

Pledge of shares, voting rights, control of a debtor company and equitable subordination of claims

Madrid, November 2021

The Court of Appeal of Madrid (CAM) has recently quashed¹ a judgment of the court conducting the insolvency proceedings of Marme (former owner of Banco Santander's *Ciudad Financiera*)² as regards the classification of The Royal Bank of Scotland (TRBS)'s claims resulting from the loan granted to Marme by TRBS and other lenders and from the interest rate swap agreement entered into between Marme and TRBS on 12 September 2008.

The insolvency court classified TRBS's claims against Marme as subordinated, despite they were secured by a mortgage on the premises of Banco Santander's *Ciudad Financiera*, on the grounds that TRBS was *specially related* to Marme.

The court noted that, on the same date of the loan and swap agreements, TRBS had granted another loan to Ramblas (Marme's parent company) that was secured by a pledge of Ramblas' shares. Since the pledge allowed TRBS to exercise the political rights in Ramblas in case of breach of contract, the court concluded that TRBS had *potential control* of Ramblas and, thus, was *specially related* to Marme's group of companies when its claims were born (12 September 2008), which is the relevant time for this purpose.

TRBS (now Natwest Markets) appealed this judgment before the CAM. It alleged, *inter alia*, that the exercise by TRBS of the voting rights attached to the pledged shares in Ramblas was dependent, as a condition precedent, on the delivery by TRBS to Ramblas of a prior notice in that regard. It is undisputed that this did not happen until 6 January 2011.

The CAM upheld the appeal, revoked the first instance judgment and ordered Marme's insolvency administration to classify TRBS's claims against Marme as *specially privileged*, as it had done with the other financial creditors. It founded its decision as follows:

- (i) A creditor can only be considered to have potential control of a company when it has an unrestricted or unconditional ability to exercise such control.
- (ii) When a creditor's ability to exercise control of a company is subject to a condition precedent, there is no control of the company (not even potential) until the condition is met.
- (iii) In the case at hand, the condition precedent was met in 2011, when TRBS sent a notice to Ramblas declaring its intention to exercise the pledged voting rights. Hence, TRBS had no potential control of Ramblas and was not, therefore, *specially related* to Marme in 2008, when its claims arose.

¹ Judgment of the Court of Appeal of Madrid 238/2021 dated 11 June 2021.

² Judgment of the commercial court 9 of Madrid 301/2019 dated 28 June 2019.