

An investment vehicle of an entity under financial supervision does not necessarily qualify as such

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Last October, the Court of Appeal of Gerona confirmed the ruling of the commercial judge denying the right to vote at the creditors' meeting to a creditor (Aguila Investments Ireland Limited) that had acquired its claim after the declaration of insolvency of the debtor. The consequence was that the creditors' arrangement did not obtain the required legal majority for its approval.

Aguila had acquired a portfolio of claims (including a claim vis-à-vis the Spanish company Matadero Salida 13, S.A.) from Barclays Bank, S.A. and Barclays Factoring, S.A. As far as Matadero is concerned, the acquisition took place after its declaration of insolvency.

Pursuant to section 122.1.2nd of the Spanish Insolvency Act (SIA), claims acquired after the declaration of insolvency cannot vote, unless (i) they have been acquired as a result of the acquisition of all the assets and liabilities of the transferor or as a result of a judicial enforcement; or (ii) by an institution under financial supervision¹.

The Court found that:

- a. Firstly, the evidence submitted to prove that Aguilá was subject to financial supervision was not sufficient. Apparently, it was based on a commercial report of the company Informa D & B, S.A. where express reference was made to the financial activities carried out by Aguilá. The report contained a disclaimer that no absolute guarantee could be given as to the accuracy of the information contained therein and that no decision could be taken on the exclusive basis of said report.
- b. Secondly, the fact that Aguilá was an investment vehicle of Paratus AMC Bank, operating in Spain under the brand Paratus AMC España, S.L., was deemed to be irrelevant. The claim had been acquired by Aguilá, not by Paratus AMC Bank, and thus it was for Aguilá to meet the financial supervision criterion.

The important conclusion to draw is that it is likely that courts interpret section 122.1.2nd of the SIA in a narrow way, and thus the company that actually buys the portfolio of claims must be an entity subject to financial supervision itself; therefore, an ad hoc SPV will probably not qualify as an institution subject to financial supervision and as a consequence will not be entitled to vote at the creditors' meeting.

¹ It is worth noting that the SIA does not define what an institution under financial supervision means, although it is generally considered that any type of financial supervision from a public entity (Spanish or foreign) is sufficient.