

INSIDE ARBITRATION: SPOTLIGHT ARTICLE: EDUARDO SOLER- TAPPA AND DAVID ARIAS

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Eduardo, can you give us some background on the Madrid disputes practice? What growth have you witnessed since you joined us in 2010? Where did we start, and where are we now? What kind of work are you doing, and for what kind of clients?

The Madrid office opened 10 years ago. During that time, the disputes practice has grown to become one of the pillars of our office, especially in the last few years. In 2010, our team had four lawyers and the practice accounted for around 16% of the office's turnover. In 2019, our team has 28 people (including 19 fee earners) and the practice accounts for 31% of the office's turnover.

We advise clients on pre-trial issues and represent them in both judicial proceedings before Spanish courts and in arbitration proceedings. Our track record includes representing the Kingdom of Spain in an UNCITRAL investment arbitration filed under the Energy Charter Treaty by 14 investment funds from Luxembourg, the Netherlands, Germany and Spain, and representing Iberdrola in an LCIA arbitration against Kenya Electricity Transmission Company Limited. Our team is also involved in arbitrations under Algerian, Brazilian, Colombian and Nepalese law, seated in London, Paris and Singapore.

As for the clients, I have already mentioned the Kingdom of Spain and Iberdrola. We also advise other IBEX35 companies, including Banco Santander, Bankia and Red Eléctrica, as well as international companies such as Acerinox, Deutsche Bank and Oaktree Capital.



David, it is so exciting for the firm that you have joined us. You are a well-known figure in the Spanish arbitration world, and it's fabulous to have someone of your experience join the team.

In recent years, you've been doing mainly arbitrator work. What made you decide to come back to counsel work?

David: Let me first say that the excitement is all mine. Dispute resolution forms part of the DNA of Herbert Smith Freehills; joining a firm like this is a thrilling opportunity for someone like me, who has been doing disputes for more than 27 years.

Getting to your question, I've been doing a lot of arbitrator work in recent years and I simply missed having the counsel hat on more often. But don't get me wrong. It has been fantastic to sit as arbitrator in cases across the globe and to share tribunals with the most respected arbitrators. It's just that I wanted to experience more regularly the excitement that is brought about by being on the other side, building a case from scratch, being the one who has to persuade instead of being persuaded, handling clients, etc. My age still lets me enjoy that excitement (and I hope it will for a few more years), so it seemed about time to return to the counsel side.

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What attracted you to Herbert Smith Freehills?

Dispute resolution is a core practice at Herbert Smith Freehills and the firm is consistently considered one of the best in the world when it comes to arbitration. Further, the firm's strength in Asia is remarkable and this may be of great help in developing the arbitration practice in Latin America, considering that investment by Asian parties in that region is on the rise. All this, together with my eagerness to act more often as counsel, could only lead to me accepting to join Herbert Smith Freehills after the firm knocked at my door.

It has not been long since I joined, so I am not fully acquainted with all of the firm's capabilities yet. However, I can say that I'm amazed by the specialised resources that the firm offers. They have already been of great help. With the support of the specialised construction team in London, for example, I was able to get ready in the blink of an eye for a conference on construction arbitration given at King's College London in June. Without that help, it would have taken me weeks to prepare for it.

Another interesting resource is Alternative Legal Services (ALT), a division of the firm that can help to process massive quantities of documents or information in a cost-efficient manner. I haven't worked with the ALT team yet, but it will surely be extremely helpful in many cases.

Spain is working to position itself as a leading arbitral seat. There is a newly-created arbitral institution, and moves to create a harmonised set of rules for Spanish-seated arbitrations. Is there room for another "leading seat" in Europe? Can Madrid offer anything that Paris and Geneva can't?

Eduardo: Spain has taken various steps since the beginning of the 21st century to position itself as an attractive arbitral seat. A very important step was, of course, the passing of the Spanish Arbitration Act in 2003, which implemented a modern legislative framework, based on the Model Law, for arbitrations seated in Spain.

David: Another important step was the creation of the Spanish Arbitration Club in 2005. The Club is an association aimed at promoting arbitration, of which I had the honour to be president from 2013 to 2017. Over the years, the Spanish Arbitration Club has expanded its remit to become one of the most relevant associations for the Iberian and Ibero-American arbitration community, and beyond. This is evidenced by its more than 1,000 members from 43 different countries.

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Eduardo: Among other things, the Club has published soft law instruments such as the Code of Good Practice, an updated version of which has been published recently. Every year since its creation, the Club has organised an international arbitration congress, which puts the spotlight of the arbitration community on Madrid, where it takes place. This year the congress brought to Madrid around 400 attendees from approximately 30 countries.

This, together with a judiciary that for the most part understands and supports arbitration, has contributed to positioning Spain as an attractive arbitral seat. It is evident, however, that Madrid is still far from the leading seats, such as London, Paris, Singapore, Hong Kong, Geneva, New York or Stockholm.

David: One thing that may have discouraged parties from seating their arbitrations in Spain is the existence of various Madrid-based arbitration institutions with different rules; specifically the Court of Arbitration of the Madrid Chamber of Commerce (CAM), the Civil and Mercantile Court of Arbitration (CIMA) and the Court of Arbitration of the Spanish Chamber of Commerce (CEA).

Parties or attorneys who were not familiar with the Spanish arbitration scene, when considering an arbitration seated in Spain under the rules of any of those institutions, may have decided against it because they were not entirely clear about the institution and rules in question.

Fortunately, these three institutions have been negotiating to create a unified arbitration centre for international arbitrations, which is expected to be up and running in the next few months.

Eduardo: The unified centre will eliminate the lack of clarity, and increase the likelihood of parties and lawyers choosing to submit disputes to its rules. This, in turn, should lead to more arbitrations being seated in Spain. Further, the rules are expected to contain modern provisions that incorporate the latest developments in arbitration. This may have a beneficial effect on domestic arbitration as well, by encouraging Spanish institutions to modify their domestic arbitration rules to mirror those of the unified centre.

David: Finally, I believe that there is room for another leading seat, and Spain is a perfect fit for that. Arbitrations involving Latin American parties are on the rise and none of the leading seats have particular ties with that region. Spain and Latin American countries not only share a language, they also have a common cultural and legal tradition. This makes Spain a perfect candidate to become the leading seat for arbitrations with a Latin American element.

David, you have a very strong Latin America practice. Can you tell us more about that?

Yes, during the last few years, I have been fortunate enough to be involved in a lot of cases with a Latin American element, mainly as arbitrator, but also as counsel.

A great number of those cases concerned major infrastructure and energy projects. I recall as a particularly enjoyable experience an ICC case seated in Santiago de Chile, concerning the construction of a power plant, in which my team and I represented an Italian group. The amount in dispute exceeded US\$ 1 billion and there were six parties involved. It was very rewarding, because the case was remarkably complex and the level of professionalism of the lawyers, arbitrators and experts was exceptional. This case ended a few years back; perhaps the reason why I have this good recollection of it is that it ended with a very positive settlement agreement for our client.

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Currently, I am sitting as arbitrator in cases involving parties from Ecuador, Colombia, Peru, Brazil or Mexico, seated in cities such as Quito, Lima, Santiago de Chile, São Paulo or Miami. Further, my team in Madrid and I are representing a company from a Latin American country in an ICC arbitration relating to the construction of a highway in the same country and subject to its law.

I certainly hope that the number of cases involving Latin America increases during the following years and that our Madrid office gets to work with other offices in many cases of that kind.

The Madrid office has just won a case with a three-woman arbitral tribunal. Is this usual in Spanish arbitration? If not, what is the Spanish arbitration community doing to improve gender (and other) diversity on tribunals?

Eduardo: First, our partner Paulino Fajardo and his team of Miguel García-Casas and Cecilia Tilve must be congratulated for the victory and also for enhancing women's visibility in arbitration panels by taking part in a case like this.

David: Turning to your question, it is not usual at all to find a three-woman arbitral tribunal in a Spanish arbitration. However, I am hopeful that this is changing with initiatives, such as the Equal Representation in Arbitration Pledge, that are gaining traction in Spain. The Pledge has been signed by Herbert Smith Freehills and I had the honour of co-organising with Juan Fernández-Armesto the event where the Pledge was introduced to the Spanish arbitration community.

Eduardo: The main Spanish arbitral institutions (CAM, CIMA, and CEA) have taken the Pledge and we haven't had to wait long to see the results. For instance, data from CAM released in September 2018 revealed that, in the previous half year, 48% of the arbitrators appointed by the CAM were women and, where the CAM was required to submit a list of potential arbitrators to be considered by the parties, at least 50% of the names were of female candidates.

David: To tell you briefly about my own experience, I have acted as counsel for Fomento de Construcciones y Contratas

(FCC) in an ICC arbitration against a Qatari company that was decided in April 2019, in which the two party-appointed arbitrators, the chair and the lead counsel of the counterparty were all women. I believe this was one of the first ICC panels with a three-woman arbitral tribunal. The point I want to make is that improving the representation of women in international arbitration greatly depends on us. If we keep taking steps in that direction, a three-woman panel will soon be unsurprising.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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