

## FIRST THING ON THE TO-DO LIST FOR 2020: DE-ACTIVATE THE RISK OF ACTIONS *IN PERSONAM* IN SPANISH DEBT POSITIONS BEING TIME-BARRED

As a result of the reform of the Spanish Civil Code in 2015, the statute of limitations on many of the actions *in personam* which creditors of Spanish debt positions would be entitled to take will expire on 7 October 2020. In this Client Briefing we explain how to identify exposure to this risk and what can be done to neutralise it.

### What we mean by "actions *in personam*"

Actions *in personam* are those actions which permit one party to ask the courts to order another party to comply with its obligations.

In the financial context, actions *in personam* enable a creditor to take legal actions against a defaulting debtor and/or against the party securing the debt<sup>1</sup>.

Unlike actions *in rem*<sup>2</sup>, which are designed to obtain the liquidation of a specific asset in order to cancel (in full or in part) an outstanding debt, actions *in personam* commit the debtor and/or personal guarantor's entire assets.

### How Act 42/2015 affected the statute of limitations on actions *in personam*

Spanish Act 42/2015, of 5 October, reformed the statute of limitations on actions *in personam*<sup>3</sup>. Its entry into force on 7 October 2015 reduced the former 15-year limitation period to 5 years.

The Act established a *semi-retroactive* transition regime which applies, with the appropriate adaptations, to certain actions *in personam* originating prior to its entry into force (in this case, those originating since 7 October 2005).

The wording of the transition regime is not clear. However, the Spanish Supreme Court has recently confirmed the majority's interpretation of such regime (Supreme Court ruling dated 20 January 2020):

- Actions *in personam* originating on or before 6 October 2005 are governed by the law in force prior to the reform.
- The statute of limitations on actions *in personam* originating between 7 October 2005 and 7 October 2015 will expire on 7 October 2020 (i.e. the 15-year period in force when they originated will not apply).
- Actions originating after 7 October 2015 will be time-barred five years from the date on which they could first be brought.

Therefore, actions *in personam* which originated between 7 October 2005 and 7 October 2015 could expire on 7 October 2020 if the necessary countermeasures have not been taken.

Before we outline some guidelines which can help in analysing exposure to this risk, it should be noted that Spanish law establishes that statute of limitations periods can be paused or interrupted (*tolling*). As a result, there are mechanisms to ensure that actions *in personam* already brought will still be pursued.

### How to neutralise the risk of time-barring

<sup>1</sup> Those parties who have granted guarantees for which they are jointly and severally or subsidiarily liable, depending on the type, with all of their assets (guarantors etc.).

<sup>2</sup> Actions *in rem* are exercised base on an *in rem* right, such as a mortgage or pledge. These actions are not affected by the legislative changes.

<sup>3</sup> The amendment was to be generally applicable, without prejudice to those actions *in personam* with a specific limitation period established by law.

According to the Civil Code, statute of limitations periods can be interrupted by: an action *in personam* brought in court, a claim for payment brought out of court, or an express acknowledgement by the debtor that the debt remains in force.

"The performance of an act interrupting the limitation period" would entail "a restart of the deadline under the new law" (Supreme Court ruling dated 20 January 2020).

To identify exposure to this risk, all defaults on debts occurring between 7 October 2005 and 7 October 2015 should be reviewed, in order to determine if this could negatively impact the creditor's expectations for debt recovery.

Debt positions should be reviewed, particularly those for which no *in rem* guarantees exist and those for which such guarantees may be insufficient to cover the entire amount of the outstanding debt, since the expiry of actions *in personam* would block access to the debtor and to the personal guarantors.

This only affects non-judicialised debt positions, since court claims for payment interrupt the statute of limitations period.

Not only should attention be given to those positions which have remained completely inactive since the default occurred. It is also advisable to review the terms under which the payment orders were issued, so as to ensure they are enforceable and thereby prevent the actions' expiry.

The biggest risk arises in relation to those debt positions forming part of non-performing loan portfolios, for which it is not easy to keep separate control over each position.

In those cases, it becomes necessary to design an action plan in coordination with the debt servicers and under the supervision of a legal advisor, to ultimately ensure that the countermeasures are fully effective in suspending the expiry of these actions and to be sure that the creditor's rights are not affected.

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