

## **ARBITRATION LAW IN SPAIN: TAKING-OFF ... AT LAST?**

David J. A. Cairns\* and Gonzalo Stampa\*\*

§1.- In February 2001, Spain's Minister of Justice Excmo. Sr. D. Ángel Acebes stated, in a major speech outlining proposals for reforms relating to the administration of justice, that the Government intended to enact a new Arbitration Act.

The existing 1988 Arbitration Act<sup>1</sup>, the Minister said, had «...*become rapidly obsolete...*»<sup>2</sup>, a judgement shared by the Spanish Chambers of Commerce and certainly by all Spanish practitioners involved in international commercial arbitration. The 1988 Arbitration Act was greeted with reservations by practitioners when enacted<sup>3</sup>, and the developments in international arbitration and Spain's rapid progress as a trading nation since then has made reform of arbitration law imperative. Spain's unique arbitration history will now require it to face the perennial question of the proper balance between party autonomy and judicial scrutiny in the arbitration process in a more acute form than the many other countries that have recently amended their arbitration legislation.

This article considers three themes: firstly, the inadequacy of the present Spanish law in respect to international commercial arbitration; secondly, the implications for arbitration law of the 2000 Civil Procedure Act; and thirdly, the likely features of a new Arbitration Act, given the unique opportunity presented by favourable international and domestic circumstances for Spain to embrace a modern arbitration law.

### **THE INADEQUACIES OF THE 1988 ARBITRATION ACT**

§2.- Spain's Arbitration Act of 1953, the predecessor of the 1988 Act, reflected the values of an autocratic regime hostile to party autonomy. The 1988 Arbitration Act introduced some flexibility into arbitration and legitimised institutional arbitration, but also involved many elements of compromise. The 1988 Arbitration Act was linked in various ways to the outdated Civil Procedure Act of 1881, only partially amended in 1984 and 1992. Further, the socialist

---

\* LL.B (Hons) (N.Z); LL.M (Toronto); Ph.D. (Cantab); Solicitor (England & Wales, and New Zealand); Associate, B. CREMADES & ASOCIADOS, MADRID.

\*\* LL.B (Universidad Complutense Madrid); LL.M (London); Abogado; Partner, B. CREMADES & ASOCIADOS, MADRID.

<sup>1</sup> Act 36/1988, of December 5, 1988.

<sup>2</sup> This speech is available at [www.mju.es/g140201.htm](http://www.mju.es/g140201.htm).

<sup>3</sup> See, for example, CREMADES: Arbitration in Spain. Butterworths. 1991.

administration of the late 1980's was suspicious of privatised law-making, and the judiciary was still reluctant to relinquish control over dispute resolution<sup>4</sup>, with the consequence that the 1988 Arbitration Act retained some substantial restrictions on party autonomy.

From this perspective, the 1988 Arbitration Act is a transitory measure in the development of Spanish arbitration law, with the time now ripe for a further advance. The new Spanish legislation will inevitably involve a shift in favour of party autonomy. This would accord with present trends in international trade and arbitration practice, and also represent a logical progression in domestic terms.

§3.- The inadequacies of the 1988 Arbitration Act mean it is not surprising that Spain has rarely been chosen as a site for international arbitrations<sup>5</sup>. The major disincentives in the present law to international commercial arbitration in Spain include<sup>6</sup>:

- a) **Restrictions on party autonomy over the choice of applicable Law:** Articles 61 and 62 of the Arbitration Act allow the Parties to specify the law applicable to, respectively, the arbitration agreement and the merits «...*provided that it has some connection with the underlying legal transaction or with the dispute...*». These provisions preclude the choice of either an entirely neutral law, or the transnational principles of the *lex mercatoria*.
- b) **Restrictions on party autonomy in connection with taking of evidence:** Unless otherwise agreed, the 1988 Arbitration Act requires the evidence in an arbitration to be taken in accordance with Spanish rules of evidence<sup>7</sup>. This means, for example, that the use of discovery and other common law procedures is not possible. This constitutes a major burden for the proper development of arbitration, as it ignores

---

<sup>4</sup> On the 1953 Arbitration Act generally see CREMADES & CABIEDES: Litigating in Spain. Kluwer. 1989. Chapter 13 and CREMADES & STAMPA: «*Commercial Arbitration in Spain: History and Current Legislation*» in The Japanese Commercial Arbitration Association Quarterly, March 1994.

<sup>5</sup> For example, in 1996 Spain was designated as the seat of arbitration in just 2 of 433 requests for arbitration received by the Secretariat of the International Court of Arbitration in the International Chamber of Commerce. In 1997, the figure was only 3 of the 452 requests; in 1998, the number fell once again to 2 of 466 requests and in 1999, the figure was only 4 of the 529 requests.

<sup>6</sup> See STAMPA: «*España Sede de Arbitrajes Internacionales: Un Despegue Abortado*» in 2000 (4981) Diario La Ley 1; 1 (2000) Revista Jurídica La Ley D-23, 1678.

<sup>7</sup> Articles 3.1, 21.2 and 26 of the 1988 Arbitration Act. The exception is in institutional arbitrations (Article 10 of the 1988 Arbitration Act) where the rules of the institution making alternative provision for the taking of evidence (e.g. limited discovery allowed under Article 20.5 of the 1998 ICC Rules of Arbitration). But even in such a case judicial assistance, if necessary, would not be available to assist the Tribunal in a mode of taking evidence not recognized in Spanish Law, but accepted in commercial arbitration.

recent trends in international commercial arbitration towards an accommodation of the common law and civil law approaches<sup>8</sup>.

- c) **Restrictions on party autonomy in respect to the choice of arbitrators:** Under Article 12 of the 1988 Arbitration Act, only a practising lawyer can act as an arbitrator in an arbitration at law. Further, judges, magistrates, state lawyers, and civil servants such as Property Registrars or Public Notaries are expressly prohibited from acting as arbitrators.
- d) **The scope of judicial scrutiny:** Spanish law draws no distinction between domestic and international awards for the purposes of judicial review. Accordingly, under Article 45 of the 1988 Arbitration Act an award in an international commercial arbitration, not subject to Spanish law on the merits and where Spain was chosen as a neutral venue, may be annulled for non-compliance with Spanish domestic public policy or the formalities established by the 1988 Arbitration Act.
- e) **The unexpected role of arbitrators as *amiables compositeurs*:** The 1988 Arbitration Act draws a distinction between arbitration at law and arbitration in equity, the latter term roughly corresponding with the concept of *amicable compositeur*. However, and contrary to the normal international expectation, the arbitration will be conducted in equity unless the parties specifically stipulate arbitration at law.
- f) **Inappropriate mandatory formal requirements:** The 1988 Arbitration Act contains a number of mandatory requirements out-of-place in an international arbitration. The most significant is the requirement for the arbitrators to deliver their award within six months of accepting their appointment, a time period that can only be extended by mutual agreement between the Parties; and if the time limit passes without such an agreement then the arbitration agreement ceases to have effect and the dispute must be resolved judicially<sup>9</sup>. Other inappropriate requirements are the necessity of notarisation of the award<sup>10</sup> and the necessity that in order to be valid, arbitration must conform to the provisions of the Act<sup>11</sup>.

---

<sup>8</sup> As manifested, for example, in the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999); see also «*Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*» in (2000) Business Law International 14.

<sup>9</sup> Article 30.1. of the 1988 Arbitration Act.

<sup>10</sup> Article 33.2. of the 1988 Arbitration Act.

<sup>11</sup> Article 3.1 of the 1988 Arbitration Act.

§4.- Spain's growing importance in international trade provides a compelling case to address the reform of its arbitration law. Spain is now one of the world's largest investor nations, and is one of the largest foreign investors in Latin America<sup>12</sup>. Further, it has in recent years concluded a number of Bilateral Investment Treaties containing provision for the arbitration of investment disputes<sup>13</sup>. Spain's economic and cultural connections with Latin America potentially place it in a strong strategic position as a seat for international commercial arbitrations involving members of the European Union and Latin America. Indeed, and no doubt in anticipation of a change in the law, the Spanish Court of Arbitration that operates under the auspices of the Superior Counsel of Spanish Chambers of Commerce, Industry and Navigation is in the process of changing its name to the «*Euroamerican Court of Arbitration*».

§5.- Domestically, there is a willingness to review the formality of Spanish procedural law, as its abuse by practitioners has been considered a major cause of the congestions and delay in Spanish Courts, and of a consequent decline in confidence in the judiciary. Further, there is recognition that the increasing complexity of disputes demands more dispute resolution options and greater specialisation. A major step forward in addressing these problems was achieved with the enactment last year of a new Civil Procedure Act<sup>14</sup>, which also amended several provisions of the 1988 Arbitration Act. Excmo. Sr. Acebes's recent speech indicates that further legislation aimed at resolving these problems, including a new arbitration act, is likely to follow.

### **THE 2000 CIVIL PROCEDURE ACT AND ARBITRATION LAW**

§6.- The 2000 Civil Procedure Act came into effect on January 8, 2001 and is the most significant reform of Spanish procedural law in the last century. It includes important changes to the courts' powers to order precautionary

---

<sup>12</sup> While the United States is by far the largest investor in Latin America, Spain has become very active since the mid-1990s, especially in Mercosur, Chile and the Andean countries. Latin America's share of Spain's total FDI soared from 29% to 72% between 1990-1998. A very large proportion of those FDI flows went to the services industry, through privatisation or M&A that became possible thanks to deregulation. Since 1996, Spain has overtaken the United Kingdom as the main European investor. See «*Recent Trends in Foreign Direct Investment*» in 76 (June 2000) *Financial Market Trends* 23.

<sup>13</sup> According to the updated list provided by the Treaty Section of the Spanish Ministry of Foreign Affairs and the comprehensive list of Bilateral Investment Treaties (1959-1999) published in a booklet by United Nations Conference on Trade and Development (UNCTAD), Spain has entered into a total of forty-eight Bilateral Investment Treaties, forty-three of which are currently in force: Algeria, Argentina, Bolivia, Bulgaria, Korea (Republic), Chile, China, Costa Rica, Croatia, Cuba, the Czech Republic, the Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Honduras, Hungary, India, Indonesia, Jordan, Kazakhstan, Latvia, Lebanon, Lithuania, Malaysia, Morocco (September 27, 1989), Mexico, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Romania, the Russian Federation, Slovakia, South Africa, Tunisia, Turkey, Uruguay and Venezuela. The five remaining Bilateral Investment Treaties, signed but not in force are: Colombia, Gabon, Morocco (December 11, 1997), Slovenia and the Ukraine.

<sup>14</sup> Act 1/2000 of January 7, 2000.

measures in respect of arbitrations, simplifies the courts' power to stay proceedings commenced in breach of an arbitration agreement, and directly and indirectly amends several provisions of the 1988 Arbitration Act. The impact of these amendments will be explained throughout the present Section.

§7.- The 2000 Civil Procedure Act finally resolves a doctrinal conflict in Spanish Law on the availability of precautionary measures ordered by ordinary courts in support of pending domestic and foreign arbitrations.

The 1988 Arbitration Act makes no mention of precautionary measures except where a party is seeking to secure the enforcement of the award<sup>15</sup> and, on this basis, some commentators took the view that precautionary measures in support of pending arbitrations were not authorised<sup>16</sup>. Such a view was at odds with the trend in international arbitration jurisprudence and with Article VI.4 of the Geneva Convention,<sup>17</sup> which expressly recognises the judicial jurisdiction to order precautionary measures in support of arbitration proceedings, but without supposing the submission to the courts of the resolution of the substantive issues<sup>18</sup>.

The latest and most important judicial decision on this question is the Order of June 28, 1999, delivered by the Madrid Court of First Instance number 69<sup>19</sup>, which was the first order granted in Spanish Courts in express support of an international arbitration proceeding in progress and seated outside Spain<sup>20</sup>.

---

<sup>15</sup> Article 50.1 of the 1988 Arbitration Act.

<sup>16</sup> See. ORTELLS & CALDERON: La tutela judicial cautelar en el Derecho español. Comares. Granada. Pages 179-187 and LORCA: Derecho de Arbitraje Español. Dyckinson. Madrid. 1994. Pages 369-376.

<sup>17</sup> European Convention on International Commercial Arbitration (Geneva, April 21, 1961), which was ratified and became part of Spanish domestic law in 1975.

<sup>18</sup> As a result of the negative effect of the arbitration clause. See generally GAILLARD & SAVAGE: FOUCHARD, GAILLARD & GOLDMAN on International Commercial Arbitration. Kluwer Law International. The Hague. 1999. §§1302 to 1345.

DONOVAN «Powers of the arbitrators to issue procedural orders, including interim measures of protection, and the obligation of the parties to abide by such orders» in 10/1 ICC International Court of Arbitration Bulletin 57.

SANDERS: Quo Vadis Arbitration? Sixty Years of Arbitration Practice. Kluwer Law International. 1999. Pages 268 *et seq.*

<sup>19</sup> *Foster Wheeler Trading Company AG SA and Foster Wheeler Trading Company AG. v. National Company for Fishing and Marketing* in 1999 Revista de la Corte Española de Arbitraje 320. For a short comment see STAMPA: «Court Issues Writ Implementing Precautionary Measures Simultaneous To International Arbitration Proceedings», in 2000 Int.A.L.R. N-19.

<sup>20</sup> In June of 1999 the Spanish subsidiary of a multinational civil engineering company filed a request for arbitration against a north-African company before the ICC International Court of Arbitration relating to two turnkey contracts for the establishment of two industrial plants in a north-African country. As customary in projects of this nature, these contracts contemplated guarantees to be posted by the Claimant with a Spanish-based bank. They were payable on first demand. The Respondent attempted to call these bonds up, and the Claimant applied for a conservatory measure. On June 28, 1999, the Claimant obtained an order from the Court of First Instance number 69 of Madrid against the bank, restraining any payment to the Respondent or any other beneficiary under the guarantees until an award on the merits had been rendered.

The Court based its order on doctrine from recent decisions of the Spanish Constitutional Court<sup>21</sup>; Article VI. 4 of the 1961 Geneva Convention; and Article 23.1 of the 1998 ICC Rules. The order also took into account the *Van Uden* case<sup>22</sup>; the wording of Article 22.5 of the Organic Law 6/85, of July 1, 1985, for the Judiciary<sup>23</sup>; and some earlier but less definite Spanish decisions.

The position so recently reached in Spain judicially has now been confirmed in the 2000 Civil Procedure Act.

Its Articles 722, 724, 727, 728 and 730.3 to 747 provide for the adoption of precautionary measures in arbitration. As a general rule, precautionary measures are to be adopted once both parties have been heard. However, Article 733.2 of the 2000 Civil Procedure Act also allows measures to be taken without the other party being heard when there are exceptional and urgent circumstances. This new regulation also sharpens the types of measures that can be adopted and simplifies the procedural path to be followed by parties seeking precautionary measures from Spanish Courts, in support of either international commercial arbitration proceedings seated outside Spain or domestic arbitrations.

§8.- The 2000 Civil Procedure Act also contains an important simplification and clarification of a court's power to stay proceedings commenced in breach of an arbitration agreement. Previously, the power to grant a stay under Article 11 of the 1988 Arbitration Act was doubtful in certain cases, creating the prospect of simultaneous arbitration and court proceedings over the same subject matter<sup>24</sup>. However, the 2000 Civil Procedure Act fully implements the principle that the judge must determine whether proceedings are to be stayed at the earliest possible procedural stage<sup>25</sup>.

Articles 39 and 63.1 of the 2000 Civil Procedure Act establish a single procedure («...*la declinatoria*...») to challenge the jurisdiction of the court on the basis that the matter properly belongs before a foreign court, another domestic jurisdiction, or to arbitrators. Article 11 of the 1988 Arbitration Act has been directly amended to refer to the *declinatoria* procedure and must now be applied in

---

<sup>21</sup> See Constitutional Court decisions in cases number 43/1988, dated March 16, 1988 and 288/1993, dated October 4, 1993 and the Order from this Court dated July 20, 1993; Supreme Court decisions of February 10, 1997; October 10, 1996 and June 19, 1993.

<sup>22</sup> Dated November 17, 1998, rendered in case C-391/95 *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line et al.* Vid. 1/98 Bulletin ASA (Association suisse de l'arbitrage) 166; 1/99 Bulletin ASA (Association suisse de l'arbitrage) 68.

<sup>23</sup> Establishing the jurisdiction of the Spanish Courts to grant precautionary measures to be enforced in Spain in respect of assets or persons which are located in Spain.

<sup>24</sup> See, amongst the most relevant, the decisions of the Supreme Court of February 10, 1997; October 10, 1996; March 16, 1996; March 1, 1996 and June 19, 1993; the Provincial Court of La Coruña of June 30, 1999; the Provincial Court of Jaen of July 21, 1998; the Provincial Court of Zaragoza of February 2, 1998; the Provincial Court of Valencia of July 20, 1994; and the Provincial Court of Madrid of March 22, 1994 and November 30, 1993.

<sup>25</sup> See Heading XX of the Preamble to the 2000 Civil Procedure Act. This new regulation seeks to both implement the negative of the arbitration clause and to avoid the possible existence of *lis pendens*.

conjunction with Articles 64.1, 248, 404 and 440.1 of the 2000 Civil Procedure Act. These articles establish precise time-limits within which any application for a stay must be made.

Article 248 of the 2000 Civil Procedure Act establishes two types of declaratory proceedings: ordinary proceedings and oral proceedings<sup>26</sup>. As a result of this classification, the exercise of the application for a stay of proceedings varies depending on the nature of the proceedings in which is raised.

In an ordinary proceeding, Article 64.1 and 404 of the 2000 Civil Procedure Act are applicable, and an application for a stay of proceedings must be filed by the party invoking the arbitration agreement within the first ten days of the twenty-days time limit established under Article 404 of the 2000 Civil Procedure Act for the submission of the defence on the merits.

If a party seeks a stay of oral proceedings, then Articles 64.1 and 440.1 of the 2000 Civil Procedure Act are applicable. In this case, the application must be made by the invoking party within five days from the date on which the parties have been summoned to appear before the Judge for a preliminary hearing, or otherwise the right to apply for a stay is waived.

§9.- Article 26 of the 1988 Arbitration Act (evidence) provides for two requirements that must be met in order for evidence to be admissible in arbitration proceedings: (i) it must be relevant; and (ii) it must be admissible at law. Admissibility in law must now be determined in accordance with Articles 299 to 386 of the 2000 Civil Procedure Act. These provisions make important changes to the Spanish law of evidence, including a move to a more free examination of witnesses and also to the much earlier production of expert evidence. However, it is to be emphasised that there is still no provision for even limited common-law style discovery in Spanish Civil Procedure.

Article 299 of the 2000 Civil Procedure Act establishes six categories of evidence:

1. Interrogatories;
2. Public deeds and documents;
3. Private documents;
4. Expert witness reports;
5. Judicial site inspection; and
6. Witness Depositions.

---

<sup>26</sup> This distinction and its applicability to proceedings to be brought before courts depends on the relief sought or the type of action to be exercised, in accordance with the guidelines provided for this purpose on Articles 249 and 250 of the 2000 Civil Procedure Act.

These categories and the rules for evidence contained in Articles 299 through 386 of the 2000 Civil Procedure Act apply both in cases under Article 26 of the 1988 Arbitration Act (evidence before the arbitrators) and under Articles 27 and 43 (judicial assistance in taking evidence) of the 1988 Arbitration Act. These latter two Articles provide for the possibility of judicial assistance in hearing evidence which the arbitrators are unable to hear themselves.

§10.-There are various other provisions in the 2000 Civil Procedure Act that have an impact on arbitrations conducted pursuant to the 1988 Arbitration Act:

- a) Article 518 of the 2000 Civil Procedure Act prescribes a period of limitation of five years to seek the enforcement of an award. Once elapsed, the right to enforce the award expires;
- b) Articles 207.1 and 207.2 of the 2000 Civil Procedure Act complement Article 2.a of the 1988 Arbitration Act, which states that issues in which a final and definitive judicial judgment has been rendered may not be subject to arbitration. In accordance with Articles 207.1 and 207.2 of the 2000 Civil Procedure Act, a distinction is made between definitive and final judgments, based on the existence or not of a right of appeal. A definitive judgment is one which decides the issues in an action at one level or in a special appeal<sup>27</sup>. A final judgment is defined as a judgment from which no ordinary or special appeal can be brought, either because it is not prescribed by law or because any of the parties fail to file an appeal before the expiration of the prescribed time-limit<sup>28</sup>;
- c) Article 241 of the 2000 Civil Procedure Act complements Article 35.1 of the 1988 Arbitration Act (costs) by specifying the rules relating to the awarding of costs;
- d) Articles 455 to 467 of the 2000 Civil Procedure Act define the procedure to be followed for an appeal pursuant to Article 42.3 of the 1988 Arbitration Act against a decision refusing judicial ratification of arbitration proceedings<sup>29</sup>. A refusal is subject to appeal to the competent Provincial Court by the procedure set out in Articles 457 to 462 of the 2000 Civil Procedure Act; and
- e) Article 437 and concordant of the 2000 Civil Procedure Act complements Article 39.3 of the 1988 Arbitration Act (procedure for judicial intervention of arbitration proceedings where the parties are unable to agree on the

---

<sup>27</sup> Article 207.1 of the 2000 Civil Procedure Act.

<sup>28</sup> Article 207.2 of the 2000 Civil Procedure Act.

<sup>29</sup> Judicial ratification is a procedure under the 1988 Arbitration Act whereby judicial assistance is sought to set in motion the arbitration where one party refuses to co-operate in the establishment of the Tribunal.



appointment of arbitrators) in requiring a party seeking this type of judicial intervention to file its petition pursuant to the requirements for oral proceedings.

### **THE SHAPE OF A NEW ARBITRATION ACT**

§11.- The Ministry of Justice has not yet released a draft Arbitration Bill, or even a full discussion paper of its proposals. However, the statements of interested parties, such as the Spanish Chambers of Commerce and the Spanish Court of Arbitration, recent scholarly writing, and the perceptions amongst practitioners provide a basis to make some predictions as to the likely form and content of a new Act.

§12.- Firstly, Spain is likely to adopt a dualist arbitration system of distinct regimes for international and domestic arbitrations. It is in the sphere of international arbitration that a shift in favour of party autonomy is most urgently required. The preamble to the 1988 Arbitration Act refers, in the context of the need for a connection between the applicable law and the dispute, to the necessity to prevent an «...*escape from the law*...», of international disputes but the result of this attitude has been the escape of the parties to more hospitable jurisdictions for the resolution of their disputes.

The dualist system adopted should also be sensitive to the latest developments in international arbitration practice, and so it would be preferable if it expressly addresses difficult issues such as the powers of the Spanish state and state-owned entities to enter into arbitration agreements and the application of the doctrine of state immunity in arbitration. Indeed, the rapid growth in Bilateral Investment Treaties, with their provision for arbitration between one Contracting State and investors from the other Contracting State, makes it incumbent on all States, including Spain, to clarify in their domestic law the rights and immunities of the state in commercial arbitrations.

§13.- Secondly, and as with other nations, a major question will be the place of the UNCITRAL Model Law on International Commercial Arbitration in its arbitration system. It seems logical for Spain to adopt the UNCITRAL Model Law in respect of international arbitrations, and in fact the Spanish Chambers of Commerce expressly endorsed this option in their statement welcoming the proposal of new legislation.

The UNCITRAL Model Law offers a carefully drafted modern text, supported by *travaux préparatoires* and a developing international jurisprudence, that is at

least familiar to and, in many cases the same as, the arbitration legislation of Spain's trading partners. The UNCITRAL Model Law also is a particularly attractive option for a nation such as Spain without a well established indigenous arbitration jurisprudence or a specialised body of arbitration practitioners and judges, but which at the same time wishes to enter the highly competitive market for international arbitrations<sup>30</sup>.

Spain's position in this respect may be sharply differentiated from, for example, England's position immediately prior to the enactment of the Arbitration Act 1996 where the sophisticated local jurisprudence, and the presumption that London's established international reputation as an arbitration centre represented a user-endorsement of that jurisprudence, were identified as major policy justifications for the rejection of the UNCITRAL Model Law<sup>31</sup>.

The UNCITRAL Model Law also offers the security of a recognised standard for applications for setting aside an arbitral award, and also the recognition and enforcement in Spain of foreign arbitral awards in accordance with the 1958 New York Convention<sup>32</sup>.

§14.- Thirdly, the procedure for the taking of evidence and proof must, in international arbitrations, be freed from the domestic Spanish rules of evidence, specifically designed for civilian procedure. This is essential if Spain has any serious pretension to establish itself as an international arbitration centre.

International arbitration by definition involves parties from different jurisdictions and often distinct legal traditions, and today is both flexible in adapting rules of procedure to the needs of the parties and the dispute and, as demonstrated for example by the *1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration*, is prepared to blend elements of both the continental and common law traditions. Where the laws of the seat of the arbitration ignore this reality and require the arbitration to be conducted in accordance with domestic rules of evidence designed for purposes other than arbitration, as Spanish law does in certain circumstances<sup>33</sup>, then that country will not prosper as an international arbitration centre.

---

<sup>30</sup> HERRMANN «*The UNCITRAL Model Law – its background, salient features and purposes*» in (1990) 6. *Arb. Int'l*, 6-39, especially at 28-29.

<sup>31</sup> See STEYN «*England's Response to the UNCITRAL Model Law on Arbitration*» in (1994) 10 *Arb. Int'l* 1-16, at page 3; LORD MUSTILL «*A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee on the UNCITRAL Model Law*» in (1990) 6. *Arb. Int'l*, 3-62, especially at 13-14.

<sup>32</sup> Articles 34 to 36 of the UNCITRAL Model Law, which would overcome the present problems with the direct contradiction between Articles 56 to 59 of the 1988 Arbitration Act and Spain's obligations under the 1958 New York Convention.

<sup>33</sup> i.e., absent the agreement of the parties or inclusion in the applicable institutional rules of arbitration, such as Article 20.5 of the 1998 ICC Rules.

For similar reasons all restrictions on party freedom to choose the applicable rules for the determination of the dispute must be removed.

§15.- Fourthly, the emphasis already apparent on increased specialisation of the judiciary is likely to mean the designation of specialised arbitration judges.

The Spanish Chambers of Commerce have already called for more judicial specialisation in arbitration in order to develop a «*clear and determinate*» jurisprudence which would contribute to create «*more confidence*» in arbitration. The objective of specialised judges should be to establish a homogeneous, technically advanced body of jurisprudence based on a profound understanding and experience of arbitration; in short, to enable Spain to develop an arbitration jurisprudence that transcends its national boundaries and draws the attention of jurists internationally. A possible model for specialized judges would be the Paris-based *Cour d'Appel*, whose reputation and reliability is beyond question in the field of commercial arbitration and has provided a major boost to arbitration in France.

§16.- Fifthly, and as a necessary corollary of the above points, a new Arbitration Act is likely to remove many of the idiosyncratic features of the present 1988 Act that are inconsistent with international arbitration. This would involve the removal of formal requirements such as the necessity of notarisation of an award, the requirement for an arbitration to be in equity unless stipulated to be at law (and preferably the replacement of the concept of the arbitration in equity, at least for international arbitrations, with the internationally recognised concept of *amiable compositeur*) and restrictions on certain professionals acting as arbitrators. It is to be hoped that such changes would follow automatically from the adoption of the UNCITRAL Model Law for international arbitrations.

## CONCLUSION

§17.- The 1988 Arbitration Act was a compromise measure at the time of its enactment. It is a transitory set of rules which has become increasingly out-of-step with international arbitration practice.

Spain's position in international trade and the apparent domestic consensus in favour of reform of the 1988 Arbitration Act lead us to think that Spain is likely to embrace this historic opportunity to establish an arbitration law which breaks entirely with the past and which adopts the latest developments in international practice.