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*393 REEVALUATING THE ROLE OF THE TORT LIABILITY SYSTEM IN JAPAN [FNp1]  

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1. INTRODUCTION  

Japan, a civil law country, has operated its current tort liability system based on tort provisions under the Civil Code and other special tort provisions for more than 110 years. However, this tort liability system has been condemned for its shortcomings, including how complex tort cases are treated, such as tort litigation arising from a mass accident, product liability, environmental pollution, and so on. In response, Japan has adopted several administrative compensation schemes for certain types of victims, [FN1] such as those injured by environmental pollution, medical products, vaccinations, blood donation accidents, and asbestos. Yet, as far as environmental pollution cases are concerned, the administrative compensation scheme does not work well. Rather, the tort liability system has been addressing the limitations of the administrative compensation system.  

The purpose of this article is to reevaluate the role of the tort liability system in environmental pollution problems in Japan. Before going on to the main subject, Part II overviews the torts and other compensation systems in Japan, paying attention to noticeable differences with the U.S. legal system. Part III explains the historical background and outline of the pollution-related health damage compensation system in Japan. Part IV first addresses why the pollution compensation system went wrong, and then how a series of litigations based on the tort liability system have been trying to restore the failures of the pollution compensation system. Finally, Part V analyzes the role of the tort liability system in environmental pollution problems.  

*394 II. TORTS AND OTHER COMPENSATION SYSTEMS IN JAPAN  

A. Tort Liability System  

1. Tort Law in the Civil Code  

There are two basic premises of Japanese tort law: the Fault Liability Principle (i.e., a person without fault is not liable), and the Self-responsibility Principle (i.e., a person is not liable for another person's act). Article 709 provides the general rule of tort liability. [FN5] Under this provision, the plaintiff/victim bears the burden of proof that (i) a defendant/tortfeasor acted intentionally or negligently; (ii) the defendant infringed any right or legally protected interest of others; in other words, the defendant's act was wrongful; (iii) damage was sustained by the plaintiff; and (iv) there was a causal relationship between the defendant's act and the plaintiff's damage. The defendant is exempt from tort liability if s/he can prove that s/he mentally lacked the capacity to appreciate his/her liability for his/her own act while s/he inflicted the plaintiff's damages (Articles 712 and 713), or that his/her act is justifiable, such as self-defense. When multiple tortfeasors are involved, Article 719 applies. [FN6]

In complex tort cases, proving a causal relationship is difficult. The *395 Japanese Supreme Court held that the standard of proof is “not a scientific standard that leaves no doubt, but a case of strong probability that a specific event caused a specific loss by considering all the evidence based on the rules of thumb.” [FN7] It also held that “strong probability” means that “a reasonable person is convinced of the conclusion to the extent s/he has no doubt.” [FN8] The standard is important in toxic tort cases involving non-specific diseases, such as asthma, where the causation issue presents a major barrier for plaintiffs. Courts admit epidemiological evidence in these cases. [FN9]

The primary remedy in torts is monetary damages. [FN10] The main purpose of tort liability is restitution; that is, to compensate a victim for his/her losses due to the tortfeasor's act. Therefore, only compensatory damages are available for a plaintiff. It is generally agreed at this tort liability system has a deterrent effect on wrongful acts, and some commentators even say that it functions as a sanction; [FN11] however, Japanese courts do not permit punitive damages. [FN12] Nevertheless, it is true that courts generally consider the maliciousness of a tortfeasor's act as one of the factors for assessing pain and suffering damages.

In case law, the loss claimed by a victim can be compensated if it had a relationship of “adequate causation” with the tortfeasor's act. [FN13] This concept was adopted from German Law. The plaintiff has the burden of proof for the amount of damages, both pecuniary and non-pecuniary. Pecuniary damages are divided into both actual loss and anticipated loss. Actual loss includes medical expenses, hospital expenses, expenses for an attendant nurse, funeral expenses, property damages, attorney's fees, etc. Anticipated loss is calculated based on the victim's income. While these damages result from the wrongful act that already occurred, the wrongful act may continue and damage may result in the future, especially in pollution cases. However, courts do not allow a plaintiff to demand damages for future damage because the amount of damages cannot be fixed at the end of trial. [FN14] Non-pecuniary damages are so-called “pain and suffering” damages. In the cases involving many victims, the court allows the plaintiff to demand both pecuniary *396 damages and non-pecuniary damages as an inclusive “pain and suffering damage.” [FN15] Such a calculation method is justified by the difficulty for victims in proving their itemized losses and the difference of each victim's anticipated loss. When assessing the amount of damages, a court takes into account the victim's fault. [FN16] In addition, the victim's mental vulnerability [FN17] or pre-existing disease [FN18] can be considered as contributing factors to his/her damage; however, the eggshell-skull rule applies to his/her pre-existing physical condition. [FN19] Japan has its own collateral source rule. For instance, the victim's life insurance is not deductible, while his/her non-life insurance is to be deducted due to double compensation. When a victim dies, his/her bereaved family inherits his/her right to demand compensation for damages. The parents, spouse, children [FN20] of the dead victim may demand their own non-pecuniary damages. [FN21]

There is a time limitation for tort litigation. A tort victim must bring his/her case into court within three years from the time when s/he comes to know of his/her damage and the identity of the tortfeasor. [FN22] The right to demand compensation for damages terminates when twenty years have elapsed from the time of the tort. [FN23]
2. The State Compensation Law

Sovereign immunity is not accepted under the Japanese Constitution. Under Japan's State Compensation Law, [FN24] when a public official who is in a position to exercise public power has, in the course of performing his duties, illegally inflicted losses on another person intentionally or negligently, the State or a public entity is liable to compensate such losses. [FN25] When a defect in construction or maintenance of public property has inflicted losses on another person, the State or a public entity is liable to compensate such losses: [FN26]

3. No-fault Liability Provisions in Pollution Control Laws

The court has recognized that fault means that a defendant breached his/her duty to avoid the undesirable result which s/he has foreseen or should have foreseen. In pollution cases, the court generally heightens the standard of due care owed by a defendant company; therefore, it is considered to be negligent whenever pollution occurs.

In 1972, a strict liability scheme was introduced into the Air Pollution Control Law [FN27] and the Water Pollution Control Law. [FN28] Under these provisions, whenever any air pollutant or water pollutant injured human life or health, the person who released such pollutant shall be liable to compensate any damages resulting in consequence. A plaintiff is not required to prove that a defendant acted intentionally or negligently.

4. Injunction

In some cases, monetary damages are not enough for a person who is infringed or likely to be infringed of his/her right or legally protected interest. There is no explicit provision in the Civil Code to allow a tort victim to seek injunctive relief; however, the court may issue an injunction if the degree of infringement exceeds the maximum permissible limit (junin-gendo). When the court applies these standards, it considers several factors, such as the nature and content of the injury, the content and degree of the public need brought about by the infringement, the complementary relationship of benefits and burdens for victims, and the content of measures for preventing injury. [FN29] The legal grounds for injunction are real rights or personal rights (jinkaku-ken). [FN30] Personal rights are derived from Articles 11 and 13 of the Constitution. [FN31]

*398 B. Dispute Resolution System for Complex Tort Cases

1. Civil Justice System

Japan has a unitary justice system which is divided into three tiers: the Supreme Court, the High Courts, and courts of first instances (district courts, family courts, and summary courts). [FN32] A jury system for civil cases has never been adopted in Japan. [FN32]

There is no class action system in Japan. Instead, the Code of Civil Procedure [FN34] allows three measures for multiple parties and/or claims. [FN35] First, multiple claims may be consolidated if they are through the same kind of court proceeding. [FN36] Second, multiple parties may sue or be sued as joint litigants, if their rights or obligations are common, they are based on the same factual or legal cause, or they are of the same kind and based on the same kind of causes in fact or by law. [FN37] Third, a group with a common interest may appoint more than one person to be a plaintiff or defendant from the group to conduct litigation. [FN38] Moreover, non-parties who have a common interest with the
parties in pending litigation cases may appoint the existing plaintiff or defendant to be their appointed party. [FN39]

Litigation, in general, has been criticized because it is time-consuming, let alone in complex tort lawsuits. The Study Council for the Acceleration of Court Proceeding [FN40] examined all civil litigation cases, including tort litigation *399 cases in the first instance, which terminated from April 1 to December 31, 2004. According to its report, the average duration of court deliberation is 20.8 months for pollution lawsuits demanding damages and 32.9 months for pollution lawsuits demanding injunction, compared to 8.2 months overall for the civil cases generally. [FN41]

Finally, there are monetary difficulties for victims in filing lawsuits in complex tort cases. In such cases, transaction costs may exceed the victim's compensation amount, even though plaintiffs' attorneys work on pro bono basis. In addition, it should be noted that a contingent fee system is generally not available in Japan. [FN42]

2. Environmental Dispute Coordination System

In 1970, the Environmental Disputes Settlement Law was enacted in order to settle environmental disputes quickly and justly. The law established the Environmental Dispute Coordination Commission at the national level and pollution examination organizations in each prefecture. The Environmental Dispute Coordination Commission conducts conciliation, mediation, and arbitration in relation to serious pollution cases incurring severe injuries, nationwide pollution cases, and inter-prefectural pollution cases. It also conducts the cause-effect adjudication and the damages-responsibility adjudication. The main benefit of using the environmental dispute coordination system is that it is made available at a lower cost than litigation proceedings. [FN43]

C. Other Compensation Systems

1. Liability Insurance Systems

A tort victim cannot receive any monetary relief if the tortfeasor has no financial resources. Nevertheless, a third-party liability insurance system has been *400 introduced for certain types of accidents, such as automobile accidents or workers' accidents. For instance, the automobile third-party insurance is compulsory for all automobile owners. [FN44] It covers damages for personal injury, up to 30 million yen; therefore, automobile accidents incurring property damage or personal damage beyond the cap are still governed by the tort liability system.

2. Administrative Compensation Systems

The difficulties in complex tort cases make it difficult for victims to use the justice system. Japan has adopted several administrative compensation systems for certain types of victims. Such systems include the Pollution-Related Health Damage Compensation System (1969), the Relief System for Injury to Health with Vaccination (1970), the Relief System for Sufferers from Adverse Drug Reactions (1979), the Relief System for Sufferers from Infections Arising from Biological Products (2004), the Relief System for Injury to Health Caused by Blood Donation (2006), and the Asbestos-related Health Damage Relief Program (2006).

III. THE POLLUTION-RELATED HEALTH DAMAGE COMPENSATION SYSTEM

A. Brief History of Environmental Pollution in Japan

In the early Twentieth Century, the Japanese government strongly encouraged industrial development. People in rural areas were affected by the copper refining industry, resulting in significant damage to local residents and their agricultural resources. People in urban areas suffered from air pollution caused by factories.

After the end of World War II, the government made economic reconstruction the first priority. It redeveloped old industrial areas and started to construct petrochemical complexes in several coastal zones. By 1955, Japan reached its pre-war economic level and entered an era of high economic growth (1955-1973).

In the 1960s, serious environmental pollutants were growing concerns in Japan: cadmium poisoning from mining pollution (Itai-itai disease) in Toyama Prefecture, mercury poisoning from industrial wastewater (Minamata disease) in Kumamoto and Niigata Prefectures, and asthma and bronchitis from industrial air pollution (Yokkaichi asthma). [FN45] These major pollution cases went to trial in early *401 1970. Furthermore, people in urban areas, such as Tokyo and Osaka, also had serious respiratory problems due to air pollution caused by industrial plants or automobiles. The demands increased for an administrative compensation system which would give fair and prompt relief to pollution victims.

B. Two Key Lawsuits Leading to the Pollution-Related Health Damage Compensation System

1. Yokkaichi Air Pollution Lawsuit

Yokkaichi is an industrial city located in Mie Prefecture, in western Japan. In 1955, a cabinet meeting approved transfer of an abandoned old naval site in Yokkaichi City to private companies. Showa Sekiyu Co. Ltd. and Mitsubishi Group then developed the Yokkaichi First Complex on the site. Soon after the complex went into full-scale operation in 1959, residents living in the vicinity of the complex began to suffer respiratory problems. The number of asthma patients rapidly increased after the Yokkaichi Second Complex started operation. In 1963, the government dispatched a research group to Yokkaichi. The team investigated the source and effect of air pollution in Yokkaichi and submitted its report to the National Diet of Japan in 1964.

Beginning in May 1965, Yokkaichi City started to offer a healthcare program in order to provide prompt relief for officially certified patients of air pollution-related diseases. It was the first of its kind in Japan. The number of patients increased so rapidly that the city could not afford the entire cost. Subsequently, the Law Concerning Special Measures for the Relief of Pollution-Related Health Damage [FN46] was promulgated in 1969 for the purpose of setting up a fund for both air pollution victims and water pollution victims. It was against the "polluter-pays principle" [FN47]—its funding was split between industry and government—and certified patients received compensation for medical care only. Since February, 1970, 464 certified patients have been covered under the fund. [FN48]

*402 On September 1, 1967, nine asthma patients in Yokkaichi filed lawsuits in the Yokkaichi Branch of the Tsu District Court. Plaintiffs sought damages from six oil chemical plants (Ishihara Sangyo Co., Chubu Electric Power Co., Showa Yokkaichi Oil, Mitsubishi Petrochemical Co., Mitsubishi Kasei Corp., and Mitsubishi Monsanto Co.) in the Yokkaichi First Complex. In order to increase the probability of success and to prevent prolongation of litigation, the plaintiffs' lawyers decided to sue only private companies and not to pursue an injunction claim. The main issue was whether respiratory problems suffered by plaintiffs were caused by sulfur dioxide (SO₂) emitted by defendants.

On July 24, 1972, the Yokkaichi Branch of Tsu District Court rendered a decision in favor of the plaintiffs. [FN49] The court admitted the plaintiffs' epidemiologic approach to proving a causal relationship between air pollution and the
high prevalence of asthma. It held all defendants liable jointly and severally for compensatory damages totaling 86 million yen sustained by the plaintiffs. The defendants did not appeal. One hundred and forty patients negotiated and concluded a compensation agreement with the defendants.

In addition, the Yokkaichi ruling has been highly praised in at least two respects. First, the court adopted the concept of total emission control. It concluded that defendants should not have emitted more than 0.1 parts-per-million (ppm) of sulfur oxide (SOx), based on studies on air pollution or occupational disease cases caused by SOx smoke, epidemiologic-al data, and Japan Public Health Association's report. In 1974, the Air Pollution Control Law was amended again. It adopted total emission regulation for SO2, wherein if industrial facilities are concentrated in an area and it is recognized that it is difficult to attain the air quality standard [FN50] solely with the K value regulation, the prefectural governor in the area is required to formulate a total emission reduction plan and to set the total emission control standard based on this plan. [FN51] From 1974 to 1976, 24 areas *403 became subject to total emission control. Second, it advocated the importance of environmental impact assessment. It emphasized that a company should comprehensively research the environmental impact of its operations, and it also should site its facility so as not to harm nearby residents. In response to severe industrial pollution all over the country, the idea of environmental impact assessment gradually became common. In June 1972, a cabinet meeting decided that each ministry would conduct environmental impact assessment for public works. [FN52] The Yokkaichi decision bolstered this trend. A basic plan of economic society, approved by a cabinet meeting in February 1973, required industrial developers and urban developers to conduct sufficient environmental impact assessments. In the same year, an environmental impact assessment process was incorporated into several laws. [FN53]

2. The First Kumamoto Minamata Disease Lawsuit

Minamata disease is a neurological disorder caused by methylmercury poisoning. The victims, mostly subsistence fishermen, consumed a lot of fish contaminated by methylmercury compounds discharged into seas and rivers from Chisso Co. The first patient with Minamata disease was officially discovered at Minamata City in Kumamoto Prefecture on May 1, 1956. At the end of the year, the toll of victims reached 52, 17 of whom died. The ensuing investigation revealed that there were victims as early as 1942. This fact is not surprising because Chisso had discharged effluents containing methylmercury into Minamata Bay, which is a part of the Shiranui Sea, since 1932.

A group of Minamata disease victims organized the Minamata Strange Disease Victims' Mutual Aid Society (later re-named as the Minamata Patients' and Families' Mutual Aid Society) to seek compensation from Chisso on August 1, 1957. Suffering from disease, dire poverty, and social pressures, the Society accepted the solatium agreement with Chisso on December 30, 1959. [FN54] Under the *404 agreement, only certified patients were eligible to receive the payments from Chisso. As Chisso refused to accept the opinion of doctors in private hospitals, the Ministry of Health and Welfare (MHL, currently the Ministry of Health, Labor and Welfare) established the Screening Council for Minamata Disease Patients. After the Law Concerning Special Measures for the Relief of Pollution-Related Health Damage was enacted on December 15, 1969, Kumamoto and Kagoshima Prefectures established pollution-related health damage certification councils, respectively.

After the official recognition, on September 26, 1968, that Minamata disease was a pollution-related disease, the Mutual Aid Society restarted negotiations with Chisso. In order to establish the Minamata Disease Compensation Processing Committee, the MHL requested victims to sign a pledge form granting the MHL discretionary power concerning the appointment of committee members. This caused the Mutual Aid Society to split off on April 5, 1969. The majority (the Entrustment Group) accepted the offer and entrusted everything regarding the negotiation to the MHL. Some victims (the
Litigation Group) rejected the offer and decided to bring a lawsuit against Chisso. Some victims (the Direct Negotiation Group) also rejected the offer and decided to negotiate directly with Chisso.

On June 14, 1969, 138 victims from 30 families brought cases for damages against Chisso to the Kumamoto District Court (the First Minamata Disease Lawsuit). There were several important issues: (1) causation, (2) the defendant's negligence, (3) the validity of the solutium agreement of December 1959, (4) statute of limitations, and (5) damages.

On March 20, 1973, the court decided in favor of the plaintiffs. [FN55] The amounts of individual damages were 16 million yen, 17 million yen, or 18 million yen depending on the severity of the injury. Although such amounts were not sufficient to redress victims' medical conditions and grievances, they were the largest awards in history. Chisso did not appeal.

After the decision, three victims groups began negotiation for a new compensation agreement with Chisso from a position of strength. The new agreement was finally reached on July 9, 1973. [FN56] Chisso agreed to pay all *405 certified patients under the pollution-related health damage compensation system a lump sum payment equivalent to the damages awarded by the Kumamoto District Court decision (16 million yen, 17 million yen, or 18 million yen) and pensions from 20,000 yen to 60,000 yen per month depending on the severity of the injury. Chisso also agreed to establish the medical fund of 300 million yen. [FN57]

C. The Enactment of the Pollution-Related Health Damage Compensation Law

In October 1973, the Pollution-Related Health Damage Compensation Law [FN58] superseded the Law concerning Special Measures for the Relief of Pollution-related Health Damage. This law designates two types of areas: Class I areas are where severe air pollution occurs and many people suffer from respiratory disease (non-specific disease), and Class II areas are where many people suffer from mercury poisoning, cadmium poisoning, and arsenic poisoning (specific disease) causally related to industrial or mining waste. Under this law, the compensation system is administered by each prefectural government. Administrative costs are split between the State and the prefectural government. Because certification is a highly technical task, prefectural governors establish municipal health damage certification councils as consultative bodies. Regarding Class I areas, the governor certifies a person within his/her jurisdiction as a pollution patient if s/he suffers from respiratory disease and has lived or worked for a certain period in that area. Regarding Class II areas, the person suffering from specific poisoning needs to establish causation between his/her symptoms and the pollutant in order to be certified as a pollution patient. The certified pollution patient is eligible to receive medical care, medical expenses and allowance, and a disability pension, while his/her family is eligible to receive a pension for rearing children with disabilities; and if the certified patient dies, the bereaved family is eligible to receive funeral expenses, a lump-sum benefit for survivors, and a survivors' pension. The funding complies with the polluter-pays principle, because the law was intended to provide prompt and "just" compensation for pollution victims. Regarding the fund for non-specific disease in Class I areas, 80 percent is raised from industrial levies, and 20 percent is raised from automobile tonnage tax. Regarding the fund for specific poisoning in Class II areas, responsible companies are required to pay in full.

*406 IV. TORT LITIGATION AS RESTORATION TOOL FOR THE POLLUTION COMPENSATION SYSTEM

A. The Failure of the Pollution-Related Health Damage Compensation System
1. Dysfunction of the Minamata Disease Certification Procedure

The success of an administrative compensation system hinges on fair and prompt certification procedure. After Chisso was found to be legally responsible for Minamata disease in the Kumamoto District Court (the First Minamata Disease Lawsuit) in March 1973, however, the number of applications for certification soared and the certification procedures were delayed. [FN59]

*407 Due to the burden of compensation, Chisso suffered financial crisis and sought financial support from Kumamoto Prefecture and the State. In 1977, the Environmental Agency (currently the Ministry of the Environment) published "The Criteria for Judging Post-Natal Minamata Disease" (the 1977 Criteria). [FN60] which replaced the criteria described in "The Certification Under the Law Concerning Special Measures for the Relief of Pollution-Related Health Damage" published in 1971 (the 1971 Criteria). [FN61] Typically, mercury poisoning causes Hunter-Russell Syndrome, which was a combination of astasia, concentric contraction of the visual field, and speech impediment. Under the 1971 Criteria, if a victim has one of these symptoms, s/he can be certified as a Minamata disease patient. However, the 1997 Criteria required a victim to have a plurality of symptoms to be certified. Victims argue that the 1977 Criteria were adopted to cap the number of certified patients considering Chisso's financial ability. Since 1978, the number of those rejected has exceeded the number of those certified. Similarly, the Kumamoto Prefecture began to support Chisso to prevent it from going bankrupt beginning 1978, as did the State starting in 2000.

2. Removal of the Class I Designation

The first oil crisis hit Japan in October 1973. Japan set back efforts for environmental protection to help its stagnant economy recover. [FN62] Beginning in 1976, the Japan Federation of Economic Organizations officially began to ask the government to review the pollution-related health damage compensation system. [FN63] In 1983, the Environmental Agency consulted the Central Council for Environmental Pollution Control to review the system. [FN64] In 1986, the council recommended removal of the Class I designation, based on its conclusion that air *408 pollution had not been the primary cause for asthmas in recent years. [FN65] Following the recommendation, the Pollution-Related Health Damage Compensation Law was amended on September 18, 1987. [FN66] At that time, 41 areas were designated as Class I areas. The amendment led to the removal of the entire Class I designation. While then-certified pollution patients up to that time continued to receive compensation, no more victims were certified as Class I patients from the date of its implementation, March 1, 1988. [FN67]

B. Minamata Disease Litigations

1. Seeking Judicial Recognition as a Minamata Disease Patient

On January 20, 1973, 141 uncertified victims from 38 families brought cases demanding damages against Chisso to the Kumamoto District Court (the Second Minamata Disease Lawsuit). One of the issues in this litigation was to *409 clarify the criteria of Minamata disease. Most of the plaintiffs became certified during the trial and voluntarily withdrew their cases. On March 28, 1979, the court held that 10 out of 12 uncertified victims were Minamata disease patients. [FN68] Both defendant and plaintiffs appealed to the Fukuoka High Court. On August 16, 1985, the court again held in favor of the plaintiffs-appellants, declaring that the combination of symptoms was too narrow as criteria for Minamata disease. [FN69] However, the Environmental Agency did not revoke the 1977 Criteria.

2. Pursuing Administrative Responsibilities for Minamata Disease

On May 21, 1980, uncertified victims filed lawsuits for demanding damages against Chisso, the State, and Kumamoto Prefecture to the Kumamoto District Court (the Third Minamata Disease Lawsuit). This was the first lawsuit pursuing the State and prefectural governments’ responsibilities regarding Minamata disease. This lawsuit was split into two before the trial. On March 30, 1987, the court held in favor of the first group of victims that the State and Kumamoto Prefecture were liable. [FN70] and on March 25, 1993, the court also held in favor of the second group of victims that the State and Kumamoto Prefecture were liable. [FN71]

Many victims had made their living by fishing. After Chisso polluted Minamata Bay, some of them moved to other places. Victims who lived in Osaka, Tokyo, Kyoto, and Fukuoka filed lawsuits for compensation against Chisso (and its subsidiaries), the State, and Kumamoto Prefecture. These plaintiffs commonly claimed that the State and Kumamoto Prefecture failed to exercise their authority to prevent the spread of Minamata disease, and challenged the reasonableness of the 1977 Criteria. On September 28, 1990, the Tokyo District Court recommended settlement to the parties of the Tokyo Lawsuit. Later, the Kyoto District Court, the Osaka District Court and the Fukuoka High Court recommended settlement for each pending lawsuit. However, the State and Kumamoto Prefecture declined their offer, respectively.

3. Political Solution

On September 28, 1995, the three ruling parties (the Liberal Democratic Party, the Japan Socialist Party, and the New Party Sakigake) proposed the final plan regarding the issues of the uncertified victims. The proposal was later called the Comprehensive Minamata Disease Medical Care Project. The contents of proposal were as follows:

- The State and Kumamoto Prefecture must officially apologize to victims.
- The victims must voluntarily withdraw their cases.
- Uncertified victims must withdraw their applications for certification.
- Uncertified victims will not be certified under this plan.
- Each uncertified victim suffering paralysis of the limbs will receive a lump sum payment of 2.6 million yen.
- Other uncertified victims will receive acupuncture and moxibustion treatment.
- Victims groups will receive additional cash benefit.

All parties, except the Kansai Group in Osaka, accepted this proposal, and the Cabinet approved this proposal on December 15. The Prime Minister expressed his regret, but did not admit administrative responsibility for Minamata disease. All the pending lawsuits, except the Kansai Lawsuit, were settled in May 1996.

From January to July 1996, 11,152 victims received medical notebooks and 1,222 victims received health notebooks under the Project. [FN72] A medical notebook holder receives a recuperation allowance for medical treatment expenses and surgical operation recuperation expenses for acupuncture and moxibustion. A health notebook holder receives surgical operation recuperation expenses associated with acupuncture and moxibustion.

4. The Supreme Court Decision on the Kansai Lawsuit and Its Impact

On October 15, 2004, the Second Petty Bench of the Supreme Court delivered its decision. [FN73] It was the first Supreme Court decision on the issue of the State and the Kumamoto Prefecture’s responsibilities regarding Minamata disease. [FN74] The opinion of the Court stated that the State and the Kumamoto Prefecture were liable for failing to exercise their regulatory authority. It also affirmed the decision of the Osaka High Court, which held that the 1977
Criteria was inadequate.

On the night of the same day of the Supreme Court's decision, the Minister of the Environment officially apologized for not preventing the spread of Minamata disease and for taking a long time to handle it. [FN75] However, on October 18, 2004, the Ministry reaffirmed that the 1977 Criteria was adequate. Therefore, both the 1977 Criteria and the judicial criteria stand.

From the date of the Supreme Court decision until March 2008, 5,992 victims applied for certification under the Pollution-Related Health Damage Compensation System, [FN76] and 16,226 victims received health notebooks under the Comprehensive Minamata Disease Medical Care Project. [FN77] Despite the flood of applications, the Kumamoto Screening Committee for Minamata Disease Patients was closed from November 2004 until March 2007. No one wanted to be a member of the committee because s/he did not know which criteria should be adopted. After resuming, the Committee used the 1977 Criteria. The Kagoshima Screening Committee for Minamata Disease Patients has been closed since September 2004.

In May 2006, the ruling parties (the Liberal Democratic Party and the New Komeito Party) established the Project Team on Minamata Disease. In October 2007, the project team released its final report, which recommends a new relief measure. Under the proposed measure, the victims who suffer from sensory disorder and have not received a lump sum payment under the Comprehensive Minamata Disease Medical Care Project should receive a lump sum payment of 1.5 million yen and 10,000 yen per month as medical allowance. Chisso has not accepted the proposal.

*412 5. New Wave of Minamata Litigations

a. The No More Minamata Lawsuit

On October 3, 2005, Minamata Shironui Victim Group brought cases against the State, Kumamoto Prefecture, and Chisso to the Kumamoto District Court. This action was called the “No More Minamata Lawsuit” and the plaintiffs seek to be judicially recognized as Minamata disease patients and demand compensation. The number of plaintiffs has reached 1,707 (as of April 2009), and these cases are pending.

b. The Third Niigata Minamata Disease Lawsuit

The residents in the basin of the Agano River in Niigata Prefecture also suffered from mercury poisoning caused by Showa Denko K.K. in the mid-1960s. Victims won their first lawsuits against Showa Denko, [FN78] and accepted the political solution during the Second Lawsuits against the State and Showa Denko.

On April 26, 2007, seventeen uncertified victims brought cases against the State, Niigata Prefecture, and Showa Denko to the Niigata District Court. The first oral argument was held on May 8, 2008, and the case is pending. [FN79]

c. The Second Generation Lawsuit

On October 11, 2007, nine uncertified victims of the Minamata disease Victims Mutual Aid Society brought cases against the State, Kumamoto prefecture, and Chisso to the Kumamoto District Court. It is called the “Second Generation Lawsuit” because all of the plaintiffs were born in a methyl-mercury-polluted area around 1956, the year in which Minamata disease was officially recognized, and were probably exposed to that substance in their mother's wombs or in their
childhood. They seek to be judicially recognized as Minamata disease patients and demand compensation for damage. The cases are pending.

*413 C. Air Pollution Litigations

1. Wave of Air Pollution Litigations

Responding to the Class I designation removal, pollution victims groups around the country began to prepare for new litigation. The purposes of such litigation were not only to seek plaintiffs’ own remedies, but also to encourage restoring the Pollution-Related Health Damage Compensation System.

a. The Nishiyodogawa Air Pollution Lawsuit

i. Background

Nishiyodogawa Ward is an industrial town located in Osaka City. It has small businesses and housing adjacent to each other, as well as several highways operated by the State or the Hanshin Expressway Public Corporation. Osaka City became one of the first designated Class I areas under the Pollution-Related Health Damage Compensation Law, and it has the largest number of certified patients in Japan.

In April 1978, air pollution victims filed lawsuits against ten private companies (Godo Steel Ltd., Furukawa Co., Nakayama Steel Product Co., Kansai Electric Power Co., Asahi Glass Co., Kansai Coke and Chemical Co., Sumitomo Metal Industries Ltd., Kobe Steel Ltd., Osaka Gas Co., and Nippon Glass Co.), the State, and the HEPC in the Osaka District Court. One hundred twenty-seven plaintiffs sought an injunction to stop the emission of air pollutants (NO₂, SO₂, and SPM) that exceeded air quality standards and damages totaling 3.8 billion yen.

In 1984, a second group of victims filed lawsuits against the above companies, the State, and the HEPC; a third group of victims filed lawsuits in 1985; and a fourth group of victims filed lawsuits in 1992. The total number of certified patient plaintiffs in the second to fourth lawsuits was 432, and the sum of their compensation claim was 8.6 billion yen.

ii. The First Lawsuit

On March 29, 1991, the Osaka District Court found all defendant companies liable for damages totaling 350 million yen for 67 certified patients. [FN80] However, it denied the liability of the State and the HEPC. It also dismissed the plaintiffs' claim for an injunction. [FN81] Both the plaintiffs and the companies appealed to the Osaka High Court.

On March 2, 1995, the certified patients and companies [FN82] reached a settlement. The settlement agreement included the companies making a lump-sum payment of 3.9 billion yen, of which 1.5 billion yen would be used for environmental protection, improvement of the plaintiffs' living environment, and revitalization of the Nishiyodogawa area, [FN83] and the companies confirming their continuing efforts in pollution-prevention measures. Lawsuits against the State and the HEPC remain pending.

iii. The Second to Fourth Lawsuits
On July 5, 1995, the court found the State and the HEPC liable for damages totaling 66 million yen for 18 certified patients. [FN84] This was the first case that recognized the relationship between vehicle emissions (NO₂ and SPM) and plaintiffs' health problems and that found the State and public corporations responsible for road-related air pollution. However, the claim for an injunction was dismissed. [FN85] The State and the HEPC appealed to the Osaka High Court.

Following a recommendation of settlement made by the court on July 29, 1998, plaintiffs-appellees, the State, and the HEPC reached a settlement on May 17, 1999. The settlement involved the State and the HEPC improving their roadside environment, and the settlement involved the plaintiffs, the State (the Kinki Region Construction Bureau of the Ministry of Construction), and the HEPC establishing a coordinating conference on the roadside environment in Nishiyodogawa area. [FN86]

*415 b. The Kawasaki Air Pollution

Lawsuits i. Background

Kawasaki City of Kanagawa Prefecture is located in the Keihin industrial area. Kawasaki Ward and Saiwai Ward in die city have been especially heavily industrialized since early times. As in other industrial areas, residents developed problems from smoke and soot from industrial plants and exhaust fumes from automobiles.

In November 1969, Kawasaki City decided to start its own healthcare program for victims of air pollution-related diseases and to establish a patient certification system. From February 1970, certified patients in both wards were covered under the fund established by the Law concerning Special Measures for the Relief of Pollution-related Health Damage.

In March 1982, 128 certified patients and their bereaved families filed lawsuits against 13 private companies (Nippon Kokan (JFE), Tokyo Electric Power Co., Tonen, Tonen Chemical, Kygnus Sekiyu, Nippon Sekiyu, Ukishima Petrochemical, Showa Denko K.K., General Sekiyu K.K., Mitsubishi Sekiyu Co. Ltd., Showa Sekiyu Co. Ltd., TOA Oil Co. Ltd., and East Japan Railway Co.), the State, and the Metropolitan Expressway Public Corporation in the Kawasaki Branch of the Yokohama District Court. Plaintiffs sought an injunction to stop the emission of air pollutants that exceeded air quality standards and damages totaling 2.6 billion yen.

In September 1983, a second group of victims filed lawsuits against the above companies, the State, and the MEPC; a third group of victims filed lawsuits in March 1985; and a fourth group of victims filed lawsuits in December 1988. The total number of plaintiffs was 321.

ii. The First Lawsuit

On January 25, 1994, the Kawasaki Branch of the Yokohama District Court found all defendant companies liable for damages totaling 463 million yen for 106 plaintiffs, including 90 certified patients. [FN87] However, it denied the liability of the State and the MEPC. [FN88] It also dismissed the claim for injunction. [FN89] Both the plaintiffs and the companies appealed to the Tokyo High Court.

On December 25, 1996, the plaintiffs and companies reached a 3.1-billion-yen settlement.

*416 iii. The Second to Fourth Lawsuits

On August 5, 1998, the Kawasaki Branch of the Yokohama District Court recognized the relationship between vehicle emissions (NO$_2$ and SPM) and plaintiffs' health problems, and it held the State and the MEPC liable for damages totaling 149 million yen for 48 plaintiffs. [FN90] However, it dismissed the claim for injunction. [FN91] The State and the MEPC appealed to the Tokyo High Court.

On May 20, 1999, plaintiffs-appellees, the State, and the MEPC reached a settlement. The settlement included: the State and the MEPC making sincere efforts toward achievement of environmental quality standards in Kawasaki Ward and Saiwai Ward; the State and the MEPC improving the road environment and road structure in both wards, including research on structural and technical problems and impact on other highways when metropolitan expressways adopt road pricing for transportation demand management; and the plaintiffs, the State (the Kanto Region Construction Bureau of the Ministry of Construction), and the MEPC establishing a coordinating conference on the roadside environment in the southern area of Kawasaki City. [FN92]

c. The Amagasaki Air Pollution Lawsuit

Amagasaki is an industrial city located in Hyogo Prefecture. It is a major part of the Hanshin industrial region, which is one of the biggest industrial regions in Japan.

In November 1970, Amagasaki City established its own healthcare program by ordinance. Starting in December, certified patients in Amagasaki were covered under the fund established by the Law concerning Special Measures for Relief of Pollution-Related Health Damage.

In December 1988, 379 certified pollution patients and their bereaved families in Amagasaki City filed lawsuits against nine companies (Kansai Electric Power Co., Asahi Glass Co., Kansai Coke and Chemical Co., Sumitomo Metal Industries Ltd., Kubota Corp., Godo Steel Ltd., Furukawa Co., Nakayama Steel Products Co., and Kobe Steel Ltd.), the State, and Hanshin Expressway Public Corporation in the Kobe District Court. They sought damages and an injunction to stop air pollutants that exceeded those air quality standards from entering their living place. A second group of victims filed lawsuits in December 1993.

Following a recommendation by the Kobe District Court, the plaintiffs settled with the companies on February 17, 1999. The companies agreed to pay 2.42 billion yen in damages, of which the plaintiffs used 920 million yen to protect the environment in Amagasaki. [FN93]

On January 31, 2000, the Kobe District Court found the State and the HEPC liable for roadside air pollution. [FN94] It ordered the State and the HEPC not only to pay to the plaintiffs 210 million yen, but also to limit the amount of SPM being emitted on Route 43 and Osaka Nishinomiya Line. [FN95] The State and the HEPC appealed to the Osaka High Court, and so did the plaintiffs.

Following a recommendation by the Osaka High Court, the parties reached a settlement on December 8, 2000. The settlement included the following:

(i) the Environmental Agency, the Ministry of Construction, and the HEPC take roadside environment measures;

(ii) the Environmental Agency makes efforts (a) to achieve a new longterm goal of diesel-powered vehicles by 2005, (b) to achieve reduction in the sulfur content (50 ppm) of light fuel oil by the end of 2004, (c) to conduct endurance tests of diesel particulate filter (DPF) and to consider support measures for promoting DPF, such as a sub-

sidy system, and (d) to consider ways of promoting the further sale and use of low-emission vehicles by auto manufacturers and business users. Based on its environmental health surveillance system, introducing an additional survey and analysis using PM2.5 as a pollution indicator is considered;

(iii) the Ministry of Construction and the HEPC (a) experiment with the environmental road pricing for certain roads, (b) inform everyone, especially truck businesses, of the Automobile NOx Control Law, [FN96] (c) strengthen regulations for specialized \*418 vehicles, and (d) research traffic volume necessary to consider the availability of traffic control of large vehicles, and request the National Police Agency to consider this issue. The air pollution monitoring system will also be enhanced; and

(iv) the parties establish a coordinating conference for improving the roadside environment in the southern area of Amagasaki City. The conference consists of plaintiffs, the State (Kinki Region Construction Bureau of Ministry of Construction), and the HEPC. The conference is held annually to exchange opinions on the road environment and road structure in the southern area of Amagasaki City.

On October 15, 2002, former plaintiffs in the Amagasaki lawsuit filed a claim with the Environmental Dispute Coordination Commission over the State's failure to abide by the settlement. It was the first case of pollution victims requesting the Commission to conduct a conciliation process based on a breach of settlement. On May 13, 2003, the HEPC joined the conciliation process.

On June 26, 2003, the parties accepted the conciliation plan offered by the Commission. The Commission found that air pollution in Amagasaki had not improved and required the State and the HEPC to implement specific measures as follows: (i) comprehensive research for reducing the traffic of large vehicles, (ii) environmental road pricing, (iii) request for the NPA to study the feasibility of traffic control of large vehicles, (iv) facilitation of the conference, and (v) promotion of cooperation of other relevant authorities. The Commission recommended the parties make efforts to achieve a better roadside environment by mutual understanding and cooperation.

After the conciliation process, the meeting became open to the public. The thirtieth meeting was held on December 17, 2008.

d. The Southern Nagoya Air Pollution Lawsuit

Residents in the southern Nagoya area suffered from air pollution caused by soot and smoke from factories and vehicle emissions from Routes 1 and 23.

In March 1989, certified patients and their bereaved families filed lawsuits against ten companies (Chubu Electric Power Co., Nippon Steel Corp., Toray Industries, Inc., Aichi Steel Corp., Daido Steel Co., Ltd., Mitsui Chemicals, Inc., Toho Gas Co., Ltd., Toagosei Co., Ltd., Nichiba Corp., and Chubu Steel Plate) and the State in the Nagoya District Court. They sought damages and an injunction against emitting air pollutants that exceeded air quality standards. In October 1990, a second group of patients filed lawsuits, and a third group of patients filed lawsuits in December 1997.

On November 27, 2000, the Nagoya District Court recognized the relationship between SOx and the plaintiff's respiratory diseases, and found all \*419 defendant companies liable for damages totaling 290 million yen. [FN97] The court recognized the relationship between SPM and plaintiff's respiratory disease, and ordered the State not only to pay 18 million yen, but also to limit the amount of SPM emitted on Route 23. [FN98]

On August 6, 2001, the parties reached a comprehensive settlement. This air pollution case was the first in which plaintiffs settled with both the companies and the State at the same time. Unprecedentedly, three uncertified patients were subject to this agreement. The State and the companies did not recognize causation between air pollution and health
damage. However, the terms of settlement included the following:

(i) The State takes measures to promptly achieve environmental quality standards. More precisely, it considers reducing the traffic lanes of Route 23 in southern Nagoya in order to reduce NOx and SPM in the area. Under the Automobile NOx/PM Control Law, Aichi Prefecture supports reduction of the total amount of NOx in the area, planting roadside trees, and conducting health effect surveys of local residents, and disclosing the results;

(ii) The parties (plaintiffs, the Ministry of the Environment, and Chubu Region Construction Bureau of the Ministry of Construction) establish a conference on improvement of the roadside environment in the southern Nagoya area in order to exchange opinions on the measures above; [FN99] and

(iii) The defendant companies pay 1.5 billion yen. They will disclose information on the amount of emission of pollutants.

c. The Tokyo Air Pollution Lawsuit

Tokyo is one of the largest cities in the world. Its average daily traffic is five times heavier than the national average. Nineteen out of 23 wards in Tokyo are formerly Class I areas under the Pollution-Related Health Damage Compensation Law. [FN100] Since 1972, the Tokyo metropolitan government has had *420 its own healthcare subsidy program for respiratory disease patients under 18 years old. [FN101] According to the Ministry of Health, Labor, and Welfare, Tokyo had approximately 197,000 asthma victims in 2004. [FN102]

On May 31, 1996, air pollution victims in Tokyo filed lawsuits against the State, Tokyo metropolitan government, Metropolitan Expressway Public Corporation, and seven companies that manufacture and sell diesel vehicles (Toyota, Isuzu, Mazda, Mitsubishi, Nissan, Nissan Diesel, and Toyota subsidiary Hino Motors) in the Tokyo District Court. Plaintiffs sought injunction relief and damages. This was the first case of suing automakers for air pollution. Five more victims groups filed lawsuits by 2006. The total number of plaintiffs has reached 653.

On October 29, 2002, the Tokyo District Court found a causal relationship between air pollution and the plaintiffs' illnesses, and ordered all of the defendants, excluding automakers, to pay a combined 79 million yen as compensatory damages. [FN103] Plaintiffs, the State, and the MEPC appealed.

On June 22, 2007, the Tokyo High Court proposed a settlement plan between the plaintiffs and all defendants including seven automakers. Five *421 hundred and twenty-seven plaintiffs and defendants accepted the proposal on July 3, 2007. The settlement included the following:

(i) Tokyo metropolitan government establishes a healthcare subsidy program for air pollution victims and will review the program after five years. Automakers contribute 3.3 billion yen, the State contributes 6 billion yen, and the MEPC contributes 500 million yen.

(ii) In order to achieve the air quality standard for NO2 promptly and to ensure the air quality standard for SPM, the Ministry of Land, Infrastructure, Transport and Tourism, the Ministry of Environment, the MEPC, and the Tokyo metropolitan government, take measures for improving the road environment, for control vehicle emissions, for monitoring PM2.5, and so on.

(iii) Automakers pay 1.2 billion yen as settlement money.

(iv) The parties establish a conference for improving the road traffic environment in the Tokyo area. The plaintiffs and Tokyo metropolitan government establish a coordinating conference on the Tokyo healthcare subsidy program.

Starting August 1, 2008, the Tokyo metropolitan government will implement a healthcare program by which certified asthma patients over 18 years old will be covered if they have lived in Tokyo for at least one year.
V. ROLE OF THE TORT LIABILITY SYSTEM IN ENVIRONMENTAL POLLUTION PROBLEMS

A. Role of the Tort Liability System in Relieving Minamata Disease Victims

1. Driving Force for Administrative Compensation System

For the purpose of relieving Minamata disease victims, tort litigation played a critical role in establishing and operating an administrative compensation system. In the creation of the Pollution-Related Health Damage Compensation System, Minamata disease victims groups could take advantage of the overall victory in the First Minamata Disease Lawsuit. The amount of a lump sum award for any patient is equivalent to the compensatory damages awarded in the First Minamata Disease Lawsuit. Chisso never took the victims' request seriously until the court held it liable. After the Supreme Court questioned the propriety of the 1977 Criteria, though never revoked, a flood of applications and new lawsuits have certainly captured the interests of public and ruling parties.

*422 2 Social Reintegration of Minamata Disease Victims

Victims have been continuing to press for apologies from the Chisso Co., Minamata City, Kumamoto Prefecture, and the State. In the beginning, the Minamata disease was deemed as a contagious disease or genetic disease and the victims were ostracized in their community. After the cause of the disease was discovered, the victims were still despised. Minamata City was heavily dependent on Chisso economically and victims claiming their legitimate rights were regarded as blackmailers. Moreover, the certified patients were sometimes blamed as “fake patients” for money. FN104 Therefore, some victims were forced to leave Minamata due to such discrimination, and to lead secretive lives in unfamiliar places. After the Supreme Court decision, applications for certification increased rapidly and exceeded six thousand as of April 2008. FN105 Many victims are first time applicants. FN106 Several studies found that various factors had prevented Minamata disease victims from coming out, including discrimination against them in job hunting or marriage. FN107 In this context, it was significant for Minamata disease victims that the highest court in Japan made the offending company, national government, and prefectural government legally accountable for their sufferings under the tort liability system.

B. Role of the Tort Liability System in Fighting Against Air Pollution

1. Common Goals in Air Pollution Litigations

The above five complex air pollution lawsuits had common goals. FN108 Pursuing tort liability of offending companies, the State, and local governments is the first step for air pollution victims toward constructive negotiation with them. Victims groups brought their cases into court not only to seek remedy for their individual damage but also to correct failures of environmental policy. Their primary goal is the latter: they tried to force the relevant authorities to restore the Class I designation under the Pollution-Related Health Damage Compensation System and to improve air quality—more specifically, vehicle emissions control.

2. Regulation by Litigation
a. Medical Care for Air Pollution Victims

According to the Ministry of Health, Labor, and Welfare, Japan has over one million asthma patients as of October 2005. [FN109] Based on the data, the removal *424 of the Class I designation was apparently premature. The Class I designation has not been restored after five lawsuits; however, the Tokyo lawsuit successfully created a new medical care program. Pollution victims see the program as a test of whether it can be expanded nationwide. The problem is that ex-defendant contributions to the program are limited to five years, and it is unclear whether it will survive or not.

b. Vehicle Emissions Control

Just a short while before the first Tokyo lawsuit was brought to court, in 1996, the Environmental Agency asked the Central Environment Council to study *425 future measures to reduce vehicle emissions. [FN110] Since that year, the council has released its recommendations almost every year, and following the recommendations, the State has gradually enhanced diesel vehicle emissions control. [FN111] Tokyo metropolitan government took measures to control diesel vehicles from August 1999, and has regulated them by its environmental ordinance [FN112] since October 2003.

In 2000, the courts granted an injunction for SPM in both the Amagasaki lawsuit and the southern Nagoya lawsuit. In June 2001, the Automobile NOx Control Law was amended to the Automobile NOx/PM Control Law. [FN113] It regulates permitted levels of emissions for diesel vehicles in designated areas in Tokyo, Osaka, Chiba, Kanagawa, Hyogo, Aichi, and Mie.

Despite these measures, there are still certain nonattainment areas for NOx and SPM. [FN114]

VI. CONCLUSION

In this article, I focused on the environmental pollution field to reevaluate the role of the tort liability system. I considered two examples: Minamata disease (mercury poisoning) cases and air pollution cases. In both cases, due to uneven distribution of resources, litigation based on the tort liability system was the last resort for victims. Once victims successfully prevailed in their cases, they negotiated on even ground with responsible companies and, more fundamentally, national and local governments. It became possible for victims not only to achieve new legislative or political solutions for their damages, but also to change national and local environmental policies for the public.

This tendency holds true with the relationship between the asbestos-related health damage relief system and asbestos litigations. In February 2006, the *426 Asbestos-Related Health Damage Relief Law [FN115] was promulgated to establish a relief fund for asbestos victims who contracted mesothelioma or lung cancer caused by asbestos and their bereaved family, who are not subject to workers' compensation. The certified patient is eligible to receive medical expenses and an allowance; and if the patient dies, their bereaved family is eligible to receive funeral expenses and a lump sum benefit for survivors. The fund is raised from contributions from the State, local government, and all business enterprises. However, many asbestos victims have chosen to go to court based on the tort liability system. In addition to the lawsuits against the asbestos-related industry, ten asbestos lawsuits against the State are pending as of October 1, 2008. The purpose of such lawsuits is not only to demand compensation based on the State Compensation Law but also to force the government to set up a more comprehensive administrative compensation system.

The tort liability system has both merits and deficits, as does the administrative compensation system. It is nevertheless true in Japan that, given these phenomena, the tort liability system serves an increasingly important role even in the areas covered by administrative compensation systems.
[FN1]. Due to the complexities of Japanese language translation, the author is singularly responsible for footnotes beginning with an asterisk (*).

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[FN1]. In this article, I use the term “victim” in a broad sense. The State and prefectural governments generally use the term “patient” only for certified victims.


[FN3]. See id.


[FN5]. See MINPo, art. 709 (“A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.”).

[FN6]. See id. art. 719, para. 1 (“If more than one person has inflicted damages on others by their joint tortious acts, each of them shall be jointly and severally liable to compensate for those damages. The same shall apply if it cannot be ascertained which of the joint tortfeasors inflicted the damages.”).


[FN8]. See id. at 1420.


[FN10]. See MINPo, art. 722, para. 1. There are some exceptions. For instance, in a defamation case, the court may order a person who defamed the victim to effect appropriate measures to restore the reputation of the victim in lieu of, or in addition to, damages.


[FN13]. See Osaka Shosen Corp. v. Murakane Shoten Corp., 5 DAIHAN MINSHu 386 (Great Ct Judicature, May 22, 1926).


[FN21]. See MINPo, art. 711; cf. Watanabe v. Motohashi, 12 MINSHu 1901 (Sup. Ct., Aug. 5, 1958) (allowing the victim's mother to demand her own non-pecuniary damages, where the victim suffered a severe injury equal to death).

[FN22]. See MINPo, art. 724.

[FN23]. See id.


[FN25]. See id. art. 1, para. 1.

[FN26]. See id. art. 2, para. 1.

[FN27]. See Taiki osen boshi ho, Law No. 97 of 1968, art. 25 (Japan).


[FN30]. For a description of personal rights, see Ueda v. Japan, 35 MINSHu 1881 (Osaka High Ct., Nov. 27, 1975), translated in JULIAN GRESSER ET AL., ENVIRONMENTAL LAW IN JAPAN 188 (1981) ("Personal rights are a composite of fundamental interests which relate to the physical as well as the mental well-being of individuals. No one can be permitted to infringe on such personal rights, and everyone has the power to act against any infringement of such rights.").


[FN33]. See id. at 113. Japan adopted a lay judge system for certain criminal cases under the Lay Judge Act. See Saiban'in no sanksuru keiji saiban ni kansuru horitsu, Law No. 63 of 2004 (Japan). Before World War II, Japan had a jury system for certain criminal cases pursuant to the Jury Act. See Baishin ho, Law No. 50 of 1923 (Japan). However, the Jury Act has been suspended by the Act Concerning the Suspension of the Jury Act. See Baishin ho no teishi ni kansuru horitsu, Law No. 88 of 1943 (Japan).


[FN35]. See id. arts. 30, 38, 136. In addition, Japan introduced a new system for consumer group action by the Law for the Partial Amendment to the Consumer Contract Act. See Shobisho keiyakubo no ichibu wo kaisesuru horitsu, Law No. 56 of 2006 (Japan). In this capacity, a consumer group certified by the Prime Minister may demand an injunction against a business operator for its unconscionable contract. See id.

[FN36]. See MINSOHO, art. 136.

[FN37]. See id. art. 38.

[FN38]. See id. art. 30, para. 1.

[FN39]. See id. art. 30, para. 3.

[FN40]. It was established under the Trial Facilitation Law. See Saiban no jinsokuka ni kansuru horitsu, Law No. 107 of 2003 (Japan).


[FN42]. See GOODMAN, supra note 32, at 241. Some law firms adopt a contingency fee system for certain types of cases, such as borrower lawsuits against consumer finance companies over excessive interest charges.

[FN43]. The application fee is smaller than the filing fee for litigation. Moreover, the Commission and prefectural organizations cover the substantial part of their proceeding cost.

[FN44]. See Jidosha songai baisho hosho ho [Law Regarding Insurance for Automobiles], Law No. 97 of 1955 (Japan).

[FN45]. Around the same time, Japan suffered food pollution cases, such as the Morinaga Arsenic Dry Milk Poisoning Case and the Kanemi Oil Poisoning Case, as well as drug-induced diseases, such as the Clioquinol SMON Case and the Thalidomide Case. See generally INDUSTRIAL POLLUTION IN JAPAN (Jun Ui ed., 1992).

[FN46]. Kogai ni kakaru kenko higai no kyusai ni kansuru tokubetsu sochi ho, Law No. 90 of 1969 (Japan).

[FN47]. See Vito De Lucia, Polluter Pays Principle, The Encyclopedia of Earth, ht-
tp://www.ecearth.org/article/Polluter_pays_principle (last visited Mar. 13, 2009). The Council of Organization for Economic Co-operation and Development (OECD) adopted the polluter-pays principle as a general principle in 1972, it is the principle according to which the polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to society or exceeding of an acceptable level of pollution. See id.


[FN50]. In 1967, the Diet enacted the Basic Law for Environmental Pollution Control. See Apec Virtual Center for Environmental Technology Exchange, Enactment of the Basic Law for Environmental Pollution Control, http://www.epcc.pref.osaka.jp/apec/eng/history/page/sogo_01.html (last visited Mar. 13, 2009). The Basic Law for Environmental Pollution Control defined environmental quality standards to be “standards for the environment recommended for protection of human health and preservation of the living environment.” See id.; see also Kogai taisaku kihon ho [Basic Law for Environmental Pollution Control], Law No. 132 of 1967 (Japan). Currently, there are ten environmental quality standards for air pollutants: sulfur dioxide (SO₂), carbon monoxide (CO), suspended particulate matter (SPM), nitrogen dioxide (NO₂), photochemical oxidants, benzene, trichloroethylene, tetrachloroethylene, dichloromethane, and dioxins. See Ministry of the Env't: Gov't of Japan, Environmental Quality Standards in Japan -- Air Quality, http://www.env.go.jp/en/air/aq/aq.html (last visited Mar. 23, 2009).


[FN53]. See Setonaikai kankyo hozen tokubetsu sochi ho [Temporary Measures Law for Environmental Conservation of the Seto Inland Sea], Law No. 110 of 1973 (Japan); Kowan ho [Harbor Law], Law No. 218 of 1950 (Japan); Koyo sumen umetate ho [Public Water Body Reclamation Law], Law No. 57 of 1921 (Japan).

[FN54]. It provided 300,000 yen for death, annual payments of 100,000 yen for adults, 30,000 yen for minors, and 20,000 yen for funeral expenses (which were extremely small amounts, even in 1959). Chisso also took advantage of the Mutual Aid Society by including exemption clauses in the agreement. See GRESSER ET AL., supra note 30, at 103-105. It was later revealed that Chisso already knew that their factory effluents were the cause of Minamata disease by their own investigation at the time of signing the agreement. In the First Minamata Disease Lawsuit, the Kumamoto District Court held that the solutum agreement was invalid because it offended public order and morals. See Watanabe v. Chisso K.K., 696 HANJI 15 (Kumamoto D. Ct. Mar. 20, 1973), partially translated in GRESSER ET AL., supra note 30, at 86, 94-95, 101-102; see generally MINPo, art. 90 (Japan).


[FN58]. Kogai kenko higai no hoshō to ni kansuru horitsu, Law No. 111 of 1973 (Japan).


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<td>2008</td>
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<td>3730</td>
</tr>
</tbody>
</table>

See id.


[FN61]. See id. at 87-88.

[FN62]. See Kankyosho [Ministry of the Env't], Nisankachisso ni kakaru Kankyo Kijun ni tsuite [Environmental Quality Standard for Nitrogen Dioxide] (July 11, 1998) (author's translation), http://www.env.go.jp/hourei/syousai.php?id=4000012 (last visited May 9, 2009). In July 1978, the Environmental Agency relaxed the air quality standard for NO₂. Under the new standard, the daily average for hourly values was set within the 0.04-0.06 ppm zone or below that zone. See id. It was more than twice as lax as before.


[FN64]. See id. at 198.


[FN66]. The title was also changed to the Law on Compensation for Pollution-Related Health Damage. See Kogai kenko higai hosho ho, Law No. 97 of 1987 (Japan).

[FN67]. The number of certified pollution patients in former Class I areas has been decreasing:

Changes in Certified Pollution Patients in Former Class I Areas

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1976</td>
<td>53414</td>
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<td>1984</td>
<td>92350</td>
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<td>1985</td>
<td>95391</td>
</tr>
<tr>
<td>1986</td>
<td>98694</td>
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</table>


[FN72]. The Ministry of the Environment extended this Project on April 7, 2005. It is because, as later explained, the applications for certification increased drastically after the Supreme Court found the 1977 Criteria was inappropriate. See KANKYōShō [MINISTRY OF THE ENV'T], KONO NO MINAMATAYO TAISAKU NITSUITE [FUTURE MEASURES AGAINST MINAMATA DISEASE] (Apr. 7, 2005) (author's translation), available at http://www.env.go.jp/chemi/minamata/taisaku050407.pdf (last visited May 9, 2009).


[FN74]. This is the second case where the Supreme Court held the State liable for not exercising its regulatory authority.
See id. The first was the coal miners' pneumoconiosis (black lung disease) case in the Chikuho region of Fukuoka Prefecture, Kyushu. See Yamamoto v. Japan, 58 MINSHU 1032 (Sup. Ct., Apr. 27, 2004).

[FN75]. From time to time, the national government expressed their regret for the Minamata disease; however, it never admitted their administrative responsibility until they lost their case in the Supreme Court. On the other hand, the mayor of the Minamata City officially apologized for its administrative responsibility for Minamata disease on May 1, 1994. See Kumamoto-ken [Kumamoto Prefecture Web Site], Minamatabyo Mondai ni Kansuru Keika Nenpyo [Minamata Disease Problem-Related Progress Chronology] (author's translation), available at http://www.pref.kumamoto.jp/site/548/list663-1355.html (last visited May 6, 2009).

[FN76]. The problem is that if a person applies for certification, s/he has to return his/her notebook under the Comprehensive Minamata Disease Medical Care Project.


[FN79]. See generally Niigata Nippo Online [Niigata Daily Report Online], Shasetsu: Niigata Minamatabyo: Sosho de shika Sukuenai no ka [Editorial: Niigata Minamata disease: Cannot Be Relieved Only by Litigation?] (Feb. 3, 2009) (author's translation) (on file with author). Niigata Minamata Disease Agano Patient Society, one of the Minamata Disease victims groups in Niigata, announced that they were preparing to bring the fourth lawsuit against the State and Showa Denko K.K. in June 2009. See id.


[FN81]. See id.

[FN82]. Nippon Glass was immune from reorganization proceedings.

[FN83]. In 1998, the pollution victims in the Nishiyodogawa area established the Center for the Redevelopment of Pollution-Damaged Areas in Japan (the Aozora Foundation) funded by part of the settlement money. This was an unprecedented experiment in Japan. Its main activities are the research for redevelopment of pollution-debilitated areas and the promotion of model business in Nishiyodogawa area, the efforts handing down experiences and lessons of pollution to posterity and offering such information at home and abroad, and the promotion of environmental education and environmental health activities. See generally Aozora Zaidan [Aozora Foundation], Welcome to the Aozora Foundation Home Page: A Blue Sky for Our Children: Bringing Dragonflies Back to the City, http://www.aozora.or.jp/newenglish/eindex.htm (last visited Mar. 22, 2009).


[FN85]. See id.

[FN86]. The meeting is held annually to exchange opinions on the road environment and road structure in Nishiyodogawa. The twelfth meeting was held on June 24, 2008. See Osaka Kokudo Jimusho [Osaka Nat'l Highway Bureau], Nishiyodogawa Chiku Doro Endo Kanko ni kansuru Renrakukai Dai 12 Kai ga Kaisai saremashita [12th Coordinating Conference on the Roadside Environment was held in Nishiyodogawa area] (author's translation), http://


[FN88]. See id.

[FN89]. See id.


[FN91]. See id.

[FN92]. The meeting is held annually to exchange opinions on the road environment and road structure in Kawasaki Ward and Saiwai Ward. The twelfth meeting was held on August 28, 2008. See KAWASAKI-SHI NANBU CHIKU DoRO ENDo KANKYO NI KANSURU RENRAKUKAI DAI 12 KAI KAISAI NITSUITE [12TH COORDINATING CONFERENCE ON THE ROADSIDE ENVIRONMENT IN SOUTHERN AREA OF KAWASAKI CITY] (author's translation), available at http://www.shutoko.jp/company/press/h20/prl2sv00000078oj-att/prl2sv00000078pw.pdf (last visited May 6, 2009).

[FN93]. With part of the settlement money, a patient group established "The Amagasaki Center for People, Town, and Dragonfly" on September 19, 1999, where patients restore their health and revitalize the town. See generally Amagasaki Hito Machi Akatombo Senta no Ichinen [A Year of Amagasaki Center for People, Town, and Dragonfly] (author's translation), http://www1.jca.apc.or.jp/kougai/sokai/sokai32/akatombo.html (last visited Mar. 22, 2009). With part of the settlement money, the patient group also opened an information center called "Amaken" on March 23, 2001. See Amaken, Setsuritsu no Kei [Establishment Progress], http://www.amaken.jp/about.htm (last visited Mar. 22, 2009).

[FN94]. See The Amagasaki Lawsuit, 1726 HANJI 20 (Kobe D. Ct., Jan. 31, 2000) (plaintiffs' names were withheld).

[FN95]. See id.

[FN96]. Jidosha N0x ho, Law No.70 of 1992 (Japan).

[FN97]. *See The Southern Nagoya Lawsuit, 1746 HANJI 3 (Nagoya D. Ct., Nov. 27, 2000) (plaintiffs' names were withheld).

[FN98]. *See id.


[FN101]. See id. As of March 31, 2008, there were 43,505 certified patients in Tokyo. See Tokyo-to Hukushi Hokenkyo -

Changes in Certified Patients Under Tokyo Healthcare Subsidy

<table>
<thead>
<tr>
<th>Year</th>
<th>Patients</th>
<th>Year</th>
<th>Patients</th>
<th>Year</th>
<th>Patients</th>
</tr>
</thead>
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<td>49093</td>
<td>2002</td>
<td>49602</td>
<td>2006</td>
<td>43505</td>
</tr>
<tr>
<td>1999</td>
<td>51038</td>
<td>2003</td>
<td>47994</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>51122</td>
<td>2004</td>
<td>46640</td>
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</tr>
</tbody>
</table>

Id.


[FN103]. See The Tokyo Air Pollution Lawsuit, 1885 HANJJ 23 (Tokyo D. Ct., Oct. 29, 2002) (plaintiffs' names were withheld).

[FN104]. On August 7, 1975, two members of Kumamoto Prefectural Assembly called the Minamata disease victims fake patients. A total of 342 Minamata disease victims and patients brought defamation lawsuits against them and Kumamoto Prefecture, and the Kumamoto District Court ruled in favor of the plaintiffs. See Moritama v. Sugimura, 964 HANJJ 108 (Kumamoto D. Ct., Mar. 24, 1980). See also Ogata v. Japan, 43 KEISHU 188 (Sup. Ct., Mar. 10, 1989); Ogata v. Japan, 18 KEISAI GEPPo 242 (Fukuoka High Ct., Apr. 18, 1986); Japan v. Ogata, 43 KEISHU 231 (Kumamoto D. Ct., Mar. 18, 1980).


tp://www.env.go.jp/chemi/minamata/survey_remedy-h19/ir_sample.pdf (last visited May 6, 2009). From April to May 2007, the Environmental Agency conducted the survey on Minamata disease victims. See generally INTERVIEW SURVEY at 1; QUESTIONNAIRE SURVEY at 1. The survey consisted of the interview survey and the questionnaire survey. See generally INTERVIEW SURVEY at 1; QUESTIONNAIRE SURVEY at 1. In the interview survey, out of 119 responding applicants for certification under the Pollution-Related Health Damage Compensation System, 76.5 percent were first time applicants. See INTERVIEW SURVEY at 3. In the questionnaire survey, out of 2,862 responding applicants, 76.6 percent were first time applicants. See QUESTIONNAIRE SURVEY at 5.


[FN108]. There were other significant air pollution lawsuits. For instance, the Route 43 Air Pollution Lawsuit became the first case where the Supreme Court recognized the liability of road administrators for road-related pollution. See The Route 43 Lawsuit, 49 MINShu 1870 (Sup Ct., July 7, 1985).


Changes in Asthma Patients (in thousands)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Patients (A + B)</th>
<th>Inpatients (A)</th>
<th>Outpatients (B)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>102.7</td>
<td>13.2</td>
<td>89.5</td>
</tr>
<tr>
<td>1980</td>
<td>106.6</td>
<td>14.3</td>
<td>92.3</td>
</tr>
<tr>
<td>1981</td>
<td>88.9</td>
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<td>99.2</td>
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<td>83.0</td>
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<td>1983</td>
<td>120.8</td>
<td>18.7</td>
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<td>1987</td>
<td>764</td>
<td>20.1</td>
<td>130.5</td>
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<tr>
<td>Year</td>
<td>Patients</td>
<td>Average Interval</td>
<td>Adjustment Factor</td>
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<tr>
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<tr>
<td>1990</td>
<td>850</td>
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<td>19.7</td>
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<td>11.6</td>
</tr>
<tr>
<td>2005</td>
<td>1092</td>
<td>155.8</td>
<td>8.7</td>
</tr>
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</table>

Estimated total patients = Inpatients + New outpatients + Old outpatients * Average interval for medical treatment * Adjustment factor (6/7)

Before 1987, an adjustment factor is not available.

FNf1. The data was gathered in October.
FNf2. Estimated total patients means the total number of patients who receive continuous medical treatment. It includes patients who did not receive medical treatment on the day of the survey.
FNf3. Total Patients means the total number of patients who receive medical treatment on the day of the survey.

See id.


[FN111]. See generally id.


[FN113]. See Jidosha NOx/PM ho, Law No.73 of 2001 (Japan).

[FN115]. Ishiwata ni yoru kenko higai no kyusai ni kansuru ho, Law No. 4 of 2006 (Japan).
26 Ariz. J. Int'l & Comp. L. 393
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Defence Counsel Journal
July, 2000

Feature Articles

*318 WHAT YOU ALWAYS WANTED AND NEED TO KNOW ABOUT THE LEGAL ENVIRONMENT OF SPAIN

After dictatorship and isolation, since 1975 Spain has been evolving a modern legal system as a part of the new Europe

Santiago Nadal [FN1]

Salvatore De Traglia [FN2]

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SPAIN emerged from nearly 40 years of dictatorship in 1975 and has since made a remarkable transformation from a sheltered, agriculture-based society to the first-world nation with a thriving economy that it is today. Part and parcel of this transformation has been Spain's development of a just and stable legal system. As more global businesses look toward Spain as a promising place for investment, it becomes increasingly important for lawyers, particularly those in North America, to have an understanding of the legal environment within which businesses will operate and commercial and other disputes will be resolved.

This article provides a basic overview of Spain's legal and court structure, a sampling of substantive laws of interest to businesses, a roadmap of procedures that are followed in the various courts (and chambers thereof), and some practical aspects of litigating in Spain.

LEGAL AND COURT SYSTEM

A. Legal System

Spain's Constitution, ratified on December 27, 1978, establishes a parliamentary monarchy form of government and a regionalized organization of 17 "autonomous communities." Some of the communities—for instance, Cataluña, Galicia and the Basque Country—retain a higher degree of political autonomy than others. Each community is divided into provinces and then into local municipalities.

The Constitution provides for the distribution of authority and power amongst the central government and the autonomous communities. Article 149 grants exclusive authority to the central government with respect to criminal, procedural, mercantile, labor, civil, tax, telecommunications and intellectual property laws, as well as matters concerning international affairs, national defense, organization of the court system, customs, the monetary system and social security.

The autonomous communities may, at their option, assume authority with respect to those matters not controlled by the central government, such as environmental law, agriculture and cultural affairs.

B. Court System

The Spanish court system is divided by both territory (national, autonomous community, provincial and district) and subject matter (civil/mercantile, criminal, administrative and labor/social) jurisdiction.

Within each district of each province are the following courts:

* Courts of First Instance (Juzgados de Primera Instancia), which hear claims concerning civil and mercantile matters;

* Courts of Instruction (Juzgados de Instrucción), which conduct preliminary investigations of criminal matters;

* Criminal Courts (Juzgados Penales), which hear oral trials pertaining to certain previously investigated criminal matters (the remainder of which are forwarded directly to the criminal chamber of the Provincial Courts);

* Contentious Administrative Courts (Juzgados de lo Contencioso Administrativo), which hear claims against the acts of local and autonomous community governmental authorities;

* Social Courts (Juzgados de lo Social), which hear matters concerning labor law, individual and collective disputes between employers and employees and claims to the National Health System.

The number of courts in a particular district varies by population.

Within the capital city of each province sits a Provincial Court (Audiencia Provincial). These courts have jurisdiction over the entire province and are divided into civil and criminal chambers. They hear appeals of judgments issued by the lower courts within the province.

The highest court within each autonomous community is the High Court of Justice (Tribunal Superior de Justicia). Each one is divided into chambers. The civil chamber hears appeals concerning certain special regional and local civil matters. The criminal chamber has only limited authority over criminal matters. The labor/social chamber hears appeals of judgments issued by the district level social courts. The contentious administrative chamber hears, among other issues, appeals concerning acts of certain office holders of the autonomous community, as well as appeals of rulings by the district level contentious administrative courts.

A special court with jurisdiction over the entire nation is the Central National Court (Audiencia Nacional). It hears criminal matters that affect national security and society in general, such as terrorism, counterfeiting and drug smuggling. The Central National Court is divided into two branches: the Central Court of Instruction and the Central Criminal Court. The famous Spanish judge Baltasar Garzón, whose investigation of former Chilean dictator Agusto Pinochet was the subject of worldwide media coverage, sits on a Central Court of Instruction.

The highest court in Spain is the Supreme Court (Tribunal Supremo). Located in Madrid, it has jurisdiction over the entire country and is divided into four chambers: civil/mercantile; criminal; contentious administrative;
and labor/social. Each chamber has its own justices and hears appeals (known as “cassation appeals”) against judgments rendered by the provincial courts. The Supreme Court serves as the court of first instance for claims against holders of certain high public offices. It is also empowered to determine whether foreign—that is, non-European Union member)—judgments and arbitration awards will be recognized in the absence of an applicable treaty.

The Constitutional Court (Tribunal Constitucional) serves a narrow yet important function in Spain's court system. It is charged with (1) resolving conflicts between the national government and the autonomous communities, (2) ruling on the constitutionality of legislation and (3) protecting the constitutional rights of individuals against violations by any government authority. The Constitutional Court consists of 12 justices and has jurisdiction over the entire country.

C. Organization of Legal Professionals

Legal professionals in Spain are organized into two main categories: lawyers (abogados) and procurators (procuradores). The lawyer's function is to set the *320* technical legal direction of the court proceedings and to draft the required writs. The procurator's function is to serve the court with all documents prepared by the lawyer and to notify the party and his lawyer of all writs related to the proceeding at bar. With the exception of labor and certain administrative proceedings, a procurator must be retained.

Spanish lawyers and procurators follow more or less identical courses of university study. The curriculum requires approximately five years to complete and results in a degree in law (licenciado en derecho). The graduate then chooses to join either the Bar Association of Lawyers (Colegio de Abogados) or the Bar Association of Procurators (Colegio de Procuradores), but not both.

Each association has its own code of ethics, which is very similar in content to that of the other, as well as to those of bar associations in other nations. For instance, the codes cover such subjects as lawyer-client confidentiality and conflicts of interest. Unlike in the United States, legal professionals in Spain are not required to take or pass a professional examination in order to enter a bar association.

There are approximately 80 bar associations in Spain, each of which is local or regional in scope. Membership in a particular bar association entitles the member to appear before courts only within its designated territory. Membership in the Madrid Bar Association is required in order to appear before the Supreme Court. Spanish legal professionals may hold membership in as many Spanish bar associations as they choose, regardless of the province or autonomous community in which it sits.

Foreign lawyers who wish to practice before Spanish courts may do so either by becoming licensed as a lawyer in Spain or by requesting a special right of audience from the appropriate Spanish bar association. The procedure for becoming licensed as a lawyer in Spain differs depending on whether the candidate is from a European Union member country or another nation.

Lawyers from European Union countries who wish to become licensed in Spain must prove that they have earned a university law degree in their home country and then pass an examination administered by the appropriate bar association. On the other hand, lawyers from non-European Union countries must prove that they have earned a university law degree in their home country, submit their law school transcripts to the Ministry of Education, whereupon the candidate's course work will be compared to that which is required of Spanish law stu-
dent, then pass an examination pertaining to each area in which the candidates' course work is found to be lacking.

Foreign lawyers wishing to appear before a Spanish court, but not to become licensed in Spain, may petition the pertinent local bar association for a special right of audience.

SUBSTANTIVE LAWS

A number of substantive laws in the Spanish legal system are of particular relevance to companies doing business in Spain. These laws may have a great effect on both the operations of the companies and the personal interests of the directors thereof.

A. Company Directors

Certain laws in the Spanish legal system impose liability directly on company directors for acts and omissions within the scope of their duties. Company directors may be subject to liability for negligence, failure to wind up the company promptly, and criminal behavior, as well as for other situations in which "piercing the corporate veil" is allowed.

1. Negligence

Under Article 133 of Spain's Company Law, directors may be liable to the company, its creditors and/or shareholders for losses caused by their negligent or bad faith acts or omissions. In order to prevail in an Article 133 action, plaintiffs, who typically are the company itself, creditors or shareholders, must prove that (1) a negligent or bad faith act or omission was committed, (2) plaintiffs suffered damages and (3) the acts or omissions directly caused the damages. If plaintiffs succeed in proving these elements, then Article 133 provides that all members of the board of directors will be jointly and severally liable.

Two types of actions typically are pursued against directors for the recovery of damages caused by their negligent acts or omissions—first, social actions, which are brought by the company itself, and second, individual actions, which are brought by creditors, shareholders or third parties. Individual directors may cleanse themselves of liability, however, if they can prove that they had no knowledge of the acts or omissions at issue or that they expressly opposed it and took all necessary steps to prevent the resulting damage.

2. Failure to Wind-Up Timely

Company directors may be liable to company creditors in a winding-up situation. Article 260 of the Spanish Company Law establishes that the winding up of a company will occur, among other causes, on (1) conclusion of the company's business, impossibility of carrying out the company's purpose or paralysis of its corporate bodies, (2) losses that reduce the company's assets to less than half of its share capital or (3) decreases in the company's share capital below the legal minimum required. In these situations, Article 262.5 of Company Law requires that the directors call a general shareholders meeting within two months and either remove the cause of the dissolution or wind up the company. If the directors should breach this obligation, then they will be jointly and severally liable for the debts claimed by the company's creditors.
3. Criminal Acts

Company directors may be held criminally liable for illegal acts carried out on behalf of, or in the name of, the company, and also for a breach of their duties or abuse of power. Spain's Criminal Code provides that directors may be criminally liable for such acts as (1) falsifying annual accounts and other company information, (2) abusive decisions that damage the company, (3) limiting shareholders' rights (for example, impeding the voting rights of certain shareholder groups, restricting a dividend distribution approved at the general shareholders' meeting, etc.), (4) interfering with the administrative supervision of government bodies (for example, withholding key documents from government tax or labor authorities), (5) abuse of position, unfair and fraudulent management or disposal of assets and (6) tax-related crimes in excess of 15 million pesetas. Under Spanish law, the company itself cannot be criminally liable.

4. Piercing the Corporate Veil

Company directors are exposed to personal liability in situations where piercing the corporate veil is allowed. Case law of the Spanish Supreme Court approves "piercing the corporate veil" in situations where (1) the identity of the company and its directors or shareholders are confused, (2) the controlled company's interests are those of the dominant company, (3) the company has not been provided with enough capital to carry out its objectives or (4) the company is structured in such a way as to avoid the fulfillment of legal, contractual and extracorporate obligations.

B. Company Itself

Certain substantive Spanish laws have relevance to the operations of the company itself, as opposed to its individual directors, including laws affecting decision-making authorities exercised at general shareholder and board meetings, insolvency* situations, tort liability for acts of employees and defective products, and the protection of personal data.

1. Shareholder and Board Meetings

Spain's Company Law establishes a mechanism to challenge and control the powers exercised at a company's general shareholders meeting. Decisions made at the general shareholder meetings may be challenged in court if they are contrary to law ("null" decisions) or contrary to the by-laws or interests of the company ("void" decisions). Actions against null decisions may be filed by shareholders, directors or any third party with a legitimate interest. Actions against void decisions may be filed by directors and shareholders who were (1) present at the meeting and opposed the decision, (2) absent from the meeting or (3) illegitimately deprived of their vote.

Decisions adopted by a company's directors at board meetings may be challenged in a similar manner, although the parties with standing to make such challenges are limited to directors and holders of at least 5 percent of the company's share capital.

2. Suspension of Payments and Bankruptcy

Suspension of payments proceedings are typically commenced by a company in order to avoid a declaration...
of bankruptcy. The aim of suspension of payments proceedings is to reach an agreement with creditors in order to re-establish normality in the payment of the debts, typically by modifying the terms and conditions of repayment.

Suspension of payments proceedings begin when the debtor files a petition, accompanied by supporting financial and accounting documentation, with the appropriate court of first instance. Only the debtor may initiate such proceedings. The documentation is forwarded to three court-appointed auditors, who draft a report that assesses the debtor's present financial situation and its causes and then list the affected creditors and their respective amounts due. The judge will analyze the auditors' report and classify the insolvency as either “provisional” (assets exceed liabilities) or “definitive” (liabilities exceed assets).

A debtor in a definitive insolvency has 15 days in which to guarantee the difference, after which the creditors may file a petition for bankruptcy proceedings. If the debtor is in a provisional insolvency, then the court will call a creditors' meeting. If the creditors approve the debtor's proposed payment plan, it will be ratified by the judge and become binding on all creditors, except those who hold a right of abstention (that is, creditors that abstained from voting at the creditors' meeting or otherwise hold a secured claim against the debtor) and did not attend the meeting. The creditors may initiate bankruptcy proceedings if the debtor breaches the payment obligations set forth in the ratified plan.

Unlike suspension of payments, bankruptcy proceedings may be initiated in civil court by either the company itself or its creditors and are designed to wind up the insolvent company and distribute its assets to creditors. In order for a creditor to initiate bankruptcy proceedings, it must provide the court with documents and witnesses proving that (1) the debtor has ceased general payment of its obligations, (2) the creditor has previously been granted a court order for seizure of the debtor's goods, but was unable to collect payment, or (3) the debtor has disappeared or hidden its assets.

The court will appoint a bankruptcy commissioner to assume managerial control of the business and auditors to identify the assets to be included in the debtor's estate. The included assets are valued and sold. Creditors' claims are then recognized at a creditors' meeting and ranked by order of preference established by law. Claims are paid out by order of preference. Since *323 the debtor company's assets are typically insufficient to satisfy its debts, most creditors not having a preferential claim receive minimal reimbursement.

3. Tort

Spanish law provides that liability in tort may be imposed on individuals not only for their own actions but also for the actions of their employees. Liability in tort is governed by Articles 1902 and 1104 of Spain's Civil Code and hinges on three elements: (1) a fraudulent or negligent act or omission by the defendant, (2) the plaintiff's suffering direct damages, which may include detriment (da-no emergente), loss of gain (lucro cesante), and moral damages (da-~nos morales) and (3) the defendant's act or omission causing the plaintiff's damages. The plaintiff has traditionally had the burden of proving the negligence of the person causing the damage, but under recent Supreme Court case law, it is now presumed that the person causing the damage acted negligently. Defendants now have the burden of proving that they behaved with due diligence.

Spanish law also imposes civil tort liability for damages arising from defective products. This product liability is governed by Law 22/1994, July 6, of Civil Responsibility for Damages Caused by Defective Products. The law defines a defective product as one that, as from the moment that it is put into circulation, does not offer the
user a level of safety that is reasonably expected of such product or of similar products. Parties subject to liability under the law include (1) producers of the finished product, (2) producers of elements or primary materials of the product, (3) parties that present themselves to the public as being the producer of such products, putting their name or other distinctive mark on the products and (4) parties that introduce such products into the European Union for sale, lease or other form of distribution.

Plaintiffs seeking reparation under the law must prove that (1) a defect existed in the product, (2) damage occurred and (3) a causal relationship existed between defect and damage. Defendants may exonerate themselves from responsibility by proving that (1) they did not put the product into circulation, (2) it is possible that the defect did not exist at the moment that the product was put into circulation, (3) the product was not produced for sale or other distribution, (4) the product was not produced within the framework of a professional or business activity, (5) the defect arose from the product's being produced in such form or manner as to comply with a mandate of law or (6) the state of scientific or technical knowledge existing at the time the product was put into circulation was not sufficiently advanced to have identified the defect. This last argument ("state of the art") may not be used when the product at issue is food, medicine or otherwise intended for human consumption.

Reparations under the Defective Product Law are allowed for death, bodily injury or damage to personal property in excess of 65,000 pesetas. Damages may not be claimed for the cost of the product itself. Other damages, including moral damages, are governed by Spain's general civil legislation. The total liability for deaths or bodily injuries arising from identical products having the same defect is limited to 10.5 billion pesetas. (As of June 10 2000, 174 pesetas equaled US$1.)

4. Unfair Competition

Law 3/1991, January 10, of Unfair Competition, governs acts of unfair competition that occur in Spain. The law prohibits various forms of market confusion (such as imitation, disparagement, denigration and the illicit exploitation of the reputation of another), unlawful disruption of the normal functioning of a competitor (such as trade secret misappropriation and interruption of contractual relations), discriminatory sales practices, and dumping. Available remedies include injunctive relief and indemnification.

*324 5. Protection of Personal Data

Organic Law 15/1999, December 13, of Protection of Data of a Personal Character, governs the collection and use of personal data pertaining to individuals. It requires that a party collecting, using and/or disseminating personal data follow certain procedures designed to protect the subject individuals. Before individuals' personal data may be collected, they must be clearly informed of (1) the existence of the database into which the data will be compiled, (2) how and for what purpose the data will be used, (3) the personal consequences (including any negative implications) likely to result, (4) the right to access, correct, cancel or otherwise oppose the collection and use of the data and (5) the identity and address of the party undertaking the compilation.

Following these disclosures, individuals must give their clear and unequivocal consent to the compilation and use of their personal data, unless the law otherwise provides an exception. Consent may be revoked at any time for cause, although the revocation will not be deemed retroactive.

Certain personal data receives special treatment and additional protection under the law. Information pertain-
ing to ideology, religion, beliefs or union affiliations may not be compiled or otherwise used unless and until the subject individual gives express written consent. Under no circumstances may individuals be compelled to divulge this information. The law expressly prohibits the creation of databases for the exclusive purpose of compiling such special data, as well as data concerning race, health or sex life.

The database owner is obligated by law to adopt all means necessary to guarantee the security of the personal data and to prevent its alteration, loss and unauthorized use or access. The owner also must notify the Spanish Agency for the Protection of Data of the existence, content and intended use of the database, as well as the security measures employed. All such details pertaining to the database will be inscribed in the public registry.

Compiled data of a personal nature may be communicated to third parties only with the prior consent of the subject individual and for purposes that are directly related to the legitimate functions of the database owner. For all practical purposes, this requirement makes it extremely difficult for a company in Spain to sell its customer database to third parties, as is commonly the practice in such countries as the United States.

**PROCEDURAL LAWS**

The procedural rules followed in Spanish legal proceedings and in the practice of evidence vary depending on the particular court (or chamber thereof) that has jurisdiction over the case.

**A. Jurisdiction**

Jurisdiction of Spanish courts for causes of action brought in Spain is governed by both international conventions—specifically, the Brussels Convention and the Lugano Convention, described below—and national law.

Article 22 of Spain's Organic Law of the Courts grants jurisdiction to Spanish courts in such matters as (1) rights that are registered in a Spanish official registry, such as patents and trademarks, (2) consumer contracts where the consumer lives in Spain, (3) contractual obligations that must be executed in Spain, (4) tort claims in which the facts giving rise to the cause of action occurred in Spain, (5) actions in which the defendant is domiciled in Spain and (6) actions in which the parties have agreed to submit the issue to Spanish courts. The decisions of foreign courts in matters falling within the exclusive jurisdiction of Spanish courts will not be honored.

**B. Procedures**

Procedures to be followed in Spanish legal actions differ considerably between the various chambers of the court system.

*325 1. Civil Actions*

Civil actions will take the form of either executory or declaratory proceedings. The purpose of executory proceedings is to obtain the transfer of goods from debtor to creditor. The purpose of declaratory proceedings is to seek a judicial declaration on whether the claimant has a right to obtain that which is claimed and may protect and make good use of such right.
Commencement of an executory proceeding first requires that the creditor present an instrument establishing an executory right, such as a cheque, bill of exchange or notarial deed. The court then issues an order of execution and payment is demanded from the debtor. The debtor may file a defense, but the avenues for opposition are limited. The judge will determine whether the transfer will be mandated. Executory judgments may be appealed to the Provincial Court, but never to the Supreme Court.

Declaratory proceedings are more involved. They are divided into three phases: (1) allegations, (2) evidence and (3) conclusions. The allegations phase encompasses the plaintiff’s initial filing of the claim and the defendant’s answer and/or counterclaim. The evidence phase encompasses both the proposal and practice of evidence, as described below. The conclusions phase requires that both plaintiff and defendant serve a writ summarizing their positions and evidence, after which the judge will issue a decision.

The judgment may be appealed, usually to the Provincial Court. These appeals are generally oral proceedings in which no further evidence may be introduced. The Provincial Court’s ruling may further be appealed to the Supreme Court, but only in certain limited circumstances. The losing party is typically responsible for all court costs, as well as the prevailing party’s lawyer, procurator and expert witness fees.

2. Contentious Administrative Actions

Administrative proceedings in Spain are regulated in great detail, with different procedures being applicable to different administrative areas. In general, however, all such actions begin with one or more proceedings occurring before the administrative body itself. These proceedings follow three phases.

The first phase involves the plaintiff filing a writ alleging an infringement of the law by the administrative body (or representative thereof) and setting forth the supporting facts. The administrative body typically replies by filing a writ asserting that either the facts set forth by the plaintiff are not correct or that the law is not applicable to such facts.

The second phase involves the parties’ presentation of evidence.

In the final phase, the parties file their respective writs of conclusion, and the judge renders a decision.

A plaintiff may appeal an administrative decision only to the pertinent contentious administrative court if and when all pre-requisites for appeal, as set forth by law, are fully satisfied. The appeal before the Contentious Administrative Court will follow a similar three phase progression.

3. Labor Actions

Labor proceedings may not be commenced unless and until mediation has been attempted before an administrative body. If a mediated settlement is not reached or the defendant does not appear, then the claimant, normally an employee, serves a written claim with the applicable social court. All labor actions in Spain are oral proceedings and are resolved much more quickly than other types of litigation. An oral hearing will take place before a specialized judge, whereupon the claimant and defendant summarize their positions. Witnesses and other evidence are produced “in situ,” and the judge is allowed to ask questions. The proceeding concludes with the parties’ closing arguments. The judge is required to render a decision within one month from the proceeding’s conclusion.

*326 C. Evidence

1. Civil Proceedings—Proposal

The evidence phase of civil proceedings is divided into two sub-phases: first, the proposal, and then, the practice. The proposal sub-phase begins when each party submits a “writ of proposal” to the judge. Writs of proposal identify the evidence that each party intends to introduce during the proceedings. The writs must be accompanied by a list of the party's proposed witnesses and the questions that will be asked of each. In principle, original copies of all proposed documents must be produced when the initial writs (that is, the plaintiff's claim and the defendant's answer) are served to the court. The judge reviews the writs and decides what, if any, of the proposed evidence will be admitted. Denials of evidence may be appealed.

Spain's civil procedure law identifies seven primary types of evidence: (1) confessions in trial, (2) public documents, (3) private documents, (4) commerce books, (5) witnesses, (6) technical reports of expert witnesses and (7) judicial recognition.

a. Confessions in Trial

Traditionally in a “confession in trial,” a party appears before the court to answer written questions prepared by the other party and approved by the judge. Spain's new procedural system, however, permits the parties to pose questions orally. They must be posed in an affirmative manner. Evasive answers may be deemed by the judge as a “confession.” Confessions at trial typically are used to confirm information that is already known and rarely generate new evidence.

b. Public and Private Documents

“Public documents” are those that have been authorized by a public notary or civil servant and are in a public registry. It is necessary to request a copy of the public document from the public registry in order to admit it into the proceedings. All other documents are considered “private.”

Unlike the civil procedure in American courts, whereby parties must produce all documents in their possession, whether favorable or unfavorable, that are relevant to the litigation, a party to a Spanish civil action is not required to disclose documents that are unfavorable to its case. One party may request that the other party disclose a particular document, but the requested party is under no obligation to comply.

d. Commerce Books

Commerce books are the financial and accounting records of a company. A party may request that the other disclose its commerce books to the court so as to allow that party or its expert witness the opportunity to analyze the balance sheet, accounts and other data.

e. Witnesses

As stated, witnesses must be proposed in advance by each party in its writ of proposal. It may propose as
many witnesses as it considers convenient. The list of proposed witnesses must be accompanied by a list of the questions that will be asked of each. Both documents must be disclosed to the opposing party, who may also serve written questions. As with the “confession in trial,” witness questions must be posed in an affirmative manner and approved by the judge in advance. Witnesses who fall within certain parameters established by Spanish law—such as friendship with one of the parties or a personal interest in the outcome of the case—may be “impeached.”

f. Technical Reports of Expert Witnesses

Expert witnesses may be proposed for matters requiring scientific, artistic or technical knowledge. The party must serve a writ setting forth the points to be analyzed by the expert. The opposing party *327 receives a copy of the proposal and may propose additional points. The judge has the final decision.

Expert witnesses traditionally have been impartial persons selected by the court and were not retained by or did not represent either party. Spain's new rules of procedure, however, permit each party to present experts and expert testimony that are not impartial. The final say on an issue, however, remains in the hands of an impartial expert selected by the judge. Each expert witness will distribute a report of his or her analyses to the judge and parties and will testify to such matters before the court.

Expert witnesses are of vital importance for proving and quantifying damages and losses and for clarifying technical matters. Judges normally place complete reliance on their findings.

g. Judicial Examination

“Judicial examination” occurs when the judge, pursuant to a party's request, personally visits a particular site and examines the object of controversy. Judicial examination is used mainly in unfair competition cases. Judges are very reluctant to engage in such activity.

2. Civil Proceedings—Practice Phase

After all issues arising from the writs of proposal have been resolved, the practice sub-phase begins. The parties are given 20 to 30 days in which to “practice” the evidence that has been proposed—that is, to depose witnesses, to receive reports from the expert witnesses, etc. In reality, however, this very short period is commonly extended. Once the evidence has been practiced, the parties are given an additional ten days to analyze the evidence and prepare their writs of conclusion.

Spain's civil procedure law allows for extensions of up to four months when evidence must be obtained from another country within Europe and up to six months when it must be obtained from in a non-European country, provided always that (1) the extension is requested within the first three days of the proposal sub-phase, (2) the facts to which the evidence pertains took place in a foreign location, (3) a witness is currently domiciled in a foreign location and (4) if the evidence at issue is a public document, the applicable registry is in a foreign location.

PRACTICAL CONSIDERATIONS
A. Before Filing Claim

A plaintiff is well advised to engage in certain activities prior to filing a claim with a Spanish court, including granting powers of attorney to the lawyers and procurator, gathering all necessary and desirable data concerning the defendant and the defendant's assets, securing all required documentation on which to base the claim, and serving pretrial notifications by means of a public notary.

1. Lawyers, Procurators and Powers of Attorney

As mentioned earlier, parties to most court proceedings in Spain must retain both a lawyer and a procurator. A party therefore must grant powers of attorney to the lawyer and procurator prior to or at the beginning of the proceeding. Grants must be made before a public notary and filed with the court in conjunction with the initial claim or answer, as appropriate. Powers of attorney granted outside of Spain must be legalized with the Apostille of the Hague Convention and translated into Spanish by a sworn translator.

2. Gathering Information

It is highly recommended that a plaintiff gather information about the defendant prior to filing the claim. In particular, it is necessary to know as much information as possible about the defendant's domicile, assets and legal status. There are several ways to obtain this information, the easiest being to request a financial report from a specialized reporting agency. This report will include basic information regarding the defendant's address, bank accounts, real estate and other assets.

The information, however, tends not to be completely reliable. In certain cases, it might be advisable to hire the services of a private detective in order to discover the actual domicile and assets of the defendant. If the defendant is a commercial entity, then a better alternative is to request a report from the Mercantile Registry, whose report will contain a full disclosure of the entity's legal history, including its structure, any changes thereto, the founding shareholders, the current directors and all empowered persons.

3. Obtaining Documentation

Civil claims filed in Spain must be accompanied by original copies of all documents on which the plaintiff bases the claim. For the purposes of Spanish civil litigation, a photocopied document that has been authenticated by a public notary will be deemed an original copy. If an original copy is not available, then a non-authenticated photocopy will be acceptable only if accompanied by a statement describing where the original is located. The defendant must likewise produce original copies of all documents necessary for the defense when filing the answer to the claim.

Documents in foreign languages must be translated into Spanish. A sworn translation is not required, unless the other party considers the translation invalid. Public documents granted in countries other than Spain must be legalized with the Apostille of the Hague Convention.

Once the initial civil complaint and answer are filed, the only documents which may thereafter be introduced are those that (1) were thereafter created, (2) were not previously known to the submitting party or (3) the submitting party could not previously obtain, provided that the party had previously notified the court as to the re-
gistry in which the documents could be found.

4. Notifications

It is highly recommended that all notifications sent prior to the initiation of court proceedings (e.g., demand letters, etc.) be served on the other party via a public notary. Here, it is well to make special mention of the role of public notaries in Spain. They are highly trained and respected public officials whose principal function is to incorporate certain types of legal acts into public deeds. Admission into the public notary profession is highly regulated and very difficult. They must have a law degree and pass an extremely competitive examination in order to be granted one of the limited number of posts. This is in sharp contrast to the role of a notary public in the United States, who is often an administrative assistant or paralegal and whose basic function is to attest to the identity of signatories of certain types of documents.

The public notary will prepare a notification based on the draft provided by the party's lawyer, serve it on the recipient, confirm its receipt, and record all details thereof in his file. Given the stature of a public notary in Spain, a notification received from one is likely grab the recipient's attention. More significant, however, a notification send via public notary will be incorporated into a public deed, and that will constitute strong evidence of both its sending and content.

B. Service of Documents

Spain's civil procedure law requires that the service of a summons be made to the defendant at the defendant's registered offices, if a company, or domicile, if a person. Service is difficult when the defendant company no longer occupies its registered offices. In those cases, the summons may be served directly to any one of the company's directors at the director's registered address or domicile. If no directors can be located, then the summons may be served by means of either publication in the Boletín Oficial del Estado or posting *329 on bulletin boards located in the pertinent courthouse. Once the defendant has appeared in court through his procurator, however, all service of documents must be made directly to the procurator.

If court proceedings are conducted abroad and one of the parties resides in Spain, then the 1970 Hague Convention on the Serving of Documents allows all documents to be served on the Spanish resident pursuant to Spain's civil procedure laws, provided, of course, that the country in which the proceedings are conducted has ratified the convention.

C. Enforcing Domestic Judgments

Once a favorable judgment is obtained by a party, it must be enforced. The difficulty of enforcing the judgment will vary depending on which court had jurisdiction. Spain's criminal, social and administrative courts normally take all steps necessary to enforce their judgments, including investigations that may be needed to locate the condemned party and the party's assets. Civil courts, however, will only take steps to enforce a judgment pursuant to the petition of an interested party.

There are certain actions that a prevailing party may take in order to enforce a dishonored civil judgment. The party may request a seizure of the losing party's assets. The seized assets will be sold at public auction, and the proceeds used to satisfy the judgment. This makes it clear that the effectiveness of enforcement depends on

seizing enough valuable assets to satisfy the judgment.

It is a common occurrence in Spain that the prevailing party to a civil proceeding commences enforcement only to discover that the losing party has either disappeared or has no valuable assets. For this reason, it is highly recommended, as noted above, that an investigation of the opposing party's financial situation be conducted prior to initiating a civil action. It is also advisable that when legally possible, civil claims be filed not only against the debtor company but also against its directors, shareholders and/or any company closely linked therewith.

The prevailing party also may request that "precautionary measures" be approved and granted by the court. These usually entail the provisional seizure of the defendant's goods and properties. They may be granted either before, during or after the claim is filed. The judge has complete discretion to decide whether or not precautionary measures will be granted. Nonetheless, a request for precautionary measures will not be granted unless there exists (1) evidence that the plaintiff has a good and strong right on which to base the claim (jus us boni juris) and (2) a likelihood that enforcement of a future judgment will be impossible unless such precautions are employed (periculum in mora). A plaintiff requesting precautionary measures also must post a bond in the amount set by the court as a guarantee. The defendant is normally given the opportunity to oppose the plaintiff's request and/or to file its own bond in order to lift the measures.

D. Enforcing Foreign Judgments

The recognition and enforcement of foreign judicial decisions is governed by multilateral and bilateral treaties entered into by Spain and, in the absence of such treaties, by Spanish procedural laws.

Spain is a member of both the Brussels Convention of September 27, 1968, and the Lugano Convention of September 16, 1968. Recognition and enforcement pursuant to the Brussels Convention requires that a petition be filed before the court of first instance of the domicile of the losing party (assuming that the judgment was rendered by a European court) and accompanied by (1) a power of attorney for the petitioner's procurators, (2) an authenticated copy of the foreign judgment, (3) a Spanish translation of the judgment, (4) written proof that the losing party was correctly summoned in the foreign proceedings and (5) written proof that the judgment is enforceable pursuant to the laws of the country where the judgment was rendered. If these requisites are met, the Spanish court will order the recognition and execution of the foreign judgment pursuant to the same rules applicable to a domestic judgment.

For those cases in which neither the Brussels nor Lugano conventions are applicable, Spanish law provides that foreign judgments will be enforceable in Spain if (1) the judgment was issued in the exercise of a personal action, (2) the judgment was not issued in a trial where the losing party was in default, (3) the obligation that is the basis for the claim is not illegal in Spain, (4) the judgment meets the legal requirements of and is enforceable in the country that rendered the judgment and (5) an original copy of the judgment is served.

A petition for the recognition and enforcement of the judgment must be filed before the civil chamber of the Supreme Court. Both the losing party and the public prosecutor will be given an opportunity to assert their arguments. If the Supreme Court decides that the judgment can be recognized and executed in Spain, it will notify the provincial court in the province where the losing party is domiciled that enforcement may begin.

Judges of first instance in Spain lack the experience needed to handle the enforcement of foreign judgments.
efficiently. Further complicating the matter is the reality that, although the losing party's assets may be provisionally seized, they may not be sold at auction until the proceedings are ended. In many cases, the losing party continuously appeals the decisions of the court, making it very expensive for the claimant to achieve his enforcement objective.

E. Duration of Proceedings

A major criticism of the Spanish legal system focuses on the duration of court proceedings. Spanish law dictates time limits applicable to each phase of a given proceeding, but the limits are rarely enforced by judges. The duration of court proceedings in Spain is difficult to predict. On average, however, civil proceedings in the courts of first instance last from 12 to 18 months. Appeals to the provincial courts typically require an additional six to 12 months. If a judgment is ultimately appealed to the Supreme Court, the appellate proceeding may last three to five years.

F. Arbitration

Arbitration proceedings in Spain may be based on law or equity, depending on the choice of the parties. If based on law, the arbitrators must be practicing lawyers. Procurators are not retained in arbitration. Arbitration may be either "ad hoc" or administered by special arbitration bodies. The latter option tends to be the most practical and frequently used. In either case, the parties' agreement to submit their dispute to arbitration must be formalized in a written agreement before the process is allowed to begin.

Spanish arbitration procedure is characterized by its flexibility. Once an arbitrator has accepted a case, the parties must agree on a timetable for each phase of the proceedings and pay the arbitration fees in advance. Oral hearings are set for the presentation of evidence, and the parties are permitted to intervene directly. The arbitrator must render a decision not later than six months from the initiation of the proceedings, unless otherwise agreed by the parties. The arbitrator's decision is notarized and will have the same binding effect as a court judgment. In principle, the arbitrator's decision may not be appealed before a court, but in certain circumstances the arbitration may be annulled before a provincial court of the place where it was issued. The judgment rendered may not be further appealed.

Enforcement of foreign arbitration awards is governed by the New York Convention for the Recognition and Execution of Foreign Arbitration Awards of July 10, 1958. Proceedings for the recognition of a foreign arbitration award must be initiated before the civil chamber of the Supreme Court. Pursuant to the convention, a party wishing to enforce a foreign arbitration award must present the Spanish court with original copies (or authenticated photocopies) of both the written agreement through which the parties agreed to arbitrate the dispute and the arbitrator's ruling. Each document must be legalized with the Apostille of the Hague Convention and duly translated into Spanish by a sworn translator.

The losing party will be notified of the enforcement claim and given an opportunity to present its case. The Supreme Court thereafter decides whether or not to grant recognition of the award. If granted, the court of first instance located in the losing party's place of domicile is notified and enforcement proceedings will begin.

G. Mediation
Mediation is not yet well developed in Spain, despite the recent efforts of arbitration tribunals and law societies. Mediation is, however, obligatory in labor law matters. It takes place before an official body administered by the national and/or regional governments. In reality, however, the only purpose of such body is to make official the agreements that have been previously arrived at between the lawyers of the employee and employer.

CONCLUSION

The authors hope this article is instructive to Defense Counsel Journal's readership, but we must caution that it is intended to provide only a general overview of a most extensive topic. It should not be taken as a comprehensive treatment of the Spanish legal scene or used as the basis for making legal decisions.

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