Kluwer Arbitration Blog

Arbitration in Spain: state of affairs

Francisco Málaga (Linklaters) · Tuesday, May 29th, 2012

In recent decades, Spanish legislators have increasingly turned their attention to private arbitration. The Spanish Arbitration Act 1953, mainly dealing with civil actions, was replaced by the 1988 Act directed at resolutions of commercial disputes, with a particular focus on international commercial arbitration. The aim was to make Spain a leader in the field, taking advantage of its influence in Central and South America and the fact that it shares the same language with most of the countries in that region.

The current Arbitration Act was passed into law at the end of 2003 (*Ley 60/2003, de 23 de diciembre*), replacing the 1988 Act and correcting various technical shortcomings. The Spanish Act is based on the UNCITRAL Model Law of 21 June 1985 and has seen two changes since it came in, the first of minor importance in 2009 and a second having greater impact exactly a year ago (*Ley 11/2011, de 20 de mayo*). The result is a modern and technically rigorous set of laws that give Spanish courts of justice a wide range of useful mechanisms.

While legislation was evolving, a vast culture of arbitration developed in Spain, made evident by the proliferation of arbitration clauses in business agreements, the burgeoning of courts of arbitration in its big cities and the arrival on the scene of renowned arbitrators and specialised litigators in the field. A major exponent of arbitration culture is the Spanish Arbitration Club (*Club Español del Arbitraje*), which brings together professionals from the industry and currently has 600 members and an in-house publication (the Spain Arbitration Review).

All this could give the impression that there is not much left to do in the field. This is not the case.

For a start, Spain has not succeeded in establishing a renowned international court of arbitration comparable to those elsewhere, not even for Central and South America. At present none of the Spanish arbitral institutions has become a point of reference in international trade, in which clauses favouring seats of arbitration in other countries still predominate, even when both parties are Spanish-speaking and come from Central or South American countries.

Moreover arbitration still has its detractors in Spain. Critics have many different arguments and these are difficult to summarise, partly because no reliable studies have been done. However, in my view, there are at least three factors working against arbitration in Spain.

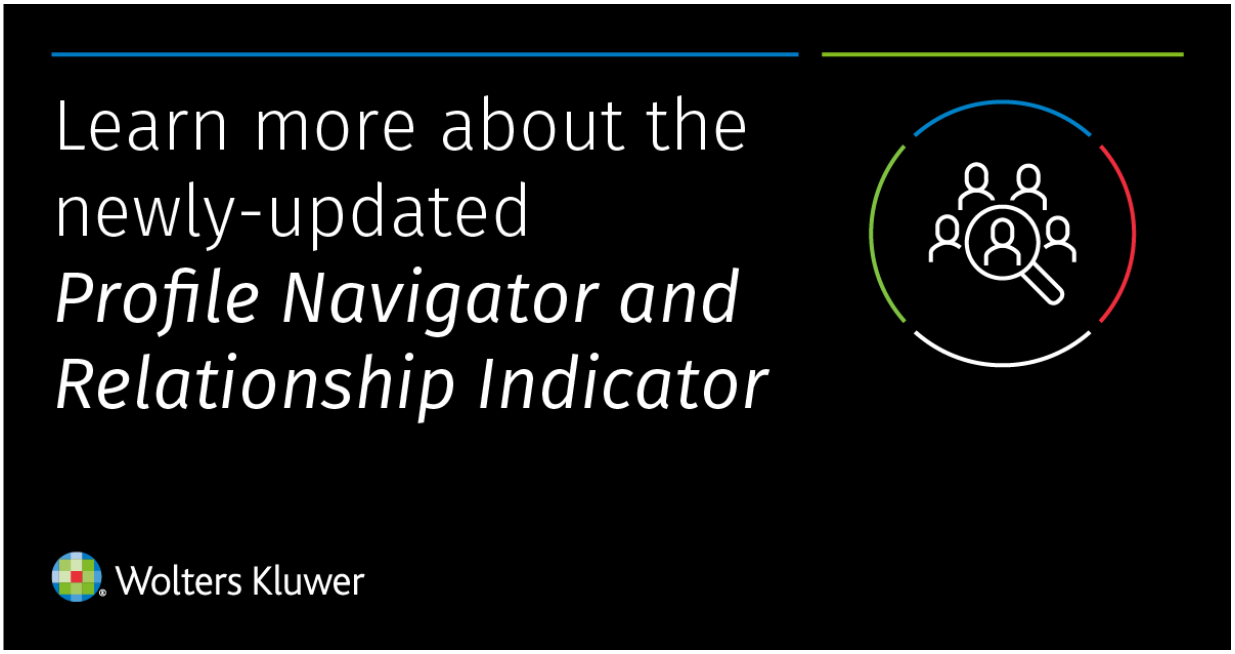
The first is cost. Taking your case to Spanish civil or commercial courts is cheap, at least relatively. Such civil or commercial proceedings in Spain cost far less than in other countries, whereas arbitration is seen as expensive, mainly because of the fees charged by arbitrators and the

institutions involved. It is this difference in cost that often puts off litigants from choosing arbitration as a way of solving their disputes, particularly disputes confined to Spain and at this time of ongoing economic crisis in the country.

The second factor is a fear of equitable decisions. There is a feeling that arbitrators in Spain, the majority being practicing lawyers, are often inclined to make partial awards that do not satisfy either party, particularly when there are three arbitrators and the parties each appoint one. The concern is all the greater because under the system those turning to arbitration have just “one go” and arbitral awards cannot be appealed.

Finally, arbitration is regarded as something of a “private club”, with the same few people always appointed to the role. This impression is made worse by those arbitration institutions which provide litigants with set lists of arbitrators without explaining how or on what criteria those people were chosen.

Arbitration will only take preference over state justice when these reservations are overcome. That means tackling the root causes. Arbitration needs to be more efficient and less costly for those involved, making sure that greater flexibility does not mean more convoluted processes. More transparency is needed in selecting arbitrators and evaluating their performance, with arbitral awards subject to objective and reliable assessments and oversight. This is the only way for arbitration to become an increasingly trusted means of dispute resolution and for Spanish arbitral institutions to achieve their desired position in Spain and internationally, particularly in Central and South America.



This entry was posted on Tuesday, May 29th, 2012 at 4:21 pm and is filed under Arbitrators, Costs
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.