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Regarding a total or partial waiver of special privileges already lodged as such in insolvency proceedings

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Purpose

1. The purpose of this paper is to examine whether secured creditors, following the lodgement of their secured claims (submission of proof of secured debt), may waive the special privileges deriving from the holding of security and voluntarily swell the class of junior unsecured creditors for the purpose of voting on a composition. Such secured creditors may not be interested in remaining in their class if the Authority's liability for termination of a concession may be destroyed as to its value by a composition on the basis of a going concern, which may be adopted by the majority of junior unsecured creditors. It would matter not that the majorities of secured creditors referred to in art. 134(3) of the Insolvency Act ('**LCon**') are not met, because the creditors of this class, who would not be 'bound' by the composition, would in fact lose the monetary value of their security.

Waiver of rights

2. The waiver of a (special) privilege under art. 90 LCon is a waiver of rights under art. 6(2) of the Civil Code ('**CC**'). The privilege, as a characteristic of the claim, is the subject matter of the waiver. In general, the Supreme Court is consistent in its treatment of waivers of rights. In order for the waiver of a right to be deemed valid and enforceable, such must be clear and express, conclusive, an indisputable statement of intent, requiring the waived right to have been acquired

and incorporated into the waiverer's estate. The waiver of rights must be explicit, clear and strict, without room for deduction from expressions of dubious meaning[1].

3. The term 'rights' must be understood in the broadest sense, as any legally protected individual interest that vests on the holder thereof content to use, a right of exclusion, a right to dispose of or to modify a *status iuris*, a right in rem, a claim privilege, an expectation, etc.

4. The waiver may be total or partial, as long as its subject matter allows for divisibility. A claim cannot at the same time be secured and unsecured, but a monetary claim is always divisible, so for all practical purposes there would be no problem in dividing the same into a secured and unsecured claim; all the more in the case of a plurality of claims.

Abdicative waiver

5. The 'waiver' of a right may be contained in an 'agreement', within the meaning of art. 1255 CC, which in turn forms part of a claim-debt obligation framework originating in a contract; or it may be an 'absolute' waiver, produced by a unilateral transaction of an abdicative nature. A waiver of this kind is a unilateral act, although, if there is an externalisation of the same, it can be considered that it is of a receptive nature; that is to say, it has to be notified or communicated to the interested party, which need not do anything for the waiver to become effective. In this sense, the waiver differs from a 'dispute' (of the list of creditors, for example) or 'acknowledgement' (of an insolvency claim payable upon distribution, for example), because these two legal institutions require a statement of intent on the part of the addressee, which is necessary to form a legal transaction or its cancellation. Therefore, while the 'lodgement' of a claim is not a 'self-enforceable' act-at-law - the claim has to be acknowledged by the insolvency practitioner - and does not produce any alteration in the state of subjective rights, an abdicative waiver immediately produces effects and is self-enforceable.

The right of security and the waiver of privileges

6. The subject matter of the waiver to which we refer is the special privilege of art. 90 LCon. Observe the nature of the provision. In it, the security is a pre-existing event outside the provision. The provision is limited to conferring a special privilege to security, but does not create or 'acknowledge' such inasmuch as presupposed outside insolvency proceedings.

7. The fact that security is ordinarily associated with a special privilege does not mean that such a connection is necessary. It might not have happened that way, if such had been the legislator's decision, which, for example, deprives a caveat entry of legal privileges. Note also arts. 90(3) and 94(5) LCon, where security ceases to support a claim privilege beyond what is known as

[1] Judgments of the Supreme Court of 2 March 1959, 18 October 1984, 4 February 1994, 22 February 1994, 11 October 2001, 18 October 2001, and 15 October 2010.

the 'value of the security', without having to reduce or partially 'cancel' said security. The same happens with art. 90(1). The 'waiver' of the privilege, or even its loss for another reason (for example, privileges subject to expiration or to the characterisation as subordinated referred to in art. 97(2) LCon), does not entail the termination of the security, nor can the debtor request a discharge of a registered charge, except in the hypothetical case of art. 149(5) LCon. The security survives with an *ius distrahendi* (right to sell that given as a pledge) and a fully enforceable privilege outside insolvency proceedings, if concluded without the charged assets being disposed of; the security also survives for its enforcement against third parties that are outside the insolvency proceedings. It should be borne in mind that the loss of privilege leads to the cancellation of the charge only in cases specially provided for by the legislator, such as art. 97(2) and 149(5) LCon.

Timing of the waiver

8. The unconditional enforceability in insolvency proceedings of a waiver of this kind could be objected to on the force of arts. 96, 96 bis, 97 and 97 bis LCon. If there is a time limit to 'dispute' the list of creditors, to 'lodge' new claims, to 'modify' the classification of claims, art. 97 bis would mark the last moment in which this modification could take place, and art. 97(3) and (4) would delimit the exclusive circumstances in which the modification is possible.

9. It seems to us that this is not as described. Note that in our case we are not 'lodging' new claims, nor is the list being 'disputed'. Even art. 97, delimiting the cases of admissible modification, refers in origin to those who have not disputed, where modifications to the list cannot be made except in the cases provided for in sub-arts. 3 and 4. These are persons who either in origin would not be concordant with the list or have subsequently suffered contingencies that render the list discordant with the actual situation of the claims. But this does not happen in our case. The list is not disputed and there is no contingency of subsequent discordancy. It is not even appropriate to refer to a claimed modification of the list, but rather to an automatic discordancy of the classification of claims, as a consequence of a unilateral act that is self-productive. It is as if the holder of the security had cancelled it unilaterally by his own will or as if that given as a pledge had ceased to be in the creditor's possession or if the building on which the fixed asset claim rests had collapsed. The privilege cannot subsist, if the cause of its expiry is a 'self-productive' contingency (cancellation, loss of the thing, fire, etc.). The list is necessarily 'updated' in cases such as these, because the affected claims are not to be paid as specially privileged when the security has disappeared, no matter what the final undisputed or unmodified list says.

10. One could insist on the exclusivity of the statutory causes of art. 97 for the purposes of art. 97 bis. But in fact there are no statutory causes, because every day there are contingencies modifying the claims, such as the assignment of the same, which are not listed in art. 97 and which are not processed by way of art. 97 bis. As an abdicative waiver is self-productive of legal effects – as is the *derelictio* (abandonment) of a thing held in ownership - there can be no 'objection' to its effects, nor is there in that regard room for a motion within insolvency proceedings.

Limits

11. Abdicative waivers are limited by the 'detriment' to third parties. But the concept of detriment must be legal, not factual. The detriment to a mere reflected interest which is not vested with a protected legal position is not sufficient. If I were really waiving 'my' right, the 'interest' of a third party in the existence of such right would be a mere reflected interest, but not a legally protected interest as a right, and thus my waiver would find no further limit than that which could be based on art. 7 CC (abuse of right), but not on art. 6(2) CC[2].

12. Junior unsecured creditors are not third parties that can claim a relevant 'detriment' within the meaning of art. 6(2) CC. Their interest is merely reflected and proof of this is that such creditors could not object to secured creditors proving their claims as junior unsecured from the start.

13. Nor do waiverer creditors act in abuse of rights, but in the defence of a legitimate interest. Due to the circumstances of the case, the privilege in question rests on the Authority's liability, but such can only be brought into the estate of the insolvent concessionaire in the event of liquidation, when the concessional operation is terminated. If the original junior unsecured creditors approve a composition on the basis of a going concern or third party subrogation, it cannot be said here that secured creditors can stay 'comfortably seated' on their security, since such would be diluted.

[2] Correctly, Judgment of the Supreme Court of 27 July 2010, in respect of a waiver of a usufructuary right.