THE ASSET TRACING AND RECOVERY REVIEW

SIXTH EDITION

Editor
Robert Hunter

THE LAWREVIEWS

THE ASSET TRACING AND RECOVERY REVIEW

SIXTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in October 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Robert Hunter

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

SENIOR ACCOUNT MANAGER
Pere Aspinall

ACCOUNT MANAGERS
Jack Bagnall, Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Keavy Hunnigal-Gaw

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Martin Roach

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-912228-56-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2018 Law Business Research Ltd

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ALLEN & OVERY LLP

ALLENS

ARENDT & MEDERNACH

ASBZ ADVOGADOS

BAKER McKENZIE

BARROW & WILLIAMS LLP

BHARUCHA & PARTNERS

DILLON EUSTACE

DONALD MANASSE LAW OFFICES

EDMONDS MARSHALL MCMAHON LTD

GASSER PARTNER ATTORNEYS AT LAW

GOVERNANCE LATAM

GRIFFITHS & PARTNERS

HAN KUN LAW OFFICES

HASHIDATE LAW OFFICE

HOGAN LOVELLS

KIM & CHANG

KOBRE & KIM

LENZ & STAEHELIN

McKINNEY, BANCROFT & HUGHES

METIS RECHTSANWÄLTE LLP

MICHAEL KYPRIANOU & CO LLC

PÉREZ-LLORCA

PRIETO CABRERA & ASOCIADOS SRL

ROGÉRIO ALVES & ASSOCIADOS – SOCIEDADE DE ADVOGADOS RL

STEPTOE & JOHNSON LLP

STIBBE

STUDIO LEGALE PISANO

ŠUNJKALAW

TRIAY & TRIAY

CONTENTS

PREFACE

'Fraud' is a word that people find easier to use than to define. Partly for this reason, it is difficult for lawyers to summarise the way in which their particular jurisdictions deal with it. Some of the sources of their laws will be domestic and will have evolved over time. Others will be recent international conventions, where regard must be had to the decisions of other jurisdictions.

But these difficulties aside, the problems that fraud generates pose unique challenges for the legal system of any country. First, there will be forensic issues: to what lengths should the court go to discover what actually happened? Here different jurisdictions place different priorities on what their courts are for. Some treat the court process as an almost sacrosanct search for truth. The courts of my own jurisdiction tend towards this end of the spectrum. Others regard it as a means of resolving disputes efficiently and providing certainty for the litigants. Often courts in this category allow no witness evidence and no procedure for disclosure of documents, regarding both as disproportionately burdensome for any benefit they might provide.

Second, there is the question of whether the court should mark conduct that is 'fraudulent' as particularly abhorrent, in civil proceedings. All will criminalise fraudulent behaviour, but not all will penalise fraudulent conduct by enhancing the victim's compensation or by depriving the fraudsters of arguments that might have been available to them if they had been careless rather than dishonest.

Third, there is the question of innocent parties: to what extent should victims of fraud be given enhanced rights over 'victims' of ordinary commercial default? In some jurisdictions, it is said that victims of fraud part with their assets – at least to some extent – involuntarily while commercial counterparties take risks with their eyes open. Hence, victims of fraud can, in some circumstances, be allowed to retrieve assets from an insolvency before ordinary trade counterparties or 'general creditors' do so.

Lawyers have been mulling over the rights and wrongs of solutions to the problems that fraud presents for centuries. They will never stop doing so. The internationalisation of fraud in the past 40 years or so, however, has meant that they argue about these problems not only with lawyers of their own country, but also with lawyers from other jurisdictions. Rarely nowadays will a fraudster leave the proceeds of fraud in the jurisdiction in which they were stolen. The 1980s and early 1990s saw quite pronounced attempts by fraudsters to 'arbitrage' the various attitudes and priorities of different jurisdictions to retain what they had taken. Perhaps the highest-profile example of this was the use of jurisdictions in which banking secrecy was a priority as a conduit to which the proceeds of fraud would be transmitted. Another well-known strategy was the use of corporate devices and trusts as a means of sheltering assets from those who deserved to retrieve them.

A number of factors have served to make this more difficult. The growth of international conventions for the harmonisation of laws and enforcement of judgments is clearly one factor. Perhaps more notable, however, has been the international impetus to curb money laundering through criminal sanctions. These have, however, been first steps, albeit comparatively successful ones. There is still a huge amount to be done.

I have specialised in fraud litigation – virtually exclusively – since the late 1980s. My chosen area has brought me into contact with talented lawyers all over the world. I remain as fascinated as I was at the outset by the different solutions that different countries have to the problems fraud creates. I am sometimes jealous and sometimes frustrated when I hear of the remedies for fraud that other jurisdictions offer or lack. When I talk to lawyers who enquire about my own jurisdiction, I frequently see them experiencing the same reactions too. The comparison is more than a matter of mere academic interest. Every month brings some study by the government or private sector tolling the cost of fraud to the taxpayer or to society in general. My own interest goes beyond ordinary 'balance-sheet' issues. When I deal with fraudsters, particularly habitual or predatory ones, I still retain the same appalled fascination that I experienced when I encountered my first fraudster, and I share none of the sneaking admiration for them that I sometimes see in the media; they are selfish, cruel and immature people who not only steal from their victims, but also humiliate them.

No book sufficiently brief to be useful could ever contain all the laws of any one jurisdiction relating to fraud. The challenge, unfortunately, for a contributor to a book like this lies as much in what to exclude as in what to say. This guide contains contributions from eminent practitioners the world over, who have, on the basis of their experience, set out what they regard as critical within their own jurisdictions. Each chapter is similarly structured for ease of reference with similar headings to enable the reader to compare remedies with those in other jurisdictions, and each contributor has been subject to a strict word limit. Despite there being a huge amount more that each would have been perfectly justified in including, I still believe this book to be an enormous achievement.

Once again, we have some of the foremost experts in the area from an impressive array of jurisdictions contributing. I have often thought that true expertise was not in explaining a mass of details but in summarising them in a meaningful and useful way. That is exactly the skill that a work like this requires and I believe that this edition will continue the high standard of the previous four. I have come across a number of the authors in practice, and they are unquestionably the leaders in their fields. I hope that other readers will find the work as useful and impressive as I do.

Robert Hunter
Edmonds Marshall McMahon Ltd
London
September 2018

Chapter 28

SPAIN

Adriana de Buerba and Laura Ruiz[1]

I OVERVIEW

According to the 2014 Financial Action Task Force (FATF)[2] Mutual Evaluation Report on Anti-Money Laundering and Counter-Terrorist Financing Measures,[3] Spain has up-to-date laws and regulations and sound anti-money laundering (AML) and counter-terrorist financing institutions. However, the report also states that:

> *Spain remains a logistical hotspot for organised crime groups based in Africa, Latin America and the former Soviet Union. The major sources of criminal proceeds are drug offences, organised crime, tax and customs offences, counterfeiting, and human trafficking.*

The recent FATF First Regular Follow-up Report, published in March 2018, states that, 'overall, Spain has made progress in addressing the technical compliance deficiencies identified' in the 2014 Mutual Evaluation Report.

Indeed, in the past few years, the Spanish parliament has passed several regulations enhancing the measures applicable to the fight against money laundering, increasing the transparency obligations for financial institutions and empowering the law enforcement and courts with new instruments for this purpose in areas such as freezing of assets or international mutual judicial and enforcement exchange of information and assistance.

Additionally, the fact that Spain is a geographic logistical hotspot for transnational crime has meant that Spanish courts and law enforcement frequently have to use and are very familiar with mutual legal cooperation instruments. For the same reason, Spanish courts and law enforcement are proactive in providing cooperation to other jurisdictions seeking their reciprocal aid.

Under the Spanish system, the victim can appear as a party to the criminal proceedings, not only for the purposes of seeking the corresponding compensation for damage but also to exercise a criminal action. Both actions are dealt with and sentenced within the same proceedings.

For these reasons, the Spanish legal system does not distinguish between civil and criminal fraud, as other legal systems do.

---

1 Adriana de Buerba is a partner and Laura Ruiz is a senior associate at Pérez-Llorca.

2 The Financial Action Task Force is an independent intergovernmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction.

3 http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Spain-2014.pdf.

II LEGAL RIGHTS AND REMEDIES

i Criminal remedies

The Spanish Criminal Code (SCC) defines fraud as obtaining undue profit from the victim using deception.[4] Committing fraud carries a prison sentence of up to three years and a fine, as a general rule. The prison sentence can rise to up to eight years if there have been certain aggravating circumstances. Misappropriation of funds is also considered as a form of fraud when perpetrated by an administrator or depositor of another's assets. There are other specific provisions in the SCC regarding fraud that are beyond the scope of this article, although some of them are referred to below.

According to the Spanish Criminal Procedural Act (SCrimPA), all criminal offences give rise to a criminal action to impose a penalty on the offender and to a civil action for the compensation of the damage caused to the victim. Both civil and criminal actions may be exercised within the same criminal proceedings.

There are two major phases in Spanish Criminal proceedings: the investigative stage and the trial. One of the main characteristics of the Spanish criminal procedure is that a judge – the investigating judge – is in charge of conducting the pretrial criminal investigation with the cooperation of the judiciary police and the public prosecutor. The trial is held before professional judges (who cannot be the same people who are in charge of the investigation) and, only in some exceptional cases, before a jury. Serious fraud cases are generally tried by a panel of three judges.

Under the Spanish system, the victim can appear as a party to the criminal proceedings, not only to seek the corresponding compensation but also to exercise the criminal action. The victim can exercise either action by filing a criminal complaint before the competent judge to launch the proceedings or by appearing as a party to ongoing criminal proceedings initiated *ex officio* to investigate the offence. During the investigative stage of all criminal proceedings, the judge must summon the victims and inform them of their right to appear as parties to the criminal proceeding and exercise criminal and civil actions. Even if the victims decide not to appear as parties to the proceedings, this would not lead to the waiver of their right to restitution. In this case, the public prosecutor is empowered by the SCrimPA to exercise the civil action on their behalf and to seek compensation for the damage caused by the criminal offence. The waiver of the civil action must always be explicit and written. The victim can also reserve the civil action to exercise it in civil proceedings before the competent civil courts, as analysed below.

If there are several victims, the waiver of the action by any one of them does not affect the other victims' rights to seek compensation. All the actions exercised by the victims of the same criminal offence shall be dealt with and decided within the same proceedings. Moreover, to the extent possible, the victims should litigate under the same legal representation. For this purpose, the judge can request that the victims reach an agreement to litigate collectively. It should be noted that the Spanish system does not foresee the possibility of class actions. However, in cases where a criminal offence causes damage for a significant number of individuals, in practice, the victims usually form an association to file a joint lawsuit.

Typically, the victim should exercise the civil action against the criminal offenders. According to the SCC, the civil action can be exercised against the individual who committed the fraud (authors) and the persons who assisted him or her in committing it (accomplices).

4 Article 249 of the SCC.

When several individuals are held liable for the fraud, the court shall determine, in the judgment, the quota for which each group shall be held accountable. Typically, all the offenders shall be held jointly and severally liable for their respective quotas. The SCC was amended in 2010 to regulate corporate criminal liability. Since then, legal persons can also be held criminally liable for fraud. Should this be the case, the company will also be sentenced to pay compensation to the victims, jointly and severally, with the individuals directly liable for perpetrating the offence.

In addition, a civil action resulting from fraud can also be exercised against the following persons.

Civil parties

The SCC foresees the possibility of seeking compensation from persons other than the criminal offenders. Among them, the following groups of persons could be sued within the framework of an investigation for fraud.

Insurance companies

According to the SCC, should the criminal event be covered by an insurance policy, the insurance company shall be held directly liable for covering the compensation to the victim within the limits provided in the policy. The action against the insurance company can be exercised in the framework of the same criminal proceedings initiated to judge the fraud. However, the insurance company could, of course, have a right of recourse against the offenders that could be exercised at a later stage.

Public entities

Any Spanish public entity will be held civilly liable for the consequences of criminal offences committed by civil servants or public employees acting under their control, provided that the damage was directly caused as a consequence of the malfunctioning of the public service with which they were entrusted. This civil liability will be subsidiary to that of the individuals or companies held criminally liable for the fraud. This means that the public entities shall only be liable for the amounts that the offenders are unable to pay to the victim.

Companies

Companies shall be held civilly liable for the damage caused as a result of the criminal offences committed by their representatives, directors or employees while carrying out their professional obligations or acting on behalf of the company. This civil liability shall also be subsidiary to that of the individuals or companies held criminally liable for the fraud.

Receivers of the proceeds of fraud

Those persons who benefitted from the effects of the fraud can be ordered to return the assets or to pay the victim compensation up to the amount of their share in the proceeds, provided that the following requirements are met:[5]

a they did not take part in the fraud;

5 Spanish Supreme Court Judgment (Criminal Chamber) No. 433/2015 of 2 July 2015.

b they received the proceeds of the fraud without any consideration; and
c they acted in good faith; in other words, they were unaware that the assets constituted the proceeds of a fraud.

Conversely, if these third parties acted in bad faith, namely knowing that the assets were the proceeds of fraud, they could be charged with the specific criminal offence of receiving stolen assets or money laundering, depending on the circumstances. Receiving stolen assets and money laundering are criminal offences that are independent from fraud and, therefore, they can be investigated in separate criminal proceedings. This might prove helpful for the purposes of tracing, in Spain, assets stolen abroad, as discussed in further detail below.

Civil action against civil parties and receivers of stolen goods

Civil action against the civil parties and receivers of the stolen goods mentioned above must also be exercised within the criminal proceedings launched against the perpetrator of the fraud. For these purposes, the investigative judge, *ex officio* or in accordance with the prosecution's or the civil claimant's request, shall call them as parties to the criminal proceedings to allow them to exercise the corresponding defence.

In Spanish case law, civil liability resulting from a criminal offence is considered to be almost objective, meaning that, once the criminal offence is proven and judicially declared, the offender shall be sentenced to compensate the victim almost automatically. Therefore, the only possible means of defence against this type of civil claim pertains to the defence against the criminal charges. The same is applicable to the civil parties referred to above. For this reason, their defence is often limited to challenging the relations with the offender that might give rise to their civil liability, in both cases.

In criminal proceedings in Spain, the burden of proving criminal liability lies with the prosecution. The standard of proof includes the presumption of innocence and *in dubio pro reo* principles according to which, in summary, the defendant cannot be sentenced if there is reasonable doubt.

The same standard of proof applies to the civil claim, when filed within criminal proceedings. According to the SCC, the civil claim shall be limited to:

a the restitution of the specific defrauded goods, when possible;
b the restoration of the injury; and
c the compensation of both material and moral damages.

The claimant has the burden of proving the amount of the damages. The Spanish system, in contrast to those in other jurisdictions, does not foresee punitive damages.

When a civil action is exercised in criminal proceedings, its statute of limitations is the same as that which is applicable to the criminal offence itself. In the case of fraud, the statute of limitations may vary from five to 15 years, depending on the seriousness of the case.

ii Civil remedies

As explained above, according to the SCrimPA, the primary avenue for the victim of fraud to claim compensation is within criminal proceedings against the offender. Still, the SCrimPA also foresees the possibility of the victim reserving a civil action to exercise it before a civil court. However, the victim cannot file a civil lawsuit until a criminal action is concluded in a final and binding judgment. For this reason, in practice, it is extremely rare for victims to choose this option.

As a general rule, the statute of limitations corresponding to a civil action, when exercised before civil courts, is five years from the day the criminal judgment became final and binding. In an exception to this, the statute of limitations for tort liability is one year, counted from the day on which the injured party became aware of the damage.

Civil courts are bound by the facts affirmed in the previous criminal judgment and, therefore, the dispute within these civil proceedings shall be limited to the extent of the damage and the amount of compensation.

III SEIZURE AND EVIDENCE

i Securing assets and proceeds

Criminal remedies

According to the SCrimPA, an investigative judge can adopt a number of protective measures to secure the assets and proceeds of fraud and preserve the victims' rights to retrieve their property or obtain compensation.

The requirements for the adoption of such measures are as follows:

a *fumus boni iuris*, or the likelihood of success on the merit of the case. According to this requirement, the judge must evaluate whether, *prima facie*, the evidence supporting the existence of the fraud is sound; and

b *periculum in mora*, or danger in the delay. The judge will evaluate whether there is a significant risk that the effectiveness of a potentially favourable judgment might be in jeopardy.

If the previous requirements are met, the SCrimPA allows any of the preventive measures provided for in civil legislation to be adopted, as described below.

In addition to these civil preventive measures, the SCC allows the investigative judges to adopt specific measures under certain circumstances. Specifically, in criminal proceedings against legal persons, the investigative judge can order the following preventive measures against the company during the investigative stage:

a temporary closure of premises or establishments;

b temporary suspension of corporate activities; or

c judicial intervention, when necessary to protect the rights of the company's employees or creditors.

In criminal proceedings, these preventive measures can be adopted at any time during the investigative stage, or even later, during the trial, if new circumstances arise that make them necessary. The judge can adopt these measures *ex officio* or following an application from the public prosecutor or the victim. As a general rule, the judge will adopt these measures after hearing both parties' allegations. However, in exceptional cases, where there is an imminent and significant risk of the assets disappearing, these measures can be adopted without previously hearing the defendant. In any case, the defendant shall be allowed to challenge the preventive measures after the fact.

Civil remedies

The Spanish Civil Procedural Act (SCivPA) does not establish an exhaustive list of precautionary measures but instead allows the judge to adopt any measures deemed necessary and proportionate to secure the plaintiff's rights, provided that:

a the judge chooses the least burdensome measure for the defendant; and

b the measure aims to guarantee the effectiveness of a potentially favourable judgment.

The SCivPA specifically refers to the following measures, but only as examples:

a freezing of the defendant's assets;

b judicial intervention or administration of productive assets;

c judicial deposit of the defrauded assets; and

d the registration of the claim with any public registry (e.g., commercial or real estate registries). This measure is especially useful to prevent the defendant from selling or transferring the asset to *bona fide* purchasers.

To adopt these measures, in addition to the *fumus boni iuris* and *periculum in mora* requirements described above, civil legislation requires that the claimant posts a bond or guarantee that is sufficient to respond, in a fast and effective way, to the damage that the measure might have caused to the defendant in the event that the claim is rejected. The latter is not necessary when the measures are adopted in criminal proceedings.

Under civil jurisdiction, the judge can only adopt these preventive measures at the request of the plaintiff. Typically, the request should be filed together with the principal claim. However, the law allows these measures to be requested and adopted before filing the claim, provided that the plaintiff proves the urgency and need for their immediate enforcement. In this case, the adopted measures will be left without effect if the claim is not filed before the judge within 20 days of their adoption. After filing the claim, during the course of the civil proceedings or the appeal, these measures can only be requested on the basis of new unexpected circumstances.

ii Obtaining evidence

In criminal proceedings

As stated above, in Spanish criminal proceedings, there is a pretrial stage where a judge is in charge of gathering all the information available as regards the facts supporting the case. This means that the judge will investigate not only the potential existence of fraud, but also the grounds for the victim's compensation rights. In accordance with the SCrimPA, the investigative judge must make sure to gather all the relevant information, regardless of whether it is detrimental or beneficial to the defendant. For these purposes, the following measures can be adopted:

a The judge can call witnesses or experts to give testimony. In accordance with the Spanish Constitution, the defendant will be assisted by a lawyer during these interrogations and cannot be forced to give testimony and has the right not to answer all or some of the questions. However, the witnesses will testify under oath and cannot be assisted by a lawyer.

b The judge can collect documents from the parties or third persons. Again, the defendant, as part of his or her right to non-self-incrimination, cannot be forced to produce documents that might be detrimental to his or her defence.

c The judge, together with the parties, can personally inspect the premises where the offence took place or any other places or objects relevant to the case;

d The judge can order that any premises be searched where there are indications that evidence of the offence might be found or the defendant's written or oral communications be intercepted. To adopt these measures, the judge must issue a written decision outlining the reasons why they are deemed to be proportionate, necessary and relevant for the case.

The judge can adopt these measures *ex officio* or at the request of any of the parties, including the civil claimant.

Additionally, the SCrimPA foresees the possibility for the judge to order the defendant to be remanded in custody, if there is enough evidence that they might try to destroy or conceal evidence relevant to the case.

In civil proceedings

A significant difference between Spanish – and continental law in general – and common law lies in the 'discovery' system. Spanish law does not allow discovery and, as a general rule, parties to a dispute cannot rely on others to provide evidence to support their allegations unless ordered by a judge. In accordance with this rule, Spain made a declaration to the Convention of 18 March 1970 on the taking of Evidence Abroad in Civil or Commercial Matters[6] (the Hague Evidence Convention) that no letters of request would be executed when issued for the purposes of obtaining pretrial disclosure of documents as known in common law countries.

However, the SCivPA establishes certain mechanisms for the parties to obtain an order of disclosure from the court that is addressed to others or to third parties.

Preliminary proceedings

Before initiating civil proceedings, the claimant can initiate preliminary proceedings to collect information needed as a basis for the claim. However, the type of documents or information that the claimant can obtain through these proceedings is limited to the closed list set out in the SCivPA,[7] namely:

a information regarding the legal standing or representation of the potential defendant;

b exhibition of the assets that constitute the object of the claim;

c exhibition of a will;

d exhibition of a company's documents or financial records, if the claimant is one of the company's shareholders;

e exhibition of an insurance policy of the person in possession of it;

f adoption of the appropriate measures for identifying the affected individuals in proceedings affecting the interests of consumers or where there are a significant number of potential claimants; and

g information related to the infringement of intellectual or trade property rights.

6 In force in Spain since 25 August 1987.

7 Article 256 of the SCivPA.

Otherwise, the general rule in civil proceedings is that each party shall provide the court with evidence supporting their respective claims.

Information requests to counterparties or third parties

Once the civil proceedings are initiated, the SCivPA[8] entitles parties to request the court to order that certain information or documents be gathered from their counterparties or third parties. Specifically, at the parties' request, the court can order companies and public entities to produce documents or to certify the accuracy of certain information.

IV FRAUD IN SPECIFIC CONTEXTS

i Banking and money laundering

Fraud

There are no specific provisions in the SCC as regards fraud affecting banks, although all the general criminal provisions are applicable to them. In recent case law, following the collapse of the Spanish financial system in 2011, there have been a number of criminal cases against the former management of financial institutions, especially affecting savings banks.[9] This case law assessed the liability of savings banks in two types of cases:

a where management at the savings banks deliberately forged the banks' financial records to conceal their actual financial situation and pretended to meet the regulator's solvency requirements; and

b where the savings banks commercialised derivative products, with insufficient transparency as to their risks, to the detriment of their clients.

The first group of cases resulted in a number of criminal convictions for accounting fraud in the past few years. As to the second group, although initially the Spanish Public Prosecution Office launched a number of criminal investigations to assess potential criminal liability in the introduction to the market of financial products by savings banks, eventually most of the criminal proceedings were closed as the prosecution did not succeed in proving the existence of a systemic and organised scheme to defraud customers. For this reason, case law eventually determined that savings banks' liability for irregularities committed when selling derivatives should be assessed by civil courts on a case-by-case basis, depending on the profile of each investor and the information provided to them. This gave rise to a significant number of civil claims.

Money laundering

Financial institutions are subject to the Spanish anti-money laundering (AML) legislation. Spanish AML legislation, which is the result of implementing the European Union

8 Article 381 of the SCivPA.

9 Savings banks have become widespread in Spain in recent decades. As opposed to banks, savings banks do not have the legal form of a commercial company but rather, typically, are foundations or associations with no commercial purpose. For this reason, savings banks have had to dedicate a significant part of their profits to social causes. Another specific characteristic of Spanish savings banks is the lack of shareholders: the principal governing body is an assembly comprised of representatives of the regional government, the savings banks' employees, the depositors and other stakeholders.

regulations[10] on the subject, imposes a number of obligations on those subject to it, including banks, for the purposes of preventing money laundering and terrorist financing. A detailed analysis of these obligations exceeds the scope of this book. For these purposes, suffice it to say that both banks and their directors and employees are subject to severe administrative sanctions if these obligations are breached. Moreover, in more serious cases, they could also be subject to criminal liability for recklessly aiding and abetting money laundering.[11]

ii Insolvency

The SCC specifically regulates several criminal offences to protect creditors from debtors' actions aiming to fraudulently put their assets beyond their reach. These criminal offences can by classified into two groups: fraudulent conveyance and punishable bankruptcy.

Fraudulent conveyance of assets

The SCC considers that a criminal offence has been committed when the debtor:[12]

a fraudulently hides his or her assets to put them beyond his or her creditors' reach, provided that the conduct results in actual or apparent insolvency; or

b carries out any other transaction, actual or simulated, for the purposes of fraudulently delaying, hindering or preventing ongoing enforcement proceedings.

Fraudulent bankruptcy

These offences are meant to protect creditors from the actions of debtors that have been judicially declared bankrupt.[13] They can be classified into the following types of misconduct:

a actions aimed at putting the debtor's assets out of reach of the bankruptcy proceedings;

b actions aimed at forging the debtor's financial records or any other relevant documents to conceal or delay the declaration of bankruptcy;

c actions aimed at favouring some creditors to the detriment of the rest; and

d in general, actions that constitute a serious breach of the diligence duties in managing the insolvency situation prior to the bankruptcy judicial proceedings.

Such misconduct may also have civil consequences in the framework of insolvency proceedings:

a any actions entailing a decrease in value of the estate with no consideration are subject to clawback (the effect of clawback actions is that the insolvent company will be entitled to recover the assets); and

b the above-mentioned misconduct can also give rise to the directors' liability. The insolvency will be declared fraudulent if any assets have been hidden from the creditors or any potential or actual enforcement action has been purportedly hindered by the insolvent company. Should the insolvency be declared fraudulent, the directors (1) may

10 Spain implemented the EU Third Directive on AML/PTF (Directive 2005/60/CE of the European Parliament and Council of 26 October 2005, developed by Directive 2006/70/CE of the European Commission of 1 August 2006) through Act 10/2010, 28 April 2010, on the prevention of money laundering and terrorist financing. The Spanish government is currently in the process of implementing the Fourth European Regulation on AML (Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015) although the deadline for the implementation passed on 26 June 2017.

11 Article 301 et seq. of the SCC.

12 Article 257 of the SCC.

13 Articles 259 to 261 *bis* of the SCC.

be disqualified (for a period ranging from two to 15 years), (2) may lose their rights as creditors, and (3) may be ordered to pay the outstanding credits that cannot be satisfied after the liquidation process has been completed.

iii The effect of fraud on evidentiary rules and legal privilege

Procedural fraud

Procedural fraud is a criminal offence under the SCC. Procedural fraud is perpetrated when one of the parties to judicial proceedings produces false evidence with the aim of deceiving the court and obtaining a favourable judgment to the detriment of the financial interests of the other party.[14] Indeed, for procedural fraud to apply, it is specifically required that the deception is carried out for the purposes of obtaining financial gain. Should this requirement not be met, the misconduct would be characterised as forgery or false testimony, depending on the circumstances.

A judicial decision will become null and void if it was rendered as a consequence of fraud (or as a consequence of any other criminal offence), provided the following requirements are met:

a the fraud had a direct impact on the outcome of the judgment, which would have been different otherwise; and

b the fraud has been declared in a final and binding criminal judgment, after specific judicial proceedings are carried out to that effect.

Legal privilege

Article 24 of the Spanish Constitution recognises the right to privilege within the context of the criminal defendant's right to a defence. For this reason, legal privilege is only specifically regulated in connection with procedural rights. In that regard, the Spanish Act on the Judiciary Board[15] sets out that lawyers are subject to professional secrecy and cannot be forced to provide testimony or information, as regards the facts that the client revealed to them in that condition. This legal privilege is not only viewed as the client's right but also as the lawyers' privilege. For this reason, even if the client waives their right, the lawyer would still have to assess whether, in the specific case, it is appropriate to disclose the privileged information and could refuse to do so.

The legal privilege will only apply to cases in which the lawyer acts as such. When it is determined that the lawyer colluded with the client to perpetrate the fraud, the legal privilege is lost and the lawyer would be treated as a co-conspirator.

V INTERNATIONAL ASPECTS

i Conflict of law and choice of law in fraud claims

Criminal proceedings

In Spanish criminal proceedings, Spanish law shall always be applicable, provided that Spanish criminal courts have jurisdiction to investigate and try the case.

The general rule is that Spanish courts will be competent for trying the case provided that the fraud was perpetrated in Spain. Spanish case law interpreted this requirement

14 Article 250.1.7 of the SCC.

15 Article 542 of the SAJB and Article 416.2 of the SCrimPA, specifically for criminal proceedings.

broadly and recently adopted the ubiquity principle, according to which the Spanish courts will be competent when any of the elements of the fraud, including its effects, took place on Spanish territory.

Exceptionally, the Spanish criminal courts will also be competent for trying fraud perpetrated abroad in the following cases:

a when the perpetrator of the fraud is a Spanish national;[16]

b when the fraud affects Spanish public interests (e.g., it involves the forgery of Spanish currency or official documents or the victim is a Spanish public entity); or

c when perpetrated by Spanish public officials based abroad.

Civil proceedings

In civil cases, the rules governing the jurisdiction of Spanish courts and the applicable law are complex and beyond the scope of this chapter. In addition to Spanish laws, EU Regulations and International Conventions on matters entered into by Spain must be taken into account.

Spanish courts are exclusively competent for trying the following cases:

a claims regarding real estate located in Spain;

b claims regarding the incorporation or winding-up of companies and legal persons domiciled in Spanish territory or regarding the decisions of their corporate bodies;

c claims regarding the validity of registrations made with any Spanish public registry; and

d claims for the recognition and enforcement in Spain of foreign judicial decisions and arbitration awards.

In other cases, the general rule is that Spanish civil courts shall be competent:

a when the parties expressly or implicitly agree on submitting the case to their jurisdiction; or

b when the defendant or any of the defendants are domiciled in Spain.

As to the applicable law, in fraud cases, the general rule is that the substance of the claim shall be decided in accordance with the law of the country where the event producing the damage took place. The validity and content of foreign law (in the event that Spanish law is not applicable) must be evidenced in the proceedings.

ii Collection of evidence in support of proceedings abroad and seizure of assets or proceeds of fraud in support of the victim

Criminal proceedings

Through Act 23/2014 on the Mutual Recognition of Criminal Judicial Decisions in the European Union of 20 November 2014, Spain introduced a comprehensive piece of

16 Provided that the following requirements are met: (1) the fraud is punishable in the country of execution; (2) the victim or the Spanish public prosecutor files a complaint in Spain; and (3) the perpetrator was not acquitted, pardoned or convicted abroad or, in the case of conviction, did not serve his or her sentence.

legislation into its internal legal system implementing all the EU Regulations related to the recognition and enforcement in Spain of judicial decisions rendered in criminal matters by the courts in other EU Member States.[17]

This Act regulates the following mutual recognition instruments:

a the European arrest warrant;
b judicial decisions imposing a penalty or security measure;
c judicial decisions on probation and supervision of probation measures and alternative sanctions;
d the European protection order;
e judicial decisions on the freezing of assets;
f judicial decisions on the freezing of assets and for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters;
g judicial decisions imposing financial sanctions; and
h the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

Act 23/2014 was amended on 11 June 2018[18] to transpose into the Spanish legal system the EU Directive regarding the European Investigation Order in criminal matters.[19] A European Investigation Order (EIO) is a judicial decision that is issued or validated by a judicial authority of a Member State to have one or several specific investigative measures carried out in another Member State to obtain evidence. An EIO shall cover any investigative measure with the exception of the setting up of a joint investigation team. Act 23/2014 specifically regulates the issuance of an EIO for the following purposes, among others:

a to hear a witness or expert by videoconference or other audiovisual transmission;
b to gather information on bank and other financial accounts;
c to gather information on banking and other financial transactions;
d to gather evidence in real time;

17 Act 23/2014 is an amalgamated text consolidating the following Framework Decisions and Directives on matters of mutual recognition of decisions on criminal matters: (1) Framework Decision 2002/584/JHA of 13 June 2002 on European Arrest Warrant; (2) Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; (3) Framework Decision 2005/214/ JHA on the application of the principle of mutual recognition to financial penalties; (4) Framework Decision 2006/783/JHA on mutual recognition of confiscation orders; (5) Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters; (6) Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; (7) Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters; (8) Framework Decision 2009/299/JHA enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial; (9) Framework Decision 829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention; and (10) Directive 2011/99/EU of the European Parliament and of the Council on the European protection order.

18 The amendment was carried out through Act 3/2018, 11 June 2018 (Spanish Official Gazette 12 July 2018).

19 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

e to intercept telecommunications; and

f to take any measure with a view to provisionally preventing the destruction, transformation, removal, transfer or disposal of an item that may be used as evidence.

The execution of mutual judicial assistance and mutual recognition requests issued by criminal judicial authorities of third states will be carried out in Spain in accordance with the provisions of any multilateral or bilateral treaty entered into with the corresponding state or, subsidiarily, in accordance with the principle of reciprocity.

These mutual judicial assistance mechanisms are aimed at freezing the defendant's specific assets once it has been determined that they are located in Spain. Conversely, these measures cannot be used to trace the defendant's assets and, in practice, locating the defendant's assets might prove difficult. For these purposes, it might prove useful to launch an investigation for money laundering in Spain against the perpetrator of fraud if there are indications that he or she could be hiding all or part of the proceeds in Spanish territory. In that case, the Spanish criminal courts in charge of the money laundering investigation will order every measure deemed necessary to trace, locate and freeze the laundered monies.

Civil proceedings

In accordance with the SCivPA, any party can file a request for protective measures before Spanish civil courts in respect of civil proceedings that are followed abroad, according to the following rules:

a EU Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters if the main proceedings are being heard before the courts of another EU country; or

b if the request is filed in the framework of proceedings concluded in a non-EU country, the measures could be granted in Spain:
- in accordance with an applicable bilateral treaty; or
- provided that the Spanish courts do not have exclusive jurisdiction over the substance of the matter.[20]

iii Enforcement of judgments granted abroad in relation to fraud claims

The enforcement of the criminal aspects of judgments granted abroad in relation to fraud matters (e.g., the sentence imposed on the offender) will be carried out by the Spanish criminal courts in accordance with the EU regulations or international treaties regarding mutual assistance in criminal matters, as described above.

The civil decisions adopted in these judgments by civil or criminal courts (e.g., the compensation of the victims) will be enforced by the Spanish civil courts in accordance with EU Regulation 1215/2012 or the international treaties regarding mutual judicial assistance in civil matters. Spanish law[21] also establishes specific proceedings for the recognition and enforcement in Spain of civil judgments rendered abroad, applicable when no EU regulation or treaty exists.

20 Article 722 of the SCivPA.

21 Act 29/2015, 30 July on international legal cooperation in civil matters and SCivPA, 25th and 26th Final Provisions.

iv Fraud as a defence to enforcement of judgments granted abroad

Spanish law does not consider fraud a specific defence against the enforcement of judgments rendered abroad. The general cause for Spanish courts denying the recognition or enforcement of a judgment rendered abroad is that it contravenes Spanish public policy. Therefore, such a defence would only be successful if the fraud was perpetrated in a way that could lead the Spanish courts to consider that the judgment was contrary to Spanish public order.

Appendix 1

ABOUT THE AUTHORS

ADRIANA DE BUERBA

Pérez-Llorca

Adriana de Buerba is head of the white-collar crime and investigations practice at Pérez-Llorca. She joined the firm in 2008, after having worked as a public prosecutor for 10 years.

She acts as defence counsel and private prosecutor, advising clients in criminal cases dealing with a wide variety of corporate criminal offences. Adriana has a wealth of experience in transnational criminal cases, assisting both foreign and Spanish companies involved in transnational criminal investigations in Spain and abroad. She regularly works with foreign law firms in the United Kingdom, the United States, France, Switzerland and other EU countries to provide appropriate multi-jurisdictional advice to her clients. She is also an expert in extradition, European arrest warrant proceedings and international mutual legal assistance mechanisms.

Adriana is a member of the Madrid Bar Association, the International Bar Association and the Anti-Money Laundering Committee of the General Council of Spanish Lawyers (CGAE). Adriana was recently appointed as an officer of the IBA's Criminal Law Committee (www.int-bar.org/Officers/Index.cfm?unit=5_0_0_1_0).

Adriana is also a member of the European Criminal Bar Association, where she is active in the European Fraud and Compliance Lawyers Association (www.efcl.eu) and the Anti-Corruption in Europe (ACE) working group.

Adriana is also a member of the Spanish Criminal Lawyers Association (UEAP). The UEAP is a non-profit association that aims to promote the improvement of the protection of the rights of individuals before the criminal justice system.

LAURA RUIZ

Pérez-Llorca

Laura Ruiz is a senior associate on the litigation team at Pérez-Llorca. She joined the firm in 2007.

She takes part in complex litigation cases involving various matters such as tort liability, directors' liability and insurance. She devotes most of her time to insolvency litigation, and she has experience in defending interests of both debtors and creditors (Spanish and foreign financial entities, investment funds, etc.) in the framework of complex issues, including multi-jurisdictional aspects of Spanish insolvency proceedings,

Laura is a member of the Madrid Bar Association.

PÉREZ-LLORCA

Paseo de la Castellana, 50
28046 Madrid
Spain
Tel: +34 91 423 67 29/42
Fax: +34 91 436 04 30
adebuerba@perezllorca.com
lruiz@perezllorca.com
www.perezllorca.com

ISBN 978-1-912228-56-0