Reforms to employer succession in Spain

Agustín Bou outlines recent reforms that enable employer succession following the sale of productive units

AGUSTIN BOU
Partner, Jausas Legal, Spain

> IN THE PAST, SPANISH COURTS HAD RULED THAT THE TRANSFER OF A PRODUCTIVE UNIT DID NOT REPRESENT AN EMPLOYER SUCCESSION

The Spanish Insolvency Act (hereinafter, "IA") propose as one of its main objectives to maintain the continuity of the economic activity in companies involved in insolvency proceedings.

During recent years, due to the regulation, it has been possible to save numerous jobs and business units through the sale of productive units within the context of insolvency proceedings. The reason behind this achievement was that this type of sale made it possible to keep business units economically viable by leaving behind insolvency liabilities, combined with subrogation of employment contracts as a necessity in order to ensure this continuity.

In the past, Spanish courts had ruled that the transfer of a productive unit did not represent an employer succession, which meant that debts owed in relation to salaries and Social Security were not assumed by the acquirer. However, although the most recent reforms to Spain's IA were theoretically designed to make such sales more flexible, they have in practice done just the opposite. Its new provisions force the purchasers of productive units to assume debts related to employee and Social Security claims.

The latest reforms of the Spanish Insolvency Act

Royal Decree-Law 11/2014 of 5 September, on Urgent Measures Related to Insolvencies, which became, after the corresponding parliamentary process, the Spanish Law 9/2015 of 25 May, on the Amendment of Insolvency Act, changes significantly the regulation contained in the IA regarding the sale of productive units within insolvency proceedings.

This reform introduces article 146 bis to the IA in order to establish special rules for the transfer of productive units. Pursuant to this article, the acquirer shall be subrogated in the debtor's contracts and administrative licenses whose termination has not been requested, and such a transfer will not give rise to the obligation for the acquiring party to settle debts unpaid by the insolvent company prior to the transfer. However, it also includes the exception "*without prejudice to the provisions found in article 149.4 IA*".

The aforementioned article 149.4 IA states that when a productive unit is transferred, it will be understood, for purposes of employment and Social Security, that an employer succession is taking place. Hence, the legislator deprives the acquiring party of the possibility of getting rid of the debts related to employee and Social Security claims.

Initially, some Commercial Court judges ruled that the reference made by article 146 bis. 4 IA to article 149.4 IA had to be interpreted in the sense that the acquirer only had to assume debts owed to the employees and to the General Social Security Treasury (hereinafter "TGSS") derived from employment contracts that were in force at the time of the transfer or adjudication. Therefore, at that time, the acquiring party did not also assume debts owed from contracts that had already been extinguished at the time of the effective adjudication.

However, this interpretation, previously held by the majority of the Commercial Court judges, has been contested and challenged both by the employees and the TGSS, generating a very strong sense of legal uncertainty until the Employment Chambers of various regional appeal courts (*Tribunales Superiores de Justicia* or *TSJ* in Spanish) have issued several rulings providing clarification on this matter.

Consolidation of the employer succession during 2017

With respect to the underlying issue, during 2017 the Employment Chambers of various regional appeal courts have affirmed that in situations regulated by the new legislation (i.e., when the liquidation phase of the insolvency proceedings were opened on, or after 26 May 2015), article 44 of the Spanish Employees' Statute shall apply if a productive unit is sold. This means that employer succession does exist at the employment level, and the party acquiring the productive unit, hence, becomes jointly and severally liable for the salary-related and Social Security debts of the insolvent company with respect to all employees (including both those who are subject to subrogation and those who are not), by virtue of the provisions of articles 146 bis. 4 and 149.4 of the IA.

The very same conclusion has been achieved in rulings by the Employment Chamber of the TSJ of Galicia on 16 June 2017 (appeal 325/2017), by the Employment Chamber of the TSJ of Andalusia (Seville) on 22 June 2017 (appeal 2581/2016), and by the Employment Chamber of the TSJ of Catalonia on 18 October 2017 (appeal 4177/2017).

This last ruling cited is especially significant because it contains an analysis of how the amendments made to articles 146 bis and 149.4 of the IA, as part of the latest legislative reforms, have represented a 360-degree turnaround on this issue: whereas previously liquidation plans were able to limit the liability of a party acquiring a productive unit in terms of debts owed to employees and the TGSS, such limitation is no longer possible, because article 149.4 IA is a mandatory provision that expressly establishes the existence of employer succession for purposes of salaries and Social Security.

Finally, it should be noted that the Spanish Supreme Court (*Tribunal Supremo*) has ruled that Spain's regional Employment Courts (*Juzgados de lo Social*) are competent to rule upon the existence of employer succession under circumstances involving the sale of productive units during insolvency proceedings.

Impact of the new regulation and its convenient reform

The reform introduced by the Spanish Law 9/2015 of 25 May, on Amendment of Insolvency Act, and its subsequent interpretations have consolidated the employer succession in sales of productive units within insolvency proceedings. This new Law represents the granting of a privileged status, that the IA does not establish in principle, to all debts related to salaries and Social Security since the acquirer will be compelled to pay such debts.

And what is more important, this new Law could checkmate the sale of productive units, since such rulings increase the amount that parties interested in acquiring productive units will have to invest and probably will scare off prospective buyers, leading instead to the disappearance of the insolvent company which included a productive unit and to the loss of all jobs.

Therefore, the approval of the Spanish Law 9/2015 and its subsequent interpretation have seriously restricted the opportunities to purchase productive units as they force the acquirers to inherit both current and past debts owed to employees and Social Security. What is more desirable now is for the legislature to finally understand that the only way to preserve the country's industrial fabric and the associated jobs is to once again reform articles 146 bis.4 and 149.4 of the Spanish Insolvency Act, in order to clearly and expressly state that when the transfer of a productive unit occurs during insolvency proceedings there is no employer succession, given that this type of sale is overseen by the insolvency judge, and it is taking place in an effort to maintain the viability of the business units.

Although such further reform is desirable, until it occurs any parties interested in acquiring productive units will have to carefully analyze the insolvent company's debts related to employees' salaries and Social Security, so that they can adapt their offers to the existence of such contingences and avoid unpleasant surprises after the acquisition. ■

> **THE APPROVAL OF THE SPANISH LAW 9/2015 AND ITS SUBSEQUENT INTERPRETATION HAVE SERIOUSLY RESTRICTED THE OPPORTUNITIES TO PURCHASE PRODUCTIVE UNITS**

Share your views!