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Pledge "of or over" future credits and pledge "securing" future credits in the reform of the Insolvency Law

Contenido

1.- The new paragraph of Article 90.1.6

The Law on the Reform of the Insolvency Law 22/2003 of 9 July (the "Reform Law") approved on 21 September 2011 and entering into force on 1 January 2012, has introduced the following paragraph in Article 90.1.6:"

"The following are credits with a special privilege:

6.- Credits secured with a pledge recorded in a public document, over pledged assets or rights that are in the possession of the creditor or a third party. If it is a pledge of credits, it will be sufficient for it to be recorded in an official dated document in order to enjoy a privilege over the pledged credits. A pledge securing future credits will only grant a special privilege to credits arising prior to the declaration of insolvency, as well as to credits arising after the same, when reinstated by virtue of Article 68 or when the pledge was recorded in a public registry prior to the declaration of insolvency."

The introduction of this new paragraph, which is already generating widespread attention among specialist legal scholars despite its relative youth, with a text that, in view of the background to its legislative process, (it seems clear was not designed for the purpose it is ultimately called to serve and did not intend to say what it ultimately says), if we heed the current literal wording, is liable to generate consequences that may be particularly relevant for financing entities as regards the consideration of certain credits as privileged in the event of the insolvency of the debtor.

2.- What are the immediate consequences of the Reform Law, if its current terms are maintained?

Until now the rule did not establish differences between creditors on the basis of whether the credits arose before or after the declaration of insolvency. In both cases, if any creditor were able to demonstrate the existence of an ordinary pledge right, duly created, officially dated prior to the insolvency, the creditor was not affected by the vicissitudes of the insolvency; he had a credit with a special privilege and, as such, a right of separate enforcement over the pledged asset.

If the literal wording of the rule discussed is maintained, this scenario would change radically for creditors of future credits arising after the declaration of insolvency. They would only be considered creditors with a special privilege if (i) the pledge they are seeking to benefit from is recorded at a public registry or (ii) the credit was reinstated by virtue of Article 68 of the Insolvency Law.

Keep in mind that, for the purposes of the above-mentioned Article 90.1.6 no distinction is made with regard to the assets or rights over which the pledge is created. That is, if I am a creditor with a credit arising after the declaration of insolvency (and, as such, a "future" credit, using the rule's own terminology) regardless of what type of asset or right my guarantee

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refers to, I will only be considered a privileged creditor if my guarantee is recorded at the public registry.

3.- What creditors will be affected?

Legal scholars do not agree on when a credit should be considered to have arisen, but we should warn you of the risk that certain credits may be considered to have arisen after the declaration of insolvency, such as the following:

- payment obligations resulting from credit disposals performed after the declaration of insolvency.
- payment obligations resulting from derivatives that fall due after the declaration of insolvency even when the agreement creating them was entered into prior to the declaration of insolvency.

4.- Collateral effects of the controversy derived from the new wording of Article 90.1.6.

Apart from drawing your attention to the possible consequences deriving from the application of Article 90.1.6 as worded after the legislative reform, we must not overlook certain alternative scenarios that could be implemented should the criticism that the current version of Article 90.1.6 is receiving make an impression on the legislator.

A relevant number of specialist legal scholars, as well as one of the rating agencies, is criticising the wording of the amended Article 90.1.6 given that in their opinion the legislator has unfortunately confused pledges "securing" future credits with "pledges over future credits".

The legal scholars consider that what the provisions of Article 90.1.6. really meant to say is that when (present or future) obligations are guaranteed by means of a pledge over future credit rights, the pledge would only grant a special privilege over this credit right in favour of the pledgee if the credit right arose prior to the insolvency or, in the event that the credit right arose after the insolvency, if the pledgee's credit had been reinstated under Article 68 of the Insolvency Law or if the pledge over future credits was recorded in a public registry prior to the declaration of insolvency.

Without entering into the pros and cons of this interpretation (or maybe better to call it a trend, since what it is seeking is the modification of the current wording of the Article, as there is little doubt with regard to the interpretation of the current wording), the effects of this modification, should it proceed, would be as follows:

In any structured bank financing, in the area of movables or rights traditionally used for guarantees, there are two distinct areas:

- existing assets: shares, participations, current credit rights (for example deferred payments corresponding to services already provided), etc.

- future assets[1] (typically credit rights): by way of example, credit rights derived from a Share Purchase Agreement, credit rights derived from insurance policies, credit rights derived from material agreements, credit rights derived from current accounts, credit rights derived from the liability of the Public Authorities.

Should the opinions indicated above make an impression on the legislator, the "clarification" of the reform of Article 90.1.6 would mean that in order to ensure the granting of a pledge guarantee over any of the credit rights that could be considered future credits and which are impervious to the insolvency of the debtor, such guarantee would have to be recorded in a public registry (that is, at the Property Registry, as stipulated by Article. 54-3 of the Law governing Chattel Mortgages and Pledges without Transfer of Possession pursuant to the reform of the Law governing the Mortgage Market dated 7 December 2007).

5.- Conclusions and practical recommendations

Provided the literal wording of Article 90.1.6 is maintained, as published in the Official State Gazette, those credits considered to be future credits will only be considered privileged in relation to an ordinary pledge guarantee when recorded in a public registry with a date prior to the declaration of insolvency.

In this regard we recommend analysing any operations performed that include derivatives or liquidity lines and considering the possibility of reviewing the package of guarantees in order to avoid said credits losing privileged credit status in the event of the insolvency of the debtor.

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[1] Please bear in mind, as discussed, that there is no consensus among legal scholars with regard to the consideration of a credit as a future or existing asset, and therefore this list should not be considered subject to review based on the circumstances of the obligation in question.

Moreover, and although it is still a hypothetical scenario at this stage, taking into account what we discussed in point 4 above, it would also be worth analysing the portfolio of operations in order to identify in which ones the "main part" of the package of guarantees consists of credit rights that may be considered future rights, with a view to considering whether it would be appropriate and/or opportune to register the pledges created over them.

One final point: pledge rights created pursuant to the provisions of Article 15-4 of Royal Decree 5/2005 should not be affected by the new rules in the Reform Law, insofar as Article 15-4 grants them special protection in the event of insolvency.