SPECIAL REPORT

Arbitration and Reputation

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d+i LLORENTE & CUENCA

In collaboration with:

ROCA JUNYENT

1. INTRODUCTION

Many times, at the time of concluding a contract, establishing a company or completing a transaction, an aspect of vital importance is not taken into consideration: how the conflicts that may arise from it will be resolved? This is a question that must be always seriously asked, although usually there is scarce knowledge about the existing possibility of this kind of pact (with the exception of international contracts).

Indeed, in many relations, many of the divergences arising may be resolved better in different systems than a pure and simple trial before ordinary courts. One of these systems is the Arbitration, which is very often more appropriate than the trial.

Characteristics of this system, as an alternative to ordinary justice, not only present obvious advantages from the judicial perspective, but result especially relevant to an appropriate reputation management of the parties involved.

Assuming that reputation is the function of notoriety (knowledge) and notability(value) that each stakeholder has over the company or person, any judicial conflict presents an scenario in which the visibility of each party increase, thus the consistency of the current valuation is challenged.

Without forgetting that it is within the framework of a conflict, arbitration offers different —and really interesting— perspectives to companies or people in dispute, in both risk management field —linked to the process or outcome— and better planning of eventual opportunities emerging as a consequence of the outcome.

Among the characteristics of the arbitration explained all along the document, there are three that are especially relevant ¤given the difference with respect to an ordinary judicial process¤ for reputation management of stakeholders: swiftness, specialized technical capacity of arbitrators, and possibility of forecasting milestones and deadlines.

To examine and look further into this issue, we propose to take some time to explain what arbitration is about, its characteristics, advantages, disadvantages, and in which situations or relations it is more advisable. We will start with the legal regulation.

2. REGULATION

Arbitration is an institution strongly promoted by all the international institutions as the ideal mechanism to favor trade and economic transactions of any kind. The first shot was fired by the UN with the New York Convention of 1958, ratified by 178 states (all the existing, with a few exceptions of small states with very peculiar political regimes). The Convention proclaims arbitration as the particularly appropriate system for resolving international trade conflicts and, hence fostering economic circulation. Its content consists essentially of regulating full enforceability of arbitration in a State —the one declared competent by the Convention— in the rest of the signatory States. For years now, the UN enacted a Model Law, known as UNCITRAL or CDNUMI —by its acronyms in English and French, respectively— with the purpose of guiding and encouraging Member States to enact similar laws to clearly favor it. Similarly, the EU has issued several Directives and adopted many provisions for the promotion and diffusion of such institution. In this respect, particular reference should be done to the Geneva Convention of 1961, which develops for Europe the New York Convention of 1958 regarding commercial arbitration in an empowering sense.

Spain caught up by the Law No. 60/2003 (reformed by the Law No. 11/2011) that clearly follows the aforementioned UNCITRAL Model Law. Both aforementioned international covenants have been ratified as well as many bilateral treaties on the effectiveness of arbitration between both signatory States have been signed.

3. WHAT ARBITRATION IS ABOUT?

Arbitration is that procedure, agreed by the parties, in which the existing discord between them is resolved by the decision of one or more people, who do not belong to any judicial body, through a resolution called "Arbitration Award" that is equally mandatory, enforceable and has the same legal effect as an ordinary judicial ruling.

4. "AD HOC" ARBITRATION AND INSTITUTIONAL ARBITRATION

There are two main systems to submit to arbitration. The least common, called "ad hoc" is that in which the parties reserve themselves the nomination of arbitrators and the adjustment of all the points mentioned below. In the event that a disagreement arises, and they do not come to an agreement at certain point, this will be decided and completed by ordinary justice.

To our knowledge, the other system, known as "institutional arbitration" offers more advantages. In this case, stakeholders entrust, partially or totally, inasmuch as they consider, the management of

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the arbitration to an arbitral institution. The choice is important: it should be a serious arbitral institution, such as the ones in our country that depend upon the Chambers of Commerce or Professional Associations, in particular upon Bar Associations, due to its wide experience and seniority. Such Institutions are not which resolve the arbitration nor deliver the Final Award. They only (i) administer or manage it, and (ii) have both experienced and studied Regulations, whose rules fill those gaps in the procedure on which the parties have not reached an agreement, (iii) and a list, usually open, or a deep knowledge of the most suitable professional to arbitrate each case, depending on the issue. We will talk about this later on.

Administer or manage an arbitration consist in receiving the request from the party who wishes the commencement of the arbitration —usually through a simple application form, whose model appears on the website— and notifying it to the other party. We must try that both reach an agreement on the arbitrator (or arbitrators, in case they are three), if they do not agree on this, an independent unbiased arbitrator with the experience and knowledge required in the field should be nominated. Eventually, in many cases, secretariat support is required by the parties or the arbitrator. From the nomination of the arbitrator —or arbitrators—, he regulates the procedure, always in accordance with the agreed by the stakeholders, and freely rules his decision.

5. ADVANTAGES OF ARBITRATION

Certain of the particular characteristics of the arbitration, which imply an advantage for stakeholders from both the legal and reputation's management perspective, are summarized below.

1. The judgment they need: such as the stakeholders need and wish.

We have defined arbitration as a procedure equally mandatory as an ordinary judgment, but agreed by the parties. This is the first characteristic and advantage that should be highlighted. Indeed, the expression "agreed by parties" has a two-pronged approach.

One the one hand, it points that an agreement between parties is required: parties should agree on it so that one, several or all the issues that may arise between them from one or more contracts or legal relationships, are resolved by it. This agreement is usually included ▫it is highly recommendable▫in the contract which with the relationship is initiated or in the articles of association of the company they constitute. It is highly advisable because, although it is possible to agree on submitting to arbitration later, once the conflict has arisen, it results far more difficult to reach any agreement, even the one on how resolve the existing dispute.

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This arbitral agreement avoid that the Court was aware of the disputes between the parties, and it is binding on the parties, which necessarily must go to the agreed arbitration. The assistance role is reserved to the Court to help the arbitrator to do tests and other elements required, as well as to enforce the final judgment (Arbitration Award), which is equally enforceable and mandatory that an ordinary judicial ruling.

On the second hand, "agreed by the parties" expresses something that constitutes an undeniable advantage, which is also the essence of arbitration. It expresses that the parties are the master of their own judgment, thus they can decide how they want it to be. In effect, parties' sovereignty over the procedure, deadline, arbitrator and other particular features, represents the essence of it. The parties, the stakeholders, who therefore decide (i) the main point: who should judge them and which features, experience and specialization should the arbitrator has; but also (ii) the acts, formalities, arguments and evidence which will shape the procedure; (iii) the language and place; (iv) how costs will be awarded and last, but not least: (v) how long it will last. They set its duration and even the specific date in which the procedure will end; that is, the specific day in which the arbitrator must make the Award as a matter of obligation, a fact that cannot even be predicted in ordinary judicial courts.

There is no need to highlight how useful is to know and control the duration of a judgment, because in many cases there are business plans, future of the society and various business forecasts, etc. that depend on it. All the above allows that, in contrast to ordinary justice, the resolution of the conflict takes place within the time limits set, by the people, and under the conditions agreed by the parties.

To manage process communication, the possibility of agreeing on certain rules, such as the deadlines and arbitrators, constitutes an obvious advantage: planning and forecasting development and resolution scenarios in more detail that in ordinary proceedings. Additionally, the fact that arbitration began with a first "agreement between parties" (albeit in documentary issues) gives to the process a style less aggressive than the legal proceedings at the request of a part. This starting point influences directly in the "parallel judgment" that public opinion may conduct, which usually takes place in an highly-balanced scenario with arguments of technical nature, due to the style of argument that this system has.

2. Swiftness

Although it depends on what the parties have agreed and the complexity of the field —sometimes parties should agree on extensions to the initial deadline because of the arguments or evidences

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required by the parties during the proceedings—, statistics show an average duration of arbitrations between 4 and 8 months (the Law has established a maximum of six months after the statement of defense, extendable by the arbitrator for another two months).

The duration of an ordinary trial varies considerably from territories and courts, but it can be estimated by averaging one or two years only in first instance; then, another one or two years on appeal before the Audiencia Provincial, which is usual on relevant issues. In certain —a few— cases, and due to fixed reasons, an appeal could be made before the Tribunal Supremo, which usually takes between one and two years to apply for and, if the application were successful, it would take about three more to render the judgment.

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3. Certainty in resolution time-scales

We consider that this characteristic is a clear advantage of arbitration over the ordinary proceedings. What interests the most to each party is certainly success. Anyway, it is not negligible to know when the outcome will be announced for purposes of business planning, strategic plans, new investments, new works or contracts, pursuit of remedies, etc.

This point, together with the previous one, leads to a considerable advantage with regard to the ordinary judicial proceedings. It is proven that any contentious case implies a period of special risk, linked to both its outcome and the development itself. When a dispute is resolved by arbitration —in a shorter (and known) timeframe—, the parties limit their public exposure and also can delete this issue from the common agenda with their stakeholders.

4. Experience, professionalism or specialization

In every human activity, the specific person who carries it out is essential, and his qualities are fundamental. Thus, it should be noted from the outset that there will be no good decision without a good decision-maker (an arbitrator, a judge, etc.).

Therefore, the arbitrator or arbitrators nominated should be experts in the field subject to arbitration, and it is certainly advisable that the parties do not dispense with this requirement. Experts in the field, in the most specific sense of the term "expert"; that is, who have extensively experienced themselves the issue subject of controversy from different perspectives. In fact, they will have done many contracts in the area in question, undergone and experienced with the client —company or professional in the field— the difficulties and particularities of the business on which they must decide. They also should know their habits, the most frequent breaches and the common manners to cover it up; as well as the difficulties to prove certain aspects, thus which signs or trace are most deciding

in order to understand or prove what has happened.

Perhaps it can be said that they don't have much experience in judging as a professional judge; but it cannot be denied that, apart from having experience in "judging" arbitration processes or having participated in hundreds of trials, they have played all the roles in the play —scriptwriter, actor, stagehand and even spectator—, thus they have a deep and extensive knowledge of the issue in question with respect to all what it involves in practice, as well as of the actual significance and importance of certain aspects.

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Despite the judges' work is usually impeccable at technical level, especially in the commercial court; experience confirms us that the arbitrator's specific preparation to address the issue in dispute provokes obvious advantages to manage communication. Apart from contributing with business or technical experience to legal interpretation of the contentious, the specialization of the arbitrator allows the parties focusing on the matter of discussion, thus the management of procedural alternatives remains lesser relevant than in other ordinary proceedings.

This point has become clear since the reform of the Criminal Code of 22.06.10 (L.O. 5/2010) on 23 December 2010, with the criminal responsibility of legal entities, which had provoked that many cases with a complex technical-business definition have been judged by Criminal Courts with a scarce experience in complex business issues.

5. Personalized service and dedication. Closeness.

There is no doubt that the way in which the arbitral procedure is developed allows, and even imposes, the arbitrator to have a dedication that cannot exist in ordinary justice. Most of Regulations and Standards for Good Practice from several Arbitral Institutions and International Professional Associations include the obligation of devoting enough time to pay full attention to them, to which they must make a written commitment under their responsibility. It should be added to this dedication the proximity both to parties and witnesses, experts and all who participate in the procedure, in open and deep dialogues —rather than interviews—, without the rush of a trial, which makes possible to delve into what had actually happened.

The flexibility of the proceedings, the ease to admit, do and carry out tests, the adaptable and friendly way in which interviews —particularly to the parties—are made in practice implies an arbitrator's immersion in the problem, full detailed, which is usually far higher than the reached in an ordinary court.

6. Flexibility of the procedure

It is worth highlighting the flexibility of the procedure, because it constitutes indeed a great advantage of the arbitration. Not only in the sense that it can be —in fact, it is— agreed by the parties, but because of the absence of the legal restrictions that ordinary proceedings have. The arbitration can be led with greater flexibility than a proceeding before the ordinary justice.

This has various points of greater importance. From practical matters, such as the place and language, to procedural matters of a substantive nature (arguments, flexibility in requests), passing through the ease and agility to deliver pleadings, documents and communications between the parties and the Court (increasingly on-line).

There is also the possibility that the arbitrator, or arbitrators, travels to test (buildings, machinery, objects) or interview the parties and witnesses.

7. Greater friendliness. Long-lasting relationships.

This feature generates an advantage that is one of the main reasons why a company or an individual devote efforts to improve relations with the stakeholders: protect long-term interactions (either they are of commercial, labor or social kind or any other nature) and resolve differences with the least possible diminution of future relationships.

A friendly communication of a dispute favors both the future relation with the other party in dispute, and the impact on other stakeholders with similar positions or interests with respect to the company, who will consider this manner of resolving difficulties as an additional reason for trusting, if it is managed properly.

7.1. Arbitration is always seen by stakeholders and the general public as a much more friendly procedure than the ordinary trial. They certainly perceive it like this, because in fact, it is so.

Firstly, because it makes evident that the parties have reached an agreement to resolve their differences, hence, they are not radical. It is a "proceeding by mutual consent" followed with the consent of both parties; it is not a lawsuit by one party against the other.

Secondly, because it is very rare that in arbitration proceedings oral or even personal hostility arises, which unfortunately, is usual in ordinary trials. Obviously, each party pleads his view with the same vehemence and eager, although during the development of the arbitration the parties and the defendants usually behave in a less aggressive and more elegant way. Perhaps what we have mentioned before —it is a "lawsuit agreed by both parties"— contributes to this,

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but it is anyway a psychological and sociological reality:

- That the arbitration does not set a party against the other, or at least, far less than other proceedings.

- That thee position of both parties, even of the one that is not awarded, is always more positive: there has not been a lawsuit of one against the other, but a system agreed by common consent so that a third party resolves the dispute.

7.2. This is particularly important in those long-lasting legal relations in which the stakeholders should continue to be associated during the resolution of the conflict and after the outcome, or between operators who intend to continue the collaboration. From a supplier who does not want to lose a client (or vice versa) despite an occasional dispute, to family or inheritance —property— relations, passing through conflicts between partners or within societies, franchise, distribution, agency agreements, or construction contracts, etc. All these are agreements and relations in which the parties (partners, developer-builder, company-distributor, etc.) should or intend to continue the collaboration until the termination of the agreement. The (more) friendly nature of the arbitration is in this respect, as we have stated before, essential.

8. A (much) greater voluntary compliance with resolutions.

Statistics are overwhelmingly favorable in this point of arbitration. Most of arbitral decisions, 80% approximately, are complied voluntarily, whereas in judicial judgments the percentage is just the opposite: between 70% and 80% must be judicially enforced, which implies in practice a new proceeding that will last several months.

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9. Confidenciality

The Law imposes the duty of confidentiality in all arbitration procedures. Institutions, arbitrators and the rest of people participating in it —experts, witnesses— scrupulously keep it. The Awards cannot be either published, unless otherwise agreed between the parties.

Another thing is what the parties do outside the proceedings. They can publicize the existing arbitration between them, its commencement or its outcome. Anyway, regarding communications management, it will be a simpler decision, since in ordinary proceedings there are often leaks out of context that do not help any of the parties, nor the Court, and only provoke "background noise". In arbitral procedures, in the event of a leak, or if details are revealed, it will contain

technical or background aspects only giving the viewpoint of each party, which will facilitate the understanding and interpretation by stakeholders.

However, it cannot be denied that discretion in dispute, the certainty that it will not reach the public opinion, is often an advantage for contenders. It allows for instance keeping unknown the serious disagreements between partners in a company with Council or Board agreements challenge, which could harm everyone by damaging company's image or its good functioning. Moreover, it can be very advisable for succession or family economic issues, in which no member of the family is interested in making publicly known what "dirty laundry is being washed at home".

"They (the parties) can publicize the existing arbitration between them, its commencement or its outcome"

10. About the economic costs

This is another discussed issue; this is why we have not entitled in an affirmative way this section, as in the previous cases. Is arbitration cheaper or more expensive than ordinary justice? Now that court fees have entered into force, since 1st December 2012, the answer is with no doubt that in case arbitration is not cheaper, it will certainly not be more expensive, considering only the effective burden that should be paid under various headings in ordinary justice and in arbitral procedures.

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Hence, the comparison between ordinary proceedings should be done having into account that other experts take part in it —attorneys—, and the existing subsequent stages of proceedings —Audiencia Provincial, Tribunal Supremo, intermediate appeals, enforcement of the judgment— with the accrual of new and substantial legal fees.

It should be noted that we have only talked so far about the cost of the strict procedure. We have not taken into account something crucial to businesses: the nontangible cost, but decisive, personal, financial or corporate, that a delay in the procedure means, with an uncertain outcome and the cessation of activities this might imply.

As we have already stated, if this cost was estimated in terms of damage or reputational risk, a priori, it would clearly present advantages related to a lesser timeframe, greater predictability and better technical specialization.

6. DISADVANTAGES OF ARBITRATION

On the other side, disadvantages should be considered as well. We will point out three of a systemic and objective nature, and we will also debunk a hoax that is usually considered like another disadvantage.

1. Fewer guarantees

Arbitration, as we can see, has only one stage, there is no possible appeal. There is only an invalidity action for exceptional reasons —to be far from what parties have agreed or what the Regulations of the institutions state; to provoke defenselessness or serious law infringement, which do not usually happen—. The swiftness that we have considered before as an advantage has it counterpart in: the impossibility that a Supreme Court reviews it. Thus, in case that the arbitrators were wrong in their decision, it cannot be reviewed (although it is obvious that such consideration depends on which party receives the Award: the judgment about the arbitral decision will be always very subjective).

That is why the choice of the arbitrator or institution that must make the Award is crucial, and for reputation management purposes, this will be an element for communication that is inexistent in ordinary proceedings, where identity of the judge or court is generally innocuous to the procedure itself.

2. Lack of authority leading the process

Arbitrators by themselves do not have the authority to obtain certain evidences if who should provide it does not voluntarily cooperate. An arbitrator cannot force witnesses to appear, or any third party —either they are notaries, public institutions or administrations— to provide them with certifications, testimonies or documentation that one party may have requested as evidence. The Arbitral Tribunal will certainly be able to write all of them, directly or by the institution managing arbitration, although they all must appear voluntarily. The proposing party is who most should take care so that the requirement of the arbitrator is met.

It is true that judicial assistance can be requested, but this usually slows the procedure, which compels the parties to agree extensions.

However, ordinary justice is not without this advantage, which is reluctant to suspend trials or postpone judgment (ruling postponing judgment until better evidence is shown) due to the lack of evidence, and even at disadvantage compared to the arbitration, since it is subject to peremptory terms and the parties have no possibility of agreeing any extension.

3. Fear for compromise

According to a black legend, there is a trend in arbitration

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to compromise, not to entirely agree with none of the parties or that none of them is fully discontent, much more than in ordinary justice.

Experience invites us not to believe. We do not trust in it, it is not based on unbiased statistics or on our professional experience.

When the arbitrator have been nominated in joint agreement by both parties, outside any institution, there are some people who believe that he will have an unconscious feeling of gratitude for the confidence reposed, which will create a particular understanding towards the viewpoints of both parties. The evil-minded would think that he will be afraid that he will not be nominated again in case that he makes an emphatic Award in favor of one party. We do not think that it could be statistically true.

Anyway, there is no point when the arbitrator has been nominated by an Institution.

What perhaps does happen in arbitration procedures is that there are no "secondary trials": those aiming to extend the ruling —presumably detrimental— or pursue other objectives (forcing a transaction, obtaining certain collateral benefits). Maybe, it is true that disputes submitted to arbitration are more balanced, and the positions frequently more equitable, thus the result is usually well-balanced.

"According to a black legend, there is a trend in arbitration to compromise, not to entirely agree with none of the parties or that none of them is fully discontent, much more than in ordinary justice"

7. IN WHICH CASES IS IT ADVISABLE TO RESORT TO ARBITRATION? SPECIAL REFERENCE TO INTERNATIONAL CONTRACTS

It can be seen from the above that, generally, advantages outweigh disadvantages, but there are relations, which have been already indicated, in which arbitration is particularly advisable.

7.1. Firstly, international agreements should be mentioned. There the rule is submitting to arbitration. None of the parties want to submit to judicial regulations of the other party's State, sometimes because of mistrust, other because of the ignorance about its procedures and laws, habits and language, and certainly due to the enormous increase in cost that litigate abroad —with foreign lawyers, and regular travels, etc.— implies.

In that case, the most frequent way to reach an agreement is submitting to a supranational judicial entity, hence, neutral, such as the most prestigious international arbitral institutions. For instance, in Europe: the CCI in Paris, the LCIA in London, the SCC in Stockholm and the Swiss (unified) institutions. All of them depend on the respective Chambers of Commerce. In America, there is the AAA.

7.2. Due to the nature of the relationship or dispute, arbitration is particularly advisable:

- In such judicial relations or situations in which the parties should continue to collaborate within the contract or relation in question to avoid own major damages because of new and more serious breaches of the contract: societies, long-term contracts —franchises, distribution, construction works—.

- In such other where discretion (confidentiality in arbitration) or whatever they have in common is agreed by both parties: societies, family agreements or parasocial agreements, family property issues.

- In such cases in which parties should or want to maintain relations and conclude new contracts, due to the lesser hostility and break that arbitration implies in comparison to a trial: maintaining client-supplier relation, not breaking the society or family consensus.

- In such cases in which time factor is vital in resolving the conflict.

- Whenever it is required that resolution is made by someone particularly experienced, expert in the subject and capable of dedicating a great amount of hour —something impossible in an ordinary trial, as the Courts are overwhelmed by thousands of affairs per year—, due to the complexity or particularity of the subject.

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8. DIFFERENCES IN REPUTATION MANAGEMENT DURING AN ARBITRATION PROCESS, IN COMPARISON WITH OTHER LAWSUITS RESOLVED BY ORDINARY JUSTICE

To summarize advantages and disadvantages, already explained, with respect to reputation management during an arbitration procedure, the following keys depending on each stage of conflict are provided:

- At the commencement: The main difference, which is an obvious advantage, is the "friendly" aspect that a dispute submitted to this way implies. Usually, the parties are less aggressive when arguing their reasons and viewpoints when the cases come to the public scene at the beginning. Even the choice of this way contributes to the interpretation that parties are willing to resolve "in good terms" the dispute, and rarely have "documentary" objectives.

"The main difference, which is an obvious advantage, is the "friendly" aspect that a dispute submitted to this way implies"

- In the development: Generally, disputes resolved by this procedure, generate lesser controversy during its development. This is due to, on the one hand, the existence of an eminently technical argumentation and, on the other hand, the swiftness of the procedure itself. Anyway, both parties will have the challenge of giving its perspective rightly, not only to the arbitrator or arbitrators, but also the different stakeholders concerned by the dispute.

- In this period, one of the features stated before is particularly useful: capacity for planning the milestones of the procedure. This is a radical difference in comparison to ordinary proceedings with respect to communications and reputation management of both parties.

- In the resolution: The "definitive" character that the Arbitral Award implies (with scarce possibility to appeal, as explained above) is the main advantage. This makes easier a "closure" of the dispute in terms of communication as well as ensures a proper memory for stakeholders of how and due to which arguments the conflict was resolved in favor of one or another party. In the case of the "awarded", it is positive to know that he has won due to technical reasons. The same idea compels the "loser" to better explain the reasons why his perspective has not prevailed, since he cannot appeal later for trying to reclaim his position. The main goal is to help stakeholders to "interpret" correctly why the arbitrator has taken a particular decision, and thus counting with a technical explanation that eases, as mentioned above, the strengthening of the relation with the stakeholders, including the contender.

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Màrius Miró, is a practicing attorney since 1972, specialized in Civil and Procedural Law, mainly in subjects related to inheritances and family. Since then, he has appeared before all type of courts and stages in countless cases of all kind of subjects related with Civil and Mercantile Law. He has appeared, and still does, in countless cases as an attorney representing parties, in national and international Arbitral Procedures. Besides, he has also acted, and usually does, as an arbitrator (either he is the only arbitrator or the president of an arbitral tribunal) having been nominated directly by the parties or by national or international arbitral institutions, such as the International Chamber of Commerce of Paris (ICC) and the Tribunal Arbitral de Barcelona (TAB). Nowadays, he is a member of the Board of Directors of the Tribunal Arbitral de Barcelona (TAB). He has been distinguished among the best Spanish trial attorneys between 2008 and 2011 by Chambers Global, Chambers Europe, Legal 500, Best Lawyers and PLC Which Lawyer. He has also published many articles and has regularly given, and still does, lectures and conferences.

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