Secured creditor class in the approval of a pre-insolvency restructuring plan

Elucidating certain matters relating to the membership of the secured creditor class(es) in Book II of the Insolvency (Recast) Act.

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The rule under consideration

According to Article 624 of the recast version of the Insolvency Act, all creditors secured *with assets of the encumbered debtor* shall be included in *the same class* for the purposes of voting on a restructuring plan, unless the "heterogeneity of the charged rights" justifies the formation of more classes.

Special privileges, not only secured

In purity, it is not the secured creditors who constitute such special class(es), but the holders of specially privileged claims up to the amount of the claim covered by the "value" of the corresponding security (Art. 617(5)), i.e. the holders of the *special privileges* of Article 270 of the recast version, who, however, are not recognised

as security holders — for instance, refinancing loan claims, claims on loans for the price of real estate with an express condition subsequent, bondholder claims of Royal Decree-law 24/2021, town planning claims and commonhold debt claims (insofar as the latter are not already legal mortgages) -. This must necessarily be the case because, otherwise, as the decisive factor in Article 623(3) is the classification by insolvency ranks, a creditor with special privilege who was 'in the money' could not form part of the ordinary class, and would necessarily have to be accommodated in the class of Article 624.

- **Common interest and rank**

  For a class of creditors to be formed, there must be a common interest between the creditors that are to form the class. *It is considered* that there is a common interest (only in this case?) between "claims of equal rank determined by the order of payments in the insolvency proceedings" (Art. 623(2)), an expression that would imply that creditors with a different insolvency rank cannot belong to the same class

Special unsecured privileged creditors fall into the security holder class

(Judgment of the Madrid Companies Court no. 14 of 28 October 2024 *(Oasisz)*. Therefore, secured and unsecured creditors of the same syndicate cannot belong to the same class (*cf.* Art. 630). Nor can ordinary creditors of the syndicate and those who are subordinate within the syndicate, even if this subordination does not alter the insolvency rank, because there would be no common interest between those creditors, even if they are of the same rank.

- **Security for restructured third-party debt**

  The holder of *security* for third-party debt is not a secured creditor in the debtor's restructuring plan, but neither is he a secured creditor in the guarantor's restructuring plan, unless he has additional security in the latter case to secure the limited liability claim in the event of failure of the "first" security. Security over shares in the subsidiary companies or the parent company of the encumbered debtor does not constitute security over assets of the encumbered debtor for the purposes of Article 624, except in the case of a joint restructuring plan under Article 642.

- **Security over new financing**

  If a creditor in the Article 624 class has a sufficiently strong security to also secure future advances and these new loan contributions are made by way of 'new financing', the secured new financing will not, however, form part of the secured claims within the restructuring plan. Nor can new financiers to whom new security is given to secure the new financing be part of the Article 624 class.

- **Secured subordinated claims**

  The Article 624 class also includes those which hold a subordinate claim (*e.g.* tax

penalties), but are endowed with a special privilege.

- **Set-off as security**

  Up to the amount involved, the *set-off* of credit and debt in favour of the creditor *functions* as security, without, however, falling within the Article 624 class because it *is not* security. Thus, once the situation liable to be offset has arisen, the creditor does not have to bear a reduction of his 'offsettable' claim and the lodging of the application for 'homologation' (sanctioning of the refinancing arrangement) is not a "withholding" of his claim within the meaning of Article 1196(5) of the Civil Code that would prevent the set-off from being enforced. The set-off cannot be enforced as security if its enforceability depends on a prior contractual termination that would be precluded by Article 618 or Article 619(3)/598(2).

- **Secondary ranks in the security**

  Ordinarily, a holder of security or security interest (in the latter case, the rule is obvious) of second or later rank should not be included in the Article 624 class. The smaller the residual value of such postponed collateral, the greater the incentive this creditor will have to vote in line with the class of non-privileged creditors, so he should not be allowed to vote in a case of conflict of interest in the Article 624 class.

- **Syndicated claims**

  A privileged syndicated claim is on the whole a claim in the Article 624 class in the part of the claim covered by the security. And it no longer matters whether the claim is undivided or not, whether each creditor can enforce the claim as a whole or only his share in the joint security, or whether, on the contrary, the enforcement of the security requires a certain majority of votes within the syndicate, or whether it can only be done jointly or by way of an agent. It is another matter whether the syndicate creditor cannot "escape" from the restructuring plan by way of Article 651 if he is not in a position to enforce his (part of) security on his own.

Syndicated secured creditors fall within the Article 624 class, even if an individual enforcement of the relevant security is not possible

- **Retention of title, capital (finance) leasing**

  Although there is abundant case law to the contrary in cases of *exoneration of unsatisfied liabilities*, it must be proposed without hesitation, and also for practical reasons, that hire vendors with a registered retention of title and capital lessors, whether registered or unregistered, take title to security for the part of the claim that is privileged, even if in one way or another it is a "privilege in own property".

- **Financial collateral**

  Holders of financial collateral, to the extent that the claim is covered by the value of

the collateral, cannot be affected in any way by the restructuring plan, and a fortiori when their financial collateral relates to the parent company's equity securities in the operating company which is the subject of such a plan. They cannot be affected by a third party release.

- **Praxis and the "value of the security"**

  Secured creditors should only be in the Article 624 class(es) to the extent that the value of the covering asset exceeds the amount of the claim. For this, however, a valuation of the assets must first be carried out by an expert, also discounting future value depreciations. If, as is common in practice, this valuation is not carried out before or after the application for approval, the creditors with genuine security value will be sacrificed to the interests of the debtor and other creditors holding spurious collateral, unless it is a consensual plan *of all creditors* (not all classes) or the secured financiers are to be required to provide new financing.