CUATRECASAS, GONÇALVES PEREIRA

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I LAW N.º 150/2015, OF 10 SEPTEMBER, AND ITS AMENDMENTS TO THE FOUNDATIONS LEGAL FRAMEWORK

The Law n. º 150/2015, of 10 September, which came into effect on October 10th, made some significant changes in the Foundations legal regime established in the corresponding Framework Law and also amended the legal entities regime that was set out in the Civil Code.

Regarding the main changes operated in the Foundations Framework Law, we have to highlight the implementation, by the legislator, of a simplified recognition procedure, under which the final decision must be taken within a maximum of 30 days from the date of submission of the recognition application by the foundation, instead of the 90 days deadline that applies to the normal recognition procedure.

In order for the applicant to be able to gain access to this simplified recognition procedure, the foundation must respect the following cumulative conditions: (i) the foundation must be created exclusively by private law persons and may not be established as a Private Social Solidarity Institution (IPSS) or pursue the typical goals of the cooperation foundations for development or of the foundations established for the creation of a higher education institution; (ii) the initial endowment must be made solely in cash; and (iii) the text of the foundation's statutes must follow a template approved in advance by order of the member of the Government responsible for the foundations.

Besides this innovation, the requirements to which the foundations are subject regarding transparency were mitigated and, as a result of that, they are no longer required to permanently present on their website, an up-to-date list of the members of their corporate bodies and the start and end dates of their term. On the other hand, foundations with an annual income below 2 million euros are dismissed from having to present on their website copies of the founding and recognition acts, the management and accounting reports, information regarding the number of workers and the nature of their contract relationship, the external audit report and the assessments made by the supervisory body over the last three years.

Moreover, regarding the public foundations and the private foundations officially recognized as being of benefit to the public, the legislator clarified the rules that govern the limits of their own expenses, establishing that, for the purposes of ascertaining the category of their activity, if the spending amounts are the same, the foundation must be submitted to the most favorable legal regime. The breach of the referred rules during two years implies that the foundation loses its status of being of benefit to the public.

Finally, some changes were made regarding a few legislative definitions, namely the promotion of the assistance and care of refugees and migrants to an activity/purpose of social interest, and also the exclusion of the payments received by the foundations as compensations, fulfillment of contractual obligations or as European funds, from the concept of financial support.

Regarding the changes that were made in the Civil Code, these were mostly made in the general legal regime applicable to all legal entities, and in the rules that specially regulate the foundations. With reference to the first matter, the legislator determined that if, when the legal entity is extinguished, exist any assets that were donated to the latter, inherited with a certain liability or that are allocated to a specific purpose, the Court must, upon request of the Prosecutor's Office, any interested party, liquidators or of the donor's heir, attribute those assets to another legal entity, maintaining their previous liability or allocation.

As to the general assets that belonged to a legal entity that was extinguished, they must follow the destination established in the statutes or in a resolution approved by the competent corporate body. However, it is also possible for the liquidators, the Prosecutor's Office or any other interested party, to request to the Court the attribution of those assets to another legal entity, or to the State, ensuring, as much as possible, the same purposes of the extinguished legal entity.

Finally, regarding the rules that specially regulate the foundations, it is established that its act of institution, its statutes and corresponding amendments, can only produce legal effects towards a third party after being publicized in the same manner as established for the commercial companies. At last, the publication in an official journal of the decision to recognize the foundation, or its refusal, it is no longer made at the expenses of the foundations that apply for recognition.

II NATIONAL CASE LAW

Judgment of the Supreme Court of Justice of April 21, 2016
Swap Contrats – Agreement conferring exclusive jurisdiction

In this judgment, the Applicant asked to the Portuguese Courts to declare the invalidity of two Swap contrats, notwithstanding the fact that a previous agreement conferring exclusive jurisdiction to the English Courts had been concluded between the parties. For this purpose, the Applicant alleged that the Defendant's domicile was in Portugal, that the referred contrats were concluded in Portugal and that the fulfillment of the corresponding obligations was to occur in Portugal, which constituted a purely internal legal situation. Furthermore, the applicant and also claimed that the agreement conferring exclusive

jurisdiction to the English Courts was invalid in face of the title clauses legal regime established by the Decree-Law n.º 446/85, of October 25.

However, the Supreme Court ruled to be incompetent to decide on this matter, due to the existence of an agreement previously concluded between the parties that conferred exclusive jurisdiction to the Courts of a foreign country, and argued that in order for the said agreement to be valid it is only necessary, considering the established in the Council Regulation (EC) n. º 44/2001 and in name of contractual freedom, that one of the parties is domiciled in a Member State, that the Court the parties choose as competent is located in the Member State where exists the mere possibility of the fulfillment of the contractual obligations, and that the celebrated contrats are involved in a chain of international financial interests.

Bearing this in mind, the swap contrats concluded between the parties are intrinsically characterized as adjustments of international nature, were drafted in English using Anglo-Saxon terminology, were subjected to the English law, the parties predicted the possibility of its execution to occur in London or in the Cayman Islands, and the Bank with which the Applicant celebrated the swaps acted as an international Bank. Therefore, all the conditions stated in the previous paragraph are met and the validity of the agreement made by the parties regarding jurisdiction may not be assessed by the requirements of a national law because European law is to be interpreted autonomously and ultimately prevails.

Judgment of the Supreme Court of Justice of April 5, 2016
Information Obligations – Regulated Markets

In the judgment under analysis, the Supreme Court referred the article 7 of the Portuguese Securities Market Code ("CdVM"), which establishes that the information to be disclosed by a legal entity that issues securities, must be "complete, truthful, up-to-date, clear, objective and lawful", and which breach can be considered as a crime of market manipulation, punished by article 379, n.º 1 of the CdVM. This provision highlights the importance of information as a key value to be preserved by all market agents, so that the latter can work in an effective way and in order for the investors to be able to act duly informed.

Moreover, the Court stated that, in order for the legal scope and the material content of that rule to be observed, the omission or the failure to provide the legally required information by a legal entity that issues securities, regarding the information disclosed in its prospectuses or in its periodic reporting mechanisms, can result in the breach of an information obligation.

However, the Court also established that it is the article 251.º of the CdVM, instead of the previously mentioned article 7.º, which is the provision contained in the CdVM that is able to generate civil liability. This article 251.º, which defers to the regime set out in article

243.º of the same Code, is an autonomous and self-governing rule that establishes a special legal regime of civil liability regarding the securities regulated market, which prevails over the general one set out by the Civil Code.

Therefore, the Supreme Court concluded in this judgment, that regarding the limitation periods of the liability arising from the violation of any information obligation prescribed by the CdVM, they are set out by article 243. º, paragraph (b), being of six and two years, respectively. This limitation periods are shorter than the ones generally prescribed by the Civil Code, but do not contradict the constitutional right to an effective judicial protection because they were established by the legislator bearing in mind the trust of futures investors and the extent and level of demand of the information obligations set out throughout the CdVM.

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