IT'S BEEN A LONG ROAD, BUT SPANISH ARBITRATION IS IN GOOD HEALTH

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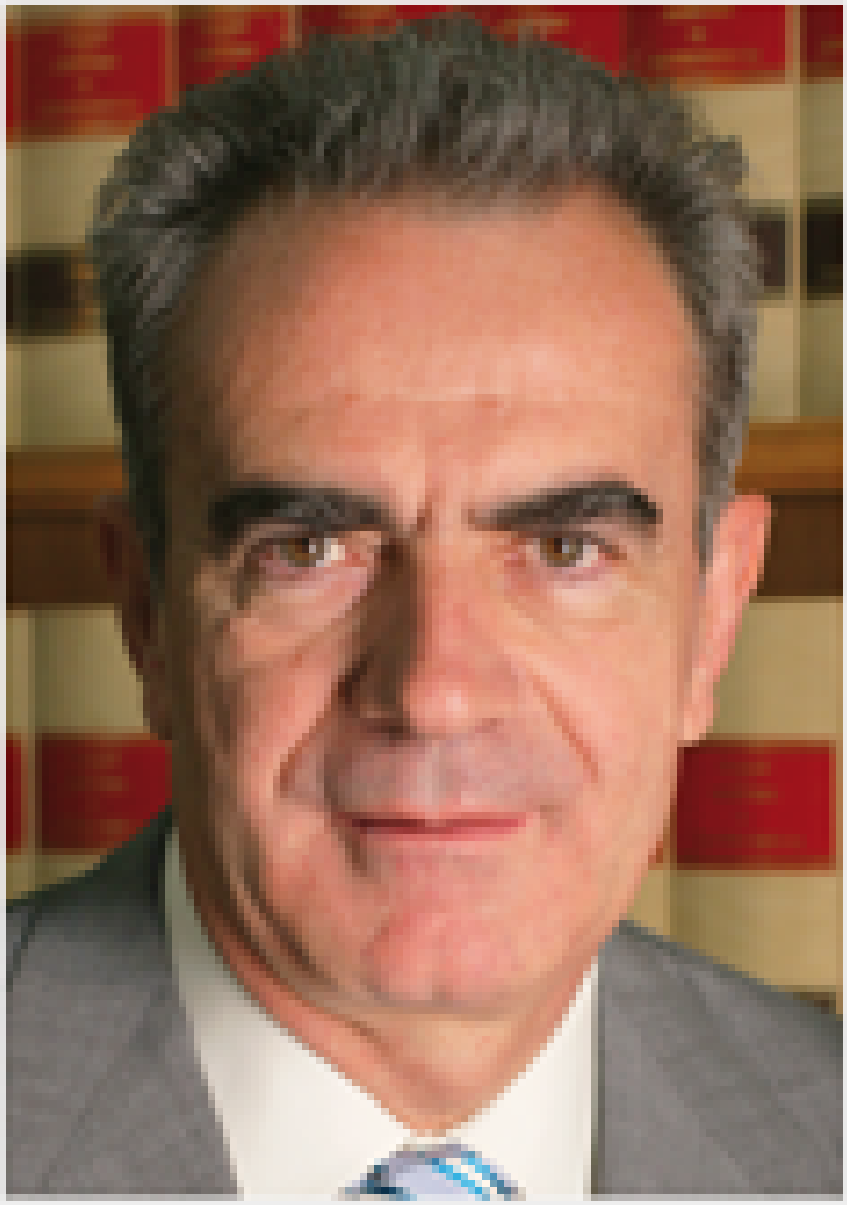

Category: Opinions

Judicial resistance to arbitration has subsided, and it is also a subject that is now popular with academics and students alike, says Bernardo M. Cremades

Given the Spanish state's jurisdictional monopoly under the old regime, the independent nature of

arbitration meant there was much reticence when it was introduced. In the 1980s, the vice president and general counsel of the World Bank, Aron Broches, called me to say he wanted to visit Madrid. He was the father of investment protection arbitration and wanted to speak to the Spanish administration about the possible Spanish ratification of the investment protection arbitration treaty and the state's incorporation into the International Centre for Settlement of Investment Disputes (ICSID).

The person we needed to see was the Director General of International Economic Relations in the Ministry of Foreign Affairs, so we went to the Palacio de Santa Cruz. Everything was easy because Spain was in need of international financing. After the greetings, Ambassador Aldasoro asked us the reason for the visit. What followed was a really embarrassing situation. Upon hearing the purpose of our visit, the Director General angrily said it was a felony to request Spain renounced its sovereignty when handling problems with foreign investors. He closed the meeting and invited us to leave. However, we left convinced our country's position was about to change, due to the work of a group of lawyers who were convinced democratic freedoms should apply to all our civil and commercial laws. This principle was established in the constitution in 1812: "No Spaniard can be deprived of the right to end their differences by means of arbitration judges elected by both parties."

Changing times

Change began when legal advisers accompanied Spanish companies entering foreign markets. Having dealt with the economic autarchy of the previous regime, they played an effective role abroad. It was then necessary to change the approach of our domestic jurists. Spain ratified the New York Treaty of 1958 on recognition and enforcement of foreign arbitral awards. Contracts included arbitration clauses and it was necessary to adapt to the new circumstances.

The Supreme Court had to abandon its policy of rejecting exequaturs of foreign arbitral awards. Until then, awards issued abroad were not effective in Spain, thus preventing Spanish companies that had lost in arbitral proceedings from complying with the decision. A meeting at the Escuela Judicial de Madrid changed the course of our jurisprudence. I remember the solemn words of the First President of the French Court of Cassation, Pierre Bellet, in dialogue with Spanish magistrates. Months later, the jurisprudence was changed to favour international cooperation between Spanish judges and international arbitrators. The argument was clear: judges must apply international treaties, which would be redundant if Spain did not comply.

Within the framework of the UIBA, a draft law-type of arbitration was developed. It was approved by the Conference of Ministers of Justice of the Ibero-American countries in Lima and discussed in the General Commission of Codification of Spain, becoming to a large extent what would be the Arbitration Law of 1988. It entailed the repeal of the 1953 law, considered an anti-arbitration law. The prohibition of institutional arbitration ended, the dichotomy between arbitration clause and commitment forgotten, all this unified in the arbitration agreement.

Bar associations and chambers of commerce created institutions responsible for administering and promoting arbitration. They did teaching and research that was fertile ground for promoting arbitration. Work is still done today by the Club Español del Arbitraje.

Our students' interest in the subject is impressive and the subject is now a major presence in our academic faculties. Meanwhile the methodology of teaching law has changed profoundly as a result of the "mock cases" used to teach arbitration. We have learned the importance of oratory in the formation of lawyers and the art of dramatising the process.

The apprehension of the judiciary, about what was seen as unfair competition from the private sector in the settlement of litigation, has disappeared. Our teachers have also abandoned the caution previously apparent in the way arbitration was taught. Meanwhile, the jurisprudence of judges and courts is now consolidating corporate arbitration. At the end of this long road, we can say that arbitration is in very good health in Spain.