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Briefing note

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Alteco: Madrid court of appeal reverses first instance decision to block enforcement of share pledge by way of interim injunction

Content

Alteco is a family owned investment vehicle which acquired a significant stake in the French company Gecina S.A. using a loan granted by a syndicate of lenders. The security package of the loan included a share pledge governed by Luxembourg law implementing the European Financial Collateral Directive (47/2002), the custodian of the shares being an entity based in Luxembourg.

Upon the maturity of the loan, Alteco filed for insolvency in Spain. In October 2012, immediately upon the request of Alteco's receivers, the insolvency judge granted an ex parte interim injunction against the lenders preventing the enforcement of the pledge. The receivers announced an immediate claw back claim challenging the validity of a specific amendment of the loan agreement (the "Amendment").

The claw back claim alleged that the Amendment was detrimental to other creditors of Alteco, as it was intended to add new circumstances in which the lenders could enforce the pledge. The receivers argued that, in accordance with the terms the loan documentation, before the Amendment the pledge had only been enforceable in the event of the early termination of the loan and not at ordinary maturity.

When requesting the interim injunction, the receivers alleged that there was a need to prevent the enforcement of the pledge since this could jeopardise the effectiveness of an eventual judgment rendering the Amendment ineffective.

The first instance decision

The claw back claim was filed a few weeks after the interim injunction. The lenders filed opposition in due course. On 5 January 2013, the court of first instance upheld the interim measures.

The court decision was controversial, both procedurally and substantively. Procedurally, because it granted an injunction based upon a petition filed by a receiver which lacked the minimum justification, disregarded basic principles on burden of proof and failed to require the claimant to post a bond to cover eventual damages (it was generally believed that such an injunction would never have been granted to a claimant other than a receiver). Materially, because the court limited the enforcement of a pledge, created as a financial collateral which should be enforceable notwithstanding the insolvency the pledgor, without ascertaining whether, as a matter of the relevant applicable laws (Luxembourg) the assumption made by the receiver (that the pledge was only enforceable in the event of an early termination of the loan) was accurate.

The court of appeal judgment

On 3 March 2014, the court of appeal reversed the first instance court's decision, declaring that the claimant must bear the defendant’s costs and fees.

The first instance judgment ruled that by virtue of the Amendment the pledge became enforceable following not only the acceleration of the loan agreement, but also upon maturity. Thus, it concluded that a new enforcement event had been introduced which could be prejudicial for third parties.

This assertion was highly controversial for the following reasons:

> i) the receiver brought no evidence that the pledge was not enforceable at ordinary maturity (this analysis being subject to Luxembourg law);
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> ii) in the case of financial collateral, the lenders' right to appropriate is a natural consequence of the granting of this kind of security, according to the EU Directive and Luxembourg implementing legislation; and
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> iii) Luxembourg law (art. 13 of Law 5/2005) does not allow financial collateral to be challenged in insolvency proceedings.
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> The court of appeal upholds the reasoning of the defendants.
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> First of all, it rules that the procedure in which the injunction was adopted (“ex parte”) does not prevent the court from examining the legal grounds for the injunction, on a plenary basis, when the defendants file the opposition. The first instance decision to revert the burden of proof, placing on the defendants the need to provide evidence, was incorrect. The receiver, as claimant, should have borne that proof.

The main argument for the court of appeal decision is based upon art. 13 of the European Insolvency Regulation. As the insolvency of Alteco was declared in Spain, the law applicable to the claw back action is Spanish insolvency law. However, the pledge is subject to the laws of Luxembourg, as the asset is located there. The court of appeal rules that if a claw back claim is not possible under the law applicable to the contract (in this case Luxembourg law), then it should not be allowed in the Spanish insolvency proceedings. The court further rules that the defendants have successfully brought evidence that Luxembourg law does not allow the pledge to be challenged.

A few weeks before the appeal judgment, the Luxembourg courts ruled on a claim brought by certain lenders, confirming that the pledge was fully enforceable in accordance with Luxembourg law also at maturity (as it was of the essence for a pledge agreement). The court of appeal noted that this decision was an additional element of conviction, as it showed that the assumption made by the Madrid first instance court (that the parties had introduced a new enforcement event) was not correct. Thus, the Amendment could cause no damage to Alteco.

Finally, the court of appeal states that under Spanish law (Royal Decree Law 5/2005) the challenge of financial collateral by means of claw back action requires evidence of fraud. The court rules that there is no prima facie evidence of fraud and that it was not even alleged by the receiver.

The court accepts the good faith of the receivers' request for the injunction (fumus boni iuris), and therefore does not consider it necessary to analyse other requirements for the adoption of an injunction, in particular the need to show evidence of risk and the placing of a bond to cover damages.

Conclusion

In our view, the decision taken by the court of appeal is well founded, both procedurally and materially. Although the facts of the Alteco case were exceptionally complex, the first instance court decision did not contribute to legal certainty, creating the possible impression that a receiver could obtain an injunction very easily and that the blocking of the enforcement of a pledge received a different treatment in Spain than in other European jurisdictions.   The court of appeal's decision has clarified the legal scenario and this is good news generally for the Spanish debt market.

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