

ARBITRARY CHALLENGES - ROCA JUNYENT

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Often heralded as a worthy alternative to litigation, the Spanish arbitration system, however, has some peculiarities that can create obstacles to its use

Arbitration has many supporters, however, in Spain, the relevant legislation creates hurdles that make the process less attractive than its litigation counterpart, according to Gonzalo Serrano Fenollosa, Civil and Commercial Litigation Partner at Roca Junyent.

He points to the high front-end costs of arbitration as parties have to pay various fees in advance, which can be problematic for small companies if the other side decides not to pay the provision of funds.

"When we are talking about a conflict between multinationals or big companies, the defendant normally has no problem in making good on the payment, but things become tougher when the economic resources of the claimant are limited," Serrano Fenollosa explains. "When David is fighting Goliath, the battle can be aborted due to an economic issue."

This can, however, be avoided by including a preventative provision in the arbitration agreement, he adds. This should include the provision that, in the event that any of the parties does not fulfil the

economic obligations, the other party will be entitled to either make good the payment or leave with no effect the arbitration clause and appear before a determined ordinary Court.

Serrano Fenollosa says the second challenge is that, unlike litigation when a court ruling obliges the loser to pay, Section 45 of Spanish Arbitration Act states the enforcement of the award can be suspended by the defendant under two criteria. First, that when it has filed before the ordinary Courts an action asking for the nullity of the award, and second that it offers a bond or caution for the amount set forth in the award plus interests.

"Obviously this consideration might not be shared by the defendant who has been condemned," Serrano Fenollosa summarises, "but in my understanding this situation makes arbitration slower than it is supposed to be and, consequently, less attractive".