Spain's New Arbitration Law: A Model of Clarity

BY BERNARDO M. CREMADES

Significant changes in the law by Spain's foremost expert on arbitration.

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Spain's new arbitration law became effective on June 10, 2011, having been approved by Spain's Parliament on May 12, 2011, and ratified by King Juan Carlos I prior to publication on May 21 in *Spain's Boletin Oficial del Estad*.

This is the third modification of Spain's arbitration regime. The first two modifications, in 1988 and again in 2003, substantially changed the arbitration statute, introducing into the Spanish legal system many of the general principles embodied in the 1985 UNCITRAL [United Nations Commission on

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International Trade Law] Model International Commercial Arbitration. Since then, this Model Law has undergone a revision and arbitration in Spain has developed considerably, revealing the need for reforms in certain areas. The problems that most needed addressing were:

- Conflicting jurisprudence between the Courts of First Instance (*Juzgados de Primera Instancia*), which had jurisdiction over proceedings to recognize and enforce foreign arbitral awards (*exequatur*), and the Regional Courts of Justice, which had jurisdiction over the annulment of arbitration awards (i.e., set-aside proceedings), as well as conflicting decisions within the departments of the Regional Courts of Justice.

- The effectiveness of arbitration clauses in matters involving corporate shareholders, which Spain's case law has upheld but the 2003 reforms excluded from the reach of the arbitration law because Spain's legislature did not want to deal with it at the time.

- Spain's insolvency law, which rendered an arbitration agreement ineffective simply because a signatory company was declared bankrupt. This law frustrated the interests of national and international arbitration users that were parties to arbitration agreements with Spanish companies that had become insolvent.

Significant Changes in the Law

The main modifications made by the new arbitration law, the first three of which respond to the issues described above, are the following.

Uniformity. To achieve greater uniformity in decision making and reduce the work load of the Courts of First Instance, the new law removed the functions of providing judicial "support" for and "control" of arbitration from these courts and the Regional Courts of Justice, and reassigned these functions to the 16 Superior Justice Courts (*Tribunales Superiores de Justicia*), one in each autonomous region of the country. As a result, the Superior Justice Courts will become specialized in arbitration matters. They may be called upon in ad hoc arbitration proceedings to appoint an arbitrator if the parties cannot agree, decide a challenge to an arbitrator's appointment, or rule on annulment and *exequatur* proceedings.

Shareholder Disputes. To address the omission of arbitration in shareholder matters from prior iterations of the arbitration law, the new law makes clear that a company constitution may authorize arbitration of disputes between the corporation and its shareholders upon a two-thirds majority vote. This change eliminates doubts about the arbitrability of such disputes, introduced by Spanish experts in corporate law, in spite of clear court decisions on this issue.

Insolvency. The new law makes clear that the validity of the arbitration agreement is maintained in the event of a declaration of insolvency. However, if the court decides that the arbitration agreement could prejudice the insolvency proceeding, it may suspend the arbitration agreement unless an international treaty provides otherwise.

Reason for Decision. The new law requires the motivation for the decision to be stated in all awards. In principle, a short explanation should be enough if sufficiently based on the facts and the law.

Arbitrability. If an award addresses an issue not submitted to arbitration, the new law provides a procedure for enforcing the portion of the award that is within the arbitrator's jurisdiction.

Award Enforcement and Annulment. The new statute clarifies the legal procedure for enforcing an arbitration agreement in Spanish courts. It also provides for clear regulation of the judicial action to request an annulment of an arbitral award.

Provisional Measures. It further develops how provisional measures are to be requested from the courts.

Conclusion

Spanish companies are active participants in the global economy; as such, they are increasingly participating in international arbitration, as evidenced by filings with the major international arbitration centers.

Spain is also an important venue for international arbitration. Indeed, Madrid is becoming the city of international arbitration for matters involving Latin American and Arab countries. The greater uniformity and clarity introduced into the new arbitration law should foster greater use of Spain as a venue for international arbitration, especially in matters involving these countries.

The Spanish arbitration community feels comfortable that the major issues raised by Spain's 2003 modifications to the arbitration law have been addressed and should boost the attractiveness of Spain as an international arbitration center in the next decade. ■

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