

Spin-offs and mergers: resilience to clawbacks in the context of insolvency proceedings

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Pursuant to article 47(1) of the Commercial Companies (Structural Changes) Act¹ ("LME"), spin-offs (partial divisions) are excluded from pre-insolvency acts of disposal susceptible to clawback (avoidance).

An insolvency practitioner filed an avoidance claim, pleading, in the main, that the conveyance of certain real property under the partial division of the insolvent company be held unenforceable and, in the alternative, that the division itself be held unenforceable.

Having the claim failed both at first instance and on appeal, a 'cassation appeal'² was lodged by the insolvency practitioner, but the Supreme Court, in its judgment of 21 November 2016, also failed to uphold it.

In its judgment, the Supreme Court starts off by recalling that, regardless of the resilience of spin-offs and mergers to clawbacks in the context of insolvency proceedings, an avoidance claim does not lie if it refers only to the transfer of certain assets, leaving the division untouched. The transfer of assets of the part of undertaking or business that has been spun off is part and parcel of the division's transfer transaction, and thus cannot be dissociated when impugning the same. Therefore, in this case, only an avoidance claim in respect of the divisional transaction is possible.

Next, the Supreme Court remarks that art. 47(1) LME, which restricts the possibility of impugning registered mergers or divisions, affects any action that seeks the unenforceability (not strictly invalidity) of the effected structural change. From this it follows that a partial division lies outside the scope of an avoidance claim in the context of insolvency proceedings (since such an action seeks a ruling of unenforceability in respect of the impugned act of disposal).

Lastly, the judgment recalls that art. 47(1) LME does not bar reliance on other remedies to safeguard the rights of shareholders or, where appropriate, creditors, who were unlawfully denied. In this case, the insolvency practitioner – insofar that the divided company is subject to insolvency proceedings – could claim compensation equivalent to the claims unlawfully defrauded with the division (claims that must have existed prior to the transaction).

¹ Ley 3/2009, de 3 de abril, sobre modificaciones estructurales de las sociedades mercantiles.

² A 'recurso de casación' is brought on the grounds of a breach of the rules governing the determination of disputes.