LITIGATION & ARBRITATION REPORT 2008: CHALLENGING PERCEPTIONS: THE STEADY GROWTH OF IBERIAN ARBITRATION

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Among lawyers in Portugal and Spain there is a strong belief that the uncertainties currently affecting both the local and international economies will result in an increase in commercial disputes.

The rapid growth and international spread of many domestic clients has led to a boom in transactions but the global impact of the credit crunch, a lack of financial liquidity, and the slowdown in sectors such as real estate and construction, may ultimately lead many into dispute, say lawyers. There is also a growing perception that clients now see litigation as another means of achieving their business goals.

From over 60 law firms participating in this year's research, Spanish respondents are predicting in excess of 20% growth in litigation in 2008 with at least double digit growth in arbitration. In Portugal firms are predicting a more cautious 10% growth in both litigation and arbitration, reflecting the different economic cycles of the Iberian economies.

Such an upturn clearly presents opportunities for law firms. Among those surveyed by Iberian Lawyer, virtually all predict significant double-digit litigation practice growth. But of course what is good for the lawyers is not necessarily good for their clients (see chart, Predicted increase in disputes – by sector).

Despite the introduction of dedicated Commercial Courts in Spain, and the expertise of the Lisbon and Oporto Commercial Courts, clients routinely complain that domestic litigation proceedings are process-driven, and that many Courts are understaffed, overworked, and there is a significant question mark over the ability of many judges when it comes to specialist cases.

"It is absurd that even a moderately simple litigation can take seven or eight years to fully resolve," says US-trained lawyer Cliff Hendel, partner at Araoz & Rueda. "While this may be considered 'normal' among those in the system, it is very hard to explain to a foreign client familiar with more functional judicial systems. So long as this remains the case, the efficiency and attraction of the courts will be severely limited."

An alternative resolution

It is perhaps no surprise therefore that economic uncertainty, coupled with the frustrations of many in their dealings with the courts, also leads law firms to predict an equally significant upturn in arbitration work.

"Considering the increase of judicial proceedings in the Portuguese Courts and their inability to present a final answer in due time, there is an increasing tendency to have contractual clauses determine a recourse to arbitration courts to solve eventual conflicts," says Nuno Líbano Monteiro at PLMJ. "While not all clients are familiar with the advantages of arbitration they are perfectly aware of the disadvantages of civil disputes," adds José Maria Corrêa de Sampaio at Abreu Advogados.

Entre los abogados españoles y portugueses prevalece la creencia común respecto a las consecuencias de la crisis económica de que pueda acarrear un creciente flujo de conflictos entre sociedades. El crecimiento acelerado y la expansión internacional de muchos clientes nacionales han supuesto un incremento de las transacciones pero el impacto generalizado de la crisis crediticia, la falta de liquidez y la caída de sectores como el inmobiliario y la construcción, pueden al final conducir a muchos conflictos, afirman los abogados. También existe una percepción general por la que parece que hay empresas que utilizan los tribunales como un medio para conseguir sus objetivos de negocio.
But we have been here before, say some lawyers in Spain. The introduction of the Ley de Arbitraje in 2004 was greeted with widespread enthusiasm and confident predictions of a dramatic growth in domestic arbitration, and of the emergence of Spain as a leading venue for international arbitrations.

"From the time of the enactment of the new Arbitration Act expectations that Spain would emerge as a primary seat for international arbitrations were high," says Ramón Mullerat, of KPMG. "But developing a reputation as a venue for international arbitration does not happen overnight."

"Many law firms have increased staff in anticipation of a growth in demand that has not yet been fully realised," adds Cliff Hendel. "There is a sense among some that the growth of arbitration disputes has not been as rapid as might have been expected."

Nonetheless, all of Spain's arbitration practitioners now agree that an upturn is a realistic prospect, and that the enactment of a modern UNCITRAL-based law, with the clear support of the legal Bars,

the arbitration institutions, the administration, and the judiciary, is worth promoting (see profile page 47, An upturn in arbitration – a realistic prediction).

Even in Portugal, where the arbitration law dates from 1986, there is confidence that there too companies are increasingly looking to resolve disputes through arbitration. The past few years have seen the growing prominence of the Porto and Lisbon Chamber of Commerce Arbitration Courts (Centro de Arbitragem Comercial da Associação Comercial de Oporto and Lisboa), and a growing acceptance among company lawyers of the validity of arbitration.

For Tito Arantes Fontes at Uría Menéndez in Lisbon: "We strongly believe that domestic arbitration practices in Portugal will soon flourish, substantially due to the expected amendment of the Arbitration Law." Arbitration offers a finality and ability to enforce awards internationally that is not found in litigation, say lawyers. There is no equivalent to the New York Convention on the Enforcement of Arbitration Awards for judicially decided litigation.

The problem with domestic arbitration

To the frustration of many the growth of domestic arbitration on major disputes in Iberia continues to fall behind that of international arbitration. "Learning about arbitration requires lawyers to make an extra effort to continually learn and develop new skills and not everyone is prepared for that," suggests José Juan Pintó Sala at Pintó Ruiz & Del Valle.

There is a lack of understanding about what arbitration is and what to expect, say many but some of the reasons that companies are afraid of arbitration – primarily the "one shot" approach – are also the major benefits in specific types of disputes, reassures José María Alonso, Chairman of Garrigues and president of the Club Español del Arbitraje (see profile page 44, The commercial imperatives of arbitration).

Also significant suggest others, is client confusion over the different rules, procedures and even levels of professionalism of the domestic arbitration bodies. It is an issue that Alonso accepts needs remedying particularly in Spain, and is an area of emphasis of the Madrid Bar (Colegio de Madrid) with which he is also involved.

"We are trying to refocus the domestic arbitration courts. It is not a question of prestige – as to which ones dominate – but rather a question of efficiency and accountability," he says.

While this may be less of an issue in Portugal – where the Porto and Lisbon Chamber of Commerce Arbitration Courts clearly dominate – more fundamental is however the outdated nature of the prevailing arbitration legislation.

"The Portuguese arbitration law was ahead of its time but is now clearly outdated. So long as there remains a reluctance for its wholesale reform there will be only limited interest in the arbitration process," says Filipe Alfaiate, who leads Clifford Chance's London-based Portuguese practice group.

Criticisms

But arbitration is not yet perceived as a universal panacea to issues presented by the domestic courts, say some lawyers.

Firstly, there remains a perception that arbitration offers only equitable solutions, so that no one wins and no one loses. Portuguese lawyers cite a perception of Solomonic decisions – "splitting the baby" – as one of the key issues to overcome in persuading clients of the merits of arbitration (see chart, Challenges to growth in arbitration).

"Yes, there is a perception that it exists but it is not necessarily true," says Manuel P Barrocas of Barrocas Sarmento Neves.

Not all agree however that it is only perception. "Solomonic decisions are a true danger that one should be aware of. In fact the restricted arbitration circle may induce, to a certain extent, the less advised arbitrator to decide Solomonically," say João Paulo Teixeira de Matos and João Duarte de Sousa at Garrigues in Lisbon.

"Given the small dimension of the market it is often difficult for a court to rule clearly in favour of one of the parties. Salomonic decisions are clearly more common than in cases presided over in the judicial courts," adds Frederico Gonçalves Pereira at Vieira de Almeida.

Significant also are prevailing client concerns over the cost and timescales involved with arbitration. "When you choose arbitration, you quickly realise that justice can be expensive," says one IBEX 35 general counsel.

Cristian Conejero, who now leads the Latin American dispute resolution practice at Cuatrecasas, but was formerly at the International Court of Arbitration of the ICC in Paris, accepts that cost can be an issue. "The arbitration process is perceived by some as too long and too expensive. It is potentially very easy for parties to lose control of costs, and the money being spent."

Experts say, off-the-record, that parties can expect to pay between €60,000 - €100,000 in total for a small litigation, while an arbitration is rarely less than €200,000. But while arbitration bodies and arbitrators have typically taken the blame, research by the ICC is clear that this is not correct. The make up of costs is typically around 85% law firm fees, 10% arbitrators' fees, and 5% institutional costs, they say.

"The high costs, with respect to commercial disputes that do not involve large amounts, discourages arbitration. Public administration of justice, despite its judicial fees, still offers a more affordable and appropriate service in these cases," says Antonio Hierro who leads the dispute resolution practice of Cuatrecasas.

Another general counsel told Iberian Lawyer that the relative costs of arbitration reflects however the very specialist nature of the process.

"Arbitrators are real experts and invest so much more time in the issues than a judge ever would, often producing a detailed written and oral decision."

"Managing clients' expectations is one of the hardest challenges concerning the growth of arbitration, when compared to litigation," says Ricardo Guimarães at Sérvulo & Associados in Lisbon. "The high expense of arbitration is an obstacle to overcome but will only be achieved by enhancing its real value: its flexibility, its technical decisions or expertise, and its speed when compared with domestic courts proceedings."

"In view of the current relative value of court fees, cost is not really a valid objection. However it continues to be invoked," agrees Nuno Morais Sarmento at PLMJ. "The duration of proceedings is likewise not an argument in a country where a court case can easily take more than five years," says fellow partner Pedro Faria.

Ultimately, say lawyers, companies active in jurisdictions in which they have little confidence in the court system have no choice but to choose arbitration. "Arbitration may have its faults, it may be slow, and it may be expensive, but what is the alternative? Many businesses do not want to find themselves arguing their case in a country's domestic courts," says Juan Fernandez- Armesto, former chairman of the Spanish Stock Exchange (CNMV), and now one of Spain's leading arbitrators.

Amiguismo

While expense might not be a key issue for multinationals engaged in the most complicated and high value cases it clearly is for domestic companies, say lawyers. But an equally significant issue for domestic companies is the impartiality of the arbitration process.

“The biggest concern for a Spanish-based arbitration practice like ours is the slow uptake of Spanish companies to arbitrate disputes with national partners,” says Calvin Hamilton at Monereo Meyer Marinel-lo Abogados. “There is still an apparent unchallenged trust in the court system to resolve domestic disputes. Or is it a mistrust of arbitration?”

“There is still a perception that Spain is not a good country in which to engage in domestic arbitration,” says one leading arbitrator. “Friendship means a lot here, perhaps more so than in other countries, and as a consequence people are concerned that arbitrators may find it hard to go against the interests of their personal or business contacts.”

Some general counsel refer to notable instances of favouratism (amiguismo) in arbitrations, including a case in which arbitrators spoke to the parties outside of the process in order to arrange a deal.

“In an arbitration panel with two partyappointed arbitrators, some arbitrators may still believe that they have a special duty to the party that appointed them hindering their absolute independence, although this is changing,” says Ramón Mullerat. “But remember that this has also been an issue in countries like the US with a very strong tradition of arbitration. Whose ethical rules have just been changed making absolute independence the normal presumption for all arbitrators.”

“My view is that we should be less selfindulgent and a bit more demanding particularly in some areas like for example the fair play between the parties involved in an arbitration and the real independence of those forming part of a Tribunal panel,” says Vicente Sierra at Freshfields Bruckhaus Deringer.

A result, some experts suggest, is that disputants may experience two very different kinds of arbitration. “Those involving parties with a familiarity with the spirit of arbitration and the rules of the game, and those – often involving local parties – with little understanding of the rules and who try to impose a litigation approach,” suggests Juan José Pinto Sala with Pinto Ruiz del Valle in Barcelona.

“There is no arbitrator in Spain who has not developed his practice out of litigation,” says Miguel Ángel Fernández-Ballesteros, another prominent arbitrator and former head of litigation at Gómez-Acebo & Pombo (GA&P). “The issue therefore is to what extent have they left their litigation mindset behind them.”

But for arbitration should we expect the same standards of autonomy and independence as we do of judges, question others. “In a small country, with a confined business community, totally independent and neutral arbitrators are hard to find. In addition, the art of judging or deciding is not always in reach the reach of arbitrators, even if they are specialists in the field,” believes José Alves Pereira at Lisbon’s Alves Pereira, Teixeira de Sousa & Associados.

Others argue that if arbitration is to be seen as a credible alternative to litigation the independence of those involved must be beyond question. “Given the usual involvement of parties in the selection of arbitrators, autonomy is even more important in arbitration than in litigation. Spain should consider introducing further legislation to protect such autonomy,” says Josep Maria Julià at DLA Piper.

Such a gap may however soon be filled by the Club Español de Arbitraje, which is now drafting guidelines on the role and independence of its 250 members when engaged in arbitration proceedings.

Conflicts

Another important issue in disputes is potential conflicts. Iberia's largest law firms may place significant emphasis on practice spread and the specialist expertise of individual lawyers, but such growth fundamentally also brings a greater risk of client conflicts.

"Conflicts of interest are a very important issue to take into consideration in an international structure the size of Garrigues," admits the firm's head of litigation Miguel Moscardo. "The growth of Garrigues is causing greater problems of conflict of interest, both to act as lawyers and arbitrators."

A recurring issue also is where to place the emphasis of firms' arbitration practices – collectively as counsel, or in the specific abilities of individuals to act as arbitrators. "In Portugal, as in other jurisdictions, the role of arbitrators is mostly restricted to law professors, former superior courts judges or experienced lawyers. A law firm as our own, mostly focused on corporate clients, tends to act as counsel," says Miguel Castro Pereira at Abreu Advogados

This clearly opens up opportunities for different types of law firms, and lawyers. Notable among those to have developed a strong domestic arbitration profile has been the success of non- Spanish lawyers at smaller firms, among them, Calvin Hamilton at Monereo Meyer Marinel-lo Abogados, Cliff Hendel at Araoz & Rueda and David Cairns at B Cremades & Asociados.

The ability to merge domestic expertise with an outside perspective is one option, while another is to operate alone as an arbitrator – away from a large law firm structure.

Participants in this year's Iberian Lawyer research suggest that by far the most successful Spanish arbitrators on the international stage are, Bernardo Cremades and Juan Fernandez-Armesto. Both are highly respected, regularly acting as arbitrators on the major international disputes regardless of any Spanish or Spanish-language connection.

Increasingly also mentioned is Miguel Ángel Fernández-Ballesteros, who in February 2007 left GA&P to set up his own practice as an arbitrator.

"It is certainly a different means of practising, but a career in arbitration is a long-term endeavour," he says. "You have to be seen to be fair, and independent, or else your career is dead."

And most experts believe progress is being made. The appointment of Miguel Temboury, a sole practitioner and former partner at respected mid-size law firm Pérez-Llorca, to lead the Madrid Arbitration Court is indicative say some of the drive also towards the independence of Spain's leading arbitration tribunals. Also welcome is the appointment of the respected arbitration figure, Antonio Hernández-Gil, as the new Dean of the Madrid Bar Association.

Looking abroad

While there is acceptance among lawyers that significant growth in domestic arbitration will take more time (see box, The problem with domestic arbitration), many nonetheless report an upturn in arbitration concerning clients' investments abroad. Consequently some firms have now begun to concertedly market their arbitration skills internationally.

Most recently, Cuatrecasas has hired Chilean lawyer Cristian Conejero – to support the practice in Latin America. Likewise, Garrigues and Uría Menéndez have strong Madrid arbitration practices and extensive Latin American relationships.

"We are convinced that there is a demand for the expertise that Spanish law firms have to offer, and that we can compete globally. This is not being bold, it is being ambitious," says Conejero – his firm is currently involved in 16 arbitration proceedings across Latin America, and in North America.

José Luis Huerta at Lovells reports that the international growth of domestic clients has seen his firm

retained by Spanish parties in arbitrations in the UK and France. While the relatively high number of arbitrations involving Spanish parties outside of Spain is noted by Bernardo Cremades. "The ICC records 56 disputes involving Spanish parties in 2006 yet none were resolved here," he says.

If some query the ability of Spanish, and Portuguese law firms to compete across the spectrum of arbitration disputes and with the most prominent US and UK law firms, others accept that in certain key arenas – for example ICC disputes involving Latin America – they may offer advantages.

In addition, the Portuguese law firms are upbeat about opportunities emerging from the increasing investment, and parallel disputes, arising from Lusophone Africa. While the Spanish face tough local competition across Latin America, the Portuguese are starting from a stronger position in both Angola and Mozambique.

Increasing the efficiency of the courts

The domestic courts, say many, are overworked and understaffed, creating a cycle of backlogs, discontent, and even questionable practices. The consensus among lawyers on both sides of the border is that urgent steps are required to speed-up proceedings and to better develop the expertise of judges.

The creation in Spain of dedicated Commercial Courts, including those specialising in IP and insolvency, is clearly increasing the trust in litigation in these areas, says Jesús M. De Alfonso at Baker & McKenzie in Barcelona. But for others further investment is required. "The creation of the Commercial Courts has generated a substantial improvement. However, as there are so few in Madrid and Barcelona, they will most likely be, if are not already, shortly saturated," says Antonio Hierro at Cuatrecasas.

"The main problem with the Portuguese court system is its lack of timely response," says Miguel Castro Pereira at Abreu Advogados. "Insufficient resources and the formality of procedures mean that it is often very difficult to provide clients with accurate estimates as to the completion dates of judicial proceedings."

The procedural nature of the courts, say many, lies at the heart of the problem. "It is now seven years since the new Civil Procedure Act was enforced in Spain, and the problem continues to be delayed. The commercial judges are doing very well but the subject matter jurisdiction is extremely limited and the workload suffered by them continues to be a serious concern," says José Luis Huerta at Lovells.

Vicente Sierra, dispute resolution partner at Freshfields Bruckhaus Deringer agrees. "In my view there is a need to modify the Civil Procedural Act, to grant civil Judges the power to dismiss at a very early stage, and without any further procedural phases, those claims that are completely ungrounded and lack any merits to succeed – to avoid the need to deploy further additional defence efforts and economic resources." More emphasis is also needed to modernise the working practices of the courts, and commercial abilities of the judges, suggest some. "In general, the process of selection and legal education of judges should place more emphasis on economic and commercial awareness," says José Miguel Fatás of Uría Menéndez.

Portugal has recently seen important amendments to its Procedural Code, intended to simplify and expedite judicial proceedings: including offering online access to files, the improved distribution of proceedings to judges, and the imposition of limits on the use of appeals to delay a binding and final decision.

But not all are however in favour of the full extent of the reforms. "We are concerned with the consequences that might arise regarding the suppression of the Right to Appeal as a result of the changes," says Martim Menezes at Carlos Cruz & Associados.

While for others, the good intentions need to be backed up with practical support. "Without adequate electronic means, efficient communications, information management systems, and most of all, qualified professionals (from court clerks to judges) the impact of the reforms will not be felt," says José Maria Corrêa de Sampaio at Abreu Advogados.

Frederico Gonçalves Pereira at Vieira de Almeida in Lisbon agrees. "The Commercial Courts are limited in number and completely overloaded. In addition, many contractual questions are not even subject to their competence which means that many commercial issues are presided over in civil courts by judges unfamiliar with the commercial dimension of the dispute."

A further fundamental change that is required, says Manuel P Barrocas of Barrocas Sarmento Neves, is a change in the public perception of the courts. One way to reduce peoples' willingness to resort to litigation may be to enable winning parties to recover their legal fees, he suggests. "A number of changes are currently being considered, including the introduction of a similar principle, although to a lesser degree, of the Anglo-Saxon rule of 'costs follow the event'."

Contractual claims

If parties are to decide the best way of resolving disputes they must first be presented with all the options, says David Arias at Pérez-Llorca. It is significant therefore that a contract not only incorporates an arbitration clause but that the parties have the confidence to act up on it – at home or abroad.

"There is no denying that corporates are now more aware of arbitration and the judges are more understanding of arbitration," adds Ramón Mullerat, "and that the number of international arbitrations is increasing in Spain."

Bernardo Cremades cautions that aspects of arbitration continue to give parties cause for concern but he acknowledges that there is a clear upturn in interest. "There is now a generation of lawyers that accept arbitration as a valid means of resolving complex disputes, and we are now seeing agreements which routinely incorporate arbitration clauses," he says.

Ten years ago, the hardest aspect of any arbitration was finding a suitable and credible person to chair the dispute, admits Fernández- Ballesteros. "Now however people want to dedicate their careers to arbitration and to develop the skills required to do so."

"Arbitration, like wine, matures with age," adds Josè María Alonso, managing partner of Garrigues, and President of the Club Español de Arbitraje. "The growth of international arbitration in Spain has run parallel to the international expansion of Spanish companies, rather than the simple promotion of arbitration."

What is ultimately required say many, is patience. Any economic downturn will inevitably produce more disputes but changing perceptions, and convincing clients of the benefits of arbitration over litigation will take time. "Given that Spain's Ley de Arbitraje only entered into force in 2004, in all likelihood we still have some way to go before we start seeing a significant increase in the number of arbitrations that point to Spain, and Spanish law, as the point of reference," says Fernandez-Armesto.

No surprises then that the conclusion being reached by some leaders of the largest dispute resolution practices is that in the interim, some of the best and most immediate arbitration opportunities may be found outside of Iberia.