Administrative

The Supreme Court's Judicial Review Division corroborates and strengthens an erroneous and unjust doctrine on the assignment of public sector claims

The lack of understanding of the mechanisms and fairness of the financing of public sector contractors once again leads the Supreme Court to deliver a flawed judgement.

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1. Facts

Hispánica de Viales 2011, S.L. was awarded work by the Provincial Government *(Diputación Provincial)* of Salamanca, consisting of reinforcement, improvement and conditioning work on different roads. Hispánica, as assignor, and Gedesco, as assignee, concluded a notary-attested assignment of claims agreement on 16 March 2017, whereby the latter became the assignee of the claims held by Hispánica, accrued but pending maturity at the date of formalisation of the agreement, and those that may accrue in the future, against the Provincial Government of Salamanca by virtue of the contracts awarded to Hispánica by the aforementioned contracting authority, listed in recital II of the aforementioned agreement and which were incorporated into the same in its annex no. 2.

In accordance with the stipulations set out in the aforementioned claim assignment agreement, the parties requested the Valencia notary Ricardo Monllor González to notify the defendant Authority of the same for the purposes set out in Article 218 of the Legislative Royal Decree approving the recast version of the Public Procurement Act (TRLCSP).

Subsequently, on 23 June 2017, the Provincial Exchequer received a communication from the Tax Agency notifying the decision to adopt the precautionary measure consisting of the attachment of property and property rights of the assignor, Hispánica, under the provisions

of Articles 41(5) and 81 of the Tax Act, to ensure the collection of the tax debts payable in the tax proceedings against Pas Infraestructuras y Servicios, S.L. as principal debtor and against Hispánica as possible vicariously liable party, with "the attachment of the debt-claims that the following persons or entities have in favour of Hispánica de Viales SL pending payment, whether they be amounts invoiced or pending invoicing or not requiring invoicing as well as those that are a consequence of services not yet carried out deriving from any type of contract in force with the aforementioned liable party: Provincial Government of Salamanca", all this to cover an amount of € 3,709,706.76.

Shortly after, on 26 June, the *Provincial Government proceeded to withhold the amounts* requested by the Tax Agency from Hispánica in accordance with the claims pending payment by the Provincial Government, *whether they be amounts invoiced or pending invoicing or not requiring invoicing, as well as those resulting from services not yet provided under any type of contract in force*, and made them available to the Tax Agency. Finally, on 17 November 2017, the Tax Agency issued a request for payment of the amount attached for the payment of the amount by Hispánica, providing a list of invoices which included two invoices held by Gedesco. The Provincial Government transferred the amounts claimed.

Once the assigned invoices were due and in view of the non-payment of the total amount of these, Gedesco proceeded on 17 November 2017 to claim, in its capacity as assignee, the amount of € 775,066.45 from the contracting authority, which was rejected by decree of the Provincial Government of Salamanca dated 28 December 2017, which indicated that the seizure order received from the Tax Agency against Hispánica was made effective against the amount of the invoices claimed. An application for judicial review was made and on 3 June 2019 the Judicial Review Court, in its Judgment no. 197/2019, found for the applicant, holding that the decree of the Provincial Government of Salamanca was inconsistent with the law, and that the payment of the invoices claimed by Gedesco in the amount of € 785,275.95 was appropriate. The Court reasoned that in accordance with case law of the Supreme Court - citing the Supreme Court Judgment of 13 March 2017 and other precedents - concerning future claims - it must be concluded that the assignment of claims was effective from 14 March 2017, when it was formalised in a public instrument, that is to say, on a date prior to the date of attachment resolved by the Tax Agency, which was on 23 June 2017, as well as prior to the decree deciding on the attachment of the amounts requested by the Tax Agency shortly after on 26 June.

A statutory appeal was lodged by the Provincial Government of Salamanca which was allowed by judgment of the Judicial Review Division of the Higher Court of Justice of Castilla y León of 10 February 2020, which is now the subject of a 'cassation' appeal.

2. Grounds of appeal

The appellant considers that a reading of Article 218, in particular paragraphs 1 and 4 thereof, does not lead to the conclusion that the assignment of future claims in the field of public procurement is prohibited, but, rather, is in accordance with the provisions of private law. Thus, Hispánica was entitled to assign the claims in dispute in accordance with the provisions of Articles 1526 to 1536 of the Civil Code and 346 and 247 of the Code of Commerce, with the contracting authority being bound to the obligatory payment to Gedesco from the time of notification. However, and despite the knowledge of the assignment of claims to Gedesco, the Court of Appeal

reasons that the assignment is ineffective until the date on which the claim accrues and the assignment is notified again, which takes place after the communication of the attachment order issued by the Tax Agency. Both Art. 218 TRLCSP, whose infringement is claimed in this appeal, and the current Article 200 of the Public Procurement Act 9/2017, ratify these rules, without prejudice to the addition of a new paragraph 5, which disassociates the Authority from the assignments prior to the birth of the legal relationship from which the right to collect derives and empowers the latter to raise against the assignee all the causal defences derived from the contractual relationship with the assignor.

3. Supreme Court (Judicial Review Division) Judgment no. 1693/2022 of 19 December

According to the Supreme Court, the question now being raised has been analysed by the same division in Supreme Court Judgment no. 53/2020 of 22 January, which examined the scope and meaning of public sector legislation in this matter of assignment of claims. In the aforementioned Judgment no. 53/2020, it was held that what is assignable is not the debt-claim, but something more circumscribed, the "right to collect". And for debt-claim arising from the performance of a public sector contract to be collected, it is necessary - apart from a period of time having passed and, where appropriate, the appropriate claim being presented and processed - that "the certificates of completion or documents proving conformity with the provisions of the contract for the goods delivered or services rendered" (Art. 198 of the Public Procurement Act) have been given; in other words, it is required that the Authority has confirmed that the work or service has been carried out correctly. According to Art. 1112 of the Civil Code this would not be necessary for the assignment of the claim by the contractor: the contractor could assign it to a third party before the other party expresses its agreement with the performance. By establishing a more restrictive rule on the assignment of claims, the legislation on public sector contracts seeks, as is obvious, to protect the public interest, preventing the Authority from having to face pecuniary claims from third parties when it has not yet given its conformity to the work or service. Only when the only thing that remains to be done is to collect, the Authority having stated that it has no objection to the performance of the public sector contract, is the assignment of this debt-claim to a third party legally permitted; a debt-claim that, in this context, is given the significant name of "right to collect". The Court now shares the view taken in the previous judgement in which the differences between civil law and the specific regulation in the public sector sphere were highlighted.

In the present case, the "right to collect" of the appellant - the assignee of the claim arising from the contractor agreement - against the Authority only arises when the relevant certificate of completion is issued, that is to say, in September 2017, not earlier when the assignment takes place. However, when the certificate of completion was issued - and the right to collect arose - the order for attachment of certain amounts had already been issued by the Tax Agency, and so the Provincial Government of Salamanca proceeded to comply with that order by deciding to transfer funds to the Tax Agency at a time subsequent to that at which the assignment of the claim took place, but prior to the time at which the "right to collect" referred to in the public sector legislation arose.

In conclusion, therefore, it is only when the Authority establishes that the contractor has properly performed the contract that the "right to collect" arises, and therefore the assignment of a claim against the Authority has no

transferable effect until the right to collect is consolidated.

It is also argued in the 'cassation' appeal that the case examined in the precedent judgment differs from that which gives rise to the present appeal, since, on that occasion, an assignment of non-contractual claims arising from the Authority's liability was examined, different from the case at issue here, which concerns the assignment of a claim arising from a public sector contract. It happens, however, that although they are indeed different cases, in both cases the public sector rules referred to above are applicable to the assignment of future claims and in both cases the same legal issue is underlying the transfer effect of assignments of future claims and the singular legal position of the assignee in the public sector sphere, reasons which lead to the conclusion that the interpretation of the provisions in question must coincide.

4. Commentary

§ 1. It is to be deplored that with this second judgement the Third Chamber of the Third Division has ultimately created case law, reproducing the terms of the previous Supreme Court Judgment no. 53/2020. This judgement was repeatedly denounced as unfortunate, both dogmatically and in terms of the interests involved.

§ 2 Both that and this judgment understand that the interpretation they uphold is necessary to ensure that public authorities are not required to pay claims that are not even settled by the relevant certificate of completion. This is a big mistake. The recognition of the effectiveness of the earlier assignment of claims would never mean that the public authority must pay something that it does not owe or before the time period in which it must pay. This is clear. Therefore, the "civilist" view to which the Court refers is absolutely neutral in terms of the protection of public interests. Because, as now proposed in section 5 of Art. 200 of the Companies Act, public authorities are immune to early assignments.

§ 3. This provision is expressed in these terms: "5. Assignments prior to the birth of the legal relationship from which the right to collect derives shall not produce effects against public authorities. In any event, public authorities may raise against the assignee all defences arising from the contractual relationship". It is curious that neither the appellant nor the judgment uses this provision, even for the purposes of argument. Because the provision refers (as not producing effects) to assignments prior to the birth of the underlying legal relationship (the contract with the Government), which is not the case, because the assignment in the disputed case concerned claims from contracts already concluded with the Government, although not fully accrued. Therefore, *a contrario*, this assignment would produce effects vis-à-vis the public authority.

§ 4. But even if this were not the case, the "non-production of effects" against the public authority would not entail the civil unenforceability of the assignment between the parties and third parties, but, firstly, and obviously, that the public authority should not make payments despite this 'earlierness' and, secondly, that it can raise against this assignment all the defences that it could raise at the time of issuing the certificate of completion. Once again, the early assignment is neutral for the public authority. It is not encumbered any more or by anything other than what it is "encumbered" by an assignment after the issuance of the certificate of completion. What does it matter to the public authority that before the time of accrual the assignees fight among themselves to determine their preference?

§ 5. The Judicial Review Division did not notice, nor did it notice beforehand, that the point of view chosen to analyse the question of the assignment is totally unfocused. Because the early assignment or pledge is not made with the effect of binding the public authority in any way, but with the effect of gaining priority of collection against third party creditors, in our case the Tax Agency. This is the conflict that is being resolved, against which the public authority is a third party, *quem cesio non nocet nec prodest*. And because the conflict is settled between creditors, there is no reason to understand that the legal regime should be different because the disputed claim derives from a public sector contract.

§ 6. The distinction between assignments of claims and assignments of collections is irrelevant. It is unfortunate that a substantive conflict is resolved with 'nominalistic' fripperies. Nor is it noticed that Art. 200 para. 5 openly refutes the view, because the provision refers to an assignment before or after the birth of the underlying legal relationship, but not before the public sector certificate. Moreover, what does it matter to the public authority whether the claims are assigned at one point in time or another, since its position is immune to this fact?

§ 7. The only question is whether the price of that work corresponds to Gedesco Factoring or to Tax Agency. Why should the latter benefit from an interpretation of the law that is intended to "favour" the common debtor? What does it matter to the common debtor whether one or the other collects? It is even clear that it is more in the interest of the Government that the financer is paid, because the failure of the factoring operation will certainly affect the course of the present and future work. Gedesco's claim is inherent in the work, it is investment financing; the Exchequer's claim is not. It is not only later in time, it has less *equity.*

§ 8. This is unfair for a second reason. The assignment of the claim is the *quid pro quo* of financing by discounting. The assignee places its trust in it, and carries out the performance on the bilateral *causa* of the assignment. The Exchequer, on the other hand, does not grant a claim on the expectation of contractual consideration. Whatsoever seizes, seizes what there is, because the origin of its claim did not constitute a performance caused by the assignment of the claim against a third party.

§ 9. Indeed, the solution adopted, which favours a subsequent seizure by the Exchequer, which does not have an *equity* investment, of an earlier assignment in favour of the main financier of the public sector work, has the consequence that forewarned financiers will not be willing to discount payments to the contractor, this discount being the only means of allowing them interim liquidity to finance work in progress of which payment will be collected in the future.

§ 10. The judgment is inconsistent and treats the two disputants with different yardsticks. It states that the assignment was made prior to the issuing of the certificate of completion, but the same applies to the issuing of the interim injunction and its enforcement (attachment) by the Provincial Government. Why is a seizure of a future claim enforceable when the assignment would not be enforceable in the same case?