The Securities Litigation Review

Second Edition

Editor
William Savitt

Law Business Research

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EDITOR'S PREFACE

This second edition of *The Securities Litigation Review* is a guided introduction to the international varieties of enforcing rights related to the issuance and exchange of publicly traded securities.

Unlike most of its sister international surveys, this review focuses on litigation – how rights are created and vindicated against the backdrop of courtroom proceedings. Accordingly, this volume amounts to a cross-cultural review of the disputing process. While the subject matter is limited to securities litigation, which may well be the world's most economically significant form of litigation, any survey of litigation is in great part a survey of procedure as much as substance.

As the chapters that follow make clear, there is great international variety in private litigation procedure as a tool for securities enforcement. At one extreme is the United States, with its broad access to courts, relatively permissive pleading requirements, expansive pretrial discovery rules, readily available class-action principles and generous fee incentives for plaintiffs' lawyers. At the other extreme lie jurisdictions like China, where private securities litigation is complex, expensive, seldom remunerative and accordingly quite rare. As the survey reveals, there are many intermediate points in this continuum, as each jurisdiction has evolved a private enforcement regime reflecting its underlying civil litigation system, as well as the imperatives of its securities markets.

This review reveals an equally broad variety of public enforcement regimes. Canada's highly decentralised system of provincial regulation contrasts with Brazil's Securities Commission, a powerful centralised regulator that is primarily responsible for creating and enforcing Brazil's securities rules. Every country has its own idiosyncratic mixture of securities lawmaking institutions; each provides a role for self-regulating bodies and stock exchanges but no two systems are alike. And while the European regulatory schemes work to harmonise national rules with Europe-wide directives, few countries outside Europe have significant institutionalised cross-border enforcement mechanisms, public or private.

We should not, however, let the more obvious dissimilarities of the world's securities disputing systems obscure the very significant convergence in the objectives and design of international securities litigation. Nearly every jurisdiction in our survey features a national securities regulatory commission, empowered both to make rules and to enforce them. Nearly

every jurisdiction focuses securities regulation on the proper disclosure of investment-related information to allow investors to make informed choices, rather than prescribing investment rules. Nearly every jurisdiction provides both civil penalties that allow wronged investors to recover their losses and criminal penalties designed to punish wrongdoers in the more extreme cases.

Equally notable is the fragmented character of securities regulation in nearly every important jurisdiction. Alongside the powerful national regulators are subsidiary bodies – stock exchanges, quasi-governmental organisations, trade and professional associations – with special authority to issue rules governing the fair trade of securities and to enforce those rules in court or through regulatory proceedings. Just as the world is a patchwork of securities regulators, so too is virtually each individual jurisdiction.

The ambition of this volume is to provide readers with a point of entry to these wide varieties of regulations, regulatory authorities and enforcement mechanisms. The country-by-country treatments that follow are selective rather than comprehensive, designed to facilitate a sophisticated first look at securities regulation in comparative international perspectives, and to provide a high-level road map for lawyers and their clients confronted with a need to prosecute or defend securities litigation in a jurisdiction far from home.

A further ambition of this review is to observe and report important regulatory and litigation trends, both within and among countries. This perspective reveals several significant patterns that cut across jurisdictions. Since the financial crisis of 2008, nearly every jurisdiction has reported an across-the-board uptick in securities litigation activity. Many of the countries featured in this volume have seen increased public enforcement, notably including more frequent criminal prosecutions for alleged market manipulation and insider trading, often featuring prosecutors seeking heavy fines and even long prison terms.

Civil securities litigation has also been a growth industry in the wake of the 2008 crisis. While class actions are a predominant feature of US securities litigation, there are signs that aggregated damages claims are making significant inroads elsewhere. Class claims are now well established as part of the regulatory landscape in Australia and Canada, and there appears to be accelerating interest around the world in securities class actions and other forms of economically significant private securities litigation. Whether and where this trend takes hold will be one of the important securities law developments to watch in coming years.

This suggests the final ambition for *The Securities Law Review*: to annually reflect where this important area of law has been, and where it is headed. Each chapter contains both a section summarising the year in review – a look back at important recent developments – and an outlook section, looking towards the year ahead. The narrative here, as with the book as a whole, is of both divergence and convergence, continuity and change.

An important example is the matter of cross-border securities litigation, treated by each of our contributors. As economies and commerce in shares become more global, every jurisdiction is confronted with the need to consider cross-border securities litigation. The chapters of this volume show jurisdictions grappling with the problem of adapting national litigation systems to a problem of increasingly international dimensions. How the competing demands of multiple jurisdictions will be satisfied, and how jurisdictions will learn to work with one another in the field of securities regulation will be a story to watch over the coming years. We look forward to documenting this development and other emerging trends in securities litigation around the world in subsequent editions.

Many thanks to all the superb lawyers who contributed to this second edition. For the editor, reviewing these chapters has been a fascinating tour of the securities litigation world, and we hope it will prove to be the same for our readers. Contact information for our contributors is included in Appendix 2. We welcome comments, suggestions and questions, both to create a community of interested practitioners and to ensure that each edition improves on the last.

William Savitt
Wachtell, Lipton, Rosen & Katz
New York
May 2016

Chapter 13

SPAIN

Cristian Gual Grau and Manuel Álvarez Feijoo[1]

I OVERVIEW

i Sources of law

The primary source of securities law in Spain is the Securities Market Act (LMV), enacted by Act 24/1988 of 28 July.

The LMV has been amended several times, mostly with the purpose of implementing European Union (EU) directives. The amendments introduced by Act 37/1998 of 16 November, Act 44/2002 of 22 November and Act 47/2007 of 19 December are particularly important, since they updated the regulatory framework to ensure consistency with EU requirements on the functioning of regulated markets and the standards applicable to investment services.

Apart from the LMV, other subordinated legal provisions regulate in detail certain aspects of the Spanish securities market. These regulations are mainly implemented through Royal Decrees, including Royal Decree 1362/2007 of 19 October on transparency requirements and Royal Decree 2119/1993, which regulates the sanctioning procedure applicable to securities market operators; and Orders issued by the Ministry of Economy and Competitiveness.

The National Securities Exchange Commission (CNMV) also issues Circulars for the implementation and enforcement of these legal provisions (e.g., Circular 8/2008 of 10 December on standard forms to announce takeover bids and to request authorisation).

Other sources of securities law in Spain include the Civil Code, the Commercial Code, the Criminal Code, the Corporations Act, legislation on the protection of consumers, the Judiciary Act 6/1985 of 1 July, the Civil Procedural Act (CPA) and the Criminal Procedural Act. These are not specific regulations on securities, but they are all potentially relevant in the context of securities litigation.

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1 Cristian Gual Grau is a partner and Manuel Álvarez Feijoo is a counsel at Uría Menéndez. The authors would like to acknowledge the significant contribution of Alba Solano Avelino, Jorge Azagra Malo and Mario Montes Santamaría in the drafting of this chapter.

ii Regulatory authorities

Civil enforcement actions involving securities are usually filed with the courts and, although less frequently, before arbitral tribunals. Rulings issued by civil judges or arbitrators are immediately enforceable, regardless of whether they are subsequently appealed. Criminal enforcement proceedings are instigated mainly by Public Prosecutors.

The CNMV is the main domestic regulatory and supervisory authority in Spain. As discussed in Section III, *infra*, the CNMV is entrusted with inspection and sanctioning powers.

Other important domestic supervisory and regulatory authorities on financial institutions and securities markets are the Bank of Spain, regarding the public debt market, the Ministry of Economy and Competition and the economy departments of some Spanish regions.

Finally, the European Securities and Markets Authority oversees the stability of the EU's financial system.

iii Common securities claims

The most common civil securities claims[2] in Spain are those filed by non-professional investors against sellers of securities seeking compensatory damages, on the basis of contractual or non-contractual liability, or the annulment of the contract. Lawsuits normally include both actions for annulment and liability, with the latter usually being a subsidiary claim in the event that the former is dismissed. Additionally, lawsuits seeking the annulment of unfair contractual terms are also common.

Claims are mainly grounded on the lack of information regarding the risks of the investment or the inadequacy of the product for the plaintiff given its previous financial experience and knowledge. Additionally, some recent claims have been based on prospectus liability.

Apart from claims against the securities' issuer and its directors, claims may also be filed against placing agents for breach of information duties during commercialisation. The possibility of success in these types of claims must be analysed on a case-by-case basis.

Other forms of secondary liability (e.g., against accountants or directors), although theoretically possible, are less common.

II PRIVATE ENFORCEMENT

i Forms of action

The main actions in securities litigation are those based on contractual liability and those seeking the annulment of the contract entered into by the parties.

While contractual liability is usually claimed on the basis of an alleged fraudulent commercialisation of securities that lead to an error in consent,[3] annulment is claimed on the basis of an infringement of imperative regulations, on the absence of essential elements of a contract or on vices in the plaintiff's consent (i.e., fraud or error). On different legal grounds, all these actions seek the recovery of the losses derived from financial investments.

2 Criminal claims are discussed in Section III.iv, *infra*.

3 The error in consent must be essential (i.e., regarding one of the key elements of the contract) and unavoidable (i.e., not avoidable when acting diligently).

Setting aside procedural or material exceptions (e.g., lack of standing, statute of limitations), the main defence against these claims is usually focused on proving, on the one hand, that the information provided during commercialisation was complete and accurate[4] and, on the other, that the financial product was appropriate for the client.

The burden of proof in these actions generally lies with the plaintiff. However, when the plaintiff falls into the category of 'consumer', courts have tended to reverse the burden.

Secondary liability claims may be also grounded on non-contractual liability arising from the defendant's conduct. In these instances, the plaintiff must evidence that the conduct was negligent and that it was the cause of the alleged damages.

ii Procedure

Disputes concerning securities are not subject to a specific procedure; instead, the standard civil procedure under the CPA applies. Most cases will fall under the jurisdiction of first instance courts.

Spanish civil procedure has been traditionally adversarial and written phases remain of predominant importance. Standard proceedings are structured in three main phases,[5] with the filing of the statements of claim and defence being the most important. In these briefs, the parties define their positions and, as a general rule, submit all documentary evidence supporting their claims, including expert reports.

It is important to take into consideration that the CPA envisages short and non-extendable time limits. Once a lawsuit has been filed, the respondent must submit a statement of defence within 20 working days.

Two hearings are held after the written stage: a preliminary hearing and the trial. In the preliminary hearing, procedural matters, if any, are discussed and the parties propose the evidence on which they intend to rely. Evidence proposed, if admitted by the court, will be examined during the trial, at which the parties will orally submit their conclusions before the case is remitted for judgment.

Spanish law does not envisage a discovery stage comparable to that of the United States. However, parties may petition the court to gather information they may need to file their claim[6] as well as to examine specific pieces of evidence before the trial, or to secure them for examination at a later stage.[7] Once the proceedings have started, the parties are entitled to request that other litigants or third parties[8] produce documents relevant to the case and directly connected to its object.[9] In general, only documents that are relevant to the case and

4 By submitting written evidence (e.g., all the contractual documents signed by the investor as well as the documents and information provided to the investor before and after the execution of the contract) and requesting the seller's testimony.

5 There could be a preliminary phase in which jurisdictional aspects are discussed if the defendant files a motion to dismiss on those grounds.

6 Article 256 CPA allows for the filing of a request before the court to obtain the necessary information to identify the potential respondent or respondents in the proceedings or individuals that may belong to a class before the filing of a class action.

7 Article 297 CPA.

8 Article 167 CPA.

9 Article 328 CPA.

previously identified trigger the duty of disclosure. These requests, which should be limited in scope and nature, must be approved by the court. General petitions of information or documents are not admissible.

Civil procedure in Spain is mainly designed for individual claimants; however, Public Prosecutors and associations of users and consumers have legal standing to file class actions on behalf of groups of individuals that were affected by the same event and whose damages were occasioned by the same cause of action.[10] Judgments resulting from class actions will be binding on every individual in a given class, even if they decided to not participate in the proceedings or were unable.[11] Thus, unlike in the US legal system, there are no opt-out mechanisms under Spanish law.[12] Conversely, the law envisages opt-in mechanisms that allow individuals to join the proceedings at different stages.[13]

As an alternative to class actions, plaintiffs have resorted to joinder[14] or consolidation of multiple cases into a single proceeding when claims are connected.[15] Unlike class actions, these judgments only affect the litigants.

Both class actions and joinders are subject to the standard rules of civil procedure.

iii Settlements

Litigants have the right to waive, accept and reach agreements at any stage of the proceedings, unless contrary to an express legal prohibition or where there is a potential harm to third parties or general interests.[16] Provided that these restrictions do not limit the parties' right to settle the dispute, courts will approve their settlement agreement,[17] bringing the proceedings to an end.

Proceedings may also terminate when the plaintiff's claims are satisfied out of court in a way that leaves the plaintiff without a legitimate interest in obtaining the court's protection. In those cases, the corresponding circumstance must be recorded and the court clerk will order the termination of the proceedings.

No legal costs will be awarded if a settlement agreement has been reached. In these cases, the parties may include legal costs in the object of their negotiations.

When proceedings terminate by means of a judgment, the court will generally order the unsuccessful party to bear the counterparty's legal costs. Should the claimant succeed only

10 These individuals are not required to be members of the association filing the complaint and may be determined at a later stage in the proceedings. When the affected individuals are not easily identifiable or are undetermined, associations have exclusive legal standing for the defence of their diffuse interests (Article 11 CPA). Article 15 CPA sets forth different publicity rules depending on whether the class is determined, determinable or undetermined.

11 Article 222.3 CPA.

12 For a comparative study on class actions in the Spanish and the US legal systems see Ferreres Comella, 'Las acciones de clase (class actions) en la Ley de Enjuiciamiento Civil' ('Class actions in the Civil Procedure Code'), *Actualidad Jurídica Uría y Menéndez* (November 2005).

13 Article 15 CPA.

14 Article 12 CPA.

15 Article 12 CPA.

16 Article 19.1 CPA.

17 Settlement agreements are regulated in Articles 1809–1819 Civil Code.

partially, then each party will bear its own costs.[18] Legal costs include, among others, the fees of attorneys, court agent fees, and experts as well as the travelling expenses of witnesses.[19] The fees of attorneys and court agents are calculated following the parameters set forth by the corresponding Bar Associations. As such, in practice, not all fees incurred by the successful party may be recovered. Moreover, the CPA creates a general limit on the payable amount of legal fees equal to one-third of the amount in dispute for each of the unsuccessful litigants.[20]

iv Damages and remedies

Violations of securities law may trigger compensation for damages when the respondent files a complaint for contractual or non-contractual liability. [21]

There are no specific rules under Spanish securities law for calculating the amount of damages that should be awarded. However, the general principle is that the harm must be fully repaired. Thus, compensation should include not only consequential damages but also loss of profit.

Generally, the party seeking compensation for damages must prove the existence and the extent of the damages, the respondents' willful or negligent conduct and the causal link between the damage and the conduct. As indicated in Section II.i, *supra*, the burden of proof can be reversed in some instances. However, no compensation for damages can be awarded if one of the previously mentioned elements is not validly evidenced.

When the claimant seeks the annulment of the contract, the granting of the annulment entails reciprocal restitution of compensation between the parties, plus accrued legal interest.[22]

Other remedies available under Spanish law include specific performance, compulsory performance, withholding of fulfilment, termination of contract and a price reduction. Nevertheless, compensation and restitution are the most frequent remedies in securities litigation.

III PUBLIC ENFORCEMENT

i Forms of action

The CNMV is entitled to initiate an administrative procedure that may lead to the imposition of a sanction when an issuer or a market operator violates securities regulations. Sanctions imposed by the CNMV can be appealed before administrative courts.

Nevertheless, the CNMV is not entitled to file a criminal complaint or prosecute securities-related crimes. If, in the course of its supervisory activity, the CNMV finds indications of a criminal offence, it must refer the case to the Public Prosecutor. The CNMV will not be a party to the criminal proceedings, but will assist the prosecutor and the court by producing documentary evidence or issuing expert opinions.

18 Article 394 CPA.

19 Article 241 CPA.

20 Article 394 CPA.

21 Articles 1101 and 1902 Civil Code.

22 The 'legal interest' is set by law (currently 3.5 per cent).

Criminal enforcement of securities regulations was enhanced in 2010 by an amendment of the Criminal Code that introduced corporate criminal liability for securities-related crimes[23] and investment fraud[24] as a new criminal offence. The amendment also extended the scope of market abuse and market manipulation crimes.[25]

ii Procedure

Enforcement actions may be divided into two main categories: administrative proceedings conducted by the CNMV and criminal proceedings pursued mainly by the Public Prosecutor before the criminal courts.

Administrative sanctioning proceedings are initiated by the CNMV *ex officio*. The resolution of initiation will be notified to the defendant, who may file written allegations (objections) within 15 days. The CNMV's Litigation Department acts as the investigative body and is entitled to perform all necessary fact-finding tasks. In view of the initial findings, the investigative body will issue a preliminary statement of charges against the defendant, who will have 20 days to reply. Once the investigation is concluded, the investigative body will issue a motion for a resolution, regarding which the defendant will have 20 days to submit objections or comments.

After this time, the investigative body will refer the motion to the corresponding authority to resolve sanctioning procedures.[26] That body may take additional investigative measures before issuing its decision. Decisions (sanctions) issued by the Board of the CNMV may be appealed to the Minister of the Economy. In turn, decisions by the Minister of the Economy may be appealed before an administrative court (the National Court in Madrid).

The duration of an administrative proceeding is limited to one year from the date of the decision to initiate the proceeding. Simplified proceedings (limited to four months) are available for minor infringements or cases in which the facts have been fully disclosed.

It is noteworthy that securities issuers and market operators are legally bound to cooperate with the CNMV during its investigations by disclosing and providing all requested information and documentation deemed necessary for the administrative proceedings. Refusal to cooperate with the CNMV is classified as a very serious administrative infringement.

As regards criminal enforcement, there is no special criminal procedure for the prosecution of securities-related crimes. Therefore, standard criminal procedure is applied.

Criminal proceedings under Spanish law are divided into three stages: the investigation stage, the accusation stage, and the oral trial or hearing. The investigation stage is aimed at investigating the alleged crimes and the alleged perpetrators (both legal and natural persons) to allow the investigating judge to decide whether the case should be dismissed (if there are insufficient grounds) or tried (if there are sufficient indications that a crime has been committed by the alleged perpetrators). The accusation stage is an intermediate step between

23 Articles 31 *bis* and 288 Criminal Code.

24 Article 282 *bis* Criminal Code.

25 Article 284 Criminal Code.

26 For 'minor' or 'serious' infringements, the competent authority is the Board of the CNMV, whereas 'very serious' infringements are overseen by the Minister of Economy.

investigation and trial during which the parties (the prosecutors[27] and defendants) file their respective briefs of accusation and defence. In the oral trial, prosecutors attempt to establish the facts and guilt of the accused parties (whether natural or legal persons).

The standard of proof depends on the procedural stage. In the investigation and accusation stages, prosecutors must provide the criminal court with sufficient indications (not evidence) that a crime may have been committed by the suspect so that an oral trial can be held. If there are insufficient indications of criminal activity, criminal proceedings will be dismissed at this stage. In the oral trial, the accused legal or natural person can only be declared guilty if criminal liability is proved beyond a reasonable doubt.

As regards discovery in criminal cases, parties may propose any investigative measure they deem necessary; however, the investigating judge has sole authority to order the measures (e.g., depositions, searches and seizures, wiretapping and document discovery). Unlike in administrative procedures, suspects have no obligation to cooperate with the court or the Prosecutor or to produce evidence.

iii Settlements

Unlike in other administrative proceedings, administrative sanctioning procedures involving securities do not allow settlements (or findings of conformity) between the defendant and the authorities concerned (in this case, the CNMV). The only possibility available to the defendant is to fully recognise and admit the infringement and redress it at its own initiative to the extent possible. Both the admission of liability and redressing actions are factors taken into account by the competent body when deciding to impose a less severe penalty within sentencing guidelines.

As regards criminal procedures, under Spanish law, public prosecutions are governed by the principle of mandatory prosecution (linked to the principle of legality). As a consequence, a Public Prosecutor is not entitled to drop or defer prosecution in the context of a settlement as long as there are indications that a crime has been committed.

However, the Criminal Procedure Act allows parties in criminal proceedings to enter into plea bargain agreements at any time before the oral trial is finished, except if the requested penalty exceeds six years of imprisonment. All securities-related crimes are subject to plea bargains given that none is punishable by a sentence exceeding six years.

A plea bargain consists of an agreed acceptance by the defendants (either legal or natural persons) of the charges, counts and penalties brought by the prosecutor before the criminal court. As a consequence, the criminal court issues a judgment in accordance with the mutually agreed penalties and damages, which are imposed on the defendants. The criminal court may only refuse to issue a judgment on those terms if: (1) there exists some doubt that

27 Under Spanish law, criminal prosecution may be initiated and held:

a by means of a criminal complaint filed by the Public Prosecutor (roughly equivalent to a state attorney in the United States);

b by means of a criminal complaint filed by private individuals. Private prosecution may only be initiated by those who have a direct interest in the facts (e.g., a victim or aggrieved individual); or

c by means of a criminal complaint filed by 'people's prosecutors'. The people's prosecution may be held by any individual or entity that, regardless of their involvement in the facts, seeks to prosecute a crime.

the accused's decision to enter into the bargain was taken under duress; (2) the defendant's attorney deems it necessary to hold the trial; or (3) the court believes that the prosecution's charges and counts contravene the law or that the sentencing requested is inappropriate. The plea-bargain judgment may only be appealed if it does not comply with the terms of the agreement.

The general rule regarding attorneys' fees in criminal proceedings is that the convicted party is responsible for all legal costs (including attorneys' fees) of the claimants (private prosecutors). As a particular feature, procedural costs may only be imposed on private prosecutors where it is established that they have acted recklessly or in bad faith.

iv Sentencing and liability

The LMV classifies administrative infringements as minor, serious or very serious, establishing different sanctions for each class of infringement.

Very serious infringements[28] are punishable with a fine amounting to the highest of the following figures: five times the amount of the gross profit made as a result of the infringement; 5 per cent of the shareholders' equity of the offending entity; 5 per cent of the offending entity's or of third parties' funds used to commit the infringement; or €600,000. In addition to the fine, other sanctions may be imposed, such as: (1) suspension or limitation of the type or volume of transactions and activities that may be undertaken by the offender in securities markets for up to five years; (2) suspension from membership in an official secondary market or a multilateral trading facility for up to five years; (3) removal of a financial instrument from trading on a secondary market or a multilateral trading facility; or (4) withdrawal of authorisation to trade.

Serious infringements[29] are punishable with a fine amounting to the highest of the following figures: double the amount of the gross profit made as a result of the infringement; 2 per cent of the shareholders' equity of the offending entity; 2 per cent of the offending entity's or of third parties' funds used to commit the infringement; or €300,000. In addition to the fine, other sanctions may be imposed, such as: (1) suspension or limitation of the type or volume of transactions and activities that may be undertaken by the offender in securities markets for a period of up to one year; or (2) suspension from membership in an official secondary market or a multilateral trading facility for a period of up to one year.

Minor infringements[30] are punishable with a fine of up to €30,000.

Article 106 *ter* of the LMV sets forth the criteria for calculating fines, such as the nature and severity of the infringement, the degree of responsibility and the financial strength of the offender, the seriousness and duration of the hazard or damage caused, the losses caused to third parties, the profit obtained or the fact that the offender redressed the infringement at his own initiative.

The Criminal Code foresees three main securities-related criminal offences: investment fraud, market abuse and manipulation, and insider trading.

28 Articles 99 and 102 LMV.

29 Articles 100 and 103 LMV.

30 Articles 101 and 104 LMV.

Investment fraud

Article 282 *bis* of the Criminal Code punishes the directors of a securities issuer that forge the prospectus of an IPO or any other mandatory statements or periodic reports to unlawfully obtain investments. No loss need be incurred by any investor for a crime to have been committed. This offence is punishable by imprisonment of between one and four years. If a loss is caused to an investor, the punishment imposed will fall within the upper half of that range (imprisonment of two-and-a-half to four years). In addition, if the damage caused is particularly serious, the penalty will range from between one and six years' imprisonment and a fine of between €360 and €144,000.

Market abuse and manipulation

Article 284 of the Criminal Code punishes market abuse or price alteration committed by: (1) using violence, intimidation or deceit; (2) spreading false news or rumours, if the offender obtains a profit exceeding €300,000 or causes damages exceeding that amount; or (3) using inside information. This offence is punishable with imprisonment of between six months and two years or a fine of between €720 and €288,000. Additionally, a special disqualification (debarment) for one to two years from trading on financial markets will be imposed on the offenders.

Insider trading

Article 285 of the Criminal Code punishes insider-trading conduct if the offender obtains a profit exceeding €600,000 or causes damages exceeding that amount. This offence is punishable with imprisonment of one to four years, a fine of up to three times the profit obtained and special disqualification (debarment) from markets and securities-related offices or activities from two to five years. The penalty will be increased (to imprisonment for between four and six years) if: (1) the offender regularly engaged in the abusive practices; (2) the profit obtained is particularly large; or (3) serious damage to the general interest is caused.

Finally, according to Articles 31 *bis* and 288 of the Criminal Code, a legal person may be held criminally responsible for any of these three offences, together with guilty natural persons, if the crime was committed by its directors, representatives, agents or employees to the benefit of the entity. In these cases, the legal person will face mandatory fines ranging from two to four times the profit obtained or between €5,400 and €9 million. In addition, the judge may impose one or more of the following penalties on the legal person: (1) winding up of the company; (2) suspension of activities (for up to five years); (3) closure of premises (for up to five years); (4) business ban (for up to 15 years); (5) disqualification (debarment) from entering into public contracts, applying for state subsidies and tax or social security benefits (for up to 15 years); and (6) judicial management of the company.

A 2015 amendment to the Criminal Code provides for an affirmative defence of compliance that allows legal entities to be exonerated if the requirements of the new Chapter 2 of Section 31 *bis* of the Criminal Code are met and proven before a court. These requirements differ depending on the source of corporate liability at stake.

When corporate liability arises from offences committed by employees or associates owing to the failure of corporate controls or surveillance, the legal entity shall be exonerated if it proves that an effective compliance programme (or model) to detect and prevent crimes, or to reduce the risk of them being committed, was implemented before the offence took place. When liability arises from offences committed by management, the following additional requirements must be fulfilled and proved: (1) the monitoring and supervision of

the compliance programme must have been entrusted to a corporate body with autonomous powers; (2) the offender must have committed the crime by fraudulently eluding the compliance programme's preventive measures; and (3) the supervisory body must have acted diligently and not have poorly performed its surveillance duties.

Chapter 5 of the new Section 31 *bis* of the Criminal Code sets forth the following requirements for a generally effective compliance programme (or model):

a a risk assessment that identifies the key areas in which offences might be committed;
b protocols and proceedings (policies) regarding the adoption and execution of crime prevention decisions;
c financial control mechanisms to prevent misuse of corporate funds;
d a whistle-blowing channel;
e a disciplinary system applicable in the event of compliance breaches; and
f regular monitoring, reviews and updates.

IV CROSS-BORDER ISSUES

Under EU Regulation No. 1215/2012 (Brussels I *bis*) Spanish courts have jurisdiction in civil and commercial matters when the contractual parties agreed to submit their disputes to Spanish courts[31] or when the respondent, irrespective of nationality, is domiciled in Spain.[32]

A defendant domiciled in another EU Member State may be sued in Spain in the following cases:

a when the contract in which the claim is based was performed in Spain;[33]
b in tortious matters when the harmful event occurred in Spain;[34]
c when civil liability stems from criminal proceedings held in Spain;[35] and
d under certain circumstances where there is more than one respondent and one is domiciled in Spain.[36]

There are two instances relevant to securities litigation in which defendants not domiciled in an EU Member State may be sued before Spanish courts: (1) when the dispute is connected to the operations of a branch, agency or other establishment situated in Spain;[37] and (2) when disputes arise out of contracts with consumers that are domiciled in Spain[38] provided that the other party pursues commercial or professional activities in Spain.[39]

If EU law is not applicable in accordance with the aforementioned rules, a foreign person can be subject to Spanish jurisdiction when so provided by an international or

31 Article 25 Brussels I *bis*.
32 Article 4 Brussels I *bis*.
33 Article 7.1 Brussels I *bis*.
34 Article 7.2 Brussels I *bis*.
35 Article 7.3 Brussels I *bis*.
36 Article 8.1 Brussels I *bis*.
37 Article 7.5 Brussels I *bis*.
38 The concept of 'consumer' is an autonomous EU law concept that has been defined as the person entering a contract for a purpose that is outside the individual's trade or profession (Article 17.1 Brussels I *bis*).
39 Article 17.1(c) Brussels I *bis*.

bilateral treaty signed between Spain and the state in which the defendant is domiciled. In these cases, the scope of Spanish jurisdiction will be determined by the treaty. In the absence of an international instrument alone, the Judiciary Act will apply, which establishes a very similar scheme to that of EU law in this matter.

To challenge jurisdiction, the respondent may file a motion to dismiss before the court[40] within 10 days of service of process. Once the motion is filed, the proceedings will be suspended until the court issues a decision. The doctrine of *forum non conveniens* is not recognised in Spain. When Spanish courts have jurisdiction according to the law, they are bound to exercise it on the basis that a different solution would compromise legal certainty.

In criminal matters, Article 23.1 of the Judiciary Act states that Spanish courts have jurisdiction to try any offence committed in Spanish territory.

V YEAR IN REVIEW

The economic and banking crisis of 2008 triggered an outbreak of securities litigation and arbitration in Spain. Thousands of claims have since been filed before the Spanish courts and the Supreme Court has had the opportunity to issue important rulings in the field, sometimes revisiting old civil categories of renewed importance.

Recent case law has stressed the importance of assessing error in consent on a case-by-case basis, carefully analysing the particular circumstances in which the plaintiff entered into a contract involving securities. However, courts have also considered that the mere infringement of information duties cannot automatically imply the annulment of a contract with a consumer.[41]

Several class actions have recently been filed in connection with financial instruments. Nevertheless, the fact that Spanish civil procedure is mainly designed for individual claimants has led to most of them being dismissed on procedural grounds.

The Supreme Court has recently confirmed the rulings of several lower courts that annulled the purchase of shares by individuals (small investors in this case) during the initial public offering (IPO) of shares in Bankia, one of Spain's major banks.[42] The Supreme Court considered that the alleged financial inaccuracies in the IPO's prospectus had led to an error in the investors' consent because, unlike in the case of large or institutional investors, this consent was directly linked to the misleading financial information provided. Also, the judgment declared that general civil actions can be compatible with the more specific actions envisaged by securities legislation.

Moreover, the Supreme Court ruled that civil courts were allowed to resolve similar cases concerning the Bankia IPO, regardless of the fact that criminal proceedings against Bankia's directors for the alleged falsification of Bankia's accounts were still pending. The Supreme Court's reasoning on this issue was twofold: on the one hand, it pointed out that the standard of proof in the two jurisdictions was different and, on the other hand, it considered that preventing claimants from exercising their civil actions until this criminal case (which was particularly complex and likely to be lengthy) was resolved would violate their constitutional right to an effective remedy.

40 Articles 63–65 CPA.

41 Judgment of the Spanish Supreme Court (First Chamber) of 15 December 2014.

42 Judgment of the Spanish Supreme Court (First Chamber) of 3 February 2016.

As a consequence of this judgment, on 17 February 2016 Bankia communicated to the CNMV that it would start a three-month process for returning investments to non-professional investors who had acquired shares during the IPO in 2011.

Many securities-related arbitration proceedings have also been initiated by private investors against financial entities. According to the most recent statistical data provided by the Governing Committee of the Fund for the Orderly Restructuring of the Banking Sector, on 14 April 2015, more than 300,000 holders of subordinated debt and preference shares of financial entities obtained economic compensation equivalent to the nominal amount of their investments in arbitration proceedings.

As regards criminal proceedings, the Supreme Court rendered judgment 491/2015 of 23 July 2015. For the first time in a self-laundering case, the Supreme Court considered that insider trading may be the predicate offence for money laundering, so it accordingly sentenced the accused for both crimes.

In addition, both the Public Prosecutor's Office (through its Memorandum 1/2016) and the Supreme Court (through its judgments 154/2016 of 29 February 2016 and 221/2016 of 16 March 2016) have provided some guidelines regarding the requirements and effectiveness of compliance programmes (or models). In fact, it is the first piece of case law on corporate criminal liability.

VI OUTLOOK AND CONCLUSIONS

In recent years, legislation and case law have evolved to ensure that operators in securities markets conduct themselves with higher standards of diligence and that consumers are afforded enhanced protection. In this respect, EU legislation has contributed to harmonising legal systems across Europe by imposing stricter duties of information, transparency and assessment of the adequacy of financial products for potential investors.

The 2015 Criminal Code amendment, which has enabled an affirmative compliance defence, together with the guidelines issued by the Public Prosecutor's Office in its Memorandum 1/2016, will have a significant impact on the field of corporate liability, as companies are effectively encouraged to develop internal compliance and ethics programmes aimed at preventing securities-related offences within their organisations.

The *Bankia* case, one of the most important cases concerning securities, has recently been resolved by the Supreme Court. The potential impact of this judgment on securities litigation is still uncertain given its factual particularities. It remains to be seen whether it will lead to an increase of claims or to a broader scope of causes of action. In any event, the judgment is likely to continue being a source of debate among legal practitioners given the Supreme Court's revisited interpretation of several legal institutions, such as causality.

The criminal proceedings against Bankia's directors are still pending. However, the Supreme Court has considered that these proceedings should not affect civil claims at this stage.

Appendix 1

ABOUT THE AUTHORS

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Cristian Gual is a partner at Uría Menéndez. He is based in the Barcelona office and was seconded to Wachtell, Lipton, Rosen & Katz in 2011.

Mr Gual focuses his practice in civil and commercial dispute resolution, especially litigation and arbitration but also mediation. He handles complex civil and commercial litigation for both national and multinational companies before Spanish courts at all instances and in national and international arbitration proceedings. His practice includes the enforcement of foreign decisions or awards. He has a wide experience on matters relating to corporate disputes such as director's liability, takeover litigation, competition (antitrust private enforcement or unfair competition cases) and intellectual property litigation, as well as more general contractual liability and tort cases, mostly in the fields of distribution and construction.

Cristian Gual is also a regular lecturer on intellectual property litigation and international arbitration.

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Manuel Álvarez is counsel at Uría Menéndez. He joined the firm's Madrid office in 2002. Since 2005 he has been based in the Barcelona office. He is a member of the firm's white-collar crime team.

His practice focuses on criminal law and criminal litigation, particularly corporate crime, advising and representing clients before Spanish courts on, among others, corporate fraud and directors' liabilities, commercial bribery, criminal bankruptcy, tax fraud, criminal liability for workplace accidents, environmental issues, intellectual property infringements, e-crime (privacy, data protection and computer sabotage), theft of trade secrets, insider trading and market manipulation.

He has also a wide experience advising clients on corporate compliance matters, crime-prevention procedures (including anti-bribery programmes under national and international standards – the FCPA and UK Bribery Act) and internal investigations.

Mr Álvarez regularly lectures at universities and publishes articles both in Spanish and international publications on various subjects of white-collar crime, corporate liability and criminal law.

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