The Dispute Resolution Review

Eighth Edition

Editor
Jonathan Cotton

Law Business Research

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EDITOR'S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 45 jurisdictions. In a world where commercial disputes frequently cross international boundaries, it is inevitable that clients and practitioners across the globe will need to look for guidance beyond their home jurisdictions. *The Dispute Resolution Review* offers the first helping hand in navigating what can sometimes, at first sight, be an unknown and confusing landscape, but which on closer inspection often deals with familiar problems and adopts similar solutions to the courts closer to home.

This eighth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward looking and the contributors offer their views on the likely future developments in each jurisdiction.

Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments. For instance, over the past year the EU has adopted a new regulation on jurisdiction which fortifies the freedom of parties of any nationality to choose to litigate in their preferred forum and grants Member State courts discretion to stay proceedings in favour of proceedings already on foot in non-Member State courts. At the other end of the spectrum, 2015 saw the Supreme Court in the United Kingdom clarify the law on penalty clauses 101 years after the seminal House of Lords' case on this issue (see the review of *ParkingEye Ltd v. Beavis* and *Cavendish Square Holding BV v. El Makdessi* [2015] UKSC 67 at page 181). But even seemingly local decisions such as this have a broad audience and can have far-reaching consequences in global commerce. It is always a pleasure – and instructive for my own practice – to observe the different ways in which jurisdictions across the globe tackle common problems – sometimes through concerted action under an umbrella international organisation and sometimes individually by adopting very different, but often equally effective, local solutions.

Over the lifetime of this review the world has plunged into deep recession and seen green shoots of recovery emerge as some economies begin to prosper again, albeit

uncertainly. One notable development over the course of 2015 has been the sharp and sustained fall in the oil price (along with commodities more generally). This has had, and will continue to have, far-reaching economic and geo-political effects which may take some time to manifest themselves fully. As many practitioners will recognise from previous global shocks, these pressures typically manifest themselves in an increased number of disputes; whether that is joint venture partners choosing to fight over the diminishing pot of profits, customers seeking to exit what have become hugely expensive long-term contracts, struggling states renegotiating or exiting their contracts (or simply expropriating commercial assets) or insolvency-related disputes as once-rich parties struggle to meet their obligations. The current economic climate and short to medium term outlook suggests that dispute resolution lawyers operating in at least the energy and commodities sectors will continue to be busy and tasked with resolving challenging multi-jurisdictional disputes for years to come.

Finally, 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 page 747 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 who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2016

Chapter 37

SPAIN

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

I INTRODUCTION TO THE 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,

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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.

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 (including the state, e.g., in a tax fraud case) may also be a party to the proceedings as private accusers. Any person or legal entity can also be represented in the proceedings even if they have not been a victim of the crime, by exercising a 'popular action' (*acción popular*).

Except for minor offences, 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

2015 was one of the most active years in recent times in terms of legislative activity in Spain. Numerous rules have been adopted that significantly amend the Spanish procedural system under a common goal of reforming and optimising the Administration of Justice.

i Law 7/2015 amending the Basic Judiciary Law

Law 7/2015 amends Spain's Basic Judiciary Law and other procedural laws including the Spanish Civil Procedure Law and the Law Regulating the Administrative Jurisdiction. Nearly all provisions entered into force on 1 October 2015.

Law 7/2015 establishes a series of measures to achieve enhancing the specialisation and streamlining of judicial responses, including: (1) allowing governmental chambers of judicial bodies to modify the rules on case distribution among courts to ensure a more effective allocation of workload, (2) empowering the General Council of the Judiciary to specialise judicial organs temporarily and on an exclusive basis due to the accumulation of disputes of the same type, and (3) creating mechanisms to increase personnel of courts responsible for the investigation of particularly complex issues.

To avoid inconsistent decisions and increase legal certainty, Law 7/2015 amends the regulation of plenary meetings to unify criteria: (1) all judges who have knowledge of the issues on which there is a difference in the approach taken by different sections of a judiciary body will participate in the plenary meetings, and (2) if a section of the judicial body departs from the criteria agreed in plenary meetings in any of its resolutions, it will be obliged to expressly justify the reasons for deviating from the general rule.

Law 7/2015 introduces several amendments regarding international law. It formally regulates the preliminary ruling as the proper legal channel to establish communication between Spanish judges and The European Court of Justice. It also amends the criteria for granting international jurisdiction of the Spanish courts under civil order.

Law 7/2015 makes specific amendments to role of court clerks (*Secretarios Judiciales*), including a change in the formal denomination (*Letrados de la Administración de Justicia* from now on), consolidating clerks' functions and granting them new powers, such as regarding mediation and resolution of monitory proceedings.

Law 7/2015 amends several aspects of the appellate system: (1) it allows filing applications for the review of final resolutions if the European Court of Human Rights has declared that the resolution was issued in violation of any right under the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, (2) it includes substantial changes in the regulation of the cassation appeal in administrative cases, allowing cassation appeals when the appellate decision has reversal interest (the law itself list some cases in which the reversal interest is presumed), and (3) it adds a new cause of inadmissibility of cassation appeals in civil matters: whether the appeal was manifestly unfounded or substantially similar appeals had already been resolved.

ii Law 42/2015 amending the Spanish Civil Procedure Law

The majority of the provisions under Law 42/2015 entered into force on 7 October 2015. The main amendments are the following:

a Law 42/2015 promotes the implementation of new technologies in the Administration of Justice. From 1 January 2016, all legal professionals, judicial bodies and public prosecutors are required to use the existing electronic systems – mainly, the Lexnet system – for filing briefs and documents and making judicial communications.

b Law 42/2015 amends oral proceedings: (1) claims must be answered in writing, (2) the parties may waive the right to hold the hearing (in which case the court will directly render its judgment on the basis of the claim, the answer to the claim and the corresponding documentary evidence), and (3) the parties may request that the judge allow oral closing statements (as currently available in ordinary proceedings).

c With the aim of incorporating the most recent resolutions of the European Court of Justice into the Spanish Civil Procedure Law, Law 42/2015 amends summary proceedings and arbitral award enforcement proceedings in order to allow the judicial control, *ex officio*, of the existence of unfair terms in consumer contracts.

d Law 42/2015 reinforces the role of court representatives as collaborators in the Administration of Justice, guiding collaborative acts of notification and communication on behalf of the court. It recognises court representatives' certification capacity, no longer requiring the assistance of witnesses to carry out acts of communication, thereby expediting procedural steps.

e Law 42/2015 also includes a substantive amendment to the Spanish Civil Code, reducing the general limitation period for personal actions from fifteen years to five years, consistent with modern trends in contract law.

iii Law 15/2015 on voluntary jurisdiction

Law 15/2015 is aimed at simplifying and modernising legal proceedings in cases in which there is no dispute among parties despite the necessity of a public authority's intervention in order to exercise rights relating to civil and commercial law. It entered into force (with general character) on 23 July 2015.

Law 15/2015 confers authority to hear a significant number of matters traditionally falling under the concept of voluntary jurisdiction acts to legal professionals other than judges, such as court clerks, public notaries and commercial and property registrars. Judges are responsible for resolving proceedings that affect the public interest or marital status, require specific action to protect substantive rules, lead to acts of disposal, acknowledgement, creation or extinction of subjective rights or which affect the rights of minors. Court clerks are responsible for, among other things, appointing judicial defenders, declaring absences or death, appointing liquidators, overseeing voluntary auctions and conciliation acts. Notaries public are responsible for many voluntary jurisdiction matters related to successions, notarial auctions and other acts involving commercial issues. Commercial and property registrars have authority to resolve minor disputes on technical matters.

Law 15/2015 establishes a summary notarial proceeding for claims of specific economic debts involving any amount (not applicable for claims involving debts arising from a contract between a businessperson or professional and a consumer). At the creditor's request, the corresponding notary public will order the debtor to pay the amount due within 20 working days. If the debtor cannot be located or the debt is challenged, the notarial proceeding will end, without prejudice to the creditor's right to claim the debt through judicial proceedings. If the order is made and the debtor fails to pay without challenging the debt, the notarial proceedings will be terminated and the notarial act obtained will constitute an enforceable instrument.

It introduces the possibility of processing specific conciliation procedures before a notary public or before commercial and property registrars.

Law 15/2015 also regulates, among other areas, the procedures for (1) voluntary auctions carried out in electronic form by court clerks as well as certain notarial auction procedures, (2) the judicial call of general meetings of companies and bondholders' meetings, (3) the appointment and removal of auditors and liquidators of corporations, (4) forced capital reductions, amortisations and disposals of shares (in the event of non-compliance with treasury stock regulations), and (5) the judicial dissolution of companies.

iv Law 29/2015 on international legal cooperation in civil matters

The purpose of this law is to provide Spain with a modern international legal cooperation framework. It applies to civil and commercial matters in the absence of applicable European Union laws, treaties or special provisions of national law. Law 29/2015 entered into force on 20 August 2015 and includes comprehensive provisions on matters including service of process, transmission of judicial and extrajudicial documents, the taking of evidence at an international level, international *lis pendens* and related actions, recognition and enforcement of judgments and information and proof of foreign law. The following are some of its more relevant provisions:

a Law 29/2015 provides for the application of the general principle in favour of international cooperation according to which Spanish authorities must cooperate with foreign authorities even if there is no reciprocity. The Spanish government may allow for non-cooperation with authorities of states that have repeatedly denied cooperation, or in which there is a legal prohibition to cooperate.

b It identifies alternative methods of transmitting requests for cooperation, when legally available under the legal systems of the requesting and requested states: (1) by direct judicial communication between the corresponding courts, (2) through the respective central authorities, (3) by consular or diplomatic channels, or (4) by notarial conduct (only suitable for the transmission of non-judicial documents).

c As regards proof and information of foreign law, Law 29/2015 specifically provides the application of Spanish law in cases in which the parties have failed to prove the content and validity of foreign law.

d Spanish judicial bodies may suspend a procedure initiated in Spain at the request of either party, following a report of the public prosecutor, in cases of international *lis pendens* or related actions. Law 29/2015 requires that the following conditions be met: (1) the jurisdiction of the foreign court must be grounded on a reasonable

connection to the case, (2) it is expected that the foreign court issue a resolution that can be recognised in Spain, and (3) the suspension is required in the interest of the proper administration of justice.

e Law 29/2015 regulates the recognition and enforcement of foreign judgments and public documents and their potential registration with public registries. Law 29/2015 amends *exequatur* proceedings previously governed under the Spanish Civil Procedure Law of 1881, which are applicable for the recognition and enforcement of foreign judgments in the absence of a treaty or special regulation (see Section III.vi, *infra*). According to Law 29/2015, recognition and enforcement will be granted when the following requirements are met: (1) exclusive national jurisdiction is respected, (2) foreign judgments are not contrary to public policy, (3) the parties' rights of defence have been respected, (4) the foreign resolution is not incompatible with a national resolution or a previous foreign resolution which can be recognised in Spain, and (5) no national proceedings involving the same subject matter and parties have been initiated before the foreign proceedings. Law 29/2015 also regulates the partial and incidental recognition of foreign judgments (in the latter case, the judge conducting the proceedings in which incidental recognition is sought shall rule on the matter solely for those proceedings). It also provides the possibility of amending foreign judgments concerning matters which, by their own nature, can be modified (e.g., resolutions establishing child-support payments or protective measures for minors and legally incapacitated adults). Meanwhile, foreign public documents shall be directly enforceable in Spain if they are enforceable in their country of origin and are not contrary to public policy.

f Law 29/2015 allows the recognition, enforcement and registration of foreign judgments and public documents containing measures not recognised in the Spanish legal system. The measures that have not been acknowledged should be adapted for this purpose to others recognised in domestic legislation with equivalent effects and for a similar purpose. Law 29/2015 recognises the parties' right to appeal against the adaptation of the measures that have not been acknowledged.

g Finally Law 29/2015 allows for the recognition and enforcement of foreign judgments issued in class action proceedings. That resolution will not be applicable to those affected in Spain who have not expressly adhered to the foreign class action if (1) it has not been communicated or published in Spain by means equivalent to those provided for in the Spanish Civil Procedure Law, or (2) those affected in Spain have not had the same opportunities to participate in or to opt out of the proceedings in the foreign state.

v New legislation on electronic auctions

Several laws were enacted in 2015 to establish electronic auctions in Spain for both the judicial (enforcement and foreclosure proceedings) and extrajudicial spheres (voluntary auctions). Of special note are Law 19/2015 amending, among others, the system of judicial auctions included in the Spanish Civil Procedure Law; Law 42/2015, which provides additional nominal modifications on electronic auctions; and Law 15/2015 on

voluntary jurisdiction. Electronic auctions carried out under these regulations will be conducted through a single electronic portal hosted by the government of Spain. The aim of these reforms is to establish a more agile and effective auction process that reduces, to the extent possible, the percentage of auctions declared void in Spain. In the judiciary sphere, the reform has been the subject of a pilot project in the Spanish region of Murcia with very positive results (the percentage of auctions with bidders has tripled).

vi Basic Law 16/2015 on Privileges and Immunities of Foreign States

Law 16/2015 closes a loophole in the Spanish legal system and seeks to ensure full compliance with existing international law on the subject, previously dispersed throughout various international treaties, customary law and case law established of international courts. Law 16/2015 regulates both jurisdictional immunity and immunity from enforcement according to the latest principles in the field reflected in international treaties such as the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted on 2 December 2004 (which has not yet entered into force).

III COURT PROCEDURE

i Overview of court procedure

All civil, criminal and labour proceedings may 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.

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 proceedings 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. Following the amendments introduced by Law 42/2015, claims must be answered in writing and may be followed by a hearing when so requested by either party and accepted by the court. Counterclaims in oral proceedings are only accepted in limited cases. If the hearing does not take place, the court will render its judgment directly. If the hearing does take place, it will include the submission and production of evidence and eventually the presentation of oral conclusions if so requested by the parties.

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.

EC Regulation 1896/2006 provides for a monitory proceeding at the European level. 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. In addition, Law 15/2015 provides for a notarial monitory proceeding (see Section II.iii, *supra*).

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 accepts the measure, filing 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.[2]

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 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.

2 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.

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'. The fee is calculated at a fixed and a variable rate, with reference to the economic value of the judicial claim. Law 10/2012 provided for certain exemptions from paying this fee (such as persons entitled to legal aid) that have been recently extended by Royal Decree Law 1/2015 to, among others, all natural persons, public prosecutors and some public administration bodies.

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 minor offences.

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.

Law 29/2015 applies for countries that have not ratified the convention (see Section II.iv, *supra*). Judicial documents may be served through central authorities, direct communication between the corresponding courts or Spanish authorities may serve documents to the final recipient by certified mail or an equivalent means of communication with acknowledgment of receipt or any other guarantee of proof of receipt. Extrajudicial documents may be served through central authorities or a notary. The documents must be translated into a language that the addressee understands or into the official language of the recipient state. Parties may request the recipient state to issue a certificate of completion of the service procedure and how it has been carried out.

vi Enforcement of foreign judgments

The recognition and enforcement of foreign judgments is regulated by international treaties, Regulation 1215/2012 in the European Union and Law 29/2015.

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*. This international enforcement model was 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.

Law 29/2015 on international legal cooperation in civil matters

Law 29/2015 regulates the recognition and enforcement of foreign judgments, replacing the former regulation in the Spanish Civil Procedure Law of 1881 (see Section II.iv, *supra*).

vii Assistance to foreign courts

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

a EC 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 Law 29/2015 on international legal cooperation in civil matters. Cooperation will be granted pursuant to this framework under the following conditions: the request is not contrary to Spanish public policy, the request is addressed to the Spanish court with authority to perform the taking of evidence, Spanish courts do not have exclusive jurisdiction over the proceedings where evidence sought is intended to be used, the request meets certain content and information requirements established by law, and the Spanish government has not ordered non-cooperation with the requesting country (because it may have repeatedly refused to cooperate or this is expressly prohibited in its legal system).

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 (or a part of it) 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

2015 has been marked by important legislative reforms. During the second half of the year and coinciding with the end of the last parliamentary term, the legislature has enacted numerous laws that have significantly amended the Spanish procedural system. These reforms are aimed at developing and optimising the Spanish Administration of Justice and adapting it to new modern legal trends and technologies. The new rules adopted include amendments to Spain's Basic Judiciary Law and Spanish Civil Procedure Law establishing, for example, the use of electronic systems to file documents and make judicial communications; several laws to establish electronic auctions in Spain in judicial and extrajudicial spheres; and a new law on voluntary jurisdiction that replaces the regulations contained in the Spanish Civil Procedure Law of 1881. There have also been several amendments which may have important implications in cases involving international elements, such as adopting a new law on international legal cooperation in civil and commercial matters, which includes comprehensive provisions on the matter and a new and updated regulation of the *exequatur* proceedings (previously also regulated under Spanish Civil Procedure Law of 1881); or a new law on privileges and immunities of foreign states. These measures are expected to help the Spanish legal system remain at the forefront internationally, offering its citizens and potential foreign investors a safe and effective system for the protection of their rights.

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 have more of an influence on national law, mainly through decisions of the European courts 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.

Appendix 1

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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, 2015 and 2016) by *Best Lawyers*.

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