The Relevance of Spain's New Arbitration Law

CALVIN A. HAMILTON,
Partner, Eva María Vázquez, Associate Monereo, Meyer & Marinel-lo Abogados, Madrid Office

The globalization of the economy and the need for an adequate system of resolution of disputes

An international transaction can be influenced by many factors that create unavoidable uncertainty which may frustrate the objectives of a foreign investment. The parties to an international transaction are usually unaware of the **basic procedural principles, the applicable law and many other legal rules of a foreign country**, which differ greatly from one country to another. The nature, competence and integrity of the tribunals also vary substantially between different countries. Other considerations, such as local political trends may lead to the conclusion that one venue is much more favorable for one of the parties than for the other.

The selection of an adequate mechanism for the settlement of disputes that may arise from an international investment is a crucial aspect in generating the required confidence in investors. Accordingly, it is highly advisable that the parties to a transaction include **contractual provisions on how any dispute arising from the contract and/or transaction will be resolved**.

Investors need a system which guarantees the feasibility and protection of their investment. Investor confidence in a good method of dispute resolution constitutes the main requisite for advancement of international commerce and the development of a global system of transnational investments.

International arbitration is the only option that significantly addresses the abovementioned uncertainties inherent in international disputes. International legal conflicts have been gradually adopting the form of arbitrations, mostly due to a lack of trust by the parties in foreign tribunals. In the absence of a global institution capable of handling this type of matters, **a private judicial system has been created, which is arbitration**[1].

Commercial relationships between Spain and Poland

Poland is Spain's largest economic partner within Central and Eastern Europe. Commercial exchange between Poland and Spain is growing exponentially and in a systematic manner. Polish exports to Spain amount to 3.1% (9th place among all European countries). Spanish exports to Poland are 4.3% of the global imports coming from the rest of the European Union.

On May 1st, 2004, ten new countries, mainly from Central and Eastern Europe, joined the European Union. Poland, Czech Republic, Hungary, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Cyprus and Malta add 75 million inhabitants to the EU and augments its territory by a third, extending its frontiers to the doors of Russia. This fact is significant in that commercial growth in these countries will have a positive impact on the macroeconomics of the European economy and international trade, where **Spain will play an important role as a place for business and as a neutral place to settle disputes** arising from trade in Europe and at an international level.

The incorporation of these countries into the EU will bring with it further modifications to their respective economies (competition, liberalization, privatization of companies and deregulation of favoured sectors). These factors will change the landscape for new business undertakings in these countries. Foreign investments in these economies will play a significant role in their economic evolution. **Spain is one of the leading countries investing in Central and Eastern Europe**. Spanish companies such as *Ferrovial*, *Acciona*, *Campofrio*, *Fagor*, *Roca*, *EADS*, *Nutrexpa*, are among the examples of Spanish capital favouring Poland as one of the most important upcoming economic partners.

New Arbitration Law in Spain

Spain has recently enacted a new Arbitration Law. The new Arbitration Law, (Law 60/2003, of December 23rd, 2003) came into force on March 26th, 2004 (the Law).

From national to international: UNCITRAL's influence

The internationalization of commercial relationships together with the need for creating a more flexible mechanism for the solution of disputes submitted to arbitration made modernization of the Spanish Arbitration Law essential.

The enactment of the new Spanish Arbitration Law has converted Spain into one of the **important places for arbitrations in the world**; we would suggest on the same level as Paris, New York, Stockholm, London and other leading venues, frequently used for international arbitrations.

This reform has been awaited with considerable fervor by arbitration experts, which results from the fact that the prior Law of 1988 had become outdated and contained inherent deficiencies. The 1988 Spanish Arbitration law was essentially designed for domestic arbitrations and not for international arbitrations. There was a need for a **legal framework for arbitration capable of tackling the challenges of the frenetic internationalization of business relations** and the growing complexity and technical nature of the matters that are brought before the arbitral system. In short, we welcome the change to the stagnant system governed by the prevailing law.

Irrefutable evidence of the new Law's international character lies in the fact that the Model Law drawn up by the United Nations Commission on International Trade Law (UNCITRAL), which has been adopted by more than 35 countries, was used as the groundwork for the writing of the legislative bill and as a reference point for its approval. The text of the Law does not stray from the Model Law in any substantial matter, except in minor points, such as the number of arbitrators that may resolve the dispute when the parties fail to reach an agreement (the Law provides for one while the Model Law allows for three), as well as its treatment of matters that must tally with Spanish internal regulations (such as support and assistance by the state judicial organs to the arbitration process).

Improvements introduced by the Arbitration Law:

Following the foregoing introductory sections, we now turn to provide a succinct overview of the improvements brought in by this new Law with respect to the prior legislation.

Nature of the arbitration

The Law opts for a monistic system providing a unitary regulation for domestic as well as for international arbitrations. A fundamental feature of the Law is a definition of the scenarios in which an arbitration may be considered international, consistent with those defined in the Model Law. Actually, the definition of international arbitration has been basically copied from those situations foreseen in the Model Law.

The Law eliminates the prerogatives that the state and its entities were able to assert in commercial contractual and extra-contractual arbitration matters. Nation states will not be given preferential treatment in any commercial matter brought to arbitration.

Unlike the previous legislation, the new Law establishes a **presumption of arbitration at law** when there is no express agreement of the parties

for arbitration at equity, consistent with most neighboring legal systems and the text of the Model Law in this regard, which states that *„The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so"*. This is an important feature in the new Law, as it enhances legal certainty through the direct reference to a specific system to resolve the dispute. There are a few cases where recourse to equity is a more appropriate way to decide an issue and the parties will not be prevented from choosing this venue in the arbitration clause. However, the truth of the matter is that most of the cases submitted to arbitration consist of complex legal issues, where the law is better equipped to provide the parties with the required relief and reasoning to decide the dispute.

Judicial intervention in arbitration proceedings and competence of the arbitration tribunal

Regarding judicial intervention in arbitration, **tribunals are precluded from knowledge of disputes submitted to arbitration**. In this way, judicial intervention in the matters submitted to arbitration are limited to support and control proceedings expressly provided for by law. The new Law details and widens the court's support for arbitration, while at the same time an attempt is made to relieve the ordinary jurisdiction of the burden placed upon it with respect to arbitration. **Judicial intervention is limited** to the proceedings for appointing arbitrators, for the hearing of certain types of evidence, for the granting and/or execution of interim measures, for the enforcement of arbitral awards, for setting aside awards and for the recognition and enforcement of foreign arbitral awards. As to the extent of court intervention, the Model Law is categorical in stating that: *„In matters governed by this Law, no court shall intervene except where so provided in this Law"*. The court intervention foreseen in the Model Law basically consists of those situations stipulated in the Spanish legislation.

In this regard, it is important to note that the arbitration tribunal maintains the authority to decide upon its own competence. It is an acceptance of the **„Kompetenz-Kompetenz" rule**, which the 1988 Law had already consecrated, although in less precise terms. This principle is extremely important and its precedence lies in the way traditional commerce handled disputes. The essence of this principle is that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, **an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract**. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso iure* the invalidity of the arbitration clause. The new Spanish Arbitration Law literally transcribes the provision included in the Model Law.

Capacity and powers of the arbitrator(s)

As regards the **capacity to act as an arbitrator**, the new Law maintains the stipulation that an arbitrator must be a natural person in full exercise of his/her civil rights but asserts for the first time that nationality will not be an obstacle to acting as an arbitrator. This provision is directly based on the provision contained in the Model Law, which stipulates that *„No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties"*.

Furthermore, the Law incorporates one of the principal innovations of the Model Law: **the power of the arbitrators to grant interim measures**. This power can be excluded by agreement of the parties, either expressly or by remission to an institution's rules of arbitration; otherwise its acceptance is presumed. Nevertheless, the execution of an interim measure may require a motion to the judicial authority. The request for interim measures to a judicial authority does not imply a tacit waiver of the arbitration. The main effect that this provision will have on the arbitration process is that the parties are in virtual control of the arbitration process. This is the first time that Spanish Arbitration Law recognizes the power of arbitrators to grant interim measures. Traditionally, an order coming from an arbitrator as to any interim measure was simply ignored by judges, because arbitrators' authority to grant such a measure was not recognised. Now that the new Law provides for this relief, the judges are bound to assist the arbitral procedure whenever it is necessary to enforce precautionary measures awarded by the arbitral tribunal.

Recognition and enforcement of arbitration awards

The Model Law stipulates the requisites for recognizing and enforcing an award, together with the grounds for refusing such recognition and enforcement. The Spanish Law deals with the matter of competence for granting recognition and enforcement of foreign awards. The old legislation bestowed competence in this area on the Supreme Court. The new Law relieves the Supreme Court of this responsibility. The competence for recognizing and enforcing the award is now transferred to the judicial organ to which the civil procedure rules attribute the enforcement of foreign judgments. By virtue of the recent modification of the Bankruptcy Laws and the Organic Law of Judicial Power, the competent body is the Court for Mercantile matters[2]. The direct benefit should be **increased speed and efficiency in recognition proceedings**, which presently suffer delays of several years before Court One of the Supreme Court. However, expediency of recognition and enforcement proceedings may come at the expense of competence and homogeneity expected from the Supreme Court. If so, the changes may come in for severe criticism as there are delicate public policy issues involved in the recognition of foreign arbitration awards and judgments.

The grounds for refusing recognition and enforcement of foreign arbitral awards are those contained in the New York Convention, of which Spain is signatory, the same as those stipulated in the Model Law. It is significant to note that harmonization in this regard is achieved throughout the global economy by virtue of the astonishing number of states that are signatories to the New York Convention.

The arbitration agreement

The new Law also introduces changes with respect to **the formal requirements of the arbitration agreement,** introducing greater flexibility and agility in the arbitral process. The requirement that the agreement be in writing is maintained. Consistent with the Model Law, the arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The **written requirement of the agreement** is met when it is contained in a document signed by the parties or in a exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of writs of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. Further forms are contemplated in the new Spanish Law, in a slight deviation from the provisions of the Model Law, which does not specifically refer to written records in a semi-permanent form such as electronic documents.

The Law confirms the validity of the so-called arbitral clause by reference, that is to say, a clause that does not appear in the main contractual document, but in a separate document, but which is understood to be incorporated in the content of the first by reference. Likewise, **the will of the parties** regarding the existence of the arbitral agreement takes precedence over form requirements. This is a replica stipulation of a Model Law provision which states: *„The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract".*

The arbitral procedure and the efficacy of the award

The Law maintains the so-called positive and negative effects of the arbitral agreement. Furthermore, it specifies that where there is a judicial procedure underway in which an exception to jurisdiction has been filed, that situation will not impede the arbitral proceeding from beginning or continuing its course.

The Law also introduces various changes with respect to the role of the arbitrators and their competences, such as in the evidentiary phase of the arbitration. The arbitrators may hand down an award based on the content of an agreement previously reached by the parties. This feature is contained in the Model Law with the following terms: *„If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms".*

As to the content of the award, it is acknowledged that arbitrators may issue as many awards as the tribunal sees fit and these **partial awards have the same value as the final award** and, with respect to the object of the partial award, its content is invariable. There is no specific provision in the Model Law to this effect, which means that the spirit of a liberal approach within the terms of the Model Law has been well understood by Spanish legislation, broadening the scope of the powers of arbitrators, and bringing a greater degree of flexibility to the arbitration process.

The efficacy of the award is augmented by the new Law: the compulsory legalization by notary of the award has been removed, in accordance with the Model Law, where the only requirement is that *„the award shall be made in writing and shall be signed by the arbitrator or arbitrators"*. This is the only requisite provided for in the Model Law.

The award is enforceable, even in the event that a motion for setting aside is filed, and the provisions of the new Law only permit the staying of its enforcement where sufficient security is deposited by the party seeking the stay. This is a revolutionary principle, which will **avoid further dilatory tactics**, attempted by the defendant by filing a setting-aside action.

With respect to **annulment of the award**, the new Law avoids the use of the term „appeal", as it is technically incorrect. It is a matter of challenging the validity of the award through a setting aside procedure. The **grounds for the setting aside of the award** are assessed without a substantive revision of the decision by the arbitral tribunal. The range of grounds for annulment is inspired by the Model Law. Furthermore, a fundamental change in this regard is that the time-limit for bringing a setting-aside action has been extended from 10 days to 2 months. The Model Law provides that *„an application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award"*.

The Law allows, for the first time, that the extension of the period for rendering the award be agreed by the arbitrators themselves and that it is not necessary that all parties agree.

Conclusions

In conclusion, the proliferation of international arbitrations as a result of the interdependent world economy is undisputed. The enactment of the new Arbitration Law will convert Spain into a competitive venue for arbitrations arising anywhere in the world, especially for those arbitrations involving nationals from Latin America, Europe and Africa. The reasons for this conclusion are numerous, not least of which is the **development of Central and Eastern European commercial relationships with Spain** and the role these nations will play in the selection of Spain as an appropriate venue for arbitrations. It will also be interesting to see how the newfound confidence in Spain's role will play out. Due to Spain's cultural and historical ties with Latin America, European partners may well see the wisdom of channelling investments to Latin America through Spain. The Europeans should be comfortable with having one of its members play a lead role in developing commercial and other relations with Latin America. It is evident that this **comparative advantage** that Spain enjoys vis-ŕ-vis its European partners will also confirm Spain as a neutral place to carry out arbitrations. The convenience of Spain can also be shown for its proximity to Africa. No doubt, Spain is set to play an increased role in international arbitration commensurate with its increased status on the world business stage.

[1] Arbitration Scorecard, by Michael D. Goldhaber, '**Private practices**'. Article published in American Lawyer Media, Focus Europe, Summer 2003.

[2] The Organic Law 8/2003, of July 9th, for the Reform of the Insolvency Proceedings, modifies the Organic Law of the Judicial Power (hereinafter, LOPJ) and both laws have created new courts specialized in mercantile matters, which will start operating next September. These news courts will deal with some matters, as described below, for which specialization of the judges will be required. These matters include, *inter alia*, arbitration, as one of the fields they will be in charge of.
Although the Arbitration Law (article 8) refers to the Court of First Instance as the competent court to deal with tasks in support of an arbitration procedure, the abovementioned legislation lead to the conclusion that the competent court will be the new mercantile courts, as provided in article 86 ter 2) g LOPJ: which establishes that the mercantile courts will be competent: *'For those matters attributed to the court of first instance in article 8 of the Arbitration Law when referred to matters contained in this article'*.