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Contents

I. New legislation	2
II. Selected court cases and significant transactions	3
III. Group of cases: enforcement in insolvency proceedings	4
IV. Insolvency round-up	5
V. Newsflash	6
VI. Garrigues files	7

I. New legislation

1. ***Instruction 3/2014, of November 19, 2014, of the Head of the Collection Department of the State Tax Agency, on the signing of special agreements with taxpayers subject to an insolvency order***

1.1 *New special agreements*

The aim of this Instruction is to lay down uniform standards for the signing of special agreements between the State Tax Agency (*Agencia Estatal de la Administración Tributaria* or "AEAT") and debtors subject to an insolvency order concerning preferred claims recognized for AEAT.

The starting point of the Instruction is that a special agreement is more appropriate for AEAT than accession to an arrangement with creditors, because this could entail an undesired drag-along of other government claims. Special agreements are also more flexible.

1.2 *Requirements for the signing of special agreements*

- Timing requirements: special agreements may be signed up to the date on which the arrangement with creditors becomes enforceable. If new preferred claims arise after they are signed, they will be incorporated into the signed agreement. Only one special agreement may be signed with an insolvent debtor.
- Solvency requirement: payment of post-insolvency order claims in full.
- Content requirement: the special conditions may not be more favorable for the debtor than the conditions set out in the arrangement with creditors.
- Reductions: only in exceptional cases will reductions to the preferred claims of AEAT be incorporated. Under no circumstances may reductions be applied to debts arising from withholdings, tax prepayments or customs debts.
- Rescheduling: special agreements may contain rescheduling conditions and as many conditions and guarantees as are deemed necessary.
- Term: will be conditional on the performance of the debtor's current obligations with AEAT.
- Interest rate: may be lower than the late-payment interest rate.
- Minimum payment: a minimum payment of a percentage of the debt forming the subject-matter of the agreement may be required.
- No amendment: it is not possible subsequently to amend the terms of a special agreement unless such amendment entails improved guarantees or collection conditions for the government claim.

1.3 Conversion of past deferrals and installments into special agreements

In the case of insolvent debtors with an approved arrangement with creditors with whom deferred or installment payments have been entered into before the Instruction, a special agreement may be signed subject to certain requirements, even if the time limit has ended on the date on which the arrangement with creditors becomes enforceable. These requirements are as follows:

- Solvency requirement: the insolvent debtor must be up to date in payment of all post-insolvency order claims and any other obligations falling due after the date on which the arrangement with creditors became enforceable.
- Minimum payment: payment of 20% of the total amount of the preferred claim.
- Nonreturnable amounts subject to attachment: no amounts may be returned in respect of payments made if attachments have already been ordered.
- Rescheduled periods: will be calculated from the date on which the arrangement with creditors becomes final, minus any rescheduled period already granted.

II. Selected court cases and significant transactions

1. Court approval of refinancing agreements

1.1 "Petromiralles" case: judgment dated July 29, 2014 rendered by Barcelona Commercial Court No. 3

The Petromiralles Group is a holding company operating in the oil industry which, in April 2014, succeeded in restructuring its financial debt and securing court approval of the refinancing agreement under Royal Decree-Law 4/2014. Two banking institutions objected to that approval, arguing the existence of a *disproportionate sacrifice*.

In the decision ruling on the objections lodged by the dissenting creditors, the court held that disproportionate sacrifice exists where creditors in the same situation are treated differently, or where creditors with preferred status are made to bear proportionately greater losses than creditors with a lower status.

On that basis, the court concluded that the sacrifice imposed on the dissenting entities was not disproportionate, for, among others, the following reasons: (i) the dissenting creditors accounted for less than 5% of the total refinanced debt; (ii) both the extension of the maturity date of the credit facilities and the continuance of the guarantee facilities applied to all creditors, so that their effects cannot be regarded as disproportionate for the dissenting creditors compared to the other financial institutions which acceded to the agreement; (iii) the sacrifice arisen from the reduction of the late-payment interest cannot be regarded as disproportionate either, since it had already been accepted by the signing creditors; (iv) as regards the non-extension of new guarantees to the dissenting creditors, the court stated that it did not make sense that a dissenting entity should be able to secure a system of guarantees equivalent to that applying to the entities that *had* acceded to the agreement; and (v) there was no disproportionate sacrifice involved in the halting of enforcements, as this is deemed to be an effect envisaged by the Law itself.

1.2 "Copisa" case: decision dated August 28, 2014 rendered by Barcelona Commercial Court No. 7

The Copisa Group, which operates in the construction industry, restructured its financial debt in August 2014. As in the "Petromiralles" case, for court approval of the refinancing agreement the rules introduced by Royal Decree-Law 4/2014 were implemented.

As per this Court decision, the new rules on court approval have done away with *ex ante* review by the courts, in other words, the courts no longer have the power to decide whether or not to approve agreements – which was the case under the previous wording. Now, the courts have an obligation to approve agreements if those agreements meet the requirements laid down in the new additional provision four. The refinancing agreement was adopted in accordance with those requirements, with the backing of creditors accounting for almost 99% of the financial claims. Accordingly, the court approved the agreement and made effects binding on dissenting third parties. Although the independent expert's report contained a number of reservations and limitations, the court took the view that the creditors were aware of them and had taken them into account. Court approval carries with it the halting of any ongoing individual enforcements brought by creditors representing the financial claims affected by the agreement as well as a prohibition on initiating such enforcements until the final maturity date of the debt.

III. Group of cases: enforcement in insolvency proceedings

1. ***Judgments rendered by the Jurisdictional Disputes Tribunal dated December 9, 2014 and by Chamber One of the Supreme Court dated December 12, 2014***

Both decisions examine an activity usually practiced by the Social Security General Treasury (*Tesorería General de la Seguridad Social* or "TGSS") against undertakings subject to an insolvency order: the attachment, after the liquidation phase has been commenced, of some of the insolvent party's economic rights as a result of the nonpayment of post-insolvency order claims held by TGSS. Both the Jurisdictional Disputes Tribunal and the Supreme Court agree that the court conducting the insolvency proceeding has exclusive jurisdiction to decide on the payment of post-insolvency order claims and on the realization of assets in the liquidation phase. Creditors holding post-insolvency order claims are not entitled to separate enforcement and they must petition for payment within the liquidation in accordance with the rules on the ranking of payments and by means of the appropriate ancillary proceeding.

2. ***Decision dated December 5, 2014 rendered by Madrid Provincial Appellate Court***

The court found that the TGSS could continue an administrative enforcement proceeding initiated after the commencement of the liquidation phase in order to collect post-insolvency order claims, notwithstanding the preferred collection right enjoyed by other holders of post-insolvency order claims, which would have to be asserted before the court conducting the insolvency proceeding. The court drew a distinction between formal or procedural matters, which affect concurrent enforcement proceedings, and substantive or factual matters, which affect the order of priority for collection among the various holders of post-insolvency order claims. The TGSS may initiate administrative enforcements in order to collect post-insolvency order claims but that does not mean that it will be able to receive the proceeds of such enforcements if there are other post-insolvency order claims which have to be paid first.

3. Decision dated January 14, 2015 rendered by Lugo Provincial Appellate Court

The TGSS applied for a declaration that certain properties were “not necessary” for the purpose of their potential enforcement. That application was refused by the court conducting the insolvency proceeding and the refusal decision was confirmed by the Provincial Appellate Court. According to the court, the assessment as to whether the assets are necessary has to be undertaken when the executing party’s application is made, which in this case took place after the commencement of the liquidation phase but before approval of the liquidation plan. At that point, the assets of the insolvent party were indeed necessary for its business, as it was possible that the liquidation plan which remained to be approved might provide for the *en bloc* sale of the assets of the insolvent party, thereby facilitating the continuation of the business by another owner.

4. Decision of the Directorate-General of Registers and the Notarial Profession dated October 24, 2014

The Registrar disputed the jurisdiction of the Court of First Instance to entertain foreclosure proceedings in respect of the assets of an insolvent debtor with an approved arrangement. The Directorate-General of Registers and the Notarial Profession stated that even where, as in the present case, the foreclosure involves assets which are necessary for the continuity of the insolvent debtor’s business, the jurisdiction to deal with it lies with the court hearing the insolvency proceeding until such time as the proceeding is completed (the approval of an arrangement with creditors does not entail its completion). By contrast, if the foreclosure involves assets which are not necessary for the continuity of the insolvent debtor’s business, the jurisdiction to deal with the foreclosure lies with the court of first instance. However, the court hearing the insolvency proceeding would first have to declare that such assets are not necessary for the continuity of the debtor’s business.

IV. Insolvency round-up

1. Objections to the approval of an advance proposal for an arrangement: judgment dated December 17, 2014 rendered by Barcelona Provincial Appellate Court

The court held that once the necessary majorities for the approval of an advance proposal for an arrangement have been reached and recorded, the rules on approval of the arrangement apply, but not the rules on subsequent restrictions to file an advance proposal for an arrangement. It stated that the Insolvency Law prohibits the submission of proposals subject to the conditions for enforcement of the arrangement (conditions precedent or subsequent), but not proposals which provide for reservations or contingencies which may condition its performance. The court held that the viability of an arrangement must be assessed when it is approved, not at a later time.

2. Ancillary proceeding for the clawback of mortgages taken out for the benefit of financial institutions: judgment dated December 18, 2014 rendered by Madrid Commercial Court No. 2

The insolvent debtor took out a mortgage on a portion of its assets as collateral for unsecured pre-existing obligations, without obtaining any additional liquidity. This amounted to an act of disposition for no consideration which must be clawed-back. Furthermore, the financial institutions acted in bad faith as they were aware of the insolvent party’s situation of extreme

lack of liquidity. Accordingly, the court decided to subordinate all the claims held by the financial institutions in the insolvency proceeding, not just the claims that might have arisen from the clawback.

3. *Prohibition on "cash sweeps" and netting in relation to bank accounts held by an insolvent company: decision dated November 18, 2014 rendered by Madrid Commercial Court No. 2*

The court considered that the prohibition on "cash sweeps" set out in the insolvency order was warranted because, besides being requested by the insolvent debtors, it was appropriate in view of the chance of enforcement action by the creditors which could diminish the assets available to creditors. Such action could only be taken if it were shown that "financial guarantees" were involved, as provided for in Royal Decree-Law 5/2005, which may form the subject-matter of a separate and independent proceeding.

4. *Enforcement action against the debtor's assets after the insolvency proceeding was concluded owing to there being insufficient assets available to creditors: judgment dated November 26, 2014 rendered by Alicante Commercial Court No. 1*

The court declared the insolvency proceeding to be at an end on account of there being insufficient assets available to creditors despite the existence of several properties among those assets. The reason was that there were mortgages on the properties and their sale would not produce sufficient cash to pay the post-insolvency order claims. After conclusion of the insolvency proceeding, individual enforcement proceedings may be taken against the assets of the insolvent party. In spite of the order to remove its registration entries, the insolvent party retains its legal personality until all of its legal dealings have come to an end.

5. *Fortuitous insolvency: judgment dated November 4, 2014 rendered by Murcia Commercial Court No. 2*

The court was called on to consider a breach of the duty to petition for insolvency promptly as claimed by the insolvency management. It conducted an examination of the concept of technical insolvency according to which the cessation in payments must be current and generalized, not sporadic, one-off or isolated, but definitive, general and complete, entailing an absolute inability to pay. In addition, the existence of a refinancing transaction does not entail a situation of technical insolvency: quite the opposite. The court took a positive view of the fact that a company in financial distress had undertaken a refinancing of its debt in order to restore its financial situation.

V. Newsflash

1. *Ongoing insolvency reforms*

Further amendments to the Insolvency Law are expected to be introduced shortly. The Ministry of Economy is currently working on a "fresh start" tool for individual traders experiencing financial difficulties in their businesses which could entail a complete debt write-off under certain circumstances. The Government is also processing in Bill form Royal Decree-Law 11/2014, which was approved in September and has been in force since then, after several extensions to the period for amendments.

2. *Insolvency proceeding affecting motorway concession-holders*

The rescue plan which the Ministry of Development hopes to submit as a proposed arrangement in the insolvency proceedings on motorway concession-holders has met with widespread rejection among foreign financial institutions. This rejection has taken the form of an appeal for reconsideration in which the financial institutions have asked the court not to admit the proposed arrangement, which could have an impact on the length of the proceeding.

3. *Drop in the number of insolvency proceedings*

According to recent figures from the Spanish National Statistics Institute, the number of insolvency proceedings dropped significantly in 2014 and the size of the enterprises undergoing those proceedings has also decreased.

Specifically, in the fourth quarter of 2014 the number of insolvent debtors stood at 1,677, representing a drop of 28.8% compared to the same quarter of 2013. The last quarter of 2014 marks the fifth successive quarter recording a downward shift in the number of these proceedings.

VI. Garrigues files

1. *Articles*

El nuevo concepto del «sacrificio desproporcionado» y sus implicaciones ("The new concept of 'disproportionate trade-off' and its implications"), [Fernández Rodríguez], *Revista de Derecho Concursal y Paraconcursal* 22/2015.

Implicaciones de la valoración en la Ley Concursal ("Implications of the valuation in the Spanish Insolvency Law"), [They Martí], *Diario La Ley* núm. 8489.

Los grupos en los acuerdos de refinanciación y de puerto seguro ("Groups in refinancing and safe harbor agreements"), [Sánchez Álvarez], *Revista de Derecho Concursal y Paraconcursal* 22/2015.

La conservación del convenio concursal ("Continuance under the insolvency arrangement"), [Gutiérrez Gilsanz], *Revista de Derecho Concursal y Paraconcursal* 22/2015.

El vencimiento anticipado y la conversión en dinero como efectos de la apertura de la liquidación sobre los créditos concursales ("Acceleration clauses and cash conversion as effects of the commencement of the liquidation phase on insolvency claims"), [Gutiérrez Gilsanz], in *La liquidación de la masa activa: VI Congreso español de Derecho de la Insolvencia "In memoriam Emilio Beltrán"*.

La continuità aziendale nel concurso per mezzo della liquidazione unitaria nell'ordinamento spagnolo ("Business continuity in insolvency proceedings by means of unitary liquidation under Spanish law"), [Gutiérrez Gilsanz], in *Il Diritto fallimentare e delle società commerciali* no. 6/2014.

2. Garrigues Blog

[Guía del mercado global de reestructuraciones en 2014 y previsión para 2015](#) ("Guide to the global restructuring market in 2014 and forecast for 2015")

The seventh edition of the Restructuring Review, once again containing contributions from Garrigues Restructuring & Insolvency Department, is aimed at the legal affairs departments of large companies, governments, financial and credit institutions and anyone interested in identifying the elements that have characterized the global restructuring market in 2014 and the conditions expected for 2015.

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