The Dispute Resolution Review

Editor

Richard Clark

Law Business Research

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SPAIN

*Esteban Astarloa and Eduardo Sánchez-Cervera**

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Spanish legal system is hierarchical. The sources of law are ranked as follows:

i Legal and regulatory provisions

Constitution

The Constitution is at the top of the hierarchy. It provides the basic regulations on fundamental rights and duties, the Crown, Parliament, the Government, the relationship between the latter, the judiciary, territorial division, the distribution of powers between the state and the autonomous regions, the Constitutional Court and the procedure to amend the Constitution.

Laws

The Parliament, composed of two chambers, the Congress and the Senate, passes legislation on matters reserved by the Constitution to the State. When a law affects fundamental civil rights and liberties, it is called 'basic law' ('*ley orgánica*') and is enacted through a special procedure requiring an absolute majority in Congress. Ordinary laws require simple majorities.

Each of Spain's 17 autonomous regions has a parliament of its own, which may pass legislation on delegated matters, including health, education, regional infrastructure and environment, certain taxes and consumer protection, among others.

The basic laws of autonomous regions are called 'statutes', which also require the approval of Parliament. Recently, several autonomous regions have called for a new statute expanding their powers.

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The relationship between laws (national or regional) is not based on a hierarchical principle but on a material one: different matters or different territorial scopes require different laws.

Decree-laws and legislative decrees

Decree-laws are approved by the government. They regulate exceptionally urgent matters and must be ratified by Congress.

In addition, Parliament may occasionally authorise the government to make and enact legislative decrees, which have the same rank as law. Legislative decrees are generally used to group and redraft existing laws.

Decrees, ministerial orders and resolutions

Legislation, national or regional, is developed through these three types of provisions. Decrees are issued by the government, ministerial orders by the relevant minister, and resolutions by administrative bodies or authorities. In case of conflict, laws prevail.

ii Custom

In the absence of an applicable law, custom has the force of law, provided that it is substantiated and is not contrary to moral standards or public policy.

iii General principles of law

In the absence of legislation and custom, general principles of law apply. They are unwritten principles underlying the legal system, based on concepts such as fairness and logic.

iv Case law

Law is never created by court decisions. However, case law issued by the Supreme Court is highly valued as a source of interpretation and application of the law.

v Court system

The Spanish court system is an independent power within the state.

The courts forming the judicial system are structured in five jurisdictions: civil and commercial, criminal, administrative, labour, and military. At the top is the Supreme Court, based in Madrid, with jurisdiction over all of Spain, featuring five chambers, one for each jurisdiction.

Civil and commercial

The civil and commercial jurisdiction deals with contractual claims, tort law, family law issues, inheritance and, in general, any matter that is not designated to the other jurisdictions. The courts of first instance are at the base of this jurisdiction.

In 2005, specialised commercial courts were created in some of the largest Spanish cities to deal with matters such as intellectual property, bankruptcy and antitrust. Elsewhere, the courts of first instance have competence over these matters.

The decisions of courts of first instance (or commercial courts, where applicable) are subject to appeal before the civil chambers of the provincial courts. The provincial

court's decisions can, in certain cases, be challenged before the Supreme Court, but only to determine the correctness of the lower court's application of the law.

Criminal

Criminal cases are investigated by a judge, who is assisted by the public prosecutor (*fiscal*) and the police. Victims may also be party to the proceedings as private accusing parties. The state or any legal entity (e.g., companies) can also be represented in the proceedings if they are victims.

Except for minor offences or misdemeanours, cases are always heard by a court other than that in charge of the investigation. Offences punished with penalties of up to five years' imprisonment are heard by 'criminal courts' (one judge), while cases involving more serious offences are heard by the criminal chamber of the corresponding provincial court (each chamber being formed by three judges).

The decision can always be appealed before a higher court: if the case is heard by a criminal court, the appeal must be filed before the corresponding provincial court; if the case is heard by the latter, the appeal must be filed before the Supreme Court directly.

Labour

A wide range of employment disputes are heard in this jurisdiction, such as claims regarding work shifts, holiday entitlement, discrimination in the workplace, the right to strike or to challenge disciplinary measures and, more usually, claims for unfair dismissal. In addition to the individual exercise of labour-related actions by employees, trade unions can also act on behalf of their members.

At the first instance, claims are heard by labour courts. Subject to statutory requirements, judgments issued by labour courts can be appealed before the High Court of Justice of the corresponding autonomous region. Likewise, and also under certain circumstances, judgments issued by the High Court of Justice can be appealed before the Supreme Court.

Administrative

Also known as the contentious-administrative jurisdiction, cases related to public authority resolutions, the challenge of general provisions with less standing than a law or of legislative decrees, appeals against a public authority's failure to act and claims linked to the liability of the public authorities and their staff are heard in this jurisdiction.

This jurisdiction is important for companies since it is the legal channel by means of which they can challenge, among other things, decisions of the regulators of the financial, telecommunications or utilities sectors or competition decisions.

The equivalent to civil courts of first instance in this jurisdiction are called contentious-administrative courts. Their decisions can be appealed before the High Court of the relevant autonomous region, and, under certain circumstances, before the Supreme Court.

Territorial organisation

For organisational purposes, the whole territory is divided into judicial districts covering one or more municipalities. There is always at least one court of first instance and one criminal investigation court in the 'capital' of each judicial district (although in small judicial districts there can be only one judge with dual responsibility).

Labour courts, criminal courts and contentious-administrative courts are situated in the capital of each of Spain's fifty provinces and in certain larger cities.

The courts of appeal are distributed regionally and include the provincial courts, the High Court of Justice of each autonomous region and the Supreme Court.

There is also a central court that combines various levels of jurisdiction called the National Court, based in Madrid but with state-wide jurisdiction on matters regarding offences with considerable implications (i.e., terrorism, organised crime), and labour and administrative matters of special importance.

In small municipalities that are not the capital of their judicial district, minor civil matters, misdemeanours, and certain civil registry functions are carried out by a justice of the peace.

The Constitutional Court

In theory, the Constitutional Court is not a part of the court system, but a separate and independent national institution that solves disputes between the state and autonomous regions, disputes related to the constitutionality of laws and violations of constitutional rights. However, the Constitutional Court has a flexible notion of its own jurisdiction and has recently adopted some controversial decisions overruling decisions of the Supreme Court in matters understood by the latter to lack constitutional significance. In practice, the Constitutional Court has at times been perceived by citizens as another instance.

II THE YEAR IN REVIEW

The Spanish legal system has been under intense pressure in recent months. For the first time, judges and magistrates called a strike, which took place on 18 February 2009. This strike was preceded and followed by other protests and strikes called by court civil servants in different regions, public disagreements between judges, and the government and the opposition, and resulted in the Minister of Justice's resignation on 23 February 2009.

In addition, the situation has deteriorated further owing to the sudden increase of insolvency proceedings and other proceedings related to the economic crisis (execution of mortgages, credit defaults, etc.).

Nowadays, the main concern of practitioners is the ineffectiveness of the legal system and the length of proceedings (some proceedings can even take over a decade).

Recent decisions of interest have been:

i Judgment of the Supreme Court (civil chamber) of 8 October 2008. Notification by announcement.

In this decision, the Supreme Court ordered that a Provincial Court of Madrid judgment be considered null for lack of adequate notification of the proceedings to the defendants.

During the proceedings, the notifications to the defendants had been made through the official gazette. The defendants showed that they had a permanent address in Spain of which the claimant was aware or should have been aware, since it was even included in one of the documents attached to the complaint. The Supreme Court stated that notification by announcement is only allowed in exceptional cases, after all means of discovering the address of the defendants have been exhausted.

ii Judgment of the Supreme Court (civil chamber) of 24 July 2008. Payments made by the Social Security to workers injured at work and compensation for damages that can be claimed by these workers under civil law.

This judgment addresses the classic case of jurisdiction overlap: occupational accidents. Until recently, the dual compensation that could be claimed by workers injured at work (payments from Social Security and the employer) had been considered independent. However, this Supreme Court decision considered them interdependent, stating that the damages to be paid by the employer to the injured worker should be reduced in view of the amount already received by the worker from Social Security.

iii Judgment of the National Court (criminal chamber) of 25 March 2008. Civil liability of banks for the infringements of their employees that made possible the commission of an offence (the Gestcartera *case).*

Gestcartera was a broker in the Spanish financial market until 2001, when the authorities intervened the company and found a difference of almost €100 million between the book value of the company's assets and their actual value, due in part to its managers' misappropriation of company assets.

One of the most important aspects that the National Court had to resolve was the degree of involvement and liability of two banks that had provided services to Gestcartera.

The employees of one of these banks had issued a certificate containing false information about the value of Gestcartera's assets deposited in the bank. These employees were found guilty of forging commercial documents, and the bank was considered civilly liable for the whole fraud committed through Gestcartera, and not only for the amounts that were falsely included in the certificate. The reasoning behind the attribution of full liability was that, without the false certificate, the authorities would have become aware of the real situation sooner and would have avoided further damage to existing and new clients of Gestcartera.

With regard to the other bank's employees, the National Court considered that they had not committed any criminal offence, but that they had infringed several financial market regulations, such as allowing Gestcartera to blur the client's assets in omnibus accounts, which was essential for the commission of the fraudulent activities. Again, the National Court held this bank civilly liable for the full amount.

This judgment is an example of a general tendency to expand civil liability to legal persons in criminal cases. However, the judgment is currently under appeal before the Supreme Court.

iv Judgment of the Constitutional Court of 20 February 2008 (the Urbanor *case). Start of limitation period for criminal offences.*

This Constitutional Court judgment has probably been one of the most talked about of the past few years, not so much for its technical and legal reasoning, but because it exemplifies the existing conflict between the Supreme and Constitutional Court.

This conflict is based on the fact that, invoking the general constitutional right to due process, the Constitutional Court deals with matters that the Supreme Court considers lack constitutional significance. In this case, the issue was determining when the limitation periods for criminal offences started.

The Supreme Court held that limitation periods for criminal offences start on the date on which a criminal report or complaint is filed, while the Constitutional Court considered that it was on the date when the criminal investigation court actually opened preliminary investigation proceedings.

The Supreme Court's reaction to this decision and other previous similar ones, has been to maintain its stance, deliberately deciding not to adapt its criteria to that of the Constitutional Court, giving rise to legal uncertainty.

III COURT PROCEDURE

i Overview of court procedure

Article 120.2 of the Spanish Constitution establishes that proceedings in Spain must be mainly oral, especially criminal proceedings. In practice, all civil, criminal and labour proceedings have written and oral parts. Conversely, administrative proceedings are mainly conducted in writing.

The oral principle is linked to the immediacy principle. Immediacy requires that the judge who renders the judgment be the same as the one that has heard the oral trial and therefore has had direct contact with the parties, the witnesses, the experts, and the subject matter of the trial, enabling him or her to form an opinion on the case.

Principles inherent to the structure of the proceedings

a Principle of controversy or dual parties

The principle of controversy or dual parties implies that the court is neutral between the claimant and the defendant (or, in criminal proceedings, between the prosecutor and the defendant). The parties must provide the court with all the relevant facts, which must be duly evidenced. The court's task is to consider the allegations and means of evidence provided by each party.

This is not strictly applicable to the investigation stage of criminal proceedings, where, even if the public prosecutor maintains that the suspects are not criminally liable, the judge can continue investigating at his or her own initiative.

Once the investigation stage of criminal proceedings has concluded, the principle of dual parties is fully applicable for the rest of the proceedings.

b Principle of equality of arms

Equality of arms means that the different parties acting in a process must have access to the same resources in forming their respective claims and defences. In other words, each party must be given a reasonable opportunity to present their

case under conditions that do not place him or her her at a substantial disadvantage. This includes the right to access to all evidence adduced or observations made.

Again, there is an exception to this principle during the investigation stage of criminal proceedings, as the judge and the public prosecutor may have access to information or documents before the parties. However, as soon as there is no risk of compromising the investigation, the parties must have access to the information.

Principles inherent to the object of the proceedings

a Principle of initiative (civil/labour proceedings)

According to this principle, only the parties to an action may initiate civil proceedings and may determine the matter under dispute through the initial claim and counterclaim. This principle entails that once the action has been brought before the court, only the parties to the claim may have some bearing on the action. Therefore, the claimant is free to continue or to withdraw the claim.

b Accusation principle (criminal proceedings)

This principle establishes that no one can be held guilty of an offence without being accused of it.

In certain cases it is difficult to match a particular form of behaviour with the legal definition of an offence, which can result in accusations being made for the 'wrong' offence. In such cases the accusation principle has been relaxed somewhat by case law in the sense that courts can impose an equal or inferior punishment to that established for the offence made by the accusation, provided that both offences are of the same nature (e.g., robbery and theft).

The right of the defendant to be heard

Also called the principle of audience, this right is applicable in all jurisdictions. According to this principle, no judgment may be rendered against anybody without them having had the opportunity to be heard. This practice entails notifying the defendant of the initiation of proceedings and the main procedural acts, including the notification through an official gazette, if his or her domicile is unknown. A breach of this principle would render the proceedings void, as reflected in the decision of the Supreme Court of 8 October 2008 mentioned above.

ii Procedures and time frames

All civil and commercial claims must be resolved either through ordinary or oral proceedings.

Ordinary proceedings

Economic claims exceeding €3,000 and some specific matters set out in the Civil Procedure Law regardless of their economic value (most significantly, challenge of corporate resolutions and protection of honour, personal image or privacy) are resolved through ordinary proceedings.

Ordinary proceedings are initiated by filing a claim with the court. Together with the claim, the claimant must file the documents on which it is based (agreements, invoices, letters, etc.). The judge must then ensure that the claim follows the formal requirements before issuing an express resolution accepting it. Once formally accepted,

the court will serve it upon the defendant, who will be given 20 business days to answer the complaint.

When answering the complaint, the defendant may:

a acknowledge the facts (in which case, judgment against the defendant will be rendered immediately); or

b contest the complaint; and/or

c file a counterclaim. The answer to the complaint will be delivered to the claimant and, if a counterclaim has been filed by the defendant, the claimant will be given 20 business days to reply.

Once the defendant has answered the complaint and, as the case may be, the claimant does the same with the counterclaim, or the corresponding terms to answer have elapsed, the court will summon both parties to a preliminary hearing to try to settle the dispute by agreement or, if this is not possible, preparations for trial will begin, allowing both the claimant and the defendant to specify, clarify or rectify their allegations, raise procedural objections and propose evidence.

In the preliminary hearing, the court will decide on the procedural objections raised, will accept the relevant means of evidence, and will fix a date for the trial.

In the trial, the evidence will be produced (examination of the parties, the witnesses, independent experts, etc.) and the parties will present their 'oral conclusions' summarising the facts in dispute and the evidence supporting their allegations.

Following the trial, the court will render its judgment.

Oral proceedings

Complaints with a value or economic interest not exceeding €3,000, as well as injunctive relief actions, disputes over lease agreements, vacant possession actions or actions for the rectification of inaccurate harmful data will be resolved through oral proceedings.

As in the case of ordinary proceedings, oral proceedings are initiated by filing a claim with the court, attaching the documents on which the claim is based. The judge must then accept the complaint by express resolution. Once the claim has been formally accepted, the court will directly summon the parties to a hearing.

In this hearing, the defendant will be given the opportunity to respond to the claim orally. Counterclaims in oral proceedings are only accepted in limited cases. The submission and production of evidence will follow, and then the oral conclusions. The court has ten days to render its judgment.

Summary proceedings

In addition, special type of proceedings are available for the repayment of economic debts of under €30,000. It is a fast track procedure through which parties seek to obtain an enforceable resolution quickly.

The first instance court of the debtor's domicile will be competent to hear the claim. If this domicile is unknown, proceedings will take place in the court with jurisdiction over the place to which the debtor could be summoned to make payment. Neither express nor tacit submissions to alternative courts are deemed valid.

Actions are initiated by filing a brief requesting payment together with a document evidencing that the claimed amounts are due (e.g., a bill, delivery invoice, or any other document commonly used in commercial relationships).

If the petition is accepted, the judge will order the debtor to pay or to provide grounds for his or her defence within 20 days. The opposition should consist of a succinct statement of the reasons why the debtor argues that all or part of the debt is not owed.

If the debtor does not oppose and fails to pay, the court will automatically issue an enforcement order for the amount owed.

If the debtor contests, then proceedings will continue as ordinary proceedings, except if the amount of the claim does not exceed €900, in which case the judge will directly summon the parties to a hearing.

Interim relief

The Civil Procedure Law regulates interim relief, allowing the parties to apply for a wide range of precautionary measures (freezing of assets, record in public registries, order to cease an activity or prohibition to carry it out, suspension of the execution of corporate resolutions, etc.) to ensure the effectiveness of the potential judgment in favour of the requesting party. The request will generally be included in the claim, although, exceptionally, the claimant may request interim relief even before filing the claim (in which case, the defendant must file the claim within the following 20 days).

Before adopting the relevant measures, the court will summon the requesting party and the defendant (or potential defendant) to a hearing where they must state the reasons for or against the adoption of the measures.

Again, in exceptional circumstances, the court may order the adoption of interim measures (usually, the seizure of assets) before hearing the affected party, in which case the hearing will take place after the measures have been implemented.

Simultaneously to ordering the adoption of interim measures, the court will require the claimant to provide security covering potential damages to the affected party. In this regard, the claimant usually provides a bank guarantee.

iii Class actions

The Civil Procedure Law regulates class actions. The most important feature of class actions in Spain is that they are reserved for consumer and user associations requesting compensation for damages in favour of consumers and users affected by the same problem, regardless of whether or not they are members of the claimant association.

Consumers are notified of the class action by virtue of an announcement in the media of the geographic area in which the impairment occurred, thus allowing them to 'opt-in' and join the class action.

Under Spanish law, the most important consequence of class actions is that the decision will be considered res judicata: no person falling under the scope of the claimant class may bring suit based on the same facts, on the basis that they were given the chance to litigate and to be compensated by virtue of the class-action proceedings.

It is somewhat surprising that there is no 'opt-out' procedure for consumers who wish to initiate proceedings independently. Their only alternative is to have their own independent counsel, albeit in the same proceedings.

The commonality requirement for bringing class actions under Spanish law is also interesting. An action can only be successfully initiated when:

a the cause of the injury is identical in relation to the different consumers or users affected; and

b it is unnecessary to project the harmful conduct or act on every consumer individually.

Recently, there have been noises in the press about class actions initiated by consumers affected by financial products linked to the collapse of Lehman Brothers and Madoff Investment Securities, which are likely to give rise to some very interesting issues.

iv Representation in proceedings

Spain has a peculiar system of representation. The general rule is that litigants must be represented in the proceedings by a court representative (*procurador*), who is an independent legal professional that acts as an intermediary between the party and the court, filing the briefs that the party's lawyer prepares and notifying the party of the resolutions issued by the court.

Generally, briefs addressed to a court must be signed by a court representative and by a lawyer, except in certain cases where the signature of these professionals is not required and the party may act unaided: complaints for a value or economic interest amounting to a maximum of €900, to be resolved through oral proceedings; requests for monitory proceedings and writs aimed at entering an appearance, requesting urgent measures, or requesting the urgent suspension of a hearing or of any other procedural act.

In criminal proceedings, representation by a court representative is optional at the investigation stage, but mandatory as from the trial stage. Legal counsel is mandatory, except in proceedings for misdemeanours.

v Service out of the jurisdiction

The first serving of an initial claim to a person or company domiciled in one of the countries that have ratified the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters will be dealt in accordance with the legal system established in such convention, to which Spain is a party. Please see also *III vii* below.

In this regard, the Spanish central authority would deliver the claim and attached documents to the other country's central authority, which is responsible for passing them on to the defendant, together with a translation of both the claim and the attached documents into the official language of the country.

To answer the claim, the defendant should grant powers of attorney in favour of both a Spanish lawyer and a court representative, who would formally represent the defendant before the courts of Spain. Once the court representative is appointed, all subsequent notifications will be served directly to him or her.

For countries that have not ratified the aforementioned convention, the principle of reciprocity would apply (generally, notification through letters rogatory).

vi Enforcement of foreign judgments

A foreign judgment is not directly enforceable in Spain, and must first be granted recognition through *exequatur* proceedings. *Exequatur* is the declaration that a foreign judgment can have legal effects in Spain. The recognition and enforcement of foreign judgments in Spain is governed by a number of international instruments ratified by Spain together with articles 951 to 958 of the Civil Procedure Law.

Recognition of a foreign judgment in Spain may be sought under two major frameworks:

a Conventional recognition and enforcement regime

Spain is party to many bilateral and multilateral treaties on the recognition and enforcement of foreign judgments, the most important of which are the Brussels Convention of 1968 (superseded by EU Regulation 44/2001) and the Lugano Convention of 1988.

b Internal recognition and enforcement regime

Recognition and enforcement of foreign judgments in the absence of an applicable treaty is based in the reciprocity principle (the party seeking recognition of the foreign judgment proves that the courts of the country of origin would recognise a similar Spanish judgment) together with the fulfilment of certain requirements: the foreign judgment must have been rendered as a consequence of the exercise of a personal cause of action; not rendered by default; the obligation to be enforced through the judgment must be lawful in Spain; and the judgment must meet all the necessary requirements for validity in the country where it was rendered and in Spain.

Recognition of a foreign judgment under either of the systems set out above must be granted through exequatur proceedings, notwithstanding procedural specialties that the applicable treaty may establish.

vii Assistance to foreign courts

Assistance to foreign courts is governed by several different sets of rules, briefly explained below:

a EU Regulation 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters. The Regulation provides a swift procedure for the transmission of requests for the taking of evidence directly between the courts of all the Member States of the European Union with the exception of Denmark.

b The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. The system provided in this convention differs essentially from that outlined in Regulation (EC) No. 1206/2001 in that such requests are not transmitted directly from the requesting court to the required court, but must be addressed to the central authority of the state where the evidence is sought. In Spain, that central authority is the Ministry of Justice's General Directorate for International Legal Cooperation.

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

d Finally, when none of the conventions or treaties referred to above apply, assistance to foreign courts is governed by articles 277 and 278 of the Judiciary Law. Cooperation will be granted under this regime under the following conditions: reciprocity between Spain and the state from which the request originates; the request is not contrary to Spanish public policy, the request is authentic and is drafted in Spanish; the request is addressed to the Spanish competent court to perform the taking of evidence; and Spanish courts are not exclusively competent over the proceedings where the evidence sought is intended to be effective.

viii Access to court files

In principle, access to court files is restricted for the parties, their lawyers and their court representatives.

As a general rule, attendance to trial and access to the judgments is public, except when there are reasons to protect the right to privacy of the victims.

In theory, intermediate resolutions or the content of procedural acts other than the trial should not be made public. In practice, the media somehow gain access to this information and neither the courts nor the professional or administrative bodies seem to adopt any kind of action to punish or prevent this practice.

In the investigation stage of the criminal proceedings, under certain special circumstances (risk of destruction of evidence or of compromising the investigation) a court may keep a file secret from the parties. The court's decision must be grounded and the secrecy period cannot exceed one month, extendable for additional monthly periods by subsequent court orders.

ix Litigation funding

There are no specific legal limits to litigation funding by third parties. Of course, when the litigants are civil servants or judges, funding by third parties could be considered bribery.

Litigation funding by third parties is uncommon in Spain. In criminal matters, for instance, third parties can themselves be a party to the proceedings in the exercise of the so called 'people's accusation', which is certainly more frequent than to fund someone else's litigation.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

There are certain Spanish regulations on the protection of information subject to conflicts of interest, however, there are no express regulations on the implementation of Chinese walls in law firms.

In practice information barriers are a reality in most legal services providers. Chinese walls are undoubtedly allowed and in cases even an obligation (including for professional legal services) in accordance with professional codes of practice.

In certain cases, especially in large mergers or acquisitions where both parties wish to be advised by the same law firm, the consent of both in writing is requested. This is common in the sale and purchase of companies, when a firm may advise the

financing party (e.g., a bank) and the potential purchaser. In these cases there is clearly a conflict of interest but a Chinese wall is set up by having different teams work for each client (including support staff), avoiding any electronic communication or sharing of information. Chinese walls are more difficult in litigation matters.

ii Money laundering, proceeds of crime and funds related to terrorism

The basic regulations in this field are Law 19/1993 (widely amended in 2003 to adapt it to the provisions of Directive 2001/97/EC) and Royal Decree 54/2005, which develops the aforementioned Law 19/1993.

Since April 2005, a range of non-financial businesses and professions became subject to Law 19/1993 for the prevention of money laundering, including tax advisers, notaries, lawyers and court representatives, in the following circumstances:

a when they take part in the preparation or assessment of any transaction on behalf of their clients for the acquisition of real property or companies; the management of funds, securities or any other assets; the creation or management of a company, a trust or any analogue structure; or

b when they act on behalf of their clients in any financial or real estate transaction.

The obligations of lawyers or other professionals mentioned are as follows:

a To request the identification documents of the clients who take part in transactions amounting to €8,000 or over. In certain cases, lawyers must request these documents regardless of the amount involved.

b To carefully examine any transaction which could involve money laundering and communicate any suspicious transaction to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary offences (SEPBLAC). In this case, lawyers are not allowed to execute the transaction before they make the communication.

The obligation to communicate does not apply when the information is obtained to determine the position of the client or to defend that client in any judicial or administrative proceedings.

c To keep all the documents supporting transactions amounting to or exceeding €30,000 for six years, as well as a copy of the identification documents mentioned in (*a*) above.

d To set up an internal structure to comply with the obligations to prevent transactions involving money laundering.

e To maintain the steps taken in accordance with these obligations confidential.

From a criminal law standpoint, money laundering is dealt with under article 301 of the Criminal Code, it being a criminal offence to acquire, process or transfer property in the knowledge that it was obtained as consequence of a crime or to commit any other act to conceal its unlawful origin or to assist any person involved in the acts with the aim of avoiding the corresponding legal consequences.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Confidentiality of information exchanged between lawyers and clients is established in the Judiciary Law and in the General Regulation of the Law Profession.

The Judiciary Law states that all lawyers must keep confidential all the facts or information acquired as a result of their professional activity and cannot be required to testify with regard to such facts or information.

There are, however, no express regulations governing 'privileged' or 'without prejudice' documents or communications, as may be the case in common law jurisdictions.

The Professional Code of Practice approved by the General Council of the Spanish Legal Profession in 2002 expressly states that 'The obligation and right of legal professional confidentiality consists of the confidences and proposals from the client, opposing parties, other attorneys and all facts and documents that have been known or have been received due to any of the different types of professional activity.'

Confidentiality is therefore both a privilege and a legal obligation, encompassing all facts and documents known or received in the exercise of the legal profession. A breach of this obligation could lead to criminal liability as well as sanctions from the Bar Association.

As to in-house counsel, the General Regulation of the Law Profession sets out that the legal profession can also be exercised under an employment relationship. In such a case, in-house counsel enjoy the same rights and obligations as external counsel, including the right (and the duty) of confidentiality and secrecy of communications.

ii Production of documents

Under Spanish law, parties may be required to produce any document considered relevant or useful by the court. Article 328 of the Civil Procedure Law establishes that a party may require the other to produce the documents unavailable to the former and related to the subject matter of the dispute or to the effectiveness of the means of evidence.

Although it may seem straightforward, the relevance test of Spanish courts is complex, and the requested document must be directly connected with the dispute.

In Spain, it is important to provide the court with original documents, rather than photocopies. Therefore, the parties often request their counterparties to produce original documents. In such cases, the Civil Procedure Law sets out that a copy of the document must be submitted to the court by the party which requests the original, or, in its absence, a very detailed description of such document.

Although, as mentioned above, Spain is a party to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, it is one of the countries that does not accept letters rogatory issued for the purpose of obtaining pre-trial discovery of documents. In fact, there is nothing similar to discovery under Spanish civil law, since a Spanish court would expect the document requested to be specific, that is, that the requesting party is certain of its existence and that it is that one identifiable document and no other which relates to the general issue.

If documents are held by a third party, in Spain or abroad, the relevance test becomes even more restrictive.

When documents are held by foreign third parties, letters rogatory are sent by Spanish courts requesting that the foreign authorities carry out the pertinent actions to obtain the document.

In summary, Spanish courts are extremely sensitive towards burdensome or disproportionate obligations in this regard, and consequently, only specific documents directly related to the litigation may be requested to be produced by the parties or by a third party.

Naturally, criminal investigation courts operate under different standards and often request the parties or third parties (banks, telecommunications companies, airlines, etc.) to provide information or documents. This can be done either at the initiative of the investigating judge or following a petition of the public prosecutor, the police or any party to the proceedings.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Arbitration and other alternative dispute resolution means are increasingly becoming a real and effective venue for settling commercial disputes in Spain. This section aims to provide a brief outline of the current status of the out-of-court mechanisms in Spain, focusing on arbitration, mediation and expert determination.

ii Arbitration

The Spanish Arbitration Act, together with a number of international instruments ratified by Spain, make up the Spanish arbitration legal framework. Soundly based on the UNCITRAL Model Law, the Arbitration Act is aimed at harmonising domestic regulations with international arbitration standards and thus fostering the development of arbitration in Spain.

In accordance with the spirit of the UNCITRAL Model Law, the Spanish Arbitration Act sets out a unitary regulation for both international and domestic arbitration, with only a few minor rules that exclusively apply to international arbitration. Consequently, the Arbitration Act applies to any arbitration proceedings, either domestic or international, in which the place of arbitration is in the Spanish territory. Another relevant feature of the Arbitration Act is the relaxation of the formal requirements of the arbitration agreement. Although the arbitration agreement must be in writing, recording by other means – such as electronic ones – is also acceptable. In addition, arbitration agreements by reference to a separate document are valid under the Act.

Spanish awards are immediately enforceable, even if a request to set aside the award has been filed. In this regard, the Arbitration Act provides that Spanish awards may only be set aside on the following grounds: (1) the arbitration agreement does not exist or is void; (2) the party challenging the award has not been given proper notice or opportunity to present its case; (3) the arbitrators have ruled on questions not submitted to their decision; (4) the composition of the arbitral tribunal or the arbitration proceedings have been irregular; (5) the arbitrators have decided on questions that cannot be settled by arbitration; or (6) the award is in conflict with public policy. The action to set aside the award is not an appeal and therefore does not entail a review of the merits of the case.

Spanish case law is consistent with this approach, making clear that the scope of review in proceedings to set aside an award is strictly limited to verifying that the essential principles of due process have been observed during the arbitration.

The enforcement of foreign awards in Spain is governed by the New York Convention. Since Spain made no reservation as to its scope of application, the New York Convention governs the enforcement of any foreign arbitration award, even if the place of arbitration is located in a non-contracting state. Spanish courts favour simplicity and expeditiousness when it comes to enforcing foreign awards.

To sum up, the Arbitration Act represents a real breakthrough in developing Spanish arbitration as an efficient alternative to litigation and promoting Spain as an attractive seat for international arbitrations, especially in connection with investments and transactions relating to Spanish-speaking countries. Spanish arbitration institutions and practitioners are fully committed to this active arbitration process, leading initiatives to encourage recourse to arbitration in Spain.

Among the latest reports in this regard, reference must be made to the publication of new rules for the Court of Arbitration of Madrid, which came into force on 1 January 2009. These new rules are intended to be compatible with international arbitration standards and to better adapt to the principles of procedural flexibility and freedom of action.

The recent launch of the first part of the Code of Good Arbitration Practice from the Spanish Arbitration Club must also be mentioned, a guide aimed at compiling general ethical duties and principles that arbitral institutions should observe to enhance confidence in arbitration as an effective means of dispute resolution.

iii Mediation

Mediation, as a private process through which a third person assists the parties to a conflict to come to an agreement, is not expressly regulated under Spanish law. Despite such lack of regulation, mediation has progressively become a recurring dispute resolution mechanism in Spain, due, partly, to the influence of countries with common law systems.

The advantages of mediation as a cost-effective and satisfactory out-of-court procedure have been recently endorsed by the European Union by means of Directive 2008/52/EC. The Directive provides solutions on issues such as confidentiality, the running of limitation periods, and the enforceability of agreements resulting from a mediation.

iv Other forms of alternative dispute resolution

Besides arbitration and mediation, expert determination is considered a relevant alternative to litigation in Spain. Expert determination is a flexible procedure for the resolution of disputes based on the decision of an independent third party: the expert. Expert determination is regarded as a dispute resolution process especially suitable for disputes where the subject matter is a limited factual one.

The category of expert is regulated under Spanish law. Specifically, the determination by a third party of the exact price of a sale and purchase agreement is governed by article 1,447 of the Spanish Civil Code. In fact, the issues that are generally

subject to expert determination relate to valuation matters, such as the EBITDA of the target company as a basis for calculating the purchase price. Recourse to expert determination is also frequent in disputes in which a high degree of technical knowledge is required, such as those resulting from construction contracts.

Under Spanish law, as well as under other European legal systems, an expert determination may be challenged on a variety of grounds, such as material error or clear bias in favour of one of the parties.

VII OUTLOOK & CONCLUSIONS

As mentioned above, the Spanish legal system is undergoing challenging times.

If the situation was initially difficult, it has worsened in recent months owing to conflicts between judges, civil servants and the government, as well as with the sudden increase of insolvency proceedings and other litigation proceedings related to the economic crisis.

The traditional way to conduct judicial proceedings – with numerous formalities – has proven inefficient for today's society. The cultural transition from 'paper' to electronic files has not taken place in the Spanish judicial system, where the value of 'original' documents tends to remain sacred.

In this context, the duration and inefficiency of the proceedings is frequently the main drawback for litigants, making arbitration an attractive option.

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