

THE GLOBAL DAMAGES
REVIEW

FIFTH EDITION

Editor
A Scott Davidson

THE LAWREVIEWS

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CONTENTS

PREFACE.....	v
<i>A Scott Davidson</i>	
Chapter 1	CONCEPTS IN FINANCIAL ACCOUNTING AND REPORTING..... 1
<i>A Scott Davidson, Sid Jaishankar and Ashley Houlden</i>	
Chapter 2	OVERVIEW OF THE FINANCIAL DAMAGES MODEL FOR INCOME LOSS... 10
<i>A Scott Davidson, Sid Jaishankar and Ashley Houlden</i>	
Chapter 3	THE FINANCIAL DAMAGES MODEL FOR LOSS OF VALUE 18
<i>A Scott Davidson, Sid Jaishankar and Ashley Houlden</i>	
Chapter 4	BRAZIL.....31
<i>Alexandre Outeda Jorge, Eider Avelino Silva and Isabella Novais Dias</i>	
Chapter 5	CANADA.....41
<i>Michael J Donaldson, KC, Rosemary Gregg and Colin Bryden</i>	
Chapter 6	CHINA.....58
<i>Lijun Cao, Sylvia Jiang and Angela Yan</i>	
Chapter 7	SINGAPORE.....80
<i>Vikram Nair, Mazie Tan and Ashwin Menon</i>	
Chapter 8	SOUTH AFRICA99
<i>Jonathan Ripley-Evans and Fiorella Noriega Del Valle</i>	
Chapter 9	SPAIN.....120
<i>Alex Ferreres Comella and Cristina Ayo Ferrándiz</i>	
Chapter 10	UNITED KINGDOM 128
<i>Clare Connellan</i>	

Chapter 11	UNITED STATES	143
	<i>Gary J Mennitt and Amy M ElSayed</i>	
Appendix 1	ABOUT THE AUTHORS.....	157
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	165

PREFACE

The inaugural edition of this publication a few years ago addressed various rules that set boundaries on what is permissible damages evidence. The focus in that publication was to survey the codified rules and common law principles underpinning the analysis and quantification of financial loss or damages and the presentation of the same.

Subsequent editions have expanded on that analysis, including additional discussion of the key principles, updates on rule changes and discussion of noteworthy cases from the various jurisdictions. One observes that although jurisdictional differences obviously exist, nonetheless ‘a loss is a loss is a loss’ and that is the common thread to be focused on in determining the relevant quantum.

I hope that you find this publication to be a helpful resource and I look forward to hearing your comments and suggestions.

A Scott Davidson

Kroll

Toronto

September 2022

SPAIN

Alex Ferreres Comella and Cristina Ayo Ferrándiz¹

I OVERVIEW

Proving the existence and the amount of actual damage resulting from somebody else's acts or behaviour is an essential requirement for any compensatory claim that is filed with the Spanish courts. Thus, Spanish tort law is based on the principle that no legal action for compensation can be brought in the absence of actual damage.

Therefore, the standard of proof on the (1) existence of the claimed damage, (2) its exact calculation and (3) their causal relationship with the wrongdoing or act that caused the damage is high. The claimant is expected to provide the court with documentary evidence that supports the existence of direct damage and expert witness evidence on the calculation of their monetary value and on the existence and calculation of loss of profit. Punitive damages are not available under Spanish law, but only compensation for damage (aimed at restoring the aggrieved party to the financial position he or she was in before the act that caused the damage took place) is awarded.

Damages that can be claimed include both pure financial damages, and pain and suffering (which are referred to as moral damages under Spanish law).

Claiming damages normally involves requesting monetary compensation. Nevertheless, nothing in Spanish tort law prevents a claimant from requesting an in natura restoration instead of monetary compensation. Thus, for example, a claimant who claims pain and suffering (in the form of anxiety) as a consequence of his or her fear of suffering future personal injuries as a result of his or her exposure to a defective product that is proven to potentially cause such injuries may be entitled to request the manufacturer of the defective product to pay for periodic medical checks for him or her to alleviate such anxiety. Restoration in natura, though, is very exceptionally applied, and monetary compensation is more common.

As to the scope of damages that the claimant can claim, there is no specific regulation on remoteness under Spanish law. However, though this is limited to contract liability, the Spanish Civil Code sets out that a good faith debtor will only be liable for damages that he or she could have reasonably expected the counterparty would suffer as a consequence of the debtor not fulfilling his or her obligations. Bad faith debtors (which under Spanish case law includes both debtors who willingly breach the contract and debtors who when the contract was executed should have considered the possibility that they would not be able to honour their contractual obligations) are responsible for all the damages – both direct and indirect – that derive from their acts or behaviour, without limitation.

¹ Alex Ferreres Comella is a partner and Cristina Ayo Ferrándiz is a counsel at Uría Menéndez. The information in this chapter was accurate as at September 2020.

There is no equivalent rule for non-contractual liability, but according to most scholars and case law, a mere negligent tortfeasor is equivalent to a good faith debtor, while a grossly negligent and intentional tortfeasor is equivalent to a bad faith debtor.

The obligation of the aggrieved party is to mitigate the damages suffered, thus he or she must make reasonable efforts to limit additional losses.

Compensation rights are subject to a five-year limitation period in the case of contractual damages and to a one-year limitation period for non-contractual damages. However, in relation to non-contractual damages, some laws state otherwise (e.g., the Spanish product liability regulation provides a three-year limitation period).

II QUANTIFICATION OF FINANCIAL LOSS

i Introduction

As mentioned above, quantifying financial loss (which entails both proving that the financial damages claimed actually exist and have already accrued) is critical to be able to claim damages.

As regards contractual liability, the high standard of proof on the existence and amount of damages has led to a widespread inclusion of penalty clauses in contracts. Thus, through the penalty clauses, parties establish the monetary value of the damages that a breach of contract by either party will cause the other party. In the event of a breach of contract, the non-breaching party can directly claim the amount established in the penalty clause, without having to prove causation and the monetary value of the damages actually suffered.

Penalty clauses are mainly used in contracts to relieve the aggrieved party from the burden of having to prove the loss of profits resulting from the breach of contract. The Spanish Supreme Court has confirmed the validity of penalty clauses included in contracts and the inability of courts to not apply or to only partially apply these clauses when the breach of contract established in the clause has occurred. Only very exceptionally, in the cases in which the defendant proves – on the basis of hardship theories – that the penalty clause greatly exceeds the actual damages suffered, can the court possibly reduce the amount of the penalty.

Finally, it is worth noting that when the financial loss to be calculated arises from personal injury, courts tend to apply by analogy the compensation schedules set out in Law 35/2015 for the calculation of damages in motor vehicle accidents. As a result, court-awarded compensation in Spain is lower than in other jurisdictions.

ii Evidence

The claimant must provide evidence of the existence and amount of the claimed damages. The means of evidence available to the aggrieved party to prove the existence and the amount of damages are:

- a* inspection of the damaged assets or the personal injuries by the court; this is an important means of evidence in very limited cases where it is used as a source of evidence that supplements expert witness evidence on the damages;
- b* documentary evidence; it is relevant in connection with direct damages that involve costs incurred by the aggrieved party. Documentary evidence is also relevant in connection with medical history when damages arising from personal injuries are claimed. Furthermore, documentary evidence may be relevant as supporting expert witness assumptions when calculating loss of profits;

- c expert witness; expert reports are specifically relevant for the calculation of damages, particularly for the calculation of loss of profits. Calculating loss of profits requires expertise in economics, and company finance and accounting; and
- d factual witnesses; this means of evidence is often not sufficient to prove damages.

iii Date of assessment

Direct damages are calculated as per their monetary value from the moment they begin to accrue. When direct damages are projected into the future (e.g., when costs for future medical checks or third-party assistance for people with disabilities are to be considered) or loss of profits are to be calculated, their monetary value is assessed as from the date on which they are presumed to have begun to accrue. For instance, if the aggrieved party who has suffered serious personal injuries is expected to need permanent assistance by a third party or to renew his or her prosthetics from time to time in the future, their monetary value will be assessed taking into account their estimated future cost.

iv Financial projections

Financial projections need to be made by expert witnesses when calculating loss of profits to have any chance of being awarded.

Financial projections involve the application of assumptions related to circumstances such as: (1) the evolution of prices or interest rates; (2) life expectancy; (3) the expected length of working life; (4) the expected evolution of a specific market; or (5) the expected evolution of the aggrieved party's future income. The correct choice by the expert witness of the source of information to base his or her assumptions on the financial projections is critical.

v Assumptions

With regard to contractual liability, Spanish case law has set a presumption that a breach of contract causes actual damage to the aggrieved party (i.e., it is thus the defendant's burden to prove that the breach of contract did not result in any actual damage to the aggrieved party). Such presumption is not applicable to non-contractual liability.

As regards calculating damages, assumptions by expert witnesses are sometimes inevitable to calculate loss of profits, as mentioned above. The Spanish Supreme Court has traditionally required that those assumptions be based on very probable hypotheses (thus certainty is not a requirement).

vi Discount rates

Spanish expert witnesses who calculate loss of profit are familiar with the need to take into account discount rates in connection with future profits that would have been obtained but for the third party's breach of contract or tortious behaviour. However, when acting before the judiciary, Spanish expert witnesses normally limit the scope of the discount rates to those that relate to the time value of money (i.e., the fact that the claimant should not benefit from the fact that he or she will dispose as from the decision of monetary compensation for profits that he or she would otherwise have obtained in the future).

However, experts do not apply additional discount rates related to the residual amount of risk of the future expected profits not finally accrued because Spanish courts have traditionally been very reluctant to award any loss of profit if the claimant cannot clearly

prove the more than likely (most probable) accrual of profits had the breach of contract or detrimental action not occurred.

Spanish arbitration courts, however, are more familiar with the application of discount rates related to residual amount of risk of the future expected profits and more frequently accept them, thereby lessening the claimant's burden to prove that the profits would have most probably been made.

vii Currency conversion

Spanish law requires that compensation be paid in national currency (in euros). Any amounts related to the calculation of compensation in a foreign currency must be converted into euros. When the amount to be considered relates to a cost incurred by the aggrieved party as a consequence of the event causing damage, the currency conversion must be carried out applying the exchange rates at the time the direct damage accrues (e.g., when the invoice related to a cost caused by the harmful action is settled).

Because of the uncertainty of future currency conversion rates, courts do not take into account the risk of devaluation or the benefit of revaluation of currency as regards compensation for loss of profits (i.e., for profits that would have been made in the future had the action that caused the damage not occurred) when the conversion is made.

viii Interest on damages

In relation to contractual liability, claimants are entitled to claim interest on damages.

In the absence of an agreement between the parties on the interest rate to be applied to a breach of contract, legal interest rates apply. Interest rates accrue as from the moment the obligation becomes due (if so stated in the contract) or as from the moment the claimant formally requests payment from the debtor.

Once the claim for damages is filed with the courts, the claimant is awarded 2 per cent interest on the legal interest on the amount awarded by the court until the defendant pays in full.

In non-contractual liability cases, the aggrieved party is entitled to request interest on damages as from the moment the damages begin to accrue. As with contractual liability, once the claim is filed with the courts, a 2 per cent rate on the legal interest applies.

ix Costs

The aggrieved party can claim costs incurred as a consequence of the act that caused the damage or behaviour of the counterparty or tortfeasor. The costs include direct and indirect costs. As regards indirect costs, however, theories such as remoteness are available to defendants in Spain to try to limit the scope of the indirect damages to be compensated.

According to the duty to mitigate rule, the aggrieved party must try to find the most economical way in the market to restore the situation or mitigate the damage.

When the costs incurred by the aggrieved party include variable costs (in particular, the costs of producing assets), expert evidence by a specialist accountant may be effective.

x Tax

The tax that the aggrieved party would have paid as a result of the profits that he or she would have obtained but for the other party's breach of contract or the tortfeasor's act or activity are not taken into account for the purposes of calculating compensation. In the

same vein, taxes that the aggrieved party would not have paid had the action that caused the damage not occurred is a direct damage that is taken into account for the purposes of calculating compensation.

III EXPERT EVIDENCE

i Introduction

Expert evidence is expressly allowed in declarative proceedings under the Spanish Procedure Law.

Spain has two basic declarative proceedings to seek the payment of compensation for damages: verbal proceedings and ordinary proceedings. Which proceedings apply in each case depends on the amount claimed: (1) verbal proceedings apply in cases involving compensation up to €6,000; and (2) ordinary proceedings apply in cases involving compensation exceeding €6,000.

In both cases, the proceedings begin with the filing of the claim, which must include the facts of the case and the legal grounds on which the claim is based. In both cases, any documentary evidence and expert reports available on the facts or events on which the allegations are based should to be attached to the briefs filed with the court. Note that no other documents will be accepted at a later stage, except in exceptional circumstances, as explained below.

If verbal proceedings are initiated, once the claim is filed and given leave to proceed, the defendant is notified so that he or she may present a defence within 10 working days (which includes every day of the year except Saturdays, Sundays, national holidays, non-working days in the autonomous region in question or city where the proceedings are held, and the month of August). This period cannot be extended unless the parties agree to stay the proceedings.

Subsequently, the court will call the parties to a hearing in which the parties propose evidence, it is examined and the final conclusions are presented.

If ordinary proceedings are initiated, once the lawsuit is notified, the defendant will have 20 working days to file the brief of response. This period cannot be extended unless the parties agree to stay the proceedings.

Subsequently, the court will call the parties to a preliminary hearing in which they will propose evidence and, finally, the court will call the parties to the trial where the evidence and final conclusions are presented.

ii The role of expert evidence in calculating damages

No particularities exist in the Spanish Procedure Law regarding experts that lead with the calculation of damages. However, according to standard practice, the following differences can be highlighted:

- a* in cases involving insurance coverage, an expert to investigate the cause of the accident other than the one who calculates the damages caused as a result of the accident may be proposed;
- b* in cases involving construction defects, the same expert usually handles both tasks; and
- c* finally, in cases involving breaches of contract, normally no expert is proposed to investigate the cause of the breach, as this point requires a legal analysis. Thus, in these cases, expert opinion is normally limited to calculating the damages caused by the breach.

iii The court's role excluding and managing expert evidence

In principle, expert reports should be filed together with the initial briefs of claim and of defence. This means that, as a general rule, the experts are usually appointed by the parties themselves. However, there are a number of exceptions in extraordinary circumstances.

In particular, when there is a risk that the action could expire and, therefore, it is proven that the claimant could not delay filing the claim to protect his or her rights, the claimant may submit an expert report at a later stage provided that this is declared in the brief of claim and the report is filed prior to the preliminary hearing.

In turn, given that the defendant only has 20 working days to file the brief of response, the Spanish Procedure Law allows the defendant to file an expert report five days prior to the preliminary hearing, provided that the defendant justifies that the report could not be obtained before the expiry of the term provided by law to file the defence brief and it declares this in his or her brief of response.

Moreover, if the need for expert witness evidence becomes clear in view of the pleadings contained in the defendant's brief of defence, or in view of the additional pleadings made by any of the parties prior to or at the preliminary hearing, the parties may submit any such expert witness report up until five days before the start of the trial.

On the other hand, the parties may prefer to request the court to appoint an expert rather than appoint one themselves. In this case, they should request so expressly in their initial briefs.

Moreover, the appointment of an expert by the court can also be requested when the need for expert testimony becomes evident either in view of the pleadings contained in the writ of defence (in which case it may only be requested by the claimant) or in view of any additional pleadings made by any of the parties before or at the preliminary hearing.

As in the cases where an expert is proposed by the parties, the cost of issuing a court-appointed expert report is assumed by the party that requested such appointment.

iv Independence of experts

Regardless of whether the experts are proposed by the parties or appointed by the court, pursuant to the Spanish Procedure Law, all experts must state under oath or affirmation and act as objectively as possible, taking into consideration both what may favour or what may harm the parties, that they are aware of the penalties they could face for failing to do so.

v Challenging experts' credentials

When the expert is proposed by one of the parties, and the report is attached to the brief of allegations, the expert is expected to have specific knowledge of the matter of the opinion.

If the expert is appointed by the court, he or she should have an official title corresponding to the matter and nature of the opinion or report. If there is no official professional title for the matter, the experts appointed must have good knowledge of the matter.

Pursuant to the Spanish Procedure Law, the opinions of academics, cultural and scientific institutions that study the subject matter of the expert opinion or of duly qualified legal persons are also valid.

Taking into consideration that the general rule is that experts be appointed by the parties, pursuant to the Spanish Procedure Law, only court-appointed experts can be objected to and disqualified.

In turn, the experts proposed by the parties can be challenged in any of the following circumstances:

- a* if they are a spouse or a relation up to the fourth degree of consanguinity or affinity of one of the parties, their lawyers or court agents;
- b* if they have a direct or indirect interest in the matter or in another similar matter;
- c* if they are or have been in a situation of dependency or conflict of interest with either of the parties, their lawyers or court agents;
- d* if they are close friends or hostile towards either of the parties, their lawyers or court agents; or
- e* if there is any other duly evidenced circumstance that makes them professionally unsuitable.

Moreover, and unless otherwise agreed by the parties, the opinion of an expert who has been involved in mediation or arbitration proceedings concerning the matter at hand is not valid.

vi Novel science and methods

Whenever novel science is involved and no personal expert is available, as mentioned above, the opinions of academics, cultural and scientific institutions that study the subject matter of the expert opinion or of duly qualified legal persons are also valid.

vii Oral and written submissions

As explained above, expert reports must be proposed and submitted by parties in their respective briefs of allegations. Only in the following exceptional circumstances can they be submitted later:

Owing to reasons of lack of time, the parties may announce in their briefs of allegations (claim and defence) that the report will be attached at a later stage. In this case, the report must be submitted five days prior to the preliminary hearing.

As a consequence of the allegations made by the defendant in his or her defence brief, or if new facts arise, or as a result of additional allegations made by the parties before or during the preliminary hearing.

When a request that the expert report be expanded on is made (during the hearing).

Moreover, a party can request the court to appoint an expert:

- a* when a party waives its right to appoint an expert in the brief of allegations and requests the court to do so; and
- b* as a consequence of the allegations made by the defendant in its brief of defence, if new facts arise or as a result of additional allegations made by the parties before or during the preliminary hearing.

Either upon attaching the expert report to the initial brief of allegations or to the additional allegations, or during the preliminary hearing, the parties (and occasionally the court, when this is deemed necessary) must state whether they wish their expert or the one proposed by the opposing party or the one appointed by the court to appear in the trial and the purpose of having him or her appear is (1) to expand on the report, (2) to answer questions, (3) to be cross-examined by the opposing party, and (4) to challenge the other party's expert witness report.

Expert witnesses, together with regular witnesses, parties' declarations and judicial recognition, will normally be examined at trial.

IV RECENT CASE LAW

The Spanish case law on damages arising from civil liability related to antitrust conducts is evolving as a consequence of the recent entering into force of the national regulation that transposed the Directive 2014/104/EU into Spanish law. Specifically, hundreds of cases are currently pending in Spain as follow-on actions arising from the EU Commission's 19 July 2016 decision in the Truck cartel. The Directive includes some provisions setting forth rebuttable presumptions on the existence of damages under certain circumstances and provides plaintiffs and courts with some procedural tools to facilitate the calculation of damages under certain circumstances. The mentioned provisions are still subject to certain restrictions in their application and it will be interesting to see how Spanish courts apply those to ensure that they are not abused.

Additionally, the Spanish Supreme Court issued a relevant decision on 27 May 2019 deciding on a case of a car accident in which it had not been possible to prove which of the two drivers whose cars collided negligently drove through a red light. In a prior 2012 decision, the Spanish Supreme Court had decided that personal injury caused to each driver as a consequence of such a collision (i.e., in which the negligence of either of two drivers cannot be proven) must be compensated by the other driver. Thus, each driver had to compensate the other for 100 per cent of the personal injury caused. In its 27 May 2019 decision, the Spanish Supreme Court further decided that in the above-mentioned cases, material damage (i.e., any damage other than personal injury and the pain and suffering arising from the car accident) suffered by each of the drivers must be met at 50 per cent by each of the two drivers involved in the accident. The different approach by the Spanish Supreme Court to the compensation for material damage is based on the principle that those must be governed by the general fault-based civil liability regulation set forth in Article 1902 of the Spanish Civil Code, while compensation for personal injury arising from car accidents is governed by the principle of social solidarity, which provides for full indemnity for personal injuries regardless of whether or not the driver causing the injury has been negligent. The case law issued by the Spanish Supreme Court in cases concerning car accidents is relevant, as it is often applied by analogy to other sorts of cases.

On 21 September 2018, the Provincial Court of Appeal of Madrid rendered a relevant decision in a collective action filed by a consumer association against the largest Spanish telecoms company. In its lawsuit, the consumer association sought both injunctive relief and compensation for the damage allegedly caused to the represented consumers by the use by the telecoms company of alleged unfair contractual terms. In its decision, the Court of Appeal confirms that prior personal communication of the commencement of the collective actions to each and all the members of the class is a prerequisite for any compensation action filed on behalf of a consumer class. As a consequence, only the injunction action was accepted to be tried, while the compensation claim that had been attached to the former was rejected. The basis for the Court decision is that compensation claims inevitably involve the assessment of individual issues that may be predominant when deciding on the merits of the claim.

Finally, in its decision dated 17 October 2018, the Spanish Constitutional Court decided that the public administrations were civilly liable for the damage suffered by drivers as a consequence of a collision with game species and rendered a legal provision aimed at limiting said civil liability as unconstitutional, it being inconsistent with the constitutional principle of the government's strict liability for the damage arising from the normal rendering of public services.

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