Chain of transfer contracts relating to contaminated land

Contract law is not subject to environmental law.

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As a private law expert, in what follows I shall address only contractual issues between private parties. I shall not comment on interpretations of sectoral rules, especially Article 100 of Act 7/2022, because my opinion on certain points is at odds with that of specialists in the field and I do not wish this to qualify what I submit below.

For what follows, it is essential to internalise that the 'polluter pays' principle has no practical meaning in contract law.

1. Presentation of the contractual problem in chains of transfers of contaminated land

On three occasions, the Supreme Court has dealt with what is in essence a repeating case: the liability of Ercros for having contaminated its land, which is then sold and, in turn, resold to a third party that has to bear the substantial costs of decontamination claimed from Ercros[1]. In the first, the third party's claim for non-contractual liability is successful[2]. In the other two, the claim fails because it is not possible for a party to incur non-contractual liability - only

[1] *Cf.* Del Olmo García, *"Responsabilidad contractual y responsabilidad extracontractual: una propuesta teórica", en:* Herrador Guardia (ed.), *Daño y resarcimiento,* 2024, pp. 192-208.

[2] Supreme Court Judgment of 29 October 2008 (RJ 2008/5801).

contractual liability to its counterparty - from causing damage to its own property and, not least in the last of the decisions, because the cost of this liability had been assumed by Ercros indirectly by deducting it from the sale price.

The polluter does not always pay: sometimes the purchaser pays

In all strictness, the three cases could have been settled the same way in accordance with the rule that the individual purchaser of an asset succeeds to the contractual remedies and recourses of his predecessor, because this particular successor would be the 'successor in title' of Article 1257 of the Civil Code (Supreme Court [Civil Division] Judgment of 22 June 2022, RJ 2022\4131). Otherwise (basically because the claimant does not state his case well), the second of the two judicial positions is the correct one because the contaminated land is a latent defect for which the seller is liable to the purchaser, who in turn will be liable to his own purchaser.

Taking a different stand, the Supreme Court (Civil Division) Judgment of 10 October 2016[3] applies the administrative legislation on contaminated land, holding that the obligation to decontaminate has already been declared administratively and that this obligation falls on the whole chain of owners, with a right to contribution against the owner who originally contaminated the land (Art. 27(2) of the Waste Act 10/1998 and arts. 34 to 36 of the Waste and Contaminated Act 22/2011 – currently Art. 100(1) of Act 7/2022 –). The legal doctrine of the Supreme Court Judgment of 11 June 2012 is not considered applicable "because in that case there was no declaration that the defendant who caused the contamination of the land that had been his property was legally obliged to decontaminate it [...] and because even if such an obligation (of the polluter) were recognised as a matter of law, the latter would have already fulfilled it vis-à-vis the claimant through the successive discounts of the cost of decontamination in the land transfer transactions".

2. The basic rules of administrative liability in the Waste and Contaminated Land for a Circular Economy Act 7/2022

The waste producer (among other persons liable) is responsible for the treatment, disposal or recycling of the waste (arts. 20, 37 and 104). Natural or legal persons owning land are obliged, on the occasion of the transfer of any right in rem, to declare in the document of title in which the transfer is formalised whether or not any potential land-contamination activity has been carried out thereon. This declaration shall be the subject of a marginal note in the Land Registry (Art. 98).

The regional authorities shall declare and delimit by means of an express decision the land contaminated due to the presence of hazardous components originating from human activities. The declaration of contaminated land will oblige the party responsible to carry out the necessary actions for its decontamination and recovery in the manner and within the time limit prescribed by the relevant regional authorities, which, as a general rule, will not exceed three years, unless technical reasons

[3] RJ 2016\4947.

associated with the decontamination process warrant a longer period (Art. 99).

The obligation to carry out the decontamination and remediation operations regulated in the previous article lies with the polluter - when there are several polluters, they shall be being jointly and severally liable for the obligation - and vicariously, the owners of the contaminated land and the possessors thereof, in that order. Those liable vicariously may pass on the cost of the actions they have carried out in the remediation of land declared contaminated to the polluter or polluters. The party responsible for decontamination and remediation may not be required more than the levels associated with the use of the land existing at the time the contamination occurred (Art. 100). *The actions to proceed with the decontamination and remediation of land declared contaminated may be carried out by means of agreements signed between those obliged to carry out these operations and authorised by the regional authorities*, by means of agreements between them and the competent Public Authority or, where appropriate, by means of the contracts provided for in the Public Procurement Act 9/2017 of 8 November. *In any case, the costs of decontamination and remediation of land declared contaminated will be borne by the party obliged*, in each case, to carry out these operations (Art. 101). Without prejudice to the penalty that may be imposed, the infringer shall be obliged to restore the situation altered by him to its original state, as well as to compensate for the harm caused, which may be determined by the competent body (Art. 116).

3. Coordination of regulatory areas

§ 1. The Judgment of the Supreme Court (Civil Division) of 11 June 2012, cited above, declared in its 5th point of law the following:

> There was no [administrative] declaration that Ercros was obliged vis-à-vis the Public Authority to decontaminate its former land in order to leave it in a suitable condition for port-residential use, and *if there had been a ruling by the judicial review jurisdiction, neither could it have prevented the relevance of the private agreements not assessed by that jurisdiction from being taken into account in subsequent litigation*.

§ 2. Consequently, the sectoral liability regime of Article 100 of Act 7/2022 will not apply between parties as long as there is no final administrative declaration of contaminated land and the corresponding imposition of decontamination liability. Even if such an administrative declaration were to take place and the sectoral liability of the original polluter were to be declared, nothing would prevent that in the subsequent civil proceedings it could be established that there is a right to contribution against the original purchaser or an action for unjust enrichment against the subsequent owner, as a consequence of the fact that the potential cost of decontamination had already been deducted from the price in the purchase chain. Consequently, Article 101(1) *in fine* of the Act is not applicable to inter-private actions arising from the land purchase chain.

§ 3. The marginal entry made in the register as to "whether or not a potential land-contamination activity has been carried out on the transferred property" (Art. 98) has no special significance in private transactions. The polluter-seller is ordinarily liable to his own purchaser for the existence of a lack of conformity in the sale and purchase, unless the registered declaration can be assessed as a sufficient apparent indication of the existence of contamination, in which case it may (or may not) be the case

that the subsequent risk has to fall (civilly) on the purchaser, who should have discounted this risk from the purchase price. The declaration noted in the Registry does not give third parties legal standing - but neither does it deprive them of legal standing - to claim against the original polluter. In reality, Article 98 is a legal absurdity because it could only acquire its full meaning if public disclosure in the register meant a shift of the risk of contamination to the purchaser (*caveat emptor*), i.e. that, contrary to the intention of Article 100, it would always be the polluter (seller) who would have an action for contribution against the current purchaser and owner.

If the contaminating activity is recorded in the Land Registry, *caveat emptor*

§ 4. According to Act 7/2022, the action for contribution against the polluter (Art. 100(2)) includes the costs of decontamination carried out in the capacity of "vicariously liable" party. It is therefore an action for contribution for the amount actually paid. Before disbursement, he has no action against the polluter *if not his own seller*. And, after the disbursement, this is the only cost that he can pass on, and not other harm that he could prove (Art. 116(1) of Act 7/2022 lacks enforceability between private parties when the harmed party is a member of the land purchase chain).

§ 5. The purchaser - provided that he did not assume the risk of the contamination by way of a price discount - is civilly entitled to take action against his seller, the polluter, by means of a contractual liability claim. The purchaser is not required to have pre-financed the decontamination. He can contractually demand the decontamination, irrespective of any administrative declaration. The purchaser can claim a price reduction. He can terminate the contract for a material breach. None of this can be done by the third party who has not been subrogated to the contractual remedies and recourses of his own seller, even if he is a "vicariously" liable third party with an Article 100(1) contribution.

§ 6. Note that the Article 100(2) action for contribution is a civil action that is brought to the civil courts. The defendant may therefore raise against the claimant all the defences he has recourse to under his own contract or the contract under which the claimant purchased. This Action for contribution is independent of the vicarious liability of the persons referred to in Article 13 of the law.

§ 7. The current owner-purchaser who bears the costs of contamination also has, *ceteris paribus*, an action for contribution against his own seller, even if the latter is not the polluter.

§ 8. The "non-enforceability to bear the costs" referred to in Article 14 of the Environmental Liability Act 26/2007 is not applicable in relations in which creditor and debtor are counterparties to a contract.

§ 9. In civil proceedings, the party who has been obliged to pay the cost of decontamination does not have the right to contribution stemming from Article 13 of Act 26/2007.