The direct action of the operating carrier against the companies preceding it in the subcontracting chain

Judgment of the Supreme Court of 6 May 2019

Background

On 24 November 2017, the Supreme Court ruled for the first time on how to interpret the direct action foreseen in Spanish Law 9/2013 that any operating carrier has against all companies preceding it in the subcontracting chain (that is, the company initially hiring the transport services and, when applicable, intermediate carriers).

At that time, the doubt was whether the liability of the claimed company was to be limited to the amounts actually owed by such company; or, to the contrary, such liability was not limited in this regard.

The Supreme Court, after going through the legislative history, the parliamentary debates and the regulations in other countries (especially France and Italy), concluded that the liability of the claimed company is unlimited. Therefore, the claimed company is liable before the operating carrier regardless of whether such company has outstanding debts or not.

In other words, the Supreme Court understood that all the companies preceding the operating carrier in the subcontracting chain are joint and several guarantors of the operating carrier: if the operating carrier does not receive the consideration agreed for the services, such operating carrier shall be entitled to claim against each and every one of the companies preceding it in the subcontracting chain.

In 6 May 2019, almost a year and a half after its first judgment on the matter dated on 24 November 2017, the Supreme Court confirmed its doctrine about the direct action.

With this new judgement, the Supreme Court lays down a consolidated case law and shows the path to be followed, unless an unexpected legislative change occurs, for the interpretation of the direct action during the following years.

Protection against the direct action

The direct action, as interpreted by the Supreme Court case law, may oblige companies hiring transport services to pay for such services to companies with which they have no direct contractual relationship, or even to pay twice for the same services. As a protection before such situation, we recommend to exercise utmost caution when drafting transport agreements and to include in such agreements clauses such as the prohibition for the hired carrier to outsource the services entrusted to it.

Alternatively, it can also be regulated in the Agreement that, if the hired company outsources the services to a third party, the payments to be made by the hiring company to the hired one shall be subject to the provision by the latter of sufficient evidence that it has paid all amounts due to the third party.