International Fraud & Asset Tracing

This is a timely and important book. Hard-hitting regulatory powers are on the increase and the appetite to use them grows. Multi-national corporations are struggling to grapple with cross-border legal problems arising from fraud, particularly when fast-moving issues need to be addressed in a timely and effective manner in order to avoid extreme financial and reputational consequences.

An in-house lawyer who wants to find out, lawfully, whether or not there has been corrupt conduct by a foreign subsidiary, or whether an internal investigation should be launched, will need help in not tripping up over the differences in foreign legal systems, while trying to gather information. This book provides that help. It is detailed, it is helpful, it is good guidance.

This volume will be a valuable resource to practitioners who may need to find an answer to a question arising in one of the 24 countries covered.

THIRD EDITION 2015

International Fraud & Asset Tracing

General Editor: Simon Bushell, Latham & Watkins

THE EUROPEAN LAWYER REFERENCE

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Jurisdictional comparisons **Third edition 2015**

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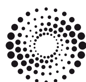

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Foreword

Lord Gold, David Gold & Associates

As global trade and interconnectivity continues to intensify, with large commercial groups utilising complex structures across multiple jurisdictions, responding effectively to the discovery of wrongdoing has become ever more difficult. At the same time, an increasingly active international regulatory environment, under which companies have been facing severe civil and criminal penalties (not to mention follow-on civil litigation), only serves to underline the importance of navigating the relevant legal regimes correctly. It is necessary for anyone tasked with advising on such matters to familiarise themselves with the key legal issues relating to corporate fraud and corruption in each of the jurisdictions in which their clients operate. This book will be of great assistance in that regard.

Numerous recent examples highlight the potential consequences where companies fail sufficiently to prevent, investigate, report and/or remedy fraudulent or corrupt activity. The collapse of MF Global in late-2011 took place in the context of allegations of financial misconduct, including dipping into client accounts to make up for its own funding shortfalls, and this has resulted in a number of civil and criminal actions against former officers and the company itself. More recently, the Banco Espirito Santo group in Portugal has collapsed amid accusations of serious financial irregularities, leading to its healthy assets being stripped out into a 'good bank' established by the Portuguese regulators. The huge fines imposed on several banks as a result of the recent Libor scandal, as well as the $490m fine against GlaxoSmithKline in China following serious bribery allegations, serve as further stark reminders of the severity of the potential repercussions that companies can face for unlawful activity. It is clear that this book, which attempts to address corporate fraud and corruption at an international level, has become even more relevant since the publication of the second edition. This has given rise to a need to update and expand the publication. This third edition deals with the major legal developments in the last three years, and there are new chapters covering several important jurisdictions, notably the USA, as well as current and emerging economic powers: Canada, India, and Nigeria and a number of smaller but strategically significant jurisdictions: The Bahamas, Cyprus, Gibraltar, Ireland and Kazakhstan.

Helpfully, and in common with previous editions, the chapters follow a common structure, addressing the following key areas: the management of the internal investigation, obtaining disclosure from third parties, steps that a victim of fraud might take to preserve assets and evidence, causes of action available to a victim of fraud, and anti-bribery/corruption legislation.

The management of an internal investigation in particular is a difficult and sensitive process which requires an appreciation of different legal nuances across the various jurisdictions in which the investigation is to take place. This is no easy task given the number of legal issues that can arise during the course of an investigation. The investigators must ensure that their activities, which will likely include interviews with employees and (if possible) a review of their emails and other communications, are conducted in accordance with applicable data protection, privacy, human rights and employment laws. These can differ widely between jurisdictions, and investigators must not fall into the trap of assuming that the satisfaction of one country's requirements will suffice elsewhere – any failure to navigate the different national rules correctly could result in any evidence obtained being deemed inadmissible, and/or sanctions being imposed on the company itself. Similarly, the rules regarding legal privilege, including the types of communications that can attract privilege and the circumstances in which privilege will be waived, can vary markedly across jurisdictions. Some countries also have strict rules prohibiting 'tipping-off' employees before the authorities have had a chance to seize evidence, with civil and criminal sanctions for non-compliance. A detailed multi-jurisdictional guide such as this will be an invaluable resource for anyone seeking to address these difficult issues.

An issue of increasing prominence in a number of jurisdictions is whether a company (or its employees) should take advantage of leniency regimes by disclosing details of wrongdoing and so seek relief from prosecution and/or other sanctions. Following a number of high-profile corporate scandals and collapses, authorities in various jurisdictions have taken steps to encourage and incentivise whistleblowing and self-reporting. The US has strengthened its whistleblower regime in recent years, and in the UK the new Director of the Serious Fraud Office, David Green CB QC, has reached out to the business community to encourage self-reporting, stressing in a speech in October 2013: *'If a company made a genuine self-report to us … in circumstances where they were willing to cooperate in a full investigation and to take steps to prevent recurrence, then in those circumstances it is difficult to see that the public interest would require a prosecution of the corporate.'* Similar trends can be observed elsewhere.

Another important development has seen competitor businesses sue their rivals for damages where the latter have been found to have engaged in corrupt practice for example in the course of a public procurement process. Such claims have been seen in the US for a number of years (the Compass Group reportedly reached a substantial settlement with two rival companies in 2006 after it was investigated for alleged bribery to secure commercial contracts). 2014 saw the first follow-on damages claim of this sort in the English Courts brought against Innospec which was accused by a Jordanian competitor of having conspired to use unlawful means in allegedly paying bribes to a Middle Eastern Oil Ministry. While such claims will often be difficult (in particular, it will not be straightforward for the claimant to establish that the alleged bribery caused it to incur loss), this

is a development of which practitioners should be keenly aware and the risk of such claims being brought by competitors may factor into their considerations when deciding whether to admit guilt and reach a settlement with national authorities.

Finally, the coming into force of the Bribery Act 2010 in the UK has been a highly significant development with international repercussions, setting a 'gold standard' for anti-corruption regulation. The Bribery Act is extraterritorial in scope (much like the Foreign Corrupt Practices Act of 1977 (FCPA) in the US and goes further in outlawing facilitation payments), and creates offences not just for the giving and receiving of bribes, but also in respect of a failure by commercial organisations to prevent bribery. This requires companies to take a pro-active approach and it is therefore more important than ever for international companies (and particularly those operating in markets known to be high risk for bribery and corruption) to establish robust compliance mechanisms. Although the Bribery Act has given rise to little significant enforcement activity so far, this is likely a result of the complex nature of regulatory investigations and practitioners would be wise not to assume that the UK authorities will be in any way reluctant vigorously to enforce their new powers.

As someone with years of experience advising and working with large corporate entities to investigate and litigate frauds and to strengthen governance and compliance functions and more recently as monitor of BAE Systems plc (appointed by the US Department of Justice), I found this book highly informative and timely. I worked alongside the book's General Editor, Simon Bushell, whilst we were both partners at Herbert Smith. Simon is a leading practitioner in this area, and he has pulled together, in this third edition of *International Fraud and Asset Tracing*, a book which is accessible, detailed and clearly structured, enabling easy comparisons between different jurisdictions. It will be an important resource for both in-house and external counsel advising on international fraud and corruption.

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1. INTRODUCTION

For the purpose of understanding the matters discussed throughout this chapter, it is fundamental to provide a general overview of the distinctive features of the Spanish legal system.

The Spanish legal system is divided into different jurisdictions that operate independently of each other (notwithstanding the liaisons that may derive from disputes affecting various jurisdictions). This separation marks a significant difference with regard to common law jurisdictions because civil, regulatory, labour and criminal matters are dealt with in various specialised courts and are subject to their own procedures, standards and substantial rules. In this regard, the following jurisdictions exist under Spanish law:

- civil jurisdiction: deals not only with matters of civil and commercial nature (eg patents, trademarks, insolvency proceedings, unfair competition), but also with other matters not explicitly assigned to other jurisdictions;
- criminal jurisdiction: deals with matters of a criminal nature, except for those allocated to the military jurisdiction;
- regulatory jurisdiction: deals with cases involving the public administration – provided that it acted in the exercise of its public powers. This jurisdiction also includes competition matters handled before regulatory bodies (eg merger control, control of horizontal and vertical restraints of competition), among others; and
- labour jurisdiction: deals with claims related to labour issues (relationships of employers *vis-à-vis* employees) and social security matters.

Each jurisdiction is governed by its own procedural rules, which are:

- the Spanish Civil Procedure Act (*Ley de Enjuiciamiento Civil*; the SCPA) for civil and commercial proceedings;
- the Spanish Criminal Procedural Act (*Ley de Enjuiciamiento Criminal*) (the SCrimPA) for criminal proceedings;
- the Spanish Act on the Regulatory Jurisdiction (*Ley Reguladora de la Jurisdicción Contencioso-Administrativa*) for regulatory proceedings; and
- the Spanish Labour Jurisdiction Act (*Ley Reguladora de la Jurisdicción Social*) on labour and social security proceedings.

These regulations also include several rules regulating the relations between the various jurisdictions.

Another fundamental difference between continental and common law lies in the concept of 'disclosure'. Disclosure does not exist in the Spanish

jurisdiction. Parties to a procedure cannot rely on each other to provide the necessary documents. Neither party is obliged to provide documents to the other party unless specifically ordered by the court, subject to certain limits.

2. MANAGING THE INTERNAL INVESTIGATION

2.1 Hard copy documents

Measures of supervision and monitoring

On the one hand, under Spanish employment law, an employer may adopt the measures of supervision and monitoring, observing due consideration for their employees' human dignity, that they deem most fitting in order to verify compliance by the employees with their work obligations and duties.

On the other hand, searches of employees, their lockers and personal effects, where necessary to protect the assets of the company and of the other workers in the company, may only be done inside the workplace and during work hours.

Regarding the monitoring measures over the resources placed at the disposal of employees, it must be pointed out that, as they are a corporate resource, in principle, they come within the purview of the powers of supervision and monitoring of the employer. For this reason, employers are in principle entitled to monitor corporate email accounts.

Limits on employers' monitoring

It should be noted that the implementation of such measures must respect the dignity and privacy of employees, and a workers' legal representative or, in his/her absence from the workplace, another employee from the company, whenever possible, shall be present.

In addition, employers should inform their employees of the existence of a monitoring or surveillance system.

Spanish Supreme Court doctrine

In light of the above, the Spanish Supreme Court has acknowledged that employees have heightened expectations of privacy regarding their belongings and lockers. In short, in Spain, there are reasonable expectations of privacy for employees' personal belongings.

Nevertheless, a company could weaken their expectations of privacy regarding computer equipment by informing employees of a specific policy on computer searches or monitoring.

Companies' internal rules

Notwithstanding the above, prior to the installation of monitoring software and the implementation of measures intended to inspect employees' workplaces, the employees must be notified of the existence of a corporate policy prohibiting the personal use of the corporate IT systems.

In this sense, it is highly recommended to establish the rules regarding the use of the corporate IT systems provided to employees if it becomes necessary to access employees' emails.

Conclusion

To summarise, companies will have to take into account the circumstances surrounding each case in order to determine if the monitoring carried out is in violation of any of the fundamental rights of employees or if it represents legitimate corporate monitoring.

In any case, according to Spanish case law, the implementation of measures intended to search employees' workplaces must be:

- justified – there are indications of violations by the employee;
- adequate to verify any possible suspicions;
- necessary – it is essential to find out the extent of the potential breach by the employee; and
- proportional – the monitoring is carried out under the terms and conditions established in the Workers' Statute.

2.2 Electronic documents

Legal considerations

The installation of monitoring software on employees' electronic equipment is subject to the legal restrictions pointed out in section 2.1. In other words, if a Spanish employer wishes to access the content of electronic documents, specifically emails, they will have to comply with the applicable legal requirements:

- reasonable grounds;
- notification to both the employee and the workers' representatives; and
- the presence of at least one workers' representative or an employee during the inspection.

In addition, the Spanish Constitution guarantees the privacy of communications and establishes that the law should limit the use of technology in order to guarantee citizens' honour and privacy.

Case law

Nevertheless, a recent case on this matter clearly broke an established doctrine of the Spanish labour courts that, in order to frustrate employees' right to privacy when using their employers' IT systems, the company had to set a specific policy, ensure that all employees are aware of this policy and carry out regular announced monitoring.

According to the aforementioned ruling of the Constitutional Court of Spain, if the applicable collective bargaining agreement expressly establishes that employees could be sanctioned for making a private use of the company's IT systems, it is possible for the employer to monitor emails even though the use of monitoring equipment has not been previously authorised.

Consequently, the Constitutional Court of Spain allows the possibility of reading employees' emails to control their use of the company's account without their consent, even in the absence of a protocol or policy on computer monitoring, in the event that the applicable collective bargaining agreement expressly establishes a sanction for the private use of the company's IT tools.

In the specific case mentioned above, the court ruled that the company's conduct did not breach the employees' right to the secrecy of their communications, as they did not have reasons to expect such secrecy. The court understood that there was no breach of the right to privacy of communications as the measure was justified, adequate, necessary and proportional, as required by law.

Moreover, the court considered that the collective bargaining agreement by itself implicitly empowered the company to monitor employees' use of professional email accounts despite the fact that the company did not have any policy regulating the use of corporate IT systems.

Limits on the privacy of communications

It should be noted that the right to private communications established in the Spanish Constitution is not absolute. On the contrary, the circumstances of each case have to be taken into consideration by companies to determine whether the monitoring carried out by them involves the infringement of employees' fundamental rights or if it represents legitimate corporate monitoring.

The ruling referred to in this section recognises that employees' privacy rights must be balanced against employers' rights to investigate employee wrongdoing and further acknowledges that employees' rights to privacy are not absolute.

Additionally, it implicitly establishes that, in the event that a company suspects that an employee is committing a serious infringement of his/her contractual duties and obligations, it is possible to monitor the corporate IT systems provided to him/her since this is the only manner to verify the infringement and guarantee certain objectivity and proportionality to the adopted measure.

2.3 Obtaining oral evidence from employees

2.3.1 Generally, are there any employment provisions that prohibit or restrict an employer from conducting a search of an employee's records?

As pointed out previously, under Spanish employment law, searches of an employee and his/her personal effects, including personal records, must be carried out with the maximum respect for the dignity and privacy of the employee and in compliance with the applicable legal requirements.

2.3.2 Can an employer require employees to be interviewed as part of an internal investigation? If so, do employees have the right to be legally represented or to attend with a colleague?

In the event that an internal investigation takes place, an employer could require employees to be interviewed as part of the investigation procedure. It should be noted that the employees are not obliged to participate in the investigation procedure carried out by their employer. However, if they voluntarily decide to participate, they can receive legal assistance.

2.3.3 Do they have the right to advance notice of what is to be discussed and/or to have an advance copy of the documents to be referred to?

Bearing in mind that they are not obliged to participate in the internal investigation, employees are not entitled to advance notice of the content of the documents to be referred to. Nevertheless, as pointed out previously, in the event that a search of the employee's belongings takes place, some legal precautions must be adopted.

2.3.4 Can they refuse to answer questions put by the employer? For example, is there a right to 'silence' if their answers may tend to incriminate them?

Once again, bearing in mind that they are not legally obliged to participate in the internal investigation, employees have the right to 'silence' and it may not be used as evidence to be incriminated. It should be noted that, in Spain, an internal investigation carried out by the employer is not a criminal investigation procedure.

2.3.5 Are there any other restrictions on the use which can be made of the interview notes which are produced?

The notes can be used in a judicial proceeding if necessary. The sole restriction on the use of testimonies arises from the Spanish Data Protection Act.

2.3.6 Are those notes themselves admissible in civil proceedings or do they need to be converted into witness statements?

The notes are admissible in employment/civil proceedings. However, in order to have a real influence on the courts, it would be best to convert them into witness statements.

2.4 Legal privilege

2.4.1 Will those documents be protected from disclosure in subsequent civil or regulatory proceedings?

As explained later, legally privileged documents should be protected from disclosure not only during dawn raids, when the CNMC should not gather this type of document, but especially within a leniency application, where the CNMC will generally not disclose a copy of the leniency application to any third party (including any courts) but, should it do so, the CNMC will expressly stress the confidential nature of the application in order to avoid its future disclosure.

2.4.2 Will they be subject to 'legal professional privilege'

With regard to competition proceedings, communications with external lawyers are subject to the principle of confidentiality of communications between lawyer and client, enshrined in Article 24 of the Spanish Constitution, which establishes the right to defence.

Notwithstanding the above, in the case of documents circulated between the company and an external lawyer for the purpose of preparing the legal defence with regard to the proceedings, the Spanish Competition Authority (the CNMC) recently held in Case R/0156/13 *Balat* that the documents will be protected from disclosure as far as the company can prove that the documents were prepared exclusively for the purpose of requesting external legal advice. In particular, a company must be able to prove that (i) the external lawyer requested such information from the company and (ii) the information was prepared only for the purpose of providing the external lawyer with the information requested. It is worth mentioning that, provided requirements (i) and (ii) above are met, such protection from disclosure would also be applicable to preparatory notes made by the company.

Nevertheless, according to the decision from the European Court of Justice (the ECJ) of 14 September 2010 in Case C-550/07 P *Akzo Nobel Chemicals Limited and Akros Chemicals Limited v Commission of the European Communities*, communications with in-house lawyers within a company or group are not covered by legal professional privilege, essentially because, in the view of the ECJ, such lawyers do not have the required degree of independence – there is an employment relationship between the in-house lawyers and their client.

In this regard, the ECJ held that an in-house lawyer cannot be treated in the same way as an external lawyer because he/she occupies the position of an employee, which, by its very nature, does not allow him/her to ignore the commercial strategies pursued by his/her employer and thereby affects his/her ability to exercise professional independence.

2.4.3 If the company makes disclosures to a regulator during the course of the investigation, will this amount to a waiver of privilege?

There are typically three different ways through which the CNMC is able to obtain information from companies:

- as a consequence of a dawn raid;
- through the response to a request for information; and/or
- through a leniency application.

Dawn raids

In the event that the CNMC carries out a dawn raid at the premises of a company, it is entitled to gather all the relevant information within the scope of the investigation, save for personal information or information subject to legal privilege (communications between the company and external lawyers). In this sense, the Spanish Supreme Court (*Tribunal Supremo*) concluded in its ruling regarding *Case Stanpa* that there will not exist a breach of the confidentiality, to which communications between the company and external lawyers are subject, if the CNMC collects certain information during the dawn raids and the company (or its lawyers) does not claim the protection of such information either during or within 10 days after the dawn raid. Therefore, the burden of proof lies with the company,

which may have to give evidence to conclude that certain information is subject to confidentiality protection.

Response to a request for information

The Spanish Competition Act (*Ley de Defensa de la Competencia*) set out the duty to cooperate with the CNMC when receiving a request for information. In this scenario, if the company decides to disclose privileged information to the CNMC, it could be understood that such information would no longer be protected.

Leniency applications

If a company discloses certain relevant information to the CNMC within the framework of a leniency application, then, pursuant to the Leniency Notice, paragraph 66(a), the company must cooperate with the CNMC and provide the Competition Directorate (the CNMC's investigatory body) with all the information and evidence that it holds that could help to prove the existence of a certain anti-competitive practice.

Although Article 51 of the Spanish Competition Regulation (*Reglamento de Defensa de la Competencia*) foresees that parties to a proceeding are able to access the information necessary to respond to the statement of objections, it denies the possibility of obtaining copies of any leniency applications. Moreover, Article 51 expressly states that it is not only the information disclosed within the framework of a leniency application that is confidential, but also the very act of applying for leniency itself.

In this regard, the SCPA sets out that the disclosure of information provided by a leniency applicant is not bound by the existing cooperation duty between the CNMC and the Spanish courts. According to this provision, the CNMC could refuse to disclose the documents submitted by a company in the context of a leniency application to any Spanish court which requests such information. This would constitute an important safe harbour for companies which may decide to apply for leniency.

3. DISCLOSURE FROM THIRD PARTIES

Criminal proceedings

As there is no discovery phase within the Spanish criminal proceedings, it is not possible for the claimant to directly obtain disclosure from the defendant or third parties before the initiation of the investigative stage of a criminal proceeding. Said disclosure takes place during the investigative phase of criminal proceedings, which serves a double purpose:

- investigative: the judge must investigate the facts alleged in the criminal complaint in order to determine if a criminal offence has been perpetrated and who has perpetrated said criminal offence; and
- precautionary: the judge must adopt the necessary precautionary measures to ensure (i) that the case can be tried successfully and (ii) the payment of the possible civil liabilities arising from the alleged criminal offence.

These precautionary measures include the disclosure of evidence from the defendant (subject to certain limits described below), claimant and third parties.

However, it is important to note that the seizure of a defendant's assets is subject to the privilege against self-incrimination, meaning that a defendant can refuse to turn over any evidence they feel may incriminate them.

Further to the above, in Spain it is possible for the public prosecutor to receive criminal complaints and carry out the investigative proceedings he/she deems necessary, although he/she may not adopt any precautionary measures, except for the preventive detention of individuals for questioning.

Civil proceedings

Spanish civil law denies requests for disclosure made in the framework of proceedings brought in other states. In this respect, the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Convention) provides that contracting states are permitted *'at the time of the signature, ratification or accession'* to declare that they will not execute Letters of Request issued in order to obtain pre-trial disclosure of documents as known in common law countries. Spain, exercising the right granted by this article, has filed reservations that essentially prohibit all pre-trial disclosure of documents.

Therefore, parties in civil proceedings are not entitled to directly address opposing parties' or even third parties' requests for disclosure or requests for documentation without specifying the documents requested. However, the SCPA establishes different mechanisms for the parties to request that the court orders opposing parties or third parties to disclose certain documents before initiating or during civil proceedings.

Preliminary proceedings

Before initiating civil proceedings, the future claimant may initiate preliminary proceedings in order to collect certain documents or information that they deem essential to their claim.

However, a party is not entitled to request any kind of documents by means of the preliminary proceedings. The information/documents that can be requested to prepare the statement of claim are those specifically established in Article 256 SCPA. Such *numerus clausus* includes the following requests:

- request for information addressed to the potential defendant in order to assess his/her legal standing and representation;
- request addressed to the potential defendant for the exhibition of that which constitutes the object of the proceedings;
- request addressed to the heir or legatee for the exhibition of a will;
- request addressed to a shareholder for the exhibition of corporate documents and/or annual accounts;
- request for the exhibition of an insurance contract covering civil liability. This request should be addressed to the person that is in possession of the document;

- in connection with proceedings for the defence of collective interests of consumers and for the purpose of specifying the members of the aggrieved group, the applicant may request the appropriate measures to identify the members of the affected group; and
- other requests set out in special regulations (SCPA refers to the preliminary measures for the checking of factual grounds regarding patents).

The writ requesting the initiation of preliminary proceedings shall:

- summarise the content of the civil proceedings that the applicant is preparing;
- express the specific measures requested, indicating the person that shall comply with it (normally the potential defendant but it can be also addressed to third parties);
- prove that the applicant has a legitimate interest and that the measures requested are justified; and
- offer a deposit in order to cover the costs and damages which the requested parties will incur to comply with the court's request.

If the court grants the request, the potential defendant/third party will be ordered to provide the claimant with the documents or information requested. If this person refuses the disclosure, a hearing will be held and the court will issue a decision. In the event that the court finds for the applicant and the requested person does not comply with the court's order, the court may grant specific measures in order to oblige the person to comply therewith and may make negative inferences against that person (Article 261 SCPA).

Information requests to third parties

Once the proceedings are initiated, the parties are also entitled to request that the court makes a request for information and documents from third parties (specifically, legal persons or public entities). Specifically, Article 381 SCPA establishes the possibility of addressing requests regarding relevant facts of the case to companies or public entities so as to certify certain information or the accuracy of certain claims by submitting a written statement or filing specific documents.

These requests shall be filed before the court specifying the points that the third party must certify or confirm or the documents requested. The third party has to file the answer to the court's request at least 10 days before the trial so the parties and/or the court may:

- summon the third party to the trial in order to complete and clarify its written statement; and/or
- request and admit, respectively, evidence addressed to contradict the assertion made by the third party.

It should be noted that these points would not be applicable in the event that the request has been addressed to a public entity and such public entity complies with a public certificate.

Cooperation between different states in the taking of evidence in civil and commercial matters

Finally, there are several international instruments aimed at improving judicial cooperation on obtaining evidence abroad.

EC Regulation 1206/2001 of 28 May 2001 on cooperation between the courts of member states (excluding Denmark) in the taking of evidence in civil or commercial matters is applicable in civil and commercial matters where the court of a member state requests

- the competent court of another member state to obtain evidence; or
- to gather evidence themselves in another member state.

These requests should be made to obtain evidence which is intended for use in judicial proceedings, whether commenced or contemplated.

The procedure for taking evidence in another member state cannot be understood as a disclosure process since this procedure is ordered and controlled by the central authorities designated by each member state. Specifically, a court making a request under EC Regulation 1206/2001 is addressing not a party in the proceedings or a third party but a court of another member state, which would take the appropriate measures in order to obtain the requested evidence.

Another international instrument is the Hague Convention, in which the procedure for taking evidence is similar to that under EC Regulation 1206/2001 (as EC Regulation 1206/2001 is inspired by Hague Convention).

4. STEPS TO PRESERVE ASSETS/DOCUMENTS

4.1 Can a claimant take pre-emptive measures to prevent the disposal of assets by the defendant?

Criminal proceedings

The claimant and public prosecutor can request that the investigative judge adopts precautionary measures to (i) prevent a defendant and certain third parties from disposing of their assets and (ii) enable a possible recovery in respect of any civil liabilities and the legal costs arising from the criminal proceedings. These measures are the imposition of a bail or the seizure of assets. The SCrimPA refers to the SCPA as regards the rules concerning the imposition of a bail and the seizure of assets.

Lastly, in addition to issuing a sentence for certain criminal offences, the court may also confiscate (i) the goods, means or instruments utilised to carry out the criminal offence and (ii) the illicit gains obtained from the criminal offence.

Civil proceedings

Upon an application by the claimant, the court may order interim measures that prevent a defendant from disposing of their assets. In this sense, Article 726 SCPA establishes that courts may grant any direct or indirect interim measures as they see fit in relation to the assets and rights of a defendant as long as (i) they choose the less burdensome action for the defendant and (ii) are aimed at guaranteeing the effectiveness of a potential favourable judgment.

Article 727 SCPA includes an exemplary list of interim measures that can be granted, including:

- the attachment of a defendant's assets (eg real estate, bank accounts, shares, incomes or other liquid assets);
- the judicial administration of productive assets; and
- the deposit of movable assets.

In any case, this list does not preclude judges from granting any other measures or actions which meet the abovementioned requirements.

The application for the interim measures must be accompanied by the supporting documentation or any other means of proof to support the claim. In particular, it is necessary to prove that the following requirements are met:

- *fumus boni iuris*: a good and arguable case is presented;
- *periculum in mora*: a real risk of dissipation of assets exists, to the point that the judgment may not be effective unless the defendant is him/herself restrained by an injunction or by a similar court order over his/her assets; and
- sufficient security for costs is deposited by the claimant in order to compensate the defendant in the event that the final decision quashes the temporary injunction.

As a rule, interim measures should be requested in the statement of claim (however, they may also be requested before or even after filing the statement of claim). In particular, a request for interim measures may only be filed before the statement of claim due to need and urgency (circumstances that the applicant must demonstrate).

Focusing on the procedure, after filing the request for interim measures, the court will summon the parties to a hearing in which evidence is produced and the parties make their allegations. After the hearing, the court will decide whether to grant the requested interim relief. This court order may be appealed before the court of appeals.

However, if urgent circumstances are present – normally, when the interim measures are requested before filing the statement of claim – the court may decide to adopt the interim measures in the absence of the defendant (*inaudita parte debitoris*). After the court's decision, the defendant will be served the decision in order to file a brief in opposition. Once the brief has been filed, the hearing is held and, in view of the defendant's statement, the court may decide to lift the granted measures.

4.2 Can a claimant take pre-emptive measures to prevent the destruction of evidence by the defendant?

Criminal proceedings

A claimant cannot take pre-emptive measures by him/herself to prevent the destruction of evidence by the defendant. Rather, the claimant may request:

- the court to order a defendant to be remanded so as to prevent the destruction of evidence;
- that certain evidence be produced before the trial stage of the criminal proceedings; or

- the seizure of evidence.

Holding a defendant on remand

The SCrimPA foresees that a judge may order that the defendant be remanded when the following requirements are met:

- the existence of one or more facts which may constitute a criminal offence punishable with a term of imprisonment equal to or greater than two years if the defendant does not have a criminal record, or with a term of imprisonment less than two years if the defendant has a criminal record;
- that there is sufficient evidence to suggest that the defendant has carried out said alleged criminal offence; and
- that the remand pursues certain objectives, one of which is the existence of a concrete and specific danger that the defendant may conceal, alter or destroy relevant evidence for the prosecution of the case.

The remand ordered to prevent the destruction of evidence by the defendant cannot exceed six months. However, it may be ordered again even if the aforementioned timeframe has elapsed if the defendant fails to appear before the court when summoned.

Production of evidence before initiation of the trial stage

In Spanish criminal proceedings, evidence is produced during the investigative stage and in accordance with the principles of immediacy (in the presence of the judge(s)), concentration (evidence is to be produced in unity) and cross examination (in the presence of all parties to the proceedings). However, under certain circumstances, it is possible and even necessary to produce evidence before initiation of the trial. These are as follows:

- pre-established evidence (*prueba preconstituida*): evidence that must be produced in advance due to extraordinary circumstances (imminent death of a witness, for example) that would make it impossible to produce at a later time (the trial itself). Said evidence must be produced in such a manner that the principles of immediacy, concentration and cross examination are complied with; and
- anticipated evidence (*prueba anticipada*): evidence that, due to its nature (visual inspection or examination of a corpse, for example), can only be produced before the trial stage. Said evidence must be very accurately described and precisely recorded in order to be properly used as evidence during the trial and subject to cross-examination by the parties.

Seizure of evidence

Lastly, the claimant may request that the court orders the seizure of evidence held by the defendant. As previously mentioned, the seizure of the defendant's assets is subject to the privilege against self-incrimination. However, this privilege does not extend to searches and seizures carried out in the defendant's domicile, if it is an individual, or centre of business (whether it be a registered office or establishment) if the defendant is a legal

person. Searches and seizures can be ordered in secret by the investigative judge. However, it is compulsory for the ordered search to be carried out in the presence of the judicial clerk and the owner of the domicile and/or legal representative of the defendant. The court resolution that orders the search and seizure shall specifically define what area of the domicile/centre of business is to be searched.

Civil proceedings

The SCPA sets out:

- measures to advance the production of evidence, which consist of producing the evidence prior to the beginning of the proceedings or, once initiated, before the trial (the procedural time at which to produce evidence); and
- measures to secure evidence, which aim for a specific piece of evidence to be proposed and produced during the regular procedural time (ie the trial).

Measures to advance the production of evidence

Measures to advance the production of evidence may be either for material items or for persons, and, in order to be granted, the applicant has to file the request before the court competent to hear, or hearing, the case.

If the measure is granted, the particular piece of evidence will be produced before initiating the proceedings or before the trial is held and in the presence of the counterparty, who would be entitled to participate (eg if the piece of evidence consists of cross-examining a witness, both the applicant and the counterparty will be entitled to ask them questions).

Finally, if a piece of evidence is produced before filing the statement of claim, the evidential value will disappear if the statement of claim is not filed within two months from producing the evidence (unless the claimant demonstrates that a *force majeure* event prevented them from filing it).

Measures to secure evidence

Measures to secure evidence may only be used for material items. Therefore, if a person is the subject or object of the piece of evidence and he/she is at risk, the appropriate measure to advance the production of evidence shall be requested.

The applicant may request any measure that they consider appropriate to secure a piece of evidence and avoid any risk of destruction (derived from opposing parties or third parties' conduct, natural events, etc). A typical example of a measure to secure a piece of evidence is the deposit or attachment of the asset in order to avoid its destruction.

Finally, for any measure for securing evidence to be granted, the applicant has to file the request before the court, demonstrating that:

- the specific piece of evidence is relevant and useful (*fumus bonis iuris*); and

- if the court follows the regular rules for the productions of evidence, this piece of evidence could be lost or its production is not going to be possible (*periculum in mora*).

These measures may be granted *inaudita parte debitoris* if special circumstances are present. Otherwise, a hearing will be held prior to the court making a decision where the person affected by the requested measure may oppose the applicant's request.

4.3 Can such pre-emptive measures be employed in respect of (i) proceedings brought in another jurisdiction and (ii) arbitral proceedings?

Criminal proceedings

Pre-emptive measures can be employed in respect of criminal proceedings brought in Spain by another jurisdiction. In this regard, it is important to differentiate between foreign proceedings brought by an EU member state and those that are not.

Proceedings brought by an EU member state

As regards pre-emptive measures for persons, EU member states may request that the Spanish authorities execute a European arrest warrant and hand over an individual who is residing or can be found in Spain in order to be tried or serve his sentence in the requesting EU member state. The Spanish authorities may subject the handover of the individual to certain conditions and/or guarantees, as set forth in Law 3/2003, of 14 March, on European Arrest Warrants.

When it comes to other pre-emptive measures, Spain has declared the provisional application of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union entered into in Brussels on 29 May 2000. Furthermore, Spain has enacted the following laws regarding the execution of resolutions from other EU member states regarding seizure of evidence and the confiscation of assets:

- Law 18/2006, of 5 June, on the Effectiveness within the European Union regarding resolutions ordering the Seizure and Assurance of Evidence in Criminal Proceedings; and
- Law 4/2010, of 10 March, on the Execution within the European Union of resolutions ordering the Confiscation of Assets.

Proceedings brought by other foreign countries

Regarding pre-emptive measures for persons, foreign countries may request the extradition of individuals who are residing or can be found in Spain. For this purpose, Spain has enacted Law 4/1985, of 21 March, on Extradition and has entered into numerous bilateral extradition treaties with other countries. As with European arrest warrants, the Spanish authorities may subject the handover of an individual to certain conditions and/or guarantees.

Lastly, as regards other pre-emptive measures, Spain is a party to numerous conventions, such as the OECD Convention on Combating

Bribery of Foreign Public Officials in International Business Transactions and the UN Convention against Corruption, and has entered into numerous bilateral treaties with foreign countries.

Civil proceedings

In accordance with Article 722 SCPA, interim measures can be employed in respect of proceedings in another jurisdiction and arbitral proceedings.

Proceedings in foreign countries

Any party may file a request for interim measures before Spanish courts in respect of proceedings that are followed abroad. The rules governing this request are:

- EC Regulation 44/2001 if the main proceedings are being heard in another EU country. EC Regulation 44/2001 has been amended by EC Regulation 1215/2012 and this new regulation will be applicable for causes of action brought after 10 January 2015. In such instance, interim measures granted in Spain may be recognised and enforced in other EU countries, disregarding which member state has jurisdiction over the substance of the matter (Article 31 of EC Regulation 44/2001 and Article 35 of EC Regulation 1215/2012). Regarding interim injunctions adopted *inaudita parte debitoris*, it should also be pointed out that EC Regulation 44/2001 has been amended by EC Regulation 1215/2012, which establishes in Article 42 that, in order to enforce such measures, it will be necessary to demonstrate that the resolution ordering the interim injunction has been served on the debtor.
- If EC Regulation 44/2001 is not applicable, Article 722 SCPA establishes that those interim measures could be granted: (i) in accordance with the applicable bilateral treaty; and (ii) as long as the Spanish courts do not have exclusive jurisdiction as to the substance of the matter. If the jurisdiction over the subject matter is attributed to the Spanish courts by virtue of the Spanish conflict of law rules, Article 722 SCPA prevents these courts from granting the measures. Therefore, although Spanish law does not exclude granting interim measures in respect of proceedings abroad, in practice, this possibility is very limited.

Finally, in the case of cross-border debts, the new European Account Preservation Order, EU Regulation 655/2014, which will be available from January 2017, is directly applicable in Spain. For a further analysis of the European Account Preservation Order, see the England & Wales chapter in this book.

Arbitral proceedings

Under certain circumstances, and with different consequences, parties who have submitted their disputes to arbitration may choose to request interim measures before the arbitral tribunal or before the courts.

Article 23 of the Spanish Arbitration Act (*Ley de Arbitraje*, the SAA), following the UNCITRAL Model Law, recognises that arbitrators have the power to grant interim measures. However, despite the arbitrators being

entitled to grant interim measures, they have no power to enforce them. Hence, in order to enforce interim measures granted by an arbitrator, the assistance of the Spanish courts is necessary.

Additionally, Article 11.3 SAA and Article 722 SCPA set out that any party to an arbitration agreement may file requests for interim measures before the courts prior to the commencement and during arbitral proceedings seated in Spain.

Regarding arbitral proceedings seated in other countries, the Spanish courts will be competent to grant instrumental interim measures if the requests for them comply with the applicable rules to the specific arbitrations and the requirements already analysed (see section 4.2 above).

4.4 Can the claimant apply for the defendant's travel documents to be confiscated?

Confiscation of travel documents is only possible in the framework of criminal proceedings. Both the claimant and the public prosecutor may request that the judge in charge of the investigative phase of a criminal proceeding confiscates a defendant's travel documents if either party believes that a defendant is a flight risk. The court resolution by which the judge orders the confiscation of the defendant's travel documents must be strongly reasoned, as it constitutes a limit of a defendant's freedom, specifically foreseen in Article 17 of the Spanish Constitution.

Civil proceedings

Under Spanish law, a victim of fraud is entitled to bring different causes of action. We have focused on those causes of actions aimed at recovering a lost asset either because it is held by a third party or because the seller sold it to another buyer.

Action for recovery of ownership (acción reivindicatoria)

An owner who has lost possession of their assets is entitled to bring action against the party who, without a legitimate title, is in possession of that asset. This cause of action is called *acción reivindicatoria*, or action for recovery of ownership, and is recognised in Article 348 of the Spanish Civil Code (the SCC). This cause of action can be brought *erga omnes*, ie against any third person or entity in possession of the assets in question.

For the success of this cause of action, the following requirements must be met:

- the claimant/owner has to clearly identify the assets whose recovery is being claimed;
- the owner has to demonstrate that he/she is the legitimate owner of the assets. Regarding real estate assets, it should be noted that if the owner has registered their title with a land registry (*Registro de la Propiedad*), this registration will constitute a rebuttable presumption of the ownership in accordance with Article 38 of the Spanish Mortgage Act (*Ley Hipotecaria*; the SMA). As for movable assets, Article 464 SCC establishes that the claimant shall demonstrate that they acquired the possession in

good faith as an owner and that they lost or were illegally deprived of possession; and
- the actual and undue possession of the defendant. Spanish case law and scholars understand that 'undue possession' (*posesión indebida*) means possession lacking a legitimate title (such as a lease agreement). The main problem of this cause of action arises when the defendant has also registered their ownership with a land registry and both the claimant and the defendant appear to have a legitimate title. In this case, the claimant also has to initiate civil proceedings requesting the cancellation or annulment of the land registry registration (Article 38 SMA). The claimant would be entitled to recover ownership of the asset only if the registration acknowledging the defendant's title were cancelled.

As for the effects of *acción reivindicatoria*, in the event that a decision in favour of the claimant is issued, the claimant would be entitled to recover the possession of their property. However, the defendant would only be obliged to reimburse the gains produced by the assets if they acted in bad faith. In such case, the claimant is also entitled to claim damages.

However, if the defendant held the assets in good faith, the defendant is not only not obliged to reimburse the gains produced by the assets, but is also entitled to claim payment for the costs incurred as a result of improvements to and investments made in the asset.

Finally, if, at the time of reimbursement, the defendant no longer holds the assets, they will be obliged to pay the claimant compensation assessed according to the market value of the assets.

Remedies in the event of a duplicated sale

Disregarding the criminal actions to be brought in the event that a company's property is stolen, the SCC establishes several remedies for cases where a seller (purportedly) sells a real estate asset or movable property twice. In such instances, the company that has been deprived of its ownership may bring civil action against the seller:
- requesting the restitution of the property and compensation for the damages incurred; and
- terminating the agreement for fraudulent breach of contract (failure to transfer the property of the asset).

Focusing on the restitution of the property, it is important to note that the success of this claim would depend on whether the third party (purchaser) acted in good faith or not.

If the purchaser acted in good faith, the obligation of returning the property purchased is subject to the following conditions or special rules:
- in the event of movable assets, Article 464 SCC provides that the claimant cannot obtain the restitution of the property without reimbursing the price paid by the third purchaser who acted in good faith; and
- in case of real estate, the good faith purchaser who first registers the purchase with the land registry will have priority under Spanish law. In such case, according to Article 34 SMA, the good faith buyer is

protected by the land registry registration and will hold their title under any circumstances. Therefore, remedies available to the claimant will be limited to damages but not specific performance (ie, recovery of the property).

If the buyer acted in bad faith (ie acquiring the asset knowing that it already belongs to another person), they would be obliged to return the property as well as the gains produced by the asset. Additionally, and as indicated, the claimant would also be entitled to claim damages.

Tort liability

Finally, we briefly address the Spanish regime regarding situations of fraud. In this respect, the SCC regulates different liability regimes for wilful misconduct:

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

We focus on giving a brief explanation of the tort liability regime; for further analysis on this issue, we refer to the chapter addressing Spain included in L Flannery (General Editor), *International Civil Fraud* (Thomson Reuters, 2014), pages 205 *et seq*.

Tort liability exists, according to Article 1902 SCC, when an 'act or omission' (ie misconduct) involving fault or negligence is present and this cause or omission causes damages. Therefore, in order to assess whether tort liability exists, based on *dolo* or fraudulent conduct, certain requirements have been established under Spanish law:

- The objective element, that is, an act or omission involving fault or negligence. 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: a party shall be liable for events that are foreseeable. In addition, tort liability also arises when the damage has been caused by wilful misconduct. A person acts wilfully if they are aware that their behaviour causes or may cause damages and fails to take the necessary steps to prevent it. According to case law, this fact in and of itself entails fraud.
- Losses: in order to be remedied, losses must be certain and not hypothetical. Generally speaking, it can be asserted that all material and moral damages suffered by the affected party or their estate must be remedied.
- The existence of a causal link between the conduct and the harmful result. The Spanish Supreme Court understands that the harmful result must be a natural, adequate and sufficient consequence of the wrongful conduct.

As for the remedies, if the claimant seeks that the defendant be ordered to do something, they may opt either to claim performance in kind (specific performance), by repairing or replacing the object harmed, or by equivalent performance, or they may claim 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).

Finally, the claimant may request the losses already suffered as well as the loss of income derived from the negligent act or omission. In an action for tort liability, the defendant is only liable to pay foreseeable losses unless the loss is caused by wilful misconduct, in which case the defendant may also be obliged to pay unforeseen losses.

6. ANTI-BRIBERY/ANTI-CORRUPTION LEGISLATION

Definitions

The Spanish Criminal Code punishes the following three forms of corruption and bribery:

Corruption of public officials

(i) This form of corruption is committed by (a) an individual who bribes an authority or a public official (whether it be Spanish or from an EU member state) and (b) the authority or public official who accepts it, irrespective of the reason behind the bribe. However, the sentence imposed (a term of imprisonment of six months to six years, a monetary fine of EUR 720 to 288,000 for individuals and EUR 10,800 to 3,600,000 in case of legal entities and disqualification of 1–12 months) varies depending on the reason for the bribe.

(ii) An authority or a public official who influences another authority or public official in order to obtain an economic profit.

(iii) An authority or a public official who, in abuse of their position and taking advantage of a conflict of interest, colludes with private individuals regarding (a) a public procurement in an attempt to defraud the Spanish public administration or (b) any other type of contract, operation or activity to obtain an economic profit.

The Spanish Criminal Code specifically foresees that legal persons can be held criminally liable for the acts of corruption specified in paragraphs (i) and (ii) above.

Corruption in international commercial transactions

This form of corruption is committed by those who corrupt or attempt to corrupt a foreign public official or public officials from international organisations in order to illicitly obtain a contact or benefit from carrying out an international economic activity. This criminal offence, however, does not extend to public officials who accept a bribe (who should be tried, as the case may be, in accordance with their national legislation). If said acts take place within the scope of a public procurement, the person responsible shall

be prohibited from entering into contracts with the public sector and from obtaining public subsidiaries or enjoy social security or tax benefits. Lastly, the Spanish Criminal Code foresees that legal persons can be held criminally liable for corruption in commercial transactions.

Corruption between private individuals

This covers any individual who offers executives, directors, employees or collaborators of any company an unfair benefit or advantage of any kind in order to obtain a favour and executives, directors, employees or collaborators who request or accept any unfair benefit or advantage.

As regards corruption in international commercial transactions and between private individuals, the Spanish Judicial Branch Law (*Ley Orgánica del Poder Judicial*) was recently amended by Organic Law 1/2014, of 13 March, to give Spanish courts standing to investigate said criminal offences in a foreign country when (i) a Spanish individual or an individual who normally resides in Spain has been accused or (ii) said criminal offence has been carried out by a legal entity whose corporate domicile is in Spain or by an administrator or director of a company whose corporate domicile is in Spain.

Anti-bribery/anti-corruption

Spanish legislation does not set forth specific obligations, or the corresponding sanctions in case of breach, that companies must comply with in order to prevent bribery or corruption. Notwithstanding the above, this does not entail that companies do not have to adopt measures to prevent corruption from taking place. In fact, corporate criminal liability can stem from, among other reasons, failure to exercise due control in the prevention of corruption. In essence, Spanish legislation gives companies freedom to decide what the best measures to adopt are. However, the range of possibilities given to companies in this regard has been criticised as it often creates a situation of legal uncertainty.

Lastly, the victims of criminal offences of corruption and bribery would be the Spanish public administration or the open market, meaning it is difficult to claim civil liabilities. Other potential victims (ie a third party competitor not awarded the procurement) can request that a company and/or its director be held criminally liable and not be allowed to enter into contracts with the public sector.

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