

# 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.<sup>1)</sup> Furthermore, foreign companies investing in Spain often prefer to submit a dispute to arbitration rather than to the Spanish courts.<sup>2)</sup>

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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*The authors wish to thank Carol Tissot and Samuel Moss (Lalive Geneva) for their assistance in the preparation of this article.*

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

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

erwise be set aside in the arbitral forum.<sup>3)</sup> 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”<sup>4)</sup>, 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.<sup>5)</sup>

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 courts<sup>6)</sup>, the form and content of the arbitration

<sup>3)</sup> 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](http://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<sup>a</sup> TERESA FERNÁNDEZ-PACHECO MARTÍNEZ, *LA EJECUCIÓN DE LAUDOS ARBITRALES CON ARREGLO A LA CONVENCIÓN DE NUEVA YORK. ANÁLISIS DE JURISPRUDENCIA ESTADOUNIDENSE* (1988).

<sup>4)</sup> *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).

<sup>5)</sup> 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.*

<sup>6)</sup> Article 8.3; 8.4; 8.6 LA.

agreement<sup>7)</sup> and how the State courts should deal with arbitration agreements<sup>8)</sup>, interim measures<sup>9)</sup>, and finally, the enforcement of arbitral awards<sup>10)</sup> and *exequatur* proceedings.<sup>11)</sup>

### 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.<sup>12)</sup> This is a logical consequence of the territorial approach of the LA.<sup>13)</sup>

#### 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.<sup>14)</sup> 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.<sup>15)</sup>

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.<sup>16)</sup> Article 44 LA contains a rule which is well known in many other European jurisdictions.

<sup>16)</sup> 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].”<sup>17)</sup>

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.<sup>18)</sup> 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.<sup>19)</sup> Another author, however, notes that the *exequatur* and the enforcement are to be separated and considered as “two separate actions.”<sup>20)</sup>

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-

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

<sup>18)</sup> 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.

<sup>19)</sup> 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.”

<sup>20)</sup> 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.<sup>21)</sup> However, the authors and the courts<sup>22)</sup> are not unanimous in this respect.<sup>23)</sup> An in-depth exploration of the relevant legal provisions is necessary.<sup>24)</sup>

## 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 law<sup>25)</sup> supplants most of the provisions of the previous Code of Civil Procedure of 1881 (*Ley de enjuiciamiento civil* – LEC 1881).<sup>26)</sup> 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 law<sup>27)</sup> 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.<sup>28)</sup>

<sup>21)</sup> 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).

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

<sup>23)</sup> 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).

<sup>24)</sup> 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.

<sup>25)</sup> 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).

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

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

<sup>28)</sup> 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”.<sup>29)</sup> 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.”<sup>30)</sup>

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*<sup>31)</sup>, 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

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

<sup>29)</sup> See section V.A.1. of this article.

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

<sup>31)</sup> 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*.<sup>32)</sup>

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.<sup>33)</sup>

**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 law<sup>34)</sup> and was replaced by Article 955 LEC 1881, which, in its revised version of 2003<sup>35)</sup>, 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.”<sup>36)</sup>

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.<sup>37)</sup> However, these courts would not be territorially competent had the award been rendered in Spain.<sup>38)</sup>

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

<sup>33)</sup> 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).

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

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

<sup>36)</sup> Emphasis added.

<sup>37)</sup> 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.

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

**d) Decision by the Audiencia Provincial of Oviedo dated  
31 March 2005**

The above-mentioned rules of competence have not been interpreted uniformly by Spanish courts. A decision rendered by the *Audiencia Provincial* of Oviedo on March 31, 2005 makes this clear.<sup>39)</sup>

In that case, the Tribunal decided that the competent court for the enforcement of a “recognized” foreign award<sup>40)</sup> is to be determined “by application of Article 545.3 of the [LEC 2000]”. However, that article is the relevant provision for determining the competent Court for enforcement proceedings of any titles *other* than judgments, national arbitral awards or titles mentioned in Article 545.1 and 545.2 LEC 2000. By applying this provision of LEC 2000, the Court ignored the application of the *lex specialis* included in Article 8.4. LA and the provision-specific references.

Despite the fact that both rules – Article 955 LEC 1881 and Article 545.3. LEC 2000 – refer to the Court of First Instance, the rules for determining territorial competence are not identical and may lead to different solutions.<sup>41)</sup> This can be illustrated by a simple hypothetical example.

It is easy to imagine a case in which a Spanish company with registered offices in Madrid loses an arbitration the set of which is outside Spain. The foreign (winning) party seeks to enforce the award in Spain and is aware of substantial assets of the (losing) Spanish party in Andalusia. According to the rules of Article 955 LEC 1881, the request for *exequatur*<sup>42)</sup> and enforcement must be filed with the Tribunal of First Instance of Madrid. Only in the event that the Respondent lacked a residence in Spain could the request for enforcement be filed at the location where the assets are located, *i.e.*, Andalusia.<sup>43)</sup>

In contrast, under the Rules of Article 545.3. LEC 2000, the party seeking enforcement would have the choice of filing the request at the losing party’s domicile or at the location where the losing party’s assets are located.<sup>44)</sup>

<sup>39)</sup> *Audiencia Provincial* of Oviedo (Sección 5a), núm 29, 31 March 2005, cited by Manuel Hernández-Tejero García, in *LEY DE ARBITRAJE*, at Article 46 (HINOJOSA SEGOVIA ed., 2008).

<sup>40)</sup> The original text in Spanish mentions a “*laudo homologado*”. This has to be understood as a foreign award which has received the *exequatur*.

<sup>41)</sup> Article 545.3 LEC 1881 refers to Articles 50 and 51 of LEC 2000 which contain general rules for territorial competence.

<sup>42)</sup> See section IV.B. of this article.

<sup>43)</sup> Article 955 reads: “la competencia para conocer de las solicitudes de reconocimiento y ejecución corresponde a los Juzgados de Primera Instancia del domicilio [...] de la parte frente a la que se solicita el reconocimiento o ejecución [...]; subsidiariamente la competencia territorial se determinará por el lugar de ejecución o donde aquellas sentencias y resoluciones deban producir efectos.” Translated in English, this means: “The competence for hearing the request for recognition and enforcement will be of the Court of First instance of the residence [...] of the party against which the recognition or enforcement is sought [...]; subsidiarily, the territorial competence is determined by the place of enforcement or where these judgments and decisions should produce their effects.”

<sup>44)</sup> Article 545.3 LEC 1881 reads: “La ejecución podrá [...], a elección del ejecutante,

This *Audiencia Provincial* decision demonstrates the uncertainties facing a party seeking efficient enforcement – and provides an example of the need to clarify the rules of competence.

## **B. The legal rule of competence for *exequatur* proceedings: Article 8.6 Spanish Arbitration Law and Article 955 of Code of Civil Procedure 1881**

Article 8.6 LA refers “for *exequatur* of foreign arbitral awards” to the competence of “the court authorized by the rules of civil procedure to enforce foreign judgments”. As explained above<sup>45</sup>), for the time being, the rules of civil procedure to enforce foreign judgments are included in Article 955 LEC 1881, and refer to the competence of the Court of First Instance at the venue where the party against which enforcement is sought has his domicile or where the relevant assets are located.

In the decision cited above<sup>46</sup>), the *Audiencia Provincial* of Oviedo based the competence of the Tribunal of First Instance for *exequatur* on Article 85 of the Spanish Law on Judicial Competence (*Ley Orgánica de Poder Judicial* – LOPJ),<sup>47</sup>) which simply states that the Tribunal of First Instance is “competent for the requests for recognition and enforcement of foreign arbitral awards [...]”.

However, this provision does not indicate the territorial competence of the Courts. The Court thereby ignored that the second sentence of Article 958 LEC 1881 had been supplanted by the revised Article 955 LEC 1881, which contains a rule of *lex specialis* in relation to Article 85 LOPJ.

## **C. Summary of the competence issue**

When the Spanish arbitration law was drafted, the *exequatur* proceedings and the enforcement proceedings did not fall in the competence of the same Courts. For this reason, Article 8 LA distinguishes between the competence for *enforcement stricto sensu* and the *exequatur*.

This differentiation no longer has any relevance. Today, the *exequatur* and enforcement proceedings fall in the competence of the Spanish Courts of First In-

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ante el de cualquier lugar en que se encuentren bienes del ejecutado que puedan ser embargados.” Translated in English, this means: “The enforcement could be initiated [...] at the choice of the enforcing party, at any location where the party against which enforcement is sought has enforceable assets.”

<sup>45</sup>) See section IV.A.3.c) of this article.

<sup>46</sup>) See section IV.A.3.d) of this article.

<sup>47</sup>) Spanish Law on judicial competence (*Ley Orgánica 6/198, de 1 julio de Poder Judicial* – LOPJ). This law contains the basic rules of competence of the different Spanish Courts. These basic rules are further specified in various other laws.

stance, primarily at the place where the party against which enforcement is sought has his registered offices.

Through the reference to Article 955 LEC 1881 for both enforcement and *exequatur* proceedings, the legislative intent was to provide for a single procedure. We therefore conclude that a separation of the *exequatur* and enforcement proceedings is apparently no longer required. Such separation would neither be efficient nor appropriate, and would contradict the spirit of the New York Convention – which seeks to facilitate both the execution and the enforcement of foreign awards.<sup>48)</sup>

The unification of competence should be explicitly mandated in the future Law on international legal cooperation in civil matters, which will supplant the provisions of the LEC 1881. For the ease of the practitioner, it would be convenient to unify Articles 8.4 and 8.6. LA into a single rule of competence for *exequatur* and enforcement of foreign decisions, and to separate from these provisions the rules of competence for the enforcement of domestic awards.

These conclusions are consistent with the practice and rhetoric of the Spanish Courts. Although different procedural rules are applicable for the *exequatur* and the enforcement steps, given their substantive similarities, we now discuss them jointly.

## V. Specific requirements to be fulfilled for the granting of *exequatur* and enforcement

### A. Legal Framework of the *exequatur* and enforcement proceedings: Articles 951–958 LEC 1881 and Article 517 et seq. LEC 2000

The presentation of all aspects of *exequatur* and enforcement proceedings falls outside the scope of the present contribution. In essence, the party seeking recognition and enforcement of a foreign award does so by filing a claim. Once the Court of First Instance has determined that the award does not fall within the grounds for refusal, recognition will be granted.

According to the rules included in Article 46 LA, the provisions of Art 951–958 LEC 1881 (which are applicable for the *exequatur* of foreign judgments) apply to *exequatur* of arbitral awards to the extent that the provisions of the New York Convention or any other Conventions do not prevail.

Upon *exequatur*, the interested party may seek enforcement of the award. The enforcement proceedings themselves – which are adversarial in nature – are similar to the proceedings for enforcing Spanish Court decisions and are not of any particular interest for the non-Spanish practitioner. The general provisions on enforcement of the Law on Civil Procedure 2000 and the specific provisions on

<sup>48)</sup> See, ALBERT VAN DEN BERG, THE NEW YORK CONVENTION OF 1958 243–245 (1981).

enforcement in Article 45 LA govern these proceedings. It is obvious that in the scope of applying the New York Convention, the provisions of enforcement *stricto sensu* can only apply to the extent they do not contradict the provisions of the Convention.

Some particularities of these proceedings are nevertheless worth mentioning.

The request for enforcement must be filed within 5 years once the award has become final. Grounds for refusing *exequatur* and enforcement are those known to the international practitioner under the New York Convention.<sup>49)</sup> The only way to object to a court decision ordering enforcement is to file a so called “*oposición*”.<sup>50)</sup> The only grounds for such an opposition are that the claim has already been paid, that the above mentioned 5-year statute of limitation has expired, or that the parties have agreed to circumvent enforcement of the award. The final decision on *exequatur* and enforcement cannot be appealed.<sup>51)</sup>

We will now focus on some formal particularities linked to filing the request for *exequatur* and enforcement which are of interest for all comparative international arbitration practitioners.

## B. Content of the claim

A claim for enforcement must be accompanied by a request for *exequatur*.<sup>52)</sup> Nothing in the law precludes a party from filing the claim for enforcement to-

<sup>49)</sup> See in this context the in-depth research made by Matthias Scherer & Samuel Moss, *Resisting enforcement of a foreign arbitral award under the New York Convention*, IPBA JOURNAL 17 (Sept. 2008).

<sup>50)</sup> Article 556 LEC 2000. This has been confirmed by Court of First Instance (*Juzgado de Primera Instancia*) n12 of Madrid in a decision dated September 23, 2004.

<sup>51)</sup> See last paragraph of Article 956 LEC 1881. This provision was understandable under the old law, when the Supreme Court decided on the *exequatur*. Taking into account that today the Courts of First Instance decide on the *exequatur*, this provision should be revised; in this respect see also Mantilla-Serrano, *supra* note 4, at 257. Apparently the *Audiencia Provincial* of Barcelona (section 15) November 15, 2006 was of the same opinion as the Court granted an appeal against a decision which denied the *exequatur*.

<sup>52)</sup> An interesting topic has recently been highlighted by Félix J. Montero, practicing lawyer with Perez-Llorca in Madrid, on an arbitration internet platform (*international law office, issue 16 October, 2008, www.internationallawoffice.com*): Montero notes that there is no remedy under Spanish law for a losing party who seeks non-recognition of a foreign arbitral award by an express declaration of violation of public policy. The claim can only refer to the recognition of the award. In the event the winning party adopts a passive attitude towards recognizing the award, but the losing party is interested in an express declaration of violation of public policy, such claim of non-recognition cannot be filed under Spanish procedural rules. If an award is not set aside in the country of origin, there is a legal presumption that the award is binding upon the parties (see section VI. of this article). According to Montero in cases where there are reasonable grounds to deny recognition and enforcement, this violates the principles of equal treatment of the parties.

gether with the request for *exequatur*. In most cases, parties file the request and the claim at the same time.

The claim for enforcement itself must indicate: (1) the title, the execution of which is sought; (2) the value of the claim to be executed; (3) whether the claimant has knowledge of the respondent's assets, and the assets of the respondent which could be attached in the event that the claimant considers these assets sufficient to satisfy his claim; (4) if necessary, a request for measures to be taken by the authorities to locate the assets; (5) the persons against whom the enforcement should be initiated.<sup>53)54)</sup>

### C. Documents to be submitted

With respect to foreign arbitral awards, Article IV of the New York Convention must be read together with the provisions of the Spanish LEC 2000 and LEC 1881. A party must file the following documents with the claim for enforcement under the LEC 2000<sup>55)</sup>:

1. the arbitral award to be enforced, the arbitration agreement<sup>56)</sup> and the necessary documents which certify the notification of the award to the parties.<sup>57)</sup>
2. the power of attorney of the "procurador".<sup>58)</sup>

#### 1. The duly authenticated original award

Article IV of the New York Convention only states that the party applying for the recognition and enforcement of the award shall, at the time of application, supply "the duly authenticated original award" or "a duly certified copy thereof" without indicating which law should apply to the issue of whether the award is "duly authenticated" or "duly certified".<sup>59)</sup> Therefore, national laws help interpret the Convention in this respect.

<sup>53)</sup> The persons must be identical to the persons identified in the award.

<sup>54)</sup> Article 549 LEC 2000.

<sup>55)</sup> Article 550 LEC 2000.

<sup>56)</sup> For the *exequatur* itself, according to Article 954 LEC 1881, the arbitration agreement is not mentioned as a document which must be submitted.

<sup>57)</sup> Article 550 1.2 LEC 2000, in the original Spanish version, reads as follows: "Cuando el título sea un laudo, se acompañarán, además, el convenio arbitral y los documentos acreditativos de la notificación de aquél a las partes." Translation: "If the title is an arbitral award, have to be joined, in addition, the arbitration agreement and the documents which certify the notification [of the award] to the parties."

<sup>58)</sup> A *procurador* is a legal professional who, without being attorney, serves as the contact between the Court and the attorneys. Only a "*procurador*" can present notifications to Spanish State Courts.

<sup>59)</sup> With regard to this issue when executing a Swiss Award in Austria, see Christian Aschauer, *Zur Anerkennung und Vollstreckung schweizerischer Schiedssprüche in Österreich*, 2 ASA BULL 287, 300 (2003).

According to the Spanish LA, the award shall be made in writing and shall be signed by the arbitrators. Pursuant to Article 37 LA, the award shall be deemed made in writing when its content and signatures are recorded and accessible for consultation in an electronic, optical, or other type of format. The award must also contain the arbitrators' reasoning<sup>60</sup>), its date and the place of arbitration, and the award on the costs of the arbitration.<sup>61</sup>) Notarizing the award is no longer required<sup>62</sup>), unless one of the parties, at its own expense, expressly requests the arbitrators to notarize the award before serving it.

## 2. The arbitration agreement

The Spanish courts usually require the party seeking enforcement to submit the arbitration agreement. In 2005, the Spanish Supreme Court confirmed a decision for refusing to enforce an award which had been rendered in London on the basis that the party seeking enforcement failed to supply a valid arbitration agreement as required under the New York Convention.<sup>63</sup>)

## 3. Translation of the award

Article IV.2 of the New York Convention requires the party seeking enforcement to supply a translation of the award if it is not made in an official language of the country in which the award is relied upon. Such a translation must be certified by an official, a sworn translator, or a diplomatic or consular agent.

Article 956 LEC 1881 provides that the enforceable title must be translated into Spanish in accordance with the law. Article 956 is silent as to whether the translation has to be certified. According to the general Rules of Civil procedure, it suffices to file a private translation<sup>64</sup>), although the opposing party may challenge the translation within five days from service if the party deems the translation inaccurate and supplies the reasons for the alleged inaccuracy. If such a challenge occurs, a certified translation must be filed. If the official translation is substantially identical to the former, the challenging party must bear the expense of the official translation.

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<sup>60</sup>) Except for those cases where the parties have agreed that no reasons are to be given or the award is an award on agreed terms.

<sup>61</sup>) Subject to the agreement of the parties.

<sup>62</sup>) This was a legal requirement under the former Spanish arbitration law of 1988 (Article 33.2).

<sup>63</sup>) Spanish Supreme Court (*Tribunal Supremo*), January 14, 2003, *Glencore Grain Ltd. V. Sociedad Ibérica de Molturación*, 64 Cuaderno Civitas de Jurisprudencia Civil (January–April 2004), 71, no. 1715, XXX YBCA 2005, 605.

<sup>64</sup>) Article 144 LEC 2000.

#### 4. Necessary documents which certify the notification of the award to the parties or the end of the arbitrators' ability to use a simple registered letter for the purposes of notification?

##### a) Introductory Comment

A significant number of diverging Spanish Court decisions have led to some uncertainty with regard to the interpreting "the necessary documents which certify the notification of the award to the parties" in Article 550 (1.2) LEC 2000.<sup>65)</sup>

The *Audiencia Provincial* of Madrid has on several occasions confirmed the refusal of the Court of First Instance to enforce an award because the "necessary documents which certify the notification of the award to the parties" had not been provided.<sup>66)</sup> The Courts reasoned that under Article 550 (1.2) LEC 2000, it would not suffice to prove the mere notification of the award, but that it must be shown that the content sent to the parties was indeed the same as the award. In one case, enforcement was denied because in the opinion of the Court, a party did not comply with the "notification" of the award requirement when such notification is done by "by registered letter sent by mail with acknowledgment of receipt, since it does not prove the content of what has been sent to the addressee". In other decisions, a notification by mail with acknowledgement of receipt sufficed.<sup>67)</sup>

Based on these conflicting Court decisions, the judges of the different sections of the *Audiencia Provincial* of Madrid, which is the common upper instance for all Courts of First Instance in Madrid, attempted to bring some uniformity to the standards of necessary notification of arbitral awards. As will be shown below, the Magistrates agreed that "arbitral awards" can be notified by any means of communication which establish receipt of the award at the parties' residence or seat, and cite as possible means of communication "intervention of the notary public, buro-fax against receipt, or any other means of communication that provides a record of the content of the communication and its receipt".

In a very detailed and well reasoned article, the eminent Professor Fernando Gascón Inchausti comes to the same conclusion and states that "there must be a judicial control over the way in which arbitral awards are served" and concludes that "arbitrators will no longer be entitled to use the postal service by registered letter with acknowledgement of receipt, since it does not prove the content of what has been sent to the addressee".<sup>68)</sup> Prof. Gascón Inchausti, however,

<sup>65)</sup> Article 550 1.2 LEC 2000.

<sup>66)</sup> *Audiencia Provincial* of Madrid (Sección 19a), Auto núm. 72/2006, March 8, 2006, JUR/2006/156660; *Audiencia Provincial* of Madrid (Sección 19a), Auto núm. 27/2007, January 30, 2007, JUR/2007/156083. See section V.C.4.b of this article.

<sup>67)</sup> *Audiencia Provincial* of Madrid (Sección 11), AC 2005/1247 September 16, 2005; *Audiencia Provincial* of Madrid (Sección 11), AC 2005/2137 October 27, 2005.

<sup>68)</sup> Fernando Gascón Inchausti, *La notificación del laudo arbitral como requisito para su ejecución forzosa*, I ARBITRAJE 87-114 (2008), criticizes the reasoning in the Court decisions of the *Audiencia Provincial* of Madrid but does not contest the outcome.

stresses that these cases were based on very specific and exceptional circumstances.<sup>69)</sup>

The court decisions mentioned above, the unified criteria of the Judges of the *Audiencia Provincial* of Madrid, and Professor Gascón Inchausti's article do not reference enforcement of foreign awards. Generally speaking, when enforcing foreign awards, Spanish courts strictly apply the text of the New York Convention and do not require additional formal requirements other than those mentioned in Article IV of the New York Convention.<sup>70)</sup> Nevertheless, in the future, it cannot be ruled out that the standards applicable to domestic awards in this respect also apply to foreign awards.

#### **b) The required standard of notification of the (domestic) award**

In the court decisions mentioned above<sup>71)</sup>, the *Audiencia Provincial* of Madrid ruled that an arbitral award cannot be enforced if the award has not been correctly notified to the parties. The legal basis was, *inter alia*, directly found in Article 37.7 LA, which provides that “*the arbitrators shall notify the parties of the award [...]*” and Article 5.1.a LA, which provides as follows:

“unless otherwise agreed by the parties [...] any notification or communication shall be deemed received on the day it is personally delivered to the addressee or delivered to its legal residence [...] Notifications are [...] valid by telex, fax or other means of electronic, telematic or similar means of telecommunication that allow delivery and receipt of texts and documents and that leave a record of such **delivery and receipt** [...]”<sup>72)</sup>

According to the court decisions, these provisions, as well as Article 550 LEC 2000, which require that the party seeking enforcement supply proof that the notification took place, give the enforcement Judge the power to verify whether the notification of the award took place. Such an assessment does not only require verification of the notification, but also that the Court be convinced that the **content** of what was notified was the arbitral award itself. Therefore, according to these decisions, the postal service by registered letter with acknowledgment of receipt is not sufficient to comply with the “requirements of Article 5.1(a) LA”.

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<sup>69)</sup> According to Gascón Inchausti, *La notificación del laudo arbitral, id.*, at 99, in all examined cases biased arbitration institutions were implied. The Courts apparently tried by all means to find reasons for refusing enforcements.

<sup>70)</sup> See Spanish Supreme Court (*Tribunal Supremo*), January 14, 2003, *Glencore Grain Ltd. V. Sociedad Ibérica de Molturación*, 64 Cuaderno Civitas de Jurisprudencia Civil (January–April 2004), 71, no. 1715, XXX YBCA 605 (2005).

<sup>71)</sup> See note 69.

<sup>72)</sup> Emphasis added.

