Grabbing the bull by the horns

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Could a new white paper clear away the doctrinal cobwebs hanging over Spanish company arbitration?

In 2011, the Spanish Arbitration Law (SAL) was amended. Among the various changes to the original text of 2003 were two new articles concerning arbitration of what has been referred to as "intra-corporate disputes," i.e. disputes between shareholders and the company, known simply as company arbitration.

While the legislative intention may have been to clearly and definitively establish - and thereby promote - the arbitrability of company arbitration, the changes have provoked several doctrinal debates. These are due, in roughly equal parts, to the complex matrix of rights and conceptions involved and to deficient drafting.

The majority of the doctrinal efforts on the SAL have focused on three concrete matters: the scope of arbitrability of company disputes, the appropriate majority required for the introduction of an arbitration clause in the pre-existing by-laws of a company and the obligatory nature of a submission to institutional arbitration – instead of ad hoc arbitration – when challenging corporate resolutions.

Arbitrability of company disputes

Since the reform, the SAL contains the following article: "Companies may submit to arbitration any conflicts arising within them."

There are differing opinions concerning the scope of this simple statement. Certain authors defend the literality of the text, i.e. that the legislation intends to declare the arbitrability of any and all manner of company dispute, free from the constraints of article 2.1 SAL, which only permits the arbitrability of "matters that may be freely disposed of at law."

Others maintain that the new text does not override article 2.1 and thus not every dispute that arises within a company may be submitted to arbitration. These authors highlight the challenges of corporate disputes involving subjects that are not generally considered to be within the free disposition of the parties, including in particular, resolutions that are void as contrary to public policy and those which may affect the rights of third parties.

Introduction of an arbitration clause

The new text of the SAL envisages that the introduction of an arbitration clause in the by-laws of an existing company (i.e. by way of amendment) requires the favorable vote of two-thirds of the share capital.

The doctrine is unanimous that, by virtue of the new content of the SAL, dissenting or absent shareholders are bound by the arbitration clause, since the law does not provide otherwise. The debate centres on the appropriateness of the two-thirds majority to amend the by-laws and introduce the clause. Three views are observed.

Some authors consider that the required two-thirds majority is prudent and appropriate. They assert that had unanimity been required, company arbitration would have been de facto excluded, as it would become unviable in practice to reach such level of consensus.

A second group believes that a simple majority would have sufficed, and that there is no compelling or sufficient reason for a special majority vote in this instance.

A third group considers that unanimity should have been required. According to the holders of this view, imposing an arbitration proceeding on shareholders that have not given their consent implies possible infringements of the constitutional right to judicial protection. Moreover, it would directly attack one of the basic principles of arbitration: the freedom of the parties.

Challenging corporate resolutions

The reform of the SAL introduces a provision that appears to indicate that arbitrations concerning the challenge of corporate resolutions (but not arbitrations involving other matters) must be administered by an arbitral institution, which would also be responsible for the designation of the arbitrators.

Nevertheless, the drafting of the article is not completely unequivocal. This imprecision, together with other factors – promotion of free competition stated in the Preamble of the Law, geographic location of the institutions, etc. – leads some to defend the non-compulsory character of the rule and, therefore, the possibility for the parties to choose ad hoc arbitration for the resolution of this kind of disputes.

The majority of commentators believe that the text of the law clearly provides an obligation of administered arbitration on the parties in challenges of corporate resolutions.

A leading expert has identified various reasons that could have led the lawmaker to impose this requirement, both of a technical nature to alleviate difficulties appointing arbitrators in multi-party arbitrations – and of a policy nature – to counteract the inequality between the company and the shareholder. The real legislative intent may have been to require institutional administration to company arbitration as a whole, but a technical imperfection, such as a mere drafting error, may have limited this exigency to the challenges to corporate resolutions.

This seems a convincing explanation of an apparent drafting gaffe, so prudence may suggest steering clear of ad hoc arbitration, which has historically been popular in Spain, but less so recently.

Not plain sailing

The express inclusion of company arbitration in the SAL has provoked interesting debates in Spanish doctrine. The debates are still open.

Firstly, the arbitrability of certain intra-corporate disputes is not unanimously accepted. Secondly, the shadow of unconstitutionality hangs over the imposition of an arbitration clause to those who have not voted in favor of its introduction in the by-laws. Thirdly, the question of whether an ad hoc arbitration is possible in the event of a dispute concerning the challenge of a corporate resolution remains unresolved.

In all likelihood, the fronts opened by the doctrine will only be closed by the Spanish courts or by further amended legislation, so will not arrive soon.

In the meantime, the Spanish arbitral community awaits the impending release of a white paper on the general topic prepared by an ad hoc group of experts – including practitioners, academics, representatives of public bodies and representative of arbitral institutions under the auspices of the Spanish Arbitration Club – with interest.

Hopefully this white paper and the possible incipient consensus within the arbitral community on the above issues will cut away at uncertainties before these matters are definitively resolved by jurisprudence or legislative clarification... or even make such definitive resolution unnecessary.

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