OVERCOMING THE BARRIERS TO THE EXPANSION OF ARBITRATION IN SPAIN

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This article on arbitration in Spain is the third of a series covering alternative dispute resolution issues (ADR) and builds on previous overviews covering negotiation (July / August 2008) and mediation (September / October 2008).

En este artículo, los letrados Antonio Hierro Hernández-Mora y Rafael Hinojosa Segovia, de Cuatrecasas, opinan que todo y que las firmas grandes e internacionales han acogido bien el proceso de arbitraje, todavía quedan varios puntos para convencer a las pequeñas y medianas empresas (PYMES) de las ventajas implícitas del proceso que, en sí, es una manera de resolver conflictos. A pesar de esta situación, y a la vista de unas percepciones a veces anticuadas, continúan los esfuerzos por mejorar el conocimiento y la comprensión del proceso y para superar las auténticas preocupaciones.

Spain's widely anticipated and much-applauded Arbitration Act 60/2003 of December 23, 2003, which follows the UNCITRAL Model Law (1985) criteria, has now been in force for nearly five years.

Statistics available since before and after the introduction of the Act show that in recent years the number of arbitration proceedings in Spain has been stable, but has not however increased.

There are various reasons for this apparent stagnation, but some recurring perceptions continue to make it difficult to encourage or expand arbitration into regular use particularly among small and medium-sized economic operators. Conversely, large companies – particularly those operating internationally – are more likely to use arbitration than any other form of dispute resolution.

According to some commentators, among the main recurring perceptions that surround arbitration include:

• a belief that only a limited number of issues are suited to resolution through the arbitration process;

• the difficulty in constituting the "judging" arbitration panel, especially when one of the parties objects to a panel member;

• higher cost (in reality the shorter duration of an arbitration hearing in comparison to the judicial process compensates for what may be an initially higher cost outlay);

• the need for courts to support and control the arbitration process;

• a belief that arbitral awards have a weaker status than a court judgment (in fact, if an award is challenged, suspension of enforcement is subject to payment of a bond, but which does not apply to provisional enforcement of a judgment);

• uncertainty over the annulment procedure for an arbitral award, and the need to re-start the arbitration proceedings or resort to the courts, and which may potentially delay resolution of the dispute;

• the impossibility of challenging infringements of substantive law under arbitration law;

• a lack of unified case law, as jurisdiction for hearing annulment proceedings lies with the provincial courts (of which there are 50 – one per province – plus their respective sections).

Even with such apparent disadvantages, as a form of dispute resolution, arbitration nonetheless offers many clear and important advantages: speed; total confidentiality; specialisation; the freedom to choose the number of arbitrators and the language the dispute is resolved in; informality; a controlled decision-making system; and the potential to maintain commercial relations between the parties throughout and after the process.

Given such benefits, efforts continue to be made to further encourage the use of arbitration in Spain, including:

• bringing greater awareness, understanding and publicity to the process (conferences, seminars and forums, specialist reviews, etc), and particularly highlighting the work carried out by the Club Español del Arbitraje (established in 2005);

• actions aimed at further improving the effectiveness of the process, such as creating courts specialising in arbitration (for appointing arbitrators, enforcing arbitral awards, etc), in a similar way as exists specialised sections of some of Spain's provincial courts; certain sectors are also calling for a single jurisdictional body to enforce foreign arbitral awards;

• reinforcing the arbitration courts through unification, so Spain can become a seat for cross-border arbitration, particularly with Latin-America; and

• at European Community level

– although this debate is in its early stages – by ending the need for Member States to approve or recognise awards in the place of enforcement if they have already been verified by the courts in the

place of origin, to promote the free movement of arbitration awards within the European area.

We believe that all this work will strengthen our “arbitration culture” and that Spain will finally become a prominent seat for cross-border arbitration, as required by its economic and geo-strategic importance.

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