

## Law and Practice

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## 1. GENERAL

### 1.1 General Characteristics of the Legal System

The Spanish legal system follows so-called civil or codified law, although it has increasingly been accepting and integrating different aspects of the common-law system.

The sources of the law consist of statutory law, custom and general principles of law. Case law is not generally considered a source of Spanish law. Nonetheless, case law issued by the Supreme Court complements the other sources of Spanish law, assisting with the interpretation and application of the law.

Spanish civil legal proceedings are conducted both through written submissions and oral arguments.

### 1.2 Court System

The principle of jurisdictional unity is the basis of the organisation and operation of the Spanish courts. The exercise of judicial authority in any kind of action, both in passing judgments and having judgments executed, lies exclusively within the competence of the courts and tribunals established by law, in accordance with the rules of jurisdiction and procedure within the law.

Spain has five distinct jurisdictional orders, which are classified by subject: civil, criminal, administrative, labour and military. Each jurisdiction has its own substantive and procedural rules. Under civil jurisdiction, specialised courts were created in order to deal with concrete subjects, for example, commercial and family matters.

The civil courts are organised in a pyramid structure, including:

- first instance courts (*Juzgados de Primera Instancia*) and commercial courts (*Juzgados de lo Mercantil*) at the lowest level;
- provincial court (*Audiencias Provinciales*) and superior courts (*Tribunales Superiores de Justicia*) which are both above first instance courts; and
- the Supreme Court (*Tribunal Supremo*), which is located at the highest level of the Spanish court system.

The Constitutional Court is not above the Supreme Court but it serves as an interpreter and guarantor of the correct application of the Spanish Constitution.

### 1.3 Court Filings and Proceedings

As a general rule, hearings in civil proceedings are open to the public, as provided for in Section 138 of the Spanish Civil Procedure Act (SCPA). However, some proceedings may be heard in closed session when this is necessary for the protection of public order, or national security in a democratic society, or when the interests of minors or the protection of the private lives of the parties and other rights and liberties require this.

### 1.4 Legal Representation in Court

According to Section 23 of the SCPA, appearance before the court must be through a court agent (*Procurador*), who must: (i) hold a law degree or any other equivalent university degree; and (ii) be authorised to exercise their profession among the judicial party in court which will hear the case.

Parties may also appear for themselves in the following cases:

- in oral proceedings (*Juicios Verbales*) the determination of which is based on the

amount (not exceeding EUR6,000); and in order for payment procedures (*Procedimiento Monitorio*);

- in universal trials, where their appearance is limited to the submission of entitlement credits or rights, or to attendance at meetings; and
- in incidents relating to a decision regarding legal aid and where urgent pre-hearing measures are requested.

In Spain, lawyers may conduct cases throughout all Spanish territory and act in all instances. However, they must be an active member of a specific local bar association.

According to Section 31 of the SCPA, litigants must be advised and represented by lawyers duly authorised to practise law. No applications may be filed without a lawyer's signature, with the following exceptions: (i) in oral hearings where the determination is based on the amount, and this does not exceed EUR2,000; and (ii) written submissions with the intention of appearing before the court, or to request urgent measures prior to trial, or to request the urgent suspension of hearings or proceedings.

## 2. LITIGATION FUNDING

### 2.1 Third-Party Litigation Funding

In Spain, litigation funding by a third party is permitted. Article 1255 of the Spanish Civil Code (SCC) states that the contracting parties can establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the law, to morals or to public order.

However, third-party funding is rare, due to the fact that it has not yet been specifically regulated, although there are no significant legal obstacles to its development. There are promis-

ing prospects for third-party funding in Spain, given that:

- the rule for the allocation of costs in civil proceedings implies that the party whose claim has been dismissed in full will face higher costs;
- besides state legal aid, there are no regulated alternative funding mechanisms for civil proceedings; and
- third-party funding overwhelmingly facilitates access to justice because it allows a party to litigate or defend itself from an action that otherwise could not be pursued.

### 2.2 Third-Party Funding: Lawsuits

There are no restrictions when it comes to the types of lawsuits available for third-party funding. In Spain, litigation funds are most commonly found in commercial litigation and arbitration.

### 2.3 Third-Party Funding for Plaintiff and Defendant

Third-party funding is available to both sides, although it is more common on the plaintiff's side.

### 2.4 Minimum and Maximum Amounts of Third-Party Funding

As explained in 2.1 **Third-Party Litigation Funding**, there is no specific regulation of third-party funding in the Spanish jurisdiction. Therefore, no minimum and maximum amounts are fixed for third-party funding.

### 2.5 Types of Costs Considered under Third-Party Funding

Third-party funds may cover both procedural costs – eg, court agent lawyers' and experts' fees – and court fees. The coverage will depend on the contract entered into between the third-party funder and the party itself.

## 2.6 Contingency Fees

Contingency fees are allowed in Spain since the Supreme Court confirmed their validity by a judgment rendered on 4 November 2008. Therefore, they may be freely agreed between the parties.

## 2.7 Time Limit for Obtaining Third-Party Funding

No specific time requirements have been set for a party to obtain third-party funding.

# 3. INITIATING A LAWSUIT

## 3.1 Rules on Pre-action Conduct

To date, neither the courts nor the law have imposed any pre-trial proceedings on the parties. However, it is common practice for the parties to try to reach an amicable solution before initiating a court proceeding.

Nonetheless, on 11 January 2019, a draft of the so-called “Act to promote mediation” was passed by the Spanish government. This act aims to introduce mediation as a complementary component for the administration of justice for the out-of-court settlement of disputes in civil and commercial fields. The purpose is to speed up the process and reduce costs for the parties. However, this matter is still under discussion.

## 3.2 Statutes of Limitations

Under Spanish law, there are two types of statute of limitations applicable to civil actions. Both are found in the SCC and their nature and application have been developed by case law.

The first type of statute of limitations (the so-called, *prescripción*) may be interrupted by means of a judicial or non-judicial claim.

There are different durations for the period of this first statute of limitations, depending on the action to be brought.

- For actions based on in rem rights (*derechos reales*) over immovable property, the period for the statute limitation is generally 30 years, whereas the period for actions over movable property is generally six years after possession was lost.
- Actions based on mortgages last for 20 years.
- The statute for actions brought to protect personal rights is five years. This statute is also generally applicable to actions arising from contractual obligations.
- The statute for actions based on a tort is one year as from the claimant becoming aware of the damages caused.

The second type of statute of limitations applicable to civil actions may not be interrupted (*caducidad*). Such is the case with:

- actions relating to the enforcement of final judgments or awards (five-year period from the date of judgment);
- actions to amend or terminate contracts (four-year period); or
- claims brought to the courts within an existing proceeding (a two-year period if there has been no procedural activity at first instance level, and a one-year period at higher levels).

In addition, under Spanish law, special legislation can contain its own limitations. For example, Section 205 of the Capital Companies Act establishes a one-year time limit for challenging company resolutions. In the same way, Section 140 of the Intellectual Property Act grants the holder a period of five years to claim damages for infringed rights.

### 3.3 Jurisdictional Requirements for a Defendant

The SCPA requires a defendant to own the capacity to be a party and to own the condition of being a legitimate party to the proceeding.

Section 6 of the SCPA determines that the following may be parties in the proceedings before civil courts:

- natural persons;
- legal persons;
- an estate or separated estate which temporarily lacks an owner or the owner of which has been deprived of disposition and administration powers; and
- entities lacking legal personality which the law recognises as having the capacity to be a party.

According to Section 10 of the SCPA, legitimate parties are those that appear and act in court as parties to the judicial relationship or the matter under dispute.

### 3.4 Initial Complaint

The proceedings – both “ordinary” and “oral” – begin with a claim. In both cases, according to Sections 399 and 437 of the SCPA, the claim must:

- properly identify the court to which the claim is brought, the parties and their domiciles, and the claimant’s attorney and court agent if their intervention is mandatory;
- neatly and separately expose the facts and the grounds of law supporting the claim;
- clearly describe the relief sought; and
- include the date and the signatures of the intervening lawyer and court agent.

Moreover, the claim must also include all related documentation that is either known or should be known at the time it is filed. In this regard,

no further documents may be added at a later stage, except where these documents are from a later date or could not be provided by the party at the time the claim was filed (Section 270 of the SCPA). However, the plaintiff may, at the preliminary hearing or at the trial proceedings, submit relevant evidence relating to the merits of the case, following allegations made by the defendant in their defence.

### Special Provisions

Under Spanish law, there are two special provisions related to the claim that can be requested even before the claim is filed.

The first one is the anticipation of the proof, which is an exceptional incident and part of the evidentiary procedure. It consists of being able to propose and present a certain means of evidence prior to the initiation of the proceedings because it is not possible to present the evidence at a later stage of the proceedings (Section 293.1 of the SCPA).

The second one is the securing of evidence, which is a preventative and exceptional measure, similar to an interim measure, which seeks to protect or secure the source of evidence affected by the specific contingency which may prevent it from being presented in the subsequent common phase foreseen for the means of evidence in which this source is subsumed (Section 297.1 of the SCPA).

### 3.5 Rules of Service

As a general rule, once the claim has been filed and admitted, the court is responsible for serving the claim to the defendant at the address specified by the claimant (Section 155.1 of the SCPA). Once served, the defendant is granted a 20 business-day period to file their statement of defence.

If the claimant is unable to designate the defendant's address or place of residence for serving purposes, the court clerk may use any suitable means to find the new domicile and may, as appropriate, approach registries, organisations and professional associations in order to do so (Section 156.1 of the SCPA).

Under Spanish law, serving a claim abroad requires following the procedure set out in:

- Regulation EC 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters, if the complaint is being served in an EU member state; or
- the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, if the complaint is being served outside the EU.

### 3.6 Failure to Respond

According to Section 496 of the SCPA, if the defendant does not file a statement of defence within 20 business days after it is served, the proceedings will continue in its absence. In such case, the court will declare the defendant in default. Being in default does not imply an acceptance of the claim or an admission of the facts of the claim by the party under such condition as it may appear at any stage during the proceedings. If this is the case, the procedural actions and measures already agreed in its absence will be valid and will not be repeated.

### 3.7 Representative or Collective Actions

Representative or collective actions are generally allowed by the Spanish legal system but differ from those of common-law countries.

Spanish law allows for representative or collective actions to be filed: (i) to defend the “collective

interest” of consumers, which may be brought by a consumer association or other authorised legal entity as long as the claimants are individually identified or are easily identifiable; and (ii) to protect the “widespread interests” of consumers, which may be brought by a representative consumer association for the protection of the common interests of consumers whose identity is unknown or difficult to determine.

Additionally, pursuant to the Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, public prosecutors and certain qualified bodies of any EU member state are allowed to seek injunctions for the protection of consumers' interests in Spain.

The Spanish legal system provides that individual consumers can freely “opt in” but they cannot “opt out” of the proceedings, as once joined, they will be bound by the final judgment.

Section 15 of the SCPA guarantees that all individual consumers are aware of the proceedings and have the opportunity to join since: (i) the admission of the complaint is published in the media of the territory where the damages occurred; and (ii) if the members of the group are identifiable, the claimant could send an individual letter to all of them prior to filing the complaint.

### 3.8 Requirements for Cost Estimate

Lawyers must provide clients with estimated fees as soon as possible. Although not required by Spanish Law, the estimated fees proposal is usually made in writing.

The Code of Ethics of the Spanish Legal Profession (CESLP) establishes the proper behaviour of lawyers in Spain. These duties can be summarised in two types of action: identification and information. These actions are established



in Section 87 of the General Statute of the Spanish Legal Profession (GSSLP).

## Relationship between Lawyer and Client

Section 87 regulates the relationship between lawyer and client, together with the lawyer's obligations. In addition to those obligations arising from their contractual relationship, lawyers are obliged to fulfil the defence mission entrusted to them with the utmost caution and diligence, as well as keeping their legal privilege. Lawyers are also required to diligently carry out the professional activities needed for the defence of the matter entrusted to them, complying with the technical, ethical and deontological requirements appropriate to the legal protection of the said matter. In doing so, lawyers may be assisted by collaborators and other colleagues, who act under the lawyers' responsibility. Finally, lawyers shall identify themselves to the person they are advising or defending, even when they are doing so on behalf of a third party, in order to assume the civil, criminal and ethical responsibilities that may be applicable.

## Lawyers' Obligations

In the exercise of the profession, lawyers must take into account the requirement of "lex artis". This concept refers to the proper conduct of professionals and can be defined as a set of technical rules of conduct in the exercise of their profession.

Lawyers undertake an obligation of means in the sense that they are obliged to carry out their activities with due diligence and in accordance with the "lex artis", without guaranteeing or committing to the result.

Furthermore, the Supreme Court of Spain, in its judgment of 23 May 2001, Appeal No 914/1996, included among lawyers' obligations the one of informing the client of the "pros and cons", the risk of the case or the convenience or otherwise

of judicial access, together with the costs, the seriousness of the situation, and the probability of success or failure.

## 4. PRE-TRIAL PROCEEDINGS

### 4.1 Interim Applications/Motions

Parties may initiate pre-trial proceedings in order to prepare a future legal action. These pre-trial proceedings consist of a request for measures known as preliminary proceedings (*Diligencias Preliminares*).

Regulated throughout the SCPA and with limited scope, the purpose of these pre-trial measures is to collect information not available to the claimant but necessary to prepare the statement of claim. The SCPA also permits a request for interim measures prior to filing a statement of claim.

### 4.2 Early Judgment Applications

No bifurcation of proceedings is possible under Spanish law. Although it is required that the statement of claim and statement of defence include both procedural and substantive grounds, a hearing on both matters always takes place. If there is no need for a resolution on the merits, the judge will specify this when issuing the judgment.

### 4.3 Dispositive Motions

See 4.1 Interim Applications/Motions.

### 4.4 Requirements for Interested Parties to Join a Lawsuit

Section 13 of the SCPA allows any interested party, not named as plaintiff or defendant, to join the proceeding at any point, as long as they hold a "direct and legitimate" interest in its outcome. Direct and legitimate interest is held whenever the judgment may constitute, modify or extin-



guish a legal relationship to which the third party is also a party.

According to Article 14 of the SCPA, the third party may: (i) voluntarily join the proceedings – without interrupting its normal course but only after the court has heard all the parties, or (ii) be requested to join by any of the parties – in time for presentation of the statement of claims and defence, unless the applicable law states otherwise – whenever such requests are authorised by law.

#### **4.5 Applications for Security for Defendant's Costs**

There is no provision in the SCPA for a defendant to apply for a court order requiring the plaintiff to pay a sum of money as security for the defendant's costs.

#### **4.6 Costs of Interim Applications/ Motions**

Rules concerning costs of interim applications/ motions are the same as the general rules (see **11. Costs**).

#### **4.7 Application/Motion Timeframe**

The timeframe will depend on the type of motion requested, but is usually longer than six months. In any case, applicants may invoke and argue urgency in order to obtain a quicker decision (Section 730 SCPA). For instance, motions to stay proceedings or motions requesting the court to grant an injunction will be dealt with promptly by the court.

## **5. DISCOVERY**

### **5.1 Discovery and Civil Cases**

The Spanish legal system does not provide for discovery.

Independently of the above, a party may request the other party to exhibit certain documents that the petitioner does not have, as long as these documents refer to the subject matter of the proceedings or the effectiveness of other means of evidence. This petition may be requested before filing the complaint or at a later stage, during the evidentiary phase.

If the petition is filed at the evidentiary phase, the petitioner must provide a copy of the documents or, if no copy is available, indicate their precise content. If the petitioned party refuses to exhibit a document, the court may give evidentiary value to the copy provided by the petitioner, or to the version of the document's content given by the petitioner, which will be assessed jointly with the other available evidence. Alternatively, the court may issue a court order so that the requested documents are included in the file of the proceedings.

Nevertheless, this injunction is limited to specific cases, for instance:

- an application against the future defendant to declare under oath or promise to tell the truth concerning their capacity, representation or legal competency required to be known for the case, or to exhibit the documents proving such capacity, representation or legal competence;
- an application against the future defendant to exhibit the object in their possession that will be referred to at the hearing; and
- an application by a partner or joint owner for the exhibition of documents and accounts of the company or condominium.

Additionally, since the implementation of Directive 2014/104/EU, the SCPA regulates a specific proceeding regarding the disclosure of evidence in order to bring legal actions for damages arising from infringements of competition law.

The Spanish courts will not allow fishing expeditions and will only accept precise and justified requests for particular documents.

Regarding the costs, the party that requests the preliminary injunction will bear the costs incurred by the individuals who participated in the referred proceeding, as well as any damages that may arise while executing the measure. This is why the party has to provide security when filing the preliminary injunction.

## 5.2 Discovery and Third Parties

As established in **5.1 Discovery and Civil Cases**, it is also possible to ask a third party to exhibit a document. For example, Section 256.1.5bis of the SCPA determines that any hearing may be prepared by requesting medical records from the healthcare centre or professional having custody of such records, under the terms and with the content provided for by the law.

## 5.3 Discovery in this Jurisdiction

As mentioned previously, discovery is not allowed in the Spanish legal system. However, it is possible to ask for documents or information in order to prepare for the trial (see **5.1 Discovery and Civil Cases** and **5.2 Discovery and Third Parties**).

The parties are not obliged to disclose documents that have not been requested by the other party and admitted by the court in an injunction proceeding, or proposed and admitted during the evidentiary hearing.

## 5.4 Alternatives to Discovery Mechanisms

See **5.1 Discovery and Civil Cases** to **5.3 Discovery in this Jurisdiction**.

## 5.5 Legal Privilege

In Spain, attorneys are legally, contractually and ethically bound to keep secret all information,

facts and issues known to them due to their professional activity and they cannot be compelled to testify about them. In fact, it is a criminal offence to reveal information that is subject to client-attorney legal privilege.

In Spanish law, the GSSLP develops legal privilege. This includes all the facts, communications, data, information, documents and proposals that a lawyer has known, issued or received in their professional practice. The lawyer must also maintain this duty of confidentiality among their collaborators and associates. Legal privilege continues even after the finalisation of the services provided to the client, without being limited in time.

## Exception to Attorney-Client Privilege

However, in C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v the European Commission, the European Court of Justice stated that in-house attorneys are not protected by legal professional privilege when they refer to EU competition matters. Therefore, if the advice given by an in-house attorney could relate to a competition issue, then the attorney must note the real risk that their communications – although containing legal advice – could be seized and used by the European competition authorities in any subsequent investigation.

## 5.6 Rules Disallowing Disclosure of a Document

A party is obliged to disclose a requested document if required to do so by the court. According to Section 261 of the SCPA, if the summoned party fails to comply with the request and does not provide convincing arguments for not complying, the court can: (i) consider as admitted the fact to be proven by the requested document; or (ii) issue an order to enter and search the premises of the non-compliant party. If the required documents are found, the court will put

them at the disposal of the applicant at the court premises.

- judicial orders to provisionally cease any specific conduct; and
- suspension of any corporate resolutions.

## 6. INJUNCTIVE RELIEF

### 6.1 Circumstances of Injunctive Relief

Injunctive relief is admitted under Spanish law and its purpose is to secure the potential enforcement of a future judgment to be rendered.

The competent court to adjudicate any injunctive relief is the first instance court of the domicile of the defendant or the court where the main claim is going to be heard. If the relief is intended to protect a foreign action, the competent court is the court of the place where the assets are located or of the place where the relief must have an effect.

Section 726 of the SCPA determines that the court may order an injunctive relief in the following circumstances:

- when it is exclusively aimed at guaranteeing the effectiveness of the judicial protection that may be granted in a potential judgment, to ensure that it cannot be prevented or hampered by any situation that occurs while the relevant proceedings are still pending; and
- when it cannot be replaced by another measure that is equally effective for the purposes of the preceding paragraph but less burdensome or damaging for the defendant.

Section 727 of the SCPA sets out specific reliefs that may be requested by any plaintiff, for example:

- freezing of assets;
- judicial intervention of productive assets;
- deposit of movable assets;
- preventative registrations in public registries;

This list is nevertheless open as Spanish law grants the opportunity to request any relief necessary to secure potential enforcement of the future judgment.

For the relief to be granted, the applicant for any injunctive relief has to meet three requirements (Section 728 SCPA).

- The petitioner has to provide good standing of its position (*fumus boni iuris*), with evidence of the asserted right or legal interest so that it appears to be plausible, eg, sufficient for it to be foreseeable so that the main decision will declare the right in favour of the party requesting the interim measure. This results in the need to ensure the effects of the interim measure by means of appropriate precautionary measures.
- The petitioner has to provide the court with solid arguments about the need for injunctive relief due to a potential risk in the course of the proceedings (*periculum in mora*). This entails that if the measures are not adopted, the effectiveness of the protection that could be granted in an eventual favourable judgment would be prevented or hindered.
- The petitioner has to deposit a bond (*caución*), which will be determined by the court but must be enough to cover the possible damages that the defendant may suffer if the claim is dismissed. Therefore, the purpose of the bond is to bear the risk of possible damages the interim measure may cause to the defendant's wealth.

The decision of the court granting the interim injunction may be subject to appeal before the provincial court.

## 6.2 Arrangements for Obtaining Urgent Injunctive Relief

The Spanish legal system allows injunctive reliefs to be requested at the time the statement of claims is filed.

Nevertheless, Section 730.2 of the SCPA allows injunctions to be sought prior to the main proceeding. This is possible if at the relevant time the applicant alleges and evidences reasons of urgency or need. If this is the case, the measures adopted on an urgency basis will cease after 20 days if the main claim is not filed before the court. The applicant would then be bound to pay all related costs (including the potential loss caused to the party that suffered the effects of the injunction).

In exceptional cases, if the applicant properly justifies the existence of urgency, the court may order an injunctive relief in the following five days without hearing the defendant (Section 733.2 SCPA).

## 6.3 Availability of Injunctive Relief on an Ex Parte Basis

It is not common practice to grant an injunction without hearing the party that will potentially suffer its effects (Section 733.1 SCPA).

However, ex parte reliefs may also be requested – and granted – if properly founded by applicants under exceptional circumstances (ie, if hearing the defendant could jeopardise proper enforcement of the relief to be granted by the court). The decision granting the injunction must be notified to the other party as soon as possible.

## 6.4 Liability for Damages for the Applicant

Once the injunctive relief has been adopted – unless revoked due to the defendant's opposition – the main process will continue until there is a final judgment on the merits of the case. If the

judgment is granted in favour of the defendant and those measures have already been enforced and executed, the applicant for the injunction will be held liable for damages suffered by the party who requested and executed injunctive relief (Section 745 SCPA).

Therefore, and unless expressly decided otherwise, Section 728.3 of the SCPA requires the applicant for the injunction to post a deposit in a sufficient amount to cover the potential damage to be caused to the party suffering the injunction as well as to compensate, in a speedy and effective manner, the damages that the adoption of the injunction may cause to that party.

## 6.5 Respondent's Worldwide Assets and Injunctive Relief

Section 726 of the SCPA does not limit the assets that can be held by an injunctive relief. Therefore, injunctive relief can be granted over all the assets the opponent party has within Spanish territory.

## 6.6 Third Parties and Injunctive Relief

In accordance with Section 726 of the SCPA, injunctive relief cannot be obtained against third parties, as these measures may only be granted over the assets and rights of the defendant.

## 6.7 Consequences of a Respondent's Non-compliance

According to Section 738.1 of the SCPA, once the injunction has been granted and the security posted, the injunction shall be enforced immediately, ex officio, using whatever means necessary, including those provided for the enforcement of judgments.

## 7. TRIALS AND HEARINGS

### 7.1 Trial Proceedings

Trials in Spain start with the statement of claims, which is filed by the claimant, followed by the statement of defence (or counterclaim), filed by the defendant within a 20-day period after the notification of the statement of claims. This phase of the procedure is conducted in writing.

Later on, parties are summoned to attend a preliminary hearing. This is an act whereby the parties may reach an agreement.

If the dispute persists, the preliminary hearing continues and the parties will normally ratify the contents of their respective statements. The court will then examine if there are any circumstances which may impede the proceedings from being validly conducted, for example:

- the res judicata effect;
- additional or clarifying submissions to those made in their written proposals; and
- the existence of a legal defect in the way the claim or the statement of defence has been filed.

During the preliminary hearing, the parties may also propose additional evidence to that attached to their respective statements, as well as oppose the admission of evidence proposed by the opponent party. Finally, the court will determine the date the trial will be held.

The trial begins by hearing the parties and continues with the taking of evidence admitted. During the taking of evidence, the parties as well as the experts on their reports will be questioned and will also be allowed to produce any images or videos approved beforehand.

After finishing the practice of the evidence, the parties present their conclusions orally. The judgment is subsequently issued in writing.

Nevertheless, it has to be taken into consideration that in oral proceedings, both the preliminary hearing and the trial are conducted at once.

### 7.2 Case Management Hearings

The SCPA does not regulate any specific provisions for case management hearings. All cases are held following the rules of the SCPA.

### 7.3 Jury Trials in Civil Cases

Spanish law does not allow jury trials in civil cases.

### 7.4 Rules that Govern Admission of Evidence

The admission of evidence is governed by the SCPA. No evidence which is considered to be useless in that it cannot help clarify controversial facts, or irrelevant, in that it is not related to the subject matter of the proceedings, will be admitted.

Moreover, under Spanish Law, evidence that is obtained in breach of fundamental rights will not be admissible in court.

### 7.5 Expert Testimony

The Spanish legal system allows for expert testimony at trial.

As a general rule, experts' reports are filed by the parties together with their respective statements. However, due to the short period of time granted to the defendant to file the statement of defence, the defendant may announce the expert report and file it up to five days' prior to the preliminary hearing.

Likewise, if the need for expert testimony becomes apparent only after the statement of

defence is filed, the claimant can ask to supplement the expert report and, if this is allowed, file it up to five days' prior to the trial (Section 338 SCPA).

Any of the parties may ask the court if they can appoint an independent expert. The request will be accepted if the court considers the testimony to be useful and pertinent to the matter under decision. If this is the case, the petitioner will bear the cost of the expert testimony, unless the court dismisses the other party's claims and orders it to pay all costs.

Moreover, the court may seek expert testimony or guidance *ex officio* in certain proceedings, such as, filiation, maternity, paternity, legal capacity or in matrimony proceedings.

## 7.6 Extent to Which Hearings Are Open to the Public

As a general rule, civil proceeding hearings are open to the public.

However, the courts may restrict the public nature of civil proceeding hearings and rule that all or some of the procedural acts or measures adopted will be kept secret to protect public order or the basic rights and freedom of the individual (minors' rights, privacy rights, honour and intimacy rights, etc).

Hearings are recorded but not transcribed in Spain. Hearing records are not usually open to the public.

## 7.7 Level of Intervention by a Judge

The level of intervention by a judge depends on the stage of the proceeding.

At the preliminary hearing, the judge leads the lawyers from one stage to another (Sections 414 and 429 SCPA).

At the trial, the judge may question the witnesses or experts summoned to testify in order to obtain clarification or additional information. The court may also question the experts regarding the conclusions reached in their reports.

In civil proceedings, all judgments are issued in writing at a later date as Section 210.3 expressly forbids oral judgments.

## 7.8 General Timeframes for Proceedings

Section 434 of the SCPA determines that the final judgment will be granted 20 days after the trial has been held. Nevertheless, on most occasions, it is not possible to determine a specific timeframe for civil proceedings, due to the fact that this may depend on:

- the workload of each court;
- the type of procedure that has been conducted (ordinary proceedings tend to last longer than oral proceedings); and
- the complexity of the particular case.

# 8. SETTLEMENT

## 8.1 Court Approval

The Spanish legal system grants parties the right to settle their disputes at any time. Court approval is not required. The parties may, however, request the court to validate the settlement. This will make the settlement enforceable.

## 8.2 Settlement of Lawsuits and Confidentiality

Parties to a proceeding may opt for the settlement of lawsuits to remain confidential by including a confidentiality clause in the settlement agreement.



### 8.3 Enforcement of Settlement Agreements

If the parties are aiming to enforce the agreement, they have to submit the agreement to the court's approval.

The court will validate the agreement unless there is a legal prohibition or there are specific limitations applicable for the protection of the general interest or a third party.

If the agreement is not approved by the court, the party looking for the enforcement of the agreement will have to start a new proceeding in order to prove the existence and the infringement of the agreement.

### 8.4 Setting Aside Settlement Agreements

Under Spanish Law, settlement agreements are not treated differently to regular contracts.

If the court has validated a settlement and a party does not comply, the aggrieved party may ask the judge to enforce the settlement by using all the means possible until the agreement has been completed.

## 9. DAMAGES AND JUDGMENT

### 9.1 Awards Available to the Successful Litigant

A successful litigant may request and be granted:

- a declaratory judgment;
- a judgment that confirms or denies a party to perform a specific act;
- a judgment including an obligation to pay;
- a judgment including an obligation to hand over something other than an amount of money; and

- a judgment including a penalty.

### 9.2 Rules Regarding Damages

Punitive damages are not admitted under Spanish law. Compensation for damages – either material or moral damages – is the general rule under Spanish law. Damages are calculated on the basis of the actual harm caused to the aggrieved party and include both the actual loss (consequential damages) and the loss of profit that the party suffered. Spanish law does not allow compensation for future damages.

The Spanish legal system allows the parties to agree on liquidated damages by the introduction of penalty clauses in contracts. However, when a penalty clause is included in a contract, the party that benefits from this cannot request additional damages compensation, as its compensation is limited to the amount agreed in the penalty clause plus any accrued interest.

### 9.3 Pre- and Post-Judgment Interest

The party whose monetary claim has been upheld may collect interest accrued before and after the judgment is rendered.

Interest accrued before the judgment is rendered is calculated on the basis of the rate set out by the parties in the contract, or where there is no agreement on this, by applying the legal interest rate fixed annually by the Spanish government.

Regarding interest accrued from the date the judgment is rendered (also known as procedural default interest), this is calculated applying an extra 3% over the legal interest rate to the claimed amount, up until the compensation is paid (the legal interest is set out in the Act on the General State Budget).



## 9.4 Enforcement Mechanisms of a Domestic Judgment

The enforcement of a domestic judgment may be obtained through, for example:

- seizure of cash, salary and bank accounts;
- administration of all or part of the assets to get revenues that may be used for payment; and
- seizure and appraisal of assets.

## 9.5 Enforcement of a Judgment from a Foreign Country

The enforcement of judgments is governed by three different sets of rules, depending on whether the judgment comes from an EU member state.

Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, will apply if the judgment is rendered by the courts of an EU member state.

If the judgment has been issued by a non-EU member state, the recognition and enforcement of the judgment should follow the rules included in the relevant bilateral or multilateral treaties signed between the states of origin and Spain.

In the event that there is no international treaty between Spain and the country where the judgment was issued, then Act 29/2015 on International Judicial Co-operation on Civil Matters will apply.

## 10. APPEAL

### 10.1 Levels of Appeal or Review to a Litigation

Judgments issued by first instance courts are subject to appeal before a higher court – a provincial court. Judgments issued by a provincial

court may – if certain requirements are met – be subject to appeal before the Supreme Court.

### 10.2 Rules Concerning Appeals of Judgments

As a general rule, a first instance judgment may always be appealed. Exceptions to the rule are judgments rendered in oral proceedings where the amount claimed does not exceed EUR3,000.

The grounds to appeal a first instance judgment are:

- infringement, by the first instance court of the party's right of defence, provided that such infringement is invoked by the party at the earliest opportunity; and/or
- errors incurred by the first instance court regarding the interpretation of the factual and legal arguments presented by the parties.

If either of these is the case, a provincial court will re-examine in full the proceeding held before the first instance court.

Moreover, a judgment issued by a provincial court may also be subject to an extraordinary appeal before the Supreme Court. Two types of appeal are possible before the Supreme Court – either individually or cumulatively – both of which are based on the following.

- Procedural infringements (*recurso extraordinario por infracción procesal*) – the grounds for this extraordinary appeal include the infringement of:
  - (a) rules on jurisdiction;
  - (b) procedural rules;
  - (c) a party's right of defence; or
  - (d) the right to a fair and equitable judgment.
- Infringement of the law regarding the merits of the case (*recurso de casación*) – the requirements for this appeal to be admissible are:

- (a) protection of fundamental rights, except those recognised by Section 24 of the Spanish Constitution (Section 477.2.1 SCPA);
- (b) the amount of the proceedings must exceed EUR600,000 (Section 477.2.2 SCPA); or
- (c) the appeal is relevant for establishing case law, even if the amount of the proceedings does not exceed EUR600,000 or the proceedings cover a particular subject matter (Section 477.2.3 SCPA).

### 10.3 Procedure for Taking an Appeal

Appeals against first instance judgments must be filed before the court that issued the challenged judgment within 20 business days of notice of the judgment.

Later on, the court clerk will confirm the formal validity of the appeal, declare its admissibility and notify the other party/parties. Where the judgment is not eligible for appeal, the court will decide on its admissibility.

If the appeal is granted, the court clerk will summon the counterparties, giving them a period of ten business days in which to file their opposition to the appeal, and/or challenge the decisions rendered in the judgment with which they do not agree.

Once the counterparties have filed their statement of opposition, the court clerk will send the case file to the provincial court.

### 10.4 Issues Considered by the Appeal Court at an Appeal

The appeal court will consider only the pleas the appeal is based on.

Normally, new evidence is not admitted by the appeal court. Nevertheless, according to Sec-

tion 460.2 of the SCPA, the parties can seek the following evidence:

- any evidence which was unduly rejected for admission by the first instance court, as long as the decision dismissing such evidence was appealed or challenged at the hearing;
- any evidence proposed and admitted by the first instance court which was not finally presented, for reasons not attributable to the applicant; and
- any evidence referring to relevant facts for the decision of the case that may have occurred after the hearing took place, as long as the party can prove it became aware of such evidence subsequently.

### 10.5 Court-Imposed Conditions on Granting an Appeal

Some formalities are required for an appeal to be admitted. In this regard, the 15th Additional Provision of the Spanish Judiciary Act states that ordinary and extraordinary appeals require a deposit amounting to EUR50.

Additionally, the Supreme Court's Governing Chamber issued an agreement on 27 January 2017 which established the maximum length and other formal requirements for extraordinary appeals.

### 10.6 Powers of the Appellate Court after an Appeal Hearing

The provincial court may confirm, dismiss or reverse, either partially or fully, the judgment issued by the first instance court. The judgment issued by the appeal court cannot be more harmful to the appellant than the judgment issued by the first instance court.

## 11. COSTS

### 11.1 Responsibility for Paying the Costs of Litigation

According to Section 394 of the SCPA, in declaratory proceedings, the costs that arise during the proceedings will be borne by the party whose claims have been rejected, unless the court considers that there are reasons to decide otherwise.

The costs the losing party has to bear are: court agents', lawyers' and experts' fees (limited to one third of the amount in dispute). Expenses for copies of documentation, judicial notifications, faxes or notices may also be included.

Section 245 of the SCPA allows parties to challenge the amount of the costs to be paid within a period of ten days from when the costs are set, if that party considers the amount to be inappropriate or excessive.

### 11.2 Factors Considered when Awarding Costs

The factors which the court considers when awarding costs are:

- if the party's pleas have been partially or totally accepted;
- the complexity of the case; and
- the litigant's recklessness (Section 394.2 SCPA).

### 11.3 Interest Awarded on Costs

Interest awarded on costs is a controversial issue in Spanish jurisdiction. Some courts consider interest applicable to costs while others disagree.

Some authors and case law consider that the decree approving the costs (Article 244.3 SCPA) constitutes an enforceable title. The party that must bear the costs is granted a 20-day period

as from the date the costs are fixed to voluntarily pay. If it does not, accrued interest will be added to the amount of the costs.

## 12. ALTERNATIVE DISPUTE RESOLUTION (ADR)

### 12.1 Views of ADR within the Country

During the state of alarm due to COVID-19, judicial activity was frozen and out-of-court settlements increased. When no settlement was possible, alternative methods of dispute resolution were used in order to prevent judicial collapse. Many initiatives have arisen to promote negotiation, arbitration and mediation, which have been available for years but are now seen as a viable alternative.

Three alternative dispute resolution (ADR) methods that are regulated by Spanish law are conciliation, mediation and arbitration.

Conciliation is less popular in civil cases, but it is more popular in labour law. Arbitration is commonly used for commercial and international disputes, while mediation is a frequent recourse when dealing with family law issues.

### 12.2 ADR within the Legal System

Conciliation as a pre-trial condition is only required in labour proceedings.

As for civil litigation, parties can file directly for a court claim and no ADR is mandatory prior to court litigation. Where conciliation is used in civil litigation, it is regulated by statutory law and is usually conducted by the judge. However, if a party to the conciliation refuses to attend the conciliation act, no sanctions are imposed.

Regarding mediation, Spain is taking baby steps in this matter with the so-called "Act to promote mediation" approved by the Spanish govern-

ment as a first draft on 11 January 2019. According to the draft, prior to initiating a civil court proceeding, the parties will be required to mediate a dispute and only if the dispute cannot be settled will the parties be entitled to file a claim.

By contrast, arbitration is quite common in Spain and Spanish companies most frequently opt for arbitration when negotiating contracts.

### **12.3 ADR Institutions**

Spain has several institutions that offer and promote ADR. Aside from the Arbitration Tribunal of Barcelona, the most relevant are located in Madrid and are focused on arbitration – the European Arbitration Association, Court of Arbitration of Madrid (CAM); the Civil and Commercial Court of Arbitration (CIMA); and the Spanish Court of Arbitration (CEA).

On 16 October 2019, the constitution of the International Arbitration Centre of Madrid (CIAM) was announced. CIAM is the result of the merger of the international activities of the three most prominent arbitration institutions in Spain – CAM, CIMA and the CEA.

As of 1 January 2020, CIAM is competent to administer two types of international arbitrations arising from new arbitration agreements. Firstly, those arising from agreements in which the parties directly designate CIAM as the administering court. Secondly, those arising from agreements between parties to submit to arbitration administered by CAM, CIMA or the CEA.

Regarding mediation, in 2020 CAM created the Centre of Mediation of Madrid, which is focused on promoting mediation in Spain.

## **13. ARBITRATION**

### **13.1 Laws Regarding the Conduct of Arbitration**

Arbitration proceedings conducted in Spain are governed by the Spanish Arbitration Act 60/2003, of 23 December 2003. However, the Spanish Arbitration Act (SAA) applies without prejudice to the provisions of any treaties that may have been ratified by Spain, or to any specific Spanish regulations containing provisions related to arbitration (such as intellectual property and consumer protection laws).

Enforcement of a domestic arbitral award in Spain is based on the provisions of the SCPA, while the New York Convention on recognition and enforcement of foreign arbitral awards applies to the recognition and enforcement of international awards in Spain.

### **13.2 Subject Matters Not Referred to Arbitration**

Section 2 of the SAA provides that only disputes relating to matters within the free will of the parties may be subject to arbitration. However, there is no definition whatsoever to determine which matters are “within the free will of the parties”. Specifically, Section 1.4 of the SAA excludes arbitration proceedings related to labour matters. In addition, it is also clear that disputes regarding criminal matters and parental issues would be, for instance, outside the scope of arbitration.

### **13.3 Circumstances to Challenge an Arbitral Award**

Section 41 of the SAA provides that an award may be set aside when the applicant evidences that:

- the arbitration agreement does not exist or, if it does exist, is null and void;

- the applicant has not been notified about the appointment of an arbitrator or about any order, or when the applicant has not been able to exercise its rights;
- the arbitrators have ruled on matters beyond the scope of their power;
- the appointment of the arbitrators and/or the proceeding is in breach of the parties' agreement or, failing the parties' agreement, it is contrary to the SAA;
- the arbitrators have decided on matters that may not be subject to arbitration; and/or
- the award is contrary to public order.

### 13.4 Procedure for Enforcing Domestic and Foreign Arbitration

The enforcement procedure of an award in Spain varies depending on whether the award is domestic or foreign.

Domestic awards may be enforced directly before the court of first instance of the place where the award was issued, following the provisions of the SCPA.

A foreign award can be recognised and enforced under the New York Convention of 1958. The motion for recognition and enforcement of a foreign award must be filed with the High Court of Justice of the domicile of the party against which the recognition is sought or, on a subsidiary basis, the place where the award is going to be effective.

## 14. OUTLOOK AND COVID-19

### 14.1 Proposals for Dispute Resolution Reform

There are no new proposals coming into force regarding alternative dispute resolution in Spain.

However, the General Council of the Judiciary Power, in its proposed "Urgency Plan for the Administration of Justice following the State of Alarm due to COVID-19" passed on 16 June 2020, proposed out-of-court dispute resolution as an effective resource. Mediation escalated as the most recommended method of dispute resolution during the pandemic to avoid collapse of the administration and courts.

Some of the measures proposed are:

- intra-judicial mediation by a judge in charge of a case; and
- compulsory mediation in matters relating to regulations issued as a result of COVID-19, particularly if one of the parties is an insurance company.

### 14.2 Impact of COVID-19

On 14 March 2020, the government of Spain declared a state of alarm throughout the country due to COVID-19. Through Royal Decree 463/2020 of 14 March, the suspension and interruption of procedural time limits were approved. Later it was ruled that these time limits should not be resumed, but restarted.

On 22 May 2020 the government of Spain issued Royal Decree 537/2020, where it agreed to maintain the measures adopted in the previous royal decree, but with some modifications in relation to the procedural deadlines. It was decided to lift the suspension agreed for procedural deadlines, which then restarted on 4 June 2020.

Regarding insolvency proceedings, until 31 December 2020, the obligation to file for insolvency proceedings was suspended even if the court was notified of the commencement of negotiations with creditors with a view to reaching a refinancing agreement. Also, applications for insolvency proceedings filed since the dec-

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laration of the state of alarm were ruled to be admissible until 31 December 2020.

During 2021, the courts resumed their proceedings and continued in their pre-pandemic course. However, some forums, such as Madrid, have collapsed and the admission of claims has been significantly delayed.

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**Andersen** has offices in Madrid, Barcelona, Valencia and Seville. The team is made up of more than 250 professionals, led by 40 partners and the managing partner in Spain, Jaime Olleros. Andersen Spain is a member firm of Andersen Global, an international association of separate, independent firms comprised of tax and legal professionals in more than 190 locations worldwide. The association allows the team to provide best-in-class service in complex transactions to important domestic and international

clients in Spain and across the globe in a seamless and consistent way. Headed by Elena Sevilla, the international arbitration team focuses its practice on international high-stakes arbitration proceedings across a wide range of industry sectors and jurisdictions. The team holds relevant expertise and in-depth knowledge of a wide range of institutional rules, and members of the team are regularly appointed to serve as arbitrators.

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