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ANALYSIS

Corporate & Commercial

Uncertificated share pledge creation, enforceability and avoidance

(Supreme Court Judgment no.183/2026 of 10 February)

In Judgment no. 183/2026, of 10 February, the Supreme Court analysed the requirements for the validity and enforceability of an uncertificated registered share pledge and examined the conditions for its avoidance in the context of insolvency proceedings.

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1. Background

§ 1. In 2008, in order to secure a debt owed to a bank by a group company, an indirect subsidiary of the latter pledged a block of shares representing an ownership interest in an investee company, in whose register of interests in shares the pledge was entered after due notification of its creation. It is important to emphasize that this was collateral for third-party debt and to note that the pledged shares had not been certificated (and therefore had not been delivered to their owners).

§ 2. The notary-attested credit facility agreement, from which the obligation secured by the collateral arose, was novated on several occasions, with changes to the interest rates and extension of the maturity dates. The last novation took place in July 2013 and the maturity date was set for 2014. These successive novations were not notified to the share issuer. It should be noted that the cancellation itself of the pledge created under the first transaction in 2008, the one entered in the register of interests in shares, was also never notified.

§ 3. Following the last novation, in March 2015, the non-debtor pledgor entered into insolvency proceedings.

§ 4. A credit institution that was a creditor of the insolvent pledgor (not the one that signed the successive credit facility agreements with the secured company) made a claim incidental to the insolvency proceedings requesting a declaration of invalidity of the pledge created in 2013, holding that, in order for the pledge to have been validly created, it would have been necessary to notify the company and enter it in its register of interests in shares. In the alternative, the claimant sought avoidance claiming that there was either a non-rebuttable presumption of detrimental transaction, since the pledge had been created as collateral for a third party's obligation (a company in the group) without consideration, or a rebuttable presumption, since the collateral had been given in favour of a person specially related to the insolvent company.

§ 5. The claim was not upheld by the Business Court. However, the appeal lodged by the claimant was allowed on appeal. The Provincial Court (following the doctrine established by the Supreme Court in Judgment no. 190/2021 of 31 March [ECLI:ES:TS:2021:1151]) concluded that the novation in 2013 could not be deemed a mere amendment of the initial agreement of 2008 (which would have entailed the continuation of the pledge created in 2008 without the need for additional notices), but that, on the contrary, it was an extinguishing novation. It also stated (now on the basis of Supreme Court Judgment no. 793/2006 of 21 July [ECLI:ES:TS:2006:4566]) that "the creation of an uncertificated share pledge requires entry in the register as a substitute for the necessary delivery". Thus, since the pledge created in 2013 had not been notified or entered in the register of interests in shares, the Court declared it invalid (which, moreover, made it unnecessary to decide on the alternative avoidance claim). Consequently, it ordered the insolvent company and the insolvency practitioner to meet the claims against the insolvent estate and the insolvency claims without taking into consideration or taking account of the allegedly created pledge, inasmuch as unenforceable (Madrid Provincial Court

[28th Chamber] Judgment no. 391/2021 of 29 October [ECLI:ES:APM:2021:13096]).

§ 6. The lending institution (pledgee) lodged an appeal on the grounds of a breach of the procedures governing the determination of a dispute and an appeal on the grounds of a breach of the provisions governing the determination of a dispute (appeal in cassation). The Supreme Court rejected the first appeal but allowed the second in Judgment no. 183/2026, of 10 February (ECLI:ES:TS:2026:525). A brief summary of the content of this judgment is provided below.

2. The requirements for creating an uncertificated (and, consequently, undelivered) share pledge

§ 7. In the first ground of the appeal in cassation, and contrary to the position taken by the Provincial Court, the appellant argued that, since it was not possible to transfer possession of uncertificated shares, neither notification of the creation of the pledge nor its entry in the register of interests in shares was necessary for the proper creation of the share pledge.

§ 8. As we will see below (section 2.1), the Supreme Court ruled that, for an uncertificated registered share pledge to be valid and *resilient* in the insolvency proceedings for the company that holds those shares, it is sufficient that it has been created in accordance with the rules of national civil law. This translates into the need to comply with the rules governing claim pledges, which, in turn, means that to create the pledge it suffices to record it in a public instrument. Notification to the company and the entry of the pledge in the register of interests in shares are not, in short, requirements for the valid and enforceable creation of the pledge (*infra*, sections 2.2 and 2.3).

§ 9. These considerations, to which we will promptly return, led to the conclusion that the pledge created in July 2013 was valid and enforceable in the insolvency proceedings and, therefore, to the appeal being allowed.

2.1. *Requirements for the validity and enforceability of the uncertificated share pledge*

§ 10. The Supreme Court agreed with the core of the appellant's argument through reasoning based on the provisions of Articles 121 and 120 of the Companies Act (LSC). The first paragraph of Article 121 establishes that "the creation of limited security interests in shares shall proceed in accordance with the provisions of national civil law". This, according to the Supreme Court, expressly provides for the possibility of creating limited security interests in the shares of a public limited company, which must be done in accordance with the legal regime governing the security interest in question. For its part, the first paragraph of Article 120 refers, for the regulation of the transfer of uncertificated shares, to "the rules on the assignment of claims and other incorporeal rights", which means that the "national civil law" applicable to share pledges is identified with the rules governing claim pledges.

§ 11. At this point, it was necessary to take into consideration the insolvency regime for claim pledges, which, in

this case, was basically set out in (now repealed) Article 90(1)(6) of the 2003 Insolvency Act, as amended by Act 38/2011 (a provision that contained a regulation substantially equivalent to that contained in the current Articles 270(6) and 271(2) of the Insolvency Act). It could be inferred from the legislation applicable *ratione temporis* that, for the pledge to be valid and *resiliant* to insolvency proceedings, it was sufficient for it to be recorded in a document with a certified date prior to the opening of the insolvency proceedings for the pledgor. Therefore, for the enforceable creation of an uncertificated registered share pledge, it would also be sufficient for it to be recorded in a public instrument with a certified date prior to the insolvency proceedings. The pledgee should therefore have this standing recognized in the pledgor's insolvency proceedings. This conclusion must hold in light of the current regime.

For the validity of an uncertificated registered share pledge, its creation in a public instrument suffices

§ 12. As advanced (*supra*, § 8), the Supreme Court - after clarifying the above points - added that neither notification to the debtor nor entry in the register of interests in shares are requirements for the validity of the uncertificated registered share pledge.

2.2. *Entry in the register*

§ 13. With regard to the entry in the register of interests in shares, an examination of Articles 120(1) (second paragraph) and 121(2) (second paragraph) LSC leads to the conclusion that the registered share pledge, once its creation has been proven, must be entered in the register of interests in shares. It is important to note that, in our legal system, such entry presupposes that the transfer (or, as in this case, the creation of the pledge) has already taken place. In other words, entry in the register is not legally considered a constitutive requirement of the pledge or transfer, without prejudice to the fact that it may fulfil other functions. In relation to this matter, the Supreme Court pointed out that, strictly speaking, the register of interests in shares has a function exclusively related to 'standing': it allows the shareholder to prove his standing vis-à-vis the company in order to exercise financial (equity-holding) and non-financial (governance) rights and also so that, where appropriate, the company can claim compliance with shareholder obligations.

§ 14. Indeed, the register is a very important instrument for standing that allows the company to know—at least presumptively—who can exercise shareholder rights vis-à-vis the company and, where appropriate, from whom the company should claim compliance with the obligations associated with ownership of its shares. The company

will only recognize as a shareholder whosoever is entered in the register (Art. 116(2) LSC). However, such entry will only have standing effects, never constitutive ones: the enforceability of the transfer of registered shares or the creation of security interests therein is therefore not conditional on entry thereof in the register. This applies whether the shares are certificated and delivered or not.

§ 15. In summary, the Supreme Court states as follows: as a rule of principle, the content of the register of interests in shares is only relevant in the context of relations between the company and its shareholders, without the principles of public certification or protection of third parties applicable to registers with substantive effects. This is because, with regard to third parties, a private register to which they have no right of access cannot have any enforceability. Their confidence in the accuracy of its content, should they have been aware of it, does not receive any special protection. In this context, entries in the register of interests in shares have no effect on the ownership of the shares or on any limited security interest that may have been established in them. Entry in the register is therefore not an additional requirement for the valid establishment of such limited security interest (in our case, the pledge).

2.3. *Notification of the creation of the pledge to the share issuer*

§ 16. With regard to notification of the creation of the pledge, the Supreme Court recalled that, in accordance with the provisions of Article 1527 of the Civil Code (to which, as part of the rules on the assignment of claims, Article 120(1) LSC refers in relation to the transfer of uncertificated shares), notification is not necessary for the validity of the assignment of credits. It noted, in this regard, that the purpose of the notification "is to adequately protect the assigned debtor who, if unaware of the assignment and pays the assignor (who no longer holds the assigned claim), does so with discharging effect". Without prejudice to the fact that this is indeed the function of the rule in Article 1527 of the Civil Code (CC), it should be noted that notification to the debtor of the assignment also serves to protect the interests of the assignee (new creditor), who, by giving such notification, will undermine the good faith of the assigned debtor and ensure that the latter will only be released from liability by paying the assignee, and not the assignor (former creditor, who will no longer be an apparent creditor).

§ 17. These rules on the transfer of claims shall apply, *mutatis mutandis*, to the case of pledges of uncertificated shares. To this end, it must be borne in mind that, in the latter case, the role of the assignee in the assignment is played by the pledgee, while the roles of assignor and assigned debtor are played, respectively, by the pledgor and the company whose capital is represented by the pledged shares. The conclusion is that failure to notify the share issuer of the creation of the pledge does not invalidate the creation of the security interest. Thus, notification, said the Supreme Court, would be

nothing more than a "burden" whose fulfillment, in which the pledgor assignor) must cooperate, satisfies the interest of the pledgee (assignee).

§ 18. Furthermore, the ruling we are reviewing explained that the notification to the company does not serve to publicly disclose the existence of the security interest with effect against third parties (who are neither informed nor can they know the existence and scope of the pledge - even when it is publicly documented, since the notarial protocol is "secret": *cf.* Art. 224 Notarial Regulations). Similarly, it does not block the possibility of creating new pledges: the conflict between successive security interests is resolved by the priority of their certified date of creation and not by that of their notification (*cf.* Art. 1473 CC).

3. The avoidance claim

§ 19. Once the unenforceability of the pledge had been ruled out, it was necessary to rule on the action to avoid the granting of the security interest, which had not been considered by the Court of Appeal (*supra*, § 5).

§ 20. As stated by the Supreme Court, this was an act of disposal carried out by the insolvent company in July 2013, therefore within the two years prior to the opening of insolvency proceedings (March 2015). It therefore fell within the so-called "suspicious period" provided for in (now repealed) Article 71(1) of the 2003 Insolvency Act (it would also do so if the current Article 226 of the Insolvency Act, which is not entirely identical, were applicable). The question then became whether the act of creating the pledge was detrimental to (i.e., reduced the value of) the insolvent estate. In this regard, it was important to analyze whether the non-rebuttable and rebuttable presumptions set out in the Insolvency Act were applicable to the case.

§ 21. The claim (*supra*, § 4) invoked one of the absolute (non-rebuttable) presumptions of detriment contained in the repealed Article 71(2) of the Insolvency Act (equivalent to the current Article 227): that the act had been performed without consideration since it did not involve any consideration or advantage for the insolvent company (because it involved the creation of a security interest to ensure the fulfilment of a third party's obligation). The relative (rebuttable) presumption of detriment established in (also repealed) Article 71(3)(1) of the Insolvency Act (equivalent to the current Article 228(1)) was also invoked (in the alternative): that the act of disposal, even if it was for consideration, had been carried out in favour of a person related to the insolvent company, as the debtor was a company belonging to the group.

§ 22. The Supreme Court first recalled the doctrine contained in Judgment no. 100/2014 of 30 April (ECLI:ES:TS:2014:1954): "A guarantee in favour of a third party is created for consideration when the creditor, as an equivalent to the guarantee given, assumes a certain consideration in favour of the guarantor or the principal debtor, which, if not fulfilled, will allow the guarantor to be released from its guarantee obligation. Unless proven otherwise, the creation of the guarantee at the same time or in the same context as the creation of the guaranteed loan shall be understood to be in correspondence with

the granting of the loan and therefore for consideration, since the creditor grants the loan in view of the existence of the guarantee, that is, it receives in respect of its loan the promise of payment by the debtor and the third party's guarantee". And, in light of these considerations, it considered that the creation of the pledge in 2013 was not an act without consideration, since the security interest was effectively contextual with the creation of the secured loan and, therefore, had to be considered as in correspondence with the granting of the loan. In effect, the creditor granted the loan (in the form of a credit facility) in consideration of the existence of the security interest and received as consideration the debtor's promise to pay and the security interest provided by the third party (the insolvent company).

§ 23. However, the fact that the security interest provided in favour of a third party (for a third party's debt) is not without consideration does not exclude the existence of detriment to the estate. In fact, as the presumption does not apply (because the act is for consideration in nature), the existence of detriment would have to be proven in view of the direct or indirect benefits that could accrue to the insolvent party from the sacrifice of assets involved in the creation of the pledge (bear in mind that this was an "intragroup" security interest). Or, where appropriate, some of the relative presumptions of detriment affecting certain acts for consideration would have to be applied.

§ 24. In this regard, the Supreme Court held that the invoked rebuttable presumption of detriment, referred to above, should apply in this case. The argument (also citing Judgment no. 100/2014 of 30 April) was based on the idea that the person favoured by the act of disposal was not only the creditor (lending credit institution), but also the principal debtor (group company and person specially related to the pledgor company that later entered into insolvency proceedings), since the simultaneous creation of the security interest had made possible the granting of the loan.

§ 25. A different issue is that, by admitting the rebuttable presumption, it should be proven in court that, in reality, there was no sacrifice of assets. This was the conclusion reached by the Business Court and also by the Supreme Court when it took over the case (it considered that the financial sacrifice involved in granting the pledge in 2013 was justified because it made it possible to maintain the existing line of credit and avoided the enforcement of the share pledge under the previous credit facility agreement; it should be recalled that the pledges created between 2008 and 2012 could no longer be subject to avoidance because they were outside the "suspicious period").