Homologated refinancing agreements and their validity in situations related to a foreign legal system

Elisa Torralba Mendiola
Reader (Associate Professor) of Private International Law, Universidad Autónoma de Madrid
Academic Council Member, Gómez-Acebo & Pombo

The fourth additional provision of the Spanish Insolvency Act (IA) provides for homologation (court sanctioning) of a refinancing agreement signed by creditors representing at least 51 per cent of financial liabilities whilst meeting certain conditions set out in article 71 bis at the time of adoption of said agreement.

As a result of the homologation, certain effects of the agreement will be extended "*to creditors of financial liabilities who have not signed the refinancing agreement or who have expressed their dissent from it and whose claims are not secured or in respect of the portion of the claims that exceed the value of the security in rem*" (third paragraph).

These refinancing agreements are insolvency-related given the systematic location of their regulation as well as the purpose they serve. They are not, however, covered by the Spanish Insolvency Procedures Regulations 1346/2000 (IPR), and this, as I show below, has implications at the EU level.

1. **Can these agreements be relied on against financial creditors who did not vote for them, whose claims are subject to foreign law and who seek through Spanish courts payment in full of said claims?**

   This question must be answered in the affirmative (provided, of course, the claim in question is not secured or, if it is, the security in rem does not cover all of it and the enforceability of the agreement is sought with respect to the portion of the claim that exceeds the value of the real security).

   If a purely contractual characterization were accepted, the creditor whose contract was subject to foreign law might argue that such can only be modified as provided by the law governing it and not by virtue of a Spanish law provision. However, having established that refinancing agreements are insolvency-related by nature, if one such agreement is homologated by a Spanish judge, inasmuch as judge of the country where the debtor's centre of main interests lies, it is imposed on the creditors regardless of the law to which their claims are subject; upon contracting with the "Spanish" debtor, they assume the risk of insolvency of the centre of main interests as provided in the Spanish legal system.

   As mentioned above, this outcome excludes creditors whose claims are secured up to the limit covered by the security in rem, simply because this is what is prescribed by Spanish legislation regardless of the location of the charged property.

2. **Can these agreements be relied on against financial creditors who did not vote for them, whose claims are subject to Spanish or foreign law and who seek through courts abroad payment in full of said claims?**

   In the event that any of the financial creditors who have not signed the refinancing agreement brings an action for payment of the entire claim before an overseas court that regards itself as of competent jurisdiction (because, for instance, the parties agreed as much under contract or because the court can base its jurisdiction on some other criterion under its legal system), the response to the contention that the court should

not allow the action but rather assert the effects of the adopted refinancing agreement over the claim depends on the possibilities of recognition of the homologated agreement (again, secured claims are excepted as provided in the fourth additional provision IA).

At the EU level this recognition cannot operate through the channel provided in the IPR (refinancing agreements are not covered by the current definition of insolvency set out in article 1, nor are they listed in Schedule A, which contains the procedures falling under the regulations' scope of application; although the envisaged amendment to the IPR may change this state of affairs).

But even admitting, which is debatable, other recognition channels between Member States of the EU, such cannot be the procedure provided in Regulations 44/2001 and, where appropriate, the recognition systems laid down in each legal regime by its internal provisions are the ones to be applied. The divergence between these provisions is considerable, leading to great uncertainty when assessing the effects of refinancing agreements in these situations and it cannot be stated, at all, that their enforceability is guaranteed. The same can be said when the country where recognition of the effects of the agreement is sought is not an EU Member State, but a third country.

For further information please visit our website at www.gomezacebo-pombo.com or send us an email to: info@gomezacebo-pombo.com

Barcelona | Bilbao | Madrid | Valencia | Vigo | Brussels | Lisbon | London | New York