The dispute resolution Review

Fifth Edition

Editor

Richard clark

Law Business Research

The Dispute Resolution Review

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Richard Clark

Law Business Research Ltd

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CONTENTS

EDITOR'S PREFACE

Richard Clark

Following the success of the first four editions of this work, the fifth edition now extends to some 58 jurisdictions and we are fortunate, once again, to have the benefit of incisive views and commentary from a distinguished legal practitioner in each jurisdiction. Each chapter has been extensively updated to reflect recent events and provide a snapshot of key developments expected in 2013.

As foreshadowed in the preface to the previous editions, the fallout from the credit crunch and the ensuing new world economic order has accelerated the political will for greater international consistency, accountability and solidarity between states. Governments' increasing emphasis on national and cross-border regulation – particularly in the financial sector – has contributed to the proliferation of legislation and, while some regulators have gained more freedom through extra powers and duties, others have disappeared or had their powers limited. This in turn has sparked growth in the number of disputes as regulators and the regulated take their first steps in the new environment in which they find themselves. As is often the case, the challenge facing the practitioner is to keep abreast of the rapidly evolving legal landscape and fashion his or her practice to the needs of his or her client to ensure that he or she remains effective, competitive and highly responsive to client objectives while maintaining quality.

The challenging economic climate of the last few years has also led clients to look increasingly outside the traditional methods of settling disputes and consider more carefully whether the alternative methods outlined in each chapter in this book may offer a more economical solution. This trend is, in part, responsible for the decisions by some governments and non-governmental bodies to invest in new centres for alternative dispute resolution, particularly in emerging markets across Eastern Europe and in the Middle East and Asia.

The past year has once again seen a steady stream of work in the areas of insurance, tax, pensions and regulatory disputes. 2012 saw regulators flex their muscles when they handed out massive fines to a number of global banks in relation to alleged breaches of UN sanctions, manipulation of the LIBOR and EURIBOR rates and money-laundering

offences. The dark clouds hanging over the EU at the time of the last edition have lifted to some degree after the international efforts in 2012 saved the euro from immediate and catastrophic collapse, although the region continues to prepare for a period of uncertainty and challenging circumstances. It is too early to tell what, if any, fundamental changes will occur in the region or to the single currency, but it is clear that the current climate has the potential to change the political and legal landscape across the EU for the foreseeable future and that businesses will be more reliant on their legal advisers than ever before to provide timely, effective and high-quality legal advice to help steer them through the uncertain times ahead.

Richard Clark
Slaughter and May
London
February 2013

Chapter 52

SPAIN

Esteban Astarloa and Patricia Leandro Vieira da Costa[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Spanish legal system is hierarchical. The sources of law are ranked as follows:

i Legal and regulatory provisions

Constitution

The Constitution is at the top of the hierarchy. It provides the basic regulations on fundamental rights and duties, the Crown, Parliament, the government, the relationship between the latter, the judiciary, territorial division, the distribution of powers between the state and the autonomous regions, the Constitutional Court and the procedure to amend the Constitution.

Laws

The Parliament, composed of two chambers, the Congress and the Senate, passes legislation on matters reserved by the Constitution to the state. When a law affects fundamental civil rights and liberties, it is called 'basic law' and is enacted through a special procedure requiring an absolute majority in Congress. Ordinary laws require simple majorities.

Each of Spain's 17 autonomous regions has a parliament of its own, which may pass legislation on delegated matters including health, education, regional infrastructure and the environment, certain taxes and consumer protection, among others.

The basic laws of autonomous regions are called 'statutes', which also require the approval of Parliament. Several autonomous regions have traditionally called for a new statute expanding their powers. However, with the current economic crisis, many

1 Esteban Astarloa is a partner and Patricia Leandro Vieira da Costa is an associate at Uría Menéndez.

autonomous regions have called for a reductions of their powers, transferring part of them back to the central state, in order to reduce their public expenditure. In turn, other autonomous regions have called for expanding their tax powers, to increase their public income.

The relationship between laws (national or regional) is not based on a hierarchical principle but on a material one: different matters or different territorial scopes require different laws.

Decree Laws and legislative decrees

Decree Laws are approved by the government. They regulate exceptionally urgent matters and must be ratified by Congress.

In addition, Parliament may occasionally authorise the government to make and enact legislative decrees, which have the same rank as law. Legislative decrees are generally used to group and redraft existing laws.

Decrees, ministerial orders and resolutions

Legislation, national or regional, is developed through these three types of provisions. Decrees are issued by the government, ministerial orders by the relevant minister and resolutions by administrative bodies or authorities. In the case of conflict, laws prevail.

ii Custom

In the absence of an applicable law, custom has the force of law, provided that it is substantiated and is not contrary to moral standards or public policy.

iii General principles of law

In the absence of legislation and custom, general principles of law apply. They are unwritten principles underlying the legal system based on concepts such as fairness and logic.

iv Case law

Law is never created by court decisions. However, case law issued by the Supreme Court is highly valued as a source of interpretation and application of the law.

v Court system

The Spanish court system is an independent power within the state. The courts forming the judicial system are structured in five jurisdictions: civil and commercial, criminal, administrative, labour and military. At the top is the Supreme Court, based in Madrid, with jurisdiction over all of Spain, featuring five chambers, one for each jurisdiction.

Civil and commercial

The civil and commercial jurisdiction deals with contractual claims, tort law, family law issues, inheritance and, in general, any matter that is not designated to the other jurisdictions. The courts of first instance are basis of this jurisdiction.

In 2005, specialised commercial courts were created in some of the largest Spanish cities to deal with matters such as intellectual property, bankruptcy and antitrust. Elsewhere, the courts of first instance have competence over these matters.

The decisions of courts of first instance (or commercial courts, where applicable) are subject to appeal before the civil chambers of the provincial courts. A provincial court's decisions can, in certain cases, be challenged before the Supreme Court, but only to determine the correctness of the lower court's application of the law.

Criminal

Criminal cases are investigated by a judge, who is assisted by the public prosecutor (fiscal) and the police. Victims may also be party to the proceedings as private accusing parties. The state or any legal entity (e.g., companies) can also be represented in the proceedings if they are victims.

Except for minor offences or misdemeanours, cases are always heard by a court other than that in charge of the investigation. Offences punished with penalties of up to five years' imprisonment are heard by 'criminal courts' (one judge), while cases involving more serious offences are heard by the criminal chamber of the corresponding provincial court (each chamber being formed by three judges).

The decision can always be appealed before a higher court: if the case is heard by a criminal court, the appeal must be filed before the corresponding provincial court; if the case is heard by the latter, the appeal must be filed before the Supreme Court directly.

Labour

A wide range of employment disputes are heard in this jurisdiction, such as claims regarding work shifts, holiday entitlement, discrimination in the workplace, the right to strike or to challenge disciplinary measures and, more usually, claims for unfair dismissal. In addition to the individual exercise of labour-related actions by employees, trade unions can also act on behalf of their members.

At the first instance, claims are heard by labour courts. Subject to statutory requirements, judgments issued by labour courts can be appealed before the High Court of Justice of the corresponding autonomous region. Likewise, and also under certain circumstances, judgments issued by the High Court of Justice can be appealed before the Supreme Court.

Administrative

Also known as the contentious-administrative jurisdiction, cases related to public authority resolutions, the challenge of general provisions with less standing than a law or of legislative decrees, appeals against a public authority's failure to act and claims linked to the liability of the public authorities and their staff are heard in this jurisdiction.

This jurisdiction is important for companies since it is the legal channel through which they can challenge, among other things, decisions of the regulators of the financial, telecommunications or utilities sectors, or competition decisions.

The equivalent of civil courts of first instance in this jurisdiction are called contentious-administrative courts. Their decisions can be appealed before the High Court of the relevant autonomous region and, under certain circumstances, before the Supreme Court.

Territorial organisation

For organisational purposes, the whole territory is divided into judicial districts covering one or more municipalities. There is always at least one court of first instance and one criminal investigation court in the 'capital' of each judicial district (although in small judicial districts there can be only one judge with dual responsibility).

Labour courts, criminal courts and contentious-administrative courts are situated in the capital of each of Spain's 50 provinces and in certain larger cities.

The courts of appeal are distributed regionally and include the provincial courts, the High Court of Justice of each autonomous region and the Supreme Court.

There is also a central court that combines various levels of jurisdiction called the National Court, based in Madrid but with statewide jurisdiction on matters regarding offences with considerable implications (i.e., terrorism, organised crime), and labour and administrative matters of special importance.

In small municipalities that are not the capital of their judicial district, minor civil matters, misdemeanours and certain civil registry functions are carried out by a justice of the peace.

The Constitutional Court

In theory, the Constitutional Court is not a part of the court system, but a separate and independent national institution that solves disputes between the state and autonomous regions, disputes related to the constitutionality of laws and violations of constitutional rights. However, the Constitutional Court has a flexible notion of its own jurisdiction and has recently adopted some controversial decisions overruling decisions of the Supreme Court in matters understood by the latter to lack constitutional significance. In practice, the Constitutional Court has at times been perceived by citizens as another instance.

The General Council of the Judiciary

The General Council of the Judiciary is the body in charge of the organisational aspects and inspection of the Spanish courts. The main functions of the General Council of the Judiciary are supervising the activity of judges and courts, selecting and training judges and magistrates and assigning them to a court, and electing from its members its own president and the President of the Supreme Court. The General Council of the Judiciary also nominates two justices to the Constitutional Court. The General Council of the Judiciary must be consulted before national or regional bills affecting the judiciary are passed.

II THE YEAR IN REVIEW

i Legislation

New legislation passed this year has been marked by the deep economic depression affecting Spain, which is causing social unrest. The Spanish economic crisis is mainly characterised by high levels of public debt; the problems of the Spanish financial system, mainly linked to former saving banks; and high unemployment rates. In this context, legislation passed this year had the following goals: to restructure the Spanish financial system; reduce public expenditure (including the reduction of the workload of Spanish

courts); increase public income (especially by collecting taxes more effectively and by preventing tax evasion); and try to protect certain mortgage debtors in foreclosure proceedings, in view of the number of families that are losing their homes.

In summary, the main legislative developments passed this year that affect, or may affect, dispute resolution proceedings, are the following:

a Royal Decree Law 12/2012, which introduces tax and administrative measures for the reduction of public debt (it came into force the same day that it was published in the Official Gazette of Spain, on 31 March 2012). The most important legislative development included in Royal Decree Law 12/2012 is the 'special tax return', also known as the 'tax amnesty'. By means of this new 'special tax return', taxpayers were given the opportunity to pay their income tax (corporate and individual income tax) of previous tax periods, by paying only a 10 per cent rate of the value of such income related to previous tax periods, with no surcharge, interests or penalties. The deadline for the submission of the 'special tax return' was 30 November 2012. Additionally, Royal Decree Law 12/2012 expressly excludes criminal liability if taxpayers pay the entire tax debt before the notification of the commencement of tax investigations. In this case, administrative tax authorities would not have to inform the Public Prosecutor about past tax evasions, even if the conduct of the taxpayer in question could have constituted tax fraud.

b Law 7/2012, which introduces amendments to tax and budgetary law, and adapts financial regulation for the improvement of actions preventing and combating fraud (it came into force the day after its publication in the Official Gazette of Spain, which took place on 30 October 2012). It introduces important legislative developments, in order to secure the payment of tax debt and prevent money laundering: it amends General Tax Law 58/2003, establishing that administrative tax authorities will be able to investigate assets of taxpayers and adopt precautionary measures to secure the payment of tax debt, even if criminal proceedings for alleged tax fraud are initiated and pending. The criminal judge may confirm, modify or lift the precautionary measures adopted by tax authorities. Another amendment to General Tax Law 58/2003 is the establishment of the specific obligation of taxpayers to inform tax authorities about assets located in foreign countries and additionally it also introduces limitations for payments in cash if one of the parties involved in a transaction is a company, businessman or professional (the general limit for payment in cash is €2,500; but it goes up to €15,000 if the paying party is an individual person not acting on behalf of a company or as a professional, and that justifies that his/her tax residence is not located in Spain).

c Law 10/2012, establishing fees for the Administration of Justice and for the National Institute of Toxicology and Forensic Sciences. It regulates the 'fee for the exercise of judicial powers in civil, administrative and labour jurisdictions', the criminal jurisdiction being the only one excluded from the application of such fee. The aim of this new fee is the direct (partial) assumption of the costs of judicial proceedings by those citizens that take their matters to courts; as well as the increase of economic resources for the financing of the judicial system (in particular, for financing legal aid).

The fee is generally applicable to:

- the filing of civil claims for the initiation of all types of declarative proceedings (ordinary or oral proceedings) and for the execution of extrajudicial enforceable titles in civil jurisdiction; to the filing of counterclaims; and to the initial petition of summary payment proceedings and of European summary payment proceedings;
- the initiation of compulsory insolvency proceedings and for ancillary claims in insolvency proceedings;
- the filing of judicial claims before administrative jurisdiction;
- the filing of the extraordinary appeal for procedural infringements in civil jurisdiction;
- the filing of appeals against judgments and of appeals before the Supreme Court, in both civil and administrative jurisdictions;
- the filing of supplications appeals and of appeals before the Supreme Court, in labour jurisdiction; and
- to oppose the enforcement of judicial titles.

Law 10/2012 establishes certain exemptions from payment of the fee, such as in the case of those who have the right to legal aid; a debtor that initiates its own insolvency proceedings; the Public Prosecutor, the Public Administration and the state's and autonomous regions' parliaments.

The fee is composed of a fixed rate established in Article 7 of Law 10/2012, as well as a variable rate, depending on the economic value of the judicial claim. If the fee is not duly paid, the judicial secretary will not give leave to proceed to the requested judicial action. Additionally, the fee can be partially recovered if the parties to the judicial proceedings decide to terminate such proceedings due to an extrajudicial resolution of the conflict, saving costs to the Administration of Justice. The fee can also be partially recovered if different claims are consolidated in a single judicial procedure.

Law 10/2012 came into force the next day of its publication in the Official Gazette of Spain, which took place on 21 November 2012. However, according to Instruction 5/2012, of 21 November 2012, issued by the General Secretariat of the Administration of Justice, the fee would not be applicable until an order of the minister of finance and public administration is published in the Official Gazette of Spain, establishing the procedure, as well as the official form, for the payment of the fee.

d Royal Decree Law 6/2012, on urgent measures to protect mortgage debtors without resources (it came into force the day after its publication on the Official Gazette of Spain, which took place on 10 March 2012). It established a Code of Good Practice for credit institutions, in order to facilitate the restructuring of mortgages for debtors that are considered to be in the 'exclusion threshold'. The requirements of the 'exclusion threshold' are referred to the critical economic situation of the debtor, when the credit or loan is secured by mortgage on the debtor's primary residence. The possible measures provided by the Code of Good Practice to restructure the mortgage debt are the improvement of loan or credit conditions; the reduction of the capital not yet paid; or debt cancellation by payment in kind (*datio in solutum*). However, the Code of Good Practice is not compulsory, as credit institutions may subscribe on a voluntary basis. Additionally,

Royal Decree Law 6/2012 also introduces amendments to the regulation of the extrajudicial auction of mortgaged property, when it is the primary residence of the mortgage debtor; and extends public aid for renters to more beneficiaries.

e Closely related to the latter, is Royal Decree Law 27/2012, on urgent measures to enhance the protection of mortgage debtors (it came into force the same day of its publication in the Official Gazette of Spain, which took place on 16 November 2012). The aim of this Royal Decree Law is to appease the social turmoil caused by the loss of primary residence by mortgage debtors, as a consequence of foreclosure proceedings initiated by the creditor, usually credit institutions. The situation is especially acute in the present Spanish context of high unemployment rates. Royal Decree Law 27/2012 established the possibility of suspension of evictions from primary homes, when the residents of the mortgaged property are considered 'especially vulnerable' and are in a critical economic situation, according to the requirements set out in the Law. The period of suspension of evictions is two years from the day Royal Decree Law 27/2012 came into force.

Apart from the legislative developments passed this year, there are three draft laws currently under consideration, that could introduce major changes to the Spanish Criminal Code, as well as to the Criminal Procedure Law.

With regard to the possible changes to the Criminal Code, a draft law on transparency and combating tax and social security fraud could introduce the possibility of political parties and unions being held criminally liable as legal persons (at the moment they are excluded from the possibility of being held criminally liable). Additionally, with regard to tax and social security fraud, said draft law has the specific aim of reinforcing the control of public expenditure and public income. The main possible amendments to said criminal offences that could be included in the Criminal Code are:

a the establishment of an aggravated tax fraud, with a penalty of up to six years of imprisonment, as a consequence increasing the statutory limitation period from five to 10 years;

b the possibility for tax authorities to collect the tax debt while criminal proceedings are still pending;

c preventing the prosecution of tax fraud if the debtor has paid the entire tax debt; and

d as regards social security fraud, the reduction of the amount from which said fraud is considered a criminal offence, from €120,000 to €50,000.

The draft law also introduces amendments to the criminal offences against workers' rights; and introduces a new criminal offence committed by officials related to fraud in public accounts. Moreover, the Spanish government is currently working on a new draft law that could introduce important changes to a great number of criminal offences established in the Criminal Code; as well as new penalties, such as life imprisonment, which is subject to review.

The government is also working on another draft law that could introduce profound changes to the Criminal Procedure Law. It could modify the core structure of criminal proceedings, especially the investigation stage. Today, a criminal investigation judge in Spain is in charge of the investigation stage of criminal proceedings; and the

public prosecutor acts as a party. In contrast, the draft law (following the preliminary draft law that the former government was working on) provides that the Public Prosecutor would be in charge of conducting the investigation stage of criminal proceedings, under the supervision of a Judge of Procedural Guarantees. The investigation of the public prosecutor would be generally limited to a maximum period of 12 months, counting from the first appearance of the investigated person within the investigation (or 18 months, for investigations handled by a specialised public prosecutor office of the National Chamber), but the Judge of Procedural Guarantees could eventually extend such time limit. According to this preliminary draft law, the aim of this new structure of the investigation stage of criminal proceedings is to secure the impartiality of the Judge of Procedural Guarantees, as well as to strengthen the rights of defence of the investigated person. This preliminary draft law could also introduce, among other things, major changes regarding appeals in criminal proceedings; the competent court to hear the oral trial; people's actions; stay of the proceedings and plea bargaining; and the development of the oral trial.

ii Court practice

In the 2010 edition of this work, we had mentioned two criminal proceedings against Judge Garzón, which were of great public interest. The criminal proceedings were related to the criminal offence of judicial prevarication allegedly committed by Judge Garzón for ordering the wiretapping of attorney–client communications in prison in the *Gurtel* corruption case; and for opening a controversial investigation regarding crimes against humanity committed during and after the Spanish Civil War.

During 2012, the relevant judgments were issued. Garzón was found guilty of judicial prevarication for ordering wiretapping in the *Gurtel* case and disqualified from the profession of judge for a period of 11 years, according to the Supreme Court judgment of 9 February 2012. The Supreme Court deemed that the wiretapping ordered by Judge Garzón was absolutely unfair, and could not be justified by any reasonable interpretation of law. The main reason for this ruling was that the order issued by Judge Garzón permitted the wiretapping of all conversations between the investigated person in prison and any of his or her lawyers; even future lawyers in respect of which Judge Garzón could not have any suspicion that they were collaborating with their clients in committing criminal offences by the time the wiretapping order was issued. The Supreme Court considered that Judge Garzón's decision infringed the right to effective legal assistance, based on confidentiality and trust; as well as the right not to incriminate oneself, legal privilege and the right to privacy.

However, Judge Garzón was found innocent for opening an investigation for crimes against humanity committed during and after the Spanish Civil War, by the Supreme Court judgment of 27 February 2012. The Supreme Court ruled that although Judge Garzón's decision was not correct attending to the letter of the law (Garzón's decision implied a broad and extensive interpretation thereof), it was not an absolutely unfair decision and thus could not constitute the criminal offence of prevarication.

Apart from the above cases, there is a great number of judicial proceedings before Spanish Courts on public corruption; and also against financial entities, initiated by individual and class actions mainly for the sale and distribution of financial products.

III COURT PROCEDURE

i Overview of court procedure

Article 120.2 of the Spanish Constitution establishes that proceedings in Spain must be mainly oral, especially criminal proceedings. In practice, all civil, criminal and labour proceedings have written and oral parts. Conversely, administrative proceedings are mainly conducted in writing.

The oral principle is linked to the immediacy principle. Immediacy requires that the judge who renders the judgment be the same as the one that has heard the oral trial and therefore has had direct contact with the parties, the witnesses, the experts and the subject matter of the trial, enabling him or her to form an opinion on the case.

Principles inherent to the structure of the proceedings

Principle of controversy or dual parties

The principle of controversy or dual parties implies that the court is neutral between the claimant and the defendant (or, in criminal proceedings, between the prosecutor and the defendant). The parties must provide the court with all the relevant facts, which must be duly evidenced. The court's task is to consider the allegations and means of evidence provided by each party.

This is not strictly applicable to the investigation stage of criminal proceedings, where, even if the public prosecutor maintains that the suspects are not criminally liable, the judge can continue investigating at his or her own initiative.

Once the investigation stage of criminal proceedings has concluded, the principle of dual parties is fully applicable for the rest of the proceedings.

Principle of equality of arms

Equality of arms means that the different parties acting in a process must have access to the same resources in forming their respective claims and defences. In other words, each party must be given a reasonable opportunity to present their case under conditions that do not place him or her at a substantial disadvantage. This includes the right to access to all evidence adduced or observations made.

Again, there is an exception to this principle during the investigation stage of criminal proceedings, as the judge and the public prosecutor may have access to information or documents before the parties. However, as soon as there is no risk of compromising the investigation, the parties must have access to the information.

Principles inherent to the object of the proceedings

Principle of initiative (civil/labour proceedings)

According to this principle, only the parties to an action may initiate civil proceedings and may determine the matter under dispute through the initial claim and counterclaim. This principle entails that once the action has been brought before the court, only the parties to the claim may have some bearing on the action. Therefore, the claimant is free to continue or to withdraw the claim.

Accusation principle (criminal proceedings)
This principle establishes that no one can be held guilty of an offence without being accused of it.

In certain cases it is difficult to match a particular form of behaviour with the legal definition of an offence, which can result in accusations being made for the 'wrong' offence. In such cases, the accusation principle has been relaxed somewhat by case law in the sense that courts can impose an equal or inferior punishment to that established for the offence made by the accusation, provided that both offences are of the same nature (e.g., robbery and theft).

The right of the defendant to be heard
Also called the principle of audience, this right is applicable in all jurisdictions. According to this principle, no judgment may be rendered against anybody without them having had the opportunity to be heard. This practice entails notifying the defendant of the initiation of proceedings and the main procedural acts, including the notification through an official gazette if his or her domicile is unknown. A breach of this principle would render the proceedings void.

ii Procedures and time frames

All civil and commercial claims must be resolved either through ordinary or oral proceedings.

Ordinary proceedings
Economic claims exceeding €6,000 and some specific matters set out in the Civil Procedure Law regardless of their economic value (most significantly, challenge of corporate resolutions and protection of honour, personal image or privacy) are resolved through ordinary proceedings.

Ordinary proceedings are initiated by filing a claim with the court. Together with the claim, the claimant must file the documents on which it is based (agreements, invoices, letters, etc.). The judicial secretary will examine the claim before issuing an express resolution accepting it. However, in the event that the claim does not fulfil the formal requirements, or when the judicial secretary considers that the court has no competence or jurisdiction over the case, he or she will inform the judge who will then decide on the acceptance of the claim. Once formally accepted, the judicial secretary will serve it upon the defendant, who will be given 20 business days to answer the complaint.

When answering the complaint, the defendant may:

a acknowledge the facts (in which case, judgment against the defendant will be rendered immediately);
b contest the complaint; and/or
c file a counterclaim. The answer to the complaint will be delivered to the claimant and, if a counterclaim has been filed by the defendant, the claimant will be given 20 business days to reply.

Once the defendant has answered the complaint and, as the case may be, the claimant does the same with the counterclaim, or the corresponding terms to answer have elapsed,

the court will summon both parties to a preliminary hearing to try to settle the dispute by agreement or, if this is not possible, preparations for trial will begin, allowing both the claimant and the defendant to specify, clarify or rectify their allegations, raise procedural objections and propose evidence.

In the preliminary hearing, the court will decide on the procedural objections raised, will accept the relevant means of evidence and will fix a date for the trial.

In the trial, the evidence will be produced (examination of the parties, the witnesses, independent experts, etc.) and the parties will present their 'oral conclusions' summarising the facts in dispute and the evidence supporting their allegations.

Following the trial, the court will render its judgment.

Oral proceedings

Complaints with a value or economic interest not exceeding €6,000, as well as injunctive relief actions, disputes over lease agreements, vacant possession actions or actions for the rectification of inaccurate harmful data, will be resolved through oral proceedings.

As in the case of ordinary proceedings, oral proceedings are initiated by filing a claim with the court, attaching the documents on which the claim is based. The judicial secretary or the judge (in the same manner as in ordinary proceedings) must then accept the complaint by express resolution. Once the claim has been formally accepted, the court will directly summon the parties to a hearing.

In this hearing, the defendant will be given the opportunity to respond to the claim orally. Counterclaims in oral proceedings are only accepted in limited cases. The submission and production of evidence will follow, and then the oral conclusions. The court has 10 days to render its judgment.

Summary proceedings

In addition, a special type of proceedings is available for the repayment of economic debts of any amount. It is a fast-track procedure through which parties seek to obtain an enforceable resolution quickly.

The first instance court of the debtor's domicile will be competent to hear the claim. If this domicile is unknown, proceedings will take place in the court with jurisdiction over the place to which the debtor could be summoned to make payment. Neither express nor tacit submissions to alternative courts are deemed valid.

Actions are initiated by filing a brief requesting payment together with a document evidencing that the claimed amounts are due (e.g., a bill, delivery invoice or any other document commonly used in commercial relationships).

If the petition is accepted, the judge will order the debtor to pay or to provide grounds for his or her defence within 20 days. The opposition should consist of a succinct statement of the reasons why the debtor argues that all or part of the debt is not owed.

If the debtor does not oppose and fails to pay, the court will automatically issue an enforcement order for the amount owed.

If the debtor contests, then proceedings will continue as ordinary proceedings, except if the amount of the claim does not exceed €6,000, in which case they will continue as oral proceedings, and the parties will be summoned to a hearing before the court.

Interim relief

The Civil Procedure Law regulates interim relief, allowing the parties to apply for a wide range of precautionary measures (freezing of assets, record in public registries, order to cease an activity or prohibition to carry it out, suspension of the execution of corporate resolutions, etc.) to ensure the effectiveness of the potential judgment in favour of the requesting party. The request will generally be included in the claim, although, exceptionally, the claimant may request interim relief even before filing the claim (in which case, the defendant must file the claim within the following 20 days).

Before adopting the relevant measures, the court will summon the requesting party and the defendant (or potential defendant) to a hearing where they must state the reasons for or against the adoption of the measures.

Again, in exceptional circumstances, the court may order the adoption of interim measures (usually, the seizure of assets) before hearing the affected party, in which case the hearing will take place after the measures have been implemented.

Simultaneously to ordering the adoption of interim measures, the court will require the claimant to provide security covering potential damages to the affected party. In this regard, the claimant usually provides a bank guarantee.

iii Class actions

The Civil Procedure Law regulates class actions. The most important feature of class actions in Spain is that they are reserved for consumer and user associations requesting compensation for damages in favour of consumers and users affected by the same problem, regardless of whether or not they are members of the claimant association.

Consumers are notified of the class action by virtue of an announcement in the media of the geographic area in which the impairment occurred, thus allowing them to 'opt in' and join the class action.

Under Spanish law, the most important consequence of class actions is that the decision will be considered *res judicata*: no person falling under the scope of the claimant class may bring suit based on the same facts, on the basis that they were given the chance to litigate and to be compensated by virtue of the class action proceedings.

It is somewhat surprising that there is no 'opt-out' procedure for consumers who wish to initiate proceedings independently. Their only alternative is to have their own independent counsel, albeit in the same proceedings.

The commonality requirement for bringing class actions under Spanish law is also interesting: an action can only be successfully initiated when the cause of the injury is identical in relation to the different consumers or users affected, but it is unnecessary to project the harmful conduct or act on every consumer individually.

iv Representation in proceedings

Spain has a peculiar system of representation. The general rule is that litigants must be represented in the proceedings by a court representative (procurador), who is an independent legal professional that acts as an intermediary between the party and the court, filing the briefs that the party's lawyer prepares and notifying the party of the resolutions issued by the court.

Generally, briefs addressed to a court must be signed by a court representative and by a lawyer, except in certain cases where the signature of these professionals is not required and the party may act unaided: complaints for a value or economic interest amounting to a maximum of €2,000, to be resolved through oral proceedings; and requests for monitory proceedings and writs aimed at entering an appearance, requesting urgent measures prior to trial, or requesting the urgent suspension of a hearing or of any other procedural act.

In criminal proceedings, representation by a court representative is optional at the investigation stage, but mandatory as from the trial stage. Legal counsel is mandatory, except in proceedings for misdemeanours.

v Service out of the jurisdiction

The first serving of an initial claim to a person or company domiciled in one of the countries that have ratified the Hague Service Convention will be dealt in accordance with the legal system established in such Convention, to which Spain is a party. Please see also Section III, (vii), *infra*.

In this regard, the Spanish central authority would deliver the claim and attached documents to the other country's central authority, which is responsible for passing them on to the defendant together with a translation of both the claim and the attached documents into the official language of the country.

To answer the claim, the defendant should grant powers of attorney in favour of both a Spanish lawyer and a court representative, who would formally represent the defendant before the courts of Spain. Once the court representative is appointed, all subsequent notifications will be served directly to him or her.

For countries that have not ratified the aforementioned Convention, the principle of reciprocity would apply (generally, notification through letters rogatory).

vi Enforcement of foreign judgments

A foreign judgment is not directly enforceable in Spain, and must first be granted recognition through *exequatur* proceedings. *Exequatur* is the declaration that a foreign judgment can have legal effects in Spain. The recognition and enforcement of foreign judgments in Spain is governed by a number of international instruments ratified by Spain together with Articles 951 to 958 of the Civil Procedure Law.

Recognition of a foreign judgment in Spain may be sought under two major frameworks, and recognition of a foreign judgment under either of these systems set out *infra* must be granted through *exequatur* proceedings, notwithstanding procedural specialities that the applicable treaty may establish.

Conventional recognition and enforcement regime

Spain is party to many bilateral and multilateral treaties on the recognition and enforcement of foreign judgments, the most important of which are the Brussels Convention of 1968 (superseded by EU Regulation 44/2001) and the Lugano Convention of 1988.

Internal recognition and enforcement regime

Recognition and enforcement of foreign judgments in the absence of an applicable treaty is based on the reciprocity principle (the party seeking recognition of the foreign judgment proves that the courts of the country of origin would recognise a similar Spanish judgment) together with the fulfilment of certain requirements: the foreign judgment must have been rendered consequent to the exercise of a personal cause of action, and not rendered by default; the obligation to be enforced through the judgment must be lawful in Spain; and the judgment must meet all the necessary requirements for validity in the country where it was rendered and in Spain.

vii Assistance to foreign courts

Assistance to foreign courts is governed by several different sets of rules, briefly explained *infra*:

a EU Regulation 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters. The Regulation provides a swift procedure for the transmission of requests for the taking of evidence directly between the courts of all the Member States of the European Union, with the exception of Denmark.

b The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. The system provided in this Convention differs essentially from that outlined in Regulation (EC) No. 1206/2001 in that such requests are not transmitted directly from the requesting court to the required court, but must be addressed to the central authority of the state where the evidence is sought. In Spain, that central authority is the Ministry of Justice's General Directorate for International Legal Cooperation.

c The European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 establish the procedure for requesting international cooperation when certain enquiries within criminal proceedings must be carried out before foreign authorities.

d Law 2/2003 and Law 3/2003, on the European arrest warrant. It transposes into Spanish law the Council Framework Decision of 13 June 2002, on European arrest warrant and surrender procedures between Member States (2002/584/JAI), establishing the procedure for the application of the European arrest warrant, which is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

e Spain is also party to many bilateral and multilateral treaties, including the Inter-American Convention on Letters Rogatory.

f Finally, when none of the aforementioned conventions or treaties apply, assistance to foreign courts is governed by Articles 277 and 278 of the Judiciary Law. Cooperation will be granted under this regime under the following conditions: reciprocity between Spain and the state from which the request originates; the request is not contrary to Spanish public policy; the request is authentic and is

drafted in Spanish; the request is addressed to the Spanish competent court to perform the taking of evidence; and Spanish courts are not exclusively competent over the proceedings where the evidence sought is intended to be effective.

viii Access to court files

In principle, access to court files is restricted to the parties, their lawyers and their court representatives.

As a general rule, attendance at trial and access to the judgments is public, except when there are reasons to protect the right to privacy of the victims.

In theory, intermediate resolutions or the content of procedural acts other than the trial should not be made public. In practice, the media somehow gain access to this information, and neither the courts nor professional or administrative bodies seem to adopt any kind of action to punish or prevent this practice.

In the investigation stage of the criminal proceedings, under certain special circumstances (risk of destruction of evidence or of compromising the investigation) a court may keep a file secret from the parties. The court's decision must be grounded and the secrecy period cannot exceed one month, extendable for additional monthly periods by subsequent court orders.

ix Litigation funding

There are no specific legal limits to litigation funding by third parties. Of course, when the litigants are civil servants or judges, funding by third parties could be considered bribery.

Litigation funding by third parties is uncommon in Spain. In criminal matters, for instance, third parties can themselves be a party to the proceedings in the exercise of the 'people's accusation', which is certainly more frequent than funding someone else's litigation.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

There are certain Spanish regulations on the protection of information subject to conflicts of interest; however, there are no express regulations on the implementation of Chinese walls in law firms.

In practice, information barriers are a reality in most legal services providers. Chinese walls are undoubtedly allowed and in some cases even an obligation (including for professional legal services) in accordance with professional codes of practice.

In certain cases, especially in large mergers or acquisitions where both parties wish to be advised by the same law firm, the consent of both in writing is requested. This is common in the sale and purchase of companies, when a firm may advise the financing party (e.g., a bank) and the potential purchaser. In these cases there is clearly a conflict of interest, but a Chinese wall is set up by having different teams work for each client (including support staff), avoiding any electronic communication or sharing of information. Chinese walls are more difficult in litigation matters.

ii Money laundering, proceeds of crime and funds related to terrorism

Until 2011, the basic regulations in this field were Law 19/1993 (widely amended in 2003 to adapt it to the provisions of Directive 2001/97/EC) and Royal Decree 54/2005, which developed the aforementioned Law 19/1993. However, Law 19/1993 has been derogated by Law 10/2010 of 28 April, which transposes Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. Said Directive establishes a general framework regarding money laundering and terrorism financing, which must be completed by each EU Member State. The purpose of Law 10/2010 is specifically to implement and complete this general framework, providing unified regulation for the prevention of money laundering and of terrorism financing, which traditionally had been regulated separately.

A range of non-financial businesses and professions are subject to Law 10/2010 for the prevention of money laundering, including lawyers and court representatives, in the following circumstances:

a when they take part in the preparation or assessment of any transaction on behalf of their clients for the acquisition of real property or companies; the management of funds, securities or any other assets; the opening or management of current accounts, savings accounts or securities accounts; or the creation or management of a company, a trust or any analogue structure; or

b when they act on behalf of their clients in any financial or real estate transaction.

Moreover, Law 10/2010 has introduced a wider definition of money laundering. While the previous regulation limited the scope of money laundering in relation to those goods that had been obtained through criminal offences punished with prison for more than three years, the new law does not include such limitations: money laundering will exist regarding any goods derived from any illegal activity, regardless of the punishment foreseen for such activity.

The new regulation establishes three levels of due diligence measures to be adopted depending on the type of client, business relationship, product or transaction, as well as certain obligations that must be fulfilled. Specifically, the obligations of lawyers or other professionals mentioned are as follows:

a to request the identification documents of the clients who take part in transactions;

b to carefully examine any transaction that could involve money laundering and communicate any suspicious transaction to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences. In this case, lawyers are not allowed to execute the transaction before they make the communication. The obligation to communicate does not apply when the information is obtained to determine the position of the client or to defend that client in any judicial or administrative proceedings;

c to keep all the documents that evidence the fulfilment of the obligations stipulated by Law 10/2010 for a minimum of 10 years;

d to set up an internal structure to comply with the obligations to prevent transactions involving money laundering. Said internal structure includes, among other measures:

- the establishment of a client admission policy;

- the creation of an internal body to control the fulfilment of the indicated obligations; and
- the drawing up of a handbook regarding the prevention of money laundering; and

e to maintain the steps taken in accordance with these obligations.

From a criminal law standpoint, money laundering is dealt with under Article 301 of the Criminal Code, it being a criminal offence to acquire, process or transfer property in the knowledge that it was obtained as a consequence of a crime, or to commit any other act to conceal its unlawful origin or to assist any person involved in the acts with the aim of avoiding the corresponding legal consequences. The reform of the Penal Code introduced by Fundamental Law 5/2010 increases the number of behaviours that can constitute this criminal offence, including not only the acquisition, process or transfer of property in the knowledge of its illegal origin, but also the possession and use of said property. Moreover, the reform foresees the possibility of holding criminally liable for a money laundering offence the same person who committed the previous crime that constitutes the origin of the goods or properties that are the object of money laundering. Additionally, Law 10/2010 makes express reference to evaded tax debts as being susceptible to money laundering. This implies that tax fraud can constitute the illegal origin of money laundering offences and, consequently, the benefits of said tax fraud can constitute the object of a money laundering offence.

iii Other areas of interest

Prior to 2011, the only requirements to practice law in Spain were holding a law degree and registration in a local bar association. But in October 2011, Law 34/2006 came into force, requiring that those holding a law degree must have professional qualifications in order to practise law. Professional qualifications will be achieved by completing a graduate course organised by a Spanish university (both public and private) or by a local bar association, and after completing an apprenticeship under the supervision of practising lawyers. Satisfactory achievement of a professional qualification is subject to an exam supervised by a commission formed by representatives of the Ministry of Justice, representatives of the Ministry of Education and representatives appointed by each autonomous region.

The new regulation is designed to bring Spanish legislation closer to that of other EU Member States. Nevertheless, Law 34/2006 is still causing significant uncertainty. Private and Public universities are only beginning to adopt the necessary measures to implement the new system.

Recently, Law 5/2012, on mediation in civil and commercial matters, amended Law 34/2006, establishing that the professional qualifications to practise law will not be required by those who obtain a law degree after October 2011 and become a member of a bar association within two years of obtaining such degree. This exception is only applicable to those who obtain a law degree, not the graduate degree in law adapted to the requirements of the European Higher Education Area (Bologna Plan).

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Confidentiality of information exchanged between lawyers and clients is established in the Judiciary Law and in the General Regulation of the Law Profession.

The Judiciary Law states that all lawyers must keep confidential all the facts or information acquired as a result of their professional activity and cannot be required to testify with regard to such facts or information.

There are, however, no express regulations governing 'privileged' or 'without prejudice' documents or communications, as may be the case in common law jurisdictions.

The Professional Code of Practice approved by the General Council of the Spanish Legal Profession in 2002 expressly states that: 'The obligation and right of legal professional confidentiality consists of the confidences and proposals from the client, opposing parties, other attorneys and all facts and documents that have been known or have been received due to any of the different types of professional activity.'

Confidentiality is therefore both a privilege and a legal obligation, encompassing all facts and documents known or received in the exercise of the legal profession. A breach of this obligation could lead to criminal liability as well as sanctions from the Bar Association.

As for in-house counsel, the General Regulation of the Law Profession sets out that the legal profession can also be exercised under an employment relationship. In such case, in-house counsel enjoy the same rights and obligations as external counsel, including the right (and the duty) of confidentiality and secrecy of communications.

ii Production of documents

Under Spanish law, parties may be required to produce any document considered relevant or useful by the court. Article 328 of the Civil Procedure Law establishes that a party may require the other to produce the documents unavailable to the former and related to the subject matter of the dispute or to the effectiveness of the means of evidence.

Although it may seem straightforward, the relevance test of Spanish courts is complex, and the requested document must be directly connected with the dispute.

In Spain, it is important to provide the court with original documents rather than photocopies. Therefore, the parties often request their counterparties to produce original documents. In such cases, the Civil Procedure Law sets out that a copy of the document must be submitted to the court by the party that requests the original or, in its absence, a very detailed description of such document.

Although, as mentioned *supra*, Spain is a party to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, it is one of the countries that does not accept letters rogatory issued for the purpose of obtaining pretrial discovery of documents. In fact, there is nothing similar to discovery under Spanish civil law, since a Spanish court would expect the document requested to be specific, that is, that the requesting party is certain of its existence and that it is that one identifiable document and no other that relates to the general issue.

If documents are held by a third party, in Spain or abroad, the relevance test becomes even more restrictive.

When documents are held by foreign third parties, letters rogatory are sent by Spanish courts requesting that the foreign authorities carry out the pertinent actions to obtain the document.

In summary, Spanish courts are extremely sensitive towards burdensome or disproportionate obligations in this regard, and consequently only specific documents directly related to the litigation may be requested to be produced by the parties or by a third party.

Naturally, criminal investigation courts operate under different standards and often request the parties or third parties (banks, telecommunications companies, airlines, etc.) to provide information or documents. This can be done either at the initiative of the investigating judge or following a petition of the public prosecutor, the police or any party to the proceedings.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Arbitration and other alternative dispute resolution means are increasingly becoming a real and effective venue for settling commercial disputes in Spain. This section provides a brief outline of the current status of the out-of-court mechanisms in Spain, focusing on arbitration, mediation and expert determination.

ii Arbitration

The Spanish Arbitration Act, together with a number of international instruments ratified by Spain, make up the Spanish arbitration legal framework. Soundly based on the UNCITRAL Model Law, the Arbitration Act is aimed at harmonising domestic regulations with international arbitration standards and thus fostering the development of arbitration in Spain.

In accordance with the spirit of the UNCITRAL Model Law, the Spanish Arbitration Act sets out a unitary regulation for both international and domestic arbitration, with only a few minor rules that exclusively apply to international arbitration. Consequently, the Arbitration Act applies to any arbitration proceedings, either domestic or international, in which the place of arbitration is in the Spanish territory. Another relevant feature of the Arbitration Act is the relaxation of the formal requirements of the arbitration agreement. Although the arbitration agreement must be in writing, recording by other means – such as electronic ones – is also acceptable. In addition, arbitration agreements by reference to a separate document are valid under the Act.

Spanish awards are immediately enforceable, even if a request to set aside the award has been filed. In this regard, the Arbitration Act provides that Spanish awards may only be set aside on the following grounds: the arbitration agreement does not exist or is void; the party challenging the award has not been given proper notice or opportunity to present its case; the arbitrators have ruled on questions not submitted to their decision; the composition of the arbitral tribunal or the arbitration proceedings have been irregular; the arbitrators have decided on questions that cannot be settled by arbitration; or the award is in conflict with public policy. The action to set aside the award is not an appeal and therefore does not entail a review of the merits of the case.

Spanish case law is consistent with this approach, making clear that the scope of review in proceedings to set aside an award is strictly limited to verifying that the essential principles of due process have been observed during the arbitration.

The enforcement of foreign awards in Spain is governed by the New York Convention. Since Spain made no reservation as to its scope of application, the New York Convention governs the enforcement of any foreign arbitration award, even if the place of arbitration is located in a non-contracting state. Spanish courts favour simplicity and expeditiousness when it comes to enforcing foreign awards.

To sum up, the Arbitration Act represents a real breakthrough in developing Spanish arbitration as an efficient alternative to litigation and promoting Spain as an attractive seat for international arbitrations, especially in connection with investments and transactions relating to Spanish-speaking countries. Spanish arbitration institutions and practitioners are fully committed to this active arbitration process, leading initiatives to encourage recourse to arbitration in Spain.

Apart from the publication of new rules for the Court of Arbitration of Madrid, which came into force on 1 January 2009 (intended to be compatible with international arbitration standards and to better adapt to the principles of procedural flexibility and freedom of action), and the launch of the first part of the Code of Good Arbitration Practice from the Spanish Arbitration Club (a guide aimed at compiling general ethical duties and principles that arbitral institutions should observe to enhance confidence in arbitration as an effective means of dispute resolution), the Arbitration Act was amended in 2010 and in 2011.

Law 11/2011 entered into force on 11 June 2011 with the objective of promoting arbitration as an alternative to litigation. The most important aspects of the Law are:

a the reassignment of judicial functions regarding arbitration;

b the possibility of establishing statutory arbitration within companies. Companies may introduce arbitration clauses in their articles of association stating that disputes arising within the company are subject to arbitration;

c an increase in the number of professionals who may be arbitrators;

d allowing the parties, witnesses and specialists and other third parties to resort to their native language in arbitration proceedings;

e the creation of an arbitration procedure designed to resolve disputes among organs of the Spanish public administration;

f the amendment of the Insolvency Act, stipulating that the mere declaration of insolvency does not affect mediation or arbitration agreements with the debtor; and

g the apparent possibility of requesting interim measures prior to the initiation of arbitration proceedings.

The amendment of the Arbitration Act is among multiple initiatives passed by the Spanish legislator to improve and streamline the functioning of the Spanish administration of justice by attempting to reduce litigation.

iii Mediation

For the first time in Spain, mediation is expressly regulated as an alternative to judicial proceedings and to arbitration, by Law 5/2012, on mediation in civil and commercial matters (it came into force 20 days after its publication in the Official Gazette of Spain, which took place on 7 July 2012). It incorporates into Spanish law European Parliament and Council Directive 2008/52/CE, of 21 May 2008, on certain aspects of mediation in civil and commercial matters. The aim of Law 5/2012 is to regulate a fast and effective process of solving conflicts on civil and commercial matters, reducing the burden of litigation weighing down Spanish Courts. According to the Ministry of Justice, mediation should also be cheaper than taking the matter to court, since there is no need for a lawyer and a court representative; and no obligation to pay the judicial fees established by Law 10/2012.

According to Article 1 of Law 5/2012, mediation is a process of solving conflicts, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a third person, the mediator. The regulation established Law 5/2012 is flexible, in order to be respectful of the will of the parties involved.

It is applicable to civil and commercial matters, including cross-border disputes, except as regards rights and obligations that are not at parties' disposal under the relevant applicable law. On 27 November 2012, the Spanish Minister for Justice announced before the Chambers of Commerce General Assembly that the process of mediation could be used, on a voluntary basis, in the following cases (among others): family matters; insurance claims; civil liability claims; inheritance conflicts; conflicts within a family company (large or small); conflicts between partners of a small or medium-sized company; conflicts regarding the commercial relationship between companies, or with clients or suppliers; conflicts between the franchisor and the franchised company; and conflicts regarding commercial leases. According to Article 2 of Law 5/2012, this regulation is not applicable to criminal mediation; mediation with the Public Administration; labour mediation; and mediation in consumer matters.

The mediator, the third party that assists the parties in reaching an agreement and in solving the dispute, must be an individual person holding an official university degree or a higher-level vocational degree; and must also have specific training in mediation. On 27 November 2012, the Spanish Minister for Justice publicly announced that a Royal Decree will regulate a registry of mediators and mediation institutions; and will establish the specific training required for mediators. Additionally, mediators must take out civil liability insurance or other equivalent guarantee to cover their possible liability. The Institutions of Mediation, which are public or private entities that promote mediation (such as Official Chambers of Commerce, Industry and Navigation, as well as Professional Associations), may facilitate access to mediation, including the appointment of a mediator.

The principles of mediation are: free and willing participation (the parties are not obliged to reach an agreement through mediation); equality between the parties and impartiality of the mediator; neutrality; and confidentiality.

During the process of mediation, the parties will not be able to file judicial claims on the same subject being dealt with in mediation. Additionally, if there is an agreement

between the parties to submit certain matters to mediation, any of them may oppose the existance of said mediation clause or agreement before the courts. In this sense, Law 5/2012 introduces amendments to Civil Procedure Law, taking into account the possibility of solving conflicts through mediation.

The final agreement or settlement eventually reached by means of mediation is binding on the parties. It can cover all or only part of the matters subjected to mediation. If the parties wish it to be enforceable, the agreement should be converted to public deed.

The Spanish Minister of Justice has publicly announced that the Ministry of Justice is already working on the regulation of criminal and administrative mediation.

iv Other forms of alternative dispute resolution

Besides arbitration and mediation, expert determination is considered a valid alternative to litigation in Spain. Expert determination is a flexible procedure for the resolution of disputes based on the decision of an independent third party: the expert. Expert determination is regarded as especially suitable for factual disputes.

The category of expert is regulated under Spanish law. Specifically, the determination by a third party of the exact price of a sale and purchase agreement is governed by article 1,447 of the Spanish Civil Code. In fact, the issues that are generally subject to expert determination relate to valuation matters, such as the EBITDA of the target company as a basis for calculating the purchase price. Recourse to expert determination is also frequent in disputes in which a high degree of technical knowledge is required, such as those resulting from construction contracts.

Under Spanish law, as well as under other European legal systems, an expert determination may be challenged on a variety of grounds, such as material error or clear bias in favour of one of the parties.

VII OUTLOOK AND CONCLUSIONS

New legislation passed this year has been significantly affected by the economic crisis. In particular, it has been marked by the government's dilemma of addressing public debt and of trying to appease social dissatisfaction provoked by this crisis.

In this context, the government is particularly aiming to collect more public income, as well as reducing public expenditure, the justice administration being one of the main areas in which the government has already adopted relevant measures (in particular, with the establishment of judicial fees through Law 10/2012).

The government is also encouraging alternatives to litigation, such as mediation in civil and commercial matters, to this end a regulation has been passed this year (through Law 5/2012) for the first time in Spain. Such regulation intends to provide an effective, speedy and low-cost tool to solve disputes in civil and commercial matters, reducing the workload of Spanish courts as a consequence.

Apart from public budgetary constraints, the government is also facing the challenge of social unrest provoked by the economic crisis and high unemployment rates. This situation is expected to determine the introduction of new regulation on foreclosure proceedings, in order to protect mortgage debtors who may lose their primary home for unpaid mortgage debt.

With regards to criminal law, the government's intentions to increase public income will probably also determine a harsher prosecution of tax and social security fraud.

Additionally, the government is also working on profound changes to the Criminal Procedure Law, continuing the work of former the government by establishing that the public prosecutor will be in charge of the investigation stage of criminal proceedings, under the supervision of a judge of procedural guarantees. This possible future regulation may make criminal proceedings more efficient and reduce the burden of investigation judges. Nevertheless, there is a clear uncertainty regarding the impartiality of public prosecutors to handle investigation proceedings (since the General State Public Prosecutor is directly appointed by the government); and on the concrete role of the judge of procedural guarantees. Moreover, it is uncertain whether there will be a large enough budget to pay the high costs that these changes may bring.

Appendix 1

ABOUT THE AUTHORS

ESTEBAN ASTARLOA

Uría Menéndez

Esteban Astarloa is a partner in the Madrid office of Uría Menéndez. He joined the firm in 1989 and became a partner in 2002.

After several years of practice in civil litigation, arbitration and advising on insolvency proceedings, he currently focuses his practice on criminal law, criminal and civil procedural law and international litigation.

Mr Astarloa has advised on some of the major white-collar crime cases in Spain, especially those with international scope (extraditions, letters rogatory, proceedings in other countries, obtaining evidence abroad and enforcement of foreign judgments).

Esteban Astarloa has also participated in some of the most significant private litigation, arbitration and insolvency cases in Spain.

He obtained a law degree and an economics degree from ICADE (Universidad Pontificia de Comillas), where he is currently a corporate criminal law professor. Mr Astarloa is also a regular speaker at law seminars and conferences. Among other forums, he has taught criminal and litigation law in the Spanish Law Innovation Centre (Centro de Innovación del Derecho) and in the Madrid Bar Association.

Esteban Astarloa is a member of the board of trustees of Fundación Profesor Uría.

He has been listed as a leading individual in the 2010 to 2012 editions of *Best Lawyers in Spain* and included in the 2007 to 2012 editions of *Chambers* (Spain).

PATRICIA LEANDRO VIEIRA DA COSTA

Uría Menéndez

Patricia Leandro is an associate in the Madrid office of Uría Menéndez. She joined the firm in 2010 and focuses her practice on criminal law, and especially on white-collar crimes.

Ms Leandro has a law degree from the Universidad Autónoma de Madrid, and is a member of the Madrid Bar Association.

URÍA MENÉNDEZ
Principe de Vergara, 187
Plaza de Rodrigo Uría
28002 Madrid
Spain
Tel: +34 91 586 04 79
Fax: +34 91 586 04 02
eah@uria.com
www.uria.com