THE DISPUTE RESOLUTION REVIEW

Fourteenth Edition

Editor
Damian Taylor

THE LAWREVIEWS

THE DISPUTE RESOLUTION REVIEW

FOURTEENTH EDITION

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 29 jurisdictions. The following chapters aim to equip the curious practitioner with an up-to-date and concise introduction to the framework for dispute resolution in each jurisdiction. Each chapter outlines the most significant legal and procedural developments of the past 12 months and the authors' views as to the big themes predicted for the year ahead. The publication will be useful to anyone facing disputes that cross international boundaries, which is ever more likely in a world that seems to be more interconnected with every passing year.

In compiling the 14th edition of *The Dispute Resolution Review*, I am reminded that despite the variety of legal systems captured in the publication, there is a clear common denominator. All systems are organised and operate to ensure parties have a means of resolving disputes that they cannot resolve themselves. I am reassured that, despite cultural, traditional and legal differences, the jurisdictions represented here are united by this common thread. It reflects an innate, international commitment to the rule of law and the rights of individuals. This edition will be a success if it assists parties to navigate different legal systems to achieve fair and efficient outcomes for whatever dispute they are facing.

Reflecting on the past year, I cannot help but add to the chorus of people who have noted how challenging, uncertain and tragic the events of the global pandemic have been, and continue to be (as I write this preface, the UK has returned recently to working from home in response to the Omicron wave). The law is a reflection of society, so naturally it has been shaped by these events. However, out of this tragedy has come some good. Our courts and tribunals have been quick to adopt new technology and processes to manage compounding caseloads and necessary new ways of working. As far as I can tell, this has been a global trend and – while there have undoubtedly been challenges – no court system has buckled and had to shut the door to justice. This is a tremendous achievement and a testament to the strength and resilience of courts around the world. It is encouraging to see that some of the emergency measures put in place to cope with the pandemic look set to become permanent features of dispute resolution in the year ahead. Here in my home jurisdiction, England and Wales, the use of remote hearings and electronic evidence, and the implementation of various pragmatic amendments to procedural rules, should make the justice system more accessible and efficient than it was pre-pandemic.

The year ahead, of course, brings new challenges, but also reasons for optimism. The fragility of our climate, and the pervasiveness of big data, will no doubt play more prominent roles in the legal sector's near future. Recent high-profile climate discussions such as COP26 have highlighted the growing urgency around curbing harm to the natural environment. The grassroots of this trend are evident as businesses and regulators set ambitious climate targets, and litigants face contractual, tortious and public law claims for climate-related matters. The

Okpabi litigation in the United Kingdom involving parent company tortious liability for an oil spill in Nigeria provides a prominent example of how the natural environment may play a greater role in our courtrooms in the year ahead.

I also suspect disputes relating to the use of data will be a theme in the legal sector in the near future. While the General Data Protection Regulation has set the basic framework for the protection of personal data, we are likely to see more claims relating to the use and abuse of personal data down the track. The United Kingdom Supreme Court in the *Lloyd v. Google* decision set out a path for group claimants to pursue collective actions in instances of unlawful processing of personal data (although the claimants in that matter, which involved the internet browsing history of 4 million Apple iPhone users, were ultimately unsuccessful). The global nature of big data suggests this trend will not be confined to the United Kingdom.

This 14th 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 a continually evolving legal landscape responsive to both global and local developments.

As always, 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 can be found in Appendix 1 and highlight the wealth of experience and learning from which we are fortunate 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
Harpenden
January 2022

Chapter 21

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. Its guiding principles are the principle of the rule of law, 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, the 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.

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

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 that 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 have been created in some of the largest Spanish cities. They deal with claims lodged in relation to:

a insolvency of companies and businesspersons;
b unfair competition, antitrust, industrial property, intellectual property (IP) and advertising matters;
c corporate law;
d international or national regulations on transport matters;
e maritime law;
f collective actions regarding general contracting conditions; and
g 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.

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).

A 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 with the corresponding High Court of Justice.

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 of 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 is 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.[2]

2 The General Council of the Judiciary is comprised of the President of the Supreme Court, who presides over it, and 20 members, 12 of whom are sitting judges and eight of whom are jurists of extensive renown. The General Council must be renewed in full every five years. Its members are appointed by the Congress and Senate by a qualified three-fifths majority. The existence of this qualified majority and the lack of agreement between Spain's two majority parties has resulted in a current failure to renew the Council, whose members will continue to serve until the Council is renewed as publicly reported.

II THE YEAR IN REVIEW

i Legislation

Among others, the following legislative developments are noteworthy.

Draft bills under discussion

Draft bill for the reform of the Insolvency Law for the transposition of Directive (EU) 2019/1023[3]

This legislative reform is designed to increase the flexibility and agility of insolvency proceedings, as well as to favour the use of pre-insolvency mechanisms.

Current pre-insolvency instruments (refinancing agreements and out-of-court payment agreements) are replaced by restructuring plans, which are instruments that seek to ensure the continuity of companies and businesses that are viable but are facing financial difficulties that may threaten their solvency and result in insolvency proceedings. The draft bill allows potentially acting at an earlier stage of difficulties – earlier than the current pre-insolvency instruments – and is governed by the principles of the majority decision of the creditors and minimum judicial intervention. It also introduces the figure of the 'restructuring expert' (similar to a mediator in the pre-insolvency context).

The insolvency process is reformed to increase efficiency, introducing multiple procedural modifications aimed at streamlining the process, facilitating the approval of an agreement when the company is viable and a quick liquidation when it is not. In particular, a special insolvency procedure for micro-enterprises is introduced, adapted to their needs and characterised by maximum procedural simplification.

Relevant modifications are also made to the second-chance procedure and the forgiveness of unsatisfied liabilities (expanding the list of forgivable debts and introducing the possibility of forgiveness without prior liquidation of the debtor's assets and with a payment plan).

Preliminary draft bill amending the Basic Judiciary Law, regarding the efficiency of commercial courts, for the transposition of Directive (EU) 2019/1023

The draft bill for the reform of the Insolvency Law described in the preceding section necessitates specific adjustments to the distribution of the jurisdiction of commercial courts and the specialised sections of provincial courts.

Commercial courts would once again have jurisdiction to handle insolvency proceedings of natural persons who are not businesspersons. On the other hand, they would no longer hear collective actions established in the legislation on general contracting conditions and legislation on consumer protection, or actions referred to in specific European Regulations on compensation and assistance to passengers in connection with various means of transport. The draft bill also includes corresponding modifications in connection with the appellate jurisdiction of the sections specialised in commercial matters of provincial courts.

Under the draft bill, the General Council of the Judiciary is empowered to agree on the assignment of a single subject matter (e.g., insolvency proceedings, intellectual property) to specific commercial courts and specialised sections of provincial courts.

3 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

Finally, the bill contains amendments to various articles of the Basic Judiciary Law in order to harmonise the text with that of the Insolvency Law and introduce clarifications, updates and drafting improvements.

Preliminary draft bill on procedural efficiency measures for the public justice service

This preliminary draft bill modifies a series of laws in the areas of civil, criminal, labour and contentious-administrative law. The following are some of main changes proposed in the area of civil law:

a The regulation of adequate means of dispute resolution, alternative to judicial proceedings, that are intended to enhance negotiation between the parties, directly or before a neutral third party, to reduce social conflict and the workload of courts. Among other provisions, the draft bill establishes the obligation to resort to any dispute resolution methods prior to the filing of a lawsuit as a procedural requirement in civil law matters.

b The modification of oral proceedings, increasing their scope of application (the maximum economic interest threshold for oral proceedings is raised from €6,000 to €15,000 and the scope of matters to be adjudicated by oral proceedings is expanded, regardless of the economic interest at issue) and introducing other changes to its framework on the holding of hearings and the submission of evidence.

c It regulates witness lawsuits, already available at the European level, which seek to reduce judicial congestion caused by mass litigation. Witness proceedings will be processed preferentially, with the concomitant suspension of all other proceedings that have a substantially identical object. Once adjudicated, the result will apply to all other suspended proceedings.

d It proposes the unification of the regulation of second instance appeals in a single appeal. The current extraordinary appeal on issues of procedural infringements would cease to exist and cassation appeals would be based on the infringement of both substantive and procedural norms, provided that the decision on the appeal has reversal interest. It also includes procedural innovations such as the simplification of the admission phase of the appeal, the holding of a hearing only if the court deems it necessary and the preferential processing of appeals against judgments issued in witness lawsuits.

Laws passed

Law 8/2021 of 2 June reforming civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity

On 3 September 2021, the new Law 8/2021 entered into force to bring the Spanish legal system in line with the International Convention on the Rights of Persons with Disabilities, adopted in New York on 13 December 2006.

Law 8/2021 introduces a new system based on respect for the will and preferences of a person with a disability, in which, as a general rule and under certain safeguards, the person with a disability will be in charge of making his or her own decisions. This approach is designed and intended to comply with Article 12 of the Convention, which recognises that persons with disabilities should enjoy legal capacity on an equal basis with others in all aspects of life.

The reform introduced by Law 8/2021 affects multiple laws, including the Civil Code, the Civil Procedure Law, the Voluntary Jurisdiction Law, the Notary Law, the Mortgage Law, the Civil Registry Law, the Law on the Protection of the Assets of Persons with Disabilities, the Commercial Code and the Criminal Code.

The changes to the Civil Code are the most extensive and far-reaching, establishing a new system focused on support for persons who need it (regardless of whether a disability has been previously recognised administratively). Preference is given to voluntary measures, which are those established by the person with a disability, including preventive powers and mandates, and the possibility of self-curatorship.

Legal or judicial support measures (de facto guardianship, curatorship and judicial defence) will only be imposed in the absence – or insufficiency – of the will of the person with a disability, and must comply with the principles of necessity and proportionality.

In the procedural area, the process for the adoption of judicial measures in support of persons with disabilities replaces the current procedures on incapacitation and modification of capacity. Adaptations and adjustments are established to ensure that persons with disabilities can participate in the proceedings under equal conditions.

Royal Decree 135/2021 of 2 March approving the General Regulation of the Legal Profession

On 1 July 2021, the new General Regulation of the Legal Profession entered into force, updating the regulations governing the profession and providing a modern, effective legislative framework to replace that in force since 2001.

The drafting of the new General Regulation is adapted to the current regulatory framework, which is strongly influenced by Community provisions and current market and competition rules. Among the most important aspects of the General Regulation, it exhaustively regulates professional secrecy and the conditions under which professional services may be advertised; incorporates a detailed framework for client relations and the right of clients to adequate information; refers to the right and duty of lawyers to participate in continuing legal education; and includes the creation of collegiate protocols for reporting to the General Council of the Judiciary the existence of deficiencies in the operation of the courts and violations of the freedom or independence of lawyers.

ii Court practice

Among others, the following noteworthy decisions were handed down in 2021.

Constitutional Court judgments on arbitration and the concept of public policy[4]

The Constitutional Court recently handed down several rulings related to arbitration proceedings and the concept of public policy in arbitration.

In a first group of rulings, the Constitutional Court annulled specific decisions of the High Court of Justice of Madrid that had declared the nullity of arbitration awards for alleged violations of public policy that were based on an expansive interpretation of the concept. In those decisions, the Constitutional Court confirmed that the action for annulment, as a mechanism of judicial control set out in arbitration legislation, has highly limited content

4 Constitutional Court judgments dated 15 June 2020, 15 February 2021, 15 March 2021 and 15 March 2021.

that does not permit reviewing the merits of the matter decided by the arbitrator; nor should it be considered a second instance review of the facts and rights applied in an award or a mechanism for controlling the correct application of case law.

In line with the above, the Constitutional Court warned that the interpretation of the concept of public policy, as a cause for annulment of the arbitration award, must be restrictive ('fundamental rights and freedoms guaranteed by the Constitution, as well as other essential principles unavailable to the legislature due to constitutional requirements or the application of internationally accepted principles'), since the contrary would violate the autonomy of the will of the parties who decided to waive the right to judicial protection (Articles 10 and 24 of Constitution) and, unless the arbitral decision is found to be arbitrary, illogical, absurd or irrational, it cannot be declared null and void on the basis of public policy.

In relation to the legally required standard of reasoning in arbitration, distinct from that of jurisdiction, the Constitutional Court stated that awards do not require exhaustive, detailed argumentation of all aspects and perspectives that the parties may have regarding the issue to be decided, but they must nevertheless contain the elements and reasons for the judgment that make it possible to know the criteria (i.e., either at law or in equity) on which the decision is based, and that they cannot be arbitrary or contain a patent error.

In a second group of rulings, the Constitutional Court reversed decisions of the High Court of Justice of Madrid that denied the closure of annulment proceedings at the request of the parties after having reached an out-of-court settlement on the understanding that the parties could not avoid annulment proceedings in which a potential violation of public policy was at stake. The Constitutional Court disagreed with this expansive interpretation of public policy, which it described as unjustified and contrary to effective judicial protection and the principles of dispositive, solicited justice. It stated that the revoked decisions did not adequately delimit the area of the underlying dispute from the object of the annulment proceedings. For this reason, regardless of whether the cause of action for annulment affects public policy, it is certain that the substantive issue is legal–private and available to the parties, and the annulment proceedings should not continue as a result of the loss of the interest underlying the litigation.

Supreme Court (full court) judgment dated 15 December 2021 on the registration of adjudications made at judicial auction[5]

This decision ends the dispute that had arisen in recent years between courts and property registers in relation to the interpretation of specific articles of the Civil Procedure Law relating to the adjudication of real estate through judicial auctions in the context of foreclosure proceedings.

In particular, Article 671 of the Civil Procedure Act expressly establishes, in the case of a judicial auction of the debtor's habitual residence in which no bidder participates, the possibility of the creditor requesting the award of the property for 70 per cent of the value at which the property would have been auctioned off for or, if the amount owed is less than this percentage, for 60 per cent of that value.

The Directorate General for Registries and Notaries had argued in various resolutions the correction of this Article being interpreted in favour of the debtor, harmonising it with other provisions of the regulation in the sense that, in those cases in which the amount owed

5 Supreme Court judgments dated 5 March 2020, 5 October 2020 and 10 May 2021.

was between 70 and 60 per cent of the appraised value, the adjudication should be made for the amount owed, with the debt being extinguished. This had led some registrars to reject the registration of judicial adjudications of real estate that had been carried out at auctions that ran afoul of this interpretation (the habitual residence was adjudicated for 60 per cent, maintaining a credit for the difference up to the amount due). These refusals to register threatened legal certainty and seriously harmed purchasers (who, despite holding legal title in their favour, were unable to register their ownership and were forced to resort to new proceedings to dispute the refusal to register the real estate).

The judgment rejected the entitlement to refuse registration in the indicated circumstances, emphasising that this rejection does not derive from the interpretation of substantive law (which the Court agreed could be better adapted to its goal) but from registrars exceeding their scope of legally established authority. In the opinion of the Supreme Court, the legal assessment underlying the adjudication decree can only be reviewed by the judicial authority, not by the land registry, through the corresponding appeal. The decision therefore ended the dispute, which risked discouraging real estate investment in Spain and compromising the development of judicial disposition mechanisms.

Supreme Court (full court) judgment dated 15 March 2021 on damage caused by the industrial use of asbestos

In this ruling, the Supreme Court ordered a company that carried out an industrial activity involving the use of asbestos to pay compensation for the damage caused as a consequence of that activity to a group of people, including relatives of workers of the plant, neighbours living in the factory's vicinity who were harmed by the environmental contamination and heirs of either of the former.

In the judgment, the Supreme Court revisited its doctrine of risk:

a The creation of a risk is not a sufficient element to impose liability (objective, as well as by risk). The existence of fault is also required. The mere occurrence of the harmful result cannot be considered proof of fault given that such an approach would be tantamount to establishing strict liability or liability by result, which is not recognised by Article 1902 of Spanish Civil Code.

b The application of the doctrine of risk in the field of civil liability requires that the damage arose from a dangerous activity involving a considerably abnormal risk (i.e., it does not include ordinary, usual or customary activities of life).

c For cases involving damage resulting from special or abnormally dangerous activities, the threshold of the duty of care required is increased considerably.

Based on the above, the Supreme Court held that the use of asbestos constituted an indisputable risk to health that was well known and that the company, despite knowing that its activity was abnormally dangerous, failed to adopt measures commensurate with the high level of diligence required.

Finally, the Supreme Court also confirmed that the compensation that the victims' families were entitled to claim for the death of their relatives was compatible with the compensation corresponding to them as heirs of the legal actions of the deceased.

Supreme Court judgments on the right of redemption in connection with litigious credits

In matters involving an assignment of credits, the Civil Code grants the debtor the right to discharge a transferred litigious credit by paying the assignee the price it paid for it, as well as any cost incurred by the assignee and the interest accruing on the price as from the payment date. This right (known as an *Anastasian* right of redemption) may be exercised by the debtor within nine calendar days of the date on which the assignee claims payment of the debt.

Debtors have been asserting this right with increasing frequency, particularly in cases of the assignment of non-performing credits by financial institutions to investors (usually investment funds or entities specialised in the collection of delinquent receivables) at a discounted rate in exchange for these buyers assuming, as part of their business, the corresponding risk of non-payment.

In response to the increase in litigation related to this right, the Supreme Court recently handed down several judgments clarifying and resolving various doubts regarding this matter. Among other things, it has confirmed that:

a a restrictive interpretation of the right is appropriate;

b for a claim to be considered litigious, its existence or enforceability must be contested within ongoing judicial proceedings (it is not sufficient that the nature, conditions or other characteristics of the credit, such as its amount, be questioned);

c the right is only applicable to an individual assignment of a credit and not to portfolios or *on bloc* assignments; and

d to exercise the right, the debtor must file a declaratory action with the appropriate court within nine days, which cannot be interrupted by, for example, the extrajudicial indication of the debtor's intention to exercise the right.

Supreme Court judgment dated 18 January 2021 on the nullity of a summons effected through a third company forming part of the defendant's corporate group

A claim seeking damages was filed based on the breach of the quality audit duties imposed on notified bodies[6] by Directive 93/42/EEC concerning medical devices.

The lawsuit was not properly addressed to the German company that acted as the notified body and was instead filed with reference to the name of the corporate group (without any company existing with that name or the group having its own distinct legal personality) and the summons to answer the claim was served on the domicile of a Spanish subsidiary.

The Supreme Court declared the nullity of the summons. The Court held that the summons could not be considered as having been correctly served, stating that the fact that they are companies of the same group does not permit concluding that one can be served at the domicile of another; nor can employees accept and collect the documentation addressed to another company of the group be required, and nor, therefore, can the summons through another company of the group be considered as having been served correctly.

The Supreme Court also emphasised that the general rule must be to respect the legal personality of companies and the rules on the scope of liability for obligations assumed by each entity. The doctrine of the lifting of the corporate veil does not permit the pursuit of liability indistinctly from one or another company forming part of the same corporate

6 A notified body is an entity designated by an EU Member State to assess the conformity of specific products with applicable legislation prior to their placement on the market.

group. The doctrine is only applied exceptionally and requires proof of circumstances clearly demonstrating the abuse of the company's personality (which did not occur in the specific case).

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.[7]

The oral principle is linked to the immediacy principle. Immediacy requires that the judge who renders the judgment be the same as the one 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 an 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.

7 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).

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 actions 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 to ensure the enforcement of a potential judicial ruling in favour of the petitioner.

The court may allow the requested interim measure provided that:

a the claimant is able to show that there is a reasonable probability of success on the merits of the case;

b 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);

c the measure is appropriate for securing the effectiveness of the resolution; and

d 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 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.

A 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 a 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 their 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 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 Constitution; or
- the appellate decision has reversal interest.[8]

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 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

8 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.

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.

There is no opt-out procedure for consumers that 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 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 with 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 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 the 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. 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 were 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.[9]

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.

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

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:

a the request is not contrary to Spanish public policy;

b the request is addressed to the Spanish court with authority to perform the taking of evidence;

c Spanish courts do not have exclusive jurisdiction over the proceedings where evidence sought is intended to be used;

d the request meets certain content and information requirements established by law; and

e the 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.

9 The resolution will not be applicable to those affected in Spain who have not expressly adhered to the foreign class action if it has not been communicated or published in Spain by means equivalent to those provided for in the Spanish Civil Procedure Law; or those affected in Spain have not had the same opportunities to participate in or to opt out of the proceedings in the foreign state.

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.

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 are 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 has been amended multiple times since its enactment. In particular, it was:

a developed by Royal Decree 304/2014 (which establishes stronger due diligence measures and expands the information duties imposed on lawyers and other professionals);

b amended by Royal Decree 11/2018 (which transposes Directive (EU) 2015/849 of 20 May 2015, establishing additional duties and measures to improve supervision and sanction of infractions, such as the obligation of 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); and

c recently amended by Royal Decree 7/2021 (which transposes Directive 2018/843 of 30 May 2018, increasing the scope of activities subject to regulation, imposing new due diligence measures and obligations relating to the identification of beneficial ownership in connection with legal persons, greater protection for whistleblowers and establishing the creation of a single, central register of beneficial ownership under the auspices of the Ministry of Justice).

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[10] and Basic Law 3/2018 on Data Protection and Digital Rights.

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).

The current data protection regulations:

a recognise the accountability principle, which imposes a proactive responsibility obligation that obliges organisations to establish measures guaranteeing and enabling the demonstration of compliance with the regulations;

b focus on internal recording obligations implying that, unless one of the legally established exceptions applies, companies must maintain an internal, written record of the processing activities carried out; and

c in addition to the traditional rights of access, rectification, cancellation and opposition, the regulations recognise and regulate rights such as the right to data portability, the right to be forgotten and the right to oppose profiling activities.

10 General Data Protection Regulation, (EU) Regulation 2016/679.

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 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 Legal 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. Confidentiality also extends to communications between lawyers of different parties, which may not be provided to the courts or clients except with the express authorisation of the other professionals subject to confidentiality or when the sender has expressly stated that the communications are not subject to professional confidentiality.

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.

The text of the recent new General Regulation of the Legal Profession expressly recognises professional confidentiality in the case of in-house lawyers. Nevertheless, under EU law, the confidentiality and secrecy of communications for in-house counsel may not apply in situations such as antitrust investigations initiated by the European Commission.[11]

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

11 See the ECJ's decision in *Akzo Nobel Chemicals Ltd v. Commission*.

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 these 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 prove 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:

a the arbitration agreement does not exist or is void;
b the party challenging the award has not been given proper notice or an opportunity to present its case;
c the arbitrators have ruled on questions not submitted for their consideration;
d the composition of the arbitral tribunal or the arbitration proceedings has been irregular;
e the arbitrators have decided on questions that cannot be settled by arbitration; or
f 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, 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 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/EC 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

2021 has been marked by the beginning of the recovery from the covid-19 health crisis.

Economic activity has been reactivating, albeit more slowly than in other European countries and without reaching pre-health crisis levels (as a consequence of, among other things, the significant weight that the tourism sector represents in Spain's domestic economy).

As far as legislative activity is concerned, the approval of new regulations accompanies the important regulatory projects currently at different stages of development. The government, which reached the halfway point of its legislative mandate last November, is developing a plan for the modernisation of the justice system aimed at improving its accessibility, efficiency and sustainability (Justice 2030),[12] a reform of the Criminal Procedure Law and various regulations transposing European norms, including, notably, the new Collective Action Directive promulgated in 2020, which must be transposed within the next year.

Judicial activity has also been reactivated. Onsite intervention is once again common practice, although it coexists with the maintenance of online hearings as introduced as a result of covid-19 health crisis.

12 It includes, among others, the preliminary draft bill on procedural efficiency measures for the public justice service (see Section II.i).

The Supreme Court has continued to review an array of doctrines and legal concepts. EU law continues to have more influence on domestic law, mainly through decisions of European courts issued in the context of preliminary rulings.

International arbitration's growth marches on (in both commercial and investment arbitrations), making Spain a reference country in the field, especially in disputes involving Latin-American parties. In particular, the Constitutional Court has recently handed down several rulings reinforcing and shielding arbitration as an alternative and autonomous dispute resolution system, reiterating the need to limit judicial intervention through actions for annulment of awards and recognising the application of the dispositive principle of parties with respect to annulment proceedings (see Section II.ii).

Appendix 1

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