1-2012
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1. NEW LEGISLATION

1.1 Royal Decree Law 3/2012, of February 10, 2012, on urgent measures to reform the labor market

Royal Decree-Law 3/2012, of February 10, 2012, on urgent measures to reform the labor market (the "**labor law reform**"), entered into force on February 12, 2012. According to this new piece of legislation, the aim of the reform is to put in place a legal framework that will contribute to more efficient management of employment relationships, lead to the creation of jobs and encourage stable employment.

The key changes in the labor law reform relating to insolvency proceedings are described below:

- A 50% reduction in the employer social security contributions for common contingencies due for workers whose contracts have been interrupted temporarily or are on short-time working caused by economic, technical, organization or production-related grounds or by reason of force majeure, including collective interruptions of contracts conducted in accordance with the Insolvency Law (the "**LC**").

- In the event of temporary interruptions of employment contracts or a reduction in the number of working days or hours followed by termination of contracts under Articles 51 or 52 of the Workers' Statute (the "**ET**") or under Article 64 LC, the affected workers will be entitled to start receiving their contributory unemployment benefit again for the same number of days as they would have received all or some of the benefit under those temporary interruptions or short-time working arrangements up to a maximum limit of 180 days.

- Companies involved in insolvency proceedings are exempt from the obligation to pay the contributions towards financing a special labor agreement in cases of collective layoffs where they include workers aged 55 or above who were not mutual entity members on January 1, 1967.

- Companies involved in insolvency proceedings are exempt from the obligation to offer an outplacement plan to workers affected by a collective layoff procedure where more than 50 workers are laid off.

- In cases involving the termination of contracts entered into by companies with less than 25 workers on the grounds set out in Articles 51 or 52 ET or Article 64 LC, the wage guarantee fund ("FOGASA") will pay the company an amount equal to eight days' salary per year of service, plus the pro rata share by months for fractions of a year.

- The labor courts have jurisdiction to hear appeals filed against decisions handed down by the commercial courts which affect employment contracts.

- Judgments handed down without the approval of the judge in the insolvency proceeding will be regarded as null and void where such approval is mandatory.

- Workers whose employment relationships have been terminated or interrupted (or whose working hours have been temporarily shortened under Article 203.3 of the General Social Security Law) pursuant to a decision by the employer in the context of an insolvency proceeding will be regarded as unemployed.

1.2 Royal Decree-Law 2/2012 of February 3, 2012, on financial industry reform

Royal-Decree Law 2/2012 on financial industry reform (the "**financial industry reform**") was published on February 4, 2012. It includes measures to restructure the Spanish banking industry to enable it to fulfill its role of channeling credit towards the real economy and supporting businesses, employment and consumer spending.

Of particular note in connection with restructurings is additional provision fifteen which has extended for the year 2012, for all legal purposes, the exceptions provided in paragraph 1 of the sole additional provision of Royal Decree-Law 10/2008, of December 12, 2008.

This provision provided exceptions for corporations and limited liability companies meeting the requirements for mandatory capital reduction and dissolution (Article 363 of the Corporate Enterprises Law) in cases involving impairment losses in respect of property, plant and equipment (mainly from real estate investments). The exceptions give temporary immunity for two years from the rules on mandatory capital reduction and dissolution for companies that have recorded impairment losses in respect of property, plant and equipment. A previous decree (Royal Decree-Law 5/2010) extended these exceptions for a two further tax years and the recent reform extends them for the year 2012.

1.3 Resolution on the criteria for admission of cassation appeals and special appeals for procedural infringements

The Resolution of the Supreme Court on the criteria for admission of cassation appeals and special appeals for procedural infringements was published on December 30, 2011. This Resolution, which was adopted by the General Session of Chamber One (Civil) applies to any appeals that may be lodged with the Supreme Court on insolvency matters and bring a certain degree of flexibility with respect to the criteria adopted by the General Session on December 23, 2000.

In particular, the new Resolutions on the admission of appeals increase the number of cases in which an appeal may be lodged at the Supreme Court on the ground of "cassational interest", and the chief changes in this connection are described below:

- As regards proof that the appealed decision infringes the case law of the Supreme Court or the Provincial Appellate Courts, the requirement for the appealed judgment to be factually identical to the judgments cited as comparison has been eased.

- An appeal may pass the admission filtering stage if there is patent evidence of the existence of conflicting case law from the provincial appellate courts on the legal problem at issue. In this way the requirement that the appellant must cite two final conflicting judgments from provincial appellate courts has been eased.

- An appeal may be filed on the ground of "cassational interest" if the appellant duly justifies the need for the Supreme Court to amend its case law in relation to a specific legal problem because social circumstances or the general opinion of the legal community has evolved.

- As regards the admissibility of appeals concerning statutory provisions that have been in force for less than five years, the Resolution establishes that the calculation of the five year period should start from the commencement of their entry into force and end on the date of the appealed judgment. If the appellant evidences that the date of the appealed judgment fell within the five-year period, the end date will be deemed to be the date on which the provision in question was relied on for the first time in the proceeding. If that date falls within the five year deadline, the cassation appeal will be admissible.

2. CASE COMMENTARIES

JUDGMENT of Madrid Commercial Court No. 5. dated January 10, 2012 Arts. 100 and 167 of the Insolvency Law ("LC").-- Judgment approving Air Madrid arrangement.—Insolvent party filed advance proposal for an arrangement with the following terms: (i) change of corporate name and amendment of corporate purpose; (ii) capital increase; and (iii) 50% release and 5-year deferral for claims under the arrangement, except for a specific category of creditors (ticket buyers for flights scheduled on or after December 15, 2006) which should recover 100% of their claim within a maximum period of 1 year.-- The arrangement received affirmative vote of 53.98% of the ordinary liabilities and a higher 77.71% majority as regards the special treatment for ticket buyers.-- Court approved arrangement and did not open the assessment phase because the arrangement included a category of creditors given a release of less than one third and a deferral of less than three years.

Commentary:

Following the insolvency order on January 11, 2007, Air Madrid filed an advance proposal for an arrangement ("PAC") which basically consisted of the following provisions:

(a) Change of corporate name and broadening of the company's corporate purpose.

Hermosilla, 3 - 28001 Madrid - Spain
Telephone +34 91 514 52 00 - Fax +34 91 399 24 08

(b) Capital increase through the conversion of a quarter of the claims held by a subordinated creditor into shares in the insolvent company.

(c) A 50% release for the claims under the arrangement and a 5-year deferral of payment.

(d) Special treatment for claims in respect of tickets for flights scheduled on or after December 15, 2006 that did not take place, which would be paid without any release within one year of the arrangement becoming final.

After a long drawn-out common phase during which over 260 ancillary proceedings were decided on, and following expiry of the statutory deadline for creditors who had signed up to the PAC to withdraw, the outcome was announced to the effect that the PAC had received the necessary majority in order to be accepted. The PAC had obtained the vote of 53.98% of the ordinary liabilities and the majority increased to 77.71% in relation to the specific provision for special treatment for certain creditors.

The PAC was notified to the insolvency court for its approval.

The court analyzed the content of the PAC and concluded that it did not infringe the statutory provisions set forth in Articles 99 *et seq.* of the Insolvency Law. Specifically, as regards the bylaw amendments, the court pointed out that this was a continuity arrangement which provided for the insolvent company's survival. The fact of the company not being able to continue the business activity it had before the insolvency order (as it did not have the requisite licenses) did not mean it could not carry on another activity. In the court's view, this is why the amendment of the corporate purpose contained in the PAC should be permitted. This amendment should not be regarded as a condition of the arrangement (which the law prohibits), but rather as a factor affecting its enforceability.

In addition, the court also held the second provision of the PAC to be lawful: making a specific creditor into a shareholder of the insolvent company by converting their claim into equity, as it had the prior express consent of the creditor concerned.

Lastly, the court considered that the provisions on release and deferral as well as the special treatment given to a specific category of creditors was valid content for an arrangement and did not infringe Article 100 LC.

The court also analyzed the possible opening of the assessment section, under the Articles of the Insolvency Law that were recently reformed by Law 38/2011 (the "**insolvency reform**"). The new wording of Article 167 LC provides that the assessment section will not be opened if a court has approved an arrangement containing a release of less than one third and a deferral of less than three years for one or more classes of creditor. In this case the PAC included payment within one year to a specific category of ordinary creditors, and therefore the court held that an assessment section was not required.

3. HEADNOTES

Supreme Court

JUDGMENT dated October 11, 2011 rendered by Chamber I of the Supreme Court

Arts. 61.2 and 62.1 LC. Obligations eligible for clawback in the interests of the insolvency: reciprocal obligations yet to be performed by both the insolvent company and the other party.-- *Pro solvendo* assignment of tax due to the insolvent company prior to the insolvency order.-- Clawback of the assignment "in the interests of the insolvency": the insolvency managers took the view that the transaction was a dation in payment which was detrimental to the interests of the other creditors.-- Inexistence of reciprocal obligations yet to be performed by both parties. The terms of the assignor's statement and the nature of both parties' consent as giving immediate effect to the transfer preclude the view that the assignor would in the future have accepted obligations to the assignee/holder of the assigned claims.-- On top of the difficulty to regard the relationship arising from the assignment as reciprocal, the requirement in Article 61.2 LC (obligations yet to be performed by both parties) was not met either. Article 61.2 did not apply.-- The Supreme Court upheld the appeal filed by the tax authorities, overturned the judgment on appeal and dismissed the insolvency manager's claim.

JUDGMENT dated October 25, 2011 rendered by Chamber I of the Supreme Court

Arts. 102 and 104 LC. Advance proposal for an arrangement ("PAC") filed by the insolvent company offering two payment alternatives to creditors.-- The choice of alternative, to be made after approval of the arrangement, is on an individual basis, both in terms of taking the decision and the resulting legal force. -- Approval of the PAC entailed approval of the alternative proposals it contained: both are compatible and both will govern the specific relationships binding the proposing debtor to its creditors, depending on which proposal each accepts.-- No basis for the imposition of the most popular alternative on all creditors, since the arrangement must be ratified or rejected with observance of the two alternatives provided (and the secondary nature of one of them) by the insolvent debtor.-- The Supreme Court upheld the appeal filed by the insolvent debtor and overturned the judgment on appeal insofar as the lower court did not hold, when it ought to have done so, that (i) both alternative proposals, which were contained in the advance proposal for an arrangement submitted by the appellant, were approved when the arrangement was approved; (ii) since both proposals were compatible, they would govern the specific obligations binding the proposing debtor to its creditors, depending on which proposal was accepted by each creditor.

JUDGMENT dated November 17, 2011 rendered by Chamber I of the Supreme Court

Arts. 164.2.4, 164.2.5 and 165.1 LC. Assessment of the insolvency as fault based. Grounds for the assessment: (a) dealings in assets by the affected parties with a view to defrauding creditors, to their detriment; and (b) breach of the directors' duty to petition for insolvency. -- Dealings in assets by the affected parties with a view to defrauding creditors, to their detriment, is an irrebuttable presumption: there does not have to be willful misconduct or gross negligence, nor do the debtor's acts need to have had an impact on the occurrence or aggravation of the insolvency. The assessment is independent of the outcome as regards the causing or aggravating of the insolvency. The only condition is that the persons involved must have engaged in any of the types of conduct described in the statutory provision. -- The directors did not become aware of the technical insolvency until the financial statements for the 2005 fiscal year were prepared, however, the company had been in technical insolvency since 2003. The delay in petitioning for voluntary insolvency only gives rise to a rebuttable presumption of willful misconduct or gross negligence, and it is necessary for the conduct to have had an impact on the occurrence or aggravation of the insolvency.-- Assessment of the insolvency as fault based: liability of directors for claims held by creditors which they had not collected when the assets available to creditors were liquidated (Art. 172.3 LC), but limited to debts incurred after September 1, 2004. The Insolvency Law is not retroactive: the provisions on liability in Art. 172.3 LC do not apply to the directors' conduct before the entry into force of the Insolvency Law.

JUDGMENT dated December 19, 2011 rendered by Chamber I of the Supreme Court

Arts. 96 and 154 LC. Objection to the inventory and list of creditors filed by the financial institution that had discounted various commercial paper instruments held by the insolvent entity prior to the insolvency order.-- After the insolvency order, three situations arose: (1) some of the instruments were paid by the debtors to the financial institution - the insolvency managers sought the return of those payments and included a claim against the financial institution in the inventory; (2) some of the instruments were paid by the debtors to the insolvent party; and (3) some of the instruments remained unpaid.-- The Supreme Court confirmed the transfer of the claims in respect of the discounted instruments to the discounting institution. Accordingly: (1) the discounting institution did not have to repay the amount of the instruments received after the insolvency order from the insolvent party's debtors; (2) the amount of the discounted instruments which the insolvent debtor collected directly from the respective debtors must be recognized as a post-insolvency order claim for the financial institution; and (3) in respect of the unpaid instruments, an ordinary insolvency claim for the discounting entity must be recognized.

High Courts

JUDGMENT dated July 26, 2011 rendered by the Basque Country High Court

Arts. 195 and 197 LC. Boundaries of the labor courts' jurisdiction.-- Objection to the list of creditors, seeking exclusion from the list and the recognition of a worker's severance claim as a post-insolvency order claim .-- Objection dismissed by the lower court and an appeal was filed: court held *ex officio* that it did not have jurisdiction to hear the case. The high court held that the fact of objecting to aspects relating to employment claims was not a reason for such matters to heard by means of a specific employment law ancillary

Hermosilla, 3 - 28001 Madrid - Spain
Telephone +34 91 514 52 00 - Fax +34 91 399 24 08

proceeding in the insolvency proceeding. This is, instead, an action specific to insolvency law, since it relates to the definition of claim rights forming part of the liabilities under the insolvency proceeding.

Provincial Appellate Courts

JUDGMENT dated March 15, 2011 rendered by Pontevedra Provincial Appellate Court

Arts. 61.2, 84.2, 89.3, 92.5 and 93.2 LC. Assessment of claims.-- Joint venture established by the appellant and the insolvent party. Assessment of the claims including the amounts contributed by the appellant to make up for what the insolvent party ought to have contributed to cover items relating to the performance of the work.-- Post-insolvency order claims do not include claims arising from obligations of the insolvent party under contracts with reciprocal obligations yet to be performed which remain in force after the insolvency order under Art. 61 LC, since partnership agreements or joint venture contracts such as the one at issue fall outside the scope of this statutory provision.-- The secondary petition for the claims to be assessed as special preferred claims because they were secured by collateral did not succeed either as the collateral was eligible for to clawback under Art.71.3.2 LC.-- Accordingly, after ruling out that the claims could be assessed as subordinated claims, the court distinguished between claims arising before the insolvency order, regarded as ordinary claims, and claims arising after the insolvency order, regarded as post-insolvency order claims, provided that the contributions were made with the authority or approval of the insolvency managers.

JUDGMENT dated October 10, 2011 rendered by A Coruña Provincial Appellate Court

Art. 62 LC. Application for termination of a sale and purchase agreement after the insolvency order was made on the ground of breaches by the insolvent debtor before the order.-- The court took the view that the Insolvency Law only permitted termination for breaches that took place before the insolvency order in the case of agreements performed over a period of time. The sale and purchase of a building with deferred payment of the price was not an agreement of this type: the sought termination of the contract was not allowed.

Commercial Courts

DECISION dated April 13, 2009 rendered by Málaga Commercial Court No. 1

Art. 1.3 LC. Voluntary insolvency order made against Gerencia de Compras y Contratación de Marbella, S.L.-- The insolvent party was a business company with a private corporate purpose, and there was no public involvement or exercise of authority in its management. However, its entire capital stock was publicly owned. Public ownership of the capital stock does not eliminate its private nature.-- Insolvency orders cannot be made against vehicular entities that are dependent on regional authorities, which are public law entities, but they can be made against private law entities.-- The court held that the requirements for an insolvency proceeding had been met in relation to the debtor and the facts, and issued a voluntary insolvency order on the entity.

Hermosilla, 3 - 28001 Madrid - Spain
Telephone +34 91 514 52 00 - Fax +34 91 399 24 08

JUDGMENT dated March 17, 2010 rendered by Palma de Mallorca Commercial Court No. 1

Arts. 84.2 and 154 LC. Post-insolvency order claims.-- Ranking of fees of counsel and court procedural representative for services rendered to obtain the insolvency order with respect to the insolvency managers' remuneration for the common phase.-- Fees of counsel and court procedural representative were incurred when the insolvency order was handed down. The insolvency managers' remuneration was incurred when they accepted their appointments (two in the case of a collective structure).-- Payment of the claims held by the lawyer and the court procedural representative had preference on a first come first served basis over the claims of the insolvency managers.

JUDGMENT dated April 7, 2011 rendered by Málaga Commercial Court No. 1

Arts. 92 and 93 LC. Subordination of a claim held by a financial institution. Requirements for Article 92.7 LC to apply in relation to the subordination of a creditor's claim on the ground that the creditor obstructed performance of a synallagmatic (or bilateral) contract to the detriment of the insolvency: (a) existence of a bilateral agreement, which is the case for the credit facility and loan agreements; (b) need for a prior report from the insolvency managers, which is taken to exist from the reply to the insolvent debtor's claim by the insolvency managers; (c) obstruction of performance of the agreement; (d) repeated obstruction and court acknowledgement of such repeated obstruction; and (e) detriment to the interests of the insolvency, regarded as the highest payment possible to creditors.-- Fulfillment of these requirements can be found in steps taken prior to the insolvency order.-- In the case at hand, subordination of the claims was also based on the defendant creditor being regarded as a person having a special (or insider) relationship with the creditor (Art. 92.5 LC), because he was a *de facto* director at the insolvent company (Art. 93.2.2º LC).-- Requirements for the existence of a *de facto* director: (a) there were no real deliberations within the company as to his appointment; (b) they systematically perform management functions; (c) they discharge functions pertaining to a *de iure* director; (e) they carry out management functions generally on an independent and enforceable basis in one or more specific strategic areas; (f) they can overrule a *de iure* director.

DECISION dated June 22, 2011 rendered by Almería Commercial Court No. 1

Art. 1.3 LC. Voluntary insolvency order made against a mixed municipal services company ("Elsur"). The debtor met the requirements for an insolvency order as the mixed municipal services company was not a public law entity because: (i) the services it provided did not involve the exercise of authority; (ii) only a minority portion of the capital stock was publicly-owned; and (iii) as transpires from its bylaws, the powers of dissolution and liquidation were not subject to any administrative requirements.-- The factual requirements also existed, as the debtor's technical insolvency could be ascertained from the submitted documentation.- Standing to petition for insolvency: although the city council had ordered the temporary transfer of the management of the services and had appointed the appropriate administrator, such an administrator does not replace the company's directors, who continue to have the power to petition for insolvency.

Hermosilla, 3 - 28001 Madrid - Spain
Telephone +34 91 514 52 00 - Fax +34 91 399 24 08

JUDGMENT dated July 4, 2001 rendered by A Coruña Commercial Court No. 1

Art. 71 LC. Clawback action.-- Claim filed by the insolvency managers seeking the clawback and rendering null and void of security interests created or provided for in the novation agreement of a syndicated loan.-- The security interests provided to strengthen the loan were in almost all of the insolvent party's assets, including its shares in foreign companies and collection rights arising from intergroup relations. Not only were they detrimental to the assets available to creditors, they were also financially detrimental to all of the creditors in the insolvency proceeding since they drastically reduced the residual realization value of the debtor's assets and the collection expectations for ordinary creditors, particularly in the event of liquidation.-- Clawback of the security interests created or to be created in assets and rights of the insolvent party, but not those created or to be created by third parties, even if they are companies in the same business group controlled by the insolvent debtor. Impossible to claw back the entire refinancing agreement since pursuant to Art. 71 LC, only acts performed by the debtor which are detrimental to the assets available to creditors are eligible for clawback.

JUDGMENT dated July 4, 2011 rendered by Barcelona Commercial Court No. 1

Art. 87 LC. Assessment of the claims held by the secured creditor in the insolvency proceeding of the guarantor. Civil law approach versus insolvency law approach: (i) assessment identical to that for the secured obligation due to waiver of the benefit of discussion, *vs.* (ii) assessment as a contingent claim as the principal obligation is not yet due for performance and the claim is subject to a condition.—The court held that the assessment of a claim as "ordinary" or "contingent" depends on the legal nature of the stipulated security. -- Joint and several liability: in order for this to exist, which would allow the inherent secondary nature of the security to be disregarded and enable the claim to be assessed as an ordinary claim, it must have been expressly stipulated that a claim can be made against either the debtor or the guarantor without the need for a prior breach by the debtor or that the surety accepts the "debt as its own".-- Conclusion: a guarantee containing a clause similar to "*regardless of breach by the principal debtor*" must be regarded as meaning joint and several liability.

DECISION dated September 19, 2011 rendered by Seville Commercial Court No. 1

Art. 57.1 LC. Resumption of mortgage foreclosure proceedings. Not permissible even though over a year had elapsed from the date of the insolvency order.-- The literal wording of Article 57.1 LC may be construed to mean that if no arrangement has been approved or liquidation initiated after the end of one year, the enforcement of security interests in the insolvent party's assets may be resumed or commenced. The court took the view that the automatic nature of this provision must be interpreted flexibly in view of the "excessive" workload of the court which had led it to the brink of collapse (various factors prevented the common phase of the insolvency from being completed within the time limit established in the Insolvency Law, and although an arrangement had not been approved, an advance proposal for an arrangement had been admitted).-- Dismissal of the application to resume the mortgage foreclosure proceedings: stayed until completion of the common phase and until it had been ascertained whether or not the advance proposal had been approved.

Hermosilla, 3 - 28001 Madrid - Spain
Telephone +34 91 514 52 00 - Fax +34 91 399 24 08

JUDGMENT dated October 5, 2011 rendered by Barcelona Commercial Court No. 7

Art. 61 and 62 LC. Claim for damage and loss filed against the insolvent party for breach of contract.-- The legal relationship comprises a complex arrangement of rights and obligations established by an initial agreement and several subsequent agreements.-- Disagreement as to whether the original agreement still in force.-- The insolvent party contended that the original agreement was not in force by relying on the *"rebus sic stantibus"* clause.-- That clause not applicable to the case at hand due to its exceptional nature and the predictable evolution of the obligations under the agreement.—The court took the view that although the insolvent company expressly denied that the original contract was in force, it had provisionally applied it in an implicit manner in order to carry out provisional payments until a new agreement had been reached with the plaintiff which, in the opinion of the court, prevented the agreement from being regarded as not in force.-- Finding of breach of contract against the insolvent party.

DECISION dated December 22, 2011 rendered by Santander Commercial Court No. 1

Art. 40 LC. System of supervision or temporary removal of the debtor's power to manage its assets.-- When the insolvency order was handed down, the court ordered supervision of the debtor's powers of management and disposal.-- Change of supervision arrangement: the insolvency managers applied for the directors to be suspended from office, arguing that the board's instability was hindering ordinary management of the insolvent company.-- The court granted the temporary removal of the powers of management and disposal in the interests of the insolvency notwithstanding the fact that the insolvent party's position, as a first division football club, presented special circumstances that made it wise for the measure to be reexamined.

JUDGMENT dated December 23, 2011 rendered by Barcelona Commercial Court No. 7

Arts. 101 and 105.1.2 LC. Objection to the approval of an advance proposal for an arrangement ("PAC").—Statutory prohibitions: The prohibition preventing a debtor from submitting a PAC, where it has breached its duly to file financial statements for the previous three tax years, cannot be given a broad interpretation: The court took the view that this prohibition applied where the financial statements for the three fiscal years *preceding* the advance proposal for an arrangement had not been filed, but not for any of the years after the PAC: no breach of the requirements necessary for submitting a PAC had arisen. -- Differences between the arrangement, payment plan and viability plan. The lack of provision for uncertain future events in the viability plan or the payment plan may, undoubtedly, be a determining factor for the performance or non-performance of the arrangement, but it does not constitute a condition, nor does it determine that the arrangement itself is objectively unviable.-- Objective inviability as a ground for objection must be applied in exceptional circumstances and interpreted restrictively. Anyone who claims inviability must be required to provide full and thorough evidence of the existence of a certain and objective inability. Examination of viability requires a detailed analysis of the proposed arrangement as well as the viability and payment plans. General statements as to the difficulty of complying with certain projected revenues under the viability plan must be accompanied by information on the impact they might have on the payment plan.

Hermosilla, 3 - 28001 Madrid - Spain
Telephone +34 91 514 52 00 - Fax +34 91 399 24 08

JUDGMENT dated December 28, 2011 rendered by Alicante Commercial Court No. 1

Art. 71 LC. Clawback action.-- Dismissal of an application for clawback of a security interest established by the insolvent party in respect of a time deposit owned by it: the insolvency managers considered that the security interest was a "disposal for no consideration" since it guaranteed the repayment of a loan granted to a company owned by the insolvent party for the purchase of a property.—The court took the view that the establishment of up-stream guarantees need not necessarily be regarded as a detrimental legal act for no consideration and that the circumstances of the case had to be examined.-- If the guarantee is justified and is in the interests of the insolvent party, which makes the detriment disappear, it will not be eligible for clawback: the analysis must be made in view of not only assets, but also the creditors as a whole: the security interest created by the insolvent debtor increases its assets since the secured loan enables the company it owns to purchase a property, thereby increasing the value of the insolvent debtor's holding in that company.

DECISION dated January 23, 2012 rendered by Barcelona Commercial Court No. 7

Arts. 8 and 133.2 LC. Objective jurisdiction of the insolvency court.-- Upon approval of the arrangement, the effects of the insolvency cease and the court that conducted the insolvency proceeding loses objective jurisdiction to hear new declaratory actions against the debtor's assets.—The insolvency court took the view that, if an action is filed before the enforceability of the arrangement, the *lis pendens* and *perpetuatio juridictionis* principles come into play, which prevent consideration of any subsequent change which may have modified the jurisdiction as it was at the time the action was filed, resulting in the insolvency court having jurisdiction.

JUDGMENT dated February 2, 2010 rendered by Barcelona Commercial Court No. 7

Art. 61 LC. Validity of contracts with reciprocal obligations.-- Claim by a creditor for payment as a post-insolvency order claim due to breach by the insolvent debtor of obligations arising under a contract in force during the insolvency proceeding.-- Objection by the insolvent party to the "*exceptio non adimpleti contractus*" exception on the basis of prior breach by the creditor/plaintiff.-- Requirements for this exception: (i) mutually dependent obligations; (ii) good faith. The prior breach exception cannot be based on a breach that is merely defective or simply irregular-- These requirements not met in the exception argued by the insolvent party. The court upheld the claim stating that, regardless of any possible action for performance and for damage and loss that may arise as result of the partial breach, post-insolvency claims owed to a creditor under a contract with reciprocal obligations yet to be performed must be paid out of the assets available to creditors.

DECISION dated February 2, 2012 rendered by Barcelona Commercial Court No. 7

Art. 87.4 LC. Dismissal of an application for preservation measures consisting of the establishment of provisions out of the assets available to creditors for the payment, should the case arise, of a contingent claim.-- The adoption of such measures depends on the course the insolvency proceeding takes (arrangement or liquidation) since this determines the adoption of a particular type of preservation measure.-- In addition, the adoption of preservation measures depends on the likelihood of the contingent claim being confirmed.-- The decision on the contingent nature of the claim depends, for the purposes of the preliminary issue, on a judgment from another court which has been appealed against, as well as the provisional enforcement of that judgment (against which, in turn, an objection is likely to be filed).-- The court ruled that a trial which would probably find in favor of the claim would be impossible at that particular time given the existence of this preliminary issue as well as the subsequent proceeding that would have to be conducted before the commercial courts.

4. PUBLICATIONS

"Reflexiones sobre las soluciones preconcursales" (Reflections on pre-insolvency solutions) [Fernández], Revista de Derecho Concursal y Paraconcursal, no 16, first half of 2012.

"La aprobación judicial acelerada de la propuesta anticipada de convenio (AJM 1 Barcelona 27.9.2010 y SJM 1 Barcelona 29.10.2010)" (The accelerated judicial approval of the early creditors agreement: Decision dated September 27, 2010 and Sentence dated October 29, 2010 rendered by Barcelona Commercial Court no 1), [Fernández, Thery, Carles], Anuario de Derecho Concursal, no 25, 2012.

"Acquisition of companies going through formal insolvency proceedings in Spain", [Gil Robles, Verdugo, Álvarez-Cienfuegos], Financier Worldwide Magazine, March 2012.

For further information:

Antonio Fernández
Partner in charge of Restructuring & Insolvency
antonio.fernandez.rodriguez@garrigues.com