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Restructuring across borders
Spain

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | MARCH 2025

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Introduction

Spanish insolvency proceedings are governed by Royal Legislative Decree 1/2020, of 5 May 2020, approving the recast Insolvency Law (the **Recast Insolvency Law**). The Recast Insolvency Law entered into force on 1 September 2020 and has been amended by Law 16/2022, of 5 September which implements in Spain the European Restructuring Directive.

The Recast Insolvency Law was published on 6 May 2020 and is the outcome of a five-year work process followed since the Spanish Government received the mandate to prepare a consolidated text of Spanish Law 22/2003 of 9 July on Insolvency (*Ley Concursal*—the Insolvency Law). The Recast Insolvency Law was published almost a year after the Ministry of Justice submitted the draft bill prepared by its Codifying Commission to public consultation.

As stated in the Preamble to the Recast Insolvency Law, "the history of the Insolvency Law is the history of its reforms", with more than 25 amendments since its enactment in 2003, especially after the onset of the financial crisis, from 2009 to 2015. The amendments resulted in a poorly systematised Insolvency Law, leading to strong debates among practitioners and scholars about its interpretation and application on numerous occasions. The successive reforms generated an unstable and hard-to-follow legal framework for a law that is crucial to developing and protecting business activities.

The Recast Insolvency Law emerges as a text that aims to clarify and harmonise insolvency regulations in Spain. In this sense, the different sections have been systematised into subjects for easier identification and interpretation.

Further to that, on 5 September 2022, Law 16/2022 amending the Recast Insolvency Law (Law 16/2022) was approved. Law 16/2022 has completed a great structural reform of the Spanish restructuring and insolvency regimes and implements in Spain the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on restructuring and insolvency (the European Restructuring Directive).

For these purposes, Law 16/2022, has completed a severe adaptation of restructuring instruments, replacing the old collective refinancing agreements by the new 'restructuring plans'. This new figure aims to favour restructuring processes in the Spanish market by encouraging the earlier restructuring of companies in financial difficulties (among others, be allowing to implement restructuring process over companies in a situation of 'likelihood of insolvency' (probabilidad de insolvencia)) and, in turn, expanding the range of available resources to secure the viability of the restructured company. Additionally, Law 16/2022 has also contemplated additional measures in the restructuring area aimed at making these processes more flexible and increasing efficiency and their chances of success (e.g., creation of a new figure, the 'restructuring expert', the specification of the debt to be restructured, the creation of 'classes of creditors' and the possibility of cramming-down dissident classes of creditors commonly used under English Schemes (cross-class cram-down)).

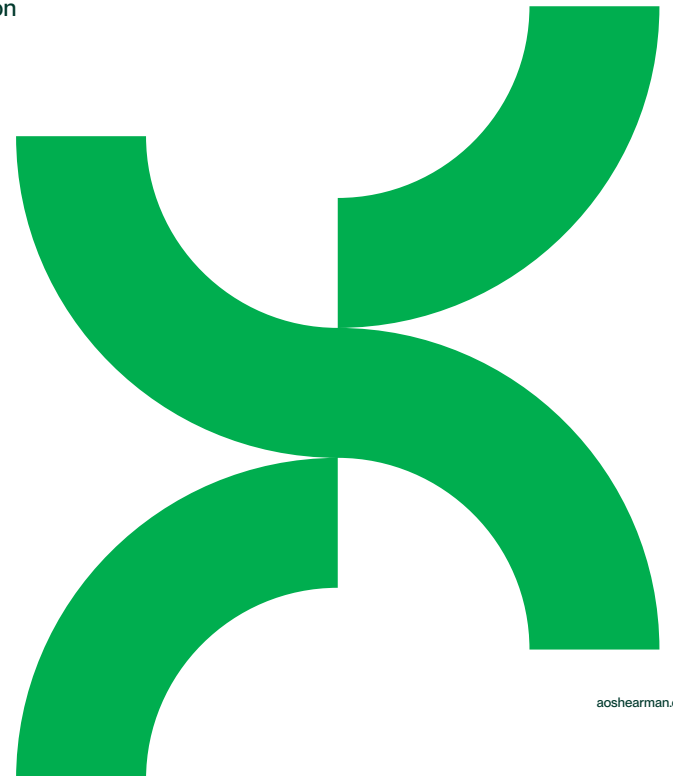
Introduction (cont.)

Law 16/2022 has also completed a general update of the Spanish insolvency regime seeking to increase the effectiveness and speed of these processes. For these purposes, several tasks and actions have been simplified and now it is also possible to overlap insolvency phases to speed up the conduction of proceedings with the intention of increasing the chances of approving a composition agreement for those companies that are viable. Additionally, for the first time in Spain, the figure of the pre-pack administration has been regulated. Law 16/2022 has also made a major streamlining of liquidation procedures, so that the value of assets to be disposed is protected to enhance expected recoveries for creditors when viability is no longer possible or does not create any surplus value.

Finally, but not less important, it has to be highlighted that the Additional Provisions of the Law 16/2022 have regulated the management and impact of insolvency in the credit arising from guarantees granted by the Instituto de Crédito Oficial (ICO) under certain financing lines approved to relieve the effects of the Covid-19 crisis and the impact of the conflict in Ukraine. With these measures as well as with the chances of refinancing or acting on the guaranteed financing (and the corresponding guarantees), the Government intends to regulate these guarantees in restructuring and insolvency scenarios. Undoubtedly, this special regime now conditions dynamics of any Spanish restructuring processes.

As a summary, the approval of the Recast Insolvency Law (as amended by Law 16/2022) has entailed an ambitious reshape of the Spanish restructuring and insolvency regimes. With these successive reforms approved by the legislator a window for new challenges and opportunities has been opened with the intention of fostering a new restructuring culture in Spain whilst facilitating, where possible, the continuation of Spanish undertakings or, if not possible, making insolvency processes as fast and efficient as possible.

Subsequently, on 2 January, Organic Law 1/2025 on measures regarding the efficiency of the Public Justice Service was approved (entering into force on 3 April 2025). This Organic Law 1/2025 amends certain aspects on insolvency administration retribution regime.



Insolvency proceedings (concurso)

After the opening of insolvency proceedings, the first stage of the proceedings is what is referred to as the "common phase" (*fase común*). This generally lasts from the date of the opening of formal insolvency proceedings until 15 business days have elapsed from the filing of the insolvency administrator report at court. During the common phase of the insolvency proceedings, creditors are entitled to inform the insolvency administrator and discuss the value and ranking of their claims or the value ascribed to the debtor's assets in the insolvency administrator report.

The effects of the opening of the insolvency proceedings on interest and its ranking depends on whether it derives from non-secured or secured loans. In the case of non-secured loans, the accrual of all interest is suspended from the date of the declaration of insolvency. In the case of secured loans, the effect of the insolvency over the accrual of secured interest varies depending on whether the interest is ordinary or default interest: while ordinary interest is recognised to the extent that is covered by security interests granted by the debtor and to the extent that the recognition of a contingent claim five (*créditos contingentes*) has been sought in the claim form filed by the relevant creditor, the accrual of any kind of default interest is suspended from the date of declaration of insolvency in accordance with the latest Supreme Court case law.

After the common phase, the insolvency proceedings will enter into the "composition phase" (*fase de convenio*) to the extent that a composition proposal has been filed by the debtor or any of its creditors in due course has been filed within the following 15 business days after the filing of the insolvency administrator report at court at the latest. If a composition is not possible (or it has not been filed in due course) then the insolvency proceedings will enter the liquidation phase (*fase de liquidación*).

The emphasis of the Recast Insolvency Law is on the survival of the insolvent debtor and therefore the law prefers (when and where possible) a composition arrangement (*convenio*) with creditors. A *convenio* may include proposals for the release of debts or the deferral of payments, a combination of both, debt for equity or asset swaps, or the conversion of debts into other kinds of financial instruments. Depending on the number of creditors (by value) that support a *convenio*, the terms of the *convenio* that can be imposed on dissenting creditors will vary. In some circumstances, to ensure that certain measures bind dissenting creditors, an enhanced majority would be required.

For these purposes, material developments have been introduced by Law 16/2022 regarding the composition with creditors. A single regime is created where advance proposals for a composition (*propuesta anticipada de convenio*) and oral processing disappear (which also determines the disappearance of the creditors' meeting). Instead, the regime will be based solely on and ordinary proposal which would be processed in writing. The relevant process will be led by the insolvency administrator who will be the one determining the result of the voting process. As previously advised, now composition proposals need to be submitted within 15 business days from the filing of the insolvency administration report at the latest. Among other amendments that have been introduced by Law 16/2022 we need to flag that:

- the stay period for ordinary claims (in terms of years) will be converted into quarterly waiting periods for subordinated claims (with a maximum total stay period for all creditors of ten years and without prejudice to the effects that the exercise of the election process between alternatives included in a composition proposal may produce);
- the application of a composition providing for a worse result than the one that the creditor could obtain through its hypothetical liquidation participation (*cuota hipotética de liquidación*) is introduced as a reason for objecting to the approval of the composition proposal; and
- the possibility to apply for the amendment of an approved composition has now been crystallised in the Recast Insolvency Law. This new faculty can be exercised only once and after two years of its initial term have elapsed, whenever there is a risk of non-compliance with the approved agreement and the modification of the original composition is essential to ensure the viability of the company.

Insolvency proceedings (concurso) (cont.)

If a *convenio* is not possible or it has not been filed at the right time, the outcome of the insolvency proceedings will be liquidation. Even in the case of liquidation, the Recast Insolvency Law encourages the continuation of the business by way of a transfer of the business as a going concern where possible.

Law 16/2022 has also made several amendments of the liquidation process. For these purposes, liquidation plans based on the initiative of the insolvency administrator disappear and are replaced by the general and special rules of liquidation. The general rules are summarized in the 'group rule' (preference for joint disposal over individual disposal of assets), the 'electronic auction rule' (preference for electronic auction of assets that have a valuation greater than 5% of the total debtor's assets) and the 'award of secured assets rule' in the event of lack of bidders (possibility for the secured creditor to request the award of assets on the basis of the rules of the Spanish Law on Civil Proceedings or a compulsory award when the valuation of the secured assets is less than debt).

Separately, special liquidation rules could be set by the Insolvency Judge based on the characteristics and composition of the insolvency estate and may be modified or left without effect at any time (including by decision of a simple majority of the total admitted liabilities or a simple majority of ordinary creditors). Lastly but not less important, it is contemplated that, if one year has elapsed from the opening of the liquidation, the sale of encumbered assets has not taken place, secured creditors' right to seek the enforcement of the relevant security interest would be reactivated.

The Recast Insolvency Law clearly provides incentives for the rescue of companies that may be going through financial difficulties. It incorporates a mechanism to ensure that a request for the declaration of insolvency is filed in a timely manner (i.e., within the following two months of the debtor being unable to regularly meet its payment obligations as they fall due). Further, a *convenio* that proposes a reduction of less than 20% of ordinary claims or a full repayment of all ordinary claims that are due and payable (*vencido y exigible*) in less than three years from the approval of the composition by the insolvency judge can be approved by a simple majority of ordinary creditors (by value) voting on the proposal.

Insolvency proceedings (concurso) (cont.)

Following the approval of Law 16/2022, the so-called qualification section (*sección de calificación*) of the insolvency proceedings would be opened in all the insolvency proceedings to determine whether the insolvency should be qualified as fortuitous or culpable. This section has now been brought forward and now takes place subsequently after the closing of the common phase. Separately, creditors have now acquired a much more prominent role in this section as creditors holding at least 10% of the liabilities or holders of credits greater than EUR1 million are granted the ability to present their own reasoned and documented qualification report (with a proposal for guilty declaration) and promote, by themselves, the qualification process. Likewise, the possibility of negotiating and reaching a settlement agreement with respect to the economic consequences of the qualification has been recognized (although all the parties to the proceedings would be allowed to provide comments). Finally, the award on the legal costs of the qualification section is also adjusted. If the judgment rejects the request for guilty declaration at the request of the insolvency administrator, it will not be ordered to pay the costs unless there is recklessness in the petition of the insolvency declaration. However, if the judgment accepts the guilty declaration, it will not order persons affected by the qualification to pay costs incurred by those entitled to defend the qualification of the insolvency as guilty.

If the insolvency is culpable, the insolvent debtor (or its directors (both *de jure* and *de facto*)), liquidators or those with a general power of attorney (if it is a corporate entity) could be declared incapable of running any business for a period of two to 15 years. They may also be held to be personally liable for the culpable insolvency of the debtor (this liability would be with respect to the insolvent debtor's debts to the extent these remain unpaid after the proceeds of the liquidation have been applied towards discharging them).

The Recast Insolvency Law further provides incentives for reaching an agreement that satisfies the insolvent debtor and its main creditors. This can be seen in the provisions that encourage the insolvent debtor to file a proposal for a *convenio* together with its creditors as the most advisable way to obtain a creditors' composition. Thus, the Recast Insolvency Law advises the insolvent debtor to propose a *convenio* that can be accepted by its creditors and restrain creditors from making proposals that potentially would not be acceptable to the insolvent debtor (and to such other creditors that have adhered to the insolvent debtor's proposals) as the insolvent debtor may potentially request its liquidation at any time.

Restructuring moratorium

The Recast Insolvency Law includes a pre-insolvency period where a debtor can negotiate with its creditors with the intention of reaching an agreement (e.g., a restructuring plan) addressed to sort its financial difficulties out.

For these purposes, in cases of imminent insolvency (*insolvencia inminente*) or likelihood of insolvency (*probabilidad de la insolvencia*) the debtor may communicate to the Commercial Courts of its place of incorporation that it has opened (or has the intention to initiate) those restructuring negotiations. The communication may also be filed in cases of actual insolvency if no petitions necessary insolvency (i.e., insolvency petitions filed by creditors) have been previously admitted by the courts. Among other things, the petition needs to include (i) a description of the reasons that support the filing; (ii) the perimeter of creditors that have been approached (or that the debtor has the intention to approach), their respective claims and confirmation as to whether any of these creditors is a specially related party (*persona especialmente relacionada*); (iii) a list on the goods and assets that are necessary 8 for the continuation of the debtor's business activity and those enforcement proceedings are carried out against these assets; (iv) a list on those contracts that are necessary for the continuation of the debtor's business activity; and (v) where necessary, a request for the appointment of a restructuring expert.

Unless the communication is kept confidential (the debtor can decide on this), the communication shall be announced in the Spanish Insolvency Registry.

Filing of the communication does not have an impact on management faculties of the debtor. Proceedings will be debtor in possession even in those cases where a restructuring expert is appointed.

Despite of the filing of the communication, the Recast Insolvency Law sets out a general rule of validity of agreements with pending reciprocal obligations subject to certain exceptions and technicalities (i.e., *ipso facto* clauses would not be enforceable).

Filing of the communication shall not affect guarantees granted by third parties. However, in those cases where the relevant guarantee has been granted by a third-party group company and the enforcement of such guarantee may lead to the debtor's and the guarantor's insolvency, the filing of communication shall also suspend the enforcement of the relevant third-party guarantee.

Restructuring moratorium (cont.)

While the communication is in place, the following limitations apply to creditors covered under the scope of the communication on the conduction of enforcement proceedings against the debtor:

(a) no enforcement proceedings may be initiated (and those initiated would be suspended) against assets that are necessary for the continuation of the debtor's business activity for the following three months;

(b) suspension may be extended at any time (following the debtor's request) for up to three additional months to any and all of the non-necessary assets of the debtor, to any and all of the debtor's creditors or to any and all of the classes of creditors as long as such suspension is necessary for the conclusion of restructuring negotiations; and

(c) despite of the filing of the communication, secured creditors may be able to initiate enforcement proceedings in respect of their own security while the communication is in place. However, once proceedings are initiated, they shall be immediately suspended. This limitation does not extend to financial collateral.

While the communication is in place, there is no obligation to initiate mandatory winding-up of the debtor due its net-worth (*patrimonio neto*) falling below 50% of its issued share capital as required under the Spanish Companies Act.

The effects of the communication initially last for three months (plus one additional month to file for insolvency). However, during this initial three-month period, it would be possible to obtain a three-month extension provided that, at least, 50% of the debtor's affected creditors accept so.

Once a communication has been filed by the debtor, the debtor is not allowed to file a new one within the next year.

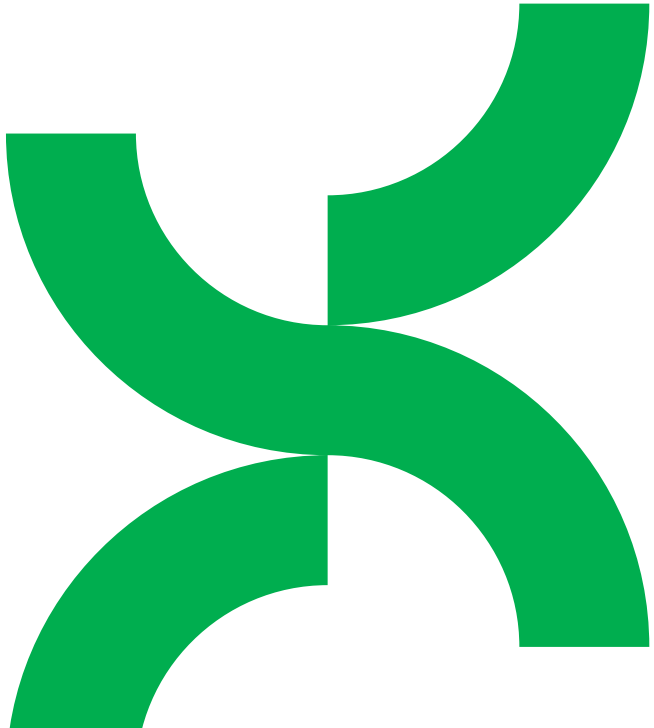
Where the initial three-month term (or, the three-month extension if applicable) have elapsed and the debtor has not reached a restructuring plan, the debtor shall file for insolvency within the next month unless it has been able to sort its financial difficulties out and it is no longer in a position of actual insolvency.

Restructuring moratorium (cont.)

While the effects of the communication are in place, insolvency petitions filed by creditors would be suspended and shall only be ruled on once the one-month window described above has elapsed without the debtor having requested to be declared insolvent. If the debtor requests the declaration of insolvency within that month, such request shall be processed first.

While the effects of the communication are in force, any insolvency petition filed by the debtor may be suspended by the judge at the request of creditors representing more than 50% of the liabilities that could be affected by the restructuring plan. Such suspension shall rely on the submission by nine creditors of a restructuring plan that has chances of being approved. When granted, the suspension shall be lifted if within the next month creditors have not submitted a request for the judicial sanction of the restructuring plan.

Finally, the Recast Insolvency Law allows for the appointment of a restructuring while the effects of the communication are in place. The appointment can take place at the request of the debtor or its creditors or even the Court himself when the judge considers it necessary to safeguard the interest of creditors. The expert will play a relevant role throughout the restructuring process. He will assist the debtor and creditors during restructuring negotiations and when preparing the restructuring plan. The expert will also support the Insolvency Court by issuing any required reports on the restructuring. The expert will also intervene throughout the restructuring process.



Court-sanctioned restructuring plans

Law 16/2022 has replaced former court-sanctioned collective refinancing agreements (*acuerdos de refinanciación*) by new restructuring plans (*planes de reestructuración*). The content of these agreements has now been broadened and more flexible, so it would be possible not only to modify outstanding liabilities (including, aside from financial liabilities other types of creditors), but also assets or the net equity, debt for asset swaps and even any necessary operational changes.

As required for the former refinancing agreements, restructuring plans must be formalized in a notarial instrument. The required content of the public instrument is now extended since, among others, it is necessary to include a description of the economic situation of the debtor and its employees or the assets and liabilities of the debtor or the contracts with pending reciprocal obligations that are going to be terminated by virtue of the plan.

As to the possibilities to amend outstanding liabilities of the debtor, restructuring plans also allow multiple options. It will be possible to amend maturity dates or the amount of principal or interest (including the application of debt write-offs), the conversion of debt into profit-participating (*préstamos participativos*) or subordinated loans, capital instruments or any other similar instrument, the modification of security interests or corporate guarantees, the replacement of the principal debtor or, eventually, the applicable law to the relevant credit. These effects may be extended to most types of credits—except for public law credits (only certain limited stays can be applied to them) and credits derived from non-contractual civil liability and labour credits (except those of senior management), including contingent or conditional credits. Likewise, the possibility of regulating the so-called "debt impact perimeter" (*perímetro de afectación*) through objective and justified criteria it is expressly regulated and subject to judicial control but now the parties are able to determine which debts are affected and which are not (previous refinancing agreements were only addressed to financial creditors and it was not possible to cram-down other creditors).

Restructuring plans can also affect agreements entered by the debtor. For these purposes, Law 16/2022 allows for restructuring plans to contemplate the termination of agreements (including senior management contracts) when this measure is necessary for the successful completion of the restructuring and to prevent the insolvency. In that scenario, any termination claims may be also affected by the financial restructuring envisaged under the plan. Any discrepancy that arises in this regard must be discussed before the Judge approving the plan by filing an incidental claim (*incidente concursal*).

Court-sanctioned restructuring plans (cont.)

One of the main novelties that restructuring plans include is that creditors are grouped in classes of creditors (similarly to an English Scheme). To this end, the formation of a class must address the existence of a common interest of its members. The general rule is that of the same ranking in an eventual insolvency should be included in the same class, but they could be eventually split up into separate classes if there is a reasonable justification for doing so. In any case, secured credits and public law credits will constitute separate classes. For the purposes of providing legal certainty and more security to the process (as this is typically one of the most contentious points when it comes to approving a restructuring plan) the debtor and creditors representing more than 50% of the affected liabilities may request the judicial confirmation of the correct formation of classes prior to requesting the judicial sanction of the plan. The creation of classes allows greater flexibility when approving measures for different groups, going even beyond the regulation of the scheme of arrangement, since it allows in certain circumstances cross-class cram-down.

In terms of the required majorities for approving a plan, a single percentage is established—66.66%—for the approval of the plan by each class of unsecured creditors but that figure builds up to 75% when the class in question is made up of secured claims. Those percentages will also be applicable so that it can be understood that a group of syndicated creditors have voted in favour of the plan (unless the syndication agreement 11 For a restructuring plan to be judicially sanctioned, the following establishes a lower majority, in which case this majority would be applicable). Otherwise, votes of syndicated creditors will be considered on an individual basis.

One of the greatest developments of Law 16/2022 is that restructuring plans may be imposed to the debtor and suspend requests for insolvency filed by the debtor. To do so, it would be necessary that either the restructuring expert (if appointed) or creditors holding more than 50% of the affected liabilities so request and that the debtor is in a situation of imminent insolvency (*insolvencia inminente*) or actual insolvency (*insolvency actual*).

Plans must be judicially sanctioned (*homologados*) in those cases were the parties intend to (i) cram-down dissenting creditors or shareholders; (ii) protect interim financing (*financiación interina*), new financing (*nueva financiación*) and acts carried out in the context of the plan against claw-back actions; (iii) recognize the interim financing or the new financing certain preferences in terms of payment in case of an eventual insolvency of the debtor; or (iv) the termination of contracts with reciprocal pending obligations in the interest of the restructuring.

Court-sanctioned restructuring plans (cont.)

For a restructuring plan to be judicially sanctioned, the following requirements apply:

(a) The debtor must be insolvent (either actual or imminent insolvency, or in a situation of likelihood of insolvency (*probabilidad de la insolvencia*)) and the plan must offer a reasonable perspective of avoiding the insolvency and ensuring the viability of the debtor in the short and medium term.

(b) The plan has to be approved by (i) all classes of creditors and the shareholders; or (ii) a simple majority of classes provided that at least one of these classes includes claims with privilege (*créditos con privilegio*); or (iii) at least one class of creditors that can reasonably be presumed to have received some payment after a valuation of the debtor as an on-going company (i.e., in the money creditors). However, once the other requirements are being met, the plan may be judicially sanctioned (and shareholders crammed down) if the debtor is in a situation of actual or imminent insolvency.

(c) Credits of the same class must receive the same treatment.

(d) The plan must be previously communicated to all affected creditors.

Once a restructuring plan has been judicially sanctioned, it will produce all its effects immediately, so that any eventual challenge will not stop its execution, and the acts of execution of the restructuring plan may even be registered.

Secured creditors that have voted against the plan and belong to a class where the favourable vote is lower than the dissenting vote will have the right to initiate the enforcement of their security interests until once month has elapsed from the publication of the judicial sanction in the Public Insolvency Registry (*Registro Público Concursal*). However, the plan may provide for the substitution of the relevant enforcement right by the option to collect the relevant claim in cash within a period of up to 120 days.

The judicial sanction of the plan may also affect third-party guarantees granted by group companies when the enforcement of the guarantee could cause the insolvency of the guarantor and the debtor.

Court-sanctioned restructuring plans (cont.)

In terms of challenge, Law 16/2022 has also revisited the former regime and has included a two-route mechanism that is chosen by the party filing the restructuring plan at court. A challenge system is established primarily, without suspensive effects and without the possibility of subsequent appeal before the Regional Court (*Audiencia Provincial*) within the following 15 days after the publication of the judicial sanction order. Alternatively, the proposing party may also decide that any objections against the judicial sanction of the plan are decided by the Commercial Court (*Juzgado de lo Mercantil*) prior to ruling on the judicial sanction of the plan. In both cases, the judicial decision on the challenge or the objections against the plan cannot be subject to further appeal. Ground of challenge rely on procedural matters and substantive matters regarding the content of the plan and its effects on the debtor or its creditors. Generally, if the challenge against the judicial sanction of a restructuring plan is upheld, this will only benefit the challenging creditor. However, in those cases where the reason for upholding the challenge is because the required statutory majorities have not been obtained or on an incorrect formation of classes of creditors, the judgement revoking the approval of the plan will affect all creditors.

The judicial sanction of a restructuring plan also vests any acts or transactions completed thereunder with a clawback protection in case of an eventual insolvency of the debtor if credits affected by the plan represent at least 50% of the total liabilities. This protection covers (i) acts or transactions that are reasonable and immediately necessary for the success of the negotiations or the execution of the plan; and (ii) the interim financing and the new financing (in the event that these have been provided by persons especially related to the debtor, affected credits must exceed 60% of the total liabilities for the protection to be applicable). If the required majority of 50% is not reached but, at least, the plan has been judicially sanctioned, relative presumptions of damage to the insolvency would not be applicable.

Finally, in case of an eventual breach of the approved restructuring plan it may not be possible to ask for the termination of the plan or the reversal of its effects unless the plan itself provides otherwise.

Continuation plans under the special procedure for SMEs

The Recast Insolvency Law sets up a special procedure for the financial restructuring of small business operators. This procedure is addressed to both natural and legal persons who conduct a business or professional activity if they meet the following characteristics (**SMEs**):

(1) they have an average of less than ten workers; and

(2) they have a turnover of less than 700,000 euros or a less than 350,000 euros in terms of total indebtedness according to the last annual accounts.

The special procedure is a procedure of a general nature and, therefore, affects the entirety of the assets and rights of the debtor's estate. Likewise, the procedure is aimed at all creditors regardless of the origin and nature of their debts. The procedure can be intended for the continuation of the activity or, on the contrary, for the liquidation of the debtor with or without the transfer of the business as a going concern.

The special procedure is applicable in situations of likelihood of insolvency (*probabilidad de insolvencia*), imminent insolvency (*insolvencia inminente*) or actual insolvency (*insolvency actual*). In cases of actual insolvency, the debtor has the 13 obligation to request its opening within two months following the date on which the SME becomes aware (or should be aware) of such situation of actual insolvency. In all other cases, the opening of the procedure is voluntary for the debtor.

To support this special procedure, the Law allows for SMEs to communicate to the competent court for the declaration of insolvency the opening of negotiations with creditors with the purpose of agreeing on a continuation plan. The communication must be made by electronic means and following the standard model. However, unlike what happens in the ordinary procedure described in the Restructuring Moratorium Section above, in this case the effects of the communication cannot be extended. Consequently, once three months have elapsed since the submission of the communication, the opening of the special procedure must be requested (if the debtor is still in a situation of actual insolvency) within the next five business days.

Regarding the restructuring of SMEs, this can be conducted through the approval of a continuation plan. The presentation of this must be made with the request for opening of the special procedure or within ten business days following the declaration of opening of the special procedure.

Continuation plans under the special procedure for SMEs (cont.)

In terms of form and content, continuation plans are remarkably similar to restructuring plans. Thus, continuation plans can contemplate haircuts or deferrals of credits (or a combination of both), the conversion of debts into profit participation loans or debt for equity swaps. Likewise, continuation plans can also provide for certain effects on contracts with reciprocal obligations pending fulfilment as well as other operative restructuring measures.

For the purposes of approving the plan, creditors are also grouped into classes, which are formed according to their economic value and their respective insolvency ranking. Once the plan is submitted at court, creditors have 15 business days to make allegations to it. The non-presentation of allegations by a creditor is understood as a tacit acceptance and will prevent the subsequent challenge by the corresponding creditor. After this initial window, creditors have a period of 15 business days to vote (votes must be casted in accordance with a standardized form). In case a creditor does not vote, it will be understood that it has voted in favour of the continuation plan. The plan will be considered approved by a class of credits if the majority of the class (by value) has voted in favour (the majority raises to 2/3 if the corresponding class is made up of secured creditors). The plan will be considered approved when it has been approved by all the classes of credits or, at least, (i) by a simple majority of the classes as long as one of them includes a class of privileged creditors; or (ii) a class that can reasonably be presumed to have received some payment after a valuation of the debtor as a going concern.

Once the plan is approved, the judicial sanction of the continuation plan can be requested. To do so, among others, the plan must pass the best interest of creditors test and, in case the plan has not been approved by a class of creditors, the plan is understood as fair or equitable (creditors of higher ranking receiving more favourable treatment than lower ranking creditors, the plan is essential to ensure the viability of the business and the credits of the affected creditors are not unjustifiably impaired).

As occurred for restructuring plans, the Recast Insolvency Law also establishes a procedure for challenging the ratification before the Provincial Court and contemplates the protection of interim financing and new financing granted under the plan.

Finally, to support or facilitate the approval of continuation plans, the Recast Insolvency Law also includes a series of ancillary or supporting measures for the negotiation process. Thus, the Law empowers to request (i) the suspension of enforcement proceedings; (ii) the opening of a mediation procedure to negotiate the content of the plan between the debtor and its creditors; (iii) the limitation of administration and management powers of the debtor; or (iv) the appointment of a restructuring expert.

In summary, the continuation procedure is a special procedure but similar to the procedure of approving restructuring plans, although certain measures and requirements are simplified and adapted bearing in mind special characteristics and needs of SMEs.

Corporate liquidation

Corporate liquidation under the Spanish Companies Act (the SCA) is a separate procedure to the insolvency liquidation process but, as opposed to what would happen in an insolvency proceeding, in a corporate liquidation the debtor is able to fully settle all its outstanding liabilities. Corporate liquidation is a standalone procedure for winding up the affairs of a company. It involves the sale of the company's assets and the payment of its debts and obligations, with a resulting distribution of any surplus to the company's shareholders and the company's ultimate dissolution.

Corporate liquidation is governed by:

(i) Chapter II, Title X of Royal Legislation Decree 1/2010, dated 2 July 2010, which approves the consolidated text of the SCA; and

(ii) the provisions of the by-laws of the company (provided that such provisions do not conflict with the provisions of the SCA—in which case the SCA takes priority).

Corporate liquidation is initiated by a decision of the company's shareholders upon the occurrence of a winding-up event. There is no insolvency test to be applied and neither is there an obligation on the shareholders to certify that the company is solvent. Upon the occurrence of a winding-up event (established under the by-laws of the company or by the SCA) the directors of the company must call a shareholders' meeting within two months from a winding-up event taking place. At this meeting the shareholders will either:

(i) adopt the resolution to initiate a corporate liquidation;

(ii) adopt a resolution to remedy the winding-up event; or

(iii) if the company is insolvent, initiate insolvency proceedings.

If the directors fail to call the meeting then any interested party may apply to the commercial court of the area of the company's registered office to adopt the resolution to wind up the company.

Upon the commencement of corporate liquidation proceedings, liquidators are appointed to the company and the company's directors are dismissed from office (with their authority to represent the company being terminated from this point). The liquidators assume the duties of the directors, ensuring the integrity of the company's assets. Unless otherwise provided in the company's by-laws, each liquidator will represent the company individually and their power of representation will extend to all operations necessary for the liquidation of the company.

The company retains its legal personality in corporate liquidation proceedings and must add the expression "in liquidation" (*en liquidación*) to its name throughout the period of liquidation.

The liquidators are obliged to compile an inventory of the company's assets and to draft an initial balance sheet (as at the date of the opening of the corporate liquidation proceedings). If, upon investigation by the liquidators, the company is found to be insolvent the liquidators must commence insolvency proceedings.

Corporate liquidation (cont.)

Liquidators will realise all of the company's assets and provide for the payment of the company's liabilities (including pending obligations). A final balance sheet will be prepared together with a complete report on the actions taken by the liquidators and a proposal for distribution of the surplus assets among shareholders.

These documents will need to be approved at a shareholders' general meeting by a resolution to be adopted by the majority of votes cast validly or by a higher majority (if specifically required by the company's by-laws). If shareholders do not approve the documents they will need to be redrafted by the liquidators for approval at a new shareholders' general meeting. The final liquidation balance sheet can be challenged by shareholders who did not vote in favour at the above meeting within two months of the documents being approved at the general meeting. If no challenge is brought within the required time period (or upon final judgment being given in relation to the claims) the surplus assets will be paid to the shareholders. The surplus assets must be distributed pursuant to the rules established in the company's by-laws or, in the absence of such rules, by the applicable legal provisions, which state that the liquidation quota for each shareholder must be proportional to their participation in the share capital of the company.

The public deed of liquidation must be registered with the Mercantile Registry, which will issue a note confirming that all entries relating to the company have been cancelled and the company will cease to exist. The liquidators must deposit all of the company's books and documents with the Mercantile Registry.

The liquidators are liable to shareholders and creditors for damages incurred due to any intentional misconduct or negligence in the performance of their duties.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**), continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding-up proceedings—secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Insolvency (*concurso*) was available as a main and secondary proceeding under the Original Regulation. This was listed as both a main and secondary proceeding because it is the single gateway into either a liquidation (*fase de liquidación del 17 concurso*) or a composition with creditors (*convenio*). However, on the basis that secondary proceedings must be limited to winding-up proceedings, it may be that any secondary proceedings would be limited to the liquidation element of the insolvency proceedings.

On top of the foregoing, certain amendments have been included in the Recast Regulation as regards Spanish insolvency proceedings. In this respect, aside from insolvency proceedings, Annex A of the Recast Regulation also includes:

(i) proceedings for judicial sanction (*homologación*) of refinancing agreements (this should cover court-sanctioned collective refinancing agreements),

(ii) proceedings for the approval of out-of-court refinancing agreements (*acuerdos extrajudiciales de pago*)

(iii) the pre-insolvency protection foreseen under the Recast Insolvency Law (and formerly under section 5bis of the Insolvency Law) in which a debtor negotiates with its creditor in order to seek a solution to overcome its financial difficulties.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com**.

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Further information

Developed by A&O Shearman's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

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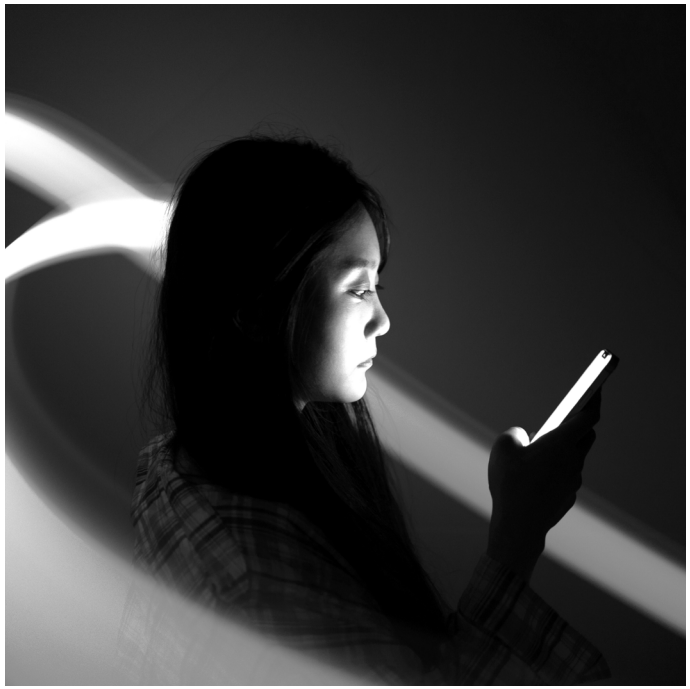

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