

## Chairman

Alberto Pérez Cedillo

## Vice-Chairman

Sarah Lucy Cooper

## Secretary

Kate Macleod

## Treasurer

Edward Riso Gill

## Membership Secretary

Susana de las Cuevas

## Executive Committee

María Enriquez  
Rupert Talbot Garman  
Dolores Rice  
Nicholas Yell

## Website Co-ordinator

Carmen Calvo Couto

## Spanish Bilateral

## Co-ordinator

Rocco Caira



The Guggenheim Museum, Bilbao

## A word from the Chairman

**B**ilbao's Guggenheim Museum has been described as "electricity in language", an "open can of sardines", the "tip of an iceberg", an "artichoke", a "mermaid", a "waterfall" a "whale" and a "big ship". Those members of the BSLA who are coming with us to Bilbao may be subjected to an informal poll to determine which simile is the most apposite or even to find a better comparison.

Meanwhile, here follows the programme for the BSLA Bilbao conference. The programme will focus on subjects of major importance for lawyers who operate on the international arena between UK and Spain such as the enforcement of judgements and the analysis of the draft for the European Convention on Law Applicable known as "Rome II". Insight into developments in Spanish legislation will be provided in two sessions on Spanish Law by leading experts.

The headquarters of Bilbao's Law Society

will be the venue for the conference where you will be given plenty of opportunities to network and enjoy socialising (we have relied on the local lawyers' knowledge when



choosing the venues, aware as we are of the Basques' good palate) so the conference promises to be a gourmet experience. We hope some of you may want to stay until Sunday for our lunch excursion to San Sebastian.

Looking forward to welcoming you or "Ongi Etorri" as the Basques would say.

**Alberto Pérez Cedillo**

Fernando Scornik Gerstein

Chairman, British Spanish Law Association

# BILBAO CONFERENCE

13-14 MAY 2005

CPD POINTS CREDITED: 7 HOURS

### Friday 13 May

10.00-10.15 *Welcome* – BSLA (UK) **Alberto Pérez Cedillo**, Fernando Scornik Gerstein  
BSLA (Spain) **Rocco Caira**, Bartell Abogados

10.15-11.00 *Biscay's Tax Regime and Aids to Investment*  
**Iñaki Alonso Arce**, Hacienda Foral of Vizcaya

11.00-11.45 *General Overview of the Spanish Legal System*  
**Luis Carreras**, Bufete Carreras Llansana

11.45-12.00 *Morning Coffee*

12.00-13.00 *Buying and Owning Property in Spain – A Legal Practical Approach*  
**Rafael Truan**, Díaz-Bastien y Truan Abogados

13.30-15.30 *Lunch at the Sociedad Bilbaina* (Dress code: business suit)

16.00-17.00 *Legal aspects of doing business in Spain*  
**Javier Bicarregui Garay**, British Chamber of Commerce & Iusfinder Abogados

17.00-18.00 *Enforcement of Judgements – Practice and Procedure*  
**Peter Rees**, Editor of the book "Civil Jurisdiction and Judgements" & Head of International Strategy, specialising in arbitration and dispute resolution, Norton Rose

18.15 *Reception at the Bilbao's Law Society, Colegio de Abogados de Bilbao*

21.00 *Dinner at a sidrería in the old part of Bilbao*

### Saturday 14 May

10.30-12.30 *Rome II: Proposed Regulation on the Law Applicable to Non-Contractual Obligations*  
**Andrew Dickinson**, specialist: Private International Law, Consultant to Clifford Chance LLP

13.00 *Lunch at the Guggenheim Museum's restaurant and guided tour*

*AN OPTIONAL PRE-CONFERENCE INFORMAL DINNER ON THURSDAY NIGHT AND LUNCH AT SAN SEBASTIAN COULD ALSO BE ARRANGED FOR THOSE ARRIVING ON THURSDAY AND LEAVING LATER ON SUNDAY*

# Enforcing Foreign Judgements & Arbitral Awards in Spain

**Antonio Bravo** explains the new Arbitration Act will work in practice



In many cases, a judicial or arbitral proceeding is not completed when a judgment or arbitral award is rendered because the resistance of the debtor to fulfil the judgement or arbitral award forces the creditor to commence another proceeding – of execution – to obligate the debtor to fulfil that judgment or arbitral award. If the decision has been rendered in a foreign jurisdiction the matter becomes yet more complicated since it may be necessary to commence a third proceeding prior to the execution in order for the foreign judgment to be recognised in Spain with the same effects as those rendered by the Spanish courts.

In Spain the enforcement of a foreign judgment entails a series of proceedings to successfully achieve the fulfilment of the judgment rendered which includes, first, the “recognition” of the foreign judgment and, secondly, its “execution”.

The object of this article is to describe, in a simplified and comprehensible manner, the series of proceedings and their fundamental aspects, based on those cases referred to as “money judgments”, since they appear most frequently before Spanish courts, and, within this category, those cases pertaining to international franchising disputes, be they in an arbitral award or judicial judgment, since in most cases these decisions entail pecuniary consequences.

## 1) Distinction

The terms “recognition” and “execution” are often used inseparably in most domestic and international legal systems. However, they have different meanings and can be used for different purposes as part of the enforcement process.

As a starting point, and in order to differentiate between one and the other, it is important to point out that foreign judgments (whether judicial judgments or arbitral awards), lack “per se” applicability in Spain, and it is necessary that the Spanish courts previously homologate them. That is to say, attribute to the judgment the same effect as those rendered by a Spanish court.

This homologating procedure is known as “recognition” of a foreign judgment and concludes with accepting the foreign judgment with the following effects:

- Executive effect, in other words, that it can be executed in Spain.
- Res iudicata effect, either negative or positive, in the

sense that a proceeding in Spain is excluded since the object of the proceeding has already been decided in a foreign final judgment.

- Fundamental effect, that is to say, that the changes or juridical modifications in the foreign country as a consequence of the final judgment or arbitral award (eg divorce) are understood as also having effect in Spain.

Within the proceedings of homologation or recognition of a foreign judgment or award it is important not to confuse between the recognition itself and the exequatur of the judgment: Recognition attributes to the foreign judgment only the fundamental effect and the res iudicata effect, while the exequatur is the necessary judicial proceeding to attribute to that foreign judgment the executive effect enabling it to be executed in Spain. The exequatur is the authorisation that is granted to a foreign judgment so that it may be the object of an execution in Spain.

If we refer to Regulation (CE) No 44/2001 of the Council of 22 December 2000, which deals with the recognition and execution of judgments in the European Union, we can see that it expressly foresees the automatic recognition of judgments rendered by courts of member states in such a manner that said judgments have the fundamental effect and res iudicata effect without the need to go previously through any kind of homologation procedure. However, in order for these judgments rendered in a member state to be executed in Spain it is necessary to carry out a prior homologation procedure known as an exequatur (although this has been referred to erroneously as “enforcement”).

In any case, once the “recognition” of the judgment or arbitral award is fully conferred, a new proceeding known as “execution” must be commenced seeking the fulfilment of the foreign judgment or arbitral award on all the goods or rights held by the debtor.

## 2) Legal framework

The bases for the recognition or homologation of foreign judgments in Spain are different depending on the judgment to be recognised.

In the case of an arbitral award the applicable legal regime is based on the New York Convention on the Recognition and Execution of Foreign Arbitral Awards signed in New York on 10 June 1958.

However, if the judgment to be recognised in Spain is a foreign judicial judgment the legal applicable regime is based on the international conventions or bilateral treaties signed by the various signatories, or by the national legislation.

In this sense it must be mentioned that international conventions and bilateral treaties confer a privileged application, since national legislation will only be applied if the convention or treaty does not regulate the question. In other words, when a convention or treaty is applicable to a judgment, its homologation will be in accordance to the latter. Only in the event that no convention or treaty is applicable will its homologation be regulated by national legislation (one cannot use national legislation in the event that an applicable treaty leads to the refusal of the homologation).

The international conventions and treaties dealing with the recognition and exequatur of judgments of which Spain is a signatory are either multilateral or bilateral. As of today's date the only multilateral conventions in effect are that of Brussels (1968) and Lugano (1988) which deal with the homologation of judgments rendered in member states of the European Union (Brussels) and of the Free Trade Association of Europe (FTAE) (Lugano), but the application of both conventions has increased enormously because of the Regulation 44/2001 which has replaced the Brussels convention (except for Denmark), and because the signatories of the FTAE (Lugano) have become members of the EU.

With regard to bilateral treaties, Spain is a signatory to the following:

- Colombia on 30 May 1908;
- Uruguay on 4 November 1987;
- Israel on 30 May 1989;
- Brazil on 13 April 1989;
- Mexico on 17 April 1989;
- Socialist Soviet Republic on 26 October 1990;
- China on 2 May 1992;
- Bulgaria on May 1993;
- Morocco on 30 May 1997;
- Rumania on 17 November 1997;
- Thailand on 15 June 1998;
- El Salvador on 7 November 2000;
- Tunisia on 24 September 2001.

If the judgment to be recognised comes from one of these countries, the requirements established in the appropriate treaty would have to be applied in order to adopt the recognition of the judgement.

If no international convention or bilateral treaty exists, the applicable legal regime for recognition and execution of judgments and award will be that foreseen in the national legislation, differentiating between the recognition and enforcement for judgments rendered in a member state of the EU (Regulation 44/2001), and that applicable to the other judgments (Civil Procedure Act).

### 3) Applicable procedure

Until recently (Law 62/2003 of December 30), the competent court to hear petitions for exequaturs was the Supreme Court unless an applicable convention or

bilateral treaty established another procedure. Since the adopting of the aforementioned law, the competent court to hear the matter is the Court of First Instance of the domicile or residence of the party against whom the recognition is being sought or of the place where the judgment will take effect.

The proceedings begin with the petition signed by the attorney and court agent accompanied by the authentic copy of the judgment or award that must be recognised and its sworn translation in Spanish. In the case of an arbitral award, it is necessary to accompany the arbitration agreement with its sworn translation in Spanish. Once the petition has been presented, the court will study its competence to hear the matter and the judgment in order to determine if both fulfil the requirements to order the defendant to appear within 30 days to be heard throughout nine days. Once the latter period has lapsed, with or without the defendant appearing, the court will render a judgment granting or refusing the recognition requested.

It is expressly forbidden to review the merits of the judgment whose recognition is being sought. In this sense the Constitutional Court of Spain has rendered judgments (SSTC 54/1889 and 132/1991) stating that the procedure used to grant a recognition of a foreign judgment is merely of a homologation nature, whose main objective is to review that the said judgment fulfils all the procedural requirements established, without the court being empowered to review the merits of the case. The court will only be able to review the merits of the judgment in the event that this is required by the application of an international public order. In reference to the latter, we refer to the case EDC vs Europaper (STS 11/5/2004) in which the Supreme Court, in light of the arguments presented by the defendants, studied the merits of the case and required that the parties submit all the judicial procedures taken in the country of origin.

Lastly, and in relation to recovering costs from the opposing party, it must be noted that in Spain the losing party in a judicial procedure is obligated to pay all legal costs of the other party. This could lead us to believe that in the event where the exequatur is refused the costs would be borne by the party that has presented it or vice versa. Nevertheless, it is not normal for the Supreme Court to impose costs on any of the parties even if the exequatur is refused or granted.

### 4) Prerequisites to enforce judgments and arbitral awards

In this section we will review the applicable jurisprudence in relation to requirements needed to proceed with the recognition of a judgment or arbitral award without including those cases where Spain has signed a bilateral treaty. The requirements are as follows:

**(a) A final judgment:** The judgment whose exequatur is being sought must be a judgment that cannot be appealed in the country of origin.

Regulation 44/2001 allows, nevertheless, the recognition and execution of judgments from member states of the EU that may be appealed provided it is

permitted to provisionally execute the judgment in the country where the judgment was rendered.

**(b) The personal nature of the action taken in the foreign country:** Spanish law on civil procedure (LEC/1881) conditions the granting of the exequatur to the fact that the action taken in the foreign country is on a personal matter. The term "personal" must be understood as opposite to "real" – this avoids the request of exequaturs in Spain of judgments rendered on real rights of goods located in Spain (especially immovables). In practice this requirement is not of the utmost importance given that the judgments that are to be homologated are on the civil status of individuals and on monetary judgments based on contractual responsibility.

**(c) The authenticity of the judgment:** The law on civil procedure (LEC/1881) requires that "the judgment fulfils all the requirements necessary in the nation in which it was rendered to be considered as authentic and that Spanish laws require for it to be irrefutable in Spain". This requirement has never caused any problems in reality since the party requesting the exequatur usually affixes the Apostille of the Hague Convention or, when it is necessary, to the necessary legalisations that the Supreme Court has considered sufficient.

**(d) Competence of the courts of origin:** When granting the recognition to a judicial judgment or arbitral award, the Supreme Court will assure that there is some connection between the litigation and the courts of the country that decided the matter in order to avoid the possibility of any fraud or the choosing of a more convenient forum. This is therefore an indirect control of forum shopping; the Supreme Court does not consider as admissible that the courts of a country are chosen when they have no relation to the matter in dispute and leads to the risk that the election of the country is based on a deliberate search by the plaintiff for a country that favours his position. Evidently the Supreme Court cannot on its own avoid or prohibit this practice but does indirectly penalise the latter by refusing to grant the exequatur of judgments rendered by the aforementioned courts.

## 5) Grounds to oppose the enforcement:

### i) Applicable to both judicial judgments and arbitral awards

**(a) Defendants default to appear:** Regulation 44/2001 defines default: "if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so";

Jurisprudence in Spain has evolved to the point where it includes a default when the defendant had no knowledge of the claim and could therefore not defend himself.

The Supreme Court considers that there are three cases of default in proceedings for exequatur:

- 1) voluntary or convenience,
- 2) involuntary or forced,
- 3) by conviction.

The effects caused by each one are diverse:

- 1) Voluntary or convenient default, when the defendant has knowledge of the existence of a procedure against him in a foreign country and freely decides to adopt a passive attitude. In these cases, there is no impediment for granting the exequatur (AATS of June 23 1998, RA) 6080 and February 17 of 1998, RA)2674).
- 2) Involuntary or forced default, when the defendant has not appeared in the proceedings since he had no knowledge of them. In the majority of these cases this is due to the fact that the summons did not produce the desired effects. When the Supreme Court considers that this is the reason for the default it will refuse to grant the exequatur. (AATS of 8 September 1998, RAJ 7263; 2 June 1998, RAJ 7195; 8 September 1998 RAJ 6846 and 26 May 1998, RAJ 5345).
- 3) Finally, the Supreme Court makes reference to default of conviction, when the defendant does not appear before the court since he does not consider the latter as competent to hear the matter. In these cases, the Supreme Court will equate this default to that of default of convenience and grant the exequatur.

The cases that create the greatest doubt when determining whether the default is voluntary or involuntary are those where the notification of the proceedings in the foreign country is not communicated personally but by means of the official legal gazette of the court. In these cases the Supreme Court usually applies the doctrine of the Constitutional Court on the residual or subsidiary character that must be attributed to the notification through an official gazette and assures itself that this was the last procedure used to contact the defendant after several previous attempts to contact him were unsuccessful (AATS February 1999, RAJ.788; 8 September 1998, RAJ 6846; 19 May 1998, RAJ 4451 and 7 April 1998, RAJ 3560).

On the other hand, the Supreme Court has in several judgments demonstrated a clear attitude that assumes that the default was involuntary, obligating the claimant to demonstrate that the defendant had knowledge of the proceedings and could defend himself.

**(b) Public order:** The law on civil procedure (LEC/1881) establishes as a requirement for the granting of an exequatur that the obligation on which the judgment is based is legal in Spain. Traditionally the Supreme Court has interpreted the legality of an obligation in line with the public order of the forum, understanding as the latter the respect of constitutional principles and fundamental rights proclaimed in the Spanish Constitution, especially those derived from article 24 (mainly audience and defence).

The aforementioned stated, we must mention two cases of importance:

In the first (EDC vs Europaper SAE) the defendant requested the rejection of the exequatur on the basis that the entity that was condemned in the foreign country was

not the same as the one against whom the exequatur was commenced. The Supreme Court understood the execution of the judgment was a manifestation of the constitutional right of defence and, in order to avoid an infringement of public order of the forum, it studied the merits of the case and through the lifting of the corporate veil came to the conclusion that the entity condemned in the foreign country and the defendant of the exequatur were the same, and due to this reason the exequatur was granted against both companies (STS 11/5/2004).

In the other case (Miller Import Corp. vs Alabastros SL), the claimant asked for the recognition of the judgment sentencing the Spanish company to the payment of punitive damages for the undue use of intellectual property and breach of trade mark. In that case, the defendant (Alabastros) opposed the exequatur pleading that a sentence to punitive damages infringed Spanish public order since the concept of punitive damages does not exist in the Spanish legal system.

However, the Spanish Supreme Court dismissed the expressed opposition and approved the exequatur arguing that even if the concept of punitive damages does not exist in Spanish law, it does not infringe public order since its recognition does not effect any fundamental right (STS 13/12/2001).

**(c) Litispendence:** The concept of litispendence is based on the necessity of avoiding the simultaneity of two judgments that may be, either themselves or through their effects, contradictory.

Litispendence must be understood in the broadest manner possible, being it sufficient a coincidence between the action taken, its object and the parties of both proceedings, in order to create a risk of incompatibility between both procedures that will produce as a consequence the rejection of the exequatur petition.

When determining the existence of litispendence it is essential to bear in mind the moment when both procedures were filed.

In this regard, in the case of "The Anthony Redcliffe Steamship vs Hermanos Vila SA" the Supreme Court rejected the exequatur since a case on a tied question existed in Spain between the same parties. The latter case was commenced in Spain prior to the arbitration that rendered the arbitral award which was the object of the recognition and execution (ATS 1/12/1998).

However, in the case of "Fashion Ribbon Co vs Iberband SL" litispendence was rejected as an opposition to the exequatur since the judicial proceedings in Spain were commenced after the arbitral proceedings was commenced abroad (ATS of 14/10/2003).

**(d) Res iudicata:** Regulation 44/2001 states that an exequatur will not be granted when the foreign judgment: "is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought".

**(e) Time limits:** Another aspect of significance is that enforcement should be sought within the prescribed time limit. There are no provisions in the New York Convention

stipulating the time limit for enforcing an award. This is a subject governed by the domestic limitation laws, and individual jurisdictions have different time limits. For instance, the time limit in Spain is five years from the date of the judgment or award.

**ii) Applicable only to awards:**

The above mentioned constitute the motives to oppose the recognition of a foreign judgment. All of these are also applicable for the recognition of an arbitral award even if article V of the New York Convention establishes specific motives of opposition for cases of recognition of arbitral awards, that are as follows:

**(a) Absence of valid arbitration agreement:** There can be no arbitration without an arbitration agreement. Under the Article VI(a), it can be a ground for resisting enforcement if the parties to the award are, under the law applicable to them, under some form of incapacity. It seems from the wording that it requires that both parties be under a legal capacity. Finding the governing law for deciding the capacity of the parties is not always easy and different jurisdictions may apply their own set of conflict of laws rules in determining this very issue.

The second paragraph of Article VI(a) establishes the rejection of the exequatur if there exists no valid arbitration agreement. In this sense, it is important to note that according to the Spanish law on arbitration, an arbitration agreement exists when it can be clearly deduced that the will of the parties was to submit any disputes to an arbitral procedure. Moreover, the arbitration agreement does not have to be included in a contract signed by the parties, but may be deduced from letters, telegrams, faxes or any other means of communication that have been exchanged between the parties. The only important point when defining the existence of an arbitration agreement is the will of the parties, regardless of whether this is contained in a contract or any other exchange of correspondence among the parties. In many cases the Supreme Court has rejected the granting of an exequatur since the claimant could not demonstrate the existence of an arbitration agreement. That is to say, the existence of an intention by the parties to resolve disputes by means of arbitration; such is the case of "Sático Shipping Company vs Maderas Iglesias" (ATS 1/4/2003) and "Nordgemüse Wilhem vs Javier Virto SA" (ATS 26/5/1998).

In other cases, the Supreme Court has decided to grant an exequatur by basing itself strictly on the will of the parties and not due to the existence of a clear arbitration agreement between the parties ("Epis Centre vs La Palentina" and "Delta Cereales España vs Barredo Hnos").

**(b) Award exceeding scope of submission:** According to Article VI(c) this situation arises when the award deals with a difference not contemplated within the terms of submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.

# The Spanish Arbitration Act

**Christian Leathley** explains why the new act is good news



The new Spanish Arbitration Act (Law 60/2003) has been long awaited by the legal community and particularly those practising in the field of international arbitration who until recently had to rely on legislation dating back to 1988 (Law 36/1988).

The Spanish Arbitration Act brings the practice of arbitration in Spain into the 21st Century. It offers a legal foundation wholly consistent with the most contemporary international practice. Over the last 20 years, many countries have adopted arbitration legislation based on the UNCITRAL (United Nations Commission on International Trade Law) Model Law. Now Spain's Arbitration Act follows suit and offers international commerce a safer haven for the resolution of arbitral disputes in Spain.

So what immediate consequence does the Spanish Arbitration Act have for industry and commerce, and lawyers practising in England & Wales? In brief, the Act is regarded as good news. This is illustrated in some of the following ways:

- At its highest level, and as already explained, the Spanish Arbitration Act is now more coherent to parties coming from common law jurisdictions by virtue of it embodying principles of the UNCITRAL Model Law. The UNCITRAL Model Law is sympathetic to common law as well as civil law customs. Consequently, clients and practitioners faced with the prospect of arbitrating their dispute in Spain will now encounter a situs for arbitration of greater procedural familiarity;
- Similarly, the Spanish Arbitration Act is now more compatible with the rules and procedures of the leading international arbitral institutions such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). This means that parties and lawyers used to participating in arbitrations under such rules will be able to do so in Spain with a reduced risk of conflict between the rules and Spain's underlying arbitration law;
- Perhaps most importantly, in practical terms, the Spanish Arbitration Act results in an easier procedure for the recognition and enforcement of arbitral awards. Previously, recognition and enforcement of

an award could take a very long time. For example, there was a requirement to involve a public attorney and the Supreme Court. However, the Spanish Arbitration Act means this process, rather than taking perhaps two years, can now be completed in less than three months. This has been achieved by removing the need to go to the Supreme Court in order to recognise and enforce an international arbitral award. Courts of first instance are now competent in this respect. By way of background, Spain is a

contracting party to the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958;

■ State and state entities (including the Spanish state) cannot rely on domestic law privileges to evade obligations under an arbitration agreement. This is a new requirement of the Spanish Arbitration Act;

■ The Spanish Arbitration Act recognises the established principle of Kompetenz-Kompetenz, whereby an arbitral tribunal has authority to decide on its own jurisdiction, including the existence or validity of the arbitration agreement;

■ The arbitral tribunal (rather like those constituted in certain circumstances in accordance with the English Arbitration Act (1996)) is permitted to grant interim relief;

■ The Spanish Arbitration Act envisages only limited circumstances for the intervention by local courts in arbitration proceedings. This is good news for those foreign investors doing business in Spain (and whose arbitrations would be sited in Spain) since it reduces the risk of unpredictable court intervention

which only goes to reduce the confidence of investors; and

- The Spanish Arbitration Act recognises the confidentiality of arbitral proceedings – a fundamental principle of international arbitration. Following the implementation of the Spanish

*Perhaps most importantly, the Act results in an easier procedure for the recognition and enforcement of arbitral awards ... this process, rather than taking perhaps two years, can now be completed in less than three months.*

Arbitration Act one can expect a time delay before seeing immediate results. This is because arbitrations come into being either by the parties agreeing to resolve their dispute at the time the dispute arises. Or, as is more likely, the parties agree to arbitration in the contract that forms the basis of their legal relationship. Accordingly, there is a natural interval between parties entering into commercial agreements and disputes arising between them that would be capable of being referred to arbitration.

Moreover, we are also likely to witness a delay between the time the Spanish Arbitration Act came into force (March 2004) and when parties consistently incorporate arbitration agreements into their commercial agreements.

Notwithstanding these issues of timing, the number of

arbitrations taking place in Spain is already increasing. What remains to be seen, however, is the treatment the Spanish courts afford the new arbitration law in practice.

This is all of great importance to English lawyers, who until now have only had to consider New York, Paris, Geneva, Stockholm and certain other venues as the alternatives to international arbitrations sited in London. International arbitration conducted in Madrid or Barcelona is now an exciting prospect. In particular, given the recent growth in Latin American arbitrations, the question is whether Spain's new role in the field of international arbitration will be to capitalise on the obvious connections she has in this regard.

**Christian Leathley**

Wilmer Cutler Pickering Hale and Dorr LLP (London)

---

## Arbitration Act

Continued from page 5

**(c) Improper composition of the arbitral tribunal:** An arbitral award may be overturned if the composition of the arbitral tribunal was not in accordance with the agreement of the parties or if the arbitration procedure conflicted with the law of the forum where the arbitration took place.

**(d) Award not yet binding or set aside:** This ground of opposition relates to an arbitral award that has not yet become binding on the parties or has been suspended by the court of the forum in which, or under the law of which, it was made.

**(e) Subject-matter not capable of settlement by arbitration:** Under Article V.2, if it is found that the subject matter of the dispute is not capable of settlement by arbitration under the law of the country of the enforcing court, recognition or enforcement of an arbitral award may be refused.

### 6) Points to consider:

In the light of the cases mentioned, a checklist of prerequisites for parties dealing with international recognition or enforcement of foreign arbitral awards has been set out below in a question format:

- Was the arbitration agreement valid?
- Was the party unable to defend itself?
- Does the award deal with matters exceeding the scope of the submission?
- Was the arbitral tribunal improperly constituted?
- Was the arbitral procedure in accordance with the parties agreement?
- Was the award not yet binding?
- Was the subject matter capable of settlement by arbitration?
- Was recognition or enforcement of the award contrary to public policy?
- Was enforcement sought within the time limitation?

**Antonio Bravo  
Mullerat**

# To Claim in Spain

**Maria Enriquez** compares the new Spanish arbitration law with its English counterpart



**A** new Spanish Arbitration Act should make Spain first choice for Latin American businesses wanting to arbitrate within the EU.

The Spanish Arbitration Act (Law 60/2003 of 23 December 2003, on Arbitration) came into effect on 26 March 2004. The reform responds to demands from international commercial parties choosing arbitration to resolve disputes.

The Act is based on the United Nations Commission on International Trade Law (UNCITRAL) 1985 model law on international commercial arbitration, which was designed to assist countries accommodate the needs of international commercial arbitration when reforming their laws on arbitral procedure. Spain is aiming for a cost-efficient, flexible and quick method of solving disputes between parties from both civil and common law systems, in particular for Latin American businesses arbitrating in the EU. The Act covers all arbitration in Spain and governs domestic and international arbitration.

## The arbitration agreement

The Act has relaxed the form and content of the arbitration agreement; it must be in writing but it is sufficient to record it in any type of information technology which will be accessible in the future. The agreement need only express the parties' intent to submit their dispute to arbitration.

This is similar to the English Arbitration Act 1996 which requires the agreement to be in writing, including tape, email and other forms of computerised record, and must express the parties' agreement to submit to arbitration.

## Legal systems

In international arbitration cases, the Act offers a choice of three alternative legal systems to determine validity and arbitrability: either the governing law of the arbitration agreement, or the law which applies to the dispute's merits, or Spanish law.

## Interim relief

For the first time, arbitrators may grant interim relief. Provisions on setting aside and enforcement also apply to interim relief decisions. In contrast, the English Act only allows interim relief ordered by arbitrators when the parties have agreed to confer them such power.

## Time limits

The time limit for issuing an award (six months unless otherwise agreed) runs from when the defence is submitted or from the submission deadline. If the award is not issued on time proceedings are terminated and the arbitrators dismissed without jeopardising the arbitration agreement's validity.

Under the English Act, where the arbitration agreement is silent about when the award must be made, the arbitrators will decide this. Failure to decide with reasonable despatch may lead to an application to court for the arbitrators' removal.

## Further innovations

The Spanish Act provides that information technology formats are acceptable for the form of award. The previous requirement to deposit the award with a notary public is now optional.

There is now a provision permitting the immediate enforcement of an award when an application to revoke it has been filed. The party against whom enforcement is sought can apply for the enforcement's suspension until the application to revoke is resolved but must offer security in the sum of the award and any damages caused by delay in execution. In contrast, under the English Act, a foreign award must be final before it can be enforced in England.

*The new Act should make Spain first choice for Latin American businesses wanting to arbitrate within the EU.*

**Maria Enriquez**  
Kennedys

# Preventing Money Laundering

**Nielson Sanchez Stewart** outlines the conflicts faced by lawyers in the fight against crime



Last year, Act 19/2003, of July 4, was approved in Spain establishing a new legal system of money transfers and foreign economic transactions and adopting certain measures for the prevention of money laundering. The Act modified Act 19/1993, dated 28 December 1993, and the most important issue – for the legal profession – is that it has included lawyers as subject, in certain situations, to the fulfilment of the obligations, activities and procedures foreseen in this Law for the prevention of money laundering.

Directive 2001/97/CE authorizes Member States to designate bar associations as the organisation to which lawyers must notify any operations subject to suspicion of money laundering. This possibility was not included in the Spanish regulation which is a pity as it has left small firms without the possibility of getting advice.

As the obligations that the Law imposes are rigorous and the activities and procedures are complex, the Government Board of the illustrious Bar Association of Malaga agreed on 3 September 2003 to become an adviser to its members in this matter by means of the formation of a Commission for this purpose which has decided to draft some recommendations to facilitate the fulfilment of the Law, and a list of transactions, also to facilitate the identification of those who can serve for money laundering and that due to its special idiosyncrasy needs special and careful examination.

The activity of the Malaga Bar Association is just to advise their members, organize training plans in the area and resolve of questions that could arise in the application of the Law, especially where it could enter into conflict with the duty of professional confidentiality. The suspicious operations of money laundering have to be communicated directly by the lawyer to the Executive Service of the Commission for Prevention of Money Laundering.

The Malaga Bar has published a document containing both recommendations and a list of transactions that might be suspicious and the plan is to subject these to permanent review, as the procedures used for money laundering are permanently changing in order to take advantage of possible lacks or failures of the system.

There will still be new regulation that will develop the Law which is pending approval.

The applicable rules in Spain are Act 19/93, of 29 December, modified by Act 19/2003, of 4 July, that transposes to our legal system the contents of Directive 2001/97/CE.

In addition, there exists a Regulation to the Act 19/93, approved by Royal Decree 925/1995, which is mainly addressed to financial organizations, due to which its application to lawyers is limited.

The indicated rules can be found in the website of the Bar Association of Malaga <[www.icamalaga.es](http://www.icamalaga.es)>.

The definition of money laundering is quite complex. According to Paragraph 1 of Act 19/93, it is defined as the acquisition, use, conversion or transmission of goods that come from any of the criminal activities to which the Law refers, or participation in the same, to hide or to conceal their origin or to help the person that has participated in the criminal activity to elude the legal consequences of their acts, as well as the concealment or coverage of their true nature, origin, location, disposition, movements or ownership or rights on such, even when the activities that generate them are developed in another State.

It is necessary to emphasize that Law 19/93, in its original drafting, had only the intention of preventing money laundering arising from narcotic or drug trafficking or related to crimes of terrorism or armed banditry. After the modification introduced by Act 19/2003, the scope extends to the prevention of money laundering from any type of criminal participation in the commission of a crime punished with a prison sentence of more than three years.

The Law is applicable to lawyers only in the following cases:

- 1 To those who participate in the conception, accomplishment or advising of transactions on behalf of clients related to the purchase of real estate or commercial organizations; the management of funds, values or other assets; the opening or management of bank accounts, savings accounts or value accounts; the organization of the necessary contributions for the creation, operation or management of companies or the creation, operation or management of trusts, or similar companies or structures, or
- 2 Act in name and on behalf of clients in any financial or real estate transaction (Paragraph 2. 2, letter d), Act 19/1993, of 28 December).

Expressly and absolutely excluded from the scope of application of the Law is "the information received or obtained from clients due to his legal position, when carrying out their defence or representation in administrative or judicial procedures or in relation to them, including the advising on the initiation or avoidance of a process, independently on whether they have received or

obtained this information before, during or after such procedures. (Paragraph 3.4, letter b, section 2 Act 19/1993, of 28 December).

Due to the fact that the rules on money laundering impose on the lawyer the obligation to communicate with the Executive Service of the Commission for Prevention of Money Laundering certain transactions of their clients, they are an exception to the duty of professional confidentiality established in article 542.2 of the Statutory Law of the Judiciary, (Ley Organica del Poder Judicial) and Paragraph 32 of the General Statute of Spanish Lawyers (Estatuto General de la Abogacia Española) and Paragraph 5 of the Code of Deontology of Spanish Lawyers (Código Deontologico de la Abogacia Española)

The same rule establishes, after making reference to the duties of information and collaboration with the Executive Service of the Commission for Prevention of Money Laundering, that: "Lawyers and Procurators will keep the duty of professional confidentiality, in accordance with the legislation in force."

It seems that the interpretation of article 3.4 of Act 19/93, according to draft given by Act 19/2003, is the following:

- a) In those cases in which the activity of the lawyer is just to analyse the legal position of his client, or prepares or carries out the defence of his client in administrative or judicial procedures, the duty of professional discretion is not subject to any rebate or alteration.
- b) When the client asks his lawyer to take an active professional participation, in some of the ways set out in the law (creation of transactions, management of funds, incorporation of companies etc.), in a transaction that can be described as money laundering the law deprives the lawyer of his duty of professional confidentiality and forces him to communicate the transaction on his own initiative to the Executive Service of the Commission for Prevention of Money Laundering in the terms referred to.

In spite of the legal opinion it is possible that the lawyer might have doubts on whether a specific situation should be considered as protected by the duty of professional confidentiality or not. In such cases it is advisable to raise the question with the President of the Bar Association, according to Paragraph 5.8 of the Code of Deontology of Spanish Lawyers.

Act 19/93 establishes, a number of obligations applicable to lawyers:

- 1 To request, by means of a proper document, the identification of clients at the time of establishing business relations, as well as to identify whichever people who intend to carry out any transactions, with the exceptions that might be applicable.
- 2 To obtain information from the clients with the purpose of knowing the nature of its professional or commercial activities and to adopt measures to verify the truth of this information.
- 3 To obtain precise information in order to know the identity of the people on behalf of whom they act when there are suspicions that the client is not acting in his own name and right.

4 To examine carefully any transaction that can be linked to money laundering, particularly those transactions that might be complex, unusual or that might apparently not have an economic or licit purpose. The results of the examination should be in writing.

5 To keep, for a minimum period of six years, the documents that prove the accomplishment of transactions and the identity of the subjects that had executed them or who had established business relations with the lawyer.

6 To establish procedures and suitable systems of internal control and communication (of special application to big firms).

7 To collaborate with the Executive Service of the Commission for Prevention of Money Laundering, communicating to the same, on own initiative, any fact or

*Questions can arise in the application of the new Law, especially where it could enter into conflict with the duty of professional confidentiality.*

transaction possibly linked to money laundering, as well as those transactions that show lack of obvious correspondence with the nature, volume of activity or operative background of the clients, whenever, from the examination of the transaction, no economic, professional or business explanation is found to carry on with the transaction.

8 Not to reveal the client, or to a third party, that information to the Executive Service of the Commission for Prevention of Money Laundering has been transmitted.

9 To facilitate the gathering of information

that the Executive Service requires in the exercise of its activities.

10 To establish measures so that all the members of the law office (including the administrative personnel) have knowledge of the requests derived from the Law.

The fines imposed for breach of these obligations are set out in Paragraphs 5 and the consecutive of Act 19/93.

The Malaga Bar Association has given the following advise to their members:

- 1 To subscribe a pro forma contract with each new client or subject that is entrusted to the lawyer, in order to accurately define the scope of the professional activity and, in case of necessity, be able at any time to prove before the authorities responsible for the prevention of money laundering, or wherever might be necessary, whether the professional order is or is not included within the scope of application of the Law as referred to above (advice and management on the indicated matters, that are not at all related to any judicial or administrative procedure).

2 To carefully identify the client. The law establishes the obligation "to request by means of a proper document, the identification of its clients", leaving the matter to be further developed.

Until such development takes place, is recommended to identify the client according to the following way:

- a) In the case of individuals, by means of the exhibition of his DNI (National Identity Document), or, if he is a foreigner, of his passport (and, if applicable, his residence and work permit). A photocopy to be included in the file will be obtained.
- b) In the case of companies, it is advisable to obtain a copy of the incorporation deed as well as information from the Mercantile Registry on its NIF (Fiscal Identity Number), address and administrators. It is advisable to obtain similar information in the case of foreign companies by obtaining copies of the company documents.
- c) It is advisable to obtain the information referred to above both from the client and from the representative (individual or company) when the client does not act on his own name and right.

3 To obtain and keep in the file any documentation that can be used to ascertain the activity of the client, such as business cards, annual accounts, publicity, etc.

When the activity declared by the client is investment in real estate and no information on previous experience is given in this area, it is also advisable to obtain information on the ultimate origin of the funds of the client.

All the verbal information obtained in this respect should be contained in a written note that should be included in the file.

4 To prepare and keep in the client's files, a written report with the analysis of those transactions that, by their nature, could be considered as linked to money laundering, including all the background that has been facilitated by the client.

5 To make sure that the activity of the client is performed in accordance with the rules of deontology and respect of the laws, confirming the truth of that information in the best possible way in each case, and leaving a written record on the client's files of the activities made in that respect.

6 Not to carry out any significant transaction of any nature before the taking the above measures.

7 Not to assist when the purpose of the advice requested is money laundering; giving notice to the Executive Service of the Commission for the Prevention of Money Laundering as soon as possible.

10 To establish suitable systems of internal control and communication, as well as a policy of admission of clients in law offices which have a large number of lawyers.

11 To adopt this document as internal procedure in prevention of money laundering matters, together with other policies that might be advisable to incorporate, according to the firm's speciality.

12 To consult with the Bar Association regarding any situation of possible conflict between the duty of professional confidentiality and the fulfilment of the information obligations established in Law 19/93.

There are a number of activities to which the Law gives special consideration in Paragraph 3.3:

- a) Transactions that might be complex, unusual or that appear not to have an economic or licit purpose
- b) Transactions that show lack of obvious correspondence with the nature, volume of activity or operative background of the clients, or might be strange, unusual or are disproportionate.

As an example, it is advisable to examine with special care, in order to fulfil the obligations established by the Law, the following transactions

- 1 Transactions related to societies:
  - a) Incorporation, in a short period of time, of a significant number of companies;
  - b) Appointment as administrator to someone who is not suitable for that duty (eg people without specific qualification, unemployed, without income, without known address, or merely with a correspondence address or who are in circumstances that make them especially unsuitable);
  - c) Appointment of a sole administrator (or authorization to act solely) in more than three companies;
  - d) Appointment of a sole administrator (or authorization to act solely) of residents in tax havens not related to the client;
  - e) Sales of shares or participation rights to someone not having a reasonable relationship with the shareholders within the fifteen days after of the inscription of the company in the Mercantile Registry.

2 Payments in cash for the accomplishment of transactions for an amount higher than €300,000, including the payment of a lawyer's professional fees.

3 Granting Powers of Attorney of residents in favour of non-residents in general and non-specific terms.

4 Transactions in which it seems that the clients do not act in their own name and right, trying to hide its real identity.

5 Amounts given in deposit with instructions to pay them against something unusual or uncommon (eg payments of high debts without believable documentary support).

6 Transactions in real estate with payment in cash for an amount higher to 25 percent of the price declared in the title deed, if such amount is higher than €300,000.

7 Transactions in real estate of a amount higher than €300,000 coming from tax havens.

8 Successive transmissions of the same real estate on the same day or within ten consecutive days.

9 In general, any transaction related to tax havens

These recommendations have been put together to helping Spanish lawyers in their new task vis a vis the authorities. The reaction has been bad as a rigorous interpretation may transform an Advocate from a defensor to a delator. Whilst the regulations to implement the Law are being prepared, the UE is preparing what is already known as the Third Directive which is straining the already complicated position. The only advantage that can be seen is that defaulters shall also be aware that lawyers are not able to help them in committing fraud and will have to look somewhere else to carry out their activities.

**Nielson Sanchez Stewart**  
Sanchez Stewart Abogados

# Business Insolvency and New Employment Law in the Insolvency Act



**Joaquin Echavarri** explains how the new Insolvency Code relates to employment issues

The new Insolvency Code has meant bringing before the Commercial Court judge all the declaratory social affairs and executive actions that could be of importance to the assets of the insolvent undertaking. Accordingly, it has been declared that judges of the Commercial Courts will have exclusive competency to hear social affairs cases the purpose of which is the collective termination, modification, or suspension of employment contracts, as well as in the suspension or termination of top executives' contracts, when the employer is insolvent.

Likewise, Commercial Court judges will have competency on enforcement with respect to the goods and rights of the asset base of the insolvent undertaking, whatever agency may have ordered such enforcement. This competency extends to all pre-trial administrative and social affairs issues directly related to the insolvency or the resolution of which is necessary to ensure the proper progress of the insolvency proceedings.

This being the case, once insolvency has been declared, no Labour Court judge may hear any declaratory or executive action – any actions the judge might perform will be null and void – which may involve the assets of the insolvent undertaking. In such cases, Civil Court and Social Affairs Court judges, before whom suits relating to the competency of the Commercial Court judges are filed, must decline to hear such suits and advise the parties to exercise their rights before the judge to whom the insolvency proceedings are assigned. Should such suits nevertheless be admitted to Civil or Social Affairs Courts any action taken with respect to the same will be shelved and have no validity whatsoever.

However, with respect to matters not assigned to the judge presiding over the insolvency proceedings, Social Affairs Court judges will have competency to hear:

- claims filed when insolvency has not yet been declared, despite the company's real or presumed insolvency.
- declaratory trials under way at the time insolvency is declared (until the judgement is definitive), except for those being heard in a First Instance Court, the

resolution of which the insolvency judge deems to have substantial importance in creating the inventory or the list of creditors.

- claims initiated after the declaration of insolvency which have relevance for the debtor's assets, though in this event the insolvency administration will be summoned as a party.

Article 8 of the Insolvency Act states that: "in judging these matters, without prejudice to the application of the specific regulations of this Act, the principles behind the statutory regulatory organisation and the labour process must be taken into consideration."

*A notable effort has been made by legislators to bring the logic of employment law closer to the rules of employer representation and defence.*

Thus, although some technical errors of a legal nature have inadvertently crept in (for example, when no reference is made to the procedure to be followed in individual modifications, suspensions, and termination or, on a more formal level, when reference is made to "the actions which the employees may take against the ruling", when it would perhaps have been more accurate to speak of "appeals"), a notable effort by legislators to bring the logic of employment law closer to the rules of employer representation and defence (full application of the Labour Procedures Act is notable) can be seen here, especially with respect to the processing of substantial modifications in working conditions or contract suspensions

or extinguishments occurring while insolvency is being declared.

This is, however, of a partial similarity. It is true that the processes provided in Articles 40, 41 and 45 of the Insolvency Act for decisions affecting a group of workers are reproduced. Still, at the same time, some dysfunctions are to be seen, and these can only be explained as stemming from actual ignorance of the logic and problems involved in labour relations.

One of the principles which seems to be behind the

Insolvency Act is that of preserving the legal business activity, despite the fact that it may be affected by insolvency proceedings. Therefore, special attention is paid and special care given to regulating the procedures to be followed when working conditions are to be modified or employment contracts are to be extinguished.

The procedure to be followed is familiar, being essentially the same as that which we mentioned earlier as the procedure for modification and termination with respect to a group of workers as contained in the Employment Code. Thus, to be noted is the need to open a file setting forth and justifying the reasons for the collective measures and the goals to be achieved to ensure the future viability of the company and jobs, the duty to initiate a period of consultation with workers' representatives in order to reach an agreement in good faith, the obligation to design a viability plan for companies with more than fifty workers, or the participation of the labour authorities, which in this case take up once more the particularly defensive, interventionist line that marked business restructuring processes prior to the labour reform of 1994.

Nevertheless, despite this "attachment" to employment regulations, it is true that the new text of the Insolvency Act creates some distortions, once the scientific and court doctrine which has made pronouncements on the areas of interdisciplinary confluence in insolvency proceedings is valued in an overall, integrated manner.

This is the case when the possibility of terminating the employment contract with severance compensation is postponed due to substantial modification of working conditions. Let us recall that the Act establishes that, when a substantial modification of working conditions is agreed for a group of employees, as provided in Article 41 of the Employment Code, the worker's right to terminate the contract with severance compensation, as acknowledged

in the Employment Code, is suspended during insolvency proceedings for a maximum of one year from the date on which the court authorises the said modification. While it is true that the law provides that application of this principle may be avoided if a move of more than 60km is involved, it is no less true that situations seriously detrimental to workers' rights are not exclusively limited to location. A substantial modification, for example in the organisation of working hours, may place the worker in a situation which is especially intensely detrimental, since he or she must maintain the employment contract under unfavourable conditions which, despite the passage of time, do not entitle the worker to greater compensation than that provided by law.

The same occurs when the extinguishment of an employment contract under Article 50.1.b) of the Employment Code is deemed "similar" to collective extinguishments under Article 51 of the same Code. This makes a break with the case law that had drawn a clear distinction between extinguishment due to unjustified delay or failure to pay a salary and extinguishments on economic, technical, organisational or production grounds.

Finally, Article 56 establishes a supposed limitation on possible modifications of working conditions as established in collective bargaining agreements, not with reference to Article 41 of the Employment Code but to "employment legislation". This lack of technical legal clarity and precision leads to a situation within insolvency proceedings in which, while an agreement with the workers' representatives is always required, the obligation to negotiate is being indirectly turned into a "regulation", whereas before there was simply a possible negotiation.

Joaquin Echavarri  
Baker & McKenzie



BRITISH SPANISH LAW ASSOCIATION  
ASOCIACION DE JURISTAS HISPANO-BRITANICA  
Membership Application Form

Name: .....

Firm: .....

Address: .....

Department and Position: .....

.....

.....

.....

Jurisdiction: .....

Membership Fee:

- |                      |                          |                |                          |                |
|----------------------|--------------------------|----------------|--------------------------|----------------|
| (1) Ordinary Member  | <input type="checkbox"/> | £50 Individual | <input type="checkbox"/> | £250 Corporate |
| (2) Associate Member | <input type="checkbox"/> | £25 Individual | <input type="checkbox"/> | £125 Corporate |

- (1) Members of any branch of the legal profession in the U.K. or Spain, including members of the judiciary, solicitors, barristers, trainee solicitors, trainee legal executives, pupil barristers and their equivalent by any other name: law academics either practising or retired.  
(2) Corporations, firms and other organisations, individuals, law students and lawyers qualified in any jurisdiction other than England and Spain.

Please return, together with a cheque made payable to the British Spanish Law Association, to  
BSLA, Holborn Hall, 193-197 High Holborn, London, WC1V 7BD.

# A Team Approach

## Sarah Lucy Cooper explores the differences between barristers and solicitors



The United Kingdom, peculiar to its island roots, likes to do things a little differently from the rest of Europe, and as such divides up its lawyers in its own unique way.

It should be noted that within the United Kingdom there are various different jurisdictions of which the main ones are England and Wales, Northern Ireland and Scotland. Each of these jurisdictions has a very different type of legal system, especially Scotland which is much more closely allied to Roman Law according to my Scottish colleagues. Both Scotland and Northern Ireland also divide up their legal professions in a similar manner to England and Wales.

### Solicitors

In England and Wales there are approximately 116,000 solicitors who are represented and regulated by the Law Society <[www.lawsociety.org.uk](http://www.lawsociety.org.uk)>. After having undertaken the academic stage of their training, prospective solicitors have to spend one year at Law School followed by working as a trainee solicitor for two years, supervised by qualified solicitors. All solicitors are required to comply with the Law Society code of conduct which is contained in the Guide to the Professional Conduct of Solicitors. This code of conduct applies in general to work carried out by solicitors abroad as well as in England and Wales.

Solicitors organise themselves into partnership "firms" which contain a mixture of partners – who may or may not own a share of the equity of the firm – and employed solicitors as well as support staff. Currently solicitors are not allowed to set themselves up as limited companies.

### Barristers

There are many fewer barristers in England and Wales than solicitors, numbering approximately 10,000. The training is different to that of solicitors although the academic stage at university is the same. After university a prospective barrister will attend Bar School and then will become a "pupil" for a year whereby he or she is supervised by a qualified barrister. The Bar Council is the body that regulates barristers <[www.barcouncil.org.uk](http://www.barcouncil.org.uk)>. However, every barrister must also be a member of one of the four Inns of Court – Inner Temple, Middle Temple, Gray's Inn and Lincoln's Inn. Each of these Inns of Court is based in the heart of legal London near to the Royal Court of Justice on The Strand. The Inns each offer excellent library, training and dining facilities for their members as well being large landlords and renting out very impressive buildings used by many barristers as well as solicitors. Each of the Inns has its own character but all are well worth visiting as they are open to the public and

contain very beautiful gardens where you may sit and eat your lunch – English weather permitting!

Barristers, who are also known as Counsel, organise themselves into groups of practitioners known as chambers. These may contain anywhere from ten to 100 members. Each barrister is self-employed but pays a share of his or her earnings to chambers to pay for the rent of the building, technological support and administration. Senior barristers are known as Queen's Counsel or "QC". They wear a slightly different gown made of silk instead of the cotton used by the rest of the Bar and for this reason they are also known as silks.

### The service of each type of lawyer

A client already involved in litigation or likely to be involved in litigation will probably need a solicitor from the outset who will be the first lawyer that he or she contacts. The solicitor will take the initial instructions from the client, give general advice, correspond with the other side and deal with all of the practical side of the court proceedings, particularly the collecting of evidence and the drafting of witness statements.

In most cases during the litigation the solicitor will then instruct a barrister which will be the usual route by which the lay client meets the barrister. Although the barrister therefore has two clients – a professional client (the solicitor) and the lay client – a barrister's ultimate duty is always to his or her lay client. As for payment, it is the solicitor who is directly responsible for paying the barrister as, in general, the barrister has no contractual relationship with the lay client.

In general, barristers would carry out the following work as part of the case:

- a) the drafting of the formal court documents setting out the details of the case. These are called pleadings and comprise the Particulars of Claim or Statement of Claim, the Defence, Part 20 Claim (ie a counterclaim) etc. The barrister would not in general draft the witness statements;
- b) giving specialist advice about a legal issue in the case. This may be in writing "an Advice" or at a meeting or "a conference";
- c) representing the client at a court hearing. Whilst solicitors now have the right to provide advocacy services in all levels of courts, the reality is still that it is mainly barristers who conduct such hearings as they are the expert advocates.

There are occasions when barristers are allowed to work without having a solicitor. One such example is with all foreign lawyers who may instruct a barrister directly, provided that proceedings in England and Wales have not

**Continued on following page**

# The Pre-Owned Asset Tax

**Zac Lucas** describes how this new measure will affect property owners



The UK Finance Act 2004 enacts the controversial Pre-Owned Assets Tax (the "Charge") designed to penalise individuals who have entered into arrangements to avoid Inheritance Tax. It only applies to individuals tax resident in the UK and contains specific provisions dealing with resident non-UK domiciled individuals.

The Charge is to commence from 6 April 2005 with tax first becoming due on 3 January 2007. Arrangements entered into as far back as March 1986 may be caught.

Three types of property are within the Charge: land, chattels and intangible property comprised in a settlor interested trust.

In the case of land, the Charge requires that the individual not only "occupy" the land but that they also have some "connection" with it. The required connection can be satisfied if the individual had previously owned the land or provided any of the consideration used for its acquisition, either by giving cash or other property.

The scope of the Charge will need to be carefully considered where a resident UK-domiciled individual has entered into arrangements, involving their Spanish second or holiday home, designed to mitigate Inheritance Tax. And likewise where a resident Spanish-domiciled individual has entered into similar arrangements with respect to their UK property.

Typically, the individual will occupy property legally owned by their children, an offshore family trust or company.

By way of illustration, in the case of UK-domiciled individuals, the following scenario will be caught and subject to Charge: In 1990 Mr & Mrs Smith gift £180,000 to their son; their son uses the cash to purchase a villa in Spain. Mr and Mrs Smith occupy the villa from November

to March in each year and live in the UK throughout the rest of the year. From April 2005 Mr & Mrs Smith will be caught by the Charge. They will be assessed to UK income tax on the basis that they have received "additional income" equivalent to the annual rental value of the villa and the tax will first become payable in January 2007.

In the case of a Spanish-domiciled individual the UK home may have been purchased by an offshore company or trust using a loan, funding for which was originally provided by the individual. In a typical arrangement two trusts would be created. The first, discretionary in form, the second, interest in possession in form. The first trust would lend funds to the second in order for it to acquire the UK property: for UK Inheritance Tax, the value of the property would be reduced by the debt owned by the second trust to the first. From April 2005 the Spanish individual will be caught by the Charge to the extent of the debt value and will, like Mr and Mrs Smith in the previous example, be assessed to tax on "additional income" equivalent to the annual rental value of the UK property. Tax will first become payable in January 2007.

Individuals caught by the Charge can "elect" to treat the property as still forming part of their estate for UK Inheritance Tax purposes – thought not for any other tax purposes. Whether or not it will be worthwhile exercising the election will depend on the values and overall tax involved.

In some cases it will be more appropriate for individuals to "dismantle" structures or, at least, change their form in order to take advantage of the various exemptions provided in the legislation. Specialist tax advice will be needed in most if not all cases.

**Zac Lucas**  
Russell Cooke Solicitors

---

## Barristers and solicitors

Continued from previous page

been issued. This can be very useful in terms of pre-action advice as it may give your Spanish client an opportunity to consider matters fully without investing too much time and money. If proceedings are then issued within England or Wales you must then have a solicitor on the court record representing you if you wish to continue to use a barrister.

Furthermore, some barristers, including myself, are allowed to have direct access to lay clients without needing a solicitor. However, in general, this would involve a lay client who is a professional organisation such as a surveyor

or accountant or will be in the context of non-contentious work.

In conclusion, the reality is that for most litigation you will have both a barrister and a solicitor. However, by reason of the different skills that they bring to a case and their separate training, the two roles do not overlap. Together the two lawyers – the solicitor and the barrister – form your team!

**Sarah Lucy Cooper**  
Thomas More Chambers

# Bilaterals' Reception

A large gathering of international lawyers attended a reception in the beautiful surroundings of the Middle Temple.

The event was hosted jointly by the BSLA together with the American, French, German and Italian bilateral associations.



■ The BSLA does not assume legal responsibility for any errors or omissions contained in this Bulletin. Opinions expressed are those of the contributor, not the BSLA.



Holborn Hall, 193-197 High Holborn, London, WC1V 7BD

Tel: 020 7404 8400 Fax: 020 7404 8500

E-mail: [cedillo@fscornik.co.uk](mailto:cedillo@fscornik.co.uk) Website: [www.BSLA.org.uk](http://www.BSLA.org.uk)

© BSLA and authors, 2005

Published on behalf of the BSLA by HAMES PUBLISHING, Suite 16, 46 Warwick Way, London SW1V 1RY  
Tel: 020 8543 6111 Fax: 020 8542 2448 E-mail: [hames.publishing@zen.co.uk](mailto:hames.publishing@zen.co.uk)