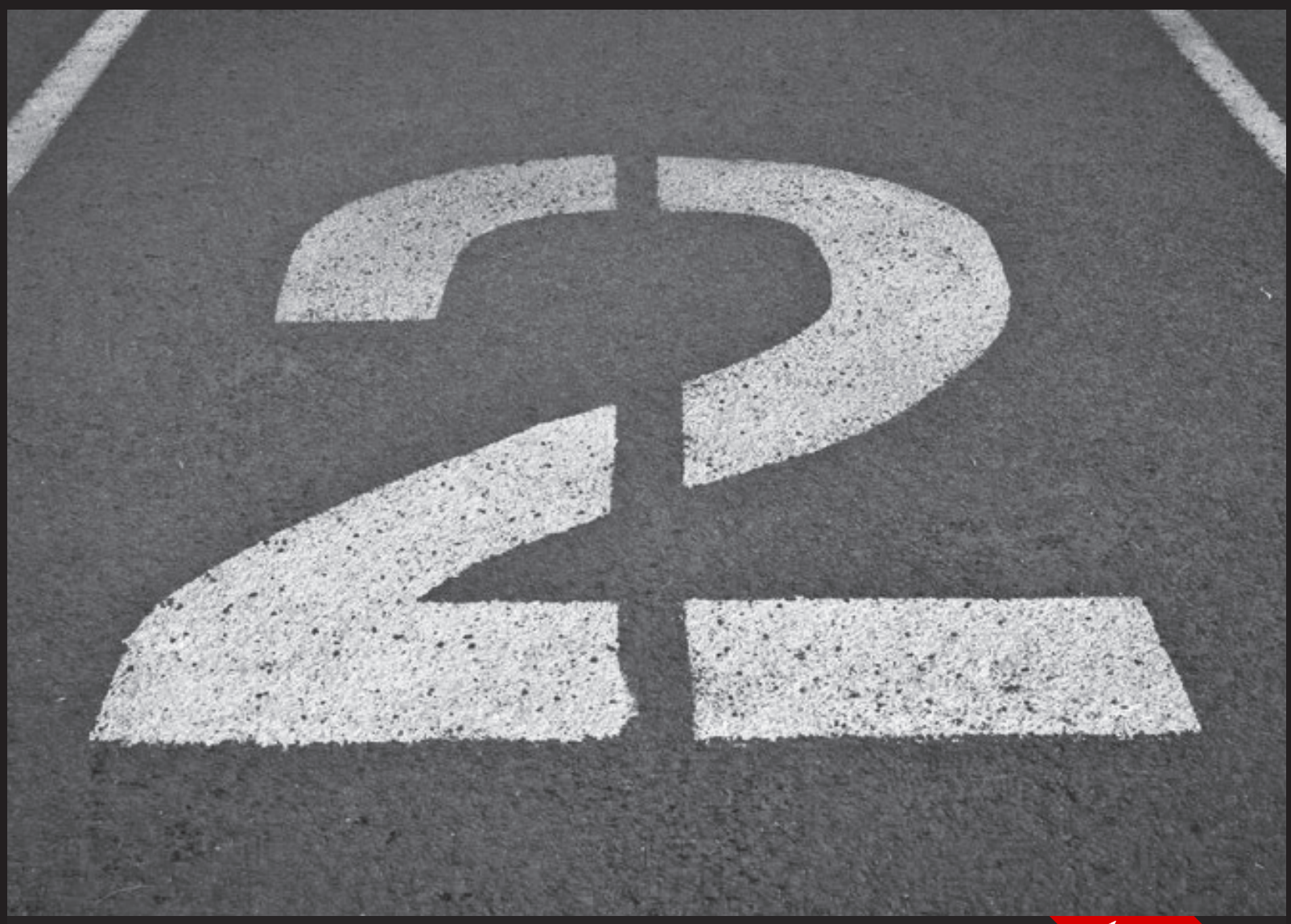

SECOND ANNIVERSARY

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EDITION 8 • JANUARY 2013

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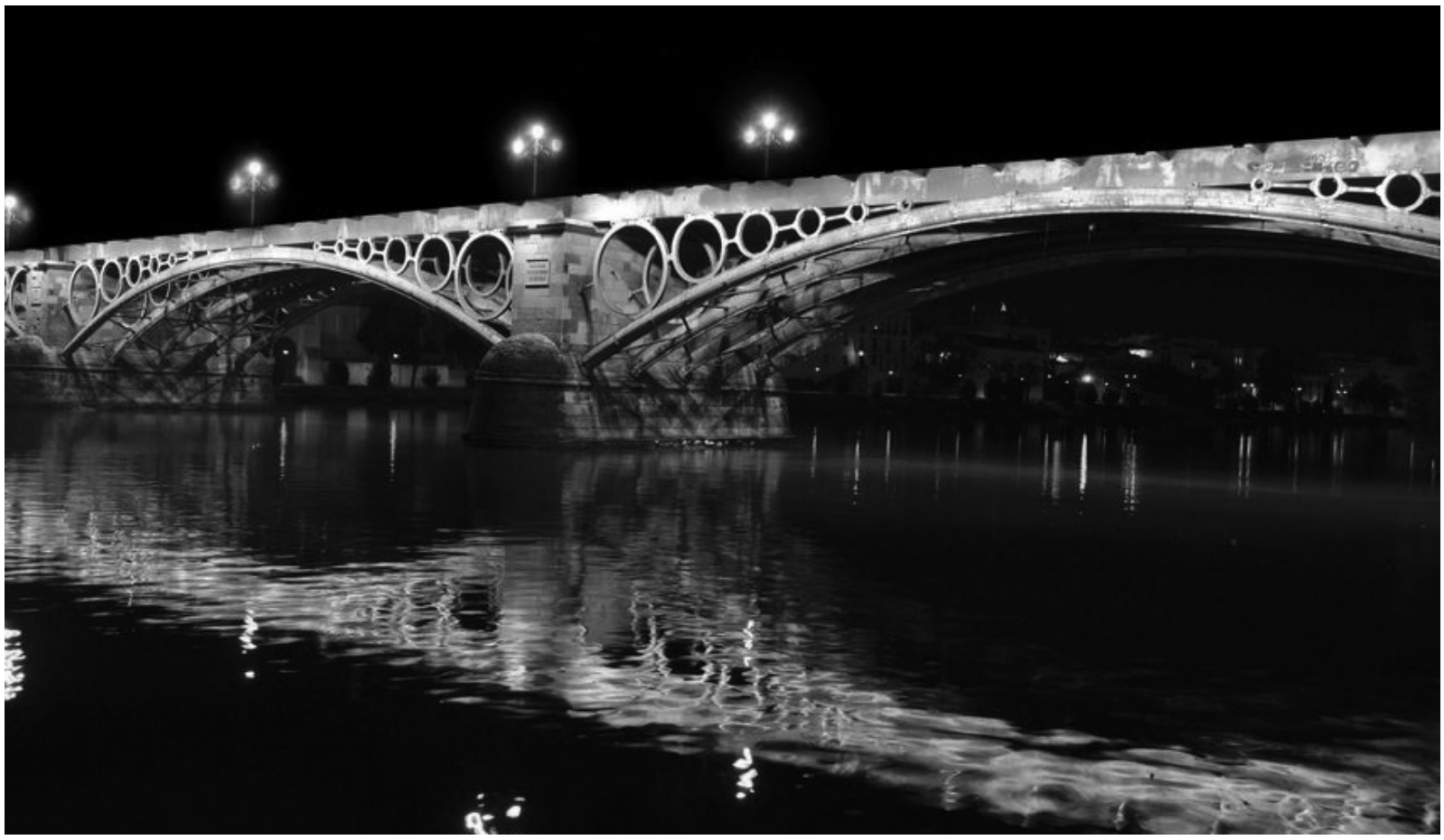


# CONFIDENCE/CONFIDENCE – REFLECTIONS ON ALTERNATE DISPUTE RESOLUTION IN IBERIA (FROM THE OTHER SIDE OF UNDER 40)

By Clifford J. Hendel

The title of this column is of course a pun, intended to catch the reader's attention. After all, is there any reader of an arbitration journal who is not sick-and-tired of articles about "*Competence/Competence*" (or worse, "*Kompetenz/Kompetenz*")? More importantly, the title aims to reflect a simple but optimistic message about non-judicial dispute resolution in Iberia.

To be invited to be the Spanish "Ambassador" to YAR, a lively and promising recent entrant in the growing international arbitral press, is an honor and a privilege. And more-so for someone (a) from the other side of Under 40 and (b) whose practice – except for two years in a U.S. federal court at the outset of my career – had, until a few short years ago, little or nothing whatever to do with arbitration (or other contentious) matters.

Recent experiences have given me pause to reflect on various conceptions of the bedrock of alternative dispute resolution, confidence, in Iberia. My conclusion is twofold. First, that confidence is a slippery and subjective concept, whose meaning is very much "in the eye of the beholder". Second, that however conceived or understood, confidence in alternative dispute resolution in Iberia is growing.

In recent months, I have written a number of short articles and delivered a number of speeches and presentations about the past, present and future of arbitration and mediation in Spain (and, essentially by analogy due to my more limited knowledge, Portugal)[1]. A common denominator of these articles and presentations is the observation that the relatively infertile (and, until recently, relatively unplanted) soil of non-judicial dispute resolution in the two countries would slow the creation of a vibrant and robust arbitration/mediation culture such as has developed in recent decades in many other jurisdictions.

Recent conversations that I have had with people intimately involved in (and to a certain extent, responsible for) the promotion of non-judicial dispute resolution in Iberia have sometimes degenerated into sterile debates as to whether the "cup" is half full or half empty, i.e., whether progress is being made "fast enough", and even more sterile debates as to how to measure the level of the cup (by the number of proceedings brought? by the number of local parties in the proceedings? by

the number of clauses contemplating such proceedings?).

Frequently, the key issue identified as being the basis for continued progress is confidence. But what does "confidence" mean in this context? How can it be measured? How can it be enhanced?

In general terms, I would define confidence as a level of comfort, serenity and satisfaction in a person or thing (including a process or the result of a process) sufficient to cause one to look favorably at relying on or using (or recommending the use of) that person, thing or process in a similar subsequent situation. Transposed to the context of non-judicial dispute resolution, confidence in arbitration or mediation can thus be considered that level of comfort, serenity and satisfaction as would cause or permit, say, in-house counsel, to rely on or use or recommend the use of non-judicial dispute resolution devices without material hesitation, i.e., to put his/her credibility "on the line" within the organization in recommending something other than traditional judicial resolution of disputes.

So what concretely would tend to give in-house counsel sufficient confidence to steer a dispute away from the courts? Without doubt, a surefire generator of confidence would be the expectation of obtaining a better result as compared to a judicial resolution, i.e., winning instead of losing, or winning by more, or losing by less. But let us leave this zero-sum-game aside; in the end, for every user who "always wins" there would be another who "always loses", resulting in no net gains in confidence on this theory. Additional (and in practice, more realistic) sources of confidence would be the conviction or expectation that the non-judicial process (leaving aside the result) would be faster and/or more final and/or cheaper and/or more confidential and/or would result in a more easily enforceable resolution and/or would be more conducive to maintaining long-term relations than would be the case with judicial dispute resolution.

These can perhaps be considered, at least on first blush, as "objective" generators of confidence, in the sense that no reasonable in-house counsel or other professional would dismiss their relevance to his or her sense of comfort, serenity and satisfaction with non-judicial dispute resolution. Speed, finality, economy, confidentiality, enforceability and relational maintenance as objective generators of confidence are essentially capable of easy measurement.

But the first point (the expectation of better results) may to a significant extent be a thinly-disguised subjective matter: what makes in-house counsel A believe that a better (or worse) result is likely in one forum as opposed to another may not affect in-house counsel B's beliefs or expectations as to the results. This is where the "slippery slope" starts, and confidence begins to adopt different hues and shirk concrete and universal definition[2].

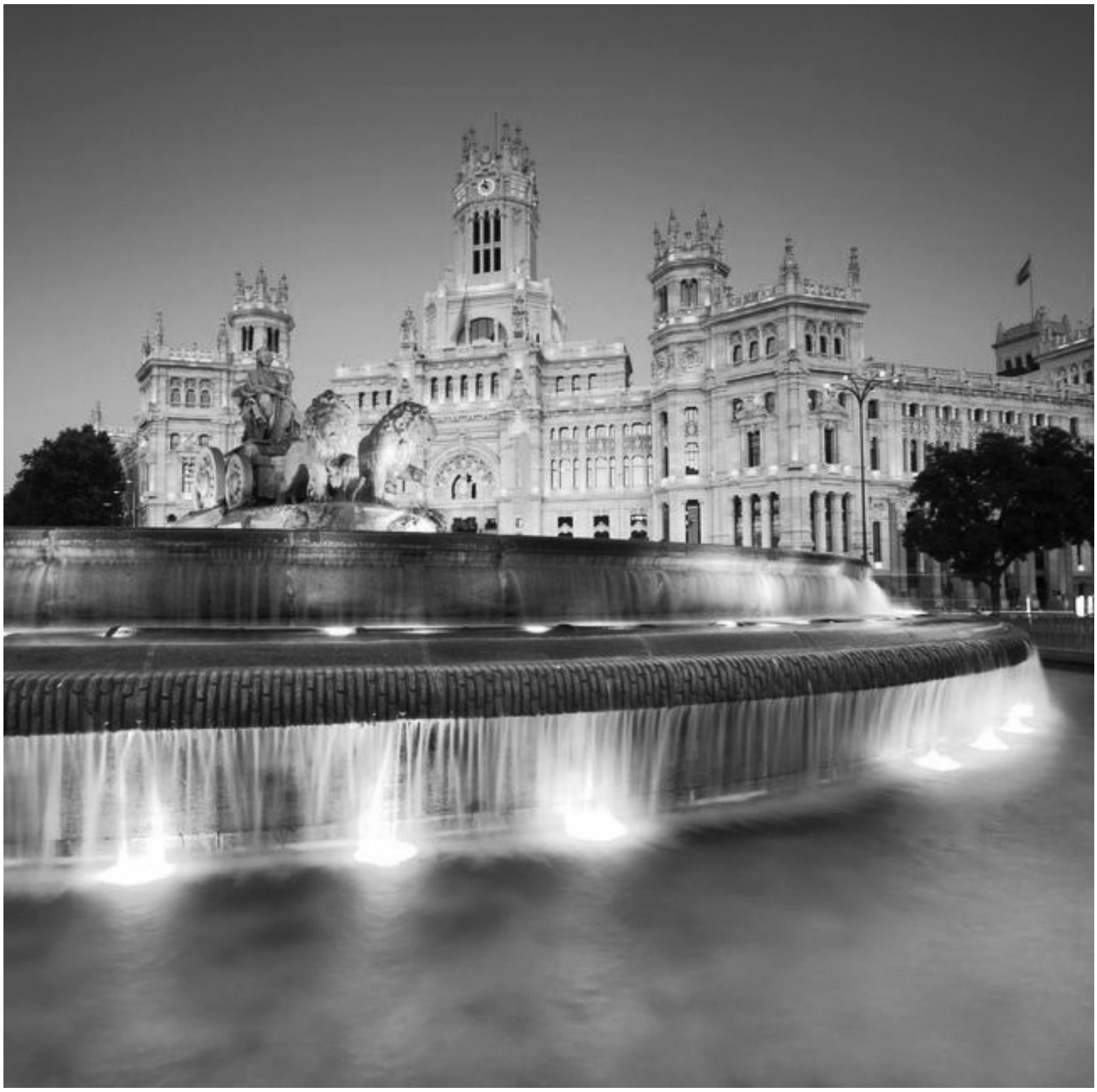
In the context of international arbitration, confidence for many lies precisely in the customary presence of a panel of three arbitrators rather than a sole adjudicator. For others, the panel of three is an anachronism, and confidence resides in the ability to choose an experienced and specialized adjudicator (whether directly or via an agreed arbitral institution or other designating authority), rather than leaving the decision to (potentially, as least) an unspecialized, inexperienced or overworked judge. For some, the principal attraction or indeed the very *raison d'être* of the traditional panel of three is for each party to be able to name an arbitrator; for others, this is viewed as the principal vice or "Achilles heel" of arbitration, creating or confirming expectations of back-channel communications, Salomonic decisions and the like. Some are comforted by arbitral institutions operating with closed lists of arbitrators and/or that prohibit individuals from acting simultaneously as arbitrator in one case and counsel in another, and/or that review arbitral awards before they are issued. And some are not. The list could go on...

In short, confidence in this area (as in others) is a largely immeasurable, subjective feeling; what creates confidence in one person might well erode it in another: confidence is in the eye of the beholder.

Turning back to Iberia, the available (albeit indirect and essentially anecdotal) evidence suggests that confidence is growing in non-judicial dispute resolution. Arbitration and mediation have a certain "buzz". The number of arbitration and mediation cases appears to be rising. Contractual clauses contemplating non-judicial dispute resolution devices appear to be becoming more frequent. Legislation and governmental proclamations embracing non-judicial dispute resolution are increasingly common. Judicial awareness and support of other means of dispute resolution are becoming more and more evident. Associations, journals, blogs and other institutions of "civil society" have become visible and vigorous advocates; the mere existence of both this journal and the Spanish Arbitration Club (with its active and enthusiastic under-40 members), among other initiatives in this area, speaks for itself. Law faculties are incorporating these areas in their formal curricula, and fomenting participation in forensic (moot) activities. The Spanish and Portuguese languages have assumed an essential role in international dispute resolution. And this list goes on too... However defined or measured, then, interest and activity in alternative dispute resolution in Iberia are surely growing, and this can only mean that confidence is growing as well.

All of which makes me re-think to some extent the certain degree of pessimism or frustration expressed or hinted at in my articles cited in note 1. And makes me remember the saying that "*The pessimist complains about the wind; the optimist expects it to change... and the realist adjusts the sails*".

Changing metaphors, the question may not be whether the cup of Iberian non-judicial dispute resolution is half full or half empty today, but rather whether it was one quarter full (or three quarters empty) yesterday and is heading towards three quarters full (or one quarter empty) tomorrow. For the reasons alluded to above, I am convinced that this forward momentum is indeed the case, irrespective of the precise factors which provide confidence to a particular user.



This invites a final observation, about an important decision in April 2012 of Spain's *Tribunal Superior de Justicia del País Vasco* (Basque Country) involving the enforcement under the New York Convention of a very large foreign arbitral award against a leading local, publicly-participated entity. While the reasoning of the decision of the (majority) decision is, to be charitable, somewhat opaque, it contains pages of "arbitration friendly" general discussion and ultimately enforces the award notwithstanding the identity of the appellant and the consequences of the award to the appellant.

It may be hard to identify precisely what the decision stands for. But it would be harder still to doubt that the Iberian user of arbitration will take real comfort in a senior court's enforcement of a major international award against a major local (and part-public) entity. Whatever the court had precisely in mind, both the generalities of the judgment and the result reached are a clear boost to non-judicial dispute resolution in Spain, which can only increase the user's confidence.[3]

And all of this is without mentioning what may be the best proof of (and more importantly, perhaps) the best source of increasing confidence in the area: the continued and growing enthusiasm and capacity of the Under-40s in Iberia, as exemplified by the existence and success of this journal.

Clifford J. Hendel

1. See in particular "Arbitration in Spain: Changed Law and Changing Perceptions", Swiss Arbitration Association Bulletin, Vol. 29, No. 1, March 2011", "Sol and Sombra in Spain's New Mediation Law", AIA Newsletter, April 2012; and "Plotting a Future for Commercial Mediation in Spain", AIA Newsletter, February 2012.
2. Like pornography, paraphrasing the famous words of a United States Supreme Court Justice: "I can't define it, but I know it when I see it".
3. For an article discussing three interesting recent cases in which Spanish arbitral awards were set aside, see my "Perspectives on Three Recent Annulment Decisions: Is Where You Stand Determined by Where You Sit?", Arbitration International (LCIA), Volume 28, Issue 2, June 2012.