Civil Procedure in Spain

By Silvia Valverde*

1) Competent court

For the first and preliminary step in litigation having a foreign element we must have regard to the legislation that assigns international judicial competence—specifically, in the European Union, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. When this international statute assigns competence to the courts of Spain, the following considerations apply:

Civil and commercial proceedings in Spain must be instituted in the court of first instance or commercial court having territorial jurisdiction. Civil and commercial courts rank equally, the test of which jurisdiction applies being the specific matter at issue.

Therefore, the Ley Orgánica del Poder Judicial ("the Judiciary Act") delimits the matters within the scope of each jurisdiction. The commercial jurisdiction is competent mainly in issues of insolvency; actions in tort against company directors; actions as to unfair competition, intellectual property and advertising; actions instituted under the rules governing commercial companies; motions brought in the field of transport, maritime law, and general terms and conditions of trade; and the recognition and enforcement of foreign judgments and orders relating to any of these domains.

Regarding territorial jurisdiction, the general rule is that the claim must be filed with the court having jurisdiction at the address of the defendant. However, there is a wide range of exceptions to this general rule, which determine when special venues apply in certain cases: e.g., real estate actions (i.e., involving proprietary rights), or actions relating to leases, or to challenges to company resolutions, inter alia.

2) Procedural representation and technical defence

In Spain, a litigant must appear in trial proceedings by means of a procurator (procurador), who is the legal practitioner who represents that litigant in the courts. The main role of the procurator is to receive and pass on to the parties concerned all written submissions and judicial communications. The involvement of the procurator is dispensable only if the amount at stake is less than €2000 and oral procedure. The procurator must be authorised under a "power of attorney for litigation" (poder para pleitos), usually executed as a notarial act in public form.

The technical side of the case is under the charge of an advocate (abogado), who is a graduate of law who must have been formally called to the bar in order to appear in that capacity in the courts. Unlike the case in the English legal system, no barrister/solicitor distinction is made between different types of advocates.

3) The procedure for the statement of case
The procedure for the statement of case is either “ordinary” or “oral”, depending on the amount or the matter in issue.

(i) The ordinary procedure: This, the most usual procedure for the statement of case, generally applies to cases where the amount at stake is in excess of €6000, or the economic interest at issue is unascertainable.

The ordinary procedure is initiated with a written statement of case, which is followed by a written reply from the opposing party. These written submissions must be supported by the essential documents on which each party intends to found its case. It is only with difficulty and in certain instances that one is subsequently permitted to submit fresh documents that were in the possession of the parties at the outset. In his reply, the defendant has the option of instituting a counterclaim (reconvención), i.e., an action against the claimant. In this case, the claimant is granted a new time limit to file a reply in opposition to that counterclaim.

After this first phase of written pleadings are submitted by the parties, a preliminary hearing is held. At this hearing, held in court, only the advocates—in the presence of the procurators—are authorised to speak. The objective is to resolve all the prior or procedural issues pleaded by the parties in their original statements of case, e.g., lack of capacity of the litigants, res judicata, lis pendens, or non-applicability of the procedure, inter alia. However, the court’s lack of jurisdiction or competence may not be pleaded, because this objection should have been made earlier within the statutory time limit. The overall purpose of this hearing is to handle any issues that are merely procedural, collateral or unrelated to the merits of the case, so that the underlying issues can then be addressed.

Hence the purpose of the preliminary hearing is to delimit which facts are in dispute and must accordingly form the target of the evidence to be adduced at the trial; secondly, each of the parties proposes the evidence on which he intends to make his case. The admissibility or otherwise of the proposed evidence is determined at the preliminary hearing itself, although the parties may apply to the court to reconsider its decision.

The forms of evidence accepted by the Spanish legal system are: (i) the testimony of the parties, or of co-litigants if their interests are inconsistent with one another; (ii) documentary evidence, embracing both notarial acts in public form and documents under hand—such documents may also be required to be exhibited to third parties or public authorities by judicial notice or order, respectively; (iii) expert evidence if the issue displays relevant features that require technical or practical expertise for a reasonable assessment to be arrived at or certainty to be achieved—with expert witnesses being authorised to appear at trial; (iv) judicial recognition of persons or things, which in practice is infrequent; and (v) the examination of witnesses who must be aware of the facts in dispute as to the subject matter of the trial. Some witnesses, such as public authorities or legal persons, are in some cases authorised to testify in writing prior to the trial being held. In addition, admissible evidence may take the form of (vi) media reproducing words, sound and images, remote communication devices and similar
instruments. Finally, the law is that the list of admissible evidence is not a closed one.

Another significant feature of the preliminary hearing is that, when it opens, the judge may encourage the parties to reach a settlement. While in practice some judges genuinely try to achieve some form of reconciliation or agreement between the parties, in most cases this step is merely perfunctory.

Finally, at the end of the preliminary hearing a day and time are appointed for the main trial itself.

On the appointed day, the trial is held in public. In the course of the trial, the admitted evidence is heard, whether in the form of testimony by the parties, examination of witnesses, and/or expert evidence. The evidence having been heard, the advocates for each party set out their conclusions, and then the trial is declared to be “seen for judgement” (visto para sentencia).

If any of the admitted forms of evidence has not been heard for reasons beyond the control of the parties, and provided that the court thinks fit, final orders may be given for that further evidence to be taken, after which the parties are granted a time limit to submit a summary and assessment of the results.

(ii) The oral procedure: This procedure applies when the amount at stake is less than €6000 and in certain other specific cases, e.g.: non-payment of rent by a tenant and similar fact patterns, eviction of tenants at will, interim orders as to the retention or recovery of possession, interim orders as to new building works or buildings in ruins, and other situations set out in statute law.

So the oral procedure usually applies to incidental issues that procedural law regards as collateral and, though distinct from the main subject matter of the case, are closely related to it or arise in respect of procedural requirements that may emerge in the course of proceedings, e.g., issues requiring prior or special determination, opposition to enforcement, incidents as to the liquidation of damages in the course of enforcement of a judgement, or incidents surrounding challenges to the assessment of legal costs.

The oral procedure is initiated by a written statement of case, which is followed directly by the appointment of a day for the trial to be held. It is at the trial itself where the defendant must reply to the claim by stating his opposing case. After this, a determination is made as to which evidence is admissible, and that evidence is then heard, all on the same day. This being so, certain statutory provisions are in place regarding, e.g., the summoning by the court of witnesses and the taking of expert evidence, so that all the evidence can be heard on a single occasion.

The oral procedure does not allow conclusions to be uttered by the advocates or the possibility of final orders for the taking of further evidence, such that, after the trial, the case is ready for judgement to be passed.
4) The enforcement procedure and special procedures

The Spanish procedural system also makes provisions for an enforcement procedure and a range of special procedures.

The enforcement procedure is in place to give effect to judgements, court-approved settlements and arbitral awards when not voluntarily complied with by the person against whom the order was made, and to enforce certain non-judicial titles that are nonetheless automatically enforceable, such as certain notarised commercial contracts, e.g., bank guarantees.

In the course of the enforcement procedure, grounds of challenge are restrictively defined, and may relate to the merits of the case or procedural defects; and, while the decision on such issues may be appealed against, if the decision dismisses the challenge, the filing of an appeal does not have the effect of suspending enforcement.

The enforcement procedure enlists the procedure for enforced recovery (procedimiento de apremio) by means of the attachment of assets, which are then sold until the enforcing party collects the amounts due for all the relevant liabilities, provided that the debtor has sufficient assets to cover them.

The special procedures relating to matters within the scope of this paper include the procedure for the division of an inheritance, the uncontested payment order procedure, and the procedure regarding bills of exchange and similar instruments (juicio cambiario). After a recent statutory reform, eviction of a tenant for non-payment also constitutes a special procedure because it is now governed by the rules of an uncontested payment order procedure (proceso monitorio). The purpose of the special procedures is to simplify the formalities so as to make them swifter and more agile than an ordinary procedure requiring statements of case.

In the commercial field, a standout is the uncontested payment order procedure, which applies to claims for money debts, of any amount, which satisfy the requirements of proof of the commercial relationship and existence of the debt. This procedure is highly useful where the defendant can be targeted by a personal summons and demand, and does not contest the claim. This enables the claimant to readily obtain an automatically enforceable title that directly opens the door to the stages of enforcement and enforced recovery.

The procedure regarding bills of exchange and similar instruments can also be agile and swift if the claimant holds a bill of exchange, a cheque, or a promissory note that satisfies the statutory requirements.

5) The appeals system

A judgement entered at first instance is always open to appeal in a higher court. The court competent to hear the appeal is the chamber of the provincial court (Audiencia Provincial) having territorial jurisdiction, formed by a bench of three justices. At second instance, the appeal court has the power to review everything done in the lower court, i.e., the substantive law applied by the court of first instance, the assessment of the evidence heard, and any procedural defences raised. In some limited cases, further evidence may be heard at second instance.
However, despite the filing of an appeal against the original judgement, the latter is capable of provisional enforcement without need of any prior security or deposit being paid into court. The party against whom the judgement was entered may challenge such provisional enforcement, but the decision on such challenge is not open to appeal. If finally the provisionally enforced judgement is set aside wholly or in part, the party enforced against must have restored to him the amount provisionally obtained, and is entitled to any damages caused to him.

The decision issued by the provincial court at second instance is sometimes open to an appeal in cassation and/or an extraordinary appeal by reason of procedural breach. Such appeals are heard by the First Chamber of the Supreme Court (Sala Primera del Tribunal Supremo) or, sometimes, by the High Court of Justice (Tribunal Superior de Justicia) of the relevant devolved region (Comunidad Autónoma) – if it is alleged in the appeal that a breach has occurred of the law specific to that region (the Kingdom of Spain is made up of devolved regions).

An appeal in cassation and/or an extraordinary appeal by reason of procedural breach must be limited to cases where the amount at stake exceeds €600,000, or where it is in the interests of the clarity of the law that the Supreme Court should settle the matter—mainly when the decision appealed against is contrary to the settled case law of the Supreme Court, or relates to an issue the case law regarding which is inconsistent at the level of provincial courts, or applies a statutory rule that has not been in force for more than five years.

Appeals of this sort do not amount to a “third instance”, nor involve a full review of the case. Rather, they are highly technical appeals the purpose of which is to settle the proper manner of application of the substantive law—e.g., a breach of the applicable rules on the issues at stake in the proceedings—or of procedural law—or a breach of rules as to jurisdiction, competence, procedural rules governing the judgement, or of procedural safeguards that might determine that the decision is a nullity or offends against the defendant’s rights of defence. There is in place a strict filter of grounds for inadmissibility of appeals which, in practice, makes it difficult to obtain a judgement from the Supreme Court.

6) Petition to the Constitutional Court
Finally, Spain has a Constitutional Court (Tribunal Constitucional), the mission of which is to protect the fundamental rights recognised as such in the Spanish Constitution, one of which rights is the “right to an effective judicial remedy” (tutela judicial efectiva).

A petition may be lodged before the Constitutional Court against violation by an ordinary court of a fundamental right provided that all other means of challenge have been exhausted within the procedural rules of judicial proceedings, and that in the course of such proceedings the violation of such right was formally invoked.

These requirements – of which we have merely touched the surface – must be coupled with a constitutionally significant feature of the case, i.e., it must be shown that the remedy being sought has a relevance that goes beyond that specific case. In practice, this requirement is a powerful filter of admissibility of petitions to the Constitutional Court.

7) Costs of proceedings
Finally, an overall picture of the system is aided by an understanding of the costs of proceedings. The following broad distinctions should be made: (i) court fees; (ii) litigation costs; and (iii) fees due to counsel.

The nationwide court fee for the administration of justice must be paid by the claimant or appellant, and comes to a fixed minimum ranging from €100 to €2000, increased by a small variable percentage based on the economic amount at issue. In addition, in some devolved regions a regional court fee applies.

Litigation costs are composed of the fees due to the procurator—set by a defined tariff—and the fees due to any expert witness who might be required to intervene. In appeal proceedings, a small amount must also be paid into court by way of an appeal security, which is awarded to the justice system if the appeal is dismissed.

Finally, fees must be paid to counsel as agreed privately. Guidelines and standards on lawyers’ fees are published by the bar associations (Colegios de Abogados) of the various court circuits.

All such costs are recoverable from the losing litigant if the judgement entered is entirely consistent with the winning litigant’s case: this is termed the “award of costs” (condena en costas), and operates as a general rule.

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