation of the submission. This provision applies to the case where any of the parties refuses to execute a public deed.\footnote{According to Article 1.279 of the Civil Code, “if the Law requires the execution of a public deed or other special formalities to make effective the obligations of a contract, one of the parties to the contract may compel the other to execute those formalities, provided that the contract meets the requirements necessary for its validity.”}

3. Minimum Content

Article 17 of the Law of 1953 establishes the minimum content of the submission. The public deed of submission must contain: a) the names, addresses and professions of the parties; b) the names, addresses and professions of the arbitrators; c) the disputes to be settled by arbitration; d) the time period within which the arbitrators must render the award; and e) the place where the arbitration proceedings are to be held.

The parties are free to add to these requirements whatever else they deem pertinent. The Law of 1953 requires the inclusion of certain information, but in no way limits what may be included in the public deed.

The parties are free to establish the type of arbitration they want, whether this be \textit{de jure} or the \textit{amiable composition}. The parties may provide for a penalty clause that would allow for the imposition of fines in the event one of the parties fails to fulfill the agreement to arbitrate. They may also provide for the awarding of costs by the arbitrators.

4. Relevance to the Arbitration Proceeding

The submission is the backbone of arbitration for two reasons. First, the parties agree to submit their dispute to arbitration and to accept the decision as adopted by the arbitrators. Second, as Article 19 states, “the submission prevents judges and courts from
examining the disputes submitted to arbitration, provided the party concerned avails itself of the appropriate defense (excepción)." The purpose of this provision is to keep the arbitration from being frustrated by preventing the parties from commencing judicial proceedings arising out of the same controversy. Thus, the execution of the submission obligates the parties to submit to arbitration. In practice, this has proven insufficient, because only the submission precludes the parties from resorting to the courts, while the preliminary contract is devoid of such a prohibition. This issue will be discussed below.

G. The Arbitrators

1. Appointment and Acceptance

Once the public deed formalizing the submission has been executed, the notary must submit this to the arbitrators who have been appointed so that they may accept their nomination. Their acceptance or rejection must be placed on a record to be signed by the arbitrators and the notary.

The appointment of the arbitrators must be made by agreement of the parties. Article 22 of the Law prohibits the parties from deferring the appointment of arbitrators to a third person.

2. Qualifications

Arbitrators must be natural persons. In the case of de jure arbitration, the arbitrators must be practicing attorneys. In the case of amiable composition, the arbitrators must enjoy their civil rights and must be able to read and write.

22. An analysis of the procedural aspects of this negative or exclusive effect of jurisdiction of the submission may be found in Gonzalez Montes, La Excepción de Compromiso, 1975 Revista de Derecho Procesal 440-49.

23. See infra text accompanying note 44. The difference between the effects of a preliminary contract and a submission is a peculiarity of Spanish law. In other countries (e.g., France) where these two forms exist, the difference between them stems merely from the fact that the preliminary contract is executed between the parties before the dispute arises, while the submission is entered into after the dispute has arisen.

24. The Law of 1953 fails to provide for the lack of acceptance, death or incapacity of an appointed arbitrator. This has lead many authors to believe that in such cases the same rules established for initial appointment should be applied by way of analogy to the appointment of substitute arbitrators. Prieto Castro, Una Nueva Regulación del Arbitraje, 450 Revista de Derecho Privado 708, 721 (1954).
3. Number

In contrast to other systems, the number of arbitrators must be odd, whether it be one, three or five.

4. Grounds for Abstention and Challenge

There are certain grounds which prevent arbitrators from accepting an appointment, unless the parties know of the circumstances and expressly waive them.

These circumstances, whether they exist in relation to the parties or the arbitrators themselves, are those that the Code of Civil Procedure provides as grounds for abstention and challenge of judges. If one of the parties is not aware of the existence of one of these grounds, and the arbitrator takes part in the arbitration, any party may subsequently challenge the award.

5. Relationship with the Parties

Once the parties have appointed arbitrators, and each of the chosen arbitrators has accepted his or her appointment in conformity with the above procedure, they enter into a legal relationship of relación arbitral de dación y recepción. This relationship produces some of the effects specified in Article 25. The arbitrators' acceptance of their appointments empowers each party to compel the arbitrators to carry on their function, under penalty of liability for damages.

A problem that arises in this regard is determining the damages caused by the arbitrators when they fail to comply with their duties. Unless a penalty clause is expressly provided for in the submission, the affected party must prove the existence of fraud, guilt or negligence on the part of the arbitrator, as well as the existence of a proximate relationship between the act or omission of the arbitrator and the damage caused.

The arbitrators are entitled to request payment of their fees by the parties, in accordance with the provisions of the Civil Code

25. Span. C. Civ. P., art. 189 provides for different grounds for challenging judges, listing the circumstances that may give rise to justifiable doubts as to their impartiality and independence.

26. According to Article 1.902 of the Civil Code, "he who by action or omission causes injury to another, by fault or negligence, is bound to repair the injury caused."
governing the contract of agency (mandato). Article 1711 of the Civil Code provides that, unless the parties provide otherwise, the mandato is presumed to be gratuitous. On the other hand, if the agent’s job involves the furnishing of services of the type to which the contract of mandato refers, the obligation to pay the agent is presumed. Therefore, if the submission does not call for payment of the amiables compositeurs, it is open to question whether they would be entitled to remuneration. In contrast, the obligation to compensate the arbitrators is more definite in de jure arbitration, due to the professional nature of the services furnished by the attorneys who serve as arbitrators.

H. Arbitration Proceedings

1. Preliminary Distinction

   The arbitration procedure varies considerably according to whether the arbitration is de jure or the amiable composition. In the latter, Article 29 provides that no legal formalities need be observed. It suffices that arbitrators give the parties an adequate opportunity to be heard and to produce the evidence that they deem necessary. *De jure* arbitration must be conducted in conformity with the rules established by the Law of 1953. In such a case, strict compliance with the procedure set forth in the Law of 1953 is mandatory.

2. Principles Common to *De Jure* Arbitration and the *Amiable Composition*

   There are a series of principles common to both types of arbitration. These principles are the following:

   a) Principle of initiative and agreement of the parties to arbitrate (*principio de iniciativa común y simultánea de las partes*), as opposed to the typical principle of adversariness that prevails in judicial proceedings.

   b) Principle of controversy (*principio de la controversia*), one of the elements necessary for the formalized written submission.

   c) Dispositive principle (*principio dispositivo*), where the parties voluntarily submit to and define the fundamental elements of arbitration.

   d) Principle of writing (*principio de escritura*), where certain
phases of both types of arbitral proceedings must be recorded in writing.

e) Principle of secrecy (principio del secreto), as opposed to the public nature of judicial proceedings.

f) Principle of official action (principio del impulso oficial), where the arbitrators must carry forward the proceedings in order to provide arbitration with flexibility and agility.27

I. De Jure Arbitration

1. Preliminary Considerations

As previously stated, the procedural norms established in Article 26 of the Law of 1953 for de jure arbitration are mandatory.

2. Procedural Phases

Article 27 of the Law establishes the procedures which must be followed in de jure arbitration, dividing it into five phases:

a. Pleadings

The purpose of this phase is to allow the parties to submit their claims and all documentary evidence. There should be as many copies submitted as there are parties.

The duration of this phase is determined by the arbitrators, but the time limit cannot exceed a quarter of the period of time set forth in the submission for rendering the award.

It is important to note that the submission of pleadings is done simultaneously by all parties concerned, unlike judicial proceedings where pleadings are consecutive.

b. Objections

In this phase, copies of the briefs submitted by each party are forwarded to the others so that they may reply in writing to the allegations of the other party and submit briefs and evidence in support of the reply. The time limit for this phase is also fixed by

27. It has been pointed out in this respect that in arbitration, "the Law, instead of a successive contradiction (complaint-answer) observed in judicial proceedings, allows simultaneous contradiction and gives each party the opportunity to contest the claims of the others by answering the adversary pleadings, thus establishing the controverted facts and their circumstances." T. Ogayar, El Contrato de Compromiso y la Institución Arbitral 213 (1977).
the arbitrators, but it may not exceed the time period agreed to in the pleadings phase.

This phase must also be carried out in writing, so that each party may be fully informed as to the terms of the claims alleged and the reasons submitted to support these claims.

c. Evidentiary Phase

The existence and relevance of this phase depends totally on the arbitrators. The Law of 1953 expressly grants to the arbitrators the power to receive the evidence in order to ascertain the facts which are relevant in the outcome of the dispute.

The arbitrators may deny a request to produce evidence if they deem it unnecessary to render the award. The arbitrators also have the power to request the production of evidence even if the parties object, as well as to determine the type of evidence that must be submitted.

The arbitrators are also responsible for fixing the time limit of this phase, in keeping with the previously noted maximum limit. The Law of 1953 provides that the submission of evidence is subject to the rules of the Code of Civil Procedure.\textsuperscript{28} It must be borne in mind that the arbitrators have ample freedom in determining what evidence is to be admitted.

Since the arbitrators cannot compel the production of evidence, they may seek judicial assistance to achieve this goal, \textit{e.g.}, to subpoena witnesses. The competent judge to assist the arbitrators is the judge with jurisdiction over the place where the arbitration is being conducted.

d. Hearings

This phase takes place after the evidentiary phase. The arbitrators listen to either the parties or the attorneys who represent them in person.

The parties may, but are not required to, attend the arbitration accompanied by their attorneys.

If there is no evidentiary phase, the hearing takes place immediately after the objections, as mandated by law.

In view of the silence of the Law of 1953 in this regard, the

\textsuperscript{28} Span. C. Civ. P., art. 578 provides that the permissible means of proof are: affidavits; public and sworn documents; private documents and correspondence; books of commerce; expert opinions; judicial inspection; and witnesses.
arbitrators may determine the order in which the parties will present their oral reports. This is the last phase in which the parties participate. The purpose of the hearing is to allow the parties to present to the arbitrators the arguments that, in view of the allegations of the other party and in light of the submitted evidence, they deem pertinent to the claim.

e. Decisionmaking

In the award, the arbitrators must settle all issues which had been submitted to them.

3. Award

a. Rendering the Award

The Law of 1953 provides that the arbitrators must adopt the award by a majority of votes. If a majority cannot be reached with respect to any of the issues, the submission is terminated.

The Law of 1953 does not specify whether "a majority" should be absolute or simple. This distinction is important if there are five arbitrators involved. Most authorities believe that a simple majority is required for two reasons. First, a simple majority is more likely to result in an award since it is less demanding than an absolute majority. Second, while the repealed law of arbitration contained in the Civil Code specified that the award had to be adopted by an absolute majority of arbitrators, the Law of 1953 is silent in this regard.29

b. Formal Requirements

The award must be rendered in the presence of a notary, so that he can give it public certification. Article 187 of the Reglamento Notorial determines the contents of the award and provides that the presence of a notary public is aimed at attesting to the identity of the parties and of the arbitrators. This is a formal requirement established by the Law of 1953 in order to mark the end of the arbitration process. Without passing judgment on the form or the merits of the award, the notary publicly attests that the award was rendered by the arbitrators in the course of de jure arbitration.

c. Content: The Principle of Conformity

The award should decide each and every one of the issues that have been submitted to arbitration. Arbitration safeguards the principle of conformity set forth in Article 359 of the Code of Civil Procedure, requiring that the award be consistent with the issues that arose in the dispute.

The correspondence or disparity between the issues arising from a dispute and the points of the award will determine the conformity of the award. A non-conforming award occurs in any of the following cases: 1) when the award grants more than what the parties requested; 2) when the award fails to resolve some of the disputed issues; and 3) when the award decides issues not raised in the dispute.

d. Time Limits

The award must be rendered within the time period provided for in the public deed of submission. The time period can be extended by agreement of the parties, which must also be embodied in a public deed. Therefore, the time period within which the arbitrators must render the award will be the difference between the time limit set forth in the submission and the time it took to complete the previous phases.

If the award is rendered after the expiration of the specified period, it may be challenged by any of the parties by the filing of the pertinent appeal.

30. The Spanish Code of Civil Procedure establishes that "decisions should be clear, precise and consistent with the complaints and other timely claims made in the lawsuit, making the declarations that these require, condemning or absolving the party being sued and deciding on those disputes that have been the object of debate." The judgment of the Spanish Supreme Court of March 16, 1987 indicates that the principle of congruence does not require "that the arbitrators should interpret the content of arbitration clauses narrowly, nor should such clauses be examined in isolation. Rather, they should keep in mind the totality of the transaction, in light of their antecedents, in order to explain the finality which brought the parties to the agreement."

31. The extension of the period initially set for the rendering of the award must be agreed to by the parties. Such agreement may take place at the initiative of the parties or at the insistence of the arbitrators. Otero Lastres, El Plazo para Dictar el Laudo Arbitral: Comentario a la Sentencia del Tribunal Supremo, Primera Sala, 20 de mayo de 1982, 1984 Revista de la Corte Española de Arbitraje 85.

32. According to Article 5 of the Civil Code, if the computation of the time period has not been otherwise established by the parties in the public deed of submission, and the time period, itself, has been fixed in days, the appropriate number of days shall be computed, including holidays; if the time period was fixed in months or years, the period shall be determined from a certain date to another. If the month in which the time period ends does not include a day equivalent to the day in which the period began, the period shall be deemed to expire the last day of the month.
e. Communication to the Parties

The Law of 1953 is silent as to how the award should be communicated to the parties. Scholarly opinions suggest that the parties must be notified of the award by the notary before whom the award was rendered. The date on which this communication is made should be ascertained in a reliable manner. The date the parties are informed of the award is important in order to ascertain the time period available for the filing of an appeal of the award.\(^3\)

J. Amiable Composition

In contrast to *de jure* arbitration, the procedure for the *amiable composition* does not have to comply with legal formalities or with substantive rules of law. However, the freedom of forms prescribed in Article 29 of the Law of 1953 is subject to some exceptions. This is evidenced by certain steps which must be observed.

The formalities that must be observed in the *amiable composition* are the following: 1) the arbitrators must grant the parties an adequate opportunity to be heard; 2) the parties must be allowed to submit evidence they deem necessary; 3) the award must be rendered in writing before a notary; 4) the award must be adopted by a majority of votes; and 5) the award must be rendered within the required time period.

As noted by legal commentators, the first two formalities are due to the principle of contradiction (*principio de contradicción*). This principle is an essential feature of Spanish procedural law. The third formality is required by the need to authenticate the award. The fourth formality is a result of the requirement that the arbitrators render the award by a majority of votes. The last formality requires that there be a fixed time period in which to render the award.\(^4\) This requirement is also established in *de jure* arbitration and serves to limit the powers granted to the arbitrators by the parties. The April 16, 1962 judgment of the Supreme Court

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33. The judgment of the Spanish Supreme Court of June 4, 1965 is relevant in this regard, for one cannot equate the date on which the award was rendered with the date on which the parties to the dispute acquired knowledge of it.

34. The December 6, 1984 judgment of the Spanish Supreme Court indicates that "the late rendering of the award taints it with nullity. The mandate of the arbitrator to settle the dispute has ceased, since he did not observe the period which was contractually fixed to carry out the function with which the arbitrator was entrusted." See also Judgments of the Spanish Supreme Court of February 2, 1983, and February 9, 1984, among others.
held that the procedure to be followed in the *amiable composition* is limited to the observance of the principle of contradiction and to the rendering of a minimally formal award. Likewise, the Supreme Court's decisions of October 13, 1966, February 18, 1968, and December 20, 1985 ruled that the awards rendered in the *amiable composition* need not furnish reasons nor explanations.

Since the only laws observed in the *amiable composition* are those stipulated by the parties in the public deed of submission, and since this type of arbitration is not governed by the rules of Spanish law, one must conclude that if the terms established in the public deed of submission or the formalities referred to above are not complied with, the arbitration is null and void. The nullification of the award may be requested by filing the pertinent appeal of the award.

**K. Recourse Against the Award in De Jure Arbitration**

1. Regulation

   Article 28 of the Law of 1953 provides that the award rendered in *de jure* arbitration may be set aside by a writ of cassation (*recurso de casación*), which is governed by Articles 1729 to 1736 of the Code of Civil Procedure. These articles govern the appeals against an arbitral award, pursuant to Law No. 34 of August 6, 1984, amending the Code of Civil Procedure.

2. Competence and Time Limit for Filing a Writ of Cassation

   The appeal must be filed with the First Chamber of the Supreme Court. The time limit for the filing of an appeal is twenty working days starting from the day the appellant is notified of the award. The notification procedure of the award must be reliable. If the appeal is not filed during this period, the award becomes final and no further appeal will be allowed. The time limit cannot be extended.

   In contrast to arbitration proceedings, the filing of an appeal and the proceedings during the development of the appeal take place before a judicial body with the mandatory intervention of an attorney and a solicitor (*procurador*).
3. Briefs

The Law of 1953 limits the type of documents that may be submitted in filing an appeal. The following documents set forth in Article 1731 of the Code of Civil Procedure may be filed:

a) the deed confirming the filing of the appeal;
b) the power of attorney;
c) a certified copy of the public deed of submission;
d) a certified copy of the award and the notification of the award to the appellant;
e) if applicable, a certified copy of the document or documents that permitted an extension of the time limit stipulated in the public deed of submission for the rendering of the award; and
f) the records and documents presented by the appellant in the course of the arbitration proceedings, provided that they were notarized along with the award.

4. Grounds for Appeal

The grounds which may support an appeal are the following:

a) the absence of essential formalities required for the rendering of the award and the arbitral proceedings, provided that the lack of observance of those formalities has resulted in violation of the appellant’s right to due process;
b) an error in the evaluation of the evidence, as shown by the documents which have been notarized together with the award and show the mistake incurred by the arbitrators;
c) a violation of the laws or the case law (jurisprudencia) applicable to the issues submitted to arbitration;
d) the rendering of the award after the time limit stipulated in the submission; and
e) the resolution of an issue not contemplated by or not falling within the terms of the submission, or the subject matter of the dispute is not susceptible of settlement by arbitration.35

The first three grounds are enumerated in sections (3), (4),

35. The March 21, 1985 judgment of the Spanish Supreme Court indicates that a dispute is non-arbitrable when the area is regulated by rules of public policy. This does not occur with the exercise of rights of private law, of which one can freely dispose or waive.
and (5) of Article 1692 of the Code of Civil Procedure, dealing with the grounds for the filing of a writ of cassation against judicial decisions. Those provisions must therefore be adapted to the requirements of the arbitration.

The fourth ground is related to the effects of rendering an award beyond the time limit provided for in the public deed of submission, or, if applicable, in any extensions.

The last ground results from the failure to observe the principles of arbitration procedure, such as the principle of conformity. The Law of 1953 does not include as a ground for appeal the fact that the arbitrator's award fails to settle disputes which were submitted by the parties to arbitration. There does not seem to be any apparent explanation for this omission, and it appears to be a sound conclusion that this might be another ground for the filing of a writ of cassation. This conclusion is supported by Article 1736 of the Code of Civil Procedure, which establishes the requirements for an appeal to the Supreme Court.

5. Procedure and Content of the Award

The appeal procedure for a writ of cassation provided in Article 1734 of the Code of Civil Procedure is subject to the provisions of the Law of 1953 to the extent that such procedure is consistent with the peculiarities of the arbitration procedure.

If the First Chamber agrees to hear an appeal complying with requirements set forth above, it must notify the notary before whom the award was rendered.

The content of the judgment that the Supreme Court may render pursuant to a writ of cassation is to a certain extent predetermined by Articles 1735 and 1736 of the Code of Civil Procedure.

The Law of 1953 contemplates that a judgment may supplant the award rendered by the arbitrators. As provided for in Article 1736, if the Supreme Court holds that the arbitrators have settled

36. The observance of this principle in the arbitral award must be appreciated in view of the circumstances of the concrete case. Thus, the June 13, 1985 judgment of the Spanish Supreme Court indicates that:
in light of the goal of arbitration, i.e., the settlement of the dispute, the interpretation of the issues submitted to arbitration cannot be done in a restrictive manner, precluding [the arbitrators'] liberty to settle the dispute with the amplitude that the agreement as a whole rationally demands.

disputes not submitted to arbitration, or that the arbitrators failed to settle disputes that were submitted to them, not only may the Supreme Court nullify those parts of the award ruling on issues that were not submitted to arbitration, but it may also decide issues that arose in the arbitration which the arbitrators failed to address in the award.

If the appeal is based on any other grounds and succeeds, Article 1735 of the Code of Civil Procedure provides that the arbitral award must be set aside.

The Court may assess the costs that have been incurred in the appeal procedure. Finally, the Court must notify the notary before whom the award was rendered of its decision.38

L. Challenging the Award in the Amiable Composition

1. Regulation

Article 30 of the Law of 1953 provides that a petition to set aside an award (recurso de nulidad) is the exclusive recourse against an arbitral award rendered by amiables compositeurs.

2. Competence and Time Limit for Filing a Petition to Set Aside an Award

The First Chamber of the Supreme Court is empowered to hear a petition to set aside an award. The time limit for filing a petition to set aside an award is twenty days after the parties are notified of the award.39

3. Briefs

The requirement for briefs that must accompany a petition to set aside an award rendered by amiables compositeurs is the same as that required for the writ of cassation. However, due to the informal nature of the amiable composition, a petition to set aside an award does not permit the appellant to introduce records of the

38. See Perez Gordo, El Recurso de Nulidad Contra el Laudo Arbitral, 339 REVISTA GENERAL DE DERECHO 1122 (1972).
39. As indicated in the May 25, 1979, and February 20, 1982 judgments of the Spanish Supreme Court, a recourse against the award cannot be utilized as an instrument to debate the merits and the greater or lesser correctness of the award, unless the award goes beyond the subject matter submitted to arbitration.
proceedings upon which the award was rendered.

4. Grounds for a Petition to Set Aside an Award

Article 1733 of the Code of Civil Procedure establishes the only grounds for a petition to set aside an award rendered in the amiable composition. These are:

a) nullity of the submission or judicial confirmation of a preliminary arbitration agreement;

b) if the award was rendered after the period provided for in the submission, or any extension has expired;

c) if the award deals with issues that were not submitted to arbitration or are not capable of being settled by arbitration; and

d) if in the course of the arbitration proceedings, the party bringing the appeal was not afforded the opportunity to be heard or to submit evidence.  

5. Procedure and Content of the Decision

The notary before whom the award was rendered must be notified of the admission of a petition to set aside an award and the resulting decision.

Articles 1735 and 1736 of the Code of Civil Procedure apply to a petition to set aside an award. Thus, if the petition is based on the inclusion or exclusion of issues that were submitted to the arbitrators, the decision must deal exclusively with such disputes. On the other hand, if a petition to set aside an award was based on any other ground, the award must be set aside.

40. The grounds for filing an appeal in the amiable composition are more limited than those allowed in de jure arbitration in view of the concordance and harmony that the legislature sought to foster with the amiable composition. See Judgments of Spanish Supreme Court of Jan. 21, 1961 and Nov. 14, 1984.

41. See Judgments of the Spanish Supreme Court of October 18, 1962, October 9, 1984, and September 17, 1985, which held that jurisdictional organs of public law cannot settle disputes other than those the litigants submit to their decision. "Incongruity" (incongruencia) will result if they decide other disputes.
M. Enforcement of the Award

1. Procedure

Once the arbitration award has become final, either because the time established to file a writ of cassation or a petition to set aside an award has expired, or because the appeal has been dismissed, the final phase of the arbitration process is the enforcement of the award. This procedure is aimed at making effective the decisions of the arbitrators.

The enforcement of the award calls for the assistance of the State’s judicial institutions. On November 11, 1960, the Supreme Court ruled that enforcing compliance with the award requires the exercise of the “imperium” which is reserved to State judicial institutions. Article 31 of the Law of 1953 provides that the Judge of First Instance of the place of arbitration has jurisdiction to hear the petition for enforcement of the award. This article provides that enforcement of an arbitral award must be carried out in the same manner established by law for enforcement of judgments.42

2. Provisional Enforcement

Article 31 of the Law of 1953 provides that the interested party may request provisional enforcement of the award by the Judge of First Instance. Provisional enforcement may be carried out even if a petition to set aside an award or a writ of cassation is pending. The provisional enforcement is subject to the posting of an adequate bond covering the costs and damages that a provisional enforcement may cause. If the award becomes final, either because no appeal is pending or because the appeal was dismissed, the proceedings for enforcement of the award must be confirmed and ratified. If the appeal is admitted and the award is set aside, the proceedings for enforcement of the award must also be set aside.

III. Weaknesses of the Law of 1953

The years that have elapsed since the promulgation of the Law of 1953 permit an evaluation of this law from a practical point

42. The procedure is governed by the Span. C. Civ. P., arts. 919-1850. See Judgment of the Spanish Supreme Court of July 12, 1985.
A. Appointment of Arbitrators

The Law of 1953 expressly prohibits deferring the appointment of the arbitrators to one of the parties or a third party. Contrary to what is allowed by other legal systems, it is impossible for an arbitrator appointed by the parties to name other arbitrators. This lack of authority becomes important if one of the arbitrators is unexpectedly incapacitated, resigns, or dies. In such a case, the parties must enter into another agreement for the purpose of appointing a substitute arbitrator. This procedure delays arbitration.

Another impediment is the prohibition of institutional arbitration, thus excluding the participation of the Chamber of Commerce. This prohibition deprives Spain of the advantages commonly associated with institutional arbitration. It is widely acknowledged that arbitration which is entrusted to a specialized institution guarantees a certain stability and efficiency. The advantage of institutionalized arbitration has been recognized by Spanish law. However, such recognition has been limited to international arbitration.

According to Royal Decree 1094/81, of May 22, 1981, the Official Chambers of Commerce, Industry and Shipping (Cámaras Oficiales de Comercio, Industria y Navegación) may provide arbitration services pursuant to agreements entered into between natural persons and juridical entities which live, reside, or are located in different states. Accordingly, the Superior Council of the Chamber of Commerce (Consejo Superior de Cámaras de Comercio) created the Spanish Court of Arbitration (Corte Española de Arbitraje). According to the Law of 1953, the jurisdictional scope of the Spanish Court of Arbitration is limited to international arbitration. This scope may be broadened to encompass domestic com-

43. It has been stated that:

... the prohibition against institutional arbitration is a historic and anachronistic relic of the Law of 1953. With the Constitution of 1978, such prohibitions are devoid of any meaning. The current legal system is based on the individual and the autonomy of the free will. Thus, if the parties, by mutual agreement, entrust the settlement of their disputes to the persons or institutions that deserve their confidence, it is logical for the law to support such an agreement.

mercial arbitration as soon as the prohibition against institutional arbitration is lifted.

B. Procedural Inefficacy of the Arbitration Clause

The most important weakness of the Law of 1953 is the procedural posture of the arbitration clause. This is probably the major reason why institutional arbitration in Spain has failed to achieve the significance and development experienced in other countries.

Historically, under the Law of 1953, once a dispute arose, either party could evade arbitration (despite the existence of an arbitration clause or preliminary arbitration contract). They could simply turn to the courts instead of requesting the judicial confirmation of the submission, because the Law of 1953 only acknowledges the legal effects of an arbitral clause as a defense (excepción dilatoria o defensa previa) once it has been judicially confirmed. The arbitration clause, as such, could not be raised as a defense in a suit brought by one of the parties to the arbitration clause on the same matter.44 The consequence of this legal situation was that the arbitration clause did not guarantee that once the dispute arose it would in fact be submitted to arbitration.

However, in its judgment of September 15, 1986, the Spanish Supreme Court ruled in favor of conferring legal effect on arbitration clauses. According to this judgment, the binding effect of the arbitration clause must be determined in accordance with the legislative intent to strengthen the efficacy of the arbitration clause. This interpretation precludes the possibility that one of the parties may withdraw unilaterally from its commitment to arbitrate. As a result of this judgment, under the Law of 1953, an arbitration clause between the parties excludes the jurisdiction of the courts to entertain the subject matter of the arbitration.

C. Default

Under the Law of 1953, the inactivity or default of one of the parties in the pleadings phase may result in termination of the arbitration. The Law of 1953 does not provide for any mechanism for the continuation of ex parte arbitral proceedings in case of default.

44. This result was confirmed by case law developed under the Law of 1953. See Judgments of the Spanish Supreme Court of Feb. 18, 1974, May 3, 1975, and Oct. 11, 1979.
D. Possible Nonexistence of the Award

Under certain interpretations, the requirement that the award be rendered by a majority of votes may lead to frustration whenever a simple plurality of arbitrators agree on the award.

E. Failure to Regulate Award Notification Procedures

The date on which the parties are notified of the award determines the time limit for the filing of appeals. The importance of the matter calls for a detailed regulation of the notification procedures, the absence of which is conspicuous in the Law of 1953.

F. Failure to Provide for Interim Protective Measures

The Law of 1953 is silent as to the adoption of interim protective measures which would ensure the enforcement of an arbitration award.

G. Recourse Against the Award

Under the Law of 1953, the parties may appeal an arbitral award to the Spanish Supreme Court on practically the same grounds as those for appeals of judicial decisions. If arbitration is a procedure freely chosen by the parties as an alternative to litigation, it is advisable to limit the number of appeals that may be brought against an award, thereby ensuring the finality of the process. An alternative would be to limit the appeal to cure such basic violations of law as violations of due process or rules of public policy. 45

H. Discrepancy Between the Law Governing Domestic and International Arbitration

The Law of 1953 was passed during a period of Spanish history dominated by autocracy and international isolation. Spain later ratified two important conventions on international arbitra-

45. Article 1256 provides "the validity and performance of contracts cannot be left to the discretion of one of the parties." See De Angel, La Práctica del Requerimiento Notarial abre la Formalización Judicial del Compromiso y por Tanto Determina el Momento en que Puede Oponerse la Excepción de Incompetencia de Jurisdicción, La LEY, No. 1936, Nov. 6, 1987.
This situation resulted in a disparity between the domestic law of arbitration and the rules applicable to international commercial arbitration.

IV. THE NEW ARBITRATION ACT OF 1988

The Ministry of Justice prepared a new Arbitration Act (the "Act") which was passed on December 5, 1988. The Act replaced the Law of 1953 as the governing statute on Spanish arbitration.

A. General Provisions

1. Scope of Application

Arbitration is a right enjoyed by all natural persons or legal entities for the settlement of disputes that arise in the course of their legal relations, provided that the subject matter of the dispute is capable of being settled by arbitration.

Whereas the scope of the Law of 1953 was circumscribed to the arbitration of disputes of civil and commercial law, the Act enlarges the scope of application of arbitration so that it only excludes labor matters. Thus, labor arbitration continues to be governed by its specific laws.

2. Supervening Arbitration

In contrast to the Law of 1953, the Act provides for the possibility of supervening arbitration (arbitraje sobrevenido). This means that the parties may submit a dispute to arbitration even though the case had been brought before the courts and a decision has been rendered on the matter. As long as the decision has not become final and there is a possibility of appeal, the parties may refer the case to arbitration.


47. Supra note 5.
3. Dual Modes of Arbitration

The Act keeps the distinction between *de jure* arbitration and the *amiable composition*. However, it provides that if the parties have not expressly chosen the type of arbitration, it will be presumed that they have chosen the *amiable composition*. This is contrary to the principle established by the Law of 1953. Since *de jure* arbitration calls for greater rigor and formality, this type of arbitration will only be applicable when expressly chosen by the parties. The only exception to this general rule arises when the parties entrust the arbitration to an association or corporation. In such case, the arbitration rules of that organization apply.

B. The Arbitration Agreement

1. Disappearance of the Dichotomy Between the Preliminary Contract and the Submission

The distinction between the arbitration clause (*cláusula compromisoria*) or preliminary contract and the submission (*compromiso*) is eliminated by the Act. The Act only contemplates the legal effects of the so-called "arbitration agreement" (*convenio arbitral*).

2. Nature of Arbitration Agreement

The arbitration agreement is an accord by which the parties promise to submit all disputes that arise between the parties to arbitration. This agreement must be in writing and may be either incorporated into a principal contract or entered into separately. It can be entered into before or after the dispute has arisen.

3. Autonomy of the Arbitration Agreement

The Act provides that the nullification of the contract does not nullify the arbitration agreement. This puts an end to the long-standing controversy as to whether the nullification of the main contract extends to all the elements or clauses contained therein, including those clauses which are alien to the purpose of the contract. The Act thus establishes the autonomy of the arbitration clause with regard to the main provisions of the contract. A party may allege that the contract is null and void and still resort
to arbitration in order to have such nullity declared by the arbitrators.

4. Principle of Freedom of Form

From the point of view of formality, the arbitration agreement under the Act is much simpler than the submission under the Law of 1953. The Act does not require the arbitration agreement to be executed in a public deed, only that it be in writing. Nor does the Act establish a certain minimum content for the arbitration agreement. If the parties have failed to provide for the appointment of arbitrators in the arbitration agreement or have not specified the procedural rules governing the arbitration, they may subsequently enter into other agreements addressing those issues.

5. Possibility of Deferring the Appointment of Arbitrators to a Third Party and the Acceptance of Institutional Arbitration

One of the major changes in the Act is that it allows the parties to defer the appointment of arbitrators to third persons. It also recognizes institutional arbitration. The Act allows the appointment of arbitrators and the administration of arbitration to be carried out by associations, non-profit organizations whose by-laws provide for arbitration functions, and corporations of public law authorized to carry out these functions. The possibility therefore arises for Chambers of Commerce to carry out arbitration functions in Spanish domestic matters.

The Act provides adequate safeguards in nullifying the arbitration agreement if one of the parties stands in a privileged position regarding the appointment of arbitrators.

6. Enforceability of the Arbitration Agreement

The Act recognizes the enforceability of the arbitration agreement. This legal effect is analogous to the one conferred on the submission by the Law of 1953. The Act also provides for a presumption that the parties waive their right to arbitrate where one of the parties initiates judicial proceedings and the other fails to invoke the existence of the arbitration agreement at the first procedural opportunity.
C. The Arbitrators

1. Qualifications

The Act maintains the inability of legal entities to act as arbitrators. The ability to act as an arbitrator is reserved to natural persons who are in full exercise of their civil rights. The arbitrators may not be related to any of the parties nor to the subject matter of the dispute in any way which may give rise to justifiable doubts as to their impartiality. They may not be judges, magistrates, prosecutors or occupy a public office remunerated by fees (*retribuída por arancel*). In *de jure* arbitration, the arbitrator must be a practicing attorney.

2. Appointment and Acceptance

The appointment of arbitrators, or the agreement concerning the mode of designating the arbitrators, may be included in the arbitration agreement or in subsequent agreements. Where the parties have failed to provide for their appointment, the appointments may take place in the course of judicial proceedings confirming arbitration. If the parties fail to agree on a method of appointment, the judge will proceed to appoint the arbitrators through a lottery among the list of practicing lawyers.48 This list is submitted annually by the Bar Association of the corresponding jurisdiction. If a lottery cannot be held, the judge may then freely designate the arbitrators, taking into account the proposals advanced by the parties.49

If the parties have entrusted the appointment of arbitrators to an institution, the appointment of arbitrators is carried out in accordance with the bylaws of such institution. The mandatory qualifications of arbitrators set forth in the Act must be respected.

The appointment must be communicated to the arbitrator in writing and in a reliable manner (*fehacientemente*). The arbitrator

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48. The arbitrators must meet the following requirements: they must have voluntarily offered to serve as arbitrators; they must have practiced their profession for more than five years; they must not have failed to fulfill their obligations in former arbitration proceedings. Also, they must not have any unfavorable marks in their professional records.

49. In case of *de jure* arbitration, the Act provides that the arbitrators to be appointed must be practicing attorneys. In the *amiable composition*, they must be associated professionals (*profesionales colegiados*) selected from lists compiled by professional associations, Chambers of Commerce, Industry and Shipping or any other corporations.
must accept the appointment within fifteen days after notification. This mechanism does away with the need of notarial intervention for the acceptance of the appointment. If the arbitrator fails to respond within the given period, it is presumed that he does not accept the appointment.

If for any reason an arbitrator fails to fulfill his function and a new appointment becomes necessary, the same mechanism is followed to designate a substitute arbitrator.

3. Number

There must be an odd number of arbitrators. It is up to the parties to determine whether the arbitral tribunal will be composed of three or five arbitrators. Failing such determination, the number of arbitrators is three. In an proceeding with three or more arbitrators, the Act provides for the appointment of a president and secretary of the arbitration tribunal.

4. Relationship Between the Parties and the Arbitrators

The acceptance of the appointments by the arbitrators establishes the legal relationship between the arbitrators and the parties. The arbitrators are bound to fulfill their functions. The Act provides that if an arbitrator fails to fulfill his obligations, he may be held accountable for ensuing damage. In contrast to the Law of 1953, the Act limits the arbitrators' liability to those circumstances in which their failure to act is due to fraud or inexcusable negligence. If the arbitration has been entrusted to an association or corporation, then the organization is liable, without prejudice to the action that the organization may bring against the natural persons that have acted as arbitrators.

Unless otherwise agreed, the arbitrators are entitled to remuneration.

5. Grounds for Challenge

The Act provides for the same grounds for challenge of arbitrators as were provided by the Law of 1953. However, it is expressly stated in the Act that an arbitrator may be challenged only for grounds arising after his appointment, or for reasons of which the challenging party becomes aware after the appointment has
been made, or when the challenging party did not participate in the appointment of the arbitrator. Arbitrators must disclose any circumstances likely to give rise to challenge as soon as they receive notification of their appointment.

If the affected arbitrator resigns, a new arbitrator is appointed in his stead. If he does not resign, the arbitration proceedings continue. However, after the award has been rendered, the challenging party may file a petition to set aside an award on the same grounds previously invoked to challenge the arbitrator.

6. Governing Principles

The governing principles of the arbitration process under the Act are the principles of hearing (audiencia), adversariness (contradicción) and equality (igualdad). The parties are free to agree on the procedure to be followed. The rules adopted by an arbitral institution govern the arbitration administered by such institution.

7. Default

The Act expressly provides that the default or inactivity of one of the parties does not preclude the continuation of the arbitration nor the rendering of the award. Nor will the default affect the enforceability of the award, provided that the arbitrators have notified the parties of the commencement of the arbitration process in a reliable manner. The arbitration proceedings are deemed to commence when any of the parties submits its pleadings (alegaciones) for the first time.

8. Objecting to the Arbitration and its Effects

In case the arbitrators uphold the objections to the arbitration brought by any of the parties during the pleadings phase, whether based on the lack of arbitral jurisdiction or the nonexistence, nullity or lapse of the arbitration agreement, then the arbitration is deemed terminated (queda sin efecto). At that point, any of the parties may appear before a court of competent jurisdiction for the settlement of the dispute.

If the arbitrators overrule the objection raised against the jurisdiction of the arbitral tribunal, the arbitration process continues its course. After rendering of the award, the party whose objection
was overruled may request that the award be set aside on that ground.

9. Place of Arbitration and Language of the Proceedings

Failing agreement of the parties, it is the responsibility of the arbitrators to inform the parties of the place of arbitration and the language to be used in the arbitral proceedings. The arbitrators are not permitted to use a language that none of the parties know, or that is not recognized as an official language in the place of arbitration.

10. Phases

The various phases of the arbitration proceeding are comprised of the initial pleadings, the submission of evidence that the arbitrators deem pertinent, and a hearing after submission of evidence, if the arbitrators deem it necessary.

Unless otherwise agreed, the arbitrators are not subject to a fixed time limitation for carrying out these phases. However, the pleadings must be filed within the time fixed by the arbitrators.

D. The Award

1. Time Limits for Rendering the Award

The period established for rendering the award is six months from the date of acceptance of the arbitrators' appointment or from the date of the appointment of the last substitute arbitrator. The parties may extend this period, in which case the arbitrators must be informed of the extension before the initial six month period has expired.

If the award is not rendered within the specified period, the arbitration agreement terminates and the parties may then resort to the courts to settle their dispute.

2. Voting, Content, and Communication Requirements

The award must be adopted by a majority of votes. The president of the arbitral tribunal has the deciding vote in case of a tie or if the arbitrators cannot reach the required majority. The decision must be rendered in a writing signed by the arbitrators and
must set forth the reasons for the decision.\textsuperscript{50}

As to its minimum content, the award must state the following particulars: name and personal data about the arbitrators and the parties; the place where the award was rendered; the dispute submitted to arbitration; the pleadings of the parties and the arbitrators; and the arbitrator's decision and its reason.

The award must be notarized and communicated to the parties in a reliable manner. The award becomes effective at the moment the parties are notified.

3. Waiver and Suspension

The parties may agree to waive (desistir) or suspend the arbitration before the rendering of the award.

In the case of waiver, the parties are deemed to cancel the arbitration agreement, so that they may resort to the courts to settle their dispute. In contrast, if the arbitration is suspended, the arbitration agreement continues to have effect, and the parties may not resort to the courts to settle their dispute.

4. Costs

The award must set forth which party will bear the costs of arbitration. If none of the parties has acted with malice, each party is responsible for his expenses, and the payment of common expenses is shared by the parties.

5. Corrections and Clarifications

Within five days following notice of the award, a party may request the arbitral tribunal to correct computations and any clerical or typographical errors, to clarify any ambiguity, or to make any additional award.

The arbitrators decide on this petition within the following ten days, notarizing their decision and informing the parties of the decision in a reliable manner. If the arbitral tribunal fails to decide on this petition within the indicated period, the request is deemed denied.

\textsuperscript{50}. However, the Act provides that the award shall not be unenforceable because some of the arbitrators were not able or refused to sign it.
6. Effects

The final award is given the same effect as *res judicata*, against which only an extraordinary writ (*recurso extraordinario de revisión*) is available. Thus, arbitral awards are given the same effect as final judgments.

**E. Court Intervention in Arbitration**

1. Judicial Confirmation of Arbitration

The Act retains the procedure of judicial confirmation of arbitration, but some variations are introduced due to the elimination of the submission. Thus, the parties must request the judicial confirmation of the arbitration agreement if they have failed to agree on the appointment of the arbitrators.

However, the judicial confirmation does not take place if the arbitrators do not accept their appointment, or if they become incapacitated, or if the association or corporation to which the administration of the arbitration was entrusted fails to accept it. If the parties do not reach agreement as to how to proceed with the arbitration, either party may resort to the courts to settle the dispute.

The procedure for judicial confirmation of the arbitration agreement must be in writing. The parties indicate the reasons for the lack of agreement, and attach the documents related to the arbitration agreement. The judge summons the parties for the purpose of encouraging them to reach an agreement concerning the appointment of arbitrators. Failing agreement of the parties, the previously mentioned lottery for the appointment of arbitrators takes place. The arbitrators thus chosen are notified of their appointment and are ordered to commence arbitration.

Once the procedure of judicial confirmation has begun at the request of one of the parties, the default of the other party does not stop the arbitration process. If the party that requested the confirmation fails to appear, his claim is dismissed and costs are awarded to the other party. However, the arbitration agreement is confirmed if the other party manifests an interest to go ahead with the arbitration.

The judge may reject the petition for judicial confirmation only if the judge firmly believes that the parties are not genuinely
interested in submitting the dispute to arbitration. This determination may be reached only in light of the terms of the arbitration agreement. The refusal to grant the judicial confirmation of the arbitration is subject to appeal, but the granting of judicial confirmation is not.

2. Production of Evidence

Where arbitrators enlist the aid of a judge to compel the production of evidence which would not otherwise be allowed in arbitration, the judge will apply the rules established in the Code of Civil Procedure regarding evidence in the judicial process. The judge may only deny judicial aid in compelling production of evidence in cases the judge considers to be contrary to law.

F. Petition to Set Aside an Award

1. Grounds

The grounds for setting aside an award are the following:

a) nullity of the arbitration agreement;

b) if the award is contrary to public policy;

c) if the award was rendered after the established period has expired;

d) if the appointment of arbitrators or the arbitral proceedings fail to comply with the essential formalities and requirements; and

e) if the award deals with a dispute not contemplated by the arbitration agreement or with matters not capable of being settled by arbitration; if possible, only that part of the award which contains decisions on matters not submitted to arbitration or not capable of being settled by arbitration is set aside.

2. Procedure

A petition to set aside an award may be brought only by the parties to the arbitration. The petition must be in writing and include the evidence deemed pertinent by the applicant. The appli-

51. The decision of the Court of Appeals (Audiencia) is unappealable and the issues that have been the object of the debate may not be raised as grounds for setting aside the award.
cation must be filed with the Court of Appeals by a lawyer or solicitor within ten days after the notification of the award or of any clarification or additional award requested by the parties. Documents related to both the arbitration agreement and award must be attached to the petition.

A petition to set aside an award must conform to the principle of adversariness which calls for the intervention of both parties, who are entitled to submit evidence. The decision of the Court of Appeals on the petition to set aside an award is not subject to appeal.

3. Interim Protective Measures

The filing of petition to set aside an award entitles the other party to request in writing the adoption of interim protective measures, so that the enforceability of the award can be assured should the petition be denied. Thus, the Act seeks to preclude the use of a petition as a means to delay the rendering of the award or as a delay tactic by the losing party.

Approval of the interim measures protects the requesting party from any injuries and damages that may result. If the adoption of such interim measures is approved, they will remain in place until such time as the appeal for annulment of the award has been resolved.

G. Enforcement of the Award

1. Limits

This phase is subsequent to the arbitration procedure and is only triggered when the parties fail to honor the award. The enforcement provisions of the Act are limited to those situations in which the enforcement falls under the jurisdiction of Spanish Courts.

2. Prerequisites

In order to petition for enforcement of an award, ten days must pass from the date of notification of the award or of any clarifications of the award from the arbitrators. This period is provided to allow for the filing of the different means of recourse against the award.
3. Procedure

The enforcement must be requested in writing together with a certified copy of the award, certified copies of the notification of the award to the parties and of the arbitration agreement, as well as a certified copy of the judicial decision denying an appeal against the award, if applicable.

The procedural mechanisms provided for in the Code of Civil Procedure for the enforcement of judicial decisions apply to the enforcement of arbitral awards.

4. Grounds for Suspension of and Refusal to Enforce

The judge must order the enforcement of the award, unless the other party opposes the enforcement on the basis of having filed a petition to set aside an award. In such case, the judge must stay the order of enforcement pending the outcome of the application. If the application is upheld and the award is set aside, then the judge must refuse the enforcement. The court's grant or denial of enforcement is not subject to appeal.

H. Enforcement of Foreign Arbitration Awards

1. Preliminary Considerations

The regulation of the enforcement of foreign arbitral awards by the Act is unprecedented in Spanish law. Previously, enforcement was subject to the rules established in Articles 951 through 958 of the Code of Civil Procedure on the enforcement of foreign judicial decisions.52

2. Foreign Arbitral Awards

A foreign arbitration award is defined as an award which was not rendered in Spain.

52. Regarding this subject, see A. Remiro, Ejecución de Sentencias Arbitrales Extranjeras en España (1980); Lopez Antón, Ejecución en España de Laudos Arbitrales Extranjeros, La Ley, No. 1223 (1985).
3. Rules Applicable to Enforcement

The enforcement of foreign arbitral awards is primarily governed by the norms in this area for enforcement contained in the applicable international treaties, if any. Only in the absence of an applicable international treaty will the rules contained in the Act apply.

4. Jurisdiction and Procedure

As in the Law of 1953, the Act, in accordance with Articles 955 to 958 of the Code of Civil Procedure, provides that the First Chamber of the Supreme Court is the court of competent jurisdiction to enforce foreign arbitral awards.

5. Correction of Clerical Mistakes

The Act provides that if enforcement is denied due to formal defects in the petition, the interested party may cure the mistakes and renew the petition for enforcement of the award.

6. Grounds for Refusal to Enforce

The Act provides a limited number of grounds upon which the court may deny enforcement. The Act distinguishes between those grounds for refusal that the Chamber may raise sua sponte, and those that can only be raised by the interested parties or the public prosecutor. Thus, enforcement may be refused if the court finds that:

   a) the award is contrary to Spanish public policy; or

   b) the award deals with issues that are not capable of being settled by arbitration under Spanish law.

The enforcement may also be refused if a party to the arbitration agreement furnishes proof that:

53. In conformity with Article 1, section 5 of the Civil Code, "the provisions of international treaties shall not be directly applicable in Spain as long as they have not become part of the internal legal system through their publication in the Boletin Oficial del Estado." Article 96 of the Constitution establishes that "the international treaties which have been validly concluded, once officially published in Spain, shall become part of the internal legal system."
a) the arbitration agreement is null and void under the applicable law;

b) the arbitration failed to observe essential requirements established by the applicable law with respect to the appointment of the arbitrators and the arbitral proceedings; and

c) the award deals with disputes that were not submitted to arbitration, in which case, only that part of the award is not enforced.

The grounds for refusing to enforce a foreign arbitral award coincide with those allowing the setting aside of awards rendered in Spain.

I. Conflict of Law Rules

1. Legal Capacity of the Parties to Enter into Arbitration Agreements

The legal capacity of the parties to enter into an arbitration agreement is governed by the national laws applicable to the subject matter of the dispute.

2. Validity and Enforcement of Arbitration Agreements

The validity and enforcement of an arbitration agreement must be determined in light of the law applicable to such agreement.

The criteria to be followed in ascertaining the applicable law are the following:

a) the law chosen by the parties applies, provided that it has some connection with the primary legal relationship or subject matter of the dispute submitted to arbitration;

b) failing agreement of the parties, the law applicable to the main legal transaction applies; and

c) in default thereof, the law of the place in which the award is to be rendered, or if that place has not been determined, the law of the place in which the parties entered into the arbitration agreement.
3. Rules Applicable to the Arbitration Proceedings

The rules applicable to de jure arbitration are determined in conformity with the following criteria:

a) the rules chosen by the parties apply provided they have some connection with the main legal relationship or with the subject matter of the dispute;

b) failing agreement of the parties, the law applicable to the main legal transaction applies; and

c) in default thereof, the law that the arbitrators deem the most appropriate under the circumstances applies.

4. Subsidiary Rules

Issues of private international law not expressly contemplated in the Act are governed by the rules of private international law established in Chapter IV of the First Title of the Civil Code (Articles 8-12).

The rules provided for in the Act apply in the event that the pertinent international treaties fail to address the issues under consideration.

The Act applies to all arbitrations which had not begun by the date the Act comes into force, even though the arbitration agreement, or the preliminary contract of arbitration had been concluded prior to the effective date of the Act.

V. SPECIAL LEGISLATION ON COMMERCIAL ARBITRATION

Spanish law provides for the arbitration of disputes arising within specific contexts, such as consumer protection, insurance, and transportation.

A. Consumer Protection Legislation

Law No. 26 of July 19, 1984, Ley General para la Defensa de Consumidores (the "Consumer Law") provides for a special arbitration procedure to settle disputes that arise in the area of consumer protection. Article 31 of the Consumer Law provides:

[T]he Government shall set up an informal arbitration system for the settlement of the complaints brought by consumers, pro-
vided that the dispute does not involve the intoxication, injury, death, or the commission of a crime, and without prejudice to the administrative or judicial protection to be provided pursuant to Article 24 of the Constitution.

This arbitration procedure is not regulated by the Act, and it is subject only to the will of the parties manifested in writing.

The arbitral tribunal is composed of representatives of interested groups, consumer protection organizations and concerned public administrative agencies.

Since its adoption in the Consumer Law, this system of arbitration has been of little practical application.54

B. Insurance

Article 34 of Law No. 33 of August 2, 1984, Ley de Ordenación del Seguro Privado (the "Insurance Law"), concerning private insurance, establishes a dual system of conciliation and arbitration for the settlement of disputes arising between the parties to insurance contracts.

As to arbitration, Article 34(3) of the Insurance Law:

establishes that the parties to an insurance contract may enter into an arbitration clause in order to settle through arbitration those issues arising out of the interpretation, application and enforcement of insurance contracts. The conduct of the arbitration shall be governed by the Law of Private Arbitration and the award shall be final and enforceable.

Article 110 of the Insurance Regulations, approved by Royal Decree 1348/85 on August 1, 1985, provides that arbitration of insurance matters may either be de jure or the amiable composition. In any case, the arbitral proceedings are governed by the provisions of the Law of 1953.

It is worth pointing out that the Insurance Law provides for the settlement of disputes through conciliation procedures, which are governed by the rules applicable to the amiable composition.

54. Regarding arbitration in this special legislation, see Roca, El Arbitraje Como vía para Resolver los Litigios de los Consumidores y Usuarios, 1985 REVISTA DE LA CORTE ESPAÑOLA DE ARBITRAJE 105.
C. Transportation

Similar to the consumer protection legislation, Law No. 16 of July 30, 1987, Ley de Ordenación de los Transportes Terrestres (the “Transportation Law”) provides for settlement of disputes through an arbitration procedure of an administrative nature.

Articles 37 and 38 of the Transportation Law provide that the arbitration will be administered by the transport arbitration tribunals (Juntas Arbitrales del Transporte). These tribunals are composed of representatives of the Administration (from which the presiding arbitrator is chosen), management, and labor organizations. The settlement of disputes, as well as their coordination, is under the direction of the General Office of Transportation (Dirección General Transportes Terrestres), under the jurisdiction of the Minister of Transportation, Tourism and Communications (Ministerio de Transportes, Turismo y Comunicaciones).

Unless otherwise provided, the transport arbitration tribunals settle disputes arising between the parties to a land transport contract, provided that the amount in controversy does not exceed 500,000 pesetas. For disputes involving a larger amount, arbitration is permitted only if it has been expressly provided for by agreement of the parties.

The arbitration procedure is established by the Government, but the procedure must be informal.

An award rendered by a transport arbitration tribunal has the same effect and efficacy as other arbitral awards.

The Arbitration Act of 1988 includes a set of additional provisions referring to the arbitration procedures contemplated by the consumer, insurance and transportation laws. The first additional provision states that the Act fills the gaps left by those special laws. The second additional provision refers specifically to the arbitration provided for in the Consumer Law. According to this provision, the arbitral clauses included in consumer contracts must be clear and explicit to be valid. It also states that “the refusal of consumers to enter into an arbitral clause different than that provided for in Article 31 of this Law shall not prevent the execution and enforcement of the principal contract.”

VI. Conclusion

To date, commercial arbitration in Spain has not fully devel-
opend into an alternative means of dispute resolution as in other Western legal systems.

Arbitration, in the Spanish commercial context, has not caught on, due, in large measure, to the absence of adequate legislation that responds to the needs of commercial trade. There is a consensus among Spanish businessmen that commercial arbitration should become the most practical means of settling disputes because of its advantages over litigation.

The Arbitration Act passed in 1988 is more accommodating to the needs of modern commercial trade. This Act has incorporated elements necessary to imbue arbitration with the efficacy that it has traditionally lacked, the absence of which has prevented arbitration from assuming the role it deserves in the Spanish legal system.

Spanish legislative efforts to improve arbitration mechanisms may serve as a reference guide for those countries where arbitration still lacks a flexible normative framework, or whose arbitration laws have proven to be inadequate to cope with the demands arising in the course of commercial transactions.