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## I. New legislation

### 1. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

On June 5, 2015, new Regulation (EU) 2015/848, which is to replace Regulation 1346/2000, was published in the Official Journal of the European Union. This unveiling follows a lengthy period of review of the application of Regulation 1346/2000, which led to the conclusion that it would be desirable to improve the use of some of its provisions in order to enhance the effective administration of cross-border insolvency proceedings.

Below you will find a brief summary of some of the most important aspects of the rules brought in by this new Regulation:

#### 1.1 Entry into force: Art. 92

- (i) Under Article 92 of the new Regulation, the Regulation will enter into force on the 20th day following its publication in the Official Journal of the European Union, that is, on June 25, 2015.
- (ii) Nonetheless, this article states that the new Regulation will only apply, in general terms, from **June 26, 2017**, and will then apply **only** to **insolvency proceedings opened after** that date (art. 84.1).

#### 1.2 Principal new features

- (i) Scope: Art. 1
  - The new Regulation departs from the traditional view of insolvency as a liquidation mechanism and embraces the wider notion of the "second chance", that is, the **preservation** of viable businesses and undertakings.
  - In line with this new approach, in addition to traditional insolvency proceedings, the Regulation also covers the new **pre-insolvency proceedings** and hybrid proceedings, as well as proceedings aimed at **relieving** companies of **unpaid debts**.
  - The proceedings covered are listed in **Annex A** to the new Regulation, it being important to note that:
    - As far as **Spain** is concerned, the following are included:
      - ◆ *Concurso* (insolvency proceedings);
      - ◆ Court validation of refinancing agreements;
      - ◆ Out-of-court payment agreements;
      - ◆ Public negotiations (we understand that this comes from art. 5 bis of the Insolvency Law) of collective refinancing agreements, validated refinancing agreements and advance proposals for an arrangement.

- As far as the **United Kingdom** is concerned, the Regulation **does not apply to schemes of arrangement**, the reason being that this mechanism falls within the scope of company law and pursues aims, within that sphere, of a broader nature than the aim of overcoming financial difficulties through debt restructuring, such as restructuring capital in situations that do not necessarily involve insolvency or pre-insolvency. These other aims might have been hindered or even prevented altogether had schemes of arrangement been included in Annex A.

(ii) International jurisdiction: Art. 3

- This article seeks to shed light on the concept of “**centre of main interests**” as the basic criterion for the conferral of international jurisdiction for the opening of main proceedings.
- It lays down **presumptions** for the purpose of determining the centre of main interests (these will only come into play if they apply for a certain period of time prior to the request for the opening of insolvency proceedings):
  - Legal persons = place of registered office (3 months)
  - Individual exercising an independent business or professional activity = principal place of business (3 months)
  - Other individuals = place of habitual residence (6 months)
- The court, or the insolvency practitioner (mediator) if the proceedings are nonjudicial, must **examine of its own motion whether it has jurisdiction** (art. 4). The decision taken on that matter may be challenged in all cases before a court (art. 5).
- The courts of the Member State where insolvency proceedings have been opened have **jurisdiction** to entertain any **action which derives directly** from the insolvency proceedings, such as **avoidance** actions (art. 6).

(iii) Secondary insolvency proceedings

- All that is required for the opening of secondary proceedings is **proof** that the debtor is **insolvent** if the opening of the main proceedings does not require the debtor to be insolvent, which may occur in pre-insolvency refinancing proceedings and hybrid proceedings (art. 34).
- Formal recognition is given to so-called “**synthetic**” **secondary proceedings**, commonplace in English-speaking countries, which seek to avoid the formal opening of secondary insolvency proceedings and their associated undesirable effects (liquidation) by means of the offer and **assumption** by the creditors in the main proceedings of any **advantages for local creditors** that could have arisen for them had secondary proceedings been opened. Under the new Regulation, synthetic secondary proceedings are structured in the following way (art. 36):
  - The insolvency practitioner in the main proceedings is allowed to give a unilateral **undertaking**, in respect of the assets located in the Member State where secondary proceedings could be opened, to comply with the distribution and priority rights under national law that would have applied had such secondary proceedings been opened.

- The undertaking must be **approved**, under the rules on **majorities** in accordance with local law, by known **local creditors**, whereupon the undertaking will become binding on the assets available to creditors ("estate"). Local creditors may apply to their own courts or to the courts of the Member State where the main proceedings were opened in order to require the insolvency practitioner to take suitable **measures to ensure compliance** with the undertaking.
- If the undertaking adequately protects the general interests of local creditors, the local court may **refuse**, at the request of the insolvency practitioner in the main proceedings, to **open secondary insolvency proceedings** (art. 38.2). At the request of the insolvency practitioner in the main insolvency proceedings, the court may **open** insolvency proceedings which are **different from the proceedings requested** by the local creditors, for reasons of coherence between the main and secondary proceedings (art. 38.4).
- It is possible to **stay the opening** of secondary proceedings, at the request of a debtor in possession or its insolvency practitioner, for a period of up to 3 months, where a temporary stay of individual enforcement proceedings has been granted in the main proceedings in order to allow for negotiations between the debtor and its creditors. Protective measures may be adopted to protect the interests of local creditors (art. 38.3).
- As regards the **outcome** of secondary proceedings, this need not be liquidation of the assets located in the Member State where the proceedings were opened. In this connection, the insolvency practitioner in the main proceedings may:
  - Apply for a **stay** in whole or in part of the **realization of assets** in the secondary proceedings provided that (i) it is of interest to the creditors in the main proceedings and, whilst such interest persists, (ii) suitable measures are taken to guarantee the interests of local creditors (art. 46).
  - Propose a **preservation solution** in the secondary proceedings, such as a restructuring plan, composition or another such comparable measure (art. 47).

(iv) Insolvency registers

- In order to prevent the possible parallel and simultaneous opening of insolvency proceedings in different Member States, and to improve the information available to creditors and courts in all Member States, provision is made for the creation by all Member States of insolvency registers. Information relating to insolvency proceedings will be published in those registers and the registers will be interconnected. Provision is also made for the creation of a European e-Justice Portal, which will serve as a central public electronic access point to information in the system.

**2. Law 9/2015, of May 25, 2015, on urgent insolvency-related measures (originating from Royal Decree-Law 11/2014, of September 5, 2014)**

This new law transfers to the Insolvency Law the wording of Royal Decree-Law 11/2014, of September 5, 2014, which made fundamental amendments to insolvency legislation in relation to the classification of claims, the terms of the creditors' arrangement and the majorities needed for its approval, and the transfer of production units in an insolvency proceeding.

The new law ushers in additional reforms and includes transitional arrangements which increase the number of insolvency proceedings to which this latest reform of Spanish insolvency law can apply. You can read a special single-topic Commentary at the following [link](#).

## II. Selected court cases and significant transactions

### 1. ***Grupo Empresarial San José” case: decision dated February 13, 2015 rendered by Pontevedra Commercial Court No. 2***

On January 21, 2015, the Grupo Empresarial San José, which operates in the real estate and construction industries and the like, applied for court validation of a refinancing agreement it had reached with a number of its creditors. After checking that the requirements set out in Section 1 of Additional Provision Four of the Insolvency Law had been met, the court validated the agreement with the following effects: (i) the effects agreed to in the refinancing agreement were made binding on dissenting entities; (ii) individual enforcement proceedings initiated against the debtor’s assets, including those initiated by dissenting entities, were halted, and a ban was imposed on initiating enforcement proceedings between the date of validation and final maturity of the debt; (iii) the financial institutions retained their rights against joint and several obligors, guarantors and sureties; (iv) individual enforcement proceedings or proceedings to enforce security interests could only be initiated if the court held that the refinancing agreement had been breached; (v) attachments relating to the debts affected by the agreement were cancelled; and (vi) the agreement could not be subject to clawback action.

### 2. ***“Banco de Madrid” case: decision dated March 25, 2015 rendered by Madrid Commercial Court No. 1***

The voluntary insolvency order in respect of Banco de Madrid handed down by decision of March 25, 2015 also included the opening of the liquidation phase. In the insolvency order, the court asked whether a financial institution that had passed a series of controls and supervisory reviews could find itself in a situation of imminent technical insolvency, and concluded that it could, based on the application of banking legislation.

The court also found that the prediction that any entity could find itself facing imminent technical insolvency if its customers were to withdraw their money en masse is not, in itself, indicative of imminent technical insolvency. It is therefore necessary to demonstrate that this prediction is based on objective circumstances giving rise to the expectation that this might transpire. In the present case, a series of factors demonstrated that Banco Madrid would not have been able to continue to meet its obligations as they fell due, notwithstanding the possible full performance of its commitments in the event of liquidation. These objective circumstances were: (i) the decision of the US Treasury Department to treat the Andorran parent company as a money laundering suspect; (ii) the decision of the Bank of Spain to supervise the entity; (iii) the en bloc resignation of the entity’s board; (iv) the appointment of temporary administrators by the Bank of Spain; (v) the opening of proceedings by the Money Laundering Prevention Service and possible action by the State Prosecutor’s Office; and (vi) the run on deposits in the space of just three days.

**3. "Concesionaria Autopista Eje Aeropuerto" case: judgment dated April 20, 2015 rendered by Madrid Commercial Court No. 2**

In the insolvency proceedings on two airport concession-holders (Aeropistas, S.L.U. and Autopista Eje Aeropuerto Concesionaria Española, S.A.U.), financial institutions submitted several incidental claims seeking, inter alia, to amend the list of creditors. Specifically, they sought to include in the pledge over collection rights the collection rights arising in favor of the insolvent party after the date of the insolvency order ("future collection rights").

In its judgment, the court held that the pledge over future collection rights only confers specially preferred status on claims arising prior to the insolvency order. It refused to allow the pledge to relate to the future collection rights arising after the insolvency order. According to the court, any future collection rights which come to light after the insolvency order do not arise for the assignee in person (the financial institution), but are added directly to the assets available to the creditors of the insolvent party (concession-holder), since if the insolvent party does not have the power of disposition over its assets and rights, it does not have the power either to transfer those assets and rights to the assignee.

**4. "Jofel Industrial" case: judgment dated May 5, 2015 rendered by Alicante Commercial Court No. 1**

Jofel Industrial, S.A., a company operating in the sanitation equipment and professional cleaning industry, was held to be in insolvency on March 31, 2014. Shortly thereafter, it submitted a proposal for an arrangement which included a partial spin-off of the company, with the transfer to a new company of the assets and liabilities of its real estate line of business, separating them from those belonging to the industrial line of business which remained with the insolvent party. In turn, and as regards payment commitments towards creditors, the insolvent party assumed payment of the claims subject to a reduction of 55% and a deferral of 6 years. The proposal was accepted by the vast majority of unsecured creditors and was subsequently approved by the court, which allowed the statutory limits to be exceeded since the insolvency legislation preventing reductions from exceeding 50% and deferrals from exceeding 5 years, except in cases of particular importance, was still in force.

This is one of the few cases involving the approval of an arrangement with creditors which includes the structural modification of the insolvent company, in this case a partial spin-off consisting in the separation of its industrial and real estate lines of business.

### **III. Group of cases: the assessment section in insolvency proceedings**

**1. Judgment dated January 12, 2015 rendered by Chamber I of the Supreme Court**

Assessment of the insolvency as fault based due to the delay in petitioning for insolvency. The new rules on liability introduced by Royal Decree-Law 4/2014, which are of a compensatory nature, are not retroactive, because: (i) the provisions on liability for insolvency are not penalty provisions and, therefore, not subject to the legal rules associated with that kind of provision, such as the retroactivity of the most favorable penalty provisions; and (ii) these are not interpretative or clarifying provisions; instead, they introduce new rules on liability which expressly require there to be a causal link between the conduct that was the determining factor in the assessment that the insolvency was fault based and the occurrence or aggravation of the insolvency. According to one dissenting opinion, however, the concept of liability under the previous wording was already of a compensatory nature and the reform brought in by Royal Decree-Law 4/2014 confirms that interpretation.

**2. Judgment dated February 3, 2015 rendered by Chamber I of the Supreme Court**

The Supreme Court held that the Social Security General Treasury did not have standing to challenge an assessment judgment which did not take into consideration a claim made by the Treasury, a claim which had not been included either in the report of the insolvency manager or the opinion of the State Prosecutor's Office. According to the judgment handed down by Chamber I, the insolvency manager, as representative of the general interests of the insolvency proceeding, and the State Prosecutor's Office, as guardian of the public interest, are the only parties entitled to submit assessment proposals that may be taken into account in the assessment judgment.

**3. Judgment dated February 5, 2015 rendered by Chamber I of the Supreme Court**

In a case involving delay in the submission by the insolvency manager of the assessment report, Chamber I held that, since this is a mandatory report which must be supported by reasons and documents, the insolvency court may, in certain circumstances, postpone the date on which the deadline for its filing by the insolvency management begins to run, provided that there are factors to justify that course of action and that the postponement is reasonable. In the case under consideration, the Chamber considered a delay of ten and a half months to be reasonable as there was no audit report on the insolvent party.

**4. Judgment dated March 11, 2015 rendered by Chamber I of the Supreme Court**

The Supreme Court noted that liability for shortfall in the insolvency proceeding only arises if the liquidation phase is opened or the assessment section is reopened due to breach of the arrangement, and therefore a person can only face charges of liability if the insolvent party is in the liquidation phase. In the case under consideration, the court held that liability for shortfall in the insolvency proceeding did not apply because the insolvent party had reached an arrangement, which was being performed.

**5. Judgment dated April 10, 2015 rendered by Chamber I of the Supreme Court**

The Supreme Court held that the distribution of dividends by the insolvent party to its parent company entailed a fraudulent outflow of assets from the insolvent party. Therefore, the court confirmed the assessment of the insolvency as fault based. The appellant pleaded that the dividends were distributed as a set-off and that there was no intention to cause detriment to creditors. The Chamber affirmed, however, that the concept of 'fraudulent outflow of assets' was equivalent to a reduction in the assets available to the creditors of the insolvent party and that, in order for fraud to exist, there was no need for there to be an intention to cause harm, because knowledge that detriment would occur is sufficient. The Chamber concluded that fraud did indeed exist, as the sole director of the insolvent party and of the parent company had to have been aware that the distribution of dividends was detrimental to the remaining creditors.

**6. Judgment dated April 23, 2015 rendered by Barcelona Provincial Appellate Court**

Panel 15 of Barcelona Provincial Appellate Court, specializing in commercial matters, upheld the appeal and assessed the insolvency as fortuitous after concluding that it was not the case that the outflow of various assets from the insolvent party to a related company was known to be causing detriment to creditors. Furthermore, the Chamber confirmed that there was no detriment whatsoever as a result of this conduct, as the related company paid into the insolvent party more than it received. As regards the delay in filing for insolvency, the

Supreme Court held that a delay of ten months did not entail gross negligence or willful misconduct if the directors had taken action aimed at preventing the insolvency, by trying to find a solution that was more reasonable, or even more favorable, for the insolvent party than an insolvency proceeding. Lastly, the Chamber considered that there is no aggravation of the insolvency where the new obligations assumed prior to the insolvency order are insignificant in percentage terms when compared to the total debts. It did not consider it had been proven that the delay had impaired the assets in such a way as to significantly diminish their value.

#### IV. Insolvency round-up

**1. Ancillary proceeding for clawback of payments of financial lease installments by the insolvent party: judgment dated April 21, 2014 rendered by Madrid Provincial Appellate Court**

The court considered that payments by the insolvent party of financial lease installments were ordinary acts as they were necessary for the continuity of the business, but held that these payments were not made under normal conditions as the company was technically insolvent. It concluded, however, that the payments were not detrimental to the assets available to creditors from the perspective of an 'unjustified asset trade-off' as those payments prevented the financial lease contract being terminated and allowed the company to continue its business.

**2. Action for liability against directors and auditors: judgment dated December 22, 2014 rendered by Chamber One of the Supreme Court**

The Chamber held that Article 60 of the Insolvency Law made it possible to toll the statute of limitations period on any actions for liability that may be brought against directors as well as auditors of the insolvent party, which does not prevent the bringing of any of these actions.

**3. Subordination of a claim held by a person having a special relationship with the insolvent party: judgment dated December 29, 2014 rendered by Chamber One of the Supreme Court**

The earlier judgments subordinated a claim held by the parent company as it had acted as 'de facto director' of its subsidiary in the two years prior to the insolvency order. The appellant claimed that de facto director status had to exist on the date on which the claim arose. The Chamber considered that Article 93.2 of the Insolvency Law, where it refers to the concept of 'de facto director', requires the subordination of claims held by persons who had that status for the two years prior to the insolvency proceeding, regardless of the date on which the claims arose.

**4. Payment into court of severance set for dismissed employees ("Hércules, C.F" case): decision dated February 2, 2015 rendered by Chamber One of the Constitutional Court**

The Labor Court had ruled that the dismissals made by the insolvent company were unjustified and ordered the company to pay severance. The high court of justice (the hierarchically superior court that had to hear the appeal against that decision) did not allow the insolvent party to appeal as it had not first paid into court the severance ordered by the Labor Court.

The appellant claimed infringement of its right to effective judicial protection, from the perspective of access to appeals, as its insolvency rendered the statutory requirement to pay the severance into court or to post a bond for it an impossible obstacle to the case being reviewed by a superior court. Chamber One of the Constitutional Court considered that the appeal for protection of constitutional rights should be upheld, with the result that it submitted to the Constitutional Court sitting in plenary session an internal issue of unconstitutionality in respect of Article 230.1 of the Labor Jurisdiction Law, staying the deadline for delivery of the judgment.

**5. *Clawback action. Creation of security interests for preexisting obligations: judgment dated February 23, 2015 rendered by Chamber One of the Supreme Court***

The appellant claimed that the creation of the security interest did not entail a reduction in the assets available to creditors because the insolvent party received simultaneously a sum of money as a loan and could draw on it to make the payments necessary to continue its business. The Chamber considered that the increase in the loan (more than 70%) and the amendment of the terms of the credit facility in the form of renewal (1 year) justified the mortgage, without there being any detriment to the assets available to creditors.

**6. *Clawback action. Creation of security interests for preexisting obligations: judgment dated February 26, 2015 rendered by Chamber One of the Supreme Court***

The Chamber considered that there was no significant increase in the loan (less than 8%) or sufficient deferral of the deadline (1 year) to justify the trade-off entailed by the creation of the mortgage, with the result that it confirmed the presumption of detriment and the unenforceability of the mortgage. The Supreme Court held that, since the property had been sold prior to the insolvency order being handed down, the beneficiary of the mortgage had to return to the assets available to creditors the amount of the debt covered by the creation of the mortgage.

## **V. Newsflash**

**1. *Drop in the number of insolvency proceedings***

According to recent figures from the Spanish National Statistics Institute, the number of insolvency proceedings dropped significantly in the first quarter of 2015.

Specifically, in the first quarter of 2015 the number of insolvent debtors stood at 1,560, representing a drop of 26.6% compared to the same quarter in 2014. The data for the first quarter of 2015 marks the sixth successive quarter in which the number of these proceedings has fallen.

Source: <http://www.ine.es/jaxi/menu.do?type=pcaxis&path=/t30/p219&file=inebase>

## VI. Garrigues Archives

### 1. Articles

*Implicaciones de la valoración en la Ley Concursal* ("Implications of valuation in the Insolvency Law"), Thery Martí, Diario La Ley No 8492, Sección Doctrina, March 3, 2015. Reference La Ley 923/2015.

### 2. Garrigues Blog

[The Wage Guarantee Fund \(FOGASA\) will have to pay sums under applications it has not decided on within three months](#)

In its judgment of March 16, 2015, the Supreme Court held that the Wage Guarantee Fund will have to pay sums relating to claims that have not been decided on by it within three months of the formal application.

### 3. Transactions

- **Advice to Sankaty Advisors LLC on the acquisition from Bankia and BFA Bankia of a portfolio of secured and unsecured non-performing loans ("Project Commander")**

The BFA-Bankia group has sold a portfolio of secured and unsecured loans for €513 million to Sankaty Advisors, an independently managed Bain Capital fund specializing in corporate debt. Garrigues provided legal advice to Sankaty Advisors during the transaction.

Over the last three years, Sankaty Advisors has acquired portfolios of European bank loans worth €2,200 million. At the end of 2014, the fund also acquired the "Amazona" credit portfolio from Bankia, with a nominal value of €800 million. Garrigues also acted as legal advisor to the purchaser in this transaction.

### 4. Awards, mentions and acknowledgements

- **"Chambers Global 2015"** (Garrigues: Band 1 in Insolvency, Band 2 in Restructuring)

*'Consistently attracts huge Spanish debtor companies seeking pre-insolvency and corporate recovery advice. Increasingly active on the lender side of insolvency proceedings. Huge network boosts an already strong reputation among domestic clients. Offers a well-integrated restructuring and insolvency practice.'*

Partners of our department named as top-ranking professionals were Antonio Fernández, Borja García-Alamán, Adrián Thery y Juan Verdugo.

- **"Chambers Europe 2015"** (Garrigues: Band 1 in Insolvency, Band 2 in Restructuring)

*'When lawyers from Garrigues go to meetings their opinions carry a lot of weight; the lawyers are specialised in insolvency proceedings and know perfectly the market and with whom to talk.'*

Among the transactions highlighted were the services provided to MARME, owner of Ciudad Financiera of Banco Santander, both in its attempt to restructure €2,800 million of debt and in its subsequent insolvency petition, as well as the advice provided to Panrico during negotiations to head off an insolvency proceeding.

Partners of our department named as top-ranking professionals were Antonio Fernández, Borja García-Alamán, Adrián They y Juan Verdugo.

- **“[Legal 500](#)”** (Garrigues: Tier 1 in Restructuring and Insolvency)

*‘A go-to firm in this area’, Garrigues ‘combines specific field knowledge’ with ‘an understanding of all ancillary matters’*

Partners of our department named as top-ranking professionals were Antonio Fernández, Borja García-Alamán and Adrián They.

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