THE DISPUTE RESOLUTION REVIEW

Eleventh Edition

Editor
Damian Taylor

THE LAWREVIEWS

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ELEVENTH EDITION

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This article was first published in March 2019
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-005-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARTHUR COX

ATTIAS & LEVY

AZB & PARTNERS

BENNETT JONES LLP

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 36 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

I wrote with hope in last year's preface that in 2019 we would have increased certainty about the future laws and procedures that will apply to cross-border litigation in the United Kingdom and across the European Union. But despite the huge volume of analysis and commentary across the legal sector, we seem to be no further forward. Instead, the UK Parliament is to vote on the proposed deal by the end of January 2019. Given the interwoven nature of UK and EU law, the next few months will be of huge importance to the legal profession in my home jurisdiction and have a long-lasting impact on how disputes (many of which are between international parties) are resolved in the United Kingdom. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year

This 11th 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.

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 573 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.

Damian Taylor
Slaughter and May
London
February 2019

Chapter 30

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. 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.

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.

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Laws

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.

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 Navarre.

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.

Specialised commercial courts were created in some of the largest Spanish cities. They deal with claims lodged in relation to insolvency of companies and businesspersons; unfair competition; antitrust, industrial property, intellectual property (IP) and advertising matters; corporate law; international or national regulations on transport matters; maritime law; collective actions regarding 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).

Criminal courts

Criminal cases are investigated by a judge, assisted by the police. The public prosecutor is a party to the criminal proceedings. 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 become a party to criminal proceedings, even if they have not been a victim of the crime, by exercising a 'popular action'.[2]

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), whereas 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.

2 Basic Law 13/2015 on Procedural Rights and Technology Investigation Measures and Law 41/2015 on Acceleration of Criminal Proceedings and Strengthening of Procedural Rights amended certain aspects of the Procedural Criminal Law aimed at (1) accelerating criminal proceedings; (2) regulating the use of new technologies during the criminal investigation; and (3) transposing Directive 2013/48/EU on the Right of Access to a Lawyer in Criminal Proceedings and Directive 2014/42/UE on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union. Some of the main innovations introduced relate to the amendment of the connection rules (governing the accumulation of criminal proceedings), attempting to avoid proceedings with a very broad purpose; the enactment of maximum periods for the criminal investigation; and the establishment of new rules on the performance of undercover officers.

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

The General Council of the Judiciary is in charge of the organisation and inspection of Spanish courts. Its functions 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

Among others, the following legislative developments are noteworthy.

General Data Protection Regulation (EU Regulation 2016/679) and Basic Law 3/2018 on Data Protection and Digital Rights

In May 2018, the two-year transitory period established in the General Data Protection Regulation ended; as from that time, its provisions became directly applicable in Spain. Some of the main novelties introduced are the following:

a it has a broad territorial scope, being applicable not only to data-processing carried out in the context of the activities of data controllers and data administrators established in the EU, but also to non-European institutions processing the data of subjects established in the EU in connection with (1) offering goods and services, or (2) control of behaviour (e.g., tracking cookies);

b the Regulation reinforces the information right and the requirements and conditions to obtain consent from data subjects (which must be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data);

c in addition to the traditional rights of access, rectification, cancellation and opposition, the Regulation recognises and regulates other rights, such as the right to data portability, the right to be forgotten and the right to oppose profiling activities;

d the Regulation recognises the accountability principle, which imposes a proactive responsibility obligation that obliges organisations to establish measures guaranteeing and enabling the demonstration of compliance with the Regulation (data protection policies must be adapted to the organisational circumstances, implemented and put into practice);

e whereas the previous normative framework required the registration of organisations' databases with the Spanish Data Protection Authority, the Regulation focuses on internal recording obligations. Thus, unless one of the exceptions laid out in the Regulation applies, companies must keep an internal, written record of the processing activities carried out; and

f the Regulation introduces the role of data protection officer, which is mandatory when the data processing is carried out by a public authority (except for courts acting in their judicial capacity) and in some cases of large-scale data processing.

Following the Regulation's direct applicability, the new Basic Law 3/2018 on Data Protection and Digital Rights was enacted on 6 December 2018. Basic Law 3/2018 harmonises Spanish law with the provisions of the Regulation and provides specific data-protection regulations in fields that are not expressly included in the Regulation or that are addressed in the Regulation but with scope for more detailed regulation to be introduced by the Member States (i.e., it widens the cases in which the appointment of a data protection officer is mandatory and governs activities that are not expressly regulated in the Regulation such as data processing activities for video-surveillance purposes, whistle-blowing channels and creditworthiness data files). Moreover, Basic Law 3/2018 incorporates 17 new digital rights into the Spanish legal

system that are aimed at resolving issues arising from the use of new technologies (e.g., right to net neutrality, right to universal access to the internet, right to be forgotten from internet searches, social networks or equivalent).

Law 3/2018 on the European Investigation Order in Criminal Matters

Law 3/2018 amends Law 23/2014 on the mutual recognition of criminal decisions to transpose Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order (EIO) in criminal matters.

The EIO may be issued for the purpose of obtaining one or more specific investigative measures to be carried out in a third executing Member State with a view to obtaining evidence or collecting evidence already in the possession of the executing authority.

The EIO creates a unique framework for obtaining evidence, although it establishes additional rules for specific types of measures (e.g., temporary transfers of detainees, telephone or videoconference appearances, obtaining information related to accounts or banking transactions, undercover investigations and telecommunications intervention). The request and practice of an investigation measure can be carried out in any of the phases of the criminal procedure, including the hearing. The competent authorities in Spain to issue and execute an EOI will be, according to the type of investigation measure, the competent court or the public prosecutor.

Law 11/2018, amending Commercial Code, Corporations Law and Account Auditing Law

Law 11/2018 modifies, restrictively, the right of separation of the partner of limited companies in the case of non-distribution of benefits:[3]

a the possibility of modifying or suppressing this right through the articles of association is expressly established;

b the minimum percentage of benefits to be distributed is reduced (from 33 per cent to 25 per cent);

c it is allowed to comply with that percentage based on the average of the preceding five years (that is, the right of separation will not arise if the total dividends distributed during the preceding five years is equivalent to 25 per cent of the profits generated in that period); and

d the right will only exist if benefits have been obtained continuously during the preceding three years.

Moreover, Law 11/2018 transposes Directive 2014/95/EU of 22 October 2014 on disclosure of non-financial and diversity information by certain large undertakings and groups, expanding the companies obliged to annually file non-financial information, along with their accounts (including information relating to environmental, social and personal issues, respect for human rights and the fight against corruption).

3 These provisions are not applicable to listed companies or those that fall under the scope of other circumstances (e.g., those that are in a situation of insolvency).

New regulatory framework on markets in financial instruments: MiFID II and MiFIR

In January 2018, the application of the new regulatory framework on markets and financial instruments began. This framework is based on Directive 2014/65/EU of 15 May 2014 on markets in financial instruments (MiFID II) and Regulation (EU) No. 600/2014 of 15 May 2014 on markets in financial instruments (MiFIR).

These new rules modify the MiFID framework with the goal of improving the efficiency, safety and resilience of financial markets. The new framework strengthens the protections afforded to investors (by introducing requirements on the organisation and conduct of the actors in these markets), adapts the regulations to technological and market developments, increases transparency, and reinforces and harmonises the supervision of financial markets.

The new framework has been incorporated into the Spanish legal system through Royal Decree Law 21/2017 of 29 December; Royal Decree Law 14/2018 of 28 September; Royal Decree 1464/2018 of 21 December and other development rules.

ii Court practice

Among others, the following noteworthy decisions were handed down in 2018.

The Supreme Court's judgment of 1 October 2018 on the transfer of treasury shares and the effects of the violation of the prohibition of financial assistance for the acquisition of own shares

The Supreme Court held that the transfer of shares of a limited company held as treasury shares, once the three-year legal limit established to end this situation has been exceeded, does not imply the nullity of the transfer itself. The Supreme Court held that the violation of the time limit to amortise or alienate treasury shares allows the remedy of this situation through judicial enforcement, but does not affect the validity of the transfer of those shares made once the three-year term has elapsed.

In the same judgment, the Supreme Court analysed the consequences of the infraction of the prohibition foreseen for limited companies to provide financial assistance for the acquisition of own shares. The Supreme Court maintains that this infraction implies the nullity of the operation of financial assistance – but not of the acquisition of the affected shares – as this measure itself allows safeguarding the purpose of the rule (to resolve the pernicious effects that this type of transaction has for the solvency of the company and the integrity of the company's equity).

The Supreme Court's judgment of 26 February 2018 on the remuneration of the directors of limited companies

Article 217 of the Spanish Corporations Law establishes, following the amendment introduced by Law 31/2014, that directors' positions are unremunerated, unless the articles of association establish otherwise (in that case, the articles of association must specify the remuneration system, and the maximum amount of remuneration of all directors must be approved at the general meeting). Article 249 establishes that, when executive functions are assigned to a member of the board of directors, a contract with the company must be formalised, with the approval of the board of directors, in which the remuneration must be detailed.

Prior to this judgment, the generalised interpretation of these provisions (defended by Directorate General for Registries and Notaries and the majority of legal scholars) was

the existence of two exclusive regulatory systems composed of a general rule (Article 217) applicable to all directors (including executives) and a *lex specialis* (Article 249) applicable only to determine the remuneration of executive functions attributed to a director (there would be two relationships between an executive director and the company and, therefore, two independent remuneration regimes, both of which apply to the executive director).

However, the systematic interpretation of the rules and the principle of transparency and control led the Supreme Court to conclude that the regimes laid out in these articles are complementary and that both must be applied cumulatively when deciding on the remuneration of a director holding executive powers. In this way, the remuneration received by a director for his or her executive functions must not only be recorded in a contract approved by the board of directors, but must be expressly regulated by the articles of association and will be subject to the maximum amount approved at the general meeting.[4]

The Supreme Court's judgments on the tax on documented legal acts

Although the tax sphere falls outside the scope of this work, reference is made to these Supreme Court resolutions owing to their media impact.

On 16 October, the second section of the administrative chamber of the Supreme Court issued a judgment establishing that the taxpayer in connection with the tax on documented legal acts, when the document subject to the tax is the public deed of a mortgage-secured loan, is the mortgage creditor (usually a financial institution). This resolution represented a radical change in the case law that had until that time interpreted that the taxpayer was the borrower (and the partial annulment of an article of the regulation of development of the Tax on Documented Legal Acts Law).

The economic and social repercussions of the judgment led the president of the administrative chamber of the Supreme Court to decide to convene a plenary session to decide a cassation appeal with the same object and, therefore, to confirm or overturn that jurisprudential shift.

On 5 November, the plenary meeting of the chamber was held, where it was decided to maintain the interpretation applied prior to the 16 October ruling (thus limiting the effects of the judgment to the case in which it was issued).

The entirety of the controversy was settled when the government, through Royal Decree Law 17/2018 of 8 November, modified the Tax on Documented Legal Acts Law to expressly establish that, in these cases, the tax must be paid by the mortgage creditor.

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.[5]

4 The doctrine of this judgment is not applicable to listed companies.

5 As from 1 January 2016, all legal professionals, judicial bodies and public prosecutors must use existing electronic systems – mainly, the Lexnet system – for filing briefs and documents and making judicial communications (Law 42/2015 amending the Spanish Civil Procedure Law).

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, in general terms, the claimant is free to continue or withdraw the claim.

The right of the defendant to be heard

This right establishes 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 and the 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 specific 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. 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

Monitory proceedings are a special type of proceeding 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 court 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 monitory proceedings 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.

Law 15/2015 provides for notarial monitory proceedings for claims of specific economic debts involving any amount (not applicable for claims involving debts arising from a contract between a consumer and a businessperson or professional). 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 proceedings 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.

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 proceedings.

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 arising as a result of harm suffered by the defendant because of 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 working days of the granting of the measures with the court with jurisdiction to render a judgment in the main proceedings. 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 harm 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. 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 court registrars (formerly referred to as 'judicial secretaries'), lodging an appeal heard by the authority that issued the decision.

b Appeal for review: allows parties to challenge decisions issued by court registrars 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 the decision.

d Extraordinary appeal owing to procedural infringements: this appeal allows parties to file an appeal to the Supreme Court challenging final rulings issued by provincial courts owing to an infringement of procedural formalities based on one of the following grounds:
- breach of rules relating to the court's jurisdiction;
- breach of procedural rules regulating the form and content of judicial decisions;
- 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
- 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:
- the value or economic interest at stake exceeds €600,000;
- the proceedings concern fundamental rights other than those established in Article 24 of the Spanish Constitution; or
- the appellate decision has reversal interest.[6]

f Extraordinary appeals in the interest of law: these 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: this allows parties to challenge a court's decision to reject admission of a remedy of appeals, an extraordinary appeal owing to procedural infringements or a cassation appeal. The complaint is heard by the court with jurisdiction to hear the rejected appeal.

Judicial fee

The payment of a fixed fee is required from legal persons in order to initiate specific proceedings in civil or commercial courts.

iii Class actions

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

It is understood that only those actions where the issues of fact that underlie each of the actions are sufficiently common could be considered class actions. In any event, there is no express regulation on the requisites with which class actions must comply such as numerosity, commonality, typicality or adequacy of representation, nor the existence of a certification of class that certifies the fulfilment of such requisites.

The Civil Procedure Law establishes several publicity requirements regarding class actions with the aim of ensuring sufficient protection of the corresponding private interests. The decision could have *res judicata* effects. Likewise, any action filed while the class action is litigated could not be admitted in application of the *lis pendens* rule.

6 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.

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

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.

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 on international legal cooperation in civil matters applies in the absence of European regulations or international conventions. It provides for the application of the general principle in favour of international cooperation, according to which Spanish authorities must cooperate with foreign authorities even in the absence of reciprocity (the Spanish government may allow non-cooperation with authorities of states that have repeatedly denied cooperation, or in which there is a legal prohibition to cooperate). Judicial documents may be served through central authorities or by 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 that the recipient state issue a certificate of completion of service of process 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* proceedings prior to the enforcement of judgments, court settlements and public documents are 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. It 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. According to Law 29/2015, recognition and enforcement will be granted when the following requirements are met:

a exclusive domestic jurisdiction is respected;
b foreign judgments are not contrary to domestic public policy;
c the parties' rights of defence have been respected;
d the foreign resolution is not incompatible with a domestic resolution or a previous foreign resolution that is recognised in Spain; and
e no national proceedings involving the same subject matter and parties were initiated prior to the foreign proceedings.

Law 29/2015 also regulates:

a the partial and incidental recognition of foreign judgments (in the latter case, the judge conducting the proceedings in which incidental recognition is sought must only rule on the matter for those proceedings);
b the possibility of amending foreign judgments concerning matters that, by their own nature, can be modified (e.g., resolutions establishing child support payments or protective measures for minors and legally incapacitated adults);
c the recognition, enforcement and registration of foreign judgments and public documents containing measures not recognised in the Spanish legal system through adaptation to other measures recognised in domestic legislation with equivalent effects and for a similar purpose; and

d the recognition and enforcement of foreign judgments issued in class action proceedings.[7]

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; see Section III.v).

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 privacy.

In the investigation stage of 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. Additionally, secrecy must be automatically applied if the judge orders the interception of communications.

7 The 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.

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 appears in certain litigation cases.

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 criminal 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 other obligations that must be fulfilled.

Law 10/2010 was developed by Royal Decree 304/2014 (which establishes stronger due diligence measures and expands the information duties imposed on lawyers and other professionals) and has recently been amended by Royal Decree 11/2018 (which transposes Directive 2015/849/EU of 20 May 2015, establishing additional duties and measures to improve supervision and sanction of infractions, such as the obligation to the private parties subject to the law to create internal procedures so that their employees, managers and agents can communicate – including anonymously – relevant information on potential breaches of this legislation).

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. It is also a criminal offence to carry out these actions recklessly. 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 the General Data Protection Regulation (EU Regulation 2016/679) and Basic Law 3/2018 on Data Protection and Digital Rights (see Section II.i).

It is necessary to provide information to data subjects before the implementation of personal data processing and to base the processing on a legal basis recognised by the applicable regulations (such as prior consent or the existence of a legitimate interest). 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 adopt additional safeguards (such as the use of EU Standard Contractual Clauses for data transfers or to obtain the data subjects' specific consent for the transfer).

For legal professionals, it is important to fulfil the obligations under data protection regulations since the provision of legal services implies the processing of personal data.

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.

According to the ECJ's decision in *Akzo Nobel Chemicals Ltd v. Commission*, 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 test performed by 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 request by the public prosecutor, the police or any party to the proceedings.

Decree Law 9/2017 specifically regulates the production of documents only applicable to procedures of claims for damages derived from antitrust infringements. It entitles claimants to request that the judge order the counterparty or third parties to grant access to specific sources of evidence necessary to substantiate the claim. This regulation is governed by the principle of proportionality and does not permit indiscriminate searches of information. The production of documents may be requested before the proceedings commence, at the time of the submission of the claim or while the proceedings are underway. In all cases, production will only be ordered after the claimant has presented sufficient facts and evidence to justify the viability of the claim for damages. The claimant will bear all expenses derived from the proceedings and damages that may rise from an inappropriate use of the sources of evidence obtained by this means or if no claim is filed following the completion of the disclosure.

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 lodge 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 justifiable fear that, owing to the activity of persons or owing 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 for their consideration; 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.

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 – competence for judicial control of arbitration was concentrated in the High Courts of Justice. It 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) 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 is 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 was to regulate a fast and effective process for solving conflicts, reducing the burden of litigation weighing down Spanish courts.

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 or mediation in consumer matters.

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

The year 2018 has been marked by the change of government that took place in June (after the approval of the no-confidence motion put forward by the socialist group). That event, and the lack of a stable parliamentary majority supporting the new socialist government, led to a reduction in legislative activity. In any case, this initial slowdown was partly counteracted in the final months of the year by the government through the approval of multiple Decree Laws (which, in the case of urgent matters, allow the government to approve regulatory changes in an accelerated manner without previously obtaining the support of the legislative chambers although they must subsequently be ratified by the Congress).

The Supreme Court has continued to review an array of doctrines and legal concepts. European Union law continues to have more influence on national law, mainly through decisions of the European courts issued in the context of preliminary rulings. Judicial activity has been steady, although less active than in the early years of the crisis, when they reached historic levels (there has nevertheless been an increase in civil proceedings, for instance in procedures related to 'floor clauses' included in mortgage loan contracts and other issues related to these contracts, which has led to the temporary specialisation of 54 courts of first instance to hear those disputes).

International arbitration's growth marches on (in both commercial and investment arbitrations), making Spain a reference in the field, especially in disputes involving Latin American parties. During the past year, the Spanish Court of Arbitration, Madrid Court of Arbitration and the Civil and Mercantile Court of Arbitration (three of the most important arbitration courts in Spain) have continued to work on the development of the memorandum of understanding signed in December 2017 to unify their arbitral activities and create a unified arbitration court to administer international arbitrations. The agreement aims to continue promoting arbitration in Spain and strengthen its position as an international centre for the resolution of commercial disputes.

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 programme at the Universidad de Navarra.

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ISBN 978-1-83862-005-9