Treatment within insolvency proceedings of claims arising from post-composition clawbacks

In Judgment no. 519/2025 of 1 April, the Supreme Court tackles the treatment to be given within insolvency proceedings to a claim acknowledged by way of a court-ordered clawback (avoidance) prior to court approval of a composition.

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1. Background

§ 1. In April 2009, in satisfaction of a claim amounting to 4 218 230.41 euros, the debtor private limited company and the creditor bank carried out a transaction whereby the former sold a property for 4 267 518.24 euros to a public limited company wholly owned by the latter. In the deed of sale it was agreed that the purchasing company was to use the amount of the sale price to cancel the debt with the credit institution (to which it was subrogated), so the seller/debtor only received a residual part of the price (49,287.83 euros) and the creditor bank delivered a letter for receipt of payment to the debtor for the total amount owed.

§ 2. The debtor private limited company entered insolvency proceedings in December 2010.

§ 3. In July 2013, the insolvency practitioner requested avoidance of the above-mentioned transaction. Judgment no. 65/2016 of the Murcia Provincial Court (Fourth Chamber) of 28 January

(ECLI:ES:APMU:2016:460), took the view that, in reality, the disputed transaction consisted of a "constructive payment in kind" and, partially upholding the motion, ordered the avoidance thereof (of the transaction as a whole, not only of the payment made as the court a quo had ruled), with a twofold consequence: the order thar the purchasing company return the acquired property to the insolvent debtor's pool of assets available for distribution and the acknowledgment in favour of the bank of an insolvency claim payable upon distribution in the amount of 4,218,230.41 euros (the letter for receipt of payment that had been delivered being left without effect). The Provincial Court's judgment became final and conclusive.

Claims acknowledged or proven by a court decision within insolvency proceedings must be treated as competing

§ 4. In the final text of the list of creditors (provided by the insolvency practitioner in December 2013), no claim derived from the aforementioned transaction in favour of the credit institution was acknowledged.

§ 5. On the other hand, while the motion for avoidance was being heard, a composition with creditors was approved in September 2014 which, among other things, provided for a 50% haircut (forgiveness of debt).

§ 6. In March 2019, the creditor credit institution filed a motion within insolvency proceedings requesting that the composition be held in breach, the termination of the composition (strictly speaking, "avoidance" thereof was requested, despite the fact that since 2014 the legal text speaks of "termination") with the consequent opening of the liquidation stage and the disappearance of the effects of the composition on the claims affected by it. In this regard, it should be noted that until March 2019, no amount of the claim acknowledged by the avoidance judgment had been paid to the creditor bank (a claim which, if affected by the composition, would have been reduced to the sum of 2 109 115.20 euros).

§ 7. The company subject to insolvency proceedings objected to the motion claiming that the composition had not been breached, given that, strictly speaking, the supposedly unpaid claim held by the creditor bank did not appear on the final list of creditors because it was a claim that arose after the composition had been approved (so that it did not have to be met during the phase of compliance with the composition, but, as the case may be, upon conclusion of the insolvency proceedings). In short: it was argued that the creditor bank lacked standing to request that the composition be held in breach.

§ 8. The motion was allowed at first instance and the insolvent debtor's statutory appeal was rejected by the Murcia Provincial Court (Fourth Chamber) in its Judgment no. 777/2020 of 17 September (ECLI:ES:APMU:2020:1814). The subsequent appeal in 'cassation' (on the grounds of a breach of the provisions

governing the determination of the dispute) was also rejected by Supreme Court Judgment no. 519/2025 of 1 April (ECLI:ES:TS:2025:1360).

2. Legal regime applicable to the case

§ 9. The above-described litigation was conducted and concluded taking into account the rules contained in the Insolvency Act 2003 (LC 2003), which, as is well known, underwent numerous amendments during its life. However, the Supreme Court itself took care to recall in its reasoning - in support of its core argument - that the conclusions reached when analysing the legislation applicable to the case are basically the same as those which - generally in a clearer and more precise manner - can be drawn from an analysis of the Recast Version of the Insolvency Act 2020 (TRLC 2020). In this paper, we will take the same approach to verify how the Supreme Court's interpretation of the regime previously in force in its Judgment no. 519/2025 holds (surely, with greater reason and, probably, in a more precise and nuanced manner) against the legislation currently in force.

3. The insolvency and competing nature of the claim arising from the avoidance of the transaction within the insolvency proceedings themselves

§ 10. The Supreme Court affirmed that the claim put forward by the credit institution "re-emerged" with the final and conclusive judgment that upheld the avoidance action. Indeed, as noted (*supra*, § 3), in this 2016 ruling, the avoidance of the asset transaction of April 2009 was granted and, as a consequence, the purchasing company was ordered to return the acquired property to the pool of assets available for distribution and the credit institution concerned was acknowledged as having an insolvency claim payable upon distribution in the amount of 4,218,230.41 euros. In other words, its debt-claim (ultimately unsatisfied) was "reborn", which, being prior to the opening of insolvency proceedings, was an insolvency claim in nature.

§ 11. The judgment we are commenting on draws on the legal doctrine contained in judgments 629/2012 of 26 October (ECLI:ES:TS:2012:7265) and 100/2014 of 30 April (ECLI:ES:TS:2014:1954). In the latter, following what was already indicated in the former, the following was stated in relation to the scope of (now repealed) Article 73 of Act 22/2003: "[T]he avoidance of a unilateral act of disposal, such as payment or set-off, does not entail the avoidance of the business from which the payment obligation that is intended to be satisfied with the contested act arises, so that the avoidance exclusively affects the payment or set-off, with the creditor benefited by the payment or set-off having the obligation to return the amount collected or set-off, without losing its debt-claim, which must be acknowledged as an insolvency claim". Furthermore, and as the Supreme Court itself specified in the judgment under discussion, this case law interpretation of the aforementioned Article 73 was later incorporated into the Recast Version of the Insolvency Act 2020 and, specifically, into Article 235, which now specifies that, if the avoidance affects a unilateral act, the judgment - if applicable - will order the return to the pool of assets available for distribution of the consideration that is the subject matter of said act and will order the inclusion in the list of creditors of the relevant claim.

§ 12. However, for the sake of clarity, it should be noted - although this clarification is irrelevant to the core of the argumentation of the judgment commented on and its conclusions - that, strictly speaking, the Murcia Provincial Court (Fourth Chamber) Judgment no. 65/2016 of 28 January (*supra*, § 3), did not unwind in isolation the payment (or satisfaction) received by the creditor bank, but the whole of the transaction carried out. However, and as just noted, this nuance does not affect the reasoning followed and the solution given to the dispute. What is significant, for our purposes, is that the right to the third party (in our case, the creditor bank) consideration was not to have the status of a claim against the insolvent estate (given that, strictly speaking, an agreement with reciprocal obligations - the sale of the property - was not avoided), but a complex transaction whose causal core, for the purposes of the dispute to be resolved, was none other than the satisfaction of a debt prior to the opening of insolvency proceedings (that is, the making of a payment - a unilateral act - *cf.* Arts. 235, paragraphs 2 and 3, and Art. 236, paragraphs 1 and 2, TRLC). In this regard, it should be recalled that the aforementioned Murcia Provincial Court Judgment no. 65/2016 already saw in the avoided transaction a "constructive payment in kind".

§ 13. A good example of this is how the Supreme Court approached and summarised the issue. Thus, it pointed out that "since the emergence of the claim is a consequence of avoidance of a pre-insolvency transaction, its acknowledgement cannot be that of a delinquent claim (lodged late), nor, in the event that a composed [*sic*] had previously been approved, can it merit treatment equivalent to non-competing claims, which are equally affected by the content of the composition, but must be satisfied once the composition has been fulfilled".

§ 14. Thus, the claim deriving from the judgment declaring the avoidance must be deemed acknowledged for all purposes and, therefore, it must participate in the collective mechanism for the settlement of the insolvency proceedings in question. Consequently, if a composition has been approved, the claim in question will be subject to it under the terms and conditions determined by its subordinate, ordinary or privileged nature. In the words of the Supreme Court itself: when "the insolvency claim re-emerges as a consequence of an avoidance ruling, handed down within insolvency proceedings, and as a counterpart to the creditor's obligation to repay the amount received [...], the claim must be included in the debt payable on distribution with the consequent rights". And if, as happened in the case in question, the claim reappears after the conclusiveness of the judgment approving the composition, its holder -who obviously had no opportunity to object to its approval- will be affected by its content and will have "the right to collect its claim, with the novation imposed by the composition, during its ordinary phase of performance". That is to say: if the insolvency claim whose existence is acknowledged by the avoidance decision is ordinary, the creditor is entitled to receive what, according to the ordered forgiveness of debt and payment deferral, would lie with the rest of the ordinary creditors affected by the composition. The claim in question will therefore be an insolvency and competing claim in nature and, insofar as it is integrated in the debt payable on distribution, it will be subject - with the particularities that correspond according to its nature - to

the collective solution - liquidation or composition - adopted.

4. The inclusion in the list of creditors of a claim deriving from the avoidance of a pre-insolvency transaction

§ 15. The question of the treatment of claims "resurfaced" as a result of an avoidance decision handed down within insolvency proceedings has a documentary aspect or profile linked to the problem of the modifiability of the list of creditors.

§ 16. In effect, the (now repealed) Article 97 *bis*(1) of the Insolvency Act 2003 (which was incorporated into the legal text in 2011 and was the provision applicable to the case) provided as follows:

> 'The modification of the definitive text of the list of creditors may only be requested before the decision approving the proposed composition is handed down or the reports provided for in the second paragraphs [*sic*] of Articles 152 and 176 *bis* are presented to the court.

§ 17. Well, in the case under discussion, the final texts (of 2013) did not acknowledge any claim in favour of the claimant bank (which was perfectly logical, since in 2009 the debt of the later insolvent debtor was considered extinguished by means of the subsequently avoided transaction to which we have referred to repeatedly). In fact, the second instance judgement that acknowledged conclusive and finally the bank's (insolvency) claim was not issued until January 2016, i.e., once the composition had been approved.

§ 18. Therefore, strictly and literally applying the aforementioned Article 97 *bis*(1), at the time when the claim in favour of the bank was acknowledged, it was no longer possible to introduce any modification to the text of the list of creditors. In this regard, it is interesting to recall what was set out at the time in Supreme Court Judgment no. 652/2016 of 4 November (ECLI:ES:TS:2016:4720):

> The provision establishes a time limit for requesting the modification of the definitive list of creditors, which, logically, varies depending on whether it is decided to conclude the insolvency proceedings by approving and fulfilling the composition or to go into liquidation.
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> In the case of a composition, the preclusive moment is the judicial approval of the composition, as from then onwards it begins to produce effects and it is advisable to prioritise the legal certainty that the amounts of the insolvency claims that must be satisfied in the phase of fulfilment of the composition are not increased.
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> In the case of liquidation, the preclusive moment will be the report justifying the transactions carried out, once the liquidation of the assets has been concluded (Article 152(2) LC) or the notification of the insufficiency of the assets to meet the claims against the insolvent estate of Article 176 *bis* LC. In reality, within the liquidation, these are two different situations. In the 'extraordinary' situation of insufficiency of the pool of assets available for distribution, the preclusion to modify the list of insolvency creditors is justified because from then onwards such

> modification becomes irrelevant, insofar as, as there are no assets to meet the claims against the insolvency estate, it is established that the insolvency petitioners will not receive anything. In the 'ordinary' situation, the preclusion is set at the conclusion of the liquidation transactions, prior to the conclusion of the insolvency proceedings, which presupposes the realisation of all the assets and the use of the proceeds to meet the claims.

§ 19. The consequence of the literal application of Article 97 *bis*(1) of the Insolvency Act 2003 and of the cited legal doctrine would, in principle, be clear. As explained (with citation of Supreme Court Judgment no. 608/2016 of 7 October [ECLI:ES:TS:2016:4292]) by Supreme Court Judgment no. 655/2016 of 4 November (ECLI:ES:TS:2016:4721): "Those claims which, because they are not included in the definitive texts, specifically in the list of creditors, cannot be considered competing, are not extinguished (unless the cause of this non-inclusion is that it has been held so when resolving the motion contesting the list of creditors), but they cannot be satisfied in the insolvency proceedings against the pool of assets available for distribution. Their satisfaction, if possible, will have to take place once the insolvency proceedings have concluded, either with the residue of the liquidation or with new assets that may enter the insolvent debtor's estate once the liquidation has concluded and with it the insolvency proceedings (Art. 178 of the Insolvency Act), or, in the event of a composition, once fulfilment thereof has been declared, although in this case the claim will suffer the haircuts agreed in the composition (Art. 134(1) of the Insolvency Act)".

§ 20. However, in the judgment in question, the Supreme Court considered (I believe with sound judgement) that the case in question presented particularities that prevented the automatic application of the aforementioned legal doctrine. On the contrary, it needed to be qualified in order to acknowledge at least one significant exception.

§ 21. It should be borne in mind that in this case the claim in question re-emerged, as an insolvency claim, as a result of an avoidance decision handed down in the insolvency proceedings themselves. It could therefore be affirmed - as the Supreme Court did - that the emergence of the insolvency claim had a causal relationship with the increase in the assets of the insolvent estate brought about by the decision in the recovery (antecedent and from directors et al.) motion (remember that the property that had left the insolvent debtor's estate in 2009 was ordered to be returned to the pool of assets available for distribution). It would not make sense for said pool to benefit from that increase in assets - which was to contribute to fulfilment of the composition (or, as the case may be, to the satisfaction of the creditors in the liquidation) — without the obligation to satisfy the claim that re-emerged with that decision (which, obviously, would have to be satisfied in the terms in which that claim was affected by the composition or in those that would result from the liquidation plan).

§ 22. Based on the above, the judgment under consideration derived from the legal system - understood as a whole - an (implicit) exception to the general rule expressed in exhaustive terms by the repealed Article 97 *bis*(1) of the Insolvency Act 2003, an exception which, moreover,

and as the Supreme Court itself made clear, is already apparent (more clearly, perhaps) from the current regulation of the matter.

§ 23. In this regard, it is worth remembering, on the one hand, that Article 308(3) of the Recast Version of the Insolvency Act 2020 now establishes that the definitive text of the list of creditors may be modified (among other cases) "when court decisions are handed down in insolvency proceedings which result in the existence, modification of the amount or type of claim or the extinction of an insolvency claim". And, on the other hand, that Article 311(1) of the same recast version provides that "when the modification of the definitive list is a consequence of a court decision issued in the insolvency proceedings, the insolvency practitioners will modify the definitive text of the list of creditors as soon as they become aware of it".

§ 24. In view of this regulation, the Supreme Court understood that this (imperative) immediate modification of the list of creditors implied, in a case such as the one in question (in which a composition with creditors had been approved), that the creditor had to be acknowledged as having the right to collect its (ordinary) claim under the terms of the composition and for the amounts owed according to the agreed payment plan. Or, to put it in more general terms: the claims "of immediate inclusion in the list of creditors as a consequence of having been acknowledged or proven by way of a court decision within the insolvency proceedings [...] will not only be affected by the novation introduced in the composition (Art. 136 LC), but may be collected together with the rest of the ordinary claims in accordance with the provisions of Article 134 LC".

5. Conclusion

§ 25. The claims acknowledged or proven by means of a court decision issued within insolvency proceedings are not affected by the time limitation for effectively requesting the modification of the definitive list of creditors referred to in Judgment no. 652/2016 of 4 November (already mentioned), and which would derive from a literal interpretation of Article 97 *bis* of the Insolvency Act 2003. Consequently, they must be immediately included in the list of creditors by the insolvency practitioners (Art. 311(1) TRLC 2020).

§ 26. The time limitation indicated (i.e. in the case of a composition, the preclusive moment is its judicial approval and, in the case of liquidation, this moment will coincide with the presentation to the court of the final liquidation report or with the notification of the insufficiency of the pool of assets available for distribution to meet the claims against the insolvent estate: *cf.* Art. 97 *bis*(1) LC 2003 and Art. 311(2) TRLC 2020) will apply, on the other hand, to the rest of the claims that have appeared in the insolvency proceedings after the approval of the list of creditors (provided that they are susceptible of inclusion in the list by means of its modification - currently, in accordance with the provisions of Article 308 of the Recast Version of the Insolvency Act 2020). With regard to these claims, the aforementioned modification must be requested before the circumstances provided in the law are verified (Art. 311(2) TRLC 2020).

§ 27. And, for similar reasons, the already cited doctrine of the Supreme Court

Judgments 608/2016, of 7 October, and 655/2016, of 4 November, does not apply to claims acknowledged or proven by means of a court decision issued within insolvency proceedings. Therefore, their holders will be able to receive the amount of their claims within insolvency proceedings under the terms established in the composition. However, this legal doctrine remains in force for the remaining claims that arise after the composition with creditors has been approved, which means that these non-competing claims will bear the haircuts approved in the composition, but they cannot be satisfied during the phase of fulfilment of the composition, but only after the composition has been held fulfilled, as the case may be.