CELSO RODRÍGUEZ PADRÓN, SECRETARY GENERAL OF THE GENERAL COUNCIL OF THE JUDICIARY,

HEREBY CERTIFIES THAT THE PLENARY SESSION OF THE GENERAL COUNCIL OF THE JUDICIARY, IN ITS MEETING ON THIS DAY, HAS APPROVED THE REPORT ON THE DRAFT BILL ON REFORM OF PROCEDURAL LEGISLATION FOR IMPLEMENTATION OF THE NEW JUDICIAL OFFICE.

I.
BACKGROUND

On 30 July 2008, the draft bill on reform of procedural legislation for implementation of the new Judicial Office, for the purpose of issuance of the mandatory report, was received in the Registry of the General Council of the Judiciary.

On 30 September 2008 the Studies and Reports Commission decided to appoint the Honourable Claro Jose Fernandez-Carnicero Gonzalez as rapporteur, and in its meeting on 10 October 2008, approved this report, agreeing to its remission to the plenary session of the General Council of the Judiciary.

II.
GENERAL CONSIDERATIONS REGARDING THE ADVISORY ROLE OF THE GENERAL COUNCIL OF THE JUDICIARY

The advisory role of the General Council of the Judiciary is set forth in article 108.1.e) of the Judicial Power Organization Act. Specifically it refers to the Council's authority to elaborate reports on draft bills and general provisions of the State and the Autonomous Communities that affect, totally or partially, among other matters expressed in the remainder of the article 108.1 of this law, *"procedural rules or legal and constitutional matters of protection in ordinary courts of the exercise of basic rights and any others that affect the constitution, organization, operation and governing of courts and tribunals".*

In light of this legal provision, and in a proper interpretation of the scope and meaning of the advisory authority recognized in the General Council of the Judiciary, the issued report shall be limited to the substantive or procedural rules included specifically therein, avoiding all matters alien to the judiciary or the exercise of the jurisdictional role assigned to it.

The General Council of the Judiciary has been delimiting for some time now the scope of its reporting authority on the basis of the distinction between a strict scope, which coincides in literal terms with the material scope defined in article 108.1.e) of the Judicial Power Organization Act, and a broader scope, which is derived from the Council's position as a constitutional government body of the judiciary. Thus, within the former scope, the issued report shall refer first and foremost to the matters contemplated in the aforesaid precept, avoiding, at least generally speaking, the formulation of considerations related to the content of the draft bill concerning issues that are not included in the aforesaid article 108 of the Judicial Power Organization Act. As for the broader scope, the General Council of the Judiciary also reserves the authority to express its opinion on aspects of the draft bill that affect basic rights and freedoms, by virtue of the prevalent position and immediate effectiveness they enjoy per the express provision of article 53 of the Constitution. On this point, the basis should be especially the pronouncements of the Constitutional Court, in its condition as the supreme interpreter of the Constitution whose resolutions, issued in all types of procedures, constitute the direct source of interpretation of constitutional precepts and provisions, binding all

judges and courts. Moreover, in accordance with the principle of collaboration among constitutional bodies, the General Council of the Judiciary has been indicating the opportunity of addressing other concerns in its reports, ones related specifically to technical-legislative concerns and terminology, with the aim of contributing to improving the correctness of regulatory texts and the effectiveness of their application in and impact on judicial proceedings, for, ultimately, jurisdictional bodies are the organs which must implement the regulations submitted to this Council for report, once approved by the body with authority in the matter.

Accordingly, in view of the purpose of the draft bill submitted for report, the draft bill shall be restricted to matters that must be reported on by the General Council of the Judiciary from the perspective of the aforementioned strict scope, without prejudice to the fact that, where appropriate, other considerations may be carried out in order to improve the technical quality of the text.

III.
STRUCTURE AND CONTENT OF THE DRAFT BILL

1. The draft bill submitted for report consists of an Explanatory Memorandum (hereinafter "EM"), subdivided into four sections, a text containing fifteen articles and three final provisions. Each of the articles, aside from certain exceptions, is subdivided into different sections, each of which corresponds to the amendment, derogation or introduction of a specific legal rule (article or provision). The arrangement of the articles follows the chronological order of the enactment of the laws subject to reform, independent of the greater or lesser importance thereof.

2. The structure of the draft bill discussed below should be succinct given the breadth of the matters included therein. Structured in nine hundred legal provisions, a more detailed exposition of its content is left to places other than the present report.

The first article modifies, in twelve sections, the Civil Procedure Act, adopted by Royal Decree on 3 February 1881, in regard to pre-trial settlement, a matter that remained in force by virtue of the sole derogatory provision of Law 1/2000 of 7 January on Civil Procedure, until a new law on non-contentious proceedings entered into force.

The second article modifies the Criminal Procedure Act of 14 September 1882, in a total of one hundred and ninety sections.

The third article modifies, in twelve sections, the Mortgage Act of 8 February 1946.

The fourth article deals with the Mobilier Mortage and Non-Possessory Pledge of Possession Act of 16 December 1954, and the reform consists of two sections.

The fifth article modifies, in five sections, Law 4/1985 of 21 March on Passive Extradition.

The sixth article reforms, in one section, Law 19/1985 of 16 July on Negotiable Instruments.

The seventh article modifies, in two sections, Law 11/1986 of 20 March on Patents.

The eighth article modifies, in one hundred and sixty-six sections, Royal Legislative Decree 2/1995 of 7 April, thereby approving the amended text of the Labour Procedure Act.

The ninth article reforms, in a single section, Act 35/1995 of 11 December on aid and assistance to victims of violent crime and crimes against sexual freedom.

The tenth article modifies, in five sections, Act 1/1996 of 10 January on free legal aid.

The eleventh article reforms, in one section, Act 7/1998 on general contracting conditions.

The twelfth article reforms, in sixty sections, Act 29/1998 of 13 July, which regulates the contentious-administration jurisdiction.

The thirteenth article modifies, in a total of three hundred and eighty-six sections, Act 1/2000 of 7 January on Civil Procedure. It is the most important reform, not simply because of its breadth, but also due to the significance of this law as a general procedural rule of additional application to the other procedures (cf. regarding what is set forth in section IV of the EM).

The fourteenth article reforms, in forty-six sections, Bankruptcy Act 22/2003 of 9 July.

The fifteenth article modifies, in three sections, Arbitration Act 60/2003 of 23 December.

Three final provisions complement the articulated text: the first (erroneously listed as *sole*) modifies the third additional provision of Act 52/1997 of 27 November on legal assistance to the State and public institutions; the second concerns competence title, found in art. 149.1.6 of the Spanish Constitution in relation to the procedural legislation; and the third establishes the entry into effect of the law six months from its publication in the Official Gazette of the Spanish State.

Three transitory provisions, which it goes without saying a reform that affects such a large number of laws provisions will require, should also be added; for example, in the matter of appeals regime, the inclusion of this kind of provision is the general norm.

3. The draft bill does not include the reports and studies on the necessity and suitability of the report, the report on the gender impact of the established measures, and the economic report with an estimate of the cost that the bill will entail, requirements envisaged in the article 22.2 of Government Act 50/1997 of 27 November.

4. The background of the draft bill submitted for report to this Council are two draft bills from the previous legislature, both from the year 2005, submitted at the time in compliance with the second final provision of Organic Law 19/2003 of 23 December, which modified Organic Law 6/1985 of 1 July of the Judiciary:

a) The draft bill of the organic law adapting procedural legislation to Organic Law of the Judiciary 29/1985 of 1 July.

b) The draft bill modifying the Criminal Procedure Act, Law 29/1998 of 13 July, regulating the contentious-administrative jurisdiction, and Law 1/2000 of 7 January on Civil Procedure, in the matters of judicial review, second hearing in criminal cases and access to justice of the year 2005.

On the basis of these two draft bills, the Council of Ministers adopted, on 29 December 2005, the bill adapting procedural legislation to Organic Law of the Judiciary 6/1985 of 1 July, reforming judicial reviews and generalizing second hearings in criminal cases. This legislative initiative expired this year as a consequence of the dissolving of Parliament

The draft bill that is the object of the this report coincides in large part with the first of the abovementioned draft bills (letter "a"), although it does not include the reform of organic laws (such as the regulatory rules of the right to rectification, the overall electoral system, the judiciary, conflicts of jurisdiction, military procedure, and, lastly, jury court), which represented a total of fifty-four articles; secondly, the draft bill of 2008 concerns precepts that were the object of reform in the second draft

bill of 2005 (letter "b"); and thirdly, other provisions are now also added that were not included in either of the two texts from 2005, just as they were not included in the bill to which they gave rise. This means that a good portion of the reports that this Council issued at the time in relation to those pre-legislative initiatives can be reiterated in the present one for basic reasons of institutional consistency while it will be necessary to incorporate relevant observations regarding what is new.

IV
GENERAL CONSIDERATIONS REGARDING THE DRAFT BILL

As stated in section II of the EM, the reform "intends, in brief, for judges and magistrates to devote all of their energies to the duties entrusted to them by the Constitution: to judge and ensure the enforcement of judgments. To this end, it is necessary to unburden them of all tasks not strictly related to the abovementioned constitutional duties, which is the direction in which the new Judicial Office tends. In it, duties and functions of a non-jurisdictional nature will be attributed to other staff members. At the same time, workflow organization systems for all judicial staff will be established in such a way that professional activity can be performed with maximum efficiency and responsibility". Moreover, section III stresses that the "joint main objective in the reform of all procedural laws is regulating the allocation of competences between judges and courts on the one hand and court clerks on the other.

As the object of the reform are the laws that regulate processes and not the organization of the Judicial Office, the draft bill is thus oriented mainly towards strengthening the authority that corresponds to court clerks in procedural matters, attributing court clerks within each of the procedures duties that differ from those attributed to judges and benches on the logic that court clerks are "ultimately responsible for carrying out all the activities that serve to assist and support the jurisdictional activities of judges and magistrates (article 435 of the Organic Law of

the Judiciary), while material implementation pertains to the staff members of the bodies regulated in Book VI of the Organic Law, in accordance with the list of responsibilities set forth therein and always under the technical procedural supervision of the court clerk (article 457 of the Organic Law of the Judiciary)" (EM I).

Consequently, the draft bill corresponds to the desire manifested for years by determined professional and doctrinal sectors to encourage the intervention of court clerks as a driving force and organizer of the process, overcoming a status quo deemed unsatisfactory.

It is true that the redefinition of the intervention of court clerks in the process was already mentioned in the Government Agreement for Justice signed on 28 May 2001 by the political parties with the most representation and point ten of which decided resolutely in favour of enhancing the duties of the office of court clerks in the following aspects:

- Redefinition of judicial certification service, harmonizing it with the incorporation of new technologies.
- Full powers of instigation of new procedures for transactions in which the intervention of a judge is not mandatory.
- Enhancement of duties in the area of enforcement and realization of assets.
- Attribution of non-contentious proceedings.
- Attribution of supervisory duties in the Judicial Office and common services, creating for this purpose the secretary of government and coordinating secretary.

This action programme is the one that took shape in Organic Law 19/2003 of December 23, through reform of the Judicial Power Organization Act, specifically through the new regulation of Title II of Book V of the aforesaid law, constituting the accommodation of procedural laws to their postulates in a second

phase of imperative adaptation in line with the mandate directed at the Government in the second final provision of aforementioned Organic Law 19/2003.

From the procedural point of view, court clerks are attributed not only the duties of formal instigation of the proceedings and others historically attributed to them (certification, documentation, custody, reporting to the court, filing and registration), but also others that "permit adopting decisions in matters collateral to the operation of the court but indispensable for it", on the basis of the idea that the "court clerk, when responsible for the common service of organizing procedures, will be better situated to instigate the procedure, enabling the judge or bench to issue resolutions in a timely and proper manner". (EM II).

The guiding principle of the draft bill is basically to make evident and grant binding features to the duty of procedural instigation that corresponds to court clerks, specifying in each of the procedures time and form of exercise of each power, with the aim of overcoming the relative lack of definition that, it is believed, has characterized the matter, preventing up to now the proper execution of the powers of intervention recognized in organic law.

The draft bill, in brief, is inspired by the basic idea according to which, on the basis of the organic reform instigated by Organic Law 19/2003 regarding the Judicial Office, it is necessary that the duties of organization of the procedure historically attributed to court clerks be enhanced and intensified to the point that procedural instigation becomes a competence pertaining and specific to court clerks, one subject only to the superior supervision and inspection of the matter that article 165 of the Judicial Power Organization Act entrusts to the presidents of the courts and judges.

In accordance with the design promoted in the commented text, this implies the recognition in the court clerk of a wide capacity for assessing and interpreting legal rules in the intra-procedural ambit, with the understanding that, as an expert in the law, court clerks are also attributed competence for interpreting and

applying the law in all that is not subject to jurisdictional reserve for the reason that it entails impact on fundamental rights, legal-material situations or relationships or questions as to whether the dispute is a matter of substance.

2. Apart from enhancing the powers of court clerks, the draft bill includes other matters of lesser importance, taking the opportunity of the reform to add improvements, updating adaptations. These will be dealt with in the present report when commenting on the reforms of each of the procedures, and some common modifications to all those found in the part of the report concerning the reform of civil procedure, with the aim of avoiding as much as possible repetition in each and every one of the procedures referring to common institutions.

3. In light of the systematic nature of the draft bill, it is considered appropriate to also make a preliminary observation that might contribute to making it easier to read and manage. It concerns the organization of articles of the text, which, as previously indicated, in fifteen articles reforms the same number of laws, observing a strict chronological as opposed to systematic order, required in large part by inescapable reasons of regulatory technique. As a result, laws of disparate significance occur and are interspersed, without any regard whatsoever for subject matter, jurisdictional order or relevance of the reform.

Thus, as much as possible, it is recommended that the articles be distributed among various chapters, one for each jurisdictional order, heading each chapter with an article devoted to the reform of basic procedural laws –Civil Procedure Act, Criminal Procedure Act, Labour Procedure Act, and regulatory rule for the contentious-administrative jurisdiction–, and continuing with the reform of the remainder of procedural laws in the corresponding jurisdiction. The character of general procedural law recognized in article 4 of the Civil Procedure Act, converting it into a suppletory law of obligatory referral in matters not regulated by the remainder of procedural laws, makes it advisable to begin the exposition of the articles with a chapter corresponding to the civil jurisdiction.

A chapter might also be reserved for the Law on Legal Aid, as it is not subject to being reduced to a concrete jurisdictional order.

Finally, on the basis of the ambitiousness of the reform, which makes an exhaustive analysis of it incompatible with the magnitude that ideally a report of this kind should reach, the examination and assessment of the reforms proposed in the draft bill shall be carried out below following the proposed order, albeit in light of procedural categories which permit systemization of the multiple facets of the reform. Moreover, while, due to its length, the main thread of the exposition will be the reform concerning court clerks, the text of the report is also obliged to include numerous references that do not strictly affect the duties of court clerks but rather those of other procedural institutions.

4. In the spirit of article 122.2, in a manner consistent with article 117.1 of the Spanish Constitution, it is should added that the governing of the judiciary is bound to the guarantee of the independence of the judges and magistrates that make up the judiciary, with the sole objective of contributing to rationalizing the model of the Judicial Offices that seeks to implement the draft bill submitted for report, as well as adapting itself to the consistency of the prescriptive content of the same for the purpose stated in its Expository Memorandum, that the aforesaid Memorandum indicates that, in regard to the relationship between the judge or bench and the court clerk, insofar as the latter is entrusted with the common service of organization of proceedings, the only thing sought is to guarantee the "best conditions" for its instigation "without resulting in the judge or bench losing control of the procedure (article 165 of the Judicial Power Organization Act)".

Consequently, the head of the legislative initiative distinguishes clearly between control of the procedure and responsibility for the common service of organization of proceedings.

Consistent with the aforementioned distinction, the regulatory classification of two types of acts, which should be introduced in the reform of the

procedural legislation affected by the draft bill, is recommended. Such categories are:

- Acts of procedural management, which are determinants in the exercise of jurisdictional duties, insofar as they directly condition their normal execution, affecting them as a whole, which, in accordance with article 117.3 of our Constitution, correspond exclusively to judges and benches determined by laws, according to the rules of competence and procedure established therein, a principle reiterated in article 2.1 of the Judicial Power Organization Act.

- Acts of implementation or ones of mere formality, which neither affect nor condition the ordinary exercise of jurisdictional duties and that can be entrusted to the responsibility of the clerk court.

- In relation to a procedural activity as important as designations in all jurisdictional orders, the proposed classification would contribute to unequivocally delimiting the responsibility of one and another body, something missing from the regulation contained in the draft bill.

Management of the process entrusted to judges and benches, articulated through the acts that participate in this manner, cannot be established or be marginal to the operation of the Judicial Office, and this for strictly functional reasons, as the efficiency of the Justice Administration, in the context of the legitimate expectations of citizens in the 21st century, must guarantee the unity of this public service.

This excludes the establishment of a stovepipe organization, with the judge on side and the court clerk on the other, which would entail the weakening of the impetus itself as a result of the breaching of the principal of unity in the exercise of the judiciary.

Consequently, as a regulatory exemplification of the above, in reference to the modification of the Civil Procedure Act sought by the draft bill, article 179.1 of the aforesaid procedural rule should be maintained in the present terms, adding below a new paragraph, which reads as follows:

"Instigation of the process via the relevant acts of implementation or ones of mere formality that do not affect the management of the process shall correspond to the court clerk".

And this in a manner consistent with what is set forth regarding instigation of the process by the court in article 456 of the Judicial Power Organization Act.

In consideration of this suggestion, the referred to regulatory proposal should extend to the procedural legislation intended for modification as a whole.

V

CIVIL REFORMS

1. CIVIL PROCEDURE ACT

The first article of the draft bill modifies the Civil Procedure Act of 1881 in twelve sections, while article thirteen, the most extensive, encompasses in a total of 386 sections the reform of the Civil Procedure Act of 2000. In an attempt at systemization, this report distributes the subject matter in order to separate the part of the reform that affects duties of court clerks from the part devoted to the institutions of the diverse civil procedures. As previously indicated, incorporated into the framework of the reform of the Civil Procedure Act of 2000 are references to other procedural laws so as to avoid unnecessary repetitions.

1.1. Duties of court clerks

The reform of the Civil Procedure Act in relation to the duties of court clerks affects, more or less, all of the duties referred to in articles 452 and ss. of the Judicial Power Organization Act: certification, documentation, opening of an enquiry or interlocutory order, accounting to the court, different modes of procedural instigation, filing, registration and entrusting of property and personal effects. This schematic is followed in the analysis below.

1.1.1. INSTIGATIONS OF PROCEEDINGS

A) General aspects

From the perspective of this heading, the content that the Judicial Power Act assigns to the instigation of proceedings in article 456 and which merits being repeated should be taken as a point of departure:

> "1. The court clerk shall instigate the proceedings in the terms established by procedural laws.
>
> 2. To this end, the necessary decisions shall be issued for the proceedings, except ones that procedural laws reserve for judges or benches. These decisions shall be called procedural steps, which can involve organization, recording, communication or enforcement. Organizational procedural steps can be appealed before a judge or rapporteurs in the cases and forms envisaged in procedural laws.
>
> 3. When envisaged in procedural law, court clerks shall have competence in the following matters:

a) Enforcement. Aside from competences that exclude procedural laws because they are reserved for judges and magistrates.

b) Non-contentious proceedings, assuming their transaction and resolution, without prejudice to an appeal that can be lodged.

c) Settlements, carrying out the mediation efforts that correspond to them.

d) Any others expressly envisaged.

4. The decision issued by the court clerk with aim of stopping the proceedings for which the court clerk is attributed exclusive competence, or when it is necessary or appropriate for the court clerk to offer his or her decision, shall be called a decree.

Schematizing this article, the duties of the court clerk linked to the instigation of proceedings are the following:

a) Procedural activity:

1st) Issuing decisions: measures of organization and decrees
2nd) Organization of measures of recording
3rd) Organization of measures of communication
4th) Organization of measures of enforcement

b) Procedural competences

1st) Enforcement. Aside from the competences that exclude procedural law because they are reserved for judges and magistrates.

2nd) Non-contentious proceedings: transaction and settlement, without prejudice to the appeals that can be lodged.

3rd) Settlements.

4th) Any others expressly envisaged.

As pointed out above, the draft bill suggests the need to clearly separate the spheres of action of judges and clerk courts. This elucidation of the limit of each sphere of action was, at the time, one of the inspirations of the new Civil Procedure Act, adopted by Law 1/2000 of 7 January, which opted for maintaining the measures of organization as an expression of the duties corresponding to court clerks in the organization of proceedings, broadening its content, and eliminated the motions for resolution, which had contributed to generating a certain amount of confusion with the duties of judges.

As the EM of the aforementioned law states, the motions for resolution, introduced by the Judicial Power Organization Act, have not allowed for making use of the unquestionable technical knowledge of court clerks. Rather they have added to the confusion between the competences attributed to clerk courts and those attributed to the courts, resulting frequently in insecurity and dissatisfaction The law therefore opted for specifying that any procedural issue that required a judicial decision had to be decided on by the courts, either through a court order or a decree, according to the case, as formal and material organization of the proceedings, in short, instigation of proceedings resolutions, were reserved to court clerks, indicating throughout the text when a measure of organization had to be issued through the use of impersonal forms, which allow for deducing that the corresponding action should carried out by court clerks in their capacity as the ones responsible for the proper handling of the proceedings.

The present reform turns to the record to specify in each transaction and action if procedural organization corresponds to the court clerk or the judge or bench. The intention is to precisely determine which actions are attributed to court clerks as the person ultimately responsible for procedural organization and which ones, due to their link to the exercise

of jurisdictional authority, must remain in the hands of the head of the court.

In the delimitation of competences between court clerks and judges or benches, the procedural reform at hand does not constitute therefore an innovation in terms of substance, for the organization of the process already corresponded to court clerks. It does constitute, however, a technical improvement in a general sense, as it expresses in a determined and precise way the actions which correspond to each authority, clarifying in each case which action is considered *collateral* to the exercise of the jurisdiction and therefore capable of being assumed by the court clerk, and which other acts must be reserved to the head of the court due to their connection with the exercise of jurisdictional authority.

The detailed reform of many of the precepts of Civil Procedure Act is a response to this illustrative and didactic objective, substituting impersonal forms for a thorough determination of who is responsible for the action. This reworking is contemplated in many precepts, the complete and exhaustive list of which shall be avoided due to the unnecessary verbosity it would entail. However, mention is made of concrete precepts and, occasionally, their content in succinct fashion. One article that has to be mentioned is article 179.1, which substitutes mention of the "jurisdictional body" for "court clerk" when attributing the task of ex officio instigation of proceedings, issuing to this effect the necessary decisions, except when the law states otherwise. Another important precept is article 186, which grants court clerks the power of directing proceedings and for opening and directing hearing of matters for which they have exclusive competence.

The trial that merits this kind of reform and adaptation of the legal text is, in general, positive, given that it will contribute to clearing up

doubts and uncertainties in the matter, in addition to granting more uniformity to the actions of the courts and Judicial Offices, thereby overcoming the unadvisable dispersion of measures that on occasion was the case. Now, given the separation of duties existing between judges or benches, on the one hand, and court clerks, on the other, the intra-procedural mechanisms that permit resolving differences between them that might arise when affirming their respective competences for deciding a determined procedural issue are sufficiently articulated. An example of a potentially controversial precept is number 1 of article 181, regarding *duties of the reporting judge*, according to which "the regular dispatch and handling of matters that have been referred to him or her, without prejudice to the instigation of proceedings that corresponds to the court clerk", shall correspond to the reporting judge.

It is true that in determined cases –as can observed below– the law establishes that the decision of the court clerk is secondary to the ultimate decision of the judge or bench, provided that it is subject to application for review; but this may be unsatisfactory cases in which the aforesaid application for review is not foreseen or that, while existing, is not exercised by the parties, and as a result the decision of the court clerk would become irrevocable. A possible solution to these problems indicates that the ultimate decision corresponds to the judge or bench, as the instigation of proceedings must be instrumental and be subjugated to the principal duty of judging. The mechanism allowing judges or benches to effectively exercise the power of directing the proceedings that correspond to them could be the ex officio discretional review of the resolutions issued by the court clerk, arbitrating, if necessary, proceedings after hearing the parties and requiring a degree of motivation equivalent to that of the reviewed resolution. From this review would be excluded that which is related to certification, the only duty which corresponds to the court clerk fully and exclusively.

On a separate issue, it is considered necessary to clarify that the assignment of duties to the court clerk should be understood as an attribution of the superior responsibility thereof in their implementation, in the capacity of the court clerk as the manager "in the technical-procedural aspect" of Judicial Office staff (article 457 of the Judicial Power Organization Act), and without prejudice to the fact that the materialization of each act of organization corresponds ultimately to the aforesaid staff.

As recognized in the EM, it is should be kept in mind that the rules the draft bill seeks to reform are regulatory laws of procedure, not rules of an organizational nature. For this reason, throughout the articles, an effort has been made not to mention, aside from exceptional cases, common procedural services. Nevertheless, to understand the elaborated texts, it should not be forgotten that in the majority of cases, it is said that the court clerk shall carry out a certain function, in his or her capacity as the person ultimately responsible for compliance with all the decisions adopted by judges and benches in the sphere of their competences (art. 452.2, Judicial Power Organization Act), given the instrumental nature of the Judicial Office to the service –"support and assistance"– of the jurisdictional activity of judges and benches (art. 435.1, Judicial Power Organization Act), without prejudice to the fact that the material implementation corresponds to the staff of the bodies regulated in Book IV of the aforementioned organic law, in accordance with the list of duties established therein and that are exercised under the procedural technical supervision of the court clerk.

At any rate, as occurs in article 451.3 of the Judicial Power Organization Act for an exceptional case, the figure of the procedural manager to should appear in the corresponding places of the articulated text, when it is appropriate to determine to whom corresponds the performance of activities of organization of proceedings that, in

accordance with article 476 Judicial Power Organization Act, are attributed in general terms, and under the principle of hierarchy, for in the same sense as it is recommendable to demarcate the duties between court clerks and the head of the jurisdictional body, it is also appropriate to determine more precisely what specific activities correspond originally to procedural managers, avoiding in this way confusion or ambiguity at this second level or hierarchical rung.

Duties pertaining to procedural managers that could be mentioned in the articles of the Civil Procedure Act would be ones that corresponded to the realization of procedural transactions that do not require an interpretation of a law or procedural rule without prejudice to the necessary accounting to the court clerk (cf. article 178.3), and, in the event that it is required, to the head of the judicial body, the exercise and signature of hearings of the parties, respecting which the manager shall have the authority to certify, the extension of notes the purpose of which is to join to the proceedings information and elements that do not constitute evidence, guaranteeing their being duly recorded, or the registration, reception and distribution of documents.

B) Designation of date and suspension of hearings

One of the aspects in which enhancement of the role granted to the court clerk in the organization of proceedings is most explicit is in regard to the designation of hearings, transferring to court clerks this competence that currently corresponds to the heads of judicial bodies.

In section IV of the EM it is stated that in order to achieve the complementary objective of *encouraging good procedural practices*

"a new regulation has been introduced into all procedural rules in regard to the designation of all kinds of hearings. It is considered

essential for ensuring that lawsuits be designated for trial when they reach a point that allows for this and always in accordance with the priorities that the laws themselves establish for certain matters that the court clerk be the one that, from a centralized service and managing a "programmed agenda" of designation of dates, establishes the dates for hearings. As such, this objective can be obtained through the desired streamlining of use of courtrooms. To this is added the unavoidable necessity of using a centralized system of designation of dates, given that as the new Judicial Office is deployed and the different common procedural services are organized, they will be the centre of destination for judicial staff, not the procedural units of direct support to the judge, said staff assisting the judge in the celebration of hearings in court.

Notwithstanding this attribution of competences to court clerks, the designation of dates shall be verified taking into account the criteria that the president of the chamber or section or the head of the court indicates to court clerks concerning both general organization of work and the approximate duration of the hearing, inasmuch as they have been able to determine after examining the matter or lawsuit concerned".

Article 182 in the text proposed in the reform regulates, in two sections, the legal regime applicable to designation of hearings and the designation of the date and time for the deliberation and voting of matters that must be adjudicated without the holding of a hearing. This articles establishes that:

"1. The designation of hearings before a bench of judges and in sole judge courts shall be carried out by the court clerk in the order in which the proceedings arrive at the point where a hearing or trial must be held, aside from legally established exceptions, and

attending to the time of the hearings, the availability of the courtroom envisaged for each judicial body, organization of human resources of the Judicial Office, coordination with the Public Prosecutor's Office in proceedings in which the law envisages the intervention of the public prosecutor, and also taking into account the number of designations and instructions and criteria in a general sense and, in particular, regarding the estimated duration of the proceedings by indicating that they have been provided by the head of the judicial body or the president of the chamber or section in courts in which more than one judge sits.

2. Designation of the date and time for deliberation and voting on matters that must be adjudicated without the holding of a hearing shall correspond to the presidents of the chambers and to the presidents of courts in which more than one judge sits.

Firstly, what has been previously indicated regarding designation in number 4 of section IV in General Considerations needs to be reiterated.

Based on the reading of the articles, in the new configuration of this precept, the incorporation into the text of references to administrative or organizational aspects that are out of context in a procedural law, such as references to the availability of the courtroom envisaged for each judicial body or the organization of Judicial Office human resources, draws attention. There can be no doubt that such staff and material resources are essential. But it is also unquestionable that they must be adapted to the needs of the proceedings and the guarantees provided for the party to the proceedings, not the other way around.

Among the articles of the Civil Procedure Act that entrust the court clerk with designation and, occasionally, also summonsing are the following: designation of hearings and trials (arts. 14.2.3, 182, 183, 193.3,

235.4, 260.1, 422.2, 423.3, 429.2, 3 and 7, 440.1, 441.4, 464.1 and 2, 486.1, 558.2, 560, 657.2, 675.3, 734.1, 747.1, 794.4, 809.2, 811.5, 818.2 and 826), hearings (art. 414.1), court appearances (arts. 22.2, 110.1, 127.1, 234.1, 393.3, 540.3, 640, 678.2, 695.2, 768.3, 771.2 and 3, 772.2, 773.3 and 4, 787.3, 801.2, 810.3 and 811.3), for the bringing of evidence before the trial (arts. 290 and 294.2), of judicial recognition (art. 353.3) and evidence as final proceedings (art. 436.1).

The Civil Procedure Act of 1881 refers to the designation for mediations in article 466 of the Civil Procedure Act of 1881, while maintaining the summons and designation by justices of the peace in mediations within their competence.

Nevertheless, the alternative of maintaining the current rule should be considered for two reasons: firstly, because the designation is an act of management of the proceedings that, due to its nature, is intimately connected to jurisdictional duty and judicial status (performance, decisiveness, remuneration, compatibility...), and, secondly, because, fundamentally in the criminal jurisdiction, the judge, due to his or her knowledge of the object of the proceedings and controversial issues, is the one who is in the best position to assess the volume and complexity of declarations and presentation of evidence, and, therefore, the elements that must be taken into account when designating a hearing or trial and potential pleas, thereby guaranteeing their proper execution and avoiding suspensions and delays that are harmful to public service.

This without prejudice to the fact that they can adopt the measures deemed necessary for achieving maximum streamlining of the existing resources.

At any rate, in accordance with the system of the draft bill, it is obvious that designations need to be coordinated with the heads of the

courts in order to guarantee satisfactory compliance with general and particular criteria established by these individuals, in such a way that under no circumstances shall designation be established that is contrary to the criteria of the judge, magistrate or president of the chamber or section that will preside over the hearings or court appearances.

Moreover, the authority recognized in the court clerk in the draft bill for carrying out the designation of hearings extends also to the decision of the sufficiency of the justification offered by litigants or lawyers for requesting a *continuance*. According to article 183 in the wording of the reform, if any of the persons required to attend a hearing is unable to do so on the indicated day, because of force majeure or a similar reason, said individuals shall apprise the court of this immediately, duly providing the cause or motive and requesting the designation of a new hearing or resolution that takes account of the situation.

The amended text distinguishes whether it is a party's lawyer or the party him- or herself that alleges the situation of impossibility, in which case the court clerk shall assess if the alleged cause is credible and accredited (art. 183.2 and 3, Civil Procedure Act), or if it is a witness or expert who claims to be in a situation of impossibility, in which case the court clerk shall not make a decision but rather declare that the parties be heard, the court deciding what it considers appropriate regarding the justification of the excuse and the necessity of carrying out a new designation or summoning the witness or expert for the presentation of evidence outside of the designated hearing.

In theory, there is nothing objectionable about this diversification of the applicable regime depending on who alleges the excuse for not appearing at the hearing. Yet the implication of the decision of continuance of the right to a trial free of undue delays (arg. art. 188.1 of the Judicial Power Organization Act regarding the period of time of a

public hearing) suggests reconsidering whether this is transferable to court clerks. What is clear (and this in line with the reform) is the unquestionable judicial competence when the time comes to decide whether or not the testimony of witnesses and expert is indispensable or not, or to declare that the aforesaid testimony be carried out prior to or in proceedings separate from the hearing. As such, it is not possible for these powers to be transferred to court clerks. Finally, on this point the reform is silent regarding the possibility that the judge or bench can agree to a continuance or change the designation for reasons other than the ones set forth, with the subsequent alteration of schedule of designations (e.g., when immediate designation of an urgent matter requiring continuance of another already designated matter is considered necessary).

The court clerk is also entrusted with the decision to *discontinue* the hearing on the designated day when the parties request this by mutual consent alleging just cause (art. 181.1.3, Civil Procedure Act), due to the absolute impossibility of any the parties being questioned in the trial or hearing, "sufficiently justified in the view of the court clerk" (art. 188.1.4, Civil Procedure Act) or due to impossibility or exercise of certain social rights of the lawyer of the party (art. 188.1.5, Civil Procedure Act). The court shall be informed of any abeyance that the court clerk agrees to on the same day or on the next working day, and the court clerk shall also inform the parties to the proceedings and anyone who has been summonsed as a witness, an expert or in any other capacity (art. 188.2, Civil Procedure Act). Article 189.1 envisages, as an instigation of proceedings measure, that once the abeyance has been agreed to, the court clerk shall proceed to a new designation, except when this is not possible, in which case the court clerk shall do so when the reason for the abeyance disappears. At this point, it should stressed that the assessment of the circumstances that are the cause of the abeyance (the "just cause" and "absolute impossibility" referred to by the article and tied

to determined situations) can require a trial regarding the actual validity of what has been alleged to justify the abeyance, a trial of proportionality entailing the right to a trial without undue delays and that should preserve judicial authority.

C) Measures for organization of proceedings

Measures for organization of civil proceedings as well as criminal, contentious-administrative and labour proceedings, are affected by the reform through two technical means: in some cases, through the substitution of express mention of the judicial body (court or bench) or the judge or magistrate by mention of the court clerk; while in others, the substitution affects the impersonal expression contained in the rule [*vgr*. "shall be transmitted"], ultimately designating the court clerk as the acting subject. As these acts of organization or proceedings are varied and the number of affected articles numerous, below are listed the kinds of proceedings in which these can be grouped, with the mention of articles as examples in many cases:

a) *Notification*

Court clerks carry out notifications for pleas (arts. 13.3, 18, 29.2, 83.1, 88.4, 90.1, 228.2, 286.2, 393.3, 593.2, 672.2, 713.2, 717, 719 and 720, Civil Procedure Act; 34, 668, 766.3 and 4, 790.5, 794.1, 846 bis d) and 880, Criminal Procedure Act; 23.2, 29.2, 30.2, 211.3 and 270.1, Labour Procedure Act; 36.2, 59.1 and 119, Contentious-Administrative Procedure Act); for instituting proceedings (arts. 52.1 and 118, Contentious-Administrative Procedure Act); and reply; for challenges and pleadings in proceedings (arts. 453.1, 454 bis.2, 461.1 and 4, 485 and 492.3, Civil Procedure Act; 185.3, 195, 212.1 and 2, and 224, Labour Procedure Act; 79.4, 85.2, 94.1, 100.5 y 102 bis.1, Contentious-

Administrative Procedure Act); for designation of a new solicitor (art. 30.1.3, Civil Procedure Act); for reports or opinions of the Public Prosecutor's Office (arts. 109.3, Civil Procedure Act; 234, Criminal Procedure Act; and 169.2, Labour Procedure Act); for requesting the appearance of an expert at the trial (art. 346, Civil Procedure Act); for contesting enforcement (art. 541.2, Civil Procedure Act); for examination of the parties (art. 627, Criminal Procedure Act), provisional qualification (arts. 649, 651, 652 and 679, Criminal Procedure Act) and indictments (art. 783.1, Criminal Procedure Act) and statements of defence (art; 784.1, Criminal Procedure Act); notification of oppositions and counterparty documents (arts. 298.8, 507.1.2, 529.2, 741.1 and 826, Civil Procedure Act), list of questions for questioning (art. 315.1, Civil Procedure Act), written responses of legal persons and public entities (art. 381.2, Civil Procedure Act) and dividing operations of the accountant for opposition of the parties (art. 787.1, Civil Procedure Act), and transfer of records to the parties (arts. 53.2 and 78.4, Contentious-Administrative Procedure Act).

Similar transactions include the opening of periods of time for hearings to the parties for pleas (arts. 14.2.2, Civil Procedure Act; 37, Criminal Procedure Act; 30 bis.2 and 274.1, Labour Procedure Act; 74.3, 125.3 and 131, Contentious-Administrative Procedure Act); periods for hearing proceedings, proceedings and pleadings to different effects –pleas, pre-trial proceedings, etc.– (arts. 48.3, Civil Procedure Act; 229, 617 and 780.2, Criminal Procedure Act; 48.5, 100.4, 116.5 and 127.4, Contentious-Administrative Procedure Act); 13.1, Passive Extradition Act; and 170.3, Bankruptcy Act).

Regarding the transfer of proceedings, the court clerk shall determine when the reporting judge shall be the one presiding over the proceedings (arts. 483.1, Civil Procedure Act; 628 and 658, Criminal Procedure Act; and 93.1, Contentious-Administrative Procedure Act).

b) Referral and claims of orders, particulars and effects

The reform indicates on many occasions that the court clerk, in the corresponding proceedings, shall be responsible for referral of orders to the objectively competent body (art. 49 bis. 4, Civil Procedure Act) for hearing the matter of discrepancy regarding the accumulation of appeals (arts. 463.1 and 482.1, Civil Procedure Act) and to the *ad quem* body for deciding appeals. Demonstration of this activity is found as well in the reform of other procedural laws: referral of proceedings and original orders, items seized and material evidence for the prosecution (arts. 15, 22, 25, 38, 232, 447, 622, 779.2, 788.5, 801.4 and 965.1.2, Criminal Procedure Act), referral of orders (art. 199.2, Labour Procedure Act) and in particular to the *ad quem* body for appeals proceedings or referral of testimony of private individuals in the appeal (arts. 224 and 766.3, Criminal Procedure Act). Under this heading should also be included the task of instigation of proceedings of the court clerk in the referral of a case back to the original court in the review of final judgments (art. 516, Civil Procedure Act) and to the *a quo* body in regard to appeal proceedings [art. 846 bis d), Criminal Procedure Act].

An example of the referral of particulars is the certification of the judgment that considers appropriate the rescission of the judgment rendered in absentia to the court of first instance (art. 507.1, Civil Procedure Act), the referral of communication of the judgment to the body that raised the question of illegality (art. 126.3, Contentious-Administrative Procedure Act) or the communication to the *a quo* body of the decree declaring the judicial review void (art. 866, Criminal Procedure Act), and the referral of cases back to the court of origin (arts. 142.1, Labour Procedure Act; 59.4, Contentious-Administrative Procedure Act).

Regarding claims for documents, effects, records, authorized copies, certifications and testimonies, *vid*. arts. 335, 470 and 988, Criminal Procedure Act; 168, 172 and 222; Labour Procedure Act.

The reform also expressly refers to the court clerk as the issuer of the acknowledgment of orders, records, documents, etc. (*vgr*. arts. 37, 228 and 232, Criminal Procedure Act).

c) *Enquiries*

This activity is deployed in different directions. First of all, in the declaration process, article 156.1 envisages use by the court clerk of the necessary means for determining the registered office or residence of the defendant, for the purpose of the defendant's appearing as a party, being able to request such information from registries, agencies, professional bodies, etc. Articles 184.7 of the Bankruptcy Act (in regard to the debtor and the administrators or proxies of the legal person) and 59.1 of Labour Procedure Act are in a similar vein.

Nevertheless, the draft bill reserves for the investigating magistrate in criminal proceedings the order of address inquiry of persons who have been served, summonsed or located, being able to obtain such information from official registries, professional bodies, entities or companies in which the interested party exercises activity, or other centres, entities or agencies in which information facilitating locating said persons might be found (art. 178, Criminal Procedure Act), as well as the orders for locating witnesses whose whereabouts are unknown, the judge being able to obtain such information from official registries, professional bodies, entities, centres or agencies in which information facilitating their whereabouts might be found (art. 432, Criminal Procedure Act).

Secondly, the Civil Procedure Act and other procedural laws entrust the court clerk with the enquiry into the debtor's assets in enforcement proceedings, with the particularities set forth below.

D) Service Communication Acts

The draft bill introduces modifications into the regulation of service communication acts in articles 149, 150, 152 and 156, as previously indicated, 157 –in relation to the central registry of civil defaulters, which shall be returned to below–, 161, 163 to 165, 167 and 168 of the Civil Procedure Act. Some of these modifications are merely detailed adaptations of the procedural regulation to the new organic regulation under Organic Law 19/2003. Thus, modifications are introduced to include among notification of decisions ones issued by the court clerk (art. 150), to adapt the regulation to the design of the new judicial office (articles 154, 155 and 163), as well as to the current denomination of the body of judicial staff (arts. 149 and 168).

Still, the reform introduces some changes of undeniable importance that merit detailed commentary, especially in regard to the role of the court clerk in performing service communication acts and the attribution of competence to solicitors for their execution.

Article 152, which regulates the form of service communication acts, undergoes an important alteration, with the elimination in its first section of the reference to the fact that the current text establishes that communication acts "shall be carried out materially by the court clerk or the staff member the court clerk designated to do so". The new regulation, in accordance with article 161.1 and 2, establishes that communication acts shall be carried out under the supervision of the court clerk, who will be responsible for the adequate organization of the service, the material execution of which shall be deferred to members of

the judicial service auxiliary staff and, where appropriate, to the solicitor of the party that has requested it, at said party's expense. It should be noted that the communication acts referred to in this article are communications with the parties and third parties that take the form of notifications, summons, citations and subpoenas, but it does not appear that they extend to warrants, official letters or communiqués (art.167) and rogatory letters (art. 172.1), the issuing of which corresponds directly to the court clerk.

The reform merits positive assessment by the Council, for it contributes to duly clarifying and distinguishing what is the competence of the court clerk (management of the service) from the material implementation of the act, which is attributed to the judicial auxiliary body. It should be recalled that, in this respect, what the Council already stated in the report issued on the draft bill of the Civil Procedure Act, wherein, in clear line with the spirit of the proposed regulation, are included the following considerations:

> "The rule continues to insist on attributing communications acts service to the court clerk and, while in this case the possibility of delegation is expressly envisaged, it is also certain that more decisiveness in the rule in the sense of permitting these acts to be carried out by staff of the office of the court clerk would be more appropriate."

The recommendation of the Council, issued at the time in regard to the draft bill of the Civil Procedure Act, is echoed to a certain extent in the proposed procedural reform, which, in keeping with the new organizational framework implemented by Organic Law 19/2003, differentiates the duty of management of the common procedural service of service communication acts, for which the court clerk has competence,

from the material execution of individual service communications acts, which the law attributes exclusively to judicial assistance staff.

Furthermore, the attribution to the party's solicitor of powers in the implementation of these acts should also be mentioned. In accordance with the reformed text of article 152.1.2, communication acts executed by the solicitor of the party that has requested them shall be considered as validly carried out, as long as the record sufficiently indicates that the acts have been implemented in person or in the domicile of the addressee. To these effects, the solicitor shall accredit, under his or her responsibility, the identity and condition of the recipient of the service communication act, making sure that his or her signature and the date on which the service is carried out appears on the copy. This provision, comparable to similar institutions of comparative law, is later established in articles 160.1, 161.1, 2 and 5, 163 and 165.

In the implementation process it is envisaged that the solicitor of the judgment creditor intervenes in the processing of the services freed up for the investigation of the assets of the judgment debtor, as well as receiving the completion thereof, imposing on all persons and public and private entities the correlative responsibility of collaboration (art. 591.1). The solicitor is also attributed the power of processing orders of detention of amounts deposited in open accounts in credit, savings or financing entities (art. 621.2) for requesting from the registrar certification of title and charges of the real estate to be auctioned (art. 656.1) and for carrying out service communications with previous holders of credits preferable to that of the judgment creditor and credits recorded prior to the executed lien (art. 660.1).

All of this intervention by the solicitor is carried out at the expense of the party that requests it, the rights that the solicitor provides as a consequence of actions of a merely optional nature that could have been

carried out by the judicial offices being excluded from the costs (art. 32.5), with the subsequent exclusion of this certificate from taxation of costs (art. 243.2).

The draft bill opts for this practice with the aim of alleviating the Judicial Office as much as possible of part of the workload entailed in carrying out these acts, without in theory reducing the specific guarantees that ensure their complete efficiency and respect for the rights of the parties; however, in the substitution in this type of act of justice system staff –subject to a public law statute that constitutes a guarantee of the exercise of their activity– for the solicitor, it would be advisable to adjudicate the measures necessary for guaranteeing the effectiveness of the reform and the confidence in this new mode of communication.

Specifically, the following articles that are the object of the reform refer to the service of the court clerk of different kinds of communication acts:

a) *Notices*

Amended precepts on this point are articles 541.2 and 3 of the Civil Procedure Act; 160, 760, 779.1.1, 789.4 and 793.1 of the Criminal Procedure Act and 18.1 of the Passive Extradition Act.

Separate mention should be of the regime of impersonal communications via edicts. Article 164 envisages in the framework of "technological modernization of the justice system", alluded to in EM IV, that the publication of edicts through the Official Bulletin of the province, of the Autonomous Community, of the Spanish State or a newspaper of national or provincial circulation can be substituted, in the terms determined in accordance with the rules, by the use of telematic, computerized or electronic means, in accordance with what is set forth in

article 236 of the Judicial Power Organization Act. Article 686.2 extends the use of these means to the process of enforcement, in regard to service of the payment order to the debtor and, where appropriate, to the non-debtor party or third possessor against whom enforcement actions have been brought. Articles 156.4 of the Civil Procedure Act and 59.2 of the Labour Procedure Act also refer to the order of the court clerk to proceed to notification of the edict.

b) *Summons*

Among the amended articles in which reference is added to the court clerk in service of summons are articles 441.4 and 514.1, Civil Procedure Act; 227, 534, 784.1, 846 bis d) and 859, Criminal Procedure Act; 328 of the Mortgage Act; 207.1, Labour Procedure Act; 49.3, 54.1 and 100.4, Contentious-Administrative Procedure Act.

c) *Citations*

Articles 292.2, 295.1, 298.8, 440.1 and 441.1 of the Civil Procedure Act; 430, 664, 780 and 785.1 of the Criminal Procedure Act concern citation orders.

d) *Writ of summons*

Articles 34.2 and 58 of the Civil Procedure Act and 19.2, 141.1, 147.2, 242.2, 251.1, 274.4, 286.2 and 288.3 of the Labour Procedure Act refer to writs of summons.

e) *Communiqués*

Although, as is well known, many communication acts of the court with public entities and individuals are carried out using this form of

communication, express mention of it along with its attribution to the court clerk is found in, among others, articles 512, 784.1, 845, 881 of the Criminal Procedure Act; 13.2 of the Passive Extradition Act and 7.3 of the Free Legal Assistance Act.

f) *Judicial assistance*

In line with article 438.3 of the Judicial Power Organization Act, which assign the functions of judicial assistance to common procedural services, articles 170, 171 and 173 of the Civil Procedure Act confer judicial assistance to judicial office of the court of first instance of the constituency in which the service needs to be carried out –except when the processing corresponds to a justice of the peace. Likewise, articles 660, 664 and 719 of the Criminal Procedure Act refer to the issuance of letters rogatory by the court clerk.

Article 177, regarding international judicial cooperation, adds a reference in its first section to the legal regime in the matter envisaged in Community rules. EC Rule no. 1393/2007 of the European Parliament and Council of 13 November 2007, in relation to the notice and transfer in member States of judicial and extrajudicial documents in civil or mercantile matters ("notice and transfer of documents") and repealing EC Rule no. 1348/2000 of the Council, can be cited in the acquis communautaire as the most recent provision concerning this matter.

E) *Authorization for working days and times*

Commentary regarding the new authority that article 131.1 and 4 –and in terms almost identical to article 43.5 of the Labour Procedure Act– seeks to confer on court clerks in relation to authorization of working days and times has been included here:

"1. Ex officio or on request of one of the parties, the courts may authorize working days and times when there is an urgent cause that demands it. This authorization shall be carried out by court clerks when the purpose is realization of procedural acts that must be performed in matters within their exclusive competence, when it entails acts ordered by court clerks or when they are intended to carry out the decisions issued by the courts."

"4. No appeal will be accepted against decisions of authorization of non-working days and times."

On this point the reform raises two objections:

1) Article 184.2 of the Judicial Power Organization Act confers exclusively to the judge or court authority for authorizing non-working days and hours, "subject to what is set forth in procedural laws".

2) The possibility that the court clerk declares the authorization also "when they are intended to carry out the decisions issued by the courts" can give rise to the court clerk determining an urgent situation and proceeding to the authorization, without the possibility of appeal, when in identical circumstances the court has not decided in the identical sense.

Consequently, the Council believes that the reform should be reconsidered regarding this point.

F) *Decisions of court clerks and system of appeals*

The decisions that court clerks can make, as an expression of the autonomy with which they perform their duties in the new organizational design, are regulated in Chapter VIII of Title V of Book I of the Civil Procedure Act, which undergoes an important transformation.

The decisions of court clerks are listed and defined in article 206.4, which distinguishes between *order of the court clerk and decrees*. This precept transfers what is envisaged in sections 2 and 4 of article 456 of the Judicial Power Organization Act. The reform invalidates the existing articles regarding orders of the court clerk (art. 223) and system of appeals against them (art. 224). Along general lines and from a purely formal point of view, the tendency of the reform when determining the type of decision that corresponds to the court clerk according to the new allocation of duties in procedure consists in substituting *court order* for *order of the court clerk* and *order* for *decree*. Another criterion that frequently appears over the course of the articles is that of entrusting the decision to the court clerk when there is agreement between the parties – or at least when the parties are not in conflict– and, where appropriate, interested third parties, while in case of the contrary it is deferred to the court (for all, *vid*. art. 657.2).

Rule 1 of article 206.4 states that orders of the court clerk shall be issued "when the purpose of the decision is to ensure the efficient conduct of the orders that the law establishes". These decisions constitute, therefore, the materialization of the acts of instigation necessary for the processing of the procedure that are not reserved by the law for judges and benches. On this point there is uncertainty regarding the limits of the attributions to court clerks, limits that the reform of the Civil Procedure Act determines applying a general criterion, establishing which specific procedural acts related to the transaction are ones that should be reserved for the heads of judicial bodies. Nor is article 206.2.1 explicit in this regard, for it limits itself to stating that the court shall issue a court order "when the decision refers to procedural matters that require a judicial decision as established by law, provided that in such cases an order is not expressly required". The delimitation of attributions of court clerks and judges and benches does not occur in the

material order, but rather formally and through the mere referral to the casuistic regulation of each of the proceedings. At any rate, the infringement of the organizational breakdown of tasks as contained in the law shall constitute the ground for invalidity of full rights consisting in settling through orders of the court clerk or decrees matters that should be decided through judicial decisions (art. 225.6).

Perhaps it would be appropriate if in regard to general provisions, the Civil Procedure Act, when regulating the decisions of judges and court clerks, established some material criterion that served to delimit the respective spheres of decision so as to be able to distinguish acts of procedural instigation reserved for judges, leaving the remainder in the hands of the court clerks.

In regard to *decrees*, rule 2 of article 206.4.4 establishes that these shall be issued "when the decision puts a stop to the proceedings for which the court clerk has been attributed exclusive competence and, in any kind of proceedings, when it is necessary or appropriate to make the decision". The reference to the decree as a decision that terminates the proceedings for which the court clerk has exclusive competence can be effective not only in the ambit of non-contentious proceedings, once the corresponding regulatory law has been published in the terms envisaged in the eighteenth additional provision of Law 1/2000, but also in determined decisions affected by the reform (*vgr*. declaration of the lapsing of the legal action or that the appeal is voided).

Furthermore, the requirement that all decisions of the court clerk that require cause adopt the form of a decree is appropriate.

Rule 3 of article 206.3 states that formal records, notifications and enforcements shall be issued for the purpose of reflecting in orders facts or acts of procedural importance, a provision that coincides with the

reference to judicial decisions of article 456.2 of the Judicial Power Organization Act, without prejudice to the fact that the legal nature of genuine decisions is debatable.

Regarding the form of the decisions of court clerks, article 208, devoted in general to the "form of decisions", regulates the form of orders of court clerks, applying to them the same system as for judicial court orders, which shall be limited to expressing what is dictated by them and including in addition a succinct cause when the law thus states it or the person who issues them deems it appropriate; and the form of decrees, which in turn coincide with that of orders regarding their structure and the requirement of reasons. Finally, article 210 refers to oral decisions that can also be issued by court clerks in hearings, trials or court appearances, without prejudice to their documentation in writing ("duly drafted"), with the possibility of declaration of finality in the same act.

The decisions of the court clerk in enforcement proceedings are the object of specific regulation in sections 6 and 7 of article 545:

- The form of the decree is reserved for decisions that determine the assets of the execution debtor to which should be extended the enforcement order and any others indicated in the Civil Procedure Act.

- Orders of court clerks are for the remainder of decisions that are within the competence of court clerks and do not require resolution by decree. It should be kept in mind that the competence of the judge in enforcement proceedings is limited to specific matters whose resolution must take the form of an order, as well as any others that must be decided through a court order when expressly indicated (sections 5 and 7 of the same article).

Lastly, the clarification regime, rectification of mistakes, corrections and complement of defective or incomplete decisions of articles 241 and 215 –the same as article 161 of the Criminal Procedure Act–, all adopted from article 267 of the Judicial Power Organization Act, apply to decisions of court clerks.

b) *Appeals*

Appeals against decisions of court clerks are included in two places: firstly, in article 206.2.2, according to which the decisions regarding appeals against decrees shall take the form of orders; and secondly, in Title IV of Book II, which is amended precisely for the purpose of introducing the specialties of the new legal regime.

1) Appeal for reversal

After generally declaring the right to appeal that article 448.1 recognizes in the parties, which extends to decisions of court clerks through the appeals envisaged in the law, article 451.1 states that regarding orders of court clerks and non-final decrees, an appeal for reversal can be lodged before the court clerk that issued the appealed decision, except in cases in which the law envisages direct application for judicial review. A general appeals regime for decisions of court clerks is thus established so that the same court clerk can review his or her own decision, as the appeal for reversal procedure is common, independent of whether the appealed decision originated with the court clerk or concerns non-final rulings and orders: the appeals must be filed within five days, indicating the infringement caused by the decision in the opinion of the appellant (art. 452.1).

The court clerk will not admit appeals for reversals against orders of court clerks and non-final decrees through a decree when they do not meet fixed deadlines and include the violation (art. 452.2). An application for review against the decree of inadmissibility of the appeal for reversal can be filed directly (art. 452.2). It seems appropriate that the judicial body has the last word on the matter, and as such the regulation is considered sound on this matter.

Once the appeal for reversal has been admitted, the court clerk will grant the other parties a deadline for challenging it. After the deadline has passed, whether the parties have submitted documents or not, the court clerk will decide on the matter without further ado through a decree (art. 453).

2) Appeal for review

In accordance with article 454 bis, introduced by the reform, an appeal for review action can be filed against the resolutive decree before the judge or bench with competence for hearing the proceedings in which the appealed decision was issued, in cases expressly envisaged by the law. Resolutive decrees of the appeal for review, therefore, can only be brought before the head of the judicial body when the law authorizes it, as they cannot be appealed in case of the contrary, section 4 of the aforesaid article anticipating that this incontestability shall exist "without prejudice to the issue being raised again, if appropriate, when appealing the final decision".

In regard to the competence of the judicial body that is required to decide on the appeal for review, it is the opinion of the Council that it is correct to attribute said competence to the judge or bench with the authority to hear the application or appeal in which the contested decree was issued, ensuring that the civil procedure takes place in diverse

instances or degrees, the resolution of which corresponds to different courts.

Furthermore, from a dogmatic viewpoint, this challenge is difficult to classify in accordance with traditional criteria of classification of appeals, as it obviously does not concern a non-remittable appeal, nor is it remittable, for it is not heard by a superior court, without being able to dispense with the procedural nature both of the appealed decision –which is non-administrative– and the appeal itself, if the intention is to put it on equal footing with a contentious-administrative appeal. This is not merely an academic problem. In addition to indicating a tendency towards the "administerization" of the procedure it affects the legal nature of the institution and can have significant practical repercussions (for example, in the application of analogy in case of loopholes).

Article 454 bis 1 also states that the appeal for review can be filed against decrees that terminate proceedings or prevent their continuation. A direct appeal for review action can also be filed against decrees in cases in which it is expressly foreseen. This direct appeal is reserved for cases in which the decision involves more sensitive matters or that require a more immediate response. Consequently, an appeal for reversal is avoided so as not to delay the decision of the head of the judicial body.

The appeal for review proceedings are regulated in section 2 of article 454 bis, which establishes that the appeal must be filed within the deadline in a letter that indicates the infringement committed by the decision. These requirements met, the court clerk, through an order of the court clerk, shall admit the appeal, granting the parties a deadline for contesting it; if the requirements for admissibility of the appeal are not met, the court shall deny it through a court order.

The decision regarding admissibility thus ends up scattered, resulting in somewhat dysfunctional proceedings: if the decision is favourable, the court clerk adopts it through an order of the court clerk; if it is unfavourable, the court decides through a court order. It would make more sense, however, to centralize the decision, both favourable and unfavourable, in the figure of the court clerk, without prejudice to the fact that the order or inadmissibility of the court clerk can be challenged through a direct review in court (in the form of a complaint appeal), so that the court has the last word.

The precept also states that, once the time limit for contesting has expired, regardless of whether letters have been submitted or not, the court will decide on the matter without further ado through an order. No appeals of any kind can be filed against the decisions of admissibility or inadmissibility. Appeal for review proceedings are very similar to appeal for reversal proceedings, except that apart from the court with competence for the decision, the judge or bench must agree to the inadmissibility through a court order not subject to subsequent appeal. The regulation is correct regarding the simplicity of the procedure, insofar as the capacity with which court clerks are provided for issuing autonomous decisions subject to court review should disturb as minimally as possible the progress of the proceedings, reducing review procedures to an essential minimum.

The resolutive order of the review cannot, as a rule, be appealed, unless it puts a stop to the proceedings or prevents its continuation, in which case appeals are permitted (art. 454 bis). We have here cases in which the law has anticipated the appeal for direct review in accordance with the fact that the direct appeal is justified by the importance of the matter decided on in the decree, which is the reason why a second tier of judicial authority is established through the appeal procedure against the resolutive order of the review.

In regard to the regime for appeals in enforcement proceedings – and unless expressly provided otherwise– the appeal for reversal shall serve as the channel for contesting any infringement of the rules regulating concrete acts of enforcement proceedings (art. 562.1.1). However, if the decision is contrary to the enforcement order, the appeal shall be a review appeal (art. 563.1).

Without prejudice to the above, it should be emphasized again that when it concerns the exercise of judicial functions, it cannot be assumed that the potential judicial review of the decision of the court clerk constitutes a legitimate case for granting court clerks attributions that do not correspond to him or her, being the exclusive competence of the court, for in the case of intra-procedural decisions, the judicial decision must be first tier, without being able to be substituted by a possible review of the decision of the court clerk, not only because within the framework of a judicial procedure the party to judicial proceedings should be made to pass through a double filter to finally arrive at a judicial decision, but also because the lack of the exercise of the recourse to appeal would consolidate and give legal status to a decision adopted by someone that does not have competence for it.

G) Decision regarding procedural requirements and prerequisites

a) *Appeals*

Regarding appeals procedure, the reform introduces a new admissions regime. Article 457 establishes that the court clerk shall admit the appeal if the contested decision is appealable and the appeal is filed within the set time limit. Otherwise, the court clerk shall inform the court so that an opinion can be offered regarding the admissibility of the appeal. If the court considers that the abovementioned requirements

have been fulfilled, it shall issue a court order admitting the appeal; in case of the contrary, it shall issue an order denying it.

The order of the court clerk or order of the court admitting the appeal is not subject to appeal. However, the appealed party can allege the inadmissibility of the appeal in the opposition to appeal proceedings to which article 461 refers; if the appealed party alleges the inadmissibility of these proceedings, the matter will be resolved in a ruling, as the Civil Procedure Act does not envisage a second filter of inadmissibility of procedural prerequisites before an *ad quem* body.

From the above it can be deduced that as an order of the court clerk admitting the appeal is not subject to appeal and, in the event of the opposition to its admission by the appealed, the matter is definitively resolved in a ruling, the decision regarding review proceedings and termination of the appeal ultimately falls to the court clerk, determining that an appeal that could be declared inadmissible in a ruling be processed in its entirety. This situation, which postpones judicial intervention at the time the ruling is issued, would affect the right of the appealed party not to be unduly subjected to a court petition, with the additional consequence that the undue admission of the appeal deprives him at that moment of the finality of the contested decision, giving rise, in turn, to material res judicata, reasons for which the decision regarding the admission of the appeal should remain in the hands of the court clerk.

b) Correction of procedural flaws

With the aim of avoiding a situation in which, due to rectifiable mistakes committed a party in legal actions, the litigants find themselves disproportionately deprived of the exercise of their rights in the procedure, the reform in various articles grants to the court clerk the responsibility of informing the parties of potential formal defects they might run into when

it comes to formulating their claims, provided that they can be corrected. This new rectification regime for specific cases anticipated by the law exists without prejudice to the fact that in general terms both the court and the court clerk must make sure that the possible defects of procedural actions of the parties can be remedied, provided that the willingness to meet the requirement demanded by the law is declared in said actions (art. 231).

While others parts of this report allude to the correction procedure regarding determined procedural institutions, the lack of accreditation of credit, consignment, deposit or establishment of surety when required for appeal in special cases can be indicated here (arts. 231 and 449.6).

In other procedural laws there are also indications of this duty of the court clerk (arts. 45.3 and 56.2 of the Contentious-Administrative Procedure Act; 195.1 of the Mortgage Act, and 193.3, 197, 207.3 and 209 of the Labour Procedure Act).

H) Stay of proceedings and lifting of the stay

a) *Stay of proceedings*

In addition to the already examined stay of trials and hearings, the reform attributes to court clerks stay of proceedings, conditioned on occasions by the petition of the party and always by the concurrence of one of legal situations, including: the purpose of determining and locating parties harmed in procedures for the protection of collective and diffuse rights and interests of consumers and users (art. 15.3); the facilitation of the appearance of the competent parties due to substitution of successor *mortis causa* (art. 16.1 and 2) and *intervivos* (art. 17.1); stay as an effect of the raising of a non-criminal prejudicial question (art. 42.3) or of the plea (64.1); stay in accumulation of trials (arts. 84.2 and 92.2); due to the

abstention of the judge or magistrate (art. 102.2), to which should be added the general possibility that the parties urge the stay, provided that it does not harm general or third party interests (art. 19.4).

As has already been observed in this report regarding other legal institutions affected by the reform, it could be argued that stay of proceedings is entrusted to the court clerk when possible harm to general or third party interests is noted (cf. art. 19.4), for deliberation of these circumstances is paramount to the instigation of proceedings, entering into the formulation of prospective trials concerning damage to legally protected rights and interests which within the framework of the procedure the courts thus require.

b) Lifting of the stay

The reforms envisages that the court clerk shall also proceed to the lifting of the stay agreed to in the proceedings in the following cases: stay due to criminal prejudiciality, when criminal proceedings end or are frozen because their normal continuation has been prevented (art. 40.6); stay due to accumulation of trials, if accumulation is denied (art. 95.2); stay due to abstention of judges and magistrates, when the abstention is dismissed (art. 102.3).

l) Appointment of reporting judge

The reform of article 180 entrusts the appointment for each matter of reporting judges on panels of judges to court clerks, "according to the allocation established for the chamber or section at the beginning of the judicial year, exclusively on the basis of objective criteria", in the words of the current draft. The reform is in accordance with what is envisaged in article 203.1 of the Judicial Power Organization Act, in which it is not determined to whom carrying out the aforesaid appointment corresponds,

and its section 2, provided that "the first decision issued in the proceedings" is entrusted to the court clerk.

1.1.2. CERTIFIFICATION AND DOCUMENTING OF JUDICIAL PROCEEDINGS

A) Minutes and participation of the court clerk in their preparation:

In this regard, EM IV states the following:

"In the matter of documenting proceedings, including hearings and certification, articles 145 to 148 of the Civil Procedure Act have been amended. The modification was necessary for adapting these precepts to the diction of the Judicial Power Organization Act, which set the principles that inform the work of court clerks when they carry out the duties of certification, such that they exercise them exclusively and fully (article 145 of Civil Procedure Act in relation to article 453.1 of the Judicial Power Organization Act). In general, the abovementioned articles are nothing more than an adaptation of the articles of the Judicial Power Organization Act. Nevertheless, article 146 envisages the use of an qualified electronic signature or some other security for recording hearings, trials and court appearances in a way that guarantees the authenticity and integrity of what is recorded. As such, it is established that the electronic document that contains the recording shall constitute the act to all effects, provided that it includes the qualified electronic signature of the court clerk. In these cases, as indicated in article 147, the presence of the court clerk in the courtroom is not required. Only in cases in which mechanisms for registration or guarantee that permit recording of trials or ensure the authenticity and integrity of what is recorded cannot be used will the minutes be taken by the court clerk. In this sense, the minimum content of the minutes that the

court clerk is required to take during trials when using technical means of recording is established and the use of an electronic signature is nevertheless not possible; for in cases in which the medium that contains the recording does not constitute the minutes of the trial there is no guarantee of the authenticity and integrity of what is recorded. When even the use of technical recording means is not possible, the minutes recorded by the court clerk shall include, with the necessary length and detail, everything in the trial. The recording of minutes by computer-based methods is also compulsorily established, except in the case in which the court where the trial is being held is not equipped with computers. The intention is the eradication of the handwritten minutes, which in many cases are illegible, still quite common in many Spanish courts".

The transfer of this statement to the text of the draft bill is carried out in articles 145 to 148.

Article 145, regarding certification, after repeating the qualities of exclusivity and fullness involved in the exercise of certification by the court clerk in accordance with the Judicial Power Organization Act, distinguishes the different form in which the aforesaid authority is materialized: certifications, when authenticating the reception of letters and documents; minutes and orders, regardless of the medium, when it concerns putting authenticated procedural acts on record; certifications or testimonies of non-secretive judicial proceedings, which must indicate the recipient and the purpose for which they were requested; and finally authorization and documentation of the awarding of powers for lawsuits.

The reform maintains the mandatory recording of oral proceedings consisting of hearings and court appearances introduced by the Civil

Procedure Act of 2000, even if article 146.1 adds that the court clerk shall guarantee the authenticity of what is recorded or reproduced.

Now it is in section 2 of article 146 where the modification is more conspicuous:

"2. When the law states that minutes must be taken, everything that occurs in the proceedings shall be included, with the necessary length and detail.

If it concerns proceedings in conformity with this law, they must be recorded on a medium apt for recording and reproduction, and the court clerk shall have an qualified electronic signature or some other system of security in accordance with the law that guarantees the authenticity and integrity of what is recorded, the electronic document generated in this way constituting the minutes to all effects.

If the guarantee mechanisms envisaged in the previous paragraph cannot be used, the court clerk must indicate in the minutes the following: number and type of proceedings; place and date of the proceedings; those present at the proceedings; requests and proposals of the parties; in the event of presentation of evidence, declaration of pertinence and priority in the presentation thereof; decisions of the judge or bench; as well as circumstances or incidents that cannot be recorded on that medium.

In these cases or when the recording means envisaged in this article cannot be used for any reason, the minutes shall be recorded through computer procedures, being handwritten only when the courtroom in which the proceedings are taking place lack computer resources."

A regime is thus established with four staggered modes of documentation of judicial proceedings, in which the use of modern computer systems for documenting and authenticating have priority:

1) Recording on a medium apt for recording and reproduction, linked to the use by the court clerk of a qualified electronic signature or some other security system that in accordance with the law guarantees the authenticity and integrity of what is recorded.

2) Recording, as above, on a medium apt for recording and reproduction but without the use of the qualified electronic signature, which obliges the court clerk to enter into the recorded minutes via electronic media certain relevant information, such as identification of the case, in voce requests and decisions, in addition to other circumstances or incidents of the documented act.

3) If the act cannot be recorded, the court clerk will take minutes using computer media.

4) Lastly, in exceptional cases, when the use of any of the above means of documentation is not possible, the minutes can be handwritten.

All of this is connected to the responsibility that article 454.5 of the Judicial Power Organization Act imposes on court clerks: namely, promoting the use of technical, audiovisual and computer resources of documentation available where court clerks provide their services, in such a way that their use cannot be neglected when they are available. The new regulation regarding the taking of minutes will undoubtedly permit overcoming the difficulties and cumbersomeness that illegible handwritten acts or ones that are very difficult to read have on occasions created.

Nevertheless, there is an important variation in the regulation of the documentation of hearings in article 187.1, as the draft bill eliminates the final clause in which it is stated that:

> "In these cases, if the court considers it necessary, a written transcription of what would have been recorded in the corresponding media will be added to the orders, within the shortest timeframe possible".

The EM of the reform does explain the reason for the elimination of this power of the court. Probably it has to do with matters of procedural economy and resources, with the understanding that a recording of the image and sound of what happens in the hearing excuses the necessity of its literal transcription. At any rate, it should not be forgotten that procedural acts such as hearings or trials, composite in nature, as they involve orderly development, successively and with the active intervention of the court, the parties to the proceedings and other subjects, of a multiplicity of particular acts of a diverse nature, are capable of reaching a degree of complexity that could make reducing them to handwritten minutes recommendable.

From the same perspective of the purpose of the procedural economy and resources, it should also be noted that the handling and use by members of the court of technical media that include recording image and sound can on occasions be burdensome –and especially for the court of second instance that lacks a reference insofar as it has not seen the documented action–, particularly when the duration of the recorded act is prolonged over time. Consequently its literal transcription, in cases in which the court considers it appropriate, can contribute to facilitating and simplifying tasks of consultation, when it involves locating, re-examining and analyzing in detail specific acts or incidents, avoiding the reoccurrence of "dead times" that normally hinder oral proceedings and which are dispensed with in handwritten minutes, thus streamlining the work of the court without eroding or diminishing the guarantee of integrity that the use of these technical media currently ensures. The preservation in the reform of the abovementioned clause is thus considered appropriate, insofar as it is useful in

facilitating judicial work and does not represent any erosion whatsoever of procedural guarantees or any unnecessary cumbersomeness or duplication in the proceedings.

As for article 147, it significantly modifies the intervention of the court clerk in the documentation of proceedings through systems that record and reproduce image and sound, for it excuses the court clerk from attending the proceedings ("hearings, trials and appearances held in court"), which are recorded on a medium apt for recording and reproducing sound and images, and which will be certified by the court clerk provided that he or she has the necessary technological media that guarantee the authenticity and integrity of what is recorded, such as an qualified electronic signature or any other security system that in accordance with the law offers these guarantees. In other words, the use of an qualified electronic signature or some other similar technical procedure in order to guarantee the security it provides would mean that the court clerk shall not be present at the proceedings that he or she certifies, but that he or she will be substituted by a computer system. Consequently, the intervention of the court clerk in these cases goes from being real to virtual.

In the analysis of this important innovation introduced by the reform, it is worth citing at least in part article 3 of Law 59/2003 of 19 December, regarding electronic signatures, entitled *"Electronic signatures, and electronically signed documents"*:

> "1. An electronic signature is a date set in electronic form, entered along with other or associated data, that can be used as means of identification of the signer.
>
> 2. An advanced electronic signature is an electronic signature that permits identifying the signer and detecting any subsequent change to signed data, which is uniquely linked to the signer and to the data to

which it refers and has been created through media that the signer is able to maintain under his or her exclusive control.

3. A qualified electronic signature is an advanced electronic signature based on a recognized certificate and generated through a secure signature-creation device.

4. In regard to data recorded electronically, a qualified electronic signature will have the same value that a handwritten signature does in regard to data recorded on paper.

5. An electronic document is information of any nature in electronic form stored on an electronic medium in determined format and susceptible to identification and differential treatment.

Without prejudice to the above, in order for an electronic document to be considered a public document or administrative document, it must comply, respectively, with what is set forth in letters a) and b) of the following section and where appropriate, the applicable regulation.

6. An electronic document shall be a medium for:

a) Public documents, for being signed electronically by staff legally attributed with the power to attest publicly, judicially, notorially or administratively, provided they act within their jurisdiction in accordance with requirements the law demands in each case.

b) Documents issued and signed electronically by staff or public employees in the exercise of their public duties, in accordance with specific legislation.

c) Private documents.

7. The documents referred to in the previous section shall have the value and effectiveness that corresponds to their respective natures, in accordance with the applicable legislation (...)"

As can be seen "the law grants a qualified electronic signature the functional equivalence of a handwritten signature with regard to data recorded electronically", according to the EM I of the Electronic Signature Act. This means that a qualified electronic signature affects the manner in which the virtual stamping of the signature is adequately represented, in this case the signature of the court clerk on the electronic document in which the trial is recorded; but this does not mean that signature as a means of authenticating the electronic document should be confused with its *prius*, to wit, with the existence of the proceedings themselves that are being recorded. The recording is a means of documentation but should not be confused with the proceedings that it documents, the signature being one of the stages of the procedure of preparation of the document; for these reasons the physical presence of the judicial representative at the proceedings being documented seems to be indispensable for responsibly "guaranteeing the authenticity and integrity of what is recorded and reproduced" (art. 453, Judicial Power Organization Act), as it seems obvious that the depository of certification is the figure of the court clerk and not a substitutive mechanism, for, otherwise, the former could not exercise this function *fully*, as established by art. 453, Judicial Power Organization Act.

B) Formation and duplication of orders

a) *Formation of orders*

The new wording of article 148 indicates more clearly the ambit of exercise of powers that correspond to the court clerk in the organization of the new Judicial Office, as opposed to duties of mere development and organizational measures of the same, which fall to various bodies of judicial staff that form part of the different procedural common services and centres, in accordance with organic

and statutory rules that are applicable. As the aforesaid precept rightly establishes, court clerks "shall be responsible for the due formation of orders" as well as the "preservation and safekeeping thereof" (article 147 also refers to the safekeeping of the electronic document that serves as a medium for recording oral proceedings held in court). This last responsibility is carried out in the exercise of managerial duties of the Archivo Judicial de Gestión (Judical Archive Management) in which, in accordance with the rule established to this effect (vid. Royal Decree 937/2003 of 18 July on modernization of the judicial archives), orders and cases whose processing is not complete shall be preserved and safeguarded, except at the time during which they are within the jurisdiction of the judge or reporting magistrate, or other magistrates that form part of the court (art. 458.1, Judicial Power Organization Act). It is unquestionable that the reform contemplated in the draft bill improves the current wording of the article, which directly attributes to them the formation, preservation and safeguarding thereof in a material sense incompatible with the new organizational structure of the Judicial Office.

As a consequence of the introduction into the Civil Procedure Act of the decisions of court clerks in the form of a decree, article 213 bis creates the " book of decrees" for the inclusion therein of decrees that are final in nature, following the same criterion that the previous article establishes for rulings and orders.

Specific declarations of the responsibility of the court clerk regarding safekeeping of orders are found in article 359, in relation to the preservation of recordings that documents the presentation of judicially recognized evidence, and article 383 regarding preservation of evidence that consists of words, images and sounds captured with filming, recording or other similar instruments, so that they remain unchanged.

b) *Duplication of orders*

The duplication of orders envisaged in the Civil Procedure Act is a procedure closely linked to the documentation of proceedings. The authority for

carrying out this procedure is attributed almost in its entirety to the court clerk of the "Judicial Office at which the disappearance or mutilation has occurred" (art. 232.1, Civil Procedure Act), the court only deciding the manner in which the proceedings should be reconstructed, or, where appropriate, in the event of total or partial disagreement of the parties in this respect (arts. 234 and 235).

C) Certification of proceedings

Attributed to court clerks by article 453.2 of the Judicial Power Organization Act, the issuing of certifications or testimonies of judicial proceedings is duty that has been attributed to them for many, many years.

Specifically, the following articles affected by the reform can be cited as examples: issuing of statements of decisions (art. 495.2, Civil Procedure Act), statement of orders (art. 527.2, Civil Procedure Act), statement of the minutes of the meeting of creditors (art. 126.1 of the Bankruptcy Act); issuing and remission of the statement of particularities of the case (art. 36, Criminal Procedure Act); certification of the sentence and dissenting opinions (art. 859, Criminal Procedure Act) and decisions in the matter of passive extradition for remission to the Ministry of Justice (arts. 17 and 18.1 of the Passive Extradition Act).

As a new feature, the modification of article 140.1 transfers Judicial Power Organization Act 476.f) to the Civil Procedure Act, entrusting the body for procedural and administrative management with simple copies of letters and documents that are included in orders, with the knowledge of the court clerk.

1.1.3 SAFEKEEPING OF PERSONAL PROPERTY

This duty entrusted to court clerks is referred to in article 459 of the Judicial Power Organization Act, which states the responsibility of the court clerk for both deposits " in locations intended for that purpose" and the deposit "in institutions intended for that purpose".

In regard to the first mode, which occurs basically in criminal trials, the safekeeping for judicial purposes of all the property of article 367 of the Criminal Procedure Act brought before the court, seized or apprehended during criminal proceedings, an article which the reform amends in order to expressly entrust the duty to the court clerk instead of the "judicial body, as in the current text, shall be brought to this place.

1.1.4. ATTESTATION

Regarding this duty expressly envisaged in article 455 of the Judicial Power Organization Act, the realization is referred to in the terms established in procedural laws, the reform of the Civil Procedure Act circumscribing attestation to judges and magistrates of petitions and claims that require their declaration and minutes that have been authorized outside of court, as well as informing them of the state of the proceedings when, at the time they expire, they must issue a decision and of the decisions of court clerks that are not merely a matter of processing (art. 178.1 and 2). This last content of attestation that refers to the decisions of court clerks that are not merely matters of processing arises if the purpose is merely informative regarding the state of the proceedings or if, in addition, it would serve as a procedural antecedent so that the court would be in a position to reform, if necessary, what was agreed to by the court clerk. As indicated above, the law should accord the court an instrument that would empower it to carry out it this monitoring.

Section 3 of the same article 178 envisages attestation commended to the staff of officers of the court with respect to court clerks, especially when the processing requires an interpretation of the law or procedural rules, without prejudice to attestation to the head of the judicial body when required.

Furthermore, the existing power of delegation of attestation of the court clerk disappears in favour of an employee of the court or bench, contemplated in article 178.3.

Examples of attestation that are the object of the reform are the following: allegations of persons or entities for failure to deliver data and documents regarding property and rights of the execution debtor (art. 591.1, Civil Procedure Act); procedures that are processed in the Judicial Office subject to accumulation (art. 38.2, Contentious-Administrative Procedure Act); the presentation of a claim for deciding on its admission (art. 81.3, Labour Procedure Act); legal reasons or regarding fundamental rights that tax organizations invoke in order to avoid delivery or attend to the collaboration that would have been required by the court clerk in the enforcement of the sentence (art. 989.2, Criminal Procedure Act).

1.1.5 DUTIES OF COURT CLERKS IN ENFORCEMENT PROCEEDINGS AND PRECAUTIONARY MEASURES

The treatment of a fundamental part of the reform, one that affects the new main role of the court clerk in the enforcement process, should be mentioned separately.

A) Broad outlines of the reform

The Council already declared itself, in the Libro Blanco de la Justicia (White Book of Justice), in favour of entrusting enforcement to court clerks. As it stated at the time,

> "The General Council of the Judiciary clearly opts for redefining the duties of court clerks. They have been entrusted with new procedural responsibilities, such as deciding cases which by nature are non-contentious and the activity of enforcement. Thus, once the judge has

passed the judgment ordering the enforcement, all the activity of the enforcement shall be carried out by the court clerk, the duty of enforcement returning to the judge only in the event of an incident that requires a decision regarding rights (...)".

Also, in its report on the Civil Procedure Act draft bill, the Council stated:

"The criterion of the General Council of the Judiciary is that the court clerk should be attributed the power of issuing autonomous decisions, specifically in regard to non-adversarial proceedings (...) and enforcement, in accordance with what is set forth in comparative law (Portugal, Germany, Austria) and the recommendation of European Council 12 (1986) of 16 September, regarding reducing the work overload of judges, limiting non-jurisdictional activities to judges, all without prejudice, it goes without saying, to the adequate resources of the judge or bench".

The reform of the enforcement process in the draft bill thus should be viewed favourably in general, as, in line with what is set forth in article 456.3.a) of the Judicial Power Organization act, it significantly modifies Book II of the Civil Procedure Act, attempting to clearly delimit the competences that can be assumed by court clerks from those reserved for judge and benches.

The basic schema of the reform is the attribution to the court of the authority to issue what the reform calls a "general enforcement order" as well as the corresponding dispatch, placing the determination of the concrete and necessary activities for carrying out the requested enforcement in the hands of the court clerk, decoupling them to a certain extent from courts and tribunals with the use of the new "court clerk responsible for enforcement" formula, linked to common service.

Article 517.2 of the Civil Procedure Act adds two new enforcement orders which currently are referred exclusively to the court: on the one hand, the decisions issued by the court clerk that approve judicial transactions and agreements reached

in the trial (no. 3) and on the other, the other documents and decisions issued by the court clerk which, according to the Civil Procedure Act and another law, incorporate enforcement (no. 9). The enforcement action founded on these two enforcement orders is subject to the same time limit as judicial enforcement orders (art. 518); likewise, the waiting period of the enforcement of article 548 applies to enforceable decisions of the court clerk.

Newly worded article 545.1 states that same court that heard the matter in the first instance or approved the transaction or agreement will be authorized to issue the order that contains the general enforcement order.

Taking into account that with the reform of article 471 of the Civil Procedure Act, the draft bill has established that approval of the compromise reached in the conciliatory action corresponds to the court clerk of the court of first instance, and that in accordance with article 476 of the same law, what is agreed in the conciliatory action will be put into effect in the same court in which the conciliation was processed through transactions established for the implementation of judicial orders, it is correct that art. 545 of the Civil Procedure Act states at the end of its first section that the "same court that heard the matter in the first instance or approved the transaction or agreement will be authorized to issue the order that contains the general enforcement order", allowing for the possibility that the compromise has not been approved by the court but by the court clerk.

Article 545, sections 4 and 5, determines the distribution of the decisions that the court must adopt and the matters that are attributed to court clerks, establishing that the court clerk shall adopt in the form of an order the following decisions:

1) Ones that contain the general enforcement order authorizing and enforcing that order.

2) Ones that decide on opposition to the final enforcement on procedural or substantive grounds.

3) Ones that involve third party claim to ownership

4) Other indicated in the Civil Procedure Act

To the court clerk will correspond:

1) The concretion of the assets of the execution debtor to ones encompassed by the enforcement.

2) The adoption of all the measures necessary for the effectiveness of the enforcement, organizing the means of determination of assets that were necessary in conformity with what is set forth in articles 589 and 590.

3) The adoption of specific implementation measures that proceed until the full satisfaction of the right of the execution creditor.

In general terms the separation of duties articulated in the precept is adequate and correct, properly embodying the spirit of article 456.3a) of the Judicial Power Organization Act, which attributes enforcement to the court clerk, "aside from competences that exempt procedural laws since they are reserved for judges and magistrates".

On this basis of the allocation of duties, the reform touches on precepts that require necessary adaptation, even if at times the modification is limited to specifying the powers that are generally attributed to the court clerk for organizing the procedure, both in declaratory proceedings and enforcement proceedings, such as, for instance, in regard to setting a date for hearings (art. 560) or discontinuance of the enforcement in legally determined cases, normally when the debtor indicates his or her opposition to the enforcement (arts. 556.3, 557.2, 568.2 –after notification that the execution debtor is in bankruptcy proceedings– and 695.2).

However, it should be critically noted that certain attributions which the reform confers to court clerks go beyond the merely procedural, affecting legal-material relationships and situations, such as the new ownership of the assets carried out necessarily as a consequence of the approval of the sale. On the other

hand, in other situations the reform rightly continues entrusting to the tribunal decisions that affect ownership, as is the case with the third party claim to ownership, which makes advisable a consistent treatment of all the decisions in the enforcement order that affect the ownership of property and rights.

As a consequence of the resolutive power of the court clerk, the court clerk shall be the one that issues by his or her own authority the enforcement orders of their decisions, so that they take effect in the Property Registry [vgr. the order that constitutes the testimony of the decree that approves the transfer of the property, in cases of agreement of execution and execution by a person or specialized entity (art. 642.2)].

B) Accumulation of enforcement proceedings

In accordance with sections 1 and 2 of article 555, the court clerk is authorized to agree to the accumulation of enforcements, both objective accumulation, ex officio or at the request of the party, and subjective accumulation, only at the request of the party.

C) Imposition of astrictions

The draft bill transfers as a rule to the court clerk the power to impose, through a decree, periodical coercive astrictions or fines on the execution debtor in the following cases:

1) When the execution debtor does not reply to the requirement of declaration of assets and rights for covering the amount of the enforcement (art. 589).

2) When the execution debtor prevents or impedes the exercise of the powers of the administrator in the administration for payment (art. 676.3).

3) If the convicted party does nothing, the wrong committed remains undone when violating the sentence (710.1).

4) When a spouse or parent repeatedly fails to meet obligations of payment of amounts for which he or she is responsible (art. 776.1).

Insofar as the court clerk has competence for adopting all orders of assurance of the enforcement, there are no grounds for objecting to the court clerk being the one that issues the specific sanctioning agreements in response to non-compliance on the part the executive debtor with a responsibility imposed by law, although it should not be forgotten that the imposition of penalties is preceded by a incident of a declaratory nature inserted in the enforcement process, as, for the case envisaged in article 711.1, it is demonstrated that "it should be taken into account that the price or consideration of the personal obligation established in the enforcement order and, if they do not appear in it or it involves an attempt to undo the wrong, the monetary cost that the market attributes to this type of conduct (art. 711.1).

Now the reform does not transfer this sanctioning competence entirely to court clerks, but keeps it in the power of the judicial authority in various cases: when persons and entities required by the court clerk to submit documents and information in their power have failed to do so alleging legal reasons or basic rights (art. 591.2), when the person who prevents or obstructs the exercise of the authority of the administrator in the administration for payment is not the execution debtor but a third party (art. 676.3), or when the execution debtor is pressured to comply with the sentence to be performed in person (art. 709.1). In the Contentious-Administrative Procedure Act, furthermore, the judge of the court has competence for imposing penalties (48.7 and 112).

This jurisdictional authority results in the unsuitability of the meaning of the modification, which authorizes in general terms the court clerk (for the "penalties envisaged in the previous articles") to determine the amount of the penalties through a decree, for it is unreasonable for the court not to set the total.

In reference to the final judicial control of these sanctions, there is satisfactory guarantee in the final clause of article 589.3 that these decisions by the court clerk are subject to appeal and subsequent review in the court that hears the enforcement.

Article 591, in its regulation of the duty of collaboration in the activity of enforcement of the different persons and entities of the execution debtor, establishes a diverse regime in the case of non-compliance that merits separate analysis. Firstly, it is said that when the aforesaid persons or entities allege legal reasons or basic rights as grounds for failure to submit documents or information in their power, the court clerk will inform the court so that the court agrees to what is applicable. This provision is correct, for invoking the potential effect on the rights of third parties, or issues of legality, the duty of settling the matter is within the exclusive competence of the court.

As for the appeals regime envisaged in article 591.3, which refers to Title V of Book VII of the Judicial Power Organization Act, the remission is compulsory in accordance with article 557 of the Judicial Power Organization Act "when one of the special corrections envisaged in procedural laws for determined cases is applicable, regarding the mode of imposition and usable resources, what is set forth in the two previous articles shall apply").

D) Monetary attachment

a) Enforcement measures - seizure of assets

Once the order containing the general enforcement order and enforcement order has been issued (art. 551.1, see below), new section 3 of article 551, in agreement with article 545.4, states that the court clerk shall then issue a decree, open to an appeal for reversal and review, containing the following important content:

“1. Concrete enforcement measures that are applied, including, if possible, seizure of assets.

In regard to these enforcement measures, noteworthy is the reform of the articles that refer generally the seizure of assets, in which mention is made of the court clerk: article 581.1 –seizure in money attachment for disregard of payment order to the creditor– and article 592.1 –subjection to what is agreed to by the parties regarding assets to be seized and, failing that, the guiding principles of the seizures.

"2. Applicable measures for locating and establishing the assets of the execution debtor, in accordance with articles 589 and 590 of this law".

Articles 589.1 and 3 envisage that the court clerk shall require the execution debtor to demonstrate sufficient assets and rights for covering the amount of the enforcement, with the possibility of imposing penalties if the execution debtor fails to duly respond to the order. When the execution creditor cannot designate assets of the execution debtor sufficient for the performance of the enforcement, the execution creditor can urge the court clerk to gather asset information regarding the execution debtor from the financial entities, organizations and public registries indicated to the execution creditor by the execution debtor (art. 590).

And "3. The content of the order for payment that must be made to the creditor, in cases in which the law establishes this requirement."

Other attributions to the court clerk are:

- Arranging for the retention of amounts seized from account balances open in credit, savings or financial entities.
- Agree on judicial administration in guarantee of seizure of profits and income (art. 622.2 and 3).

- Designating and naming the judicial depository of seized assets (art. 626.2 and 4); arrange for the exhibition and delivery of assets (art. 627.1) and agreeing to removal of charge (art. 627.1).

- Release and remit to the Registry the order for preventive annotation of seizure of immovable property and other assets or rights subject to registration (art. 629.1).

- Set the terms of the liquidation of companies when there is agreement between the parties –otherwise the court that issued the "general enforcement order" will settle the matter (art. 631.1); proceed to appointing an auditor (631.2); authorize the liquidator to transfer or encumber shareholdings in the company or the shareholdings of the company in other companies, immovable assets or others that due to their nature or importance the court clerk has especially indicated (art. 623); grant possession to the liquidator and order the execution debtor to stop the liquidation (art. 633.1); and settle discrepancies regarding actions of the liquidator (art. 633.2) and the opposition formulated against the adjusted account that the liquidator submits (633.3).

Regarding the seizure of salaries and pensions, a new section 7 is added to article 607, which opens up the possibility of direct delivery of the seized amounts of salaries and pensions in the accounts designated by the execution creditor, informing the court clerk on a quarterly basis of the sums remitted and received (607.7 and 621.3).

The court clerk shall agree to the enhancement, reduction and modification of the seizure, in general terms (art. 612.2 and 3); the enhancement of the seizure before a third party claim to ownership (art. 598.3); the adoption of measures in guarantee of the re-seizure (art. 610.3) and who orders the seizure of the total (611).

b) Enforcement

In this regard the reform leans towards the exercise of functions in favour of the court clerk:

1) Arranges the *direct delivery* to the execution creditor of determined classes of seized assets (art. 634).

2) Orders the *alienation of actions and other forms of seized shares* (635.1)

3) Approves the forms of *implementation* of the seized assets *agreed to between the parties and stakeholders* (art. 636.1).

4) Approves the implementation agreement of the seized asset (the title of the article therefore should not refer to the "court"), with suspension of the enforcement regarding the asset that is the object of the agreement and dismissal of the enforcement regarding the same asset when compliance with what has been agreed to is verified (art. 640.3 and 4).

5) Arranges the *implementation of the seized asset by the person or specialized entity* and the conditions in which this should be carried out (art. 641.1 and 3), and approves the operation (art. 641.4 and 642.2).

6) The part of the reform that affects an auction as a means of enforcement of assets requires more detailed mention.

The draft bill encourages the use of computer and telematic resources: article 649.2 envisages that in order to "achieve more effective implementation" the act of auctioning can be complemented by electronic bids if the necessary technical resources are available, under the supervision of the court clerk.

The court clerk:

- Accepts or denies the approval of the total (arts. 650.1 and 4 –auction of movable assets–, 670.1 and 4 –auction of immovable assets–, and 673– simultaneous auction), issuing an adjudicating decree once the total is approved and the fee recognized (arts. 650.6 movables– and 670.8 –immovables).

- Agrees to the lifting of the seizure when there is neither a bidder nor a creditor at the auction that requests adjudication of assets (art. 651) and makes a decision regarding the deposits established for bidding (art. 652.2) and the deposits of the highest bidders that result in the bankruptcy of the auction (653.2).

Regarding the *auctioning of immovable assets*, the court clerk has competence for:

- Submitting the order to the Property Registry so that it remits to the court certification of domain and property liabilities of the immovable asset to be auctioned (art. 656.1); issuing the order to the effects of article 144, Mortgage Act (record in the Registry, so that any act or agreement between the parties takes effect before a third party that can modify or destroy the effectiveness of a prior mortgage obligation) (art. 657.2); submitting an order to the Registry for recording the payment by the holders of rights recorded subsequent to the levy that is enforced, the amount of the credit, interest and costs, and the subrogation in the rights of the execution creditor (art. 659.3); issuing a statement of the decree approving the total of an immovable asset auctioned in order to constitute the mortgage referred in article 107.12 of the Mortgage Act (mortgage of the right of the highest bidder regarding auctioned assets in a judicial procedure once the price of the sale is satisfied and the domain registered in favour of the highest bidder) (art. 670.6); issuing testimony of the adjudicating decree of the auctioned immovable asset for recording in the Registry (art. 674.1); and issuing a cancelation order of the annotation or registration of the lien that the highest bidder made or the adjudication and cancelation of all subsequent registrations and annotations (art. 674.2).

- Lifting the seizure when with certification of registration the seized asset is registered in the name of a third party (art. 658), and also when the auction is cancelled and the creditor does not request adjudication of assets (art. 671).

-Suspending the enforcement of the seized immovable asset when the value of the charges and liens equals or exceeds the determined value of the asset (666.2)

- Allocating the sums obtained from the auction (art. 672.1 and 2).

- Arranging for the celebration of the simultaneous auction.

- Agreeing to the eviction of the occupant of the property that is the object of the sale when the court has ruled that said occupant does not have the right to remain in it (art. 675.2).

Among the particularities of the enforcement regarding *mortgaged or pledged assets*, court clerks are authorized to:

- Order the deposit of pledged assets or mortgaged vehicles and the appointment of an auditor (art. 687.1 and 2).

- Agree to the finalization of the enforcement if, according to the certification of the Registrar, the mortgage that is being enforced does not exist or has been cancelled (art. 688.3).

- Determine that the creditor administer the mortgaged property or asset (art. 690.2) and approve the accounts of the liquidator (art. 690.3).

- Agree to the liberation of the asset that is the object of the enforcement and termination of enforcement proceedings, after payment by the debtor or a third party (693.3).

Similarly, mortgage legislation substitutes references to "adjudication orders" for "adjudication decrees" (art. 20, Mortgage Act) and "sale or adjudication order" for "sale or adjudication decree" as sufficient titles for the registration of the property or adjudicated right in favour of the highest bidder or tenderer (art. 133, Mortgage Act) and for the cancelation of the mortgage that motivated the enforcement and of all subsequent charges (art. 134, Mortgage Act).

7) Agrees to the *liquidation for payment* (art. 676.2), approves or rectifies submitted accounts (art. 678.2, Civil Procedure Act) and stops it when the execution creditor is unable to satisfy his or her right through the liquidation, agreeing then to the forced realisation of other assets (art. 680.3).

Common to some of the above forms of realisation of assets is the designation of tax experts for the purpose of assessing the value o seized assets – or requiring the designation of a suitable person to entities obligated to assume the assessment– (art. 638), and the final setting of the value of seized goods for the purpose of taxation (art. 639.4).

Once the above reform panorama regarding monetary enforcement has been lain out, it can observed the decision of the sale is entrusted to the court clerk, a decision of obvious legal-material efficiency, as it affects the new ownership of foreclosed assets. As is well known, what commonly occurs in the foreclosure process is the replacement of the willingness of the execution debtor, inactive at the time of possessing his or her assets for satisfying the right to payment of the execution creditor, by that of the State. Now this substitution, the peak of which in the monetary enforcement is the act of adjudication of the sale, must correspond to the court given its effects, we insist, on the material legal sphere and, where appropriate, with a significant influence on the public registry and the security of legal transactions.

Furthermore, and as an example of what is claimed here, it is telling that the draft bill maintains jurisdictional attribution when deciding, in non-monetary enforcement, that the declaration of willingness has been issued when in fact it has not been by the offender when issuing it by virtue of the judicial decision or arbitral award (art. 708.1). The legal basis of this intervention of the court is same as that for the intervention of the court clerk in the approval of the sale: the substitution by the public power of the intervention of the execution debtor in the realisation of an act of importance in legal-material relationships and situations. Therefore the legal decision should be the same in light of the jurisdictional nature of the decision shared by both institutions.

E) Non-monetary enforcement

For this enforcement, agreeing to the guarantee measures adequate for ensuring the effectiveness of the sentence if the requirement for doing, not doing or submitting something distinct from a monetary amount cannot be immediately met corresponds to the court clerk, as does lifting the seizure agreed to in this type of enforcement, if sufficient surety has been given for ensuring the payment of potential substitution damages and the cost of the enforcement (art. 700).

a) Enforcement of responsibility of submitting property

The reform entrusts the court clerk with the following duties:

- Place the thing due in the execution creditor's possession, applying whatever pressures deemed necessary to achieve this end, when the execution debtor does not carry out the submission within the established time limit (art. 701.2).

- Question the execution debtor or third parties regarding the whereabouts of the thing if the place in which the thing is located is unknown or if the thing is searched for and not located in the place where it should be found (art. 701.2).

- Place general or undetermined things or things due in the possession of the execution creditor when the requirement for delivery has not been fulfilled, or see to it that the execution creditor acquires them at the cost of the execution debtor (art. 702.1).

- Order adhering to the content of the sentence when ownership involves the transfer or delivery of an immovable asset, require the execution debtor to remove the things that were not the object of ownership (art. 703.1) and set a time limit for eviction from the property the possession of which must be submitted, when it is the regular residence of the execution debtor or his or her dependents (704.1).

b) Enforcement of affirmative and non-affirmative obligations

The court clerk shall set the time limit for complying with non-affirmative personal obligations required by executable instrument (art. 706.1) and designate the experts for assessing the cost of the non-affirmative personal obligation for which a third party is responsible, as well as approval of the cost (art. 706.2).

c) *Payment of damages and costs, income and fruits, and rendering of accounts*

Among the new duties assigned to the court clerk by the reform that are currently attributed to the court is the approval of the list of damages and costs submitted by the execution creditor, if the debtor agrees to it (art. 714.1); and the approval, if the creditor agrees to it, both of the payment submitted by the debtor of the amount due for fruits, incomes, utilities or products of any kind (art. 719.1) and the rendering of accounts of an administration (art. 720, Civil Procedure Act).

F) Precautionary measures

Precautionary measures, located systematically in the Civil Procedure Act in the same Book III as the enforcement measure, also are affected by the new distribution of duties and in virtue of which the following responsibilities are entrusted to court clerks:

- Lift or revoke acts of compliance that have been carried out, with the order for payment of costs by the petitioner and declaration of responsibility for damage and injury caused to the passive party to the precautionary measure, in the event that the precautionary measures agreed to prior to the presentation of the complaint are ineffective if the demand is not submitted within the time limit set by the law (art. 730.2).

- Lift precautionary measures in cases of acquittal of the defendant by final judgment but not beyond appeal, except if the petitioner asks that it be maintained or another measure be adopted, in which case the court will make the

decision (art. 744.1); and lift the measure once the judgment of acquittal is final (art. 745).

As can be seen, the new intervention of the court clerk occurs in cases in which the lifting of the measure operates to a certain extent automatically, while given the fact that a weighting of conflicting interests is necessary, it is the court that decides. It should be noted here that, contrary to what the draft bill envisages regarding enforcement, in object-of-reform article 738.2 the decisions concerning improvement, reduction or modification of the freezing order precautionary measures continue to be adopted by the court, surely because the judgment in the event of the material requirements of the precautionary measures [*fumus boni iuris* and *periculum in mora* (cf. art. 728)] must be jurisdictional because of the weighting of conflicting interests of the petitioner and passive party to the measures, and for the impacts the measure has within the legal-material sphere. On the contrary, in the enforcement the terms in which it must be carried out are pre-fixed to the implementing body in the enforcement order.

Finally, the modification of article 730.2, specifically the part that confers to the court clerk the order to pay the costs and the declaration of liquidated damages, is questionable. Both decisions should remain in the jurisdictional sphere: the first because it affects an asset-related right such as the right of a party to the refund of determined expenditures at the cost of the other party; and the second, even more clearly, as it implies a declarative pronouncement of extra-contractual responsibility, independent of whether the harmful act occurred during a trial or not.

1.1.6. JUDICIAL OFFICIAL IN THE TEXT OF THE REFORM

Although the reform affects neither organic aspects nor the implementation program of the Judicial Office, it would be excessively wordy to indicate each and every one of the reformed rules, as there are many, in which the figure of the "Judicial Office" appears in specific transactions, as an "organization of

an instrumental nature that serves to assist and support the jurisdictional activity of judges and benches" (art. 435.1, Judicial Power Organization Act).

In some cases, the substitution is merely is a matter of place, employing the phrase "Judicial Office" instead of "clerk", " court secretary" or "tribunal secretary" (arts. 90.2, 161.2, 212.1, 242.3, 330.1, 662.1, 668.1, 787.1, 799.3 and 800.2, Civil Procedure Act; 790.1, 876 and 976.1, Criminal Procedure Act; 38.2, 54.3, 94.1, 97.3 and 100.5, Contentious-Administrative Procedure Act; 96.4, 98, 108.2, 111.2, 113.1, 115.1 and 3, 139.1, 142.1.2 and 2, 148.1 and 2, 152 and 185, LC) or "in the seat of the tribunal" (arts. 129.1, 259.1 and 2, and 645.1, Civil Procedure Act). Other references are also employed, such as "office of the court or tribunal that hears the case" instead of "place of the court or tribunal that hears the case (art. 512, Criminal Procedure Act), or "Office of the Employment Tribunal" instead of "Secretariat of the Employment Tribunal" (art. 110.3, Labour Procedure Act).

On other occasions, along with what is referred to above, the mention of the "Judicial Office" accompanies the new system of competence attribution in order to indicate indirectly that the decision that no longer resides with the judge or bench but with court clerks as the individuals responsible for technical procedural aspects of Judicial Office staff (cf. art. 457, Judicial Power Organization Act). Examples of this second type of substitution are the change of references to "Court" (arts. 624.1.1, Civil Procedure Act; 784.5, Criminal Procedure Act; 192.2, Labour Procedure Act), "Court or Section" (art. 69, Civil Procedure Act). "Court or Tribunal" or "Judge or Bench" (arts. 164, Civil Procedure Act and 54.4, Contentious-Administrative Procedure Act), "tribunal" or "tribunals" (arts. 155.5, 157.3, 159.3, 171.1 and 232.1, Civil Procedure Act), "jurisdictional body" or "judicial body" (arts. 173, Civil Procedure Act; 57.3, 253.2 and 256.2, Labour Procedure Act), "judicial presence" (art. 20.3, Labour Procedure Act), "Court of First Instance" (art. 170, Civil Procedure Act), "trial judge" (art. 446, Criminal Procedure Act) and "Employment Tribunals and Courts" (art. 47.1, Labour Procedure Act).

Lastly, it bears mentioning that the draft bill adapts some provisions to the existing names of the bodies of justice administration staff (e.g., arts. 100.2, 104, 149.5, 168.1 and the heading of Chapter V of title IV Book I of the Civil Procedure Act; and art. 63 of the Law on Chattel Mortgages and Non-dispossessory Pledges).

1.2 Specific reform of conciliation proceedings

Article one of the draft bill deals with the modification of various articles that regulate the proceedings for conciliation in Title 1 of Book II of the Civil Procedure Act adopted by Royal Decree on 3 February 1881, which, as is well known, by virtue of the sole derogatory provision of Law 1/2000 –second exception of its first section– remains in effect until the announced Law on Non-adversarial Proceedings enters into effect.

The draft bill opts for anticipating a new regulation for this matter, with the aim of coordinating it with the new powers that the reform grants to the court clerk so that by decree a trial can be avoided when the parties, exercising their powers for disposition regarding the process itself or its object, reach a compromise or settlement.

In regard to this, EM III refers to article 456.3.c) of the Judicial Power Organization Act, amended by Organic Law 19/2003, which attributes to court clerks specific authority in the matter of conciliations, granting them a mediating role, which currently is expressed both in the civil pre-procedural conciliation and the reform of the Labour Procedure Act, which also leaves in the hands of the court clerk the celebration of intra-procedural acts of conciliation. Now it should be noted that the act of conciliation would be correctly attributed to the court clerk if it were limited to the avoidance of a trial, without introducing any innovation that might affect rights and obligations (of the parties and third parties), that is, the material legal sphere of exclusive jurisdictional competence; but this limitation of what could be the object of homologation by the court clerk would obviously make the conciliation less effective.

In this respect it is extremely important to point out that the legal handling of the litigious object, insofar as it entails a legal material innovation, continues being the responsibility of the court (art. 19.2).

The affected articles are 460, 463 to 469, 471, 473 and 476 of the Civil Procedure Act of 1881, in which are introduced, in brief, the following modifications of the original regulation:

1) The conciliation can be promoted in a pre-trial procedure before the court clerk of the Court of First Instance or before justices of the peace with competence in the matter (art. 460), with the elimination of the domicile of the "defendant" as a subsidiary territorial jurisdiction and its establishment as the sole domicile, except in cases in which the domicile of the petitioner is a concurrent jurisdiction when it involves corporate bodies (art. 463). The duty of mediation is thus transferred from the judge to the court clerk, albeit the competence originally recognized in the judge is maintained.

2) References to judges of first instance are substituted by mention of the court clerk for regulating the effects of objection (art. 464) and the processing of the requests for conciliation (arts. 466 to 469), substituting "papeleta" (ballot paper") as formal vehicle for "solicitud por escrito" (written request) – without committing the error of calling this act of nomination a "complaint" –, which can be formulated by filling out standardized forms at the disposal of the parties in the corresponding court.

3) The court clerk of the court of first instance is granted competence for issuing a decision of approval of the compromise reached by the parties, and the closing of the case (art. 472), without prejudice to the competence of justices of the peace.

4) As for the effects of what is agreed to in the conciliation, the draft bill maintains the current distinction (art. 476, Civil Procedure Act 1881), which

differentiates between what is agreed to by the parties in the act of conciliation when it involves matters of competence of the court and other cases, that is, when what is agreed to exceeds the competence of the justice of the peace that participated in the conciliation:

- In the first case, what is agreed to entails enforcement and shall be carried out in the same court in which the conciliation was transacted. The reform makes express mention of the enforcement order of article 517.2.9 ("the other legal decisions and documents that, by virtue of this law and another law, entail enforcement").

- However, when the content of the agreement exceeds the objective competence of the court, it will have the value and effectiveness of an agreement recorded in a public and legal instrument. The only case is that of justices of the peace, the competence of whom is limited to hearing cases involving amounts no greater than ninety euros and matters not included in article 250.1 of the Civil Procedure Act (art. 47, Civil Procedure Act).

After the above statements, the reform adds a final paragraph: "Enforcement shall be carried out in accordance with what is set forth in the Civil Procedure Act for enforcement of judicial decisions or those of court clerks and legally approved settlements and agreements". The final placement of this paragraph in the article –along with the fact that it would be redundant to place it solely in relation to conciliations that are the enforcement order of article 517.2.9 of the Civil Procedure Act, to which the first paragraph refers– may lead to the logical conclusion that the "value and effectiveness" of the "agreement recorded in the public and formal instrument" belong to an order that entails enforcement. Moreover, this interpretation would dovetail with the rule of functional competence contained in article 545.1 of the Civil Procedure Act, also the object of the reform: "If the enforcement order included judicial decisions, decisions issued by court clerks that this law recognizes as enforcement orders or legally approved settlements or agreements, the body *with competence for issuing the order containing the general*

enforcement order and the issuance thereof shall be the court that heard the matter in first instance or *in the one that approved and adopted* the settlement or *agreement* (our italics), without exceptions.

This systematic interpretation, however, would not explain why a distinction is maintained that depends on the competence of the justice of the peace for hearing the matter that is the object of the conciliation. Historically, this distinction has implied that in cases in which the matter exceeds the competence of the justice of the peace, what is agreed to shall have the value and effectiveness of an agreement recorded in a public and formal instrument, that is, that as an appropriately documented settlement, it could serves evidence of an act constitutive of a procedural claim deducible in the corresponding declaratory judgment or of an act discharging the obligation of the action exercised by the other party, but without recognizing in it genuine enforceable effectiveness. For this reason it is necessary that the wording of the rule clearly indicate the enforceable effectiveness of the act of conciliation.

Ultimately, if the present reform seeks to guarantee the enforceable effectiveness of compromises reached in all acts of conciliation, it would be wise to assess the innovation of the rules of attribution of competence contained in Title I of Book II of the Civil Procedure Act of 1881, in particular article 463, conferring the hearing of these acts to the Court of First Instance. What would be lost insofar as the proximity to the justiciable is concerned in these judicial procedures would be more than compensated for by the guarantee of the enforceability in the decree of the court clerk in all cases in which a compromise between the parties is reached and approved, thereby avoiding the continuance of the disparity in procedural handling and effectiveness that currently characterizes acts of conciliation, due to the rules of territorial competence, which determine that the competent body shall be a court of first instance or a justice of the peace according to the municipality where the domicile of the potential defendant is located.

It is the belief of the Council that the institutional guarantee of article 100.1 of the Judicial Power Organization Act would not be violated when attributing competence in the civil jurisdiction to justices of the peace, for the aforesaid rule envisages they will hear proceedings at the first instance, rulings and implementation of processes that the law determines, as well as the fulfilment of Civil Registry duties and others that the law assigns them, attributive organic order of competence subject to legal configuration which in this case is duly fulfilled in article 47 of the Civil Procedure Act and in other competences attributed to them regarding legal assistance and Civil Registry, without being able to affirm that the conciliation constitutes a determining and necessary feature for recognizing the identity of justices of the peace within the judicial organization.

In any case, once the contentious process has started, the power of mediation and trying to achieve a conciliation and eventual settlement in processes is established to this effect (vgr. in the pre-trial hearing) or at any moment, the approval of what has been agreed to remains directly and completely in favour of the judge or bench (art. 19.2, in relation to the enforcement order of art. 517.2.3).

1.3. Reform of general provisions of civil proceedings

In addition to what was already examined when dealing with the duties of court clerks, the draft bill affects other institutions contained in Book 1 of the Civil Procedure Act.

1.3.1. RECUSATION

To harmonize recusation proceedings of the Civil Procedure Act with those of the Judicial Power Organization Act, a section 4 is added to article 107 in words almost identical to those of article 223.3 of the Judicial Power Organization Act, regarding holding of oral proceedings by a judge or magistrate regarding cases of formulated challenges.

With the same harmonizing intent, article 109.4 adapts to article 225.4 of the Judicial Power Organization Act, modifying the present provision of the Civil Procedure Act contrary to the halting of the proceedings in the face of a challenge until the summons for final judgment, by the general rule of the Judicial Power Organization Act regarding immediate termination of proceedings until the challenged has been ruled upon.

The reform also affects the recusation proceedings of the court clerk (arts. 116 and 118). And as for recusation of staff pertaining to Procedural and Administrative Management, Procedural and Administrative Processing and Legal Aid bodies, article 121.2 transfers the decision of the judge or president of the tribunal to the person "who has competence for issuing the decision that puts an end to the lawsuit or trial in the respective instance", which in line with the new distribution of duties could be the court clerk or one of them, as appropriate.

1.3.2. LEGAL REPRESENTATION

Regarding the figure of the solicitor, in addition the new and important task assigned to the solicitor regarding service communication acts, article 23.3 contemplates the possibility that a solicitor can be present at any type of proceeding, without the need of a lawyer, for the sole purpose of hearing and receiving notices, meeting requirements and making appearances of non-personal nature on behalf of those being represented who were solicited by the judge, court or court clerk, without being permitted during these proceedings to formulate any sort of request whatsoever.

The act of seizure *apud acta* is reformed in order to exclude from article 24.2 of the Civil Procedure Act the necessity of the solicitor taking part in the act of granting authority. This would result in a case of tacit acceptance of the order, which

could be deduced subsequent to the acts of the solicitor/mediator (cf. art. 1710 of the Civil Code).

Regarding the right to free legal aid, article 33.2 adds a paragraph, granting the defendant a time limit of three days to formulate a request, calculated from the reception of the document instituting the proceedings in ordinary court or the summons to the oral proceedings.

1.3.3. PROCEDURAL ACTIVITY

A) Working days and hours

In accordance with article 182.1 of the Judicial Power Organization Act, article 130.2 broadens non-working days to include Saturdays and the days 24 and 31 December.

B) Immediacy

Article 137.3 extends to court clerks the current requirement of judicial presence "regarding proceedings that must be carried out solely before them". The adverb "solely" is key here, since, as has been seen when analyzing the reform of the documentation of procedural acts and notarization, the court clerk will fail to attend these hearings, trials, court appearances, etc. held in the presence of a judicial representative with increasing frequency, as the implementation of an electronic signature becomes more common.

C) Language

Article 143.1 guarantees the provision of interpretation services in cross-border suits to those persons who know neither Spanish nor, where appropriate, the

official language of the autonomous community, in the terms set forth in Law 1/1996 of 10 January, regulating free legal aid.

D) Judicial decisions

As a result of the new system of decisions of court clerks, the system of judicial decisions is also modified in the following way (art. 206.2):

a) *Court orders*

This type of decision shall be issued when the decision refers to procedural matters that require a judicial decision as established by law, provided that such cases do expressly require an interlocutory order. Currently, this kind of decision has as its purpose, in general terms, procedural matters not limited to the application of rule to move the proceedings forward (orders of court clerks serve this purpose), which require a judicial decision, either because the law says so, or because charges are derived from it or because it affects the procedural rights of the parties, provided that in these cases an interlocutory order is not expressly required. Therefore, the court order acquires a residual role in the context of decisions of a procedural nature: it will be adopted in the absence of a decision of the court clerk and a judicial decision in the form of an interlocutory order.

b) *Interlocutory orders*

The purpose of decisions in the form of an interlocutory order is broadened to include decisions regarding appeals of decrees, but on the other hand is restricted regarding certain decisions regarding procedural prerequisites, annotations and registrations and any incidental issues, whether the law indicates they require special processing or not, as the ruling of the court is now no longer required. When it is a matter of decisions that put an end to proceedings in the first instance or an appeal before its ordinary transaction is complete, they will take the form of a interlocutory order except when the law states that they must be finalized

by decree, which means the same thing, in different terms than the above formulation ("provided that in such cases the law requires the decision of the court").

c) *Judgments*

As for judgments –which will be returned to later when dealing with extraordinary appeals for breach of procedure– mention of "extraordinary appeals" is substituted by a reference to "cassation appeal", thus incorrectly limiting appeals that must settled through a judgment.

As for the publication of judgments, incorporated into article 212.2 is the provision of article 266.1 of the Judicial Power Organization Act, regarding the possibility that any interested party has access to the text of the judgments or determined details thereof, which can be restricted when it might possibly affect the right to privacy, the rights of persons that require special duty to custody, the guarantee of anonymity of injured parties, as well as, in general terms, to avoid that rulings might be used for ends contrary to the law.

Likewise, in harmony with what is envisaged in article 267.7 of the Judicial Power Organization Act, a section 5 is added to article 215 in order to exclude the ability to appeal decisions that determine the clarification, correction, improvement of supplementation of defective or incomplete decisions, without prejudice to appeals filed against the decision in question.

E) Nullity of procedural steps

The modification of article 228 regarding the extraordinary case of nullity of procedural steps draws attention because the modification of the first paragraph of section 1 is adapted to the version of article 241.1 of the Judicial Power Organization Act prior to the reform entailed in the first final provision of Organic Law 6/2007 of 24 May, modifying Organic Law 2/1979 of 3 October of the Constitutional Court; consequently, the new wording suggested by the draft bill must be an error,

as it does not make sense that the Civil Procedure Act would envisage a regulation distinct from that of the Judicial Power Organization Act, when, in addition, this article of civil procedural law, along with others, will not be applied while this matter remains to be reformed ("derogate" *rectius*) in the Judicial Power Organization Act, according to the seventeenth final provision of Law 1/2000.

D) Central registry of civil default

In addition to establishing in article 157.3 the obligation of the judicial body to petition ex officio the cancellation of the registration in this registry when it has knowledge of the domicile of a person registered therein, the draft bill envisages in the case of unforeseeable absence of the defendant that has appeared in court that any court that needs to know the present address of the defendant whose whereabouts are unknown subsequent to the appearance in court can turn to this central registry so that notice can be given to contribute to the court's being facilitated the domicile where judicial communications can be sent, provided that this information is known by the Registry.

E) Procedural notarization

The inclusion in article 247 of a new section 5, in line with what is set forth in article 557 of the Judicial Power Organization Act, effectively clears up any doubts that may still have existed regarding the procedural or governing nature of sanctions for violations of the rules of procedural notarization, employing to this end an indirect means such as the determination of the system of appeals regarding sanctions, which refers to the governing regime established in Title V of Book VII of the Judicial Power Organization Act, specifically in article 556 (appeal for hearing against the agreement of the imposition of the correction and the appeal for review of the decision of a public body in Government Court).

1.4. Reform of declaratory civil proceedings

1.4.1. JOINING OF ACTIONS AND PROCEEDINGS

One of the guiding principles of the reform is that of streamlining the joining of actions and proceedings in all the courts, with the aim of avoiding multiple procedures when diverse proceedings have the same purpose. In accordance with EM IV:

> "delays in the processing of lawsuits can thus be mitigated to a certain extent if efforts are concentrated on a single proceeding, or, as in the contentious-administrative jurisdiction, if it involves a witness suit, eliminating the remainder of appeals inasmuch as the first is not settled. It should be added that, in addition, these legal provisions will be the adequate instrument for ensuring the effectiveness of the objectives of transparency in court proceedings and the proper evaluation of the performance of the persons that preside over them".

Of the two proposed ends –celerity and transparency– it is the second which might benefit most from the enhancement of the procedural mechanisms of joining of actions, both of actions and proceedings, inasmuch as the concentration of actions will contribute to simplifying statistical computation, which will not necessarily result in greater speed, for depending on the situation a massive joining of actions in one proceeding, or of proceedings of diverse provenance, might result in impairment of the agility of the proceedings if the proceedings become "macro-procedural", that is, of a size difficult to manage.

Furthermore, the technique the draft bill uses to facilitate joinder of actions consists in reducing the judicial discretion currently recognized in the judge or bench, imposing, in accordance with the law, the obligation of joining in cases of legally established requirements, ones that are maintained in the practically the same terms. While it should be noted that it concerns a legitimate legislative option, perhaps the raising of the question is a bit simplistic, for ultimately the determination of the existence of the object in the actions and processes that are susceptible to

being joined, or of the concurrence of a need of the joint carrying out of the procedures in order to avoid the risk of contradictory or incompatible judgments or grounds, will always be the fruit of unhindered judicial evaluation verified in light of the circumstances in each case.

In the civil jurisdiction the main reform in the matter is contained in article 75 of the Civil Procedure Act, which states that:

> "The joining can be requested by anyone who is a party to any of the procedures whose joining is sought or is agreed to ex officio by the court, provided that it is in one of the cases envisaged in the following article".

The current text of this rule envisages joining of actions only at the request of the party, except in cases in which the law foresees something else.

Article 76.1 establishes that the joining of actions "shall be agreed to provided that:

> 1. The judgment that must devolve on one of the procedures may affect the other prejudicially.
>
> 2. Among the objects of the procedures to be joined there is such a connection that, pursued separately, the result could be the issuance of judgments with contradictory, incompatible or mutually exclusive statements or grounds.

The current text, however, states that the joining of actions "is only ordered" in these cases.

Article 76 adds in addition to new cases of joining of actions:

> “1. When it involves procedures initiated for the protection of collective or diffuse rights and interests that the laws recognize in consumers and users, subject to being joined in accordance with section 1.1 of this article and article 77, when the diverse nature of the procedures could not be avoided through the joining of actions or the intervention envisaged in article 15 of this law.
>
> 2. When the object of the procedures to be joined is to challenge social agreements adopted in a committee or assembly or in a session of an administrative bench of judges. In this case all the procedures initiated as a result of claims in which the declaration of nullity or the nullification of the aforesaid agreements is requested shall be joined, as long as they were submitted in a period of time no greater than forty days from the presentation of the first of the claims.

At any rate, agreeing to the joining of actions corresponds to the court that hears the least recent procedure (art. 79.1, Civil Procedure Act), and any requests that fail to comply with this requirement shall be denied by the court clerk through a decree. Furthermore, the criterion of seniority is likewise applicable when the joining of actions is agreed to ex officio (regarding the processing of ex officio joining of actions, vid, arts. 83.4 and 88). To the court clerk is entrusted the rejection of the request of joining a subsequent action if the one who requests it has initiated the action that is intended to be joined (art. 97.2).

The draft bill amends other precepts related to the processing of requests for joining of procedures and the adoption of decisions in this respect. It has to do with concrete reforms concerning promoting the joining of actions as much as possible for the abovementioned purposes [such as the notion of "loss of procedural rights" as a negative requirement in the joining of an ordinary trial and a declaratory action (art. 77.1) or the moment of suspension of joined proceedings (arts. 81 and 88.2)].

1.4.2. INITIATION OF THE PROCEDURE: ADMISSION OF CLAIMS

The enhancement of the intervention of the court clerk that the draft bill presents as a primary objective of the reform has one of its most characteristic spheres of action in the initiation phase of civil proceedings, the processing of the admission of the claim.

The option followed in the draft bill finds justification in its EM III:

> "The right to access to justice forms part of the right to effective legal protection. For this reason, the decision regarding the starting of proceedings has been reserved for judges and benches and the initiation of proceedings through the admission of the claim, allegation or complaint continues to be within their sphere of competence.
>
> Nevertheless, it has been regulated that the court clerk may confirm compliance with the formal requirements of each jurisdiction and for each type of proceeding before the judge or bench makes a statement in regard to these admissions. As such, the court clerk may require the rectification of potential defects in the initial written request: including the failure of a party to submit powers of procedural representation, lack of obligatory application or defence, failure to submit necessary documents, failure to indicate the amount in the claim, etc.
>
> Once this initial procedural transaction is completed, which would alleviate the work of the judge, the judge will then make a decision regarding the admission of the claim or complaint, and without prejudice to re-examining merely formal requirements and setting them out and calling for new rectification, if deemed appropriate".

The reform favours a distribution of duties by virtue of which judges and benches retain the power of decision regarding starting proceedings, through the admission of the claim, granting the court clerk the task of verifying compliance with the formal requirements of the written document that initiates the process, the authority to require rectification of formal defects detected therein (vid. what was stated above regarding the duties of court clerks), and the determination of adequate proceedings. They are therefore entrusted with verifying a first filter for the purpose of reducing the workload of the judge, without prejudice to the judge's being able to re-examine formal requirements, call attention to their absence or deficient configuration and call for their possible rectification.

This division of labour can be observed in the regulation proposed for article 404.1 in regard to an ordinary trial, according to which:

> "The court clerk shall the review the claim for the purpose of requiring of the plaintiff rectification of possible formal defects therein; otherwise the case will be closed. Once the correction is completed or the time limit set for this purpose, where appropriate, expires, the court will be informed so that it can decide itself on the admission of the claim".

In the event that the observed defects cannot be corrected, or have not been rectified in the time limit granted for this purpose, the court clerk will transfer the matter to the court so that it can agree to the denial of admission of the claim and the closing of the case.

In regard to formal defects of the statement of the defence, an identical system of control is established, through the referral in section 4 of article 405 to section 1 of the previous article.

The court clerk is not only assigned the task of filtering initial written documents that suffer from formal defects, but also ex officio control of the type of trial that needs to be held. Article 254 refers to this power, which in the new wording

of the draft bill establishes that the trial will initially be treated in the manner indicated by the plaintiff in the claim, albeit

> "if in light of the allegations of the claim, the court clerk sees that the trial chosen by the plaintiff does not correspond to the indicated value or to the matter referred to by the demand, the court clerk shall agree, in an order of the court clerk, to grant the matter the proceedings that correspond to it. An appeal for reversal and subsequent review by the court can be filed against this order".

The attribution to the court clerk of this "first filter" function and control of the adequacy of the proceedings is deserving of favourable comment, for without a doubt it alleviates some of the workload of the head of the court that can be adequately performed by the court clerk.

Lastly, the indication of these formal defects is not limited to the claim (art. 404.1) and the statement of defence (art. 405.4), but also includes the failure to submit copies of initial written documents and outside documents (art. 275) and the failure to deposit or the insufficiency thereof when filing the claim for review of final judgments (art. 513.2).

1.4.3. EVIDENCE

In regard to evidence, the draft bill affects ancillary matters regarding expert and witness evidence.

A) Expert

The decision regarding disqualification of experts is distributed between the court clerk and the court. It corresponds to the court clerk to make this decision when the affected expert acknowledges the ground for disqualification (art. 126) and

to declare the discontinuance of the disqualification when the objector does not appear in court (art. 127.2). As for the court, it shall make the decision when the disqualification is controversial (127.1).

The reform confers to the court clerk decision-making power regarding the just cause that the legal expert might allege as an obstacle to accepting the role (art. 342.2); and in the matter of fees, the decision regarding the provision of funds requested by the expert and the order of the payment of the amount set by the court clerk (art.342.3).

B) Witness

The right of the witness to be compensated is recognized when he or she appears in court in response to a summons, while in the current text this right is limited to witnesses that *give testimony*; moreover, the court clerk is also authorized to set the amount of compensation (art. 375.1 and 2).

1.4.4. TERMINATION OF PROCEEDINGS

In regard to the termination of a declaratory action,

> "(...) the idea that the reform has in mind is that in cases in which this action can be terminated as a result of the parties' failure to act, or if the parties to the action have reached an agreement, the court clerk can issue a decree that puts an end to the proceedings. This is so because in these cases it is a matter of verifying nothing more than the expression of willingness of the parties, without prejudice to the appeals that can be filed against the decree so that the head of the court can review the decision.

> As such, the court clerk has been attributed the authority to declare the anticipated termination of the proceedings because of withdrawal of the claim at the express request of the plaintiff, the termination of the proceedings because of extra-procedural gratification, because the eviction action has been rendered ineffectual because of payment or deposit for the payment of debt by the tenant with the full consent of the lessor, the declaration of expiration of the formal request due to procedural inactivity of the parties, the homologation of the settlement reached by the parties, etc. Also included, of course, is the conciliation for carrying out the mediation that the Judicial Power Organization Act attributes to court clerks in article 456.3.c)" (EM III).

The situations included in the articles are, firstly, presumed withdrawal due to the failure to appear in court on the part of the beneficiaries of the plaintiff (16.3, Civil Procedure Act), in which case the court clerk shall issue a decree indicating the withdrawal of the action on the part of the plaintiff and order that the case be closed, unless the defendant is opposed to this, in which case what is set forth in article 20.3, which will be examined below, shall be applied.

Secondly, the stay of proceedings due to withdrawal in article 20.3 of the Civil Procedure Act, which in the amended version states that if the defendant agrees to the stay of proceedings, or is not opposed to it, the court clerk shall issue a decree agreeing to it, and the plaintiff can bring a new action in regard to the same object. But if the defendant is opposed to the stay of proceedings, the judge will be the one who settles the matter.

Also in relation to stay of proceedings, article 442.1 expressly refers to the court in the decision to terminate a declaratory action, with the imposition of payment of costs on the plaintiff in compensation of the defendant, when the court considers the stay of proceedings presumptive in light of the former's failure to appear at the hearing, without the latter alleging a legitimate interest in continuing the proceedings with termination in a judgment on the grounds of merit. The reason

the decision corresponds to the court resides in the fact that it is adopted in a hearing celebrated in court.

Likewise, termination due to ex post facto disappearance of the object of the proceedings expressed in article 22.1 of the Civil Procedure Act, which states that when as a result of ex post facto circumstances regarding the claim or counterclaim there is no longer a legitimate interest in obtaining the intended judicial protection, because the claims of the plaintiff and, where appropriate of the counterclaiming defendant have been satisfied outside of the proceedings, or for any other reason, if the parties are in agreement, the court clerk shall issue a decree announcing the termination of the proceedings, without an order for payment of costs.

If the parties have not reached an agreement such that one of them maintains the existence of a legitimate interest, the court clerk will summons the parties to appear in the court that will decide solely on this matter; after the appearance, the court will decide in an order if the action should be continued or not.

In regard to this system of allocation of duties depending on whether there is agreement between the parties or not, it should be noted that the existence of such an agreement for terminating initiated proceedings through the decisive intervention of the court clerk will not always be sufficient, for while it is true that access to the civil jurisdiction and the assertion of the procedural claim are regulated by the dispositive principal, it is also true that the act of disposition can hide an abuse of the process of the court to the detriment of the substantive rights of third parties, which must be controlled by the court.

In the same vein as the previous articles, article 22.4 envisages conclusion on the grounds of the eviction being rendered ineffectual through a decree issued by the court clerk, in eviction proceedings concerning an urban property due to failure of payment of rent or amount due by the tenant, in cases where prior to the hearing, the tenant pays the plaintiff or puts at his disposal in court

or through a notary the sum of the amounts claimed in the claim and the sum of the amounts due at the moment of the payment that renders the eviction ineffectual, although the reformed text requires "full consent of the plaintiff in order for this manner of termination of proceedings to take place".

The declaration of expiration of the action due to procedural inaction despite the ex officio instigation of proceedings is also attributed to the court clerk, as a result of the substitution of "interlocutory order" by "decree" as the form of the decision issued by the court clerk (art. 237.2).

Lastly, in regard to judicial settlement, and contrary to what is stated in the paragraph of the EM cited at the beginning of this section, this rightly continues to be within the sphere of competence of the court (art. 19.2).

1.4.5. APPEALS

A) Appeal against judgment

The amendment of article 457 affects the system of admission of this appeal in the preparation stage, granting the court clerk the authority to admit it through an order of the court clerk if the challenged decision can be appealed and the appeal is filed within the fixed time limit, without the possibility of this decision being appealed, although the party against whom the appeal is directed can allege the inadmissibility of the appeal in the challenge to the appeal referred to in article 461. However, if the appeal does not fulfil the abovementioned requirements for admissibility, the court clerk shall defer the decision to the court so that it can pass judgment on filing the appeal.

B) Appeal for review on the grounds of procedural error

It is well known that the Bill of 2005, adapting procedural legislation to Judicial Power Organization Act 6/1985 of 1 July, reforms cassation appeals and generalizes criminal dual instance, which was submitted to Parliament in the previous legislature, did not flesh out the articles that the Civil Procedure Act devotes to this appeal, the full implementation of which, for that matter, has not occurred as, to date, the High Courts of Justice have not been attributed competence for hearing these appeals (vid. sixteenth final provision of Law 1/2000). Nevertheless, this derogation is not undertaken in the draft bill of 2008; despite this, in two articles that are the object of the reform the reference to the aforementioned means of challenge is eliminated [admission of allegations of lack of territorial competence where mandatory rules applied (art. 67.2) and functional competence for hearing petitions related to precautionary measures that were formulated during the formal carrying out of remittable appeal procedures –excluding complaints– (art. 723.2)], and in article 206.2.3., devoted to decisions that need to take the form of a judgment, reference to "appeals reserved for the Supreme Court" that must culminate in this type of decision is substituted by the more restrictive mention of "cassation appeal", which is only one of the appeals reserved for the Supreme Court in the Civil Procedure Act, as if in addition to the appeal reserved for the Supreme Court on the grounds of procedural error, the appeal on the grounds of error had also disappeared –or that they will not be decided in a judgment, which is contrary to their own procedural nature. Consequently, there are no grounds for justifying the exclusion in the precepts of the appeal for Supreme Court review on the grounds of procedural error, which seems to respond to inertia and lack of updating of the text in regard to the previous legislative initiative.

C) Cassation appeal

The modification of article of 482.1 eliminates the summonsing of the parties before the *ad quem* body once the document instituting the proceedings has been submitted, a transaction that currently is carried out alongside the remission of interlocutory orders to the competent ruling court, without any explanation for the elimination of a procedure as fundamental as summonsing.

In brief, regarding strictly jurisdictional appeals, authority for making such decisions as declaring the appeal void when not filed in time and imposing the costs (arts. 458.2 and 481.4), notifying the remaining parties of the filed appeal (arts. 461.1, 485.1 and 492.3), and, as well as for the application for setting out grounds for the appeal or the notice of opposition, remitting the interlocutory orders to the competent court for settlement, summonsing the parties to appear before said court (arts. 463.1 and 482.1), setting the date and time of the appeal hearing, where appropriate (arts. 464.1 and 486.1, Civil Procedure Act), and transferring the proceedings to the reporting judge so that said judge can conduct a preliminary investigation of suspects (art. 483.1) is given to the court clerk.

1.4.6. PROCEDURAL COSTS

In addition to the taxation of costs that article 243.1 continues conferring to the court clerk, the reform introduces a section 3 in article 244 that attributes to the court clerk the approval, through a decree that can be appealed upon review, of the taxation of uncontested costs. Also, the court clerk shall hear challenges on the grounds of excessive or undue fees through a decree than can be contested upon review (246.3 and 4).

1.4.7. DEFAULT

A important element of the reform is the attribution to the court clerk of the authority declare a defendant that fails to appear on the date or within the time limit set on the citation or summons to be in default, "except in the cases envisaged in this law in which the declaration of default corresponds to the court (art. 496.1). Elsewhere, the reform attributes to the court clerk declaration of default on the part of the defendant in a more concrete case, that in which as a result of the defendant's death, the other parties do not know the heirs or the heirs cannot be located or do not want to appear in court (art. 16.3).

Default is a procedural principle that offers a reasonable solution to the situation resulting from the complete inactivity of the defendant in the initial phase of proceedings, but entails a special system of communication with the party declared to be in default that impacts each procedure involving procedural rights. As such, the declaration of default should remain in the hands of the court. To this should be added that in the face of the silence of the reform in regard to the decision of the court clerk that declares default, it would entail an order of the court clerk (art. 206.4.1), one whose appeal for reversal could only be brought before the same court clerk that issued it (art. 451.1), thereby preventing judicial review of a decision that affects the exercise of the procedural rights of the defendant.

Regarding default proceedings, the draft bill modifies certain aspects that affect the regime of notification of decisions that terminate the procedure:

1) Substitution of the publication in official bulletins of notification by edict of the decision that terminates the proceedings for the use of web-based and electronic technology in accordance with article 236 of the Judicial Power Organization Act (art. 497.2).

2) The publication of an edict in official bulletins in proceedings in which the judgment does not have the effect of a res judicata –"material" should understood as in reference to summary orders– is not necessary, as the publication of the edict on the announcement board of the Judicial Office will suffice (art. 497.3).

3) Article 500, in regard to the two above cases, introduces a rule related to the *dies a quo* of the calculation of the time limit for appealing the judgment.

1.4.8. DECLARATORY ACTION

While included in the section devoted to *expert conclusions* in the heading related to *provisions common to declaratory actions*, the reform puts problems detected in the proposition of expert evidence in declaratory actions to rights.

First of all, article 338.2 is amended in order to establish that only in declaratory actions with a written reply shall conclusions whose need or usefulness is generated by the reply to the claim be submitted by the parties for submission to the opposing parties, with at least five days prior to the celebration of the hearing.

Secondly, article 339 modified the petition regime for judicial designation of an expert by the defendant in declaratory actions without a written reply, independent of whether or not the defendant is a beneficiary of free legal aid. The petition must be made at least ten days prior to the date set for the celebration of the hearing so that the designated expert can issue his or her report prior to the hearing, the admission of the request being barred once the time limit expires. Judicial designation of an expert must take place in the period of time of two days from the submission of the request. It can be assumed that the reform seeks to avoid the undesired phenomenon of the suspension of the hearing in declaratory actions without a written reply, since in these proceedings, when formulation of the reply to the claim is made in the hearing itself, it might be suspended if the evidence is submitted then and admitted by the judge, which is why the reform anticipates the proposition of the expert conclusion so that it can be issued prior to the hearing.

Related to the above and presumably for the same purpose of avoiding suspension of hearings, as a consequence of the impossibility of the parties to attend hearings with the evidence intended to be validated in therein, article 440.1 is modified so that the litigants, in the time limit of three days after being served the summons to appear at the hearing, indicate the persons who, unable to submit them themselves, must be summonsed to appear at the hearing to give testimony as parties to the proceedings or witnesses.

1.5. **Reform of civil enforcement proceedings**

While intricately related to the new regime of attributions for court clerks, the reform of civil enforcement procedures also affects other matters, which is why the analysis thereof has been transferred for systematic reasons to this place.

1.5.1. COMPETENCE OF MERCANTILE COURTS

Article 955 of the Civil Procedure Act 1881 is amended in order to attribute to Mercantile Courts objective competence for hearing petitions regarding recognition and enforcement of judgments and other foreign judicial and arbitral decisions that concern matters for which they have competence. This exequatur related competence corresponds with what is envisaged in section 3 of article 86 ter of the Judicial Power Organization Act, added by Organic Law 13/2007 of 19 November for extraterritorial prosecution of illegal trafficking or clandestine immigration of persons.

1.5.2. INTERVENTION OF ASSOCIATION OF SOLICITORS

In relation to enforcement, the reform confers to Associations of Solicitors, as judicial depositories of seized assets, the authority to locate, manage and deposit said assets (art. 626.4) as well as acting as a specialized entity in the auction of assets (art. 641.1).

1.5.3. TEMPORARY ENFORCEMENT

With the modification of article 524.1 the "simple petition" is added to the "claim" as a means of urging temporary enforcement, with reference to article 549, section 2 of which envisages, according to the text of the draft bill in terms identical to those of the current text being reported on now, that "the suit for execution can be limited to the request that the enforcement be implemented, identifying the judgment

or decision whose enforcement is sought", provided that the enforcement order is a decision issued by the court with competence for hearing the enforcement –which is inherent to temporary enforcement. This means that the "simple request" does not constitute a formal vehicle distinct from the claim that must be mentioned as an alternative in article 524.1, but possible content thereof when enforcement (temporary or permanent) of a decision issued by the body with competence for enforcing it is urged.

As for opposition to temporary enforcement, the modification is dual in article 528:

1) Opposition to the enforcement of a non-monetary sentence is conditioned upon the execution debtor indicating alternative measures or offering guarantee. If this requirement is not met, the court clerk shall declare the opposition inadmissible in a decree that can be directly appealed in a review (art. 528.2).

2) Added are grounds for opposition based on merit that partially coincide with grounds for opposition regarding enforcement of judicial or arbitral decisions and settlements and legally approved agreements, to wit, payment or compliance with what is ordered in the substantiated judgment, and judicial pacts or settlements "that have been agreed to and substantiated in the proceedings in order to avoid temporary enforcement" (art. 528.4). In regard to the latter, the grounds for opposition are more restrictive than the grounds envisaged in article 556.1 regarding ordinary or temporary enforcement, in which it is enough that "said pacts and settlements are recorded on a public document", though without requiring that "they have been *agreed to* and substantiated in the *proceedings* (our italics).

3) The court clerk shall be the one who agrees to the suspension of temporary enforcement when the execution debtor places at the disposal of the court the amounts the execution debtor has been sentenced to pay, deciding likewise whether the enforcement should be continued or stopped (art. 531). Along these same lines article 533.1 confers to the court clerk the authority for dismissal of

this enforcement if the ruling sentencing the execution debtor to a money payment is fully revoked.

1.5.4. ENFORCEMENT ORDER AND ENFORCEMENT

Article 551.1 is modified insofar as the interlocutory order issued by the court regarding enforcement is substituted by the interlocutory order that contains the "enforcement order" and "enforcement" thereof (article 551.1). This interlocutory order shall contain the following:

> "1. The person or person in whose favour the enforcement is implemented and the person or persons who are the object of the enforcement.
> 2. If the enforcement is joint and several or solidary.
> 3. The amount, where appropriate, of the enforcement, on all grounds.
> 4. Details that must be attended to regarding the parties to or the content of the enforcement, according to the enforcement order, and also regarding those responsible for the debt or owners of property especially affected by the payment thereof or those entailed in the enforcement, in accordance with what is set forth in article 538 of this law".

The content of this order differs from the existing enforcement order (art. 553.1) in that it no longer includes measures for locating and determining the assets of the execution debtor, the enforcement proceedings that should be agreed to at this time, including the seizure of specific assets, or the content of the order for payment that must be directed at the debtor, when the law establishes it. The reason is obvious: these decisions have been transferred to the court clerk.

Article 568 introduces a section1 establishing new grounds for denial of enforcement, stating that an interlocutory order shall not be issued authorizing and

ordering enforcement if it is brought to the attention of the court that the defendant is in the midst of bankruptcy proceedings.

1.6 Reform of special civil procedures

1.6.1. PROCEDURES REGARDING CAPACITY, PARENTANGE, MATRIMONY AND MINORS

A) General provisions

Article 753.2 of the Civil Procedure Act extends the processing of conclusions in oral statements foreseen in article 433 for a plenary suit to the declaratory action hearing for these procedures and the appearance referred to in article 771, regarding application for annulment, separation or divorce.

B) Procedures regarding matrimony and minors

Regarding the hearing of minors or disabled persons (art. 770.4), the reform agrees with the current text that "they shall be heard if they are sufficiently capable of providing testimony", yet the phrase "and, at any rate, if they are older than twelve years of age" is substituted by a provision that excludes this mandatory element and subjects it to a judgment of necessity: the hearing of minors shall occur "when it is considered necessary ex officio or at the request of the Prosecutor, parties or members of the Legal Team or the minor him- or herself".

As for the competences of court clerks, the reform attributes them, among others, declaration of finality of the pronouncement of judgments regarding annulment, separation or divorce, when the challenge affects only pronouncements related to measures (art. 774.5), and the agreement to end the proceedings if the application for separation or divorce by mutual agreement was not ratified by one of the spouses, with direct appeal for review in court (art. 777.3).

C) Special opposition proceedings regarding administrative decisions in the matter of protection of minors and proceedings for determining the necessity of assent in the case of adoption.

The court clerk shall agree to the suspension of adoption proceedings and set the time limit he or she deems is needed for submission of the application when the parents' intent is that their assent is necessary for the adoption (art. 781.1); if the application is not submitted, the court clerk shall issue a decree "terminating the procedure", which can be appealed in court (art. 781.2).

1.6.2. JUDICIAL DIVISION OF ASSETS

Regard this type of special procedure the most noteworthy modifications affect special proceedings for the division of an inheritance.

The court clerk shall agree to:

- Approval of the dividing operations and issuance of the protocolization order when there is no opposition by the interested parties (787.2 and 4).
- Lifting of the suspension of the proceedings agreed to at the time on the grounds of criminal prejudiciality (art. 787.6).
- Discontinuance of proceedings and placement of assets at the disposal of heirs when the proceedings are dismissed and the parties to the proceedings request it by common agreement (art. 789).
- Agreement to cease judicial intervention, requested by common agreement (796.2).
- Remittal of order to the Property Registry for recording the state of the administration of properties of the inheritance and the naming of an administrator (art. 797.3); approval of the accounts of the administrator and return of the guarantee if there is no opposition by the parties (art. 800.3); fixing of the remuneration of the administrator regarding incomes through various elements and

agreement of payment of expenses (art. 804.1.4 and 2) and authorization of separation of the responsibility of the auxiliary administrator from the judicial administrator (art. 805.2).

In the proceedings for liquidation of the matrimonial economic regime, the court clerk shall appoint the accountant and experts when there is no agreement regarding the liquidation (810.5).

1.6.3. ORDER FOR PAYMENT PROCEDURE

In addition to the elevation of the amount of the order for payment procedure from thirty thousand to one-hundred fifty thousand euros (art. 812.1, vid. EM IV), the second paragraph of section 1 of article 815 is also modified, in the sense that the "order for payment to the debtor can be carried out through edicts only in the case regulated in the following section of this article"; nevertheless, the reform is tautological and does not appear to add anything new to the current regime, for the aforesaid paragraph envisages that in the claims referred to in article 812.2.2 (debts accredited through certifications of failure to pay amounts due for common expenses of Owners' Associations of urban properties), and after other means of service have failed, this will be carried out in accordance with article 164, in relation to "service by publication".

Other modifications affect the agreement to close the proceedings if the debtor attends to the order for payment and discontinuance of proceedings and payment of costs by the creditor, if in response to the opposition of the debtor, the petitioner did not file a claim for a plenary suit that corresponded to the amount of the claim (art. 818.2) (regarding payment of costs, we refer to what has already been set forth above).

1.6.4.EXCHANGE TRIAL

In line with other sections of the reform, article 825 assigns the court clerk the duty of handling the seizure after the court has ordered enforcement.

1.6.5. SPEEDY CIVIL TRIALS

Speedy civil trials, the specialties of which are regulated in the fifth additional provision of the Civil Procedure Act by virtue of section 3 of the eleventh additional provision of Organic Law 19/2003, are affected in the following aspects:

1) It is established as a presupposition of admissibility that in claims and petitions that the plaintiff submits to the Oficinas de Señalamiento Inmediato (Offices for Immediate Setting of Court Dates) a domicile or residence of the defendant be designated for the purpose of being served (section 2).

2) For preliminary proceedings prior to the admission of the demand envisaged by the first Rule of section 3 (registration of claims, allocation, communication service acts, etc.), a time limit is set ("on the same day as its submission or, if this is not possible, on the next working day"), and the process of rectifying any procedural defects that submission of the demand or petition might entail is pushed forward to this time, currently situated in the process of admission of the claim or petition, from where it is eliminated (Third rule of section 3).

3) Finally, the immediate ex officio designation of a lawyer and solicitor to the party that requires it shall depend on whether or not at the moment in which the order for admission of the claim is issued the request is heard in this sense: in the first case, the designation requirement will be carried out by the judge of First Instance in the order for admission of the claim; in the second, it will be carried out by the court clerk in a subsequent decree (Third rule of section 3).

1.7. Incorporation of civil procedures of Community law

According to the EM IV:

> "advantage is taken of the present law to incorporate into the Civil Procedure Act the necessary rules for the correct application in Spain of the two Community regulations that recently have regulated procedures related to cross-border lawsuits and civil and mercantile matters. On the one hand, Rule (EC) no. 1896/2006 of the European Parliament and Council of 12 December 2006, establishing an order for payment procedure, and, on the other, Rule (EC) no. 861/2007 of the European Parliament and Council of 11 July 2007, establishing a European small claims procedure. In both cases the intention has been to link their provisions to our procedural legislation, determining essential aspects to this end. Such is the case, among others, of the determination of the competent judge, review or appeal proceedings, and Spanish procedural rules that will round out the provisions of those European rules".

For this adaptation the final provisions of the Civil Procedure Act are enumerated, ultimately occupying the twenty-third number devoted to Enforcement in Spain of the *European order for payment procedure*, developed in 17 sections, while the new twenty-fourth final provision will have as its purpose Enforcement in Spain of a *European small claims procedure*, in 12 sections.

These two European procedures agree in attributing jurisdiction and objective competence to the Courts of First Instance, Mercantile Courts and Labour Affairs Tribunals, in regard to the legal relationship of the pecuniary credit that is the object of the claim (order for payment procedure) or the object of the procedure (small claims procedure). The majority of the remaining questions regarding competence (territorial, enforcement) and proceedings is regulated with reference to the articles or the forms in the Annexes of the respective Community Regulations, as well as the rules of the Civil Procedure Act that apply, given that "all procedural

matters not dealt with expressly in the present Rule shall be governed by domestic law" (art. 26 of Rule no. 1896/2006), and "without prejudice to the provisions of the current Rule, the European small claims procedure shall be governed by the procedural legislation of the member State in which the procedure takes place" (art. 19 of Rule no. 861/2007. None of this prevents the direct application of the provisions of the Rules themselves (arts. 33 and 29, respectively).

2. MORTAGE ACT

The third article of the draft bill introduces certain modifications in the articles of the Mortgage Act of 8 February 1946, which represent mere adaptations of the text required by the duties that the Civil Procedure Act recognizes in the court clerk, specifically in regard to enforcement of judicial decisions and effectiveness of legal proceedings, some of which were already cited above.

The new regulation includes decrees of court clerks along with judicial decisions as documents that can have access to the Property Registry (vid. art. 134). The court clerk is attributed competence for issuing orders to the Property Registry (vid. arts. 57.2 n 257). Also, the court clerk is attributed the power to request of the Registrar issuance of certifications (vid. arts. 229 and 231).

All these reforms, inasmuch as they are the direct consequence of the modification of the Civil Procedure Act, deserve the assessments already set forth.

3. LAW ON MOBILIER MORTGAGE AND NON-POSSESSORY PLEDGE OF POSSESSION.

Modification of this law of 16 December 1954 is verified in article four of the draft bill, and it affects articles 18 and 63 for the sole purpose of adapting the references to the Civil Procedure Act. Article 63 specifies the competence of the

judge for authorizing entry into the place where the pledged thing is deposited, when the creditor has requested verification of its existence and present state, determining equally that the order be carried out by the court clerk and Procedural and Administrative Management staff.

4. LAW OF NEGOTIABLE INSTRUMENTS

The sixth article of the draft bill modifies Law 19/1985 of 16 July in its article 85.3, solely in order to the establish that, once the damage or theft of a bill of exchange has been reported and the complaint admitted, "the judge will order that the court clerk notify" the drawee or acceptor, ordering said person to retain the payment and notify the court of the circumstances of the submission. The current text in force states that the judge "notifies". It concerns a mere reform of detail to harmonize with the Civil Procedure Act, removing the duty of coordination of the procedure from the sphere of judicial competence.

5. PATENT LAW

Article seven of the draft bill modifies articles 130 and 139 of Law 11/1996 of 20 March regarding Patents.

Article 130 refers in passing to procedural coordination, by virtue of which the judge "shall order service" of the petitioner that does not inform the judge of the result of preliminary proceedings held to verify the facts that might constitute violation of the exclusive right granted by the patent, when the judge considers that the inspected means serving for the commission of said violation.

Article 139 attributes to the court clerk competence for lifting precautionary measures adopted before the exercise of the main action in a decree, if said action is not performed in the time limit envisaged in article 730.2 of the Civil

Procedure Act. In this case, the court clerk will declare that the petitioner is responsible for the damages caused, for which the defendant will be granted compensation with the surety offered by the plaintiff, and whose amount will be determined in accordance with articles 712 and others of the Civil Procedure Act. It concerns, as can be observed, a mere adaptation to the regulation of the Civil Procedure Act, and for this reason the observations already offered in this respect should be taken into account again.

6. LAW ON GENERAL CONTRACTING CONDITIONS

The eleventh article of the draft bill modifies Law 7/1998 of 13 April on General Contracting Conditions.

In line with the reforms carried out in the Civil Procedure Act, the clerk court is attributed the duty of remitting orders to the Registry of General Contracting Conditions (art. 22).

7. BANKRUPTCY ACT

The fourteenth article of the draft bill modifies some articles of Mortgage Act 22/2003 of 9 July, in order to make explicit the duties that correspond to the court clerk in the matter of service communication acts, transfer of documents and setting the time and date of hearings, proclaiming ex officio instigation of proceedings in article 186.1.

Regarding documentation of proceedings through recording systems and reproduction of images and sound, the reformed fifth final provision refers specifically to what is set forth in the Civil Procedure Act. As for the attestation of the court clerk, it may draw attention in relation with what was said regarding other procedures, one in which the physical presence of the court clerk at certain acts is

dispensed with, which in the modification of article 126.5 stresses that "at any rate, the presence of the court clerk at the meeting of creditors and the scope of the meeting referred to in section 1 of this article are essential".

Article 197.1 regulates appeals than can be filed against the decisions of court clerks through express reference to the regime envisaged in the Civil Procedure Act.

The majority of the matters continue to be within the competence of the judge, due to the direct impact that such decisions have on the debtor's assets, and as such the decision-making autonomy of the court clerk is limited in comparison with what is envisaged in the Civil Procedure Act.

Furthermore, the opportunity of the draft bill is utilized to reform other matters of interest:

1) Cardinal number 6 of article 8 extends the exclusive jurisdiction of the bankruptcy judge: both to actions involving claims of social welfare debts brought against subsidiary partners responsible for the debts of the bankrupt corporation, regardless of the date at which they were incurred, and actions for requiring that the bankrupt corporation pay the deferred social welfare contributions or fulfil accessory benefits.

2) Declaration of default due to failure to appear in the sixth section for the evaluation of the bankrupt's degree of fault of persons that could be affected by the evaluation of the bankrupt's degree of the fault or declared complicity (article 170.3).

3) Broadened are two sections of article 198, in relation to the Registry of Bankruptcy Decisions, adding the following guidelines to the regulatory role entrusted to the Ministry of Justice: management of the Registry by and at the expense of the Spanish Association of Property, Commercial and Movable Property

Registrars, through an Internet portal; remission by the court clerk to the commercial registrar of the place corresponding to the bankrupt's domicile, the testimony of the judicial decision or the copy of the order; and remission by commercial registrars to the aforesaid Association, for inclusion on the relevant portal, of the content of the judicial decisions made in relation to bankrupt debtors, even if these debtors were not registered in the Commercial Registry or it involves legal persons that are not business executives. Transfer will also be made to the Central Commercial Registry if it concerns commercial organizations, and they will communicate the disqualification to the centralized index of disqualified entities of said Association.

8. ARBITRATION ACT

The fifteenth article of the draft bill amends articles 33, 42 and 45 of Law 60/2003 of 23 December, in order to attribute to the court clerk determined duties in regard to coordination of proceedings, issuing statements, service act communications and setting the date and time of hearings. As it concerns adaptations in line with the reform of the Civil Procedure Act, a detailed commentary is not called for.

VI

PENAL REFORMS

1. CRIMINAL PROCEDURE ACT

The second article of the draft modifies the Criminal Procedure Act of 14 September 1882. As for the scope of the reform, the EM IV states that the "obsolescence of the rules in the Criminal Procedure Act have necessitated a partial reform regarding the Judicial Office, as shall be seen below and contingent upon the

full revision of this law in order to bring about a new one as in the new Civil Procedure Act of 2000". Furthermore, given the supplementary nature of the latter, many of the observations just made in the analysis of its reform are absolutely transferrable. To this should be added that with regard to the specific procedural reforms within the framework of the Civil Procedure Act, mention has already been made of the equivalent modifications carried out in other procedural laws, so the scope of the considerations here will be more limited.

Finally, also analyzed are the parts of the reform that affect matters independent of the duties of the court clerk and the new role of the Judicial Office.

1.1. Duties of court clerks

The reform of the Criminal Procedure Act has a more limited scope than that of the Civil Procedure Act. It obeys not merely the nature of general procedural law of the latter but also the fact that in criminal procedure the competences that court clerks can assume, disregarding ones relating to mere coordination of instigation of proceedings and ones having to do with real precautionary measures and legal proceedings for enforcement of civil rulings, are extremely limited due to the greater role played by the judge, given that the decisions adopted frequently affect the basic rights of the parties to the proceedings, particularly those of the accused, and occasionally third party rights. The possibilities of broadening the powers of the court clerk and granting court clerks more autonomy in proceedings are therefore restricted.

Furthermore there is the oldness of the Criminal Procedure Act, referred to in the draft bill EM, being the only large procedural law that has not been replaced by a new law, as is the case of the Civil Procedure Act, the Regulatory Law of the Contentious-Administrative Jurisdiction and the Labour Procedure Act. The criminal procedural reform incorporated into the draft bill centres mainly on the adaptation of the current Criminal Procedure Act to the requirements of the new Judicial Office, for

the basic purpose of avoiding problems that could arise as a result of the attribution of new competences to court clerks if the criminal jurisdiction were to remain outside the scope of the reform.

At any rate, throughout the body of the Criminal Procedure Act, the draft bill refers in detail to the responsibility of the court clerk in the due coordination of the procedural act, hoping to avoid any mistakes that might occur when determining if a specific action corresponds to the court clerk or the judge or bench. At times, with the same legislative approach used in the reform of the Civil Procedure Act, the reform limits itself to replacing certain impersonal forms ("transfer will be made") through inclusion of the subject of the sentence so that there is no doubt as to whom the performance of the referred to act corresponds. In most cases the purpose of the modification of rules is to establish that service act communications, safekeeping of effects or documentation in minutes and enquiries correspond to the court clerk, as is presently the case.

The General Council of the Judiciary believes that these detailed reforms, even when they do not add anything innovative whatsoever, contribute to clarifying the sphere of action of court clerks, and in this respect are neither superfluous nor redundant and thus should be regarded positively. Insofar as they do not represent a change in the role of the court clerk, they will be the object of a detailed examination in this Report, which will focus on aspects of the reform that actually do entail relevant changes in the configuration of the process.

It should also be noted that the reform of Criminal Procedure Act contains a series of articles in which the silence regarding the decision-maker and the impersonal forms employed (vgr. "shall be sent") is lifted with the inclusion of express reference to the judge or court (Chamber, Courtroom), presumably to clear up any doubt that might arise regarding the jurisdictional nature of the decision, but without this entailing in essence any change in the existing system.

1.1.1. INSTIGATION OF PROCEEDINGS

A) Setting hearing dates and times and suspensions

As has been observed regarding civil procedure, in the regulation of the different proceedings included in the Criminal Procedure Act, the court clerk is attributed the duty of setting the date and time for declaratory actions, hearings and court appearances, as well as indicating the day for continuance of the trial in the event of suspension.

And in regard to appeal hearings, cases of recusal of experts and consideration of admissibility, the attribution to the court clerk of the power to set actions is deserving of the general considerations set forth both in number 4 of section IV of General Considerations and in the analysis of the reform of the designation of the day for hearings and declaratory actions, etc. in the Civil Procedure Act.

B) Service communication acts

In this regard the reform introduces slight variations on Title VII of Book II of the Criminal Procedure Act, headed by article 166, to which is added a first paragraph that establishes that "service communication acts will be carried out under the supervision of the court clerk". The reform opts for amending only those articles that require this for express attribution to the court clerk of competences that the current wording attributes in general terms or in the form of a mere stylistic clause to the court. Also contained therein are references to "corresponding staff" charged with carrying out the service communication. There is nothing objectionable about these variations in style, except that perhaps it would be more appropriate if the new wording made more explicit the position of the court clerk as the one ultimately responsible for these service communication acts, as director of the Judicial Office, determining in each case that service communication acts be

performed by the staff member of the common service with competence for doing so.

Article 178 of the draft seeks to regulate the activities of locating recipients of notices, citations and summons for criminal proceedings, when their domicile is unknown. The rule now states that the examining judge shall order what is necessary for determining said domicile, adding, after retaining the reference to the order of the Judicial Police for the search of the interested party, that the examining judge can turn to official registries, professional associations, organizations and bodies that might contain information that will facilitate the location. The reform in this matter recognizes that locating any person whose intervention is necessary for proper criminal proceedings constitutes an act of investigation, which must be carried out ex officio, and the competence for which resides exclusively in the court.

C) Decisions of court clerk and appeals

a) *Decisions*

These are regulated in article 144 bis, which the draft bill incorporates into the next text of the law. The rule is limited to transferring what is set forth in article 456.2 and 4 of the Judicial Power Organization Act, distinguishing between orders and decrees, and regulating cases in which they will be issued (kinds, forms and content) in accordance with what is set forth in the organic rule, in regard to which, in principle, there is no objection.

Additionally, the reform involves the modification of the content of the judicial decisions in article 141, affecting mainly the purpose and grounds for court orders, which will settle procedural issues reserved for the judge and which do not require a interlocutory order, which "can be succinctly motivated without subjection to any formal requirement whatsoever when deemed necessary".

The third paragraph of article 144 bis states, "a decree is the decision that the court clerk issues when the court clerk's decision is necessary or appropriate". The determination of cases in which the court clerk will issue a decree in the criminal jurisdiction thus refers in general terms to cases in which the law expressly states it, and, certainly, when it is necessary or appropriate for the court clerk to offer his or her decision, insofar as a decree is a kind of decision that requires specific grounds and a structure entailing separate paragraphs and numbers, divided into factual background, arguments of law and an operative part, similar to that of interlocutory orders.

It is perfectly consistent that the reform incorporates into article 161 that court clerks are authorized, where appropriate, to clarify any obscure concept, make omissions and rectify any significant mistakes, in the same terms the law envisages for judicial orders. Also necessary was the incorporation of specific references to the decisions of court clerks in regulatory rules of service communication acts (art. 175), periods for issuing them (art. 197, 204 and 205) and for appealing them (art. 211).

b) *Appeals*

Regarding challenging decisions of the court clerk, the draft bill adds a Chapter II to Title X which under the heading "Appeals against decisions of court clerks" incorporates two articles (238 bis and 238 ter).

As for appealing decrees and without prejudice to that fact that all decrees are subject to reversal (art. 238 bis), there is no general rule regarding appeal for review in court, except in the case where the appealed decision is the decree that settles the appeal for reversal in the face of an order of the court clerk, in which case a review can occur when expressly stated in the law (art. 238 bis). If this gap cannot be filled, the restrictive appeals regime in the matter of decrees of the Civil Procedure Act shall be applied. As such, judicial control of the decisions of the court clerk would be restricted to the exception rather than the rule, which is not suitable given the singular importance of the interests that are at stake in criminal

proceedings. It should be taken into account as well that in criminal proceedings the governing principle is exactly the opposite, advocating the general appealable nature of judicial decisions (vid. art. 218, which in relation to interlocutory orders admits the complaint when the appeal is not appropriate, or in regard to abbreviated proceedings, article 766.1, which admits the appeal against all interlocutory orders of the examining magistrate and criminal judge that are not exempted from appeal). The option of procedural law of the appealable nature of decisions points clearly to the need to strengthen the accuracy of the decisions adopted and constitutes an applicable principle without objections to the system of appeals of decisions adopted by court clerks.

Thus, it is considered more appropriate that article 238.ter contemplate the possibility of appeal for review of all decrees of the court clerk that were not exempted from appeal by express disposition of the law.

Regarding the appeals regime in the face of decisions of the court clerk issued for enforcement of civil judgments and the implementation of real precautionary measures, the text of the reform refers in article 238 to the appeals regime envisaged in the Civil Procedure Act.

As for the determination of the judge or bench that must settle the appeal for review filed against the decree of the court clerk, article 238 ter states that

> "(...) it shall be brought before the judge or bench with functional competence in the matter in the phase of the proceedings on which the challenged decree of the court clerk has devolved (...)".

This is appropriate, for it takes into account the structure of criminal proceedings, in which are distinguished, at least, a summary phase and an investigative phase, and another plenary or procedural phase, the hearing of which corresponds to distinct courts, as is well known, the criterion of functional competence being the most appropriate.

1.1.2. ATTESTATION AND DOCUMENTATION OF LEGAL PROCEEDINGS

One of the most important innovations of the procedural reform carried out by the draft bill is the introduction of the obligation to the record the development of oral proceedings, incorporating into criminal proceedings the rule that holds sway in article 187.1 of the Civil Procedure Act for documentation of civil hearings. Reformed article 743 thus states:

> "1. Oral proceedings sittings shall be recorded on a medium apt for recording and reproducing sound and image. The court clerk shall safeguard the electronic document that serves as the recording medium. The parties may request, at their own expense, a copy of the original recordings.
>
> 2. Provided that the necessary technological media are available, the court clerk shall guarantee the authenticity and integrity of what is recorded or reproduced through the use of an qualified electronic signature or some other security system that conforms with the law that ensures said guarantees. In this case, the celebration of the act shall be carried without the presence in the courtroom of the court clerk and the electronic document thereby generated shall constitute the minutes for all intents and purposes.
>
> 3. If the guarantee mechanisms foreseen in the previous section cannot be used the court clerk must record in the minutes, in the very least, the following data: name and type of proceeding; place and date of the celebration thereof; duration; persons present; petitions and proposals of the parties; regarding evidence, declaration of relevance and order in the

submission thereof; decisions that judge or bench adopts; as well as circumstances and incidents that cannot be recorded on that medium.

4. When the means of registration foreseen in this article cannot be used for any reason, the court clerk will take the minutes of each sitting, including in them, with the necessary scope and detail, the essential content of the evidence submitted, any resulting incidents and claims, and the decisions adopted.

5. The minutes foreseen in sections and 3 and 4 of this article shall encompass computer procedures, being handwritten only when the courtroom where proceedings are held lacks computer resources. In these cases, when the sitting is over, the court clerk shall read the minutes, making any corrections that the parties note therein, if the court clerk deems said corrections appropriate. The president and members of the court, the prosecutor and the advocates for both parties shall sign the minutes".

Reference to this article is made in articles 788.6 and 791.1 (oral proceedings and appeal hearing in abbreviated proceedings, respectively), 815 (hearing proceedings for criminal defamation against individuals) and 972 (hearing for misdemeanour trial).

Other rules are reformed in anticipation of the non-attendance of court clerks at hearings: article 786.2, which eliminates mention of the court clerk at the reading of indictments and defence at the beginning of the trial; article 787, which entrusts the judge or president of the court with informing the accused of the consequences of consent, a duty currently performed by the court clerk; and article 789.2, which in cases of judgments issued in voce eliminates the reference to the attestation of the court clerk at the time of documenting the ruling and succinct motivation in the minutes.

In line with the above regarding documentation of civil hearings and the non-attendance of the court clerk at hearings, it should be ultimately noted that the order for mandatory use of technical media for recording image and sound in criminal oral proceedings is complemented by the mention of the power of the court to request, if it is deemed necessary, the inclusion in interlocutory orders, in the shortest period of time possible, of a written transcription of that which the court deems most relevant among all that is recorded on the corresponding media. In regard to this aspect, we refer to what was set forth above when examining the documentation of civil hearings.

Lastly, in relation the duty of documentation, the reform affects the intervention of the court clerk in terms of putting on record proceedings of acts or matters of procedural importance [vgr. recording the characteristics of destroyed judicial effects (art. 367 ter.2); of the circumstances of line-up identifications (art. 369); of the time invested in questioning (art. 393); of the objection of the defendant during questioning regarding incompetence of the judge –it being questionable for it to be maintained in such cases that the "defendant cannot (...) refuse to answer"– (art. 395); of the rendering of the statements by the defendant (art. 397); of the full content of the questions and answers of witnesses (art. 401); of the admonition of waiver of the obligation to make a statement (art. 416.1) and the obligation of the witness to appear when summonsed and bringing changes in domicile to notice, with reprimands in the event of non-compliance (art. 446); of replies in anticipated testimonial evidence (art. 448); of the observations that the parties submit to experts (art. 480) and the opening of correspondence (art. 588)].

1.1.3. PRECAUTIONARY MEASURES, ENFORCEMENT OF CIVIL JUDGMENTS AND COSTS

Regarding enforcement of preventive seizure measures for assurance of monetary obligations, both of the defendant and civil third parties, the reform attributes competence for enforcement of civil judgments, as well as taxation and

exaction of costs, to the court clerk, in accordance with the regulation of said matters in the Civil Procedure Act.

Deserving of note is that possibility contained in article 591 that the requirement to deposit a guarantee can be deemed fulfilled if it constitutes a surety in cash, or through joint and several guarantor of indefinite duration and payable to the first requirement issued by the financial institution or mutual guarantee company or by any means which, in the opinion of the judge, guarantees immediate availability, where appropriate, of the relevant amount, a provision that incorporates the possibility currently contemplated in diverse precepts of the Civil Procedure Act.

Article 597 establishes that if on the day following the service of the order requiring establishment of a guarantee said assurance is not provided, the court clerk shall proceed to the seizure of the defendant's assets, ordering the defendant to indicate what is sufficient for covering the amount fixed for financial liabilities.

Article 568 determines the seizure order for assets, article 592 making reference to the prohibitions of articles 605 and 606 of the Civil Procedure Act and to what is set forth in article 584 of the aforesaid law. There is nothing objectionable about these references, as they contribute to clarifying the legal regime by means of which the application of these assurance measures should be governed.

Article 600 states that other proceedings held in enforcement of the preventive interlocutory seizure order envisaged in article 589 shall be governed by sections 2 and 3 of article 738 of the Civil Procedure Act (vid. the defective wording in which they reference is made), with the specialty established in article 597 regarding the defendant's obligation to indicate assets. The reference to section 2 of article 738 of the Civil Procedure Act is accurate, for section one requires prior provision of guarantee for the adoption of preventive civil measures, a requirement that it is impossible to export to criminal proceedings, in which real precautionary measures addressed at impacting the assets of the accused in the name of bringing the proceedings to a good end must be adopted ex officio by the investigating

magistrate, as an unavoidable consequence of the obligation of assurance of financial liability inherent in pre-trial activity (art. 299, in fine).

As for enforcement of civil liabilities, article 989.2 assigns to court clerks the function of entrusting revenue authorities asset investigation proceedings for the purpose of enforcement.

Regarding costs, the modification of articles 242 and 244 refer challenging costs for being excessive and general proceedings in this matter to the Civil Procedure Act.

1.1.4. ROLES IN GUARANTEEING THE PROCEDURAL RIGHTS OF THE PARTIES

The draft bill attributes to court clerks the additional role in criminal proceedings of guaranteeing the rights of the victim of a crime. Presumably these articles have been amended in order to apply what is set forth in point 17 of the "Pacto de Estado para la Reforma de la Justicia" (State Pact for Judicial Reform), the stated primary objective in the ambit of criminal proceedings of which is "enhancing the protection and defence of the victims of violent crimes", as well as in the Charter of Citizens' Rights in Court, which in its second heading states, "*Justice that protects the most vulnerable*", which "will guarantee that the victim has effective knowledge of the decisions that affect the victim's safety, above all in cases of domestic violence". In this matter the reform is in line with Law 38/2002 of 24 October, which partially reforms the Criminal Procedure Act regarding proceedings for speedy and immediate trials for certain crimes and misdemeanours and modification of abbreviated proceedings, and in Organic Law 15/2003 of 25 November, which modifies Organic Law 10/1995 of 23 November 1995 of the Penal Code.

Declaration of this informative obligation required of the court clerk is found in the reforms of articles 659 and 785.5 (informing the victim of the date and

place of oral proceedings in ordinary and abbreviated proceedings, respectively); 761 (offering of actions in abbreviated proceedings); and 791.2 (informing the victim of the appeal hearing).

Also entrusted to the court clerk is the responsibility of communicating to those persons directly wronged or damaged by the crimes all decisions related to the sentenced person pronounced in the enforcement phase that could affect their safety (art. 990). Attribution of these duties to the court clerk merits positive assessment.

In regard to strengthening procedural guarantees, and particularly the right to defence, also deserving of positive assessment is the incorporation into section 3 of article 797 of a final paragraph that states:

> "In order to guarantee exercise of the right to defence, the judge, once expedited proceedings have been initiated, shall order that transfer be made (to the lawyer appointed for the defence) of a copy of the official report and all actions carried out or being carried out in police court".

This rule is not superfluous. Although the lawyer represents the accused, who, in accordance with the status granted the accused in article 118, must be informed without delay of "any procedural action in which there is charge of a crime (...), a notion that encompasses not only actions of the police court judge but also the official police report that has motivated the actions and that are included in the proceedings, in relation to proceedings in police court, their being heard live by the lawyer for the defence guaranteed by the fact that they are adopted in his or her presence and that of the opposition. For this reason the reform makes sense, given that once the report is delivered by the police to the investigating magistrate and prosecutor, and once expedited proceedings are initiated, before proceedings commence in police court, the judge will order transfer to the lawyer for the accused a copy of the report, in addition to any other actions carried out –arguable before the order for initiation of proceedings– or that take place in police court. The reading of

the report at this initial moment will allow the lawyer for the defence, prior to the holding of proceedings in police court, and in particular when taking the statement of the accused, to acquire sufficient knowledge of the terms in which the implication sustained by the police is based, allowing for the preparation of a more effective defence. This additional guarantee, furthermore, should not be restricted to expedited proceedings in police court in the sphere of speedy trial proceedings for certain crimes, which is where the commented on precept is systematically found, but should also be equally acknowledged in other proceedings.

1.2. Reform of criminal declaratory actions

The reform of criminal proceedings entailed in the draft bill has taken the opportunity to introduce modifications in the legal text that are not related to the new roles of the court clerk, as stated above, which will be dealt with below following as much as possible systematic application of the law.

1.9.1. ORDINARY CRIMINAL PROCEEDINGS

A) Pre-trial phase

Article 448 is reformed so as to require that the anticipated testimonial evidence be submitted "immediately" and "assuring at any rate possible challenge by the parties", which is viewed positively given the danger implied in delaying agreeing to its submission in the envisaged cases.

B) Intermediate phase

In line with the suggestion of this Council in its Report on the draft bill regarding reform of procedural legislation introduced in 2005, a new regulation now governs the legal regime of notification of the parties of the investigation of the preliminary investigation, envisaged in article 627. According to EM IV

"included is the doctrine of the Constitutional Court consolidated on the basis of Supreme Court Ruling no. 66/89 of 17 April, requiring re-establishing in the so-called intermediary phase balance between the parties in criminal proceedings. To this end a modification is introduced into article 627 of the Criminal Procedure Act that makes notifying the defence of the accused of the prosecution mandatory, so that statement can be made regarding the order that ends the preliminary investigation, requesting organization of new measures of inquiry, the opening of the trial or, where appropriate, stay of proceedings".

As is already known, the aforesaid precept currently states that, after receiving the interlocutory orders in court from the Investigating Magistrate's Court and after the time limit indicated for appearance in said court has expired, the orders will be transferred to the prosecutor for investigation, for a period of time of no less than three days and no more than ten, and then to the solicitor for the complainant if he or she is being represented as a party, all of whom will return it accompanied by a document agreeing that with the order from the lower court, the preliminary investigation has terminated, or requesting new proceedings; if the opinion is in harmony with the order terminating the preliminary investigation, the Public Prosecutor's Office and the solicitor for the complainant, if there is one, shall request that the opening of a trial or stay of proceedings of any kind be deemed appropriate. The existing rule does not at any time say that the solicitor for the defence of the accused be equivalently notified, which generates manifest imbalance between accusation and defence which had to be compensated jurisprudentially through an integrating interpretation of the legal text in line with constitutional requirements.

The *secundum constitutionem* interpretation of the rule becomes obligatory by virtue of the doctrine of the Constitutional Court consolidated on the basis of Ruling no. 66/89 of 17 April, which requires establishing the balance between parties in the tenth legal point, which states:

"Recognition of the right to a trial with all guarantees certainly implies that in order to avoid imbalance between parties, both should have the same possibilities and burden of allegation, proof and challenge. This requirement (which is open to modulations or exceptions in the preliminary phase, due to the nature of the investigative activity that it entails) assumes without a doubt singular importance in criminal proceedings in the oral phase and bringing of evidence, including cases of anticipated evidence (art. 6.3d) European Convention on Human Rights) but it also must be respected in the so-called intermediary phase of proceedings for a crime (as a result of the doctrine contained in our S 44/1985 of 22 March).

Indeed, in said phase not only is there a tendency to provide the opportunity to fully gather investigative material aimed at the adequate preparation and accounting for the criminal claim, but also it is the moment for determining whether the necessary prerequisites exist for opening a trial. And those who are tried have an undeniable interest in both aspects, and therefore their participation cannot be dispensed with. It should be taken into account that, in light of the documents of the parties, formulated in accordance with article 627 of the Criminal Procedure Act, various possibilities are opened to the criminal court, and not only and obligatorily the opening of a trial.

Thus, the court, in accordance with article 631 of the aforementioned law, revokes the order of the Investigating Magistrate, devolving on said magistrate the procedure and coordinating the instigation of new proceedings; or rather, and still confirming the judge's order and declaring the preliminary investigative phase over, the court is not bound by the petitions of the accusatory parties to open a trial, as the Court, in accordance with article 645 of the Criminal Procedure Act, can declare a stay of proceedings if it considers that the act does not constitute a crime, in accordance with article 637.2 of the abovementioned procedural law.

For this reason, and given the diversity of possibilities open to the court, the fact that solely the accusatory parties can argue in this regard places today's appellants in position of inequality, as they cannot present their arguments in opposition to the arguments of the other parties.

(...) Thus, if article 627 of the Criminal Procedure Act expressly envisages transfer orders for investigation to the Public Prosecutor's Office and the complainants present, it does not prohibit in any way (...) that defendants also be notified. And, in the light of what is set forth in article 24.2, it followed to incorporate what was ordered in article 627 of the aforesaid Act, a rule pre-constitutional in origin, with the guarantees that result from the aforementioned constitutional rule, which include the parties being on a level playing field and, therefore, and in this case, notifying the accused in the same terms as those foreseen in article 627 of the Criminal Procedure Act for the Public Prosecutor's Office and the complainant if there is one.

(...) In conclusion, there is no doubt that the importance of the decision to be adopted requires the Criminal Court, in accordance with articles 24.2 EC and 7.2 of the Judicial Power Organization Act, to carry out a integrating interpretation of the aforementioned article 627 of the Criminal Procedure Act so as to give the accused the opportunity not simply to request and judge the fairness of the stay of proceedings, but also to show an interest in, where appropriate, holding new proceedings distinct from the rejected ones, which might be relevant for the purpose of justifying said ruling due to the criminal irrelevance of the facts that are the subject of the trial".

Consequently, modification of article 627 accurately expresses this doctrine in the positive text.

C) Trial phase

Among pre-trial actions, article 688 entrusts the court clerk to ensure that on the indicated day, the evidence gathered be present in the courtroom.

As a consequence of the reform that replaces the presence of the court clerk at the trial with the use of an electronic signature applied to the recording of the sitting, references to the "court clerk" in the attestation of the start of the trial (art. 701) is eliminated –the impersonal use of "will be informed"– and in the recording in the minutes of the question and putting the question again that the president has prohibited to be answered (art. 709).

1.9.2. MISDEMEANOUR TRIAL

To article 984, regarding enforcement of the ruling in a misdemeanour trial, is added that enforcement in relation to civil liability "shall at any rate be set in motion ex officio by the judge that issued it".

1.9.3. PREVENTIVE MEASURES

A) Pre-trial detention procedure

Section 6 of article 505 regulates the procedure to follow in the frequent case in which the detained is placed at the disposition of a judge different from the judicial authority that heard or would hear the matter. In these cases, there are two solutions: firstly, that the detained can be placed at the disposition of the court that heard the action within 72 hours of being detained; and secondly, if this is not possible, the police court in whose disposition the detained has been placed will hold the proceedings envisaged in the same article for deciding on the personal situation of the detained. In the event of the latter, once the judge or court responsible for the matter receives the orders, the accused, assisted by his or her

attorney, will be heard as soon as possible and the judge or court shall issue the appropriate decision.

Now, as the EM IV states, "articles 516 and 517 are provided with content in order to respond promptly to and legalize as quickly as possible the personal situation of the detained that appears in police court". That is, for the second case elucidated above, the reform envisages preparatory actions so that the judge that lacks competence for hearing the matter, but at whose disposition the detained has been placed, is in the best possible position, insofar as information about the case and the circumstances of the detained are concerned, for making a decision regarding the personal situation of the detained.

As a first step, the judge that agreed to a search for the accused through a summons must indicate the particulars of the case that were necessary for making a decision regarding the personal situation of the person summonsed once the summons has been carried out, which shall be borne witness to, along with the judicial decision and the particulars, by the court clerk for remission to the police court or for inclusion in the computer system if it exists, where they will be registered (art. 516).

Secondly, if the duty court judge needed to decide on the personal situation in the event of the presentation of the sought after person, he or she can request the assistance of the court that had issued the summons or, in its absence, the court that was the duty court in the latter's legal district, for the purpose of facilitating the referred to documentation and information (art. 517).

The modification should be assessed positively, for it provides legal support to a practice observed during detentions by the Investigating Magistrate Courts, ensuring that the flow of information regarding data relevant to the decision concerning the personal situation of the detained is transmitted between the bodies providing duty court service, when judicial disposition occurs outside the normal working hours of the courts and tribunals that issued the summons.

B) Referral to the Civil Procedure Act

In relation to the civil purpose of criminal proceedings, the harmonization of procedural system through the adaptation of the Criminal Procedure Act to the provisions of the Civil Procedure Act is a wise move. This can be seen in the enforcement regime for seizure (preventive) order (art. 600), accompanied by the derogation of articles 601 to 610, today in large part obsolete, and in the possibility introduced by article 591 that surety for potential financial liabilities is constituted through a joint and several guarantee of indefinite duration and payable on first demand issued by the financial institution or mutual guarantee company.

On a separate issue, though related to the previous one, the modification of article 536 means that enforcement procedure for bonds guaranteeing provisional freedom shall be regulated by provisions of the financial enforcement procedure of the Civil Procedure Act.

1.2.4. APPEALS REGIME

The modification of appeals regime of the Criminal Procedure Act is also of importance, though to a lesser extent.

A) General regime

The reform also grants the court clerk the authority in criminal proceedings to declare the appeal void when the appellant is not present to sustain it (art. 228 –appeal–, 866 –complaint–, and 873 and 878 –cassation).

B) Appeals against judgment or sentence

The draft bill affects appeals against judgment or sentence in important ways.

a) *Appeals against interlocutory orders of benches of judges*

First of all, article 236, regarding the general appeals regime against interlocutory orders of criminal courts, is modified, adding to the appeal for reversal –which keeps its name without adopting the common expression "review" generalized by the Civil Procedure Act for non-devolution appeals, independent of the single-judge or bench-of-judges nature of the *a quo* body–, the possibility of filing a devolution appeal such as the appeal against judgment or sentence "only in cases expressly envisaged in the law".

With the reform, it is unquestionable that the only decisions made by benches of judges that are subject to appeal will continue being definitive appeals, and not interlocutory orders, which currently, to wit, are decisions issued by the jury court and determined articles regarding consideration of admissibility [cf. art. 846 bis a) in relation to art. 676].

Now, if the reformed precept must substitute criminal proceedings by novation, it must be applicable when a bench of judges issues, *ex novo* and not in appeal proceedings, a decision subject to appeal: for example, if in the declaratory action phase the provincial court issues an order that decrees, extends or denies pre-trial detention or agrees to the liberty of the accused, in response to which "the appeal against judgment or sentence can be filed in the terms envisaged in article 766" –procedural, not organic, *terms*. If these cases are subject to appeal, the courts with functional competence according to the Judicial Power Organization –Civil and Criminal Courts of the High Courts of Justice [art. 73.3.c) Judicial Power Organization Act] and Appellate Court of the National Court (art. 64 bis Judicial Power Organization Act– shall hear the challenge.

b) Reproduction of the recording of the trial in the second instance

Of even more importance is the reform that affects the regime for evidence in the second instance in abbreviated proceedings, as a result of the generalization of the recording of the sitting of the trial in the first instance:

1) The parties, within the period of time of three days following service of the judgment, can request a copy of the media on which the sitting has been recorded, with suspension of the time limit for filing an appeal, the calculation being resumed once the requested copies have been delivered (art. 790.1).

2) The appellant and the other parties can request the reproduction in the court with competence for hearing the appeal of parts of the recording related to the bringing of evidence in the first instance (art. 790.3 and 5).

3) The hearing will be held beginning with, where appropriate, the bringing of evidence and reproduction of recordings if appropriate (791.2).

This important innovation warrants a series of observations. The possible reproduction in the second instance of criminal proceedings of the recording of the trial in the first instance should be viewed as possibly representing a substantial alteration of the limited appeal system of the Criminal Procedure Act, in which the *ad quem* court can only evaluate two types of evidence: firstly, evidence that does not require immediacy in order to be assessed (vgr. documental proof and evidence); and secondly, personal evidence that can be brought in the second instance –heavily restricted in the Criminal Procedure Act– in the *ad quem* court in conditions of immediacy. This is, in short, the doctrine that the Constitutional Court has reiterated in multiple rulings.

As article 790.2, which contemplates mistaken allegation in the evaluation of evidence, remains unchanged in the reform, and given that the reform is approved in this terms, there is the possibility of a new evaluation in a challenge to the evidence in the first instance on the basis of the reproduction of a recording

which, by definition, implies "mediation" and which, for this reason, should not be enjoy the immediacy from the court of first instance benefits. In other words, personal evidence evaluated with immediacy should not be re-evaluated in the second instance in poorer conditions of immediacy on the basis of a recording. This, however, as a means of documentation –but not evidence– can serve other purposes such as controlling the bringing of evidence in the hearing.

In this respect, it is interesting to reiterate what this Council argued in the Report of 5 October 2005, regarding the draft bill modifying the Criminal Procedure Act, Law 29/1998 of 13 July, regulating the Contentious-Administrative Jurisdiction and Law 1/2000 of 7 January on Civil Procedure, in the matter of cassation appeals, second criminal hearing and joint community justice:

> "This formula (that of the draft bill, according to which the appellant that grounds his or her appeal on a mistake in the evaluation of personal evidence linked to the principle of immediacy can request the reproduction in the *ad quem* court of the recording of the bringing of evidence in the first instance), which does not wish to distort the system of limited appeal and at the same time seeks to allow for the new evaluation of personal evidence without having to reproduce said evidence in actual form in the second instance, cannot be considered satisfactory for the following reasons:
>
> 1) It is clear that the viewing and hearing of a recording does not provide the judge with the same impressions as the object recorded, which means that the two courts participate at different levels of immediacy, to the detriment of the one that has the last word. In the words of the Order of the Second Chamber of the Supreme Court of 16 February 2004:
>
> "Not even a video recording of the trial in the first instance would be sufficient because they are images of the past that permit knowing the setting but not the direct and non-transferable experience of the parties to

the proceedings, and so it is sufficient, with a dissection and analysis adequate to the criterion of the court, for the requirements demanded by logic and experience".

2. At any rate, the recording shall not serve to call attention to errors of evaluation in the formation in all conscience of the intimate conviction of the court, but only large and blaring errors of sensory perception by the *a quo* judge regarding the objective result of the evidence brought forth, errors generally infrequent and extraordinary when it involves benches of judges.

3. While requiring of the appellant the essential identification of the error and the exact point in the recording where it can be found, there would be a risk that what is stated in oral proceedings might be the object of selective and isolated treatment in order to demonstrate apparent errors of perception, thereby taking passages of the evidence that are the object of the joint evaluation by the court of first instance out of context.

(...)

5. It can be assumed that parties will make use of this possibility offered to them by the law. As such, the collapse of courts of second instance is foreseeable if they are required to devote to each appeal an amount of time no less than the amount devoted by the courts of first instance, as the majority of the time invested in oral proceedings is taken up by the bringing of personal evidence. This risk can only be avoided by increasing the number of appellate courts to match the number of courts of first instance".

It can be assumed these observations were taken into account by the Government, so that the meaning of the draft bill reform of article 790.3, to wit:

> "The appellant that bases an appeal on an error in the evaluation of personal evidence linked to the principle of immediacy can request reproduction, in the court with competence for hearing the appeal, of the recording of the bringing of evidence in the first instance",

was modified in the 2005 draft with the wording of section 2 of art. 790:

> "The statement of the appeal shall be submitted in the court that issued the decision being challenged, and it shall set forth in an orderly manner the allegations regarding the violation of the presumption of innocence and procedural guarantees or the violation of constitutional or legal rules on which the challenge is based. Moreover, the appeal can be founded on the appearance of new facts".

And of the first paragraph *in fine* of section 3 of the same article, in terms identical to the draft bill that is the focus of this report:

> "The appellant can request the reproduction, in the court with competence for hearing the appeal, of the parts of the recording related to evidence brought in the first instance".

This, however, is not the course to be followed now, for the draft bill that is the focus of this report leaves article 790.2 intact, which opens the possibility, as already stated, of a new evaluation in the second instance of evidence brought with immediacy in the first instance on the basis of a recording reproduced in the appeal. If the new regulation is interpreted in accordance with the criteria set forth, it could enter into conflict with case law in the matter of evaluation of personal evidence in the second instance.

c) Cross-appeal

Also introduced in abbreviated proceedings is the cross-appeal by the party who initially did not file an appeal. Article 790.1 envisages that in the processing of allegations to the filed appeal, the party that did not file an appeal can exercise arguments and allege the grounds in the assertion of his or her rights, this appeal being subject to the initial appellant maintaining his or her appeal (art. 790.1).

It is a matter, therefore, of an appeal "subject to" the initial appeal –not subject to the claim of the initial appellant but to the sustainability of his or her challenge–, which is in line with that the lawmaker set forth in article 846 bis d), in regard to "appeals against judgments and certain orders".

C) Cassation appeal

While not related solely to cassation appeals but also appeals for reversal and cases that the Second Chamber of the Supreme Court hears in a sole instance, it is important point out here the wording of the reform of article 145: "For issuing orders and judgments in matters heard by the Supreme Court, seven Magistrates are required, unless in some cases envisaged in this law a smaller number is sufficient".

The Criminal Procedure Act envisages only the number of Magistrates of the court for forming chambers in article 898: three or five Magistrates for issuing cassation judgments, depending on the duration of the imposed sentence or that could be imposed, in the case that the grounds set forth by the accusatory parties are upheld.

In the remainder of cases in which the reform is upheld, where the law is silent in this regard, seven Magistrates will be necessary for settling the following matters:

1) Court order for complaint appeal (art. 869).

3) Order for admissibility of cassation appeal, which must be adopted unanimously (arts. 888 and 889).

4) Interlocutory orders in applications for review (art. 957).

5) Review ruling (art. 959).

In addition, article 145 would also concern the orders of the court in cases against privileged persons, which would give rise to practically insoluble problems of lack of impartiality when forming the sentencing chamber.

Consequently, we believe that the proposed text should be modified for two reasons: firstly, to avoid describing a clearly incoherent panorama when requiring, for example, three Magistrates –or a total of five– for issuing a judgment, while seven are necessary for settling the complaint appeal; and secondly, to avoid foreseeable operational problems that it might cause in the Second Chamber of the Supreme Court, unless it is complemented by specific rules that would leave article 145 practically without content.

In this regard, the Council recommends that, as a general rule, the number of Magistrates be five for judgments and three for orders.

On a separate issue, the modification of the cassation appeal deprives Chapter IV of Title II of Book V (arts. 947 to 953), in relation to "cassation appeal in death cases", of content, and eliminates in regard to the separate numbering of appeals references, some obsolete for some time now, appeals against decisions arising from cases in which there is a sentence of death, ones that deal with competence, cases *in fraganti*, the procedure of the Law of Public Order and ones based on procedural defects (art. 877).

D) Appeals against refusal of leave to appeal

In regard to this challenge in the face of the denial of the preparation of the cassation appeal, the new wording proposed for art. 870 envisages in the face of

the falsity of the facts alleged as the basis of the complaint, in addition to setting the criteria for the calibration of the punishment, that the competent bench of judges will be served notice of the action brought against the rules of procedural good faith, for the purpose of imposing the disciplinary sanction.

1.3. Reform of criminal enforcement procedure

The reform adds to the current provisions of article 990, among which of note is the one that imposes on the judge or bench the responsibility of ensuring enforcement of the judgment, a paragraph that complements the previous one by stating that "instigating the enforcement procedure of the judgment corresponds to the court clerk, who will issue the necessary orders for this purpose, without prejudice to the competence of the judge or bench for ensuring enforcement of the sentence".

2. LAW OF PASSIVE EXTRADITION

The fifth article of the draft bill modifies various articles of Law 4/1985 of 2 March, on Passive Extradition, following the guidelines of the reform of the Criminal Procedure Act regarding attributing to the court clerk service communication acts to the parties, transfer of documents (art. 12.3), provision of testimony (arts. 17 and 18.1), appointment of an ombudsman for the person concerned (art. 13.2) and setting of hearings (art. 14.1). In regard to this the only thing that needs to be repeated is what was stated at the time comments on the Civil Procedure Act and the Criminal Procedure Act were made.

3. ACT ON AID AND ASSISTANCE TO VICTIMS OF VIOLENT CRIMES AND CRIMES AGAINST SEXUAL FREEDOM

The draft bill, in article nine, modifies Act 35/1995 of 11 December on aid and assistance to victims of violent crimes and crimes against sexual freedom. Even though it is an administrative rather than a procedural law, it is included systematically in this paragraph of the Report due to its direct link with the public aid that constitutes its object of regulation as the result of a criminal trial.

The reform limits itself to article 15.4 in order to introduce the same obligations that the reform of the Criminal Procedure Act imposes on the court clerk in defence of the interests of the victim of the crime: the court clerk shall inform the victim of the victim's right to obtain restitution and reparation from damage suffered, as well the benefit of free legal aid, shall make sure that the victim is informed of the place and date of the celebration of the trial as well as the victim's being notified personally of the outcome thereof, even if the victim is not a party to the proceedings. It is a matter, in brief, of normative provisions that merit favourable opinion.

VII

REFORMS IN THE CONTENTIOUS-ADMINISTRATIVE JURISDICTION

The reform affects here only one legal text, Law 29/1998 of 13 July, which regulates the Contentious-Administrative Administration, which the tenth article of the draft bill modifies in sixty sections.

1. **CONTENTIOUS-ADMINISTRATIVE JURISDICTION ACT**

As with the remainder of the reforms undertaken, the purpose was to delimit and underscore in an express way the competences that correspond to court clerks in the matter of notification of proceedings, service communication acts,

appearances in court, evaluation of compliance with formal requirements in documents submitted by the parties, as well as setting hearings.

Still, the reform also takes the opportunity to introduce certain changes in the body of the text, such as the attribution to the court clerk of competence for fixing the amount of the contentious-administrative appeal and the promotion of so-called good procedural practices establishing the mandatory accumulation system of appeals, along with other issues independent of the new role assigned to court clerks.

The reform also contemplates, naturally, the regulation of the decisions of court clerks and appeals brought against said decisions, even though in this regard the majority of its content is a literal reiteration of the precepts of the Civil Procedure Act.

1.1. Duties of court clerks

1.1.1. INSTIGATING PROCEEDINGS

A) Setting of hearings

The draft bill reforms article 63.1 in order to attribute to the court clerk the duty of setting hearings. The reformed rule states that if a hearing is to be held, the court clerk will set the date of the hearing in strict accordance with seniority of the cases, except those referring to matters that, in accordance with the law or in light of an agreement of the court, must take preference. When setting hearings court clerks shall follow the criteria established in article 182 of the Civil Procedure Act. Lastly, they have to provide here the observations already formulated both in number 4 of section IV of the General Considerations and the analysis of the reform of the setting of hearings in the Civil Procedure Act.

B) Appeals against the decisions of court clerks

The reform adds a Seventh Section to Chapter III of the law, entitled *"Appeals against the decisions of the court clerk".* Said Section consists of a single article, 102 bis, which regulates appeals for reversal and applications for review.

Appeal for reversal procedure is very similar to that for appeals for reconsideration, insofar as the appeal must be filed within a period of time of five days starting from the day after the service of the challenged decision, and the court clerk shall serve the copies of the statement to the other parties so that they can challenge it if they wish. When the time limit expires, the matter will be settled by decree.

Inadmissibility of the appeal corresponds to the court clerk through a decree if the appeal is not filed within the time limit. A direct application for review can be filed against the decree of inadmissibility.

Regarding *application for review*, the procedure is regulated in section 3 of article 102 bis in terms very similar to those envisaged in article 454 bis of the Civil Procedure Act, including the fragmentation of the admission procedure according to which admission of the appeal corresponds to the court clerk through a measure of organization of procedure, while inadmissibility corresponds to the judge or bench through a court order.

As stated above when dealing with this issue in civil procedure, the fragmentation of the procedure is dysfunctional as it necessarily implies that when the court clerk sees that the filed application for review does not meet the minimum requirements for admissibility, the court clerk must abstain from making any decision and remit the matter to the court for resolution. It would therefore be more efficient to centralize the decision, whether favourable or unfavourable, in the court clerk, without prejudice to the fact that the decree of inadmissibility can be challenged through a direct review in court, so that the court has the last word.

C) Decision regarding procedural requirements and prerequisites

Article 45.3 is reformed in order to attribute to the court clerk competence for examining, ex officio, the validity of the appearance for submitting the statement of the contentious-administrative appeal. The precept states that the court clerk shall examine the validity of the appearance as soon as the statement is submitted, and, if the court clerk sees that the statement is not accompanied by the documents indicated in the previous section or the ones submitted are incomplete or, in general, if the court clerk considers that the requirements of this law for the validity of the appearance are not met, the court clerk will immediately require the rectification thereof, setting a time limit for the appellant to do so; if the appellant does not verify the rectification in the time limit given, the court or chamber will announce the closing of proceedings.

b) *Examination of initial statements of the parties*

The modification of article 56.2 grants the court clerk the authority of preliminary examination of the claim. It states that the court clerk shall examine the claim, ex officio, and require that all defects be rectified within a period of time of no more than ten days. Once the defects have been rectified or the time limit granted for doing so runs out, the court clerk will inform the judge or bench so that a decision can be made regarding the admissibility of the claim. The judge or bench may require the plaintiff to make further corrections if the judge or bench finds defects, with a warning that the procedure will be terminated if they are not corrected.

For its part, article 59, which regulates the processing of preliminary statements, is also the subject of the reform, stating that the court clerk will notify the claimant of the statement in a period of time of five days. The claimant may correct the alleged defect of inadmissibility, if appropriate, in a period of time of ten days.

Section 4 of the aforesaid rule establishes that the same approval order of preliminary statements shall declare the inadmissibility of the appeal, and, once final, the court clerk shall order the devolution of the administrative proceedings onto

the appropriate office. The current wording is therefore modified to indicate that the approval order of preliminary statements becomes final, before the inadmissibility of the appeal can be agreed to. The draft bill improves the rule, for, due to reasons of procedural economy, it is a more adequate for the approval of the preliminary statements and the inadmissibility of the appeal to be decided in a single decision.

The subsequent devolution of proceedings, once the order is final, as an act of mere coordination, is rightly entrusted to the court clerk.

1.1.2. JUDICIAL CERTIFICATION SERVICE AND DOCUMENTATION OF JUDICIAL PROCEEDINGS

The draft bill regulates the regime applicable to the documentation of hearings in sections 3 to 7 of article 63 –Ordinary proceedings– and in sections 21 and 22 of article 78 –Abbreviated proceedings–, which reiterates almost literally new article 146.2 of the Civil Procedure Act, commented on above; moreover, article 78.22 rightly expresses in detail the relevant particulars that must be recorded in the minutes by the court clerk when technological means of registration are not available. Article 122.2 –Procedure for the protection of basic personal rights– and article 135 –preventive measures– refer in turn to the aforesaid article 63.

1.1.3. DUTIES OF COURT CLERKS IN ENFORCEMENT ACTIONS

Among the particulars of contentious-administrative procedure in regard to the new functional framework of court clerks is the order for registration of rulings of final nugatory judgments in public registries to which the annulled act had access and publication in official or private newspapers (art. 107.1 and 2).

1.2 Reform of territorial competence

Article 14.3 is modified so as to eliminate the selective jurisdiction of the domicile of the claimant when it concerns appeals against acts of the Administrations of the Autonomous Communities or the entities of the Local Administration, the claimant's choice being limited to the jurisdiction of the High Court in which the court that issued the original challenged act is located. The grounds for the reform can be found in the new system for appeals proposed in the bill of 2005, in which, briefly, cassation courts with competence in the matter of autonomous law are the respective High Courts of the Autonomous Communities. As such, it seems essential that in accordance with rules of functional competence the *a quo* body be in their territorial jurisdiction, a circumstance that is not possible if the claimant is able to choose the instance court of the claimant's domicile.

1.3. Reform of contentious-administrative declaratory process

1.3.1. ACCUMULATION OF APPEALS AND PROCESSING WITNESS DISPUTES

Regarding the request submitted by the claimant to extend the contentious-administrative appeal to other actions, dispositions and proceedings, article 36.2 is reformed exclusively for specifying that the court clerk shall notify the other parties of the request.

Article 37.2, for its part, states, in the words of the reform, that when a plurality of appeals with the same objective are before a judge or bench, the court, if they appeals have not accumulated, shall hear one or various on a pre-emptive basis after hearing the parties in a period of time of five days, suspending the course of the others until judgment has been made on the first ones.

The innovative character of the reform lies in the obligatory nature of the application of this technique, for in the original wording of the rule the judge or bench is attributed the mere power of hearing witness disputes.

Section 3 of article 37 alters the wording, though not the meaning, of the regulation the extension of the effects of the judgment issued in the witness dispute, indicating the requirement that it is now final. In accordance with the new text, once final, the court clerk will notify the parties affected by the suspension of the judgment, so that they can seek to extend its effects in the terms envisaged in article 111, continue the proceedings or withdraw the appeal.

Accordingly, article 111 reiterates the requirement of the court clerk in the indicated terms, and incorporates with the reform a new paragraph in which it is stated that if extension of the effects is requested, the court or bench shall agreed to it, except in the event of the circumstance anticipated in article 110.5.b) or any of the cases of inadmissibility of the appeal contemplated in article 69.

In general terms, the draft bill option of imposing the hearing of a witness dispute (or various) as an obligatory alternative in the case of non-accumulation should be viewed positively, as it will contribute to reducing the number of lawsuits, saving procedural efforts and granting greater transparency to the activity of the courts in the contentious-administrative jurisdiction when it comes to evaluating its real activity and workload.

1.3.2. DETERMINATION OF AMOUNT OF THE APPEAL

Also introduced in article 38.2 are very specific modifications in order to replace the term "court clerk" with "Judicial Office", more in accord with the new organic regulation, while in article 40, mention of the court is substituted by a reference to the court clerk.

Article 40 attributes to the court clerk the authority to set the amount of the contentious-administrative appeal, once the statements of the claim and counterclaim have been formulated, in which the parties can set forth, furthermore,

their opinion in this respect; otherwise, the court clerk will order the claimant to set the amount, granting the claimant a time limit to do so. If the claimant fails to do so within the time limit granted, the court clerk shall fix the amount, after hearing the defendant.

In short, the reform attributes to the court clerk determination of the amount, both if the claimant fails to do so and when there is controversy between the parties in this regard; according to the wording proposed in the draft bill for article 40.3, when the defendant does not agree with the amount set by the claimant, the defendant shall set this down in writing, and the court clerk will make a decision accordingly. In this case, the judge or bench will definitively settle the dispute. The wording of section four of the aforesaid precept changes while the content remains substantively the same.

Worthy of note is the importance of this new attribution to the court clerk, inasmuch as the amount may determine the type of proceeding (ordinary or abbreviated) and the kind of appeal (appeal against judgments and sentences or cassation appeals, in which the importance of the amount is accentuated due to the necessary individualization of the challenges of the appellants), which raises a question as to whether the decision that affects the mode of exercise of procedural rights and type of challenge should be entrusted to the court clerk, independent of the fact that ultimately the decision will be made by the court in the judgment, for, as repeated throughout this report, in proceedings, jurisdictional decisions must be adopted by judges and benches, without having to pass through other filters or be subject to delay of final decision until the conclusion of proceedings.

1.4.3. APPLICATION FOR FILES AND SUMMONS

The reform modifies sections 1, 5 and 7 of article 48, granting the court clerk the authority to require of the Administration remission of files and summonsing of persons concerned. It also states in section 7 that, if the time limit for the

remission expires and the petition has not been fully met, the request will be made again, and if the request is not fulfilled within a period of 10 days,

> "(...) after determining their responsibility, following the warning of the court clerk notified personally for the formulation of statements, the judge or bench will impose a coercive penalty of three hundred to two thousands euros on the authority or employee responsible".

The court clerk will therefore issue a warning to the authority or staff member responsible for the delay so that statements can be made. The word "apercibimiento" (warning), while included in the original text, does not seem correct as it does not refer to the requirement of immediate remission of the file; in the present case it entails gathering the appropriate statements from the staff member in justification of conduct that potentially constitutes a violation of the obligation of cooperation, and as such perhaps the precept should state that a summons will be served in that sense.

The court clerk shall verify that the corresponding notices for summonsing have been served, require that they be completed, and order the publication of edicts (art. 49).

1.3.4. ANTICIPATED TERMINATION OF PROCEEDINGS

Articles 74.3 and 8 and 76.2 are slightly altered. The reform distinguishes the closing of proceedings in cases of withdrawal by the claimant and recognition of the defendant, in this case the Administration, in administrative proceedings of the allegations of the claimant, which is attributed to the judge or bench, of the withdrawal of appeal of judgment or sentence or a cassation appeal, in which case the court clerk, by decree, will declare the staying of proceedings, ordering the discontinuance of orders and devolution of proceedings onto the court of origin.

1.3.5. APPEALS

A) Appeals of judgments or sentences

Article 85.1 is reformed in order to establish that, after the period of time of fifteen days following service of the judgment expires, during which time an appeal against judgment or sentence has not been filed, the court clerk will declare the judgment final.

In the procedure for admitting the appeal, article 85.2 states that if the submitted statement meets the requirements envisaged in the previous section and refers to a judgment subject to appeal, the court clerk shall issue a decision admitting the appeal, against which no appeal of any kind is permitted, and will notify the other parties thereof so that they can challenge it if they so wish. Otherwise, the judge will deny the admission in an order, against which a complaint appeal can be filed.

However, the possibility that the judge does not regard the criterion adopted by the court clerk favourable to the admission of the appeal should be assessed; inasmuch as the superior direction of the procedure continues to reside with the head of the court, any connection of this figure to the decisions of the court clerk regarding processing should be avoided, even if these decisions are not subject to appeal, as in the present cases. We therefore suggest that the wording of the last paragraph of the commented section be revised, indicating that

> "In any event, the judge can the reject the admission through an order if he or she deems that necessary requirements have not been met, without being subject to the decision of the court clerk. The order will subject to a complaint appeal (...)".

Article 85.8 is also the object of reform in the draft bill, stating that the court clerk will agree to the celebration of a hearing, in which case the court clerk will set the appropriate date, or the submission of conclusions, if requested by all the parties or if evidence has been brought. There is nothing to object to in this regard, given that in these cases the celebration of a hearing is determined *ope legis*. The Chamber, for its part, can agree to the celebration of the hearing, which the court clerk shall set, or that written conclusions are to be submitted when it considers this to be necessary, depending on the nature of the matter.

B) Cassation appeal

Also in line with what is envisaged in the reform regarding the appeal regime for other procedures, article 92.2 and 4 envisage that the court clerk can declare the cassation appeal void when it is not defendable or the document requesting the appeal is not formulated.

Appeals against judgment of sentence and cassation appeals coincide to the extent that it is the court clerk who declares the finality of the challenged judgment, due to the expiration of the time limit for filing an appeal (art. 85.1) or if the cassation is declared void (art. 89.4).

VIII
REFORMS IN THE SOCIAL AFFAIRS JURISDICTION

The eighth article of the draft bill reforms in one hundred and seventy-six sections Royal Legislative Decree 2/1995 of 7 April, approving the Revised Labour Procedure Act.

1. LABOUR PROCEDURE ACT

The opportunity of the reform has been used to introduce modifications in line with those carried out in the Civil Procedure Act in relation to common matters, especially in what refers to attributions to clerk courts in general, and in regard to enforcement and conciliation, although other areas are also affected.

1.1. Duties of court clerks

Regarding this first point and as a mode of introduction, article 74.1, which opens Title IV ("Principles of procedure and procedural responsibilities") of Book I of the Labour Procedure Act, is worthy of note. This article establishes that "judges and benches in the social affairs jurisdiction and court clerks in fulfilment of their duty of coordinating proceedings and other competences attributed by article 456 of the Judicial Power Organization Act will interpret and apply the regulatory rules of ordinary labour procedure according to the principles of immediacy, orality, concentration and speediness. There is no doubt that anyone who participates in the administration of justice must do so observing the aforementioned principles; nonetheless, the article goes beyond this, for it implies that in the interpretation and application of procedural rules these procedural principles must be considered, and this consideration affects the basic guarantees of the procedure whose protection corresponds to the courts.

1.1.1. EXPEDITING COURT ACTIONS

A) Setting and suspension of hearings

The reform attributes the authority to set and, where appropriate, suspend hearings to the court clerk. This is laid down, regarding an ordinary trial, in article 82.1 when it is established that if the judge or bench admits the claim, the court clerk will designate, within ten days following its submission, the day and time in which the conciliation and trial will successively take place, with a minimum of ten days between the summons and the celebration of said acts.

The section concludes with a paragraph that states that in the setting of hearings and trials "the court clerk will follow the criteria established in article 182 of the Civil Procedure Act", and therefore we must reiterate what was stated in number 4 of section IV of the General Considerations and in the analysis of the reform of setting hearing and trials in the Civil Procedure Act.

B) Decisions and appeals filed against decisions of court clerks

a) *Decisions*

The decisions of the court clerk –measures of organization and decrees– is made reference to in the new sense of section 2 of article 49, section 3 of which extends to court clerks the possibility of issuing oral decisions during the celebration of the actions over which they preside. The content common to all decisions is the subject of article 51. Accordingly, the decision proposals and measures of organization of court clerks are eliminated, as they were regulated in the past (arts. 51 and 52).

b) *Appeals*

Articles 184 to 186 incorporate specific references to the appeals that can be made against decisions of court clerks, in terms very similar to those envisaged in the reform of the Civil Procedure Act.

In article 184 is introduced the *appeal for reversal* against measures of organization and non-definitive decrees, albeit section 4 excludes appeals of the "court orders, orders, measures of organization and decrees issued in collective disputes and challenges of collective agreements".

The regulation of the procedure for an *appeal for reversal* is the focus of article 185, which envisages a common procedure for judicial decisions and decisions of the court clerk.

Article 186 regulates the procedure for an appeal for reversal. The admission process is divided, for the court clerk issues the appeal for judicial review through an order of the court clerk, while denial of the appeal corresponds to the judge or bench through a court order.

In regard to appeals against judicial decisions, it should be noted that the reform of article 302 and others eliminates the appeal for reversal to a court higher than the trial court against the decisions of benches of judges, extending the appeal for reversal to the same, which implies equating the appeal regime in this aspect to the one already established in the Civil Procedure Act.

C) Decision regarding formal requirements of claims

As established in civil procedure, the first control to ensure that formal requirements of the claim are met is attributed to the court clerk, for, according to the meaning the draft bill grants article 81.1, the court clerk will notify the party of the formal defects or omissions in the claim so that they can be corrected within a period of time of four days.

Section 2 states that if attestation of the prior act of conciliation is not included with the claim, the court clerk will notify the claimant that he or she must accredit the celebration of or the attempt to celebrate the aforesaid act in period of time of fifteen days, starting from the day after the reception of the notice.

This first filter conferred to the court clerk is rounded off with the provision of section 3, which entrusts the court with the decision regarding admission of the claim, with the possibility of evaluating in turn the existence of formal defects, requiring new rectification by the claimant, with the warning that the claim will be dismissed without further proceedings if the corrections are not made. Lastly, article 139 –previous complaint in proceedings against managing entities or common services of Social Security–, article 145 bis 2 –claims of managing entities of Social

Security for refund of benefits due to unemployment–, and article 148 –claims in proceedings urged ex officio by the labour authority– are reformed in the same sense.

D) Organization of proceedings – Service act communications

In the regulation of judicial proceedings, the reform of the Labour Procedure Act generally follows the steps of the Civil Procedure Act (vid. arts. 42, 47.2, 53.1 and 57.4, Labour Procedure Act), at times with express reference, and it is therefore useful to keep in mind the observations made when dealing with the Civil Procedure Act, as well as referring to the previous quotations of precepts where applicable.

The reform of article 60.2 is interesting insofar as it opens a channel that permits service communication acts with the Counsel for the State and Lawyers in the Social Security Administration to be carried out through the technological means referred to in section 5 of article 56 –electronic media, telematic services, info-telecommunications, or some other similar means in the terms of article 162 of the Civil Procedure Act–, which would not only result in the service being performed more rapidly but would also have an impact on the determination in real time of the exact moment in which it is carried out.

E) Astriction actions

Observations regarding coercive penalties have been made elsewhere in this Report. Now we only wish to point out that in labour procedure, the authority to impose them is attributed to court clerks in two distinct situations: in article 48.2, when orders not sent back once the time limit given for their examination has expired; and in article 239.2, due to non-compliance with what is ordered in the enforcement order.

1.1.2. JUDICIAL CERTIFICATION SERVICE AND DOCUMENTATION OF JUDICIAL PROCEEDINGS

The new form of documenting the development of oral proceedings is regulated in article 89, in which the modification is set forth in almost the exact same terms as those in sections 1 and 2 of new article 146 of the Civil Procedure, albeit the article of the procedural labour law regulates with commendable meticulousness, in section 4, the content of the minutes that the court clerk must take when technological means cannot be used at the time of documentation. Regarding appearances of judicial presence at the catch-the-eye procedure, article 236 refers to what is set forth in article 89.

As previously stated, aforesaid article 89 follows the guidelines of article 146 of the Civil Procedure Act and, therefore, exempts the presence in the courtroom of the court clerk when an electronic signature is used in the recording of oral proceedings. Nevertheless, this important provision can cause hermeneutic problems in relation to other articles of the Labour Procedure Act also affected by the reform. Thus, section 3 of article 49 envisages that what is agreed to by the judge, bench or court clerk will be documented in the minutes, indicated the ruling and succinct grounds for the judgment, and similarly article 50.1, in regard to in voce judgments, the phrase "through the certification of the court clerk" is eliminated. That is, the legal hypothesis that the notary public does not attend trial but that what is settled must be documented in the minutes applies, the problem being, in addition to the one to which the non-attendance of the court clerk gives rise, in what way should "documentation of the minutes" be understood, for if it means that they must be written, it would seem that the presence of the court clerk in order to attest to the content is implied, while if it is understood to mean that it refers to minutes documented by means of recording, then there is no need of an additional documentation by these means, for the moment in which the decision is issued in voce is already fully documented in the recording of the act.

Another problematic issue resulting from the non-attendance of the clerk court at the trial is that if it is taken into account that in according to article 82 a single but successive call for a conciliation action and trial is required, and that article 85.1 states that "if an agreement is not reached in the conciliation, a trial shall follow, with notification of the act", it will be the case that if in the conciliation before the court clerk (art. 84.1) no agreement was reached, a rupture in the unity of the act will occur so that the trial continues without the presence of the court clerk and it will not be the court clerk who notifies regarding the content of the act.

1.1.3. CONCILIATION

Article 456.3, c) of the Judicial Power Organization Act, referred to on various occasions, attributes to court clerks competence regarding conciliations, "carrying out the task of mediation for which they are responsible". This competence finds fertile ground in the area of procedural law, where the court clerk can exercise with broad autonomy the necessary labour of rapprochement of the parties with the aim of achieving a conciliatory settlement of the suit.

Along these lines, article 84, according to its reformed sense, states that the court clerk will seek conciliation in a public hearing, carrying out the task of mediation for which the court clerk is responsible, informing the parties of the rights and obligations which might apply to them.

According to the rule, if the parties reach an agreement, the court clerk will issue a decree approving it and agreeing, moreover, to stay the proceedings (section 1); if the court clerk considers that what has been agreed to constitutes grave damage for one of the parties, abuse of the process of the court or frivolity, the court clerk will not approve the agreement in a decree, notifying the parties that they must appear in court for the celebration of the trial.

While in theory there is nothing objectionable in attributing to the court clerk an important role in the ambit of mediation, so as to encourage conciliation, it is more debatable, however, that the evaluation of possible grounds for denial of approval of the agreement should necessarily be subject to the court clerk's decision; it would be more appropriate if the rule envisaged in these cases that the court clerk limited him- or herself to notifying the judge or bench so that the judge or bench made a decision with respect to the approval or denial of the agreement reached, for the uncertainties to which the agreement could give rise regarding its potential harmful effect on general interests or those of a third party would more appropriately be resolved directly through the courts by the head of the body to which the matter corresponds, said body ultimately hearing claims challenging the validity of the agreement in accordance with what is set forth in section 6 of the rule.

Said observation should extend to what is set forth in article 148.2.b), which regulates the conciliation in proceedings initiated ex officio.

In any case, once the judge or bench is established in a public hearing for celebrating the trial or hearing in the principal matter or incidental ones (art. 84.3), the authority to mediate or seek conciliation or settlement and, in turn, approval thereof at any moment corresponds expressly to the court or bench. Now the court clerk recovers the power of approval of the agreement between the parties if the trial is suspended for any reason (art. 84.3).

In all of these cases the agreement will be put into effect through the procedures for enforcement of judgment (art. 84.5).

1.1.4. ROLE OF COURT CLERKS IN ENFORCEMENT PROCEDURE

The new intervention of the court in enforcement procedure is apparent in the following:

1) Power to grant a postponement of enforcement, if immediate fulfilment of the obligation to be enforced might occasion, to employees sensitive to the enforcement, disproportionate prejudice by putting at risk the continuity of labour relations with the indebted company (art. 243.1).

2) Seizure and a guarantee of distraint:

- Demand the execution debtor to declare assets and rights as means of guaranteeing said debtor's responsibilities (art. 247.1), as well as request asset information regarding the execution debtor from bodies and public registries and financial entities or depositories or other private individuals (art. 248).

- Order public registries to release writs of attachment of registrable assets and rights for the entry of the seizure, with issuance of certification that this has been done and ownership of assets and burdens (art. 253.1).

- Establish the terms of the administrative receivership of seized assets, provided there is agreement in this respect between the parties (art. 254.2). On this point the reform, contrary to the current text, omits the reference to the case in which the approval seeks not administrative receivership but judicial intervention, which should be rectified.

- Following the Civil Procedure Act, the court clerk shall ratify or modify the seizure order issued by the enforcement committee and adopt the measures of assurance of the distraint (art. 257.1), as well as the re-seizure agreement and the measure for its effectiveness (art. 256.1).

3) Forced execution

- In enforced collection procedure, the reform refers to civil procedural legislation regarding the court auction of seized assets, with the exception of the adjudication of assets through 30 percent of the valuation (art. 262).

- Suspend liquidation of contested assets after the admission of third party claim to ownership (art. 258.3).

- Arrange the sale of seized goods by the authorized entity (art. 261.1).

- Approve distribution of the amounts obtained in the enforcement among creditors when no controversy exists regarding distribution (arts. 269.2, 270 and 271).

- When the seized asset is adjudicated, the decree of the court clerk will be sufficient for registration in the registry (art. 265.2).

- Declare total or temporary insolvency of the execution debtor business executive (art. 274.2).

4) Regarding enforcement of final judgments of dismissal, the court will issue, also in accordance with the meaning of the reform of the Civil Procedure Act, the order containing the enforcement order and the writ of execution (arts. 278 and 280.2), entrusting to the court clerk the adoption of measures in the event of non-compliance on the part of the business executive with the order for reinstatement of the employee: continuation of receipt of salary, in the case of leave and contribution to Social Security, and as the representative of employees (art. 282). The importance of these substitutive measures of the inactivity of the enforcement in the material legal ambit, even affecting the right of union representation, calls into question whether their adoption is subject to the decision of the judicial authority.

1.2 Territorial competence

One of the reforms not directly related to the new duties of court clerks but of undeniable importance concerns the ex officio evaluation of territorial competence introduced in section 1 of article 5, which in the wording of the draft bill would now read:

"If jurisdictional bodies consider themselves incompetent for hearing the claim due to the nature of the matter, territory or role, they will then issue

an order declaring this and informing the claimant how and before whom to make use of his or her right".

Through this simple reform, which limits itself to introducing the reference to competence on the grounds of territory, the objective is to resolve the intense doctrinal controversy that arose regarding the consideration in the social affairs jurisdiction of territorial competence as unavailable procedural requirements.

Case law has generally taken the majority position that the jurisdiction of territorial competence established in article 10 is mandatory, for, interpreting said precept in connection with article 54.1 of the Civil Procedure Act, in the absence of the express disposition of the law to the contrary, it is believed that said jurisdictions are optional; furthermore, given that aforesaid article 5.1 only contemplates in its present sense ex officio evaluation of competence on the grounds of subject matter and function, it is also generally believed that it is not possible to evaluate the absence of territorial competence ex officio.

This doctrine is made explicit in the ruling of the Fourth Chamber of the Supreme Court of 16 February 2004, issued after the meeting of its General Chamber. The ruling recognizes, however, the non-pacific nature its doctrinal conclusions:

"It is true that article 5.1 is a controversial and difficult rule that has given rise to important doctrinal debates, above all when seen in relation to what is ordered in number 1 of the Second Basis of Law 7/1989 of 12 April, regarding Basis of Labour Procedure. It is recalled that number 1 of article 5 states that, "if the courts deem that they lack competence for hearing the claim due to the subject matter or function, they will then issue an order declaring this..." While number 1 of the Second Basis of the aforementioned Basis of Law establishes that: "The competence of social affairs courts is not extendible. The court and tribunals will examine ex officio their own competence and will make a decision in this regard in

the presence of the parties and the Public Prosecutor's Office". In light of the content of these two precepts, a sector of doctrine upheld that the aforementioned article 5.1 of the articulated text of the Labour Procedure Act of 27 April 1990 was unlawful, for, according to these authors there was a departure from what was ordered by aforesaid second Base, number 1. The fundamental basis of this thesis is in the wording of number 1 of the Second Base to which we have been referring, in which it is stated that "the competence of social affairs courts is not extendible", adding that the court and tribunals "will examine ex officio their own competence", without making any kind of differentiation or distinction, which determines, according to the criterion of said doctrinal sector, that this ex officio analysis also extends to and includes cases of territorial competence, not only in cases of competence due to subject matter and function; and as alluded to article 5.1 limits the ex officio analysis to these latter two, said authors believe the article commits incurs in unlawfulness".

The Supreme Court, however, does not share said opinion and pronounces to the contrary, reasoning, in summary, that:

- Second Base number 1 of Law of Basis 7/1989 proclaims a general principle subject to nuance and limited in its scope in the corresponding articulated text. Thus, the exclusion of territorial competence in article 5.1 does not entail a violation of the Basis, but development thereof. Furthermore, with the enactment of the Revised Text of 7 April 1995, the *ultra vires* violation invoked is not apparent, for this text is predicated on the authorization awarded to the Government through the fifth final provision of Law 11/1994 of 19 May, an authorization which refers exclusively to the content of Royal Legislative Decree 521/1990 of 27 April, without exclusion or exception of any kind with respect to article 5.1.

- Territorial competence has a purely differentiated meaning from competence due to subject matter, for violation of this determines that the lawsuit is

settled by a judge or bench to whom, due to the nature of the matter, the hearing thereof is forbidden, inasmuch as the violation of territorial competence does not produce the effect of declaration of invalidity (cfr. art. 238.1, Judicial Power Organization Act).

- For some time now the extendibility of territorial competence in both the civil and social affairs jurisdiction has been established, while ex officio evaluation of its absence is not possible, aside from exceptional cases determined by the law. This was stated in articles 54, 56 and others of the Civil Procedure Act of 1881, is reiterated in article 54.1 of the current Civil Procedure Act, and was also set forth in articles 2 and 3 of the Text of the Labour Procedure Act of 17 August 1973, and the Revised Text of the same law of 13 June 1980, the same as the judicial doctrine that interpreted these articles. It should be understood in light of this that article 5.1 of the Text of the Labour Procedure Act adopted by Legislative Royal Decree 1/1995 of 7 April reaches similar conclusions to the ones established by those rules.

- Judges of the social affairs jurisdiction have the majority in forensic practice when the parties do not challenge it.

The aforesaid ruling declares in its sixth legal basis that while the express submission agreement is inadmissible in the social affairs jurisdiction, given the protective purpose of the interests of the worker that enjoys the Right to Work, the tacit submission of the parties to a territorial jurisdiction distinct from the one determined by law is appropriate.

The draft bill, with the reform of article 5.1, decides to act clearly on the issue, resolving it definitively in an inverse sense to what was declared in the doctrine of the Supreme Court, and deciding explicitly that territorial competence must be examined ex officio by the judge.

Furthermore, it should be noted that the draft bill also reforms article 14 in order to eliminate the writ of prohibition as means of raising questions of competence, in keeping with the regulation of the current Civil Procedure Act. Also

eliminated is the reference to the fact that the declinatory plea must be proposed as a peremptory exception, given that this no longer exists in the Civil Procedure Act.

1.3. Actions

The reform introduces in several places references to the rights of geographic mobility and the reconciliation of personal and professional life, which constitutes one of the objectives of Organic Law 3/2007 of 22 March on effective equality between men and women:

- Actions aimed at these rights are excluded from accumulation of actions and counterclaims (art. 27.4).

- Exclusion of non-working month of August regarding procedural rules related to the exercise of these actions (art. 43.4), adding those labour actions derived from the rights established in Organic Law 1/2004 of 28 December on Integral Protective Measures against Gender Violence.

- Exemption from the requirements of previous conciliation (art. 64.1) and previous complaint (70.1 and 2, Labour Procedure Act) prior to legal action through proceedings related to these actions. The provision also extends here to labour actions derived from the rights established in the aforesaid Organic Law 1/2004.

- Modification of the heading of Chapter V of Title II of Book II in the following terms: "Vacations, electoral matters, geographic mobility, substantive changes of work conditions and legally or conventionally recognized rights of reconciliation of professional and personal life" and, consequently, of the heading of its Section 5: "Legally or conventionally recognized rights of reconciliation of professional and personal life".

- Application of procedural specialties of article 138 bis to these actions (time limit for filing a claim and urgent and preferential processing of the proceedings).

- Exemption of appeal for reversal of judgments and orders in enforcement of judgments issued by the social affairs court settling appeals for review against decrees of the court clerk (at. 189).

1.4. Legitimisation of the Wage Guarantee Fund

Article 23.2 is modified so as to establish that in "cases of companies involved in bankruptcy proceedings, as well as companies already declared insolvent or disappeared, the court clerk will summons as a party the Wage Guarantee Fund, serving it the claim so that said Fund can assume its legal obligations and urge whatever is in its best interest". While a cursory reading of the precept leads one to believe that it involves a simple summons, the fact is what we have here is a case of *ex lege* procedural intervention, of a call to a procedure that entails recognition of passive legitimisation of what was until now a third party (Wage Guarantee Fund), a decision that for this reason should remain within the sphere of competence of the court.

However, the same objection does not apply to the reform of the following article 24.2, which establishes that "once the enforcement is ordered, the court clerk shall issue a decree indicating the resulting subrogation (of the rights and actions of workers that appear in the enforcement order in favour the Wage Guarantee Fund) (...)", as the active legitimisation granted to the subrogating entity in the enforcement procedure is not granted by the court clerk through a decree but by the court in a order ordering enforcement, which must identify "the person or persons in whose favour the enforcement is ordered and the person or persons against whom the enforcement is ordered" (cfr. art. 551.2.2, Civil Procedure Act).

1.5 Contentious-administrative disclosure process

1.3.1. ACCUMULATION OF ACTIONS, PROCEEDINGS, APPEALS AND ENFORCEMENTS

A) Accumulation of actions

The draft sets as an objective the promotion of accumulation of actions, proceedings and appeals, as well as enforcements, as a means of guaranteeing *judicial transparency* and an instrument for streamlining procedural transactions.

Title III of Book 1 of the Labour Procedure Act, which deals with accumulations, reflects the modification of diverse rules in this sense. To article 27 is added subjective accumulation of actions that the same plaintiff brings against the defendant, an objective mode –or objective/subjective– of accumulation, which would form the third section of the precept, according to which,

> "Also capable of accumulation, exercised simultaneously, are actions that a plaintiff or various plaintiffs brings against one or various defendants, provided that among these actions there is a nexus due to the order or cause of the action. It is understood that the order or cause of the action is identical or linked when the actions are based on the same facts".

At any rate, the evaluation of the rules of accumulation, objective as well as subjective, will correspond to the judge or bench (section 6).

B) Accumulation of procedures

Article 29 introduces the obligatory nature of the accumulation of procedures followed in the same court or tribunal, for its first section states that

> "If various claims against the same defendant brought in the same court or tribunal, even if the plaintiffs are distinct, and identical actions are exercised in that court or tribunal, the accumulation of the orders will be agreed to, ex officio and at the request of the party".

Article 30, according to its reformed text, extends the obligatory nature of accumulation even when the claims are pending in distinct procedures in two or more social affairs courts of the same jurisdiction, in which case the request will be directed at the court or tribunal that heard the claim it had previously entered in the registry.

For its part, article 30 bis, as a result of the intended reform, states in its first section that

> "The accumulation of procedures pending in the same or distinct court or tribunal will also be agreed to when among the subjects of the procedures whose accumulation is sought there is such a connection that, followed separately, judgments containing contradictory, incompatible or mutually exclusive pronouncements and foundations could be issued".

A criterion of objective accumulation is thus introduced identical to the one envisaged in article 76.1.2 of the Civil Procedure Act, in accordance with the wording given to it by the draft bill.

C) Accumulation of appeals

As for appeals, article 33 of the Labour Procedure establishes the accumulation thereof in the following terms:

> "In the Social Affairs Chambers of the High Courts and the Supreme Court, the accumulation of pending appeals shall be agreed to ex officio,

and must be decreed if it is at the request of one of the parties when there is identity of claim between them and one of the parties, after the appearance of the parties in all cases and Public Prosecutor's Office in cassation appeals".

Regarding appeals for reversal of judgment or sentence and cassation appeals, the Labour Procedure Act reiterates its position in the same terms as in article 232.1.

The implementation of the rule of enforceability in accumulations is similar to what is regulated in civil procedure. In this regard, what was stated above in relation with the civil jurisdiction should be recalled, specifically, between the two objectives sought through promotion of accumulation –speediness and transparency– the latter may be more highly favoured insofar as it cannot be denied that the concentration of actions will contribute to simplifying statistical calculations, though it will not always guarantee greater speed, for in certain cases promoting massive accumulation of actions in one procedure, or in procedures of diverse origins, can result inversely in the impairment of procedural agility if the procedure assumes dimensions that prove difficult to manage.

Furthermore, the technique that the draft bill employs in the social affairs jurisdiction to facilitate accumulation, which consists in reducing judicial margin of discretion, is equally debatable, for while a legitimate legal option, its approach perhaps is excessively schematic, for ultimately determination of the existence of identity of claim in actions and procedures subject to accumulation, or the concurrence of a need of unitary carrying out of procedures to avoid the risk of contradictory or incompatible pronouncements and foundations will always constitute the fruit of free judicial evaluation in view of the circumstances in each case.

D) Accumulation of enforcements

Regarding accumulation of enforcements, the reform attributes the decision to the court clerk, who, according to article 37:

> "1. When exercised actions involve the delivery of an amount of money and there are indications that the assets of the debtor may be insufficient to satisfy the total of the credits being executed, the court clerk will agree to the accumulation of enforcements, ex officio or at the request of the party, to be heard in the same court or, at the request of the party, in distinct courts.
>
> 2. In other cases the court clerk will agree to the accumulation, ex officio or at the request of the party, when the criteria of economy and connection among the diverse obligations whose enforcement is sought apply".

That the decision regarding accumulation is attributed to the court clerk is theoretically deserving of positive assessment, for it is an unavoidable consequence of the central role granted court clerks in the matter of enforcement in article 456.3. a) of the Judicial Power Organization Act and that the draft bill fully recognizes in labour procedure.

Furthermore, the criteria of accumulation set out in the rule seem reasonable, preserving enforceability of the existing text in the case of the first section (insufficient assets), and also preserving the reference to the evaluation of the criteria of economy and connection among diverse obligations, in the second section, which ultimately allows for recognition of a sufficient margin of decision-making discretion when determining the practical utility of the intended accumulation.

Article 38 introduces criteria of determination of the seniority of enforcement that facilitate the settlement of doubtful cases: enforcement procedures will accumulate to the first that was ordered in the enforcement; if the order is of the

same date, it will accumulate to the seniority of the enforceable title; lastly, it will accumulate to the date of the claim.

Finally, article 39 establishes that accumulation will be agreed to by the court clerk through decree, and only in the cases in which there is lack of agreement among the court clerks of the bodies where the affected enforcements are transacted, the immediate "Social Affairs Chamber of the High Court ("high" with a lower case "h" is probably intended, as it could be the Supreme Court) common to both judicial bodies will decide".

1.3.2. ORDINARY PROCEDURE

Labour Procedure Act proceedings are partly affected regarding their regulation. Beginning with ordinary proceedings, the main modifications are the following:

1) The reform confers to the court clerk suspension of the acts of conciliation and trial at the request of the parties or on justified grounds, and the declaration of abandonment of the claim on the part of the plaintiff if the plaintiff fails to appear at the conciliation, while competence is attributed to the judge or bench if the plaintiff fails to appear at the trial (art. 83.1 and 2).

2) Once the procedural obstacles raised by the parties have been overcome in the trial, the reform introduces a new section 5 into article 85 in order to establish in this act a procedure in which the parties or their defence establish the facts in terms of which the conformity or lack of conformity of the litigants is based (concretion of admitted and controversial facts), upon which proof will devolve.

3) Regarding prejudicial criminal matters that might arise through "falsity of a document that could be decisive in the suit, because it is essential to the decision of the criminal case for due judgment or directly conditions the content

thereof", the reform of article 86.2 modifies the suspension effect of the labour procedure, in the sense that the trial will continue until the end –as now–, but conditions the suspension of subsequent proceedings in the event that "the judge or bench considers that the document could prove decisive in deciding on the merit of the case". This addition, which has an influence on the evidential significance of the document, is hard to justify insofar as said significance should be considered at any rate, for in order for documental falsity to have a prejudicial effect on labour proceedings it must involve "a document that could be *decisive in the suit*, *because it is essential to* the settlement of the criminal case for the *due judgment thereof or conditions directly the content thereof*" (our italics).

4) Regarding evidential matters, the following modifications are of interest:

- For a case of *ficta confessio*, it is added to article 91.2 that the questioned party must have participated personally in the events to which the questions refer and that their establishment as certain is wholly or partially prejudicial to said party, a modification that aligns this proof to the questioning of the parties in the Civil Procedure Act.

- In the bringing of expert evidence, it is required that this be carried out in the trial, the experts submitting their report and ratifying it. The existing prevention according to which the general rules regarding balloting of experts is eliminated (art. 93.1).

- The possibility that the court agrees ex officio to the issuance of decisions of competent public bodies as the final procedural step (instead of "in order to better anticipate, according to new article 88.1) is extended to proceedings in which a question of discrimination on the grounds of race or ethnicity, religion or beliefs, disability, age or sexual orientation has arisen (art. 95.3).

1.3.3. COLLECTIVE DISPUTE PROCEDURES

Article 160, in the draft, states that the court clerk will immediately stay the proceedings upon receiving, before judgment, notification from the parties that the dispute has been resolved.

1.3.4. APPEALS FOR REVERSAL OF JUDGMENT OR SENTENCE AND CASSATION APPEALS

In keeping with the general tone of the reform, articles 208.3 –cassation appeal– and 221.1 –cassation appeal for unification of doctrine– attribute to the court clerk the declaration of voiding of the appeal when the appellant fails to appear in the *ad quem* court after summonsing.

Furthermore, the reform maintains appeals for reversal of judgment or sentence and cassation appeals in the enforcement of judgment –the latter eliminated from civil procedure with the reform of the Civil Procedure Act of 2000– and extends them to orders that decide appeals for review filed against decrees of the court clerk, provided that, in one case and another, substantive points not contested in the trial, not decided upon in the judgment or that contradict what was enforced are resolved.

1.3.5. REVIEW OF JUDGMENTS AND FINAL ARBITRATOR'S AWARD

The intended wording of article 234 ("against any judgment issued by courts in the social affairs jurisdiction, the review anticipated in the Civil Procedure Act shall apply, which will be requested of the Social Affairs Chamber of the Supreme Court and shall be settled in accordance with said procedural Act, while the deposit for appeal will be the amount which the current law indicates for cassation appeals") and the corresponding heading of Chapter IV ("Review of judgments") does not make up for the omission that occurred at the moment in

which for the first time the character of enforcement order was extended to the ambit of social affairs enforcement, equating it expressly to final judgments, to "equally final arbitrator's awards, issued by the body that can establish them through the intra-professional and collective agreements referred to in article 83 of the Revised Text of the Ley del Estatuto de los Trabajadores (Law on the Status of Workers)" (seventh additional provision of the Labour Procedure Act, added by Law 11/1994 of 19 May), which did not regulate the judicial procedure for cancellation of the arbitrator's award, in spite of contemplating the possibility thereof in article 65.3, nor the review of final related-related arbitrator's awards.

Civil legislation and arbitration legislation, after diverse legislative options, expressly contemplate the review of final arbitrator's awards in accordance with what is set forth regarding procedural legislation for final judicial judgments, and as such it also argued that in labour arbitrations (excluded from civil arbitral legislation) and in the social affairs jurisdiction the possibility of urging review of final arbitrator's awards be regulated, thereby avoiding the existing defencelessness of the affected parties, especially execution debtors, that cannot obtain the nullity of an order that might contain grave defects, as well as serving to enhance this means of extrajudicial resolution of conflicts.

IX
REFORM NOT LINKED TO A SPECIFIC JURISDICTION

Free Legal Assistance

Article ten of the draft bill modifies, in five sections, Law 1/1996 of 10 January on Free Legal Assistance, in order to attribute to the court clerk judicial competence for carrying out determined service communication acts, writs of summons and calling to appear in court (arts. 7.3, 20 and 21), and introduces in article 16, as an innovation alien to the mere organizational aspect of the Judicial

Office, a special paragraph aimed at preventing fraudulent use of requests for free legal assistance as means of delaying the course of proceedings, establishing that said request can only have the suspensory effect when formulated within the time limits established in procedural laws. It is presumable that the innovation obeys the intention of avoiding the possibility that requests made extemporaneously might oblige the judge or bench to suspend proceedings when the primary goal sought by the petitioner is to delay the proceedings.

However, on this point we are forced to object on dual grounds, both from the perspective of the prerequisite on which it is based, the supposed binding obligation of the judge to the request, for in the current text the request for free judicial assistance does not under any circumstances oblige the judge to suspend proceedings, the judge being able to deny said request if he or she views abuse of process in the petition, and from the perspective of the technique adopted, consisting in restricting the margin of judicial discretion, which could result unjust situations of authentic privation of procedural rights due to mere failure to comply with a deadline.

Perhaps it would have been more appropriate to leave the precept as it was, such that the judge is the one who determines, in each case, if the intention of the petition is fraudulent or legitimate, *animus* which in no way can be bound to mere non-compliance with the submission deadline. It should be taken into account that adopting this modification would oblige the judge to deny the suspension, with the grave consequences this would have on the preclusion of proceedings and loss of rights, for the sole reason that the petition was submitted extemporaneously, even when there is no indication of genuine fraudulent intention in said delay.

Insofar as the organic legislation amply empowers the judge to avoid the potential disruptive effect on proceedings of any request considered a clear abuse of process or that entails abuse of process of the court or procedure (art. 11.2, Judicial Power Organization Act), it is more correct to fully maintain the judge's discretionary power in the matter of suspension of deadlines and proceedings, without limiting it or

restricting it to added determinations that, in certain cases, would give way to undue limitation of the procedural rights of economically vulnerable litigants.

Finally, the section 3 added to 46 in the following way is deserving of comment:

> "In the ambit of application of this chapter (Chapter VIII, "Free legal assistance in cross-border lawsuits of the European Union"), its provisions predominate among member States over the agreements and multilateral and bilateral treaties ratified by them. In relations with other States, the application of this chapter will not affect the remainder of agreements and multilateral and bilateral treaties ratified by Spain".

This rule of primacy in favour of the LAJG may exceed what is envisaged in article 20 of Council Directive 2002/8/EC of 27 January 2003, aimed at improving access to justice in cross-border disputes through the establishment of minimal joint rules regarding free legal assistance for said disputes –incorporated into Spanish legislation through Law 16/2005 of 18 July, modifying Law 1/1996 of 10 January on free legal assistance, in order to regulate the specialties of civil and mercantile cross-border disputes in the European Union. The reason is that the Directive establishes this primacy in its favour and not that of domestic systems: "The present Directive will take precedent, among member States and in relation to the matter to which it is applied, over the provisions contained in bilateral and multilateral agreements reached by member States.

2. Law 52/1997 on Free Legal Assistance to the State and Public Institutions

The third additional provision of the draft bill carries out in this law a lesser reform, one limited to updating the allusion to "the different Common Services or Managing Entities in which said legal practitioners are registered" through

reference to the "Legal Service of the Social Security Administration, to the management of Legal Service of the Social Security Administration".

3. Updating of currency

Articles of laws affected by the reform in which amounts in *pesetas* are converted into euros are numerous (v. 175.5 and 870, Criminal Procedure Act; 201.3 and 7, Mortgage Act; 97.3, 189.1, 223.3, 227.1 and 233.1, Labour Procedure Act; 81.1, 86.2, 96.3, 99.2 and 112, Contentious-Administrative Procedure Act; 190.2, 228.2, 247.3, 292.1, 441.4 and 812.1, Civil Procedure Act; and 20, LAJG), without updating of the amounts, a modification which, according to EM IV, could be carried out subsequently through the authorizations granted to the Government. Nevertheless, the modification of the texts is not complete, for *pesetas* are maintained in other articles, such as 513.1 of the Civil Procedure Act, section 2 of which, however, is modified, which makes comprehensive updating advisable.

Finally, there are other cases in which the reference to the limit of the amount in the "maximum amount envisaged for penalties in the Penal Code as a sentence corresponding to the misdemeanour" is replaced by an amount quantified in euros, as in article 239.2 of the Labour Procedure Act.

Thus concludes the report of the General Council of the Judiciary.

In witness whereof and for pertinent purposes, I hereby sign this document in Madrid, on the twenty-ninth of October of the year two thousand eight.