GARRIGUES Newsletter

Restructuring and Insolvency Work

May 2014

Index

I. New Legislation

1. Law 1/2014, of February 28, 2014 for the protection of part-time workers and other urgent economic and welfare measures

March 1, 2014 saw the publication in the Official State Gazette of Law 1/2014, of February 28, 204, for the protection of part-time workers and other urgent economic and social measures, which came into force the following day.

The most important new legislation in the field of insolvency law is the amendment to article article 64 of the Insolvency Law (Ley Concursal or 'LC') to adapt it to the changes made to labor and employment law in relation to the negotiating committees for collective layoff procedures. The adaptation of the LC has put an end to any doubts that article 41 of the Spanish Workers' Statute applies for these purposes.

The new article 64 LC will apply to any insolvency proceedings that were in progress on August 4, 2013, and therefore the new rules on the formation of negotiating committees will apply for both the application and voting processes in collective layoff procedures in insolvency proceedings (adoption of measures involving collective termination, temporary interruption or amendment of the insolvent company's employment contracts).

(i) Negotiating committee members

The new rules on the negotiating committee are based on the premise that it must only consist of labor union or worker-elected representatives at the workplaces ultimately affected and have up to 13 members, determined as follows:

- If the measures affect only one workplace, the committee members will be: (i) from the labor union branches where they so decide, provided they have majority representation on the works council or among the personnel delegates; (ii) if the labor branches do not accept membership, the members will be taken from the works council or personnel delegates; (iii) if there are no such legal representatives, an ad hoc committee must be appointed with three members democratically elected from among and by the workers; and (iv) in the absence of any of the above, an ad hoc committee of three members must be appointed by the most highly represented labor unions.

- If the measure affects more than one workplace, the committee members will be: (i) from the labor union branches where they so decide, provided they have majority representation on the works council or among the personnel delegates; (ii) if the labor branches do not accept membership, the members will be taken from the central works council as appointed in the collecting labor agreement; (iii) if there is no central works council, an ad hoc committee must be formed with thirteen members appointed from among the various central representatives (works councils and labor union delegates); (iv) if any of the workplaces does not have any central representatives, a 13-member committee will be formed consisting of central representatives and ad hoc representatives of the workplace/workplaces in a proportionate number to the workers they represent; and (v) if none of the workplaces have representatives, a committee will be set up with 13 members consisting of ad hoc representatives of the workplaces in a proportionate number to the workers they represent.

(ii) Time periods for forming the committee

The time period for forming the committee is now 7 days if all the workplaces have central representatives (works councils or personnel delegates), or 15 days if any of the workplaces do not have any such representatives.

If the negotiating committee is not formed in those time periods, the workers' legal representatives will be allocated by the judge in the insolvency proceeding to a representative committee (formed by up to three members and consisting of the labor unions representing the highest number of workers and those representing the sector to which the enterprise belongs).

(iii) Decisions by majority

The decision on the collective measures affecting the employment contracts will have to be approved by a majority of the members of the negotiating committee or, in the absence of a negotiating committee, of the representative committee, provided, in both cases, they represent the majority of the workers at the workplace or workplaces affected.

2. *Commission recommendation, of March 12, 2014, on a new approach to business failure and insolvency*

In 2012, the European Commission launched a consultation process for revision of Council Regulation (EC) No. 1346/2000, on insolvency proceedings, to assess the functioning of this regulation in its first ten years. The generalized opinion after this consultation process is that the Regulation, which arose out of the member states' shared wish to coordinate their various legal insolvency regimes, has operated satisfactorily as a general rule, although there is ample scope for improving and perfecting it.

Following a first report by the Commission on the reforms that could be made, on February 5, 2014, the European Parliament voted in favor of most of the modifications to the Regulation suggested by the Commission and proposed various amendments, before returning an alternative version to the Commission.

A significant number of the reforms suggested by the Commission and of the proposals and amendments by the European Parliament have been included in this recent Commission Recommendation, published in the Official Journal of the European Union on March 14, 2014.

The objective of this nonbinding Recommendation is to encourage member states –while waiting for the reform of Council Regulation (EC) No. 1346/2000, on insolvency proceedings to be concluded- to provide a framework that will enable efficient restructuring of viable enterprises in financial difficulties, and give honest entrepreneurs a second chance, to promote entrepreneurship, investment and employment and contribute to reducing the obstacles to the smooth functioning of the internal market.

The Commission's main recommendations to the member states have to do with encouraging them to address in their respective legal systems, and preferably before September 14, 2015, methods and reforms in the following fields:

- Creation of preventive restructuring frameworks;

- Creation of frameworks that facilitate negotiations by viable enterprises in financial difficulties on restructuring plans, through the appointment of a mediator and staying enforcement actions;

- Laying down the minimum contents of restructuring plans, identifying the various classes of creditors that may exist and a procedure for the restructuring plan to be confirmed by a court body, so that they may take effect in relation to dissenting creditors or creditors not participating in the negotiations;

- Protection of fresh money provided in a preventive restructuring;

- Legal framework for a second chance or fresh start for honest entrepreneurs.

II. Case Commentaries

Decision dated March 17, 2014 rendered by Granada Commercial Court number 1

Article 5 bis LC.—Prior notice of negotiations with creditors ("pre-insolvency notice").—Application of the insolvency reform under Royal Decree-Law 4/2014, adopting urgent refinancing and restructuring measures.—Petition filed before the entry into force of the insolvency reform: The judge applied the new reform because that was the legislation in force when the court examined the case, although the notice took effect from the filing date at the court.—Effects of the notice: secret nature of the notice, stay of ordinary enforcement action brought by a creditor with a financial claim against necessary assets and rights (cash, among others) and lifting of any attachments placed in that ordinary enforcement proceeding.—Other issues explored by the judge: (i) Ability to lift attachments: they can be lifted if placed under ordinary enforcement action, but not if the attached assets are encumbered with the security interest being enforced, in which case the enforcement of the security interest may be halted but the approved attachment measures on the secured asset would stay in place; (ii) Jurisdiction of the judge in the insolvency proceeding: the judge has jurisdiction to stay or halt enforcement action conducted at other courts; (iii) Effects of the notice: full and automatic staying effects were granted to the notice under article 5 bis LC, but it appears the creditor affected by the stay is authorized to object to the measures affecting it.

Commentary

One of the most important new changes made by Royal Decree-Law 4/2014, of March 7, 2014 adopting urgent measures on business debt refinancing and restructuring, extends the effects afforded to the notice under article 5 bis of the Insolvency Law ("pre-insolvency notice"). Specifically, the law allows that notice to be filed to stay any enforcement proceedings brought against the debtor.

The reform entered into force on March 8, 2014, whereas in this case the notice was sent to the court on March 7, 2014. The judge held, however, that in certain circumstances the royal decree-law allows it to take effect on notices filed earlier. Besides, in this case, the insolvent debtor expressly asked for it to be applied after the entry into force of the reform and, as a result, for the new effects to come into play. The court therefore held that the parties could elect the new regime under article 5 bis LC, although it clarified that the four month time period must be computed from the filing date of the notice.

The decision also clarified the various options or scenarios provided in the new article 5 bis LC for halting enforcement proceedings, by identifying three different scenarios:

- Enforcement proceedings on "necessary" assets by unsecured creditors:

  From when the notice is filed no enforcement proceedings can be commenced on assets that prove "necessary" for the continuity of the debtor's professional or business activities. Any that might have already been started on those types of assets will be stayed.

- Separate enforcement proceedings by creditors with financial claims:

  From when the notice is filed no separate enforcement proceedings by creditors with financial claims under additional provision four LC (also amended) can be commenced and any that are in progress will be stayed, provided it is substantiated that a percentage of 51% or higher of those creditors supported the commencement of negotiations aimed at the signing of a refinancing agreement.

- Enforcement by secured creditors:

  Secured creditors can commence an enforcement proceeding against the assets and rights provided to them as security, although the proceeding will be halted until the end of the stay period under article 5 bis LC.

One of the main issues that has appeared since the publication of Royal Decree-Law 4/2014 is over the jurisdiction of the courts when determining whether or not the assets are "necessary." The decision presented in this commentary makes a systematic interpretation to confer that jurisdiction to the commercial court judge, who is the recipient of the notice under article 5 bis LC.

Moreover, the new article 5 bis LC does not lay down any specific procedure for declaring that the asset that is, or likely to be, the subject of an enforcement proceeding is "necessary." For these purposes, the court contemplated two possible scenarios:

- The debtor's notice and resulting decision by the commercial court judge must include the assets that the debtor considers "necessary" for its activity.

- The declaration of being "necessary" may be extended to take in a specific asset or specific assets if after the filing the notice under article 5 bis LC, the debtor substantiates their necessity on the basis of certain documents.

In the case under examination, the court chose the first scenario.

Lastly, the decision clarified that the stay of enforcement proceedings in progress must apply equally to the cancellation of any attachments that might have been placed on necessary assets, since otherwise, the measure would not be operative. As an exception in relation to the specific assets or rights in which a security interest is being enforced, the law allows the proceeding to start and determines it will later be halted. The term "halt" is different to "stay" (this being the only scenario in which, according to the judge, attachments may be lifted). Therefore, the judge held that the attachment measures adopted in the enforcement proceeding started by a secured creditor, even if it has been halted, must continue.

III. Headnotes

1. Supreme Court

1.1 Judgment dated February 12, 2013 rendered by Chamber I of the Supreme Court

Articles 61.2 and 90.1.4º LC.—Classification of claims in respect of the payments under finance lease agreements that fell due after the insolvency order on the finance lessee. The provincial appellate court had classified the claims as specially preferred pre-insolvency order claims, confirming the view taken by the judge in the insolvency proceeding. Cassation appeal: the appellant, who stated that the agreement does not specify that the lessor has fulfilled its obligations in full, affirmed that the finance lease is an agreement with reciprocal obligations for both parties until its total completion, and therefore requested that the claims be classified as post-insolvency order claims.-- Dismissed.—Definition of "reciprocal obligations": neither the Insolvency Law nor the Civil Code define the meaning of reciprocal obligations: from the consequences the Civil Code affords to them, that reciprocity requires that: (i) each party must be creditor and debtor of the other simultaneously; (ii) each obligation must be a token of exchange, a token of value, or consideration because they each depend on each other, even if there is no objective or subjective equivalence in value between both obligations; and (iii) both obligations must be principal obligations in the functioning of the contractual relationship.—Difference between the "genetic phase" of the relationship (referring to when the obligation is created) and the "functional phase" (focusing on the time of performance and that both obligations have to be performed simultaneously).—The finance lessee does not acquire a security interest in the asset, but the right to use the property of another, and the lessor accepts the obligation to allow undisputed enjoyment of that property for the lessee. Therefore it may be said that the finance lease agreement, in abstract terms, generates reciprocal obligations even though the values of the obligations may not be equivalent.—By validly altering any of the characteristic elements of the defined agreement, the parties may invalidate the lease elements of the finance lease. As a result, the decision on the reciprocity of the obligations under the finance lease in this specific case does not have to be based on the obligations that the lease agreement imposes by definition.—In this case, the finance lessor had already fulfilled all its obligations once the agreement had been created, by making the asset available to the lessee, and therefore the Supreme Court concluded that the claims in respect of the finance lease payments falling due after the insolvency order must be classified as specially preferred pre-insolvency order claims.

1.2 Judgment dated February 19, 2013 rendered by Chamber I of the Supreme Court

Articles 61.2 and 90.1.4º LC.—Classification of the claims in respect of finance lease payments that had fallen due and were not paid after the insolvency order.—The insolvency judge found that the lessor's obligations were performed completely upon the acquisition of the specified item by the recipient and the lease to that recipient, and therefore, if this obligation was performed before the insolvency order, the only obligations outstanding were the debtor's. As a result those claims must be classified as pre-insolvency order claims.—The provincial appellate court arrived at the same conclusion by affirming that the lessor released itself from any liability for action in connection with defects in the assets being leased.—Cassation appeal: dismissed: the appellant contended that the finance lease has a high lease component, which means that the lessor is under obligation both to deliver the asset and also to allow undisputed enjoyment for the lessee over the term of the agreement.—Reciprocal obligations exist where, as consideration under the same contract, duties to perform an obligation arise for both parties, provided the obligations are mutually dependent on each other, and can therefore be considered to be connected by a causal link: reciprocity does not require equivalence in their

values but both obligations do have to be principal obligations in the functioning of the contractual relationship.—The reciprocity of the duties may be observed in the "genetic phase" of the relationship (when it is created) but, for the purposes of article 61 LC, it must also exist later, in the "functional phase" of the relationship and, also, after the insolvency order has been handed down.—The asignee of the right to use the item has a right to claim against the finance lessor which entitles it to use the item and its correlative obligation for the lessor is to provide this use to it: However, the content of that right of the finance lessee and the related duty to perform an obligation for the finance lease enterprise can only be identified from the validly stipulated terms, and in the absence of those terms, from the natural content of the agreement. The clauses validly stipulated by the contracting parties need to be examined to determine whether the legal relationship created under a finance lease agreement continues to function as a bilateral contract after the insolvency order has been issued. In this case, the agreement frees the finance lessor from indemnification for ejectment of title and for defects in the asset, and from the necessary repairs to keep the asset in perfect working order.—Although the lessor does continue to have the obligation not to disturb the lessee's possession of the asset, this is nothing more than a general duty of conduct, implicit in pacta sunt servanda (allowing peaceful enjoyment of the item), insufficient to classify the lessor's claim as a post-insolvency order claim.

1.3 Judgment dated November 6, 2013 rendered by Chamber I of the Supreme Court

Article 71 LC.—Clawback action: effects on the earlier assignment of receivables of the standstill ordered on assignor's payments.—Facts of the case: signature of a credit facility agreement which the borrower (assignor) secured by assigning a receivable consisting of a series of payments that the borrower was due to receive in the future from a third party. After this transaction, the assignor was the subject of a standstill order on payments and the third party made the payments directly to the assignee.—As a result, the assignor filed a complaint asking for the payments made by that third party to the assignee to be clawed back to the assets available to creditors.—The complaint was upheld in full at first instance, and the assignee was ordered to give back all the sums received.—At second instance, the provincial appellate court partially upheld the assignee financial institution's appeal, by reducing the sum to be clawed back because certain sums had never been paid to the assignee but had gone directly towards paying third parties.—Cassation appeal lodged by the assignee: upheld: what the assignor and assignee stipulated was not a "pledge of receivables" but an "assignment of receivables" pro solvendo (to secure payment), so the assignment of the receivable to the assignee financial institution worked as security for the repayment of the loan provided to the assignor in the event of its default.—Importance in a standstill on payments for the assignor of the distinction between a "pledge of receivables" and "assignment of receivables" pro solvendo: in the case examined the assignment took effect from when it was stipulated, because at that time the defining features of the assigned receivable were adequately determined, without the need for a subsequent legal transaction or specific act of delivery. Because the assignment of the receivable took place in advance, the assignor forfeited its power of disposal over the assigned receivable: the receivable concerned is created immediately in the assignee's "mind", on the basis of the already conveyed expectation of acquisition while the assignor still had unrestricted power of disposal over the asset.—The assignment's full effectiveness as a transfer of the receivable operates not only when it has been performed pro soluto (for payment), but also when it is done pro solvendo (to secure payment).—As a result, the receivable must be seen as already having been transferred before the start of the standstill on payments for the assignor and, therefore, the assigned receivable cannot be clawed back to the assets available to creditors.

1.4 Judgment dated December 4, 2013 rendered by Chamber I of the Supreme Court

Article 84.2.5º LC.—Submission by the Spanish social security authorities (Tesorería General de la Seguridad Social or "TGSS") of an ancillary claim seeking recognition of a post-insolvency order claim including the social security surcharges generated after the insolvency order.—The first-instance judgments partially upheld the ancillary claim and recognized the unpaid social security contributions after the insolvency order as a post-insolvency order claim, but refused to allow the surcharges for nonpayment to be classified as such, because they were ancillary obligations.—Cassation appeal lodged by the TGSS: upheld: the Supreme Court held that the surcharges are also post-insolvency order claims: indeed, article 84.2.5º LC confers post-insolvency order status on claims generated by the debtor carrying on its professional or business activities after the insolvency order, without making any special provisions concerning social security contribution surcharges, unlike the surcharges falling due before the insolvency order, which are classed as subordinate claims.—The surcharges will have the same post-insolvency order status as the claim on which they arose, under the rule that subjects ancillary debt to the same classification as that warranted by the principal debt.

1.5 Judgment dated February 11, 2014 rendered by Chamber I of the Supreme Court

Articles 61.2 and 90.1.4º LC.—Classification of claims in respect of payments under finance leases that fell due and were unpaid after the insolvency order.—For the payments owed after the insolvency order to be able to be classed as post-insolvency order claims, it is necessary for the debtor's duty to perform an obligation to be reciprocal with respect to the obligation accepted by the creditor, and for both to be outstanding.—In this case, the Chamber held that, although the finance lease is a reciprocal agreement when it is created ("genetic phase"), in the so-called "functional phase" the parties' obligations are no longer reciprocal. The Supreme Court Tribunal held that the lessor did not have reciprocal obligations outstanding, since: (1) the agreement sets out (i) the release from liability for the lessor for the condition of, and potential defects in, the leased item; and (ii) the assignment to the lessee of the right to action against suppliers and third parties related to a failure to deliver and the related terms and conditions, and any resulting from the warranty, technical assistance and after-sales service; (2) the finance lessor's obligation not to disturb the lessee's possession of the good is nothing more than a duty of general conduct implicit in pacta sunt servanda (allowing peaceful enjoyment of the item), which is insufficient to determine that the lessor has an outstanding reciprocal obligation.—For these reasons, the court concluded that because of the nonexistence of reciprocal obligations outstanding, the payments owed after the insolvency order could not be classed as post-insolvency order claims, and retained their status as specially preferred claims.

1.6 Judgment dated February 25, 2014 rendered by Chamber I of the Supreme Court

Article 8.1 LC and article 1597 CC.—Direct action by the subcontractor against the owner of the construction project after the contractor assigned its claims against the owner in respect of that project to a financial institution.—In a special appeal concerning a procedural infringement, the owner of the project (i) questioned the jurisdiction of the court of first instance to entertain the direct action; and (ii) pleaded an infringement of article 43 of the Civil Procedure Law (Ley de Enjuiciamiento Civil or "LEC") (preliminary civil issue to be ruled on) arguing that the process needed to be stayed because an insolvency ancillary proceeding was in progress in which the parties were the contractor (insolvent debtor) and the owner of the project.—The special appeal was dismissed on a procedural infringement: the Chamber held that (i) the judge in the insolvency proceeding is not responsible for entertaining the direct action, because the action was not brought against the assets of the contractor (insolvent debtor) but against owner of the project; and (ii) there is not a preliminary civil

issue to be ruled on because the judgment on the direct action, according to how the dispute was brought, could not affect the preconditions for the direct action (because the contractor would still hold a claim against the owner of the project).—In the cassation appeal, the owner of the project contended that the requirements for the subcontractor to bring the direct action had not been met: no claims between the owner of the project and the contractor because of the assignment by the contractor of all its receivables to a financial institution: upheld: for direct action to be brought, it is a necessary requirement for a debt to exist between the owner of the project and the contractor when the claim is made. The Chamber considered that the assignment of the receivables that the contractor had against the owner of the project was a fully effective transfer before the direct action was brought, and, besides, was notified to that principal. The transfer of receivables takes effect not only when the assignment has been performed pro solute (for payment), but also when it has been performed pro solvendo (to secure payment), and therefore, even in the case of an assignment of receivables for factoring with recourse, the assignee fully acquires the assigned receivable. In this case in which the assignment of receivables was done under a factoring without recourse arrangement, the transfer of ownership of those receivables is even clearer.—The effect of the assignment of receivables before the insolvency proceeding on the contractor (insolvent debtor and assignor) is that they should not form part of the assets available to creditors.

1.7 Judgment dated February 28, 2014 rendered by Chamber I of the Supreme Court

Article 42 of the Commercial Code.—Groups of companies acting as a single integrated enterprise and principle of "piercing the corporate veil".—The court of first instance dismissed a monetary claim brought by the claimant and partially upheld the claim for damages brought by the defendant not only as a counterclaim against the claimant but also against other companies in the same group.-- Appeal: the companies ordered to pay lodged an appeal which was partially upheld to modify the decision slightly.—Cassation appeal: the appellants pleaded an infringement of the principle of "piercing the corporate veil", by arguing that, as far as they were concerned, they were independent from the principal claimant against whom the counterclaim had been brought, and that they had no obligations whatsoever under the agreements that the principal claimant signed at the time with the counterclaimant. Dismissed: the counterclaim was brought against a group of companies, seeking a decision that all the companies acted as a single integrated enterprise, governed by the same decision-making power, which was sufficient justification for all of them to have standing to be sued as codefendants. The Chamber held that the codefendants were nothing more than instruments of an economic unit which, by reason of the business being organized into divisions, adopted separate corporate forms: the dispute must be resolved globally, by ignoring the independent legal personalities that each of them wanted to assert with respect to the various agreements at issue. As a result, "piercing the corporate veil" was allowed so as to prevent absolute respect for the personality of each of the companies unreasonably causing detriment to the lawful rights and interests of third parties.—The Supreme Court confirmed that the following elements were relevant in this case: (i) interference by the controlling company in the agreements which it claimed were unrelated to it; and (ii) the very significant fact that all the companies had the same registered office.—Groups of companies and the principle of "piercing the corporate veil": the connection between the companies may be established in a way that does not fall within the provisions in the specific legislation on groups of companies acting as a single integrated enterprise. The real determining factor in this case was proof that there were several enterprises–with their own legal personality–which participate in trading operations, for their own ends, with the aim to benefit from each other's existence, which has nothing to do with whether or not they conform properly to the legislation on groups of companies acting as a single integrated enterprise.

1.8 Judgment dated March 17, 2014 rendered by Chamber I of the Supreme Court

Article 96 LC.—Challenge of the list of creditors.—At first instance, the application to include a post-insolvency order claim for damages as a result of a strike by employees of the insolvent company, which forced the claimant to stop operating.—The provincial appellate court dismissed the appeal lodged by the defendant in relation to this point.—Cassation appeal: dismissed.—The ancillary proceeding can be used to include a post-insolvency order claim: there is nothing to prevent the nature, existence and amount of a post-insolvency order claim for damages in respect of a strike at the insolvent company from being debated in a procedure to challenge the inventory and list of creditors, by bringing for this purpose declaratory action for noncontractual liability, because a secondary petition had been made for it to be included and recognized as a pre-insolvency order claim.—In any event, the claim for compensation could not be recognized on any of its conditions (as a pre- or post-insolvency order claim).—In the Chamber's view, insufficient proof had been provided of the causal relationship (necessary condition to claim noncontractual liability) between the insolvent debtor's liability and the damage caused to the creditor.—Absence of contributory negligence: because the appellant failed to pay what it owed to the insolvent company, that company failed to pay its employees' salaries, which led to industrial action, and therefore it was unfair for the appellant to benefit by receiving compensation for this situation.

1.9 Judgment dated March 25, 2014 rendered by Chamber I of the Supreme Court

Article 61.2 LC.—Classification of claims in respect of the payments under a finance lease that fell due and were unpaid after the insolvency order.—Ancillary claim against the modification of the classification of the claims that appeared in the report by the insolvency manager, who was appointed at the start and later replaced by another insolvency manager because of a joinder of insolvency proceedings. The new insolvency manager replaced the original classification as post-insolvency claims of the payments that fell due after the insolvency order to class them as specially preferred claims.—The Commercial Court dismissed the ancillary claim and ruled to retain the modification of the list of creditors in relation to the claim recognized for the claimant.—Appeal: upheld: the provincial appellate court held that the modification sought by the new insolvency manager was not lawful, because the original classification had not been challenged within the statutory time limit.—Cassation appeal lodged by the insolvent debtor: dismissed: reciprocal obligations are involved where, as consideration under the same contract, duties to perform an obligation arise for both parties, provided the obligations are mutually dependent on each other, and can therefore be considered to be connected by a causal link.—The reciprocity of the duties may be observed in the "genetic phase" of the relationship (when it is created) but, for the purposes of article 61 LC, it must also exist later, in the "functional phase" of the relationship and, also, after the insolvency order has been handed down. However, the content of that right of the finance lessee and the related duty to perform an obligation for the finance lease enterprise can only be identified from the validly stipulated terms, and in the absence of those terms, from the natural content of the agreement: the clauses validly stipulated by the contracting parties need to be examined to determine whether the legal relationship created under a finance lease agreement continues to function as a bilateral contract after the insolvency order has been issued.—In this case, the parties did not produce the nine finance lease agreements executed to be able to be examined and determine the content of the transaction under them, from which any reciprocal obligations taken on by both contracting parties may be observed. Therefore, unable to pronounce a decision on its content, the court had to dismiss the appeal.

1.10 Judgment dated April 1, 2014 rendered by Chamber I of the Supreme Court

Articles 2.2 and 165.1 LC and article 262.5 of the Spanish Corporations Law (Ley de Sociedades Anónimas or "LSA").—Assessment section.—The first and second instance judgments assessed the insolvency as fault-based and held that the corporate directors of the insolvent company were affected by that assessment.—Cassation appeal: upheld.—Legal definition of insolvency: it is different from an equity imbalance.—Assessment of the insolvency as accidental: the lower courts' judgments incorrectly treated the technical insolvency (objective precondition for an insolvency proceeding) the same as if there were a ground for dissolution because the company's losses had reduced equity to below half of the capital stock (a precondition for action for liability for debts under article 262.5 LSA). Book equity can be below half of the capital stock, and assets can be below liabilities and the debtor can still meet its obligations as they fall due by obtaining financing. The determining factor to observe whether the precondition under article 165.1 LC is met is technical insolvency, and not an equity imbalance or the statutory ground for dissolution as a result of aggravated losses.—The corporate directors were acquitted from the orders for their liability issued against them.

1.11 Judgment dated March 27, 2014 rendered by Chamber I of the Supreme Court

Article 164.2.5º LC and article 1291.3 of the Civil Code.—Petition for an insolvency order with a simultaneous petition for liquidation.—At both first and second instance, the insolvency proceeding was assessed as fault-based, under article 164.2.5º LC (fraudulent dealings in the debtor's assets or rights), and the person affected by the assessment was the insolvent company's sole director.—Cassation appeal: dismissed.—The fraudulent element in the dealings with assets and rights as set out in that article must be related to that required in article 1291.3 of the Civil Code for clawback action based on fraud: it is not necessary for there to be animus nocendi (intention to cause damage or harm), it being enough for there to be scientia fraudis (knowledge that harm is being caused). Because these circumstances relate to what goes on inside the individual's head, which is difficult to prove, the intentional element may be inferred from conclusive facts that necessarily determine the existence of fraud.—In the case under examination, there was fraud, because the director and sole shareholder of the insolvent company used a company asset to discharge his own personal loan. Besides, he did so through an illegal capital reduction, by not being registered at the Commercial Registry, which was clearly detrimental to creditors, who could not take any measures, or even know about it.

2. Provincial Appellate Courts

2.1 Judgment dated October 17, 2013 rendered by Girona Provincial Appellate Court

Article 122.1.2º LC.—A creditor was deprived of the right to vote at the meeting because it had acquired its claims after the insolvency order.—The insolvent company appealed against the deprival of the right to vote for that creditor, a decision that proved to be a determining factor for failure to approve the arrangement with creditors.—The Chamber held that the fact of there being no fraudulent intent in acquiring the claims does not prevent the literal wording of article 122.1.2º LC from being applied. The only element that needs to be confirmed is whether the acquisition took place in an inter vivos act or whether it was a universal acquisition.—The appellate court ruled out a universal acquisition, because the new creditor did not acquire all the debt relationships held by the transferors (in other words, all the assets and liabilities of an economic unit or of a line of business), but only the debts those transferors were owed by various debtors (the insolvency company, among them).—The appellant insolvent company did not provide sufficient proof that the company acquiring the claims was an institution subject to

financial supervision.—For all of the above reasons, the Chamber held that the court acted correctly by depriving the company that acquired the debts of a vote, and therefore dismissed the appeal and confirmed the lower court's judgment.

2.2 Judgment dated October 29 rendered by Las Palmas Provincial Appellate Court

Article 71 LC.—Clawback of spinoff transaction.—In the context of a spinoff, the insolvency manager sought clawback of the valuations incorrectly attributed to the insolvent debtor, which only benefitted the other beneficiary of the transaction.—The lower court's judgment dismissed the clawback action in the insolvency proceeding by holding that: (i) clawback action is not allowed in an insolvency proceeding against acts performed under a capital restructuring transaction; and (ii) there was no detriment because none was observed at the correct time by either the insolvent company or the creditors who were informed of the transaction, who failed to exercise their right to timely objection or to challenge it.—Appeal: upheld: the Insolvency Law does not rule out the option to bring the clawback action under article 71 LC to challenge acts or decisions entailing structural modifications of capital: the relevant factor is not the nature of the act that is challenged but whether that act meets the requirements laid down in article 71 LC.—After confirming that the spinoff took place within the two year period before the insolvency order, it must be examined whether the challenged spinoff resolution may be held to be detrimental to the insolvent company's assets available to creditors: The insolvent company's creditors are both those it had before the spinoff and those that became creditors after the spinoff, as well the original creditors of the other company who, as a result of the resolution, became creditors of the company now under an insolvency proceeding.—The creditors' right to object to the spinoff does not prevent them from bringing clawback action in an insolvency proceeding, given that the scenario envisaged for bringing clawback action is an insolvency scenario: whereas, the starting out context for a structural modification transaction involves solvent companies able to perform their obligations and not qualifying for a ground for dissolution: the differences in aim, subject-matter and standing to exercise these rights makes it completely impossible to claim that the protection for creditors that the right to objection involves can "replace" the protection conferred by clawback actions in insolvency proceeding.—The spinoff can be used spuriously to the detriment of creditors, workers or other interested sectors: the detriment to the assets available to creditors has an effect on all the creditors, and not only on those who were creditors of the company performing the spinoff and those of the beneficiaries of the spinoff when it was performed, given that what is evaluated is the inability to receive payment in respect of all the insolvent parties' obligations, to which the challenged act contributed.—The allocation to the other beneficiary of the spinoff of a value higher than 50% of the value of the equity of the company performing the spinoff (in which the insolvent company was shareholder owning 50% of its capital stock) involves an apportionment for no consideration of the value of equity above the amount it should have received, and therefore article 71.2 LC applies.—The clawback action was upheld: effects: it is legally impossible for the clawback to return things to the position they were in just before the spinoff: the insolvency manager confined his claim to remedying the detriment caused as a result of the difference in the value of the apportionment of equity, by claiming the amount that would make both parties to the spinoff receive equal apportionments, which the Chamber agreed to allow.

2.3 Judgment dated December 16, 2013 rendered by Zaragoza Provincial Appellate Court

Articles 164.and 166 LC.—Assessment of fault-based insolvency.—The insolvency was held to be fault-based at first instance, and the directors and a supplier of the company who was held to be an accomplice were held liable.—Appeals were lodged by insolvent company's directors (partially upheld) and the accomplice (fully upheld).—The directors were held to have been at fault: it was evidenced that the financial statements were not filed within the term and that the

require adjustment to the accounts was delayed, both factors contributed to an opaqueness regarding the company's real economic position and caused an increase in its insolvency: that conduct caused a material inaccuracy in the accounting records, which was a ground for fault under article 164.2.1ª LC. The directors must accept liability for neglect or the absence of qualification on the part of the people in charge of keeping the accounting records.—Order to cover the shortfall in the insolvency proceeding: to render a decision in this respect, the judge must assess, under the rules in the law and to support the necessary apportionment of blame, the various elements concerning the intent and acts of each of the directors in relation to the conduct that had influenced the assessment of the insolvency as fault-based. Given that the lower court's judgment increased the amount ordered to be paid to cover the shortfall with respect to the amount requested by the insolvency manager and the public prosecutor, this meant that the judge went beyond the petition, with a breach of article 218.1 LEC.—Complicity of the supplier: the lower court's judgment accused the supplier of: (i) continuing to supply goods to the insolvent company that it did not pay for, until it notched up a debt of €14 million; and (ii) knowing about the economic situation of the enterprise, later the insolvent debtor.—The Chamber revoked the lower court's judgment on this point: the accounting records provided by the insolvent debtor to the supplier provided justification for a certain margin of risk in relation to the volume of business because they disclosed high inventory levels which served as security for the supplies made. They also recorded the existence of payments for most of the supplied goods.—Concerning the allegation that the supplier knew about the financial situation of the insolvent debtor, the evidence taken showed otherwise: the commercial, financial and accounting information that the insolvent debtor provided to the supplier was inaccurate, and therefore it could not be concluded that the supplier knew, or could have known, about the insolvent debtor's situation.—Complicity requires participation that is only accessory, not essential, to the conduct of another, whereby any cooperation is not enough, but that cooperation must consist of an act that formed the ground for the insolvency proceeding being assessed as fault-based, and only in that case can it be at fault.—The described conduct, which was supplying goods without claiming their price for years, not only had not been evidenced, but did not even bear any relation to the grounds for fault that were upheld.—In short, the creation or aggravation of the insolvency of the insolvent debtor by reason of willful misconduct or serious fault, concerning the creation of a debt with the appellant, cannot per se be a ground for fault.—The costs of the party initially held to be an accomplice were awarded against the insolvency manager.

2.4 Judgment dated December 20, 2013 rendered by Burgos Provincial Appellate Court

Articles 84.2 and 96.1 LC.—Challenge of the list of creditors.—The tax agency ("AEAT") asked for the personal income tax withholdings due in respect of unpaid wages before the insolvency order to be treated as tax claims, not as employee wage claims.—In principle, the withholdings must be included in the insolvency proceeding as an employee claim because it is a sum forming part of a wage, even if it is deducted from it. However, if, as in the case in the proceedings, in the common phase of the insolvency proceeding the wages before the insolvency order are paid by the wage guarantee fund (FOGASA) without deducting the withholdings, the employees must be left off the final list of creditors, because the entire amount of their claims has already been paid.—The fact that it is the employees themselves who must pay over the personal income tax liability to the tax agency does not preclude the withholdings being included as a tax claim payable to the tax agency because the extinguishing effects of the payment made by the wage guarantee fund cannot extend to a third party, such as the tax agency: failure by the wage guarantee fund to withhold tax upon payment of the wages to the employees does not release the party legally required to make the withholding, which is the insolvent debtor.—Partially upheld: the appellate court revoked the lower court's judgment, and included in the insolvency proceeding the claims in respect

of personal income tax withholdings, held by the tax agency and classified as them "post-insolvency order claims" because the time that counts is when the payment was made by the wage guarantee fund (after the insolvency), even if the wages fell due before the insolvency order.

2.5 Decision dated January 17, 2014 rendered by Madrid Provincial Appellate Court

Articles 188.3 and 197.4 LC.—Court authorization: appeals regime: the commercial court rendered decisions authorizing the direct disposal of certain assets during the insolvency proceeding. Appeals were lodged against those decisions by a creditor bank, and both were dismissed. The bank then sought to lodge another appeal that was not admitted for consideration.-- Appeal against the denial of leave to appeal: the appellant bank alleged that, given that article 197.4 LC grants the right to deferred reproduction of the matter at issue in the closest appeal, if there were signs that that closest appeal might not take place it should be granted the chance to lodge a direct appeal, thereby allowing it to exercise its right to "two instances," because it had not been given the chance to exercise its deferred right to appeal.-- Dismissed: the deferred appeal established in article 197.4 LC can only be made where there is a vehicular decision that may give rise to the closest appeal procedure.—You cannot try to make directly appealable a matter that would only have been able to be heard at second instance though the deferred appeal procedure: Acting otherwise would be a clear departure from what had been provided by the legislator.—The Insolvency Law is complete in relation to appeals, and therefore it is not possible –as the appellant has done – to call on the Civil Procedure Law as secondary legislation.—If the legislator has not conferred on the party to the lawsuit the right to appeal against a decision, or has deferred his right power to do so, his right to effective defense (article 24.1 Spanish Constitution) cannot be held to be violated since the right to an appeal does not stem directly from the Constitution, but from the provisions in procedural laws.—The legal interest that a case may arouse is no justification for avoiding the procedural rules governing the right to an appeal, which insurmountably bind the courts.

2.6 Judgment dated January 17, 2014 rendered by Castellón Provincial Appellate Court

Article 71 LC.—Clawback action for a mortgage and assignment of receivables.—At first instance, the clawback of both transactions was upheld on the basis that they were detrimental to the assets available to creditors.—Appeal: dismissed.—The creation of a mortgage to secure a future or conditional obligation is not an act of disposal for no consideration, but the creation of security for the payment obligations related to the supply of products, and therefore the legal presumption concerning the detrimental nature of the challenged transaction does not apply.—Definition of a transaction in the ordinary course of business: these are transactions which because of their economic characteristics are those that explain the enterprise's daily and completely normal activities: they must have the usual characteristics for their class, fall within the ordinary trading operations normally carried out by the debtor and not be exceptional, because they respond to the usual way in which those transactions are performed by both the debtor and in the economic trading sector in which the debtor operates. Determining which transactions qualify as such in the debtor's ordinary professional or trading activities is definitely case-specific, because it is not easy to establish finite general categories.—In this case, the supply transaction bears a relation to the insolvent debtor's corporate purpose and belongs to its trading operations, and therefore, from this standpoint, it is an ordinary transaction, but it cannot be forgotten that the clawback relates to the creation of a security interest in real estate: in relation to this collateral, it is a well-known fact that before the creation of the security interest the same enterprises were in relationships of the same type, and no mortgage had been created to secure the payment of its obligations by the party that is now insolvent debtor: this means that the transaction at issue cannot be determined as a transaction in the ordinary course of business or a transaction on ordinary

conditions.—In relation to the assignment of receivables performed by the insolvent debtor, the suspicion aroused by it being performed three days before the petition for an insolvency proceeding cannot be overlooked, as it brings to light the favorable treatment of one creditor above all the others, when the difficult situation it was experiencing was clear to the assignor. Therefore, the assignment of receivables must also be clawed back.

2.7 Judgment dated February 3, 2014 rendered by A Coruña Provincial Appellate Court

Article 71 LC.—Clawback action on mortgages provided the insolvent debtors to a third party.—The insolvency manager sought clawback of the mortgages that the insolvent debtors had provided to a third party as countersecurity for some guarantees provided by the third party to the group's parent company, which had requested for them to be used as security for a financial restructuring transaction for bank debts and to provide fresh working capital.—Contextual security: the provision of guarantees among group companies cannot be treated as a gift, if that the action is justified by the interest of the group of a whole, which acts as consideration. Article 71.4 LC applies, and therefore the insolvency manager is responsible for proving that the creation of the mortgages caused detriment to the assets available to creditors.—The Chamber considered that the creation of the security did not cause a detriment to the assets available to creditors for the following reasons: (i) that act was performed within a financial restructuring transaction; (ii) in this transaction funds were obtained to restructure liabilities and obtain the necessary cash, which, although requested by the parent company, benefitted the subsidiaries in the business group; (iii) the transaction was clearly of interest to the whole group; (iv) at the time it was provided, the contextual security did not cause an unjustified tradeoff in the financial transaction as a whole; (v) the transaction was beneficial for the group's subsidiaries and for the guarantors, by implying a significant reduction to the claims that the parent company had against shareholders and group companies.—The appellate court held that, in view of the absence of evidence of the detriment to the assets available to creditors, the appealed judgment had to be revoked and the complaint dismissed.

2.8 Decision dated March 3, 2014 rendered by Madrid Provincial Appellate Court

Articles 8 and 71 LC and article 721 LEC.—Adoption without hearing the party concerned of injunctive remedies by the judge in the insolvency proceeding (Alteco-Gecina case). Injunctive remedies requested by the insolvency manager before bringing clawback action. Purpose of the injunctive remedy: stay of the out of court enforcement of financial security (pledge of listed shares of a French enterprise, which were owned by the insolvent debtor). The pledge, subject to Luxembourg law and provided to several financial institutions had been the subject of a stay of execution by the insolvency judge.—Appeal: appeal lodged by the financial institutions was upheld.—Nature of the ancillary proceeding for objection: a mechanism to preserve the principle of allowing an adversarial proceeding in cases where there is seen to be justification for this, if an injunctive remedy has been adopted without hearing the affected parties. The Chamber explained that the ancillary proceeding for objection is aimed at preserving the balance between the parties, momentarily disturbed for reasons of urgency or efficiency, but this does not imply a reversal of the burden of proof, as was held in the appealed decision. A reversal of the burden of proof would unjustifiably place the financial institutions affected by the measures in a worse position in the proceeding, firstly because they have to endure an injunctive remedy without being heard, and then they also have to evidence that the requirements for adopting the remedy were not met. – The Chamber held that the judge in the insolvency proceeding did not assess the material allegations for objection by the financial institutions: existence of procedural infringement consisting of failure to give any consideration to a core allegation by the financial institutions with infringement of the basic right to effective remedy before a court.—The injunctive remedy was lifted due to the nonexistence of fumus bonis iuris or the appearance of a good legal basis: the Chamber held

that the requirement for the appearance of a good legal basis had been invalidated for three reasons: (i) The insolvency judge did not apply article 17 of Royal Decree 5/2005 ("shield" for financial security against the insolvency): the pledge created under Luxembourg law was untouchable under article 13 of Council regulation (EC) No 1346/2000, on insolvency proceedings; (ii) absence of prima facie evidence of the detriment that was caused to the insolvent debtor by the novation of the credit facility agreement (a novation that was the precondition for the clawback action sought as an injunctive remedy by the judge in the insolvency proceeding); and (iii) article 15.5 Royal Decree 5/2005: absence of allegation and proof (if applicable) that the novation of the credit facility agreement was an act performed in fraud of the creditors' rights.

3. Commercial Courts

3.1 Decision dated April 16, 2013 rendered by Málaga Commercial Court No. 1

Articles 176 bis.4 and 178.3 LC.-- Insolvency order and conclusion of insolvency proceeding concerning a company due to insufficient assets available to creditors (concurso exprés or "fast-track" insolvency proceeding).-- In a single decision, the court handed down an insolvency order against a company and ended the insolvency proceeding due to there being insufficient assets available to creditors, because the company did not have sufficient assets or any cash whatsoever to pay the post-insolvency order claims (including the fees of the insolvency manager). The company will not even be able to bring collection proceedings as it would be unable to meet the attendant expenses.-- As a result of the insolvency order and conclusion of the insolvency proceeding due to insufficient assets under Article 176 bis.4 LC, the court ordered the extinguishment of the company and the removal of its registration at the Commercial Registry.

3.2 Decision dated May 10, 2013 rendered by Málaga Commercial Court No. 2

Articles 176 bis.4 and 178.3 LC.-- Insolvency order and conclusion of insolvency proceeding concerning two companies due to insufficient assets available to creditors (concurso exprés or "fast-track" insolvency proceeding).-- In a single decision, the court handed down an insolvency order against both companies and ended the insolvency proceeding due to there being insufficient assets available to creditors, because: (i) the companies did not have sufficient assets – except for shares in another company also under an insolvency proceeding and small VAT refunds remaining to be received – to meet the attendant expenses of the insolvency proceeding, the post-insolvency order claims and the pre-insolvency order claims; (ii) there was no justification for commencing an insolvency proceeding with the sole aim of settling possible clawback actions or actions for liability against third parties, as there are civil law remedies available for that purpose; and (iii) the insolvency order alone would generate expenses, such as the fees of the insolvency manager which, obviously, could not be paid by either company.-- As a result of the insolvency order and conclusion of the insolvency proceeding due to lack of assets under Article 176 bis.4 LC, the court ordered the extinguishment of both companies and the removal of their registration at the Commercial Registry.

3.3 Decision dated May 22, 2013 rendered by Madrid Commercial Court No. 11

Article 197.6 LC.-- Appeal against a judgment approving an arrangement with creditors. Application for stay of enforcement of the arrangement. The insolvency manager had previously brought action against the appellant creditor, seeking that the real estate

mortgages and pledges securing pre-existing debts be held unenforceable and be terminated, and that the claims held by that creditor be stripped of their preferred status and given ordinary or subordinate status.-- The appellant, who held more than half of the pre-insolvency order debts, appealed against the judgment approving the arrangement and sought a stay of the enforcement of that arrangement until disposal of the appeal, in order to prevent the insolvent debtor from distributing certain sums among the unsecured creditors during the period between the lodging and disposal of the appeal, which would cause a significant loss of liquid assets to the insolvent debtor.-- Article 197.6 LC provides that the court may, when admitting the appeal for consideration, acting on the request of a party or on its own motion, order a stay of acts which may be affected by the outcome of the appeal.--Partial and temporary stay of an arrangement with creditors: the period of time in which the stay of the arrangement must take effect should be the period between the date on which the appeal against the judgment approving the arrangement was admitted for consideration and the date on which that appeal is disposed of by the provincial appellate court.-- Partial stay of the enforcement of the arrangement: only relates to the proceedings that may be affected by the decision that may be handed down on the appellant's petitions.-- Whilst it is true that non-appellant creditors may be affected by the stay on enforcement of the arrangement, the detriment that may be caused to them must be viewed alongside the potential irreparable detriment that may be caused to the appellant creditors if the requested stay is not granted. Stay of enforcement of the arrangement granted as regards the advance payment provided in one of its clauses to the ordinary creditors or creditors holding generally or specially preferred claims who had adhered to the arrangement.

3.4 Judgment dated December 3, 2013 rendered by Oviedo Commercial Court No. 3

Articles 93.2.2 and 96.1 LC.-- Ancillary claim filed by a creditor seeking amendment of the provisional report and recognition of his claim as an ordinary claim, as the insolvency manager had classified that claim as subordinate because the creditor was a "de facto director" of the insolvent debtor.—Definition of "de facto director". It must be evidenced that the person has control in practice over the management of the business.-- Requirements defining a de facto director: (i) they must have taken on management functions which are reserved by law to the actual or de iure directors; (ii) those management functions must have been discharged continuously; and (iii) those functions must have been carried out from a position of complete independence.-- Claim upheld and finding that the plaintiff was not a "de facto director". The evidence taken was not sufficient to conclude that the plaintiff had participated in the management of the insolvent debtor, and controlled the actions of the actual director of the insolvent debtor. Furthermore, the type of debt notified, which was accepted as being purely "commercial" and having arisen from the supply of goods, did not entail specific conduct on the part of the plaintiff that would have caused detriment to the insolvent debtor and benefitted the plaintiff as a result, conduct which could substantiate or reveal the existence of conduct more akin to that of a de facto director than a real supplier.

3.5 Judgment dated December 3, 2013 rendered by Oviedo Commercial Court No. 3

Articles 93.2.2 and 96.1 LC.-- Ancillary claim filed by a creditor seeking amendment of the provisional report and recognition of his claim as an ordinary claim, as the insolvency manager had classified that claim as subordinate because the creditor was a "de facto director" of the insolvent debtor.—Definition of "de facto director." It must be evidenced that the person has control in practice of the management of the business.-- Requirements defining a de facto director: (i) they must have taken on management functions which are reserved by law to the actual or de iure directors; (ii) those management functions must have been discharged continuously; and (iii) those functions must have been carried out from a position of complete independence.-- The plaintiff's status as "de facto director" was upheld. It was apparent from

the documentation supplied that the plaintiff effectively and continuously issued orders to the insolvent debtor's actual director. The court referred to various e-mails which demonstrated that the actual director was a person who had been interposed between the plaintiff and the insolvent debtor, and it was the plaintiff who gave orders regarding the collective layoff procedure, staff supervision, financial management, etc. Reference was also made to the existence of a financing facility granted by the plaintiff to the insolvent debtor, financing which was not connected to any previous commercial relationship but which preceded the plaintiff's "takeover" of the insolvent debtor and the appointment of the actual director as a "conduit" for the plaintiff's orders.

3.6 Decision dated December 11, 2013 rendered by A Coruña Commercial Court No. 2

Article 40.4 LC.—Temporary removal of the insolvent debtor's powers to manage its assets and conferral of those powers on the insolvency manager for the time needed to prepare the financial statements.-- Article 40.4 LC provides that the court may modify the powers of the insolvent debtor at the request of the insolvency manager, provided that the debtor is heard.-- The court refused to remove the debtor's management powers, as it might destabilize the insolvent football club and prevent new signings during the "winter market".-- Nonetheless, the court considered it appropriate to temporarily remove the debtor's powers to manage its assets only as regards preparation of the financial statements, since: (i) the creditors' meeting was due to take place shortly and there was an urgent need for financial statements to be prepared which present a true and fair view of the financial and net worth position of the insolvent football club; and (ii) the financial statements would be prepared by the insolvency manager, which would ensure that they gave a true and fair view.

3.7 Decision proposing reference for a preliminary ruling dated December 11, 2013 to the European Court of Justice from Barcelona Commercial Court No. 3

Article 149.2 LC combined with article 5 of Directive 2001/23/EC, 148 LC and article 44 of the Workers' Statute.-- Award of a production unit during the liquidation phase. The liquidation plan provided for the sale of the insolvent debtor's production unit without subrogating the purchaser to the obligations of the insolvent debtor/seller, namely, its tax and social security obligations.-- The purchaser consisted of some, but not all, of the workers of the insolvent debtor/seller.-- The court order approving the sale of the production unit was appealed by the social security authorities and by a group of workers who, in turn, had sued the purchaser at the labor courts, before the transfer took effect.-- The court questioned the relationship between, of the one part, article 149.2 LC and related provisions and, of the other, article 5 of Directive 2001/23/EC combined with articles 3 and 4. To that end, the court filed a reference for a preliminary ruling with the European Court of Justice on the basis of seven questions, including the following: (i) As regards the transfer of production units or undertakings that have been judicially or administratively declared insolvent and in liquidation, can Directive 2001/23/EC be interpreted not only as safeguarding of contracts of employment but also as making it certain that the purchaser will not have to be liable for debts incurred before the award of that production unit?; (ii) Does the wording of Article 149(2) LC, when it refers to the transfer of an undertaking, constitute the provision of national law required by Article 5(2)(a) of Directive 2001/23 for the exception to operate?; and (iii) If this is so, must the award order issued by the court conducting the insolvency proceeding and which contains these guarantees and safeguards at all events be binding on all other courts or in administrative proceedings that may be brought against the new purchaser in respect of debts incurred before the date of purchase, with the result, therefore, that Article 44 of the Workers' Statute cannot render ineffective Article 149(2) and (3) LC?

3.8 Decision dated January 10, 2014 rendered by Cádiz Commercial Court No. 1

Article 40.4 LC.-- Unanticipated alteration of the situation with respect to the oversight of the insolvent debtor's powers over its assets. The insolvency manager applied for the oversight mechanism to be replaced by the suspension mechanism, given the board's inefficient management of the insolvent debtor.-- An application to alter the insolvent debtor's asset management powers requires a proper statement of reasons, weighing up the risks to be averted and the advantages sought to be obtained.-- The existence of a viability plan does not consist in announcing the company has a plan, but in explaining, structuring, defining and providing details of the plan from the standpoint of what is prudent and feasible. There was no basis for giving the insolvent debtor's board a second chance to propose a viability plan and the strategies to be implemented: since there had already been a delay of one year and three months, there could be no further delay in adopting the measures necessary to ensure the continuity of the business, the preservation of the assets available to creditors and the defense of the rights of creditors.-- The temporary removal of the managing body's powers is an ideal measure: it seeks to prevent mismanagement and legal action taken to clarify the ownership of the majority shareholding in the insolvent debtor from interfering and undermining the viability of the company.-- The mere oversight of the powers of the directors – which was initially prescribed in the insolvency order – was clearly insufficient. There was an urgent need to create trust among the creditors and suppliers of the insolvent debtor by coordinating the management of the business and its finances, preventing the differences of opinion affecting the divided shareholders from extending to that task, it was essential to offer clarity and transparency. Based on Article 40.4 LC, the court ordered the removal of the asset management powers of the insolvent debtor. That did not entail the removal from office of the directors, but rather that their powers would be exercised in future by the insolvency manager.

3.9 Decision dated January 10, 2014 rendered by Madrid Commercial Court No. 10

Articles 176 bis.4 and 178.3 LC.-- Insolvency order and conclusion of insolvency proceeding concerning two companies due to insufficient assets available to creditors (concurso exprés or "fast-track" insolvency).-- In a single decision, the court handed down an insolvency order against two companies and ended the insolvency proceeding due to there being insufficient assets available to creditors to meet the necessary expenses of the insolvency proceeding, the post-insolvency order claims and pre-insolvency order claims. The assets of the two companies classified as insufficient were as follows: (i) collection rights which would be difficult to enforce; (ii) stocks and personal property which would be difficult or costly to sell; (iii) a mortgaged property whose appraised value was insufficient to pay off the debts.-- Furthermore, there was no likelihood of bringing action for clawback, challenge or third-party liability, or of the insolvency being found to be fault-based, nor were the debts sufficiently secured by third-parties.-- As a result of the insolvency order and conclusion of the insolvency proceeding due to lack of assets under Article 176 bis.4 LC, the court ordered the extinguishment of both companies and the removal of their registration at the Commercial Registry.

3.10 Decision dated January 15, 2014 rendered by Oviedo Commercial Court No. 3

Article 96.1 LC and Article 2.d of Legal Aid Law 1/1996.-- Appeal by the insolvent debtor against an interlocutory order admitting an ancillary insolvency claim for consideration. The insolvent debtor alleged that the claimants had not paid the relevant fee.-- Appeal dismissed. The claimants – workers, in this case – were exempt from payment of the fee as it was held that the action brought by means of the claim – challenge against the inventory – was directly linked to the "effectiveness of employment rights in insolvency proceedings", to which reference is made in article 2.d of Legal Aid Law 1/1996, of January 10, 1996. The

establishment of the value of the assets marks the starting point for the realization of those assets (in the event of liquidation), which may have tangible consequences on the payment in full of the pre-insolvency order claims, as well as on the portion that is ultimately left unpaid.

3.11 Decision dated January 30, 2014 rendered by Madrid Commercial Court No. 8

Article 25 LC.-- Joinder of insolvency proceedings ("Astra-Air Comet" case).-- The insolvency manager of a company (Astra) applied to the court to have its insolvency proceeding joined to that conducted by the court in respect of another group company (Air Comet).-- Rules on the joinder of insolvency proceedings. Explanation of its scope. Joint and coordinated conduct of proceedings.-- The court conducting the insolvency proceeding on Air Comet held that Air Comet and Astra constituted a single integrated enterprise, for which reason the joinder must be allowed (under Article 25 bis.1 LC).-- Limited effects of the joinder of insolvency proceedings. The court dismissed the application for substantive consolidation, clarifying that, in all cases, the authority to apply for such consolidation lies exclusively with the insolvency manager in either of the joined insolvency proceedings.-- In the present case, it was the debtor (Astra) who had applied for substantive consolidation without the agreement of its insolvency manager and without the insolvency manager of Air Comet having adopted a view on the matter.-- In any case, the court held that, since the deadline for the report to be issued by the insolvency manager of Air Comet had expired and no challenge had been raised on that ground, the application by the debtor (Astra) was also late.-- Scope of substantive consolidation under Spanish insolvency law: (i) exceptional option; (ii) an essential principle of Spanish property law is that the obligation must arise between debtor and creditor; (iii) only for reasons of material justice (fraud or abuse) can this essential principle be transgressed (theory of lifting of the corporate veil under corporate/commercial law, or the theory of single employers under labor/employment law); (iv) in Article 25 bis.1 LC, the legislator did not wish to extend those reasons of material justice to substantive consolidation, which will be carried out "for the purpose of drawing up the report of the insolvency manager"; (v) however, this literal interpretation must be qualified, as after the substantive consolidation has taken place for the purpose of the report, the creditors in each insolvency proceeding will extend their payment expectations to the assets available to creditors in both insolvency proceedings; and (vi) substantive consolidation is only possible when there are "intertwined assets", a concept which the decision also discusses (mixing of elements of the companies' equity , which affects those elements generally or in their vast majority, both assets and liabilities alike, because the definition of "equity" includes both elements).-- Substantive reasons which prevent substantive consolidation: (i) in the case under examination, 90% of Astra's debt was owed not to Air Comet, but to a specific financial institution, with the result that the obligation-based relationship was clearly established; (ii) in addition, the third-party payments, under which Air Comet paid on behalf of Astra, are clearly accounted for in the reports of the insolvency manager and appear in the assets and liabilities of both companies; (iii) the distribution of functions among companies in the same group does not provide a sufficient basis for ordering consolidation – this is a legitimate practice within groups of companies; (iv) the fact that other group companies besides Air Comet and Astra internally account for payments made by one on behalf of another does not signify that the assets are intertwined because these are acts carried out by a third company and because there was no evidence of operations using a common cash pool as the mechanism for settling debts deriving from third-party payments.

3.12 Decision dated January 31, 2014 rendered by Oviedo Commercial Court No. 3

Article 148 LC.-- Double appeal filed by a banking institution (creditor-transferor) and SAREB (creditor-transferee) against the order awarding SAREB real property belonging to the insolvent debtor awarded in payment of its specially preferred claim.-- First ground of appeal: the award decision under appeal included assets which were not used or necessary for the

business of the insolvent debtor and which were subject to ongoing foreclosure proceedings and had expressly been found not to be necessary assets by the court. Appeal upheld: the court excluded from the assets awarded in payment properties in respect of which the financial institution had already initiated foreclosure proceedings before the insolvency proceeding and which had expressly been found not to be necessary assets by the court.-- Second ground of appeal: the banking institution and SAREB claimed that they could not be forced to accept the award in payment as regards the other properties as SAREB, holder of the claims, had not given its express consent. Dismissed: the fact that the financial institution did not submit any remarks on the approved Liquidation Plan, despite being a party, precluded it from objecting to the Plan and must be interpreted as an indication of its consent to the Plan. Furthermore, the lack of remarks by SAREB on the Liquidation Plan was exclusively due to the fact that it was not a party to the process, for which SAREB alone was responsible, and Article 155.4 LC does not require the award in payment to be expressly accepted by the creditor.

3.13 Decision dated February 12, 2014 rendered by Toledo Court of First Instance and Examination No. 1 and Commercial Court

Articles 8, 9, 43 and 67 LC.-- Application for judicial assistance in order to have the court instruct the Ministry of Development to reduce a guarantee, to bring it down to the value of the works outstanding for performance by the insolvent concession holder.-- The insolvent debtor based its application for assistance on the fact that the insolvency manager had previously applied for the reduction to the Ministry of Development, but not received a reply.-- The court found that it lacked jurisdiction to grant the insolvent debtor's application for the following reasons: (i) the insolvent debtor's petition went beyond mere preservation of the assets available to creditors and, therefore, exceeded the boundaries of the area within which the court conducting the insolvency proceeding is able to provide assistance; (ii) in reality, the requested action entailed altering the content of and obligations under a government contract, an action which must be carried out in accordance with the provisions of the specific legislation on government contracts; (iii) the administrative powers conferred by law on a public authority restrict the powers of the insolvency court, as this case involved the dividing line between the functions of the court and those belonging to the authorities; and (iv) the interest in preserving the assets available to creditors cannot, per se, be asserted in an absolute sense to replace any remedy to bring claims or legal action with an instruction from the insolvency court.

3.14 Decision dated February 13, 2014 rendered by Madrid Commercial Court No. 9

Article 84.4 LC.-- Attachment by the social security authorities of collection rights of the insolvent debtor against a third party for the payment of its post-insolvency order claims.— According to the wording before Law 38/2011, the public authorities could not initiate enforced collection proceedings in order to collect post-insolvency order claims; however, article 84.4 LC in its current wording expressly allows that power.-- Need to interpret articles 84.4 in fine, 84.3 (or, as the case may be, 176 bis) and 154 LC in a coordinated manner. The enforcement of post-insolvency order claims in or out of court may not impede liquidation transactions. The oversight exercised by the insolvency manager on the assets available to creditors requires the enforcement and use of the proceeds to be carried out under its supervision and decision-making powers.-- In this case, the social security authorities' conduct was at odds with a systematic interpretation of the statutory provisions. The social security authorities took on powers reserved for the courts, such as: (i) those relating to the recognition and classification of post-insolvency order claims (as the social security authorities had unilaterally assigned that status to claims other than those already recognized as such); and (ii) the performance and scope of enforcement steps taken directly in respect of assets assigned to the liquidation in the insolvency proceeding, resulting in detriment to other creditors with a higher or equal

ranking.-- The court stated that it was not required to find that the attachment ordered by the social security authorities was null and void as it did not have jurisdiction to do so, but it ordered the social security authorities to recognize that the judge in the insolvency proceeding had exclusive jurisdiction – to the exclusion of all others – to realize the attached asset and to determine the post-insolvency order claims and their payment, and if it failed to do so the court would bring conflict of jurisdiction proceedings.

3.15 Judgment dated February 25, 2014 rendered by Granada Commercial Court No. 1

Articles 82.3, 87.3 and 87.5 y 90.1.1 LC.-- Classification of the claim held by the mortgagee in the insolvency proceeding on the non-debtor mortgagor.-- Difference between non-mortgagor debtor and non-debtor mortgagor: (i) in the insolvency proceeding on the non-mortgagor debtor, the claim held by the mortgagee will be classified as an unsecured claim; (ii) in the insolvency proceeding on the non-debtor mortgagor, the mortgagee may not be regarded as a creditor – therefore, it does not hold a specially preferred claim – as the guarantor is not, strictly speaking, a debtor of that creditor.-- The correct classification is as a contingent claim, which must distinguish – as it does not benefit from preferred status – between whether it is an ordinary or subordinate claim, since the guarantee is also subject to that division.-- The mortgaged asset will be included in the assets available to creditors in the insolvency proceeding, and in the inventory its value will be decreased by the amount of the accepted security.-- Despite its classification as a contingent claim, the mortgagee retains the full range of powers attached to the collateral provided to it, particularly the right to enforce that collateral, which will be subject to the specific rules set out in articles 55, 56 and 155 LC.

3.16 Judgment dated February 28, 2014 rendered by Oviedo Commercial Court No. 3

Article 71 LC.-- Asset clawback action against mortgage. The insolvent debtor mortgaged unencumbered assets and did so to secure the future obligations of a related company. Dismissed: (i) the transaction must be placed in context, as barely one and a half months before the disputed mortgage was taken out, a loan agreement was executed for a loan to the insolvent debtor, in which the beneficiary under the mortgage had established itself as joint and several guarantor and non-debtor mortgagor, and the insolvent debtor-borrower was the beneficiary of the cash deposit. The court held that the disputed mortgage was not an act of disposition for no consideration as the rationale behind the transaction was to provide coverage and a counter-guarantee to the related company in the event of default by the insolvent debtor on the loan it had received; (ii) the transaction could not be included either in the presumption of detriment under Article 71.3.2 LC either ("creation of in rem guarantees for pre-existing obligations") as the guarantee was created for future obligations, in other words, obligations that had not arisen or fallen due as of the date of the disputed transaction (default by the insolvent debtor on the loan would give rise to a payment obligation for the joint and several guarantor). Lastly, the court concluded that (iii) no detriment had been caused to assets as the existence of an unjustified trade-off in assets benefitting a third party had not been proven.

3.17 Decision dated on March 4, 2014 rendered by Madrid Commercial Court no. 9

Article 3 European Regulation on Insolvency Proceedings ("ERI").—Court order of insolvency in Spain of three companies in the same group, two of them Dutch, the Court considering that the Center of Main Interest ("COMI") of all three of them is in Spain, where the registered office of the subsidiary is located (Case «Marme»).—Three companies of the same group petition for insolvency in Spain. The registered office of the parent company and that of its 100% investee is in Holland, and the registered office of the subsidiary owned by the parent is

located in Spain.—The Court considers that there are sufficient grounds against the presumption juris tantum established by the ERI that assumes that the COMI of a company is at the place where it has its registered office.—The Judge construes that the COMI of the Dutch companies coincides with the registered office of the Spanish subsidiary, due to the fact that: (i) their incorporation has the sole purpose of implementing the financing granted to the subsidiary for the performance of a transaction; (ii) they act as a mere bridge for the financing granted to the subsidiary; (iii) they are lacking activity, workers or an establishment open to the public; (iv) it cannot be considered that a corporate body exists that assumes the managing and administration of the companies at their registered office; (v) the relevant acts of said companies are located in Spain; and (vi) the absence of relation of both companies to their registered office and the centralization of managerial and administration decisions of the group in Spain is objective and known by third parties that would operate with the two companies.—Accordingly, since the COMI of the three companies is in Spain, the Court considers itself to have territorial jurisdiction to hear the petition for insolvency of all three companies and that the current insolvency of the three companies is corroborated and declares the three companies to be in an event of voluntary insolvency.

3.18 Judgment dated March 13, 2014 rendered by A Coruña Commercial Court No. 1

Article 84 LC.-- Nature of a claim arising from an award of costs against the insolvent debtor: the plaintiff sought a finding that the costs determined after the date of the insolvency order, arising from a judgment pre-dating the insolvency, should be classified as a post-insolvency order claim.-- Dismissed: the plaintiff already held a contingent claim in the insolvency proceeding as a result of the judgment against the insolvent debtor, a claim which was made up of the order to pay the principal sum and costs.-- Neither Article 84.2.10 LC (claims arising by law following the insolvency order, but not before) nor Article 84.2.3 LC (claims for costs incurred in favor of the assets available to creditors) apply to the claim for costs.-- Post-insolvency order claims must be expressly covered by statutory provisions and the plantiff's argument was not allowable, to the effect that, by logical inference, an award of costs can be classified as a post-insolvency order claim because another award of costs set out in the law is classified as a pre-insolvency order claim (Article 51.2 LC).

3.19 Decision dated on March 20, 2014 rendered by Pontevedra Commercial Court no. 1

Articles 100, 101 and 114 LC.—Remedy and admission to processing of a proposal for creditors' arrangement (Case «Pescanova»).—Mention in a proposal for a creditor' arrangement that the adhesion or vote in favor will not damage the personal guarantees of the creditor in respect of other persons and should be deemed innocuous since the Law does not establish such detrimental effect.—On remedying the proposal for creditors' arrangement submitted, the amount of the claims which would be paid without reduction of amount but with an extension of term of one year is increased, in addition to the percentage of share capital into which certain claims not paid could be converted. The Court considers that such amendments made with the remedy of the proposal for a creditors' arrangement are not sufficiently relevant for it to be considered that a proposal for a creditors' arrangement is made ex novo.—Exclusion of the right of objection of the creditors bound by the arrangement to the structural amendments it contemplates. The Court is in principle in agreement with the fact that the creditors bound by the arrangement should also be bound by the corporate transactions it announced and accordingly will not be able to demand security of collection. However, the Court considers that such review should in any case be reviewed by the Court having jurisdiction to the exercise of an eventual right of objection.—The creditors' arrangement of a company will only be subject to the result of the related insolvency proceeding of other companies where such insolvency proceedings are already being conducted.—The Court adds two qualifications: (i) the fact that no reduction of debt exists for

some of the creditors could imply if the creditors' arrangement is approved that the assessment section will not be opened; and (ii) since the terms for the submission of proposals for creditors' arrangements and their remedy are close to expire and other matters have delayed the notifications, the term to adhere to the proposal for a creditors' arrangement should be extended.—The Court admits for processing the proposal for a creditors' arrangement and extends the term for adhesions.

3.20 Decision dated April 1, 2014 rendered by Barcelona Commercial Court No. 7

Articles 138 and 140 LC and 286 LEC.-- Application for injunctive remedies by a creditor due to a possible risk of a breach of the arrangement by the insolvent debtor, as it had allegedly departed from the viability plan accompanying the approved arrangement.-- Ancillary claim not admitted for consideration for the following reasons: (i) the procedural rules on new facts under Article 286 LEC refer to a decision in a process that is already underway, which would apply to the ancillary proceeding challenging approval of the arrangement, and in this case the commercial court no longer had jurisdiction as the judgment approving the arrangement with creditors was appealed to the provincial appellate court; (ii) the plaintiff did not seek a finding of breach of the arrangement but rather a series of preventative or injunctive remedies against a likely breach.-- During the stage of performance of the arrangement, the judge in the insolvency proceeding can only adopt two decisions: (i) decision on a breach of the arrangement; or (ii) decision on conclusion of the insolvency proceeding due to performance of the arrangement. The petition under consideration did not fall within either of those two categories and, therefore, there was no basis for adopting injunctive remedies such as those requested.-- Since the viability plan is not part of the content of the arrangement, the arrangement cannot be challenged for reasons relating exclusively to the viability plan.-- The possible breach of the insolvent debtor's duty to provide a six-monthly report on performance of the arrangement cannot, per se, give rise to a breach of that arrangement. The court ultimately ordered the insolvent debtor to report on the circumstances alleged by the plaintiff creditor, and on the extent to which they might affect performance or breach of the arrangement.

3.21 Judgment dated April 23, 2014 rendered by Barcelona Commercial Court No. 9

Article 176 bis LC.-- Conclusion of the insolvency proceeding due to insufficient assets available to creditors as the statutory requirements for this decision had been met.-- Dismissal of the objections to the conclusion raised by various creditors who sought commencement of the assessment section on the ground that there was evidence of potential assessment of the insolvency as fault-based. Despite the facts set out by the objecting parties, the insolvency manager and the public prosecutor's office (to which the case was notified to enable that office to take a view) considered that the insolvency proceeding had to be assessed as accidental and, therefore, since they alone have standing to decide at the assessment stage, it was not appropriate to order the commencement of the assessment section, without even examining the grounds for fault referred to by the objecting parties.-- Furthermore, none of the objecting parties explained to what extent the commencement of the assessment section would make it possible to obtain income in the insolvency proceeding which could be used to pay all of the post-insolvency order claims, nor had they made any payment into court to provisionally cover such claims in accordance with Article 176 bis 5 LC.

4. Courts of First Instance

4.1 Decision dated December 17, 2013 rendered by Seville Court of First Instance No. 19

Articles 62 LC and 43 LEC.-- Stay of an ordinary proceeding for the enforcement of guarantees securing a contract entered into by the insolvent debtor and a third party. Preliminary civil issue to be ruled on. The guarantee could be stayed until a decision had been taken on the ancillary proceeding brought by the insolvent debtor for termination of the contract by reason of a breach by the third party.-- Distinction between the existence of a preliminary civil issue to be ruled on and lis pendens: the key issue is whether one proceeding is subject to another, which, for reasons of logic and legal connection, determines that the subject-matter of one proceeding or another should be regarded as forming a preliminary issue, and therefore the decision taken in one of those proceedings is the logical precedent of the decision on the other.-- In order for a plea of lis pendens to operate, the parties, subject-matter and cause must be the same in both proceedings. Otherwise, if when a proceeding is brought there is another in progress, and the previous proceeding determines and is binding for elements of the decision on the later proceeding, the solution is to apply the effects of a preliminary civil issue to be ruled on.-- In the present case, in parallel to the ordinary proceeding, the insolvent debtor brought action for termination of a contract which was at the origin of the relationship between the plaintiff in this case and the insolvent debtor. The insolvent debtor's action had the effect of a preliminary issue to be ruled upon, because if the court upheld the petition for contractual termination, the principal obligation of the insolvent debtor would disappear and, with it, the ancillary obligation under the guarantee.

5. Directorate-General of Registers and the Notarial Profession

5.1 Decision of the Directorate-General of Registers and the Notarial Profession dated January 20, 2014

Articles 176 bis and 145 et seq. LC.-- Registration of a mortgage taken out by the director acting severally of an insolvent debtor over an asset owned by it to secure post-insolvency order claims which might remain unpaid in the event of liquidation of the insolvent debtor.-- Notwithstanding the notary's classification of the mortgage as a mortgage securing future obligations, the fact remained that those obligations were already in existence, although the secured obligation was subject to future uncertain events, which were: (i) the insolvency proceeding ending with a liquidating arrangement; and (ii) the potential nonpayment, in whole or in part, of the post-insolvency order claims.-- Article 176 bis LC provides for the termination of an insolvency proceeding due to insufficient assets available to creditors unless, inter alia, the judge in the proceeding takes the view that the post-insolvency order claims are sufficiently secured by a third party. This is where the mortgage in question theoretically fits in; however, allowing that security is not implemented in the insolvency legislation. In any event, any potential security for assets outside the insolvency proceeding cannot alter the rules on liquidation, should this occur, nor can it lay down exceptions with respect to the way claims are paid.-- The Directorate-General of Registers and the Notarial Profession concluded that the mortgage could not be registered because it did not meet the relevant statutory requirements, in particular: (i) it could not be considered to be a mortgage securing future obligations; (ii) neither the title holders nor the secured obligations were identified; and (iii) the requirements set out in the Mortgage Law for unilateral or floating mortgages were not met.

5.2 Decision of the Directorate-General of Registers and the Notarial Profession dated February 12, 2014

Article 67 LC.-- Possibility of registering an administrative decision on a concession at the Property Registry due to an insolvency order having been handed down against the concession-holder.-- The Directorate-General of Registers and the Notarial Profession examined whether the concession right could be removed by means of an administrative decision, or whether the consent of the registered holder or, failing which, a final judicial decision was required.-- Article 67 LC provides that the effects of the insolvency order on government contracts entered into by the insolvent debtor will be governed by their own specific legislation. The grounds for termination of contracts set out in both the Government Contracts Law (which applied at the relevant time) and the Public Sector Contracts Law include the making of an insolvency order against the contracting party, and therefore the concession may be terminated on that ground.-- The decision of the contracting authority terminating the concession is an order which benefits from the presumptions of legality and enforceability of administrative acts and is immediately enforceable, notwithstanding any action that may be taken by means of a judicial review. The finality of the decision in the administrative jurisdiction is necessary and sufficient to enable administrative acts which entail legal change to real property to be registered at the Property Registry.-- Since the decision to terminate the concession was adopted by the acting authority in compliance with all of the established legal formalities, the Directorate-General of Registers and the Notarial Profession confirmed that it could be registered.

5.3 Decision of the Directorate-General of Registers and the Notarial Profession dated March 12, 2014

Articles 72.3, 73.2 and 193 LC.-- Refusal to remove encumbrances ordered by judgment in an ancillary asset clawback proceeding, because the owners of the encumbrances were not summoned in that proceeding.-- The insolvency manager had filed a claim seeking clawback of a contribution of properties which the insolvent debtor had to a third company. Those properties were registered at the Property Registry in the name of the third company, although they were subject to specific encumbrances whose owners were not cited as defendants in that ancillary proceeding. The court ordered removal of the registration of ownership made for the third company, as well as the removal of the encumbrances on the properties.-- The Directorate-General of Registers and the Notarial Profession confirmed the refusal of the Registrar, as: (i) the third parties owning the encumbrances on the disputed asset ought to have been cited as defendants in the ancillary proceeding; (ii) those third parties were not bound by the judgment that was handed down; and (iii) the mere fact that the owners appeared as parties to the main insolvency proceeding, or the fact that they were notified of the existence of a claim (under Article 193 LC) did not make them parties to the proceeding whose outcome was sought to be registered.-- Despite confirming the refusal, the Directorate-General of Registers and the Notarial Profession held that the court which conducted the ancillary proceeding ought to have determined whether or not the proceeding had been adversarial to rule out the denial of due process rights. Accordingly, the court should rule on whether the registered owners had the opportunity to intervene in the process, whether they are bound by the judgment and whether there are circumstances indicating that the ground which justified the Registrar's refusal must disappear.

IV. Awards and Accolades

Chambers Global 2014: "Band 1" in Restructuring and Insolvency

Our Restructuring and Insolvency Department has sealed its leadership position and, for the sixth year running, takes the top spot ("Band 1") in the ranking of the world's law firms specializing in corporate restructuring and insolvency.

Chambers Europe 2014: "Band 1" in Restructuring and Insolvency

Once again this year – as in every year since 2009 – the European edition of the Chambers & Partners directory has singled out our Restructuring and Insolvency Department as leader ("Band 1") in the ranking of European law firms practicing in the area of business reorganization, debt refinancing and insolvency.

The Legal 500: "Tier 1" in Restructuring and Insolvency

In its recent 2014 edition, The Legal 500 awarded Garrigues' restructuring and insolvency practice a place on the highest step of the podium.

IFLR: "2014 Law Firm of the Year: Spain"

Garrigues scooped up the award for "Law Firm of the Year: Spain" handed out every year by the specialist Euromoney journal the International Financial Law Review (IFLR). This is the seventh time that Garrigues' work has been recognized by these international awards, now in their thirteenth year (six times as best law firm in Spain and once in the category of best mergers and acquisitions transaction).

International Law Office: "2014 Firm of the Year in Spain"

Garrigues has picked up the Client Choice Award 2014 as Firm of the Year in Spain, the fourth time it has received this award. The accolade is handed out every year by the International Law Office review to the most outstanding law firm in recognition of excellence in client service.

V. Garrigues Publications

"**Una nueva reforma preconcursal**" (A new pre-insolvency reform), [Burillo], Diario de Navarra, March 9, 2014.

"**La hora de los acreedores**" (Creditors' time has come), [Almoguera], El Sur, March 20, 2014.

"**Impulso legal a las refinanciaciones bancarias. Esta vez sí**" (Legal boost for bank refinancings. This time, for real), [González Pajuelo], La Verdad de Murcia, April 3, 2014.

"**Spain. Summary on March 2014 legal amendments on debt restructuring**", [Verdugo], DebtXplained, London, April 2014.

"**First exclusion from the insolvency proceeding of the individual right of objection of the creditors (Merger arrangement of Fiesta)**" (Primera exclusión concursal del derecho individual de oposición de acreedores (Convenio de fusión de Fiesta)" [Thery, Fernández] Revista de Derecho Concursal y Paraconcursal, 2013.

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