

# How does a right to purchase or repurchase operate in relation to an insolvent estate?

For the first time in the Supreme Court:  
purchase rights  
in insolvency proceedings.

---

## ÁNGEL CARRASCO PERERA

Professor of Civil Law, University of Castilla-La Mancha  
Academic counsel, Gómez-Acebo & Pombo

### 1. Supreme Court judgment of 14 February 2025

The question is whether the *commitment to repurchase shares* assumed by a person before entering insolvency proceedings is a *claim against the estate*. The effects of the promise or undertaking to repurchase may vary and this requires, according to the Supreme Court, looking beyond the contractual terms used to consider its internal content and the function it seeks to

perform. In the present case, it is a commitment to repurchase shares at a specified price and once a term has been fulfilled, with the purchaser reserving the right to demand such repurchase. When the person who had assumed the repurchase obligation entered insolvency proceedings, the term within which the purchaser could demand repurchase had not yet been fulfilled. However, the fact that the repurchase obligation was not enforceable does not mean that the obligation

arose after the insolvency proceedings. It arose with the original agreement, so it is appropriate to speak of reciprocal obligations pending fulfilment by both parties: Article 61(2) of the Insolvency Act ('LC') (Art. 158 of the Insolvency (Recast) Act) classifies the right to demand the obligation assumed by the insolvent party as

## *For the first time in the Supreme Court: purchase rights in insolvency proceedings*

a claim against the estate. The appellate court did not see it that way and relied on the Supreme Court ruling of 19 November 2015, *Afinsa* case, to justify this conclusion. The Supreme Court, on the other hand, upheld the 'cassation' appeal and stated that the applicable regime should be that of contracts with reciprocal obligations pending fulfilment. In the words of the Supreme Court:

Regardless of whether its enforceability was subject to the fulfilment of the agreed term and the exercise of the put option by Belarmino under the agreed conditions, there is reciprocity between the payment of the agreed price and the transfer of the shares subject to repurchase. This reciprocity requires the simultaneous fulfilment of both obligations, which justifies Article 61(2) LC classifying the right to demand the obligation assumed by the insolvent party as a claim against the estate.

And it explains the difference between this case and the *Afinsa* case in the following terms:

... in that other case, a series of financial products had been acquired from the insolvent debtor, in which the various legal forms structured the way in which the investor could recover the investment, so that, for the purposes of Article 61 LC, what prevailed was the investor's unilateral claim to recover his investment [...]. In some way, in the precedent invoked, due to the uniqueness of the investment product contracted, we understood that for the purposes of *Afinsa*'s subsequent insolvency proceedings, the right to recovery of the investment through the exercise of the appropriate warrant entailed obligations for the insolvent debtor (*Afinsa*), without the formal ownership of the stamps and the transfer of their ownership being relevant for these purposes.

## 2. Commentary

This legal doctrine does not seem correct. The *repurchase obligation* is not synallagmatic with any other obligation arising from the sale and purchase agreement, unless the *obligation* to repurchase was the specific counterpart of some obligation (other than the payment of the price) assumed by the purchaser, of which there is no record. What is recorded is that, for this *obligation* to be activated, it was necessary for the purchaser to exercise the relevant elective right (to resell) and for a term to have expired. What the judgment

is saying in material terms is that purchase rights as such are not debtor liability and are not subject to the rules governing insolvency proceedings. If the counterparty has entered insolvency proceedings, the purchase right, which entails the power to

bring about a legal change, functions as if it were in any case a right in rem resistant to insolvency proceedings. And this is curious, because such a thing is neither stated, nor implied, nor denied in the Insolvency Act.