GARRIGUES

RESTRUCTURING & INSOLVENCY

NOVEMBER 2016


Get out
of Debt

CONTENTS

1941-2016 GARRIGUES

RESTRUCTURING & INSOLVENCY

01 NEW LEGISLATION

1.1. Amendment of Council Regulation (EC) No 1346/2000 of May 29 2000 on insolvency proceedings

Council Implementing Regulation (EU) 2016/1792 of 29 September 2016 has made amendments to Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings. The annexes contain the designations that each member state gives to the proceedings and liquidators to which the Regulation applies. The amendments in the annexes stem from the reforms of the law on insolvency proceedings in Poland and Slovakia.

1.2. Partial repeal of Law 10/2012, of November 20, 2012 on certain fees charged in the justice system and by the Spanish Toxicology and Forensic Sciences Institute

In a judgment delivered on July 21, 2013, the articles listed below of Law 10/2012 (the "Court Fees Law") were held unconstitutional by the Constitutional Court:

i. Article 7.2 (variable amount): the court fee was held unconstitutional in relation to its variable amount.
ii. Article 7.1 (fixed amount): the court fee was held unconstitutional in relation to the fixed amounts determined in the labor, judicial review and civil jurisdictions (appeals to an immediately superior court, cassation appeals and special appeals against procedural infringements). The fixed fee has been retained for other procedures in the civil jurisdiction (trials, payment instrument procedure, payment order procedure, European payment order procedure, out of court enforcement, objection to the enforcement of judicial instruments, ancillary insolvency proceedings and application for a necessary insolvency proceeding).

To implement constitutional court judgment of July 21, 2016, the Directorate-General for Taxes issued Binding Ruling no 8571-16, of September 12, 2016, clarifying that in cases where the court fee has been requested from the party with tax obligations and remains outstanding even if it has become chargeable, it does not have to be paid because the Constitutional Court has overturned the right to charge it.

02 SELECTED COURT CASES AND MAJOR SETTLEMENTS

2.1. Luzentia case: decision by Madrid Commercial Court no 1 on June 8, 2016, and decisions by Madrid Commercial Court no 3 on July 4 and July 5 2016

During the court-homologation procedure for the refinancing agreement for Luzentia Promoción and Mantenimiento Renovable, S.A.U. ("Luzentia"), a dissenting creditor petitioned for a necessary insolvency proceeding on the company. The company objected, among other pleadings, because there was a preliminary civil issue to be decided, due to the homologation process being handled for its refinancing agreement.

The commercial court disallowed the preliminary civil issue plea by holding that there was no logical or legal connection between the petition for a necessary insolvency proceeding and the petition for court homologation because these proceedings have different purposes and therefore cannot be deemed mutually incompatible.

On the substantive side, the commercial court explained that the court homologation of a refinancing agreement is not sufficient per se to set aside a petition for a necessary insolvency proceeding, although it considers that it may be a key element for the refinanced debtor to evidence the supervening disappearance of the facts revealing its technical insolvency. Furthermore, the court concluded that the standing of the creditor petitioning for a necessary insolvency proceeding would not later be affected if it were "dragged along" by reason of the court homologation of the refinancing agreement, using reasoning based on the *perpetuatio legitimationis* principle (the original standing to petition for a necessary insolvency proceeding survives throughout the proceeding even if supervening changes occur which cause the forfeiture of creditor status).

Lastly, the court advised that the fact of a claim being under litigation does not remove the creditor's standing to petition for a necessary insolvency proceeding and that, even if the petitioning creditor's claim ultimately ceases to be payable by reason of the homologation

of the refinancing agreement, the judge hearing the petition for a necessary insolvency proceeding could issue an insolvency order at their own initiative if they found by other means that technical insolvency existed. In the homologation proceeding conducted by another court in the same judicial district, the same dissenting creditor filed a request for a ruling on jurisdiction with the aim to bring the homologation proceeding to a standstill, and ultimately for the homologation proceeding to be handled by the court that was hearing the petition for a necessary insolvency proceeding. The dissenting creditor explained that another commercial court was hearing the petition for a necessary insolvency proceeding on the debtor, and that the jurisdiction to hear the homologation proceeding lay with the court which "*had jurisdiction for the insolvency order*" as determined in additional provision 4.5 of the Insolvency Law ("LC"). The court at which the request for a ruling on jurisdiction was filed set it aside, explaining that article 10.2 LC only indicates which court must hear the request for an insolvency proceeding, but does not impose the joining of both proceedings.

Lastly, the commercial court conducting the court-homologation proceeding for Luzentia's refinancing agreement, finally validated the refinancing agreement and made its effects binding on the dissenting creditors.

2.2. Maderas Raimundo Díaz case: decision by Madrid Provincial Appellate Court on October 17, 2016

One year into an insolvency proceeding, a pool of banks filed a complaint for foreclosure on a mortgage on the insolvent debtor's premises. Later, though still before the foreclosure proceeding had commenced, the insolvency manager initiated clawback action against the same mortgage, and then requested a stay of the mortgage foreclosure proceeding on the ground of a preliminary civil issue to be decided. The court granted the insolvency manager's request and stayed the mortgage foreclosure proceeding.

The pool of banks appealed against the decision to stay the proceeding. The provincial appellate court upheld the banks' appeal, explaining that: (a) the effect of a preliminary civil issue to be decided requires the existence of two proceedings remaining to be held, which was not the case here because the complaint for foreclosure on the mortgage had not been admitted; (b) a preliminary civil issue to be decided cannot be found in a mortgage foreclosure proceeding because the existence of clawback action on the mortgage is not one of the very few legal grounds for a stay of that proceeding. The National Appellate Court therefore rendered the stay of the mortgage foreclosure invalid, returned the proceedings to the lower court to deliver the required judgment on the enforcement order and concluded that the effects of a hypothetical provisional enforcement of the judgment terminating the mortgage fall outside the matter at issue.

2.3. Sun project: sale of non-performing loan portfolio by Caixabank to Apollo

In October, Caixabank completed on the sale of a portfolio of non-performing loans with a face value of €450 million and backed by 112 hotels and a further 32 vacation premises, assets that were primarily located in the Canary Islands, Catalonia and the Balearics. The buyer was Apollo and the size of the transaction amounted to €250 million.

The sale of this portfolio is believed to be the largest transaction on defaulting hotels to date.

03 CASE GROUP: ASSESSMENT SECTION AND FAULT-BASED INSOLVENCY

3.1. Fault-based insolvency proceeding on a foundation: judgment by Seville Commercial Court no 1 on January 20, 2016

The failure to deliver a foundation's books of account makes it impossible to review the transactions with economic relevance, which triggers an irrebuttable legal presumption of fault. The discrepancies between the accounting records and the balance sheets filed with the petition for an insolvency order, the use of general accounts which were not itemized and the absence of supporting documents

for the accounting records are irregularities preventing an understanding of the foundation's net worth or financial position. Moreover, the court held that there had been a late filing of the petition for an insolvency order, but did not give a fault-based assessment for that reason because it considered that the current board of trustees could not be held responsible for aggravation of the insolvency by reason of that late petition, considering that when the current board of trustees started governing the foundation it had already entered into technical insolvency, and gave the preinsolvency notice a few months later. The judgment clarifies that where foundations are concerned, the trustees discharge management activities, and are therefore liable to be held at fault as persons affected by the assessment. Their standard of care must be measured by reference to (i) the type of foundation (nonoperating or operating); (ii) whether they are compensated for their services; and (iii) the governance structure and the activities discharged by the trustee. The existence of an executive committee which was bestowed authority to keep the accounts implies that any fault on the part of trustees not receiving compensation is minor and therefore they should not be held persons affected by the assessment. The judgment further concluded that they should not be ordered to cover the shortfall in the insolvency proceeding because it had not been evidenced in which way the conduct that had determined the fault-based assessment had generated or aggravated the institution's technical insolvency.

3.2. *Joint and several liability between the legal entity and its individual representative: judgment by Barcelona Provincial Appellate Court on April 19, 2016*

The Chamber dismissed separate appeals lodged against the lower court's judgment assessing the insolvency proceeding as fault-based and ordered the directors to pay the shortfall in the insolvency proceeding. Since the entry into force of the new Corporate Enterprises Law ("LSC"), particularly, of article 236.5 (which introduced joint and several liability between the legal entity director and its individual representative), it is now possible to attribute direct liability to the individual (appointed by the legal entity director) for facts for which that legal entity is liable. The chamber held that the same principles apply in insolvency proceedings as are found in the LSC and therefore liability for the insolvency may be claimed in the assessment section for the individual representative of the legal entity director without needing to apply the de facto director or accomplice tests.

3.3. *Order to cover the shortfall in the insolvency proceeding and to pay damages and losses: judgment by the Supreme Court (Chamber One) on July 14, 2016*

The Supreme Court (Chamber I) held that payment of damages and losses may be imposed with respect to any damaging conduct that was either willful or negligent (not only with respect to the unlawful obtaining of property and rights owned by the debtor before or after the insolvency proceeding). The chamber clarified that such liability for damages could be attributed to both the persons affected by the assessment and the accomplice. By contrast, liability for the shortfall in the insolvency proceeding may not be attributed to the accomplice and requires an assessment and evidence of various intentional and factual elements in the acts of each of the directors ("added justification") in relation to the steps that determined the fault-based assessment of the insolvency proceeding. The court partially upheld the cassation appeal and acquitted the director from the order to pay damages and losses.

3.4. *Order to cover the shortfall in the insolvency proceeding (Tenedismar case): judgment by Madrid Commercial Court no 4 on September 30, 2016*

In the assessment section, the insolvency manager and the public prosecutor's office requested a fault-based assessment for the insolvency proceeding due to the insolvent debtor's delay in petitioning for an insolvency order and failure to keep accounting records. After it had been evidenced that the insolvent debtor's accounts had not been filed, the court held that this irrebuttable presumption of fault-based insolvency applied, which made it unnecessary to examine the existence of the other ground for presuming fault (delay in petitioning). Concerning the order to cover the shortfall, the court ordered the directors acting severally to cover the whole of the shortfall in assets, to pay the creditors the amount they would not receive in the liquidation of assets available to creditors, and disqualified them for 3 years for managing the property of others, representing or managing anyone's affairs, operating in business or holding office or any form of administrative or economic intervention in business or manufacturing companies.

04 INSOLVENCY ROUND-UP

4.1. Jurisdiction of the insolvency judge, once the arrangement has been approved, to classify claims: judgment by Barcelona Provincial Appellate Court on October 21, 2015

Following the approval of an arrangement with creditors a discussion ensued over the jurisdiction of the commercial court or labor court to hear the enforcement of a judgment delivered in the labor jurisdiction ordering the insolvent debtor to pay severance. At the heart of the dispute was whether the claim recognized in the judgment was a pre-insolvency order claim and therefore fell within the approved arrangement, or a post-insolvency order claim which had to be paid in full. The court explained that the commercial judge had the jurisdiction to hear the enforcement complaint, because it was not a straightforward post-arrangement claim, for which the insolvency judge would not have jurisdiction, but rather an ancillary proceeding concerning whether the complainant's claim is a pre- or post-insolvency order claim.

4.2. Inclusion of the insolvency manager's fees in the appraisal of costs: decision by the Supreme Court (Chamber I) on November 11, 2015

At issue was whether in an ancillary insolvency proceeding in which there is an order to pay costs by reason of the acts of the insolvency manager, his fees must be included in the appraisal of costs. The chamber concluded that the insolvency manager's participation in ancillary insolvency proceedings falls within the compensated activities according to the tariff rules and does not cause any additional cost for the insolvent debtor. The chamber clarified, however, that the appraisal of costs did indeed have to include those generated by the activities of the insolvency manager, because they act not for themselves and on their own behalf, but as representative of the debtor's assets available to creditors. Therefore, there is an interest for the assets available to creditors in the receipt of the costs generated by the activities of the insolvency manager.

4.3. Inability to claw back refinancing agreements and their homologation: decision by Madrid Commercial Court no 1 on March 1, 2016 (Realia Case)

The judgment explains that following the amendment made by Law 17/2014 to the legislation on the homologation of refinancing agreements, severe restrictions have been placed for monitoring the tests to be met by a refinancing agreement for its homologation, for which the existence of a disproportionate trade-off cannot be initially examined by the court.

Affirming that court monitoring is void of content and that court homologation amounts to a regulated act in the dark, which is unavoidable simply because a given majority of the financial liabilities exists, would imply opening the floodgates for banking transactions of any type approved in a critical pre-insolvency scenario to find it easy to achieve a privilege of absolute non-eligibility for clawback as a result of automatic homologation by a judicial authority not be able to monitor them, which obviously cannot have been the legislature's intention and contradicts every principle underlying the Spanish insolvency legislation.

The only parameter that may be used by the courts in their monitoring is whether broadening or modification of the claim is reasonable for the purpose of heading off imminent insolvency. Simply replacing earlier obligations with other new ones with different due dates, regardless of whether they are accompanied by the provision of new security, would not be sufficient for these purposes if it has not been shown that, in the reasonable scenario that has been provided in the viability plan, it does not bring a real alternative way out of the distress but rather simply postponed it. The petitioner for the homologation accompanied its request with a viability plan to which it attached a projected income statement and cash flow statement for the period between December 2015 and December 2018. The plan set out how the debts with financial creditors who were not party to the refinancing agreement and would not be bound by it would be satisfied; from which it transpired that the agreement benefitted all the financial creditors, since their debts could be satisfied in full, either under or outside the refinancing agreement.

The inability to claw back the refinancing agreement as determined in additional provision 4.13 of the Insolvency Law must be interpreted in harmony with the first point of article 71 bis LC and therefore, without the need for any particular pronouncement, that inability to claw back the agreement will apply to all transactions, acts and payments,

regardless of their nature and how they were performed, and to the security provided by enforcing the refinancing agreement.

4.4. *Liquidation of a construction agreement and reflection in the debtor's inventory: judgment by Madrid Provincial Appellate Court (Panel 28) on June 10, 2016*

The prohibition on compensation of credits after the insolvency order has been issued applies only to claims arising from different legal relationships, not to those hailing from the same legal relationship. The claims brought by the subcontractors in direct action provided to be justified, as was held in a final judgment, and therefore the amount paid out had to be discounted from the developer's debt to the contractor. The attachment order on the developer's debt to the contractor debtor was stayed as a result of the insolvency order on the latter, which meant that the debt had to remain in the debtor's inventory and the developer has no payment obligation whatsoever to the subcontractor who petitioned for the attachment order, but rather only to the insolvent debtor.

4.5. *Joint and several liability of the single integrated enterprise for labor purposes: judgment by Catalonia High Court on June 20, 2016*

In the context of an insolvency proceeding, the chamber held that the group companies and the insolvent debtor were jointly and severally liable for the economic consequences of termination of the debtor's employment contracts. The chamber explained that the petition for liability for the group companies at the pleading stage following the end of the consultative stage of the proceeding is not late if the proof provided evidences the existence of a single integrated enterprise for labor purposes characterized by work operations functioning as a unit at the companies, closely interrelated assets, cash pooling, fraudulent use of the legal personality and/or unfair use of single management. All of these elements have to be assessed in relation to the specific cases being examined.

4.6. *Criminal insolvency: judgment by the Supreme Court (Chamber II) on June 22, 2016*

The Supreme Court held that there is no criminal insolvency if sufficient property remains in the debtor's hands to be able to satisfy adequately the rights of creditors, or if the acts of disposal performed by the debtor caused the entry of new assets with an equivalent economic and financial content. In particular, when privately owned assets were contributed to a company, the privately owned real estate were replaced by shares in a holding company that was equally wealthy, and the replacement has not implied, in the case examined by Chamber II, an inability or any serious difficulty to pay debts or any difficulty to locate the assets, because the shares are registered at the commercial registry. Moreover, the delivery of property in payment of a debt cannot substantiate criminal insolvency if it is not evidenced that the value of the delivered property was unjustified with respect to the satisfied debt, since the legal right that is protected by the crime of fraudulent insolvency is not the legal order for payment, but the creditors' right to be able to have their claims paid until the debtor's assets run out.

4.7. *No jurisdiction for labor courts, after the arrangement has been approved, to handle enforcements of employee claims: judgment by Madrid High Court on June 23, 2016*

The labor courts have no jurisdiction to handle the enforcement of a judgment delivered in the labor jurisdiction where an arrangement with creditors has been approved and the insolvency proceeding has not yet concluded. The approval of the arrangement does not conclude the insolvency proceeding, since the grounds for conclusion of the insolvency proceeding are defined (article 176 LC), and the labor judge will only recover the jurisdiction to initiate or continue with any enforcements to be heard when the insolvency proceeding has actually concluded. If the labor judge were allowed to continue with the enforcement, the assets available to creditors would be reduced to the detriment of other creditors and the principle of placing all creditors on an equal footing (*par conditio creditorum*) would be breached, thereby avoiding the rules on treatment, classification of claims envisaged in the Insolvency Law.

4.8. *Delivery in payment of a debt made by an debtor company in an insolvency proceeding and under liquidation where the delivery does not appear in the Liquidation Plan: decision by the Directorate-General for Registries and the Notarial Profession on June 28, 2016*

The liquidation plan approved by the insolvency judge set out the following means of liquidating the assets: a)

direct sale; b) auction; and c) award of property to the mortgagee in respect of the whole of the debt where (i) the price offered in the sale is lower than the debt secured by the sold asset; (ii) the auction has no bidders; (iii) the bids made in the auction do not cover the secured claim; or (iv) the outcome is a failed auction. There is no loose or broad interpretation of the liquidation plan from which it could be affirmed that the delivery in payment was implicitly included in the direct sale or in the auction. Nor may a sale and delivery in payment be treated as the same thing because they are different concepts. This authority clarified also that, if the delivery were implicitly provided for in the liquidation plan, it could not be carried out partially, because the plan provides that property can only be awarded at the amount owed in all respects. Therefore, and because the delivery of assets in payment had not expressly been authorized by the court, the deed for the delivery in partial payment of the debt could not be registered.

4.9. Challenge of the court-homologation of a refinancing agreement (Hune case): judgment by Madrid Commercial Court no 2 on June 30, 2016

The disproportionate sacrifice is an undefined legal concept. The court did not find a disproportionate trade-off because the challenging parties had not evidenced that in a liquidation scenario they would have more chances of recovering their claim. It may not be allowed under any circumstances, as the challenging creditor had requested, to alter the effects of the refinancing agreement: if the requirements for its homologation included in the fourth Additional Provision of the Insolvency Law are not fulfilled, the judge is obliged to uphold the challenge, thus rendering void the homologation that may have been declared. The scheme of the action to challenge only grants place for the confirmation of the homologation or its withdrawal.

Lastly, on the subject of the absence of the necessary majorities because the claims of a financial institution were not computed properly (a financial institution which the creditor imputed with being a de facto director and shadow shareholder), the court set aside that ground for challenging because of the lack of proof of the alleged link between the debtor's manager and the financial institution; its understanding that the share pledge to the financial institution had not been enforced; and because the financial institution active participation in the refinancing is not equivalent to discharging management activities which are identical to those of a de jure director, but rather amounts to the participation that may be expected by reason of the financial institution being the company's main creditor.

4.10. Insolvency manager's fees: judgment by the Supreme Court (Chamber I) on July 5, 2016

The insolvency manager's fees must be aligned with the services actually performed and within limits preventing the assets from shrinking to an extent that prevents the main purpose of the insolvency proceeding: the highest and fairest payment to creditors. The Supreme Court held that if, in the context of an alteration of the fees set for an insolvency manager, there is more than one director and there is only just cause in relation to one of them, the alteration may only apply to that director. Just cause must be found in relation to the activities actually discharged. If the director concerned does not have professional status, the chamber upheld that the identical fee rule under article 2 of the decree on tariffs for insolvency managers had not been breached, because that rule only applies to professional insolvency managers and because under subarticle 2.2 of that decree, any insolvency manager who is not a professional may only receive half of the fee relating to each of the professional insolvency managers, without prejudice to subsequent alteration via article 34.4 LC.

4.11. Mandatory audit of financial statements during the liquidation process in an insolvency proceeding: decision by the Directorate-General of Registries and the Notarial Profession on July 6, 2016

Article 46.2 LC provides that a company in an insolvency proceeding is required to audit its financial statements, and this obligation remains during the liquidation phase having regard to the essentially reversible nature of a company in liquidation, since its legal personality subsists until the distribution of the liquidation dividends among its shareholders takes place and, after it has been extinguished, the removal of its entries at the registry. Furthermore, there is also the obligation to attach the certificate evidencing that the filed financial statements are the ones that were audited.

4.12. Sale of a productive unit and transfer of an undertaking for labor purposes: decision by Valencia Commercial Court no 1 on July 29, 2016

In sales of productive units, a transfer of an undertaking for labor purposes may only be said to take place with respect to the employment contracts in force to which the transferee is subrogated, not with respect to the employee and social security debts that the insolvent debtor might have or have had in the past with the other workers with respect to which no subrogation took place. Under article 5 of Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, the purchaser may only be required to assume certain debts with respect to the workers if there is an express national law requiring it do so. The reference in Spanish law to transfers of undertakings for labor purposes does not distinguish between whether or not the transferee is subrogated to the workers, and therefore that subrogation cannot be interpreted broadly to include the employment contracts to which the transferee is not subrogated.

4.13. Extinguishment of a company with no assets and with one creditor: decision by the Directorate-General for Registries and the Notarial Profession on August 1, 2016

At issue was whether a company with no assets and with one creditor must petition for an insolvency proceeding or whether it may carry out a company liquidation. In the described case, the company had petitioned for an insolvency order, but the petition was not admitted by the court because it was a necessary requirement for there to be more than one creditor and more than one creditor taking part in the proceeding. The Directorate-General considers that: (i) the existence of more than one creditor is a natural but not an essential characteristic of the insolvency proceeding, and the proceeding must be allowed also to satisfy the right of one creditor; (ii) there is no legislation making the removal of the registry entries of a company that has no assets conditional on a prior insolvency order; (iii) if the liquidator has taken responsibility for recording that there are no assets, the removal of the registry entries cannot be prevented; (iv) the removal is not detrimental to the creditor (because, should the case arise, it is entitled to bring individual action for liability, action to challenge acts performed by the company with fraud for creditors, or action to set aside or revocatory action) nor will it prevent the company's subsequent liability if company assets later appear which were not taken into account in the liquidation. As a result, it was decided to remove the registry entries under the following premises: (a) the liquidator's affirmation regarding the absence of assets and the existence of a single credit must be accepted; (b) the only creditor does not either have to be notified or participate; (c) a pronouncement by a court ordering the removal is not necessary.

4.14. Contingent claims due to being under litigation: judgment by the Supreme Court (Chamber 1) on September 20, 2016

The Supreme Court held that if the existence of any claim has been directly questioned in court, in a civil or other type of lawsuit, that claim is under litigation, provided that it has not been recognized in a final or definitive judgment. In the case, the Provincial Court of Barcelona issued a resolution declaring proved the fact that the assumption of the exchange obligations did not respond to the existence of any claim and the documents issued to explain such existence were false, thus condemning the debtors' administrators for an attempted crime of procedural fraud and a crime of forgery on commercial documents. The Supreme Court clarified that the mere fact of commencing criminal proceedings is not sufficient to hold that the claim is under litigation, but rather it is necessary for the insolvency manager and, if applicable, the insolvency judge, to determine that the criminal proceedings involve a clear and serious dispute over the reality and existence of the claim. If these tests are met, the claim is contingent, a conclusion that may not be hindered by the fact that the claim is documented in a bill of exchange which has been submitted to support its existence. The Supreme Court upheld the appeal and overturned the judgment, by holding that the claim is contingent because when the insolvency order took place criminal proceedings had been initiated and the outcome of that proceeding had a direct effect on the claim.

4.15. Attachment due to the non-payment of urban shares (foreclosure of tacit legal mortgage): decision by the Directorate-General for Registries and the Notarial Profession on September 22, 2016

The labor courts have no jurisdiction to handle the enforcement of a judgment delivered in the labor

jurisdiction where an arrangement with creditors has been approved and the insolvency proceeding has not yet concluded. The approval of the arrangement does not conclude the insolvency proceeding, since the grounds for conclusion of the insolvency proceeding are defined (article 176 LC), and the labor judge will only recover the jurisdiction to initiate or continue with any enforcements to be heard when the insolvency proceeding has actually concluded. If the labor judge were allowed to continue with the enforcement, the assets available to creditors would be reduced to the detriment of other creditors and the principle of placing all creditors on an equal footing (*par conditio creditorum*) would be breached, thereby avoiding the rules on treatment, classification of claims envisaged in the Insolvency Law.

4.16. Definition of rights in rem in the European Insolvency Regulation: judgment by the Court of Justice of the European Union on October 26, 2016

The court examined the definition of "right in rem" for the purposes of article 5 of Regulation 1346/2000 on insolvency proceedings, which establishes that the opening of insolvency proceedings cannot affect the rights in rem of creditors or in respect of the assets belonging to the debtor which are situated within the territory of another member state. A request for a ruling was submitted as to whether a German public charge on real property situated in Germany in respect of debts related to real estate tax fell within article 5. The court held that the charge does fall within the article for which it gave two arguments: (i) it is a charge which directly and immediately encumbers the property; (ii) the owner of the property must accept enforcement against the property. The court also uses a third and reinforcing argument, by mentioning that the tax authority has preferred creditor status, conferred on it by the charge on the real property.

4.17. Judgment by the Court of Justice of the European Union (Fifth Chamber) on November 9, 2016

In an enforcement proceeding on a tax claim a Rumanian court, submitted a request for a preliminary ruling to the CJEU as to whether article 4 of Regulation (EC) No 1346/2000, on insolvency proceedings which sets out, in general terms, the law applicable to those proceedings, may be interpreted to the effect that its scope of application may include the provisions of the national law of the state of the opening of proceedings on (i) forfeiture of the right of a creditor which has not taken part in the insolvency proceeding to pursue its claim, or (ii) suspension of the enforcement of that claim as a result of the opening of an insolvency proceeding in another member state. The chamber found that it could, by explaining that article 4 provides that, unless stated otherwise in the Regulation itself, the law of the member state in which the proceeding was opened (lex fori concursus) is applicable and determines all the effects of the insolvency proceeding, and that the list in article 4(2) is not exhaustive due to the predominant role of the universal proceeding and the principle of procedural autonomy (provided the application of those principles does not contradict the principle of equivalence with national law and the principle of effectiveness of EU law). The chamber held also that this interpretation is consistent with article 15 of the Regulation by considering that enforcement proceedings do not fall within the scope of application of article 15, which refers to proceedings "pending" and would indeed be governed by the law of the member state where the proceeding is conducted. Lastly, the requesting court posed a question as to whether the tax nature of the claim pursued through enforcement is relevant for the purposes of the reply given to the first request for a preliminary ruling (that the law of the state of the opening of the proceedings, i.e. the lex fori concursus, applies to determine the forfeiture of the right to pursue a claim), to which the court replied that it did not and clarified that the Regulation does not distinguish between public and private law creditors.

05 NEWSFLASH

5.1. Reduction in the number of distressed companies

Official statistics have reported that the number of companies in insolvency proceedings has fallen by over 20% every year since 2013. The information collected in June 2016 (Axesor) shows that 2016 has seen the lowest figure for insolvency proceedings in the past eight years.

5.2. R-3 and R-5 circulars kept open

Following the initial court order to close the R-3 and R-5 circulars around Madrid due to the cessation of operations of the motorway concession-holder for both highways, the Development Ministry and the insolvency manager have reached an agreement which has caused the postponement of implementation of the court decision on the cessation of the operations of the insolvent debtor. The central government has undertaken to step in to operate the motorways before July 1, 2017.

06 GARRIGUES ARCHIVES

6.1. Publications

• The Restructuring Review

UK publishing house Law Business Research has again turned to Garrigues' Restructuring and Insolvency Department for the ninth edition of this review. The Garrigues partners by which the chapter on Spain will once again be written are Borja García-Alamán, Adrián Thery and Juan Verdugo.
The Restructuring Review provides an overview of the most important international transactions in the legal restructuring market concluded over the second six months of 2015 and the first six months of 2016, as well as summarizing the main new legislation in 28 countries across five continents, with a special focus on Latin America, Asia and Europe. The review highlights Garrigues' participation in the most important transactions concluded in Spain, including its advisory services to hedge funds in relation to the purchase of loan portfolios (such as the Baracoa Project, worth €800 million), the refinancing of the sustainable debt of major renewable energy corporations (Aliwin), or the management of financial institutions' interests in insolvency proceedings with important cross-border implications (TP Ferro). Mention is also made of the advisory services provided by Garrigues to the consulting firm McKinsey within the framework of the so-called "Phoenix Project", a mechanism devised by the leading Spanish financial institutions to rescue companies which are highly leveraged yet viable (GAM, Bodegas Chivite and Condesa).

• Conservación de empresas en concurso por medio de la enajenación unitaria liquidatoria en el sistema español

("Preserving companies through "all-in" disposal in the liquidation process in the Spanish system") ([Gutiérrez Gilsanz, A.], published in the collection entitled Hacia un nuevo paradigma del derecho europeo de insolvencias. Sistemas jurídicos a debate ("Towards a new paradigm of European insolvency law. Legal systems under debate") AA.VV., EuriConv, Lecce, Italia, 2016, pages 115-129.

• El fracaso de la Ley Concursal

("The failure of the Spanish Insolvency Law") [Pérez Arbizu, A.], Diario ABC Sevilla, October 21, 2016.

• *Brexit* e insolvencia internacional

("Brexit and international insolvency") [Thery Martí, A. y Heredia Cervantes, I.], El Notario del Siglo XXI, October 17, 2016.

• Spain: Hurdles when Acquiring or Managing NPLs or REOs Portfolios [García-Alamán, B., Gil-Robles, J.M. and Verdugo García, J.], Global Restructuring Review, October 21, 2016.

6.2. Recognitions

• Innovative Lawyers 2016

At the "Innovative Lawyers 2016" awards ceremony held in London and organized by the Financial Times, the restructuring of Jofel Industrial, on which Garrigues acted as advisor, was included among **the most innovative legal deals in Europe** in the "Commended" category.

Financial Times explained that Jofel Industrial was restructured by combining restructuring tools meant for different scenarios and new to Spain. The team was led by Garrigues partner Juan Verdugo.

• "International Finance Law Review 1000 2016": Tier 1

Our restructuring and insolvency practice has yet again achieved top ranking from IFLR1000.
In the words of the IFLR, Garrigues has a premiere

restructuring and insolvency department that has enabled us to play an active role in some of the most important transactions of the year in Spain. The IFLR reports that our department represented Aeropistas and Autopista Eje Aeropuerto in the insolvency proceeding on the M-12 toll road in Madrid. Another example it gives is Garrigues' work in another sector in distress, renewable energy, on representing a pool of banks in connection with the refinancing and court homologation of the refinancing agreement on Aliwin Plus, which meant it was able to avoid liquidation.

6.3. Events

Recent events and conferences featuring Garrigues professionals:

• **"INSOL Europe Annual Congress",** Insol Europe**, September 22-25 2016, Lisbon.**
Our partners Borja García-Alamán and Adrián Thery spoke on panels for discussion of *Directors' Liability & Lenders' Liability under Spanish Law and Liability & Finance (Director and/or Lender).*

• Roundtable discussion on ***Arbitraje y concurso en el nuevo Reglamento Europeo de Insolvencia*** ("Arbitration and insolvency in the new European Insolvency Regulation"), organized by **Fundación para la Investigación sobre el Derecho y la Empresa (FIDE), September 28, 2016**.

• Borja García-Alamán and Iván Heredia moderated and spoke in the roundtable discussion on ***Arbitraje y concurso en el nuevo Reglamento Europeo*** de Insolvencia ("Arbitration and insolvency in the new European Insolvency Regulation").

• **International Conference: The implementation of the New Insolvency Regulation – Improving Cooperation and Mutual Trust**, Max Planck Institute for International, European and Regulatory Procedural Law, October 7, 2016, Luxembourg.
Adrian Thery spoke on the panel for discussion of *The applicability of the EIR on pre-insolvency and hybrid proceedings.*

• **International Conference: Actualité du droit européen,** Conseil National des Administrateurs Judiciaires et Mandataires Judiciaires (CNAJMJ), **October, 2016, Paris**.

Garrigues partner Adrian Thery spoke on the panel for discussion of *Harmonisation des droits nationaux: de la Recommandation du 12 mars 2014 à l'initiative législative de la Commission européenne de 2016.*

• **International Conference: A Chapter 11 for Europe?,** Institut Droit et Croissance & Banque de France, **October 28, 2016, Paris.**

Adrian Thery was speaker on the panel for discussion of *What insolvency law should apply to corporates in the European Union? Debate on the publication of the report produced by the Association for Financial Markets in Europe and the report of the Haut Comité Juridique de Place.*

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