

Specific Issues Regarding the Recognition and Enforcement of Foreign Arbitral Awards in Spain: Can arbitrators still use registered letters with acknowledgment of receipt?

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I. Introduction

Over the past few decades, Spain has transformed itself from an importer to an exporter of capital. Spanish companies are not shy about investing abroad, particularly in the oil and gas sector, as well as in the electricity, construction, and engineering sectors. Favorite targets for investment are Latin America, Asia, and Central and Eastern Europe. This development has led to an increase in the number of contracts calling for arbitration as a means of dispute resolution.¹⁾ Furthermore, foreign companies investing in Spain often prefer to submit a dispute to arbitration rather than to the Spanish courts.²⁾

Many of the contracts involving a Spanish party provide for an arbitration forum outside Spain. Currently, a large majority of foreign arbitral awards are complied with in Spain, making enforcement proceedings unnecessary. However, such proceedings may become unavoidable.

This article explores selected problems that a party and their counsel may be confronted when seeking enforcement of foreign arbitral awards in Spain, and the concerns for arbitrators when confronted with a dispute involving a Spanish party.

The article is not meant to give a global overview of all aspects of *exequatur* and enforcement proceedings of foreign awards. Rather, we will focus on the issue of which courts are competent, on possible implications of recent Spanish court decisions dealing with the form of notification of arbitral awards, and on the issue of whether an award can be enforced if it is still appealable, non-final, or can oth-

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¹⁾ Spanish multinational companies frequently chose to include an arbitration clause in their international contracts as a matter of internal policy.

²⁾ See generally "Spain opens up", 3 GLOBAL ARBITRATION REVIEW (2008).

erwise be set aside in the arbitral forum.³⁾ Before dealing with these issues, some background regarding the Spanish Arbitration Law and the characteristics of *exequatur* and enforcement proceedings are necessary.

II. The Monistic Approach of the Spanish Arbitration Law (Law 60/2003 of 23 December 2003) (Ley de arbitraje, LA) and its scope of application

The Spanish Arbitration Law 60/2003 (the “LA”⁴⁾, which is based on the UNCITRAL Model Law, was conceived as an independent statute not incorporated in a civil procedure law or any other law. The LA follows the monist system whereby, save for a few exceptions, the same rules apply to domestic and international arbitration.⁵⁾

The scope of application of the LA is strictly territorial. Article 1.1. LA provides that it “shall apply to all arbitration proceedings, whether domestic or international, with their place of arbitration within Spanish territory”, and recognizes the priority of rules of international conventions.

Article 1.2. LA provides an exception to the territoriality rule; some provisions relating to certain types of judicial intervention shall also apply to foreign arbitration proceedings. As will be shown below, these provisions deal in particular with the competence of Spanish courts⁶⁾, the form and content of the arbitration

³⁾ For a detailed overview of the *exequatur* and enforcement proceedings in Spain, see: GUILLERMO ORMAZÁBAL SÁNCHEZ, *LA EJECUCIÓN DE LAUDOS ARBITRALES* (1996); Werner von Tabouillot, *Country Report Spain*, in WEIGAND, *PRACTITIONER’S HANDBOOK ON INTERNATIONAL ARBITRATION* 995 *et seq.* (2002); JOSE ANTONIO COLMENERO GUERRA, *LA EJECUCIÓN FORZOSA DE LOS LAUDOS ARBITRALES. ESTUDIOS DE DERECHO JUDICIAL* (2006); Ricardo De Angel Yagüez, *La nueva Ley de arbitraje (II); el laudo arbitral: procedimiento, anulación, revisión y ejecución forzosa*, 13 *ECONOMIST&JURIST* 36–47 (2004); Miguel Angel Gómez Jené, *El arbitraje internacional en la nueva Ley de Arbitraje*, *Diario la Ley*, n° 5952, 11 February 2004, available at www.laley.net (last visited 12 November 2008); MIGUEL ÁNGEL FERNÁNDEZ-BALLESTEROS, *LA EJECUCIÓN FORZOSA Y LAS MEDIDAS CAUTELARES EN LA NUEVA LEY DE ARBITRAJE* (2001); ANÍBAL SABATER MARTÍN, *LA EFICACIA EN ESPAÑA DE LOS LAUDOS ARBITRALES EXTRANJEROS* (2002); M^a TERESA FERNÁNDEZ-PACHECO MARTÍNEZ, *LA EJECUCIÓN DE LAUDOS ARBITRALES CON ARREGLO A LA CONVENCIÓN DE NUEVA YORK. ANÁLISIS DE JURISPRUDENCIA ESTADOUNIDENSE* (1988).

⁴⁾ *Ley 60/2003, de 23 de diciembre, de arbitraje*, *Boletín Oficial del Estado (BOE) no. 309*, (Spanish Arbitration Law of 26 December 2003). The law entered into force on 26 March 2004 and derogated the former arbitration law of 1988 (*Ley 36, de 5 de diciembre de 1988, BOE no. 293*, 7 December 1988). An English version of the Spanish arbitration law can be consulted in the following commentary on the LA: FERNANDO MANTILLA-SERRANO, *LEY DE ARBITRAJE, UNA PERSPECTIVA INTERNACIONAL* 336 *et seq.* (2005). In the present contribution, all English citations of the LA have been taken from this translation. In the following, when reference is made to the *Ley de arbitraje*, the authors will use the Spanish abbreviation “LA” (*Ley de Arbitraje* – Spanish arbitration law).

⁵⁾ A succinct overview over the rules of the LA in English can be found in the commentary MANTILLA-SERRANO, *supra* note 4, at 336 *et seq.*

⁶⁾ Article 8.3; 8.4; 8.6 LA.

agreement⁷⁾ and how the State courts should deal with arbitration agreements⁸⁾, interim measures⁹⁾, and finally, the enforcement of arbitral awards¹⁰⁾ and *exequatur* proceedings.¹¹⁾

III. *Exequatur* and enforcement: separated or “one and unique” proceedings?

A. The Foreign Award under the Spanish Arbitration Law

Under the regime of the Spanish Arbitration Law, an award is to be qualified as “foreign” if it has been rendered outside Spain.¹²⁾ This is a logical consequence of the territorial approach of the LA.¹³⁾

B. Consequences of the qualification as “foreign award”: *exequatur* in Spain

According to Article 46.2. LA, a “foreign award” is subject to “*exequatur*” in Spain, whereas the *exequatur* proceedings “shall be governed by the [...] New York Convention [...] without prejudice to the provisions of other international conventions more favorable to granting *exequatur*” and shall be “carried out according to the procedure established by the civil procedure law for *exequatur* of foreign judgments”.

The provisions of the New York Convention have been applicable in Spain since August 10, 1977.¹⁴⁾ The new arbitral law therefore merely reinforces an existing obligation. The same is true for the 1961 European Convention on International Commercial Arbitration, and various bilateral conventions.¹⁵⁾

7) Article 9 LA.

8) Article 11 LA.

9) Article 23 LA.

10) Article 45 LA.

11) Article 46.1 LA.

12) *Id.*

13) This definition of “foreign award” had already been included in Article 56.2 of the previous arbitration law of 1988. Therefore, the comment made by MANTILLA-SERRANO, *supra* note 4, at Article 46 LA, 254 whereas the present definition of “foreign award” applying the territorial approach was made “for the first time” in the LA 2003 cannot be followed.

14) Spain ratified the New York Convention on May, 12 1977.

15) The European Convention on International Commercial Arbitration (Geneva 21 April 1961) was ratified by Spain on 5 March 1975. In addition, Spain has signed various bilateral treaties which might be applicable for the enforcement of foreign arbitral awards. For an overview of the most important bilateral treaties on the subject, see ARANZADI, CÓDIGO DE ARBITRAJE (2005).

Spain has not formulated any reservations with regard to the applicability of the New York Convention. The rules contained in the Convention are therefore applicable regardless of whether the subject matter of the dispute is a commercial conflict or if the State in which the award is rendered is a contracting State of the New York Convention.

Thus, the legal framework for *exequatur* of foreign awards is contained in the rules of the applicable international conventions, in the Spanish Arbitration Law and, as will be demonstrated below, other rules of the Spanish Law of Civil Procedure.

C. Uncertainties with regard to the interrelation of *exequatur* and enforcement

Article 46 LA does not include any reference to enforcement proceedings *stricto sensu*, *i.e.*, the applicable proceedings for the enforcement of the homologated foreign award.

Basic rules on the enforcement can be found in Articles 44–45 LA.¹⁶⁾ Article 44 LA contains a rule which is well known in many other European jurisdictions.

¹⁶⁾ Article 44–45 LA: “Enforcement of the arbitral award”:

Article 44 Applicable rules

The enforcement of arbitral awards shall be governed by the provisions of the Law on Civil Procedure and the provisions of this Chapter.

Article 45 Suspension, stay and resumption of enforcement in the event of an action to set aside.

1. An award is enforceable even if an application to set aside the award has been made. Nevertheless, in that case, the party against whom enforcement is sought may request the competent court to suspend the enforcement proceedings, provided that it posts security in the amount of the award plus any damages that could result from the delay in enforcing the award. The security may be provided in any of the forms authorized in the second paragraph of article 529.3 of the Law on Civil Procedure. Once the application for suspension is filed, the court, after hearing the party seeking enforcement, shall decide on the security. No appeal may be taken from this decision.

2. The suspension shall be lifted and enforcement resumed when the court is satisfied that the application to set aside has been denied, without prejudice to the right of the party seeking enforcement to request, if applicable, payment for damages caused by the delay in enforcement, pursuant to the procedure set forth in articles 712 *et seq.* of the Law on Civil Procedure.

3. Enforcement shall be stayed, with the effects set forth in articles 533 and 534 of the Law on Civil Procedure, when the court is satisfied that the application to set aside the award has been granted.

If a decision to set aside the award only affects the matters referred to in Article 41.3 [LA] and other decisions of the award stand, the award shall be deemed only partially set aside, for the purposes of article 533.2 of the Law on Civil Procedure.”

Article 1.2. LA expressly provides that the rules set forth in Titles VIII (*i.e.* the rules applicable for enforcement contained in Article 44–45 LA) “*apply even when the place of arbitration is outside Spain*”.

According to this provision, the enforcement of awards shall be governed by the provisions of the Law on Civil Procedure and “the specific provisions contained in Article 45 [LA].”¹⁷⁾

It is not uncommon for Spanish practitioners, when seeking to enforce a foreign award, to be unclear as to how the rules of “*exequatur*” (Article 46 LA) and “enforcement” (Articles 44–45 LA) interact, and to hesitate as to whether these – ostensibly separate – procedural steps are to be handled by the same court in the same proceeding.

A recent practice development in the Spanish courts is that these two proceedings may be handled as a singular “unique” proceeding. However, as will be demonstrated below, the legislative situation is not clear and supports the opposite conclusion.¹⁸⁾ A very experienced arbitration lawyer, in his commentary on the Spanish Arbitration Law, has the same doubts when he “assumes” and “recommends” that “the Court of First Instance” should be competent to decide in a “unique proceeding” on the *exequatur* and the enforcement of foreign arbitral awards.¹⁹⁾ Another author, however, notes that the *exequatur* and the enforcement are to be separated and considered as “two separate actions.”²⁰⁾

These doubts are – in large part – based on the unclear rules of competence with regard to *exequatur* and enforcement. An in-depth study of the rules of competence is therefore necessary in order to evaluate if *exequatur* and enforcement are one, rather than separate, proceedings.

IV. Competent Courts

A. The rule of competence for enforcement proceedings of arbitral awards

1. Basic rules of competence: Article 8 LA

The basic rule of competence contained in Article 8.4. LA provides:

“8.4. For enforcement of the award, the Court of First Instance of the place where the award was rendered shall have jurisdiction, pursuant to Arti-

¹⁷⁾ For the relevance of Article III of the New York Convention in the enforcement proceedings *stricto sensu*, see section V.A. of this article.

¹⁸⁾ Several paragraphs in the Spanish Arbitration Law and the Spanish Code of Civil Procedure conclude that the *exequatur* proceedings and the enforcement proceedings are separated: Title VIII and IX LA deal separately with “*exequatur*” and “enforcement.” Furthermore, Article 8 LA provides for separate rules of competence with regard to these proceedings.

¹⁹⁾ MANTILLA-SERRANO, *supra* note 4, at Article 8 LA 74: “[...] se supone que el juez de primera instancia será competente, en un mismo y único procedimiento, para otorgar el *exequatur* al laudo extranjero y proceder a su ejecución.”

²⁰⁾ Manuel Hernández-Tejero García, in *COMENTARIOS A LA LEY DE ARBITRAJE* at Article 46 LA 296 (HINOJOSA SEGOVIA ed., 2008).

cle 545.2 of the Law on Civil Procedure and, where appropriate, to Article 958 of the 1881 Law on Civil Procedure.”

As will be demonstrated below, this provision of the LA includes outdated references, which has led some authors to conclude that the provision should not be applied as a rule of competence for enforcement of foreign awards.²¹⁾ However, the authors and the courts²²⁾ are not unanimous in this respect.²³⁾ An in-depth exploration of the relevant legal provisions is necessary.²⁴⁾

2. Coexistence of the Spanish Code of Civil Procedure 2000 and the Spanish Code of Civil Procedure 1881: waiting for the Law on international legal cooperation in civil matters

In order to be able to understand the references in Article 8.4 LA to the Code of Civil Procedure, an introductory comment with regard to this law has to be made: in 2000, the Spanish Code of Civil Procedure (*Ley de enjuiciamiento civil* – LEC 2000) was totally revised. The revised law²⁵⁾ supplants most of the provisions of the previous Code of Civil Procedure of 1881 (*Ley de enjuiciamiento civil* – LEC 1881).²⁶⁾ However some provisions of the 1881 law remain in force.

Among the still-good provisions are those covering enforcement of “judgments dictated by foreign tribunals” included in Articles 951–958 of LEC 1881. The new statutes supplanting the 1881 law²⁷⁾ provide that the 1881 enforcement provisions “shall stay in force until the entering into force of the Law on international legal cooperation in civil matters”. As of this publishing, *i.e.*, eight years after the Code of Civil Procedure 1/2000 was entered into force, no draft of such a law has been promulgated.²⁸⁾

²¹⁾ Alfonso Espada Méndez, in *COMENTARIOS A LA LEY DE ARBITRAJE DE 2003* 78–79 (DAVID ARIAS LOZANO ED. PÉREZ LLORCA, 2005); Antonio Hernández-Gil Ivarez Cienfuegos, in *COMENTARIO A LA LEY DE ARBITRAJE* 265–266 (DE MARTÍN MUÑOZ & HIERRO ANIBARRO eds., 2006).

²²⁾ See the discussion regarding the decision rendered by the *Audiencia Provincial* of Oviedo 31 March 2005, section IV A. 3. d of this article.

²³⁾ Jorge Hernández Burriel, in *LEY DE ARBITRAJE* at Article 8.4 LA 65 (HINOJOSA SEGOVIA ed., 2008), states that Article 8.4 LA contains the rules of competence for the enforcement of a foreign award. He proposes that this article has to be read together with Article 85 LOPJ (*Ley Orgánica 6/1985*, 1 July 1985, *Poder Judicial* – Judicial Competence), which relates to the competence of the Court of First Instance. As will be demonstrated below, the authors of the present article do not agree with this argument (*see* section IV.A.3.d) of this article).

²⁴⁾ From an academic and practical point of view it would be more consistent to deal with the competent Courts for *exequatur* first, before dealing with the competent Courts for enforcement. However, due to the structure of the Spanish Arbitration Law it seems to be more advisable to start with the rule of competence for enforcement.

²⁵⁾ Spanish Code of Civil Procedure 8 January 2000 (*Ley 1/2000, de 7 enero que aprueba la ley de enjuiciamiento civil* (BOE núm. 7, de 8 enero).

²⁶⁾ Royal Decree of 3 February 1881 (*Real Decreto de 3 de febrero de 1881, de promulgación de la Ley de Enjuiciamiento Civil*).

²⁷⁾ *Disposición Derogatoria única de la LO 19/2003, de 23 diciembre*.

²⁸⁾ JORGE HERNÁNDEZ BURRIEL, in *LEY DE ARBITRAJE* (HINOJOSA SEGOVIA ed., 2008), in his

3. Competence for the enforcement of domestic awards vs. competence for enforcement of foreign awards

Under the LA, a court's competence to enforce an award is determined by the nature of the award and depends upon whether the award is foreign or domestic.

a) Article 8.4. LA and Article 545.2 Code of Civil Procedure (2000): enforcement of domestic awards

Article 545.2 LEC 2000 reads as follows:

“In the event that the title is an arbitral award, the Court where the arbitral award has been rendered will be the competent Court for the enforcement of the award.”

Since the rule assumes that the same court that rendered the award can enforce the award, it is evident that this rule cannot apply to foreign awards. Therefore, the reference in Article 8.4. LA to Article 545.2. LEC 2000 is meant only to determine the competent Court for the enforcement of domestic awards.

b) Article 8.4. LA and Article 958 Code of Civil Procedure 1881: an outdated reference for the enforcement of foreign awards

Article 951–958 LEC 1881 regulates the “enforcement of foreign judgments”.²⁹⁾ In particular, Article 958 – to which Article 8.4 refers – provides:

“In the event that [the *exequatur*] is dismissed, the enforceable title will be returned to the petitioner.”³⁰⁾

This reference does not contain any rule of competence. When the arbitration law was drafted, Article 958 of LEC 1881 had a second sentence – that is no longer in force – that read:

“In the event that [the *exequatur*] is granted, the order will be communicated for certification to the *Audiencia*³¹⁾, which will give the order to the Court of First Instance of the domicile of the defendant of the proceedings or where it has to be executed in order that [the decision] can have its effects, applying the means of enforcement as indicated in the previous section.”

The details of this now-defunct rule are beyond the scope of this article. For our purposes, it is sufficient to mention that when the Arbitration Law 2003 was drafted, the competent Court for granting the *exequatur* of a foreign award was

recent commentary on Article 46 LA equally states that on a short term basis the “appearance” of this law is not foreseeable.

²⁹⁾ See section V.A.1. of this article.

³⁰⁾ The original Spanish Text reads as follows: “*Denegándose el cumplimiento, se devolverá la ejecutoria al que la haya presentado.*”

³¹⁾ Here was meant the *Audiencia Provincial*, which is court of the second instance in every of the 17 Spanish Provinces.

the Spanish Supreme Court. When the Supreme Court granted the *exequatur*, it sent the decision to the local Court of First Instance for enforcement via the *Audiencia Provincial*.³²⁾

This explains the reference included in Article 8.4 LA to Article 958 LEC 1881. However, as the second sentence of Article 958 LEC 1881 is no longer in force, this reference is outdated.³³⁾

c) Article 955 Code of Civil Procedure 1881: the true rule of competence for the enforcement of foreign awards

On the same day that the Arbitration Law was adopted, the second sentence of Article 958 was supplanted by another law³⁴⁾ and was replaced by Article 955 LEC 1881, which, in its revised version of 2003³⁵⁾, reads as follows:

“Without prejudice to the provisions of Treaties and other International norms, the competent Court to decide on the request for recognition and enforcement of judgments [...] and foreign arbitral awards [...] is the competent Court of First Instance of the domicile or the residence of the party against which the recognition or enforcement is requested, or the domicile or residence of the person to which the decision has its effects; subsidiarily, the territorial competence will be determined by the place of execution or where these judgments [...] shall produce their effects.”³⁶⁾

Thus when enforcing foreign awards in Spain, the Courts of First Instance mentioned in Article 955 LEC 1881 are competent. In many cases these will be the Mercantile Courts.³⁷⁾ However, these courts would not be territorially competent had the award been rendered in Spain.³⁸⁾

³²⁾ And thus at the time the LA was drafted, the “*exequatur*” and the “*enforcement*” were necessarily separate proceedings.

³³⁾ See, e.g., Alfonso Espada Méndez, in *COMENTARIOS A LA LEY DE ARBITRAJE DE 2003* 78–79 (DAVID ARIAS LOZANO (PÉREZ LLORCA) ed., 2005); Antonio Hernández-Gil Ivarez Cienfuegos, in *COMENTARIO A LA LEY DE ARBITRAJE* 265–266 (DE MARTÍN MUÑOZ & HIERRO ANIBARRO 2006).

³⁴⁾ *Disposición única de la LO 19/2003, de 23 diciembre*.

³⁵⁾ Article 955 LEC 1881 was revised by *Ley 62/2003, de 30 diciembre 2003*.

³⁶⁾ Emphasis added.

³⁷⁾ Commercial matters fall in the competence of the Mercantile Courts (*Juzgado Mercantil*). In Spain, the powers of these Courts have most recently been defined by the Spanish Insolvency Law (*Ley 22/2003 Ley Concursal* of 9 July 2003) and by the rules competence of *Ley Orgánica 8/2003*, 9 July 2003, modified by *Ley Orgánica 20/2003*, 23 December 2003). The articles that regulate the distribution of competence between the ordinary Courts of First Instance and the Mercantile Courts have been criticized because these rules of Article 86 ter LOPJ (*Ley Orgánica 6/1985*, 1 July 1985, *Poder Judicial – Jurisdictional Competence*) are to some extent too vague and allow significant latitude in interpretation.

³⁸⁾ Pursuant to Article 545.2 LEC 2000, this is the Court of First instance where the award was rendered.

