SUITABILITY OF EU LEGAL CAPITAL RULES AS A MECHANISM OF CREDITOR PROTECTION

A COMPARATIVE AND FUNCTIONAL STUDY

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Abstract

Suitability of EU legal capital rules as a mechanism of creditor protection - A comparative and functional study

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This thesis evaluates the adequacy of EU legal capital rules as a mechanism of creditor protection. This role indisputably constitutes the fundamental purpose of the regulation of such doctrine by EU law in the last four decades, since the original Capital Directive until the current codification on Company Law. This thesis questions the effectiveness of legal capital rules for that aim once transposed and incorporated into Member States' national laws and aims to unravel the impact that they have in practice from a law and economics perspective and by means of a comparative and functional analysis.

Starting from the premise that providing creditor protection is not only desirable *ex post* but also *ex ante*, this thesis analyses legal capital rules alongside other mechanisms - both real and theoretical- and argues that *prima facie* EU legal capital rules are not fit for that purpose. However, an empirical and comparative study on the implementation of these rules and enforcement of creditor rights in Spain and the UK suggests that Member States' approach has a great impact on the effectiveness and functionality of these rules in practice, and therefore the EU framework does not ultimately determine their adequacy. A comparative analysis between these two Member States demonstrates that creditor protection is largely provided by –and achieved through- means of directors' liabilities and insolvency rules, and the relevance of legal capital rules *per se* is rather limited. Nevertheless, legal capital rules have a higher impact and functionality in Spain than in the UK, namely due to Recapitalise or Liquidate rules (ROL) and legal reserves.

This thesis advocates that a system containing ROL based on adequate capitalisation and assisted by the control of solvency tests and related directors' liabilities together would provide a more comprehensive regulatory package than the framework provided by the EU Directive.

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‘ There can be no doubt that the primary goal of rules on capital is the protection of creditors.’

Friedrich Kübler

‘Capital as such is not evil; it is its wrong use that is evil. Capital in some form or other will always be needed.’

Mahatma Gandhi

Introduction

The debate on the suitability of legal capital rules as a mechanism of creditor protection has been active for the past four decades, since their implementation in 1977 by the Second Directive on Company Law, the so-called 'Capital Directive' [1]. There is unanimity among scholars and practitioners that legal capital rules can be only justified as an instrument for the protection of creditors.[2] EU legal capital rules revolve around two concepts. On the one hand, a minimum capital requirement for public companies, established in €25,000. On the other hand, a series of rules were dedicated to the maintenance of the abovementioned amount of minimum capital. The approach taken by the EU legislator has been severely criticised, to the extent that it has been questioned whether it is worth keeping these rules in place, as it will be explained in detail in the next chapters. Even though many attempts of reform have followed, the legal capital rules regime remains largely intact since its first enactment in 1977.

Since the chosen vehicle for the implementation of such regime was a Directive, member states have had some margin of discretion in implementation. This thesis explores the approaches taken by two very divergent legal systems within the EU, the UK and Spain, to undertake a comparative analysis which studies the approaches, differences, effects, and implications of the transposition of that EU mandate into their national legal systems. These legal systems have been chosen since they represent historically divergent Company Law systems prior to the adoption of the Capital Directive. Whilst Spain belongs to the group of EU countries which a minimum capital was obligatory,

[1] Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty [currently Article 54 of the Consolidated Version Of The Treaty On The Functioning Of The European Union (OJ C 326, 26.10.2012)], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L 26/1.

[2] Peter O. Mülbert and Max Birke, 'Legal Capital- Is there a Case Against the European Legal Capital Rules?' (2002) 3 (4) EBOR 695.

the UK represents of the Anglo-Saxon approach, where no minimum capital was prescribed.[3]

The principal purpose of the rules governing legal capital is to regulate the existing conflict between creditors and shareholders concerning the rights over company's assets, which becomes evident in an insolvency scenario when the company does not have sufficient funds as to stand up to its financial obligations.[4] In order to deal with this problem, the principal means utilised by the EU has been the imposition of rules placing a burden on the shareholders regarding their investment in the company's capital, pursuing the aim of protecting creditors.[5] Specifically, the Capital Directive[6] established, among others, specific rules related to public companies' obligations on minimum capital subscription, capital maintenance and creditors' protection in the event of alteration of the company's share capital. Nevertheless, the efficacy and desirability of these rules has been questioned by academics and professionals, since they impose a rigid and costly capital regime[7].

The aim of this research is to examine whether the EU legal framework requiring minimum capital maintenance addresses the issues raised by law and economics literature; and, in particular, to what extent it guarantees the protection of creditor rights. There is unanimity among scholars and practitioners that legal capital rules can be only justified as an instrument for the protection of creditors[8] but it has been largely questioned to what extent the capital maintenance rules respond effectively to that aim.[9] The most severe criticism[10] was given by professors Enriques and Macey who examined

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[3] Adriaan Dorresteijn, Tiago Monteiro, Christoph Teichmann and Erik Werlauff, *European Corporate Law* (2nd edn., European Company Law Series, Volume 5, Kluwer Law International, 2009) 54
[4] Jennifer Payne, 'Legal Capital in the UK following the Companies Act 2006' in John Armour and Jennifer Payne (eds) *Rationality in Company Law: Essays in Honour of DD Prentice* (Hart Publishing, 2009), 123.
[5] Ibid.
[6] Second Council Directive (n 1).
[7] Adriaan Dorresteijn et al (n 3).
[8] Mülbert and Birke (n 2).
[9] Payne (n 4); Mülbert and Birke (n 2).
[10] Mülbert and Birke (n 2).

the issue from a law and economics perspective.[11] They stated that the burdens imposed by the legal capital rules are unjustifiable since not only they do not substantially benefit creditors but also they harm them in specific occasions. Further criticisms have pointed out that the current legal capital regime does not give an effective response to creditors' protection and questioned the balance between benefits and costs of the legal capital regime.[12] This debate namely emerged as a result of the regime implemented in the US, where both the minimum legal capital requirements and the regulation of profits and assets distributions have been to a large extent eliminated.[13] Instead, the US system implemented a regime for creditor protection based solely on contractual agreements.[14]

Although the interests of the company's creditors are namely that the company holds sufficient funds as to meet its debts, the range of conflicts between shareholders and creditors is very diverse. In addition to the plain situation of insolvency, conflicts in which creditors' may need special protection may arise from opportunistic shareholder behaviour. For instance, conflicts may emerge from dishonest distributions, choice of overly risky projects, additional leverage or underinvestment.[15] Despite the fact that the legal capital rules may serve as a 'seriousness test' according to which these rules may have a deterrent effect on corporations without serious business purpose and that it provides an 'equity cushion' for repaying debts, it has been repeatedly argued that they do not protect creditors in the vast majority of the cases.[16]

As a result, alternative means to protect creditor's interests have been suggested. For example, mechanisms such as piercing the corporate veil[17], individual protection through debt covenants, extension of the shareholder's and director's liability beyond

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[11] Luca Enriques and Jonathan R. Macey, 'Creditors Versus Capital Formation: The Case Against the European Capital Rules' (2001) 86 Cornell Law Review, 1165.
[12] Mülbert and Birke (n 2).
[13] Ibid.
[14] Payne (n 4).
[15] Mülbert and Birke (n 2).
[16] Ibid.
[17] John Armour 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law' (2000) 63 (3) MLR, 355.

capital, directors' disqualifications and equitable subordination of shareholder loans have been recognised as a complementary means to protect creditor's rights.[18] Nevertheless, none of the cited mechanisms has been acknowledged as to guarantee creditor protection and, as far as this author is aware, there are no studies which both considered the practical implications of these mechanisms and suggested a more effective means to achieve the acknowledged desirable creditor protection under EU law.

Thus, taking into account the wide scope of criticisms that the system of capital maintenance has received, the present normative analysis on the suitability of EU capital maintenance rules for the purposes of creditor protection through a comparative, functional and multidisciplinary perspective will constitute a valuable contribution to the existent literature and serves as a means to test the efficiency of the system and to demonstrate the functionality of legal capital rules within the context of the two jurisdictions studied.

Methodology

This thesis is built upon an interdisciplinary methodology which contains a number of elements, which could be described as a 'functional comparative economic analysis of law'. The use of this methodology has been inspired by the seminal work *The Anatomy of Corporate Law. A Comparative and Functional Approach*[19], given that here is no doubt that since the first edition of this work was published a decade and a half ago it has been a reference for the study of modern company law. As it will be discussed below in detail, this methodology is based in three interlinked elements, each complementing each other. The main elements are two case studies, which serve as a basis for the functional comparative analysis, which in turn is informed by descriptive quantitative

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[18] Francisco Soares Machado 'Mandatory Minimum Capital Rules or Ex Post Mechanisms?' (2009) Available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568731 Accessed on 20 October 2013.

[19] Kraakman et al. (eds.) The Anatomy of Corporate Law. A Comparative and Functional Approach (3rd edn, OUP 2017).

data that acts as a supporting element with an instrumental value, merely informing the otherwise doctrinal analysis of the law[20]. Once case studies are undertaken and functional equivalences are drawn and analysed, the results are interpreted and studied through the lenses of law and economics theories.

Functional comparative analysis

Functional comparative analysis is a very extensively used method within comparative analysis, although to date there are still very few seminal works addressing it as such. The theoretical base of this method, although popular, is rather scarce. Although there have been efforts to narrow down the scope of this method,[21] there is still no definition of the concept. It has its supporters and opponents, perhaps due to its vague -and sometimes overreaching- while tremendously complex application,[22] which has been even been accused of being used so frequently and generally that "it has become a truism to refer to it as a truism".[23] Criticisms are rather unsurprising, given that the origins of functionalism as a method are to be found in social sciences, where the needs of functionalism are opposed – or at least divergent in most cases- from the needs of comparative law.

There are numerous types of functionalism, and comparative law cannot be encapsulated in either of them. In fact, functional comparative law is a compound of all functional methods, being ultimately interested in explaining the effects of legal institutions as well as the needs and responses to realities as functions.[24] From all the possible approaches

[20] Doctrinal research is not conflicting with interdisciplinary research, but rather informing it. For further insights, see Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in a Dawn Watkins and Mandy Burton (eds) *Research Methods in Law* (2nd edn, Routledge 2018).
[21]Namely, Konrad Zweigert and ein Kotz 'An Introduction to Comparative Law' (translated by Tony Weir, 3rd edn, 1998) 32 – 47; or Konrad Zweigert, 'Methodological Problems in Comparative Law' (1972) 7 Israel Law Review 465 and Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) The Oxford Handbook of Comparative Law (OUP 2006) 339.
[22] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) The Oxford Handbook of Comparative Law (OUP 2006) 339.
[23] Laura Kalman, *Legal Realism at Yale, 1927-1960* (1st edn 1986, reprinted 2011, University of North Carolina Press) 229.
[24]Michaels (n 21).

that a functional analysis can take, in this thesis the chosen one is equivalence functionalism. This approach has been considered to be particularly well suited for the present research given both the nature of the inquiry and its transnational dimension. Using function as *tertium comparationis* in a comparative analysis of creditor protection is highly valuable, particularly between civil law and common law systems. Between such different legal origins, a factual analysis would most likely disregard or misinterpret the comparability of the objects of the inquiries because it lacks tools to identify that responses given to common problems which might appear different (because they appear in a different context of group of laws, for example) are in fact functionally equivalent and, therefore, comparable. Equivalence functionalism, in contrast, provides the tools to undertake such comparison in a meaningful manner, taking into account common problems and functional needs, by understanding that different institutions can serve to fulfil similar functions.[25]

More aptly put, functional equivalence means that "similar problems may lead to different solutions; the solutions are similar only in their relation to the specific function under which they are regarded"[26]. In the context of the suitability of legal capital rules as a mechanism for creditor protection, functional equivalence would be concerned by the common problem –creditor protection- the solutions given to it –legal capital rules and others such as directors' liability, or insolvency measures- and how these solutions, even though they appear different from a strictly national perspective, are similar in their relation to the specific function they are regarded. For example, how wrongful trading and tortious insolvency are functionally equivalent since they give response to a common problem, which is the negligence or fault or company's directors and managers who continue trading when the situation of insolvency is already known to them.

[25]Morten Knudsen, 'Surprised by Method—Functional Method and Systems Theory' (2010) 11(3) Forum: Qualitative Social Research. 12, http://nbn-resolving.de/urn:nbn:de:0114-fqs1003122.
[26]Michaels (n 21).

This methodology becomes particularly relevant in Chapter 5, where the functional comparative analysis is undertaken alongside a law and economics assessment of the given results.

Case Studies and descriptive quantitative data

One of the main elements of this research is undertaken through two case studies[27], contained in Chapters 3 and 4 respectively. The aim of the case studies is to obtain a real picture of the impact of the positive law in practice. The rationale of this activity is to observe the use of creditor protection rules in the context of litigation, in order to ultimately assess the weight that legal capital rules hold in such context and the role they play in national legislation as to provide the intended purposes. The instruments used are addressed in a three-stage fashion. First, a doctrinal study reveals the particularities of legal capital rules in each of the studied legal systems. Second, a descriptive quantitative study aims to unravel the importance of such rules in creditor claims, i.e. when their interests are at stake. Last, but not least, a second doctrinal analysis of each of the creditor protection mechanisms identified by the data obtained from the quantitative data in order to analyse their relationship with creditor protection and legal capital rules in particular, as well as their relevance within the creditor protection context from the creditors' perspective.

The inclusion of enforcement strategies in the analysis enriches the picture of how company law effectively deals with creditor- shareholder-manager agency problems at the core of the business corporation as a nexus of contracts.[28] In particular, such task is tackled by analysing a representative sample of cases in the context of creditor's rights claims, aiming to unravel the role of minimum capital and capital maintenance rules and to explore issues related to its transposition by both legal systems. One possible option to undertake this task was using quantitative methods, but it was rejected. There is no

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[27] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research', in Peter Cane and Herbert M. Kritzer (eds.) *The Oxford Handbook of Empirical Legal Research* (OUP, 2010), 938.
[28] Stefano Lombardo, 'The Comparative, Law and Economics Analysis of Company Law. Reflections on the Second edition of The Anatomy of Corporate Law. A Comparative and Functional Approach' (2011) 8 (1) ECFR 47.

extensive literature analysing the application of this method in legal research; some use it, and some others either cite it or ignore it.[29] The principal criticisms to this model are this methodology ignores the complexity, dynamic nature and heterogeneity of legal systems and as a result it remains on the surface.[30] Besides, it has been argued that this method disregards the fact that in the era of globalisation and increasing internationalisation of legal relationships one cannot examine national legal systems independently, as existing side by side.[31]

Therefore, in this study the use of descriptive quantitative data has been considered more suitable given that their main purpose is to merely seek to determine or recognise "what is"[32]. The function of this data collection is merely instrumental; used to identify which is the reality concerning creditors' preferences in litigation when seeking the court protection of their infringed rights. As it is a general characteristic of this method, it is used because of its capability to shed new light on current affairs by data collection which provides the necessary tools to describe a situation more thoroughly and completely than it would be if this method wasn't employed.[33]

More specifically, this research takes into account cases dealt in a period of ten years (2004 -2014), from the implementation of the *Juzgados de lo Mercantil* (commercial courts) as a specialized court to deal with corporate and commercial law issues in Spain.[34] As it is considered that it would be preferable for the purpose of this study that the judgements analysed constitute legal precedent, the chosen courts in the United Kingdom are among the superior courts the High Court Chancery Division, the Court of

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[29] Mathias M. Siems, 'Numerical Comparative Law: Do we Need Statistical Evidence in Law in order to Reduce Complexity?' (2005) 13 Cardozo J. of Int'l & Comp. Law 521.
[30] J. B. Ruhl, 'Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State' (1996) 45 (5) Duke L.J. 849.
[31] Mathias Reimann, ' Beyond National Systems: A Comparative Law for the International Age' (2001)
[32] D.E. Ethridge, *Research Methodology in Applied Economics* (John Wiley & Sons, 2004) 24.
[33]W Fox and MS Bayat, *A Guide to Managing Research* (Juta Publications, 2007) 45.
[34] Ley Orgánica 8/2003, de 9 de julio, para la Reforma Concursal, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (hereinafter referred as LORC). The second final provision of LORC establishes that *Juzgados de lo Mercantil* will be operational from 1st September 2004. The original text in Spanish states that '*Disposición Final Segunda. Los juzgados de lo mercantil entrarán en funcionamiento a partir del día 1 de septiembre de 2004*'.

Appeal and occasionally the Supreme Court. In Spain, the selected courts are the *Audiencias Provinciales* (which deal with cases in appeal from first instance tribunals) and the *Tribunal Supremo* (the Spanish Equivalent to the Supreme Court)[35]. A range of 450-500 cases dealt in these courts in each country has been explored, both those strictly covering capital protection and other neighbouring areas which could serve as a means to identify problems derived from the main issue or related with possible alternatives, such as insolvency or directors' liability, amongst others.

Last, but not least, the nature of this study makes it unlikely to be comprehensive, since the top down search approach is bound not to include an exhaustive list of interests due to limitations of the technology used and their systems of keywords. Since a database which includes judgements from both Spain and the UK does not exist, it was necessary to use two different databases, Westlaw UK and Westlaw Aranzadi Spain. Nevertheless, both databases are Westlaw and -even though they are country specific- they operate in very similar ways. The intrinsic limitation is the law *per se;* the searches in these two databases are bound to be distinct, given that keywords, legal concepts and approaches to law in these two legal systems are notoriously different.

Each case study has its particularities which will be addressed in detail within the relevant chapters (Chapter 3 for Spain and Chapter 4 for the UK). However, they have a common design, aimed to respond to the research questions whilst ensuring comparability between both legal systems. A first screening for data was done through the use of the generic words 'creditor protection' in each database for each countries. The aim of this initial screening was to identify a big picture of all mechanisms that are utilised in court in the context of creditor protection. The results obtained from such initial screening were very diverse including all (or most, as this is one of the limitations of this search as stated above) of such mechanisms. They were used as a means to identify the most important mechanisms for protection of creditors' rights. Such assessment, however, was not made purely on numerical grounds. A screening of the

[35] Artículo 26, Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (LOPJ).

content of each of the cases was made in order to include one case to only one category. This was a subjective assessment, since most cases were addressing more than one issue. Consistency is ensured throughout by applying the same criteria to the categorisation of each cases: the issue to which the main claim revolved around. Even though there could be a number of ancillary issues, these ones are not represented given that the main issue determines to which category that specific case is placed. Once all cases were screened, they were placed into categories and grouped into five bigger categories to facilitate a functional comparative analysis: civil matters, banks, insolvency, company law and others. Given the above recognised limitations of that first screening, a second screening followed, focusing in an individual manner in each of the representative methods of creditor protection. It was limited to the most representative ones given that an exhaustive screening of all mechanisms was considered not viable due to the time and length constraints of this thesis, and it is believed that such activity would not have added significant value to the present research. This *ad hoc* search identified in a more reliable manner the quantitative weight of each of those mechanisms in each legal system. [36] The final case study results reflect a combination of results of both screenings.

Law and Economics[37]

Law and economics is the main methodological tool used in this thesis. This approach analyses the law through the lens of economic theory and, as one of the founding fathers of the discipline stated, 'as a result of that examination confirms, casts doubt upon, and often seeks reform of legal reality'.[38] It comes in two varieties: positive and normative analysis. Whilst positive analysis is based on the prediction of individuals behaviour to

[36] For details on the contents and results of both screenings, see sections 3.3 and 4.3 of this Thesis.
[37] Also referred in this thesis interchangeably as 'economic analysis of law' or 'economically informed analysis of law'. There are some studies which pursue to stablish differences between these concepts, but these differences are very technical and not relevant for the present study, which is based on common grounds of all economic analysis of law, namely efficiency and cost benefit analysis. See, for example, Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollenction* (Yale University Press 2017).
[38] Ibid.

a specific rule based on the perception that gains will exceed the cost[39]- usually by means of game theory and neoclassical price theory-[40], normative analysis is based in the premise that efficiency is a social goal that must be pursued[41]and it is interested in how the law can be improved in order to achieve that goal. The analysis in this thesis is based on the latter aspect, and it informs not only the doctrinal analysis conducted in Chapters 1 and 2 where all the theoretical background is addressed, but also inspires the interpretation of the case studies as well as the comparison and discussion of implications of such results in Chapter 5.

Is the use of this discipline justifiable?

Law an economics is a methodological discipline that, although dominant in US, is still not predominantly established in EU and UK scholarship.[42] Although this methodology has grown in the recent years,[43] particularly in company law, it is still far from the impact that is having on US based research. There is an on-going debate on whether EU scholars should follow the path of their American counterparts, which namely argue that EU and UK is still very rooted in providing a purely doctrinal approach, often oriented to find solutions for a 'better law' and doing research for policy purposes, being therefore more preoccupied about the societal relevance of their inputs than in theoretical relevance, and that approach should be abandoned.[44] This debate extended to the particular discipline of company law. This could seem as a rather surprising fact, given that the application of this methodology appears to be less questionable given the economic nature of company law. Main criticisms revolve around the justification of the

[39] Thomas J Miceli, *The Economic Approach to Law* (2nd edn, Stanford University Press 2009) 2.
[40] Alan Devlin, Fundamental Principles of Law and Economics (Routledge 2015) 2.
[41] Richard Posner, *Economic Analysis of Law* (6th edn, Aspen Law & Business 2003).
[42] Nuno Garoupa and Thomas S Ulen, 'The Market for Legal Innovation: Law and Economics in Europe and the United States' (2007-2008) 59 Alabama Law Review 1555.
[43] There are a few examples of edited books compiling law and economics papers in different disciplines. See, for example, Klaus Mathis (ed) *Law and Economics in Europe. Foundations and Applications* (Springer, 2014).
[44] Rob van Gestel and Hans-W. Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20(3) European Law Journal 292, 300.

preferment of efficiency or welfare over justice or fairness[45] or particular aspects such as agency theory and its focus on shareholder primacy.[46]

Nevertheless, such criticisms are not necessarily relevant at all times. Efficiency and welfare do not necessarily exclude justice or fairness. The economics discipline is based in two major policy values: efficiency and distribution.[47] Although the former is clearly the dominant normative concept, distribution cannot be easily disregarded, particularly when addressing issues of public policy, such as taxation or cost-benefit analysis. What is more, it has been argued that the concepts of justice used in economics bear great semblance to efficiency. This occurs as a result of the economic concepts of utilitarianism, which alongside social welfare respond to distributive justice. Not to enter at this point in too much detail,[48] these theories advocate for fairness on the distribution of wealth across different levels of society, using different economic methods and assumptions to estimate the best–after all, the most efficient- course of action in relation to a particular issue. According to utilitarian theory, a utility maximising consumer would regard the price of the goods as the same as its marginal utility[49] and the standard assumption is that the marginal utility of income decreases as a person's wealth increases.[50] This evolved to the idea of need of redistribution of wealth and, as economists see it, such idea is not incompatible with efficiency. In fact, efficient redistribution of wealth would encompass the social welfare function.

When extrapolating these concepts to company law and, in particular, to creditor protection one could argue that law an economics is a valuable tool to assess the issue. Creditor protection is a field of law that requires both economic and financial efficiency and social welfare. Efficiency is a good method to evaluate issues revolving around

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[45] Mathis (n 43).
[46] Jukka Mähönen, 'Law and Economics in European Company Law' (2009) Working Paper Annual Legal Research Network Conference 2009, 1.
[47] Robert D. Cooter, ' The Confluence of Justice and Efficiency in the Economic Analysis of Law' in Francesco Parisi and Charles K. Rowley (eds) *The Origins of Law and Economics; Essays by the Founding Fathers* (Edward Elgar 2005) 222, 224.
[48] Ibid.
[49] J.H. Burns, 'Happiness and Utility: Jeremy Bentham's Equation' (2005) 17 Utilitas 46.
[50] This line of thought responds to a tradition that materialised in the work of Pigou. See A.C. Pigou, *The Economics of Welfare* (Macmillan 1932).

creditor protection, given that undoubtedly the adequate means to provide such protection are providing suitable means to promote the solvency of debtor companies – along sufficient means for their enforcement- so they can satisfy the creditors' claims in due course without causing harm to any of the involved parties. There are two main concepts of efficiency, which both respond very well to the improvement of creditor protection: Pareto efficiency and Coarse's cost-benefit efficiency. These will be studied in more detail below, setting the concepts in context with the present research.

Furthermore, it has been argued that law and economics is a very well suited mechanism to address comparative law research.[51] Comparative law an economics might be a methodological school itself, but it is not developed sufficiently as to be able to ascertain whether it is ready to stand alone. Nevertheless, it contains –as expected- elements of both comparative law and law and economics methodologies. The core benchmark of comparative law and economics is the notion that there is a competitive market for the supply of law (and assumes that legal actors will choose the most efficient option) and it aims to explain the convergence of legal systems as an effort to achieve efficiency.[52] Such a perspective also inspires the research undertaken in this thesis, by informing the rationale under the present 'functional comparative economic analysis of law'.

Approaches to efficiency

Pareto Efficiency

The concept of efficient creditor protection is not only difficult to narrow, at best, but also very challenging to frame. Economists use a wide range of concepts to explain efficiency.[53] Perhaps one of the most widely used is the concept of Pareto efficiency – also known as Pareto optimality- which establishes that a specific allocation of resources

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[51] Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' (1994) 14 International Review of Law and Economics 3.
[52] Raffaele Caterina, 'Comparative Law and Economics' in Jan M. Smits (ed.), Elgar Encyclopedia of Comparative Law (Elgar 2006) 161.
[53] For comments on the meaning of the term efficiency, see for example Simon Deakin and Alan Huges, 'Economic Efficiency and the Proceduralisation of Company Law' (1999) 3 The Company, Financial and Insolvency Law Review, 169.

is efficient or optimal when there is no alternative allocation of resources which would make one party better off without making at least another one worse off.[54] This concept can be extrapolated to a legal and regulatory context, such as creditor protection. Applying this economic concept of Pareto efficiency to creditor protection, it could be concluded that efficient creditor protection would be achieved if the best interests of creditors were protected without prejudice of any other stakeholders including, naturally, shareholders. It has been suggested that Pareto efficiency occurs when no other alternative which all parties involved would prefer actually exists.[55] This is however a utopian scenario; the reality is far away from such ideal context. Pareto efficiency is highly dependant on feasibility, given that the achievement of a Pareto optimal situation depends on the means available and it is necessarily variable throughout time.[56] Given the complexity of the issue, there are –to date- no mechanisms that can ensure such optimality.

One of the most significant limitations of this concept of efficiency is that it disregards issues of social welfare. Such approach is solely based on the idea that a superior system would find the perfect balance between all parties' interests, completely disregarding notions of fairness and the existence of superior rights which need to be ultimately protected (even at expense of other stakeholders' interests). A number of –namely US based- scholars have made a case on why legal analysis should only revolve around notions of welfare and disregard notions of fairness.[57] There are situations where this restrictive approach would act severely in detriment of interests of involuntary creditors, such as third parties that acquire credits against the corporate entity either by law (tax agencies) or tort (victims of corporate negligence or wilful misconduct). Arguably, these

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[54] See, for example, Hal R. Varian *Intermediate Microeconomics : a Modern Approach* (8th edn, W. W. Norton & Company 2010) 14; or Louis Kaplow and Steven Shavell, 'Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice' (2003) 32 J. Legal Stud. 331.
[55] In the context of the US company charters, see Marco Becht, Patrick Bolton and Ailsa Röell, 'Corporate Law and Governance' in A. Mitchell Polinsky and Steven Shavell (eds) *Handbook of Law and Economics* (Vol. 2, Handbooks of Economics 27, North Holland 2007) 829, 842.
[56] Christopher P. Taggart, 'Fairness versus Welfare: The Limits of Kaplow and Shavell's Pareto Argument' (2016) 99 Marq. L. Rev. 661, 704.
[57] Discussion on this issue is very vast and it cannot be addressed in further detail in this thesis.

creditors require a superior level of protection than voluntary creditors and in some instances that might require that other stakeholders (namely shareholders) are worse off. [58]

It is therefore important to balance the concept of fairness with efficiency, since giving priority to fairness over efficiency would also entail perverse effects. For example, a system providing very strong protection to non-adjusting creditors (which would necessarily be *ex post* within insolvency) would discourage adjusting creditors with monitoring skills to call upon prompt insolvency because that would decrease their chances to be –at least to some extent -repaid.[59] Such behaviour would act in detriment of all creditors given that it would jeopardise the company's ability to regain solvency –at best- or, if they are successful, detract funds from the pool that would have been made available to all creditors in insolvency. This issue has been observed and it is usually addressed by legal systems. For example, transaction avoidance provisions;[60] the law of preferential transfers in the US, which aims to provide a deterrence effect on such behaviour by punishing creditors repaid before insolvency in detriment of other creditors;[61] paulian actions or clawback actions within the 'pre-insolvency' laws in Spain, rendering ineffective payments or other acts of extinguishing obligations made

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[58] See, for example, David W. Leebron, 'Limited Liability, Tort Victims and Creditors' (1991) 91 (7) Columbia Law Review, 1565. For further analysis on tort claims and corporate liability, see for example Should Shareholders Be Personally Liable for the Torts of Their Corporations? (1967) 76 (6) Yale L.J. 1190. Available at: http://digitalcommons.law.yale.edu/ylj/vol76/iss6/4 Last accessed 15 March 2017.

[59] Francesco Denozza, 'Different Policies for Corporate Creditor Protection' in Horst Eidenmüller and Wolfgang Schön (eds) *The Law and Economics of Creditor Protection. A Transatlantic Perspective* (TMC Asser Press 2008) 413, 416.

[60] This is a very wide concept that cannot be explored here for focus reasons. For an overview on the concept and its implications see John Armour, 'Transactions at an Undervalue' in John Armour and Howard Bennet (eds.), *Vulnerable Transactions In Corporate Insolvency* (Hart 2003) 47; Roy Goode, 'The Avoidance of Transactions in Insolvency Proceedings and Restitutionary Defences' in Andrew Burrows and Alan Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 299; Irit Mevorach, 'Transaction Avoidance in Bankruptcy of Corporate Groups' (2011) 8 (2) ECFR 235; or Aurelio Gurrea Martínez 'The Avoidance of Pre-Bankruptcy Transactions: An Economic and Comparative Approach' (2017) Instituto Iberoamericano de Derecho y Finanzas (IIDF), Working Paper Series 10/2016. Available online at SSRN: https://ssrn.com/abstract=2845101 or http://dx.doi.org/10.2139/ssrn.2845101.

[61] Brook Gotberg, 'Optimal Deterrence and the Preference Gap' (2018) Legal Studies Research Paper Series Research Paper No. 2018-16. Working paper available at SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119695&download=yes. Permission for citation and reproduction granted by the author on 13 March 2018.

in advance when their due date was after the judicial declaration of insolvency[62] or rules on restitution for unjust enrichment in the UK, providing claims to both creditors and liquidators to recover the value of assets transferred to particular creditors.[63] Such mechanisms minimise the perverse effects of creditor overprotection, but still disregard issues of social welfare, fairness and heterogeneity of the pool of creditors.

An additional issue derived from the heterogeneity of creditors is the situation of financial lenders. In most cases, such lenders would be in a situation where their business is providing finance and therefore they undertake such activity in order to earn a recurrent profit. Such contractual agreement to periodic payments (which could entail either interest, returning of capital or both) could be arguably conceptually comparable to the rights of shareholders to a dividend.[64]

Therefore, the concept of Pareto-efficiency, although *prima facie* very attractive -since it would imply that some parties are better off without any others being worse off- appears to be very difficult to reconcile with the different needs derived from the heterogeneity of the pool of creditors and their radically different positions and rights, and particularly to those especially disadvantaged non adjusting creditors, when fairness and social welfare concepts should be predominant to preserve their rights.

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[62] Pre-insolvency laws is a doctrinal construction of certain measures adopted in the Spanish legal system providing instruments to manage insolvency beforehand and aimed at avoiding the deterioration of financial difficulties of the debtor company since they are detected until they are a formal cause of insolvency. There is a vast body of literature addressing this issue, but for an illustrative framework see Manuel Olivencia Ruiz, 'Concurso y Preconcurso' (2015) 22 Revista de Derecho Concursal y Paraconcursal, 11; or Ana Belén Campuzano and María Luisa Sánchez Paredes *Prevención y Gestión de la Insolvencia* (UOC 2016). This issue will be further addressed in Chapter 3.

[63] UK Insolvency Act, sections 238, 239 and 423. For further inputs on the issue, see Simone Degeling 'Restitution for Vulnerable Transactions' in John Armour and Howard Bennett (eds) *Vulnerable Transactions in Corporate Insolvency* (Hart Publishsing 2013) 385; or Roy Goode *Principles of Corporate Insolvency Law* (4th edn, Sweet & Maxwell 2011) 519. This issue will be further explored in Chapter 4.

[64] Louise Gullifer and Jennifer Payne *Corporate Finance Law, Principles and Policy* (2nd edn, Hart Publishing 2015) 79.

Cost-benefit efficiency

There are other variations of the concept of efficiency which give a more manageable – and more realistic- response to the issue.[65] In particular, law and economics scholarship is more interested in a wider concept of efficiency from an economic cost-benefit perspective.[66] This approach provides simultaneously more flexibility and some answers to some of the challenges of an efficient system of creditor protection, by offering a way to make issues like creditor protection more 'tractable'.[67] This mode of reasoning namely revolves around concepts of maximisation of fairness, wealth and welfare;[68] the facilitation of transactions (i.e. the support and enhancement of market-led contractual solutions) [69] ; and the minimisation of agency costs, [70] transaction costs and externalities.[71] A system which could find a perfect balance between these elements of regulating creditor protection and implementing such rules, would be more efficient than a system that either fails to do so or does it to a lower extent. A cost-benefit approach to law and economics is, therefore, is concerned about a concept of maximisation of efficiency in a more tractable way, instead of strict economic efficiency as the concept of Pareto-efficiency would suggest. Applying economic theory to law and regulation – although very useful and informative- requires a certain level of flexibility, which justifies the approach not as law or economics as independent disciplines but a combined one, which is the economically inspired analysis of law.[72] Law and economics scholars are interested in a holistic and systemic analysis of creditor protection,[73] focusing

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[65] This discussion is very broad and it falls out of the scope of this thesis. For different approaches on law and economics, see for example

[66] Armour (n 17), or John Armour, Gerard Hertig and Hideki Kanda, 'Transactions with Creditors' in Kraakman et al. (eds.) *The Anatomy of Corporate Law. A Comparative and Functional Approach* (3rd edn, OUP 2017) 109.

[67] John Armour (n 17) 356.

[68] Kaplow and Shavell (n 64) 389.

[69] Jonathan Rickford (ed) 'Report of the Interdisciplinary Group on Capital Maintenance, Reforming Capital' (2004) 15 EBLR 919.

[70] Peter O. Mülbert, 'A Synthetic View of Different Concepts of Creditor Protection, or: a High Level Framework for Corporate Creditor Protection' (2006) 7 EBOR 357; Armour, Hertig and Kanda (n 66).

[71] Ronald H. Coase, 'The Relevance of Transaction Costs in the Economic Analysis of Law' in Francesco Parisi and Charles K. Rowley (eds.) *The Origins of Law and Economics. Essays by the Founding Fathers* (The Locke Institute, Edward Elgar 2005) 199.

[72] Brian R. Cheffins, *Company Law: Theory, Structure and Operation* (Oxford, OUP 1997) 528.

[73] Rickford (n 69).

particularly on whether the institution of limited liability responds to cost-benefit efficiency.[74] This is also the concept of efficiency used throughout this thesis, being of particular importance in Chapter 2.4, when the cost-benefit law and economics analysis of creditor protection is addressed.

Research questions and thesis outline

The aim of this thesis is to give response to a main research question: Is the current EU system of legal capital rules fit for purpose in providing creditor protection? If it is not, and provided that creditor protection is considered desirable, would it be advisable to reform the system by introducing alternative or complementary means of creditor protection? In order to provide an answer to the main research question, this thesis this thesis aims to give response to a number of research sub-questions, coinciding with each of the main chapters.

Chapter 1 aims to unravel whether it is desirable that company law provides mechanisms for creditor protection or not and, if it is, whether the system adopted by the EU responds to this need. To that end, it covers a normative analysis of the law and economics literature on creditor protection by means of legal capital rules. The model adopted by the EU is based on rules which establish a minimum quantitative threshold in capital maintenance, as well as rigid rules to amend or reduce capital, procedures to distribute dividends, etc. From a law and economics perspective, EU legal capital rules appear to be insufficient for the purpose of providing efficient creditor protection. Namely, the criticisms revolve around the lack of revision of the fixed minimum capitalisation required for public companies, the fact that the scope is limited to those public companies and that the absence of a requirement of proportional minimum capitalisation undermines its purpose to protect creditors to such a large extent it lost its raison d'être.

Chapter 2 seeks to examine if, on the basis of law and economics theory, there are

[74] Armour, Hertig and Kanda (n 66).

alternative means to the EU system which could be better suited to provide creditor protection. Hence, it explores the need of efficient creditor protection, the nature of both *ex ante* and *ex post* mechanisms, the virtues of efficient creditor protection form a cost benefit approach, to identify the justifications for the desirability of the imposition of regulatory – and often mandatory- creditor protection mechanisms. Once these assessments are made, Chapter 2 explores different methods of creditor protection, both *ex ante* and *ex post*, regulatory and voluntary; and finalising by assessing their efficiency and practicability as either complementary or alternative means to legal capital rules.

Chapter 3 contains the first case study based on Spain, and it aims to decipher to what extent Spanish company law safeguards creditors' rights in practice and whether the Spanish legal system provides such protection solely relying on the implementation of the EU legal capital rules or additional mechanisms also apply. Likewise, Chapter 4 contains the second case study based on the UK and, consistently with Chapter 3, it aims to unravel to what extent UK company law safeguards creditors' rights in practice and whether the UK legal system provides such protection solely relying on the implementation of the EU legal capital rules or additional mechanisms also apply.

These two chapters address the issue of creditor protection from a functional perspective. Particularly, this task was undertaken through conducting a case study of two different legal systems within the EU: the United Kingdom and Spain. This research examined a representative sample of cases where the courts dealt with this issue, in order to assess the enforcement and implementation in practice of these rules from a multi-disciplinary law and economics perspective. The current legal approach to capital rules has received severe criticisms[75], and these case studies are able to show that the criticisms to the current model remain. The aim of these chapters was to unravel the effectiveness of the mechanisms provided by national laws for creditor protection, both analysing the law in force and through a comprehensive study of creditors' rights' related litigation in the period 2004-2014. In particular, those case studies address the law on minimum capital

[75] For more details, see Chapter 1.

requirements, the law on capital maintenance, and other mechanisms of creditor protection.

Finally, based on the aforementioned normative (Chapters 1 and 2) and functional (Chapters 3 and 4) studies, Chapter 5 aims to undertake a critical assessment of the alternative means of creditor protection proposed by the literature, exploring different alternatives to this model and discussing to what extent these alternatives could act as a more effective means to protect creditor rights. Furthermore, it suggests either new or complementary means of achieving a satisfactory creditor protection from the law and economics perspective, such as material capitalisation, the utilisation of solvency indicators or a debt insurance regime.[76] Thus, the ultimate objective of this research is to suggest recommendations from a normative point of view in order to enhance the current system, especially regarding creditor protection.

[76]See, for example, Cheffins (n 72) and Judith Freedman 'Limited liability: Large Company Theory and Small Firms'(2000) 63 (3) MLR 317.

Chapter 1 Legal capital rules and creditor protection.

1.1 Introduction

There is no controversy on the fact that the principal aim of the EU legal capital regime is to provide creditor protection.[1] Nevertheless, many questions revolve around this approach. First and foremost, the extent to which this aim has been achieved is questionable. Likewise, the suitability of the means utilised to pursue that aim are also under debate. What is more, it is even questionable whether such legal protection is desirable or not. The aim of this chapter is to examine the views suggested by the literature on these issues in an attempt to provide a grounded answer to these questions. The rationale behind this enquiry is, coherently with the rest of the thesis, to obtain literature support as a means of analysing the general suitability of the legal capital system in order to provide creditor protection. By taking into account the most representative and relevant arguments provided by the existing legal and financial literature, it is intended to present a grounded suggestion that EU legal capital rules are not fit for purpose, so that alternative or complementary mechanisms should be considered. Chapter 2 will examine a number of alternative systems to the current model that have been suggested and will analyse their potential benefits as a substitute model

[1] As it is stated in the Explanatory Memorandum of the Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty [currently Article 54 of the Consolidated Version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012)], in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC) OJ L 26, 31.1.1977, p. 1. (hereinafter, the 'Capital Directive'). For scholar support, see for example John Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law' (2000) 63 (3) MLR 355; and Jennifer Payne, 'Legal Capital in the UK following the Companies Act 2006' in John Armour and Jennifer Payne (eds) *Rationality in Company Law: Essays in Honour of DD Prentice* (Hart Publishing, 2009) 123.

to the current legal capital rules.

First in this chapter, the question whether creditors should be protected or not will be addressed. Prior to the examination of the protection that legal capital rules provide, it is essential to analyse the importance of such protection. It will be argued that such protection is not only desirable but also necessary, since there are creditors who do not have access to mechanisms of self-protection. Moreover, a lack of protection would not only harm creditors but also have undesirable effects for the general economy.

Secondly, after justifying that creditor protection should be guaranteed, the two main mechanisms of creditor protection will be analysed: the US system based on private contractual protection, the EU system relying on legal capital rules and other complementary mechanisms that are implemented within the systems in order to facilitate their application. The main features of these two systems will be contrasted, and the differences within them will be explored. Furthermore, the feasibility and potential outcome of the combination of these systems either between them or with other alternative means will be also addressed.

Thirdly, an in-depth analysis of the system chosen by the EU will be undertaken, starting from the scope of the Capital Directive, through the nature of the Directive as a legal instrument and the challenges that the freedom of establishment entails. In addition, this section will assess separately two regulatory subcategories within the legal capital doctrine: the minimum legal capital requirement and the capital maintenance regime. As far as creditor protection is concerned, the minimum capital requirement appears not to have any ground to be maintained as a mandatory rule since not only there is no evidence that it protects creditors but also it constitutes a significant burden for shareholders and general business. However, this paper will also attempt to demonstrate that, even assuming that the implementation of a minimum capital threshold could serve as a means for creditor protection, the amount established in the Capital Directive lost its purpose since it remained unaltered for the last four decades. Fourthly, this chapter will analyse the most representative criticisms that the literature has suggested, by taking into consideration to the issues exposed in the previous sections, i.e. the diversity of creditors,

the different situations when special protection must be provided and the solutions given by other legal systems. Thereby, it will attempt analyse to what extent the EU legal capital regime gives response to its aim of protecting creditors. Finally, this chapter will criticise the passivity that the EU has demonstrated against this issue since, notwithstanding the fierce criticisms and the consistent requests of reform, has remained intact in the last four decades.

1.2 The importance of protecting creditors.

1.2.1 Should creditors be legally protected?

In an ideal scenario where capital markets are perfect and contracting is costless, this question would not even emerge[3]. The root of this idea in law and economics comes from the Coase Theorem, which already in 1960 proposed that in an economy where transactions do not carry any cost there would not be limitations to exchange as the mere negotiation between parties would always relocate the rights at stake at the most efficient use and destination. Therefore, the role played by the law would be marginal since it would not provide any surplus in terms of economic efficiency.[4]

Even though an economy with perfect capital markets does not indeed exist, this ideal scenario serves as a theoretical framework in order to identify the market weaknesses. As to company law in general and creditor protection in particular is concerned, such weaknesses might lead to unfair transfers of wealth from creditors to shareholders which in turn would justify the creation of legal rules to protect them. The weaknesses of the imperfect capital markets are very diverse. Following Coase's reasoning, the imperfect

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[3] See, for example, Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law,* (1991, Harvard University Press), 46; Simon Deakin and Alan Huges, 'Economic Efficiency and the Proceduralisation of Company Law' (1999) 3 The Company, Financial and Insolvency Law Review, 169; John Armour, n (1).

[4] Ronald Harry Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics, 1.

capital markets inherently carry contracting costs, which entail unfair wealth distributions within stockholders. Indeed, creditors and shareholders are not an exception. Therefore, in contrast with the ideal scenario proposed by Coase, capital markets *per se* are allocatively inefficient[5] and this fact justifies the requirement of a certain set of rules (either mandatory or procedural[6]) to ensure minimum levels of fairness[7], efficiency and competitiveness in business contracting. This has been deliberately proposed as one of the foundations of modern company law in many legal systems, such as the EU in general and the UK in particular.[8]

In addition to Coase's argument, there are other factors that play an important role in order to evaluate the need for creditor protection. Although creditor protection can be misunderstood merely as banks and bondholders protection, one should bear in mind that the concept of creditors includes not only any third party contracting with the company by exchanging goods or services for money[9] (i.e. those who voluntarily engaged in a contract with the company, also referred to as adjusting creditors by the

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[5] The concept of efficiency is very vague and can have numerous meanings depending on the context in which it is analysed. A deep analysis of the concept falls out of the scope of this research, although the issue is addressed more thoroughly in the methodology section of the introductory chapter, such task is only undertaken to enlighten the reader for the purposes of this study only. Nevertheless, when applied it is to be understood as referring to allocation of resources to their most value.

[6] For an analysis on whether the application of mandatory or procedural rules regarding legal capital makes any real difference in practice, see Deakin and Huges (n 3).

[7] The term fairness is highly ambiguous and it has different facets, such as welfare, equality, rights or justice. Since there are many factors that can affect fairness, thus it is highly difficult to provide a single definition which could assemble all those factors. Although an in-depth analysis of the different facets and concepts that fairness implies is out of the scope of this paper, the term has been used in its broadest sense, including not only its welfare economics facet but also its legal implications such as equality or corrective justice. For further discussion on the concept of fairness and its elements, see for example Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press, 2002) and Daniel M. Hausman and Michael S. McPherson, *Economic Analysis, Moral Philosophy and Public Policy* (CUP, 2nd edn, 2006).

[8] As regards to the UK, see Department of Trade and Industry, 'Modern Company Law for a Competitive Economy. The Strategic Framework' (1999) A Consultation Document from the Company Law Review Steering Group, 8. Available online at: http://webarchive.nationalarchives.gov.uk/20121029131934/http://www.bis.gov.uk/files/file23279.pdf For the EU, see the Commission document COM (2003) final, Report on a Modern Regulatory Framework for Company Law in Europe, 2002.

[9] John Armour, Gerard Hertig and Hideki Kanda, 'Transactions with Creditors', in Renier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansman, Gerard Hertig, Klaus Hopt, Hideki Kanda and Edward Rock, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (OUP, 2009, 2nd edn), 115.

law and economics literature) but also includes involuntary creditors (or non-adjusting creditors) such as tort victims and state public agencies.[10] The nature of the relationship between the latter and the company is not contractual, therefore they do not decide neither whether to engage or not in a business with a specific company nor under which terms and conditions.

Tort claimants', in particular, are in most cases more vulnerable than contractual creditors' for several reasons. First and foremost, as it has been already mentioned, they do not voluntarily engage in contract with the company. Thus, as they are deprived of any possibility of either negotiating, approving or disproving the terms of their relationship, they cannot introduce mechanisms of self-protection. Secondly and closely related to the previous argument, they are in a worse position than contractual creditors since they do not have the privilege of preserving assets or adjusting their behaviour in cases of financial distress. On the contrary, it is for instance common practice among financial lenders to introduce in their agreements covenants which provide to some extent protection against potential averse outcomes derived from limited liability. Third, tort victims are also in a worse position than contractual and more specifically debt creditors since their exposure is not limited.[11] Whilst contractual creditors' potential loss will never exceed the risk of their contracts[12], tort victims may well see their loss surpass the rights initially at stake since, in addition to their existing and potential wealth, they might have also suffer the loss of health or even life.[13]

It can be argued, therefore, that tort claimants should have a superior level of protection than voluntary contractual creditors. What is more, it has been suggested that the law should provide 'super-priority' status to tort victims, although not necessarily by means

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[10] Jenniffer Payne and Louise Gullifer, *Corporate Finance Law, Principles and Policy* (2nd edn, Hart Publishing 2015).
[11] David W. Leebron, 'Limited Liability, Tort Victims and Creditors' (1991) 91 (7) Columbia Law Review, 1565. For further analysis on tort claims and corporate liability, see for example 'Should Shareholders be Liable for the Torts of their Corporations? (1967) 76 (6) The Yale L.J., 1190.
[12] Considering contract risk in its largest extent, including clauses which may have effect *ex post facto*, such as liquidated damages and indemnity clauses.
[13] Leebron (n 11) and 'Should Shareholders be Liable for the Torts of their Corporations? (1967) 76 (6) The Yale L.J., 1190.

of company law. This extra protection could (or should) be provided either through mechanisms which facilitate this priority in insolvency, through establishing a mandatory liability insurance, corporate criminal liability [14] or even unlimited shareholder liability to cover tort claims against the company. [15] All the above-mentioned, however, only applies in the absence of insurance policies which would indeed assume to some extent shareholder's risks against tort. [16]

Therefore, as the concept of creditors encapsulates a highly heterogeneous group and there are not only right's violations at stake but also undesirable effects for the general economy, the range of interests to protect is also very vast. The common feature among both voluntary and involuntary corporate creditors is that they need protection from the potential abuse of limited liability. The main difference between them, however, is that the former have more mechanisms in order to (self) protect their rights. In addition to the means provided by company law such as capital maintenance rules, rules in raising capital and bankruptcy laws, contractual creditors have a significant set of resources which can serve as self-protection mechanisms.[17] For example, trade creditors can retain ownership of goods until delivery; financial creditors have the option to secure their credits against company's assets, make a floating charge or subrogate the risk to a third party; and in transactions with small and medium companies, creditors might ask for personal guarantees either to directors or shareholders. Additionally, countless sources of information which can protect contractual creditors *ex ante* are available. For instance, and in addition to the accounting information provided by the financial accounting legal requirements, creditors can also have access to credit rating agencies rankings and reports, or even rely on their previous experience contracting with a certain company.[18]

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[14] Reinier Kraakman, 'Concluding Remarks on Creditor Protection' (2006) 7 (1) E.B.O.R, 465.
[15] Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale L.J. , 1879.
[16] Leebron (n 11) and 'Should Shareholders be Liable for the Torts of their Corporations? (1967) 76 (6) The Yale L.J., 1190.
[17] Kraakman (n 14).
[18] Christopher J. Cowton, 'Putting Creditors in their Rightful Place: Corporate Governance and Business Ethics in the Light of Limited Liability' (2011) 102 Journal of Business Ethics, 21.

However, it is worth noting that the pool of voluntary creditors is also heterogeneous, and not all of them hold the same level of –if any- bargaining power.[19] Similarly to what Coase suggested and as it will be discussed below in detail, the US approach to creditor protection defends that mandatory rules must be kept to a minimum given that the market will allocate the resources in the best effective way, and this can be materialised by contracting between the parties. They justify this approach for the purposes of protection of all creditors arguing that weaker ones with more limited or none bargaining power can free ride on the rights acquired by the stronger ones with bargaining power. This is not always the case (for example when strong creditors such as financial institutions hold security interests) and not only for involuntary creditors, but also for weak voluntary ones.

Even though the main and common interest of the company's creditors is that the company holds sufficient funds as to meet its debts, the legal justification based on the balance of recovery rights between company's stakeholders is not the only justification behind the existence of rules protecting creditors. From a financial economics point of view, it has been proven that the level of protection of creditor's rights plays a significant role in economic terms. For example, a global study which compared 49 different legal systems from the most relevant legal traditions (essentially common law and civil law based) found that the level of creditor protection provided by national laws is directly proportional with the existence of strong capital markets.[20] Although this study has been largely criticised by other scholars,[21] it is considered now relevant as an example as it

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[19] In depth discussion of this issue falls out of the scope of this thesis, but for a very enlightening assessment of the issue and the importance of mandatory rules over freedom of contracting see Michael Galanis, 'Vicious Spirals in Corporate Governance: Mandatory Rules for Systemic (Re)Balancing?' (2011) 31 (2) Oxford Journal of Legal Studies 327.

[20] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Vishny, 'Law and Finance' (1998) 106 (6) Journal of Political Economy, 1113.

[21] In broad terms, this study has been criticised for not considering a sufficiently representative sample in order to conduct the empirical research as well as for using US-based biased criteria. As a result of these practices, the results of the study have been considered to be unrealistic and prominently conducting an exercise of rating legal systems in relation to US standards. For detailed criticisms and proposed alternatives, see for example John Armour, Simon Deakin, Priya Lele and Mathias Siems, 'How Do Legal Rules Evolve? Evidence from a Cross- Country Comparison of Shareholder, Creditor and Worker Protection' (2009) 57 (3) The American Journal of Comparative Law 579. For further criticisms, see for example Mathias Siems and Simon Deakin, 'Comparative Law and Finance: Past, Present and Future

developed an indicator known as Creditor Protection Index which has served to ulterior economic analysis to predicate how creditor's rights regulations influence different aspects of the economy and the financial markets.[22] For instance, recent studies have posited that the extent of protection of creditor's rights can also influence dividend policies at a global level by reducing the agency costs of debt.[23] They demonstrate through a functional analysis that in legal systems where creditor's rights are inadequately legally protected (either in terms of material regulation or enforcement[24]), creditors can influence the company's corporate decisions. The underlying reason is that they are less confident of recovering their debts, especially under insolvency or nearing insolvency circumstances. As a result, they demand higher control rights to those controlling the company and both parties are more likely to agree dividend restrictions in order to compensate the weak legal creditor rights[25].

Therefore, there is a wide range of reasons which justify a legal protection of creditor's rights. All the aforementioned indicates that inadequate creditor protection leads to undesirable consequences both in terms of legal rights protection and more generally for the economy. However, the measurement of the extent to which those rights should be protected and which situations deserve especial regulatory emphasis is a more difficult to address issue. Since there are different sorts of creditors with different interests and numerous effects from both law and economics perspectives, it seems justified that a law and economics approach would be the most appropriate in order to deal with that issue.[26]

Research' (2010) 166 Journal of Institutional and Theoretical Economics 120; or Ruth V. Aguilera and Cynthia A. Williams, 'Law and Finance: Inaccurate, Incomplete, and Important' University of Illinois Law & Economics Research Paper No. LE10-002, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523895 Last accessed on 29 September 2014.

[22] See, for example, Greg Nini, David C.Smith and Amir Sufi, 'Creditor Control Rights and Firm Investment Policy' (2009) 92 (3) Journal of Financial Economics, 400.

[23] Paul Brockman and Emre Unlu, 'Dividend Policy, Creditor Rights and the Agency Costs of Debt' (2009) 92 Journal of Financial Economics, 276.

[24] For further insights on the effects that regulatory protection and its enforcement in financial economics, see Narjess Boubakri and Hatem Ghouma, 'Control/Ownership Structure, Creditor Protection and the Cost of Debt Financing: International Evidence' (2010) 34 Journal of Banking and Finance, 2481.

[25] Brockman and Unlu (n 23).

[26] John Armour (n 1).

The facilitation of certain mechanisms of creditor protection indeed appears to be justified. Although creditors' rights must be protected in the general course of the company's business, there are specific circumstances where creditors are in need of special protection. Creditors are especially vulnerable in situations where the debtor company is encountering financial difficulties because it is in those situations when there is a higher risk that the credits cannot be repaid. Next subsection will explore in detail those situations where creditors deserve special protection.

1.2.2 Situations where creditors need to be especially protected

We have seen that there are numerous reasons which justify creditors' rights protection. However, there are specific situations where their need to be protected deserves special attention. The most significant situations where creditors need special protection occur when the company is immersed in financial difficulties, such as non-foreseeable ex post unilateral changes (shareholder opportunistic behaviour),[29] dishonest distributions, under or overinvestment, risk shifting in asset investments and additional leverage. However, the outcome of such situations might not only be financial difficulties but also can lead to the company's insolvency.

1.2.2.1 Insolvency

In a situation of insolvency, creditors may need special protection since their main interest of recovering their credits is at stake. By definition, in a situation of insolvency a company cannot repay in an ordinary way its outstanding liabilities.[33] Insolvency is a very general term which can entail numerous situations. There are essentially two types

[29] Peter O. Mülbert and Max Birke, 'Legal Capital – Is There a Case against the European Legal Capital Rules?' (2002) 3 (4) E.B.O.R, 695.
[33] John Armour, 'The Law and Economics of Corporate Insolvency: A Review' (2001) ESRC Centre for Business Research, University of Cambridge, Working Paper 197. Available at <http://www.cbr.cam.ac.uk/pdf/WP197.pdf> Last accessed on 14 July 2014.

of insolvency. On the one hand, balance sheet insolvency occurs when the company's assets value is inferior to its liabilities. On the other hand, cash flow insolvency (or financial distress according to the financial literature[34]) takes place when a company does not have enough liquidity as to deal with its debts in due course. Although both situations entail financial difficulties for the company, they imply different risks for the company's creditors. Whilst in cash-flow insolvency the company will encounter difficulties to repay debts in the short term due to the imminent lack of liquidity, in a situation of balance sheet insolvency the outcome and the capacity of debt repayment will remain uncertain. Balance sheet insolvency demonstrates business failure because the realisation of the assets would not cover the liabilities. Nevertheless, it does not necessarily mean that the company does not hold sufficient liquidity as to repay debts in short term in due course. However, it is very difficult to address these issues since the legal approach to insolvency varies largely among different legal systems.[35] There are studies which suggest that despite the fact that there is a clear difference of approach between legal systems, it seems that the recent law reforms are moving towards a harmonised model.[36]

It is especially important not to confuse insolvency with insolvency proceedings.[37] Although insolvency if permanent will lead to insolvency proceedings, it can occur that a company is insolvent during a certain period but insolvency proceedings have not been initiated yet. For the purposes of analysing creditor's rights protection it is especially

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[34] See, for example, Karen Hooper Wruck, 'Financial Distress, Reorganisation and Organisational Efficiency' (1990) 27 (2) Journal of Financial Economics, 419 ; or Stuart C. Gilson, John Kose and Larry H.P. Lang, ' Troubled Debt Restructurings: An Empirical Study of Private Reorganisation of Firms in Default' (1990) 27 (2) Journal of Financial Economics, 315.

[35] For an overview on US law, see for example Frank Easterbrook 'Is Corporate Bankruptcy Efficient?' (1990) 27 Journal of Financial Economics, 411; Robert C. Clark, 'The Duties of the Corporate Debtor to Its Creditors' (1977) 90 Harvard Law Review, 505. For the UK regulation of insolvency law, see for example Brian C Cheffins, *Company law : theory, structure, and operation* (1997, OUP). For an insightful comparative analysis between both systems, see for example Armour (n 33). For an EU overview, see Maria Brouwer, 'Reorganization in US and European Bankruptcy law' (2006) 22 (1) European Journal of Law and Economics, 6.

[36] Brouwer (n 35).

[37] This issue is explored in further detail in Chapter 5, given its importance for functional comparability between Spain and UK's legal systems. See, for example, Horst Eidenmueller 'What Is an Insolvency Proceeding?' Law Working Paper N° 335/2016, ECGI 2017. Available online at https://ecgi.global/working-paper/what-insolvency-proceeding Last accessed 12 August 2018.

important to differentiate the major two legal insolvency proceedings: reorganisation and liquidation. The principal difference between these two proceedings is the expected outcome. Reorganisation is a procedure normally started by the debtor company in situations where they have difficulties to repay debts in due course but this situation is considered to be repairable. Therefore, the debtor claims that the company has economic viability. The financially distressed company's business continues operating with the aim of recovering the financial health in a certain period of time, usually alongside compromises from creditors of reductions of their credits.[38] This insolvency proceeding consists of a financial restructuring, by means of renegotiation of credits with the creditors or, in case that the negotiation fails, an imposed reduction by the courts. Therefore, creditors will be almost necessarily deprived of part of the value of their original claim. Liquidation proceedings, however, constitute a completely different situation. Liquidation can be invoked when the insolvency situation is so severe that it is not considered that the company can have economic viability, and essentially involves the cessation of the company's business activities and the alienation of company's assets. The cash obtained by such alienation will be distributed among the company's creditors, who expectedly (although not necessarily since it depends on the market value of the company's assets) will see their credits substantially decreased. Therefore, as a result of an insolvency procedure, creditors' claims will be necessarily affected although the extent of the loss incurred will be subject to the success of the insolvency proceeding.[39]

Insolvency laws are primarily intended to minimise creditor's losses.[40] Although it has been largely discussed whether this aim was accomplished or not,[41] it is true that many mechanisms have been provided for this purpose. As a general rule, supremacy is given

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[38] This is the case, for example, of *Concurso fortuito* (fortuitous insolvency) in Spain, explained in detail in Chapter 3.
[39] John Armour, *Vulnerable Transactions in Corporate Insolvency* (Hart publishing, 2003) Chapters 2 and 3.
[40] Luca Enriques and Jonathan R. Macey, 'Creditors versus Capital Formation: The case against the European Legal Capital Rules' (2001) 86 (6) Cornell Law Review, 1186.
[41] Ibid.

to creditor's interests over the interest of other stakeholders, including shareholders.[42] For example, under UK law, director's duties shift to preserve creditors' interests and they can also be liable for wrongful trading if they act disregarding creditor's best interests.[43] Additionally, under UK laws the decision whether an insolvency proceeding should be started or not is taken taking into account creditor's best interests.[44]

What is more, most insolvency laws provide companies' creditors with a dual role in the company. Although in a scenario where the company is financially healthy creditors are mere contractual counterparties, in a situation of insolvency they are able to take possession of the assets and undertake any required measures to recover their debt. In such situation, alienation becomes the last resort.[45] It has been argued that this privilege constitutes the most powerful of creditor's mechanisms of self-protection because if the company does not comply with the obligation of repaying its debts, creditors take control of the company.[46]

However, insolvency laws do not provide the same level of protection in every legal system. The abovementioned study conducted in 1998 explored the prevalence of some specific creditor's rights in a comparative basis. Specifically, the study evaluated whether different national systems provided creditors with the right of gain possession over the assets after the initiation of a restructuring procedure, in particular: whether secured creditors were given primacy in asset distribution, whether creditors have the power to decide on which insolvency procedure is more appropriate or whether managers are allowed to continue executing their functions within reorganisation. The study found that common law jurisdictions provided double creditor protection than French-based civil law jurisdictions, whereas German-based civil law jurisdictions were in the middle. Secured creditors are more protected in German-based civil law countries

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[42] This fact is an expression of Jackson's common pool theory which reflects collective creditor action in debt collection in insolvency procedures. For further insights related to this theory see Thomas H. Jackson, *Logic and Limits of Bankruptcy Law* (HUP, 1986) or Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (CUP, 2nd edn, 2009).
[43] Enriques and Macey (n 40).
[44] Ibid.
[45] Armour et al (n 9).
[46] Easterbrook and Fischel (n 3).

and common law countries than in French law origin countries.[47] Thus, although national laws are substantially divergent, it can be argued that national legislators have already acknowledged creditor protection in insolvency and insolvency laws largely provide it.

1.2.2.2 Prior to insolvency

Notwithstanding the above, one must bear in mind that insolvency is not the only scenario where creditors may need special protection. Creditors might also be in need of protection before the debtor falls into a situation of insolvency. They can be victims of poor business results derived from unsuccessful management, deficient business conditions or even exogenous shocks.[49] These circumstances are outside the scope of any legal regulations, therefore there is very little to do in order to protect creditors from them. Nevertheless, creditors can also be victims of other circumstances which can be mitigated, such as opportunistic shareholder behaviour.

Due to the privilege that limited liability provides to shareholders,[50] they can act in an opportunistic manner which may harm creditors if this action does not have a positive outcome. Shareholders are those who hold the control of the company's business and operations, either directly by means of the general meeting or indirectly through directors and ultimately through managers.[51] They hold a privilege that leaves open the opportunity to act in their own interest, and therefore in detriment of creditors' interests.[52] Conflicts of interest between those who own and control the company and creditors arise as a result of the peculiarities derived from the status of a company as a

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[47] La Porta et al (n 20).
[49] Paolo Santella and Riccardo Turrini, 'Capital Maintenance in the EU: Is the Second Company Law Directive Really that Restrictive?' (2008) 9 E.B.O.R, 427.
[50] See, for example, Easterbrook and Fischeln (3) and Christopher J. Cowton, 'Putting Creditors in their Rightful Place' (2011) 102 Journal of Business Ethics, 21.
[51] Gullifer and Payne (n 10).
[52] Ibid.

debtor[53], such as the abovementioned shareholders privileges, their capability to manipulate limited liability, opportunistic shareholder behaviour in detriment of creditors, underinvestment, etc. Even though general contract law will apply to regulate those relationships, it is essential to provide additional mechanisms in order to protect companies' creditors from conflicts that arise when the company is still solvent. Thus, this section will focus on the conflicts in which creditors' may need special protection, fundamentally arisen from opportunistic shareholder or managerial behaviour.[54]

Conflicts of interest between shareholders and creditors have been named by the law and economics literature as 'shareholder-creditor agency problems'. Agency problems is a terminology more commonly used to refer to conflicts arisen between those who hold the control of the company (essentially board of directors and managers) and those who own the company (i.e. shareholders)[55]. However, this terminology evidences the fact that agency problems might also arise between both controllers and owners and creditors.

As noted above, creditors should be provided with special protection in view of the possibility of opportunistic shareholder behaviour. It may occur in numerous ways, the most remarkable ones being dishonest distributions, choice of overly risky projects, additional leverage, underinvestment[56] or asset dilution[57]. This fact is an immediate result of the nature of limited liability, as it places shareholders in a position less vulnerable to take risks over assets than creditors. In order to prevent opportunistic behaviour, it is necessary to provide mechanisms to balance limited liability and creditor protection.[58]

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[53] Armour et al (n 9).
[54] Mülbert and Birke (n 29).
[55] This concept was introduced in 1932 Berle and Means and it has been the foundation of modern corporate governance. See Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (Macmillan, 1932).
[56] Mülbert and Birke (n 29).
[57] Armour et al (n 9) 116.
[58] Massimo Miola, 'Legal Capital in Limited Liability Companies: the European Perspective' (2005) 2 (4) ECFR, 413.

An example of opportunistic behaviour is the dishonest distribution of dividends. Dishonest dividend distributions occur when shareholders accelerate the return of residual net assets, either directly or indirectly, prejudicing therefore the company's creditors. The most common means to perform these activities are either muddling shareholder's assets with company's assets or engaging in highly risky operations with an uncertain outcome.[59] Thus, creditor's rights might also be at stake by an elevation of the company's investment risk, especially when this procedure takes place through asset substitution[60]. In contrast with the rest of the addressed situations, this dishonest conduct has been regulated and subject to liability in a number of jurisdictions, including the UK.[61]

Although the empirical relevance of risk-shifting has been largely criticised by the financial literature[62], it is noteworthy that an increase of risk derived from selling current assets and reinvesting the earnings in riskier ones will prejudice creditors while it can benefit shareholders.[63] If the choice of the substitution of current assets for others with higher risk succeeds, shareholders will increase their profits whereas creditors will not benefit from that. This occurs because the new asset will provide more cash flow and, therefore, more returns. In case that the asset substitution does not have the expected outcome, shareholders are not damaged because they do not lose more than they already had at risk. However, it will cause harm to creditors because the value of the new assets being inferior, they guarantee the repayment of their credits to a lesser extent than the original assets did.[64]

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[59] Ibid.
[60] Michael J. Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 (4) Journal of Financial Economics, 305.
[61] Paul Davies and Sarah Worthington, Gower Principles of Modern Company Law (10th Edn, Sweet and Maxwell 2016).
[62] See, for example, Milton Harris and Arthur Raviv, 'The Theory of Capital Structure' (1991) 46 (1) The Journal of Finance, 297; and Valentin Dimitrov, 'Capital Structure and Firm Risk' in H. Kent Baker and Gerald S. Martin (eds.) *Capital Structure and Corporate Financing Decisions: Theory, evidence, and Practice (John Wiley & Sons, 2001),* 59.
[63] Armour et al (n 9) 117.
[64] Ibid.

Additionally, shareholders can also benefit themselves at creditors' expense by engaging in additional leverage. By means of this strategy, shareholders obtain the benefit of being financed by the original creditors who, in contrast with the new borrowers, provide very favourable borrowing conditions. Nevertheless, those original creditors are prejudiced in the sense that the assets which guaranteed the repayment of their debts become proportionally smaller since they are shared with a larger amount of creditors[65].

Therefore, the issue arisen from all the abovementioned conflicts is that, if they occur, the company's assets can be of a significantly lower value. Creditors will be prejudiced by that since it undermines the guarantee that the assets provide for credit repayment and it increases the risk of balance sheet insolvency. It is of special importance to provide mechanisms in order to reduce to a large extent such conflicts, as for example by restricting the possibility to divert or substitute assets[66]. In fact, it is very common business practice that shareholders and creditors foresee these conflicts and they engage in contract in order to regulate bilaterally the defence of their respective interests[67]. Nevertheless, this practice disregards the involuntary creditors who will still be prejudiced in a similar extent than the contractual creditors but do not have any contractual means available to protect their rights. As a result, the approach most commonly adopted to prevent these behaviours has merely been the imposition of directors' liabilities for wrongful trading, specifically for continuing with the company's activity under circumstances where liquidation or insolvency should be declared[68].

1.3 Mechanisms to protect creditors

Most modern legal systems regulate these conflicts, by establishing on the one hand provisions which aim to guarantee to shareholders their interests derived from limited

[65] Ibid.
[66] Ibid.
[67] William W. Bratton, 'Bond Covenants and Creditor Protection: Economics and Law, Theory and Practice, Substance and Process' (2006) 0 (1) European Business Organization Law Review, 39.
[68] Miola (n 58).

liability and on the other hand rules aiming to protect creditors' rights.[69] The existence of these conflicts cannot be disregarded, since they can potentially undermine the value of the companies' assets. As a result, a certain level of regulation (not only aiming to financially protect the company of the potential negative outcomes which can derive from such conflicts but also aiming creditor protection) can benefit both creditors and shareholders[70] as it ultimately protects the company's financial health. Nevertheless, not every legal system has adopted a similar regulatory approach to provide mechanisms for creditor protection. Whilst the EU opted for the imposition of mandatory legal capital rules, the US adopted a different approach based on contractual agreements. The former provides a regulatory system based on legal rules, whereas the latter leaves the protection to the parties' free will. In addition, as it will be further explored in the following chapters of this thesis, EU member states have adopted a third approach at a national level, namely revolving around directors' liability (in some cases like Spain, such liability is in some instances linked to the compliance with legal capital rules). Next subsections will examine the main characteristics, advantages and disadvantages of both EU and US systems, as well as complementary mechanisms to facilitate creditor protection.

1.3.1 The EU approach

The EU opted to introduce a system of creditor protection based on legal capital rules. The principal means utilised by the EU has been the imposition of rules restricting corporate activity through a burden on the shareholders regarding their investment in the company's capital, pursuing the aim of protecting creditors.[73] Specifically, through the

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[69] Eilis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (OUP, 2nd edn, 2014), 155.
[70] John Armour, Gerard Hertig and Hideki Kanda, 'Transactions with Creditors', in Renier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansman, Gerard Hertig, Klaus Hopt, Hideki Kanda and Edward Rock (eds.), *The Anatomy of Corporate Law. A Comparative and Functional Approach* (OUP, 2009, 2nd edn), 118.
[73] Jennifer Payne, 'Legal Capital in the UK following the Companies Act 2006' in John Armour and Jennifer Payne (eds) *Rationality in Company Law: Essays in Honour of DD Prentice* (Hart Publishing, 2009), 123.

enactment of the Capital Directive, which was the first attempt within the context of the European Union to harmonise the formation of public limited liability companies and the maintenance and alteration of their capital. The Capital Directive contains a set of rules governing legal capital with the aim of regulating the conflict between creditors and shareholders concerning the rights over company's assets.[74] Such conflicts, as exposed in section 1.2.3 earlier in this chapter, are more likely to occur when the company either suffers or anticipates financial difficulties. Thus, it has been argued that the ultimate purpose of legal capital rules is not only the protection of creditors prior to insolvency but also the prevention of insolvency *per se.*[75] However, there is no unanimity regarding this issue. A segment of the literature advocated certain scepticism to this fact by arguing that legal capital rules can only control the asset distribution, but it cannot protect creditors from their losses for business misfortune in general or managerial malpractice or shareholder opportunistic behaviour in particular. Thus, they argue that since those mechanisms cannot prevent these situations, it is very unlikely that it could prevent insolvency given that those are the major circumstances which can lead a company to insolvency.[76]

Although the main aim of those rules is to resolve this conflict by favouring creditors, this is not always the case in practice[77] as the Capital Directive seems to disregard this general aim through the imposition of certain rules. For example, it imposes rules regulating pre-emption rights more directed to protect shareholders and other rules aimed to protect market integrity[78] or raising of capital rules, which are neutral as regards to creditors.[79]

Predominantly, rules governing legal capital provided by the Capital Directive can be divided into two categories.[80] Firstly, those rules which govern capital raising and

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[74] Payne (n 1) 123.
[75] Paolo Santella and Riccardo Turrini, 'Capital Maintenance in the EU: Is the Second Company Law Directive Really that Restrictive?' (2008) 9 (3) E.B.O.R, 427.
[76] Mülbert and Birke (n 29).
[77] Gullifer and Payne (n 10) 116.
[78] Ibid.
[79] Ibid, 120.
[80] Ibid, 115.

subscription or, in other words, those which rule the investment that shareholders must make in the form of the company's capital.[81] Secondly, there is another set of rules which regulate the circumstances under which capital can be returned to shareholders, generally known as capital maintenance rules.[82]

It has been repeatedly argued that capital maintenance rules do not protect creditors in the vast majority of the cases.[83] The efficacy and desirability of these rules has been questioned by both academics and practitioners, since it imposes a superfluous[84], rigid and costly capital regime.[85] Nevertheless, even though these statements have been largely accepted by the literature, there are few defenders of the capital model who argued that the qualification of superfluous (although partially true) is 'trivial'. Trivial in a sense that, from their point of view, legal capital's aim has never been the prevention of insolvency. They argue that, originally, legal capital was created in order to protect minority shareholders by assuring a permanent par value of the shares, not only at the moment of their issue but also at later stages.[86]

All the abovementioned suggests that here are indeed numerous reasons which made the EU approach to legal capital and creditor protection questionable as regards the accomplishment of its core aims. Most of these criticisms are based on a comparative analysis between EU, US and alternative approaches. Therefore, and in order to provide sufficient grounds as to deeply analyse those criticisms, next sections will expose the most representative alternative regimes to legal capital.

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[81] Ibid, 115.
[82] Ibid, 115.
[83] Adriaan Dorresteijn, Tiago Monteiro, Christoph Teichmann and Erik Werlauff, *European Corporate Law* (2nd edn., European Company Law Series, Volume 5, Kluwer Law International, 2009) 54.
[84] Jonathan Rickford, 'Reforming Capital. Report of the Interdisciplinary Group on Capital Maintenance (2004) E.B.L.R, 919.
[85] Dorresteijn et al (n 83); Enriques and Macey (n 40) and Armour et al (n 9).
[86] Marcus Lutter, 'Legal Capital of Public Companies in Europe' in Markus Lutter (ed.) *Legal Capital in Europe* (De Gruyter, ECFR special volume, 2006), 2.

1.3.2 The US system

There are other mechanisms which, in addition to legal capital rules, can provide creditor protection. Indeed, not every legal system uses a set of legal capital rules as a means to achieve that purpose. For example, the US system is based on contract as a means for creditors to guarantee their rights. It provides a wide discretion to shareholders, and rules dedicated to creditor protection are rare.[87] For instance, the Model Business Corporation Act (which as a model act provides a framework for the states laws to develop the mandate in the most suitable way for the specific jurisdiction) does not make any reference to par value shares, capital accounts or rules regarding shares' payment mechanisms. Instead, it suggests the application of a balance sheet and solvency test.[88] This two-part test aims to ensure that the value of the assets must not be inferior to the value of the liabilities after profit distribution.[89]

Likewise, state corporation laws also provide very little protection to creditors. The rules regarding legal capital issues in the US vary among the states, but they can be grouped into three different models.[90] First, Delaware Laws are characterised for relying on a rather traditional legal capital system. Delaware corporate laws (and case law indeed) are very representative since approximately half of the US corporations are incorporated there.[91] Shares must be issued and reimbursed at par value and companies are allowed to distribute dividends as long as they do not exceed the surplus or the net profits of the preceding year.[92] However, these laws do not establish either any minimum capital requirement or capital maintenance rules, which are the foundations of the EU legal capital regime.

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[87] Gullifer and Payne (n 10) 117.
[88] Revised Model Business Corporation Act 1984 (Renamed as Model Business Corporation Act in 1988) Hereinafter, MBCA.
[89] MBCA 6.40.
[90] Richard A. Booth, 'Capital Requirements in United States Corporation Law' in Marcus Lutter (ed.) *Legal Capital in Europe* (De Gruyter, ECFR Special Volume, 2006), 627.
[91] Ibid.
[92] Delaware General Corporation Law (DGCL), 160, 170.

Secondly, New York laws also retain to some extent a system of legal capital rules. As Delaware laws do, it regulates share issuing at par value and allows dividends to be distributed to the extent of the existing surplus. Besides, New York laws establish a minimum capital requirement, which is the consideration received for the shares issued.[93] Nevertheless, this amount can be reduced (with the only limitation of leaving at least 'some' capital) if the board of directors considers it appropriate within 60 days.[94] Therefore, although New York laws apparently go a step further than Delaware Laws, the result is that they do not provide any legal capital mechanism for creditor protection either.

Finally, the last group of state laws follow California corporate laws. These laws do not provide any rules regarding par value share issuing and determine dividend distribution through a retaining earnings test and remaining assets test.[95] Hence, dividends can be distributed to the extent of either retained earnings or the excess of assets over liabilities after the dividend distribution. As a result, California laws adopted the most extreme approach of all, by having completely eliminated any legal capital rule from their legal system.

As all the above-mentioned indicates, state corporate laws do not provide any meaningful mechanism of creditor protection. In the US, the only means that creditors have in order to safeguard their own interests are contractual agreements, federal 'fraudulent conveyance laws' [96] , the doctrine of piercing the corporate veil and ultimately in bankruptcy laws.[97] Those supporting this system claim its superiority since it provides more flexibility and more choice, [98] whereas those supporting the EU legal capital system have largely criticised this system due to its incapability to protect creditors who are not able to negotiate an appropriate protection for their rights[99] and

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[93] New York Business Corporation Law (NYBCL), 506 (a).
[94] NYBCL 506 (b).
[95] California Corporations Code (CCC) 500, 501.
[96] Clark (n 35).
[97] Booth (n 90).
[98] Friedrich Kübler, 'A Comparative Approach to Capital Maintenance: Germany' (2004) 15 (5) E.B.L.R, 1031.
[99] Armour et al (n 9) 118.

additionally the engagement in covenants for every transaction implies significant transaction costs.

Those who support the system based on legal capital rules claim that the US system, essentially based on contract protection, cannot be acknowledged as creditor protective. The underlying reason to make such a claim is that as creditor protection is left to contract, this protection only covers contractual creditors who are in a position and have the power to negotiate with the debtor company and therefore have the real possibility of looking after their rights and interest.[100] Therefore, this regime disregards the protection of a large group of creditors, including those who are not in a position to negotiate their contracts with the company and the involuntary creditors, plus the rest of company's stakeholders.

A counter-argument to this would suggest that it is not necessary that company law provides such protection to these groups for two main reasons. First, it has been argued that even creditors who do not have the power to adjust their interests might benefit from contractual protection because they might 'free ride' on covenants negotiated by more powerful creditors.[101] However, there is no guarantee that this can effectively occur and additionally the creditors' interests (except debt repayment) might not be matching. For example, some restricting covenants might prejudice creditors who are in a position to take more risk.[102] Secondly, it has been suggested that if the company is solvent (in the sense that it is neither in a situation as cash-flow insolvency nor under any insolvency procedure) these creditors would not be in need of protection because their credits are repaid in due date. In contrast, if the company is insolvent, insolvency laws will provide the required protection.

However, this counter –argument disregards some facts that clearly undermine this regime, in a sense that it does not contemplate that there are different levels of risk of default. Specifically, it disregards the fact that the concept of insolvency is very vague,

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[100] Payne (n 1) 123.
[101] Enriques and Macey (n 40).
[102] Hanno Merkt, 'Creditor Protection through Mandatory Disclosure' (2006) 7 (1) European Business Organization Law Review, 95.

that there are different stages of insolvency, that the company can fail to repay its debts even in an objective situation of financial health and that both exogenous matters and opportunistic managerial and shareholder behaviour can diminish the company's value and therefore creditor's risk would rise.[103]

Those who criticise the US system also argue that it implies higher transaction costs than a system providing a legal capital regime.[104] However, this argument is undermined by the fact that it is based on the assumption that a legal capital regime and a contract-based regime are necessarily mutually exclusive, which is not the case indeed. Whereas in the US system there is no room for legal capital rules, the EU legal capital regime allows the coexistence of contractual agreements with the mandatory legal capital rules.

1.4 The Capital Directive

Prior to the enactment of the Capital Directive, in the context of what is today the European Union, issues regarding legal capital and other mechanisms related to creditor and shareholder protection were regulated at the domestic level. National legislators were concerned with providing an equitable system that could accommodate simultaneously protection to both shareholders and creditors and preventing the eventuality of any conflict arising between them. However, they had different approaches to this issue. The measures adopted by the national legal systems preceding the Capital Directive [134] presented noticeable divergences. Due to the limited shareholder's liability in both private and public companies, national legislators sought to prevent or correct abuses.[135] In broad terms, three different approaches could be

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[103] Payne (n 1) 123.
[104] F.G. Easterbrook and D. Fischel, 'Limited Liability and the Corporation' (1985) 52 (1) The University of Chicago Law Review, 89.
[134] Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (EEC) 77/91, OJ 1977 L 26/1.
[135] Dorresteijn et al (n 83) 54.

found. First, there were legal systems which opted for the requirement of a minimum capital. Within these countries, some examples are Spain, Germany and France. Secondly, there were legal systems such as Belgium or the Netherlands, where this requirement applied only at the moment of the incorporation. Finally, other systems such as the United Kingdom had no minimum capital requirements. However, this last group of countries provided protection by means of disclosure of information regarding the company's capital.[136]

In 1977, the European Council enacted the Capital Directive.[137] The wording of this Directive was largely inspired by the German theory of creditor and shareholder protection.[138] As regards the inclusion of mandatory legal capital rules, it was argued that the principal aim was to provide a legal framework to ensure creditor protection. An additional expression of the German influence is the adoption of a rules-based strategy, in contrast with the US standards strategy.[139] The means utilised by the Capital Directive in order to regulate legal capital are essentially based in two foundations. On the one hand, it establishes a minimum capital requirement of €25,000 and on the other hand, capital maintenance rules which limit the capacity of the companies to provide distributions to its shareholders or other investors, being profit distributions through dividends the most common mechanism.[140]

As a result of the severe criticisms, the European Commission initiated a procedure of modernisation of the Capital Directive, as it will be further analysed in subsection 1.6 below. All particular aspects of the Capital Directive relevant to creditor protection will be addressed below.

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[136] Ibid, 54.
[137] Second Council Directive (n 134).
[138] Fernando Dias Simões, 'Legal capital rules in Europe: is there still room for creditor protection?' (2013) 24 (4) International Company and Commercial Law Review, 166.
[139] Eilís Ferran, 'The Place for Creditor Protection on the Agenda for Modernisation of Company Law in the European Union' (2006) 3 (2) ECFR, 178.
[140] Rickford (n 84).

1.4.1 Scope: Public Companies

The Capital Directive applies exclusively to public companies.[141] Although it was suggested extending the Directive's application also to private companies, those attempts failed essentially due to the influence of the United Kingdom. The doctrine of legal capital imposed by the Directive constituted a rather radical deviation from the previous UK company law framework.[142] Therefore, the imposed modification was not warmly received and as a result the UK sought to limit its application as much as possible.[143]

An additional criticism to this choice is that company law harmonisation in the EU context was designed to apply only to public companies divided by shares, which were traditionally considered to hold the most important business. However, this statement does not apply to every legal system. Whilst in jurisdictions such as the UK and Germany business model is reserved for big businesses, in other south European systems as for example in Spain, the domestic equivalent (sociedad anonima, SA) can also be perfectly used by small entities. Nevertheless, although private limited companies are not under the scope of the Capital Directive, many national legislators such as Germany have also extended the rules provided therein to these entities. As a result, not only the intended harmonisation has not been accomplished but also a high degree of inconsistency can be observed.[144]

1.4.2 Harmonisation and freedom of establishment

The legal instrument chosen by the EU in order to regulate legal capital is a Directive. The main distinguishing feature between directives and regulations is that whilst

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[141] Directive 2012/30 14 of November of 2011, [2012] OJ L315, Art 15.
[142] Mülbert and Birke (n 29).
[143] Ibid.
[144] Eddy Wymeersch, 'Reforming the Second Company Law Directive' (2006) Working Paper Series, WP 2006-15, Financial Law Institute, Universiteit Gent. Available online at http://ssrn.com/abstract=957981 Last accessed on 11 March 2013.

regulations have direct application (i.e. direct enforceability and validity without any intervention of the national legislator), directives do not. The latter provide binding guidelines to the Member States in order to transpose specific aims and objectives into national laws.[145] Since this instrument provides national legislators with the freedom to decide which means are the most adequate to transpose the EU directives into their national laws, every legal system has transposed it into their national laws in a different manner and indeed it caused inconsistencies between member states.

It has been observed that the national legislators tend to be overcautious therefore the implementation becomes stricter than it was intended by the Directive. The underlying motive is that the national legislators intend to guarantee creditor protection, since it is the principal aim pursued by legal capital rules.[146]Indeed, this fact undermines the spirit of the legal capital doctrine. This fact generated an academic debate especially as a result of the Court of Justice of the European Union's (CJEU) doctrine of recognition of the so-called 'pseudo-foreign' companies. [147] Pseudo-foreign companies are those companies which have been incorporated in an EU jurisdiction different from the EU jurisdiction where the sit of administration is in fact placed. The CJEU (although in the context of private companies) has consistently followed the trend to advocate in favour of freedom of establishment by imposing the companies' recognition by the member state where the administration is set[148], by holding that the pseudo-foreign company cannot be submitted to the company laws of the country where the administration is set[149], and by restricting the capability of Member States to use creditor protection or

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[145] Nevertheless, one must bear in mind that the non-direct application of the directives is not absolutely certain. Extensive ECJ case law established a limitation through the doctrine of direct effects. As a result of this doctrine, directives became instruments that, under certain circumstances and provided that the specific provision has sufficient precision and clarity, can be invoked directly by individuals in court as a means to ensure a minimum level of protection to their rights. See, for example, Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337, Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723 and Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] ECR 292.

[146] Mülbert and Birke (n 29).

[147] Ferran and Chan Ho (n 69) 155.

[148] Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [2000] ECR I-09919.

[149] Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd [2003] ECR I-10155.

fraud as a means to limit the right of freedom of establishment.[150]

Therefore, in can be observed that the CJEU decisions influenced legal capital doctrine in practice. The Court held that initiatives based either on fraud or creditor protection cannot justify the application of national laws with detailed capital rules which disrupt the actions of Treaty freedoms[151] and questioned the advisory effect of the national rules on legal capital for creditor protection purposes.[152] As a result, in a situation where the country of incorporation of a company and the country where the administration is effectively held are different, one can foresee according to CJEU precedent that the applicable laws will be those of the country of incorporation even if they are more lax in terms of capital requirements than the laws of the country where the administration takes place. This fact can compromise the best interest of creditors in the country of administration since, although in their national laws the level of protection is superior, they will be only protected to the extent of the protection provided by the laws of the country of incorporation. In addition, apart from creating disequilibrium between Member States, it can be a reason for forum shopping.[153]

1.4.3 The minimum capital requirement

The European system of legal capital adopts as one of its foundations a minimum capital requirement.[154] Specifically, the Capital Directive in Article 2.1 establishes a minimum capital requirement for public companies of €25,000.[155] Since this amount constitutes a minimum threshold, different legal systems have transposed the Directive in different ways. However, most of the EU legal systems have gone further and are imposing significantly higher minimum thresholds.[156] For example, Germany imposes a minimum

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[150] Case C-212/97 Centros Ltd v Erhvervs – og Selskabsstyrelsen [1999] ECR I-1459.
[151] Centros (n 150); Überseering (n 148); Kamer (n 149).
[152] Kamer (n 149).
[153] Werner F. Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Uberseering, Inspire Art and beyond' (2004) 38 (3).
[154] Horst Eidenmüller, Barbara Grunewald and Ulrich Noack, 'Minimum Capital in the System of Legal Capital' in Marcus Lutter (ed.) *Legal Capital in Europe* (De Gruyter, ECFR Special Volume, 2006), 17.
[155] Capital Directive 2012 Recast. Article 6(1) of the Capital Directive 1977.
[156] Eidenmüller et al (n 154) 17.

capital of €50,000 for listed companies[157], the UK establishes a minimum capital of £50,000 for public companies[158] and Spain sets a minimum capital for the so-called *sociedades anónimas* of €60,000 [159].

This approach has been largely criticized, even by some of the fierce supporters of the legal capital system as a whole.[160] The main criticism arises from the inappropriateness to set a fixed amount as a minimum threshold. The aim of its existence is to prevent early insolvencies [161] and to provide an 'equity cushion' for repaying debts. [162] Nevertheless, it has been argued that the fact that it is a fixed amount undermines such purpose. In order to pursue those aims the minimum amount of capital required must be in accordance to the company's assets and liabilities, alongside with the potential risks.[163] Therefore, in many occasions, although a specific company is sufficiently capitalized according to legal capital rules, it can be simultaneously enormously undercapitalized as to serve the purposes preventing early insolvency and protecting creditors.

1.4.3.1 Material undercapitalisation

This issue, also known as material undercapitalization, has been in the centre of academic debate and concerns have been expressed.[164] The foundations of this theory lie on the limited liability theory and on its pendant, the legal capital theory. Limited

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[157] Section 7 German Marketable Share Company act (Aktiengesetz).
[158] Section 763 Companies Act 2006 (Section 118 Companies Act 1985).
[159] Art 4 Ley de Sociedades de Capital. Before September 2010, Art 4 Texto Refundido de la Ley de Sociedades Anónimas (in force until 1st September 2010): 10.000.000 Pesetas (60.101,21 €).
[160] See, for example, Wolfang Shön, 'The Future of Legal Capital' (2004) 5 E.B.L.R, 429; Eidenmüller et al (n 154) 17.
[161] Lutter (n 86) 2.
[162] Dorresteijn et al (n 83) 54.
[163] Eidenmüller et al (n 154) 19.
[164] See for example, Cándido Paz-Ares, ' Sobre la infracapitalización de las sociedades' (1983) Anuario de Derecho Civil, 1587; for a revised theory, Cándido Paz-Ares, 'La infracapitalización. Una aproximación contractual' (1994) Revista Derecho de Sociedades, 253; Rafael Guasch Martorell, 'La doctrina de la infracapitalización. Aproximación Conceptual a la Infracapitalización de Sociedades' (1999) 254 RDM, 163.

liability constitutes a paradox to legal capital aims.[165] Although (as it has been repeatedly exposed) the principal aim of legal capital is to guarantee creditor protection, the fact that the means chosen by company law to provide it are shareholders' contributions with limited liability provoke that the accomplishment of this aim remains rather difficult. It has been argued that limited liability has a perverse outcome, by not only not eliminating the risk of bankruptcy but also shifting risk to creditors.[166]

Thus, this theory claims that it is possible that limited liability is only efficient if the level of capitalisation is sufficient to pursue legal capital functions. The purpose of advocating for a sufficient capitalisation is to extend shareholders' liability when the endowed capital is insufficient and inadequate as to guarantee a sustainable equilibrium between assets and liabilities. Undercapitalization increases the risk of bankruptcy and it also increases the ratio between own funds and liabilities. Therefore it increases the agency costs arisen between shareholders and creditors. For instance, in the frame of an undercapitalised company it is more likely that shareholders approve the adoption of certain investment strategies which are not in the best interest of the creditors, since the former do not have so much to lose as to gain.[167]

An additional undesirable effect of undercapitalisation is that it puts up the price of liabilities and therefore it prejudices the company's solvency. Without unlimited liability the concept of public limited liability companies would probably not exist, since wealthy investors would not be willing to participate either in small proportions of the capital or jointly with less wealthy ones. Besides, in practice it has been demonstrated that, to a large extent, directors will anticipate those costs and will transfer them to the company's creditors either through risk bonus or personal sureties.[168]

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[165] Ibid.
[166] F.G. Easterbrook and D. Fischel, 'Limited Liability and the Corporation' (1985) 52 (1) The University of Chicago Law Review, 89.
[167] Paz-Ares (n 164).
[168] Susan Woodward, 'Limited Liability and the Theory of the Firm' (1985) 141 (4) Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics, 601.

1.4.3.2 The minimum threshold

Additionally, it has been argued that minimum capital do not achieve its purpose of serving as a 'seriousness test'.[169] In theory, legal capital rules may have a deterrent effect over corporations without serious business purpose, since it places a burden to shareholders to invest a sufficiently significant amount of money that they would not put at stake if the company did not have a business project which expectedly would provide investors a certain amount of profits. Therefore, this aim could be achieved in 1970 at the time that Capital Directive was drafted,[170] when an amount of €25,000 could be regarded as significant, but it is beyond doubt that nowadays, nearly forty years later, it does not entail the same value only because the effect of inflation.[171]

Article 6.2 of the Capital Directive[172] establishes that every five years the Parliament, upon proposal of the Commission, shall examine and revise these amounts. Despite the fact that this provision persisted identical since the first drafting of the Capital Directive in 1970, this amount remains unaltered. Therefore, variables which could affect the real value of the minimum capital (such as inflation) have not been taken into account. In addition to inflation, there are other variables which can affect the value of the capital since there is a wide range of circumstances which can affect it, as for instance national purchasing power ratios, Gross Domestic Product (GDP), interest rates, saving and wealth, price indexes or economic growth.[173] This is a very important issue, since in a lapse of more than four decades the differences are substantial.

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[169] Dorresteijn et al (n 83) 54.

[170] Original texts of the proposal were published in the Official Journal of the European Communities in French, Dutch, German and Italian. For the Italian version, Proposta di seconda direttiva del Consiglio intesa a coordinare, per renderle equivalenti, le garanzie che sono richieste, negli Stati membri, alle società di cui all'articolo 58, secondo comma, del trattato per tutelare gli interessi dei soci e dei terzi per quanto riguarda la costituzione della società per azioni nonché l'integrità e le modificazioni del capitale sociale della stessa (Presentata dalla Commissione al Consiglio il 9 marzo 1970) [1970] OJ C48/8. Art. 6.

[171] Eidenmüller et al (n 154) 32.

[172] Directive 2012/30/EU of 25 October 2012 [2012] OJ L 315, 74. Article 6(3) of the Capital Directive 1977.

[173] Andrew Abel, Ben Bernanke and Dean Croushore, *Macroeconomics, Global Edition.* (Pearson, Eighth Edition, 2014) 126.

For the purposes of this study and taking into account the nature and characteristics of legal capital, GDP and inflation rates have been chosen as the most relevant indicators in order to calculate the current value update of legal capital. Inflation is a macroeconomic indicator which denotes the variation of prices of goods and services. Thus, in other words, it shows to what extent the purchasing power drops. GDP, however, measures the volume of economic activity within a specific economy during a specific period of time. Nevertheless, in order to conduct accurate comparison between periods and to identify real changes in the final output of goods and services, it is necessary to eliminate from the GDP the effects of inflation. It is indeed necessary because in periods of rapidly increasing prices (such as asset price bubbles) the GDP values would be largely overestimated. The most appropriate method to deflate the nominal GDP is through the application of the GDP deflator, which denotes the weighted average of prices of both produced and purchased goods and services.[174]

By taking into account that the value of the legal capital was established in 1970 with the first draft of the Capital Directive,[175] the tables below show the monetary equivalences between the original value of €25,000 at different times taking into account the two aforementioned indicators. However, as there are numerous methods to update the value of money and countless variables which can be taken into account, it has to be acknowledged that these calculations must serve not as an exhaustive analysis but as a means to exemplify which could be the current amounts of the legal capital requirement under the Capital Directive, if updated in accordance with its own provisions. In addition, further limitations of this research are the progressive enlargement process of the EU since 1970 and the adoption of the Euro as a common currency. The enlargement process and the progressive accession of member states involved that different

[174] Joseph G. Nellis and David Parker, *Principles of Macroeconomics* (Prentice Hall, 2004), 23, 35-37 and 216.

[175] Original texts of the proposal were published in the Official Journal of the European Communities in French, Dutch, German and Italian. For the Italian version, Proposta di seconda direttiva del Consiglio intesa a coordinare, per renderle equivalenti, le garanzie che sono richieste, negli Stati membri, alle società di cui all'articolo 58, secondo comma, del trattato per tutelare gli interessi dei soci e dei terzi per quanto riguarda la costituzione della società per azioni nonché l'integrità e le modificazioni del capitale sociale della stessa (Presentata dalla Commissione al Consiglio il 9 marzo 1970) [1970] OJ C48/8. Art. 6.

jurisdictions were involved into different economic situations and applied different economic and monetary policies to deal with them. Therefore, there is no harmonised data which can represent all the EU Member States since 1970. In order to provide a coherent approach with the general aim of this thesis and with its methodology, the study has been carried out using official data from two individual jurisdictions, Spain and the UK, although none of them were member states at the time of the proposal. The chosen milestones have been the initial proposal for the minimum capital of €25,000 in 1970, the Directive's final enactment in 1977, its major revision in 2006 and at its last revision (before codification) in 2012. [176]

Spain					
Indicator	1970	1977	2006	2012	Increase (%)
Inflation, consumer prices	€ 25,000.00	€ 64,689.09	€ 447,816.72	€ 514,090.28	2056%
GDP deflator	€ 25,000.00	€ 63,687.10	€ 479,565.08	€ 507,800.95	2031%

Figure 1 Updated legal capital values in Spain.

[176] The last revision to date is 2017. Nevertheless, this date has been chosen as the last revision before the collection of data for this thesis was closed, in December 2016.

United Kingdom					
Indicator	1970	1977	2006	2012	Increase (%)
Inflation, consumer prices	€ 25,000.00	€ 62,255.67	€ 230,417.34	€ 276,956.25	1108%
GDP deflator	€ 25,000.00	€ 60,584.08	€ 254,916.09	€ 295,159.26	1181%

Figure 2 Updated legal capital values in the UK.

As it can be appreciated from the data shown in the tables above, the lack of revision of the initial amount of €25,000 provokes an enormous disequilibrium in real value. The data suggests that in 1977, when the Capital Directive was first enacted, the values were already underestimated in more than €35,000 according to both legal systems' economies. The trend in 2006 appears to be continuously increasing, revealing that the amount should have been substantially increased at least up to €230,417.34 in the UK and to €447,816.72 in Spain in order to have an equivalent value. Likewise, in 2012, the calculations indicate that the values should have been raised to amounts that approximate to €300,000 in the UK and to €500,000 in Spain.

This already suffices to evidence the clear inadequacy of the minimum capital requirement due to a prominent loss of its value. What is more, this data demonstrates that the level of protection provided by the original threshold of minimum capital requirement established by the EU has dropped, in the most conservative scenario, in 1108% (i.e., is at least 11 times smaller than its economic equivalent in 1970). Therefore, the appropriateness of the preservation of a minimum threshold of €25,000 becomes, from the creditors' protection perspective, at least questionable. Nevertheless, the need for reforming this issue appears to be out of the EU regulatory agenda. The High Level Group of Experts stated in their report of 2002 that a debate whether these rules should

be amended or suppressed is not in the EU regulatory priorities.[177]

1.4.4 EU Capital Maintenance Regime

The Capital Directive implemented, apart from specific rules on the public companies' obligations on minimum capital subscription, capital maintenance rules and creditors' protection in the event of alteration of the company's share capital.

On the assumption that minimum capital requirements are met at incorporation, the Capital Directive introduces further rules in order to protect creditors from future actions which may undermine the amount (and therefore the aim) of the minimum capital. Those rules can be divided into two categories. First, it contains capital maintenance rules, which aim to safeguard the legal capital during the business functioning. Secondly, it establishes rules governing capital rising, in order to protect creditors from being prejudiced from it.

Rules on capital maintenance[178] implement limitations to shareholder's powers, such as dividend distribution or share buy backs, by introducing a 'balance sheet test'.[179] It is noteworthy that in the context of the Capital Directive, the concept of distribution is limited to payment of dividends, distribution of profits to shareholders and capital reductions. The intended aim of the inclusion of such provisions was to protect creditors from a shareholder's appropriation of the assets in light of a foreseeable insolvency[180]. Therefore, the spirit of the capital maintenance doctrine is to preserve the protection of creditors through guaranteeing the non-distribution of the share capital plus some

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[177] Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe (2002). Available online at < http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf> Accessed on 15 February 2014.
[178] Article 2.3 Capital Directive.
[179] Dias Simões (n 138).
[180] Rüdiger Veil, 'Capital Maintenance. The Regime of the Capital Directive Versus Alternative Regimes', in Markus Lutter (ed.) *Legal Capital in Europe* (De Gruyter, ECFR special volume, 2006), 77.

reserves to shareholders except in exceptional circumstances[181]. This is reflected in Article 17 (1) of the Capital Directive[182], which establishes that:

> *' Except for cases of reductions of subscribed capital, no distribution to shareholders may be made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the law or the statutes'*

According to this provision, at the closing date of the financial year only the net assets exceeding the share capital and the non-distributable reserves can be distributed to shareholders. The concept of non-distributable reserves for this purpose has not been officially defined, therefore it lacks of clarity. [183] It has been suggested that indistributable reserves in this context should be regarded as mandatory reserves.[184] In the UK, for example, such reserves would be the share premium account[185] and capital redemption reserve[186]. The former is constituted by the premium paid for the acquisition of shares over their nominal value, whereas the latter contains the amounts paid for the company as a result of acquisition of their own shares. Therefore, the assets' distribution criteria adopted by the Directive does not take into consideration any solvency circumstances. As a result, a company with enough capacity as to repay its debts without threatening other creditor's rights might not be allowed to distribute profits[187].

In addition to this particular capital maintenance rule, the Capital Directive also contains other complementary rules very closely related to capital maintenance. For instance, the Directive establishes a list of limitations in capital reduction scenarios. In particular, its

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[181] Ferran and Chan Ho (n 69) 155.
[182] Capital Directive 2012 recast.
[183] Eilis Ferran, 'The Place for Creditor Protection on the Agenda for Modernisation of Company Law in the European Union' (2006) 3 ECFR, 178.
[184] Mülbert and Birke (n 29).
[185] UK Companies Act 2006. Section 610.
[186] UK Companies Act 2006. Section 733.
[187] Ferran and Chan Ho (n 181) 155.

Article 36 is worth of special attention[188], which sets up the prohibition of reducing the amount of capital to the extent that pending claims cannot be covered. Moreover, it prohibits the provision of financial assistance to acquire the corporation's own shares. As a result, useful transactions such as management buy-outs and private equity transactions became nearly impossible.[189] However, the Directive establishes an exception which makes feasible the acquisition of shares by banks in the normal course of business and the financing of employee stock acquisition programs.

Likewise, the Directive introduced a duty to call a special shareholder meeting in case of serious loss of the subscribed capital[190]. Some member states (France, Italy, Sweden and Spain) went a step further in the transposition of the Directive, and in their national laws they established what the literature called 'Recapitalize or Liquidate' rule[191]. According to this rule, shareholders need to recapitalise the company in case that net assets' value drop below half the company's legal capital. Otherwise, the company must be dissolved.

In addition to these rules, the Capital Directive provides complementary regulations. Among them, one could highlight provisions regarding capital raising, restrictions on share buy backs and on preferential or pre-emptive subscription rights. Nevertheless, those complementary rules do not comply with the aim of protecting creditors, since such business strategies do not prejudice them. What is more, creditors might not only be left in a neutral position for these strategies but also eventually be left in a more beneficial position than before.

EU Capital maintenance rules have been largely criticised during the past two decades. This debate emerged after the enactment of the Capital Directive[192] which has been

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[188] Art 36 Capital Directive 2012 (32 1977 Directive).
[189] Wymeersch (n 114).
[190] Art 19 Capital Directive (17 before).
[191] Enriques and Macey (n 40).
[192] Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability

criticized for several reasons which will be further discussed in section 1.5, but essentially and regarding creditor protection, for placing excessive burdens as a means to achieve too little benefits[193].

1.5 Is the EU regime fit for purpose?

The usual rationale behind the legal capital rules is that they are meant to protect creditors from shareholders' abuse of limited liability[194]. It has been largely questioned to what extent the capital maintenance rules carry out the task the EU has envisaged for them—*ie* whether they effectively protect company creditors or not[195]. One of the most severe criticisms[196] was given from a law and economics perspective[197]. It was stated that the burdens imposed by the legal capital rules are unjustifiable since not only do they not substantially benefit creditors, but also harm the companies and the society in general.[198] Following the same line of argument, further criticisms have pointed out that the current legal capital regime does not give an effective response to creditors' protection and questioned the balance between benefits and costs of the legal capital regime[199].

Nevertheless, it must be acknowledged that although creditor protection is the principal aim of the capital rules contained in the Directive, many provisions of the Directive are aimed to protect also shareholders in general and minority shareholders in particular. Therefore, it has been also argued that the issue is not whether the Directive provides

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companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (EEC) 77/91, OJ 1977 L 26/1.

[193] Heribert Hirte and Alexander Schall, 'Legal Capital and the EU Treaties' in Dan Prentice and Arad Reisberg (eds.) *Corporate Finance Law in the UK and the EU* (OUP, 2011), 519.

[194] Armour (n 1).

[195] Payne (n 1); Mülbert and Birke (n 29).

[196] Mülbert and Birke (n 29).

[197] Enriques and Macey (n 40).

[198] Ibid.

[199] Mülbert and Birke (n 29).

adequate protection to both creditors and shareholders, but if linking this protection to capital rules is the best approach or not[200]. This debate namely emerged from the regime implemented in the US, where both the minimum legal capital requirements and the regulation of profits and assets distributions have been to a large extent eliminated. Instead, the US system implemented a regime for creditor protection from fraudulent actions based solely on contractual agreements (as discussed above in section 1.3.2).

In addition, the Rickford Report[201] described the sense and utility of the legal capital regime as 'superfluous'. The group of experts emphasized three major criticisms to the model[202]. First, it argues that there is no record that legal capital has ever prevented insolvency. Secondly, and closely related to the previous argument, these rules have never provided an adequate framework to ensure an adequate capitalization. Finally, it is called superfluous also because the costs derived from the rules are not proportionate with the benefits that they provide.

As it has been analysed in Section 1.4.3, the static amount required by the Capital Directive does not provide any substantial protection to creditors, to the extent that it has even been branded as 'insignificant'[203] or 'trivial'[204]. Besides, an increase of this amount would not be a satisfactory solution either. Although one cannot deny that it would provide higher protection to risk-adverse and involuntary creditors, it would have a detrimental impact upon the general economy. A substantial minimum capital requirement would establish a groundless entrance fee to the securities markets[205] and would increase unreasonably the costs of new business to get into certain sectors and therefore would facilitate oligopolistic markets.[206] Additionally, a minimum capital requirement will have detrimental effects over risk-preferring creditors, since the legal

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[200] Wymeersch (n 114).
[201] Rickford (n 84).
[202] Lutter (n 85) 2.
[203] Dan D. Prentice, 'Veil Piercing and Successor Liability in the United Kingdom' (1996) 10 Florida Journal of International Law, 469.
[204] Enriques and Macey (n 40).
[205] Eilis Ferran, 'Creditors' Interests and "Core" Company Law' (1999) 20 (10) Company Lawyer, 314.
[206] Easterbrook and Fischel (n 3) 17.

capital regime is intrinsically risk-reducing. Thus, such creditors see their business possibilities undermined as they would prefer to bargain in order to achieve higher returns.

Even though at first glance seems that legal capital would protect at least weak contracting creditors and involuntary creditors, by conducting a deeper analysis it can be observed that in practice it cannot be demonstrated that it does. These creditors still get higher levels of protection by themselves through contract,[207] by acquiring rights by means of free riding more powerful creditor's covenants, or as a last resort not providing credit to a company with a default in repayment history[208]. Involuntary creditors do not benefit from the EU legal capital regime either. These creditors did not choose neither to give credit to the company nor under which terms, therefore they do not have the chance to consider if they rely on legal capital as an informative mechanism a priori. Therefore, the only benefit that these rules could provide to this group would be if they could either prevent insolvency or ensure sufficient funds (i.e. minimum capital requirement) as to repay all tort claims and tax public agencies. An empirical study which compared the US with other eleven legal systems posit that the US had the lowest ratio of bankruptcies per capita. Although there is no empirical analysis whether legal capital rules decrease the risk of bankruptcy, the results of this study suggest that probably they do not. As a result, it can be argued that creditors have better means available to protect themselves. Voluntary creditors can use their contracts to stipulate protection mechanisms and involuntary creditors have more efficient mechanisms at their disposal such as insolvency laws or piercing the corporate veil procedures.[209] Once again, one must differentiate between different situations where insolvency may occur. In case of balance sheet insolvency, it is very difficult to justify how the establishment of a minimum legal capital requirement and rules about capital maintenance can protect

[207] For an insightful example on how a trade relationship between a company and a small creditor can be more profitable without the intervention of legal capital rules, see Enriques and Macey (n 40).
[208] Justin. J. Mannolini, 'Creditors' Interests in the Corporate Contract: a Case for the Reform of our Insolvent Trading Provisions' (1996) 6 (1) Australian Journal of Corporate Law, 14.
[209] Enriques and Macey (n 40).

creditors since, by definition, there is no capital left.[210]

It has been argued that the legal capital doctrine is based on the premise that legal capital protects creditors by illustrating them the funds which the company holds and that are not distributable to shareholders. However, it has been demonstrated that in practice creditors do not consider legal capital as a safeguard.[211] First and foremost, this occurs due to the fact that the value of the capital deposited initially at the moment of incorporation varies automatically when the company starts its operations. Capital will be used as a means to acquire assets, which are subject to change in value over time. Therefore, legal capital tells very little to creditors about the company's real financial situation. In order to obtain grounded financial information, they would consider the whole financial statements, since balance sheet, income statement and cash-flow statement will provide a more accurate picture of the real situation.[212]

Whilst in the last decades capital was an essential indicator for banks in order to consider the extent of the risk at the time of granting credits, recently other indicators seem to be more important factors to determine the extent of creditors' protection. For instance, indicators such as future cash flows, business model, or quality of management have been used by banks to assure their position and comfort as creditors[213]. Controversially, it has been even argued that if the financial institutions relied on capital as a basis to make the decision whether to give credit or not, the credit market would possibly fail.[214] Nevertheless, it is worth mentioning that in the context of small companies, banks still rely on capital as a means to decrease their risk as a creditor, as demonstrated by the usual requirement of a capital increase as a precondition to grant a loan[215].

Thus, the question arisen is not only whether the current legal capital regime is not

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[210] Mülbert and Birke (n 29).
[211] Enriques and Macey (n 40).
[212] Enriques and Macey (n 40).
[213] Wymeersch (n 114).
[214] Bernard Walter in Schneider, 'Diskussionsbericht: Gesetzliches Garantiekapital and Kreditentscheidung der Banken' (1998) 43 Die Aktiengesellschaft, 373.
[215] Wymeersch (n 114).

responding to its essential purpose of protecting creditors, but also whether the system might have become obsolete. For instance, it is noticeable that the rules provided by the Directive not always respond to the current corporate finance instruments and techniques. They are based on the idea at the time that companies are financed to a larger extent by banks and to a lesser extent by shareholders. However, especially in the context of the credit crunch, it can be argued that this concept no longer applies, since as it becomes more difficult to get financing from banks, capital markets are increasingly becoming the dominant form of business financing. In the last decades, more sophisticated funding mechanisms became available and is well known that this trend is evolving therefore businesses are increasingly expanding their funding sources such as public markets, by issuing shares, bonds, or heaving off part of the assets through securitisation techniques.[220]

Nevertheless, there is no unanimity among scholars regarding the critiques to the legal capital rules imposed by the Capital Directive. There is still a part of the scholarship, which is namely German[221], who supports the Capital Directive's approach.[222] They argue that, although the current EU legal capital regime can be vastly criticised, it has also some favourable outcomes.[223] For instance, it has been argued that it constitutes a means to promote responsible and trustworthy corporate governance. This affirmation lies on the basis that, on the one hand, legal capital eases the formation phase of the company preventing it from a precipitated insolvency and, in the other hand, this regime ensures that during the business' life of the company only the free assets in general and realisable profits in particular are distributed. However, none of these arguments is sufficiently strong as to promote the application of a legal capital system. First, the minimum threshold that legal capital rules demand is not substantial enough as to prevent precipitated insolvency. In most cases, it would barely cover the incorporation and starting business costs, even if one considers the far superior amounts that the

[220] Wymeersch (n 114).
[221] For example, Professors Marcus Lutter, Massimo Miola and Hanno Merkt.
[222] Heribert Hirte and Alexander Schall, 'Legal Capital and the EU Treaties' in Dan Prentice and Arad Reisberg (eds.) *Corporate Finance Law in the UK and the EU* (OUP, 2011), 519.
[223] Lutter (n 86) 3.

national legal systems in the transposition of the Capital Directive, such as €60.000 in Spain or £50.000 in the UK. Secondly, the fact that under legal capital rules only realisable profits can be distributed, appears to be an important advantage of this system. Nevertheless, as it has been further explored in section 1.3.2 above, the system free of legal capital rules implemented in the US demonstrates that this protection through dividend distribution policy can be achieved by other means such as solvency tests.

Therefore, there are grounds to argue that the legal capital regime *per se* and specially the system adopted by the EU fails to comply with its principal function of protecting creditors. Despite the fact that disclosure of information mechanisms have been introduced and serve as a means to complement the legal capital rules object of protecting creditors, it seems that the system is still weak.

1.6 The process of modernisation of legal capital: a lost opportunity?

As a result of the severe criticisms, the European Commission initiated a procedure of modernisation of the Capital Directive: *The European Union's Action Plan for Company Law: Modernising Company Law and Enhancing Corporate Governance in the European Union. A plan to move forward*.[224] This Action Plan reveals a new orientation regarding company law in Europe. It moves from the previous approach of creditor protection to a new approach more focused on business facilitation, based on efficiency and competitiveness. Indeed this undermines the Capital Directive, since '*it can no longer be simply assumed that* [EU] *company law should protect creditors*'.[225]

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[224] Communication from the Commission to the Council and the European Parliament 'Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward' COM (2003) 284. Available online at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52003DC0284 Last accessed 12 March 2014.

[225] Eilís Ferran, 'The Place for Creditor Protection on the Agenda for Modernisation of Company Law in the European Union' (2006) 3 (2) ECFR, 178.

Nevertheless, it must be noted that the application of the economic terms efficiency and competitiveness to company law rules does not constitute an EU institutions policy making novelty. The application of such concepts in the US dates from the early 80's, and thereinafter it spread to other jurisdictions as, for example, the UK. In the latter, it was in particular after the Company Law Review. This initiative of the Law Commission (carried out by the Department of Trade and Industry's Company Law Review Steering Group) had the principal aim to revise the current UK company laws in order to facilitate economic activity in the most competitive and efficient manner for everyone's benefit[226].

As a result of this initiative taken by the Commission in order to simplify the EU rules, Directive 2006/68[227] was enacted as an amendment of the Capital Directive. The initiative, also known as SLIM (Simpler Legislation for the Internal Market), revised numerous Directives and provided a set of recommendations within a wide range of fields, one of them being company law. The Commission, assisted by the High Level Group of Company Law Experts[228] alongside the feasibility study on an alternative to the capital maintenance regime established by the Capital Directive carried out by KPMG in 2005[229], drafted several proposals—which essentially advocated for some sort of deregulation[230].

The mandate given to the High Level Group was explicitly intended to criticise the corporate rules in light of the Report that the Commission presented to the European

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[226] Department of Trade and Industry, 'Modern Company Law for a Competitive Economy. The Strategic Framework' (1999) A Consultation Document from the Company Law Review Steering Group, 8. Available online at: http://webarchive.nationalarchives.gov.uk/20121029131934/http://www.bis.gov.uk/files/file23279.pdf and Simon Deakin and Alan Huges, 'Economic Efficiency and the Proceduralisation of Company Law' (1999) 3 The Company, Financial and Insolvency Law Review, 169.
[227] Directive 2006/68 of September 6, 2006 [2006] OJ L264/32.
[228] Commission document COM (2003) final, Report on a Modern regulatory Framework for Company Law in Europe, 2002.
[229] KPMG, 'Feasibility Study on an Alternative to the Capital Maintenance Regime established by the Second Company Law Directive 77/91/EEC of 13 December 1976 and an Examination of the Impact on Profit Distribution of the EU- Accounting Regime' Contract ETD/2006/IM/F2/71. Available online at: http://ec.europa.eu/internal_market/company/docs/capital/feasbility/study_en.pdf Accessed on 15 October 2013.
[230] Wymeersch (n 114).

Parliament and the Council based on the fourth phase of the SLIM initiative[231], which took the form of a Feasibility Study on an alternative to the capital maintenance regime established by the Capital Directive 77/91/EEC of 13 December 1976 and an examination of the impact on profit distribution of the new EU accounting regime[232].This study more than analysing the current regime, provides a comparative analysis of the legal capital regimes inside and outside the EU. It namely focuses on examining the appropriateness (through pros and cons) of other systems regarding creditor and shareholder protection, going through scholar opinions and proposing new approaches.

As a response of these results, the Internal Market and Services Directorate General published an informal document assessing the results of the study[233]. This informal document expresses the view that, in light of the reports provided, it seems that the Capital Directive is a flexible instrument because it allows Member States to: (i) impose legal capital requirements under their own criteria as long as they comply with the minimum amount required, (ii) to require companies to apply the International Financial Reporting Standards (IFRS) for the purposes of dividend distribution, (iii) to implement solvency tests as it is practice in other legal system, and even (iv) to apply some of the alternative mechanisms to protect creditors. The only limitation to these actions is to guarantee compliance with the principle of non-distribution of profits in the presence of a negative balance sheet. Finally, it became apparent from the study that the costs of compliance with the Capital Directive are not significant, especially in contrast with those required by alternative mechanisms applied outside the EU.

As a conclusion, the Internal Market and Services Directorate General stated that '*the current capital maintenance regime under the Second Company Law Directive does not*

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[231] 'A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts' (2002) Available online at http://ec.europa.eu/internal_market/company/docs/modern/consult_en.pdf Last accessed 21 March 2014 and Mülbert and Birke (n 29).
[232] http://ec.europa.eu/internal_market/company/docs/capital/feasbility/study_en.pdf
[233] http://ec.europa.eu/internal_market/company/docs/capital/feasbility/markt-position_en.pdf

seem to cause significant operational problems for companies. Therefore no follow-up measures or changes to the Second Company law Directive are foreseen in the immediate future.'[234]

As a result of all this process, an amending Directive[235] was enacted in 2006 and implemented with the purpose of reorienting the regime to business efficiency and competitiveness, which has been interpreted as a focused approach to the detriment of the creditors' protection. This new approach has been also criticised[236] since it undermines the aim of the Capital Directive by subordinating creditor protection to business efficiency and to the satisfaction of subsidiarity and proportionality considerations. Even though the Commission's proposals were to a large extent included in the amending Directive[237], it has been argued that as a result the Directive was more pragmatic than approaching theoretical arguments.[238]

As far as legal capital rules are concerned, this amending Directive did not introduce any changes[239]. However, it amended some of the other relevant issues related to capital in the previous Directive. First, it provided additional regulation regarding expert valuations for contributions in kind. Secondly, regarding share buy backs, it allows member states to lower some requirements. Additionally, it abolishes the requirement of 10 per cent ceiling, providing as a new ceiling the amount equivalent to distributable net assets instead. Thirdly, it amended the previous ruling regarding the prohibition of financial assistance to buy own shares. This Directive allowed member states to deregulate their laws regarding prohibition of financial assistance. Nevertheless, if member states decide not to derogate their financial assistance rules, they must still comply with the Directive's requirements. Additionally, it requires general meeting

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[234] Ibid.
[235] Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital.
[236] Ferran (n 183).
[237] Wymeersch (n 114).
[238] Ibid.
[239] Dias Simões (n 138).

approval, with a majority of at least 66% (depending on the Directive's transposition to national law), board's report to be published. Specifically, according to Article 23 the board is responsible of these transactions, although is the majority of the general meeting who ultimately approves it, and has to justify that the share's price is 'fair'. Nevertheless, these transactions do not harm creditors, since the company's funds flow out as a loan but come back as own funds.[240]

The next action taken by the European Commission was the enactment of a recast of the Second Company Law Directive in 2012[241], aiming at providing safeguards not only to creditor protection but also protecting the rights and interests of the shareholders. The means utilised to pursue this aim are the clarification, codification and coordination of domestic laws regarding formation and capital maintenance of public companies. It is noteworthy that the recast, apart from introducing a formal amendment resulting from CJEU case law, does not introduce relevant modifications in terms of content to the Capital Directive. Furthermore, the very last amendment to the Capital Directive comes in a form of codification in 2017.[242] This new Directive is the result of the 2012 action plan in corporate law and corporate governance.[243] In 2015, the Commission adopted a proposal to codify and merge a number of existing company law Directives. The aim of this proposal was to make EU company law more "reader-friendly and to reduce the risk of future inconsistencies".[244] It codifies certain aspects of company law, repealing not only the last Capital Directive (2012/30/EU) but also the Directives 82/891/EEC,

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[240] Wymeersch (n 114).
[241] Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.
[242] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169.
[243] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions Action Plan: European Company Law and Corporate Governance - a modern legal framework for more engaged shareholders and sustainable companies /* COM/2012/0740 final */. Available online at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012DC0740 Last accessed on 17 of September 2018.
[244] EU Commission policies in company law and corporate governance. Available online at https://ec.europa.eu/info/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_en Last accessed on 17 of September 2018.

89/666/EEC, 2005/56/EC, 2009/101/EC and 2011/35/EU. This codification aims to ensure, amongst other reasons [245], a minimum equivalent protection for both shareholders and creditors of public limited liability companies, given that it is considered that the coordination of national provisions relating to the formation of such companies and to the maintenance, increase or reduction of their capital is of premium importance.[246] Nevertheless, it is noteworthy that none of these last recasts, apart from the introduction by the 2012 Directive of a formal amendment resulting from European case law[247], they do not introduce relevant modifications in terms of content to the Capital Directive. Therefore, although the aftermath of these last attempts still remains uncertain, in the light of the previous model and its criticisms one cannot expect a significant improvement regarding creditor protection.

1.7 Conclusion

Legal systems must provide mechanisms to protect creditors. The concept of creditors is very heterogeneous, since it includes both contractual and involuntary creditors. Besides, inside the category of voluntary creditors, the range is also very vast since it can include from very small creditors with rather limited bargaining power to very strong creditors who can negotiate or even impose their interests. This fact makes necessary for the legal systems to provide a mechanism to ensure that desirable protection to those who have either limited or non-existing access to mechanisms of self-protection. In order to provide that protection, legal systems have adopted different techniques. As a general rule, company laws provide mechanisms to safeguard creditors' rights during the companies' period of financial health, leaving the *ex post* remedies to insolvency laws. Whereas insolvency laws provide substantial protection during insolvency procedures,

[245] Title I is concerned about general provisions and the establishment and functioning of limited liability companies, whereas Title II of the Directive regulates mergers and divisions of limited liability companies.
[246] Directive (EU) 2017/1132 preliminary notes (3).
[247] Ibid.

the effectiveness of the means provided by company laws *ex ante* have been largely questioned. The US contractual-based system is very costly and does not provide protection to weak parties. The EU system, although it is specially focused on protecting the most disadvantaged creditors, in practice does not provide any meaningful means to achieve that purpose. Apart from issues in its application such as the lack of real harmonisation among member states and the scope of application limited to public companies, the legal capital rules do have functional weaknesses which are difficult to overcome. The lack of revision of the minimum capital threshold alongside the non-requirement of a minimum capitalisation related to the extent of the liabilities, make the established minimum threshold undervalued to the extent that it can be argued that it completely lacks a purpose. Besides, the capital maintenance rules are too burdensome for the company in relation to the little benefits provided to creditors.

As a result, given that creditor protection is desirable and the framework provided by the EU legislator on legal capital rules is not fit for its purpose of providing creditor protection, Chapter 2 explores alternative or complementary mechanisms to assess whether there are alternatives to the current system which would be not only fit for their purpose but also more efficient.

Chapter 2 Alternative -or Complementary- Creditor Protection Mechanisms to Legal Capital

2.1 Introduction

The previous chapter examined the current EU system of legal capital rules from a normative point of view and it attempted to assess whether such system is suitable for creditor protection. First, it analysed the complex question of whether it is desirable that company law provides mechanisms for creditor protection. The desirability of creditor protection appears to be indisputable but the best mechanisms to achieve such protection are very difficult to identify. This reality is due to the different layers of creditor protection and the approaches that each legal system has towards them.[1] The concept and desirability of providing creditor protection varies across legal systems and legal approaches. As a result, the extent to which is considered that regulatory means must be in place to provide also varies, even within the framework of EU law. Despite the challenges that the concept of creditor protection entails, the intervention of company law introducing mandatory mechanisms of creditor protection would be beneficial not only for the protection of creditors rights but also for safeguarding the safety of trade and, as a result, also protecting other stakeholders' rights.[2]

Having argued that creditor's rights must be observed and protected, being of prime

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[1] Peter O Mülbert, 'A Synthetic View of Different Concepts of Creditor Protection, or: a High Level Framework for Corporate Creditor Protection' (2006) 7 EBOR 357.

[2] 'some mandatory component to corporate law is thus in but also to understand where the line should be drawn between the mandatory and enabling components' John C Coffee Jr, 'The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role' (1989) 89 (7) Columbia Law Review 1618, 1620 or John Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law' (2000) 63 (3) MLR 355, 357.

importance in times of financial distress or in the vicinity of insolvency, it was concluded that the system regulated by the Capital Directive appears to be insufficient. From a law and economics perspective, it was argued that the benefits provided are not compensated by the costs it entails. Additionally, the regulation contained in the Capital Directive is very generic –arguably purposely given the nature of a Directive being the instrument chosen for the implementation- and its lack of detailed regulation links its effectiveness to the actual implementation and enforcement in each of the Member States' legal systems. Last, but not least, it is unclear whether legal capital rules do accomplish their aim of protecting creditors. Not only the minimum amount of capital required is merely symbolic but also sophisticated and involuntary creditors do not appear to rely on it, since even in a scenario of compliance with the rules their claims of repayment are very unlikely to succeed.

If it is argued that the legal capital regime as contemplated in the Capital Directive is not fit for its purpose of creditor protection, and having argued that creditor protection is considered desirable, it is then necessary to examine whether there are either alternative or complementary means to the legal capital regime to provide a more adequate level of creditor protection. The aim of this chapter is to explore the different mechanisms either suggested theoretically by the literature or implemented in EU Member States –and therefore within the framework of the Capital Directive- and in other non-EU countries (such as the US) in order to either substitute or supplement the current legal capital regime.

One must bear in mind, however, that complementary mechanisms do not provide creditor protection by themselves. Those mechanisms act (as the adjective indicates) as a complementary means to facilitate the application of the main mechanisms and help the system to achieve its aims and objectives. The real debate between mechanisms of creditor protection revolves around which system serves as a better mechanism to protect creditors. Although it has been largely examined, the debate is still on whether creditor protection is better guaranteed by providing a mandatory regulatory framework or by relying in the contracting parties' free will. It has been argued that this combination would achieve better results as far as creditor protection is concerned since

it is a more suitable regulatory mechanism than strict mandatory regulation.

There are a number of mechanisms, besides legal capital rules, which can provide protection to creditors' rights. For instance, creditors can be protected though the imposition of mandatory disclosure rules (especially regarding accounting and financial situation), a wide solvency based approach sustained by directors' and managers' personal liability, corporate governance monitoring mechanisms or the agreement of application of higher interest rates to transfer risk to the company. These mechanisms are not necessarily mutually exclusive, but rather complementary.

In order to address this question, this chapter is divided into five parts. First, it introduces some background remarks on the applicability of complementary or alternative means of protection and its limitations. Secondly, it addresses the differences and challenges of creditor protection at different stages, differentiating between *ex ante* and *ex post* insolvency mechanisms. Thirdly, understanding that creditor protection is desirable, this chapter analyses the concept of efficient creditor protection, particularly from a cost-benefit perspective, aiming to unravel the needs underneath the generic concept and providing grounds for assessment in the subsequent sections of the specific mechanisms explored. Finally, different alternative and/or complementary mechanisms are suggested, based on both theoretical assessments and reflection on systems already in place. The main proposed mechanisms are mandatory disclosure of financial information, mandatory insurance for creditor protection in case of default, directors' liability, shareholders' liability (essentially for unlawful distribution of dividends or tort claims), a mandatory 'recapitalise or liquidate' rule, mandatory solvency tests or complete de-regulation. The final concluding section asserts that none of these mechanisms are adjusted to be a perfect and exclusive means to provide complete creditor protection without jeopardising the sanctity of core principles of company law such as limited liability or unbalancing interests of all stakeholders.

2.2 Background

Most EU countries have implemented accountancy instruments in order to measure compliance with capital maintenance rules. The traditional and more extended accountancy system bases the valuation of assets at historical cost. This approach is based on the German accounting tradition and it is considered to be creditor oriented. However, this approach has been the object of severe criticisms since it usually leads to undervalued assets and overvalued liabilities. Therefore, it does not reflect the real value of the company's assets and liabilities at the expense of creditors and, as a result, it has been argued that it comes into conflict with a system with legal capital and capital maintenance rules. Therefore, as a result of their implementation, one could question whether compliance with legal capital rules can still be determined through published financial statements or not.

However, the application of the valuation at historical cost has been largely abandoned given that the European Commission encourages the use of the International Accounting Standards (IAS) accounting system. This system facilitates giving a more accurate picture of the company's financial situation and, as a result, it is increasingly accepted the application of this alternative accountancy system based on the 'fair value', which is considered to reflect more accurately the current value of the assets. Although it appears to be a more efficient approach, it has been demonstrated that it is more focused on shareholder protection rather than to creditor protection.

Likewise, the EU has progressively updated the so-called 'accounting directives', with the purpose of promoting transparency in the public companies' annual accounts. The Fourth Directive provides the mechanisms to coordinate member states' regulations regarding contents, presentation and publication of annual accounts and reports and introduces methods of asset valuation. The Seventh Directive takes a step further, by extending such information and disclosure mechanisms to groups of companies through consolidated annual accounts. Although those requirements improved the protection of creditors, they were considered to be excessively burdensome for medium sized companies. As a result, both directives were amended in 2009 in order to rectify those

undesirable effects as well as to clarify the operation of the IFRS accounting standards.

In contrast, the US state laws largely diverge from the EU in terms of asset valuation. State company laws such as Delaware do not require the application of IFRS requirements and permits that assets are valued under any reasonable manner. Other states such as California, although in previous versions of the CCC it had a special requirement of valuation at historical cost, the latest version only requires that assets have been subject to either a 'fair valuation' or 'any other method that is reasonable under the circumstances' .

If one considers that an appropriate mandatory disclosure based on a real value of assets accountancy system would protect creditors to a larger extent than the current European and US approaches do, it might be no longer necessary to protect them via mandatory legal capital rules. However, it could be argued that a system combining mandatory rules (but instead of regulating legal capital, establishing a framework for an information mandatory disclosure) and other mechanisms of self-help, such as corporate governance monitoring mechanisms or contractual provisions would provide a superior level of creditor protection.

2.3 Creditor protection ex ante and ex post

The issue of creditor protection is, as indicated above, not easy to address since there are many different aspects and regulations to be taken into account. One of the major issues that creditor protection laws need to address is the time when they should be entering into the corporate business picture.[3] The need of creditor protection when the company is either insolvent or nearing insolvency appears indisputable, but creditor protection cannot be limited to that moment in time. Efficient creditor protection

[3] See Chapter 1, section 1.2.2.

mechanisms – as explained below - would also be in place beforehand, i.e. either at the time of contracting or during the course of business between the company and the creditors. A system which includes such mechanisms would be superior to a system which does not, given that those *ex ante* mechanisms are ultimately aimed to decrease the likelihood of arising the need of future *de facto* real protection due to the company's default. As a result, there are two main different situations which must be clearly differentiated when addressing the issue of creditor protection from a functional perspective: *ex ante* and *ex post*.[4]

Creditor's rights *ex ante* are largely not protected by the general law.[5] This occurs as a result of the understanding that creditors are only in need of legal protection when the company defaults and that they are capable of self-protection through a variety of means, such as contractual or proprietary mechanisms of protection, or increasing their price or even refusing to contract. Albeit true, this premise disregards the fact that not all creditors are able to adjust (namely tax authorities and tort claimants). These groups of creditors are entirely unable to protect themselves from the consequences of the debtor's company default, and therefore they are in need of legal mechanisms to provide such protection.

The only mechanisms which have been suggested for protecting creditors *ex ante* are mandatory disclosure and minimum maintained capitalisation. However, these two mechanisms themselves do not provide adequate levels of creditor protection, as it will be further discussed below. On the one hand, whilst mandatory disclosure mechanisms would provide protection for creditors supplying finance by way of markets and financial creditors only, a minimum maintained capitalisation would not discriminate and provide coverage to all groups of creditors. On the other hand, however, minimum

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[4] This distinction based on a functional approach has been used in numerous leading literature on law and finance. For instance, see John Armour, Gerard Hertig and Hideki Kanda, 'Transactions with Creditors' in Kraakman et al. (eds.) *The Anatomy of Corporate Law. A Comparative and Functional Approach* (3rd edn, OUP 2017) 109.

[5] Louise Gullifer and Jennifer Payne *Corporate Finance Law, Principles and Policy* (2nd edn., Hart 2015) 79.

maintained capitalisation mechanisms in place only cover creditor's rights to a very limited extent -if at all- whereas mandatory disclosure mechanisms are capable of providing more comprehensive protection (namely for sophisticated creditors).

Last but not least, creditors are in need of protection particularly when the previous failed, and therefore the company is already in financial distress and either unable or having difficulties to meet all their obligations when they fall due. At this point, mandatory insurance and insolvency laws come into place and they play a very important role in attempting to preserve creditors' rights as intact as possible.

Nevertheless, besides these two clearly differentiated categories of creditor protection, there are hybrid mechanisms which have both *ex ante* and *ex post* effects. Such mechanisms are essentially based on personal liability of the company's agents, namely directors and shareholders. Although these are mechanisms *ex post* in nature because they will be enforced after the event that triggers them (which will naturally be linked to the company's insolvency), they will entail behavioural implications *ex ante*.[6] They are meant to have a deterrent effect, so directors and/or shareholders have incentives to act more attentively towards preventing the likelihood of that company to entering into financial distress. This is achieved through judicial enforcement; courts imposing liability to companies' agents allows constructs an *ex post* mechanism posing *ex ante* incentives.

The effectiveness of rules remains largely dependent on liability laws and their enforcement. In the context of minimum capital and capital maintenance rules this is particularly true, since the rules *per se* are not enforceable but their enforcement is achieved through personal liability of those who must ensure compliance with the rules. Therefore, they rely on liability laws on those subjects who are responsible for the observance of mandatory solvency levels. For example, capital maintenance rules

[6] Richard Williams, 'What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?' (2015) 78 (1) MLR 55.

enforcement rely on mechanisms based on shareholder and directors' liability.[7] The main issue here is that historically, courts have been reluctant to make shareholders (by lifting the corporate veil, for example) and directors liable for corporate debts.[8]

Therefore, it could be argued that what is ultimately mandatory is not the rule *per se* but the use and outcomes of judicial decisions. The fact that the effectiveness of an *ex ante* rule is dependant of an *ex post* dispute resolution mechanism demonstrates the weakness of the system.[9] The main question is then whether the introduction of an effective regulation on providing directions on enforcement and reducing then the task that courts have of gap-filling would be feasible. It has been argued that that could be achieved by having a system at the courts' disposal that allows them to undertake their *ex post* role by aiming to create *ex ante* incentives of compliance with the law and therefore providing creditor protection.[10] Such incentives could be related to any of the alternative or complementary mechanisms to legal capital addressed later in this chapter, but perhaps the most significant being mandatory disclosure of information. If any of these *ex ante* rules are breached, courts would then not only be allowed but bound to enforce liability rules, giving a more adequate response to the issue of creditor protection.

It must be noted, however, that the essential principle of independent legal personality –alongside limited liability- impedes, in principle, creditor protection mechanisms in going beyond the corporate entity. For reasons of public interest and fairness, however, some legal systems have introduced these mechanisms of creditor protection falling outside the scope of the corporate entity. Even though these sorts of mechanisms are in theory meant to be residual, given that the preservation of the separation of legal personality and limited liability are considered essential in modern company law[11], in

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[7] Joelle Simon, 'A Comparative Approach to Capital Maintenance: France' (2004) 15 (4) EBLR 1045, 1055.
[8] This statement will be largely explored in Chapters 3 and 4 in the context of Spain and UK respectively, through the analysis of case studies based on courts approach to enforcement of legal capital rules.
[9] Coffee Jr (n 2).
[10] Ibid.
[11] Armour (n 2).

practice – and particularly in the context of the EU- they constitute one of the essential pillars of creditor protection.[12]

It becomes apparent that the issue of creditor protection is particularly complex, particularly given the agency problems between shareholders, managers and creditors. National legislators face the challenge of balancing all these parties' rights, which can be particularly difficult in an *ex ante* context. Although there are arguments to sustain the necessity of such mechanisms, it is difficult to reconcile with shareholders' -and others'- rights which might seem intuitively superior at the time according to traditional and essential company law principles as stated above. Therefore, the challenges that legislative bodies face in order to find the best possible solution revolve around concepts of efficiency and fairness, either independently or inspired by both. An economically inspired analysis of these concepts and their importance follows below, aiming to unravel the needs of creditor protection and later exploring the suitability of existing and proposed mechanisms for such purpose.

2.4 Law and economics analysis of creditor protection

In line with the aim and methodology of this thesis, it is now important to make an assessment of creditor protection in general from a law and economics perspective. As explained in the methodology section[13], the chosen method to assess creditor protection in general and each of its manifestations in particular, is a normative analysis based on cost-benefit efficiency. Measuring and attempting to achieve efficient creditor protection is, indeed, a very challenging task. There are a number of factors that play an important role and deserve to be taken into account. First, it entails a conceptual challenge. It is very difficult to precisely delimit where to draw the line between protection of creditors and protection of other related parties, i.e. the company itself, the company's managers and directors, shareholders and other stakeholders. The ideally

[12] This statement will be proven in this thesis through case studies, namely in chapters 3 and 4.
[13] See Introduction section of at the beginning of this thesis.

efficient scenario would find a perfect balance between all the involved parties' rights. Additionally, as the pool of creditors is also very heterogeneous, this task becomes particularly challenging. There are protective mechanisms that will respond to the needs of a specific group of creditors, such as mandatory disclosure (which would only protect sophisticated creditors, as discussed above) or shareholder unlimited liability (which would only protect tort creditors). In addition, creditors not only require protection from the company and other stakeholders but also –and perhaps more importantly- from other groups of creditors.[14] Efficient creditor protection would be provided by a system holding adequate mechanisms to safeguard creditors' rights but at the same time not conferring overprotection,[15] which could act in detriment of other stakeholders, or even have perverse effects within the pool of creditors. Law and finance literature has traditionally advocated for strong creditor rights[16], but this body of literature has been highly criticised not only for methodological reasons but also for taking a US- biased approach to the issue of creditor protection.[17] The extent of protection provided must be taken cautiously given that overprotection would cause ex post inefficiencies,[18] such as the incentives of secured creditors to instigate the sale of remaining assets with little regard to the prices, even if those are significantly under the market value.

Secondly, it encompasses coherence challenges. Even within the national borders, it is difficult to design a coherent system of creditor protection given that there are several areas of law which can potentially play a significant role in this issue. Besides company

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[14] Francesco Denozza, 'Different Policies for Corporate Creditor Protection' in Horst Eidenmüller and Wolfgang Schön (eds) *The Law and Economics of Creditor Protection. A Transatlantic Perspective* (TMC Asser Press 2008) 413, 416.

[15] Mülbert (n 1), or, from an economics perspective, Viral V. Acharya, Yakov Amihud and Lubomir Litov 'Creditor Rights and Corporate Risk-taking' (2011) 102 Journal of Financial Economics 150.

[16] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Vishny 'Law and Finance' (1998) 106 (6) Journal of Political Economy 1113; or Simeon Djankov, Caralee McLiesh and Andrei Shleifer 'Private Credit in 129 Countries' (2007) 84 (2) Journal of Financial Economics 299.

[17] As a comprehensive compilation of the literature on law and finance to date, see Simon Deakin, Prabirjit Sarkar and Ajit Singh, 'An End to Consensus? The Selective Impact of Corporate Law Reform on Financial Development' (2011) Centre for Business Research, University of Cambridge Working Paper No 423; or Gerhard Schnyder, 'The Law and Finance School: What Concept of Law?' (October 27, 2016). Available at SSRN: https://ssrn.com/abstract=2859950. Last accessed 1 April 2018.

[18] Vikrant Vig, 'Access to Collateral and Corporate Debt Structure: Evidence from a Natural Experiment' (2013) 68 (3) The Journal of Finance 881; or, in the context of US laws, Kenneth M. Ayotte and Edward R. Morrison, 'Creditor Control and Conflict in Chapter 11' (2009) 1 (2) Journal of Legal Analysis 511.

law *per se*, there are other areas of law which might impact creditor protection, such as contract law, tort law, accounting law, tax law, insolvency law or even – in some instances- criminal law.[19]

Company law provides different sources of solutions to these issues. On the one hand, company law allows for the company to protect their creditors' rights for their own interest. It is understood that companies themselves are interested in providing their creditors a sense of security to contract, since it is also in their best interest in order to obtain the best possible deals. They can provide this sense of security by facilitating access to information. This does not only entail a full and recurrent disclosure of financial information (which could be either undertaken voluntarily or by the mandate of state rules) but also minimising the costs of monitoring to their creditors. The most common mechanism used for such purposes is asset partitioning.[20] By undertaking asset partitioning, companies isolate assets or types of business so each of them can handily attributed to those creditors directly related with them. This mechanism has a positive impact on creditor protection because as creditors' claims are linked to a specific pool of assets, their costs of monitoring them decrease substantially and therefore they will be able to offer cheaper credit. Additionally, issues and costs arisen from creditor's lack of specialisation in evaluating and monitoring assets are also minimised.[21] This approach, although it could be arguably positive for providing protection to adjusting creditors, would not provide any to non-adjusting creditors. In addition, given its voluntary nature and subject to the applicable accounting rules, it would merely be a complementary approach.

On the other hand, giving response to the number of challenges that creditor protection entails, company law has also included mandatory rules in order to protect not only adjusting but also non-adjusting creditors, in all stages of the company business (i.e. in

[19] For example, the criminal offence of fraudulent trading in the UK (sections 213 and 246ZA, Insolvency Act 1986).
[20] Armour, Hertig and Kanda (n 4) 110.
[21] Richard Squire, 'The Case for Symmetry in Creditors' Rights' (2009) 118 The Yale L.J. 806.

solvency, nearing insolvency and insolvency). National company laws have for example attempted to limit to address issues of creditor protection before insolvency using a range of mechanisms such as mandatory disclosure, mandatory rules on maintenance of capital, remedies on equitable subordination of debts (US) or rules on wrongful trading (UK).

Taking into account all the abovementioned, the following sections engage in the study of different creditor protection mechanisms -either in place or suggested by the literature- and their ability to provide efficient creditor protection. It is at this point a purely theoretical exercise, which constitutes the foundation for building the hypothesis that will be tested by case studies based in national laws in the following chapters.

2.5 Creditor protection mechanisms besides legal capital

2.5.1 Mandatory disclosure

Mandatory disclosure is an *ex ante* creditor protection mechanism, which addresses issues such as transaction costs, information costs and agency costs. A system embracing this mechanism would entail a mandatory disclosure of a high level of information of company's finances and managerial business decisions. Mandatory disclosure would usually work as a necessary precondition to creditor self-help, given that it provides creditors with sufficient information to enter into contracts stipulating an adequate risk premium, covenants or collateral.[22]

The rationale beneath this mechanism is that, as a result of the principle of limited liability, creditors' safeguards are limited to corporate assets. Therefore, lenders have a legitimate interest in monitoring those assets, given that the risk related to their credits

[22] Mülbert (n 1) 379.

depends entirely –or to a large extent, depending on the proneness/predisposition that a specific legal system has towards lifting the corporate veil- on their value and availability. Sophisticated creditors who have the means and expertise to monitor and evaluate the assets will be able to offer cheaper credit, given that the risks and transaction costs are significantly diminished.[23] This also serves as an incentive for asset partitioning and corporate group restructuring. If the creditor is certain as to which asset or group of assets are available to guarantee the repayment of their credits, they become more specialised, the information costs decrease and ultimately the transaction costs also decrease. Therefore, a creditor bares less risk and debt becomes more affordable.

Nevertheless, an efficient creditor protection system based on mandatory disclosure is very difficult to implement since it is hard to determine the desirable extent of appropriate disclosure. On the one hand, if disclosure is only based on financial statements and level of capitalisation, creditors –and particularly small creditors- will not be sufficiently protected. Since this information is only published on a yearly basis and financial statements only reflect a static picture of the company's finances at a specific time of that year, creditors are not able to rely on such information for on-going trade. Additionally, this mechanism of mandatory disclosure forces small creditors to undertake time consuming and costly procedures to gather not only such information but also the knowledge and skills to analyse it adequately.[24] As a result, small creditors will often consciously refuse to access and utilise such information, as the costs can exceed the risks of default of their credits. For example, a supplier of goods of relatively small value to a large number of companies will not be interested in analysing all annual accounts of all the companies they are supplying goods to because the transaction costs involved (such as request of annual accounts or hiring accounting expert services to interpret them) would exceed the benefit of avoiding credit default.

On the other hand, if mandatory disclosure was based on on-going updated information

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[23] Armour, Hertig and Kanda (n 4).
[24] Mülbert (n 1) 379.

on assets related to each creditors' claims and liquidity available to repay them, creditors would be ideally positioned as to calculate with a high level of precision the risk premium and therefore they would be more efficiently protected. Efficient creditor protection would only be achieved if the information was easily available, periodically updated and following standardised reporting formats so it could be easily interpreted.[25] This way, all the disadvantages and inefficiencies that annual accounts entail for creditor protection would be compensated for. However, such system of mandatory disclosure would entail exorbitant costs, becoming then inefficient from the debtor company perspective.

The key point appears to be, therefore, finding a balance between costs incurred and benefits obtained from all parties involved. Legal systems within the EU have responded to this issue differently. Besides the standardised reporting of annual accounts to which all EU countries are subject to by virtue of the Directive 2013/34/EU[26] -which is in light of the abovementioned arguably insufficient for providing adequate creditor protection - other mechanisms have been implemented to safeguard creditors' rights by mandatory disclosure.

None of the abovementioned legal systems has taken any advantage of these duties to increase the mandatory disclosure protection. One might argue, however, that it would be feasible to require the disclosure of such information on a regular basis. A mere negative statement published regularly by the company's directors in a costless and publicly accessible platform –the company's website, for instance- stating that to the best of their knowledge the company is not in financial distress at a particular date would not only significantly increase creditor protection but also it would provide large benefits to trade in general. Since creditors are offered a higher level of protection, transaction costs decrease dramatically and arguably so would credit risk premiums. From a cost-

[25] Ibid.
[26] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

benefit point of view, this could add a great level of security to creditors at a very small cost. It does not impose any additional costs on the company given that directors are already obliged to undertake such assessment on a regular basis and lending and trade would undoubtedly become more efficient as transaction costs are reduced.

Therefore, even though a system of mandatory disclosure is difficult to implement given the challenge to balancing all the involved party's rights, there is room to enhance the current approach. Mandatory disclosure has been suggested in a theoretical basis for longer than a decade,[27] but it has not been implemented thoroughly. Therefore, even though there is not a system of regular mandatory disclosure of information in place, creditors are benefiting from mandatory disclosure indirectly, i.e. not related to company's finances but directed to their knowledge of no risk of default.

2.5.2 Mandatory Insurance policies

Mandatory insurance as a mechanism to enhance creditor protection has been long suggested as an efficient creditor protection mechanism, namely for protection of tort claims and credit default.[28] It has been argued that involuntary creditors differ significantly from other kinds of creditors, given that they hold no leverage to ensure the satisfaction of their claims. They do not possess any means of pursuing agreements around the existing rule nor monitoring and pricing the risk to which they are exposed.[29]

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[27] See, for example, Paul G. Mahoney 'Mandatory Disclosure as a Solution to Agency Problems' (1995) 62 (3) The University of Chicago Law Review 1047; Hanno Merkt, 'Creditor Protection through Mandatory Disclosure' (2006) 7 (1) EBOR 95; Gerard Hertig, 'Codetermination as a (Partial) Substitute for Mandatory Disclosure' (2006) 7 (1) EBOR 123; or Jeremy Bertomeu and Robert P. Magee, 'Mandatory disclosure and asymmetry in financial reporting' (2015) 59 (2-3) Journal of Accounting and Economics 284.

[28] David W. Leebron, 'Limited Liability, Tort Victims and Creditors' (1991) 91 (7) Columbia Law Review 1565; Frank H. Easterbrook and Daniel R. Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89; or Paolo Santella and Riccardo Turrini, 'Capital Maintenance in the EU: Is the Second Company Law Directive Really That Restrictive?' (2008) 9 (3) EBOR 427.

[29] There are exceptions to this statement. There are certain types of tort victims that might have had contractual relationship with the debtor company, such as customers either defrauded or injured by a product provided by the company in question. For a more detailed assessment on this issue, see Richard Posner, 'The Rights of Creditors of Affiliated Corporations' (1975) 43 The University of Chicago Law

As a result, it has been repeatedly argued that limited liability does not protect their rights, since they do not have the opportunity to bargain for unlimited liability and therefore they have no hope to hold managers, directors or shareholders responsible for those credits except if there are mandatory rules in place.[30] The suitability of unlimited liability towards tort claimants will be further discussed later on in this chapter, but it serves here as an argument supporting mandatory insurance. This argument is based once again in efficiency reasons. If shareholders are not personally liable for corporate torts and the company is not required to provide sufficient insurance, costs are not externalised but instead they displace the cost of insolvency from equity to debt.

Therefore, mandatory insurance for tort liability could be used as a complementary mechanism to legal capital for tort claimants' protection. If insurance is available, it becomes questionable whether shareholders, directors or managers would be the most appropriate risk bearers through unlimited liability. In situations where the number of tort claimants is vast but the tort liability for each is rather small, then shareholders become inefficient risk bearers because their loss (costs) would be tremendous and the gains of tort claimants (benefits) would be insignificant in comparison. These inefficiencies could be overcome by an efficient system of mandatory insurance. Nevertheless, it is difficult to determine the coverage of that mandatory insurance. Although insurance policies are currently more sophisticated, they have historically presented gaps in coverage and serious issues of enforceability, which to a large extent still remain.[31] On the one hand, if regulations at this respect are not specific enough, companies are very unlikely to insure non-economic losses such as pain and suffering, loss of function or death.[32] In that case, if the company is facing a tort claim that it is not covered by the insurance policy, the company –and perhaps even shareholders if such liability is in place- would be ultimately liable for those claims, which would make the

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Review 499, 507.
[30] Leebron (n 28).
[31] Tom Baker and Sean Griffith, Ensuring Corporate Misconduct: How Liability Insurance Undermines Shareholder Litigation (Univerity of Chicago Press 2001) 43.
[32] David Leebron, 'Final Moments: Damages for Pain and Suffering Prior to Death' (1989) 64 NYU Law Review 256.

whole system of mandatory insurance redundant[33] and therefore highly inefficient. On the other hand, if regulations do specify the extent of the coverage and they require full coverage for any sort of damage resulting from a tort claim, then the insurance costs will increase exponentially and it would create a highly inefficient situation, given that such costs would be unbearable for the majority of businesses and particularly to small and medium companies. This would be undeniably counter-productive, since a mechanism aimed at creditor protection would become a systemic barrier to conducting business and therefore acting in detriment of creditor protection.

It must be noted, however, that a system of mandatory insurance could be implemented not only to cover tort claims but also other credits. Risk management is one of the most challenging tasks for creditors.[34] There are numerous financial products available for creditors and companies to avoid credit related risks, being insurance one of the most self-evident ones. Credit insurance is constituted by a compromise from a third party (the insurance provider) that credits will be repaid in case that the company defaults and their obligations cannot be met, in exchange of an insurance premium. Although traditionally credit insurance used to be provided by government agencies, the latest developments of sophisticated financial products such as credit default swaps (CDS) inverted the trend towards private providers, namely banks and insurance companies[35] or international organisations such as the World Bank Multilateral Investment Guarantee Agency in structured finance and assets securitization. A system of credit insurance is efficient *a priori* given that it allows trading and lending at a lower cost and therefore it increases borrowing and lending capacity. Creditors are exempt of information and monitoring costs, which are now held by the insurance companies. This fact, alongside the coverage of the risk, allows creditors to calculate and allocate effectively the cost

[33]Leebron (n 28).
[34] For extensive discussion on the importance and management of credit risk, see for example Robert C. Merton, 'On the Pricing of Corporate Debt: The Risk Structure of Interest Rates' (1974) 29 (2) Papers and Proceedings of the Thirty- Second Annual Meeting of the American Finance Association , The Journal of Finance 449; or Hayne E. Leland, 'Agency Costs, Risk Management, and Capital Structure' (1998) 53 (4) Journal of Finance 1213.
[35] Van Son Lai and Iossuf Soumaré, 'Risk-Based Capital and Credit Insurance Portfolios' (2010) 19 (1) Financial Markets, Institutions and Instruments 21.

the risk they are bearing which will be, arguably, significantly diminished. It also has the benefit to provide a cushion for situations of financial distress and cash flow deficiencies. One of the main issues is, however, that since the providers are private companies themselves and such instruments are traded in the financial market, they are also subject to risk of default.

Although from a theoretical and abstract point of view it appears that mandatory insurance would be a highly efficient mechanism to provide tort claimant protection, there are numerous challenges which require assessment. In a similar fashion as minimum capitalisation requirement, mandatory insurance requirements carry administrative costs associated with determining the extent of the insurance policy. In addition, they might act as an entry barrier for entrepreneurs, since new companies are considered by insurers as bearing higher risks. Therefore, they might be requested to pay higher premiums and in some circumstances, they might even find it difficult to be able to secure insurance in the first place.[36] Additionally, mandatory insurance might have a negative impact by incentivising directors and shareholders to engage in risky activities. Whilst minimum capitalisation decreases this incentive, insurance -by definition- will increase it, particularly if the insurer has limited capability to monitor. Companies will take higher risks because they have nothing to lose. If credit insurance was mandatory, insurance companies must be required by law to insure all enquirers regardless of the risk and at a non-prohibitive cost so no company is left out of the market for this reason. Such scenario is highly inefficient; although it increases exponentially creditor protection, it deters companies to try to balance risk when trying to maximise profits and insurance companies would be deterred to provide sufficient coverage to risk.

A possible alternative to this mandatory insurance regime could be a system of incentives for companies' directors to subscribe insurance policies, based on the assurance of relief of personal liability for company's debts. Such policies are known

[36] Frank H. Easterbrook and Daniel R. Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89, 115.

as Directors and Officers Insurance (DOI), and cover a range of liabilities based on directors' duties and responsibilities.[37] The above mentioned benefits of insurance would be still applicable whereas its drawbacks would be largely minimised. Directors' of solvent companies would be highly motivated to subscribe insurance policies- irrespective of its costs- given that in the eventuality that the company is in financial distress in the foreseeable future, the insurance would provide the required creditor protection and at the same time they would be free of liability. This enhances the system of directors' personal liability, since it switches the focus from a mere punitive sense for directors' misbehaviour to the idea of protection of creditors' rights in the strict sense of having their credits repaid. Since it is not mandatory and subject to directors' liability for breach of their duties, start-ups would not be affected by the provision and opportunistic managerial behaviour is not promoted either. It could be argued, however, that this insurance encourages directors to subscribe it in anticipation of engaging in risky investments. Therefore, insurance companies would be well aware of the risk and establish the premiums accordingly. Consequently, this entails a perverse effect given that incentives would switch; the riskier the activity, the more expensive the premium and therefore the less attractive new ventures will become.

Therefore, it appears that a mandatory insurance regime would impose very large costs to companies, particularly start-ups and companies undertaking particularly risky activities, as an exchange to very little added value to creditor protection, which indicates its low cost-benefit efficiency. Moreover, in a social and political context where it is considered a priority to incentivise entrepreneurship (as it is in the EU, where numerous reforms of company law have been directed that way) this would be a particularly undesirable approach, given that it would undoubtedly jeopardise such endeavour.

2.5.3 Directors' liability

[37] See, for an example of the regime in its non mandatory aspect and its implementation in the UK, Jonathan Mukwiri, 'Directors' and Officers' Insurance in the UK' (2017) 28 (4) EBLR) 547.

Director's liability constitutes a mechanism of creditor protection that numerous legal systems have in place as a complement to a legal capital regime. There are a number of scenarios where different legal systems have implemented rules on directors' liability related in some way to legal capital, particularly within a EU context and therefore under the scope of application of the Capital Directive. In order to render an effective application of the minimum capital and capital maintenance requirements mandated by the Capital Directive, Member States not only should incorporate such rules to their national legal systems but also provide the appropriate mechanisms in order to ensure compliance with the rules.

When companies are unable to repay their debts, or are in a situation of financial distress, the need for creditor protection arises. As it has been stated before, there are two sets of rules where mechanisms aimed at providing such protection apply: *ex ante* and *ex post*. Legal capital rules constitute an *ex ante* mechanism, i.e. intended to prevent the value of the companies' net assets to be either equal or inferior to their liabilities. This is a very important principle to be respected, given that it arguably safeguards all stakeholders involved in a business activity. Therefore, company law is concerned about this issue and when implementing remedies, directors' liability appears to be a back-up mechanism as a way to make them personally responsible for not observing the general principles of company law. Given that in such situations there are many interests at stake, different legal systems have reacted differently to the issue, which shall be discussed in more detail below. It is worth mentioning at this point that this section is not concerned about directors' liability for breach of their general duties intrinsic to their status, but only limited to those situations where they were acting as guardians of their companies' solvency and ultimately as guardians of creditors' rights.

The most representative examples of directors' liabilities aimed to safeguard the companies' solvency -and by extension creditors' rights- are liability for disguised

distributions[38], for serious loss of legal capital[39] delays in filing for insolvency proceedings[40], for fraudulent or wrongful trading (UK), for fraudulent conveyance (US) or, as in member states with a strict interpretation of legal capital rules, for non-compliance with a mandatory recapitalise or liquidate rule.

These liabilities are not required by the Capital Directive but they have been applied widely by member states as a supporting mechanism to the mandatory system of legal capital rules nonetheless. For instance, Spain has in place a duty to directors to assess the company's finances and their risk of default on a quarterly basis. Even though those assessments are not required to be made public or available to companies' creditors, directors are required to take action if they consider the company is in financial distress because it has incurred serious losses which could trigger either the company's dissolution or their voluntary insolvency.[41] Directors have only two months to convene a general meeting to call for dissolution or three months to file for voluntary insolvency if these causes occur. Although assessing the risk of default with a certain degree of accuracy is not an easy task, directors' will be thorough and meticulous because failing to do so would lead to personal, joint and several accountability for company's debts. Prior to 2010, the extent of this liability was extensive to all debts,[42] whereas since then the legislator has considered this duty and liability to be too burdensome on directors and it is now restricted to debts incurred only after the legal cause of dissolution is forthcoming.[43] This system as it is, does not provide any extra protection to creditors

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[38] Holger Fleischer, 'Disguised Distributions and Capital Maintenance in European Company Law' in in Marcus Lutter (ed.) *Legal Capital in Europe* (ECFR, Special Volume, De Gruyter, Berlin, 2006) 94; Paul Davies and Sarah Worthington, *Gower Principles of Modern Company Law* (10th Edn, Sweet and Maxwell 2016) 292.

[39] Susanne Kalss, Nikolaus Adensamer and Janine Oelkers, 'Directors' Duties in the Vicinity of Insolvency – a comparative analysis with reports from Germany, Austria, Belgium, Denmark, England, Finland, France, Italy, the Netherlands, Norway, Spain and Sweden' in Marcus Lutter (ed.) *Legal Capital in Europe* (ECFR, Special Volume, De Gruyter, Berlin, 2006) 112.

[40] Karsten Schmidt, 'Grounds for Insolvency and Liability for Delays in Filing for Insolvency Proceedings' in Marcus Lutter (ed.) *Legal Capital in Europe* (ECFR, Special Volume, De Gruyter, Berlin, 2006) 144.

[41] This issue is addressed in detail in Chapter 3 of this Thesis.

[42] Article 262.5 of the Royal Decree 1564/1989 (in Spanish), Real Decreto Legislativo 1564/1989, de 22 de Diciembre, por el que se aprpuebo el Texto Refundido de la Ley de Sociedades Anónimas or TRLSA).

[43] Article 367 of the Corporate Enterprises Act 2010 (in Spanish, Ley de Sociedades de Capital or LSC).

related to disclosure of information, other than an extra security as far as the risk of default is concerned.

The UK, for example, takes a similar approach, through rules on wrongful and fraudulent trading.[44] Directors are also accountable for trading when they either have or ought to have the knowledge that the company was in financial distress and in potential risk of default.[45] This creates a duty to make regular assessments on the company's liquidity and capacity to repay its debts when they fall due.

These mechanisms act as complementary mechanisms to legal capital rules, by creating incentives to the companies' agents to safeguard solvency or at least take responsibility by means of continuous awareness of their company's finances. Nevertheless, directors are not the only group of companies' agents who could be subject to liability for acting in detriment of creditors' rights. Other stakeholders, such as shareholders, could also be held liable for that reason. However, there is a strong case for also providing strong shareholder protection. This, alongside the principle of limited liability, would minimise their liability towards creditors. There are nonetheless a few proposals at this respect worth examining. To that end, Chapter 5 of this thesis assesses the regulations of directors' liability and their implications in the two member states now subject to study, based on the data drawn from the case studies in place in Chapters 3 and 4 for Spain and the UK respectively.

2.5.4 Shareholder liability

Shareholders' liability as a mechanism of creditor protection has been highly limited by the laws and criticised by the literature given its apparent conflict with limited liability. There are a few exceptions, such as shareholders liability for unlawful distributions and lifting the corporate veil. Despite criticisms, the justification of the desirability of such mechanisms is precisely to introduce an offset instrument to the negative intrinsic effects

[44] Insolvency Act 1986, sections 213 and 214.
[45] This issue will be further developed in Chapter 4 of this Thesis.

of limited liability, (such as opportunistic shareholder behaviour)[46] or, in words of Jennifer Payne, as the "fraud exception to the Salomon principle".[47]

Shareholders' liability for unlawful distributions responds to a mandate of the Capital Directive,[48] and it belongs to the category of capital maintenance rules. It seeks the reimbursement of unlawfully distributed dividends to the company in situations when it has been proven that receiving shareholders knew or ought to have known the unlawfulness of the distributions made to them, in order to protect creditors' appropriation of assets in light of foreseeable insolvency.[49] In theory, this ought to be one of the most important mechanisms of creditor protection related to legal capital, given that dishonest distribution of dividends is considered one of the clearer means of shareholder opportunistic behaviour, which is in turn one of the more plausible reasons to justify the legal capital doctrine.

Lifting – or piercing- the corporate veil[50], in turn, is a mechanism intended as a deterrent for shareholders to engage in activities or take decisions in detriment of creditors maliciously and fully consciously. The doctrine of corporate veil allows courts to impose personal liability on controlling shareholders for the company's debts. The foundations of this possibility lie on the correction of an abuse to the principle of limited liability and corporate personality. It is, however, widely regarded to be exceptional and the need to be kept to a minimum has been repeatedly highlighted. Nevertheless, the specificities of the doctrine of lifting the corporate veil are rarely regulated statutorily and therefore this doctrine largely defined by case law (which is the case for both Spain and the UK).

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[46] Renier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansman, Gerard Hertig, Klaus Hopt, Hideki Kanda and Edward Rock (eds.), *The Anatomy of Corporate Law. A Comparative and Functional Approach* (2nd edn, OUP 2009) 138.
[47] Jennifer Payne, 'Lifting the Corporate Veil: A Reassessment of the Fraud Exception' (1997) 56 (2) Cambridge Law Journal 284.
[48] Directive (Eu) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) Article 57.
[49] Rüdiger Veil, 'Capital Maintenance. The Regime of the Capital Directive Versus Alternative Regimes', in Markus Lutter (ed.) *Legal Capital in Europe* (De Gruyter, ECFR special volume, 2006) 77.
[50] These terms are here used interchangeably, but for discussion on the doctrinal differences between these terms see Chapter 4 Section 4.4.4.3. of this Thesis.

Next chapters will address the details of the doctrine in both legal systems, in context with company law at a national level.

The main issue here is that, historically, courts have been reluctant to make shareholders liable for corporate debts. Even though shareholder liability could constitute an efficient mechanism of creditor protection – alongside directors' liability- it is difficult to enforce. Its limitations not only lie on the need of preservation of limited liability per se, but also they are embedded into the general conception favouring the shareholder-oriented model of corporation.[51] The opinion that 'corporate law should principally strive to increase long-term shareholder value'[52] appears to have grown to a consensus. This is no longer only justified by shareholders' rights but it is increasingly justified on efficiency grounds. It is argued that, whoever the immediate and direct beneficiaries of this approach, it ultimately indirectly benefits everyone by ensuring the maximization of aggregate social wealth and therefore it is the most desirable outcome.[53]

2.5.4.1 Shareholders' liability for unlawful distributions[54]

The Capital Directive establishes limitations to distributions as part of the legal capital rules, more specifically as a means of ensuring compliance with the given levels of capital maintenance.[55] Some authors have strongly stated that in order to shield a declaration of solvency, a system of civil liability must be in place.[56] However, although there is a strong claim for directors' liability for unlawful distributions and indeed some strong legal systems such as the US[57], New Zealand[58] or the UK[59] have implemented it,

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[51] Paddy Ireland, 'Shareholder Primacy and the Distribution of Wealth' (2005) 68 (1) MLR 49.
[52] Henry Hansmann and Reinier Kraakman,'The End of History for Corporate Law' (2001) 89 Georgetown LJ 439.
[53] Ireland (n 51).
[54] Rüdiger Veil, 'Capital Maintenance: The Regime of the Capital Directive versus Alternative Systems' in Marcus Lutter (ed.) *Legal Capital in Europe* (ECFR, Special Volume, De Gruyter, Berlin, 2006) 75.
[55] Directive (Eu) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) Article 57.
[56] Veil (n 46) 84.
[57] Model Business Corporation Act (MBCA), §6.40 and §8.33.
[58] Sec. 52 (2) Companies Act 1993 (NZ).
[59] Companies Act 2006 s.847(2).

such liability is more usually placed upon the company's shareholders, particularly in the context of the EU. EU law requires member states to implement shareholder liability for dividend distributions unlawfully made, pursuant to evidence that those shareholders either had knowledge or could have knowledge of the unlawfulness of the distributions made to them. In particular it establishes limited liability to reimburse the unduly received dividends.[60]

In line with the EU law mandate, member states have introduced this mechanism to their national legal systems. For example, English company law addresses the issue of unlawful distributions establishing that they must be repaid "If at the time of the distribution the member knows or has reasonable grounds for believing that it is so made".[61] This provision, although very similar to what is establish in the EU Directive, could be interpreted differently in the event of the shareholders arguing not having knowledge of the unlawfulness of the distribution. English case law has evolved from a more restrictive to a more lenient interpretation regarding the concept of unlawfully distributed dividends. Before the CA 2006, the rules on capital maintenance in general and shareholder liability for unlawful distributions were stricter. For example, companies' dividends could not be paid out of companies' capital[62], or dividends paid as hidden distributions or "unbalanced exchange transactions"[63] were usually deemed as unfaithful.[64] From the enactment of the CA 2006, however, the conceptualisation of unlawful distributions appears to be more relaxed. The provision regulating the issue has been interpreted that shareholder liability arises when the shareholder in question is aware that such distribution has been paid using funds which are not strictly distributable profits but have other origins, irrespective on their knowledge on the legality of the

[60] Directive (Eu) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) Article 57.
[61] Companies Act 2006, Section 847 (2).
[62] Exchange Banking Co., Flitcroft's case (1882) 21 Ch. D. 519, 533-534.
[63] Fleischer (n 38) 101.
[64] To illustrate this see, for example, *Re Halt Garage (1964) Ltd.* [1982] 3 All ER 1016, 1042; or *Aveling Barford Ltd v. Perion Ltd* (1989) 5 BCC 677, 683.

transaction.[65]

Furthermore, there is still a great level of uncertainty the state of knowledge necessary to render a recipient of unlawful dividends liable to return those dividends.[66] Recent case law[67] has clarified this point, stating the assumption that if at the time of the distributions it is proven that there were no distributable profits according to the company's balance sheet, shareholders either knew or they ought to have known that the distribution was unlawful, and therefore they are subject to liability.

Last, but not least, the CA is not the only source of law where shareholder liability can be based, as repayment can also be claimed at common law.[68] It has been determined that in situations where the 'transferee of the assets' had knowledge of the "facts rendering the disposition ultra vires" they are also liable to reimbursement.[69] This common law claim, although very similar to the one in the CA and equally ambiguous as far as the concept of knowledge is concerned, operates by making the shareholder a constructive trustee of such distribution.[70]

The UK approach appears to be highly restrictive. Beyond the EU framework, other legal systems have implemented limited shareholder liability for unlawfully distributed dividends. For instance, New Zealand laws establish that shareholders are liable for the repayment of unlawfully distributed dividends, except if it can be proven that they acted in good faith.[71] Shareholders can be also exempt of such repayment if they altered their position as a result of their confidence on the distributions' validity, given that in such circumstances it is considered that requiring restitution -either in part or in full- would

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[65] *It's A Wrap (UK) Ltd. v Gula* [2006] 2 B.C.L.C. 634 CA.
[66] Jennifer Payne, 'Recipient Liability for Unlawful Dividends' (2007) 1 Lloyds Maritime and Commercial Law Quarterly 7; or Paul Davies and Sarah Worthington, *Gower Principles of Modern Company Law* (10th Edn, Sweet and Maxwell 2016) 291.
[67] Global Corporate Ltd v Hale [2017] EWHC 2277 (Ch).
[68] CA 2006, section 837 (3)
[69] Rolled Steel Products (Holdings) Ltd. v British Steel Corp (1986) Ch. 246, 303-304.
[70] Davies and Worthington (n 38) 292.
[71] Samarang Developments Ltd, Re: Walker [2004] BCL 940.

be unreasonable.[72] Although such provisions are comparable to the ones contemplated by the UK, they are arguably more permissive. Subjective tests such as good faith and reliance on such distribution are exemptions to the reimbursement, whereas the UK takes a more objective interpretation based on financial information made available to shareholders. What is more, the interpretation by the courts appears to be based on the assumption that shareholders are not only capable to have access to financial information but are also capable of understanding the financial situation of the company at a specific time. The efficiency of such very restrictive approach is questionable. Whilst it provides an increased level of creditor protection, it acts in detriment of shareholders rights particularly minority shareholders and lay shareholders acting merely as investors with limited or no ability to accessing and understanding the company's financial situation.

A system of shareholders' liability for unlawful distributions, however, is desirable since it plays an important role on minimising the impact of shareholders engaging in opportunistic behaviour. It has a great significance as an *ex ante* complementary mechanism to legal capital rules, given that it serves as a mechanism for their enforcement. Limited shareholder liability –perhaps with subjective exceptions such as the ones contemplated in New Zealand - constitutes an efficient addition to legal capital rules, in order to ensure the maintenance of legal capital. What is more, this system could be applied indistinctively to private and public companies. For private companies, where there are no minimum requirements of legal capital, a system relying on solvency tests and mandatory disclosure could be implemented. Public companies, in turn, could also implement that system alongside capital maintenance regimes under the umbrella of the Capital Directive, as a mechanism of enforcement of capital maintenance mandates.

2.5.4.2 Unlimited –pro rata- shareholder personal liability for corporate torts

The idea of introducing an unlimited shareholder personal liability emerged in the early

[72] Christopher I Haynes, 'The Solvency Test: A New Era in Directorial Responsibility' (1996) 8 Auckland U. L. Rev. 125, 135.

1990's in the US, triggered by the fact that for the first time there were prospects that tort claims (such as environmental based claims, hazardous products or carcinogens) could surpass the capacity of most corporations, including very large ones. The underlying reasoning resides on the premise that limited liability encourages indulgent risk taking, given that it exempts shareholders of bearing the real costs of their activities. [73] However, such establishment is justified by the belief that it is the cost of obtaining 'efficient capital financing'. Hansmann and Kraakman authored the first and perhaps most significant study on the subject.[74] They suggested that in the context of tort liability, there are supreme rights which need to be preserved and that there are no presentations of support which can prove that limited liability is superior to unlimited liability in this particular context. They also claim that more prudent initiatives such as expanding directors' liability to corporate torts, mandatory insurance or a more rigorous regulation of veil piercing are ultimately substandard compared to the suggested unlimited liability.[75] They also acknowledge, however, that the proposed presents certain limitations, such as the fact that shareholders could avoid unlimited liability by means of asset diversion, externalisation of risk (through insurance, for example) or personal insolvency. What is more, some have argued that a system based on minimum capitalisation requirements and capital maintenance could provide similar benefits regarding creditor protection.[76] They also acknowledge, however, that the superiority of this rule is very difficult to prove, given that there is no empirical, statistical or case study data that could support it.

Further studies[77] have been conducted and, even though the norm is still in need of proof

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[73] R. Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale L.J. 1879.
[74] Ibid.
[75] Ibid.
[76] Joseph Grundfest, 'The Limited Future of Unlimited Liability: A Capital Markets Perspective' (1992) 102 YALE L.J. 387, 421.
[77] Robert B. Thompson, 'Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise' (1994) 47 (1) Vand. L. Rev. 1; or Nina A. Mendelson, 'A Control-based Approach to Shareholder Liability for Corporate Torts' (2002) 102 (5) Columbia Law Review 1203, who advocates for narrowing down the scope not only to active but to controlling shareholders; or Timothy P. Glynn, 'Beyond Unlimiting Shareholder Liability: Vicarious Tort Liability for Corporate Officers' (2004) 57 (2) Vand. L. Rev. 329.

and polishing for implementation, other arguments have been added. It has been pointed out that limited liability is not necessarily a core principle to be protected at all costs. If shareholders neither bear the risks of their actions nor the actions of their agents, such risks do not vanish; those risks just shift, and they are necessarily borne by someone. In situations where that someone who ultimately bears the risk is a tort claimant, the concept of limited liability becomes at least problematic.[78]That issue constitutes a social cost. Besides, they propose narrowing the scope of unlimited liability for corporate torts to be applicable to active or controlling shareholders, i.e. to those that not merely hold stock but they played an active role in decision making that led –eventually- to the origin of the tort claim, given that tort law would never support liability of passive shareholders.

It remains unclear whether some sort of system involving unlimited shareholder liability would be more efficient than maintaining a stricter approach to limited liability, mainly due to the issue of social costs and moral hazards. Commentators have presented opposing opinions on this issue. Whilst some argued that introducing shareholder liability for corporate torts would be a more efficient approach as it would reduce social costs, others differ on the basis that such statement cannot be generalised as it depends on the source, extent and context of social costs. For example, it has been argued that the extent of the social cost is much lower in private companies than in public companies, given that small companies are less likely to be subject to exorbitant tort claims since their activities and business tend to be more modest and, particularly, the number of potential victims is also considerably smaller.[79] On the other hand, even though the social cost caused by limited liability in large enterprises is potentially bigger, it has been argued that this drawback is compensated – or it can be at least mitigated- by other benefits of limited liability provided by company law, such as directors' duties and liabilities, mandatory disclosure or even insurance. The debate essentially revolves around law and economics concepts, challenging which of the two alternatives presents

[78] Thompson (n 70).
[79] As mentioned above, the commentators are concerned about situations of huge impact such as environmental disasters or public health violations.

higher costs and whether it can be determined that one system is superior to the other efficiency-wise.[80]

One should bear in mind, however, that the core of this discussion is based on US law and therefore from a very rooted culture of claims for damages and liability. In an attempt to extrapolate the conclusions and argumentations given to a EU context, it appears that some of those arguments are not that convincing. It appears that one of the strongest arguments in favour of the system is the avoidance of social costs in a context of mass tort claims, where neither the company itself nor the directors are able to tackle the expense that such claim would entail. It has been also argued that the argument lacks foundation in private companies. Particularly in the context of the EU, where the majority of companies are Small and Medium-sized Businesses (SMB), the argument of avoiding social cost and dealing with moral hazard appears rather weak. At any case, it would be rather difficult to support the implementation of a system that breaks the core principle of limited liability while providing such little benefit, given the availability of numerous alternative mechanisms which can tackle the same issue. In law and economics terms, it seems arduous to implement a system with is most likely inefficient, given that its costs (sacrificing limited liability and all it entails) do not compensate the few and hardly relevant –if any- benefits provided.

2.5.5 Mandatory 'recapitalise or liquidate' rule

The implementation of a mandatory recapitalise or liquidate rule (henceforth ROL) has been highly controversial. Particularly so within the European Union, where there are still countries like Spain[81], France, Italy or Sweden, where their legal systems contain such rule in belief that it is an efficient method of creditor protection, and others holding a looser approach to capital requirements.[82]

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[80] Glynn (n 70) 376.
[81] Further detailed explanation on the Spanish legal system approach on legal capital and creditor protection is undertaken in Chapter 3.
[82] Armour (n 2) 371.

A mandatory rule of recapitalise or liquidate imposes an obligation to directors to ensure the compliance with a minimum capital maintenance at all times during a company's life. This requirement constitutes a step beyond what is required by the Capital Directive[83], which dictates an obligation to the general meeting to take into consideration whether any measures must be taken, such as winding up. Nevertheless, the literal interpretation of the provision does not imply that any of such measures are mandatory.[84]

Legal systems where a ROL rule is in place, however, require that in cases where a company's net assets value decreases under a given minimum threshold, the company *must* take some measures. Such measures usually require that shareholders and directors take the necessary steps to either recapitalise the company to recover the abovementioned minimum level of capitalisation, reorganising to a type of company where the capital requirements do not exceed the available net assets, or either dissolve or/and liquidate the company.[85] Moreover, if none of such actions is taken, recapitalise or liquidate rules usually impose directors' personal liability.[86]

For example, in Italy, a company experiencing losses in excess of the amount of the statutory minimum capital, when failing to recapitalise or converting into a different kind of company with lesser capital requirements, is under the duty to dissolve.[87] Other legal systems like France[88], Sweden[89] or Spain[90], have in place a more rigorous/severe version of the ROL rule, which has been referred to as "Super-ROL"[91]. This version of

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[83] Article 17 Capital Directive
[84] Massimo Miola. 'Legal Capital and Limited Liability Companies: The European Perspective' (2005) 4 ECFR 413, 427-8, note 72.
[85] Luca Enriques and Jonathan Macey, 'Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules' (2001) 86 Cornell Law Review 1165, 1184.; Miola (n77); Mülbert (n 1) 387.
[86] This issue will be addressed in the following chapters in thorough detail in relation to UK and Spain. For a non-country specific approach, see for example Luca Enriques and Jonathan Macey (n 78) 1184.
[87] Italian *Codice Civile*, approved by Royal Decree of 16 March 1942, n.262, art.2447.
[88] French *Code de Commerce*, art. L. 225-248.
[89] Armour (n 2) 371.
[90] See Chapter 4.
[91] Lorenzo Stanghellini, 'Directors' Duties and the Optimal Timing of Insolvency. A Reassessment of the "Recapitalize or Liquidate" Rule' in P. Benazzo, M. Cera, S. Patriarca *Il Diritto Delle Società Oggi. Innovazioni e Persistenze* (UTET Giuridica, Torino, 1st edn, 2011) 753, 758.

the rule only requires that the value of the legal capital -usually limited to public companies- to have decreased under half of the companies' subscribed share capital. Therefore, such ROL rules are triggered notwithstanding the residual value of the company's net assets, which can lead to perverse effects.[92] Although these systems establish the same measures to be taken and similar consequences, the main difference resides in what triggers the obligation to take such measures. The trigger is not related to the statutory minimum legal capital but an aggravated situation, i.e. when assets fall below half of the company's share capital in the books.

More specifically, French laws require that if "a company's share capital falls below half of its subscibed capital, the board (…) must call an extraordinary general meeting within four months of the approval of the accounts revealing the said loss to decide whether the company should be prematurely dissolved. If no decision is taken to wind up the company (…) the company must reduce its capital to a sum at least equal to that of any losses not charged to reserves unless the equity capital has been restored to a figure at least equivalent to a half the capital".[93] Swedish and Spanish laws similarly require a loss of 50 per cent of share capital for the general meeting to take the required measures to recapitalise or liquidate.

The functionality regarding creditor protection and efficiency of the implementation of this rule are highly debatable. These rules are indeed built upon the concept of a statutory minimum capital and its maintenance – idea, as we have repeatedly seen, debatable itself- but not necessarily linked to it. For example, in strict compliance with the Capital Directive, Germany has a system of minimum statutory capital and capital maintenance whereas they do not have any form of ROL in place.[94]

Nevertheless, ROL mechanisms based on proportionality of subscribed capital or in compliance of solvency tests, could provide a meaningful justification to the very

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[92] Ibid 758.
[93] French *Code de Commerce*, art. L. 225-248.
[94] Ibid.

existence of a system of legal capital rules. The vast majority of criticisms associated to a mandatory legal capital are overthrown if ROL is in place. For example, it has been suggested that the fact that the requirement of minimum capitalisation is a fixed amount undermines its function as a creditor protection mechanism, given that in medium and big companies –and most importantly public companies under the scope of the Capital Directive- such amount would render insignificant. By implementing ROL based on proportionality of the subscribed capital, such criticism becomes irrelevant.[95] If directors are required to liquidate the company when the value of net assets is lower than a certain percentage of the subscribed capital, creditors are protected regardless of the total amount invested as capital. In addition, ROL provides an efficient mechanism to enforce the maintenance of capital, and it also serves as an incentive for directors to liquidate or file for voluntary insolvency in earlier stages to avoid liability. As a result, the company's assets always exceed the liabilities and creditors have the benefit of higher levels of protection.

Therefore, it could be argued that the implementation of ROL increases the efficiency of legal capital rules. It appears undeniable, however, that the efficiency of this system is very closely related to the chosen method to trigger the rule. Critics of the system argue that the barometer for the assessment of ROL should ignore its impact and application on private companies, given that they have much more difficulties to access external financial assistance[96] and therefore ROL would be too burdensome. However, their difficulties to reach external financing are only limited to equity markets and public bond financing, since they have available all other sorts of external financing[97]. Consequently, ROL being triggered in proportionality to the subscribed –as opposed to legal minimum- capital, would still be meaningful since it ensures creditors that a certain level of capital is maintained and therefore assets exceed liabilities.

In order for this to be true, however, ROL must depart from financial statements based

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[95] For details on adequate capitalisation, see Chapter 1 section 1.4.3.1 and Chapter 5 section 5.2.2.
[96] Enriques and Macey (n 78).
[97] Stanghellini (n 84) 760.

on book or historical value of assets and liabilities. Book value does not necessarily reflect the real or actual value of assets, given that it is static and it does not take into account market variations. Nevertheless, some improvements have been made at EU level at this respect. The Fourth Council Directive[98] establishes a number of accounting alternatives and principles, which serve to different objectives besides creditor protection. If IFRS are applicable both realised and unrealised profits are distributable, and therefore creditors rights might be in jeopardy. Additionally, this Directive promotes the accounting principle of prudence, which encourages a conservative approach to the value of assets, liabilities and revenues. Such approach could act in detriment of creditors, since it might reflect an inaccurate picture of the financial reality through undervalued assets and overvalued liabilities. The Accounting Directive[99] has attempted to solve this issue by recommending the adoption of the principle of true and fair view as opposed as to the principle of prudence. This new approach provides an improved framework where recorded values are most likely to reflect the financial reality.

Efficient ROL would be triggered as a result of the company failing not only a balance sheet test (which will typically account assets at book value) but also a solvency test. This way, the intended creditor protection is achieved without conflicting with other stakeholders' interests. Different proposals for a system based on a solvency test are analysed below in detail.

2.5.6 Mandatory Dotation of a Legal Reserve

This ex ante mechanism can be used as either as an alternative or as a complement to the minimum statutory capital and capital maintenance rules. This rule has been implemented in Spain as an accountancy rule, with the purpose of preventing insolvency and, as a result, providing protection to creditors.[100] The legal reserve is a fund that every

[98] Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies.
[99] Accounting Directive 2013/34/EU
[100] Article 274 LSC.

company has to set up in order to increase the chances to prevent a situation of insolvency. In other words, it is a fund dedicated to the compensation of losses. Given its imperative nature, it has to be reflected in the annual accounts and financial statements and it has to be satisfied prior to dividend distribution.

In the case of Spain, for example, the Enterprise Act obliges all companies to constitute this legal reserve by setting aside the equivalent to 10% of the year's profits, and continue doing so every year until the total amount set aside on that legal reserve reaches the 20% of their legal capital. Until the value of such reserve does not reach 20%, such reserve can only be used for compensation of losses provided that there are not other available sufficient reserves which could cover the loss. Even though the benefits of such mandatory rule for creditor protection are already apparent, the law also allows for an agreement in the by-laws to voluntarily increase that percentage.

Even though this rule does not strictly belong to legal capital rules, it is a very important addition that could support legal capital rules in providing effective creditor protection ex ante. From a cost benefit perspective, such rules would make the doctrine of legal capital rules more efficient given that the benefits outweigh its costs. Companies going concern would voluntarily constitute reserves in order to provide a cushion for possible unexpected contingencies that could not be covered by profits (namely because they are too costly and this would be insufficient). However, companies in financial difficulties would find it challenging to do so voluntarily. Even if a company is still solvent (in the sense of balance sheet solvency), the amount of profits made might not be sufficient for ensuring that all debts are repaid when they fall due. If that occurs, that company is in a situation of either actual or imminent cash flow insolvency. In such cases, in absence of mandatory rules that establish the order of priorities for the destination of available funds, directors and managers would find it challenging to set aside a percentage of those profits, given that it would compromise their compliance with short term obligations. Therefore, from a theoretical perspective, one could argue that the inclusion of this rule in a legal system as a complement to legal capital rules would be desirable for providing more efficient creditor protection.

2.5.7 System based on a solvency test

A system based on a solvency test is undoubtedly one the most common alternatives proposed by the law and economics literature to minimum capital and capital maintenance regime.[101] This idea was introduced at a EU level in 2002, by the High Level Group of Company Law Experts report[102], on a modern regulatory framework for company law in Europe. The High Level Group was concerned about verifying whether the system of minimum capital and capital maintenance established by the Capital Directive could guarantee an efficient safeguard of creditors' rights. They were concerned about dividend distributions and the impact the current regulation had on efficient creditor protection. They found that under mandatory minimum capital and maintenance regime, 'it is possible that a solvent company is unable to make distributions, or, conversely, that an insolvent company is able to make distributions'.[103] This is an issue because those distributions are based on profits and distributable reserves, typically calculated based on the historical value of assets and consequently not reflecting accurately the company's financial situation. As a means to overcome that issue, they made a proposal based on a two-part solvency test: a balance sheet test and a liquidity test (also known as current assets/current liabilities test).[104] The effectiveness of this test for creditor protection purposes is based on a directors' duty to issue a solvency certificate, by explicitly confirming that the dividend distribution in question satisfies the solvency test. The High Level Group also proposes that directors (including shadow directors) must be held liable for the accuracy of the solvency test and the certificate, and Member States should promulgate adequate sanctions.

Similarly, in 2006 the Rickford Report[105] suggested a 'two-part solvency test', focusing

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[101] Enriques and Macey (n 78); Jonathan Rickford et al., 'Reforming Capital: Report of the Interdisciplinary Group on Capital Maintenance' (2004) 15 EBOR 13; or

[102] High Level Group of Company Law Experts (2002). Report of the High Level Group of Company Law Experts on a modern Regulatory Framework for Company Law in Europe. Available online at http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf.

[103] Ibid 87.

[104] Ibid 92.

[105] Rickford et al. (n 94).

on the strict regulation of distributions to ensure that the company's solvency remains steady through time. The suggested test takes a step further and requires two demands on the managements' opinion. First, it requires an expression of opinion on whether the company is able to meet its liabilities, both immediately after distributing dividends –or any other action that entails a diminution of capital- and in the foreseeable future.[106] Secondly, it demands the managers to ascertain whether in a situation of going concern –either imminent or foreseeably- the company is still able to repay its debts as they will fall due in the subsequent accounting year. As a result, directors are expected to issue a solvency certificate, which asserts that the company has successfully passed the two-part solvency test.

This opinion must be given in compliance with the rules of what entails the duty of care, skill and diligence under English law. Specifically, it requires that directors should emit such opinion having made 'enquiry into the affairs and prospects of the company which is proper for the purpose'. However, the proposal also acknowledges that such certificate cannot be expected to guarantee the solvency of the company, and it must be merely understood as a statement of grounded opinion. Additionally, in order to guarantee the effectiveness of this rule, they propose to complement the mandate with the implementation of sanctions. Such sanctions include provisions on directors' liability -either civil or criminal -for not complying with the abovementioned rules or shareholders' liability to refund unlawfully distributed dividends.

Opposing the two previous proposals, which advocate for the suppression of the mandatory balance sheet test and its substitution by solvency test, there are other proposals that present a more compromising approach by accepting the mandatory balance sheet test but introducing some modifications or additions that are able to complement the current system and enhancing this way the level of protection for creditors *ex ante*.

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[106] Ibid.

The Lutter proposal[107] proposes a system based on the combination of an enhanced balance sheet (net assets) test with a solvency test.[108] Lutter is concerned about the challenges that financial statements present due to their compliance with accounting standards. He does not argue for an abolition of a balance sheet test, but for a refinement of it instead. The proposal is based on the problem that such test presents which is that according to IFRS, both realised and unrealised profits are distributable. This is in his opinion inadequate for dividend distribution, and proposes an additional solvency test to tackle the problem. Therefore, instead of complying with IFRS principles of realisation and imparity, distributions should comply in addition with a solvency test for the following one or two years as a maximum. However, the proposal acknowledges that passing the solvency test must not be a requirement for dividend distribution because it could have a perverse effect: directors' and shareholders could dispose of the fixed share capital, which is undesirable and should certainly be avoided. Therefore, since the solvency test has to have either a discretionary nature or having its application limited to certain circumstances, they acknowledge the limitations of the proposal of this alternative mechanism since its justification lies on creditor protection. On the one hand, it facilitates the diminution of costs for the companies and prevents the distribution of unlawful dividends. Although it is not perfect, it can be an interesting solution to certain problems without creating major costs for companies.

Another proposal that accepts the maintenance of the balance sheet test with a switch based on solvency test is the Dutch proposal.[109] This proposal is based on the Delaware system, and it rejects the current approach of the Capital Directive[110] on the application

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[107] Marcus Lutter ' Legal Capital of Public Companies in Europe. Exectutive Summary of Considerations by the Expert Group on "Legal Capital Marcus Lutter (ed) 'Legal Capital in Europe' Special Volume 1 ECFR (De Gruyter 2006) 1,11.

[108] The proposal distinguishes between GAAP and IFRS accounting methods. However, we focus only on the part of the proposal revolving around IFRS, since this is the standard accounting method in most Member States. This is a result of the implementation of Regulation (EC) No 1606/2002 not only requires that all listed companies must prepare their consolidated financial statements according to IFRS, but also offers the possibility to member states to opt to extend the IFRS to all annual financial statements and/or non-listed companies.

[109] H Boschma, M. Lennarts and J. Schutte-Veenstra 'Alternative Systems for Capital Protection, Institute for Company Law, Groningen 2005, 6.

[110] Article 15(1)(a)

of an enhanced net asset test. Instead, it suggests a simple balance sheet test where the criterion is whether, after making a distribution, the assets of the company are at least equal to its debts and provisions. Additionally, directors should prepare a detailed estimated liquidity test, taking into consideration both hard figures and forecasts. This undoubtedly entails a high level of uncertainty; therefore a very specific system has to be in place in order to guarantee the maximum level of clarity and homogeneity.

The main argument of this proposal is that the main creditor interests that are to be protected are based on information, providing the security or high probability that the company will be able to repay its debts when they fall due in the near future. They suggest that in order to safeguard these rights, financial statements - namely the balance sheet test and its complementary solvency test - must be published more often, for example every six months instead of once a year. The aim of the liquidity test is to complement the static financial picture based in past data by introducing future estimations of solvency, whereas the financial test also complements the liquidity test in the sense that it reflects other financial information also important but not only related to cash flows.

Finally, a last proposal advocating for the maintenance of the balance sheet test is the one introduced by the European Federation of Accountants (FEE).[111] In a similar fashion as the Dutch proposal, the FEE advocate for a combination of a balance sheet test and a liquidity test. Their proposal agrees with the above mentioned in the sense that they highlight the importance of all types of financial information, present and future. However, their proposal differs from the above mentioned in the sense that they believe that a simple liquidity test based on a year forecast does not provide sufficient guarantees for creditors, given that long term liabilities and its effects are not reflected. For example, a final payment of a long-term loan due in three years' time wouldn't be reflected, but it should be taken into account at the time of present dividend distributions. What they

[111] FEE Discussion paper on Alternatives to Capital Maintenance Regimes, September 2007, available at https://www.accountancyeurope.eu/wp-content/uploads/DP_Alternatives_to_Capital_Maintenance_Regimes_0709289200741923.pdf

suggest is a two-part solvency test, being the first part a 'snapshot' test and the second part a 'forward-looking' test. If the dividend distribution does not pass the snapshot test, then the forward-looking test would not be necessary. They also suggest that these tests are not only based on prediction of future cash flow, but also reflecting other solvency indicators such as receivables and obligations that led to receipts and payments over a certain period of time or short-term assets and liabilities, such as inventories.

These proposals can be grouped into two main categories: those advocating for a solvency test replacing the balance sheet test and those advocating for the coexistence of both. If consistently with the rest of this thesis a law and economics approach is taken, the latter seems to be the one to prefer, since a sole solvency test would 'pave the way for managements to produce an (overly) optimistic solvency prognosis'[112] and that would also deter the main purpose of the rule of these tests to solve the shareholder – creditor agency problems, particularly and most importantly the so called 'cash and run'.[113]

All these proposals based on the introduction of a solvency test, if implemented, could constitute very efficient mechanisms of creditor protection. Although this appears to be a widely accepted approach and -to my knowledge- free of criticism, it has yet to be implemented in any of the EU member states. It has been argued that if one parts from the premise that accounting principles are primarily aimed to serve as an information mechanism, a solvency test must be mandatory.[114] It has been made clear that the Capital Directive allows for solvency tests but it leaves the decision to the regulation and implementation to the Member States[115] but they have chosen not to implement this

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[112] André Mena Hüsgen, 'Solvency Tests – The Right Path for the European Union?' (2015) Governance Lab Working Paper 02/2015, 3. Available online at <http://www.governancelab.org/media/document/46/52/baa79a2abade3bbad2720238bd75.pdf> accessed 11 May 2018.

[113] Christoph Kuhner, "The Future of Creditor Protection through Capital Maintenance Rules in European Company Law – An Economic Perspective" in Marcus Lutter (ed) *Legal Capital In Europe* (ECFR Special Volume 1, 2006) 349.

[114] Josef Arminger, 'Solvency Tests - An Alternative to the Rules for Capital Maintenance within the Balance Sheet in the European Union' (2013) 2 (1) ACRN Journal of Finance and Risk Perspectives 1.

[115] European Commission, Results of the external study on the feasibility of an alternative to the Capital

mechanism. Given that all these proposals are longer than a decade old and ever since the experts' opinion has been positive, it remains unclear why these measures have not yet been implemented into national laws.

2.5.8 Insolvency laws

As discussed in Chapter 1[116], one of the most important situations where creditors are in need of protection is when the debtor company is insolvent. At this point, by definition, there is no capital left. It is then where insolvency laws apply, supplying mechanisms which aim to ensure the most positive outcome for all involved in the business dealings by attempting to resolve -or, at least, minimise - the effects of the situation of insolvency and maximise the creditors' prospect of having their credits repaid.

It appears indisputable that insolvency laws constitute an essential element of creditor protection. These mechanisms are in general aimed at not only maximising the returns to creditors, but also identifying the causes of failure and, if appropriate, those responsible for it.[117]

As a result, this indicates that insolvency laws are two-fold. On the one hand, insolvency laws include mechanisms aimed at preserving or enhancing the debtor company's equity and liquidity. Even though the instruments utilised to pursue those aims are very diverse and vary largely amongst legal systems[118], they are based on the idea that legal intervention is imperative for the purpose of minimising loss of funds and therefore maximising creditors' prospects to recover what is owed to them. Examples of such

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Maintenance Regime of the Second Company Law Directive and the impact of the adoption of IFRS on profit distribution. Available online at <http://ec.europa.eu/internal_market/company/docs/capital/feasbility/markt-position_en.pdf>. Last accessed on 11 May 2018.

[116] See Chapter 1.2.2.1

[117] Roy Goode, *Principles of Corporate Insolvency Law, Student Edition* (4th edn, Sweet and Maxwell 2011) 58.

[118] These body of mechanisms is examined in detail in Chapters 3 and 4 for Spain and the UK, respectively. Detailed assessment of these beyond these two legal systems is beyond the scope of this thesis.

mechanisms include claw-backs (undoing transactions in order to recover unduly alienated assets or funds) or credit classification (establishing a fair and equitable system for the ranking of claims and the distribution of assets among creditors). On the other hand, insolvency laws include mechanisms seeking to unravel the underlying reason of the insolvency and responsible actors. These mechanisms -and their remedies and enforcement- also vary largely amongst legal systems, but they concur in the idea that if either fraud or negligence can be proven (or even in some instances presumed) it is necessary to held responsible actors liable in order to restore the company's financial health. For instance, mechanisms such as tortious insolvency in Spain or fraudulent and wrongful trading in the UK fall within this category.

As far as applicability is concerned, insolvency laws provide different protection to creditors. This issue resides in the concept of insolvency itself, given that different insolvency proceedings will be triggered by different events. In Spain, insolvency law pursues creditor protection through a sole formal insolvency proceeding, the so-called 'concurso de acreedores'. It is widely accepted[119] that only real or imminent cash-flow insolvency legally triggers this proceeding.[120] In contrast, if the company is under balance sheet insolvency, other pre-insolvency company laws apply. The underlying reasoning for such approach is that the Spanish legislator considers balance sheet insolvency an issue of lack of capitalisation, not an issue of ongoing business. As a result, shareholders and directors are directly made liable for undercapitalisation through mandatory dissolution if failing to recapitalise.[121] In the UK, in contrast, the outlook is fundamentally different. Both cash flow and balance sheet insolvencies trigger insolvency proceedings, and therefore issues that are otherwise covered by company

[119] For discussion on the differences between economic and legal insolvency see, for example, Ana Belén Campuzano and María Luisa Sánchez *Paredes Prevención y Gestión de la Insolvencia* (UOC 2016) 113 - 128.

[120] Article 2.3 Ley 22/2003, de 9 de julio, Concursal (LC) states that 'If the petition for a declaration opening the insolvency proceedings is submitted by a debtor, he must justify his indebtedness and state of insolvency, which may be current or imminent. A debtor who foresees he may not duly and punctually fulfil his obligations is in a state of imminent insolvency'

[121] For more details, see Chapter 2 section 5.5 for functioning and rationale of the recapitalise or liquidate rule, or Chapter 3 section 4.4.1.1.

laws are in this case included in insolvency law. This issue will be studied later in this thesis in detail, but this will condition the difference in legal responses that are provided both pre and post insolvency.

These rules are an effective mechanism of creditor protection, given that not only apply when creditors are most in need of such protection but they do so in a very tangible and effective manner. However, the concern of this thesis is that ex post mechanisms come in to play too late. Creditors are already not only at risk but already put in a situation where that risk becomes tangible and therefore they are in immediate need of protection not to protect their rights but to minimise the damage inflicted by the situation of insolvency.

However, this statement is not true for every mechanism of creditor protection provided by insolvency laws. Even though insolvency appears to be by definition an ex post protection tool, there are specific mechanisms that cannot be secluded to that category. Both wrongful trading and tortious insolvency, for instance, do not function as ex post mechanisms per se. These are more appropriately defined as hybrid mechanisms[122] given that even though they are triggered *ex post facto* (after the declaration of insolvency) their effects are not only prospective but also retrospective, given that direct liability will have not only corrective effects but also deterrent effects.

2.5.9 Complete de-regulation

Another alternative to the current legal capital system could entail a complete de-regulation of minimum capital and capital maintenance rules. This way, the undesirable effects of the rule, such as the excessive burden on start-ups or limits on dividend distributions would be eliminated. Additionally, for those supporting the idea that the

[122] See Chapter 2 subsection 3 above 'Creditor Protection ex ante and ex post' for further details.

current legal capital regime does not provide any meaningful creditor protection whilst creating a considerable amount of costs, this idea might sound appealing. In absence of legal capital mandatory rules, market forces would provide an adequate substitution through bargaining and financial covenants would cover creditor protection for debt financing. Adjusting creditors, secured creditors and financial institutions would directly benefit from this substitution to the standardised regulatory approach to capital maintenance. This would decrease transaction costs between these groups and the debtor company, given that the contractual agreements are less risky –particularly those supported by security- and therefore interests can be minimised. Additionally, this approach would allow firms to have freedom of choice of financing (equity, bonds or debt finance) according to the most efficient distribution for their particular needs.[123]

More vulnerable groups such as tort claimants and other non-secured creditors are not so intuitively benefited from de- regulation. Although it has been argued that in some instances they can free ride on rights negotiated by adjusting creditors[124], this would seldom be the case. However, this could be argued to be more costly, since instead of a mandatory standard set of rules agreements need to be dealt with each individual creditor. Financial assistance and capital maintenance rules may operate as merely 'default' loan covenants, but the problem is that they come in only one form and are mandatory in application.[125] A possible solution to this issue would be the extension to the law of wrongful trading (based in the English model) or the law of directors' liability as a EU Directive as a substitute to the capital maintenance rules.

In case of de-regulation of mandatory legal capital rules, other mandatory mechanisms for creditor protection must be in place. A feasible and efficient approach would

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[123] Patrick Bolton and Xavier Freixas, 'Equity, Bonds, and Bank Debt, Capital Structure and Financial Market Equilibrium under Asymmetric Information' (2000) 108 (2) Journal of Political Economy 324.
[124] Reinier H. Kraakman, John Armour & Henry Hansmann, 'Agency Problems, Legal Strategies, and Enforcement' in *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Reinier H. Kraakman et al. eds. Oxford Univ. Press 2d ed. 2009) and Henry Hansmann & Reinier H. Kraakman, 'The Uneasy Case for Limiting Shareholder Liability in Tort' (1991) 100 Yale L.J. 1879.
[125] Armour (n 2) 375; or I Ayres and R. Gertner, 'Filling Gaps in Incomplete Contracts: an Economic Theory of Default Rules' (1989) 99 Yale L.J. 87.

combine a number of the abovementioned alternative mechanisms, namely a system based on solvency test combined with mandatory disclosure and insurance mechanisms and strengthened by agents –namely directors- liabilities as means of effective enforcement.

2.6 Conclusion

In light of the criticisms of the suitability of legal capital rules for creditor protection, this chapter addressed the issue of creditor protection in general using the lens of law and economics theory, in order to unravel the feasibility of application of different mechanisms to either complement or substitute the highly criticised current system. Creditor protection is a very complex issue namely given the heterogeneity of the pool of creditors, but nonetheless it is desirable that creditor protection is guaranteed -at least to some extent- particularly for those creditors who are not able to adjust and therefore are more vulnerable to the debtor's company insolvency. Another challenge of creditor protection revolves around the time where such protective mechanisms must be put in place. Insolvency is clearly the pivotal point, but a case can be made for the implementation of protective mechanisms aimed to prevent such situation. Legal capital rules and mandatory disclosure are the only means available to provide creditor protection through the safeguard of the company's solvency, namely by restricting returns to shareholders at the expense of creditors interests.

Pursuant to a cost-benefit approach, there are a number of creditor protection mechanisms which could act either as a complementary mechanism or as alternatives to the current legal capital regime. On the one hand, as an *ex ante* mechanism, it has been advocated that efficient mandatory disclosure of financial statements on a regular basis – in shorter periods than the standard accounting year, as it is required in certain jurisdictions for directors' liability purposes and as a basis for the obligation to file for insolvency- would contribute substantially to creditor protection, particularly for those most disadvantaged creditors with restricted access to information. On the other hand,

as *ex post* mechanisms, it has been argued that there are a number of options that the member states legislators could implement in order to provide that desirable efficient creditor protection. A system based on mandatory solvency tests –either alongside or in substitution of the legal capital regime- preferably based on future cash flows and current value of assets would undoubtedly provide a more efficient creditor protection, as long as it is supported by also efficient mechanisms of enforcement. Such mechanisms are either mandatory insurance for protection of unsecured creditors in the event of insolvency or directors' and/or shareholders liability for acting in detriment of creditors, namely in the vicinity of insolvency.

All those mechanisms could be implemented either as complementary or alternative means to the legal capital regime. It must be noted, however, that this appears to be mere theory. Although the framework of the Capital Directive allows member states to adopt these measures, the reality is that in practice the approaches taken by member states differ greatly. The following chapters will address this issue by undertaking case studies in Spain and UK, attempting to unravel their approach to creditor protection by examining the rules incorporated in their legal system as well as litigation trends.

Chapter 3 Creditor Protection and Legal Capital Rules. The Case of Spain

3.1 Introduction

It has been argued that legal capital rules do not serve their purpose of protecting corporate creditors.[1] Besides the problems that the system of mandatory legal capital has by itself, which have been repeatedly raised by the literature, there is a crucial issue which has been largely overlooked. Legal capital rules are built to provide creditor protection by means of granting a minimum amount of equity. These are not accessible funds, therefore they will not serve as a direct guarantee of repayment. Instead, they act more as a cushion which would soften the effects of loss of profit. This way, shareholders alleviate creditors from a significant amount of risk for issues such as losses in everyday business or asset depreciation. However, these rules -which have undoubtedly been put in place with very good intentions- become meaningless if there is a lack of legal mechanisms to ensure these rules are effectively applied. It is therefore not only the existence of legal capital rules – in the traditional sense of the term- which would provide the so much longed-for creditor protection[2] but also the enforcement mechanisms in place.

It is then apparent that the concept of legal capital rules has historically been interpreted in a restrictive manner. This trend is most likely generated by the concepts introduced by the Capital Directive, which limits the concept of 'legal capital rules' to those related

[1] Addressed in detail in Chapters 1 and 2.
[2] Discussion whether creditor protection is necessary or at least desirable to be found in Chapter 1.

to minimum capital and capital maintenance. The main issue with such understanding of the rules is, however, that it does not include mechanisms of enforcement. This, however, does not mean that such mechanisms are not in place. Different legal systems have addressed this issue very differently.[3] The Spanish legal system in particular does offer a wide range of rules, which are related to legal capital that can be used to enforce those related to minimum capital and capital maintenance.

The aim of this chapter is to analyse the suitability of capital rules -in its broadest sense- for creditor protection in Spain. As indicated above, this aim is built on the premise that legal capital rules must not be solely understood as minimum capital and capital maintenance, but also as a wider concept including its enforcement mechanisms. In order to devise such enforcement mechanisms, this chapter will include a case study on Spanish litigation trends regarding creditor protection. It will start from a pool of cases, where creditors litigated seeking for protection, then the data obtained will be used to identify any links between those enforcement mechanisms and legal capital rules, in order to analyse each of them and their overall effectiveness over creditor protection.

In order to undertake such a task, this chapter will be divided in five sections. This, as an introductory section, exposes the rationale and structure of this chapter. The second section will examine the Spanish legal capital rules in their traditional sense, i.e. minimum capital and capital maintenance rules. It will analyse the origins and evolution of these rules, the transposition of the Capital Directive, as well as its current regulation. The third section will elaborate on the methods used in this chapter in order to fulfil its aim, paying special attention to the construction of the case study. The fourth section will address the case study results, aiming to identify enforcement mechanisms related to legal capital. This section will in turn be divided in five subsections, approaching separately claims related to civil matters, bills of exchange and cheques, insolvency proceedings, company law mechanisms – with special reference to directors' liabilities and, more specifically, directors' liability for corporate debts- and commercial contracts.

[3] How this is addressed in England and Wales will be addressed in Chapter 4.

Finally, a fifth concluding section will summarise the most relevant findings and will assess their relationship to legal capital. In summary, it will make an overall assessment of the rules in place in the Spanish legal system and their suitability to provide creditor protection.

3.2 Legal Capital rules In Spain

3.2.1 Origin, evolution and current situation

The first codification of legal capital rules in Spain dates back to 1829, by the first Commercial Code (CC 1929). Since then, many amendments were made, but the most relevant ones were done by the Code of Commerce 1885 and the Company law Act of 1951[4], when modern concepts were introduced. For instance, the latter adopted as a fundamental principle the 'determination and unity of legal capital'.[5] This way, legal capital should be precisely established in the company's by-laws[6], fully subscribed[7] and the emission of shares under par value is prohibited[8]. The most noteworthy novelties, however, were related to the doctrine of capital maintenance. An agreement of reduction of capital which entitled any restitution to shareholders would be rendered ineffective if a period of three months had not been given to creditors to exercise their right to oppose to such reduction. Creditors' could exercise this right if their debts were not repaid or the company did not provide sufficient securities to guarantee such repayment. Moreover, it stipulated limitations as regards as dividend distribution and loss of capital under the minimum threshold as a cause of dissolution. These rules constituted an early expression of later developments which will be implemented as a result of the transposition of the Capital Directive. The most important difference was the inadequacy of the Spanish legislation at the time to hold specific instruments of verification or

[4] Ley De 17 De Julio De 1951, Sobre Regimen Juridico De Sociedades Anonimas.
[5] Joaquín Garrigues y Rodrigo Uría, *Comentario a la Ley de Sociedades Anónimas* (Madrid 1976) 184.
[6] Article 11,3, f and g, Company law Act of 1951.
[7] Article 8 Company law Act of 1951.
[8] Article 33 Company law Act of 1951.

external control, which were not introduced in the legal system until the reform in 1989 as a result of the requirements EU company law Directives.[9]

The current regulation of legal capital rules in Spain is to be found in the Corporate Enterprises Act 2010 (Ley de Sociedades de Capital hereby referred to as LSC). This Act is a consolidation of the previous legislation on provisions for public companies ("sociedades anónimas" SA, which are the closest equivalent to the UK's concept of public companies[10]) and limited liability companies ("sociedades de responsabilidad limitada" SRL, which are closest equivalent to UK's private companies[11]), alongside some provisions on public listing regulations.

The LSC justifies in its preamble the reasons why the separation between these two types of companies, regulated independently prior to LSC, still remains within the newer and wider concept of Sociedades de Capital (Corporate Enterprises). There are a number of justifications for this differentiation but, as far as legal capital and creditor protection are concerned, the preamble states that such distinction is due to two major reasons. On the one hand -as it is the case in most modern company law stipulations around the globe- public companies are 'naturally open' organisations, whereas limited liability companies are typically closed. On the other hand – and perhaps a more distinctive fact- Spanish public companies hold rigorous mechanisms for preserving their share capital and a fixed asset retention value, hence they provide thoughtful means to protect creditors. However, limited liability companies tend to substitute these defence mechanisms with liability regimes as the preamble literally says 'at times [in a] more formal than effective [manner]'. The preamble also observes that these differences are created by the legislation governing these aspects of both companies, being the latter significantly less rigid than the former. Nonetheless, the preamble also recognises that the conflict between these two types of companies is not irreconcilable since, in practice, the by-laws of the vast majority of Spanish public companies – besides publicly listed

[9] Heliodoro Sánchez Rus, *El Capital Social, Presente y Futuro* (First edn, Thomson Aranzadi 2012) 236.
[10] Companies Act 2006, Section 4.
[11] Ibid.

companies- contain clauses that limit those rules governing the free transferability of shares, which is a very distinctive characteristic of limited liability companies.

The legal capital regime is therefore based on a two pillar concept: minimum capital requirements and capital maintenance rules.

As far as minimum capital requirements are concerned, and despite the fact that the scope of application of the Capital Directive does only embrace public companies, Spanish law extends its application to limited liability companies as well. LSC establishes a minimum of €60,000 for public companies and €3,000 for limited liability (i.e. non-public) companies. [12] In 2013, however, light of legislative trends in other EU jurisdictions and aiming to overcome the criticisms of lack of support to entrepreneurs that such requirement implied,[13] compliance with the minimum requirement for the latter was relaxed. Even though such minimum will still need to be achieved during the life of the company and at liquidation, it doesn't need to be subscribed and disbursed at incorporation. Instead, the company's capital can be contributed to gradually during the subsequent years to incorporation, in proportion to their profits.[14] Regarding public companies, although the Spanish legislator builds this regulation on the Capital Directive requirements, the established minimum threshold is significantly higher.

In relation to capital maintenance rules *per se*, the Spanish legislator is particularly fruitful. Not only it complies with the Capital Directive, but also takes a step further by increasing the severity of sanctions and increasing the scopes of application. As stated above, the Spanish Legislator has chosen to extend legal capital rules also to private companies. It merely establishes a prohibition of capital under the legal minimum by requiring that no deeds of incorporation can be authorised for corporate enterprises whose total capital is below the legally established minimum. It adds that amendment

[12] Article 4 Real Decreto Legislativo 1/2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital (LSC).
[13] Preamble Ley 14/2013, de 27 de Septiembre, de Apoyo a los Emprendedores y su Internacionalización.
[14] Article 4 bis LSC.

instruments rendering company capital below such amount are not permitted, except in compliance with a specific legal provision.[15] It is worth noting, however, that the Spanish legal system contains a large number of ancillary rules, which aim to protect legal capital and its functions, as it is addressed in detail below.

3.3 Methods

This chapter aims to undertake a top-down functional approach through the examination of the application, feasibility and use of the Capital Directive's legal capital rules once they are transposed and integrated in the Spanish legal system. This legal system has been considered to be significant since it represents a civil law system with extensively codified legislation and a legal capital tradition. In addition, as it will be discussed below, Spain has a rather strict approach to legal capital, and it significantly extends the requirements established by the framework provided by the Capital Directive. Spain has chosen not only to extend legal capital rules also to private companies but also to implement a Super-ROL regime, in contrast to the UK where following the common law tradition legal capital rules are more lax and strictly restricted to the Capital Directive mandate.

The aim of this case study lies on examining whether the legal capital rules are suited for their purpose of providing creditor protection and, if otherwise, whether there are other mechanisms better suited for that purpose. In other words, this case study is based on the hypothesis that legal capital rules – as restrictively and traditionally approached, i.e. limited to minimum capital and capital maintenance rules- do not protect creditors and, moreover, there are other mechanisms, which can provide a better response to creditors seeking for protection of their rights. Based on this premise, this chapter relies on the initial hypothesis that legal capital rules might not suffice to accomplish their principal aim of providing creditor protection, except if there are appropriate

[15] Article 5 LSC.

enforcement mechanisms in place to ensure their correct application, as the law and economics literature suggests. The underlying rationale is to take this debate a step further by not only assessing the issue from a purely doctrinal point of view but also by analysing the implications of its implementation in practice. It is expected that such exercise will provide sufficient data as to examine and discuss the most substantial means to protect creditors in Spain.

More specifically, this chapter will examine cases where creditors sought protection in court. Since a comprehensive study would be impossible to undertake due to the large amount of cases and variables involved, some limitations have been established. To begin with, it has been considered appropriate to limit the assessment of cases within a period, matching with the creation and operation of the commercial courts (specialized in commercial and corporate matters) in 2004. Additionally, this period of time is also matching with the enactment of the current insolvency law, which would be of special importance in this analysis, since it introduced significant modifications as regards of creditor protection in situations of financial distress.

Moreover, the search criterion to select the sample has also been narrowed to the keywords 'creditor protection'. As the aim of this case study is to test whether legal capital rules are providing sufficient protection to creditors, it was considered that this search criterion would serve as a means to identify an extensive and exhaustive number of cases where creditor protection was at stake. The tool utilised to undertake this search was the database Westlaw Aranzadi Spain. This database is widely acknowledged as a reliable and exhaustive source of Spanish cases. The cases studied are limited to those in higher courts, specifically to the Audiencias Provinciales (Spanish appeal courts) and Tribunal Supremo (Spanish Supreme Court) as they are the only courts, whose judgements would be considered in subsequent judicial resolutions, although they are not formally considered to be binding precedent. Under Spanish law, court judgements are not a formal source of law[16] and the Supreme Court's judgements must be

[16] Article 1.1 Spanish Civil Code (Real Decreto de 24 de julio de 1889, Código Civil): 'Las fuentes del

understood merely as a complement of the legal system.[17] As a result, they do not constitute precedent (at least in the sense of the doctrine of *stare decisis* as understood in common law systems)[18] and therefore courts –neither superior nor inferior or equal- are not bound by higher courts' previous decisions.[19] Nevertheless, even though there is no obligation to do so, it is common practice that courts refer to previous judgements dealing with similar issues either to adhere to them or to depart from them, duly justifying the reason if the latter is the chosen option.

The chosen method to pursue this aim is the critical assessment of cases where creditors sought protection of their rights in court and their relative relevance within the pool of cases obtained. Such analysis provides a clear picture of creditors' preferences for the enforcement of their rights, namely which are the mechanisms most commonly used, which is the rationale underneath those choices and to what extent legal capital was related or played any role on the sought enforcement of creditors' rights.

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ordenamiento jurídico español son la ley, la costumbre y los principios generales del derecho.'

[17] Ibid, Article 1.6.

[18] This is a highly debated issue among Spanish scholarship. The study of the doctrine of precedent under Spanish law is immense and it would be unreasonable to try to approach it in this work as it falls out of the scope of the thesis. However, it is worth mentioning that even though judicial judgements do not constitute precedent and are not binding as in the common law doctrine of *stare decisis*, it has been argued that they certainly have some degree of integrating power. This integrating power has been interpreted in various ways by the literature, resulting –in a very simplistic manner- in two opposite doctrines. On the one hand, some scholars support the fact that the so-called 'jurisprudence' is not binding precedent and, on the other hand, other scholars support that it entails at least some sort of formal precedent. For more details about this discussion see, for example, Víctor Ferreres Comella and Juan Antonio Xiol Ríos, *El Carácter Vinculante de la Jurisprudencia* (2nd edn, Fundación Coloquio Jurídico Europeo 2009); Alfonso Ruiz Miguel and Francisco J. Laporta 'Precedent in Spain' in D. Neil MacCormick and Robert S. Summers (eds.), *Interpreting Precedents- A Comparative Study* (Ashgate publishing 1997); Gema Rosado Iglesias, 'Seguridad jurídica y valor vinculante de la jurisprudencia' (2006) 28 Cuadernos de Derecho Publico 83; María Isabel Garrido Gómez, 'La Predecibilidad de las Decisiones Judiciales' (2015) 1 Revista Ius Et Praxis 55; Luis Díez-Picazo, 'Jurisprudencia y Seguridad Jurídica' *ABC* (Madrid, 22 july 2002); or Eduardo García de Enterría, 'Cambio Radical en el Sistema Jurídico Español?' *ABC* (Madrid, 6 july 2002).

[19] This fact has been also ratified by the Constitutional Court, by stating that '*the judge is bound by law* (in the sense of statutory law) *and not by precedent*' Spanish Constitutional court ruling 49/1985. Sala Segunda, Recurso de Amparo núm. 278/1984, sentencia núm. 49/1985 de 28 de Marzo. Original version in Spanish published in the State Official Gazzette (in Spanish, Boletín Oficial del Estado) is available online at http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-1985-6353.pdf.

It is hereby acknowledged as a limitation of this method of study the fact that disputes dealt through alternative dispute resolution will not be included. Private disputes have been excluded given their non-public nature and therefore the difficulty to get access to official data would detriment the study overall. In addition, the non-assessment of the claims outcomes in a number of cases constitutes a second limitation to the method. Due to the time limitations established in the construction of this case study it was not possible to gather all final resolutions as to assess whether courts resolved the studied cases in favour of creditors or not and, if so, to what extent. This is the case for those dealt in the Appeal Court, given that most of them are still open to a last appeal before the Supreme Court. Furthermore, envisaging cases' outcomes constitutes a particularly challenging task in insolvency proceedings given that the agreements, payments and sanctions are not included in the main judgements. Therefore, it has been decided not to apply them, except when those particular cases where considered to have a special importance and an exception was made- and focus the study to creditor's preferences in litigation instead of the outcomes obtained from that litigation. That would be a different and very interesting approach which shall be taken into account for future research.

3.4 Case Study Results

Cases addressing creditors claims	**Numbers**	**Percentages**
Civil matters	11	2.10
Bills of exchange and cheques	44	8.38
Banks	49	9.33
Insolvency proceedings	170	32.38
Company Law mechanisms	163	38.10
Including:		
• Directors' liability	131	24.95
• Lifting the corporate veil	28	5.33
Commercial Contracts	50	9.52
Total	**524**	**100**

Table 1 Litigation trends in Spain

By applying the methods examined in the previous section, a pool of 524 cases was identified. These cases are based on creditor protection, between 2004 and 2014, coming from both Appeal and Supreme Courts, and are limited to commercial matters. The data analysed reveals that creditors are seeking protection through a wide range of different mechanisms. From the entire sample of 524 cases where creditors decided to place claims to protect their rights and those claims reached either the Appeal or Supreme Court, the distribution of claims can be broadly divided into nine categories: civil matters, bills of exchange and cheques, insolvency proceedings, banks, commercial contracts, company law, criminal law, civil justice and consumers claims, which have been left out from this study for equivalence functionality and comparative reasons.

3.4.1 Civil matters

Accion Pauliana	Fraudulent Conveyance	1	
Reclamación de cantidad	Claim for quantum	6	
Levantamiento del velo	Piercing the corporate veil	1	
Derecho al honor	Defamation	1	
Tercería de dominio	Third party claim proceedings	1	
Enriquecimiento injusto	Unjust enrichment	1	
Total		**11**	**2.10%**

Table 2 Civil matters

The first identified group of creditors, which constitute a very small percentage (2.10%), chose to claim for the protection of their rights through civil procedures.[20] For instance, they pursued claims for fraudulent conveyance, *quantum* recovery, defamation or unjust enrichment. This fact indicates that civil matters are very rare among corporate creditors

[20] Civil proceedings under Spanish law can cover a very wide range of issues. Broadly speaking, are considered civil proceedings all those related to contracts, obligations, property rights, family or inheritance. The Spanish civil justice system establishes specific proceedings for specific claims, with very rigid procedural rules. Both companies and individuals can bring these actions.

or, at least, the actions are not brought before commercial courts. Moreover, only one of these claims appears to be related with legal capital rules, through an action claiming for lifting the corporate veil. Consequently, it has been decided not to conduct a further in depth study of civil claims and therefore confine the study to the examination of cases held solely before commercial courts. Nevertheless, the small number of cases found and their rather limited significance in terms of *quantum* seems to justify the exclusion of the study in detail of civil matters.

3.4.2 Bills of exchange, cheques and other contractual relationships with banks

Pagaré	Promissory note	32	
Cheque	Cheque	1	
Aval	Guarantee, Caution	2	
Falta de provisión de fondos	Retaining fee	2	
Letra de cambio	Bills of exchange	7	
Total		**44**	**8.38%**

Table 3 Bills of exchange and cheques

SWAPs (Permuta financiera)	SWAPs	18	
Hipoteca	Morgages	2	
Obligaciones preferentes	Preferential participating shares	4	
Refinanciación de deuda	Roll-over of debt (debt rescheduling)	4	
Póliza de crédito	Renewable credit facilities	1	
Cuenta Corriente	Current Account	2	
Tarjeta de credito	Credit card	1	
Préstamo	Loans	16	
Leasing	Leasing	1	
Total		**49**	**9.33%**

Table 4 Banks

A second group of creditors brought claims to the commercial courts arising out of bills of exchange and cheques. Although these claims are considered to belong to civil jurisdiction[21], under some circumstances and only when related to issues arisen from commercial legislations, commercial courts can deal with these claims.[22] This time the results show a more significant number of cases, especially those related to promissory notes. However, the rest, i.e. those related to banking contracts such as SWAPs, mortgages, preferential participating shares, roll-over of debt, renewable credit facilities, current accounts, credit cards, loans or leasing- are once again very small in numbers. Furthermore, none of these claims were related in any manner to legal capital. These facts, alongside the small overall percentage (9.33%) and the special regulation of banks[23], it has rendered it justified that these cases will also be omitted from the main analysis in this study.

3.4.3 Insolvency proceedings

Concurso culpable		Tortious insolvency	37
Retroacción/Acción de reintegración por actos en perjuicio de la masa		Claw-backs	91
Clasificación de creditos contra la masa		Credit classification	31
Efectos de la insolvencia	Levantamiento del velo	Piercing the corporate veil	2
	Sobre contratos	Over Contracts	1
Incidente de oposición a aprobación de cuentas		Oposition to annual accounts	1

[21] Juicio cambiario. For discussion about the status of *juicio cambiario* as an independent proceeding among the civil jurisdiction, see for example Carlos Manuel Martín Jiménez and Juan Jose Martín Jiménez, *Teoría y Práctica del Ejercicio de las Acciones Civiles. Comentarios y Formularios* (2nd edn, Lex Nova 2012) 442.

[22] Article 86 ter 2 a) Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.

[23] Regulation of banks and banking contracts is entirely different and for reasons of feasibility falls out of the scope of this thesis.

Competencia objetiva del juez	Conflicts of jurisdiction	2	
Modificación calificación del concurso en informe de la administración concursal	Modification of insolvency description/category	2	
Responsabilidad del liquidador por irregularidades contables	Liquidator's liability	1	
Legitimación pasiva	Conflicts of jurisdiction	1	
Responsabilidad de los administradores por retribución al consejo a pesar de pérdidas	Director's liabilities for their own remuneration	1	
Total		**170**	**32.38%**

Table 5 Insolvency proceedings

A third group of creditors' claims were brought through insolvency proceedings. The list of cases analysed show a significant amount of creditors, who sought protection in an insolvency proceeding, reaching a 32.38% of the total amount of claims scrutinized. This fact seems to support the theory that very often creditors are in need of protection when the company is already insolvent and therefore, by definition, with no legal capital left.[24] However, one must be cautious with this statement given that under the current Spanish insolvency system the debtor company is entitled to file for insolvency voluntarily due to a systematic impossibility to meet their debt repayments in due course or, what is more, in the expectation or foreseeability of such impossibility in the near future, when debts will fall due.[25]

[24] Except if the insolvency proceeding is started voluntarily by the debtor company due to a systematic impossibility to meet their debt repayments on due course.

[25] Article 2.3 LC, which literally states that 'If the petition for a declaration opening the insolvency proceedings is submitted by a debtor, he must justify his indebtedness and state of insolvency, which may be current or imminent. A debtor who foresees he may not duly and punctually fulfill his obligations is in a state of imminent insolvency'

The nature of the claims identified is very diverse, covering most of the issues that might arise according to the current Spanish Insolvency Law.[26] To be specific, even though the range of claims is very wide, there are three outstanding circumstances within insolvency which are worth of an in-depth analysis: tortious insolvency, claw backs for actions in prejudice of the debtor's assets and classification of credits against the insolvent company.

First, it appears that 37 creditors (7, 44% of the total number of cases identified) pursued their claims in the context of tortious insolvency. One of the most distinctive features of the Spanish insolvency law is that it contemplates the opening of a section during the insolvency proceedings for evaluation of the insolvent's company degree of fault.[27] According to this rule, insolvency can be qualified either as fortuitous or as tortious.[28] A situation of insolvency would be considered tortious when either the debtor company's or its legal representatives' malicious intent or gross negligence have caused the generation or aggravation of the state of insolvency.[29] This distinction is of great importance since the outcomes are entirely different. Whilst in a fortuitous insolvency the company's directors are not legally responsible for the company's insolvency, if insolvency is rated as tortious directors might be personally liable to either to pay a fine, compensation or even to contribute to all or part of the financial losses suffered by creditors.[30]

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[26] Ley 22/2003, de 9 de julio, Concursal (LC).

[27] As regards to the nature of this case study, it is worth mentioning that the current insolvency regime entered into force in 1st September 2004. Since then, it has been subject to numerous amendments, which aimed to address and clarify several concerns that courts have been dealing with over the last years. As a result, all the cases brought to court after this date are subject to its rules. However, after this date and due to the inherent delays in justice and because the studied cases cover appeal cases, we can find creditor' claims which are still based on the previous legislation. Therefore we find two different regimes of insolvency within the cases studied. For those proceedings filed prior to 2004 the applicable regime was that implemented by the laws on *quiebra y suspensión de pagos* in the Code of Commerce of 1885, a regime completely repealed by the new insolvency law which came into force in 2004.

[28] Article 163 and 164 LC.

[29] Article 164 LC.

[30] Articles 163 to 166 LC. For further insights, see for example Jose Antonio García Cruces, 'La Calificación del Concurso' in Ángel Rojo Fernández-Río (ed) *La Nueva Ley Concursal* (Revista del Poder Judicial, número monográfico, XVIII, CGPJ, Madrid 2004) 483.

Furthermore, pursuant to an amendment introduced in 2015[31], this liability is also extended to shareholders who decided not to capitalise the claims or to issue convertible stock or instruments without a reasonable cause.[32] This mechanism, although not shown in the case study due to the limitations established in terms of period of study (last cases included were those held on 31 December 2014) cannot be disregarded since it is directly related to legal capital. It punishes shareholders for not taking action when the capital was insufficient to avoid insolvency. What is more, LC establishes a presumption of tortious insolvency when such conduct has thwarted the achievement of a refinancing agreement or an extrajudicial agreement on payments. This point will be discussed below in further detail.

It is worth noting, however, that the separate section of qualification of the insolvency proceeding is only applicable either when the debtor company cannot reach an agreement with its creditors[33] or when all the efforts intended to revert the viability of the company failed and, therefore, insolvency necessarily leads to liquidation.[34] Although there is no official recent data of the percentage of insolvency proceedings, which are qualified as fortuitous and those qualified as tortious, it is expected that percentages are similar to those published in 2005 and 2006[35], when a rather small percentage of the insolvency proceedings, 12% and 22.6% respectively, were qualified as tortious. Nevertheless, even though courts seem to be reluctant to qualify the insolvency proceeding as tortious, in those situations where it has been opened the section of qualification and qualified the proceeding as tortious, directors were held

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[31] Amendment of Article 172 Section 2.1 of the LC by Sole Article Three 4 of Act 9/2015, dated 25th May.
[32] Article 172.2.1 and 172 Bis LC. Unfortunately, the evaluation of the impact of this rule will not be covered by this study, since at the time of closing of this case studies (2014) there were still not law in force and therefore not represented.
[33] Under Spanish law, it is known as 'Convenio'.
[34] José Machado Plazas, *El Concurso de Acreedores Culpable. Calificación y Responsabilidad Concursal* (1st edn., Colección Estudios de Derecho Concursal, Thomson Civitas 2006) 73.
[35] Consejo General del Poder Judicial, 'El Concurso de Acreedores' (2007) 10 Boletín de Información Estadística. Available online at < http://www.poderjudicial.es/cgpj/es/Temas/Estadistica%2DJudicial/Analisis%2Destadistico/Datos%2Dde%2Dla%2DJusticia/El%2Dconcurso%2Dde%2Dacreedores%2DN%2D%2D10%2D%2Ddiciembre%2D2007%2D>

personally liable in a significant number of cases. A recent study based on claims held at appeal courts against qualification stated that although the standard pattern is to award paying a percentage of the deficit, sometimes it also entails the reimbursement of certain damages. In around 10% of the cases studied, directors were held personally liable for over than a million euros, reaching in some cases significantly higher figures in excess of 15,000,000 euros.[36]

A second group of creditors opted for claiming claw backs for actions in prejudice of the debtor company assets. Spanish laws have been historically concerned about the fact that directors and managers undertook fraudulent transactions in detriment of the company's solvency. Prior to the enactment of the current insolvency law, all transactions undertaken during a certain period before the formal judicial declaration of insolvency were considered to be void. This had severe consequences in the regular course of business, since any third party acting in good faith could be affected *ex post* by the state of insolvency of its counterpart. Having noticed that undesirable effect, the current insolvency law imposed a new rule regarding claw-backs. The new law established that there is no presumption of void transactions but ineffectiveness could be found in specific circumstances: if assets were given without valuable consideration, payments or other acts of extinguishing obligations were made in advance when their due date was after the judicial declaration of insolvency, payments were made to individuals specially related with the debtor company or due to the securities for existing obligations.[37] The underlying rationale for the introduction of these measures is to protect creditors from fraudulent transactions carried out with the sole aim of cause such harm and to restore the unlawfully extracted funds to the insolvent debtor company.

A third group of creditors, also highly significant within this category, pursued claims related to the classification of their credits within the insolvency proceedings. Those

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[36] Study conducted by Clyde&Co in 2015. A summary of their findings is available at Diario Expansión, 'Concursos Culpables' 06.03.2015. Available online at http://www.expansion.com/2015/03/06/juridico/1425665359.html

[37] Jose Antonio Garcia Cruces, 'De la Retroacción de da Quiebra a la Rescisión de los Actos Prejudiciales para a Masa Activa' (2004) 2 Anuario de Derecho Concursal.

creditors are seeking protection by claiming their credits having a higher rank within the preferential scale. Claims included on the list of creditors are classified, for the purposes of the insolvency proceedings, as preferential, ordinary, and subordinated.[38] Preferential claims, in turn, are sub-classified as claims with special preference (if they are secured on certain properties, goods or rights, such as mortgages or financial leases) and general preference claims (if they affect all the assets of the debtor but they are not secured. For example, tax claims and tort claims would belong to this category).[39]

It must be noted, however, that there is an additional group of debt claims, the so-called 'claims against the estate'.[40] In contrast with the abovementioned, which are the liabilities which caused the situation of insolvency (since the company did not have enough liquidity to repay them), the claims against the estate are those created by the insolvency proceeding *per se*.[41] This category would include, for instance, claims of salaries for the last thirty days of work prior to insolvency proceedings being declared open, judicial costs and expenses caused by the petition and declaration opening the insolvency proceedings, insolvency practitioners fees or maintenance for the debtor and of persons with regard to whom he is legally required to provide for, among others.

Creditors are concerned about the classification of credits given that the inclusion of their credits in one category or another might imply a significant difference in return. Whilst claims against the estate and claims with special preference are the most likely to be repaid, claims with general preference or ordinary claims are less likely to be paid (or at least, to a lesser extent) and subordinated claims are hardly ever repaid.[42] Whilst one could encounter insolvency proceedings, where there is not even sufficient liquidity

[38] Article 89.1 Ley 22/2003 LC.
[39] Articles 90 and 91 LC.
[40] Article 84 LC.
[41] Emilio M. Beltrán Sánchez, 'La Prioridad de los Créditos Contra la Masa', in *Estudios sobre la Ley concursal : libro homenaje a Manuel Olivencia* (Vol 4, Marcial Pons, 2005) 3611-3634.
[42] It must be borne in mind that this is only an average trend used as an indicative pattern, given that every insolvency proceeding is different.

to repay the claims against the estate (which are preferential) there are other where most of the liabilities can be repaid (pursuant to the arrangements made).

These results seem to illustrate that insolvency constitutes one of the most relevant mechanisms for creditor protection. At least, it is one of the most used mechanisms used by creditors to seek for such protection when needed. This was a much-expected outcome, since the whole rationale behind insolvency laws is to provide the suitable mechanisms for guaranteeing debt satisfaction to the larger possible extent in situations of insolvency and financial distress. More than half of the creditors' claims within insolvency proceedings were actions brought to challenge the classification of their credits. This is also very sound theoretically, since credit classification will play a big role in creditors' position and the likelihood of seeing their debts repaid. What is perhaps more surprising is that, from all the mechanisms that insolvency law provides and notwithstanding its residual nature, the second larger group of claims was based on tortious insolvency. This fact indicates that, when insolvency leads to liquidation and the section of qualification is opened, creditors are seeking to maximise their returns through directors' personal liability.

It is difficult to determine the relationship within these insolvency cases and the sufficient capitalisation –or the lack thereof- of the insolvent companies. Whilst in cases where the debtor company filed for insolvency due to a solvency test issue the direct relationship can be drawn, in those cases where they did file for insolvency due to either current or imminent cash flow issues will not necessarily be the case. Nevertheless, it cannot be disregarded since the likelihood that they are –at least remotely- related is very high. Cash flow issues, if perpetuated in the long term, would diminish the amount of equity (in a sense of capital plus reserves) to an extent that if they surpass the reserves and the company is merely capitalised to the legal minimum, the company's capital could be found under the minimum threshold as well.

3.4.4 Company law mechanisms

Liquidación (Liquidation)	Others	Others	7
	Levantamiento del velo	Piercing the corporate veil	2
	Responsabilidad de liquidadores	Liquidators' liability	1
Propiedad industrial y competencia desleal		Intellectual property and unfair competition	4
Cuentas anuales, responsabilidad del auditor		Annual accounts; auditors' liability	1
Sociedades Anónimas (Public Companies)	Escisión	Companies' divisions	2
	Responsabilidad de los administradores (Directors' liabilities)	For not calling a general meeting	1
		For asset imbalance	12
		For ommitting winding up when required	31
		For disregarding the rule "recapitalize or liquidate'	10
		For loans from the insolvent parent company to the subsidiaries	1
		For failing to repay debt	2
		Mergers/ takeovers	1
		Claim of shares' payments	1
		For directors ceased in their positions prior to the winding up requirement	2
Sociedades limitadas		For disregarding the rule "recapitalize or liquidate'	21

(Limited Liability companies)	Responsabilidad de los administradores (Directors' liabilities)	For unfair competition	1
		For ommitting winding up when required	31
		For creditors' direct claims	2
		Material winding-up	2
		For directors' appointed after the wrongdoing	4
		For asset imbalance	4
		For inexistence of link	1
		For disregarding the obligation to formulate annual accounts	1
		Debt waivers	1
	Expulsion socio unico (SLU)	Expulsion of sole owner (OPC)	1
	Disolucion	Winding up	2
	Impugnación de acuerdos sociales	Opposition to company agreements	1
	Levantamiento del velo	Piercing the corporate veil	2
Sociedades de Capital (Both public and limited liability)	Responsabilidad de los administradores (Directors' liabilities)	For ommitting winding up when required	1
Cooperativas (Cooperatives)	Responsabilidad de los miembros del consejo	Directors' liability	1
Capital Social (Company's capital)	Aumento de capital por compensación de créditos	Capital increase by debt compensation	2

	Financiación para adquisición de acciones propias	Financing acquisition of own shares	2	
	Disolución por pérdidas	Winding up for losses	1	
Cambiario (Securities)	Avales prestados en nombre de sociedad no constituida	Guarantee provided representing a non-incorporated company	1	
Civil	Socios contra auditores	Shareholders calims against auditors	1	
	Publicidad engañosa	Misleading advertisements	1	
Contratos (Contracts)	Responsabilidad de los administradores no procede por ser impago de hipoteca en perjuicio de socios y no acreedores	Director's liability	1	
Levantamiento del velo jurídico		Lifting the corporate veil	28	
TOTAL			**200**	**38.1%**

Table 6 Company Law mechanisms

A fourth group of creditors opted to use as a means for enforcement for their claims mechanisms found in company law legislation. The table above shows that this is again a very large group, comprising 38.10% of the claims. The nature of these claims has been separated between different types of companies and other enterprises. This criterion has been applied because they were regulated by independent pieces of legislation before LSC 2010[43] and it has been considered that this reflects more

[43] As stated earlier, Public Companies were regulated in TRLSA and Limited liability companies in LSRL.

accurately the spirit and applicability of each of these rules. Within these claims, there is an outstanding group: directors' liability. Claims based on directors' liability are numerous, amounting to the 26.36% of the pool of cases analysed. In turn, a large percentage of those are related to their liability arisen from legal capital rules: for omitting winding up when required and for disregarding the 'recapitalise or liquidate' rule. Next subsections will analyse both groups in detail, with the aim to envisage their relationship and their contribution to the purpose of legal capital rules as a suitable mechanism to protect creditors.

3.4.4.1 Directors' liability

Sociedades Anónimas (Public Companies)	Responsabilidad de los administradores (Directors' liabilities)	For not calling a general meeting	1
		For asset imbalance	12
		For ommitting winding up when required	31
		For disregarding the rule "recapitalize or liquidate'	10
		For loans from the insolvent parent company to the subsidiaries	1
		For failing to repay debt	2
		Mergers/ takeovers	1
		Claim of shares' payments	1
		For directors ceased in their positions prior to the winding up requirement	2

Sociedades limitadas (Limited Liability companies)	Responsabilidad de los administradores (Directors' liabilities)	For disregarding the rule "recapitalize or liquidate'	21
		For unfair competition	1
		For ommitting winding up when required	31
		For creditors' direct claims	2
		Material winding-up	2
		For directors' appointed after the wrongdoing	4
		For asset imbalance	4
		For inexistence of link	1
		For disregarding the obligation to formulate annual accounts	1
		Debt waivers	1
Sociedades de Capital (Both public and limited liability)	Responsabilidad de los administradores (Directors' liabilities)	For ommitting winding up when required	1
Cooperativas (Cooperatives)	Responsabilidad de los miembros del consejo	Directors' liability	1
TOTAL		**131**	**24.95%**

Table 7 Directors' liability

Directors' liability is one of the most important mechanisms of enforcement under Spanish Company law. It is of special importance to note that there are two major sets of rules under Spanish law that regulate directors' liability and they must be differentiated. On the one hand, there are these groups of norms which establish

directors' liability within company law rules and on the other hand those which establish directors' liability within insolvency rules (which have been addressed above).

Within the company law systems of directors' liability, there are three different schemes. First, they allow either the company itself, shareholders or creditors to pursue a claim against the directors when a damage to company's assets has been caused by directors' actions.[44] This corporate action has the nature of damages claim, targeted to obtain compensation for the harm caused directly by the directors' actions, which require wilful misconduct or negligence[45] and a direct causal link between the action and the harm[46]. The company itself is considered the victim of the action and therefore it is the general meeting that is primarily entitled to pursue the claim. Nevertheless, it is acknowledged that not only the company but also other stakeholders are directly affected by such loss, and therefore the law also gives an ancillary right to pursue this claim to minority shareholders[47] and to creditors[48]. This has been regarded as a clear and effective[49] mechanism to protect creditors since, regardless of which stakeholder group actually pursued the claim, the ultimate aim of this rule is to seek for reimbursement for any loss the company has suffered due to directors' wrongful exercise of their duties. Therefore, if the claim is successful, the result would be a restitution of the value of the company prior to the wrongdoing. As the company's solvency is incremented, creditors' chances to protect their legitimate rights of their debts being repaid are necessarily enhanced.[50]

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[44] Acción social de responsabilidad (Corporate Action to Demand Liability); Articles 238-240 LSC.
[45] Article 236 LSC, 'damage caused by their acts or omissions where contrary to law or the by-laws or by any performed or omitted in breach of the duties inherent in their position'.
[46] There is extensive jurisprudence addressing this issue. See, for example, STS 8/10/07 (RJ 2007, 6806), STS 12/04/89 (RJ 1989, 3007), STS 11/10/91 (RJ 1991,6909), STS 16/02/00 (RJ 2000, 679) or 6/10/2000 (RJ 2000, 8803).
[47] Article 239 LSC.
[48] Article 240 LSC.
[49] See, for example, Fernando Sánchez Calero, *Los Administradores en las Sociedades de Capital* (1st edn, Civitas 2005) or Daniel Prades Cutillas, *La Responsabilidad del Administrador en las Sociedades de Capital* (Tirant lo Blanch, Valencia, 2014) 162.
[50] Juan Sánchez-Calero Guilarte, *Los Administradores en las Sociedades de Capital* (2nd Edn, Cizur Menor, 2007) 367.

Secondly, they provide an individual action for seeking directors' liability.[51] This mechanism has the same characteristics as the corporate action, being the only difference the subject who is considered to be the victim of the harm.[52] This mechanism allows for restitution in damages when directors have caused a direct detriment to the claimants' interests exercising their duties. In this case, claimants will be either shareholders or third parties (amongst which, certainly, creditors are included). Whereas the aim of the corporate action is to restore the company's financial damage, the individual action aims to restore he detriment caused to shareholders or third parties.[53] It is worth noting that this is a non-contractual claim, since directors' duties are owed to the company and not to the claimants themselves, and claimants are engaged in a contractual relationship with the company and not with the directors.[54]

Finally, there is a special regime for directors' liability for corporate debts, based on their failure to dissolve and wind up the company when required. For the purposes of this study, one of the most relevant triggers of the obligation to dissolve the company is when losses reduce the company's equity to an amount lower than half of the subscribed share capital[55] (the so-called Super-ROL[56]) or for a capital reduction to a sum below the legal minimum[57] (ROL). Directors' liability for corporate debts in Spain will be addressed below in detail, with particular emphasis to liability arising from breach of ROL and Super-ROL rules.

3.4.4.1.1 Directors' liability for corporate debts

Directors' liability for corporate debts was introduced in 1985 as a result of the adaptation of commercial and company legislation to the Company Law Directives.[58] In

[51] Article 241 LSC.
[52] Javier Hernando Mendívil, *La Calificación del Concurso y la Coexistencia de las Responsabilidades Concursal y Societaria* (First Edn, Bosch 2013) 269.
[53] STS 4/11/91 (RJ 1991, 8143).
[54] STS 9/01/06 (RJ 2006, 199).
[55] Article 363.1.e) LSC (amended pursuant to Art 1.20 of Act 25/2011 of 1 August).
[56] See Chapter 2, section 5.5.
[57] Article 363.1.f) LSC (amended pursuant to Art 1.20 of Act 25/2011 of 1 August).
[58] Article 7 of Ley 19/89, de Reforma Parcial y adaptación de la legislación mercantil a las directivas de la CEE en materia de sociedades.

particular, this norm was introduced to comply with the requirements of the Capital Directive, which suggested a framework to provide some safeguard to companies' creditors with the ultimate aim to reduce the possibilities of insolvency, by placing an obligation on directors to call for a general meeting if there were significant losses and decide on whether dissolution or other mechanisms of financial rehabilitation would be best suited for the particular situation.

The Spanish legislator, however, applied this mandate more extensively. With the intention of mirroring the Italian Civil Code[59] at first, which stipulated an unlimited personal liability on corporate debts on company directors for engaging in new business when the existence of a cause of dissolution had been proven. The ultimate aim of this piece of legislation was to avoid the disappearance of companies with liabilities.[60] Nevertheless, the result went -perhaps inadvertently at first – significantly beyond this, causing numerous problems of application, to the extent that it has been even argued that this concept of liability could violate the Spanish constitutional principles of equality and determination and proportionality of the sanction and it is therefore possibly unconstitutional.[61]

As for public companies, the liability was introduced for the first time by Article 262.5 of the Royal Decree 1564/1989[62] (Texto Refundido de la Ley de Sociedades Anónimas, henceforth referred as TRLSA), in relation to the dissolution of the company. Directors were personally, jointly and severally liable[63] for failing to comply with the below

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[59] Article 2449.1 of the Italian *codice civile.*
[60] Emilio Beltrán Sánchez 'La Resonsabilidad por las Deudas Sociales' in Ángel Rojo and Emilio Beltrán (eds) *La Responsabilidad de los Administradores* (1st Edn, Tirant lo Blanch, Valencia 2005) 216.
[61] Josep Farrán Farriol, *La Responsabilidad de los Administradores en la Administración Societaria* (J.M. Bosch Editor, 1st edn., publisher, Barcelona 2004) 163.
[62] Real Decreto Legislativo 1564/1989, de 22 de diciembre, por el que se aprueba el texto refundido de la Ley de Sociedades Anónimas.
[63] This is the closest approximation to a concept of liability existing in Spanish law but not in Common Law jurisdictions, the so-called Responsabilidad Solidaria. Responsabilidad Solidaria extends the responsibility throughout all the subjects, in a way that every subject is responsible for the totality of the debt. The creditor is entitled to claim the whole credit to one debtor (therefore there is no need to split evenly amongst them) which, once the debt is satisfied, can in her turn claim to the other debtors individually to recover the part they were initially liable for.

mentioned obligations to convene the General Meeting within two months from the date when the cause of dissolution occurred or to file for judicial dissolution in absence of an agreement by the general meeting.

Article 260 TRLSA establishes a number of circumstances which would trigger the dissolution of a public company: agreement of the general meeting, end of the pre-determined period of activity or any other cause agreed in the by-laws, the company's functioning becomes impossible for the loss of object or its capability to pursue the corporate objective, merger, acquisition or dissolution of the company, dissolution due to losses which reduce its equity to an amount lower than half of the subscribed capital (what has been coined by the literature as Super-ROL) or the voluntary reduction of the legal capital under the legal minimum threshold (ROL), It is worth noting for the purposes of this work the importance of the last two causes of dissolution, which constitute an essential part of what has been coined by the literature as the 'Recapitalise or Liquidate Rule'[64]. Pursuant to these laws, undercapitalisation within those limits is then a cause of companies' dissolution and ultimately will prompt directors' personal liability for company's debts.

If one of these circumstances occurs, then directors have the duty to convene a general meeting within a period of two months from the date when the cause of dissolution occurred.[65] The purpose of this general meeting is to assess the circumstances which are believed to constitute the cause of dissolution and adopt an agreement, given that the general meeting is ultimately the organ that has the power of taking such a decision. Nevertheless, if at least one of the causes of dissolution was applicable and the general meeting does not reach a dissolution agreement, a new duty for directors arises. Directors would then be liable if they have not filed for judicial dissolution of the company within two months, counting either from the date scheduled for the holding of the meeting (when it has not been legally constituted) or the day of the meeting when

[64] See Section 2.5.5
[65] Article 262.2 TRLSA.

the agreement would have been contrary to dissolution.[66] This new concept of liability had no precedent, neither in previous Spanish company laws nor in comparative law.[67] This concept of liability was harshly criticised by the literature as being objective, impersonal (in the sense it applies to all cases regardless of causation and degree of fault) or *ex lege*, provided that it does not require any test of fault or fraud in the directors' execution of their duties. It is seen as a penalty rather than a responsibility regime, i.e. a punishment for the omission of complying with the duty to dissolve the company.[68] Moreover, it appears to encourage directors to pursue the company's dissolution to avoid this extended personal liability, which has undesirable effects on employment contracts, since dissolution would avoid the requirements of an agreement for redundancies.[69] The law must be proportionate to its aim, and mentioned above, this liability seems to exceed the means utilised for the intended end which could raise questions about its constitutionality.

It has been even argued that such an indiscriminate liability could favour unjust enrichment for creditors in cases of dissolution for losses, given that they are allowed to make direct claims to the directors' personal assets. Such claims can be made regardless of the directors' actual responsibility on the matter, being that norm just a mere punishment for an error which –as the literature acknowledges- would be merely formal in a large number of situations.[70] This could then constitute a more attractive alternative for creditors than filing for the company's insolvency, since the outcome of the latter would expectedly be less onerous than the former.

Furthermore, if one of the causes of dissolution concurred, directors found themselves in an arguably perverse situation. Calling for this general meeting would most likely

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[66] Article 262.2 TRLSA.
[67] Daniel Prades Cutillas, *La Responsabilidad del Administrador en las Sociedades de Capital* (Tirant lo Blanch, Valencia, 2014) 250.
[68] Farrán Farriol (n 65) 160.
[69] For details on the effects on employment law see, for example, Daniel Prades Cutillas, 'Paro y Responsabilidad por Deudas Sociales: Influencia de la Norma Mercantil en la Generación de Desempleo' (2012) 87 Revista ICADE 7.
[70] Beltrán Sánchez (n 57) 219.

have as a result the termination of their contracts as directors', regardless of the dissolution outcome. They would not only lose their jobs if the company was actually dissolved, but also in the opposite scenario as the general meeting would lose trust on them and they would be most likely replaced. On the other hand, however, failing to comply with the duty to call/convene for this general meeting would impose an unlimited personal liability on corporate debts. Directors had, therefore, incentives to try to avoid the dissolution of their companies due to the very harsh effects imposed by the legislation on them, at least in theory. This appears to demonstrate that these rules instead of presenting a dissuasive effect, act more as a punishment for the unwary.

Additionally, the extent of the liability appears to be largely unreasonable since as the law was worded, directors were personally, jointly and severally liable for all companies' debts. What is more, the Spanish legislator made what it has been considered to be a great error when mirroring the rationale of the TRLSA, included a similar rule in the law regulating limited liability companies[71] (henceforth LSRL[72]). TRLSA's first draft eliminated the temporary reference to the company's liabilities which could be directly attributable to directors as a result of their actions. This way, directors became liable for all company's debts – both posterior and prior to the event which caused the dissolution- as it was explicitly stated in LSRL to avoid any doubts about it.[73]

This system was regarded to be sensible as long as the cause of dissolution was suffering of losses which would reduce the company's equity to an amount lower than half of the minimum legal capital and the company was simultaneously insolvent. Then, that would be a very efficient mechanism of creditor protection. In practice, indeed, these rules have been applied in the vast majority of cases in situations where directors of insolvent companies –in the broadest sense, either balance sheet insolvencies or cash flow insolvencies, and regardless of whether insolvency had been filed - failed to adopt the

[71] Limited liability companies constitute the functional equivalent to UK's private companies.
[72] Ley 2/95, de 23 de Marzo, de Sociedades de Responsabilidad Limitada.
[73] Emilio Beltrán 'Capitulo 6. La Responsabilidad de los Administradores por Obligaciones Sociales' in Ángel Rojo and Emilio Beltrán (eds) *La Responsabilidad de los Administradores de las Sociedades Mercantiles* (4th Edn., Tirant lo Blanch, Valencia, 2011) 255.

necessary measures when an event which would constitute a cause of dissolution occurred.[74]

Although it appears to serve a fair purpose, it might have gone a bit too far as far as directors' responsibilities are concerned. First, the Capital Directive was intended to be solely applicable to public companies. These rules make no distinction whatsoever as to which companies shall apply. This implies that one can find private companies holding a very small amount of capital (for example €3.000, the minimum threshold), holding the minimum in reserves (10% of the capital) running a proportionally bigger business, which have €2000 in losses at the end of the previous year, being the usual volume of business of thousands of Euros. This company's capital has now a value under the half of the legal capital and that constitutes a cause of dissolution. An unwary director, who would not call the general meeting within the period of two months, would be responsible for all company's debts. That could lead to a highly unreasonable situation, where the debts are significantly higher than the losses, which caused the directors' responsibility in the first place. Secondly, and perhaps more importantly, this new rule makes specific mention that directors would be personally liable for *all* companies' debts.

Moreover, it has been argued that this rule does not serve the initial purpose of avoiding *de facto* disappearances of companies with liabilities from the markets given that in practice there are a number of mechanisms to avoid it. A very good example is a resolution of the DGRN[75], which allowed the registration of an agreement of dissolution with a simultaneous resignation of the directors. There was no appointment of a new board, justified by the lack of candidates, which implied the validation of dissolution as liquidation but avoiding the appointment of liquidators.[76] This, in fact, provides a legal blessing for the referred disappearances, excluding the possibility of observing personal

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[74] Ibid, 255.
[75] Dirección General de los Registros y el Notariado (General Directorate of Notaries and Registries). This institution belongs to the Spanish Ministry of Justice and holds competences to issue opinions on questions raised by notaries and registries when exercising their duties.
[76] DGRN 22/09/2000 (RJ 2000, 10202).

liability. As a result, it could be argued that Article 262.5 TRLSA in practice constitutes more a trap for the unwary than a guarantee for commercial realities.[77]

There is a particularly relevant Supreme Court case which influenced the law in this context.[78]This case constitutes precedent -and it is therefore binding for interpretation- since it is the second time the Supreme Court is addressing this issue.[79] This case is a landmark one, because it clarifies two of the most controversial issues until that time: first, it clarifies the *dies a quo* to count the period of two months to convene the General Meeting in case of losses (art. 262.2 TRLSA) and the effects of the so-called 'late compliance' on the liability derived from its non-compliance (art 262.5 TRLSA).

Both issues are highly relevant for this study. First, by determining the *dies a quo* the court had to clarify the meaning of the concept of losses used in the TRLSA as a cause for dissolution. In short, this case clarifies that the concept of losses, which the law refers to, does not only include those losses which appear in the annual accounts but also those which appear in any of the balance sheets the company used for a voluntary reduction of capital.[80]

The second argument used to defend the idea that those losses, which are the cause of dissolution, have to be reflected on the year balance sheet, is based on the necessity to treat in a similar manner two circumstances which are believed to be analogous: the reduction of company's equity under two thirds of the value of legal capital (art. 163.1.2 TRLSA) and the reduction of company's equity under the half of the value of legal capital (art 260.1.4 TRLSA).

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[77] Prades Cutillas (n 64) 255.
[78] STS 8154/2004, Sala 1a, of 16 December 2004.
[79] First time was in STS 7878/2000, Sala 1a, of 30 October 2000.
[80] In accordance to a resolution of ICAC (Instituto de Contabilidad y Auditoria de Cuentas) 20 November 1996, which establishes that if a company undertakes a voluntary reduction of capital at a time that it does not coincide with the closing of annual accounts, they must elaborate a balance sheet reflecting the situation at that specific time. To my knowledge, this is still the case.

It has been argued, however, that these two concepts are not to be identified one to another. In the latter the legislator considered that such severe or qualified losses affect the very possibility of the company to pursue its activities, and therefore established a very short period of two months to call for a general meeting to amend the situation before the company becomes insolvent.[81] In the former, however, the legislator allows waiting until the end of the end of accounting year given that it is an extraordinary mechanism which should only be applicable when there are no other viable mechanisms to save the company's financial health.[82]

3.4.4.1.2 Evolution and amendments to the rule

There have been repeated attempts to amend the abovementioned drawbacks by amending the rules. Specifically, three major amendments to this rule have been made since then: in 2003, 2005 and 2010.

First, in 2003, the new insolvency law modified both acts by introducing the filing for insolvency as an alternative to dissolution when appropriate. This amendment was introduced as a response to the fact that, as stated above, in practice these rules were most commonly applied in situations where directors' of insolvent companies failed to adopt the necessary measures when an event which would constitute a cause of dissolution occurred.[83] Specifically, there were incongruities amongst case law. Whilst some recognised that filing for insolvency should –and would- produce the same effects as judicial dissolution, others considered that as a result of the silence of the law at this

[81] See, for example, J. Machado Plazas, Pérdida del Capital Social y Responsabilidad de los Administradores por las Deudas Sociales (Civitas, Madrid, 1997) 203.
[82] Rodrigo Uría, Aurelio Menéndez and Emilio Beltrán 'Disolución y Liquidación de la Sociedad Anónima (artículos 260 a 281 de la Ley de Sociedades Anónimas', in Rodrigo Uría, Aurelio Menéndez y Manuel Olivencia (eds) *Comentario al Régimen Legal de las Sociedades Mercantiles* (Volume XI, Civitas, Madrid, 2002) 40.
[83] Beltrán (n 70) 255.

respect, directors' could not be exempt of their liabilities arisen from their failure to comply with their duty to file for judicial dissolution.[84]

Both TRLSA and LSRL were amended in 2003 using the Insolvency Act (LC). As a result of this amendment, the application for the court declaration for voluntary insolvency would be a complementary addition to the directors' duty to pursue dissolution for major losses. This way, directors' duties would be considered met not only when they call for a General Meeting – and requesting judicial dissolution when appropriate- but also when they file for voluntary insolvency. This is the case because in such situation insolvency rules would substitute the company law duty to file for dissolution.

Nevertheless, the literal wording of these laws was so unfortunate that made even more difficult their interpretation and made the legal system at this respect even more complicated. This brought new criticisms into place since further issues arose from the implementation of such amendments. As a result, in addition to the harshness and the numerous issues arising from the interpretation of the rules, at this time the criticisms revolve around the suggestion that the whole system should be absorbed by general rules on tort liability[85] or a system of insolvency sanctions to directors who either cause or aggravate the current situation of insolvency. According to the wording of the rules at the time, filing for voluntary insolvency as an alternative process to filing for judicial dissolution would only be enforceable 'if applicable'.

Being conscious of the abovementioned interpretative issues and once again as a response to repeated concerns manifested in case law about the extent of the responsibility falling on directors' shoulders, the Spanish legislator aimed for an amendment of the rules in 2005 through the Public European Companies Act.[86] This

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[84] At this respect see, for example, Supreme Court cases on 4/02/1999, 21/09/1999 and 13/04/2000. Also cases issued with posteriority to 2003, where the facts occurred prior to it: 20/10/2003, 16/02/2004, 09/01/2006, 06/04/2006, 19/09/2007, 14/05/2008, 24/06/2008, 01/12/2008, 03/06/2010 or 14/07/2010.
[85] SSTS 28/04/2006
[86] Ley 19/2005, de 14 de noviembre, sobre la sociedad anónima europea domiciliada en España.

new rule added a clarification that entails that directors' liability will only apply for those liabilities to which the company engaged after the cause of dissolution arose. In addition, having in mind that the ultimate aim of this amendment was to clarify the law, it was established that it will be presumed that all obligations which are claimed to occur in the specific situation arose after the event that would cause the dissolution. Therefore, there was then a shift on the burden of proof as directors must prove the actions occurred prior to the event causing the dissolution if they want to avoid liability.

Finally, in 2010, the LSC as a recast of both TRLSA and LSRL and now the only regulation on corporate enterprises, made a step further by adding clarity to this area of law. In general terms, this Act was enacted in order to unify such a complex regime in both public and private companies, which was so far unreasonably divergent.
The current law in force reads as follows:

> *Article 367: Joint liability of the directors*
>
> *Directors who fail to convene the mandatory general meeting within two months to adopt a decision on dissolution shall be jointly and severally accountable for corporate obligations incurred after the legal cause of dissolution is forthcoming. Directors who fail to apply for a court ruling to dissolve the company or, as appropriate, to institute insolvency proceedings within two months of the date scheduled for the meeting, if not held, or from the day of the meeting, if the dissolution proposal is defeated, shall be equally liable.*
> *In such cases, corporate obligations constituting the object of claims shall be regarded to be subsequent to the legal cause for dissolving the company unless the directors can substantiate that they are dated prior thereto.*

3.4.5 Commercial contracts

Propiedad Industrial	Patent rights	3
Depósito mercantil	Security deposit	1
Agencia	Commercial agency agreement	9

Concesión	Concession contract	1	
Transporte	Transport	4	
Compraventa mercantil	Commercial sales	16	
Publicidad	Advertising contract	1	
Seguros	Insurance	7	
Distribución	Distribution contract	1	
Suministro	Supply contract	2	
Franquicia	Franchise agreement	1	
Préstamo mercantil	Commercial loan	2	
Corretaje	Brokerage contract	2	
Total		**50**	**10.06%**

Table 8 Commercial contracts

A fifth group of creditors brought claims to the commercial courts arising out of commercial contracts. This sample contains a wide range of claims regarding commercial contracts that represent a 10.06% of the total of the pool of 524 cases. This amounts once again to a significant number, especially as far as sales are concerned. This responds very logically to the nature and rationale of litigation for creditor protection. It was expected that by using this methodology, approaching the issue from a bottom-up perspective, one should find not only claims brought when the debtor company is not able to repay its debts but also claims brought to court when creditors are in need of protection due to contractual debt discrepancies. However, exploring these claims independently – aside from sales- appear to be merely incidental, amounting less than one per cent of the total. Nevertheless, this demonstrates that the system of creditor protection and the mechanisms to provide its enforcement do not only appear in situations of financial distress; this demonstrates that there are creditors who are in need of protection also in a context where the debtor company is financially healthy and that at the same time they have chosen to seek for enforcement of their rights timely.

These claims, however, will also be omitted from the main analysis in this study. Although this time the results show a more significant number of cases, they do not

appear to be related to legal capital, not even in an ancillary manner. Therefore, a qualitative analysis of this category would fall out of the scope of this study.

3.5 Conclusion

This case study on the litigation trends of creditors seeking for protection shows very interesting facts about their preferences. Although most of the possibilities available for creditor protection[87] are represented to some extent, stronger preferences are made evident. From a quantitative point of view, one could argue that preferences revolve around insolvency mechanisms and directors' liability, as those categories outnumber significantly the others. At first glance, this seems to demonstrate that claims based on legal capital rules are merely incidental and as a result the legal capital regime appears to be non-functional and arguably burdensome and inefficient. However, such assumption might be questionable. Even though legal capital enforcement mechanisms introduced by the legislator to provide creditor protection (such as the right to opposition to reduction of capital) are largely underrepresented, claims related to directors' liability for company's losses are very significant. This constitutes a mechanism to enforce the so-called 'Recapitalise or Liquidate' rule, one of the most distinctive features of the Spanish legal system as far as legal capital is concerned. Pursuant to this rule, companies whose capital has fallen under the half of the subscribed capital are obliged to dissolve the company. What is more, this obligation falls under the scope of directors' duties, and there is a system of personal liability in place for breach of that duty. This could arguably strengthen the legal capital rules' purpose of providing creditor protection and therefore enhance the legal capital system, particularly if it could be demonstrated that in practice respond to their aim to correct debtor-creditor conflicts of interests.

Next chapter will address undertake a case study based on UK litigation trends, and the same issues will be addressed from a UK perspective. Naturally, issues of legal transplants and comparative law arise these case studies are constructed aiming to gather

[87] Chapters 2 and 5 address which are those mechanisms and which of them are not represented in the case studies -and why- carefully.

data which is functionally comparable. Chapter 5 then follows, where the functional and comparative analysis between these two case studies is made, aiming to unravel the suitability of EU legal capital rules as a mechanism of creditor protection.

Chapter 4 Creditor Protection and Legal Capital Rules. The case of the United Kingdom.

4.1 Introduction

The aim of this chapter is to analyse the suitability of capital rules -in its broadest sense- for creditor protection in the United Kingdom. In line with the previous chapter of this thesis, this aim is built on the premise that legal capital rules must not be solely understood as minimum capital and capital maintenance, but also as a wider concept including its enforcement mechanisms. In order to devise such enforcement mechanisms, this chapter will include a case study on litigation trends regarding creditor protection in the United Kingdom. It will start from a pool of cases, where creditors litigated seeking for protection, then the data obtained will be used to identify any links between those enforcement mechanisms and legal capital rules, in order to analyse each of them and their overall effectiveness over creditor protection.

English law is characterised by having a very scant approach as far as creditor protection is concerned. One of the landmark cases in English company law did establish that "the unsecured creditors (…) may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They (…) had full notice that they were no longer dealing with an individual".[1] This approach, still prevailing, demonstrates that English law assumes to a large extent that creditors can adjust to the risks posed by limited liability. This characteristic differentiates Anglo-Saxon jurisdictions – namely UK and US- from continental jurisdictions, where regulatory mechanisms of mandatory creditor protection are in order.

[1] Lord Macnaghten in *Salomon v A. Salomon* & Co. Ltd [1897] AC 22.

However, although this is the general rule, it is also well known that not all creditors are able to adjust, such as tort creditors, tax agencies and occasional suppliers. Additionally, it is also well known that even though adjustments are possible in the majority of situations, those may be less effective (or even ineffective) in the vicinity of insolvency. For example, risks such as asset substitution or asset dilution aggravate in the proximity of insolvency proceedings.

English law has addressed this issue through a wide range of different mechanisms. As it will be examined in this chapter, there are specific mechanisms related to ensure a minimum share capital and its maintenance throughout the company's course of business. As it was also indicated, these mechanisms have had a rather small impact upon effective creditor protection, mainly due to the lack of enforcement mechanisms and its major overlap with corporate insolvency laws. As the results of case studies conducted will demonstrate, the issue of creditor protection has been most effectively addressed by three differentiable sets of rules: judicial abandonment of limited liability by 'piercing' or 'lifting' the corporate veil[2], establishing a system of common law for creditor protection and a substantive statutory system of creditor protection mechanisms. Each of these will be studied independently in this chapter, from both a theoretical and a functional point of view, aiming to unravel the functionality of creditor protection in the UK in general and the role played by legal capital rules in particular.

In order to undertake such assessment, this chapter will be divided in five sections. This, as an introductory section, exposes the rationale and structure of this chapter. The second section will examine the legal capital rules, analysing the origins and evolution of these rules, the transposition of the Capital Directive, as well as its current regulation. The

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[2] In *The Coral Rose* (No 1) [1991] 1 Lloyd's Rep 563,571, Staughton LJ established a difference between the concepts of 'piercing the corporate veil' and 'lifting the corporate veil'. He made such distinction on the grounds that piercing the corporate veil would entail 'treating the rights or liabilities or activities of the company as the rights or liabilities or activities of its shareholders', whereas lifting the corporate veil would mean 'having regard to the shareholding in a company for some other legal purpose'. In this thesis such distinction is not adopted; both concepts are merged and both terms will be used interchangeably.

third section will elaborate on the methods used in this chapter in order to fulfil its aim, paying special attention to the construction of the case study. The fourth section will address the case study results, aiming to identify enforcement mechanisms related to legal capital. This section will in turn be divided in five subsections, approaching separately claims related to contract law and property matters, banks and financial contracts, insolvency proceedings (with special reference to directors' liabilities and, more specifically, directors' liability for wrongful and fraudulent trading) and company law mechanisms (particularly directors' liability and judicial abandonment of limited liability by piercing the corporate veil). Finally, a fifth concluding section will summarise the most relevant findings and will assess their relationship to legal capital. In summary, it will make an overall assessment of the rules in place in the English legal system and their suitability to provide creditor protection.

4.2 Legal Capital Rules in the UK

UK company law has traditionally not required a minimum capital amount to form a company.[3] However, as a result of the implementation of the EU Second Company Law Directive, public companies are now subject to minimum capital requirements. Legal capital rules have been used by English law as a mechanism to give response to the risks of limited liability, namely restricting the freedom of companies' controllers to transfer assets out of the company when such undertaking might prejudice creditors.[4]

Since the introduction of modern company law in Britain in mid-nineteenth century, the law has encompassed mechanisms to remove the safeguard provided by limited liability and extend responsibility for companies' obligations to shareholders. This approach has always been taken very cautiously, and as a result there are few examples in law of

[3] David Kershaw, *Company Law in Context, Cases and Materials* (2nd edn., OUP 2012) 817.
[4] Paul Davies and Sarah Worthington, *Gower's Principles of Modern Company Law* (10th edn, Sweet and Maxwell 2016) 147.

situations worth lifting the corporate veil. In modern company law the target for the legislation aiming to combat opportunistic behaviour have rather been those individuals in charge of the company's management (which are typically its directors). Directors more likely to undertake an opportunistic action than shareholders, given the concentration of power in the board. It is worth noticing that shareholders are not necessarily excluded from such liability, insofar they are acting in a managing capacity (acting as 'shadow directors', for instance) or as a consequence of their unlawful behaviour (they commit fraud, for example) but not in their mere capacity as shareholders.

4.2.1 Origin, evolution and current situation

Legal capital rules in the UK are largely affected by the influence of EU legislation. Before joining the European Economic Community on January 1973, Britain held a very distinctive Anglo-Saxon approach to legal capital. The first time the concept of limited liability – and therefore company's capital limited by shares[5]- was introduced in the UK was in 1855, by means of the Limited Liability Act 1855.[6] At the time, the English legislator established a minimum capital subscription and disbursement requirement, without nevertheless stating a minimum amount of total nominal capital required.[7] Additionally, the Limited Liability Act 1855 established an obligation for directors to proceed to wind up the company if at least three fourths of that nominal capital was lost.[8] This requirement indicates a very early approach to legal capital as a mechanism to ensure the company's solvency and, perhaps daringly, an indication of what has been later coined by company law scholars as 'Recapitalise or Liquidate' rule.[9] Nevertheless,

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[5] Or 'nominal capital', as the Limited Liability Act refers it to in Section 1 (4).
[6] The Limited Liability Act 1855 (18 & 19 Vict Cop. 133) An Act for Limiting Liability of Members of Certain Public Companies, p. 27.
[7] Section 1 (4) of the Limited Liability Act 1855 stipulates that in order to complete registration, a limited liability company must have at least 25 shareholders, those have to hold at least three quarters of the company's nominal capital and at least have paid up twenty per cent of it.
[8] Section 13 Limited Liability Act 1855.
[9] This rule has never been formally implemented in the UK, in contrast with other continental legal systems such as Spain (see Chapter 3 of this thesis) or Italy, for example. For a comprehensive discussion

such requirements were promptly removed – barely a year after- by the Public Companies Act in 1856.[10] The justification for such abolition was that capital requirements were an unnecessary protective mechanism given that it was only functional in very large and wealthy companies.[11]

Although there were a series of narrow-targeted modifications to enhance the effectiveness of the system, major changes were not introduced until 1980, with the transposition of the Capital Directive. Since then, not only the statutory provisions but also the common law standards are largely corresponding with the continental approach. However, they are significantly less detailed and restrictive, allowing to a larger scope of judicial discretion in company law matters than in other EU member states. [12]

The European influence on the English regime was put in place with the transposition of the Capital Directive in 17/12/1978 by means of The Companies Act 1980. This act was also the utilised as a mechanism to extend regulations on directors' conflicts of interest, to introduce a number of limitations on insider dealing, to require employees' interests to be taken into account by directors and to facilitate minority shareholder access to courts.[13] However, for the purposes of this study only Parts I to III, which are essentially concerned with implementing the Capital Directive, will be carefully examined.

The Capital Directive, as it is an inherent characteristic of this instrument of EU law, sets a framework of inspiring principles and minimum requirements to be implemented

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on the rule in the Italian legal system, see for instance Lorenzo Stanghellini, 'Director's Duties and the Optimal Timing of Insolvency. A Reassessment of the 'Recapitalize or Liquidate' Rule.' in P. Benazzo, M. Cera and S. Patriarca (eds.) *Il diritto delle società oggi. Innovazioni e persistenze* (Torino, UTET 2011) 733.

[10] Public Companies Act 1856 (19 & 20 Vict. c.47).

[11] Geoffrey Todd, 'Some Aspects of Public Companies, 1844-1900' (1932) 4 (1) The Economic History Review 46.

[12] Paddy Ireland, 'Finance and the Origins of Modern Company Law' in Grietje Baars and Andre Spicer (eds) *The Corporation: A Critical, Multi-Disciplinary Handbook* (1st edn., CUP 2017) 238.

[13] M. Freeman Durham, 'The Companies Act, 1980: Its Effects on British Corporate Law' (1982) 4 (2) Northwestern Journal of International Law and Business 551.

in national systems. In the process of transposition of the Capital Directive, Britain had different approaches to different issues. They chose to strictly respect the Directive in some issues, such the scope of application only to public companies limited by shares (whereas other EU member states, such as Spain, have also applied the rules of minimum capital to other forms of privately held companies). However, they also chose to widen the Capital Directive requirements in other aspects, such as the amount established as a minimum legal capital for such public companies, going notoriously beyond what it was required.

Even though the Capital Directive requires a minimum capital of €25,000, the Companies Act 1980[14] required that a public company must have a minimum allotted nominal share capital of £50,000 in order to trade. Nevertheless, it is only required the disbursement of a quarter of that amount for a public company to start operating in business. That amount has remained static over time, both at a EU level and a national UK level, which supports one of the main criticisms to the system emerging from the discipline of law and economics.[15] This amount, solely due to the effects of the inflation, after four decades of its initial implementation has become highly undervalued, to the extent that in the UK, for example, the equivalent amount in value in 2014 to the referred €25,000 would be more than €275,000[16].

Additionally, in light of these new requirements, the Companies Act 1980 also amended the concepts of private and public companies, aiming to establish the former as the default choice for incorporation rather than the latter.[17] Following the implementation of the Capital Directive implementation to the English legal system and in order to take advantage of the exonerations authorised by the Capital Directive, the Companies Act

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[14] Companies Act 2006, sections 761-763.
[15] For details of how the real value of that amount has decreased in the last 30 years due to the effects of inflation, see Chapter 1 Section 1.4.3.2.
[16] On the 31st of December 2014, being the exchange rate EUR-GBP of 0.777, €500.000 would equal to £388,500.
[17] This trend still operates after the enactment of the Companies Act 2006. Very rarely companies are incorporated as public limited companies. Instead, they are incorporated as private companies and re-registered in a later stage in accordance to business needs and strategies.

1981 introduced a regime allowing company's purchase of their own shares and a system for issuing redeemable shares. Both acts were repealed and consolidated integrating the text of the Companies Act 1985, which has now also been repealed, consolidated and amended into the currently in force Companies Act 2006 (henceforth referred as CA 2006). As far as legal capital rules is concerned, the CA 2006 mirrored the content of the previous acts at the time of its enactment. Revisions based on the directions on mandatory creditor protection introduced by the Directive 2006/68/EC [18] were introduced in later stages[19], being the current version in force since 1 October 2009.

The current situation is regulated by the CA 2006, as addressed above, did not introduce major amendments to the legal capital regime previously regulated by the previous post-Directive Acts. As far as minimum capital is concerned, this has remained untouched since it is regulation in 1980. Therefore, the situation remains, as public limited companies are required to hold a minimum allotted capital of £50,000[20] whereas limited companies are not formally required to hold any minimum amount of capital. It must be noted, however, that aligned with the English modern company law tradition there is no requirement of full disbursement. The CA only requires that at least a twenty-five per cent of the nominal value such amount plus the whole of the premium (if applicable) have to be paid up.[21] This rule will apply when public limited companies have been incorporated as such, which occurs in very rare occasions. The most common scenario is that companies originally incorporated as private companies re-register as public companies when the necessity arises. In such situation, the CA establishes the full disbursement of at least the minimum capital requirement of £50,000 in full as a requisite of incorporation.

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[18] Directive 2006/68/EC of The European Parliament and of The Council of 6 September 2006, amending the Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital.
[19] The Companies Regulations 2008 SI 2008/719 for reduction of capital and The Companies Regulations 2009 SI 209/2022 for share capital and acquisitions by the companies of their own shares.
[20] Sections 761 to 765 CA 2006.
[21] Section 586 CA 2006.

This requirement goes hand in hand with rules on premature trading.[22] Rules on premature trading aim to ensure that capital requirements –among others- are met. They introduce a system of enforcement through liability of the company, its officers and directors for starting trading undercapitalised. These rules establish that a public company "must not do business or exercise any borrowing powers" unless the Registrar of Companies has issued a trade certificate. Such certificate verifies that the public company complies with the provisions related to minimum share capital, which is ultimately aimed to protect creditors by compelling a company to possess a certain value of assets. These rules establish that the nominal value of a public company's share capital must be at least equal to the 'authorised minimum' capital of £50.000.

Most importantly, the effects of the failure to observe that obligation are rather severe. The company and its officers will be subject to payment of fines and the directors would be jointly and severally liable for any loss suffered by the counterparty for the company's failure to comply with the abovementioned provisions. Nevertheless, even though the CA 2006 provides a system of enforcement this has been proven to be highly ineffective. As the results of the case studies will show, this system has never been invoked since the enactment of CA 2006. This outcome was to a large extent expected – even though zero cases appears to be particularly significant- since these provisions only apply in the process of companies' incorporation. As above mentioned, public companies are rarely directly incorporated as such in the UK and, when it occurs, they tend to be sufficiently capitalised – usually far past beyond the minimum legal requirements- so such issues at incorporation are proven to not occur in practice. It is very difficult to determine which are the exact reasons for that, but it seems reasonable to assume that it is a combination of both a cautious behaviour in observance/compliance with the provisions in premature training and company's finance strategic decisions.

These rules, as it will be further demonstrated later in this chapter and generally in this thesis, they lack of any use. As it will be later discussed, these formal requirements are

[22] Section 761 of Companies Act 2006.

in practice not very effective since private companies are necessarily capitalised and public limited companies are rarely adjusting to this minimum threshold. Capitalisation makes these requirements irrelevant, since companies are in need to higher capitalisation in order to run their everyday business and to provide credibility to stakeholders in general and shareholders in particular. For example, looking at the capitalisation values of companies in the London Stock Exchange[23], it can be observed that the lowest level of capitalisation of listed companies is £89,000. From a total number of 2,267 companies, only one is at this lowest value[24], seven under half million pounds and 26 under a million.[25] This data indicates that capitalisation of public companies goes largely above and beyond the requirement of minimum capital, being only an insignificant portion close to the values required by the Capital Directive and the CA 2006.

The CA 2006, also in line of the requirements of the Capital Directive, regulates not only a minimum requirement of subscribed capital at the time of incorporation, but also rules on the maintenance of that capital. The means utilised to ensure such maintenance through the course of business of a company by the CA 2006 include provisions limiting the transfer of assets after incorporation, placing limits on the acquisition of own shares and regulating the steps to be taken in the eventuality of loss of capital and directors' liability in case of non-compliance.

First, if a public company -incorporated as such- wishes to enter into an agreement to transfer non-cash assets in return of at least ten per cent of its issued share capital within two years of the approval of their trading certificate, is required to be subject to independent valuation in order to deem that agreement valid. The resolution containing the agreement alongside the independent report has to be filed with the Registrar of Companies within fifteen days. Failure to comply with such rules triggers criminal

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[23] This data includes all companies, not only the ones in the main market but also AIM and PSM.
[24] IRF European Finance Investments
[25] Values at 30 December 2016. London Stock Exchange Historical Statistics, 'All company files on the London Stock Exchange at 30.12.2016' Available online at http://www.londonstockexchange.com/statistics/historic/company-files/company-files.htm Last accessed on 10 March 2017.

penalties[26] and the declaration of the agreement as void and the consequent possibility for the company to recover any consideration given for any unperformed obligations.[27] However, there is an exception to this rule. If the company in the ordinary course of their business enters into such an agreement and provided that it can be demonstrated that the need for acquisition of specific assets –either from the company itself or any other stakeholder- is part of such ordinary business, companies are excused of complying with the limitations on transfer of assets after incorporation.[28]

Secondly, the CA 2006 also establishes limitations and to the acquisition of own shares. Namely, those limitations and conditions essentially revolve around the capacity of issuing redeemable shares and purchasing its own shares (the so- called share buy-backs). A PLC can issue redeemable shares as long as it is authorised to do so by its articles of incorporation.[29] The company's directors might be entitled to decide on the terms, conditions and manner of such redemption either by a mandate contained within the articles or by ordinary resolution. If they wish to pursue a new share issue for redemption, they can only use distributable profits for that purpose.[30] Redeemed shares must be cancelled and the Registrar of Companies must be notified[31] for reassurance on compliance and publicity purposes.

It must be noted, however, that shares issued as redeemable shares are not the only ones subject to be extracted of the market. PLCs are also allowed to purchase their own shares provided that they are fully paid and they are paid for upon purchasing. Such action can only be funded through either distributable profits or the proceeds of a fresh issue of shares made just for that purpose.[32] The CA 2006 differentiates between two kinds of purchase: on and off market. The requirements and procedures are notably different,

[26] Section 602 CA 2006.
[27] Section 604 CA 2006.
[28] Section 598 CA 2006.
[29] Section 684 CA 2006.
[30] Section 687 CA 2006.
[31] Section 688 and 689 CA 2006.
[32] Sections 690 to 692 CA 2006.

being stricter when the share buy-back is off market[33], since interests of shareholders and creditors must be protected. To enhance that protection, the CA 2006 enables the option for shareholders and creditors to apply for a court order within five weeks of the passing of the share buy-back resolution either for buy-out of the dissident shareholder(s) or to protect the position of shareholders or creditors.[34]

Thirdly, the CA establishes a regime for the eventuality of serious loss of capital. More specifically, it requires the company's directors to call a general meeting if the company's capital has fallen to fifty per cent or less of its called-up share capital.[35] The aim of the meeting is to consider whether any, and if so what, steps should be taken to deal with the situation. Director's failure to comply with this provision is considered an offence, which would entail a conviction to a fine. However, it is noteworthy that given that this section is only applicable to public companies and it is not directly associated to any of the procedures of corporate insolvency, it lacks of any practical relevance.[36] Since the enactment of CA 2006 there have been no claims in court related to this specific provision. This is very likely to occur due to the fact that in situations where the share capital falls under the fifty per cent of its call-up value will commonly have associated liquidity issues and even more often balance-sheet insolvency issues. Therefore, in such situations directors will follow the rules of insolvency proceedings instead. The inclusion of this provision in the CA 2006 mirrors largely the provisions set in other continental legal systems, namely Spain. However, there is a major discrepancy between those systems on the practical importance of this rule, especially as far as creditor protection is concerned. Whilst in Spain directors' liability for undercapitalisation –before insolvency is triggered- would be one of the pillars in which creditor protection is based, in Britain it is of no use. This issue will be thoroughly discussed in the subsequent chapter(s) of this thesis, within a comparative analysis

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[33] For example, the law requires a super majority of 75% of votes in a special resolution to approve the off-market share buy-backs.
[34] Sections 709 to 723 CA 2006.
[35] Section 656 CA 2006.
[36] Ian Snaith, 'United Kingdom' in Dirk Van Gerven (ed.) *Capital Directive in Europe; The Rules on Incorporation and Capital of Limited Liability Companies* (CUP 2014) 942.

between these two legal systems in the context of legal capital rules and creditor protection.

4.3 Methods

In line with the preceding chapter, the aim of this chapter is to undertake a top-down functional approach through the examination of the application, feasibility and use of the Capital Directive's legal capital rules once they are transposed and integrated in the English legal system. This legal system has been considered to be significant since it represents a traditionally Anglo-Saxon legal system, whose company law is based on a common law and equity tradition, which has only been recently regulated by statutory controls, most as a result of the need of implementation of EU company directives.

The aim of this case study also lies on examining whether the legal capital rules are suited for their purpose of providing creditor protection and, if otherwise, whether there are other mechanisms better suited for that purpose. In other words, this case study is based on the hypothesis that legal capital rules – as restrictively and traditionally approached, i.e. limited to minimum capital and capital maintenance rules- do not protect creditors and, moreover, there are other mechanisms, which can provide a better response to creditors seeking for protection of their rights. Based on this premise, this chapter relies on the initial hypothesis that legal capital rules might not suffice to accomplish their principal aim of providing creditor protection, except if there are appropriate enforcement mechanisms in place to ensure their correct application. The underlying rationale is to take this debate a step further by not only assessing the issue from a purely doctrinal point of view but also by analysing the implications of its implementation in practice. It is expected that such exercise will provide sufficient empirical grounds as to examine and discuss the most substantial means to protect creditors in the UK.

More specifically, this chapter will examine cases where creditors sought protection in court. As this project would be impossible to encompass due to the large amount of cases

and variables involved, some limitations have been established. To begin with, it has been considered appropriate to limit the assessment of cases within a period of time. As the ultimate aim of this exercise is to conduct a comparative analysis between Spain and the UK, some limitations and compromises have been made. The designed period of study starts in 2004, matching with the creation and operation of the Spanish commercial courts (specialized in commercial and corporate matters) and illustrating at the same time the impact of the enactment and implementation of the CA 2006. Additionally, this period of time is also matching with the enactment of the current Spanish insolvency law, which would be of special importance in this analysis, since it introduced significant modifications as regards of creditor protection in situations of financial distress. Therefore, this period chosen for study covers the largest amount of cases which have been dealt in court in application of company and insolvency laws currently in force in both jurisdictions.

The search criterion to select the sample combines a top down approach with a bottom up approach. To start with, in order to undertake the top down search, the criterion has also been narrowed to 'creditor protection'. This initial search is not aimed to be comprehensive but to provide a general picture of the preferences of creditors when they pursue claims intended to protect their rights. As the aim of this case study is to test whether legal capital rules are providing sufficient protection to creditors, it was considered that this search criterion would serve as a means to identify an extensive and exhaustive number of cases where creditor protection was at stake. However, as the implementations of such limitations have been put in place not only as a response of an issue of practicability but also aiming to achieve a high degree of comparability, it has been considered appropriate to complement the results provided by this top down search with a complementary bottom up search. The idiosyncrasies of both legal systems and the disparity in categorising terms in the databases utilised made the abovementioned approach incomplete when assessing cases dealt in the UK. By broadening the search criteria, the results obtained contain a comprehensive picture of the creditor protection related claims in English courts, which will arguably allow for an effective comparative analysis between both legal systems. This task has been undertaken by adding the terms 'corporate veil', 'wrongful trading' and 'fraudulent trading' to the search criteria.

The tool utilised to undertake this search was the database Westlaw. This database is widely acknowledged as a reliable and exhaustive source of cases both in Spain and the UK. The cases studied are limited to those in higher courts, specifically to the Supreme Court, High Court and Court of Appeal. This decision has been made once again for consistency purposes. Since the institution of legal precedent and the consideration of judgements as applicable law is notoriously different in Spain, cases where narrowed down to higher courts to ensure they had some legal weight.

The chosen method to pursue this aim is the critical assessment of cases where creditors sought protection of their rights in court and their relative relevance within the pool of cases obtained. Such analysis will provide a clear picture of creditors' preferences for the enforcement of their rights, namely which are the mechanisms most commonly used, which is the rationale underneath those choices and to what extent legal capital was related or played any role on the sought enforcement of creditors' rights.

It is hereby acknowledged as a limitation of this method of study the fact that disputes dealt through alternative dispute resolution will not be included. Private disputes have been excluded given their non-public nature and therefore the difficulty to get access to official data would detriment the study overall. In addition, the non-assessment of the claims outcomes in a number of cases constitutes a second limitation to the method. Due to the time limitations established in the construction of this case study it was not possible to gather all final resolutions as to assess whether courts resolved the studied cases in favour of creditors or not and, if so, to what extent. This is the case for those dealt in the Appeal Court, given that most of them are still open to a last appeal before the Supreme Court. Furthermore, envisaging cases' outcomes constitutes a particularly challenging task in insolvency proceedings given that the agreements, payments and sanctions are not included in the main judgements. Therefore, it has been decided not to apply them, except when those particular cases where considered to have a special importance and an exception was made- and focus the study to creditor's preferences in litigation instead of the outcomes obtained from that litigation. That would be a different and very interesting approach which shall be taken into account for future research.

4.4 Case Study Results

Cases addressing creditors claims	Numbers	Percentages
Contract law and property matters	30	5.55
Banks	16	2.96
Insolvency proceedings	207	38.26
Including:		
• Fraudulent Trading	46	8.50
• Wrongful Trading	58	10.72
Company Law mechanisms	288	53.23
Including:		
• Piercing the corporate veil	242	44.73
Total	**541**	**100**

Table 9 Litigation trends in England and Wales

By applying the methods examined in the previous section, a pool of 541 cases was identified. These cases are based on creditor protection, between 2004 and 2014, coming from Appeal Courts, High Court and Supreme Court, and are limited to commercial matters. The data analysed reveals that creditors are seeking protection through a wide range of different mechanisms. From the entire sample of 541 cases where creditors decided to place claims to protect their rights and those claims reached those higher courts, the distribution of claims can be broadly divided into four categories: contract law and property matters, banks and financial contracts, insolvency proceedings and company law mechanisms. Each of these categories will be examined below.

4.4.1 Contract law and property matters

Breach of Contract		4	
Real Estate		4	
Equity		1	
Trusts		1	
Consumers claims		9	
Succession		2	
Tenancies	Piercing the corporate veil	2	
Restitution	Defamation	3	
Unjust enrichment	Third party claim proceedings	4	
Total		**30**	**5.55%**

Table 10 Contract law and property matters

The first identified group of creditors, which constitute a small percentage (5.55%) of the total claims, chose to claim for the protection of their rights through private law procedures. This category aims to embrace all those claims that are directly pursued by creditors aiming to enforce the payment of their credits. It acts as a miscellaneous category which is used to embrace all claims pursued directly from creditors which are neither related to financial relationships (banks) nor within the framework of the CA 2006 or insolvency laws. For instance, they pursued claims related to breach of contract, real estate, tenancies, restitution or unjust enrichment. This very small representation indicates that corporate creditors rarely chose direct claims to protect their rights. As it has been mentioned before, this search is not exhaustive but it serves as an indication of the proportions of claims as to assess creditors preferences. Consequently, it has been decided not to conduct a further in depth study of private law claims and therefore confine the study to the examination of cases which represent the biggest groups of preferences.

4.4.2 Banks and financial contracts

Procedural issues	2	
Banking contracts	7	
Equity	2	
Swaps	1	
Trusts	2	
Damages	1	
Mortgages	1	
Total	**16**	**2.96%**

Table 11 Financial issues

A second group of creditors brought claims to the commercial courts arising out of financial relationships. Although these claims could be considered as contractual or commercial law related, it has been considered they are distinctive enough as to be grouped under an independent category. This time the results show a more significant number of cases, especially those related to banking contracts. However, the rest, i.e. those related to procedural issues, banking contracts, equity, SWAPs, trusts, damages or mortgages are once again very small in numbers. Furthermore, none of these claims were related in any manner to legal capital. These facts, alongside the small overall percentage (2.96%) and the special regulation of banks[37], it has rendered it justified that these cases will also be omitted from the main analysis in this study.

[37] Regulation of banks and banking contracts is entirely different and for reasons of feasibility falls out of the scope of this thesis.

4.4.3 Insolvency proceedings

Administration		34	
		6	
	Administrators powers and duties		
	Administrators appointments	3	
Mergers		1	
Directors' liability		1	
	For Wrongful Trading	58	
	For Fraudulent Trading	47	
Claims to shareholders		2	
Block transfer orders		1	
Voluntary arrangements		9	
Liquidators' liability		3	
Winding up		2	
	Creditors' voluntary winding up	1	
Unsecured creditors		2	
Asset valuation		1	
Asset distribution		4	
Book debts		1	
Cross-border insolvency		1	
Insurance		2	
Liquidation of debts		1	
Pensions		3	
Reorganisation of capital		1	
Administrative receivership		2	
Creditors' schemes of arrangement		22	
Total		**207**	**38.26%**

Table 12 Insolvency proceedings

A third group of creditors' claims were brought through insolvency proceedings. The list of cases analysed show a significant amount of creditors, who sought protection in

an insolvency proceeding, reaching a 38.23% of the total amount of claims scrutinized. This fact seems to support the theory that very often creditors are in need of protection when the company is already insolvent and therefore, by definition, with no legal capital left.[38] There are four particularly numerous groups of claims within this category: claims brought within administration proceedings (34), claims brought by creditors within schemes of arrangement (22), claims against directors for wrongful trading (58) and fraudulent trading (47). These results indicate, on the one hand, that creditors appear more active within insolvency proceedings led to companies rescue rather than in liquidation. Although these case studies are inconclusive on what motivates such circumstances, it can be argued that -since creditors are driven by the possibility of recovering the biggest portion of their credits- they are more interested in being actively involved in flexible proceedings where if an agreement is made their prospects of recovery are substantially increased, rather than in other inflexible proceedings such as liquidation, where their proactivity would not influence the final outcome. In addition, in the context of liquidation, it is more likely that claims are to be pursued by the liquidator (such as for wrongful trading or claims for transactions at undervalue). On the other hand, these results indicate that creditors are interested on pursuing not only claims against the insolvent company but also against its directors. The rationale underneath this trend appears to give response to the same aim, which is minimising the damage caused by the inability of the insolvent company to repay its debts. As a result, as insolvency law allows, creditors are in a position to seek for personal liability for misconduct which led to the insolvent situation. They are highly motivated to pursue such claims given that it substantially increases their chances to maximise returns of their credits.

The case study results show –perhaps unsurprisingly- that the majority of cases where creditors placed claims within insolvency proceedings, those are targeted to directors' liability. The means utilised to pursue such claims, fraudulent and wrongful trading, are

[38] See discussion on the differences between cash- flow insolvency and balance sheet insolvency on Chapter 5.

two very distinctive institutions of the UK legal system. These two aspects will be thoroughly discussed below, in order to unravel their rationale, use and relationship with legal capital rules.

4.4.3.1 Fraudulent trading

First, it appears that 47 creditors (out of the total number of cases) pursued their claims in the context of fraudulent trading. This rule has been integrated into English law through statutory mechanisms. Specifically, fraudulent trading is regulated both as a civil liability[39] and as criminal liability[40]. These two sections are essentially identical, being the fundamental difference merely procedural. Whilst the civil liability holds as a standard of proof the mere balance of probabilities, the criminal liability would require proof above reasonable doubt.[41]

Fraudulent trading occurs 'if in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose'. In such cases, either the liquidator or the administrator[42] may apply to the court to declare –as they think proper- that 'any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets'.

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[39] Section 213 Insolvency Act 1986.
[40] Section 993 Companies Act 2006.
[41] Louis Doyle and Andrew Keay, *Insolvency Legislation, Annotations and Commentary* (4th edn., Jordans 2014) 277.
[42] The extension of fraudulent trading to administration procedures was introduced in 2015 by modification of S.214 and the introduction of Sections 246ZB to 246ZD IA 1986 which were in turn inserted by the Small Business, Enterprise and Employment Act 2015, section 117 and 118. Therefore, as the time frame of the case studies currently analyzed is 2004-2014 such circumstances are not represented. However, it has been considered important to be considered and discussed at a theoretical level.

It is then important to discern which the main elements of this offence are. First, the business is 'carried on'[43] with intent to defraud. This implies an element of dishonesty, and therefore mere negligence or mistake would not suffice. For instance, courts have regarded as dishonesty the proven knowledge of the fact that there were no prospects of creditors being ever paid.[44] Courts stressed the fact that it must be a knowing party, such as directors who either carried out the fraud or participated somehow in it. [45] It has been clearly stated that blind eye knowledge, negligence or recklessness would not suffice.[46]

If the court finds that fraudulent trading occurred, will order a compensation in a shape of contribution to the company's assets from the director personal assets. Nevertheless, the provision does not specify which subjects are directly liable; it refers to anyone who knowingly had participated in an act aimed to defraud creditors. Therefore, subjects other than directors can also be subject to these proceedings, such as companies[47], shadow or non-executive directors, creditors or even outsiders. There is some discussion whether the nature of this contribution is actually merely compensatory or also punitive, even though there seems to be consensus in the fact that this is merely compensatory. There are however punitive mechanisms in place, such as s 993 CA 2006 for criminal liability or directors' disqualification.

4.4.3.2 Wrongful trading

English law has been traditionally concerned with regulating wrongful trading. One of the first and most directly targeted regulations are to be found in the Companies Act 1948[48], which held dishonest directors liable for continuing trading in a situation of insolvency. These rules are intended to minimise the perverse effects of limited liability,

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[43] *Morphitis v Bernasconi* [2003] EWCA 289.
[44] *Re William C Leitch Bros Ltd* [1990] BCC 526.
[45] *Re Augustus Barnett & Son Ltd* [1986] BCLC 170.
[46] *Morris v Bank of India* [2005] EWCA Civ 693.
[47] Ibid.
[48] Section 332.

particularly the fact that limited liability promotes that shareholders and directors continue to trade in a situation of insolvency[49], given that it promotes risk shifting to creditors, as shareholders cannot suffer further losses.[50]

This issue was again reconsidered by the Cork Committee[51], which report concluded that this provision –which preceded the current concept of fraudulent trading- was proven to be not sufficiently effective as a result of the need to prove dishonest behaviour.[52] As a result, they suggested the regulation of directors' liability also when continuing trading implies that the company 'incurs in liabilities with no reasonable prospect of meeting them'.[53]

Such proposal was incorporated in section 214 of the English Insolvency Act[54], which establishes a duty on directors towards creditors. More specifically, it imposes liability to directors who having had knowledge of the situation of inevitable insolvency, failed to take the reasonable steps to minimise creditors' losses. Courts have established, however, that knowledge of inevitable insolvency does not suffice to trigger the application of S.214 but the knowledge – or lack thereof- of the fact that the company was inevitably led to insolvent liquidation. For example, the undertakings of transactions with assets at undervalue would constitute a ground for directors' liability under S. 214.[55]

This form of directors' liability for insolvent trading was introduced as a result of the urge from the Cork Committee[56] for a significant extension of the liability of those

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[49] Insolvency is referred to in the sense that the liabilities exceed the assets. In other circumstances, such as the company is not able to repay its debts when they fall due, this might not necessary be the case because it is possible that the surplus obtained from a voluntary winding up could exceed the liabilities and therefore shareholders have a remote chance to be better off by not continuing trading.
[50] See, for example, Dan D. Prentice, 'Creditors Interests and Directors' Duties' (1990) 10 OJLS 265.
[51] Insolvency Law and Practice, Report of the Review Committee (Chairman, Sir Kenneth Cork) Cmnd 8558 (1982) (henceforth Cork Report).
[52] Cork Report para 1776.
[53] Cork Report para 1783.
[54] Insolvency Act 1986, herein referred as IA 1986.
[55] *Re Bangla Television Ltd* (in liq) [2009] EWCH 1632 (Ch) , [2010] BCC 143.
[56] Cork Report.

directors who recklessly or negligently trading -at the time where the company had a very slim provability of recovering financially- did increase creditors' losses.[57] The rationale beyond this section is to held directors accountable for disregarding their fiduciary duties to creditors. Those duties are similar to those ought to shareholders in the context of financial health, related essentially to safeguard their best interests in the company. As a result, this remedy has been largely praised since its introduction in the IA 1986. However, even though it was undoubtedly a significant step forward[58], its impact has been arguably rather limited, as it shall be discussed later.

Section 214, however, does not come across free of uncertainties. There are a number of issues which appear to be either unclear or unresolved by the courts. First, the knowledge that the situation of insolvency is required from the directors in question in order to be held accountable for wrongful trading. Such concept of insolvency is based on a balance sheet test, defined by the same section in subsection 6 as the situation when the company's assets do not suffice to meet its liabilities plus the costs of the procedure at the time the company has entered into it. This appears to be an objective test, basing the assessment on a point where creditors could not possibly be better off but there is a possibility (depending on directors' approach and actions) that they could be stopped from being worse off.[59] However, neither this section nor any other statutory disposition clarify which are the indicators of such circumstances, and therefore it remains unclear at what specific moment of time the directors know or ought to know that this is a reality. From the precedent stated in cases which have dealt with this issue, it can be argued that courts agree that liquidators must specify the time when liability for wrongful trading emerges. However, courts appear to have discretion on determining the starting point.[60]

S.214 also makes an attempt to frame the wrongdoing, by stating that are subject to liability "those which would be known or ascertained, or reached or taken, by a

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[57] Cork Report para 1782.
[58] For example, Prentice (n 50).
[59] Davies (n 4) 210.
[60] *Re Purpoint Ltd* [1991] BCC 121 at 128.

reasonably diligent person having both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and the general knowledge, skill and experience that that director has." This reference is very vague and it maintains the issue of knowledge and potential liability unresolved, which leads to a large extent to legal uncertainty.

Secondly, another uncertainty lies on the determination of the extent of liability to which the director would be subject to. S214 stipulates that "the court, on the application of the liquidator, may declare that that person is to be liable to make [such] contribution (if any) to the company's assets as the court thinks proper'. Therefore, the extent of the liability appears to be left to the courts' discretion[61]. The Court of Appeal, however, has recently established (in a case dealt alongside S.213 of fraudulent trading) that directors' liability should 'reflect the loss' that the wrongful trading engendered by their actions caused to creditors.[62] Nevertheless, it has also been established in earlier cases that even though this should be the norm, courts should be able to impose liability more strictly to directors who have been acting recklessly, maliciously or negligently than to those directors who have acted in an honest manner or even ingenuously.[63] It has also been argued that this liability is unlimited.[64]

Thirdly, it also remains unclear how the concept of director can be applied. This section clearly stipulates that the concept of "director" includes a shadow director. Although this clarifies the scope of the concept of director that the legislator considered pertinent, but such statement can be problematic. It is very common that shadow directors are in fact shareholders who are acting beyond their duties. If that is the case, it remains unclear how could it be determined –and by extension proved- when a shareholder started acting as a shadow director.

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[61] *Re Produce Marketing Consortium Ltd* (1989) 5 BCC 569 at 597.
[62] *Morphites v Bernasconi* [2003] EWCA Civ 289.
[63] *Re Produce Marketing Consortium Ltd* (1989) 5 BCC 569 at 597.
[64] Richard Williams, 'What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?' (2015) 78 (1) MLR 55.

Additionally, this section only applies either when the company has gone either to insolvent administration or liquidation. Prior to October 2015, this rule was applying solely when the company was in formal process of liquidation and it could only be triggered by a liquidator. Since that date, also an administrator (S.246 ZB IA) could claim for fraudulent and wrongful trading.[65] This was introduced as a result of the Transparency and Trust reforms,[66] with the aim of increasing the amount of financial compensation recovered from directors who had behaved under wrongful trading conditions. Even though the outcome of such addition remains to be proven in practice, it seems that it would not change dramatically the current situation. Besides, only liquidators (and since October 2015 admittedly also the administrators) have the power to pursue a claim for wrongful trading. Therefore, in situations where they cannot do so – or deliberately choose not to for whatever reason- creditors are left impotent and do not have available any mechanisms safeguard their rights for wrongful trading.[67]

Last but not least, it is apparent that this provision presents a major flow: it does not specify which specific directors' action would trigger the breach.[68] Given that there is no statutory reference to which actions, common law attempted to give response to those issues (even though claims brought from liquidators on directors' liability for wrongful trading have not been very numerous[69]). It can be seen from cases such as *Re Continental Assurance Co of London plc* [2001] BPIR 733 and *The Liquidator of Marini Ltd v Dickensen* [2003] EWHC 334 (Ch), [2004] BCC 172 that liquidators who issued claims against directors have encountered difficulties to obtain positive judgements. However,

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[65] Small Business, Enterprise and Employment at 2015 (SBEEA 2015), section 117.
[66] Department for Business, Innovation & Skills, 'Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK business' Government Response, April 2014, 64.
[67] Department for Business Innovation & Skills 'Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business' Government Response (April 2014). Available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/304297/bis-14-672-transparency-and-trust-consultation-response.pdf Last accessed 5 April 2017.
[68] Doyle and Keay (n 41) 282.
[69] Only 30 since the introduction of this section in IA 1989 until 2014, according to Department for Business Innovation & Skills (n 66).

there are very few exceptions, such as *Re Sherborne Associates Ltd* [1995] BCC 40 or *Re Continental Assurance Co of London plc* [2001] BPIR 733.

Moreover, courts appear reluctant to impose liabilities on directors, particularly when they sought advice from outsider/independent professionals. This conclusion can be drawn from the fact that they appear to restrict the imposition of personal liability in situations where they have acted negligently.[70] For example, in *Grant v Ralls, Re Ralls Builders Ltd (in liquidation)* [2016] EWHC 243 (Ch) even though the court found that the company had wrongfully traded in a known and inevitable vicinity of insolvency and the conduct of directors against creditors was considered to be reproachable, directors were not held liable. Nevertheless, if directors are held accountable for wrongful trading, the courts will have discretion on the extent of the contribution and its allocation, provided that such funds are not designated to specific creditors [71] given that the aim of the provision is to benefit the whole pool of creditors.

This uncertainty on which actions actually constitute wrongful trading plays a major role in the fact that the impact in practice of this remedy has been rather limited. This provision was supposed to have not only a compensation effect (ex post) but also a deterrent effect ex ante (so directors would not wrongfully trade). This unpredictability prevents the director to predict with a certain level of accuracy when liability might arise so he/she can stop trading.[72] These two effects of the rule were essential to the recommendations in Cork's report, which justified the need to implement this rule as a mechanism to correct market failures in corporate credit relationships. The report explains that that even though this liability is ex post in nature because compensation can only be ordered in circumstances where wrongful trading, it is not always and only the case because it also has a deterrent effect. The imposition of such liability would

[70] Doyle and Keay (n 41) 282.
[71] *Re Purpoint Ltd* [1991] BCLC 491 at 499.
[72] Richard Williams, 'What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?' (2015) 78 (1) MLR 55.

also provide clear effects ex ante, since it would provide incentives to directors to guard more attentively the company's assets when those are in the vicinity of insolvency.

The Cork report went a step further and claimed that this deterrent aspect of the wrongful trading would even 'encourage directors to satisfy themselves that their companies were adequately capitalised'. This statement is very strong and it is very difficult to verify whether the institution of wrongful trading as it is known today has had any impact on companies' capitalisation. Other legal systems, as it will be further addressed in the following chapter, have put mechanisms into place to directly relate directors' liability for wrongful trading –or otherwise- to adequate capitalisation.

4.4.4 Company law mechanisms

Directors' liability			
	Abuse of director's powers	1	
	Breach of fiduciary duties	3	
	Breach of duty of care	1	
	Contractual responsibility	5	
	Tort (negligence)	21	
	Tort of deceit	7	
Share Capital (increase/reduction)		2	
Claims against shareholders		2	
	Lifting the corporate veil	242	
Mergers		2	
Contractual rights (stakeholders)		1	
Auditors' negligence		1	
Total		**288**	**53.23%**

Table 13 Company law mechanisms

A fourth group of creditors opted to use as a means for enforcement for their claims mechanisms found in company law legislation. The table above shows that this is again a very large group, comprising 53.23% of the claims. The nature of these claims comprises both claims pursued under the umbrella of the CA 2006 and the common law. Within these claims, there are two particularly outstanding sub-categories: directors' liability in general and negligence claims in particular and claims aiming for lifting or piercing the corporate veil[73].

The concept of directors' liability has been largely covered traditionally by the common law – often mirroring the rules applying to trustees, fiduciary or equitable duties[74]- and vastly codified in the Companies Act 2006[75]. There are several instances where English law has considered appropriate to implement directors' personal liability as a result of a wrongdoing in their performance as an agent of the company in question, either formally or in the shade[76]. The extent is very vast, but this Chapter will focus on those duties that directors' have either in order to protect creditors' rights or at least to observe them when taking corporate decisions.

Under English law, directors' liability related to creditor protection can be divided in several categories, depending on the nature of the claim and the time when that claim can be pursued. For the purposes of this study, based on creditor protection in situations of insolvency, vicinity of insolvency or even in financial health, such division will be referred to as *ex ante* (relating to any mechanisms applicable before the insolvency proceedings begin) and *ex post* (relating to the opposite, i.e. any mechanisms applicable after the initiation of the insolvency proceedings).

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[73] These two terms were largely used interchangeably during the scope of this case study (2004-2014). A recent case has introduced some conceptual novelties which might impact on such distinction (as it will be discussed later in detail), but for the purposes of coherence with the terminology during the period object of study and due to the impossibility to discern between them ex post facto, they will be also used interchangeably.

[74] Davies and Worthington (n 4) 463.

[75] Companies Act 2006, Ch. 2 of Pt. 10, "General Duties of Directors".

[76] See discussion on the facto and shadow directors above.

4.4.4.1 Directors' liability ex ante

Directors' liability ex ante is a very limited and complicated area of liability. At this stage, creditors will have legitimation in some specific circumstances to pursue direct claims to directors. Since directors do not owe a duty of care to creditors[77], the only means to pursue direct liability claims ex ante are in the context of contract and tort law. The common law has clarified that duties are not owed directly to creditors, but their interests are to be protected in the name of the company.[78] However, proving that the director was directly and personally liable for that specific harm would be a very ambitious task,[79] given that the shift to their duties to creditors does not occur except if it is known that the company, although still solvent, it is unlikely to remain solvent and therefore creditors are put at risk.[80] Moreover, in contract law, the creditor will encounter the difficulty that the director acts as an agent of the company[81] and that presumption will be difficult to break. In tort, it will be difficult to prove that the director personally came under a duty of care to the creditor, with the exception of tort of deceit where directors cannot claim to be committing fraud or fraudulent misrepresentation and free of liability for such actions.[82] Therefore, although in theory there are mechanisms to pursue directors' direct liability before the vicinity of insolvency available, in practice those would be very difficult to enforce.

It must be noted here, however, that even though English Law contains a legal capital regime as a mechanism to minimise the effects of limited liability ex ante, there are no remedies which in practice serve as enforcement of such regime. There are two mechanisms in place: the prohibition of premature trading and the duty company's

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[77] *Kuwait Asia Bank v National Mutual Nominees* [1990] 3 WLR, S. 172 CA 2006.
[78] *Miller v Bain* [2002] 1 BCLC 266; D.D. Prentice, 'Creditors' Interests and Director's Duties (1990) 10 OJLS 275.
[79] *Williams v Natural Life Health Foods Ltd* [1998] 1 BCLC 689, [1998] 2 All ER 577, [1998] 1 WLR 830 HL
[80] Winkworth v Edward Baron Development Co ltd [1986] 1 WLR 1512.
[81] *Salomon v A. Salomon (n 1)*
[82] *Standard Chattered Bank v Pakistan National Shipping Corp* [2002] UKHL 43; [2003] 1 AC 959 at 20-23 for and *Contex Drouzhba Ltd v Wiseman & Anor* [2007] EWCA Civ 1201 for directors' liability for fraudulent misrepresentation.

directors to call a general meeting if the company's capital has fallen to fifty per cent or less of its called-up share capital.[83] The latter, imposes personal liability to directors linked to the violation or negligence of the implementation of capital maintenance rules. They will be thoroughly addressed below but is worth advancing that such rules have never been invoked in court. As a result, these rules neither encourage nor ensure the observation of the legal capital rules. Therefore, the imposition of a system of legal capital rules, already highly questionable for its lack of efficiency[84] and perhaps only justifiable for its role as ex ante mechanism for creditor protection, appears to be deficient in legal mechanisms that would enforce that role.

4.4.4.2 Directors' liability for breach of fiduciary duty

Directors' are subject to a wide range of fiduciary duties[85] such as to act in good faith to promote the success of the company, to exercise their powers for legitimate purposes and to exercise reasonable care, skill and diligence. These duties were historically imposed by the common law but they are now codified. Chapter 2 of Part 10 of the Companies Act 2006 has replaced the common law rules, but a number of the provisions are still based on rules of equity and common law and, naturally, rely on those for interpretation.[86]

It must be noted, however, that the general rule is that directors' fiduciary duties are not owed to shareholders, creditors or other stakeholders[87] but to the company itself. Nevertheless, the Common Law imposed a limitation to this rule: in situations of insolvency or vicinity of insolvency, directors have to 'have regard to' the rights of

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[83] Section 656 CA 2006.
[84] See Chapters 1 and 2 for a detailed explanation on benefits and drawbacks of a mandatory minimum capital and capital maintenance regime.
[85] CA 2006 s 170 (4).
[86] Roy Goode, *Principles of Corporate Insolvency Law, Student Edition* (4th edn, Sweet and Maxwell 2011) 647.
[87] *Kuwait Asia Bank v National Mutual Nominees* [1990] 3 WLR.

creditors.[88] This exception to the rule, although it is opening a new door for creditor protection, raises a number of questions - which will be thoroughly addressed below – such when the fiduciary duty switches from being owed to the company and/or its shareholders to being owed to creditors or the extent of the concept of 'having regard to' the interests of creditors.

Therefore, as it could be observed, this duty is very vague and there are many questions arising from its application. A first question arising from this section is when do directors' fiduciary duties to shareholders alter and switch to be owed to creditors. In other words, it is unclear when directors' duties alter and therefore they must prioritise the interest of creditors rather than/ instead of shareholders. This question remains unresolved, as case law has not addressed the issue in a satisfactory manner yet. [89] Some attempts of tackling the issue has been done but they just tend to reiterate vague concepts such as 'insolvent or even doubtfully solvent'[90], 'in the verge of insolvency'[91] or introducing ideas such as 'directors are not free to take action which puts at a real (as opposed to remote) risk the creditors' prospects of being paid'[92]. The underlying problem is that courts are not able to narrow down this concept because in English law there is no specific regulation on what triggers the vicinity of insolvency. As opposed to other legal systems such as the continental Germany or the common law based Australia, the UK has no provision which establishes an obligatory exposure of the companies to court insolvency given specific circumstances (commonly those being failing to pass either a balance sheet test or a cash flow test). The reason for this divergence has been regarded to be the English tradition to deal with insolvency away from court, exhausting first any opportunities of a private work out with the creditors.[93] Therefore, in practice,

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[88] *West Mercia Safetywear Ltd. V. Dodd* [1988] BCLC 250.
[89] There is difference between when insolvency is a fact or unavoidable. Nobody knows when the common law duty bites.
[90] *Brady v Brady* [1989] AC 755, regarding prohibition of financial assistance.
[91] *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] BCC 885, which recognises the existence of directors' duties towards creditors in the vicinity of insolvency.
[92] *Hellard v De Brito Carvalho* [2013] EWHC 2876 (Ch).
[93] Paul Davies, 'Directors' Creditor- Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency' (2006) 7 EBOR 301.

shareholders hold directors accountable until insolvency, when liquidators or administrators will act in creditors' best interests.[94]

If those mechanisms of direct liability are either not applicable or they fail, English law provides creditors with a number of ex post mechanisms to safeguard their rights.

4.4.4.3 Judicial abandonment of limited liability by piercing the corporate veil

Lifting the corporate veil is an inherent feature of the concept of limited liability in the vast majority of western jurisdictions.[95] It is the other side of the coin – as the limitations of the system are widely acknowledged, legal systems have introduced mechanisms in order to counterbalance the inevitable yet undesirable effects of limited liability, particularly as far as creditor protection is concerned. Most legal systems have adopted a system of shareholder responsibility, although, as we shall discuss below, limited to those shareholders who hold actual managerial power or a controlling share of the company and have been found responsible of abusing the corporate form.[96]

It is worth noting, however, that lifting the corporate veil is not the only mechanism that different jurisdictions implement in order to impose shareholder liability. In addition to it, other mechanisms such as the doctrine of shadow directors or equitable subordination[97] can be found. Pursuant to the doctrine of shadow directors where this is applied, it is recognised that a shareholder who acts as a director -even though it has not been appointed as such- it is subject to the same regime of liabilities as formally

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[94] Andrew Keay, *Directors' Duties* (2nd edn., Jordans 2014) Chapter 13 367.
[95] Renier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansman, Gerard Hertig, Klaus Hopt, Hideki Kanda and Edward Rock (eds.), *The Anatomy of Corporate Law. A Comparative and Functional Approach* (2nd edn, OUP 2009) 138.
[96] Ibid.
[97] Martin Gelter, 'The Subordination of Shareholder Loans in Bankruptcy' (2006) 26 (4) International Review of Law and Economics 478; Andreas Cahn, 'Equitable Subordination of Shareholder Loans?' (2006) 7 (1) EBOR 287 or David A. Skeel and Georg Krause-Vilmar, 'Recharacterisation and the Nonhindrance of Creditors' (2006) 7 (1) EBOR 259.

appointed directors. Under English law there are several situations where directors' liability is also extended to shadow or de facto directors. A very clear and straightforward example can be found in the English Insolvency Act 1986, which establishes in its section 214 (related to fraudulent trading) subsection 7 that '(in this section) "director" includes a shadow director'. On the other hand, according to the doctrine of equitable subordination, claims for debts that controlling shareholders are bringing against the states of the insolvent company would be subordinated, either because they have behaved in an inequitable manner or because shareholder loans are simply subordinated in every case (as in Germany, for example[98]) or only under specific circumstances (Italy).

The doctrine of corporate veil allows courts to impose personal liability on controlling shareholders for the company's debts. This possibility, although expressly recognised at common law,[99] it is regarded to be exceptional and the need to be kept to a minimum has been repeatedly highlighted. This becomes apparent with the small number of cases dealt in English courts about this issue and the even smaller number where courts did rule veil lifting.[100] Additionally, the doctrine of lifting the corporate veil appears not to be consistent within case law, which still impedes the anticipation of whether the courts would choose to lift the corporate veil in a case by case basis.[101] An empirical study carried out in 1998 which analysed the results of a number of UK cases including a request to the courts to lift the corporate veil[102], demonstrated that the corporate veil was only lifted in 47.24% of the cases. Additionally, the results of this study suggest that the final verdict appeared to be conditioned by a number of factors, such as the party requesting the action. Whilst 65.06% of the claims brought by an outsider party –namely

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[98] Martin Gelter (n 93).
[99] *Petrodel Resources Ltd v Prest* [2013] UKSC 34; [2013] 3 WLR 1.
[100] For cases prior 1999, see Charles Mitchell, 'Lifting the Corporate Veil in the English Courts: An Empirical Study' (1999) 3 CfiLR 15.
[101] The vast majority of commentators in English company law agree on this statement. See, for example, Davies and Worthington, n (4) 197.
[102] Charles Mitchell, n (96). The methodology of this study recognizes some limitations regarding the sampling for the used data, only including those cases where the issue was in fact taken into consideration by the courts and ruled either in favor or against it.

the government- succeeded, only 16.67% of the claims brought by employees did. The study also reveals a steady trend throughout the last decades, being the total of cases where the veil was lifted orbiting 50% of the claims in each decade.

Having passed nearly two decades of this study, it seems that the trends should continue to be very similar. There haven't been any breakthrough cases which could indicate a change of trend until 2013, when the Supreme Court ruled in *Prest v Petrodel* [103] that previous cases where the veil was lifted were characterised by "incautious dicta and inadequate reasoning"[104]. The judgement recognises that previous case law has not applied the doctrine of lifting the corporate veil rigorously, since they failed to differentiate between companies which were incorporated for the sole purposes of merely concealing or evading.[105] This was the first time such a distinction was made and it criticises previous decisions for focusing excessively in terms such as "façade' or "sham", arguing that the boundaries and conceptualisation are too difficult to determine and therefore to establish certainty in law. Concealing and evading are considered to be more functional terms, which would ensure a more coherent and systematic application of the law.

According to Lord Sumption, concealing is not reproachable and therefore not a reason for veil piercing, whereas evading is. This decision of the Supreme Court appears to narrow down the scenarios where the corporate veil might be lifted.[106] The Lord emphasises that "there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal

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[103] Prest (Appellant) v Petrodel Resources Limited and others (Respondents) [2013] UKSC 34; [2013] 3 WLR 1.
[104] Ibid.
[105] Ibid.
[106] Ibid.

personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.'[107] Nevertheless, a sceptical view could argue that since the judgement did not consider appropriate to lift the corporate veil, those new and supposedly more efficient measurements remain undefined and therefore the law on veil lifting still remains uncertain. More empirical studies would be needed in the future, to assess the real impact of this theoretically ground-breaking Supreme Court case.

4.5 Conclusion

Legal capital rules aim to provide creditor protection during the course of business of a company. This is no different in the UK, where legal capital rules have been evolving since the beginning of what is known as modern company law, with the creation and implementation of the concept of limited liability. The concept of legal capital has evolved ever since matching the needs of the business realities at that certain point in time. The last major modification was triggered by the transposition of the Capital Directive by the Companies Act 1980. Since then, little changes have been made, and those made did not affect the core of the doctrine, namely the minimum capital requirement and its maintenance.

Legal capital rules in the UK revolve around the abovementioned two pillars. On the one hand, there is a minimum capital requirement of £50,000 for all public companies. Unlike other EU jurisdictions, the UK has chosen not to expand this requirement also to private companies. This minimum capital requirement goes far beyond the £25,000 required by the Capital Directive, but it is still very low to regard any real functionality. For example, the vast majority of public companies listed in the London Stock Exchange

[107] Prest (Appellant) v Petrodel Resources Limited and others (Respondents) (n 103)

have a level of capitalisation which exceeds one million GBP. One of the reasons of this effect is the concept and use of public companies in the UK. Public companies are large companies listed in primary or secondary markets which usually started as private companies in expansion. Very rarely public companies are initially registered as such; instead, they are more commonly private companies re-registered as public companies. This indicates that this minimum requirement of capitalisation it is mostly insufficient to respond to business needs of public companies in the UK.

The legislator, however, following the indications of the Capital Directive has also regulated mechanisms to maintain the minimum capitalisation. The mechanisms are very diverse, from limitation of acquisitions of own shares, limitations on the issuing of redeemable shares, limitations on dividend distribution or imposition of directors' duties in case of loss of capital. It is a very challenging task to determine whether the rules on capital maintenance are functional or effective. The only monitoring mechanism are auditors' reports, which should be issued not only for annual accounts purposes but also in specific circumstances such as when capital is paid up by contributions in kind. Capital maintenance rules are aimed to function during the company's' course of business and there are no public mechanisms to ascertain whether they are put in place. In the period now subject to study, there were no claims –pursued by company's creditors- related to those issues. This indicates that those rules are ineffective when creditors' rights are at stake.

The lack of creditors seeking enforcement of their rights through capital rules in court is not a coincidence. English law does not provide sufficient enforcement mechanisms for such purposes. Legal capital rules are static and not directly enforceable. The only exceptions are directors' liability for non-compliance with their duties in case of loss of capital under the 50 per cent of the called-up capital and for premature trading (i.e. starting trading before the minimum capital requirements of issue, subscription and disbursement of shares have been met). The fact that these two enforcement mechanisms have not been used in the last decade demonstrates the ineffectiveness of the rule. The number of reasons for this occurrence is likely to be very vast, but there are two reasons that appear indisputable. First, the circumstances under which liability for directors for

loss of capital would be triggered largely overlap with situations of insolvency or imminent insolvency. Therefore, it is very likely that before such enforcement mechanisms can be of use, insolvency mechanisms are already applicable and, as we shall see later, those would deal with creditor protection in a more effective manner. Secondly, more often than not, a situation of large loss of capital where the company is either not able or it considers it inappropriate to recapitalise, it serves as a certain indicator of not only insolvency but also unviability. If shareholders, equity holders and potential investors do not demonstrate an interest on recapitalising it is safe to assume that they do not consider the company viable and therefore worth the investment.

English law, however, does provide other mechanisms to safeguard creditor rights, perhaps more effectively. There is very little controversy that creditor protection in the UK revolves around three institutions: the doctrine of piercing or lifting the corporate veil, the imposition of directors' fiduciary duties towards creditors and the regulation of fraudulent and wrongful trading. As opposed as what was found regarding legal capital rules, the case studies demonstrate that such institutions/remedies are highly represented amongst creditors' preferences in litigation in order to enforce their rights. To be precise, these tools represent the largest portion of creditor claims. This fact is not a coincidence either. English law provides enforcement mechanisms for such rules protecting creditors' rights more effectively. Although it has been argued that courts are reluctant to enforce these rules, it appears to be the preferred mechanism for creditors to pursue a claim to protect their rights.

A common denominator of these rules is that they are based on personal liability for the company's debts. Whilst the doctrine of lifting or piercing the corporate veil abandons limited liability and aims to hold shareholders responsible for company's debts, non-compliance with fiduciary duties against creditors and rules on wrongful trading and fraudulent trading would held directors accountable for the company's losses. This insinuates that when creditors' liabilities are unpaid, as the main reason appears to be the fact that the company either struggles or is unable to pay its debts when they fall due (i.e. insolvency or vicinity of insolvency) creditors tend to seek the opportunity to have

access to external patrimonies, hoping these hold a level of solvency higher than the company itself.

All the abovementioned appears to support the statement that has been supported in the law and economics literature in the last decades: legal capital rules do not serve to their purpose of protecting creditors. Nevertheless, as mentioned earlier, the main reason for this appears to be the lack of enforcement mechanisms provided. Next chapter will undertake a comparative analysis between Spain and the UK, which aims to demonstrate that historically different approaches to legal capital, now under the umbrella of the EU Capital Directive, do provide a framework that, although similar in appearance, it is different de facto and that affects the functionality of the legal capital rules. Effective mechanisms of creditor protection have been identified in both jurisdictions and the implementation of the traits that make them effective can potentially enhance the institution of creditor protection in general and legal capital rules significantly.

Chapter 5 Comparative analysis between Spain and the UK

5.1 Introduction

The aim of this chapter is to give response to the main research question, which addresses the issue of whether the current EU system of legal capital rules is fit for its purpose in providing creditor protection. In addition, this problem question also aims to unravel whether in case that it is concluded that it is not -and provided that creditor protection is considered desirable- it would be advisable to reform the system by introducing alternative or complementary means of creditor protection.

As it was assessed in Chapter 1, the corporate structure organised around legal capital is just one of the possible corporate forms in order to articulate relationships between the basic elements – or agents, in law and economics terminology- of every business enterprise: investment, decision's power and risk allocation.[1] By means of limited liability and a capital structure, legal systems aim to guarantee legal certainty between relationships accrued both internally –namely shareholders and directors- and externally with creditors. It is therefore ultimately an issue of reduction of transaction costs as a means to facilitate optimal investment decisions and, as a result, promoting the efficient use of the capital as a scant resource.[2] This aim of reduction of transaction costs is achieved through a mandatory legal framework associated to requirements of disclosure.

[1] For an extensive study of the rationale of legal capital, see for example Josep Oriol Llebot Majó, 'La Geometría del Capital Social' (1999) 231 RDM 37; or argumentations exposed in detail in Chapter 1.
[2] Ronald H. Coase, 'The Relevance of Transaction Costs in the Economic Analysis of Law' in Francesco Parisi and Charles K. Rowley (eds.) *The Origins of Law and Economics. Essays by the Founding Fathers* (The Locke Institute, Edward Elgar 2005) 199.

However, legal capital rules are not free of criticisms. The most agreed upon are related to their inability to reduce such transaction costs, as it has been addressed in Chapter 1. There are a number of issues which compromise the efficiency of the system: its limited scope of application to only public companies, issues arisen from the minimum fixed amount of capitalisation, they carry a large amount of costs while providing very little benefits. These criticisms are based namely on the legal capital regime as it is constructed by EU laws. Next subsections will analyse in detail how Spain and the UK have addressed the transposition and implementation of such rules and, based on a comparative analysis, determine whether there is something that can be learnt at a EU level to overcome the abovementioned criticisms.

5.2 Theoretical criticisms to the legal capital models

5.2.1 Scope of application limited to public companies

The scope of application of such minimum capital requirements according to the Capital Directive is limited to public companies. The CA 2006 applied strictly this mandate, by only obligating public companies to comply with such requirements.[3] The Spanish LSC, however, extends it to all companies, public or private, although establishing different minimum capital requirements.[4] In addition to the regulation of capital requirements for public companies, Spanish law also imposes a minimum capital requirement –and maintenance- to private companies of €3,000. This decision goes beyond the scope of the Capital Directive, and the UK lawmakers have chosen not to implement such a requirement.[5] Although imposing such a modest amount of investment as a minimum capital requirement can seem to have a very limited impact, it demonstrates the firm belief that the Spanish legislator has on the legal capital rules system. Whilst other

[3] CA 2006 s 763.
[4] Article 495 Real Decreto Legislativo 1/2010, de 2 de julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital.
[5] Companies Act 2006 Part 20 Ch2.

legislators have opted for relieving private companies of the burden of minimum capitalisation, the Spanish legislator remains firm in their approach.

In order to provide a meaningful discussion on the importance of this difference in approaches, it is indispensable to address what is understood as legal capital rules and, most importantly, which is their purpose. This issue has been largely discussed earlier in this thesis, but it is nonetheless worth assessing at this point the importance of functional similarity across legal systems, particularly related to capital maintenance. The concept of capital maintenance emerges from the Capital Directive, but neither the Spanish legislator nor the UK legislators make any reference to such concept.[6] Naturally, this does not mean that they do not apply the mandate of transposition of the rules in the Capital Directive; they just chose to implement the rules independently, without acknowledging they are part of a capital maintenance regime. As a result, there are key differences between both legal systems as a result of their interpretation of the referred concepts. For example, issues of wrongful and fraudulent trading, although they are regulated in the Insolvency Act, are very often studied alongside creditor protection in Company Law. The line between insolvency law and company law is very fine – particularly regarding creditor protection- and there would necessarily be different interpretations as to where the rules belong.

Therefore, the impact of requiring a minimum capitalisation and its maintenance also for private companies will be subject to the rules that each member state would have adopted and related to legal capital rules. In this case, being Spain the object of study, capital maintenance rules for private companies do revolve around dividend distribution, derivative acquisition of the company's own shares, acceptance of company's own shares as a security or financial assistance, in addition to all ancillary rules on directors' liability for loss of capital. Given the particularly closed nature of private companies in Spain, where the transferability of shares – or 'participations' as the Spanish legislator

[6] None of the main company laws in each country – LSC in Spain and the CA 2006 in UK-, where other mandatory legal capital rules are included, mention the concept of 'maintenance of capital'.

chose to call them, perhaps to draw special attention to their different nature to 'shares'- is limited and requires the agreement of the simple majority of the general meeting (except if the company bylaws establish otherwise)[7] and members are often involved in the company's management, the extension of all capital maintenance rules to these companies appears to impose an unjustified amount of transaction costs.

The aim of capital maintenance rules regulated by the EU Directive have a clear aim to protect the company's solvency in order to ultimately protect creditors. In private companies, however, the minimum required capital is so modest that the imposition of duties related to its maintenance are so costly and burdensome that outweigh the possible benefits that maintaining that nearly insignificant capital requirement would provide and, as a result, such approach appears to be inefficient. As it has been widely argued by the literature,[8] this acts in detriment of entrepreneurship.

Nevertheless, this is not the only issue to address about minimum capitalisation being limited to public companies. The concept of public companies is very heterogeneous, ranging from small non-listed public companies to very large multi-million enterprises. The scope is therefore not as limited as it can initially appear, and the minimum capital requirement that both Spain and the UK establish is not as relevant as it may initially seem.

Shareholders of public companies which are either not publicly listed -or listed in a secondary market[9]- are under the obligation to subscribe and pay the minimum required capital of €60,000 in Spain and £50,000 in the UK. *A priori*, this might seem a rather strict approach, even though in practice it is not. In the UK, companies would very rarely adopt the public company form unless they plan to pursue floating in the near future. On the one hand, if they are setting the grounds to float to the main market, then the

[7] Article 107 LSC.
[8] See Chapter 1 for more detailed review of such literature. For a very illustrating argumentation see the reference work of Luca Enriques and Jonathan R. Macey, 'Creditors versus Capital Formation: The case against the European Legal Capital Rules' (2001) 86 (6) Cornell L. Rev. 1186.
[9] Alternative Investment Market (AIM) in the UK; or Mercado Alternativo Bursátil (MAB) in Spain.

minimum capitalisation required will be significantly higher, as addressed below. On the other hand, if they are planning to float to secondary markets, the minimum capitalisation remains the same as per non-listed companies, but it is consistent throughout. Therefore, in practice, non-listed public companies are either ready to comply with listing requirements or making the necessary arrangements to comply with them in the near future. As a result, being public but not listed appears to be in the majority of cases nothing other than an interim situation paving the path to listing in a stock market.

In Spain, even though the consequences appear to be equally trivial, the rationale is very different. Non-listed public companies and private companies appear to be very similar, to the extent that the Spanish legislator decided to consolidate the laws on private and public companies in 2010.[10] In contrast to the UK, it is very common that SME operate in either public or private company forms, and there is a very large number of public companies that are not listed. In this case, the higher amount of minimum capital required appears to merely be a price for the free transferability of the company's shares, given that transferability of shares is limited in private companies. Therefore, the larger minimum capital requirement for non-listed public companies appears to be of little use, given that the doctrine was originally created to provide a response to the financing needs of companies which require an enormous amount of investment in fixed assets.[11] Such function seems difficult to defend for small or medium businesses, which would benefit from the possibility to use a public company as a vehicle in order to attract investment, which is significantly more difficult in privately held companies given that the majority of shareholders must agree to the transferability of shares.[12]

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[10] LSC.
[11] Heliodoro Sánchez Rus, *El Capital Social; Presente y Futuro* (Estudios de Derecho Mercantil, Civitas 2012) 109.
[12] Article 107 LSC, of voluntary *inter vivos* transfers.

In sum, the different nature and dichotomy of 'public' and 'private' companies in different jurisdictional context makes drawing a fine line between them and the EU level almost impossible. This necessarily complicates the design of the Capital Directive.

5.2.2 Insufficient minimum fixed capital requirement

As addressed extensively in Chapter 1, the fact that the minimum capital requirement is a fixed amount is problematic. The main aims for the existence of a minimum capital requirement are to prevent early insolvencies and to provide an 'equity cushion' for repaying debts.[13] The Capital Directive requires that public companies must hold a minimum capital of €25,000 from incorporation and it must be maintained throughout the company's life. The established amount by the EU Capital Directive dates from 1974 and it has remained untouched ever since.

Spain, however, has implemented a higher threshold and requires joint-stock companies –which are characterised by a free transferability of shares but are not necessarily publicly listed- of €60,000. The UK has taken a similar approach, requiring a minimum capital of £50,000 to public companies.[14] These two amounts are of similar value both in the context of their economies and in currency exchange. For example, the currency exchange rate at the starting date of reference of these case studies (02.01.2004) was 1 GBP = 1.4210 EUR (therefore £50,000 = €71,050); or in the closing date of reference the (31.12.2014) 1GBP = 1.2841 EUR (therefore £50,000 = €64,205)[15]. These amounts – in a similar fashion as the EU Capital Directive- have remained untouched since their first implementation.

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[13] See, for example, Marcus Lutter, 'Legal Capital of Public Companies in Europe' in Markus Lutter (ed.) *Legal Capital in Europe* (De Gruyter, ECFR special volume, 2006), 2; or Adriaan Dorresteijn, Tiago Monteiro, Christoph Teichmann and Erik Werlauff, *European Corporate Law* (2nd edn., European Company Law Series, Volume 5, Kluwer Law International, 2009) 54.

[14] For more details and references see Chapter 3.2 and 4.2 respectively.

[15] Data available online at Bank of England's Statistical Interactive Database http://www.bankofengland.co.uk/boeapps/iadb/Rates.asp.

In addition, in both Spain and the UK the minimum capitalisation for listed companies is significantly higher. This requirement derives from an EU Directive [16] which states that the foreseeable market capitalisation of the shares -for which admission to official listing is sought- must be at least €1,000,000.[17] For example, the Financial Conduct Authority requires a minimum capitalisation of £700,000 for admissions to listing in the UK's main market.[18] The Spanish legislator, however, took this requirement a step further and requires €6,000,000 as a minimum expected[19] capitalisation for admission to listing.[20] In addition, such expected value of capitalisation is variable and can therefore be even higher, pursuant to the main activity and object of the listed company[21] (for example, investment companies, financial investors and banks would have naturally higher expected minimum requirements. Nevertheless, such entities are out of the scope of this study, which is namely focused on public companies in a broader sense).

Nevertheless, this is in fact the point where another main criticism revolves around. The amounts established as minimum capital requirements for both public and private companies, although arguably unjustifiable as stated above, do not serve for the purpose they were created for. The main aim of establishing minimum capital requirements at incorporation is to ensure a certain level of seriousness and commitment from those promoting the new enterprise in a public form. Even though this objective was possibly achieved with the initial enactment of the Capital Directive and its extensive interpretation and transposition to the Spanish and UK legal systems, such purpose has been increasingly diminished through the passing of time. Due to the effects of inflation

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[16] Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L184) Hereon referred as Consolidated Admissions and Reporting Directive or CARD.
[17] Art. 43.1 CARD.
[18] FCA Listing Rules, Chapter 2 'Requirements for listing: All securities' s 2.2.7 (1) (a). Available online at https://www.handbook.fca.org.uk/handbook/LR/2/2.pdf Last accessed 18 August 2018.
[19] As the Article 9. 6. a) of the Royal Decree 1310/2005 (por el que se desarrolla parcialmente la Ley 24/1988, de 28 de julio, del Mercado de Valores, en materia de admisión a negociación de valores en mercados secundarios oficiales, de ofertas públicas de venta o suscripción y del folleto exigible a tales efectos, herein CMV) establishes, the concept of 'expected' refers to expected market value of shares once they are listed. In order to estimate if this requirement is complied with, the listing authorities will take into account the price paid by investors in the public offer prior to the admission (as long as it exists).
[20] Ibid.
[21] CMV.

and the lack of revision of the original amount stated in 1970 in the first draft of the Capital Directive, the real value of legal capital has diminished in astonishing 2,000% in Spain and 1,000% in the UK.[22] If the original values were updated,[23] the minimum capitalisation in 2014 ought to be €500,000 in Spain and €290,000 in the UK. Therefore, such prominent loss of value evidences that the level of seriousness –and therefore creditor protection- has dropped in the same proportion, being as a result rendered insignificant and consequently not being able to fulfil the desired outcome.

Although the previous criticism should be taken into consideration, it does not take into account the specificities of the commercial realities of the legal systems now subject to study. It is a general criticism which is certainly applicable and relevant to these legal systems, but it is more practically relevant – and even perhaps true- to Spain rather than the UK. In practice, as it has been addressed above, each legal system has three different minimum capital thresholds: one for private companies, another for non- listed or listed in secondary markets public companies, and a third significantly superior one for companies listed in the main markets. The difference between these numbers is not only factual but also functional. Factually, these numbers appear very disparate in both legal systems, ranging from €3,000 to €6,000,000 in Spain and from zero to £700, 000 in the UK. Nevertheless, these disparities are functionally more significant in Spain than in the UK. Whilst in Spain such divergence is also coherently distributed within different functional purposes (i.e. closed and relatively small private companies, medium sized ambitious non listed companies or listed in secondary markets companies, and very large companies listed in primary markets), in the UK one can observe that from a functional perspective the minimum threshold required for public companies of £50,000 will be rarely of use. This has, in practice, a perverse implication: minimum capital requirements will be in the vast majority of cases either zero (for private companies) or £700,000 (for public listed companies), with the exception of those public companies either listed in secondary markets or preparing to float in either capital market. We can

[22] See Chapter 1, Section 3 and related figures and tables for reference.
[23] Exact values vary depending on which indicator is used, inflation on consumer prices or GDP deflator. See Chapter 1, Section 3 and related figures and tables for reference.

observe that the disparity is in practice of a larger scale than it appears to be in theory, which demonstrates the lack of belief that the UK legislator has in the legal capital system. Taking into account the particularities and idiosyncrasies of the commercial realities of the UK, the legislator has consciously made a decision to require no minimum capitalisation to private companies and a large amount to public companies, leaving the £50,000 requirement as a residual situation which will be most likely interim.

This approach is consistent with the criticisms above exposed to the requirement of a minimum insufficient amount. Even though formally UK laws do comply with the EU requirements of minimum capitalisation for private companies, they establish a relatively low threshold to facilitate access to public markets, whilst adjusting to a higher requirements for those companies which are expected to be larger in size and therefore providing a more meaningful protection to their creditors. This statement would not be equally true in relation to Spain, given that due to the commercial realities the minimum capitalisation for public companies would be of significantly higher implementation, and therefore the criticisms to insufficient minimum capitalisation would apply.

The problem of undercapitalisation has been one of the biggest criticisms posed by the Spanish literature regarding legal capital rules for the last two decades.[24] According to this theory, limited liability becomes paradoxical if implemented trough a very limited and static amount of limited capital.[25] If the amount disbursed/ paid-up is too small for creating a good balance between assets and liabilities, then it is of no use for creditor protection. This occurs not only because of the limited amount of funds available but also because in such case shareholders are more prone to take risky decisions, given that they have potentially a lot to win and very little to lose. This creates at the same time a

[24] The amount of literature is vast, but for seminal works on the topic see Cándido, Paz-Ares, ' Sobre la infracapitalización de las sociedades' (1983) Anuario de Derecho Civil, 1587; for a revised theory, Cándido Paz-Ares, 'La infracapitalización. Una aproximación contractual' (1994) Revista Derecho de Sociedades, 253; Rafael Guasch Martorell, 'La doctrina de la infracapitalización. Aproximación Conceptual a la Inftacapitalización de Sociedades' (1999) 254 RDM, 163.
[25] F.G. Easterbrook and D. Fischel, 'Limited Liability and the Corporation' (1985) 52 (1) The University of Chicago Law Review, 89.

vicious circle, given that if there is no use of creditor protection then it is very difficult to justify the very existence of a minimum requirement of capitalisation. Transaction costs will be high – as it would be if the requirement was of ideal or optimal levels of capitalisation – but there is no justification as why are those even in place. The shareholders' equity – liabilities ratio must be confided to the market forces, given that those would establish an optimal ratio which maximises the value of the company, by adjusting it in order to minimise both internal and external agency costs. It might even be in the company's best interests to have a high debt ratio, given that the external agency costs would then be lower than the internal agency costs is avoiding.

This reasoning, from a theoretical law and economics perspective, is perfectly sound. However, as it has been argued by the European Commission in the last revision of the company law directives, it is not functionally important. The grounds for that statement are that, in practice, public companies tend to be adequately capitalised (i.e. above the minimum requirements established by both the Capital Directive and the national legal systems through its transposition) for other reasons other than the legal framework. This argument, albeit true, can be interpreted as an admission by the commission that the imposition of a minimum capital requirement is irrelevant and most likely insignificant.

For all the abovementioned, it could be argued that the current situation on minimum requirements of legal capital is cost-benefit efficient, given that imposes costs which are arguably proportional to the benefits it provides. In private companies, there is not *de facto* minimum capital requirements neither in Spain nor in the UK. For public non listed companies, the minimum capital requirement is –although arbitrary- sufficiently low not to create a big burden for companies which are confident and big enough to aim for their free transferability of shares in public markets. For public listed companies, the minimum capital requirements are sufficiently high as to achieve the aim of creditor protection without becoming an unbearable burden for the company's finances.

Therefore, it seems that the position that the EU commission has is grounded and can be supported. The rules on minimum legal capitalisation that the Capital Directive establishes are under the values above mentioned. Consequently, it is of very little

relevance and the applications that both Spain and the UK made in the transposition of such Directive increase the efficiency of the rule. The effects of the Capital Directive are therefore trivial, since both countries decided to enhance significantly such requirement.

5.3 A Functional Assessment

All the abovementioned appears to indicate that the current model of legal capital rules imposed by the Capital Directive is not fit for its purpose of creditor protection. However, having all these concerns been raised to the European legislator, it has been chosen not to amend the model arguing that it was not in their priorities. Even though there are grounds to argue it does not achieve its desired outcome, it does not contravene the legality and the disadvantages do not appear to outweigh the advantages.[26] In other words, from a law and economics perspective, such approach reflects an intended inactivity based on the perceived lack of adverse consequences of having that system in place.

This thesis aims to test that approach, and uses it as the foundations of the functional analysis of creditor protection. It works on the premise that the issue of the revision of the capital doctrine does not appear to be of upmost importance to the European legislator and that such approach can only be justified if the impact of the main criticisms to the model – namely that it fails to fulfil its purpose of protecting creditors- is trivial. Therefore, a functional assessment is essential to unravel the impact of the existence and application of legal capital rules. The study of two different legal systems within the EU, with notoriously diverging approaches to creditor protection, provides the adequate tools to assess the impact of the legal capital rules doctrine on the protection of creditor's rights. The case studies demonstrate that legal capital rules are of very limited use for direct creditor protection sought through litigation –which would second the approach

[26] The High Level Group of Experts stated in their report of 2002.

taken by the EU legislator- but such result must not be interpreted lightly. Legal capital doctrine *per se* is not intended to provide direct relief to any harm made to creditors' rights *ex-post*;[27] instead, it is intended to provide a cushion of equity to prevent to a large extent the risk posed to creditors to have they rights violated. Legal capital rules are of great significance nonetheless; even though there is no direct use of them from creditors seeking to protect their rights through judicial claims (which is coherent with their *ex ante* creditor protection functions), the legal systems assessed have implemented ancillary rules directly linked to legal capital rules. Namely, they revolve around directors' liability either within or outside insolvency proceedings, as it will be discussed in detail below.

5.3.1 The importance of lexicology and conceptual clarity.

The very nature of a comparative analysis requires the establishment of ground rules regarding the terminology used. Inevitably, different conceptualisations of similar terminology in the context of separate legal systems might affect the accuracy of the comparative analysis. In addition, the reader (with the added challenge of usually reading the law of one of legal systems as a second language) can be also misled by not only the terminology *per se* but also a different country-biased perception of the meaning of the words in a different context.[28]

5.4 Comparative analysis drawn from case studies

The aim of this section is to undertake a functional comparative analysis between Spain and UK case studies, with a particular focus on the suitability of legal capital rules on

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[27] Chapter 2 thoroughly addresses this issue. For further reading, Louise Gullifer and Jennifer Payne *Corporate Finance Law (2nd edn, Hart 2015).*

[28] Thomas Bachner, *Creditor Protection in Private Companies; Anglo- German Perspectives for a European Legal Discourse* (CUP 2009) 146.

creditor protection. Having undertaken the case studies, it is safe to state that the impact that legal capital has on creditor protection in both countries is rather limited, but it is particularly scarce in the UK. There are a number of reasons that lead to such conclusion. First, the number of claims related to legal capital is nearly imperceptible. However, this fact is not very conclusive given that neither of the studied legal systems provide direct mechanisms to claim against the breach of legal capital rules. The means provided to enforce legal capital rules are ancillary, namely based on directors' liability (such as ROL in Spain or rules on unlawful distributions of dividends in the UK) and shareholders' liability (such as the application of the doctrine of lifting the corporate veil).

Secondly, these ancillary means to protect legal capital are remarkably relevant in practice in both legal systems. The Spanish legislator has opted for a system of directors' liability for breach of the Recapitalise or Liquidate rule in order to preserve the company's legal capital. In the contrary, the UK does not have such a rule in place. The application of this rule is likely to contribute to the prevention of ruinous insolvencies, given that it acts as an incentive for directors *ex ante* to be informed of the financial situation of the company (both in cash flow and balance sheet) and bring this information to the general meeting in case of detection of a situation where the value of legal capital has fallen under half of the legal minimum.

Thirdly, Spain and the UK have a very different approach to creditor protection. Spain has in place more mechanisms which aim to provide creditor protection *ex ante*, being directors' liability the most representative of all them. The UK, on the contrary, relies heavily in insolvency rules in order to pursue and enforce creditor protection. Therefore, whilst Spanish law is more concerned about the avoidance of situations where creditors might be unprotected, the UK is more centred on providing effective solutions when such a thing occurs. These approaches reflect their respective legal traditions, being Spain a firm believer on the legal capital system and the UK a more firm supporter of the Anglo-American approach, where commercial protections are largely reliant on the markets and covenants. The case studies clearly reflect this fact: whilst Spain shows a balanced number of claims brought through insolvency cases and company law cases,

the UK shows a clear imbalance between the two, being insolvency heavily represented in comparison to any other creditor protection mechanisms (besides lifting the corporate veil). The real impact of lifting the corporate veil cases within this case studies is difficult to determine. As it is described both in the methodology section and section 4.3, lifting the corporate veil was added as a result of an *ad hoc* second screening, ergo whilst the data on the other cases is a representative sample of the reality (narrowed down by the search criteria), lifting the corporate veil in the UK is an exhaustive result, including all cases within the 2004-2014 time frame.

5.4.1 Insolvency proceedings

Insolvency proceedings are without a doubt the backbone of creditor protection. Nevertheless, there are major discrepancies between the approaches taken in Spain and the UK which are worth assessing in order to undertake a meaningful comparative analysis. One of the first remarks that must be drawn upon is conceptual and terminological. In Spain, there is only one formal insolvency proceeding, known as *concurso de acreedores,* which roughly translates as 'the process where creditors concur'. This process is unique and for the Spanish jurist is just natural to use the terms '*concurso de acreedores'* and 'insolvency proceeding' interchangeably. Likewise, referring to a company as 'insolvent' when it is in a state of cash flow insolvency (i.e. unable to pay its debts when they fall due) is also common, given that the law establishes that cash flow insolvency will necessarily lead to the opening of an insolvency proceeding.[29] This is not the case in the UK, where there are a number of insolvency court based proceedings, each of which has different purposes and principles: of administration, administrative receivership and winding up or liquidation (even though winding up can indeed be an exit from administration,[30] or the extrajudicial solutions of statutory compromises or restructurings can lead either to administration or winding up). In addition, insolvency legislation constrains the term 'insolvency' to a formal

[29] For more details, see Chapter 3 Section 3.4.3.
[30] Insolvency Act 1986 Sch B1 paras. 79 (4) (d) and 83.

insolvency proceeding.[31] Therefore, any similar situation outside a formal insolvency proceeding – in the abovementioned extrajudicial procedures, for instance - will be merely referred as 'unable to pay its debts'. Although it is not a material issue, it is relevant in order to undertake accurate comparative analysis.

A more material issue is that in Spain, insolvency is triggered by cash flow insolvency (the company is unable to pay its debts when they fall due) rather than balance sheet insolvency (liabilities exceed the assets). The latter would trigger ROL instead, which is a company law mechanism clearly differentiated from insolvency. In the UK, however, insolvency is triggered by both cash flow insolvency and balance sheet insolvency. Cash flow insolvency would be applicable for the purposes of grounding a winding up order or administration order. Balance sheet insolvency, however, will apply not only in such circumstances but also for the purposes of wrongful trading. This constitutes a major difference, given that the grounds for insolvency –in particular when directors' liability is at stake- are conspicuously divergent. UK insolvency laws do not interpret cash flow insolvency as a sufficient reason to trigger wrongful trading, whereas its functional equivalents in Spanish law -tortious insolvency and claw backs- will occur in insolvency proceedings triggered by a fail in a cash flow test.

5.4.1.1 Wrongful trading, fraudulent trading and tortious insolvency

There are concepts that although are functionally comparable, are contextually and lexically divergent A clear example can be found in the context of liabilities for breach of directors' duties. For example, the concept of UK's fraudulent trading is equitable with the Spanish concept of tortious insolvency. Both operate in the context of insolvency, imposing liability to those directors who dishonestly engaged in business, entered into transactions or took any action purposely or in full knowledge that it would directly affect creditors' rights. *A priori*, they may seem divergent, given that the context

[31] See, for example, the Insolvency Act 1986, ss 240(3) or 247(1).

and the particularities of each concept do not exactly match. For instance, fraudulent trading can be a criminal offence, whereas tortious insolvency cannot; any stakeholder can commit fraudulent trading, whereas tortious insolvency can only derive into directors' liability; tortious insolvency is a separate section of qualification within the insolvency proceeding which only opens when the debtor company cannot reach an agreement with creditors or when efforts to revert insolvency fail, whereas fraudulent trading is a separated claim to the main case of insolvency (in the broadest sense); and fraudulent trading requires a context of insolvent liquidation, whereas tortious insolvency could arise both in contexts of insolvent liquidation or business continuity.

Given these differences, one could argue that tortious insolvency would perhaps be more akin to wrongful trading. However, it is challenging to draw such comparison given that wrongful trading does not require intent, whereas intent is one of the basic pillars of tortious insolvency. This illustrates the difficulties of functional comparative analysis stated above: tortious insolvency is functionally comparable to fraudulent trading as far as the punishable conduct is concerned (both require full intent or gross negligence when acting on detriment of creditors in a situation of foreseeable insolvency), but functionally comparable to wrongful trading in terms of subjects and legal consequences on the punishable conduct.

Therefore, it appears that both fraudulent trading and wrongful trading are functionally comparable to tortious insolvency. The aim of all provisions is to provide a legal response for situations where directors' –and others in the case of UK- have continued operating or have pursued new transactions with knowledge that the company was in financial distress and such acts were consciously carried on detriment of creditors' rights. This fact, naturally, renders the drawing of a functional comparison particularly challenging. Quantitatively, referring back to the empirical data in Chapter 3 and 4 tortious insolvency (37 cases out of 524, 7.06%) and fraudulent trading (47 cases out of 541, 8.69%) appear to have a similar impact on both legal systems. Creditors prefer other mechanisms, such as directors' direct liability or directors' liability for corporate debts in Spain, or claims for wrongful trading in the UK.

5.4.1.2 Wrongful trading, claw-backs and transactions at undervalue

What is more, the concept of claw-backs under Spanish law has also functional similitudes to the concept of wrongful trading. The current insolvency law regulates claw-backs as a way to render specific transactions ineffective –as opposed to the previous presumption of being void[32]- in specific circumstances. Such circumstances cover, for example, situations where assets where alienated without valuable consideration or payments due in later dates were made in advance prior to the judicial declaration of insolvency. In the UK context, such actions would amount to wrongful trading as long as they are accompanied by a balance sheet insolvency (as it will be seen in more detail below) and they can be directly related to directors' misconduct. The reason why the test for wrongful trading is balance sheet insolvency is that the UK legislator sees no reason for imposing liability to contribute to the restitution of the company's assets if those are not insufficient to meet the company's liabilities in winding up.[33] The approach is different in Spain, where the test is the general test for insolvency.

Nevertheless, the Spanish concept of claw-backs can also be functionally comparable -perhaps even more accurately – to the Insolvency's Act concept of transactions at an undervalue.[34] Transactions at undervalue, similarly to claw backs, would potentially target any transaction undertaken in the two-year period immediately before entering into a formal insolvency proceeding which consideration gotten in return has been significantly inferior to the consideration given. Although the concept of contractual consideration does not exist under Spanish law, the rationale is nevertheless equivalent, since the main idea is that the object of that transaction (in other words, what has been given) was more valuable than its compensation (what has been given in return).

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[32] Jose Antonio García Cruces, 'De la Retroacción de la Quiebra a la Rescisión de los Actos Perjudiciales para la Masa Activa' (2004) 2 Anuario de Derecho Concursal.
[33] Roy Goode, *Principles of Corporate Insolvency Law* (4th edn., Sweet & Maxwell 2005) 115.
[34] S.238 IA 1986.

Unfortunately, further functional comparison within these two concepts cannot be drawn from the present case studies, given that transactions at an undervalue are not included. This is due to the fact that the present case studies were focused on actions brought by creditors in order to protect their rights, and claims based on transactions at an undervalue can only be pursued by a liquidator or administrator in the heart of a formal insolvency proceeding.[35] Just for illustrating purposes, the number of claims brought up by administrators and liquidators in concept of transactions at an undervalue during the same period covered by the case studies (2004-2014) is 74.[36] This number is similar to the number of claims brought up in Spain for claiming draw-backs.

5.4.1.3 Impact and implications

The results of the case studies undertaken in Chapters 3 and 4 show that the most representative claims within insolvency are related to claw backs (91), tortious insolvency (37) and credit classification (31) in Spain, and related to administration (34), wrongful trading (58) and fraudulent trading (47) in the UK.

Having drawn the functional equivalences between these claims, it can be argued that claims in both legal systems rely heavily in directors' liability and the retroaction of undue transfers of assets out of the company before the declaration of insolvency. This similarities are coherent with the rationale of insolvency law, given that these are the only mechanisms that creditors can actively use in defence of their rights within the context of an insolvency proceeding.

Nevertheless, the implications and context of such claims are different. Directors' liability for tortious insolvency will occur as a result of the opening of the so called 'section of qualification', which will be opened *ex officio* by the commercial court which is hearing the insolvency proceeding in case that a satisfactory agreement between the

[35] S. 238(1).
[36] See annexes 1 and 2 for details.

debtor company and its creditors cannot be reached or when all efforts to viability fail and therefore the insolvency proceeding leads to liquidation. Directors' liability for wrongful and fraudulent trading, however, arises in a very different context. These claims would not be brought *ex officio* in the process of insolvency. They are separate claims that need to be brought up to the court, either by a creditor or by the liquidator (if that is the case). This fact means that even in situations when there would be grounds to bring these claims up, the entitled person can willingly –or inadvertently- choose not to do so. This is very likely to reduce the claims given that, for example, liquidators might consider that given that the risk of not succeeding with the claim alongside all litigation costs might ultimately act in detriment of the already limited funds available to distribute in liquidation. What is more, it was not until 2015 that claims for wrongful and fraudulent trading could be brought within administration. Before, these claims could only emerge in the context of winding up, which made their likelihood even more limited. In Spain, in contrast, insolvency could be defined as tortious when the equivalent to administration (the first stage of *concurso de acreedores*) closes, therefore they are incompatible.

Also in 2015, the Spanish legislator introduced a novelty in the concept of tortious insolvency. As a result of this modification, not only directors' but also shareholders can be held personally liable for tortious insolvency. Although this is sadly not reflected in the case studies (given the 2004-2014 established timeline), it is very significant. Besides the application of the doctrine of lifting the corporate veil, there is no other mechanism which would held shareholders responsible for their acts. In this context, it can expected to be a very effective mechanism, given that the burden of filing for insolvency or dissolution does not lie on directors' but also in the general meeting, which surprisingly – and arguably unfairly- was not held accountable, even though the duty of analysing the state of insolvency or cause of dissolution was shared between the two. However, it is still yet to be seen how the courts will apply this rule, given that issues related to minority shareholders or dissenting voting shareholders are likely to arise. In the UK, in contrast, there are no mechanisms to hold shareholders accountable in the context of insolvency.

5.4.2 Company Law mechanisms

5.4.2.1 Recapitalise or Liquidate rule

This rule does not exist in the UK. It exists in Spain, and it imposes directors' liability for not complying with capital maintenance rules. Direct claims for non-compliance with this rule are rare (only 3 cases in the context of this case study) but directors' liability for company's debts as an ancillary rule is much more significant. According to this rule, directors are jointly and severally liable for not complying with the duty to call a general meeting when a cause of dissolution has arisen -being the loss of half of the subscribed capital (super-ROL) or loss of half of the minimum legal capital (ROL) the main reasons- or not filing for judicial dissolution or voluntary insolvency (if applicable) within two months since the date of the general meeting. Therefore, directors can be also liable even if the company generates sufficient cash flow to meet short term debts, since this duty is related to the compliance with causes of dissolution instead of requirements to file for insolvency.

This duty does also exist in the UK, but it has a much more limited applicability.[37] It is also their duty to call a general meeting in case of a serious loss of capital but- in contrast to Spain where the purpose is the application of ROL and Super-ROL rules- the purpose of that meeting is merely to address the situation and consider whether any steps must be taken to deal with the situation and, if considered appropriate to do so, define and specify which ones. This aim is considerably vaguer than the one required by the Spanish legislator, who requires the directors to propose to the general meeting either to recapitalise, to dissolve or to file for voluntary insolvency. This not only constitutes a much more specific and narrow approach, but also it is more effective. Director's direct liability for corporate debts constitutes one of the main pillars on which creditor protection lies upon. As seen in the case study undertaken in Chapter 3, claims on directors' liability for corporate debts have a significant impact on the protection of

[37] Section 656 (4) and (5) CA 2006.

creditors. In the UK, on the contrary, this rule is hardly noticeable, to the extent that there are no cases where such provision was object of dispute. Likewise, English company law textbooks also tend not to include the study of this provision, perhaps induced by the apparent lack of applicability and relevance it appears to maintain. Secondly, the CA provision imposes more moderate consequences to directors for its breach. It establishes directors' personal liability will only arise within insolvency, either as wrongful or fraudulent trading.

ROL and Super-ROL cases constitute a very high portion of the total claims object of this study (26.36%), being the single largest group of claims from creditors in Spain in the context of this case study. It appears to be a very attractive and efficient mechanism creditor protection; creditors are assured that the company is not trading if it is heavily undercapitalised. Indeed, even though both ROL and Super-ROL will trigger directors' liability for company's debts, it is noteworthy that their practical significance is highly divergent. Even though both have a clear aim to protect creditors for undercapitalisation, directors' liability for losses reducing the company's equity to a lower value than the subscribed capital has a higher impact in litigation. In fact, from all the pool of cases, the vast majority (all except two) are related to Super-ROL. This is a much expected outcome, given that for its nature of a supervening event rather than a planned event like reduction of capital it is more likely to occur. Nevertheless, this appears to be a mere consequence of the choices made by the Spanish legislator and it cannot be generalised. ROL and Super-ROL as systems are equally functional and efficient. The effects of these rules within Spanish laws are not related to the concept of ROL and Super-ROL requiring the loss of half of the legal or subscribed capital respectively, but they emerge due to the actions that triggers them are differentiated (voluntary reduction of capital or incurring in losses respectively). Additionally, both rules are different expression of the same concept, i.e. the duty to dissolve when the company is undercapitalised.

Therefore, in situations where shareholders and investors are no longer providing a cushion for a company which is immersed in losses – or do so in an insignificant manner, having the capital fallen under half of its value due to losses-, the company files for dissolution in a time where the assets still exceed the liabilities, which is in the best

interest of creditors since they have very good chances to have their debts repaid. Alternatively, the company's directors can file for insolvency if in addition there is a cash flow issue and they cannot –or will not in the foreseeable future- as a result pay the debts when they fall due. Once again, this is a very desirable situation for creditors, given that the company's losses will not be overtaking all capital and therefore the assets will be sufficient to cover the liabilities (at least at book value, which can of course be superior to the current market value). If the company's directors do not comply with the requirement of taking action in either of the abovementioned ways, they will face personal liability for any debts incurred after the dissolution cause arose. This, in turn, means that if liabilities exceed the assets (at book value, which is something worth discussion itself given that it might not be adjusted to the current realisable market value) because directors have failed to file for dissolution or insolvency in case of loss of capital, they will be personally liable for any debts incurred after that loss of capital. This way, creditors hold a very high level of protection against disastrous insolvencies.

5.4.2.2 Shareholders' liability and lifting the corporate veil

Shareholders' liability is a mechanism that has been highly limited –or plain rejected – by the laws and literature given its apparent conflict with limited liability. There are a few exceptions, such as shareholders liability for unlawful distributions and certain limited cases where lifting the corporate veil has been granted. Some authors have suggested the introduction of shareholders' unlimited liability (particularly for tort claims against the company)[38] or even shareholders' liability for undercapitalisation.[39] Such suggestions remain theoretical and haven't been implemented. Shareholder's liability for unlawful distributions, however, are contemplated and implemented by the

[38] Henry Hansmann and Reinier Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale L.J. 1879.
[39] Rosa Otxoa-Errarte Goikoetxea *La Responsabilidad de los Socios por la Infracapitalización de la Sociedad* (Aranzadi 2010).

UK and Spain legal systems.

Shareholders' liability for unlawful distributions responds to a mandate of the Capital Directive,[40] and it belongs to the category of capital maintenance rules. It seeks the reimbursement of unlawfully distributed dividends to the company in situations when it has been proven that receiving shareholders knew or ought to have known the unlawfulness of the distributions made to them, in order to protect creditors' appropriation of assets in light of foreseeable insolvency.[41] In theory, this ought to be one of the most important mechanisms of creditor protection related to legal capital, given that dishonest distribution of dividends is considered one of the clearer means of shareholder opportunistic behaviour, which is in turn one of the more plausible reasons to justify the legal capital doctrine. However, the case studies seem to indicate that they have a rather limited impact in practice. They show that claims directed to recover unlawfully distributed dividends are rare, to the extent that the first screening of creditor protection mechanisms does not contain any case where this rule was invoked in Spain, and only two cases in the context of the UK.[42] Although these quantitative results are just informative, it is safe to assume that their presence and usage amongst other creditor protection mechanisms is nearly unnoticeable.

Another mechanism to seek shareholders' liability for corporate debts is lifting – or piercing- the corporate veil.[43] This mechanism has been used in both Spain and in the UK as a deterrent for shareholders to engage in activities or take decisions in detriment of creditors maliciously and fully consciously. The case studies showed that these instruments are more often relied upon in creditor protection claims. The first screening

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[40] Directive (Eu) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) Article 57.
[41] Rüdiger Veil, 'Capital Maintenance. The Regime of the Capital Directive Versus Alternative Regimes', in Markus Lutter (ed.) *Legal Capital in Europe* (De Gruyter, ECFR special volume, 2006) 77.
[42] See the limitations of these case studies in the Methodology subsection of the introductory chapter and sections 3.3 and 3.4. There is an element of subjectivity in them, given that one case was put to one category only. This way, it is possible that a specific claim was included in a case but it wasn't considered to be the most relevant aspect for its categorization and therefore it does not appear in the results.
[43] These terms are here used interchangeably, but for discussion on the doctrinal differences between these terms see Chapter 4 Section 4.4.4.3. of this Thesis.

indicated its importance by the appearance of 5 cases in Spain. As no cases where found in the UK, and a second ad hoc screening was deemed necessary to reveal the real implications. In the period between 2004 -2014, there have been 28 cases in Spain and 242 cases in the UK when the doctrine of lifting the corporate veil was assessed. This numbers indicate radically divergent use, being significantly more used in the UK than in Spain. Provided that both legal systems claim that this doctrine must only be applied in exceptional circumstances and only when it is absolutely necessary, this difference is attention-gathering. This method appears particularly relevant in groups of companies (when lifting the corporate veil is deemed necessary given the misuse of subsidiaries in the prejudice of creditors) or in situations where the company is used as a *façade* to disguise personal interests. Neither in Spain nor in the UK there are pieces of legislation regulating the doctrine; therefore it has been in both countries entirely developed by courts. Even though courts are generally reluctant to estimate claims for lifting the corporate veil, in practice it appears to be a key instrument in both Spain and the UK.

5.5 What can be learnt?

From a functional perspective, both Spain and the UK appear to have very different approaches to creditor protection. Even though both are dedicated to provide mechanisms for their protection, they chose different means to achieve that goal. First and foremost, Spain is more concerned about creditor protection *ex ante*, whereas the UK is mostly interested in creditor protection *ex post*. This is a major systemic difference, which is reflected in the mechanisms provided and used for the protection of creditors' rights. This way, Spain provides a system of legal capital significantly more efficient than the UK, by means of a Recapitalise and Liquidate rule as well as directors' liability for undercapitalisation. The UK, on the other hand, does not include any effective mechanism of enforcement of legal capital rules, given that the two only available mechanisms (rules on premature trading and liabilities for serious loss of capital) have never been neither applied nor invoked in court. The only consequence of flagrant undercapitalisation is to be found in the context of public companies, either non listed or listed in secondary markets– given that private companies are exempt of this requirement and companies listed in the main market are subject to its own rules- is that

it would necessarily affect either the cash-flow test or balance sheet test (or both) and it would trigger the filing for insolvency.

Unsurprisingly, the case studies reveal that UK mechanisms for creditor protection revolve around insolvency with the exception of lifting the corporate veil. In contrast, Spain is equally focused on company law mechanisms and in insolvency mechanisms, which denotes their aim to provide solutions before the company's balance sheet or cash-flow statements reveal a situation of imminent incapability of repaying their debts with creditors. These company law mechanisms, in turn, revolve largely around legal capital rules. What is more, the case studies show that they are constructed in an efficient manner, given that it has been demonstrated that creditors see them as useful mechanisms to protect their rights before insolvency arises. Therefore, not only there are rules in place, but also they appear to be attractive to creditors.

The downside, however, is that those mechanisms are based on directors' liabilities. This causes a clear agency problem, given that directors before insolvency are meant to maximise returns and protect shareholders' rights. With these rules in place, directors find themselves in a predicament where they are obliged to disregard the will of the general meeting in order to abide with the law and protect creditors' rights. An example of this is the Spanish rule which obliges directors to pursue the company's dissolution when the legal capital has fallen under half of its value. They have to present the dissolution cause to the general meeting, but they have also to act on it regardless of the decision made. A possible way to overcome this limitation could be the introduction of a mandatory Directors' and Officers' Insurance, which would cover directors' liability in such circumstances. This way, directors are not forced to act in contravention of an agreement of the general meeting (which could arguably cost them their jobs) and creditors would be protected with the insurance payout. However, Directors' and Officers' Insurance does not cover claims where there is any form negligence or wrongdoing involved in the directors actions. This means that the impact that the introduction of such mandatory insurance regime would have on directors', shareholders' and creditors' protection would be rather limited.

Such agency problem, however, does not arise in the context of insolvency. Therefore, in contrast with the abovementioned, where directors' liabilities arise within or after a formal insolvency proceeding –for fraudulent and wrongful trading, for example- there are no issues (at least from a law and economics perspective) for which directors' liability ought to be limited or undermined.

Notwithstanding that limitation, it seems that there are good grounds to advocate for a system of creditor protection based on directors' liability *ex ante* for contravention of legal capital rules. The first hypothesis on which this thesis (and the vast majority of the literature as it was reviewed in Chapter 1) was based on, stipulates that legal capital rules are not suited for their main purpose of creditor protection. It is this writer's opinion that even though that statement is true in both the wider context of the EU Capital Directive and the UK, one cannot state the same about Spain. The crucial difference is precisely director's liability *ex ante* for contravention of legal capital rules. A system containing these rules is superior to another one which does not include them. First, it complies with the main aim of the existence and implementation of legal capital rules, which is providing creditor protection *ex ante*. Secondly, it has the potential to reduce significantly the number of insolvencies, given that directors' are under the obligation to know the financial situation of their company on a regular basis, which could be as often as three months. Third, it is an efficient mechanism of creditor protection given that the number of benefits it entails is very vast, whereas the costs are relatively low. The introduction of a system of liability does not increase the internal costs, other than the ones associated to the regular monitoring of the company's finances and elaboration of routine solvency tests. Fourth, most of the criticisms aimed at legal capital rules are no longer relevant with such association. For example, Enriques and Macey argue that the implementation of legal capital rules is not only harmful for the company but to the economy in general. Jonathan Rickford defined this regime as 'superfluous'. The group of experts emphasized three major criticisms to the model: there is no record that legal capital has ever prevented insolvency, these rules have never provided an adequate framework to ensure an adequate capitalization and it is superfluous because the costs derived from the rules are not proportionate with the benefits that they provide.

It has already been justified why the first and third criticisms are overcome by the implementation of a system based on directors' liability. The second criticism, however, remains. Legal capital rules as they are designed, revolving around a minimum static amount of capitalisation do not respond efficiently to their aim of providing creditor protection, given that such minimum amounts could be either too high and burdensome for the functioning of the company's business or too low –or even insignificant- as to provide any valuable benefit to creditor protection. Nevertheless, the implementation of a requirement of adequate capitalisation –as opposed to static minimum capitalisation – would be very costly to implement. It would require periodic adjustments and shareholders' investment –either directly subscribing new shares or via reserves created by non-distributed dividends- which is not only very costly but creates high levels of uncertainty. A possible solution to such problem would be the regular dotation of a legal reserve based on a percentage of profits, which would increment yearly the amount of capitalisation. Spain has a comparable requirement in place, requiring the dotation of a reserve by setting aside 10% of the company's profits -at their value at the time of closing the financial year- until it reaches a value equal to the 20% of the company's share capital. Its rationale is to serve as a mandatory instrument to oblige companies to hold a certain amount of savings and as a result not to rely so heavily in external financing.

Such requirement alongside ROL and directors' liability make the legal capital system a good asset for creditor protection purposes. Therefore, despite all the criticisms that the legal capital regime has been subject to at a EU level, the case of Spain proves that despite the harsh criticisms that minimum capital and capital maintenance rules have received as a mechanism of creditor protection, it is possible that, under the umbrella of EU law in general and the Capital Directive in particular, such rules can be adjusted to provide an superior level of protection. The imposition of mandatory rules such as ROL, Super-ROL or the dotation of a legal reserve as a complementary mechanism within the already existing set of EU legal capital rules is proven possible, and the contribution that they make to the doctrine regarding creditor protection cannot be underestimated. What is more, it can be argued that the addition of such rules to the Capital Directive would also be desirable given the creditor protection benefits provided, for the pursuance of

harmonisation at a EU level. At any case, and regardless of whether such mechanisms to increment capitalisation are in place, from a solvency perspective a minimum requirement of capitalisation would invariably be a superior mechanism of support to the maintenance of solvency, given that it guarantees a certain minimum required difference between assets and liabilities. It serves as a cushion for cash flow insolvencies, and as a clear head start for balance sheet solvency.

5.6 Conclusion

The EU system on legal capital has been criticised for not serving the purpose of protecting creditors. Having tested the application and impact of the legal capital rules once transposed to two Member States, it has become apparent that such criticisms, albeit true purely at EU level, they are not so clear at a national level. Having taken the guidelines provided by the EU Directive to transpose the legal capital rules system into their national laws, both Spain and the UK demonstrate that the given framework can result in very different outcomes. Spain, on the one hand, has internalised the spirit of the rules, to the extent that it has taken a step further by requiring a minimum capital to private companies, incrementing the minimum capital for public companies and introducing a ROL system associated to directors' liability for undercapitalisation and capital maintenance. The UK, on the other hand, relies more heavily in insolvency law mechanisms for providing creditor protection, having implemented the EU mandate of legal capital rules to the minimum required (with the exception of a higher minimum required capitalisation for public companies). It appears evident that the levels of creditor protection *ex ante* vary largely, even though both are implementing the same directives. Consequently, it could be argued that even though legal capital rules (as they have been designed by the EU legislator) do not serve for the purpose of creditor protection, those rules could be improved by including ancillary rules to complement the existing ones, namely directors' liability, ROL and periodic mandatory contributions to the capital. These case studies have proven that such mechanisms are functional and attractive to creditors. This way, legal systems would be providing efficient *ex ante* mechanisms for creditor protection and could decrease the numbers of insolvencies, which is not only in the best interests of creditors but the society as a whole.

Conclusion

The aim of this thesis was to unravel whether the current EU system of legal capital rules is fit for its purpose in providing creditor protection. It has been argued that even though the EU system of legal capital rules is not perfect for its purpose of providing creditor protection, there is opportunity for improvement. Such suggestion is based on two case studies, Spain and the UK, undertaken to test the referred suitability. In order to assess the suitability of EU legal capital rules, this thesis was designed to cover five main topics. The first step in Chapter 1 was a normative analysis of the EU legal capital system and the criticisms posed by the law and economics literature regarding creditor protection. Such undertaking revealed that given that creditor protection is not only desirable but also necessary (since the pool of creditors can be very heterogeneous, including those creditors who do not have access to mechanisms of self-protection) regulatory mechanisms of creditor protection must be in place. Alternative systems to the EU requiring a minimum legal capital and maintenance were explored, but they aren't deemed satisfactory for sufficient and fair non-adjusting creditor protection.

Within the legal capital doctrine, the two main categories were analysed: the minimum legal capital requirement and the capital maintenance regime. As far as creditor protection is concerned, the capital maintenance rules appear not to have any ground to be maintained as a mandatory rule since not only there is no evidence that they protect creditors (particularly the most disadvantaged ones) but also it constitutes a significant burden for shareholders and general business. In addition, the amount established in the Capital Directive as a minimum capital requirement lost its purpose since it remained unaltered for the last four decades. What is more, even after repeated attempts at modernising the regime and addressing the criticisms which has been subject to – alongside consistent requests for reform- has demonstrated an unprecedented passivity, since the rules have remained intact since their implementation in 1977 until the last revision done through the codification of 2017.

As a general rule, company laws provide mechanisms to safeguard creditors' rights during the companies' period of financial health, leaving the *ex post* remedies to insolvency laws. Whereas insolvency laws provide substantial protection during insolvency procedures, the effectiveness of the means provided by company laws *ex ante* have been largely questioned. In light of these criticisms, Chapter 2 of this thesis addressed the issue of creditor protection in general using the lens of law and economics theory, in order to unravel the feasibility of application of different mechanisms to either complement or substitute the highly criticised current system. Namely, the main question revolves around the time where such mechanisms are to be provided to be the most effective. Creditor protection mechanisms *ex ante* (i.e. before insolvency occurs), provided that they are constructed in a functional and efficient manner, are preferable to those mechanisms provided *ex post* (i.e. within or after insolvency), given that the possibilities that the credits are repaid entirely increase dramatically. Legal capital rules and mandatory disclosure are the only means available to provide creditor protection through the safeguard of the company's solvency, namely by restricting returns to shareholders at the expense of creditors interests, and they are commonly applied together in Member States. Other effective *ex ante* mechanisms would include a mandatory disclosure of financial statements on a regular basis – in shorter periods than the standard accounting year, as it is required in certain jurisdictions for directors' liability purposes and as a basis for the obligation to file for insolvency-, particularly for those most disadvantaged creditors with restricted access to information. However, the implementation of such mechanism systematically would entail the imposition of severe costs on the company, which compromises severely its efficiency. On the other hand, as *ex post* mechanisms, a system based on mandatory solvency tests –either alongside or in substitution of the legal capital regime- preferably based on future cash flows and current value of assets would undoubtedly provide a more efficient creditor protection, as long as it is supported by also efficient mechanisms of enforcement. Such mechanisms are either mandatory insurance for protection of unsecured creditors in the event of insolvency or directors' and/or shareholders liability for acting in detriment of creditors, namely in the vicinity of insolvency.

Even though the framework of the Capital Directive allows member states to adopt these

measures, the reality is that in practice the approaches taken by member states differ greatly. The subsequent chapters attempted to unravel their approach to creditor protection by examining the rules incorporated in their legal system as well as litigation trends.

Chapter 3 explored the case of Spain. Although most of the possibilities available for creditor protection are represented to some extent, stronger preferences are made evident. From a quantitative point of view, one could argue that preferences revolve around insolvency mechanisms and directors' liability, as those categories outnumber significantly the others. Legal capital enforcement mechanisms introduced by the legislator to provide creditor protection (such as the right to opposition to reduction of capital) are largely underrepresented, but a powerful find is that claims related to directors' liability for company's losses are very significant. This constitutes a mechanism to enforce the so-called 'Recapitalise or Liquidate' rule, one of the most distinctive features of the Spanish legal system in contrast to the UK legal system in this context. According to this rule, companies whose capital has fallen under the minimum threshold are obliged to dissolve the company, and directors face personal liability for breach of that duty. This could arguably strengthen the legal capital rules' purpose of providing creditor protection and enhance the legal capital system, particularly if it could be demonstrated that in practice respond to their aim to correct debtor-creditor conflicts of interests.

Chapter 4 explored the case of the UK. Legal capital rules in the UK revolve around two pillars. On the one hand, there is a minimum capital requirement of £50,000 for public companies. Unlike Spain, the UK has chosen not to expand this requirement also to private companies. This minimum capital requirement goes far beyond the £25,000 required by the Capital Directive, but it is still very low to regard any real functionality. Regarding maintenance of capital, the mechanisms are very diverse, from limitation of acquisitions of own shares, limitations on the issuing of redeemable shares, limitations on dividend distribution or imposition of directors' duties in case of loss of capital, in line with the mandate of the Capital Directive. The UK also imposes directors' liability for non-compliance with their duties in case of loss of capital under the 50 per cent of

the called-up capital and for premature trading. In contrast, however, that in the period subject to study, there were no claims related to those issues, which indicates the inefficiency of capital maintenance rules for the safeguard of creditors' rights.

As Chapter 5 explores, what these instruments have in common is that they are based on personal liability for company's debts. This suggests that when creditors' rights are at stake (namely because their credits with the debtor company are not satisfied) the preferred vehicle to pursue such claims is seeking personal liability of either directors or shareholders, aiming this way at patrimonies which are likely to be more solvent than the debtor company. Spain and UK, however, having historically divergent approaches to legal capital but now under the framework of the Capital Directive, demonstrate to have still very different approaches to creditor protection. Even though they ought to have common grounds per imperative of EU law, they are de facto divergent and this affects the functionality and efficiency of legal capital rules at a national level. Effective mechanisms of creditor protection have been identified in both jurisdictions and the implementation of the traits that make them effective can potentially enhance the institution of creditor protection in general and legal capital rules significantly.

This thesis unravels the similarities and differences between Spain and UK's approaches to creditor protection in general and legal capital in particular. Even though both include a system of legal capital rules as a result of the mandate of the EU Capital Directive, they have distinct approaches. On the one hand, Spain has embraced the spirit of the rules to the extent that it has not only incremented the minimum requirement of capitalisation, but also has extended its application to private companies. Additionally, it has strengthened the efficiency and functionality of the rules by introducing a ROL system, which serves as an ancillary rule to legal capital establishing directors' liability as mechanism of enforcement of capital maintenance rules. The UK, on the other hand, have implemented the EU mandate of implementation of legal capital rules to the minimum required (and even though it also increases the minimum requirement of capital and the mechanisms related to legal capital and capital maintenance remain to a

large extent unused. In contrast, creditor protection is provided more significantly by *ex post* mechanisms, namely by means of insolvency.

Consequently, it could be argued that even though legal capital rules (as they have been designed by the EU legislator) are trivial as far as creditor protection is concerned, those rules could be improved by including ancillary rules to complement the existing ones, embracing and learning from Member States (and in particular Spain and the UK) and how they have implemented these rules into their national legal systems. This thesis suggests that the legal capital regime could be improved by complementing it with directors' liability, ROL and periodic mandatory contributions to the capital. These case studies have proven that such mechanisms are functional and attractive to creditors. In addition, this way the EU would be providing an efficient framework for Member States to be able to ensure efficient *ex ante* mechanisms for creditor protection and as a result decrease the numbers of insolvencies, which is not only in the best interests of creditors but the society as a whole.

Annex 1. List of cases Spain

1	TS	2014	Concurso; ACTOS PERJUDICIALES PARA LA MASA ACTIVA: ACCIONES DE REINTEGRACION: procedencia: perjuicio patrimonial causado por acuerdo social de reparto de dividendos con cargo a reservas voluntarias adoptado con infracción de las normas de protección del patrimonio social y su correspondencia con el capital social: presunción legal del perjuicio patrimonial por haberse hecho el acto de disposición a favor de personas especialmente relacionadas con el concursado: oposición a las normas que permiten el reparto de dividendos con cargo a beneficios o a reservas voluntarias solo cuando el patrimonio social no resulte ser, antes del reparto de dividendos o como consecuencia de tal reparto, inferior al capital social: merma injustificada de la masa activa del concurso. SENTENCIA: INCONGRUENCIA: inexistencia: adecuación del fallo a las pretensiones de las partes, no impide enjuiciar críticamente los elementos fácticos de la controversia planteada.	Concurso, merma injustificada de la masa activa por distribucion de reservas voluntarias via dividendos a personas especialmente realcionadas con el concurso	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 631/2014 de 1 noviembre. RJ 2014\6154	Concursal/ Capital social
2	TS	2014	QUIEBRA: EFECTOS: RETROACCION: NULIDAD DE LOS ACTOS POSTERIORES A LA FECHA DE RETROACCION: Evolución jurisprudencial en la interpretación del art. 878.II CCom: ineficacia sólo de aquéllos actos que ocasionen perjucio para la masa de la quiebra: interpretación de este concepto: EJERCICIO DE ACCIONES: CADUCIDAD: La acción basada en la ineficacia de los actos posteriores a la fecha de retroacción nace con la determinación del periodo de retroacción de la quiebra y se extingue con la terminación de la quiebra, no siendo de aplicación el plazo de cuatro años previsto en el art.1299 CC pese a su naturaleza rescisoria; LITIS CONSORCIO PASIVO NECESARIO: Requisitos que deben concurrir conjuntamente; INEXISTENCIA: Préstamo hipotecario concertado en el periodo de retroacción de la quiebra destinado al pago de deudas preexistentes con la entidad bancaria prestamista que constituyó hipoteca sobre un local en garantía de su devolución, que luego ejecutó adjudicándose el local que posteriormente vendió a un tercero: al acto de transmisión no se aplica el régimen de la retroacción: la acción de ineficacia frente al acto de otorgamiento del préstamo debe dirigrise contra la quebrada y contra quienes fueron parte en el acto impugnado: RESTITUCION DE PRESTACIONES RECIPROCAS: improcedencia: crédito de naturaleza concursal y no contra la masa al estar ante la constitución de una garantía real a favor de una obligación nueva contraída en sustitución de otra anterior que carecía de esta garantía, que ya ha sido ejecutada y los bienes adjudicados a un tercero que no fue parte en el acto impugnado: el banco debe abonar el valor de los bienes al tiempo en que salieron del patrimonio del concursado.	Hipoteca consituida en periodo de retroaccion: nulo por constituir perjuicio contra la masa	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 169/2014 de 8 abril. RJ 2014\2309	Concursal
3	TS	2013	ACCION PAULIANA: LEGITIMACION ACTIVA: concurso de acreedores instado antes de la entrada en vigor de la Ley Concursal: legitimación de la sindicatura del concurso; procedencia: pago de deuda ajena encontrándose en situación de insolvencia para a continuación declararse en concurso de acreedores.	**Accion Pauliana**; 1.111 y 1.291 y ss. del C.C., DÍEZ-PICAZO, como «el poder que el ordenamiento jurídico confiere a los acreedores para impugnar los actos que el deudor realice en fraude de su derecho».		Civil

4	TS	2012	CONCURSO (LEY 22/2003, DE 9 JULIO): CALIFICACION: culpable: procedencia: responsabilidad de los administradores o liquidadores sociales: alcance: valoración de la gravedad objetiva de la conducta y del grado de participación en los hechos que hubieran determinado la calificación del concurso.DAÑOS Y PERJUICIOS: DETERMINACION DE SU EXISTENCIA Y CUANTIA: impugnación en casación: procedencia sólo en casos de evidente y notorio error de hecho, o resolución caprichosa, desorbitada o injusta.NORMAS JURIDICAS: IRRETROACTIVIDAD: procedencia: Ley Concursal: aplicación a las conductas determinantes de la calificación del concurso realizadas o consumadas estando vigente la nueva legislación.RECURSO DE CASACION (LECiv/2000): MOTIVOS: infracción de Ley: cuando se alegue más de una infracción, cada una de ellas debe ser formulada en un motivo distinto; requisitos formales: individualización del problema jurídico planteado, fundamentación suficiente de la infracción alegada y respeto a la valoración de la prueba efectuada en la sentencia recurrida.	Responsabilidad de los administradores por concurso culpable	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 501/2012 de 16 julio. RJ 2012\9330	Concursal
5	TS	2010	LEGITIMACION ACTIVA: concepto: cualidad de la persona para hallarse en la posición que fundamenta jurídicamente el reconocimiento de la pretensión ejercitada; requisitos: adecuación entre la titularidad jurídica afirmada y el objeto jurídico pretendido; inexistencia: sociedades de responsabilidad limitada: acción de responsabilidad de administradores sociales amparada en el art. 105.5º LSRL y 135 LSA: falta de legitimación de los síndicos de la quiebra para su ejercicio.RECURSO EXTRAORDINARIO POR INFRACCION PROCESAL: INFRACCION DE NORMAS REGULADORAS DE LA SENTENCIA: desestimación: incongruencia omisiva: falta de denuncia en la instancia de las omisiones atribuidas a la sentencia impugnada, mediante la petición de complemento o aclaración.	Legitimacion activa para instar accion de responsabilidad de los administradores aer 105.5 LSRL y 135 TRLSA	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 634/2010 de 14 octubre. RJ 2010\7460	Procesal / Mercantil
6	TS	2010	QUIEBRA: RETROACCION: ineficacia de los actos afectados por la retroacción: art. 878 CCom: criterio jurisprudencial flexible: no alcanza a los correspondientes al giro y tráfico ordinario del quebrado, ni a los que resulten beneficiosos para el quebrado y los acreedores o al menos no causen lesión o perjuicio a éstos; NULIDAD: procedencia: transmisión del único bien inmueble de la sociedad quebrada a uno solo de sus acreedores: perjuicio evidente para los acreedores.	Enajenacion del unico activo de la deudora con posterioridad a la fecha de retroaccion; nulo por perjuicio a acreedores	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 525/2010 de 10 septiembre. RJ 2010\6965	Concursal
7	TS	2010	QUIEBRA: Retroacción: Nulidad de los actos posteriores a la fecha de retroacción: improcedencia: constitución de hipoteca sobre finca, ejecutada y adjudicada a la entidad bancaria hipotecante y vendida a los cónyuges demandados que a su vez la hipotecaron en favor de otra entidad bancaria y la inscribieron en el Registro, no existiendo constancia registral de la quiebra: protección de los subadquirentes de buena fe a quienes no alcanza la nulidad por no ser adquirentes directos del quebrado: análisis jurisprudencial del art. 878 Ccom.: criterios rigorista y flexible: aplicación del principio de seguridad jurídica para propiciar una interpretación compatible con la eficacia del art. 34 LH: doctrina consolidada.	Constitucion de hipoteca con posterioridad a la fecha de retroaccion; valido por no constancia registral del concurso y proteccion a los terceros adquirientes de buena fe.	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 496/2010 de 29 julio. RJ 2010\6945	Concursal
8	TS	2010	SOCIEDADES ANONIMAS: ADMINISTRADORES: responsabilidad: naturaleza: no constituye sanción o penalidad civil que justifique la aplicación del principio de retroactividad de la disposición legal más favorable: reforma de la LSA/1989 por la Ley Consursal y la Ley sobre sociedades anónimas europeas: sujeción al principio general de irretroactividad de la leyes; procedencia: pérdidas que reducen el patrimonio a la mitad del capital social, sin convocar Junta general para adoptar el acuerdo de disolución: presunción de preexistencia de la causa de disolución al nacimiento de la deuda reclamada: no excluye la responsabilidad la solicitud de suspensión de pagos o de concurso voluntario: insolvencia definitiva declarada en el expediente.	Recapitalizar o liquidar; responsabilidad de los administradores	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 458/2010 de 30 junio. RJ 2010\5694	Concursal / Capital Social

9	TS	2010	QUIEBRA: RETROACCION: efectos: nulidad de los actos posteriores a la fecha de retroacción: art. 878 CCom: mitigación jurisprudencial de su rigor cuando los actos de transmisión o administración no afecten o no sean contrarios a los intereses de los acreedores; procedencia: hipoteca constituida por sociedad del quebrado y su esposa, sobre fincas aportadas a ella por los cónyuges, a favor de una sociedad acreedora del quebrado: intento de beneficiar a un acreedor en perjuicio del resto de los acreedores: presunta cesión del crédito de éste último contra el quebrado a la sociedad hipotecante por precio a abonar mediante letras aceptadas por el propio quebrado.CESION DE CREDITOS: inexistencia: pago del precio de la cesión no por el cesionario sino el propio deudor cedido.TERCERO HIPOTECARIO: inexistencia: falta de buena fe y gratuidad de la hipoteca constituída: alcance de la hipoteca por los efectos de la retroacción de la quiebra.SENTENCIA: INCONGRUENCIA: inexistencia: adecuación del fallo a las pretensiones de las partes: peticiones implícitas en el suplico y consecuencia lógica de la acción ejercitada: reintegro a la masa de la quiebra del precio satisfecho por el quebrado por una presunta cesión a sociedad familiar de crédito contra él: pretensión implícita en la de nulidad de la hipoteca que garantizaba el pago del precio de la cesión.	Acciones en perjuicio de la masa, constitucion de hipoteca en periodo de retroaccion en perjuicio de acreedores	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 82/2010 de 8 marzo. RJ 2010\1457	Concursal
10	TS	2007	SOCIEDADES DE RESPONSABILIDAD LIMITADA: LIQUIDACION: nombramiento de liquidadores: designación judicial: procedencia: previsión estatutaria de la liquidación por los administradores a falta de nombramiento de liquidadores por la Junta General: bloqueo de la Junta por pertenecer las participaciones sociales al cincuenta por ciento a dos grupos familiares enfrentados.NORMAS JURIDICAS: ANALOGIA: requisitos: procedencia: aplicación al bloqueo de la Junta General para nombramiento de liquidador de la norma prevista para el supuesto de fallecimiento o cese del liquidador.RECURSO DE CASACION: ALCANCE: facultad del Tribunal de Casación para integrar los hechos probados; no cabe hacer supuesto de la cuestión.	Nombramiento de liquidadores - Administradores liquidadores	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 601/2007 de 30 mayo. RJ 2007\3609	Mercantil
11	AP	2014	CONTRATOS BANCARIOS: SUSCRIPCIÓN DE VALORES-OBLIGACIONES PREFERENTES: constituyen lo que se conoce como «híbrido empresarial», a mitad de camino entre las acciones y las obligaciones o bonos: naturaleza, características, liquidez y riesgo elevado de estos instrumentos: constituyen un producto de inversión: imposición de estrictas obligaciones a las entidades comercializadoras en orden a suministrar a sus clientes, de manera conveniente, información sobre tales extremos: régimen jurídico aplicable; NULIDAD: procedencia: error contractual al suscribirals: creencia por el cliente de haber contratado un depósito tradicional: consentimiento prestado sin tener un pleno y cabal conocimiento de las características y riesgos del producto contratado: efectos de la declaración de la nulidad atendiendo a lo dispuesto en el art. 1303 CC. CONTRATOS: INEFICACIA: NULIDAD RELATIVA: inexistencia de caducidad de la acción de nulidad.	Bancos; obligaciones preferentes; vicios del consentimiento	AP Ourense (Sección 1ª), sentencia núm. 322/2014 de 30 julio. AC 2014\1509	Civil / Contractual
12	AP	2013	CONCURSO (LEY 22/2003, DE 9 JULIO): CULPABLE: extensión de los efectos de la declaración de culpabilidad del concurso a los administradores que lo fueron dentro de los dos años anteriores a la declaración del concurso: aplicación de los arts. 164.1 y 172 LC en la redacción introducida por la Ley 38/2011 a los procedimientos concursales en tramitación en los que no se haya acordado, como es el caso, la formación de la sección de calificación a la fecha de su entrada en vigor: interpretación literal del art. 164.1; ADMINISTRADOR: RESPONSABILIDAD: inexistencia: no concurre la condición de administrador dentro de los dos años anteriores a la declaración del concurso: cese.	Concurso culpable; responsabilidad de los administradores	AP Ourense (Sección 1ª), sentencia núm. 464/2013 de 30 diciembre. AC 2013\2227	Concursal
13	AP	2014	CONCURSO (LEY 22/2003, DE 9 JULIO): MASA PASIVA: CREDITO ORDINARIO: procedencia: crédito que ostenta una sociedad que pertenece al mismo grupo que la concursada: grupo horizontal: ambas están participadas por un accionista mayoritario y comparten órgano de administración: no existe una relación de jerarquía ni una sociedad dominante de la que dependa la dominada: tampoco concurre ninguno de los supuestos del art. 42.1 CCom. VOTO PARTICULAR.	Concurso, clasificacion de los creditos contra la masa	AP Barcelona (Sección 15ª), sentencia núm. 449/2013 de 11 diciembre. JUR 2014\19588	Concursal

14	AP	2013	CONTRATOS BANCARIOS: GESTIÓN DE RIESGOS FINANCIEROS O SWAP: NULIDAD: procedencia: infracción de la normativa contenida en el RD 217/2008 y LMV por la entidad financiera que ofertó la contratación a la pequeña empresa, cliente minorista, que no obtuvo la información necesaria sobre el producto ofertado: vicio del consentimiento y excusabilidad del error. CONTRATOS: VICIOS DEL CONSENTIMIENTO: ERROR: requisitos del error invalidante: DOCTRINA DEL TS.	Bancos; Swaps; vicios del consentimiento	AP Castellón (Sección 3ª), sentencia núm. 36/2013 de 25 enero. AC 2013\888	Civil / Contractual
15	AP	2011	CONCURSO (LEY 22/2003, DE 9 JULIO): ACCIONES DE REINTEGRACION: procedencia: reconocimiento de deuda y cesión de crédito: desprendimiento de toda la cartera de clientes pendientes de cobro por una cantidad que es más de 5 veces superior al valor del activo que ha quedado en la empresa: cesionario que recibe un exceso de posibilidad de cobro muy superior a la cantidad que se le adeudaba: mala fe.	Concurso, accion de reintegracion por perdida de cartera de clientes, reconocimiento de deuda y cesion de credito	AP Salamanca (Sección 1ª), sentencia núm. 297/2011 de 1 julio. AC 2011\1483	Concursal
16	AP	2011	COSTAS PROCESALES: TASACION: HONORARIOS DE ABOGADOS: autodefensa: no excluye de la tasación de costas los honorarios del letrado; impugnación por indebidos: procedencia: concurso en tramitación a la entrada en vigor del RDl 3/2009: abogado administrador concursal: incidente de nulidad sustanciado en el seno de incidente de recusación: imposibilidad sobrevenida de que el administrador concursal-letrado pueda percibir cualquier cantidad en concepto de honorarios profesionales por su intervención en el incidente	Concurso, honorarios de letrados-administradores	AP Madrid (Sección 28ª), sentencia núm. 62/2011 de 4 marzo. AC 2011\981	Concursal
17	AP	2010	(Sentencia confirmada o inadmisión de recurso contra la misma) SOCIEDADES DE RESPONSABILIDAD LIMITADA: DISOLUCION: procedencia: paralización de los órganos sociales imposibilitando su funcionamiento: dos bloques enfrentados con un 50% de participaciones cada uno: innecesario pedir previamente convocatoria judicial de junta para aprobación de las cuentas; LIQUIDADOR: nombramiento: disolución por bloqueo social: aplicación analógica del art. 110.3 LSRL: designación judicial en persona ajena a la entidad a liquidar.	Disolucion por bloqueo social; nombramiento judicail de liquidador	AP Murcia (Sección 4ª), sentencia núm. 625/2010 de 2 diciembre. AC 2011\186	Mercantil
18	AP	2010	PROPIEDAD INTELECTUAL: PLAGIO: inexistencia: formato televisivo: talk show infantil: similitudes: carencia de concreción y originalidad bastante: sólida y extensa experiencia de la demandada en la selección y elaboración de programas con menores. COMPETENCIA DESLEAL: inexistencia: ausencia de asociación, confusión o aprovechamiento indebido de la reputación ajena.	Propiedad intelectual y competencia desleal	AP A Coruña (Sección 4ª), sentencia núm. 375/2010 de 31 julio. JUR 2010\335504	Mercantil
19	AP	2010	(Sentencia confirmada o inadmisión de recurso contra la misma) CONCURSO (LEY 22/2003, DE 9 JULIO): determinación de la masa pasiva: derechos de procurador: intervención en la solicitud y declaración de concurso: crédito contra la masa: inaplicación automática del arancel de los procuradores: gran pasivo y miles de consumidores afectados como acreedores de la concursada: moderación.	Concurso; determinacion de los creditos contra la masa; honorarios de procurador	AP Madrid (Sección 28ª), sentencia núm. 194/2010 de 16 julio. JUR 2010\336559	Concursal
20	AP	2009	(Sentencia confirmada o inadmisión de recurso contra la misma) LEGITIMACION ACTIVA: inexistencia: nulidad de hipotecas sobre instalaciones de sociedad de responsabilidad limitada: para financiación de adquisición de participaciones sociales de la misma: actora titular de más del 94% del capital social y administradora única de la sociedad: concurrencia de su representante al otorgamiento de las escrituras públicas de constitución de hipoteca: entidad actora que no era tercero ni pudo ignorar la operación	Financiacion (hipoteca) para adquisicion de participaciones propias	AP Córdoba (Sección 3ª), sentencia núm. 219/2009 de 23 diciembre. AC 2010\391	Mercantil / Capital Social

21	AP	2009	CONCURSO (LEY 22/2003, DE 9 JULIO): EFECTOS DE LA DECLARACIÓN DE CONCURSO SOBRE LOS ACREEDORES: EFECTOS SOBRE LAS ACCIONES INDIVIDUALES: juicios declarativos: demanda, en juicio declarativo, contra sociedad que, posteriormente, fue declarada en concurso: aplicación del art. 51.1 LC.SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: acción de responsabilidad solidaria de las obligaciones sociales: nueva regulación de los arts. 104.1 y 105 LSRL/1995 dada por la LC: concurrencia del supuesto de hecho de la norma: obligación de la administradora de responder de la totalidad de las deudas sociales con su propio patrimonio: no se excluye su responsabilidad por el solo hecho de que solicitara el concurso voluntario más de una año después de concurrir la causa de disolución de la sociedad.	1. Efectos de la declaracion de concurso sobre acciones individuales previas. 2. Responsabilidad de los administradores	AP Las Palmas (Sección 4ª), sentencia núm. 77/2009 de 6 marzo. JUR 2009\250012	Concursal
22	AP	2009	QUIEBRA: DECLARACIÓN DE QUIEBRA: EFECTOS: retroacción: nulidad de los actos posteriores a la fecha de retroacción: doctrina jurisprudencial: corrección del rigorismo legal del art. 878 párr. 2º CCom: evolución jurisprudencial: la sanción de nulidad se lleva a efecto cuando el acto dispositivo perjudica a la masa de acreedores; procedencia: compraventa de vivienda y dación en pago por deuda ajena: contratos celebrados por la concursada, como vendedora, siendo accionista de la entidad compradora: acto dispositivo que perjudica a la masa de acreedores.	Quiebra, Actos posteriores a la fecha de retroaccion, solo nulidad cuando dichos actos perjudican a la masa pasiva	AP Alicante (Sección Tribunal de Marca Comunitaria), sentencia núm. 287/2008 de 24 julio. AC 2009\24	Concursal
23	AP	2008	QUIEBRA: DECLARACIÓN DE QUIEBRA: EFECTOS: RETROACCIÓN: nulidad de los actos posteriores a la fecha de retroacción: líneas jurisprudenciales divergentes sobre la materia: una rigorista, que establece la nulidad radical y absoluta o de pleno derecho de todos los actos y contratos realizados en el periodo de retroacción, y otra flexible, que excluye de la nulidad los actos de administración o de transmisión que no causen lesión o perjuicio a los acreedores; improcedencia: fútbol: extinción por el club, declarado en quiebra necesaria, del contrato de un jugador perteneciente a su disciplina: resolución contractual pactada no realizada en perjuicio de la masa de acreedores.	Quiebra, Actos posteriores a la fecha de retroaccion,lineas jurisprudenciales divergentes	AP Badajoz (Sección 3ª), sentencia núm. 333/2007 de 20 noviembre	Concursal
24	AP	2006	QUIEBRA: DECLARACION: RETROACCION: NULIDAD DE LOS ACTOS POSTERIORES A LA FECHA DE RETROACCION: improcedencia: fútbol: traspaso de jugador: precio muy inferior al de la cláusula de rescision pactada: inadecuación de equiparación entre ambas cantidades: precio real, cierto y 10 veces superior al pagado por el jugador por la quebrada meses antes: inexistencia de perjuicio a acreedores y «consilium fraudis».	Quiebra, Actos posteriores a la fecha de retroaccion, solo nulidad cuando dichos actos perjudican a la masa pasiva	AP Badajoz (Sección 3ª), sentencia núm. 305/2006 de 27 noviembre	Concursal
25	AP	2006	QUIEBRA: RETROACCION: NULIDAD DE LOS ACTOS POSTERIORES A LA FECHA DE RETROACCION: corrección del rigorismo legal cuando los actos de transmisión o administración no afecten o no sean contrarios a los intereses de los acreedores: evolución jurisprudencial; improcedencia: compraventa de chalets y parcelas: operación negocial correspondiente plenamente con el objeto social de entidad quebrada: pago íntegro del precio por compradores: presunción de compra a precio de mercado: ausencia de perjuicio a acreedores.	Quiebra, Actos posteriores a la fecha de retroaccion, solo nulidad cuando dichos actos perjudican a la masa pasiva	AP Madrid (Sección 10ª), sentencia núm. 359/2006 de 22 mayo	Concursal
26	AP	2003	QUIEBRA: EFECTOS: retroacción: nulidad de los actos posteriores a la fecha de retroacción: procedencia: escritura de constitución de hipoteca: superposición de garantía por deudas anteriores, hipotecando el bien inmueble de mayor valor en evidente perjuicio para el resto de acreedores: afectación a la «par conditio creditorum».	Quiebra, Actos posteriores a la fecha de retroaccion, solo nulidad cuando dichos actos perjudican a la masa pasiva; alteracion par conditio creditorum	AP Islas Baleares (Sección 3ª), sentencia núm. 325/2003 de 3 junio	Concursal
27	TS	2014	CONCURSO (LEY 22/2003, DE 9 JULIO): CLASIFICACION DE CREDITOS: CREDITOS CON PRIVILEGIO ESPECIAL: CREDITO REFACCIONARIO: Concepto: caducidad de la anotación preventiva registral de la refacción sin haber iniciado el acreedor la conversión preventiva en hipoteca: efectos sobre su calificación.	Concurso; clasificacion de creditos, privilegio especial	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 207/2014 de 22 abril	Concursal

28	TS	2014	SENTENCIA: INCONGRUENCIA: INEXISTENCIA DE «REFORMATIO IN PEIUS»: CONCURSO CULPABLE: Exige la expresión de la causa en que se basa tal calificación, siendo suficiente que se contenga en la fundamentación jurídica de la sentencia con suficiente claridad: consideración por la Audiencia de una sola conducta como constitutiva de la causa de calificación del concurso como culpable, la de no haber adoptado las medidas exigidas a los administradores en caso de incurrir la sociedad en pérdidas agravadas, equivalente a la insolvencia, encuadrada por el Juzgado de instancia en la infracción del deber de solicitar la declaración del concurso por dolo o culpa grave en la generación o agravación de la insolvencia.CONCURSO (Ley 22/2003, de 9 julio) DECLARACION DE CONCURSO: PRESUPUESTO OBJETIVO: La insolvencia a efectos del concurso: comparación con la situación de pérdidas agravadas y con la de sobreseimiento general en el pago corriente de las obligaciones del deudor; INFORME DE LA ADMINISTRACION CONCURSAL: PRESENTACION: COMPUTO DEL PLAZO: No es automático tras la publicación de la resolución judicial de apertura de la fase de liquidación, sino que viene determinado por la notificación que de la resolución le efectúe el órgano judicial; CALIFICACION DEL CONCURSO: CULPABLE: IMPROCEDENCIA: Equiparación incorrecta de la insolvencia con la concurrencia de causa legal de disolución por pérdidas agravadas que hayan dejado reducido el patrimonio a menos de la mitad del capital social: infracción del art. 2.2 LC al no computar la sentencia el plazo de dos meses desde que el deudor conoció o debió conocer su situación de insolvencia no pudiendo cumplir regularmente sus obligaciones exigibles, y no fijar siquiera cuándo se produjo tal circunstancia	Calificacion del concurso como culpable; improcedencia por confusion presupuesto objetivo de insolvencia con la norma de recapitalizar o liquidar como causa de disolucion.	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 122/2014 de 1 abril. RJ 2014\2159	Concursal/ Capital social
29	TS	2013	PRINCIPIOS PROCESALES: PRINCIPIO PROHIBITIVO DE LA «MUTATIO LIBELLI: Modificación de la pretensión bajo la cobertura del principio «iura novit curia»: no cabe en la segunda instancia pretender la nulidad de una cesión de crédito cuando solo se alegó en la primera su falta de constancia en documento público: plantear por la demandada la nulidad de un contrato que sirve de sustento a la demanda y que junto a ésta configura en lo esencial el debate procesal, supone una auténtica pretensión impugnatoria que requiere contradicción de la demandante: declararla constituiría incongruencia de sentencia.SENTENCIA DE CONDENA: RESERVA DE LIQUIDACION EN EJECUCION: Interpretación jurisprudencial del art. 219 LECiv: no exige que se pida expresamente en la demanda, ni que tal liquidación haya de tener lugar en todo caso en un proceso declarativo posterior: su apartado segundo refiere la posibilidad de reservar a ejecución de sentencia la liquidación de la condena.CONTRATO DE AGENCIA: Gastos de promoción propios de la labor del agente: regla general de no repercutibilidad en su principal salvo pacto en contrario: justificación en el carácter de empresario independiente del agente.SOCIEDADES ANONIMAS: RESPONSABILIDAD DE ADMINISTRADORES: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: irretroactividad del art. 262.5 LSA en la redacción reformada por la Ley 19/2005, de 14 de noviembre: doctrina jurisprudencial: disposición no sancionadora.CONTRATOS: RESCISION POR FRAUDE DE ACREEDORES: Subsidiaridad: que la acción rescisoria se ejercite acumuladamente con otras no significa que falte este requisito: doctrina jurisprudencial.	Prohibicion de la mutatio libelli; imposibilidad de pretension a posteriori de nulidad de cesion de credito.	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 737/2013 de 28 noviembre. RJ 2013\7875	Procesal
30	TS	2013	QUIEBRA: RETROACCION DE EFECTOS: nulidad de los actos posteriores a la fecha de retroacción: interpretación de las normas derogadas por la Ley Consursal en relación con las del concurso regulado en ésta: abandono del perturbador sistema de retroacción y sustitución por el de las acciones rescisorias de reitegración; procedencia: actos realizados en perjuicio de terceros acreedores: cobro en especie a través de sociedad interpuesta del crédito que ostentaba frente a la quebrada: vulneración del principio de igualdad de trato; alcance de la retroacción a subadquirentes de mala fe.	Quiebra, Actos posteriores a la fecha de retroaccion, abandono sistema de retroacion y sustitucion por acciones rescisorias de reintegracion (LCon)	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 435/2013 de 3 julio. RJ 2013\5195	Concursal

31	TS	2013	QUIEBRA: NULIDAD DE LOS ACTOS POSTERIORES A LA FECHA DE RETROACCION: PROCEDENCIA: ineficacia de un contrato de compraventa de un inmueble celebrado en el periodo de retroacción de la quiebra de la entidad vendedora: alcanza a la posterior transmisión del inmueble a quien es subadquirente de mala fe: atenta contra la integridad de la masa activa: transmisión mediante una dación en pago, lo que supone un claro propósito, que excluye la buena fe de la recurrente, al conculcar el principio de igualdad de trato cobrando en especie el crédito: ineficacia también de la dación en pago, como consumación de un contrato, el de ejecución obra, que se había perfeccionado fuera del periodo de retroacción y en ejecución de las garantías previstas en el propio contrato; dación en pago: no es un operación propia del tráfico ordinario, ni la que es objeto de examen estuvo realizada en condiciones de mercado, ni la doble transmisión -antes de la dación-, es una actividad normalizada en el tráfico jurídico-mercantil: perjuicio para la masa en perjuicio del resto de los acreedores a los que se sustrae la posibilidad de resarcimiento sobre el inmueble; dación en pago recibido de un tercero -testaferro-, en pago de un crédito que la recurrente ostentaba contra la quebrada: efectos: restitución: impone que el bien retorne a la masa de la quiebra salvo que, hubiera sido transmitido a un tercero de buena fe y no se logre adquirir de nuevo, en cuyo caso habrá de abonar a la masa el precio que obtuvo del tercero.	Quiebra, actos posteriores a la fecha de retroaccion, ineficacia de dacion en pago y restitucion a la masa.	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 440/2013 de 2 julio. RJ 2013\5194	Concursal
32	TS	2013	QUIEBRA: DECLARACION DE QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: ineficacia de un contrato de compraventa de un inmueble celebrado en el periodo de retroacción de la quiebra de la entidad vendedora: alcanza a la posterior transmisión del inmueble a quien es subadquirente de mala fe: atenta contra la integridad de la masa activa: transmisión mediante una dación en pago, lo que supone un claro propósito, que excluye la buena fe de la recurrente, al conculcar el principio de igualdad de trato cobrando en especie el crédito: ineficacia también de la dación en pago, como consumación de un contrato, el de ejecución obra, que se había perfeccionado fuera del periodo de retroacción y en ejecución de las garantías previstas en el propio contrato; dación en pago: no es un operación propia del tráfico ordinario, ni la que es objeto de examen estuvo realizada en condiciones de mercado, ni la doble transmisión -antes de la dación-, es una actividad normalizada en el tráfico jurídico-mercantil, sino todo lo contrario: perjuicio para la masa en perjuicio del resto de los acreedores a los que se sustrae la posibilidad de resarcimiento sobre el inmueble; dación en pago recibido de un tercero -testaferro-, en pago de un crédito que la recurrente ostentaba contra la quebrada: efectos: restitución: alcance.	Quiebra, actos posteriores a la fecha de retroaccion, ineficacia de dacion en pago y restitucion a la masa.	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 413/2013 de 24 junio. RJ 2013\4635	Concursal
33	TS	2013	SOCIEDADES ANONIMAS: ADMINISTRADORES: acción de responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: irretroactividad del art. 262.5 LSA en la redacción reformada por la Ley 19/2005, de 14 de noviembre: disposición no sancionadora.	SAs; Recapitalizar o liquidar	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 414/2013 de 21 junio. RJ 2013\4634	Mercantil

34	TS	2013	QUIEBRA: DECLARACION DE QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: ineficacia de un contrato de compraventa de un inmueble celebrado en el periodo de retroacción de la quiebra de la entidad vendedora: alcanza a la posterior transmisión del inmueble a quien es subadquirente de mala fe: atenta contra la integridad de la masa activa: transmisión mediante una dación en pago, lo que supone un claro propósito, que excluye la buena fe de la recurrente, al conculcar el principio de igualdad de trato cobrando en especie el crédito: ineficacia también de la dación en pago, como consumación de un contrato, el de ejecución obra, que se había perfeccionado fuera del periodo de retroacción y en ejecución de las garantías previstas en el propio contrato; dación en pago: no es un operación propia del tráfico ordinario, ni la que es objeto de examen estuvo realizada en condiciones de mercado, ni la doble transmisión -antes de la dación-, es una actividad normalizada en el tráfico jurídico-mercantil, sino todo lo contrario: perjuicio para la masa en perjuicio del resto de los acreedores a los que se sustrae la posibilidad de resarcimiento sobre el inmueble; dación en pago recibido de un tercero -testaferro-, en pago de un crédito que la recurrente ostentaba contra la quebrada: efectos: restitución: alcance.	Quiebra, actos posteriores a la fecha de retroaccion, ineficacia de dacion en pago y restitucion a la masa.	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 392/2013 de 19 junio. RJ 2013\4633	Concursal
35	TS	2013	QUIEBRA: DECLARACION DE QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: ineficacia de un contrato de compraventa de un inmueble celebrado en el periodo de retroacción de la quiebra de la entidad vendedora: alcanza a la posterior transmisión del inmueble a quien es subadquirente de mala fe: atenta contra la integridad de la masa activa: transmisión mediante una dación en pago, lo que supone un claro propósito, que excluye la buena fe de la recurrente, al conculcar el principio de igualdad de trato cobrando en especie el crédito: ineficacia también de la dación en pago, como consumación de un contrato, el de ejecución obra, que se había perfeccionado fuera del periodo de retroacción y en ejecución de las garantías previstas en el propio contrato; dación en pago: no es un operación propia del tráfico ordinario, ni la que es objeto de examen estuvo realizada en condiciones de mercado, ni la doble transmisión -antes de la dación-, es una actividad normalizada en el tráfico jurídico-mercantil: perjuicio para la masa en perjuicio del resto de los acreedores a los que se sustrae la posibilidad de resarcimiento sobre el inmueble; dación en pago recibido de un tercero -testaferro-, en pago de un crédito que la recurrente ostentaba contra la quebrada: efectos: restitución: impone que el bien retorne a la masa de la quiebra salvo que, hubiera sido transmitido a un tercero de buena fe y no se logre adquirir de nuevo, en cuyo caso habrá de abonar a la masa el precio que obtuvo del tercero.	Quiebra, actos posteriores a la fecha de retroaccion, ineficacia de dacion en pago y restitucion a la masa.	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 380/2013 de 4 junio. RJ 2013\4367	Concursal
36	TS	2013	QUIEBRA: RETROACCION DE EFECTOS: nulidad de los actos posteriores a la fecha de retroacción: interpretación de las normas derogadas por la Ley Consursal en relación con las del concurso regulado en ésta: abandono del perturbador sistema de retroacción y sustitución por el de las acciones rescisorias de reitegración; procedencia: actos realizados en perjuicio de terceros acreedores: cobro en especie a través de sociedad interpuesta del crédito que ostentaba frente a la quebrada: vulneración del principio de igualdad de trato; alcance de la retroacción a subadquirentes de mala fe.	Quiebra, Actos posteriores a la fecha de retroaccion, abandono sistema de retroacion y sustitucion por acciones rescisorias de reintegracion (LCon)	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 347/2013 de 28 mayo. RJ 2013\4963	Concursal
37	TS	2013	QUIEBRA: RETROACCION DE EFECTOS: nulidad de los actos posteriores a la fecha de retroacción: interpretación de las normas derogadas por la Ley Consursal en relación con las del concurso regulado en ésta: abandono del perturbador sistema de retroacción y sustitución por el de las acciones rescisorias de reitegración; procedencia: actos realizados en perjuicio de terceros acreedores: cobro en especie a través de sociedad interpuesta del crédito que ostentaba frente a la quebrada: vulneración del principio de igualdad de trato; alcance de la retroacción a subadquirentes de mala fe.	Quiebra, Actos posteriores a la fecha de retroaccion, abandono sistema de retroacion y sustitucion por acciones rescisorias de reintegracion (LCon)	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 340/2013 de 27 mayo. RJ 2013\4962	Concursal

38	TS	2013	QUIEBRA: RETROACCION DE EFECTOS: nulidad de los actos posteriores a la fecha de retroacción: interpretación de las normas derogadas por la Ley Consursal en relación con las del concurso regulado en ésta: abandono del perturbador sistema de retroacción y sustitución por el de las acciones rescisorias de reitegración; procedencia: actos realizados en perjuicio de terceros acreedores: cobro en especie a través de sociedad interpuesta del crédito que ostentaba frente a la quebrada: vulneración del principio de igualdad de trato; alcance de la retroacción a subadquirentes de mala fe.	Quiebra, Actos posteriores a la fecha de retroaccion, abandono sistema de retroacion y sustitucion por acciones rescisorias de reintegracion (LCon)	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 316/2013 de 20 mayo. RJ 2013\4954	Concursal
39	TS	2013	QUIEBRA: RETROACCION DE EFECTOS: nulidad de los actos posteriores a la fecha de retroacción: interpretación de las normas derogadas por la Ley Consursal en relación con las del concurso regulado en ésta: abandono del perturbador sistema de retroacción y sustitución por el de las acciones rescisorias de reitegración; procedencia: actos realizados en perjuicio de terceros acreedores: cobro en especie a través de sociedad interpuesta del crédito que ostentaba frente a la quebrada: vulneración del principio de igualdad de trato; alcance de la retroacción a subadquirentes de mala fe.	Quiebra, Actos posteriores a la fecha de retroaccion, abandono sistema de retroacion y sustitucion por acciones rescisorias de reintegracion (LCon)	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 299/2013 de 13 mayo. RJ 2013\4615	Concursal
40	TS	2013	QUIEBRA: RETROACCION DE EFECTOS: nulidad de los actos posteriores a la fecha de retroacción: interpretación de las normas derogadas por la Ley Consursal en relación con las del concurso regulado en ésta: abandono del perturbador sistema de retroacción y sustitución por el de las acciones rescisorias de reitegración; procedencia: actos realizados en perjuicio de terceros acreedores: cobro en especie a través de sociedad interpuesta del crédito que ostentaba frente a la quebrada: vulneración del principio de igualdad de trato; alcance de la retroacción a subadquirentes de mala fe.	Quiebra, Actos posteriores a la fecha de retroaccion, abandono sistema de retroacion y sustitucion por acciones rescisorias de reintegracion (LCon)	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 292/2013 de 10 mayo. RJ 2013\4613	Concursal
41	TS	2013	QUIEBRA: EFECTOS DE SU DECLARACION: RETROACCION: NULIDAD DE LOS ACTOS POSTERIORES A LA FECHA DE RETROACCION: abandono del criterio rigorista en favor de excluir de la retroacción las operaciones propias del tráfico ordinario: alcance: aplicación a los contratos sinalagmáticos del criterio de restitución recíproca de lo entregado tratado el derecho de restitución como una deuda de la masa; EXISTENCIA: compraventa de finca urbana concluida en el período de retroacción de la quiebra actuando la compradora como testaferro de la vendedora quebrada, al hacer dación en pago de la finca a un tercero en pago de una deuda que este tercero mantenía con la vendedora, tercero al que no cabe considerar de buena fe por conocer la situación de quiebra de su deudora: utilización de un testaferro para eludir las posibles sanciones que pudiera merecer el acto de disposición realizado: actuaciones fraudulentas en perjucio de la masa que imponen su nulidad a pesar de la aplicación del criterio flexible de interpretación seguido en la instancia: alcance de la nulidad a los dos actos traslativos de dominio que exceden de lo que puede considerarse una operación ordinaria realizada en condiciones normales: restitución del inmueble a la masa de la quiebra volviendo el tercero a ser titular de un crédito anterior a la declaración de quiebra de naturaleza concursal.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion, perjuicio a la masa	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 190/2013 de 12 marzo. RJ 2013\2592	Concursal

42	TS	2013	QUIEBRA: EFECTOS: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: dación en pago en período de retroacción por una sociedad que es testaferro de la sociedad quebrada, de un bien recibido previamente por ésta y dado posteriormente a un acreedor de la quebrada en pago de una deuda de ésta: utilización de un testaferro para eludir la declaración de ineficacia que pudiera merecer un acto de disposición realizado a favor de un acreedor directamente por una sociedad en situación de insolvencia: falta de la condición de tercero de buena fe; la previsión en el contrato de obra de determinadas garantías del cobro del precio de la obra no convierte al contrato de obra en un negocio transmisivo de la propiedad del inmueble que se habría consumado en la dación del mismo en pago de la deuda: los negocios mediante los que se transmitió la propiedad del inmueble son el contrato de compraventa y la posterior dación de pago: son los únicos negocios jurídicos que habían de ser impugnados para conseguir la reintegración del inmueble a la masa activa de la quiebra; perjuicio a la masa sin que pueda considerarse la operación impugnada como propia del tráfico ordinario de la empresa; efectos: restitución de las prestaciones: la restitución de la situación anterior a la celebración de los negocios jurídicos transmisivos de la propiedad del inmueble, que han sido anulados, implica que el bien vuelva a la masa de la quiebra: crédito anterior a la declaración de quiebra y por tanto de naturaleza concursal respecto de la citada quiebra.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion, perjuicio a la masa	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 150/2013 de 7 marzo. RJ 2013\2284	Concursal
43	TS	2013	QUIEBRA: EFECTOS: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: dación en pago en período de retroacción por una sociedad que es testaferro de la sociedad quebrada, de un bien recibido previamente por ésta y dado posteriormente a un acreedor de la quebrada en pago de una deuda de ésta: utilización de un testaferro para eludir la declaración de ineficacia que pudiera merecer un acto de disposición realizado a favor de un acreedor directamente por una sociedad en situación de insolvencia: falta de la condición de tercero de buena fe; la previsión en el contrato de obra de determinadas garantías del cobro del precio de la obra no convierte al contrato de obra en un negocio transmisivo de la propiedad del inmueble que se habría consumado en la dación del mismo en pago de la deuda: los negocios mediante los que se transmitió la propiedad del inmueble son el contrato de compraventa y la posterior dación de pago: son los únicos negocios jurídicos que habían de ser impugnados para conseguir la reintegración del inmueble a la masa activa de la quiebra; perjuicio a la masa sin que pueda considerarse la operación impugnada como propia del tráfico ordinario de la empresa; efectos: restitución de las prestaciones: la restitución de la situación anterior a la celebración de los negocios jurídicos transmisivos de la propiedad del inmueble, que han sido anulados, implica que el bien vuelva a la masa de la quiebra: crédito anterior a la declaración de quiebra y por tanto de naturaleza concursal respecto de la citada quiebra.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion, perjuicio a la masa	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 90/2013 de 1 marzo. RJ 2013\2281	Concursal

44	TS	2013	QUIEBRA: EFECTOS: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: dación en pago en período de retroacción por una sociedad que es testaferro de la sociedad quebrada, de un bien recibido previamente por ésta y dado posteriormente a un acreedor de la quebrada en pago de una deuda de ésta: utilización de un testaferro para eludir la declaración de ineficacia que pudiera merecer un acto de disposición realizado a favor de un acreedor directamente por una sociedad en situación de insolvencia: falta de la condición de tercero de buena fe; la previsión en el contrato de obra de determinadas garantías del cobro del precio de la obra no convierte al contrato de obra en un negocio transmisivo de la propiedad del inmueble que se habría consumado en la dación del mismo en pago de la deuda: los negocios mediante los que se transmitió la propiedad del inmueble son el contrato de compraventa y la posterior dación de pago: son los únicos negocios jurídicos que habían de ser impugnados para conseguir la reintegración del inmueble a la masa activa de la quiebra; perjuicio a la masa sin que pueda considerarse la operación impugnada como propia del tráfico ordinario de la empresa; efectos: restitución de las prestaciones: la restitución de la situación anterior a la celebración de los negocios jurídicos transmisivos de la propiedad del inmueble, que han sido anulados, implica que el bien vuelva a la masa de la quiebra: crédito anterior a la declaración de quiebra y por tanto de naturaleza concursal respecto de la citada quiebra.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion, perjuicio a la masa	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 75/2013 de 28 febrero. RJ 2013\2279	Concursal
45	TS	2013	QUIEBRA: EFECTOS DE SU DECLARACION: RETROACCION: NULIDAD DE LOS ACTOS POSTERIORES A LA FECHA DE RETROACCION: abandono del criterio rigorista en favor de excluir de la retroacción las operaciones propias del tráfico ordinario: alcance: aplicación a los contratos sinalagmáticos del criterio de restitución recíproca de lo entregado tratado el derecho de restitución como una deuda de la masa; EXISTENCIA: compraventa de finca urbana concluida en el período de retroacción de la quiebra actuando la compradora como testaferro de la vendedora quebrada, al hacer dación en pago de la finca a un tercero en pago de una deuda que este tercero mantenía con la vendedora, tercero al que no cabe considerar de buena fe por conocer la situación de quiebra de su deudora: utilización de un testaferro para eludir las posibles sanciones que pudiera merecer el acto de disposición realizado: actuaciones fraudulentas en perjucio de la masa que imponen su nulidad a pesar de la aplicación del criterio flexible de interpretación seguido en la instancia: alcance de la nulidad a los dos actos traslativos de dominio que exceden de lo que puede considerarse una operación ordinaria realizada en condiciones normales: restitución del inmueble a la masa de la quiebra volviendo el tercero a ser titular de un crédito anterior a la declaración de quiebra de naturaleza concursal.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion, perjuicio a la masa	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 70/2013 de 25 febrero. RJ 2013\2576	Concursal
46	TS	2012	CONCURSO (LEY 22/2003, DE 9 JULIO): CALIFICACION COMO CULPABLE: Simulación de situación patrimonial ficticia: requisitos; Responsabilidad de los administradores societarios: naturaleza y requisitos: condena discrecional a la cobertura del deficit concursal: parámetros; EXISTENCIA: Suscripción de contrato de arrendamiento por tiempo de 8 años de la nave industrial que constituía el principal activo de la concursada ante su inminente declaración de insolvencia: hecho lesivo a los intereses del conjunto de acreedores que determina la responsabilidad del administrador demandado condenado a indemnizar un 45% del deficit concursal por su grado de participación en los hechos que determinaron la calificación del concurso y por su falta de colaboración con la administración concursal: responsabilidad por complicidad de la empresa arrendataria condenada a la pérdida de cualquier derecho que pudiera ostentar como acreedor concursal o de la masa: no es preciso que la situación fingida consista en publicitar como real una contabilidad ficticia, ni que del comportamiento derive daño a la masa activa.ABUSO DE DERECHO: existencia: abuso procesal: imposición de costas y multas por recusaciones infundadas en procedimiento de concurso culpable generadoras de un perjuicio económico evitable de no mantenerse un comportamiento procesal carente de sentido y fundamento.	Concurso culpable; responsabilidad de los administradores	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 669/2012 de 14 noviembre. RJ 2013\1614	Concursal

47	TS	2012	SOCIEDADES DE CAPITAL: Cuentas anuales: Verificación de las cuentas anuales: Informe del auditor: indemnización de daños y perjuicios: procedencia: prestación profesional defectuosamente ejecutada al incumplir los principios de contabilidad y normas técnicas que llevaron a la sociedad a ser sancionada por infracción grave, impidiendo además conocer su situación patrimonial y financiera y la adopción de medidas urgentes contra el consejo de administración: relación causal constatable en los actos de disposición irregulares que no se habrían producido de haber tenido los socios la información correcta.	Cuentas anuales, indemizacion auditor por irregularidades contables	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 558/2012 de 3 octubre. RJ 2012\9711	Mercantil
48	TS	2011	QUIEBRA: RETROACCION DE SUS EFECTOS: «nulidad» de los actos alcanzados por ella: interpretación del término legal: no contempla una nulidad radical o absoluta por ministerio de la Ley, sino una ineficacia sobrevenida de esencia rescisoria que requiere la acreditación de un perjuicio para la masa ligado a los actos de administración o dominio en cuestión: evitación de una declaración de nulidad automática e indiscriminada: limitación a los actos que se demuestre han causado un perjuicio para la masa activa y para el trato igualitario que merecen los acreedores.RECURSO DE CASACION (LECiv/2000): MOTIVO: infracción de norma legal material: inadmiisbilidad del planteamiento de cuestiones procesales.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion, perjuicio a la masa	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 879/2011 de 24 noviembre. RJ 2012\3398	Concursal
49	TS	2011	QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: improcedencia: compraventa: perjuicio inexistente. RECURSO EXTRAORDINARIO POR INFRACCION PROCESAL: procedencia: quiebra: retroacción: acción declarativa de nulidad ejercitada por el síndico único de la quiebra: convenio alcanzado después de interpuesta la demanda con la previsión de sustituir al síndico por una comisión de acreedores: «perpetuatio legitimationis»: no pierde el síndico su legitimación activa.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 724/2011 de 24 octubre. RJ 2012\429	Concursal
50	TS	2011	SOCIEDADES ANONIMAS: ADMINISTRADORES: responsabilidad: improcedencia: conocimiento suficiente de la situación de desequilibrio patrimonial en el cierre del ejercicio: adquisición con la idea de reflotar la sociedad en crisis: presentación de un plan de viabilidad o reorganización de la mutua y sus filiales antes de que se agotara el plazo de dos meses siguientes al cierre del ejercicio sin que el infructuoso resultado de esa medida, por la intervención administrativa de la mutua y, por ende de su filial constituya razón suficiente para declarar la responsabilidad de los gestores: acción significativa para evitar el daño.	SAs; Responsabilidad de los administradores por desequilibrio patrimonial al cierre del ejercicio	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 328/2011 de 19 mayo. RJ 2011\3980	Mercantil
51	TS	2011	QUIEBRA: DECLARACION: retroacción: declaración de su fecha: irrecurribilidad en casación de la sentencia que versó sobre la modificación de la fecha a la que debían retrotraerse los efectos de la quiebra; tiempo de retroacción en el Código de Comercio: ningún obstáculo existía para que la retroacción se proyectase en el tiempo al momento, próximo o distante, en que se constatase que se había producido la quiebra prevista por la norma: la concurrencia o no de una situación de sobreseimiento es una cuestión de hecho cuya apreciación corresponde al Tribunal de instancia; incidencia de la Ley Concursal en el plazo de retroacción: no cabe extrapolar el plazo de dos años que la nueva Ley Concursal prevé en su art. 71 para las acciones rescisorias, que suponen un sistema legal diferente al de la retroacción absoluta, que respondía a sus propios presupuestos y que carece de encaje en la nueva Ley Concursal.	Quiebra; plazos de retroaccion y acciones rescisorias	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 227/2011 de 25 marzo. RJ 2011\3436	Concursal
52	TS	2011	SOCIEDADES ANONIMAS: Administradores: Acción de responsabilidad: existencia: deuda social de sociedad filial por préstamos concedidos por la sociedad matriz declarada en quiebra y titular del 98% de las acciones de aquélla, coincidiendo los administradores sociales en ambas: no es apreciable mala fe, ni retraso desleal ni conducta abusiva o fraudulenta al accionar la sindicatura de la quiebra la protección de los acreedores mediante el reintegro a la masa activa de una suma de dinero prestada.SENTENCIA: INCONGRUENCIA «EXTRA PETITUM»: Alteración de la causa de pedir: existencia: la apreciación en la instancia de mala fe es cuestión con sustantividad propia introducida como «ratio decidendi» sin que fuese fundamento de oposición en la demanda: elemento «ex novo» determinante de indefensión ajeno al control de oficio: infracción del principio de rogación.	SAs; Responsabilidad de los administradores por prestamos concedidos de la matriz quebrada a la filial	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 131/2011 de 14 marzo. RJ 2011\2769	Mercantil

53	TS	2011	CONCURSO: CALIFICACION: culpable: procedencia: incremento de la insolvencia de la sociedad con una actuación gravemente culposa: comportamiento culposo ante el crecimiento desmesurado del pasivo social; administración de la sociedad bajo la cobertura de una administradora aparente: situación disimulada y negada por ambos administradores, la de derecho y el de hecho; responsabilidad de los administradores: art. 172.3 LC: carece de la naturaleza sancionadora que le atribuye el recurrente, dado que en él la responsabilidad de los administradores o liquidadores sociales deriva de serles imputable la generación o agravamiento del estado de insolvencia de la sociedad concursada: el daño que indirectamente sufrieron los acreedores en una medida equivalente al importe de los créditos que no perciban en la liquidación de la masa activa; obligación de satisfacer los derechos de los acreedores sociales en medida equivalente al total de lo que no percibieran en la liquidación de la masa activa: deducción del importe del pasivo existente al cerrarse el ejercicio social: el administrador de hecho no podía ser responsable de la situación anterior al inicio de su actividad de gestión en la sociedad, luego declarada en concurso.	Concurso culpable; responsabilidad de los administradores	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 56/2011 de 23 febrero. RJ 2011\2475	Concursal
54	TS	2010	CONCURSO: ACTOS PERJUDICIALES PARA LA MASA ACTIVA: acciones de reintegración: procedencia: garantía hipotecaria de un bien propio para una deuda ajena: acto gratuito que produce un perjuicio para la masa activa de la quiebra: presunción «iuris et de iure»; derechos hipotecados de nuda propiedad y usufructo: rige el principio de distribución pero puede pactarse la indivisibilidad: no hay convenio entre las partes, pero ello no impide que pueda acordarse la modificación por mandato judicial: la modificación por reducción parcial no afecta a la regulación legal, y entra dentro de las posibilidades del principio de determinación; remisión de la determinación de los porcentajes de gastos, intereses y costas derivados de la reducción parcial al procedimiento de ejecución hipotecaria. NORMAS JURIDICAS: IRRETROACTIVIDAD: improcedencia: concurso: art. 71 LC: negocios realizados con anterioridad a la entrada en vigor de la Ley Concursal: regulación de la LC en cuanto a los actos perjudiciales para la masa activa realizados por el deudor dentro de los dos años anteriores a la fecha de la declaración: está impregnada de naturaleza intertemporal y opera con efecto retroactivo.	Concurso, accion de reintegracion por hipoteca de bien propio como garantia de deuda ajena, perjuicio para la masa	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 791/2010 de 13 diciembre. RJ 2011\140	Concursal
55	TS	2009	CONCURSO (LEY 22/2003, DE 9 JULIO): INFORME DE LA ADMINISTRACIÓN CONCURSAL Y DETERMINACIÓN DE LAS MASAS ACTIVAS Y PASIVAS DEL CONCURSO: DETERMINACIÓN DE LA MASA PASIVA: créditos con privilegio general: art. 91.4º LC: cálculo: exclusión de la suma total del crédito concursal de los importes que gozan de privilegio especial del art. 90.1º LC, los beneficiarios del privilegio general del art. 91.2º LC, y el crédito que se califica como subordinado conforme al art. 92.4º, atribuyendo el privilegio general del art. 91.4º al 50% del crédito concursal resultante; créditos subordinados: estimación: recargos de apremio: naturaleza accesoria: sanción por la falta de cumplimiento de la deuda tributaria: la regulación de la LGT se halla subordinada a la normativa de la LC; composición: crédito contra la masa: desestimación: créditos por IVA por hechos imponibles anteriores a la declaración del concurso: aunque el plazo de liquidación se cierre con posterioridad: consideración como crédito concursal; créditos por retenciones por IRPF contra el deudor correspondientes a rentas o salarios abonados con anterioridad a la declaración del concurso: con independencia del momento de conclusión del plazo para el ingreso: constituyen créditos concursales. DOCTRINA JURISPRUDENCIAL DEL TS EN INTERES CASACIONAL.	Concurso; determinacion de la masa pasiva, creditos con privilegio general u especial	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 589/2009 de 20 septiembre. RJ 2009\5482	Concursal
56	TS	2009	CONTRATOS ATIPICOS: contrato de colaboración mercantil asimilado al de agencia: cobro de comisiones devengadas tras la extinción: improcedencia: ausencia de los presupuestos requeridos para su percepción; indemnización por clientela: aplicación analógica del art. 28 de la Ley 12/1992.	Contrato de colaboracion mercantil asimilado al de agencia	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 329/2009 de 28 mayo. RJ 2009\4142	Contratos mercantiles

57	TS	2009	PRESCRIPCION DE ACCIONES: CULPA EXTRACONTRACTUAL: procedencia: responsabilidad exigida por los socios a los auditores fuera del ámbito de legitimación reconocido para el ejercicio de la acción social de responsabilidad en la LSA: carácter extracontractual: sujeción del ar.t 1968.2º CC: ejercicio por un sujeto distinto de la sociedad que celebró el contrato con los auditores: ausencia de estipulaciones en favor de los socios en calidad de terceros: la unidad de la culpa civil no permite su invocación con el fin de aplicar el régimen contractual a una responsabilidad nacida fuera del ámbito subjetivo del contrato: la remisión del artículo 211 LSA al régimen de responsabilidad de los administradores de la sociedad se refiere únicamente a la legitimación; COMPUTO DEL PLAZO: FECHA INICIAL: acta de inspección: conocimiento por los socios: existencia de la situación contable gravemente irregular de la sociedad; INTERRUPCION DE LA PRESCRICION. IMPROCEDENCIA. procedimiento iniciado a instancias de la DGS: no puede ser equiparada por razones subjetivas, objetivas y formales a una reclamación de carácter extrajudicial: el sujeto que ordena la iniciación del procedimiento no es el acreedor: procedimiento administrativo al control técnico de la actuación auditora, encaminado a la iniciación de un procedimiento sancionador por parte del ICAC: el conocimiento en el procedimiento administrativo de la documentación de los auditores no es requisito necesario para el ejercicio de la acción de responsabilidad civil.	Sas; accion social de responsabilidad socios contra auditores; al ser extracontractual no aplica, sujecion al Ccivil	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 355/2009 de 27 mayo. RJ 2009\3044	Mercantil/ Civil
58	TS	2009	PAGARE: ACCIONES POR FALTA DE PAGO: EXCEPCIONES DEL DEUDOR: improcedencia: aval condicionado al protesto: justificación de la condición de presidente de la cooperativa acreedora, que el compareciente había manifestado tener, con posterioridad al plazo de vigencia del aval: reconocimiento de la validez del protesto por el avalista en la diligencia de contestación al darse por requerido, aun cuando exigiera acreditar la legitimación para el pago a quien instaba el protesto: aplicación de la doctrina de los actos propios y principio de buena fe: posesión del pagaré en el momento del requerimiento junto con acreditación posterior de la condición de presidente: suficiente para considerar el pago como liberatorio en consideración a la doctrina del acreedor aparente.	Credito contractual, pagare, juicio cambiario	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 334/2009 de 20 mayo. RJ 2009\3186	Civil/ Cambiario
59	TS	2009	QUIEBRA: RETROACCION DE SUS EFECTOS: nulidad de los actos posteriores a la fecha de retroacción: procedencia: hipoteca constituida por la sociedad quebrada dentro del período de retroacción de la quiebra: perjuicio para los acredores: alteración de la «par conditio creditorum».TERCERO HIPTECARIO: PROTECCION: improcedencia: nulidad radical de la hipoteca constituida con efectos para el acreedor favorecido por ella.	Quiebra, nulidad de actos posteriores a la retroaccion	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 58/2009 de 11 febrero. RJ 2009\1286	Concursal
60	TS	2008	CONTRATO DE CONCESION: resolución contractual y liquidación de la concesionaria con la empresa fabricante: indemnización por clientela: existencia: acreditación de circunstancias concurrentes en la relación de las partes semejantes a las del agente: aplicación analógica del art. 28 de la Ley 12/92 de 27 de Mayo.INTERESES MORATORIOS: existencia: aplicación de la regla «in illiquidis non fit mora» conforme al cambio de criterio jurisprudencial: la condena a cantidad inferior a la reclamada no obsta a la realidad de la deuda y a su injustificada insatisfacción.	Contrato de concesion	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 897/2008 de 15 octubre. RJ 2008\6914	Contratos mercantiles

61	TS	2008	SOCIEDADES ANONIMAS: JUNTA GENERAL: impugnación de acuerdos sociales: procedencia: aumento del capital social por compensación de créditos con exclusión del derecho de suscripción preferente: incumplimiento del art. 159 LSA: no cabe descartar que el derecho de suscripción preferente pueda tener efectividad mediante el pago de sus créditos a los terceros acreedores por socios que se subroguen en su posición para recibir las nuevas acciones correspondientes: no procede atribuir a la certificación del auditor exigida por el art. 156.1 b) LSA para el aumento del capital social por compensación de créditos las mismas funciones que a la memoria de los administradores y al informe del auditor de cuentas exigidos por el art. 159.1 b) de la misma ley; exclusión injustificada de los demandantes de participar en la ampliación pese a ser también acreedores de la sociedad, es decir, pese a encontrarse en la misma situación que los socios que a cambio de sus créditos iban a adjudicarse íntegramente las nuevas acciones.	aumento del capital social por compensación de créditos con exclusión del derecho de suscripción preferente	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 403/2008 de 23 mayo. RJ 2008\3170	Mercantil/ Capital social
62	TS	2008	SOCIEDADES ANONIMAS: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: no requiere una relación de causalidad entre la obligación cuyo cumplimiento se exige y el incumplimiento de los deberes legales por parte de los administradores: sin que el hecho de haber instado en su día, después de haber contraído las obligaciones exigidas por la actora, el expediente de suspensión de pagos que finalizó con la declaración de insolvencia definitiva, o el hecho de haber promovido la declaración de quiebra después de haberse interpuesto la demanda que da origen al proceso del que se trae causa, sirva para exonerar a aquéllos de responsabilidad.	Responabilidad de los administradores por inobservancia de la causa de disolucion recapitalizar o liquidar	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 408/2008 de 14 mayo. RJ 2008\3076	Mercantil/ Capital social
63	TS	2008	TRANSPORTE TERRESTRE INTERNACIONAL: daños producidos en la carga como consecuencia del incendio, en una autopista, del motor, la cabina y la caja del camión: fallo localizado en su sistema eléctrico, que no se hallaba en buenas condiciones: inexistencia de caso fortuito. SENTENCIA: INCONGRUENCIA: improcedencia: dato accesorio o complementario que puede entenderse implícitamente alegado cuando el litigante invoca alguna de las categorías generales con las que lógicamente aparece conectado. RECURSO DE CASACION: no cabe hacer supuesto de la cuestión. INTERESES MORATORIOS: procedencia: desde la interpelación judicial: oposición de las demandadas carente de toda justificación, desde el momento que negaron a lo largo del proceso deber no menor cantidad que la reclamada en la demanda, sino la propia exigencia de su responsabilidad.	Transporte terrestre,contratacion mercantil	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 244/2008 de 25 marzo. RJ 2008\4061	Contratos mercantiles
64	TS	2007	COMPRAVENTA MERCANTIL: existencia: adquisición de terrazo para colocación en viviendas de protección oficial; Obligaciones del vendedor: incumplimiento: existencia: entrega de baldosas de distinta coloración unas de otras: sustitución del material cumpliendo instrucciones de la dirección técnica y el deseo de los compradores: aplicación de los arts. 1101 y 1124 CC: falta de correspondencia objetiva entre lo pactado y lo entregado residenciado en el régimen general de la responsabilidad por incumplimiento de contrato: jurisprudencia que lo avala: improcedencia de su saneamiento.ACTOS PROPIOS: INEXISTENCIA: seguro de responsabilidad civil: manifestación por la aseguradora del conocimiento del defecto fuera del proceso.PRUEBA: apreciación por los Tribunales: no cabe, en casación, aislar una sola prueba para pretender desmontar los hechos probados que tienen condición de firmes; Documentos públicos: valor probatorio: informes técnicos y actas notariales tenidas en cuenta en relación con el conjunto probatorio: ineficacia de prevalencia probatoria plena sobre las demás pruebas.	Compraventa mercantil, incumplimiento de contrato	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 1085/2007 de 22 octubre. RJ 2007\8094	Contratos mercantiles

65	TS	2007	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: omisión del deber de promover la disolución ante la falta de ejercicio de la actividad social durante tres años consecutivos y la existencia de pérdidas que reducen el patrimonio contable a menos de la mitad del capital social: responsabilidad solidaria de los administradores por las deudas sociales: carácter objetivo o cuasi-objetivo de la responsabilidad: falta de conocimiento de esta situación de insolvencia social por la acreedora perjudicada al tiempo de concertar las operaciones de que deriva la deuda social.PRESCRIPCION DE ACCIONES: PLAZO DE PRESCRIPCION: acción de responsabilidad de administradores sociales: cuatro años; cómputo: fecha inicial: el día de su cese.RECURSO DE CASACION: ALCANCE: no cabe realizar una nueva valoración de toda la prueba practicada: sólo procede ante la existencia de una manifiesta arbitrariedad o falta de lógica de la valoración realizada; no cabe casar una sentencia por un motivo cuando ello no suponga alteración del fallo en la resolución recurrida: doctrina de la equivalencia de resultados.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 500/2007 de 14 mayo. RJ 2007\3554	Mercantil/ Capital social
66	TS	2007	QUIEBRA: RETROACCION DE SUS EFECTOS: alcance: limitación a los adquirentes del quebrado: no se extiende a los terceros subadquirentes de buena fe que adquieren de persona no quebrada y con facultades conforme al Registro para la transmisión de la propiedad; improcedencia: adjudicación en procedimiento ejecutivo del art. 131 LH a la acreedora hipotecaria del bien ejecutado que la deudora adquiriera por compra a la entidad quebrada en el período de retroacción de la quiebra: falta de conocimiento por la adjudicataria de la situación de la quebrada al tiempo de contituirse la hipoteca y adjudicarse el bien a su favor.	Quiebra, retroaccion, alcance solo a seudores no subadquirientes de buena fe	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 358/2007 de 19 marzo. RJ 2007\1852	Concursal
67	TS	2006	SOCIEDADES ANONIMAS: AUMENTO DE CAPITAL: aumento por compensación de créditos: reducción a cero y aumento simultáneo con emisión de nuevas acciones, por compensación de créditos: crédito líquido; certificación del auditor: cumple un importante papel en defensa de los intereses de los socios y los terceros: no excluye el control judicial, en protección de unos socios acreedores que han sido indebidamente preteridos.	Sas; aumento de capital por compensacion de creditos;	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 584/2006 de 9 junio. RJ 2006\8201	Mercantil/ Capital social
68	TS	2006	FRAUDE DE LEY: existencia: sociedades: escisión impropia del patrimonio afecto a una rama de actividad de la sociedad para su aportación a otra de nueva constitución a cambio de acciones de ésta última: cesión que no incluía el pasivo: no excluye la responsabilidad de la nueva sociedad por la deuda de la escindida al realizarse el negocio para obtener beneficios fiscales al amparo de normativa que lo asimilaba a la escisión parcial en sentido estricto.SOCIEDADES ANONIMAS: Escisión parcial impropia: diferencias con la fusión y con el supuesto de mera aportación no dineraria; escisión total: características.ACTOS PROPIOS: existencia.SUSPENSION DE PAGOS: acreedor que no solicita al juez de la suspensión de pagos la inclusión de su crédito en la lista de acreedores: no puede después ejercitar su pretensión en juicio declarativo: prohibición no aplicable respecto de quien no es la entidad suspensa, aunque, por un fenómeno de sucesión, hubiera resultado deudora de sus acreedores.	Escision; cesion de patrimonio aunque no de pasivo, escision impropia	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 12/2006 de 27 enero. RJ 2006\735	Mercantil/ Capital social
69	TS	2005	FIANZA: CLASES Y MODALIDADES: aval a primera demanda o primer requerimiento: concepto y naturaleza; reclamación de cantidad: procedencia: condición accesoria: actos propios.COSTAS PROCESALES: IMPOSICION: estimación de petición subsidiraria: no excluye el principio del vencimiento.	Aval; Fianza; reclamacion de cantidad	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 735/2005 de 27 septiembre. RJ 2005\6860	Civil
70	TS	2005	RETROACCION DE QUIEBRA: NULIDAD: efectos; existencia: préstamo hipotecario a la construcción: situación fraudulenta: gravamen íntegro de los bienes sin haberse entregado el montante del supuesto préstamo.HIPOTECA: normativa ex Ley 2/1981: carácter excepcional: interpretación restrictiva.PRESTAMO: entrega de la cosa: requisito esencial.	Quiebra; retroaccion; nulidad por falta de entrega de la cosa	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 194/2005 de 29 marzo. RJ 2005\3205	Concursal

71	TS	2003	SOCIEDADES ANONIMAS: CONSEJO DE ADMINISTRACION: IMPUGNACION DE ACUERDOS: improcedencia: ejecución de acuerdo previo de junta declarando concluido proceso de suscripción de todas las nuevas acciones y ejecución de operación acordeón: publicación del acuerdo de reducción en un solo periódico: alcance meramente contable del acuerdo de reducción: carencia de activo neto y situación de bancarrota: aumento de capital real y efectivo: conocimiento del acuerdo por el actor: intereses de los acreedores protegidos: suscripción íntegra no vulnera el art. 161 LSA aunque el acuerdo de la junta previera la suscripción incompleta.	Sas, nulidad del acuerdo de operacion acordeon por vicios formales	TS (Sala de lo Civil, Sección Unica), sentencia núm. 1052/2003 de 12 noviembre. RJ 2003\8298	Mercantil
72	AP	2014	CONCURSO (LEY 22/2003, DE 9 JULIO): ADMINISTRADORES DE SOCIEDAD: ACCION SOCIAL DE RESPONSABILIDAD: procedencia: cobro de retribuciones como miembros del consejo de administración pese a que la sociedad presentaba pérdidas: retribución prevista estatutariamente solo si la sociedad presentase beneficios y repartiese dividendos: no puede inferirse que los codemandados realizasen ninguna función objetivamente diferente de las propias que corresponden a los miembros del consejo de administración: de los tres consejeros sólo recibían remuneración los dos codemandados.	Concurso; responsabilidad de los administradores; retribucion al consejo a pesar de perdidas	AP Lugo (Sección 1ª), sentencia núm. 348/2014 de 9 octubre. JUR 2015\8311	Concursal/ Mercantil
73	AP	2014	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: acreditación de que al tiempo de asumir la obligación la sociedad estaba incursa en causa de disolución, en atención al patrimonio neto que presentaba.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Salamanca (Sección 1ª), sentencia núm. 221/2014 de 18 septiembre. AC 2014\1843	Mercantil/ Capital social
74	AP	2014	CONTRATOS BANCARIOS: SUSCRIPCION DE PARTICIPACIONES PREFERENTES: nulidad: procedencia: error en el consentimiento: deficiente información sobre el producto contratado: desconocimiento de las características y riesgos del producto financiero; inexistencia de actos propios.	Contratos bancarios; Suscripcion de preferentes, nulidad por defectos del consentimineto	AP Ourense (Sección 1ª), sentencia núm. 361/2014 de 31 julio. AC 2014\1666	Contratos mercantiles
75	AP	2014	CONTRATO DE PUBLICIDAD: reclamación de cantidad: reducción en un 50% el precio reclamado: acreditada la existencia de defectos sobre elementos esenciales del contrato, y omisión de la creación de un página web: agencia responsable de los errores y omisiones.	Reclamacion de cantidad	AP Málaga (Sección 4ª), sentencia núm. 312/2014 de 30 junio. AC 2014\1640	Contratos mercantiles
76	AP	2014	CONCURSO: FASE DE LIQUIDACION: PAGO A ACREEDORES DE CREDITOS CON PRIVILEGIO ESPECIAL AL ESTAR GARANTIZADO CON HIPOTECA INMOBILIARIA: SOBRANTE DE LA ENAJENACION EN PUBLICA SUBASTA: de bienes del concursado que constituyen garantía hipotecaria: destino: transformación objetiva de la carga hipotecaria existente, en un derecho preferente sobre el sobrante: derecho de separación del acreedor hipotecario sobre dicho sobrante de la subasta donde se ejecutó el bien por la Seguridad Social: inexigibilidad de acudir al procedimiento del art. 56 y 57 LC.	Concurso; liquidacion; pago creditos privilegio especial y sobrante enajenacion publica	AP Cádiz (Sección 5ª), sentencia núm. 198/2014 de 15 abril. AC 2014\804	Concursal
77	AP	2014	CONTRATOS BANCARIOS: CONTRATO DE PERMUTA FINANCIERA DE TIPOS DE INTERES O SWAP: nulidad: procedencia: error en el consentimiento: incumplimiento por la demandada de los deberes de información correcta, completa, previa y comprensible a prestar a su cliente: ausencia de conocimientos financieros o económicos: error causado causado por dolo indirecto.	Swaps; nulidad por vicios del consentimiento	AP Barcelona (Sección 17ª), sentencia núm. 50/2014 de 13 febrero. AC 2014\332	Contratos bancarios
78	AP	2014	CONCURSO (LEY 22/2003, DE 9 JULIO): ACTOS PERJUDICIALES PARA LA MASA ACTIVA: ACCIONES DE REINTEGRACION: procedencia: constitución de la garantía hipotecaria por la concursada en garantía de un préstamo a favor de un tercero: constitución contra el patrimonio de la concursada, sin contraprestación alguna, ni beneficio o utilidad personal a favor de ella: preexistencia de acreedores: presunción de fraude: alteración del estado patrimonial del deudor.	Concurso; reintegracion por constitucion de hipoteca en perjuicio de la masa activa	AP Islas Baleares (Sección 5ª), sentencia núm. 37/2014 de 12 febrero. AC 2014\676	Concursal
79	AP	2014	- CONCURSO (LEY 22/2003, DE 9 JULIO): ACCIONES DE REINTEGRACION: procedencia: garantía hipotecaria constituída por la concursada: preexistencia de acreedores al momento de constituirse el gravamen y su conocimiento por la propia entidad: el acreedor no asumió ningún sacrificio real: la práctica totalidad del capital de nuevo préstamo se destinó a cancelar la deuda anterior, sin que conste frente a la constitución del nuevo gravamen, una correlativa entrada de un elemento activo en el patrimonio de la concursada.	Concurso; reintegracion por constitucion de hipoteca en perjuicio de la masa activa	AP Islas Baleares (Sección 5ª), sentencia núm. 29/2014 de 4 febrero. AC 2014\319	Concursal

80	AP	2014	JUICIO CAMBIARIO: demanda de oposición: pagaré en blanco: firmado como garantía de un contrato de préstamo: forma parte de un contrato de adhesión por consumidores: cláusula abusiva por falta de negociación individual: inexistencia del control que garantiza la intervención de federatario público en el cumplimiento: vulneración del art 10.bis.1 LGDCU	Juicio cambiario; pagares	AP Cáceres (Sección 1ª), sentencia núm. 17/2014 de 3 febrero. AC 2014\779	Civil/ Cambiario
81	AP	2014	CONCURSO (LEY 22/2003, DE 9 JULIO): ACCIONES DE REINTEGRACION: procedencia: hipoteca inscrita sobre un inmueble propiedad de la concursada: falta de acreditación de ausencia de acreedores: gratuidad en fraude de acreedores: falta de prueba de qué contraprestación recibió la concursada: acto gratuito y en perjuicio de acreedores reales preexistentes. CADUCIDAD DE ACCIONES: PROCEDENCIA: la legitimación restringida a la administración concursal una vez declarado el concurso no justifica que comience un nuevo cómputo de plazo: el plazo se inicia desde que razonablemente pudieron tener conocimiento del acto los perjudicados: los acreedores preexistentes.	Concurso; reintegracion por constitucion de hipoteca en perjuicio de la masa activa (gratuidad en perjuicio de acreedores)	AP Islas Baleares (Sección 5ª), sentencia núm. 468/2013 de 16 diciembre. AC 2014\112	Concursal
82	AP	2013	CONCURSO (LEY 22/2003, DE 9 JULIO): COMPENSACION: improcedencia: arrendamiento de obra: retenciones de obra: no pueden ser liquidadas y aplicadas unilateralmente por la promotora: debe la promotora ingresar en la masa las cantidades retenidas.	Concurso; acciones perjudiciales contra la masa	AP Córdoba (Sección 3ª), sentencia núm. 110/2013 de 11 junio. AC 2013\1745	Concursal
83	AP	2013	CONTRATOS BANCARIOS: contrato sobre derivados financieros: nulidad: improcedencia: ausencia de error en el consentimiento: entidad mercantil que dispuso de suficiente información y conocía el riesgo que corría. PAGARE: CESION ORDINARIA: procedencia: inexistencia de endoso: anticipo por parte de la entidad bancaria a la demandante que era tenedora del efecto del importe del mismo, estando respaldada esta operación por la póliza para negociación de documentos que la mercantil actora y el banco firmaron: aval prestado por el banco no vigente: demandante no legitimada para formular pretensiones en relación con la obligación de pago del importe del efecto.	Contratos bancarios; nulidad de derivados financieros por vicios del consentimiento	AP Castellón (Sección 3ª), sentencia núm. 15/2013 de 21 enero. AC 2013\1019	Civil/ contratos
84	AP	2012	CONCURSO (LEY 22/2003, DE 9 JULIO): CONTRATO DE CONSTRUCCION DE UN BUQUE: carta de intenciones: responsabilidad precontractual in contrahendo o resolución de contrato por incumplimiento: improcedencia: irrelevancia de la culpabilidad en el procedimiento incidental si se ha reconocido el crédito por la administración concursal y por la concursada, y expresamente el incumplimiento del contrato en la acción dirigida a obtener la declaración de culpabilidad.	Concurso; reconocimiento de creditos contra la masa	AP Pontevedra (Sección 1ª), sentencia núm. 665/2012 de 21 diciembre. JUR 2013\40886	Concursal
85	AP	2014	PROPIEDAD INDUSTRIAL: MOELOS Y DIBUJOS INDUSTRIALES: bancada de madera: acreditada por la parte actora la autoría, testifical, pericial y documental expresa: existencia de novedad ornamental: obra original con valor artístico que presenta características singulares que hacen que en la práctica sea inmediatamente identificada por culaquier consumidor; contraprestación por la actividad de diseño realizada base de la comercialización previa fabricación de producto por la persona jurídica codemandada: porcentaje de 3,5% sobre facturación: prueba.	Propiedad industral, requerimientos	AP Vizcaya (Sección 4ª), sentencia núm. 936/2012 de 21 diciembre. AC 2014\1187	Mercantil/ Contractual

86	AP	2012	JUICIO CAMBIARIO: DEMANDA DE OPOSICIÓN: EXCEPCIONES: doctrina jurisprudencial: procedimiento que ha recibido una regulación autónoma en la LECiv/2000: el art. 827.3 proclama su carácter plenario «respecto de las cuestiones que pudieron ser en él alegadas y discutidas»: cierre de la polémica doctrinal y jurisprudencial anteriormente existente; FALTA DE LEGITIMACIÓN PASIVA: interpretación del art. 9 LCCh: la omisión de antefirma obliga personalmente al librador del pagaré: doctrina mayoritaria; improcedencia: acción cambiaria del tenedor de un pagaré dirigida contra quien estampó su firma en él, sin hacer constar antefirma alguna. PAGARÉ: doctrina jurisprudencial: frente a la acción cambiaria fundada en un pagaré no puede oponerse propiamente la excepción de falta de provisión de fondos, sí la de la inexistencia o desaparición de la causa del título valor, siempre que los hechos en que se funde la misma se comprendan en el ámbito de las relaciones personales entre el firmante y el tenedor: doctrina sentada por la STS 17-4-2006; ACCIONES POR FALTA DE PAGO: EXCEPCIONES DEL DEUDOR: FALTA DE CAUSA: improcedencia: acreditación de la relación causal motivadora de la emisión del pagaré no desvirtudada mediante prueba por el firmante del título valor.	Juicio cambiario; pagares	AP Islas Baleares (Sección 3ª), sentencia núm. 522/2012 de 13 noviembre. AC 2013\575	Civil/ Cambiario
87	AP	2012	CADUCIDAD DE ACCIONES: inexistencia: inaplicabilidad del art. 1301 CC a los contratos radicalmente nulos por falta de consentimiento. CONTRATOS BANCARIOS: SWAP: NULIDAD: procedencia: error en el consentimiento: claras y flagrantes vulneraciones del deber de información: contratación del producto a través de conversaciones telefónicas.	Contrarios bancarios; swap; nulidad por vicios del consentimiento	AP Valladolid (Sección 1ª), sentencia núm. 405/2012 de 6 noviembre. AC 2012\2238	Contratos bancarios
88	AP	2012	CONCURSO (LEY 22/2003, DE 9 JULIO): ADMINISTRADORES CONCURSALES: RETRIBUCION: improcedencia: reclamación de honorarios devengados después de la sentencia que aprobó la propuesta de convenio presentada por la concursada: la sección sexta no genera un derecho a retribución añadido a las fases común y/o de convenio o liquidación.	Concurso; creditos contra la masa, remuneracion de administradores concursales	AP Islas Baleares (Sección 5ª), sentencia núm. 450/2012 de 24 octubre. AC 2012\2211	Concursal
89	AP	2012	CONTRATOS BANCARIOS: «swap»: nulidad: procedencia: error en el consentimiento: falta de claridad e información: perjuicio claro al cliente en caso de bajada de los tipos de interés.	Contrarios bancarios; swap; nulidad por vicios del consentimiento	AP Murcia (Sección 4ª), sentencia núm. 658/2012 de 11 octubre. AC 2012\1996	Contratos bancarios
90	AP	2012	CONTRATOS BANCARIOS: «SWAP»: NULIDAD: procedencia: contratación a instancia del banco haciendo creer al cliente que tenía una finalidad de cobertura para estabilizar el tipo de interés: falta de información sobre el riesgo que asumía: error en el consentimiento: contratación de otros productos, incluso de otro «swap», no presupone la existencia de conocimientos financieros: tests ilegibles o suscritos en blanco.	Contrarios bancarios; swap; nulidad por vicios del consentimiento	AP Santa Cruz de Tenerife (Sección 4ª), sentencia núm. 380/2012 de 8 octubre. AC 2013\560	Contratos bancarios
91	AP	2012	(Sentencia confirmada o inadmisión de recurso contra la misma) CONTRATOS BANCARIOS: contrato de cobertura de tipo de interés en la modalidad denominada "collar bonificado": nulidad: procedencia: error en el consentimiento: cliente minorista: necesidad de disponer de una información completa sobre la operación financiera que concertaban: entidad de crédito promotora del contrato que soslaya la evaluación de clientes minoristas, de cuyo oficio y preparación nada se sabe, so pretexto de que aquéllos han rehusado facilitar la información necesaria y que, siendo conscientes de ello, asumen las consecuencias de la operación, que dicen conocer y comprender.	Contratos bancarios; nulidad de derivados financieros por vicios del consentimiento	AP Castellón (Sección 3ª), sentencia núm. 125/2012 de 9 marzo. AC 2012\754	Contratos bancarios
92	AP	2012	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación concurriendo causa legal para ello; falta de presentación de cuentas anuales: extensión de la responsabilidad.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Cáceres (Sección 1ª), sentencia núm. 21/2012 de 12 enero. AC 2012\89	Mercantil/ Capital social
93	AP	2011	(Sentencia confirmada o inadmisión de recurso contra la misma) QUIEBRA: DECLARACION DE QUIEBRA: efectos: retroacción: nulidad de los actos posteriores a la fecha de retroacción: improcedencia: acuerdo de resolución y pago que no infringen el principio de la «par condicio creditorum», ni causa perjuicio para la masa activa: de giro y tráfico ordinario de la ulteriormente quebrada, atendiendo a la propia actividad habitual de ésta.	Quiebra; retoaccion; vulneracion de la par conditio creditorum	AP Madrid (Sección 28ª), sentencia núm. 367/2011 de 20 diciembre. AC 2012\256	Concursal

94	AP	2011	CONTRATO DE AGENCIA: indemnización por clientela: procedencia: cuantificación: prueba pericial; intereses: cómputo: determinación de la cuantía tras la prosecución del pleito: deuda existente antes de la interposición de la demanda, por lo que en mayor o menor medida la pretensión dineraria supone enriquecimiento del deudor en perjuicio del acreedor: devengo: desde la fecha de la reclamación judicial y hasta su completo pago.	Contrato de agencia; credito devengado de indemnizacion por clientela	AP Alicante (Sección 6ª), sentencia núm. 494/2011 de 3 noviembre. AC 2011\2281	Contratos mercantiles
95	AP	2011	CONCURSO (LEY 22/2003, DE 9 JULIO): CALIFICACION DEL CONCURSO: CULPABLE: art. 172.3 LC: responsabilidad por déficit patrimonial: obligación de pago por los administradores a los acreedores concursales, total o parcialmente, el importe que de sus créditos, no perciban en la liquidación de la masa activa: alcance y requisitos materiales, cuantitativos y subjetivos: naturaleza jurídica: criterios jurisprudenciales respecto de si es sanción o indemnización con previa determinación de culpa, daño y relación de causalidad: consideración como sanción: argumentos en favor de ello: posibilidad de graduar o moderar judicialmente dicha responsabilidad.	Concurso culpable; responsabilidad de los administradores	AP A Coruña (Sección 4ª), sentencia núm. 452/2011 de 26 octubre. JUR 2011\397555	Concursal
96	AP	2011	NULIDAD DE ACTUACIONES: PROCEDENCIA: falta de competencia objetiva: acción del art. 1597 CC ejercitada después de la declaración del concurso: competencia del juzgado de lo mercantil y no del juzgado de primera instancia: el crédito afecta de modo directo al patrimonio o activo que se fije en el concurso e indirecto a las otras dos mercantiles demandadas, en virtud de las relaciones internas entre ellas y especialmente de la existencia de retenciones por la obra contratada.	Acciones relacionadas con creditos nacidos con posterioridad a la declaracion de concurso; competencia objetiva juzgados mercantil conocedor del concurso	AP Valencia (Sección 7ª), sentencia núm. 544/2011 de 19 octubre. AC 2012	Concursal/ Procesal
97	AP	2011	CONCURSO (LEY 22/2003, DE 9 JULIO): ACCIONES DE REINTEGRACION: procedencia: reembolsos efectuados por la sociedad concursada en favor de socia mayoritaria: préstamo: actos dispositivos a título oneroso con persona especialmente relacionada con la concursada: perjuicio.	Concurso; reintegracion; actos en perjuicio de la masa	AP Valladolid (Sección 3ª), sentencia núm. 274/2011 de 26 julio. AC 2011\2116	Concursal
98	AP	2011	CONTRATOS BANCARIOS: préstamo con garantía hipotecaria: reclamación de devolución en concepto de comisión de amortización anticipada: improcedencia: subrogación por cambio de acreedor: supone una cancelación anticipada que legitima a la demandada a cobrar la correspondiente comisión: pacto expreso de que el ejercicio por parte del prestatario de la facultad de reembolso anticipado del préstamo da lugar a favor de la financiera de una comisión.	Contratos bancarios; subrogacion de prestamo hipotecario	AP Barcelona (Sección 13ª), sentencia núm. 403/2011 de 19 julio. AC 2011\2078	Contratos bancarios
99	AP	2011	CONCURSO: DETERMINACION DE LA MASA PASIVA: reconocimiento de créditos: determinación de la cuantía de los honorarios correspondientes a los servicios prestados por el letrado de la concursada por mor del procedimiento concursal: falta de acreditación de que se haya pactado un precio fijo y determinado por los servicios jurídicos contratados: consideración del contenido normativo del Baremo de Honorarios: ausencia de prueba sobre una especial dedicación al asunto que le hiciese merecedor de una mayor retribución a la ya percibida por el mismo.	Concurso; determinacion de la masa pasiva, honorarios de letrados	AP Pontevedra (Sección 1ª), sentencia núm. 385/2011 de 8 julio. AC 2011\1514	Concursal
100	AP	2011	JUICIO CAMBIARIO: DEMANDA DE OPOSICIÓN: EXCEPCIONES: FALTA DE LEGITIMACIÓN PASIVA: aceptación por representación: incumplimiento del mandato del art. 9.2 LCCh de hacer constar la representación en la antefirma: consecuencias: jurisprudencia de las Audiencias Provinciales; improcedencia: firma de los pagarés litigiosos por el demandado cambiario, demandante de oposición, sin haber hecho constar en los mismos que firmaba en representación de la sociedad, de la que era apoderado y socio, que recibió el suministro de fruta de la empresa demandante, demandada de oposición: vinculación personal del firmante.	Juicio cambiario; pagares	AP Barcelona (Sección 11ª), sentencia núm. 350/2011 de 30 junio. AC 2011\2069	Civil/ Cambiario

101	AP	2011	CONCURSO: DETERMINACION DE LA MASA PASIVA: créditos subordinados: procedencia: adquisición de una participación del contrato de financiación por cesión, cuando ya era miembro del Consejo de Administración de la deudora: ostentaba en ese momento la condición de persona especialmente relacionada con la concursada: subordinación del crédito, sin que sea óbice para ello, que no interviniese al momento de su concertación o que el titular originario no fuese persona especialmente relacionada con la entidad concursada. COSTAS PROCESALES: IMPOSICION: procedencia: al actor: desestimación de la demanda respecto de algunos codemandados: ausencia de dudas de derecho: el Auto aclaratorio no ha supuesto la realización de un juicio valorativo nuevo o distinto de la sentencia, ni ha exigido operaciones de calificación jurídica o nuevas apreciaciones de las pruebas, ni se ha resuelto sobre cuestiones discutibles u opinables.	Concurso; calificacion de creditos	AP A Coruña (Sección 4ª), sentencia núm. 231/2011 de 23 mayo. AC 2011\1281	Concursal
102	AP	2011	CONCURSO: EFECTOS: sobre el deudor: anulación de los actos del deudor: procedencia: arrendamiento del negocio de clínica como unidad patrimonial de explotación: realización de actividades, constatadas documentalmente, al margen de la administración concursal, que en una normal y lógica confrontación de las diferentes fechas de los mismos, suponen una infracción de la restricción de su capacidad de obrar que deriva de su situación concursal ya declarada: efectos: restitución de los bienes afectados a la masa activa del concurso y nacimiento de un crédito en quien contrató con la ahora concursada. PERSONAS JURIDICAS: personalidad: penetración de los Tribunales en su substratum, levantando en velo jurídico: procedencia: confusión o identidad real entre la persona jurídica y la persona que ejerce directamente el control efectivo interno y externo de dicha sociedad, contribuyendo con su actuación a la salida de créditos del activo de la concursada, en beneficio de dicha sociedad y en perjuicio de los acreedores del concurso.	Concurso; efectos; anulacion actos deudor al margen de la admin concursal en perjuicio de acreedores; levantamiento del velo	AP Salamanca (Sección 1ª), sentencia núm. 201/2011 de 9 mayo. AC 2011\1220	Concursal
103	AP	2011	CONCURSO: EFECTOS: sobre los contratos: resolución: procedencia: arrendamiento de obra con suministro de materiales: obligaciones recíprocas pendientes de cumplimiento para ambas partes: obra paralizada: efectos: recuperación de la posesión de la obra al abandonar la misma el contratista: efectos análogos a la recepción provisional, habiendo transcurrido el plazo de casi tres años desde entonces sin que conste incumplimiento alguno de las obligaciones que se garantizan por las retenciones. PAGARE: endoso de los pagarés que instrumentaban el pago de las certificaciones de obra que se reclaman, siendo procedente descontar los importes de los pagarés librados pero no así las cantidades fijadas para intereses y costas en los procedimiento cambiarios causadas por el impago del librador de los pagarés: la demandante no puede devolver los títulos a la demandada por lo que no puede pretender la pretensión causal: mientras no estén en su poder, no puede restituirlos y la demandada deudora está legitimada para retener la prestación causal y ello por la necesidad de impedir que el deudor se vea expuesto a un doble pago.	Concurso; efectos sobre contrato de arrendamiento de obra y pagares endosados a fin de instrumentar el pago de las certificaciones	AP Vizcaya (Sección 4ª), sentencia núm. 279/2011 de 14 abril. AC 2011\1942	Concursal

104	AP	2010	PAGARE: ACCIONES POR FALTA DE PAGO: excepciones del deudor: falta de legitimación pasiva: improcedencia: firma en el pagaré en el espacio reservado para ello sin hacer mención alguna a su condición de apoderado o representante de la mencionada empresa, ni constar alguna otra referencia o signo indicativo de esa condición: sin que el libramiento contra una cuenta de la entidad o empresa tenga incidencia a estos efectos; falta de legitimación activa: improcedencia: pagarés con la cláusula «no a la orden»: transmisión en los pagarés constatada: legitimación del cesionario fuera de duda al quedar acreditada la tenencia de los documentos con la propia cesión; falta de notificación de la cesión del crédito: negocio jurídico bilateral sujeto a los requisitos generales de cualquier cesión de un crédito a cuya eficacia no afecta la falta de notificación al deudor cedido de la operación realizada; cesión ordinaria de un crédito cambiario: el cesionario del título puede ejercitar también la acción ejecutiva que pudiera corresponder al cedente, sin que esta consecuencia, inherente a la transmisión de los derechos de naturaleza cambiaria, se vea afectada por los diferentes efectos que producen el endoso y la cesión ordinaria: el cesionario no se beneficia del efecto legitimador del endoso, teniendo que probar el negocio causal adquisitivo del título, ni tampoco del efecto de garantía sobre la aceptación y el pago: el cedente responderá de la legitimidad del crédito y de la personalidad con la que hizo la cesión, pero no de la solvencia del deudor, salvo pacto expreso que así lo declare.	Pagare, incumplimiento requisitos formales, falta de legitimacion pasiva	AP Madrid (Sección 11ª), sentencia núm. 800/2010 de 22 diciembre. AC 2011\230	Civil/ Cambiario
105	AP	2010	CONCURSO: ACTOS PERJUDICIALES PARA LA MASA ACTIVA: acciones de reintegración: procedencia: hipoteca y prenda sobre bienes de la concursada: obligación contraída en sustitución de otra preexistente, superponiéndose unas garantías reales antes inexistentes: superposición de garantías: falta de acreditación de que la operación estuviera justificada para la viabilidad de la empresa, ni siquiera que sirviera para su refinanciación: acreditación de consilium fraudis: conciencia de que estaba perjudicando a los demás acreedores.	Concurso; reintegracion, actos perjudiciales para la masa	AP Córdoba (Sección 3ª), sentencia núm. 232/2010 de 3 diciembre. AC 2011\1948	Concursal
106	AP	2010	CONCURSO: CONCLUSION: oposición a la aprobación de cuentas: procedencia: créditos derivados de distintos conceptos que se engloban en la reclamación de la Tesorería: créditos contra la masa: realización de diversos pagos de créditos contra la masa de vencimiento posterior; no existe obstáculo legal para que en el incidente de oposición a la aprobación de cuentas que contempla el art. 181. 2 y 3 LC se solicite la reordenación de los pagos y se reclame el pago de un crédito contra la masa cuando la oposición razonada a la aprobación de cuentas se fundamenta, precisamente, en el impago del crédito contra la masa que se reclama y además son indiscutidos el crédito salvo en una mínima cuantía y el vencimiento. SENTENCIA: INCONGRUENCIA: improcedencia: postulado implícito: si se formula oposición a la aprobación de cuentas, se pretende que las presentadas no se aprueban pues en otro caso no se formularía objeción a la aprobación.	Concurso; incidente de oposicion a la aprobacion de cuentas por pago a creditos contra la masa con vencimiento posterior	AP Vizcaya (Sección 4ª), sentencia núm. 608/2010 de 23 julio. AC 2010\1644	Concursal
107	AP	2010	CONCURSO: DETERMINACION DE LA MASA PASIVA: reconocimiento de créditos: crédito contra la masa: improcedencia: obligaciones de los clientes carentes de posibilidad de reactivación, puesto que se pasó, sin solución de continuidad, de la situación de suspensión a la de cese de la actividad filatélica que se decretó de inmediato en sede del concurso: falta de los presupuestos para apreciar la reciprocidad de prestaciones pendientes de cumplimiento que permitiría la recta aplicación del artículo 61.2 de la LC: tratamiento concursal de crédito ordinario dispensado al reconocimiento del derecho a cobrar por parte de los clientes de la concursada las cantidades correspondientes al precio de series filatélicas vendidas con anterioridad al concurso en el desarrollo de los contratos tipo "abono filatélico" aunque éstos siguiesen formalmente vigentes; artículo 84.2.6º LC: falta de la pertinente acción judicial; créditos subordinados: improcedencia: revalorizaciones de los lotes filatélicos adquiridos por los clientes: del precio comprometido (o garantizado) por la recompra de los sellos: no constituye un concepto accesorio: aspecto esencial del contrato de la concursada con sus clientes: crédito ordinario.	Concurso; reconocimiento de creditos contra la masa	AP Madrid (Sección 28ª), sentencia núm. 184/2010 de 16 julio. AC 2010\1284	Concursal

108	AP	2010	ARRENDAMIENTO DE OBRA: RESPONSABILIDAD «EX ART. 1597 CC»: improcedencia: ejercicio de la acción directa con posterioridad a la declaración del concurso: principio prior tempore, potior iure: necesidad de que el titular de la acción directa para hacer efectivo su crédito debe concurrir con el resto de los acreedores en el procedimiento concursal.	Concurso; delimitacion de la masa activa	AP Zaragoza (Sección 4ª), sentencia núm. 325/2010 de 30 junio. AC 2010\1500	Concursal
109	AP	2010	COMPETENCIA OBJETIVA: competencia del juez del concurso: acción del art. 1597 CC: la competencia se decide en razón de la acción ejercitada en relación con la fecha de interposición de la demanda: la LC obliga a todo acreedor, una vez se ha producido la declaración en concurso de su deudor, a integrarse en la masa pasiva y estar a las resultas del proceso concursal según la clasificación de su crédito, salvo los casos excepcionales que la Ley permita.	Comptencia objetiva del juez del concurso	AP Vizcaya (Sección 5ª), sentencia núm. 295/2010 de 11 junio. AC 2010\1617	Concursal
110	AP	2010	Sentencia confirmada o inadmisión de recurso contra la misma) CONCURSO: DETERMINACION DE LA MASA PASIVA: reconocimiento de créditos: crédito contra la masa: procedencia: contrato de transmisión de solar a cambio de obra futura: incumplimiento principal por parte de la cesionaria, que se mantiene y se prorroga después de la declaración del concurso, de las obligaciones principales de finalización y entrega de la posesión: crédito contra la masa a favor de los aportantes del solar donde se encuentra levantada la construcción y parcialmente ejecutada: cuantificación.	Concurso; reconocimiento de creditos contra la masa	AP Islas Baleares (Sección 5ª), sentencia núm. 122/2010 de 30 marzo. AC 2010\994	Concursal
111	AP	2010	CONCURSO: DETERMINACION DE LA MASA PASIVA: reconocimiento de créditos: cobros pendientes al tiempo de la declaración de concurso por contratos filatélicos entonces todavía en vigor: obligaciones de los clientes carentes de posibilidad de reactivación: no se dan, a efectos concursales, los presupuestos para apreciar la reciprocidad de prestaciones pendientes de cumplimiento que permitiría la recta aplicación del artículo 61.2 LC y que con ello pudiera justificarse, la calificación de los créditos de los clientes como "contra la masa": crédito ordinario; crédito contra la masa: improcedencia: liquidaciones de contratos anteriores al concurso: falta de ejercicio de acción judicial con el fin de obtener la resolución, en sede concursal, al amparo del art. 61.2 segundo párrafo LC, del contrato en interés del concurso ó la resolución ulterior del contrato, también en sede concursal, por incumplimiento por la vía del art. 62 LC; revalorizaciones filatélicas: no estamos ante un concepto accesorio, sino ante una parte del precio comprometido (o garantizado) por la recompra de los sellos: crédito ordinario.	Concurso; determinacion de la masa, calificacion y reconocimiento de creditos	AP Madrid (Sección 28ª), sentencia núm. 75/2010 de 22 marzo. AC 2010\976	Concursal
112	AP	2011	CONCURSO (LEY 22/2003, DE 9 JULIO): ACCIONES DE REINTEGRACION: procedencia: operación de refinanciación: préstamos hipotecarios destinados a cancelar préstamos anteriores no vencidos a fecha de declaración del concurso; procedencia: constitución de hipotecas para garantizar créditos concedidos a otras empresas del grupo.	Concurso; creditos contra la masa, acciones de reintegracion	AP Guipúzcoa (Sección 2ª), sentencia núm. 96/2011 de 11 marzo. JUR 2014\179975	Concursal
113	AP	2010	CONCURSO: CALIFICACION: culpable: procedencia: retraso en la solicitud del concurso e incumplimiento generalizado de las obligaciones de pago de cuotas de la Seguridad Social; efectos: inhabilitación de las personas afectadas: fijación conforme a los principios dispositivo y de legalidad, pues no podrá imponer un tiempo superior al solicitado, ni inferior al mínimo legalmente previsto en la norma; sanción de pagar a los acreedores concursales el importe de sus créditos que no puedan percibir tras la liquidación de la masa activa: responsabilidad por deudas, «ex lege», de carácter sancionador: no es preciso otro reproche culpabilístico que el resultante de la atribución a tales administradores o liquidadores de la conducta determinante de la calificación del concurso como culpable: determinación: 50% de los créditos que no se hayan podido satisfacer.	Concurso culpable; responsabilidad de los administradores	AP Lleida (Sección 2ª), sentencia núm. 2/2010 de 4 enero. AC 2010\318	Concursal

114	AP	2009	(Sentencia confirmada o inadmisión de recurso contra la misma) SOCIEDADES ANONIMAS: ACCIONES: declaración de libre transmisibilidad: improcedencia: decisión de compra decidida por el consejo de administración: convalidación por acuerdo de la junta general; decisión del consejo de administración de designar al auditor de cuentas para determinar el valor de las acciones: ausencia de infracción de los estatutos; función del auditor de cuentas: valoración de las acciones: función de arbitrador: posibilidad de impugnar su arbitrio con efectos no meramente anulatorios sino revisorios; informe de valoración efectuado por el auditor designado por el órgano de administración de la entidad demandada: exclusión de cualquier variación en el valor teórico contable para calcular el valor real de la acción no razonable por su arbitrariedad: el arbitrador no se ha ajustado a las reglas que debió seguir para fijar el precio de la transmisión: el valor razonable de las acciones exigía tener en cuenta las plusvalías: no compensación con minusvalías; pretensión de ordenar a la sociedad a adquirir o, en su caso, ofrecer a los socios, la adquisición de las acciones de los demandantes por el precio señalado en el informe según el método del descuento de flujos de caja: improcedencia: limitaciones a la transmisibilidad que justifican la aplicación de primas de iliquidez: la evolución del precio de la vivienda libre no es adecuada para calcular la revalorización de los inmuebles del inmovilizado de una empresa dedicada fundamentalmente a la explotación de grandes almacenes y grandes superficies.	Sas, valoracion de acciones	AP Madrid (Sección 28ª), sentencia núm. 311/2009 de 23 diciembre. AC 2010\87	Mercantil
115	AP	2009	CONCURSO (LEY 22/2003, DE 9 JULIO): DETERMINACION DE LA MASA ACTIVA: INCLUSION: estimación: consignación para recurrir en suplicación en procedimiento laboral: finalidad eminentemente cautelar: la titularidad sobre el dinero consignado o el derecho sobre el mismo sigue integrado en el patrimonio del consignante: no adquisición de firmeza de la sentencia en el momento de declararse el concurso: cantidad consignada que es titularidad de la concursada.	Concurso; cantidades consignadas por provcedimiento laboral, determinacion de la masa	AP Pontevedra (Sección 1ª), sentencia núm. 503/2009 de 22 octubre. AC 2009\2308	Concursal
116	AP	2009	CONCURSO: CALIFICACION: culpable: efectos: responsabilidad del administrador: naturaleza: responsabilidad-sanción: determinación y graduación de la responsabilidad por el déficit concursal: situación de insolvencia desde años atrás contrayendo nuevas deudas: atemperación de la responsabilidad a las circunstancias concurrentes: agravación del estado de insolvencia: porcentaje en la mitad del déficit concursal; irregularidad relevante para la comprensión de la situación patrimonial de la concursada e incumplimiento del deber de solicitar la declaración de concurso.	Concurso culpable; responsabilidad de los administradores	AP León (Sección 1ª), sentencia núm. 479/2009 de 13 octubre. AC 2010\202	Concursal
117	AP	2009	PERSONAS JURÍDICAS: DOCTRINA JURISPRUDENCIAL: doctrina del «levantamiento del velo»: aplicación: no cabe alegar la separación de patrimonios de la persona jurídica por razón de tener personalidad jurídica cuando tal separación es ficticia y la sociedad y la persona física son lo mismo; PERSONALIDAD: penetración de los Tribunales en su «substratum», levantando el velo jurídico: improcedencia: no acreditación de la existencia de confusión entre la persona física, socia codemandada sin facultad de gestión de la sociedad, y la persona jurídica, sociedad de responsabilidad limitada, condenada: no participación en la gestación del presunto fraude.SENTENCIA: FORMA: MOTIVACIÓN: doctrina jurisprudencial: alcance de la exigencia: doctrina del TC y del TS.	Levantamiento del velo (improvcedencia)	AP Guipúzcoa (Sección 3ª), sentencia núm. 258/2009 de 8 octubre. AC 2010\1667	Civil
118	AP	2009	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución concurriendo causa legal para ello: causa de disolución concurrente cuando la deuda se contrajo: sociedad sin activos: la obligación de pago de los intereses es solo de la sociedad que fue demandada en el pleito anterior: no puede ser trasladable al administrador una obligación, como es la del pago de los intereses, que necesita para nacer del requerimiento de pago al deudor. NORMAS JURIDICAS: IRRETROACTIVIDAD: procedencia: Ley 19/2005.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Burgos (Sección 3ª), sentencia núm. 342/2009 de 18 septiembre. AC 2009\2019	Mercantil

119	AP	2009	CONCURSO (LEY 22/2003, DE 9 JULIO): Efectos de la declaración de concurso: sobre los actos perjudiciales para la masa activa: acciones de reintegración: acción de rescisión concursal: venta, por parte de la concursada, de una cantera a un precio inferior al normal de mercado: descapitalización: improcedencia: no puede probarse que se trate de una acción perjudicial: no interesa, desde el punto de vista económico, la rescisión pretendida; acción de rescisión: pago, realizado por el comprador de una cantera propiedad de la concursada, en extinción de un crédito ostentado por una entidad bancaria contra la sociedad vendedora: improcedencia: que se ingrese en el patrimonio de la concursada la parte del precio restante una vez deducidas las cargas no supone una actuación perjudicial contra la masa.	Concurso; acciones de reintegracion por descapializacion	AP Pontevedra (Sección 1ª), sentencia núm. 369/2009 de 22 julio. JUR 2009\361897	Concursal/ Capital social
120	AP	2009	CONCURSO: CALIFICACION: art. 172.3 LC: interpretación: consideración como responsabilidad sanción y no de mero resarcimiento del daño; responsabilidad del administrador en virtud del art. 172.3 LC: improcedencia: responsabilidad sin actividad antes de la entrada en vigor de la LC: ausencia de actuación fraudulenta del administrador único cuando personalmente ha avalado parte de las deudas sociales: no constan las causas que provocaron la situación de insolvencia de la sociedad; cómplices: improcedencia: socio único de la entidad concursa: falta de condición de administrador: no cabe declaración de complicidad por la circunstancia de no haber promovido la remoción del administrador ante el incumplimiento de sus funciones típicas.	Concurso culpable; responsabilidad de los administradores	AP A Coruña (Sección 4ª), sentencia núm. 313/2009 de 26 junio. AC 2009\1742	Concursal
121	AP	2009	CONCURSO: CALIFICACION: culpable: procedencia: incumplimiento del deber de solicitar la declaración de concurso: agravamiento de la insolvencia: perjuicio de las expectativas de cobro de los acreedores; responsabilidad del administrador: procedencia: administrador en el ejercicio de su cargo al tiempo de solicitarse el concurso necesario por la entidad acreedora: no procede abordar en sede de aplicación del art. 172.3 LC, un juicio sobre las intenciones del administrador de generar o agravar la insolvencia societaria, ni sobre lo acertado de sus alegados intentos de afrontar la situación económica de la concursada.	Concurso culpable; responsabilidad de los administradores por incumplimiento del deber de solicitud de concurso	AP Madrid (Sección 28ª), sentencia núm. 176/2009 de 26 junio. AC 2009\2065	Concursal
122	AP	2009	CONCURSO (LEY 22/2003, DE 9 JULIO): CULPABLE: procedencia: alzamiento de bienes en perjuicio de los acreedores: venta de bienes de la sociedad antes de solicitar la declaración de concurso voluntario y después de dicha solicitud antes de la declaración judicial del concurso: falta de acreditación de que el dinero obtenido por dicha venta se destinara al pago de trabajadores: descapitalización de la sociedad.	Concurso culpable; responsabilidad de los administradores por alzamiento de bienes	AP Granada (Sección 3ª), sentencia núm. 278/2009 de 5 junio. JUR 2009\370821	Concursal
123	AP	2009	CONCURSO: CALIFICACION: culpable: procedencia: graves irregularidades contables y una muy descuidada y confiada gestión social, nada diligente, sino pasivamente tolerada hasta reaccionar promoviendo la declaración de concurso cuando la situación era irreversible y de progresivo empeoramiento: responsabilidad del administrador: art. 172.3 LC: deficiente contabilidad que enmascaraba su imagen real y de la que se aprovechó desde una apariencia contable que sólo logró incrementar su endeudamiento en perjuicio de sus acreedores y determinante de una insolvencia final irreversible y expresiva de su propio descontrol que a él le incumbía atajar: alcance de la responsabilidad.	Concurso culpable, responsabilidad de los administradores	AP Granada (Sección 3ª), sentencia núm. 229/2009 de 15 mayo. AC 2009\1091	Concursal
124	AP	2009	PAGARE: ACCIONES POR FALTA DE PAGO: acciones por falta de pago: excepciones del deudor: pago y contrato no cumplido: improcedencia: tercero cambiario derivado de endoso: el endoso convierte la obligación de pago en un crédito puro desvinculado de la situación personal que caracterizaba dicho crédito en manos del originario tenedor.	Pagare, acciones por falta de pago	AP Badajoz (Sección 2ª), sentencia núm. 96/2009 de 2 abril. JUR 2009\220921	Civil/ Cambiario

125	AP	2009	(Sentencia confirmada o inadmisión de recurso contra la misma) PUBLICIDAD: doctrina jurisprudencial: regulación de la actividad publicitaria: normativa: efectos contractuales de la publicidad; PUBLICIDAD ILÍCITA: procedencia: publicidad engañosa: construcción y venta de viviendas: anuncio de las vistas al mar en los folletos y publicidad empleada por las entidades demandadas para la captación de compradores destinatarios: moderación de la responsabilidad de las vendedoras por no estar todas las viviendas privadas de tales vistas en la misma proporción: fijación de la indemnización valorando dichas circunstancias.PERSONAS JURÍDICAS: doctrina jurisprudencial: «levantamiento del velo jurídico»: proscribe la prevalencia de la personalidad jurídica si con ello se comete un fraude de ley o se perjudican derechos de terceros.LEGITIMACIÓN ACTIVA: doctrina jurisprudencial: legitimación por subrogación: frente a los constructores y promotores, además de las personas que con ellos contrataron, están legitimados por subrogación los sucesivos compradores de los pisos, quienes, al adquirirlos, adquirieron los derechos que tenía el originario comprador.	Publicidad engañosa, indemnizacion parcial, levantamiento del velo	AP Valencia (Sección 8ª), sentencia núm. 157/2009 de 23 marzo. AC 2009\919	Mercantil/ Civil
126	AP	2009	Sentencia confirmada o inadmisión de recurso contra la misma) PAGARE: ACCIONES POR FALTA DE PAGO: extinción del crédito cambiario: improcedencia: embargo de créditos por la Agencia Tributaria: no puede el apelado oponer válidamente el pago de los pagarés al legítimo tenedor de éstos, aún cuando se haya hecho en virtud de la orden de retención y embargo de la Agencia Tributaria: la órden de retención y embargo no afectaba al pago hecho al legítimo tenedor de los pagares distinto del deudor de Hacienda.	Pagare; acciones por falta de pago; improcedencia extincion credito cambiario por embargo de creditos AEAT	AP Barcelona (Sección 11ª), sentencia núm. 107/2009 de 3 marzo. AC 2009\1284	Mercantil/ Civil
127	AP	2009	CONCURSO (LEY 22/2003, DE 9 JULIO):CALIFICACION DEL CONCURSO: CULPABLE: estimación: deficiencias contables: información contable que presenta irregularidades y deficiencias tan relevantes que no resultaba posible a la vista de la misma poder llegar a conclusiones fiables sobre cuál era la situación real del concursado al tiempo al que se refiere la misma: trascendencia para comprender la génesis y evolución de una empresa que ha acabado en situación de concurso; responsabilidad exigible a los administradores: debe estimarse: requisitos:sólo para los casos más graves de concursos de personas jurídica calificados como culpables: art. 172 LC: interpretación; posibilidad de aplicación de la Ley Concursal, a los efectos de calificar el concurso como culpable o fortuito, a conductas anteriores a la entrada en vigor de dicha norma: inexistencia de problema de retroactividad en la imposición de la responsabilidad concursal del administrador.	Concurso culpable; responsabilidad de los administradores por informacion contable irregular	AP Madrid (Sección 28ª), sentencia núm. 17/2009 de 30 enero. AC 2009\294	Concursal
128	AP	2008	(Sentencia confirmada o inadmisión de recurso contra la misma) SOCIEDADES ANONIMAS: ADMINISTRADORES: acción de responsabilidad: procedencia: prohibición de asistencia financiera: sociedad adquirida que proporcionó a la adquirente el dinero necesario para la adquisición y luego éste fue entregado a los socios vendedores, sin que se haya procedido a su reintegro.	Sas; responsabilidad de los administradores por proveer asistencia financiera para adquisicion de acciones propias	AP La Rioja (Sección 1ª), sentencia núm. 288/2008 de 17 octubre. AC 2009\140	Mercantil/ Capital social
129	AP	2008	JUICIO CAMBIARIO: EXCEPCIONES: falta de provisión de fondos: improcedencia: arrendamiento de obra: ausencia de incumplimiento total: inexistencia de frustración del objeto del contrato.	Juicio cambiario	AP Ávila (Sección 1ª), sentencia núm. 153/2008 de 4 septiembre. AC 2008\1720	Civil/ Cambiario
130	AP	2008	(Sentencia confirmada o inadmisión de recurso contra la misma) CONTRATO DE AGENCIA: resolución no imputable al agente: modificación de las contraprestaciones de las partes de forma unilateral e innegociable por la demandada; indemnización de daños y perjuicios: improcedencia: facturas anteriores a la firma del contrato: no existía ninguna obligación contractual por parte de la entidad actora de efectuar publicidad de los productos de la demandada mediante campañas: gastos no derivados de inversiones en bienes susceptibles de ser amortizados.	Contrato de agencia; modificacion unilatreral de las condiciones del contrato	AP A Coruña (Sección 4ª), sentencia núm. 252/2008 de 21 mayo. AC 2008\1151	Contratos mercantiles

131	AP	2008	CONCURSO (LEY 22/2003, DE 9 JULIO): DETERMINACION DE LA MASA PASIVA: lista de acreedores: no se admite en el concurso ningún privilegio o preferencia que no esté reconocido en esta Ley: no puede irse a una interpretación extensiva de normas extraconcursales con posible aplicación de privilegios no contemplados en la ley concursal: interpretación del art. 77 LGT; créditos subordinados: procedencia: recargos: naturaleza accesoria con la obligación principal.	Concurso; calificacion de creditos	AP Lugo (Sección 1ª), sentencia núm. 397/2008 de 13 mayo. AC 2008\1669	Concursal
132	AP	2008	(Sentencia confirmada o inadmisión de recurso contra la misma) QUIEBRA: RETROACCION DE SUS EFECTOS: nulidad de los actos posteriores a la fecha de retroacción: procedencia: compraventa: vendedora accionista de la compradora: identidad de administrador: adjudicación por la compradora en pago de deuda de la vendedora a favor de una acreedora de ésta: finalidad fraudulenta: inexistencia de enriquecimiento injusto por condena a la devolución del valor del bien.COMPETENCIA OBJETIVA: procedencia: quiebra: nulidad de actos posteriores a la fecha de retroacción: competencia del Juzgado que conoce del procedimiento de quiebra.TERCERO HIPOTECARIO: inexistencia: dación en pago en período de retroacción de la quiebra: transmisión a acreedora valiéndose de una tercera sociedad cuyo administrador lo era también de la transmitente.	Quiebra; retraccion; enriquecimiento injusto por compraventa siendo la vendedora accionista de la compradora	AP Alicante (Sección 8ª), sentencia núm. 179/2008 de 8 mayo. AC 2008\2052	Concursal
133	AP	2008	CONCURSO (LEY 22/2003, DE 9 JULIO): EFECTOS DE LA DECLARACIÓN DE CONCURSO SOBRE LOS ACTOS PERJUDICIALES PARA LA MASA ACTIVA: ACCIONES DE REINTEGRACIÓN: doctrina jurisprudencial: régimen jurídico diverso al de las acciones generales de impugnación ex arts. 1111 y 1291 CC: alcance; procedencia: rescisión: compraventa: transmisión de locales y vivienda por la propietaria en favor de su hija y yerno: notoria diferencia entre precio real-precio de venta: operación efectuada con la que se malbarataron bienes del patrimonio de quien estaba en grave situación económica en perjuicio de sus acreedores.	Concurso; acciones de reintegracion por actos perjudiciales contra la masa	AP Alicante (Sección 8ª), sentencia núm. 136/2008 de 9 abril. JUR 2008\189071	Concursal
134	AP	2008	(Sentencia confirmada o inadmisión de recurso contra la misma) CHEQUE FALSO O FALSIFICADO: responsabilidad de la entidad bancaria: procedencia: falsificación por parte de persona no autorizada, a lo largo de varios años, de más de novecientos cheques correspondientes a cuentas de las que era titular la empresa demandante: entrega de talonarios de cheques a persona que no estaba autorizada para ello, de lo que la entidad financiera era bien consciente: falta de verificación de firmas: ausencia de culpa en la entidad actora. LITIS CONSORCIO PASIVO NECESARIO: IMPROCEDENCIA: cheque: acción del art. 156 LCCh: acción dirigida contra la entidad bancaria. INTERESES MORATORIOS: devengo: desde la fecha de la demanda: reclamación de una cantidad bien precisa y líquida de suerte que, tras la minoración efectuada en el escrito de replica y únicamente basada en haber sido la demandante en parte indemnizada por el defraudador, la sentencia recurrida condena al pago de la total cantidad reclamada.	Cheques emitidos por persona no autorizada	AP Castellón (Sección 3ª), sentencia núm. 150/2008 de 28 marzo. AC 2008\1325	Penal
135	AP	2008	(Sentencia confirmada o inadmisión de recurso contra la misma) QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: compraventa: acto dispositivo a título oneroso realizado a favor de persona especialmente relacionada con el deudor: vendedora que es accionista de la compradora: perjuicio al resto de acreedores: irrelevancia de que sea un bien gravado con hipoteca cuyo acreedor tiene el privilegio de la ejecución separada: la realización de la garantía en pública subasta es el modo en el que se obtiene el mejor precio lo que redunda en beneficio de todos los acreedores.	Quiebra; retroaccion; nulidad de compraventa por ser la vendedora accionista de la compradora; acto dispositivo oneroso con persona especialmente relacionada	AP Alicante (Sección 8ª), sentencia núm. 70/2008 de 14 febrero. JUR 2008\166938	Concursal
136	AP	2008	CONCURSO (LEY 22/2003, DE 9 JULIO): CALIFICACION: culpable: procedencia: administrador que permitió que la sociedad siguiera funcionando cuando los fondos propios negativos eran muy abultados sin disolver la sociedad o solicitar la declaración en concurso, provocando el aumento exponencial del desbalance patrimonial de la sociedad concursada: ausencia de aumento de capital: prolongación de la conducta una vez entró en vigor la Ley Concursal el 1 de septiembre de 2004.	Concurso culpable; responsabilidad de los administradores	AP Madrid (Sección 28ª), sentencia núm. 31/2008 de 5 febrero. AC 2008\834	Concursal

137	AP	2008	CONCURSO (LEY 22/2003, DE 9 JULIO): Calificación del concurso: culpable: gestión inadecuada de la sociedad: responsabilidad de los administradores de hecho y de derecho: inhabilitación: agravación de la insolvencia societaria sin tomar medidas en protección de acreedores ni solicitar la declaración de concurso: procedencia.	Concurso culpable; responsabilidad de los administradores	AP Barcelona (Sección 15ª), sentencia núm. 11/2008 de 18 enero. JUR 2008\267642	Concursal
138	AP	2007	CONCURSO (LEY 22/2003, DE 9 JULIO): CULPABLE: procedencia: concurrencia de dolo o culpa grave de los administradores de la sociedad cuya gestión influyó en la causación de la insolvencia o en el empeoramiento de su estado económico: graves y reiteradas irregularidades y omisiones contables que impedían comprender el verdadero estado y situación patrimonial de la concursada.NORMAS JURÍDICAS: IRRETROACTIVIDAD: doctrina jurisprudencial: ámbito de aplicación y alcance: la irretroactividad de las leyes está asentada en principios de seguridad jurídica y de derechos adquiridos.	Concurso culpable; responsabilidad de los administradores por irregularidad contable	AP Granada (Sección 3ª), sentencia núm. 519/2007 de 14 diciembre. AC 2008\1605	Concursal
139	AP	2007	QUIEBRA: CALIFICACION: FRAUDULENTA: estimación: balance de situación presentado por la quebrada sobre su situación patrimonial que no ofrece fiabilidad alguna al carecer de soporte contable legal que lo ampare: sobreseimiento en el pago de las obligaciones: calificación de los síndicos no vincula al juzgador; partícipes: cómplices: accionista mayoritario de la quebrada y del administrador de la entidad instante de la quiebra.	Quiebra feraudulenta; accionista mayoritario y administrador culpables	AP Las Palmas (Sección 3ª), sentencia núm. 488/2007 de 7 septiembre. AC 2008\814	Concursal
140	AP	2007	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: RESPONSABILIDAD: art. 105.5 LSRL: conforme a la redacción dada por la Ley 19/2005: irretroactividad; estimación: ejercicio por acreedor de la sociedad: deudas posteriores a la concurrencia de la causa de disolución: falta de promoción.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Pontevedra (Sección 1ª), sentencia núm. 335/2007 de 14 junio. AC 2007\1726	Mercantil
141	AP	2007	ntencia confirmada o inadmisión de recurso contra la misma) QUIEBRA: DECLARACIÓN DE QUIEBRA: EFECTOS: RETROACCIÓN: nulidad de los actos posteriores a la fecha de retroacción: procedencia: compraventa: fraudulencia en la transmisión: nulidad.	Quiebra; retroaccion; compraventa fraudulenta	AP Madrid (Sección 28ª), sentencia núm. 54/2007 de 8 marzo. JUR 2007\149955	Concursal
142	AP	2006	CONCURSO (LEY 22/2003, DE 9 JULIO): DETERMINACION DE LA MASA PASIVA: impugnación: improcedencia: crédito garantizado por un derecho de retención válidamente constituido: no ha sido considerado como privilegio de ningún tipo por el legislador concursal, por lo que se impone la consideración del crédito así garantizado como crédito ordinario; derecho de ejecución separada: improcedencia: titular de un crédito con garantía real, que no goza de privilegio especial: alteración de la «par conditio creditorum»: reconocimiento del derecho de ejecución separada únicamente a los títulos de créditos con garantía real que gocen de privilegio especial.CATALUÑA: DERECHOS REALES: derecho de retención: garantía real.	Concurso; determinacion de la masa pasiva; credito garantizado	AP Barcelona (Sección 15ª), sentencia de 5 octubre 2006. JUR 2007\145340	Concursal
143	AP	2006	DERECHO AL HONOR: INTROMISIÓN ILEGÍTIMA: existencia: banca: inclusión indebida del nombre del actor, a instancias del banco demandado y del que era cliente, en un registro de morosos o fichero ASNEF/EQUIFAX por deuda inexistente: ataque a su intimidad personal patrimonial: indemnización: determinación.	Derecho al honor; indemizacion por uso indebido de nombre en fichero ASNEF	AP Santa Cruz de Tenerife (Sección 4ª), sentencia núm. 280/2006 de 28 agosto. AC 2007\272	Civil
144	AP	2006	PROPIEDAD INDUSTRIAL: MARCAS: acción de cesación de la violación del derecho: procedencia: utilización por la demandada en el tráfico económico de la denominación «Café del Mar Canarias» para servicios de cafetería y restauración en un establecimiento por ella explotado: denominación que presenta semejanza o similitud con la marca registrada por el actor «Café del Mar» para idénticos servicios: inducción a error o confusión al consumidor.	Marcas; cesacion por violacion del derecho	AP Las Palmas (Sección 4ª), sentencia núm. 354/2006 de 31 julio. AC 2006\2355	Mercantil
145	AP	2006	LEGITIMACION ACTIVA: IMPROCEDENCIA: sociedades: demanda interpuesta por una sociedad limitada cuando el documento en que se fundamenta la reclamación está firmada por dos personas físicas en su propio nombre y con continuas menciones a ellos mismos y no a las sociedades en las que tienen sus intereses: ausencia de acuerdo de escisión.	Falta de legitimacion activa	AP Pontevedra (Sección 1ª), sentencia núm. 416/2006 de 12 julio. AC 2006\1534	Procesal

146	AP	2006	SOCIEDADES ANÓNIMAS: ADMINISTRADORES: ACCIÓN DE RESPONSABILIDAD: doctrina jurisprudencial: responsabilidad solidaria del art. 262.5 LSA: responsabilidad «cuasi objetiva» entendida como una responsabilidad «ex lege»: requisitos; procedencia: acreditación de la deuda contraída por la sociedad codemandada para con la actora: cierre de facto sin que en su domilicio social se desarrolle actividad alguna: responsabilidad del administrador demandado.PRESCRIPCIÓN DE ACCIONES: unificación por la jurisprudencia del régimen de prescripción según la acción se ampare en el art. 135 o en el 262.5 LSA: aplicación del plazo especial de cuatro años previsto en el art. 949 CCom.	Sas; accion responsabilidad administradores;	AP Madrid (Sección 19ª), sentencia núm. 317/2006 de 12 junio. AC 2007\273	Mercantil
147	AP	2006	PAGARE: ACCIONES POR FALTA DE PAGO: excepciones del deudor: título sin fuerza ejecutiva: improcedencia: defecto de timbre: tratamiento normativo diferente de las letras de cambio y los pagarés; legitimación activa: procedencia: pagarés con la cláusula «no a la orden» por la que el librador excluye la transmisión de los mismos por endoso: legitimación del cesionario al quedar acreditada la tenencia de los documentos con la propia cesión.	Pagare; acciones por falta de pago; defecto de timbre	AP Madrid (Sección 11ª), sentencia núm. 206/2006 de 12 mayo. AC 2006\959	Civil/ cambiario
148	AP	2006	QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: improcedencia: compraventa efectuada a favor de las personas físicas codemandadas y a la entidad bancaria que concede el crédito hipotecario: subadquirentes de buena fe: terceros protegidos por la fe pública registral que consagra la seguridad jurídica en el ámbito inmobiliario.	Quiebra; retroaccion; compraventa fraudulenta pero terceros adquirientes de buena fe	AP Madrid (Sección 28ª), sentencia núm. 58/2006 de 29 abril. JUR 2006\261458	Concursal
149	AP	2006	(Sentencia confirmada o inadmisión de recurso contra la misma) SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: falta de acreditación de que los demandados hayan realizado actos de competencia desleal hacia la sociedad a través de las otras sociedades demandadas: pérdida del principal cliente por voluntaria decisión de su director general; NULIDAD DE LA SOCIEDAD: improcedencia: objeto social lícito: su constitución no constituye un negocio simulado, sino real, que responde a la causa típica del negocio social: actividades lícitas en un sistema económico regido por el principio de libre competencia.	SRLS; no responsabilidad de los administradores por competencia desleal ni nulidad de la sociedad	AP Barcelona (Sección 15ª), sentencia núm. 185/2006 de 19 abril. JUR 2006\272748	Mercantil
150	AP	2006	ARRENDAMIENTO DE OBRA: RESPONSABILIDAD EX ART. 1597 CC: procedencia: concurso: deuda real, cierta y exigible: precio alzado: ejercicio de la acción antes de la declaración del concurso: el crédito seguía operando contra el patrimonio de la contratista principal, pero se había desplazado en beneficio de la subcontratista antes de que el concurso fuera declarado.	Concurso, delimitacion de la masa	AP Barcelona (Sección 15ª), sentencia núm. 102/2006 de 2 marzo. AC 2006\1594	Concursal
151	AP	2005	INTERESES: PACTADOS: MORATORIOS: procedencia: préstamo mercantil: inaplicación de la doctrina del retraso desleal en relación a la entidad prestamista: desidia en la reclamación que no ha alcanzado a lo que el ordenamiento jurídico sanciona con la prescripción.	Intereses moratorios prestamo mercantil	AP Alicante (Sección 6ª), sentencia núm. 525/2005 de 20 diciembre. JUR 2006\129453	Mercantil
152	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: doctrina jurisprudencial: diferencias entre la «acción individual» y la «acción social»; improcedencia: acción individual: desaparición de hecho de la sociedad, sin acudir a las vías legalmente establecidas: falta de intervención del administrador demandado, que se desvinculó de la sociedad incluso antes de la preceptiva adaptación de la misma a la ley 1995, que finalmente no se llevó a efecto.PRUEBA (LECIV/2000): PRESUNCIONES JUDICIALES: regulación en la nueva normativa procesal: alcance	SRLs; responsabilidad de los administradores; acion individual y accion social	AP Alicante (Sección 8ª), sentencia núm. 459/2005 de 16 noviembre. AC 2006\388	Mercantil

153	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: no atención de las cuotas de la Seguridad Social: situación de inactividad de la empresa y existencia de deudas de relevante importancia.LEGITIMACION PASIVA: PROCEDENCIA: sociedades: acción de responsabilidad contra el administrador: deuda generada con la demandante desde el inicio de actividad social cuando la demandada era administradora solidaria.PRESCRIPCION DE ACCIONES: IMPROCEDENCIA: aplicación del art. 949 CCom: cese de la demandada como administradora solidaria de la sociedad no inscrito en el Registro Mercantil.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Cáceres (Sección 1ª), sentencia núm. 377/2005 de 11 octubre. AC 2005\1880	Mercantil
154	AP	2005	QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: posturas jurisprudenciales: art. 878 párr. 2º CCom: la jurisprudencia más reciente ha venido apuntalando la interpretación más rigorista de dicho precepto; procedencia: cantidad abonada por la quebrada al Ayuntamiento demandado en pago de una licencia urbanística de la que no era tributaria: nulidad del abono de la licencia: reintegro a la masa activa de su importe.	Quiebra; retroaccion; reintegro a la masa activa	AP Alicante (Sección 8ª), sentencia núm. 318/2005 de 19 julio. AC 2005\1433	Concursal
155	AP	2005	DEFENSA DE LA COMPETENCIA: ABUSO DE LA POSICION DOMINANTE: doctrina jurisprudencial: concepto de posición de dominio y de abuso de la posición dominante; FALSEAMIENTO DE LA LIBRE COMPETENCIA POR ACTOS DESLEALES: restricción a la competencia: suministro de prensa diaria: existencia de una conducta ilícita por parte de las empresas demandadas suministradoras hacia la actora, que regentaba un negocio de venta al por menor de artículos de prensa y papelería y a quien se negó el suministro: existencia de prácticas concertadas: indemnización de daños y perjuicios.INTERESES LEGALES: MORATORIOS: doctrina jurisprudencial: atenuación de la regla «in illiquidis non fit mora.	Competencia desleal	AP Barcelona (Sección 15ª), sentencia núm. 203/2005 de 3 mayo. AC 2005\1097	Mercantil/ civil
156	AP	2005	(Sentencia confirmada o inadmisión de recurso contra la misma) QUIEBRA: DECLARACION DE QUIEBRA: EFECTOS: retroacción: nulidad de los actos posteriores a la fecha de retroacción: escritura de hipoteca concertada como superposición de garantía de una línea de crédito agotada y con efectivo conocimiento de la insolvencia de la entidad deudora: perjuicio de los demás acreedores al constituir hipoteca sobre casi todo el patrimonio de la deudora que había sobreseído de forma general el pago de sus obligaciones.TUTELA JUDICIAL EFECTIVA: INDEFENSION: inexistencia: falta de actividad alguna destinada a hacer valer la alegada y ahora reproducida indefensión en el procedimiento incidental, mediante la interposición de recurso de apelación contra la sentencia o instando la nulidad de actuaciones.LEGITIMACION PASIVA: PROCEDENCIA: quiebra: acción de nulidad de actos realizados en período de retroacción: entidad recurrente parte en el contrato.	Quiebra; retroaccion; constitucion de hipoteca en perjuicio de otros acreedores	AP Islas Baleares (Sección 3ª), sentencia núm. 106/2005 de 8 marzo. AC 2005\530	Concursal
157	AP	2004	SOCIEDADES ANONIMAS: ESCISION: derechos de los acreedores: reclamación de cantidad: estimación: expresa adhesión de la parte actora al convenio consistente en una espera: no supone límites al ejercicio de la acción: la extinción de las obligaciones del deudor y la consiguiente satisfacción de los derechos de los acreedores no se producen por la simple aprobación del convenio sino sólo su cumplimiento extingue aquéllas.	Sas; escision; procede reclamacion de cantidad por acreedor haberse adherido a convenio	AP Barcelona (Sección 15ª), sentencia núm. 386/2004 de 16 julio. AC 2004\1971	Mercantil
158	AP	2004	INADECUACION DE PROCEDIMIENTO: PROCEDENCIA: quiebra: retroacción: acción de nulidad: procedimiento incidental: la multiplicidad de actos a que puede afectar la determinación de la fecha de retroacción hace necesario y conveniente que las oportunas acciones de nulidad deban ventilarse en el juicio declarativo que corresponda, sobre todo, cuando los procesos de tal naturaleza permiten dilucidar las cuestiones de la más variada índole.	Quiebra; retroaccion; acciones de nulidad dentro del concurso	AP Madrid (Sección 18ª), sentencia núm. 307/2004 de 24 mayo. AC 2004\1681	Concursal

159	AP	2004	PAGARE: ACCIONES POR FALTA DE PAGO: excepciones del deudor: falta de formalidades necesarias: procedencia: falta del lugar de emisión: no constituye formalismo intrascendente desde el momento en que es un dato determinante, de acuerdo con la legislación que le es propia: sólo puede suplirse la falta de consignación del lugar de emisión del pagaré con el lugar que aparezca al lado del firmante; falta de provisión de fondos: improcedencia: funcionamiento del software: si se efectuó alguna actuación para bloquear o no permitir el funcionamiento del sistema por la actora, son cuestiones que exceden de la excepción.	Pagare; acciones por falta de pago	AP Castellón (Sección 1ª), sentencia núm. 174/2004 de 11 mayo. AC 2004\966	Civil/ Cambiario
160	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: realización de las operaciones comerciales origen de la deuda reclamada cuando el patrimonio contable de la sociedad ya era muy inferior a la mitad de la cifra del capital social de la entidad codemandada: falta de adopción de ninguna medida apropiada respecto del capital social, ni promoción de la liquidación ordenada de la empresa.	SRLs; responsabilidad de los administradores; recapitalizar o liquidar	AP Madrid (Sección 10ª), sentencia núm. 474/2004 de 23 marzo. AC 2004\1556	Mercantil/ Capital social
161	AP	2004	PERSONAS JURIDICAS: personalidad: penetración de los tribunales en su «substratum», levantando el velo jurídico: procedencia: utilización de la diferente personalidad jurídica de las entidades como apariencia con el fin de obtener un resultado jurídico contrario a derecho, en perjuicio de terceros: semejanza en el nombre de las sociedades y coincidencia parcial de cargos: genera cierto confusionismo en esos terceros que es contrario a la seguridad y confianza que deben presidir las relaciones jurídicas.	Levantamiento del velo por actos deliberadamente en perjuicio de terceros	AP Murcia (Sección 1ª), sentencia núm. 72/2004 de 9 marzo. AC 2004\874	Civil/ Mercantil
162	AP	2004	QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: cesiones de crédito: contrato de factoring propio o sin recurso: se produce una transmisión plena del crédito al cesionario, cesión que tiene una causa onerosa como es el pago al cedente del importe del crédito cedido, con las deducciones pactadas y en el plazo contractualmente previsto.	Quiebra; retroaccion; cesion de credito factoring en perjuicio acreedores	AP Madrid (Sección 8ª), sentencia núm. 51/2004 de 23 enero. AC 2004\1157	Concursal
163	AP	2004	SOCIEDADES ANONIMAS: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: disolución «de facto» porque la Seguridad Social embargó la maquinaria y demás útiles de trabajo de la misma.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Madrid (Sección 11ª), sentencia núm. 301/2004 de 16 enero. AC 2004\1155	Mercantil
164	AP	2003	CARGA DE LA PRUEBA: principio de normalidad: quien actúa frente al estado normal de las cosas o situaciones de hecho o derecho ya producidas ha de probar el hecho que aduce.CARGA DE LA PRUEBA: relaciones comerciales: suficiencia de los documentos con los que normalmente se documentan: necesidad de acreditar la concurrencia de circunstancias extraordinarias que induzcan a pensar que los documentos no fueron librados para el fin que le es propio.	Carga de la prueba en relaciones comerciales	AP Barcelona (Sección 15ª), sentencia de 18 noviembre 2003. JUR 2004\5861	Procesal/ Contratos
165	AP	2003	PAGARE: ACCIONES POR FALTA DE PAGO: EXCEPCIONES DEL DEUDOR: falta de legitimación del tenedor: desestimación: endoso en blanco; inexistencia de tráfico cambiario: estimación: endosos simulados o sin contraprestación; «exceptio doli»: estimación.	Pagare; acciones por falta de pago	AP Islas Baleares (Sección 3ª), sentencia núm. 581/2003 de 11 noviembre. JUR 2004\76501	Civil/ Cambiario
166	AP	2003	PAGARE: ACCIONES POR FALTA DE PAGO: excepciones del deudor: falta de provisión de fondos: improcedencia: reparación de camión: circulación durante tres meses sin reproche o protesta acreditada del dueño: ausencia de incumplimiento total ni tampoco parcial del contrato de arrendamiento de servicios prestados.	Pagare; acciones por falta de pago	AP Salamanca (Sección Unica), sentencia núm. 416/2003 de 6 noviembre. AC 2003\1792	Civil/ Cambiario
167	AP	2003	DERECHO AL HONOR: INTROMISION ILEGITIMA: inexistencia: inclusión en registro de impagados: actor que era deudor hipotecario al constituirse la relación jurídico-procesal.	Derecho al honor; inclusion registro impagados	AP Granada (Sección 3ª), sentencia núm. 865/2003 de 5 noviembre. AC 2003\1722	Civil

168	AP	2003	JUICIO EJECUTIVO: NULIDAD: título sin fuerza ejecutiva: improcedencia: póliza de arrendamiento financiero: amortizaciones concretas y líquidas: no exige previa liquidación ni notificación a efectos del art. 1435 LECiv/1881; notificación del ejecutante: falta de notificación por los demandados del cambio de domicilio: falta de conocimiento a causa sólo imputable a los destinatarios; EXCEPCIONES: pluspetición: procedencia: instancia de una ejecución por mayor cantidad que la realmente debida por los deudores tanto en el momento de emitirse la certificación por la entidad bancaria como de la expedida por el fedatario mercantil, por no haberse deducido en la demanda ejecutiva los ingresos efectuados por los ejecutados en fechas muy anteriores a las de dichas certificaciones.SENTENCIA: INCONGRUENCIA: «extra petitum»: procedencia: juicio ejecutivo: resolución sobre cuestión no planteada.	Leasing; nulidad de juicio ejecutivo	AP Madrid (Sección 10ª), sentencia de 25 octubre 2003. AC 2004\807	Civil
169	AP	2003	COMPRAVENTA MERCANTIL: SUMINISTRO: resolución: procedencia: suministro en exclusiva de cerveza: incumplimiento de la exclusividad por la demandada; efectos: restitución del importe correspondiente al depósito irregular: improcedencia: ambigüedad conceptual que no puede nunca perjudicar a la parte que se adhiere al contrato: se refería a la devolución del mobiliario entregado por la actora, que no del dinero en el que el mismo se valoraba; intereses: pactados: falta de acreditación de remisión de comunicación;	Compraventa mercantil, incumplimiento de contrato	AP Islas Baleares (Sección 4ª), sentencia núm. 213/2003 de 13 mayo. JUR 2003\229139	Contratos mercantiles
170	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: patrimonio muy inferior a la mitad de su capital social.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Girona (Sección 2ª), sentencia núm. 64/2003 de 19 febrero. AC 2003\330	Mercantil/ Capital social
171	AP	2003	SOCIEDADES ANONIMAS: SOCIOS: derecho a la información: vulneración: improcedencia: falta de impugnación de los acuerdos adoptados: ausencia de omisión de datos a los socios que a la vez hubiesen servido para adoptar acuerdos, ADMINISTRADORES: RESPONSABILIDAD: improcedencia: no convocatoria de junta general extraordinaria: convocatoria de junta ordinaria anterior: la extraordinaria hubiese duplicado el debate y el control; venta de finca rústica: precio destinado a sufragar gastos societarios, necesarios y urgentes: facultades para la venta: ausencia de daños directos a la sociedad o a sus accionistas: ausencia de incumplimiento de obligaciones.	Improcedencia de Responsabilidad de los administradores por no convocar junta extraordinaria para la venta de una finca para sufragar deudas; no vulneracion del derecho de informacion	AP Islas Baleares (Sección 5ª), sentencia núm. 85/2003 de 17 febrero. JUR 2003\196478	Mercantil
172	AP	2003	PROPIEDAD INDUSTRIAL: PATENTES: ACCION DE NULIDAD: procedencia: estuches para guardar discos compactos: patente concedida que excede del contenido de la solicitud formulada: inexistencia de novedad y actividad inventiva.	propiedad industrial, patentes	AP Valencia (Sección 9ª), sentencia núm. 106/2003 de 15 febrero. AC 2003\707	Civil/ Mercantil
173	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: condición de socio en el actor: exigencia de solicitud a los administradores de la covocatoria de la disolución; concurrencia de causa de disolución de la sociedad: determinación de la fecha: condición en el actor en esa fecha de presidente del consejo de administración recayendo sobre él precisamente la responsabilidad que ahora está exigiendo al resto de administradores de la sociedad.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Murcia (Sección 5ª), sentencia núm. 37/2003 de 27 enero. JUR 2003\196144	Mercantil
174	TS	2010	SOCIEDADES ANONIMAS: ADMINISTRADORES: responsabilidad: naturaleza: no constituye sanción o penalidad civil que justifique la aplicación del principio de retroactividad de la disposición legal más favorable: reforma de la LSA/1989 por la Ley Consursal; existencia: pérdidas que reducen el patrimonio a la mitad del capital social, sin convocar Junta general para adoptar el acuerdo de disolución: no excluye la responsabilidad la solicitud de suspensión de pagos. ENRIQUECIMIENTO SIN CAUSA: requisitos; inexistencia.	Responabilidad de los administradores por inobservancia de la causa de disolucion recapitalizar o liquidar; ademas, llo no excluye la responsabilidad de solicitud de suspension de pagos.	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 557/2010 de 27 septiembre. RJ 2010\7140	Mercantil/ Concursal

175	TS	2009	INTERPRETACION DE LOS CONTRATOS: Función del juzgador de instancia: debe prevalecer salvo que sea absurda, arbitraria, ilógica o infrinja preceptos legales: compraventa de participaciones sociales con depósito del precio de venta hasta la determinación definitiva del patrimonio neto de la sociedad adquirida y obligación del depositario de entregar a las partes la suma depositada, a resultas y en función de esa determinación: interpretación racional y lógica del proceder del depositario en las entregas efectuadas conforme al resultado de la auditoría practicada: calificación del contrato en la instancia como depósito con designación de persona para entrega de la cosa depositada, como figura análoga al secuestro convencional o como depósito con elementos del mandato, que en nada obsta al cumplimiento de la obligación constituida: impugnación vedada en casación.	Contrato de deposito mercantil; interpretacion	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 171/2009 de 20 marzo. RJ 2009\1994	Civil/ contratos
176	TS	2008	SOCIEDADES ANONIMAS: Impugnación de acuerdos sociales: improcedencia: acuerdo de disolución por pérdidas: convocatoria en la que se establece como primer orden del día la remoción de la causa de disolución: no implica necesariamente que se fuese a debatir la ampliación o reducción del capital social y fuese por eso exigible el cumplimiento en la convocatoria de los requisitos de aplicación en las modificaciones estatutarias.RECURSO DE CASACION: estimación.	Impugnacion acuerdo social de disolucion por perdidas	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 76/2008 de 5 febrero. RJ 2008\5208	Mercantil/ Capital social
177	TS	2007	SOCIEDADES DE RESPONSABILIDAD LIMITADA: RESPONSABILIDAD DE LOS ADMINISTRADORES: existencia: solidaria por deudas sociales: falta de solicitud o convocatoria de disolución de la sociedad por su parte: innecesariedad de nexo causal entre el crédito accionado y la inactividad de los administradores, ni de cualquier otra negligencia de éstos; Carácter sancionador impropio sin connotación penal del art.105.5 de la Ley 2/1995: razonamiento; Prescripción de la acción: aplicación del art. 949 CCom.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 953/2007 de 26 septiembre. RJ 2007\5446	Mercantil/ Capital social
178	TS	2007	TERCERIA DE DOMINIO: inexistencia: embargo de pagarés endosados en blanco: doble transmisión simulada en perjuicio del acreedor ejecutante: acción de éste frente al último tenedor adquirente del título simuladamente que ejercita la tercería: invocación acertada de su nulidad como excepción extracambiaria por falta de causa en la transmisión; LITIS CONSORCIO PASIVO NECESARIO: inexistencia: la nulidad del título hecha valer como simple excepción no exige la presencia en el proceso de la sociedad endosataria y posterior endosante, al declararse unicamente la inexistencia de título válido en el tercerista.	Tercería de dominio;doble transmision de pagares simulada en perjuicio de acreedores	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 707/2007 de 26 junio. RJ 2007\5576	Civil
179	TS	2006	SENTENCIA: INCONGRUENCIA: no se produce cuando se concreta el quantum indemnizatorio en la sentencia, cuando de las actuaciones se desprenden los datos suficientes que han sido objeto de las actividades probatorias.CONTRATO DE SUMINISTRO: atípico: su régimen jurídico no se identifica con el de la compraventa, aunque sea afín a ella: se regula por lo previsto por las partes y, en su defecto, por el Código Civil o el de Comercio; aplicación de la normativa relativa al incumplimiento de la compraventa -arts. 332 y 339 CCom- cuando el comprador rehusare sin causa justa recibir los objetos comprados: improcedencia: por no tratarse de cosas ciertas, no pudiendo aplicarse a un objeto cuya fabricación dependía de las necesidades del suministrado y, además, tratándose de géneros que se encontraban ya depositados.MORA: regla «in ilíquidis non fit mora»: matización jurisprudencial.	Compraventa mercantil, contrato suministro, mora	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 924/2006 de 27 septiembre. RJ 2006\8631	Contratos mercantiles
180	TS	2006	LETRA DE CAMBIO: AVALES PRESTADOS EN NOMBRE DE SOCIEDAD AUN NO CONSTITUIDA: no la vinculan: ratificación por junta general antes de la inscripción de la sociedad en el Registro Mercantil, y no dentro de los tres meses siguientes a dicha inscripción: inexistencia de actos posteriores de los que pudiera deducirse una aceptación tácita de los avales.	Letra de cambio; avales en nombre de sociedad no constituida	TS (Sala de lo Civil, Sección 1ª), sentencia de 31 mayo 2006. RJ 2006\3500	Mercantil/ Cambiario
181	TS	2003	SOCIEDADES ANONIMAS: LIQUIDACION: carácter imperativo de las normas que la regulan: su infracción produce la nulidad del acuerdo social que lo aprueba; acuerdo aprobatorio: nulidad: inventario y balance inicial no practicado, inobservancia sobre la norma relativa a la información de la liquidación y patrimonio social no recogido con exactitud.	Sas; inobservancia requisitos formales del procedimiento de liquidacion	TS (Sala de lo Civil, Sección Unica), sentencia núm. 758/2003 de 15 julio. RJ 2003\5840	Mercantil

182	TS	2003	SOCIEDADES ANONIMAS: LIQUIDADOR: renuncia ante notario no notificada a la junta general, pero sí a todos los socios verbalmente: validez: nulidad de actuaciones liquidadoras posteriores; NULIDAD DE LA LIQUIDACION: procedencia: distribución entre los socios de las deudas sociales.	Liquidacion; nulidad y distribucion de deudas entre los socios (levantamiento del velo)	TS (Sala de lo Civil, Sección Unica), sentencia núm. 664/2003 de 2 julio. RJ 2003\5805	Mercantil
183	TS	2003	SOCIEDADES ANONIMAS: CAPITAL SOCIAL: reducción a cero: opción necesaria por imperativo legal si se quería evitar la disolución de la sociedad.	Sas; operacion acordeon para evitar disolucion	TS (Sala de lo Civil, Sección Unica), sentencia núm. 566/2003 de 12 junio. RJ 2003\5352	Mercantil/ Capital social
184	AP	2014	CONTRATOS BANCARIOS: ADQUISICION DE PARTICIPACIONES PREFERENTES: NULIDAD: ERROR EN EL CONSENTIMIENTO: procedencia: incumplimiento por la entidad bancaria de los deberes de información: cliente minorista: producto complejo de difícil seguimiento de su rentabilidad y que cotiza en el mercado secundario: servicio de inversión en el que la entidad bancaria debe prestar un servicio activo e intenso de asesoramiento.	Contratos bancarios; Suscripcion de preferentes, nulidad por defectos del consentimineto	AP Madrid (Sección 25ª), sentencia núm. 358/2014 de 9 octubre. JUR 2014\297624	Contratos bancarios
185	AP	2014	CONTRATOS BANCARIOS: PARTICIPACIONES PREFERENTES: nulidad: estimación: error en el consentimiento: condición de inversor minorista: incumplimiento por la entidad demandada de su obligación de informar en los términos previstos en la Ley del Mercado de Valores al tratarse de un producto complejo: error esencial, vencible y excusable: inexistencia de vulneración de la doctrina de los actos propios.	Contratos bancarios; Suscripcion de preferentes, nulidad por defectos del consentimineto	AP Ourense (Sección 1ª), sentencia núm. 366/2014 de 31 julio. JUR 2014\246885	Contratos bancarios
186	AP	2014	CONCURSO (LEY 22/2003, DE 9 JULIO): EFECTOS DE LA DECLARACIÓN DE CONCURSO: SOBRE LOS ACTOS PERJUDICIALES PARA LA MASA ACTIVA: ACCIONES DE REINTEGRACIÓN: procedencia: cancelación del saldo acreedor de la cuenta corriente de crédito: pagos realizados a favor de un sólo acreedor por la concursada que ya se encontraba en situación de insolvencia y no por un tercero: mala fe: rescisión: requisitos: calificación de los créditos resultantes de la operación como subordinados: DOCTRINA JURISPRUDENCIAL: Art. 71 LC: requisitos que debe reunir el acto impugnado para que pueda rescindirse: concepto de perjuicio: valoración: interpretaciones doctrinales y jurisprudenciales.	Concurso; acciones de reintegracion por actos perjudiciales contra la masa	AP Islas Baleares (Sección 5ª), sentencia núm. 228/2014 de 28 julio. JUR 2014\221707	Concursal
187	AP	2014	PRODUCTOS ESTRUCTURADOS: empresa dedicada a la comercialización al por mayor de productos de electrónica náutica para embarcaciones deportivas y de recreo: contratación de seguros de tipo de cambio: banco lider mundial en el mercado de divisas: cotización de GPB: nulidad: error en el consentimiento: infracción del deber precontractual sobre el inicio de la crisis económica y sus efectos sobre GPB: empresa inexperta en productos financieros: productos altamente complejos: test de conveniencia: escasa experiencia inversora.	Contratos; nulidad de contrato de seguros de cambio por vicios del consentimiento	AP Madrid (Sección 14ª), sentencia núm. 265/2014 de 30 junio. JUR 2014\236400	Contratos mercantiles
188	AP	2014	CONSUMIDORES Y USUARIOS: CLAUSULAS ABUSIVAS: PROCEDENCIA: contrato de mantenimiento de ascensores: plazo de duración de 10 años con prórroga automática a pesar del preaviso de la parte demandada y sin que se prevea un mecanismo idéntico de compensación o indemnización cuando el incumplimiento es de la entidad actora: falta de reciprocidad: cláusula prohibida que no ha sido adaptada a la Ley 44/06 en el período de dos meses desde su entrada en vigor.	Consumidores; clausulas abusivas	AP Badajoz (Sección 3ª), sentencia núm. 113/2014 de 27 mayo. JUR 2014\180620	Mercantil/ Civil
189	AP	2014	JUICIO CAMBIARIO: DEMANDA DE OPOSICION: EXCEPCIONES: pagaré en blanco: pagaré completado de una manera incorrecta: desestimación: préstamo con interés fijo, por lo que la cantidad adeudada viene determinada por los importes adeudados, para la fijación del importe no hace falta realizar ninguna liquidación, y resulta innecesario la intervención de fedatario público.	Juicio cambiario; pagares	AP Córdoba (Sección 1ª), sentencia núm. 214/2014 de 9 mayo. JUR 2014\191367	Civil/ Cambiario
190	AP	2014	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ORGANOS DE LA SOCIEDAD: ADMINISTRADORES: RESPONSABILIDAD: Desestimación: acción ejercitada por deudor: falta de acreditación del perjuicio producido: cobro parcial de deuda y aplazamiento del resto por la sociedad, que no pueden imputarse a demandada: restablecimiento del equilibrio en patrimonio social anterior al vencimiento de deuda novada, cuando la demandada ya había cesado en el cargo.	Srls; no responsabilidad de los administradores en accion directa de cobro ejercitada por deudor	AP Zaragoza (Sección 5ª), sentencia núm. 88/2014 de 26 marzo. JUR 2014\119918	Mercantil

191	AP	2014	CONSUMIDORES Y USUARIOS: CLAUSULAS ABUSIVAS: inexistencia: contrato de refinanciación de préstamo personal por uso de tarjeta de crédito: fijación unilateral del saldo deudor mediante certificación de la entidad financiera: naturaleza ordinaria y no ejecutiva de la acción ejercitada: ningún efecto probatorio privilegiado presenta: inexistencia de inversión de la carga de la prueba.	Contrato de refinanciacion; fijacion unilatral del saldo deudor por la entidad financiera	AP Salamanca (Sección 1ª), sentencia núm. 32/2014 de 18 febrero. AC 2014\238	Contratos bancarios
192	AP	2014	CONCURSO (LEY 22/2003, DE 9 JULIO): CALIFICACION DEL CONCURSO: modificación del informe de calificación emitido por la Administración Concursal: no existe obstáculo alguno para que, atendiendo a lo que se hubiera puesto de manifiesto durante la tramitación del incidente, pueda alterar sus pretensiones iniciales, manifestadas en lo que la Ley denomina "propuesta de resolución".	Concurso; modificacion calificacion en informe de administracion concursal	AP Madrid (Sección 28ª), sentencia núm. 57/2014 de 17 febrero. JUR 2014\163100	Concursal
193	AP	2013	SOCIEDADES DE CAPITAL: RESPONSABILIDAD DE LOS ADMINISTRADORES: estimación: incumplimiento del deber de proceder al cierre, disolución y liquidación de la manera ordenada ante la situación de insolvencia social existente desde el ejercicio del año 2007: inexistencia de actuación del demandado tendenre al restablecimiento del patrimonio contable y el social.	Sociedades de Capital; responsabilidad de los administradores por incumplimiento deber de disolucion por insolvencia social	AP Segovia (Sección 1ª), sentencia núm. 187/2013 de 30 diciembre. JUR 2014\69607	Mercantil / Capital Social
194	AP	2013	CONCURSO (LEY 22/2003, DE 9 JULIO): LIQUIDADOR: responsabilidad: existencia: irregularidad contable relevante: no sólo impedía la comprensión cabal de la situación patrimonial de la sociedad sino que comportó la insolvencia definitiva.	Concurso; responsabilidad del liquidador por irregularidades contables	AP Las Palmas (Sección 4ª), sentencia núm. 426/2013 de 2 diciembre. JUR 2014\73695	Concursal
195	AP	2013	CONTRATOS BANCARIOS: GESTIÓN DE RIESGOS FINANCIEROS O SWAP: NULIDAD: procedencia: infracción de la normativa contenida en el RD 217/2008 y LMV por la entidad financiera que ofertó la contratación a la pequeña empresa, cliente minorista, que no obtuvo la información necesaria sobre el producto ofertado: ausencia del test de idoneidad: vicio del consentimiento y excusabilidad del error. VICIOS DEL CONSENTIMIENTO: ERROR: requisitos del error invalidante: DOCTRINA DEL TS.	Swaps; nulidad por vicios del consentimiento	AP Castellón (Sección 3ª), sentencia núm. 407/2013 de 21 octubre. JUR 2014\794	Contratos bancarios
196	AP	2013	CONCURSO (LEY 22/2003, DE 9 JULIO): MASA PASIVA: LISTA DE ACREEDORES: IMPUGNACION: procedencia: crédito a favor de la Agencia Estatal de las Islas Baleares: derivado de un contrato de préstamo a una entidad deportiva que ha recibido financiación privada, para un fin exclusivamente propio, y no en protección del interés general: crédito ordinario.	Concurso; impugancion lista de acreedores y calificacion de creditos contra la masa	AP Islas Baleares (Sección 5ª), sentencia núm. 366/2013 de 30 septiembre. JUR 2013\328275	Concursal
197	AP	2013	CONCURSO (LEY 22/2003, DE 9 JULIO): EFECTOS DE LA DECLARACIÓN DE CONCURSO: SOBRE LOS ACTOS PERJUDICIALES PARA LA MASA ACTIVA: ACCIONES DE REINTEGRACIÓN: DEBE ESTIMARSE: Contratos de cobertura de vencimiento: acreditado perjuicio para los restantes acreedores por el pago realizado para cancelación y reducción del principal de los contratos: deuda no líquida, vencida y exigible:	Concurso; acciones de reintegracion por actos perjudiciales contra la masa	AP Sevilla (Sección 5ª), sentencia núm. 433/2013 de 27 septiembre. JUR 2013\383651	Concursal
198	AP	2013	PAGARE: EXCEPCIONES DEL DEUDOR: falta de legitimación pasiva: improcedencia: pagaré firmado por el demandado, sin haber hecho constar junto a su firma que lo hacía en representación de la sociedad de la que era administradora o con sello o estampilla de la misma.	Pagare, incumplimiento requisitos formales, falta de legitimacion pasiva	AP Barcelona (Sección 11ª), sentencia núm. 294/2013 de 27 junio. JUR 2013\334733	Concursal
199	AP	2013	CONCURSO (LEY 22/2003, DE 9 JULIO): ACTOS PERJUDICIALES PARA LA MASA ACTIVA: acciones de reintegración: improcedencia: constitución de hipoteca: hecho acontecido en el periodo anterior de dos años a la declaración de concurso: la fecha de la válida constitución de la hipoteca no la debemos entender referida a aquella en la que realmente se haya efectuado la inscripción, sino a la de presentación en el Registro de la Propiedad.	Concurso; acciones de reintegracion por actos perjudiciales contra la masa	AP Sevilla (Sección 5ª), sentencia núm. 208/2013 de 29 abril. JUR 2013\252709	Concursal
200	AP	2013	CONTRATOS BANCARIOS: «SWAP»: NULIDAD: procedencia: error del consentimiento: grave insuficiencia respecto del deber de información.	Swaps; nulidad por vicios del consentimiento	AP Valladolid (Sección 1ª), sentencia núm. 147/2013 de 26 abril. JUR 2013\201122	Contratos bancarios
201	AP	2013	ABOGADOS: HONORARIOS: normas de honorarios colegiales: no son vinculantes para los órganos jurisdiccionales: carácter meramente orientativo: facultad moderadora de los tribunales. CONCURSO (Ley 22/2003, de 9 julio): HONORARIOS DE ABOGADO DE LA SOCIEDAD EN CONCURSO: crédito contra la masa: cuantía: moderación judicial: igualación a los del administrador concursal único.	Concurso; determinacion de la masa pasiva, honorarios de letrados	AP A Coruña (Sección 4ª), sentencia núm. 541/2013 de 1 febrero. AC 2013\902	Concursal

202	AP	2013	CONCURSO (LEY 22/2003, DE 9 JULIO): DETERMINACION DE LA MASA PASIVA: clasificación de créditos: créditos con privilegio general: improcedencia: art. 91.5 LC: interpretación: no se extiende a las obligaciones que surgen «ex lege» o derivadas de una garantía legal como la prevista en el artículo 1591 CC.	Concurso; calificacion de creditos	AP Madrid (Sección 28ª), sentencia núm. 7/2013 de 14 enero. JUR 2013\71050	Concursal
203	AP	2012	SWAP: NULIDAD: estimación: contrato de alto riesgo: cliente minorista: error en el consentimiento: deficiente información sobre aspectos esenciales.	Swaps; nulidad por vicios del consentimiento	AP Castellón (Sección 3ª), sentencia núm. 576/2012 de 30 noviembre. JUR 2013\46912	Contratos bancarios
204	AP	2012	SENTENCIA: MOTIVACION: VALORACION DE LA PRUEBA: ALCANCE: el deber de motivación no exige la consideración en la resolución judicial de todos los medios de prueba: innecesariedad de motivar el porqué se acepta un medio de prueba y no otro. CONTRATO DE DISTRIBUCION EN EXCLUSIVA: RESOLUCION POR INCUMPLIMIENTO DEL CONCEDENTE DEL PACTO DE EXCLUSIVIDAD: procedencia: mantenimiento de la relación comercial con otro concesionario: incumplimiento doloso: voluntad del concedente de incumplir el contrato: remisión de productos a través de pedido, con otro concesionario a través de tercera empresa, remisión de lista de precios a aquel y documentos donde la concedente reconoce, frente a clientes, la existencia de la relación con otro concesionario; DAÑOS Y PERJUICIOS: improcedencia: falta de acreditación de la existencia de los daños y perjuicios reclamados respecto del costo de financiación del stock: necesidad de acreditarlos incluso cuando el incumplimiento es doloso: no consideración como daño de los gastos de almacenamiento del stock, de los gastos de lanzamiento de la actividad o por pérdida de imagen; EFECTOS: devolución del material que estuviera en el almacén del concesionario al concedente: abono del precio pagado por el concesionario más los intereses correspondientes, así como los gastos por devolución, si no la realiza la concedente.	Contrato de distribucion en exclusiva; resolucion por incumplimiento doloso del cedente del pacto de exclusividad	AP Vizcaya (Sección 5ª), sentencia núm. 348/2012 de 27 septiembre. AC 2014\722	Contratos mercantiles
205	AP	2012	PAGARE: EXCEPCIONES DEL DEUDOR: inexistencia o falta de validez de la propia declaración cambiaria: improcedencia: certificación registral aportada que no concreta o no permite conocer qué actos de administración exigen la firma conjunta y mancomunada, que ahora sin prueba de su exigibilidad, de nuevo hace valer la sociedad codemandada, tratando de eximirse del pago de una deuda documentada y firmada por su administrador principal: mala fe.	Pagare; excepciones interpuestas por el deudor	AP Granada (Sección 3ª), sentencia núm. 326/2012 de 6 julio. JUR 2013\55090	Civil/ Cambiario
206	AP	2012	CONTRATOS BANCARIOS: contrato de gestión de riesgos financieros: nulidad: procedencia: error en el consentimiento: cliente minorista sin experiencia y conocimientos en materia financiera: falta de información al cliente, incumpliendo las obligaciones impuestas por la normativa sectorial.	Contratos bancarios; nulidad de derivados financieros por vicios del consentimiento	AP Castellón (Sección 3ª), sentencia núm. 347/2012 de 28 junio. JUR 2012\314692	Contratos bancarios
207	AP	2012	[illegible]ntencia confirmada o inadmisión de recurso contra la misma) CONCURSO: ACTOS PERJUDICIALES PARA LA MASA ACTIVA: procedencia: hipoteca en garantía de la devolución del préstamo que grava la vivienda propiedad de los concursados y fianza constituida en póliza de préstamo a interés fijo: acto perjudicial para la masa activa.	Concurso; acciones perjudiciales contra la masa	AP Islas Baleares (Sección 5ª), sentencia núm. 16/2012 de 17 enero. JUR 2012\67279	Concursal
208	AP	2011	CONSUMIDORES Y USUARIOS: PROTECCION DE LOS CONSUMIDORES: INTERESES ECONOMICOS Y SOCIALES: CLAUSULAS ABUSIVAS: improcedencia: cláusula de vencimiento anticipado: tiene como condicionamiento previo una causa justa, libremente pactada por las partes en el contrato, como es el incumplimiento de varias cuotas de periodicidad mensual, habiéndole requerido puntualmente para regularizar el pago, sin que el aviso surtiera efecto alguno.	Consumidores; clausulas abusivas	AP Madrid (Sección 25ª), sentencia núm. 545/2011 de 11 noviembre. JUR 2012\3361	Consumidores
209	AP	2011	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ORGANOS DE LA SOCIEDAD: ADMINISTRADORES: RESPONSABILIDAD: improcedencia: situación financiera por si sola no es suficiente para apreciar la existencia de una causa de disolución cuando se constata un resultado positivo aunque exiguo del ejercicio.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Girona (Sección 1ª), sentencia núm. 360/2011 de 20 septiembre. JUR 2011\387588	Mercantil
210	AP	2011	QUIEBRA: DECLARACION DE QUIEBRA: efectos: retroacción: nulidad de los actos posteriores a la fecha de retroacción: procedencia: compraventa: pago del precio no acreditado.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion	AP Islas Baleares (Sección 5ª), sentencia núm. 134/2011 de 20 abril. AC 2011\1395	Concursal
211	AP	2010	SOCIEDADES ANONIMAS: ADMINISTRADORES: RESPONSABILIDAD: estimación: falta de convocatoria de junta general concurriendo causa de disolución.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Madrid (Sección 10ª), sentencia núm. 532/2010 de 23 noviembre. JUR 2011\54805	Mercantil / Capital Social
212	AP	2010	PAGARES: ACCIONES POR FALTA DE PAGO: excepciones del deudor: exceptio doli: improcedencia: falta de acreditación de que el banco hubiera adquirido el pagaré deliberadamente en perjuicio del deudor cuando el beneficiario de los efectos y de sus descuento nada manifestó al banco de que el pago se habría efectuado contablemente por parte de la libradora: derecho de la demandada a reclamar los daños y perjuicios derivados de la hipotética actuación fraudulenta del librador de efecto que no retira los pagarés de la circulación pese a que, supuestamente, el crédito a su favor había quedado extinguido.	Pagare; excepciones interpuestas por el deudor	AP Murcia (Sección 1ª), sentencia núm. 574/2010 de 9 noviembre. JUR 2011\42120	Civil/ Cambiario

213	AP	2010	CONCURSO: CALIFICACION: culpable: personas afectadas por la calificación del concurso: exclusión: procedencia: situación de insolvencia inminente y no actual cuando el codemandado asume la administración; improcedencia: incumplimiento sustancial de la obligación de llevar contabilidad e irregularidades relevantes: omisiones imputables al administrador codemandado.	Concurso culpable; responsabilidad de los administradores	AP Madrid (Sección 28ª), sentencia núm. 203/2010 de 10 septiembre. JUR 2010\387162	Concursal
214	AP	2010	CONCURSO: DETERMINACION DE LA MASA PASIVA: crédito contra la masa: desestimación: cobros pendientes al tiempo de declaración de concurso por contratos filatélicos entonces en vigor: ausencia de reciprocidad de prestaciones pendientes de cumplimiento: revalorizaciones filatélicas: crédito ordinario: procedencia.	Concurso; calificacion de creditos	AP Madrid (Sección 28ª), sentencia núm. 65/2010 de 15 marzo. JUR 2010\207574	Concursal
215	AP	2010	SEGURO DE ACCIDENTES: RECLAMACION DE CANTIDAD: improcedencia: invalidez permanente: prescripción: transcurso del plazo de cinco años desde que se tuvo por el asegurado conocimiento del alcance definitivo del resultado lesivo padecido.	Reclamacion de cantidad	AP Castellón (Sección 3ª), sentencia núm. 83/2010 de 12 marzo. JUR 2010\221205	Civil
216	AP	2010	CONCURSO: DETERMINACION DE LA MASA PASIVA: reconocimiento de créditos: crédito contra la masa: improcedencia: art. 84.2.6º LC: necesidad de haberse ejercitado la pertinente acción judicial con el fin de obtener la resolución, en sede concursal, al amparo del art. 61.2, 2º párr. LC del contrato en interés del concurso la resolución ulterior del contrato, también en sede concursal, por incumplimiento por la vía del art. 62 LC; créditos subordinados: improcedencia: revalorizaciones filatélicas: parte del precio comprometido por la recompra de los sellos: concepto no accesorio: responde a una ganancia estipulada en la operación pactada de recompra.	Concurso; reconociminto de creditos contra la masa	AP Madrid (Sección 28ª), sentencia núm. 55/2010 de 12 marzo. JUR 2010\207816	Concursal
217	AP	2010	CONCURSO: DETERMINACION DE LA MASA PASIVA: crédito contra la masa: desestimación: cobros pendientes al tiempo de declaración de concurso por contratos filatélicos entonces en vigor: ausencia de reciprocidad de prestaciones pendientes de cumplimiento: revalorizaciones filatélicas: crédito ordinario: procedencia.	Concurso; delimitacion de la masa activa	AP Madrid (Sección 28ª), sentencia núm. 69/2010 de 12 marzo. JUR 2010\207808	Concursal
218	AP	2010	CONCURSO: DETERMINACION DE LA MASA PASIVA: crédito contra la masa: desestimación: cobros pendientes al tiempo de declaración de concurso por contratos filatélicos entonces en vigor: ausencia de reciprocidad de prestaciones pendientes de cumplimiento: revalorizaciones filatélicas: crédito ordinario: procedencia.	Concurso; calificacion de creditos	AP Madrid (Sección 28ª), sentencia núm. 62/2010 de 12 marzo. JUR 2010\207807	Concursal
219	AP	2010	PRESCRIPCION DE ACCIONES: IMPROCEDENCIA: suministro de gas: adquisición de gas por parte del demandado contratada para integrarla en el proceso industrial del negocio de hostelería que el mismo explotaba en la finca destinataria del suministro: no es de aplicación el artículo 1.967 CC, referido a compraventas civiles: aplicación del plazo de 15 años.	Contrato de suministro; plazos de prescripcion	AP Madrid (Sección 13ª), sentencia núm. 27/2010 de 19 enero. JUR 2010\199039	Contratos mercantiles
220	AP	2009	PAGARE: acciones por falta de pago: excepciones del deudor: pago: procedencia: pago de buena fe efectuado al agente o representante comercial de la entidad demandante	Pagare; acciones por falta de pago	AP Granada (Sección 3ª), sentencia núm. 573/2009 de 29 diciembre. JUR 2010\127812	Civil/ Cambiario
221	AP	2009	DAÑOS Y PERJUICIOS: procedencia: compraventa mercantil: hilo elastómero defectuoso: inhabilidad del objeto: aplicación del plazo de prescripción de quince años.	Compraventa mercantil, incumplimiento de contrato	AP Valencia (Sección 8ª), sentencia núm. 624/2009 de 18 noviembre. JUR 2010\62772	Contratos mercantiles
222	AP	2009	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: RESPONSABILIDAD: estimación: por las deudas sociales: administrador único que había vendido sus participaciones: constancia como tal en el Registro Mercantil sin que se haya acreditado ni el cese en dicho cargo ni se haya siquiera alegado que dicho supuesto cese haya sido publicado: demanda presentada en junio de 2005: causas de disolución e incumplimiento del deber de promover la disolución de la sociedad o de remover sus causas que existían a dicha fecha.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Las Palmas (Sección 4ª), sentencia núm. 248/2009 de 18 junio. JUR 2009\370064	Mercantil / Capital Social
223	AP	2009	CONCURSO: DETERMINACION DE LA MASA ACTIVA: acciones de reintegración: procedencia: pago a cuenta de póliza de crédito concedido a la concursada: no procede la compensación: mala fe en el pago burlando la prohibición del art. 55 LC: descapitalización de la concursada.	Concurso; acciones de reintegracion por descapializacion	AP Málaga (Sección 6ª), sentencia núm. 372/2009 de 17 junio. JUR 2010\14184	Concursal/ Capital social
224	AP	2009	CONTRATO DE AGENCIA: indemnización por clientela: procedencia: resolución unilateral por el demandado sin causa justificada: ausencia de incumplimiento contractual imputable a la actora: concertación para la demandada de contratos de seguros, prorrogables, que seguirán produciendo en el futuro beneficios sustanciales a la compañía demandada: cuantificación.	Contrato de agencia; credito devengado de indemnizacion por clientela	AP A Coruña (Sección 4ª), sentencia núm. 265/2009 de 3 junio. JUR 2009\290168	Contratos mercantiles
225	AP	2009	(Sentencia confirmada o inadmisión de recurso contra la misma) CONCURSO: EFECTOS: actos perjudiciales para la masa activa: acciones de reintegración: procedencia: compraventa: existencia de relación empresarial entre ambas mercantiles: favorecimiento a ciertos acreedores en detrimento del conjunto de todos ellos, que se ven seriamente perjudicados por la pérdida de un activo muy sólido.	Concurso; reintegracion, actos perjudiciales para la masa	AP Málaga (Sección 6ª), sentencia núm. 162/2009 de 12 marzo. JUR 2009\275004	Concursal

226	AP	2009	SOCIEDADES ANONIMAS: ADMINISTRADORES: responsabilidad: existencia: aplicación retroactiva de la norma.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Ourense (Sección 1ª), sentencia núm. 43/2009 de 11 febrero. JUR 2009\191013	Mercantil/ Capital social
227	AP	2009	(Sentencia confirmada o inadmisión de recurso contra la misma) DAÑOS Y PERJUICIOS: lucro cesante: contrato de franquicia: incumplimiento del franquiciador: indemnización por clientes captados y no servidos por el franquiciador y por las bajas por defectuoso cumplimiento del servicio prestado por este.	Contrato de franquicia; indemizacion por lucro cesante	AP Madrid (Sección 19ª), sentencia núm. 65/2009 de 9 febrero. JUR 2009\238350	Contratos mercantiles
228	AP	2009	JUICIO CAMBIARIO: EXCEPCIONES: falta de provisión de fondos: improcedencia: acreditación por el acreedor de la existencia de la provisión de fondos opuesta: no pueden oponerse las relaciones entre avalista y avalado, al ser ajenas al mismo y no probarse por la recurrente la concurrencia de circunstancias de las que puedas deducirse la connivencia entre avalado y tenedor de la letra para apreciar la existencia de la "exceptio doli".	Aval; falta de provision de fondos	AP Santa Cruz de Tenerife (Sección 3ª), sentencia núm. 41/2009 de 6 febrero. JUR 2009\238466	Civil/ Cambiario
229	AP	2009	PAGARE: ACCIONES POR FALTA DE PAGO: excepciones del deudor: pacto de favor: improcedencia: falta de acreditación de que el tenedor actual albergara finalidad o intención perjudicial para el deudor cambiario.	Pagare; acciones por falta de pago	AP Tarragona (Sección 1ª), sentencia núm. 32/2009 de 27 enero. JUR 2009\173807	Civil/ Cambiario
230	AP	2009	(Sentencia confirmada o inadmisión de recurso contra la misma) CONCURSO (LEY 22/2003, DE 9 JULIO): ACTOS PERJUDICIALES PARA LA MASA ACTIVA: acciones de reintegración: procedencia: reducción de indemnización por incumplimiento recíproco de contrato de distribución en exclusiva: abono de intereses desde la fecha de la sentencia de primera instancia.	Concurso; reintegracion, actos perjudiciales para la masa	AP La Rioja (Sección 1ª), sentencia núm. 370/2008 de 26 diciembre. JUR 2009\212095	Concursal
231	AP	2008	CONCURSO: DETERMINACION DE LA MASA PASIVA: crédito subordinado: art. 93.2.1º LC: aplicación analógica: no debe estimarse: dicho precepto está acotando de manera nítida su supuesto de hecho, del que deriva consecuencias perjudiciales o restrictivas de derechos, a una realidad material concreta: exclusión de su ámbito objetivo y subjetivo de otros supuestos distintos o añadidos que pudieron haber sido recogidos por la norma, al definir su supuesto de hecho, y que no lo fueron, como es el caso de los anteriores socios: el hecho de que en el informe de la Administración Concursal se diga que el negocio de venta de todas participaciones sociales comportó una descapitalización evidente de la sociedad no determina que deba atribuirse a los vendedores la condición de persona especialmente relacionada con la persona jurídica deudora.	Concurso; determinacion de la masa pasiva, credito subordinado	AP Barcelona (Sección 15ª), sentencia núm. 434/2008 de 28 noviembre. JUR 2009\144647	Concursal
232	AP	2008	CONCURSO (LEY 22/2003, DE 9 JULIO): informe de la administración concursal: créditos con privilegio especial: crédito con garantía hipotecaria: intereses moratorios: improcedencia: inexistencia de incumplimiento culpable una vez incluido el crédito en la masa pasiva: aplicación del tipo de interés ordinario: interés de la masa: la previsión del art. 155 LC no configura una obligación de pago inmediato sino solo una facultad.	Concurso; creditos con privilegio especial; hipoteca e intereses moratorios	AP Salamanca (Sección 1ª), sentencia núm. 348/2008 de 25 noviembre. JUR 2009\104066	Concursal
233	AP	2008	CONCURSO: CALIFICACION: culpable: procedencia: situación de quiebra técnica altamente endeudada que trara en la contabilidad de paliarse o enmascararse aludiendo a cuentas de existencia que no han sido localizados, capital en tesorería no justificado, activos fijos y capital circulante muy inferior al pasivo y perspectivas ruinosas para la empresa desentendida de los pagos: incumplimiento de los deberes sociales de los administradores.	Concurso culpable, responsabilidad de los administradores	AP Granada (Sección 3ª), sentencia núm. 421/2008 de 14 octubre. JUR 2009\52030	Concursal
234	AP	2008	JUICIO CAMBIARIO: DEMANDA DE OPOSICIÓN: EXCEPCIONES: INEXISTENCIA O FALTA DE VALIDEZ DE LA PROPIA DECLARACIÓN CAMBIARIA: procedencia: cheque librado por los demandados opositores que estamparon su firma en el mismo: no constancia de antefirma: condición de administradores mancomunados de la sociedad obligada deudora frente a tercero: no asunción personal de la deuda por los libradores	Cheque, incumplimiento requisitos formales, falta de legitimacion pasiva	AP Madrid (Sección 9ª), sentencia núm. 393/2008 de 18 septiembre. AC 2008\240	Civil/ cambiario

235	AP	2008	CONTRATO DE AGENCIA: retribución del agente: falta de aceptación por el agente de la modificación del porcentaje de retribución aplicado por la demandada en detrimento del agente: determinación; cálculo de comisiones: el porcentaje de la comisión debe ser aplicado sobre las ventas netas facturadas al cliente y no sobre los pedidos verificados por el agente; indemnización por clientela: procedencia: aprovechamientos de la clientela generada por la agente y aportación de nuevos clientes: cuantificación.	Contrato de agencia; credito devengado de indemnizacion por clientela	AP Barcelona (Sección 19ª), sentencia núm. 284/2008 de 11 junio. JUR 2008\355290	Contratos mercantiles
236	AP	2008	CONCURSO: FASE DE LIQUIDACION: honorarios de abogado: actuación limitada a la impugnación de un recurso de reposición: cuantificación.	Concurso; liquidacion; honorarios letrados	AP Alicante (Sección 8ª), sentencia núm. 211/2008 de 3 junio. JUR 2009\18605	Concursal
237	AP	2008	CONCURSO (LEY 22/2003, DE 9 JULIO): DETERMINACION DE LA MASA PASIVA: créditos subordinados: procedencia: recargos: naturaleza accesoria con la obligación principal; lista de acreedores: impugnación: improcedencia: art. 77 LGT: no puede entenderse que para el caso de que el proceso concursal desemboque en liquidación el régimen de todos sus créditos coincida con lo dispuesto en el artículo 77.l: no cabe interpretar la norma como pretende la Agencia Tributaria de que al afirmar la Ley General Tributaria que en caso de convenio los créditos tributarios queden sometidos a la Ley Concursal ocurra lo contrario en caso de liquidación.	Concurso; determinacion de la masa pasiva, credito subordinado	AP Lugo (Sección 1ª), sentencia núm. 410/2008 de 16 mayo. JUR 2008\339255	Concursal
238	AP	2008	(Sentencia confirmada o inadmisión de recurso contra la misma) QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: compraventa realizada con finalidad fraudulenta: nulidad: perjuicio al resto de los acreedores. COMPETENCIA DE JUECES Y TRIBUNALES: OBJETIVA: nulidad de los actos posteriores a la fecha de la retroacción de la quiebra: deberán ser resueltos dentro del marco de la quiebra, por el Juez que conozca de ella, y en razón a la "vis atractiva" que se desprende de tal estado y situación.	Quiebra; retroaccion; compraventa fraudulenta	AP Alicante (Sección 8ª), sentencia núm. 174/2008 de 7 mayo. JUR 2009\32891	Concursal
239	AP	2008	QUIEBRA: EFECTOS: nulidad de los actos posteriores a la fecha de retroacción: procedencia: compraventa: finalidad fraudulenta: vendedora accionista de la compradora: lo determinante no es la fecha del contrato de ejecución de obra sino la fecha de la concesión de la opción de compra y del contrato de dación en pago, verdaderos actos dispositivos, los cuales tuvieron lugar después de la fecha fijada para la retroacción de la quiebra.	Quiebra; retroaccion; nulidad de compraventa por ser la vendedora accionista de la compradora; acto dispositivo oneroso con persona especialmente relacionada	AP Alicante (Sección 8ª), sentencia núm. 169/2008 de 6 mayo. JUR 2009\32893	Concursal
240	AP	2008	(Sentencia confirmada o inadmisión de recurso contra la misma) QUIEBRA: DECLARACION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: compraventa con finalidad fraudulenta: devolución del valor de la vivienda en el momento de la primera transmisión: inexistencia de enriquecimiento injusto. COMPETENCIA DE JUECES Y TRIBUNALES: OBJETIVA: nulidad de los actos posteriores a la fecha de retroacción de la quiebra: deberán ser resueltos dentro del marco de la quiebra, por el Juez que conozca de ella, y en razón a la "vis atractiva" que se desprende de tal estado y situación.	Quiebra; retroaccion; compraventa fraudulenta	AP Alicante (Sección 8ª), sentencia núm. 163/2008 de 30 abril. JUR 2009\32915	Concursal
241	AP	2008	PAGARE: ACCIONES POR FALTA DE PAGO: EXCEPCIONES DEL DEUDOR: «exceptio doli»: requisitos; improcedencia: endoso: concierto o dolo no acreditados.	Pagare; excepciones interpuestas por el deudor	AP Málaga (Sección 4ª), sentencia núm. 115/2008 de 27 febrero. AC 2008\1252	Civil/ Cambiario
242	AP	2008	SOCIEDADES ANONIMAS: JUNTA GENERAL: impugnación de acuerdos: improcedencia: no indicación de cuál era el orden del día de la junta, ni del contenido de los acuerdos objeto de impugnación, pese a que el demandante pudo haber conocido el contenido de los acuerdos asistiendo a la junta general: impugnación respecto de la actuación de los liquidadores durante el proceso de liquidación.	Sas; impugnacion acuerdos sociales respecto actuacion de liquidadores	AP Madrid (Sección 28ª), sentencia núm. 40/2008 de 8 febrero. JUR 2008\113324	Mercantil
243	AP	2007	CONCURSO: CALIFICACION: culpable: procedencia: inventario acompañado con la solicitud de concurso de acreedores que adolece de inexactitudes graves, ocultación de bienes, en concreto los que eran objeto del referido contrato de arrendamiento financiero, venta de un inmueble por un precio muy inferior al de mercado y retraso en el cumplimiento del deber de instar el concurso de acreedores: efectos.	Concurso culpable	AP Barcelona (Sección 15ª), sentencia núm. 541/2007 de 29 noviembre. JUR 2009\33340	Concursal
244	AP	2007	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: existencia: desaparición de hecho de la sociedad sin adoptar las cautelas legales adecuadas: constitución posterior de otras empresas con idéntico o similar objeto social.	Srls; responsabilidad de los administradores por desaparicion de hecho de la sociedad	AP Alicante (Sección 7ª), sentencia núm. 216/2007 de 15 junio. JUR 2008\157896	Mercantil

245	AP	2006	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: cierre de la empresa: imposibilidad manifiesta de realizar el fin social.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Tarragona (Sección 1ª), sentencia de 16 octubre 2006. JUR 2007\145080	Mercantil
246	AP	2006	SOCIEDADES DE RESPONSABILIDAD LIMITADA: administradores: responsabilidad: caducidad de la acción: improcedencia: aplicación del plazo de cuatro años; liquidador: responsabilidad: estimación: la conducción de la sociedad hacia un proceso ficticio de liquidación sin contenido real y posterior extinción causó un perjuicio real y cierto a la acreedora, que se vio imposibilitada de hacer efectivo su legítimo derecho de crédito.	SRLs; responsabilidad del liquidador por proceso ficticio de liquidacion en perjuicio de acreedores	AP Barcelona (Sección 15ª), sentencia de 15 junio 2006. JUR 2007\72171	Mercantil
247	AP	2006	PAGARE: ACCIONES POR FALTA DE PAGO: excepciones del deudor: falta de provisión de fondos: improcedencia: arrendamiento de obra: desacuerdo puntual sobre ciertos extremos de las obras que justificaron dicho pagaré, relativas a imbornales y tapas de alcantarillado que no estaban bien resueltas.	Pagare, acciones por falta de pago	AP Castellón (Sección 1ª), sentencia núm. 101/2006 de 9 junio. JUR 2006\253450	Civil/ Cambiario
248	AP	2006	CULPA CONTRACTUAL: RESPONSABILIDAD: procedencia: falta de acreditación por la demandada de que se haya incumplido la asunción de los pagos por apertura de establecimientos, ni se acredita que no ejercite su actividad mercantil regularmente la empresa actora ni que no se haya prestado el servicio o asistencia cuando fue requerida: admisión de la entrega de mercancias.	Incumplimiento de contrato	AP Vizcaya (Sección 3ª), sentencia núm. 395/2006 de 7 junio. JUR 2007\96798	Contratos mercantiles
249	AP	2006	SOCIEDADES ANONIMAS:ADMINISTRADORES: ACCION INDIVIDUAL DE RESPONSABILIDAD: procedencia:acción ejercitada por acreedor de la sociedad: acreditación de la existencia, vencimiento, exigibilidad y cuantía de la deuda de la sociedad compradora y codemandada: cese definitivo por ésta en su actividad empresarial, desaparición de la sede social y eliminación de su patrimonio: indiligencia de sus administradores.	Sas; responsabilidad de los administradores; ejercicio accion individual por acreedor social	AP Barcelona (Sección 15ª), sentencia de 31 mayo 2006. AC 2007\566	Mercantil
250	AP	2006	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: RESPONSABILIDAD: estimación: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello en el plazo de dos meses: responsabilidad «ex lege» y no sólo por las deudas posteriores al incumplimiento.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Lugo (Sección 1ª), sentencia núm. 162/2006 de 29 mayo. AC 2006\1100	Mercantil
251	AP	2006	QUIEBRA: RETROACCION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: venta realizada a una sociedad formada por el administrador de la quebrada y su cónyuge, constituida unos días antes de la firma del contrato privado de compraventa: artificio de constituir una sociedad con la finalidad de despatrimonializar a la quebrada: coincidencia de intereses en la vendedora y la compradora: transmisión de las diez fincas resultantes de la calificación o construcción realizada a terceros subadquirientes que no contrataron con la quebrada y que se hallan bajo la salvaguarda del art. 34 LH.	Quiebra; retroaccion; levantamiento de bienes	AP Madrid (Sección 13ª), sentencia núm. 488/2006 de 10 mayo. JUR 2007\168213	Concursal
252	AP	2006	ABUSO DE DERECHO: improcedencia: por retraso desleal: préstamo: intereses de demora: reclamación por el ICO: liquidación por la entidad actora prestamista de la póliza por incumplimiento del demandado: demanda interpuesta diez años después del vencimiento de la última cuota, siendo el ejercicio de la acción personal de quince años: inexistencia de conducta pasiva de la acreedora.	Poliza de credito; abuso de derecho por retraso desleal de la liquidacion por la prestamista (ICO)	AP Valencia (Sección 7ª), sentencia núm. 273/2006 de 8 mayo. JUR 2006\230766	Contratos bancarios
253	AP	2006	TERCERO HIPOTECARIO: EXISTENCIA: entidad de crédito otorgante de la hipoteca: terreno hipotecado adquirido por permuta atípica por pisos a realizar en la misma: falta de anotación registral de la imposibilidad de hipoteca del terreno pese a ser ello posible.	Hipoteca; derechos reales; registros	AP Badajoz (Sección 2ª), sentencia núm. 173/2006 de 2 mayo. JUR 2006\166592	Contratos bancarios
254	AP	2006	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: cese de la condición de administrador antes de los pedidos realizados: cese no inscrito: sociedad no incursa en causa de disolución.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Murcia (Sección 5ª), sentencia núm. 179/2006 de 24 abril. JUR 2006\159134	Mercantil

255	AP	2006	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: situación creada de pérdidas que dejaron reducido el patrimonio contable a menos de la mitad del capital social.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Asturias (Sección 1ª), sentencia núm. 137/2006 de 6 abril. JUR 2006\140153	Mercantil / Capital Social
256	AP	2006	QUIEBRA: DECLARACION DE QUIEBRA: efectos: retroacción: nulidad de los actos posteriores a la fecha de retroacción: desestimación: hipoteca constituida para la concesión de préstamo para la adquisición de la nave que disfrutaba el deudor en concepto de leasing: ausencia de perjuicio para los acreedores.	Quiebra; retroaccion; hipoteca para adquisicion de nave en leasing no perjudica acreedores	AP Madrid (Sección 10ª), sentencia núm. 237/2006 de 3 abril. JUR 2006\159807	Concursal
257	AP	2006	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: concurrencia de causa de disolución: inactividad o paralización de sus órganos sociales: responsabilidad solidaria de la administradora con la sociedad por las deudas sociales.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Madrid (Sección 10ª), sentencia núm. 146/2006 de 27 febrero. JUR 2006\118805	Mercantil
258	AP	2006	SOCIEDADES DE RESPONSABILIDAD LIMITADA: administradores: responsabilidad: estimación: por no desempeñar el cargo con la diligencia debida, y por no promover la disolución de la sociedad concurriendo dos causas para ello; la renuncia al cargo carece de efectos frente a tercero al no constar inscrita.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Murcia (Sección 1ª), sentencia núm. 89/2006 de 22 febrero. JUR 2007\21205	Mercantil
259	AP	2006	TRANSPORTE TERRESTRE: RECLAMACION DE CANTIDAD: procedencia: pérdida de la mercancía: ausencia de toda prueba sobre el motivo por el que tal bulto se perdió: ha de perjudicar a la parte demandada; acaecimiento de un robo en el camión en que se encontraban las mercancías: ausencia de dolo del transportista: limitación de responsabilidad: cuantificación.	Contrato de transporte; reclamacion de cantidad	AP Madrid (Sección 28ª), sentencia núm. 5/2006 de 17 febrero. JUR 2006\264846	Contratos mercantiles
260	AP	2006	BUENA FE: EN EL EJERCICIO DE LOS DERECHOS: procedencia: préstamo: ausencia de retraso desleal: no consta que la actora haya realizado acto alguno del que pudiera inferirse una condonación del crédito y/o sus intereses: la condonación no era una medida de gracia incondicional, exenta de cualquier otro requisito, sino que estaba subordinada al pago voluntario e inmediato de la totalidad del resto de la deuda.PRESCRIPCION DE ACCIONES: IMPROCEDENCIA: préstamo: intereses moratorios: aplicación del plazo de 15 años.	Prestamo; ausencia de retraso desleal	AP Alicante (Sección 6ª), sentencia núm. 58/2006 de 8 febrero. JUR 2006\243777	Contratos mercantiles
261	AP	2006	SOCIEDADES DE RESPONSABILIDAD LIMITADA: organos de la Sociedad: administradores: responsabilidad: solidaria: por incumplimiento de sus obligaciones: estimación: situación de insolvencia de la sociedad sin instar la disolución ordinaria ni judicial.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Badajoz (Sección 2ª), sentencia núm. 41/2006 de 1 febrero. JUR 2006\297170	Mercantil
262	AP	2005	CONTARTOS BANCARIOS: CUENTA CORRIENTE: reclamación de cantidad: procedencia: ausencia de renuncia por la ejecutante a los intereses: procedencia de devolución de las cantidades que excedan de la suma del principal más los intereses a que fue condenada: determinación.	Cuenta corrinte; erclamacion de cantidad	AP Sevilla (Sección 5ª), sentencia de 7 diciembre 2005. JUR 2006\176128	Contratos bancarios
263	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: JUNTA GENERAL: IMPUGNACION DE ACUERDOS SOCIALES: procedencia: aprobación de cuentas y liquidación: vulneración de derecho de información respecto de un ejercicio social que impide la aprobación de los siguientes y la liquidación.	SRLS; impugnacion acuerdos sociales de aprobacion de cuentas y liquidacion	AP Islas Baleares (Sección 3ª), sentencia núm. 473/2005 de 4 noviembre. AC 2005\2365	Mercantil
264	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: deuda superior al capital social desembolsado: situación de insolvencia.	SRLs; responsabilidad de los administradores; recapitalizar o liquidar	AP Madrid (Sección 9ª), sentencia núm. 22/2005 de 5 octubre. JUR 2005\257849	Mercantil/ Capital social
265	AP	2005	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: por falta de convocatoria de Junta General que acuerde la disolución de la sociedad concurriendo causa para ello: inactividad o desaparición de hecho la sociedad que implica la imposibilidad manifiesta de realizar el fin social; pérdidas que dejen reducido el patrimonio a una cantidad inferior a la mitad del capital social.	Sas; responsabilidad de los administradores por incumplimiento deber recapitalizar o liquidar	AP Madrid (Sección 9ª), sentencia núm. 8/2005 de 15 septiembre. JUR 2005\258078	Mercantil/ Capital social

266	AP	2005	QUIEBRA: DECLARACION DE QUIEBRA: efectos: retroacción: nulidad de los actos posteriores a la fecha de retroacción: improcedencia: compraventa de vivienda: transmisión que no ha causado perjuicio a los intereses de los acreedores en su conjunto: operación que se correspondía plenamente con el objeto social de la entidad quebrada: coincidencia del precio de la venta con el valor de mercado: inclusión dentro del mismo de las obligaciones con garantías hipotecarias anteriores a la venta: ocupación efectiva de la vivienda por la adquirente.	Quiebra; retroaccion; compraventa de vivienda que no perjudica acreedores por caber en objeto social	AP Madrid (Sección 10ª), sentencia núm. 492/2005 de 7 julio. JUR 2005\185806	Concursal
267	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: administradores: responsabilidad: acción ejercitada por acreedor social: estimación: solidaria junto con al ela empresa: falta de disolución de la sociedad en el plazo de dos meses concurriendo causa para ello: perdidas que dejaron reducido el patrimonio contable a menos de la mitad del capital social.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Madrid (Sección 10ª), sentencia núm. 506/2005 de 4 julio. JUR 2005\185953	Mercantil / Capital Social
268	AP	2005	LETRA DE CAMBIO: cesión ordinaria: requisitos: no es precisa ni constitutiva la notificación al deudor: carácter bilateral que sólo vincula al cedente y al cesionario, y su eficacia no viene condicionada a la notificación del deudor.EJECUCIÓN FORZOSA (LECIV/2000): oposición a la ejecución: motivos de fondo: falta de legitimación activa: desestimación: ejecución por quien es la libradora de los pagarés, es decir, quien figura nominativamente en los títulos; novación extintiva de la deuda: desestimación: falta de prueba de la existencia de acuerdos en tal sentido.	Letra de cambio; oposicion a la ejecucion forzosa	AP Madrid (Sección 14ª), sentencia núm. 436/2005 de 21 junio. JUR 2005\175955	Civil/ Cambiario
269	AP	2005	CONTRATO DE MEDIACION O CORRETAJE: AGENTES DE LA PROPIEDAD INMOBILIARIA: resolución unilateral: improcedencia: pacto de irrevocabilidad al pactarse el mandato y la exclusividad durante tiempo determinado.	Corretaje; APIs; irrevocabilidad contrato	AP Sevilla (Sección 5ª), sentencia núm. 309/2005 de 20 junio. JUR 2005\233792	Contratos mercantiles
270	AP	2005	ENRIQUECIMIENTO SIN CAUSA: INEXISTENCIA: adjudicación en subasta por la acreedora ejecutante de la vivienda por un precio inferior al tasado de común acuerdo entre las partes: dos primeras subastas desiertas.	Enriquecimiento injusto; adquisicion bien bajo valor mercado en subasta siendo anteriores desiertas	AP Málaga (Sección 4ª), sentencia núm. 533/2005 de 16 junio. JUR 2006\33071	Civil
271	AP	2005	CONTRATOS BANCARIOS: CUENTA CORRIENTE: reclamación de cantidad: procedencia: saldo deudor: falta de acreditación de una posible inexactitud cuantitativa o cualitativa de los numerosos y variados cargos que figuran consignados en el «debe» de la cuenta de la que es titular el demandado: determinación: intereses.	Cuenta corrinte; erclamacion de cantidad	AP Alicante (Sección 6ª), sentencia núm. 246/2005 de 11 mayo. JUR 2005\163456	Contratos bancarios
272	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: pago por el actor de deuda de sociedad de responsabilidad limitada: reclamación contra el nuevo administrador que no lo era al tiempo de contraerse la deuda.	SRLs; responsabilidad de los administradores	AP Madrid (Sección 10ª), sentencia núm. 324/2005 de 4 mayo. JUR 2005\142898	Mercantil
273	AP	2005	CONTRATO DE AGENCIA: indemnización por clientela: improcedencia: falta de acreditación de captación de clientes o del aumento de la cartera de clientes; indemnización por falta de preaviso: procedencia: ausencia de incumplimiento contractual del agente: cuantificación.	Contrato de agencia; credito devengado de indemnizacion por clientela	AP Málaga (Sección 4ª), sentencia núm. 342/2005 de 18 abril. JUR 2005\143462	Contratos mercantiles
274	AP	2005	CONTRATOS BANCARIOS: PRESTAMO: reclamación de cantidad: procedencia: vencimiento anticipado por impago.CONDICIONES GENERALES DE LA CONTRATACION: NULIDAD: condiciones abusivas: improcedencia: préstamo: vencimiento anticipado por impago: aceptación.CLAUSULA PENAL: MODERACION DE LA PENA: procedencia: préstamo: indemnización fijada por demora en contrato desproporcionadamente alta para las circunstancias concurrentes.	Prestamo; vencimiento anticipado por impago	AP Valencia (Sección 9ª), sentencia núm. 149/2005 de 12 abril. JUR 2005\165048	Contratos bancarios
275	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: cierre de instalaciones dejando deudas pendientes.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Castellón (Sección 1ª), sentencia núm. 52/2005 de 7 abril. JUR 2005\130222	Mercantil
276	AP	2005	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: solidaria junto con la de la empresa: acción ejercitada por acreedor social: incumplimiento del deber de disolver legalmente la sociedad ante la imposibilidad de realizar el fin social y la situación de sobreseimiento general de pagos y carencia de bienes.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Barcelona (Sección 15ª), sentencia núm. 145/2005 de 6 abril. JUR 2005\184134	Mercantil
277	AP	2005	JUICIO EJECUTIVO: NULIDAD: título sin fuerza ejecutiva: cantidad ilíquida: improcedencia: póliza de préstamo: liquidez de la deuda predeterminada en la propia póliza; EXCEPCIONES: prescripción: procedencia: intereses remuneratorios: aplicación del art. 1966 obligación 3ª CC.	Prestamo; juicio ejecutivo	AP Madrid (Sección 21ª), sentencia núm. 130/2005 de 15 marzo. JUR 2005\107957	Civil/ Mercantil

278	AP	2005	SENTENCIA: INCONGRUENCIA: procedencia: incongruencia «extra petitum»: por conceder lo no pedido: juicio cambiario: pagaré: demandante de oposición que sólo opuso la extinción del crédito y apreciación por el Juzgador de otra causa de oposición que ni explícita ni implícitamente había sido alegada.	Pagare; juicio cambiario	AP Valencia (Sección 9ª), sentencia núm. 107/2005 de 8 marzo. JUR 2005\131485	Civil/ Cambiario
279	AP	2005	SOCIEDADES ANONIMAS: ADMINISTRADORES: acción individual de responsabilidad: inexistencia: impago de débito que no acredita culpa por sí mismo: acción de responsabilidad societaria: inexistencia: situaciones procedentes doctrinalmente.	Sas; no responsabilidad de los administradores por impago de debito	AP Guadalajara (Sección 1ª), sentencia núm. 55/2005 de 2 marzo. JUR 2005\90642	Mercantil
280	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello.PERSONAS JURIDICAS: personalidad: penetración de los Tribunales en su «substratum», levantando el velo jurídico: improcedencia: falta de acreditación de sucesión empresarial.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion; levantamiento del velo	AP Barcelona (Sección 15ª), sentencia núm. 89/2005 de 25 febrero. JUR 2005\117709	Mercantil
281	AP	2005	PAGARE: ACCIONES POR FALTA DE PAGO: excepciones del deudor: extinción del crédito cambiario: improcedencia: pago al tomador no oponible al endosatario.	Pagare; excepciones interpuestas por el deudor	AP Murcia (Sección 2ª), sentencia núm. 59/2005 de 23 febrero. JUR 2006\68557	Civil/ Cambiario
282	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: falta de condición de administrador cuando comenzaron las disfunciones de la sociedad: cese del administrador: no inscripción del cese correspondiendo la inscripción al nuevo administrador o a los socios.	SRLS; no responsibilidad de los administrador por no ostentar el cargo al empezar las disfunciones	AP Jaén (Sección 3ª), sentencia núm. 9/2005 de 24 enero. JUR 2005\146292	Mercantil
283	AP	2004	JUICIO CAMBIARIO: posición del demandado: demanda de oposición: excepciones: falta de provisión de fondos: existencia: efecto firmado y relaciones comerciales entre las partes sin descargo de su causa.	Juicio cambiario; falta de provision de fondos	AP Almería (Sección 2ª), sentencia núm. 252/2004 de 29 noviembre. JUR 2005\57259	Civil/ Cambiario
284	AP	2004	SOCIEDADES ANONIMAS: ADMINISTRADORES: acción de responsabilidad: requisitos: ejercicio por terceros: ausencia de convocatoria de Junta para adopción de acuerdo de disolución de la sociedad: alcance.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Madrid (Sección 10ª), sentencia núm. 951/2004 de 19 octubre. JUR 2005\46969	Mercantil
285	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ORGANOS DE LA SOCIEDAD: administradores: responsabilidad: acciones: concepto y alcance: obligación de disolución de la sociedad: causas.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Barcelona (Sección 15ª), sentencia núm. 424/2004 de 23 septiembre. JUR 2004\292513	Mercantil
286	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: cese de hecho no eximente.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Barcelona (Sección 15ª), sentencia núm. 424/2004 de 23 septiembre. JUR 2004\292513	Mercantil
287	AP	2004	PAGARE: ACCIONES POR FALTA DE PAGO: excepciones del deudor: inexistencia o falta de validez de la propia declaración cambiaria: improcedencia: firma de los pagarés por el administrador de la sociedad deudora: la simple omisión en la antefirma de su función representativa, no le convierte en deudor cambiario: falta de acreditación de que librase deliberadamente los referidos pagarés carentes de antefirma debido a su propósito de asumir personalmente la deuda que los mismos representaban.	Pagare, incumplimiento requisitos formales, falta de legitimacion pasiva	AP Barcelona (Sección 16ª), sentencia núm. 465/2004 de 7 septiembre. JUR 2004\287973	Civil/ Cambiario
288	AP	2004	COMPETENCIA DESLEAL: IMPROCEDENCIA: acto publicitario: texto litigioso que se orienta a preconizar la prescripción de especialidades farmacéuticas de marca frente al mismo principio activo como especialidad genérica.	Competencia desleal	AP Madrid (Sección 10ª), sentencia núm. 837/2004 de 6 septiembre. AC 2005\212	Mercantil/ Civil
289	AP	2004	(Sentencia confirmada o inadmisión de recurso contra la misma) SUSPENSION DE PAGOS: JUNTA GENERAL DE ACREEDORES: convenio: aprobación: improcedencia: inexactitud fraudulenta del balance e inteligencia fraudulenta entre el deudor y uno o más acreedores o de éstos entre sí para votar a favor del convenio.	Suspension de pagos; convenio frudulento	AP Barcelona (Sección 15ª), sentencia núm. 391/2004 de 29 julio. JUR 2005\126464	Concursal
290	AP	2004	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: desaparición de hecho de la sede social: incumplimiento por parte del administrador de la obligación de convocar junta general con objeto de proceder a la disolución de la sociedad; plazo: prescripción de la acción: desestimación: falta de transcurso del plazo de cuatro años del art. 949 CCom.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Barcelona (Sección 15ª), sentencia núm. 364/2004 de 8 julio. JUR 2005\178351	Mercantil

291	AP	2004	QUIEBRA: CALIFICACION: fraudulenta: procedencia: no puesta a disposición del Juzgado de los bienes de la quebrada, no aportación de la contabilidad así como la situación del pasivo de la quebrada respecto del activo y distinta valoración de sus bienes.	Quiebra fraudulenta por no aportacion de contabilidad y valoracion fraudulenta de activos y pasivos	AP León (Sección 1ª), sentencia núm. 124/2004 de 31 mayo. JUR 2004\279302	Concursal
292	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: situación de cierre y abandono de la sociedad: pérdidas que redujeron su patrimonio contable a menos de la mitad del capital social; acción individual de responsabilidad: ausencia de decisión destinada a paliar la situación económica, tendente a aumentar el capital social o, en su caso, solicitar suspensión de pagos o promover su disolución, resolviendo, en último término, cesar en el ejercicio de la actividad social: daño efectivo a la sociedad acreedora.EXCEPCIONES: DEFECTO LEGAL EN EL MODO DE PROPONER LA DEMANDA: improcedencia: descripción de los concretos hechos que sostienen la petición de la parte actora, con perfecta identificación de las personas de los demandados.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Las Palmas (Sección 4ª), sentencia núm. 282/2004 de 5 mayo. JUR 2004\194184	Mercantil/ Capital social
293	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: SOCIOS: responsabilidad: improcedencia: el hecho de que se trate de una sociedad familiar resulta completamente insuficiente para extender la responsabilidad por la deuda reclamada a los socios de la misma, cuando no se ha probado en momento alguno que fuera constituida precisamente con el ánimo de defraudar a sus proveedores.PERSONAS JURIDICAS: personalidad: penetración de los Tribunales en su «substratum», levantando el velo jurídico: improcedencia: no basta las meras referencias a unas identidades personales entre las dos sociedades: necesidad de acreditar el ánimo y el actuar defraudatorio.	SRLs; no levantamiento del velo solo por ser empresa familiar si no han actuado en perjuicio de acreedores	AP Madrid (Sección 10ª), sentencia núm. 554/2004 de 21 abril. JUR 2004\247564	Mercantil
294	AP	2004	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: inexistencia: cese acreditado mediante escritura anterior a constituirse la sociedad en causa de disolución.	Sas; no responsabilidad de los administradores por haber cesado del cargo anteriormente a causa de disolucion	AP Barcelona (Sección 15ª), sentencia de 19 marzo 2004. JUR 2004\224996	Mercantil
295	AP	2004	QUIEBRA: revocación: desestimación: declarada por sentencia firme: principio de intangibilidad de las resoluciones jurisdiccionales; fraudulenta: estimación: incumplimiento de la obligación de llevanza de libros de contabilidad y alzamiento de bienes: enajenación de sus activos en favor de terceros que impedía o dificultaba la satisfacción de los créditos de sus acreedores.	Quiebra; retroaccion; enajenamiento de bienes en perjuicio de acreedores	AP Alicante (Sección 5ª), sentencia núm. 127/2004 de 13 febrero. JUR 2004\92673	Concursal
296	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: existencia: aportación de dinero a la sociedad por condonación de deudas sociales: no enerva la responsabilidad si no es en concepto de aumento de capital social: ausencia de efectos retroactivos si la sociedad estaba incursa en causa legal de disolución.	SRLs; responsabilidad de los administradores por condonacion de deudas sociales	AP Barcelona (Sección 15ª), sentencia de 30 enero 2004. JUR 2004\225027	Mercantil
297	AP	2004	(Sentencia confirmada o inadmisión de recurso contra la misma) OBLIGACIONES: ACCION DE CUMPLIMIENTO: procedencia: incumplimiento de las obligaciones de pago asumidas en el contrato celebrado consistentes en el compromiso de asumir el pago de una hipoteca que gravaba el domicilio del demandante: interpretación del contrato: no resulta posible interpretar la cláusula como un compromiso o garantía de preferencia sobre la distribución de beneficios: alcance de la responsabilidad: el gestor únicamente respondería del daño que el incumplimiento hubiera producido por su propia culpa o negligencia.SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: el art. 105.5 LSRL está pensado para servir de instrumento de tutela de los derechos de terceros y no del socio; acción individual: venta de la totalidad del patrimonio de la sociedad sin haber aplicado ninguna cantidad al pago del crédito reclamado y dejando a la sociedad completamente despatrimonializada y sin activo alguno: para que exista responsabilidad es preciso que concurra negligencia, y el resultado adverso de la gestión social no la presupone.	Hipoteca; incumplimiento obligaciones de pago; no responsabilidad de los administradores puesto que se vulneran derechos del socio no de los acreedores	AP Barcelona (Sección 15ª), sentencia de 30 enero 2004. JUR 2004\97908	Mercantil/ Contractual

298	AP	2003	PRESCRIPCION DE ACCIONES: IMPROCEDENCIA: sociedades de responsabilidad limitada: responsabilidad de administradores: aplicación del plazo del art. 949 CCom: cómputo: cese de hecho de los administradores: es preciso que simultánea o previamente se haya producido el cese de derecho para que produzca esos efectos: la falta de ejercicio del cargo no exonera de responsabilidad al administrador, que tampoco puede extraer provecho de esa circunstancia cuando existe una obligación legal de actuar.	SRLS; responsabilidad de los administradores anunque cesados en el cargo a posteriori	AP Barcelona (Sección 15ª), sentencia núm. 793/2003 de 16 diciembre. JUR 2004\31568	Mercantil
299	AP	2003	SOCIEDADES ANONIMAS: ADMINISTRADORES: responsabilidad: improcedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: deuda contraída al tiempo que la sociedad estaba administrada por la demandada: abandono del domicilio sin que conste haber accedido al registro la modificación del domicilio social.PRESCRIPCION DE ACCIONES: IMPROCEDENCIA: sociedades anónimas: responsabilidad de administradores: aplicación del plazo de cuatro años del art. 949 CCom	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Madrid (Sección 10ª), sentencia núm. 177/2003 de 9 diciembre. JUR 2004\89577	Mercantil
300	AP	2003	SOCIEDADES ANONIMAS: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: desaparición de facto en un contexto de crisis económica.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Barcelona (Sección 15ª), sentencia núm. 761/2003 de 2 diciembre. JUR 2004\29005	Mercantil
301	AP	2003	QUIEBRA: EXAMEN Y RECONOCIMIENTO DE CREDITOS: exclusión de crédito: improcedencia: no cabe impugnar un crédito que nace de una resolución judicial dictada en anterior procedimiento y que ha sido plenamente consentida en aquel proceso por la parte hoy impugnante.	Quiebra; reconocimiento de creditos	AP Islas Baleares (Sección 3ª), sentencia núm. 564/2003 de 31 octubre. JUR 2004\76072	Concursal
302	AP	2003	QUIEBRA: efectos: retroacción: doctrina jurisprudencial; nulidad de los actos posteriores a la fecha de retroacción: finalidad: aplicación del principio «pars conditio creditorum»; estimación: dación en pago: bienes y derechos salidos del patrimonio del deudor no pudieran reintegrarse a la masa por pertenecer a tercero no demandado: devolución a la masa el valor de los inmuebles al momento de la dación en pago.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion; dacion en pago perjudica la par conditio creditorum	AP Málaga (Sección 5ª), sentencia núm. 893/2003 de 22 octubre. JUR 2003\265050	Concursal
303	AP	2003	SEGURO DE TRANSPORTES TERRESTRES: reclamación de cantidad: procedencia: cobertura del riesgo de caída de la mercancía en tránsito a consecuencia de rotura de los elementos de sujeción de la estiba: no concurrencia de causa de exclusión: indemnización por la aseguradora del daño producido.	Reclamacion de cantidad - Seguros	AP Pontevedra (Sección 1ª), sentencia núm. 339/2003 de 24 septiembre. JUR 2006\24334	Civil
304	AP	2003	SEGURO CONTRA DAÑOS: seguro de responsabilidad civil: acción directa del perjudicado contra el asegurador: procedencia: accidente en el recinto de la pista propiedad del demandado cuando utilizaba un mini-kart por el circuito de la misma: inexistencia de velocidad excesiva: existencia de un obstáculo en la pista con el que colisionó: indemnización por los días que resultó incapacitado como consecuencia del accidente.	Reclamacion de cantidad - Seguros	AP Murcia (Sección 2ª), sentencia núm. 156/2003 de 17 junio. JUR 2003\275096	Civil
305	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: acción individual de responsabilidad: falta de acreditación de nexo causal.PERSONAS JURIDICAS: personalidad: penetración de los Tribunales en su «substratum», levantando el velo jurídico: improcedencia: falta de acreditación de que se han utilizado los medios concedidos por la legislación societaria con finalidad defraudatoria.	SRLS; no responsibilidad de los administradores por falta de nexo causal	AP Barcelona (Sección 15ª), sentencia de 10 junio 2003. JUR 2004\38121	Mercantil
306	AP	2003	QUIEBRA: retroacción: nulidad de los actos posteriores a la fecha de retroacción: estimación: compraventa de fincas en el período de la retroacción: perjuicio para los acreedores de la quiebra; no afecta el acto de disposición realizado por el adquirente del quebrado en favor del tercero subadquirente: protección del tercero hipotecario.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion	AP Alicante (Sección 5ª), sentencia núm. 239/2003 de 9 mayo. JUR 2003\222759	Concursal
307	AP	2003	PROPIEDAD INDUSTRIAL: marcas: acciones: acción de nulidad: prohibiciones: estimación: inscripción de marca susceptible de riesgo de asociación o confusión con marca dominante.	propiedad industrial, marcas	AP Granada (Sección 3ª), sentencia núm. 361/2003 de 26 abril. JUR 2003\230285	Mercantil
308	AP	2003	SOCIEDADES ANONIMAS: administradores: representación: estimación: concertación de contrato de préstamo: ratificación posterior por la sociedad demandada; tercero de buena fe; acción individual de responsabilidad: requisitos y diferencias con la acción social de responsabilidad; desestimación: prescripción de la acción: transcurso del plazo de un año a partir de la fecha en que se constata la desaparición social.	Sas; responsabilidad de los administradores; ejercicio accion individual por acreedor social	AP Barcelona (Sección 15ª), sentencia de 8 abril 2003. JUR 2004\38015	Mercantil/ Civil

309	AP	2003	JUICIO EJECUTIVO: LEGITIMACION ACTIVA: desestimación: no constancia de la transmisión de la letra ni por endoso ni por cesión ordinaria, quedando identificada la cambial con la entidad mercantil actora tan sólo por los sellos estampados por la misma en aquélla.	Juicio cambiario; letra de cambio	AP Teruel (Sección Unica), sentencia núm. 69/2003 de 1 abril. JUR 2003\142650	Civil/ Cambiario
310	AP	2003	SOCIEDADES ANONIMAS: ADMINISTRADORES: acción de responsabilidad: desestimación: falta de acreditación que la demandada se hallaba incursa en causa de disolución.	Sas; no responsabilidad de los administradores por incumplimiento deber disolucion	AP Guadalajara (Sección Unica), sentencia núm. 77/2003 de 17 marzo. JUR 2003\136818	Mercantil / Capital Social
311	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: doctrina jurisprudencial: diferencias entre la acción «individual» y la acción «social»; procedencia: acción individual de responsabilidad: ejercitada por acreedor de la sociedad: patente dejación de las más elementales obligaciones exigidas por el art. 61 LSRL.	SRLs; accion individual de responsabilidad	AP Madrid (Sección 20ª), sentencia de 12 febrero 2003. JUR 2004\160144	Mercantil/ Civil
312	AP	2003	COOPERATIVAS: ORGANOS DE LA SOCIEDAD: CONSEJO RECTOR: responsabilidad de los miembros: desestimación: los demandados ya no forman parte del Consejo: dimisión anterior a los hechos: a pesar de tardía inscripción en Registro de Cooperativas.	Cooperativas; responsabilidad de los miembros del consejo	AP Murcia (Sección 3ª), sentencia núm. 29/2003 de 6 febrero. JUR 2003\134956	Mercantil
313	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: abandono del domicilio social: cese de actividad: deudas impagadas.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Barcelona (Sección 15ª), sentencia de 17 enero 2003. JUR 2004\14175	Mercantil / Capital Social
314	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: sociedad no incursa en causa de disolución: fondos propios al cierre del ejercicio en cantidad superior a la del capital social	SRLs; no responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Barcelona (Sección 15ª), sentencia de 14 enero 2003. JUR 2004\37964	Mercantil / Capital Social
315	AP	2003	CONCURSO (LEY 22/2003, DE 9 DE JULIO): CALIFICACIÓN DEL CONCURSO: CULPABLE: ESTIMACIÓN: existencia de "ratios" económicos-contables que demuestran la insolvencia de la concursada, junto con una clara situación de sobreseimiento general en el pago de las obligaciones, y una mala gestión empresarial, falta de colaboración con el administrador concursal y defectuosa y tardía presentación de documentación contable y mercantil ineludible, después del proceso preconcursal instado por la sociedad deudora: cobertura del déficit patrimonial por los administradores sociales de la concursada.	Concurso culpable	AP Zaragoza (Sección 5ª), sentencia núm. 174/2014 de 29 mayo. JUR 2014\187619	Concursal
316	AP	2014	SOCIEDADES DE RESPONSABILIDAD LIMITADA: SOCIOS: EXPULSIÓN: estimación: responsabilidad en su condición de administrador único: disposición de forma indebida y sin autorización del resto de los socios de fondos societarios, en beneficio propio y sin devolver tal cantidad, causando un daño directo a las arcas sociales, obligando a un aumento de capital o a utilizar las reservas disponibles.	SRLs; responsabilidad del administrador unico/socio; expulsion	AP Islas Baleares (Sección 5ª), sentencia núm. 138/2014 de 5 mayo. JUR 2014\170760	Mercantil
317	AP	2014	CONSUMIDORES Y USUARIOS: CLÁUSULAS ABUSIVAS: desestimación: contrato de préstamo para la adquisición de un vehículo a motor de alta gama: intereses moratorios del 1,5% mensual: seis puntos por encima del límite fijado por la ley 1/2013 para los intereses de préstamos hipotecarios para la adquisición de vivienda habitual.	Consumidores; clausulas abusivas	AP Sevilla (Sección 8ª), sentencia núm. 102/2014 de 10 abril. JUR 2014\225580	Consumidores
318	AP	2014	CONCURSO (LEY 22/2003, DE 9 JULIO: ACTOS PERJUDICIALES PARA LA MASA ACTIVA: ACCIONES DE REINTEGRACIÓN: procedencia: dación en pago: cesión y transmisión de un ático en pago de una deuda: doctrina jurisprudencial: concepto de actos perjuiciales contra la masa activa: dación en pago por un 34% de menor valor en comparación con la venta de otro ático en el mismo edificio: claro perjuicio a la maasa activa cuando se transmite un bien de la misma por un valor inferior al real y en pago de una deuda no acreditada.	Concurso; acciones de reintegracion por actos perjudiciales contra la masa	AP Pontevedra (Sección 1ª), sentencia núm. 134/2014 de 9 abril. JUR 2014\219473	Concursal
319	AP	2014	JUICIO CAMBIARIO: PROCEDIMIENTO: DEMANDA: desestimación: demandante que no es acreedor cambiario y no es tenedor legítimo de los pagarés acompañados a la demanda: el actor no interviene en una compraventa, que alega impagada parte del precio: injustificación de la causa del endoso y falta en el endoso en blanco de la firma de los dos administradores mancomunados de la endosante: inaplicación del principio de apariencia y confianza.	Juicio cambiario; pagares	AP Granada (Sección 3ª), sentencia núm. 85/2014 de 4 abril. JUR 2014\170789	Civil/ Cambiario

320	AP	2014	CONTRATOS: INEFICACIA: RESCISION POR FRAUDE DE ACREEDORES: REQUISITOS: existencia de un crédito, posterior realización de un acto dispositivo por el deudor con ánimo de perjudicar al acreedor y ausencia por éste de otro medio para el cobro de su crédito; IMPROCEDENCIA: falta de indicación de quienes son los acreedores preexistentes perjudicados y el importe de su crédito: irrelevancia de que la acción se ejercite en sede de concurso, al amparo del art. 71.7 LC: obligación de acreditar todos los requisitos de la acción pauliana: facilidad probatoria de dicho extremo para con la administración concursal: no cabe acudir a la presunción de fraude por la gratuidad de la hipoteca en garantía de deuda ajena al no ejercitarse la acción del art. 71.2 LC. CONCURSO (LEY 22/2003, DE 9 JULIO): EFECTOS DE LA DECLARACION SOBRE LOS ACTOS PERJUDICIALES PARA LA MASA ACTIVA: ACCIONES DE REINTEGRACION: ACCION PAULIANA: ejercicio por la administración concursal, al amparo del art. 71.7 LC: obligación de acreditar todos los requisitos de dicha acción: alcance de las presunciones del art. 71.2 LC; IMPROCEDENCIA: acción pauliana: hipoteca gratuita en garantía de deuda ajena: falta de indicación de quienes son los acreedores preexistentes perjudicados y el importe de su crédito.	Concurso; rescision de contratos por fraude de acreedores; acciones de reintegracion por actos contra la masa; accion pauliana	AP Zaragoza (Sección 5ª), sentencia núm. 90/2014 de 26 marzo. JUR 2014\119799	Concursal/ contratos
321	AP	2014	CONTRATOS BANCARIOS: CLASES: DE PRÉSTAMO: cantidad reclamada en concepto de intereses remuneratorios, que constituyen el precio del contrato, teniendo en cuenta que el pacto de intereses y sus efectos están debidamente determinados en el contrato y reflejado en la tabla de amortización: interés remuneratorio del 12% que no es desproporcionado cuando el interés legal del dinero estaba al 5,50%.	Contratos bancarios; prestamo	AP Santa Cruz de Tenerife (Sección 3ª), sentencia núm. 100/2014 de 25 marzo. JUR 2014\232251	Mercantil/ Bancario
322	AP	2014	CONSUMIDORES Y USUARIOS: PROTECCIÓN: CLÁUSULAS ABUSIVAS: CLÁUSULAS SUELO: desestimación: cláusula suelo que figura en un contrato de préstamo con garantía hipotecaria: acreditación de la plena transparencia en la comercialización del producto financiero: las cláusulas suelo solo son lícitas siempre que su transparencia permita al consumidor identificar la cláusula como definidora del objeto principal del contrato y conocer el real reparto de riesgos de la variabilidad de los tipos: abusividad de cláusulas de intereses moratorios.	Consumidores; clausulas abusivas	AP Jaén (Sección 1ª), sentencia núm. 109/2014 de 18 marzo. JUR 2014\132573	Consumidores
323	AP	2014	COMPRAVENTA MERCANTIL: SUMINISTRO: RESOLUCIÓN: procedencia: reclamación de cantidad por impago: fabricación y venta de hormigón preparado: servicios de transporte de hormigón para los distintos centros de fabricación: novación modificativa: pacto de un mínimo diario de facturación: concurso voluntario de acreedores: excepción de compensación respecto de dos créditos: compensación anterior a la declaración del concurso: intereses de de demora: sustitución de la liquidez de la deuda por el “canon de razonabilidad de la oposición”: rebaja de la cantidad adeudada.	Compraventa mercantil, contrato suministro, mora	AP Madrid (Sección 21ª), sentencia núm. 149/2014 de 4 marzo. JUR 2014\106979	Mercantil/ Contractual
324	AP	2014	SOCIEDADES DE RESPONSABILIDAD LIMITADA: FUSIÓN POR ABSORCIÓN: ACCIÓN DE IMPUGNACIÓN: improcedencia: determinación del valor de canje sobre la base del valor real del patrimonio de las sociedades afectadas: no vulneración del derecho de información de los socios; acción social subsidiaria de responsabilidad de los administradores: desestimación: la fusión no es consecuencia de la exclusiva voluntad y actuación de los administradores de la sociedad.	SRLs; impugnacion de fusion por absorcion	AP Valencia (Sección 9ª), sentencia núm. 68/2014 de 27 febrero. JUR 2014\111794	Mercantil / Capital Social
325	AP	2014	CONTRATOS BANCARIOS: permuta financiera de tipos de interés: "CLIP BANKINTER": NULIDAD: procedencia: error como vicio del consentimiento: falta de información clara y completa del producto y del riesgo que conlleva: persona ajena a toda actividad financiera: persona que no tiene por actividad principal o profesional la actividad financiera: suscripción del producto de referencia en el ámbito personal como medio de inversión de sus ahorros.	Contratos bancarios; permuta financiera; vicios del consentimiento	AP Valladolid (Sección 1ª), sentencia núm. 27/2014 de 3 febrero. JUR 2014\72411	Contratos bancarios

326	AP	2014	CONTRATOS BANCARIOS: INTERESES MORATORIOS: liquidación de deuda tributaria: suspensión de la ejecución del acto administrativo impugnado: presentación de aval bancario: pago de comisiones para la concesión de dicho aval: incorrecta liquidación de las comisiones: devolución: discrepancias en el cálculo respecto de los intereses de demora: cantidad ilíquida: sustitución del criterio de liquidez de la deuda por el "canon de razonabilidad de la oposición": doctrina jurisprudencial del TS: aplicación por el Banco avalista de los criterios del Banco de España: justificación de su oposición al pago.	Contratos bancarios; aval	AP Madrid (Sección 21ª), sentencia núm. 84/2014 de 28 enero. JUR 2014\81501	Contratos bancarios
327	AP	2014	SOCIEDADES DE RESPONSABILIDAD LIMITADA: LIQUIDACION: designación judicial de un tercero imparcial para gestionar la liquidación: procedencia: protección de los intereses de todos los socios y posibles acreedores.	SRLs; nombramiento liquidadores	AP Madrid (Sección 28ª), sentencia núm. 16/2014 de 17 enero. JUR 2014\56605	Mercantil/ Capital social
328	AP	2014	DERECHO FUNDAMENTAL A OBTENER LA TUTELA EFECTIVA DE JUECES Y TRIBUNALES: Derecho de acceso a la jurisdicción: legitimación «ad causam»: aptitud para ser parte en un proceso concreto: falta de ligitimidad para interponer recurso de apelación contra sentencia dictada, por no haber formulado la acción y estando el legitimado satisfecho con la decisión de primera instancia. CONCURSO DE ACREEDORES: EFECTOS: RETROACCION: NULIDAD DE LOS ACTOS POSTERIORES A LA FECHA DE RETROACCION: Interpretación del art. 878.2 CCom: evolución jurisprudencial. Existencia: Compraventa formalizada seis meses antes de la declaración del concurso cuando aún existía vinculación personal, que supone un acto perjudicial para la masa activa por sustraerse un bien de la misma.	Concurso; nulidad de actos posteriores a la fecha de retroaccion; tutela judicial efectiva	AP Sevilla (Sección 5ª), sentencia núm. 36/2014 de 17 enero. JUR 2014\105100	Concursal
329	AP	2014	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: RESPONSABILIDAD: PRESCRIPCION: cuatro años desde el cese en la administración.	SRLS; responsabilidad de los administradores anunque cesados en el cargo a posteriori	AP Cádiz (Sección 5ª), sentencia núm. 24/2014 de 14 enero. JUR 2014\75555	Mercantil
330	AP	2013	COMPRAVENTA MERCANTIL: OBLIGACIONES DEL COMPRADOR: PAGO DEL PRECIO: INCUMPLIMENTO: existencia: defectos en el material suministrado: daños y perjuicios como consecuencia de la defectuosa pintura suministrada: evidentes diferencia de color: falta de uniformidad en la tonalidad: entrega de cosa distinta: incumplimiento contractual; caducidad de la acción: improcedencia: «aliud pro alio»: inaplicación de art. 342 CCom: no se trata de un mero vicio o defecto: los trabajos de pintura tuvieron que efectuarse de nuevo en la práctica totalidad de la construcción.	Compraventa mercantil, incumplimiento de contrato	AP Valencia (Sección 8ª), sentencia núm. 575/2013 de 23 diciembre. JUR 2014\72740	Contratos mercantiles
331	AP	2013	CONCURSO (LEY 22/2003, DE 9 JULIO): INFORME DE LA ADMINISTRACIÓN CONCURSAL Y DETERMINACIÓN DE LAS MASAS ACTIVAS Y PASIVAS DEL CONCURSO: PUBLICIDAD E IMPUGNACIÓN DEL INFORME: Impugnación del informe: desestimación: carácter privilegiado de créditos de acreedora instante del concurso: inexistencia de grupo de sociedades: administrador común de concursada y acreedora: inaplicación de doctrina del levantamiento del velo y de fraude de ley.	Concurso; impugnacion del informe de la administracion concursal; levantamiento del velo	AP Madrid (Sección 28ª), sentencia núm. 359/2013 de 16 diciembre. JUR 2014\60551	Concursal
332	AP	2013	PERSONALIDAD JURÍDICA MERCANTIL: RECLAMACIÓN DE CANTIDAD: LEGITIMACIÓN PASIVA: improcedencia: incapacidad para ser parte en un proceso de una sociedad disuelta, liquidada y cancelada su inscripción registral. SOCIEDADES ANÓNIMAS: EMPRESA DE AGUAS RESIDUALES MUNICIPAL: LIQUIDACIÓN: capacidad procesal: inexistencia: la empresa no puede ser parte en un proceso, al no aparecer inscrita en el Registro Mercantil: insubsistencia de la personalidad jurídica de la demandada al fusionarse con otra y extinguirse, siendo su sucesora, la que se subroga en todos los derechos y obligaciones de aquélla.	Liquidacion; falta de legitimacion pasiva pra reclamacion de cantidad	AP Valencia (Sección 6ª), sentencia núm. 460/2013 de 5 noviembre. JUR 2014\79616	Mercantil
333	AP	2013	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: RESPONSABILIDAD: inexistencia: acción individual de responsabilidad: falta de acreditación de haber ocasionado un daño directo al acreedor por la no liquidación de la sociedad desaparecida; falta de prueba de la inactividad social de la entidad demandada.	SRLs; accion individual de responsabilidad	AP Cádiz (Sección 5ª), sentencia núm. 552/2013 de 5 noviembre. JUR 2014\44839	Mercantil
334	AP	2013	SEGURO: seguro de transportes terrestres: daños en las mercancías: acción directa del perjudicado frente a la aseguradora de la sociedad porteadora: procedencia: seguro que cubre la pérdida o daño de los bienes transportados: concurrencia del seguro de la sociedad porteadora y de la sociedad propietaria de las mercancías transportadas.	Reclamacion de cantidad - Seguros	AP Madrid (Sección 28ª), sentencia núm. 297/2013 de 25 octubre. JUR 2014\9291	Contratos mercantiles

335	AP	2013	SOCIEDADES DE CAPITAL: LIQUIDACION: nombramiento de liquidadores: nombramiento de un órgano colegiado de liquidación, sorteando las disposiciones estatutarias y el texto literal de la norma legal por concurrir causa de falta de imparcialidad o objetividad en el administrador.	Liquidacion; nombramiento de liquidadores	AP Zamora (Sección 1ª), sentencia núm. 170/2013 de 24 octubre. JUR 2013\349000	Mercantil
336	AP	2013	CONSUMIDORES Y USUARIOS: CLAUSULAS ABUSIVAS: existencia: préstamo: interés de demora del 20,85%.	Consumidores; clausulas abusivas	AP Valencia (Sección 6ª), sentencia núm. 416/2013 de 1 octubre. JUR 2014\9040	Consumidores
337	AP	2013	PAGARE: ACCIONES POR FALTA DE PAGO: oposición: nulidad al haber sido completado en cumplimiento de una condición abusiva: desestimación: deudor que conocía el importe que debe abonar.	Pagare, acciones por falta de pago	AP Zaragoza (Sección 5ª), sentencia núm. 386/2013 de 24 septiembre. JUR 2014\16328	Civil/ Cambiario
338	AP	2013	CONTRATO DE PERMUTA FINANCIERA: NULIDAD: estimación: producto especulativo: carencia de información.	Contratos bancarios; permuta financiera; vicios del consentimiento	AP Madrid (Sección 18ª), sentencia núm. 257/2013 de 20 mayo. JUR 2013\262800	Contratos bancarios
339	AP	2013	CONTRATOS BANCARIOS: TARJETA DE CREDITO: RECLAMACION DE CANTIDAD: estimación parcial: reducción en base a la cobertura del seguro de protección de pagos.	Contratos bancarios; tarjeta de credrito; reclamacion de cantidad	AP Alicante (Sección 8ª), sentencia núm. 83/2013 de 21 febrero. JUR 2013\150998	Contratos bancarios
340	AP	2012	CONCURSO (LEY 22/2003, DE 9 JULIO): culpable: falta de legitimación de la concursada para recurrir contra la declaración de responsabilidad del administrador.	Concurso culpable, responsabilidad de los administradores	AP Asturias (Sección 1ª), sentencia núm. 170/2012 de 20 abril. JUR 2012\178368	Cocnursal
341	AP	2012	CONTRATOS BANCARIOS: DE PRÉSTAMO: póliza de crédito suscrita en beneficio de la empresa de la que todos eran socios: sociedad en situación de insolvencia: requerimiento de pago por la entidad bancaria a todos los cofiadores: pago por un fiador de toda la deuda: acción de reintegro frente al resto de los cofiadores: cumplimento de los requisitos del artículo 1844 CC: no es precisa la reclamación judicial cuando hay un requerimiento por parte de la entidad financiera acreedora: condición de fiadora solidaria a título personal: los pactos entre matrimonios no afectan a terceros.	Contratos bancarios; prestamo	AP Vizcaya (Sección 3ª), sentencia núm. 161/2012 de 15 marzo. JUR 2014\146783	Contratos bancarios
342	AP	2011	PAGARE: ACCIONES POR FALTA DE PAGO: «exceptio doli»: desestimación: falta de acreditación.	Pagare, acciones por falta de pago	AP Murcia (Sección 1ª), sentencia núm. 593/2011 de 20 diciembre. JUR 2012\16279	Civil/ Cambiario
343	AP	2011	CONCURSO: EFECTOS DE LA DECLARACION. sobre los actos perjudiciales para la masa activa: acciones de reintegración: estimación: constitución de garantía real: legitimación pasiva: existencia.	Concurso; reintegracion; actos en perjuicio de la masa	AP Córdoba (Sección 3ª), sentencia núm. 163/2011 de 8 julio. JUR 2011\378130	Concursal
344	AP	2010	CONTRATO DE AGENCIA: inexistencia. CONTRATOS ATIPICOS: contrato mercantil atípico: reclamación de cantidad: procedencia.	Contrato de agncia; reclamacion de cantidad	AP Valencia (Sección 9ª), sentencia núm. 320/2010 de 4 noviembre. JUR 2011\64976	Contratos mercantiles
345	AP	2010	COMPRAVENTA MERCANTIL: obligaciones del comprador: pago del precio: incumplimiento de la obligación: falsedad de la firma de los albaranes de entrega de algunas de las facturas. INTERESES: LEGALES: procesales: procedencia: indiferente que la sentencia dé menos de lo pedido.	Compraventa mercantil, incumplimiento de contrato	AP Granada (Sección 4ª), sentencia núm. 441/2010 de 29 octubre. AC 2011\646	Contratos mercantiles
346	AP	2010	PAGARE: ACCIONES POR FALTA DE PAGO: excepciones del deudor: cumplimiento defectuoso suministro: desestimación: improcedencia en ámbito del juicio cambiario.	Pagare, acciones por falta de pago	AP Málaga (Sección 4ª), sentencia núm. 494/2010 de 29 septiembre. JUR 2011\83194	Civil/ Cambiario
347	AP	2010	RECURSO DE APELACION: admisión indebida: indemnización de daños y perjuicios derivados de accidente de circulación: consignación insuficiente que no cubre los intereses del art. 20 LCS. SEGURO: recargo por demora: procedencia: inexistencia de causa justificada.	Seguros	AP Jaén (Sección 2ª), sentencia núm. 70/2010 de 23 marzo. AC 2010\978	Contratos mercantiles
348	AP	2010	CONTRATOS BANCARIOS: PRESTAMO: vencimiento anticipado: procedencia: por impago: intento de notificación al prestatario de dicho vencimiento: remisión de burofax al domicilio que figura en el contrato no entregado y dejado aviso.	Contratos bancarios; prestamo	AP Castellón (Sección 3ª), sentencia núm. 2/2010 de 18 enero. JUR 2010\159386	Contratos bancarios
349	AP	2009	(Sentencia confirmada o inadmisión de recurso contra la misma) CONCURSO: CALIFICACION DEL CONCURSO: culpable: estimación: al no haberse cumplido el deber exigible al consejo de administración de la concursada de solicitar en plazo, dada la grave situación de insolvencia, la declaración de concurso: al no haberse formulado las cuentas anuales y no haberlas depositado en el registro mercantil en los tres ejercicios anteriores a la declaración.	Concurso; calificacion como culpable	AP Valladolid (Sección 3ª), sentencia núm. 213/2009 de 22 julio. JUR 2009\361916	Concursal
350	AP	2009	CONCURSO: DETERMINACION DE LA MASA PASIVA: reconocimiento de créditos: actuación inspectora de la TGSS: debe verificarse a través de la Inspección de Trabajo y Seguridad Social, con conocimiento del deudor y de la administración concursal: la labor de comprobación realizada por otros servicios de la Administración de la Seguridad Social no puede calificarse como función inspectora: "pendente apellatione nihil innovetur".	Concurso; determinacion de la masa, calificacion y reconocimiento de creditos	AP Málaga (Sección 6ª), sentencia núm. 397/2009 de 1 julio. JUR 2010\65457	Concursal

351	AP	2009	CONCURSO: CALIFICACION: culpable: procedencia: incumplimiento del deber de solicitar el concurso en el plazo legalmente establecido.	Concurso; calificacion como culpable	AP Barcelona (Sección 15ª), sentencia núm. 100/2009 de 27 marzo. JUR 2009\411331	Concursal
352	AP	2008	(Sentencia confirmada o inadmisión de recurso contra la misma) COMPRAVENTA MERCANTIL: OBLIGACIONES DEL COMPRADOR: pago del precio: incumplimiento: improcedencia: acreditación de su pago: compraventa de lechugas: testifical que refiere pagos en metálico: transcripción de conversación telefónica de la que se deduce ello: prueba pericial que determina que la conversación no ha sido manipulada.	Compraventa mercantil, incumplimiento de contrato	AP Madrid (Sección 12ª), sentencia núm. 697/2008 de 9 octubre. JUR 2009\26931	Contratos mercantiles
353	AP	2008	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: condición de director general del actor: conocimiento sobre la marcha de la entidad: carece de la condición de tercero.	SRLs; responsabilidad de los administradores	AP Barcelona (Sección 15ª), sentencia núm. 275/2008 de 11 julio. JUR 2009\243312	Mercantil
354	AP	2008	SOCIEDADES DE RESPONSABILIDAD LIMITADA: Administradores: responsabilidad: estimación: por incumplimiento del deber de convocar la Junta general para adoptar el acuerdo de disolución concurriendo causa para ello.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Álava (Sección 1ª), sentencia núm. 1/2008 de 8 enero. JUR 2008\168277	Mercantil / Capital Social
355	AP	2007	ARRENDAMIENTO: resolución: estimación: por falta de pago: servicios de tránsito y voz contra el pago de una cuota fija y variable por consumos: facultad de modificación periódicamente las cuotas en atención a las fluctuaciones del mercado: falta de prueba de la modificación unilateral de esas variaciones ni de ser contrarias a la buena fe.SOCIEDADES DE RESPONSABILIDAD LIMITADA: administradores: responsabilidad: estimación: solidaria por deudas sociales: falta de disolución de la Sociedad concurriendo causa para ello: existencia de pérdidas que dejan reducido el patrimonio a la cantidad inferior a la mitad del capital social, situación de insolvencia.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Madrid (Sección 10ª), sentencia núm. 596/2007 de 4 diciembre. JUR 2008\101697	Mercantil / Capital Social
356	AP	2007	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: improcedencia: acción individual: impago de los suministros de la actora: no puede ligarse causalmente a la actuación del administrador en cuanto tal, ni debe responder éste como administrador negligente por el hecho de que la sociedad no pague sus deudas.	SRLs; accion individual de responsabilidad	AP Barcelona (Sección 15ª), sentencia núm. 162/2007 de 15 marzo. JUR 2007\273033	Mercantil
357	AP	2007	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: RESPONSABILIDAD: prueba: carga probatoria: criterio de disponibilidad y facilidad probatoria: la determinación y valoración del patrimonio social es una prueba que escapa al que ejercita la acción de responsabilidad por su complejidad e inaccesibilidad: facilidad del administrador de destruir la calificación de insolvencia patrimonial de la sociedad de la que deriva su posible responsabilidad frente a los acreedores sociales.	SRLs; responsabilidad de los administradores; carga de la prueba	AP Pontevedra (Sección 6ª), sentencia núm. 108/2007 de 15 febrero. JUR 2007\142587	Mercantil / Capital Social
358	AP	2006	LETRA DE CAMBIO: EXCEPCIONES OPONIBLES POR EL DEUDOR CAMBIARIO: causales (falta de provisión de fondos): «exceptio doli»: requisitos; desestimación: frente al adquirente de la misma: falta de acreditación de los requisitos para su admisión.	Letra de cambio; oposicion a la ejecucion forzosa	AP Vizcaya (Sección 3ª), sentencia núm. 763/2006 de 27 diciembre. JUR 2007\98750	Civil/ Cambiario
359	AP	2006	CONTRATO DE MEDIACION O CORRETAJE: EFECTOS: reclamación de comisiones por la cartera de clientes y las pólizas contratadas y cuantificación de la retribución del subagente: informe pericial.INTERESES: moratorios: estimación: desde la interposición de la demanda.	Corretaje; reclamacion de comisiones	AP A Coruña (Sección 6ª), sentencia núm. 231/2006 de 15 junio. JUR 2006\196897	Contratos mercantiles
360	AP	2006	(Sentencia confirmada o inadmisión de recurso contra la misma) QUIEBRA: DECLARACION DE QUIEBRA: retroacción: nulidad de los actos posteriores a la fecha de retroacción: desestimación: subadquirente: segunda compraventa ejecutada por los adquirentes del quebrado reuniendo los requisitos del art.34 LH, y además no son contrarios a los intereses de los acreedores de la quiebra.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion	AP Madrid (Sección 10ª), sentencia núm. 257/2006 de 3 abril. JUR 2006\175299	Concursal
361	AP	2006	(Sentencia confirmada o inadmisión de recurso contra la misma) QUIEBRA: fraudulenta: estimación: ausencia de libros contables y contabilidad inadecuada: ocultación de costes laborales y de situación de la empresa a la Comisaría de la quiebra.	Quiebra fraudulenta por no aportacion de contabilidad y valoracion fraudulenta de activos y pasivos	AP Palencia (Sección 1ª), sentencia núm. 71/2006 de 6 marzo. JUR 2006\160799	Concursal
362	AP	2005	COMPRAVENTA MERCANTIL: SUMINISTRO: INCUMPLIMIENTO DEL COMPRADOR: EXISTENCIA: carburante: falta de pago del precio: inexistencia de prescripción.	Compraventa mercantil, contrato suministro, mora	AP Valencia (Sección 7ª), sentencia núm. 580/2005 de 14 octubre. JUR 2005\273553	Contratos mercantiles

363	AP	2005	SOCIEDADES DE RESPONSABILIDAD LIMITADA: administradores: responsabilidad: objetiva: estimación: desaparición sorpresiva de la mercantil de su domicilio social: acreditado el cese de la actividad societaria en un momento posterior a su nombramiento como administrador único.	Srls; responsabilidad de los administradores por desaparicion de hecho de la sociedad	AP Cantabria (Sección 2ª), sentencia núm. 406/2005 de 12 septiembre. JUR 2005\237053	Mercantil
364	AP	2005	SOCIEDADES ANONIMAS: ADMINISTRADORES: responsabilidad: procedencia: incumplimiento de la obligación de promover la disolución y liquidación de la sociedad concurriendo causa legal para ello: desaparición del domicilio social: conocimiento de la deuda antes del cese.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Madrid (Sección 9ª), sentencia núm. 278/2005 de 23 mayo. JUR 2005\159474	Mercantil / Capital Social
365	AP	2005	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: solidaria junto con la de la empresa: falta de convocatoria en el plazo de dos meses de Junta General para proceder a la liquidación ordenada de la sociedad desde que los administradores conocieren la pérdida del patrimonio a valor inferior a la mitad del capital social.	Sas; responsabilidad de los administradores por incumplimiento deber recapitalizar o liquidar	AP La Rioja (Sección 1ª), sentencia núm. 133/2005 de 9 mayo. JUR 2005\132154	Mercantil / Capital Social
366	AP	2005	JUICIO EJECUTIVO: oposición del deudor a la ejecución: excepciones: falsedad del título o del acto que le hubiere dado fuerza ejecutiva: desestimación: inoponibilidad frente a la acción cambiaria de la excepción de cumplimiento defectuoso.	Juicio ejecutivo cambiario	AP Huelva (Sección 2ª), sentencia núm. 76/2005 de 26 abril. JUR 2005\143115	Civil/ Cambiario
367	AP	2005	SEGURO: derechos del asegurador: extinción del contrato: improcedencia: reclamaciones extrajudiciales efectuadas por la aseguradora al demandado, tomador del seguro y obligado al pago de la prima, sin dejar transcurrir el plazo de seis meses previsto en el art. 15.2 LCS.	Seguros	AP Sevilla (Sección 5ª), sentencia de 7 abril 2005. JUR 2005\138402	Contratos mercantiles
368	AP	2005	SOCIEDADES ANONIMAS: ADMINISTRADORES: acción individual de responsabilidad: existencia: falta de promoción de la disolución de la sociedad no siendo operativa en sus relaciones con terceros.	SAS; accion individual de responsabilidad por inobservancia deber de disolucion	AP Madrid (Sección 20ª), sentencia núm. 65/2005 de 31 enero. JUR 2005\110177	Mercantil/ Capital social
369	AP	2004	LETRA DE CAMBIO: EXCEPCIONES OPONIBLES POR EL DEUDOR CAMBIARIO: causales: falta de provisión de fondos: desestimación: no acreditación por la obligada cambiaria de la total inidoneidad de los objetos servidos para el uso a que debían destinarse: inadmisibilidad del mero cumplimiento defectuoso como causa de oposición.	Letra de cambio; oposicion a la ejecucion forzosa	AP Guadalajara (Sección 1ª), sentencia núm. 11/2004 de 30 diciembre. JUR 2005\92878	Civil/ Cambiario
370	AP	2004	EJECUCIÓN FORZOSA (LECIV/2000)_ TÍTULOS EJECUTIVOS (LECIV/2000): acción ejecutiva: títulos ejecutivos: títulos que llevan aparejada ejecución: supuestos: títulos nominativos o al portador: procedencia: letra de cambio: oposición: «exceptio doli»: mala fe en el endoso: falta de acreditación: acción dirigida contra los avalistas ante el impago por los obligados en ella: incumplimientos del negocio causal subyacente posteriores al endoso.	letra de cambio; ejecucion forzosa	AP León (Sección 1ª), sentencia núm. 357/2004 de 30 diciembre. JUR 2005\44755	Civil/ Cambiario
371	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: Organos de la Sociedad: administradores: responsabilidad: procedencia: acción ejercida por acreedor de la sociedad: incumplimiento de su obligación de formulación de las cuentas anuales: imposibilidad de los acreedores de conocer la situación patrimonial de la empresa.	SRls; accion individual de responsabilidad de los administradores por incumplimiento de obligacion de formulacion de cuentas anuales	AP Madrid (Sección 10ª), sentencia núm. 991/2004 de 29 octubre. JUR 2005\46827	Mercantil
372	AP	2004	CONSUMIDORES Y USUARIOS: indemnización de daños y perjuicios: responsabilidad: fabricante, importador, vendedor o suministrador de productos: estimación: averías en vehículo por la incorrecta revisión oficial impuesta por la marca: responsabilidad del concesionario y del fabricante.	Consumidores; indemnizacion daños y perjuicios; responsabilidad del fabricante	AP Málaga (Sección 6ª), sentencia núm. 632/2004 de 30 julio. JUR 2004\255448	Consumidores
373	AP	2004	QUIEBRA: DECLARACION DE QUIEBRA: efectos: retroacción: nulidad de los actos posteriores a la fecha de retroacción: procedencia: acuerdo de restitución de aportaciones a los socios mediante compensación con los créditos de la sociedad frente a dichos socios por mercaderías adquiridos: acuerdos en perjuicio de acreedores: nulidad absoluta: obligación de restituir.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion	AP Madrid (Sección 14ª), sentencia núm. 628/2004 de 28 julio. JUR 2004\265446	Concursal
374	AP	2004	SOCIEDADES ANONIMAS: ADMINISTRADORES: RESPONSABILIDAD: existencia: incumplimiento de la obligación de disolución de la sociedad concurriendo causa legal para ello: inactividad y reducción del capital social por debajo del mínimo legal: responsabilidad solidaria existente.	Sas; responsabilidad de los administradores por incumplimiento deber recapitalizar o liquidar	AP Barcelona (Sección 15ª), sentencia de 28 mayo 2004. JUR 2004\221150	Mercantil / Capital Social
375	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: responsabilidad: existencia: falta de disolución de la sociedad concurriendo causa legal: inactividad y reducción del capital por debajo del mínimo legal: responsabilidad solidaria existente.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Barcelona (Sección 15ª), sentencia de 28 mayo 2004. JUR 2004\221140	Mercantil / Capital Social

376	AP	2004	INTERESES LEGALES: MORATORIOS: procedencia: desde la fecha de la interpelación judicial: aunque la cantidad concedida sea inferior a la reclamada.	Reclamacion de cantidad	AP Guipúzcoa (Sección 3ª), sentencia núm. 101/2004 de 18 mayo. JUR 2004\296083	Civil
377	AP	2004	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: inexistencia: demora en los pagos, transformación en unipersonal y traslado de la actividad societaria sin sustantividad para justificarla.	Sas; no responsabilidad de los administradores por impago de debito	AP Barcelona (Sección 15ª), sentencia núm. 245/2004 de 14 mayo. JUR 2004\196043	Mercantil
378	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTADORES: RESPONSABILIDAD: procedencia: acción ejercitada por acreedor de la sociedad: incumplimiento de la obligación de convocar en plazo junta general para disolución de la sociedad: concurrencia de la causa de disolución d) del art. 104 LSRL.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Barcelona (Sección 15ª), sentencia de 27 abril 2004. JUR 2004\157948	Mercantil / Capital Social
379	AP	2004	SOCIEDADES ANONIMAS: SOCIOS: reclamación de cuotas: procedencia: condición de socio del demandado.	SAS; reclamacion cuotas socios	AP Madrid (Sección 25ª), sentencia núm. 173/2004 de 25 marzo. JUR 2004\248607	Mercantil
380	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: disolución: indefinición en la causa: no implica incongruencia respecto a la acción ejercitada.	SRLs; disolucion	AP Barcelona (Sección 15ª), sentencia de 19 marzo 2004. JUR 2004\224995	Mercantil
381	AP	2004	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: existencia: falta de presentación de cuentas anuales, inactividad social y ausencia de domicilio: obligación de convocar junta general para disolución de la sociedad.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Barcelona (Sección 15ª), sentencia de 19 marzo 2004. JUR 2004\122586	Mercantil / Capital Social
382	AP	2004	LEGITIMACION: activa: estimación: seguro: de la aseguradora en virtud del art. 72.3 LCS.SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: estimación: incumplimiento de la obligación de proceder a la liquidación de la sociedad concurriendo causa para ello: pérdidas que dejen reducido el patrimonio contable a menos de la mitad del capital social.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Zaragoza (Sección 5ª), sentencia núm. 175/2004 de 15 marzo. JUR 2004\106713	Mercantil / Capital Social
383	AP	2004	SOCIEDADES DE RESPONSABILIDAD LIMITADA: personalidad jurídica: levantamiento del velo: existencia: contratación de mercancía propia de bar en nombre propio a pesar de la confusión o apariencia creada de contratación a nombre de mercantil: constancia de no tener ésta por objeto social actividad de hostelería.	SRLS; levantamiento del velo	AP Murcia (Sección 5ª), sentencia núm. 13/2004 de 20 enero. JUR 2004\80243	Mercantil
384	AP	2004	SOCIEDADES ANONIMAS: administradores: acción individual de responsabilidad: requisitos; acción de responsabilidad: plazo: de cuatro años establecido en el art. 949 CCom; estimación: ación ejercitada por acreedor de la sociedad: falta de convocatoria de la junta general en el plazo de dos meses conociendo la existencia de causa legal para la disolución de la misma.	SAS; accion individual de responsabilidad por inobservancia deber de disolucion	AP Barcelona (Sección 15ª), sentencia núm. 25/2004 de 20 enero. JUR 2004\53917	Mercantil / Capital Social
385	AP	2004	SOCIEDADES ANONIMAS: administradores: responsabilidad por actos posteriores a su cese no inscrito en el registro mercantil: desestimación.	Sas; responsabilidad de los administradores posteriormente a su cese	AP Zaragoza (Sección 5ª), sentencia núm. 5/2004 de 8 enero. JUR 2004\168662	Mercantil
386	AP	2003	SOCIEDADES ANONIMAS: ADMINISTRADORES: acción individual de responsabilidad: desestimación: falta de nexo de causalidad entre el daño producido y una gestión negligente del administrador.	Sas; accion individual de responsabilidad	AP Barcelona (Sección 15ª), sentencia de 23 diciembre 2003. JUR 2004\38352	Mercantil
387	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: socios: responsabilidad: improcedencia: ausencia de causa legal de disolución.	SRLs; no responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Barcelona (Sección 15ª), sentencia núm. 790/2003 de 16 diciembre. JUR 2004\31570	Mercantil / Capital Social
388	AP	2003	SOCIEDADES ANONIMAS: administradores: prescripción de la acción: aplicación del plazo anual del art.1968.2 CC; desestimación: ausencia de relación de causalidad entre el hecho negligente que se imputa a los administradores y el daño.	Sas; accion individual de responsabilidad	AP Barcelona (Sección 15ª), sentencia núm. 788/2003 de 16 diciembre. JUR 2004\31569	Mercantil
389	AP	2003	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: diferencias con la acción individual de responsabilidad del art. 135 LSA; estimación: responsabilidad solidaria con la sociedad por las deudas soiales por incumplimiento de la obligación de disolver y liquidar la sociedad concurriendo causa para ello: desparición de hecho de la sociedad.	Sas; responsabilidad de los administradores por incumplimiento deber recapitalizar o liquidar	AP Barcelona (Sección 15ª), sentencia núm. 737/2003 de 18 noviembre. JUR 2004\5859	Mercantil / Capital Social
390	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: solidaria frente acreedores sociales: estimación: incumplimiento del deber de instar la disolución concurriendo causa legal para ello.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Salamanca (Sección Unica), sentencia núm. 405/2003 de 30 octubre. JUR 2003\260120	Mercantil / Capital Social

391	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: incumplimiento de sus obligaciones: estimación: responsabilidad solidaria ante acreedores social por no instar la disolución existiendo causa legal para ello.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Salamanca (Sección Unica), sentencia núm. 400/2003 de 27 octubre. JUR 2003\260015	Mercantil / Capital Social
392	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: incumplimiento de sus obligaciones: estimación: por no haber procedido a la disolución de la sociedad cuando concurría una causa legal para ello, en concreto, por haber sufrido pérdidas que dejen reducido el patrimonio contable a menos de la mitad del capital social, sin que este se haya aumentado o reducido suficientemente.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Lleida (Sección 2ª), sentencia núm. 386/2003 de 5 septiembre. JUR 2003\257189	Mercantil / Capital Social
393	AP	2003	COMPRAVENTA MERCANTIL: SUMINISTRO: incumplimiento del comprador: existencia: impago del importe de las mercancías suministradas.INTERESES LEGALES: MORATORIOS: devengo: desde la reclamación judicial: atenuación del principio «in illiquidis non fit mora».	Compraventa mercantil, contrato suministro, mora	AP Navarra (Sección 3ª), sentencia núm. 187/2003 de 23 julio. JUR 2004\285	Contratos mercantiles
394	AP	2003	EJECUCIÓN FORZOSA (LECIV 1/2000): oposición a la ejecución: pago: pagaré: desestimación: excepción inoponible frente a terceros de buena fe que, desconociendo el hecho del pago, adquieren el documento y el derecho incorporado al mismo sin restricción alguna.	Juicio ejecutivo cambiario	AP Asturias (Sección 4ª), sentencia núm. 292/2003 de 4 julio. JUR 2004\14703	Civil/ Cambiario
395	AP	2003	QUIEBRA: DECLARACION DE QUIEBRA: efectos: retroacción: estimación: sobreseimiento general en los pagos y la constancia de una operación sospechosa de haber sido realizada en beneficio de unos acreedores en perjuicio de otros.	Quiebra; retroaccion; sobreseimiento de pagos por ser en beneficio de unos acreedores y en perjuicio de otros	AP Murcia (Sección 5ª), sentencia de 3 julio 2003. JUR 2003\234552	Concursal
396	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: disolución: improcedencia: falta de legitimación activa para solicitarla.	SRLs; disolucion	AP Córdoba (Sección 3ª), sentencia núm. 167/2003 de 12 junio. JUR 2003\183769	Mercantil
397	AP	2003	PAGARE: transmisión: endoso en blanco de los pagarés: existencia de una relación negocial que había generado un crédito a favor de la entidad actora y contra el endosante: legitimación existente.	Juicio cambiario; pagares	AP Granada (Sección 3ª), sentencia núm. 515/2003 de 7 junio. JUR 2003\234180	Civil/ Cambiario
398	AP	2003	PAGARE: acciones por falta de pago: excepciones del deudor: falta de legitimación del tenedor: procedencia: incumplimiento por el documento en que basa su legitimación de los requisitos del endoso y falta de acreditación de la cesión: falta de acreditación de los términos de adquisición.	Pagare, acciones por falta de pago	AP Granada (Sección 3ª), sentencia núm. 477/2003 de 31 mayo. JUR 2003\234032	Civil/ Cambiario
399	AP	2003	SOCIEDADES ANONIMAS: administradores: incumplimiento de sus obligaciones: desestimación: cuentas anuales depositadas: causa legal de disolución no acreditada.	Sas; no responsabilidad de los administradores por incumplimiento deber disolucion	AP Barcelona (Sección 15ª), sentencia de 20 mayo 2003. JUR 2004\38085	Mercantil / Capital Social
400	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: existencia: incumplimiento de la obligación de disolver la sociedad existiendo causa legal para ello.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Barcelona (Sección 15ª), sentencia de 20 mayo 2003. JUR 2004\38079	Mercantil / Capital Social
401	AP	2003	SOCIEDADES ANONIMAS: administradores: acción individual de responsabilidad: prescripción de la acción: aplicación del plazo de prescripción de un año del art. 1968.2; desestimación: ausencia de relación causal entre el daño referido al actor y el hecho negligente que se le imputa a los administradores.	Sas; accion individual de responsabilidad	AP Barcelona (Sección 15ª), sentencia de 20 mayo 2003. JUR 2004\38076	Mercantil
402	AP	2003	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: desaparición de hecho de la sociedad del tráfico mercantil sin que su administrador haya procedido a su ordenada liquidación: falta de presentación en el Registro Mercantil las cuentas anuales desde el ejercicio 1996.	SAS; accion individual de responsabilidad por inobservancia deber de disolucion	AP Barcelona (Sección 15ª), sentencia de 20 mayo 2003. JUR 2004\38074	Mercantil / Capital Social
403	AP	2003	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: acción ejercitada por acreedor social: existencia de pérdidas que dejen reducido el patrimonio contable a menos de la mitad del capital social e imposibilidad de conseguir el fin social: falta de convocatoria de Junta General para su ordenada disolución.	SAS; accion individual de responsabilidad por inobservancia deber de disolucion	AP Barcelona (Sección 15ª), sentencia de 20 mayo 2003. JUR 2004\38073	Mercantil / Capital Social

404	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: acción de responsabilidad del art. 105 LSRL: naturaleza jurídica: responsabilidad «ex lege» por incumplimiento de la obligación legal de promover la disolución de la sociedad ante la concurrencia de las causas legalmente establecidas para ello; falta de ejercicio de la acción de subrogación por parte de la aseguradora en base al seguro de crédito y caución que cubría el riesgo derivado de la insolvencia definitiva de la empresa a quien suministraban mercancías los actores.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Valencia (Sección 6ª), sentencia núm. 316/2003 de 10 mayo. JUR 2003\171756	Mercantil / Capital Social
405	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: estimación: acción derivada del incumplimiento de los deberes relativos a la disolución de la sociedad: concurrencia de causa de disolución: falta de actividad empresarial.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Badajoz (Sección 3ª), sentencia núm. 263/2003 de 30 abril. JUR 2004\30727	Mercantil / Capital Social
406	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: estimación: compra de mercancía con el conocimiento de la imposibilidad del pago de las mismas.	SRLS; responsabilidad de los administradores conociendo situacion de insolvencia (falta de liquidez)	AP Valencia (Sección 9ª), sentencia núm. 256/2003 de 16 abril. JUR 2003\171248	Mercantil
407	AP	2003	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: concurrencia de causa legal de disolución de la sociedad sin convocar Junta Genral en el plazo de dos meses para su ordenada disolución: la solicitud de quiebra no exonera de la obligación de convocar la Junta; administrador de hecho: desestimación.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Barcelona (Sección 15ª), sentencia de 8 abril 2003. JUR 2004\38023	Mercantil / Capital Social
408	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: acción individual y acción social de responsabilidad: diferencias; prescripción de la acción: desestimación: aplicación del plazo de prescripción de cuatro años del art. 949 CCom; estimación: falta de disolución de la sociedad concurriendo causa legal para ello: proceso de suspensión de pagos no podría ser instrumento útil para obtener la liquidación de la socieda.	SRLS; responsabilidad de los administradores por no liquidar	AP Barcelona (Sección 15ª), sentencia de 8 abril 2003. JUR 2004\38022	Mercantil / Capital Social
409	AP	2003	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: falta de convocatoria de Junta General para la disolución de la sociedad concurriendo causa legal para ello.PRESCRIPCION DE ACCIONES: PLAZO DE PRESCRIPCION: acción de responsabilidad social: aplicación del plazo de prescripción de cuatro años del art. 949 CCom.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Barcelona (Sección 15ª), sentencia de 8 abril 2003. JUR 2004\38017	Mercantil / Capital Social
410	AP	2003	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: concurrencia de causa de disolución de la sociedad por pérdidas que dejen reducido el patrimonio contable a menos de la mitad del capital social: falta de convocatoria de Junta General en el plazo de dos meses.	Sas; responsabilidad de los administradores por incumplimiento deber recapitalizar o liquidar	AP Barcelona (Sección 15ª), sentencia de 8 abril 2003. JUR 2004\38016	Mercantil / Capital Social
411	AP	2003	SOCIEDADES ANONIMAS: administradores: acción individual de responsabilidad: requisitos y diferencias con otras figuras afines; desestimación: falta de prueba del nexo causal entre la actuación del demandado y el daño sufrido.PERSONAS JURIDICAS: aplicación de la doctrina del levantamiento del velo: desestimación.	Sas; accion individual de responsabilidad; desestimacion levantamiento del velo	AP Barcelona (Sección 15ª), sentencia de 8 abril 2003. JUR 2004\38020	Mercantil
412	AP	2003	PERSONAS JURIDICAS: aplicación de la teoría del levantamiento del velo: desestimación.SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: estimación: desapariciónd e hecho de la sociedad sin proceder a su ordenada disolución.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Barcelona (Sección 15ª), sentencia de 8 abril 2003. JUR 2004\38014	Mercantil / Capital Social
413	AP	2003	COMPRAVENTA MERCANTIL: obligaciones del comprador: pago del precio: incumplimiento de la obligación: estimación: determinación de la cuantía: falta de prueba que realmente hubiese entregado más mercancía que la que consta en las facturas reclamadas ni que el precio unitario de la misma debiese ser el doble que el que figura en aquella.	Compraventa mercantil, incumplimiento de contrato	AP Granada (Sección 3ª), sentencia núm. 297/2003 de 7 abril. JUR 2003\200198	Contratos mercantiles
414	AP	2003	SOCIEDADES DE RESPONSABILIDAD LIMITADA: órganos de la Sociedad: administradores: responsabilidad: prescripción de la acción: desestimación: aplicación del plazo prescriptivo de cuatro años del art. 949 CCom; solidaria junto con la de la sociedad: ex lege una vez constatada la causa imperativa de disolución y la omisión del deber de promover la misma en el plazo de dos meses.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Barcelona (Sección 15ª), sentencia de 31 marzo 2003. JUR 2004\14215	Mercantil

415	AP	2003	PRESCRIPCION DE ACCIONES: PLAZO DE PRESCRIPCION: préstamo: intereses compensatorios debidos como retribución e intereses moratorios debidos como indemnización por retraso: distintos plazos prescriptivos: aplicación del plazo de cinco años a los compensatorios, no a los moratorios.	Contratos bancarios; prestamo	AP Murcia (Sección 1ª), sentencia núm. 93/2003 de 11 marzo. JUR 2003\197437	Contratos bancarios
416	AP	2013	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: estimación: concurrencia de causa legal de disolución de la sociedad por desaparición de hecho de su domicilio social y falta convocatoria de la Junta para proceder a la legal disolución de la misma.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Barcelona (Sección 15ª), sentencia de 11 marzo 2003. JUR 2004\38011	Mercantil / Capital Social
417	AP	2013	SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: plazo: aplicación del plazo de cuatro años del art. 949 CCom; estimación: concurrencia de causa legal de disolución de la sociedad sin haber convocado el administrador Junta General en el plazo de dos meses para que adopte el acuerdo de disolución.	Sas; responsabilidad de los administradores por incumplimiento deber disolucion	AP Barcelona (Sección 15ª), sentencia de 11 marzo 2003. JUR 2004\38010	Mercantil
418	AP	2013	SOCIEDADES ANONIMAS: administradores: acción individual de responsabilidad: requisitos; desestimación: acción ejercitada por acreedor social: falta de nexo de causalidad entre los actos realizados por el administrador y el daño sufrido por el acreedor.	Sas; accion individual de responsabilidad	AP Barcelona (Sección 15ª), sentencia de 11 marzo 2003. JUR 2004\38008	Mercantil
419	AP	2013	SOCIEDADES ANONIMAS: administradores: acción individual de responsabilidad: diferencias con la acción social de responsabilidad; acción de responsabilidad: plazo: aplicación del plazo de cuatro años del art. 949 CCom; estimación: concurrencia de causa legal de disolución de la sociedad por imposibilidad de cumplir con su fin social sin haber convocado junta para la disolución de la misma.	SAS; accion individual de responsabilidad por inobservancia deber de disolucion	AP Barcelona (Sección 15ª), sentencia de 11 marzo 2003. JUR 2004\38000	Mercantil
420	AP	2013	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: RESPONSABILIDAD: estimación: incumplimiento de la obligación legal de convocar Junta General para proceder a la disolución cuando concurra causa para la misma: ausencia de prescripción de la acción: constancia de la inscripción de la administradora en el Registro Mercantil.	SRLs; responsabilidad de los administradores por inobservsancia de causas de disolucion	AP Valladolid (Sección 3ª), sentencia núm. 44/2003 de 11 febrero. JUR 2003\84642	Mercantil
421	AP	2013	SOCIEDADES DE RESPONSABILIDAD LIMITADA: administradores: responsabilidad: prescripción de la acción: desestimación: aplicación del plazo de cuatro años del art. 949 CCom; estimación: concurrencia de la causa legal de disolución establecida en el art. 260.1.4º LSA: existencia de pérdidas acumuladas que dejaron reducido el patrimonio social por debajo de la mitad del capital social.	SRLs; responsabilidad de los administradores por incumplimiento de disolucion 'recapitalizar o liquidar'	AP Barcelona (Sección 15ª), sentencia de 11 febrero 2003. JUR 2004\37983	Mercantil / Capital Social
422	AP	2013	SOCIEDADES ANONIMAS: administradores: acción individual de responsabilidad: diferencias con la acción social de responsabilidad; desestimación; personalidad jurídica: aplicación de la doctrina del levantamiento del velo jurídico: desestimación: falta de prueba que se han utilizado los medios concedidos por la legislación societaria con finalidad defraudatoria: la unipersonalidad no puede justificar el levantamiento del velo.	Sas; accion individual de responsabilidad; desestimacion levantamiento del velo	AP Barcelona (Sección 15ª), sentencia de 11 febrero 2003. JUR 2004\37985	Mercantil
423	AP	2013	SOCIEDADES DE RESPONSABILIDAD LIMITADA: ADMINISTRADORES: RESPONSABILIDAD: procedencia: compraventa de vivienda: incumplimiento de la obligación legal de garantizar la eventual devolución de las sumas entregadas a cuenta por los compradores.	SRLs; responsabilidad de los administradores	AP Girona (Sección 2ª), sentencia núm. 41/2003 de 5 febrero. JUR 2003\156896	Mercantil/ Contractual
424	AP	2013	DEFECTO LEGAL EN EL MODO DE PROPONER LA DEMANDA: se da cuando en el escrito inicial del proceso no se llenan los requisitos establecidos en el art. 524 LEC de modo que falte la debida claridad y precisión en lo pedido y dificulte o impida al demandado articular adecuadamente su defensa.	Procesal	AP Madrid (Sección 10ª), sentencia de 1 febrero 2003. JUR 2003\128672	Procesal
425	AP	2013	QUIEBRA: RETROACCION: nulidad radical de todos los actos dispositivos del quebrado posteriores a la época a que se retrotraigan los efectos de la quiebra.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion	AP Murcia (Sección 2ª), sentencia núm. 19/2003 de 27 enero. JUR 2003\115213	Concursal
426	AP	2013	PERSONAS JURIDICAS: aplicación de la doctrina del levantamiento del velo.SOCIEDADES ANONIMAS: administradores: acción de responsabilidad: desestimación: el mero hecho del incumplimiento contractual por la mercantil no constituye prueba de que ello tenga su causa directa en que los administradores hayan llevado a cabo una actuación negligente.	Sas; accion individual de responsabilidad; desestimacion levantamiento del velo	AP Málaga (Sección 6ª), sentencia núm. 570/2003 de 17 enero. JUR 2003\140515	Mercantil
427	AP	2014			AP Islas Baleares (Sección 5ª), sentencia núm. 279/2014 de 28 octubre. JUR 2014\277868	Concursal

428	AP	2014			AP Girona (Sección 1ª), sentencia núm. 254/2014 de 29 septiembre. JUR 2015\786	Mercantil
429	AP	2014			AP Madrid (Sección 25ª), sentencia núm. 326/2014 de 12 septiembre. JUR 2014\290237	Contratos bancarios
430	AP	2014			AP Asturias (Sección 1ª), sentencia núm. 225/2014 de 25 julio. JUR 2014\256244	Contratos mercantiles
431	AP	2014			AP Madrid (Sección 20ª), sentencia núm. 394/2014 de 25 julio. JUR 2014\288336	Contratos mercantiles
432	AP	2014			AP Islas Baleares (Sección 3ª), sentencia núm. 230/2014 de 23 julio. JUR 2014\220228	Contratos bancarios
433	AP	2014		Titulos valores, juicio ejecutivo	AP Guadalajara (Sección 1ª), sentencia núm. 211/2014 de 21 julio. JUR 2014\218815	Mercantil
434	AP	2014		Concurso; compraventa vivienda	AP Zaragoza (Sección 5ª), sentencia núm. 263/2014 de 18 julio. JUR 2014\224563	Concursal
435	AP	2014			AP Valencia (Sección 7ª), sentencia núm. 229/2014 de 16 julio. JUR 2014\270911	Contratos bancarios
436	AP	2014			AP A Coruña (Sección 4ª), sentencia núm. 242/2014 de 14 julio. JUR 2014\218708	Contratos bancarios
437	AP	2014			AP Valladolid (Sección 3ª), sentencia núm. 143/2014 de 8 julio. JUR 2014\223557	Concursal
438	AP	2014			AP Islas Baleares (Sección 5ª), sentencia núm. 198/2014 de 30 junio. JUR 2014\199599	Concursal
439	AP	2014		Titulos valores	AP Málaga (Sección 4ª), sentencia núm. 296/2014 de 26 junio. JUR 2014\256148	Civil/ Cambiario
440	AP	2014			AP Islas Baleares (Sección 5ª), sentencia núm. 188/2014 de 17 junio. JUR 2014\194810	Concursal
441	AP	2014		Responsabilidad de los administradores	AP A Coruña (Sección 4ª), sentencia núm. 195/2014 de 16 junio. JUR 2014\218621	Mercantil
442	AP	2014			AP Valladolid (Sección 3ª), sentencia núm. 129/2014 de 16 junio. JUR 2014\191916	Contratos mercantiles
443	AP	2014			AP Granada (Sección 3ª), sentencia núm. 158/2014 de 13 junio. JUR 2014\277346	Contratos mercantiles
444	AP	2014			AP Pontevedra (Sección 1ª), sentencia núm. 206/2014 de 6 junio. JUR 2014\220194	Mercantil
445	AP	2014			AP Cáceres (Sección 1ª), sentencia núm. 135/2014 de 5 junio. JUR 2014\187102	Concursal
446	AP	2014		Titulos valores, juicio ejecutivo	AP Madrid (Sección 9ª), sentencia núm. 265/2014 de 5 junio. JUR 2014\233146	Civil/ Cambiario
447	AP	2014		Banca, mercado de valores	AP Valencia (Sección 11ª), sentencia núm. 194/2014 de 4 junio. JUR 2014\252134	Contratos bancarios
448	AP	2014			AP Castellón (Sección 3ª), sentencia núm. 190/2014 de 30 mayo. JUR 2014\254658	Contratos bancarios
449	AP	2014			AP Valencia (Sección 7ª), sentencia núm. 175/2014 de 28 mayo. JUR 2014\199487	Contratos bancarios
450	AP	2014			AP Barcelona (Sección 1ª), sentencia núm. 233/2014 de 27 mayo. JUR 2014\234235	Concursal
451	AP	2014		Banca, mercado de valores	AP Valladolid (Sección 1ª), sentencia núm. 107/2014 de 22 mayo. JUR 2014\180061	Contratos bancarios

452	AP	2014		Banca, contratos mercantiles	AP Castellón (Sección 3ª), sentencia núm. 173/2014 de 15 mayo. JUR 2014\255185	Contratos bancarios
453	AP	2014		Banca, mercado de valores	AP Badajoz (Sección 2ª), sentencia núm. 112/2014 de 8 mayo. JUR 2014\161552	Contratos bancarios
454	AP	2014		Banca, contratos mercantiles	AP Pontevedra (Sección 1ª), sentencia núm. 155/2014 de 2 mayo. JUR 2014\219553	Contratos bancarios
455	AP	2014			AP Jaén (Sección 1ª), sentencia núm. 178/2014 de 30 abril. JUR 2014\196546	Concursal
456	AP	2014		456- Contratos mercantiles.Banca.Consumidores y Usuarios.Proceso Civil.Ordenamiento jurídico comunitario.	AP Granada (Sección 3ª), sentencia núm. 110/2014 de 30 abril. JUR 2014\170793	Mercantil
457	AP	2014			AP Toledo (Sección 1ª), sentencia núm. 75/2014 de 23 abril. JUR 2014\136322	Civil/ Cambiario
458	AP	2014			AP Badajoz (Sección 3ª), sentencia núm. 83/2014 de 22 abril. JUR 2014\139849	Concursal
459	AP	2014			AP Pontevedra (Sección 1ª), sentencia núm. 148/2014 de 22 abril. JUR 2014\219290	Contratos bancarios
460	AP	2014			AP Las Palmas (Sección 5ª), sentencia núm. 146/2014 de 31 marzo. JUR 2014\146495	Contratos bancarios
461	AP	2014		461- Sociedades.Responsabilidad (otras cuestiones).	AP Castellón (Sección 3ª), sentencia núm. 125/2014 de 31 marzo. JUR 2014\160771	Mercantil
462	AP	2014		462- Títulos valores.Juicio ejecutivo.	AP La Rioja (Sección 1ª), sentencia núm. 91/2014 de 21 marzo. JUR 2014\126616	Civil/ Cambiario
463	AP	2014		Banca, contratos mercantiles	AP Pontevedra (Sección 1ª), sentencia núm. 100/2014 de 19 marzo. JUR 2014\219454	Contratos bancarios
464	AP	2014		Banca, contratos mercantiles	AP Madrid (Sección 10ª), sentencia núm. 98/2014 de 18 marzo. JUR 2014\113543	Contratos bancarios
465	AP	2014		Banca, contratos mercantiles	AP Palencia (Sección 1ª), sentencia núm. 43/2014 de 17 marzo. JUR 2014\118456	Contratos bancarios
466	AP	2014			AP Badajoz (Sección 3ª), sentencia núm. 57/2014 de 11 marzo. JUR 2014\97838	Concursal
467	AP	2014			AP Valencia (Sección 8ª), sentencia núm. 99/2014 de 10 marzo. JUR 2014\121077	Contratos mercantiles
468	AP	2014			AP Barcelona (Sección 17ª), sentencia núm. 85/2014 de 5 marzo. JUR 2014\134985	Contratos bancarios
469	AP	2014			AP Barcelona (Sección 19ª), sentencia núm. 88/2014 de 26 febrero. JUR 2014\113505	Contratos mercantiles
470	AP	2014		Arrendamiento de obra	AP Córdoba (Sección 1ª), sentencia núm. 72/2014 de 25 febrero. JUR 2014\101709	Concursal
471	AP	2014		Sociedades	AP Sevilla (Sección 5ª), sentencia núm. 131/2014 de 21 febrero. JUR 2014\133322	Mercantil
472	AP	2014		Sociedades	AP Cádiz (Sección 5ª), sentencia núm. 96/2014 de 19 febrero. JUR 2014\102205	Mercantil
473	AP	2014			AP Ciudad Real (Sección 2ª), sentencia núm. 38/2014 de 14 febrero. JUR 2014\71021	Contratos mercantiles
474	AP	2014			AP Murcia (Sección 4ª), sentencia núm. 97/2014 de 13 febrero. JUR 2014\89365	Contratos bancarios

475	AP	2014			AP Sevilla (Sección 6ª), sentencia núm. 27/2014 de 12 febrero. JUR 2014\132822	Consumidores
476	AP	2014			AP Guadalajara (Sección 1ª), sentencia núm. 46/2014 de 11 febrero. JUR 2014\65652	Concursal
477	AP	2014			AP Guadalajara (Sección 1ª), sentencia núm. 35/2014 de 4 febrero. JUR 2014\65650	Concursal
478	AP	2014		478- Sociedades.Responsabilidad (otras cuestiones).	AP Cádiz (Sección 5ª), sentencia núm. 30/2014 de 14 enero. JUR 2014\76412	Mercantil
479	AP	2013		Compraventa	AP Ourense (Sección 1ª), sentencia núm. 444/2013 de 30 diciembre. JUR 2014\23727	Concursal
480	AP	2013		concursl titulos valores	AP Asturias (Sección 1ª), sentencia núm. 388/2013 de 19 diciembre. JUR 2014\17982	Concursal
481	AP	2013		Arrendamientos urbanos	AP Barcelona (Sección 1ª), sentencia núm. 562/2013 de 17 diciembre. JUR 2014\49800	Contratos mercantiles
482	AP	2013		Sociedades	AP Sevilla (Sección 5ª), sentencia núm. 622/2013 de 16 diciembre. JUR 2014\104240	Mercantil
483	AP	2013			AP Alicante (Sección 8ª), sentencia núm. 447/2013 de 29 noviembre. JUR 2014\172592	Contratos mercantiles
484	AP	2013		Seguros, trafico	AP Islas Baleares (Sección 3ª), sentencia núm. 366/2013 de 24 octubre. JUR 2013\346797	Contratos mercantiles
485	AP	2013		485- Proceso Civil.Contratos mercantiles.	AP Castellón (Sección 3ª), sentencia núm. 377/2013 de 26 septiembre. JUR 2013\350620	Mercantil/ Contractual
486	AP	2013			AP Sevilla (Sección 5ª), sentencia núm. 399/2013 de 9 septiembre. JUR 2013\380058	Concursal
487	AP	2013			AP Granada (Sección 3ª), sentencia núm. 241/2013 de 5 julio. JUR 2013\329565	Contratos mercantiles
488	AP	2013			AP Vizcaya (Sección 4ª), sentencia núm. 263/2013 de 10 mayo. JUR 2014\146313	Concursal
489	AP	2013			AP Sevilla (Sección 5ª), sentencia núm. 215/2013 de 30 abril. JUR 2013\252707	Concursal
490	AP	2013			AP Guipúzcoa (Sección 2ª), sentencia núm. 104/2013 de 27 marzo. JUR 2014\162545	Concursal
491	AP	2013			AP Barcelona (Sección 15ª), sentencia núm. 25/2013 de 24 enero. JUR 2014\55795	Concursal
492	AP	2012		Titulos valores	AP Barcelona (Sección 1ª), sentencia núm. 462/2012 de 14 octubre. JUR 2014\13485	Civil/ Cambiario
493	AP	2012			AP Guipúzcoa (Sección 2ª), sentencia núm. 215/2012 de 29 junio. JUR 2014\154300	Contratos mercantiles
494	AP	2012		494- Sociedades.Responsabilidad (otras cuestiones).	AP Guipúzcoa (Sección 2ª), sentencia núm. 203/2012 de 15 junio. JUR 2014\154153	Mercantil
495	AP	2012			AP Córdoba (Sección 3ª), sentencia núm. 35/2012 de 3 febrero. JUR 2014\13692	Concursal
496	AP	2012			AP Córdoba (Sección 3ª), sentencia núm. 25/2012 de 27 enero. JUR 2014\13340	Concursal
497	AP	2010		Titulos valores	AP Guadalajara (Sección 1ª), sentencia núm. 182/2010 de 26 octubre. JUR 2011\5046	Civil/ Cambiario

498	TS	2012	QUIEBRA: RETROACCION DE EFECTOS DE SU DECLARACION: nulidad de los actos posteriores a la fecha de retroacción: procedencia: compraventa de finca urbana concluida en el período de retroacción por sociedad luego quebrada como vendedora y sociedad interpuesta que la transmite mediante dación en pago a una tercera de mala fe: utilización de un testaferro para eludir las posibles sanciones que pudiera merecer el acto de disposición realizado: alcance de la ineficacia a los dos actos traslativos de dominio.DERECHOS FUNDAMENTALES Y LIBERTADES PUBLICAS: IGUALDAD ANTE LA LEY: igualdad en la aplicación de la Ley: proscribe las desigualdades artificiosas o injustificadas por no venir fundadas en criterios objetivos y razonables, según juicios de valor generalmente aceptados; vulneración: inexistencia: diversidad de supuestos de hecho enjuiciados.BUENA FE: IMPUGNACION EN CASACION: cauce adecuado para efectuarla: la fijación de los datos de hecho corresponde a la valoración de la prueba: la significación jurídica de dichos datos, una vez demostrados, forma parte del juicio técnico jurídico revisable en casación.	Quiebra; nulidad de actos posteriores a la fecha de retroaccion	TS (Sala de lo Civil, Sección 1ª), sentencia núm. 71/2012 de 20 febrero. RJ 2012\5284	Concursal

Annex 2. List of cases UK

	CATEGORY	TOPIC	SUB-TOPIC	SUBJECT	CASE	COURT	DATE	KEYWORDS	REFERENCE	
1	Commercial Law	Agency	Authority of Agents; Conflict of Laws Agency	Banking and finance; Contracts; Agency	UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH	High Court Queens Bench division (Commercial Court)	04/11/2014	Authority; Bribery; Capacity; Collateralised debt obligations; Conflict of interest; Credit default swaps; Default; Fraudulent misrepresentation; International banking; Rescission; Voidable contracts	[2014] EWHC 3615 (Comm)	
2	Commercial Law	Agency	Conflict of Laws Agency	Agency; Equity; Trusts	FHR European Ventures LLP v Cedar Capital Partners LLC	Supreme Court	16/07/2014	Agents; Breach of fiduciary duty; Constructive trusts; Equitable remedies; Proprietary rights; Purchase of land; Secret commission; Secret profits	[2014] UKSC 45	
3	Commercial Law	Agency	Conflict of Laws Agency	Insolvency; Company law; Conflict of laws	Apcoa Parking (UK) Ltd, Re	High Court Chancery Division	26/03/2014	Choice of law; Creditors' meetings; Foreign companies; Jurisdiction; Schemes of arrangement	[2014] EWHC 997 (Ch)	
4	Commercial Law	Agency	Conflict of Laws Agency	Conflict of laws; Insolvency; European Union	Joint Administrators of Heritable Bank Plc v Winding Up Board of Landsbanki Islands HF	Supreme Court	27/02/2013	Administration; Cross-claims; European Economic Area; Foreign judgments; Iceland; Insolvency; Recognition of judgments; Scotland; Winding-up proceedings	[2013] UKSC 13	
5	Commercial Law	Agency	Conflict of Laws Agency	Insolvency; Conflict of laws	Primacom Holdings GmbH v Credit Agricole	High Court Chancery Division	20/01/2012	Allocation of jurisdiction; Creditors; Defendants; Domicile; Jurisdiction; Schemes of arrangement	[2012] EWHC 164 (Ch)	
6	Commercial Law	Agency	Conflict of Laws Agency	Company law; Insolvency; Conflict of laws	Primacom Holdings GmbH v Credit Agricole	High Court Chancery Division	20/12/2011	Discretion; Foreign companies; Germany; Jurisdiction; Recognition of judgments; Schemes of arrangement	[2011] EWHC 3746 (Ch)	
7	Commercial Law	Agency	Conflict of Laws Agency	Banking and finance; Conflict of laws; Contracts	Carey Group Plc v AIB Group (UK) Plc	High Court Chancery Division	11/03/2011	Agreements; Assignment; Banker-customer relationship; Banking and finance; Credit facilities; Declaratory orders; Foreign law; Foreign legislation; Implied terms; Jurisdiction	[2011] EWHC 567 (Ch)	
8	Commercial Law	Agency	Conflict of Laws Agency	Insolvency; Civil procedure; Conflict of laws	Alitalia Linee Aeree Italiane SpA, Re	High Court Chancery Division	18/01/2011	Conflict of laws; Distribution; Insolvency; Insolvency; Pari passu; Priorities; Secondary insolvency proceedings; Unsecured creditors	[2011] EWHC 15 (Ch)	
9	Commercial Law	Agency	Conflict of Laws Agency	Banking and finance; Trusts	Lehman Brothers International (Europe) (In Administration), Re	High Court Chancery Division	19/11/2010	Agency; Beneficial ownership; Proprietary interests; Repurchase agreements; Securities; Settlement; Stock lending; Trusts	[2010] EWHC 2914 (Ch)	

10	Commercial Law	Commercial arrangements	Unincorporated Associations	Insolvency; Sport	Inland Revenue Commissioners v Wimbledon Football Club Ltd	Court of Appeal (Civil Division)	28/05/2004	Agreements to sell; Clubs; Company voluntary arrangements; Creditors; Football; Inland Revenue; Preferential creditors; Priorities	[2004] EWCA Civ 655	
11	Commercial Law	Company law	Company administration	Insolvency	Med-Gourmet Restaurants Ltd v Ostuni Investments Ltd	High Court Chancery Division	15/10/2010	Administration; Administrators; Appointments; Creditors' rights; Directors	[2010] EWHC 2834 (Ch)	
12	Commercial Law	Company law	Company administration	Insolvency	Hockin v Marsden	High Court Chancery Division	19/04/2014	Administration; Administrators; Assignment; Claims; Judgments and orders	[2014] EWHC 763 (Ch)	
13	Commercial Law	Company law	Company administration	Pensions; Insolvency	Bloom v Pensions Regulator	Supreme Court	24/07/2013	Administration; Administrators' powers and duties; Contribution notices; Creditors; Defined benefit schemes; Expenses; Financial support directions; Occupational pensions; Pari passu	[2013] UKSC 52	interaction pensions legislation with insolvency legislation; effects of the FSD (financial support direction) upon companies in administration.
14	Commercial Law	Company law	Company administration	Insolvency	Joint Administrators of Station Properties, Petitioners	Court of Session (outer house)	12/07/2013	Administration; Administrators' powers and duties; Insolvency; Scotland	[2013] CSOH 120	
15	Commercial Law	Company law	Company administration	Insolvency	Tambrook Jersey Ltd, Re	Court of Appeal (Civil Division)	22/05/2013	Administration; Judicial co-operation	[2013] EWCA Civ 576	(cross- boarder mergers)
16	Commercial Law	Company law	Company administration	Conflict of laws; Insolvency; European Union	Joint Administrators of Heritable Bank Plc v Winding Up Board of Landsbanki Islands HF	Supreme Court	27/02/2013	Administration; Cross-claims; European Economic Area; Foreign judgments; Iceland; Insolvency; Recognition of judgments; Scotland; Winding-up proceedings	[2013] UKSC 13	Regulation 28 deals with creditors' rights to set-off in a way that gives domestic effect to Art 23 of the Directive
17	Commercial Law	Company law	Company administration	Insolvency; Financial regulation; Trusts; Banking and finance	Lehman Brothers International (Europe) (In Administration), Re	Supreme Court	29/02/2012	Administration; Client accounts; Client money; Distribution; Financial institutions; Pooling; Statutory trusts	[2012] UKSC 6	Banks - Statutory trusts
18	Commercial Law	Company law	Company administration	Insolvency	Joint Administrators of Heritable Bank Plc v Winding Up Board of Landsbanki Islands HF	Court of Session (inner house, first division)	28/09/2011	Administration; European Economic Area; Iceland; Recognition of judgments; Scotland; Winding-up; Winding-up proceedings	[2011] CSIH 61	(i) the conditions for, and the effects of, the closure of insolvency proceedings, in particular by composition; (j) creditors' rights after the closure of winding-up proceedings; (k) who is to bear the costs and expenses
19	Commercial Law	Company law	Company administration	Insolvency; Pensions	Bloom v Pensions Regulator	High Court Chancery Division	10/12/2010	Administration; Expenses; Financial support directions; Liquidation; Pensions Regulator	[2010] EWHC 3010 (Ch)	Overruled in appeal [2013] UKSC 52
20	Commercial Law	Company law	Company administration	Insolvency	St George's Property Services (London) Ltd (In Administration), Re	High Court Chancery Division	14/10/2010	Administration; Administrators; Appointments; Extortionate credit transactions; Insolvency; Loans; Replacement administrators	[2010] EWHC 2538 (Ch)	Secured/unsecured creditors

21	Commercial Law	Company law	Company administration	Insolvency; Civil procedure	Leyland Printing Co Ltd (In Administration), Re	High Court Chancery Division	11/08/2010	Administration; Administrators' powers and duties; Creditors; Directions; Insolvency practitioners' proposals; Limitations	[2010] EWHC 2105 (Ch)	Directions as to the proper treatment of creditors' claims and, specifically, whether the administrator or subsequent liquidator of the companies can and should accept any claims that have become statute-barred since the making of the administration orders in respect of the companies for the purpose of proving and receiving a dividend from the realisations that have been made during the course of the administrations.(...) the administrator be authorised to and do, prior to such discharge taking effect, agree the claims of and make payments to the companies' preferential and unsecured creditors;
22	Commercial Law	Company law	Company administration	Insolvency; Financial regulation; Banking and finance; Trusts	Lehman Brothers International (Europe) (In Administration), Re	Court of Appeal (Civil Division)	02/08/2010	Administration; Bank accounts; Client accounts; Distribution; Pooling; Statutory trusts	[2010] EWCA Civ 917	Resolved in appeal [2012] UKSC 6
23	Commercial Law	Company law	Company administration	Insolvency	Winding Up Board of Landsbanki Islands HF v Mills	Court of Session (outer house)	20/07/2010	Administration; Iceland; Recognition of judgments; Scotland; Winding-up proceedings	[2010] CSOH 100	Creditors' rights after the closure of winding up proceedings
24	Commercial Law	Company law	Company administration	Insolvency	Kaupthing Singer & Friedlander Ltd (In Administration), Re	Court of Appeal (Civil Division)	11/05/2010	Administration; Creditors; Debtors; Directions; Mutual credits; Set-off	[2010] EWCA Civ 518	Creditors' rights within debts in set- off administration
25	Commercial Law	Company law	Company administration	Insolvency; Banking and finance	Kaupthing Singer & Friedlander Ltd (In Administration), Re	High Court Chancery Division	19/02/2010	Administration; Banks; Bonds; Distribution; Subordination; Winding-up	[2010] EWHC 316 (Ch)	Asset ditribution amongst preferential/ secured creditors and unsecured creditors in winding up
26	Commercial Law	Company law	Company administration	Insolvency; Banking and finance	Lehman Brothers International (Europe) (In Administration), Re	High Court Chancery Division	20/01/2010	Administration; Bank accounts; Deposits; Distribution	[2010] EWHC 47 (Ch)	Administration Beneficial interests Creditors' rights Deposits Investment banks
27	Commercial Law	Company law	Company administration	Company law	Salvesen, Petitioner	Court of Session (outer house)	08/12/2009	Administration; Charges; Registration; Scotland; Secured creditors	[2009] CSOH 161	Insolvent company's funds allocation according to creditors' rights (secured - unsecured creditors issues)
28	Commercial Law	Company law	Company administration	Insolvency	Hellas Telecommunications (Luxembourg) II SCA, Re	High Court Chancery Division	26/11/2009	Administration; Administrators; Creditors; Pre-pack administrations	[2009] EWHC 3199 (Ch)	Forum shopping Insolvency and corporate restructuring
29	Commercial Law	Company law	Company administration	Insolvency	BLV Realty Organization Ltd v Batten	High Court Chancery Division	20/11/2009	Administration; Administrators' powers and duties; Appointments; Creditors; Fairness	[2009] EWHC 2994 (Ch)	

30	Commercial Law	Company law	Company administration	Insolvency; Banking and finance; Trusts	Lehman Brothers International (Europe) (In Administration), Re	Court of Appeal (Civil Division)	06/11/2009	Administration; Creditors; Investment banks; Jurisdiction; Proprietary interests; Schemes of arrangement; Trust property	[2009] EWCA Civ 1161	
31	Commercial Law	Company law	Company administration	Insolvency; Banking and finance; Contracts	Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd	Court of Appeal (Civil Division)	06/11/2009	Administration; Agreements; Corporate insolvency; Joint ventures; Licences; Loan notes; Priorities; Swap agreements	[2009] EWCA Civ 1160	(related to Lehman Bros) Banks are failing to pay sums due under the ISDA must file for bankruptcy or insolvency or similar.
32	Commercial Law	Company law	Company administration	Insolvency	Kaupthing Singer & Friedlander Ltd (In Administration), Re	High Court Chancery Division	02/10/2009	Administration; Creditors; Debtors; Directions; Joint administrators; Set-off	[2009] EWHC 2308 (Ch)	Sums payable to creditors in insolvency
33	Commercial Law	Company law	Company administration	Insolvency; Trusts; Banking and finance	Lehman Brothers International (Europe) (In Administration), Re	High Court Chancery Division	21/08/2009	Administration orders; Investment banks; Proprietary interests; Schemes of arrangement	[2009] EWHC 2141 (Ch)	
34	Commercial Law	Company law	Company administration	Employment; Insolvency	Oakland v Wellswood (Yorkshire) Ltd	Court of Appeal (Civil Division)	30/07/2009	Administration; Continuity of employment; Transfer of undertakings; Unfair dismissal	[2009] EWCA Civ 1094	Employees as creditors in insolvency; pension schemes
35	Commercial Law	Company law	Company administration	Insolvency; Partnerships	Clydesdale Financial Services Ltd v Smailes	High Court Chancery Division	18/06/2009	Administrators' powers and duties; Joint administrators; Pre-pack administrations; Sale of assets; Work in progress	[2009] EWHC 1745 (Ch)	
36	Commercial Law	Company law	Company administration	Insolvency	Kayley Vending Ltd, Re	High Court Chancery Division	15/05/2009	Administration orders; Expenses; Information; Pre-pack administrations	[2009] EWHC 904 (Ch)	
37	Commercial Law	Company law	Company administration	Insolvency; Banking and finance	Global Trader Europe Ltd (In Liquidation), Re	High Court Chancery Division	29/03/2009	Administration; Bank accounts; Corporate insolvency; Derivatives; Distribution; Liquidation; Preferences; Trusts; Unsecured creditors	[2009] EWHC 602 (Ch)	
38	Commercial Law	Company law	Company administration	Insolvency; Banking and finance	Lehman Brothers International (Europe) (In Administration), Re	High Court Chancery Division	24/11/2008	Administration; Administrators' powers and duties; Creditors; Information; Investment banks; Investment funds; Jurisdiction; Proprietary interests; Securities; Security; Trust property	[2008] EWHC 2869 (Ch)	Corporate insolvency Costs Creditors' rights Liquidators' powers and duties
39	Commercial Law	Company law	Company administration	Insolvency; Landlord and tenant	Sunberry Properties Ltd v Innovate Logistics Ltd (In Administration)	Court of Appeal (Civil Division)	18/11/2008	Administration; Administrators' powers and duties; Breach of covenant; Leases; Licences; Occupation; Permission; Pre-pack administrations; Proceedings; Rent	[2008] EWCA Civ 1321	Lanlord is creditor and tenant debtor - lanlord should be unsecured
40	Commercial Law	Company law	Company administration	Employment; Insolvency	Oakland v Wellswood (Yorkshire) Ltd	**Employment appeal tribunal**				
41	Commercial Law	Company law	Company administration	Insolvency; Civil procedure	RAB Capital Plc v Lehman Brothers International (Europe)	High Court Chancery Division	22/09/2008	Administration; Administrators' powers and duties; Directions	[2008] EWHC 2335 (Ch)	Banks - fixed and floating charges - secured and unsecured credits
42	Commercial Law	Company law	Company administration	Insolvency	Thorniley v Revenue and Customs Commissioners	High Court Chancery Division	05/02/2008	Administration; Floating charges; Secured creditors; Unsecured creditors	[2008] EWHC 124 (Ch)	

43	Commercial Law	Company law	Company administration	Insolvency	Leeds United Association Football Club Ltd, Re	High Court Chancery Division	25/07/2007	Administration; Damages; Football; Wages; Wrongful dismissal	[2007] EWHC 1761 (Ch)	
44	Commercial Law	Company law	Company administration	Insolvency; Company law	Hydroserve Ltd, Re	High Court Chancery Division	19/06/2007	Administration; Dividends; Judgments and orders; Setting aside; Unsecured creditors	[2007] EWHC 3026 (Ch)	
45	Commercial Law	Company law	Company administration	Insolvency	HPJ UK Ltd (In Administration), Re	High Court Chancery Division	26/03/2007	Administration; Distribution; Revenue and Customs; Settlement; Unsecured creditors	[2007] B.C.C. 284	
46	Commercial Law	Company law	Company administration	Insolvency	TM Kingdom Ltd (In Administration), Re	High Court Chancery Division	26/03/2007	Administration; Administrators' powers and duties; Creditors' voluntary winding-up; Liquidation; Statutory interpretation	[2007] EWHC 3272 (Ch)	
47	Commercial Law	Company law	Company administration	Insolvency	DKLL Solicitors v Revenue and Customs Commissioners	High Court Chancery Division	06/03/2007	Administration orders; Discretionary powers; Realisation; Winding-up petitions	[2007] EWHC 2067 (Ch)	
48	Commercial Law	Company law	Direct claims for breach of contract	Landlord and tenant; Civil procedure	Metro Nominees (Wandsworth) (No.1) Ltd v Rayment	**County court**				
49	Commercial Law	Company law	Company administration	Insolvency; Personal injury; Insurance	T&N Ltd, Re	High Court Chancery Division	16/06/2006	Administration; Asbestos; Contribution; Creditors' meetings; Creditors' rights; Employers' liability insurance; Schemes of arrangement; Schemes of arrangement; Validity	[2006] EWHC 1447 (Ch)	
50	Commercial Law	Company law	Company administration	Insolvency; Civil procedure	TT Industries Ltd, Re	High Court Chancery Division	26/04/2005	Administration orders; Applications; Court administration; Delay; Extensions of time; Jurisdiction	[2006] B.C.C. 372	
51	Commercial Law	Company law	Company administration	Insolvency; Pensions	T&N Ltd, Re	High Court Chancery Division	21/10/2004	Administration; Company voluntary arrangements; Creditors; Cross-border insolvency; Reorganisation of capital; Winding-up	[2004] EWHC 2361 (Ch)	
52	Commercial Law	Company law	Company mergers	Company law; Civil procedure	Diamond Resorts (Europe) Ltd, Re	High Court Chancery Division	04/12/2012	Certification; Cross-border mergers; Discretionary powers; Spain; Stakeholders	[2012] EWHC 3576 (Ch)	Protection of creditors' rights within a merger (judge declares they are protected)
53	Commercial Law	Company law	Company mergers	Insolvency	MyTravel Group Plc, Re	High Court Chancery Division	24/11/2004	Companies; Jurisdiction; Reconstructions; Schemes of arrangement; Shareholders	[2004] EWHC 2741 (Ch)	acknowledgment that absent the scheme the creditors' rights would have to be enforced in a winding up and in no other way
54	Commercial Law	Company law	Receiverships	Succession; Insolvency	Joint Stock Co Aeroflot - Russian Airlines v Berezovskaya	Court of Appeal (Civil Division)	04/03/2014	Administration of estates; Confidential information; Confidentiality agreements; Court-appointed receivers; Creditors' rights; Executors; Insolvency	[2014] EWCA Civ 431	

55	Commercial Law	Company law	Receiverships	Insolvency; Contracts	Rayford Homes Ltd (In Administrative Receivership), Re	High Court Chancery Division	23/07/2011	Administrative receivership; Agreements; Interpretation; Priorities; Secured creditors	[2011] EWHC 1948 (Ch)	
56	Commercial Law	Company law	Receiverships	Trusts; Equity	Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd	Privy council (Cayman Islands)	21/06/2011			Privy council does not exactly belong to UK judiciary - it persuasive not binding
57	Commercial Law	Company law	Takeovers	Insolvency; Civil procedure	Expro International Group Plc, Re	High Court Chancery Division	26/06/2008	Adjournment; Offers; Proposals; Schemes of arrangement; Takeovers	[2008] EWHC 1543 (Ch)	Scheme of arrangement - takeover
58	Commercial Law	Company law	Directors	Company law	Vivendi SA v Richards	High Court Chancery Division	09/10/2013	Breach of fiduciary duty; Directors' powers and duties; Dishonesty; Good faith; Payments; Shadow directors	[2013] EWHC 3006 (Ch)	Shadow directors in breach of duty for making payments in vicinity of insolvency (company goes to liquidation right after
59	Commercial Law	Company law	Directors	Company law	HLC Environmental Projects Ltd, Re	High Court Chancery Division	25/09/2013	Creditors; Directors' liabilities; Directors' powers and duties; Liquidators' powers and duties; Misfeasance; Payments	[2013] EWHC 2876 (Ch)	'misfeasance'procedure provided by s.212, Insolvency Act 1986, the liquidators seek financial relief against its principal director, in respect of a number of payments whichhe caused the Company to make between 30 November 2005 and 27 October 2008.
60	Commercial Law	Company law	Directors	Insolvency; Company law; Civil procedure	Hellard v Carvalho	High Court Chancery Division	23/07/2013	Amendments; Delay; Directors; Directors' liabilities; Directors' powers and duties; Estoppel; Liquidation; Misappropriation; Particulars of claim	[2013] EWHC 2876 (Ch)	Is exactly the same case as HLC environmental projects
61	Commercial Law	Company law	Directors	Insolvency; Company law	Kudos Business Solutions Ltd (In Liquidation), Re	High Court Chancery Division	09/06/2011	Breach of duty of care; Directors' liabilities; Liquidation; Misfeasance; Sole directors; Wrongful trading	[2011] EWHC 1436 (Ch)	Misfeasance
62	Commercial Law	Company law	Directors	Insolvency	Med-Gourmet Restaurants Ltd v Ostuni Investments Ltd	High Court Chancery Division				Repeated (company administration - insolvency)
63	Commercial Law	Company law	Directors	Company law	Prestige Grindings Ltd, Re	High Court Chancery Division	04/11/2005	Addition of parties; Directors; Disqualification orders; Joint and several liability; Liquidation; Representation orders		
64	Commercial Law	Company law	Directors	Company law	Gardner v Parker	Court of Appeal (Civil Division)	23/06/2004	Creditors; Directors; Fiduciary duty; Reflective losses; Shareholders; Transactions at an undervalue		
65	Commercial Law	Company law	Formation of Companies	Creditors; Directors; Fiduciary duty; Reflective losses; Shareholders; Transactions at an undervalue	La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC	Privy Council (Jersey)	17/07/2002	Company incorporation; Corporate personality; Executive power; Jersey; Ministers' powers and duties; Sovereignty; State immunity	[2012] UKPC 27	Privy council does not exactly belong to UK judiciary - it persuasive not binding

66	Commercial Law	Company law	Fraudulent trading	Insolvency; Civil procedure	Carman v Cronos Group SA	High Court Chancery Division	12/06/2006	Champerty; Continuance; Creditors' meetings; Fraudulent trading; Liquidators; Remuneration	[2006] EWHC 1390 (Ch)	Champerty: an illegal agreement in which a person with no previous interest in a lawsuit finances it with a view to sharing the disputed property if the suit succeeds.
67	Commercial Law	Company law	Share capital	Company law	Vodafone Group Plc, Re	High Court Chancery Division	01/05/2014	Creditors' rights; Reduction of share capital; Schemes of arrangement	[2014] EWHC 1357 (Ch)	
68	Commercial Law	Company law	Share capital	Company law	Liberty International Plc, Re	High Court Chancery Division	16/06/2010	Creditors' rights; Reduction of share capital; Share premium account	[2010] EWHC 1060 (Ch)	
69	Commercial Law	Company law	Share capital	Insolvency; Pensions	T&N Ltd, Re	High Court Chancery Division	21/10/2004	Administration; Company voluntary arrangements; Creditors; Cross-border insolvency; Reorganisation of capital; Winding-up	[2004] EWHC 2361 (Ch)	
70	Commercial Law	Company law	Shareholders	Banking and finance; Company law	Assenagon Asset Management SA v Irish Bank Resolution Corp Ltd (formerly Anglo Irish Bank Corp Ltd)	High Court Chancery Division	27/07/2012	Abuse of power; Corporate bonds; Minority shareholders; Resolutions; Ultra vires	[2012] EWHC 2090 (Ch)	
71	Commercial Law	Company law	Shareholders	Company law; Insolvency	Uniq Plc, Re	High Court Chancery Division	25/03/2011	Courts' powers and duties; Financial assistance; Minority shareholders; Schemes of arrangement; Special resolutions; Voting	[2011] EWHC 749 (Ch)	
72	Commercial Law	Company law	Shareholders	Insolvency	MyTravel Group Plc, Re	High Court Chancery Division	24/11/2004	Companies; Jurisdiction; Reconstructions; Schemes of arrangement; Shareholders	[2004] EWHC 2741 (Ch)	
73	Commercial Law	Company law	Shareholders	Company law	Gardner v Parker	Court of Appeal (Civil Division)	23/06/2004	Creditors; Directors; Fiduciary duty; Reflective losses; Shareholders; Transactions at an undervalue	[2004] EWCA Civ 781	
74	Commercial Law	Company law		Company law; International law; Insolvency	Apcoa Parking Holdings GmbH, Re	High Court Chancery Division	19/11/2014	Car parks; Class meetings; Creditors; Debt restructuring; Germany; Insolvency; Schemes of arrangement	[2014] EWHC 3849 (Ch)	
75	Commercial Law	Company law		Company law; Insolvency; Tax	Official Receiver v Gawn	High Court Chancery Division	22/01/2014	Corporate insolvency; Creditors' rights; Directors disqualification; Disqualification orders; Non-payment; Tax	Case No: 4328/2012	
76	Commercial Law	Company law		Family law; Company law	Petrodel Resources Ltd v Prest	Supreme Court	12/06/2013	Assets; Companies; Corporate personality; Financial orders; Legal personality; Transfer of property orders	[2013] UKSC 34	

77	Commercial Law	Company law		Insolvency; Banking and finance; Company law	BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc	Supreme Court	09/05/2013	Assets; Call options; Companies; Corporate insolvency; Crystallisation; Future liabilities; Liabilities; Loan notes; Securitisation; Statutory interpretation; Sub-prime mortgages	[2013] UKSC 28	
78	Commercial Law	Company law		Insolvency; Company law; Trusts	Marconi Corp Plc, Re	High Court Chancery Division	21/02/2013	Beneficiaries; Directions; Distributions; Escrow; Interpretation; Judicial decision-making; Missing persons; Remainders; Schemes of arrangement	[2013] EWHC 324 (Ch)	
79	Commercial Law	Company law		Company law; Civil procedure	Blight v Brewster	High Court Chancery Division	09/02/2012	Creditors' rights; Delegated powers; Election; Judgment creditors; Judgment debts; Pension funds; Shares	[2012] EWHC 165 (Ch)	
80	Commercial Law	Company law		Insolvency	Mills v HSBC Trustee (CI) Ltd	Supreme Court	19/10/2011	Administration; Distributions; Rule against double proof; Set-off	[2011] UKSC 48	
81	Commercial Law	Company law		Trusts; Company law; Insolvency	Starglade Properties Ltd v Nash	Court of Appeal (Civil Division)	19/11/2010	Breach of trust; Creditors; Dishonest assistance; Dishonesty; Preferences	[2010] EWCA Civ 1314	
82	Commercial Law	Company law		Banking and finance; Contracts; Company law	HHY Luxembourg Sarl v Barclays Bank Plc	Court of Appeal (Civil Division)	22/10/2010	Banking and finance; Loan agreements; Release; Security; Share sales	[2010] EWCA Civ 1248	Creditors' rights Debt restructuring Interpretation Loan agreements Release Security Intercreditor agreement: release on disposals clause P.L.C. 2011, 22(1), 54-55 Business restructuring Creditors' rights Interpretation Loan agreements Release Security Subsidiary companies Trustees' powers and duties Upstairs downstairs: crossing the creditor class divide B.J.I.B. & F.L. 2011, 26(1), 3-5 Business restructuring Creditors' rights Loan agreements Mezzanine finance Release Release of liabilities by security trustee
83	Commercial Law	Company law		Insolvency; Banking and finance; Company law	La Seda de Barcelona SA, Re	High Court Chancery Division	26/05/2010	Approvals; Creditors; Guarantors; Jurisdiction; Releases; Schemes of arrangement	[2010] EWHC 1364 (Ch)	
84	Commercial Law	Company law		Torts; Company law	Lindsay v O'Loughnane	High Court Queens Bench division (Commercial Court)	18/03/2010	Agents; Corporate personality; Deceit; Directors' powers and duties; Fraudulent misrepresentation; Implied representations	[2010] EWHC 529 (QB)	
85	Commercial Law	Company law		Insolvency; Company law	Bluebrook Ltd, Re	High Court Chancery Division	11/08/2009	Approvals; Creditors; Debts; Directors' powers and duties; Fairness; Schemes of arrangement; Valuation	[2009] EWHC 2114 (Ch)	

86	Commercial Law	Company law		Insolvency; Company law	Hydroserve Ltd, Re	High Court Chancery Division	19/06/207	Administration; Dividends; Judgments and orders; Setting aside; Unsecured creditors	[2007] EWHC 3026 (Ch)	
87	Commercial Law	Company law		Insolvency; Company law	Sovereign Marine & General Insurance Co Ltd, Re	High Court Chancery Division	09/06/2006	Creditors' meetings; Foreign companies; Insurance companies; Insurance policies; Jurisdiction; Schemes of arrangement	[2006] EWHC 1335 (Ch)	
88	Commercial Law	Company law		Insolvency; Company law; Personal injury	Cape Plc, Re	High Court Chancery Division	07/06/2006	Amendments; Asbestos; Companies; Creditors' meetings; Personal injury claims; Provisional damages; Schemes of arrangement; Unfair contract terms	[2006] EWHC 1316 (Ch)	
89	Commercial Law	Company law		Insolvency; Company law	International Brands USA Inc v Goldstein	High Court Chancery Division	23/06/2005	Creditors' meetings; Creditors' voluntary winding-up; Judgment debts	[2005] EWHC 1293 (Ch)	
90	Commercial Law	Company law		Insolvency; Company law	Telewest Communications Plc (No.1), Re	High Court Chancery Division	26/04/2004	Bonds; Corporate insolvency; Creditors' meetings; Currencies; Dates; Jurisdiction; Voluntary arrangements	[2013] EWCA Civ 869	
91	Commercial Law	Consumer law		Consumer law; Insolvency	Evans v Finance-U-Ltd	Court of Appeal (Civil Division)	18/07/2003	Bankruptcy; Bills of sale; Cars; Consumer credit agreements; Delivery up; Enforcement; Loan agreements; Possession; Security	[2013] EWCA Civ 548	
92	Commercial Law	Consumer law	Contract	Sale of goods; Consumer law; Damages	Manton Hire and Sales Ltd v Ash Manor Cheese Co Ltd	Court of Appeal (Civil Division)	16/05/2003	Breach of contract; Contracts of sale; Fitness for purpose; Implied representations; Mitigation; Modification; Plant and machinery; Pre-contractual misrepresentation; Proposals		
93	Commercial Law	Insolvency	Block transfer orders	Insolvency	Donaldson v O'Sullivan	High Court Chancery Division	29/02/2008	Appointments; Bankruptcy; Block transfer orders; Jurisdiction; Replacement; Trustees in bankruptcy	[2008] EWHC 387 (Ch)	
94	Commercial Law	Insolvency	Company voluntary arrangements	Insolvency; Sport	Revenue and Customs Commissioners v Portsmouth City Football Club Ltd (In Administration)	High Court Chancery Division	05/08/2010	Administrators; Company voluntary arrangements; Corporate insolvency; Creditors' meetings; Football; Material irregularity; Preferential creditors	[2010] EWHC 2013 (Ch)	
95	Commercial Law	Insolvency	Company voluntary arrangements	Insolvency	Mourant & Co Trustees Ltd v Sixty UK Ltd (In Administration)	High Court Chancery Division	23/07/2010	Company voluntary arrangements; Guarantees; Landlords; Unfairly prejudicial conduct	[2010] EWHC 1890 (Ch)	Company voluntary arrangements Creditors' rights Guarantees Landlords' rights Parent companies Mourant & Co Trustees Ltd v Sixty UK Ltd (In Administration)
96	Commercial Law	Insolvency	Company voluntary arrangements	Insolvency	Energy Holdings (No.3) Ltd (In Liquidation), Re	High Court Chancery Division	19/03/2010	Claims; Company voluntary arrangements; Creditors' rights; Foreign proceedings; Parallel proceedings; Supervisors	[2010] EWHC 788 (Ch)	

97	Commercial Law	Insolvency	Company voluntary arrangements	Insolvency	Gold Fields Mining LLC v Tucker	Court of Appeal (Civil Division)	11/03/2009	Claims; Company voluntary arrangements; Creditors; Interpretation; Time limits	[2009] EWCA Civ 173	
98	Commercial Law	Insolvency	Company voluntary arrangements	Insolvency; Landlord and tenant	Prudential Assurance Co Ltd v PRG Powerhouse Ltd	High Court Chancery Division	01/05/2007	Commercial property; Company voluntary arrangements; Creditors; Guarantors; Landlords; Unfairly prejudicial conduct	[2007] EWHC 1002 (Ch)	Creditors' rights Guarantees Landlords' rights Unfairly prejudicial conduct Validity Company voluntary arrangement: the restructuring trends Ins
99	Commercial Law	Insolvency	Distribution of assets	Insolvency	Permacell Finesse Ltd (In Liquidation), Re	High Court Chancery Division	30/11/2007	Assets; Corporate insolvency; Creditors' rights; Distribution; Floating charges; Liquidation; Liquidators' powers and duties; Secured creditors; Unsecured creditors		
100	Commercial Law	Insolvency	Distribution of assets	Insolvency	Courts Plc (In Liquidation), Re	High Court Chancery Division	09/10/2008	Corporate insolvency; Distribution; Jurisdiction; Orders; Priorities; Unsecured creditors	[2008] EWHC 2339 (Ch)	
101	Commercial Law	Insolvency	Distribution of assets	Insolvency	Permacell Finesse Ltd (In Liquidation), Re	High Court Chancery Division	30/11/2007	Assets; Corporate insolvency; Creditors' rights; Distribution; Floating charges; Liquidation; Liquidators' powers and duties; Secured creditors; Unsecured creditors	[2007] EWHC 3233 (Ch)	
102	Commercial Law	Insolvency	Individual voluntary arrangements	Insolvency; Civil procedure	Davis v Price	Court of Appeal (Civil Division)	21/01/2014	Creditors; Creditors' meetings; Creditors' rights; Individual voluntary arrangements; Setting aside; Statutory demands; Suspension	[2014] EWCA Civ 26	
103	Commercial Law	Insolvency	Individual voluntary arrangements	Insolvency; Civil procedure; Banking and finance	Mond v MBNA Europe Bank Ltd	High Court Chancery Division	09/07/2010	Creditors' powers and duties; Debt management; Declaratory orders; Individual voluntary arrangements; Insolvency practitioners; Intention to create legal relations	[2010] EWHC 1710 (Ch)	
104	Commercial Law	Insolvency	Individual voluntary arrangements	Insolvency	Tradition (UK) Ltd v Ahmed	High Court Chancery Division	05/12/2008	Creditors' meetings; Individual voluntary arrangements; Voting	[2008] EWHC 2946 (Ch)	
105	Commercial Law	Insolvency	Individual voluntary arrangements	Insolvency	Ravichandran, Re	High Court Chancery Division	30/03/2004	Bankruptcy; Discharge; Individual voluntary arrangements	[2004] B.P.I.R. 814	
106	Commercial Law	Insolvency	Liquidator	Insolvency	Joint Liquidators of the Scottish Coal Co Ltd, Noters	Court of Session (inner house, second division)	12/12/2013	Abandonment; Directions; Liquidators; Liquidators' powers and duties; Scotland	[2013] CSIH 108	Scottish courts
107	Commercial Law	Insolvency	Liquidator	Insolvency	Kelly v Inflexion Fund 2 Ltd	High Court Chancery Division	11/11/2010	Creditors' rights; Floating charges; Liquidators' powers and duties; Secured creditors; Surrender; Unsecured creditors; Winding-up	[2010] EWHC 2850 (Ch)	
108	Commercial Law	Insolvency	Liquidator	Insolvency	Morris, Petitioner	Court of Session (outer house)				

109	Commercial Law	Insolvency	Liquidator	Insolvency; Civil procedure	HIH Casualty & General Insurance Ltd, Re	Court of Appeal (Civil Division)	09/06/2006	Australia; Cross-border insolvency; Insurance companies; Letters of request; Liquidation; Pari passu	[2006] EWCA Civ 732	The courts in England had jurisdiction to wind them up and the need to protect most creditors' rights apart from those excepted creditors who would be paid anyway would be a very good reason to exercise it.
110	Commercial Law	Insolvency	Statutory demands	Contracts	Collier v P & MJ Wright (Holdings) Ltd	Court of Appeal (Civil Division)	14/12/2007	Agreements; Promissory estoppel; Statutory demands	[2007] EWCA Civ 1329	proof Statutory demands Promissory estoppel and the part-payment of debts S.L. Rev. 2009, 57(Sum), 18-20 Consideration Creditors' rights Joint debtors Promissory estoppel Demanding times
111	Commercial Law	Insolvency	Winding up	Insolvency	Hunt v Renzland	High Court Chancery Division	20/05/2008	Compulsory winding-up; Costs; Private examinations	[2008] B.P.I.R. 1380	Administrators' powers and duties Appointments Corporate insolvency Costs Creditors' rights Liquidators' powers and duties Pari passu Private examinations Unsecured creditors
112	Commercial Law	Insolvency	Winding up	Insolvency; Civil procedure	Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd (In Liquidation)	Court of Appeal (Civil Division)	29/11/2005	Creditors; Insurance policies; Limitation periods; Voluntary winding-up	[2005] EWCA Civ 1408	rights against the company. In the course of his opinion he described the effect of a winding-up on creditors' rights in rather different terms from those used by Judge Paul Baker Q.C., whose judgment does not appear to have been
113	Commercial Law	Insurance		Insolvency; Banking and finance; Contracts; Insurance	Merrill Lynch International Bank Ltd (formerly Merrill Lynch Capital Markets Bank Ltd) v Winterthur Swiss Insurance Co	High Court Queens Bench division (Commercial Court)	20/04/2007	Bankruptcy; Commercial contracts; Credit; Indemnities; Insurance policies; Insured event; Swap agreements	[2007] EWHC 893 (Comm)	counterparty bankruptcy under the policy as a procedure seeking any other relief under any bankruptcy or insolvency law affecting creditors' rights. The safeguard proceedings constituted French insolvency law and clearly affected creditors' rights. (2) In light of the finding that a counterparty bankruptcy did occur for the purposes of the policy, likewise
114	Commercial Law	Mortgages		Banking and Finance; Civil procedure	Thakker v Northern Rock (Asset Management) Plc	High Court Queens Bench division (Commercial Court)	05/02/2004	Codes of conduct; Counterclaims; Creditors' rights; Equitable set-off; Mortgagees' powers and duties; Possession claims	[2014] EWHC 2107 (QB)	
115	Commercial Law	Mortgages		Civil procedure; Heritable property; Rights in security	Accord Mortgages Ltd v Edwards	Sheriff Court (Lothian and Borders)	25/06/2012			Scottish courts
116	Commercial Law				Northern Rock (Asset Management) Plc v Millar					Scottish courts

117	Commercial Law	Mortgages		Rights in security; Real property; Banking and finance	Royal Bank of Scotland Plc v Wilson	Supreme Court	24/11/2010	Default; Heritable property; Mortgage claims; Notices; Possession claims; Registered charges; Requisitions; Rights in security; Scotland; Security; Standard securities	[2010] UKSC 50	Conveyancing and Feudal Reform (Scotland) Act 1970
118	Commercial Law	Mortgages		Banking and finance	Chelsea Building Society v Nash	Court of Appeal (Civil Division)	19/10/2010	Accord and satisfaction; Creditors' rights; Joint debtors; Mortgages	[2010] EWCA Civ 1247	Where one co-debtor was released from the debt by accord and satisfaction, co-debtors would all be released unless the creditor expressly reserved its rights against the co-debtors; if there was no express reservation of rights, the court could determine whether such a term could be implied. A joint debtor was not, therefore, liable for half of the shortfall between a mortgage debt and the amount realised on the sale of the mortgaged property where the creditor had accepted a payment from her co-debtor in full and final settlement but failed to reserve its right to pursue the debt against her, either expressly or by implication.
119	Commercial Law	Partnerships			Rosserlane Consultants Ltd, Petititoners	Court of Session (outer house)	20/08/2008	Appointments; Creditors' rights; Judicial factors; Partnerships; Scotland; Sufficiency of evidence	[2008] CSOH 120	Scottish courts
120	Contract Law	Breach of Contract	Restitution	Banking and finance; Local government; Contracts; Negligence; Restitution	Haugesund Kommune v Depfa ACS Bank	High Court Queens Bench division (Commercial Court)	04/09/2009	Authority; Banks; Borrowing powers; Capacity; Change of position; Failure of consideration; Good faith; Investments; Legal advice; Loan agreements; Local authorities' powers and duties; Mistake; Swap agreements	[2009] EWHC 2227 (Comm)	Norwegian municipalities were not bound by swap transactions entered into with an Irish bank, because they lacked the capacity to enter into them, but the bank was entitled to a restitutionary remedy against the municipalities.
121	Contract Law	Operation of Contract		Banking and finance	Cattles Plc v Welcome Financial Services Ltd	Court of Appeal (Civil Division)	13/05/2010			

122				Civil procedure	JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev	High Court Chancery Division	19/12/2014	Discharge; Dissipation of assets; Freezing injunctions; Non-disclosure	[2014] EWHC 4336 (Ch)	It would not be appropriate to discharge a worldwide freezing order obtained against the defendant by a Russian bank and a Russian state organisation. Although there had been some non-disclosures by the claimants, they were not significant enough to justify discharging the order; further, the claimants had established both a good arguable case in respect of the claim pursued and a sufficient risk of dissipation of assets.
123				Insolvency; Civil procedure	Calibre Solicitors Ltd, Re	High Court Chancery Division	11/12/2014	Administrators; Creditors' rights; Discretionary powers; Extensions of time; Progress reports; Remuneration	[2015] B.P.I.R. 435	Creditors' applications to challenge an administrator's remuneration and expenses under the Insolvency Rules 1986 r.2.109 had to relate to sums already incurred, and could not relate to future sums. Accordingly, if a creditor wished to challenge the remuneration detailed in two progress reports, he had to issue two applications. However, the court had power to extend time for late applications if it was appropriate to do so.
124				Consumer law; Civil procedure	Grace v Black Horse Ltd	Court of Appeal (Civil Division)	30/10/2014	Causation; Consumer credit agreements; Credit rating; Data protection principles; Default judgments; Enforcement; Hire purchase; Limitations	[2014] EWCA Civ 1413	A default registration entered by a finance company under an unenforceable hire purchase credit agreement was in breach of the Data Protection Act 1998 and had caused losses incurred by the debtor. It was not accurate to describe the debtor as a defaulter under his agreement once a competent court had decided that the agreement was irremediably unenforceable against him.

125				Tax	Vocalspruce Ltd v Revenue and Customs Commissioners	Court of Appeal (Civil Division)	31/10/2014	Corporation tax; Debts; Loan notes; Profits; Related party transactions; Share premium account	[2014] EWCA Civ 1302	The exclusion from corporation tax under the Finance Act 1996 s.84(2)(a) of profits arising from loan relationships and related transactions did not apply to a credit on the accrual of profits on loan notes which had been assigned under an agreement between related companies where the requirement to transfer the profits to the assignee's share premium account arose solely by reason of the contractual arrangements between the parties. That situation fell outside the purpose of s.84(2)(a), which was to take out of account for corporation tax purposes sums which would only otherwise constitute taxable profits by reason of being a premium on the issue of shares.
126				Succession; Civil procedure	Randall v Randall	High Court Chancery Division	07/10/2014	Beneficiaries; Contentious probate claims; Contingent interests; Creditors; Entitlement; Estates; Locus standi; Probate	[2014] EWHC 3134 (Ch)	With regard to whether a claimant had legal standing to bring a contentious probate claim, the requirement to show an interest in an estate was a mandatory substantive requirement and was not merely procedural. Neither a creditor of the estate, nor the creditor of a beneficiary of the estate, had the requisite interest in the estate to confer legal standing.
127				Banking and finance; Equity; Civil procedure	Day v Tiuta International Ltd	Court of Appeal (Civil Division)	30/09/2014	Chargees; Cross-claims; Equitable defences; Mortgagors; Set-off; Subrogation; Summary judgments	[2014] EWCA Civ 1246	The court examined the equitable doctrine of subrogation in the context of a chargee's purported right of subrogation where the chargoror had an unliquidated cross-claim for damages which he sought to set off against the loan.
128				Insolvency; Civil procedure; Banking and finance	Zodiac Pool Solutions SAS, Re	High Court Chancery Division	03/07/2014	Creditors; Creditors' meetings; Creditors' rights; Foreign companies; Jurisdiction; Schemes of arrangement	[2014] EWHC 2365 (Ch)	All creditors falling within the class of senior scheme creditors were placed in a single class for the purpose of convening meetings on six proposed schemes of arrangement under the Companies Act 2006 Pt 26 where their rights were not so dissimilar that they could not be expected to consult together with a view to their common interest at a class meeting.

129				Insolvency; Civil procedure	O'Connell v Rollings	Court of Appeal (Civil Division)	21/05/2014	Adjournment; Administrators' powers and duties; Disposition of property; Fixed charges	[2014] EWCA Civ 639	A judge was entitled to make an order pursuant to the Insolvency Act 1986 Sch.B1 para.71 granting administrators the permission to sell a company's assets as if they were not subject to a fixed charge security in favour of one of its former directors.
130				Contracts	Swallowfalls Ltd v Monaco Yachting and Technologies SAM	Court of Appeal (Civil Division)	27/02/2014	Implied terms; Loan agreements; Shipbuilding; Summary judgments	[2014] EWCA Civ 186	In an agreement for a loan advanced by the buyer of a yacht to a shipbuilding contractor, the buyer was entitled to demand immediate repayment of the loan. However, the builder was entitled to argue that the agreement contained implied terms, meaning that there could not be summary judgment on the buyer's claim to enforce repayment.
131				Real property; Equity	Day v Shaw	High Court Chancery Division	17/01/2014	Apportionment; Debts; Guarantees; Marshalling; Mortgages; Proceeds of sale; Sureties	[2014] EWHC 36 (Ch)	Where a husband and wife had executed a charge over their property as surety for the debt of a company, and the husband had also given a guarantee in relation to the debt, the wife was entitled to an equity of exoneration and the debt was first to be paid out of the husband's share of the proceeds of sale of the property.
132				Insolvency; Banking and finance	Co-Operative Bank Plc, Re	High Court Chancery Division	04/12/2013	Banks; Creditors' rights; Discretion; Duty of care; Equitable principles; Fairness; Modification; Schemes of arrangement	[2013] EWHC 4074 (Ch)	The court approved the modification of a scheme of arrangement in respect of a bank where the existing scheme disproportionately favoured creditors with smaller holdings of notes. There had been no legal or equitable impediment to the bank withdrawing or amending the existing scheme where they had formally reserved the right to do so, and creditors who had taken action in anticipation of the existing scheme had done so at their own risk.

133				Insolvency; Company law; Equity	Closegate Hotel Development (Durham Ltd) v McLean	High Court Chancery Division	25/10/2013	Administrators; Appointments; Authority; Directors; Floating charge holders; Implied representations; Promissory estoppel; Validity	[2013] EWHC 3237 (Ch)	A lender had not been estopped from appointing administrators under its floating charge over a borrower's assets where the borrower had failed to show that the lender had made a clear and unequivocal statement, to be inferred from letters and negotiations, that it would not call in its loan until either it was apparent that the negotiations had terminated, or the lender gave reasonable notice to terminate negotiations. The borrower's directors were not deprived of authority to challenge the administrators' appointment by the Insolvency Act 1986 Sch.B1 para.64.
134				Equity; Real property; Banking and finance	Highbury Pension Fund Management Co v Zirfin Investments Ltd	Court of Appeal (Civil Division)	03/10/2013	Banks; Creditors; Debtors; Debts; Legal charges; Marshalling; Priorities	[2013] EWCA Civ 1283	A judge was wrong to find that a creditor's right to invoke the principle of marshalling was circumscribed by a clause of a guarantee between the debtor and a creditor bank. The right could be excluded by contract but only if the contract was between the two creditors themselves.
135				Insolvency; Financial regulation; Banking and finance; Contracts; Trusts	MF Global UK Ltd (In Special Administration), Re	High Court Chancery Division	16/08/2013	Administration; Breach of trust; Brokers; Client money; Contracts; Corporate insolvency; Financial regulation; Proof of debt; Rule against double proof; Special administration regime	[2013] EWHC 2556 (Ch)	The contractual claim of a client proving in the insolvency of a broker-dealer had to be reduced by the amount received by the client by way of distribution of client money from the client money pool pursuant to chapters 7 and 7A (CASS 7 and 7A) of the Clients Assets Sourcebook section of the Financial Services Authority Handbook.

136				Insolvency; Pensions	BESTrustees Plc v Kaupthing Singer & Friedlander (In Administration)	High Court Chancery Division	31/07/2013	Administration; Administrators' powers and duties; Employer debt; Funding levels; Occupational pensions; Pensions management; Trustees' powers and duties; Trust funds	[2013] EWHC 2407 (Ch)	A decision by the administrators of a bank to reduce a proof of debt submitted by the trustee of an occupational pension scheme sponsored by the bank was reversed on the ground that the administrators had confused the status of a deposit in a trust fund as somehow being part of the funding deficit calculated pursuant to the Pensions Act 1995 s.75. Whereas they had tried to argue that the trustee's claim offended against the principle of "double dipping", the funds in the trust account had always belonged to the trustee, never to the bank, and could not therefore be used to discharge the s.75 debt.
137				Insolvency; Civil procedure	Smith-Evans v Smailes	High Court Chancery Division	29/07/2013	Bankruptcy orders; Creditors' meetings; Individual voluntary arrangements; Ratification; Setting aside	[2013] EWHC 3199 (Ch)	The effect of an approved individual voluntary arrangement under the Insolvency Act 1986 s.260 extended to purported approved arrangements; not to interpret that provision purposively produced the startling result that a debtor said to be in breach could challenge an IVA on the basis that it never existed. In the instant case, it was not open to a debtor to challenge an approved IVA that was later ratified by two creditors voting as if a valid IVA had been in place.
138				Insolvency; Government administration; Administration of justice	R. (on the application of Howard) v Official Receiver	Queens Bench Division (Administrative Court)				
139				Civil procedure	Atrium Training Services Ltd (In Liquidation), Re	High Court Chancery Division	07/06/2013	Costs; Disclosure; Extensions of time; Overriding objective; Unless orders	[2013] EWHC 1562 (Ch)	An application under CPR r.3.1(2)(a) for an extension of time would be scrutinised more rigorously since the overriding objective had been amended in April 2013 to include the enforcement of compliance with orders. On the other hand, it was important not to encourage unreasonable opposition to extensions that were applied for in time and which involved no significant fresh prejudice.

140				Civil procedure; Conflict of laws; Insolvency	Kemsley v Barclays Bank Plc	High Court Chancery Division	15/05/2013	Anti-suit injunctions; Bankruptcy; Centre of main interests; Foreign proceedings; Insolvency	[2013] EWHC 1274 (Ch)	Allowing a creditor to pursue a debtor, who had been declared bankrupt in England, in proceedings in Florida and New York, would not avoid the operation of the English insolvency regime and so an anti-suit injunction was not justified.
141				Banking and finance; Contracts; Consumer law; Conflict of laws	Deutsche Bank (Suisse) SA v Khan	High Court Queens Bench division (Commercial Court)	13/03/2013	Agreements; Choice of law; Conditions precedent; Good faith; Guarantees; Interest; Loan agreements; Misrepresentation; Mortgages; Possession claims; Reasonableness; Residential development; Set-off; Unfair contract terms; Unfair relationships; Unilateral mistake; Valuation	[2013] EWHC 482 (Comm)	A bank's claim in debt under a facility agreement succeeded and it was entitled to possession of properties charged to secure the defendants' indebtedness under the facility. A no set-off clause in the facility excluded any counterclaims that the defendants might have had.
142				Insolvency	Holgate v Reid	High Court Chancery Division	20/02/2013	Administrators' powers and duties; Creditors; Going concern; Sale of business; Unfairly prejudicial conduct	[2013] EWHC 4630 (Ch)	An application by creditors and members of a company for an order under the Insolvency Act 1986 Sch.B1 para.74 directing joint administrators not to sell a company's assets, represented by a caravan park, and revoking the deemed approval of their proposal to do so was rejected where there was no evidence that the administrators had acted or were proposing to act either unfairly, or unfairly to harm the creditors' interests. The caravan park could not be operated as a viable business.
143				Civil procedure; Conflict of laws; Banking and finance; Torts; Contracts	Alliance Bank JSC v Aquanta Corp	Court of Appeal (Civil Division)	12/12/2012	Collateral contracts; Deceit; Formation of contract; Forum non conveniens; Guarantees; Indemnities; Jurisdiction clauses; Kazakhstan; Loans; Service out of jurisdiction; Subrogation; Unjust enrichment	[2012] EWCA Civ 1588	A Kazakhstan bank had not established that the English court was the most appropriate forum for resolution of disputes arising out of an alleged conspiracy to defraud it of £1.1 billion. Although two of the instruments used to further the fraud were expressly governed by English law, the essence of the dispute had very little connection with the domestic jurisdiction. The court also examined the availability of subrogated rights, causes of action in implied contract, and the jurisdictional gateway in CPR PD 6B.

144				Banking and finance; Equity	Saltri III Ltd v MD Mezzanine SA SICAR (t/a Mezzanine Facility Agent)	High Court Queens Bench division (Commercial Court)	07/11/2012	Creditors' rights; Fiduciary duty; Power of sale; Preferential creditors; Private equity; Sale of assets; Trustees' powers and duties	[2012] EWHC 3025 (Comm)	A security trustee under an inter-creditor agreement had owed duties to the subordinate lenders equivalent to the duty owed by a mortgagee to a mortgagor. However, when selling charged assets to an associated party, the security trustee did not owe any special duty to obtain and follow expert advice as to the method of sale.
145				Consumer law; Civil procedure	Jones v Link Financial Ltd	High Court Queens Bench division (Commercial Court)	22/08/2012	Assignment; Consumer credit agreements; Debts; Enforcement	[2012] EWHC 2402 (QB)	A legal assignee of a debt under a regulated consumer credit agreement was a "creditor" within the meaning of the Consumer Credit Act 1974 who was entitled to enforce the legally assigned debt subject to the performance of statutory duties under the Act.
146				Company law; Contracts	Gard Maritime and Energy Ltd v China National Chartering Co Ltd (formerly China National Chartering Corp)	High Court Queens Bench division (Commercial Court)	26/07/2012	China; Contractual rights; Foreign companies; Successor companies; Time charters	[2012] EWHC 2109 (Comm)	A Chinese state-owned limited-liability company was entitled to sue upon a contract entered into by its predecessor, a registered state-run enterprise.
147				Company law; Banking and finance; Civil procedure; Insolvency	International Leisure Ltd v First National Trustee Co UK Ltd	High Court Chancery Division	16/07/2012	Administrative receivers; Debenture holders; Reflective losses; Secured creditors; Striking out	[2012] EWHC 1971 (Ch)	A secured debenture holder's claim against an administrative receiver it had appointed over a company ought not to have been struck out as its claim did not offend the rule against reflective loss. To strike out such a claim arbitrarily denied a secured creditor fair compensation for any primary loss suffered.
148				Civil procedure; Banking and finance	JSC BTA Bank v Ablyazov	High Court Queens Bench division (Commercial Court)	04/07/2012	Assets; Freezing injunctions; Loans	[2012] EWHC 1819 (Comm)	The defendant in exercising his rights under certain loan agreements to have the lenders pay moneys to his solicitors and others was not disposing of or dealing with assets within the meaning of a freezing injunction.
149				Insolvency	Healthcare Management Services Ltd v Caremark Properties Ltd	High Court Chancery Division	29/05/2012	Administrators; Appointments; Creditors' rights	[2012] EWHC 1693 (Ch)	Where creditors to an insolvent company could not agree on the administrators to be appointed, and there was no basis to choose between the rival candidates, the relative value of the debts owed to the creditors was used as a tie-breaker and the nominees of the creditor with the larger value of debt were appointed.

150				Insolvency; Pensions	Raithatha v Williamson	High Court Chancery Division	04/04/2012	Entitlement; Income; Income payments orders; Pension benefits	[2012] EWHC 909 (Ch)	An income payments order under the Insolvency Act 1986 s.310 could be made where the bankrupt was a member of a pension scheme and was entitled to elect to draw a pension, but where he had not exercised that entitlement at the time of the s.310 application. The pension payments to which he was entitled constituted income by reference to which an income payments order could be made.
151				Civil procedure	Auger Investments Ltd, Re	High Court Chancery Division	27/01/2012	Ability to pay; Assets; Delay; Jurisdiction; Security for costs	[2012] EWHC 94 (Ch)	A company was ordered to provide security for costs under CPR r.25.13(2)(c) in respect of its unfair prejudice petition because, due to a lack of clear evidence on the value of its assets, there was reason to believe that it would be unable to pay the other party's costs if ordered to do so.
152				Insolvency	Horler v Rubin	Court of Appeal (Civil Division)	18/01/2012	Consent; Creditors' meetings; Creditors' rights; Disposals; Partnership assets; Proxies; Trustees in bankruptcy; Voting by proxy	[2012] EWCA Civ 4	A proxy sent to a creditors' meeting on behalf of his principal had actual authority by virtue of the Insolvency Rules 1986 r.8.1 and r.8.3(6) to make whatever decision he thought fit concerning proposed resolutions, unless his authority was expressly restricted by his principal.
153				Civil procedure; Banking and finance	Saad Investments Co Ltd (In Liquidation) v Al-Sanea	High Court Queens Bench division (Commercial Court)	14/10/2011	Freezing injunctions; Notices; Put options; Service out of jurisdiction	[2011] EWHC 2584 (Comm)	The court declined to set aside an order for service out of the jurisdiction of proceedings relating to a put option agreement and made a freezing order in support of the proceedings.
154				Restitution; Banking and finance; Contracts	Ibrahim v Barclays Bank Plc	High Court Chancery Division	21/07/2011	Contracts of indemnity; Debts; Discharge; Equitable remedies; Intention; Letters of credit; Restitution; Subrogation; Unjust enrichment	[2011] EWHC 1897 (Ch)	The claimant was not entitled to be subrogated to the rights of the Secretary of State for Business, Innovation and Skills in relation to secured funding provided by a bank, where a debt due to the secretary of state under a counter-indemnity had been discharged
155				Damages; Banking and finance	Soutzos v Asombang	High Court Chancery Division	21/06/2011	Causation; Compensation; Compensation; Cross-undertakings; Ex turpi causa; Freezing injunctions; Loans; Loss	[2011] EWHC 1582 (Ch)	An unsuccessful claimant was not liable to pay compensation to defendants for losses alleged to have been sustained as a result of a freezing injunction he had obtained against them: the principle of ex turpi causa barred any claim for compensation.

156				Insolvency; Civil procedure	Rodenstock GmbH, Re	High Court Chancery Division	06/05/2011	Discretion; Insolvency; Jurisdiction; Schemes of arrangement	[2011] EWHC 1104 (Ch)	Whilst Regulation 1346/2000 and Regulation 44/2001 substantially curtailed the international jurisdiction of the English court to wind up companies, they did not restrict or exclude the English court's traditional jurisdiction in relation to the sanctioning of schemes of arrangements concerning solvent companies: the touchstone for jurisdiction over a company, even one from another Member State, was whether it was liable to be wound up.
157				Landlord and tenant; Housing; Human rights; Local government	Manchester City Council v Pinnock	Supreme Court	03/11/2010	Demoted tenancies; European Court of Human Rights; Jurisdiction; Local authority housing; Possession orders; Proportionality; Right to respect for private and family life	[2010] UKSC 45	The European Convention on Human Rights 1950 art.8 required that a court asked to make an order for possession under the Housing Act 1996 s.143D(2) had the power to assess the proportionality of making the order.
158				Equity; Damages	Fearns (t/a Autopaint International) v Anglo-Dutch Paint & Chemical Co Ltd	High Court Chancery Division	23/09/2010	Costs; Currencies; Debts; Equity; Judicial decision-making; Liquidated damages; Liquidated sums; Set-off	[2010] EWHC 2366 (Ch)	As there was little direct authority on the subject, the court examined in detail the meaning of "set-off" as used in English law, including the difference between legal set-off and equitable set-off and how equitable set-off could operate to extinguish liabilities. It also devised an approach to be used when ordering set-off between amounts payable in different currencies and considered whether there could be a set-off of costs against damages.
159				Banking and finance	Carey Value Added SL (formerly Losan Hotels World Value Added I SL) v Grupo Urvasco SA	High Court Queens Bench division (Commercial Court)	23/07/2010	Certificates; Guarantees; Loan agreements; Performance bonds	[2010] EWHC 1905 (Comm)	An application for summary judgment was refused where it was well arguable that a deed of guarantee and indemnity did not contain language appropriate to a demand bond imposing a primary liability on the guarantor.

160				Equity; Contracts	Geldof Metaalconstructie NV v Simon Carves Ltd	Court of Appeal (Civil Division)	11/06/2010	Counterclaims; Damages; Equitable set-off; Separate contracts	[2010] EWCA Civ 667	A contractor was entitled to set-off its counterclaim for damages against a claim brought against it by a subcontractor as, although the claim and counterclaim concerned two separate contracts, events had brought them into a close and inseparable relationship with one another and it would be manifestly unjust to allow the claim under one contract without taking into account the counterclaim.
161				Real property; Human rights; Civil procedure	National Westminster Bank Plc v Rushmer	High Court Chancery Division	19/03/2010	Audi alteram partem; Charging orders; Charging orders; Delivery up; Procedural irregularity; Residential property; Right to respect for private and family life; Stay of execution	[2010] EWHC 554 (Ch)	The reliance, by a master, on a letter that had been sent to him by one party but not disclosed to the other constituted a procedural irregularity where the affected party had not been allowed an opportunity to respond to it. However, that irregularity did not render the master's entire decision unjust and so the court considered the merits of those claims not determined by him.
162				Insolvency; Real property	Pick v Sumpter	High Court Chancery Division	03/02/2010	Bankrupt's estate; Conditions; Creditors' rights; Possession	[2010] EWHC 685 (Ch)	On an application for possession and sale of a property by a trustee in bankruptcy, the judge should have considered the interests of the creditors and simply ordered possession and sale without a condition that the orders would only take effect unless sums required to clear the bankruptcy debts and expenses were paid within a specified date.
163				Consumer law; Banking and finance	Carey v HSBC Bank Plc	High Court Queens Bench division (Commercial Court)	23/12/2009	Agreements; Consumer credit agreements; Copies; Credit cards; Creditors' powers and duties; Debtors; Provision of information; Requests for information; Variation	[2009] EWHC 3417 (QB)	The court gave guidance in relation to practices to be followed by creditors in discharging their duty under the Consumer Credit Act 1974 s.78 to provide copies of credit card agreements in response to requests by the debtors, and about the consequences of non-compliance with s.78.
164				Shipping; Contracts; Banking and finance	AS Klaveness Chartering v Pioneer Freight Futures Co Ltd	High Court Queens Bench division (Commercial Court)	18/12/2009	Agreements; Collateral contracts; Contract terms; Forbearance; Forward contracts; Freight; Novation	[2009] EWHC 3386 (Comm)	The claimant was entitled to judgment for sums claimed under a number of forward freight agreements.

165				Insolvency	Freeburn v Hunt	High Court Chancery Division	19/11/2009	Burden of proof; Costs; Creditors' rights; Reasonableness; Remuneration; Trustees in bankruptcy	[2010] C.L.Y. 1903	Where a creditor challenged the remuneration of a trustee in bankruptcy, it was for the trustee to justify his fees, not for the creditor to justify his challenge. In the instant case, the costs and expenses incurred by the trustee were reasonable, even though they had consumed the majority of the bankruptcy estate and left very little for distribution to the creditors. Although many of the tasks undertaken by the trustee had produced no monetary benefit to the estate, they had been necessary to relieve the estate from potential monetary expenditure in the future.
166				Consumer law; Banking and finance	McGuffick v Royal Bank of Scotland Plc	High Court Queens Bench division (Commercial Court)	06/10/2009	Consumer credit agreements; Credit reference agencies; Data protection principles; Enforcement; Loan agreements; Unfair relationships	[2009] EWHC 2386 (Comm)	It was open to a bank to continue reporting the state of a debtor's account to credit reference agencies during the period when a loan agreement could not be enforced because the bank had not complied with its duty under the Consumer Credit Act 1974 s.77(1) . Reporting to credit reference agencies and related activities did not amount to "enforcement" for the purposes of s.77(4) .
167				Negligence; Company law; Accountancy	Stone & Rolls Ltd (In Liquidation) v Moore Stephens (A Firm)	House Of Lords (Supreme Court)	30/07/2009	Auditors; Corporate insolvency; Duty of care; Ex turpi causa; Fraud; Knowledge; Professional negligence	[2009] UKHL 39	Where a "one-man company" had deliberately engaged in serious fraud, the principle of ex turpi causa prevented it from claiming that its auditors were in breach of their duty of care in failing to detect that fraud.
168				Insolvency	Nationwide Building Society v Wright	Court of Appeal (Civil Division)	29/07/2009	Bankruptcy; Bankruptcy orders; Bankruptcy petitions; Charging orders; Execution; Judgment creditors	[2009] EWCA Civ 811	A judgment creditor who had obtained a final charging order before the making of a bankruptcy order was not to be deprived of the benefit of his security by reason of the bankruptcy alone.

169				Insolvency	Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd	High Court Chancery Division	28/07/2009	Bankruptcy proceedings; Part 8 claims; Public policy; Stay of proceedings; Trust deeds; Validity	[2009] EWHC 1912 (Ch)	The provisions of a trust deed granting priority of noteholders to collateral held by a trustee where there was a default in payment under a credit insurance scheme were valid. The deed was not contrary to public policy because there was no attempt to oust the mandatory provisions of the Insolvency Act 1986, and despite the commencement of bankruptcy proceedings in the United States involving the trustee, the collateral could not pass to to a liquidator or trustee in bankruptcy free from the priority conditions.
170				Insolvency	Arucana Ltd, Re	High Court Chancery Division	03/07/2009	Administrators; Appointments; Creditors' rights; Moratoriums; Statutory interpretation; Winding-up petitions	[2009] EWHC 3838 (Ch)	A creditor's winding-up petition constituted "legal process" and "legal proceedings" within the meaning of the Insolvency Act 1986 Sch.B1 Pt 4 para.43(6). Therefore, where the petition had been lodged on the same day as the company had filed notice in form 2.8B of its intention to appoint an administrator, the petition was to be stayed until the court gave permission for it to proceed, or until the interim moratorium brought into operation by para.44(2) expired.
171				Insolvency; International law	Bud-bank Leasing SP zo o, Re	High Court Chancery Division	29/06/2009	Compensation; Cross-border insolvency; Foreign proceedings; Model laws; Poland; Recognition	[2010] B.C.C. 255	The court found that the Polish compensation proceedings that it was asked to consider were "a foreign proceeding" within the meaning of the Cross-Border Insolvency Regulations 2006 Sch.1 and were therefore capable of recognition in the United Kingdom.
172				Insolvency; Real property	Lewis v Metropolitan Property Realisations Ltd	Court of Appeal (Civil Division)	12/06/2009	Assignment; Bankruptcy; Beneficial interests; Realisation; Trustees in bankruptcy	[2009] EWCA Civ 448	The word "realise" in the Insolvency Act 1986 s.283A(3)(a) meant getting in the full cash consideration for the transaction and did not extend to an assignment for deferred contingent consideration.

173				Real Property	C Putnam & Sons v Taylor	High Court Chancery Division	29/01/2009	Beneficial interests; Charging orders; Co-ownership; Discretionary powers; Enforcement; Human rights; Matrimonial home; Sale of property orders	[2009] EWHC 317 (Ch)	The court exercised its discretion to enforce a charging order over a joint tenant's beneficial interest in property where the joint tenants had not altered their respective beneficial interests before the charging order had been registered and it would have been inequitable to keep the creditor out of the money to which it was entitled indefinitely.
174				Insolvency; Real property	Brittain v Haghighat	High Court Chancery Division	12/01/2009	Bankrupts; Possession; Real property; Spouses; Trustees in bankruptcy	[2009] EWHC 90 (Ch)	It was just and reasonable, having regard to the matters which the Insolvency Act 1986 s.336 and s.337 directed were to be taken into account, to grant a trustee in bankruptcy an order for possession of a property occupied by a bankrupt and his family, but deferring it for three years to enable the family, which included a seriously disabled son, to be rehoused by the local authority and effect an orderly change to the son's care arrangements.
175				Civil procedure	Yorkshire Bank Finance Ltd v Mulhall	Court of Appeal (Civil Division)	24/10/2008	Charging orders; Enforcement; Judgment debts; Limitation periods	[2008] EWCA Civ 1156	The Limitation Act 1980 s.20(1) did not apply to the enforcement of charging orders.
176				Arbitration; Conflict of laws; Insolvency; European Union	Syska v Vivendi Universal SA	High Court Queens Bench division (Commercial Court)	02/10/2008	Applicable law; Arbitration agreements; Arbitration awards; Arbitration claims; Bankruptcy; EC law; Foreign law; Foreign proceedings; Jurisdiction; Validity	[2008] EWHC 2155 (Comm)	The exception for "lawsuits pending" in Regulation 1346/2000 art.4(2)(f) and art.15 was not limited to proceedings by way of execution but extended to actions brought to establish the validity of a claim including arbitration proceedings. An arbitration agreement could be invalidated by the law of the state of the opening of insolvency proceedings as a "current contract" within art.4(2)(e), but where arbitration proceedings were pending at the date of insolvency art.4(2)(f) and art.15 applied so that the effect of insolvency on the reference was governed by the law of the member state in which the arbitration was pending.

177				Insolvency	Oracle (North West) Ltd v Pinnacle Financial Services (UK) Ltd	High Court Chancery Division	11/07/2008	Administrators; Appointments; Unsecured creditors	[2008] EWHC 1920 (Ch)	Where a dispute had arisen between the directors of an insolvent company and its largest unsecured creditor in relation to the appointment of administrators, the matter was resolved having regard to the wishes of the creditor, for whose benefit the administration was.
178				Banking and finance; Trusts	Bank of New York v Montana Board of Investments	High Court Chancery Division	10/07/2008	Agreements; Assets; Interpretation; Security; Trustees' powers and duties	[2008] EWHC 1594 (Ch)	The court construed the terms of a security agreement to determine whether senior note holders had the right to direct the security trustee of assets of a structured investment vehicle on the time, place and manner of sale of the assets and whether the agreement mandated any specific timing for the liquidation of collateral.
179				Contracts	Burdale Financial Ltd v Agilo Master Fund Ltd	High Court Chancery Division	19/05/2008	Acceleration; Creditors; Debtor-creditor agreements; Debtors; Facility letters; Repayments	[2008] EWHC 1103 (Ch)	In the circumstances, a junior creditor was not entitled to demand repayment of a debt due under a facility arrangement having failed properly to notify the senior creditor and the debtor of its intention to do so pursuant to the terms of an intercreditor deed.
180				Civil procedure; Conflict of laws	Masri v Consolidated Contractors International Co SAL	Court of Appeal (Civil Division)	04/04/2008	Enforcement; Equitable execution; Extraterritoriality; Freezing injunctions; Judgment creditors; Jurisdiction; Oil and gas industry; Receivers	[2008] EWCA Civ 303	There was no rule that the court could not ever make a receivership order by way of equitable execution in relation to foreign debts. A receiver could be appointed by way of equitable execution over future debts. An order appointing a receiver of revenues from an oil concession and a freezing injunction were not "proceedings relating to enforcement" within Regulation 44/2001 art.22(5) .
181				Contracts; Banking and finance	Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd	Court of Appeal (Civil Division)	22/02/2008	Assets; Futures; Implied terms; Termination; Valuation	[2008] EWCA Civ 116	A term requiring an objective inquiry into the true market value of certain assets, or imposing a duty of reasonable care upon the valuer, was not to be implied into a forward sale agreement between banks, since such an implied term was not necessary or sufficiently certain.

182				Contracts; Banking and finance	Donegal International Ltd v Zambia	High Court Queens Bench division (Commercial Court)	15/02/2007	Agreements; Authority; Bribery; Confidential information; Debts; Illegality; Misrepresentation; Mistake; Penalty clauses; Sovereign debt; State immunity	[2007] EWHC 197 (Comm)	In the circumstances a state was not entitled to state immunity in respect of a claim to enforce a settlement agreement relating to sovereign debt but the state had a real prospect of defending the claim on the basis that certain provisions of the agreement were penal.
183				Civil procedure; European Union	Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicationes de Cuba SA	High Court Queens Bench division (Commercial Court)	24/01/2007	Enforcement; Extraterritoriality; Foreign judgments; Freezing injunctions; Recognition of judgments	[2007] EWHC 19 (Comm)	registered in England pursuant to Regulation 44/2001 there was no basis for restricting protective measures to the freezing or disclosure of domestic assets.The applicant Mexican bank (B) applied for the continuation of a worldwide freezing order in respect of the assets of the respondent Cuban state-controlled telecommunications company (E). E had agreed with B to guarantee the restitution of financing provided by B to the National Bank of Cuba under a credit facility arising under a loan agreement. E had also entered into agreements for the supply by a third party (G) of telephone equipment and plant. Subsequently the Cuban government, because of political differences that it believed had arisen between it and Mexico, issued a decree that E's guarantee to B was null and void. As a result E informed B that it could not comply with its obligations under the agreement. Proceedings ensued and an Italian court ordered E to pay damages to B on the basis that the Cuban decree did not constitute an event of force majeure because of the Cuban government's
184				Civil procedure; Insolvency	Gotham v Doodes	Court of Appeal (Civil Division)	25/07/2006	Charges; Charging orders; Limitations; Sale of property	[2006] EWCA Civ 1080	An order made under the Insolvency Act 1986 s.313 did not confer a "right to receive" anything for the purposes of the Limitation Act 1980 s.20(1) until an order for the sale of the property was made by the court.
185				Arbitration	Stansell Ltd (formerly Stansell (Builders) Ltd) v Co-operative Group (CWS) Ltd	High Court Chancery Division	22/07/2005	Arbitration; Arbitration awards; Assignment; Breach; Construction contracts; Industrial and provident societies	[2005] EWHC 1601 (Ch)	Arbitration; Arbitration awards; Assignment; Breach; Construction contracts; Industrial and provident societies

186				Insolvency; Banking and finance; Company law	Spectrum Plus Ltd (In Liquidation), Re	House Of Lords (Supreme Court)	30/06/2005	Bank accounts; Book debts; Debentures; Fixed charges; Floating charges; Insolvency; Liquidation; Precedent; Preferential creditors; Proof of debt	[2005] UKHL 41	A charge over book debts in a debenture which required the proceeds of the book debts to be paid into an account with the bank but placed no restriction on the use that could be made of the balance on the account thereafter was a floating and not a fixed charge, Siebe Gorman & Co Ltd v Barclays Bank Ltd (1979) 2 Lloyd's Rep 142 overruled.
187				Insolvency	TXU Europe German Finance BV, Re	High Court Chancery Division	29/10/2004	Winding up—Creditors' voluntary winding up—Companies incorporated abroad—Companies passed resolutions for creditors' voluntary winding up in England—Application to confirm voluntary winding up in England—Whether companies' centre of main interests here—Whether court should exercise discretion to confirm resolutions—Whether adequate safeguards that foreign creditors would be treated equally as English creditors—Insolvency Act 1986, ss.84(1)(b), 89, 221(4); Insolvency Rules 1986 (SI 1986/1925), r.7.62; EC Insolvency Proceedings Regulation 1346/2000, Arts 3(1), 4(1).	[2005] B.C.C. 90	
188				Insolvency; Company law	Manning v AIG Europe UK Ltd	High Court Chancery Division	27/07/2004	Debts; Indemnities; Liquidation; Pari passu; Subordination agreements; Subsidiary companies; Sureties	[2004] EWHC 1760 (Ch)	A subordinated debt clause in a deed of indemnity, which was intended to ensure that the surety's debt ranked in priority to debts owed by the indemnitor to any other, prohibited the indemnitor from proving for debts owed to it from its subsidiaries and from receiving a dividend in respect of such debt in the liquidation of its subsidiaries unless and until the surety had been paid in full. As between the creditors of the indemnitor's subsidiaries, the subordination of the debt due to the indemnitor did not infringe the pari passu rule since they had agreed to the subordination.

189				Restitution	Filby v Mortgage Express (No.2) Ltd	Court of Appeal (Civil Division)	18/06/2004	Fraud; Mortgages; Subrogation; Tracing; Unjust enrichment	[2004] EWCA Civ 759	A mortgagee remained both legal and beneficial owner of the balance of the proceeds of sale of a property where the signature of one party to the joint mortgage application had been forged, and the mortgagee was entitled to be subrogated to the rights of an unsecured creditor whose debt had been paid using those proceeds.
190				Insolvency; VAT	Secretary of State for Trade and Industry v Frid	House Of Lords (Supreme Court)	13/05/2004	Debts; Insolvency; Liquidation; Proof of debt; Redundancy payments; Set-off; Subrogation	[2004] UKHL 24	A VAT credit due to an insolvent company could be set off under the Insolvency Rules 1986 r.4.90 against the Crown's subrogated claim in respect of payments made to employees under the Employment Rights Act 1996.
191				Restitution; Banking and finance; Sale of goods	Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)	Court of Appeal (Civil Division)	28/04/2004	Contribution; Subrogation; Unjust enrichment	[2004] EWCA Civ 487	A bank that had been unjustly enriched by a mistaken payment was liable to pay to its codefendant the whole amount of a judgment obtained by the claimant against the bank and the codefendant where the codefendant had satisfied the judgment in full.
192				Insolvency	Transbus International Ltd (In Liquidation), Re	High Court Chancery Division	27/04/2004	Administrators; Assets; Creditors' meetings; Directions; Disposals	[2004] EWHC 932 (Ch)	Administrators were permitted to sell the assets of a company in advance of their proposals being approved by creditors to the same extent under the provisions of the Insolvency Act 1986 Schedule B1 as they were under the provisions of the Insolvency Act 1986 prior to its amendment by the Enterprise Act 2002.
193				Real property; Restitution	Cheltenham & Gloucester Plc v Appleyard	Court of Appeal (Civil Division)	15/03/2004	Mortgages; Possession claims; Registration; Subrogation	[2004] EWCA Civ 291	A lender who had obtained some security, albeit less than he had bargained for as a result of being unable to register a legal charge, was not precluded from claiming further security by subrogation.
194				Pensions; Insolvency; Human rights	Malcolm v Mackenzie	High Court Chancery Division	26/02/2004	Discrimination; Occupational pensions; Pension benefits; Retirement annuity contracts; Self-employed workers; Trustees in bankruptcy	[2004] EWHC 339 (Ch)	The fact that the holder of a retirement annuity contract found that his benefits under that contract vested in his trustee in bankruptcy whilst those of a member of an occupational pension trust did not failed to give rise to a breach of of the Human Rights Act 1998 Sch.1 Part 1 Art.14.

195				Landlord and tenant	Pennycook v Shaws (EAL) Ltd	Court of Appeal (Civil Division)	12/02/2004	Business tenancies; Counter-notices; Protection of property; Revocation; Right to fair trial	[2004] EWCA Civ 100	It was not open to a tenant to serve a negative counter notice in response to a landlord's notice terminating a tenancy where a positive counter notice had been served first.

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