

INTRODUCTION TO SPANISH BUSINESS LAW

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PREFACE

For the past twenty years Spanish economy has steadily grown and become more and more competitive. Hence, Spain has become an attractive market where to do business and establish industry.

This guide is addressed to all those foreign investors who may want to take advantage of business opportunities in Spain.

When designing this short handbook, CORTADA ADVOCATS aim has been to offer to such potential investors a general idea of the fundamental legal regulations related to doing business in Spain.

The reader will find in this guide the answer to the first basic matters that may arise when considering investing in Spain, such as taxation, litigation, labour law, bankruptcy, exchange controls and many others.

Because of the intended simplicity of this guide, we do recommend potential investors to procure themselves with the advise of legal professionals, which will provide them with the exhaustive and updated information that might be required.

However our hope is that this guide will help the reader in his future business in Spain.

Barcelona, June 1997.

INTRODUCTION

The Spanish Constitution of 1978, establishes in its article 1 the political organisation of Spain:

“Spain is a Parliamentary Monarchy the sovereignty of which resides in the Spanish population from which the branches of state emanate”.

The head of the State is the King, symbol of its unity and permanence, who moderates and arbitrates the functioning of the Spanish institutions, having the highest representative function in the international relations.

The Spanish population is represented by the Parliament, formed by two chambers, the Congress and the Senate. The Parliament has the legislative power of the State, approves the budget, controls the Government and has all the other powers established by the Constitution like national security, international relations, administration of justice, etc.

Spanish territorial organisation is divided in municipalities, provinces and Autonomous Communities. All these entities have autonomy to deal with their own concerns.

CATALUNYA is an autonomous community the capital of which is Barcelona. It has its own government, with Courts and legislative assembly. It has its own legislative power in matters such health, culture, education, agriculture, etc.

THE SPANISH SOURCES OF LAW

According to the article 12.3 of the Spanish Constitution, “the judges and Courts are obliged to resolve all the matters they may have”.

These judgements will be founded in the sources of law, contained in the article 1 of the

Spanish Civil Code. The Spanish law sources are:

- 1.- **Law:** Written, binding express rules.
- 2.- **Customs:** Not contrary to the morals and public order.
- 3.- **General Principles of Law:** Only applicable in case the Law and Customs are not applicable.

LAW BAR ASSOCIATIONS

In Spain, people who have a law degree are not lawyers until their entry as a members of a local bar associations. Being a member of a bar association is indispensable to practise as a lawyer and appear before the Courts.

Bar associations have their own rules such as the Statue for the Spanish lawyers or the Statue of each local bar; they are as well subjected to the EC Code of conduct approved in Strasbourg in 1988 by the CCBE.

All these statutes mentioned above regulate the professional practice and establish the main principles for the lawyers to be followed: Independence, dignity, integrity, social function, immunity, confidentiality and free election for anyone to choose his lawyer.

Bar associations also establish the rules that regulate relations between lawyers, lawyers and courts and they give guidelines for fees.

FORMS OF DOING BUSINESS IN SPAIN

The Spanish Civil Code defines the Companies as voluntary associations of people who create a common wealth fund for collaborating in a business operation, looking for an individual benefit and participating in the profits.

There are four types of companies in Spain:

- The *Sociedad Anónima*.
- The *Sociedad de Responsabilidad Limitada*.
- The *Sociedad Colectiva*.
- The *Sociedad Comanditaria*.

It is very important to choose the legal form of the company according to the planned purpose and size of the business to be started.

I. LIMITED LIABILITY COMPANIES

The *Sociedad Anónima* is the most common way to do business in Spain through a Limited Liability Company. It is identified by the letters *S.A.* after the name of the corporation. The Companies Act of 1989, harmonised Spanish Law with EC Directives on Company Law, and attracted small and medium sized companies to another form of Limited Liability companies, cheaper and easier to run than the *S.A.*, the *Sociedad de Responsabilidad Limitada* or *S.L.*

According to the Central Commercial Registry data, almost 50% of *Sociedades Anónimas* became *Sociedades de Responsabilidad Limitada* after the Companies Act of 1989, looking for a form of company less regulated than the *S.A.*

In the following paragraphs we will describe both forms of Limited Liability Companies:

a) *SOCIEDAD ANÓNIMA*

The *Sociedad Anónima* is the prototype of capitalist company. It does not care about the personal conditions of its partners but in their contribution of capital.

The investors must subscribe the entire capital, although at the time of subscription only a 25% needs to be paid in. The capital of the company is divided into negotiable shares and the liability of the shareholder is limited to the amount of capital contributed to the company in exchange for the shares and the amount which the shareholder is committed to contribute in the case of partially paid-up shares.

The minimum capital requirement for the *Sociedad Anónima* is 10 million Ptas. for both quoted and unquoted companies. Banks, insurance and leasing companies and certain other companies, are statutory required to adopt this business form and have higher capital requirements.

The expenses regarding the formation of a *Sociedad Anónima* (and a *Sociedad de Responsabilidad Limitada* as well), are the transfer tax of 1% of the capital and the notarial

and registration fees which amount varies from 0.5% to 1% of the capital. When purchasing shares, there is no transfer tax, except in the case of real state companies, but there are brokerage or notarial fees which amount is approximately the 0.5% of the purchase price.

Shares, may be registered or bearer and are generally freely transferable though they can be subject to express pre-emption rights or company consent clauses which may be included in the by-laws. Transfers must be authorised by a Spanish public attesting officer such as notary, stockbroker or consul. They may be voting or non-voting, and non-voting shares bear an obligatory cumulative preferred dividend not less than 5%. However, it is prohibited to issue preferred shares with voting rights.

b) *SOCIEDAD DE RESPONSABILIDAD LIMITADA*

The Private Limited Liability Company or *Sociedad de Responsabilidad Limitada*, is intended for small to medium sized businesses. It is distinguished by the letters *S.L.* after its name.

The advantages of the *Sociedades de Responsabilidad Limitada* are that less legal formalities and documentation is required and it is also easier to adapt the *S.L.* regulation to the real will of the partners through the company statutes.

This form of companies must be incorporated by one or more investors who must pay the entire share capital of 500,000.- Ptas. minimum upon incorporation. The capital of the company is divided into equal participations.

The liability of the subscribers to the capital is limited to the fully paid-up value of the participations.

Members of the company may transfer their participations to a third party, but they are obliged to inform the company in writing so as to give the other members a preferential right to purchase the participations. In none of the members of the company exercises this option of preferential right to purchase, the company itself may purchase the participations and reduce its capital instead of allowing a transfer to a third party.

c) *COMMON PROVISIONS TO S.A. AND S.R.L.*

Directors of the limited liability corporations are required to produce a balance sheet, profit and loss account, annual report and a proposed distribution of profits statement as well as a management report within three months following the end of the financial year of the company. These documents must be approved by a majority of the members of the company and are subject to various audit, publication and filing requirements.

There is no answer to the question of which of this both forms of company is the best. It is the businessman who has to decide after a rigorous analysis of all aspects that may be considered and the valuation of other options.

d) *SPECIFIC LEGAL PROVISIONS FOR SOCIEDADES ANÓNIMAS AND SOCIEDADES DE RESPONSABILIDAD LIMITADA WHICH HAVE A SOLE SHAREHOLDER.*

Pursuant to Eight Transitory Provision of the Law 2/1995, prior to January 1st, 1996, joint stock companies or limited liability companies that have a sole shareholder, are required to file a declaration indicating the identity of the sole shareholder, signed by a person with certificating powers and with his/her signature authenticated by a Notary Public for its registrations in the Mercantile Registry. In the event they fail to comply with this obligation, the sole shareholder will be personally, unlimitedly as well as jointly and severally liable for all corporate debts during the period in which the company had a sole shareholder.

As long as the company continues to have a sole shareholder, the company must expressly disclose this fact in all of its documentation, correspondence, stationary and invoices, as well as in all of the advertisements that are to be published pursuant to law or the corporate bylaws.

Agreements executed between the sole shareholder and the company must be in writing or in the documentary form required by law depending on the nature of the agreement, and shall be transcribed in a register-book of the company that shall be legalised according to the same procedure established for minute books of the companies. In the annual report, an express and specific reference must be made to all such agreements, indicating both the nature and conditions thereof. All Agreements with the sole shareholder that are not registered in the register-book, and are identified in the annual report or those that are identified in an annual report if the latter has not been deposited at the Commercial Registry according to the Law, will not be binding vis-à-vis third parties in the event of provisional insolvency or bankruptcy of the sole shareholder. The sole shareholder will be liable vis-à-vis the company for the benefits that the sole shareholder may have obtained, whether directly or indirectly, to the detriment of the company as a consequence of such agreements during a period of two years from the date of their execution.

II. PARTNERSHIP

The *Sociedad Colectiva* or General Partnership is identified by the names of all of the partners or some of the names followed by the words “y Compañía”.

In this form of companies, not all of the partners need to contribute capital, but those who do not contribute, cannot participate in the management of the partnership. All the partners are jointly and severally liable for the debts of the partners. Unless otherwise provided in the partnership agreement, the profits and losses of the partnership are attributed to the partners in proportion to their interest in the partnership.

The *Sociedad Comandita* or Limited Partnership, must always be identified by the words mentioned above after the names of the partners. There must be at least one general partner who participates in management of the partnership and one limited partner who only contributes capital. The general partners are jointly and severally liable for the debts of the partnership, and the limited partners are only liable to the extent of the capital they contribute.

III. SETTING UP A BRANCH

Another form of settlement in Spain for those companies who wish to do business in our country is set up as a branch of their company.

The branch does not have its own legal personality and it is merely a secondary establishment of permanent representation with a degree of independent management through which the activities of the company are wholly or partially developed. A branch is governed by the articles of the parent company which sets it up.

The parent company of a branch is liable for the acts and omissions of the branch. In order to avoid vicarious liability, there is the possibility to set up a subsidiary through the incorporation of a Company in Spain.

IV. REQUISITES TO SET UP A COMPANY

Anyone that would like to set up in Spain any of the forms of company described in this section must follow these procedural steps:

- Notary deed of incorporation.
- Payment of tax.
- Registration at the Commercial Registry.

If they were foreign residents, besides of the mentioned steps they would have to follow another two steps:

- Registry at the Foreign Investments Registry.
- Exchange control clearance.

The authenticated copy of the deed, once the tax has been paid, must be registered at the Commercial Registry located at the Provincial capital. The Commercial Registry verifies the incorporation deed and the by-laws which usually takes 20 to 30 days. Should the Register consider the deed defective, he may refuse registration.

Companies do not acquire legal personality until the deed of incorporation is registered at the Commercial Registry. Registration at the Foreign Investments Registry is a legal obligation, but it is not necessary in order to exercise any right of transferring dividend or capital invested.

TAXATION

The Spanish tax structure is a system of both direct and indirect taxes, imposed either by the central, regional or municipal governments as well as autonomous regions despite those ones have limited tax authority.

Direct taxes consist of individual and corporate income tax, net worth tax, inheritance and gift tax.

Indirect taxes consist of value added tax, transfer tax and stamp duties.

DIRECT TAXES

PERSONAL INCOME TAX - IRPF

IRPF, is a direct, personal and subjective tax that encumbers the world-wide income of all those residing in Spain. Non-residents in Spain are taxed just on the income earned in Spain.

It is considered resident in Spain the person who spends more than 183 days per year in the Spanish territory and therefore subject to the Spanish taxation, except in case of existence of double taxation due to one of Spain's double tax treaties.

The tax rate to be applied is different for residents and non-residents. For residents the tax rate to be applied is established in a scale and varies from (20%) to (56%). For non-residents, the general tax rate to be applied is (25%).

CORPORATE INCOME TAX - IS

The Corporation Income Tax or IS, is a direct and personal tax which encumbers the corporations income and other legal entities. Non-residents corporations, are only taxed on the income earned in Spain.

The general tax rate to be applied is 35%.

INDIRECT TAXES

VALUE ADDED TAX - IVA

IVA is a general tax on consumption levied on the supply of goods and the rendering of services by a person or entity conducting a commercial or business enterprise or practicing an art or profession in Spain.

This tax encumbers::

- Income on delivery of goods and rendering of services done either by businessmen and professionals.

- Income on EC acquisition of goods.
- Imports of goods.

The general tax rate to be applied is 16%. There is a reduced tax rate for certain products to be applied (7%), and a super-reduced tax rate (4%).

TRANSFER TAX ON LAND AND BUILDINGS & STAMP TAX - ITP y AJD

Transfer tax is paid on the transfer of rights on industrial and rustic land and buildings (ownership, usufruct, servitude, leasehold). The tax rate to be applied is (6%) of the value given to the right.

Tax rate for Company operations is (1%), applied on the value of the patrimonial transfer from the company to the shareholders from the shareholders to the company (incorporation, increase or decrease of capital, merger, wind up).

A range of stamp taxes are levied on legally recognized documents that must be filed with public offices, that are receipts for payment or that are exhibited to the public. Stamp duty may be assessed as either a percentage or as a fixed fee, depending on the type of document and its contents (eg. Mortgages stamp tax is (0.5%) of the total amount of the mortgage, Drafts are taxed following an scale).

OTHER TAXES

There are other municipal taxes like the Economic Activities Tax (IAE), for doing business in a certain municipality, which takes into account the activity carried out and the physical space occupied to carry it out, the IBI or tax on real property, tax on motor vehicles and tax on the increased value of land which is paid when transferring the land, and takes into account time of ownership of the transferor.

Other taxes like special levies are collected in return for increases in the value of properties as a result of public works or establishment of public services and in return for a public service provided by the central, regional or municipal authorities.

LABOUR LAW

Knowledge of how to obtain the maximum flexibility and cost efficiency in the organisation of the company's personnel, will help the employer in the settlement of his business.

The Spanish Constitution of 1978 establishes the framework through which all the labour regulations must be developed such as the Workers Statute or specific labour regulations. Besides, the Constitution contains as fundamental rights the right of strike and the right to join a trade Union, (article 28 of the Spanish Constitution).

WORKERS STATUTE

The Workers Statute of 1980, amended in 1995, is the most important labour law. It is applicable to all the employees who voluntarily work for another person, individual or legal, in Spain, and to all those Spanish employees contracted in Spain although working in a foreign country.

In general, the Workers Statute establishes the guarantees and principles that must regulate the employers and employees activity, such as Collective bargaining, labour Unions, termination of a contractual relationship, dismissals, holidays and permits part-time work regulations, probationary periods, youth formation contracts, etc.

COLLECTIVE BARGAINING

Collective bargaining agreements are the result of negotiation between both representatives of the employees and the employers. They are freely adopted by both parties and in a specific sector of industry, they regulate the conditions of work, productivity, as well as labour peace.

Collective bargaining are periodically revised and obligate employees as well as employers of a specific sector for a certain period of time, usually three or four years.

These agreements can be adopted either for a national sector of industry, between national unions and national employer's associations or for the manager and employees of an specific factory. What is important is that such collective bargaining is the result of the contract negotiation between the employer and the employees.

DISMISSALS

The Workers Statute regulates in its chapter III section IV, the extinction of the labour contract. It is defined as the unilateral decision of the employer to finish the labour contract due to culpable non observance by the employee of such contract.

The dismissal must always be founded in the non observance by the employee of the contract or in objective causes (causes due to economic, productivity or technical factors).

Article 54 of the Workers Statute, establishes the reasons on which the dismissal must be founded. These are:

- Unjustified and reiterative lack of punctuality and assistance at work.
- Non discipline and disobedience at work.
- Physical or verbal offences to the employer, other employees or their families.
- Breakdown of contractual good faith.
- Diminishing of productivity.
- Intoxication or drunkenness in case it affects work.

The way and effects of dismissals are also regulated in the Workers Statute. Dismissals must be notified in writing, explaining the reasons on which the dismissal is founded, and the date from which the dismissal enters into effect.

Through the collective bargaining agreements, other conditions can be established when dismissing someone.

The Dismissal can be considered null, justified or unjustified:

- **Null:** Such is the case for the dismissal that violates and discriminates the fundamental rights and public freedom of the worker and the dismissal that violates the rules and principles established in the Constitution and laws.

The employee must be readmitted in his job getting paid for the indebted salaries.

- **Justified dismissal:** When the non observance of the workers duties is duly proved. It has the same effects as the termination of contract. No indemnification or indebted salaries are due.

- **Unjustified dismissal:** When the employer cannot prove the non observance of the workers duties. The employer may choose between readmitting the employee or giving an indemnification calculated on the basis 45 days' salary for each year worked up to a

maximum of 42 months' salary, according to article 56 of the Workers Statute.

In case the dismissal is founded in objective causes (causes due to economic, productivity or technical factors), the indemnification would be calculated on the basis 33 days for each year worked up to a maximum of 24 months' salary.

LABOUR CONTRACTS

In response to a wide social demand that considers necessary to reduce the high rate of unemployment, a recent regulation of 1997 (RDL 16/5/97) establishes a set of measures orientated to improve the job hunting.

The main objective of this regulation is to make easier to contract an employee and to establish urgent measures to foment the indefinite labour contracts.

Fiscal and Social Security incentives are bound to this new measures and to the transformation of temporary contracts to indefinite ones.

Types of labour contracts:

- Formation contracts:

- a) Probationary contracts. Maximum 2 years. For those employees with a university graduate or superior/medium studies.
- b) Formation contract:
For employees from 16 years to 21 years without the studies required for a probationary contract.

- Part-time work contracts:

- a) Homework contract.
- b) Relief contract: Substitutes the vacant labour journey of the employee that reduces his journey.
- c) Fix-discontinuous contract

- Temporary contracts:

- a) Structural temporary contracts: Contracts depending on the productivity, contracts for a certain job or service, contracts for the starting of a new product.
- b) conjuncture temporary contracts.

- **Indefinite contract:**

- a) Contracts for disabled people.
- b) Contracts for foreigners.

EXCHANGE CONTROLS

The exchange control in the Spanish law is defined as the forms of administrative intervention that the government establishes in order to regulate all the transactions, businesses and operations between residents and non-residents which implicate foreign collections or payments.

For forty years, the exchange controls in Spain were regulated by the *Ley de Delitos Monetarios* (Law of monetary crimes) of 1938, born in the middle of the Spanish civil war. Due to the war economy system of that time, it prohibited all the foreign transactions without an express authorisation of the administration. It was substituted in 1979 by the Legal Regime of exchange controls (40/1979 10th December), which regulated all the economical transactions between residents and non-residents, and developed in 1980 by a Royal Decree. The entrance of Spain in the EC in 1986, obliged to adapt the legal regulation of the exchange controls in Spain to the liberal and less restricted European regulations.

The first regulations were established with the intention of protecting our currency against the speculative movements of capital in a period of time where Spanish peseta was in crisis. The development of the Spanish economy and its increasing grade of integration in the world economic structures has helped a progressive policy of liberalisation, despite the present regulation still intends to defence the interests of the State, using the exchange controls as an instrument of the economic policy.

The increasing internationalisation of the economic activity in Spain, made convenient to extend the liberalisation, not only for EC members' transactions, but for transactions with third countries.

The Royal Decree 1816/1991 of 20th December establishes that are free those businesses, transactions and operations from which collections or payments may arise in between residents and non-residents.

Such regulation eliminated the restrictions for transactions to almost the totality of the operations, except for the physical export of currency (bills, bank notes or gold).

Due to the jurisprudence of the EC Court of Justice, the article mentioned above was modified by the Royal Decree of 5th July 1996. Now the export and import of pesetas or foreign currency is free as a general rule, though the export of one million pesetas or more per person and trip is subject to declaration as well as the import of the million pesetas mentioned above by a non-resident, which is subjected to declaration to the Administration authorities.

The Royal Decree 20th December 1991 establishes that the *Ministerio de Economía y Hacienda* may propose some limits, exceptions or prohibitions to determinate transactions with foreign countries when such transactions may affect seriously the Spanish interests.

An Administrative authorisation may be necessary for wide short-term movements of capital that may cause tensions in the Spanish market of changes or to the Spanish policy

According to what we have seen, it is very important to define what a resident or non-resident is.

- **Resident:** Establishments or branches in the Spanish territory of foreign resident individuals or foreign legal entities.
- **Non Residents:** Establishments or branches in a foreign country of individuals residents in Spain or Spanish legal entities.

Collections or payments between residents and non-residents and transfers, to or from foreign countries, in pesetas or other foreign currency, must be done through a deposit entity registered with the Bank of Spain's Register.

Though free, foreign investments are required to be notified and registered in a specific Registry which depends from the Exchequer (*Ministerio de Economía y Hacienda*). The circumstance of not being any longer holder of a foreign investment shall be as well notified to the same Registry mentioned above.

Basically, the following acts need to be declared:

- **Direct investments:** Acquisition of shares which enables control of the company and acquisition of certain loans.
- **Investments in securities:** Acquisition of shares, bonds, etc. of Spanish companies.

- **Investments in land:** Acquisition of rights on the land.

The exchange control regulation established that in some cases (eg. Investment over 500.000.000.-Ptas.), not only notification shall be required, but as well previous clearance from the administrative authorities.

Non compliance with these requirements of notification and previous clearance, will entail the corresponding administrative fines.

BANKRUPTCY and SUSPENSION OF PAYMENTS

Insolvency in the Spanish Law is regulated through two types of proceedings, Bankruptcy and Suspension of payments. Both of them are autonomous, not related to each other and not complementary, which means that bankruptcy can not be requested during suspension of payments proceedings.

These proceedings are regulated in the Spanish Commercial Code, the Civil Procedure Act and the Suspension of Payments Act.

Bankruptcy:

Bankruptcy is a *status*, when the businessman can not afford payment of due obligations, but it is also a juridical institution, a procedure which aim is to wind up debtor's assets and to allocate the proceeds to his creditors. Bankruptcy proceedings may only be initiated when the debtor is not able to pay the debts, after a judicial declaration of bankruptcy.

There are three classes of bankruptcy, depending on the qualification of which, the judicial options will be determined:

-**The fortuitous bankruptcy:** Because of external economic conditions, a well managed company is unable to pay its debts.

-**Negligent bankruptcy:** Because of poor management of the company.

-**Fraudulent bankruptcy:** Involves improper accounting, preferential payments

defrauding creditors, etc.

There are two conditions for the bankruptcy to be petitioned. The bankrupt must be a businessman, and must have generally supersede payment of his obligations.

The petition of bankruptcy may be done either by the debtor or the creditors. When bankruptcy is petitioned by the debtor it is called voluntary bankruptcy and when asked by the creditors it is called necessary bankruptcy.

There are four main actors in the Spanish bankruptcy proceedings:

- **The Judge** who issues the bankruptcy order and supervises the proceedings.
- **The Liquidators:** There are usually three of them and they represent the interests of creditors and the debtor. The liquidators are creditors or representative of creditors appointed at the general creditors meeting, to sell of the assets of the debtor.
- **The bankruptcy commissioner:** He is the link between the liquidators and the judge who delegates some judicial and auditory functions on him. He administers the debtor's assets until the liquidators are appointed.
- **The general creditors meeting** in which the creditors approve the composition and appoint the liquidators.

Once a bankruptcy order is issued, personal and patrimonial consequences come into play, like restrictions in the businessman's legal capacity and disability for administration of his assets. There are other consequences like appointment of the bankruptcy commissioner, judicial seizure of all assets and records of the debtor, appointment of a depositary, publication of the bankruptcy in the newspapers and in the province official newspaper and the cease of obligations of the debtor.

Bankruptcy in Spain may give rise to criminal liability of the company's managers.

Suspension of payments:

Suspension of payments is a legal status petitioned by the businessman in which the temporarily insolvent businessman seeks to arrange an agreement with creditors and therefore to keep operating his business reducing and postponing the debts.

There are three types of suspension of payments:

- **Provisional insolvency:** Despite having more assets than liabilities the debtor in not

able to pay his debts.

- **Definitive insolvency:** The liabilities exceed the assets and within fifteen days the debtor is unable to satisfy the deficit.
- **Mixed insolvency:** Through declared provisional insolvency, the agreement reached with creditors tends to wind up the company assets.

The suspension of payments proceedings may only be initiated on the debtor's petition who must be, as in the bankruptcy, a businessman, and it has to be declared by the judge. Debtor's petition must be accompanied by all the documentation required by the Suspension of payments Act (detailed balance sheet, list of creditors, proposal of payment, general information about the debtor, etc.).

There are three main actors in the suspension of payments proceedings:

- **The Judge** who issues the suspension of payment declaration and supervises the proceedings presiding the general creditors meeting.
- **The Receivers:** Two of them are accountants and the third one is appointed by the creditors. They complement the legal capacity of the debtor in his commercial acts.
- **The Creditors** representing at least 3/5 of the liabilities have to assist to the general creditors meeting and discuss about the convenience or not of approving the creditors settlement.

While waiting for the final agreement with his creditors, the debtor is allowed to continue in the management of his business but subjected to the restrictions ordered by the judge and the approval of the three receivers. Subsequently, there will be pre-declaration of suspension debts and post-declaration of suspension debts. Those creditors for post-declaration of suspension debts are free to claim the credit through all legal proceedings.

The suspension of payments aim is to celebrate a creditors settlement, approved before the judge in the general creditors meeting. Some creditors may oppose or abstain the composition. Those creditors, who may oppose the composition, may institute an individual judicial action or request for a bankruptcy order.

If the composition is not approved by the majority of the creditors legally required, the only possibility is to declare bankruptcy.

LITIGATION

The State in Spain is divided in three branches, *executive, legislative and judiciary*, created in the Spanish Constitution of 1978.

In this section of the handbook, we will take a quick overview of the judiciary. (see scheme enclosed).

As we introduced in the first section of this guide, Spain is divided in municipalities, provinces and Autonomous communities. The system of justice in Spain is determined for such distribution of the territory. The Court with jurisdiction over an offence will be determined depending on the place of residence of the plaintiff or defendant, place where the offence was done or seriousness of the offence.

There are five jurisdictions in Spain, depending on which the cases will be seen before one court or another. The Spanish jurisdictions are:

- Civil jurisdiction.
- Penal jurisdiction.
- Administrative jurisdiction.
- Social jurisdiction.
- Military jurisdiction.

The judicial system is organised in the form of a pyramid. The *Tribunal Supremo* (Supreme Court), is at the apex, divided in divisions (civil, penal, administrative, social, military). Below there is the *Audiencia Nacional* and the *Tribunal Superior de Justicia de las Comunidades Autónomas* (Superior Court of justice of each Autonomous Community). Both of them are divided in divisions (penal, administrative and social). The *Audiencia Provincial* is below (consisting of Court of Appeal), and the inferior civil and criminal courts, as well as inferior social courts.

The *Tribunal Constitucional*, is out of the pyramid mentioned above. It only prepares lawsuits for judgement in relation to the Constitution.

SPANISH CIVIL PROCEDURE

In the Spanish Civil Procedure, we distinguish between the *Juicios Declarativos* and the *Juicios Ejecutivos*.

In the *Juicios Declarativos* are included the higher value proceedings (*Juicios de mayor cuantía*) in which the claim exceeds 160 millions Ptas., the lesser value proceedings (*juicios de menor cuantía*) in which the claim is between of 800.000 and 160 milions Ptas., the verbal proceedings (*juicio verbal*) in which the claim is between 80.000 and 800.000 Ptas., and the cognition proceedings (*juicio de cognición*) in which the claim is between 8.000 and 80.000 Ptas. The basic structure of those procedures in the Spanish Civil Law would be divided into four phases as follows:

- The Plaintiff, usually through his legal representative, starts the action by presenting the Statement of Claim, where the Plaintiff states the facts and the law on which his pleading relies.

The Court issues a writ of summons which is served to the defendant, together with a copy of the Statement of Claims. Within a limited time from reception of the writ, the defendant must in turn deliver his Defence, together with any Counterclaim which he may have.

- After this first period of allegations, the evidence period is opened, which is divided into the proposal of the evidence and the production of the evidences.
- The third phase is the conclusion period, in which the parties submit written conclusions evaluating the evidence.
- Once these three phases are complete, the judge will issue the judgement.

Before final judgement is rendered and throughout all the procedural steps of the action, certain judicial determinations may be appealed, thereby suspending the main proceedings until the appeal is decided, if in the judge's discretion proceeding with the trial would cause irreparable prejudice.

After the final judgement, either party may appeal as of right. However, in cases in which the relief sought is a fixed sum of money, judgements may be executed provisionally pending the decision on appeal, though the Court in this case would require the Plaintiff to post a bond, whose value depends on the value of the claim and the court's discretion, to protect the

Defendant's interests, should the decision on appeal be favourable to the Defendant.

Should there be appeals, the proceeding could take at least two to three years before resolution.

Once the judgement is final, i.e. it has not been appealed, or the Court of Appeal has confirmed the judgement, it will have to be executed.

It is advisable that before starting a judicial procedure, Plaintiffs get some information on the defendant (prejudicial report) since it is necessary to check the chances of recovering the debt from the defendant if the plaintiff gets a favourable judgement. This information will help the client to decide whether it is worth to start a judicial procedure or not.

In order to proceed judicially it is necessary to issue a power of attorney before a Public Notary, granting authority to court agents of the jurisdictions where the claim is to be presented in the first instance and on appeal and to the lawyers who will represent the client. If the power of Attorney is issued before a foreign Public Notary it must bear the Apostille of the Hague Convention.

The parties in Spanish legal proceedings are required to employ two legal professionals, a lawyer, for the presentation of the party's case and a court agent (*Procurador*) for the representation of the party at court. In Spain, we do not distinguish between solicitors and barristers, therefore any lawyer may appear before the Courts. Cost of judicial proceeding will therefore comprise Lawyer and Court agent fees.

Lawyer's fees are calculated on the basis of the amount claimed, following the guidelines for fees established by the Bar of their Province. Lawyer has the right to ask before initiating the procedure, for retaining fees and receive the rest at the end of the procedure.

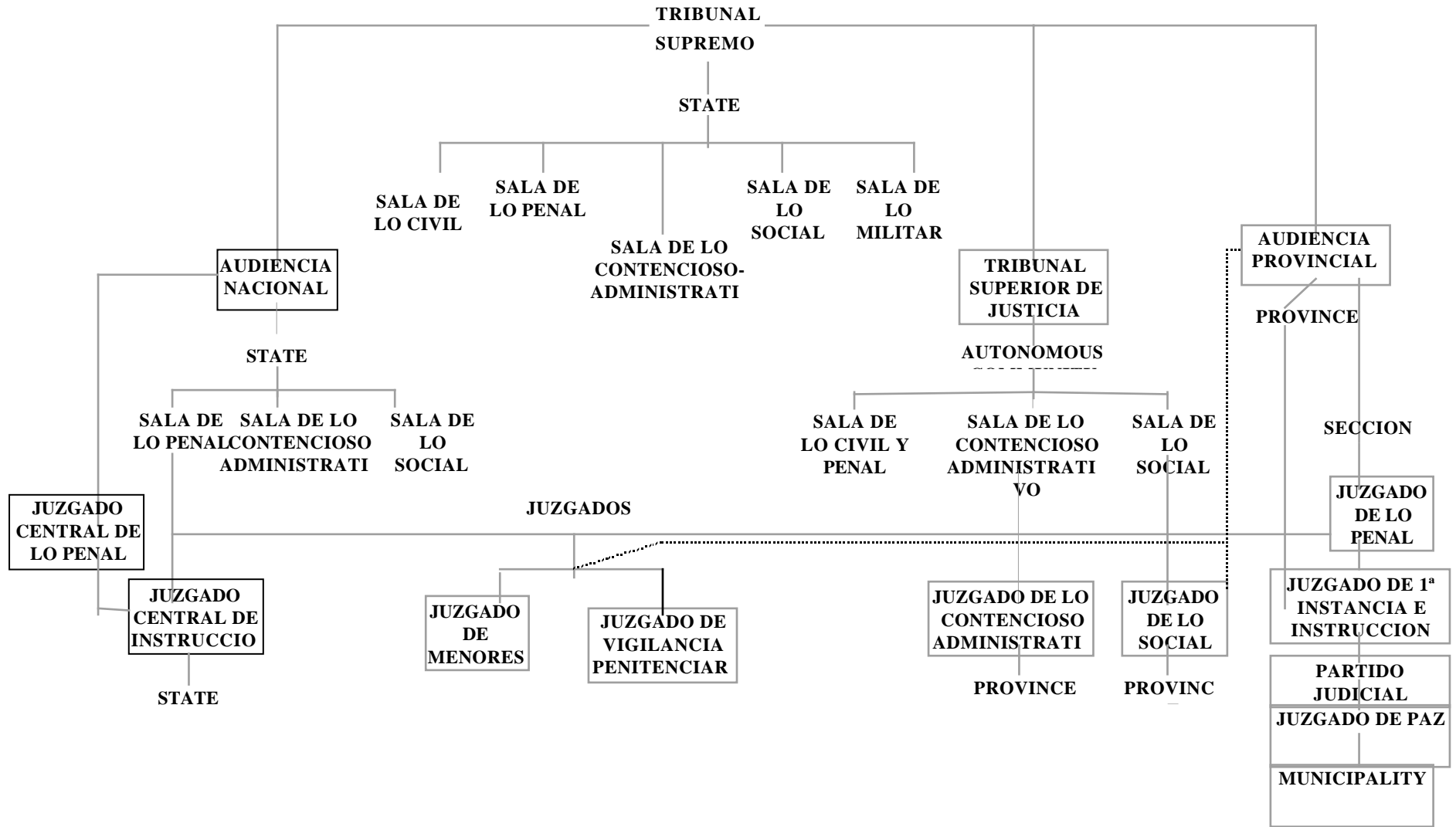
Initially Court Agents will ask for retaining fees for estimate costs of the procedure and at the end of the procedure receive the rest of their fees.

As a general rule, Spanish civil procedure provides that after litigation, the loser pays the winner's legal fees. The loser though can dispute those fees before the Court, which will consult on this matter the local bar association.

On the other hand, under Spanish law the Plaintiff may not sue for interest on the claim before initiating the action. Legal interest, approximately 10%, begins to accrue once the claim is filed with the court. Such interest as well may therefore be recovered from the Defendant.

The *Procedimiento ejecutivo* is the civil procedure where there is direct execution of the judgement, which is issued almost automatically since the debtor has limited arguments to oppose and the period of evidence, if any, is shorter.

The possibility of going through one of the procedures mentioned above, will depend on the title in which the debt is claimed. The titles which open the access to an executive procedure are regulated by law. The most common executive titles are drafts and promissory notes.



ARBITRATION

Commercial agreements frequently contain an “arbitration clause”, under which in the event of any dispute arising between the parties to the contract, the dispute is to be referred to one or more arbitrators for informal settlement.

The Spanish legal system, provides for an arbitration system of dispute resolution, (Law of Arbitration, 36/1988). Through Arbitration, individuals or legal entities, previous an agreement, can submit the decision of a litigation that emerged or might emerge in the future, to one or more arbitrators.

There are certain kind of disputes excluded from Arbitration: Labour Arbitration (submitted to the Labour Arbitration Law), disputes where the parties do not have power of disposition, disputes where a court decision has been dictated, etc.

Arbitration, to be valid, must follow the Law regulations contained in the Law of Arbitration, and Arbitration by-Laws.

The Arbitrators may be appointed from any suitable person selected by the disputants at the time. They have to resolve the litigation according to Law, equity, and their own knowledge. They are always odd and if the parties do not agree on the number of Arbitrators they are three.

The Arbitration agreement cannot be deducted or supposed. It arises from the unmistakable will of the parties to submit the resolution of an emerged dispute or a dispute that might emerge in the future to one or more Arbitrators. The Arbitration agreement in Spain must be agreed to in writing. This agreement could be incorporated in the contract through an arbitration clause. The Arbitrators must be appointed in the arbitration clause, as well as the number of Arbitrators and the manner of appointment of Arbitrators.

The advantages of arbitration as a way of settling disputes are speed and accessibility (rather than litigation in courts), informality and cheapness. Normally an Arbitration proceeding lasts approximately 2 months and never exceeds 6 months until the Arbitrators award is dictated. The

Arbitration award must be always dictated in writing and is enforceable before the Spanish jurisdiction.

Foreign Arbitration awards would be enforced in Spain according to the International Treaties adopted in Spain. Enforcement of a foreign arbitration award must be petitioned in the Supreme Tribunal.

The inconvenience of this procedure is that the costs are higher than in the civil judicial procedure.