# Litigation & Dispute Resolution

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# CONTENTS


| | | |
|---|---|---|
| **Preface** | Michael Madden, *Winston & Strawn London* | |
| **Australia** | Martin Garrett & Matthew Eglezos, *Freehills* | 1 |
| **Belgium** | Koen Van den Broeck & Thales Mertens, *Allen & Overy LLP* | 14 |
| **Bermuda** | Kiernan Bell & Martin Ouwehand, *Appleby (Bermuda) Ltd.* | 19 |
| **BVI** | Andrew Willins, *Appleby* | 26 |
| **Bulgaria** | Assen Georgiev, *CMS Cameron McKenna LLP - Bulgaria Branch* | 37 |
| **Cayman Islands** | Tony Heaver-Wren & Shaun Tracey, *Appleby (Cayman) Ltd.* | 44 |
| **China** | Hongji Li & Jie Ma, *Commerce & Finance Law Offices* | 59 |
| **Costa Rica** | Róger Guevara & Abraham Balzer, *Batalla Abogados* | 64 |
| **Cyprus** | Nicos G. Papaefstathiou & Maria Papaefstathiou, *Tassos Papadopoulos & Associates LLC* | 68 |
| **Ecuador** | Jorge Sicouret Lynch, César Sánchez Icaza & Gabriela Lecaro Malnati, *Coronel & Pérez* | 76 |
| **England & Wales** | Michael Madden & Bryn Dodson, *Winston & Strawn London* | 85 |
| **Estonia** | Pirkka-Marja Põldvere, *Aivar Pilv Law Office* | 100 |
| **France** | Denis Chemla & Erwan Poisson, *Allen & Overy LLP* | 110 |
| **Germany** | Jörg Staudenmayer & Judith Walz, *CBM International Lawyers LLP* | 120 |
| **Guernsey** | Jeremy Le Tissier & Adam Cole, *Appleby* | 127 |
| **Hong Kong** | Giovanna Kwong, *SJ Berwin LLP* | 133 |
| **India** | M. Dhyan Chinnappa & M.V. Sundararaman, *CrestLaw Partners* | 141 |
| **Indonesia** | Kartini Muljadi, *Kartini Muljadi & Rekan* | 148 |
| **Isle of Man** | Chris Cope, Elizabeth Simpson & Gillian Duffy, *Appleby (IOM) LLC* | 157 |
| **Italy** | Ferdinando Emanuele & Milo Molfa, *Cleary Gottlieb Steen & Hamilton LLP* | 170 |
| **Japan** | Yoshio Otani, Junya Naito & Tsuyoshi Suzuki, *Momo-o, Matsuo & Namba* | 180 |
| **Jersey** | Fraser Robertson & Davida Blackmore, *Appleby* | 189 |
| **Malaysia** | Tiang Joo Su, *Cheah Teh & Su* | 199 |
| **Mexico** | Miguel Angel Hernandez Romo Valencia & Miguel Angel Hernandez Romo, *Bufete Hernandez Romo* | 209 |
| **Netherlands** | Marius Josephus Jitta & Damiën F. Berkhout, *Stibbe* | 215 |
| **Nigeria** | Kolawole Mayomi & Debo Ogunmuyiwa, *SPA Ajibade & Co.* | 224 |
| **Spain** | Álvaro López de Argumedo & Juliana de Ureña, *Uría Menéndez* | 235 |
| **Switzerland** | Balz Gross, Claudio Bazzani & Julian Schwaller, *Homburger* | 243 |
| **Turkey** | Gönenç Gürkaynak, İlay Yılmaz & Gözde Kitapcı, *ELIG Attorneys at Law* | 252 |
| **Ukraine** | Andrey Astapov, Oleh Beketov & Oleksiy Zorin, *AstapovLawyers International Law Group* | 260 |
| **USA** | Kapil Longani & Gunjan Sharma, *Skadden, Arps, Slate, Meagher & Flom LLP* | 270 |

# Spain

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**Efficiency/integrity**

The current economic difficulties in Spain have led to an increase in litigation, putting the judiciary under severe pressure. The number of civil claims has been growing firmly over the past decade with over two million claims filed in 2009 and almost one and a half million cases filed by mid 2010, compared to less than 900,000 in 2007. To a certain extent this has led to an increasing tendency to resort to arbitration and other alternative dispute resolution methods such as mediation, as will be explained below.

Although ordinary proceedings are relatively straightforward[1], and the time limits granted by the parties to make their claims are quite limited, due to the significant number of cases dealt with in each court, in practice the parties may have to wait several months before they are summoned to a preliminary hearing and the actual trial could even take place up to a year after the filing of the corresponding briefs.

The average period of time taken by a first instance court to issue a decision ranges from ten to fourteen months, which is relatively fast, and which may be subject to provisional enforcement even if appealed. However, if the judgment is appealed, the average time taken for a final judgment to be issued by the Court of Appeal is between six months and two years. After this, the decision may still be appealed before the Supreme Court (although the grounds for this appeal are very limited) and this court generally takes between two to three years to issue a decision. Due to the uncertainty surrounding the duration of appeals, disputes involving large companies or significant amounts of money tend to be resolved through arbitration, as will be explained below. Despite the praiseworthy efforts of the over 5,000 Spanish judges (nearly 3,850 for civil and commercial matters), because of the shortage of means and the excessively formal nature of the Spanish judicial system, millions of Euros are stuck in litigation for years.

The need to address the extensive time taken to obtain a final judgment (i.e., one that cannot be appealed) has led to intensive reforms of the Spanish Civil Procedure Act (CPA) in order to make the system more agile and efficient. The latest of these reforms was enacted by Law 37/2011 of 10 October 2011. The most significant amendments involve the appeal system.

Before Law 37/2011, once a decision had been issued by the first instance courts, either party could announce its intention to appeal within five days of notification of the decision. Once the intention to appeal had been accepted, the appellant would have 20 days to file its full appeal. In practice, due to the workload of most courts, notifications and the acceptance of the intention to appeal could be delayed and, thus, the time that the appellant would have to prepare its full brief could be extended, in some cases, by several months. This would also be the case with extraordinary appeals (*recurso extraordinario por infracción procesal*) and cassation appeals (*recurso de casación*) before the Supreme Court.

Law 37/2011 removed the term to notify an intention to appeal. Consequently, the appellant now only has 20 days after notification of the judgment to file its full brief of appeal. This is also the case with appeals before the Supreme Court. Moreover, prior to the modification, one way of being able to file a cassation appeal was if the amounts under dispute amounted to EUR 250,000. This amount has



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been significantly increased by Law 37/2010 to EUR 600,000. Therefore, access to appeal before the Supreme Court has been significantly reduced.

Whether these modifications actually make the judicial system more agile is still to be seen. But as litigation levels continue to grow, the judicial system will continue to be under pressure. The increase in litigation, partly caused by the financial strains of the global economic system and partly influenced by a greater use of American-style litigation, has brought to light two groups of claims that have been rapidly spreading through the system: (i) class actions; and (ii) foreclosures:

(i) Class actions are a relatively new phenomenon in Spanish civil litigation, at least at the level which they have reached. Indeed, the collapse of the global financial system and the uncovering of the Madoff ponzi scheme, has led Spanish investors to pursue their interests in an intensified and collective manner in Spanish courts, creating unsuspected challenges for the judicial system. The regulation of class actions in the CPA is considerably scarce and there is no specific procedure for class actions. According to articles 11 and 15 CPA, consumer and user associations may file claims for the defence of collective interests. However, whether these claims allow the inclusion of individual claims together with the association, which could increase the number of claimants to the thousands, is a highly debated issue. The main difficulty with massive claims filed by hundreds or even thousands of parties –whether or not represented by a single association– is that the CPA is silent on the terms of the proceedings and the trial. Having a respondent answer hundreds of claims within the same 20-day term established to respond to a single claim is no doubt challenging, to say the least. Moreover, how the trial is to be conducted when there are hundreds of witnesses is another issue of concern. So far, although these types of actions imply additional work for the courts, the system still works.

(ii) The number of foreclosure proceedings has also increased rapidly (there are currently over 300,000 ongoing proceedings according to judicial sources), making it another hot topic both in the judiciary and in legislative chambers. Whether a mortgage can be foreclosed by the mere delivery of the property *in lieu* of payment –which, for now, has no legal backing– has been subject to a few controversial decisions by provincial courts (courts of appeals) (judgments of the Provincial Court of Navarra dated 17 December 2010 and by the Provincial Court of Gerona dated 16 September 2011) where the courts have held that given that the value of the property had been fixed by the lender, if a lesser amount was obtained in realisation proceedings, the lender should be satisfied with the property. These decisions have also led to much debate at national level.

Due to the effects of the bursting of the housing bubble in Spain and the particularly harmful effects of high unemployment rates, the current legal structure –where a debtor may still owe significant sums to the lender after he/she is evicted and his/her property is seized– is raising serious concerns amongst the general public and the government. Conversely, the Spanish financial system is in need of a cash-influx, amongst others, in the form of loans for both ordinary households and small- and medium-sized companies. The possibility of directly changing the current legislation so that lenders are obliged to accept the property instead of full repayment of their credit would, no doubt, have a detrimental effect on the economy, causing banks to be even more cautious when granting loans.

In an attempt to circumvent the widespread criticisms of the current legal structure and balance the interests of the financial system, in late March 2012, the government enacted a Code of Good Conduct, whereby the bank can: (i) re-negotiate and restructure the debt establishing a grace period of up to four years; (ii) extend the period of the mortgage loan for up to forty years; and finally, if all else fails and under limited circumstances; and (iii) accept the property *in lieu* of payment. In the latter case, the debtor may remain in the property under a lease agreement for two years, which can be extended. Although the Code of Good Conduct is not mandatory, if a bank chooses to apply it, its terms become binding.

The provisions of the Code of Good Conduct resemble the system recently implemented by Bank of America in certain areas of the US. So far, relevant financial actors such as Banco Santander and Banco Sabadell have stated that they will apply the Code. Although the Code may manage to appease the general public, how effective it will be in reducing the number of foreclosures



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remains uncertain. All and all, the Code of Good Conduct has been well received by the general public.

## Enforcement of judgments/awards

The Spanish judiciary has a well established tradition of supporting and facilitating the enforcement of both foreign (i) judgments, and (ii) awards. In fact, the recognition and enforcement of foreign judgments is so well entrenched in the judicial system, that it has not been subject to any relevant modifications (save those imposed by international conventions) since the late nineteenth century, implying the strength of the system[2].

For a foreign judgment to be enforced in Spain, an order declaring it is enforceable or *exequatur* is necessary. Once the *exequatur* is granted, enforcement itself is quite fast, provided that the assets are identified. Attachment of the assets will be immediate and time for realisation will depend on the type of asset. First instance courts are competent for the enforcement of foreign rulings.

As to awards, Spain is a party to the New York Convention and has made no reservations. Therefore, the recognition and enforcement of awards is straightforward and implies the same guarantees and practicalities sought by the New York Convention and arbitration practitioners worldwide, with an additional advantage: the existence of a court specialised only in arbitration issues. Seeking to reinforce support for arbitration while liberating the courts of first instance of their overwhelming case load, on 25 November 2010, the General Council for the Spanish Judiciary created a new first instance court in Madrid to deal exclusively with certain arbitration issues. The newly created court will deal with judicial support of arbitration such as the taking of evidence, and the enforcement of foreign awards, provided the application of the applicable procedural rules establish the jurisdiction of the Madrid courts.

With the aim of unloading part of the work load of the courts of first instance, the competence to set aside awards was transferred to the High Courts of Justice (seated in each capital of every autonomous region in Spain). The advantages of having High Courts of Justice rule over actions to set aside awards are significant. Out of the judicial hierarchy, the High Courts have a notably inferior case load than other judicial bodies. This allows them to render decisions in as little as two months and provide homogenous decisions in these matters.

With the latest modifications, recognition and enforcement of awards is as safeguarded and speedy as ever.

## Privilege and disclosure

The disclosure of documents is quite limited under Spanish law. Only specific documents, relevant and material to the case, which are presumed to be in the opposing party's possession, are subject to disclosure. In other words, the system resembles document production as regulated by the IBA Rules on the Taking of Evidence in International Arbitration. Hence, under Spanish law there is no general requirement to disclose as in common law systems under the figure of "*discovery*".

The party requesting the disclosure of evidence must include a copy of the document requested or, if this is not possible, an exact description of the requested document. Should the party to whom the request is made refuse to produce the document without justification, the court may value the copy of the document presented or may directly order that the document be submitted in the proceedings.

The notion of e-discovery, understood as the disclosure of the meta data of documents and other forms of electronic information, is unfamiliar in judicial proceedings in Spain. It is not expressly regulated, and although from the wording of the CPA it could be understood that this electronic information can be included as part of the evidence, due to the difficulties of including it within the limited grounds for disclosure, a court is unlikely to order its disclosure.

According to article 5 of the Spanish Lawyers' Code of Conduct and Ethics (*Código Deontológico de la Abogacía Española*), all communications between clients and their lawyers are privileged and cannot be subject to disclosure. Communications between counsel are also privileged and may only be disclosed if the opposing counsel agrees to their disclosure.



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As to drafts and other communications made during negotiations prior to judicial proceedings, whether or not these can be disclosed would greatly depend on the level of confidentiality stipulated by the parties.

### Costs and funding

Courts are empowered to decide which party must bear the legal costs of the proceedings. The costs are generally borne by the unsuccessful party. In the event of partial success, each party will bear its own costs. This scheme is non-negotiable given that the application of procedural laws is mandatory.

Fees payable as legal costs include: (i) the attorney's and court agent's fees (which are calculated according to the fees set by the corresponding Bar Association); (ii) mandatory deposits to lodge appeals; (iii) expert fees; and (iv) certain expenses incurred during the proceedings, such as witnesses' travel expenses. The attorney's and court agent's fees are calculated according to the type of proceedings and amount under dispute. Therefore, although parties might have incurred in significant amounts for their defence, if the dispute has no monetary value, the costs recovered may only partially cover the parties' expenses.

Although times are changing and contingency fee arrangements are more in demand by clients, any agreement on fees must always contain a fix base, to which a success fee may be added. In other words, the typical case where counsel and clients both share the risks of litigation is forbidden under Spanish law.

As to the possibility of having third party funding, there is no tradition or regulation in Spain. Although it is timidly starting to be used in arbitration, there is a long way to go before third party funding reaches judicial proceedings.

### Interim relief

Due to the difficult financial situation of economic players worldwide, requests for interim measures have been rapidly increasing since late 2008. Indeed, the request for interim measures in support of both judicial and international arbitration claims is on the rise. Spanish courts generally swiftly render judgments on interim measures, allowing the claimant to have a decision in as little as a week, making them highly effective.

Lately, one of the most common requests for injunctive relief relates to judgments ordering the respondent to refrain from enforcing bonds or bank guarantees on first demand until the main dispute is resolved either in judicial proceedings or arbitration. These guarantees are commonly issued in different types of transactions in order to give the beneficiary easy access to significant amounts if the opposing party is in breach. However, due to the financial difficulties that many industries are suffering, it has become increasingly common to enforce these guarantees with or without grounds.

There is no specific regulation governing bonds on first demand, and case law is somewhat ambiguous in determining whether or not the enforcement of these guarantees can be suspended through interim measures, with many decisions both in favour and against this possibility. As a result, there has been much debate amongst scholars and a certain level of uncertainty both for the beneficiaries and the guaranteed parties. Whether some light will be shed on the matter in the near future is uncertain.

### International arbitration

As mentioned above, major arbitration disputes are also on the rise. Spain has a solid arbitration law (SAL), equally trusted by both counsel and corporations.

After the surge of takeovers and the sale and purchase agreements involving large- and medium-sized companies during Spain's economic boom in the late nineties and early 2000s, there are now an increasing amount of disputes involving financially distressed purchasers seeking to reduce the price paid for the acquired companies. The actions usually brought with that aim include: (i) allegations of breach of representations and guarantees; (ii) liability for latent defects in the companies; or (iii) wilful misconduct of the seller.



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Other industries in which arbitration disputes are on the rise are construction and energy. Weighed down constructors and engineering companies are commonly requesting additional payments from their client for variations in the scope of work or the price increase for delays in the execution of works. These costly and sometimes lengthy proceedings often involve interim measures and other forms of judicial support where the specialisation of the Spanish courts works in favour of the efficient and adequate resolution of these incidents.

Since the enactment of the Spanish Arbitration Law in 1988, and particularly the more modern SAL of 2003, the arbitration culture has been embraced by practitioners and companies of all sizes. Two factors that have, perhaps, contributed most to making Spain an attractive seat for disputes involving Spanish or Latin American enterprises are the specialised judiciary –greatly supportive of arbitration– and the language.

The SAL was recently modified by Law 11/2011 of 20 May 2011. Among its main novelties, we must stress the possibility of including arbitration as a dispute resolution method for internal disputes within corporate bodies in a company's articles of association. This simplifies and saves time in resolving internal corporate struggles, while allowing the parties to keep the dispute confidential.

A more controversial highlight refers to the possibility granted to the parties to request the rectification of the partial extra limitation of the award whenever it has resolved matters not subject to its decision or issues that cannot be resolved by arbitration. This has caused intense debate amongst practitioners. For some, this denaturalises the "rectification", turning it into a sort of preliminary ruling on a possible action to set aside the award. Others consider the modification positive, generating greater certainty and limiting the grounds for the annulment of the award. The truth is that the scope of the "rectification" and, hence, its effects on arbitration are still to be seen.

There are two main arbitration institutions in Spain, the Court of Arbitration of the Official Chamber of Commerce and Industry of Madrid (CAM) and the Civil and Commercial Arbitration Court of Madrid (CIMA), both of which have modern and flexible rules, making them a huge success for the support of arbitration. The number of cases –both domestic and international– handled by both institutions, has been rapidly increasing over the past years and the trend is on the up. In particular, proceedings in the CAM are resolved swiftly, allowing the parties to obtain an award in as little as six months.

## Mediation and ADR

After months of expectation –and years of yearning by ADR practitioners– on 16 March 2012, the Spanish Civil and Commercial Mediation Law (CCML) was enacted. The CCML is mostly based on the UNICITRAL Mediation Model and was carefully drafted as to avoid creating a conflict with other mediation laws enacted by certain autonomous regions, such as Catalonia.

Unlike the embedded tradition of common law countries towards mediation, in Spain there is barely any tradition to attempt mediation either prior to judicial or arbitral proceedings. However, litigation practitioners, especially arbitration practitioners, are familiar with this dispute resolution method and have been craving formal regulation for some time. Although the CCML has been prematurely judged by some as too timid, it is doubtlessly a step in the right direction for Spanish society to become acquainted with its many advantages.

While aiding to relieve pressure on the jammed judicial system, mediation can be particularly useful to resolve disputes between parties who have a long standing business relation, avoiding the sour feeling left by judicial proceedings or arbitration.

* * *

Despite the increasing levels of civil and commercial litigation in Spain, legislators are very focused on enacting reforms and modifications in order to make the judiciary more agile and efficient. Alternative dispute resolution methods are being promoted by legislative bodies, the government



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and litigation practitioners. The latest modifications of the Spanish Arbitration Law and the recent enactment of the Civil and Commercial Mediation Law are clear proof of their support. Whether the legislative effort will be successful in unloading the heavy weight of civil and commercial courts is still to be seen, but at least we can rest assured that measures are on the way.

* * *

**Endnotes**

1 As regards judicial proceedings, the CPA states that civil and commercial claims will be decided either through (i) verbal proceedings, or (ii) ordinary proceedings. The rules determining which proceedings should be followed are based on the nature of the dispute and its economic value. Claims for specific performance or restitution of damages can be requested either way.
Verbal proceedings are applicable to claims with an economic value of less than EUR 6,000 and claims related to leases and other real estate issues, amongst others. Therefore, most commercial claims follow ordinary proceedings. In short, verbal proceedings start with the filing of a claim including all relevant documentary evidence. After the respondent is notified, the parties will be summoned to a hearing where the claimant will make its allegations, followed by the respondent's allegations. Any procedural objection will be raised at the hearing and subsequently resolved by the judge. The parties will then propose their evidence and all evidence admitted by the judge will be examined at that same hearing. After the evidence is examined, the judge will declare that the case is ready for judgment. Then, a decision will be rendered in writing.
Ordinary proceedings are lengthier and entail the exchange of written briefs as well as a preliminary hearing and then, a trial. In brief, ordinary proceedings start with the filing of a claim including all relevant documentary evidence, before the competent court. The respondent must respond to the claim and file, if applicable, a counterclaim within 20 days from the notification of the claimant's brief. As in the case of the claim, all documentary evidence must be included with the respondent's brief, which generally includes expert reports. Should the respondent file a counterclaim, the claimant will be granted 20 days to file its response with the relevant documentary evidence to support its case.
Once the parties' briefs are filed, the court will summon both parties to a preliminary hearing, where the parties will be asked whether an agreement between them is feasible. If no agreement is reached, which is typically the case, any procedural issues raised by the parties (such as the lack of legal standing, the existence of res judicata or lis pendens, and the lack of objective or territorial competence, etc.) will be addressed and decided. Following the allegations on procedural issues, if any, the disputed facts of the case will be established. Then, the parties will propose all the evidence that they consider should be provided at the trial. The judge will only accept evidence that it considers relevant to resolve the dispute. The date of the trial will be set after the preliminary hearing.
During the trial, the parties, witnesses and experts will be called to testify and, where appropriate, there will be voice, image and sound reproduction. Verbal closing statements will be made by the parties immediately after the examination of the witnesses and experts. After the parties' final allegations, the court will declare that the case can be decided. Subsequently, a judgment will be rendered.

2 According to articles 951 - 954 CPA of 1881, for a foreign judgment to be enforced in Spain, an order declaring it is enforceable or exequatur is necessary. This order may be obtained through three different methods:
(i) Following the provisions of any applicable treaty, such as the Brussels Convention (EU Regulation 44/2001) for judgments pertaining to the European Union and several other numerous treaties signed with individual countries such as Colombia, Mexico, El Salvador and Israel. It is worth mentioning that no such treaty has been signed with the USA.
(ii) In the absence of a treaty, a foreign judgment may be enforceable on a reciprocal basis. Under the reciprocity regime, if it is proved that the courts of the country which judgment's enforcement is sought recognise and enforce Spanish judgments subject to certain conditions, the same conditions for recognition and enforcement will be applied by the Spanish courts (positive reciprocity). If it is proved that the foreign courts actually deny the recognition and enforcement of Spanish judgments of similar nature, then the exequatur will be denied by the Spanish courts (negative reciprocity).



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The reciprocity regime is less favourable to recognition and enforcement than the subsidiary regime, described below, which is far more liberal. Due to this, in practice, the usual applicable regime is, paradoxically, the subsidiary one.

(iii) Article 954 CPA of 1881 determines a series of requisites which must be complied with in order for exequatur to be obtained. Other requirements have been established by case law. The requirements that must be met are the following:

a. The foreign judgment must be final (i.e. not subject to appeal) and have been rendered as a consequence of a personal action.

b. The respondent must have entered a personal appearance or have been duly summoned. The judgment cannot have been rendered in default of the respondent.

c. The obligation established by the foreign ruling must be licit in Spain.

d. The foreign judgment must not enter into conflict with a Spanish ruling or with a foreign judgment recognised in Spain.

e. Recognition and/or enforcement of the foreign judgment does not infringe Spanish public policy.

f. The copy of the foreign judgment must be authentic, meaning a certificate or apostille given in accordance with The Hague Convention of 5 October 1961.



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Recently, Legal Media Group's Guide to the World's Leading Commercial Arbitration Experts distinguished Álvaro as one of the world's pre-eminent experts in commercial arbitration. He is a member of the Madrid Bar Association, Madrid Arbitration Court, London Court of International Arbitration and Spanish Court of Arbitration.

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