

# International Civil Fraud

Jurisdictional comparisons

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# Spain

**Pérez-Llorca**

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## 1. THE BASIS OF CIVIL FRAUD OBLIGATIONS UNDER SPANISH LAW

### Civil fraud under Spanish law

The legal concept of civil fraud, as understood in common law systems, does not exist under Spanish law. There are no specific procedural rules for causes of action based on civil fraud. However, there are different causes of action based on civil liability, under which the existence of wilful misconduct is a form of aggravated responsibility. Therefore, certain situations that fall within the common law concept of civil fraud are present in many liability regimes under Spanish law.

This chapter discusses the different liability regimes regulated by the Spanish Civil Code (*Código Civil*) (SCC) and focuses on cases of civil liability for wilful misconduct. In this regard, the article distinguishes between the following liability regimes:

- contractual liability;
- tort liability;
- pre-contractual liability;
- contractual invalidity caused by defective consent;
- contractual invalidity due to unlawful causes;
- specific cases.

### Contractual liability

Contractual liability is the obligation to remedy damages caused in connection with the failure to perform a contract. In the context of contractual liability, civil fraud is similar to the legal concept of *dolo* which entails a wilful breach of obligations (*dolo contractual*) (Articles 1101 and 1102, SCC). However, the Spanish courts have had a significant role in interpreting what *dolo* is and what its consequences are.

### Tort liability

Tort liability is the obligation to remedy damages when there is no contractual link between the cause of the damage and the affected party. The regulation of tort liability is set out in Articles 1902 to 1910 of the SCC. Wrongful conduct leading to damage could have originated with the defendant (direct liability) or with a third party (vicarious liability). Articles 1903 to 1910 of the SCC outline the cases in which vicarious liability exists, for example:

- parents and guardians;

- owners or managers of establishments;
- companies or entities;
- persons in charge of education centres;
- owners of buildings.

There are also specific tort liability regimes concerning the amount of the damages, time limits, and so on. For example:

- civil liability of managers for defective products and civil liability for harm caused to consumers and users (*Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*);
- civil liability for motor vehicles (*Real Decreto Legislativo 8/2004, de 29 de octubre, por el que se aprueba el texto refundido de la Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor*);
- civil liability for damages caused by nuclear or radioactive materials (*Ley 12/2011, de 27 de mayo, sobre responsabilidad civil por daños nucleares o producidos por materiales radiactivos*).

### Pre-contractual liability

The legal concept of *dolo* not only entails a wilful breach of obligations, but can also mean that one of the parties has:

- wilfully induced the other party to enter into an agreement under false pretences; or
- failed to provide the correct information.

In pre-contractual liability (*dolo precontractual* or *dolo in contrahendo*), Spanish law pays particular attention to consumer protection. In this sense, practices such as misleading actions or omissions that mislead the consumer into entering into a contract can be classified as misconduct.

### Contractual invalidity due to defective consent

A contract does not exist if it does not contain certain fundamental elements (that is, consent, object and cause) (*Article 1261, SCC*). In particular, when consent has been given in error, or as a result of violence, intimidation or fraud, it is void and the contract will be deemed null and void. In this chapter, we focus on the assumption of contractual invalidity arising as a result of fraud (or *dolo* (see above, Contractual liability)). Articles 1265, 1269 and 1270 of the SCC establish the regime for contractual invalidity based on the existence of *dolo*.

### Contractual invalidity due to unlawful causes

Contracts with unlawful causes have no effects (*Article 1275, SCC*). By unlawful causes we mean any cause that is contrary to the law or morality. For example, case law has considered contracts entered into under the following circumstances as null and void:

- contracts that restrict or limit competition between companies (*Ley 15/2007, de 3 de julio, de Defensa de la Competencia*);
- a contract whose particular cause may be detrimental to a third party. An example of this would be a partnership agreement reached to the detriment of its minority shareholders.

### Specific cases

Civil liability in Spanish law is a comprehensive regime, with a wide range of examples. Therefore, in addition to the more generic cases discussed above, there are specific cases of liability which are subject to special rules. The most relevant example is creditor fraud, giving rise to the revocation cause of action (*acción pauliana*) (*Article 1111, SCC*). This cause of action is a defence mechanism for creditors by which they can request the revocation of acts performed by the debtor to their detriment.

A revocation cause of action is also contemplated in the context of insolvency proceedings (*Article 71, Insolvency Act (Ley 22/2003, de 9 de Julio, Concursal)*). Unlike the *acción pauliana* (see above), the existence of fraudulent intent is not required. In any case, this specific cause of action is compatible with the *acción pauliana* (ie they can be initiated at the same time).

Spanish law also establishes civil liability for directors of a company who carry out their duties negligently. Therefore, the law attributes liability personally to those who manage the company in a negligent way. This system seeks to protect:

- third parties (usually company creditors);
- the assets of the shareholders; and
- the assets of the company.

### The difference between civil and criminal fraud under Spanish contractual law

This article focuses on analysing the regime of liability arising from the civil fraud. However, it is necessary to point out the difference between civil and criminal fraud, given that it is an important aspect of contractual liability under Spanish law. Very serious cases of civil liability, in certain circumstances, may also constitute a criminal offence. In these cases, civil and criminal liability are fully compatible. Criminal liability is regulated by the Spanish Criminal Code (*Código Penal*) and presents an independent regime from civil fraud regulation. This article will focus on civil fraud and its regulations under Spanish law.

### Reform

There are no proposals for reform. It appears that some of the courts may be relaxing the standard of proof of *dolo precontractual* (see section 2, Pre-contractual liability) when a qualified party (such as a bank) is involved. However, this trend only appears in cases related to the annulment of certain financial products (eg securities and swaps).

## 2. THE MAIN ELEMENTS OF CAUSE OF ACTION IN SPAIN BASED ON CIVIL FRAUD

### Basic requirements

Generally, to assess whether civil liability exists, based on *dolo* (see section 1, Contractual liability), the law establishes certain requirements:

- the objective element: this refers to the behaviour of the party acting fraudulently. However, the SCC does not enumerate which specific

behaviour signifies the existence of *dolo*. Case law and scholars identify *dolo* as wilful misconduct, either by commission or omission;

- damages: damages can be defined as any impairment that a person suffers to their property as a result of a particular event. To be remedied, damages must be certain and not hypothetical. Generally, it can be asserted that all material and moral damages suffered by the affected party or his estate must be remedied (eg any damage to property rights or other economic rights, physical injuries, any non-monetary harm or violation of the affected party's rights);
- the existence of a causal link between the conduct and the damages. The Spanish Supreme Court understands that the harmful result must be a natural, adequate and sufficient consequence of the wrongful conduct. One must necessarily have led to the other.

Although these are the main elements of a cause of action based on civil liability, each specific cause of action when *dolo* is alleged to have occurred have their own specific considerations (see below).

### Contractual liability

The more generic cause of action based on contractual liability is governed by Articles 1101 and 1102 of the SCC. In addition to the basic requirements (see above, Basic requirements), for this cause of action to succeed there must also be a breach of contract.

To show the existence of *dolo* (see section 1, Contractual liability), *animus decipiendi* must also exist (that is, the purpose of misleading the other contracting party to obtain their consent). This means that the particular misconduct should have been wilful.

The *dolo* causing the breach of contract must be significant. According to case law, to be considered significant, the wilful misconduct must be sufficiently serious.

### Tort liability

Tort liability stems from an act or omission (ie misconduct) involving fault or negligence (*Article 1902, SCC*). Fault or negligence is defined as the failure to act with the standard of diligence as duly required by the nature of the obligation. The main feature in determining whether there is fault or negligence is predictability (that is, people are liable for events that are foreseeable). Scholars understand the event causing damage to be foreseeable if it is reasonable to expect the situation to occur if one were not to act with the normally required level of diligence.

In addition to conduct involving fault or negligence, tort liability also arises when the damage has been caused by wilful misconduct. A person acts wilfully if they both:

- are aware that their behaviour causes or may cause damage;
- fail to take the necessary steps to prevent it.

According to case law, this fact in itself entails fraud.

### Pre-contractual liability

Civil liability may also arise out of misconduct during the drawing-up stage of the contract (ie *dolo in contrahendo*). There is *dolo* in *contrahendo* when both:

- the pre-contractual information received by the party/consumer is false or omits information and deceives, or is likely to mislead the party/consumer;
- party/consumer entered into a contract that they would not have entered into otherwise.

### Contractual invalidity due to defective consent

Wilful misconduct leading to the annulment of a contract consists of insidious words and machinations designed to bring the consent of the other party to the contract (*Article 1269, SCC*). Case law considers that any lie, trick or concealment may constitute *dolo* (see section 1, Contractual liability). However, for a contract to be declared null and void, the following additional requirements are required:

- error: this is defined as insidious behaviour carried out with an intention to mislead, that causes the contracting party to make an error. In addition, the error made should:
  - affect essential elements of the contract; and
  - be excusable (ie it could not have been avoided with the affected party's diligent behaviour).

However, if wilful misconduct is caused by an omission (*dolo omisivo*) (that is, when the party responsible has consciously hidden relevant information, to obtain the contractual consent of the counterparty), the contract is considered null and void even if the situation in which the error caused by *dolo* was not excusable.

- decisive nature: *dolo* is decisive when, in the absence of misconduct, the contracting party affected by the conduct of the responsible party would not have concluded the contract. In other words, a causal link between the misconduct and the error entered into is fundamental.

If any of the above requirements are not met, the misconduct is called incidental fraud or *dolo incidental*, as it was not the determining factor in a cause of action of annulment. The difference between intentional or incidental fraud is that the affected party is entitled to claim different remedies for them (see section 3).

### Specific causes of action

#### Cause of action based on creditor fraud

For a cause of action based on creditor fraud to succeed, all of the following conditions must be met (*Articles 1111 and 1291 et seq., SCC*):

- the existence of a fraudulent act. According to scholars, any legal act or financial transaction which is detrimental to creditors can be a fraudulent act;
- the existence of a credit in favour of the creditor/claimant which had expired before the fraudulent act;
- creditor loss. This involves a fraudulent act that jeopardises the possibility of credit compliance. Scholars and case law consider that it is not necessary for the debtor to be insolvent to bring this cause of action; and
- the majority of scholars consider that *animus decipiendi* (ie the intention

to cause damage to creditors) is not required. All that is required is that the debtor is aware of the damage that his act has caused the creditors.

#### **Liability of company directors.**

Spanish law requires that a relationship exists between the director's conduct and the damage caused. Therefore, it must be proved that the director's breach of duties did in fact cause damage to either the company, shareholders or third parties.

Directors are liable to the company, its shareholders and its creditors for damages caused by either:

- acts or omissions contrary to law or to the company's bye-laws;
- acts carried out in breach of the duties inherent to their position.

The approval, authorisation or ratification of the invalid act or resolution by the general shareholders' meeting does not release directors from their liability.

Spanish law establishes two procedures through which directors' liability can be claimed:

- corporate actions: this cause of action will be carried out by the company by means of a previous resolution approved in the shareholders' meeting. The shareholders holding at least 5 per cent of the company's share capital can also request that a general shareholders' meeting be convened. The company's creditors can initiate a corporate action based on civil liability against the directors if the action is not initiated by the company or its shareholders, provided that the company's assets are insufficient to ensure the payment of their credits. These actions are designed to indemnify the company for damages caused by the director's conduct in breach of their obligations;
- individual actions: these claims seek to indemnify the shareholders or third parties for damages caused directly by the director's actions or omissions.

### **3. REMEDIES AVAILABLE UNDER SPANISH LAW IN RELATION TO CIVIL FRAUD**

There are a number of remedies available for civil fraud. In civil liability causes of action, the SCC establishes the following remedies, among others:

- specific performance;
- equivalent performance;
- damages;
- suspension of the claimant's obligations;
- price reduction;
- termination of the contract; and
- restitution of the enrichment achieved by the debtor through the fraudulent action (action for unjust enrichment).

#### **Contractual liability**

In simple contractual liability, the claimant can seek two main remedies (*Article 1124, SCC*):

- specific performance of the contract plus damages; or
- termination of the contract due to a wilful fundamental breach plus damages.

Specific performance can consist of either:

- delivering the specific thing or specific completion of the transaction; or
- if delivery or completion is not possible, an equivalent performance.

Equivalent performance occurs when specific performance in the strict sense is impossible or too costly for the debtor. Technically, this claim is articulated as an action for damages (*Article 1101, SCC*).

According to case law, the claimant can request the termination of a bilateral contract if all of the following apply:

- the obligation breached was essential;
- the breach of contract was serious (in the sense that the purpose of the contract is frustrated); and
- the claimant has not defaulted on his own obligation.

The termination of the contract implies that the claimant has ended the legal relationship. The claimant can, after opting for specific performance, request the termination of the contract when compliance is impossible.

In any case, the claimant can also include a claim for declaratory relief (for example, relating to nullity of the contract, breach of the contract, or the existence of an act or omission violating laws).

#### **Tort liability**

If the claimant seeks that the defendant is ordered to do something, the claimant can claim either:

- performance in kind (specific performance), through repairing or replacing the thing harmed, or equivalent performance, which consists of paying the amount at which the thing harmed is valued;
- compensation for the damages sustained (eg a third party is entrusted to perform the obligation and the defendant will be ordered to pay the costs incurred by the claimant in having the obligation performed). This option is valid unless specific performance is impossible (or particularly onerous).

The affected party can also request the removal of the cause of the damage.

#### **Pre-contractual liability**

In *dolo precontractual* (see section 1, Pre-contractual liability), the party can request that the court declare a contract null and void. In this case, the parties should be left in the same position they would have been in if the contract had never existed. However, only current damages (such as legal fees) can be claimed (ie loss of profit is not included in the compensation for damage in pre-contractual liability).

#### **Contractual nullity due to defective consent**

If consent to a contract has been given due to wilful misconduct, the contract is voidable (*Article 1300 et seq., SCC*). Article 1270 of the SCC establishes that, for the contract to be void, the insidious conduct must be serious and must

not have been carried out by both contracting parties. There is confusion between the concepts of void and voidable. However, case law has resolved this issue by establishing that contracts entered into with *dolo* (see section 1, Contractual liability) are voidable.

Additionally, wilful misconduct entitles the victim to seek compensation for the damage caused. However, case law clarifies that the claimant can seek negative interest as damages (ie the cost of entering into the contract) but not the performance interest (ie the profit that would have been generated if the contract had been honoured).

If the misconduct is classified as *dolo* incidental (see section 2, Contractual invalidity due to defective consent), the affected party can only seek damages; the contract will remain valid (*Article 1270, SCC*).

### Contractual nullity due to unlawful cause

In contracts with unlawful causes, the responsible party cannot (*Articles 1305 and 1306, SCC*):

- claim the restitution of what they have provided under the contract; or
- request the fulfilment of what the other party has promised under the contract.

By contrast, the party that is not responsible can claim the restitution of what they have provided under the contract but are not required to comply with their obligations. Specific performance is not available for this kind of cause of action.

In the case of contractual provisions that are contrary to competition law, case law states that the whole contract is null and void due to the unlawful provision. The nullity of the contract can be requested by either contracting party, regardless of who is responsible for the inclusion of the anti-competitive clause. Therefore, in practice, Article 1306 of the SCC could allow the party responsible for the unlawful cause to bring the action and claim restitution.

### Specific situations

The remedy in causes of action based on creditor fraud is the termination of the contract or agreement. This termination operates *ex tunc* (that is, from the outset) and implies the reversing of all the consequences of the contract and restoring matters to their status before the contract was entered into. Therefore, the remedy for this cause of action is the obligation to return the goods acquired by fraud, wherever possible, with their price and interest (*Articles 1295 and 1298, SCC*). Otherwise, the debtor must compensate the damages caused.

A party affected by a director's conduct, actions or omissions can seek, before the Spanish courts, compensation for the damage brought about by the director's negligent management of the company. This compensation usually covers the current damage caused by the director's wilful misconduct.

## 4. DAMAGES; BASIS OF CALCULATION

Assessing damages is the courts' task and is a discretionary power (ie the valuation is based on the circumstances of the case). The concept of damages under Spanish law is based on the idea of indemnity, that is, the claimant

must be left in the same position as if the conduct of the liable party had never occurred. Punitive damages (see section 7.4) and consequential damages are not recognised.

### Damages for each cause of action

#### Contractual liability

Articles 1101, 1106 and 1107 of the SCC regulate damages for contractual liability. Specifically, in claims of *dolo contractual* (see section 1, Contractual liability), the claimant can request compensation for both:

- the damages that it has suffered;
- loss of income derived from the fraudulent breach of contract.

Requests for damages caused by actions with *dolo* may result in the defendant being ordered to pay unforeseen damages.

#### Tort liability

In actions based on tort liability, the claimant can request compensation for both:

- the damages already suffered;
- loss of income derived from the negligent act or omission.

In an action for tort liability, the defendant is only liable to pay foreseeable damages, unless the damage is caused by wilful misconduct, in which case the defendant may also be obliged to pay unforeseen damages.

#### Pre-contractual liability

In actions where *dolo precontractual* (see section 1, Pre-contractual liability) is present, the claimant is only entitled to be placed in the same position they were in before the contract was entered into.

#### Assessment of the damages

To determine the amount of damages to be granted to a victim of wilful misconduct, the court usually assesses the current damages and loss of profit, if proven, suffered by the affected party. This assessment is made on a case-by-case basis, with all circumstances being taken into account. Additionally, there are specific rules for the assessment of damages in particular cases.

Current damages constitute the financial loss that the victim of the fraudulent act suffers and includes, among others:

- damages to the affected party's assets (indemnity damages);
- the highest value of the asset that the claimant has not received or has lost due to the wilful act;
- loss of value of the asset as a result of the damage; and
- incidental costs arising from the costs incurred to minimise the damage caused.

Indemnity damages consist of the direct and material damage to the property interests of the affected party due to the wilful misconduct.

The loss of profit is the net income that the claimant fails to obtain as a result of the wilful misconduct. To be granted compensation for loss of profit, it is fundamental to prove that the loss is real (ie that if the wilful misconduct

had not occurred, there would have been specific profit).

For physical damages, the regulation of civil liability and insurance of motor vehicles (*Real Decreto 8/2004, de 29 de octubre*) includes a comprehensive system of assessment of physical injuries and damages to determine compensation. Use of this system is becoming increasingly common in assessing damages for physical injuries other than those caused by motor vehicles, such as household accidents and injuries caused by surgical procedures.

In some specific cases of civil liability, the law provides limits on compensation. This is the case for civil liability in the manufacturing of defective products when multiple damages are caused. In these circumstances, the regulation of consumers and users sets a limit of EUR63,106,270.96 on the manufacturer's global liability. Another example is found in the regulation of civil liability in the air transport sector. In this case, specific regulations establish a limit on the global compensation for damages caused due to an air accident, depending on the nature of the injury (death or permanent total disability, permanent partial disability or temporary disability). Finally, the civil liability of a ship owner as a result of marine pollution by oil (toxic waste) is governed by the International Convention on Civil Liability for Damages from Oil Pollution, of 29 November 1969. In particular, Article 5 provides limits on this liability based on the tonnage of the ship.

### The burden of mitigating damages

The innocent party must mitigate their damages. The claimant bears the risk of unmitigated damages if, in the circumstances, mitigating the damages was reasonable but the claimant failed to do so. The claimant will be reimbursed for the costs he incurred in mitigating the damages.

The requirement to mitigate damages has been established and developed by case law. Therefore, there is no specific regime relating to mitigation or a specific list of measures or requirements to comply with the burden of mitigation. According to case law, compliance with the obligation to mitigate includes, for example, trying to find a third buyer for goods delivered under a void contract and reparation of the material damages.

## 5. AVAILABLE INTERIM RELIEF

The SCC does not contain specific interim relief for causes of action involving tort liability. However, this does not preclude the option of requesting interim relief under the Spanish Civil Procedure Act (*Ley de Enjuiciamiento Civil*) (SCPA).

Courts can grant any direct or indirect measure as they see fit in relation to the defendant's assets and rights (*Article 726, SCPA*). However:

- the measure must be exclusively aimed at guaranteeing the effectiveness of a potential favourable judgment; and
- in weighing up two effective measures, the judge must choose the less burdensome measure for the defendant.

Article 727 of the SCPA includes a list of interim measures that can be granted. However, the list does not preclude judges from granting any other

measure or action which meets the above requirements.

Interim measures are generally adopted after the defendant has had the opportunity to oppose the interim measures requested. However, if urgent circumstances justify it, the court can decide to adopt the injunction before the appearance of the defendant (*inaudita parte debitoris*).

## 6. BARS TO RELIEF FOR CIVIL FRAUD

### 6.1 Delay

As a general rule, if the action is brought within the period provided by law, there is no penalty regardless of whether it is initiated immediately or at the end of the term (ie with a delay). However, in cases in which there has been an unfair exercise of the cause of action (unfair or abusive delay), the delay itself may result in the loss of the right to remedies.

### 6.2 (Lack of) good faith

For *dolo* (see section 1, Contractual liability) to render a contract null and void, it cannot be present in both contracting parties (*Article 1270, SCC*).

If a contract is null and void as a result of unlawful causes and both parties are responsible, neither party is entitled to damages for specific performance or restitution (*Article 1306, SCC*). In addition, if the unlawful cause constitutes a criminal offence caused by both parties, both parties will be prosecuted in accordance with the Spanish Criminal Code.

A similar rule applies to tort liability. There is a bar to relief if the affected party contributed to their own damages (that is, even if damage is caused due to an act or omission of one person, the affected party is not entitled to compensation if they acted with fault or negligence). If both parties acted with negligence, the court can either:

- moderate the amount of the damages to be granted to the claimant;
- decide that no damages are to be paid.

In taking this decision, the court must analyse all the circumstances of the case.

Other factors that prevent the granting of relief in tort include:

- exonerating circumstances such as *force majeure*;
- self-defence;
- the fact that the damage was unforeseeable or unavoidable.

### 6.3 Applicable limitation periods

Contractual claims. The limitation period for contractual liability is 15 years from the date on which the breach of contract occurred. For actions seeking a declaration that a contract be declared null and void, a four year limitation period applies.

### Tort

The limitation period in actions filed on the basis of tort liability is one year from the date on which either (*Article 1968.2, SCC*):

- the affected party became aware of the damages; or
- the damage was caused.



However, there is a presumption that the affected party is instantly aware of the damages, unless proven otherwise.

If the damage caused is a bodily injury, case law provides that the limitation period begins to run either:

- once the medical certificate has been issued; or
- if there are further subsequent consequences, from the moment on which these are made known.

If a person sustains long-term injuries, case law usually establishes the beginning of the limitation period as the time when either the:

- victim is fully aware of the damages that they are suffering; or
- act or omission causing the damages is completed.

Some causes of action that are not regulated in the SCC but are regulated in other specific laws have different limitation periods. For example, the limitation period for civil liability for the manufacture of defective products is three years from the date the defective product was introduced onto the market. Another example is civil liability for construction defects, where the following limitation periods apply:

- 10 years for structural defects which directly compromise the stability of the building;
- three years for construction defects affecting habitability requirements; and
- one year for execution defects that affect minor elements of the finished works.

In cases of directors' liability, the limitation period is four years.

#### 6.4 Position of good faith purchaser for value without notice (innocent third parties)

This applies to cases where a seller sells a real estate asset or movable property twice. In these cases, as a general rule (however, see below), a good faith purchaser must return the property purchased if a cause of action based on civil liability against the seller succeeds and the seller is required to restore the property. A person who has lost a movable asset or has been unlawfully deprived of that asset can require its restitution (*Article 464, SCC*). However, if the holder of the asset has acquired the asset in good faith, the rightful owner cannot obtain restitution without reimbursing the price paid by the holder.

However, a good faith purchaser of real estate that registers its purchase in the Land Registry (*Registro de la Propiedad*) is protected. The purchaser who first registers the purchase with the Land Registry will have priority under Spanish law. In such a case, the purchaser who has been damaged by the duplicated sale can file an action against the seller terminating the agreement for fraudulent breach of contract (failure to transfer the property of the asset). However, the good faith purchaser is protected by the Land Registry registration and will hold their title in any case (*Article 34, Mortgages Act (Ley Hipotecaria)*). Good faith is always presumed unless it can be proved that the third party knew that the registry was inaccurate when they acquired the asset (*Article 34, Mortgages Act*). In these cases, remedies available to the claimant are limited to damages and the purchaser is not entitled to specific performance.

## 7. ASPECTS OF PLEADING FRAUD IN SPAIN

### 7.1 Lifting the corporate veil

The corporate veil can be lifted if a company's shareholders abuse the limited liability of their company. It is very difficult to show that such an abuse was carried out with mere negligence and not fraudulently. However, pleading fraud does not mean that the corporate veil will be lifted.

The advantage of pleading fraud in this kind of action is that the claimant could therefore hold the company's shareholders liable for company debts, when the company is unable to fulfil its obligations.

The lifting of the corporate veil is established in order to claim liability from company shareholders. In addition to this legal concept, Spanish Law also establishes the possibility of initiating causes of action against the directors (see sections 1 and 2, specific causes of action).

Finally, and in the event of insolvency, in addition to the causes of action that creditors can initiate against the directors, the Insolvency Act provides for a specific section (*Sección de Calificación*) which addresses whether or not the insolvency was carried out wilfully or not. In this section, the liability of the directors of fact or law and the representatives of the insolvent company is analysed.

### 7.2 Settlements/exclusion clauses

The parties to a contract can include clauses exempting or moderating their liability in certain circumstances. In the case of moderating liability, a maximum amount of money or time period in which they will be liable is established.

The existence of clauses setting out the exclusion or limitation of liability of one of the parties in principle implies the existence of a contract. Therefore contractual liability, rather than tort liability, applies. However, some legal authors recognise that the parties can agree to make limitation periods shorter or longer, even in tort claims.

These clauses do not apply if a breach of contract is fraudulent (ie in cases where wilful misconduct is present).

### 7.3 Extension of limitation

The limitation periods cannot be extended.

### 7.4 Punitive damages

Punitive damages are not recognised in Spain.

### 7.5 Standard of proof

Although the claimant always bears the burden of proving the facts on which it bases its claim, the standard of proof is higher when the claimant alleges that the defendant has acted fraudulently. It must be proved that the defendant either:

- wilfully breached his obligations;
- induced the claimant to enter into a contract knowing that there was a lack of relevant information or that the information provided was not true.

Fraud cannot be induced from assumptions or mere assertions by the claimant.

Additionally, in causes of action based on tort liability, the standard of proof is reversed when the claimant alleges fault, negligence or vicarious liability. In these cases, the defendant must prove that he acted with due diligence.

The claimant must prove that the damage is certain and demonstrate its extent and scope. Damages cannot be induced from assumptions or mere assertions by the claimant.

### 7.6 Lawyers' duties when pleading fraud

Lawyers must ensure that the standard of proof is met. Additionally, lawyer's action and intervention are subject to compliance with the Spanish Bar's Code of Ethics, approved by Royal Decree 658/2001 of 22 June 2001.

## 8. BASIC REQUIREMENTS IN RELATION TO ISSUING PROCEEDINGS; APPLYING FOR INJUNCTIVE OR INTERIM RELIEF; OR SERVING PROCEEDINGS ABROAD

Actions based on tort liability are decided in declaratory proceedings which, depending on the amount claimed, can be ordinary or oral. In particular, oral proceedings should be initiated when the amount claimed is less than EUR6,000. In other cases, ordinary proceedings should be initiated.

### Ordinary proceedings

Ordinary proceedings start with the claimant filing a statement of claim with the court of first instance. The court *sua sponte* (that is, of its own accord) examines the procedural requirements for the admission of the claim. If the admission complies with these requirements the court admits the claim.

The defendant is served with the claim and is granted 20 working days to file the statement of defence. However, within the first 10 working days of the 20-day period, the defendant can file a plea to challenge the court's jurisdiction to hear the matter.

The claimant and defendant must include, together with the statement of claim or statement of defence respectively, all of the documents that support and demonstrate their allegations. After filing the pleadings, it is not possible to file any additional documents unless certain specific circumstances exist.

When the parties' pleadings have been filed, the parties will be called for a preliminary hearing. The main purposes of the preliminary hearing are:

- determining whether a settlement is possible;
- resolving procedural issues and clarifying points of fact and law;
- ruling on the admissibility of evidence; and
- setting a date for the trial.

At the trial, evidence is produced before the judge, witnesses and experts are examined and closing arguments are made. After this, the court rules over the dispute. This judgment can be appealed before the relevant court of appeal.

Ordinary proceedings usually take more than 12 months, depending on the workload of the specific court of first instance in charge of the matter. Once rendered, the judgment is (generally) provisionally enforceable even if there is an appeal pending.

### Oral proceedings

Oral proceedings start with the claimant filing a succinct statement of claim with the court of first instance. The court *sua sponte* examines the procedural requirements for the admission of the claim. If the admission complies with these requirements the court admits the claim.

The parties are called for the hearing. At this point, the parties have:

- three working days to request that a witness be summoned or to request written responses from public or legal entities; and
- five working days to file a challenge to the jurisdiction of the court to hear the matter.

At the hearing, the defendant answers the statement of claim in voce (that is, verbally), evidence is produced before the court, witnesses and experts are examined and closing arguments are made. After that, the court rules over the dispute. This judgment can be appealed before the court of appeals.

Oral proceedings usually take less than 12 months, depending on the workload of the specific court of first instance in charge of the matter. Once rendered, the judgment is (generally) provisionally enforceable even if there is an appeal pending.

There is a proposed amendment of the SPCA which modifies oral proceedings. In particular, the proposed amendment includes a written statement of defence instead of the answer *in voce*.

### Applications for interim relief

As a rule, interim relief should be requested in the statement of claim (however, it may also be requested before or even after filing the statement of claim). The application must be accompanied by the supporting documentation or any other means of proof to support the claim.

The court summons the parties to appear at a hearing. At the hearing, evidence is produced and the parties make their allegations with respect to the application. After this, the court decides on whether or not to grant the interim relief requested. The court order can be appealed before the court of appeals.

However, if urgent circumstances justify it, the court can decide to adopt the measures in the absence of the defendant (*inaudita parte debitoris*). After the court's decision, the defendant is served the decision (in order to file its opposition). If an opposition writ is filed, a hearing is held and the court can decide to lift the measures granted.

Interim measures proceedings usually take from two weeks to two months, depending on the workload of the specific court of first instance in charge of the matter.

### Serving proceedings abroad

The service of civil proceedings initiated in Spain in other EU countries is governed by Regulation (EC) 1393/2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (Service of Documents Regulation). When proceedings are to be served in non-EU countries, the HCCH Convention on the Service Abroad of Judicial

and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention) applies if the country is a contracting state.

## **9. PROCEDURE AND REQUIREMENTS FOR ENFORCING INTERIM INJUNCTIONS FROM ABROAD IN SPAIN**

If Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation) applies, foreign interim injunctions are recognised and enforced in Spain. However, injunctions adopted *inaudita parte debitoris* (that is, without the possibility for the defendant to be heard before the measure is adopted) issued in EU countries other than Spain may not be enforced in Spain.

The Brussels Regulation has been amended by Regulation (EU) 1215/2012. This establishes that, to enforce an interim injunction adopted *inaudita parte debitoris*, it is necessary to demonstrate that the resolution ordering the interim injunction has been served on the debtor (*Article 42*). However, Regulation (EU) 1215/2012 only applies for causes of action brought after 10 January 2015.

Injunctions issued in non-EU countries are not enforceable in Spain unless there is a bilateral treaty providing otherwise.

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