

Stock options: critical points within the Spanish labour legal framework

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Abstract: Macroeconomic indicators are showing a progressive improvement in Spain. Hopefully, companies will cease to implement traumatic measures for their employees (collective redundancies, substantial amendment of working conditions, etc.) and will re-focus on compensation policies. Amongst the most best-known variable remuneration tools stock options (hereinafter, “stock options”) stand out. This paper aims to revisit the stock options most controversial features from a legal Spanish standpoint.

Keywords: stock options, variable remuneration, severance, court ruling.

1. Introduction

In Spain, the legal analysis of stock options arises from the nonexistence of a specific regulatory framework regarding employee remuneration models linked to the stakes that they hold in the company’s equity stock. This lack of legal regulation leads to a clear relevance of the stock option plans in which the companies set forth their regulations, as well as the decisions passed by Spanish courts and their doctrinal interpretation.

Notwithstanding the fact that Spanish labour court rulings refer, necessarily, to the customised study of the stock option plan, there has been consensus based on jurisprudence¹ and most applicable doctrines in regards to the stock options concept. A stock option plan is devised as a right in which an onerous and voluntary conveyance confers employees the right, within a determined timeframe, to acquire stocks in the company itself or in another related company, at a price that is duly established for this process.

Each stock option plan contains its own specific regulations. However, there are elementary concepts that must be considered in order to understand how standard stock option plans operate within the Spanish legal framework:

- **Stock vesting period.** This is the period of time that participant in the stock option plan must wait before being able to exercise their rights regarding the stock options, which, consequently, have reached maturity.

The maturity of stock options varies according to the specific plan. There are three year plans that determine a similar three year vesting period for the entirety of the stock options, whereas other plans establish partial maturity periods. Considering the previous example, a third of all stock options would mature at the end of the first year of the plan, the second third would ma-

¹ Sentence passed by the Labour Chamber of the Supreme Court on 24th October 2001 (RJ 2002/2363).

ture at the end of the second year of the plan and the final third would accomplish their vesting upon the third anniversary of the initial concession for the three year stock option plans.

- **Exercising stock options (strike price and exercising period)**. Once the vesting period has elapsed for the stock, they are duly released so that employees may exercise their preferential option rights on said stock. Therefore, the stockholder may acquire the corresponding stock at the strike price established in the stock option plan and in the timeframe that is stipulated in this plan.

Generally speaking, the strike price tends to be the value of the stock quoted on the stock exchange on the day that the right is granted, therefore, following the vesting period for the maturity of the aforesaid stock, and once exercised, the employee may receive either of the following:

- An economic amount resulting from the difference between the stock price quoted on the market at the moment of the acquisition of said right (once the maturity of the option has elapsed) and the strike price for the right established in the plan;
 - Or the stock itself, valued at the price established in each plan at the time the right was granted. In this case, the employee shall be free to sell the aforesaid stock on the market and receive the value that the aforesaid stock held at that time, in exchange.
- **Earnings derived from the sale of acquired stock**. Obviously, the higher the quoted price, the greater the earnings, since the difference between the strike price established in the plan (and at which the employee acquired the stock exercising their option) and the price at which the employee manages to sell the stock shall be higher².

Apart from the delivery of stock options, other similar remuneration instruments exist (e.g., phantom shares, restricted stock units, etc.). There is a common philosophy and purpose of all of these tools: to offer incentives to increase employee performance by linking a variable salaried remuneration to the behaviour of stocks on the markets from the employer's company (or a company in its company group).

The syllogism is simple: when employees contribute more and better to optimise the company's position (measured in terms of the stock performance in the stock exchange), they shall receive more remuneration in the form of stock options.

2. Foreign elements in stock option plans

The parent company of an international corporation is usually the one that appears as part of the stock option plans. In other words, it is the foreign parent stock's value in the corresponding stock exchange market (e.g. New York, London or Amsterdam) which is taken as the reference point to instrument the stock option plans.

The head company of the group designs a single stock option plan which is designed to be applicable to all jurisdictions in which its subsidiaries operate and which the executives offer the possibility of participation.

This presents some legal issues of significant interest. Often times, the aforementioned stock option plans are addressed in foreign courts in order to elucidate on the discrepancies involving their interpretation or application and they are subject to local foreign law (for example, the substantive laws of New York, the United Kingdom or the Netherlands) in any disputes arising from these plans.

² For example, if the stock has a fixed strike price of 20 euros per share in the plan, when the employee may exercise his stock options, he/she may acquire (purchase) the stock at the established strike price, i.e., 20 per share. Regardless of the quoted price on the stock exchange for this stock, at the time of purchase, the employee shall acquire these for 20 euros per share.

2.1. Inapplicability of the submission clauses in foreign courts

It has been possible for Spanish courts to analyse their jurisdiction regarding stock option plans submitted in foreign courts³.

The ruling of the High Court of Justice of Catalonia, Labour Chamber, on the 19th of September 2008 (AS 2008\2965), is perhaps one of rulings that most rigorously analyses this issue. The Catalonia High Court of Justice settled a claim filed by a Spanish executive regarding stock options granted by the French parent company of the Spanish employer (hereinafter referred to as, the “**Bouygues case**”). This ruling does not mention whether the discussed stock option plan anticipated express submission in the French courts⁴.

The employee is allowed to select the forum from one in which the defendant companies has its registered address, according to the provisions of the Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, subsequently modified by the accession conventions for new member states adjoining said convention and in accordance with stipulations of European Council Regulation (EC) No. 44/2001 of 22 December 2000 (now amended as Regulation (EU) number. 1215/2012, from 12 December 2012)⁵. This, in addition to the fact that in the Bouygues case the employee had habitually provided his services in Spain, allowed the High Court of Justice of Catalonia to conclude that the Spanish courts had jurisdiction for this *litis*.

Notwithstanding the express submission of foreign jurisdiction that are commonplace in stock option plans, the protective nature of Spanish labour laws which are also reflected in international legislation on applicable jurisdiction, enables employees who bring the actions to select the *forum*.

This, in practice, means that disputes are resolved in the Spanish courts, insomuch as that Spain is typically the place where employees have their residence and the member state in which they offer their services⁶. In the majority of cases, this element concurs as the corresponding subsidiary, and the plaintiff’s employers tend to be registered in Spain.

2.2. Submission clauses in foreign law

Once the legal jurisdiction of the Spanish courts has been admitted for labour matters, further doubts may arise, in view of the rulings of Spanish courts, regarding the substantive law to be applied in order to clarify the lawsuits in terms of the rights derived from a stock option plan that is submitted expressly in favour of foreign law.

The reference judgment in this matter was passed by the Spanish Supreme Court, Labour Chamber, on the 26th of January 2006 (RJ\2006\2227), -the “**Microsoft case**”- analysing a scenario in which the plaintiff signed “*the acceptance document for the adjudication of stock options in Microsoft Corporation containing 1,800 shares*” at a specific price, expressly declaring in the aforesaid document “*that*

³ Article 22.1 of Organic Law 6/1985, passed on the 1st of July on Judicial Power (hereinafter referred to as the “**LOPJ**”) determines that “*The Spanish Courts and Tribunals will hear the cases brought before them in the Spanish territories between Spanish citizens, between foreigners and Spanish citizens and foreigners in agreement with the terms of this Law and in the international conventions and treaties to which Spain is a party*”.

⁴ Even for express submission clauses before foreign courts, none of the reviewed rulings states legal inadequacy on behalf of the Spanish courts (specifically for employment matters) in this type of cases.

⁵ EU regulation 1215/2012 of the European Parliament and Council from 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters.

Even in the case in which the parent company (not the plaintiff’s direct employer) that grants the stock option plan is not registered in any member state of the European Union, Article 21 of the aforementioned regulation states that “*An employer domiciled in a Member State may be sued*” in “another Member State” in “the courts for the place where or from where *the employee habitually carries out his work*”.

⁶ Article 2.1 of LOPJ establishes that “*for labour matters, the Spanish Courts and Tribunals will have powers in: (i) Matters of rights and obligations derived from employment contracts, when the services have been provided in Spain or the contract was underwritten in Spanish territories; when the defendant is registered in Spanish territories or has an agency, branch, delegation or any other representation in Spain; when the worker and employer are of Spanish nationality, wherever the services are provided or the contract was held, as well as in the case of shipment contracts, if the contract was preceded by an offer received in Spain by a Spanish employee.*”

the exercising of this right be submitted before the laws of Washington (USA), as this is the place in which the Microsoft Corporation's headquarters is located".

Notwithstanding the express submission before foreign substantive law, the Spanish Supreme Court opted for the application of the Spanish regulations and not those from the state of Washington (USA), due to the general principle of "*freedom of choice*" of the contracting parties for the applicable substantive law. The Rome Convention⁷ establishes the limitation in not contravening the mandatory provisions of a country (i.e., Spain) "*when all of the elements in relationship are located in a single country at the time when the choice was made*" (i.e., Spain).

As for employment relations, the Spanish Supreme Court concludes that, in accordance with the Rome Convention "*the choice of the parties in terms of applicable Law may not result in the privation of the employee from the protection afforded to them by the mandatory provisions of the Law that would be applicable, should no choice be made available*".

Notwithstanding this ruling passed by the Spanish Supreme Court, other rulings are also especially significant as they have quite similar legal scenarios and have concluded that the applicable law was foreign law, or because the Tribunals agree that Spanish law is applicable based on reasoning other than that used by the Spanish Supreme Court.

2.2.1. Effectiveness of submission clauses before foreign law

The most paradigmatic scenario regarding the application of foreign legislation in matters of stock options is probably the Bouygues case, in which it is concluded that French substantive law governs the stock option plan and, therefore, is enforceable.

The High Court of Justice of Catalonia settles the dispute by applying French substantive law in compliance with the provisions of Article 10.6 of the Civil Code⁸ and the previous version of the Rome Convention, now transferred to Article 3 of the Rome Regulations I⁹.

Among other issues, this relevant ruling evaluates that (i) the notifications made by the President of the Bouygues Group to the plaintiff regarding the stock option plan were sent from France, where the main company in the group had its headquarters, (ii) said notifications were written in French (although they were accompanied by their Spanish translation) and (iii) in said notifications, reference was made to Article 163 bis C of the "French General Taxation Code" and Article 443-6 of the French "Labour Legislation".

This evidence allows the court to conclude that the "*the will of whomsoever unilaterally makes the offer on stock options is that French laws govern*" the stock option plan.

The High Court of Justice of Catalonia completes the argument by stating that "*whoever accepts the offer [the employee] without any exceptions, also accepts the application of the legislation of the country in which the company group is registered*". This statement is somewhat surprising in the Spanish labour sphere, when considering how it diluted the Spanish labour jurisdiction of the principle of "*autonomy of freewill*" stated in Article 1255 and concordant articles of the Civil Code.

The Supreme Court writ of the 8th September 2009 (JUR 2009\451721) dismissed the judicial review of the unification of the doctrine lodged by the employee, declaring the firm nature of the judgment passed by the High Court of Justice of Catalonia regarding the Bouygues case.

To conclude this section, we shall quote the judgments passed by the Labour Chamber of the High Court of Justice of Madrid, from the 12th and 30th of May 2008 (JUR 2008/295045 and JUR 2008/233547) -the "**Steria case**"-, in which the first instance ruling is declared invalid due to the *a quo*

⁷ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

⁸ Article 10.6 of the Royal Decree passed on the 24th of June 1889 by which the Civil Code was published (henceforth referred to as, the "**Civil Code**") establishes that "*the obligations derived from the professional employment contract, in lieu of express submission on the part of the parties and notwithstanding the provisions of Section 1 of Article 8, shall be legally bound by the Law of the site in which the services are provided*".

⁹ Article 3.1 of regulation (EC) number 593/2008 of the European Parliament and Council passed on the 17th of June 2008 on the law applicable to contractual regulations (henceforth referred to as, "**Rome Regulation I**") determines that "*The contract shall be governed by the law chosen by the parties*".

judge rejecting the practice of evidence intended to demonstrate that the applicable law to a stock option plan was French substantive law.

Specifically, the companies contributed with two “*opinions*” drafted by French legal scholars to certify the material content of foreign legislation and the interpretation which, according to them, could be made (“*affidavit*”).

The High Court of Justice of Madrid concludes that, regardless of the legal conviction that the *a quo* judge reached on the enforceability of the Spanish law, “*there may be no doubt that such means of evidence collects all of the necessary premises to be admitted, moreover when the criteria for the “judex a quo” [origin judge] on this issue is not shared by the Court entrusted with the role of reviewing its decision (...), that would be deprived of the possibility of knowing the foreign jurisdiction that one of the parties considers applicable, thereby placing the proposer of the evidence in a true state of legal powerlessness*”.

2.2.2. Inapplicability of submission clauses in foreign law

The decision passed by the Labour Chamber of the High Court of Justice of the Community of Valencia, on the 16th of May 2005 (AS 2005/2234) -henceforth referred to as the “**Hasbro case**”-, is also significant since, although it does not deny the prioritisation of the application of a foreign law to resolve a lawsuit dealing with stock options, it does establish this when the company does not fulfil its obligation to evidence foreign law, in compliance with Article 281 of Law 1/2000, from the 7th of January, for the Civil Procedure Code (henceforth referred to as “**LEC**”)¹⁰.

Similar rulings were passed by the Civil Chamber of the Supreme Court on the 10th of June 2005 (RJ 2005/6491) and the 4th of July 2006 (RJ 2006/6080) as well as those passed by the Labour Chamber of the Supreme Court on the 4th of November 2004 (RJ 2005/1056).

The (posterior) Hasbro and Microsoft cases reached similar conclusions based on different reasoning.

That said, the decision of the Hasbro case concluded that, based on the lack of evidence presented regarding the laws of Rhode Island (USA), to which the disputed stock option plan was subject, the laws of “*lex fori*” (i.e. Spanish labour legislation) were deemed applicable in regards to the doctrine foreseen in the ruling passed by the Labour Chamber of the Supreme Court on the 4th of November 2004 (RJ 2005/1056), according to which the absence of foreign law did not offer grounds for the case to be dismissed, but rather, it was more compliant with Article 24 of the Spanish Constitution (effective judicial protection), to make an exhaustive examination but applying subsidiary Spanish legislation.

Another argument that is used from time to time by the Spanish courts involved with labour matters in order to end up applying Spanish legislation in detriment to foreign law, is that the benefits derived from the stock option plan, even when they originated from foreign stock, are an integral part of the employment relationship between the employee and the employer and therefore, they are “*inherent to the employment contract*” subject to Spanish labour laws.

In this way, for example, the High Court of Justice of Madrid, Labour Chamber, in its ruling from the 20th December 2005 (AS 2006/606) -the “**Hewlett Packard case**”- concluded that the indivisible consequence of said integration in the employment contract is that the stock options must be governed by the same laws governing the employment contract, regardless of whether the stock option plan was subject to foreign law.

In the Hewlett Packard case, the ruling of the High Court of Justice of Madrid contains the following literal text, which is of immense illustrative value:

¹⁰ The LEC article states the following: “*The foreign law and customs shall also be subject to evidence. The provision of evidence of customs shall not be necessary should the parties be in agreement regarding its existence and content and its norms did not affect public order. Foreign law must be proven inasmuch as it is relevant based on content and validity, being deemed valid the courts of however many means of inquiry were considered necessary for its application.*”

“Although it is true that effectively the stakeholder underwrote the acceptance documents for the awarding of the stock options from the Packard Company, (...), and that (...) it was established that the plan, as well as all of the decisions and actions adopted based on the same, would be regulated by the legislation of the State of California and would consequently would be interpreted in this manner, and, even though this could result in such legislation being applicable to any dispute that had been caused in the interpretation or compliance of the plans to which to the documents reference, the clause may not, certainly, be extended to the legal consideration that the benefits derived from the stock that was obtained by the stakeholder must hold, which are considered to be of a salary nature, and which, are consequently inherent to the employment contract. And since these are included in the same, they are bound by the rules that the latter is governed by, which certainly must be unique, and the legislation of two or more states is not applicable to the same employment relationship, but rather, exclusively, it is applicable that which is to be determined, in this case, to be a non-contentious issue, the Spanish legislation. Therefore, this legislation is the one that must be applied to any amount received by the stakeholder as a consequence of their employment contract and, as such, the income derived from the stock options (...)”

3. Salary and the inclusion in the “regulatory salary” for employment termination severance calculation

3.1 Salary

The doctrine of the Spanish Labour Chamber of the Supreme Court is non-contentious¹¹ in regards to the salary-based items of one of the potential uses of stock options. Judicial rulings have established that the stock purchase options may derive two different advantages or uses:

- The first usage is that in which the consideration of salary is given if payment is made for the work performed. This is “*the difference between the share price quoted on the stock exchange at the moment of purchase and the agreed strike price for the right*” given on the plan when the stock option plan is granted. The quantification of this first usage may be included, therefore, in the calculation of compensation owing from dismissal.
- The second use (“*patrimony*”, according to certain rulings¹²) consists of the sale of the stock acquired as a consequence of the exercising of rights, which is a commercial transaction outside of the employment relationship, and therefore, is not affected in terms of the “salary”.

Focusing on the first of the two mentioned stock options uses, it is worth highlighting that in order to determine salary-based nature, it is not a hindrance for the underwritten stock to be the subject of stock of a foreign-based parent company, distinct from the local employer company (the Spanish subsidiary), which is, legally speaking, the employing company.

In compliance with the most consolidated case law, the relevant issue to determine the remuneration nature of the economic amount is the benefit attributed to the worker, and “*not the initial ownership of assigned goods or perks*”¹³.

3.2. Inclusion of stock options in the regulatory salary as severance payment, following their vesting period

The most common scenario for stock option plans is the multi-annual plan (e.g., three years), a condition that adjusts better to the spirit of retaining and maintaining the beneficiary motivated over

¹¹ Judgments of the Supreme Court (Labour Chamber) made on the 3rd of June 2008 (RJ 2008/3300), 26th of January 2006 (RJ 2006/2227) and the 1st of October 2002 (RJ 2002/10666).

¹² Judgment of the High Court of Justice of Madrid (Labour Chamber) from the 15th of December 2014 (JUR 2015/43216).

¹³ Ruling passed by the Supreme Court, Labour Chamber, on the 26th of January 2006 (RJ 2006/2227).

the medium or long-term, such that their individual performance results in an increased yield for the company.

These multi-annual plans for stock options create the doubt as to whether the benefits of these stock options are to be included in the computation of the “regulatory salary” (*salario regulador*), used to calculate severance payments in Spain. In short, Spain severance payments resulting from employment terminations are calculated taking into account two parameters: (i) the employee’s length of services and (ii) the employee’s “regulatory salary”, which includes the total (fixed, variable, in kind, etc.) gross yearly salary for the twelve-month period prior to the termination of the employment contract.

The absence of express regulations regarding stock option plans has led to a doctrinal and jurisprudential discussion as to the means of quantifying the benefits derived from the participation in this type of retributive programmes for the purpose of calculating severance pay for dismissals.

In general, the benefits derived from these multi-annual plans are usually payable at the end of the established period (e.g., at the end of the third year). However, these amounts reward the professional activity over the entire period of multi-annual vesting of the stock options and not solely performance over the last year.

The judgment of the Labour Chamber of the Supreme Court, the 3rd of June 2008 (RJ 2008/3300) is the reference decision and up to the present time the only one the Supreme Court has issued in this matter. The core of the decision for this ruling included the analysis of how benefits derived from exercising stock options must be calculated for severance calculation purposes. It may be concluded that, for the purpose of the severance payment calculation, only the prorated benefit corresponding to the 12 months prior to the dismissal date should be considered, notwithstanding the multi-annual nature of the stock option plans.

The Supreme Court reached this conclusion based on the fact that the remuneration period for the employee is that which extends from the date of granting until the date of exercising, and therefore the obtained benefit must not be calculated for only a single year, but must be prorated throughout the entire remuneration period.

The “prorata” criterion has been used by several Spanish High Courts of Justice¹⁴ to determine the regulatory salary for severance payment purposes. To quote some of the most recent rulings, one which was passed by the High Court of Justice of Catalonia on the 24th of May 2013 (JUR 2013/26032) analysed a stock option plan and concluded that “*to summarize, the difference between the share price quoted on the market at the moment of exercising the stock and the strike price of such right must be distributed proportionally between the number of years of the vesting period [generation period], including [in the “regulatory salary”] only the part corresponding to the last year worked by the dismissed employee”.*

Likewise, the recently mentioned judgment determines that “*the options remunerate the work performed during the vesting period of the stock from the moment they are granted, in such a way that only the part of the stock options accruing as a consequence of the provision of services during the year immediately prior to dismissal should be considered, rejecting accruals that were settled in the previous financial year prior to the dismissal but which are compensation for service provision from periods prior to that year.*”

Similarly, the ruling of the Labour Chamber of the High Court of the Basque Country from the 16th of September 2014 (JUR 2014/288044), quoted the judgment of the Labour Chamber of the Supreme Court on the 3rd of June 2008 (RJ 2008/3300), in which it is established that “*the period for remuneration must be determined [...] and must be therefore distributed across said period if this is greater than one year (...)*”.

¹⁴ Some of these rulings are (all from the corresponding Labour Chamber): the SHCJ (“**Sentence of the High Court of Justice**”) of Catalonia from the 24th of May 2013 (JUR 2013/26032), the SHCJ of Castile and León, Burgos, passed on the 22nd of April 2010 (JUR 2010/193454), the SHCJ of Navarre passed on the 20th of March 2009 (AS 2009\2052), the SHCJ of Madrid passed on the 27th of November 2009 (AS 2010/452) or the SHCJ of Madrid passed on the 30th of September 2008 (JUR 2009/39484).

3.3. Inclusion of stock options in the regulatory salary as severance payment before reaching maturity

One of the issues leading to numerous lawsuits is the interpretation of the clauses in stock option plans in regards to the following:

- The inclusion of dismissals acknowledged as being unfair for the regulated scenarios in plans such as those issued as “*unbeknown to the will of the employee*” (situations such as retirement, invalidity, etc.); and
- The relevance of the date on which said unfair dismissal takes place with respect to the date of maturity of the stock options and the link to the employer’s fraudulent behaviour to prevent the accrual of the benefits associated with the stock options.

3.3.1 *Inclusion of stock options in the regulatory salary as compensation severance payment in cases of fair dismissal*

It is common for stock option plans to establish that fair dismissals do not lead to the right to receive stock options for employees in cases of fair dismissals. No interpretive doubts have arisen in regards to this aspect.

3.3.2. *Inclusion of stock options in the regulatory salary for compensation severance payment purposes in cases of unfair dismissal*

3.3.2.1. *Approximation of the unfair dismissal to the causes leading to the termination of the employment relationship unbeknown to the will of the employee*

Stock option plans generally establish that in order to have the right to exercise the stock options, it is a requirement to be actively employed by the company at the time in which the aforementioned shares reach maturity, and consequently, may be exercised. This content is coherent with the ultimate goal of these remuneration systems in the medium-term. *Sensu contrario* (to the contrary), employees would lose their right to receive benefits for stock options that had not matured prior to the finalisation of their employment relationship (e.g., voluntary resignation).

As an exception to the previous, stock option plans may include a “rescue” clause according to which, if employees do not continue to work in the company due to a specific set of circumstances (i.e., retirement, invalidity, death, etc.) those non-mature stock options shall not be automatically be lost, but rather, they may be exercised (i.e., “rescued”) within the timeframe established in each plan.

Disputes arise in those scenarios in which the corresponding plan **does not include any specific regulatory provision** for contractual termination.

In these cases, the debate consists of deciding whether, a dismissal acknowledged as unfair by the employer is a case in which the employee is denied the benefits of the unvested stock options or, in the opposite case, if this “illegal” termination (unfair, as acknowledged by the company) could be considered “unbeknown to the will of the employee”, as it is caused by circumstances such as retirement, invalidity or death of the employee.

Until the highly relevant judgment of the Supreme Court from the 3rd of May 2012 (RJ 2012/6290), which shall be considered in greater detail later on, both companies and employees assumed a type of automatism in the granting of benefits for the stock option plans that the employer denied with the argument that the unfair dismissal took place prior to the full vesting of the requested stock options.

This reasoning is based on the fact that the employer cannot prevail in the case of illicit circumstances (such as the acknowledgment of an unfair dismissal practice) in order to reject the

accrual of these amounts associated with the stock option plans which, through unlawful actions, were not received by the employee¹⁵.

As a response to these company practices, numerous rulings¹⁶ have concluded that unfair dismissals must equate to those regulated situations in the stock option plans such as “contract termination for reasons unbeknown to the will of the employee” (e.g., retirement, invalidity, death, etc.), that granted the employee the possibility of obtaining the benefits associated with the plan, whenever these were exercised within a certain timeframe (i.e., “rescue” clause). This has been duly stated in some of the most relevant rulings (see previous footnote):

“For this reason, this situation [unfair dismissal] must equate to those others provided for in the agreed stipulations in which, for reasons unbeknown to the will of the employee, such as death, invalidity and to a lesser extent retirement, allow for the stakeholder or their heirs to exercise the right, leaving it always clearly stated that there is only the option to exercise it when the term has reached maturity, not at the time when the contemplated contingency occurs. The reason for this is based on the fact that the company may not unilaterally neutralise, meaning that the validly underwritten option contract became void, without a legally valid reason, and even less so with grounds that are not admitted by the Law, thereby infringing Article 1256 of the Civil Code”¹⁷.

The financial impact of the acknowledgement of the right to receive benefits from the linked stock option plan, specifically, with the termination of the employment relationship, may have a highly significant impact on the calculation of the regulatory salary for severance payment purposes arising from dismissal.

3.3.2.2. The relevant ruling of the Supreme Court, Labour Chamber from the 3rd of May 2012 (RJ 2012/6290). The relevance of the literality of the stock option plan and the valuation of the “fraudulent” nature of the company depending on the nearness over time of the unfair dismissal and the maturity of the stock options

The decision from the 3rd of May 2012, issued to derive doctrine unification by the Labour Chamber of the Supreme Court (RJ 2012/6290) -the “**Alstom case**”- reinterpreted the consolidated jurisprudential doctrine based on the rulings from 2001 and 2009 by the very Supreme Court (see footnote 15).

The Alstom case analysed whether an employee had the right to exercise stock options whose vesting period had yet to elapse when he was dismissed by the company in a dismissal that was acknowledged as unfair on behalf of the employer. The purchase option for the stock could not be exercised until more than two years had elapsed as of the date in which the dismissal took place.

It should be noted that in the stock option plan, it was established that the right to exercise the stock options was **lost** for employees who, amongst other reasons, had had their “employment contracts terminated” by the company.

It must be pointed out that the Supreme Court grants significant relevance to the literality of the stock option plan in the Alstom case, in which the loss of right was established for “*beneficiaries whose*

¹⁵ The reasoning of the reference rulings with respect to this, from the Labour Chamber passed by the Supreme Court on the 24th of October 2001 (RJ 2002/2363) and on the 15th of July 2009 (RJ 2009/6104) is as follows:

“as the obligation was subject to a fixed term [the stock options], their materialisation shall only be possible once the term is over; as it will be the deed holder of the right who at this time decides whether or not to exercise them. The problem arises when, as seen in this case, the employee is no longer in the company. Though unlike the case of voluntary redundancy or fair dismissal, unfair dismissal admitted as such by the company and effectuated some months before the employee could exercise their right to the option, may not constitute a different event and for these purposes must be evaluated as unilateral conduct on behalf of the obliged party through the offering of the option [the company] to situate itself in such conditions so as to prevent, or at least try to prevent, the exercising of this right, (...) attempting to withdraw the contracted obligations at the time of underwriting the contract on the option.

¹⁶ The most representative being those mentioned in the previous footnote.

¹⁷ Article 1256 of the Civil Code establishes the following: “*The validity and compliance of the contracts must not be left to the arbitrary governance of one of the contracting parties*”

employment contract is rescinded or revoked by the group (...)". This literality, as acknowledged by the Supreme Court itself, includes cessations that have been recognised as being unfair.

Therefore, according to the doctrine of the Alstom case, it cannot be understood that, in compliance with the provisions of the plan, the unfair dismissal was an unregulated scenario in the plan and was comparable to the scenarios of "termination due to causes unbeknown to the will of the employee" which generally grant the possibility of exercising stock options (accelerated vesting or rescue clause). Inasmuch as being expressly contemplated in the stock option plan, its literal nature would have to be considered.

Thus, in the Alstom case, the declaration concluded that the company acted in compliance with the stock option plan when it denied the dismissed employee (acknowledged as being unfair) the exercising of the stock options that had yet to reach maturity on the date of the latter's termination.

Likewise, it should also be noted that in the Alstom case the infraction of article 1256 of the Civil Code was rejected, as alleged by the employee, since it was not considered that the company acted in a way that would affect the validity or the compliance with the contract on behalf of the arbiter of one of the contracting parties.

On the one hand, the stock option plan demanded that employees should be employed and providing services to the company when they wished to exercise their stock options. On the other hand, as in the present case, it was considered that there was no willingness on the part of the company to prevent the exercising of the stock options with the dismissal, since the aforementioned dismissal took place seven months *after* the granting of the plan and more than two years *prior to* the exercising date of those stock options. In light of these events, the Supreme Court concluded that, in the Alstom case, the employee lost the possibility of exercising his/her right to the option for the acquisition of the stock following the termination of his employment contract.

The main conclusions that may be drawn from the Alstom case are:

- The "automatism" that links unfair dismissal with the consequent exercising of the non-mature stock options (mentioned in the foregoing section 3.3.2) is duly qualified.
- Significant relevance is granted to the literality of the stock option plan, acknowledging the validity of clauses as part of the plan that enables the company to deny the right to exercise the *stock options* even if the contract termination is knowingly illicit (unfair dismissal).

For these purposes, it is relevant that the employers protect their interests by expressly incorporating the loss of the right to exercise options in the stock option plan for those beneficiaries whose "*employment contract is rescinded or revoked*", in terms similar to those of the Labour Chamber of the Supreme Court judgment from the 3rd of May 2012 (2012/6290).

- All employment terminations of employees that had been granted stock options shall demand the analysis of the willingness of the company to prevent their exercising of the same, in accordance with the time in which the dismissal was caused, with respect to the maturity of the stock options.

Therefore, in those cases in which the regulation of the stock option plan expressly determines the loss of the right to exercise options for beneficiaries "*whose employment contract is rescinded or revoked*", (such as those in the Alstom case) it is possible to consider how the courts would react if an unfair dismissal occurs just "*a few months before*" the employee can exercise his right of option.

This circumstance may be considered evidence of the fact that the company dismissed the employee in order to prevent him/her from exercising his/her stock options. This situation could be seen as unilateral conduct on behalf of the company to make it impossible to exercise the right of stock option, and, therefore, would contravene Article 1256 of the Civil Code.

3.4. Recent judicial decisions applying the most recent doctrine of the ruling passed by the Supreme Court on the 3rd of May 2012 (Alstom case)

In the following section, a reflection on the relevant judgment of the Supreme Court in the Alstom case is synthesised in minor case law:

- The judgment of the Labour Chamber of the High Court of Justice of Madrid, from the 7th of February 2014 (JUR 2014/60939) considered a case in which the Human Resources Manager of a company was dismissed in a process that was acknowledged as being unfair. During the employment relationship, stock options were granted to this individual, based on stock option plans that expressly established that *“options that had been granted at the time of the termination of the employment relationship but that had not yet reached maturity are subsequently expired and may never be exercised (...)”*.

The court concluded that the company upheld the option agreement that includes elements that regulate the carrying out of the right on stock options, *“without providing evidence [from the company] that expressly or fraudulently thwart the stakeholder’s right, since, if we observe the facts, those options which at the time of the termination of the professional contract, 30th of June 2008, had been granted, though they had not reached their maturity date, in compliance with clause 7 of the master plan, and therefore expired, never to be exercised.”*

- The ruling of the Labour Chamber of the High Court of Justice of Andalusia from the 20th of December 2012 (JUR 2013/151411) analysed the request of a group of employees who had resigned voluntarily and who had been previously granted stock options rights.

The plan that regulated the operating of the stock options stated that, in the case of a beneficiary with a purchase option who is *“no longer an employee of the company for any reason, the balance of the option that had not been exercised at the date on the certificate in which the decision relating to their departure, means that after said date, these rights may not be exercised and the interested party shall have no grounds to claim compensation”*.

The Andalusian courts quoted the Supreme Court decision from the Alstom case, and reaches the conviction that this clause is enforceable since the stakeholders had voluntarily left the company, and therefore, *“there is no volition on the part of the company to prevent them from exercising their purchase right on the option (...); the right does not have the chance to reach fruition due to the non-compliance of one of the necessary requirements for accrual which is the continuance of the link between the company and employee, as this right to preferential purchase option for the stock rewarded employee loyalty with the company, and their participation in the proper functioning of the company and its obtaining profits, which in this case disappears with the voluntary departure of the plaintiffs from the company (...)”*.

- The ruling of the High Court of Justice of Madrid (Labour Chamber) from the 9th of January 2015 (JUR 2015\41208) references the Alstom case doctrine in regards to the delivery of three stock option plans granted consecutively reaching maturity, also, in consecutive years.

The court considers that, in light of the lack of specific regulation for the stock option plan regarding the exercising of options in the case of unfair dismissals, the aforementioned situation must be assimilated to the scenarios involving the termination of the employment relationships as foreseen in the stock option plans for reasons not attributable to the will of the employee (retirement, death, professional invalidity or incapacitation), according to which the right of option on the non-mature stock is not lost provided that these rights are exercised within the three months following departure from the company on these grounds. Without

denying the exercising of the stock options, the court concludes that the stakeholder should have exercised these rights within the three months following his/her departure.

On the other hand, the court recognized that the fact that the stakeholder's dismissal took place eight months *prior to* the vesting of the corresponding stock (in other words, two years and eight months *had passed since* the plan had been granted) does not constitute grounds to prove the willingness of the company to prevent the exercising of the employee's stock options.

As for this specific matter, the consistency of this decision may be questioned with regards to Alstom case doctrine, given that the limited timeframe between the unfair dismissal and the date of maturity for the plan may be interpreted as fraudulent behaviour on behalf of the employer. Thus, in the Alstom case, the employment relationship ended only once *six months had elapsed* following the underwriting of the plan and when there were still *two years and 6 months remaining* before the stock reached maturity. However, the previously mentioned ruling of the Labour Chamber of the High Court of Justice of Madrid considers a scenario in which *two years and six months had already lapsed* between the stock option plan being granted and only *eight months were remaining* until the corresponding stock of the aforesaid plan would mature and the options could be exercised.

In light of the foregoing, it may be worthwhile to consider the issue of when is the "limit" date after which a company is considered to be intending to prevent its employees from exercising their rights regarding a stock option plan.