Arbitration in Spain: Recent legislative and jurisprudential developments

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This article will touch on the highlights of recent legislative initiatives and jurisprudential developments in Spain, which will likely benefit the future of international arbitration in the country.

I. Recent Legislative Developments

Spain enacted a modern, monist, UNCITRAL-based arbitration law in 2003. In the spring of 2011, the law was modified in certain respects. The stated objectives of the reform, in essence, were to further the development of arbitration, particularly international arbitration, in Spain, by increasing confidence and security in the institution and efficiency in the arbitral process and in so doing, increase Spain's attractiveness as a seat for international arbitration.

While some have questioned the wisdom or necessity of tinkering with a law that is only eight years old, the reform has been generally well-received by the "arbitration community," and almost unanimously has been favorably viewed as furthering its objectives.

Some of the principal measures in the 2011 reform include the following:

Reallocation of judicial functions

The reform "elevates" to the high courts of Spain's 17 Autonomous Communities matters relating to arbitration including principally proceedings for the annulment of awards, for the recognition and enforcement of foreign arbitral awards and for the judicial appointment or removal of arbitrators. The 2003 law had assigned jurisdiction for annulment actions to the high courts of Spain's 52 provinces, and New York Convention matters to the more than 3000 courts of first instance.

In both cases, the intent of the reform is to concentrate at the highest practical judicial level involvement in these essential areas of interface between arbitration and court jurisdiction, in the expectation that this will provide greater uniformity and more specialised competence than when these matters were dealt with by more numerous and lower-level judicial bodies.

Arbitral institutions

The reform introduced certain changes aimed at strengthening - and perhaps more significantly, strengthening the image of - institutional arbitration in Spain.

Specifically, the reform requires the institution to "look after" or "oversee" compliance with the conditions as to the capacity of arbitrators, their independence and the transparency of their appointment. While this may at first seem a merely cosmetic change, the text will require Spanish arbitral institutions to be more transparent and more pro-active in carrying out their functions, particularly insofar as naming arbitrators is concerned.

Corporate arbitration

A third major focal point of the 2011 reform confirms and clarifies the arbitrability of corporate disputes, including challenges to corporate decisions, where the by-laws of the company in question so provide.

In summary, and as these few examples show, the reform shows a clear and strong commitment to clarifying, structuring and generally strengthening the institution and image of arbitration, particularly international arbitration, in Spain.

II. Recent Jurisprudence

Three interesting and controversial recent annulment decisions of the Madrid high provincial court can be understood to support the proposition that Spanish courts will not intervene recklessly or excessively to upset or annul commercial arbitral awards, but will require a certain level of transparency, rectitude, disclosure and restraint on the part of the arbitral panel as a condition of respecting such awards. (See the author's piece on this topic appearing in *Arbitration International, 2012 Volume 2,* for detail as to the three rulings and a discussion of their possible messages).

To the extent that this is indeed the intent and effect of the trilogy of decisions, they can be expected to promote and strengthen arbitration in Spain over time, in a manner complementary to that of the 2011 legislative reform.

III. Conclusions/Reflections regarding the future of international arbitration in Spain

The situation in Spain is reminiscent to some extent of the situation in France described by Jan Paulsson several years ago in his entertaining "International Arbitration is Not Arbitration", Stockholm International Arbitration Review, 2008: *"Lawyers involved predominantly in domestic matters often have a cynical*

view of arbitration. So do business people... the relevant community often seems too small to avoid suspicions of partisanship... yet international arbitration is held in great esteem... Major French corporations may complain about costs and delays, but they do not perceive a moral hazard in international arbitration, and are content to entrust major contractual relations to the ultimate control of the international process... Legislators, judges and scholars follow suit and have tolerated, acknowledged and ultimately supported a system of international arbitration which is a world apart from domestic processes." (emphasis added)

Spanish domestic arbitration today may not be an entirely pretty picture. Spain will have to avoid the risk applicable to monist regimes identified by Paulsson, i.e., the risk that *"corrections of domestic phenomena may unintentionally harm international achievements and harmonisation."*

The recent legislative and jurisprudential developments summarised above seem aimed at avoiding this risk and suggest that the current and future of international arbitration in Spain may be, if not the Mona Lisa of international arbitration, at least a close copy.

Mediation in Spain: Transposition of EU Directive brings first national mediation law

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On 7 March 2012, Spain's first mediation law on civil matters, applicable nationwide, entered into effect: "Royal Decree-law 5/2012 on mediation in civil and commercial matters" (*Real Decreto-ley 5/2012, de 5 de marzo, de mediación en asuntos civiles y mercantiles*, the "RDLM"). The RDLM transposes Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the "EU Mediation Directive"). The government justified the Royal Decree format, reserved for urgent legislative matters, because the deadline for transposing the EU Mediation Directive had lapsed on 21 May 2011.

Mediation is far from unknown in Spain. It is used frequently for labor disputes, which are beyond the scope of the RDLM, since it is limited to civil and commercial matters (see art. 2.2). The question remains, however, whether the new mediation law will take hold and foment a real mediation culture in Spain such as that known to Anglo-American jurisdictions. The interest generated by the new law is encouraging. Its timing, arriving at a moment when Spanish courts are tremendously backlogged, the judiciary's budget –like all public budgets in Spain– has been heavily restricted and private actors are looking for alternatives to costly litigation and arbitration proceedings, could hardly be better.

The three aims of the RDLM

The lengthy Preamble describes the three "axes" or aims of the RDLM. The first is "de-judicialisation", which is described as the aim to streamline the dockets of the courts, such that recourse to litigation in civil and commercial disputes is viewed as a "last resort". The second is "de-legalisation", or the eclipse of the law's "central role" by a dispute resolution method that values considerations that are not strictly legal. The third axis is to strip dispute resolution of the jurist's function (*"dejuristificación"*), since the form and content of agreements reached will depend entirely on the parties and will not be the product of a third-party neutral.

Although the preamble fixes properly the bases for the development of mediation in Spain, some aspects of the RDLM are susceptible to modification if mediation is to develop efficiently and fruitfully among potential users in Spain. In effect, there are certain aspects of the RDLM which suggest that the Spanish legislator, probably motivated by a desire to stimulate the use of mediation, has opted to "over-regulate", even though, in the particular area of mediation, the maxim "less is more" should normally prevail.

The mediation "procedure"

Article 10.1 of the RDLM states that regardless of the "principles" established in the RDLM, mediation *shall* be organised (*"se organizará"*) however the parties see fit. The statement is an important one, which should not be lost on the first-time user of mediation in Spain.

At the same time, the RDLM contains a full title comprised of no less than nine articles setting forth a "Mediation