Payment contribution between joint and several co-debtors party to an illegal contract

What is the fate of the *ex lege* joint and several liability between a transferor and a transferee of employees in a prohibited contract when one or the other satisfies the liability to the employees?

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1. Supreme Court Judgment no. 949/2025 of 17 June

The employment jurisdiction had found that the sham service contract between companies AA and BB concealed an illegal transfer of employees from the company providing the services to the company receiving the services, which is prohibited by Article 43 of the Workers' Statute Act, imposing joint and several liability on the parties vis-à-vis the employees. In the contract between AA and BB there was an indemnity clause whereby BB declared itself liable alone for any legal obligations arising from the performance of the contracted work in any of the employment, tax, hazard prevention or any other areas caused by its own or subcontracted workers, being liable in any case for any claims that might arise against AA. Once the employment tribunal decision became final and conclusive, AA suffered various claims from the workers' collective (requalification, wage equalisation, severance pay), the amount of which it sought to recover from BB, firstly on the basis of the indemnity clause and, secondly, in accordance

with the provisions of the Civil Code (CC) for the *pro parte* contribution between joint and several co-debtors (Art. 1145 CC). The joint and several nature of the liability would result directly from Article 43(3) of the Workers' Statute Act ("The employers, transferor and transferee, who infringe the provisions of the previous paragraphs shall be jointly and severally liable for the obligations contracted with the workers and with the Social Security, without prejudice to any other liability, including criminal liability, that may be applicable for such acts"), which does not contain rules on reimbursement between co-debtors. The defendant contended that the contract was void insofar as it did not relate to the provision of services but to an illegal transfer of labour and could therefore have no effect. Nor could the claimant rely on a right of recovery or a right of recourse on the basis of a void clause, nor could the defendant be bound by the agreements which the defendant had unilaterally reached with the employees, as it had no connection with them.

The Alava Provincial Court overturned the judgment handed down by the tribunal and dismissed the claim. According to the Provincial Court, the civil proceedings were bound by the employment tribunal decision as regards the matters within its jurisdiction, such as the fact that the legal relationship existing between the disputing parties, under the contract for the provision of services, was, in reality, a case of illegal transfer of labour and that the service actually provided by BB consisted solely of placing labour at AA's disposal. The *causa* (purpose) of the contract, therefore, infringes the prohibition on the transfer of labour under Article 43(2) of the Workers' Statute Act and the contract must be held void for illegality (Arts. 1261 and 1275 CC). Consequently, the clause underpinning the main claim for contractual performance and the alternative claim for 100 % recovery are not binding on the parties because the contract is invalid. The Provincial Court also dismissed the action brought under Articles 1138 and 1145 of the Civil Code, by which BB was to be ordered to pay the sums paid by AA in respect of wage differences. The Provincial Court held that this claim was intended to circumvent the consequences of the prohibition on the transfer of labour. If it were accepted that AA could obtain, by means of the action for recovery, 50 % of the amount of the wage differences - which it had to pay to the workers as a result of the unlawful transfer of labour - it would be benefiting from this illegal operation by achieving a reduction in the labour cost by that 50 %. Therefore, even if the original order issued in the employment proceedings were joint and several, without any determination as to shares, Article 43 of the Workers' Statute Act would lose its effectiveness in protecting the individual and collective rights of the workers if the appellant were to succeed in obtaining, in whole or in part, a saving in labour costs, which would be a prohibited result constituting fraud of law *(frau legis)* in accordance with Article 6(4) of the Civil Code, and that claim must therefore also be dismissed.

The Supreme Court will allow AA's appeal in cassation as far as it matters here. But the argumentation is very brief, to put it in the mildest terms. The claimant / appellant argues that it paid the entire debt and is therefore entitled to the action for

recovery under Article 1145 of the Civil Code to claim from the co-debtor "the part that corresponds to it and the interest on the advance payment". It cites case law of the Supreme Court on the interpretation of said provision and the configuration of the action for contribution as a several claim whose raison d'être is to avoid unjustified enrichment and, specifically, Supreme Court Judgment no. 473/2015, of 31 July, in a similar case also involving the illegal transfer of labour. In the words of the latter court, the Provincial Court's stance cannot be upheld because the prohibited transfer also benefited the defendant, insofar as it obtained a profit from such transfer of, at least, 59 607.58 euros, given that the annual cost of the agreed service was 655 246.88 euros, so that the amount corresponding to labour amounted to 595 639.30 euros; this means a 26.41 % profit, in which proportion, and not equally by virtue of the presumption in Article 1138 of the Civil Code, the defendant is liable, which means that it is ordered to pay the sum of EUR 59 599.44 (225 670 x 26.41 %) plus interest on the advance payment in accordance with the second paragraph of Article 1145 of that Code. The judgment cites in its support Supreme Court judgments 1424/2023 and 743/2025, which, despite the citation, are not decisive in the present case.

2. Commentary

§ 1. According to the Supreme Court, the viability of the action for recovery between the transferor and transferee in cases of illegal transfer of labour was allowed by Supreme Court Judgment no. 50/2021 of 4 February. But this judgement is not a precedent, because both the Provincial Court and the Supreme Court assumed there that the action for contribution was admissible, and what was solely disputed was whether the internal share was determined according to the degree of the unlawful contribution of each party (according to the Supreme Court) or whether it was admissible for half of the debt (according to the Provincial Court). Neither is Supreme Court Judgment no. 473/2015 of 31 July, where the contribution (also in the case of illegal transfer of workers) was taken for granted and only the limitation period was disputed.

§ 2. Despite its very weak argumentation (that of the Provincial Court is stronger), the decision of the Supreme Court is the correct one.

§ 3. In order for the action for contribution under Article 1145 of the Civil Code not to lie, Article 1275 or 1306 of the same code would have to be applied. But neither leads to the desired outcome. Article 1275 contains a *denegatio actionis* for the two parties involved in the illegal contract. Obviously, the invalidity extends to the indemnity clause. But the contribution for payment of a joint and several co-debtor *ex lege* is neither content nor effect of the prohibited contract, but legal liability. Note that the joint and several liability does not derive from the contract, but from the "penalty" of Article 43 of the Workers' Statute Act. Article 1306 also contains a *denegatio actionis*, in this case, not of what has been agreed, but of the restitution of what has been delivered by a contract that is unlawful. In our case, AA has not delivered anything to BB under the prohibited contract that it now claims should be 'returned' to it. Because its employment

liability is not a service provided by AA to BB under the contract, but civil liability to the workforce. AA is already civilly "penalised" with the burden of joint and several liability.

§ 4. This does not mean that Article 1306 of the Civil Code is not applicable in this relationship. It is, so that AA would have no action to recover the payments made to BB in consideration for the "transfer" operated by the prohibited contract. But this point does not arise in these proceedings.

§ 5. For a general prohibition of actions that have their causal origin in a prohibited contract to be applicable, there should be a general principle in Spanish law that, as in (non-statutory) common law, prevents recourse to a judicial remedy when one comes before the court *with unclean hands* or, in general, a universal application of the exception *in pari delicto* ("At common law, Delaware did not recognise a right of contribution among joint tortfeasors", *In re Rural/Metro,* 2014). This principle does not exist among us, and its functions cannot be transferred to the rule of interdiction of abuse of rights (Arts. 7 of the Civil Code and 247 of the Civil Procedure Act), unless it is held (and it would not be nonsense, but it is not tested in our case law) that it constitutes an abuse of rights for someone to claim a debt an *ex lege* from another party that has its remote causal origin in an illegal contract between the parties.

An ex lege payment contribution by a joint and several co-debtor is not an effect of the prohibited contract, but rather a legal liability

§ 6. We will now consider the two solutions (of the Provincial Court and the Supreme Court) in terms of strengthening incentives for compliance with mandatory rules protecting specific persons (as is Article 43 of the Workers' Statute Act). Let us assume in the abstract a type of conflict: is it better to leave the loss (the liability) entirely to the person to whom it falls or to share the costs of the infringement by halves, even by way of contribution? In the abstract type of conflict, the choice would have no effect on the level of certainty of compliance. If the rule were that of sharing, each party would assume that its non-compliance costs in terms of liability are 50% of the total liability amount. If the rule of 'wherever it falls, it stays' were applied, each of the infringers would have a 0.5 probability of it falling on them, and then the total sum would be divided by two based on probability. Consequently, the Supreme Court's solution neither weakens nor favours the enforcement policy of employment rules.

§ 7. But we never work with abstract types. In our case, AA was a multinational, a much more robust company than BB, which rather resembled one of the many empty structures of pure movement of workers *hither and thither.* Evidently, the workers preferred to be enrolled in AA's workforce at AA's collective bargaining agreement wages. The probability of AA being cho-

sen is not 0.5, but 1 in 1. The *prima facie* liability cost will always fall on AA, which, according to the Provincial Court, could not be set off in BB's pocket. And it is clear that it is much more efficient in terms of regulatory compliance for the entire cost to be borne by AA. BB was an "ancillary" company in terms of regulatory non-compliance, a company, moreover, that has no incentive to comply, because it has no creditworthiness to lose, nor does it take long to enter into insolvency proceedings if it is put under pressure.

§ 8. However, this will not always be the model for the conflict of Article 43 of the Workers' Statute Act. Perhaps then what would be optimal would be the final solution arrived at in U.S. legislation and case law, which consists of allowing *prima facie* reimbursement between *joint intentional tortfeasors*, but with the reservation of equitable discretion for the judge to avoid a scandal in cases particularly shocking against the decency demanded in the courts, for example, if the illegality under Article 43 of the Workers' Statute Act "constitutes a criminal offence" (Art. 1305 CC), within the scope of Articles 311 and 312 of the Criminal Code; but this is not obvious either, but rather the opposite, if one takes in literal terms Article 116(2) of this code, which allows (it seems) a contribution under Article 1145 of the Civil Code, *criminal malice against criminal malice*.

§ 9. Spanish law lacks the flexibility afforded by a dual system of strict law and equity, and our courts - educated in the rule of submission to the law - will never proceed as the U.S. courts operate or as the *praetor* operated in Roman law. In such a case, and given the foregoing considerations, we favour, *rebus sic stantibus*, the solution espoused by the Supreme Court.