Liability of partners / directors in a private partnership (*sociedad civil privada*)

This article analyses the civil liability of partners / directors in a private partnership (sociedad civil), with particular reference to the debt-recovery procedure against a partnership and the possibility of extending the civil action to include the partners as defendants

In order to determine whether or not the directors of a partnership are liable for the debts of the partnership they administer and manage, and what form the said liability is to take (type of liability), it is first necessary to establish whether or not the partnership has a commercial purpose, because, if it does, the caselaw has held that this constitutes an irregular commercial company, and, as such, the partners forming such a partnership would be personally and jointly-and-severally liable.

The caselaw has held that where a private partnership is deemed to be an irregular commercial company, the recovery of debts (which is based on article 544 of the Spanish Civil Procedure Law [hereinafter, "L.E.C."]) may be extended to include the partners, and that the directors / partners are personally and jointly-and-severally liable for the debts incurred by the partnership against third parties.

This finding has been upheld by resolution 162/2017, of 5 October, of the Provincial Court of Appeal of Barcelona, Judgment 314/1996, of 14 October, of the Provincial Court of Appeal of Huesca, and Judgment 193/2014, of 14 May, of the Provincial Court of Appeal of Barcelona.

Within the framework of the debt-recovery procedure, on the basis of article 538.2.2 of the L.E.C. (which also refers to the aforementioned article 544 of the same legal text), the partners forming a partnership are personally liable for the debt pursuant to a statutory provision, and they can be summoned as defendants even if they are not named as debtors in the instrument recognizing the debt (the Judgment).

However, despite the existence of a solid current within the caselaw to the effect that partners are personally and jointly-and-severally liable for the debts of their partnership where it constitutes an irregular commercial company, there is another sector of learned opinion and caselaw that argues that even if there was no such personal and joint-and-several liability, at least there is always subsidiary liability and, as such, partners will be subsidiarily liable for the debts in proportion to their percentage interest in the partnership. This view is upheld by some courts on the basis of art. 1,698 of the Spanish Civil Code.

In this regard, Judgment 700/2004, of 4 October, of the Provincial Court of Appeal of Barcelona imposes liability first on the partnership and then subsidiarily on all the partners, pursuant to article 1,698 of the aforementioned Civil Code. Judgment 269/2015, of 3 December, of the Provincial Court of Appeal of Seville reached the same conclusion.

Ultimately, if the partners forming a partnership are not held to be personally and jointly-and-severally liable, they will always at the very least be subsidiarily liable, and as such, where the partnership does not have sufficient assets to honour its debts with third parties, the partners will be liable for the debts of the partnership with their personal assets and in proportion to their percentage interest in the partnership and its business.

The foregoing is of particular significance for the creditors within the framework of debt-recovery procedures, where (on the basis of the arguments put forward) it is possible for debts to be recovered against the partners forming the partnership without having to commence new judicial proceedings against them (even where they are not named in the instrument recognizing the debt) given that this is already envisaged and provided for in art. 544 and 538 of the L.E.C., without this causing the said partners to incur in a situation of legal defencelessness.

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