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Evidence in Civil Law - Spain

Author:
Núria Mallandrich Miret


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Evidence in Civil Law – Spain

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NÚRIA MALLANDRICH MIRET

ABSTRACT This work presumes to be an introduction for the foreign reader to Spanish regulations in regard to evidence. It has been structured following a classic design in the Spanish academic literature with the aim to approach the reader to the Spanish legal way of thinking. With the same goal it a starting Chapter that analyzes the different principles that lead Spanish Civil Procedure has been included.

KEYWORDS: • civil procedure • evidence • Spain • means of proof • ordinary proceedings • oral trials • fundamental principles of the procedure

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Author Biography Núria Mallandrich Miret obtained her degree in Law from the University Pompeu Fabra (Barcelona) in 2001. The same year, she enrolled in the University of Barcelona Law School PhD program. In 2004 she achieved the Advanced Studies Diploma with the thesis entitled "Procedural aspects in the electronic commerce law". In 2009 she obtained the PhD degree with the dissertation "Interim measures in Arbitration" (Medidas cautelares en la Ley de Arbitraje), under the supervision of Dr. Vicente Pérez Daudí. Her PhD dissertation was awarded with by the University of Barcelona PhD special distinction and published the following year as a monograph titled "Medidas cautelares y arbitraje".

From 2004 to 2013 she has worked as a full time assistant professor at the University of Barcelona Law School. In 2013 she became a founding partner of the Barcelona based law firm, MBC IURIS Abogados y Consultores where she works as a lawyer specialized in civil litigation and arbitration. Currently she lectures civil procedure and arbitration at University Abat Oliba, University of Barcelona and University Pompeu Fabra. She also collaborates lecturing civil procedure at the Barcelona Bar Association Young Lawyers Program.

Her research has mainly been focused on arbitration, interim relief, enforcement, costumers bankruptcy and, recently, civil evidence. Regarding her research on the field of evidence in civil procedure she has taken part as a national reporter in the European Project funded by the European Commission "Dimensions of Evidence in European Civil Procedure", directed by Professor Vesna Rijavec from the University of Maribor (Slovenia) and currenly is a working member of the research project "La prueba civil a examen: estudio de sus problemas y propuestas de mejora", directed by Professor Joan Picó i Junoy from the Rovira i Virgili University (Spain). A characteristic of her research is that most of these topics have been examined from comparative law approach. With this aim she has done research stays at Université Paris X-Nanterre in France (2008-2009), the University of Illinois (2012) and University of Chicago (2013) in USA.

She is the author of the book "Medidas cautelares y Arbitraje", published in 2010, has also chaptered collective books and has published several papers in national and international reviews. The most significant ones are "Aspectos procesales del comercio electrónico. Especial referencia a los aspectos subjetivos", Colección tesinas de doctorando, Revista Peruana de Jurisprudencia, No. 47, December 2005, pages 1 to 128; "La adopción de medidas cautelares en los Juzgados de Instancia. Un estudio empírico", Diario La Ley, No. 8013, pages 1 to 13; "Las medidas cautelares en el arbitraje regulado en el Código Procesal Civil Modelo para Iberoamérica. Una comparación con la Ley Espanyola de Arbitraje y la Ley Modelo sobre Arbitraje Comercial Internacional de la CNUDMI, in *Derecho Procesal contemponáneo. Ponencias de las XXI Jornadas Iberoamericanas de Derecho Procesal*, Puntolex-Thomson Reuters, Santiago de Chile, 2010, Vol. II, pages 1075 to 1098; With VIÑAS MAESTRE, D., "Los recursos en los procesos de familia", in *Derecho de família*, Bosch, Barcelona, 2011, pages 429 to 477;

"Las medidas provisionales", in *El proceso de familia en el Codigo Civil de catalunya*, Atelier, Barcelona, 2011, pages 227 to 253; "La adopción de medidas provisionales en caso de violencia de género", Justicia: Revista de Derecho Procesal, No. 1, 2012, pages 435 to 458; "La regulación del auxilio judicial en el arbitraje tras la reforma de la Ley de Arbitraje operada por la Ley 11/2011, de 20 de mayo", Diario La Ley, No. 7903, 2012, pages 1 to 8; "¿Puede el Juez de Primera Instancia efectuar un control de la admisibilidad de la prueba propuesta en los supuestos de auxilio judicial para la práctica de la prueba en el arbitraje?", Diario la Ley, No. 7947, 2012, pages 20 to 21; "El tratamiento de las situaciones de sobreendeudamiento en los Estados Unidos", Justicia: Revista de Derecho Procesal, Justicia: Revista de Derecho Procesal, No. 2, 2013, pages 373 to 408; "Los principios rectores del arbitraje: Manifestaciones y límites a la autonomía de la voluntad", in *Principios y garantías procesales. Liber amicorum en homenaje a la profesora Mª Victoria Berzosa Francos*, J.M. Bosch, Barcelona, 2013, pages 425 to 429; "La apreciación de cláusulas abusivas como causa de oposición a la ejecución hipotecaria. Un estudio de las resoluciones recientes". RJCat, No. 2, 2014, pages 385 to 396; "La regulación del sobreendeudamiento en el derecho comparado. La experiencia francesa y norteamericana", in *Deshaucios y ejecuciones hipotecarias. Un drama social y un problema legal*, Tirant lo Blanch, Valencia, 2014, pages 387 to 416; "Las vías actuales de solución de los problemas de sobreendeudamiento de las personas físicas", en *Hacia una ejecución moderna y eficaz de la ejecución procesal*, dirigido por Francisco Ramos Méndez, Atelier, 2014, pages 267 to 273.

She was also a speaker at several conferences in Spain and also in Mexico and Andorra.

Foreword

Most of the content of this work has its origin in a national report about evidence in civil procedure done in the framework of the European Project funded by the European Commission "Dimensions of Evidence in European Civil Procedure", directed by Professor Vesna Rijavec from the University of Maribor (Slovenia). I would like to take this opportunity to thank the faculty and staff at the University of Maribor that have taken part in the project execution and given me the opportunity to join them in this exiting experience of looking for aspects in common and divergences in the Europeans procedural systems.

Nevertheless, the original report has later been adapted to the structure of an academic study an also developed in extension and contents seeking to give to the reader a complete image of evidence's regulation in the context of Spanish civil procedure. I have decided to title this work "General guidelines on evidence in the Spanish civil procedure" because it just pretends to be an introduction for the foreign reader to Spanish regulations in regards to evidence. It doesn't pretend to be a treaty, which develops all issues that could be addressed in this field.

The other relevant aspect to take into account is that the study refers to the Spanish procedural system. On this basis, I have decided to follow the classical structure used in the Spanish literature, although it has been partially adapted to the content of the report. For this reason, after developing the fundamental principles of civil procedure from the point of view of evidence taking on Chapter II, in Chapter III I have analyzed the general regulation made by the Spanish law regarding evidence. Next, in Chapter IV the different means of proof are examined paying special attention to the parties testimony, the witnesses testimonies, documents and experts' opinion. Finally, Chapter VI deals with international cooperation in the taking of evidence. Hereafter I have included as appendix synoptic tables of civil proceedings. I hope this will help the reader to better understand the Spanish civil procedure system and the active role that evidence has in it.

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Part I

1 Introduction[2]

Spanish civil procedure is regulated by the Civil Procedure Act (*Ley 1/2000, de Enjuiciamiento Civil*) enacted in 2000, known as LEC.

General regulations regarding evidence are set in Book II, Title I, Chapters V and VI, articles 281 to 386 LEC, although there are also important provisions regarding the presentation of documents and copies provided in Chapters III and IV, articles 264 to 280. Some other relevant provisions may be found within the regulation of specific proceedings. There are also certain specific aspects related to evidence regulation that are set in the Civil Code.

While Chapter V establishes main principles and regulations that govern civil evidence in Spain, Chapter VI deals with the means of proof and how they produce evidence. First article of this Chapter, number 299, describes all the different means of proof that may be used in trials. According with this article, the taking of evidence in trials shall include: 1st. Questioning the parties; 2nd. Public documents; 3rd. Private documents; 4th. Experts' opinions; 5th. Personal inspection by the court[3]; and, 6th. Questioning witnesses. At the same time, second paragraph of article 299 LEC provides that all means of recording words, sounds and images, as well as, instruments that allow words, data and mathematical operations to be saved, known or reproduced shall be admitted. Finally, the Chapter pays special attention to presumptions as a way to proof facts.

As it has been stated in previous paragraphs, the precedent general provisions regarding evidence have to be complemented with the regulations of each type of proceedings. It is the only possible way to get a complete overview of the Spanish procedural system and the role that evidence plays in it.

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[2] This paper is based on the "Spanish National Report on Evidence" made within the EU project "Dimensions of Evidence in European Civil Procedure". University of Maribor, Slovenia, directed by Professor Vesna Rijavec, and later developed within the framework of the research project titled "La prueba civil a a examen: estudio de sus problemas y propuestas de mejora", lead by Professor Joan Picó i Junoy and funded by the Spanish Ministry of Economy and Competitiveness (DER 2013-43636-P). Special thanks to Angela Tillery who has reviewed the study.

[3] In Spanish: *Reconocimiento judicial*. In the official translation of the LEC made by the Ministry of Justice is referred as "taking the evidence by the court", but in my opinion this translation may produce a misunderstood as consequence of the wide meaning of the words used.

2 Fundamental Principles of Civil Procedure

2.1 Principle of Free Disposition of the Parties and Officiality Principle

According to BERZOSA[4], the principle of free disposition of the parties (in Spanish *"principio dispositivo"*) is defined by four different elements:

a) The process has to be initiated by the parties. The process starts by the claimant filing a lawsuit whose content is determined in article 399LEC.
b) Parties will determine the matter of the action.
c) Decisions must be coherent with the claim. The court is not allowed in any case to decide either extra, ultra or infra petitum.
d) Parties can decide to end the process at any moment. The claimant can abandon the action, the defendant can admit liability, and both parties can settle an agreement.

Parties must introduce the relevant facts of their claim in their first writs (sections 399 and 405 LEC), otherwise a rule of preclusion is applied. Thereafter, according to articles 286 and 400 LEC only facts that have occurred or that have been known later by the party can be introduced. Any other attempt to allege these facts will be rejected by the court.

The rule is similar in regards to evidence. The LEC provides that documents and expert witnesses' reports must be presented with the first writ of each party. Other means of proof must be submitted in a specific stage of the procedure (preliminary hearing or the hearing depending on the proceedings), otherwise they will be directly rejected. In any case, once all the means of proof have been submitted, the court has to decide on their admission. All means of proof can be rejected for three reasons: 1) they don't have anything to do with the debated facts; 2) They are useless; 3) they are unlawful.

Courts have to decide within the factual framework and claims of the parties. According to article 218 LEC "judgements must be clear, precise and coherent with the claims and with the other pleas of the parties, as deduced in due time during the proceedings. They shall make all the statements required by the latter, convicting or acquitting the defendant and resolving on all issues in dispute that where the object of the debate". The rule forbids deciding both *extra* (something different than what has been requested) and *ultra petitum* (more than what has been requested by the parties) but also *infra petitum* (less than what has been petitioned). The prohibition to decide *infra petitum* doesn't mean that the court can't partially uphold the claims of the plaintiff. What is forbidden to the court is to forget to decide about a specific claim that the plaintiff has done.

2.2 The Adversarial and Inquisitorial Principle

Traditionally legal doctrine has distinguished between the adversarial system and the inquisitorial system. We talk about "systems" in a wider sense than "principles". In the

[4] BERZOSA FRANCOS, Los principios del proceso, Justicia: revista de derecho procesal, vol III, 1992, p. 577-578.

Spanish procedural system, principles used to allude to evidence collection are the principle of contribution by the parties and the principle of court investigation.

The adversarial system is defined by the following elements: procedures are based on the principles of orality, public hearing, concentration, procedural equality of the parties, contribution by the parties to take evidence, and legality.

In terms of the inquisitorial system, it's defined by these elements: secrecy of the proceedings, written form of the proceedings, there is no equality between the parties and the court can take evidence *ex officio*.

Closely related to the principle or free disposition and even sometimes confused with it, is the principle of contribution by the parties[5]. According to this principle, facts and evidence must be adduced by the parties[6]. In general, it's forbidden for the courts to introduce any facts or to adduce any evidence. However, this rule is not absolute in non-dispositive cases such as family or capacity cases. In these cases there is a public interest (minors and person's civil rights) that justify specific powers of the court. In this type of cases, the court is entitled to take as much *ex officio* evidence as necessary to ascertain the facts. At the same time the law entitles the court to introduce in the proceedings all relevant facts to decide the case. In those cases in which the court is entitled to take *ex officio* evidence, the court is acting under the principle of court investigation. This latest principle is the one that prevails at the investigation stage in criminal procedure.

However, we should take into consideration that there are some specific kinds of non-dispositive cases, as family cases, in which petitions can have a different nature. The court usually has to decide on petitions that concern children and other petitions that only affect the interest of the couple, such as compensatory maintenance for the spouse. The court is only entitled to take *ex officio* evidence regarding those petitions that have to do with children because only in these a public interest is affected.

2.3 Hearing of Both Parties Principle and Contradictory Principle

Spanish legal doctrine has discussed whether the hearing of both parties' principle and the contradictory principle are the same principle or two different principles[7]. For those who think that they are two different principles, the hearing of both parties principle would be the right of both parties to allege the case's relevant facts and to submit the means of proof needed, whereas contradictory principle would refer to the right of the parties to answer the allegations made by the other party. For those who think that they

[5] BERZOSA FRANCOS, Los principios del proceso, Justicia: revista de derecho procesal, vol III, 1992, p. 593-600.

[6] FONS RODRÍGUEZ, El principio de adquisión procesal: Los hechos y su falta de prueba, in Principios y garantías procesales, Librería Bosch, S.L., Barcelona, 2013, p. 188.

[7] CALAZO LÓPEZ, Principios rectores del proceso judicial español, Revista de Derecho de la UNED, No. 8, 2011, p. 53-58; MARTÍNEZ ATIENZA, Artículo 24. Principios de igualdad, audiencia y contradicción. Comentarios a la Ley de Arbitraje, Ediciones Experiencia, 2011.

are the same principle, the previous distinction shows two different aspects of the same principle. The right to answer the allegations made by the other party would be comprised in the wider concept of being heard.

It is important to say that the in the Spanish legal system is not just a procedural principle but also a constitutional right. According to the Spanish Constitutional Court, it is part of the right of defense set forth in article 24 of the Spanish Constitution.

Violation of any legal provision in which this principle is gathered can lead to the invalidity of the procedure because that infraction is at the same time a violation of a fundamental right (article 225 LEC). Parties must allege the violation in appeal and ultimately the complaint can be brought before the Constitutional Court. The court can also declare *ex officio* the procedure null and void.

LEC provides two situations in which the court's decision can be said *ex ante*: interim measures and the enforcement proceedings. Spanish Constitutional Court has confirmed that these regulations are constitutional because according to law regulations, the defendant is entitled to contest the decision once it's been issued[8]. On the contrary, any regulation that allows a court decision but does not accept the defendant's allegations *ex post*, would be unconstitutional.

2.4 The Principle of Equal Treatment

The principle of equal treatment is a fundamental principle in Spanish law, recognized by the Spanish Constitution. Although it's not clearly expressed in the text, the Spanish Constitutional Court has repeatedly said that it's part of the right to obtain effective protection from the judges and the courts, the right of defence and the right to a public trial with full guaranties[9].

The principle of equality means that the parties have the same rights, opportunities and procedural obligations to protect their interests in the procedure. This principle is specially respected in the declaratory proceedings in which parties are in the same situation. However, in the executive proceedings regulations there is a lack of equal treatment. The petitioner is placed in a higher position.

2.5 Parties Absence

If a party is absent from the procedure, consequences are different depending on the party. If the defendant is absent, a default judgement may be entered by the court. In any case, is important to say that absence cannot be considered as an acceptance of the claim nor an admission of the facts of the claim, except in the cases in which law sets forth otherwise (article 496.2 LEC).

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[8] See Judgement of the Spanish Constitutional Court number 218/1994, of 18 of July and Judgement of the Spanish Constitutional Court number 88/1995, of 6 of June.

[9] Judgements of the Spanish Constitutional Court No. 125/1995 of 24 July; No. 67/1999, of 26 April.

The defendant can appear before the court at any time of the procedure but he or she would have lost the opportunity to participate into the previous proceedings (article 499 LEC). However, this rule is not absolute. Regarding to evidence there is an exception. If the defendant has appeared in the first instance once evidence has already been proposed and admitted or straight into the second instance, as far as he or she has been declared in default for any reason not attributable to him or her, the defendant may request any taking of evidence in the second instance.

If the claimant doesn't attend the hearing, the case would be dismissed unless the defendant requests the court to go on with the proceedings.

2.6 Principle of Orality – Right to Oral Stage of Procedure, Principle of Written Form

The principle of orality has been recognized by the Spanish Constitution. Article 120.2 provides that "Proceedings shall be predominantly oral, especially in criminal cases".

Strictly, the principle of orality requires that court decisions have to be based only on oral proceedings. However, nowadays it's impossible to design a completely oral procedure. Orality must be always combined with the principle of written form[10]. General rule is that pleadings stage takes the written form while evidence is taken orally.

LEC designs two main declaratory proceedings: the ordinary proceedings (*juicio ordinario*) and the oral trials (*juicio verbal*). In ordinary proceedings, both the claim and the defendant's statement are written. On the other hand, in oral trials while the claim will be written, the defendant's statement will be made orally at the hearing.

In both proceedings, the evidence stage always takes place in a hearing. In ordinary proceedings, evidence will be proposed by the parties and admitted by the court at the preliminary hearing. Evidence will be taken later at the trial. In oral trials, evidence is proposed, admitted and taken at the hearing. However, LEC stands, as general rule, that all documents and expert witnesses reports must be presented with the claim or the defendant's statement otherwise they will be rejected by the court.

In ordinary proceedings once the evidence has been taken, the parties shall orally state their conclusions on the facts in question. Afterwards, the court will issue judgement. Oral judgements are forbidden. It's not clear in LEC if parties can state their conclusions at the end of an oral trial hearing[11]. While most of the legal doctrine has support this option, daily practice show us that most courts are against that interpretation.

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[10] BERZOSA FRANCOS, Los principios del proceso, Justicia: revista de derecho procesal, vol III, 1992, p. 609.

[11] MONTERO AROCA, Derecho Jurisdiccional II. Proceso Civil, Tirant lo Blanch, Valencia, 2014, p. 404.

2.7 Principle of Directness

The principle of directness is closely related to the principle of orality[12]. This principle means that evidence must be taken before the same judge that has to deliver judgement[13]. That's why in the Spanish procedural system the main objective of the hearing is to take evidence. The Civil Procedure Act is strict regarding this principle. According to article 137.4 LEC the infringement of the provisions of article 137 LEC shall determine the nullity of the procedures.

However, appellate courts may exceptionally take evidence. According to article 460 LEC parties can propose evidence when one of these situations occurs:

a) Evidence that has been unduly rejected in first instance, as long as the reversal of the decision dismissing such evidence has been attempted or the appropriate protest filed at the hearing.
b) Evidence proposed and admitted in the first instance which could not be taken for reasons not imputable to the applicant, not even as final proceedings.
c) Evidence referring to relevant facts for decision making in the case that it may have occurred after the time limit to issue a judgement in the first instance, or after such time limit, as long as in the latter case the party can prove he was aware of such evidence subsequently.
d) Documents referring to relevant facts dated subsequently to the claim or the response or even when they already existed before, when the party justifies not having known of their existence beforehand.
e) When the judgement has been made in default, the defendant that has been declared in default for any reason not attributable to him, can propose any taking of evidence he or she thinks important to his or her interests.

Under these circumstances a party may propose evidence in the written statement to lodge the appeal or to contest it. If the taking of evidence is admitted by the court a hearing shall be held within a month. The hearing shall follow the same proceedings provided for oral trials.

2.8 Principle of Public Hearing

As it's been said regarding the principle of directness, also the principle of public hearing (commonly known as principle of publicity) is closely related to the principle of orality. General rule in the Spanish procedural system (both civil and criminal) is that all hearings are public in the sense that everyone is entitled to assist the hearings. This principle as well as orality is recognized in article 120 of the Spanish Constitution. According to this article, "*Judicial proceedings shall be public, with the exceptions specified in the laws on procedure*".

[12] OROMÍ VALL-LLOVERA, El principio de inmediación como garantía constitución del proceso civil, in Principios y garantías procesales, Librería Bosch S.L., Barcelona, 2013, p. 205.
[13] BERZOSA FRANCOS, Los principios del proceso, Justicia: revista de derecho procesal, vol III, 1992, p. 613.

As the Constitution sets forth, procedural laws provide some exceptions. Article 138 LEC provides that hearings may be heard in closed session when the court believes that it's necessary for the protection of public order or national security. This measure can also be adopted when public hearings can affect the interest of minors, the protection of private lives of the parties or other rights and liberties. Finally, the court can also adopt this measure when due to the occurrence of special circumstances; publicity might damage the interests of justice.

2.9 Principle of Pre-trial Discovery

The principle of pre-trial discovery does not exist in the Spanish civil procedure law.

Articles 256 to 263 rules on preliminary proceedings (*diligencias preliminares*) which can be used to prepare a case. Before submitting the claim, parties can request the courts to provide them information or documents relevant for claim preparation. However, it's not a proceeding that can be used in any case. LEC provides a *numerus clausus* list of the information, documentation and circumstances which parties can request for preliminary proceedings.

According to article 256 LEC a trial can be prepared by:

"1st. An application for the individual against whom the claim may be lodged to declare under oath or promise to tell the truth on a fact concerning his capacity, representation or legal competency required to be known for the case, or to exhibit the documents proving said capacity, representation or legal competence.

2nd. An application for the individual who is to be sued to exhibit the object in his possession that shall be referred to in the trial.

3rd. An application filled-out by an individual considering himself to be an heir, co-heir or legatee for the exhibition of the deed of last shall of the predecessor in title of inheritance or legacy by whoever has the deed in his possession.

4th. An application presented by a partner or a joint owner for the exhibition of documents and accounts of the company or condominium, directed to the latter or to the consortium or joint owner who has those documents in his possession.

5th. An application of the individual considering himself damaged by an event that could be covered by a civil liability insurance for the exhibition of the insurance contract by whomever has the possession thereof.

5th bis. An application for medical records addressed to the health centre or the professional having custody of said records, in conditions and with the content established by the law.

6th. By an application by whomever intends to initiate legal action for the defense of the collective interests of consumers and users with a view to specifying the members of the group of aggrieved parties when, not having been determined, it can easily be determined. To this end, the court shall take appropriate measures to verify the members of the group, in accordance of the case and the details provided by the applicant, including a request the defendant to cooperate in said determination.

7th. An application formulated by the party intending to bring legal action for infringement of a right of industrial or intellectual property committed through acts carried out at a commercial level, for proceedings to obtain details on the origin and distribution networks of the goods or services infringing the right of intellectual or industrial property […].

8th. An application by the party intending to bring legal action for infringement of a right of industrial or intellectual property committed through acts carried out at a commercial level for the exhibition of the bank, financial, commercial or customs documents issued within a specific period of time and assumed to be in possession of whom may be sued as liable. […].

9th. An application for the proceedings and verifications established by the relevant special laws for the protection of certain specific rights".

The aim of preliminary proceedings is to ask to the future counterparty or even to a third person for documentation or information need to prepare the claim or, in a previous stage, to determine if a successful lawsuit may be filled or such an option should be rejected.

3 General Principles of Evidence Taking

3.1 Relevance of Material Truth

Traditionally it's been said that the purpose of evidence is to seek for the truth[14]. Traditional legal doctrine has distinguished between material truth and formal truth. While material truth would be the aim to reach in criminal procedure, civil procedure would only look for the formal truth. The concept of formal truth is closely related to the principle of free disposition. The court has to establish which party is right taking into account the facts introduced by the parties and the proofs that have been taken at the parties' request.

As it's been previously stated, parties have to allege all the relevant facts at their first writs (claim and statement of defence). The court is not allowed to introduce any facts. Only facts that have occurred or that have been known later, will be able to be alleged at a later stage. Also evidence has to be proposed by the parties. The court is not entitled to propose or to take any evidence *ex officio* in all dispositive cases. The judge is only

[14] MONTERO AROCA, Derecho Jurisdiccional II. Proceso Civil, Tirant lo Blanch, València, 2014, p. 250-251.

entitled to tell the parties that in his or her opinion evidence that has been proposed is not enough to proof the facts at issue.

3.2 Proof of Facts and Types of Evidence

General rule is that all kind of facts can be proved thought any means of evidence. However there are some facts that, because of their nature, will be usually proven thought a specific mean of evidence. Under Spanish law, all means of evidence have the same value but practice shows us that this principle is not always absolute. Attending to the principle of free assessment of evidence, courts usually consider that a specific mean of evidence is often more appropriate to prove a particular fact (i.e. usually the most suitable way to prove the existence of a contract is a document, better than a testimony).

Anyway, there are certain procedures in which relevant facts that will allow parties to bring the case before the court have to be proved though some specific documents. It's a procedural requirement that parties must follow if they want to use that exceptional procedure. Otherwise the process should be carried out thought one of the ordinary declaratory procedures in which they will be able to prove the facts thought any mean of evidence. These exceptional procedures are:

- Enforcement actions based on non-judicial or arbitral titles. According to article 517 LEC only some documents are suitable to be used to initiate this procedure.
- Small claims procedure. According to article 812 LEC small claims procedure can be used for whoever seeks payment of net, specific, due and enforceable monetary debt that can be proven by: a) Any documents which are signed by the debtor or contain his seal, stamp or mark or any other physical or electronic sign, b) Any invoices, delivery notes, certifications, telegrams, telefaxes or any other documents which, even if created unilaterally by the creditor, are commonly used to prove credits and debts in relationships of the nature that appear to exist between creditor and debtor.
- Negotiable instruments collection proceedings (for cheques or bills of exchange). According to article 819 LEC, the original cheque or bill of exchange has to be presented at the time of the filing[15].

3.3 Unlawful Evidence

In the Spanish civil procedural system there isn't a law based distinction between "illegally obtained evidence" and "illegal evidence". Unlawful evidence is ruled both in article 11 of the Law 1/1985, of the Judiciary (*Ley Orgánica del Poder Judicial – LOPJ*) and article 287 LEC. According to article 11 of Law 1/1985, evidence obtained violating any fundamental right won't have any effect in the proceedings. At the same time, article 287 LEC defines as "illegal evidence[16]" evidence that has violated any fundamental right when it is obtained or in the origin of evidence.

[15] Judgement of the Supreme Court No. 586/2013 of 8 October. The original document has to be attached to the claim otherwise it will be dismissed.

[16] "Illegal evidence" is the translation used at the translation made by the Ministry of Justice.

However, a relevant part of the legal doctrine has distinguished between "illegal evidence" and "irregular evidence"[17]. The distinction is made taking in account that the Spanish Constitution provides two different kinds of fundamental rights: the "material fundamental rights" (and the "procedural fundamental rights", ruled on article 24. If the violation affects a material right then the evidence is illegal. On the contrary, if the infraction has to do with a procedural right, then evidence is "irregular".

As soon as a party knows that evidence has been obtained violating a fundamental right, he/she must allege so before the court. The consequences of the declaration of illegality by the court can be slightly different depending on the status of proceedings. Usually, the question arises when evidence is proposed at the preliminary hearing. In this case, the court will never admit the illegal evidence (article 283 LEC[18]). If the violation is alleged later, once evidence has been admitted, the consequence will be the one provided on article 11 of the Law 1/1985, this is, it won't have any effect on the proceedings. In any case, according to article 287 LEC, the court will allow both parties to propose and take evidence intended to proof the legality or illegality of evidence.

If a party alleges a violation of a procedural fundamental right, the procedure to allege and assess illegality is processed as a case of nullity. According to article 225 LEC and 238 of the Law 1/1985, procedural actions shall be fully null "when essential rules of the procedure are disregarded, as long as a lack of proper defense may have come out as a result thereof". To apply this rule to irregular evidence, it has to be assumed that, first, the violated procedural rule has to do with evidence and, second, that the violation must cause at the same time a lack of defense. Otherwise, the violation is irrelevant. At the same time, it's important to take into account that the violation has to be alleged as soon as it's known, otherwise the party affected by the infraction won't be able to submit the question to the court later.

3.4 Free Assessment of Evidence

Prior to rule how evidence should be assessed, Spanish Civil Procedure Act establishes what needs to be proved. According to article 281 LEC, only those facts in which parties haven't fully agreed about its existence must be proved. There is a specific moment at the preliminary hearing in which parties must say and agree which are the facts at issue. The court will only admit evidence lead to prove those facts. Other evidence will be rejected.

[17] ARMENTA DEU, La prueba ilícita (un estudio comparado), Marcial Pons 2006, p. 46-47.

[18] A part of the legal doctrine distinguishes between "illegal evidence" which would be referred to any violation of law, including ordinary law and fundamental rights, according to article 283.3 LEC, and "illegal evidence" in the sense of article 286 LEC referred only to the violation of fundamental rights. See ANDINO LÓPEZ, El secreto professional del abogado en el proceso civil, J.M. Bosch, 2014, p. 189. The main part of the legal doctrine thinks that the concept of "illegal evidence" is limited to the contents of article 11 Law 1/1985 and article 286 LEC. See PICO JUNOY, La prueba en la nueva Ley de Enjuiciamiento Civil, Revista Iuris, No. 36, 2000, p. 39; ABEL LLUCH, Derecho probatorio, J. M. Bosch, 2012, p. 285.

On the contrary, parties cannot make any decision about how a fact has to be proved or how an evidence has to be assessed.

Regarding to evidence assessment, Spanish Civil Procedure Act sets forth a mixed system in which the principle of free assessment of evidence operates, but at the same time there are some specific means of evidence whose assessment is ruled by law.

LEC doesn't use the expression "free assessment of evidence" but the expression "assessment according to the rules of sound criticism[19]," although the first one is commonly used in practice by legal doctrine and the courts.

When the law allows the court to freely assess evidence the judge uses the lessons of experience that he or she has acquired in his or her daily life. On the contrary, when assessment of evidence is ruled by law, is the own law the one that lays down a specific lesson of experience that has to be applied.

According to article 316 LEC, harmful facts that have been recognized as being true by a party will be constructed as such at judgement as long as they don't contradict conclusions reached through other evidence. Article 319 LEC sets forth that some public documents previously listed in article 317 LEC, shall product full proof of facts documented by them, as well as the date in which those documents were produced and the identity of the parties In regards to private documents, article 326 LEC extends the same effect provided for public documents to private ones where authenticity is no contested by the party which they may harm.

3.5 Burden of Proof

The concept of burden of proof in Spanish procedural system is referred to whoever has to assume the consequences of the lack of evidence to prove a fact[20]. According to article 217 LEC, the plaintiff or the counterclaim defendant have to prove the facts from which the legal effect of the causes of action of the claim and the counterclaim are ordinary inferred. On the contrary, it corresponds to the defendant and the counterclaim plaintiff to prove the facts which preclude, extinguish or enervate the legal efficacy of the facts alleged by the plaintiff.

However, as legal doctrine has established, these rules sometimes produce unsatisfactory consequences[21]. Which is why LEC has added two extra rules: to apply these provisions the court has also to take into account the availability of evidence and the ease of proof[22].

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[19] Regarding the expression used by the law see MONTERO AROCA, *Derecho jurisdiccional II. Proceso Civil, Tirant lo Blanch, 2013,* p. 276.
[20] Judgement of the Supreme Court No. 424/2008 of 19 May; No 513/2013 of 19 July; No. 586/2013 of 8 October; 155/2014, 19 March.
[21] ORMAZÁBAL SÁNCHEZ, Carga de la prueba y sociedad de riesgo, Marcial Pons, 2004, p. 9.
[22] MONTERO AROCA, La prueba en el proceso civil, Civitas, 2012.

As it's been stated before, only the facts at issue have to be proved, as well as custom and foreign law. Facts which the parties fully agree to, as well as, well known facts are exempt from evidence.

Spanish Civil Procedural Code recognizes the principle of *iura novit curia* in its article 218.1.II. The court has to resolve in accordance with the rules applicable to the case, even if they have not been correctly mentioned or alleged by the parties.

4 Means of Proof

4.1 Different Means of Proof Regulated in the Spanish Law

Means of proof are listed on article 299 LEC. According to this article the means of proof are:

a) Questioning to the parties. Parties may be questioned at the trial about facts they know as far as this facts have something to do with the matter of the action (article 301.1 LEC).
b) Public documents. While LEC lists those documents that are considered public documents[23], article 1216 of the Civil Code defines as public instruments those documents that are authorised by a Notary or a competent public employee with the legal solemnities required by law.
c) Private documents. Private documents are all those that cannot be defined as public documents.
d) Expert's opinions. Parties can use this means of proof when scientific, artistic technical or practical knowledge is necessary to ascertain any facts that are relevant to the matter of the action (article 335 LEC).
e) Examination of evidence (in Spanish *reconocimiento judicial*). This means of proof can be used when for the purposes of clarification and evaluation of the facts, it is necessary for the Court to examine a certain place, object or individual in person (article 353 LEC).
f) Questioning witnesses. Parties may request the declaration of individuals regarding facts that have something to do with the matter of the action.

As means of proof are also admitted, any means used to record words, sounds and images, as well as any other instrument that allows words, data and mathematical

[23] According to article 317 LEC public documents are the following:
a) Court rulings and procedures of all kinds and any attestations thereof Court Clerks may issue.
b) Documents duly authorised by Notaries public under the law.
c) Documents executed with the involvement of Registered Commercial Notaries any certifications of transactions in which they may have intervened which have been issued by them with reference to the Registry Book they keep in accordance with the law.
d) Certifications of registry entries issued by Property and Company Registrars.
e) Documents issued by civil servants legally empowered to certify matters lying within the scope of their functions.
f) Documents referring to archives and records belonging to the bodies of the State, the public administrations or any other public law entities issued by civil servants duly empowered to certify the provisions and actions of such bodies, administrations or entities.

operations to be carried out for accounting purposes or any other purposes[24]. The inclusion of this latest mean of proof to the list has been criticised by legal doctrine who thinks that is not a real mean of proof but a source of proof[25]. While a source of proof is something that takes place out of the proceedings, a mean of proof is the way that parties have to bring these sources before the court to be considered[26]. Following this position, means of proof will be always *numerus clausus* because they refer to a procedural activity that has to be ruled. On the contrary sources of proof cannot be listed.

4.2 Parties' Testimony

As it's been stated in the previous paragraph, Spanish Civil Procedure Act, sets forth the parties testimony as a specific mean of evidence.

A party can request the court to question the adversary party as well as a joint litigant as far as there is a dispute or a conflict of interest between them. A party may not request the court to question him or herself.

In contrast with Spanish criminal procedure, although the Civil Procedure Act doesn't specifically provide the obligation of the parties to declare, formally they are. The LEC sets forth negative consequences of the refusal regarding the assessment of that evidence. According to article 307 LEC if a party refuses to testify, the court will warn him or her that the facts referred to in the questions can be considered as true as far as the person called to declare has been personally involved in them and their ascertainment as being true may turn out to be fully or partially harmful to him or her. Also article 304 LEC provides a similar consequence for those cases in which a party that has been called to testify fails to appear at the trial. Also in this case the court can consider as true those facts in which the party has been personally involved as far as they are harmful to him or her. It's important to take into account that the law uses the word "can" that means that these consequences set forth in articles 304 and 307 LEC can be applied or not by the court. General rule regarding the assessment of this mean of evidence is that parties' statements have to be assessed according to rules of sound criticism.

On the contrary, as it's been previously stated it's a compulsory rule the one provided in article 316.1 LEC. All harmful facts recognized by a party will be considered as true.

In contrast with witnesses, parties don't declare under oath. Perjury, ruled on article 458 of the Criminal Code, is only referred to witnesses but not to the parties.

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[24] See ORMAZÁBAL SÁNCHEZ, La prueba documental y los medios e instrumentos idóneos para reproducir imágenes o sonido o para archivar y conocer datos, La Ley, Las Rozas, 2000.
[25] GÓMEZ COLOMER, *Derecho jurisdiccional II. Proceso Civil, Tirant lo Blanch, 2013*, p.339.
[26] MONTERO AROCA, *Derecho jurisdiccional II. Proceso Civil, Tirant lo Blanch, 2013*, p.267.

4.3 Written Evidence, Documents

According to MONTERO, a document is any object in which a statement of intention from one or more people is written, the expression of an idea, a thought, knowledge or an experience[27]. As seen, the definition provides the idea that a document has to be something written. However, in practice also pictures are commonly considered as documents as far as they are printed on a paper.

As it's been previously stated Spanish procedural system distinguishes between public and private documents. In general, public documents are those authorized by a Notary or a competent public employee with the legal solemnities required by law (article 1216 of the Civil Code). At the same time, Civil Procedure Act, specifies which documents have to be considered as public in terms of evidence, listing them in article 317 LEC. Public documents provide full proof of the act documented by them, as well as the date in which those documents where produced, and the identity of any person who intervenes in them.

A special kind of public documents are foreign public documents. These documents have the same probative force than national public documents as far as they are recognized as such by virtue of international treaties or conventions.

On the other hand, private documents are those that cannot be defined as public documents. However, according to article 326 LEC, private documents also provide full proof of the facts in the same terms than public documents if their authenticity is not contested by the party which they may harm.

Article 3.6 of the Electronic Signature Act, defines an electronic document as any type of information in electronic form, stored on an electronic device according to a certain format and capable to be identified. For purposes of evidence in proceedings, these documents can be considered as private or public depending on the characteristics of authenticity they have.

In general, all documents have to be annexed to the first writs of the parties otherwise they will be rejected. Only documents that refer to new facts in the terms of article 286 LEC, or those documents that have been produced or known after the beginning of the procedure can be brought before the court at a later point.

Once documents are admitted by the court, they will be able to produce full evidence effects according to the rules of assessment. The court can read and assess the documents on its own. The Spanish Civil Procedural Act doesn't require reading them at the trial or hearing to award full effectiveness.

[27] MONTERO AROCA, *Derecho jurisdiccional II. Proceso Civil, Tirant lo Blanch, 2013,* p. 298.

4.4 Documents Exhibition Duty

Both parties, and any person who is not involved with the proceedings, who are in possession of a document relevant at the issue have the duty to exhibit it at court if they are requested to do so.

However, consequences of the failure to show the documents are different depending on who is requested. If a party fails to exhibit a document without any justification, according to article 329 LEC, the court may, taking into consideration the other evidence, attribute probative value to the non-certified copy filed by the applicant of the exhibition or to the contents that this party claims it has.

If the document is in possession of someone who is not involved with the proceedings, he or she also has the obligation to exhibit it because of the general obligation to cooperate with justice. The Civil Procedure Act doesn't rule on the consequences of the refusal. However, this behaviour could be considered as a crime of disobedience to authority[28].

4.5 Witnesses

4.5.1 Duty to Declare

According to article 361 LEC all individuals are suitable to declare as witnesses except those who are of permanent unsound mind or unable to use their sense regarding the facts they should testify on. Children under 14 y.o. will only declare when the court concludes they possess the necessary capacity of judgement to know and declare truthfully.

People described in the previous paragraph are suitable to declare as witnesses but not all of them are obliged to do so.

Witnesses can be summoned by the court or can be called and brought to the hearing under the parties' responsibility. Parties must request the court to summon a specific witness at the preliminary hearing in the ordinary proceedings (*juicio ordinario*) or, at oral trials (*juicio verbal*) within the three day time limit since they are summoned for the hearing. Otherwise, the court assumes that the witness will be called and brought by the party. Only those witnesses that are summoned by the court have the duty to appear at the hearing. If they don't appear, the court will fine them. If they fail to appear for a second time without any previous excuse, the witness may be accused of committing the crime of contempt of court. However, it must be said that in practice these sanctions are applied only when the refusal to appear at the hearing is reiterated, after having been summoned two or three times.

[28] RUIZ DE LA FUENTE, El principio dispositivo y las intimaciones judiciales en la prueba, in Principios y garantías procesales, Librería Bosch, S.L., Barcelona, 2013, p. 205.

There are also some people that because of their profession are free to refuse to declare although they still have the duty to appear at the hearing. Once there, they have to inform to the court that they have the duty to maintain silence. After that, the court will consider the grounds for the refusal and decide. The LEC doesn't include a list of professionals that can refuse to declare adducing the duty to keep silent. Among this professionals are lawyers, priests, journalists, psychologists and doctors. The duty to keep silent of each of these professionals is ruled on their own professional regulations (i.e. for attorneys: Estatuto General de la Abogacía Española).

State officials can refuse to declare when they are questioned about a state secret. In these cases, the judge may ask the competent authority to certify that the facts at issue are classified as such. Later, the Court will attach the document to the records, pointing out the specific facts that are covered by the official secret.

All witnesses that aren't under age (18 y.o.) declare under oath. Perjury is ruled as a crime in the Criminal Code, punished with imprisonment from six months up to three years and a fine from three months up to twelve months, depending on the seriousness of the crime. The Spanish Civil Procedure Code, as well as the Criminal Procedure Code, doesn't provide the consequences of the refusal to swear. However this refusal could be considered as contempt n of court as far as it's a legal duty to testify under oath.

4.5.2 Powers of the Parties and the Court in the Process of Questioning

Article 368 LEC sets forth some limitations to questioning. Questions shall be formulated with due clarity and precision, without including any valuation. The court will only admit those questions that have to do with the facts at issue. Questions that are not related with the personal knowledge of the witness won't be admitted either.

Witnesses can be questioned by both parties. According to the proceedings, the party who has called a witness will start the examination. Right after, the opposing party will be able to cross examine the witness.

The court can also question the witness in order to obtain clarifications and additions to the answers that the witnesses have given to the questions of the parties' attorneys. However, it has to be said that although the law allows the court to question the witnesses, this is a right that courts hardly ever use because it's thought that it can affect the principle of free disposition of the parties.

4.5.3 Ways to Produce Testimony

The general rule is that all witnesses must declare orally at the trial. However the Spanish Civil Procedure Act provides some exceptions to this rule. When facts that have to be proven have to do with legal persons and public entities activities but it isn't possible or necessary the testimony of a specific person, the requesting party can propose that the legal person or entity respond about the facts in writing within 10 days

previous to the trial. This request must be done at the preliminary hearing in the ordinary proceedings (*juicio ordinario*) or within the time limit of three days following the reception of the summons in the oral trials (*juicio verbal*).

Also legal persons and public entities have the duty to declare, otherwise, the court will be able to fine and take action for disobeying the authority against the person personally responsible for the omission.

4.5.4 Evidence Assessment

In the field of evidence assessment, there aren't any particular rules. As it's been previously said, the general rule of free assessment of evidence is applied.

4.6 Expert Witnesses

The Spanish Civil Procedure Code considers expert witnesses as a specific means of proof, different to witnesses. Its aim is to provide the court with scientific, artistic, technical or practical knowledge that is necessary to ascertain any facts relevant to the matter.

As other means of evidence that have been described above, this mean has to be proposed by the parties. Spanish procedural law distinguishes between the expert witness report and the testimony of the expert witness at the trial or hearing. While the report is always necessary, the testimony of the expert witness is up to the decision of the delivering party. According to article 347 LEC, the delivering party can propose the expert witness declaration to: a) complete explanations given at the report; b) reply questions or objections related to the method, premises, conclusions or other aspects of his or her opinion; c) be questioned about other connected issues to those analyzed in the report; d) make a critical evaluation of the opinion concerned by the expert of the counter-party.

Expert witnesses can be appointed by a party or by the court at a party's petition. Usually, expert witnesses are appointed by the parties. In this case, the report has to be submitted with the claim or the statement of defense or later if the party justifies that she or he hasn't had time enough to prepare it. In any case, the report has to be provided five days before the date of the preliminary hearing. In oral trial proceedings, the claimant will have to provide the report five days in advance of the hearing but the defendant will be able to submit it at the hearing.

If the expert has to be appointed by the court, parties will have to request the appointment in their first writs. In oral trial proceedings, in which the statement of defense is orally made at the hearing, the defendant has to request the court to appoint the expert at least ten days in advance of the date of the hearing. The expert is appointed from the ones included in a list prepared by various professional associations of similar entities, every January.

At the hearing both parties as well as the court can examine the expert. However, the court can ask about the contents of the report but it won't be able to order *ex officio* to extent it.

Expert witness expenses are paid by the party who appoints the expert or who requests the court's appointment. If both parties apply to the court to appoint an expert, expenses have to be paid in halves.

5 The Taking of Evidence

5.1 Time and Form to Produce Evidence

As it's been previously stated, there is a specific moment in which parties have to bring to the process the different means of proof. All documents and reports from expert witnesses appointed by the parties have to be submitted with the claim or the statement of defense. When the parties allege at the claim or at the statement of defense that a report from an expert witness can't be attached to those writs, they will be able to bring them later, five days before the date of the preliminary hearing. Parties can also request the court to appoint an expert witness at the preliminary hearing. Other means of proof will have to be proposed at the preliminary hearing. Any violation of these rules involves the application of a rule of preclusion.

At the preliminary hearing, parties propose evidence they would like to be taken later at the trial. Next, the court decides which means of proof have to be admitted, rejecting those means that are useless, don't have anything to do with the facts at issue or are unlawful. Parties may appeal for reversal the decision before the court who can reconsider its decision.

Evidence is taken at the trial. Evidence that can't be taken at the trial because its characteristics (i.e. taking evidence by the court outside the court's buildings), has to be taken before the trial day. Afterwards, only evidence that hasn't been able to be taken at the trial for reasons not imputable to the party that has proposed it, will be able to be taken within a time limit of twenty days after the trial (final proceedings).

Spanish Civil Procedure Code establishes a specific order to take evidence. According to article 300 LEC, evidence has to be taken in the following order:
1st. Questioning the parties.
2nd. Questioning witnesses.
3rd. Experts' statements about their opinions.
4th. Taking evidence by the court, where it doesn't have to be conducted outside the court's premises.
5th. Reproduction before de court of any words, images and sounds captures thought filming, recording and other similar instruments.

In the same category, those sources of proof that have been proposed by the claimant will be taken first, and later, those that have been requested by the defendant.

5.2 Measures to Seizure Evidence and Taking Evidence in Advance

In those cases in which parties fear that evidence won't be able to be taken ordinarily, they are be able to request the court either to seize evidence with the aim to take it later at the trial or to take evidence in advance when seizure isn't enough to assure evidence taking. LEC doesn't provide a list of cases in which evidence can be seized or taken in advance.

The party requesting specific evidence to be taken in advance must justify the reason why it's not possible to take it later. Regarding the seizure of evidence the party will have to justify that before the commencement or during the course of the proceedings, an event may occur which can destroy or alter physical objects relevant to evidence taking.

Questions related to witnesses and expert witnesses have been previously answered in sections 4.5 and 4.6.

5.3 The Hearing

As it's been previously stated, the general rule is that evidence has to be taken at the hearing. However, whenever due to the nature of evidence or the circumstances, a specific evidence won't be able to be taken at the trial, the law provides that it has to be taken in advance. Only exceptionally, evidence will be able to be taken later, within a 20 day time limit, as final proceedings. According to article 435 LEC, evidence can be taken after the trial if it hasn't been taken for a cause not imputable to the party that has proposed it or if it's new or newly known evidence that can be taken in accordance with article 286 LEC. The general rule and the limitation of exceptions is a clear manifestation of the principle of directness.

Another representation of the principle of directness is that evidence has to be taken before the same judge that is going to issue judgement. If for any reason a judge cannot issue judgement, the new competent judge has to order the repetition of the taking of evidence. However, the previous rule is not absolute and fails when evidence has to be taken outside the court's territorial district. All procedural activity that has to be carried out outside its territorial district has to be done through judicial assistance (articles 169 to 177 LEC).

6 Costs and Language

6.1 Costs

6.1.1 General Rule Regarding the Payment of Costs

According to article 241 LEC each party has to pay for the costs and expenses of the proceedings as they happen. However, most of these costs can be reimbursed to the

party that obtains a favorable judgement. Legal costs can be referred to in the following items:
1) Attorney's fees and technical representation. The payment of these expenses as well as other amounts that have to be paid to other professionals who are not subject to rates or tariffs (i.e. expert witnesses) is limited to one third of the amount of the claim, except when the court declares the recklessness of the litigant ordered to pay the costs.
2) The placement of advertisements or public notices.
3) Deposits required to lodge appeals.
4) Experts' fees and any other payments that have to be paid to other people involved in the proceedings. This category includes witness' compensations.
5) Copies, certificates, notes, affidavits or any other documents that can be requested in accordance with the law.
6) Tariffs that have to be paid as result of the proceedings.
7) Legal fees.

6.1.2 Compensation for Appearance of a Witness Before the Court

Witnesses can request a compensation for their appearance before the court. However, although this right is ruled by Civil Procedure Code, witnesses hardly ever ask for compensation, except when they have incurred in a big expenditure to attend to the court's summons (i.e. flight o train tickets). Sometimes this is due to the ignorance of the rule by the witness and others because the amount of the expense is not worth the time needed to request the compensation.

According to article 375 LEC, the court clerk will decide the amount of the compensation by taking into account the "data and the circumstances which have contributed". As it's shown, Civil Procedure Code doesn't provide a list of the expenses that can be refunded or damages that can be compensated. The final decision is taken by the court's clerk in accordance to the circumstances. In practice, usually it is requested that the witness justify damages, such as loss of work time or any other and to show the cash tickets or bills that justify the expenses previously incurred into in order to attend court.

Compensation has first to be paid by the party who has appointed the witness, notwithstanding later decisions regarding costs payment. If the party refuses to pay, the witness will be able to enforce the court's clerk decision.

When an expert witness is appointed by the court at a party's request, the requesting party will have to pay the expert's fees in advance, notwithstanding, again, the court's decision regarding the payment of costs. Generally, the expert doesn't start the job if fees aren't paid in advance. The consequence of the default is then preclusion.

6.2 Language and Translation

6.2.1 Translation in Oral Proceedings

Parties and witnesses can use before the court any of the Spanish official languages: Spanish, Catalan, Basque and Galician. If a party or a witness doesn't understand Spanish or any other official language an interpreter will be appointed by the court. The interpreter can be a professional but also the law entitles the judge to appoint any person who knows the foreign language. The translator has to promise or swear that the translation is true to the original, under the penalty of committing perjury. The same rule is applied when the witness declares through videoconference.

The costs of interpretation are paid by the party to whom the translation benefits.

6.2.2 Translation of Documents Written in Foreign Languages

All documents that have to be attached to the records have to be written or translated to Spanish or any other official language. The translation can be done by an official translator but also the document can be privately translated by the party itself or any other translator. If it's privately translated, the counter-party can contest the translation in the term of five days. In this case, the clerk will appoint an official translator that will translate the document again. Expenses of the translation will have to be paid by the counter-party if the translation is substantially the same than the private translation. On the contrary, if there is a relevant difference, the costs are paid by the party who has submitted the document to the court.

7 International Cooperation in the Taking of Evidence

7.1 International Cooperation Regulations

As a consequence of the particularities of the case, it could be necessary to bring before the court as evidence, for example, a testimony who lives in a foreign country or a document held by a third person who currently resides abroad. According to article 177 LEC it is possible to request international cooperation to another country in accordance with the Community legislation or the International Treaties in which Spain is a party. Otherwise the national legislation is applied. In that case, the taking of evidence abroad depends on the determination of the requested country. In the absence of any international legislation, Spain accepts to cooperate with the judicial authorities of foreign countries in the basis of the reciprocity principle.

When evidence has to be taken in a country which is a member of the European Community, the Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters is applied.

Spain accepts requests and communications pursuant to the Regulation that are drawn up in Spanish or Portuguese. For the time being, only postal transmission is accepted by the Spanish authorities.

Spain is also a signatory party of some multilateral and regional agreements:

- The Hague Convention on the taking of evidence abroad in civil or commercial matters of 18 March 1970.
- The Hague Convention on Civil Procedure of 1 March 1954.
- Inter-american Convention on Letters Rogatory of 30 January 1975 (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Spain, United States, Uruguay and Venezuela).

Spain has also signed some bilateral agreements: i.e.:

- Beijing Convention on Judicial co-operation in Civil or Commercial matters between Spain and China of 2 May 1992.
- Madrid Convention on Judicial Co-operation in Civil matters between Spain and USSR of 26 October 1990.
- Madrid Convention on Judicial Co-operation in Civil, Commercial and Administrative matters between Spain and Morocco of 30 May 1997.
- Madrid Convention on Judicial Co-operation in Civil matters between Spain and Algeria of 24 February 2005.

Spain has also signed bilateral agreements on Civil Judicial Co-operation matters with Thailand, Brazil and Tunisia.

7.2 Competent Courts for the Taking of Evidence

The Spanish competent central body according to article 3 (3) of the Council Regulation (EC) No. 1206/2001 is the "Subdirección General de Cooperación Judicial Internacional" in the Ministry of Justice[29] (Directorate for International Judicial Cooperation)[30].

The competent courts to perform the taking of evidence in accordance with the Council Regulation 1206/2001, are the Courts of First Instance from judicial district in which the taking of evidence has to be done.

[29] http://www.mjusticia.gob.es/cs/Satellite/es/1215197995954/Tematica_C/1215198002352/Detalle.html.

[30] The official translation to English can be found at the European Judicial Atlas in Civil Matters http://ec.europa.eu/justice_home/judicialatlascivil/html/te_centralbody_es_en.htm.

Part II – Synoptical Presentation

1 Synoptic Tables

1.1 Ordinary Proceedings' Synoptic Table

Phase #	**Name of the Phase** **Name of the Phase in National Language**	**Responsible Subject**	**Duties of the Responsible Subject (related only to Evidence) and Consequences of their Breach**	**Rights (related only to Evidence) of the Responsible Subject**
1	Claim (*demanda*)	Plaintiff (*demandante*)	Documents and expert witnesses reports have to be annexed to the first writ, otherwise they will be rejected by the court.	
2	Admision of the claim *(Admisión a trámite de la demanda)* (article 404 LEC)	The court of first instance clerk and the judge *(Secretario Judicial y Juez de Primera Instancia)*		
3a	Statement of defence *(Contestación a la demanda)* (article 405 LEC)	Defendant *(demandado)*	Documents and expert witnesses reports have to be annexed to the first writ, otherwise they will be rejected by the court.	
3b	Counterclaim *(Reconvención)* (article 406 LEC)	Defendant *(demandado reconviniente)*	Documents and expert witnesses reports related to the facts alleged at the counterclaim have to be annexed to this writ, otherwise a rule of preclusion is applied.	
3c	Statement of defence to the counterclaim *(Contestación a la reconvención)* (article 406 LEC)	Plaintiff	Documents and expert witnesses reports related to the facts alleged at the counterclaim have to be annexed to this writ, otherwise a rule of preclusion is applied.	

3d	Declinatory action of jurisdiction or competence *(Declinatoria)*	Defendant	The writ of declinatory plea has to be accompanied of any documents or principles of evidence in which is grounded.	
4	Preliminary hearing (audiencia previa). Contents:	The parties and the court		
4a	Conciliation and mediation (article 415 LEC)	The parties and the court		
4b	Examination and decision on procedural issues (articles 416 to 425 LEC)	The parties and the court		
4c	Additional and clarifying pleas *(alegaciones complementarias)* (Article 426 LEC)	The parties and the court		Parties may submit at the hearing documents and opinions that can be justified on the basis of additional pleas, rectifications, petitions, additions and new facts.
4d	Stance of the parties with regard to the documents submitted (*posicionamiento de las partes en relación con los documentos)* (art. 427 LEC)	The parties and the court	Each party shall sets forth its stance with regard to the documents that have been submitted by the other party up to the moment, stating whether they admit or recognize them, or whether they propose the taking of evidence on their authenticity.	
4e	Establishing the facts at issue (article 428 LEC)	The parties and the court	It's a very relevant phase regarding evidence taking because the court will only admit evidence related to the facts at issue previously established.	
4f	Evidence proposal (article 429 LEC)	Plaintiff and defendant	Parties have to propose evidence they want to be taken, otherwise a rule of preclusion will be applied. If they request the declaration of a witness they have to tell the judge if the witness has to be summoned by the court or if the declaration has to be done through videoconference or using judicial assistance or international cooperation from another court.	Parties can request the opposite party or thirds to show them any documents the have.
4g	Evidence admission (article 429 LEC)	The court's clerk	If the parties don't agree with the court decision on evidence admission, they	Both the plaintiff and the defendant can appeal for reversal if they don't

			have to appeal for reversal once the decision has been orally delivered, otherwise, they won't be allowed to do so later. If appeal is denied the appealing party should protest the decision with a view to enforcing their right in the second instance.	agree with the court's decision regarding the evidence admission.
4h	Setting a date for the trial (article 429 LEC)	The court		
5	Trial (article 431 LEC). Contents:			
5a	Evidence taking	Plaintiff, defendant and the court	Parties, witnesses and experts are heard by the court. Witnesses and experts have the duty to appear before the court. If a party fails to appear, the court can consider some harmful facts as true (art. 304 LEC).	Parties can question and cross examine opposite parties, witnesses and experts.
5b	Oral conclusions on the facts at issue (article 433 LEC)	Plaintiff and defendant	Parties have to summarize evidence taken to support the facts at issue.	
6	Eventually, final proceedings (article 435 LEC)	Plaintiff and defendant	The taking of evidence as final proceedings will take place when: a) it wasn't taken at the trial due to a cause not imputable to the requesting party; b) evidence has to do with facts that have been recently known. The petition has to be done within a time limit of five days, before judgement is issued. However, it is usually done at the end of the trial.	
7	Judgement	The court	Judgement has to record the facts and evidence taken to proof the facts at issue (article 209 LEC).	
8	Appeal *(recurso de apelación)* (articles 457 to 467 LEC)	The parties, the court of first instance and the court of appeals		
8a	Lodging the appeal *(interposición del recurso de apelación)*	The losing party	Within the time limit of 20 days. Only documents described on article 270 LEC (documents issued after or whose existence has been known after the trial) can be attached to the writ.	Parties can propose the taking of evidence when: a) it has been unduly rejected by the court; b) evidence was admitted but it couldn't have been taken for reasons not imputable to the requesting party; c)

				evidence related with facts known after the end of the trial.
8b	Admission of the appeal writ *(admisión a trámite del recurso de apelación)*	The first instance court clerk		
8c	Written statement contesting the appeal *(escrito de oposición al recurso de apelación)*	The winner party	Idem to 8a	Idem to 8a The appellee party can do the allegations he or she considers appropriate regarding the admissibility of any document or evidence referred at the appeal writ.
8d	The records are send to the court of appeals (*remisión de los autos)*	The first instance court clerk		
8e	Decision regarding the admission of evidence *(admisión de la prueba)*	The court of appeals		
8f	Hearing *(vista)*		Eventually, only when the taking of evidence has been accepted. The purpose of the hearing is to take the evidence and later, parties are able to summarize evidence that has been taken.	
8g	Judgement *(sentencia)*		Idem to 7	
9	Appeal for cassation *(recurso de casación)*	The parties, the appeal court, the Supreme Court	There aren't any rules regarding the taking of evidence.	
9a	Lodging the appeal *(interposición del recurso de casación)*	The losing party		
9b	Admission of the appeal writ by the court of appeals *(providencia por la que se tiene por interpuesto el recurso de casación)*	The court of appeals		
9c	The records are send to the court of appeals (*remisión de los autos)*	The court of appeals clerk		
9d	Admission of the appeal writ by the	The Supreme Court		

	Supreme Court			
9e	Written statement contesting the appeal *(escrito de oposición al recurso de apelación)*	The winning party		
9g	Hearing *(vista)*		Eventually, if both parties have requested the holding of a hearing or the Supreme Court decides so.	
9f	Judgement *(sentencia)*			

1.2 Oral Trials Synoptic Table

Phase #	**Name of the Phase** **Name of the Phase in National Language**	**Responsible Subject**	**Duties of the Responsible Subject (related only to Evidence) and Consequences of their Breach**	**Rights (related only to Evidence) of the Responsible Subject**
1	Claim (*demanda*)	Plaintiff (*demandante*)	Documents and expert witnesses reports have to be annexed to the first writ, otherwise they will be rejected by the court	
2	Admision of the claim *(Admisión a trámite de la demanda)* (article 440.1 LEC)	The court of first instance clerk and the judge *(Secretario Judicial y Juez de Primera Instancia)*		
3	Parties may request the court to summon witnesses and parties that have testify at the hearing (article 440.1.III LEC)	Plaintiff and defendant	The request must be done within the time limit of three day, otherwise the petition will be rejected.	Parties can call and bring witnesses by themselves.
4	Witnesses and parties are summoned by the court clerk	The court clerk		
5	Hearing. Contents:			
5a	Explanation of the grounds of the claim or ratification	Plaintiff		

5b	Allegations to the claim (article 443.2 LEC)	Defendant		
5c	Examination and decision on procedural issues (article 443.3 LEC)	The parties and the court		Parties may request to place his objections on the record if their procedural allegations are dismissed.
5d	Establishing the facts at issue (article 443.4 LEC)	The parties and the court		
5e	Conciliation (article 443.4 LEC)	The parties and the court		
5f	Evidence proposal (article 443.4.II LEC)	The parties		In accordance with article 429 LEC.
5g	Evidence admission	The court		Parties may protest the decision of the court regarding the rejection of evidence or admission of evidence reported to have been obtained in violation of fundamental rights, with the view to enforcing their rights in the second instance.
5h	The taking of evidence			
6	Judgement	The court		
7	Appeal *(recurso de apelación)* (articles 457 to 467 LEC) *Idem to the ordinary proceedings (8)*			
8	Appeal for cassation *(recurso de casación)* *Idem to ordinary proceedings (9)*			

1.3 Functional Comparison among Spanish Procedural Law, Bilateral Treaties, Multilateral Treaties and the EU Regulation 1206/2001

1.3.1 Spanish Court as Requesting Court

Legal Regulation / Means of Taking Evidence	National Law	Bilateral Treaties	Multilateral Treaties	Regulation 1206/2001
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	It's possible according to articles 177 LEC and articles 276 to 278 of Law 1/1985. International cooperation has to be done according to the European legislation, International treaties to which Spain is a party and, in their absence, according to the domestic legislation (article 177 LEC and 277 LOPJ). If there isn't any international regulation, the principle of reciprocity is applied and the petition will be fulfilled according to Spanish and the requested country's regulations. The petition is processed through diplomatic and consular authorities (article 276 Law 1/1985).	Spain has signed bilateral conventions with: China, Russia, Thailand, Morocco, Tunisia, Algeria and Brazil. China: Through central authorities (Ministry of Justice) (article 3) according to the national law. When the destinatary consignee is a Spanish citizen, the petition can be processed directly through Spanish consular authorities. Russia: Through central authorities (Ministry of Justice) (article 4) according to the national law or a special procedure if it's not contrary to Russian law. Thailand: Through central authorities (Ministry of Justice) (article 3) according to national law or a special procedure if it's not contrary to the requested state law (article 13). Morocco: Thought central authorities (Ministry of Justice) (article 6) according to the national law or	- The Hague Convention on the taking of evidence abroad in civil or commercial matters of 18 March 1970. It's possible according to article 7. - The Hague Convention on Civil Procedure of 1 March 1954. The letter of request must be settled through consular authorities (article 9). Each state will apply it's own law to execute the petition. So, the procedure depends on the requested state law (article 14). - Inter-American Convention on Letters of Rogatory of 30 January 1975. The petition can be processed through judicial channels, diplomatic or consular agents or the central authority of the state of origin (in Spain the Technical General Secretariat of the Ministry of	Cooperation is processed directly between courts (article 2) in accordance with national law of the requested country or a special procedure if it's not incompatible with the requested state law. Spanish domestic legislation is applied.

		specific procedure if it's not contrary to the national law. When the consignee is a Spanish citizen, the petition can be processed straight through the Spanish consular authorities. Algeria: Through central authorities (Ministry of Justice) or exceptionally through diplomatic agents (article 7) according to national law or a special procedure if it's not contrary to the requested state law. Tunisia: Through diplomatic authorities (article 10) according to national law or a special procedure if it's no contrary to the requested state law. Brazil: Through central authorities (Ministry of Justice) or through diplomatic agents (article 3) according to national law or a special procedure if it's not contrary to the requested state law.	Justice) or of the state of destination. The letter of request has to be executed according to the laws and procedure rules of the state of destination. The authority of the state of destination may execute the letter through a special procedure, or accept the observance of additional formalities in performing the act requested if this procedure or those formalities are not contrary to the law of the state of destination (article 10).	
Hearing of Witnesses by Video-conferencing with Direct Asking of Questions	According to Spanish legislation it is possible to hear witnesses through video-conference (article 229 Law 1/1985). However, when the principle judicial cooperation lays on the principle of reciprocity we have to attend the	China: See above. Russia: See above. Only if special procedure is allowed. Thailand: See above. Morocco: See above. Algeria: See above.	- The Hague Convention on the taking of evidence abroad in civil or commercial matters of 18 March 1970. Article 10 is applied. It depends on the legislation of the requested country. - The Hague	According to article 10.4 the taking of evidence can be done through videoconference except if this of making the request is not compatible with the requested state law. In regards to Spanish legislation,

	requested country's legislation.	Tunisia: See above. Brazil: See above. Only if special procedure is allowed.	Convention on Civil Procedure of 1 March 1954. Article 14 is applied. It depends on the legislation of the requested country. Inter-American Convention on Letters of Rogatory of 30 January 1975. See above.	videoconference would be possible but the final result would depend on the legislation of the requested country.
Direct Hearing of Witnesses by Requesting Court in Requested Country	It's not possible according to Spanish legislation.	It's not possible according to the Spanish legislation.	- The Hague Convention on the taking of evidence abroad in civil or commercial matters of 18 March 1970. Article 8 is applied. It's not possible according to Spanish legislation. - The Hague Convention on Civil Procedure of 1 March 1954. The convention doesn't provide this option. It may depend on the requested country legislation. - Inter-American Convention on Letters of Rogatory of 30 January 1975. See above.	It's not possible according to Spanish legislation.

1.3.2 Spanish Court as Requested Court

Legal Regulation / Means of Taking Evidence	National Law	Bilateral Treaties	Multilateral Treaties	Regulation 1206/2001
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	If there isn't any international regulation, the principle of reciprocity is applied and the petition will be fulfilled according to the Spanish and the requested country regulations. The petition is processed thought diplomatic and consular authorities (article 276 Law 1/1985). According to Spanish regulations regarding judicial assistance it is possible to hear witnesses by mutual legal assistance (articles 273 to 277 Law 1/1985).	China: See above. Russia: See above. Thailand: See above. Morocco: See above. Algeria: See above. Tunisia: See above. Brazil: See above.	- The Hague Convention on the taking of evidence abroad in civil or commercial matters of 18 March 1970. It's possible according to Spanish legislation (arts. 273 to 277 Law 1/1985). - The Hague Convention on Civil Procedure of 1 March 1954. The letter of request must be settled through consular authorities. Spain hasn't accepted other ways or procedures (article 9). To execute the petition see what's been said regarding national law. - Inter- American Convention on Letters of Rogatory of 30 January 1975. See above.	See above.
Hearing of Witnesses by Video-conferencing with Direct Asking of Questions	It's possible according to articles 177 LEC and 277 Law 1/1985 in accordance with article 229 Law 1/1985.	China: See above. Russia: It would be possible according to Spanish legislation. Thailand: It would be possible according to Spanish legislation. Morocco: It would be possible according to	- The Hague Convention on the taking of evidence abroad in civil or commercial matters of 18 March 1970. Article 10 is applied. It's possible according to article 229 Law 1/1985.	It's possible according to articles 177 LEC and 277 Law 1/1985 in accordance with article 229 Law 1/1985.

		Spanish legislation. Algeria: It would be possible according to Spanish legislation. Tunisia: It would be possible according to Spanish legislation. Brazil: It would be possible according to Spanish legislation.	- The Hague Convention on Civil Procedure of 1 March 1954. To execute the petition see what's been said regarding national law. - Inter-American Convention on Letters of Rogatory of 30 January 1975. See above.	
Direct Hearing of Witnesses by Requesting Court in Requested Country	It's not possible according to Spanish legislation.	It's not possible according to Spanish legislation.	- The Hague Convention on the taking of evidence abroad in civil or commercial matters of 18 March 1970. Article 8 is applied. It's possible according to the declarations and reservations that Spain has done to the Convention. - The Hague Convention on Civil Procedure of 1 March 1954. To execute the petition see what's been said regarding national law. - Inter-American Convention on Letters of Rogatory of 30 January 1975. See above.	Article 12

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