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Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

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- Leading cases of other Swiss Courts
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- Notices of publications and reviews

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Annulment of Commercial Arbitral Awards by State Courts

A Comparative Study of Spain and Switzerland

ALEX LEVIN CANAL, VANESSA ALARCÓN DUVANEL*

Spain – Switzerland – Arbitration – Annulment proceedings – Public policy – Spanish Arbitration Act – Swiss Private International Law Act – Comparative analysis

I. Introduction

Switzerland is one of the leading places for arbitration world-wide. In 2019, Switzerland was the third most frequently chosen seat in the world for arbitrations conducted under the aegis of the ICC (12.1%), after the United Kingdom and France.[1] Among the factors making Switzerland a top choice for arbitration are its arbitration-friendly legislation and courts and its tradition for neutrality. Spain, on the other hand, has a more recent arbitration history. Its favorable legal framework and a dynamic arbitration community are driving a successful growth. Madrid comfortably appears in the top ten most frequently selected cities of the ICC ranking, presently in the seventh position (2.3%).[2]

What distinguishes a consolidated and an emerging seat of arbitration? Among other factors, the deference domestic courts show in annulment proceedings. In this regard, the success rate in annulment actions is 7.65% in Switzerland and 21% in Spain.[3] Considering that Spain and Switzerland share

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1 *International Chamber of Commerce (ICC) – Dispute Resolution 2019 Statistics*, available at: www.iccwbo.org/dr-stat2019, at 28.

2 *Id.*

3 Felix Dasser & Piotr Wójtowicz, *Swiss International Arbitral Awards Before the Federal Supreme Court – Statistical Data 1989-2019*, ASA Bulletin, Vol. 39, No. 1, 2021, p. 7-41; *Observatorio de Arbitraje en España – Año 2018*, Primera Edición, Fieldfisher Jausas, available at: https://www.fieldfisher.com/ca-es/locations/espana/observatorio-de-arbitraje-en-espa%C3% B1a-2018, at 8.

a similar legal framework for international arbitration but show a widely divergent success rate in setting aside proceedings, what judicial decision-making and reasoning underlies these numbers?

This article compares the statutory framework and body of case-law in annulment actions of commercial arbitral awards and seeks to identify key differences in the application by Spanish and Swiss courts of similar arbitration legislation. It compares the Spanish and Swiss grounds for annulment grouped in the order of the UNCITRAL Model Law.

This paper is divided in five sections. Leaving behind this Introduction, section II compares the Spanish and Swiss arbitration legislations (overview of the act and annulment procedure). Section III then presents a comparative analysis of the body of case-law in annulment actions and, section IV offers a statistical comparative analysis of the success of annulment actions, before the conclusion in section V.

II. National Legislation

Both Spain and Switzerland have sophisticated and modern arbitration laws and share a similar legislation despite following a monistic (Spain) and dualistic (Switzerland) approach respectively. Spain, mirrorring the 1985 UNCITRAL Model Law, follows a monistic approach and both domestic and international arbitrations are governed by the Spanish Arbitration Act ("SAA") from 2003.[4] In contrast, Switzerland's international arbitration law, following a dualistic approach, is governed by Chapter 12 of the Swiss Private International Law Act ("PILA") from 1989.[5] Although the PILA is not modeled after the UNCITRAL Model Law, there are no major differences.

1. Spain

a. Overview of the Spanish Arbitration Act

The Spanish Arbitration Act entered into force on 26 March 2004 and replaced the Arbitration Act of 1988. The SAA is largely based on the Model Law, although minor amendments were introduced to adapt its application to the Spanish legal system. The SAA was not modified to include the 2006 amendments to the Model Law, but in several ways the Spanish Arbitration Act anticipated the 2006 amendments.

4 Law 60/2003 of 23 December 2003 on Spanish Arbitration Act ("SAA").

5 Swiss Private International Law Act of 18 December 1987 ("PILA").

In 2011, significant modifications were introduced to increase the quality and enforceability of the award.[6] Most notable, within the scope of this work, the High Courts of Justice (*Tribunales Superiores de Justicia*) were given jurisdiction over actions to set aside arbitral awards.[7]

The SAA adopts and provides a uniform regulation of domestic and international arbitration, with some provisions applying exclusively to international arbitration. A single regime with few distinctions, none relating to the annulment of the award. Where a distinction exists, this article will refer to the provision governing international arbitration.

b. Annulment Procedure

Pursuant to Article 41(4) of the SAA, an action for setting aside an award must be filed before the High Court of Justice where the award was rendered within two months from the date of notification of the award.[8] The respondent of the claim may object in writing to the application to set aside within twenty days of receiving the copy of such application.[9]

Once the defense is received, a hearing may be held upon the parties' request. If no hearing is requested, the court will proceed immediately to deliver its judgment;[10] a judgment that pursuant to Art. 42(2) (incorporated by the 2011 amendments), will not be subject to any further appeal.[11]

The filing of the appeal does not suspend the execution of the arbitration award, unless a party petitions and the court issues an order accordingly. Otherwise, the enforcement is revoked if the award is set aside.[12]

A party shall be deemed to have waived the right to challenge the award on a ground that was known at the time of the arbitration proceedings and was not objected to.[13] For the grounds of incongruence and violation of public policy, a previous objection is not required as a violation on these grounds would only be detected after the award has been rendered.[14]

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6 Law 11/2011 of 20 May 2011 amending the Spanih Arbitration Act.

7 The High Courts of Justice are the highest bodies of the judiciary in each of the 17 Spanish autonomous communities.

8 SAA, Art. 41(4) and 8(5).

9 SAA, Art. 42(1)(b).

10 SAA, Art. 42(1)(c).

11 SAA, Art. 42(2).

12 SAA, Art. 45(1).

13 SAA, Art. 6; Madrid Hight Court Judgment, 28 September 2002 and 26 April 2005.

14 Jesús Remón, *La anulación del laudo: el marco general, el pacto de exclusión y el orden público*, Revista del Club Español del Arbitraje No. 1 (2008), p. 115-132.

Agreements excluding or waiving the right to challenge an award are not permitted under Spanish law. Although not expressly prohibited under the SAA, the Spanish Constitutional Court has repeatedly held that exclusion agreements constitute the voluntary exclusion of applicable law and are thus void as contrary to the fundamental right to effective legal protection (which incorporates any legal recourse created by the legislature).[15]

2. Switzerland

a. Overview of the Swiss Private International Law Act

Switzerland follows a dualistic approach, regulating international and domestic arbitration separately. Since 2008, domestic arbitration is governed by the Swiss Code of Civil Procedure ("SCCP"; in force since 1 January 2011) and international arbitration proceedings are governed by Chapter 12 of the Private Swiss Law Act of 12 December 1987 in force as of 1 January 1989.[16] Chapter 12 was recently amended to include, among others, the possibility of making English language submissions to the Swiss Federal Tribunal ("Federal Tribunal" or "SFT") and the codification of longstanding case law of the SFT.

b. Annulment Procedure

According to Art. 191 of the PILA, the Swiss Federal Tribunal has exclusive jurisdiction to hear applications to set aside international arbitral awards rendered by arbitral tribunals seated in Switzerland. The formal and substantive requirements for a setting aside application must be strictly followed, failing which the Federal Tribunal will declare the application inadmissible and will not examine the application on its merits.[17]

A setting aside application must be submitted in one of Switzerland's official languages (German, French, Italian, Romansh) and for awards renderered on or after 1 January 2020 also in English.[18] The party seeking annulment of the award must file its written application within thirty days of the notification of the award.[19] The Federal Tribunal will first verify that the

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15 Spanish Constitution of 29 December 1978 ("Spanish Constitution"), Art. 24; Spanish Constitutional Court Judgment No. 218/2016 from 3 July 2016, No. 69/2005 from 4 April 2005 and No. 176/1996 from 11 November 1996; Remón (2008), *supra* fn. 14, at 8-10.

16 Swiss Code of Civil Procedure of 19 December 2008 ("SCCP").

17 J. William Rowley QC (general editor), *The Guide to Challenging and Enforcing Arbitration Awards*, Law Business Research (May 2019), at 550.

18 SFTA, Art. 77(2bis).

19 SFTA, Article 100; Rowley (2019), *supra* fn. 17, p. 552.

application is admissible and not patently unmeritorious. It will notify the application to both the arbitral tribunal and the opposing party and give them the opportunity to comment. The Federal Tribunal usually renders its decision within four to six months after receipt of the application to set aside the award.[20]

The PILA expressly allows parties to waive their right to challenge the award in its entirety or limit the challenge to one or several of the grounds listed in article 190(2) PILA. For this waiver to be valid, the parties may not have their domicile, habitual residence or place of business in Switzerland.[21] Furthermore, the waiver must be explicit and express the clear intention of the parties to waive any action for setting aside the award. However, the waiver is unavailable in the realm of sports arbitration, as the SFT confirmed in its landmark Cañas decision of 2007.[22]

3. Grounds for Annulment in Spain and Switzerland

The grounds for annulment are regulated under Art. 41(1) of the SAA and 190(2) of the PILA.

Article 41 SAA:

1. An award may be set aside only if the applicant alleges and furnishes proof:
   a) that the arbitration agreement does not exist or is not valid;
   b) that the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
   c) that the award contains decisions on questions not submitted to arbitration;
   d) that the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with an imperative provision of this act, or, failing such agreement, was not in accordance with this act;
   e) that the subject-matter of the dispute is not apt for settlement by arbitration;
   f) that the award is in conflict with public policy.

20 *Id*. at 548-551.
21 PILA, Art. 192(1).
22 ATF 133 III 235 (22 March 2007), 4.3.

Article 190(2) PILA:

(2) The award may only be challenged:

a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;

b) if the arbitral tribunal wrongly accepted or declined jurisdiction;

c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;

d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;

e) if the award is incompatible with public policy.

III. Grounds for Annulment of Commercial Awards

Following the UNCITRAL Model Law, this section examines Spain and Switzerland's statutory provisions and case-law for the grounds for annulment in the following order: (1) invalidity of the arbitration agreement; (2) due process; (3) violation of the mandate conferred to the arbitrators; (4) irregular constitution of the arbitral tribunal; (5) lack of arbitrabililty; and (6) public policy.

1. Validity as to the Form or Substance of the Arbitration Agreement

a. General comment

The validity as to the form and content of the arbitration agreement is governed directly by the law of the seat of the arbitration, that is, the SAA (Art. 9) and the PILA (Art. 178(1)).[23]

The SAA establishes a *favorem validatis* principle inspired by the PILA. Indeed, the substance of an arbitration agreement is valid under Spanish and Swiss law if it conforms either with the law: (i) chosen by the parties, (ii) governing the subject-matter of the dispute, or (iii) applicable at the seat, that is, Spanish or Swiss law.[24]

The absence of a valid arbitration agreement is a ground for setting aside the arbitral award in Spain and Switzerland, yet not pursuant to the

[23] SAA, Art. 9; PILA, Art. 178(1); *see also* UNCITRAL Model Law, Art. 6 and N.Y. Convention, Art. II(2).

[24] SAA, Art. 9(6); PILA, Art. 178(2).

same reasoning. In Spain, following the Model Law, it comes within the ground that the "*the arbitration agreement does not exist or is not valid*".[25] In Switzerland, on the other hand, it is considered under the lack of jurisdiction of the arbitral tribunal.[26]

Both Spain and Switzerland have adopted the well-established principle of separability of the arbitration agreement in their arbitration laws.[27] Furthermore, under Spanish and Swiss law, an arbitration clause must be interpreted according to the rules generally applicable to the interpretation of contracts. The Swiss Federal Tribunal has established that interpretation must be used in pathological arbitration clauses, and the contract must be supplemented in accordance with the general rules of contract law "*to seek a solution consistent with the fundamental will of the parties to submit to arbitral jurisdiction*".[28] Similarly, the Spanish Supreme Court has stated that an arbitration agreement "*must be interpreted in accordance with the general rules on interpretation contained in the provisions of the [Civil Code] that refer to contracts*".[29]

b. Case-law

Under Spanish law, the arbitration agreement must be in writing in a document signed by the parties, or in an exchange of letters or communications that constitute a record of the agreement.[30] Thus, an arbitration agreement cannot be proven by tacit consent. Furthermore, the parties' intent to submit their disputes to arbitration must be unequivocal.[31] The Spanish Supreme Court has repeatedly held that submission to arbitration "*must be understood as decisive, exclusionary and exclusive, non-concurrent or alternative with other jurisdictions*" and "*to be considered effective and binding, […] the firm and unequivocal will of the parties [is necessary]*."[32]

The High Court of Madrid annulled an arbitral award on the ground that the appellant in the setting aside action had signed some of the documents but had not signed the document containing the arbitration clause.[33]

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25 SAA, Art. 41(1)(a).
26 PILA, Art. 190(2)(b).
27 *See also* PILA, Art. 178(3); SAA, Art. 22(1).
28 ATF 138 III 29 (7 November 2011), 2.3.
29 Spanish Supreme Court Judgment, 20 November 2008.
30 SAA, Art. 9.3; Valencia Court of Appeals Judgment, 28 January 2009.
31 Asturias Court of Appeals Judgment, 16 July 2009.
32 Spanish Supreme Court Judgment, 18 March 2002, 20 June 2002, and 31 May 2002.
33 High Court of Madrid Judgments No. 20/2012 and No. 21/2012, 6 June 2012.

Under Swiss law, an arbitration agreement must be in writing and clearly express the will of the parties to waive the jurisdiction of the state courts in favor of a private arbitral tribunal.[34] Such will must appear "*plainly*".[35]

In contrast to Spanish law, an unsigned arbitration clause may be upheld.[36] Under both Spanish and Swiss law, no signature requirement appears necessary when the arbitration clause is entered into by an exchange of emails or other communication methods. This rule has been codified in the Amended PILA.

2. Due Process: Unable to Present its Case

a. General Comment

The violation of the right to present the case or to be heard is also referred to as a violation of "*due process*".[37] Art. 41(1)(b) of the SAA, mirrors the Model Law and provides that the award may be challenged when the applicant "*was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings*" or was otherwise "*unable to present his case*".[38] Switzerland covers due process under the "*principle of equal treatment of the parties or the right of the parties to be heard*" in Art. 190(2)(d) of the PILA.[39]

In Spain, a challenge based on a violation of the right to be present the case may be raised not only by the applicant, but also by the court hearing the application to set aside the award on its own motion or at the request of the Attorney-General.[40] No similar rule exists in Switzerland.

b. Case-law

In Spain, specific areas that would fall under the right to present one's case include: (i) the arbitrary inadmissibility of admissible and relevant evidence (Article 25 SAA); (ii) the failure to hold hearings requested by one party (Article 30(1) SAA); (iii) the failure to give sufficient advance notice of a hearing (Article 30(2) SAA); (iv) the failure to hand over evidence from the

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34 PILA, Art. 178(1); ATF 4A_676/2014 (3 June 2015), 3.2.

35 ATF 142 III 239 (18 February 2016), 3.3, Bull. ASA 967 (2016).

36 *Id.*

37 *UNCITRAL Digest of Case Law on the Model Law on International Arbitration*, United Nations Publication (2012), p. 177, ¶ 23.

38 SAA, Art. 41(1)(b).

39 PILA, Art. 190(2)(d).

40 SAA, Art. 41(2).

opposing party (Article 30(3) SAA); or (v) the refusal to hold an expert witness hearing requested by an arbitrator (Article 32(2) SAA).[41]

However, on account of Spain's extensive reliance on public policy, purported breaches of a party's right to present its case is routinely considered under public policy rather than due process. This is a significant difference with Switzerland. As a result, it is more common to see Spanish litigants raise only the first part of the provision protecting due process (i.e., the failure to provide proper notice of the appointment of the arbitral proceedings).[42]

For example, the High Court of Catalonia rejected an action for annulment brought on the ground that the appointment of the arbitrator had not been duly notified. The court asserted that a denial of defense must have a "*substantive and real content*"[43] and that a defective notice on the designation of the arbitrator does not produce any procedural denial of defense if the party was able to participate during the proceedings and did not raise any objection on that issue in the course of the case.

Conversely, the High Court of Madrid set aside an arbitral award for failure to correctly serve notice of the proceedings.[44] The appellant had been defectively served, and the judgment addressed the need for the arbitrator's reasonable inquiry in order to confirm the current address of the party to be notified. It is worth noting however that the applicant had raised not only a violation of the right to present the case but also a violation of public policy. The Spanish court's broad interpretation of public policy often induces appellants to include the public policy ground in their challenge application.

With respect to a violation of the right to present the case more generally, the Spanish Supreme Court ruled that there is no infringement of the right to be heard or the principles of adversary proceedings and equal treatment of the parties that might amount to an effective denial of defense when the parties were able to present their allegations and used their own means of defense regarding the merits of the case.[45]

In Switzerland, Art. 190(2)(d) of the PILA only permits an annulment request where the mandatory procedural rules set out in Art. 182(3) of the

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41 Alberto Fortún & Germán Álvarez-Garcillán, *La Impugnación de los Laudos Arbitrales*, Economist & Jurist, Vol. 21, Nº. 171 (2013), p. 12-20.

42 SAA, Art. 41(1)(b); *see also* High Court of Catalonia Order No. 37/2012, 15 March 2012.

43 High Court of Catalonia Order No. 37/2012, 15 March 2012.

44 High Court of Madrid Judgment, 5 June 2013.

45 Spanish Supreme Court, 13 March 2001.

PILA are violated.[46] This provision is similar to Art. 18 of the Model Law and provides that an arbitral tribunal has a duty to ensure "*equal treatment of the parties and the right of the parties to be heard in adversarial proceedings*". The case-law derives from this right, among others: (i) the right of the Parties to state all facts important for the judgment; (ii) to submit their legal arguments; (iii) to prove their factual allegations important for the judgement by means of suitable evidence submitted in a timely manner and in the proper format; (iv) to participate in the hearings; (v) and to access the record.[47]

The right to be heard does not entail a right to a reasoned award[48] but imposes on the arbitrators a minimal duty to examine and address all pertinent issues. This duty is breached when "*inadvertently, or due to a misunderstanding, the arbitral tribunal does not take into account some factual allegations, arguments, evidence, or offers of evidence submitted by one of the parties that are important to the decision to be issued*".[49] The omission of a pertinent argument must be justified in the brief while an argument that "*objectively lack[s] any pertinence to the decision*" does not have to be refuted.[50]

The right to be heard is formal in nature and the "*court must not replace the arbitral tribunal's substantive reasoning with its own.*" Thus, the court should not examine whether a different result would have been reached if the legally relevant submissions had been considered.[51] If the court determines that the applicant's right to be heard has been violated it must annul the award.

Under Spanish law, similar matters have been challenged on the ground of public policy and resolved by Spanish courts under the concept of procedural public policy (*See infra* III.6).

3. The Arbitral Tribunal's Compliance with the Mandate Conferred to it by the Parties

a. General Comment

The arbitral tribunal's violation of their mandate is also known as the principles of *extra petita* (outside of what is requested), *ultra petita* (beyond

46 ATF 4A_532/2016 (30 May 2017), 4.1, 36 ASA Bull 972 (2018).

47 ATF 4A_342/2015 (26 April 2016), 4; ATF 130 III 35 (30 September 2003), 5.

48 ATF 4A_342/2015 (26 April 2016), 4.1.

49 ATF 4A_532/2016 (30 May 2017), 4.1, 36 ASA Bull 972 (2018).

50 ATF 4A_532/2016 (30 May 2017), 4.1, 36 ASA Bull 972 (2018); ATF 133 III 235 (22 March 2007), 5.2.

51 ATF 4A_460/2013 (4 February 2014), 3.1, 32 ASA Bull 356 (2014); ATF 138 III 270 (2 May 2012), 3.1.

what is requested) and *infra petita* (failing to decide matters presented to the tribunal). In all these instances, the arbitral tribunal would have exceeded its authority.

Under the SAA, this ground for annulment is set forth under Art. 41.1(c): "*that the award contains decisions on questions not submitted to arbitration*".[52] However, this provision only covers *extra petita* and *ultra petita*, while cases of *infra petita* are (once again) dealt with as a breach of public policy.[53] In *ultra petita* and *extra petita* cases, the parties must first request the rectification of the award "*covering questions not submitted to the arbitrators*"[54] prior to filing an annulment action pursuant to 41.1(c).[55] Similarly, in *infra petita* cases the parties must seek an additional award on claims presented in the proceedings and omitted from the award.[56]

Pursuant to Art. 41(3) of the SAA, if the annulment action is successful, only the questions not submitted to the arbitrators or not subject to arbitration will be set aside, provided they can be separated from the others.[57]

The Swiss PILA on the other hand, expressly contemplates *extra petita*, *ultra petita* and *infra petita* (Art. 190(2)(c) of the PILA).[58] In the Amended PILA, a completion mechanism similar to the one articulated under Art. 41(3) of the SAA has been created. It gives the parties the opportunity to apply to the arbitral tribunal within 30 days after the award was rendered to seek an additional award on claims asserted but erroneously left undecided.[59] This rule should help avoid *infra petita* challenges.

b. Case-law

The High Court of Justice in Madrid partially set aside an arbitral award on the ground that the arbitral tribunal had ruled *extra petita* by finding the company director subsidiarily liable, although none of the parties had sought a ruling on this point. The award was declared null and void on the ground of congruency.[60]

Similarly, the Swiss Federal Tribunal partially annulled an award on *extra petita* grounds where the sole arbitrator awarded compensation despite

52 SAA, Art. 41(c).
53 SAA, Art. 41(f).
54 SAA, Art. 39(1)(d).
55 High Court of Galicia Judgment No. 6248/2019, 12 November 2019.
56 SAA, Art. 39(1)(c).
57 SAA, Art. 41(3); High Court of Galicia Judgment No. 15/2012, 23 April 2012.
58 PILA, Art. 190(2)(c).
59 PILA, 2021 Amendment, Art. 189(a).
60 High Court of Madrid Judgment, 9 February 2016.

the party's request for a declaratory judgment.[61] The SFT found that the arbitral tribunal had gone beyond the scope of the parties' prayers for relief by essentially treating the claimant's requests for declaratory relief as claims for performance (i.e., payment of damages). Even if the absence of a prayer for relief may surprise the arbitral tribunal, it remains bound by the parties' requests.[62]

In decision 4A_440/2010, the SFT rejected an application to set aside where the appellant claimed that the arbitral tribunal had ruled *ultra petita* by awarding interests that had not been sought. The SFT stated that "*the arbitral tribunal does not go beyond the claims if ultimately it does not award more than the total amount sought by the claimant*" (even if it awards more than was requested in relation to a specific prayer for relief; i.e., interest).[63]

With respect to *infra petita* challenges, the Swiss Federal Tribunal has thus far rejected all applications. In decision 4A_524/2009, the SFT clarified that an award which rejects "*any other or further submissions*" is to be considered as implicitly rejecting all arguments even if it does not specifically address them. The court added that "*when an appeal is partially admitted, it is rejected for the portion that is not admitted*."[64]

4. Irregular Constitution of the Arbitral Tribunal

a. General Comment

The constitution of an arbitral tribunal may be challenged on the ground that it contravenes the parties' agreement, the agreed arbitration rules or (failing such agreement) the law of the seat of the arbitration. With party autonomy being the guiding principle of arbitration, the law of the seat will only invalidate a tribunal when the peremptory norms set forth by the arbitration law are breached.

Practically, all the provisions contained in the SAA are operative. A few examples of peremptory norms include: (i) the need for an odd number of arbitrators (Art. 12); (ii) the arbitrator's competence to rule on their own

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61 ATF 4A_294/2019 (13 November 2019), 4.1.

62 ATF 4A_294/2019 (13 November 2019), 4.1; *see also* Nathalie Voser & Katherine Bell, *Swiss Supreme Court partially sets aside ICC award on grounds of extra petita*, Kluwer Arbitration Blog, 3 July 2020, available at: https://uk.practicallaw. thomsonreuters. com/w-023-6181?transition Type=Default&contextData=(sc.Default)&firstPage =true.

63 ATF 4A_440/2010 (7 January 2011), 3.1.

64 ATF 4A_524/2009 (5 March 2010), 3.2.

jurisdiction (Art. 22(1)); (iii) respect for the principles of equality, hearing and contradiction (Art. 24).[65]

Similarly, several provisions of the PILA are relevant, including mandatory provisions that the parties cannot derogate from, such as (i) the requirement that arbitrators be impartial and independent (Art. 180(1)(c) PILA); the principle of *Kompetenz-Kompetenz* (Art. 186(1) PILA); and compliance with fundamental principles of procedure (Art. 182(2) PILA).[66]

b. Case-law

The High Court of Justice in Madrid annulled an award that was decided by two arbitrators after one of the arbitrators in the tribunal resigned.[67] The award was rendered by an even number of arbitrators, in contravention of a peremptory norm, thus rendering the award null and void.

Awards have also been challenged on the ground that the arbitrator failed to issue the award within the stipulated deadline. Subject to any contrary agreement, the arbitrators must render the award within 6 months since the date of the reply.[68] Unless otherwise agreed to by the parties, this term may be extended by the arbitrators for a period of no longer than 2 months under a duly justified decision.[69] However, a failure to deliver the award within the time limit will not affect the validity of the arbitration agreement or of the award delivered, without prejudice to the liability that may be incurred by the arbitrators.[70]

Another possible challenge relating to the composition of the arbitral tribunal (which is usually brought in conjunction with a claim of violation of public policy), is that of a lack of independence and impartiality of the arbitrators.[71] In this respect, Spanish courts have established that even when "*justifiable doubts as to [the arbitrators] impartiality or independence*" arise, the proponent of the disqualification must show "*objectively justified suspicions, that is, externalized and supported by objective data*".[72]

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65 SAA, Arts. 11(2), 11(3), 22(3), 12, 22(1), 24; Fortún/Álvarez-Garcillán (2013), *supra* fn. 41, at 16.

66 PILA, Arts. 180(1)(c), 186(1), 182(2).

67 High Court of Justice of Madrid Judgment, 9 February 2016.

68 SAA, Art. 37.

69 SAA, Art. 37(2).

70 *See* High Court of Justice of Madrid Judgment, 30 July 2013; High Court of the Canary Islands Judgment, 17 May 2016.

71 SAA, Art. 17(1) and 41(d); Spanish Constitutional Court Judgment No. 9/2005, 17 January 2005.

72 SAA, Art. 17(2); Spanish Constitutional Court Judgment, 17 March 2001; Catalonia High Court of Justice Judgment, 29 July 2014.

In Spain and Switzerland, a challenge based on this ground is subject to the pre-requirement that the parties must raise the objection timely.[73] However, this rule in Spain is derived from the SAA (Art. 6) and in Switzerland from case-law. The SFT applying the principle of good faith has concluded that the right to invoke the irregular composition of the arbitral tribunal is forfeited unless the party raises it immediately because it cannot keep it in store only to raise it if the outcome of the arbitral proceedings is unfavorable.[74]

An award may then be challenged when it is rendered by a truncated tribunal, that is, when one of the members of the tribunal dies, resigns or fails to attend the proceedings or deliberations leaving the two other members at the helm. The SFT annulled an award rendered by two arbitrators after the third member had passed away and was not replaced.[75] An award can also be challenged when the arbitral tribunal was temporarily irregular. The SFT set aside an award on this ground where one of the arbitrators had not participated in the deliberations, which was evidenced by his signature missing on the award.[76]

A lack of independence or impartiality of the arbitral tribunal also falls under the concept of the irregular constitution. Under the Swiss case-law, an arbitrator must present sufficient guarantees of independence and impartiality. These guarantees will be assessed by reference to the constitutional principles applicable to state courts.[77] According to the Federal Court, a challenge will be admissible both when the arbitrator's lack of impartiality is effective and apparent. Because effective partiality (internal disposition on the part of the arbitrator) can hardly be proven, it suffices that the circumstances give rise to fear of partial activity of the arbitrator. The court will only take into account circumstances observed objectively; the purely individual impressions of one of the parties are not decisive.[78]

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73 ATF 4P.196/2003 (7 January 2004), 3.2.1.

74 ATF 4A_234/2008 (14 August 2008), 2.1.

75 ATF 4A_602/2010 (14 February 2011), 3.

76 ATF 4P.154/2005 (10 November 2005), 3.1.

77 Swiss Federal Constitution, Art. 30(1) guarantees that the case be heard by a "legally constituted, competent, independent and impartial court."

78 ATF 129 III 445 (27 May 2003), 3.3.3.

5. Subject-Matter of the Dispute not Capable of Settlement by Arbitration

a. General Comment

As mentioned above, Art. 190 of the PILA does not expressly contemplate annulment for lack of arbitrability. A challenge on this ground would fall under letter (b), that is, the arbitral tribunal wrongly accepted jurisdiction.[79]

Under Swiss law, objective arbitrability is governed by Article 177(1) of the PILA, which stipulates that any dispute of "*financial interest*" may be submitted to arbitration.[80] This rather broad notion includes all monetary claims. By contrast, the following matters are excluded from arbitration under Swiss law: (1) legal status matters in family law (matrimony, paternity suits, adoption, paternalism, divorce); (2) insolvency law matters; and (3) issuance and constitutive registration of patents, designs and trademarks.[81] Subjective arbitrability is regulated in Article 177(2) of the PILA and bars a state, or a state-controlled entity from using its legislative power to prevent the resolution of disputes by arbitration.[82]

In Spain, objective arbitrability is regulated in Article 2.1 of the SAA and provides that only those disputes which relate to matters within the free disposition of the parties are arbitrable.[83] Arbitration is thus not possible in matters over which the parties lack the power of disposition under their personal law. As such, certain family matters (legal status of the person, adoption, matters related to marriage and alimony) and criminal law matters are excluded; labor-related matters are expressly excluded from the scope of the Act (Art. 1.4 SAA). Industrial property and issues subject to company by-laws are eligible for arbitration. Finally, Article 2 of the SAA, mirrors Article 177(2) of the PILA and provides that in proceedings where one of the parties is a state (or a state-controlled entity), such party shall not be able to appeal to the prerogatives of its own law to avoid obligations arising from the arbitration agreement.[84]

It is important to note that in Spain, and similarly to the violation of the right to present one's case and public policy, a challenge based on a lack of arbitrability may be raised by the applicant, and by the court hearing the

79 PILA, Art. 190(b).
80 PILA, Art. 177(1).
81 SCCP, Art. 354.
82 PILA, Art. 177(2).
83 SAA, Art. 2(1)
84 SAA, Art. 2.

application on its own motion or at the request of the Attorney-General.[85] Furthermore, similarly to *infra petita* and *ultra petita* challenges, the SAA articulates a rectification mechanism when the award covers "*questions on a matter not subject to arbitration*".[86]

b. Case-law

The High Court of Galicia annulled a consumer arbitration award which ruled on a claim that had been explicitly excluded from the arbitration agreement. The Court ruled that despite the *Kompetenz-Kompetenz* principle (Art. 22.1 SAA), a decision by the arbitrators on their own competence "*must be protected by the content of the arbitration agreement itself, which establishes the objective scope of the decision, the margin of action of the arbitrators, so that it is not possible for the arbitrators to determine their own competence outside of that agreement*."[87]

This ground for annulment has also been raised to challenge equity arbitral awards on matters regulated by peremptory rules. The High Court of Catalonia, in a judgment issued on 29 October 2018, dismissed a set aside action where the appellant argued that the dissolution of a company could not be submitted to an equity arbitration, as had been agreed by the by-laws, because the matter was regulated in part by peremptory norms. The appellant did not challenge the arbitrability of the subject matter; rather, that it could not be submitted to an arbitration of equity. This was based on the ground that in an equity arbitration, the arbitrator may dispense with the applicable legal norms, which in this case were peremptory. The Court concluded that the law does not limit arbitration of law to matters that are partly governed by peremptory norms. Arbitrability is not based on the type of the arbitration (law or equity), but rather, on those matters in which the parties do not enjoy free disposition of their rights (the matter is governed by a peremptory norm). The Court concluded: "*If this were the case, there could be no equity arbitrations in many of the areas in which there is no doubt about their arbitrability or even their origin, such as inheritance, horizontal property, etc., which are also partly regulated by mandatory rules*."[88]

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85 SAA, Art. 41(2).

86 SAA, Art. 39(1)(c).

87 High Court of Galicia Judgment, 3 December 2015.

88 High Court of Catalonia Judgment, 29 October 2018.

The only exception to this rule appears in relation to corporate matters, where the SAA requires that any challenge to corporate agreements be submitted to an arbitration administered by an arbitral institution.[89]

In Switzerland, there is no international subject matter exclusion, making this ground for annulment hardly relevant. The Federal Court has stated that they "*do not see, in particular, which fundamental legal principles would establish a monopoly of state jurisdiction to settle disputes over claims of a civil nature influenced by rules of public international law*."[90]

6. Annulment on Public Policy Grounds

a. General Comment

One can think of fewer more nebulous notions than public policy. A "*legal enigma*" the interpreter struggles to define and circumscribe.[91] In the words of the Spanish Supreme Court: "*extremely subtle, imprecise and indeterminate*".[92] Swiss courts, comparing public policy to a chameleon, have noted its fleeting and elusive nature and changing appearance.[93]

Spain has an extensive arbitral concept of public policy, which is identified with the fundamental rights and freedoms enshrined in the Spanish Constitution. It is defined as a "*set of principles and essential rules that inspire the political, social and economic organization of Spain*"[94] and that evidence the essential values of a society at a given time.[95] Public order therefore "*operates as a necessary and indispensable limit to the autonomy of the will, in order to guarantee the effectiveness of the constitutional rights of citizens*".[96]

Similarly, the Federal Tribunal defines public policy as the essential and widely recognized values that inspire Switzerland, noting that a Swiss judge "*does not live in a no man's land but in a country attached to a given civilization where certain values are privileged over others, is led to identify*

89 SAA, Art. 11 bis. 3.

90 ATF 118 II 353 (23 June 1992) 3.b.

91 Spanish Supreme Court Order, 24 October 1979.

92 *Id.*

93 ATF 4P.278/2005 (8 March 2006), 2.1, 24 ASA Bull 521 (2006).

94 High Court of Catalonia Judgment, 7 January 2014.

95 José Carlos Fernández Rozas, *Contravención al orden público como motivo de anulación del laudo arbitral en la reciente jurisprudencia española*, Revista de Arbitraje Comercial y de Inversiones No. 830 (January 2015), p. 823-852.

96 High Court of Catalonia Judgment, 7 January 2014.

said principles by according to its own sensitivity and the essential values with which this civilization is imprinted."[97]

b. Case-law

In Spain, courts have repeatedly held that the notion of public policy should be interpreted in a restrictive and exceptional way. An award must contain a "*serious violation*", which should be "*fragrant, effective and concrete*" and present a "*manifest*" contradiction with fundamental legal principles.[98] This threshold excludes from this challenge those issues that have not produced a "*real and material defenselessness and* [are not] *constitutionally relevant*".[99]

An award is contrary to procedural public policy when it violates any of the fundamental rights or principles set out in Article 24 of the Spanish Constitution, which guarantees (1) the right to defense, (2) the right to due process with every legal guarantee, (3) the right to request and provide evidence and (4) the right to receive a decision based on the merits of the case.[100]

A novel and controversial concept of "*economic public policy*" was introduced by the Madrid High Court in 2015.[101] On this basis, the court started reviewing the arbitrators' reasoning and assessment of the evidence and annulled a series of awards relating to the validity of swap agreements entered into between banks and consumers. Two recent landmark rulings from the Spanish Constitutional Court (dated 15 June 2020 and 15 February 2021) have curbed this expansive interpretation to the satisfaction of the Spanish arbitration community.[102] In its latest decision of 15 February 2021, the Constitutional Court took a strong stance and held that "*the possible judicial control of the award and its acceptance of public policy cannot lead to the consequence whereby the judicial body replaces the arbitral tribunal in its duty to apply the law*".[103] It added that the right to a reasoned award and

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97 ATF 4P.278/2005 (8 March 2006), 2.2.2, 24 ASA Bull 521 (2006).

98 Fernández Rozas (2015), *supra* fn. 95, at 831.

99 *Id.*

100 High Court of Madrid Judgment, 12 May 2008.

101 High Court of Madrid, 28 January 2015 and 3 November 2015. The awards were annulled on the basis of the general principle of contractual good faith in situations of inequality, disproportion or asymmetry between the parties by reason of the complexity of the product or disparate knowledge of the contracting parties.

102 Spanish Constitutional Court Judgments No. 46/2020 from 15 June 2020 and 17/2021 from 15 February 2021.

103 Spanish Constitutional Court, 15 February 2021.

the arbitrator's assessment of the evidence are only breached when the award is "*arbitrary, illogical, absurd or irrational*".[104]

The Swiss Federal Tribunal for its part, has advised that a challenge on procedural public policy grounds should be subsidiary, and may only be brought when no other grounds of Art. 190(2) are available.[105] Public policy constitutes a "*precautionary norm*" against any procedural flaws which the legislator had not considered when adopting the other subsections of Art. 190 (2) PILA.[106] The standard is high and requires that the award "*unacceptably contraven[es] the sense of justice*".[107] This applies to procedural and substantive public policy. A procedural rule, even if arbitrary, does not violate procedural public policy; rather, it requires the violation of a rule essential to ensure the fairness of the proceedings.[108]

An award is contrary to substantive public policy when it violates fundamental principles of substantive law "*to such an extent that it is no longer consistent with the prevailing legal order and system of values*". In the SFT's view, substantive public policy encompasses the founding stones of any legal order (e.g., the principles of *pacta sunt servanda*, good faith, prohibition of discriminatory or confiscatory measures). The case-law shows that the chances of setting aside an award for contravention of public policy are extremely slim;[109] one of the reasons being that the SFT generally does not review the arbitrator's findings of fact or application of the law.

IV. Statistical Comparative Analysis

Having completed the substantive review, we turn to the success of annulment actions in numbers. As a consequence of Spain following the monistic approach, its data pool includes both domestic and international awards and decisions from many different High Courts of Justice. The body of Swiss case-law, on the other hand, is slightly more homogenous and consistent since all applications against international arbitration awards are submitted to the highest Court. While an "apple to apple" comparison is not possible, the figures remain very interesting.

The first finding worth noting is the inadmissibility rate for challenges against arbitration awards: 14% in Switzerland vs. 6% in Spain. This data

104 *Id.*
105 ATF 138 III 270 (2 May 2012), 2.3.
106 *Id.*
107 ATF 4P.143/2001 (18 September 2001), 3.c.
108 ATF 129 III 445 (27 May 2003), 4.2.
109 ATF 132 III 389 (8 March 2006), 2.

confirms the notion presented above that the formal and substantive requirements for a setting aside application must be strictly followed in Switzerland.[110]

On the merits, the figures show a similar pattern. According to the detailed study carried out by Felix Dasser and Piotr Wójtowicz, in the 1989 through 2019 period, of the 660 cases that were decided on the merits in Switzerland, the success rate in annulment actions was 7.65%.[111] In Spain, between 2011 and 2017 (per the last comprehensive study available), of the 666 cases that were decided on the merits, the success rate was 26%.[112] A different and more recent study for the year 2018 shows a 21% success rate (8 out of 38 cases).[113]

With respect to the grounds for challenge, violation of public policy is by far the most popular choice among Spanish litigants and ranks second among parties to arbitrations in Switzerland. To date, only two awards have been set aside on this ground in Switzerland (as of 2019, 2 out of 220 cases), which represents a negligible 0.9%.[114] Conversely, in the 2011-2016 period, the High Court of Madrid alone granted 21% of challenges based on public policy (46 out of 168 cases). A more recent study analyzing data from 2018 shows that in Spain 38 actions to set aside were filed. Of these 38, 26 were lodged at the High Court of Madrid which granted 8 of them. 5 of these 8 successful annulment actions were based on a violation of public policy (making public policy the dominating ground for appeal with 62% of all successful challenges).[115] But this trend is unlikely to continue its course. As mentioned above, two Spanish Constitutional Court rulings in June 2020 and February 2021 have put an end to the extensive examination carried out by some High Courts by setting a higher threshold for violations of public policy.

Finally, and walking away from public policy, the violation of the right to equal treatment and right to be heard is the most popular and the second most successful ground for annulment in Switzerland. It ranks third in Spain but as discussed above, many violations of the right to equal treatment and right to be heard are brought as a violation of public policy. Illustrating this

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110 Dasser/Wójtowicz (2021), *supra* fn. 3, at 12; Gonzalo Stampa, *Seis años de jurisprudencia española de control arbitral*, (October 2017), available at: http://www.stampaabogados.com/noticias/seis-anos-de-jurisprudencia-de-control-arbitral.

111 Dasser /Wójtowicz (2021), *supra* fn. 3, at 16.

112 In 2011, jurisdiction for set-aside actions was attributed to the High Court of Justice. Stampa (2017), *supra* fn. 110.

113 Fieldfisher Jausas (2018), *supra* fn. 3, at 8.

114 Both awards that were annulled on public policy grounds related to sports arbitration.

115 *Id.*

with figures: in Switzerland, 257 actions were filed on this ground, and the success rate was 5.4%; before the High Court of Madrid, the success rate was 17% (18 out of 105 cases).[116]

V. Conclusion

Looking at the disparate numbers of successful annulment actions in both jurisdictions (7.65% vs. 26%), one could assume that the legal framework regulating annulment actions in Spain and Switzerland is very different. But this is not the case. To the contrary, the relevant sections of the SAA and PILA are largely similar. Thus, the difference between both jurisdictions' approach to arbitration lies in the body of case-law and the differing judicial view taken by the courts in both countries.

The underlying theme is the equilibrium that state courts try to strike between party autonomy and the effectiveness of the constitutional rights of litigants. In upholding a set of essential societal values, state courts are influenced by the nature of the litigants that appear before them for legal resolution of a dispute. The legal framework—monistic or dualistic—also plays a part in determining the level of protection granted by domestic courts.

As a result, the SAA is generally more protectionist, grants less party autonomy and offers a higher degree of protection for parties in the arbitral process. In contrast, the PILA is generally more liberal, and the principle of party autonomy is recognized to the fullest possible extent. This, of course, is helped by the fact the PILA was designed to govern *only* international arbitrations.

Annulment actions are statistically more likely to succeed in Spain than in Switzerland. The question, however, is whether this would still be the case if Spain followed a dualistic approach and regulated international and domestic arbitration separately, like Switzerland does.

[116] Dasser/Wójtowicz (2021), *supra* fn. 3, p. 276-280; Stampa (2017), *supra* fn. 110.

Alex LEVIN CANAL, Vanessa ALARCÓN DUVANEL, *Annulment of Commercial Arbitral Awards by State Courts. A Comparative Study of Spain and Switzerland*

Summary

This article compares the statutory framework and body of case-law in annulment actions of commercial arbitral awards in Spain and Switzerland and seeks to identify key differences in the application by domestic courts of similar arbitration legislation.

With a widely divergent success rate in annulment actions (7.65% in Switzerland and 21% in Spain), what judicial decision-making and reasoning underlies these numbers? In answering this question, this article starts by comparing the national legislation and the annulment proceedings in both countries. It continues by comparing on a ground-by-ground basis the court's interpretation of the different annulment grounds. Finally, it concludes with a statistical comparison, aimed at understanding the practical effect of the theoretical differences explored as well as how the success rate of the different grounds for annulment compares in both countries.

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Aims & Scope
Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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