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Global Restructuring & Insolvency Guide

Spain

Overview, Introduction and Legal Framework

In Spain there is a single procedure (called *concurso de acreedores*) in the event of the insolvency of a debtor (either an individual or a corporation). The procedure is regulated by the Spanish Insolvency Act 22/2003, dated 9 July (the “**Insolvency Act**”).

The purpose of the Insolvency Act had been to satisfy the various creditors’ claims whilst preventing the liquidation of the bankrupt companies, in an attempt to ensure their economic feasibility. However, after more than a decade since the entry into force of that legislation, experience has shown that it has not overcome some of the drawbacks that the current financial and economic recession has highlighted. Most proceedings (more than 90%) end up in liquidation and the vast majority of claims are left unpaid, not to mention the significant delays that are faced, due to the high workload of commercial courts. This is rather distant from the spirit of Spanish insolvency legislation, which was designed precisely to maintain companies and their production capacity.

The Insolvency Act has undergone various reforms over the last several years, though none has managed to correct this tendency. After some modifications in 2009, the Insolvency Act was globally amended by Act 38/2011, dated 10 October, effective as of 1 January 2012, in an attempt to adapt the Spanish legislation to the emerging economic and social circumstances and, in particular, to the recession environment, by offering continuity alternatives for distressed companies and businesses and by simplifying the insolvency proceedings, thus decreasing the workload of the Spanish tribunals.

The legislation was again revised by new amendments which have tried to offer pre-insolvency solutions and to make creditors' arrangements more flexible, thus providing the debtors with more suitable refinancing and restructuring alternatives.

The first reform, effective as of 18 October 2013, was approved by Act 14/2013, dated 27 September, on support to the internationalisation of business and entrepreneurship. It implemented out-of-court solutions for minor restructuring cases (also known as “insolvency mediation”).

The second amendment came into effect on 9 March 2014, with the approval of Royal Decree-Law 4/2014, of 7 March, implementing urgent measures for the refinancing and restructuring of corporate debt. This new reform, rushed through parliament in record time, is complex and represents one of the most daring recent developments in handling bankruptcy. It seeks to work in depth on relief procedures for viable companies’ financial debt in order to avoid bankruptcy by eliminating the rigidity of the rules governing refinancing agreements. The legislation was approved following a number of insolvency cases with wide media coverage that showed the imperfections of the previous system. Royal Decree-Law 4/2014 focuses on the pre-insolvency phase (that is, the beginning of negotiations to reach a refinancing agreement or to approve of an early composition agreement), as well as the refinancing agreements and their content, requirements, effects and authorisation. This Royal Decree-Law was recently ratified by Act 17/2014, dated 30 September, which adopted urgent measures for refinancing and restructuring corporate debt, effective as of 2 October 2014.

A third amendment came into effect on 7 September 2014 with the approval of Royal Decree-Law 11/2014, dated 5 September, on urgent measures in insolvency proceedings. This reform extends the pre-insolvency solutions provided for by Royal Decree-Law 4/2014 to creditors' arrangements that are achieved during insolvency proceedings (composition agreements). It also attempts to improve the regime of the purchase of production units and debt of insolvent companies. This reform was later endorsed by Act 9/2015, dated 25 May, on urgent measures in insolvency proceedings, which came into effect on 27 May 2015.

Pre-Insolvency Alternatives to Avoid or Postpone the Application

As a general matter, the debtor, either personally or, if it is a company, through its management body, must file for insolvency within two months following the date on which the debtor's insolvency was known or should have been known.

Article 5bis: Insolvency Postponement Notice

Article 5bis of the Insolvency Act regulates an exception to the legal period to file for insolvency, by entitling distressed companies to file a "notice of postponement" (*comunicación de prórroga concursal*) before the commercial courts. The filing opens a three-month negotiation period either to reach a refinancing agreement with financial creditors or to obtain an anticipated adhesion to a composition agreement with creditors, thus suspending the legal period to apply for insolvency. The postponement may also be used by the debtor to find a third-party investor interested in acquiring the company or a business or production unit.

This provision tries to facilitate pre-insolvency restructuring schemes in terms similar to Italian insolvency law (through institutions such as *concordato preventive* and *programa di ristrutturazione*) and French insolvency law (regulation of *sauvegarde des enterprises*).

The debtor may apply for a "confidential" notice of postponement. This means that it will not be published in the Public Insolvency Registry. Before this, the broad public knowledge of pre-insolvency cases made the refinancing of companies in this early phase more difficult.

If the agreement obtained is validated (endorsed) by the court, its postponement clauses will be extended to other financial creditors. Judicial validation will be granted, subject to certain requirements, and if the agreements do not involve disproportionate damage to the estate's assets (see "Refinancing Agreements and Their Endorsement by the Court" below). However, if a composition or a refinancing agreement is not reached within three months from the filing of the notice of postponement, and the debtor is still insolvent, it must file for insolvency within the following month. Therefore, Article 5bis grants the debtor, in practice, a protective shield of four months to compromise with its creditors or develop a restructuring plan for the company, whilst protecting the debtor from insolvency petitions filed by creditors and excluding the personal liability of its directors for delay in filing for insolvency.

Enforcements against the debtor's assets necessary to its activity are prohibited and those under way will be stayed from the time of filing the notice of postponement, either until the agreement is formalised or, in any event, for three months after the notice is filed in court. The court handling the insolvency postponement is competent to decide whether the affected assets are necessary to the debtor's activity.

This affects enforcement proceedings (either judicial or non-judicial) against goods which are necessary for the debtor to continue its activity (in which case it will be sufficient for the debtor to present the court ruling admitting the notice of postponement) and enforcements promoted by creditors holding financial rights of credit when the debtor verifies that it has the support of at least 51% of its financing creditors to initiate the negotiations to formalise a refinancing agreement and their express commitment not to initiate or continue enforcements.

In practice, though, the majority of postponement communications end with a voluntary insolvency filing.

In the course of an ensuing insolvency, the appointed insolvency receiver will check that the debtor used the postponement term to look for alternatives to keep its business viable. For instance, the debtor may be forced to provide the receiver with evidence, such as a binding written commitment to acquire the company or any operating productive unit, or correspondence or drafts regarding refinancing or composition agreements.

Out-of-Court Settlement Agreement of Payment of Debts

An out-of-court settlement agreement, also known as "insolvency mediation", is a debt renegotiation mechanism which also takes place in a pre-insolvency stage, as an alternative to the abovementioned postponement. It seeks to promote out-of-court solutions for minor restructuring cases, allowing for the exoneration of debts and transfer in payment of debts in certain cases. It is designed for individual entrepreneurs, freelancers and small and medium-sized businesses that have not yet been declared insolvent and whose assets and liabilities meet certain requirements.

To initiate the procedure of out-of-court settlement of payments, the debtor submits a petition to a notary public or, if it is a company, to the commercial registrar in its place of incorporation. A new role, that of the insolvency mediator (*mediador concursal*), has been introduced. The insolvency mediator is appointed from a list of eligible candidates by the public notary or the registrar in charge of the file and is subject to the same requirements and prohibitions as the insolvency receiver (*administrador concursal*) (described below). The insolvency mediator is intended to act as an independent negotiator. He leads the procedure, thus promoting consensus among the debtor and its creditors.

Although the procedure will be processed out of court, both the court having jurisdiction and the tax authorities will be informed when it is instituted.

Like the postponement notice under Article 5bis of the Insolvency Act, the out-of-court settlement of payments extends the term during which the debtor must file for its own insolvency. During the extension, the debtor may continue to conduct its business activity, subject to certain cost-saving restrictions. No enforcement proceedings against the debtor may be initiated or continued during this term, except for those brought by secured creditors, who will need to choose between enforcement of their claim or adhesion to the settlement agreement.

The procedure is aimed to reach a binding agreement between the debtor and its creditors, with the opportunity to have up to 25% of the debt written off and a three-year payment moratorium. Most significantly, it also includes the option of accepting goods in lieu of payment (dation in payment). The out-of-court settlement of payments binds all the creditors (but for public creditors and secured creditors who opt not to adhere to the negotiation process).

The creditors are summoned to a meeting in which the approval of the proposed payment and feasibility plans will be addressed, and those not attending may have their claim degraded to subordinate status. Approval requires the favourable vote of 60% of the liabilities affected by the settlement or, in the event that goods are accepted in lieu of payment, the favourable vote of 75% of the liabilities affected, and of any creditor who has a security interest in the transferred goods.

The procedure ends when the impossibility to achieve a settlement becomes evident or if an agreement is concluded and then breached. In either case, the insolvency mediator will directly file a petition before the court having jurisdiction and request that “subsequent insolvency proceedings” (*concurso consecutivo*) be instituted straight into liquidation.

Insolvency Proceedings Step By Step

Application for Insolvency

Under Spanish legislation, any debtor that is (or foreseeably will be in the immediate future) unable to meet its payment obligations on a regular basis is regarded as insolvent. Case law clarifies, though, that inability to meet regular obligations occurs when the debtor fails to pay its debts to at least 15% of two different types of creditors (classified for these purposes as financial, commercial or public creditors). Insolvency may occur regardless of the debtor’s balance sheet or the value of the debtor’s assets.

An impairment situation, that is, when the debtor is facing losses that reduce its equity to an amount less than one-half of the share capital, may also result in an insolvency scenario. If a debtor confronts an impairment scenario which subsequently is determined to be an insolvency situation, the filing of insolvency proceedings has legal priority over a mere corporate liquidation or any other commercial measure provided by corporate legislation.

The debtor, either personally or, if a legal person, through its management body, must file for insolvency within two months following the date on which the insolvency was known or should have been known. Also, any creditor (except for those who have acquired claims by *inter vivos* acts and by singular title, after maturity thereof, within the six months prior to lodging the insolvency petition) may apply for its debtor's insolvency by providing evidence of both the enforceability of its claim against the debtor and the debtor's indebtedness situation.

When the applicant is the debtor, the following documentation must be provided within the application:

- Special power of attorney to petition for insolvency in favour of a court agent (*procurador*), which is a mandatory representative under Spanish procedural rules.
- Report stating the history of the debtor, the activity or activities performed in the last three years, the establishments, offices or operating facilities owned, the causes of the insolvency and the valuations and proposals on the viability of this situation.
- Inventory of assets and rights, stating their nature, the place where they are located, register identification data when appropriate, acquisition value, appropriate valuation corrections, and estimation of the present real value. An indication must also be given of the encumbrances, liens and charges that affect these assets and rights, stating their nature and the identifying data.
- List of creditors stating their nature and identity, as well as the amount and maturity of the respective claims and the personal or *in rem* guarantees established.
- Names of staff and the identity of the body that represents the employees, if any.
- Annual accounts (separate and consolidated) and, when appropriate, management reports or audit reports for the last three business years. Also, a report stating the operations performed with other companies of the group during that same period.
- Report on the significant changes that occurred in the debtor's economic state following the last annual accounts drawn up and deposited and the operations that, due to their nature, object or amount, exceed the ordinary business or trading by the debtor.
- Intermediate financial statements prepared after the last annual accounts presented, in the event of the debtor being bound to serve notice of these or to submit these to the supervisory authorities.

If the request for insolvency is submitted by the creditors, it may be based on a title whereby the enforcement against the debtor's assets has been requested but not obtained; or it may be based on any of the following circumstances, as listed in Article 2(4) of the Insolvency Act:

- Total failure by the debtor to meet its payment liabilities;
- Attachments for pending executions which affect the debtor's assets on a general basis;
- Fraudulent concealment or hasty disposal of assets by the debtor;
- General failure to fulfil the following within the three months prior to the filing of the insolvency petition: tax duties; payment of any kind of social security contributions to be made by the company; or payment of salaries, indemnities and any other compensation to employees.

Assignment of the Insolvency Case to Commercial Courts

The insolvency proceedings are heard by the Spanish Commercial Courts (*Juzgados de lo Mercantil*, and hereinafter, commercial or insolvency courts), which are the specialised courts in commercial matters, broadly experienced in companies' financial crises. They are the only courts with jurisdiction to decide, not only on most commercial or civil issues related to the insolvent debtor, but also on those administrative or labour matters which are directly linked to the insolvency and whose resolution is necessary for the proper development of the bankruptcy procedure.

The application and supporting documents must be submitted to the commercial courts in the capital of the province where the debtor's "centre of main interests" or, more commonly, "COMI", is located, that is, the place known to others from which the debtor habitually manages its activity (presumably, its registered address).

In each provincial capital, there may be one or, more commonly, various tribunals. The filed application will be assigned by rotation to one of these available tribunals, by means of computer software managed by the Regional Ministry of Justice. There are no fixed criteria for this assignment other than randomness and the fact that the tribunal which was last appointed in charge of a large insolvency case will be automatically discarded in the next "raffle". Aspects such as the nature of the debtor's business, the value of the insolvency liabilities or the continuity/liquidation perspectives of the petitioned bankruptcy are irrelevant for the assignment.

Court Ruling Declaring Insolvency

Once assigned, the court will examine the debtor's application and the supporting documents and, if they are considered sufficiently thorough and insolvency is deemed to have been proven, the court will issue a ruling (*auto*) declaring the debtor insolvent.

By means of this ruling, the court:

- States whether the insolvency is voluntary (application filed by the debtor) or compulsory (application filed by a creditor) and, when appropriate, whether the debtor has applied for liquidation;
- States whether the system is one of intervention (the debtor's management body maintains the power to administer and dispose of its assets, subject to approval by the receiver) or revocation (these powers are assigned to the receiver). As a general rule, debtors who have applied for their own insolvency will be subject to a system of intervention (see "Effects of the Insolvency Ruling on the Debtor and its Business" below);
- Appoints the insolvency receiver;
- States whether interim injunctive relief is applicable to protect the debtor's assets until the receiver accepts the appointment;
- States whether abbreviated proceedings are applicable (see "Abbreviated Proceedings" below);
- Specifies the publicity that is to be given to the declaration of opening the insolvency proceedings; and
- Calls for creditors to notify the receiver of their claims within one month after the publication of the court order declaring the insolvency in the Spanish Official Gazette.

An abstract of the court order is published online free of charge in the Spanish Official Gazette (*Boletín Oficial del Estado*), at www.boe.es and in the Insolvency Public Registry at www.publicidadconcursal.es. The latter is a new centralised insolvency information system that seeks to shore up the deficiencies of the former Public Insolvency Rulings Registry, which was in effect since 2005. The new Registry, approved by Royal Decree 892/2013, dated 15 November, makes available to any citizen a free public tool for accessing official, reliable information on all types of insolvency (and pre-insolvency) proceedings and contributes to the transparency in the disclosure and publication of these matters.

In addition, if the debtor is registered in the Commercial Registry, the insolvency ruling and details as to whether the debtor is subject to intervention or revocation of powers and the appointment of the receiver will appear in this Registry. This information is also included in any public Registry where the debtor's assets or rights are registered.

The Insolvency Receiver: Appointment and Role

The receiver (*administrador concursal*) is appointed by the insolvency judge, who refers to the publicly available lists available in the Insolvency Public Registry of professionals who have expressed their availability and have proven training and expertise in insolvency matters. Neither the debtor nor its creditors may influence the decision of the insolvency judge as to which receiver is appointed. The receiver will have to appear before the court in order to accept his appointment.

The receiver must be either a lawyer or an economist, with more than five years' experience and accredited knowledge in insolvency proceedings. A company may also be appointed receiver, provided that it has, at least, both a lawyer and an economist. Exceptionally, if the insolvency has technical complexity and special significance, the court may appoint as second receiver any public administrator that is also a creditor.

For large insolvency cases, it is common that auditors, consultancy firms or boutique law firms are appointed as receivers (Deloitte for the Pescanova case; Forest Partners, ex KPMG, for the La Seda case; Mazars for the HUSA case; PwC and KPMG for the Fagor case; Deloitte for the Cacaolat case; PwC for the Spanair case; Marroquín for the Esteban Ikeda case; and Ernst & Young for the Habitat case).

The Insolvency Act provides for a series of incompatibilities and prohibitions related to the appointment of receivers. Amongst others, a person "specially related" to the debtor or a competitor (or a company belonging to a competitor group) cannot be appointed as a receiver.

The receiver is paid from the estate of the insolvent debtor, and his fees are calculated according to a fixed rate based on the number of creditors and the scale of the proceedings (small, medium or large). The criteria for the classification of insolvencies within this scale will be determined by a future regulation yet to be approved.

The role of the receiver differs depending on whether the insolvency is voluntary (where the debtor's power to administer and dispose of its assets is subject to the receiver's approval) or necessary (in which case the debtor's power to administer and dispose of its assets is assigned to the receiver).

In our experience, the receiver will visit the company on a weekly basis, at this early stage of the case, to monitor payments and obligations, to obtain information for the report of the so-called common phase and to assist the managers with creditors and employees or in connection with any controversial situation under the insolvency scenario.

The receiver is liable for all damages that he may cause either to the debtor or to the creditors as a result of his negligence.

Notice by the Creditors of Their Claims against the Debtor

Once the court order is published in the Official Gazette, the creditors are granted a one-month period to report to the insolvency receiver their claims and rights of credit against the debtor, under penalty of having their claims degraded to subordinate status.

This notice is usually a simple process. The requirements are the following:

- The notice must be submitted to the receiver in writing, by letter or e-mail, either by the creditor or by a person with power to act on its behalf and need not be filed before the court;
- The notice must provide the full name, address, e-mail address and any other identification details of the creditor.
- The notice must indicate the origin, amount, acquisition date, expiration date and main characteristics of the claim, as well as the priority that this claim should merit according to the creditor (if the claim is secured, the notice must identify the security and, if applicable, any relevant registry data); and
- All documents relating to the claim must be submitted with the notice. It is not mandatory to submit the original documents or a duly certified copy of them, unless it is otherwise required by the insolvency receiver.

In any particular case, the complexity of the submission will depend on any special circumstances relating to the claim, such as a right to set-off, doubt concerning its priority, or any potential controversy regarding the existence or the amount of the claim.

Preliminary Stage: The Common Phase

The court order declaring the debtor insolvent marks the beginning of the common phase (*fase común*). The purpose of this preliminary stage of insolvency proceedings is to establish the circumstances in which the insolvency occurred and to determine in detail the assets and liabilities of the insolvent debtor, by way of the report submitted by the insolvency receiver within two months from the acceptance of his appointment.

This report must contain the following:

- An analysis of the facts and circumstances of the debtor;
- The receiver's comments on the state of the accounts of the debtor and, if appropriate, his opinion on the accounts, financial statements and reports;
- A summary of the main decisions and actions of the insolvency receiver;
- An inventory of the assets of the debtor upon the declaration of insolvency;
- A list of liabilities of the debtor upon the declaration of insolvency, which will include all the debts recognised within the insolvency proceedings; and
- An assessment regarding an early composition or winding-up proposal, when appropriate.

Once the debtor is declared insolvent, all its due debts are frozen and classified as "privileged", "ordinary" and "subordinated" debts, in accordance with certain criteria which will affect their payment priority.

However, debts arising after the declaration of the insolvency will be treated differently and referred to as "debts owed by the debtor's estate". In general terms, debts owed by the debtor's estate are those arising after the declaration of the insolvency and as a result of the debtor's activity during the insolvency proceedings, including but not limited to salaries or compensations for employees, ordinary expenses of the business, legal advice and receiver's fees. These debts will be paid when due, regardless of the insolvency, and thus have the highest priority in recovery (see "Payment of Creditors' Claims" below).

The report may be challenged by the debtor or any creditor, by filing an insolvency plea within 10 days. The common phase concludes once the insolvency receiver's final report is submitted. This happens after the period to challenge the inventory or the list of creditors expires, or after the court has ruled on all challenges.

Fork in the Road: Composition Agreement Phase vs. Winding-Up Phase

The Spanish insolvency procedure allows the debtor either to continue in business or to opt for liquidation by selling the assets and paying the creditors in the priority order provided by the law. Thus, after the common (or preliminary) phase, two possible scenarios can arise in the course of insolvency proceedings: reaching a composition agreement with creditors; or opening the winding-up (or liquidation) phase.

Whereas the first scenario assures the bankrupt company's economic feasibility, the second one involves its liquidation and dissolution.

The Composition Agreement Phase

Once the common phase is finished, unless the debtor has requested to move directly to the winding-up (or liquidation) phase, the court will open the composition agreement phase, in which the debtor will seek to reach a composition agreement with its creditors.

The debtor may also file a proposal of early composition agreement during the initial phase of the insolvency proceedings, that is, before the termination of the common phase and, specifically, before the expiration of the initial one-month term granted to creditors to report their rights. An early composition agreement may also be submitted within the application for voluntary insolvency, in which case the insolvency proceedings are regarded as abbreviated (see "Abbreviated Proceedings" below).

The court ruling opening the composition agreement phase will schedule a creditors' meeting. Either the debtor or any creditors representing at least 20% of the debts may submit a proposal of composition agreement no later than 40 days before the date scheduled for that meeting.

This agreement may provide for up to 50% of the debts to be written off and/or up to a five-year payment moratorium. Exceptionally, a qualified majority of 65% of the unsecured debts may validate a discharge of more than 50%, without limit, and payment moratorium from 5 to 10 years.

After the approval of Royal Decree-Law 11/2014, dation in payment may also be included in these arrangements, and the capitalisation of debt is also favoured.

All proposals must contain a payment schedule and a feasibility plan, which must specify the resources necessary to comply with the proposal and their availability. At the creditors' meeting, the debtor and the creditors will discuss, in the presence of the receiver and the judge, the composition agreements that have been proposed.

Creditors may provide support for the proposals either by attending the meeting and voting in favour or, prior to that, in writing, by appearing before the court clerk or in a public deed. Opting for one method or the other will have no impact on the value of each vote, which will be proportional to the amount of claims held in the insolvency proceedings by each voting creditor.

The Insolvency Act now promotes the acquisition of claims by distressed investors after the declaration of insolvency. The former regulation discouraged this kind of operation by depriving the acquirer of the claim of its voting rights, and thus affording the acquirer a very limited intervention in the insolvency proceedings. After Royal Decree-Law 11/2014, the acquirer preserves its voting rights, unless it is a person "specially related" to the debtor.

If a proposal is accepted in the creditors' meeting by at least 50% of the ordinary creditors, the judge will issue a judgment approving the agreement, unless a defect is detected *ex officio*. The approval by the insolvency court may be challenged by the receiver, the creditors who did not attend the creditors' meeting, the creditors who were illegitimately deprived of their right to vote and the creditors who voted against the adopted proposal. In case a challenge is filed, the judge will issue a judgment deciding whether the proposed agreement will be approved or dismissed.

After this judgment, the receiver will resign and all effects of the declaration of insolvency will be replaced by those specified in the composition agreement. The debtor will have to inform the judge and the creditors on a bimonthly basis about the completion of the agreement.

The former regulation attributed binding effects of the approved composition agreements only with respect to unsecured ordinary and subordinated claims. Pursuant to Royal Decree-Law 11/2014, approved arrangements, subject to a majority within each class of claims, may now bind privileged creditors, as well. Arrangements with creditors including discharges of more than 50% and postponement of up to five years will be binding on a privileged creditor when a 60% majority of the debt in that class votes in favour. These include creditors holding (1) employment-related debt, (2) debt with public entities, (3) financial debt, and (4) any other class of debt. Thus, for example, a dissenting bank holding a mortgage was not subject to the arrangement before the reform, but now is subject if 60% of the other creditors holding financial debt support it, whether or not they hold a mortgage. Cramdowns for arrangements with discharges of less than 50% and postponements of 5 to 10 years require a supermajority of 75% of the debt in the same class.

In the event that no proposal is approved, the judge will order the initiation of the winding-up (or liquidation) phase. If a proposal is approved, however, the winding-up phase will also begin if the debtor fails to comply with the composition agreement in force.

Royal Decree-Law 11/2014 expressly allows the revision of arrangements with creditors adopted in keeping with earlier legislation if they are breached and were contrary to the new regulations. Revision is allowed within two years of the effective date of this reform and must be approved by qualified majorities.

Finally, the Insolvency Act also provides for a special procedure to approve a composition agreement if the number of creditors exceeds 300, called “written proceedings”. In such event, the court may hold that the proposed composition agreement be approved by creditors in accordance with a written procedure. Rather than attend a creditors’ meeting, the creditors provide their adhesion only by appearing before the court clerk or in a public deed.

The Winding-Up Phase

The debtor may request the initiation of the winding-up (or liquidation) phase at any moment and, specifically, during the term of a composition agreement, as soon as it becomes aware that it cannot comply with the same. The creditors are also entitled to request liquidation, should they detect any sign of insolvency during such term. In the event of termination of the debtor’s activity, the receiver may request liquidation, too. The judge will also, on his own initiative, order the liquidation phase to begin if no composition agreement is proposed or (if proposed) approved, or if the debtor breaches an approved agreement.

As a result of the court ruling opening the liquidation phase, the dissolution of the bankrupt company will be declared and its directors will be directly substituted by the receiver, who will have, from that moment, the power to manage and dispose of the debtor’s assets.

The receiver will submit within the following 15 days a winding-up plan ordering the further steps and rules regarding the liquidation of the debtor’s assets and subsequent collection by the creditors. This plan should, in principle, grant priority to the sale of the business or operating productive unit of the debtor as a whole. The debtor, the employees and the creditors are entitled to comment upon or propose amendments to the proposed plan within 10 days after the plan is submitted. The court will ultimately approve (potentially taking into account the comments or proposals made) or reject the proposed winding-up plan. If the plan is rejected, the liquidation phase will be regulated by the Insolvency Act, which also considers, essentially, the global sale of the business or operating productive unit of the debtor, when possible.

Every three months following the opening of the winding-up phase, the insolvency receiver must present a report to the court on the status of the operations, which will detail and quantify the claims against the estate accrued and pending payment, stating their maturity dates.

Payment of Creditors’ Claims

The Spanish procedure for insolvency proceedings is aimed at maximising the satisfaction of creditors, who should be treated equally under the *par conditio creditorum* rule (i.e. treating equally ranked creditors equally). The payment of creditors’ claims depends on whether a composition agreement is reached and approved by the judge or the liquidation phase begins. Whereas in the composition agreement phase the debt collection will depend on the continuity of the debtor’s activity and economic revitalisation, if the liquidation phase begins, the creditors’ recovery will depend on the realisation of the debtor’s assets.

In the liquidation phase, the creditors will be paid off as established in the winding-up plan, respecting the order of priority established in the Insolvency Act:

Claims against the entire insolvency estate (Articles 84 and 154 Insolvency Act)	*Créditos contra la masa*	This applies to claims generated after the issuance of the court order declaring the insolvency, expenses and costs generated during the insolvency proceedings, and certain claims owed to the debtor’s employees. These claims are paid when due.

Claims with special privilege (or preference) (Articles 90 and 155 Insolvency Act)	*Créditos con privilegio especial*	Secured claims (mortgage, pledges, leasing quotas, etc.). The scope of the special privilege is limited. It may not exceed the value of the relevant guarantee and such value will be 9/10 of the reasonable value of the good or right in question minus the amount of the unpaid debts with preferred guaranties. In no event can it be less than zero or more than the amount of the privileged credit or the maximum agreed liability. Any other amount of the credit exceeding the limit will be classified according to its nature. Payment of claims with special preference will come from the security, subject to either separate or collective foreclosure.
Claims with general privilege (or preference) (Articles 91 and 156 Insolvency Act)	*Créditos con privilegio general*	Salaries and employee compensations, with certain limits; tax and social security claims; 50% of claims held by the creditor that filed for mandatory insolvency; claims arising from new cash flow granted under the framework of a refinancing agreement; etc. After deducting from the estate the assets required to settle the foregoing senior claims, payment of those enjoying general preference will be honoured, in the order established in the Insolvency Act and, when appropriate, in proportion among them within each class.
Ordinary claims (Articles 89(3) and 157 Insolvency Act)	*Créditos ordinarios*	This applies to all other commercial claims without special guarantees. Payment of the ordinary claims will be carried out once the claims against the estate and preferential claims are settled, in proportion among them.
Subordinated claims (Articles 92 and 158 Insolvency Act)	*Créditos subordinados*	Claims degraded (claims of managers, directors or partners of the debtor; intra-group loans; fines; interest; claims not reported in due time; etc.). Payment of the subordinated claims will not be performed until the ordinary claims have been fully settled.

The Insolvency Act provides the criteria for establishing the classification of each claim by the receiver. In case of a dispute between the creditor and the receiver's report, a small and ancillary piece of litigation − insolvency plea − may be filed before the court by the concerned creditor (within the period of 10 days granted to challenge the report). A court judgment will eventually decide on the recognition and classification of the specific claim.

Abbreviated Proceedings

Abbreviated proceedings provide celerity to those cases requiring a prompt response from the tribunals when the continuity of the business is at stake. As a general rule, abbreviated proceedings are limited to cases lacking technical complexity, with fewer than 50 creditors or liabilities and assets of less than EUR 5 million. However, regardless of whether these criteria are fulfilled, abbreviated proceedings will be applied when the debtor submits along with the petition for insolvency either: (i) an early proposal of composition or a proposal of composition that includes a structural modification by which all its assets and liabilities are conveyed; or (ii) a winding-up plan that contains a binding written commitment from a third party to purchase the operating productive unit.

Liability of Third Parties: Classification of the Insolvency

For insolvency proceedings to generate liability for third parties, the insolvency must be classified as fraudulent (or culpable) rather than fortuitous. The classification plea shall be opened by the court, in a separate piece of the insolvency proceedings (*pieza de calificación*):

- When the court approves a composition agreement with creditors, which establishes a discharge of more than one-third of the total amount of debt or a postponement of more than three years in payment; or

- In any situation in which liquidation is required.

The Insolvency Act gives details on the instances in which liability occurs, who is to be held liable, and the effects arising from such liability. An influence from English law (with the institutions of fraudulent trading and wrongful trading) and French law (with the *action du complement de passif*) may be noted.

The insolvency will be classified as fraudulent when the generation or aggravation of the insolvency involves malicious intent or serious negligence on the part of the debtor or, for a legal entity, on the part of its *de facto* or *de jure* directors, liquidators, proxies or any other legal representatives (and also the individuals who held these positions up to two years prior to the declaration of insolvency).

In any case, the insolvency shall be classified as fraudulent, pursuant to Article 164 of the Insolvency Act, when any of the following circumstances arise:

- The debtor, legally obliged to keep accounting books, fails substantially to fulfil this obligation, maintains a double accounting system, or commits an irregularity in its accounting books which is relevant for the comprehension of its equity or financial situation;

- The debtor commits a serious inaccuracy in any of the documents attached to the request for the declaration of insolvency or submitted during the proceedings, or the debtor attaches or submits false documents;

- The liquidation phase is opened on the court’s initiative due to the breach of a composition agreement by the insolvent party;

- The debtor conceals all or part of its goods in detriment to its creditors or performs any act that delays, hinders, or prevents effective seizure of its goods in any type of enforcement initiated or foreseeably to be initiated;

- Goods or rights are fraudulently removed from the debtor’s equity during the two years prior to the date on which insolvency is declared; or

- The debtor performs any legal act intended to present a false image of its equity status prior to the date on which the insolvency is declared.

Supplementing the above, the existence of malicious intent or serious negligence shall be presumed, in the absence of evidence to the contrary, under Article 165 of the Insolvency Act, when the debtor (or any of the abovementioned representatives):

- Has failed to fulfil its duty to request the declaration of insolvency;

- Has failed to fulfil its duty to cooperate with the judge presiding over the insolvency proceedings and with the receiver, has failed to provide information necessary or useful to the proceedings, or has failed to attend the creditors' assembly either in person or through a representative;

- For a debtor who is legally obliged to keep accounting books, has failed to prepare the annual accounts, to submit them to audit when required, or, once they have been approved, to deposit them with the Commercial Registry in any of the last three fiscal years prior to the declaration of insolvency.

- Has refused the capitalisation of credits with no reasonable cause, thus preventing a refinancing agreement from being approved. Capitalisation is presumed to be for a reasonable cause when so declared by an independent expert's report.

The insolvency court will issue a judgment to decide on the classification of the insolvency.

If the insolvency is declared fraudulent (or culpable), the *de facto* or *de jure* directors, liquidators, proxies or any other legal representatives of the company (and also the individuals who held these positions up to two years before) may be forced to pay the claims which cannot be paid out of the assets in the company's insolvency estate. The accomplices – whoever they might be – may be also obliged to pay for the damages caused as a consequence of their involvement in the events which made the insolvency fraudulent.

The decision classifying the insolvency as culpable must contain the following pronouncements:

- The determination of the persons affected by the classification, as well as those declared accomplices. If any of the affected persons is a *de facto* director, liquidator or legal representative of the debtor company, the decision must give the reasons for which it deems the person to be a person affected;

- Disqualification of the persons affected by the classification as fraudulent to manage the goods of others for between 2 and 15 years, or to represent or administer any person for the same period, taking into account, in any event, the seriousness of the facts and the degree of damage caused; and

- The loss of all rights which the persons affected by the classification as fraudulent or declared accomplices have as insolvency creditors or creditors against the insolvency estate, and the obligation to return the goods or rights unduly obtained from the debtor's equity or received from the insolvency estate, as well as to pay indemnification for the damages caused.

Completion of the Proceedings

Insolvency proceedings will terminate if any of the following circumstances occur:

- The Court of Appeal revokes the court judgment declaring the insolvency;

- The insolvency judge issues a ruling declaring that the creditors' composition agreement has been fully complied with or the liquidation phase has been terminated;

- At any stage of the proceedings, when payment of all the claims recognised or full settlement of the creditors by any other means is verified, or the situation of insolvency no longer exists;

- At any stage of the proceedings, when the debtor's assets are found to be insufficient to cover claims against the estate; or

- All known creditors have relinquished their claims against the debtor and the insolvency court has accepted their withdrawal.

When the debtor is an entity, in cases of conclusion of the insolvency proceedings due to winding-up or the insufficiency of assets, the judicial resolution that declares this must order the dissolution of the debtor and provide for closure of the inscription sheet on the relevant public registers, to which end the Court will issue an order containing an attestation of the final resolution.

In case new assets appear after completion, insolvency proceedings may be reopened before the same court, and they will be limited to the winding-up phase with respect to those new assets.

Effects of the Insolvency Ruling on the Debtor and its Business

The court ruling declaring the insolvency has immediate effects on the debtor and its activity.

- Management Powers

In the event of voluntary insolvency, the debtor will retain the powers of management and disposal of its assets, the exercise of which shall be subject to intervention by the insolvency receiver, via his authorisation or approval.

In the case of compulsory insolvency, exercise by the debtor of the powers of management and disposal of its assets will be suspended, being substituted therein by the insolvency receiver.

Any acts that breach the foregoing limitations and have not been endorsed or confirmed by the receiver may be annulled at the receiver's request.

- Management Body

In the event the debtor is a legal person, its management body will be maintained, notwithstanding the effects on its powers of management or disposal as described above.

The insolvency receiver may attend and speak at the meeting of the management bodies and, to this end, he must be summoned in the same manner and with the same advance notice as the members of the body that is to meet. The resolutions by the meeting or assembly that may have an asset-based content, or that may be directly relevant to the insolvency, will require authorisation or confirmation by the insolvency receiver to be effective.

In practice, though, receivers are not likely to exert an excessive interference in the debtor's decision-making, especially in the case of well-organised corporations or large businesses in which they are not expert or do not have time to dedicate a lot of resources.

In any event, the debtor's management body is bound to appear personally before the court or the insolvency receiver as often as required to do so and to collaborate and provide information on all matters relating to the insolvency proceedings.

- Business Activity

Continuation of the professional or business activity performed by the debtor will not be interrupted.

However, exceptional closure of all or part of the offices, establishments or operations held by the debtor, as well as the total or partial cessation or suspension of operations, may be ordered by the court, at the request of the receiver and after hearing the debtor and the representatives of the employees.

In case of intervention, the legal obligation of the debtor to draw up and submit the annual accounts to audit, under supervision of the insolvency receiver, will continue. In the event of suspension, this obligation equally continues, with those powers lying with the insolvency receiver.

- Debts

No offsetting; no accrual of new interest; interruption of expiry periods.

- Assets

With the declaration of insolvency, all assets are integrated into the insolvency estate.

Their conservation will be attended to in the manner most beneficial for the interests of the insolvency proceedings.

The assets may not be disposed of or encumbered without the court's approval, except for acts of disposal or encumbrance (i) that the insolvency receiver considers indispensable to guarantee the feasibility of the business or cash flow needs, (ii) of assets that are not necessary for continuity of the activity (provided that the price does not significantly differ from the value assessed by the receiver), or (iii) inherent to continuation of the business activity (e.g. sale of stocks).

- Judicial Claims

Joinder of civil claims filed against the debtor or its managers after the insolvency ruling with the court conducting the insolvency proceedings.

Continuation of previous claims at the same court that was processing them until the ruling is final (except for proceedings claiming damages from the debtor's directors or auditors).

Joinder of labour claims.

- Arbitration procedures

Continuation of arbitrations initiated before insolvency ruling. Arbitration proceedings may also be initiated against the company declared insolvent, as long as the declaration of insolvency does not ipso facto affect the effectiveness of arbitration clauses (or mediation agreements), provided that such clauses do not block the continuity of the insolvency proceedings.

- Enforcement of judgments (or awards)

Suspension of all the proceedings (including those filed by *in rem* creditors for at least one year), except very limited cases not affecting the continuity of business.

- Bilateral contracts in force

General effectiveness; possibility of termination for breach; possibility of forced termination or forced maintenance by the court in the interest of the insolvency estate.

Sale of the Insolvent Debtor' Assets of during Insolvency Proceedings

One of the main purposes of the Insolvency Act, as declared in its preamble, is to facilitate the continuity of business and employment. This objective is combined with the goal of maximising the return to creditors. The sale of assets of the insolvency estate may be a useful way of achieving both purposes.

However, the Insolvency Act has been quite restrictive for this type of transaction in the course of insolvency proceedings. Spain has not yet developed much in the way of a distressed assets market. Recent amendments, though, are moving in the direction of opening up the legal environment to foreign traders and firms which specialise in benefitting distressed companies.

The acquisition of the debtor's assets and the assumption of its debts within the insolvency proceedings is increasingly common, and it can be done during the common phase, the composition agreement phase or the winding-up phase.

The rights and obligations arising from contracts involved in the continuation of the professional or business activity of the production unit the termination of which has not been requested will be assigned to the purchaser with no need for the other party's consent. The licenses and administrative authorisations involved in the continuation of the business or professional activity will be assigned, unless the intention not to subrogate has been expressly stated.

In no event will the payment of pending debts be assumed, whether they are insolvency claims or claims against the insolvency estate, unless expressly assumed.

Production units will be auctioned off. If the auction has no bidders or it is deemed more suitable for the interests of the insolvency proceedings, the judge may order a direct sale or a sale through a specialised entity, the remuneration for which will be paid against the insolvency administration's accounts. In this case, the employee's representatives and any interested parties will submit their evaluation of the offers presented and the judge shall award the purchase by means of a court order.

The purchaser will not automatically succeed to the debtor's liabilities linked to the production unit, except for labour and social security liabilities, as provided in Article 149.4 of the Spanish Insolvency Act. The insolvency court, however, may exclude the debtor's unpaid debt to its employees which accrued prior to the disposal of the unit, to the extent of the amount of salaries or severance compensation which was to be assumed by the Spanish Wage Guarantee Fund, as established in Article 33 of the Spanish Workers' Statute. Also, under Article 155.3 of the Spanish Insolvency Act, if the purchaser acquires assets linked to a mortgage, the purchaser will subrogate to the debtor's position as mortgagor. Aside from these exceptions, the purchaser will acquire the debtor's production unit free of any other debts (even free of those claimed by tax authorities), as provided in the insolvency legislation and as confirmed and supported unanimously by case law doctrine.

Sale of Assets within the Common Phase

Rules on the purchase of distressed assets or operating productive units during the common phase, pursuant to Article 43 of the Insolvency Act, have been affected by the latest legal developments. This type of transaction requires court approval based on the interest of the estate on a case-by-case basis. The decision will be adopted on a discretionary basis in order to conserve assets or reduce expenses for the proceedings.

As a general rule, the price should be determined in accordance with the value included in the receiver's report. The price might be lower, but not more than 20% less than this value for real estate assets, and 10% for movable assets.

The offer will be approved automatically if no other offers are received within 10 days thereafter. Any interested party may file against the court ruling authorising the transaction a motion to reconsider before the same judge.

Sale of Assets within the Composition Agreement Phase

In the composition agreement phase, a sale of assets of the insolvency estate may be authorised as part of the agreement proposed to creditors (*convenio de asunción*), pursuant to Article 100 of the Insolvency Act, which provides for the sale of whole parts of the business and operating productive units.

To obtain court authorisation for such a transaction, the debtor must submit to the court a binding commitment to the continuity of the activity, a payment plan and a business plan.

Sale of Assets within the Winding-Up Phase

In the winding-up (or liquidation) phase of the proceedings, under Articles 148 and 149 of the Insolvency Act, a sale of assets and operating production units may be considered in the winding-up plan or during the winding-up phase.

The insolvency court will establish a deadline for the submission of bids for the production unit. In deciding the award, the court will grant priority to those bids which guarantee either the continuity of the production unit and associated jobs or the payment of the maximum volume of credits, also taking into consideration any allegations filed by the receiver, the employees' representatives or the creditors.

Labour Issues within Insolvency Proceedings

Insolvency proceedings allow restructuring measures such as lay-offs or collective modifications of working conditions, which are processed exclusively before the commercial court which has jurisdiction over the insolvency proceedings. Also, any ongoing collective redundancy procedures in companies declared insolvent will be handled by the commercial court in charge of the concerned insolvency proceedings.

The collective redundancy procedures or collective change of working conditions procedures in the insolvency proceedings starts with the petition by the company. If such petition is duly based and documented it must be supported by the receiver and also confirmed by the court through its ruling.

The scheme of collective redundancy procedures and collective change of working conditions procedures in the insolvency proceedings may be described as follows (Article 64 Insolvency Act):

- Procedural initiative: The insolvency receiver, the company, and the legal representatives of the employees have the legal standing to request the initiation of the collective redundancy procedures or collective change of working conditions procedures.

- Term of application: Application must be made after the issuance of the receiver’s report, except when it is found that delay in the application of the targeted collective measures could seriously threaten the future viability of the company or jobs or when serious damage could be caused to the employees, in which case, by demonstrating this circumstance, the petition may be made to the commercial court at any stage of the proceedings after the declaration of insolvency.

- Content of the application: The application must state and justify, where appropriate, the causes motivating the foreseen collective measures and the expected results in order to assure, where appropriate, the future viability of the company and its jobs.

- Consultation period: The judge will convene the parties to a consultation period, which will not exceed 30 calendar days.

- Incorporation of third parties for the consultation period: The legal representatives of the employees and the insolvency receiver are legally entitled to request that the commercial court summon other individuals or entities which might make up an economic unit, in order for them to participate in the consultation period. The commercial court is authorised to collect additional information from the company to determine such economic units.

- Negotiation: During the consultation period, the employees’ representatives and the insolvency administration will negotiate in good faith to reach an agreement.

- Agreement: The agreement will require the consent of the majority of the employees’ representatives or, where appropriate, of the majority of the members of the representative body of the employees, provided that, in both cases, they represent the majority of employees in the affected work centre(s).

- Severance compensation: The agreement will include the identity of the employees affected and will establish their severance compensation, which will comply with employment legislation, unless higher severance compensations have been expressly agreed, considering all the interests affected by the insolvency proceedings. The employment legislation provides a reference framework applied in each case, according to the individual circumstances of the insolvent company.

- Labour authority’s report: The court secretary will request a report by the labour authority on the proposed measures or the agreement reached. The report must be issued in 15 days, following a hearing of the insolvency administration and the employees’ representatives.

Once the judge in the insolvency proceedings receives the report or once the deadline to issue the report has elapsed, the proceedings will continue. If the report is submitted late, it may nevertheless be taken into account by the judge in the insolvency proceedings when making the relevant decision.

- Court ruling: The court will render its decision on the proposed measures within five days, accepting, where appropriate, the agreement reached, unless fraud, wilful malice, abuse of right, or defective consent are detected. In such event, or if no agreement is reached, the judge will decide what action to take in accordance with employment legislation.

- Appeal against the court's decision: The insolvency receiver, the insolvent party, the employees through their representatives, and the Spanish Wage Guarantee Fund may appeal against the court's ruling before the Labour Section of the Higher Court of Justice, under Royal Legislative Decree 2/1995, of April 7, which approved the Revised Text of the Employment Procedures Act. However, these appeals will not suspend the insolvency proceedings.

Rescission (Clawback) of Acts Detrimental to the Assets of the Insolvent Debtor

Under Article 71, the Insolvency Act regulates clawback actions (*acciones de reintegración*) based on certain acts of the debtor that are detrimental to the insolvency estate. This is different from the classical rescission actions under civil legislation, which are based on fraud or concealment from creditors.

The receiver (or a creditor, should the receiver not apply for the rescission within two months of the creditor's request) may file before the insolvency court a clawback action against any act which was carried out by the debtor within two years prior to the ruling declaring the insolvency and which has been detrimental to the debtor's assets (to the extent that it has led to a reduction of the assets, thus preventing the recovery of claims by creditors within the insolvency proceedings). Both unilateral and bilateral acts may be rescinded, including agreements, payments, extinction of obligations, etc. It should be observed that fraudulent intention is not required for rescission to proceed. Spanish commercial courts are also rescinding acts that, though not detrimental to the assets, infringe the *par conditio creditorum* principle of distribution (i.e. treating equally ranked creditors equally).

Detriment to the assets of the debtor declared insolvent will be presumed, with no possibility of rebuttal, if the debtor did not receive any consideration in exchange for the act or agreement, or the debtor paid an obligation that was not enforceable until after the declaration of insolvency.

Additionally, there is a presumption of such detriment in any act or agreement entered into by the debtor declared insolvent with a person or company "specially related" to it during the above-mentioned two-year period, or if the debtor constitutes any *in rem* guarantee in relation to previous obligations. This presumption is *iuris tantum* and, therefore, is subject to rebuttal. In any other case, the clawback action must establish the existence of detriment to the assets of the debtor declared insolvent.

Rescission by the court will result in an obligation to return all consideration, plus interest, thus bringing the parties back as close as possible to their positions before they entered into the agreement. If reimbursement is not possible, given that the rights or assets belong to a third party that acted in good faith or whose position is protected by a public registry, the subject who contracted with the insolvent debtor will be ordered to pay the equivalent value of those rights and assets at the time of delivery, plus interest. Furthermore, should the court consider that this subject acted in bad faith, this subject would be ordered to compensate for all damages that the act in question may have caused to the assets of the estate of the debtor declared insolvent.

Under no circumstances may an act included within the ordinary course of business of the debtor be subject to rescission, provided that it has been performed under normal circumstances (i.e. at market value, for good and valuable consideration, and with no unusual provisions).

Royal Decree-Act 3/2009 included two additional cases of non-rescindable agreements: guarantees securing public claims and in favour of the Wage Guarantee Fund and refinancing agreements (*acuerdos de refinanciación*) that meet the conditions provided in the Insolvency Act, as explained below.

Refinancing Agreements and Their Endorsement by the Court

Non-Rescindable Refinancing Agreements

Pursuant to Article 71bis of the Insolvency Act, a refinancing agreement is defined as an agreement reached with a debtor prior to the declaration of insolvency for the purpose of significantly increasing available credit or modifying its obligations by means of an extension of the maturity date or the undertaking of new obligations that replace previous obligations. Nevertheless, these agreements must be based on a feasibility plan that enables the debtor to continue engaging in its business in the short and medium terms.

The risk of rescission of the refinancing agreements entered into by insolvent companies within the clawback period is now eliminated, provided that the agreement meets, as contained in Article 71bis(1), the following requirements (with respect to the acts, transactions and payments made, as well as the performance guarantees provided):

- The agreement must include the consent of creditors representing at least 60% of the debtor's liabilities on the effective date of the refinancing agreement.

- The agreement must be accompanied by a certificate issued by the debtor's auditor attesting that the required majority has been obtained. The certificate replaces the previous requirement of an independent expert's report, which now becomes optional for the debtor, thus simplifying the refinancing possibilities.

- The agreement must be executed as a public deed, including all the documents proving the fulfilment of the above requirements.

In addition, recent amendments implemented a new type of refinancing agreement, under Article 71bis(2), which despite not reaching the 60% majority required in Article 71bis(1) is equally not subject to rescission. However, the agreement must improve the debtor's equity, allow it to overcome insolvency by restoring a positive operating fund and include the following conditions:

- The agreement must increase the proportion of assets over the proportion of liabilities.

- The current assets must be greater than the current liabilities.

- The value of the guarantees issued in favour of the creditors taking part may not exceed 90% of the value of the outstanding debt or the proportion of guarantees to outstanding debt prior to the agreement.

- The interest rate applicable to the underlying debt or the debt resulting from the agreement may not exceed the prior debt by more than one-third.

- The agreement must be executed as a public deed, including all the documents proving the fulfilment of the above requirements, and expressly recording the economic reasons justifying the acts and transactions from the economic viewpoint.

Endorsement and Extension of Effects

Pursuant to Additional Provision Four, judicial endorsement of a refinancing agreement may be provided by the court, at the request of the debtor or any of the contracting creditors, when it fulfils the following criteria:

- The agreement must include the consent of creditors representing at least 51% of the debtor's financing liabilities on the effective date of the refinancing agreement.

- The agreement must be accompanied by a certificate issued by the debtor's auditor attesting that the required majority has been obtained. The certificate replaces the previous requirement of an independent expert's report, which now becomes optional for the debtor, thus simplifying the refinancing possibilities.

- The agreement must be executed as a public deed, including all the documents proving the fulfilment of the above requirements.

The endorsed refinancing agreement will be equally non-rescindable, despite not being supported by 60% of the debt's liabilities contemplated under Article 71bis(1). The endorsement will be sufficient to eliminate the risk of rescission, with no need for additional quorums.

The endorsement procedure seeks to make the agreement binding on dissident and non-participating financing creditors as well. The court merely needs to verify that the above requirements are satisfied. This decision will be made on an urgent basis, within 15 days of the request, and will be published in the Public Insolvency Registry and the Spanish Official Gazette. It will take effect the following day.

The binding effects of the endorsed agreement may be extended to financing creditors that did not participate or dissented, and even to those who have an *in rem* guarantee, according to the following rules:

- Provisions of moratoriums up to five years and conversions of credits to equity loans with less than five years' maturity will be binding on other financing creditors, provided that the agreement has the support of 60% of the financing liabilities of the debtor (and on financing creditors holding *in rem* guarantees, provided that the support reaches 65%).

- Provisions of written-off debts, moratoriums between five and ten years, capitalisations of credits and conversions of credits to equity loans with a maturity of between 5 and 10 years will be binding on other financing creditors provided that the agreement has the support of 75% of the financing liabilities of the debtor (and to financing creditors holding *in rem* guarantees, provided that the support reaches 80%).

Additionally, to encourage these kinds of agreements, Article 84(2)(11) of the Insolvency Act recognises a privilege for "fresh money" injected into the company under insolvency by third parties not related to the debtor, as a consequence of a protected refinancing agreement, in the event the debtor ends in insolvency proceedings. Hence, 50% of this "fresh money" will be qualified as a claim against the debtor's estate, thus being payable at its due term, and the other 50% as a claim with general privilege. This 50% is being temporally increased to 100% of the "fresh money" injected in refinancing arrangements until 2 October 2016.

Groups of Companies

The Insolvency Act does not define a group of companies. However, pursuant to article 42.1 of the Spanish Code of Commerce, a group exists when a company, directly or indirectly, holds or may hold control over one or several others, i.e. when several companies make up a decision-making unit. The Code of Commerce gives various circumstances in which a decision-making unit is deemed to exist.

Articles 25, 25bis and 25ter of the Insolvency Act provide detailed regulation on consolidation of insolvency proceedings for groups of companies, subsidiaries or companies with mixed assets. This consolidation is decided by the judge at the request of the insolvency receiver, the debtor or any of the creditors, and it can be done either at the very beginning of the insolvency proceedings, with a court ruling declaring the insolvency of different bankrupt companies at the same time, or afterwards, accumulating different insolvency proceedings already started.

The insolvency of all the bankrupt companies of the same group will follow a coordinated procedure, with the same receivership, although their assets and liabilities should not get confused.

Main Issues Regarding Insolvency of Individuals

The Insolvency Act provides that an individual may request to be declared insolvent in the same circumstances as a company. In the case of individuals, the insolvency procedure is abbreviated. The insolvency ruling produces the same effects as those for companies, as detailed above.

The debtor is entitled to claim and receive compensation for ordinary personal expenses.

The two main differences between the insolvency proceedings for individuals and those for companies are:

- The outstanding debts generally are not cancelled after the termination of the insolvency procedure. However, Spanish law has recently incorporated, subject to certain requirements, the cancellation of unsatisfied debts owed by individuals, freelance professionals and individual entrepreneurs once the insolvency proceedings with liquidation have concluded, granting these debtors the opportunity to have a fresh start in a manner similar to foreign legislation.

- Court enforcement procedures against the individual's domicile may not be suspended by the insolvency ruling, since the domicile is not an affected element necessary for business.

Closing Remarks

The number of judicial cases has increased remarkably, and the current workload of the commercial courts affects the normal length of proceedings and is causing a significant delay in their resolution.

The majority of insolvency proceedings finish with the liquidation of the company, mostly due to the fact that debtors tend to file for insolvency too late. It could therefore be recommended to file for insolvency when it is still possible to reach a composition agreement with creditors and refinancing alternatives with financial institutions, and, if possible, in a pre-insolvency scenario, thus avoiding the risks that postponing the filing could entail.

Most amendments of the Insolvency Act have not entirely succeeded in sorting out the defects caused by the former legislation, such as the significant delays suffered by most proceedings, or in adapting the Spanish legislation to the current recession environment. However, the trend of the Spanish legislation is to invigorate the out-of-court refinancing solutions, and, most significantly, the purchase of distressed assets and operating productive units within insolvency proceedings.

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