INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

General Report Questionnaire for Working Session

"State Court Participation in Arbitration – Help or Hindrance?"

International Arbitration Commission & Litigation Commission

AIJA London 2015 Congress

General Reporters:

Silvia Pavlica Dahlberg
VINGE
Gothenburg, Sweden
T.+46 721-79 15 72
E-mail: Silvia.Dahlberg@vinge.se

Arnoldo Lacayo
Astigarraga Davis
Miami, USA
T.+1 305-372-8282
E-mail: alacayo@astidavis.com

Gunnar Pickl
Dorda Brügger Jordis
Vienna, Austria
T. +43-1-533 4795-102
E-mail: Gunnar.Pickl@dbj.at

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Thank you for agreeing to be a National Reporter for the Working Session entitled *"State Court Participation in Arbitration – Help or Hindrance?"*, to be held at the AIJA Annual Congress in London in September 2015. We appreciate your efforts to provide information about developments in your jurisdiction which contribute to this Working Session.

Please find below the questions which we would like you to answer. The purpose of the questionnaire is to cover the range of issues which will be addressed in the Working Session. As follows from the questionnaire, the reports and the Working Session will cover various aspects of state court participation in arbitration, with a focus on state court participation before and during the arbitration proceedings.

Please answer each question fully, yet concisely. Also, please provide the legal support for your analysis and conclusions as much as possible, using footnotes like this one.[1] When drafting your report, please use the attached template and follow the styles and formats stated therein.

When saving your work, please name the document using the following convention: "National Report (country).doc", for example **National Report (Sweden).doc**

Please send your report to the General Reporters by e-mail **by 13 February 2015.** If you have any questions, please do not hesitate to contact us.

Finally, we would also like to draw your attention to the Transfer of Copyright statement included at the end of this Questionnaire.

We are looking forward to working with you.

The General Reporters

[1] Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones 1996.

Questionnaire.....

1. Enforcement of the Arbitration Agreement and other issues related to Jurisdiction

1.1 In your jurisdiction, is there an obligation for state courts to enforce an arbitration agreement, i.e. to deny or otherwise refrain from exercising jurisdiction on that ground?

In Spain there is not a specific obligation for state courts to refrain from exercising jurisdiction on matters subjected to an arbitration agreement if the parties have not informed the courts in that terms. Notwithstanding, article 39 of the Spanish Procedure Act and article 11 of the Arbitration Act establishes that if one of the parties alleges that the dispute was submitted to arbitration, the Courts must refrain from exercising jurisdiction.

1.2 If so, how is the enforcement carried out? Please give a short overview of the procedure and the type of decision that the court would issue.

If any matter subjected to an arbitration agreement is filed before the Court, and one of the parties -usually the defendant- files a writ objecting the jurisdiction due to the existence of an arbitration agreement, the Court will issue a judicial decision by means of which it will declare itself as non-competent to decide in that concrete matter. If the matter is subjected to arbitration but the defendant does not file a writ informing of the arbitration agreement and continues with the proceeding, it will be understood that the parties renounce to the arbitration agreement.

1.3 Is it required that the respondent(s) challenge or object to the court's jurisdiction or would the court enforce the arbitration agreement on its own motion, provided that it becomes aware of the fact that an arbitration agreement between the parties exists?

The respodent must file a writ (in Spanish is called the "declinatoria") or declinatory action in which he informs that that specific issue is submitted to an arbitration agreement. In other case it is unlikely that the State Courts refrain from exercising jurisdiction.

1.4 Does your jurisdiction allow a party to bring a declaratory action or any other kind of action to obtain an affirmative declaration by the court about an arbitration agreement (e.g. that an arbitration agreement exists between the parties, that it has a certain scope or that it covers a specific dispute between specific parties)?

Usually in our jurisdiction the parties file for the proceeding and if the matter is subjected to arbitration the other party files a writ informing of the lack of competition. The scope of the arbitration agreement is decided by the arbitrator.

1.5 If so, what are the procedural requirements, if any, for bringing such a declaratory action? Please focus on the requirements which are specific for this type of action.

As we have already answered there is no specific proceeding for bringing such a declaratory action.

1.6 Are there any restrictions as to timing for asserting an objection to the state court's jurisdiction or to bring an action for an affirmative declaration about arbitral jurisdiction? E.g. would on-going challenge proceedings on the ground that the tribunal lacked jurisdiction prevent such an action from being brought?

Yes. In Spain the Civil Procedure Act establishes that the "declinatory" or the objection in order to declare the Court's lack of competition, must be filed within the first 10 days of the term allowed to reply to the claim or within the first 5 days following the summons to appear at the hearing.

1.7 When deciding on arbitral jurisdiction, do the courts in your jurisdiction apply the *doctrine of assertion* or any other doctrine according to which evidence is not required with respect to certain facts (so-called facts of double relevance) or the standard of proof is lowered compared to decisions on the merits in regular civil litigations? If so, does the doctrine apply equally in a declaratory action regarding arbitral jurisdiction and in a litigation case where an objection to the court's jurisdiction has been made with reference to an arbitration agreement? Please describe.

In Spain the parties can agree to submit an issue to arbitration by means of a contractual clause or by means of an independent agreement that results of the voluntary decision of the parties. Therefore if any of the parties file a "declinatory" or objection writ bringing before the Court the arbitration agreement, the Court will check the arbitration agreement and the documents or principles of evidence on which the objection is grounded. The other parties will have a term of 5 days as of the notification of the "declinatory" action to allege whatever they deem convenient to sustain the jurisdiction or the competence of the Court.

1.8 When deciding on arbitral jurisdiction, how does your jurisdiction handle the situation where there are several alternative grounds for the claims, some covered by the arbitration agreement and some not (e.g. one ground based on contract, one on tort)? Will the courts split the case between different fora or if not, what forum will it refer the entire dispute to?

In our jurisdiction Spanish Courts will only decide on those claims grounded on issues for which the Courts are competent. Therefore, if any other issue subjected to arbitration is included in those claims, the Court will declare itself non competent for deciding on that particular matter that should be claimed before the arbitration court.

1.9 Does your jurisdiction allow for *anti-arbitration injunctions* or any other types of decisions attempting to prevent an arbitration from being initiated or from proceeding? Please describe.

There is not an anti-arbitration injunction system in Spain.

1.10 If so, who can such an injunction be directed at – a party, the arbitrator(s), an arbitral institute, etc.?

It does not apply.

1.11 What connection to your jurisdiction is required for the state courts to be competent to hear such a request?

It does not apply.

1.12 Are you aware of any case in the past ten years where an anti-arbitration injunction or a similar type of decision has been issued by a state court in your jurisdiction? If so, please describe briefly the facts and what the effect of the injunction ultimately was.

I am not.

2. The Arbitral Tribunal

2.1 Does your jurisdiction offer assistance by the state courts in appointing arbitrators? If so, please describe briefly what options are available.

The Spanish Arbitration Act gives freedom to the parties in order to decide the procedure to appoint arbitrators. Nevertheless, article 15 of the Spanish Arbitration Act establishes that when the parties cannot freely appoint arbitrators through the procedure agreed, either party may request the competent court for the appointment of the arbitrators. The Courts will only be able to deny this request if no arbitration agreement results from the documents provided.

2.2 What prerequisites, if any, must be satisfied for the court to deal with the appointment of an arbitrator (timing, failure by a party to act, etc.)?

The only prerequisite that must be satisfied is that an arbitration agreement exists. The Arbitration Act's preamble establishes that Courts are not expected to analyse the validity of that arbitration agreement or if the discussed matter is an issue that can be judged by an arbitrator. Notwithstanding in real practice Courts analyse with much more detail than expected, the arbitration agreement.

2.3 When deciding thereon, will the court consider whether there is arbitral jurisdiction? If so, what level of review will the court undertake in this respect?

As said in the previous question, the Court will consider that there is arbitral jurisdiction if the parties provide the arbitration agreement. The Arbitration Act establishes that the level of review must not be detailed and that the arbitrator's decision in relation to the jurisdiction prevails in front of the Courts but our practice shows that Courts analyse with more detail than required, those agreements.

2.4 Please describe briefly the procedure for the appointment of arbitrators by the state courts, including any time-limits.

According to article 15 of the Arbitration Act, the procedure for the appointment of arbitrators will be carried out by means of a general oral proceeding. The oral proceeding is quicker and will start with a writ containing the specific request of appointing an arbitrator justifying that the parties have not been able to reach an agreement in this particular issue. The arbitration agreement must be provided with the writ.

2.5 How does the court decide which arbitrator to appoint? Is there a list of arbitrators available to the court?

In accordance with provisions of article 15.6 of the Arbitration Act, the Court will draft a list of three names per every one arbitrator that has to be appointed, taking into account the requirements established by the parties in the arbitration agreement. From those possible arbitrators one will be appointed by lot.

2.6 Does the above apply irrespective of whether the arbitration is administered by an institute or not?

If the arbitration is administered by an institute, the institute will be the one in charge of appointing the arbitrator.

2.7 Does your jurisdiction offer assistance by the state courts to remove or replace an arbitrator?

The parties are free to agree on the procedure for disqualifying an arbitrator. In case there is no agreement, the party that wants to disqualify the arbitrator shall give reasons within 15 days after becoming aware of the arbitrator's acceptance or after becoming aware of any circumstances that give rise to doubts in relation to the arbitrator's impartiality. If the disqualification or challenge is unsuccessful, the party will be able to repeat the reasons of requesting the arbitrator's replacement by challenging the arbitration award. Therefore, there is no legal provision that establishes specifically Court assistance in this matter. This is due to the fact that our legal system pretends to avoid unnecessary delays.

2.8 If so, please describe the procedure therefore briefly.

As said in the above question, there is no legal provision that allows the removal of the arbitration by the Court. The party can argument the incompatibility or lack of independency of the arbitrator by challenging the arbitration award in case the claim before the arbitrators dismisses the claim.

3. Interim Measures

3.1 In your jurisdiction, does an arbitral tribunal have the power to issue an interim injunction? If yes, what is the way to enforce such interim injunction?

The Preamble of de Arbitration Act 60/2003, of 23rd December states "the Spanish lawmakers have followed the United Nations' recommendation, taken the Model Law as a basis and furthermore taken into consideration the successive tasks undertaken by the Commission in order to include technical advances and tackle the

new needs for carrying out arbitration, in particular regarding the requirements for arbitration agreements and the adoption of interim measures".

Therefore the article 23 includes one of the Act's main innovations: the arbitrators' legal authority to order interim measures. The parties' may exclude this legal authority, directly or by referring to an arbitration regulation, but are otherwise deemed to accept it. The Act deems it preferable not to determine the scope of this legal authority to order interim measures.

Obviously, arbitrators lack the power of enforcement, so enforcement of interim measures may be sought through the courts, in the same way as for an award on the merits of the case.

However, if one can distinguish between the declaratory side and the enforcement side of an interim injunction, this Act recognises the arbitrators as holding the former power, unless otherwise agreed by the parties. This regulation neither repeals nor restricts the possibility, set forth in articles 8 and 11 of this Act and the Civil Procedure Act, that an interested party may petition the courts to order interim measures. The legal authority of the arbitrators and the courts regarding interim measures are alternative and concurrent, notwithstanding the role of the principle of procedural good faith.

3.2 In your jurisdiction, what is the way, if any, to enforce an interim injunction issued by an arbitral tribunal having its seat outside your jurisdiction?

A specific problem arises with decisions on interim injunction issued by an arbitral tribunal, whose place is seated "outside the Spanish territory". The key question is: are these measures need to overcome an exequatur in Spain to be executed by state courts?

Please note that arbitrators may take protective measures in two ways: (a) A recommendation to the parties; and (b) Using an "interim award" or a "partial award" relating solely to interim measures. In the latter case the question for need of the exequatur is controversial in Spain.

Firstly, some authors have relied on Article 23.2 of the LA which states: "The rules concerning the setting aside and compulsory enforcement of awards shall be applied to the arbitrators' decisions concerning interim measures, whatever form they may take".

Therefore, foreign arbitral awards that issue an interim injection are subject to the provisions of Title VIII concerning the compulsory enforcement of the award, without the need to get an exequatur. The reason being these provisions also apply to arbitrations developed outside Spain (Arbitration Act 60/2003, Article. 1.1). This first position has a clear advantage: it increases the effectiveness and sense of interim injunction, without exequatur or other precedes process. The disadvantage is that it gives a huge power regarding interim measure to the foreign arbitrators.

On the contrary, other authors argue that in order to enforce an award is required prior an exequatur according to Arbitration Act 60/2003 (Title IX). In this regard it should analogy apply the Article 46.1 of the LA, which says: "Foreign awards are those made outside of Spanish territory.

The conclusion is that it seems that it is necessary for an exequatur in order to enforce an interim measures issued by an arbitral tribunal having its seat outside Spanish jurisdiction

3.3 If a specific interim measure as issued by a foreign arbitral tribunal is not available in your jurisdiction where it is sought to be enforced, what would be the way to proceed?

If an interim measure as issued by arbitral tribunal is not available in Spanish jurisdiction there will be no way to proceed.

3.4 In your jurisdiction, are state courts competent to decide on a request for interim relief despite the fact that the parties entered into an arbitration agreement? May a party file for interim relief with a state court even before arbitration proceedings are initiated? If yes, what are the consequences with respect to the "main" claim that is sought to be secured by such interim injunction, i.e. is the party asking for interim relief obliged to commence arbitration within a certain period of time?

The Arbitration Act 60/2003, of 23rd December, stipulates that the fact that court proceedings are pending in which an interim measures has been stated does not prevent arbitration proceedings from being initiated or continuing; so court proceedings cannot simply be used to block or hinder arbitration.

So then, according to the Article 11.3: "Arbitration agreements shall not prevent any of the parties requesting a court to adopt interim measures nor prevent the court from ordering same prior to or during arbitration proceedings".

It has been clarified that petitioning a court for interim measures is in no manner whatsoever a tacit waiver of arbitration; although neither does it simply make the negative effect of the arbitration agreement apply. This clarifies any remaining doubts about the possibility of a court issuing interim measures concerning a dispute subject to arbitration, even before arbitration proceedings have begun.

This possibility is not open to doubt in view of the Civil Procedure Act, but it is important for it to be included in arbitration legislation as well. In addition, it covers any petition to a foreign court for interim measures concerning arbitration governed by Spanish law.

3.5 May parties file for interim relief with a state court even though arbitration is already pending in the respective matter?

According to the Article 11.3 of the Arbitration Act 60/2003: "Arbitration agreements shall not prevent any of the parties requesting a court to adopt interim measures nor prevent the court from ordering same prior to or during arbitration proceedings".

So then, the parties can file for an interim relief with a state court even though arbitration is already pending in the respective matter.

3.6 In your jurisdiction, does a state court have the power to order reimbursement of legal costs in proceedings for interim relief? If yes, what are the consequences if the claim that is sought to be secured by interim relief is subject to an arbitration agreement?

In Spanish jurisdiction a state court has the power to order reimbursement of legal costs in proceedings for interim relief without any consequences if the claim is sought to be secured by interim relief is subject to an arbitration agreement.

In the Article 37.6 of the Arbitral Act 6072003 only provides that "Subject to what may have been agreed by the parties, the arbitrators shall rule on the arbitration costs in the award, which shall include the arbitrators' fees and expenses and, as applicable, the fees and expenses of the parties' representatives, the cost of the service rendered by the arbitration administration institution and the other expenses resulting from the arbitration proceedings".

4. Evidence

4.1 In your jurisdiction, do the state courts play a role in the gathering of evidence for use in arbitration?

In the Arbitral Act 60/2003 is also regulated the judicial assistance in taking evidence. This is one of the courts' traditional roles in support of arbitration. Assistance need not necessarily require the court to obtain certain evidence; in certain cases, other measures will suffice that allow the arbitrators to obtain it themselves, such as freezing or discovery orders.

So then the Article 33 provides that "The arbitrators or either of the parties with the approval of the arbitrators may request the competent court's assistance in taking evidence, according to the rules on taking evidence which may apply. Such assistance may consist of taking evidence in the competent court or the latter adopting the specific measures required so that the evidence may be taken by the arbitrators. If so requested, the court shall take the evidence under its own direction exclusively. Otherwise, the court shall merely adopt the relevant measures. In both cases, the court shall deliver a statement of the proceedings to the applicant".

4.2 If your state courts play a role in the gathering of evidence for use in arbitration, how is the assistance or intervention of the state court requested (letters rogatory, petition, motion, filing of an action, etc.)?

The assistance or intervention of the state court who plays a role in gathering of evidence for use in arbitration can be given in different way according to the rules on taking evidence which may apply.

Such assistance may consist of taking evidence in the competent court or the latter adopting the specific measures required so that the evidence may be taken by the arbitrators.

If so requested, the court shall take the evidence under its own direction exclusively. Otherwise, the court shall merely adopt the relevant measures. In both cases, the court shall deliver a statement of the proceedings to the applicant.

4.3 Is there specific legislation or other legal authority governing the assistance that the state courts can provide?

The legislation that governs the assistance that the state courts can provide is the Arbitral Act 60/2003 which refers to the provisions of the Civil Procedure Act 1/2000, of 7 January.

4.4 What requirements must the party requesting the evidence-gathering assistance satisfy in order to obtain the state court's assistance?

The evidence phase of arbitration also allows the parties and arbitrators the utmost freedom provided the right to defense and the principle of equality are respected — and the greatest of flexibility. The Act only lays down rules about expert evidence, of singular importance in modern arbitration, which are applicable even if the parties fail to agree. These rules are aimed at allowing both reports issued by experts appointed directly by the parties and those issued by experts appointed by the arbitrators, *ex officio* or at the request of a party, and guaranteeing due expert challenge. It not applied.

4.5 What kinds of evidence gathering can the state courts authorize or assist in (document production, sworn interrogation, depositions, in-court examination by the judge, inspections, etc.)?

The state courts can authorize or assist in any kinds of evidence gathering according to the provisions of Civil Procedure Act 1/2000, of 7 January, failing such agreement between the parties.

4.6 What rules govern the evidence gathering (rules of the state court, rules of the arbitral institute, others)?

According to the Article 25 of the above mentioned Arbitration Act: "Unless otherwise agreed by the parties, the arbitrators may, at the request of a party, order such interim measures as they may consider necessary in respect of the subject matter of the dispute. The arbitrators may require the party requesting such measures to provide appropriate security. The rules concerning the setting aside and compulsory enforcement of awards shall apply to arbitrators' decisions concerning interim measures, whatever form they may take".

4.7 Does the kind of arbitration (domestic vs. international, investor-state, commercial, etc.) impact what evidence can be gathered with the assistance of the state court?

The different kind of arbitration (domestic vs. international, investor-state, commercial, etc) doesn't impact what evidence can be gathered with the assistance of the state court.

The evidence can be gathered with the assistance of the state court according to the provisions of the Arbitral Act 60/2003 and the Civil Procedure Act 1/2000, both above mentioned.

4.8 Who can the courts order disclosure or discovery from? In other words, who do the state courts have jurisdiction over?

The state courts can order disclosure or discovery from everybody in the Spanish territory. So then the state courts have jurisdiction over natural or legal person and private or public person but only in the Spanish territory.

Outside of the Spanish territory the state courts are subject to the rules of international law.

4.9 Does the state court have the power to compel the discovery or disclosure target to give the evidence? When will the state court take that step?

The state courts always have the power to compel the discovery or disclosure target to give the evidence.

In other words, the state courts can force the compliance when the recipient (the natural or legal person and private or public person) fails to comply with orders given by the authority.

4.10 What can the state court do if the discovery or disclosure target fails to comply?

If the discovery or disclosure target fails to comply the state court may take any measures to ensure the gathering of evidence with the only limit represented by the respect of the current legislation.

4.11 Who can request assistance from the state court (parties to the arbitration, the tribunal, the arbitral institution, others)?

According to the Article 33 of the above mentioned Arbitration Act, the arbitrators or either of the parties but with the approval of the arbitrators may request the competent court's assistance in taking evidence, according to the rules on taking evidence which may apply.

Such assistance may consist of taking evidence in the competent court or the latter adopting the specific measures required so that the evidence may be taken by the arbitrators.

If so requested, the court shall take the evidence under its own direction exclusively. Otherwise, the court shall merely adopt the relevant measures. In both cases, the court shall deliver a statement of the proceedings to the applicant.

4.12 Can the disclosure or discovery target seek relief from state court or to otherwise modify or prevent the disclosure or discovery?

According to the Article 33 of the above mentioned Arbitration Act, the parties are free to agree on the procedure to be followed by the arbitrators in conducting the proceedings.

So the, failing such agreement, the arbitrators may, subject to the provisions of this Act, conduct the arbitration in such manner as they consider appropriate.

The power conferred upon the arbitrators includes the power to determine the admissibility, relevance and usefulness of evidence, the manner of taking same, even ex officio, and its assessment.

In the other words, the state courts the court only may intervene when it has been requested court assistance in taking evidence.

4.13 What consideration will be given by the state court to concerns about the invasion of a privilege (attorney-client, etc.), confidentiality protections, or potential criminal liability in the event of disclosure? Whose laws and rules will the state court apply?

Depending on the invasions of a privilege (attorney-client, etc), confidentiality protection or potential criminal liability in the event of disclosure, it will be given the consideration according to the current legislation in Spain.

4.14 Do the state courts need to enquire into the view of the arbitral tribunal on the disclosure or discovery?

The state courts don't need to enquire into view of the arbitral tribunal on the disclosure or discovery, unless the parties have not established something else.

4.15 Do the state courts need to enquire into the ultimate admissibility of the evidence in the arbitration?

The state courts don't need to enquire into the ultimate admissibility of the evidence in the arbitration, unless the parties have not established something else.

4.16 Do the state courts have the power to order reimbursement of attorneys' fees or expenses incurred by the disclosure or discovery target? If so, in what instances will they order that?.

The state courts don't have the power to order reimbursement of the attorney's fees or expenses incurred by the disclosure or discovery target.

So according to the provisions of the Article 37.6 of the above mentioned Arbitration Act Subject to what may have been agreed by the parties, the arbitrators shall rule on the arbitration costs in the award, which shall include the arbitrators' fees and expenses and, as applicable, the fees and expenses of the parties' representatives, the cost of the service rendered by the arbitration administration institution and the other expenses resulting from the arbitration proceedings.

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