THE INTERNATIONAL LITIGATION QUARTERLY

Winter/Spring 2011 Vol. 27, Issue 2

A PUBLICATION OF THE INTERNATIONAL LITIGATION COMMITTEE OF THE SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION

IN THIS ISSUE

AMERICAN BAR ASSOCIATION
Section of Litigation

Depositions in Mexico for U.S. Litigation

By Francisco Rivero and Antonio Salazar Escobar

The Hague Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters was created to facilitate obtaining evidence in commercial matters among civil and common-law legal systems. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970. As contracting states to the Hague Convention, Mexico and the United States may request, from one another, the provision of evidence for use in either state's respective judicial proceedings. Hague Convention, art. 1.

Procedural Nuts and Bolts

The process of obtaining evidence under the Hague Convention begins with the judicial authority, which includes both courts and tribunals, of the requesting state sending a letter of request to the central authority of the state addressed. Hague Convention, arts. 24 and 25. Mexico's directorate-general of legal affairs at the Ministry of Foreign Affairs serves as its central authority for letters of request purposes. Secretaría De Relaciones Exteriores, www.sre.gob.mx (last visited Nov. 6, 2010). In turn, the U.S. Department of Justice Civil Division's Office of International Judicial Assistance fulfills the role of central authority in the United States. Department of Justice, www.justice.gov (last visited Nov. 6, 2010).

A letter of request is a communication from one state authority to another petitioning to obtain evidence within the other's jurisdiction. Generally, a letter of request and its accompanying materials must either be translated into the

continued on page 3

Sovereign Immunity: A Venerable Concept in Transition?

By James E. Berger and Charlene Sun

Sovereign immunity, the principle derived from the ancient truism that the "king can do no wrong" and holding that nations are immune from the jurisdiction of other nations' courts, is recognized by virtually every nation in the world. Despite the principle's universality, however, its application differs across states. Some states extend sovereign immunity as a matter of comity, while others have codified the doctrine in their jurisdictional statutes. Some states, such as China, afford foreign states absolute immunity, while the majority of nations, including the United States, have adopted a more restrictive approach that immunizes foreign states from suit in connection with sovereign acts but leaves them subject to suit in connection with commercial acts.

Sovereign Immunity in the United States Before 1952

Virtually from its founding, the United States has recognized that foreign states enjoy immunity from suit. The doctrine was first recognized in *Schooner Exchange*

continued on page 6

Arbitration in Spain: Leaving the "Black List" Behind

By Clifford J. Hendel

Rome, goes the saying, was not built in a day. Similarly, creating and nurturing a legal and commercial culture that is not only accepting of, but favorable to, the solution of disputes by private means like arbitration cannot be anything 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 head. The booming arbitration cultures of "emerging" countries, such as Brazil, on the one hand, and the somewhat more stunted advance of the institution in Spain, on the other, exemplify this counterintuitive point.

Thus, the most fertile ground for rapid and solid growth of arbitration might be virgin ground (a "blank slate," or one as close to blank as possible), while a less hospitable foundation might actually be one with a certain history and the baggage (positive as well as negative) that any historical experience brings.

It is not within the scope of this article to fully develop the above hypothesis with a detailed analysis, and this article will limit its focus to Spain.

Clifford J. Hendel is a partner of Araoz & Rueda in Madrid, Spain.

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.

Overview of Spanish Arbitral History

During the middle decades of the twentieth 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 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 twentieth 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 arbitration law based on United Nations Commission on International Trade Law (UNCITRAL) 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, 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. The club has also contributed to the area by facilitating and expanding relations between the Spanish and international arbitration communities and preparing, among other documents, model arbitration institution rules that are becoming a harmonizing "gold standard" for Spain's multitude of arbitral institutions and recommendations as to matters of arbitrators' independence and impartiality.

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 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, 40 years ago, Spanish companies rarely ventured outside the Iberian Peninsula and, 20 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. Perhaps the most significant example is the massive entry over the past 10 or so years (this trend will surely continue) of Spain's financial, energy, and construction elite into the United States, a market that previously had been considered so complex and competitive as to be considered almost off limits to Spanish companies.

The number of arbitration proceedings in Spain has significantly increased in recent years, thus reflecting increased confidence in the institution and laying the groundwork for its further growth.

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 (with 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 groundwork for its further growth, when—inevitably—disputes arise under these agreements.

Other, more informal initiatives, such as the increasing number of course offerings in Spanish law faculties and postgraduate programs and the recent establishment of the "Madrid Moot"—the first Spanish-language moot court competition that draws on the globally successful Vis competition has already attracted participant teams from three continents—also reflect a certain ebullition in Spanish arbitration.

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. There are two significant areas of activity in this regard—one that is clearly favorable and another that is surely favorable in intention, although perhaps mixed in execution.

Recent Judicial Decisions 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 toward and in 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 that plague Spanish courts in resolving litigations of all sorts—the facts and figures boggle the minds of most foreign clients and practitioners—has indeed adopted a nurturing, favorable approach toward 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. They are 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, June 22) 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 willful misconduct) were found not to be applicable, imposes a very high bar, with a substantial margin of error or deference, and requires at minimum clearly, manifestly, and grossly negligent conduct by the arbitrator before liability can be imposed, indicating that any other approach would be damaging to the institution of arbitration.

A ruling of the Audiencia Provincial of Madrid (n° 289/2009, July 13) annulled 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 a prod to counsel to be vigilant and rigorous in drafting and to arbitrators to be vigilant and rigorous in interpreting arbitration clauses, and as such, it is

favorable rather than unfavourable to the institution.

A ruling of the Audiencia Provincial of Madrid (nº 293/2009, July 13) contained a clear and emphatic confirmation of the very limited scope of the public policy (*orden público*) ground for annulment of an arbitral award, and it points out in particular the inappropriateness of its serving as a basis for reopening 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).

Another ruling of the Audiencia Provincial of Madrid (nº 187/2010, April 15) annulled an award where the respondent had requested a witness hearing and the law required that the arbitrators respect such request. Properly viewed, the ruling is seen, like the ruling about the narrowly drafted arbitration clause mentioned earlier, not as anti-arbitration in nature, but rather as anti-bad arbitral practices and thus, in fact, pro-arbitration.

A ruling by the distant Audience Provincial of Las Palmas (Canary Islands, nº 111, March 23) dismissed an action for annulment in a comprehensive manner, evidencing an intimate familiarity with and appreciation of the arbitral institution that is not exceeded by its Madrid- and Barcelona-based counterparts (which more frequently exposed to such actions) and confirming the growing "savoir faire" of the Spanish judiciary with respect to arbitration.

Finally, a ruling of the Supreme Court (nº 6/2009, January 12) 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.

Proposed Amendments to the Arbitration Law

Separate and apart from the support increasingly being 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.

Regrettably, the proposal is also a reflection of the haphazard and opaque Spanish legislative (or at least, pre-legislative) process, spearheaded by government technicians without particular expertise in the area or interest, without relying to a significant extent upon views of relevant professional associations or practitioners before putting pen to paper and without particular transparency in explaining why certain changes have been proposed and others not. Regardless 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 toward the bottom of the list of short-term legislative priorities—or whether it is ultimately replaced by a more complete legislative overhaul of existing law, a number of the points included represent clear steps in an arbitration-friendly direction. These points include the following:

- "Centralizing" questions of the judicial naming of arbitrators, annulment actions, and actions to enforce foreign arbitral awards in the 17 Superior Courts of Justice. While some commentators would have preferred raising annulment and enforcement actions to the Supreme Court to assure 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 improving the resolution of these questions.
- Eliminating an archaic provision of Spain's bankruptcy law that 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 that may actually be the subject of an arbitration agreement, a means to raise such grounds for dismissal other than via the usual Spanish procedural avenue.
- 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.
- 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 a basis is proper only when the violation of public policy is "manifest."

The proposal also includes a number of provisions that, while of dubious utility, 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 regardless of the parties' desires, its intent is clearly to eliminate the type of arbitration that has traditionally 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.

Similarly, the proposal includes precatory language to the effect that arbitrators must maintain professional liability insurance (which is difficult to put into place where, as noted above, liability is only triggered by gross negligence or willful 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.

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, particularly domestic arbitration, has historically been viewed as a Solomonic, slightly a-legal system. Spanish lawyers and their clients have historically looked somewhat askance at the institution, preferring judicial processes and their lengthy appeals (the first of which is an appeal not only on grounds of law but a full review on facts). As noted above, only the younger generation of Spanish lawyers has been exposed to the institution of arbitration as part of its 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 the negative effect of a lingering cultural overlay.

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