

THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW 2016



Published by Global Arbitration Review in association with

Pérez-Llorca



www.GlobalArbitrationReview.com

Spain

Félix J Montero and Mercedes Romero

Pérez-Llorca

A new law has come into force in Spain, the International Judicial Cooperation in Civil Matters¹ (the IJCCM Act), which aims to provide access to the justice system for parties involved in transnational relationships.

The IJCCM Act is applicable to civil and commercial matters and has a subsidiary application² regarding EU Regulations, International Treaties and some specific laws (such as the Insolvency Act, Adoption Act, Civil Registry Regulations, Consumers and Users Regulations, Arbitration Act, Mortgage Regulations, Commercial Code and Regulations, and International Rules of Voluntary Jurisdiction Law). In other words, all of these treaties and laws have a preferential application, meaning that the IJCCM Act will be applied in default of other provisions provided in those regulations.

The IJCCM Act sets forth, to begin with, several general provisions and is further divided into sections that govern:

- the service abroad of judicial and extrajudicial documents;
- taking of evidence abroad;
- evidence of foreign law, information and evidence of foreign law;
- *lis pendens* and related international actions; and
- recognition and enforcement of foreign resolutions.

The most innovative part of the IJCCM Act is related to the recognition (*exequatur*) and enforcement of foreign resolutions, also applicable to foreign arbitral awards. The IJCCM Act replaces the procedure established in the Spanish Procedural Code³ and establishes a new procedure which, as stated in the preamble of the IJCCM Act, 'takes into account the most innovative academic developments as well as the most recent legal tendencies'. The reason for this is very simple: until the IJCCM Act was enacted, the recognition and enforcement of foreign resolutions was governed by the former Spanish Procedural Code, dated 1881,⁴ by reference of the Spanish Procedural Code 2001. Case law and scholars alike have been making a concerted effort to try to fill the procedural gaps presented by the antiquated law, but have been confronted with contradictory interpretations and opinions, which in practice has given rise to legal uncertainty.

Therefore, the new regulation is more than welcome and highly anticipated. However, the question is, does it fulfil the expectations?

In our experience there are three issues that have been successfully introduced by the IJCCM Act. The first is related to the possibility of requesting the non-recognition of foreign resolutions, including foreign arbitral awards. The second is that the inclusion of the express statement regarding the possibility of requesting the partial recognition and enforcement of the foreign award is also satisfactory. Finally, the possibility of requesting the recognition of a foreign award within the framework of other proceedings, without the need to initiate separate proceedings, has been employed to streamline procedures.

Non-recognition and enforcement of foreign awards

A few years ago, we highlighted a situation in which the winning party adopts a passive attitude towards the recognition of the award, but the losing party is interested in seeking non-recognition of the award in order to obtain, for example, an express declaration of violation of public policy.⁵ In this situation, the losing party had no right of rebuttal or right to file a claim of non-recognition.

Should the winning party seek recognition of the award, the losing party could always rebut said recognition by filing a claim of opposition sustaining, among other things, the violation of public policy. In this situation, the judge would deliver a final decision on the matter. Conversely, should the winning party take no steps, the losing party would have no right of rebuttal or right to file a claim of non-recognition under Spanish procedural rules.

This situation has been resolved by article 42.2 of the IJCCM Act, which expressly foresees the possibility of requesting the non-recognition of an award. Therefore, if a party is interested in obtaining the non-recognition of an award it may do so directly.

Partial recognition and partial enforcement of an award

A party may be faced with the situation in which an award contains several rulings and some of them are enforceable and others not, as they are, for example, contrary to public policy.

A successful solution to this issue is by way of articles 49 and 50.3 of the IJCCM Act, which allow the partial recognition and enforcement of foreign resolutions. This solution is coherent with the purpose of the IJCCM Act and other regulations, which increasingly seek to facilitate the recognition and enforcement of foreign resolutions, abolishing as many barriers as possible.

Recognition of foreign awards in the framework of other proceedings

The situation would be as follows: a party is involved in proceedings (the main proceedings) that are dealing with claims that have been adjudicated by a foreign arbitral award and hence could be faced with an issue of *res judicata*. However, the foreign arbitral award has no legally binding effect in Spain until it has been recognised and, therefore, until the active party has initiated a recognition procedure under the IJCCM Act. Therefore, the party is not legally entitled to rely on said foreign arbitral award in order to successfully argue a *res judicata* defence.

In practice this could raise several issues, as the main proceedings could proceed at a faster pace than the recognition procedure and therefore grounds for arguing *res judicata* could be limited.

From our point of view, an outstanding approach was introduced by article 44.2 IJCCM Act, which allows a party to request the recognition of the foreign award within the main proceedings. The efficacy of the recognition would be limited according to the results of the main proceedings and will not prevent the request of recognition and enforcement of the foreign arbitral award. In

addition, as stated in the preamble of the IJCCM Act, this recognition will be made directly in the judgement.

However, an interesting point remains whether it would be possible to request the non-recognition of a foreign arbitral award within the framework of the main proceedings. From a different perspective, a defendant might be willing to argue that the foreign arbitral award has dealt with issues different than those claimed in the main proceedings and hence no *res judicata* or similar issues are involved.

Article 44.2 of the IJCCM literally states that ‘when the recognition of a foreign resolution is argued in the main proceedings [...] the judge must rule taking into account said recognition’. Therefore, the literal terms of the article seem to exclusively foresee the possibility of requesting the recognition of a foreign arbitral award but not the possibility of requesting the non-recognition of the foreign arbitral award. However, a joint interpretation of article 42.2 of the IJCCM Act (the non-recognition of foreign resolutions) and article 44.2 of the IJCCM Act (the request of the recognition within the main proceedings) may leave some room open for a different interpretation.

Notwithstanding the above and the innovative approaches adopted in some issues, unfortunately, from our point of view, the IJCCM Act has left some controversial issues unresolved or partially resolved, which in practice will complicate the recognition and enforcement procedure.

Jurisdiction of the Court on recognition and enforcement

According to article 52.1 of the IJCCM Act, the competent court for the request of the recognition and enforcement of a resolution is the Court of First Instance of the domicile of the party against which the resolution is being recognised or enforced.

However, according to article 8.6 of the Spanish Arbitration Act, the competent court for the recognition of an arbitral award is the civil and penal branch of the High Court of Justice that corresponds with either the region where the party whose recognition has been requested has its place of business or residence, or the region where the person affected by said award has its place of business or residence.

Therefore, whereas the IJCCM Act refers to the Court of First Instance for the recognition of a foreign resolution (in the understanding that it includes foreign awards), the Spanish Arbitration Act refers to the civil and penal branch of the High Court of Justice.

As stated by Professor Gómez Jene,⁶ and in article 2 of the IJCCM Act, the Spanish Arbitration Act has a preferential application to the IJCCM Act⁷ and hence the competence for the recognition of foreign arbitral awards remains in the civil and penal branch of the High Court of Justice.

Notwithstanding the above, according to article 8.4 of the Spanish Arbitration Act, the competence for the enforcement of the award will be the Court of First Instance.

This means that in practice two different courts will deal with recognition (High Court of Justice) and enforcement (Court of First Instance). Hence, the joinder of claims (recognition and enforcement) will not be possible for foreign arbitral awards. Note that article 54.1 of the IJCCM Act expressly refers to the possibility of joining these claims, however this will only be possible in cases where the recognition and enforcement of resolutions other than arbitral awards is sought.

Exequatur: Lack of right of opposition of the party seeking enforcement

In the former Spanish Procedural Code dated 1881, the proceedings were as follows: the party seeking recognition would file a claim, complying with certain requirements. The party which the recognition was sought against had the opportunity to oppose the recognition based on the grounds stated in the New York Convention,⁸ within a period of 30 days plus 9 days from the date on which the claim was served. Subsequently, the Court would deny the recognition or recognise the award.

This proceeding was highly criticised by scholars and case law. On the one hand, some scholars argued that the party seeking the enforcement should be granted the opportunity to rebut the grounds of opposition raised by the other party. Despite the fact that this procedural step was not contained in the Spanish Procedural Code dated 1881, in certain occasions courts granted the party seeking the enforcement with said opportunity.⁹ On other occasions, the Courts denied this right based on the literal proceedings foreseen in the 1881 Spanish Procedural Act which did not contain such a right. Hence, this caused uncertainty in practice and, depending on the Court, one would have the right or not have the right to oppose.

On the other hand, some scholars¹⁰ argue that the recognition proceedings are not contradictory proceedings and that no party should be entitled to make any allegations. The Court should be the only one that examines whether there are grounds to refuse the recognition of the resolution. However, this approach might not coincide with article V.1 of the New York Convention, which states:

Article V 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that

Whether we follow one debate or the other, the fact is that the IJCCM Act has not resolved any of these questions and has left a 30 day period for the party against whom the enforcement is sought against to file an opposition. Therefore, the IJCCM Act does not grant the party seeking the enforcement with the opportunity to rebut the grounds of opposition raised by the other party.

Intervention of a public prosecutor

Under Spanish law, the task of the public prosecutor is to promote the operation of the justice system in defence of the legality of the rights of citizens and public interest, as safeguarded by the law, whether *ex officio* or at the request of interested parties, as well as protecting the independence of the Courts. Its functions include:

- ensuring that the judicial function is exercised effectively in accordance with the laws and within the time periods stipulated by way of the necessary actions, appeal procedures and other measures;
- acting in the criminal process, ensuring that the judicial authority takes the appropriate precautionary measures and carries out investigations aimed at clarifying the facts;
- acting in any civil proceedings required by law that affect the public interest or the interests of minors, the disabled or the underprivileged until the normal representation mechanisms are provided; and
- performing the functions assigned to them by the relevant legislation in relation to the criminal liability of minors, in the best interests of the minor.

In the former Spanish Procedural Code dated 1881, the intervention of the public prosecutor was compulsory, as the recognition of foreign resolutions could involve public policy issues. The intervention of the public prosecutor in practice delays the proceedings.

This intervention of the public prosecutor has remained compulsory in article 54.8 of the IJCCM Act. In practice, not all recognitions of resolutions involve public policy issues and hence it would have been advisable to expressly limit the intervention of the public prosecutor only to the cases necessary.

Conclusion

The IJCCM Act was highly anticipated, particularly with respect to the part regarding the exequatur and enforcement of foreign resolutions, as the current regulation was outdated. From our point of view, although some issues have been successfully included, such as the non-recognition of resolutions, the possibility of requesting partial recognition and enforcement, and the possibility of requesting recognition within the framework of other proceedings, other situations will continue to raise practical issues. Jurisdictional matters, procedural aspects (turn to rebut) and the intervention of the public prosecutor have not, it seems, simplified the proceedings.

Notes

- 1 Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil.
- 2 See article 2 IJCCM.
- 3 Ley 1/2000, de 7 de enero de Enjuiciamiento Civil.
- 4 The Spanish Procedural Code dated 1881 was replaced by the current procedural code Ley 1/2000, de 7 de enero de Enjuiciamiento Civil. However, the provisions regarding the recognition and enforcement of resolutions remained unaltered and were regulated by the procedures foreseen in the 1881 Spanish Procedural Code.
- 5 See F J Montero 'Seeking non recognition of an arbitral award'. International Law Office. 16 October 2008.
- 6 M Gómez Jene, 'Arbitraje Internacional y Anteproyecto de Ley de Cooperación jurídica internacional en materia civil'. Diario la Ley, Nº 8388, Sección Doctrina, 20 de Septiembre de 2014.
- 7 See article 2 IJCCM.
- 8 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
- 9 See for example: Sentencia del Tribunal Supremo de 7 de octubre de 2003 [JUR 2003, 261577].
- 10 See L Bonilo Garrigo 'Comentarios relativos al Anteproyecto de Ley de Cooperación Jurídica Internacional'. Diario la Ley, Nº 8486, Sección Tribuna, 23 de Febrero de 2015.



Félix J Montero
Pérez-Llorca

Félix J Montero is an expert in litigation and arbitration, and has extensive professional experience in both commercial and civil litigation, as well as national and international arbitration. Félix joined Pérez-Llorca in July 2004 after six years as a practising lawyer, and was promoted to partner in January 2008. His working languages are Spanish and English, and he regularly lectures on litigation and arbitration law.

Félix has experience in domestic and international commercial arbitration, both institutional and ad hoc. He has participated in important arbitrations on disputes administered by the International Court of Arbitration of the ICC on mechanical engineering turnkey contracts (energy, automotive, oil, iron and steel industry), international corporate law, international loan agreements, civil engineering contracts (harbour construction, railway overhaul, water treatment and telecom infrastructures), distributorship contracts, administrative concessions and so on.

Félix regularly contributes articles to national and international publications and is co-author of *Código de Arbitraje* (Aranzadi, second edition, 2009), a volume compiling and commenting statutory materials and rules on arbitration. In addition, Félix has participated in the Thomson-Aranzadi commentary to the 2003 Spanish Law on Arbitration, with comments on articles 6, 35, 36, 37, 38 and 39.

Félix is also a member of the Spanish Club of Arbitration, an officer of the IBA Litigation Committee and a former member of the steering committee of the International Arbitration Commission at the Union Internationale des Avocats.



Mercedes Romero
Pérez-Llorca

Mercedes Romero joined Pérez-Llorca in 2006 after practising law for a year and a half at a medium-sized Spanish law firm. In 2004, Mercedes was an intern at the International Chamber of Commerce (ICC) in Paris. She graduated with a degree in Law from Universidad Carlos III in Madrid and she also completed a postgraduate programme in International Commercial Arbitration at Queen Mary University in London. Mercedes is a lecturer at Universidad Carlos III in Madrid.

Mercedes has wide experience in domestic and international commercial arbitration. She has participated in important arbitrations on disputes administered by different institutions related to engineering and construction contracts mostly from the energy sector.

Mercedes regularly contributes articles to national and international publications and is co-author of *Código de Arbitraje* (Aranzadi, second edition, 2009), a volume compiling and commenting statutory materials and rules on arbitration.

Mercedes is also a member of the Spanish Club of Arbitration.

Pérez-Llorca

Paseo de la Castellana, 50
28046 Madrid
Spain
Tel: +34 91 436 04 20
Fax: +34 91 436 04 30
pll@perezllorca.com

Félix J Montero
fmontero@perezllorca.com

Mercedes Romero
mromero@perezllorca.com

www.perezllorca.com

Established in 1983, Pérez-Llorca has become one of the leading independent Spanish law firms due to the solid legal background, experience and continuous training of its lawyers, as well as their dedication to quality and efficiency. The firm advises both international and domestic clients, including major banks, public and private companies, national and regional government authorities, international and domestic investors and funds, and prestigious foreign law firms.

International experience

The firm has continued experience in cross-border transactions. Our legal advice is tailored to the requirements of national and international companies within the main sectors of Spanish law: administrative law, banking and finance, capital markets, civil and commercial litigation, commercial law, competition law, copyright law, corporate compliance, corporate governance, corporate law, corporate restructuring, data protection and e-commerce, environment, European Union law, insolvency, intellectual property, labour law, land planning, litigation before the European Court of Justice, litigation before the public administrations, M&A, national and international arbitration, private equity, project finance, public procurement, real estate, tax, unfair competition and white collar crime.

Our litigation and arbitration practice

This team is principally dedicated to defending the interests of the client companies, with lawyers acting before all legal forums throughout Spain. This team focuses on both commercial litigation and international and domestic arbitration. Its members have 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.



**ABA Section of
International Law**
Your Gateway to International Practice

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research



**THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012**