International Law Office

INSOLVENCY & RESTRUCTURING - SPAIN

Composition of active mass: inventory of goods and rights – special cases

30 April 2021 | Contributed by Augusta Abogados

AUTHOR

Alicia Herrador Muñoz

Introduction
Pension plans
Financial leases
Instalment sales with reservation of title
Right to obtain a tax refund
Witholdings in guarantee

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 before 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).

Under Article 198 *et seq* of the TRLC, the bankruptcy administration must prepare an inventory of the insolvent party's assets and rights, including their value, by the end of the day immediately preceding the day on which it presents its report (for further details please see "Composition of active mass: inventory of goods and rights"). This article examines special cases regarding the composition of the inventory of goods and rights.(1)

Pension plans

According to Article 8 of Royal Decree Law 1/2002, which approved the Revised Text of the Pension Plans and Funds Regulation Law, pension plans are excluded from the inventory of good and rights due to their unattachable nature:

> *the vested rights of the participant in a pension plan may not be subject to seizure, judicial or administrative attachment, until the moment in which the right to the benefit is caused or in which they become available in the cases of serious illness or long-term unemployment or because they correspond to contributions made at least ten years before.*

Further, in a 5 July 2020 decision, a Madrid court held as follows:

> *in the context of insolvency proceedings and while the insolvency proceedings are ongoing, the vested rights of the pension funds and plans owned by the insolvent company are considered unattachable by law, as long as none of the contingencies of art. 8.6 of the Royal Legislative Decree 1/2002 (aforementioned), not being possible their retention, seizure and entry into the insolvency assets until said contingency; in such a way that if they occur during the insolvency proceeding, such benefits will enter the insolvency assets, and if they occur after its termination, they will give rise to the reopening of the insolvency proceeding [art. 179 L.Co], to a new insolvency declaration or to the declaration of the insolvency proceeding [art. 182 L.Co.] of the estate in the event of death as a contingency that allows the recovery of the benefits.*

According to a 21 September 2016 Barcelona court decision (202/2016), pension plans cannot be seized as such, but the associated benefits or vested rights can be seized once any of the contingencies that allow their holders or beneficiaries to dispose of them have occurred. In this case, the pension plan had been included in the inventory but not in the liquidation plan because when the latter had been presented, the pension plan had been unavailable. However, since the insolvent party's retirement was impending, it was logical to delay the conclusion of the insolvency proceedings and refuse the exoneration of the unsatisfied liabilities until the

liquidation of these rights, which were not attachable and realisable.

Financial leases

Article 198.3 of the TRLC states that property owned by others which is in the insolvent party's possession and over which the insolvent party has the right of use is excluded from the inventory. However, as an exception, the right to use an asset owned by others will be included in the inventory if the bankrupt is a financial lessee.

This gives rise to two possibilities:

- credit for leasing instalments is a contract under Article 158 of the TRLC. Such contracts are considered to give rise to reciprocal obligations pending fulfilment by both parties; or
- credit for leasing instalments is a bankruptcy credit with special privilege under Articles 157 and 270.4º of the TRLC.

According to a 29 June 2016 Supreme Court decision (STS 439/2016), the following requirements must be met in order for reciprocity to exist:

- each party must simultaneously be the creditor and debtor of the other party;
- each obligation must be the counterpart or countervalue of or consideration for dependence on the other;
- although an equivalence of values (objective or subjective) between the two performances is not required, both must have the status of principal in the operation of the contractual relationship. Conditionality between a principal obligation and an accessory or secondary obligation does not qualify; and
- reciprocity must exist in the functional phase of the bond and after the insolvency proceeding has been declared.

In order to determine whether the legal relationship arising from the lease continues to operate as a synallagmatic relationship after the declaration of insolvency, since the reciprocal obligations of the two parties will be pending fulfilment, it will be necessary to consider the clauses validly agreed by the contracting parties.

Further, the Supreme Court held that the following obligations are not reciprocal pending fulfilment after the declaration of insolvency:

- an obligation that the lessor leave the property owned by the lessee;
- an obligation to allow the peaceful enjoyment of the leased property;
- an obligation not to impede the lessee's use of the property;
- an obligation to receive the agreed rent; and
- an obligation to transfer ownership of the leased property once the purchase option has been exercised and the instalment corresponding to the residual value has been paid.

Therefore, if it is concluded that the credit for leasing instalments is a bankruptcy credit with special privilege under Articles 157 and 270.4º of the TRLC, the leased asset must be included in the inventory. The privilege falls on said right of use.

Instalment sales with reservation of title

According to a Burgos court decision of 8 February 2011, Article 270.4º of the TRLC bestows a special privilege on credits for leasing instalments or purchase and sale instalments with a deferred price of movable or immovable property, in favour of lessors or sellers and – where appropriate – financiers, where such property is leased or sold with a reservation of title, with a prohibition on disposal or a resolutory condition in case of non-payment.

In order for such privilege to be recognised, Article 271 of the TRLC requires that the guarantee be constituted prior to the declaration of bankruptcy. Further, the requirements and formalities provided for in the law must be met in order for the guarantee to be enforceable against third parties.

Article 15.1 of Law 28/1998 of 13 July 1998 on the sale of movable property in instalments requires domain reserves or the prohibitions on being included in the contract to be included in the Registry of Movable Goods in order to be opposed by third parties.

Otherwise, the creditor lacks the special privilege and the property will be included in the inventory without any charge having to be recorded thereon.

Right to obtain a tax refund

The right to obtain a tax refund does not arise until an express administrative act of recognition of such right has been issued by the Spanish Tax Agency (AEAT).

It is possible to include these credit rights against the AEAT, merely for information purposes and stating their provisional nature until a final administrative act of recognition has been issued.

The right to offset future positive results takes effect only when the positive result to be offset occurs.

Withholdings in guarantee

Finally, consideration must be given to withholdings in guarantee of a contract for the execution of works where the insolvent company is the contractor.

Under Article 154 of the TRLC, when insolvency proceeding have been declared, the exercise of the lien on goods and rights integrated in the active mass is suspended. This raises the question of whether goods and rights are integrated in the active mass despite being held by a third party.

According to Supreme Court decisions of 30 May 2014 and 24 July 2014, the liquidation of contracts for the execution of works in which there were reciprocal credits regarding price, conventional penalties for delays and retentions in guarantee should be admitted. Liquidation is to be carried out by the judge of the insolvency proceedings or by the Court of First Instance if the insolvent party files a claim for retention and the contractor opposes defects in the execution or assumption of labour debts. The result of the liquidation is incorporated in the inventory or in the list of creditors, depending on the result.

The offset prohibition under Article 153 of the TRLC does not apply. The amount of compensation due as a result of liquidation of the same contractual relationship, from which obligations may have arisen for one or both parties, will be decided in a judicial proceeding subsequent to the declaration of insolvency of one of the parties. Further, the Supreme Court decision of 15 April 2014 (STS 188/2014) states that this is more than compensation – rather, it is a mechanism of liquidation of a contract that has already been resolved.

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). The Augusta Abogados website can be accessed at www.augustaabogados.com.

Endnotes

(1) This article is part of a series on the active mass under the TRLC. For other articles in the series, please see:

- "Composition of active mass under TRLC"; and
- "Composition of active mass under TRLC – case law";
- "Composition of active mass: inventory of goods and rights".