New rules on enforcing judgments in other jurisdictions

EU regulations on recognising member state judgments in other countries represent progress, but there is still uncertainty

Julio Garrido

Santiago Gastón de Iriarte

New regulations introduced by the European Union that impact on the enforcement of member state court judgments in other jurisdictions are a "positive step" for international litigation, according to Santiago Gastón de Iriarte and Julio Garrido, partners at AC&G Asesores Legales in Madrid.

The recast Brussels Regulation (EU) No 1215/2012, which impacts on the recognition of judgments in civil and commercial matters, came into force on 10 January, 2015. "With the regulation now containing, among other matters, revised provisions both on jurisdiction and on the recognition and enforcement of judgments in the domicile of the defendant, it will facilitate a positive view of judgements in member states," says Garrido. "This is very important for international litigation in the EU, but also applies to other state judgments."

However, there are specific matters that are causing uncertainty. For example, one issue is the effect the resolution will have on provisional and protective measures [formally known as 'interim measures'] in litigation. Gastón de Iriarte says that while such measures "must be adopted in principle and served on the defendant prior to enforcement, regardless of whether the defendant has time to appear", they cannot actually be enforced in certain circumstances.

Another issue that needs clarification is how the regulation will apply within the context of copyright, following the 2014 Spanish intellectual property law reform. "In Spain, our legal system has always been protective of the defendant," explains Garrido. "Now, we'll be able to ask for data to prepare a case against the defendant, making us closer to the prosecutor."

But while the regulation is seen as important for demonstrating the different laws within the European Union, lawyers also see it as a positive step for international litigation within Spain. "By establishing specific regulations from a domestic point of view that can then be enforced in other countries, a whole new concept is being introduced to our country," says Gastón de Iriarte.

Arbitration now seen as faster way to resolve disputes

Paulo de Moura Marques

Despite the fact that clients may prefer arbitration over litigation for the flexibility, independence and specialism it offers, it has traditionally been considered the more expensive option, according to Paulo de Moura Marques, founding partner at Lisbon-based AAMM.

However, Moura Marques adds that with arbitration costs now more balanced, parties are viewing it as a faster way to resolve a dispute and avoid a prolonged judicial fight.

"One of the major trends I've seen in Portugal over the last two to three years is an increasing number of parties asking for alternative dispute resolution [ADR]," says Moura Marques. "The fact that arbitration in particular, is now considered just as viable an option as going to court, is a real game changer within the legal community."

Moura Marques adds that another trend observed by lawyers is that, the higher the value the case, the more likely that arbitration will be used "whether by contract or by clause, or where both parties believe it is the best way to solve the issue", according to Moura Marques. He adds: "Arbitration clauses are also becoming increasingly relevant for lawyers disputing certain elements within ongoing contracts, due to the fact that confidentially can be maintained over a period of time."

Meanwhile, arbitration is mandatory in some specialist areas of the law, such as sport and pharmaceuticals. In such circumstances, Moura Marques says lawyers are "no longer able to suggest arbitration as a good option for resolution, instead they're legally obliged to start one".

Consequently, Moura Marques believes that these trends are now beginning to be followed by those that have traditionally been averse to arbitration. He says: "The rules have changed – I've seen a number of state contracts proposing ADR clauses for conflict resolution and this is a major departure from what we had in the past."

New investment could lead to greater use of arbitration

Arbitration could increase as new companies and joint ventures – involving local businesses and international partners – are established in Spain

Javier Mendieta

Alternative dispute resolution is not used frequently in Spain, at least in the commercial field, where firms are much more likely to enter into litigation, according to Javier Mendieta, a partner at CMS Albiñana & Suárez de Lezo in Madrid.

Among clients' reservations about alternative dispute resolution, are – with regard to arbitration, for example – the extent of the independence and impartiality of the arbitrator, as well as the likelihood of being able to predict what the outcome of an arbitration will be. However, on the positive side, arbitrators are often extremely knowledgeable about the matters subject to the arbitration, which is not necessarily the case with judges in courts.

With regard to arbitration, despite the fact the Spanish arbitration law – enacted in 2003, amended in 2009 and 2011 and aimed at allowing Spain to become a centre for dispute resolution between Latin America and Europe – is technically good and provides for flexibility, Mendieta says he has noticed a decrease in its use, particularly in the case of domestic disputes.

This is because clients do not perceive arbitration as being faster or cheaper than litigation in Spain, even though the judicial process has become more expensive in recent years, according to Mendieta. The legal right to provisionally enforce a first instance judgment, subject to appeal, without the need for posting a bond, has in most cases reduced the attractiveness of an award rendered in an arbitration procedure due to the impossibility to file an appeal against it.

More arbitration?

However, Mendietta adds that the increase in investment in Spain, as the country begins its economic recovery, may lead to a rise in the number of arbitration cases, particularly international ones, due to the incorporation of new companies and joint ventures in Spain involving local businesses and international partners.

That said, in some sectors, such as construction, it is much more likely that firms will use the courts for conflict resolution, rather than seeking arbitration. In this regard, there could be opportunities for more legal work in instances of arbitration involving a private company and a foreign public company or government as arbitration clauses may be inserted into contracts regarding investment.

Mendieta – who specialises in litigation, pre-litigation and arbitration in civil, commercial and bankruptcy law – says this is because when a case involves two companies from different countries, there is always a "certain mistrust toward the legal system of the counterpart and that frequently determines the inclusion of an arbitration clause in the relevant agreement".

Client concerns

Clients are always concerned about two main issues when considering the inclusion of an arbitration clause in an agreement. First, they want to know about the independence and impartiality of the future arbitrators, and second, the predictability of the decision in a potential controversy.

The first concern justifies and explains the common assignment of the administration of the arbitration procedure to a reputed international or domestic arbitration institution, as well as the agreement of the parties to submit themselves to the rules and regulations of that relevant institution, especially for the purposes of the appointment of the arbitrators.

"The arbitration institutions have made an effort to establish the relevant proceedings to ensure, as far as possible, the independence and impartiality of arbitrators," says Mendieta.

Judgment of Solomon

Regarding the second issue, some of the main concerns of clients are uncertainty about the procedures of the arbitration and the possibility of facing a "judgment of Solomon" award. This has led to a substantial reduction in the arbitration clauses which order the disputes to be settled or ruled in equity.

But those concerns are balanced with the usually greater and more extensive experience of the arbitrators on the relevant issues raised in the case subject to arbitration compared to that of the judges in the ordinary courts.