THE SECURITIES LITIGATION REVIEW

Fourth Edition

Editor
William Savitt

THE LAWREVIEWS

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PREFACE

This fourth 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 have worked to harmonise national rules with Europe-wide directives – an effort now challenged by the imminent departure of the United Kingdom from the European Union – 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. In the years 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 continued to be a growth industry as the 2008 crisis has given rise to a new normal in the private enforcement of securities laws. 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 Litigation 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 and divergence, continuity and change – with divergence and change particularly predominant in recent years, following political upheaval in the United States and Britain that could herald a sharp break from international cooperation and forceful government regulation in the global finance capitals of New York and London.

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 fourth edition, which covers more countries than ever before. 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
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June 2018

Chapter 20

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), approved by Royal Legislative Decree 4/2015 of 23 October.

The current LMV is the product of the consolidation of the previous Act 24/1988 of 28 July, on the Securities Market, which has been amended several times, mostly with the purpose of transposing European Union (EU) directives and other provisions codified in various laws. The most recent example has been the implementation of EU Directive 2014/65/EU (MiFiD II), which entered into force on 3 January 2018.

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 1/2018 of 12 March on warnings relating to financial instruments).

Additional 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 relevant in the context of securities litigation.

ii Regulatory authorities

Civil 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, below, the CNMV is entrusted with inspection and sanctioning powers.

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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.

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 actions for annulment, termination and damages, with the last two usually being subsidiary claims in the event that the action for annulment is dismissed. Additionally, lawsuits seeking the annulment of unfair contractual terms are also common.

Claims are mainly grounded on the lack of information provided to investors 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 judgments have been issued 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 probability 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 or defective commercialisation of securities that lead to an error in consent,[3] annulment is claimed on the basis of an infringement of imperative regulations, absence of essential elements of the contract or 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.

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 that the information provided during commercialisation was complete and accurate[4] and 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.

2 Criminal claims are discussed in Section III.iv.

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).

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.

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 subject to the standard civil procedure under the CPA. 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.

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 accepted 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, rules on access to evidence are being more flexibly interpreted by courts and have been recently broadened by law in certain matters.[6] This may indicate a new trend in civil litigation, more generally. Under the current general framework, parties may petition the court to gather information they may need to file their claim[7] as well as to examine specific pieces of evidence before the trial, or to secure them for examination at a later stage.[8] Once the proceedings have started, the parties are entitled to request that other litigants or third parties[9] produce documents relevant to the case and directly connected to its object.[10] In general, only documents that are relevant to the case and 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.[11] Judgments resulting from class actions will be binding on every individual in a given class, even if they decided to not participate in the

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 See Royal Decree-Law 9/2017 of 26 May implementing EU Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions.

7 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.

8 Article 297 CPA.

9 Article 167 CPA.

10 Article 328 CPA.

11 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

proceedings or were unable.[12] Unlike in the US legal system, there is no certification of class process under Spanish law or opt-out mechanisms.[13] Conversely, the law envisages opt-in mechanisms that allow individuals to join the proceedings at different stages.[14]

As an alternative to class actions, plaintiffs have resorted to joinder[15] or consolidation of multiple cases into a single proceeding when claims are connected.[16] 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.[17] Provided that these restrictions do not limit the parties' right to settle the dispute, courts will approve their settlement agreement,[18] bringing the proceedings to an end. There are no specific mechanisms envisaged for collective settlements.

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 partially, then each party will bear its own costs.[19] Legal costs include, among others, the fees of attorneys, court agent fees and experts, as well as the travelling expenses of witnesses.[20] 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.[21]

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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.

12 Article 222.3 CPA.

13 An overview of class actions regulation in Spain can be found in Ferreres Comella, A *et al.* 'Spain. The Class Actions Law Review' in The Class Actions Law Review. Shallow, R (Ed.), Law Business Research, London, 2017.

14 Article 15 CPA.

15 Article 12 CPA.

16 Article 12 CPA.

17 Article 19.1 CPA.

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

19 Article 394 CPA.

20 Article 241 CPA.

21 Article 394 CPA.

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.[22]

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' wilful or negligent conduct and the causal link between the damage and the conduct. As indicated in Section II.i, 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.[23]

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.

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[24] and investment fraud[25] as a new criminal offence. The amendment also extended the scope of market abuse and market manipulation crimes.[26]

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.

22 Articles 1101 and 1902 Civil Code.

23 The 'legal interest' is set by law (currently 3 per cent).

24 Articles 31 *bis* and 288 Criminal Code.

25 Article 282 *bis* Criminal Code.

26 Article 284 Criminal Code.

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.[27] 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 investigation and trial during which the parties (the prosecutors[28] 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.

27 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.

28 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.

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 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[29] 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

29 Articles 278 to 289 and 302 LMV.

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[30] 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[31] are punishable with a fine of up to €30,000.

Article 310 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.

Investment fraud

Article 282 *bis* of the Criminal Code punishes the directors of a securities issuer that forge the prospectus of an initial public offering of shares (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.

30 Articles 291 to 299 and 303 LMV.

31 Articles 300 and 305 LMV.

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[32] or when the respondent, irrespective of nationality, is domiciled in Spain.[33]

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;[34]

b in tortious matters when the harmful event occurred (or, in some cases, had effects) in Spain;[35]

c when civil liability stems from criminal proceedings held in Spain;[36] and

d under certain circumstances where there is more than one respondent and one is domiciled in Spain.[37]

There are two main 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;[38] and (2) when disputes arise out of contracts with consumers that are domiciled in Spain[39] provided that the other party pursues commercial or professional activities in Spain.[40]

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 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[41] 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.

32 Article 25 Brussels I *bis*.

33 Article 4 Brussels I *bis*.

34 Article 7.1 Brussels I *bis*.

35 Article 7.2 Brussels I *bis*.

36 Article 7.3 Brussels I *bis*.

37 Article 8.1 Brussels I *bis*.

38 Article 7.5 Brussels I *bis*.

39 The concept of 'consumer' is an autonomous EU law concept that has been defined as the person entering into a contract for a purpose that is outside the individual's trade or profession (Article 17.1 Brussels I *bis*).

40 Article 17.1(c) Brussels I *bis*.

41 Articles 63–65 CPA.

V YEAR IN REVIEW

The financial crisis of 2008 triggered an outbreak of securities litigation and arbitration in Spain. Thousands of claims have since been filed before 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.

Courts have 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.[42]

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 *Bankia* case decided by the Supreme Court in February 2016, regarding the Bankia IPO in 2011, has had a significant impact in securities litigation. In this judgment, dealing with small investors, the Supreme Court considered that the alleged financial inaccuracies of the IPO's prospectus had led to an error in the investors' consent because it was directly linked to the misleading financial information provided. It also ruled that civil courts were allowed to resolve cases regarding the Bankia IPO, even though there were ongoing correlated criminal proceedings. On 24 February 2017, the Supreme Court handed down an important decision on floor clauses (i.e., those setting a lower limit on interest). The decision is important for securities litigation since it rejects the application of the *res iudicata* effects of judgments in class actions to individual actions with potentially overlapping scope.

Another important judgment was issued on 15 November 2017. In this ruling, which followed the criteria set by the European Court of Justice on the matter (C-186/16), the Supreme Court concluded, contrary to its former understanding, that multicurrency mortgages are not a financial instrument, and, therefore, the LMV does not apply.

The statute of limitations, a key procedural defence in securities litigation, has also been debated by the Court in its judgments of 31 January and 19 February 2018. Notably, while the Court confirmed its prior interpretation in the first judgment, it seemed to change its view in the second. Given the disparate factual background between the cases, whether the Court's interpretation has changed is unclear.

Securities-related arbitration proceedings have continued to be brought by private investors against financial entities.

The criminal case on Bankia's 2011 IPO remains pending. The proceedings were initiated in 2012 for alleged offences of investment fraud, misappropriation and accounting fraud. In 2017 charges were formally filed against the bank, its former directors and the auditors, and the trial will take place by the end of 2018.

Additionally, in 2017, criminal proceedings were started as a consequence of Banco Popular's resolution by EU's Single Resolution Mechanism (SRM). The investigating judge is carrying out an inquiry into different facts (mainly capital increases) that may have had negatively impacted the bank's financial situation, leading to its resolution. The proceedings, which remain at a very preliminary stage, are being conducted against Banco Popular, its

42 Judgment of the Spanish Supreme Court (First Chamber) of 15 December 2014 and 21 February 2017.

former directors and its auditors for alleged offences of investment fraud, market abuse and manipulation, insider trading, misappropriation and accounting fraud. At the same time, several individual civil cases were filed against Banco Santander (Banco Popular's acquiror).

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 *Bankia* case continues to have an important impact on securities litigation, stressing the importance of the analysis of the investor's profile when the allegations concern the contravention of information obligations or the absence of, or faults in, the plaintiff's consent. The Supreme Court's revisited interpretation of several legal institutions in this and in some other recent judgments is a source of debate.

The developments in the Bankia and Banco Popular cases show a shift on the potential criminal liability of financial markets' supervisors and gatekeepers (e.g., auditors). From the initial prosecution of top government officers of those supervisory bodies along with the auditors, cases have evolved to criminal charges raised exclusively against the gatekeepers. The trend started in Bankia's case and Banco Popular's case seems to confirm the path of prosecution.

Appendix 1

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Mr Gual focuses his practice on 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 wide experience in matters relating to corporate disputes such as directors' 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.

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