

Already an IBA member? [Sign in](#) for a better website experience

# Analysis of a resolution of the High Court of Justice of Valencia regarding the competence to grant interim measures in support of proceedings for the recognition of a foreign arbitral award

Friday 4 March 2022

Ignacio Santabaya

*Pérez Llorca, Madrid*

[isantabaya@perezllorca.com](mailto:isantabaya@perezllorca.com)

Silvia de Paz

*Pérez Llorca, Madrid*

[sdepaz@perezllorca.com](mailto:sdepaz@perezllorca.com)

Buenaventura Hernández

*Pérez Llorca, Madrid*

[bhernandez@perezllorca.com](mailto:bhernandez@perezllorca.com)

In international arbitration, it is not uncommon that the party which has prevailed in the proceedings needs to enforce the award in a jurisdiction other than that of the seat. In Spain, this requires proceedings to recognise the foreign arbitral award (following the provisions of the New York Convention) before it can be enforced. Thus the losing party may have time to take measures to frustrate or hinder the enforcement proceedings. In order to tackle this problem, it is possible to ask for interim measures that remain in place while the recognition proceedings are ongoing.

In this context, where urgent action is required, Spanish law does not expressly state which judicial body has the competence to grant interim measures. Moreover, in a first approach, there could be two possibilities: the First Instance Courts (*Juzgados de Primera Instancia*) which will ultimately be in charge of the enforcement proceedings; or the High Courts of Justice (*Tribunales Superiores de Justicia* - 'HCJ'), which are the ones responsible for hearing the recognition proceedings.

As we explain in this article, we are of the view that the First Instance Courts are the competent judicial bodies. This is also the conclusion of the HCJ of Valencia in its recent resolution of 5 August 2021 and the one maintained by the HCJ of Catalonia. We consider that the resolution of the HCJ of Valencia is relevant because the matter remains unclear for some First Instance Courts; and the number of precedents that we are aware of is very limited. We also note that it would be useful for the legislator to clarify this specific point; or for the HCJs to ensure that the interpretation followed in Valencia and Catalonia will also be upheld in the remaining fifteen Autonomous Regions.

In order to understand how we have reached this situation we need to take a look back at the original version of the current Spanish Arbitration Act ('LA'). When the LA was enacted in 2003, HCJs had no role in relation to arbitral proceedings. Thus, it was the Courts of Appeal (*Audiencias Provinciales*) and First Instance Courts who would deal with cases when the support of the judiciary was needed.

In respect to the recognition of foreign arbitral awards, Article 8(6) established that the jurisdictional bodies with competence to enforce foreign rulings (i.e. First Instance Courts) were also the ones in charge of the recognition of foreign arbitral awards. On the other hand, based on Articles 8 (3) and (4) and 723 of the Spanish Civil Procedure Act ('LEC'), there was no doubt that First Instance Courts were competent to hear requests for interim measures as well as requests for recognition of foreign arbitral awards.

However, this situation changed in 2011, when the Organic Act of the Judiciary ('LOPJ') and the LA were amended. This amendment entailed that some attributions of Courts of Appeal and First Instance Courts were transferred to HCJs. According to Article 73(1) (c) LOPJ HCJs would be in charge of 'the support and control functions of arbitration as provided for by law, as well as requests for exequatur [recognition] of foreign arbitral awards'. This implied that HCJs received the competence to hear: (i) annulment actions; (ii) actions for the appointment and removal of arbitrators; and (iii) requests for recognition of foreign arbitral awards. Nevertheless, the competence to adopt interim measures established in Article 8 (3) LA was not modified. This raises the question of whether the First Instance Courts retained the competence to adopt interim relief related to arbitration, even in cases where they would not be hearing the main proceedings (i.e. recognition proceedings); or whether the new distribution of competences would imply that the HCJs were able to adopt interim relief to protect the subsequent enforcement of the award that they were considering recognising.



SHARE

Against that backdrop, on 5 August 2021, the HCJ of Valencia rendered a resolution whereby it dealt with this issue. It declared that it lacked competence to decide on a request for interim measures while the recognition process of a foreign award was ongoing. Instead, it stated that First Instance Courts were competent to grant such interim measures.

The case started with a request for interim relief filed with the Courts of First Instance in the place where the enforcement of the award had to be conducted. At the same time, the claim related to the recognition of the foreign award was filed with the HCJ. The relief sought in the interim measures was the preventive seizure of certain assets and/or prohibition of free disposal. Prior to deciding on the admission of the interim measures, the relevant First Instance Court granted a deadline to the Public Prosecutor to file allegations on the jurisdiction to hear the case. The Public Prosecutor considered that the Court lacked jurisdiction to hear the case and the Court upheld that view on the basis of the provisions of Article 723 LEC and Article 73(1)(c) LOPJ. Article 723 LEC establishes that the jurisdiction to decide on interim measures corresponds to the court in

charge of the main proceedings. On the other hand, article 73(1)(c) sets forth that HCJs are competent to hear cases related to the recognition of foreign awards. The conclusion was to decline the competence of the First Instance Court and express that the request should be filed with the HCJ.

Given the urgency of the interim relief, it was considered appropriate to request the relevant measures from the HCJ while deciding whether to challenge the decision of the First Instance Court. Therefore, the interim measures were filed before the HCJ which was already hearing the claim related to the recognition of the award. As in the case of the First Instance Court, the Public Prosecutor filed allegations regarding the HCJ's lack of competence to decide on the interim measures. Following a completely different line of reasoning to that maintained by the First Instance Court, the Public Prosecutor, and subsequently the High Court, decided that it was for the First Instance Court to deal with the request.

Their reasoning, which we share, is based on the fact that the competence of HCJs in cases related to recognition of foreign awards is set out in article 73(1)(c) LOPJ. According to this provision, HCJs will be in charge of 'the support and control functions of arbitration as provided for by law, as well as requests for exequatur of foreign arbitral awards'. Likewise, Article 8(6) of LA establishes that the competence to have foreign arbitral awards recognised will correspond to the HCJs. According to the HCJ of Valencia, the amendment introduced in 2011 attributed the competence on matters related to the support of arbitrations to HCJs. However, this amendment did not modify the attribution of competence related to interim measures, which corresponded to First Instance Courts.

Secondly, the HCJ of Valencia considered that it was not competent to rule on the request since the adoption of interim relief would not ensure the effectiveness of its judgment (as required by Articles 721 and 726 LEC). In this regard, the HCJ highlighted that recognition proceedings have a declarative nature, so they become effective by their own resolution (i.e. no enforcement is needed). In other words, the role of the HCJ within recognition proceedings would only be to review whether the requirements of Article IV of the New York Convention are met; as well as to confirm that none of the circumstances provided for in Article V of the New York Convention that could prevent the recognition of the award are present. Therefore, the HCJ sustained that it was difficult to justify that granting interim measures consisting of preventive seizure of assets and/or prohibition of free disposal could be necessary to secure the future declarative judgement. Rather, the relief sought was intended to guarantee the potential enforcement proceedings (which clearly correspond to the First Instance Courts), not the potential declarative judgement of the HCJ.

Thirdly, while the general rule on the competence to grant interim measures is that it corresponds to the relevant court which is hearing the main proceedings (Article 723 LEC), there are exceptions. Article 724 LEC is an example: interim measures requested in support of proceedings for the appointment of arbitrators (a decision that corresponds to HCJs) have to be filed with the court in the place that the award is to be enforced (i.e. the First Instance Courts in accordance with Articles 8(3) and (4) of LA).

The HCJ of Valencia acknowledged that there was a loophole in the Spanish law, since it does not specify which jurisdictional body is competent to grant interim measures in support of proceedings for the recognition of a foreign award (Article 8 of the LA, Articles 722 and 724 LEC). Nevertheless, the HCJ sustained that a systematic interpretation of these articles led to the conclusion that the competence corresponded to the First Instance Courts.

While the above interpretation is not new, the number of resolutions dealing with this issue is scarce. To the extent of our knowledge, there are only three other precedents that dealt with the topic after the amendment of 2011 came into force: (i) resolutions of the HCJ of Catalonia dated 9 December 2011 and 30 July 2014; and (ii) resolution of the HCJ of Valencia dated 19 July 2019.

It is worth noting that before the current LA of 2003, the competence on recognition of foreign awards corresponded to the Spanish Supreme Court. Thus, the Supreme Court rendered some resolutions whereby it followed a similar reasoning to the one now held by the HCJ of Valencia<sup>[1]</sup> and also explained that:

- (i) The Supreme Court, unlike First Instance Courts, does not have a structure that enables it to grant urgent resolutions (and the same happens now with HCJs);
- (ii) The resolutions of First Instance Courts can be subject to appeals, while those of the Supreme Court cannot (again this is also applicable to the decisions of HCJs); and
- (iii) It makes sense that First Instance Courts grant interim measures since they will eventually be in charge of the enforcement.

Although the conclusion of the HCJ of Valencia is not new, this precedent is relevant as it may help to clarify an issue which raises questions and, as happened in this case, continues to be misconstrued by some Courts. In this regard, interim measures are usually filed in situations that require an urgent judicial answer; otherwise, these measures may become ineffective. Therefore, legal certainty concerning the competent court is extremely significant. In its absence, the potential differing criteria of the HCJs and First Instance Courts on whether they are competent to grant interim measures may prevent the adoption of interim relief and leave the claimant in a situation of defencelessness.

Consequently, due to the amendments introduced in 2011, it is unlikely that the Spanish Supreme Court will ever be able to establish case law on this issue. Therefore, in the absence of a legislative change that would solve the problem, it would be useful for all HCJs to adopt the same position in order to provide the necessary legal certainty.

in

Some of the resolutions rendered were the following: (i) 9 October 2001; (ii) 29 January 2002; (iii) 16 April 2002; or (iv) 24 September 2002.

SHARE