ICLG

The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2017

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A practical cross-border insight into litigation and dispute resolution work

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General Chapter:

Country Question and Answer Chapters:

Continued Overleaf

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Litigation & Dispute Resolution*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of litigation and dispute resolution.

It is divided into two main sections:

One general chapter. This chapter provides an overview of Cybersecurity, particularly from a UK perspective.

Country question and answer chapters. These provide a broad overview of common issues in litigation and dispute resolution in 41 jurisdictions, with the USA being sub-divided into 10 separate state-specific chapters.

All chapters are written by leading litigation and dispute resolution lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Greg Lascelles of Covington & Burling LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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BROSETA

I. LITIGATION

1 Preliminaries

1.1 What type of legal system has your jurisdiction got? Are there any rules that govern civil procedure in your jurisdiction?

The Spanish jurisdiction system is based on civil law. The main law governing the civil procedure is the Spanish Procedural Act "*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*", commonly known as LEC. Other specific laws may contain aspects that may affect the proceeding. As an example, in insolvency matters the Insolvency Act "*Ley 22/2003, de 9 de julio, Concursal*" should also be considered.

1.2 How is the civil court system in your jurisdiction structured? What are the various levels of appeal and are there any specialist courts?

The Spanish jurisdiction system is structured in several stages or steps from the lowest instances to the highest instances. Judicial structure is ruled by the Spanish act "*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*". In the Spanish civil jurisdiction, we find "*Juzgados de Paz*" and "*Juzgados de Primera Instancia*" which are first instance courts. Furthermore, in every province there is also the "*Audiencia Provincial*" which is a tribunal that reviews the judgments issued by lower courts. Finally there is the Supreme Court "*Tribunal Supremo*" located in Madrid, which can review some cases and judgments previously issued by the "*Audiencia Provincial*". Besides, in civil jurisdiction there are also Commercial Courts called "*Juzgado de lo Mercantil*" that may attend issues related to insolvency procedures, transportation disputes, IP rights disputes, corporate law disputes, etc. In some cities where there are several "*Juzgados de Primera Instancia*", some of them may be specialised in a specific areas, such as family law, mortgages foreclosure, awards enforcement, etc.

1.3 What are the main stages in civil proceedings in your jurisdiction? What is their underlying timeframe (please include a brief description of any expedited trial procedures)?

A normal proceeding "*procedimiento ordinario*" shall usually have the following steps:

(i) Claim submission: in which claimant should explain by written the facts, the merits and the request to the court, the claim should include all documents that serve as evidence to justify the facts and merits used;

(ii) Answer to the claim: is to be submitted 20 days after the claim was notified by the court. In the same sense as the claim submission, answer to the claim should explain by written the facts and merits including all documents and evidence that serve to prove the facts and merits mentioned.

(iii) The preliminary hearing: according to the law, should take place 20 days after the answer to the claim was submitted, but depending on the court, it often takes place 3–5 months after the answer to the claim was submitted. The purpose of this hearing is to a) try to reach an agreement, b) provide new facts to the case, c) clarify procedural issues, d) state new arguments in the answer to the claim, e) impeach documents, f) fix and set the controversial facts, g) propose witnesses, judicial experts and other evidence to be practiced during the trial, and finally h) schedule the trial date.

(iv) The hearing: according to the law, should take place one month after the preliminary hearing took place; however, depending on the court, the hearing usually takes place 3–5 months after the preliminary hearing date. During the hearing the witness and experts statements are heard and any other evidence that was previously approved during the preliminary hearing. After the hearing finishes, according to the law, the judgment may come out within a 20-day term.

Oral proceedings "*procedimiento verbal*" usually have these steps: (i) claim submission; (ii) answer to the claim; and (iii) the hearing.

There are other special proceedings which may have other structures, for example eviction procedures "*procedimiento de desahucio*" or mortgage foreclosure proceedings "*procedimiento de ejecución hipotecaria*".

All these proceedings are specified in the Spanish procedural act LEC.

1.4 What is your jurisdiction's local judiciary's approach to exclusive jurisdiction clauses?

Despite some mandatory rules regarding public interest reasons or consumer protection fields, under Spanish law the parties are autonomous and their will prevails, being able to choose an exclusive jurisdiction. Bilateral hybrid jurisdiction clauses (combining the possibility of jointly using arbitration and the judicial system) are permitted according to the Madrid Provincial Court decision dated 18 October 2013.

In case no mandatory forum is specified by law or in case the parties have not specified which will be the territorial court in order to solve the dispute, then generally the claimant will have to submit the claim at the address of the respondent's local court.

1.5 What are the costs of civil court proceedings in your jurisdiction? Who bears these costs? Are there any rules on costs budgeting?

Litigation costs in Spain usually include: lawyer fees; "*procurador*" fees; taxes (when the plaintiff is submitted by a company); experts fees (in cases where their services are needed); and other possible costs that any party may disburse for the purpose of the dispute.

The final judgment may contain a decision regarding which party shall pay the cost of the proceeding "*condena en costas*" usually dismissal of the pleas represents an obligation to pay these costs.

Lawyers' fees are fixed according to local BAR criteria "*Criterios para la fijación de costas del Colegio de Abogados*" which can be challenged in case parties do not agree on its amount.

"*Procuradores fee*" are calculated according to the following rule "*Real Decreto 1373/2003 de 7 de noviembre por el que se aprueba el arancel de derechos de los procuradores de los tribunales*".

Taxes are also calculated according to the rule "*Ley 10/2010 de 20 de noviembre por la que se regulan determinadas tasas, en el ámbito de la Administración de Justicia y del Instituto Nacional de Toxicología y Ciencias Forenses*".

Experts' fees are justified with their own invoice.

There are no specific rules on costs budgeting.

1.6 Are there any particular rules about funding litigation in your jurisdiction? Are contingency fee/conditional fee arrangements permissible?

The Spanish Legal System is based on client/lawyer autonomy to agree, arrange and stipulate their fees. This matter is regulated by the General Rules of the Bar Association and the Code of Conduct of the Bar Association "*Real Decreto 658/2001 de 22 de junio de 2001*".

Contingency fee/conditional fee arrangements are permitted.

There are no particular rules regarding funding litigation or third-party funding.

1.7 Are there any constraints to assigning a claim or cause of action in your jurisdiction? Is it permissible for a non-party to litigation proceedings to finance those proceedings?

Causes or actions based on economic rights can be assigned at any moment, before or after the judicial proceeding has started. A general exception to this rule refers to those actions that are strictly personal, so they cannot be assigned (family matters, right to honour, etc.).

With regards to funding the proceeding, there are no rules that forbid a non-party from assuming the costs of a judicial proceeding. Despite this, it can become a controversial issue when the third party not only funds the costs but also wants to take a relevant decision on the proceeding.

1.8 Can a party obtain security for/a guarantee over its legal costs?

There are no specific rules regarding security for costs in Spain. In this sense, only when a final judgment exists, the winning party can claim the costs, but not before.

The only exception to this is the monetary enforcement or foreclosure proceeding. In this case, the seizure of goods requested in the claim by a claimant can include up to 30% amount increase to be liquidated after the proceeding is finished, this amount is to cover the interest and the costs of the proceeding.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

When initiating a proceeding some formal requirements should be considered, the starting writ should contain details of the lawyer submitting the document, "*procurador*" details, contact details of the defending party, explanation of the facts, evidences supporting the facts, the merits that sustain the plea and the final petition.

Since 2016, all writs submitted by a lawyer or "*procurador*" should be submitted telematically, only when original documents must be included are paper submissions admitted.

Some proceedings do not need the mandatory intervention of a lawyer and "procurador" but in most of them their intervention is a must.

When acting with a lawyer and "*procurador*" the first writ submitted at the court should include a procedural power of attorney attached, granted by the party in favour of his lawyer and "*procurador*". In some cases, this power should include special faculties such as a criminal lawsuit or an insolvency proceeding.

Before submitting the claim, parties should consider whether taxes should be paid or not. Some regions, such as Catalunya, have specific local taxes which are additional to the national tax.

In case the tax has not been paid, the court will require the liquidation of the tax before admitting the claim.

Some specials proceedings, such as mortgage foreclosure proceedings, are very formal and always require that original documents (notarial deeds) are incorporated in the claim.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Limitation periods should be considered when submitting a claim, they are contained in specific acts, such the Spanish Civil Code or Spanish law in "*Competencia Desleal*". The time period in order to submit a claim changes a lot depending on the kind of action that has been used.

It is important to note that the general prescribed term changed after 7 October 2015, as a consequence of the approval of the "*Ley 42/2015 de 5 de noviembre*" that modified article 1964 of Spanish Civil Code. This term changed from 15 to five years. This means that unless one specific rule sets a different term, a general five-year period will apply to any action.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in your jurisdiction? What various means of service are there? What is the deemed date of service? How is service effected outside your jurisdiction? Is there a preferred method of service of foreign proceedings in your jurisdiction?

Civil proceedings are issued once the claim is filed and, after a formal examination by the court, if all the requirements are fulfilled

it is admitted and served on the other party. The claim is served through the court, firstly at the defendant's address given by the claimant. If the claimant does not know the defendant's address or nobody receives the claim at the address, the claimant can ask for the court's help in order to make the necessary inquiry. It is also possible for the claimant's "*procurador*" to personally notify the claim to the defendant if claimant requires it.

Once the defendant submits his statement of defence through his lawyer and "*procurador*", all the services will be done through the "*procurador*".

The date when the defendant receives the claim is considered as the date of service, and so the start of the term given to answer to the claim with the statement of defence.

In case it is necessary to carry on a service outside the court's jurisdiction, the court will require judicial cooperation by means of the "*exhorto*". Also, based on the judicial cooperation principle which is regulated at the European or international treaties, if any service is required in a foreign country, the foreign court will attend it like their own. For example, in the European Union, service is regulated at the "Regulation (EC) 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters" issued in order to speed up the judicial services between member countries.

3.2 Are any pre-action interim remedies available in your jurisdiction? How do you apply for them? What are the main criteria for obtaining these?

In order to ensure the outcome of the litigation, considering that the effectiveness of a possible favourable judgment to the applicant is at risk, the claimant may request the adoption of precautionary or interim measures. These measures can be requested before filing the claim (in case urgency or need occurs), either simultaneously with the statement of claim or after the claim has been submitted, in case the reason that justifies the adoption of precautionary measures appear after the submission of the claim.

The request of interim measures will lead to an independent and separate process from the main process with a separate court order.

As for the measures which can be requested, article 727 of the LEC provides a non-exhaustive list, such as, seizure of goods, receivership, public registry inscriptions, etc.

In any case, when requesting interim measures the applicant must justify that the following requirements are met:

a. *Prima facie* case "*fumus boni iuris*": the applicant must show that, without prejudging the merits of the case, his claim is apparently reputable.

b. Risk of procedural delay "*periculum in mora*": this means that if the interim measures are not taken during the pendency of the proceeding, there is a risk of inability of the effectiveness of the final decision.

c. Guarantee: to provide a guarantee to cover any possible damage that can be caused to the defendant in case the precautionary measure is adopted but the final decision dismisses the claimant's request.

3.3 What are the main elements of the claimant's pleadings?

The main elements of the claim are regulated in article 399 of the Spanish LEC (article 437 in case of the oral proceeding). The claim should identify the parties (personal data and address), claimant's lawyer and "*procurador*", identify and expose the facts and legal grounds (numbered and separately), on which the claim professes to be based.

In addition, the claim should incorporate all the documents and evidence that justify its content. The claimant has the burden of proving all the facts argued in his claim.

Regarding the legal grounds, besides the ones that sustain the legal matter, the claim should reflect the capacity of the parties, justify its legal representation, the jurisdiction and competence of the court, etc.

Lastly, the claim must contain a final pleading "*suplico*" that includes the petition that is requested to the court.

3.4 Can the pleadings be amended? If so, are there any restrictions?

In general terms, the pleading can be amended but it cannot be totally changed. The amendment or change of the pleading of the claim must be totally justified in order to avoid any kind defencelessness of the defendant. Any amendment or change to the pleading can be requested during the preliminary hearing "*audiencia previa*" or even in the hearing, in case of an oral proceeding.

The claim should contain all the known facts that ground the action, these facts are directly connected to the pleading, and so, if the facts do not change then the pleading should not be changed.

3.5 Can the pleadings be withdrawn? If so, at what stage and are there any consequences?

Yes, in general terms pleadings cannot be changed after the claim has been answered, but they can be withdrawn at any moment before the judgment has been issued.

In case that the claimant decides to withdraw their pleas before the defendant has been called upon to attend the claim he may not be responsible for legal costs, but in case this withdrawal comes after the defendant has been called upon to attend the claim, then he may be responsible for legal costs depending upon whether the defendant accepts the withdrawal or not.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/ claim or defence of set-off?

The statement of defence must accept or deny the facts alleged by the claimant and contain the evidence and entire legal basis that could serve to support the dismissal of the claim.

In case of the defendant's silence the court could consider that the defendant admits and accepts the claimant's argued facts. In case either all or certain facts put forward by the claimant are accepted, the defendant answers the claim acquiescing, where appropriate, in whole or in part.

By means of the submission of the statement of defence the defendant can counterclaim, to bring an action against the claimant in case there is a connection between his counterclaim and the first claim. This means that the counterclaim should be related to the facts of the claim or otherwise, the defendant should bring a new action in a separate proceeding.

4.2 What is the time limit within which the statement of defence has to be served?

Once the claim has been admitted by the court, it is served on the defendant.

In case of an ordinary proceeding, the defendant has 20 labour days to submit the statement of defence.

In case of an oral proceeding, the defendant has 10 labour days to submit the statement of defence.

The defendant's "*procurador*" will serve the claimant with the statement of defence and its documents.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on or share liability by bringing an action against a third party?

There are different possibilities.

In the case the defendant considers that he should not have been sued, he could argue a lack of passive standing, which means that the claimant has no action against the defendant, this issue will be solved in the final judgment. In case this is accepted by the judge, the claim will be dismissed.

In the case the defendant considers that other parties should also have been sued, he could argue a preliminary issue of lack of due joint litigation that would be solved in the preliminary hearing. In case this procedural issue is admitted by the court then the claimant will have to expand the claim to other parties, otherwise the proceeding will be closed.

Finally the defendant can call other parties to the proceeding, "*intervención provocada/llamada en garantía*" a kind of caused intervention of third parties that may also be considered responsible for the claim. These cases must be specified by law, so this implies that the third party will be called to the proceeding only in cases where a concrete rule specifies it. In case this intervention is accepted by the court, these third parties will have to answer the claim but they will not be sentenced unless the claimant decides to expand the claim against them. The defendant may use this judgment in further proceedings against those third parties who were called to the proceeding.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, he will be held in contempt by the court. Nevertheless, this status does not interrupt the judicial proceeding which will continue its normal procedure. The defendant held in contempt could even emerge at the preliminary hearing and/or at the final hearing but their defence should be limited to the extent that it does not enforce by means of the statement of defence. In the case that the defendant does not appear during the proceeding, then the proceeding will continue in *absentia*.

4.5 Can the defendant dispute the court's jurisdiction?

Absolutely, the defendant can file a motion to contest jurisdiction called "*declinatoria*", the defendant has 10 working days to submit it from the date that the claim was served. This brief will serve to challenge national, competent or territorial jurisdiction.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

There are two main mechanisms which allow a third party to take part in a proceeding in which it was not originally involved.

On one hand, and in general terms, anybody who proves a direct and legitimate interest in the outcome of the proceeding can be considered to be admitted as part of the proceedings. If the interest in the outcome of the case is recognised, the newly admitted party will appear in the court for all legal purposes.

Specifically, as one of the particular cases in which this intervention mechanism applies, the Spanish Procedure Act, LEC, sets forth that any consumer or user can take part in proceedings lodged by legally recognised entities in defence of their interests.

This mechanism is called voluntary intervention "*intervención voluntaria*" and is regulated by article 13 of the LEC.

On the other hand, there are specific cases in which the defendant can ask someone to take part in the proceeding. These cases must be specified by law, so this implies that the third party will be called to the proceeding just in the case that a concrete rule specifies it.

This mechanism is called "*intervención provocada*" and is regulated by article 14 of the LEC.

In case this intervention is accepted by the court, these third parties will have to answer the claim, but they will not be condemned unless the claimant decides to expand the claim against them. The defendant may use this judgment in further proceedings against those third parties who were called to the proceeding.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

In fact, two sets of proceedings can be consolidated in order to get a single court decision.

The consolidation can be claimed by the party of any proceeding whose consolidation is sought or by the court (*ex officio*) if the case complies with the legal requirements.

The consolidation of proceedings must be agreed when:

1. The court decision in one of the proceedings may bring about harmful effects on the other.
2. The court decision could be contradictory, incompatible or mutually exclusive decisions because of the connection between the matters.

In general terms, the consolidation needs both proceedings to have the same procedure rules, in order to protect the procedural rights of the parties. With regard to this, it is necessary for the court to have the competence to know about both proceedings. Finally, it must bear in mind that the consolidation must be agreed during the first instance of the proceeding.

5.3 Do you have split trials/bifurcation of proceedings?

The Spanish system does not have a split trial proceeding itself; however, the system provides the existence of certain questions,

related to the main issue of the proceeding. In this case, it needs a specific process, called incidental proceeding "*procedimiento incidental*" or "*incidente*".

In general terms, the incidental question must arise after the claim has been submitted and it will end before the process is finished. Furthermore, the incidental question needs particular procedural treatment.

In specific terms, we can make a difference: (i) if we talk about a proceeding inside of the proceeding, for example in the case of precautionary measures; or (ii) if the proceeding is completely separate from the main proceeding, as are any procedural questions that have arisen during the preliminary hearing, such as the questions of competition, legal aid, joinder, etc.

In case of insolvency matters any claim or dispute that may arise inside the insolvency proceeding will be also considered as an incidental matter to be solved by a court decision or order but inside the insolvency proceeding, this is called "*incidente concursal*".

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in your jurisdiction? How are cases allocated?

In general terms, the allocation of cases in the Spanish civil jurisdiction is regulated by distribution rules, which are agreed by a board of judges.

As a general norm, the allocation is based on the order of arrival. However, these rules regulate certain cases to specific matters. In some cities where there are several "*Juzgados de Primera Instancia*" first instance courts, some of them may be specialised in specific areas, such us family law, mortgages foreclosure, awards enforcement, etc.

6.2 Do the courts in your jurisdiction have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Judges must take part in the proceeding, be proactive, participate actively in order to guide the acts and debate during the proceeding, and if possible, encourage parties to obtain an agreement before the trial. In this regard, during the preliminary hearing, in the ordinary proceeding or during the hearing, in case of oral proceedings, the judge is required to invite the parties to reach an agreement, or use ADR methods.

Parties can request interim applications with their briefs, such as precautionary measures. These measures can be requested before filing the claim, either simultaneously with the statement of claim or counterclaim or even after the claim or counterclaim has been submitted.

As for the measures that can be requested, article 727 of the LEC provides a non-exhaustive list, such as, seizure of goods, receivership, public registry inscriptions, etc.

The cost of any measures adopted must be afforded by the applicant of the measures. This cost is contemplated in the guarantee that must be provided by the applicant once the measures have been adopted by the court.

6.3 What sanctions are the courts in your jurisdiction empowered to impose on a party that disobeys the court's orders or directions?

The Spanish Courts are empowered to impose economic penalties to anyone that unjustifiably does not fulfil any order or a direction given during the proceeding. Not only can the claimant or defendant be fined but witnesses, third parties or even lawyers can also.

Furthermore, judicial disobedience is a crime under the Spanish Criminal Code.

6.4 Do the courts in your jurisdiction have the power to strike out part of a statement of case or dismiss a case entirely? If so, at what stage and in what circumstances?

The Spanish civil judicial system is governed by two fundamental principles that shall be taken into account during the whole proceeding.

The first one is enshrined in the Spanish Constitution and it is called effective judicial protection, "*tutela judicial efectiva*". This principle supposes the citizen's right to obtain justice from courts and tribunals. Courts are required to give judgment.

The second one is the principle of requested justice "*justicia rogada*". According to this principle, as a general rule, the court shall decide only and exclusively about those matters, facts, evidence and claims provided by the parties to the proceeding.

There is a limit to court activity due to the fact that judges will only be able to know and decide about what they have been asked for. In this sense, Spanish judges are not personally able to strike out anything the parties have asked for.

According to these principles, judges will have to decide about parties' pleas by accepting or dismissing them through a court decision or judgment. Claim or statement of defence should not be struck out unless formal requirements are not fulfilled or preliminary procedural issues such as the lack of due joint litigation, the court's lack of competence, *res judicata*, etc.

6.5 Can the civil courts in your jurisdiction enter summary judgment?

The Spanish Civil Procedural system does not regulate a specific summary proceeding. However, the general oral procedure is faster than the ordinary procedure. Furthermore, and trying to get a real summary proceeding, the Spanish legislation recognises certain particularities to specific cases, which must be shorter. One of these cases is the oral procedure of eviction "*juicio verbal de desahucio*". The main characteristic given by the law in order to simplify and streamline this process is the single hearing, celebrating all the steps of the prior hearing during the hearing, so that procedural times are reduced.

6.6 Do the courts in your jurisdiction have any powers to discontinue or stay the proceedings? If so, in what circumstances?

On its own initiative the court should not stop and stay the proceeding unless there is a very exceptional and justified reason, such as the court changing its judge and he needs time to study the case, or the file of the case being lost or needing to be reconstructed. Parties are the only ones entitled to request the suspension of the proceeding in case they are negotiating a possible agreement.

The proceeding can be also stopped in case of parties' inactivity, for example in case the claimant is requested by the court to bring a new defendant's address in order to serve the claim and the claimant does not do anything in this respect.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in your jurisdiction? Is it possible to obtain disclosure pre-action? Are there any classes of documents that do not require disclosure? Are there any special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure, such as predictive coding?

Under Spanish law, disclosure does not take place between the parties, but only before the court. That is, disclosure does not work in the same way as it does under a Common Law system.

As a consequence of that, there are no special rules concerning the disclosure of electronic documents or practices for conducting e-disclosure.

When submitting their claim or statement of defence, parties are under an obligation to preserve and disclose all relevant documents and other written material related to the grounds of the case, unless there are specific exceptions.

It is possible to obtain a kind of pre-action disclosure under article 256 of the LEC, in case the claimant needs to obtain some documents or know some facts in order to prepare their claim. This is only intended to happen when the claimant is not sure of the defendant's identity for example, or when the claimant does not know whether he has action to sue or not. This pre-action disclosure does not serve to anticipate evidence to the proceeding in order to prepare the claim and it is restricted to those specific cases contemplated in the law.

In the preliminary hearing before the trial, under article 328 of the LEC, each party may request that the other party exhibits any documents that are not in his possession and which refer directly to the proceedings whenever the relevance and the lack of availability of the document requested justifies it.

7.2 What are the rules on privilege in civil proceedings in your jurisdiction?

There are two main types of privileges in our regulation:

a) The attorney-client privilege: which protects the confidentiality of communications between lawyers and their clients.

b) The privilege between lawyers: in the course of judicial proceedings, that protects the confidentiality of communications between lawyers when negotiating over the dispute.

These privileges are unlimited in time, remain after the process and at the end of the relationship with the client.

7.3 What are the rules in your jurisdiction with respect to disclosure by third parties?

Articles 330 and 332 of the LEC, provide for the disclosure of documents by third parties or public entities. Non-litigant third parties shall solely be required to exhibit documents owned by them and sought by one of the parties where the court considers that the knowledge of such documents is transcendental for issuing the judgment. In case of disclosure, after it has been ordered by the court, but has not been accomplished, the court is allowed to force the requested party to disclose the demanded information.

It is also possible to require a third party to disclose documents under article 256 of the LEC, as explained in question 7.1.

7.4 What is the court's role in disclosure in civil proceedings in your jurisdiction?

The court is entitled to order a document's disclosure to be accomplished by a party, third party or public entity.

This order is based on whether disclosure of some documents is relevant to the grounds of the case or not and always upon a party's previous request.

7.5 Are there any restrictions on the use of documents obtained by disclosure in your jurisdiction?

The LEC does not contain any restriction concerning the use of documents obtained in the course of a procedure. However, data protection rules and fundamental rights such as secrecy of communications should be considered.

8 Evidence

8.1 What are the basic rules of evidence in your jurisdiction?

The proposal and admission of several different means of evidence must be done by stating them separately at the preliminary hearing before the trial. The evidence must be relevant to the dispute resolution otherwise its admission should not be accepted by the judge.

After the preliminary hearing has taken place, it is not possible to propose and admit new evidence except in the cases provided in article 435 of the LEC. The so-called "*diligencias finales*" can take place when there are new facts or news relevant to the dispute resolution, or when previous admitted evidence, for example a witness statement, could not take place for justified reasons.

Under Spanish law, parties should prove customs have used applicable law and foreign law.

The judge is not allowed to propose any kind of evidences but exceptionally this could happen when the judge considers that there is a considerable lack of evidence that prevents him from solving the dispute.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Evidence must be relevant to the dispute resolution. Evidence cannot be useless or consist in any activity prohibited by law.

The different kinds of evidence accepted are the following:

- Parties and witness statements.
- Public and private documents.
- Expert opinions.
- Judicial recognition of place, object or person.
- Multimedia reproduction of image or audio.

Regarding expert evidence, as with other evidence, expert opinion must be relevant to the dispute resolution. The author of the expert report must be an expert in a technical matter (science, art, engineering, etc.); this is necessary so the judge can conclude on the trial.

In general terms, the expert opinion should be incorporated in the statement of claim, unless it is totally justified that it was not possible to have it before. The defendant can incorporate the expert report in the statement of defence or even five days before the preliminary hearing takes place, in case it was not possible to prepare the expert report in the time given to submit the statement of defence. An expert report can also be incorporated in the proceeding five days before the trial takes place when, as a consequence of the defendant's considerations contained in the statement of defence, the claimant requests it in the preliminary hearing.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

The main rules about the calling of witnesses or facts are the following:

- A witness statement is oral not written and takes place in the main hearing after the parties' statement.
- Witnesses are supposed to be independent and so, witnesses should not have a relationship with parties, or an interest in the dispute resolution.
- If a witness is objected by the opposing party who has not proposed that witness, the judge should take this objection into consideration when bearing in mind his statement.
- The judge will require the witness to promise to tell the truth and will advise and warn him that a false witness statement is punishable by criminal law.
- Each party is allowed to refuse a proposed witness.
- The witness must collaborate with justice and go to court to testify otherwise the judge could fine him.
- In case a relevant witness statement cannot take place during the hearing due to witness absence, at the parties' request the trial could be postponed, or the witness statement could take place after the hearing in a final hearing.

8.4 Are there any particular rules regarding instructing expert witnesses, preparing expert reports and giving expert evidence in court? Does the expert owe his/her duties to the client or to the court?

An expert can be appointed by the claimant or defendant but also appointed by the court, when a judicial expert report is requested by the parties.

Whether the expert has been appointed by the parties or by the court, he must promise in his report to tell truth and to be objective about the information and opinion contained in the report.

An expert is supposed to owe his duties to the court, but it is obvious that a parties' expert report will usually support those arguments of the party that had proposed him, this should not cause a problem with his independence and objectivity duties.

Despite it is not being established by law, and considering that judges are free to value evidence according to free criteria, judges usually give more independence and objectivity to a report that it has been issued by an expert appointed by the court, than to the judicial expert.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in your jurisdiction empowered to issue and in what circumstances?

According to the LEC, courts may issue five types of judgments, which are contained in article 206 of the LEC.

Judgments "*sentencia*", court order "*auto*" and Procedural court order "*providencia*" are issued by the judge.

Decree "*decreto*" and Clerk order "*diligencia*" are issued by the court clerk "*letrado de la administracion de justicia*".

a) Judgments "*sentencia*": the aim of the judgment is to conclude the proceeding by solving the dispute, it can be used in first and second instance and also by the Supreme Court.

b) Court orders "*auto*": shall be issued when decisions are adopted on appeals against procedural court orders or decrees, or when a decision is adopted on the admission or rejection of a claim, counterclaim, joinder of actions, admission or rejection of evidence, judicial approval of settlements, mediation agreements and covenants, injunctions and nullity or validity of the procedures. Likewise, decisions shall be in the form of an order when they concern rules of procedure, registry annotations and inscriptions and incidental matters, regardless of whether or not LEC establishes a special procedure for them.

c) Procedural court orders "*providencia*": are court rulings, and court decisions referred to procedural matters, whenever the form of an order "*auto*" is not expressly requested.

d) Decrees "*decreto*": shall be issued when the court receives and accepts the claim and when a procedural issue that concerns the Court's Clerk ascription is finished.

e) Clerk's orders "*diligencia*": in general terms it is used by the Court's Clerk to conduct the judicial proceeding.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Spanish courts can rule on these three concepts:

a) Damages: the judge can order a party to pay the damage requested by the applicant. Damages must be proven and quantified.

b) Interest: the judge can order a party to pay the interest accrued when it is requested by the applicant. The interest rate can be calculated according to contract stipulations signed between parties or in the absence of that according to what is established by law.

c) Costs: the judge may order that the cost of the proceeding is afforded by one party. This cost is calculated in accordance with the indicative criteria of the local Bar Association "*Colegio de Abogados*".

9.3 How can a domestic/foreign judgment be recognised and enforced?

A domestic judgment is automatically enforced at the same court that issued it. The way to enforce it is through an enforcement claim "*demanda ejecutiva*".

In case a foreign judgment wants to be enforced, then we should assess whether this judgment comes from a country belonging to the European Union or not.

In case that the judgment's country of origin belongs to the European Union, in general terms, the recognition and enforcement of the judgment is automatic under the terms provided in Regulation 1215/2012 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (also called Brussels I *bis*).

In case the judgment's country of origin does not belong to the European Union, the recognition and enforcement of the judgment will depend in the international bilateral treaties subscribed between the judgment's origin country and the Kingdom of Spain.

In case there is no international bilateral treaty a foreign judgment, should be enforced according to a special proceeding called "*exequatur*". This procedure is regulated in article 53 of the Spanish act, *Ley 29/2015*, of 30 July, on international legal cooperation in civil matters.

The "*exequatur*" does not review the grounds of the judgment issued abroad; it is a procedure to verify that the foreign judgment meets the formal requirements to be valid and therefore to be recognised and enforced in Spain.

9.4 What are the rules of appeal against a judgment of a civil court of your jurisdiction?

According to the LEC, judgments and court orders can be appealed.

Only judgments of those matters that do not exceed 3,000 Euros are excluded from appeal.

The grounds of the appeal will be those needed to challenge the judgment, mainly challenging the interpretation of the facts that have been considered proved by the court and the use of law.

10 Settlement

10.1 Are there any formal mechanisms in your jurisdiction by which parties are encouraged to settle claims or which facilitate the settlement process?

According to the Spanish act "*Ley 15/2015 of July 2, de jurisdicción voluntaria*" about voluntary jurisdiction, through the voluntary jurisdiction procedure parties can avoid a judicial procedure reaching an agreement or settlement in court.

Despite that, during the preliminary hearing of an ordinary proceeding and during the hearing of an oral proceeding, the judge will invite the parties to initiate a mediation process or to reach a judicial settlement in that moment. In case parties refuse these options the hearing and the proceeding will continue.

II. ALTERNATIVE DISPUTE RESOLUTION

1 General

1.1 What methods of alternative dispute resolution are available and frequently used in your jurisdiction? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The most frequently ADR methods available and used in Spain are Arbitration and Mediation.

Civil Arbitration is very common between companies, especially institutional arbitration. Arbitration in Spain is similar to other countries.

Mediation is not as common as arbitration but its use is growing, especially since the new Civil and Commercial Mediation Act came out in 2012.

In insolvency matters, for those insolvency proceedings in which the debt does not exceed five million Euros, creditors and debtors can also use mediation to reach a payment agreement.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Civil and commercial arbitration regulation is contained in the Spanish Arbitration Act "*Ley 60/2003, de 23 de diciembre, de Arbitraje*".

Consumer arbitration is regulated in the decree "*Real Decreto 231/2008, de 15 de febrero, por el que se regula el Sistema Arbitral de Consumo*".

Mediation regulation is contained in the Spanish Civil and Commercial Mediation Act, "*Ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles*".

Insolvency mediation is regulated in the Spanish Insolvency Act "*Ley 22/2003, de 9 de julio, Concursal*".

1.3 Are there any areas of law in your jurisdiction that cannot use Arbitration/Mediation/Expert Determination/Tribunals/Ombudsman as a means of alternative dispute resolution?

Arbitration is often used for commercial matters and especially for matters which are of free disposition between individuals. That means, those legal issues in which parties are free to agree whatever they have considered.

However, there are subjects unavailable in arbitration such as family matters, capacity proceedings, parentage, marriage, criminal issues, employment, constitutional law, or conflicts against Public Administration.

Regarding mediation, it has been common for some employment proceedings and family law issues. Since 2012, mediation has been used for civil and commercial matters. The use of mediation for criminal matters is also possible for some specific crimes but not very common yet.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court – pre or post the constitution of an arbitral tribunal – issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to your jurisdiction in this context?

An existing dispute can be referred to arbitration by means of an arbitration submission agreement between the parties. In case that this arbitration agreement does not exist, the court is not able to force parties to arbitrate.

In case the arbitration agreement exists, the defendant may invoke the court's lack of jurisdiction within 10 days of the claim being served.

The court can invite parties to use mediation to solve their controversies, this invitation is optional but not an obligation.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to your jurisdiction in this context?

Arbitral Awards are not appealable. A second revision of the background of the case is not possible. However, the Spanish Arbitration Act contains a special proceeding for requesting the annulment of the award. This proceeding must be based on some specific requirements which are very restrictive.

Arbitral awards must be enforced in the First Instance Court of the place in which the award was issued. In some cities the award enforcement is assigned to a specific specialised First Instance Court.

If one of the parties is a consumer, the judge is entitled to review unfair clauses in the contract before starting the foreclosure proceeding.

Regarding mediation, the mediation agreement reached through a mediation process can be enforced in case it is ratified by a court or if parties decide to grant a notary public deed.

The nullity of the mediation agreement can be only challenged on the basis of contract nullity reasons.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in your jurisdiction?

In Madrid the major alternative dispute resolution institutions are "*La Corte de Arbitraje de la Cámara de Comercio e Industria de Madrid"* and *"La Corte Civil y Mercantil de Arbitraje (CIMA)*".

In Barcelona we find the "*Tribunal Arbitral de Barcelona (TAB)*" and "*The Barcelona Consolat de Mar*" which is the Conflict Resolution Centre of the Barcelona Official Chamber of Commerce, Industry and Navigation.

Bar associations usually have arbitration courts that provide arbitration service to be considered.

Regarding mediation, last year the Arbitration Courts and Bar Associations developed their own mediation centres.

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BROSETA Litigation department offers a wide range of legal advice for all types of dispute or conflicts in litigation. BROSETA is particularly keen on corporations and business activities matters such as all kinds of claims, unfair competition, banking litigation, enforcement actions or termination of contracts, liability of directors, challenging social arrangements, bankruptcy, distribution contracts, construction and building, insurances, etc.

BROSETA handles insolvency proceedings, having been appointed as insolvency administrator by the Court, and also has a wide practice defending creditors' interests.

The Firm is also very active in the field of arbitration, especially in commercial domestic and international arbitration. BROSETA acts before the main national and arbitration courts, not only as counsel but also as arbitrators.

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