CIVIL LITIGATION

1. **In what language(s) may court proceedings be conducted? What arrangements can be made for translation/interpreter services?**

   Court proceedings are conducted in Spanish or in the official language (catalan, etc.) of the region where the court is located. Documents filed in a foreign language have to be translated into Spanish (or any other official language) by a private translator. If the translation is challenged by a litigant for reasons of substance (i.e. the dissatisfied litigant has to explain any discrepancies) the document will be re-translated by a certified translator at the cost of the party having filed such documents. Non Spanish witness can make the oral statements in their mother tongue but such statements have to be translated by an interpreter usually arranged by the Court system (art. 143.1 LEC). The interpreter must give a sworn statement or promise to translate faithfully the statements of the witness.

2. **What types of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?**

   There is no need to send a warning letter before issuing proceedings (unless this is required by the relevant contract). However, it is standard practice to send a before action letter to the defendant served through a local notary or by burofax (a mode of service arranged by the Spanish Mail which is accepted as authentic by local courts). Spain has recently enacted a mediation law which in certain cases would require mediation as a pre-litigation action (please see a fuller explanation in answer 2 below - Arbitration).

3. **What are the costs of civil and commercial proceedings? Who bears the costs?**

   There are essentially three costs: a) lawyers' fees, b) court agent ("procurador") fees and c) official user's fees ("tasas judiciales"). For litigation matters the Spanish bars recommend fees based on ad valorem basis, roughly 6 - 8% of the value of the claim. Local bars have drawn up schedules in this respect which are used by the courts for the taxation of the costs of the losing party. The court agent fees are based on similar principles although the schedules are considerably lower. It is possible to agree fees with the client on a time cost basis which is not always a good idea (except in claims of extremely high value) because of the complexities and the duration of Spanish proceedings. The official user's fee collected by the court system is also based on ad valorem arrangement although the maximum fee is capped at € 6,000. In Spain the successful litigant is awarded legal costs which have to be pay by the losing party on the basis of the above system. However, certain disbursements such as travel, translation costs are not recoverable from the other party.

4. **What are the basic rules of disclosure of documents in civil and commercial proceedings? Which documents do not require disclosure? Is electronic disclosure of documents normal?**

   As a basic rule, all documents must be presented with the initial pleas (writ of demand and of response). There is no pre-trial discovery of documents. However, if a party does not have in its possession a relevant document, it can designate the archive or file etc where it is kept and ask the court or request its production in the proceedings. The plaintiff is also allowed to file additional documents which are relevant in the light of the arguments made by the respondent's writ. Such filing has to be made at the preliminary hearing to be held by the court to discuss and approve the evidence to be submitted in the full trial. There are certain special rules on the filing of expert witness' reports. Spanish law distinguishes two basic types of documents (i) public documents, i.e. issued by notaries, registrars or government officials being empowered to authenticate

documents in the discharge of their duties (ii) all other documents which are called private documents. The so called public document constitutes evidence of the fact, transaction or things documented by them, of its date and of the persons who executed it. Private documents have to be presented in original form (or authenticated copies) and can be challenged. There are very strict rules on the preclusion of documents not filed in the initial pleas (art. 270 LEC), essentially the parties can only file documents dated after the demand, the response on the preliminary hearing (as the case may be) or documents dated before provided the concerned party justifies to the court that it had no knowledge of its existence. Electronic disclosure of documents (email correspondence etc.) is accepted by Spanish courts subject to its authenticity. For this purposes, email documentation should be attached to expert witness reports confirming their authenticity by having checked servers, electronic data files, or personal computers.

5. What is the process for witness evidence (namely, is it deposition based in advance, or witness statement, or examination or cross-examination)? Can a witness be compelled to attend to give evidence?

The process for witness evidence is based on the examination and cross examination in front of the judge during the trial. Filing of affidavits in advance is not usual and is not considered as a witness deposition. A witness is obliged to attend to give evidence. Failure to attend the hearing is penalized with a fine at € 180 - € 600. In exceptional circumstances when the witness lives far away or there are travel difficulties or similar personal circumstances which make personal appearance either impossible or very costly, a witness may be heard by means of a rogatory letter sent to the court of the place of residency of the concerned witness.

6. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties/counsel privileged (i.e: may not be disclosed to the court)?

Settlement discussions are usually conducted orally between the lawyers. The settlement correspondence is privileged. Non compliance is a violation of bar rules, not of Spanish law procedure rules. In our practice we have seen cases where a lawyer has disclosed to the court privileged correspondence.

7. How can foreign judgments be enforced?

Any judgment obtained in the Courts of a member country of the European Union in respect of the Agreement will be enforceable in the Courts of Spain on the basis and subject to the limitations imposed by the Regulation (EU) nº 44/2001 of the European Parliament and Council dated 22nd December 2000 on Jurisdiction, Recognition and Enforcement of Court Decisions in Civil and Commercial matters. Judgments from Denmark will be enforced pursuant to the Brussels Convention, and those from Switzerland, Iceland and Norway, pursuant to the Lugano Convention.

Aside from the foregoing, one should also take into account Regulation (EC) no. 805/2004 of European Parliament and the Council of 21 April 2004 creating an European Enforcement Order for uncontested claims. This Regulation lays down minimum standards to ensure that judgements and court settlements can circulate freely. This entails the absolution of exequatur, i.e. the automatic recognition and enforcement, without any intermediate proceedings or grounds of refusal of enforcement, of judgements handed down in another member state.

Any final and conclusive judgment obtained in the courts of any other countries (except in the case when such country has entered into a bilateral treaty for these purposes with Spain) in

respect of the Agreement will be recognized and enforced in the courts of Spain provided such judgement complies with the requirements of article 954 of the Spanish law on Civil Procedure (LEC) of 1881, namely (i) the judgement has been rendered as a result of an action "in personam" (as opposed to an action "in rem"); (ii) the judgement has not been rendered in default of the appearance of the other party; (iii) the obligation to be enforced is legal under Spanish law; (iv) the documentation prepared for the purpose of requesting the enforcement meets all requirements under the laws of the court of the country of origin of the judgements in order to be considered an authentic judgment and it also meets all requirements under the laws of Spain; and (v) a Spanish judgment would be recognized by and enforceable in the relevant jurisdiction of the country of origin of the judgement on a reciprocal basis. If the judgment of the relevant court is recognized in Spain, the case will not be re-examined on the merits.

ARBITRATION

1. **Are mediation clauses in commercial contracts binding and enforceable?**

   Mediation clauses in commercial contracts are binding and enforceable. Under Spanish law there is a "bona fide" obligation to submit the dispute to mediation before starting litigation. A mediation clause would be effective even if the dispute is about the validity or existence of the contract incorporating such clause.

2. **What is the procedure for mediation? Is it a popular method for resolving commercial disputes?**

   The Spanish law on mediation - Royal Decree Law 5/2012 of 5th March - has been very recently enacted. Consequently there is little or even no experience on the matter. Mediation has not been popular for resolving commercial disputes. Articles 16 to 22 of Royal Decree Law 5/2012 provide for the procedure of mediation: a) initiation b) information sessions c) hearing and procedure during the hearing d) termination, which may finished with a mediation agreement. The mediation agreement may be engrossed as notarial agreement (the parties have to expressly agree to this by appearing and signing a notarial deed), in which case it is enforceable through quick legal action.

3. **Are arbitration clauses in commercial contracts binding and enforceable?**

   Yes, they are binding and enforceable. Pursuant to Article 11 of the Spanish law on Arbitration - Law 60/2003 of 23rd December as amended from time to time - arbitration clauses are legally binding and preclude ordinary courts to adjudicate on matters submitted to arbitration in the event that either litigant invokes an objection to the jurisdiction of the relevant court.

4. **What type of arbitration is commonly used for resolving commercial disputes: ad hoc arbitration or institutional arbitration?**

Both ad hoc and institutional arbitration are quite common.

5. **Which arbitration institutes are most popular?**

C.I.M.A., the Court of Arbitration of the Chamber of Commerce of Madrid, and the Court of Arbitration of Barcelona.

6. **What influence can the parties have on the identity of the arbitrator(s)?**

Under the Spanish law on Arbitration of 2003 as amended from time to time, the parties may freely agree the method to appoint the arbitrators provided the principle of equality between the parties is not violated. In the event of a sole arbitrator, he or she will be appointed by the court upon the request of either party (or by the chairman of the institution designated in the arbitration clause). In the event of an arbitration tribunal of three members, each party will appoint an arbitrator and the third one, who shall act as chairman, will be appointed by the arbitrators designated by the parties. If they failed to agree within 30 days the third arbitrator will be appointed by the court upon the request of either party. Each arbitration institute has specific rules on the matter but in all cases the chairman is appointed by the institution should the parties fail to agree.

7. **In what language is an arbitration proceedings conducted?**

The language of the arbitration proceeding can be freely chosen by the parties in the arbitration clause under the contract or in a subsequent ad hoc agreement. If there is no agreement (by the parties) on the language, the arbitrators shall decide on this issue (art. 28.1 of Law 60/2003).

8. **What types of pre-arbitration measures are available and what are their limitations?**

Under Spanish law the intervention of Courts of Justice in arbitration proceedings is highly restricted. Before the initiation of the proceedings, the role of courts is limited to the appointment of the arbitrators when such appointment is not regulated by the relevant arbitration court. Until such time when the arbitration proceedings are under way, it is not possible to request the assistance of the courts in relation to the collection of evidence. However such assistance would be given in the case the parties intend to start proceedings before the courts of another country.

9. **What are the costs of arbitration proceedings and who bears these costs?**

There are essentially two costs: a) lawyers' fees and b) fees of the arbitrators. For litigation matters the Spanish bars recommend fees based on ad valorem basis, roughly 6 - 8% of the value of the claim. Local bars have drawn up schedules in this respect which may be used by the arbitrators for the taxation of the costs of the losing party. It is possible to agree fees with the client on a time cost basis. The arbitrator's fees are also based on ad valorem arrangements. The rules of the

institutions make a distinction between arbitrator's fees and the fees and dues charged by the secretariat for handling the case. In Spain the successful litigant is awarded legal costs which have to be pay by the losing party on the basis of the above system. However, certain disbursements such as travel, translation costs are not recoverable from the other party.

10. **What are the basic rules of document disclosure in arbitration? Which documents do not require disclosure?**

    Art. 24 of the Spanish Arbitration Law only provides for the basic principles of equality between the parties, right of audience and the right to submit countermotions or allegations. In an ad hoc arbitration the parties may freely determine the rules of procedure. The procedure rules of Spanish Arbitration Institutes are quite flexible (as compare to LEC) in relation to the disclosure of documents which can be file even of the last stage of the procedure, which can be sometime confusing for the arbitrators.

11. **What is the procedure for witness evidence in arbitration (namely, is it deposition based or witness examination or cross-examination)?**

    The procedure for witness evidence is based on the examination and cross examination in front of the judge during the trial. Filing of affidavits in advance is not usual and is not considered as a witness deposition. A witness is obliged to attend to give evidence. In exceptional circumstances when the witness lives far away or there are travel difficulties or similar personal circumstances which make personal appearance either impossible or very costly, the arbitrators may request court assistance so that a witness may be heard by means of a rogatory letter sent to the court of the place of residency of the concerned witness.

12. **How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties and/or counsel privileged (i.e., may not be disclosed to the Arbitrator)?**

    Settlement discussions are usually conducted orally between the lawyers. The settlement correspondence is privileged. Non compliance is a violation of bar rules, not of Spanish law procedure rules.

13. **Under what circumstances can an Arbitration Award be enforced, challenged or annulled?**

    Spain has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. A foreign arbitration award (e.g. a US award) would be recognized and enforced in Spain according to the New York Convention of 1958 if it satisfies the requirements of such Convention i.e. the judgment must not run contrary to Spanish public policy, the subject matter must be capable of being settled by arbitration under the laws of Spain, lack of proper notice of the appointment of the arbitrator or of the arbitration proceeding must have been served upon the defendant, etc (see article V).

    According to the article 46 of the Spanish Arbitration Law the procedure is the same established by the Spanish law on Civil Procedure (LEC) of 1881 regarding foreign judgments. The timing for enforcement may take several months (3-9 months), depending on the backlog of work of the Court of competent jurisdiction.

Aside from the above the reasons for annulment of an award are very restricted under Spanish law. The applicant must argue and prove: a) the arbitration clause does not exist or is invalid, or b) the appointment of an arbitrator and/or the arbitration proceedings have not been properly notified or a party has been unable for any reason to exercise its right of defense, or c) the appointment of the arbitrators or the arbitration proceedings have not been carried out in accordance with the agreement between the parties (unless such agreement was contrary to mandatory law) or in the absence of such an agreement, in accordance with the arbitration law d) the arbitrator has decided about matters which can not be arbitrated; e) the award is contrary to Spanish public policy. The motion of annulment has to be filed not later than two months from the dated of the award in the High Court of Justice ("Tribunal Superior de Justicia") of the relevant Spanish region. Its decision is final.