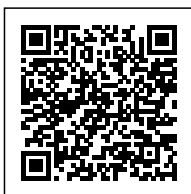


DON'T JUST SIT ON UNPAID DEBTS - FERNANDO DÍAZ BARCO

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When helping clients who are facing late or non payments, says Fernando Díaz Barco, the worst thing lawyers can do is to do nothing

Cuando los clientes solicitan ayuda relativa al impago o a la demora de pagos, Fernando Díaz Barco afirma que los abogados deben reaccionar de manera más proactiva e intentar ofrecer soluciones. La actual situación económica ha causado numerosos procesos litigiosos y disputas a raíz de impagos o demoras injustificadamente largas, provocando serios problemas de liquidez para las

empresas.

The current economic crisis has brought a marked increase in non-payments, delays on payments and litigation on unpaid debts. This is resulting in mounting unpaid invoices at a time when the bottom line is the priority for Spanish businesses. Spain is behind most EU countries when it comes to late payments, with the average period of national payment collections at well over 100 days. The amendments made to Law 15/2010 on combating late payments (transposing the Directive 2011/7/EU), related to shortening the payment periods, however, are to enter into force in early 2013.

Public sector

Even Spanish public administrations cannot escape being a part of this trend of late payments. Until very recently it was a solvent and reliable client, but today, lawyers are struggling against delays or avoidance of payments.

Earlier this year, the Spanish Government partially tackled these issues by preparing a payment plan for the suppliers of local and autonomic administrations. While this has, for the most part, addressed the problem, it has not yet been completely resolved. Unfortunately, the Government omitted to include a number of debts within the scope of the plan and, as the plan was no mandatory, some public administrations chose to ignore it.

This issue is therefore still outstanding and there is a lot of frustration among lawyers currently trying to collect from public administrations. Spanish regulation still favours the public administrations, and the law grants them privileges over and above the private sector. For instance, the right to effective judicial protection, widely recognised in Spanish jurisprudence and supported by the doctrine of the Constitutional Tribunal, guarantees, among others, the right to enforce a judgment. However, as public administrations are immune from having their assets seized, this right is rendered unenforceable and thus breaches the constitutional principle of the effective judicial protection.

Private sector

The crisis and the high unemployment rate have also caused an increase in late payments by both companies and individuals. The late payment rates of the Spanish banks and financial credit institutions are on the rise with no end in sight, and they are currently close to 10 per cent, an increase of three per cent from last year. On top of this, the reduction in banking lending over the past years has added to what is already a difficult situation.

However, it is also true that in the private sector, there are more options when it comes to enforcing judgements, and therefore the task of enforcing the collection of unpaid debts is easier than in the public sector. Notwithstanding, even though there have been many recent regulatory reforms focused on solving the problem, the situation has gone far beyond the predictions of the regulators. Their laws and regulations, especially insolvency laws, have not produced the results they had hoped for.

The direct consequence of late payments and the non-payment of the debts is that litigation is on the rise. But the Tribunals are now overloaded with claims, and the speed with which the judicial system deals with issues related to the collection of debts is incredibly slow. If the system is not working, then justice isn't being served and the right of the effective judicial protection becomes lost.

What can lawyers do?

Both In-House counsel and law firms agree that the worst thing to do in these cases is to be passive and not act at all. Just because the system is flawed does not mean they should just assume that it will be impossible to collect on outstanding debt.

Lawyers must take action. They should search assets, demand that the tribunals assist, request reports and, if required, file independent claims for personal liability against any managers that could be liable for bad administration of the company.

They should try to reach friendly agreements, offer alternative payment arrangements or the possibility of credit compensations, for example.

After all, any of these solutions are preferable to writing off unpaid debt and losing out on much needed income in the crisis.

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