

REFORM OF THE TREATMENT OF PLEDGES OF FUTURE CREDITS IN INSOLVENCIES:

The amendment of article 90.1.6. of the insolvency act envisaged in the bill of public sector legal regime act

Introduction

The legislator is looking to take advantage of the new Public Sector Legal Regime Act to reform the heavily criticised Article 90.1.6^o of the Insolvency Act, on the pledge of credit rights. This reform would entail conferring a special privilege on pledges of credit rights, provided that the legal relationship from which the credits arise exists at the moment the pledge is created, albeit without the need for registration. The authorisation of the government will also be required in order to pledge credits derived from a concession contract, such as the RPA.

Background

As we all know, the question of the resistance of pledges over future credits in insolvencies (understood as those that are "born" after the declaration of insolvency), suffered extraordinary disruption due to the highly defective wording of Article 90.1.6. of the Insolvency Act ("LC") in the reform of November 2011. At that moment, the legislator, referring literally to pledges "**securing**" future credits and pledges "**over**" future credits, seemed to oblige any pledge created as security for future credits to be recorded in a public registry (ultimately understood to be the Registry of Moveable Assets) in order to enjoy the special privilege. The doubts generated by this wording generated a notorious increase in the creation of pledges of credits under the formula of pledges without transfer of possession, which were recorded in the Registry of Moveable Assets, to the detriment of the pledge with transfer regulated in the Spanish Civil Code, which is simpler, less formal and cheaper.

Legal scholars were incessant in their criticism of the wording of Article 90.1.6, asking the legislator to amend it, which it has only just got round to doing now, despite the repeated reforms of the Insolvency Act in recent times.

The long-awaited reform has been some time in coming, and in the interim the approach of both the Commercial Courts and Courts of Appeal has evolved significantly. While many judgments initially, in the context of insolvencies and based on Article 90.1.6., rejected the effectiveness of pledges over future credits, they have recently begun to interpret Article 90.1.6 literally, as not applicable to pledges over future credits but only to pledges of credits as security, in turn, for future credits, in accordance with its literal wording.

As for a pledge over future credits "stricto sensu", the most recent case-law trend was based on traditional Supreme Court doctrine on the assignment of credits as guarantees, which accepted their effect in insolvencies if the legal relationship from which the credits arose existed at the time the guarantee was established. The

Supreme Court judgment of 6 November 2013, dealing with a case of an assignment of credits that predated the insolvency of the assignor, in which the credit came into being after the declaration of insolvency, confirmed the Supreme Court judgment of 22 February 2008 which declared that a credit that was assigned prior to an insolvency, but that came into being after the insolvency, is already born in the mind of the assignee and, as such, does not belong to the insolvency assets if it is derived from a legal relationship that already existed at the time of the assignment, even if the credit does not actually come into being until after the declaration of insolvency.

In light of these two judgments, the most recent case law had opted to apply this approach to the question of the resistance of pledges of future credits in insolvency situations, leaving the application of Article 90.1.6 in fine LC for cases (of scant importance in insolvencies in practice) in which a pledge is created as security for a future credit right.

The planned reform

The reform we are discussing, included in the 5th Final Provision of the Bill on the Public Sector Legal Regime Act which is likely to be passed in the coming weeks, seems to settle the matter once and for all, backing the doctrine established by the above-mentioned Supreme Court judgments of 22 February 2008 and 6 November 2013, stating that:

"credits secured with a pledge created over future credits will only enjoy a special privilege when the following requirements are met prior to the declaration of insolvency:

a) the future credits arise from contracts concluded by legal relationships constituted prior to said declaration,

b) the pledge is in the form of a public document or, in the case of a pledge without transfer of possession, is recorded at the corresponding public registry,

c) in the case of credits derived from the termination of concession contracts for works or the management of public services, they must also meet the requirements of Article 261.3 of the restated text of the Public Procurement Act (Ley de Contratos de Sector Público) passed by Royal Legislative Decree 3/2011 of 14 November."

Thus, the rule clarifies that it is sufficient for a pledge with transfer of possession - an ordinary pledge - to be granted (as security for present or future credit rights) for the special privilege to accrue to a creditor over future credit rights, provided that they arise from contracts executed prior to the declaration of insolvency.

As such, the reform has significant practical relevance, insofar as it seems to dispel once and for all the doubts surrounding the effect of a pledge over credit rights in insolvencies, the latter being a very common guarantee in financing operations, such as the case of pledges of credit rights over leases, in real estate financing, or a pledge over what is known as "government financial liability" ("RPA"), in project financing.

Precisely in relation to credit rights over RPA we should also mention that an important reform of the corresponding legal regime is envisaged following the planned reform of Articles 261, 271 ter and 288 of the Public Procurement Act contained in the 9th Final Provision of the above-mentioned Bill on the Public Sector Legal Regime Act.

For the purposes of pledges of credits over RPA that may be granted by a debtor holding a public works or public services concession, the most significant new development in the planned reform, consisting of a requirement that had not existed previously, is the need for prior authorisation from the government in order to grant the pledge.

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