GARRIGUES Newsletter

Restructuring and Insolvency Work

February 2014

Index

I. New Legislation

1. Law 26/2013, of December 27, 2013, on savings banks and banking foundations

Law 26/2013, on savings banks and banking foundations was published in the Official State Gazette on December 28, 2013 and came into force a day later.

Final provision seven of this law contains two amendments relating to insolvency proceedings:

- The wording of additional provision no. 4.1 of the Insolvency Law, on court approval of refinancing agreements, was amended for the definition of "financial institution" to include both asset management company SAREB and anyone who acquire its claims, by any means, all for the purpose of computing the necessary majority for court approval of the refinancing agreements.

- Additional provision no. 2.2 of the Insolvency Law now includes article 24 of Law 14/2013, of September 27, 2013, to support entrepreneurs and their internationalization, under the heading "internationalization bonds." As a result, upon the entry into force of this law comes into force, article 34 will be treated as "special legislation" applicable to the insolvency proceedings on credit institutions or entities treated as such by law, investment service firms and insurance companies, as well as members of official securities markets and the participants in securities clearance and settlement systems.

For more information on this law, see our **newsletter**.

2. Royal Decree Law 1/2014, of January 24, 2014, on infrastructure and transport reform, and other economic measures

This Royal Decree-Law, which includes a series of modifications regarding concessions, in particular, concessions for the operation of toll motorways, was published on January 25, 2014 in the Official State Gazette. The new rule modifies article 17.2 of Law 8/1972, of May 10, 1972 on the construction, conservation and operation of motorway concessions.

The modification takes effect from the date that the Royal Decree-Law comes into force (one day following its publication, which in this case is January 26, 2014) and will be applicable to all concession agreements irrespective of the date on which they are awarded.

3. Royal Decree 3/2014, of January 10, 2014, establishing the special rules on the grant of pre ordinary retirement aid under the social security system for workers affected by corporate restructuring processes

On January 29, 2014 the Official State Gazette published Royal Decree 3/2014, establishing the special rules on the grant of pre ordinary retirement aid under the social security system for workers affected by corporate restructuring processes. It came into force on the day after its publication, i.e., on January 30, 2014.

The key elements of this royal decree are:

- Pre ordinary retirement aid is aimed as providing financial support for workers nearing retirement age to cover situations of emergency and need in social and employment terms. This aid will help to maintain employment or alleviate the social fallout of corporate

restructuring processes that might lead to the cessation of all or part of the companies' activities.

- The beneficiaries of the aid will be workers whose employment contracts are terminated under collective or objective individual layoffs (on economic, technical, organizational or production-related grounds) provided that they meet a number of requirements established in the Royal Decree.

- The aid will consist of financial assistance to be paid monthly to the worker and of contributions to the social security system while the aid is being received, up to a maximum of four years and, in all cases, until the recipient reaches the age stipulated in article 161.1.a) and in transitional provision no. 20 of the General Social Security Law.

- A 60% portion of the aid (including social security contributions) will be funded by the applicant companies (the contribution may be greater where so agreed), and the remaining 40% will be charged to the relevant program of the general budget of the central government or of the autonomous community government, where these services have been devolved to it. The employer may choose between paying its share in a lump sum or dividing it into as many annual installments as years in which the workers are going to continue receiving the aid, up to a maximum of four (in which case, sufficient guarantees must be provided to secure payment of any outstanding obligations).

For more information on this subject, see our **newsletter**.

II. Case Commentaries

1. JUDGMENT dated December 11, 2013 rendered by Barcelona Provincial Appellate Court

Article 42 of the Commercial Code and article 93 of the Spanish Insolvency Law (*Ley Concursal or "LC"***).—Subordination of a claim because it was held by a "person having a special relationship" (an insider creditor): the plaintiff contested the list of creditors because it considered that none of the scenarios for subordination stipulated in article 93 LC were present.—At the lower court the insolvency judge upheld subordination of the claim.-- Appeal: Upheld: Despite corroborating the first instance judge's view that the type of group concerned was "horizontal" or "by coordination", the Chamber held that additional provision no. 6 of Insolvency Reform Law 38/2011 excluded these types of "horizontal groups" from the scope of article 42.1 of the Commercial Code; that "group" can therefore not be interpreted broadly and, consequently, that the subordination of claims in the appealed judgment is incorrect: Inclusion of the appellant's claim on the list of creditors as an ordinary claim.—Dissenting opinion: article 42 of the Commercial Code. does not attempt to offer a single and universal definition of "group," but rather to define which parties have the duty to file consolidated financial statements.—The definition of "group" resulting from the interpretation of article 42 of the Commercial Code. is not formal and static and, furthermore, contains requirements falling outside those specific to the definition of "group" in connection with insolvency proceedings: Analysis of the definition of "group" in connection with insolvency proceedings: it is a functional definition in which the essential parameter is economic in nature.**

Commentary:

In the insolvency proceeding on Cubigel Compressors, S.A.U. ("Cubigel"), Koxka Technologies, S.L.U. ("Koxka") appealed against the first instance judgment, in which the court upheld the insolvency manager's classification of its claim as subordinated because Koxka belonged to the same group as Cubigel.

When including Koxka's subordinate claim in the report (under article 92.5 LC read in conjunction with article 93 LC), because Koxka was a "person having a special relationship" (insider creditor) with the debtor, the insolvency manager did not specify which of the relationships defined under article 93 Koxka had.

In the case under analysis, one individual held a controlling interest in Koxka and in Cubigel, both sole-shareholder companies.

Koxka contested the list of creditors on the basis that none of the cases stipulated under article 93.2 LC were present, because it had not been a shareholder, director, liquidator or attorney-in-fact at Cubigel and also it considered it did not belong to the same group as Cubigel within the meaning of article 42 of the Commercial Code. The insolvency manager objected to the complaint on the basis that Cubigel and Koxka did belong to the same group because they were related by having the same sole shareholder who had control over both companies, thus giving rise to a decision-making unit between Cubigel and Koxka.

The first instance judgment upheld the insolvency manager's assessment that it was a subordinated claim, taking the view that the nature of the relationship between Koxka and the insolvent party was a horizontal relationship or one of common "control" and holding that the reason for subordination was the need for those closest to the debtor to make greater sacrifices in the insolvency proceeding.

In its appeal, Koxka argued that the subordination was unlawful because, under additional provision no. 6 introduced by Insolvency Reform Law 38/2011, the applicable definition of "group" is that set forth in article 42.1 of the Commercial Code, in which the predominant factor is not the "decision-making unit" but rather the concept of "control" and in this case, Koxka was not controlled by a parent company which also controlled Cubigel.

The appeal was upheld.

The Chamber began by arguing that Spanish legislation does not have a systematic set of rules on groups of companies which lay down a uniform definition, valid in all cases and scenarios and for all purposes evidencing legal regulation of this corporate concept. The Chamber itself referred to the notion of group of companies as a flexible, variable and dynamic concept. Despite these fragmented rules on groups of companies, the Chamber noted a progressive convergence of the special laws towards the notion of group which, for the purposes of filing consolidated financial statements, is defined in article 42 of the Commercial Code.

It went on to say that in order to fund the position of "control" described by article 42, it is not necessary for the controlling company to be a shareholder of the controlled or dependent company or companies. Although some statutory presumptions of control require the controlling company to have an ownership interest in the dependent company, control does not arise exclusively from a direct and immediate interest in the other company.

The Chamber pointed out that, with the insolvency reform law, the legislature wanted to bring an end to the various interpretations of group offered in connection with insolvency proceedings, by choosing one of them. By establishing in additional provision no. 6 that "for the purposes of this law, "group of companies" shall be construed pursuant to article 42.1 of the Commercial Code", the legislature was excluding "horizontal" or "joint" groups or groups "by coordination" founded on the idea of a "decision-making unit".

The Chamber confirmed that additional provision no. 6 of the Insolvency Reform Law excludes "horizontal groups" from the scope of article 42.1 of the Commercial Code. and that, accordingly, the broad interpretation and subordination of the claim by the appealed judgment could not be allowed. The Appellate Court concluded that the broad interpretation set forth in the first instance judgment was unlawful, given the penalizing nature of the rules on the subordination of claims. It concluded by upholding the appeal and subsequently including the plaintiff's claim on the list of creditors as an ordinary claim on the understanding that, in the case at hand, the relationship between the companies was horizontal and, accordingly, a hierarchical relationship did not exist between them.

Dissenting opinion of senior judge Juan F. Garnica Martín

The judgment includes a dissenting opinion by one of the three senior judges at the Chamber handing down the judgment, in which the senior judge takes the view that article 42 of the Commercial Code does not attempt to offer a single and universal definition of "group" but rather its purpose is to define which parties have the duty to file consolidated financial statements. Along these lines, the discrepancy of the dissenting opinion lies in the definition of "group" accepted by the majority of the members of the Court. According to the latter, a group cannot be composed of two companies over which, according to the evidence, the same individual exercises direct control. Against this view, the dissenting opinion offers the following explanation:

- The interpretation of the definition of "group" under article 42 of the Commercial Code in connection with the subordination of claims in an insolvency proceeding cannot be restricted in scope. Article 42 of the Commercial Code. should not be regarded as a formal and static definition and it naturally contains requirements falling outside those specific to the definition of "group" in connection with insolvency proceedings. Article 42.1 of the Commercial Code does not define "group," but rather stipulates which companies are required to file consolidated financial statements, referred to in specialized terminology as the "contours of consolidation" (perímetro de consolidación). Thus, article 42.1 cannot be taken as a reference for defining "group" for purposes other than filing consolidated financial statements. The provision, the dissenting opinion goes on to say, contains two paragraphs, of which only the second has a bearing on the definition of what should be understood as a group of companies.

- Although the definition of "group" requires a relationship of "control", in order to find the existence of a group between two companies it is not necessary for one of them to be the controlling company of the other (the dependent company). If the latter idea were accepted, it would reduce the definition of "group" to a ridiculous extreme, since a group could never be said to exist between dependent companies at the same hierarchical level ("sister" companies with the same parent company). A group must be said to exist whenever companies come together, regardless of how many, if there is a situation of direct or indirect control among them. For this reason the key factor for determining whether a group exists is exclusively the statutory test of "control", whether real or potential, direct or indirect.

- The definition of group in connection with insolvency must be a functional definition whose essential parameter is economic in nature, since control is commonly translated as "economic control" that enables a company to exercise its influence decisively over one or more other companies.

- The group constitutes a risk of abuse of personification, and the reason for regulating it is to protect the market and those operating in it, and for this reason a reductionist interpretation of "group" is inadmissible.

The dissenting opinion states that a group will exist where a situation of control arises between two or more companies which can have an impact on the multiple effects taken into consideration by the legislature when referring to groups of companies, i.e., not only in connection with filing consolidated financial statements but also with all the other effects that the legislature determines for groups, including the subordination of claims in an insolvency proceeding.

The senior judge choses an open definition of group since, in his opinion, arguing that a group does not exist between two companies under common control would lead to a corruption of the definition of "group" to the extent of considering that a group exists only between a controlling company and a dependent company filing consolidated financial statements. In his opinion, only groups "by coordination", i.e., those in which the companies act as a group for reasons other than through control, should be excluded from the definition.

The dissenting opinion concludes that it is not necessary for the "control" to be held by a controlling company, since it may also be held by an individual. The legislature itself acknowledges, in article 42.6 of the Commercial Code., that the parent company can be an individual instead of a company. Were this not so, it concludes, observance or otherwise of the legislation on groups would be left to the discretion of the parties.

2. DECISION dated December 20, 2013 rendered by Madrid Commercial Court no. 8

Article 43.2 LC.—Liquidation transactions in an insolvency proceeding. Authorization of a pre liquidation disposal of a production unit. Need to perform the disposal in the common phase.—Assessment of the bid by reference to the best interests of the insolvency proceeding.—Exclusion of the effect of business succession: the purchaser of the production unit will not be subrogated to debts payable to the social security authorities.—Obligatory assignment of contracts linked to the production unit.

Commentary:

In the context of the insolvency proceedings of the Maemoda (Blanco) Group companies, on November 20, 2013 the insolvency manager submitted a proposal drawn up by Fawaz Abdulaziz Alhokair Company, a United Arab Emirates company, for the acquisition of the production unit comprising elements involving fourteen group companies.

In a decision dated December 20, 2013, the insolvency judge authorized the pre liquidation disposal of the production unit. According to the decision, in order to assess acquisition bids at such an early date, it must be impossible to wait for the liquidation phase in the insolvency proceeding to perform the disposal, and this must be properly evidenced. Regard must also be had to the best interests of the insolvency proceeding such as the existence of sufficient guarantees to achieve the greatest transparency in the disposal and ensure compliance with prohibitions against acquisition by certain parties, ensuring that there is no breach of the prohibitive effects of the liquidation phase.

The judge justified the need to carry out the disposal in the common phase on the following grounds:

- The production unit was composed of a complex set of assets and rights, and its sale required particularly delicate management.

- The bid comprised elements involved in fourteen insolvency proceedings and, accordingly, waiting for each and every one to reach the liquidation phase could delay the management

of the sale due to both the number of proceedings and also the complex nature of some of them.

- Financial difficulties made it unlikely that the production unit could be kept operational until the commencement of the liquidation phase.

- Before authorizing the sale of the production unit, the judge analyzed, first, the strength of the acquirer, in terms of size and financial soundness, and, second, the terms of the bid, by looking at the price, the agreement to bear the debts to banks and employees, the absence of real estate or shares in the production unit and the number of workers directly dependent on the production unit, whose contracts would be transferred to and retained by the purchaser.

When assessing the safeguard of the best interests of the insolvency proceeding, the judge made the following comments:

- The alternative would be individual sales in the liquidation phase of each of the components of the production unit, which would involve greater effort.

- Because no real estate or third-party claims are attached to the production unit, the price obtained on the sale would entail a very considerable expectation of enrichment for the insolvency proceedings on the group companies.

- The saving of 1,200 jobs would avoid the appearance of post insolvency order claims for severance if those jobs are eliminated.

- The Insolvency Law repeatedly comes down in favor of the disposal of operational production units.

- There is no alternative acquisition bid, despite extensive advertising of the sale.

The insolvency manager requested two rulings from the judge: to exclude the effect of business succession and to order compulsory subrogation in contracts instrumental to the continuation of the production unit's business.

The first request was to exclude liability for social security debts incurred before the transfer. The insolvency judge affirmed his jurisdiction over the matter pursuant to article 9.1 LC, and pointed out that the insolvency legislation was to be applied with preference over labor legislation and therefore the purchaser of the production unit would not be subrogated to any of the insolvent companies' debts to the social security authorities incurred before the transfer.

The second request was for the compulsory assignment of the contracts linked to the production unit. The production unit could continue operating if all the contracts under which it carried on its economic activity were kept, since otherwise they would choke the insolvent company's business. The purpose imposed in the Insolvency Law cannot depend exclusively on the will of the other contractual party to retain those agreements, especially considering the more than obvious rendition of the principles of freedom of contract and contractual relationships in insolvency proceedings throughout the Insolvency Law.

Nonetheless, the judge qualified the compulsory subrogation by specifying the effect of the assignment of contracts. Thus, for contracts which contain no provision whatsoever on assignment, the effect of the assignment will be only the replacement of the insolvent debtor by the acquirer. Nonetheless, if there are statutory provisions or provisions in collective labor agreements on the effect of the assignment on ancillary elements (such as security), those

provisions will prevail and nothing can place at risk or jeopardize the validity, enforceability or durability of the contract, which must continue to be performed by the acquirer.

The acquirer's agreement to bear the debt owed by the insolvent company to certain creditors does not alter the equality of creditors principle because the LC contemplates this possibility (articles 100.2 and 149.2), and the best interests of the other creditors lie in the disappearance of those liabilities; an entirely different situation would be the use given by the insolvency manager to the sale price, since the payment of creditors must be in line with the statutory priority of payments.

In summary, the judge authorized the pre liquidation sale of the production unit of the insolvent Maemoda (Blanco) Group companies, and ordered the compulsory assignment of the contracts linked to the unit, the assumption by the acquirer of part of the debt, the cancellation of all charges created on the production unit's assets before insolvency (other than those constituted in favor of specially preferred claims), and the exclusion of all effects of a business succession other than the employment effects, expressly excluding liability for debts owed to the social security authorities and any outstanding salaries and severance pay relating to the production unit which were assumed by the Wage Guarantee Fund.

III. Headnotes

1. Court of Justice of the European Union

1.1 JUDGMENT of the Court of Justice of the European Union of 16 January 2014 (First Chamber)

Article 3.1 Regulation 1346/2000, on insolvency proceedings. Reference for a preliminary ruling. The German judge asks the Court of Justice of the European Union whether the jurisdiction of the judge for the place where the debtor has the center of his main interests (COMI) extends to an action to set aside due to insolvency brought against a defendant who has its domicile or registered office outside a Member State.—In the case analyzed by the CJEU, the German creditor-appointed trustee had brought an action to set aside due to insolvency against an individual resident in Switzerland.—Application of the "Seagon" doctrine: the Courts of the State with jurisdiction to bring an insolvency proceeding have international jurisdiction to entertain actions arising directly from this proceeding and which are closely related to it: accordingly, the German judge may entertain an action to set aside brought against a defendant whose domicile or registered office is outside a Member State.—The harmonization, within the Union, of the rules on the jurisdiction of the courts with respect to actions to set aside due to insolvency contributes to promoting the predictability of a court's jurisdiction in matters of insolvency and, consequently, legal certainty.—The international jurisdiction of the judge for the COMI does not prevent the decision handed down in the insolvency proceeding from being binding on third countries because, even if there is no possibility of claiming the Regulation against a third country, it is sometimes possible to attain, under a bilateral convention, the recognition and enforcement of a decision handed down by the court with jurisdiction; additionally the defendant may have assets in other Member States which are able to recognize and enforce the decision of the judge for the COMI.

2. Supreme Court

2.1 JUDGMENT dated November 19, 2013 rendered by the Supreme Court (Chamber One)

Article 878 of the Commercial Code.—Interpretation of the scope of the unenforceability of acts performed by an insolvent debtor during the retroactive period.— The Supreme Court had traditionally interpreted the provision literally, taking the view that all acts falling within the retroactive period were void by operation of the law, although the odd decision departed from this interpretation. There came a time, however, when the Supreme Court changed its view and began to rule repeatedly that the unenforceability contemplated in article 878 of the Commercial Code was not the result of voidness per se, since it was not automatic, absolute, original or structural, but rather was in line with the category of clawback action, the ultimate basis for which lies in the existence of detriment to the assets available to creditors. In the opinion of the Chamber, this interpretation of article 878 of the Commercial Code. fits in better with the spirit and purpose of the current asset clawback action.—The Supreme Court ultimately dismissed the appeal of the creditor-appointed trustee in the insolvency proceeding, by taking the view, consistent with its most recent repeated case law, that the contested act was not detrimental to the assets available to creditors and, accordingly there was no need for the clawback action.

2.2 JUDGMENT dated December 11, 2013 rendered by the Supreme Court (Chamber One)

Article 1597 of the Civil Code and articles 21.2 and 51 bis.2 LC.—Claim filed in direct action brought against the owner of construction work, the main contractor being subject to a mandatory insolvency proceeding.—Fact: prior out-of-court claim against the owner of the construction work, of which notice was served two days after the petition for insolvency was filed but one day before the insolvency order.—At first instance the claim was fully upheld.—Appeal: Upheld, and the appealed decision set aside.—The Chamber of the Provincial Appellate Court held that, from the time the petition for insolvency was admitted for consideration, the effects of the pending lawsuit extended to the time the petition was filed, in accordance with the general and supplementary rules of the Civil Procedure Law and, accordingly, the claim filed against the owner of the construction work cannot take out of the assets available to creditors a claim which has already been immobilized by and for the insolvency proceeding.—Cassation appeal: Dismissed.-- Chamber I corrected the judgment of the Provincial Appellate Court to the effect that it was not allowable to rely on the Civil Procedure Law as supplementary law because, under article 21.2 LC, the insolvency order took effect when the decision containing it was handed down and, because the claim against the owner had been brought before the insolvency order, in principle, it would be valid pursuant to article 1597 of the Civil Code. Nonetheless, the Supreme Court dismissed the cassation appeal on the basis of article 51 bis.2 LC, introduced by Insolvency Reform Law 38/2011, which imposed a stay on direct action as a result of the insolvency order and, accordingly, eliminated the preferred right of the party who had brought direct action against the owner of the construction work before the insolvency order. The Chamber added that where an insolvency order takes place after the payment of an amount to a claimant in direct action, that payment may be subject to an asset clawback action if the claim does not meet the requirements laid down, such as those relating to it being due and payable.

3. Provincial Appellate Courts

3.1 JUDGMENT dated July 24, 2013 rendered by Las Palmas Provincial Appellate Court

Articles 164 and 165 LC.—Assessment of the insolvency as fault-based following the reopening of the assessment section due to a breach by the insolvent party of the arrangement with creditors. The liquidation phase was commenced at the request of the debtor, not ex officio,

for which reason the presumption of fault pursuant to article 164.2.3º LC (referring to the commencement of liquidation due to a breach of the arrangement with creditors on grounds attributable to the insolvent party) did not apply.—Existence of "material accounting irregularities" based on the following facts: (i) unjustified discharge of balances payable to the majority shareholder to the detriment of the other creditors; (ii) incorrect capitalization of tax assets, aimed at feigning fictitious assets; and (iii) overstatement of assets.—Breach by the director of the duty to cooperate with the insolvency judge, given his failure to report half yearly on compliance with the arrangement. This duty cannot be said to have been discharged without sufficient and justified information being furnished in writing.—Aggravation of insolvency by the late request for the commencement of the liquidation phase. The duty to request liquidation arises from the time the debtor becomes aware it cannot comply with the arrangement with creditors, but the provincial Appellate Court deemed it reasonable (by analogy with the deadline for petitioning for an insolvency order), to grant the debtor two (2) months in which to request liquidation. Once the inability to obtain financing is known, a delay in submitting that request beyond the stipulated deadline aggravated the insolvency due to the accrual of late-payment interest and the increase in the penalties and surcharges payable to the public authorities.—The assessment affected the company's *de iure* director and the parent company, as *de facto* director. The parent company was the *de facto* director because the individuals through which it operated acted as representatives of the parent company, i.e., in defense of the interests of the parent company or of the group.

3.2 DECISION dated October 8, 2013 rendered by Córdoba Provincial Appellate Court

Articles 55 and 149.3 LC.— lifting and removal of an attachment (ordered by the social security authorities before the insolvency order) of a claim necessary for the continuation of the business activity.—In the common phase, the new wording of article 55 LC permits the lifting and removal of attachments at any time, where keeping them seriously hinders the continuity of the insolvent party's professional activities. In the liquidation phase, all the assets available to creditors are transferred, free and clear of charges, and the proceeds are used to increase the assets available to all creditors and, accordingly article 55.3 LC does not apply to this phase.—The prohibition against the lifting and removing attachments by the public authorities under article 55.3 LC refers only to those enforced on an individual basis and ordered before the insolvency order on assets not involved in the proceeding. These attachments do not include attachments resulting from ordinary claims, which are subject to the general rule under which they can be removed under an order by the insolvency judge, subject to three conditions: (i) the insolvency judge must order the removal at the request of the insolvency manager; (ii) keeping the attachments must seriously hinder the continuation of business activities; and (iii) the affected creditors must be heard first.—Cash is considered a necessary asset, provided that it is not surplus and it is used for reinvestment or for the company's normal business activities.—The Chamber concluded that because the claims were necessary for the business activities, and in view of the satisfaction of the three conditions required for the removal of the attachment ordered by the social security authorities, it was required to uphold the decision of the court that had decided to lift and remove it.

3.3 DECISION dated January 30, 2014 rendered by Pontevedra Provincial Appellate Court

Article 149.2 LC and article 44 of the Workers' Statute.—Approval of the liquidation plan providing for business succession for employment purposes.—The insolvency manager had submitted a liquidation plan in which the transfer of the production unit would entail a business succession for employment purposes, i.e., subrogation of the new employer and joint and several liability for the new employer and the former employer, albeit with two special features: (i) the transferee would not be subrogated to any salaries or severance pay outstanding before the acquisition, since they would be assumed by the Wage Guarantee Fund; and (ii) the transferee and the workers could sign agreements for the collective modification of working conditions.—The lower court approved a liquidation plan which

departed from the line taken by the insolvency manager, deeming it more reasonable to exclude all effects of a business succession, including liability for salary claims, including amounts owed to the social security authorities, with a view to encouraging a larger number of bids to acquire the production unit.—The Appellate Court revoked this section of the liquidation plan in view of the appeal filed by the representatives of various workers.—The Chamber held that a sale, within an insolvency proceeding, of an entity or production unit as a whole which maintains its identity entails, at all times and in all cases, a business succession at least for employment purposes, pursuant to the LC, read in conjunction with the Workers' Statute. A situation of insolvency does not allow exceptions to the general rules protecting employee claims pursuant to Directive 2001/23/EC and to article 44 of the Workers' Statute.— The transferee of the production unit must take responsibility for the claims in respect of social security debts, pension commitments and all existing worker protection obligations.—The Chamber revoked the disputed section of the liquidation plan and concluded that a sale en bloc or the sale of a production unit as a whole places the insolvency judge under the obligation to declare that there is, in fact, a business succession for employment purposes, although two of the consequences of such a declaration may be excluded, i.e., the two special features under article 149.2 LC which had also been provided for by the insolvency manager in the liquidation plan (points i and ii above).—Lastly, please note that whether or not a business succession is deemed to exist from an employment standpoint falls outside the commercial jurisdiction and has a direct impact in the labor jurisdiction (the acquirer had explained to the Appellate Court, which refused to entertain the case based on its lack of jurisdiction, that a business succession for employment purposes had not actually occurred because the contracts had been terminated before the acquisition).

4. Commercial Courts

4.1 DECISION dated November 27, 2013 rendered by Madrid Commercial Court no. 12

Articles 8 and 84.4 of LC.—Powers of the public authorities (social security authorities, State Tax Agency) to initiate, following the commencement of liquidation, enforcements outside the insolvency proceeding, with a view to collecting their outstanding post-insolvency order claims.—The new wording of article 84.4 LC permits the initiation of court or administrative enforcements aimed at collecting outstanding post-insolvency order claims upon commencement of the liquidation phase.—The social security authorities may enforce outstanding post-insolvency order claims upon commencement of the liquidation phase, although that must make any amounts they receive available to the insolvency manager so that he can decide how those amounts should be used and pay post-insolvency order claims.—The judge dismissed the insolvency manager's request to have the attachments ordered by the social security authorities on outstanding post-insolvency order claims rendered void, because this decision falls outside the jurisdiction of the insolvency judge. The dispute over the voidability of administrative acts falls within the judicial review jurisdiction, while the decision on disputes regarding the application of the order of priority of payments falls to the insolvency judge.

4.2 JUDGMENT dated December 3, 2013 rendered by Ávila Commercial Court

Articles 172 and 172 bis LC.—Assessment of the insolvency: the judge held that the insolvency was fault-based and ordered that the *de facto* director and by the *de iure* directors forfeit all their rights as creditors in the insolvency, be disqualified from acting as directors or representatives for ten years and cover 100% of the asset shortfall in the insolvency proceeding.—The economic liability of the parties in question is joint and several, since there are both *de facto* and *de iure* directors and it is impossible to separate their individual liability according to their participation in the events.—Reliance on absence of liability for the *de iure* director: the law imposes certain duties on directors which, if breached, give rise to liability

and, accordingly, the most serious breach, such as complete neglect of corporate matters, cannot serve as a basis for a release from liability.—*De facto* directors: the essential characteristic of a *de facto* director is independence or lack of subordination to a corporate managing body, in addition to the habitual nature of the discharge of their duties as such. *De facto* directors do not include the attorneys-in-fact, provided that they act regularly under mandates or as the directors' managers.—In the event of serious wilful misconduct or fault, the company directors are liable for having caused the insolvency, but it is not necessary to prove a causal relationship between their conduct and the damage caused by that conduct.—The order to cover the shortfall is not a necessary consequence of an assessment of fault-based insolvency, but rather requires added support following an evaluation of the various subjective and objective elements of each director's conduct with respect to the conduct on which the assessment was based.

4.3 DECISION dated December 5, 2013 rendered by Alicante Commercial Court no. 1

Articles 2.4 and 7 LC.—Petition for mandatory insolvency: dismissal: in a petition for mandatory insolvency, the petitioner must state clearly the facts required pursuant to article 2.4 LC and on which it bases its claim; it is not enough just to mention transactions qualifying as contrary to the principle of equal treatment for creditors.—General and purely routine expressions are insufficient, since they would deny the debtor his right to due process, obliging it to prepare its objection without knowing what it is objecting to.—Facts disclosing the insolvency other than those mentioned in the petition cannot be introduced at the hearing through the expert opinion: the expert opinion is not a vehicle for introducing facts on which the claim is based, but rather a method of proving such facts.—Neither is it admissible to submit new revealing facts which arose after the petition for mandatory insolvency was filed, since this would prevent the other party from making submissions and proving what it deems appropriate to its rights.—General cessation in timely payment of obligations: general cessation cannot be found where the only creditor identified by name is the party that petitioned for insolvency: although there is evidence of the existence of another financial debt, the existence of agreements reached within a restructuring process for that debt makes it impossible to refer to a general cessation: the petitioner cannot classify the debt of the two financial institutions that preferred to negotiate and not to claim simply as unpaid debt or debt "ceased to be paid". Rather than to a general cessation of timely payments, the evidence showed that significant payments were made, in number and quantity, to suppliers; payments to the tax and social security authorities were up to date; and there were unencumbered assets available to cover claims.—Failure to pay the debt into court before the hearing: the failure to pay the debt into court does not necessarily imply that the defendant was insolvent if the defendant assumes that its objection alone will avoid the insolvency order: anything else would be to use the insolvency process as a mechanism to apply pressure in order to collect the claim ("*querella concursal*").

4.4 DECISION dated December 11, 2013 rendered by Barcelona Commercial Court no. 3 (Reference for a preliminary ruling submitted to the CJEU)

Article 149.2 LC in connection with article 5 of Directive 2001/23/EC, article 148 LC and article 44 of the Workers' Statute.—Award of a production unit in the liquidation phase: the liquidation plan provided for the sale of the production unit of the insolvent party, without the transferee being subrogated to the obligations of the insolvent party/transferor, in particular the tax and social security obligations. The transferee was formed by some, but not all, of the workers of the insolvent party/transferor. The court decision approving the sale of the production unit was appealed by the social security authorities and by a group of workers who, in turn, had filed a claim against the transferee at the labor courts, even before the transfer became effective. The court questioned the applicability of article 149.2 LC and companion provisions and of article 5 of Directive 2001/23/EC in connection with articles 3 and 4 thereof. For this purpose the judge submitted a reference for a preliminary ruling to the CJEU based on

seven (7) questions, including most notably: (i) Can Directive 23/2001 be interpreted, with respect to the transfer of production units or enterprises declared insolvent by court or administrative order and in liquidation, in such a way as to permit not only the protection of the employment contracts but also the certainty that the transferee will not be held liable for debts incurred prior to the acquisition of the production unit? (ii) Given the wording of article 149.2 LC regarding business succession, is this the opinion of domestic law required by article 5.2 a) of Directive 23/2001 for the exception to operate? (iii) If this is the case, should the award handed down by the judge of the insolvency proceeding with such guarantees and safeguards be binding in all cases on all other jurisdictions or administrative proceedings brought against the new transferee with respect to debts incurred before the acquisition date, thus determining that article 44 of the Workers' Statute cannot render void the contents of articles 149.2 and 3 LC?

4.5 DECISION dated December 16, 2013 rendered by Murcia Commercial Court no. 2

Articles 1291.3, 1297 and 1111 of the Civil Code and article 71.6 LC (as worded before Law 38/2011).—Bringing of revocatory action with a view to terminating: (i) two mortgages created on the insolvent party's only real estate to secure two loans provided to two other companies in the same group of companies; (ii) the transfer of claims by the mortgage creditor to a third party.—With respect to the action to terminate the mortgages, the court held that it was a gratuitous act carried out to defraud creditors and, accordingly, was detrimental to the insolvent party, on the following grounds: (i) as a revocatory action, rather than an asset clawback action pursuant to article 71 LC, the damage must be analyzed from the standpoint of civil law rather than insolvency law; (ii) civil law damage establishes absolute protection of creditors, with preference over any other affected interests; (iii) the insolvent party's assets were reduced upon the creation of two mortgages on its only real estate without it receiving any consideration in exchange; (iv) the mortgages secured the debt of other parties, since they guaranteed two loans provided to enterprises other than the insolvent party; the fact that those two enterprises belonged to the same group of companies is not material under the Civil Code and, accordingly, it is impossible to claim "group interest" or "justified trade-off in assets"; and (v) the transaction was detrimental to the creditors' rights, by depriving them of an asset which could have been used to satisfy their rights.—On all these grounds, the court held it was a gratuitous act, aimed at defrauding creditors, and ruled to terminate the mortgages.—In connection with the transfer of claims, the court dismissed the asset clawback action because the LC restricts such action to acts "carried out by the debtor" and the transfer of claims did not meet this requirement because it was a transaction to which the debtor did not give its consent and, accordingly, the debtor was not party to the agreement.

4.6 DECISION dated January 30, 2014 rendered by Madrid Commercial Court no. 8

Article 25 LC.—Joining of insolvency proceedings (Case "Astra-Air Comet").—The insolvency manager of one company (Astra) requested for an insolvency proceeding to be joined with the insolvency proceeding conducted at court in connection with another group company (Air Comet).—Rules on the joining of insolvency proceedings; explanation of their scope: joint and coordinated processing.—The judge for the Air Comet insolvency proceeding concluded that Air Comet and Astra form a group of companies, which means that the two proceedings should be joined (article 25 bis 1 LC).—Limited effects of joining insolvency proceedings: the insolvency judge dismissed the request for substantive consolidation, clarifying that, in any case, substantive consolidation can only be requested by the insolvency manager of either of the joined insolvency proceedings. – In this case, the debtor (Astra) had requested substantive consolidation without the consent of its insolvency manager and without the insolvency manager of Air Comet having adopted a position. – In any case, the judge took the view that, because the time limit for the report by the Air Comet insolvency manager had ended, without any protest being submitted, the time limit on the request by the debtor (Astra) had also

ended. – Scope of substantive consolidation under Spanish insolvency law: (i) exceptional possibility; (ii) an essential principle of the Spanish law on net worth requires that the obligation arises between debtor and creditor; (iii) only reasons of substantive justice (fraud or abuse) can prevail over this essential principle (the theory of the piercing of the corporate veil in corporate law or the theory of single-integrated enterprises in labor law); (iv) article 25 bis 1 LC did not intend to extend these reasons of substantive justice to substantive consolidation, which is to be carried out "*for the purpose of preparing the insolvency manager's report*"; (v) nonetheless, this literal interpretation must be qualified because, once the available assets have been consolidated for the purpose of the report, the creditors in each insolvency proceeding will extend their collection expectations to the assets available in each and every insolvency proceeding; and (vi) it is only possible to consolidate the available assets where the net worth of both parties is "intertwined", a concept also used in the decision (a mixture of the elements comprising the net worth; assets and liabilities, affecting all or most of the net worth, and both the assets and the liabilities because "net worth" encompasses both).—Reasons of substance which prevent substantive consolidation: (1) in the case at hand, 90% of Astra's liabilities were not with Air Comet, but rather with a specific financial institution and, accordingly, the obligational relationship clearly had been constituted; (2) additionally, the payments through a third party with which Air Comet paid for Astra were perfectly recorded in the insolvency manager's reports and in the assets and liabilities of the two companies; (3) the distribution of functions among group companies is insufficient reason to rule on consolidation, it is a lawful practice in groups of companies; (4) the fact that group companies other than Air Comet and Astra kept internal accounts of payments made for the account of each other does not entail intertwined assets and liabilities because they are acts performed by a third company and because, without evidence of how the debts incurred by payment through a third party were settled, there is no proof that they operated with a "single cash pot".

5. Directorate-General of Registries and Notaries

5.1 DECISION dated November 8, 2013 rendered by the Directorate-General of Registries and Notaries

Articles 8.4 and 24 LC.—Refusal to register a provisional noting of a claim filed against an insolvent party.—The insolvent vendor filed a claim against the purchaser (also subject to an insolvency proceeding) requesting : (i) that the transfer of a property be rendered void on absolute terms; and (ii) that the claim be noted provisionally at the appropriate registry. The judge for the vendor's insolvency proceeding, who was entertaining the claim, issued a court order addressed to the Property Registry ordering the provisional noting of the claim in connection with the registered property owned by the purchaser, subject to an insolvency proceeding.—The Registrar refused to enter the provisional noting because, inter alia, an entry had already been made of the insolvency order on the purchaser/registered owner, and because the injunctive relief had been ordered by a judge other than the judge in the registered owner's insolvency proceeding.—The Directorate-General of Registries and Notaries rendered the Registrar's refusal void.—It argued that the judge with the jurisdiction to order injunctive relief relating to the assets and liabilities of the insolvent party should be the judge for the purchaser's insolvency proceeding. Nonetheless, because both parties were subject to insolvency proceedings, in this case the jurisdiction of the commercial judge handling the vendor's insolvency proceeding should prevail, because the claim had been filed with this judge, who was also the first to entertain the claim, especially since, additionally, the injunctive relief had also been reported to the commercial court conducting the purchaser's insolvency proceeding.

5.2 DECISION dated November 18, 2013 rendered by the Directorate-General of Registries and Notaries

Article 155.4 LC.—Discharge of a mortgage on a property sold during the liquidation phase of the insolvency proceeding on the property's owner.—The issue was to determine whether the requirements in article 155.4 LC for discharging the mortgage had been met as a result of the disposal of the mortgaged property during the liquidation phase of the insolvency.—The Directorate-General of Registries and Notaries upheld the Registrar's negative assessment by considering that the order to remove charges did not evidence various elements required by article 155.4 LC; in particular, the order did not record compliance with the following requirements which are essential to the discharge of a mortgage at the Property Registry: (i) that the mortgagees had been informed of the liquidation plan; (ii) that measures had been taken in order to pay off special preferred claims; and (iii) that the liquidation plan was final.

6. Directorate-General of Taxes

6.1 BINDING RULING V2770-13 dated September 19, 2013 rendered by the Directorate-General of Taxes

Article 80.4 of the VAT Law and article 84.2.8 LC.—Modification of the taxable amount for VAT purposes relating to a claim derived from an asset clawback action.—Pursuant to article 80.4 of the VAT Law, the taxable amount for VAT purposes can be reduced if claims relating to the output VAT on taxable transactions are totally or partially uncollectable one year after the output VAT falls due and provided that the claims arose after the decision containing the insolvency order.—This means that, in order to modify the taxable amount for VAT purposes, the *ex lege* post-insolvency order claim derived from the asset clawback action must be treated as a claim arising subsequent to the decision containing the insolvency order (article 84.2.8 LC) and, accordingly, the modification may be made provided that the other statutory requirements imposed under article 80.4 of the VAT Law are met.

IV. Garrigues publications

«El auto de 4 de diciembre de 2012 del Juzgado de lo Mercantil núm. 12 de Madrid y el artículo 191 ter. 2 de la Ley Concursal como nuevo supuesto legal de subrogación contractual forzosa en España» (The decision dated December 4, 2012 rendered by Madrid Commercial Court no. 12 and article 191 ter. 2 of the Insolvency Law as a new legal scenario for enforced contractual subrogation in Spain) [Fernández & Thery, *Práctica mercantil para abogados: Los casos más relevantes en 2012 de los grandes despachos*, La Ley publishing house, Madrid, 2013]

«Para qué nos sirve la ley de emprendedores» (What use can we make of the entrepreneurs law?), [De la Vega Cavero, El Periódico Mediterráneo, January 19, 2014]

«Alzamiento de embargos dentro del concurso» (Dealing in assets to defraud creditors in insolvency proceedings) [Verdugo & Lama, Economist & Jurist, no. 177]

«Modificación y refinanciación del convenio concursal» (Modification and refinancing of the creditor´s agreement) [Gutiérrez Gilsanz, La Ley Digital ref. 96/2014]

«Compra de empresas en concurso» (Purchase of companies under an insolvency proceedings) [Laqué Rupérez, Diario Sur, 9 de febrero de 2014]

«Improcedencia de medidas cautelares para créditos litigiosos existiendo convenio concursal de espera» (Inadmission of precautionary measures regarding litigious claims with an existing creditor´s agreement establishing a deferral) [Gutiérrez Gilsanz, Diario La Ley Digital núm. 8252, 17 de febrero de 2014]

«Nuevas fórmulas para gestionar las deudas empresariales o profesionales. El acuerdo extrajudicial de pagos» (New ways to manage business or professionals debts. Out of court payments agreement) [Lorente Lara, CEHAT, Febrero de 2014]

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