NATIONAL REPORT FOR SPAIN ON
ELECTRONIC EVIDENCE AND VIDEOCONFERENCING

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DIGI-GUARD

Digital communication and safeguarding the parties' rights: challenges for European civil procedure. DIGI-GUARD

National Report

Spain.

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1. General aspects regarding electronic evidence.

1.1. Does the law of your Member State provide any definition of electronic evidence?

There is not a definition under Spanish law of electronic evidence in the Act of Civil Procedure or in any other law. The current legislation for the civil procedure was approved in 2000 (the previous regulation was an act of year 1881). In the regulation of 2000, among the regulation of all the means that can be used as evidence in civil procedure, legislator includes a section with three articles about the evidence by means of reproduction of sound and image and any other data. This regulation is included in arts. 382, 383 and 384:

"Section 8. On the reproduction of speech, sound and image and the instruments which make it possible to file and know data relevant to the proceedings.

Article 382. Instruments for filming, recording and similar instruments. Value as evidence.

1. In court, the parties may propose the reproduction of speech, images and sounds recorded through instruments for filming, recording and other similar instruments as means of evidence. On proposing this evidence, the party may, as appropriate, attach a written transcription of the words contained in the media in question which are relevant to the case.

2. The party which proposes this means of evidence may provide the opinions and instrumental means of evidence it considers to be advisable. The other parties may also

provide opinions and means of evidence when they question the authenticity and precision of what has been reproduced.

3. The court shall evaluate the reproductions referred to in paragraph 1 of this article in accordance with the rules of fair criticism.

Article 383. Certificate of the reproduction and custody of the relevant materials.

1. An appropriate certificate shall be drafted of the acts carried out in application of the previous article, and this shall contain all that is necessary for the identification of the filming, recording and reproductions made, and, as appropriate, the justifications and opinions provided or the evidence examined.

2. The material which contains the speech, image or sound reproduced related to the court records must be kept by the Court Secretary so that it does not undergo any alterations.

Article 384. On the instruments which make it possible to file, know or reproduce data relevant to the proceedings.

1. The instruments which make it possible to file, know or reproduce speech, data, figures and mathematical operations carried out for accounting purposes or for other purposes, which, as they are relevant to the proceedings, must be admitted as evidence, shall be examined by the court through the means which the party proposing provides or which the court decides shall be in such a way that the other parties to the proceedings can allege and propose what is convenient for their rights with identical knowledge to the court.

2. The provisions in paragraph 2 of Article 382 shall apply to the instruments stipulated in the previous paragraph. The documentation in the records shall be kept in the manner most appropriate to the nature of the instrument, in the trust of the Court Secretary, who, as appropriate, shall also adopt the measures required for their custody.

3. The court shall evaluate the instruments referred to in the first paragraph of this article in accordance with the rules of sound criticism applicable to these depending on their nature."

Before the approval of the Act of Civil Procedure of 2000 it was also possible to use as evidence in civil procedure this kind of instruments since the means of evidence in Spanish Law are not a *numerus clausus*. However, it is very positive that instruments

containing data, images or sound have an specific regulation in the current Act of Civil Procedure.

Authors underline that this regulation does not refer to the electronic document. Evidence by documents is regulated in arts. 317 and following of the Act of Civil Procedure[1]. Initially regulation of documents, according to the wording of the different articles, referred mostly to a paper document, but some of the articles have been amended to adapt the regulation to electronic documents and to the requirements of Regulation (UE) n. 910/2014.

In what concerns to the electronic signature of documents is regulated Act 6/2020, of 11 November, regulating certain aspects of electronic trust services. According to its art. 3 "Public, administrative and private electronic documents have the legal value and effectiveness that corresponds to their respective nature, in accordance with the legislation applicable to them".

Neither Act 6/2020 nor Act of Civil Procedure provides a definition of electronic document, even a definition of document. Act of Civil Procedure just regulates the requirements and value of public documents.

Another important Act on electronic documents is Act 42/2015 of 5th October, amending the Act of Civil Procedure. According to this amendment all documents and any other information in the civil process must be provided electronically through an IT application. This application is not the same for the 17 Autonomous Communities in Spain but the commonest applications are Lexnet and Avantius). Barristers must log in the application and provide all the files through it; of course, they will receive the files of the counter litigant in the same way. The objective, that has already been achieved, is "zero paper" in the domain of justice.

[1] G. Sacristán, Comentarios al artículo 382 [Comments on art. 382], in M. A. Fernández et. Al. Comentarios a la Ley de Enjuiciamiento Civil [Comments on the Act of Civil Proceeding] (Iurgium, 2000), p. 1761; G. Ormazábal, El documento electrónico como medio de prueba [Electronic document as instrument of evidence] in Boletín de la Confederación de Asociaciones de Archiveros Bibliotecarios, Museólogos y Documentalistas [Bulletin of the Confederation of Associations of Archivists, Librarians, Museum Professionals and Documentalists] 2006, num.4, p. 69.

Ormazábal considers that the accurate distinction would be: electronic documents, documents, electronic evidence. However the law only distinguishes: documents and electronic evidence, being the latter data or records of sounds or images.

1.2. Does the law of your Member State define of what is considered as paper document?

No, it doesn't. Law just establishes the documents that are considered public documents in art. 317 Act of Civil Procedure:

"(i). Court rulings and procedures of all kinds and any attestations thereof Court Secretary may issue[2].

(ii). Documents duly authorised by notaries public under the law.

(iii). Documents executed with the involvement of Registered Commercial Notaries and any certifications of transactions in which they may have intervened which have been issued by them with reference to the Registry Book they keep in accordance with the law.

(iv). Certifications of registry entries issued by Property and Company Registrars.

(v). Documents issued by civil servants legally empowered to certify matters lying within the scope of their functions.

(vi). Documents referring to archives and records belonging to the bodies of the State, the public administrations or any another public law entities issued by civil servants duly empowered to certify the provisions and actions of such bodies, administrations or entities."

Any other document (different than those in art. 317 Act of Civil Procedure) will be considered private document (art. 324 Act of Civil Procedure). The difference between public document and private document lies in its requirements and, subsequently, in its value as evidence in the process.

Before the achievement of the objective "zero paper" in the Administration of Justice (year 2015), it was considered that writing was not necessarily a requirement of the document, since maps and photographs or other graphic representations could be

[2] Court Secretary, Court Clerk is one of the main legal professions in Justice. In every court there will be one; the requirements to be a Court Clerk are similar to those to become a judge: hold a Law degree and pass a public exam. Their name changed in 2015, from that moment the law changed the name of "Secretario Judicial" in "Letrado de la Administración de Justicia" [Lawyer of the Administration of Justice]. I've maintained the translation as Court Secretary because I think that Lawyer of the Administration of Justice can be misleading in comparative law context.

considered documents according to the Act of Civil Procedure. But a document should be necessarily a movable asset[3].

1.3. How is electronic evidence categorised among means of evidence within the law of your Member State?

Electronic evidence is regulated in arts. 382 and following of Act of Civil Procedure (see answer to question 1.1). The law deliberately distinguishes electronic evidence from any other kind of evidence, as it can be seen in art. 299:

"Article 299. Taking of evidence.

1. The taking of evidence in trials shall include:

(i). Questioning the parties.

(ii). Public documents.

(iii). Private documents.

(iv). Experts' opinions.

(v). Taking of evidence by the court.

(vi). Questioning witnesses.

2. Pursuant to the provisions set forth herein, any means to record words, sounds and images shall also be admitted, as shall any instruments that allow words, data and mathematical operations carried out for accounting purposes or any other purposes, which are relevant to the proceedings, to be saved, known or reproduced.

3. Where certainty about relevant facts may be attained by any other means not expressly set forth in the preceding paragraphs of this Article, the court may, at the request of a party, admit such means as evidence and shall adopt any measures which may turn out to be necessary in each case".

From a theoretical point of view, this distinction between electronic evidence and any other taking of evidence is not relevant, since art. 299.3 allows the party to use any other means of evidence in the process; however, the fact that legislator establishes a list of the different means for the taking of evidence shows a certain distrust of the legislator

[3] J. Montero, La prueba en el proceso civil [Evidence in civil procedure], (Civitas, 2011), p. 280.

towards the electronic means. However, it should be noted that Act of Civil Procedure was approved in 2000, this mentality has been superseded in practice.

It is important to underline that the Act of Civil Procedure in many respects assimilates electronic media to the documents; this appreciation has been accentuated over the years whith the application of the Act of Civil Procedure.

As an example, the Judgement of the Provincial Court of Barcelona 2nd May 2007 considers that there are several reasons to defend the analogy between electronic evidence and documentary evidence. The first one is the words of the Preamble of the Act of Civil Procedure comparing documents and electronic evidence[4]. The second reason is that the rules of form and time of attachment of electronic evidence and documents are the same. The third reason is that the amendments of the Act of Civil Procedure after its approval in 2000 have confirmed this equalization on the regulation of electronic evidence and documents.

Judgement of the Provincial Court of Barcelona 2nd May 2007: "Initially, the thesis of the analogy with the documentary evidence, judicial or expert recognition, was accepted, which somehow 'maintains' since the analogy with the documentary is alluded to in the Preamble, particularly the "instruments" of the art. 384 (including some precept, expressly regulates them as documents, such as art. 812 Act of Civil Procedure among those who can access monitoring; or regarding the contribution, art. 265 et seq. or the possibilities of exhibition, arts. 329 to 334), with the expert, as complementary with respect to authenticity (art. 382 L.E.C.) or with judicial recognition (art. 382, as the 'video')".

Also Judgement of Audiencia Provincial [Provincial Court] of Cádiz of 25th February 2008 considers the electronic document as a subspecies of the document: "A special case of document is the so-called "electronic document", this is "the one written in electronic support that incorporates data that is electronically signed", to which section 3 of article 326 of the LEC refers, introduced by the Law 59/2003 of December 19,

[4] The wording of the Preamble comparing the use and efficacy of electronic evidence and documents is as follows: "The Law, attentive to the present and foreseeable of the future, opens the door to the presentation of writings and documents and to the acts of notification by electronic, telematic and other similar means, but without imposing on the litigants and citizens who have these means and without ceasing to regulate the demands of this communication. In order for the acts carried out by these means to take full effect, it will be necessary for the instruments used to include the guarantee that the communication and what is communicated are surely attributable to whoever appears as the author of one or the other. And full reception and other legally relevant circumstances must also be guaranteed".

electronic signature. This new precept refers to the authentication and effects of the electronic document, to article 3 of the aforementioned Special Law".

1.4. Does the law of your Member State explicitly regulate that evidence or data in electronic form has evidentiary value?

Yes: art. 382 and 384 of the Act of Civil Procedure, establishes that judge is free to value electronic evidence in accordance with the rules of fair criticism; this means that this kind of evidence has not a privileged value; judge is free to attribute the value that he considers, but of course judge must reason this value in the judgement.

However, except free value of evidence is the general rule in Spain.

The courts may not give value to a specific means of electronic evidence if they consider that other electronic evidence would be to prove the facts. As an example, in the Judgement of Provincial Court [Audiencia Provincial] of Madrid of 31st January 2011, the claimant considered than a TV commercial violated fundamental rights, the judgement dismiss the claim because the court considered that the proper evidence would be a video recording but the claimant just attached to the claim screen shots of the commercial[5].

But as a general rule, Spanish court do not hesitate to give value to electronic evidence to support the judgement, and in certain areas of contracting electronic evidence is quite common. For example, in the field of some esential services such as telephony, electricity, etc., telephone contracting is the general rule. In the event that there is, in addition to the telephone recording, any document, court usually gives the same value to both of them. This is the case, for example, of the Judgement of the Provincial Court [Audiencia Provincial] of Zaragoza of 22nd October 2020, in which an insurance company refuses to pay damages to the insured. The reason given by the company is that the driver had taken alcohol at the moment of the car accident and, in that case, the insurance

[5] Judgement of the Provincial Cour of Madrid 31st January 2011: "Absent from the procedure, the videographic support of the news, -which should have been brought to litigation by the plaintiff at the time referred to in art. 265 of the LEC -, and taking into account that the defendant only admitted in the act of the trial (this has been verified in its viewing) that a piece of news was broadcast on the day and time stated in the lawsuit in which a report prepared by the UCE in relation to the 905 telephone services, without, in any case, making reference to the plaintiff or her organization, nor linking her anagram to a fraudulent or illegal action, it can only be concluded that , in effect, there is no admission of the facts in the terms that are included in the sentence under appeal, nor of course, and therefore, sufficient proof of the same that can support the estimate, even partial, of the demand; the documents provided together with the claim, consisting of photographs from different moments of the broadcast, do not prove that the content of the claim was produced in the terms in which the claimant claimed".

company is not responsible for damages. The insurance company submitted an electronic evidence (a phone recording) but the insured considered that it was not clear, according to the words and the intonation of the insurance company employee, the exclusion of the compensation of the damages when the driver is drunk: "In these circumstances, this court considers that the requirement of clarity of the exclusion is sufficiently fulfilled. The offeror referred to cases of exclusion from compensation and was listed. That the intonation or the rhythm of the speech it is not an obstacle to identify two concepts, driving and alcohol. What in the cultural heritage of an average consumer has a clear meaning".

1.5. Does the law of your Member State explicitly differentiate between electronic and physical private documents as evidence?

Usually authors underline that electronic evidence, electronic document an electronic signature must be considered different concepts, and there is certain confusion in the regulation of these three legal instruments because its regulation is not unified. However, some authors consider that electronic evidence should be referred to regulation of arts. 383 to 384 of the Act of Civil Procedure, meanwhile electronic document must be subject to the regulation of documents of arts. 317 and following of Act of Civil Procedure and, finally, electronic signature (that of course is used always in electronic documents) is regulated Act 6/2020, of 11 November, regulating certain aspects of electronic trust services[6].

Then amendment of Act of Civil Procedure in 2020 by means of Act 6/2020 of 11th November has confirmed this interpretation. This amendment introduces a new paragraph 3 and 4 in art. 326, within the regulation of private documents that establishes as following: "3. Where the party in whose interest the effectiveness of an electronic document is sought or the authenticity, integrity, date and time accuracy or other characteristics of the electronic document that a non-qualified electronic trust service as provided for in Regulation (EU) No 910/2014 of the European Parliament and of the

[6] M. P. Díaz, Prueba electrónica y proceso civil: los documentos electrónicos, ¿un nuevo medio de prueba? o ¿nuevas perspectivas del concepto de documento desde la Ley 6/2020, de 11 de noviembre, reguladora de determinados aspectos de los servicios electrónicos de confianza? [Electronic evidence and civil procedure: electronic documents, a new evidence? or new perspectives in the concept of document from Act 6/2020, of 11 November, regulating certain aspects of electronic trust services?], in Llorente, M. and others, Digitalización de la justicia: prevención, investigación y enjuiciamiento [Digitalization of Justice: prevention, investigation and prosecution], (Aranzadi, 2022), p. 231; G. Ormazábal, El documento electrónico como medio de prueba [Electronic document as instrument of evidence], supra n.1.

Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market can attest, is challenged, the procedure shall be as set out in paragraph 2 of this Article and in Regulation (EU) No 910/2014.

4. If a qualified trust service as provided for in the Regulation referred to in the previous paragraph has been used, the document shall be presumed to meet the disputed characteristic and the trust service shall be presumed to have been properly provided if it was, at the relevant time for the purposes of the discrepancy, on the trusted list of qualified providers and services.

If the electronic document is nevertheless challenged, the burden of verification shall be borne by the challenger. If the result of such verification is negative, the costs, expenses and fees incurred in the verification shall be borne exclusively by the party who lodged the objection. If, in the opinion of the court, the objection was frivolous, it may also impose a fine of 300 to 1200 euros".

Actually, Judgement of Provincial Court [Audiencia Provincial] of Cádiz, considers that the concept of electronic document could be: "a document drawn up on an electronic medium incorporating data which are electronically signed, as referred to in art. 326.3 of the LEC [Act of Civil Procedure]".

1.6. Does the law of your Member State recognise the special evidentiary value of public documents, and does this also apply to electronic public documents?

Article 319 of Act of Civil Procedure recognizes a privileged value to public documents as follows:

"Article 319. Probative force of public documents.

1. The public documents included under items (i) to (vi) of Article 317 shall provide full proof of the fact, action or state of affairs documented by them, as well as of the date in which such documents were produced, of the identity of those certifying them and of any other persons, if any, intervening in them with the requirements and in the cases set forth in the following articles".

It must be underlined that case law doctrine in the sense that public notaries are allowed to document what parties say, but the document does not prove that these statements are true. As an example, Judgement of the Supreme Court of 15th June 2021 establishes as follows: "The reference to full proof in Art. 319. 1 LEC must be understood

in the sense that the public document brought to the procedure (in this case, the notarial deed of subrogation), in addition to its legitimacy of origin and authenticity of content, by itself and without the need for any other demonstrative element or deductions or interpretations, accredits the contents to which the precept expressly refers: 'fact, act or state of affairs that it documents, of the date on which this documentation is produced and of the identity of the notaries and other persons who, where appropriate, intervene in it'.

In accordance with settled case law, 'fact' is everything that encompasses the unity of the act, from the appearance to the reading and signing of the document, including the declarations of the signatories, but without the authenticity of these going beyond considering it proven that they have been carried out or issued in the presence of the notary and without affecting their intrinsic veracity, because this aspect is beyond the notary's perception".

1.7. Describe the legal effects of changing the form of electronic evidence to physical.

As answered in question 1.1, parties are obliged to issue all the documents in electronic support from year 2015. This means that no physical documents are allowed in civil procedure. So, the possible discussion between electronic or physical form has disappeared in the domain of Justice.

1.8. Describe the legal effects of changing the form of physical evidence to electronic.

See answer to 1.7. There are some judicial decisions in this regard that refer to the difference between a hand handwritten signature in a document that has been scanned considering that it cannot be equated to a digital signature Judgement of Provincial Court [Audiencia Provincial] of Girona 8th February 2021. This judgement has been delivered in the domain of civil contracts, not in the administration of justice.

1.9. Explain the rules and what is considered to be an original and what a copy (the concept of original).

Procedural regulation does not establish when a document is considered an original and a copy.

Arts. 267 and art. 268 Act of Civil Procedure establish the form in which public and private documents shall be issued in the process:

"Art. 267: When the documents which have to be provided in accordance with the provisions in Article 265 are public and may be presented as a simple copy, on paper, electronically through a digitalised image enclosed as a schedule which shall have to be signed with a recognised electronic signature and, if its authenticity is challenged, the original records, copy or certification of the document may be consulted in order to provide evidence".

Art. 268 refers to the submission of private documents: "Private documents which must be submitted shall be presented as originals or as copies authenticated by a Notary Public and shall be attached to the court orders or testimony shall be given of these, with the return of the irrefutable originals or copies submitted, if this is requested by the parties concerned. These documents may be submitted through digitalised images, incorporated to electronically signed annexes".

It should be noted that the reference to the possibility of issuing the copy of the document in paper must be considered abrogated from year 2015, according to the obligation of the parties to issue all the documents by means of the IT application of the Administration of Justice (see answer to 1.1).

Art. 317 of Civil Procedure Act establishes which documents can be considered public documents (see answer to 1.2). The regulation of the different documents of art. 317 may include a definition of original or copy.

For example, art. 1220 of Civil Code establishes: "Copies of public documents of which there is a matrix or protocol, challenged by those to whom they are prejudicial, shall only have probative force when they have been duly collated".

Art. 17 of Notaries Act establishes: "The matrix document is the original document that the Notary must draw up on the contract or act subject to his authorisation, signed by the parties to the contract, by the instrumental witnesses, or witnesses of knowledge where applicable, and signed and signed by the notary himself".

Whenever there is a matrix or protocol (and sometimes, if the document is very old, it is not digitalised) it is assumed that it is impossible to issue the document other than in a copy, since the matrix document must always be kept by the notary.

1.10. Describe the legal effects of a copy of electronic evidence within the law of your Member State.

The copy of electronic documents is regulated in art. 326.3 and 4 Act of Civil Procedure (quoted in answer to question 1.5). In what concerns to the electronic evidence, any kind of recording or data can be used as evidence as established in arts. 382, 383 and 384 Act of Civil Procedure (quoted in answer to question 1.1), these articles do not mention anything about the originals and the copies.

Usually the party is free to use in the process a copy of the document. At the moment the documents were used as evidence in paper (before year 2015), a photocopy of the document was enough. If the counterparty had any doubt about the authenticity if was his duty to challenge before the court the authenticity of the copy, and the party who presented the copy.

There is an specific rule for non-written texts in art. 333 of the Act of Civil Procedure, only in this case, the law distinguishes between physical or electronica format:

"Article 333. Obtaining copies of documents that are not written texts.

In the case of drawings, photographs, sketches, plans, maps and others documents which are not mainly comprised of written texts, if only the original exists, a party may request that a copy be obtained when they are exhibited in the presence of the Court Secretary, who shall certify that it is a true and faithful reproduction of the original.

If these documents are provided in electronic format, the copies made by electronic means by the court office will be considered to be true copies".

We must also take into account the consequences referred to the value of the evidence when the party refuses to present a non-certified copy, according to art. 329 of the Act of Civil Procedure.

"Article 329. Effects of a refusal to exhibit.

1. Should an unjustified refusal to exhibit pursuant to the preceding Article come about, the court may, taking into consideration the other evidence, attribute probative value to the non-certified copy filed by the applicant of the exhibition or the version such document's contents may have given.

2. In the case of the unjustified refusal referred to in the preceding paragraph, the court may issue a requirement by means of a procedural court order instead of the provisions set forth in such paragraph, so that the contents whose exhibition has been sought are filed in the proceedings, where the characteristics of such documents, the other

evidence provided, the contents of the pleas sought by the applicant and the allegations to ground them should so suggest."

2. Authenticity, reliability and unlawfully obtained electronic evidence

2.1. Are there any particular procedure, guidelines, mechanism or protocol on how the parties shall obtain electronic evidence in order to preserve their authenticity and reliability before submitting them to the court?

No.

2.2. Is there any particular procedure on how the court should identify the source of electronic evidence?

No.

2.3. Does the law of your Member State stipulate different rules or provisions for different types of electronic evidence? (Please explain whether certain types of electronic evidence are presumed authentic and reliable and others inauthentic and unreliable. If applicable, please cite the provisions regarding (in)authenticity and (un)reliability of electronic evidence.)

No.

2.4. Does an unfamiliarity with the technical part and a (high) possibility of manipulation of electronic evidence impact its evidentiary value?

No.

But the claimant has the duty to ensure that the court has the proper means to reproduce the electronic evidence, otherwise, he is in charge of providing the means for the reproduction of electronic evidence in the oral hearing; as established in art. 384.1 of the Act of Civil Procedure "shall be examined by the court through the means which the party proposing provides".

Usually, courts in main villages are very properly provide of any king of means of reproduction and reading data. However it may happen than in small villages the IT means are not so suitable.

2.5. When should the court appoint experts to process electronic evidence?

The court in civil procedures is not allowed to appoint experts, but the party does according to art. 382.2 Act of Civil Procedure: "The party which proposes this means of

evidence may provide the opinions and instrumental means of evidence it considers to be advisable. The other parties may also provide opinions and means of evidence when they question the authenticity and precision of what has been reproduced". This article does not refer expressly to the expert but, of course, includes it; if could be for example an expert who declares that a video has not been edited or manipulated.

2.6. Who bears the costs if an expert needs to be appointed to assess the reliability, authenticity and (un)lawful manner of obtaining electronic evidence?

The expert appointed as established in art. 382.2 Act of Civil Procedure (see answer to 2.5) will be paid by the party who appoints him. However, the loser part of the proceeding shall bear the costs, and the fees of the expert are included in the costs.

2.7. What options are available to a party claiming that electronic evidence has been compromised, tampered with, manipulated or obtained illegally (e.g. by hacking into an IT system)?

See answer to 2.5

2.8. How is the admissibility of compromised or illegally obtained electronic evidence regulated within the law of your Member State?

Illegally obtained evidence has an unitary regulation for every process (civil, criminal, administrative and labour) in art. 11.1 Organic Act on the Judiciary Court: Every type of proceeding shall respect the principle of good faith. Evidence obtained directly or indirectly in a manner that violates fundamental rights and freedoms shall be deemed inadmissible". Please, note that illegally obtained evidence, under Spanish Law is only the evidence that violates fundamental rights.

In civil procedure regulation of illegally obtained evidence has been developed in art. 287 Act of Civil Procedure: "1. When one of the parties deems that fundamental rights have been infringed upon when obtaining evidence or in the origin of evidence, the party shall allege this immediately, and the other parties shall be notified of the fact, as the case may be.

As regards this matter, which can also be requested ex officio by the court, it shall be resolved in the judgement, or, if the proceedings are oral, at the beginning of the hearing, before the taking of evidence. For this purpose, the parties shall be heard and, as

appropriate, the pertinent and useful evidence proposed in the act on the specific point of the aforementioned illicitness shall be taken.

2. Against the resolution referred to in the preceding paragraph there is only an appeal for reversal, which shall be lodged, substantiated and decided in the trial or hearing, and the right of the parties to reproduce the challenge of the illicit evidence against the final judgement shall remain safeguarded".

According to this article, any of the parties or the judge, at any moment, can allege the fact that an evidence has been illegally obtained. According to the moment (even though the law is not very clear in this regard) the consequences will be different: if the illegality of the evidence has been denounced before the admission of the proof the consequence should be a decision of the judge in the sense of rejecting the admission of the evidence. If it has been denounced before the admission but before the practice, the consequence should be that the evidence would not be practiced in court (e.g.: in the case of a record of a phone conversation, it will not be reproduced in court). And finally, if the cause of illegality is known after having practised the evidence in court the consequence is that the judge is not allowed to value it.

An example of illegally obtained evidence (in the domain of civil procedure) could be, for example, a video that has been recorded with a violation of the right to privacy, as an example Judgement of the Provincial Court [Audiencia Provincial] of Baleares 36/2014, 18th February).

2.9. Which party carries the burden of proving the (in)authenticity or (un)reliability of electronic evidence?

See answer 2.5.

2.10. Does the court have the discretion to challenge the authenticity and reliability of electronic evidence even if neither party objects the authenticity and reliability of electronic evidence?

No, except on cases of illegally obtained evidence (see answer to 2.8), in this case the court is allowed to act *ex oficio*. In any other case, the court can decide that the evidence is not reliable and, as a consequence, will not value it; however, the judgement must contain a reasoning of why the court considers the evidence unreliable.

2.11. How is the manipulation or (un)lawful manner of obtaining electronic evidence assessed by the court in the case of a challenge?

See answer to 2.8.

2.12. What are the consequences if the court finds that evidence was indeed compromised or obtained illegally?

See answer to 2.8. If the judge finds that the evidence has been illegally obtained, then he must reject it. That is: the parties have to do a proposal of the evidence they are going to use. If the counterparty considers that one of the evidences has been illegally obtained he can allege the illegality; if this happens, the judge must answer the allegation of the party, saying if he admits the allegation of illegality (and, subsequently, he cannot admit the evidence) or if he doesn't (in this case, he will admit the evidence and the evidence will be reproduced in court). The judge *ex oficio* is also allowed (even if the counterparty does not allege in this sense) to consider that the evidence has been illegally obtained. In this case, he must reject the admission of the evidence. In any of this cases he must give a reasoned answer to the parties, so that, they can appeal the decision of the judge any sense (that means: either if he admits the evidence or refuses it).

2.13. Does the law of your Member State enable for the parties to submit written statements of witnesses?

Yes, written responses are enabled, only in the case of art. 381 of the Act of Civil Procedure:

"Article 381. Written responses from legal persons and public entities.

1. When it is pertinent for legal persons and public entities, as such, to inform on facts which are relevant for the proceedings, as these facts refer to their activities, and it is not applicable or necessary to individualise the knowledge of interest for the proceedings in determined natural persons, the party this evidence is of use to can propose that a legal person or entity respond in writing about the facts within the ten days previous to the trial or hearing, at the request of the court.

2. In the proposal of evidence referred to in the previous paragraph, the points which the declaration or written report must deal with shall be stated precisely. The other parties may allege what they consider to be advisable and, specifically, if they wish other

points to be added to the request for a written declaration or that that the points stated by the proposer of the evidence be rectified or added to.

Once the parties have been heard, as appropriate, the court shall decide on the relevance and usefulness of the proposal, and shall precisely determine, as appropriate, the terms of the question or questions which must be the subject of the declaration of the legal person or entity and shall request it to provide the declaration and forward it to the court within the established time limit, with the caution of a fine of €150 to €600 and shall take action against the person personally responsible for the omission, for disobeying the authority. The examination of this evidence shall not suspend the course of the procedure unless the judge considers this necessary to prevent the lack of proper defence of one or both parties.

Once the written responses have been received, the Court Secretary shall transfer these to the parties for the effects stipulated in the following paragraph.

3. In the light of the written responses, or the refusal or omission of these, the court may provide, ex officio or at the request of any o the parties, through a procedural court order, that the natural person or persons whose testimony may be relevant and useful in order to clarify or complete the declaration of the legal person if this were obscure or incomplete, be summoned to the trial or hearing. At the request of a party, any evidence, which is relevant and useful in order to contradict this declaration, may also be admitted.

4. The provisions in the previous paragraphs shall not apply to public entities when, in an attempt to know of facts with the characteristics set forth in paragraph 1, these can be obtained from those certifications or testimony subject to being provided as documentary evidence.

5. The other rules of this section shall be applied to the declarations regulated in previous paragraphs, insofar as this is possible".

This is the only case in which a written response is allowed in civil procedure. If the witness has serious difficulties to go to court, art. 364 of the Act of Civil Procedure allows the so-called domiciliary testimony as follows:

"Article 364. Domiciliary testimony of the witness.

1. If, due to illness or any other reason referred to in the second subparagraph of paragraph 4 of Article 169, the Court considers that a witness is unable to appear at the

court premises, it may take his statement at his place of residence, either directly or through judicial assistance, depending on whether or not the said place of residence is located within the jurisdiction of the court.

The statement may be attended by the parties and their barristers and, if the latter are unable to assist, they shall be authorised to submit a prior written interrogatory containing the questions they wish to put to the examined witness".

Even though this kind of witness testimony is called "domiciliary testimony", it does not take place necessarily in the domicile, it can take place in a hospital or in any other place, the idea is that instead of following the general rule: that the witness has to go to court, the court will go to the place where the witness lives at the moment. The circumstances for the domiciliary testimony are usually illness or old age.

No kind of pre-recorded testimony is admitted in the Act of Civil Procedure or in practice.

3. Duty to disclose electronic evidence.

3.1. How is the duty to disclose electronic evidence regulated within the law of your Member State?

At the moment of the claim (or the response to the claim) parties must enclose the evidence mentioned in art. 265 Act of Civil Procedure:

"Article 265. Documents and other writs and objects relating to the grounds of the case.

1. All claims and responses shall be accompanied by:

(i) The documents on which the parties base their right to the judicial protection they claim.

(ii) The means and instruments referred to in paragraph 2 of article 299 if they are the basis for the claims for protection formulated by the parties.

(iii) The certifications and notes concerning any registry entries or the contents of the register books, procedures or proceedings of any nature whatsoever.

(iv) The expert opinions on which the parties base their claims, notwithstanding the provisions of articles 337 and 339 of this Act. Any party entitled to free legal aid shall

not be bound to present the opinion together with the claim or the response, but may simply announce it in accordance with paragraph 1 of article 339.

(v) The reports, worded by legally qualified private investigation professionals, concerning relevant facts on which the parties base their claims. If such facts are not acknowledged as true, oral evidence shall be taken.

2. Only where the parties, when submitting their claim or response, do not have the documents, means and instruments referred to in the first three points of the previous paragraph, they may designate the file, protocol or place where they are to be found or the registry, register book, acts or proceedings from which a certification is intended to be obtained.

If what the parties intend to present at the hearing is contained in a file, protocol, proceedings or registry from which they may request and obtain authentic copies, the plaintiff shall be deemed to have them at his disposal and shall be bound to attach them to the claim and cannot confine themselves to the designation referred to in the preceding paragraph.

3. Notwithstanding the provisions of the preceding paragraphs, the plaintiff may, at the pre-hearing, submit the documents, means, instruments, opinions and reports relating to grounds for the case, whose interest or relevance has only become evident as a result of the allegations made by the defendant in his response to the claim".

According to this article, when the party files the claim, he must enclose all the documents required by art. 265 Act of Civil Procedure; actually, these documents are evidences, so the judge will examine them and, if any of these documents does not fulfil the requirements to be an evidence, he will refuse them at the beginning of the oral hearing.

All documents must be numbered, so that, any of the persons that participate in the process can easily identify it by saying, for example: "according to doc. n. 5 of the claimant".

Note that this obligation belongs to both parties in civil process, since the first words of this article is: "All claims and responses", that is: both the claimant (when he files the claim) and the defendant (when he files the answer to the response to the claim).

If the party has not the documents at the moment of filing the claim or the response to the claim, he must advice about the impossibility of having the documents at the moment but they must identify the document and the place where it is located, as established in art. 269 of the Act of Civil Procedure:

"Article 269. Consequences of the lack of preliminary submittal. Special cases.

1. When the claim, response or, as the case may be, the pre-trial hearing, the documents, resources, instruments decisions and reports which, in accordance with the provisions herein should be submitted at this time or the place where the document should be is not located, if the latter is not available, the party may not subsequently submit the document, nor may it be submitted in proceedings except in the cases stipulated in the following article.

2. Claims to which the documents referred to in article 266 have not been attached shall not be admitted."

In this case, it is mandatory to the party the exhibition of the document (see below answer to 3.3).

Please, note that whenever the law regulates the disclosure of documents it refers to experts' reports and electronic evidence also.

In addition to the regulation of the disclosure, there is also a regulation of what the Act of Civil procedure considers as preliminary proceedings [diligencias preliminaries]:

"Article 256. Types of preliminary proceedings and how to apply for them.

1. Any hearing may be prepared by:

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

(ii) An application for the individual who is to be claimed against to exhibit the object in his possession that shall be referred to at the hearing.

(iv) An application made by a partner or a joint owner for the exhibition of the documents and accounts of the company or condominium, directed to the latter or to the consortium or joint owner who has such documents in his possession.

(v) An application by the individual considering themselves damaged by an event that may be covered by civil liability insurance for the exhibition of the insurance policy by whoever has possession of it.

(v.a). An application for medical records addressed to the health centre or professional having custody of such records, under the terms and with the content provided for by the law.

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

The scope of the preliminary proceedings is to facilitate the prospective claimant the preparation of the process.

Be aware that the exhibition of these documents (and others regulated in art. 256 Act of Civil Procedure) does not refer to the evidence but to the preparation of the process. E.g.: if the object of the claim is a certain object and the claimant is not sure about the person who has in its possession, he can ask the judge to adopt the measure of art. 254.1.2 of the Act of Civil Procedure. The scope of the measure in this case will be to be sure about the identification of the person to whom he shall address the claim.

Another example according to art. 256.1. 5: if a person wants to ask for damages to the insurance company but he is not sure about the content of the contract, he can ask the insurance company to exhibit the insurance contract, so that the prospective claimant can make sure about his rights and take a decision about claim against the company or not.

The scope of the measures varies in order to the preparation of the process. In some cases these measures will serve to help the prospective claimant to take a decision about his chances to win the process and, as a consequence, to decide if he files the claim

or not. Some other measures aim to the identification of the defendant and avoid procedural defects, etc.

Thereby, the scope of the measures of art. 256 of the Act of civil Procedure is not to disclose evidence, however some of the measures may imply it. This is the case, for example, of the exhibition of the contract with an insurance company of art. 256.5; or the exhibition of the documents of a condominium of art. 256.6, etc.

The person who has the documents or the object is obliged to fulfil the requirements of the preliminary proceeding, in what concerns to the exhibition of the documents, the law is very tough, since it allows the judge to enter in the place where the documents are supposed to be. Please, note that "entry and search" implies the intervention of the police, who will be in charge of the forced entry.

Art. 261 Act of Civil Procedure: "If an application has been made for the exhibition of titles and documents and the court finds that there are sufficient indications that the said titles and documents may be at a specific place, it shall order the entry to and search of the said place and, if found, shall take possession of the documents and put them at the disposal of the applicant at the court premises".

3.2. What is the scope of the party's duty to disclose electronic evidence within the law of your Member State?

The requirement regulated on art. 265 Act of Civil Procedure requires that the party has to accompany documents to the claim has the scope to allow the other party to be aware of the most important evidences that are going to be used in the process.

In the civil process documents are supposed to be usually the most important evidence to be used by the parties, the scope of the measure of art. 256 of the Act of Civil Procedure is that at the moment of the hearing both the claimant and the defendant and, of course, the judge have (and know the content) of most of the evidences of the counterparty.

Another scope of this rule is as follows: the hearing is performed orally so at the moment of the oral hearing the documents are not read, the parties just refer to their content, because all the involved parties: judge, claimant and defendant are supposed to have read by that moment the content of all the documents.

At the beginning of the oral hearing, the parties must refer the evidence they are going to use, but some of the evidence has already been enclosed at the moment of the claim or the response. So, at this moment, the only evidences that are going to be disclosed are witness testimony and examination and cross interrogation of the parties. Parties at this moment use the words "se da por reproducida" [it is considered reproduced] as a reference to the documents that have been already enclosed.

During the hearing, if the parties have to refer to the content in their intervention in the hearing, the barrister may say, as an example: "As it is said in document number 1…", or "In the expert opinion of document number 9…", etc. At that moment all the parties are supposed to know the content of all the documents.

3.3 Does the duty to disclose electronic evidence apply to third persons?

The duty to disclose electronic evidence is not expressly regulated in the Act of Civil Procedure. However analogically we may apply the rules of the duty to disclose of documents, which are as follows:

"Article 328. Duty of exhibiting documents amongst the parties.

1. Each party may seek that the other parties exhibit any documents that are not in his possession and which refer to the matter at issue in the proceedings or the value of the evidence.

2. A non-certified copy of the document shall be attached to such application and, should it not exist or be unavailable, the document's contents shall be indicated as accurately as possible.

3. In proceedings dealing with an infringement of industrial or intellectual property rights committed on a commercial scale, the plea for exhibition may particularly extend to any bank, financial, commercial and customs documents produced during a specific period of time and which are and which are assumed to be in the defendant's possession. Preliminary evidence shall be attached to such plea, which may consist of the submission of a sample of the copies, goods or products through which the infringement may have come about. The court may decide to keep the proceedings secret at the request of any party in order to ensure the protection of confidential data and information".

When the holder of the documents is a third party, the rule is the art. 330 Act of Civil Procedure:

"Article 330. Exhibition of documents by third parties.

1. Unless set forth otherwise with regard to preliminary proceedings, non-litigant third parties shall solely be required to exhibit documents owned by them and sought by one of the parties where the court should deem that knowledge of such documents is transcendental for the purposes of issuing judgement.

In such cases, the court shall order the personal appearance of whomever may have such documents in their possession through a procedural court order and, after hearing them, shall rule as appropriate. Such rulings shall not be subject to any kind of appeal. Nonetheless, the party holding an interest in the matter may reiterate his plea in the second instance.

Should they be prepared to show the documents voluntarily, they shall not be obliged to appear at the Judicial Office and, should they so wish, the Court Secretary shall go to their address to draw up an attestation of the documents.

2. For the purposes of the preceding paragraph, any parties involved in the legal relationship at issue or that may have been the cause of such relationship though they do not appear as parties to the trial shall not be construed as third parties".

We may see that the obligation of the third parties is not as tough as the obligation of the parties; the refusal of the third party to the exhibition of the documents has not very severe consequences[7]. However a Public Administration (Central State, Town Council, etc.) may not refuse the exhibition of a document, when a court, according to art. 332 of the Act on Civil Process, requires it:

"Article 332. Public bodies' duty to exhibit.

1. Agencies dependent on the State, autonomous regions, provinces, local authorities and any other public law bodies may not refuse to issue any certifications and attestations that they may be required to submit by the courts or refuse to exhibit any documents kept in their premises and archives, unless the document is legally declared or

[7] Some authors are very critical with this distinction, they consider that the third party should be punished if he does not show the documents, according with the general duty of cooperation with the administration of Justice that every citizen has, according to art. 118 of Spanish Constitution. See F. Gascon, Materiales de Derecho Procesal Civil [Materials for the Study of Civil Procedure Law], 2023, p. 300 (Not published, the book is free available at: https://eprints.ucm.es/index.html).

classified as reserved or secret. In such a case, a grounded exposition of such reserved or secret nature shall be sent to the court.

2. Unless a special legal duty to secrecy or reservation should exist, any entities and companies that perform public services or that are in charge of activities of the State, autonomous regions, provinces, local authorities and any other local entities shall also be subject to the obligation of exhibiting documents and issuing certifications and attestations under the terms set forth in the preceding paragraph".

There is an specific rule for non-written texts in art. 333 of the Act of Civil Procedure, only in this case, the law distinguishes between physical or electronic format.

"Article 333. Obtaining copies of documents which are not written texts.

In the case of drawings, photographs, sketches, plans, maps and others documents which are not mainly comprised of written texts, if only the original exists, a party may request that a copy be obtained when they are exhibited in the presence of the Clerk of the Court, who shall certify that it is a true and faithful reproduction of the original.

If these documents are provided in electronic format, the copies made by electronic means by the court office will be considered to be true copies".

3.4. Are there any limits to the duty to disclose electronic evidence specified within the law of your Member State?

Yes, there are special rules for the industrial property claims regulated in art. 328.3 (quoted in answer to 3.3) and art. 124 and following of the Patent Act. Both articles establish measures to prevent the violation of trade secret. The scope of this rules is avoid all kind of fraudulent action from the prospective (or actual) claimant in the sense of asking for an exhibition of the document of the counterparty with the only scope of obtaining information about trade secrets of the company.

To avoid this behaviour the law adds certain requirement to the exhibition: the exhibition of the document will be reserved (that means that it will be restricted to a limited number of persons) and the law requires any kind of evidence to prove the *fumus boni iuris* of the claimant.

The trade company that has the obligation of disclosure has the right to claim for damages but only if the claim finally is not filed or if the claimant looses (art. 126 of Patent Act).

3.5. What are the consequences of a violation or non-compliance with the duty to disclose electronic evidence?

Documents and other evidences (including electronic evidence) must be included with the claim or in its response, if the party does not fulfil this obligation, he is not allowed to use that evidence in the process, as stated in art. 269 Act of Civil Procedure (see answer to 3.1). Exceptions to that rule are in the following article of the Act of Civil Procedure:

"Article 270. Submittal of documents after the commencement of proceedings.

1. After the claim and the response to the pre-trial hearing, or whenever it is appropriate, the documents, resources and instruments related to the merits of the case presented by the claimant, or the defendant shall only be admitted in the following cases:

(i). They are dated subsequent to the claim or the response or, possibly, subsequent to the pre-trial hearing, on condition that it was not possible to draft or obtain them prior to the proceedings.

(ii). They are documents, means or instruments prior to the claim or response or, as appropriate, to the pre-trial hearing, when the party which submits them justifies not having known of their existence before.

(iii). It was not possible to obtain the documents, means or instruments due to reasons which are not attributable to the party, providing the designation referred to in section 2 of article 265 was duly made or, as appropriate, the announcement referred to number 4. in section 1 of article 265.

2. When a document, means or instrument regarding facts related to the merits of the case, are presented once the acts referred to in the previous section have concluded, the other parties may allege the inadmissibility of taking these into consideration in the proceedings or hearing as they do not come under any of the cases referred to in the previous section. The court shall decide immediately and, if it considers that there is an intention to delay or procedural bad faith in the presentation of the document, it may also impose a fine of € 180 to € 1200 on the guilty party".

We must also take into account the consequences referred to the value of the evidence when the party refuses to present a non-certified copy, according to art. 329 of the Act of Civil Procedure (see answer 1.10).

3.6. Have there been any problems before the national courts in your Member State arising from differences in national regulations of the duty to disclose electronic evidence, or are such problems to be expected in the future?

No. I don't think these problems are expected in the future, since as I have already mentioned, similarities between documents and electronic evidence are very often taken into account by case law. Documentary evidence is one of the most used (and regulated) in civil process (see answer to 1.3).

4. Storage and preservation of electronic evidence

4.1. How is the storage and preservation of electronic evidence regulated within the law of your Member State?

Storage and preservation of all files and evidences is entrusted to the Court Secretary. Generally is entrusted to the Court Secretary in the Organic Act on Judiciary that is applicable to all the jurisdictions (civil, criminal, labour and administrative).

However, there is a more specific regulation for every jurisdiction. For civil processes it is included in the Act of Civil Procedure (see below answer to 4.2) [8].

Organic Act on Judiciary entrusted the regulation of the preservation of judicial files to a more specific regulation; this regulation is RD (Royal Decree [Real Decreto]) 937/2003, of July 18th, modernizing judicial files[9]. It applies to all the jurisdictions (civil, criminal, labour and administrative).

4.2. Provide a short overview of requirements, standards, and protocols for properly storing and preserving electronic evidence.

There is not an specific protocol for the preserving of electronic evidence; it will follow the rules of all the records of the process (apart from articles of Act of Civil

[8] Written regulation for criminal processes is more complete; it contains rules that apply specifically to evidence in which it is detailed which rule must be fulfilled by the police and by the court. In addition the Act of Criminal Procedure is more technical making differences (for example, it distinguish between clone and copy of IT files). Although the Act of Criminal Procedure is quite old (1882), there was an amendment in 2015 to regulate electronic evidence that is very complete.

[9] The royal decree is a regulatory norm, which is approved by the executive power (in this case it was approved by the Ministry of Justice) and which has a lower rank than the law.

Procedure quoted in answer to 4.4). This regulation is the scope of RD (Royal Decree [Real Decreto]) 937/2003, of July 18th, modernizing judicial files. But all the rules of the RD 937/2003 apply to all the records, there are no specific rules for evidence.

In every court there will be a Registry of all the records of processes in that court, the records will remain under the custody of the Court Secretary meanwhile the Court is still competent and the matter is *sub iudice* (art. 5 RD 937/2003).

There is a protocol of the Ministry of Justice of 2004, once again for the storage of the whole proceeding, in which appears the person who shall perform every task in the storage. This protocol establishes how the persons in charge of the Territorial Judicial Registry have to proceed.

The tasks to be performed in the Territorial Judicial Registry are the following:

-Verification of complete receipt of file to file.

-Control of coincidence with the list and acknowledgment of receipt. Entry computer record.

-Apply conservation measures of Files and Effects.

-Elaboration of identification label.

This protocol has been completed in 2013. However it should be taken into account that the protocol applies to all jurisdictional orders, and in criminal jurisdiction it is quite common to have objects that have served as an evidence, such as samples, weapons, etc.

Actually, in the protocol of 2004 already established that in what concerns to IT files, the person who shall perform the task just have to check file by file that all the items included in the list have been received and just transfer it to the system of the Territorial Judicial Registry.

The person who shall perform these tasks is the processing staff [personal de tramitación], they have to pass a competitive public exam but they do not need to have a law degree, although most of them do.

4.3. Is electronic evidence stored in one central location, or is the storage decentralised?

Art. 4 RD 937/2003 establishes three different kinds of registries: Judicial Management Registry [Archivo Judicial de Gestión]; Territorial Judicial Registry [Archivo Judicial Territorial] and Central Judicial Registry [Archivo Judicial Central].

When the law refers to location of the storage actually regulates the court in whose Court Secretary will be in charge of the custody of the storage, but it does not express how the transfer will be done.

a) Judicial Management Registry exists in every Court and its scope is the storage of all the records of the processes that are taking place in that court.

Once the process is finished or if in 5 years there has been no activity in a process, the Court Secretary will send it to the Territorial Judicial Registry (art. 14 RD 937/2003).

We consider that a process is finished when the execution has already finished; the inactivity is a very unusual possibility under current legislation: it may take place when any of the parties asks for the suspension of the process and none of them asks for its resumption.

Even if the judgement has been appealed and later appealed by means of cassation, the proceedings (all documents, records, etc.) will go back then to the first instance court, that is in charge of the execution. So it belongs to the Court Secretary of first instance Court to send the proceedings to the Territorial Management Registry.

b) There is at least one Territorial Judicial Registry in every Autonomous Community. In addition to the capital city of the Autonomous Community there may be a Territorial Judicial Registry in the provinces which capital city has more than 10 civil first instance courts.

The scope of this Registry is to store the records until the moment they have to be destroyed.

c) Central Judicial Registry: this Registry is in the Supreme Court and it will be in charge of the storage the records of the Supreme Court and other courts with jurisdiction in all the country.

Once again, we must take into account that the rules for the storage and preserving affect to all the records, not only the evidence (of any kind).

4.4. Who is entitled to carry out the activities related to storing and preserving electronic evidence?

There are no specific rules to regulate the storing and preserving of evidence of any kind; the law refers to the storage of the records that includes also all the evidences.

It is always the Court Secretary, according to Organic Act of the Judiciary Court: "Article 454. 1. The Court Secretaries are responsible for the documentation function that is theirs, as well as for the formation of the orders and files, leaving a record of the resolutions issued by the judges and magistrates, or themselves when so authorized by law".

Act of Civil Procedure also regulates to the storing of the records. Oral hearings are recording in video, and the Act refers to the storage of the oral hearings in art. 147:

"Article 147. Recording proceedings using image and sound recording and reproduction systems.

Oral proceedings in hearings, cases and appearances held before judges or magistrates or, as appropriate the Clerk of the Courts, will be recorded on media suitable for recording and reproducing sound and image and may not be transcribed.

As long as the necessary technical means are available, the Clerk of the Court shall ensure the authenticity and integrity of whatever may have been recorded or reproduced through the use of recognised electronic signatures or any other security system offering such guarantees under the law. In such a case, the holding of a hearing shall not require the Clerk of the Court's presence in the chamber, unless the parties have requested it at least two days before the hearing is to be held or, exceptionally, should the Clerk of the Court deem it necessary due to the complexity of the matter, the amount and nature of the evidence to be taken, the number of people involved, the possibility of any incidents that cannot be recorded coming about or the existence of any other equally exceptional circumstances that may justify it. In such cases, the Clerk of the Court shall issue a succinct record under the terms contained in the preceding article.

Oral proceedings and hearings recorded and documented on digital media may not be transcribed, except in cases where a law determines they shall.

The safekeeping of the electronic document serving as a medium for the recording shall be the Clerk of the Court's responsibility. The parties may request copies of the original recordings at their own expense.

Article 148. Drawing up, safekeeping and conservation of the records.

Court Secretaries shall be held liable for the records being appropriately worded, recording any decisions the Courts or they themselves may issue, when duly authorised by the law. They shall likewise be held liable for the safekeeping of such records, except for the time they may be in possession of a Judge, Senior Reporting Judge or any other Senior Judge belonging to the Court."

Finally, and according to art. 6 RD 937/2003 establishes also that the order and custody of the documents belongs to the Court Secretary: "In accordance with the provisions of articles 287 and 473.3 of Organic Law 6/1985, of July 1, on the Judiciary, the court clerk will be responsible for the ordering, custody and conservation of the documents, for which he will have the assistance and advice of the technical personnel determined for this purpose".

4.5. Who may access electronic evidence in a particular case and how?

This matter is regulated in the Organic Act of the Judiciary:

"Article 458. 1. The lawyers of the Administration of Justice will be responsible for the Judicial Management File, in which, in accordance with the regulations established for this purpose, those records and files whose processing is not finished will be kept and guarded, except for the time in which they were held by the judge or the reporting magistrate or other magistrates who are members of the court. 2. By royal decree, the regulations governing the ordering and archiving of records and files that are not pending any action, as well as the purging of judicial archives, will be established. In general, the records and judicial files will be destroyed after **six years** have elapsed since the finality of the resolution that definitively put an end to the procedure that gave rise to the formation of those. Excepted from the foregoing are those formed for the investigation of criminal cases followed by crime, as well as the assumptions that could be contemplated by regulation, especially in attention to the cultural, social or historical value of the archived. Previously, the Lawyer of the Administration of Justice will grant a hearing for a period of not less than fifteen days to the parties that were present so that they are interested, in their case, the breakdown of those original documents that have contributed or exercise the rights that this Law gives them. 3. It corresponds to the Ministry of Justice to determine the registry books that must exist in the courts and tribunals and to establish the regulatory standards for keeping them through the appropriate regulations. 4. The lawyer of the Administration of Justice will be responsible for keeping the record books

through the corresponding computer applications and, in his absence, manually, giving the appropriate instructions to his dependent staff".

As this article establishes, this matter was developed in RD 937/2003; which art. 7 of the RD 937/2003 regulates the access to the documentation of the Judicial Management File (not only the evidence): "Those who have been a party to legal proceedings or are holders of a legitimate interest, in accordance with the provisions of article 235 of Organic Law 6/1985, of July 1, on the Judiciary, may access the documentation kept in the Judicial Archives of Management, through the forms of exhibition, testimony or certification legally provided, except when it is reserved. It corresponds to the secretary of the respective court or tribunal to provide the interested parties with access to the judicial documents that appear in their files or come from them (…)".

So usually the person who formerly was a party in the process is entitled to access to the records and all the documentation and object of the process; a third party has to prove his interest. There could be an interest for example in a heir who wants to know the juridical situation of the assets of the deceased.

The proceeding is also established in art. 7 RD 937/2003: it belongs to the Court Secretary decide if a person has the right to access to the records according to the law. The exhibition of the records and evidences also depends on the Court Secretary.

As an exception if the right to privacy or fundamental rights of any of the parties may be compromised, the person affected must agree with the exhibition.

4.6. How is the accessibility of stored electronic evidence preserved over time?

See answer to 4.6.

4.7. How is the transmission of electronic evidence to other courts (e.g. to an appellate court) carried out in order to preserve the integrity of evidence?

The transmission of the records, evidences, etc. to other courts belongs always to the Court Secretary. See as an example the regulation of art. 463 that refers to the transmission in case of appeal of the judgement that was delivered in the first instance:

"Article 463. Sending the proceedings.

1. Once the appeals have been lodged and, as appropriate, the written statements contesting or challenging them have been filed, the Court Secretary shall order the

proceedings to be sent to the court holding jurisdiction decide on the appeal, summoning the parties within a time limit of ten days".

The word "proceedings" [autos] refers to all the records, evidences (including objects, documents, etc.) belonging to the process. Nowadays, most of them will be in IT files (according to the policy "zero paper") but there could be, for example, an object that has to be examined by the judge. This could be the case of a proceeding on intellectual property on the copy of a work of art; or the malfunctioning of a mobile object, etc. Such objects are also part of the "proceedings".

In what concerns to the transmission of the proceedings to the Territorial Judicial Archive from the Management Judicial Archive, art. 13 of RD 937/2003 shall be applied: "The remittance of the documents found in a Management Judicial Archive to the corresponding Territorial Judicial Archive or the Central Judicial Archive will be formalized periodically, at least annually, depending on the volume of management of each archive, and will necessarily be accompanied by of a list of the judicial procedures or actions in which they are integrated, in accordance with a uniform and obligatory model approved by the competent public Administration. 2. The list will be sent through the existing computer programs and applications, and each court clerk must keep a copy of the list, stating the date it was sent to the Territorial or Central Judicial Archive and proof of receipt. 3. The list will include all the procedures or procedural actions that are referred, and will refer at least to the judicial process or action to which they correspond, the jurisdictional order in which they were carried out, the nature of the process or procedural action, their number and year, the intervening parties, a brief reference to its purpose and the date on which the procedural proceedings were terminated or paralyzed".

4.8. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa?

This possibility is regulated in art. 3 of the RD 937/2003: "Judicial documents whose support is paper, which are stored and guarded in the judicial archives, may be converted to magnetic support or any other that allows subsequent reproduction on paper support, through digitalization, microfilming or other similar techniques, provided that the integrity, authenticity and conservation of the document be guaranteed, in order to obtain an easy and quick identification and the search for the documentation".

Please, note that this will be necessary only to those documents of processes before year 2015 (see answer to question 1.1.), from that year all documents must be filed by the parties using the IT application of Justice; and documents from the Administration of Justice will be delivered to the parties in the same way.

5. Archiving of electronic evidence

5.1. How is the archiving of electronic evidence regulated within the law of your Member State?

5.2. Shortly explain the requirements, standards and protocols for properly archiving electronic evidence.

5.3. Is electronic evidence archived in one central location, or is archiving decentralised?

5.4. Who may carry out the archiving of electronic evidence?

(See answers to 4.1, 4.2, 4.3 and 4.4).

5.5. Must electronic evidence be archived indefinitely, or must it be deleted or destroyed after a certain period? How is the accessibility of archived electronic evidence preserved over time?

RD 937/2003 regulates the purge [expurgo] in art. 14 y ss.

Expurgo of the proceedings is entrusted to the Purge Board, who depends on the Ministry of Justice and a prosecutor, a Court Secretary, and a specialist in storage form it, among others.

According to art. 21 and 22 of the RD 937/2003 the proceedings can be sold or destroyed. The selling of the proceedings is only possible when the proceedings are in paper (which does not happen in civil procedure from 2015), and in this case the paper can be sold only "for reuse as common use paper", as stated in art. 21.

"Article 21. Alienation and destruction.

1. The competent Administration in matters of provision of material and economic means for the operation of the Administration of Justice will proceed to the alienation or destruction of judicial files. 2. The files that are subject to disposal, under the terms provided in the State Assets Law or applicable regional legislation, must be destined by the purchaser exclusively for treatment for subsequent reuse as common use paper. The

sale must be reflected in a written contract that contains the requirements set forth in article 12 of Organic Law 15/1999, of December 13, on the Protection of Personal Data. 3. In no case may the purchaser disclose the content of the judicial files or, under any circumstances, allow third-party access to them. The foregoing prohibitions must be expressly stated in the purchase and sale contract. 4. The destruction of judicial and government files will be carried out either through an administrative contract, or through the signing of a collaboration agreement with a public Administration that has adequate facilities for this purpose. The list of particular administrative clauses or the agreement will contain the prohibitions included in the previous section.

Article 22. Transfer of documents.

1. Once the documentary transfer to the competent Administration in matters of historical heritage, the purchase and sale contract, the collaboration agreement with another public Administration or the administrative contract has been formalized, a copy of these will be sent to the secretary of the Purge Board. 2. The secretary of the Board will issue a certification accrediting its purpose and the natural or legal person who is a party to the legal business and will send it to the court clerk responsible for the file where the judicial and government files are located, in order to be able to authorize the delivery of these, after drawing up the minutes, which will be recorded in this file and in the management file, if both do not coincide".

There is not specific regulation to the update of IT systems.

5.6. What are the rules regarding the conversion of electronic evidence into physical evidence and vice versa? (Please describe rules regarding the possibility of conversion from electronic form to physical and from physical form to electronic when archiving evidence.)

There is not an specific rule for transformation in physical to electronic when the process is concluded, the rule to apply is the same: art. 13 of RD 937/2003 (see answer to question 4.8).

<u>6. Training on IT development</u>

6.1. Are the judges, court personnel or other legal practitioners required to undergo any training on technological developments relevant to taking, using and assessing electronic evidence?

When a person passes the exam to become a judge he must follow a training course after this exam. This training course lasts a year, and it is takes place at the Judicial School [Escuela Judicial] of the General Council of the Judiciary in Madrid or Barcelona. Once a prospective juror passes the exam, the training course and the mark obtained in it will influence in the chances of the new judge to choose a destination, but the training course will rarely involve an impediment to become a judge for the person who has already passed the exam.

This course includes different subjects, one of them deals with transversal competences which contain new technologies strategies but this training does not refer to evidence but to the use of the IT applications used in the administration of justices and artificial intelligence[10].

For the judges there are continuous training courses, also organized by the General Council of the Judiciary[11], following these courses is not mandatory for the judges but they can be taken into account as a merit for judges who want to move up in their professional career.

Some training has special value as a merit, for example, the training in commercial matters to serve as judge in a Commercial Court, or the knowledge of any of the cooficial languages in Spain when a judge wants to transfer to a territory with a cooficial language[12].

Same could be said for court personnel such as Court Secretaries[13]. For other categories of personnel working for the Administration of Justice training is not taken into account to transfer to other court; only the knowledge of language of the Autonomous Community may be considered.

In what concerns to legal practitioners they don't have either any obligation of being trained in electronic evidence. To become a legal practitioner one must hold a Law

[10] See Annex I p. 19. This document is the syllabus of the training for the prospective judges that will take place during the course 2023-24.

[11] https://www.poderjudicial.es/cgpj/es/Temas/Escuela-Judicial/Formacion-Continua/

[12] Spanish is the official language in all the country; but some Autonomous Comunities (Galicia, País Vasco, Cataluña, Comunidad Valenciana and Islas Baleares) have their own language. In these Autonomous Communities there are two official languages: Spanish and the language of the Autonomous Community. If a judge wants to move to a court in one of these Autonomous Communities, the knowledge of the language of the Autonomous Community will be considered as a merit.

[13] For Court Secretary the training is also provided official organization that depends on the Ministry of Justice. See: https://letradosdejusticia.es/

Degree and a Master Degree in lawyering, but it does not necessarily include specific training in electronic evidence.[14]

7. Videoconference

7.1. In general, does the law of your Member State provide for videoconference technology to be used in civil proceedings?

In year 2003 the Organic Act on the Judiciary, amended art. 229 to introduce the possibility of using videoconference.

"Article 229.

1. Court proceedings shall be predominantly oral, especially in criminal matters, without prejudice to their documentation.

2. Statements, interrogations, testimonies, confrontations, explorations, reports, ratification of expert reports and hearings shall be conducted before a judge or court in the presence or intervention, as the case may be, of the parties and in open court, except as provided for by law.

3. These proceedings may be conducted by videoconference or any other similar system that allows two-way and simultaneous communication of image and sound and visual, auditory and verbal interaction between two persons or groups of persons who are geographically distant, ensuring in all cases the possibility of contradiction of the parties and the safeguarding of the right of defence, when so agreed by the judge or court".

This article does not mean that before the amendment of Organic Act on the Judiciary, didn't exist the videoconference in our proceedings; he judge has wide faculties to manage the oral hearing so, he is enabled to authorize the videoconference if he considered it necessary for the process.

In 2020 it was approved the Act 3/2020 of 18th September, of procedural and organisational measures to cope COVID-19 in the field of the Administration of Justice.

According to art. 14 of this Act, until the moment the pandemic is finished all the oral proceedings will be performed preferably by videoconference. The scope of this

[14] As an example, see the Master Program for Attorneys of Carlos III University of Madrid. The contents of this Master is a good example of the contents of the Masters of the different Spanish universities: https://www.uc3m.es/master/abogacia#programa

regulation was clearly to address the health situation, but it allowed rapid progress to be made in the experience of conducting proceedings telematically. Since then, and although the health circumstances that justified it have ended, the legislator is trying to promote the use of video conferencing, in this case for an economic reason of lower cost in justice.

A law, known as the Procedural Efficiency Measures Act, is in the process of being drafted, which provides for the general use of videoconferencing in its art. 5:

"Article 5. Actions carried out by telematic means.

1. The parties may agree that all or some of the negotiation proceedings within the framework of an appropriate means of dispute settlement shall be carried out by telematic means, by videoconference or other similar means of voice or image transmission, provided that the rules laid down in this Title and, where appropriate, the implementing regulations specifically envisaged for mediation are complied with.

2. When the object of the dispute is a claim for an amount not exceeding 600 euros, it shall preferably be carried out by telematic means, unless the use of such means is not possible for any of the parties".

There is a Guide provided by the General Council of the Judiciary of year called "Guide for the conclusion of telematic proceedings", it was delivered in 2021 an in its 17 pages contents very useful protocols for the use of videoconferences.

7.2. Does the law allow for videoconference technology to be used solely for the taking of evidence or also for conducting other procedural stages of the hearing? Videoconference in your Member State may be used for:

a) Witness testimony

b) Expert witness testimony

c) Inspection of an object (and/or view of a location)

d) Document (document camera)

e) Party testimony

f) Other means of evidence (please elaborate)

g) Conducting the hearing in broader/general terms (please elaborate)

See answer 7.1: videoconference is allowed for any proceeding. However the commonest situations in which it is used are before the difficulties of witnesses and expert to attend the process or to celebrate all the oral hearing telematically[15].

The party who wants to use in the process a videoconference system will address a petition to the court, explaining the reasons for the use of videoconference, in this petition the party can suggest the means to be used, etc. The petition can never come from the witness since he is not part in the process.

The judge must answer to the petition of the party, and videoconference will be developed according to the rules established by the judge.

The "Guide for the conclusion of telematic proceedings" allows the use of videoconference also for internal proceedings, such as the deliberation of the judges of the court.

7.2.1. If the law allows for (remote) view of location, how would such a videoconference be practically implemented?

This possibility is not considered in the law; probably the judge could allow it, if he considers that it can be useful for the process but it is not mentioned in the Law or in the Guide of the General Counsel of the Judiciary.

7.3. Which applications (software) are used for videoconferencing in civil court proceedings?

The commonest application is Cisco Webex Meeting due to its compatibility with the application used in Justice. However, sometimes other applications such as Zoom or Skype are used.

Any kind of application may be used but, in any case, it must be allowed by the judge in advanced.

But some technical parameters are suggested: "[ISDN: 3 lines (128Kb*3 -> 384Kb bandwidth) - IP: Advisable 768Kb up to 2Mb (bidirectional)], but no valid software is indicated for this purpose, so that it expressly states, "the implementation of

[15] "Guide for the conclusion of telematic proceedings" of the General Counsel of the judiciary, p. 19.

the technological systems is the responsibility of the service-providing administrations"[16].

7.3.1. Are the applications (see Question 7.3.) commercially available?

Yes, usually the commercial version is used.

7.3.2. Are the applications (see Question 7.3.) interoperable with other applications?

It is not considered in the law, however the judge has the possibility to allow it.

7.3.3. Does the application allow a text-based chat function during the videoconference; does it allow screen sharing and sharing of documents?

Abellán considers that there must be a moderator that recommended that the moderator manages:

"Invitations to connect.

Possibility of muting attendees.

Possibility of expelling an attendee.

Presentation of documents.

Display of the person speaking in large size and the rest in small size".

Abellán suggests also that it would be very useful to provide a private chat for the communication of the Court Secretary and the judge, or between the lawyer and the client.

But there is no legal provision or protocol about the use of a chat.

However, the General Council of the Judiciary, considers that the documents should better be given in advance, so that the court gets sure that they have been able to download them: "to avoid interruptions, it is considered advisable that in the procedural acts to be held electronically in which the intends to present documentary evidence, this is provided previously to the court or tribunal through a system that guarantees its accessibility to the attorneys for viewing and eventual download. The volume of documents that is planned presenting is a complexity factor to assess the opportunity to holding trials and hearings electronically. Throughout appropriate, it is appropriate to

[16] A. ABELLÁN, Las nuevas actuaciones procesales mediante videoconferencia, [New proceedings by videoconference]. At: https://elderecho.com/las-nuevas-actuaciones-procesales-mediante-videoconferencia.

require that the documents be duly submitted ordered and foliated, with hyperlinked indices to facilitate their use during the telematic session"[17].

7.4. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when taking evidence?

See answer to 7.2.

The commonest case of the use of videoconference is in the witness testimony, when for the witness is very difficult to attend the court, e.g.: when a witness lives abroad. The Act on Civil procedure establishes other means to obtain the witness in this cases: international judicial cooperation or domiciliary testimony; however, videoconference is more commonly used now than international judicial cooperation.

It is not foreseen in the law the possibility of practising evidence by videoconference.

7.5. From the perspective of case management and party autonomy, under which circumstances is the use of videoconferencing technology allowed in your Member State when conducting hearings?

It is possible just if the party asks to do the hearing by means of videoconference and the judge allows it. However, usually barrister, if there are not special difficulties, prefer attend the hearing.

7.6. If the court orders the use of the technology, may the parties oppose that decision? If so, how do the parties make their opposition clear (e.g. appeal)?

Yes, parties may always appeal to judicial decision. Now the possibility of using videoconference depends on the petition of the parties and the judge must answer it. Once he has answered, his decision may be challenged.

In a near future probably will be mandatory to celebrate some proceedings through videoconference. A new Act is being drafted, according to it "when the object of controversy is a claim for an amount that does not exceed 600 euros, it will preferably be carried out by telematic means, unless the use of these is not possible for any of the parties" (See answer 7.1).

[17] "Guide for the conclusion of telematic proceedings" of the General Counsel of the judiciary, p. 10.

7.7. Does the law of your Member State provide that courts can, in civil procedure cases, impose coercive measures against a witness or a party to provide testimony?

There are not specific rules for videoconference so general coercive measures will be applicable in any case.

The regulation of the testimony of the party and the testimony of a witness has different regulation. In what concerns to the party, consequences of silence or evasive answers for the party are regulated in art. 307 of the Act of Civil Procedure:

"Article 307**.** *Refusal to testify, evasive or inconclusive responses and admission of personal facts.*

1. Should a party summoned to testify refuse to do so, the court shall warn him at the hearing that the facts referred to in the questions may be ascertained as being true unless a legal obligation to keep a secret should exist, as long as the person called to testify has been personally involved in them and their ascertainment as being true may turn out to be fully or partially harmful to him.

2. Where the responses given by the party called to testify are evasive or inconclusive, the court shall warn him as set forth in the preceding paragraph on an ex oficio basis or at the request of a party".

In what concerns to the witness, the regulation can be found in art 365 Act of Civil Procedure:

"Article 365. *Oath or promise of the witnesses.*

1. Before making his statement, each witness shall make an oath or promise to tell the truth, cautioning him on the penalties established for the offence of false testimony in civil cases, which the Court shall explain to him should he declare that he ignores them."

According to art. 292.1 of the Act of Civil Procedure: "1. The witnesses and the summoned experts will have the duty to appear at the trial or hearing that has finally been indicated. Violation of this duty will be sanctioned by the Court, after hearing for five days, with a fine of one hundred eighty to six hundred euros".

In Spain witnesses can be asked to give testimony on a civil process by the party or by the judge; so, in this case, the fine will be imposed only if the witness have been summoned (that is, by the judge), if it is the party who ask him to declare as a witness it

has no consequences. However if the party considers that the witness may not go, he will ask the judge to summon it.

7.7.1. Under which circumstances may a witness refuse testimony?

It is not foreseen any special rule of the refusal to give testimony in videoconference, so the general rule is applied in the Act of Civil Procedure according to art. 371: "When, due to his or her state or profession, the witness has the duty to keep secret regarding the facts for which he or she is being questioned, he or she will state it with reason and the court, considering the grounds for the refusal to testify, will resolve, through an order, what is appropriate. If the witness is released from responding, it will be recorded as such in the minutes". This could be the case, for example, of a doctor or a priest of any religion.

7.7.2 Does the law of your Member State allow for cross-examination?

Yes, according to Act of Civil Procedure: "Article 289. *Manner of taking evidence.*

1. The evidence shall be taken by cross-examination and in a public hearing, or with similar publicity and documentation if this is not carried out in the court premises".

7.8. If videoconference technology is used to conduct hearings, how (if at all) can the court and/or parties terminate the use of videoconference technology and revert to regular (on-site) proceedings?

Usually the court decides upon the request of one of the parties, and usually there is a reason for it, since our law does not establish in general, the videoconference. So, if the party applies to have a videoconference proceeding, the judge usually will hear the counterparty and decide considering the reasons of both parties. But this is not currently regulated in our procedural law.

7.9. Does the law (or best practice) provide, that the court should – before ordering the use of videoconference technology – check (please elaborate):

a) the internet connection availability (and/or speed) of the persons involved in the videoconference;

b) the technical equipment of the persons involved in the videoconference;

c) the technical literacy of the persons involved in the videoconference;

d) the physical capacity of the persons involved in the videoconference (e.g. if they are located in the Member State, their health status (hospitalisation; vocalisation, hearing and seeing));

e) other (please specify)?

(In addition, please specify if the court has to conduct a "test" session" before the actual videoconference.)

There is no regulation on the Act of Civil Procedure, but there are some suggestions in the Guide of the General Council of the Judiciary: "In order to avoid interruptions and suspensions of proceedings as far as possible, it is advisable that in good time possible, it is advisable to check in good time whether it is technically possible to the technical feasibility of carrying out the relevant procedural steps should be checked in good time the technical possibility of carrying out the relevant procedural acts, by checking the equipment of all participants and the quality of the connection"[18].

7.10. Does the law (or best practice) offer special safeguards for vulnerable persons?

In the criminal process, yes but not in civil processes. In a criminal process, as a general rule, disabled persons or minors, when they are victims shall declare by means of videoconference, and only once (in the pre-trial stage). In this cases the scope of videoconference is to avoid visual confrontation with the defendant so, they usually go to court but they do not declare at the courtroom.

The only rules in the Act of Civil Procedure referring to the questioning of minors are included in the regulation of marriage proceedings; in these articles the law provides that the child shall be questioned with the assistance of a psychologist, and in private.

7.11. Does the law of your Member State provide:

a) The location of the persons engaged in the videoconference (i.e. where the videoconference must or may be conducted) and the use of virtual filters and backgrounds?

[18] "Guide for the conclusion of telematic proceedings" of the General Counsel of the judiciary, p. 9.

The "Guide for the conclusion of telematic proceedings" gives some recommendations in this sense[19].

"When the telematic holding of internal proceedings is indicated, the judges and magistrates may meet at the seat of the judicial body or at any other place that has the appropriate means for the holding of the proceedings.

Where it is indicated that procedural acts relating to external proceedings may be conducted telematically, the judge or the members of the court shall be seated at the seat of the court or tribunal. In the case of collegiate bodies, when health measures so require or make it advisable, their members may connect telematically from different premises at the same seat. The foregoing is without prejudice to the provisions of art. 268.2 LOPJ when it is impossible to move to the seat or when justified reasons so advise for the better administration of justice, in which case judges and members of the courts may access the telematic sessions from places that meet the appropriate conditions to avoid interruptions, without the members of the collegiate body having to be in the same room.

Members of the Public Prosecutor's Office, lawyers, solicitors, barristers and social workers could intervene from their official offices or professional offices when their physical presence is not required by the judicial body".

For the other persons who participate in the process (lawyers, parties, witnesses), the General Council of the Judiciary deems advisable their participation from judicial dependencies. But this is just an advice. Usually lawyers connect from their offices and clients are with them at their office, which allows better communication.

aa) How does the law sanction a person who does not conduct the videoconference at the designated location?

There is no sanction because the provisions about the place in the Guide are only a recommendation.

ab) Are there any rules for the inspection of the location where the person heard is situated and the privacy it offers?

Yes, there is a suggestion in this sense: "The professionals involved in the acts will have the obligation to adopt the necessary measures so that their participation is

[19] "Guide for the conclusion of telematic proceedings", p. 14.

develop in a dependency that ensures a reserved environment and endowed with sufficient technical means"[20].

b) the time when the videoconference may be conducted?

The law regulates the time of the proceedings: days of the year and hours of the day when the proceedings may be developed; this rules are included in the Organic Act of the Judiciary and, as a general rule the time for the proceedings is form Monday to Friday and from 8 to 15 (in civil proceedings). In other hours and days the judge must declare working hours or days when necessary. For example: if the best hour for the videoconference with a witness who is abroad in a different time zone, the judge is allowed to declare any hours in the afternoon working areas.

c) the apparel and conduct of the persons taking part in the videoconference?

It is included in the Guide for the conclusion of telematic proceedings:

"Prior to the commencement of the proceedings or at the commencement of the proceedings, it is advisable for the judge or presiding judge to give the parties and the parties and intervening parties with instructions concerning the conduct of the session, with special mention of the need to behave with the respect required by the respect required by the institutional nature of the proceedings. Once the current dispensation from the wearing of gowns ceases to apply, those participating in telematically-conducted events will wear the gown when they are obliged to do so in accordance with the LOPJ"[21].

7.12. Can (or must) a videoconference be recorded?

7.12.1. Does the recording of a videoconference contain video feedback from all cameras in the court or only the camera in focus?

All proceedings must be recorded, even when they take place in presence; usually the camera focus on the judge, so barristers can be seen to both sides of the judge and the witnesses and other third parties are seen backwards.

7.12.2. Which persons are shown on video during the videoconference?

[20] "Guide for the conclusion of telematic proceedings", p. 11.

[21] The "dispensation from wearing the gown", refers to the pandemic COVID-19 in which, on health grounds, judges and barristers were dispensed from wear gowns (gowns for barrister are at free disposal for them at the court).

Always they are shown the judge and the barristers and the parties. It is very common that parties join the videoconference from their barristers' office (see 7.11)

7.12.3. How (which medium and format) and where is the footage of the videoconference stored and later archived?

7.12.4. Does the footage of the videoconference enter the record of the case?

7.12.5. Who has access to view the footage after it has been recorded?

For this questions see answer to 4.2.

7.12.6. Presume that the proceedings have concluded at the first instance and an appeal or other recourse has been submitted by the party. May the second instance court access and view the recording of the videoconference?

Yes. See 4.7.

7.12.7. If the court orders *ex post* transcription of the hearing, does the court reporter write the Minutes of the case by transcribing the footage of the videoconference or is there a separate audio log for transcription?

No, there are no written minutes of the oral hearings, even if they don't take place by videoconference.

7.13. Concerning court interpreters – does the law (or best practice) provide for successive or simultaneous interpretation during the videoconference?

7.13.1. Where is the interpreter located during the videoconference?

According to the "Guide for the conclusion of telematic proceedings" (p.14): the court interpreter may provide interpretation from his professional office: "For a better use of public resources, it is possible to accept that the intervention of experts belonging to public bodies and that of interpreters in criminal proceedings that do not have to provide continuous interpretation to one of the parties is carried out from official dependencies and professional offices, provided that the judge or court does not appreciate reasons for the intervention of these people to be in person".

Notice that this rule applies to crimina proceedings, however it may be easily adapt to civil processes.

7.14. Immediacy, equality of arms and case management.

7.14.1. How does the law of your Member State generally sanction an infringement of the principle of immediacy?

Consequence of the infringement of inmediacy is the nullity as established in 137 of the Act of Civil Procedure:

Article 137. *Judicial presence at declarations, evidence and hearings.*

1. The Judges and Senior Judges members of the court which is dealing with a case shall be present at the declarations of the parties and the witnesses, confrontations, presentations, explanations and responses provided by the experts, as well as at the oral criticism of their decisions and any other act concerning evidence which, in accordance with the provisions set forth herein, must be carried out with examination and cross-examination and in public.

2. The hearings and appearances which are intended to hear the parties before issuing a decision shall always be held before the Judge or the Senior Judges who make up the court dealing with the case.

3. The provisions set forth in the preceding paragraphs shall be applicable to the Court Clerks with regard to the procedures which must be carried out only before them.

4. The infringement of the provisions set forth in the preceding paragraphs shall determine the nullity of the corresponding procedures fully in law".

7.14.2. Does the law of your Member State specify any special aspects regarding the principle of immediacy when using videoconferencing technology?

According to the "Guide for the conclusion of telematic proceedings" (p. 2): "The principle of publicity of judicial proceedings -art. 120 EC, 229 LOPJ and 138 LEC; confidentiality when this requirement is imposed by procedural rules and data protection; the greatest breadth of defense rights; the validity, integrity and epistemic quality of the evidence on which the conviction of the judge or court depends; or the guarantee provided by immediacy are achievements from which one cannot go back as a possible paradoxical consequence of advances in technology".

7.14.3. Have your courts dealt with cases alleging an infringement of the principle of immediacy or the impartiality of judges in videoconference proceedings?

The judgement of the Supreme Court 22nd October 2012, establishes that videoconference can not be consider *per se* a violation of inmediacy and contradiction:

“In relation to the breach of the principle of immediacy and contradiction, the videoconference system, whose transmission is carried out in real time, cannot be considered to imply a violation of such rights or of the right of the accused to submit witnesses to examination in court in equality of arms with the Prosecutor (…).”

7.14.4. How do parties (and their advocates) express objections or pose questions during a videoconference?

7.14.5. How does an inspection of an object take place during a videoconference?

None of these questions are solved in the Law or in the Guide of the General Council of the Judiciary, the judge must take a decision if the problem arises on the proceeding.

7.14.6. Can documents only be presented by means of a document camera or also through the use of file/screen sharing in the videoconference application?

See answer to 7.3.

7.14.7. During the videoconference, does the application (software) highlight only the person actively speaking or are all participants visible at all times (and at the same size)?

7.14.8. Suppose that the connection becomes unstable, and the quality of the audio and/or video feed drops. One of the parties considers that the quality does not allow for correct testimony. Consider also that the video feed breaks down before or in the middle of the videoconference and only the audio feed is available. What options do the court and parties have in regards to the continuation of the videoconference? Can a continuation in such circumstances constitute grounds for appeal?

7.14.9. If one party enjoys a better audio-visual experience due to better technical equipment and/or internet connection than the other, and the court allows the continuation of the proceedings, can the other party allege a breach of equality of arms?

7.14.10. During the videoconference, the court suspects that a person being heard is receiving outside help/suggestions or is under duress. Can the court order the person to turn the camera and show the apartment or share their screen? Can the court request the person to shut down other technological devices in their vicinity during the videoconference? Can the court request that other persons be removed from the location of the videoconference?

In what concerns to questions 7.14.7 to 7.14.10 there are no rules in the Act of Civil Procedure or in the Guide of the General Council of the Judiciary. In my opinion, and according to the faculties for the management of the proceedings of the judge, it is up to him to take a decision. If the connexion is so bad for one of the parties that he cannot hear properly, the judge will probably stop the hearing and will continue it other day with a better connexion.

7.15. Does the law (or best practice) provide any special rules for the participation of the party's advocate (e.g. together with the party at the same location, or in separate locations)?

The law does not regulate it; but the "Guide for the conclusion of telematic proceedings" does:

"In the exceptional circumstances where the lawyer and the accused are not in the same room during a criminal trial, the accused, while not giving evidence, shall have the possibility of maintaining permanent and reserved contact with his or her lawyer by telematic means.

Similarly, where there are exceptional circumstances of health alarm which make it advisable for a detainee to give evidence from a police station without the lawyer being physically present, steps should be taken to ensure that appropriate arrangements are made for the interview with the lawyer to take place in confidence, and that this confidence is effective"[22].

7.16. Are there any special rules pertaining to the distribution of costs in case of videoconferencing?

No.

7.17. How does the law guarantee the publicity of videoconference hearings?

The law does not regulate it; but the "Guide for the conclusion of telematic proceedings" does: it considers that the judge shall provide the means to guarantee the publicity, and suggests two means to guarantee publicity:

"In general, it can be considered that the most suitable way of ensure this principle is through the attendance of the public to the room of views of the body that celebrates

[22] "Guide for the conclusion of telematic proceedings", p. 12.

the act or other judicial dependency where you can observe it in a closed circuit, trying to adopt the necessary measures to avoid clandestine recordings of what can be seen on the monitors"

The second one is allowing the conection of the public: "If it is not possible for the public to attend the headquarters of the court that celebrates the act or in another judicial headquarters from which it can be followed, in the corresponding electronic headquarters will be located a "board of virtual announcements" in which the information indicated in the art. 232.2 LOPJ regarding the date and time of celebration, type of action and procedure number. In such cases, the program that is used for the telematic session must allow the access of third parties by password or invitation, which will be provided once the person concerned is accredited, physically or virtually, before the court."

However, the judge has wide faculties to manage the process, and if he wants he is allowed to give another publicity to the proceeding, for example, he is allowed to decide the broadcasting of the whole proceeding.

7.18. The Recast Regulation (EU) 2020/1783 on the taking of evidence in civil or commercial matters provides in Article 20 the primacy of direct taking of evidence through videoconference if the court considers the use of such technology to be "appropriate" in the specific circumstances of the case. What do you consider would fall in the category of "inappropriate"? In addition, should form N in Annex I of said Regulation be supplemented in your opinion (explain how and why)?

I think that the confidenciality of some process is not properly guaranteed in the videoconference, for example proceedings dealing with minors or fundamental rights. In my opinion, at the moment it is not easy to control if any of the parties is also recording the videoconference.

I also think that the testimony of children should be taken in person, according to the circumstances of the proceeding. In some cases, a psychologist questions the child; probably the videoconference is not very accurate to get the testimony of the child.

Additional information.

-Spanish Department of Justice provides a translation into English of some Spanish statutes, which includes the regulation on civil procedure. Although these texts are not official translations and some of them are not updated, they can be helpful. These

translations are available at: https://www.mjusticia.gob.es/es/areas-tematicas/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol

-I often say “judge” instead of “court” that is because most of the oral hearings take place during the first instance of the process, which is usually entrusted to the First Instance Judge.