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International Arbitration

Spain – Trends & Developments

Contributed by

Pérez-Llorca

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SPAIN

The 'Trends & Developments' sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

Trends and Developments

Contributed by Pérez-Llorca

Pérez-Llorca has a litigation and arbitration practice in their Madrid and Barcelona offices. The team is comprised of four partners, two counsel and 30 other qualified lawyers, who act before all legal forums throughout Spain and focus on commercial litigation as well as international and domestic arbitration, including investment. The firm's members have broad experience in corporate issues, shareholders' disputes, directors' liability, contractual disputes (claims arising from distribution, agency, franchising, purchase and sale, supply and provision of services agreements, etc), unfair competition, IP, energy, construction, engineering, insurance, banking, tort liability, claims for infringement of rights to honour, privacy and personal image, debt restructuring and insolvency. Partners are regularly appointed as arbitrators in significant international and domestic arbitration proceedings.

Authors

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In the first quarter of 2016, Spain consolidated the economic growth it had achieved in 2015, confirming the country's progressive recovery and its good future economic prospects after a number of years suffering the consequences of the global financial crisis.

In terms of arbitration, a quick look back reveals that proceedings have not been unaffected by the crisis. The kinds of matters becoming involved in arbitration have radically changed, and disputes related to the banking and finance sector became some of the most controversial issues to be dealt with by the arbitration courts in 2015, according to the information provided by the Madrid Arbitration Court (*Corte de Arbitraje de la Cámara Oficial de Comercio e Industria de Madrid* – 'CAM').

The improving economic situation seems to have reduced the number of arbitration proceedings currently taking place, even though the amounts involved in the disputes have increased.

Updating the regulations on international legal co-operation

Throughout the last few decades, Spain has been demonstrably aware of the importance of harmonising legal provisions on arbitration, particularly in connection with international trade, which inevitably leads to swifter and easier recognition and enforcement of decisions ruled by arbitration institutions settled abroad.

Continuing on the path to modernisation, on the 20th August 2015 a new act relating to international legal co-operation in civil matters entered into force (Law 29/2015, of 30 July, "*Ley 29/2015, de 30 de julio*"), which signalled a significant step forward for the recognition and enforcement of foreign court decisions.

From an international arbitration perspective, the International Legal Cooperation Act has replaced obsolete articles 951 to 958 of the 1881 Civil Procedure Code, in order to design a whole new process of exequatur regulation to handle the proceedings for the recognition of foreign awards under the New York Convention.

Contributed by Pérez-Llorca ***Authors:*** Ana Ribó, Albert Poch

Despite the changes to the proceedings having raised some initial controversy, the competence of the courts to recognise and enforce foreign awards has remained unchanged. Therefore, the competence to recognise foreign awards still falls to the Civil and Criminal Chambers of the High Court of Justice of the Autonomous Community ("*Tribunales Superiores de Justicia*"), while the competence to enforce the awards will remain with the Courts of First Instance.

Spain, a new target for investment arbitration

In 2007 and 2008, the Spanish Government promoted a new energy policy in order to help boost investment in the renewables industry, by granting subsidies to those choosing to invest in various energy subsectors principally in photovoltaic energy, but also, to a lesser extent, in thermosolar and wind.

The ambitious reforms, which were enacted with the aim of converting Spain into a world leader in renewable energies, and which attracted the interest of international investors, included a feed-in tariff in the photovoltaic sector, as well as certain tax benefits and soft loans.

However, the severe paralysis of the financial crisis revealed the unsustainability of the system and consequently led to the amendment of the energy policy. The generous incentives given to investors were progressively rolled back in order to contend with the growing Spanish deficit, and a legal battle under the provisions of the Energy Charter Treaty (ECT) then began against Spain.

Several companies and international investment funds claimed for compensation before the international arbitration courts. According to the ECT, the investor can choose between ICSID arbitration, the Stockholm Chamber of Commerce, or *ad hoc* arbitration under UNCITRAL rules. These disgruntled investors claimed that government incentives and subsidy cuts significantly damaged their renewable energy businesses and were essentially indirect expropriations.

The claims against Spain started in 2011, once the first legislation modifying the special regime for solar energy producers entered into force in 2010. The number of claims rose sharply as new legislative changes that further reduced incentives were implemented by the Spanish Government in 2013 and 2014. By the first quarter of 2016, some 30 claims (most of which were held before the ICSID court of arbitration) were filed against Spain, causing Spain to earn the unwelcome title of most sued country in the world.

However, 2016 also brought good news as Spain emerged victorious from the first two awards issued in the first quarter of 2016.

According to the information on the first of the awards to be made public at the time of writing (*Charanne B.V. and Construction Investments, S.à.r.l. Vs Kingdom of Spain, SCC 062/2012*), the Arbitral Tribunal considered that the claimants had not received any specific commitment regarding the stability of the special regime and could not reasonably expect that the legal framework within which the subsidies were conceded would not be amended, and therefore the changes to the energy policy by the Spanish Government did not affect the investor's legitimate expectations.

Despite the success of this first award, its significance for further proceedings is still uncertain, given that the award contains the partial dissenting opinion of one of the arbitrators and only analyses the legislative changes implemented in 2010; the majority of the arbitral proceedings still pending are challenging the legislative changes implemented by the Spanish Government in 2013 and 2014.

With the second of the awards remaining confidential (*Isolux Infraestructure BV Vs The Kingdom of Spain*), it is difficult to anticipate the result of the upcoming awards, but what is certain is that they will introduce solid case law under the ECT regarding whether or not investors had reasonable and legitimate expectations that were breached as a result of the state's actions.

An unexpected friend: the European Commission

The deluge of litigation against Spain over the last few years has coincided with a renewed interest by the European Commission (EC) to intervene as a non-disputing party (*amicus curiae*) in several investment arbitration proceedings.

The EC is concerned about the relationship between intra-European Union (EU) investment agreements, and EU law and has decided to play a very active role in investment arbitration disputes involving Member States, in some cases even adopting an active position against the enforcement of some of the ICSID awards, such as in the *Micula Vs Romania* case.

With the case of Spain, the participation of the EC as *amicus curiae* has been increasing, particularly in order to allege the lack of jurisdiction of the Arbitral Tribunal to hear the case, which is in line with its goal of preventing unequal treatment of investors among Member States.

By concluding that the ECT, the EU and the Member States have not created international obligations between the Member States *inter se*, the EC considers that the competence for investment protection for investments carried out by an investor from one EU Member State in another EU Member State is governed by Union law, and falls within the external competence of the Union and not the EU Member States.

According to the EC's interpretation, the appropriate forum for the claimants to bring an action against the Kingdom of Spain to protect their investment would have been the national courts and tribunals of Spain, which may benefit Spanish interests and be detrimental to the investors, as both the Supreme Court and the Constitutional Court have dismissed the claims submitted against the legislative changes put in place in the renewable energy sector.

For the time being, the Arbitral Tribunals have considered the EC's intervention to be premature and have rejected the EC petitions related to the lack of jurisdiction. However, the Commission's role in the investment arbitration is far from clear as its expansionary intervention in such proceedings may still be subject to further developments.

It is highly likely that some of the pending arbitration proceedings involving Spain in the renewable energy sector will be settled soon and will thereby provide new information on the intervention of the EC as a non-disputing party.

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