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Contributing Editor:
Ted Greeno

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PREFACE

Since the last edition of this book, the global business community has been forced to face the many new challenges that have been thrown up by the Coronavirus pandemic and the almost universal lockdown measures that have been taken in response to it. Courts all over the world have also had to adapt and change.

It might be said that the lockdown strategies pursued by governments would not have been sustainable but for the internet and the ability it affords us to work remotely. Certainly, courts around the world have adapted to this way of working, with procedural hearings and depositions, and even full-scale trials, being conducted exclusively on videoconference platforms. The use of video technology to take witness evidence is, of course, not new. It goes back 20 years or more. However, it was not embraced by commercial litigators because its lack of immediacy impaired the quality of the evidence and sometimes last-minute technical hitches could disrupt and delay trials. Over the last few months, however, the improved technology available and the need to make remote hearings work have shown that they are a reasonable, if not ideal, substitute for in-person attendance.

It remains to be seen how permanent the move to remote hearings becomes. I doubt that trials will be held remotely once all Coronavirus restrictions are lifted. Courts will revert to in-person hearings, but it is surely likely that videoconferencing technology will be used more than it was before the lockdown for procedural hearings and other hearings where no oral evidence is required, both in international litigation and arbitration. The saving of the time and cost of travel, as well as the environmental benefits, will be a significant incentive.

One factor that may play on the need for remote hearings is the potentially sharp increase in litigation that is likely to flow from the forthcoming lockdown-induced recession. A growing volume of cases will inevitably put pressure on the capacity of courts to cope with the increased demand. We are yet to know how serious a recession it will be, but the stress on contracts and cash flows that recessions bring always leads to an increase in commercial disputes. Litigation, even of a weak defence, is sometimes the least worst option for cash-strapped companies. Recessions also tend to expose long-running fraudulent schemes, as the money moved around to create an impression that nothing is missing ultimately runs out. As Warren Buffett famously said, albeit in a different context, it is only when the tide goes out that you discover who has been swimming naked.

In such times, a swift and efficient commercial court system is all the more essential to the economic health of a nation. This time round, disputes will be even more international in nature than in the last recession. Countries can therefore help themselves and each other by easing cooperation between them for the service of process, the taking of evidence, the enforcement of judgments or awards and the swift resolution of jurisdiction challenges.

To that end, this book aims to provide an insight into how such issues are managed by the court systems and procedures of jurisdictions around the world, with a particular focus on practical considerations. I hope it is a useful guide for all lawyers who advise businesses that trade internationally.

Finally, I am grateful to all the contributors from across the globe for the clarity and expertise of their contributions.

Ted Greeno
Quinn Emanuel Urquhart & Sullivan

Spain

Pedro Moreira & Isabel Álvarez
SCA LEGAL, SLP

Efficiency of process

Introduction to the Spanish legal system

Spain is a democratic State and a parliamentary monarchy in which, as in all modern democracies, powers are divided up between the three main branches of Government. Judicial Power is vested in courts and tribunals, whose function is to administer justice in the name of the people.

In Spain, Judicial Power is ruled by the Constitution of 1978 (hereinafter, "CE"), specifically in Title VI (arts 117 to 127), and in Organic Law 6/1985, of July 1st, *on the Judicial Power* (hereinafter, "LOPJ"), modified by, among others, Organic Laws 19/1993, 20/2003, 2/2004, 6/2014, 13/2015, 3/2008, 4/2018 and 5/2018.

Different judicial bodies are in charge of the exercise of Judicial Power, organised in the civil, criminal, contentious-administrative, labour and military orders. These bodies must deal with and decide all the litigations that must be prosecuted in Spain, according to their nature.

In this chapter, we will focus on the Spanish institutional framework by which the prosecution of litigations in the civil and commercial areas is governed.

Courts and tribunals

For judicial purposes, Spain is organised territorially into municipalities, parties, provinces and autonomous communities.

The organisation and running of the courts and tribunals is regulated in the LOPJ, under which these bodies may be single-judge courts or collegiate courts. Next, we proceed to analyse the most relevant categories of courts and tribunals in the context of civil and commercial disputes:

- **Supreme Court (*Tribunal Supremo*)**: Based in Madrid, the Supreme Court is the highest judicial body in all orders, except for the interpretation of constitutional rules, for which the Constitutional Court is responsible. The Supreme Court has jurisdiction throughout Spain and all other judicial bodies exercise their powers in subordination to it. It is formed by the civil, criminal, contentious-administrative, labour and military chambers.
  The matters it deals with are assessed and regulated in the LOPJ, the most relevant civil proceedings dealt with by such court being those related to cassation of appellation rulings, revision and other extraordinary remedies.
- **Regional High Courts of Justice (*Tribunales Superiores de Justicia*)**: These courts are judicial bodies with jurisdiction over the territory of each Autonomous Community, after which they are named. Each of these courts is made up of the civil and criminal, contentious-administrative and labour chambers.

The High Courts of Justice are the judicial bodies before which all successive procedural instances of pleas initiated in the respective communities for matters within their competence finish up, without affecting the higher competence of the Supreme Court and central jurisdictional bodies in certain matters.

The Civil Chamber of these courts deals with appeals for annulment and review against resolutions of jurisdictional bodies of the civil order based in the Autonomous Community, provided that the appeal is based on violation of civil, local or special law norms of the community, and after the corresponding Statute of Autonomy has approved this. In addition, it supports and controls arbitration, as well as requests for *exequatur* of arbitration awards or foreign resolutions, unless this corresponds to another court or tribunal according to the provisions of treaties or European Union regulations.

- **Provincial Courts (*Audiencias Provinciales*)**: Each province has a court, which is a higher judicial body with certain powers in the civil and criminal areas. As a rule, each Provincial Court is named after the capital of the province and extends its jurisdiction to the entire territory of that province.

  In the civil order, these courts mainly deal with and decide on appeals against rulings given by the courts of first instance.
- **Courts of first instance**: These are single-judge judicial bodies with jurisdiction in civil and most commercial matters. In each judicial county, there are one or more courts of first instance. Their headquarters are in its capital and each of these courts has jurisdiction in all of its territorial area.
- **Commercial courts**: These courts are single-judge judicial bodies based in the capital of each province; they have jurisdiction over it, although commercial courts may be established to extend their jurisdiction to two or more provinces of the same Autonomous Community. These are specialised courts within the civil order, and have jurisdiction in the commercial area (bankruptcy, anti-competitive practices, transportation, industrial property, intellectual property and publicity, as well as corporate matters, among others). However, civil and commercial matters that are not expressly assigned to them by law are dealt with by the courts of first instance.
- **Constitutional Court (*Tribunal Constitucional*)**: This court is the Spanish constitutional body that acts as supreme interpreter of the Constitution. It is regulated in the CE, in Title IX (arts 159 to 165), and in Organic Law 2/1979, of October 3rd, of *Constitutional Court*, amended, among others, by Organic Laws 6/2007, 12/2015 and 15/2015.

  This court is independent from the Judicial Power and, in the performance of its function, is subject to the CE and its Organic Law only. In addition, it is unique in its order and extends its jurisdiction to the entire national territory. The magistrates of the Constitutional Court are appointed by the King, among lawyers and other professionals in the world of law proposed by different higher bodies of the State, including Parliament and Government (art. 159 CE).

  The last interpretation of the provisions of the CE is constitutionally assigned to the Constitutional Court which, as such, is in charge of hearing requests for the declaration of unconstitutionality of ordinary rules, protection of rights foreseen by the CE and solving conflicts of competence between the State and the Autonomous Communities and between the Autonomous Communities, without detriment to others that the laws of ordinary rank may assign to it. With these commitments, at the time of interpreting constitutional rules and the adequacy of the ordinary ones to these, the Constitutional Court is definitely in a position to, among others, rule in terms that affect the validity of rulings given, in civil and commercial disputes, by ordinary courts, and/or uphold constitutionally protected rights in case of breach of the same by ordinary rulings.

Mechanisms for dispute resolution

The Spanish legal system basically foresees two ways of resolving disputes in civil and commercial matters: on the one hand, judicial proceedings; and on the other, voluntary proceedings, the latter being an alternative to the first with two types of instruments: mediation; and arbitration.

Judicial proceedings

In civil and commercial matters, Law 1/2000 of January 7th, *on Civil Procedural Law* (hereinafter, "LEC"), basically foresees two types of declaratory judgments for the resolution of disputes: the so-called "small claims procedure" (*procedimiento sumario*) and the ordinary procedure (*procedimiento ordinario*); and an abbreviated procedure without a properly declaratory character, the order for payment procedure (*procedimiento monitorio*).

- The **small claims procedure**, regulated in arts 437 to 447 of the LEC, is a type of declaratory procedure for claims of up to €6,000, and for the prosecution of matters expressly mandated by that legal body, regardless of their amount.
  This procedure begins with a claim, which is followed by the defendant's written response, and a sole hearing in which decisions are made about procedural issues and the admission of evidence. Evidence is then taken before trial and it ends with the issuance of a ruling.
- The **ordinary procedure**, regulated in arts 399 to 436 of the LEC, is applicable to certain matters expressly contemplated in the law (for example, in competition law matters, and claims of amounts of over €6,000, as long as this matter is not to be dealt with by a small claims procedure). This procedure is similar to a small claims procedure, except for the fact that instead of a sole hearing, it is developed by two trials, namely: a pre-trial, in which procedural issues are resolved and evidence is proposed and admitted; and a main trial, in which the evidence is produced and conclusions, on the evidence and the law applicable to it, are drawn by the parties. Once the trial has been held, the case ends with the issuance of a ruling.
- The **order for payment procedure**, ruled in arts 812 to 818 of the LEC, is an expediting procedure foreseen for the settlement of disputes which, as discussed above, does not have a declaratory nature and does not end with the declaration of the law to be applied to the claim it is dealing with. Like the aforementioned declaratory judgments, it is heard by a court of first instance and is intended for monetary claims of any amount, provided that the claimed amount is liquid and determined, the deadline for its settlement has expired and that it is backed by any evidence means admitted in law (invoices, delivery notes, *etc*.).
  The procedure is initiated by an initial petition in which the court is asked to require the debtor to pay or make the pertinent allegations. If the debtor pays or does not answer the court's request, the judge will issue a payment order, which has executive character and ends the procedure; if the requested party opposes, the requesting party has to file a declaratory claim, to be dealt with in a small claims court or ordinary procedure, depending on the amount claimed by the plaintiff.

Voluntary proceedings

Arbitration and mediation are currently regulated, respectively, in Law 60/2003, as of December 23rd, *on Arbitration*, in the Spanish Arbitration Act, which repealed the first Spanish arbitration law enacted in 1988, and in Law 5/2012, of July 6th, *on mediation in civil and commercial matters*.

As provided in Law 60/2003, submission to arbitration is always voluntary and responds to an agreement – previous or contemporary to the dispute – between the parties, to choose the arbitrator, the language of the proceedings, the place, and whether the arbitration is to be governed by rules of law or equity. An arbitrator (or several) will be in charge of resolving the dispute through an arbitral award.

Although submission to arbitration is voluntary, the resolution issued in the arbitral proceedings is, in any case, mandatory for the parties.

Once the award has been issued, neither party can go to court to obtain a different resolution, since an arbitration award is deemed to be judged. In the event that the parties fail to comply with the award voluntarily, the party benefitting therefrom may request the enforcement of the same before the courts of the State, by filing a suit for execution, under the terms provided by the LEC for judicial resolutions liable to execution.

With the approval of the aforesaid laws on arbitration and mediation, the legislator has tried to encourage the use of mediation and arbitration to solve private disputes. However, for the time being, partly due to lack of knowledge from the justiciables and partly due to the costs that they may entail, voluntary proceedings are not heavily used in Spain.

Procedural management

From a procedural point of view, Spain has a special characteristic, insofar as the law provides for the existence of a professional other than the lawyer (hereinafter, *abogado* or "lawyer"); the *Procurador de los Tribunales* (hereinafter, *Procurador*), to whom it entrusts the representation of each of the parties in civil and commercial proceedings.

In her capacity as representative of the party, the law assigns the *Procurador*, among others, powers to serve the pleadings of the party she represents and to receive notifications of the pleadings served by the other, as well as the decisions issued by the judicial body before which the case is being heard. Her intervention is mandatory in all civil proceedings, with the exception of the order for payment procedure and in proceedings where the amount does not exceed €2,000, or where the parties do not need to appear in court with the assistance of a *Procurador*.

At the same time, the *abogado* is responsible for the client's assessment and technical defence. As with the *Procurador*, her intervention is mandatory, except with regard to the initial request for payment procedure and in proceedings where the amount does not exceed €2,000.

In recent years, with the approval of Law 18/2011, of July 5th, which regulates the use of information and communication technologies in the administration of justice, and Royal Decree 1065/2015 which develops it, an electronic system ("LEXNET") was set up, through which all the procedural documents must be served and all the notifications made in the proceedings must be received.

Although its introduction means progress, so far the use of LEXNET has not significantly invigorated the procedural management system, as it suffers from technical deficiencies and its participation in this process is still limited.[1]

Efficiency of the system

In general terms, the Spanish legal system adequately protects the rights of the justiciables, who see their disputes resolved in an independent and professional manner within a period of time that is usually not too long.

The time it takes to resolve a dispute in the first instance, that is, from the filing of the claim to the sentencing, is usually around one year.[2,3] In case of appeal, it would be necessary to count on one more year until the matter is ruled in the second instance. Once an appellation

ruling has been issued, and if this resolution is to be revised by the Supreme Court (in those scenarios where this is allowed), the procedure may be extended for another two years.

This average timespan, which does not seem excessive, at least in comparison with other countries in our legal and cultural vicinity, can, however, be extended in certain situations, as there can be other delaying factors, such as difficulties with the service of the claim to the defendant, excessive workload of the court or tribunal in charge of the case, or the request for legal aid by one of the parties, with consequent damage to the interests of one or more of the parties.

Notifying the defendant of the claim can be problematic when the defendant does not reside at the address the plaintiff is aware of, since, in that case, the law imposes the burden on the plaintiff of finding an address where the claim can be served to the defendant. In our opinion, this is a bad solution, especially in the area of contractual disputes, in which, like in other countries, it would be possible for the law to consider the inclusion in contracts of a *domicilium citandi* for each of the parties, to the effect that the party to whom the court has to notify the filing of the claim is considered notified as of the moment at which the judicial notice has been sent to the address included in the contract.

Integrity of process

In Spain, access to the judicial system is fully granted by the CE. In effect, art. 24 of said legal body establishes, as a constitutional principle, the right of individuals to effective judicial protection in the exercise of their rights and legitimate interests without ever being defenceless.

Likewise, art. 117 of the CE guarantees respect for certain essential principles, undoubtedly necessary for the proper functioning of the Judiciary, such as the principles of impartiality, independence, job stability and responsibility of judges and magistrates and of legality, according to which the work of these must always be based on the law.

In addition, as established in the LEC (arts 99 *et seq.*), judges and magistrates must refrain from hearing any lawsuit in which, objectively, they may have some type of interest; the parties may request their exclusion if they believe that the judge or a certain magistrate appointed to hear the case is not in a position to do so impartially, and the affected judge or magistrate has not recused themselves *ex officio* from hearing such case.

Privilege and disclosure

Privileged communication

Legal privilege is a right and an essential duty in the Spanish legal profession, extending to communications between lawyer and client and between lawyers themselves.

In Spain, legal privilege in the legal profession is regulated in different legal bodies, especially in the LOPJ, the *General Statute of the Spanish Practice of Law*, approved by Royal Decree 658/2001, of June 22nd, and the *Code of Ethics of the Spanish Practice of Law*.

According to the aforementioned regulations, lawyers are to keep secret all facts or news they know through any of the modalities of their professional performance, so that the relationship between *abogados* and their clients is protected by a duty of confidentiality imposed on the legal practitioner. As a rule, *abogados* are not forced to declare on matters in which they have been professionally involved.

Legal privilege encompasses the conversations of the lawyer with her clients, opposing parties or their lawyers, and as such, these conversations cannot be recorded without prior

consent of the parties involved, and will always be protected by legal privilege. Likewise, communications between the lawyer and her client, and between lawyers, must be considered confidential and reserved.

The duties that imply legal privilege will remain even after the *abogado* has ceased to provide services to her client.

The breach of legal privilege by lawyers can have different disciplinary consequences that, depending on their severity, can range from the imposition of a minor penalty to the disqualification of their position for a specific time, or even expulsion from the Bar Association to which they belong.

Disclosure

1. In civil proceedings, an essentially accusatory model of evidence applies, so it is the parties who are obligated to collect and prepare the evidence they consider appropriate to prove their claims, with very limited intervention from the judge, who, as far as not admitting evidence he does not consider pertinent, can do little more than invite the parties to propose certain evidence to prove certain facts, if he believes the evidence proposed by them is insufficient.
   Although, as we have pointed out, the Spanish evidence system is essentially accusatory, it is only possible in a limited way for each party to develop an intense probative activity (discovery) which the other party cannot refuse, under the supervision of a judge and prior to the inception of contentious proceedings, unlike what happens in several common law countries and especially in the United States of America. However, recently the legislator has chosen to include in Law 15/2015, of July 2nd, *on non-contentious proceedings*, a procedure applicable in commercial matters under which, within certain terms, a person legally obliged to keep accounting may be required to display the corresponding books, documents and accounting support. In the event that she does not do so without justification, the court will apply a coercive fine of up to €300 per day until the requested evidence is submitted.
2. In May 2017, Royal Decree-Law 9/2017, of May 26th, came into effect, which transposed, among others, Directive 2014/104/EU, of the Parliament and of the Council. It establishes certain rules to govern, under national law, actions for damages resulting from infringements of the competition law of the Member States and the European Union. In procedural matters, this transposition was carried out through the addition of new provisions, on procedures for claiming damages for breach of competition law, to the LEC (arts 283*bis a* to 283*bis k*).
   The new regulations are intended to prevent the obstruction of evidence by the opposing party, adopting a series of measures to those effects, such as, for example, the possibility of having a hearing for such purpose. The court may adopt measures to order a document production. However, it is by no means a true "discovery" mechanism, since the request for production to third parties or to the opposing party is only allowed for certain documents, and in all cases under certain proportionality requirements which significantly limit its use.

Evidence

The hearing of evidence is ruled by the LEC, which provides for the necessary requirements and deadlines. They vary according to the declaratory procedure. As for the admitted evidence, the LEC includes several types, such as, among others, witnesses' testimony, the declaration of the other party, and the contribution and examination of documents, public or private, including electronic documents of any type (art. 299.1 LEC).

General provisions

According to the mentioned rule, the purpose of the evidence shall be those controversial facts that are related to the judicial protection it is intended to obtain from the proceedings (the subject of the evidence shall also include custom and foreign law) (art. 281 LEC).

Facts that the parties fully agree to are exempt from evidence, except in cases in which the object of the proceedings is beyond the power of the parties (non-renounceable rights). The same rule also applies to acts of public knowledge, which are thus excluded from any sort of evidence provision.

The evidence shall be examined at the request of the party. However, the court may rule *ex officio* that certain evidence be examined or that documents, opinions or other means of evidence and instruments be provided when this is foreseen by the law (art. 282 LEC).

Proposal and admission

Evidence shall be proposed by the parties in a timely procedure (according to the correspondent type of procedure) and the court shall decide on the admission of each piece of evidence proposed.

No evidence that is deemed irrelevant – in the sense that court that deems it irrelevant or with no relation to the objects of the proceedings – shall be admitted by the court (art. 282 LEC).

Evidence that, according to reasonable and secure rules and criteria, can in no case contribute to clarifying controversial facts, must not be admitted owing to their useless nature. In addition, no activity forbidden by law can be admitted as evidence (art. 283 EC).

Taking of evidence

Pursuant to the provisions set forth in the LEC, any means to record words, sounds and images shall also be admitted, as shall any instruments that allow words, data and mathematical operations carried out for accounting purposes or any other purposes, which are relevant to the proceedings, to be saved, known or reproduced (art. 299.2 LEC).

Where certainty about relevant facts may be attained by any other means not expressly set forth in the LEC, the court may, at the request of a party, admit such means as evidence and shall adopt any measures that may turn out to be necessary in each case (art. 299.3 LEC).

Burden of proof

As a rule, it is up to the plaintiff to provide evidence of the facts from which, according to the legal rules applicable to them, the legal effect foreseen by such party is ordinarily inferred. The same is to be said of the facts alleged by the defendant from which, according to the applicable rules, the legal effect foreseen by such party – *i.e.*, the impairment of those alleged and proven by the plaintiff – is ordinarily inferred (art. 217 LEC).

If, at the time of ruling on the case, the court understands that certain facts relevant to the decision are uncertain, it shall dismiss the lawsuit filed by the plaintiff or the counter-claim defendant, or those of the defendant or the counter-claim plaintiff, depending on the party to whom corresponds the burden of proof of the facts that remain uncertain and constitute the ground for the suit (art. 217.1 LEC).

Costs

In Spain, procedural costs are all those verifiable expenses that originate during a legal process, the most important of which are the fees charged by professionals (*Abogados*, *Procuradores*, experts), translation of documents, publication of notifications in official gazettes, and the court fees.[4]

The costs are imposed in the ruling, in accordance with a general principle according to which the costs are imposed on the party losing the lawsuit, who, therefore, is liable for the payment of her own costs and those of the winning party (art. 394 LEC).

Also, as a rule, if the claim is upheld partially, each party will bear its own litigation expenses, the common ones being borne by each of the parties equally.

Once the court imposes costs on one of the parties, the same must be assessed in a separate proceeding (cost assessment proceeding), initiated at the request of the winning party, although its amount as a rule shall not exceed one-third of the amount of the main lawsuit.

Litigation funding

To litigate in Spain, each party must pay for their own lawyer's and *Procurador*'s[5] fees; nevertheless, as discussed above, such fees may be recovered by either party according to the judgment of costs. Under the rule whereby the loser pays the costs (art. 394 LEC), and as costs are usually to be paid long before a final ruling is given, they must actually be paid by the party that has incurred said costs; only after such final ruling is given will the wining party be in a position to claim her costs from the losing one.

However, nothing prevents the costs of a lawsuit being financed by a third party, despite the fact that, so far, no legislation specifically covering this type of financing has been approved. The truth is that, in recent years, in Spain, as in other countries, several non-financial companies and even law firms have begun to finance lawsuits, notably those where the disputed amounts are substantial and the uncertainty regarding the terms of the outcome of the case is high, at least from the party's perspective, by providing what is now widely known as "litigation funding".

This funding is not an ordinary one, where compensation due to the financier is an interest, but a funding where the "financier" actually acts more as a business partner of the litigator or the assignee of the litigator's position than a true financier. Therefore, what is peculiar about "litigation funding" is the type of compensation sought by the provider of the funds: actually, instead of being entitled to receive interest and to be paid back the loaned funds at the end of the loan period, the provider of litigation funding assumes the risk of the outcome of the case by accepting to be paid nothing but a share of the proceeds won by the funded party in case this party wins the case. In case of assignment of the litigator's credits, a transaction permitted by the Spanish contract law and notably covered by art. 1535 of the Civil Code, the scenario is even more extreme, as the provider buys the litigious credit for a certain amount and assumes the full risk of losing the case as the price for keeping the proceeds of this in full, if, in the end, she wins the same.

Class actions

Strictly speaking, one could say that the LEC does not allow class actions, if by these we understand any actions where the plaintiff sues a defendant not only in her own name but also in that of a class of persons who are absent in the procedure, but who somehow form a group or class or have a common position before the defendant. As a matter of fact, in Spain, a plaintiff cannot sue on behalf of a group of persons who are not parties to the procedure and, as a rule, a ruling passed in a certain procedure can in no way generate rights or obligations to persons who were absent from that procedure.

Nonetheless, arts 11 (2) and (3) of the LEC provide for any consumers' association that sufficiently represents a set of consumers affected by a certain consumer matter (a class

of consumers)[6] to file a lawsuit on behalf of all persons who can be deemed so, no matter whether they are actually members of such an association or not. Under certain circumstances, rulings passed in such procedures would bind not only the members of the plaintiff association but also all other members of the class represented by this association (art. 221 LEC).[7]

Although in Spain a consumer is not entitled to file a lawsuit or to act in court on behalf of any other consumers of the same class, as mentioned previously, a consumers' association can do so and, as such, a lawsuit filed by such an association on behalf of any consumers of a certain class should somehow be deemed a true class action, in the sense that the ruling given in the corresponding procedure is enforceable by any affected consumer, even if she is not a member of the plaintiff association.

Nonetheless, the solution devised by art. 11 of the LEC raises many doubts at the time of preparing a class action lawsuit, notably on the ground that it does not set forth a special regime on the petition to be made to the court, and the ordinary one, which requires the plaintiff to determine exactly what the court should order the defendant to do (such as pay a certain amount or to do or not to do a certain thing), may not be appropriate for class action lawsuits. In addition, even the issue of the effects of the rulings given in this sort of lawsuit is not uncontroversial, as the regime devised thereto by the mentioned art. 221 of the LEC, paragraph (1), determines that certain types of class actions – those where the remedy sought by the plaintiff is a declaration of voidness or invalidation of an act or contract – would bind those consumers absent from the procedure only in the cases foreseen in the consumer protection legislation.[8]

Based on the above, class action activity in Spain is still very limited and the fact is that many consumer disputes that could give ground to class action lawsuits have not done so. As a matter of fact, so far, most of those disputes have led to independent lawsuits filed by each of the affected consumers who decided to sue on their own, something that has generated a dramatic increase in the workload of the courts, for which these have shown not to be prepared.

Interim relief

In Spanish legal proceedings, the claimant has the power, if she deems it appropriate, to request precautionary measures, in order to ensure the effectiveness of the legal protection that may be granted to her in the ruling. These measures may never be adopted *ex officio* by the court.

In civil proceedings, these measures are ruled in arts 727 *et seq.* of the LEC, which foresee a series of specific precautionary measures that may be adopted (liens, intervention or administration of productive assets, movable property deposit, *etc.*); notwithstanding that, when appropriate, the plaintiff may request the court to adopt certain measures not specifically foreseen in the law.

The judge shall decide by an order and in separate proceedings, wherever she upholds the precautionary measures requested by the plaintiff or, by contrast, dismisses them. The granting of precautionary measures must be grounded and comply with a series of requirements established by law.

Unless expressly provided otherwise, the enforcement of precautionary measures is subject to the provision by the plaintiff of a surety bond which covers the damages that those measures could impose on the defendant's estate.

Enforcement of judgments/awards

Under Spanish legislation, the enforcement of rulings falls under the authority of the Judicial Power (art. 117.3 of the CE). Likewise, the LEC regulates the enforcement procedure in civil matters in its arts 5, 45 and 551 *et seq*.

In the event that the condemned party does not voluntarily comply with the judgment, the winning party may, by suit for execution, request the enforcement of such ruling.

The law establishes that the suit for execution must be based on an enforceable title. Final judgments,[9] arbitral awards and mediation agreements made through a deed issued by a notary public are all deemed enforceable titles.

As a general rule, the enforcement is requested by application and at the request of a party before the judge of the court of first instance who has issued the judgment or resolution that is intended to be executed, or who has heard the case in the first instance.

The suit for execution must express the title on which the enforcement is based, as well as the court protection sought from the court, the property of the condemned or obliged party that is to be seized, the investigation measures necessary to identify seizable assets, and the name of the person or persons against whom the judgment is to be enforced.

Once the necessary procedures have been carried out and provided that all assumptions and procedural requirements are met, the court shall dictate a general enforcement order followed by a decree, which will detail the specific appropriate enforcement measures, including those concerning the investigation of the assets of the condemned or obliged party.

The condemned or obliged party may oppose the enforcement on several grounds, in which case a limited contradictory procedure is opened. In this limited procedure, the court allows the hearing of evidence, after which a court order maintaining the enforcement or dismissing it is issued; the said resolution is appealable.

In the event that, in the enforcement, assets subject to seizure[10] are found, the claimant may request that the court orders their seizure.

Awards given within an arbitration seated in Spain are enforceable in this country in the same terms as a court-given ruling would be (arts 44 of the Spanish Arbitration Act and 517.2, 2nd, of the LEC).

Foreign awards, *i.e.*, those given within an arbitration seated outside of Spain, are enforceable here once they have received the *exequatur*, as foreseen by art. 46 of the Spanish Arbitration Act, which rules that recognition and enforcement of any foreign awards follows the *New York Convention of the Recognition and the Enforcement of Foreign Arbitral Awards*, of 1958. In all matters not covered by this Convention, the enforcement of a foreign award will be subject to the provisions on enforcement foreseen by the LEC as if it were an award given in an arbitration seated in Spain.

Cross-border litigation

According to the provisions of the LOPJ (art. 21), as a general rule, Spanish courts will hear claims that arise in Spanish territory in accordance with the provisions of international treaties and conventions that Spain is part of, in the rules of the European Union and in Spanish laws.

Likewise, the aforementioned rule establishes a series of matters on which the Spanish courts shall have exclusive jurisdiction, regardless of whether the dispute presents elements of connection with other jurisdictions.[11]

Recently, the Spanish Parliament enacted Law 29/2015, as of July 30th, *on international legal cooperation in civil matters* (hereinafter, "LCJI"), which rules on international legal cooperation between Spanish and foreign authorities in civil and commercial matters.

Among other matters, the LCJI covers the serving of court and other official documents, including notifications, as well as the request for execution of letters rogatory, at the request of foreign authorities. The LCJI is governed by a principle of cooperation[12] – under which our authorities are to cooperate with foreign authorities on said matters, even in situations where the existence of reciprocity by these in similar cases has not been determined.

The Ministry of Justice of Spain is the department in charge of applying the LCJI and, as such, is obliged to collaborate with the requesting authorities and resolve any difficulties that may arise in the processing of cooperation requests.

Notification of documents

According to the LCJI, the Spanish authorities may make notifications abroad (or receive notifications therefrom) by mail addressed to the recipient, provided that the legislation of the destination State[13] does not exclude such practice.

In the event that the defendant does not appear in the proceedings, it will be suspended as long as it has been proven that the document has been regularly served; likewise, six months after the date of dispatch of the document, the competent authority shall deem the party's request duly addressed, even if it has not been able to verify that the notification has taken place.

As for the documents issued by a notary public and other authorities, the LCJI provides that they can be notified abroad, when the requesting authority is Spanish, or in Spain, when the issuing authority is foreign, for formalities concerning court documents, as long as such formalities are suitable for these documents.

Hearing and obtaining of evidence internationally: Evidence of foreign law

The LCJI allows the obtaining of evidence in Spain for a foreign procedure or abroad for a procedure taking place in Spain, provided that the requested evidence is directly related to this procedure and, if such evidence is to be produced at a pre-trial phase, then it must be suitable for such purpose under Spanish legislation.

Likewise, the LCJI establishes that the evidence must observe the due process guarantees foreseen in the Spanish legislation and be carried out in accordance with Spanish procedural provisions, but without establishing a listing of evidence that may be heard in Spain at the request of a foreign court.

Finally, concerning the evidence of foreign law that is to be applied to a lawsuit being heard in Spain, there is a general principle according to which the party invoking foreign law in court must prove its content and validity. In the absence of evidence, the judge must apply Spanish law (art. 281.2 of the LEC).

Recognition and enforcement of foreign judicial decisions

According to Regulation (EU) 1215/2012, of December 12th, of the European Parliament, in matters of jurisdiction and recognition and enforcement of judgments in civil and commercial matters, judgments issued in a Member State of the European Union will be recognised without the need for any recognition proceedings, and may be fully enforced once the court verifies that none of the grounds for denial of the recognition, expressly foreseen in such piece of legislation, apply.

Likewise, the LCJI establishes that foreign judicial resolutions can be recognised and enforced in Spain. In principle, all foreign resolutions that comply with the requirements

set forth in the LCJI will be recognised, provided that they are deemed *res judicata*, in case they have been issued in a contentious procedure, or anyhow definitive resolutions, in case they have been issued in a non-contentious procedure.

For the recognition of resolutions issued in non-EU countries, the LCJI has opted to keep the traditional *exequatur* procedure. Once the *exequatur* has been granted, the foreign judicial resolution will merit recognition and will be enforced as if it were Spanish.

Likewise, the LCJI contains a list of grounds to refuse the granting of the *exequatur*, such as the fact that the ruling is contrary to public order, that it has been issued with an obvious breach of the rights of defence of any of the parties, that it rules on a matter over which only the Spanish courts have jurisdiction, or that there is no reasonable connection between the dispute and the foreign court country that has issued the judgment.

In addition, the LCJI establishes that no special process will be required for the registration in official Registries of foreign judicial resolutions that are deemed *res judicata*. However, the Registrar must verify the regularity and authenticity of the documents presented to her and also the absence of any grounds under which the *exequatur* should be denied. In those cases in which the registration is denied, the interested parties must apply for the granting of the *exequatur* by the competent court.

Foreign judicial decisions that are enforceable in the country where they were issued are enforceable in Spain once the *exequatur*[14] has been obtained, the same rule applying to foreign court settlements.

For other official documents, the law does not foresee a prior recognition procedure, provided that a series of requirements are met (being enforceable in the country of origin, not being contrary to public order, and having at least the same or similar effectiveness of similar documents issued by Spanish authorities).

International arbitration

As mentioned above, arbitration is currently regulated by Law 60/2003, of December 23rd, *on Arbitration*, the mentioned Spanish Arbitration Act, as revised in 2009, 2011 and 2015; this legal body is applicable to purely internal arbitrations as well as to arbitrations that present elements of connection with more than one legal system (international arbitrations). It covers all relevant issues in arbitration, including the arbitration agreement and its effects, the arbitrators and their powers, the arbitration proceedings, and the award and its effects and validity.

As a rule, the Spanish Arbitration Act is applicable to domestic and international arbitration that takes place in the territory of Spain (art. 1). Nonetheless, this piece of legislation contains certain provisions that are applicable to international arbitration only (arts 2.2, on limitation of the prerogatives of the parties that are sovereigns or companies, 9.6, on the requisites of validity of the arbitration agreement, 34, on the rules applicable to substance of dispute, *etc*.).

Pursuant to art. 3 of the Spanish Arbitration Act, an arbitrage is deemed international if any of the following circumstances occur: (i) the parties reside in different countries at the time of the making of the arbitration agreement; (ii) the place of arbitration, the place where a substantial part of the obligations arising out of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected is different from the country where the parties reside; or (iii) the relationship from which the dispute arises affects the interests of international trade.

The Spanish Arbitration Act follows the 1958 UNCITRAL Model Law on International Commercial Arbitration. However, the amendments to this Model Law adopted in 2006 have not been passed to Law 60/2003 in the three amendments enacted since 2009.

International arbitrations that take place in Spain are also ruled by the provisions of the *European Convention on International Commercial Arbitration*, of 1961, of which Spain has been a party since 1975. In case of contradiction between this Convention and the Spanish Arbitration Act, the former would prevail on the ground that, in Spain, international law prevails over the ordinary internal law.

Likewise, the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, of 1958, of which Spain has been a party since 1977, applies to the recognition and enforcement of foreign arbitration awards and would prevail over any Spanish domestic legislation on the subject in case of contradiction.

Mediation and ADR

With the approval of the aforementioned Law 5/2012, of July 6th, which incorporated into Spanish law with Directive 2008/52/EC, of May 21st, 2008 of the European Parliament and of the Council, *on cross-border mediation in civil and commercial matters*, the Spanish legal system has a new mechanism for voluntary dispute resolution – mediation – for disputes in matters or business, including so-called "cross-border disputes".[15]

Mediation is a dispute resolution mechanism in which, regardless of its name, two or more parties try voluntarily to reach an agreement to resolve a dispute between them with the assistance of a mediator (art. 1 of Law 5/2012).

As a rule, according to Law 5/2012, mediation is possible when the dispute concerns rights that can be renounced by the parties, as is usual in commercial disputes, and this is regardless of whether the mediation takes place out of or during a judicial procedure.

The agreement reached in mediation is enforceable whenever it is made in a deed issued by a notary public or once it has been homologated by a court (art. 25 of Law 5/2012).

In 2013, Royal Decree 980/2013, of December 13th, was passed, which Law 5/2012 implemented in several aspects, such as the training required for mediators to do their job, the creation of mediator records, the introduction of a simplified electronic mediation procedure, and the possibility to enter into agreements with the Ministry of Justice and the Autonomous Communities to promote the circulation of the information contained in the different mediator records.

As for ADR, itself a form of mediation, the only piece of Spanish legislation approved so far on this is Law 7/2017, of November 2nd, which transposed to Spanish law Directive 2013/11/EU, of May 21st of the European Parliament and of the Council, *on alternative dispute resolution for consumer disputes*. Nonetheless, nothing in the law prevents the parties engaged in non-consumer disputes from informally using mechanisms devised by this piece of legislation as an instrument for the settlement of such disputes.

Regulatory investigations

In Spain, there are several independent agencies and bodies in charge of enforcing the regulations applicable to certain sectors of activity where regulation and control by the authorities is considered of utmost interest for the economy, the consumers and the general interest (banking, electricity, natural gas, telecommunications, ports, railways, securities markets, among others).[16,17]

Each of these agencies and bodies is vested with the authority to carry out investigations aimed at determining the breach of certain mandatory legislation by companies operating in the sector under its supervision. These agencies count on extensive investigative powers, although all investigations must comply with the proceeding rules foreseen in the law, whose framework is based on a balance between the public interest behind the investigations and the interests of the investigated operators. Investigation powers include, among others, those of making dawn raids, checking books and other documents, obtaining copies of any documentation, and enquiring the staff of the operator under investigation. The performance of some of them (*e.g.*, that of making a dawn raid) depends on the express prior consent of the affected operator or, failing that, on a court authorisation.

Though this sort of proceeding is non-contentious, in the sense that proceedings are managed at an administrative level, in case they end up with the application of a sanction or somehow determine that there existed some wrongdoing, the sanctioned business operator can always bring the case to the courts in charge of hearing these sorts of disputes.

* * *

Endnotes

1. This is so on the grounds that the *abogados* cannot access the system in those proceedings in which the representation of the parties by a *Procurador* is mandatory – a great majority – and also due to the fact that, instead of offering an integrated view of the proceedings (with access to all the documents that have been generated at any time in each proceeding, organised by dates and parties), the system is limited to being a mere platform for the service of documentary communication.
2. The 2020 edition of the Report on "*Doing Business*", published by the World Bank in October 2019, to which the first of the authors has contributed, estimates that 510 days is the time required on average to enforce a contract in Spain. Though this figure is close to a year-and-a-half, this period of time includes not only the time required to obtain an enforceable first instance ruling but also the time necessary to enforce such ruling, in case the condemned defendant does not voluntarily comply with the same.
3. At the time of writing this chapter (early June 2020), Spain is still in the state of emergency (*estado de alama*) declared by the Government in March 2020 as a response to the wake of the COVID-19 epidemic which has been affecting Europe since February. As courts were closed for non-urgent matters during part of this period and only recently have they resumed their activity, significant delays in the courts are expected in the months ahead, with a foreseeable increase in the time required on average for a contract to be enforced in Spain. With a view to reduce tensions in the management of court cases but with dubious effects on commercial litigation, including bankruptcy and insolvency proceedings, the Government has passed Royal Decree-Law 16/2020, of April 28th, which, among others, adopts temporary measures on procedures, deadlines and formalities, and reinforces the use of telematic facilities on court hearings.
4. In terms of costs, *abogados*' fees are usually calculated according to the Guiding Criteria of the professional association to which they belong, while the *Procuradores*' fees are calculated through the application of tariffs approved by law.
5. In addition, the plaintiff is also bound to pay the court fees, in cases foreseen by the law where such payment is mandatory.
6. The concept of representativity of a consumers' association is developed by art. 24 (2) of the Restatement of the Consumers Protection Act (*Texto Refundido de la Ley*

General para la Defensa de los Consumidores y Usuarios) approved by Royal Decree Law 1/2007, of November 16th.

7. A Law passed in 2007 added paragraph (5) to art. 11 of the LEC, which allows for the public prosecutor to also file a lawsuit on behalf of any consumers for the defence of their interests, in terms quite similar to those foreseen for consumers' associations.
8. This matter is covered by art. 53 of the Consumer Protection Act mentioned in note 5 above, which rules on the injunction aimed at the protection of the collective interests of consumers, in accordance with Directive 2009/22/EC, of April 23rd, 2009 of the European Parliament and of the Council, *on injunctions for the protection of consumers' interests*.
9. In certain cases foreseen by the LEC, the law allows the provisional enforcement of judgments that are not final, in the sense that an appeal filed against them is still pending.
10. In order to protect the debtor, the LEC establishes immunity for seizure of certain assets, as well as proportional quantitative limits, in case of seizure of wages and pensions.
11. This is the case, among others, of matters such as the rights over real property located in Spain, the setting up, validity, voidness or winding up of companies organised under the laws of Spain, and the validity or voidness of any registrations carried out by a Spanish Registrar.
12. The principle of cooperation allows for exceptions, as the LCJI contains a wide range of situations, very similar to the grounds for denial of the *exequatur*, which can be grounds for the dismissal of requests for international legal cooperation.
13. Along with the documents subject to notification or transfer abroad, there must be a translation to the official language of the destination State or in a language that the recipient understands, and all foreign documents subject to notification in Spain must be translated into Spanish or, where appropriate, into the official language of the Autonomous Community where the documents are to be served.
14. The procedure for the enforcement of foreign resolutions in Spain will be governed, in any case, by the provisions of the LEC, including those relating to the expiration of the right of enforcement of the resolution.
15. A dispute is considered cross-border when at least one of the parties is domiciled in a State different from that of the other party at the time when both agree to use mediation or when they are required, under the applicable law, to accept mediation as the method for solving their dispute (art. 2 of Law 5/2012).
16. Of those agencies and bodies, the most significant are Spain's central bank (*Banco de España*), in charge of the banking sector, the Commission on Markets and Competition (*Comisión Nacional de los Mercados y de la Competencia*), in charge of several regulated sectors (electricity, natural gas, telecommunications, ports, railways, among others), and the Securities Exchange Commission (*Comisión Nacional del Mercado de Valores*), in charge of the securities market.
17. In addition to controlling several of the mentioned sectors, the *Comisión Nacional de los Mercados y de la Competencia* is also in charge of enforcing competition rules, both EU and domestic, in Spain. As a competition watchdog, it is also vested with significant investigation powers.

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