

## **The Spanish Supreme Court on the *kompetenz-kompetenz* principle**

Madrid, July 2017

Banco Popular (BP) and one of its clients signed a financial transactions master or framework netting agreement (Contrato Marco de Operaciones Financieras or CMOF, in Spanish) whose general terms and conditions contained a clause whereby all disputes or conflicts resulting from this Framework Agreement, its interpretation, performance and enforcement shall be finally settled by arbitration in equity.

Sometime later, the two parties concluded a swap and a put. BP's client eventually sought the annulment of both derivatives before the judicial courts. BP argued that the matter had to be decided in arbitration, and not by the seized court. The first instance court and the court of appeals dismissed BP's argument, and the Supreme Court confirmed the view that the arbitration clause included in the CMOF did not cover the disputes arising out of the swap or the put.

The Supreme Court's held that the consent to refer disputes to arbitration must be explicit, clear, categorical and unequivocal, and found that the swap and the put had their own contractual entity, and therefore were not caught by the reference to performance (of the framework agreement) included in the CMOF arbitration clause.

The Supreme Court took this judgment as an opportunity to rule on the implications of the *kompetenz-kompetenz* principle under the Spanish Arbitration Act (SAA). The Supreme Court said there are two possible standards of (judicial) review of the arbitration agreement.

According to the strong view of the *kompetenz-kompetenz* principle, judicial courts must refer the parties to arbitration when -prima facie- there is an arbitration agreement. The reason is that only the arbitrator may decide about his own jurisdiction, and judicial courts may review the arbitrator's decision only if and when the award is challenged.

The soft view, however, leads to a full review of the arbitration agreement by judicial courts (in case, naturally, one of the parties submits the dispute to said courts despite the arbitration agreement). Judicial courts may therefore rule on the validity and effectiveness of the arbitration agreement and on its applicability to the subject matter of the dispute; and they may do so without any limitation. However, when the arbitrator has already decided that he has jurisdiction, then his decision can only be reviewed by judicial courts through an action seeking the vacatur of the award.

According to the Supreme Court, the SAA posits the soft interpretation of the *kompetenz-kompetenz* principle, which, by the way, is compatible with article II.3 of the New York Convention and consistent with whereas 12 of regulation 1215/2015 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast Brussels I).