

Dispute Resolution

Spain

I. INTRODUCTION TO SPANISH LAW**I.1 LEGAL SYSTEM**

The Spanish Legal System is a “continental” legal system, in terms of being fully based on a codified body of rules, that have to be interpreted by the Courts of Justice. The Customs (“*Costumbre*”), General Principles of the Law and Judicial Precedents are considered as additional “sources” of the Law, but in reality they can not create new Law by themselves.

I.2 SOURCES OF LAW**I.2.1 Statute Law (*Legislación*)**

The Source of Law in Spain is the Law as enacted by the Central Parliament, comprised of Congress and Senate. Nevertheless there is no possibility of an effective veto on the part of the Senate. The Parliament enacts Ordinary Laws and Organic Laws (that deal with issues of Constitutional transcendence, and therefore need of an absolute majority of the Congress to be enacted).

Spain is divided in 17 Autonomous Communities, that have also Legislative Power, exercised by their Regional Parliaments. Only Criminal Law is an exclusive Legislative Prerogative of the Central Parliament.

All the Legislation is submitted to the potential review of the Constitutional Court, and can therefore be abolished on the ground of being against the Constitution

I.2.2 Administrative Regulations and Delegated Legislation (*Reglamentos y Decretos*)

The Government, as an executive power, can enact delegated legislation on the form of “*Decretos*”, based on an urgency reason. Nevertheless, these kind of Laws must be approved again by the Parliament in no more than thirty days.

The further detailed development of the Laws is relied on the “*Reglamentos*”, enacted by the Government. These lower-range regulations are submitted to the ordinary review of the Courts, and not to the Constitutional Court.

I.2.3 Influence of European Law and International Treaties

Since 1985, Spain is part of the European Community, and currently of the European Union. Also under Spanish Constitution, the International Treaties in which Spain is part of, and that are not against the Constitution, are a full-right part of the legal system.

1.3 LIMITATION PERIODS

Limitations Periods (Caducity and Prescription) are ruled by the Civil Code, and in many specific Laws. If a certain period of time is allowed to pass without issuing proceedings or preliminary actions, the claim will be “statue barred”, and the defendant could use this exception as to make claims to be dismissed.

The most usual Limitation Periods are:

- for claims in regards of inmovables, thirty years;
- for movables, six years;
- the general rule of personal claims, fifteen years.

Notwithstanding the above, all these periods could be different depending on the Autonomous Community (“*Comunidad Autónoma*”) and the specific matter or speciality.

2. ADMINISTRATION OF JUSTICE AND JUDICIAL FUNCTION

2.1 JURISDICTION

2.1.1 Spanish Courts

As a general rule the Spanish Courts have jurisdiction for the litigation that arises on Spanish Territory between Spanish Citizens, Spanish Citizens and foreigners, and between foreigners, according to the Spanish Legislation and the International Conventions and Treaties in which Spain is part of.

2.1.2 The European Union

Spain, as a member of UE, is part of the “Brussels I” Regulation 2001, and of the Brussels Convention of 1968.

2.1.3 Rest of the World

As regards of the EFTA states Spain is part of the Lugano Convention of 1988.

The Spanish Law contemplates, by default of International Treaty or Convention, some exclusive jurisdictions.

It is considered to be exclusive competence of the Spanish Courts: the disputes concerning renting and property of real estate located in Spain; incorporation, validity, nullity or dissolution of Companies or Legal Entities that have their domicile in Spanish Territory, and concerning the decisions of their bodies or departments; about the validity or nullity of inscriptions made in a Spanish Register, inscription and validity of patent and other rights submitted to deposit or registering if the application had been made in Spain, and matters concerning the recognition and enforcement in Spain of foreign judicial and arbitral decisions.

3. LEGAL PROCEEDINGS

3.1 COURT SYSTEM

Currently the territorial distribution of competences between the different courts in Spain is being submitted to an important reformation process.

There are four different branches of Courts, or “*Jurisdicciones*”, based on the different branches of the Law:

Civil Courts (*Jurisdicción Civil*), that deal with Private Law, and that have two specialized kind of Courts: Family Courts and Commercial Courts.

Administrative Litigation Courts (*Jurisdicción Contencioso-Administrativa*), that deal with disputes between a citizen and the Public Administration, and the different bodies of the Administration amongst themselves.

Criminal Courts (*Jurisdicción Penal*), that deals with Criminal Law. There are some Criminal Courts specialized on Domestic Violence and Spousal Abuse.

Social Courts (*Jurisdicción de lo Social*), deals with Labour Law.

On the principle of dealing with the Litigation procedures between particulars, and Companies, we must further examine the Civil Courts.

3.1.1 The First Instance Courts (*Juzgados de Primera Instancia*)

On the Civil Courts, the first instance is located on the First Instance Courts, that deal on a first basis with most of the cases. They are formed by only one Judge that hears the case.

3.1.2 The Commercial Courts (*Juzgados de lo Mercantil*)

Recently created, these Courts are located on the Capital cities of each Province, as a specialized kind of First Instance Courts.

Among others, they deal with the Bankruptcy Procedures, including the Labour issues, Unfair Competition, Industrial and Intellectual Property, Corporate Law, Maritime and Transport Law and some Consumers Law.

3.1.3 The Provincial Courts (*Audiencias Provinciales*)

They are essentially the appeal courts for the First Instances Courts aforementioned and for the Commercial Courts. The cases are reviewed by three or more Magistrates.

3.1.4 The Superior Courts (*Tribunales Superiores de Justicia*)

On some cases, in which the specifics of a region Civil Law are dealt with, they are the final instance on Civil cases.

3.1.5 The Supreme Court (*Tribunal Supremo*)

Is the third and last instance Court. The “*Recurso de Casación*”, or Casation Appeal, is the last appeal to the Supreme Court and sometimes to the Superior Courts, depending on the case, and it is an extraordinary Appeal, that is not easily accessed to.

3.2 CIVIL PROCEDURE

The Civil Procedure is ruled by the Law 1/2000, “*Ley de Enjuiciamiento Civil*” or LEC. It establishes not only the two main procedures (Ordinary and Verbal Trial) but also specific procedures that are to apply for certain matters, such as; Capacity; filiation, maternity and paternity; Divorce and Separation; Judicial Division of an Inheritance; Liquidation of the Marital Common Assets, Monitory Procedures (special procedures for simple economical claims) and the Procedure called “*Juicio Cambiario*”, for the enforcement of unpaid checks, Bills of exchange, etc.

There are two main Procedures: Ordinary and Verbal. The Ordinary Trial rules are the general rules of any special civil procedure, except on the specifics of that particular procedure

3.2.1 Ordinary Trial (*Juicio Ordinario*)

Any economical claim higher than 3.000 euros, as it is on regards of certain matters, not based on the amount of them claim, the procedure to follow is this (such as litigation on regards of the decisions of the General Meeting of Limited Liability Companies)

Preliminary Measures

Prior to formally issuing procedures through a formal action (“*Demanda*”) the Law allows the potential plaintiff to demand through Courts certain Preliminary Measures. They are mostly based on the exhibition of documents or goods that are necessary in order to issue further procedures.

Pre-Action Steps

Many times, before issuing the formal procedures through Courts, in order to have the possibility of being granted also with the costs (“*Costas*”) of the procedures is advisable to make private requirements to the other part, in order to prove later on that the plaintiff has made reasonable efforts to avoid using the Judicial Procedure.

Formal Claim (*Demanda*)

The beginning of Procedures is brought by the “*Demanda*”, the writ made by the Plaintiff. It must feature all the documents and expert opinions that he wants to use, except the ones that he can justify by a fair cause that he was unable to provide with. It must feature on separate parts of the writ the Factual and the Legal Fundamentals of the case, and the exact requests he demands to be declared by the Judgement and the orders that have to be made to the defendant in the final Judgement.

Answer to the Claim and potential Counterclaim

The Defendant has twenty working days to answer to the Claim (“*Contestación*”). He can potentially issue a “*Reconvención*” or Counterclaim: it means to issue another Claim against the Plaintiff, that it must be connected to the one issued against him. Then, the Plaintiff has twenty working days to answer the new Claim.

Interim Measures (*Medidas Cautelares*)

Along with and after the Claim and the “*Reconvención*”, or even before, the Plaintiff can demand from the Court for Interim Measures, so as to guarantee a real effect of the potential Judicial Decision. Some of the Measures can be seizing goods of the defendant, making notations on the Land or Commercial Register about the existence of the Procedures, the deposit of the litigious goods, suspending an activity, etc.

The Plaintiff must give caution that is proportional to the potential damages that these measures can cause to the Defendant.

Declinatory Plea (*Declinatoria*)

In case that the Defendant states that the Court in which Procedures have been issued are not the competent one, he must issue an specific writ on the first ten working days of procedures. The other party would have five working days to answer. Then the Judge will decide whether he is competent or not.

First Hearing (*Audiencia Previa*)

A First Hearing will take place in which the Judge would ask the parts about the possibility of an agreement. Then it would examine the procedural issues that the parties bring to question, it would determine exactly the points of litigation and it would examine the Pieces of Evidence that the parties want to use, and decide on their admission.

Trial (*Juicio*)

After the First Hearing, the Trial will take place. On it the parties, the Witnesses and Expert Witnesses will be interrogated. Then each party would make the final report, and the procedures will be ready for the Judgement (“*Sentencia*”)

3.2.2 Verbal Trial (*Juicio Verbal*)

Any claim below 3.000 euros, and specific matters (such as the rental, unpaid rents and possession of real estate and immovables) must be issued through these procedures.

Its main characteristics are the lack of a written answer by the defendant, since once the Judge has examined the Claim, both parts will assist to a single Hearing, in which the Legal Fundamentals and Evidence of both parties would be exposed. Once this Hearing is finished, the procedures will be ready for the Judgement

3.2.3 Enforcement of Judgements

Since 2001, with the New Civil Procedure Law aforementioned, the First Instance Judgements are directly enforceable, without any need on the enforcing party to give caution or guarantees, but the other way around: it is the party that wants to avoid the enforcement of a first instance Decision that has to provide a caution for the potential damages that this delay on the enforcement may cause to the other party.

The same Court that has granted the First Instance Decision would be in charge of the enforcement procedures, that would become an new specific procedure, in which a number of potential measures of execution, in case of need a compulsory enforcement of the Decision

could be asked for by the enforcer. Some of these measures are seizure of assets, or bank accounts, etc.

3.2.4 Enforcement of Foreign Judgements

A Judgement obtained in any Country that it is part of the Brussels I Regulation, the Brussels Convention or the Lugano Convention, will not need of an special procedure to be enforced. Also some Bilateral Agreements grant this lack of an special procedure, or prevent the procedure to take place on the First Instance Courts.

Otherwise the enforcement will take place on the Supreme Court (“*Tribunal Supremo*”), through a procedure called “*Exequatur*”, that first would take into consideration if the country where the judgement comes from enforces judgments from Spain.

The Judgement that is going to be enforced must be provided through a certified or authenticated copy, and if not in Spanish, it must be duly translated by a Legal Translator.

3.2.5 New mandatory deposit requested to appeal:

Since November 2009 private parties of civil proceedings that want to appeal a Court resolution (not only judgements, but also practice directions and rulings) shall fulfil a new compulsory legal requirement that consists of making a deposit before the Court that may be refunded only in case the appeal is upheld. The amount of such deposit depends on the type or resolution that is appealed and the type of appeal (from € 25 – minor appeal as *Recurso de Reposición* before the same Court - to € 50 - major appeals as the *Recurso de Apelación* before the Regional Courts or the *Recurso de Casación* before the Spanish Supreme Court) .

4. ARBITRATION

4.1 ARBITRATION IN SPAIN. THE 2003 ARBITRATION LAW

Arbitration as a way to solve disputes between particulars is becoming increasingly popular in Spain. In order to promote this and to avoid Court Litigation, on 2003 the New Arbitration Law was enacted, following the guidelines of the UNCITRAL Model Law on Commercial Arbitration of (1985), and giving the Arbitration Procedures more flexibility.

The General Rule, by default of an express agreement between the parties, is that the rule to be applied by the Arbitrator is the Law, and not Equity. Also with the new Law, except that in the Arbitration Agreement is been stated otherwise, the Arbitrator can adopt Interim Measures.

Some of the most important Arbitration Institutions in Spain are the Corte Española de Arbitraje, Tribunal Arbitral de Consumo (specialized in Consumer Law Disputes), the Tribunal Arbitral de Barcelona (T.A.B), the Corte de Arbitraje de Madrid (both of them were created by the Chambers of Commerce of Barcelona and Madrid, respectively), and the Corte Civil y Mercantil de Arbitraje de Madrid (CIMA).

On the E-Commerce field it must be pointed out the E-Global ADR, Tribunal of the Asociación Española para el Derecho y la Economía Digital (AEDED), that is pioneering in the “*Micro-Arbitraje*”, a simplified Arbitration procedure for small Internet related claims.

4.2 PROCEDURE

The Arbitrator is entitled to examine his own competence, and the validity of the Arbitration Agreement, than case of being a clause of a contract it would be examined as an agreement on itself whose validity is not tied to the one of the whole contract.

The Arbitrator or Arbitrators can decide if it is needed to celebrate hearings or if the whole of the procedure will be performed by writing. The first step is a Claim similar to the one of the Ordinary Judicial Procedures, that it is answer by the Defendant.

If there is not an agreement by the parties against it, the Arbitrator can nominate expert witnesses for certain matters of the case.

The Award (“*Laudo*”) is directly enforceable on the same terms as a Judicial Judgement.

Action of Nullity of the Award

Once the Award is granted by the Arbitrator, there are very few grounds on which one of the parties can challenge it in front of the Courts of Justice; and without giving caution for the potential damages, this procedure does not avoid the enforcement of the Award.

It can be only be challenged on the ground of the Arbitration Agreement being non-existent or invalid; that the party has not been properly notified about the beginning of the procures and have not been able to make his claims heard; that the designation of the Arbitrators has been performed against the Arbitration Agreement or the Law; that the Arbitrator has made an Award on grounds that are not suitable to Arbitration; or that the Award goes against the “Public Order”.

5. ALTERNATIVE EXTRA-JUDICIAL DISPUTE RESOLUTION

5.1 ALTERNATIVE DISPUTE RESOLUTION

I This is the name given to describe the different situations in which the parties agree to settle their disputes through means of solution that are not the Litigation through Courts of Justice or the Arbitration.

5.2 MEDIATION

The main ADR Mechanism in Spain is Mediation, and it has been on Labour disputes that there has been traditionally a major use of these techniques.

5.2.1 General Procedure

Currently it is being promoted by different Laws and the creation of Institutions to bring Mediation to the Family Law field, following the UE recommendations, and providing a more gentle way to settle disputes. Many times the Judge himself offers and advises the use of the Service of Family Mediation, that is attached to Family Courts.

On the commercial issues there is a growing trend to use this means of solution, since they guarantee further secrecy on its procedures, and usually are friendlier and less traumatic to the parties.

5.2.2 Advantages and Disadvantages of Mediation

Mediation provides a more confidential and less belligerent way to settle disputes. Also it is usually faster than litigation.

The main disadvantages of Mediation rely on the fact that the parts cannot be obliged to submit to the authority of the Mediator, and cannot be forced to accept the Mediator's decision, so that this decision has in no way the compulsory and enforceable nature of a Judicial Decision (Judgement) or an Arbitral Award. So it would depend very much on the willingness of both parties that the Mediation becomes a successful way to settle the dispute.

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