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RELOCATION OF A SPANISH COMPANY'S REGISTERED OFFICE TO ANOTHER EU MEMBER COUNTRY AND JURISDICTION FOR INSOLVENCY PROCEEDINGS

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The current economic environment and the recession that the Spanish economy is suffering have caused many troubled companies to analyse alternatives to facilitate the continuity of their operations with the least economic impact.

To such end, there are within the EU environment, jurisdictions which are laxer than Spain, and contrary to the approach of the Law on Insolvency Proceedings (hereinafter "LCon") currently in force, other jurisdictions have enacted rules that provide advantages for insolvent debtors and offer generally faster and more dynamic proceedings.

Faced with that situation, some businessmen and managers have set their eyes on those regulatory bodies, and among them very evidently on the regulations of the United Kingdom, even contemplating the possibility of relocating the main centre of business of the companies to other countries for the purpose of filing there for the opening of insolvency proceedings and thus benefiting of more flexible rules.

We analyse below the possibility of carrying out the relocation of the registered office of Spanish companies to other states, and the consequences of such relocation over the determination of competent jurisdiction related to the companies' insolvency proceedings.

1. **Regulation of the relocation of a company's registered office under Spanish Law: the Law on Structural Modifications**

   The relocation of the registered office of a Spanish company to a foreign jurisdiction maintaining such company's legal personality is allowed under Articles 92 and subsequent of Law 3/2009, on Structural Modifications of Corporations (hereinafter, "LME"). It offers a possibility that is contemplated by Spanish legislation, but which is not required neither by European legislation nor by European case law, and as such, which has no reason to be admitted in equivalent manner by other member states. This means that Spanish rules may allow the companies' relocation to other states, but the relocation's effectiveness, and especially its nature as such (which allows the continuity of the legal personality of the relocated company, without requiring its dissolution and reincorporation) does not only depend on Spanish legislation, but also on the approach adopted by the laws of the host foreign jurisdiction.

   The requirement of article 5 of the Spanish law on corporations ("LSA") and article 6 of the Spanish law on limited liability companies ("LSRL"), that any company whose main seat of business is located in Spain must also establish its registered office in this jurisdiction, brings as a result that the relocation to Spanish territory of the main business of a foreign company should entail the transfer to Spain of its registered office as well, and that if a Spanish company relocates its registered office to a foreign jurisdiction, it should likewise move its main business to such jurisdiction.

   The LME only contemplates the relocation of companies incorporated under Spanish law, but excludes those under liquidation *or which are undergoing insolvency proceedings*. It would seem that such reference to the insolvency proceedings must be interpreted as a prohibition to relocate companies in respect of which such proceedings have been initiated, being unclear whether the insolvency filing is sufficient or the formal declaration of its opening is necessary, but that the prohibition is not applicable to those cases where there has not been a formal filing for

Analysis

insolvency, even though the conditions for it actually exist.

Articles 95 and subsequent of the LME regulate the relocation procedure. Among the most relevant aspects of such procedure is the requirement that the management of the company draft a relocation "Project", which must include the information of Article 95 of the LME, and that they file it with the relevant Registry of Commerce. The Project will afterwards be published in the BORME (Official Bulletin of the Registry of Commerce). The required Project information comprises the memorandum and articles of association that will govern the company after its relocation, including (if relevant) the new company name.

Given that after relocation, the company will be ruled by new companies legislation, its new memorandum of association must comply with such legislation. It must also adequately fit with one of the company types available in the new jurisdiction, which requires the prior election of the type that will best match with that used by the company until then.

The Project must also state the rights contemplated for the protection of partners, creditors and workers, and include a managers' report explaining and justifying the relocation project from a legal and economic standpoint and its consequences for the above stakeholders (Article 6).

The relocation must be decided by a partners' meeting summoned with at least two months' prior notice. Among other requirements, the summoning notice must state the right to withdraw afforded to partners who voted against the agreement, the right of opposition granted to creditors, and the way such rights may be exercised (article 98). The agreement must be approved by a partners' meeting which complies with the requirements and formalities established by Spanish law for each relevant type of company.

Article 101 stipulates that the Spanish registry shall certify compliance by the relocating company with the required acts and formalities before relocation, and that such certification brings about the closure of registration. However, the relocation only becomes effective at the date of enrolment in the new registered office's registry, and the cancellation of the company's registration in Spain is executed only after evidence of such enrolment is provided and the publicity requirements of article 103 of the LME are complied with.

2. **Consequences of the relocation with respect to the competent international jurisdiction for the opening of insolvency proceedings**

Article 3.1 of Council Regulation (EC) No 1346/2000 on insolvency proceedings ("RPI") states that "the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

The notion of "centre of main interests" is not defined in the articles of the RPI, but in section 13 of the introduction, where it is considered that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

From that perspective, the presumption of article 3.1 is a rebuttable presumption, meaning that can be overturned upon the showing of sufficient proof. This entails that any conflict between facts and forms will be resolved in favour of the former. However, in the absence of rebuttable elements, the legal statement of the presumption should be taken as truthful. This has been the sense of a ruling by the Court of Justice of the European Union ("CJEU"), according to whom the centre of main interests of a company is located in the Member State in which it has its registered office and that presumption "can be rebutted only if factors which are both objective

Analysis

and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated" (CJEU, May 2 2006, Eurofood C-341/04).

On the other hand, *the procedural stage which is relevant to determine the international court of competent jurisdiction is that of the filing of the request for the opening of the insolvency proceedings*. The later relocation to a foreign jurisdiction of the debtor's centre of main interests does not modify the court's jurisdiction, not even if carried out after the mere filing of the request, but prior to its opening by the competent court.

The above rule is not modified even when the relocation takes place immediately before the filing of the request, because the RPI does not establish any minimum period requirement for the registered office of the company to serve as the source of determination of jurisdiction. *Nevertheless, a formal relocation is not sufficient. It is necessary that the new location be based on facts, and that the debtor carry out from there the administration of his business on a regular basis*.

Contrary to the above, article 10.1 of LCon, after establishing a rule of territorial and international jurisdiction similar to that of article 3.1 of the RPI, mandates that any change of the registered office of a company carried out within six months prior to a filing for insolvency proceedings shall be invalid. However, this rule is not applicable within the ambit of the European Union. In those cases in which the RPI is applicable, this is the only pertinent rule in relation to the determination of the international court of competent jurisdiction on insolvency and it does not contain, as we have seen, any period requirement for the registered office of the company prior to the filing for insolvency. The rule of the LCon can therefore only be understood with domestic effectiveness, that is once the jurisdiction of the Spanish courts is ascertained by application of the RPI, and in order to resolve discrepancies among Spanish courts. Nevertheless, there are no court precedents on this issue, and thus it cannot be assured that the Spanish judges may erroneously apply this rule in the opposite sense.

3. **Conclusion**

(i) The LME does not allow the relocation of the registered office of companies which are subject to insolvency proceedings, not being clear whether a declaration of insolvency proceedings is required or a filing for that purpose is enough.

(ii) The company's relocation prior to the filing for the insolvency proceedings is possible, becoming competent to open such proceedings the authorities of the State where the new registered office is situated, as the new location of the centre of the company's main interests. However, the presumption of coincidence between the company's registered office and its centre of main business can be disabled. The relocation, in order to be effective with respect to the change of jurisdiction, must reflect factual and not purely formal elements.

(iii) The rule of article 10.1 LCon, according to which is ineffective for the determination of the court of competent jurisdiction any change in the registered office of a company carried out within the six-month period prior to the filing for insolvency proceedings, is not applicable within the scope of the EU environment, and is only valid to delimit the local territorial jurisdiction among the Spanish courts that have been considered competent by operation of the RPI. However, there are no relevant court precedents in this respect, and therefore there is a risk of mistaken interpretation of this rule by Spanish courts.