INSOLVENCY & RESTRUCTURING - SPAIN

Composition of active mass under TRLC

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Introduction

Article 192 of the Consolidated Text of the Bankruptcy Law (TRLC) introduces the concept of the 'active mass' of a bankruptcy, which constitutes all of the assets and rights integrated into the bankrupt's assets on the date of the declaration of bankruptcy, as well as those that are reintegrated to the bankrupt or acquired until the conclusion of the bankruptcy proceedings.

The active mass incorporates the principle of universality derived from Article 1.911 of the Civil Code (ie, the debtor is liable for all of its present and future assets).

Inclusions

To be included in the active mass, assets and rights must belong to the debtor (subjective requirement) and have a patrimonial nature and be alienable and attachable (objective requirement).

Assets with security interests, leased assets and assets with reservation of title are included in the active mass under the principles of universality and the preservation of business.

Exclusions

Legally unseizable assets are excluded from the active mass (Article 192.2 of the TRLC). These include:

- absolutely unseizable assets, including inalienable assets and assets declared as such by law (Article 605 of the Law on Civil Procedure (LEC)); and
- furnishings and household goods, non-superfluous clothes, books and instruments needed by the debtor to practise their profession, goods dedicated to worship and amounts which are expressly declared unattachable according to Section 607 of the LEC and are calculated as a net amount (Article 606 of the LEC).(1)

The following assets are also excluded:

- assets owned by third parties without a right of use, guarantee or retention (Article 239 of the TRLC – right of separation of the assets held by an insolvent party); and
- vessels and aircraft taxed according to specific legislation (Article 241 of the TRLC).

The holders of credits with special privilege can separate these assets from the active mass of bankruptcy proceedings by taking the actions set out in the specific legislation. Any remaining assets will be incorporated into the active mass.

Parties have one year from the declaration of bankruptcy to exercise a separation action. After one year, the assets will be incorporated into the active mass with the classification corresponding to the credit in accordance with the TRLC.

Assets seized in administrative enforcement proceedings or labour executions before the declaration of bankruptcy are also excluded from the active mass, provided that they have been declared to be unnecessary for the continuity of the activity. Such assets have a separate right of execution. Any surplus assets will be incorporated into the active mass.

If – in a third-party action exercised by the bankruptcy administration – it is determined that there are

bankruptcy credits with a preference for collection, the amount of the proceeds will be made available to the bankruptcy court up to the limit of the preference.

As of the date of approval of the liquidation plan, the executions are without effect unless the notices of auction of the seized assets or rights have already been published.

Active mass of married persons

Articles 193 *et seq* of the TRLC set out the regime for the separation of property in case of married persons.

In such cases, the active mass includes the bankrupt party's own or private assets and rights.

Indistinct accounts
The credit balances of accounts of which the bankrupt is an indistinct holder are included in the active mass, unless proof to the contrary is deemed sufficient by the bankruptcy administration. A decision in this respect can be challenged during the insolvency proceedings.

Rebuttable presumptions in transactions between spouses
Rebuttable presumptions operate as long as there is no judicial or *de facto* separation.

If the bankrupt was married under a separation of assets regime, it will be presumed for the benefit of the active mass, unless proven otherwise, that they donated to their spouse half of the consideration paid by them during the year before the declaration of bankruptcy for the acquisition of goods or rights for consideration.

If it is proven that the consideration came, directly or indirectly, from the bankrupt's assets, the donation of the entire consideration is presumed.

Survivorship agreements
The assets acquired in accordance with a survivorship agreement will be considered divisible in the insolvency of either spouse. The half which corresponds to the bankrupt will be incorporated into the active mass.

Community of property regime
The active mass includes not only the private assets of the bankrupt spouse, but also the community or joint assets when they must respond to the bankrupt spouse's obligations.

As a counterpart, under Article 251 of the TRLC, claims against the spouse that are the responsibility of the partnership or marital community are included in the bankrupt party's liabilities.

The bankrupt's spouse has the right to acquire all of the community property included in the active mass by paying the mass half of its value fixed by mutual agreement with the bankruptcy administration. In case of default, the judge, after hearing the parties, will determine the market value. If necessary, the judge may request an expert report.

As an exception to the above, the value of the principal residence will be that of the acquisition price updated in accordance with the consumer price index, without exceeding the market value.

Under Article 125 of the TRLC, the spouse of a bankrupt party has the right to request the dissolution of the marital partnership or community property when marital property is included in the inventory of the active mass. In such cases:

- the judge will agree to the liquidation of the marital partnership or community property;
- the creditors will be paid; and
- the remainder of the property will be divided between the spouses.

Treatment of principal residence
Under Article 125 of the TRLC, the spouse of a bankrupt party is entitled to have the main residence of the marriage that has a common or community character preferentially included in their assets up to the amount of the property. If the amount of the property exceeds the value of their assets, the spouse must pay the excess in cash.

There are no other provisions for the protection of habitual residences in the TRLC.

However, this does not exclude the possibility of setting a minimum sale price of a habitual residence, for the debtor's benefit, in an insolvency liquidation, as provided for in Articles 670.4 and 671 of the Civil Procedure Law (Barcelona Provincial High Court, 16 October 2018, Order 131/2018). In this case, the liquidation plan contemplated this limitation, rejecting that the direct sale of the residence (the first phase of the liquidation) be carried out for an amount lower than the appraised value and that bids lower than 70% be admitted in the

auction (the second phase). No creditor had objected to this provision of the liquidation plan.

In principle, a main residence cannot be excluded from a liquidation. However, although it had not been raised in the appeal, in this case, it could not be ruled out that the value of the guarantee exceeded the value of the property or that it was foreseeable that the disposal would not cover the mortgage loan. Following the 2015 law reform, it is necessary to consign the value of a guarantee (Article 155.5º). If so, taking into account whether the loan has not matured and the instalments have been paid on time, the judge may authorise, after informing the holder of the credit and the other creditors present, that the property will not go to auction. In this case, CAIXABANK has not opposed the appeal and will surely be interested in keeping the loan in force. On the other hand, forced realisation would not benefit the rest of the creditors either. In these circumstances, the most reasonable thing to do would be to rule out the disposal.

If there were a surplus, the unsecured creditors would also benefit therefrom. This possibility was not necessarily excluded in a Madrid Provincial High Court decision in view of the value assigned to the property (6 July 2018, Order 109/2018). Moreover, the existence of this surplus, which is contingent on the conditions under which the sale finally takes place, would not be a reason to order the exclusion of this property from the insolvency liquidation, since it forms part of the insolvency assets and its destination is already legally fixed.

Further, the fact that the insolvent party, with the help of third parties, wanted to continue paying the mortgage loan instalments did not imply that the aforementioned property should not continue to form part of the active mass of the insolvency proceedings and that its destination, once the liquidation phase is reached, should be its realisation in order to meet, insofar as possible, the rights of the creditors. Even if the mortgage charge were paid by the party claiming nothing in exchange for it (to avoid exchanging one debt for another), the property would continue to be subject to the bankruptcy liquidation.

The disposal of the home in which the bankrupt resides would represent a significant disruption. However, there is no solid legal or jurisprudential support that would allow the court to find in favour of a claim of the nature of the one that the insolvent party argued in this case. Therefore, the court had no choice but to dismiss the appeal.

For further information on this topic please contact Alicia Herrador Muñoz at Augusta Abogados by telephone (+34 933 621 620) or email (a.herrador@augustaabogados.com or s.iglesias@augustaabogados.com). The Augusta Abogados website can be accessed at www.augustaabogados.com.

Endnotes

(1) As an exemption from attachment of minimum family income, if the party against whom enforcement is sought has dependants, the court may apply a reduction of 10% to 15% of the amount calculated, provided that it does not exceed five times the minimum wage.

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