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Trends & Developments

Pérez-Llorca has a Litigation & Arbitration practice in both our Madrid and Barcelona offices. The team is composed of four partners, two counsel and 30 other qualified lawyers. Lawyers defend client interests before all legal forums throughout Spain and focus on both commercial litigation and international and domestic arbitration. The team has broad experience in complex cases relating to unfair competition, intellectual property, energy, construction, engineering, banking, tort liability, distribution and agency contracts. In addition, partners of the firm are regularly appointed as arbitrators in significant international and domestic arbitration proceedings.

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Basic trends

Although signs of economic recovery were evident in Spain in 2014, according to government figures, this did not seem to have a decisive influence on arbitration in comparison with 2013.

According to the information provided by the arbitral institutions over the last few years, the global financial crisis does not appear to have affected the number of arbitration proceedings which are taking place, although all the courts agree that a significant increase in numbers of matters in dispute during 2014 is a positive occurrence. As a result of the general improvement in the economic situation of the country, the amounts involved in the disputes are expected to consolidate in 2015. However, Spanish arbitral institution figures demonstrate that the consequences of the global financial crisis were evident in the matters involved in the disputes. The growing incidence of disputes related to the banking and financing sector has become one of the most controversial issues to be decided by the arbitration tribunals, whilst in other traditionally very active sectors, such as construction, the number of cases submitted to arbitration has gone down as a result of the real estate crisis.

The changes to the Arbitration Law in 2011 (Ley 11/2011, de 20 de mayo) in respect of statutory arbitration in corporate entities have also had a significant impact, as the number of arbitration proceedings in this area has progressively increased in the arbitration courts.

Regarding consumer arbitration, figures indicate a consolidation of this practice as a means of dispute settlement since Law 231/2008, of February 15 (Real Decreto 231/2008, de 15 de febrero), was passed. This law is regulated with a view to providing a new set of rules to govern this system. This was particularly evident in the banking and financing sector, given that the Consumer Arbitration System received 145,000 user and consumer complaints with regard to the case of Bankia and its preferred shares and subordinated debentures.

With regard to investment arbitration, there has been a significant increase in claims against Spain, mainly brought before the International Centre for

Settlement of Investment Disputes ('ICSID') but also before the Stockholm Chamber of Commerce ('SCC').

This proliferation of claims against Spain is a consequence of the legislative reforms adopted by the Spanish authorities since 2010 in the area of renewable energy. These reforms sought to tackle an electricity tariff deficit which had reached EUR35 billion in 2012.

As a result of these reforms, private sector investment in the area of renewable energy turned out to be far less profitable for investors than they had initially expected and as such they have started claiming against Spain as the reforms may constitute an infringement of the Energy Charter Treaty.

According to recent ICSID reports, in August 2014 there were seven claims against Spain before the ICSID, and by January 2015 this number had increased to ten. Amongst the claimants were foreign energy companies, investment funds and the Abu Dhabi sovereign fund.

Even though Spain had almost never been taken to the international courts before 2010, it has now become one of the most sued States before the ICSID, and is only just behind Venezuela, Argentina and Egypt.

Developments

Firstly, there has been a modernisation of the rules of arbitration.

In the domestic arena, the current Arbitration Law, which was adopted on 23 December 2003 (Ley 60/2003, de 23 de diciembre) and based on the United Nations Commission on International Trade Law's ('UNCITRAL') 1985 Model Law on International Commercial Arbitration, clearly had an international dimension as it responded to demands from international commercial parties who had a longer tradition of choosing arbitration to resolve disputes.

The preamble of the current Arbitration Law explains how it intends to 'take into consideration the requirements of uniformity of the arbitral procedural law and the needs of international commercial arbitration practice' and, many years after its publication, the Spanish arbitration courts are certainly achieving their goal of internationalisation.

In order to adapt their regulations to international trends and to make Spain an attractive place for arbitration, the biggest centres of arbitration can be found in Spain's main cities and industrial locations, mainly in Madrid and Barcelona, but also in the Basque Country, Valencia and Seville. These centres are making a concerted effort to modernise their rules of arbitration.

The clearest example of this is the recent modification of the arbitration rules of the Madrid Arbitration Court (Corte de Arbitraje de la Cámara Oficial de Comercio e Industria de Madrid - 'CAM') which entered into force on 1 March 2015, and the rules of arbitration of the Civil and Commercial Arbitration Court (Corte Civil y Mercantil de Arbitraje – 'CIMA') also based in Madrid, that entered into force on 1 January 2015. These recent modifications were preceded by the amendment of the rules of arbitration of the Spanish Arbitration Court (Corte Española de Arbitraje – 'CEA') on 15 March 2011.

The Barcelona Arbitration Court (Tribunal Arbitral de Barcelona – 'TAB') also amended its rules of arbitration in September 2014 in order to adapt its regulation to international trends.

The result of this update of its rules is a regulation which has been brought in line with international standards and is a step forward in the Spanish regulation of arbitration. This regulation seeks to extend the use of arbitration and establish Spanish arbitral institutions as a point of reference in international trade.

Secondly, there has been a consolidation and professionalisation which means that awards are annulled by the Spanish competent courts only in exceptional cases.

Numerous legal innovations and a constant professionalisation of the arbitral institutions have been having a positive impact on this area and awards are not often annulled in Spain, given that the grounds for setting aside an award by the ordinary courts are very limited and the courts are reluctant to object to or set aside awards rendered by arbitrators.

Since the Act 11/2011 reforming Spanish Arbitration Act 60/2003 entered into force, the competent courts to hear cases concerning the action to annul an award have moved from the Provincial Courts (Audiencia Provincial) to the Civil and Criminal Chambers of the High Court of Justice of the Autonomous Community (Tribunales Superiores de Justicia) where the award was rendered (Article 8.5 of the Spanish Arbitration Act), coinciding with a consistent decrease in the percentage of annulments from 2011 to the present date.

According to statistics, during the period 2011 to 2014, from the list of possible grounds to set aside an award, three of them were particularly successful and led to the most award annulments. From best to least successful, these grounds were:

- the contravention of public policy (31.17% of the total);
- the fact that the claimant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present their case (26.13% of the total); and
- the arbitration agreement did not exist or it was not valid (16.19% of the total).

However, even if public policy grounds led to more actions of annulment being upheld than any other grounds for setting aside an award, Spanish case law has nevertheless restricted the concept of public policy by relating it to fundamental rights and freedoms proclaimed in the Spanish Constitution and to the right to effective judicial protection established in Article 24 of the aforementioned Spanish Constitution. Therefore, all matters or questions that have not brought about a 'constitutionally relevant, real and material lack of defence' are to be excluded from the public policy grounds and the annulment action is to be dismissed.

Spanish case law provides a number of circumstances in which the courts have taken into account public policy grounds, and they are mainly the following: (i) lack of motivation or reasoning; (ii) the existence of res iudicata; (iii) arbitrator partiality; (iv) infringement of the equal treatment principle; and (v) illegal evidence.

In absolute terms, the outcomes of the awards that were annulled for being in conflict with public policy are not significant, as the Civil and Criminal Chambers of the High Court of Justice throughout the Spanish territory have never annulled more than 15 awards per year for this reason in the period 2011 to 2014.

However, even though public policy grounds encompass a number of different circumstances, the chance of successful annulment actions are very restricted, which is why it is very difficult to set aside an award if the arbitral procedure has been diligently conducted by the arbitrator and if the rights of defence of the parties have been protected.

In conclusion, it is clear that the reform of the Spanish Arbitration Act 60/2003 contained in Law 11/2011, 20 May 2011 together with the subsequent reforms of the arbitration rules of the arbitral institutions have introduced positive changes into the current arbitration system whose ultimate objective is to strengthen and promote arbitration in Spain in order for the country to be an attractive venue for international arbitration.

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