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Davies Arnold Cooper

The Firm

Davies Arnold Cooper started operating back in 1989, headed by Pablo Wesolowski.

In line with the main areas of practice of Davies Arnold Cooper, the Madrid operation has always focused on the insurance sector and other liability carriers' needs. Davies Arnold Cooper Abogados is involved in the development of the insurance industry in Spain, mainly by providing legal services to local and international insurance and reinsurance companies, brokers, Lloyds' syndicates and other liability carriers. Where appropriate, DAC Madrid works closely with DAC London in order to provide a unique seamless service in international insurance and reinsurance matters.

Currently, DAC Madrid comprises a team of 20 lawyers who speak fluent business English.

Areas of practice

DAC Madrid benefits from a notable expertise in insurance law and legal liability matters. From the incorporation of insurance companies in Spain, policy drafting and wording adaptation in accordance with Spanish legislation, to administration of Spanish claims for London and international reinsurers, handling local claims, arbitration and litigation. In this regard, DAC Madrid is involved in some of the largest claims in Spain and probably in Europe.

DAC Madrid protects insurers' interests both in the civil and criminal courts, as in Spain claimants may bring actions directly against insurers.

DAC has a leading reputation in directors' and officers' liability and all types of professional liability, having an incomparable specialist knowledge and expertise in this sector of the insurance business.

DAC has acted in the setting up of the Spanish branches of a number of foreign insurance companies, the firm being experienced in corporate processes (including due diligence procedures, mergers and acquisitions, liquidations etc). DAC Madrid regularly advises on all the related employment and regulatory aspects. This department was strengthened in 2001 with the addition of a new partner specialising in general corporate advice and the restructuring of companies.

DAC Madrid's expertise extends to all aspects of commercial property, property finance and development. Clients include domestic and international investors and construction companies.

Pablo Wesolowski

Pablo Wesolowski, born in 1961, qualified in Law in Madrid in 1985. Has an MA in Business Law from London. Having Practice both in England and Spain, he joined DAC in 1989, becoming the Managing Partner of the Madrid Office in 1995.

He has advised major national and international insurance companies and Lloyd's Syndicates on complex and protracted claims on a corporate, regulatory, licensing and fiscal issues. In addition, he has advised in the drafting of a large number of insurance policies (D&O, E&O, BBB, Kidnap & Ransom...)

He is a member of the AIDA, the International Association of Insurance Law, AGERS and the Risk Management Association. Also he is a member of the Madrid Bar Association and is registered as a foreign lawyer in the Law Society in London.

He has written numerous articles on insurance matters for both Spanish and English publications and has addressed a large number of conferences and seminars about insurance and reinsurance issues in England, Spain, Germany or South America.

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International perspectives in Directors, Officers and Managers Liability

The legal position in Spain

1- STRUCTURE OF SPANISH CORPORATE ENTITIES.

Spanish law envisages various different kinds of Corporate Entities which can be classified as follows,

- Entities where the partners are jointly and severally liable with the whole of their net worth for the debts of the partnership (i.e. General Partnership, Limited Partnership, etc).
- Entities where the partners are liable only for the amount of capital contributed by each partner, the most significant being the *Sociedad Anónima* (“SA”) and *Sociedad de Responsabilidad Limitada* (“SRL”). As these are the most common and frequently used types, a brief summary of their basic lines is set out below,

1- Sociedad Anónima (SA)

Capital

The minimum amount of capital stock required for an S.A. is Euros 60,101.21.

The capital must be fully subscribed and at least 25% of the par value of the shares must be paid up.

It is divided into shares.

Shareholders

No minimum number of shareholder is required.

Shareholders can be individuals or companies of any nationality and residence.

The liability of the shareholders is general, limited to the amount of capital contributed by each of them.

Governing bodies

The governing bodies are the Shareholders’ Meeting and the Directors

Shareholders’ Meeting is the supreme governing body

The law distinguishes between two types of meetings, the ordinary and the extraordinary.

The ordinary shareholder's meeting may be held as and when stipulated by the articles of association, but an ordinary meeting must be held within the first six months of the financial year for the purpose of reviewing the way in the management has conducted the business, and to approve, if appropriate, the financial statement for the previous year and the proposed distribution of the previous year's profits.

The extraordinary shareholder's meeting is any meeting other than the above.

The Directors are the executive governing body

The directors are appointed by the shareholders' meeting, the appointment being legally effective when it is accepted by the appointee. It is registered in the Companies Registry for a fixed term established in the articles of association, within the 5 years maximum period established by Law. Directors can be re-elected one or more times subject to the same maximum per mandate.

The structure can be,

- Sole Director having all management functions.
- Joint directors. Each one has a management function.
- Directors acting by common consent.
- Board of Directors, this must have a minimum of three members; there is no upper limit. This is the most common structure.

2- *Sociedad de Responsabilidad Limitada (SRL)*

2.1 The main differences of this type of structure are:

2..1.1 The capital stock may not be less than Euros 3,005.06, which must be fully paid up. It is divided into units, which may be of different values.

2.1.2 These units are generally not freely transferable (unless they are acquired by other holders, their ascendants or descendants, or companies within the same group)

2.1.3 The scope for representation at the General Meeting is limited.

2- **WHO ARE DIRECTORS, OFFICERS AND MANAGERS?**

A Director is a member of the administrative body of the company. An officer or a manager is a person who performs management functions delegated by the Administrative Body of the company or the Executive Committee.

Directors are appointed by the shareholders of the company whilst officers are appointed by the company by a decision of the Directors.

The Spanish Supreme Court and legal writers have, as in other jurisdictions, developed the concept of the "De Facto Director". This is the person who actually runs the

company, but who has not been formally appointed by shareholders as a director. In Spain, the new 1995 Criminal Code established legal recognition of the concept of a “de facto director” for the first time. In this respect, the new code expressly provides that liability is the same for both directors appointed by shareholders and “de facto directors”.

3- LEGAL BASIS FOR LIABILITY OF DIRECTORS, OFFICERS AND MANAGERS IN SPAIN.

a) Statutory, civil or contractual legal framework.

A Director is a member of the administration body of the company, which is regulated by the articles of association.

As a member of the administrative body, a director has what is known in Spain as “organic powers of representation”. When a Director uses these powers, the company itself is deemed to be acting through the Director. Some powers of directors are given to them by the Companies Act direct (calling shareholders’ meetings, producing annual accounts, etc), whilst other powers are defined in the articles of association. In any event, unless the articles of association provide for any restrictions, it is understood that directors are authorised to do in any way which will develop the business of the company.

Officers are usually linked to the company by an employment contract or a service agreement and do not have organic powers. The scope of their authority depends on the scope of delegation by the directors. The officers are authorised by means of a power of attorney granted by the directors.

b) Duties and requirements of directors, officers and managers

Directors are required to perform their duties with the diligence of an conscientious businessman and of a loyal representative as established by Section 127 of the Companies Act.

Under Spanish law, directors are jointly and severally liable, with the exception of those directors who can show that they had no part in the adoption or implementation of the relevant resolution, or that they had no knowledge of it, or that, being aware of the resolution, they took such steps as practicable to avoid the damage caused, or at least that they expressly opposed the resolution.

This regime applies to executive and non-executive directors, since the Companies Act does not provide for any exceptions to the general liability of directors. Therefore, the fact that the board of directors delegates some of its powers in favour of an executive director or an executive committee does not alter that and, consequently, non-executive directors remain jointly and severally liable together with the executive directors.

c) Is there an equivalent in Spain to the US Business Judgement Rule?

There is no similar provision in Spanish law.

d) Duties of directors, officers and managers towards the corporation

As indicated above, the Companies Act provides, as a general rule, that the Directors are obliged to perform their duties with the diligence of a prudent businessman and of a loyal representative. Therefore, there is a legal duty of loyalty towards the corporation, and directors are obliged to do everything in their power to develop the object and business of the corporation and to avoid or remove any obstacles to or limitations on doing so. By way of example, directors of the corporations cannot compete with the corporation in cases of conflict of interest (unless authorised to do so by the company), or take advantage of their position for personal gain.

The Companies law also provides for specific duties towards the corporation, such as confidentiality, even after the resignation or retirement of the director. The articles of association may impose further obligations.

e) Duties of directors, officers and managers towards majority and minority shareholders

The Companies law does not provide for specific duties of directors towards majority shareholders but towards the shareholders in general.

Section 48.2 of the Companies Act provides that the shareholders of any company shall have, at least, the following rights:

- a) The right to participate in the profits of the company.
- b) Pre-emption rights in relation to the issue of new shares or bonds of the company
- c) The right to attend shareholders' meetings, the right to vote and the right to challenge the shareholders' agreement
- d) The right to information

The above is a list of minimum rights. The articles of association of any company may grant additional rights to its shareholders.

In respect of minority shareholders, the Companies Act provides that any shareholder who holds at least 5% of the capital of the company is entitled to ask the directors to call a shareholders' meeting within 30 days.

As far as the right of the shareholders to obtain information about the corporation is concerned, directors are bound to provide information to any shareholder (i.e. no minimum shareholding is required) when requested, unless in the Chairman's view, the disclosure of such information may damage the company.

In turn, the Criminal Code incriminates certain behaviours in order to protect minority shareholders. This means that, if a director prevents a shareholder from exercising any of his rights, or enters into abusive agreements or takes advantage of a majority position on the Board of Directors, it may amount to a criminal offence.

f) Duties of directors, officers and managers in case of bankruptcy

The Spanish Companies law provides that, in certain circumstances, including a reduction of corporate capital to below the legally established minimum, or where, following a loss, the assets of the company fall below 50% of the capital, the board of directors is under an obligation to call a shareholders' meeting within two months in order to decide whether the Company should be wound up. If the directors fail to do so within the time limit, they become jointly and severally liable for the debts of the company. For an action against the directors to succeed, there is no need to prove the loss or a causal link.

Insolvency therefore entails a risk for company directors. However, if the liquidation is carried out in accordance with the law, claims against directors can generally be avoided.

g) Liability of directors, officers and managers in respect of tax, employment and environmental regulations.

Tax:

Spanish tax law is, in principle, more organic than criminal law, and allows for offences being committed by taxpayers. This means that the liability of directors, officers and managers is, in principle, a subsidiary liability.

Liability is determined by the *Ley General Tributaria* [general tax law], which expressly provides that “*subsidiary liability for simple tax infringements and liability for the whole of the tax debt in cases of serious offences committed by companies will lie with directors who fail to comply with their tax obligations, consent to others failing to comply with their obligations or enter into agreements which allow such offences to be committed. Subsidiary liability for the taxes of companies which have ceased trading will also lie, in any event, with the directors of those companies*”.

In the first place, this is a subsidiary liability which lies with the directors of a company. For this purpose, the definition of “director” is not based on formal criteria, so that the real scope of function of the person concerned will prevail over the title of his office. In effect, the person who actually runs the financial operations of the company will be the director with liability for tax.

Secondly, there is a distinction between simple and serious offences. In the case of the latter, the Treasury aims to guarantee payment of the whole of the tax debt.

Finally, once payment has been made by the director in question, a civil action for recovery is taken against the company, without prejudice to any action which the company, its partners or third parties may wish to take against the directors for the losses caused to the company by the mismanagement of the company's tax affairs.

Employment:

Under various items of Spanish law, employees are granted a large number of rights. The first item of legislation, which contains fundamental rights, is the Spanish Constitution, which governs all aspects of Spanish life including the broadest employment rights. The second item of legislation is the Workers Statute of 1995, which aims to protect the basic rights of employees. Other items of legislation are also relevant.

Spanish employment law does not contain any specific provisions on directors' and officers' liability. However, the Spanish courts have ruled that, where a director or officer is personally responsible for the infringement of a fundamental right of an employee, then the director or officer concerned will be jointly and severally liable with the company to the employee.

In addition, some employment practices constitute criminal acts under the Spanish Criminal Code.

Section 184 of the Criminal Code provides that anyone who requests favours of a sexual nature for himself or for a third party in the context of an employment, educational or service relationship, and by such behaviour intimidates the victim or subjects him or her to a hostile or humiliating situation, will be punished. Penalties range from fines to imprisonment. The Criminal Code also devotes an entire chapter to crimes against the rights of employees. By way of example, it is considered a criminal offence to cause any person in any private or public employment situation to be discriminated against, or to impose on employees conditions which may limit or prejudice their rights. If these criminal offences are alleged against corporate entities, the penalty is imposed on the directors, officers or persons in charge of the department in which the offences took place.

Environmental:

Environmental liability is an increasing risk for directors and officers. Under Spanish law, in the event of a spillage or pollution accident, the directors and officers of the company involved will be liable, unless the director or officer concerned is able to show that he did not have the necessary decision-making capacity, or that he was opposed to the action which caused the contamination.

For an environmental crime to be committed, it will be sufficient to create a serious risk to natural systems: a harmful outcome is not required. This means that criminal proceedings against the Directors and Officers can be commenced even if there has been no actual damage to the environment.

In a Judgment on 30th November 1990, the Spanish Supreme Court set out the basic criteria for liability arising from environmental damage caused by companies:

- A power station based in Barcelona caused acid rain. The Court found the manager of the station guilty of an environmental crime, and held him directly liable for the damage. The company was held vicariously liable.

- It was the Court's view that liability for damage arises from the capacity of managers, directors and officers to take decisions and to run the company. In addition, the Court appeared to be of the view that Directors and Officers are liable because, on the one hand, they are supposed to be aware of and have control over all the activities of their employees and the company; and on the other hand, because they are supposed to take preventive measures to avoid environmental damage.

Under this doctrine, directors or officers were targets, but employees were rarely accused. However, a recent judgment given by the Criminal High Court of Barcelona has changed this.

- A number of directors of a company were accused of an environmental crime, together with an employee of a plant where an oil spillage took place.
- The directors were not found guilty. The court considered that one of the accused directors was not liable because he was not an executive director, and therefore he was not actually aware of what was going on in all the departments and areas of the company.
- The court held that the other director was not liable because his duties were based in Madrid, and the plant in which the oil spillage occurred was in Barcelona.
- The Court therefore found the employee working at the plant guilty, on the grounds that he was the person in charge of the process.

Notwithstanding the above, to date there has not been any other court ruling in which the liability of directors and officers for environmental damage has been rejected. Environmental liability therefore continues to be a risk.

h) Criminal liability of directors, officers and managers

The 1995 Criminal Code provides that anyone who legally or *de facto* acts as a director or manager of a corporate entity is personally responsible for the criminal offences committed by that corporate entity.

The Spanish Criminal Code lists a large number of criminal offences, such as falsification of documents, fraud, etc. The Code also takes into account the actions of directors and shareholders, and includes a number of "corporate crimes", primarily aimed at protecting the interests of the market place and of minority shareholders.

From amongst the new crimes which are specifically intended to protect the market place, it is worth noting the following:

- falsification of the accounts or any other document containing information or reporting on the legal or financial position of the company

- failure to co-operate with relevant regulatory authorities (Stock Exchange Commission, Bank of Spain, General Directorate of Insurance, etc.) in their investigations or inspections.

From amongst the new crimes which are specifically intended to protect minority shareholders, it is worth noting the following:

- any director interfering with, or preventing any shareholder from exercising his/her rights.
- the adoption of any abusive agreement or decisions by directors or shareholders, which take advantage of a majority position on the board of directors or in the shareholders meeting.

Any director, officer or manager who commits any of the above will be subject to a criminal charge.

4- STATUTE OF LIMITATIONS

a) Shareholders actions

The Companies Act does not provide any limitation period in respect of actions against directors. The Mercantile Code provides that any action against a director will be time barred 4 years from the date on which the director leaves office.

The Spanish Courts have not reached a uniform and clear conclusion in this respect. In some cases, the Spanish courts apply a one-year limitation period, as provided in the Civil Code for liability in tort, and in other cases, they apply the 4-year period referred to in the previous paragraph.

b) Contractual disputes

The standard limitation period under the Spanish Civil Code is 15 years. However, as the director is not a party to the contracts entered into by the company, the Spanish courts will tend to apply the above-mentioned limitation periods (1 or 4 years).

c) Actions for discrimination

Such actions may be brought in a criminal, civil or labour court. The limitation periods are as follows,

- For criminal actions, 3 years.
- For civil actions, 1 year.
- For labour actions, between 20 days and one year.

d) Sexual harassment actions

This kind of action may be brought in a criminal, civil or labour court. The limitation periods are

- For criminal actions, 3 years.
- For civil actions, 1 year.
- For the labour actions, between 20 days and one year.

e) Wrongful dismissal actions

The Workers Statute provides a limitation period of 20 days for actions based on a wrongful dismissal.

f) Fraud

The Criminal Code provides that the limitation period depends on the sentence stipulated for that offence, as follows:

- 10 years, for imprisonment of 5 years or more.
- 5 years, for imprisonment of 3 years or more (up to 5 years)
- 3 years, for imprisonment of less than 3 years.

g) Tax

According to the regulations referred to earlier, the limitation period for a tax offence will depend on the sentence. Where the stipulated sentence is imprisonment for three years or more, the limitation period is 5 years. If it is less than 3 years, the limitation period is 3 years.

The limitation period provided by the Spanish tax regulations is 4 years.

5- WHO CAN SUE?

a) Claims by the corporation, shareholders, creditors, third parties and insolvency

Under the provisions of the company law, the following types of action can be brought against the directors of a company:

Corporate Liability Action

Shareholders are entitled to bring claims against directors in respect of any wrongful act or omission which gives rise to any kind of damage. This is known as a “Corporate Liability Action”. Only the Company can bring this action against the directors and, for this purpose, a resolution to this effect by the majority of shareholders at a General Shareholders Meeting is required. In limited circumstances, the minority shareholders will be entitled to bring this action.

The Company's creditors can also bring a corporate liability action against the Directors, but only if the shareholders or the company have failed to bring one and provided that the assets of the company are not sufficient to meet its liabilities.

Individual Liability Action

The second type of action which can be brought against the directors of a company is the Individual Liability Action. Any shareholder or third party is entitled to bring a liability action against the particular director who has caused direct damage to that shareholder or third party.

In one case, company creditors brought an individual liability action against the directors of a company, claiming damages amounting to 100,000,000 Pesetas on the grounds of gross negligence on the part of the directors who incorporated instrumental companies, creating confusion amongst creditors. In a ruling on 3rd July 1998, the Supreme Court found in favour of the creditors and ordered the directors to pay 94,000,000 pesetas.

In another case, minority shareholders brought an individual liability action against the directors of a company on the grounds that they failed to acknowledge shareholders' ownership of the shares they had acquired. In a ruling on 20th March 1998, the Supreme Court found in favour of the minority shareholders and ordered the directors to pay damages to the shareholders. The Supreme Court gave a similar decision in its ruling of 25th September 1996.

A third party brought an individual liability action against the directors of a Company, seeking compensation for damage caused to property belonging to the plaintiff following an explosion in a mine owned by the company. In a ruling on 20th July 1995, the Supreme Court found in favour of the plaintiff and against the Directors, applying the doctrine of "lifting the corporate veil".

On another occasion, the creditors of a company brought an individual liability action against its directors on the grounds that they had made a high risk investment in financial products, resulting in the insolvency of the company, and that the Directors failed to take the measures required by the Company law to protect creditors when the company becomes insolvent. In its ruling of 9th April 1997, the Supreme Court ordered the Directors to indemnify the creditors.

Action against directors for a company's debts

Spanish Company law provides that, in certain circumstances (insolvency, reduction of the capital below the legal minimum, etc.) the board of directors is under an obligation to call a shareholders' meeting within two months in order to decide whether the company should be wound up. If the directors fail to do so within the time limit, they become jointly and severally liable for the debts of the company. For the action against the Directors to succeed, there is no need to prove damage or a causal link.

The typical context in which this liability arises is when the loss reduces the value of the Company below one half of the share capital, and the Directors fail to call a shareholders' meeting to wind up the company within 2 months.

b) Regulatory Authorities

The Companies Act does not provide for fines or punishments to be imposed on directors and officers. However, the laws and regulations governing certain sectors, such as banking, insurance, securities, etc. have provided a selection of sanctions and penalties which can be imposed on directors and officers by the relevant regulatory body.

By way of example, the Securities Exchange law provides a list of infringements of the securities regulations, categorised as very serious, serious and minor (failure to report to the CNMV -the Spanish SEC- of certain events, insider trading, etc). An infringement may result in a fine or penalty. The following sanctions may be imposed on the Director and Officer concerned:

- A fine of Pesetas 50,000,000 or 5% of the assets involved in the infringement, whichever is the higher.
- Disqualification of up to 3 years.
- A ban on holding any directorship, which can be for periods of up to 5 years in any financial entity, or up to 10 years in a similar type of financial entity.

The CNMV is particularly active: the Markets Control Unit of the CNMV has made some 2,000 requests for information from companies, and more than 150 official investigations (45% in connection with insider trading and close to 30% in connection with manipulation of quotations) and has imposed sanctions amounting in total to 26,000,000,000 pesetas. By way of example:

- As a consequence of a failure to report to the CNMV on certain investments carried out by a Spanish company in the London Metal Exchange, the CNMV imposed a fine of 175,000,000 pesetas and 35,000,000 pesetas on one of the company's directors.
- In relation to investments carried out by a securities brokerage house, the CNMV imposed fines totalling 620,000,000 pesetas, and disqualified its directors for periods of between 8 and 10 years.
- A fine of 20,000,000,000 pesetas was imposed on a securities brokerage house and one of 50,000,000 pesetas on its directors for carrying on business without the necessary licences.

c) Employees

Employees can sue directors and officers in the civil or labour courts in cases of infringement of an employee's fundamental rights. Also, in accordance with EU Directives relating to the burden of proof in sex discrimination, which have been fully implemented by Spain, it is for the employee to provide a preliminary indication that the employer discriminated or infringed his/her fundamental rights in order to shift the

burden of proof onto the employer, who will then have to prove that the employee was dismissed on reasonable and objective grounds.

Employees can also bring actions in the criminal courts.

Examples of claims are as follows:

- **Sexual harassment:** On 4th May 1999, in confirmation of the ruling of the First Instance Court, the Criminal Appeal Court of Seville ordered a member of the board of directors of a company to indemnify an employee on the grounds that it was proved that the Director had touched and kissed the 18-year-old employee against her will.

On 21st September 1998, in confirmation of the ruling of the First Instance Court, the Criminal Appeal Court of Murcia ordered the owner and managing director of a company to indemnify an employee on the grounds that the defendant, having employed a female verbally, i.e. without a written contract, made the promise of a written employment contract conditional upon the employee having some form of sexual relationship with him. As a result of this incident, the female employee suffered post traumatic stress requiring psychological treatment.

- **Freedom of affiliation to a trade union.** The Criminal Appeal Court of Burgos found against the managing director of a company on the grounds that he had violated [his employees'] freedom of affiliation to a trade union. Following a strike, trade union representatives gained access to the company and came into confrontation with the defendant's son. The defendant asked his employees to withdraw their affiliation to the trade union concerned and even drafted the document withdrawing representation on their behalf.
- **Equal pay discrimination.** A female employee brought proceedings in the civil courts against her employer and a director of the company seeking an indemnity for the depression she suffered as a result of the discrimination between herself and a male colleague who, despite being the plaintiff's junior and when their jobs were exactly the same, received a higher salary than the plaintiff. It is worth noting that the employee had previously brought proceedings before the labour courts where she was awarded the sum of Pesetas 7 million for wrongful termination of an employment contract. The Supreme Court held that the above indemnity was given in the context of a contractual relationship and that this was not incompatible with the employee seeking an indemnity for non-contractual liability on the part of the employer arising out of negligence. The Supreme Court considered that the employer had behaved in a discriminatory manner and ordered the employer to indemnify the female employee with an additional sum of Pesetas 3,000,000.
- **Infringement of the right to privacy.** The registration of an employer's computer at work without the employee being present, and copying certain personal files, was deemed to infringe employee's right to privacy. On 25th February 2000 the employer was ordered by the Territorial Labour Court of Andalusia to indemnify the employee.

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6- WHAT IS THE ENFORCEABILITY OF A FOREIGN JUDGEMENT ON SPANISH DIRECTORS, OFFICERS AND MANAGERS UNDER SPANISH LAW

There are no specific regulations in Spain regarding the enforceability of a foreign judgement on Spanish directors, officers and managers.

However, a foreign judgment relating to civil and commercial issues may be enforced in Spain in accordance with European regulations.

7- CAN DIRECTORS, OFFICERS AND MANAGERS BE LIABLE FOR PUNITIVE DAMAGES UNDER SPANISH LAW, AND ARE PUNITIVE DAMAGES INSURABLE UNDER SPANISH LAW?

No. Under Spanish law, punitive damages are not regulated.

8- CAN A COMPANY INDEMNIFY ITS DIRECTORS, OFFICERS AND MANAGERS UNDER SPANISH LAW AND, IF SO, UNDER WHAT CONDITIONS?

Spanish law does not provide for any form of obligation on the company to indemnify its directors.

9- DIRECTORS, OFFICERS AND MANAGERS LEGAL LIABILITY INSURANCE?

- Who pays the premium?

According to the Spanish Insurance Contracts law, the policyholder (normally the company) pays the insurance premium in accordance with the terms of the policy. However, the insured (directors and officers) can pay the insurance premium instead of the policyholder.

- Must the D&O insurance policy be issued by a local admitted insurer?

Before answering this question, it is advisable to clarify the concept of “local admitted Insurer”. To this end, a local admitted Insurer comprises not only the Spanish insurers, but also European insurers licensed to write insurance business in Spain on a freedom of services and/or establishment basis.

The Spanish law no. 30/95 on Ordination and Supervision of Private Insurance provides that a risk is deemed to be located in the Member State in which the policyholder resides (in the case of an individual) or where the policyholder has its registered office or branch (in the case of a corporation). According to the DGS, the concept of a branch also includes subsidiaries. Therefore, as in this scenario a Spanish subsidiary is involved in the D&O insurance policy, only a local admitted insurer can issue an insurance policy of a Spanish risk.

If the answer is yes, does the same rule apply to a Spanish subsidiary of a multinational carrying a D&O insurance policy in Spain?

According to the rules referred to above, although the multinational is carrying a D&O global insurance policy, the risk would be Spanish as the insurance programme also affects to the Spanish subsidiaries. Therefore, only a local admitted insurer can issue an insurance policy covering a Spanish risk.

- Issue of tax allocation on local premium for local D&O insurance policy under Spanish law

A Spanish risk is subject to local requirements concerning compliance with the Spanish Insurance Contracts law and payment of insurance premium tax. Section 107.6 of the Spanish Insurance Contracts law provides that, if the insurance contract covers risks located in several Member States of the European Union, it will be considered that several contracts exist and that each one corresponds to only one single state.

With regard to the payment of taxes and surcharges in Spain, the Third Non-Life Insurance Directive states that every insurance contract will be exclusively subject to the indirect taxes and parafiscal charges on insurance premiums in the Member State in which the risk is situated.

The Spanish Insurance Premium Tax law provides that any insurer carrying on insurance business in Spain will be subject to this tax.

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