

## Sale and purchase of a Productive Unit in Spanish liquidation insolvency proceedings

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1. The sale of productive units of a company subject to insolvency proceedings has become common practice in the Commercial Courts, especially those of Catalonia, which have the express support of the Directorate General for Industry of the Regional Government of Catalonia.

This procedural solution allows companies to continue as a going concern, ensuring the maintenance of jobs and avoiding the destruction of the business landscape. From the buyer's perspective, it can define the subject of acquisition (one, several or all productive units within the company) without the liabilities or contingencies that might be hidden in the transferor company.

2. The sale of the productive unit will be the preferred option if it appears that the company's value as a productive organisation is more convenient to the interests of the insolvency proceedings than the prior division and isolated realisation of the company's components (arts. 148 and 149 of the Spanish Insolvency Act (IA)). Moreover, special summary liquidation proceedings may be opened when, together with the petition for insolvency proceedings, the debtor presents a liquidation plan that contains a binding written proposal to purchase the productive unit in operation or that the debtor has ceased business altogether and has no employment contracts in place (art. 191 *ter.* in relation to art. 190(3) IA).

Within the initial "common stage", a court sanctioned sale of the productive unit prior to the liquidation stage is also possible (art. 43(2) IA).

3. While sanctioned by a court decision, this transaction is not free from doubt and risks.

It has been said by the courts:

- a. Regarding the sale of a productive unit within liquidation insolvency proceedings, the Commercial Court judge thereof will be the authority of competent jurisdiction to decide whether or not there is a transfer of undertaking and the conditions under which such undertaking is disposed of (Orders of the 1<sup>st</sup> Section of the *Audiencia Provincial* of Álava, of 15 December 2010 and of 24 March 2011, Order of the *Audiencia Provincial* of Barcelona, of 29 November 2007).
- b. If there is a transfer of undertaking, for three years the transferee will be jointly and severally liable along with the transferor for defaulted employment obligations arising prior to the transfer (article 44 of the Spanish Workers' Statute (WS)). However, the judge may rule that the transferee does not take on the part of pay or compensation, outstanding prior to the disposal, assumed by the Spanish Wage Guarantee Fund (FOGASA, its acronym in Spanish) in accordance with

article 33 WS (Judgments of the 1<sup>st</sup> Section of the *Audiencia Provincial* of Pontevedra, of 29 June 2010 and of 16 July 2012 and Order of 25 May 2012; similarly, Judgment of the 15<sup>th</sup> Section of the *Audiencia Provincial* of Barcelona, of 29 November 2007 and Order of 10 June 2010).

- c. With regard to other debts of the body corporate subject to insolvency proceedings, the general idea is that the sale of the company or productive unit within the liquidation involves the transfer of the debtor's assets, but not of the liabilities (Judgment of the 1<sup>st</sup> Section of the *Audiencia Provincial* of Pontevedra, of 29 June 2010, Judgment and Order of the 15<sup>th</sup> Section of the *Audiencia Provincial* of Barcelona, of 29 November 2007 and 10 June 2010, respectively, and Order of the Commercial Court of Barcelona, of 6 September 2012).
- d. With regard to tax liabilities and penalties, article 42(1)(c) of the Spanish General Tax Law contains an express provision exonerating the "*purchasers of economic undertakings or activities belonging to an insolvent debtor when the purchase is made in insolvency proceedings*".
- e. With regard to debt outstanding with the Social Security (contributions and benefits), joint and several liability with the transferor employer (articles 104 and 127.2 of the Consolidated Text of the General Social Security Act) is not applicable (Order of the 15<sup>th</sup> Section of the *Audiencia Provincial* of Barcelona, of 29 November 2007). The reason is that if the Social Security claims were secured with the transferred assets, such would be an "*almost insurmountable obstacle in the market to achieve the sale of the company as a whole*" (Judgment of the 1<sup>st</sup> Section of the *Audiencia Provincial* of Pontevedra, of 29 June 2010).

Contrary to the above, Orders of the 1<sup>st</sup> Section of the *Audiencia Provincial* of Alava, of 15 December 2010 and 24 March 2011, and Order of the Commercial Court of Santander, of 14 October 2008, which hold that jurisdiction to decide whether joint and several liability applies or not lies with

the Spanish Social Security Agency (TGSS, its Spanish acronym) and not the Commercial Court Judge.

- f. According to art. 7 of Act 37/92, the sale or transfer of the entire business or professional assets in favour of a single purchaser may not be subject to VAT.
- g. As a rule, the assignment of contracts (leases, supplies, distribution, licensing) requires the consent of all parties to the contract, especially of the *in bonis* contracting party (the other, non-insolvent, party to the contract).

However, pursuant to art. 155.3 IA, in the purchase of a company or productive unit, the consent of the creditor or *in bonis* contracting party to take on any existing leasing agreements may be dispensed with where authorised by the Commercial Court Judge.

Likewise, goods and rights encumbered by creditor claims with special privileges, by subsisting liens (mortgage, pledge, antichresis, etc) and by the assumption of the insolvent debtor's liability by the purchaser, may be disposed of (Order of the 15<sup>th</sup> Section of the *Audiencia Provincial* of Barcelona, 6 February 2012).

If the intention were to convey the productive unit comprehensive of assets with first-priority encumbrances (mortgaged, pledged, leasing) and free and clear of charges, whether or not the consent of the creditor with special privileges is required, even when the acquisition offer meets a market value, at present remains an open question. Art. 155(4) IA, with its conditions on the disposal of assets with first-priority encumbrances and the problem of how to distribute sale proceeds between the secured creditor and other creditors, make it impossible to reach a clear answer that, after all, will depend on judicial discretion and the circumstances of the case.

- i. Art. 149(3) IA provides the cancellation of the seizures ordered in the order approving the auction or transfer of the

productive unit's assets (Judgements of the *Tribunal Superior de Justicia* of 22 June 2009, 3 July 2008 and 2 December 2006).

- j. For reasons of speed and legal certainty, the awarding court decision is unappealable

ex art. 149.1 IA or at best only an administrative review of final decisions (*recurso de reposición*) is allowed within five days before the same court (Judgment of the 15<sup>th</sup> Section of the *Audiencia Provincial* of Barcelona, of 13 December 2012).

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