6-2013
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1. INSTRUCTION 1/2013, OF THE PUBLIC PROSECUTOR'S OFFICE ON THE INTERVENTION OF THE PUBLIC PROSECUTOR IN INSOLVENCY PROCEEDINGS

The intervention of the Public Prosecutor is mandatory in Section Six of insolvency proceedings, in which the representative of the Public Prosecution Service must issue an opinion as to the accidental or fault-based nature of the insolvency.

The Public Prosecutor's Office has issued Decision 1/2013, of July 3, 2013, analyzing the implementation of Section Six of insolvency proceedings and setting in place a series of guidelines for the intervention of the Public Prosecutor, which are summarized below:

- The Public Prosecutor must prepare his opinion with the utmost independence and impartiality and his assessment of the insolvency may differ from that previously given by the insolvency manager.

- If, due to the complexity of the proceeding or for other reasons, the Public Prosecutor anticipates difficulties to issue his opinion within the statutory 10-day period, he must request an extension of that period from the court when notification is served.

- If the insolvency manager's assessment report does not meet the requirements established in article 169 of the Insolvency Law (LC), the Public Prosecutor may ask the judge to order that the insolvency manager redraft the report in order to bring it into line with the law.

- The Public Prosecutor is required to issue an opinion. The fact that the Insolvency Law interprets the Public Prosecutor's silence as "no objection" to the insolvency manager's report by no means entitles the Public Prosecutor not to prepare the relevant opinion.

- The Public Prosecutor's opinion must be reasoned and documented, based on the relevant facts for the assessment of the insolvency, and contain a decision proposal. The opinion must follow the structure of a claim, with a statement of the facts, the legal grounds and a prayer for relief.

- The Public Prosecutor must give an opinion as to the disqualification period that should be ordered for the responsible parties. Similarly, he must request that all the injunctive remedies he sees fit must be ordered.

- After a judgment bringing Section Six to a close has been rendered, the Public Prosecutor must assess whether or not to file an appeal against the judgment, and answer in detail any appeal(s) filed by other parties without submitting standard forms and with a request that the insolvency manager reply to the appeals in due form.

- Lastly, the Public Prosecutor must ask for an official copy of the judgment if he considers that the facts held to have been proven in the judgment may constitute an offense. To this end, regard must be had to the definitions of criminal insolvency contained in Chapter VII of Title XIII of the Criminal Code (articles 257 to 261 bis).

The Public Prosecutor's Office's Instruction also contains the following guidelines on jurisdictional aspects:

- As a general rule, the person responsible for preparing the opinion will be the Public Prosecutor assigned to the Civil Panel, acting in coordination with the Public Prosecutors on the Financial Crime Panel. Nonetheless, where the efficiency of the service so requires, the preparation of the opinion may be assigned to the Financial Crime Panel, upon giving notification to the Public Prosecutor's Office.

- The Civil Panels will hear any jurisdictional issues that may arise and must intervene in the proceeding for the adoption of the injunctive remedies under article 1 of the Insolvency Reform Law.

- The Chief Public Prosecutor of the Supreme Court Civil Chamber will coordinate the intervention of public prosecutors in insolvency proceedings, even where such duties are assigned to the Financial Crime Panels.

2. CASE COMMENTARIES

JUDGMENT dated July 23, 2013, rendered by Chamber One of the Supreme Court

Articles 57.3, 148, 149 and 155 LC.—Liquidation transactions in insolvency proceedings. Disposal of an asset encumbered with a mortgage as part of a purchase offer for the production unit contained in the liquidation plan. Type of disposal: with the subrogation of the purchaser to financial claims secured by a mortgage: maintenance of the mortgage charge.

Commentary:

The Order of June 5, 2009 determined the commencement of the liquidation phase of the insolvency proceeding on Onte, S.A.

On June 16, 2009, the insolvency manager submitted a liquidation plan proposing the wholesale disposal of the entire company, including a property secured with a mortgage in favor of three creditors. None of the creditors submitted any pleadings against the liquidation plan filed by the insolvency manager, which was approved on July 16, 2009.

Once the time period for the submission of bids for the wholesale purchase had expired, the order of October 29, 2009 legally approved the only bid submitted for the purpose of all of the insolvent party's assets. Among other matters, the bid envisaged the transfer of the mortgaged property with the subrogation of the purchaser to the three claims secured by mortgages, providing for payment in one hundred and two successive and equal monthly installments.

Following the transfer, the purchaser requested that the court cancel the mortgage on the property in question. However, the court turned down the request on the understanding that the liquidation in insolvency did not, in principle, determine the cancelation of the lien, but rather the forfeiture of any separate enforcement against the insolvent party and that, in fact, the purchaser had been subrogated to the claims secured by mortgages, with the encumbrance remaining in force until the claims had been settled.

The purchaser appealed against the judgment and the Provincial Appellate Court upheld the appeal, with a decision to cancel the mortgage on the understanding that the mortgage creditors had not only forfeited, as from the commencement of the liquidation phase, their right to exercise separate enforcement (article 57.3 LC), but rather, in addition to this, because they had not submitted any remarks on the liquidation plan or the purchase offer, they had forfeited the right to maintain registration of the charge and their right to separate enforcement for having failed to plead its continuity (article 148 LC), although the proceeds of the sale could be used to observe these creditors' preferred status.

Two of the mortgage creditors filed a cassation appeal against the mortgage cancelation approved by the Provincial Appellate Court, and the Supreme Court upheld both appeals based on the following conclusions:

- If, following the commencement of the liquidation, a decision is taken to realize the mortgaged asset alone or together with other assets –whether on the terms in the approved liquidation plan or under the secondary provisions in article 149 LC -, the proceeds of the sale (the price attained on realization or sale of the asset, if disposed of separately, or the proportional part of the proceeds obtained in respect of the group of assets relating to the mortgaged asset, where it is transferred with other assets) must be used to pay the claim secured by a mortgage, and the realization of the asset will give rise to the cancelation of the lien. The rest of the unpaid claim will be recognized as a pre-insolvency order claim with the relevant assessment.

- However, if, as in this case, it is decided to realize the mortgaged asset together with other assets and the purchaser is subrogated to the claims secured by mortgages, the lien must be deemed to have survived (article 155.3 LC), meaning that the mortgage will continue to secure payment of the mortgage claim (an obligation that will be incumbent on the purchaser who accepted subrogation to the debt), and a decision cannot therefore be taken to cancel the lien.

In short, the Supreme Court concluded that, although the liquidation plan sets out a special method for disposing of the debtor's assets (and that method is an alternative to the rules in article 149 LC), this method cannot bypass the rights of the mortgage creditor in the insolvency as recognized in article 155 LC.

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3. HEADNOTES

National Appellate Court

Judgment dated September 12, 2013 rendered by Panel Six of the National Appellate Court

Articles 21.1.5 LC and 80. Three LIVA.—Appeal for Judicial Review. Spanish VAT: Time period to modify the tax base for invoices issued to a company as a result of the insolvency proceeding on the company. The appellant argued that the time period to modify invoices and inform the Public Finance Authority is one month, regardless of whether or not the insolvency proceeding is "ordinary" or "expedited" in nature.—Appeal upheld and public authorities ordered to pay costs: wording of article 80. Three of the VAT Law does not allow for the interpretation supported by the appealed decision, according to which the period in which to modify invoices and inform the authorities would only be 15 days, given that the insolvency proceeding in question is "expedited" in nature and that article 191 LC provides that deadlines in this type of proceeding are reduced by half.

Supreme Court

JUDGMENT dated February 12, 2013, rendered by the Civil Chamber of the Supreme Court

Article 167.2 LC (as worded before Insolvency Reform Law 38/2011).—Insolvency assessment. Scope of commencement of liquidation where there is a breach of a "non-onerous" arrangement, i.e., with a release below one third of the amount of the claims or a deferral for under three years.-- Article 167.2 LC only provided for the consequences of a breach of an "onerous" arrangement, in which the assessment section had already commenced and, as a result, the types of conduct classified in articles 164 and 165 LC had already been adjudged. Following a breach of this type of arrangements, the grounds for the new assessment were limited to analyzing whether or not the breach was attributable to the insolvent party (article 164.2.3 LC).—In cases of breach of a "non-onerous" arrangement and even where not provided for in the Insolvency Law, it follows that the assessment need not be restricted to determining whether the breach of the arrangement is attributable to the insolvent party, meaning that any other grounds or reasons for assessment that could not be judged earlier may be analyzed since it was precisely the approval of the "non-onerous" arrangement that had previously prevented the commencement of the Assessment Section.

JUDGMENT dated April 9, 2013, rendered by the Civil Chamber of the Supreme Court

Article 61.1 LC—Effects of finance agreement within the framework of insolvency proceedings. Agreement executed between the insolvent party and an entity that financed its asset acquisitions. The financing creditor sought termination of the agreement on the ground of a breach, and sought clawback of any acquired assets not subsequently sold, thus canceling the debt held with the financing party.—The clawback action was dismissed at first instance and on appeal because it was held that the agreement only gave rise to outstanding obligations for one of the parties –since the defendant claimed it had met all of its obligations –, termination of the agreement within the insolvency proceedings did not

therefore apply, since this is only possible where there are reciprocal obligations incumbent on both parties.—The Supreme Court dismissed the cassation appeal after confirming that, according to the terms of the agreement, there were no outstanding obligations on the part of the claimant but rather only for the insolvent party.

JUDGMENT dated April 18, 2013, rendered by the Civil Chamber of the Supreme Court

Article 1111 CC—Clawback action brought by the creditor-appointed trustees in bankruptcy in insolvency proceedings instituted before the entry into force of the Insolvency Law.—The judgment rendered at first instance held that the creditor-appointed trustees did not have the authority bring the action, because clawback action is a personal action that can only be brought by the individual creditor affected and on its own behalf. The Provincial Appellate Court upheld the first instance decision by referring to the difference between ordinary clawback action and insolvency action, with different grounds, characteristics and effects and, as a result, with different legal authority for bringing the action.—Cassation appeal upheld: Chamber I upheld the appeal and quashed the previous judgments, also upholding the clawback action brought by the creditor-appointed trustees on the understanding that the right to bring the action lies with the body representing the collective interests of the creditors, and allocating the amount obtained to the assets available in the bankruptcy proceeding in order to avoid an alteration of the "par conditio creditorum" principle.

JUDGMENT dated May 24, 2013, rendered by the Civil Chamber of the Supreme Court

Article 164.1, 166 and 172.2 LC—Fault-based assessment of the insolvency of a Sports Corporation (football club). The Chairman of the Board of Directors was held to be a person affected by the assessment for having participated in the generation and aggravation of the organization's technical insolvency, with serious negligence, for having incurred excessive costs by signing new players and paying high and unjustifiable intermediation fees in a bid to refloat the football club following relegation to the second division.—The Supreme Court held that the standard of conduct required of the director of a company must be in keeping with its activities. Despite the risk implicit in the football market, with earnings depending on purely sporting outcomes, failing to use earnings and expenses projects, in addition to incurring expenses above the budgeted amounts, constituted serious negligence. Moreover, ignorance of the serious situation of economic crisis at the company, acting as if it did not exist, was further evidence of a flagrant breach of the duty to be up to date, at all times, with developments at the company managed.

JUDGMENT dated July 11, 2013, rendered by the Civil Chamber of the Supreme Court

Articles 90.1.4 and 61.2 LC—Finance lease contract and assessment of the claims thereunder: Cassation appeal: the financial institution appealed against the Provincial Appellate Court judgment confirming the classification as specially preferred pre-insolvency claims of the outstanding installments under a finance lease agreement, falling due after the insolvency order.-- Dismissed: The Chamber held that the finance lease installments could only be treated as post-insolvency claims if, according to the contract and following the insolvency order, there are reciprocal outstanding obligations for the

account of the financial lessor: reciprocity must exist not only in the original contract but also at the "functional stage of the relationship" and, more specifically, after the insolvency order.—Analysis of the contract: Chamber I concluded that, in order to establish whether reciprocity exists after the insolvency order, the contract in question must be analyzed, studying the clauses validly stipulated by the contracting parties in each case. In this specific case, the Supreme Court confirmed that the contract did not provide for the finance lessor's breach anywhere, and that the lessor's outstanding obligations were not obligations as such because they either derived from the principle of "*pacta sunt servanda"* (allowing the peaceful enjoyment of the thing) or required a new legal transaction with subsequent statements of intent from both parties (transfer of ownership of the leased asset if the call option is exercised).

JUDGMENT dated July 16, 2013, rendered by the Civil Chamber of the Supreme Court

Article 91.4 LC—general preferred claims: application of the general fifty percent preferred right to "tax and other public law claims".—The Supreme Court held that the reference to "tax and other public law claims" in article 91.4 LC is equivalent to that contained in article 5.2 of the General Budget Law - "claims of a public nature of the state tax authorities"- comprising taxes and other rights with economic content that meet two requirements: (i) they pertain to the central government or its autonomous agencies and (ii) they derive from an administrative authority. Claims deriving from repayable loans granted by government ministries meet both requirements and, as a result, must be classified as "preferred" in up to fifty percent of their amount.

JUDGMENT dated July 25, 2013, rendered by the Civil Chamber of the Supreme Court

Article 62.1 LC—Termination of a home sale agreement due to a breach of termination and delivery of the home before the insolvency order. Agreement with outstanding reciprocal obligations for both parties: the vendor had to finish building and deliver the home and the buyer had to pay the remaining stipulated price, of which only a part had been paid as an advance payment.—Chamber I considered it essential to distinguish whether the agreement was of a one-time or ongoing nature, since only the second type allows for termination during the insolvency proceeding on the ground of a prior breach. Definition of one-time agreement: where the obligation is set up as a single obligation, regardless of whether it is performed in one legal act or at one time or is divided into partial obligations performed over equal periods of time or otherwise: agreements with one obligation but performed on a divided or split basis do not cease to be one-time agreements, as is the case of the home sale agreement in installments, even where the performance of the obligations of each of the parties is deferred over time.—In short, the Chamber considered the agreement was a one-time agreement and, under article 62.1 LC, the nonbreaching party would not be able to terminate it on the ground of a breach before the insolvency order, even if the breach takes place over time: if the termination right has not already been exercised, it cannot be exercised after the insolvency order on the debtor.

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Provincial Appellate Courts

JUDGMENT dated May 2, 2013, rendered by the Barcelona Provincial Appellate Court

article 71 LC—Asset clawback action: In an appeal, the insolvency manager sought the clawback of the payment of a loan falling due after the insolvency order. The insolvent debtor repaid the loan as part of a series of transactions for the purchase of properties under construction by a financial institution and the price obtained was used to discharge various obligations to the same institution.-- Article 71.2 LC contains an irrebuttable presumption of detriment where the payment takes place of an obligation falling due after the insolvency order.—The Provincial Appellate Court confirmed the insolvency court's decision, but nonetheless considered that in a complex situation such as this, in which a financial institution acquires properties under construction, where that activity is not in its corporate purpose, and at a reasonable price, all with a view to facilitating the company's financial viability, the existence of detriment for the purposes of article 71 LC must be assessed with respect to the business as a whole and not exclusively with respect to one of its transactions. Thus, the Provincial Appellate Court dismissed the appeal lodged by the insolvency manager because it did not question the business as a whole but rather only one of its transactions (the payment of obligations falling due after the insolvency proceeding).

JUDGMENT dated July 15, 2013, rendered by the Gipuzkoa Provincial Appellate Court

Transitional provisions no. 1 and 11 of Law 38/2011 and article 176 bis. 2 LC.-- Application to an insolvency proceeding in progress of an order to pay post-insolvency order claims due to insufficient assets available to creditors as established in the new article 176 bis. 2 LC. The social security authorities sought rectification of the proposed payment of post-insolvency order claims submitted by the insolvency manager deferring payment of its claims – due and payable and claimed on several occasions – and demanded payment under the order established in the repealed article 154.2 LC, as the amendment made by Law 38/2011 was not applicable, because the claim had arisen before its entry into force.—The Appellate Court noted that the insolvency proceeding was in progress and that, pursuant to Transitional provision no. 1, the new article 176 bis should apply. It also added that the application of a provision to situations before its entry into force is not a retroactive application of the provision or a breach of the principle of legal certainty.—The expression "from that time" in section 2 of article 176 bis LC makes no reference to the transitional regime applicable to the provision but rather to the date on which the insolvency managers must pay the post-insolvency order claims under the new established order.

Commercial Courts

JUDGMENT dated December 7, 2007, rendered by Soria Commercial Court no. 2

Articles 164, 165 and 172 LC—Assessment of the insolvency and persons affected by the assessment: The judge assessed the insolvency as fault-based on the basis of the following facts: (i) failure to submit the petition in due time (rebuttable presumption of fault); (ii) failure to submit the notes to the financial statements (irrebuttable presumption of fault); (iii) serious accounting irregularities due to distortion of revenues (irrebuttable presumption of fault); (iv) failure to submit the financial statements (irrebutable presumption of fault);

(v) asset stripping at the company (irrebuttable presumption of fault).—The court also found to be at fault, among others, a director who tendered his resignation but only registered it at the Commercial Registry years later, by holding that the resignation for the purpose of establishing his liability took place on the date of registration, due to the fact that: (i) despite failing to register his resignation he maintained frequent contact with the insolvent company, and was not unaware of the breaches he was incurring; (ii) despite having resigned from his position, he continued to be a shareholder of the insolvent company, and may therefore have influenced the running of the company; (iii) his commercial prestige and links to the insolvent party (via another group company which continued to supply material to the insolvent company and was aware of its financial difficulties) formed the basis of third parties' trust when entering into contracts with the company, because they were unaware that he had resigned due to his failure to register the resignation.

DECISION dated March 18, 2011, rendered by Barcelona Commercial Court no. 1

Articles 148, 149.1 and 155.4 LC—Liquidation Plan and position of the mortgage creditor: The insolvency court examined the observations made by a mortgage creditor regarding the liquidation plan submitted by the insolvency managers.—The creditor sought recognition in the liquidation plan of the preferences envisaged at auctions for the mortgage creditor and foreclosing party .—The court rejected recognition of those preferences: liquidation is a collective procedure in which the creditor is not treated as a party foreclosing a mortgage and does not therefore enjoy the preferences that the Civil Procedural Law envisages generally for this role.

DECISION dated January 9, 2012, rendered by Madrid Commercial Court no. 6

Article 62.1 LC.—Application for termination of a lease agreement: the insolvent company breached the lease agreement on its offices, by failing to pay rent before and after the insolvency order.—The lessor sought termination of the agreement, clawback of the leased asset and full payment as post-insolvency order claims of the installments that had fallen due after the insolvency order, and had not been paid.-- Upheld: the lease agreement is of an ongoing nature and its termination is covered by article 62.1 LC. The allegations of the insolvent party to the effect that the lease agreement was a sham because it was a finance agreement could not be examined in that proceeding, but rather must be pleaded via other channels (articles 71.1, 71.6, 96.1 and 154 LC). The rent accrued until the effective repossession of the building must be classified as a post-insolvency order claim: the prolongation of the repossession is detrimental to the creditors by withholding assets for the payment of the earned rent. Order for eviction and vacation.

DECISION dated May 29, 2012, rendered by Vitoria Commercial Court no. 1

Articles 100.5 and 106.1 LC—Advance proposal for an arrangement: The insolvency court refused to admit an advance proposal for an arrangement given that (i) the proposal did not provided reasons for the particular importance for the economy of the insolvent company's business with a view to obtaining the mandatory court authorization to exceed the limits on debt reduction and deferral (ii) the mandatory viability plan for proposals exceeding those limits was not attached.—The insolvent company brought an ancillary proceeding to set aside a decision because it has not been granted the statutory period for remedying those defects.—The court upheld the insolvent party's claims and admitted the proposal,

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concluding: (i) that the details featuring in the petition for insolvency attached to the proposed arrangement provided evidence of the particular importance for the economy of the insolvent company's business; and (ii) that the requirement for a viability plan only applies to ordinary proposals for arrangements , not to advance proposals.

DECISION dated July 5, 2012, rendered by San Sebastián Commercial Court no. 1

Article 56.1 LC—Assets used in the insolvent company's business and stay of enforcements of security interests: Financial institution requested that the insolvency court declare that some of the insolvent company's assets were "not used in its business" in order to be able to continue with the foreclosure of a mortgage on those assets. – The court examined the definition of assets used in the business, basing its examination on the more traditional notion of assets "permanently" used in the conduct of the insolvent company's business. The court found that the real estate assets were used in the company's business because, although the insolvent party did indeed trade in those assets and recorded them as inventories on its balance sheet– raising doubts about their "permanent" nature – the commercialization of the properties at a market price, higher than that potentially obtainable from an enforcement, is absolutely necessary for the conduct of its business. The properties were found to be used in the business and the mortgage creditor could not resume its foreclosure.

DECISION dated September 20, 2012, rendered by Murcia Commercial Court no. 1

Article 152 LC—Reports on the liquidation: the creditor asked for its post-insolvency order claims to be included in the quarterly reports prepared by the insolvency manager.—This requirement was introduced to article 152 LC by the 2011 insolvency reform, applicable, with respect to article 152 LC, to insolvency proceedings in which the liquidation had not commenced by the entry into force of the reform.—Although in this case the insolvent party was already in the process of liquidation on the date of entry into force of the reform, the insolvency court made a "purposive, inclusive and spirit-based" interpretation of the Insolvency Law, considering that the general wording of article 152 LC did allow for the interpretation that the insolvency managers were required to record the status of the post-insolvency order claims.

DECISION dated December 14, 2012, rendered by Madrid Commercial Court no. 11

Articles 148, 149.1 and 155.4 LC.—Liquidation plan and position of the mortgage creditor: the mortgage creditor sought acknowledgment of the preferences under Civil Procedural Law for parties foreclosing mortgages in an auction staged after the commencement of the liquidation phase.—The court held that the creditor was not a party foreclosing a in an auction staged within the context of insolvency proceedings nor was it entitled to the related preferences, besides which the liquidation plan says nothing whatsoever about retaining those preferences.

DECISION dated February 12, 2013, rendered by Vitoria Commercial Court no. 1

Article 61.2 LC.—Agreement with outstanding obligations for both parties following the insolvency order.—The insolvency manager and the nonbreaching creditor requested termination of the agreement in the "interests of the insolvency".—The judge terminated the agreement with regard to the "interests of the insolvency" and, as the insolvent party

made no objection to its termination, held that no indemnification or compensation whatsoever need apply because none had been requested by the claimants and the insolvent party acknowledged its agreement with its silence.

JUDGMENT dated February 15, 2013, rendered by Murcia Commercial Court no. 2

Articles 21, 26 y 93 LC.—Standing to challenge the list of creditors: the judgment resolved various ancillary insolvency proceedings that had previously been joined.—The insolvency court dismissed an ancillary claim challenging a creditor's claim brought by another creditor: it held that the challenging party did not have standing to sue, because the claimant had to have a legitimate interest above and beyond a general interest in increasing the insolvent party's assets available to creditors.—Definition of group of companies: moreover, the judgment examined the potential existence of a group of companies formed by the insolvent party and several creditors, in order to ascertain the potential subordination of claims on the basis of the creditors being "persons with a special relationship". The judge held that a corporate group existed because, among other reasons, the companies had "converging activities" with a single cash pot and decision-making process.—Notification of claims: August a non-business month: the month of August must be deemed a non-business month for the purpose of the time period for notifying claims and must therefore be excluded from the calculation of the above time period.

JUDGMENT dated March 27, 2013, rendered by A Coruña Commercial Court no. 1

Article 71 LC.—Asset clawback action: the insolvency managers sought the clawback of a mortgage arranged several months after the provision of the loan it secured.—The court examined whether there was any distortion of the presumption of detriment under article 71.3.2 LC, whereby the arrangement of security interests for preexisting obligations is presumed to be a detriment on an irrebuttable basis.—The mortgage creditor pleaded that the mortgage was arranged simultaneously with the loan, although it was perfected months later.—Claim upheld: having regard to the "transactional logic" of the facts, the mortgage cannot be deemed to be linked to the provision of the loan, given that the creditor did not ask the debtor to arrange the mortgage in the time period agreed on by both when the loan was provided. Thus, the perfection of the mortgage was done "out of context", i.e., not linked to the finance obtained with the loan, confirming the presumption of detriment.

DECISION dated June 11, 2013, rendered by Barcelona Commercial Court no. 3

Articles 19 LEC and 134 LC.-- Modification of an insolvency arrangement ("Habitat" case): several years after court approval of the arrangement, the insolvent company filed a petition for the court that approved it to ratify a settlement agreement modifying the payment schedule with the main financial creditors. Upheld: the arrangement is an agreement of a contractual nature. The jurisdiction to ratify an agreement transforming the arrangement lies with the court that approved it. The settlement reached between the insolvent party and the main financial creditors is an agreement that does not contravene the law or the general interest or harm any third party interests.—Amplification of the parties subject to the modification of the arrangement: the modifications to the payment schedule were extended to 90% of the financial creditors, which either expressly signed up to the new conditions or made no formal objection to the above modification after having been notified. There is no record of any formal objection by any institutions supervised by public bodies or that have assigned their claims to Sareb.

DECISION dated June 21, 2013, rendered by Cádiz Commercial Court no. 1

Articles 84.3 and Additional provision no. 2 bis LC.—Application of the insolvency legislation with preference over the sports competition sectorial regulations.—Football club under an insolvency order deposited an amount of money payable to Spanish football association Real Federación Española de Fútbol ("RFEF") to secure potential non-payments, as required under the private championship rules, all in order to be able to compete.—The court ordered that RFEF repay the amount.-- RFEF appealed against the order.— RFEF's appeal dismissed: the insolvency court held that, although additional provision no. 2 bis LC provides that sports rules regulating insolvency situations prevail, on the date of this decision there were no statutory or implementing sports provisions containing such rules, and the Insolvency Law must therefore prevail over the private championship rules. Thus, the court determined that the deposit made under that private legislation altered the order of payment of the post-insolvency order claims, since its aim was to secure post-insolvency claims that had not yet fallen due, with a breach of the Insolvency Law, which requires that post-insolvency order claims must be settled when they have fallen due.

JUDGMENT dated August 7, 2013, rendered by Barcelona Commercial Court no. 5

Additional provision no. 4 LC—Court approval of a refinancing agreement. Objection made by dissenting financial creditors for having exceeded the 3-year deferred payment term under the refinancing agreement. Dismissed.—The court concluded that the 3-year period refers to the maximum length of the "stay of enforcement" but not to the maximum length of time that the "stipulated deferral " in the arrangement can be extended: the LC allows the stipulated deferral to be extended beyond three years, because the "stipulated deferral" is different from the "statutory deferral" and is not subject to the 3-year limit but rather depends on the freedom of contract of the parties, albeit with the proviso that there should be no disproportionate trade-off for the dissenting entities.—Absence of disproportionate trade-off: there is nothing disproportionate about extending the deferral for 5 years because, besides being the deferral stipulated by an ample majority, it is in response to the success of the refinancing; nor is there anything disproportionate about the 5 years because it is not a proclamation of the unlimited nature of any deferral that may be imposed, given that the limit will always be a disproportionate trade-off.—There is no disproportionate trade-off due to a purported worse position for the dissenting parties: the dissenters do not share the additional personal guarantees and collateral offered, the accrual of higher interest under the agreement or the option to swap their debt for a stake in the capital stock with those signing the refinancing agreement. However, they are not in a worse position than they were in *before* the agreement, regardless of whether the position of the others had improved, especially if this improvement is not a disproportionate trade-off.—There was also no disproportionate trade-off because the refinancing agreement could not be performed: the judge dismissed this ground for objection since, even though there was some uncertainty in the independent expert's report, that uncertainty did not affect medium or long-term viability because the agreement allowed for lower leveraging and, as a result, better alternatives for refinancing, where necessary, any potential outstanding debt.—Lawfulness of the extension of the effects of the refinancing agreement despite the debtor's prior breach: the court held the original breach of the agreement to be irrelevant for the purposes of court approval as the Insolvency Law allows the stipulated deferral to be extended provided there is no disproportionate trade-off.—Definition of

"deferral": the court clarified that the instrument for court approval and the extension of the refinancing agreement to the dissenting creditors only allows the dissenters to be compelled to novate their obligations with respect to the deferral period: the modification of the mandatory and partial early repayment schedules would therefore be allowed because those new schedules, in addition to the new due date, fall easily within the definition of deferral.

DECISION dated September 3, 2013, rendered by Madrid Commercial Court no. 5

Article 155.3 LC.—Sale of an asset that was security for a specially preferred claim: the mortgage creditor requested the sale of the asset to a previously identified third party, in order to settle its claim with the proceeds. Court authorization of the sale subject to several conditions: 1. New appraisal of the asset by a specialized entity and approved by the Bank of Spain; 2. The proceeds had to be used to pay the specially preferred claim and any outstanding amount to settle the other claims: 3. The sale had to give rise to the preferred claims being excluded from the pre-insolvency order claims; 4. The mortgage creditor had to discontinue the foreclosure in progress; 5. The sale price had to be equal to or greater than that set in the deed for auction purposes, or lower if the mortgage creditor and debtor so agreed, but at no time lower than the approved entity's new appraisal; 6. The sale price had to be paid in cash, and discharge the specially preferred claim in one and the same act; 7. The sale authorization had to be publicly advertised (notice board, Insolvency Register, Ministry of Justice portal, and the door to the commercial establishment) along with the specific advertisement requested; 8. Bids had to be submitted to the insolvency managers, and any that did not exceed the price already offered by the third party introduced by the mortgage creditor would not be considered; in the event of a higher bid, the court would commence the relevant tender process (article 155 *in fine*); 9. Persons with a special relationship with the debtor were prohibited from bidding.

DECISION dated September 9, 2013, rendered by Santander Commercial Court no. 1

Article 134 LC.-- Modification of an arrangement with creditors ("Rácing de Santander" case): several months after the court approval of the arrangement, the insolvent party (football club) asked the court to modify the members of the steering committee overseeing performance of its arrangement, by replacing the Professional Football League ("LPF") with another institution. The grounds alleged by the insolvent party to justify the replacement were (i) the unanticipated change of circumstances because the club no longer belonged to the LFP following its relegation; (ii) the existence of an unanticipated conflict of interest between the football club and the LPF and (iii) the breach by the LPF of its duties as a member of the committee. Dismissed: the insolvent party had not included any legal grounds justifying the viability and procedural channels for its request to modify the arrangement: the insolvent party's request would, in essence, constitute a modification of the final judgment that approved an arrangement accepted by the creditors.

DECISION dated September 23, 2013, rendered by A Coruña Commercial Court no. 2

Article 96.4 LC.—Closure of the common phase and commencement of the arrangement phase when the challenges affect less than 20% of assets or liabilities. The literal and teleological interpretation of the provision allows the common phase to be brought to an end not only where the challenges do not initially exceed 20% but also where the challenges have been progressively resolved – as in this case – and the remaining

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challenges did not exceed this threshold.—The closure of the common phase was advisable because: (i) there was a risk that the prolongation of the insolvency proceeding could cause the creditors to enforce their security under art. 56.1 LC, which could make it difficult to adopt an arrangement at the creditors' meeting; and (ii) given that the insolvent company generated a considerable amount of post-insolvency order claims, the main creditor – the Public Finance Authority – was "financing" the insolvency proceeding with the attachments stayed by the court, a state of affairs that could be allowed to continue.

Courts of First Instance

JUDGMENT dated December 7, 2012, rendered by Jaén Court of First instance no. 4

Additional provision no. 4 LC (in the wording before the reform, currently Article 71.6 LC).—The insolvency managers filed a claim for clawback action to be applied to a refinancing agreement.—The insolvency court examined whether the requirements laid down by the Insolvency Law to guarantee that the refinancing could not be clawed back had arisen, above all those questioned by the claimant, concluding that: (i) the refinancing had the favorable opinion of an independent expert and, even where the predictions of such an expert were erroneous, the fact is that the law does not require that the opinion subsequently prove correct; (ii) the refinancing gave rise to the modification of obligations, without there being any need to evaluate the underlying purpose or the damage caused by such refinancing in order to deem this requirement to have been met; (iii) the refinancing was in line with a viability plan, regardless of whether or not the plan was fully performed, since such performance is not a requirement under the law; (iv) the refinancing obtained the backing of the mandatory creditor majorities. On confirmation of those requirements, called into question by the insolvency managers, the claim for clawback action was dismissed.

DECISION dated June 11, 2013, rendered by Vitoria Court of First Instance no. 2

Article 55 LC and 559 LEC.—proceeding for the enforcement of non-court approved instruments.—Enforcement of a loan by a financial institution.—Objection by the party subject to the enforcement on procedural grounds: the enforcing party did not have standing to do so because it did not have creditor status.—Upheld: The judge held that the enforcing financial institution had assigned the loan agreement it was seeking to enforce to Sareb.—The court concluded that, regardless of whether or not the financial institution was tasked with collection management, Sareb is the sole creditor by virtue of the loan, and the financial institution therefore has no standing to institute the enforcement based on the above financial instrument.

DECISION dated September 3, 2013, rendered by Soria Court of First Instance no. 2

Articles 19 LEC and 51.2 LC.—Request for court approval of the agreement providing for the termination of Sections Five and Six of insolvency proceedings following a settlement: Upheld: the court deemed the possibility of settlement to be implied by article 51.2 LC and is standard practice at the commercial courts and tribunals. The settlement is not prohibited by law, there are no limitations of any other type and there is no detriment to any third party interests. Sections Five and Six must be terminated by settlement, without ordering any of the parties to pay costs, since this was so agreed by the insolvency managers the insolvent party and the workers' representatives. The Public Prosecutor's Office made no

objection to the termination by settlement agreement of the assessment section, which had been provisionally suspended. Approval of the agreement reached since it is in the interest of all of the parties involved.

4. AWARDS AND ACCOLADES

International Law Finance Review 2014

Garrigues Restructuring and Insolvencies Department held firm to its place at the top of the rankings ("*Tier 1*") in the latest edition of the IFLR 1000 guide. Clients noted that interactions with the Firm's engagement teams boost the chance of a successful outcome and highlighted our expertise in Spanish insolvency law and our dispute and litigation settlement know-how.

Garrigues partners Antonio Fernández and Borja García-Alamán were also singled out as "leading lawyers" in this practice area.

Financial Times Innovative Lawyers Awards 2013

Once again, the Financial Times named Garrigues Continental Europe's most innovative law firm. The Firm claimed tenth place in the European ranking of innovative practices, making it the only Spanish firm to crack the "*top ten*" in legal innovation.

At the awards ceremony staged in London on October 3, Garrigues Restructuring and Insolvencies Department was "*Commended*" for its groundbreaking legal approach to the insolvency proceeding on Jugueterías Poli, in which it successfully argued for an interpretation of Article 191.3.2 in line with US legislation, thus facilitating the sale of a production unit to a third party with the mandatory subrogation of the other parties to certain agreements.

5. GARRIGUES PUBLICATIONS

5.1 Publications in English

"**The Restructuring Review 2013**", Law Business Research

A team from Garrigues Restructuring and Insolvencies Department, headed by Antonio Fernández, and partners Borja García-Alamán, Adrián Thery and Juan Verdugo, has compiled a selection of the most noteworthy cases and legislative developments in Spain over the course of 2012/2013.

The Spanish chapter of this global comparative guide to insolvency systems draws attention to the impact of the current crisis on the country. As well as looking into formal Spanish insolvency proceedings and out-of-court debt refinancing arrangements, the Spanish chapter also breaks down the latest breakthroughs in terms of restructuring and liquidation at credit institutions, corporate debt refinancing and company restructuring. It also mentions the biggest deals in areas of growing interest in Spain, such as banking, telecommunications and energy.

This sixth issue of the guide will be unveiled at the Annual Conference of the International Bar Association in Boston (October 2013), The Annual International INSOL Conference (Hong Kong, March 2014) and the 20th Annual Restructuring and Insolvencies Conference (Barcelona, May 2014).

5.2 Publications in Spanish

El alcance de la resistencia al concurso de la prenda de créditos futuros (The scope of protection from insolvency proceedings for pledges of future claims), Fernando Pantaleón y Beatriz Gregoraci, Revista de Derecho Concursal y Paraconcursal no. 20, La Ley.

La calificación del crédito garantizado en el concurso del garante (A propósito de la Sentencia de la Sección 15ª de la Audiencia Provincial de Barcelona de 14 de enero de 2013) (Assessing secured claims in insolvency proceedings on the guarantor –In response to the Judgment of Section 15 of the Barcelona Appellate Court of January 14, 2013–), Antonio Fernández, Revista de Derecho Concursal y Paraconcursal, no. 19/2013, pages 215-220.

La nueva Ley de Apoyo a Emprendedores: ¿Un antídoto al concurso de acreedores? (**The new Law to support Entrepreneurs: An antidote to insolvency proceedings?**), Bosco Cámara, September 26, 2013.

"Ley de emprendedores: Novedades concursales" (Entrepreneurs Law: Insolvency proceedings updates), Juan de la Fuente. Diario de Navarra. 11 de octubre de 2013.

Primera exclusión concursal del derecho individual de oposición de acreedores (convenio de fusión de «Fiesta») **(First insolvency proceeding exclusion of creditor's individual right to object –merger agreement of Fiesta–)**, Antonio Fernández y Adrián Thery, *Revista de Derecho Concursal y Paraconcursal*, no. 19/2013, pages 273-280.

Virtualidad de la prenda constituida sobre la responsabilidad patrimonial de la Administración (RPA) a favor de las entidades financieras en el concurso de las sociedades concesionarias de autopistas (Effectiveness of pledges to secure government liability in favor of financial institutions in insolvencies of highway concession-holders), Andrés Gutiérrez, Diario La Ley no. 8061, May 2, 2013