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## *QUESTIONNAIRE FOR NATIONAL REPORTS*

# *SPAIN*

**BOLEO GLOBAL S.L.**

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## GLOSSARY SPANISH – ENGLISH / ACRONYMS

***Acción de nulidad* — Nullity action**

***Acción ejecutiva* — Enforcement action**

***Acuerdo de mediación* — Mediation agreement**

***Auto* — Judicial decree**

**BIA – Brussels I Regulation**

***CC (Código Civil)* — Civil Law**

***Decreto (LAJ)* — Non-judicial decree**

***Derechos reales* — Real rights**

***Diligencia (LAJ)* — Proceeding**

***Diligencia de comunicación* — Communication proceeding**

***Diligencia de constancia* — Constancy proceeding**

***Diligencia de ejecución* — Execution proceeding**

***Diligencia de ordenación* — Order proceeding**

***Escritura pública* — Public deed**

***LAJ (Letrado de la Administración de Justicia)* — Justice Administration Attorney**

***Laudo arbitral* — Arbitration award**

***LEC (Ley de Enjuiciamiento Civil)* — Civil Procedural Law**

***LN (Ley del Notariado)* — Law of the Notarial collective**

***Ley Orgánica* — Basic Law**

***LOPJ (Ley Orgánica del Poder Judicial)* — Constitutional Law of the Judicial Branch**

***Pie de recurso* — Footer of appeal**

***Prejudicialidad (Cuestión prejudicial)* — Preliminary questions of Law**

***Procurador* — Legal representative**

***Providencia* — Decision**

***Real Decreto* — Royal Decree**

***Recurso* — Appeal**

***Resolución* — Judgment**

***Sentencia* — Sentence**

***Sentencia firme* — Final sentence**

## BASIC CONCEPTS: DEFINITIONS

***Acción de nulidad*** **(Nullity action):** Nullity action is an instrument that can be used by the parties to obtain from the Courts the declaration of nullity (ineffectiveness) of an act or contract. It can be evoked because of the lack of some essential element of the act (nonexistence), because it is contrary to the law (full nullity) or because it suffers from some vice or defect that makes it capable of producing its ineffectiveness (relative nullity or annulment).

***Audiencia Provincial*****:** The Provincial Courts (*Audiencias* Provinciales) are the highest judicial bodies of the provinces of Spain. They are located in the capital of each province and exercise their jurisdiction over all of it. These Courts hear civil and criminal matters and are structured into sections consisting of three or four magistrates. The Provincial Courts are aware of the appeals that are formulated against decisions adopted by the single-person Courts of the province. In the criminal order, they are aware of the prosecution of crimes that carry more serious penalties (for which the *Juzgados de lo Penal* or Criminal Courts are not competent).

***Auto*** **(Judicial decree):** This is a kind of judicial instrument. It is used, in accordance to art. 206.1 2º LEC, to solve appeals against decisions or decrees/orders, regarding admission or dismissal of evidence, judicial approval of transactions, mediation agreements and covenants, provisional and protective measures, nullity or validity of the procedure, procedural presuppositions, registry entries and registrations, incidental issues, or when the Prosecution Law says so, along with those which put an end to procedure actuations before concluding ordinary processing. The Spanish legal order establishes, as well, that judicial decrees must be issued to solve appeals against non-definitive judicial decrees (arts. 451.2 and 453.2 LEC) and definitive judicial decrees (art. 465.1 LEC), to solve the admission or dismiss of the lawsuit or counterclaim (art. 404.2 LEC), and to solve about joinder of causes of action.

***Decreto*** **(Non-judicial decree):** It is a decision made by the LAJ (*Letrado de la Administración de Justicia*). It is established by art. 206.2 2º LEC and art. 456.3 LOPJ, that a non-judicial decree will be pronounced to admit a claim/lawsuit, when the procedure in which the LAJ had absolute competency is finished, and, in every kind of procedure, when the decision made should be reasoned. Specifically, Court will pronounce a decree to determinate the costs or expenses of the procedure (art. 244.2 LEC).

***Diligencias*** **(Proceedings):** Proceedings are decisions pronounced by the LAJ for the impulse and processing of the procedure (art. 206.2 LEC). They can be order proceedings (to give the judicial decrees the course provided by Law), constancy proceedings, communication proceedings, or execution proceedings (to express the event or reality with objective data, or the activity carried out and, if needed, the result).

***Escritura pública*** **(Public deed):** Those are notarial public documents in which legal business or legal transactions are recorded. Public deeds can content declarations of will, the legal acts that imply consent, contracts and legal business of all kinds (art. 17 LN).

**LAJ:** The LAJ (in Spanish, *Letrado de la Administración de Justicia*, that we translate as Justice Administration Attorney), are "public officials who constitute a unique Superior Legal Body, of a national nature, at the service of the Justice Administration, under the Ministry of Justice, and who exercise their functions with the character of authority, holding the direction of the Judicial Office" (art. 440 LOPJ). Their general functions are: 1) Exercise of judicial public faith with exclusivity and fullness. 2) To be responsible for the documentation activity. 3) Procedural functions. 4) To drive and order the process. 5) Functions as Directors of the Judicial Office. 6) Collaboration and cooperation with other bodies and Administrations.

***Procedimiento declarativo ordinario* (Ordinary declarative procedure):** It is a judicial procedure that is basically regulated in articles 399 to 436, both inclusive, of the LEC; and that, by virtue of article 249.2 of this same legal text, it is the procedure applicable to all those claims whose amount exceeds three thousand euros and those whose economic interest is impossible to calculate, not even in a relative way.

***Procurador* (Legal representative):** The legal representative (*procurador*) is a professional with a Law degree who represents his or her client in Court. The *procurador* also receives all the notifications about the procedure and submits the documents to the Court. With few exceptions, his or her presence as representative is mandatory.

***Providencia* (Judicial decision):** This judicial instrument seeks the material organization of judicial proceedings. According to art. 206.1 1º LEC, decisions would be issued when the ruling refers to procedural issues that require a judicial ruling as required by Law, just in case the form of judicial decree is not expressly required.

***Tribunal Supremo* (Supreme Court):** The Supreme Court is based in Madrid and is a unique Court in Spain with jurisdiction over the entire national territory, constituting the highest Court in all orders (civil, criminal, contentious-administrative and social), except as provided in Constitutional guarantees and rights, whose competence corresponds to the Constitutional Court. Specifically, the Supreme Court constitutes the top of the appeal system and is, therefore, the maximum responsible for the unit of interpretation of jurisprudence in Spain. It deals, among other issues, with *recursos de casación* (deciding appeals), *revisión* (review) and other extraordinary appeals. It is also responsible of the prosecution of members of high state organs and of the processes of declaring political parties illegal.

# PART 1: GENERAL INQUIRIES REGARDING ENFORCEMENT TITLES

## 1.1. Briefly present how an "enforcement title" is defined in your national legal order.

***Comment: In addition to the definition, enumerate the domestic judicial (and other legal) instruments which conform to the above definition of an enforcement title. If there is a statutory definition, then please provide the citation to the exact article/paragraph of that Law and an English translation. Provide a list of enforcement titles.***

Spanish legal order assigns the enforcement of judgments to judges and courts, as a natural consequence of their task to issue judgments, in accordance with the laws and rules on jurisdiction (Article 117(3) of the Spanish Constitution 1978)[1]. Under the Spanish Code of Civil Procedure (henceforth, LEC),[2] which regulates the enforcement procedure in civil matters, the judge is tasked with monitoring the proper implementation of the enforcement procedure (Articles 545, 551, 552 and the corresponding provisions). The Spanish Legal Dictionary of the Royal Language Academy defines **enforcement title** as "*document to which the Law expressly grants force enough to obtain from the Courts the compliance of the obligation integrated in its content*".[3] This definition has been built upon an interpretation of the Spanish LEC, lacking of a precise definition of its own, has established that "*the enforcement action must be based on a title that is linked to execution*".[4] It should be said that the enforcement titles can be judicial or extrajudicial, both types provided by Law.

The following list of enforcement titles is legally established in the Spanish legal order[5]:

- Final conviction sentence (in Spanish, *sentencia de condena firme*).
- Arbitration award (*laudos arbitrales*).
- Mediation agreement (*acuerdo de mediación*), if raised to public deed.
- Judgments (*resoluciones judiciales*) that approve or homologue judicial transactions and that have achieved agreements during the procedure.
- First copies of public deeds (*escrituras públicas*). If it is a second copy, it must be given because of a court order.
- Commercial contract policies (*pólizas de contratos mercantiles*) signed by the parties and by a registered trade broker.

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[1] Spain, and Francisco Franco. 1972. *The Spanish Constitution: fundamental laws of the state*. Madrid: [Ministerio de Información y Turismo]. The current Constitución was passed by the Cortes Generales (Plenary Meetings of the Congress of Deputies and the Senate) on 31 October 1978, then approved by national referendum on 6 December, and received royal assent on the 27 December.{Citation}

[2] Law 1/2000 of 7 January 2000, BOE No 7 of 8 January 2000, as amended, establishing the Code of Civil Procedure.

[3] RAE. 'Definición de título ejecutivo - Diccionario del español jurídico - RAE' [*Definition of enforcement title – Spanish legal dictionary – Spanish Royal Academy*], www.dej.rae.es/lema/titulo-ejecutivo visited 15 May 2020.

[4] Code of Civil Procedure, Art 517.1.

[5] Code of Civil Procedure, art. 517.2.

- Bearer or registered financial bonds (*títulos al portador*) representing past due obligations and coupons, also past due, of said bonds.
- The unexpired certificates (*certificados no caducados*) issued by the entities in charge of accounting records regarding the securities represented by book entries referred to in the Securities Market Law.
- Judicial decree (*auto judicial*) that establishes the maximum claimable amount under compensation during criminal procedures derived from the use of motor vehicles.
- Other procedure decisions and documents that are linked to execution by legal provision. E.g., judicial decrees when the defendant partially accepts the claim (art. 21.2 LEC); judicial decrees that decide on the challenge for excessive attorney's fees (art. 246.3 LEC); or judicial decrees issued estimating the opposition to the precautionary measures adopted without the defendant's hearing (art. 742 LEC).[6]

## 1.2. How are "civil and commercial" matters defined in your national legal order?

The Spanish legal system is a civil law ("*ius civilis*")system based on the Roman-Germanic tradition and private legislation is prescribed under the Spanish Civil Code, a rule of law that was established under the Royal Decree of 24th of July, 1889; and the Spanish Code of Commerce, Royal Decree, dated before on August 22nd, 1885, following the French legal model. They define the main legal regulations, the manner in which such laws are applied and other relevant legal aspects.

The civil legislation regulates the relations between other branches of law and the competency of a branch in relation with another one. The main legal provisions of the civil law in Spain address the following aspects:

- Persons)[7]: the legal definition of a Spanish citizen, the statute of foreigners, the civil personality and the distinction between natural persons and legal entities, such as Spanish companies and businesses;
- Domicile and marriage: the requirements for concluding a marriage in Spain, the rights and duties of the spouses, the nullity of marriage, its dissolution, the legal effects of separation and divorce;
- The paternity and filiations, the support between relative: parent-child relations, the parental authority, the legal representation of children;
- The legal age and emancipation and the aspects of incapacitation: issues related to guardianship, the judicial defender, the legal custody and the provisions of the power of attorney;

[6] J. Gómez Sánchez. La ejecución civil [*The Civil enforcement*] (Dykinson 2004) pp. 20.
[7] Civil Code, Book I. Of persons (articles 17 to 332). There are also: Book II. Of goods, of property and of their modifications (articles 333 to 608); Book III. Of the different ways of acquiring property (articles 609 to 1087); Book IV. Of obligations and contracts (articles 1088 to 1975).

- Property, ownership, joint ownership and possession: the classification of property, the right of accession, the special properties and the acquisition and effects of possession and the property registry;
- Contracts and partnerships: the general provisions of Spanish contracts, their validity, effectiveness and nullity, the obligations of partners and the legal obligations within a contract.

Within the private law, civil law and commercial law are distinguished as two separate juridical branches, each of them being autonomous.[8] Considering commercial law as special law (*ius speciale*). However, their co-existence as law applicable to the same matter necessitates the development of a criterion which will permit a definition of the field of application of each.[9]

The original Spanish Commercial Code of 1829 referred the classic concept of commercial law as a law having a "***professional character***" or "***merchant quality***".[10] Thus, the characterization of an act as being commercial was made to depend fundamentally on the "***merchant-like***" situation of the subject, and therefore, the distinction is based on the requisite of "***merchant quality***". However, even today these definitions are causing trouble and practical conflicts.[11]

Regarding to Civil matters, our Basic Law of the Judicial Branch (LOPJ)[12] enumerates a list of specific competencies for the Civil Courts in its art. 22, including:

- Real rights and real state leaseholds, regarding to properties in Spain.
- Constitution, validity, nullity or dissolution of companies or legal entities that have their domicile in Spanish territory.
- Validity or nullity of the inscriptions practiced in a Spanish registry.
- Inscriptions or validity of patents, trademarks, designs or drawings and other rights subject to deposit or registration, when the deposit or registration has been requested or effected in Spain.
- Recognition and execution of judgments and other arbitral decision and mediation agreements in a Spanish territory pronounce abroad.

Besides those competences, Civil jurisdiction has a residual character, that is, it handles every matter that hasn't been specifically conferred to any other jurisdictional order (art. 9.2 LOPJ). As a matter of fact, Civil Law, and, consequently, civil matters, have been defined as "***the branch of Law that takes care of matters that affect to the private person,***

[8] *See* Enrique Lalaguna Domínguez, "The Interaction of Civil Law and Commercial Law," *LOUISIANA LAW REVIEW* 42 (1982): 15.
[9] Domínguez, 1634.
[10] Carlos Petit, "El Código de Comercio de Sainz de Andino (1829). Algunos Antecedentes y Bastantes Críticas," *Revista de Derecho Mercantil* 289 (January 1, 2013): 109–51.
[11] *See* Juan Manuel Murillas Escudero, "Unas Notas sobre el Concepto de la 'Mercantilidad,'" *Revista Electrónica de Derecho de la Universidad de La Rioja (REDUR)*, November 1, 2002, 101, https://doi.org/10.18172/redur.3814.
[12] Spain. Ley Orgánica 6/1985, 1st of July, del Poder Judicial (LOPJ) [*Basic Law of the Judicial Branch*]. Boletín Oficial del Estado, 1st July 1985, n. 157.

***from his birth and family relations to his death and succession; likewise his patrimony, the obligations and contracts, and the civil responsibility***".[13]

Commercial matters, on the other hand, is not defined in our legal order. Nevertheless, Commercial Law is doctrinally defined as a special branch inside Private Property Law, "***that regulates the relationships developed inside the Market between its various operators, professional or not, referring in this last detail to consumers or users"***. Thus, it intends to attend to all legal-private relationships that are developed in the economic field of the Market.[14]

## 1.3. Which bodies conform to the definition of "Courts and Tribunals" as provided for by the BIA under your domestic legal system?

In accordance with the explanatory memorandum to Organic Law 6/1985 of 1 July 1985 on the Judiciary, the State is divided territorially, for judicial purposes, into municipalities, districts (partidos), provinces and autonomous communities.

The exercise of judicial power is attributed to the following courts: magistrates courts (Juzgados de Paz), courts of first instance and preliminary investigations (Juzgados de Primera Instancia e Instrucción), commercial courts (Juzgados de lo Mercantil), courts for dealing with violence against women (Juzgados de Violencia sobre la Mujer), criminal courts (Juzgados de lo Penal), courts for contentious administrative proceedings (Juzgados de lo Contencioso-Administrativo), social courts (Juzgados de lo Social), juvenile courts (Juzgados de Menores), courts with special duties in the matter of criminal sentences (Juzgados de Vigilancia Penitenciaria), provincial courts (Audiencias Provinciales), high courts of justice in the autonomous communities (Tribunales Superiores de Justicia), the National High Court (Audiencia Nacional) and the Supreme Court (Tribunal Supremo). The National High Court, the Supreme Court, the central criminal courts (Juzgados Centrales de Instrucción) and the central courts for contentious administrative proceedings (Juzgados Centrales de lo Contencioso-administrativo) have nationwide jurisdiction.

We understand that the defining element of "Courts and Tribunals" that the question refers to is that the institution can address judgments of a commercial or civil nature.

- **Tribunal Supremo - Supreme Court (Highest Instance).** The Supreme Court of Spain is the highest judicial instance in Spain in all areas of law. The Court consists of the following chambers: Civil Chamber, Criminal Chamber, Administrative Chamber, Labour Chamber and a Military Chamber. The court decides on appeals from the National or High courts and decides in first instance in criminal cases regarding members of the judiciary and government.

[13]RAE. 'Definición de derecho civil - Diccionario del español jurídico - RAE' [*Definition of Civil Law – Spanish legal dictionary – Spanish Royal Academy*], www.dej.rae.es/lema/derecho-civil visited 15 May 2020

[14] M. Olivencia Ruiz. 'Concepto del Derecho Mercantil' [*Concept of Commercial Law*], in Lecciones de Derecho Mercantil [*Commercial Law lectures*] (Tecnos 2015) p. 41 at p. 41-53.

- **Audiencia Nacional - National Court.** The national Court is divided into 3 chambers, Criminal, Administrative and Social. The Criminal Chamber decides on cases involving crimes committed against the Royal Family, high Government officials, major drug trafficking, counterfeiting and offences committed outside the Spanish Territory which are prosecuted in Spain.

- **Tribunal Superior de Justicia de las Comunidades Autónomas - Appellate Courts / High Courts.** The Tribunal Superior de Justicia is the highest level of Justice within each Autonomous Community of Spain. It is divided into 4 Chambers: Civil, Criminal, Administrative and Labour.

- **Audiencia Provincial - Regional Courts.** The Provincial Court (Audiencia Provincial) decides on civil and criminal cases. Its jurisdiction covers the Province where it is located.

- **First Instance Courts**: Criminal Courts (Juzgados de lo Penal); Examinining Courts (Juzgados de Instruccion) and First Instance Courts (Juzgado de Primera Instancia).

- **Justices of Peace - Minor Courts Justices of the Peace**. Close to the citizen and empowered to face minor cases.

### 1.4. Briefly present the types of domestic decisions (e.g. Judgments, Decrees, Decisions, Orders) which may be rendered/issued under your Member State's civil procedure.

***Comment: Briefly elaborate on the meaning and effects of these of types of decisions. Please note that the word "decision" is used as a generic and neutral term, e.g. in Slovenia, "decisions" rendered by the court shall take form either of a "judgment" (Slovene: "Sodba") or of a decree (Slovene: "Sklep"). "Civil procedure" is to be understood as any procedure so designated by domestic Law. In addition, decisions not rendered in civil procedure, but having a civil character (e.g. decision on damages in criminal procedure), should also be included. Indicate which of these decisions may be considered enforcement titles. Additionally, please state what these decisions are called in the official language of your Member State. If enforcement titles are exhaustively enumerated by statute, please provide the citation to the exact article/paragraph of that statute and an English translation.***

Along the Civil procedure, we can find both judicial and non-judicial decisions. We enumerate the following list:[15]

[15] J. Flors Matíes and M. López Orellana. GPS Procesal Civil [*Civil Procedural GPS*] (Tirant lo Blanch 2019) at p. 419 and following.

1. **Judicial:** They are listed in art. 206.1 LEC, except the oral rulings, and they are:

- **Decisions (*providencias*)**: Those seek the material organization of judicial proceedings. According to art. 206.1 1º LEC, decisions would be issued when the ruling refers to procedural issues that require a judicial ruling as required by Law, just in case the form of judicial decree is not expressly required.

- **Judicial decrees (*autos*):** This instrument is used, in accordance to art. 206.1 2º LEC, to solve appeals against decisions or decrees/orders, regarding admission or dismissal of evidence, judicial approval of transactions, mediation agreements and covenants, provisional and protective measures, nullity or validity of the procedure, procedural presuppositions, registry entries and registrations, incidental issues, or when the Prosecution Law says so, along with those which put an end to procedure actuations before concluding ordinary processing. The Spanish legal order establishes, as well, that judicial decrees must be issued to solve appeals against non-definitive judicial decrees (arts. 451.2 and 453.2 LEC) and definitive judicial decrees (art. 465.1 LEC), to solve the admission or dismiss of the lawsuit or counterclaim (art. 404.2 LEC), and to solve about joinder of causes of action.

- **Sentences (*sentencias*):** A sentence will be passed, according to art. 206.1 3º LEC, to put an end to the proceedings, in first or second instance, once it has concluded its ordinary processing provided by Law (also, art. 245.1 LOPJ). Sentences will also resolve extraordinary appeals and reviews of final judgments, and the rescission of final sentences at the request of the convicted in absentia (art. 505 LEC). Decision on damages in criminal procedure are also resolved in a sentence/judgment.

- **Oral rulings:** Decisions will be orally pronounced during the celebration of a hearing, trial or appearance, as it is said in art. 210.1 and .2 LEC, specifically those referred to admission or dismissal of evidence (art. 285 LEC) or to any of the issues raised in the previous hearing (e.g. arts. 420.1, 421.2, 422.2, 423.1 LEC).

2. **Non-judicial**: The decisions pronounced by the LAJ are:

- **Proceedings (*diligencias*)**: Proceedings are decisions pronounced by the LAJ for the impulse and processing of the procedure (art. 206.2 LEC). They can be order proceedings (to give the judicial decrees the course provided by Law), constancy proceedings, communication proceedings, or execution proceedings (to express the event or reality with objective data, or the activity carried out and, if needed, the result).[16]

- **Non-judicial decrees (*decretos*)**: It is established by art. 206.2 2º LEC and art. 456.3 LOPJ, that a non-judicial decree will be pronounced to admit a claim/lawsuit, when the procedure in which the LAJ had absolute competency is finished, and, in every kind of procedure, when the decision made should be reasoned. Specifically, Court will pronounce a decree to determinate the costs or expenses of the procedure (art. 244.2 LEC).

There exist other non-procedural decisions, which are the Court agreements (art. 244 LOPJ) and LAJ agreements (art. 456.4 LOPJ).

### 1.5. Taking account of the euro-autonomous definitions of "Judgment" and "Authentic instrument" elaborated by the CJEU for the purposes of BIA, which domestic decisions and instruments conform to these definitions?

***Comment: Please explain which domestic decisions and instruments are problematic in the light of the euro-autonomous definitions and why. Explain which decisions and instruments do not fall within the definitions. If you use English translations of domestic decisions, then please also provide the domestic term in brackets next to the translation, e.g. In Slovenia, condemnatory Judgements [Sodbe] issued in litigious proceedings…".***

Regarding the concept of «judgment», it includes, in principle, the four types of judicial decisions mentioned in question 1.4 (decisions [*providencias*], judicial decrees [*autos*], sentences [*sentencias*] and oral rulings). It also includes non-judicial decrees [*decretos*] pronounced by the LAJ that determine the costs or expenses of the procedure (as it is referred in art. 244.2 LEC). This concept should also include Court agreements, even though those are non-procedural decisions as such. However, this concept does not cover the rest of the non-judicial decisions, apart from non-judicial decrees that determine costs or expenses, some of which might be as relevant as judicial ones.

As for «authentic instruments», they are referred as «public documents» (*document público*) under the Spanish translation of the BIA, in accordance to the existing concept in our Civil Law in art. 1216 C.C., although the definition t is very brief.[17] There is listing of public documents (for the purposes of evidence during the procedure) detailed within

[16] Flors Matíes and López Orellana 2019, supra n. 9, p. 420.
[17] Spain. Real Decreto 24th of July, 1889, por el que se publica el Código Civil (CC) [*Royal Decree whereby the Spanish Civil Law is published*].

art. 317 LEC, including notarized documents, and the certifications of operations in the intervened centres, certifications issued by Land and Commercial Registrars, and those issued by legally authorised public authorities (either in the exercise of their powers or on behalf of a Public Administration). All of these instruments are in conformity with the definition provided by the BIA. Also, art. 323 LEC establishes that, for procedural purposes, foreign public documents shall be considered public documents if, by virtue of international treaties or conventions or special Laws, In such cases, they shall have the probative force provided for in art. 319 LEC.

## 1.6. Have the national courts of your Member State addressed any questions for a preliminary ruling (Art. 263 TFEU) to the CJEU regarding the notion of "Judgment"?

According to the data provided by our General Council of the Judicial Branch (CGPJ), no, they have not.[18]

## 1.7. Please explain the level of judicial control (the "power of assessment") exerted by the courts when rendering default judgments in your Member State.

***Comment: The power of assessment may significantly vary. For instance, the courts may be barred from examination of the substance of the case or limited to checking compliance with mandatory rules of Law.***

In Spain, default judgments control or assessment is always issued by motion of a party through the different kind of appeals that are available by our Civil Procedural Law. There is only one exception, that is an instrument provided by art. 214 LEC that allows the Courts to clarify or correct a judgment. They cannot change the ruling, but they may clarify any obscure concept (within the two following the publication of the decision) and rectify any material or arithmetic error (at any moment). This may be done *ex officio*. Referring, again, to appeals, judges can both examine the substance of the case and check if the mandatory rules of Law are being followed, depending on the appeal filed, the moment of the procedure, and the judgment that is appealed. We enumerate a list of the main resources that the parties have to appeal for an allegedly default judgment:

- *Declinatoria*: It is not properly an appeal, but it is an action that can be filed with the same Court that is hearing the main matter, to inform that it has a lack of jurisdiction or competency and to suspend the procedure (art. 63 LEC).

[18] C.G.P.J – 'Cuestiones Prejudiciales Iniciadas Ante El Tribunal de Justicia de La Unión Europea' [*Preliminary questions iniciated before the Court of Justice of the European Union*], www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Aspectos-internacionales/Cuestiones-prejudiciales-iniciadas-ante-el-Tribunal-de-Justicia-de-la-Union-Europea/ visited 16 May 2020.

- *Recurso de reposición*: This appeal can be filed against every order proceeding, non-judicial decree, decision and judicial decree, all of them not final (art. 451 LEC). The objective of this appeal is always procedural matters, and it must be founded on the lack of compliance of formal and material requirements. There is another similar appeal that is called *recurso de revisión* which can be filed against final decrees (art. 454 bis LEC).

- *Recurso de apelación*: This appeal is filed to ask the higher hierarchical Court to examine the adequacy of the appealed judgment, and to issue another favourable, or more favourable, for the appellant (art. 455 LEC). This appeal allows a new ruling upon every issues (of fact and of Law) aimed in the first trial, as it explains the STS 626/2012.[19] It is not a new trial, but a review of the first procedure, which objective scope had already been set by the parties. The sentences that rule about the *recurso de apelación* can be appealed, too, by a *recurso extraordinario por infracción procesal*, taking the issue to a higher Court (art. 468 LEC), but it can only be founded on procedure matters or fundamental rights violations.

- *Recurso de casación*: This appeal is filed against sentences ruled by the Provincial Courts (*Audiencias provinciales*), asking the Supreme Court (*Tribunal Supremo*) to examine the material rules applied in the appealed sentence, in order to correct that application if they have been infringed and, where appropriate, unify or define the jurisprudential doctrine on the matter (art. 477 LEC).

There exist other means of appeals that the parties can use during the procedure (*recurso en interés de la Ley*, *recurso de queja*), and a remedy called *revisión de sentencias firmes* (revision of final sentences), that can be used to challenge final sentences (and some other resolutions) of a previous procedure. This is done grounded on the fact that the appearance of certain events occurred outside that process allow us to suppose that the ruling could be unfair or erroneous allowing the case to be submitted for a new judicial examination (art. 509 LEC).

[19] Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Sentence no. 626/2012 of 11 October.

## PART 2: GENERAL ASPECTS REGARDING THE STRUCTURE OF JUDGEMENTS

### 2.1. Which elements are comprised in the structure of a domestic (civil) Judgment in your legal order?

***Comment: A judgment normally contains an array of (necessary) information in separate constituent parts (elements), e.g. the title; the proclamation that the Court issues the Judgment in the name of the people; the Court and the judge rendering the judgment; Parties to the dispute; the Operative part; the Reasoning; the Legal instructions etc.***

Art. 208 LEC establishes the content of the different kinds of judgments previously exposed in question 1.4:

> *"1. The order proceedings and judicial decisions will just express what is sent by them, and will also include a succinct motivation when the Law or whoever dictates them finds it convenient. 2. Judicial decrees and non-judicial decrees will always be motivated and will content in separated and numerated paragraphs the factual background and the findings of Law in which the subsequent ruling will be founded. 3. In case of sentences and judicial decrees, the Court that pronounces them must be indicated, with expression of the Judge or Magistrates that integrate it and their signature, and indication of the reporting judge, when the Court is collegiate. In case of decisions pronounced by courtrooms, it will be enough with the reporting judge's signature. The judgments issued by the LAJ shall always indicate the name of the one who pronounced it, with extension of his signature. 4. Every judgment will include a mention of the place and date of pronouncing, and whether it is final or it can be appealed, mentioning, in this latter case, which appeal is appropriate, before which legal body it must be interposed, and the term to appeal."*

In practice, every judgment is drafted with a header indicating the date, place, identifying number/s (number of procedure, of appeal, of judgment), the name of the Judge or the reporting Judge, and the name of the parties involved, and ends with what information regarding legal remedies on the case (*pie de recurso*), spefecifying if the judgment can be appealed or not, and which kind of appeal can be issued (as it is referred in art. 208.4 LEC and art. 248.4 LOPJ), and the signature. So, considering art. 208 LEC (and art. 209 LEC in case of judgments), and the Court practice, we can find the following elements in each kind of judgment:

- Decisions: Header, legal instructions, footer of appeal, signature.[20]
- Judicial decrees: Header, factual background, legal findings, ruling, remedies, signature.[21]

[20] As an example, see Elche. Juzgado de Primera Instancia no. 5. Decision (providencia) of 28 June 2011.
[21] As an example, see Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Judicial decree (auto) of 11 December 2008.

- Sentences: Header, factual background, findings of Law, ruling, footer of appeal, signature.[22]
- Proceedings: Header, legal instructions/facts, footer of appeal, signature.
- Non-judicial decrees: Header, factual background, findings of Law, ruling, footer of appeal, signature.

### 2.2. Is the structure of a Judgement prescribed by Law or court rules or developed in court practice (tradition or custom convention)?

***Comment: If applicable, please provide the citation to the exact article/paragraph of the rule and an English translation.***

Court practice has accomplished the structure previously described and regarding judgment art. 209 LEC is followed:

> *'Judgements will be formulated in accordance with what has been said in the previous article, and in accordance, in addition, with the following rules:*
>
> *1st. The names of the parties must be expressed in the header and, whenever it is necessary, it shall also include the legitimation and representation by virtue of which they act, as well as the names of the attorneys and the legal representatives and the aim of the trial.*
>
> *2nd. In the factual background shall be recorded, with clarity and conciseness and in separate and numbered paragraphs, the claims of the parties or interested parties, the facts on which they are based, which would have been alleged in a timely manner and are related to the issues to be resolved, the evidences that have been proposed and practiced, and the proven facts, if applicable.*
>
> *3rd. The findings of Law shall express, in separate and numbered paragraphs, the factual and legal facts established by the parties and those that offer the controversial questions, giving the reasons and legal grounds used for the issued ruling, with concrete expression of the rules applicable to the case.*
>
> *4th. The ruling, which will follow what is provided in art. 216 and following, will contain, numbered, the pronouncements corresponding to the claims of the parties, although the admission or dismissal of all or some of said claims could be deduced of the legal bases, as well as the pronouncement on costs and expenses of the trial. It will also be determined, where appropriate, the aimed amount of the sentence, not being able to reserve its determination for the phase of enforcement of the sentence, without prejudice to the provisions of art. 219 of this Law."*

[22] As an example, see Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Sentence no. 142/2020 of 2 March (ECLI:ES:TS:2020:702).

### 2.3. How standardised (regarding form and structure) do you consider judgments from your Member State to be (e.g. inadequately; adequately; standardised, although exceptions can be found)?

***Comment: If the Law regulates this issue, then it is expected that judgments are standardised. However, if certain courts tend to disregard standards or if standards are too loosely defined, then please elaborate. If your Member State has multilevel governance structures (e.g. federalisation; autonomous regions) please elaborate if the different governance structures also apply different standards.***

We consider judgements in Spain adequately standardised. Regarding other kinds of rulings, specifically decisions and non-judicial decrees, the structure may not be defined but given the extension and content of those judgments, is does not entail a problem. Additionally, we must say that our Member State has a multilevel governance structure, dividing Spain in seventeen autonomous regions, but it does not affect to the content or structure of the judgments, which are the same for all the country, with certain languages and translation requirements since we have 4 official langauges (Spanish, Basque, Catalan, and Galician).

### 2.4. How are the different elements of the Judgment separated from one another (e.g. headline, outline point etc.)?

In every judgment, part of the heading is in a different lettering style (usually bold). The rest of the content is separated by headlines in judicial decrees, sentences and non-judicial decrees, and has no specific separation in decisions and proceedings.

### 2.4. If courts, other than courts of first instance, may issue enforceable judgments, how does the structure of such judgments differ from judgments issued by the courts of first instance?

***Comment: The question comes into play especially in cases where, after recourse, appellate and other courts may modify first instance judgments or decide on the claim independently. In addition to general observations, please focus on the operating part, e.g. does it make reference to first instance judgements, how does it uphold or dismiss those judgements?***

Courts of higher instances to which the appeal is lodged, need to refer, in their operative part, to the previous judgment, to express if they keep or revoke the appealed ruling. Taking as an example STS 521/2019 of 8 October[23], it sets the following three statements:

- Dismiss the appeals filed by the appellant part against the previous judgement (and a reference of the concrete decision),
- Confirm the appealed judgement,

[23] Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Sentence no. 521/2019 of 8 October (ECLI:ES:TS:2019:3194).

- And condemn the appellant to the payment of the costs and expenses of the appeal procedure.

Apart from that, the only difference with the rest of the judgements (of lower instances) is that they need to make a reference in the beginning of the document to the number and other identification facts of the appealed sentence, but the structure remains essentially the same.

### 2.5. How does the assertion of a counterclaim affect the structure of the Judgment?

***Comment: In addition, explain when a counterclaim can be entertained in the same proceedings and be decided in a single Judgment (if possible).***

It does not affect the structure. The content (the petitions and the facts) collected in the counterclaim are added, as well as those of the demand, in the factual background and the usual structure of the sentence, ultimately ruling regarding both writings, the claim/lawsuit and the counterclaim.[24]

A counterclaim is always a part of the reply to a complaint, as it is referred in art. 406 LEC. It must be admitted if there is a real connection with the claim and the main demand, unless the Court that admitted the main claim lacks objective jurisdiction by reason of the matter or the amount or when the action that is exercised must be aired in judgment of a different type or nature. If it can be admitted, it will be entertained in the same proceedings and be decided in a single judgment.

### 2.6. Does the Judgment include a specification of the time-period within which the obligation in the operative part is to be (voluntarily) fulfilled by the defendant? Conversely, does the judgment contain a specification of the time-period within which the judgment is not to be enforced? Does the judgment contain a specification of the time-period after which the judgment is no longer enforceable?

***Comment: If applicable, please also explain what happens if the court does not include the above time period(s). If applicable, how would the court, acting as a court of the Member State addressed, deal with a situation where a judgment is no longer enforceable after the limitation period for enforcement has expired, and this time period was not specified by the court in the Member State of origin, either because there is no obligation for the court to specify the period or because the court unintentionally omitted the specification?***

No, the judgment does not include any of those time-periods. Our Civil Procedural Law specifies, however, the time-period within which the judgment is not to be enforced, that

[24] As an example, see Oviedo. Juzgado de Primera Instancia no. 10. Sentence no. 50/2013 of 6 June (ECLI: ES:JPI:2013:50).

is set by Law with a delay of twenty days since the judgment becomes final (art. 548 LEC). It is important to emphasise that, in Spanish legal order (Civil), a judgment can be judicially enforced only by request of the interested party, through a new procedure initiated by a petition for execution (except from actions for evictions, which can be included in the first claim and executed without further procedures).

Regarding the time-period after which the judgment is no longer enforceable, Art. 518 LEC establishes that "***the enforcement action based on a sentence, a Court judgment or a LAJ judgment that approves a judicial transaction or an agreement achieved during the procedure, arbitration award or mediation agreement, will expire if the pertinent petition for execution is not lodged within the first five years after the judgment or sentence became final.***"

### 2.7. What personal information must be specified in the Judgment for the purposes of identifying the Parties to the dispute?

***Comment: For example, in Slovenia, the Judgment will list the Parties' name and surname, residence and Unique Personal Identification Number (so-called "EMŠO"). This number is provided to each citizen of Slovenia and is also a feature in other countries of the former Yugoslavia. The information is stated in the Introduction to the judgment and is usually not repeated in other parts of the judgment.***

It is mandatory to specify just the name and surnames of the parties, and, whenever it is necessary, it shall also include the legitimation and representation by virtue of which they act, either as legal representative of a natural person or an entity or company.

### 2.9. How do courts indicate the amount in dispute? Comment: Please elaborate how this amount is specified (if this information is specified), especially in cases where amendments to claims occur during proceedings.

The amount is specified in the factual background (referring to the amount that the claimant requests in his lawsuit) and in the operative part (referring to the amount that the Court finds actually due). When it is not known or partially known, the Judge must establish in the operative part the specific arithmetic rules that will be used to quantify it.

### 2.10. How do courts indicate the underlying legal relationship (legal assessment of the dispute), if this circumstance bears further relevance, e.g. in enforcement proceedings.

***Comment: Take for example § 850f of the German ZPO, where enforcement is sought against earned income (wage) of the debtor. The Law imposes limitations to the scope of the attachable part of the income. However, these limitations may be disregarded to an extent, if enforcement is pursued for a claim arising from an intentionally committed tort. The execution court must therefore be able to identify the legal***

***relationship (intentional tort). Similar examples might include the indication of maintenance or annuity by way of damages.***

The underlying legal relationship is fundamental to provide the enforcement title, but the once obtained the title is independent and enforceable. Beyond the general practice, under Spanish Law there exist similar cases to those of § 850f of the German ZPO. Court interpretation and decision-making will be always determined by the cause of the judgment and the facts of the case.

## 2.11. Can the Claimant seek interim declaratory relief and what effects (if any) are attributed to the decision on this claim? How is the decision specified in the Judgment?

The claimant may obtain seek interim declaratory relief on the existent, or not, of a right or legal relationship. Therefore, their main aim is to confirm and provide legal certainty to protect its interest base on an existing right. The relief will have "*erga omnes*" effect and therefore will not require further execution.

## 2.12. What kinds of decisions can a court issue in regular litigation proceedings?

***Comment: For example, in certain Member States, the court may decide on procedural issues (e.g. admission of evidence; modification of claim) with a "decree" and a "Judgment" on the merits of the case. Provisional and protective measures may or may not be tied to the proceedings.***

Answer to this question already provided in 1.4..

## 2.13. How are Judgments drafted when (if) they contain a "decision" on issues other than the merits of the case?

***Comment: Such decisions can, for example, pertain to the modification of a claim, withdrawal of a claim, joinder of parties, joinder of proceedings etc.***

In the main judgment, the Judge or Court must strictly address the claims of the parties, being unable to decide in the same judgment on anything that exceeds those limits.

~~**2.13.1 How does this effect the operative part and/or the reasoning?**~~

~~**2.13.2 Which decisions (2.12) can be incorporated into the judgment?**~~

**2.13.3 Can provisional and protective measures form part of a Judgment or can they only be issued separately?**

Protective measures can be requested within the main claim/lawsuit, or before, having them filed it in a separated claim. But, regardless how they are requested, they might be issued separately by a judicial decree (arts. 730 and 735 LEC).

# PART 3: SPECIAL ASPECTS REGARDING THE OPERATIVE PART

## 3.1 What does the operative part communicate?

The operative part of a sentence must include the pronouncements about the claims of the parties and the distribution of the costs and expenses of the procedure, although the granting (or not) of some of those claims may be deduced because of the findings of Law and may not be necessary developed.[25] It must rule about the litigious issues between the parties, without exceeding those limits.

### 3.1.1 Must the operative part contain a threat of enforcement?

***Comment: A threat of enforcement is to be understood as a legal instruction referring to the possibility of enforcement proceedings if the debtor does not voluntarily perform the obligations imposed by the judgment.***

Yes, under certain conditions it can be done. For instance, Art. 1128 CC establishes that any obligation without a deadline may be fixed by the Court and therefore the enforcement can be related to its compliance.

### 3.1.2 Must the operative part include declaratory relief if the Claimant sought payment (e.g. if the debtor's obligation to perform is found to be due and the Claimant requested performance)?

Yes, it must be included.

### 3.1.3 Is the specification of the debtor's obligation finalized by the court or is it left to later procedures/authorities?

The Court must specify its decision about the claims of the parties, including, if it is the case, the debtor's obligation. If the obligation is the payment of an amount of money or goods, art. 219 LEC establishes that, when a determined amount of money is claimed in a trial, the Court must indicate, if it issues a conviction sentence, the exact quantification of the due amount or the arithmetic rules that will be used to quantify during the enforcement of the judgment. It is not possible to leave the quantification (nor the specific obligation) to further procedures.

### 3.1.4 How is the operative part drafted in the case of a prohibitory injunction (German: "Unterlassungsklage")?

An enforcement title, in this case a final conviction sentence, can establish a mandatory or prohibitory injunction (obligation of doing something or obligation of stopping an action or behaviour). There is no relevant change in the drafting of the sentence when the conviction is prohibitory. An example of this kind of ruling is the SJPI 89/2007 of 29 May,[26] in which the Court rules that the defendant must

[25] S. Iglesias Machado. La sentencia en el proceso civil [*The sentence in the Civil procedure*] (Dykinson 2015) at p. 81.
[26] Molina de Segura. Juzgado de Primera Instancia no. 1. Sentence no. 89/2007 of 29 May.

stop the commercial use of a product protected by intellectual property, and it establishes a compensation and an amount that shall be paid for each day that the illicit activity continues. The phrasing, in this kind of cases, would be '*Condenamos al demandado al cese de su actividad comercial…*' [We condemn the defendant to cease his commercial activity…], as an example.

### 3.1.5 If applicable, how is the operative part drafted in an interim judgment?

***Comment: Should a claim be in dispute both on its merits and as regards its amount, the court may take a (preliminary) decision on the merits. An interim judgement in the context of the above question should therefore be understood as a judgement on the merits (basis, grounds, liability) of the claim (e.g. a court issues a judgement regarding the liability of a defendant for tort, but leaves the amount of the damages to be decided later in a "final" judgement).***

In Spain, this example (or similar cases) are not applicable. The judge can only make interim decisions regarding procedural matters, but the merits must be decided in the judgement, along with the determination of the amount of the debt (see question 3.1.3).

### 3.1.6 If applicable, how is the operative part drafted in an interlocutory judgment?

***Comment: Within the context of the question, an interlocutory judgement refers to a temporary decision regulating the matter of the dispute. Take for example the French "Ordonnance de référé", which is a provisional decision made on the application of one party, the other one being there or having been called, in cases where the power to order immediately the necessary measures is vested to a judge who is not called to decide the whole case.***

The most similar instrument that the Spanish legal order provides is the *medidas provisionales* [interim measures], but those do not really regulate the matter of the dispute, but ensure the fulfilling of a possible conviction sentence. Therefore, it is not applicable.

### 3.1.7 How is the operative part drafted in the case of alternative obligations, i.e. where the debtor may decide among several modes of fulfilling a claim?

Despite the Supreme Court had considered *damages in lieu* as an amount part of the compensation derived from the Section 1.101 of the Civil Code (Cc), there is a series of very recent cases law in which damages in lieu are considered as an independent and different remedy from due compensation. Besides, damages in lieu in performing of judicial sentence are separated from the ones applicable in breach of contract cases.

*Damages in lieu* in performing of judicial sentence have their legal grounds in certain procedural rules that are not useful to create, in matter of breach of contract, a compensation different from the one derived from Art. 1.101 Cc.

### 3.1.8 How is the operative part drafted when a claim is wholly or partially dismissed (on substantive grounds)?

***Comment: For the purposes of the question, a "dismissal" refers to the situation where a claim appears to be without justification, either in and of itself or as the result of an objection lodged by the defendant (German: Klageabweisung).***

There is no significant change in the drafting of the operative part. In the first case, the Court says that they dismiss the claim ('*desestimamos el recurso/la demanda*'). In the second case, the Court writes in the sentence that they 'partially admit' the claims of the claimant, specifying which part of the claim is granted and which is dismissed. In Spanish, the phrase used for this purpose is '*estimamos parcialmente…*'. As an example, see STS 228/2011 of 3 January.[27]

### 3.1.9 How is the operative part drafted when a claim is wholly or partially rejected (on formal/procedural grounds)?

***Comment: For the purposes of the question, a "rejection" refers to the situation where the court finds it cannot entertain a claim due to formal/procedural reasons (or lack thereof), e.g. if it lacks jurisdiction or if the prescribed time for filing the action has elapsed.***

This issue, when referred to a claim or counterclaim, is not addressed in a sentence, but in a non-judicial decree or *decreto*, generally, and, in certain cases, a judicial decree or *auto* (see question 1.4). It is resolved before the judge decides on the judgement. Regarding the drafting of the operative part of that decision, the LAJ or the Judge issues in the decree that they "*do not admit the claim"* [*inadmite a trámite la demanda*].

[27] Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Sentence no. 228/2011 of 3 January (ECLI: ES:TS:2011:228).

#### 3.1.10 How is the operative part drafted if the debtor invokes set-off? Provide an example.

***Comment: In certain jurisdiction, set-off (compensation invoked in proceedings) requires the operative part to specify how the claim and counter-claim are extinguished and to what extent. This may, for instance, be done by specifying the amount of both claims and declaring the amount to be compensated.***

As referred about, any invocation from the parties entitle to certain rights or compensation has to be addressed at the judgment.

### 3.2 Are there specifications pertaining to the structure and substance of the operative part of the Judgment in your national legal system – set out by law or court rules or developed in court practice? If so, please provide an English translation of the relevant provisions.

The content of the sentence is provided by Law in art. 209 4th LEC: "*The ruling, which will follow what is provided in art. 216 and following, will contain, numbered, the pronouncements corresponding to the claims of the parties, although the admission or dismissal of all or some of said claims could be deduced of the legal bases, as well as the pronouncement on costs and expenses of the trial. It will also be determined, where appropriate, the aimed amount of the sentence, not being able to reserve its determination for the phase of enforcement of the sentence, without prejudice to the provisions of art. 219 of this Law".* Then, in art. 216 and the following, the LEC specifies the principles of the ruling that we address, again, in question 3.9. Regarding the rest of decisions (judicial and non-judicial) there is no legal specification.

### 3.3 Does the operative part contain elements from or references to the reasoning of the judgment (grounds for the decision/legal assessment)?

No, it usually does not.

### 3.4 Elaborate on the wording used in your national legal system, mandating the debtor to perform.

***Comment: For instance, in Slovenia, the debtor is not specifically "ordered" to perform by the wording of the operative part, since the operative part only finds the debtor "liable to pay" a certain amount. However, in practice, it is universally understood that this "liability" is to be understood as a duty to perform and not merely as declaratory relief. Would you find such wording problematic?***

In our legal system, when the claims of the claimant are granted, the sentence says that the debtor is 'condemned' to do something (in Spanish, '*debo/debemos condenar a …*'). This expression means that the Court recognises the obligation of the debtor to do (or stop doing) what the claimant requested, and it does not need another judgment to make it

enforceable (it becomes enforceable the twenty days after it becomes final, as it is said in question 2.7), although it does need a further procedure to actually enforce the decision.

### 3.5 If applicable, explain how the operative part is drafted in cases of reciprocal relationships where the Claimant's (counter-) performance is prescribed as a condition for the debtor's performance? How specifically is this condition set out?

As in any other case the Judge considering the claims of the parties.

### 3.6 How are the interest rates specified and phrased in a judgment ordering payment?

***Comment: Please provide a typical wording and the legal basis– not concerning the merits but concerning the requirement in procedural law as to how to draft the operative part.***

In the sentence, the Spanish Courts apply the following phrase: '*We must condemn the defendant to the payment of the amount of X euros plus the legal interest of the money since the day [date]*'. As an example, see SJPI 201/2019 of 30 December.[28] The legal disposition is in art. 576.1 LEC, that provides the following redaction:

> *"Since the sentence is issued in First Instance, every sentence or decision that condemns to the payment of an amount of liquid money will determine, in favour of the creditor, the accrual of an annual interest equal to the legal interest of the money incremented by two points or what it corresponds because of a pact between the parties or special disposition of Law."*

### 3.7 Please, demonstrate how the operative part differs when claims to impose different obligations on the debtor are joined (e.g. performance, prohibitory injunction, etc.) or when the action is of a different relief sought (e.g. action for performance, action for declaratory relief, action requesting modification or cancellation of a legal relationship).

***Comment: Please elaborate on the second part of the question only if such a joinder of claims is admissible. Please accompany your answer by providing typical (abstracted) examples of operative parts in situations where the debtor is ordered to pay an amount of money; when he is ordered to perform an action; when a prohibitory injunction is issued against him; when he is ordered to hand over moveable property. Additionally, formulate abstracted examples of declaratory relief (including negative declaratory relief) and actions for the creation, modification or cancellation of legal relationships).***

When a judgment includes several obligations to be performed by the debtor, it must establish, listed, the different obligations to be fulfilled, as, for example, the already cited

[28] Vitoria. Juzgado de Primera Instancia no. 7. Sentence no. 201/2019 of 30 December.

STS 228/2011 of 3 January.[29] As it is requested in the question, we set a list of abstracted examples of the phrases used in the following situations:

- Ordered to pay an amount of money: '*Condenamos a la parte demandada al pago de X euros en concepto de…*' [We condemn the defendant to payment of the amount of X euros in concept of…].
- Prohibitory injunction: '*Condenamos a la parte demandada al cese inmediato de la venta y distribución del producto…*' [We condemn the defendat to the immediate cease of the sell and distribution of the product…].[30]
- Ordered to hand over moveable property: '*Debo declarar que el bien mueble X era propiedad de Y. En consecuencia, debo condenar y condeno a la demandada a reintegrar dicho bien a su propietario*' [I must declare that the moveable property X belonged to Y. Consequently, I must condemn and I do condemn the defendant to reintegrate that property to its rightful owner].[31]
- Declaratory relief: '*Debo estimar la demanda interpuesta por la parte actora y, en consecuencia, se declara que la finca registral X es exclusivamente propiedad de…*' [I must grant the application of the claimant and, consequently, I declare that the registered state is exclusively property of…].[32]
- Negative declaratory relief: '*Que, desestimando la demanda presentada por la parte actora, debo absolver y absuelvo a la parte demandada de los pedimentos contenidos en el escrito de demanda*' [That, dismissing the claim submitted by the claimant, I must absolve and I do absolve the defendant of the motions contained in the document of the lawsuit].[33]
- Actions for the creation, modification or cancellation of legal relationships (e.g., a judicial divorce): '*Declaro que, estimando parcialmente la demanda por divorcio, debo declarar disuelto por divorcio el matrimonio contraído entre ambos cónyuges litigantes, adoptando como medidas definitivas las siguientes…*' [That, partially granting the application, I must declare dissolve by divorce the marriage contracted by the litigating spouses, adopting as definitive measures the following…].[34]

[29] Sentence no. 228/2011 supra n. 21.
[30] As an example, see Sentence no. 228/2011 supra n. 21.
[31] As an example, see Betanzos. Juzgado de Primera Instancia no. 1. Sentence no. 133/2011 of 22 September (ECLI:ES:JPII:2011:143).
[32] As an example, see Inca. Juzgado de Primera Instancia no. 2. Sentence no. 95/2011 of 20 October (ECLI:ES:JPI:2011:51).
[33] As an example, see Santander. Juzgado de Primera Instancia no. 3. Sentence of 8 April 2005.
[34] As an example, see Sevilla. Juzgado de Primera Instancia no. 7. Sentence no. 223/2011 of 8 April (ECLI:ES:JPI:2011:11).

## 3.8 May the operative part refer to an attachment/index (for example, a list of "tested claims" in insolvency proceedings)?

***Comment: Please explain the "technique" of drafting such operative parts and how attachments are actually attached/connected to the judgment? Which attachments can be referred to in the operative part?***

The operative part, as it said in question 3.1, must rule about all the requests made in the claim and/or the counterclaim, and only about that. The Court can rule basing its decision on every evidence and document that has been properly provided during the procedure, but the operative part must refer only to those claims made in the original claim/counterclaim.

## 3.9 What are the legal ramifications, if the operative part is incomplete, undetermined, incomprehensible or inconsistent?

***Comment: Explain whether this presents a ground for appeal or other legal remedy. Explain how this affects enforcement proceedings.***

Judgements must be exhaustive, clear, precise and congruent (referred to all the claims made by the parties and only to those claims), and the ruling must be motivated, as it is said in arts. 216 and 218 LEC. There is an instrument provided by art. 214 LEC that allows the Courts to clarify or correct a ruling. They cannot change the ruling, but they may clarify any obscure concept (within the two days after the publication of the decision) and rectify any material or arithmetic error (at any moment). This can be done *ex officio*. If the Court manifestly omits a ruling about any of the pretensions of the parties, they may ask, within the five days following the issuing of the judgement. In any case, judgements may be appealed as it was referred in question 1.7.

## 3.10 May the operative part deviate from the application as set out by the claimant? If so, to what extent? In other words, how much discretion does the court enjoy when formulating the operative part?

No, it may not. Courts can decide to grant, to dismiss, or to partially grant the petitions of the claimant (or the counterclaimant), but they can never decide anything that had not been asked by the parties.

## PART 4: SPECIAL ASPECTS REGARDING THE REASONING

### 4.1 If applicable, how does the law or court rules or legal practice govern the structure and content of the reasoning of the judgment?

In our legal order, the reasoning includes both factual background and findings of Law, being two specific and independent parts of the judgment (see question 2.2). Regarding the judgments, the structure and content of those two parts are provided by art. 209 LEC and they have already ben referred:

> *"2nd. In the factual background shall be recorded, with clarity and conciseness and in separate and numbered paragraphs, the claims of the parties or interested parties, the facts on which they are based, which would have been alleged in a timely manner and are related to the issues to be resolved, the evidences that have been proposed and practiced, and the proven facts, if applicable.*
>
> *3rd. The findings of Law shall express, in separate and numbered paragraphs, the factual and legal facts established by the parties and those that offer the controversial questions, giving the reasons and legal grounds used for the issued ruling, with concrete expression of the rules applicable to the case.".*

#### 4.1.1 Is there a specific order to be followed when drafting the reasoning? *Comment: The reasoning usually contains both factual and legal grounds for the decision. Should these aspects follow a predetermined order or may they intertwine?*

Yes, there is an specific order. First, the factual background, explaining, chronologically, all the facts and events that are legally interesting. Then, the findings of Law, that must explain the concrete legal rules used to solve the controversy and grant or dismiss the claims of the parties.

#### 4.1.2 How lengthy/detailed is the reasoning?

The reasoning constitutes the longest part of the judgement, but its extension depends on the complexity of the case and the quantity of the facts that need to be examined. There is no limit to its extension.

#### 4.1.3 Do you find the reasoning to be too detailed?

It depends on the concrete judgement, but, usually, no, we do not. It must express only what is relevant to the case.

#### 4.1.4 Are the parties' statements (adequately) summarised in the grounds for decision?

They should be, but often there are extensive grounds that are summarized and briefly referred by the Court.

#### 4.1.5 Is it possible to distinguish between the parties' statements and the court's assessment (the problem of an unclear distinction between the parties' statements and the court's findings and interpretation)?

Yes, it is possible. Usually, Courts establish in the judgment this distinction very clearly. Also, the parties' statements are usually in the factual background, whereas the Court's assessment if mainly composed by the findings of Law.

### 4.2 In the reasoning, do the courts address procedural prerequisites and applications made after the filing of the claim?

***Comment: Prerequisites are to be understood as all criteria necessary to initiate the proceedings correctly under national law, e.g. jurisdiction, standing, party capacity etc.***

Procedural prerequisites are usually examined in a different and previous decision, but the defendant can appeal what is called *cuestiones procesales* [procedural issues] in the counterclaim or the answer to the claim. The procedural issues are provided by art. 405 LEC, and it allows the Court to examine those procedural prerequisites (that the defendant argue that the claimant lack) and, if it is the case, rule an absolutory sentence without making any decision on the merits of the case. In this situation, the Courts can address procedural matters in the reasoning, but only in this situation.

### 4.3 Are independent procedural rulings properly re-addressed in the judgment?

Procedural ruling may or may not be part of the final judgment depending on their legal nature. Whenever procedural ruling are fundamental to the final decision they must be precisely referred in the reasoning of the judgment although they do not need to be developed again.

### 4.4 What legal effects (if any) are attributable to the reasoning, e.g. is the reasoning encompassed within the effects of the finality of the Judgment?

The ruling must be based on the reasoning, and, sometimes, it may decision about certain claims may be considered within the findings of Law and it is not necessary to address them in the operative part. Also, the findings of Law refer jurisprudence setting a precedent that might be used in further procedures. The argument of the Court to make a decision must be equal in every judgment of the same Court and can be standardised if it is considered by higher instances.

## PART 5: EFFECTS ON JUDGMENTS – THE OBJECTIVE DIMENSION OF RES JUDICATA

### 5.1 A final judgment will, in most Member States, obtain res judicata effect. With regard to this point, please answer the following questions:

#### 5.1.1 What are the effects associated with res judicata in your national legal order?

Our Civil Procedural Law establishes in its explanatory statement (IX), that "**the *res judicata effect* has an essentially procedural character, addressed to impede the improper repetition of litigations and to ensure, by the effect of positive connection to what has been ruled before, the harmony of the sentences that pronounce about something in cases with a link that is previous than the procedure.**" On this matter, res judicata implies, in our legal order, essentially the following effects:[35]

- *Res judicata* forces the Tribunal that is hearing the case to stick to what has been said in those decisions for the rest of the procedure (art. 207.3 LEC). This is what is called «*formal res judicata*», which has an *ad intra* effect, inside the same procedure.
- *Res judicata* of final sentences impedes a subsequent procedure with the exact same subject matter (art. 222.1 LEC). That is considered the negative effect of the «material res judicata», which has an *ad extra* effect, applicable to subsequent procedures.
- At that point, it will bind the Court of any following procedure when it appears as a logical antecedent of what is its object, only when the parties of both procedures are the same or the *res judicata* is extended to them by legal provision (art. 222.4 LEC). That is considered the positive effect of the «material res judicata».

#### 5.1.2 What decisions in your Member State have the capacity to become res judicata?

Since we understand that what is relevant for the purposes of this questionnaire is what we call «*material res judicata*» (which has effect in other procedures), only final judgements that decide the main controversy of the matter of a procedure becomes *res judicata*.[36] However, any judicial decision that becomes final, even those that rule about procedural matters, can have «*formal res judicata*» effect.

Having that in mind, is relevant to outline that any sentence that, even if it becomes final, does not decide on the merits of the case, has no material *res judicata effect*. That is what the STS 999/2004 of 19 October says in its third finding of Law,

[35] Tapia Fernández. La cosa juzgada. Estudio de jurisprudencia civil [*Res judicata. A study of Civil jurisprudence*] (Dykinson 2010), chapter 2.1.
[36] Tapia Fernández 2010, supra n. 29, chapter 2.2.

when the Court denies the *res judicata effect* of a final judgement of a previous procedure that left without ruling the main merit of the case, dismissing the claims because a procedural matter (lack of joinder of parties).[37] There is some controversy, in any case, about the *material res judicata effect* regarding final judgments that express a lack (or not) of jurisdiction. Our Constitutional Court has studied in STC 226/2002 of 9 of October[38] a case where a Court, that had dismissed a *declinatoria de jurisdicción* [exception of jurisdiction] and had ruled about the merits of the case in a previous procedure, had not accepted a claim because it considered that it lacked the necessary jurisdiction in a linked further procedure between the same parties. The Constitutional Court established then that the decisions that may decide on jurisdiction have no material res judicata effect. However, this sentence had two dissenting opinions, which considered that this resolution was incorrect and caused legal uncertainty.

But there is actually an exception to this point. Judicial decisions that put an end to the procedure because of the satisfaction of the debt out of the process have the negative application of the material *res judicata effect* (it impedes a subsequent procedure with the exact same subject matter) when they become final.[39] This mater in developed under art. 22 LEC.

### 5.1.3 At what moment does a Judgment become res judicata?

***Comment: Pinpoint the time and/or requirements when the judgment meets the criteria for becoming res judicata.***

A judgement becomes *res judicata* (in its material aspect) when it decides on the main merits of the case and it becomes final. That means that, either there is no possibility of filing an appeal, or the deadline for filing it has expired. The procedural decisions and those ruled during summary procedures may not have material *res judicata effect*.[40]

5.1.3.1 How (if at all) does the exercise of the right to appeal/the exercise of legal remedies affect this moment?

As long as there is the possibility of filing an appeal, the judgment does not become final, so it may not have *res judicata* effect.

5.1.3.2 How does the answer to this question differ depending on whether the remedies being invoked are considered "ordinary" or "extraordinary" under your domestic law – is the classification of remedies into one of these two categories dependent on these effects?

As said before, as far as remedies are possible, there is no *res judicata* effect.

[37] Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Sentence no. 999/2004 of 19 October.
[38] Spain. Tribunal Constitucional (Sala 1ª). Sentence no. 226/2002 of 9 December (ECLI:ES:TC:2002:226).
[39] Flors Matíes and López Orellana 2019, supra n. 9, p. 493.
[40] Flors Matíes and López Orellana 2019, supra n. 9, p. 492.

### 5.1.4 Is res judicata restricted to the operative part of the judgment in your legal system or does it extend to the key elements of the reasoning or other parts of the judgment?

*Res judicata* extends, in our legal system, to the claims of the parties, including the parties themselves, the specific judicial protection that the parties ask for (*petitum*), and the foundation of that petitions (the combination of legally relevant elements that found the claims, *causa petendi*), but also to what the claimant could have asked for but did not do it (art. 400.2 LEC).[41] This means, necessarily, that not only the final ruling or the operative part of the judgment receives *res judicata effect*, but also some other points of the factual background and the findings of Law, although not every reasoning was made to achieve the final decision.[42] The doctrine and the jurisprudence consider that, apart from the operative part, only the legally relevant facts, those that identify and individualize the *causa petendi* of the specific claim, can have res judicata effect. That occurs because the Judge had to contemplate and examine them as decisive elements for the final ruling (what is called *ratio decidenci*).[43] Therefore, for example, if a Court issues a convicting judgment, compelling the defendant to pay a compensation for an employment contract, actually performed, not only the operative part (the final ruling) becomes res judicata, but also the existence of that contract in which the Court has fundamentally based its decision, which is part of the factual background and the findings of Law.

However, this interpretation is not provided by Law and, therefore, is not unanimous. There is a part of the jurisprudence that rules the opposite way, establishing that only the operative part can become res judicata. In this way, e.g., STS 324/2004 of 6 May.[44] See also STS 1041/2002 of 6 November.[45]

#### 5.1.4.1 Are courts bound by prior rulings on preliminary questions of law?

***Comment: A court in Member State A has to rule whether a seller must deliver goods. In its decision, the court argues that the contract between the seller and the buyer is null and void because of some errors of will. If the seller in Member State B later submits an action for the payment of the purchase price, does a court in Member State B have to dismiss that claim, as it is bound by the reasoning in the judgment of the court in Member State A, which argued that there had been an error of will? Will this be the case in your Member State? In other words, does finality pertain to preliminary questions on points of law? If it does, how are preliminary questions decided upon? Does the decision on***

[41] Tapia Fernández 2010, supra n. 29, chapter 4.1.1.
[42] J. M. Blanco Saralegui and R. Blázquez Martín (coords.). Doctrina jurisprudencial sobre cuestiones procesales [*Jurisprudential doctrine about procedural matters*] (Tribunal Supremo, Sala Primera 2017) at p. 77.
[43] Tapia Fernández 2010, supra n. 29, chapter 4.1.2.
[44] Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Sentence no. 324/2004 of 6 May.
[45] Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Sentence no. 1041/2002 of 6 November.

***preliminary issues form part of the operative part or reasoning? How are they elaborated in the Judgment?***

The Spanish Civil Procedural Law foresees three different types of preliminary questions regarding the civil jurisdiction:

- ***Prejudicialidad Penal (Criminal Preliminary Ruling)***: When, during a civil procedure, appears something that may be a crime prosecutable by the Courts, the tribunal that is hearing the case may adjourn the procedure to submit a preliminary question to the Criminal Court (art. 40 LEC).
- ***Cuestiones prejudiciales no penales (Non Criminal Preliminary Ruling)***: Civil Courts can issue matters that belong to other jurisdictional orders (except from Criminal jurisdiction), just for preliminary purposes, or, by petition of the parties or legal mandate, those questions may be submitted as preliminary questions to the corresponding jurisdictional order (art. 42 LEC).
- ***Prejudicialidad civil (Civil Preliminary Ruling)***: When, to decide on the merits of a litigation, it is necessary to decide on something that is the main matter of another litigation pending in any Civil Court, not being able the joinder of actions, the tribunal can suspend the procedure, by petition of the parties, to wait for the ruling of that other judgment as a preliminary question (art. 43 LEC).

This questionnaire is referred to Civil and Commercial order, therefore, we will answer this question talking about the preliminary questions of law submitted and solved in that jurisdictional order.

About the second group, if the Court decides to not submit a preliminary question but to decide on that concrete issue, it is provided by Law that that decision will not have material res judicata effect, but only formal effect (*ad intra*, inside the same procedure) (art. 42.2 LEC). But when the Court actually submits a preliminary question to the correspondent jurisdictional order (social or administrative), it becomes a different scenario. We must understand that any preliminary question solved in another jurisdictional order would become res judicata the same way that it is explained in previous questions.

Regarding that last group, strict Civil preliminary questions, it may happen that the question that need to be submitted has already been solved by a Civil Court in another procedure. In that case, if the judgment is final, it should have *res judicata* effect as any other final sentence (see previous questions to clarify), but this is not really a preliminary question, but another judgment with *res judicata effects* that is useful as jurisprudence for this concrete sentence.

5.1.4.2 Does your legal order operate with the concept of "claim preclusion"?

***Comment: Claim preclusion bars a claim from being brought again on an event, which was the subject of a previous legal cause of action that has already been***

***finally decided between the parties. Consider the following examples. First example: A claimant files suit for damages he incurred in a traffic accident, alleging that the defendant acted negligently. The court dismisses the claim. The claimant then files a second action for damages arising from the same traffic accident; however, this time he alleges battery (intentional tort) on defendant's side. Is the second action admissible? Second example: A claimant files suit for personal injury (non-material damages) he incurred in a traffic accident. The court awards the claimant the relief sought. The claimant then files a second action, wherein he claims material damages from the same traffic accident. Is the second action admissible or should the claimant have requested all damages in the first action?***

Yes, the Spanish legal order operates with that concept, provided by art. 400.1 LEC, that we translate below:

"*When what is requested in the claim may be founded in different facts or findings or legal titles, all of those which are known or can be invoked at the time of filing the claim must be adduced in it, without being admissible the reservation of their allegation for a further procedure.*

*The charge of the allegation to which the previous paragraph refers will be understood regardless of the complementary allegations or new facts or new news allowed in this Law after the claim and the answer to the claim.*"

In this sense, none of the examples provided in the comment to the question would be admissible in our legal order.

5.1.4.3 Are courts bound by the determination of facts in earlier judgements?

***Comment: Consider the following example. A claimant files suit for personal injury (non-material damages) he incurred in a traffic accident. The court finds that the claimant correctly observed traffic rules and drove through a green light. The court awards the claimant the relief sought. The claimant then files a second action, wherein he claims material damages. In these proceedings, however, the court finds that the claimant drove through a red light. Is this a permissible finding or should the court give effect to the findings of the first judgement?***

As we specified in question 5.1.4, *res judicata* extends, in our legal system, to the claims of the parties, including the parties themselves, the specific judicial protection that the parties ask for (*petitum*), and the foundation of that petitions (the combination of legally relevant elements that found the claims, *causa petendi*). The doctrine and the jurisprudence consider that, apart from the operative part, only the legally relevant facts, those that identify and individualize the *causa petendi* of the specific claim, can have res judicata effect, because the Judge has had to contemplate and examine them as decisive elements for the final ruling (what is called *ratio decidenci*).[46] Following this interpretation, Courts are

[46] Tapia Fernández 2010, supra n. 29, chapter 4.1.2.

bound by the determination of facts in earlier judgements that acquire material res judicata effect. Also, as we said in the same question that material res judicata effect extends not only to what the parties asked for, but also to what the claimant could have asked for but did not do it (art. 400.2 LEC).[47]

## 5.2 If part of a civil claim is being claimed in civil proceedings, how does this affect the remainder of the claim, taking into account res judicata effects?

Answer to this question already provided at 5.1.4.1.

## 5.3 In the case of a negative declaratory action, what is the effect of a finding that the matter is res judicata?

***Comment: For example, A initiates an action against B for a declaration that he does not have to pay B 1000 EUR (negative declaration). If the court dismisses the claim, does the judgment at the same moment declare that A does have to pay B 1000 EUR? If the dismissal of a negative declaratory action is the equivalent of a declaration of the converse (in inter partes proceedings), is such a judgment enforceable for the creditor (in this case: B)?***

Art. 222.1 LEC provides that "***res judicata of final judgements, either when the claim is granted or dismissed, will exclude, as provided by Law, any further procedure with the exact same merits than those of the procedure in which that was ruled***". The doctrine confirms that this prevision is valid for every kind of final sentence, including declaratory sentences, regardless the direction of the ruling.[48]

## 5.4 If a court issues an interim judgment concerning the well-foundedness of a claim, does this judgment have any effects outside of the pending dispute?

***Comment: Can a party rely on the res judicata effects of such a judgment in separate proceedings (is the court in another set of proceedings bound by the judgment) or are these effects confined to the dispute in which the judgment was rendered? Note: an interim judgment on the well-foundedness of a claim refers to a judgment finding the liability of the defendant to pay, but leaves the amount of payment to be determined in a subsequent judgement (the same as under question 3.1.5).***

As we already specified in question 3.1.5, this is not applicable to the Spanish courts.

[47] Tapia Fernández 2010, supra n. 29, chapter 4.1.1.
[48] S. Calaza López. 'La Cobertura Actual de La Cosa Juzgada' [*The current range of the res judicata*]. RJUAM, 20 (2010) p. 67 at p. 70.

5.5 Suppose the following hypothetical. If, in Member State Y, a seller (S) as claimant is suing the buyer (B) as defendant for payment of the purchase price, B will not be able to sue S in Member State Z for liability on a warranty at the same time due to lis pendens rules under BIA.

**5.5.1 Is it possible for B to sue S in Member State Z after the case in Member State Y has been decided with res judicata effect? What is the position regarding this question in your Member State?**

Assuming that our Member State equals State Z in this scenario, if the decision has *res judicata* effect in its Member State, as long as it can be recognised as it is said in the BIA, it must acquire *res judicata* effect in our State.[49] However, if the main merits are not the same, like in this situation, it can be claimed in our courts despite the res judicata effect regarding those matters on which the res judicata deploys its effects.

**5.5.2 If it is possible for B to sue S in Member State Z (in the above situation), will the court in State Z be bound by the reasoning in the judgment from the court in Member State Y? What is the position on that question in your national legal order**

5.5.2.1 If in domestic cases you do not extend res judicata effect to the elements of a court's reasoning (Question 5.1.4)?

Not applicable.

5.5.2.2 If res judicata effect is extended to elements of the reasoning in the Member State of origin but not in the Member State addressed?

Our Law of International Legal Cooperation (LCJI)[50] provides, in art. 44.3, that, "***by virtue of the recognition, the foreign decision will be able to produce in Spain the same effects than in the Member State of origin"***. Doctrine specifies that this, regarding **res judicata**, means that the extension of the res judicata effect of a foreign judgement is set by the State of origin, not by the Spanish Law.[51]

5.5.2.3 If res judicata effect is not extended to elements of the reasoning in the Member State of origin but is in Member State addressed?

Refer to 5.5.2.2.

[49] F. Gascón Inchausti. 'Reconocimiento y ejecución de resoluciones judiciales extranjeras en la ley de cooperación jurídica internacional en materia civil' [*Recognition and enforcement of foreign decisions under the new spanish act on international judicial cooperation in civil matters*]. Cuadernos de Derecho Transnacional, 7 (2015) p. 158 at p. 160.
[50] Spain. Ley 29/2015, 30th July, de Cooperación Jurídica Internacional en materia Civil (LCJI) [*Law of International Juridical Cooperation in Civil matters*]. Boletín Oficial del Estado, 31st July 2015, n. 182.
[51] F. Garcimartín. 'Lecciones: reconocimiento y ejecución de sentencias extranjeras en España' [*Lectures: Recognising and enforcement of foreing sentences in Spain*], www.almacendederecho.org/lecciones/ visited 26 May 2020.

**5.5.3 How do you handle the limitation period problem in the scenario described above? The lis pendens case law of the CJEU prevents the filing of a warranty liability claim in State Z as long as a payment claim is pending in State Y. How can the buyer prevent the limitation period from running in State Z (your home State) without making the warranty case pending?**

International *lis pendens* is regulated in art. 39 LCJI, which we translate below:

> *"1. When there is a pending procedure with identical object and causa petendi, between the same parties, before the Courts of a foreign State at the moment that a claim is filed before a Spanish Court, the Spanish Court can suspend the procedure, by request of a party and with a previous report of the Public Prosecutors Office, as long as the following requisites are met:*
>
> *a) That the competency of the foreign Court obeys to a reasonable link with the trial. The existence of a reasonable connection will be presumed when the foreign Court has based its international judicial competence on criteria equivalent to those provided by the Spanish legislation for that specific case.*
> *b) That it is foreseeable that the foreign court will issue a resolution that may be recognized in Spain.*
> *c) And that the Spanish Court finds necessary the suspension of the procedure for the sake of the right Justice administration.*
>
> *2. Spanish courts can agree to continue the procedure at any moment, by request of a party and with a previous report of the Public Prosecutors Office, when any of the following circumstances occurs:*
>
> *a) That the foreign Court had declared itself incompetent, or if, required by any of the parties, would not have ruled on its own competency.*
> *b) That the procedure before the Court of the other State have been suspended or dismissed.*
> *c) That it is considered unlikely that the procedure before the Court of the other State concludes in a reasonable time.*
> *d) That it is considered necessary the continuation of the procedure for the sake of the right Justice administration.*
> *e) That it is understood that the final sentence that, eventually, may be dictated, will not be liable to be recognized and, if applicable, executed in Spain.*
>
> *3. The Spanish Court will put an end to the procedure and will archive the proceedings if the procedure before the foreign Court has concluded with a recognizable decision and, if applicable, enforceable in Spain.*'

To find a legal answer, we thehrefore should address any of the circumstances provided by art. 39.2 LCJI.

## PART 6: EFFECTS OF JUDGEMENTS - RES JUDICATA AND ENFORCEABILITY

### 6.1 What is the relation of res judicata to enforceability, i.e. can a judgment be enforced before it is res judicata?

***Comment: Does your legal order operate with the institution of "provisional enforceability", i.e. the enforceability of judgments that are not (yet) res judicata, but have nonetheless been endowed, either by the decision of a court or by operation of law, with the attribute of enforceability? Do you think such (foreign) judgments might be controversial from the perspective of the (procedural) legal order of your Member State, if the creditor attempted to enforce them? For an example of provisional enforceability, see §§704, 708, 709 of the German ZPO).***

A final judgment requires twenty (20) days to become enforceable, and, after that, it is necessary to initiate an enforcement procedure to actually enforce the decision. A judgement, on the other hand, becomes *res judicata* at the moment it becomes final.

Under certain requirements, a judgment can be provisionally enforced before it is *res judicata* or even before it is final, since we do operate with the institution of **provisional enforceability**, provided by art. 524 and following of our Civil Procedural Law. It is conceived as a procedural instrument that allows the enforcement of judicial judgments that are not final, attempting to avoid the potential consequences of an excessive duration of the procedure due to an abuse of the use of resources.[52] However, not every decision can be provisionally enforced. Art. 525 LEC specifically excludes judgements regarding paternity, maternity, filiation, annulment of marriage, separation and divorce, capacity and marital status, opposition to administrative resolutions regarding the protection of minors, as well as measures related to the restitution or return of minors in cases of international abduction and honorific rights, except the pronouncements that regulate patrimonial obligations. Also, it excludes sentences that condemn to emit a declaration of will, those that declare nullity or caducity of titles of industrial property, foreign non-final judgments and the pronouncements of a compensatory nature of the judgments that declare the violation of the rights to honor, personal and family privacy and reputation.

#### 6.1.1 Is provisional enforceability suspended (by operation of law or at the discretion of the court) if an appeal is lodged?

Provisional enforceability can only be requested after an appeal (*recurso de apelación*, *recurso por infracción procesal* or *recurso de casación*) is lodged, at any time between that moment and the ruling of the appeal, so no, it is not suspended but quite the opposite. However, the enforced party can file a notice of opposition within the next five (5) days after the notification of the ruling.

[52] M. A. Velázquez Martín. La ejecución provisional en el proceso civil en la nueva Ley de Enjuciamiento Civil [*Provisional enforceability during the Civil procedure in the new Civil Procedural Law*] (Dykinson 2003) chapter 1.

### 6.1.2 Who bears the risk if the provisionally enforceable judgement is reversed or modified?

If it is reversed, the petitioner (the party who benefited of the provisional enforcement) must return the received amount (if any) along with the costs and expenses and compensate the other party for the damages that such enforcement may have been caused (art. 533.1 LEC). If the judgment is just partially revoked, the petitioner will return only the difference between the received and the ruled amount, plus the increment of the legal interest of the money (during the time that the provisional enforcement subsisted) as established in art. 533.2 LEC. If the provisionally enforceable judgment does not consist of the delivery of an amount of money, the petitioner still bears the risk:

- The party is ordered to hand over moveable property: The petitioner will return the property plus incomes, fruits or products, or the pecuniary value of the use of the property. If the restitution is impossible, the enforced party could ask for a compensation.
- The party is ordered to do something: If that action was actually done, the enforced party could ask to undone the action and to be compensated.

6.1.2.1 Must the judgment creditor provide security before the judgment can be enforced?

No, it is not necessary, according to art. 526 LEC, but it might be requested considering the risk or damages that could be caused to the other party.

6.1.2.2 Must the creditor compensate the debtor for damages he has suffered by the judgement being enforced, or by the payments he had to make, or any other actions he had to take in order to avert enforcement?

Answer to this question already provided in question 6.1.2.

6.1.2.3 Does the answer to the previous question (6.1.2.2) vary, if the debtor voluntarily payed (performed) the claim?

If the debtor voluntarily payed or performed the claim there is no provisional enforcement, since the enforcement is always forced (not voluntary).

6.1.2.4 Does the answer to the previous question (6.1.2.2) vary, if the judgement was a default judgement, by a first instance court or a court of appeals?

No, it does not.

6.1.2.5 What is the scope of the compensation? Is it limited to direct loss or is indirect loss also covered?

When the condemn consist of the delivery of money, the compensation must include not only the quantities actually received by the petitioner and its interests, but also the valuation of the consequences of the privation (temporary or

permanent) of the assets whose realization has allowed the effectiveness of what has been provisionally enforced.[53]

When the obligation does not consist on the delivery of money, the enforced party can also seek for a compensation for everything that he could have perceived, as for example, fruits and incomes (see question 6.1.2).

## 6.2 Does your legal order prescribe a suspensive period within which the judgement creditor cannot initiate the enforcement proceedings? For example, must the judgement creditor first demand payment from the debtor before he can move to enforcement (execution of the judgement)?

***Comment: The question is framed in general terms regarding enforcement of judgements, not in relation to provisional enforceability. If answered in the positive, please indicate what are the legal consequences of the suspension, i.e. is the judgement by operation of law not considered enforceable within this period or does the judgement creditor merely take on the risk of bearing costs for enforcement.***

As we repeatedly referred along this questionnaire, our Civil Procedural Law specifies the time-period during which the judgment may not be enforced. That is set by Law in twenty (20) days after the judgment becomes final (art. 548 LEC). It is important to emphasise that, under the Spanish legal order (Civil), a judgment can be judicially enforced only by request of the interested party, through a new process initiated by a petition for execution (except from actions for evictions, which can be included in the first claim and executed without further procedures). Although, it is not necessary to demand the payment before initiating the enforcement procedure, since the final conviction judgement is enough to seek the voluntary fulfilling of the obligation. During the delay of twenty days period the judgment is not enforceable.

## 6.3 Does the judgment incorporate elements akin to the French "command and order to the enforcement officer" (*Mandons et ordonnons a tous huissiers de justice à ce requis de mettre le present jugement à execution*) and what are its effect?

No, they do not. The mandate of enforcement is in the operative part of the judicial decision (*auto*) that issues the petition for execution mentioned before, but not in the final conviction judgment that is meant to be enforced.

[53] L. Caballol I Angelats. 'La Ejecución Provisional de Resoluciones Judiciales En La LEC 1/2000' [*Provisional enforceability of judicial decisions in the LEC 1/2000*]. Revista Xurídica Galega, 26 (2000) p. 295 at p. 322.

## 6.4 How would your legal order deal with foreign enforcement titles, which involve property rights or concepts of property law unknown in your system?

Art. 523 LEC stablishes "1**.** ***For confirmed judgments and other foreign enforcement titles to be enforceable in Spain, execution will be done in accordance with the international Treaties and the legal provisions regulating international legal cooperation. 2. In any case, the enforcement of foreign enforcement judgments and titles will be carried out in Spain in accordance with the rulings of this Law, unless it is provided something else in the international Treaties applicable in Spain.***"

As we specified in question 5.5.2.2, art. 44.3 LCJI provides that, "***by virtue of the recognition, the foreign decision will be able to produce in Spain the same effects than in the Member State of origin', and art. 44.4 LCJI stablishes that 'if a judgment contains a measure that is unknown in the Spanish legal system, it will be adapted to a known measure that has equivalent effects and that follows a similar finality and interests, although such adaptation will not have more effects than those provided in the Law of the State of origin. Either party may contest the adaptation of the measure".***

We can understand, therefore, that when a foreign enforcement title is recognised in our State, it will deploy the same effects than in its origin State, being enforceable by Spanish judicial authorities, whether in its original form or adapted, but maintaining its essential finality and effects. However, even if it becomes enforceable, it will need to go through the same procedure than a Spanish enforcement titles, that means, the interested party must issue a petition for execution and will be attached to the same time-periods and expiration periods (art. 50.2 LCJI).

## PART 7: EFFECTS OF JUDGMENTS –PERSONAL BOUNDARIES OF RES JUDICATA

### 7.1 How are co-litigants and third persons (individuals who are not direct parties of the proceedings) affected by the judgment (e.g. alienation of a property or a right, which is the subject of an ongoing litigation; indispensable parties)?

In Spain, we may foresee the following situations:

- *Litisconsorcio* (Co-litigants): It happens when the claim is filed by multiple claimants or against multiple defendants (arts. 12 and 72 LEC). It can be voluntary or mandatory, but the effect of the judgment is the same as if they were individual parties.

- *Intervención litisconsorcial* (Intervention of joinder of parties): It is voluntary and occurs when the procedure has already started, but is the same situation than in voluntary *litisconsorcio*. That is a third person that shares the legal relationship that has given rise to the claims with the parties. The third person who intervenes by the defendant may be condemnd if the claimant addresses his claim against him (as the jurisprudence has specified). In any case, whatever position he occupies, as he is the co-titular of the material legal relationship debated in the procedure, the res judicata effect will affect him.[54]

- *Intervención adhesiva simple* (Simple adhesive intervention): Also voluntary, in this case the third person is not co-titular of the legal relationship, but holder of another legal relationship that may be affected indirectly or reflected by the effects of the judgment of that procedure (e.g., the sub-lessee in trials between the tenant and the sub-lessor) (art. 13.1 LEC). In that case, the third person can not be condemned in the sentence (since he is not titular of the legal relationship) and it can not be enforced against him, but can be injured by the reflex effect of it (*efecto reflejo*). If the sentence is favourable to the side in which the third intervened, none unfavourable consequence will be produced to him (since the damage he attempted to stop would not be produced). Only if the sentence is contraire to the side of the third person it will produce that said reflex effect (or prejudicial effect) in his legal relationship, being bonded by it. The sentence will rule only about the litigious legal relationship, not about the

[54] Flors Matíes and López Orellana 2019, supra n. 9, p. 100.

one of which the third is titular, and, therefore, it not produce res judicata effect about it.[55]

- *Intervención provocada* (Provoked intervention): When the Law allows a party to call a third person to the procedure, he must do it in the claim or the answer to the claim (art. 14 LEC) (e.g. arts. 511 and 1559 CC allows the usufructuary or lessee sued in a process to call the third owner of that property, as mediate holder, communicating the disturbance in the possession of which they are the object, due to the process promoted against them). The effects of the sentences are not equal to all of the situations that can be evoked in this kind of intervention.

    - In the event of a call in guarantee in cases of eviction, the third party must not be acquitted or sentenced, since what is involved is to inform the third party of the existence of the dispute so that, in his case and at the time, assume the consequences derived from your responsibility.

    - In the cases of 'call for common cause' (call to the joint heirs by the defendant heir and call to other agents for defects in construction), a condemnatory (or acquittal) pronouncement must be possible, but that requires that the claim contained in the lawsuit has been expressly addressed against said third person. In these cases, if the third party is acquitted, the costs may be imposed on the person who requested their intervention.

    - The third person must also be acquitted or convicted, in cases of a call to the mediated holder, when said third person replaces the subject initially sued. If the third person is acquitted, the costs may be imposed on the person who requested his intervention.[56]

[55] Flors Matíes and López Orellana 2019, supra n. 9, p. 100. Also, Belzuz Abogados. 'La intervención en el procedimiento civil español de un tercero no demandante ni demandado' [*The intervention in the Spanish Civil procedure of a third person not claimant nor defendant*], www.belzuz.net/es/publicaciones/en-espanol/item/838-abogados-procesal-arbitraje-madrid-procedimiento-civil-tercero.html visited 31 May 2020.

[56] Flors Matíes and López Orellana 2019, supra n. 9, p. 106.

## 7.2 Do certain judgments produce in rem (*erga omnes*) binding effects?

The Civil judgment itself does not usually produce *erga omnes* effects. In our Civil jurisdiction, that effect is applicable in certain rights in rem (*derechos reales*), like property rights, but not to the judgment as a judicial decision. If the judgment determines the constitution of a right in rem, that constituted right would have *erga omnes* effect. However, there are certain exceptions. In the judgments on marital status, marriage, filiation, paternity, maternity, incapacitation and reintegration of capacity, the res judicata effect will be effective on everyone from its registration or entry in the Civil Registry (art. 222.3 LEC). This article does not simply proclaim the constitutive effects of the final sentence, but it establishes, *erga omnes*, the binding effectiveness proper to res judicata.[57]

## 7.3 How are (singular and universal) successors of parties affected by the judgment?

***Comment: Explain how succession of parties occurs after the rendering of the judgment as well as in potential enforcement proceedings, and what acts, if any, must be undertaken for interested persons to demonstrate succession. In addition, explain whether there are circumstances in which succession is not possible, e.g. succession to non-pecuniary damages claims.***

Under the Spanish Legal System, the succession of the parties occurs during the pendency of the procedure in three different cases: The death of a party, the merger or absorption of legal entities, and *inter vivos* conveyance of the disputed object. However, succession is not possible when the procedure issued refers *derechos personalísimos* (exclusive personal rights) of the deceased (e.g., separation or divorce, incapacitation, or those in which the party requests alimony), in the case of succession because of the death of a party.[58]

Since this question is about succession after the rendering of the judgment, we understand that it is referred to successors because of death of a party. Art. 16.1 LEC specifies that the successors of the deceased party will occupy, in the procedure, the same place that the deceased had to all effects, including those relative to the sentence. When the succession occurs after rendering the judgment, referring to the enforcement of the sentence, according to arts. 1.003 and 1.023 1º CC, the obligation can be directed against the heirs or the inheritance, but they will only respond with what they receive in inheritance. Art. 540 LEC establishes the following:

> *"1. The enforcement may be dispatched or continued in favour of the person who proves to be the successor of the one who appears as the executor in the executive title and in front of the one who is proven to be the successor of the person who appears as executed in said title.*

[57] S. Calaza López. 'La cosa juzgada en el proceso civil y penal' [*Res judicata in the Civil and Criminal procedure*]. Boletín de la Facultad de Derecho, 24 (2004) p. 131 at p. 140-141, and Flors Matíes and López Orellana 2019, supra n. 9, p. 498.
[58] Flors Matíes and López Orellana 2019, supra n. 9, p. 110.

*2. To prove the succession, for the purposes of the previous section, the reliable documents in which it is recorded must be presented to the Court. If the Court considers them sufficient for such purposes because they meet the requirements for their validity, it will proceed, without further formalities, to dispatch the enforcement in favour of or in front of whoever turns out to be a successor by reason of the documents presented. In the event that enforcement has already been dispatched, the succession will be notified to the executor or executed, as appropriate, continuing the execution in favour or in front of whoever turns out to be a successor.*

*3. If the succession does not appear in reliable documents or the Court does not consider them sufficient, it will ask the LAJ to transfer the petition that the executor or executed whose succession has occurred, to whom is recorded as executed or executor in the title and to whom it is claimed to be his successor, giving them a hearing within 15 days. Once the allegations have been issued or the period has elapsed without them having been made, the Court will decide what is appropriate on the succession for the sole purpose of dispatch or the continuation of the execution".*

## PART 8: EFFECTS OF JUDGMENTS - TEMPORAL DIMENSIONS

### 8.1 Can changes to statute or case-law affect the validity of a judgment or present grounds for challenge?

The General Principal of legality principle and non-retroactivity applies in Spain. Any legal change or case-law will apply to future cases.

### 8.2 If the judgment requires the debtor to pay future (periodic) instalments (e.g. maintenance or an annuity by way of damages), how can the judgment be challenged in order to amend the amount payable in each instalment?

The judgment can be appealed the same way as it is specified in question 1.7, but it is not possible to challenge, separately, each instalment. Based on legal grounds (change of economic conditions, etc.) the judgment might be challenge to amend the amount payable.

### 8.3 Can facts that occur after the last session of the main hearing and are beneficial to the defendant (debtor), be invoked in enforcement proceedings with a legal remedy?

Art. 286.1 LEC establishes the following about allegation of new facts or facts recently known: "***In case allegation delays provided by Law are precluded, and before the deadline to render a judgment is initiated, an event of relevance for the decision of the trial occurs or is known, the parties could assert that fact, pleading it immediately through a document that will be called an extension of the facts. Allegation that could have been done during the act of the hearing are excluded, since they should have been done during the process in due time".***

This is referred to new facts occurred between the acceptance of the claim and/or the counterclaim and the final ruling, and this instrument can be used by both parties (debtor and claimant), always proving the new facts. There is also a similar instrument that can be used after the ruling to review final sentences when new documents relevant to the case are found, or when the reliability of some of the evidences used are questioned (*revisión de sentencias firmes*, question 1.7). That would be the instrument that could be invoked in enforcement proceedings, but it is not based on new facts (occurred after the sentence to be enforced), but on facts that, having occurred before the sentencing, were unknown.

## 8.4 Can set-off of a judicial claim be invoked by the debtor in enforcement proceedings, even if the debtor's counterclaim already existed during the original proceedings?

No. As referred regarding *res judicata effect* in question 5.1.4: It extends to the claims of the parties and also to what the claimant or counterclaimant could have asked for but did not do it (art. 400.2 LEC).[59]

[59] Tapia Fernández 2010, supra n. 29, chapter 4.1.1.

## PART 9: LIS PENDENS AND RELATED ACTIONS IN ANOTHER MEMBER STATE AND IRRECONCILABILITY AS A GROUND FOR REFUSAL OF RECOGNITION AND ENFORCEMENT

### 9.1 The BIA regulation uses the concept of a "cause of action" for the purposes of determining lis pendens.

#### 9.1.1 How does your national legal order determine lis pendens?

Answer to this question is provided in 5.5.3.

#### 9.1.2 How does the BIA concept of a "cause of action" correspond to any similar domestic concept in your national legal order? Describe how your national legal order establishes the identity of claims.

In the Spanish translation of the BIA, "cause of action" is translated as "*objeto y causa*" (object and cause). However, the concept "*objeto*" is an addition to the Spanish translation, being "cause of action" equivalent only to what we call "*causa petendi*". Actually, the InterActive Terminology for Europe (IATE), used in EU institutions, translates "cause of action" directly to "*causa petendi*".

Spanish case-law has said that the *causa petendi* is "***the legal fact or title that serves as the basis for the right claimed, that is, on the basis or reason for claiming […]. So, the identity of the cause of action exists only when a perfect identity is produced in the determining circumstances of the right claimed and its enforceability, which serve as the basis and support for the new action"***.[60]

#### 9.1.3 Does your national legal order allow a negative declaratory action? If so, how is this action treated in relation to contradictory actions (e.g. for (payment of) damages)?

Sure. The judgement may establish the obligation not to do, modify existing situations or bring back existing rights to one of the parties.

#### 9.1.4 How do you determine the identity of parties in national proceedings and how (if at all) does the methodology differ from that of the BIA?

It is just the same and parties have to be identified in Court by their Identity Cards and their representative by notarized powers of attorney or specific powers of attorney provided in Court.

[60] E.g., Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Sentence no. 265/1992 of 16 March.

#### 9.1.5 How should we understand the requirement that judgments need to have "the same end in view" as expressed by the CJEU?

"***The same end in view***" should be understood as the requirement of having the same object in the different procedures.[61] In Spain, the identity of objects, also called *petitum*, is the specific judicial protection that the parties ask for. That is, the final object or purpose of the claims of the parties.

### 9.2 Does your national legal order operate with the notion of "related actions"? If so, what are the effects it ascribes to them? Please accompany the answer with relevant case law.

Yes, we do operate with that notion, but we call it *conexidad*, which has no literal translation but can be understood as "connection of actions/cases". It does not consist on the absolute identity of the object, but on the fact that, to rule on a second procedure it is necessary to decide on some matter that, at the same time, constitutes the main object of another pending procedure.[62] It is a kind of *prejudicialidad civil* that we talked about in question 5.1.4.1 of this questionnaire. In those cases, if a joinder of actions is not possible, the Court that is hearing the second procedure, by request of the parties or one party can issue a judicial decree to suspend the procedure until the other one is finished, and will be bound to the ruling of the other procedure since it deploys res judicata effect (arts. 43, 222.4 and 421.1 second paragraph LEC). To expand the information in this regard, we can find some relevant sentences, such as the judicial decree AP Madrid 10/2013[63], or the judicial decree AP Barcelona 76/2016[64].

### 9.3 Has your Member State experienced cross-border cases involving related actions within the meaning of the BIA?

#### 9.3.1 How have your courts defined irreconcilability for the purpose of related actions?

Recently, in Judgement at the Audiencia Provincial de Barcelona[65], refers Art. 34 of BIA excluding the suspension of proceeding due to international conextivity in a complex case in Honduras and the European Union.

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[61] M. Ahmed. 'The Enforcement of Settlement and Jurisdiction Agreements and Parallel Proceedings in the European Union'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network (2015). https://doi.org/10.2139/ssrn.2748292 at p. 13.

[62] Flors Matíes and López Orellana 2019, supra n. 9, p. 230.

[63] Madrid. Audiencia Provincial (Section no. 25). Judicial decree no. 10/2013 of 1 February (ECLI:ES:APM:2013:1804A).

[64] Barcelona. Audiencia Provincial (Section no. 4). Judicial decree no. 76/2016 of 8 March (ECLI: ES:APB:2016:280A).

[65] Judgement 887/2018, Section 14, Ordinary Proceeding 36/2017 from the Court of First Instance n. 30 in Barcelona.

At the Audiencia Provincial de Girona, Section 1, in the appeal of 11 May 2020 in Auto n. 189/2020, The Court establishes a clear analysis of this matter applying the connectivity in a consumer case.

#### 9.3.2 How have your courts exercised the discretion to stay proceedings?

No, we have not found cases where courts exercise the discretion to stay proceedings.

# PART 10: COURT SETTLEMENTS

## 10.1 What are the prerequisites for the conclusion of a court settlement?

Art. 1.809 CC provides that "***the settlement is a contract by which the parties, giving, promising or withholding each one something, avoid the starting of a trial or put an end to the one they had already started".*** We are interested here in the second kind of settlement, Court settlement, which tries to put an end to an already started trial, regulated in art. 19 LEC. For the Court settlement to be possible, the main prerequisite is that the object of the trial is disposable for the parties and that the parties have absolute disposal power over that object (art. 19.1 LEC). In addition, the legal representatives of the parties must have a special power to be able to settle in Court (art. 25.2 1º LEC). Besides, our jurisprudence specifies that the transaction is a bilateral, reciprocal and onerous contract that must be signed or expressly or tacitly made by the parties, but this consent needs to be reciprocal, free and definitive (let there be no doubt).[66]

### 10.1.1 Describe the necessary elements a court settlement must contain.

Regarding the formal scheme of the settlement, as a contract, it is governed by the principle of formal freedom, as it is specified in art. 1.258 CC. It can be orally performed in the act of the hearing or agreed and signed in an external document that is brought to the trial.[67] However, apart from the formal scheme, there are certain material elements that conform the Court settlement, that are set by the Court practice.[68] Those are the following three: [69]

- The *res dubia* or disputed right that involves an uncertain legal relationship between the parties.
- The parties' intention to replace the doubtful relationship with a true and incontestable relationship.
- The reciprocal concessions of the interested parties, to resolve the controversy.

### 10.1.2 What formal requirements must be satisfied (e.g. signature of the parties; service)?

As referred before, there exists a principle of formal freedom for this agreement. However, for a Court settlement to be effective, there exist some prerequisites specified in question 10.1, that include, as formal requirements, the signature or oral manifestation (express or tacit, but free and definitive) made by the parties and a special power of the legal representatives.

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[66] Madrid. Audiencia Provincial (Section no. 10). Sentence no. 1046/2004 of 16 November.
[67] Flors Matíes and López Orellana 2019, supra n. 9, p. 301.
[68] Spain. Tribunal Supremo (Sala de lo Civil, Sección 1ª). Sentence no. 734/2008 of 17 July 2008.
[69] S. San Cristobal Reales. 'La transacción como sistema de resolución de conflictos disponibles' [*The settlement as a system of resolution of disposable conflicts*]. Anuario jurídico y económico escurialense, 44 (2011) p. 277 at p. 279-280.

#### 10.1.3 What (substantive) legal relationships can be settled in a court settlement?

Parties Identity cards and deeds of incorporation and appointment of legal representatives and/or powers of attorney.

#### 10.1.4 What (substantive) legal relationships can be settled in a court settlement?

Under Spanish Law, parties can achieve a Court settlement in the trials in which the object is disposable for them. Consequently, our Civil Law excludes the settlement when it comes to trials about the civil status, or about marriage, or future alimony (art. 1814 LEC). For all other civil matters, including civil liability in criminal proceedings (art. 1813 CC), the parties can settle, except when the law prohibits it or establishes limitations for reasons of general interest or for the benefit of a third party (art. 19.1 LEC).

### 10.2 When does a court settlement become enforceable?

For a Court settlement to be enforceable, it needs to be homologated. That is a mechanism available for the Court that consists in a revision of the prerequisites and the legality of the settlement. If the Court finds the agreement according to the legal requisites, it will homologate or approve the settlement and it will become enforceable (art. 19.2 LEC). However, the judicial decree that homologates the settlement can be appealed (through a *recurso de apelación*, see question 1.7).

### 10.3 How are (singular and universal) successors of parties affected by the judgment?

***Comment: Explain how succession of parties occurs after the rendering of the judgment as well as in potential enforcement proceedings, and what acts, if any, must be undertaken for interested persons to demonstrate succession. In addition, explain whether there are circumstances in which succession is not possible.***

Since this is the exact same question than in question 7.3, with the same commentary, see 7.3 for the answer.

### 10.4 If applicable, describe how the legal relationship, once settled, can be amended?

When a Court settlement is homologated (see question 10.2), it becomes enforceable because it fits the specified prerequisites, but it can still be amended as any other private contract. In that sense, art. 1.817 CC provides that any settlement can be amended because of error (of Law or of fact), *dolus* (fraud), violence or falsity of documents, but in the case of Court settlements (inside an already started procedure) one party cannot oppose error of fact since he has been separated from the trial because of that settlement. To amend

those vices, the interested party must lodge a nullity action (*acción de nulidad*) within the next four years after the signature of the settlement, or after the cease of the violence (art. 1.301 CC). With that claim the party will start a *procedimiento declarativo ordinario* (ordinary declarative procedure, see glossary). In addition, a Court settlement can also be amended if new documents are discovered and were hidden with lack of good faith, or if there is a final sentence, previous to the settlement and unknown to the parties, that decides on its content (at. 1.818 and 1.819 CC).

The settlement will be automatically null and void (*nulo de pleno derecho*) if there is a total lack of consent, object or cause, because of an absolute indeterminacy of the object or its unlawfulness, because of the unlawfulness of the cause or expression of false cause, or for not being a disposable matter (arts. 6.3 and 1.255 CC).[70]

Finally, the parties can also amend the judicial decree that homologues the Court settlement through a *recurso de apelación* (see question 1.7).

### 10.5 If applicable, describe how (under what circumstances) a court settlement can no longer be considered enforceable?

Same circumstances that a judgment.

### 10.6 If applicable, describe how errors in a court settlement can be remedied and the recourses that are available against a notarial act, whether independently or during enforcement proceedings.

Answer to this question already provided in question 10.4 for the first part, and in question 11.8 for the second part.

[70] S. San Cristobal Reales 2011, supra 57, p. 299-300.

## PART 11: ENFORCEABLE NOTARIAL ACTS

### 11.1 Briefly describe the competence the notary holds in civil and commercial matters in your Member State.

In Spain, notaries' main function is to give public faith, that is, certify, with public value, about the facts, acts or businesses that take place before them. In other words, guarantee that the contract or business is adjusted to the strictest legality. Moreover, they also act as consultants, advising individuals on the most appropriate legal means to achieve their objectives. They must also keep track of the documents they authorize, using indexes, in order to collaborate with Public Administrations when they require it.

### 11.2 Is (can) a notarial act be considered an enforcement title in your respective Member State/Candidate Country? If so, briefly present, how the concept of a notarial act as an enforcement title is defined in your national legal order.

***Comment: If the definition is provided by a provision of law, then please provide the citation to the exact article/paragraph of that rule and an English translation.***

Yes, notarial acts can be considered enforcement titles. Art. 17 LN[71] and art. 517.2 4th LEC stablish that first copies of public deeds (*escrituras públicas*) are enforceable, and that second copies of public deeds can be enforcement titles if they are given by virtue of judicial mandate and with the summons of the potential damaged party, or with the agreement of all the parties. Also, art. 17.1 LN and 517.2 5th consider the testimony issued by the Notary about the original document of a policy (*póliza*) duly preserved in his Book-Register or its authorized copy, accompanied by certification, to be another enforcement title. On the contrary, notarial minutes (*actas notariales*) can never be enforcement titles.

### 11.3 Is, according to your domestic legal order, a notarial act an enforcement title per se or must it contain additional conditions/clauses to be considered as such?

***Comment: For instance, in Slovenia, notarial acts are considered enforcement titles only if they contain a so called 'direct enforceability clause'.***

A Public Notary Document constitutes an Executive Title as such (art. 517 LEC).

Since July 23, 2015, certain, fix and due debts may be required through the Notary Public.[72]

[71] Spain. Ley del Notariado de 28 de mayo de 1862 (LN) [*Law of the Notarial Collective*]. Boletín Oficial del Estado, 29th May 1862, no. 149.
[72] Ley 15/2015, de 2 de julio, de la Jurisdicción Voluntaria modificando, entre otras muchas, la Ley del Notariado, a la que añade todo un nuevo Título VII.

**11.3.1 If there is a certain clause (that constitutes the notarial deed an enforcement title) please set out an example of such a clause (cite an example clause). Furthermore, explain if there a difference in said clause if the deed refers to monetary or non-monetary claims?**

There are model deeds for Notaries as executive title for payment of debt. The structure and main content being:

1. Introductory information, description of the parties and the debt, providing evidence with invoices, contracts, etc.
2. Confirmation that is not one of the matters excluded (consumers, …)
3. Notary "jusisdiction" and domicile of the debtor
4. Execution title and requiring the debtor to pay or to provide evidence and allegations.

**11.3.2 Is the debtor's consent to direct enforceability considered to be part of a notarial act?**

No, The debtor receive the notarial deed but consent is not necessary to enforce the executive title

**11.3.3 If the previous question is answered in the positive, can such consent be of a general nature or specific and concrete to the debtor's obligations arising from the notarial act?**

Is not necessary.

## 11.4 How is a notarial act structured in your domestic legal order? What elements must it contain?

Although it is not provided by Law, common practice has set that any public instrument made by notaries should be divided in the following parts[73]:

- First part: It is used to identify the formal facts of the public instrument. Those are the preliminary mentions, and include a summary of the instrument, the protocol number, the location where the instrument is made, the date, and the identification of the Notary.
- Second part: Its function is to identify the appearing parties, the grantors, the means by which the representation is justified if it is the case, the judgment of capacity and the qualification of the act or contract.
- The proper content of the business, which is usually divided in: a) A factual background, where the facts are exposed and the object is identified, and b) the contract with all of its clauses.

[73] J. Borrell. Derecho notarial [*Notarial Law*]. (Tirant lo Blanch 2011) at p. 202.

- Some final mentions, that are usually divided in: a) Granting, b) reservations and legal warnings, c) faith of knowledge, and d) giving of faith and authorization.

Nevertheless, that is the structure that is usually used, but it is not an imposition and it can change depending on the Notary and on the concrete act.

## 11.5 What personal information must be specified in the notarial act for the purposes of identifying the Parties?

Art. 156 of the RN[74] requires that, for the correct identification of the parties, the document must designate their names and surnames, age, marital status, domicile and the number of the DNI (*Documento Nacional de Identidad*, that is, national identity document). That article excepts the case of public officials involved in the exercise of their positions, in which case it will suffice with the indication of this and their name and surnames. Art. 156 10th RN also stablishes that, if the Notary of the parties find it necessary, the profession or any other personal data should be included.

## 11.6 Must a notarial act, considered to be an enforcement title, contain a threat of enforcement?

Yes, the debtor must be fully informed of the consequence of the enforcement title.

## 11.7 If applicable, how lengthy and important is the part of the notarial act, which contains warnings and explanations by the notary?

Brief but clear.

### 11.7.1 Is the notary obliged to explicitly warn the parties about the direct enforceability of the act?

Yes, the Notary is obliged to inform about the exact content of the document and every possible consequence of signing it. This duty of information is repeatedly stablished by the RN, but it is concreted in art. 193, that provides that 'Notaries will give faith of having read to the parties and witnesses the complete document or of having allowed them to read it before they sign it […]. It will be understood to be complete when the Notary had communicated the content of the instrument with the necessary extension for the knowledge of its scope and effects'.

[74] Spain. Decreto 2nd of Jun, 1944, por el que se aprueba con carácter definitivo el Reglamento de la organización y régimen del Notariado (RN) [*Decree of the organisation and regime of the Notary collective*]. Boletín Oficial del Estado, 7th July 1944, no. 189.

### 11.7.2 Is there a need for parties and/or the notary to sign each page of a notarial act, to be considered valid?

No, it is not necessary. Art. 154 RN provides that the parties and interveners must sign at the end of the document.

## 11.8 What are the consequences if the parties fail to meet the formal requirements for a valid notarial act?

Formal errors are contemplated in art. 153 RN: 'Material errors, omissions and formal defects suffered in the notarial documents *inter vivos* can be remedied by the authorizing Notary, his substitute or his successor in the protocol, by his own initiative or by request of the damaged party. Only the authorizing Notary can remedy the lack of the expression in the document of the identity or capacity or other aspects of his own activity in the authorisation. […] The correction can be made by diligence in the parent public deed itself or by means of a notarial act in which they shall record the error, omission, or formal defect, its cause and the declaration that remedies it. […] When it is impossible to perform the correction according to that method, it wil require for its performance the consent of the parties or a judicial decision.'

However, if the formal errors cannot be remedied (e.g. incompetence of the Notary), the public deed will have the concept of private document, if it is validly signed by the grantors (art. 1.223 CC). Also, there are certain cases provided by Law that entail the nullity of the document art. 27 LN, that are the public instruments '1º That contain a provision in favour of the authorizing Notary. 2º In which the witnesses are relatives to the parties interested in them or to the Notary. 3º Those in which the Notary does not give faith of the knowledge of the granter, or does not supply that diligence in the proper way, or the signatures of the parties, the witnesses or the Notary are not in the document.'

## 11.9 What kind of (substantive) obligations, arising out of legal relationships and contained in a notarial act can become directly enforceable, according to your domestic legal order (e.g. mortgage)? Conversely, are there legally valid obligations, which cannot become directly enforceable due to restrictions in legislation or due to judicial decisions?

***Comment: For instance, in Slovenia, taxes, which arise from the claim-enforcement procedure, cannot be directly enforced by the creditor. The same applies to some bank products.***

Since 2006 notarized documents and public deeds are directly enforceable. Law 36/2005 (29 November 2005) on measures to prevent tax fraud and R.D. 45/2007 (19 January 2007) introduced very innovative and relevant changes in the Notary activity. Deeds and Notary public documents are therefore enforceable and the obligations included might be duly executed.

11.10 Is it possible that conditional claims, contained in a notary act are directly enforceable? If so, are there any special conditions, which have to be met in notarial acts or in enforcement procedure?

As referred above, Notary documents are enforceable and conditional claims may be accepted.

11.11 Can obligations, contained in a directly enforceable notary deed, be contained in attachments to the notarial act or must they be set out specifically within the text of the act?

The must be included in the Act, either in the text or attached.

11.12 Is it possible for parties to conclude a contract wherein they set up a legal (contractual) relationship and only later bring said contract to the notary in order to confirm the direct enforceability of obligations, arising out of the contract?

Yes, it is possible. In Spanish, it is called *elevación a escritura pública de un contrato privado* (elevation to public deed of a private contract).

11.13 Must the notarial act include the specification of the time period in which the obligation of the debtor is to be performed? In conjunction, is there the possibility that a notarial act is directly enforceable even if the time period has not yet expired? If so, under what conditions?

Yes, they can be included but the act as such is enforceable.

11.14 Disregarding EU legislation, are there any special restrictions regarding recognition and enforcement under the private international law of you Member State, pertaining specifically to foreign notarial acts?

To answer this question, we must quote arts. 56 and 57 LCJI:

> '*Article 56. Execution of foreign public deeds.*
>
> 1. *Public deeds issued or authorized by foreign authorities will be enforceable in Spain if they are so in their State of origin and are not contraire to the public order.*
> 2. *For the purposes of its enforcement in Spain they must have at least the same or equivalent efficacy as those issued or authorized by Spanish authorities.*
>
> *Article 57. Adequacy of foreign juridical institutions.*

*Spanish notaries and public officials, when it is necessary for the correct execution of foreign public deeds, can adequate the unknown foreign juridical institutions to the Spanish legal order, replacing them with other institutions that have equivalent effects in our legislation and that follow similar finalities and interests. Any interested party may challenge the adequacy made directly before a Court.'*

11.15 Is it possible to bring grounds of objection in enforcement proceedings, concerning not only enforcement proper (execution), but opposition to the claim itself? In other words, can the debtor raise grounds against the claim contained in the notary act in enforcement proceedings?

No.

11.16 If your domestic legal order does not operate with enforceable notarial acts, how would you enforce a foreign enforceable notarial act?

This is not applicable, since in Spain we operate with certain enforceable notarial acts.

11.17 Are there other authentic instruments under your domestic legal order, which are considered enforcement titles?

All the enforcement titles of the Spanish legal order are specified in 1.1.

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