The Impact of Uniform Law On National Law: Limits and Possibilities. Commercial Arbitration.

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1. From your national law perspective, would it be proper to include within the notion of "Uniform Law" usages of the trade, or "customs", general principles of law, general principles of contract law or of the law of obligations, transnational law, lex mercatoria, general rules of procedure?

[JATL] No, it would not be proper. Spain is a country which belongs to the continental Law system, like France, Italy, Portugal or Germany. That is the reason why most topics which have been included in the question have also been the matter of a specific regulation by Spanish Law. This means that they do not need to be included in Uniform Law to be applied in Spanish disputes and to decide them. In fact, they can be applied as a part of Spanish legal system, and not for being included in Uniform Law. Under Spanish law, several of these topics have to be considered sources of Law. This the case of the "usages of the trade", of the "customs" and of the "general principles of law". Art. 1.1 of Spanish Civil Code states that the sources of all the Spanish legal system, not only of the Civil Law, are "the Law, the custom and the general

principles of the Law". This order also means a hierarchy, where the lead role is played by law, which is settled in the first and upper place (art. 1, n. 3 and 4 of Civil Code), because it is approved by legislative power (a two chambers Parliament: Congress and Senate). Consequently, the other two sources cannot settle a rule which is contrary to law, because it would be void (art. 1.2 of Civil Code). It is obvious that usages of the trade or customs can be integrated into Spanish legal system as customary rules –second level sources of law–, and be consequently applied as a custom, but these customary rules are only valid if there is not a law directly applicable on the matter or if they are not contrary to any legal rule. General principles of contract law and of the law of obligations are expressly included in the regulation of Spanish Civil Code (arts. 1089, 1101, 1254, 1255, 1261, etc.), and may be summarized in several basic principles, which are common with other continental legal systems: perfection of the contract when offer and acceptance join, need of a consideration which is called "causa" (reason why), freedom of agreements with very few limits (compulsory rules, public policy, *bona fides,* etc.), validity of *nuda pacta,* also called principle of freedom of formalities.

Otherwise, the question suggest at least two different senses of the expression "Uniform Law". First one, referred to substantive law, which is to be applied by the Judge or the Court at the end of the process, in the judgement, to decide the dispute. The other one, probably is used to designate the so called, in Spanish, "Ley modelo de arbitraje" (Spanish words for "Model Law of Arbitration"), which is a procedural law on the matter of arbitration approved by UNCITRAL in 1985. The Spanish Law of Arbitration 60/2003, approved on December, 23, 2003, seems to be a faithful copy of the Model Law, but there is an important difference: Spanish Law is applicable to any arbitration process, not only to international commercial arbitration, but also to solve disputes between non traders people. As a result of this fact, we can consider that legal and procedural world in Spain is divided in two very different and separated fields: on one hand, the field of state Courts and, on the other hand, the field of Arbitration, and this two fields have almost no intercommunication between them.

2. To which extent your country has incorporated Uniform Law as national through treaty ratification, other enactments or court decisions?

[FLS] As we have just said, the legal system of Arbitration in Spain is currently settled basically by Law 60/2003, of December 23, of Arbitration (forward, LA), certain international treaties ratified by our country (Convention of New York of 1958, between others) and many legal and administrative rules applicable to certain special kinds of arbitrations (labour, consumers or intellectual property arbitrations).

Spanish Law in force tries to improve the defects of the former Law of 1988 and is based in the Model Law of June 21 of 1985 approved by the United Nations Commission for International Commercial Law (UNCITRAL), recommended by General Assembly in its resolution 40/72, of December 11 of 1985, to unify the rules which regulate international arbitrations. In this sense, preamble (ap. I) of LA says that "its principal criterion of inspiration consists of founding the Spanish legal system of arbitration on the Model Law (…). Spanish legislator follows the recommendation of United Nations and takes Model Law as a basis and, moreover, takes in account the following reports of that Commission with the purpose to incorporate the technical advances and to pay attention to the new needs of arbitral practice, particularly in the matter of requirements of arbitral agreement and of taking cautionary measures". This has been the principal reason why a new Law of Arbitration has been approved in Spain, only fifteen years after Law of 1988 was approved.

Moreover, the LA of 2003 follows the monist system, that is to say, Spanish legislator has chosen a single regulation for both, international and domestic arbitration and, consequently, with a few exceptions the same rules are applied to both kinds of arbitration. The reason is that "this Law starts form the basis –and this is also the opinion of the current trends on the matter– that a good regulation of international arbitration has to be also good for domestic arbitration and viceversa". The Model was born inside UNCITRAL, and was specifically created for international commercial arbitration; but it foundation and solutions are also perfectly valid in most cases for domestic arbitration" (Preamble of LA, ap. II).

In short, Spain has fully incorporated into its legal system the Model Law of arbitration of UNCITRAL through the approval of LA of 2003 by Spanish legislative power (which is called "Cortes Generales"), which is a faithful copy of that one and applicable to domestic and international arbitration.

3. To which extent your national law should be considered as including Uniform law when designated as proper law of the contract? The law governing the tort? When your country is designated as place (seat) of the arbitration?

[JATL] 3.1. The answer is negative. When Spanish law is designated as governing the contract, this reference is understood to be made to the national substantive rules of contracts, that is to say to domestic law. That means that designation must be understood to be made to those rules which are included in Spanish Civil Code, as mentioned above, in the first reply. And this rules are the applicable ones to decide the dispute. This is the solution settled in article 34.2 of Spanish Law of arbitration for this specific case.

3.2. The answer is also negative for the same reason. The designation is understood to be made to the national substantive rules governing torts, unless the reference was expressly made to the conflict law system, on the basis of article 34.2 of the Law of arbitration. Torts are called "non–contractual liability" under Spanish law, and they have their general regulation and principles in article 1902 and followings, until article 1910, of the Civil Code. The general principle in the Civil Code regulation is based on the idea of negligence of the damager, which links with the roman rule called *culpa aquiliana,* because it was introduced by the *Lex Aquilia.* Otherwise, this general rule has been changing in a double sense: first, through the judgements of the Courts, principally of Spanish Supreme Court, which have been fashioning the rule and moving it to a *de facto* strict liability system*;* second, through special laws governing different matters, the nature of them claim also for a strict liability system, usually because they involve dangerous activities for persons or general population (driving motor vehicles, hunting, commercial aviation, atomic energy, etc.). Consumer protection rules, settled in Spanish Constitution as a general principle (articles 51 and 53) and developed in a specific Law which was recently reformed (on November, 2007), have also helped to this change, because it has stated strict liability rules of producers, importers or retailers, in the interest of consumers.

3.3. The designation of Spain as place of the arbitration means that the arbitral process is governed by Spanish Law of arbitration, as it is settled in article 1 of the same. We have just explained how the references to Spanish law are understood to be made to substantive rules, not to the conflict law system. The sense and interpretation of article 1 is understood to be completed by article 34.2 of Spanish Law of Arbitration.

4. To which extent legal notions in your country applicable in the process of deciding a dispute by courts or arbitrators (including public policy and international mandatory rules or lois de police (national or foreign)) will accept Uniform Law incorporated in the foreign law (substantive or procedural) applicable, as the case may be, to the contract giving rise to the disputes/at the foreign arbitral place or seat?

[JATL] Answer would be negative if the sense of the question, and principally of the expression "legal notions", is referred only to "legal basic concepts".

But there is an article in Spanish Arbitration Law that states that the legal rules applicable to decide the dispute can be designated by the parties. It is article 34.2 which states the following rule:

"(…) Cuando el arbitraje sea internacional, los árbitros decidirán la controversia de conformidad con las normas jurídicas elegidas por las partes. (…) – – Si las partes no indican las normas jurídicas aplicables los árbitros aplicarán las que estimen apropiadas".

This may be the English translation:

"(…) In the case of international arbitration, arbitrators will decide the dispute according to the legal rules designated by the parties(…). – – If the parties have not designated any applicable legal rules, arbitrators may apply those which were the most accurate in their opinion".

This designation is always referred to foreign law and makes applicable, to decide the dispute, any rule of any legal system and of any State. That means that the reference is intended to be made to substantive rules. In fact, this also means that if Uniform Law is incorporated, in any way, to the designated foreign law is also able to be applied to decide the dispute. Spanish Law goes more far than Uniform Law, because the last requires the previous application of the system of rules of conflict (art. 28.2 of Uniform Law) and this requirement has disappeared of the text of article 34.2, second paragraph, of Spanish Law.

Application of Uniform Law by Spanish Courts to decide disputes is also possible, but more difficult. There are Spanish rules of International private law settled in articles 9 to 12 of Spanish Civil Code which states several possibilities of application of foreign law by Spanish courts to

decide disputes. Possibly the most important of these rules, because it involves the general principle on the matter, is settled in article 12.2 which establishes that:

"La remisión hecha al Derecho extranjero se entenderá hecha a su ley material (…)".

The legal expression can be translated into English in this way:

"The reference made to foreign law is understood to be made to its substantive law (…)".

The meaning of this rule is that reference is not made to the foreign system of conflict of rules. But this also means that substantive foreign law can be applied by Spanish Courts to decide a dispute when connection rules designate foreign law as the applicable one. That are the cases of articles 10.3, 10.6, 10.7, 10.8, 10.9, referred to contractual obligations, donations, torts and non-contractual obligations.

In the matter of contracts, general rule is even wider. It is settled n article 10. 5, which states:

"Se aplicará a las obligaciones contractuales la ley a que las partes se hayan sometido expresamente, siempre que tenga alguna conexión con el negocio de que se trate; en su defecto, la ley nacional común a las partes; a falta de ella, la de la residencia habitual y, en último término, la ley del lugar de celebración del contrato".

English translation of the rule may be made as follows:

"Applicable law to contractual obligations will be that one to whom the parties had expressly submitted, if it has any connection with the matter; in default of submission or connection, the common national law of the parties will be applicable; in default of this, the law of the residence of the parties and finally the law of the place where the contract was made".

It is easy to understand that there are two ways to apply Uniform Law in its first sense to decide disputes in Spanish arbitrations or procedures. First one takes place in the matter of arbitration, under article 34.2 of Arbitration Law; the other, appears under Spanish international private Law system, under articles 9 to 12, specially article 10.

But application of foreign law has is not unlimited. Under Spanish Law they exist several legal tools which ban the application of foreign law. The most important and principal is the so-call *"excepción de orden público"*, which means approximately a ban to application of foreign law based on "public policy" or *lois de police*. This means of defence of Spanish legal system denies

the application of a foreign law which is opposite to the basic legal principles of Spanish legal system (for example, freedom of agreement, unjustified enrichment, etc.).

5. To which extent arbitral awards are officially published or informally disseminated in business and legal circles in your country? Is your country a stare decisis country? If so, to which extent stare decisis applies to arbitral determinations/awards? To which extent issue preclusion or collateral estoppel (if accepted in your legal system) is applicable in arbitration (from court of law to arbitral tribunal and viceversa/between arbitral tribunals)?

[FLS] 5.1. Arbitral awards are not published in Spain in official publications (those which depend on the State or on a Public Administration). There exist in Spain several private publications in which one can find selections of arbitral jurisprudence: principally, the *Boletín del Tribunal Arbitral de Barcelona* (Bulletin of Arbitral Tribunal of Barcelona), the *Revista Vasca de Derecho Procesal y Arbitraje* (Basque Review of procedure Law and Arbitration) or the *Revista de la Corte Española de Arbitraje* (Review of Spanish Court of Arbitration).

This shortage of publications –common to Spain and other countries– is not strange if we think that one of traditional advantages of arbitration is to avoid publicity from third persons. In this sense LA of 2003 (art. 24.2) imposes professional secret to every person who hold arbitral tasks. That is the reason why several internal regulations of Spanish arbitral institutions expressly state that arbitral awards cannot be published (that is the rule of art. 19 of arbitral regulation of Arbitral Tribunal of Barcelona, which states that the awards will not be published unless the parties expressly agree with it).

5.2. The Anglo-Saxon system of *stare decisis*, the bounding judicial precedent, does not exist in Spanish legal system. Contrary to that, Spanish Constitution of 1978 states that judges are independent and are only submitted to the realm of law (art. 117.1). and the Civil Code states that the judgments of the Supreme Court hold a complementary task of the legal system, but they are not a source of law (art. 1.6). The decisions of the Supreme Court is accepted by the lower Courts because of its authority and not because they have a binding value.

Consequently, the introduction into Spanish legal system of *stare decisis,* which is a foreign of our system and of our legal tradition, would suppose a substantial change which would require at

least a constitutional revision of the independence of the judges and a modification of the system of sources of law.

5.3. If preclusion or collateral estoppel mean *res iudicata,* there is no doubt that this rule is fully accepted in our country concerning to arbitration and is applied from courts of law to arbitral tribunals and viceversa.

— *From courts of law to arbitral tribunals (effectiveness of* res iudicata *of a definitive sentence inside an arbitral process):* On the contrary than the former law, LA of 2003 does not mention expressly the exclusion of an arbitration of the questions which have been previously decided by a court of law in a definitive way. It is an obvious statement because there is no doubt that all decisions of the courts which cannot be appealed have the effectiveness of *res iudicata* (except in a few exceptional cases: art. 447 of Spanish Law of procedure). That means that it is not possible to begin another suit with identical purpose than this other which has been previously decided (art. 222.1 of Spanish Law of procedure).

— *From arbitral tribunals to the courts of law (*res iudicata *of an arbitral award in a court procedure):* Spanish Constitutional Court has declared several times that arbitration is "a jurisdictional equivalent through which the parties can obtain the same purposes than they can get with civil jurisdiction, that is to say, obtaining a decision of the dispute with the same effects than *res iudicata"* (Sentence of the Constitutional Court 62/1992, March, 22, between others). In the same sense, art. 43 of LA states that "the firm arbitral award has the same effects than *res iudicata".* A firm award is one which cannot be appealed. An then, the article adds the only means of attacking a firm arbitral award is through a revision, according to the process established by Law of civil Procedure for the firm Court sentences. The purpose of the legislator has been to give to arbitral awards the same effects than the *res iudicata* for the Court sentences or judgements. So that, it is applicable to a firm award the same doctrine about the double effect of *res iudicata:* positive, or prejudicial, and negative, excluding a new dispute with the same object in both, a court or an arbitral process (in this sense, many sentences of Spanish Supreme Court: June, 4, 1991; July, 28, 1995, between others).

In both cases –a new arbitral or court process–, *res iudicata* can be appreciated *ex offitio by* judge or arbitrator (that is to say, even the defendant has not alleged it) or be opposed by the defendant

in the first possible moment (answering the lawsuit), through the tool called "procedure exceptions" (art. 22 of LA and 421 of Law of Civil Procedure).

6. To which extent national laws and state courts in your country are "arbitration friendly"? Does your answer change depending on whether a state party or a state interest are directly involved in or affected by the resolution of the dispute or the contract may be labelled as a "public" or as a "administrative" contract under your legal system? Whether the arbitration is "international" or "domestic"? Whether its seat/place is within/without your country?

[JATL] The answer must also be negative. Spanish courts never are "arbitration friendly" neither in the double sense of the expression as arbitrators and as *amici curiae,* which is an unknown figure in Spanish legal system.

As we have said before, Spanish legal system is a closed system which is based on the primacy of law. The role of judges and courts does not consist in creating Law, but only in applying the existing laws, which have to be approved by the legislative power (the double chamber Parliament).

There is only one case we can consider that a Spanish judge plays a similar role, but not the same, than an *amicus curiae.* This is the case we are going to describe. Spanish Law of Civil Procedure has stated a previous trial, just at the beginning of the process, which is called "audiencia previa", in which the Judge is legally compelled to encourage to the parties to solve their differences and to get an agreement. If the result of the trial is positive, the process ends and the agreement is enforceable. But experience has showed that less than a 5 per 100 of the processes get this desirable kind of ending. Usually this previous trial is a nonsense where the parties repeat their own initial positions and explain the evidences they want to use in the principal trial which is called "juicio".

The answer would not change if they are public interests or contracts involved or affected. Under Spanish system there is a special kind of process for the disputes in which Public Administration is involved. It has been created by a special Law, called "Ley de la jurisdicción contencioso administrativa" (which can be translated into English as "Administrative jurisdiction Act"). There also exist special Courts, called "Tribunales contencioso administrativos", that is to say

"Administrative Disputes Courts". It is supposed that this kind of process is neutral, but this seems not to be true. Public Administration has a privileged position, far enough of the neutrality which is the greatest guarantee for the parties in any kind of processes. A few details will give a good evidence of this: plaintiff cannot prepare a suit when he likes, but he has to attack a previous act of the Administration; then, he is compelled by the time: two months to announce his intention to present a suit; twenty days to prepare and present it before the Court from the day of summons, etc. All the process is extremely formal an bounded to Law and the final judgement is only the result of strict application of Law. So, there would not be any change in the reply in the case that Public Administration were one the parties or any public interest were involved in the dispute.

The answer neither changes in the following question. It is a doubtful matter that Spanish Pubic Administration can be submitted to an Arbitral process. Certainly, Spanish Law 30/1992, about "Legal System of Public Administration" has settled the possibility that Spanish Public Administration may be submitted to Arbitration in his disputes with citizens, but it is only a theoretical possibility. One cannot forget that submission to an arbitral process requires a previous agreement, signed up by the parties of a contract or of another kind of legal relation. Obviously, Administration will always refuse to sign this kind of agreements. He feels far more comfortable in his special process, as we have said above, in which their own possibilities to win increase very much.

Finally, the answer of the two last questions are also the same. No changes at all an no possibilities of any kind of "arbitration friendly" if Spanish courts are involved.

7. To which extent arbitral awards are subject to control on the merits (including from the outlook of private international law or choice-of-law methodologies, rules or principles applicable or accepted in your country) or in respect of procedural notions or matters (e. g., due process) when rendered in your country or (if rendered abroad) when brought for enforcement/recognition in your country?

[FLS] 7.1. Arbitral awards rendered in Spain can be controlled by courts in several ways. These controls, and also the cases of help of courts to arbitration, have to be limited to the cases which have been expressly previewed by the Law, because Spanish legislator think that the points of

contact and interferences between arbitration and public jurisdiction have to be as less as possible (arts. 7 and 8 of LA).

These are the cases of control, when arbitration is rendered in Spain:

— *Nullity of the award* (arts. 40 to 42 of LA): The means of attack an arbitral award is through the so called *"acción de anulación"* (which can be translated into English as an lawsuit of nullity) which will be decide by the *Audiencia Provincial* (Spanish kind of Upper Court which has its competence all over the territory of a territorial division called *"provincia"*). Spanish legislator does not consider that nullity of an arbitral award is an appeal, because in most cases it cannot replace the award by another different resolution, but only declare that a previous decision is not valid.

To get the nullity of an award, the interested party has to allege and prove some of the reasons which strictly stated by art. 42.1 of LA. Several of these reasons are referred to the formal procedural rules (e. g., the party was not properly notified about designation of the arbitrator or he could not, for any reason, to defence himself: art. 41.1.b of LA); other to the substantive rules (i.e., the award is contrary to *"orden público",* which means public policy: art. 41.1.f). Some of these reason can be declared by the Court *ex offitio*, that is to say, even none of the parties have alleged it (e.g., the two cases above mentioned or a decision on a matter unable to be subject of an arbitration, etc.). *"Orden público"* means the essential foundations of social life, (the basic principles of it).

— *Revision of an arbitral award* (art. 43 of LA): If an award has not been attacked to get the nullity it becomes unattackable, that is to say, firm. A firm award only can be attacked through a new suit of revision which only can be decided by Spanish Supreme Court (or by the Upper Justice Courts of the Autonomous Communities), according to the general rules stated in the Law of Civil Procedure. There are only four cases which allow the revision when new facts appear or have been known which can modify the existing award. These four cases are included in art. 510 of Law of Civil Procedure.

— *Enforcement of an award* (arts. 44 and 45 of LA): Only the State Courts can enforce an award. And sometimes, this fact give an opportunity to the Courts to control validity of the award, especially if the lawsuit of nullity was not presented. In the moment of enforcement, the Court, en fact, has the opportunity to control if the dispute was able to be subject of an arbitration

or if the award is accurate or contrary to *"orden público"* (public policy). In that cases enforcement has to be refused by Court, *ex offitio* as we have said above.

7.2. Enforcement in Spain of arbitral awards rendered in foreign countries: It can be made according to international treaties which have been ratified by Spain. Principal of these treaties is the Convention of New York of 1958, which was signed by Spain in1977. It is well known that this Convention states a system very favourable to *exequatur* of foreign arbitral awards. Spain did not oppose any reservation to the Convention, so that it is applicable to all kinds of foreign awards, even if they have been rendered in States who are not parties of the convention. That is the reason why, the Preamble of LA says that "in Spain is no necessary a domestic legal system of *exequatur* of foreign arbitral awards", and, a s a consequence, the art. 46.2 of LA only remits to the Convention of New York.

As it is also well known, the Convention of New York has stated very few cases of refusal of *exequatur,* and they are very similar to the causes of nullity of a domestic award. The convention also distinguish between the reasons which only can be appreciated if alleged by one of the parties and the reasons which can be declared by the Court *ex offitio,* and inside the last, that the matter was not subject to arbitration or the award is contrary to the public policy. So that, in Spain the control of state Courts of foreign arbitral awards, through the *exequatur,* which is decided by the low-level Court (in Spanish, *Juzgado de primera instancia)*, is substantially the same that the control through the lawsuit of nullity of domestic awards, because the reasons which allow the control of both of them are very similar.

8. What is the notion of and role played by public policy in the recognition or enforcement or arbitral awards rendered abroad? Of lack of arbitrability? International mandatory rules or lois de police (national or foreign)? To which extent any of these reservations/notions serve the purpose of advancing primarily local or domestic notions regarding both substantive law or procedural law matters?

[FLS] Two of the reasons to refuse the *exequatur* of a foreign arbitral award are, as we have seen, the lack of arbitrability of the dispute and the breach of public policy. Both of them can also be appreciated *ex offitio* by the Court and are stated by Convention of New York (par. V.2).

— Lack of arbitrability of the dispute means that arbitrators have decided questions which cannot be subject to an arbitration, according to national law. In the case of Spain it means that the award has decided a dispute referred to matters that the parties cannot dispose on them (art. 2.1, *a sensu contrario,* of LA). The current Law, on the contrary that ancient Law of 1988, does not states a list of cases which are excluded from the arbitration. Nevertheless, it is admitted that the ancient art. 2 continues being applicable to this matter, and, consequently, it is not possible to submit to an arbitration the following matters: a) When the same question has been decided by a firm judicial judgement, except if it is an aspect of its enforcement; b) When they are inseparably joined to another one that cannot be subject to disposal by the parties; c) When the dispute is referred to matters in which the Public Attorney has to act on behalf of persons who lack capability or legal representation or cannot act by themselves (minors, incapacitated, etc.). Spanish Civil Code adds another cases to this list, as the matters referred to personal status, like nationality, majority, minority or marital status.

— Public policy means, as Spanish Constitutional Court has stated, the general organization of society and its basic principles. Currently, the matters concerning to constitutional system, specially the matter of human essential rights. More specifically, the Constitutional Court has said that, even the full effectiveness of human rights and public freedoms only can be reached under Spanish sovereignty, Spanish authorities and judges cannot recognize foreign resolutions or awards which attempt against that rights, because it would suppose to avoid the efficacy of that rights (Sentences of the Constitutional Court 54/1989, of February, 23, and 132/1991, of June, 17).

The causes of refusal of *exequatur* have been understood by Spanish Supreme Court in the most favourable sense to enforceability of foreign arbitral awards. In this sense, the Supreme Court has said that Convention of New York tries to improve commercial international relations between States and, consequently, international commercial arbitration states a true presumption of enforceability (Decision of the Supreme Court of February, 10, 1984). The Supreme Court has specially tried to define clearly the notion of public policy and has said that international Conventions allow to avoid the strict application of domestic law in order to formalities, e. g. the number of arbitrators or the proceedings (Decision of the Supreme Court of October, 8, 1981).

It is clear that these notions (particularly the notion of public policy) try to protect the local mandatory laws, both substantive or procedural ones. And this seems to be reasonable, because, on the opposite, a foreign award could be receive a most favourable treatment than a domestic one, and even a judicial judgment. The effectiveness of arbitration requires that the awards have a high value and procedural efficacy, buy if they have accomplished minimum requirements of the legal system where they are going to be recognized or enforced.

9. Having in mind your answers to questions 3-8 above, to which extent arbitral awards or determinations influence, or may be considering as possibly influencing, state courts decisions or legislative change in your country? To which extent courts of law in your country defer to determinations made by local or international arbitral institutions in charge of administering arbitrations? If no experience at hand, which would be the prospective answer to these questions? Please, differentiate the areas of the law in which this influence exists or may potentially exist in the future.

[FLS] 9.1. As we have said above, there is almost no intercommunication between the areas of arbitration and of courts of law. Spanish legislator has positively wanted that arbitration lives its own and independent universe, clearly separated of the judicial world. As we have seen, there are very few points of contact: nullity, certain cases of control and, principally, enforcement of arbitral awards. Under the ancient Law of Arbitration of 1988, lawyers and interested parties missed the possibility to take cautionary measurements inside an arbitration process, a decision which was not possible. Currently, the law in force allows to take this kind of measurements, but not by arbitrators but by the judges of courts of law (one of the cases of the jurisdictional help of the world of legal system to the arbitration one). Under the ancient system, the need to make possible this kind of cautionary measurements was felt and exposed and published by doctrine. Undoubtedly, this has been one of the reasons of the admission of the cautionary measurements in the current system. But in the rest of the cases, the influence has not been much, neither referring to the decisions of the courts of law nor referring to legal changes. Spanish legal system is not a judicial system, and judges and courts are not bound by the precedent doctrine. Even less by decisions (we mean the arbitral awards) which have been taken “outside” the system.

9.2. The answer is also negative. State courts enforce the awards, both international or domestic, and this requires a previous recognition for international arbitrations. And that is all, as we have had the chance to see above. As far as we know there has not been any other reference to arbitral institutions, that s to say, institutions which administer arbitrations. Only the final decision is valid and enforceable under Spanish law system.

9.3. The characteristics of Spanish legal system does not allow to make this kind of prospective. We think that the system will remain being the same, that is to say, with only this small intercommunication and influence exposed above.

10. Having in mind your answers to questions 1-9 above, to which extent arbitral awards rendered in your country, enforced or enforceable in your country or concerning national of or residents in your country apply or may be dimmed as based on Uniform Law? If no experience at hand, which would be your prospective answer in this question?

[JATL] The question suggests that the first sense of the expression Uniform Law must be used. And the answer is not easy. We have said above (replying question 5) that there is not in Spain a reliable system of publishing arbitral awards; so that it is not an easy work to know them.

But, as far as we know, it does not seem possible to apply Uniform Law as a proper law, that is to say, as the first source of Law, but only as the second one, that is to say, like a customary rule.

Otherwise, we also have to make an important distinction. It is not the same thing to have rendered the arbitration in Spain and under Spanish Law than simply to enforce it in Spain. In the first case, we could speak about application of Uniform Law to solve a dispute in any way linked to Spanish legal system, because it concerns to a national or a resident in Spain. But, in the second case, if arbitration has been legally rendered in other country, it is a foreign arbitration, according to article 46.1 of Spanish Law of Arbitration. Of course, it is also enforceable in Spain under article 46.2 of Spanish Law of Arbitration (that is to say, according to Convention of New York of june, 10, 1958, referred to enforcement of foreign arbitral awards, to which there exists a remission made in this article). But this case is not properly one of application of Uniform Law, but only of enforcement in Spain of a foreign arbitral award. That means that, in fact, the award may have applied Uniform Law to solve the dispute, but this does not mean the application of

Uniform Law in Spain, in the same sense that enforcement of a foreign judgment which has applied its own Law (foreign Law for Spanish point of view) does not mean that this foreign Law has been really applied in Spain.

11. Having in mind your answers to questions 1-10 above, which has been the impact of arbitral awards and determinations in introducing, firming up or applying Uniform law, including through legislative change or the action of the courts in your country? Of foreign courts decisions regarding arbitral awards or determinations referred to or based on Uniform Law? If no experience at hand, which would be the prospective answers to these questions?

[JATL] As we have said above, there is not any intercommunication between the world of state courts and that of arbitration. So, as far as we know, there has not been any impact of arbitral awards in the activity of the courts at all. Spanish Courts only cite from the doctrine of Supreme Court or from their own doctrine and never make citations of any other class. So there is not any influence or impact of Uniform Law in the activity of Spanish courts neither directly nor through its application in domestic or international arbitral awards. Our prospective is also negative. There are very few possibilities that Uniform Law can get any kind of influence in Spanish legal system by this way.

12. Having in mind your answers to questions 1-9 above which has been the impact on the fashioning of your national legislation on arbitration –domestic or international– or on arbitral awards rendered in your country or concerning nationals of or residents in your country of: (a) the action and rules of international arbitral institutions (e.g. the International Court of Arbitration of the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and its International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA)); (b) the works of international organizations (e.g., UNCITRAL, UNIDROIT, the European Union, NAFTA, the Organization of American States); and (c) foreign court decisions or legislation reflecting the influence of the action or works of institutions or organizations like the ones mentioned in subparagraphs (a) or (b) above? If no experience at hand, which would be your prospective answers to these questions?

[FLS] Actualization of Spanish legislation in the matter of arbitration, and specially referred to international arbitration, has been strongly influenced by:

— The work of European Economic Commission of the United Nations Organization, who inspired the preparation and signature the Convention of Geneva of April, 21, 1961, of International Commercial Arbitration.

— The work of International Chamber of Commerce, in whose frame was prepared the first draft of Convention of New York, followed by another draft from the Social and Economic Council of the United Nations.

Spain, who had remained a long time outside of the matter of international arbitration (the first Spanish Law of Arbitration, of December, 22, 1953, limited its application to domestic arbitration), ratified in the seventies these two very important international treaties (1975, Geneva; 1977, New York). The rules of these treaties were immediately introduced in Spain, first through the Royal Decree (a rule developed by the Government) 1094/1981, of may, 22, which opened the door to international commercial arbitration, and specially through the Law of Arbitration of 1988 (the second Spanish Law on this matter) which stated a very necessary adaptation of domestic legal system to the principles of international arbitration.

— The works of UNCITRAL, and particularly the Model Law have had a very strong influence in the last actualization of Spanish legislation on this matter through the Law of Arbitration of 2003. As we have said above (answer to the question number 2), Spanish legislator has tried to give an answer to the requirements of a better international harmonization on the matter of commercial arbitration; that is to say, that Spanish Law fully follows the principles of the Model Law of UNCITRAL. It is expressly declared in the Preamble of the Law of 2003: “its principal inspiration is to base Spanish legal system of arbitration in the Model Law prepared by UNCITRAL on June, 21, 1985”. This inspiration, of course, allows to go to the text of the Model Law and the others works developed by UNCITRAL n order to get some rules or criteria to better understand and interpret the Spanish law in force.

It does not seem that the rest of the works mentioned in the question have had any impact, at least, an important impact, on the legal changes on the matter of arbitration happened in Spain.

GENERAL REMARK:

The general sense of the questions suggests a very specific point of view to prepare them and also seem to be thinking in a very specific legal system very similar to a common law system: judicial creation of law, same authority for judges and arbitrators, also same level of authority for judgements and arbitral awards and, finally, a fluid intercommunication between these two different worlds. And probably, the country in which this system has been developed has not approved any Law of Arbitration neither signed the Convention of New York. The final result of the mix of all these elements is an almost unique or single system, in which there will not be any substantial difference between decisions which solve disputes attending the fact they have been pronounced by judges and courts or by arbitrators or arbitral tribunals.

Spanish legal system is located just in the opposite side: primacy of law, closed role of sources of law, complete separation between judges and arbitrators and complete separation between state courts and arbitral tribunals and, as a logic consequence, a quite non-existent intercommunication between these two fields of legal activity. Probably that is the reason why most replies have been not only negative, but categorically negative in the present legal scope and in our prospective.