



Arbitration and Dispute Resolution Bulletin

The new Commercial Courts in Spain: Hope for better quality in business law

Of the many reforms introduced by the recent Bankruptcy Act (2003), the creation of the new Commercial Courts in Spain has so far proved to be one of the most interesting. The Bankruptcy Act aims to modernise outdated Spanish bankruptcy law proceedings and provides for the creation of at least one Commercial Court in each provincial capital in Spain. Therefore, a minimum of 52 new courts will be created, or at least appointed to separate their ordinary civil cases from their commercial cases. In larger cities such as Madrid, Barcelona or Valencia, commercial necessity led to more than one Commercial Court being created.

The "Exposición de Motivos" (Introduction in which the legislature describes the purpose of the Act) explains that the creation of the Commercial Courts aims to advance a process of specialisation, and to provide the judges in charge of these courts with in-depth resources on commercial matters. These measures will ensure improvement in quality, speed, coherence and unity for the interpretation of the law.

The Commercial Courts have been created to deal specifically with matters relating to Commercial Law and are also specialised First Instance Courts, their jurisdiction being limited to commercial matters, though they sometimes deal with employment law cases derived from insolvency proceedings. As a First Instance Court, cases are reviewed by a single judge who hears the case, and his decision can be appealed to the Provincial Courts, just as any other First Instance decision. It must be remembered that in Spain, since the New Civil Procedure Act of 2001, any First Instance Decision is directly enforceable without the enforcer having to provide guaranties.

The original idea was to make the Commercial Courts deal solely with bankruptcy proceedings. But the matters that can be reviewed by the Commercial Courts have been expanded and are stated in the Act as follows:

During bankruptcy proceedings the Commercial Courts deal with all the civil litigation that is aimed at the insolvent's assets (except those regarding capacity, filiation, matrimony and minors), the employment law issues derived from the bankruptcy, all enforcements and interim measures against those same assets, and the liability of the directors, auditors or liquidators for any loss caused to the bankrupt individual during the proceedings.

Other matters dealt with by the Commercial Courts are claims about unfair competition, intellectual and industrial property, publicity, as well as any other matter related to Company Law, National and International Transport Law, Maritime Law, general terms and conditions, appeals against the decisions of the Office for the Register and Notaries concerning decisions of the Commercial Register and the issues that have to be dealt with by First Instance Courts with regard to arbitration of these matters.

There have been differing views about the advantages of creating these courts and the scope of their jurisdiction. Concerns have been expressed that the current limitations will create problems in proceedings in which issues arising from the same facts and persons involved could fall into different categories of the law, this leading to the possibility of having to divide these cases and of several proceedings taking place in different courts. The Act is not very clear on this topic and, therefore, it remains to be seen how these concerns will be resolved by practice, judicial decisions, or even legal reform in the future.

An interesting fact to note is that, so far, the Commercial Courts have been able to perform faster than the rest of the First Instance Courts. This is clearly good news for Commercial Litigation, where efficiency is needed for litigation to be useful. Nevertheless, as the workload of these Courts increases with time, some of this speed may be lost.

The best aspect of these new courts is that their judges are very specialised. They have to show deeper knowledge in certain fields in order to become judges in a Commercial Court. What is likely to happen is that these specialised judges will become accustomed to dealing exclusively with business issues, commercial transactions and other aspects of business law. Consequently they will have a better understanding, not only of the applicable law, but also of the reality of business life and the specific needs of the litigants in these cases.

Provided this specialisation materialises, the establishment of the Commercial Courts has great potential to improve the quality of the administration of justice in respect of all business disputes in Spain.

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The Newsletter of the PLG International Network

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English Focus Arbitration – a preferred choice of resolving commercial disputes

If you conduct trans-border business, you may find yourself in a predicament if a deal goes wrong and you have to decide in which jurisdiction and under which set of national laws to commence court proceedings – however, arbitration could be the answer to all your troubles.

A dispute may be arbitrated because the contract between the parties contains an arbitration clause. Alternatively, the parties may decide to arbitrate their dispute and enter into a separate arbitration agreement once the dispute has arisen. In any event, arbitration is consensual and can only take place if both parties have agreed to it.

Why arbitration?

Arbitration offers many advantages over litigation, especially to businesses involved in international commercial contracts.

- The parties can agree on key aspects such as the timetable, the venue and the language of the arbitration. While complex arbitration proceedings may be just as time-consuming as a court trial, they are much more flexible as the arbitrator will generally concede to the agreed directions of the parties.
- The parties are free to choose the arbitrator(s) who will resolve their dispute. This will often be an expert in the area of business or law which is in dispute, rather than a judge chosen by the Court Service who may not know anything about the subject matter of the dispute. Moreover, a free choice of arbitrator helps ensure the impartiality of the tribunal.
- Arbitration proceedings are conducted in private, whereas court proceedings are generally open to the public, including the media. Sensitive trade information would therefore better be dealt with by arbitration, where the identity of the parties and the issues in dispute remain confidential.
- Arbitration proceedings are less formal than court proceedings and provide an environment which is more conducive to reaching an amicable settlement. This is particularly important where parties have a long-standing relationship and wish to continue dealing with each other in the future.

- Arbitration awards are usually final and binding. Disputes can be resolved at first instance as there is no appeal on the merits in arbitration proceedings, whereas in litigation further time and expenses are often incurred in taking the dispute to appeal. To safeguard against procedural irregularities to the detriment of one party, the award will generally be subject to judicial review.
- Arbitration awards can be enforced comparatively easily in any of the 140 countries that are signatories to the “New York” Convention on the Recognition and Enforcement of Foreign Arbitral Awards, some of which do not readily recognise and enforce judgements of foreign national courts.

However, this freedom of choice comes at a price: In addition to the legal costs incurred by the parties, arbitrators will either charge an hourly rate, which in the case of specialists can be considerable, or a percentage of the amount in dispute or of the damages awarded; in addition, most institutional arbitration tribunals charge a one-off fee for registration of the dispute.

Why institutionalised arbitration?

In the arbitration agreement, the parties may set out the details of the procedure to be adopted in their arbitration, albeit subject to certain mandatory statutory requirements. Alternatively, the parties may adopt or adapt a standard set of arbitration rules published by an arbitral body such as the London Court of International Arbitration (LCIA). The latter approach is generally favourable, especially in international commercial contracts, because these rules are universally applicable, incorporate the best features of both civil and common law systems and ensure compliance with mandatory statutory requirements.

Care must be taken when drawing up the arbitration agreement, irrespective of whether it includes detailed provisions or incorporates a set of rules, in order to avoid disputes arising out of its interpretation or over the procedure of the arbitration. In the worst case, an invalid arbitration agreement may affect the validity and enforceability of the arbitration award. Therefore, the parties would be well advised to seek expert professional legal advice in drafting any pre- or post-dispute arbitration agreement.

In their arbitration agreement, the parties can choose to either designate an arbitral body such as the LCIA to administer the arbitration or to appoint an ad hoc arbitrator outside an institutional framework. Institutionalised arbitration, although it will require payment of a substantial fee, has the clear advantage that any procedural problems in commencing or conducting the arbitration or challenges to an award can be dealt with internally, for instance by the LCIA Court. In ad hoc arbitration, the parties may have to resort to local courts to resolve disputes arising out of the arbitration itself. Also, institutional arbitral bodies will assist in selecting suitable arbitrators from their database.

Why London?

Among the various institutional arbitral bodies that deal with international disputes, the LCIA stands out for various reasons. Founded in 1891, the LCIA is one of the longest-established international institutions for commercial dispute resolution, yet at the same time one of the most modern and forward-looking. While the headquarters are based in London, the LCIA arbitration rules are universally

applicable and some 70% of the cases referred to it involve no UK parties at all. Moreover, both the arbitrators and the members of the LCIA court are international and recognised leaders in their respective fields of expertise. Finally, unlike other arbitral bodies, the LCIA charges an hourly rate without regard to the amounts in issue, thereby recognising that a very substantial monetary claim does not necessarily lead to a technically or legally complex case.



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The ICBMC, Italy China Business Mediation Centre

The ICBMC is the first specific mediation centre that serves business between Europe and China. It was set up as the result of co-operation between the Chamber of National and International Arbitration of Milan, The Italy-China Chamber of Commerce and the Mediation Centre of the China Council for the Promotion of International Trade (CCPTI) in Beijing.

The purpose of the centre is to provide a meeting point and centre of assistance to companies operating between Italy and China and making mediation available to resolve commercial and corporate controversies.

The complexity of the commercial relationships that have developed between the two countries require specific knowledge and ICBMC has grouped some of the leading providers of mediation of both countries who also have specific knowledge of Italian and Chinese culture and trade. The centre also offers the option to work with two mediators, one from each country.

The procedure set out in the Rules of the centre fully implements the principles whereby mediation should be voluntary, informal, confidential, fast, inexpensive and effective.

The dispute is submitted to the centre by filing a form to the ICBMC via mail or fax. The centre notifies the other party and if this agrees to mediation the parties select a mediator (or two mediators, one Chinese and one Italian) from the centre's Panel of Mediators, on the basis of information offered by the centre. If the parties fail to reach an agreement on the selection of the mediator or if they specifically ask, the centre will appoint the mediator. Mediation sessions can be conducted in Beijing or in Milan and the languages to be used in the mediation are Chinese, Italian or English. If a settlement is reached an agreement is signed. The settlement agreement is not publicized except for the purpose of implementing enforcement.

To give an example of fees and administrative expenses: for a controversy of value between 1,000,000.00 euros and 5,000,000.00 euros there will be administrative expenses for 500.00 euros and fees of 0.25% of the claim, with a minimum of 7,500.00 euros. The time scale for a mediation is about a month.

Mediation has proved particularly effective in cases where it was a primary interest of the Italian investor who had an interest to maintain a business relationship with the other party, the parties did not wish information concerning the dispute to be made public, a rapid settlement of the dispute was essential.

The service has been welcomed by the market and has proved effective in providing a neutral venue where the parties can discuss and find a solution to their problems with the aid of specifically trade mediators, thus preserving and developing commercial relationships between the two countries.

It is foreseeable that the example of the Milan Arbitration Chamber will be followed by other major European arbitration centres to answer the market requirements of their countries.



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The arbitration proceedings in Israel - the end?

In order to encourage recourse to arbitration proceedings in Israel, the Law of Arbitration, 1968, limited the causes for cancellation of an arbitration award. There is no appealing of an award and it can only be cancelled for very limited reasons. By doing so the legislator believed that commercial parties will prefer the means of arbitration, which will be a prompt, efficient and final one, as opposed to court proceedings where a dispute might take a long time, and since appeals are allowed any case can always be heard by at least two instances, and, sometimes, by three instances.

The Law enumerates ten possible causes for cancellation of the arbitration award:

- There exists no enforceable arbitration agreement
- The arbitration award was given by an arbitrator not duly appointed
- The arbitrator acted without authority, or deviated from the powers conferred upon him by the arbitration agreement
- A party was not given an appropriate opportunity to present its arguments and evidence
- The arbitrator did not hand down a decision on one of the matters referred to the arbitration
- The arbitration agreement specified that the arbitrator should give the reasons to his award, and the arbitrator failed to do so
- It was determined by the arbitration agreement that the arbitrator should give his judgment in accordance with the Law, and the arbitrator failed to do so
- The arbitration award was given after the time determined for this purpose has expired
- The content of the arbitration award contradicts the public welfare
- There exists a cause that could cause a court of law to cancel a verdict which is not subject to appeal.

As one can see, the causes for cancellation of an arbitration award do not contain the main cause, normally used for appealing a court verdict, i.e. a mistake in the verdict, whether in law or in fact. The courts have interpreted their authority to cancel an arbitration award in a narrow way and most of their decisions have denied the request to cancel the arbitration award and gave full power to the arbitrators' decisions. This happens also in cases where it is clear that if it were a court's verdict, the Court of Appeal would have changed the decision and accepted the appeal. By doing that the legislator and the courts thereafter aimed to render the arbitrations proceedings efficient and cause arbitration to become an efficient and speedy means of dispute resolution.

Unfortunately, however, not only the goal of the legislator was not fulfilled, but parties are afraid of going to arbitration because of the impossibility to appeal an award even in case of an obvious mistake "on the face of the verdict".

Presently there is a public outcry as a result of an arbitration award which imposed upon one of Israel's most prominent financial institutes the duty to pay its client, a broker, an amount equal to approximately 17,000,000.00 euros without giving any serious reasoning. A request to cancel this decision was recently filed with the District Court in Tel Aviv, but it is unclear what the results will be.

However, it became obvious that a change in the law is essential, and broadening the causes for cancellation of the arbitration award shall not derogate from parties' intention to refer matters to arbitration, but rather the contrary. Even before the decision in this case was handed down, a leading institute for arbitration in Israel offered the parties the possibility to include a voluntary right to appeal in their arbitration agreement. We expect that in the near future we shall see whether the Law of Arbitration shall be amended, or, failing this, one might expect the demise of arbitration as a tool for dispute resolution in Israel.



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Autumn 2006

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TO OUR READERS

This Newsletter is intended to introduce and explain on a regular basis new areas of law relating to arbitration and dispute resolution which is of general interest to all of our clients. It is jointly written and produced by PLG's Litigation Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in PLG Arbitration and Dispute Resolution Bulletin. Further information is available on all topics but nothing in PLG Arbitration and Dispute Resolution Bulletin is to be regarded as a definitive statement of the law or as specific legal advice and reliance should only be placed on particular advice obtained from the relevant practitioners in the light of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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