

Pledging dividends from a previously pledged share in a Catalanian company

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Pledging dividends as a claim when the underlying share has already been pledged is no mean feat. More so if the company with share capital has its registered office address in Catalonia. But it can be done.

We address here the question of whether a shareholder's right to dividends can be pledged separate from the pledge of the share itself. Such hypothesis comes to the fore when the company share has already been pledged and another creditor accepts the financial (equity holding) right attached to the same as collateral "in the second degree". We will assume that under the agreement, as is usually the case, the first pledge extends to dividends as proceeds of the subject matter (art. 1868 of the Civil Code [CC]), regardless of whether, vis-à-vis the company (art. 132(1) of the Companies Act [LSC]), the right to dividends is attached to the shareholder or to the creditor.

The isolated dividend pledge would take the shape of a pledge of present claims (dividends already agreed upon) and contingent receivables (dividends that could be agreed upon in the future). Note that we are not talking about the possibility of assigning the "abstract" right to collect dividends. The dividend claim pledge is not a second pledge of the share or of a part thereof, although this does not mean that the approved dividend is not already "naturally" included in the first pledge, as an "antichresis" extension of the collateral to the proceeds the subject matter may yield.

Such a possibility would seem to be impeded by a "universal" rule and by a particular one to Catalanian law. The universal objection is that company shares are indivisible (art. 90 LSC). The Catalanian objection springs from art. 569-15(1) of their Civil Code (CCCat), which prohibits second pledges of the same property, but for the exception there provided that we need not concern ourselves with now.

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As for the first of the objections.

It is a postulate of corporate and commercial legal doctrine that company shares are indivisible (art. 90 LSC) and that giving the same in usufruct or in pledge does not contradict the maxim that the rights that constitute the status of shareholder cannot be separated into modalities of divided ownership. However, in a forceful judgment, where stock is taken of the problem and theory, only to depart from it, the Supreme Court (Judgment of 23 October 2012, RJ 10123) held that the contract whereby the seller of shares retains ownership of the non-financial (governance) rights as collateral to secure a deferred payment is valid. Leaving aside the confusion that the doctrine has caused in corporate and commercial law dogmatism - which, in my opinion, has no good reason to try to restrict the scope of the court's view to internal relations between contracting parties - its impact on collateral law is anything but trivial.

That is to say, if with these precedents there would hardly be room for objections to encumber as collateral the "abstract right" to dividends (as well as the abstract voting right), less could be objected to the encumbrance of present or future dividend claims.

As for the second of the objections.

In principle, though far from swayed by it, a rebuttal argument could be made that the first pledge is not a pledge of dividends, but of ownership, with an extension "essential" to the "abstract right to dividends" and a "natural" extension to the specific right to dividends as proceeds. It would seem that Catalan law would only prohibit successive pledges of the same kind.

As we said, the above argument strikes us as falling short because the confusing "problems of competing claims" that could arise in the enforcement of pledges - and which probably are the historical rationale for the Catalan rule - would arise all the same. Besides, the argument just put forward by me is to all appearances quite "formalistic".

Notwithstanding, the Catalan rule does not apply if the dividend claim pledge is subject to a Law other than that of Catalonia, a situation that is perfectly conceivable in light of art. 17(3) of Royal Decree Act 5/2005. According to this article, it is the law regulating the assigned/pledged claim that determines its pledgeability and its enforceability against the debtor and third parties. But the dividend claim between the company and the shareholder is a claim regulated by Spanish *lex societatis* (law regulating the internal affairs of a company), which is common throughout the whole territory. And the *lex societatis* does not contain any limitation on the pledging of dividend claims or, in general, of claims. Note that the Catalan law (in this case, the precepts of Book 5 CCCat on the Catalan pledge) is not the law that governs the dividend claim between the shareholder and the company. Such is a law that refers to pledges, not to the receivable underlying the pledge; but claim pledges and assignments are subject to art. 14 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I): essentially, the governing law is that chosen by the parties when creating the pledge, which need not be that of Catalonia even if the company has its registered office address there.

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