

Amendments introduced by the voluntary jurisdiction act (law 15/2015) and of interest to the insurance industry

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1. Introduction

In addition to aspects of a more general nature, the current Voluntary Jurisdiction Act (Law 15/2015 of 2 July published in the BOE, or official state gazette, on 3 July, hereafter the "LJV" for the Spanish) broaches certain questions which are of great interest as regards the day-to-day processing of case files by insurers and warrant a basic description of them in this article.

We particularly refer to the amendments introduced by it as regards the different ways of **designating the third adjuster**, as mentioned in article 38 of the Insurance Contract Act (hereafter the "LCS" for the Spanish) for those cases where there is no agreement between the parties on designating such person. Additionally, as regards the regulation of procedures for the **payment into court of compensation** for the purpose of releasing the insurer from his obligation to pay in those cases where two persons claim to be entitled to receive the compensation or those other cases where the beneficiary, the party harmed or the insured (according to the various different situations) refuse to accept the payment. Change has also been made to the general regulation of **settlement hearings** which are sometimes used by the insured, without any need for the case to go to trial, to encourage reconsideration of the decision taken so as to try to obtain extra-procedural satisfaction of the interests at stake. These hearings are not very usual in insurance activity and occur in certain cases of claims where the insured does not approve of either the compensation or the rejection of the claim as a step prior to initiation of the declaratory court proceeding.

Finally this is of interest as regards the handling and payment of compensation, finding out about the amendments that concern rights to succession and inheritance, and especially with respect to the **broader definition of eligible cases where a declaration of heirs by a notary public can be applied for**.

With respect to competence to execute acts of voluntary jurisdiction, in short, the LJV upholds some of the powers proper to judges, principally exclusive hearings of voluntary jurisdiction proceedings that affect the fundamental rights of citizens or the interests of minors or persons who deserve special protection. Nevertheless, in other kinds of voluntary jurisdiction cases, as we shall see, there is the possibility of the parties concerned also availing themselves of other legal actors such as notaries public. Let us therefore now look at the amendments of most interest within the activities in the insurance industry.



The chief amendment which the LJV introduces is that, before it came into force, if there were discrepancies between the adjusters designated by the insurer and the insured and there was no agreement on the designation of the third adjuster, it was the judge of the court of first instance in the place where the assets were located who had the competence to designate him or her.

Now the designation of the third adjuster can be processed either through the home Commercial Court of the insured, where it is the court clerk (the justice administration lawyer under the reform made legally operative in the Organic Law on the Judiciary via LO 7/2015) who will appoint him in the event of a lack of agreement between the parties, or else before the notary public in the manner laid down in art. 80 of the Notarial Profession Act of 28 May 1862, (hereafter the LN).

2. Regulation of the designation of a third adjuster

In **Final Provision nine** of the LJV, it amends **paragraph six of article 38** of Law 50/1980 of 8 October, the Insurance Contract Act (LCS).

The new wording (in italics) of Art. 38 LCS reads thus:

"Where there is no agreement between the adjusters, both parties shall designate a jointly approved third adjuster. Should there be no such adjuster, a procedure may be initiated in the manner envisaged in the Voluntary Jurisdiction Act or in notarial legislation. In such cases the adjuster's report shall be issued within the space of time indicated by the parties or, failing this, within thirty days starting from when the third adjuster accepts his appointment."

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It thus becomes necessary to look more closely at both possibilities:

2.1. Court processing of the appointment of the third adjuster

The procedure is described in the LJV itself, specifically under **HEADING VIII "Voluntary jurisdiction cases concerning commercial matters", in Chapter VIII "Appointing an adjuster in insurance contracts"** which comprises **Arts. 136-138 LJV**. Briefly, the regulation is as follows:

- a) **Standing to initiate it:** Either of the parties to the insurance contract or both together may initiate this action.
- b) **Competence:** The commercial court in the place where the insured's address is has competence.
- c) **Representation and defence:** During the processing of this case the involvement of an advisory and a court lawyer is not mandatory.
- d) **Initiation of the procedure:** The procedure is initiated by means of a submission being filed by either of the parties concerned, which must include:
 - The facts concerning which there are discrepancies between the adjusters designated by the parties concerned in setting a value on the damage suffered.
 - The appointment of a third adjuster is to be requested.
 - It should be accompanied by the insurance policy and the adjusters' opinions.
- e) **Processing:**
 - The parties are summoned to appear and when they do so the justice administration lawyer shall urge the parties concerned to agree on appointing another adjuster. Failing agreement, he shall name one pursuant to the rules laid down in the Code of Civil Procedure.

- The nomination having been made, the person designated shall be informed so that they can state whether they accept the role or not.
- Once the role has been accepted, the parties are asked to provide funding divided half each. The adjuster must issue his decision within the space of thirty days, which will be added to the file, whereupon the case shall be considered to be concluded.

2.2. Notarial processing of the appointment of the third adjuster

The procedure is described in **final provision eleven of the LJV** which amends the **Notarial Profession Act (LN)** by inserting **Heading VII, "Intervention by Notaries in procedures and special proceedings"**, where the regulation which is contained in **CHAPTER VI "Cases concerning commercial matters", Section 3 "Appointing adjusters in insurance contracts"** is of particular relevance to the situation that concerns us here.

- a) **Standing to initiate it:** Either of the parties to the insurance contract or both together may initiate this action.
- b) **Competence:** Competence to nominate falls to the notary public whom the insured and the insurer choose by mutual agreement. Failing agreement, this may be any notary among those who live in the place where the address or normal residence of the insured is or where the object of the valuation is, at the election of the petitioner. A notary may also be chosen from a district neighbouring those above.
- c) **Initiation of the procedure:** The procedure is initiated by means of a submission being filed by either of the parties concerned which must include:
- The facts concerning which there are discrepancies in setting a value on the damage suffered between the adjusters who were designated by the parties concerned.
 - The appointment of a third adjuster is to be requested.
 - It should be accompanied by the insurance policy and the adjusters' opinions.
- d) **Processing:**
- The notary summons the parties to appear so that the parties concerned can agree on the nomination of another adjuster. If no agreement is reached, the procedure is to name one pursuant to article 50. This article establishes a system (similar to that used in the courts, *mutatis mutandi*) whereby every year the chairman of each notaries' association requests that the various professional associations handle the study of the matters that are the object of the different skills and sends a list of members or affiliates to act as adjusters who will be at the disposition of the notaries in their notaries' association. The association shall make the designations from this list in consecutive order, as and when they are requested by the notaries public who belong to it.
 - Once the nomination has been made, the person designated shall be informed so that they can state whether they accept the role or not.
 - Once the role has been accepted, the parties are asked to provide funding divided half each. The adjuster must issue his decision within the space of thirty days, which will be added to the file, whereupon the case shall be considered to be concluded.

3. Regulation of the procedures for making deposits of assets and payment offers

As is the case with appointing an adjuster, deposit procedures can be processed either via the courts or through a notary public.

It is important to remember that **art. 92 of Final Provision One of the LJV** also amends certain articles in the **Civil Code** concerning legal deposits, specifically **arts. 1176, 1178 and 1180**, and adapts them to the new procedure.

The new wording (in italics) of the articles of the Civil Code that have been amended by the LJV reads thus:

Article 1176

"If the creditor to whom the offer of payment is made pursuant to the provisions regulating the latter should decline, either expressly or de facto, for no reason to accept it, or to sign the document evidencing that the guarantee has been made or cancelled (should such document exist), the obligor shall be released from their liability via the deposit of the item owed.

The act of making the deposit alone shall give rise to the same legal effect when it is performed while the creditor is absent at the place where payment should be made, or when he is prevented from taking receipt of it at the time when this should be done, and when several persons claim to be entitled to take receipt, whether the creditor is unknown or the deed of title which has the obligation in it has been mislaid.

Whatever the circumstances, making a deposit shall be appropriate in all those cases where honouring the obligation becomes more burdensome for the obligor for reasons not attributable to him."

Article 1178

"The deposit shall be made by the obligor or by a third party and by placing the items owed at the disposition of the Court or the Notary and on the terms envisaged in the Voluntary Jurisdiction Act or in notarial legislation."

Article 1180

"Acceptance of the deposit by the creditor or a legal declaration that this has been performed properly shall extinguish the obligation, and the obligor may apply for an order to cancel the obligation and the guarantee, as appropriate.

Meanwhile, the obligor may withdraw the item or sum left on deposit, thus leaving the obligation still in effect."

3.1. Judicial processing of deposit procedures

The regulation of Deposits in court in the LJV is contained in arts. 98 and 99 of Chapter II of Heading IV thereof.

- a) **Competence:** this falls to the judges of first instance in the place where the obligation must be fulfilled and, if there should be several of them, this shall be the one who is indicated by the applicant, and failing this, the one for the place where the obligor's address is.
- b) **Representation and defence:** As regards the processing of the deposit, the intervention of an advisory or a court lawyer is not mandatory.
- c) **Initiation of the procedure (Art. 99 LJV):** The procedure is initiated by means of a submission being filed which must include:
 - The details and circumstances identifying the parties concerned in connection with the obligation that the deposit relates to, and their addresses.
 - The facts and reasons behind the deposit and everything in relation to the object of the deposit and its placing at the disposition of the court and what is being sought with respect to the deposit.
 - There must be accreditation of the offer of payment, if appropriate, and, in all circumstances, notice of the deposit to the creditor and any other parties with an interest in the obligation.

If the requirements are met, the justice administration lawyer shall notify those concerned that a deposit exists so that they can withdraw the item owed within the space of 10 days.

Processing:

- If the persons concerned appear and withdraw the item and indicate their express acceptance of the item, the lawyer from the justice administration shall issue a procedural order declaring it as having been accepted.
- If, in the space of 10 days referred to above, no pleadings have been filed by the persons concerned or the deposit has not been accepted, **the initiator** has **five days** in which to press for the return of the item on deposit or ask for it to be retained.
 - **If he seeks the return of the deposit**, the request is passed on to the creditor for a further five days to see whether he authorises its return. If he does authorise this, the initiator can withdraw the deposit and the justice administration lawyer shall issue an order resolving that the procedure be shelved, whereupon the creditor loses all precedence over the item and any joint initiators and guarantors are released from their obligations in this regard. If the creditor fails to reply, the initiator may withdraw the item and the procedure is shelved, although the obligation remains in effect.
 - **If he asks for the deposit to be retained**, an appearance before a judge shall take place and the latter shall rule on whether the deposit has or has not been made properly. If it has been made properly, the item is handed over to the creditor and the obligation is cancelled if the initiator requests this, while if it has not been made properly, the deposit is returned to the initiator and the obligation remains in effect.

3.2. Notarial processing of deposit procedures

The regulation of notarial deposits is also implemented in the reform of the **Notarial Profession Act (LN)** discussed above, wherein a new **Heading VII** has been created which refers to Intervention by **Notaries** in procedures and special proceedings introduced by section one of final provision eleven of the LJV.

Chapter IV, Section 1, art. 69 LN regulates offers of payment and deposits before a notary, whereas **arts. 70 and 71** of Section 2 are given over to the regulation of unrefuted monetary debts. At this point we shall focus on art. 69 LN:

Initiation: The initiator of the procedure must state

- The details and circumstances identifying the parties concerned in connection with the obligation that the payment offer or deposit relates to, and the address at which they can be located.
- Additionally, the reasons for acting, and everything that relates to the object of payment or deposit and the placing of this at the disposition of the notary public.

When the assets deposited consist of money, securities or financial instruments, they shall of necessity be deposited by the notary public with the financial institution that is acting in conjunction with the justice administration.

Should these be of a different nature to the assets mentioned in the previous paragraph, the notary public shall arrange for them to be deposited or entrust them to the custody of a suitable establishment for such purposes, and in so doing shall ensure that the necessary measures are taken for their safekeeping, which shall be properly evidenced by means of a document filed as part of the proceedings.

Processing: The notary public shall advise the interested persons that an offer of payment or deposit exists so that within the space of 10 business days they can accept payment, withdraw the item owed, or file any pleadings that they view as appropriate.

- Should the creditor reply to the request by accepting the payment or item on deposit within the window allowed for this, the notary public shall hand over the asset to him and ensure that this is evidenced on record, and then the procedure shall be held to have concluded.
- If, after the window has passed the creditor has failed to withdraw the asset, failed to file any pleading or declined to take receipt of it, the item on deposit shall be returned with no further formal processing and the file shall be shelved.

4. Regulation of settlement hearings or procedures

In this case as well, settlement hearings or procedures can be processed either through the courts or extra-judicially.

4.1. Court processing of settlement action

The regulation of settlement hearings in the **LJV** can be found in **Heading IX, articles 139-148**. The characteristics and procedure involved in this is as follows:

a) **Scope of settlement and exclusions:**

Generally, in all cases, prior settlements can be initiated, provided that these do not involve any minors or persons having judicially revised capacity as regards the free administration of their assets, the state, the autonomous communities and other arms of government administration, corporations or institutions of a similar nature and, generally, any that are initiated in connection with matters that cannot be subject to legal settlement or submission to arbitration.

b) **Competence:**

Competence shall fall to the lawyers of the justice administration who belong to the courts of first instance or the commercial court that corresponds with the address of the respondent, depending on the matter at hand.

c) **Procedure:**

Initiation: The procedure is commenced via a submission filed by the party concerned (neither advisory nor court lawyers are mandatory) which should include:

- The details of the petitioner and the respondent in the settlement and the place of residence in question.
- The object of the settlement which is sought, giving clear indication of the purpose of any reconciliation.
- Any documents held to be relevant should be included.

Holding of the settlement hearing: The justice administration lawyer shall summon the parties to appear:

- If the applicant fails to appear the case shall be shelved and considered to have been abandoned.
- If the respondent fails to appear, reconciliation shall be deemed to have been attempted without legal effect. If there are several different respondents, if any of them appear, the settlement hearing shall be held with them and shall be held to have been attempted with respect to the others.
- If both parties appear, the petitioner shall set out his claim and the respondent shall reply as he considers appropriate, while the justice administration lawyer shall attempt to have them reach a settlement.
- Should there be agreement, the terms of the settlement shall be left on record in the minutes signed by those appearing.
- Should no settlement be forthcoming, this shall be left on record in the minutes.

Once the hearing has finalised, the court clerk shall issue a procedural order whereby a record shall be left of the outcome, be this a settlement, disagreement or a legally fruitless attempt to reconcile, and proceedings in this regard shall be shelved definitively.

d) **Legal effects, especially with regard to prescription:** The presentation with subsequent leave to proceed of a petition for settlement interrupts adverse possession and extinctive prescription, and the time period for this starts to count again when the order by the justice administration lawyer is issued whereby the procedure is closed.

e) **Enforcement:** competence to enforce shall belong to the same court that processed the settlement hearing where this refers to matters that fall within its jurisdiction, while in all other cases competence lies with the courts of first instance which would have been called upon to hear the suit. Likewise enforcement shall be carried out pursuant to the Code of Civil Procedure with regard to enforcing judgments and agreements that have been judicially approved.

f) **Application for annulment:** This remedy can only be exercised on the same grounds that invalidate contracts, which are those contained in arts. 1300 to 1314 of the Civil Code.

4.2. Notarial processing of settlement procedure

The regulation of notarial processing for settlement procedure is also contained in the reform of the **Notarial Profession Act (LN)** referred to above in which, as we have already said, a new **Heading VII** has been created on Intervention by **Notaries Public** in procedures and special proceedings that is introduced by section one of final provision eleven of the LJV. To be precise, Chapter VII of this Heading, Arts. 81 to 83 LN., is called **“Settlement procedures”** and provides for the procedure to follow in notarial settlement, which, briefly, is as follows:

a) **Scope of application, exclusions:** Its purpose is to settle the different conflicting interests in any commercial, inheritance or family dispute so as to reach an extra-judicial agreement. Even so, notarial settlement may not be permitted with regard to non-applicable matters such as those where minors or persons with judicially revised capacity or government administrative bodies are concerned or with respect to matters regarding which legal settlement or submission to arbitration are not allowed.

b) **Procedure:** No specific procedure is established for this purpose, for which reason formalities are left to the discretion of whatever the notary public may consider appropriate.

5. Amendments to the regulation for declaring heirs

The LJV also makes certain amendments as regards the matter of inheritance and the declaration of heirs, which participants should be aware of for the sake of proper processing of procedure. The amendments mentioned affect numerous articles in the **Civil Code**, namely articles 681, 689, 690, 691, 692, 693, 703, 704, 712, 713, 718, 756, 834, 835, 843, 899, 905, 910, 945, 956, 957, 1005, 1008, 1011, 1014, 1015, 1017, 1019, 1020, 1024, 1030, 1033, 1057 and 1060.

Whatever the case and as regards the relatively limited purpose of this article, it should be noted that the LJV does not just provide for the intervention of notaries public in most proceedings relating to wills and heirs, such as the declaration of heirs on intestacy, or the certification of statements not made before a notary public and the notarisation of wills, but it also amends the Law of Government Succession so that, in the case of a declaration of heirs on intestacy in favour of general government, the autonomous communities or of other bodies, this is also referred to out-of-court solutions. This also justifies the reform of article 14 of the Mortgage Act in order to recognise (together with the will and the inheritance agreement) proclamatory notarial documents as instruments of hereditary succession in the declaration of heirs on intestacy (for the purposes of the Register) and the administrative declaration of either the state or the autonomous communities as heirs on intestacy.

After the coming into effect of the LJV, **notarial competences in the matter of succession and inheritances have broadened considerably:**

- 1) **Notaries public have come to have exclusive competence to declare heirs on intestacy, thereby removing competences that have thusfar belonged to the judges of first instance in the place where the deceased had their normal residence, given that it fell to them to make such a declaration if the heirs were siblings, nephews or nieces, or other collateral kin of the deceased or else the state.**
- 2) It is also before them that sealed wills and holographs will have to be presented, certified, opened and notarised.
- 3) The notary public shall also authorise the public deed of resignation or continuation of the executor, as well as that for the designation of the court-appointed partitioner of the estate, the resignation thereof or continuation in the position, as well as the approval of the partition of the estate carried out by the court-appointed partitioner thereof when approval for this is necessary. Likewise it falls to the notary public to approve the partition of the estate when

payment in cash is made of the legitimate inheritance of the offspring and descendants and there is no confirmation of these. These competences are shared by the notary public with the justice administration lawyer and the person concerned can choose between the two legal professionals to process such procedures.

- 4) **Acceptance of the inheritance by benefit of inventory or with the right to deliberate must always be performed before a notary public.** In such cases the making of the inventory which follows acceptance of the inheritance shall also be performed before a notary public, where the notary public who is competent to do this is the one who emerges after applying the same rules on territorial jurisdiction that are stated for declarations of heirs on intestacy.
- 5) **Any party concerned may request that the heir accept or waive the inheritance through a notary public within the space of 30 calendar days, warning them that if they fail to declare their wish within this window, the inheritance shall be understood to have been accepted purely and simply. This notarial activity arises from the new wording which the LJV has given to article 1005 of the Civil Code.**

Processing: Another of the amendments introduced by **Final Provision eleven** of the **LJV** into the **Notarial Profession Act (LN)** via **Heading VII** thereof is what is set out in **Chapter III**, which implements the regulations on procedures for successions, **arts. 55 and 56 LN** being reserved for declarations of heirs on intestacy.

- According to **art. 55, competence** to process the procedure **falls to the notary public** for the last address or normal place of residence of the deceased, i.e. the one for the place where the deceased has died, the one for the place where the bulk of their estate might be found or any other notary public who practices in neighbouring districts, and in the absence of all of these, the notary public for the address of the person who calls upon the notary public to initiate the certification procedure.
- On the other hand, **art. 56** brings new regulation of the **procedure** for declaring heirs on intestacy and introduces the step of a hearing for those parties concerned, the right of any person involved to oppose and the express reservation of rights in favour of those who did not appear in the procedure or whose claim was not addressed so that they can file it via the appropriate judicial channels.

To sum up, it should be highlighted in relation to this section that, with the regulation established in the LJV, declarations of heirs on intestacy must in general be made before a notary public, except in those cases where a declaration of the state as heir is sought, this function being in all circumstances resolved out of court.