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In the past thirty years, the world's nations and the international business community have raised the sophistication and efficiency of international commercial arbitration to unprecedented levels. This is due to the recognized advantages that arbitration offers over litigation in national courts. These advantages are particularly pronounced in the field of international commerce where a neutral forum, expeditious procedures and effective enforcement are most necessary. In an attempt to respond to these needs, nations have signed such important treaties as the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958,[1] the European Convention on International Commercial Arbitration of 1961[2] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965.[3] Model laws and procedures have also been created by public and private international bodies.[4] Finally, individual

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1. New York Convention on the Recognition and Enforcement of Arbitration Awards of 1958, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as the New York Convention].

2. The European Convention on International Commercial Arbitration of 1961, Apr. 21, 1961, 484 U.N.T.S. 349.

3. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

4. The United Nations Commission on International Trade Law [hereinafter cited as UNCITRAL] is presently working on a model law of international commercial arbitration. *See* the draft text of a Model Law on International Commercial Arbitration [March 6, 1984]. (Unpublished report of the UNCITRAL Working Group on International Contract Practices, on file at the Secretariat to UNCITRAL, P.O. Box 500 A-1400 Vienna, Austria). UNCITRAL has also established rules for arbitration commonly known as the UNCITRAL Rules. These rules have been adopted for use by the Spanish Court of Arbitration. *See infra* text accompanying note 42. The International Chamber of Commerce [hereinafter cited as ICC], a private association which generally represents the interests of international business, has also estab-

nations have promulgated supportive national arbitration laws.[5]

Spain, recently liberated from its Franco-era isolation, has also come to recognize the benefits of international commercial arbitration. In an attempt to attract international commercial arbitrations to its territory, the Spanish Government promulgated Royal Decree 1094 on May 22, 1981.[6] This Royal Decree provides for the establishment of the Spanish Court of Arbitration. The charter of the Court, as subsequently established, follows the most progressive trends for the administration of international commercial arbitration. Unfortunately, the activities of this fledgling institution may be frustrated by the Spanish Law of Private Arbitration of 1953.[7] This article will first analyze the relevant aspects of the Law of 1953. It will then examine Royal Decree 1094 and the Spanish Court of Arbitration in order to point out possible conflicts between the anticipated activities of the latter and the Law of 1953.

I. The Law of 1953

A. Substantive Content

The Law of Private Arbitration of 1953 is characterized by both its formalism and the limited concessions it makes to party autonomy (freedom of contract).[8] Its formalism occasions various procedural pitfalls which may preclude an enforceable award, while the limitations it imposes on party autonomy provide numerous opportunities for recalcitrant parties to cause delays by requiring the intervention of the judiciary. The result is a slow and costly procedure offering few if any advantages over litigation in court.

The manner in which parties must conclude an effective arbitration agreement is perhaps the Law of 1953's most salient characteristic. An effective arbitration agreement is usually the result of two agreements between the parties: the first, a preliminary agreement usually contained in the contract

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lished rules for arbitration for its Court of Arbitration. These are commonly referred to as the "ICC Rules."

5. Examples of such supportive legislation are The English Arbitration Act, 1979, ch. 42; French Decree No. 81-500 of May 12, 1981 (1981), Journal Officiel de la République Française, 1380, 1981 Dalloz-Sirey, *Législation* 222.

6. B.O.E. May 22, 1981 (No. 140); 1981/Aranzadi Legislative Reporter, marginal note 1337. In Spain a law or decree comes into effect 20 days after it is published in the Boletín Oficial del Estado [hereinafter cited as B.O.E.] unless such law indicates otherwise. Spanish Civil Code, art. 2.

7. B.O.E. Dec. 24, 1953. In Spanish this law is called "La Ley Sobre Arbitraje de Derecho Privado" [hereinafter cited by its English translation, Law of Private Arbitration of 1953 or simply the Law of 1953].

8. For an in-depth examination of the Spanish Law of Private Arbitration, *see* B. Cremades, Estudios Sobre Arbitraje (1977); J. Guasp, El Arbitraje en el Derecho Español (1956); F. Ferreiro, Los Arbitrajes en el Derecho Privado (1964); J. Chillon & J. Merino, Tratado del Arbitraje Privado Interno e Internacional.

from which the dispute arises and the second, a *compromiso*, drawn up after the dispute has arisen.[9]

The formation of a preliminary arbitration agreement is subject to a few formal requirements. It needs only to conform to the requirements of the Civil Code for the formation of a contract and to indicate that future disputes arising from a given legal relationship are to be determined by arbitration.[10] However, the preliminary arbitration agreement does not, by itself, create an obligation to arbitrate in the event of a dispute. Rather it obliges the parties to enter into a *compromiso*.[11] Once the *compromiso* is completed the parties are obligated to arbitrate.[12]

The *compromiso*, as compared with the preliminary arbitration agreement, is much more strictly regulated by the Law of 1953. At a minimum, the parties must include the following: 1) the personal details of the parties to the dispute as well as those of the agreed upon arbitrators (which must number one, three or five); 2) the time period within which the arbitrators must render the award; 3) the place where the arbitration is to take place; and 4) the nature of the dispute and questions to be submitted to the arbitrators.[13] A number of optional provisions may also be expressed, including a grant to the arbitrator to reach a decision based on principles of equity.[14] Finally, the *compromiso* must be drawn up in a public document before a notary in order to have a binding effect.[15]

The sequential distinction between the preliminary arbitration agreement, drafted prior to the dispute, and the *compromiso*, drafted after the dispute arises, has important practical ramifications. As a result of this distinction, a recalcitrant defendant is provided with numerous opportunities to impede the carrying out of the arbitration. He may, despite the existence of a preliminary arbitration agreement, refuse to enter into the *compromiso*, thereby forcing the other party to seek judicial formation of the *compromiso*, as described below. He may also present related claims in court prior to the formation of the *compromiso*. A preliminary arbitration

9. Law of 1953, arts. 6, 11 and 18. A preliminary agreement is not necessary if, *after a dispute has arisen*, the parties can voluntarily agree on the terms of a *compromiso*. However, in such a case, if no preliminary agreement exists, no judicial *compromiso* can be obtained when one of the parties refuses to arbitrate.

10. Law of 1953, art. 8. For the formation of a valid contract, art. 1261 of the Spanish Civil Code requires: (1) consent of all parties to the contract; (2) definition of the contractual undertakings; and (3) consideration, as this term is generally understood in common law jurisdictions. Civil Code, art. 1261. Gaceta de Madrid (The Gaceta de Madrid was the name previously used for the B.O.E.) July 25, 1889.

11. Law of 1953, art. 9.

12. *Id.* at art. 18.

13. Law of 1953, art. 17.

14. *Id.*

15. *Id.* at art. 16.

agreement does not, by itself, preclude judicial consideration of a dispute.[16] To do so, it must be complemented by a *compromiso*. Ironically, given the purpose behind inserting an arbitration clause in the initial contract (avoidance of judicial proceedings), a party seeking to avoid court litigation may find himself before two different courts prior to the initiation of arbitral proceedings. Such a situation would arise where one party seeks judicial formation of a *compromiso* while, in the meantime, the opposing party initiates court proceedings to determine the merits of the dispute.

When a dispute arises from a contract containing a preliminary arbitration agreement and one of the parties refuses to appear before the notary, or the parties cannot agree to the terms of the *compromiso*, the party who wishes the arbitration to go forward must seek judicial formation of the *compromiso*.[17] The appropriate judge, if he determines that a valid preliminary arbitration agreement exists, will complete those parts of the *compromiso* upon which the parties could not agree. In these proceedings, the petitioning party must be assisted by both an *abogado* and a *procurador* and present a notarized certification of the opposing party's failure to cooperate.[18] The opposing party, similarly represented, is permitted to respond. Both parties may present relevant evidence and thereafter a decision by the court whether or not to complete the *compromiso* is rendered. If completion is denied, no appeal is available. The petitioning party must initiate ordinary court proceedings in order to prove the validity of the preliminary arbitration agreement and to compel a judicial *compromiso*.[19]

As mentioned, the parties' choice of arbitrators is included in the *compromiso*. Art. 22 of the Law of 1953 states: "In all cases the arbitrators must be appointed by mutual agreement: an agreement to delegate, to one of the parties or to a third party, the choice of any arbitrator will be invalid." The parties must directly choose the arbitrators and no delegation of this decision is permitted. Where an agreement between the parties cannot be reached then judicial formation of the *compromiso* will be necessary. The Law of 1953 also requires the parties to directly choose the situs of the arbitration and the time period within which the award must be rendered. All of these requirements preclude the use of procedures commonly found in institutional arbitrations whereby third parties, usually the institution

16. *Id.* at art. 19.

17. *Id.* at art. 9.

18. *Id.* at art. 10.2. Spain has a split legal profession. The *abogado* is in charge of preparing the case to be presented in court. He acts as a legal advisor and directs litigation. The *abogado* is also responsible for oral argument before the courts. The *procurador* is responsible for submitting to and receiving from the courts all written documents previously prepared by the *abogado*. Technically, he is the parties' representative before the courts and, unlike the *abogado*, must be given written powers by the party he represents.

19. Law of 1953, art. 10.5.

administering the arbitration or the arbitrators, make these decisions. According to the Law of 1953, when the parties cannot agree on these terms, they must resort to the courts to fill in the gaps.

The parties may agree in the *compromiso* to have the arbitrator apply law or principles of equity to the merits of the dispute.[20] Where the parties do not expressly agree to the application of principles of equity, law must be applied.[21] Whether the arbitrator is to apply law or equity will determine the necessary qualifications of the arbitrators, the nature of the arbitration proceedings and the types of appeal available.

Arbitrators applying law must be attorneys.[22] Except for the imposition of certain time limits, the arbitrator who applies law has broad discretion in carrying out the arbitration.[23] In summary, art. 27 of the Law of 1953 requires the arbitrator to divide the arbitration into four time periods none of which may exceed one quarter of the time granted to the arbitrator, in the parties' *compromiso*, for the rendering of the award. In the first time period the parties must submit their complaint and response respectively with the appropriate evidence. In the second period the parties may respond to their adversary's claims and evidence. In the third period the arbitrator will hold hearings meant to clarify the evidence submitted by the parties. At this point the arbitrator may request the parties to submit further evidence of any nature which is permitted by the Spanish Code of Civil Procedure. Finally, in the last period, the arbitrator renders his award. Appeals in the case of arbitration according to law may be based on the improper application of substantive law or the improper completion of procedural requirements.[24]

Arbitrators empowered to render an award based on equity need not be attorneys.[25] Proceedings in which equity is applied have fewer requirements and need only permit the parties the opportunity to be heard and present

20. The Law of 1953 indicates in art. 17 that the parties may authorize the arbitrators, in the *compromiso*, to decide according to their "knowledge and understanding" and not according to law.

21. Law of 1953, art. 4.

22. *Id.*, at art. 20.

23. The author submits that arbitrating parties arbitrating according to law may be limited as to the extent to which they can obligate the arbitrator to proceed as agreed by them. With regard to arbitrations according to law, art. 27 indicates that the *arbitrators* will determine the relevant time periods (for the submission of the complaint, response, proof etc.), and that the submission of evidence and its evaluation will be subject to the provisions of the Spanish Code of Civil Procedure. Regarding arbitration according to equity, art. 29 indicates that the *arbitrator* shall have a free hand in conducting the proceedings. Finally art. 26 establishes that the procedures elaborated in arts. 27 and 29 cannot be modified by agreement between the parties. This would seem to indicate that those proceedings, and perhaps the powers of the arbitrator, expressly laid out in these articles cannot be modified by the parties.

24. Law of 1953, art. 28. Note that appeals based on the improper application of substantive law will permit the Spanish courts to set aside the award based on the merits of the dispute.

25. *Id.* at art. 20. Article 20 only requires that arbitrators empowered to render an award based on equity be physical persons who are literate and possess all their civil rights.

their cases.[26] Awards based on equity may only be appealed on procedural grounds.[27] The final arbitration award must be drawn up in a public document before a notary.[28] The notary is charged with notifying the parties of the award and the award becomes effective on the date of such notification.

The Spanish Law of Private Arbitration of 1953 represents a legal framework which is largely incompatible with more progressive notions of commercial arbitration. This incompatibility stems from two of its fundamental characteristics. First, the two-step process usually necessary to create an obligation to arbitrate and to prevent court consideration of the dispute and, second, the inability of arbitrating parties to delegate their choice of arbitrators, arbitral situs and time periods to third parties. The disadvantages of the Law of 1953 and its incompatibility with many procedures commonly used in international arbitrations require the international practitioner to be aware of its contents, especially in situations which may give rise to the intervention of Spanish courts.[29]

B. Scope of Application

The Law of Private Arbitration of 1953 precludes from its scope: "arbitrations involving matters of public law, whether international, corporate, union related or any other nature." Without making a clear statement, the text seems to indicate that its content is applicable to all arbitrations of a private nature, whether domestic, foreign or international.

The Law of 1953's lack of precisely defined scope is, in part, clarified by other Spanish legislation and judicial decisions. For example, the Spanish Supreme Court has determined that arts. 951 to 958 of the Code of Civil Procedure regarding the enforcement of foreign court judgments are similarly applicable to foreign arbitration awards.[30] These articles indicate the exclusive criteria upon which Spanish judges may grant or deny enforcement. The Law of 1953 is not included among these criteria and its application in such a determination is therefore precluded. Apart from arts. 951–

26. Law of 1953, art. 29.
27. *Id.* at art. 30.
28. *Id.* at art. 27.6.
29. The intervention of Spanish courts is most likely to occur when an arbitration takes place in Spanish territory and the Spanish judge determines that this arbitration is Spanish. For a discussion of this question *see infra* text accompanying notes 34–40. Spanish courts will also intervene when a party seeks to enforce a foreign arbitration award in Spain. *See infra* note 30.
30. Tribunal Supreme (hereinafter cited as T.S.), T.S. Jan. 26, 1899; T.S. Apr. 1923; T.S. May 16, 1936; T.S. July 5, 1956. *See* R. Brotons, Ejecución de Sentencias Arbitrales Extranjeras, at 25–26 (1980). Articles 951–954 set forth three routes by which a final foreign court judgment (and therefore a final foreign arbitration award) may be recognized. These are: (1) recognition based on an applicable treaty; (2) recognition based on reciprocity; and (3) recognition based on compliance with the enumerated criteria of art. 954.

958, awards rendered in foreign countries, as well as non-Spanish awards, will be subject to the New York Convention when applicable.[31]

Since the newly created Spanish Court of Arbitration will administer international arbitrations in Spain, it is important to determine the Spanish law applicable to them.[32] Spanish legislation does not specifically provide for international arbitration held in Spain. Whether or not the Spanish courts will apply the Law of 1953 to these arbitrations will depend largely on the criteria they use to determine the nationality of the resulting award.[33] If they employ a purely geographic criterion, deciding that arbitrations carried out in Spain result in Spanish awards, then the Law of 1953 will apply. If, on the other hand, they determine that other criteria, such as the applicable law chosen by the parties, their nationality or the object of the dispute, cause the resulting award to be non-Spanish, then recognition of the award will most likely be subject to the terms of the New York Convention which indicates that the Convention is applicable to awards rendered in another state as well as to those awards that are not considered national in the nation where recognition is sought.[34]

Given the traditional application of geographic criteria by states to determine the procedural law applicable to arbitrations as well as the nationality of the resulting award,[35] it would appear that an international arbitration held in Spain would produce a Spanish award and the proceedings would be

31. *See supra* note 1. Spain ratified the New York Convention on May 12, 1977, B.O.E., July 11, 1977.

32. For the purposes of this article the author defines "international arbitration" in a manner similar to that found in Royal Decree 1094. This Decree limits the jurisdiction of the Spanish Court of Arbitration to the administration of "international arbitrations" or those arbitrations between parties having different nationalities or domiciles in different countries. However, international arbitration is often more broadly defined to include even those arbitrations between parties of the same nationality whose dispute is closely linked to international commerce. *See, e.g.*, French Decree No. 81-500, *supra* note 5. This Decree modified article 1492 of the French Code of Civil Procedure, which now reads "Arbitration is international if it implicates international commercial interests." The ICC Rules limit the Court of Arbitration's activities to the administration of business disputes of an international character. This international character has been broadly interpreted to include even those disputes between parties of the same nationality whose dispute stems from a contract affecting international commerce. W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 10.02 (1984).

33. The Spanish Supreme Court has not yet determined whether the Law of 1953 will be applied to international arbitrations held in Spain. Although the Spanish Code of Civil Procedure went through substantial reform in 1984, the sections applicable to the enforcement of foreign arbitration awards were left untouched. Consequently, an opportunity to indicate, in the text (as opposed to relying on judicial interpretation), that these sections are applicable to foreign arbitration awards, these reforms also failed to clarify the status of the international awards rendered in Spain.

34. Art. I.1 states "It (the Convention) shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

35. 2 J. Wetter, THE INTERNATIONAL ARBITRAL PROCESS 397 (1979).

scrutinized pursuant to the Law of 1953. This conclusion is given further support by art. 8.2 of the Spanish Code of Civil Procedure which provides that Spanish laws are the only ones applicable to proceedings held in Spanish territory.[36]

Despite the traditional weight given to geographical criteria, it can be argued that the Spanish Supreme Court will, in given circumstances, determine that the nationality of an award and the law regulating the arbitral procedure may depend more on the law to which the parties have subjected the proceedings than on the situs of the arbitration. The Court has firmly supported the concessions made to party autonomy under the New York Convention.[37] Regarding awards rendered in other countries, it has stated that both the parties' choice of law and the arbitral agreement will prevail over the law of the country where the arbitration is held.[38] The Court's liberal interpretation of the Convention indicates that, when determining the applicability of the Convention to awards rendered in Spain, it may not necessarily feel bound by geographic criteria and that it may give greater weight to the parties' autonomy. When the parties have decided to arbitrate in Spain within the framework of the Spanish Court of Arbitration and pursuant to the UNCITRAL Rules, it is unlikely, as will be seen, that they intended to subject their arbitration proceedings to the contradictory mandates of the Spanish Law of 1953. When, in addition, they expressly provide for a non-Spanish law to regulate the arbitration and one or both of the parties is not Spanish, the Spanish Supreme Court might determine that the award is non-national as described by the Convention's art. I.1 and that the New York Convention is therefore applicable.[39] In such cases the Law of 1953 would not be applied.

36. It is not clear from art. 8.2 whether "proceedings" refers exclusively to judicial proceedings or whether such reference also includes arbitration proceedings.

37. Exemplary of the concessions made to party autonomy in the New York Convention are arts. V.1.a. and V.1.d. Art. V.1.a permits a court to deny recognition of a foreign award when "The said agreement is not valid *under the law to which the parties have subjected it* or, failing any indication thereon, under the law of the country where the award was made." Art. V.1.d. permits a court to deny recognition of a foreign award when "The composition of the arbitral authority or the arbitral procedure was *not in accordance with the agreement of the parties*, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." (Emphasis added.)

38. T.S. Feb. 10, 1984.

39. The author submits that, should the above question arise, the Spanish Supreme Court will be forced to face questions not unlike those presented in the renowned *Gotaverken* case. In that case, the French Cours d'appel determined that where two foreign parties chose Paris as the situs for their arbitration, and for reasons apparently unrelated to potentially applicable French legislation, the award rendered was not French and therefore not subject to appeal before the French courts. This decision was rendered in the face of no determinative French law on the question. This legislative gap was subsequently filled by the promulgation of a decree regulating international arbitration conducted in France. On the *Gotaverken* case, *see generally* Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981).

Sound arguments regarding the application of the Law of 1953 to international arbitrations held in Spain can be made both ways. What is certain is that there exists a need for legislative clarification. In the meantime, parties engaged in international arbitrations in Spain will be uncertain as to the law applicable to the proceedings.

II. Royal Decree 1094

A. Substantive Content

In its second paragraph, Royal Decree 1094 indicates its purpose: to establish in Spain an institution capable of efficiently administering international commercial arbitrations, particularly those involving parties from Latin America. To this end, Royal Decree 1094 authorizes the Spanish Superior Counsel of the Official Chambers of Commerce, Industry and Navigation to establish the necessary institution for the administration of international commercial arbitrations. The Decree makes it clear that all of the international treaties ratified by Spain will be applied to the arbitrations administered by the projected institution and that this institution shall be competent to administer those arbitrations stemming from arbitration agreements between parties who, at the time the agreement was entered into, had their habitual residences, domiciles or company headquarters in different countries.[40] Finally, the Decree indicates that the establishment of this institution shall in no way affect the competence of other persons, whether physical or legal, to carry out similar arbitrations.[41]

Pursuant to Royal Decree 1094 the Ministries of Justice and of Economy and Commerce established the charter of the Spanish Court of Arbitration.[42] This charter provides, in part, for: 1) an institution which fulfills an administrative and not a decision-making role; 2) an open list of arbitrators,

40. The jurisdiction of the Spanish Court of Arbitration is considerably narrower than that of the ICC Court of Arbitration. Art. 1 of the ICC Rules states that the ICC Court of Arbitration shall only consider "business disputes of an international character." The ICC Court has interpreted the international character of an arbitration broadly so as to include disputes between parties of the same nationality when the contract affects international commerce. W. Craig, W. Park, J. Paulsson, International Chamber of Commerce Arbitration § 10.02 (1984).

41. According to the Decree, the Spanish Court of Arbitration is not the only entity or person capable of carrying out international arbitrations. Though no other institutions now exist in Spain which administer international arbitrations, the Decree makes it clear that the establishment of the Spanish Court of Arbitration does not preclude other persons from exercising such functions. Such persons may be legal or physical.

42. The charter is published in the 1984 edition of the *Revista de la Corte Espanola de Arbitraje*. In addition, the charter, Royal Decree 1094, the UNCITRAL Rules, a schedule of fees and model arbitration clauses are contained in a booklet published by the Court. Requests for this booklet should be sent to: La Corte Espanola de Arbitraje, Claudio Coello, 19, 28001 Madrid. Telephone: 275-3400, Telex: 23227 CCCIN-E.

in which special emphasis is placed on the inclusion of Latin American arbitrators; 3) use of the UNCITRAL arbitration Rules without prejudice to other rules which the parties may choose in their place; 4) and the use of the Court, where the parties have not provided otherwise, as the appointing authority pursuant to the UNCITRAL Rules. In general, the Court's functions and powers are similar to those of most of the commonly used European arbitration institutions.[43]

B. Potential Conflict between Court of Arbitration and 1953 Law

The arbitrations to be administered by the Spanish Court of Arbitration are, unless altered pursuant to art. 1(2) of the UNCITRAL Rules, in conflict with the requirements of the Spanish Law of Private Arbitration of 1953.[44] If the Law of 1953 is applicable, it will prevail. The Spanish Court of Arbitration's charter was established pursuant to a Royal Decree. A Royal Decree, passed by the Cabinet of Ministers, must yield before laws, such as the Law of 1953, which are enacted by the Spanish Parliament.

An example of such a conflict is where arts. 5 through 8 of the UNCITRAL Rules to be used by the Court provide for third parties to choose a sole or third arbitrator (depending on the parties' agreement) when the parties are unable to agree on such choice. This directly contradicts art. 22 of the Law of 1953 which prohibits the parties from delegating the choice or arbitrators to third parties. According to the Law of 1953, when the parties are unable to agree on the arbitrators they must obtain a judicially appointed arbitrator.[45]

Another example of a conflict between the Law of 1953 and the Court's activities is that the Law of 1953 requires the parties, even when an arbitration clause is contained in the contract from which the dispute arises, to enter into a subsequent *compromiso* drawn up by a notary before they are obligated to arbitrate.[46] The charter of the Spanish Court of Arbitration, on the other hand, calls for arbitration whenever the parties, in their contract, use the Court's model clause or any other clause which submits the dispute to the Court's administration.[47] In keeping with international practice and treaties, neither the Court's charter nor the UNCITRAL Rules require a subsequent notarized *compromiso* to oblige the parties to arbitrate.

There exist a number of other discrepancies between the UNCITRAL

43. For a comparative examination of the world's major arbitral institutions *see* Wetter, *supra* note 35, 119–254.

44. *See* discussion *infra* text accompanying note 54.

45. Law of 1953, art. 9.

46. *Id.* at art. 18.

47. Art. 4 of the Court's charter.

Rules and the Law of 1953. The UNCITRAL Rules do not require the division of the proceedings into four equal time periods corresponding to the presentation of claims, counterclaims, evidence and finally the rendering of the award.[48] In addition, the UNCITRAL Rules do not, as does the Law of 1953, require the arbitrators, in an arbitration according to law, to be attorneys.[49]

The above-mentioned provisions of the Law of 1953 are drafted in language which is likely to be interpreted by the Spanish courts as mandatory.[50] Other provisions, in contrast, indicate that the parties may provide for arbitration according to equitable principles[51] or that the parties may choose to arbitrate with one, two or three arbitrators.[52] Since the Spanish courts have not yet decided these questions, the Spanish Court of Arbitration, as well as the arbitrators, would be wise to adapt the UNCITRAL Rules to the Law of 1953 for those arbitrations held in Spanish territory.

The UNCITRAL Rules themselves provide for adaptation. Art. 1(2) states that: "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." In effect, art. 1(2) incorporates into the Rules, the mandatory provisions of the law applicable to the arbitration.[53] It is therefore theoretically incorrect to speak of a conflict between the UNCITRAL Rules and the law applicable to the arbitration. However, given the legal uncertainty existing in Spain, the UNCITRAL Rules as applied by the arbitrator may in fact conflict with mandatory provisions of Spanish law as subsequently applied by the Spanish courts.

Adaptation of the UNCITRAL Rules to the Law of 1953 will be a difficult task. The arbitrator will be forced to determine whether the Law of 1953 is actually applicable. In the face of uncertainty, the careful arbitrator who wishes to render an enforceable award should assume that the Law of 1953 is applicable. Thereafter, he will have to determine which provisions of the Law of 1953 are applicable and alter the UNCITRAL Rules accordingly. However, the arbitrator may find that the formation of the arbitral tribunal has already contravened the Law of 1953. Such might be the case where the arbitrating parties have failed to enter into a *compromiso*[54] or where

48. *See* discussion *supra* text accompanying note 23.

49. Law of 1953, art. 20.

50. These provisions are drafted in the imperative sense. In addition, art. 3 of the Law of 1953 states that: "An arbitration, in order to be valid, must meet the requirements of this law."

51. *See supra* note 20.

52. Law of 1953, art. 21.

53. *See generally* Boksteigel, *The Relevance of National Arbitration Law for Arbitrations under the UNCITRAL Rules*, 1 J. INT'L ARB. 223 (1984).

54. *See* discussion *supra* text accompanying notes 9–16.

the arbitrator has not actually been directly chosen by the parties.[55] Even if the arbitrator can successfully adapt the proceedings to the Law of 1953, the parties are likely to find themselves arbitrating according to a procedure very different from and less efficient than the one they had originally anticipated.

The question therefore arises whether an arbitration administered in Spain by the Spanish Court of Arbitration pursuant to the UNCITRAL Rules is enforceable in Spain or elsewhere. If the Law of 1953 is applicable, the award may well be unenforceable as a domestic Spanish award because of the above-mentioned conflicts. Furthermore, it may, based on the same conflicts be set aside in Spain. Pursuant to art. V.1.e of the New York Convention the courts of other signatory countries would thereafter be able to deny recognition and enforcement to such an award since it had been set-aside in the country in which it was rendered.[56] The problem is clear: if the Spanish courts apply the Law of 1953 to international arbitrations held in Spain and administered by the Spanish Court of Arbitration, they will largely frustrate Royal Decree 1094 and might impede the growth of international arbitration in Spain. Unfortunately, until there is a legislative clarification of the issue, it is not clear whether the Spanish courts will apply the Law of 1953 to these arbitrations.

In order for the Spanish Court of Arbitration to effectively administer arbitrations which produce enforceable awards, the scope of application of the Law of 1953 must be clearly defined for the courts, arbitrators and parties, otherwise they will not know when and to what extent the Law of 1953 is applicable. In addition, the text must be altered so that when it is applicable to international arbitration held in Spain, it does not interfere excessively with those procedures anticipated by the parties in their agreement.[57]

55. *See* discussion *supra* text accompanying notes 19–20.

56. Art. V.1.e. of the New York Convention states one reason for which a court may refuse the recognition and enforcement of a foreign award: "The award has not yet become binding on the parties, or has been set-aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

57. The Law of 1953 might, for example, be altered along the following lines. First, the text would clearly indicate that it is applicable to all arbitrations held in Spain. Second, it would establish the criteria for distinguishing those arbitrations which implicate primarily national interests and those which implicate primarily non-national interests. These criteria would reflect Spanish policy concerning the extent to which domestic interests needed protection and might take into account a number of factors including both the object of the dispute and the nationality of the parties. Third, the amended law would indicate that the primarily national arbitrations would be subject to the law's present provisions, as modified to protect domestic interests.

III. Conclusion

Spain is attempting to establish itself as a major situs for international arbitration, particularly those arbitrations related to Latin America. Royal Decree 1094 lays the groundwork for an international arbitration institution capable of competing with other similar institutions found throughout the world. Nonetheless, this institution's activities, due to the lack of well-defined and supportive legislation, are threatened by the application of the Spanish Law of Private Arbitration of 1953.

By promulgating Royal Decree 1094, the Spanish Government has put the cart before the horse. It has established an institution and procedures well adapted to administering international arbitrations in Spain, yet it has failed to enact legislation which will require the cooperation of the Spanish courts. Until such legislation is enacted the parties, arbitrators and the Spanish Court of Arbitration itself, should integrate, to the extent possible, the mandatory provisions of the Law of 1953 into all arbitration proceedings held in Spain.