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CONSTITUTIONAL COURT DECLARES REGULATION RELATED TO PLEDGE OVER TRANSFEREABLE SECURITIES IN FAVOR OF BANKS TO BE UNCONSTITUTIONAL

On September 1, 2015, the Constitutional Court of Chile ("TC") partially accepted a requirement which was introduced by Inversiones Mass Limitada, in an attempt to have article 6 of Law 4,287, which regulates transferable securities pledge in favor of the banks, declared unconstitutional. The importance of this article resides in the quick enforcement mechanism that was contained there, which solely required a judicial notice to the debtor and a seven days' notice for the execution of the pledge.

In its analysis, the TC states that although this pledge is ruled by a summary exceptional execution guarantee, it does not prevent it from being judged from the perspective of the group of procedural rights of article 19 No. 3 of the Chilean Constitution, which includes (among others) two different guarantees: 1) effective judicial protection and 2) due process. Both of these guarantees are considered to be violated by article 6 of Law 4,287.

The TC states that effective judicial protection shall cover all interests that are legitimately invoked before the courts. Therefore, it would guarantee equal safeguards from the law in the exercise of the rights in all actions and appeals protected under the law. In connection with the respective article, the TC concludes that this guaranteed protection has been infringed upon, because the execution of justice cannot be annulled, due to paragraph 1 of article 6 which states that, "without further intervention than that which is provided by regular judicial procedures". In this case, regular legal proceedings would distort the sense of the constitutional jurisdiction itself, which is stated in article 76 of the Chilean Constitution. In the words of the TC, the foreclosure process is not prohibited, however, the unilateral execution of a foreclosure process without genuine judicial control is forbidden.

Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor.
Las Condes, Santiago, Chile.
www.carey.cl

With regard to due process, the TC indicates that the reviewed article 6 establishes the, “simple judicial notice to the debtor”, and the, “7 day term, following said notice”, as the only requirements to proceed to the execution of the pledge. The TC continues stating that although an enforceable process with only one instance and without necessity of granting judicial remedies it is plausible, this process “shall contain a final and constitutional direction in connection with the process”. Therefore, according with the TC, this norm would be one that does not duly measure the preventive restrictions that allows access to a process and the respective constitutional protection that it implies.

Bearing the above in mind, the TC establishes that part of article 6 of Law 4,287 lacks several elements of due process, among them, the right to defense, which may be interpreted as the possibility to contest the enforceable nature of the title, challenge the legitimacy of the title, or contest the fulfillment of the formal and substantial requirements of the title. Likewise, the absence of effective judicial participation means that evidence that could potentially be used to mount a defense, cannot be evaluated because the debtor would never be allowed a chance to defend himself, present exceptions or prevent the transfer of the pledge.

Taking into account article 19 No.3, article 76 and article 93 subsection 1, No. 6 and subsection 11 (all from the Constitution), the TC decided to partially accept the requirement that was presented, and, declare part of article 6 of Law 4,287 to be unconstitutional (inapplicable), only with respect to the phrases, “after a simple judicial notification to the debtor and after a term of 7 days following said notification”, and, “without any additional intervention by a court of law other than the above mentioned and not subject to established procedures”, and, “neither”.

As a result of the exclusion of the phrases stated above, the relevant article shall remain drafted as the following, “if one of the obligations guaranteed by a pledged security indicated in the articles afore mentioned is overdue, the bank company may proceed to the transfer of the pledge by the Civil Procedure Code, by the law-decree number 776 dated December 19, 1925 and by the rules of article 2,397 of the Civil Code”.

According to such reformulation, our interpretation is that the execution procedure of the pledge over mobile securities shall be

ruled, primarily, by Law Decree No. 766 from 1925 (“DL 766”), being a special norm that contains the general regime of pledge executions. In the absence of such regulation, the pledge shall be regulated by the rules of the Civil Code and Civil Procedure Code. This legal opinion is confirmed by the TC in section sixteen of the sentence that states, “this procedure permits the identification of one of the effects of accepting this requirement, that is, to lift the exceptions and open a free path to a general regime of pledges”.

Authors: Felipe Moro