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ARBITRATION NEWS & NOTES

ARBITRATION IN SPAIN: CHANGED LAW AND CHANGING PERCEPTIONS

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Introduction

Rome, goes the saying, was not built in a day. Similarly, creating and nurturing a legal and commercial culture which is not only accepting of, but favorable to, the solution of disputes by private means such as arbitration cannot be other than a lengthy and arduous process.

Logic might suggest that the development and consolidation of a vibrant and vigorous arbitration culture would be relatively easy in a jurisdiction where the institution has already achieved a significant level of acceptance and visibility over a significant period of time. The same logic might suggest that creating a solid arbitration culture “from scratch” in a jurisdiction where the institution is barely known and has achieved only very scant acceptance and visibility would be an onerous and slow process, at best.

But experience often trumps logic. Recent international experience in the area of arbitration, in fact, would seem to turn this logic on its hand. The booming arbitration cultures of “emerging” countries such as (for example) Brazil, on the one hand, and the somewhat more stunted advance of the institution in Spain, on the other, exemplify this counter-intuitive point.

It is not within the scope of this article to provide a detailed analysis of arbitral history in an “emerging” country like Brazil, with little or no historic tradition of arbitration and a more “developed” country like Spain, with a much fuller tradition. Rather, this article will limit its focus to Spain, providing a short historical oversight, indicating recent and ongoing initiatives to foster and strengthen an arbitral culture and mentioning certain pre-existing and difficult-to-eliminate conceptions and perceptions which work in the opposite direction, restraining or restricting the growth of the institution.

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At the risk of over-stating the case, the thesis suggested by this article is that – paradoxically – insofar as the establishment and furtherance of an arbitration culture is concerned, no experience at all may be better than some (mixed or, especially, bad) experience.

A. Simplified Overview of Spanish Arbitral History

Without disregarding the risks imposed by any crass simplification on a subject of analysis, the recent and relevant history of arbitration in Spain can be briefly summarized, from a strictly legislative perspective, as follows:

During the middle decades of the 20th century, the global economy boomed and the leading trading nations became increasingly intertwined. While arbitration took solid root in most leading commercial jurisdictions, Spain remained in the equivalent of the “Dark Ages” of arbitration, with an antiquated and highly-criticized 1956 law the deficiencies of which earned the country – in the middle years of the long, isolating and increasingly anachronistic Franco regime – a place on the “black list” maintained by many international companies and their advisors of countries considered as not favorable to, or even hostile to, arbitration.

After the end of the Franco regime, the adoption of the Constitution of 1977, the country’s accession in the same year to the New York Convention and its joining what is today known as the European Union, a 1985 law brought Spain much closer to its neighbors in terms of laying a foundation for a significant arbitration culture. But this legislation was also fraught with problems, and generally considered outdated even when promulgated. The last decades of the 20th century could be considered the “Middle Ages” of Spanish arbitration, reflecting some significant steps in the direction of creating a solid and favorable legal framework, but still trailing far behind its neighbors in the race for arbitral modernity.

Finally, in 2003 a truly modern, UNCITRAL-based arbitration law was passed, and with it, Spain can be said to have at last joined the “Modern Ages” insofar as a legal structure for arbitration is concerned.

The recent years have seen a significant amount of non-legislative activity designed to develop an arbitral culture in Spain, building on the solid foundation laid by the 2003 law. The Spanish Arbitration Club, as a leading example, has been especially active in promoting the institution in general and the position of Spain in particular as an attractive arbitral seat and a point of reference for disputes involving Latin American parties.

Governmental bodies and entities of various levels have similarly picked up the gauntlet, making efforts and investing funds to develop the

attraction of Spain as an arbitral seat. The local arbitral institutions have made significant strides in modernizing their rules, upgrading their technological capacities, internationalizing their appeal and profile, and generally “marketing” both their services and their attraction and that of Spain as an arbitral seat.

Going hand-in-hand with these changes over the recent two or three decades, of course, is the increasing and rather remarkable opening and internationalization (globalization) of the Spanish economy and its most visible actors. If forty years ago Spanish companies rarely ventured outside the Iberian peninsula, and twenty years ago their clear focus (the so-called “*reconquista*”) was on Latin American markets where common language, common commercial and legal traditions and a shared history facilitated the task, today no market is too foreign for the leading Spanish companies to explore.

The results of all the above actions and trends, while difficult to quantify with precision, are undeniable: the number of arbitration proceedings in Spain has significantly increased in recent years, as has (this being almost entirely an impressionistic view) the number of arbitration clauses used by Spanish parties in their contracts, thus reflecting increased confidence in the institution and laying the ground for its further growth, when – inevitably – disputes arise under these agreements.

But more needs to be done so that the solid infrastructure laid by the 2003 law is both improved where possible and put to proper use, with a solid and flexible superstructure built upon it so as to permit the institution to reach its potential. Two significant areas of activity in this regard, one which is clearly favorable and the other surely favorable in intention although perhaps mixed in execution, will be summarized in the remaining pages of this article.

B. Recent Spanish Judicial Decisions Involving or Relating to Arbitration

No matter how well-crafted a nation’s arbitration law may be, the successful construction of an arbitration culture depends to a large extent on judicial attitudes towards, and support of, arbitration. An attitude of judicial indifference, or even outright hostility, would clearly be lethal; whereas an attitude of understanding and acceptance would have a nurturing, synergetic effect on the institution.

All indications are that the Spanish judiciary, aware more than anyone of its own overwhelming workload and “underwhelming” resources to deal with it in such a way as to reduce the chronic delays – the facts and figures are such as to boggle the mind of most foreign clients and practitioners – that

plague Spanish courts in resolving litigations of all sorts, has indeed adopted a nurturing, favorable approach towards arbitration.

This is not to say that Spanish courts rule on a knee-jerk basis in favor of arbitration, arbitration clauses or arbitral awards; but rather that they view the institution as an acceptable and laudable alternative or partner to their own activities and have no qualms whatever in giving effect to the legislative and party intent to resolve their disputes outside the state judicial system. Thus, even the few decisions that annul arbitral awards in commercial arbitration can generally be understood to be decisions quashing bad arbitrations or bad arbitration clauses: not negative to the institution in general, but actually rather positive.

This is no mean accomplishment. Today's Spanish judges (and the same can be said in general about Spain's lawyers) are yesterday's Spanish law students, having studied yesterday's (or the day before yesterday's) legal texts and doctrine; the "Dark Ages" or "Middle Ages" formation, orientation and perception to the institution cannot be changed overnight, and it would be unrealistic to expect otherwise.

A sampling of relevant cases handed down since January 2009 includes the following:

- A ruling of the Supreme Court (n° 429/2009, of June 22nd), addressing among other things, an arbitrator's civil liability under circumstances in which the statutory terms for liability under the current law (gross negligence or wilfull misconduct) were found not to be applicable, imposes a very high bar, with a very substantial margin of error or deference, and requiring at minimum clearly, manifestly and grossly negligent conduct by the arbitrator before liability could be imposed, and indicating that any other approach would be damaging to the institution of arbitration.
- A ruling of the Audiencia Provincial of Madrid (n° 289/2009, of July 13th), annulling an award as addressing issues not within the scope of a narrowly-drafted arbitration clause. The decision makes clear its aim of giving effect to – and encouraging clarity in the drafting of – contractually-reflected intentions of the parties, and thus should be interpreted not as a splash of cold water on the Spanish arbitral culture but rather as a prod to counsel to be vigilant and rigorous in drafting and arbitrators to be vigilant and rigorous in interpreting arbitration clauses, and thus, as favorable rather than unfavourable to the institution.
- A ruling of the Audiencia Provincial of Madrid (n° 293/2009, of July 13th), containing a clear and emphatic confirmation of the very

limited scope of the public policy (“*orden público*”) ground for annulment of an arbitral award, and in particular the inappropriateness of its serving as a basis for re-opening the substance of the matter and revisiting the facts as found in the decision of the arbitrators (as in the case of a normal Spanish judicial appeal proceeding).

- Finally, a ruling of the Supreme Court (nº 6/2009, of January 12th), addressing a court claim rather than an arbitration claim, but in terms surely applicable to both, permitted an award not only of costs (under Spain’s typical “loser pays” rule) but also of damages as a consequence of the respondent’s having failed to respect contractually agreed choice of law and choice of forum clauses, overturning the decision below to the effect that clauses of this nature are “adjective” and not “substantive” in nature and thus could be breached without triggering the normal consequences of breach. (as applicable in the case of “substantive” contractual provisions).

C. Proposed Amendments to the Arbitration Law

Separate and apart from the support being increasingly shown by the Spanish judiciary as exemplified by the decisions mentioned above, a recent proposal to amend the 2003 law is a further reflection of official or general interest in furthering the development of arbitration in Spain.

. Irrespective of whether this patchwork proposal goes forward or not the Spanish political and economic crisis brewing as these lines are written could likely push relatively “minor”, technical amendments of legislation of this sort towards the bottom of the list of short-term legislative priorities or whether ultimately it is replaced in due course by a more complete legislative “overhaul” of existing law, a number of the points included represent clear steps in an arbitration-friendly direction. These include:

- “centralizing” in the 17 Superior Courts of Justice questions of judicial naming of arbitrators, annulment actions and actions to enforce foreign arbitral awards. While some commentators would have preferred raising annulment and enforcement actions to the Supreme Court, thereby assuring a clear, unitary line of jurisprudence, the proposal to raise them to the 17 “autonomous region” high courts rather than those of the 60 provincial high courts is recognized as a step in the direction of centralizing and thereby improving the resolution of these questions;

- eliminating an archaic provision of Spain’s bankruptcy law which stripped arbitration clauses of their validity on the declaration of insolvency;
- providing, in accordance with the UNCITRAL model law and with the effect of creating a less constraining time period for the filing of arbitration exceptions to a court seized of a matter which may actually be the subject of an arbitration agreement, for a means to raise such grounds for dismissal other than via the usual Spanish procedural avenue for the same;
- providing a special and accelerated procedure for hearing claims that an award had exceeded the proper bounds of the arbitration, so as to permit a means of addressing and if appropriate correcting these thorny issues before any annulment action is brought; and
- adding, in accordance with French law, as a means of emphasizing the very limited scope for setting aside awards on grounds of “public policy,” that annulment on such basis is proper only when the violation of public policy is “manifest.”

The proposal includes a number of provisions which, while of dubious utility, do seem to be motivated by a pro-arbitration intention. These include:

- related proposals to eliminate “arbitration in equity” in domestic arbitrations and to eliminate dissenting opinions; while the first seems to overregulate (irrespective of the parties’ desires), its intent is clearly to eliminate the type of arbitration which traditionally has given rise to the most annulment actions and annulments, and surely for this reason it has caught the drafters’ eye; the elimination of the dissenting opinion appears to be similarly (although, again, perhaps not convincingly) motivated, so as to eliminate what has proved to be a frequent bone of contention and encouragement for the filing of often spurious annulment actions.
- precatory language to the effect that arbitrators must maintain professional liability insurance (difficult to put into place where, as noted above, liability is only triggered by gross negligence or wilful misconduct and these risks are precisely those unlikely to be insurable) and that arbitral institutions must seek to ensure various aspects of the arbitral process, including the independence and impartiality of arbitrators. These provisions, again, may be ineffectual and ill-advised, but it is hard not to see behind them an intention to provide strength, certainty and confidence in the institution of arbitration.

Whether or not the amendment package is adopted, and in what form, its existence, content and especially manifest intention is a clear sign of Spain's increasing commitment to and confidence in the institution of arbitration.

D. Lingering Cultural Overhang; Prospects for the future

Slowly but surely, Spain's approach to arbitration is evolving. The 2003 law has not, and any 2011 amendments or tweaks, will not, change anything overnight. Perceptions and conceptions of judges, lawyers, clients and society at large – surely do not and cannot be expected to change overnight.

Spanish arbitration has long been viewed as a Salomonic, slightly a-legal system. Spanish lawyers and their clients have historically looked somewhat askance at the institution, preferring judicial processes and their lengthy appeals. As noted above, only the younger generation of Spanish lawyers has been exposed to the institution of arbitration as part of their studies.

But these perceptions are changing and with them, the future of Spanish arbitration – particularly, international arbitration, where the backgrounds, mindset and general “baggage” of arbitrators and counsel tend to have a more modern (less Solomonic) orientation to the process – looks bright notwithstanding a certain negative effect of a lingering cultural overlay.

Vestiges of Spain's not-distant past on the “Black List” are not easily erased. Slowly but surely, however, they are fading away.
