# SUMMARY OF AMENDMENT OF THE 2003 ARBITRATION ACT

On May 19, 2011, Spanish Parliament passed a Bill for the reform of the 60/2003 Act, of 23 December, of Arbitration and regulation of institutional arbitration in the Spanish Public Administration, giving raise to the 11/2011 Act, of 20 May, for the Reform of the Arbitration Act (*Ley de Reforma de la Ley de Arbitraje,* hereinafter referred to as the *LRLA* ), which was published in the Official Gazette on May 21[1].

This reform seems to be aimed at fostering Spain as an arbitration seat, trying to make our arbitration system rank fully in line with the system that rules in other countries of our environment.

Accordingly, in an effort to attain greater uniformity in the effectiveness of arbitral proceedings held in Spain, the *LRLA* modifies several regulations. Thus, in particular, it amends the Arbitration Act (*Ley de Arbitraje,* hereinafter *LA* , which suffers the deepest transformation), the Civil Procedure Act (*Ley de Enjuiciamiento Civil*, hereinafter *LEC* ) and the Bankruptcy Act (*Ley Concursal,* hereinafter *LC* ).

## I. Changes to the 2003 Arbitration Act

The explanatory memorandum of the *LRLA* states that one of the purposes of this reform is *(to) modify some aspects of the 60/2003 Act that in practice has shown improvable, thus contributing to the promotion of alternative means of dispute resolution*

The fact is that the *LRLA* intends to lay the foundations for the development of arbitration in Spain, given the increase this type of proceedings has had in Spain over recent years.

The changes the *LRLA* has introduced in the *LA* can be outlined as follows:

### *A) Court with jurisdiction over the recognition and enforcement of arbitration awards.*

Following, perhaps, the French example, the enactment of the *LRLA* has granted to Civil and Criminal court rooms of the Superior Courts of Justice of Autonomous Communities (usually in the place where the award has to produce its effects) the jurisdiction over issues relating to the recognition of awards, vesting in First Instance courts the authority to enforce them.

The abovementioned rule applies to foreign awards as well, and whereas their exequatur is now reserved to the Superior Courts of Justice of the Autonomous Communities (so no longer centralized in a single court, as it was before), their enforcement lies with First Instance courts of the place in which the award must produce its effects.

The trend that seems to be prevailing these days in the arbitration landscape is the separation in two different jurisdictional bodies of award recognition and award enforcement. However, it remains to be seen whether the advantages such system may bring (inter alias, a greater technical precision of resolutions concerning arbitration that results from the specialization of courts and tribunals in the knowledge of such matter) will make up for

[1] Along with the 5/2011 Organic Act of 20 May, complementary to the *LRLA*, which introduces relevant changes in the 6/1985 Act of the Judicial Power to get full effectiveness of the allocation of jurisdiction and competence in arbitration issues as vested by the *LRLA* in several Courts and Tribunals.

the immediacy of a final decision on the enforcement of awards that characterised the single court system.

Civil and Criminal court rooms of the Superior Courts of Justice are also vested with the authority to decide on actions seeking nullification of awards, and questions concerning the appointment or removal of arbitrators.

Likewise, the *LRLA* provides for the procedure to request a court or tribunal hearing a case allegedly referred to arbitration, to refrain from hearing such case any further and transfer jurisdiction over the issue to the arbitration tribunal. In such case, the party wishing to prevent the court hear the matter should lodge with that Court a declinatory exception within the first ten days of the time-limit allowed to file the statements of defence (ordinary trial) or of the summon for the hearing (oral trial).

*B) Arbitrations concerning corporate issues ( Arbitraje Estatutario ).*

In order to incorporate into the Positive law the already broad jurisprudence that is inclined to admit the submission to arbitration of disputes arising in the core of capital companies (not in General or Limited Partnership), the *LRLA* provides for the inclusion of sections 11Bis and 11 Ter. in the *LA*. Thus, the new text of the *LA* enables Capital companies to refer to arbitration any internal disputes (including the challenge of corporate resolutions by members or directors), so long as the arbitration clause has the favourable vote of, at least, two thirds of corporate shares.

It is also allowed the registration of the nullity of an agreement that is subject to registration, and the cancellation of the entry showing such agreement.

*C) Arbitration of Companies of Public law and public entities.*

Within the framework of institutional arbitration, public entities are included as bodies administering arbitrations and nominating arbitrators (provided their regulatory rules so permit). Entities administering arbitration are compelled to ensure transparency in the nomination of arbitrator, as well as their independence and capacity.

On the other hand, the *LRLA* provides for the resolution of relevant legal disputes that may arise between the General Public Administration of the State and a series of public bodies (or just between those public bodies). Such solution is supplied through a system that, even it is not absolutely identical to an arbitration procedure, takes such disputes our of the usual administrative or judicial conflict resolution channels. Relevant legal disputes shall mean those involving over €300,000 or especially relevant to the public interest[2].

*D) Types of arbitration and requirements to be met by arbitrators.*

The possibility remains for the parties to submit to arbitration in equity (which until the last minute was meant to be removed) and it is required that if the arbitral tribunal is formed by at least three arbitrators, one of them must be a jurist. However, in case of arbitration in law administered by a sole arbitrator, he/she must meet such condition.

The *LRLA* is silent as to what the term jurist should mean (yet it is a qualification that can be attributed to almost every actor of the law world). Thus, it should be understood that such term has been chosen to allow access to arbitration tribunals to individuals in the legal professional who are not practising lawyers.

On the other hand, the *LRLA* resolves the debate on whether a mediator may or may not be an arbitrator in the same case in which he has acted as mediator, by establishing that unless otherwise agreed by the parties, the arbitrator may not have acted as mediator in the same dispute between the parties.

[2] This system of dispute resolution is still pending development of its rules.

*E) Obligation to contract a civil liability insurance policy.*

The *LRLA* compels arbitrators or arbitral institutions (on behalf of the formers) to contract a civil liability insurance policy that should cover any civil liability that may be incurred during the arbitration proceedings arbitrators are entrusted with. Irrespective of the fact that the precise wording of the terms of such insurance policy is pending development through the rules of the Act, it is to be noted that currently most of the Spanish tribunals have already hired such an insurance (yet from now on, such contract has become an obligation and not just a mere precaution).

*F) Majorities, time limit and language of the award.*

In providing the possibility for arbitrators to express their discrepancies with a decision taken by the majority of co-arbitrators, the *LRLA* has replaced the sentence reading *they may express their dissent* and changed it by that other reading *leave evidences of their votes in favour or against* . It seems then that from now on the *LA* will only allow an arbitrator to disclose his vote against the award, but it is unclear whether it authorises the arbitrator to explain the reasons that led him to take such a decision (this is perhaps to impede that the arbitrator may show to one of the parties the way to an action for annulment).

The period of six months to deliver an award (running from the defence pleading or following expiry of the term to file such defence) remains the same, as well as the possibility to extend that deadline another two months by the arbitrators, unless otherwise agreed by the parties.

The *LRLA* has made the possibility that the non-delivery of the award within the time limit may affect the effectiveness of the arbitral agreement conditional to an agreement between the parties in that respect. Conversely, the *LRLA* has removed the possibility for the parties to agree on having an award without rationale, and so now, awards must always bear it.

As regards language, the *LRLA* continues giving the parties the possibility to choose freely the language of the arbitral proceeding (and the award). However, in the absence of any agreement by the parties as to the language to be used in case of arbitration, and in order to protect the right of Spanish people to use their respective official languages (other than Castilian language), arbitration shall be conducted in any of the official languages of the place where the proceeding is held. In addition, witnesses, experts and any other third party involved in the arbitral proceeding may use their own language (yet the Act does not specify if such own language must be one of the official languages of the place where the arbitral proceeding is taking place or, in case of an international arbitration, its own national language).

*G) Effectiveness of the award*

The distinction between firm and final award has been eliminated. So now, the award is effective as res judicata from the very moment it is delivered, irrespective of the fact that there may be a motion for annulment or for clarification (all that following the philosophy of giving the award the maximum efficiency as provided by law).

*H) Challenging the Award.*

Nullification of the award delivered by an arbitrator or by an arbitral tribunal may be sought by an action for nullification that can be brought exclusively before the Civil or Criminal courtroom of the Superior Court of Justice of the Autonomous Community in which the award were delivered. The new Act has not modified the causes on which basis the nullification may be declared.

The *LRLA* also clarifies the procedure by which the parties may request a correction of the award from the arbitral tribunal. Indeed, within ten days following the date on which the award was served on the parties, they may (previous notification to the other party) request the arbitrators the following:

- Correction of errors.
- Clarification of one point or a specific part of the award.
- Complement in respect of petitions made but not resolved.
- Rectification of those resolutions in the award deciding on issues not submitted to the arbitrator s decision or on matters not subject to arbitration (in order to avoid actions for award nullification).

II. Modifications in the Civil Procedure Act -*Ley de Enjuiciamiento Civil ( LEC )*-.

The *LRLA* amends two articles of the *LEC*:

a) The article 955 identifies the bodies with jurisdiction to enforce judgements and any other foreign court resolutions (as well as mediation agreements), and embodies the procedure for recognition and enforcement of awards, as already indicated in paragraph I. A) above. This article clearly provides that decisions from Superior Courts of Justice relating to the recognition of foreign awards and other foreign arbitral decisions are not subject to appeal, and

b) The article 722 considers that the party legitimated to request interlocutory injunction from the Tribunal is that who either (i)proves to be a party to an arbitration agreement (even before commencement of the arbitration procedural steps), (ii) is already a party to an arbitral proceeding in Spain (what raises the question of whether the parties to an arbitral proceeding pending abroad can seek interlocutory injunction for that reason), (iii)has asked for judicial formalization of an arbitration, or (iv) has requested from an arbitral institution the initiation of arbitral proceedings.

III. Changes in the Insolvency Act -*Ley Concursal ( LC )*.

The changes the *LRLA* has incorporated in the *LC* are not too extensive in their wording, but quite significant in their scope. Thus, the *LRLA* only modifies two articles of the *LC*, namely:

a) The article 8.4. refers to the competence the judge in care of a bankruptcy proceeding has to know of the interlocutory injunctions that could affect the bankrupt s estate. The said judge, however, will not be competent in respect of any injunctions decided by the arbitrators in arbitral proceedings. This means a sort of crack in the attractiveness of the insolvency jurisdiction (however, the new wording of the article 8.4 of the *LC* allows the bankruptcy judge to set aside, or request the lifting of, the interlocutory injunctions decided by the arbitrators whenever such measures may be detrimental to the bankruptcy proceedings).

b) The article 52.1 introduces a modification of great relevance in doctrinal terms. Indeed, former wording of article 52.1 did not do much but to cause misunderstandings and apocalyptic interpretations, as it seemed to deprive arbitral agreements of value during the bankruptcy proceeding.

Since the enactment of the *LRLA* (10 June 2011), the declaration of bankruptcy by itself affects neither the mediation agreements nor the arbitral agreements entered to by the bankrupt. This means that the mediation or arbitration proceedings may continue its course until their completion, regardless of the existence and development of a bankruptcy proceeding.

Clearly, the possibility of suspending the effects of the said arbitral proceedings is left to the bankruptcy judge s discretion, provided that they may cause any impairment to the bankruptcy estate (it remains to be seen how this provision is to be

construed by scholars and jurisprudence, because in an arbitration proceeding the bankrupt may be regarded as a debtor that is compelled to pay a sum of money to any creditor, and that may be regarded as a circumstance that would potentially cause harm to the bankrupt s estate.

*The foregoing does not constitute legal advice and should not be relied on as such; it is intended only to inform on the changes that have taken place in Spanish arbitral legislation in force*

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In Madrid, June 2011

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