MORE EFFECTIVE WAYS OF RESOLVING DISPUTES - BERNARDO CREMADES

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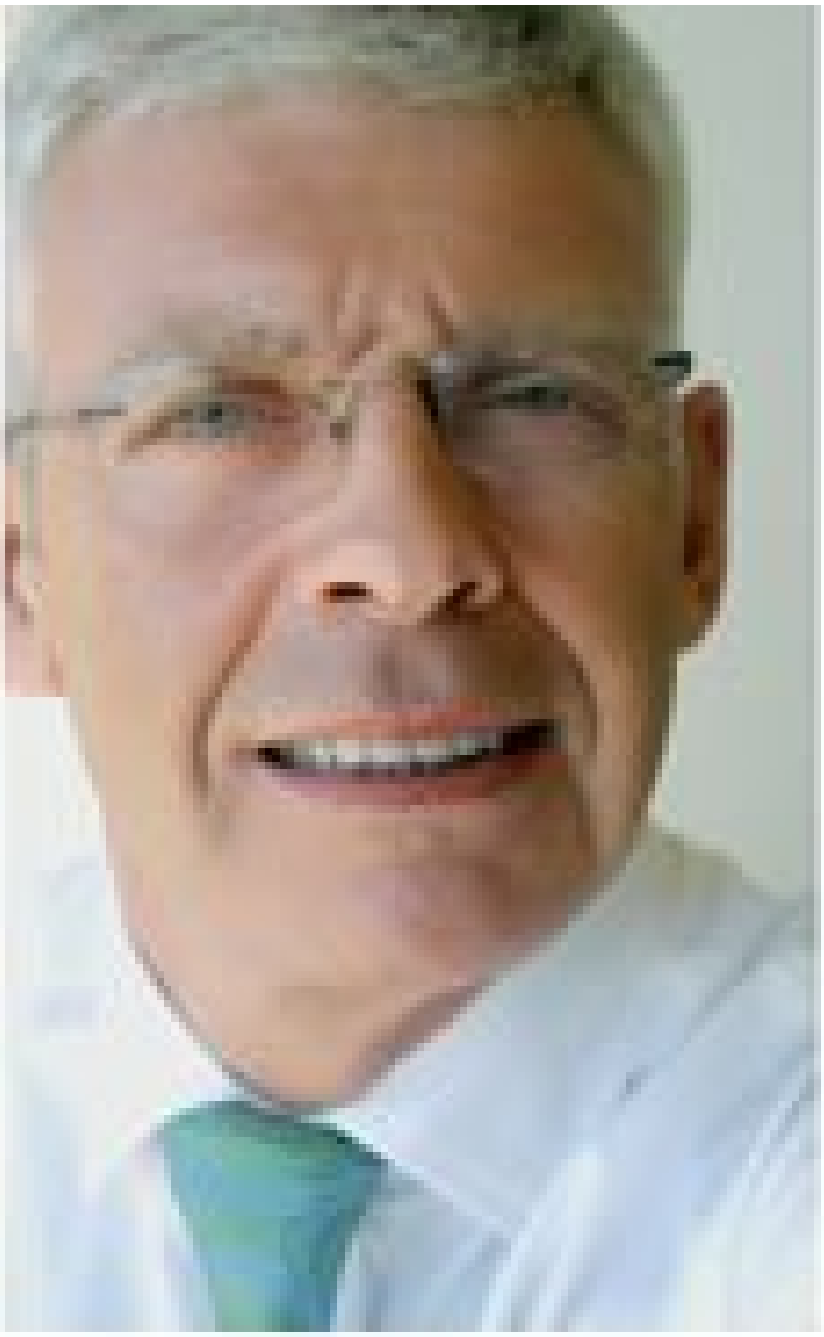

"The nature of legal services will continue to evolve and improve but the driver for innovative change should now be the clients themselves."

Category: Opinions

The publication of a Draft Mediation Law and reforms to the 2003 Arbitration Act indicate that Spain is now taking the two dispute resolution mechanisms seriously, says Bernardo Cremades

The Spanish Ministry of Justice has recently published three important draft Laws, approved by the Council of Ministers on 19 February 2010: The Draft Law on Mediation in Civil and Commercial Matters, the Draft Reform of the Arbitration Act and the Draft Organic Law Act that complements both these two pieces of legislation. These are perhaps small changes which will make a major positive practical impact.

The Mediation Act incorporates into Spanish law the European Union Directive on Mediation in Civil and Commercial Matters. In my view, this law has two key points. The first relates to agreements to mediate, which are now given true value and which provide enforceable title as set out in the Civil Procedure Code – provided that the executive demand is accompanied by a copy of the initial and final minutes of the proceedings.

The second key feature relates to the Act's demand to create a Register of Mediators and of Mediation Institutions, but it also signifies an evident interest on the part of the legislature in the training of mediators. The success of this law will however crucially depend on how well a mediation culture takes root in Spain, including the practical ability of mediators to gain the confidence of potential users.

The reform of the Arbitration Act is equally significant, albeit the result of criticism directed at the 2003 Act almost since before it was enacted. Significant structural arbitration reforms were already made by the preceding 1988 Act, but many felt that the 2003 Act was primarily intended to improve the marketing appeal of Spanish arbitration – thus the weight given to the arguments for adopting the UNCITRAL Model Law. The idea behind this legislative development was seemingly to enable Spain to promote itself as an attractive venue for international arbitrations.

La aprobación del Anteproyecto de Ley de Mediación y las reformas propuestas a la Ley de Arbitraje de 2003 indican que España se está tomando en serio estos dos mecanismos de resolución de conflictos, dice Bernardo Cremades. Se trata de cambios pequeños pero que tendrán un gran impacto positivo. La nueva Ley también brinda la oportunidad de modernizar el procedimiento de arbitraje en concordancia con la práctica arbitral de los íºltimos años, lo cual muchos venían reclamando desde hacía un tiempo.
The 2003 Act was also criticised for failing to embed within its text the necessary rules that would have helped ensure the cooperation of judges and trial courts in supporting, rather than seeking to control, arbitration proceedings. In addition, the execution of foreign or international arbitration awards was gifted to Spain's Courts of First Instance, which has in practice created chaos through a series of contradictory jurisprudence. The process of annulling arbitral awards meanwhile is the competence of the Provincial Courts, where we have experienced jurisprudential contradiction between courts, and even between sections of the same Provincial Court. The result again has been to generate an inordinate amount of legal uncertainty.

The nuances of the 2003 Act aside, arbitration in Spain has been additionally complicated by the

Bankruptcy Act. This has had the practical effect of negating the validity of previously accepted arbitral agreements because once a company enters bankruptcy, arbitral awards are deemed invalid. In passing the 2003 Arbitration Act, Spain's legislature resolutely refused to address and support the validity and enforceability of arbitration clauses in corporate scenarios, contrary to the opinion held by both the Director General of Registries and Notaries and the Supreme Court.

All these issues are however thankfully now tackled in the new Draft Reform of the Arbitration Act. The new Act also offers the opportunity to modernise arbitration proceedings in accordance with the development of arbitral practice and jurisprudence of recent years.

The Draft also however addresses a subject beyond the remit of the corporate and commercial sphere. There is a clear intention to reduce the litigiousness of Spain's Public Administration. Under the new Act, disputes will be settled by a Government Delegate Commission with the power to issue binding resolutions on parties that may not be contested before the courts.

In summary, in Spain we now face an interesting legislative effort to introduce mediation into the everyday dispute landscape as well as to reform and bring up to date arbitration practice. This requirement was clearly evident from the day the 2003 Act entered force, at which time many already considered it outdated. These are welcome and important developments for which many of us have long campaigned.

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