



the global voice of
the legal profession®

Arbitration News

Newsletter of the International Bar Association Legal Practice Division

VOL 18 NO 2 SEPTEMBER 2013



Developments in Spanish Company Arbitration*

Introduction

In 2011, the Spanish Arbitration Law (the ‘SAL’) was amended. Included among the various changes to the original 2003 law were two new articles concerning the arbitration of what has been referred to as ‘intra-corporate disputes’, that is, disputes between shareholders and between shareholders and their company. In this article we refer to these as ‘company disputes’ and ‘company arbitration’.

Arbitration has been used in Spain to settle corporate disputes since the 19th century. The situation completely changed in 1956, when the Supreme Court ruled that company disputes were not arbitrable. It was only in the late 1990s that the courts began once more to recognise company arbitration as a means for a company or its shareholders to resolve their disputes. Because the Arbitration Law of 2003 did not include specific provisions on company arbitration, it soon became apparent that an amendment was necessary in order to dispel doubts and uncertainty and to stimulate the use of company arbitration in Spain.

While the legislative intent of the 2011 reform may have been to clearly and definitively provide for the arbitrability of company disputes, and thereby promote company arbitration, the changes have instead provoked extensive doctrinal debate. In the opinion of the authors, this is due, in roughly equal parts, to the complex matrix of the notions and rights involved and to deficient drafting.

In order to shed some light on the matter and to further the awareness and use of company arbitration in Spain and perhaps elsewhere¹, an ad hoc group of arbitration experts – chaired by independent arbitrator and ex-Chair of the Spanish Securities and Exchange Commission Juan Fernández-Armesto – has prepared a white paper on the topic, under the auspices of the Spanish Arbitration Club (the ‘White Paper’).

This article sets out the different doctrinal views that have already evolved in relation to some of the most burning issues in Spanish company arbitration, including the positions reflected in the White Paper.

The three most debated issues

The majority of the doctrinal works on the SAL have focused on three issues:

- (i) the scope of arbitrability of company disputes;
- (ii) the appropriate majority required for the introduction of an arbitration clause in the pre-existing by-laws of a company; and
- (iii) the obligatory nature of a submission to institutional arbitration – instead of ad hoc arbitration – when challenging corporate resolutions.

Arbitrability of company disputes

Since the 2011 reform, the SAL has contained the following article: ‘Companies may submit to arbitration any conflicts arising within them’.² There are differing opinions concerning the scope of this simple statement. Certain authors defend the literal interpretation of the text, that is, that the legislation intends the arbitrability of any and all manner of company dispute, free from the constraints of Article 2.1 of the SAL, which only permits the arbitrability of ‘matters that may be freely disposed of at law’.³

Other experts maintain a different stance: they believe that the new text does not override Article 2.1 and thus not every dispute which 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.⁴

The White Paper joins the first group by declaring that every company dispute is arbitrable, since all matters of company law are within the free disposition of shareholders and officers. The White Paper clarifies, however, that some mandatory or public order rules might restrict the freedom of disposition of the parties, but – in a clear nod to *favor arbitris* trends – it points out that it is for arbitrators, and not judges, to apply these rules.⁵

EUROPE

Clifford J Hendel**

Araoz & Rueda
Abogados, Madrid
hendel@
araozyrueda.com

Elena Sevilla

Olleros Abogados,
Madrid
sevilla@
ollerosabogados.com

Introduction of an arbitration clause in the pre-existing by-laws of a company

The 2011 SAL envisages that the introduction of an arbitration clause in the by-laws of an existing company (ie, by way of amendment) requires the vote of two-thirds of the share capital.⁶

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.⁷ The debate centres on the appropriateness of the two-thirds majority to amend the by-laws and introduce the clause. There are three schools of thought.

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 be virtually impossible in practice to achieve such a level of consensus.⁸

A second group of authors believe that a simple majority would have sufficed. This view emphasises that arbitration, being a customary method of dispute resolution for company disputes, is not a subject in respect of which special protection is required.⁹

A third group considers that unanimity should have been required. According to these authors, imposing arbitration 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.¹⁰

The White Paper seems to accept the two-thirds rule established in the SAL, though it does not express a clear stance (pro or contra).¹¹ It merely explains the rule and its application, including the calculation of two-thirds of the share capital.

The White Paper does highlight, however, two important ideas concerning the required majority. First, it warns that certain by-laws may require majorities greater than the two-thirds established in Article 11.2 bis of the SAL for their amendment. In such cases, the by-laws provision should prevail.¹² Secondly, the White Paper emphasises that the SAL lays down a majority for the inclusion of the arbitration clause in the by-laws, but it does not do so for the amendment and the derogation of said clause.¹³

It is interesting to observe that the debate over the binding character of an arbitration

agreement contained in company by-laws is not limited to Spain. In Brazil, for instance, it is still not clear whether the inclusion of an arbitration clause in the by-laws or articles of association requires the unanimous approval of the shareholders, or whether a simple majority decision is sufficient. A further issue discussed in that country concerns the situation of those who became shareholders after the arbitration provision was inserted in the company's by-laws, the enforceability of such a provision having been put in doubt by some authors.¹⁴

The obligatory nature of a submission to institutional arbitration when challenging corporate resolutions

The 2011 reform of the SAL introduced a provision that seems to indicate that arbitrations concerning the challenge of corporate resolutions (but not arbitrations involving other matters) must be administered by an arbitral institution, which will also be responsible for the designation of the arbitrators.¹⁵

Unfortunately, the provision as drafted is far from clear. This imprecision, together with other factors – the promotion of free competition stated in the Preamble of the SAL, geographic location of the institutions, and so on – has led some authors 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 dispute.¹⁶

Most authors consider that the SAL requires that arbitration concerning challenges to corporate resolutions be administered by an institution.¹⁷ One expert has identified various reasons that could have led the lawmaker to impose this requirement. These are both of a technical nature – to alleviate the difficulties related to the appointment of arbitrators in multi-party arbitrations – and of a policy nature – to counteract the inequality between the company and the shareholder. He suggests, in fact, that the real legislative intent may have been to require institutional administration of company arbitration as a whole, but a technical imperfection (ie, a mere drafting error) may have limited this exigency to challenges to corporate resolutions.¹⁸

The White Paper does not question that the SAL requires institutional arbitration for company disputes.¹⁹ What is more, it explains that it would be convenient to extend to

other company disputes the submission to administered arbitrations, by means of an arbitration clause (so as to avoid the awkward and potentially conflictual situation where certain matters are submitted to administered arbitration and others are not).²⁰

Nevertheless, the White Paper foresees that parties could reach an ex post agreement to designate the arbitrators by themselves. On the other hand, it does not suggest that parties could also reach an ex post agreement to choose ad hoc arbitration.²¹ Perhaps the authors of the White Paper omitted this possibility because they only contemplated the hypothesis of an agreement subsequent to the submission of a request for arbitration that, in these authors' view, has to be filed with an institution.

Conclusions

The express inclusion of company arbitration in the SAL has provoked a number of interesting debates.

The White Paper is an extraordinary piece of work that reflects a high consensus within the Spanish arbitral community on the above issues, but it cannot be denied that the debate continues. First, the arbitrability of certain intra-corporate disputes is not unanimously accepted. Secondly, the shadow of unconstitutionality hangs over the imposition of an arbitration clause on those who have not voted in favour of its introduction in company by-laws. Lastly, 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.

The White Paper, for its part, provides the users of arbitration with two valuable tools that will help to fight against the ambiguities of the SAL: a model provision to be included in the arbitration rules of the institutions and a suggested arbitration clause to be included in the company by-laws. Both tools have been drafted in order to gain certainty. For instance, the arbitration clause favours institutional arbitration for all kinds of company disputes. Also, it introduces a majority requirement for the amendment or derogation of an arbitration clause, and it contains a provision on the arbitrability of all company disputes.

In all likelihood, the fronts opened by the doctrine will only be closed by the Spanish courts or by further amended legislation,

that is, not for some time to come. But the path blazed by the 2011 amendments and the recent White Paper will surely promote the awareness and effective use of company arbitration in Spain.

Notes

- * An initial version of this article, prepared before the White Paper was released, and not referencing its content, appeared in CDR-News.com, April 2013 under the title 'Grabbing the Bull by the Horns'.
- ** With the collaboration of Antonio Gordillo Fernández de Villavicencio (antgorfer@gmail.com).
- 1 In Latin America, for example, where many jurisdictions frequently look to Spain for legislative and jurisprudential guidance. The Spanish Arbitration Club and its Latin American chapters have, for example, been active in cross-Atlantic fertilisation of trends and practices.
- 2 Article 11 bis.1. NB: all translations of articles of the SAL are taken from M Olivencia, 'Company Arbitration in Spanish Law', *World Arbitration & Mediation Review – Liber Amicorum Abascal*, Vol 6, No 2, 2012.
- 3 See P Perales, 'La Reforma de la Ley de Arbitraje (Ley 11/2011, de 20 de mayo)', *Arbitraje: revista de arbitraje comercial y de diversiones*, Vol 4, No 3, 2, 'El arbitraje societario tras la última reforma', *Anales de la Academia Matritense del Notariado*, Tomo LII, 2012.
- 4 See Olivencia, op cit and P Miroso, 'Arbitrabilidad de la materia societaria: la soportable levedad de la Ley 11/2011 de reforma de la Ley de Arbitraje', *Diario La Ley*, No 7927, 9 September 2012.
- 5 Paragraph 78.
- 6 Article 11 bis.2.
- 7 Although some authors (see Olivencia, op cit) deny the contractual nature of the arbitration clause introduced in the by-laws by way of corporate resolution, considering instead that such clause is in the nature of a corporate resolution, they do not question that the law imposes arbitration on the absent and dissenting shareholders.
- 8 See Fernández-Armesto, op cit. See also J F Merino, 'Configuración del Arbitraje intrasocietario en la Ley 11/2011', *Revista jurídica de Castilla y León*, No 29, January 2013 and M Vicente-Almazán, 'La reforma de la ley de arbitraje: aspectos notariales y registrales', *El Notario del siglo XXI*, No 38, 4 July 2011.
- 9 See Perales, op cit.
- 10 See Olivencia, op cit., and in 'El Arbitraje en España. Impacto de la Ley 11/2011, de reforma de la Ley 60/2003', *Revista Jurídica de Catalunya*, No 4, 2012.
- 11 Paragraph 64 et ss.
- 12 Paragraph 67.
- 13 Paragraph 68.
- 14 See A Wald, 'Current problems in Brazilian arbitration involving corporate law', *IBA Arbitration News*, Vol 17, No 1, 2012.
- 15 Article 11 bis 3.
- 16 See Perales, op cit and in 'Arbitration in Spain: An international perspective of the modifications operated by Law 11/2011', *World Arbitration & Mediation Review – Liber Amicorum Abascal*, Vol 6, No 2, 2012. See also Vicente-Almazán, op cit.
- 17 See Fernández-Armesto, op cit, Olivencia, op cit and A Magdaleno, 'El arbitraje societario y su realidad normativa', *Diario Jurídico*, 6 February 2012.
- 18 See Fernández-Armesto, op cit.
- 19 Paragraph 32 et ss.
- 20 Paragraph 38.
- 21 Paragraph 43 et ss.