GARRIGUES

RESTRUCTURING AND INSOLVENCY

JULY 2016

CONTENTS

1941-2016 GARRIGUES

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01 SELECTED COURT CASES AND MAJOR SETTLEMENTS

1.1. Pacific case: Decision by the Colombian government's companies supervisory authority (Superintendencia de Sociedades), June 10, 2016

A number of companies in the Pacific Group petitioned for the commencement of an insolvency proceeding to the Ontario Superior Court of Justice (Canada) to approve a restructuring agreement. An application for a procedure for recognition of the Canadian insolvency proceeding was later made to the Colombian authority, with the aim, essentially: (i) for it to recognize the primary nature of the Canadian proceeding; (ii) to approve certain necessary protection measures; and (iii) not to decree the commencement of a reorganization proceeding of the Colombian branches of the companies that had already been included in the Canadian insolvency proceeding, because the branches were not in a cessation of payments position.

Concerning the petition to deem the process the primary proceeding, the Colombian authority held that alongside the registered office or principal place of residence of the companies concerned, other reference factors count to determine their center of main interests (among others, the location of their books and records, of their primary assets, of their employees, the location of their main bank, the place where their commercial policy is determined, the place of origin of the law applicable to their main agreements, the place where the administration of cash management systems takes place, etc.). Based on those factors, the authority recognized as the primary proceeding the insolvency proceeding ordered in Canada, and approved: (i) a stay and ban on commencing enforcement proceedings against the property of the debtors located in Colombia and (ii) the continuity of the agreements being performed which were necessary for the continuity of the ordinary business of the branches. The authority did not, however, make any determination regarding the non-commencement in Colombia of a reorganization process on the branches and asserted that this would imply restricting the commencement of those reorganization processes if a cessation of payments took place.

Until the present day, this is the most relevant cross-border insolvency-related case which has occurred in Colombia.

1.2. Baracoa case: Sale of portfolio of nonperforming loans by Cajamar to Baracoa Holdings Designated Activity Company

In July, Cajamar Rural Sociedad Cooperativa de Crédito and the collection of financial institutions in its group (Cajamar Group) completed the sale of a portfolio of more than 2,000 non-performing loans subject to insolvency proceedings with a face value of €530 million. The buyer was Baracoa Holdings Designated Activity Company.

The sale of the Baracoa portfolio is the fifth transaction completed successfully in Spain by Bain Capital Credit (formerly, Sankaty) following the acquisitions of non-performing loans from Bankia (Amazona and Commander projects) and Sabadell (Chloe and Pirene projects).

02 CASE GROUP: BREACH OF CREDITORS´ ARRANGEMENTS

2.1. Judgment by the Supreme Court (Chamber One), April 8, 2016

The insolvent company brought action with a first instance court to make a monetary claim in respect of defaulted rent payments against a creditor, who objected asserting that the claims had been netted against the debts which the insolvent debtor owed to it. The court disallowed the netting after deeming that it was based on a breach of the arrangement with creditors in the insolvency proceeding and

an ancillary insolvency proceeding was the specific remedy to be sought to address this issue, as a result of which it fully upheld the complaint by the insolvent company. The provincial appellate court revoked the judgment and upheld the netting of claims asserted by the creditor. Against that judgment, a cassation appeal for a procedural infringement was lodged by the insolvent company founded on the argument that a decision regarding the netting of claims was the responsibility of an insolvency judge not a first instance judge. In that context, the chamber held that the Court of First Instance had jurisdiction to render a decision on the asserted objection to netting, since this matter is settled by way of a pretrial decision and does not really decide on the netting of claims in an insolvency proceeding or on the breach of the arrangement with creditors, which can only be heard by the insolvency judge. Furthermore, the chamber held that unless there is a decision affirming compliance with or breach of the arrangement, a netting of novated and matured claims according to the arrangement with creditors against the debts which the insolvent debtor owed its creditors in the insolvency proceeding can be upheld.

2.2. Decision by Alicante Commercial Court no 3, May 16, 2016

In the phase for compliance with the arrangement, on determining default on some of its claims, a creditor requested for an attachment to be ordered in enforcement of the judgment rendered in an ancillary insolvency proceeding to challenge the list of creditors in w hich certain claims were recognized to the creditor. The judge held that the judgment recognizing the creditor's claim in an ancillary insolvency proceeding can only be brought into effect within the insolvency proceeding, and is not a valid instrument for a separate enforcement. The court concluded that if the creditor considers that the arrangement with creditors is being breached as a result of default on its claim, that creditor can seek the remedy under article 140 of the Insolvency Law (ancillary insolvency proceeding for breach of the arrangement with creditors), but is not authorized to commence a separate enforcement proceeding in that it would imply an evasion of insolvency rules on the payment of creditors and compliance with the arrangement.

03 INSOLVENCY ROUNDUP

3.1. Design of the Liquidation Plan: Judgment by A Coruña Provincial Court, April 18, 2016

The chamber partially upheld the appeal lodged by the insolvency manager of Martinsa in relation to the following amendments to the liquidation plan: (i) charging taxes on the buyer is not contrary to the law or detrimental to the interests of the insolvency proceeding, provided it does not alter the tax law, because the buyers are free to decide whether to accept the terms and conditions of liquidation; (ii) if due to the complexity of the insolvency proceeding, or to the circumstances of given assets, the insolvency manager needed the services of a specialized firm, the insolvency manager could apply for authorization from the court for the specialized firm's fees to be paid by the buyers; (iii) the liquidation plan can include a provision to remove the registered attachments and encumbrances, so that the transfer of property may be performed free and clear of any encumbrances, and the approval serves as the enabling instrument to remove the encumbrances from the register; (iv) friendly repossession or "dation in payment" (dación en pago) is perfectly acceptable as an alternative liquidation mechanism and does not need the creditors' express consent; and (v) a system of distributing assets by lots and awarding them to subgroups of creditors in proportion to their claims does not prove to be arbitrary or contrary to the pars conditio creditorum (equal treatment for creditors) principle.

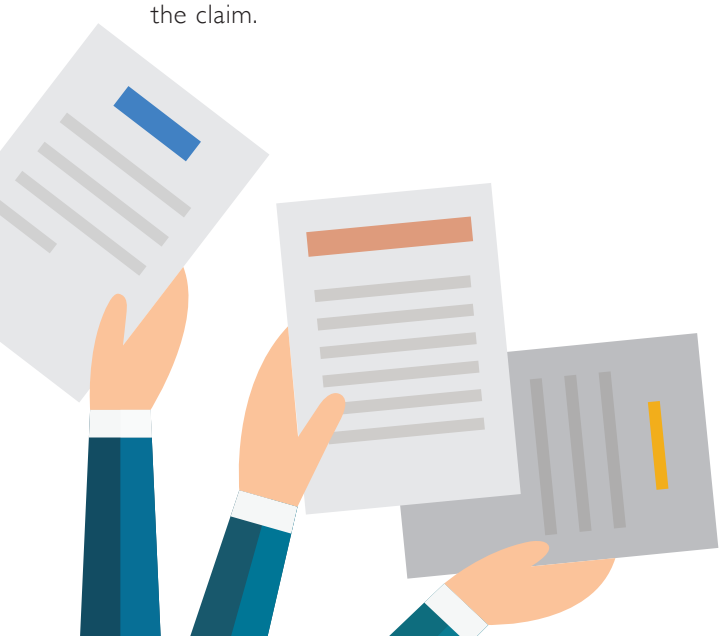
3.2. Assignment of claims and right to redeem the debts at their transfer price under the new Navarra provincial law: Decision by Navarra Provincial Appellate Court, April 27, 2016

The chamber dismissed the appeal and confirmed the judgment of the Court of First Instance which failed to admit an application for an order for payment

procedure because the enforcing party (to whom the claim had been assigned) had not evidenced the price for the assignment of the claim. The chamber held that for the right to redeem the debts at their transfer price under the new Navarra provincial law (which would apply in this case, according to the chamber) the assigned claim does not have to be the subject of a lawsuit (which sets it apart from the pre-emption right (retracto anastasiano) under article 1535 of the Civil Code in which the claim must be a disputed claim) but rather allows the debtor of the assigned claim, regardless of the position of that claim, to free itself of its debt by paying the price paid by the assignee plus all the legal interest and costs caused. This implies, therefore, that the debtor for the assigned claim knows the price of that assignment beforehand, and if it is not known the order for payment procedure cannot be commenced.

3.3. Binding ruling by the Subdirectorate-General for Taxes on Consumer Spending, April 27, 2016

The Subdirectorate-General for Taxes on Consumer Spending concluded that the petition for a necessary insolvency order filed by a creditor cannot in itself be held a 'judicial claim' for the purposes of compliance with requirement 4 of article 80.Four, letter A), of VAT Law 37/1992, of December 28, 1992, which specifies the conditions for deeming a claim fully or partially uncollectible. A petition for a necessary insolvency proceeding does not seek to obtain collection of a claim but only an insolvency order which may or may not give rise to collection of the claim.



3.4. Insolvency manager's fees: Judgment by the Supreme Court (Chamber One), June 8, 2016 (no. 390/2016)

The Supreme Court held that, once the insufficiency of the assets available to creditors has been notified, the insolvency manager's fees will be post-insolvency order claims (and therefore have absolute priority for payment) only if they are in respect of the steps strictly necessary to obtain cash and manage the liquidation and payment. The Supreme Court explained that it is the insolvency managers themselves who must provide precise identification of which steps are strictly necessary to obtain cash and manage the liquidation to enable the judge hearing the insolvency proceeding to evaluate the circumstances justifying the priority payment of these claims. The insolvency managers' other fees, not indispensable for the liquidation transactions, cannot fall under article 176 bis 2.4 of the Insolvency law, because they are not fees for ensuring justice but for administration, and therefore have to be relegated to the category under article 176 bis 2.5 of the Insolvency Law (covering "the other post-insolvency order claims").

3.5. Insolvency manager's fees: Judgments by the Supreme Court (Chamber One), June 8, 2016 (nos 391/2016 and 392/2016)

The Supreme Court clarified that the due date of the post-insolvency order claim related to the insolvency manager's fee is not the date on which they accepted office but rather the date of effective provision of the services according to the due dates on completion of stages in the process under Royal Decree 1860/2004, of September 6, 2004, on the tariffs for insolvency managers' fees. Therefore, the order of priority for payment of post-insolvency order claims according to their due date must be followed, while observing at the same time the respective due dates for the insolvency managers' fee claims. The chamber ordered the insolvency manager to return the collected fee claims to the assets available to creditors to the extent of the amount needed to pay any claims with an earlier due date than his fees.

3.6. Clawback of a pledge established for preexisting obligations: Judgment by the Supreme Court (Chamber One), June 8, 2016

The lower court judgments clawed back a pledge provided to secure a novated claim by reason of the presumed detriment under article 71.3.2° of the Insolvency Law (provision of security interests for preexisting obligations or for the new obligations entered into to replace them). The Supreme Court overturned the clawback, explaining that although the provision of security is effectively an act of disposal which implies a trade-off in assets, in this case, the trade-off is fully justified because correlatively with the provision of the pledge a significant increase in the amount was decided (from 1 million euro to 2.5 million euro) together with an extension of the due date for the novated claim (1 year).

3.7. Assessment of the insolvency: Judgment by the Supreme Court (Chamber One), June 9, 2016

The lower court judgments simply indicated that the company's directors took part in the acts determining the assessment of fault-based insolvency without providing any further justification, and ultimately ordered them to cover the shortfall. The Supreme Court overturned this determination by arguing that order to cover the shortfall requires "further justification", after weighing up the intentional and physical contents of the behavior of each of the directors in relation to the acts determining the assessment of fault-based insolvency.

3.8. Direct action by the subcontractor against the project owner (article 1597 Civil Code): Judgment by the Supreme Court (Chamber One), June 14, 2016

The Supreme Court upheld the cassation appeal and quashed the first and second instance judgments which had upheld the complaint for direct action brought by the subcontractor against the project owner and had ordered the project owner to pay to the subcontractor the sums it owed to the insolvent contractor. The chamber held that the direct action by the subcontractor only falls outside the confines of the insolvency proceeding if it had been brought out of court and brought into effect before the insolvency order, or if the action had been brought in court before the insolvency order. If, however, the direct action takes place after the insolvency order, the action must give way to the insolvency rules under the principle that special rules override general rules and the principle of vis atractiva of insolvency.

3.9. Exceptional payment of pre-insolvency claims before post-insolvency order claims: Decision by Madrid Commercial Court no 1, June 24, 2016

Following a petition by the insolvency manager, the judge hearing the insolvency proceeding authorized on an exceptional basis the payment in advance of preferred claims and a portion of the ordinary unsecured claims before the payment of the post-insolvency order claims, provided: (i) provisions have been set up to satisfy any post-insolvency order claims expected to be generated, contingent claims and claims that have been challenged; (ii) provisions have been set up to ensure that the creditors holding specially preferred claims who have not secured the payment of all their specially preferred claims paid with the sale of the assets provided as security do not later find that the remainder of their unsecured claim is paid in a lower percentage than the claims of the other creditors in their same class; and (iii) the insolvency manager submits a report specifying the schedule for advanced payments, the updated status of available cash, the total amount in the provisions that have been set up and the percentages of the claims that will be paid. The court also clarified that (i) an advanced payment cannot be authorized if it only benefits certain classes of creditors or alters the legal priority for payment; and (ii) the ability to make an advanced payment requires prior court authorization.

04 NEWSFLASH

4.1. Insolvency law reforms have reduced the number of companies in insolvency

According to a report prepared by the Bank of Spain on the reforms of the Insolvency Law, the insolvency law reforms over recent years appear to have made the insolvency proceeding a more attractive alternative (than company liquidation and mortgage foreclosure). The Bank of Spain explained that these reforms are also reportedly reducing the number of insolvency proceedings ending in liquidation, increasing the number of arrangements with creditors and making these proceedings shorter in length.

According to data from the commercial registry registrars, the number of insolvency proceedings ending in liquidation has fallen from 92.77% (2009) to 89.4% (2015).

4.2. Drop in the number of insolvency proceedings

According to recent figures from the Spanish Statistics Institute (INE) the number of insolvency proceedings ordered in Spain has fallen again in the first quarter of 2016.

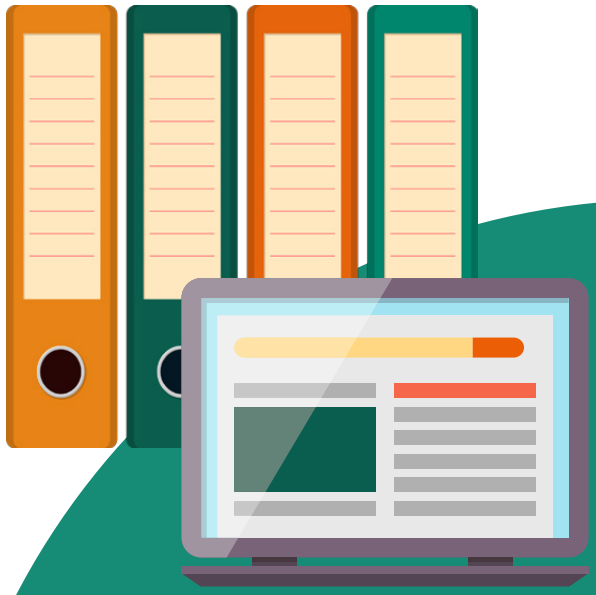
According to the INE, in the first quarter of 2016 the number of insolvent debtors was 1,171, which meant a 27.6% drop year on year. By type of proceeding, ordinary proceedings decreased by 28.5% and abbreviated proceedings, by 14.4%. Following the figures for the first quarter of 2016, the number of insolvency proceedings has now been falling over nine consecutive quarters.

4.3. Rise in the percentage insolvency proceedings ordered and simultaneously dismissed

Although the overall number of insolvency proceedings continues to fall, the same cannot be said for the number of insolvency proceedings ordered and simultaneously ended. These cases totaled 126 in Barcelona and 55 in Madrid. While these figures remained unchanged from 2015, in percentage terms they showed increases of 35% and 19% respectively, due to the overall year on year drop in the number of insolvency proceedings.

4.4. TP Ferro's creditors ask the judge for liquidation of the company

The bank and fund creditors of TP Ferro, the concession holder for the railway tunnel connecting Figueres and Perpignan, have asked the insolvency judge not to admit the proposal for an arrangement submitted by the company and to commence the liquidation phase in the insolvency proceeding. The proposal for an arrangement sets out, among others, the deferral of payments by more than ten years, the supply of new financing by its own creditors and the conversion of €292 million in preferred debt (of the close to €400 million) into a participation loan.



05 GARRIGUES ARCHIVES

5.1. Articles

• **«¿Leyes de insolvencia y garantías mobiliarias, se repelen?»** ("Do insolvency laws and collateral have a repelling effect on each other?") [De la Calle Restrepo, Bogotá], La República, June 14, 2016.

• **«Loan portfolio sales: developments and areas of uncertainty in relation to non-performing loan claims»** [Verdugo García, Madrid], Expansión, July 15, 2016.

• **«Brexit in legal check?»** [Verdugo García, Madrid], El Norte de Castilla, July 22, 2016.

5.2. Publications

• **Uncertainties arising from Brexit in relation to international litigation and corporate restructuring and insolvency matters**

Commentary describing some of the main problems and uncertainties that the United Kingdom's departure from the European union will mean in matters such as choice of court clauses, recognition and enforcement of judgments, choice of law and cross border restructurings and insolvency proceedings.

5.3. Events

International events in which our experts have recently taken part or will take part shortly:

• **"TMA Europe Annual Conference"**, Turnaround Management Association, June 9, 2016, Rome.

Juan Verdugo participated in the panel: "Latest trends, techniques and tools for SME debt restructuring in the main continental european jurisdictions".

Adrian Thery acted as moderator in the panel: "Equity cram-down and EU harmonization".

• **"International Conference: The treatment of shareholders' rights in the insolvency of companies"**, Banca d'Italia & Universitá degli studi Firenze, June 23, 2016, Rome.

Adrian Thery took part in the panel: "What role for shareholders in various insolvency systems around the world".

• **"Insol Europe Annual Congress"**, Insol Europe, September 24, 2016, Lisbon.

Adrian Thery will take part in the panel: "Liability & Finance (Director and/or Lender)".

• **"International Conference: The implementation of the New Insolvency Regulation – Improving Cooperation and Mutual Trust"**, Max Planck Institute for International, European and Regulatory Procedural Law, October 7, 2016, Luxembourg.

Adrian Thery will participate in the panel: "The applicability of the EIR on pre-insolvency and hybrid proceedings".

• **"International Conference: Actualité du droit européen"**, Conseil National des Administrateurs Judiciaires et Mandataires Judiciaires (CNAJMJ), October 20, 2016, Paris.

Adrian Thery will take part in the panel: "Harmonisation des droits nationaux: de la Recommandation du 12 mars 2014 à l'initiative législative de la Commission européenne de 2016".

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

Adrian Thery will take part in the panel: "What insolvency law should apply to corporates in the European Union? Debate on the publication of the report produced by the Association for Financial Markets in Europe and the report of the Haut Comité Juridique de Place."

5.4. New acquisitions

Iván Heredia Cervantes has joined Garrigues as a new team member. Iván is a tenured lecturer in private international law at Universidad Autónoma de Madrid, has a doctorate in law and furthered his studies at Max Planck Institut in Hamburg and at Oxford University. Between 2009 and 2012 he was Subdirector-General for Notaries and Registries and he has written a wealth of books and articles on international civil litigation law and international insolvency.

Iván's arrival has reinforced the Restructuring and Insolvency Department and prepared it in advance for the future entry into force in 2017, of the new Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20, 2015 on insolvency proceedings.

Garrigues has thus reaffirmed its position as a leading firm in the management of cross-border insolvency proceedings with an international component.

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