The Dispute Resolution Review

Seventh Edition

Editor
Jonathan Cotton

Law Business Research

The Dispute Resolution Review

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THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

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EDITOR'S PREFACE

The Dispute Resolution Review covers 48 countries and territories. Disputes have never respected national boundaries and the continued globalisation of business in the 21st century means that it is more important than ever before that clients and lawyers look beyond the horizon of their home jurisdiction.

The Dispute Resolution Review is an excellent resource, written by leading practitioners across the globe. It provides an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is written with both in-house and private legal practitioners in mind, as well as the large number of other professionals and businesspeople whose working lives bring them into contact with disputes in jurisdictions around the world.

This Review is testament to the fact that jurisdictions face common problems. Whether the issue is how to control the costs of litigation, which documents litigants are entitled to demand from their opponents, or whether a court should enforce a judgment from another jurisdiction, it is fascinating to see the different ways in which different jurisdictions have grappled with these issues and, in some cases, worked together to produce a harmonised solution to international challenges. We can all learn something from the approaches taken by the 48 jurisdictions set out in this book.

A feature of some of the prefaces to previous editions has been the impact that the turbulent economic times were having in the world of dispute resolution. Although at the time of writing the worst of the global recession that gripped many of the world's economies has largely passed, it is has left its mark. Old and new challenges and risks remain in many parts of the world such as renewed speculation on the future of the eurozone, the sanctions imposed on Russia, and falls in the price of oil. In some regions, the 'green shoots' of recovery have blossomed while in others they continue to need careful nurturing. Both situations bring their different challenges for those involved in disputes and, while the boom in insolvency-related disputes and frauds unearthed in the recession remain, the coming year could see an increase in investment and acquisitions with a subsequent focus on disputes concerning the contracts governing those investments.

I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at p. 739 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research, in particular Nick Barette, Eve Ryle-Hodges and Shani Bans, who have impressed once again in managing a project of this size and scope, and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2015

Chapter 40

SPAIN

Ángel Pérez Pardo de Vera and Francisco Javier Rodríguez Ramos[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Spain is a non-denominational, social, democratic and sovereign state governed by the rule of law, which advocates freedom, justice, equality and political pluralism as higher values of its legal system.

Spain's government is a parliamentary monarchy. It has been a Member State of the European Union since 1986. Its territory is divided into 17 autonomous regions and two autonomous cities. Some of these regions have significant legal peculiarities.

The Spanish system is a 'civil law system', characterised mainly by the primary role of statutory provisions and the lack of binding case law. Its guiding principles are the principle of the rule of law, the normative order, the publication of regulations, the non-retroactivity of punitive provisions that are unfavourable to or restrictive of individual rights, legal certainty and accountability, and prohibition of bias for public powers.

i Sources of law

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

Legal and regulatory provisions

Constitution

The Constitution provides the basic regulations on fundamental rights and duties, the Crown, Parliament, the government, the relationships among the main institutions, 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.

1 Ángel Pérez Pardo de Vera is a partner and Francisco Javier Rodríguez Ramos is an associate at Uría Menéndez.

International provisions and European Union law

Validly concluded international treaties constitute part of the internal legal order once officially published in Spain. In the event of a contradiction between the provisions of an international treaty and national law, the former will prevail.

European Union law is also part of the Spanish legal system, and is hierarchically above national laws. European law is divided into primary law (the treaties ratified by Spain) and secondary law (legislative acts emanating from the European Union institutions).

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 denominated a '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 its own parliament, which may pass legislation on delegated matters including health, education, regional infrastructure, the environment, specific taxes and consumer protection matters.

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.

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 consolidate and redraft existing laws.

Decrees, ministerial orders and resolutions

Legislation, both national and 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 event of conflict, laws prevail.

Custom

In the absence of applicable law, custom has the force of law, provided that it is substantiated and is not contrary to moral standards or public policy. Custom is considered as the primary source of law under the special civil legal framework in the region of Navarra.

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.

Case law

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

ii 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, featuring five chambers, one for each jurisdiction.

Civil and commercial courts

The civil and commercial jurisdiction deals with contractual claims, tort law, family law, inheritance and, in general, any matter that does not fall under the other jurisdictions. The courts of first instance are the core of this jurisdiction.

In 2005, specialised commercial courts were created in some of the largest Spanish cities to deal with claims lodged in relation to insolvency; antitrust, industrial property, intellectual property (IP) and advertising matters; corporate law; international or national regulations on transport matters; maritime law; general contracting conditions; and appeals against specific decisions issued by the Directorate General for Registries and Notaries. If a commercial court does not exist in a particular judicial district, the corresponding matters remain under the jurisdiction of the courts of first instance.

Decisions of courts of first instance (or commercial courts) are subject to appeal before the civil chambers of the provincial courts. A provincial court's decision can, in certain cases, be appealed to the Supreme Court (see Section III.ii, *infra*).

Criminal courts

Criminal cases are investigated by a judge, assisted by a public prosecutor and the police. Victims may also be a party to the proceedings as private accusers. The state or any legal entity can also be represented in the proceedings if victims.

Except for minor offences and 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 severe 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 directly with the Supreme Court.

Labour courts

A wide range of employment disputes are heard in this area of law, including claims regarding work shifts, holiday entitlement, discrimination in the workplace, the right to strike or 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 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, under certain circumstances, judgments issued by a high court of justice can be appealed to the Supreme Court.

Administrative courts

Cases related to resolutions issued by public authorities, the challenge of general provisions with lower hierarchical standing than a law or 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 by administrative courts.

This jurisdiction is the legal channel through which companies can challenge, *inter alia*, decisions of the regulators of the financial, telecommunications or utilities sectors, and competition decisions.

Contentious administrative courts are the equivalent to the civil courts of first instance in administrative law. Their decisions may be appealed to the high court of justice of the relevant autonomous region and, under certain circumstances, to the Supreme Court.

Territorial organisation

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 may only be one judge with dual responsibility).

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

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, the National Court, which combines various levels of jurisdiction. The National Court is based in Madrid but has nationwide jurisdiction on matters regarding offences with considerable implications (e.g., terrorism and organised crime) and labour and administrative matters of special importance.

The Constitutional Court

The Constitutional Court is not part of the court system, but rather an independent national institution that resolves disputes between the state and autonomous regions, disputes related to the constitutionality of laws and violations of constitutional rights.

The General Council of the Judiciary

This body is in charge of the organisation and inspection of Spanish courts. The main functions of the General Council of the Judiciary are supervising judges and courts, selecting and training judges and magistrates and assigning them to a court, and electing its own president and the president of the Supreme Court from among its members. It also names two judges to the Constitutional Court.

II THE YEAR IN REVIEW

i Legislation

There has been significant legislative activity in Spain in the last few years. Some draft bills drafted by the government have already reached the Parliament and are being discussed by the Justice Commission (or have been approved by Parliament). Others have been initially approved by the government, but not yet delivered to Parliament for debate.

Laws passed by Parliament

Law 3/2014 amending the Law for the Protection of Consumers

Law 3/2014 entered into force on 29 March 2014 and is applicable to contracts executed with consumers as from 13 June 2014. The main amendments introduced are as follows:

a The concepts of consumer and user are extended to include natural persons acting for purposes outside their craft or profession (i.e., not only trade or business) and legal entities or entities without legal personality acting for non-profit reasons and in a context falling outside the scope of a trade or business activity.

b The concept of entrepreneur is also extended to include any legal or natural person, public or private, acting directly or through another person acting on his or her behalf or pursuant to his or her orders, for purposes related to his or her trade, business, craft or profession.

c The pre-contractual information requirements for contracts executed with consumers are reinforced, supplementing the information requirements under Law 17/2009 on the Free Access to the Services Activities and their Practice and Law 34/2012 for the Information Society and Electronic Commerce Services.

d Distance contracts and contracts executed outside business premises (according to EU Directive 2011/83) are more comprehensively regulated, in particular clarifying the concept of business premises and also providing more comprehensive regulation of the right of withdrawal.

e In terms of implementing contracts, Law 3/2014 introduces new regulations in relation to the delivery of goods, fees applicable to the use of different means of payment, the transfer to consumers of the risk of loss or deterioration of purchased goods, telephone communications and additional payments.

f It allows the exercise of injunctions simultaneously with nullity actions, breach of contract actions, contract termination or contract rescission actions, actions seeking refunds of amounts paid pursuant to conduct, terms or standard conditions deemed unfair or non-transparent, and actions seeking damages caused by the implementation of such terms or conducts.

Draft bills under discussion in Parliament

Bill on voluntary jurisdiction

This bill is aimed at simplifying and modernising legal proceedings in cases in which there is no dispute among parties although the intervention of a judicial body is required in order to exercise rights relating to civil and commercial law. The bill differentiates between acts of voluntary jurisdiction *stricto sensu* (those that must be conducted, in court, before a judge or court agent) and others that become acts to be carried out by public notaries, commercial registrars or property registrars.

The bill proposes that public notaries be responsible for many voluntary jurisdiction matters related to succession issues, voluntary auctions and other acts in relation to commercial issues. Under the bill, public notaries are authorised to resolve specific monetary claims. Commercial and property registrars would have authority to resolve minor disputes on technical matters without bringing them to court.

Bills already approved by the government, but not yet subject to discussion in Parliament

Preliminary bill of the Basic Judiciary Law

This preliminary bill is aimed at replacing the current Judiciary Law, dating back to 1985. The preliminary bill envisages a significant change to the Spanish judiciary system, seeking to adapt the judiciary to current needs. One of the most significant novelties is the reorganisation of the Spanish court system, replacing courts of first instance with new provincial courts (which should reduce the current total number of courts). The preliminary bill also proposes changes to the civil and criminal appellate systems: decisions issued in those areas will be subject to appeal to the high court of justice of the corresponding autonomous region (assuming the responsibility that has, until now, fallen on the provincial courts). Another important proposal in the preliminary bill is the creation of a new type of case law that would be considered binding (i.e., a source of law), mirroring the role of case law in common law systems. The binding case law would be identified by the Plenum of the Supreme Court, at quarterly meetings from among the judgments issued within that period. Other amendments under the preliminary bill include:

a creation of a new system for preliminary ruling under which lower courts could consult the Supreme Court – prior to the issuance of a ruling – if they consider that the case law issued by the Supreme Court (1) could lead to manifest injustice, (2) contradicts the doctrine of the Constitutional Court as regards constitutional guarantees, or (3) is contradictory;

b modification of the appellate system, increasing the scope of judgments subject to appeal, and eliminating extraordinary appeals due to procedural infringements (appeals based on infringements of formality and procedural law would fall within the scope of cassation appeals);

c inclusion of new mechanisms to protect judicial independence; and

d reinforcement of the role of court representatives, guiding collaborative acts of notification and communication on behalf of the court and increasing the scope of involvement in attachment and foreclosure proceedings.

In any event, the future of this preliminary bill is not clear following the recent resignation of Spain's Minister of Justice and criticism from the judiciary, some legal professionals and other interested groups.

Preliminary bill on international legal cooperation in civil matters

This bill is aimed at providing Spain with a modern international legal cooperation framework and complying with the mandate under the Spanish Civil Procedure Law adopted in 2000, and would be applicable to civil and commercial matters. The bill would regulate, for the first time, direct judicial communications, which would allow

Spanish courts to communicate with foreign judicial bodies without the assistance of intermediaries. It also includes comprehensive provisions on various aspects of international judicial assistance, including service of process, transmission of judicial and extrajudicial documents, and the taking of evidence. Finally, the preliminary bill would amend *exequatur* proceedings applicable in the absence of a treaty or special regulation (see Section III.vi, *infra*), with an eye towards filling any procedural gaps in current regulations and addressing issues such as the partial or incidental recognition and enforcement of foreign judgments or the possibility of amending foreign judgments. The new provisions would apply to judgments and decisions issued in contentious proceedings and those issued in adversarial proceedings as well as those issued in voluntary jurisdiction proceedings. It would also modify the grounds for refusal of recognition of foreign judgments and their registration with public registries.

ii Court practice

The economic crisis led to a significant increase in litigation, which peaked in 2009, when more than 9.5 million cases were filed.

The Supreme Court has continued developing case law in the field of contract law, seeking to harmonise Spanish case law with the corresponding international harmonisation instruments. The following decisions in 2014, *inter alia*, are noteworthy.

Supreme Court judgment of 30 June 2014, on the application of rebus sic stantibus

This decision includes a study on the current application of the *rebus sic stantibus* doctrine. The Supreme Court advocates normalising the application of the doctrine (following the trend observed in previous judgments such as those of 17 and 18 January 2013), abandoning the traditional approach to the doctrine, in which it was deemed a measure only applicable under significantly limited circumstances. The Supreme Court bases its position not only on the current economic crisis, but also on the nature of the doctrine as adopted in the most relevant international harmonising instruments on contract law.[2]

Supreme Court judgment of 23 May 2014 on the grounds for contract termination

This judgment is another example of the Supreme Court's tendency toward openness in the field of contract termination and complements case law developments undertaken in recent years.[3] In the decision, the Supreme Court distinguishes between two levels of analysis in assessing whether a breach of contractual duties are sufficiently relevant to justify termination of a contract. The first level of analysis (the most traditional) – the performance level – in which the breach of a contractual duty is considered a cause for contract termination if it is a serious breach, understood as non-performance or inadequate performance of a basic contractual duty (not ancillary or complementary duties) or duties stated as basic by the contracting parties. A second level of analysis – the

2 UNIDROIT principles of International Commercial Contracts, Principles of European Contract Law.

3 Supreme Court case law has analysed different grounds for contract termination, including anticipatory breaches, unjustified delays in performance and intentional breaches of contract.

purpose level or satisfaction level – focuses on the satisfaction reached by the contractual parties, rather than comparing the expected and actual contractual performances. This second level allows for the termination of a contract not only if a basic contractual duty is breached, but also if ancillary or additional duties are breached, frustrating the contractual parties' expectations.[4]

European Court of Justice judgment of 17 July 2014

This judgment was issued after a Spanish judge requested a preliminary ruling from the ECJ concerning the compatibility of the Spanish appeal system in mortgage foreclosures proceedings and Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts and Article 47 of the Charter of Fundamental Rights of the European Union.

Article 695 of the Spanish Civil Procedure Law did not grant the debtor against whom mortgage foreclosure proceedings were brought standing to lodge an appeal against the decision dismissing the debtor's objection to the foreclosure. In contrast, the law grants the creditor seeking enforcement standing to lodge an appeal against the decision terminating the foreclosure proceedings or ordering that an unfair term not be applied. The ECJ deemed Spanish appeal system applicable in mortgage foreclosure proceedings contrary, in that particular matter, to the principle of equality and the consumers rights established by Council Directive 93/13/EEC and the European Convention of Human Rights.

III COURT PROCEDURE

i Overview of court procedure

All civil, criminal and labour proceedings have written and oral phases. 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 that who heard the oral trial and has therefore had direct contact with the parties, the witnesses, the experts and the subject of the trial, enabling the judge to form an opinion on the case.

Principles inherent to civil proceedings

Principle of controversy or dual parties

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.

4 It is necessary to assess whether the results of the contract fulfil the benefits, results and profits that can legitimately be expected, including any other particular benefit expected by a contractual party as long as this situation is known by the others.

Principle of equality of arms
Parties acting in a process must have access to the same resources in preparing their respective claims and defences. This includes the right to access all evidence produced or observations made.

Principles inherent to the object of the proceedings
Principle of initiative
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 any bearing on the action. Therefore, the claimant is free to continue or withdraw the claim.

The right of the defendant to be heard
This right established that no judgment may be rendered against anybody without the party having had the opportunity to be heard. This practice entails notifying the defendant of the initiation of proceedings and the main procedural acts. A breach of this principle would render the proceedings void.

ii Procedures and time frames

Civil and commercial claims must be resolved through either 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 and privacy) are resolved through ordinary proceedings.

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 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, accept the corresponding means of evidence and set a trial date.

In the trial, the evidence will be produced (examination of the parties, the witnesses, experts) and the parties will orally present their closing statements summarising the facts in dispute and the evidence supporting their allegations.

Following the trial, the court will render its judgment.

Oral proceedings
Oral proceeding are used to resolve complaints with a value or economic interest not exceeding €6,000, as well as other actions such as certain injunctive relief actions for the protection of collective and diffuse interests of consumers, some disputes over lease agreements, vacant possession actions, maintenance claims, actions for the rectification

of inaccurate harmful data and those related to matters not included among those reserved for ordinary proceedings.

As in the case of ordinary proceedings, oral proceedings are initiated by filing a complaint with the court. The court will directly summon the parties to a hearing. In the hearing, the defendant will have the opportunity to orally respond to the complaint. Counterclaims in oral proceedings are only accepted in limited cases. The submission and production of evidence will follow.

Summary proceedings

The monitory proceeding is a special type of proceedings 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.

If the debtor does not submit a challenge and fails to pay, the judicial secretary will issue an order declaring the termination of the summary proceedings, allowing the creditor to seek enforcement and payment of the amount owed. If the debtor submits a challenge, proceedings will continue as ordinary proceedings, except if the amount 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.

There is also a monitory proceeding at the European level established by EC Regulation 1896/2006. This fast-track procedure is applicable to civil and commercial matters in cross-border cases, in which at least one of the parties is domiciled or habitually resident in a Member State (except Denmark) other than the country hearing the action.

Interim relief

The Civil Procedure Law regulates interim relief, allowing Spanish courts to admit any kind of interim measure in order to ensure the enforcement of a potential judicial ruling in favour of the petitioner.

The court may allow the requested interim measure provided that (1) the claimant is able to show that there is a reasonable probability of success on the merits of the case, (2) in its absence there is a real risk that a judgment in favour of the claimant might not be executed (for instance, the assets might be taken abroad or otherwise removed), (3) the measure is appropriate for securing the effectiveness of the resolution, and (4) there are no less harmful measures that may be equally effective in securing the pending final determination of the proceeding.

If the court ultimately allows the measures, the petitioner must provide a bond in order to cover any potential damage that the adoption of the interim measure may cause to the defendant. The Spanish system on interim measures establishes a strict liability regime, meaning that if the petitioner loses on the merits, he or she will be liable for any damages the defendant suffered due to the measures adopted.

The Spanish Civil Procedure Law does not contain an exhaustive list of these measures, so the petitioner may call for the adoption of any interim measure that will be useful to secure the future judgment.

The request for interim measures is usually submitted to the court together with the complaint, but they may also be requested prior to the filing of a lawsuit. In this case, the petition for interim measures must be filed within 20 days of the granting of the measures with the court with jurisdiction to render a judgment in the main

proceeding. Nevertheless, petitions for interim measures may be admitted after the filing of the lawsuit under exceptional circumstances. If the interim measure is revoked, the petitioner will be ordered to make restitution for any damages caused to the defendant by implementing the measure. The court may allow the defendant to substitute the interim measure for alternative security.

The parties may appeal the court order accepting or rejecting the interim measure. Nevertheless, if the order acepts the measure, the filing of the appeal will not prevent the measure from being enforced.

Appeals on civil matters

Appeals on civil matters are as follows:

a Appeal for reversal: allows parties to challenge interlocutory decisions issued by judges or judicial secretaries, lodging an appeal heard by the authority that issued the decision.

b Appeal for review: allows parties to challenge decisions issued by judicial secretaries that state the termination of the proceedings or prevent its continuation, lodging an appeal heard by the judge of the court in charge of the proceedings.

c Remedy of appeal: final rulings (on the merits of the case, in whole or in part) may be challenged by the party whose claims have been rejected by lodging a remedy of appeal. The appeal will be heard by the provincial court with territorial jurisdiction, which is the court immediately above the first instance court that issued the decision. If both parties are unsatisfied, each may appeal part of the decision.

d Extraordinary appeal due to procedural infringements: this appeal allows parties to file an appeal to the Supreme Court challenging final rulings issued by provincial courts due to an infringement of procedural formalities based on one of the following grounds: (1) breach of rules relating to the court's jurisdiction; (2) breach of procedural rules regulating the form and content of judicial decisions; (3) breach of rules regulating procedural guarantees if the breach implies the invalidity of the judicial act or has caused a lack of a defence; or (4) a violation of the fundamental rights contained in article 24 of the Spanish Constitution.

e Cassation appeal: by lodging this appeal with the Supreme Court, parties challenge final rulings issued by provincial courts when: (1) the value or economic interest at stake exceeds €600,000; (2) the proceedings concern fundamental rights other than those established in article 24 of the Spanish Constitution; or (3) the appellate decision has reversal interest.[5]

f Extraordinary appeals in the interest of law: may be lodged with the Supreme Court by the Public Prosecutor, the Ombudsman and other public authorities

5 The decision contradicts the Supreme Court's case law, the case relates to a matter on which there is conflicting case law among the provincial courts or it applies laws that have been in force for less than five years and there is no relevant case law from the Supreme Court in relation to previous laws of identical or similar content.

with respect to the interpretation of procedural rules in which the holdings of the civil and criminal chambers of the high courts of justice diverge.

g Complaint: allows parties to challenge a court's decision to reject admission of a remedy of appeals, an extraordinary appeal due to procedural infringements or a cassation appeal. The complaint is heard by the court with jurisdiction to hear the rejected appeal.

Judicial fee

The upfront payment of a fee was introduced in 2012 as a requirement to exercise certain judicial actions. Law 10/2012 regulates the 'fee to exercise judicial powers in civil, administrative and labour jurisdictions'. Law 10/2012 was recently amended by Royal Decree Law 3/2013.

The fee is calculated at a fixed and a variable rate, with reference to the economic value of the judicial claim. There are certain exemptions from payment of the fee, such as persons entitled to legal aid.

iii Class actions

Although the Civil Procedure Law expressly regulates class actions, only in recent years have class actions become an important legal feature of Spanish civil litigation. Since 2008, some Spanish investors have sought recourse collectively (especially concerning claims for damages deriving from the purchase of financial and investment products).

Class actions in Spain are reserved for consumer associations, certain authorised legal entities and other affected groups requesting compensation for damages arising from the same matter.

The Civil Procedure Law establishes several publicity requirements regarding class actions with the aim of ensuring sufficient protection of the corresponding private interests. Thus, when the proceedings involve identified or easily identifiable damaged parties, the class action would only be admissible if the claimants have previously notified the affected parties of their intention to lodge a class claim. Following notification, the consumer or user may 'opt in' and join the class action at any time (but may only carry out procedural acts that have not been precluded). The Civil Procedure Law provides a second notification after the admission of the claim: a judicially agreed announcement in the media of the geographical area in which the damage occurred. In cases in which the affected consumers are unidentified or it is difficult to identify them, the prior publicity requirements are substituted by a temporary two-month stay of the proceedings in order to make the claim public.

The most important consequence of class actions is that the decision will have *res judicata* effects: no person falling under the scope of the claimant class may bring a suit based on the same facts. Likewise, any action filed while the class action is litigated would not be admitted in application of the *lis pendens* rule.

There is no 'opt-out' procedure for consumers who wish to initiate proceedings independently.

The commonality requirement for bringing class actions under Spanish law is also noteworthy. An action can only be successfully initiated when the cause of the injury is identical in relation to the different consumers affected, that is, if: (1) the origin

of the damage is unambiguous in relation to the affected consumers; and (2) it is not necessary to prove the damaging conduct or action for each represented consumer, individually considered.

iv Representation in proceedings

Spain has a peculiar representation system. The general rule is that litigants must be represented in the proceedings by a court representative, who is an independent legal professional acting 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.

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

Within the European Union, service of process between Member States is governed by EC Regulation 1393/2007. The system established by this regulation allows the service of judicial and extrajudicial documents in civil or commercial matters through direct communication between the agencies designated by the Member States (rather than the usual method of transmitting notifications through central authorities).

The applicant who forwards documents to the transmitting agency must translate the document into a language that the addressee understands or into the official language of the Member State where service is to be effected. The documents are exempt from legalisation or any equivalent formality.

The receiving agency should either serve the document itself or have it served within one month, according to the law of the receiving Member State, or by a particular method if this is requested by the transmitting agency and it conforms to the national law.

Beyond the European Union, the first serving of an initial claim to a person or company domiciled in one of the countries that has ratified the Hague Service Convention will be dealt in accordance with the legal system established in that Convention, to which Spain is a party.

The Spanish central authority pursuant to the Convention 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. For countries that have not ratified the convention, the principle of reciprocity would apply (generally, notification through letters rogatory).

vi Enforcement of foreign judgments

The recognition and enforcement of foreign judgments is regulated by Regulation 44/2001 in the European Union and the Spanish Civil Procedure Law passed in 1881.

European Union Regulation 1215/2012

The recognition and enforcement of judgments in civil and commercial matters issued in European Union countries was governed by Council Regulation (EC) No. 44/2001. The Regulation was applicable to enforce any judgment given by a court or tribunal of a Member State. The enforcement under the regulation included a two-stage process: first, declaration of enforceability through *exequatur* proceedings and, second, enforcement under the applicable *lex fori*. The judgment would only not be recognised if (1) it was manifestly contrary to public policy in the Member State in which recognition was sought; (2) the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable the defendant to prepare his or her defence; (3) it was irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; or (4) it was irreconcilable with an earlier judgment given in another country involving the same cause of action and the same parties.

This international enforcement model has been amended through Council Regulation (EC) No. 1215/2012, which replaced Council Regulation (EC) No. 44/2001 from 10 January 2015. The *exequatur* proceeding prior to the enforcement of judgments, court settlements and public documents is abolished by the new regulation. Mutual trust in the administration of justice in the European Union and the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed.

Spanish Civil Procedure Law of 1881

Although this statute has been derogated by the Spanish Civil Procedure Law of 2000, some provisions remain in force. In particular, Articles 951 to 958 currently regulate the enforcement of foreign judgments of a civil, commercial and labour law nature through *exequatur* proceedings.

There are three different regimes for obtaining *exequatur* in Spain: (1) that stated in the conventions, (2) the reciprocity regime and (3) the regime of conditions or independent internal control. In all cases, Spanish courts demand that exclusive national jurisdiction is respected and that foreign judgments are not contrary to international public policy.

vii Assistance to foreign courts

Assistance to foreign courts is governed by several different sets of rules, including the following:

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 to the central authority of the state where the evidence is sought. In

Spain, that central authority is the Ministry of Justice's General Subdirectorate for International Legal Cooperation.

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

d When no convention or treaty applies, assistance to foreign courts is governed by Articles 277 and 278 of the Judiciary Law. Cooperation will be granted pursuant to this framework 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 court with authority to perform the taking of evidence; and Spanish courts do not have exclusive jurisdiction over the proceedings where evidence sought is intended to be used.

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 if there are reasons to protect the victim's right to privacy.

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 on the funding of litigation by third parties. Although this practice has historically been uncommon in Spain, it is usually reported in international arbitration involving foreign parties and is increasingly prevalent in 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 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 parties in writing is requested.

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

Law 10/2010 of 28 April provides unified regulations on the prevention of money laundering and of terrorist financing, which were traditionally 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, when:

a 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 analogous structure; or

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

Money laundering is deemed to exist regarding any goods derived from any illegal activity, regardless of the punishment foreseen for such activity.

There are 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.

Law 10/2010 was recently developed by Royal Decree 304/2014. The new royal decree establishes stronger due diligence measures and expands the information duties imposed on lawyers and other professionals.

From a criminal law standpoint, it is 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. Law 10/2010 also makes express reference to evaded tax debts as likely to be used for 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 Data protection

Data protection in Spain is regulated by Basic Data Protection Law 15/1999 and Royal Decree 1720/2007. The authority in charge is the Data Protection Authority (DPA). As to the processing of personal data, the controller must register the creation, modification and deletion of each database with personal data it controls with the Spanish DPA. It is generally necessary to provide information to data subjects on the processing of their personal data and to obtain their prior consent before the implementation of personal data processing. When personal data is to be transferred to a country outside the European Economic Area in which regulations have not been identified by the EU authorities as ensuring an adequate level of protection, the controller must generally obtain the DPA's authorisation.

For legal professionals, it is important to fulfil the obligations provided by data protection regulation, since personal and private data is frequently reviewed.

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.

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.

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 a 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. According to the ECJ's decision in the *Akzo Nobel Chemicals Ltd v. Commission*, however, the confidentiality and secrecy of communications for in-house counsel is not applicable, at least in relation to antitrust investigations initiated by the European Commission.

ii Production of documents

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

The relevance test of Spanish courts is usually rigorous, and the requested document must be directly connected with the dispute. Spanish courts expect the document requested to be specific, in other words, the requesting party must be certain of its existence and it must refer to that specific, identifiable document and to no other document that relates to the general issue.

Naturally, criminal investigation courts operate under different standards and often request the parties or third parties (banks, telecommunications companies, airlines, etc.) to provide information and 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.

Pretrial proceedings

The Spanish Civil Procedure Law allows parties to obtain the information necessary to file an action through pretrial proceedings. The basis for these proceedings is that in some cases the future claimant may find it impossible to obtain all the information necessary to file an action without the assistance of judicial authorities. According to the Civil Procedure Law, pretrial proceedings are limited to the following issues:

a the production of documents or evidence of facts regarding capacity;
b representation and legal standing;
c the disclosure of items in possession of the respondent, and upon which the trial will be based;
d the disclosure of wills and other testamentary documentation;
e the disclosure of accounting documentation of companies and owners associations;
f the disclosure of insurance policies;
g the disclosure of medical records;

h the determination of the members of the group that initiate legal actions for the defence of the collective interest of consumers; and

i the disclosure of information regarding the origin and distribution of merchandising networks pertaining to disputes involving industrial and IP matters.

In any event, the petitioner must grant a sufficient guarantee to cover any hypothetical damage that may occur if no action or claim is filed following the completion of pretrial proceedings.

Taking of evidence in advance

The Civil Procedure Law also allows the parties to request that evidence be taken in advance (even before the initiation of legal proceedings) when there is grounded fear that, due to the activity of persons or due to the circumstances, the evidentiary acts may not be carried out at the usual procedural moment.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

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

ii Arbitration

The Spanish Arbitration Law passed in 2003 established a very favourable legal framework for arbitration. Its main goal was to provide economic agents with an efficient and flexible dispute resolution mechanism, both in the domestic and the international arena. It was hoped that this would have two positive effects for the legal system: from a domestic perspective, it should relieve the courts of a significant number of cases for which the flexibility of the procedure and the specialisation of the arbitrators proves to be a more appropriate alternative; and, from an international perspective, it should promote Spain as a seat of international arbitrations. In general, it can be said that the Arbitration Law has fulfilled those expectations.

Spanish awards are immediately enforceable, even if a request to set aside the award has been filed. The Arbitration Law 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 contrary to 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-signatory state. Spanish courts favour simplicity and expeditiousness when enforcing foreign awards.

The Arbitration Law 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.

With the benefit of several years' experience, the legislature considered that it was the appropriate time to take another look at the Law in order to improve its text and to give fresh impetus to arbitration in Spain. As a consequence, Law 11/2011 was passed to amend the Arbitration Law. Two features of the amendment stand out. First, the amended Law retains the fundamental pillar of arbitration, that of party autonomy. Second, in order to unify case law and guarantee greater legal certainty, the – limited – competences of judicial control of arbitration were concentrated in the high courts of justice. It now falls within their authority to hear actions for annulment of arbitral awards rendered in arbitrations where Spain is the seat of arbitration and to hear the requests for recognition of foreign awards. The role of supporting arbitration (except the judicial appointment of arbitrators) still falls to first instance courts: they continue to assist in the taking of evidence, the judicial granting of interim measures and the enforcement of awards.

iii Mediation

Mediation has been expressly regulated as an alternative to judicial proceedings and arbitration by Law 5/2012, on mediation in civil and commercial matters. It incorporates European Parliament and Council Directive 2008/52/CE of 21 May 2008 on certain aspects of mediation in civil and commercial matters into Spanish law. The aim of the Law is to regulate a fast and effective process of solving conflicts, reducing the burden of litigation weighing down Spanish Courts. There is no need for a lawyer and a court representative.

It is applicable to civil and commercial matters, including cross-border disputes, except as regards rights and obligations that are not at the parties' disposal under the relevant applicable law. This regulation is not applicable to criminal mediation, mediation with public authorities, labour mediation, and mediation in consumer matters.

The mediator must be an individual person holding an official university degree or a higher-level vocational degree; and must also have specific training in mediation. 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.

During the mediation process, the parties will not be able to file judicial claims on the same subject being dealt with in mediation.

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

On 13 December 2013, Royal Decree 980/2013 was approved, developing specific aspects of Law 5/2012.

iv Other forms of alternative dispute resolution

Apart from 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.

Recourse to expert determination is also common in disputes in which a high degree of technical knowledge is required, such as those resulting from construction contracts.

VII OUTLOOK AND CONCLUSIONS

2014 has been an interesting year in terms of decisions establishing case law. The Supreme Court has continued to review doctrines and legal concepts. This judicial approach is expected to continue in the coming years. European Union law continues to gradually increase its influence on the national law, primarily or mainly through European Courts' decisions issued in the context of preliminary rulings. Judicial activity has been continuous, although less than in the early years of the crisis, when historic levels were reached. International arbitration has continued to grow, turning Spain into a reference in the field, especially in cases involving parties from Latin American countries. Legislative activity is also significant, although the most innovative measures for the modernisation of the Spanish judiciary and international cooperation are still works in progress.

Appendix 1

ABOUT THE AUTHORS

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Francisco Proença de Carvalho joined Uría Menéndez – Proença de Carvalho in April 2010 following the merger of the firm Proença de Carvalho & Associados with Uría Menéndez. He is now a partner in the litigation and arbitration department of the Lisbon office. Before that, he was a partner at Proença de Carvalho & Associados, a prestigious litigation and business law boutique in the Portuguese market.

He focuses his practice on litigation, covering all areas of professional litigation and arbitration practice. He also has experience in mergers and acquisitions matters.

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Ángel Pérez Pardo de Vera is a partner in the Madrid office of Uría Menéndez, and he focuses his practice on dispute resolution conflicts in the litigation and arbitration areas. He completed his international practice at the litigation department of the New York office of Cravath, Swaine & Moore LLP.

Mr Pérez Pardo de Vera advises on conflict situations of a civil, commercial and private international nature – mainly contractual liability, corporate litigation and inheritance. He has experience in a wide variety of complex high-profile proceedings, often involving several jurisdictions (banking, electrical, telecommunications, technology, the internet and industrial sectors).

He received his law degree with honours from the University of Navarra and completed his education on finance at Columbia Business School. He is a lecturer on the master's programmes at the Universidad de Navarra.

In 2011 he received the '40 Under Forty' award from the legal publication *Iberian Lawyer*. He has also been distinguished as a leading lawyer in Litigation (2013) and both in the litigation, and arbitration and mediation areas (2014 and 2015) by *Best Lawyers*.

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