4-2012
October 2012

1. NEW LEGISLATION

1.1 Royal Decree-Law 20/2012, of July 13, 2012, on measures to ensure budgetary stability and on encouraging competitiveness.

This piece of legislation was published in the Official State Gazette on July 14, 2012. Alongside the important new tax legislation it contains, in the ambit of insolvency law it lowered the limit on the amount of unpaid wages and severance that can be paid out of FOGASA, the Spanish wage guarantee fund, as follows:

- For unpaid wages, the limit on the payment of wages out of the wage guarantee fund has been reduced from three times to twice the minimum wage, and the cap has been brought down from 150 days to 120 days.

- For severance, the limit on the daily wage that can be taken as the calculation base has been brought down from three times to twice the minimum wage.

1.2 Royal Decree-Law 24/2012, of August 31, 2012, on the restructuring and termination of credit institutions

This piece of legislation, published in the Official State Gazette and coming into force on August 31, 2012, set out provisions on the early action, restructuring and termination processes for credit institutions, and established the legal rules on the FROB (*Fondo de Reestructuración Ordenada Bancaria*), providing public financial support to banks, and the general rules on its activities. The legislation is aimed at protecting the stability of the Spanish financial system, by reducing the use of public funds to a minimum.

Following this royal decree, the Bank of Spain can now first adopt "early action" measures designed to bring credit institutions failing to meet (or are reasonably expected to fail to meet) the solvency, liquidity, organizational structure or internal control requirements back on the path of compliance. Alternatively, "restructuring" or "termination" measures are provided for credit institutions undergoing financial stress which cannot be remedied with the "early action" measures.

It also sets out the legal rules on the *Sociedad de Gestión de Activos* (the asset management company, more commonly known as the "bad bank"), which will be set up within three (3) months, under the name *Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria, S.A.* All banking institutions which, on the date the new

royal decree comes into force, are majority-owned by the FROB or which, in the opinion of the Bank of Spain, are going to need the commencement of a "restructuring" or "termination" process will have to transfer assets to the "bad bank."

Lastly, the new royal decree provides that if there is an insolvency order on a financial institution, any asset transfers that the institution might have made to the "bad bank" cannot, under any circumstances, be terminated using the clawback actions set out in the Insolvency Law.

Click here for further information on this law.

1.3 Royal Decree 1333/2012, of September 21, 2012, concerning civil liability insurance and equivalent protection for insolvency managers.

This royal decree was published in the Official State Gazette on October 6, 2012 and implements the requirement set out in Law 38/2011, reforming the Insolvency Law, for insolvency managers to take out civil liability insurance –or equivalent protection- to be able to be appointed and act as such.

Having an insurance policy in force –or equivalent protection – is thus as a prior condition for being able to accept the position, which means that insolvency managers will not be able to accept their appointment without proving that they have this cover, which they must keep throughout the insolvency proceeding. The only exception is if a public authority is appointed insolvency manager, or a public law entity linked or attached to a public authority, where an individual who is a public employee is appointed to carry out the duties attached to the position.

The insurance or equivalent protection must provide cover for the potential obligation to indemnify the debtor or the creditor for damage or losses caused to the estate in the insolvency proceeding by the acts or omissions of the insolvency manager in performing his duties, as well as any authorized representative where the insolvency manager is responsible for their activities. Besides, it will cover the damages and losses caused by the acts or omissions of the insolvency receiver that damage the interests of the debtor, creditors or third parties.

The minimum sum that must obligatorily be insured is 300,000 euros. This minimum must however be increased by reference to the number of insolvency proceedings in which the insolvency manager is involved as such, and where the insolvency proceeding is of "special importance" (article 27 bis of the Insolvency Law)

1.4 Circular no. 6/2012, of September 28, 2012 of the Bank of Spain, to credit institutions, amending Circular 4/2004, of December 22, 2004, on rules concerning public and restricted financial information and financial statement formats.

This circular, published in the Official State Gazette on October 2, 2012, placed the financial institutions that are being supervised by the Bank of Spain under obligation to include all of their customers' debt refinancing and restructuring translations as part of

the information that those institutions must disclose in their financial statements. Both of these elements have drawn the attention in recent years of financial information users, but also of the European authorities.

The circular concerns transactions known as refinancing, refinanced, renewal and renegotiated transactions, which are placed in one or other category depending on the creditworthiness of the recipient of the finance. The circular states that financial institutions' refinancing and restructuring policies must focus on the recovery of all sums owed, which implies the need to recognize immediately in the financial statements any and all sums which they consider will not be recovered.

The circular also requires financial institutions to disclose the carrying amount of the aggregate total of their financing transactions, detailing those that have real estate as collateral and those that have other security interests, and breaking down their customers at public authorities, other financial institutions, non financing companies and individual entrepreneurs (with separate information, according to their aim, for construction and real estate development, construction of civil engineering works and other aims; and, for these other aims, for those granted to large enterprises, on the one hand, and to small and medium-sized enterprises and individual entrepreneurs, on the other), and other homes and non-profit institutions serving homes (with separate information, based on their aims, for residence, consumer spending and other aims).

The financial institutions must also provide aggregate information on their concentration of risks, broken down by geographic area and segment of business, and identify the transactions that warrant special monitoring.

2. CASE COMMENTARIES

Supreme Court

JUDGMENT of Chamber I of the Supreme Court dated March 21, 2012. Art. 62.3 Insolvency Law ("LC").-- Termination in the insolvency proceeding of contracts performed over a long period of time due to a breach. Electricity company applied for termination of an electricity contract with a company in an insolvency proceeding or, secondarily, under art. 62.3 LC, for it to be paid out of the assets available to creditors for supplies owed to it before the insolvency order.—The Commercial Court and the Provincial Appellate Court dismissed both petitions.—The Supreme Court held that a terminating breach before an insolvency order remains and continues after it, and therefore the potentially pre-insolvency order claim "crystalizes" as a post-insolvency order claim by reason of the obligation to keep the contract in force, not by a unilateral decision of the supplier but because legally it is required to make a current sacrifice which strips it of the right to terminate compelling it to continue supplying to the person who committed the terminating breach.—Cassation appeal upheld.—The electricity supplied before and after the insolvency order must be paid for out of the assets available to creditors.

Commentary:

The Supreme Court Judgment of March 21, 2012 gave the answer to an important dispute over the assessment of claims arising before the insolvency order and concerning contracts over a long period of time, where the creditor or party *in bonis* applies for termination of the contract and the court imposes mandatory compliance in the interests of the insolvency proceeding.

In the case examined by the Supreme Court, the electricity company applied for termination of the electricity contract by reason of a breach by the insolvent company, stating that if, under art. 62.3 LC, it were forced to continue supplying electricity, the claims arisen before the insolvency proceeding should be paid as post-insolvency order claims.

Both the Commercial Court and the Provincial Appellate Court found that the electricity contract was essential for the continuity of the business of the insolvent company, because if the company stopped supplying electricity, the insolvent company would automatically stop operating. As a result, they compelled them to continue with the contract, although they classified the claims of the supply company as pre-insolvency order claims, because they considered that the claims arose before the start of the insolvency proceeding, and art. 62.3 LC only allowed claims arising after the order to be paid out of the assets available to creditors.

In contrast to the decisions by the lower courts, the Supreme Court held that the outstanding sums for supplies made both before and after the insolvency order must be paid out of the assets available to creditors. The Supreme Court held that supply contracts are a typical example of contracts performed over a long period of time and, as such, the rules contained in the Insolvency Law apply to them.

Therefore, if compliance with the contract is imposed on the supplier under art. 62.3 LC, the Supreme Court takes the view that the potentially pre-insolvency order claim "crystalizes", by reason of the contract being kept in force, as a post-insolvency order claim. The reason being that a current sacrifice is imposed on the supplier, the supplier is stripped of the right to terminate the agreement, and required to continue supplying to the person that committed the terminating breach.

3. HEADNOTES

European Court

JUDGMENT of the European Court of Justice (First Chamber) dated July 5, 2012

Art. 5.1 Regulation (EC) No 1346/2000 on insolvency proceedings.—Application of art. 5.1 of Regulation 1346/2000 to the security interests of a creditor or other party in the assets of a debtor which upon the adhesion by a state to the European Union are in the

debtor's own territory. The commencement of an insolvency proceeding in a member state will not affect the security interests in the debtor's assets which, when the proceeding starts, are in the territory of another state which later becomes part of the European Union, provided the enforcement of the security interest in the recently included state starts after the inclusion and resulting acceptance of Regulation 1346/2000. Otherwise the legislation of the included state will apply.

Supreme Court

JUDGMENT dated April 12, 2012 rendered by Chamber I of the Supreme Court

Art. 71 *et seq.* LC.—Indemnification paid by the insolvent company to a company for unilateral termination of an exclusive distribution agreement, where the termination was a necessary condition to transfer a line of its business to another enterprise, all of which took place before the insolvency order.—The insolvency manager petitioned for clawback of the paid indemnification, while maintaining the transfer of the line of business. The petition was partially upheld by the judge in the insolvency proceeding and by the Provincial Appellate Court, by reducing the paid indemnification.—The appellant argued to the Supreme Court that the clawback must entail, in all cases, recovery of the obligations performed, which cannot take place if the sale of the line of business transferred by the insolvent company is not clawed back simultaneously.—Cassation appeal dismissed.—The Supreme Court pointed out that, although as a general rule, clawback affects the whole of a complex transaction that the parties intended as a whole, the law itself allows the various elements that may be included in a contract or legal transaction to be split up (by keeping them in force, on the one hand, and, on the other, by allowing clawback of specific acts of enforcement and other acts terminating obligations which matured after the insolvency proceeding). There is no obstacle to termination of a specific contract even though it may be economically linked to another. There is no law expressly preventing partial clawback where it is actually possible.—The effects of the clawback do not extend to other acts or contracts which, although related, are not held to be clawed back. Clawback only entails the recovery of obligations performed in cases where liquidation of the post clawback position so requires to keep the balance of obligations, but not in cases where clawback is based on the absence of consideration or on the imbalance determining the loss.

DECISION dated May 14, 2012 rendered by Chamber I of the Supreme Court

Article 8 LC.—Exclusive power of the judge in the insolvency proceeding to entertain any civil suits against the insolvent company's assets. Claim filed against the insolvent company after the approval of the arrangement with creditors. The judge in the insolvency proceeding does not have the authority to entertain the claim. Article 133.2 LC. The approval of an arrangement with creditors renders the insolvency order ineffective, including the conferral of powers on the judge in the insolvency proceeding.—The Chamber clarified that if the judgment that is rendered recognized that the claimant had a claim that arose before the insolvency order, that claim would be affected by the arrangement with creditors.

JUDGMENT dated May 21, 2012 rendered by Chamber I of the Supreme Court

Additional Provision Number One LC.—Breach of an arrangement with creditors approved before the Insolvency Law came into force.—The insolvent companies did not pay off their debts with creditors within the agreed time limits. The claimant petitioned for the arrangement with creditors to be held to be terminated by breach.—The appellate court held that no terminating breach had taken place because the arrangement contained a specific rule for cases where the reduced debts were not paid within the specified term (transformation of the monitoring committee into liquidating committee).— Retroactive application of insolvency law is prohibited by Additional Provision One. Art. 100.3 LC cannot be applied.—The cassation appeal was upheld.—The Supreme Court held that it was not sufficient to apply the derogated law, as required by the general rule on non-retroactive laws, but rather application of the law must be directed towards the aim sought by the Insolvency Law and must observe the spirit underlying it. Additional Provision Number One requires the derogated legislation to be applied in light of the spirit and aim of the law in force, by eliminating from the reach of the arrangement with creditors all activities aimed at liquidating the debtor's assets, by reason of the mutually exclusive nature of the two solutions in the insolvency proceeding.—The court upheld a breach of the arrangement with creditors and ordered commencement of the insolvency proceeding only for the liquidation.

JUDGMENT dated May 25, 2012 rendered by Chamber I of the Supreme Court

Art. 92 LC.— Part of the claim of a guarantor that had performed their obligation as such before the insolvency order on the guaranteed debtor was classified as subordinate; the portion relating to the interest generated by the paid loan.—The interest was classified as a subordinated claim in accord with art. 92.3 LC because it has to be postponed until after the payment of ordinary claims if the pre-insolvency order claims so require. After performing the debtor's outstanding obligation, the guarantor is authorized by law to recover the sums it has paid through action for nonpayment; but in the event of an insolvency proceeding on the guaranteed debtor, the guarantor's claim cannot receive a different assessment when it is subject to action for repayment from the assessment it would originally receive. Under the principle of freedom of choice, the interested parties exclude subordination as an effect of payment, although they cannot escape the claim being assessed in the insolvency proceeding as subordinated in relation to interest.

JUDGMENT dated May 28, 2012 rendered by Chamber I of the Supreme Court

Arts. 51 and 54 LC.—Need for the powers of the insolvency manager and debtor's ability to decide: the lodging of an appeal by the insolvent company only needs the authorization or consent of the insolvency manager where the process had started after the insolvency order. Personal vote: article 51.3 LC must be applied with article 40 LC and, therefore, the consent of the insolvency manager is needed to lodge an appeal against a judgment rendered after the insolvency order, even if the decision is on a proceeding started earlier. Besides affecting the economic or financial interests under dispute, an appeal can entail an expense for the assets in the insolvency proceeding.

JUDGMENTS dated June 20 and June 26 2012 rendered by Chamber I of the Supreme Court

Article 58 LC.—Prohibited compensation: differences between compensation and enforcement of a pledge on financial instruments: creditor's authority to enforce payment against the pledged assets after the insolvency order. The cassation appeal lodged by the financing party was upheld: a reduction in the insolvent company's debt achieved by the institution appropriating the value secured in a financial collateral arrangement cannot be deemed to be compensation. Application of Royal Decree-Law 5/2005, which implemented Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements. Article 15.4, of Royal Decree 5/2005: the right to separate enforcement of the collateral, exercised in this case by the creditor, now the appellant, is not limited, restricted or affected, in any way, by the commencement of an insolvency proceeding by the debtor making the pledge.

JUDGMENT dated July 16, 2012 rendered by Chamber I of the Supreme Court

Art. 172 LC.—The company directors were ordered to cover the shortfall on liquidation. Retroactive application of the law is not allowed where the acts determining the classification of the insolvency proceeding as fault-based were carried out or completed when the debtor petitioned for an insolvency order, while the new legislation was in force.—The law gives broad discretional powers to the judge, which is why the fact of the insolvency proceeding being classified as fault-based does not necessarily and unavoidably lead to the directors of the insolvent company being ordered to pay the shortfall on liquidation of the assets in the insolvency proceeding. It is appropriate for the judge, after casting aside their impact on the generation of worsening of the insolvency proceeding, to take into account the objective seriousness of the acts and the degree of participation in the facts that had determined the classification of the insolvency proceeding. The judge must assess subjective and objective elements of the behavior of each one of the directors in relation to the activities that determined the classification of the insolvency proceeding where the corporate body they are identified with or form part of have been accused of those activities.

Provincial Appellate Courts

JUDGMENT dated December 5, 2011 rendered by Seville Provincial Appellate Court

Article 84.2.2 LC.—Fees of the debtor's lawyer. The tariffs set by Royal Decree 1860/2004, on the tariffs of insolvency managers cannot imply a maximum limit on the fees earned by the insolvent company's lawyer. In this respect: (i) the duties and activities of the insolvent company's lawyer cannot be treated in the same way as those of the insolvency manager; (ii) the agreement reached with the lawyer must be observed, where the insolvency manager never petitioned for the agreement to be rendered invalid; (iii) the lawyer has a right to be paid for any ancillary insolvency proceedings initiated to defend the assets; (iv) the lawyer has a right to be paid for any court proceedings conducted outside the insolvency proceeding seeking, either to increase the assets or avoid an increase in liabilities.

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JUDGMENT dated February 8, 2012 rendered by Valencia Provincial Appellate Court

Art. 71 LC and Art. 86 bis and ter of the Judiciary Organic Law.—Clawback action brought against the Spanish tax agency to claw back for the assets available to creditors the Spanish VAT payment by a mortgage creditor who had been awarded six dwellings that belonged to the insolvent company. Art. 71 LC was not applicable. The activities of the debtor were not examined but rather those of a third party who, as a result of the award in a public tender of several buildings belonging to the insolvent company, made a VAT payment to the tax agency in respect of that transaction.—The return of tax payments considered to be incorrectly made and the related procedure is set out in the VAT Law. Art. 86 ter of the Judiciary Organic Law does not confer authority on the Commercial Court to entertain action to seek the return of an incorrect tax payment. Abuse of the civil jurisdiction.

JUDGMENT dated March 6, 2012 rendered by Madrid Provincial Appellate Court

Art. 109 LC.—An arrangement with creditors approved following amendment by the judge on his own initiative is not enforceable. The judge approving the arrangement does not have the authority to create the rules of conduct, only to control its legality. The judge can approve or reject the arrangement–or agree to having the appropriate formalities repeated with the aim of remedying its defects –, but is not authorized to make amendments to its contents.—If the judge considers it must be amended for strictly legal reasons or in a given interest, an adversarial procedure is needed.—The absence of an adversarial procedure is clearly detrimental and violates constitutional protection, as the creditor who adhered to the advanced proposal for an arrangement cannot revoke their adhesion or object to the amended proposal. The creditor would be tied to an arrangement with different conditions to those it had accepted.

JUDGMENT dated March 13, 2012 rendered by Barcelona Provincial Appellate Court

Art. 192 and Art. 194 LC.—Ancillary insolvency proceeding and action for termination of contract.—Whether the ancillary proceeding to challenge the list of creditors is the right place to air action for termination of a contract and quantification of damages, to determine the creditor's claim on the list of creditors. The appeal was upheld. The auxiliary proceeding to challenge the list of creditors is indeed the right place to set the creditor's claim for damages for breach of contract by the insolvent company: article 192 of the Insolvency Law provides that the any separate legal action that is joined to the insolvency proceeding must be conducted via an ancillary proceeding; this includes the action brought in the complaint.

JUDGMENT dated March 15, 2012 rendered by Asturias Provincial Appellate Court

Arts. 71 *et seq*. LC.—Concurrent guarantees. Clawback action against a strict suretyship entered into by the insolvent company to secure a claim, simultaneously with the formalization of the secured legal transaction.-- At first instance, the commercial court

held that in order to terminate the suretyship entered into at the same time as the loan, the transaction had to be challenged in its entirety.-- In contrast, the Provincial Appellate Court found that clawback action could only be brought against the guarantee for another's debt, since the establishment of the strict suretyship for no consideration by a third party constituted an "unjustified asset trade-off", as it assumed a unilateral obligation with an economic content whose only beneficiaries were the principal debtor and the banking institution. The suretyship was rendered null and void and there was no clawback of obligations.

JUDGMENT dated April 26, 2012 rendered by Barcelona Provincial Appellate Court

Arts. 61.2 LC and 5 Royal Decree Law ("RDL") 5/2005.-- Assessment of claims arising from an interest rate swap agreement as ordinary claims.-- The set-off under article 5 RDL 5/2005 does not relate to the set-off of balances or an internal set-off within a single swap transaction, but rather to a set-off between different transactions, with the result that it does not apply where there is a single transaction.-- The swap could give rise to obligations for both parties, but these would be independent rather than reciprocal obligations.-- The notion of reciprocal obligations outstanding for performance by both parties does not apply here as each payment will be made by one of the parties, for which reason it does not fall within the ambit of art. 61.2 LC.

JUDGMENT dated June 5, 2012 rendered by Guadalajara Provincial Appellate Court

Arts. 84 and 91.2 LC.-- Assessment of withholdings on account of personal work for personal income tax purposes.-- The Supreme Court has held that claims in respect of personal income tax withholdings relating to income or salary paid before the date of the insolvency order must be assessed as pre-insolvency order claims. *A sensu contrario*, if the withholdings relate to salary earned after the date of the insolvency order, they must be assessed as post-insolvency order claims.

DECISION dated June 6, 2012 rendered by Madrid Provincial Appellate Court

Arts. 8, 50 and 133 LC.-- Jurisdiction of the Court of First Instance to hear a debt recovery action against a company in the process of performing an arrangement. -- Under article 133 LC, as soon as the arrangement comes into force, all of the effects flowing from the insolvency order cease and are replaced by the effects provided for in the arrangement, if any. The effects arising from the insolvency order include the conferral of exclusive jurisdiction on the judge in the insolvency proceeding to hear actions raised against the debtor's assets (art. 8.1 LC) and new declaratory actions (art. 50).-- Since the judgment approving the arrangement had ordered the cessation of the effects of the insolvency order, the Court of First Instance had jurisdiction to conduct the debt recovery action.

DECISION dated September 18, 2012 rendered by Pontevedra Provincial Appellate Court

Article 189 LC.-- The court ordered that the conduct of the assessment section be stayed until the criminal courts had delivered a final judgment on the alleged forgery of certain invoices issued to the debtor. Those invoices were also being analyzed by the judge in the insolvency proceeding in order to ascertain whether they related to services actually provided to the insolvent company, to the extent that they could constitute a material accounting irregularity or one that could have prevented an understanding of the debtor's economic or financial situation (article 164.2.1 LC).—Appeal upheld: the Provincial Appellate Court found that the proceeding should not be stayed on the grounds of a preliminary criminal issue to be ruled on because article 189 LC provides that the bringing of criminal proceedings cannot stay an insolvency proceeding: the legislature has thereby opted for speed in the conduct of insolvency proceedings. The foregoing is underpinned by article 163.2 LC which states that decisions taken by the judge in the insolvency proceeding during the assessment section will not bind the criminal courts when trying criminal conduct.

Commercial Courts

JUDGMENT dated May 9, 2012 rendered by Madrid Commercial Court No. 6

Arts. 84 and 154 LC.-- Fees of lawyers and court procedural representatives of the creditor petitioning for an insolvency order.-- Only expenses that directly and immediately derive from the existence of the proceeding will be regarded as post-insolvency order claims, on the basis of article 84.2.2 LC. Expenses and fees or tariffs that do not directly and immediately relate to the necessary technical assistance or procedural representation, or which exceed what is necessary, useful and relevant in order to enable the petitioning creditor to apply for and obtain an insolvency order from a court, must be disregarded and excluded from the assessment of post-insolvency order claims.

DECISION dated May 28, 2012 rendered by Balearic Islands Commercial Court No. 1

Art. 55 LC.-- Lifting of the attachment on collection rights held by the insolvent company against several customers performed by the Social Security General Treasury. Those rights were the only real source of income for the insolvent company and were absolutely essential for the continuity of its business; without them, the business would cease resulting in closure and liquidation.-- Corrective interpretation of article 55.3 *in fine*.-- A finding that an asset or right is necessary for business continuity does not, of itself, permit the cancellation of administrative attachments in enforced collection proceedings pre-dating the insolvency order. However, cancellation is possible if the asset or right is used or disposed of during the insolvency proceeding in order to favor the continuance of the business.

JUDGMENT dated June 12, 2012 rendered by Alicante Commercial Court No. 1

Arts. 1111 and 1291.3 Civil Code-- Application by the insolvency managers for a decision declaring to be null and void a dividend distribution agreement to the sole shareholder of the insolvent company.-- Dismissed. No authenticated proof of defaulted payments to creditors on the dividend distribution date nor as to the likelihood of that circumstance occurring imminently and as a result of an intention to frustrate the creditors' collection rights. The situation of technical insolvency on the date on which the transactions were performed could not be regarded as proven, nor could the allegation that they were carried out fraudulently in connection with the purported insolvency.-- The dividend distribution agreement cannot be classified as an act for no consideration as the materialization of the right to the benefit of the shareholder is inherent in the shareholder's status.

JUDGMENT dated July 2, 2012 rendered by Alicante Commercial Court No. 1

Article 76 LC.—Ancillary proceeding for a finding that an asset held by the insolvent company (collection right against a third party) cannot be used to pay creditors because it belongs not to the debtor but to the plaintiff, a financial institution, following a transfer made before the insolvency proceeding. Procedure: this was not an action for separation under article 80 LC, which would require a prior claim from the insolvency managers and for the asset to be nonfungible. Merits: this was an asset belonging to a third party: transfer of a collection right prior to the insolvency order pursuant to a factoring agreement: the transfer of a collection right that has not been extinguished results in the transferee acquiring ownership of the right on the same terms as the ownership of the transferring creditor. Conclusion: it was proven that the collection right belonged to the plaintiff financial institution that had transferred it with the result that it cannot be regarded as forming part of the assets available to creditors in the insolvency proceeding. The principle of *pars condictio creditorum* was not altered: The fact that the transfer of the collection right could be clawed back because it had been performed during the "suspicious period" for the insolvency proceeding does not prevent its effects being felt in the absence of clawback.

JUDGMENT dated July 23, 2011 rendered by Barcelona Commercial Court No. 10

Article 84.3 LC.-- Postponement of payment of post-insolvency order claims held by workers: the workers demanded payment of severance due to the termination of their contracts: the insolvency managers acknowledged that they had postponed payment of their claims in favor of others that were strictly necessary for the continuity of the business -- Nonapplication of the prohibition on postponing payment of workers' severance: (1) the rule is designed for cases where there are insufficient assets available to creditors (article 176 bis LC); (2) the workers contradicted themselves as they had accepted that payment should be made according to the availability of cash, when they signed the agreement in the collective layoff procedure.-- The court ultimately dismissed the application to suspend the payment of the other prior post-insolvency order claims because to do so would mean that the business could not continue and would directly and adversely affect employment.

DECISION dated September 20, 2012 rendered by Oviedo Commercial Court

Article 84.2 LC.-- Fees of counsel for the insolvent company. Appeal for reconsideration upheld. The court initially lowered the fees on the basis of the moderating rule that they should not exceed the fees charged by the lawyer/insolvency manager.-- On appeal, the court reconsidered its view and set counsel's fees at the same amount as that contained in the fee estimate signed by the company prior to the insolvency proceeding, for several reasons: (i) the existence of a fee estimate or engagement letter pre-dating the insolvency proceeding; (ii) substantiation of the specific steps taken by the lawyer as a result of the insolvency proceeding; and (iii) the nonexistence of damage to the assets available to creditors as a consequence of the approval of an arrangement that did not provide for debt reduction.

JUDGMENT dated September 21, 2012 rendered by Barcelona Commercial Court No. 9

Article 84.3 LC.-- Postponement of payment of post-insolvency order claims held by workers.-- Worker demanded payment of severance due to the termination of his contract. The insolvency manager acknowledged that they had postponed payment of the claims in favor of others that were strictly necessary for the continuity of the business. -- Nonapplication of the prohibition on postponing payment of workers' severance: (i) the rule refers to "claims held by workers", requiring that the workers continue to be active, generating new income; (ii) this is an exception and, as such, must be interpreted narrowly; (iii) the law refers only to "claims held by workers", which is far wider than "employment claims"; (iv) "workers" do not include those who have already left; (v) in the event of there being insufficient assets available to creditors, the payment of severance will indeed be postponed in favor of expenses that are necessary to conclude the insolvency proceeding (article 176 bis 2 LC) and (vi) the exception must be interpreted consistently with the continuance of the business, with the result that if the difficulties in meeting insolvency claims as they fall due nonetheless enable claims to be paid gradually, the payment of post-insolvency claims may be postponed.

DECISION dated October 4, 2012 rendered by Madrid Commercial Court No. 4

Article 25 bis LC.-- Joint insolvency order made against the concession-holder of the R-4 (Madrid-Ocaña) motorway and its shareholder: imminent insolvency: the court held that a single integrated enterprise existed comprising the concession-holder and the holding company, and found the existence of intra-group relationships in the financing agreement and collateral provided by both companies. Article 27.2.3 LC: insolvency proceeding of special importance: appointment of a sole insolvency manager, without prejudice to the appointment of a second insolvency manager if the needs of the insolvency proceeding so require.

4. AWARDS

'Continental Europe's Most Innovative Firm', Financial Times, Innovative Lawyers Awards, 2012

In a repeat of last year's success, Garrigues was named 'Continental Europe's Most Innovative Firm' at the seventh annual FT Innovative Lawyers Awards, an event hosted by the British newspaper, the Financial Times, in recognition of the most innovative initiatives by European law firms. In the ranking published by the Financial Times of the most innovative firms, Garrigues (in 9th place) is the only Spanish firm in Europe's top ten.

"Leader in the Spanish legal industry", according to the Expansión ranking

In the 13th edition of the annual ranking published by Expansión, Garrigues came top yet again in the Spanish legal industry category. The ranking covers a total of forty-eight (48) law firms.

In addition to advice provided in the finance and banking fields, the ranking singled out the energy and healthcare industries as well as litigation work, especially advice on insolvency proceedings.

5. PUBLICATIONS

Publications in English

"The Restructuring Review 2012", Law Business Research

After the success achieved by previous editions of "The Restructuring Review", the prestigious British publishing house, Law Business Research, has once again selected Garrigues' Restructuring and Insolvency Department to compile an overview of the events occurring over the past twelve months in the Spanish legal market for business restructurings and insolvencies.

The full chapter on Spain can be accessed here

"More of a debtor-friendly law but actually a close friend to certain creditors", DebtXplained

DebtXplained is an independent provider of financial information on the European high yield bond markets. DebtXplained offers its reports and tracking products on the secondary markets to a range of investors. Garrigues has prepared a special report on the characteristics of the Spanish Insolvency Law, dealing directly with the areas in which the law protects the interests of insolvent companies and highlighting the advantages that the insolvency rules grant to certain kinds of creditor.

6. EVENTS

Insolvency Forum, Thomson-Reuters Aranzadi 2012-2013

Garrigues has received an exclusive commission from publishing house Thomson-Reuters Aranzadi to monitor and explain current legal developments and legislation in the insolvency field at the Insolvency Forum. The aim of the Insolvency Forum is to act as a meeting point for practitioners and members of the judiciary, based on practice and debate, and to provide regular updates in the areas of insolvency law, the economy and accountancy.

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