

Abuse of the *article 5 bis notification* to prevent enforcement of a security

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The Spanish Insolvency Act (SIA) requires the debtor to file for the judicial declaration of insolvency within two months from the date it knew or should have known about its situation of insolvency.

However, article 5 bis SIA exceptionally allows not to file for insolvency provided the debtor notifies the court that it has entered into negotiations with its creditors relating to certain types of refinancing agreements or an anticipated proposal of arrangement (*propuesta anticipada de convenio*).

One of the effects of the *article 5 bis notification* is a temporary suspension of all enforcement proceedings on assets that are deemed necessary for the debtor's business. However, the debtor is not required to prove that negotiations with its creditors are actually happening or that they are likely to resolve its economic and financial situation for the *article 5 bis notification* to produce this suspensive effect. Therefore, article 5 bis SIA may be easily abused.

The commercial court nº 6 of Madrid issued some months ago an interesting order¹ regarding an *article 5 bis notification* filed by a company called Jolva in order to suspend enforcement by Deutsche Bank of a mortgage on some of its properties. Jolva had previously tried to prevent enforcement of the mortgage on several grounds, all of which had failed.

Jolva then filed an *article 5 bis notification* and requested the suspension of the enforcement proceedings.

Deutsche Bank submitted that no negotiations between Jolva and its creditors had taken place in reality and that the sole purpose of the *article 5 bis notification* was to hinder the enforcement of the mortgage.

The court found that the *article 5 bis notification* had actually been abused, given, *inter alia*, that the debtor's insolvency had started long time ago and that there were no serious prospects to solve it through a refinancing that Deutsche Bank (holding more than 90 per cent of the claims) did not accept.

Use of article 5 bis SIA has been widespread in the last 10 years or so, also in some of the largest insolvencies in Spain. However, to our knowledge, this is one of the few cases -if not the first- where an *article 5 bis notification* has been found to be abusive and hence ineffective.

¹ Order of 10 September 2019, challenge nº 1240/2019.