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A Lender's Guide to the Spanish Insolvency System

Updated by Law 16/2022 of 5 September transposing the Restructuring Directive

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A LENDER'S GUIDE TO THE SPANISH INSOLVENCY SYSTEM
IMPORTANT NOTE

This Guide provides an overview of key aspects of the Spanish insolvency system.

We have prepared the Guide taking into account the perspective of a professional lender that provides financing to Spanish large or mid-cap companies. Therefore, this Guide does not address specific legal matters under the Insolvency Law that could be relevant for natural persons or small entities.

The Insolvency Law applies to all types of debtors other than specific companies that are subject to separate insolvency frameworks (e.g. financial institutions, investment companies and insurance companies). These specific legal frameworks, as well as specialities provided for individuals, fall outside the scope of this Guide and must be assessed separately.

The information contained in this Guide is not intended to be used – and must not be used – as legal advice and does not constitute a legal opinion, either on general questions of insolvency law or questions related to any specific transaction. Uría Menéndez would nevertheless be pleased, upon request, to provide specific advice on any matters related to insolvency law.

The information contained in this Guide is provided as at 6 September 2022. Updates to the information in this Guide may be requested from Uría Menéndez; however, Uría Menéndez has no obligation – and has no responsibility – to provide any updates in the absence of a specific, agreed-upon request.

Madrid, 6 September 2022

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Foreword

1 Foreword

Filing for insolvency has specific advantages and disadvantages for creditors and debtors. However, in Spain, an insolvency filing has traditionally been the least-desirable alternative given that the vast majority of companies that file for insolvency ultimately resulted in liquidation. The cost and time associated with insolvency proceedings in Spain are prohibitive in most cases. Meanwhile, value is destroyed and creditors generally collect, if anything, only a nominal portion of their claims.

This Guide offers an overview of the Spanish insolvency system and also analyses and explains why creditors and debtors generally favour out-of-court agreements and other fast-track restructuring solutions (e.g. restructuring plans and pre-pack sales of business units).

Understanding and addressing each party's interests, including those of shareholders, debtors, creditors and even directors, is key to achieving a successful out-of-court restructuring in Spain.

Debtors and shareholders' interests

Starting with debtors and shareholders, our experience is that, at the beginning of any restructuring process, debtors tend to be in denial and have the belief that creditors will extend their loans indefinitely and will be reluctant to take control of the company. This proved to be somewhat true in the first few years of the 2008 financial crisis, when Spanish lenders were generally hesitant to take control of the debtor through debt-to-equity restructurings or other long-term solutions. Instead, extend-and-pretend was the quick fix. As the financial crisis in Spain had a strong real-estate component, lenders gradually started to enter into debt-for-asset transactions.

Unfortunately, delaying restructuring negotiations has been common in Spain. This reduces the time available to reach an agreement given that directors are legally required to file for insolvency and banks and other supervised lenders may need to provision for bad debt. Meanwhile, the business deteriorates and clients, suppliers and credit insurers become nervous, demanding upfront payments or withdrawing credit. The dilemma is that restructuring processes are highly time consuming: a steering committee is normally formed; advisors need to be engaged; an independent business review must be carried out;

a term sheet must be negotiated on the basis of that review; credit-committee approvals are required; long-form documents need to be prepared and extensively negotiated; and multiple conditions precedent must be fulfilled, even if consent is obtained from all lenders and the debtor does not need to request that courts apply a cram-down. All these circumstances limit the likelihood of a successful outcome.

Once the debtor and its shareholders become aware of the debtor's liquidity problem, the main discussions will focus on value and how value should be distributed post-restructuring among all stakeholders (creditors and, if applicable, shareholders). Shareholders will have a strong incentive to argue that they are "in the money", while creditors are prone to argue the opposite.

In practice, lenders have traditionally left some value on the table for shareholders as a way to secure their cooperation and avoid holdouts. For example, as a capital increase was required in debt-for-equity restructurings, diluted shareholders were not expected to cooperate unless something was left for them.

Following transposition of the Restructuring Directive shareholder cooperation is not always necessary. Uncooperative shareholders can be wiped out if certain circumstances. Yet, the Spanish legislature has not ultimately opted for a strict absolute-priority rule when transposing the Restructuring Directive. Under a strict absolute-priority rule shareholders should not receive any value post-restructuring if any class of creditor receives equity or equity-linked instruments as payment of its pre-restructuring claim. Under the new Spanish rules, an exception to this principle can be made when sharing part of the value with junior classes is deemed indispensable to ensure the viability of the debtor provided that the claims of the affected creditors are not unfairly prejudiced.

If the shareholders are not wiped out, they will attempt to retain as much control over the debtor and its business as possible. The reality, however, is that creditors will impose on the debtor myriad restrictions through a wide array of covenants. For instance, expanding into new lines of business or incurring additional debt may be restricted or even prohibited. Information obligations will be upgraded, including periodic business reviews. Divestment plans will form part of the restructuring plan, forcing the debtor to divest specific businesses or assets. A chief restructuring officer may also be appointed by the lenders.

There has been some debate on the limits of lenders' intervention in debtors' affairs. In the early years of the financial crisis, one of the main concerns of lenders was being considered shadow directors, which would, among other consequences, subordinate their claims in insolvency proceedings. Some decisions from lower courts unfortunately failed to mitigate this concern. However, the 2014 reform of the Insolvency Law made it patently clear that imposing obligations on the debtor to comply with its viability plan should not cause creditors to become shadow directors. The Spanish Supreme Court's case law on this matter provides additional comfort to lenders, although caution must nevertheless be exercised.

Creditors' interests

Creditors' interests usually differ and should therefore not be taken as a whole. Otherwise the restructuring may fail. Under the new regime resulting from the Restructuring Directive, creditors with a sufficient commonality of interest should be grouped into the same class. In any event, whatever their class, it is critical to understand each creditor's situation and incentives for restructuring. Being able to determine the minimum common denominator of those who are "in the money" is key for a successful restructuring. The ranking of the debt is one, but not the only, factor to group the creditor into classes. Regardless of the parties' legal status, from a practical standpoint, parties should not assume that all creditors of a particular class or ranking have identical interests.

The following are some examples of diverging creditor interests:

a) Trade creditors (e.g. suppliers) are rarely secured, but are normally critical to the debtor's day-to-day business. Before, in specific cases (e.g. when replacing a supplier was not a viable option) they could be de facto in a stronger bargaining position than secured financial creditors given that, under the previous system, they could not be crammed down in an out-of-court restructuring. This has now changed with the implementation of the Restructuring Directive, as trade creditors can now be subject to restructuring plans and are subject to several rules and restrictions to terminate their contracts.

b) Understanding who is secured and who is not is also likely to be pivotal. Secured creditors will form a separate class, which in practice requires calculating the value of the collateral to determine the portion of the claim not covered by the security. If the lender benefits from any form of credit risk or surety insurance it is likely to seek instructions from its insurer in order not to risk losing coverage.

c) Dealing with bilateral facility agreements and ensuring coordination among unrelated lenders is a common challenge in Spain.

d) Finding the minimum common denominator can be even more problematic when there are several layers of debt. Unlike the Loan Market Association's model Intercreditor Agreement, Spanish finance documents rarely contain provisions entitling senior creditors to "cut loose" junior creditors when the latter are "out of the money", although it should now be possible to achieve this outcome through a cross-class cram down process.

e) Even when there is only a single layer of debt, specific creditors could take different approaches. For example, a lender that purchased protection under a credit default swap may have an interest in triggering a "credit event" in order to secure payment from the hedge provider. In contrast, the interest of a lender that forms part of the same syndicate but that is unhedged will usually be diametrically opposed to triggering a credit event.

f) Creditors with significant exposure to the debtor may have a strong incentive to restructure the debt. When major creditors have much at stake, minority creditors occasionally attempt to hold them up, seeking to be bought out. Prepayment of small stakes in syndicated loans is not possible since these loans usually include sharing clauses that prevent any bank from being repaid before others, except where yank the bank or equivalent provisions apply. While additional alternatives will need to be considered, there is no obvious solution other than opting for an approach that allows the cram-down of dissenting creditors.

g) Special-situations funds and distressed investors, which are increasingly common in Spain, also have distinct motivations and strategies. Not all funds are alike. Once perceived by the market as opportunistic – and rarely welcomed – they are now largely accepted as forming part of the solution as providers of equity or debt. Their role sometimes involves not only acquiring existing debt as part of a loan-to-own strategy but also providing new money or participating in refinancing exercise with other creditors. Implementing these strategies is particularly challenging in a pre-insolvency scenario, as it requires strategic legal thinking and structuring in order to mitigate potential claw-back risks, avoid equitable subordination and obtain a more favourable enforcement position in a worst-case scenario.

h) As the debtor is likely to approach the restructuring process short of cash, providing interim financing may be critical. Who provides this financing and on what terms and conditions (prepayment and repayment terms, super seniority, security package) will be key.

i) Offering cross-border solutions is increasingly important as we see groups of companies with distinct layers of debt governed by the laws of multiple jurisdictions or with foreign affiliates or branches that must also be included in the restructuring.

Directors' duties and interests

Last but not least, the debtor's directors may have their own interests, including the avoidance of liability for a late insolvency filing. As described in this Guide, the Insolvency Law establishes that insolvency may be declared "negligent" if the directors of the insolvent debtor fail to file for insolvency or do so late. If the debtor ultimately ends up in liquidation and its assets are insufficient to pay all claims, the court may hold the directors liable for the payment of all or part of creditors' claims.

Directors must also ensure that they fulfil their duties with adequate diligence if insolvency is probable. The Restructuring Directive establishes that Member States must ensure that, in such situations, directors have "due regard" for the interests of creditors, equity holders and other stakeholders. Having "due regard" does not imply that directors' fiduciary duties shift from the shareholders (who are likely to be "out of the money") to creditors (who are likely to be, at least partially, “in the money” and, therefore, potential future owners of the business). However, at a minimum, it requires that directors proceed with extreme caution and take steps to minimise losses and avoid insolvency.

Exercising their duty of care in these circumstances includes (i) seeking professional advice and, if a restructuring is sought, preparing a business plan that is both realistic and feasible; (ii) protecting the company’s assets in order to maximise their value; (iii) reducing expenditures; (iv) refraining from committing the company to transactions (in particular, divestments to obtain liquidity) potentially subject to claw-back risk without a solid business justification (including transactions that are below market value); (v) continuing to carry out the company´s activities in circumstances in which it is appropriate to do so in order to maximise going-concern value (but not otherwise); (vi) holding negotiations with the company’s creditors; and (vii) designing a backup plan for the survival of the business if negotiations are unsuccessful. The duty of care should be satisfied if directors work on a backup plan, whether it involves carrying out a pre-pack sale of the business or an early in-court composition agreement, both of which can be implemented swiftly in insolvency proceedings to allow the debtor (or at least its business or the viable portion of it) to emerge from insolvency as soon as possible.

In some cases insolvency will be, of course, inevitable. This occurs when the debtor is not deemed viable or when, for any reason, a viable debtor is unable to reach an out-of-court agreement with its creditors. Non-viable debtors (zombie or dormant companies) have been supported in the past, sometimes to delay provisioning bad loans or to survive the two-year hardening period. COVID-19 moratorium measures may have increased the number of dormant companies in Spain. Artificially extending the life of a non-viable company by providing credit will in some cases exacerbate the company’s financial situation, creating the appearance of normality to other creditors. This should also be carefully considered by directors and lenders.

* * *

Professional advice should be sought before navigating this potential minefield.

2

Legal framework

2 Legal framework

This Guide summarises the most important provisions of the Spanish insolvency system from a lender's perspective and addresses specific issues to be taken into consideration following the approval of the Law 16/2022, of 5 September (the **"Law"**), which has been published in the Spanish Official Gazette as of the date of this Guide, and will come into force by 26 September, 2022, with certain exceptions.

This Law amends Royal Decree-Legislative 1/2020 of 5 May (as amended, the **"Insolvency Law"**), which was enacted to restate and improve the previous legal framework governing insolvency in Spain, with the aim of implementing the restructuring framework required by Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (the **"Restructuring Directive"**), as well as otherwise significantly amending the Insolvency Law.

3

Distressed debtors

3 Distressed debtors

3.1 ACTUAL OR IMMINENT INSOLVENCY - CASH-FLOW TEST

A debtor is insolvent when it is unable to regularly pay its debts as they fall due. This situation is known as "actual insolvency" and triggers, except in the case of a pre-insolvency filing in the terms described in section 4, the company's obligation to request a declaration of insolvency from the court within two months of the moment the directors knew, or should have known, that the company was insolvent.

In contrast to other jurisdictions, the Insolvency Law exclusively sets out a cash-flow test to determine whether or not a debtor is insolvent, meaning that an insolvency situation is only deemed to occur if the debtor is unable to pay its debts when they become due and payable. Other situations that could be regarded in other jurisdictions as "balance-sheet insolvency" (such as cases in which a company has more liabilities than assets) are generally addressed outside the context of insolvency proceedings (see section 3.3), unless they coexist with a situation of actual insolvency.

A debtor may also – but is not required to – file for insolvency if it is expected that it will become insolvent imminently (known as "imminent insolvency," as opposed to actual insolvency), which is now deemed to occur when the debtor foresees that it will not be able to timely and regularly pay its debts in the following three months.

As described in the introductory section of this Guide (see section 1), directors of debtors in a situation of financial distress are under considerable time pressure and face a difficult dilemma. On the one hand, a late insolvency filing can entail severe consequences in terms of directors' liability. On the other hand, filing for insolvency may undermine or frustrate any attempts to keep the company's business afloat and reach a successful agreement with creditors before resorting to the courts.

Indeed, if directors fail to file for insolvency within two months of the time they become aware (or should have become aware) of the company's actual insolvency, a legal presumption of negligence exists that would entitle the court to declare the insolvency as "negligent" (see section 13). In that event the company's directors could, among other consequences, be held personally liable for the payment of the shortfall (i.e. the amount of the debts that cannot be satisfied with the debtor's assets as set out in the list of creditors and the inventory of assets submitted by the insolvency administrator – see section 8). The presumption applies not only to the company's legal directors, but also to shadow directors, general managers and attorneys in fact, as well as all persons who carried out those functions within the two years preceding the insolvency declaration.

However, this legal presumption may be rebutted by the directors if they are able to produce sufficient evidence that, despite the late filing for insolvency, they nevertheless acted diligently using their business judgement and having regard to the best interests of the company and the different stakeholders at that time, or if they can prove that the debtor's insolvency was not exacerbated as a result of the delay. For example, some Spanish courts (e.g. *Spanair*) have accepted that negotiating a refinancing agreement could release directors from liability if the insolvency petition is filed late, provided they acted diligently during the negotiations and the insolvency was not made worse in the meantime.

Experience has consistently shown that two months to file for insolvency is an extremely short period that does not allow companies to find a satisfactory solution to the situation causing the financial distress. As a consequence, the law provides mechanisms (as further explained in section 4) allowing the company to extend this period by making an insolvency pre-filing when it has started, or intends to start, restructuring negotiations with creditors. In fact, the law goes even further by trying to incentivise directors to take preventive action early, when insolvency is not even imminent, but is just likely, and avoid waiting too long until the company is actually insolvent and it is too late.

3.2 LIKELIHOOD OF INSOLVENCY

To encourage directors to take preventive action, following the implementation of the Restructuring Directive, the Insolvency Law has introduced the concept of "likelihood of insolvency" (*probabilidad de insolvencia*), which is when it is objectively foreseeable that the debtor will be unable to regularly fulfil its obligations that fall due in the next two years unless it enters into a Plan (as defined in section 5.2.2 below) with its creditors.

As further explained in section 4, in addition to being able to start negotiations with its creditors with a view to entering into a Plan at any time while insolvency is likely, the debtor will also be able to file for pre-insolvency in court, in which case it will inform the court that it is trying to negotiate a Plan with its creditors.

But the debtor is unlikely to file this pre-insolvency petition with the court when the insolvency situation is neither actual nor imminent, unless it needs to benefit from any of the effects of doing so (such as stays on enforcement). Accordingly, while the insolvency is simply likely, it can be reasonably expected that these negotiations with creditors will normally take place without filing this petition.

3.3 CAPITAL IMPAIRMENT - BALANCE-SHEET TEST

Even if a company is not insolvent, it may need to take action if it is in a situation of capital impairment, which, according to Spanish corporate law, is deemed to exist when, due to accumulated losses, the company's net equity falls below 50% of its share capital. In this situation the company must be dissolved unless the shareholders adopt any measures necessary to overcome the imbalance between net equity and share capital (such as approving an increase or reduction of the share capital or granting profit-participating loans that qualify as equity for these purposes).

Directors have specific duties and face additional liability in these situations. In particular, the company's directors are obliged to call a shareholders' meeting – to approve a resolution in order to overcome the capital impairment or, ultimately, dissolve the company – within two months of the date on which they became aware (or should have been aware) of the existence of the capital impairment. If the shareholders' meeting is not held or the situation is not resolved at that meeting, the company's directors have an additional obligation to file for the company's judicial dissolution within two months of the date on which the shareholders' meeting was held or should have been held.

If the company's directors fail to comply with any of these obligations, they will be jointly and severally liable for any debts incurred by the company after the existence of a mandatory cause for dissolution[1]. All debts are legally presumed to be subsequent to the cause of dissolution and, therefore, directors bear the burden of proving which debts were incurred prior to that date.

In the event that a company is both insolvent and in a situation of capital impairment, the obligation to file for insolvency prevails over any other corporate duty. Any liability claim that directors may face due to their inaction following a situation of capital impairment will be suspended automatically and will only resume once a voluntary composition agreement enters into force (see section 8.2.4) or the insolvency proceedings conclude.

To date, Spanish case law has applied this liability rather strictly and objectively and has often disregarded attempts to defend directors who did not comply – or complied late – with these legal duties.

In view of the above, directors of a company that is in a situation of capital impairment who are negotiating a restructuring agreement may be subject to significant pressure as they can be subject to the threat of claims based on failure to timely fulfil these duties,

1.- COVID-19 regulations established that accounting losses for fiscal year 2021 would not be taken into consideration for the purposes of determining if a capital impairment situation exists in 2021. However, if the results of fiscal year 2022 cause the company to fall into a situation of capital impairment due to losses, directors will be obliged to call a shareholders' meeting within two months of the end of fiscal year 2022 to either decide on the dissolution of the company or adopt measures to overcome the capital impairment situation (e.g. capital increase). Shareholders would also be entitled to request that a shareholders' meeting be held.

made, for instance, by hold-out creditors who are trying to influence the outcome of the negotiations. Also, for some creditors, claims against directors, even if suspended during the insolvency proceedings, may be regarded as a second chance to recover additional amounts from the directors once the insolvency proceedings end and claims may be resumed.

Following the transposition of the Restructuring Directive, the Insolvency Law allows directors to defer their obligation to call the shareholders' meeting to dissolve the company until the Pre-Insolvency Period (see section 4) has elapsed, provided that the company has filed for pre-insolvency with the court and informed it that it has started, or it intends to start, negotiations with its creditors. But the obligation to call the meeting will immediately apply once the Pre-Insolvency Period (including any extension thereof) elapses.

While the capital impairment situation and actual or imminent insolvency often coincide in practice, this may not be the case when insolvency is merely likely to happen. If they do coincide, directors would need to decide whether to call the shareholders' meeting or file for pre-insolvency to start negotiations with the creditors. However, the suspension of their duties to call the shareholders' meeting will be limited to cases in which the debtor has filed for pre-insolvency. Accordingly, directors will not be released of such obligations when the company starts negotiations with creditors without filing for pre-insolvency.

In the absence of a provision that suspends compliance with a mandatory dissolution obligation that might frustrate restructuring efforts, creditors have occasionally released the debtor from having to comply with this obligation by converting a portion of their credit rights into a profit-participating loan that qualify as equity while negotiating a Plan. Although under the current Insolvency Law the Plan's approval does not suspend the obligation to call the shareholders' meeting in a capital impairment situation, such capital impairment situation will presumably be one of the issues the Plan deals with and resolves.

4

The pre-insolvency period

4 The pre-insolvency period

4.1 SCOPE AND PURPOSE

As described in the preceding section, the Insolvency Law establishes that a debtor must file for insolvency within two months of the date it became aware (or should have been aware) of its actual insolvency (*insolvencia actual*). A debtor is insolvent when it cannot regularly pay its debts as they fall due.

However, restructuring negotiations take significant time. Soon after the financial crisis of 2008 began, it became evident that the two-month period established in the Insolvency Law to file for insolvency was insufficient in most cases to achieve a successful outcome. On the contrary, this excessively short period to file for insolvency could have made out-of-court solutions more likely to fail, as all negotiating parties were under considerable time pressure, particularly the debtor and its directors, who are under the threat of facing potential personal liability in the case of a late filing, as explained in section 3.

To facilitate the negotiation of restructuring solutions, and recalibrate the duties of directors of companies in financial distress during such negotiations, a temporary exception to the obligation to file for insolvency was introduced in the Insolvency Law for the first time in 2011 and has since been gradually improved to regulate not only a suspension of the duty to file for insolvency, but also a temporary stay of individual enforcements and restrictions on termination of contracts (as further described below).

In particular, the Insolvency Law establishes that, if a debtor's insolvency is imminent or likely, or if it is already actually insolvent (but, in this case, provided that a court has not admitted yet a creditor's insolvency request), the debtor may file for pre-insolvency, notifying the court that it has started negotiations (or intends to do so immediately) with its creditors to seek support for a Plan. Following the pre-insolvency filing, the debtor will have a grace period of three months (or of up to six months if extended as explained in section 4.4) to continue negotiations to agree a Plan with its creditors (the **"Pre-Insolvency Period"**).

If the debtor is unable to arrange a Plan with its creditors within the Pre-Insolvency Period, and unless the debtor is no longer insolvent, the debtor must apply for insolvency within the following month from the expiry of the Pre-Insolvency Period.

To benefit from the Pre-Insolvency Period, the debtor is not required to produce evidence of the start of negotiations (e.g. execution of a standstill agreement or a term sheet for the refinancing agreement). It is nevertheless highly advisable that the debtor be in a position to produce appropriate evidence in order to avoid the courts qualifying any subsequent insolvency as "negligent" based on a fraudulent suspension of the legal duty to file for insolvency (see section 13.1).

4.2 PROCESS

The debtor must notify the court with jurisdiction to hear the insolvency proceedings that it has started or has the intention to start negotiating with its creditors. The court clerk (*letrado de la administración de justicia*) will rule on the pre-filing, although in certain cases creditors may file an appeal for review (*recurso de revisión*) to be decided by the court. The creditors may also challenge the court's jurisdiction to hear the pre-insolvency filing through a specific process. Companies of the same group can file a joint petition but creditors cannot file for pre-insolvency.

The decision to notify a Spanish court that has jurisdiction could limit the debtor's ability to make a subsequent insolvency filing with a different Spanish court or even a foreign court (for instance, filing for Chapter 11 in the United States), given that such decision could be considered as evidence of the main centre of interests of the debtor or its parent company. Therefore, careful assessment is required before carrying out such notification in order to avoid compromising any subsequent restructuring strategy (see section 14).

The Pre-Insolvency Period starts when the debtor files its notice with the court, which includes information about, among others, (i) its (actual or imminent) insolvency or likelihood of insolvency (although it does not need to prove its insolvency), (ii) the creditors with whom it has started or is about to start negotiations and the amount and nature of their claims, (iii) its business activity, net worth, turnover and employees, (iv) the assets and contracts required for its activity to continue and which of them have been seized or attached, (v) if applicable, a request to appoint a restructuring expert and (vi) evidence of its outstanding tax and social security obligations if the Plan aims to include public claims.

Unless the above formalities are not met, and to the extent that the court considers itself to have the authority to hear the case, the court will acknowledge the notice, and publish it together with the above information in the Public Insolvency Registry (*Registro Público Concursal*), unless the debtor has specified that it is confidential. Creditors have very limited grounds to challenge the court's decision to acknowledge the pre-insolvency filing notice.

After filing, the debtor is not entitled to make another pre-insolvency filing for a one-year period.

Experience reveals that the Pre-Insolvency Period imposes significant pressure on transactions and management, which must be carefully reviewed in light of the specific circumstances. For these purposes, directors should consider not only the time required for a successful negotiation and execution of the Plan, but also the risks associated with not filing for pre-insolvency (such as enforcement or the risk of an insolvency petition by creditors), while also bearing in mind that the debtor must file for insolvency within two months of falling within the scope of actual insolvency, unless they file for pre-insolvency.

Even if it files for pre-insolvency, the debtor continues to be in possession of its assets for the entire Pre-Insolvency Period. Therefore, neither the debtor's management powers nor its power to transfer its assets will be in any way affected by either the pre-insolvency filing or the appointment of a restructuring expert.

4.3 EFFECTS

4.3.1 Insolvency petitions

As indicated, the pre-insolvency petition results in a temporary suspension of the legal duty to file for insolvency during the Pre-Insolvency Period.

When the Pre-Insolvency Period expires, the debtor will be obliged to apply for insolvency within one month unless it is no longer insolvent (either because it has been refinanced under a Plan, or it is no longer – or not yet – in a situation of actual insolvency).

Despite being called a "pre-insolvency" process, the pre-insolvency filing does not in fact automatically lead to insolvency proceedings unless the debtor (or a creditor, when entitled to do so) makes a formal judicial request, filing for the debtor's insolvency. The court is not entitled to declare the existence of insolvency *ex officio.*

An important change introduced in the context of the implementation of the Restructuring Directive, is that the court may now suspend a debtor's voluntary application for insolvency during the Pre-Insolvency Period at the request of either the restructuring expert or creditors holding more than 50% of the debt affected by the Plan, if the court receives evidence that a creditor-supported Plan has been prepared that could be approved. This rule may therefore prevent debtors from frustrating ongoing refinancing negotiations by filing for insolvency, thus allowing viable Plans to be accomplished, as long as the creditors submit the Plan for the court's approval within a month following the debtor's petition for voluntary insolvency.

The court will not admit insolvency petitions filed by creditors during the Pre-Insolvency Period. Petitions filed by creditors after that time will only be admitted if the debtor has not filed for insolvency within one month of the expiry of the Pre-Insolvency Period. If the debtor makes the filing within that period, the insolvency will be considered voluntary, even if the creditor's request for insolvency preceded that of the debtor (see section 7.1).

As opposed to the debtor's insolvency petitions described in the preceding paragraph, existing creditor petitions for insolvency that were admitted for processing by a court before the pre-insolvency filing cannot be suspended, even if a Plan is being negotiated.

4.3.2 Enforcement and acceleration

(A) Stays on enforcement actions

A significant improvement to the pre-insolvency mechanism described in this section 4 was introduced in the Insolvency Law in 2014, when it was established for the first time that, during the Pre-Insolvency Period, debtors would be entitled to benefit from a stay of enforcement actions. Prior to that amendment, the Pre-Insolvency Period only granted debtors additional time to negotiate a restructuring without fear of assuming the consequences of a late insolvency filing. However, throughout the negotiation process, debtors were exposed to the threat of hold-out creditors, who could start individual enforcement actions at any time, endangering the restructuring's success. The current Insolvency Law transposing the Restructuring Directive continues to apply this approach in order to provide a safe harbour for debtors that are in the midst of negotiations with creditors, who can benefit during this process from a temporary stay of individual enforcement actions in order to be able to continue operating or at least to preserve the value of its estate during the negotiations.

In particular, during the Pre-Insolvency Period following the filing of the communication with the court, enforcement actions are stayed, subject to the following:

a) As a general rule, neither judicial nor extrajudicial enforcement proceedings may be initiated to seize or attach assets or rights that the debtor requires to continue its professional or business activities (the so-called "necessary assets"). Previously initiated enforcement proceedings will be stayed. It is not always easy to determine when an asset is necessary to operate the business and, for this reason, this issue needs to be decided by courts on a case-by-case basis. They normally take a flexible approach and consider elements such as cash or credit rights as assets that are necessary to continue to run the business. However, creditors may challenge the court clerk's asset qualification, which the court will hear.

b) At the debtor's request, the court may impose these stays to one or several creditors or classes of creditors in respect of other assets or rights, even if they are not deemed "necessary assets", if doing so could help bring the negotiations to a satisfactory conclusion, provided the restructuring expert, if one has been appointed, has given its consent. The court decision on this suspension may be challenged by a remedy (*recurso de reposición*), exclusively.

c) Subject to a) above, enforcing security in rem over "necessary assets" may be initiated but will be automatically stayed. However, neither financial collateral governed by RDL 5/2005, nor security interests located in another Member State (other than Denmark) (see section 14.1) should be affected by this suspension.

Controversially, the suspension does not, however, affect the enforcement of public claims. As an exception however, if the event that the enforcement of public claims is directed at assets that are necessary for the continuation of the business, a limited stay may be imposed when the asset should be sold at the end of the seizure or enforcement procedure by the court for a maximum of three months, following which the suspension will automatically cease to apply. It is unclear if this deadline may be extended in case the Pre-Filing Period is extended to six months, as this is not expressly foreseen and only three months are referred to.

Likewise, creditors that cannot be subject to the effects of a Plan (see 5.3) cannot be affected by the Pre-Insolvency Filing.

(B) Acceleration

Filing a pre-insolvency request by itself will not entitle creditors to accelerate their claims (i.e. any acceleration or termination event or any provision amending the terms of any indebtedness instrument based exclusively on an insolvency pre-filing will be invalid).

However, creditors will be entitled to demand payment of any due amounts under any third-party personal guarantees, irrespective of whether the debtor has filed for pre-insolvency, including where the creditor is negotiating the Plan. As an exception, filing the communication with the court will suspend the enforcement of personal or in rem guarantees and security that any other company of the debtor's group not included in the notice may have granted, provided the debtor had requested so and evidenced that enforcing those guarantees and third-party security could force the guarantor and the debtor itself into insolvency.

In contrast, setting off claims is possible during the Pre-Insolvency Period (including early acceleration or termination of netting arrangements under the scope of RDL 5/2005, which are not affected by the pre-insolvency filing).

The Pre-Insolvency Period does not interrupt the two-year hardening period commencing with the declaration of insolvency for claw-back purposes. However, the hardening period may begin to accrue from the pre-insolvency filing date in certain cases (see section 11).

4.3.3 Contract continuation

Filing for pre-insolvency will not per se affect the debtor's bilateral contracts with outstanding reciprocal obligations, which will remain in force. Any provisions setting forth the early termination, modification or suspension of such contracts following a pre-insolvency filing, a request to stay enforcement actions or any other related circumstance will become void and unenforceable.

Those contracts that need to remain in force for the debtor to be able to continue its business activities cannot be suspended – nor terminated early or modified during the Pre-Insolvency Period, even on the grounds of prior breaches that are unrelated to the pre-insolvency filing. A party affected by such suspension may ask the court to review this if it considers that the contract is not necessary for the continuation of the debtor´s activity.

Hedging agreements within the scope of RDL 5/2005, as well as energy, services or goods contracts that the debtor needs to continue running its business activities and that are negotiated in organised secondary markets so that they can be replaced at any time at market value, can be terminated early or accelerated and will not be affected by the pre-insolvency filing.

4.3.4 Mandatory dissolution

During the Pre-Insolvency Period, the obligation of the debtor's directors to call a shareholders' meeting to approve a resolution to dissolve the company if it is in a capital impairment situation will be suspended (see section 3.3).

4.4 EXTENSIONS

Before the end of the initial three-month grace period, either the debtor, or creditors holding more than 50% of the debts that the Plan may affect at that time (net of any credits that would qualify as subordinated claims in an insolvency situation), may request the court for an additional three-month extension, provided the restructuring expert, if one is appointed, issues a favourable report in support of the request.

The debtor must also provide either evidence of the agreement, executed by all creditors representing the abovementioned majority, or execute a personal responsible statement informing such majority has been achieved.

The request must indicate the state of the negotiations and the matters pending agreement, as well as the identity of any creditors that have expressly opposed the extension request or are noncommittal about it.

The court's decision to grant the extension will be published in the Public Insolvency Registry (even if the pre-insolvency filing was made confidential), and will be sent to all courts and authorities where enforcement actions had been stayed. The court's decision rejecting the extension cannot be challenged, and the one accepting the extension may be challenged through a remedy (*recurso de reposición*), exclusively.

The court may lift the grace period extension at the request of the debtor, the restructuring expert or creditors holding more than 40% of the debt that the Plan may affect at that time (net of any credits that would qualify as subordinated claims in an insolvency situation), or any creditor that proves that such extension no longer fulfils the objective of supporting the Plan negotiations.

Any creditor may ask to be excluded from the effects of the grace period extension if it could be unfairly prejudiced by it, and particularly if it could lead to its actual insolvency or a significant loss of the value of its collateral.

5

Restructuring plans

5 Restructuring plans

5.1 THE PREVIOUS SPANISH SCHEME

Until 2011, the Spanish law did not have an equivalent to the English scheme of arrangement or any other type of cram-down mechanism for preventive restructuring processes. This placed Spain at a competitive disadvantage with other legal systems. As a result, certain Spanish companies with links to England were forced to apply for schemes of arrangement in the courts of England and Wales to cram down blocking minority creditors (e.g. *La Seda de Barcelona, Cortefiel, Metrovacesa*).

In 2011, a reform was passed that created a mechanism named *homologación judicial* as a way to effectively cram down dissenting creditors. However, the 2011 reform failed to achieve that goal and certain companies (e.g. *Cortefiel*) continued to apply for English schemes of arrangement whenever possible. There were several reasons why it failed: (a) only "financial entities" were affected by the mechanism and, among other issues related to ambiguity, it was unclear whether professional lenders other than credit institutions (e.g. funds) fell under this category; (b) at the time, only a deferral of up to 3 years could be imposed on dissenting creditors (which was patently insufficient to achieve an effective restructuring); and (c) secured creditors were shielded from the effects of this mechanism.

After a year in force, it was clear that the *homologación judicial* was not as useful as intended. In June 2013, a Barcelona court interpreted the mechanism in a creative manner that allowed the Spanish steel company Celsa to restructure its debt. The court reasoned that the law did not impose a limit on the duration of the deferral but merely on the stay applicable to enforcement actions. More importantly, the court concluded that, as the consent of a majority of the lenders was required to enforce the security package, and the majority expressly adhered to the refinancing, dissenting creditors were not effectively secured and could therefore be subject to *homologación judicial.* This landmark case proved that more drastic measures were needed to allow companies to effectively restructure their debt.

The *homologación judicial* mechanism was significantly amended in 2014 to do away with the impediments outlined above and align it with restructuring tools available in other jurisdictions. Although the mechanism has subsequently been modified and improved various times, it has largely retained the key features introduced in 2014. Even the former Insolvency Law, which was enacted in 2020 to recast and improve the previous legal framework governing insolvency in Spain, opted to leave the 2014 framework practically unchanged.

Under the former Insolvency Law, *homologación judicial* enabled a court to approve specific qualifying refinancing agreements so that they would be protected against claw-back actions and could bind certain dissenting creditors (**"Previous Spanish Scheme"**). The Previous Spanish Scheme (i) applied to any creditor holding a "financial claim" (irrespective of whether the creditor was a regulated entity); (ii) could affect both unsecured and secured debt, provided specific qualified majorities were met; and (iii) allowed dissenting creditors to be crammed down in connection with a wide array of contractual arrangements depending on the majority obtained (e.g. debt extensions up to 10 years; write-offs; conversion of debt into any type of instrument, including subordinated or convertible loans; and debt-to-equity and debt-to-asset transactions).

The Previous Spanish Scheme proved to be a flexible, effective tool that allowed numerous companies to restructure their debt, including as part of cross-border restructuring processes (e.g. *Abengoa, FCC* and *Isolux*). However, although the Previous Spanish Scheme was a significant improvement, it was still limited in a number of ways. Firstly, it could only apply to holders of financial claims, thus excluding trade claims (*créditos comerciales*) and public claims (*créditos de derecho público*), among others. Secondly, a closed-ended list expressly regulated the measures that could be imposed on dissenting creditors, but did not cover all the situations and measures needed to implement a successful restructuring (it was particularly silent on corporate restructurings, sales and restructuring of assets, rather than liabilities). Finally, equity holders could not be dragged to the provisions of the Previous Spanish Scheme, although the former Insolvency Law contained specific mechanisms designed to discourage their dissent.

The transposition of the Restructuring Directive into Spanish law has given the legislature an opportunity to take a step forward in favour of preventive restructuring procedures, by improving the *homologación judicial* procedure and resolving most of the Previous Spanish Scheme's limitations.

Lastly, it is worth noting that insolvency proceedings qualifying as subsequent upon a Previous Spanish Scheme will continue to be ruled by certain sections of the former Insolvency Law, and not by the new Law, which may affect certain matters such as claw back, new money, shareholders liability and the jurisdiction of the court to declare the insolvency.

5.2 SCOPE AND REQUIREMENTS

5.2.1 Actual and imminent insolvency; likelihood of insolvency

A core principle in the Restructuring Directive is that debtors should be able to address their financial difficulties at an early stage, at a time when it appears likely that insolvency can be prevented and the viability of the business ensured. This means that preventive restructuring frameworks should be available before the debtor fulfils the conditions to be considered insolvent under domestic law.

Under the former Insolvency Law, only debtors in actual or imminent insolvency could use the Previous Spanish Scheme (unlike in other systems such as the English scheme of arrangement). A debtor therefore had to be in a state of financial distress to be able to cram down creditors under the Previous Spanish Scheme. The former Insolvency Law also required (and the Insolvency Law continues to require) the debtor not to have been already declared insolvent by the court.

In line with the Restructuring Directive, the Insolvency Law now covers situations where there is a "likelihood of insolvency", thus allowing debtors to react and initiate restructuring processes earlier (see section 3.2). The underlying intention of this definition is that debtors who are solvent and not facing either financial difficulties or at evident risk of not being able to continue their business should not casually use restructuring tools to pursue other hidden agendas or for self-serving purposes. Debt restructuring is therefore not an option for a (foreseeably) solvent business.

5.2.2 Concept of a "restructuring plan" and minimum content

The Insolvency Law also establishes, in line with the Restructuring Directive, the legal concept of a "restructuring plan" (the **"Plan"**), as the cornerstone of preventive restructuring frameworks. As explained previously, Plans are available to debtors suffering from financial (or even non-financial) difficulties that make their insolvency likely. The Insolvency Law defines the scope of such Plans more broadly than the scope of the refinancing agreements that were eligible for the Previous Spanish Scheme under the former Insolvency Law.

As opposed to the Previous Spanish Scheme, which only allowed a closed-ended list of measures to be imposed on dissenting creditors, a Plan under the new Insolvency Law may contain almost any restructuring alternative, provided it is sufficient and proportionate to ensure the viability of the business and its continuation as a going concern. The debtor and its creditors may agree on any type of measure deemed necessary to effectively restructure the debtor's business, including changes in the composition, conditions or structure – not only of the debtor's liabilities, but also of its assets or any part of its capital structure. This could include sales of assets, parts of the business or even the entire business as a going concern, as well as any other necessary operational changes, or a combination of the same.

In a Plan, the parties can therefore agree on measures that were not expressly included in the former Insolvency Law (e.g. mergers, demergers and other corporate transactions; potential changes in the debtor; addition or release of debtors or other obligors; divestments of assets or businesses with the prior release of guarantees and security interests). The Plan must nevertheless set out the reasons why it has a "reasonable prospect of preventing the insolvency" of the debtor and ensuring the viability of its business, including the necessary pre-conditions for its success.

In addition, the Plan must include, at a minimum:

a) the debtor's identity;

b) the identity of the restructuring expert (if one is appointed) (see section 5.7.2);

c) a description of the debtor's financial situation and the situation of its employees, as well as a description of the causes and extent of the debtor's financial difficulties;

d) the debtor's assets and liabilities at the date of the Plan;

e) the affected creditors, identified individually or by class, stating the value of their claims and interests in each class (see sections 5.3 and 5.4);

f) the contracts with outstanding reciprocal obligations that would be terminated as a consequence of the Plan (see section 5.6.4);

g) if the shareholders' rights are affected, the face value of their shares;

h) the identity of unaffected creditors or shareholders, either individually or by class, stating the reasons for their exclusion;

i) a description of the proposed operational restructuring measures and their term, as well as estimated cash flows and financial-debt-restructuring measures proposed in the Plan, including interim and new money, as well as a justification of their necessity and the consequences for employees;

j) the conditions necessary for the Plan to succeed and the reasons why it has a reasonable prospect of preventing the insolvency;

k) information to provide and consultations to make with employees, if they are necessary under domestic law; and

l) if public claims are affected, evidence of the debtor's compliance with tax and social security obligations, attaching the relevant official certificates issued by the governmental authorities.

Any Plan proposal must be notified to all affected creditors individually (by mail or electronically) or, if that is not possible when their identity or address are unknown, through the debtor's website or, as a last resort (if requested by the restructuring expert when appointed, or by the applicants of the court approval (*homologación judicial*)), by being published in the Public Insolvency Registry. In case of public creditors, notices shall be served in any event through the official website (*sede electrónica*) of the relevant governmental authority. As to syndicated claims, the Plan proposal must be notified according to the provisions of the syndicated agreement.

A restructuring expert may be appointed on a case-by-case basis to assist the debtor and creditors in negotiating and drafting the Plan (see section 5.7.2.). However, the debtor always remains in possession while a Plan is being negotiated and filed.

The Plan and other related documents must be formalised in a public document (*formalizado en instrumento público*), attaching a certificate issued by either the restructuring expert (if one is appointed), or otherwise by the debtor's auditor, evidencing that the relevant majorities required for approval have been met (these majorities are calculated individually with respect to each debtor company, even if it belongs to a group of companies).

5.2.3 Requirements for court-approval

A commercial court must approve the Plan (i.e. *homologación judicial*) in any of the following cases: (i) dissenting creditors or dissenting classes of creditors who did not vote in favour of the Plan or the debtor's shareholders need to be crammed down (see sections 5.6.1, 5.6.2 and 5.6.3); (ii) certain contracts need to be terminated for the benefit of the restructuring (see section 5.6.4); or (iii) the interim money, new money or the Plan itself, as well as its implementing transactions, need to be protected against claw-back actions (see sections 5.6.6, 5.6.7) and receive the preferred ranking provided by the Insolvency Law (see sections 10.2m) and 10.3.2e)).

The court should approve a Plan as long as:

a) the debtor is in a likelihood of insolvency, imminent insolvency or actual insolvency, and the Plan offers a reasonable prospect of avoiding an insolvency declaration (*concurso*) and ensuring the debtor's viability in the short and medium term;[2]

b) the Plan complies with the minimum content and formal requirements (see section 5.2.2);

2.- For these purposes, according to the Restructuring Directive, Member States can introduce (or maintain) a viability test under domestic law. Spain has not introduced such a viability test, but the Plan must set out why it has a "reasonable prospect of preventing the [debtor's] insolvency" and ensuring the viability of its business, including the necessary pre-conditions for its success.

c) the Plan has been approved by all classes of affected creditors (except where a cross-class cram down needs to be sought, in which case a different rule will apply) (see sections 5.6.1 and 5.6.2), as well as by the debtor or, if applicable, its shareholders (see section 5.6.3 below);

d) all claims within the same class are treated equally (*paritario*); and

e) the Plan has been notified to all affected creditors in accordance with the formalities set forth in the Insolvency Law.

In addition, the court-approval request must comply with the following general rules:

a) the debtor or any affected creditor supporting the Plan must request the court-approval;

b) debtor consent is only needed when the debtor is an individual or a small or medium-sized enterprise (see section 5.10);

c) if the debtor is in a state of actual insolvency, the Plan's court approval can be requested as long as there is no creditor's "involuntary" insolvency petition (*solicitud de concurso necesario*) admitted for processing (*admitida a trámite*) (see section 7.1); and

d) if a court has approved a Plan, no new requests regarding the same debtor will be admitted for a period of one year as from the date when the previous Plan was requested for court-approval.

5.3 AFFECTED CLAIMS

The Previous Spanish Scheme could only affect financial claims. One of the major improvements resulting from the current Insolvency Law (following the implementation of the Restructuring Directive) is that the effects of a Plan can now be imposed on most types of creditors and claims (subject to specific exceptions), including trade creditors, one or multiple classes of creditors and, with certain exceptions, even shareholders. Public creditors can only be subject to the Plan if very strict requirements are complied with (as further explained below), which in practice is going to make extremely difficult to restructure tax or social security claims.

The range of "affected claims" can comprise any claims that, pursuant to the Plan, undergo changes to their terms and conditions, including their maturity, principal amount or interest; conversion into profit-participating loans (*préstamos participativos*), subordinated loans, shares or any other instrument with a different rank or conditions; amendment or cancellation of their guarantees or security interest; or even a change of debtor or governing law.

The debtor and its creditors therefore have some discretion to decide which creditors/claims will be affected and which will not, but they will need to specify the reasons for this choice which cannot be arbitrary and must be properly justified in the Plan. Otherwise, affected creditors could attempt to challenge the court-approved Plan.

The Insolvency Law has thus ended a longstanding debate on whether the Previous Spanish Scheme could only affect a specific sub-group of creditors. It is also now clear that any type of claim, including contingent or conditional claims, can be affected. Recovery or subrogation claims (i.e. those corresponding to the guarantor or to the provider of collateral following enforcement of the guarantee or security interest) are affected in the same manner as the guaranteed or secured claim, if provided for by the Plan (see section 5.6.5).

However, the Plan cannot affect some specific claims or can only affect them to a certain extent:

a) *Public claims.* After intense debate between academics and market practitioners, the Insolvency Law allows public claims to be crammed down, but subject to the following conditions: (i) public claims shall be necessarily grouped into a separate class; (ii) the debtor, both when filing for pre-insolvency to start the negotiations over a Plan (see section 4) and when requesting the court to approve the Plan, must be up to date with its tax and social security payments, which must be evidenced by attaching the relevant official certificates issued by the relevant governmental authority (and since this is not very likely with insolvent companies, this condition will considerably restrict the cram down of public claims); and (iii) the public claims in question must have originated less than 2 years before the date of the pre-insolvency filing.

   The range of effects that may be imposed on affected public-law claims is also significantly limited, as there is a long list of changes that cannot be imposed on public creditors, namely, haircuts; changes of applicable law; changes of debtor; amendments or releases of guarantees securing the public claims; or conversions of debt to equity, to profit-participating loans or to another financial instrument of a different rank or type.

   In practice, therefore, the main effect a Plan can have on public creditors is deferring payment obligations, which in turn is limited to:

   (i) in general, up to twelve months after the court approves the Plan, or

   (ii) up to (only) six months after the court approves the Plan if the public creditor and debtor had reached an agreement to defer payment obligations before the Plan was signed.

   Furthermore, if pre-insolvency has been filed for (see section 4.2), all public claims must be repaid in full within eighteen months of that filing.

   These restrictions significantly constrain the possibility of cramming down public claims and puts public creditors in a situation of clear advantage versus any other type of creditors .

b) *Financial collateral*[3]. A Plan can neither affect financial collateral arrangements governed by RDL 5/2005 nor restrict the creditor's capacity to accelerate the secured claims up to the value of the collateral. This special protection of Spanish financial collateral arrangements

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3.- Collateral (i) granted over securities and equivalent financial instruments (*valores negociables y otros instrumentos financieros*), cash in bank accounts or, in certain cases, credit rights held against financial institutions; (ii) that secures the fulfilment of principal financial obligations; and (iii) that complies with the requirements of Royal Decree-Law 5/2005, which transposed into Spain Directive 2002/47/EC on financial collateral arrangements (**"RDL 5/2005"**).

is coherent with Directive 2002/47/EC on financial collateral arrangements, in line with other jurisdictions (such as Luxembourg) and discourages forum shopping. It is worth noting that, regardless of their legal status, the right of these types of creditors is often affected or restricted by intercreditor agreements.

c) *Netting and derivative agreements.* Netting arrangements (also governed by RDL 5/2005) can be accelerated despite a Plan having been approved, but the resulting net amount will be subject to the Plan. This shall be understood without prejudice to the right of separate enforcement of the financial collateral that may secure the netting arrangement.

   In contrast, future claims arising from derivative agreements that are to remain in force after the Plan is approved cannot be affected.

d) *ICO-guaranteed loans.* Many debtors undergoing a restructuring process may have previously received loans from financial institutions (acting as primary lenders) benefitting from a partial *guarantee* from the Spanish Official Credit Agency (*Instituto de Crédito Oficial*) (**"ICO"**) (a state-owned entity) in connection with the financial assistance programs approved by the Spanish government in 2020 to support companies affected by the COVID-19 lockdown or in 2022 to support companies affected by the Russian invasion of Ukraine.

   The Spanish State's rights under an ICO-guaranteed loan (which may be actual or contingent depending on whether the ICO guarantee has been enforced by the primary lender)[4] constitute financial claims which may be affected by a Plan. However, the Insolvency Law prohibits primary lenders from voting in favour to a Plan that involves, in respect of these claims:

   (i) any changes that cannot be imposed on public claims as explained in paragraph (a) above, or

   (ii) unless the prior approval from the Spanish Tax Agency has been obtained, any deferment or haircut of the claimed or acknowledged amounts.[5]

   For this reason, restructuring debtors with ICO-guaranteed loans may be a complex endeavour, particularly if the primary lenders that have granted these loans represent a significant part of the debtor's liabilities. In such cases, unless the Spanish Tax Agency takes a flexible stance and acts quickly to approve the Plan, the parties may need to consider ad hoc alternatives to achieve a successful restructuring (e.g., carving out ICO-guaranteed loans from the scope of the Plan; the primary lenders voting in favour of the

4.- If an ICO guarantee is enforced by the primary lender, the Spanish State will subrogate into the primary lender's rights against the debtor in an equivalent amount, but the primary lender will continue to be in charge of the recovery process for the full amount of the loan (with the same repayment conditions being applicable pari passu to both the State-backed and unbacked parts of the loan).

5.- A failure to obtain this authorisation may result in the primary creditor losing the ICO guarantee or (if the guarantee has been already enforced) the Spanish State's rights against the restructured debtor not being deemed affected by the Plan.

Plan even if they risk losing the ICO guarantee, or the required cram-down majorities being achieved without the vote from the primary lenders of the ICO-guaranteed loans).

e) *Others.* The Plan cannot affect family maintenance claims (*créditos por alimentos*), tort or extra-contractual liability claims and employment claims (other than those that senior executives hold, which may be discontinued with a reduction of any due compensation as further explained below).

For the purposes of calculating the relevant majorities (see section 5.6):

a) each claim will be valued pursuant to its principal amount plus the due and unpaid interest and surcharges up to the date the Plan is formalised in a public document;

b) facility credit agreements (*contratos de crédito*) will be valued pursuant to the amount drawn as at the date the Plan is formalised in a public document;

c) claims in other currencies will be converted into euro at the official spot rate available at the date the Plan is formalised in a public document;

d) contingent claims, litigious claims and claims subject to a condition precedent will be valued pursuant to their maximum amount (unless the Plan stipulates a lower amount). If such claims crystallise, they will only be affected in the amount included in the Plan; and

e) the value of secured claims will be, at a maximum, the Security Value (calculated as described in section 10.3.1) of their collateral. Any shortfall will be considered an unsecured claim (and, therefore, as belonging to a different class).

5.4 FORMATION OF CLASSES OF CREDITORS

Following the Restructuring Directive, creditors must be grouped into distinct classes if there is a "sufficient commonality of interest amongst creditors making up one class, according to objective criteria".

The Insolvency Law has opted to be flexible in this regard, so as to ensure that substantially similar claims are treated equally and that Plans can be adopted without unfairly prejudicing the rights of affected parties.

Claims that would have the same payment ranking in an insolvency scenario are deemed to have a "commonality of interest"; however, in some cases it may be justified to include claims with the same payment ranking in different classes. According to the Insolvency Law some factors that may be considered for this purpose are (i) whether the claims are of a financial or non-financial nature, (ii) the existence of conflicts of interest among creditors belonging to different classes, and (iii) how the Plan will affect the claims. Creditors who are small and medium size enterprises and whose claims would decrease in value by 50% pursuant to the Plan shall also be grouped into a separate class.

For class-formation purposes, the following types of claims will be considered financial claims: (i) loans or credit facilities, irrespective of the type of creditor (banks, investment funds, non-financial creditors, etc.); (ii) claims held by financial entities, whether supervised or not, including insurance companies for credit risk insurance or surety insurance; and (iii) other similar agreements such as financial leases, sales with a retention of title, bank guarantees or counter-guarantees, *factoring or confirming.* Trade claims (even with a deferred price) or public claims will never be treated as financial claims, unless they have been assigned to a financial entity. This being said, nothing impedes to group into a same class financial and non-financial claims if they have the same ranking and a "sufficient commonality" of interests.

At a minimum, secured claims must be allocated to a separate class than unsecured claims (this is consistent with the approach taken for the Previous Spanish Scheme). Public claims will also constitute a separate class among the classes with the same payment ranking.

How claims affected by the Plan are distributed into different classes will be key for the success of the Plan, as it will be relevant both for voting and to be able to cram-down not only claims pertaining to the same class (intra-class cram-down), but also those belonging to separate classes (cross-class cram-down). A careful balance will need to be struck to avoid the temptation of creating an excessive number of creditor classes, which may make it harder to implement the Plan in practice.

In practice, whoever is proposing the Plan will have discretion to form the different classes of creditors, provided the minimum requirements explained above are met. However, the court will examine the voting rights and formation of classes during the Plan-approval process and an unjustified formation of classes can be subject to challenges. To give the parties legal certainty, the Insolvency Law allows the debtor and creditors holding more than 50% of the affected claims by the Plan to voluntarily request the court to review and confirm upfront the formation of one or several classes before potentially approving the Plan. Such request must evidence that the class formation's proposal was notified to the affected parties, who were also informed of the filing of the confirmation petition.

This *ex-ante* confirmation may be advisable given how complex class formation can be and the potential scope for challenges of a court-approved Plan if the affected parties decide that the formed classes are incorrect. In fact, this has proven to be a highly litigated field in jurisdictions where class formation was already an option before the current text of the Insolvency Law was enacted in Spain. However, requesting for this *ex-ante* confirmation may delay negotiations until the court confirms the class formation, which could hinder the refinancing. For this reason, this option may be used in very complex cases with debtors who are in a situation of likelihood of insolvency (but whose insolvency is not yet actual or imminent).

If this *ex-ante* confirmation procedure is followed, affected creditors may challenge the class formation within 10 business days following the date on which the court acknowledges its jurisdiction to review and confirm the class formation. The court must rule on the challenge within 5 business days of the end of that ten-day challenge period. No remedy is allowed against this ruling. Once the court confirms the class formation, creditors will not be able to use it to challenge the court's subsequent approval of the Plan.

5.5 EXERCISE OF VOTING RIGHTS BY EACH CLASS

All affected creditors will be entitled to vote on the Plan. The Restructuring Directive gave Member States the option to exclude from this voting right (i) equity holders; (ii) creditors whose claims rank below the claims of ordinary unsecured creditors in the normal ranking of liquidation priorities; or (iii) other parties related to the debtor or that are in some way subject to other types of conflicts of interest pursuant to domestic law.

Under the Insolvency Law, Spain has opted to exclude category (iii) in some cases (see section 5.6.7) and is silent on category (ii), which should therefore be deemed included. With respect to category (i), equity holders have not been included as a separate creditor class, but shareholder approval will be required in some cases (see section 5.6.3).

5.6 EFFECTS

5.6.1 Approval by all classes. Intra-class cram-down

Majorities will be calculated in respect of each class, based on the votes of affected creditors within that class and, as stated above, must be evidenced through a certificate issued by the debtor's restructuring expert (if appointed) or the auditor.

In general, the majorities must be obtained in all of the affected classes (otherwise, a cross-class cram-down will need to be sought – see section 5.6.2) and must represent the following proportions over the total value of the claims ascribed to the class:

Type of class	Required majority
All classes (other than secured classes)	> 2/3 of the total liability represented by the claims in the class
Classes composed of claims secured by rights *in rem*	≥ 3/4 of the total secured liability represented by the claims in the class[6]

6.- See section (5.3e)) A class composed of "secured claims" will only include the Security Value (see section 10.3.1). This means that, depending on the value of the collateral, one creditor can be treated – in respect of the same debt – as a holder of both a secured and an unsecured claim (in the latter case, in connection with the portion of its claim that exceeds the Security Value).

The Restructuring Directive offered Member States the option to also require an additional majority linked to the number of affected parties in each class (i.e. a headcount), but the Insolvency Law does not require such additional majority.

The intra-class cram-down of dissenting claims will function as follows: if the corresponding majority is obtained within a class of creditors, the Plan will be deemed to have been supported by the entire class of creditors. If the court ultimately approves the Plan, it will apply to all claims within the class (including those that dissenting creditors hold).

There is a special rule for calculating majorities in syndicated facilities (which the former Insolvency Law already included and has remained, albeit modified). When the Plan affects syndicated claims, all creditors holding an interest in the syndicated claim will be deemed to have approved the Plan if creditors holding the voting majorities set out above, or a lower majority if so established in the syndicated facility agreement, vote in favour of the Plan (**"Syndicate Voting Rule"**).

If the required majorities are not reached, the vote of each creditor in the syndicate will be counted separately to verify whether the class to which each such creditor belongs has approved or rejected the Plan. However, if the syndicated claims have formed a separate class on their own, the Plan will be deemed rejected by that separate class. In addition, dissenting creditors under the syndication agreement will be entitled to oppose or challenge the Plan unless the agreement provides otherwise.

5.6.2 Approval by some (but not all) classes. Cross-class cram-down

All voting classes of creditors do not need to accept a Plan for it to be adopted. This is undoubtedly one of the most significant changes the Insolvency Law has introduced following the provisions of the Restructuring Directive.

If the Plan meets all the requirements set out in section 5.2.3 (final paragraph) other than achieving a majority in all creditor classes, the court may still approve the Plan so that it becomes binding for both (i) dissenting creditors in classes where a majority has been achieved (i.e. intra-class cram-down); and (ii) creditors in classes where no majority has been achieved (i.e. cross-class cram-down).

For the latter to happen, the Plan must meet one of the following two requirements:

a) it must be supported by a simple majority of the classes, provided at least one of those classes is composed of claims that would benefit from a general or special privilege (i.e. secured claims) if the debtor were declared insolvent; or, failing that,

b) it must be supported by at least one of the classes that is "in the money" (i.e. any class that would, upon a valuation of the debtor as a going concern, be reasonably presumed to receive any payment[7] according to the ranking of liquidation priorities applicable under the amended Insolvency Law). In this case, the valuation of the debtor as a going concern must be supported by a report issued by the restructuring expert (see section 5.7.2) and submitted to the court.

The Restructuring Directive established the principle that dissenting voting classes of affected creditors had to be treated at least as favourably as any other class of the same rank and more favourably than any junior class (the "relative-priority rule"). Member States were however allowed to replace that rule with the "absolute-priority rule" pursuant to which when a more junior class receives any payment – or maintains any interest – under the Plan, the senior dissenting voting class must be repaid in full by the same or equivalent means.

The Spanish Insolvency Law has opted for the absolute-priority rule, with some exceptions. As a general rule, a dissenting class subject to a haircut will be allowed to challenge the Plan based on a more junior class (or the equity holders) receiving any payment from – or maintaining any interest in – the debtor under the Plan. The Insolvency Law however, in line with the Restructuring Directive, allows confirmation of the Plan even if the absolute-priority rule is not met, when necessary to achieve the viability of the business and where the Plan does not unfairly prejudice the rights or interests of any affected creditors.

The effects of a cross-class cram-down are subject to some limitations. If the Plan affects a class of claims secured by rights in rem, and that class has rejected the Plan by a majority of dissenting votes over favourable votes, any secured dissenting creditor of that class will have the right to:

a) enforce the underlying security interest (which will accelerate the underlying secured claim) within a month of the court ruling approving the Plan being published in the Public Insolvency Registry. If the proceeds obtained from the enforcement:

    (i) are lower than the Security Value of the collateral (see section 10.3.1) set out in the Plan, the creditor will keep those proceeds in full. Any deficit will remain unsatisfied, or

    (ii) are higher than the Security Value collateral value set out in the Plan, but lower than the original claim, the creditor will keep those proceeds in full. Any excess will be deducted from the amounts that the creditor's unsecured part of the claim would be entitled to receive pursuant to the Plan; or

b) alternatively, and only if expressly provided in the Plan, the dissenting creditor may wait to receive a cash payment for the amount of the secured claim that is covered by the Security Value of the collateral within no more than 120 days. If payment is not received in a timely manner, the affected creditor will be entitled to enforce the security interest.

7.- The Restructuring Directive adds the language "or maintained any right or interest". The Insolvency Law does not include this wording.

5.6.3 Equity holders

As described in the Foreword, shareholders of a debtor who is undergoing a restructuring process are often "out of the money". This is not only because equity is subordinated to debt, but also because, as a general rule, all other (non-equity) claims (except for trade claims or other non-financial claims) held by shareholders who qualify as "specially related parties" of a debtor are also subordinated if the debtor is declared insolvent (see section 10.4). Due to shareholders' limited prospects of recovery, their main goal in a restructuring context is to avoid the dilution of their shareholding interests in the debtor. Plans involving debt capitalisations or equivalent equity-like solutions (such as converting claims into convertible loans) are therefore likely to face opposition from existing shareholders.

While the former Insolvency Law contained some incentives for shareholders to support restructuring measures, one of its greatest limitations was that the effects of the Previous Spanish Scheme could not be imposed on the debtor's shareholders, other than in their capacity as creditors. Their vote remained necessary to approve a number of typical restructuring measures that require shareholder involvement in accordance with Spanish corporate legislation. These measures included share capital increases or reductions, debt capitalisations, articles of association amendments, mergers/de-mergers and other structural modifications, and disposals or contributions of essential assets (*activos esenciales*), namely those representing more than 25% of the debtor's assets. This implied that controlling shareholders had a veto over key aspects of the restructuring and only minority shareholders could be dragged to the outcome of the restructuring in those cases where the support of the controlling shareholders or those reaching the required majorities was achieved. To achieve their consent, even if they were out of the money, at least a small part of the value need to be shared with them.

Departing from the former regime, the Insolvency Law now contains three distinct sets of measures aimed at restricting shareholders' bargaining power and ensuring that they will not unreasonably frustrate or impede the adoption, approval or implementation of a Plan.

Firstly, the Insolvency Law restricts shareholders' ability to frustrate the adoption of a Plan:

a) *Shareholder approvals required under corporate law do not apply in actual or imminent insolvency scenarios.* If the debtor is in actual or imminent insolvency situation when the Plan is adopted (in which case the debtor's shareholders are likely to be "out of the money"), shareholder approval will not be needed[8], even if expressly required by corporate law rules in order to implement some of the effects of the Plan. If the Plan contains measures that require, pursuant to corporate law, shareholder approval that has not been obtained, the debtor's directors or any other person the court appoints will have authority to directly implement those measures (even if they involve amending the

8.- Corporate law rules that require shareholders to approve one or more measures of the Plan will only continue to apply in a "likelihood of insolvency" scenario.

debtor's articles of association) by simply exhibiting the court ruling approving the Plan (*auto de homologación*) to the commercial registrar or any other relevant authority. Thus, while the debtor's shareholders are not formally treated as a class of creditors, in some instances they can be affected by the court-approved Plan, even if they did not vote for it or actually voted against it.[9]

b) *Only in a limited set of cases does the Insolvency Law expressly require that shareholders approve the Plan.* Other than in the scenario described in a), the Insolvency Law only requires the debtor's shareholders to approve the Plan in the following two cases: (i) shareholders who are personally liable for the debts of a corporate debtor who is in an insolvency situation, and (ii) shareholders of small and medium size debtors (see section 5.10).

Secondly, the Insolvency Law facilitates the approval of Plans by the general shareholders' meeting of corporate debtors (public limited liability companies (*sociedades anónimas*), private limited liability companies (*sociedades de responsabilidad limitada*) or partnerships limited by shares (*sociedades comanditarias por acciones*). Among other special rules: (i) the minimum periods to call the meeting are shorter than usual (e.g. 10 days in general,[10] or 21 days if the debtor's shares are listed in a regulated market); (ii) the meeting may even be held after the request for the court's approval of the Plan is submitted (in which case the court will wait until the meeting is held to rule on the request); (iii) whether to approve or reject the Plan must be the only item on the meeting's agenda and shareholders' information rights will be limited to that item; (iv) a mere ordinary majority will suffice for the shareholders to approve the Plan and its measures, and thus no special quorums or majorities will apply, even if provided for in other legislation or the debtor's articles of association; (v) if structural modifications are to be adopted pursuant to the Plan (e.g., mergers, de-mergers, segregations), the general corporate law opposition right in favour of certain creditors will not apply, and (vi) if the debtor is in actual or imminent insolvency, its shareholders will not benefit from corporate pre-emption rights over new shares issued pursuant to share capital increases (particularly, if those are adopted simultaneously with a prior reduction of the share capital to zero or to a figure below the minim required share capital that is provided in the Plan). However, any other corporate law requirements and procedures that are unrelated to shareholder decision-making or protecting creditors will apply.

9.- While recognising that the interests of shareholders and other equity holders must be protected, the Restructuring Directive required that Member States adopt measures to ensure that they cannot unreasonably obstruct the implementation of a Plan that would result in the debtor becoming viable again. The Restructuring Directive provided two alternatives for achieving this: (a) equity holders could be considered as a separate class of creditors for the purposes of voting on a restructuring agreement; or, alternatively, (b) equity holders could be excluded from the right to vote on the Plan. The Insolvency Law has opted somehow for the latter alternative: shareholders are entitled to vote in accordance to any applicable corporate laws, but a Plan can be imposed on them if they vote against it.

10.- This is much shorter than the default periods under Corporate Law (which can be extended in the company's articles of association) of (i) one month in public limited liability companies and partnerships limited by shares, or (ii) 15 days in private limited liability companies.

Thirdly, special rules apply to shareholders who oppose the Plan:

a) *If the general shareholders' meeting has approved the Plan but not unanimously:* shareholders who did not vote in favour of the Plan may challenge the resolution of the general shareholders' meeting, by following the procedure and requirements for dissenting creditors to challenge the Plan described in section 5.8.1 (C) (and this challenge by one or more shareholders will be joined with any challenges creditors bring). The ordinary corporate law procedure to challenge company resolutions will not apply.

b) *If the general shareholders' meeting (or sole shareholder) has not approved the Plan:* shareholders (or the sole shareholder) will be entitled to challenge the Plan on the grounds described in section 5.8.1(C). If the shareholders' consent was required to approve the Plan (as described above), but that consent was not obtained, only those shareholders who voted against the Plan will be entitled to challenge it.

Lastly, it is worth noting that the Insolvency Law has not imported the Restructuring Directive's term "equity holders", which is broader than "shareholders" and refers to all persons who have an ownership interest in a debtor or a debtor's business, including a shareholder, insofar as the person is not a creditor (e.g. holders of warrants or other instruments potentially giving access to a debtor's share capital). It is still too early to predict how the courts will treat equity holders who are not shareholders.

5.6.4 Continuation and restructuring of contracts

The former Insolvency Law provided that a declaration of insolvency would not affect the debtor's contracts, which would remain in force (see section 9.2). The Insolvency Law has kept this contract continuation principle; in fact, it has gone further and extended its scope to pre-insolvency filings (see section 4.3.3) and Plans.

This principle has two main aspects:

a) The mere judicial approval of a Plan will not affect bilateral contracts with outstanding reciprocal obligations at that time – they will remain in force.

   In particular, clauses under which a contract can be amended, suspended or terminated early because a Plan is filed or approved by a court (or any other similar or related circumstance) are void and unenforceable.

b) Contracts that are deemed necessary to ensure the continuity of the debtor's business cannot be amended, suspended or terminated due to a change of control in the debtor resulting from the implementation of the Plan. This will be helpful in debt-to-equity transactions or sales of businesses as a going concern adopted within the framework of a Plan whereby creditors or a third party take control of the debtor's equity.

But there are also some new exceptions to the principle of continuation of bilateral contracts that aim to ensure a Plan's success:

a) *Executory contracts.* While the Plan is being negotiated, the debtor may request that an executory contract (i.e. a contract under which both parties have outstanding reciprocal obligations) be amended or terminated if necessary to achieve the restructuring and prevent the debtor's insolvency. The parties will then negotiate the terms of the amendment or effects of the termination and, failing an agreement, the (future) Plan may establish the early termination of the executory contract. Any amounts one contractual party owes another as a result of the early termination (including penalties and liquidated damages) may be treated as a claim affected by the Plan. This could prove useful, for instance, to terminate lease agreements with excessive rents or supply agreements or deferred purchase agreements with high prices and, in general, any other relationships entailing a cost that cannot be borne by the debtor.

b) *Contracts with senior executives.* The Plan may suspend or terminate contracts between the debtor and its executive directors (i.e. directors who carry out executive functions in the company) or senior executives[11] if doing so is necessary to achieve the restructuring.

   In Spain, an employee whose employment relationship is terminated without cause is entitled to a legally established severance payment. Because the default severance payment is relatively small for senior executives (owing to the particularities of their special employment relationship), they often negotiate a much higher severance pay in their contract. With respect to executive directors, an agreement must be signed between the director and the company setting forth all payment considerations to be received by the director, including the severance pay in the event of early termination of the agreement.

   In this context, the Insolvency Law establishes that, if the contract with the executive director or the senior executive is terminated and the parties are unable to agree on a reduced severance pay, the court may reduce it regardless of the amount agreed in the contract. This reduced amount cannot be lower than the severance payment established by law for collective redundancies.

   If the Plan stipulates that the contract will be suspended, the executive director or the senior executive may opt to terminate it triggering their right to severance pay as described above.

c) *Financial collateral arrangements; netting arrangements.* As explained in section 5.3, financial collateral arrangements (up to the value of the collateral) or netting arrangements governed by RDL 5/2005 cannot be affected by a Plan, and are therefore not affected by the contract continuation principle. With regard to netting arrangements, they can be accelerated regardless of whether a Plan is approved, but the net amount will be subject to its provisions.

11.- Employment agreements with senior executives are special (as opposed to ordinary) employment relationships that are governed by a specific regulation on the matter: Royal Decree 1382/1985 of 1 August.

d) *Traded supply agreements.* Agreements for the supply of goods, services or energy necessary for the continuation of the debtor's business cannot be terminated or early terminated, unless these are traded on an exchange or other market, so that they can be substituted at any time at their current market value.

5.6.5 Treatment of third-party guarantors

As a general rule, personal guarantees or security interests that third parties grant are not affected by the Plan's judicial approval, unless the main creditor (the beneficiary of the guarantee or security interest) has agreed otherwise. This is reflected in the Insolvency Law as follows:

a) only the beneficiary creditor (and not the third-party guarantor) has a right to vote on the Plan regardless of any internal arrangements between the creditor and the guarantor affecting their relationship;

b) the guarantees or security interests of a beneficiary creditor who *voted in favour* of the debtor's Plan may be discharged or amended in line with the changes to the guaranteed/secured obligation agreed as part of the Plan (for instance, write-offs or debt-for-asset swaps that reduce the outstanding amount of the guaranteed obligation), unless the third-party guarantor and the beneficiary creditor have agreed otherwise (which is typically the case, at least, in the case of guarantees and collateral granted to professional lenders);

c) a beneficiary creditor who *did not vote in favour* of the debtor's Plan and is affected by the cram-down will retain its rights in respect of any personal guarantee or security interests provided by third parties, who cannot benefit from the provisions of the court-approved Plan in a manner that is to the creditor's detriment.

   In practice, this means that each guarantor should also restructure its obligations under personal guarantees or security interests under a Plan or an equivalent procedure in the jurisdiction where it has its COMI (see section 14).

As a single exception in group restructuring cases, the effects of the main debtor's Plan may be extended to personal guarantees or security interests that another company of the same group grants (even if no separate Plan is adopted in respect of that group company). This extension will only be possible if enforcing the relevant guarantees or security interests might lead to the insolvency of both the guarantor and the main debtor. This addition is an unprecedented rule in Spain. Its aim is to facilitate group restructurings, which traditionally required the relevant majorities and other requirements for court approval to be fulfilled in respect of each of the group companies, both on an individual and consolidated basis, even if some of those companies only acted as guarantors of another group company's debt. It is yet to be seen how this rule will be applied by courts.

5.6.6 Protection against claw-back

As explained in section 11.1, transactions executed by a debtor during the "suspect period" could potentially be clawed back if they are deemed detrimental to the insolvency estate, even in the absence of fraudulent intent.

Traditionally, the risk of claw-back has been particularly significant in restructuring agreements, as the former Insolvency Law established a rebuttable presumption that specific transactions typical of restructuring deals are detrimental to the insolvency estate (e.g. prepaying debt prior to its maturity date, granting additional security to secure old debt). The presumption is unrebuttable in some cases.

The Insolvency Law has kept the rebuttable and unrebuttable presumptions (see section 11.1.1), but now allows court-approved Plans to benefit from protection against claw-back in the following cases:

a) If the Plan affects claims that represent at least 51% of the debtor's total liabilities, the following will not be subject to claw-back unless it is proven that they were made with an intent to defraud creditors:

   (i) actions and transactions that were "reasonable" and "immediately necessary" for the successful negotiation of the Plan, if expressly identified as such in the Plan.

   Any payment of (1) fees or costs in relation to negotiating, signing or confirming the Plan; (2) fees for legal and professional advice closely related with the restructuring; (3) employee salaries for completed work; and (4) other amounts in the ordinary course of the debtor's business activity, will be deemed to be protected actions and transactions;

   (ii) interim and new money, including the one provided by specially related parties (see section 5.6.7); and

   (iii) actions and transactions that are reasonable and immediately necessary to implement the Plan.

b) If the Plan affects claims that represent *less than 51%* of the debtor's total liabilities, the actions and transactions described in sub-paragraph a) above may still be subject to claw-back, but none of the rebuttable presumptions of detriment (explained in section 11.1.1) will apply. Therefore (as long as none of the non-rebuttable presumptions apply), the insolvency administrator or the creditor requesting the claw-back will need to evidence the detriment.

Court approval of a Plan may be sought merely to ring-fence it from potential claw-back if the debtor becomes insolvent (i.e. without seeking to cram down dissenting creditors). The court will verify that the relevant majorities required for court approval are met before approving the Plan.

Unlike the effects of a cram-down, which only affected creditors can challenge, claw-back protection can be lifted if any creditor who did not vote in favour of the Plan successfully challenges it, regardless of whether that creditor was affected by it. However, unaffected creditors can only challenge it in the following scenarios:

a) the required special majorities to protect interim money or new money are not met (see section 5.6.7);

b) interim money, new money, or the actions or transactions to implement the Plan do not meet the legal requirements, or are unfairly detrimental to creditors' interests; or

c) the Plan is not necessary to avoid the debtor's insolvency and ensure its viability in the short and medium term (this ground is exclusively available to unaffected creditors).

If a challenge on any of these grounds succeeds, the sole consequence will be that the actions and transactions carried out to implement the Plan will be subject to the ordinary claw-back and claims-classification regime that applies if and when the debtor becomes insolvent.

An examination (or re-examination) of these grounds cannot be sought in a future insolvency scenario if no challenge or opposition was brought in the first place, or if it was unsuccessful. Fraud therefore remains the only potential ground to claw back a fully protected Plan.

5.6.7 Protection of interim and new money

The Insolvency Law specifically protects the following forms of financing granted by any party in the context of a Plan (whether or not granted by an existing creditor):

a) *Interim money:* new financing granted to the debtor that is reasonable and immediately needed to (i) ensure that the debtor's activity continues totally or partially while the Plan is being negotiated (and until a court approves it); or (ii) maintain or increase the value of the debtor's business or business units.

b) *New money:* new financing granted to the debtor that is provided for in the Plan and is necessary for its implementation.

Interim and new money may benefit from: (a) protection against claw-back, and (b) a preferential repayment treatment.

a) *Protection of interim or new money against claw-back.* Interim and new money can benefit from protection against claw-back under the same terms as any other actions or transactions resulting from the Plan (see section 5.6.6). The court will verify that the necessary majorities are met before approving the Plan and, in respect of new money, that it does not unfairly prejudice the creditors' interests. Creditors (including unaffected creditors) can challenge this protection as described in section 5.6.6.

As a special rule, in order to protect interim or new money lent by a "specially related party" to the debtor from claw-back, the claims affected by the Plan (after deducting the claims held by that specially related lender) must represent more than 60% of the debtor's liabilities. Otherwise, they will be subject to the ordinary claw-back regime (see section 11.1).

b) *Preferential treatment for repayment of interim or new money.* In the event of insolvency, 50% of the interim or new money provided in the framework of a court-approved Plan will be treated as a claim against the estate (*crédito contra la masa*). The remaining 50% will be treated as a generally privileged claim (*crédito con privilegio general*). See sections 10.2 and 10.3.2, respectively.

   This preferential treatment will only apply if the claims affected by the Plan exceed the minimum thresholds described above with respect to the debtor's total liabilities (i.e. 51% in general, and 60% if interim or new money is granted by a specially related party to the debtor – whose claims will not be considered for calculation purposes).

5.7 PROCEDURE TO OBTAIN COURT APPROVAL

5.7.1 Filing and process

Either the debtor or any adhered creditor, with the approval of the management body of the party filing the request, may seek a Plan's court approval.

This request must be filed with the commercial court (*Juzgado de lo Mercantil*) with jurisdiction over the debtor's declaration of insolvency. If the debtor previously filed for pre-insolvency (see section 4.2), the request must be filed with the same court.

The court may question its own jurisdiction to approve the Plan or any party that may be affected by the Plan's approval may be challenge its jurisdiction. If the court questions its own jurisdiction, it must rule on the matter before admitting the request and ordering its publication. This decision may be appealed. If a creditor – or the debtor itself – challenges the court's jurisdiction, a special procedure applies to decide the matter before the court rules on whether to approve the Plan.

For Plans that affect multiple companies, they may be filed individually for each company or collectively for all companies, irrespective of whether the pre-insolvency was filed collectively on behalf of all the companies. Nevertheless, the requirements for the court's approval must be analysed with respect to each company individually, whether the filing was made collectively for multiple Plans or for a single Plan affecting all debtors.

The court approval request must include a copy of the public document containing the Plan as well as all documents that must be included therein (see section 5.2.2), and also indicate where the affected parties can consult the Plan, either in paper form or electronically.

If the requirements described in section 5.2.3 are met (which at this stage, apart from issues of jurisdiction, will only be subject to the court's formal verification), the request will be admitted for processing and the decision will be published in the Public Insolvency Registry. The court decision will prohibit any individual enforcement actions against the debtor's assets and suspend actions already underway until the Plan is either accepted or rejected.

In case the Plan amends or terminates labour relationships, Labour law rules will be applicable, including rules on information and consultation of employees.

5.7.2 Independent restructuring expert

An important novelty in the Insolvency Law (pursuant to the Restructuring Directive) is the figure of the "independent restructuring expert" (*experto en la reestructuración*).

The role of the restructuring expert goes far beyond that of the voluntary "independent expert" (*experto independiente*) under the Previous Spanish Scheme, which had essentially been limited to (i) assessing the grounds on which the viability plan prepared by the debtor was based, and (ii) confirming that the security package offered to creditors under the refinancing agreement was proportional and in line with market standards.

The restructuring expert must be a legal or natural person (i) either with the necessary legal, financial and business expertise and experience in restructuring transactions or (ii) who meets the requirements to become insolvency administrator. The transaction's size, complexity and potential cross-border elements must be considered when determining the most suitable candidate. Candidates are subject to the same disqualifying circumstances (*incompatibilidades*) that apply to auditors, and must not have rendered services to the debtor (or "specially related parties") in connection with the restructuring during the two preceding years, other than having been appointed as an "independent expert" before. This exception is highly useful given that a professional or firm who acted as an independent expert in a debtor's or group's previous restructuring will probably be best placed to act as the restructuring expert in subsequent restructurings of that same debtor or group.

In addition, the expert will prepare and submit to the court various reports required by law, which include:

a) a report certifying that the voting majorities needed to approve the Plan have been obtained (see section 5.6.1), and

b) in the event of a cross-class cram-down, a report on the value of the debtor as a going concern that evidences that at least one of the classes that supported the Plan was "in the money" (see section 5.6.2b)).

The court can ask for any additional reports it deems necessary or advisable. While an expert report on class formation is not expressly required, courts can be expected to ask the appointed expert to report on the reasons that justify the class formation given the complexity of the matter and the potential room to challenge an approved Plan based on an incorrectly formed class.[12] Likewise, similarly to the opinions issued in the past to confirm that the security package was proportional and in line with market standards, it seems advisable that the expert confirms that the actions and transactions foreseen in the Plan (including new collateral granted or disposals) are "reasonable" and "immediately necessary" for it to be successful, which is an express requirement to benefit from the clack-back protection (see 5.6.6). Even if not expressly required, in order to pre-empt future challenges, it seems also advisable that the expert continues to review the business plan to confirm that it is feasible and appropriate to ensure the continuation of the debtor.

When performing their tasks, experts must act with a high standard of care (the standard applicable to a professional expert) and take an independent, neutral position between the parties. As experts may incur liability towards the debtor or creditors if they breach their duty of care or act in a manner that is not neutral and independent, they must have liability insurance or an equivalent guarantee to cover potential claims for damages.

An important novelty is that if the Plan's court approval has been requested and the debtor files for voluntary insolvency, the independent restructuring expert can request that the court suspend the debtor's insolvency filing. This will significantly reduce malicious threats from debtors while negotiations are ongoing (see mirror provisions for the Pre-Insolvency Period in section 4.3.1).

The independent restructuring expert will also play a role after a pre-insolvency filing (see section 4). If an expert has been appointed, its report will be needed in order to:

a) justify a full-fledged stay of enforcement actions over any of the debtor's assets (i.e. not restricted to assets that are necessary to ensure the continuity of the debtor's business);

b) request (i) an extension of the Pre-Insolvency Period to continue negotiations with the creditors, or (ii) the lifting of that extension; or

c) request that the court suspend the debtor's filing for voluntary insolvency.

The appointing authority no longer has discretionary power to select the expert. Under the former Insolvency Law, the expert was selected by the commercial registrar from a list of candidates available in the Commercial Registry. Now, the expert is instead appointed by the court, which will either:

a) appoint the candidate proposed by the debtor or creditors, as the case may be; or

12.- The Insolvency Law has maintained the original reference to the need for an "independent expert" to issue a report regarding the value attributed to assets (other than real estate and listed securities) for the purposes of, among other things, determining the Security Value of secured claims (see section 10.3.1). Arguably, this and any other functions entrusted to "independent experts" should now be deemed allocated to the restructuring expert (but this is a matter that the Insolvency Law does not explicitly clarify).

b) when the court considers that the proposed candidate does not have the required expertise, experience or resources in view of the restructuring transaction at hand, ask the petitioner (the debtor or creditors) to propose three alternative candidates and appoint one of them, provided they meet the legal requirements and have the necessary skills for the task.

A restructuring expert must be appointed in the following circumstances:

a) at the debtor's request;

b) at the request of creditors holding more than 50% of the value of the claims that are likely to be affected by the Plan;

c) when the court grants a general stay of individual enforcement actions and it considers that a restructuring expert is necessary to safeguard the interests of the parties affected by the stay; and

d) when the Plan's effects are to be imposed on dissenting classes (through a cross-class cram-down) or shareholders.

In addition, if no expert has been appointed because none of the grounds listed above applies, creditors holding 35% of the value of the claims likely to be affected by the Plan have the right to propose one specific candidate, who the court will appoint unless the debtor opposes the appointment by successfully arguing that either a restructuring expert is unnecessary or that the specific candidate does not meet the legal requirements (in that case, the same creditors can propose an alternative candidate).

In any case, if the expert has been appointed at the request of the debtor or of a minority group of creditors, the Insolvency Law gives the majority of the creditors (i.e. those holding more than 50% of the value of the claims likely to be affected) the option to request that the court replace the appointed expert. This means, in practice, that the majority of the creditors will have the final say on this important aspect of a restructuring process.

If the expert is appointed at the creditors' request (whether a majority or a minority group), those creditors will have to bear the restructuring expert's fees, unless the Plan states otherwise.

5.7.3 Court approval

The court must approve the Plan within 15 business days of the request being published, provided it complies with the requirements described in section 5.2 and has received the support of the required creditor majority.

The court's ruling must identify the secured dissenting creditors that belong to a class that has not approved the Plan; it must also lift the stay of enforcement actions over credit rights that are not affected by the Plan, and terminate the remaining enforcement procedures. The court must also verify that any corporate transaction included in the Plan is lawful.

The court ruling approving the Plan (*auto de homologación*) will be published in the Public Insolvency Registry and will be effective and enforceable immediately. As such, even if the decision is not final and remains subject to potential challenges, the Plan's effects will be immediately binding on all affected claims and on the debtor and its shareholders. Thus, the transactions set out in the Plan (e.g. extensions, haircuts, debt-to-equity swaps, debt-to-asset transactions, conversions into subordinated or convertible instruments) may be implemented as from that moment – including registering those actions or transactions that must be recorded in public registries or adopting measures that require shareholder approval, even if no such approval has been obtained (see section 5.6.3), notwithstanding the consequences that a subsequent challenge may have for the challenging creditors (see section 5.8). If the Plan includes operative-restructuring measures, they must be implemented pursuant to the general applicable Law rules, and any controversy will be ruled by the court with jurisdiction on such matters.

Once the Plan has been approved, no new requests regarding the same debtor will be admitted for a period of one year as from the date when the previous Plan was submitted for court-approval.

5.8 CHALLENGING A RESTRUCTURING PLAN

5.8.1 Default framework

Non-participating or dissenting creditors are entitled to challenge the court-approved Plan within 15 business days of the court's decision being published. The challenge will be assessed by the provincial court of appeal (*Audiencia Provincial*). This is in contrast with the former Insolvency Law, which required challenges against a Previous Spanish Scheme to be brought before the same commercial court that had approved the scheme (and whose final decision could not be appealed).

The applicable regime will depend on whether all classes of creditors have approved the Plan, whether all the debtor's shareholders have approved it, and whether the contract terminations affect the counterparties.

(A) *All the classes approve the Plan:* in this case, challenges by dissenting creditors may only be based on one of the eight following grounds:

(a) breach of the Plan's communication, content and formality requirements explained in section 5.2;

(b) failure to create the classes and approve the Plan according to the rules explained above;

(c) the debtor is neither in imminent, actual nor likely insolvency (see section 3);

(d) the Plan not offering a reasonable prospect of avoiding a declaration of insolvency and guaranteeing the debtor's viability in the short and medium term;

(e) the claims have not been treated equally with other claims of the same class;

(f) the value of the claims of the challenging creditor having been reduced by an amount manifestly higher than necessary to guarantee the debtor's viability (if the creditor acquired the claim at a discount this ground for challenge will only be triggered if the reduction exceeds the discount at which the claims were acquired);

(g) non-compliance with the "creditors' best interest test"; or

(h) the debtor's breach of its obligations to comply with its tax and social security obligations.

The Plan will be considered to have failed the "creditors' best interest test" when, under the Plan, the affected claims will receive a lower amount than that which they could be reasonably deemed to potentially receive by liquidating the debtor's assets, either in a piecemeal sale or in a sale of the business as a going concern (assuming, for these purposes, that the fictional liquidation occurs within two years of the Plan's approval). The practical consequence of this principle is that it is essential that the business plan supporting the Plan also includes a sufficiently detailed calculation of the liquidation value of the restructured debtor's assets and the recovery that creditors would receive in a liquidation scenario within the referred two year period following the execution of the Plan.

(B) *All classes do not approve the Plan:* in this case, dissenting creditors may challenge the Plan, irrespective of whether they belong to a class that approved the Plan, on the same grounds as those explained in (A) above for a Plan approved by all classes of creditors. In addition, dissenting creditors belonging to a class that has not approved the Plan may challenge the Plan on the following additional grounds:

(a) it has not been approved by the required class or classes, as explained in section 5.2 (and 5.6.2);

(b) one of the classes would be receiving rights or shares for a value higher than the amount of their claims;

(c) the class to which the challenging creditor belongs would be treated less favourably than any other class of the same rank;

(d) the class to which the challenging creditor belongs would be receiving rights or shares for a value lower than the amount of its claims within that class, and either a junior class or the debtor's shareholders would be receiving any payment or keeping any right or share in the debtor under the Plan ("absolute-priority rule"); or

(e) if the Plan affects public claims, the debtor has breached its tax and social security obligations.

Exceptionally, even if condition (d) (which adopts the "absolute-priority rule" – see section 5.6.2) is not met, the court may still approve the Plan (effectively watering down the absolute-priority rule) if the junior classes or shareholders need to receive the payments or keep the rights or shares to ensure the debtor's viability, provided that the affected creditors' rights are not unfairly prejudiced.

(C) *The shareholders do not approve the Plan:* the debtor's shareholders who have voted against the Plan's approval will be entitled to challenge the Plan on any of the following grounds:

(a) breach of the Plan's content and formality requirements explained in section 5.2;

(b) lack of approval by the required class or classes;

(c) the debtor not being in a state of imminent or actual insolvency;

(d) the Plan not offering a reasonable prospect of avoiding a declaration of insolvency and guaranteeing the debtor's viability in the short and medium term; or

(e) one of the classes would be receiving rights or shares for a value higher than the amount of the claims within that class.

(D) *Contractual counterparties challenge the Plan:* the debtor's counterparties in contracts that the Plan declares terminated may challenge the Plan on any of the following grounds:

(a) termination is unnecessary to guarantee the restructuring and avoid the debtor's declaration of insolvency, or

(b) the indemnity granted as compensation for the contract's early termination is inadequate.

A natural consequence of the increase of the scope of the Plan and of the variety of the parties that may be subject to its effects, as well as of the introduction of the possibility of cramming-down not only dissenting creditors but also entire classes, is that there are now more grounds to challenge a Plan than before with the Previous Spanish Schemes. It is therefore reasonable to expect that Plans will now become more contentious. However, irrespective of which party challenges the court decision confirming the Plan, the challenge will not suspend the Plan's enforceability. All challenges will be dealt with jointly before the court of appeal, which will hear the debtor and creditors that are parties to the Plan before issuing its decision.

Once issued, the decision will be effective immediately, and may not be suspended, postponed or further appealed. The consequence of the court upholding any of the challenges is limited to a declaration that the Plan will not affect the successful claimant. If the effects have already taken place and cannot be reversed, that party will be entitled to be indemnified by the debtor for the loss or damage caused to them.

In relation to those creditors and shareholders who did not challenge the Plan, or whose challenge was unsuccessful, the Plan will continue to apply to them and those creditors and shareholders will not be able to benefit from the decision upholding the challenge.

Exceptionally, if the challenge was upheld (i) for lack of the required majorities or (ii) incorrect formation of classes, the court of appeal's ruling will declare that the Plan is void with respect to all parties, including those who adhered to it.

If specific transactions in the Plan have already been executed or implemented when the decision upholding the challenge is handed down, bona fide third parties will not be prejudiced by the decision.

5.8.2 Optional pre-emptive framework

Challenges against the court decision approving the Plan may be avoided if the party requesting approval of the Plan also requests that creditors and shareholders who may ultimately be affected by the Plan have standing to oppose it prior to the court's approval.

This request to allow pre-emptive challenges of the Plan must be filed simultaneously with the request for the Plan's approval. Therefore, the hostility between parties who have signed the Plan and those who have not and do not wish to be affected by the Plan is brought forward and reviewed by the same court that will decide whether to approve the Plan (i.e. the commercial court and not the court of appeal).

Once the court accepts the request for approval, those who wish to oppose the Plan may file a brief with the court based on any of the grounds that may be alleged in the ordinary challenge procedure before a court of appeal (including the court's lack of jurisdiction).

The court will decide on all challenges jointly and the party requesting approval will be entitled to respond to those challenges, after which the court will hand down its decision within the following month. Such decision will be final and not subject to appeal.

5.9 DEFAULT

Once approved by the court, it will not be possible to request the termination of the Plan for breach unless the Plan provides otherwise. As a general rule, the consequences of a debtor's default under a court-approved Plan will be governed exclusively by the terms of the Plan itself.

There are two exceptions to this general rule:

a) in the event of default, affected public creditors will be entitled to seek the termination of the effects of the Plan over public claims. For these purposes, the Plan will be deemed breached if (i) the debtor defaults on any of the payment instalments of public claims affected by the Plan (see section 5.3); or (ii) new debt is incurred in relation to ordinary tax and social security payments; and

b) if the Plan's breach is caused by the debtor's insolvency, any person with standing will be entitled to file an insolvency petition against the debtor.

5.10 SPECIAL RULES FOR SMALL AND MEDIUM-SIZED DEBTORS

Small and medium-sized corporate debtors who do not qualify as microenterprises (*microempresas*) (see section 15) benefit from special rules in respect of the pre-insolvency framework and Plans.

These rules only apply to corporate debtors who do not belong to a group subject to consolidation obligations and whose balance sheet for the financial year preceding the pre-insolvency filing or the application for court-approval of a Plan reflects (i) a yearly average number of employees not exceeding 49; and (ii) a yearly turnover not exceeding EUR 10 million.

The applicable special rules are as follows:

a) *In respect of the pre-insolvency framework:* (i) neither the creditors nor the restructuring expert will be entitled to ask the court to suspend the debtor's insolvency petition during the Pre-Insolvency Period (see section 4.3.1); and (ii) only the debtor will be entitled to ask for a (single) extension of the Pre-Insolvency Period (see section 4.4).

b) *In respect of Plans:* (i) the debtor's and (where required) its shareholders' consent is required for the court to approve a Plan, even if the debtor is in a likelihood of insolvency situation (that is, shareholders cannot be wiped out against their will); (ii) only the debtor (but not creditors) may voluntarily request the court to approve confirmation of the class formation; (iii) a cross-class cram-down is possible simply based on the "relative-priority rule" being observed (namely, that the dissenting class (or classes) are treated more favourably than any junior class), despite the "absolute-priority rule" (see section 5.6.2) not being satisfied. Junior creditors (or shareholders) could therefore be allowed to receive distributions or maintain interests under the Plan even if more senior (dissenting) classes are not paid in full; and (iv) the parties may use an official Plan template (available electronically) tailored to the needs of small enterprises. A template-based Plan does not have to be formalised in a public document, nor does an auditor need to certify that the required majorities have been achieved.

5.11 CROSS-BORDER EFFECTS OF RESTRUCTURING PLANS

5.11.1 Cross-border effects of Spanish Plans and pre-insolvency petitions

The Insolvency Law claims to have "universal scope" in respect of the cross-border effects of Spanish pre-insolvency filings and court-approved Plans. These effects are therefore intended to prevail over any foreign-law provisions regarding, among other things, (a) rights in rem or retentions of title over the Spanish debtor's assets located in another jurisdiction, (b) rights or transactions of the debtor subject to public registration in another jurisdiction, (c) set-off rights involving receivables governed by the laws of another jurisdiction, (d) contracts over real-estate or employment not governed by Spanish law, (e) foreign claw-back actions, and (f) outstanding declaratory proceedings (*juicios declarativos*) brought in another jurisdiction in respect of the debtor's assets. The only specific exception is for rights over book-entry securities or in a clearing system, settlement system or financial market, in respect of which the applicable laws will be those of the jurisdiction where the relevant registry, system or market is located.

In order for these intended cross-border effects of a pre-insolvency filing or a court-approved Plan to be enforced by courts outside Spain, these pre-insolvency tools will need to be formally recognised in the relevant foreign country pursuant to applicable private international law rules.

As further explained in section 14, Spanish pre-insolvency filings and court-approved Plans should benefit from automatic recognition in other EU Member States, and thus be enforceable throughout the EU (except in Denmark), with the corresponding effects established in the Insolvency Law. On that basis, creditors affected by a court-approved Plan should be bound by the terms of the Plan not only in Spain, but also in all other Member States (excluding Denmark).

In the rest of the world, whether a court-approved Plan is recognised will depend on the domestic private international law provisions of each country, which vary substantially. Local advice is therefore necessary to review the corresponding requirements and available courses of action if the debtor and creditors executing the Plan intend to make it recognisable – and thus enforceable – outside of the EU. This could be particularly important not only when the debtor has assets abroad that the parties aim to protect against dissenting creditors, but also to protect branches or establishments located outside of the EU.

Some Previous Spanish Schemes (e.g. *Isolux, Abengoa*) were recognised in the US under Chapter 15 proceedings filed pursuant to US law. This favourable US federal case law may improve the prospects of Spanish court-approved Plans having effect in the US, always in view of the specific circumstances of the case.

There is, however, considerable uncertainty over the potential recognition of a Plan in the United Kingdom following Brexit. As the United Kingdom is no longer an EU Member State for the purposes of the European Insolvency Regulation, the automatic-recognition rule no longer applies. Recognition must therefore be sought pursuant to the private international law rules applicable in England and Wales.

5.11.2 Jurisdiction of Spanish courts in case of group restructurings

The Insolvency Law also confers Spanish courts with jurisdiction over companies with their COMI located outside of Spain, exclusively in the context of group restructurings (see section 14). The requirements for this are as follows:

a) the Spanish courts must have jurisdiction over a pre-insolvency filing or a Plan to be adopted by the group's parent company (i.e. whose COMI must be located in Spain);

b) the pre-insolvency filing or the application for court approval of the Plan in relation to the subsidiaries being requested must be confidential in nature (and not published in the Public Insolvency Registry), and therefore not fall within the scope of the European Insolvency Regulation (see section 14.1), but it may be subject to recognition under other international private law instruments; and

c) an efficacy test, such a cross-border extension of jurisdiction over the group's subsidiaries must be necessary to negotiate, achieve or comply with the Plan.

The jurisdiction of Spanish courts will nevertheless be limited to common creditors of both the parent company and the relevant subsidiaries that originate from a contractual agreement.

This extended-jurisdiction rule appears to be connected with the "group coordination proceedings" regime of the European Insolvency Regulation (whereby the insolvency proceedings over two or more members of an international company group are coordinated by the court of a single EU Member State). However, the two regimes differ because extended jurisdiction under the Spanish Insolvency Law is a prerogative of the court, whereas group coordination proceedings under the European Insolvency Regulation are to be initiated at the request of the insolvency practitioner (in Spain, the restructuring expert) of one group company with the consent of a two-thirds majority of the insolvency practitioners involved in the jurisdictions of the other affected group companies. Other ways of having the extended-jurisdiction rule recognised outside Spain may therefore need to be explored.

5.11.3 Effects of foreign restructuring plans (or other pre-insolvency mechanisms) in Spain

Notwithstanding the universal scope of the Spanish pre-insolvency mechanisms, cross-border issues and potential disputes regarding early restructuring processes initiated in multiple jurisdictions will be subject to the applicable Private International Law rules.

In parallel with the European Insolvency Regulation regime, the Insolvency Law establishes that its own private international law rules, intended for insolvency procedures, will also apply – with the necessary changes – to pre-insolvency filings and restructuring plans.

However, some of these rules (on recognition of foreign pre-insolvency procedures and coordination between parallel insolvency procedures) will be limited to foreign early restructuring procedures that are "functionally equivalent" to the Spanish ones (i.e. collective procedures based on insolvency legislation that are intended to restructure the debtor or its business to ensure its viability and avoid insolvency), and rely on either a jurisdiction COMI test, or "a reasonable connection with an equivalent nature".

6

Sale of a business as a going concern in insolvency. The Spanish pre-pack

6 Sale of a business as a going concern in insolvency. The Spanish pre-pack

6.1 SPANISH PRE-PACKS: SCOPE

As mentioned in section 5, one of the key developments of the reform of the Insolvency Law resulting from the implementation of the Restructuring Directive is that the scope of court-sanctioned Plans has been expanded and now allows to restructure not only liabilities but also the assets of a debtor in a situation of likely, imminent or actual insolvency, including sales of all or part of the business as a going concern and release of collateral and guarantees. A sale under a Plan will need to comply with the requirements, class formation and majorities described in section 5.

In some circumstances, an even speedier way to carry out sales of businesses could still be, however, to implement those in the context of, and almost concurrently with, the opening of insolvency proceedings. With this aim, the Spanish Insolvency Law allows pre-packaged plans (the **"Spanish Pre-Packs"**) by entitling the debtor to submit a binding purchase offer for its business as a going concern together with the insolvency petition and a liquidation plan.

Spanish Pre-Packs offer an opportunity to successfully restructure the business, particularly where approving a Plan is not feasible (for instance, where creditors no longer trust the debtor, or claims cannot be successfully refinanced because the required majorities cannot be achieved – see section 5.5 – or the debtor receives no new money), but the business remains viable. The alternative (i.e. the business entering into insolvency proceedings with no plan in connection with the outcome, which may eventually imply the closure of the business and its unorderly liquidation) is likely to be worse for creditors and certainly for employment continuity.

In addition, Spanish Pre-Packs benefit from some advantages in respect of labor and social security succession, automatic assignment of contracts and licenses and a clean-cut (with few exceptions) from pre-existing liabilities related to the business (as further explained in section 6.3.1) that will not automatically apply to sales carried out under a Plan. Under a Plan, the scope of the assets and liabilities that are transferred to the buyer will be subject to general corporate or sectorial law and, to the extent legally permitted, will need to be agreed on a case by case basis (e.g. third party consents may need to be obtained for transfer of licenses and contracts and the buyer may take on further tax and employment liabilities).

6.2 SPANISH PRE-PACKS: PROCESS

For Spanish Pre-Packs to be successful in practice debtors must be ready to file for insolvency and sell the business and investors must be ready to file a binding purchase offer.

The regime applicable to pre-packaged plan has evolved significantly over the years. It was not sufficiently detailed in the former Insolvency Law, and, for this reason, some courts, such as those in Barcelona and Madrid, took a more flexible stance and published guidelines on preparing and filing a pre-pack procedure with the aim of allowing a speedier and a more certain procedure.

The current text of the Insolvency Law provides now clearer and more detailed guidelines on the Spanish Pre-Packs procedure. In a nutshell:

a) The Insolvency Law provides that the debtor may include a third party binding purchase offer for its business or several business units as a going concern, together with the insolvency request. Such offer must include an undertaking by the buyer to maintain the business activity for at least three years. Damages could be claimed in case of breach of that undertaking.

b) As an additional right, the Insolvency Law now expressly allows the debtor in a situation of actual, imminent or likely insolvency to request the court to appoint an independent expert to coordinate the sale process and collect binding purchase offers from third parties. These offers must contemplate an up-front payment of the purchase price and the undertaking to maintain the business for at least two years (there is a contradiction in the Law on the length of this undertaking to be shown once the offer is filed). The court's appointment of the independent expert is not made public. If the debtor finally files for insolvency, this independent expert may become the insolvency administrator if the court ratifies its appointment. This is a big improvement as it significantly reduces the risk of the insolvency administrator or court not accepting the purchase offer that is finally chosen.

c) The request for insolvency and the existence of the offer must be published with the Public Insolvency Registry. The court may request additional information from the debtor and the bidder to facilitate competing offers, and require that such information is also published.

d) Within 15 days since the declaration of the insolvency, the insolvency administrator must submit a report assessing the offer in light of the interest of the insolvency. The insolvency administrator must specifically inform on the effect that the termination of contracts provided by each offer may have on the insolvency estate and liabilities. Creditors are also entitled to submit allegations within such 15 days term.

e) Additionally, competing bids may be submitted within such 15 days of the insolvency. Employees may file a competing offer too.

If competing offers are made, the court will require the insolvency administrator to issue a report assessing the different bids within 5 days. Once issued this report, the court will give all bidders three days to simultaneously improve their offers, and it will then approve within 3 business days from the end of such deadline the offer the court considers "most beneficial in the interest of the insolvency". This may not be the highest bid, as the court may consider other factors such as whether anti-trust authority approval is required. The court will give priority to the offer filed by employees if it provides the continuity of the business and preserves more employment, provided it is as least equal or better in other terms to the other offers filed.

As described in section 4.1, a debtor in an actual, imminent or likely insolvency situation may file the pre-insolvency communication to negotiate a Plan and temporarily suspend its obligation to file for insolvency, which would trigger the start of the Pre-Insolvency Period. This Pre-Insolvency Period could also be used to seek bidders that may be interested in purchasing the business and complete the Spanish Pre-Pack.

Negotiating a Plan and the Spanish Pre-Pack would normally be alternative choices, since the Spanish Pre-Pack requires filing for insolvency, while the Plan normally aims to avoid having to do so. In this case, two independent experts could be necessary, one to act as independent restructuring expert (see section 5.7.2) and the other to collect the binding purchase offers to file the Spanish Pre-Pack by the end of the Pre-Insolvency Period, should Plan negotiations fail. It is unclear whether the same person can carry out both roles at once, but doing so would in practice reduce the chances of the independent expert that collects the purchase offers from being appointed insolvency administrator as, for the purpose of giving some certainty to the insolvency administrator or the court accepting the purchase offer, the restructuring expert cannot later become the insolvency administrator.

6.3 SALE OF THE BUSINESSES AS A GOING CONCERN IN INSOLVENCY

6.3.1 Scope of assets and liabilities of the transferred business

All or part of the business may be sold at any time within the insolvency proceedings (either through a Spanish Pre-Pack or as part of the common or ordinary liquidation phases, see section 12), provided that it constitutes a "business unit" (*unidad productiva*). Excluding sales proposed by the debtor and implemented through the Spanish Pre-Pack, it is generally the insolvency administrator who determines the assets and rights that form part of the business to be sold.

Sales of businesses carried out in the context of insolvency proceedings benefit from a favoured regime in respect of contract continuation and assumption of liabilities. In particular:

a) While it is optional for the buyer to assume the debtor's contractual position under the existing agreements with third parties, the change of debtor is compulsory for its counterparties, who cannot oppose to the change if the agreements are necessary for the continuation of the business activity. This approach facilitates the assignment of existing agreements that are vital for the business, among others, existing leases and supply agreements.

b) Existing administrative operating licences will also be transferred to the buyer and will remain in force without further consents or authorisation requirements if the business activity continues to be carried out from the existing facilities. As an exception, this rule does not apply, however, to concessions governed by public law, the transfer of which will have to be approved by the applicable public authorities.

c) The sale of business as a going concern will create a firewall against most outstanding obligations. In particular, the buyer will not assume any of the debtor's credits or liabilities, except for:

   (i) those expressly accepted by the buyer;

   (ii) a limited list of liabilities that, according to law, must be borne by the buyer, such as unpaid real-estate tax (*impuesto sobre bienes inmuebles*) or zoning and environmental obligations; and

   (iii) employment and social security obligations and claims transferred to the buyer by operation of legislation applicable to transfers of undertakings (*sucesión de empresa*). The Insolvency Law has now expressly attributed exclusive jurisdiction to the court hearing the insolvency proceedings to rule whether a transfer of undertakings is taking place for employment and social security purposes and determine the assets, liabilities and employment relations that are effectively transferred as part of the business unit. This has solved pre-existing doubts about the jurisdiction to resolve on these matters. To take this decision, the court may request a prior report from the Labour Inspectorate (*Inspección de Trabajo y Seguridad Social*) on the employment relations related to the business unit to be sold and any outstanding social security debts with respect to those employees. This procedure allows the buyer of the business to have legal certainty about the scope and outstanding amount of employment and social security obligations that it would effectively assume when acquiring the business unit.

   (iv) Spain's General Tax Law expressly establishes that the buyer of a business acquired as a going concern within insolvency proceedings will not assume any of the selling debtor's tax liabilities.

If the buyer is a natural person who is specially related to the debtor (see section 10.4), the buyer will not benefit from the above exemption regarding existing claims and liabilities of the debtor and will assume all of them.

6.3.2 Cram-down framework in connection with collateral subject to security rights in rem that form part of the business

If the buyer requests the cancellation of security in rem over any asset forming part of the business to be transferred and the price to be received by the secured lender is less than the Security Value (see section 10.3.1), secured lenders representing 75% of all secured claims of its class (e.g. financial, public) must consent to the sale of the business, provided that those secured lenders benefit from a "separate enforcement right" (*derecho de ejecución separada*). Therefore, 75% of secured claims can cram down dissenting secured creditors and impose specific sale terms. Silence from specially privileged creditors to the consent request does not imply tacit acceptance.

According to recent case law of the Spanish Supreme Court, specially privileged creditors will hold a "separate enforcement right" even if they did not initiate the enforcement of the security prior to the opening of the insolvency proceedings.

The determination of the portion of the sale price to be received by a secured lender will depend on the proportion that the Security Value of its collateral represents over the global valuation of the business to be sold.

If the business is transferred without the cancellation of existing security rights in rem, no consent is required from specially privileged creditors (who are therefore obliged to accept a change in the debtor's position).

7

Insolvency filing

7 Insolvency filing

7.1 INSOLVENCY PETITION

The declaration of insolvency may be requested by the debtor or its creditors.

The time between the request and the court's insolvency declaration will depend on: (i) whether the filing was submitted by the debtor or the creditor; (ii) whether the debtor has challenged the request, if made by the creditor; (iii) whether all appropriate documentation has been submitted in a timely manner or if filed late or incomplete; and (iv) the court's workload.

An insolvency is denominated "voluntary" (*concurso voluntario*) if the debtor files for insolvency. An insolvency is "involuntary" (*concurso necesario*) if the insolvency petition is filed by a creditor. Although the insolvency proceedings are similar in both cases, certain differences arise, for instance, in connection with the scope of the insolvency administrator's powers vis-à-vis the debtor's management powers (see section 9.1). The insolvency will be also "involuntary" when the debtor files for insolvency in the following three months since a creditor's insolvency petition was admitted for processing, even if such creditor withdrew the insolvency petition, did not attend the hearing, or did not ratify the insolvency petition.

A creditor can seek a debtor's declaration of insolvency if, following a default, it can prove that it has failed to attach any debtor´s assets, or has attached insufficient assets, to satisfy the amount owed. If the creditor proves these facts, the court will declare the debtor insolvent without granting the debtor the opportunity to challenge the insolvency petition.

A creditor may also apply for a debtor's insolvency if it can prove to the court any of the following insolvency events:

a) a general failure by the debtor to meet its payment obligations;

b) the existence of attachments in connection with the debtor's assets that generally affect its estate;

c) a general liquidation by the debtor of its assets, under specific circumstances;

d) a general failure by the debtor to comply with tax, social-security, salary and other employment obligations during the three-month period preceding the insolvency filing; or

e) the existence of a previous judicial or administrative resolution of insolvency, provided that the resolution cannot be challenged.

If a creditor justifies the insolvency petition on the basis of the insolvency events in (b) or (e), the court will also declare the insolvency without granting the debtor an opportunity to challenge the declaration. In all other cases, the debtor will be entitled to challenge the insolvency petition in a court hearing being held prior to the court's ruling on the matter.

In practice, the existence of a general default on due and payable obligations is the most common insolvency event raised by creditors seeking to have a debtor declared insolvent, although proving these circumstances is not always easy. For instance, proof of lack of payment of a single loan agreement may not constitute sufficient evidence in all cases.

To ease the creditor's burden of proof in connection with other debts on which the debtor may have defaulted, it is generally accepted that the court may issue discovery orders compelling third parties to produce information on specific debts (e.g. requests may be sent to the tax authorities, social-security authorities, or general court offices (*Decanato*) on foreclosure processes underway against the debtor). Additionally, creditors generally provide reports on the debtor's financial situation prepared by either specialised companies on the basis of public sources, accounting records, or even independent experts specifically engaged for that purpose.

The debtor may challenge the creditor's insolvency petition by alleging (i) the creditor's lack of standing to file the request (e.g. challenging the existence of a claim held by the alleged creditor); (ii) the non-existence of the insolvency event alleged by the creditor to justify the declaration of insolvency; or (iii) even if existing at the time of the filing, the lack of subsequent insolvency (e.g. the insolvency has been overcome as a consequence of successful restructuring negotiations).

Likewise, those creditors who have purchased, on a singular title, a claim already matured or accelerated against the debtor are generally not entitled to file for the debtor's insolvency in the following six months from the acquisition.

Debtors often repay the claim of the creditor who filed for insolvency in exchange for the creditor withdrawing the insolvency petition before insolvency is declared by the court. This route is not free of risk. For instance, when the repayment is made at the hearing, the court could continue to process the insolvency petition if it considers that the debtor is insolvent and there are additional creditors who have (or appear to have) standing. The potential risk of claw back of such repayment also cannot be disregarded (see section 11.1).

If the court refuses to declare the debtor insolvent, the filing creditor may be sued for damages, as well as be ordered to pay the legal expenses (*costas*) of the proceedings (unless the creditor's claim had matured in the preceding six months, except for recklessness or bad faith). This, together with the burden and difficulties of proving the debtor's insolvency and the consequences that the declaration of insolvency may entail for financial institutions in terms of provisioning of bad debts, explain why Spanish lenders have generally been reluctant to file for a debtor's insolvency, although there are some precedents. A creditor's request for insolvency may be a feasible route to explore for lenders to gain leverage in connection with the collection of their claims or to cause the debtor to lose control of the business if insolvency is declared (see section 9.1).

Following the declaration of insolvency, the debtor and other interested parties will be entitled to appeal the decision.

7.2 GROUP INSOLVENCY

For insolvency purposes, the concept of "group" follows the general definition under article 42 of the Spanish Commercial Code (*Código de Comercio*), which states that a group exists whenever a company directly or indirectly controls one or more companies, and sets forth specific circumstances under which control is deemed to exist.

The Insolvency Law does not regulate specific insolvency proceedings for corporate groups. As such, if a group of companies becomes insolvent, each insolvent company will be subject to its own insolvency proceedings. In addition, the insolvency of one company of a group, including the parent company, does not necessarily imply the insolvency of the remaining companies of the group.

Nevertheless, the Insolvency Law allows companies that form part of the same corporate group to file for "joint insolvency", which facilitates the coordination of all insolvency proceedings given that they can be handled by the same court.

If two or more companies of a group have been declared insolvent separately, either a debtor or the insolvency administrator may request that one court handle all insolvency proceedings. In the absence of a request by any of those parties, any creditor may file the request.

However, as a general rule, any "simultaneous or joint insolvency" (which may be filed for at the beginning of the proceedings or joined once the proceedings have commenced) will essentially result in separate insolvency proceedings being heard in Spain by the same court and insolvency administrator on a coordinated basis. However, proceedings will not be joined in substance(among others, there would not be, in principle, any comingling of the assets and liabilities of each party).

In exceptional cases, the court may, acting *ex officio* or at the request of any creditor or other affected party, order that the insolvency proceedings are joined not only for procedural reasons but in substance, if the assets and liabilities of various companies within the group are comingled and the legal ownership and responsibility for all assets and liabilities cannot be adjudicated without incurring unjustified cost or delays.

Even if, as a general rule, creditors of one company of the group lack recourse against other companies of the same group (except where cross-guarantees exist), according to a less-common approach taken by some courts in few decisions, in specific exceptional circumstances, the corporate veil may be pierced (*levantamiento del velo*).

The Spanish Supreme Court has consistently held that the corporate veil may only be pierced in extraordinary circumstances, including, among others, where there exists (i) a commingling of assets or entities acting in the market; (ii) damage to third parties or, alternatively, circumvention of obligations by the corresponding entity; and (iii) existence of a causal nexus between (i) and (ii). The Spanish Supreme Court has frequently ruled that the fraudulent intent of the related entities also constitutes a key element to justify the piercing of the corporate veil.

8

Insolvency proceedings

8 Insolvency proceedings

8.1 MAIN PROCEDURAL STEPS AND OUTCOMES

The Insolvency Law establishes a single insolvency proceeding (*concurso de acreedores*) applicable to any insolvent debtor, which includes a "common phase" (*fase común*), and two potential outcomes: (i) a voluntary composition agreement (*convenio*) (**"VCA"**), or (ii) the debtor's liquidation.

Whether to adopt a VCA or liquidate the debtor's estate will depend on a number of factors, including the economic value that can be generated from each option and an assessment of the company's general financial situation and solvency prospects.

Experience reveals that VCAs may be viable restructuring tools for businesses that are not significantly affected by the loss of value caused by the insolvency. This could be the case, for instance, of companies with few employees, or companies that can continue their business without generating new claims against the insolvency estate. This explains why large real-estate companies were able to achieve a VCA at the beginning of the 2008 financial crisis (although most were subsequently breached and ended in liquidation). There have also been cases in which Spanish commercial companies have reached a VCA (e.g. *Pescanova*). Likewise, majorities to reach the VCA are different from those required to approve a Plan (see section 5.6) and dissenting equity holders cannot be bound by a VCA, which, depending on the specific circumstances of the case, could incentivize VCAs as opposed to Plans.

Liquidation nevertheless remains the most common outcome of insolvency proceedings in Spain. This explains why out-of-court restructuring tools have been favoured by the European and Spanish legislature (see section 5).

The entire insolvency proceedings are managed under the supervision of a judge who is specialised in commercial matters (*Juez de lo Mercantil*), including insolvency matters.

When the court declares the debtor's insolvency, the insolvency proceedings are initiated and the common phase begins. During the common phase, the main functions of the insolvency administrator are to (a) determine the debtor's assets and liabilities; (b) control (either by intervention or replacement) the management of the debtor during the insolvency proceedings; (c) investigate any suspicious acts carried out by the debtor during the two years preceding the filing for of insolvency (the so-called "suspect period") that could be considered detrimental to its estate and therefore subject to claw-back (see section 11); (d) examine if the management's actions caused or aggravated the insolvency for the purposes of the insolvency's potential classification as "negligent" (see section 13); and (e) issue an opinion on the debtor's accounts.

Within the two-month period following the declaration of insolvency (which can be extended in certain circumstances), the insolvency administrator will file a report, together with an inventory of the debtor's assets, a list of creditors, a valuation of the business units owned by the debtor under both a going-concern scenario and a liquidation scenario, and a report on any VCA when filed.

The inventory of assets and list of creditors may be challenged in court within 10 business days since those documents are published in the Public Insolvency Registry.

The common phase ends 15 business days after the insolvency administrator files the abovementioned report. The liquidation phase will start simultaneously unless a VCA has been previously filed (even if has not been admitted for processing).

The insolvency administrator will file the definitive list of creditors and inventory of assets later, once the court has settled any the challenges made. Apart from exceptional cases, the definitive inventory and list cannot be amended.

8.2 VOLUNTARY COMPOSITION AGREEMENTS

8.2.1 Filing and processing

The debtor may file a proposal for a VCA if it did not request liquidation (i) together with the insolvency petition, or (ii) any time during the insolvency process up to fifteen days after the insolvency administrator files its report (see section 8.1). Once the liquidation phase opens, a VCA is no longer an option.

Creditors holding (individually or on aggregate) more than 20% of the overall amount of claims may also file a proposal for a VCA within the abovementioned fifteen days term. However, creditors do not generally file VCA proposals in practice unless such proposals has been previously agreed with the debtor.

VCA proposals filed by the debtor or by creditors must first be evaluated by the court in order to determine if they comply with all formal requirements under the Insolvency Law. If they do, the court will admit the VCA for processing. Once admitted, the VCA can neither be amended nor withdrawn, but the debtor is entitled to withdraw from it by asking for liquidation.

If a VCA is not filed or, when filed, is not admitted for processing, the court will immediately start liquidation.

VCA proposals must also be assessed by the insolvency administrator, who must issue a report on the proposals' content. The insolvency administrator must provide its opinion on the VCA, which may be favourable – with or without reservations – or non-favourable. Favourable reports with reservations and non-favourable reports will not prevent the VCA from being voted on by creditors.

After being admitted for processing, creditors have two months to adhere to, or oppose, the VCA, pursuant to the voting rules and formalities provided in the Insolvency Law. No creditors' meeting is therefore required pursuant to the Insolvency Law. Favourable adherences may be withdrawn in certain circumstances. The debtor may request the court to early terminate this term as soon as the legal majorities to pass the VCA proposed by the debtor are achieved. When there are justified reasons, the court may grant, at the debtor's request, an extension of up to two months.

8.2.2 Content

A VCA will include a detailed repayment schedule as well as a viability plan if the repayment schedule is based on the debtor's future cash flows.

The VCA must set out, at a minimum, deferral proposals of up to ten years, debt reductions (the Insolvency Law does not establish any maximum limits), or a combination of both.

It is also possible to propose additional restructuring measures for all, some or a specific class of creditors (except public creditors), including:

a) converting loans into shares (which must be freely transferable for a period of ten years), enabling the debtor's directors to increase the share capital without holding a shareholders' meeting and without granting any pre-emption rights to the former shareholders over the newly issued shares;

b) converting claims into profit-participating loans or other new debt instruments;

c) debt-for-asset deals, subject to specific requirements;

d) assignment of claw-back claims; or

e) the merger, demerger or global assignment of the company's assets and liabilities (in which case, the corporate law opposition right in favour to certain creditors will not apply) under certain circumstances.

The VCA may also establish the sale of the whole business, or specific business units, to a third party (*convenio por asunción*). In that event, the purchaser must assume the obligation to continue to run the business and pay creditors pursuant to the terms agreed in the VCA. This alternative is nevertheless rarely implemented in practice.

A VCA proposal cannot:

a) include any form of global liquidation of the debtor's assets;

b) alter the ranking of the creditors' claims established in the Insolvency Law (see section 10.3);

c) include conditions, although the proposal can be subject to the approval of the VCAs of other companies of the group that have also been declared insolvent (see section 7.2);

d) impose additional obligations on any creditor, unless expressly accepted;

e) impose certain restructuring measures on public and employment claims, such as changing the governing law or the debtor (although a third party may assume the repayment obligation without releasing the debtor), modifying or cancelling their security, or converting their claims into shares, profit-participating loans or new debt instruments which characteristics or ranking are different; or

f) include haircuts or defer certain social security claims.

Lastly, the VCA may limit the debtor's management functions and register such limitations with the relevant registries, grant the insolvency administrator controlling powers, and include proposals for the sale of assets affected by a special privilege (mortgage or pledge – see section 10.3.1).

8.2.3 Required majorities

Different voting rights are vested in each group of creditors depending on (i) the ranking and value of the claims recognised in the definitive list of creditors prepared by the insolvency administrator and (ii) the specific restructuring measures set out in the VCA.

Holders of contingent claims, subordinated claims and ordinary and privileged claims purchased by specially related parties after the declaration of insolvency (see section 10.4) are not entitled to vote on a VCA.

If approved, the VCA will be binding on both ordinary and subordinated creditors. The effects and measures of the VCA may also apply to privileged creditors (including secured creditors) if either they adhere to the VCA, or the required majority (which depends on the specific restructuring measures proposed in the VCA) is reached.

The Syndicate Voting Rule (see section 5.6.1) also applies to VCAs.

The following chart summarises the majorities required for each restructuring measure.

Restructuring measure	Majority of ordinary claims (by value)(1)	Majority of privileged claims (by value)(2)
Full payment of ordinary claims with a debt deferral not exceeding three years	Supporting claims higher than dissenting claims	60%
Prompt payment of ordinary matured claims with a haircut not exceeding 20%, and remaining claims when they mature	Supporting claims higher than dissenting claims	60%
Haircuts not exceeding 50%	Over 50%	60%
Haircuts exceeding 50%	65%	75%
Deferral of principal, interest or any other due amount for a period not exceeding five years	Over 50%	60%
Deferral of principal, interest or any other due amount for a period of five to ten years	65%	75%
Conversion into PPLs for a period not exceeding five years(3)	65%	60%
Conversion into PPLs for a period of five to ten years(3)	65%	75%
Debt-for-assets	65%	75%
Debt-for-equity(3)	65%	75%
Sale of a business unit	65%	75%
Any other restructuring measure	65%	75%

(1) Including ordinary claims as well as generally and specially privileged claims that voluntarily adhere to the VCA.

(2) Taking into account only creditors holding privileged claims. For specially privileged claims, calculated taking into account the supporting Security Value with respect to the total Security Value of each class. For general privileged claims, calculated taking into account the supporting general privileged claims with respect to the total general privileged claims of each class.

(3) Excluding labour and public creditors, who cannot be affected by this measure.

If specific claims or groups of claims in accordance to their characteristics are treated differently, the support of the majority of the claims not affected by such special treatment is also required. There is no special treatment when the VCA keeps the rights related to a privilege, as long as those privileged creditors are affected by the same haircuts and deferrals than ordinary creditors.

8.2.4 Court approval, effects and challenges

If the VCA is approved by the required majorities as so declared by the court clerk, it will be subject to court's approval.

The legal grounds for creditors not adhering the VCA or the insolvency administrator to challenge the VCA, to be brought in the 10 business days after the court clerk's statement on majorities, are:

a) breach of the rules applicable to the content of the VCAs set forth in the Insolvency Law;

b) breach of the rules on form and content of the adherences to the VCA, only when such adherence is essential to approve the VCA;

c) adherence, either by those who were not legitimate owners of the claims, or by virtue of actions in breach of *pari passu* rules among ordinary claims, insofar as adherence was essential to approve the VCA;

d) mistake in the majorities' outcome statement;

e) debtor's refusal to accept the VCA proposed by the creditors; or

f) non-compliance with the "creditors' best interest test" (see section 5.8.1(A)(f)).

The court can also reject the VCA *ex officio* in any of these cases.

The court's ruling accepting the challenge, and therefore rejecting the VCA, may be appealed.

When the VCA is approved by the court, the effects triggered by the insolvency declaration will cease to apply (see section 9) and the insolvency administrator will be dismissed, unless otherwise established in the VCA. However, the insolvency proceedings will not formally end until the VCA is complied with in full pursuant to its terms and the court declares so pursuant to the rules provided in the Insolvency Law

The effects on claims of the approved VCA will also enter into force and cram down all ordinary and subordinated pre-insolvency claims, even if such claims did not adhere the VCA, or were not recognised in the insolvency proceedings. Privileged claims will be bound by the VCA in case they adhered to the VCA on legal time, or they adhere any time after the VCA has been approved by creditors or the court until the date when the court declares the VCA has been complied with, or the special majorities referred to above are achieved. Claims against the estate (see section 10.2) will not be crammed down by the VCA.

Subordinated creditors will be paid under the VCA once all ordinary (and privileged) creditors are paid in accordance with the terms of the VCA. If the VCA establishes a debt deferral, the deferral for subordinated creditors will begin upon expiry of the deferral agreed for ordinary creditors (each annual instalment for ordinary claims under the VCA being considered a quarterly instalment for subordinated claims, with a maximum deferral for all creditors of ten years since the VCA comes into force).

Unless otherwise agreed between the creditor and the guarantor, third party guarantors will benefit from the provisions of the VCA (such as debt reductions and deferrals) if the creditor voted in favour of the VCA. However, professional lenders usually carve-out this right in the relevant documentation. Otherwise, creditors holding claims guaranteed by a third party usually enter into an agreement with the guarantor before voting in favour of any proposed VCA. In contrast, dissenting creditors crammed down by the VCA maintain their rights against guarantors, who cannot benefit from the content of the VCA.

8.2.5 Breach

Any creditor is entitled to ask the court to declare a breach of the VCA affecting such creditor. A breach of the limitations on the debtor's management functions established in the VCA may also lead to a VCA default.

The debtor is obliged to file for liquidation when it knows that it will not be able to comply with the VCA or the new claims arising after the VCA is approved.

In case the VCA default has been declared by the court, the court will declare the debtor's liquidation. Additionally:

a) haircuts, deferrals and any other amendments to the claims included in the VCA will cease to have effect. Specially privileged creditors affected by the VCA will recover their right to enforce their security as to collect their claims in an amount not exceeding the original claim;

b) actions or transactions carried out by the debtor or by third parties in compliance with the VCA will retain their effects (particularly, payments, perfected security, and corporate decisions passed in order to comply with the VCA, such as share capital increases, structural transactions or amendments of the articles of association);

c) actions or transactions which have either breached the VCA or altered the *pari passu* rules among creditors may be annulled;

d) debtor's actions carried out within two years preceding the VCA breach' petition or, when the VCA's compliance is not possible, the liquidation petition, may also be subject to claw back if detrimental to the debtor's estate (see section 11); and

e) any claims created during the period of compliance of the breached or annulled VCA will rank as pre-insolvency claims (*créditos concursales*) in the liquidation, and not as claims against the insolvency estate (*créditos contra la masa*) (see section 10.2).

8.2.6 Amendment

The debtor may ask for the VCA to be amended two years after its entry into force, if there is a risk that it may be breached for reasons other than the debtor's fraud or negligence, and the debtor proves that the amendment is essential for the business' viability. Once the amendment petition is filed, no VCA default or liquidation petitions will be admitted.

The amendment petition must be filed together with a list of the repaid and outstanding insolvency claims, the outstanding new claims assumed while the VCA has been in force, an inventory of assets, a viability plan and a repayment plan. The process will be similar to the one applicable to approve the VCA, and the majorities will be calculated according to the value of the outstanding claims under the VCA that is to be amended.

The VCA amendment can affect neither the new claims, nor privileged claims who were crammed down by the VCA or voluntarily joined the VCA after it was approved by the court, unless they expressly support the proposed amendment.

If the VCA amendment is approved, no other amendments can be made.

8.3 LIQUIDATION

8.3.1 Who can request liquidation

If neither the debtor nor a creditor proposes a VCA, or if no VCA is approved by the required majority, or if the approved VCA is not subsequently sanctioned by the court, the court will declare the debtor's liquidation. Liquidation is also declared when, once approved, the VCA is declared null, or breached.

The debtor may apply for liquidation at any time during the insolvency proceedings.

The liquidation phase may also be opened at the request of the insolvency administrator if the debtor's business or professional activities have ceased. The court will grant the debtor three business days, after which the court will decide whether to open the liquidation phase within the following five business days.

Creditors lack legal standing to request that the court declares the liquidation, even if they represent a portion of liabilities that is sufficiently large to veto any VCA or expedited sale of the business as a going concern, or they suspect the debtor is no longer able to comply with the VCA or the new debts incurred after the VCA is approved. This rule affords significant leverage to debtors, who, as a result, can take a mere "file-and-see" approach, which could potentially be detrimental to the ability to reach an efficient outcome of the insolvency.

The court order declaring liquidation may be appealed by the debtor.

8.3.2 Effects

The opening of the liquidation phase entails serious consequences for the debtor and its management, including the following:

a) The debtor's management will be dismissed and replaced by the insolvency administrator (although the management bodies will continue to represent the company within the insolvency proceedings and related court processes).

b) The court will declare the debtor's dissolution (which would have otherwise required the approval of its shareholders).

c) Deferred claims will be accelerated and non-monetary claims will be converted into monetary claims.

Even if the court orders the liquidation, the debtor's business operations may continue until the conclusion of the liquidation. Liquidation therefore does not necessarily imply the cessation of the business activities.

The Insolvency Law does not establish a mandatory period for concluding the liquidation. Creditors may request that the court dismiss and replace the insolvency administrator if liquidation takes more than one year, although the court will assess whether there exists a justified reason for the delay and, if so, will not dismiss the administrator. The insolvency administrator's fees in liquidation will also be reduced by 50% in case liquidation lasts more than eight months, unless the court justifies there are objective reasons for the delay or the insolvency administrator was diligent in complying with the rest of his or her functions. Additionally, the court cannot establish special liquidation rules which performance may cause liquidation to take more than one year. Lastly, the insolvency administrator must provide a detailed plan, for information purposes, of how and when to liquidate the assets and rights pending to be sold, once liquidation has taken more than a year. Subsequent quarterly reports must detail the actions carried out to comply with such plan, or the reasons preventing its performance.

8.3.3 Special liquidation rules

In liquidation the debtor's business operations and assets are sold to pay its creditors pursuant to their legal ranking (see section 10).

Pursuant to the Insolvency Law, the insolvency administrator no longer files a liquidation plan for court approval. When declaring liquidation or subsequently, the court will also approve, prior hearing the insolvency administrator, any special liquidation rules the court deems appropriate (which cannot provide for liquidation to go beyond one year or require court approval for the sale of any assets).

The court may modify or terminate these special liquidation rules at any time, either *ex officio,* or at the insolvency administrator's request. Only a remedy (*recurso de reposición*) is available against these court decisions.

The special liquidation rules approved by the court will be terminated when so requested by either creditors holding more than 50% of the ordinary claims, or creditors holding more than 50% of all liabilities.

In the absence of special liquidation rules approved by the court, certain subsidiary rules set forth in the Spanish Insolvency Law will apply (see section 12).

Quarterly reports on the liquidation status must be submitted by the insolvency administrator and sent to the creditors by electronic means. The breach of this information duty may cause the dismissal of the insolvency administrator and his or her personal liability for the damages caused to creditors.

8.4 OTHER TERMINATION GROUNDS

The insolvency proceedings will also terminate, at any stage, if, *inter alia,* the debtor can prove that all claims have been repaid, that all creditors have been satisfied in full by other means, or that all creditors included in the list of creditors withdraw from the insolvency proceedings after the common phase.

The insolvency proceedings will also terminate if only one creditor is included in the definitive list of creditors filed by the insolvency administrator.

Lastly, insolvency proceedings may terminate at any time, at the request of the insolvency administrator after having repaid or deposited the outstanding claims against the estate in accordance to the order provided by Law, when assets have been insufficient to pay claims against the estate (see section 10.2). To such end, the insolvency administrator must also file a report, reasoning that either that no future claw-back actions (see section 11) or actions claiming liability vis-à-vis directors (see section 9.1) are envisaged and the insolvency is not expected to be classified as negligent (see section 13), or that the potential outcome of these actions will not be sufficient to repay all outstanding claims against the estate.

Creditors may challenge this termination petition, by justifying there are sufficient clues to bring claw-back or liability actions, or lead the insolvency to be considered as negligent. Creditors must deposit an amount sufficient to attend all foreseeable claims against the estate at court, or provide an on demand bank guarantee with indefinite term for such amount.

Termination of the insolvency proceedings may also be ordered simultaneously with the declaration of insolvency in specific circumstances established in the Insolvency Law, even with no insolvency administrator appointed (unless creditors holding at least 5% of all liabilities request such appointment within 15 business days following the publication of the declaration of insolvency with the Spanish Commercial Gazette and the Public Insolvency Registry). In this case, the insolvency administrator will be appointed in order to submit a report informing on potential claw-back grounds, request director liability or the insolvency to be declared negligent. The insolvency administrator's fees will be paid by the creditors who requested the appointment. The debtor must immediately provide all information requested by the insolvency administrator to submit such report. In case such report is favourable to the declaration of insolvency, liquidation will be simultaneously opened and the insolvency administrator must take the legal action detailed in his or her report within the following two months (as well as the creditors who requested the insolvency administrator's appointment if the insolvency administrator does not do so).

9

Effects of the declaration of insolvency

9 Effects of the declaration of insolvency

9.1 EFFECTS ON THE DEBTOR'S MANAGEMENT POWERS

The court decisions to open the insolvency proceedings will determine the scope of the restrictions imposed on the debtor's management powers and will include the appointment of an insolvency administrator. In Spain, the insolvency administrator is appointed by the court – and not by creditors or by a court at the request of the creditors. Creditors are not entitled to request that the court dismisses the insolvency administrator, unless they can prove a justified ground and the court accepts that ground.

Only one insolvency administrator must be appointed (a practising lawyer or an auditor or economist, any of whom must have at least five years of experience and proven specialised training in insolvency law). Once the insolvency administrator's statute is enacted, insolvency administrators will be correlatively selected from a list available at the Public Insolvency Registry depending on the kind of insolvency proceeding to be dealt with, except in the case of large insolvencies, in which case the court will have discretion to choose the insolvency administrator. If the appointed insolvency administrator is a natural person, as opposed to a legal person (e.g. a Big Four), the court may appoint an assistant (in some cases the appointment of an assistant is mandatory). The court may appoint an additional administrator (a public authority or public entity) if justified for reasons of public interest. The independent restructuring expert who intervened in the negotiation of a Plan (see section 5.7.2) cannot be appointed as insolvency administrator.

The insolvency administrator acts as a court assistant, either supervising the debtor's management (*intervención*) or assuming control over and replacing the debtor's management (*sustitución*).

As a general rule (see section 7.1) if the debtor files for insolvency (voluntary insolvency), the debtor will retain its management powers (debtor-in-possession) and will be subject to the supervision of the insolvency administrator. Actions carried out by the debtor in breach of any mandatory supervision of the insolvency administrator may be declared void unless ratified by the insolvency administrator.

In contrast, and as a general rule, if the creditor files for insolvency (involuntary insolvency), the debtor's management will be replaced by the insolvency administrator.

These limitations on the management's faculties also affect the representation faculties under powers of attorney granted by the company. This may affect, for instance, irrevocable powers of attorney granted by the debtor in favour of the security agent or lenders in relation to security granted under the relevant facility agreement, which will not be unilaterally enforceable if the debtor is declared insolvent given that the exercise of the powers conferred therein may require the insolvency administrator's approval.

Among other faculties, the insolvency administrator may request that the court cancels or reduces any compensation that directors receive pursuant to the company's articles of association, change the company's auditors and vest in the insolvency administrator the debtor's voting rights in connection with its subsidiaries. Furthermore, once the insolvency has been declared, only the insolvency administrator will be entitled to exercise actions against directors and general managers for damages caused to the company in insolvency (*acción social de responsabilidad*) before or after the declaration of insolvency, which will be ruled by the insolvency court.

Finally, the court may decide, as an interim measure (*medida cautelar*), either ex officio or at the request of the insolvency administrator, to attach the assets of the directors or of the debtor's general legal representatives, if there are justified reasons to believe that the insolvency will be declared fraudulent. Those individuals may be ordered to satisfy any debts that the debtor cannot pay upon liquidation (see section 13).

The Public Insolvency Registry, in the form of a website (www.publicidadconcursal.es), provides free access to information related to insolvent debtors.

9.2 EFFECTS ON THE CONTINUATION OF THE BUSINESS AND CONTRACTS

One objective of the Insolvency Law is to support the survival of the debtor's business, which is not legally suspended despite the company having been declared insolvent. As an exception, the insolvency administrator is entitled to apply for liquidation at any time if the debtor ceases its business or professional activities.

An immediate consequence of the above referred principle of business continuation is that the declaration of insolvency does not affect the debtor's contracts, which remain in force. Early-termination, suspension or amendment clauses triggered solely by the declaration of insolvency or the liquidation are deemed void and unenforceable, except when such provisions are legally permitted (e.g. swap agreements).

In addition, the termination of existing contracts on other grounds is only possible subject to court approval in limited circumstances expressly regulated by the Insolvency Law:

a) *Termination in the interest of the insolvency estate.* The debtor or the insolvency administrator, with the court's approval, may request the termination of executory contracts (i.e. those with outstanding reciprocal obligations) in the interest of the insolvency estate (*interés del concurso*), including in the absence of contractual grounds for termination. A hearing with the parties will be held at which they will have the opportunity to reach an agreement on the termination and its effects. If an agreement is not reached, formal court proceedings will be held that will result in a decision issued by the court. The indemnity granted to the contractual counterparty as a result of a contract being terminated early will be an insolvency claim (*crédito concursal*), and no longer a claim against the estate (*crédito contra la masa*). If case of financial leasings, an independent appraisal of the value of the leased assets must be provided, for the court to consider when ruling on the indemnity.

b) *Termination due to breaches.* As a general rule, it is not possible to terminate an executory contract for breaches that occurred before the declaration of the insolvency proceedings. However, if a material breach of the executory contract occurred after the declaration of insolvency, the non-defaulting party may request the termination of the contract by filing a termination claim with the court.

   As an exception to the above, termination due to pre-existing breaches may be admitted if the executory contract is a continuing-performance contract (*tracto sucesivo*). A continuing performance contract is characterized by the long trade relationship that the parties enter into with each other, without requiring a one-off performance, but rather successive or continuous performance over an agreed period (for instance, leases or supply agreements). Some case law and legal scholars take nonetheless the position that termination of the contract should not be possible if one party already complied with all its contractual obligations prior to the declaration of insolvency.

   When the default took place before the declaration of insolvency (when allowed), the claims of the non-defaulting party (including indemnity claims) will be an insolvency claim (*crédito concursal*). On the contrary, claims arising from defaults which took place after the declaration of insolvency will be claims against the estate (*crédito contra la masa*). Termination of the contract will also extinguish the outstanding contractual obligations.

   The court may disregard the breach – regardless of whether it occurred before or after the declaration of insolvency –, and order specific performance of the contract for the remaining contractual term if the continuation of the agreement is deemed to be beneficial for the outcome of the insolvency proceedings. The court order may be appealed. If the default took place after the declaration of insolvency, the amounts owed to non-defaulting parties arising from the agreement must be paid from the debtor's insolvency estate within three months after the court order. If such payment is breached, the contract may be terminated.

Notwithstanding these rules, in practice, suppliers are unlikely to finance an insolvent company and it is doubtful that lenders will discount receivables or provide new facilities in order to avoid payment-default risk. Nevertheless, as addressed in section 10.3.4, subordination risk should be carefully considered in these cases, which could potentially lead the court to consider that the counterparty is repeatedly hindering the contract's compliance to the detriment of the insolvency estate.

Creditors' rights to retain assets included in the debtor's estate will be suspended. If the assets have not been transferred to third parties upon conclusion of the insolvency proceedings, they will be returned to the creditor, who holds the right to retain them, provided that its claim has not been fully settled. This stay will not affect retentions established in administrative, tax, employment or social security regulations.

9.3 REINSTATEMENT OF FACILITY AGREEMENTS

To ensure that the debtor's estate has sufficient financial resources to continue the business, the Insolvency Law allows the insolvency administrator, either unilaterally or at the debtor's request, to reinstate (*rehabilitación*) credit and other facility agreements to which the debtor was a party and which were accelerated by the creditor as a result of a payment default (principal or interest) in the three months preceding the declaration of insolvency. The exercise of this power by the insolvency administrator is subject to three conditions:

a) the insolvency administrator must provide notice of the reinstatement to the creditor before expiry of the term to lodge claims (that is, as a general rule, one month as from publication of the declaration of insolvency);

b) the insolvency administrator must satisfy or deposit any amounts unpaid at the time of reinstatement and "assume" future payments against the insolvency estate; and

c) the creditor must not have opposed the reinstatement or started any actions to claim payment before the insolvency proceedings commenced.

In practice, insolvency administrators rarely seek the reinstatement of credit or facility agreements given that, in most cases, debtors cannot satisfy the unpaid amounts and the insolvency administrator cannot guarantee that the debtor will make future payments.

A similar reinstatement rule exists in relation to deferred-payment purchase agreements that are terminated early within the three months preceding the declaration of insolvency.

9.4 SET-OFF RIGHTS

Set-off is prohibited once the debtor has been declared insolvent, unless the legal conditions to benefit from a set-off right were complied with before the insolvency was declared. In this case, set-off will be permitted even if (i) a court or administrative resolution states that the set-off of claims was requested by the relevant creditor after the declaration of insolvency or (ii) the creditor lodged the claim in the insolvency (see section 10.1) without applying the set-off.

Under Spanish law (articles 1195 et seq. of the Civil Code), set-off is only allowed:

a) between two parties (i.e. a debtor and a creditor) with mutual claims;

b) if the claims of each party are specific and quantifiable (i.e. not subject to further determination or calculation), due and payable; and

c) if no third party has notified either party that the set-off claim is subject to challenge or retention.

Set-off is also allowed after the debtor's insolvency (i) if the claims to be settled arise from the same agreement or contractual relationship or (ii) when permitted by the law applicable to the obligation held by the debtor in insolvency to be set off (e.g. a hedging agreement governed by a law that permits set-off after an insolvency declaration as is the case of netting transactions governed by RDL 5/2005).

9.5 COURT ACTIONS. ENFORCEMENT

As a general rule, declarative court proceedings already initiated prior to the declaration of insolvency will continue to be processed by the same court who was handling them, until the final judgment is handed down. Some legal exceptions apply as to either suspend, or accumulate to the insolvency proceedings, certain declarative actions. On the contrary, social or civil declarative actions brought after the declaration of insolvency will be processed by the commercial court hearing the insolvency proceedings, as long as such court has jurisdiction pursuant to the Insolvency Law.

New enforcement proceedings against the debtor's estate, including administrative and tax enforcement proceedings, will not be admitted as from the declaration of insolvency. Enforcement proceedings against the debtor's estate already initiated will be immediately suspended as from that time, except administrative or labour enforcement proceedings as long as the attachment order (*diligencia de embargo*) is previous to the declaration of insolvency and the attached assets are not necessary to ensure the continuation of the debtor's business.

The enforcement of security interests is governed by specific rules. Once the debtor is declared insolvent, the enforcement of security interests over assets owned by the debtor that are necessary for its professional or business activities (presumably most of the debtor's assets) will be stayed until the earliest of the following circumstances: (a) approval of a creditors' VCA (insofar as it does not affect secured claims and, therefore, the exercise of the relevant enforcement right); or (b) one year has elapsed since the declaration of insolvency without liquidation proceedings having been initiated. Enforcement of security interests will automatically be stayed even if, at the time of the declaration of insolvency, the notices announcing the public auction of the assets charged with the security were already published.

Any holders of security interests over the debtor's assets will be affected by these rules, even if they do not hold a claim against the debtor (i.e. in the case the debtor has granted security to secure third party debts).

The same stay will apply to any actions aimed at:

a) terminating real-estate-sale agreements due to a payment default, even if the termination clause was registered with the land registry (*Registro de la Propiedad*);

b) recovering assets sold with retention-of-title clauses registered with the registry of movable assets (*Registro de Bienes Muebles*); and

c) recovering any assets transferred under financial-leasing agreements, even if registered with the land registry or the registry of movable assets, as the case may be.

As an exception to the above, the suspension of enforcement does not affect financial collateral under RDL 5/2005 or collateral located in another Member State (except Denmark) pursuant to the European Insolvency Regulation. Enforcement of collateral located outside of a Member State (or in Denmark) at the time of the declaration of the insolvency will be governed exclusively by the law of that State.

Only the court overseeing the insolvency proceedings can determine whether an asset is "necessary" to carry out the debtor's activity. The court's determination of whether an asset is "necessary" may vary during the insolvency proceedings. When determining which of the debtor's assets are necessary, courts have generally embraced a broad interpretation and tend to include most of the debtor's assets (including cash).

Shares held by the debtor in special purpose companies that exclusively hold the assets and liabilities necessary for the financing of their activities are not considered "necessary", provided that the enforcement of the security over the shares does not constitute a ground for terminating or modifying the contractual relationships of the debtor that allow it to continue to use those assets.

When the suspension period ends, the enforcement of the security interest may be initiated or resumed, and will be ruled on separately by the court hearing the insolvency proceedings.

Lenders must consider whether they want to start enforcement early to retain such option in the case the restructuring efforts fail and the debtor ends in liquidation given that, as addressed in section 12.2, the commencement of the liquidation phase will result in the loss of the right to commence a separate enforcement process for those secured lenders who did not start enforcement either before the declaration of insolvency or within a year of the declaration of insolvency. However, secured creditors will recover their right to enforce the security interest if a year has elapsed since liquidation was opened without the collateral being sold.

If the collateral is not deemed necessary for the continuation of the business activity, as determined by the court, the secured lender will be entitled to commence – or continue with – the enforcement proceedings in the court with jurisdiction pursuant to general Spanish civil-procedure rules.

9.6 GUARANTEES

The declaration of insolvency of the debtor does not prevent creditors from enforcing personal guarantees against their guarantors. Although the Insolvency Law is silent on this, the same rule should apply in respect of enforcement of security provided by third parties.

Once the guarantor repays the guaranteed debt (or the security is enforced), the third party guarantor or security provider will have a direct recourse against the debtor and will step into the shoes of the creditor in respect of the amounts reimbursed or recovered by the creditor. The right of the guarantor or security provider to be reimbursed will be reclassified by the insolvency administrator in accordance with the lower ranking corresponding to either the original creditor or the guarantor. Therefore, if specially related parties granted guarantees or security interests, any claims that such parties may have against the debtor following the enforcement of such guarantees or security interests will be classified as subordinated, irrespective of whether the guaranteed or secured claim had a better ranking.

When the guarantor has partially repaid the debt under the guarantee, the original creditor is entitled to lodge (see section 10.1), together with the outstanding debt, the reimbursement claim held by the guarantor against the main debtor.

If the guarantor is declared insolvent, the following circumstances should be considered when the creditor lodges its claim against the guarantor:

a) guarantees that cannot be enforced against the insolvent guarantor without the prior seizure of the assets of the main debtor (*beneficio de excusión*) will be recognised as contingent claims if the creditor does not fully justify that is has seized all the assets of the debtor, in which case recognition of the claim for the remaining balance will be confirmed;

b) in cases of joint-and-several guarantees (*garantías solidarias*), Spanish case law has consistently held that (i) the claim against the guarantor will not be recognised as a claim against the debtor's estate (see section 10.2), although the guarantee may be enforced after the guarantor's insolvency declaration; and (ii) pursuant to the ancillary nature of personal guarantees, the claim against the guarantor will be recognised as contingent or conditional until the guaranteed debt becomes due and payable; and

c) the ancillary nature of guarantees implies that the guarantor cannot owe any amount higher than the debt owed by the debtor.

9.7 ARBITRATION AND MEDIATION AGREEMENTS

The declaration of insolvency does not affect arbitration and mediation agreements, which will remain in force and binding. However, the insolvency administrator may challenge them in the event of fraud.

The court, either ex officio or at the debtor's request in the case of intervention or at the insolvency administrator's request in the case of suspension (see section 9.1), may decide to suspend mediation and arbitration proceedings insofar as (i) mediation or arbitration proceedings have not yet commenced; and (ii) they could potentially be detrimental to the insolvency proceedings. International treaties prevail in any case.

On the contrary, mediation and arbitration proceedings already underway at the time of the declaration of insolvency will continue. Final arbitration awards will be binding on the insolvency court.

10

Creditors and the insolvency estate

10 Creditors and the insolvency estate

10.1 LODGING OF CLAIMS

The insolvency estate (*masa activa*) is formed by all assets and rights owned by the debtor at the time the insolvency is declared as well as those that are returned to the debtor as a consequence of the exercise of claw-back actions (see section 11) or acquired during the proceedings. Creditors are paid out of the insolvency estate.

The insolvency administrator will prepare and file an inventory of assets identifying all the assets and rights, as well as their value and status, albeit merely for informative purposes.

The insolvency administrator must also file a list of creditors identifying all the debtor's liabilities and quantifying and classifying the liabilities in accordance with their nature. When preparing the list of creditors, the insolvency administrator will rely on the debtor's accounting information, as well as the notices of claims that all creditors are obliged to lodge before the end of the first month following the publication of the declaration of insolvency in the Spanish Official Gazette (*Boletín Oficial del Estado*). It is essential that creditors be active and lodge their claims in a timely manner following the opening of the insolvency proceedings. Notices of claims may still be lodged after the end of the one-month period although, in that case, the claim will be classified as subordinated (unless the creditor can prove that it was unaware of the existence of the claim at that time or the recognition of the claim is mandatory for the insolvency administrator pursuant to the Insolvency Law).

Creditors may lodge their claims electronically. No formal brief must be filed with the court. However, the creditor may decide to formally appear in the insolvency proceedings, in which case it will be considered a party to the same. This may be advisable, for instance, if the creditor wishes to be informed of all measures and actions carried out within the insolvency process in a timely manner. In order to become a formal party, the creditor must engage a Spanish court agent (*procurador*).

The creditor's notice must state the name, address and other data identifying the creditor, as well as those related to the claim, including, among others, type, amount, date of origination or acquisition of the claim, maturity date, key features and intended ranking. The creditor must also indicate a physical or e-mail address for notification purposes. A copy of all documents related to the claim, which can be electronic if the filing was electronic, must also be provided, although the insolvency administrator may request original or certified copies.

At least 10 business days before filing its report (see section 8.1), the insolvency administrator must send an electronic notice to each creditor who lodged a claim, providing them the inventory and list of creditors, as well as informing them of the expected filing date of the report. The debtor and creditors are entitled to request, also electronically, the correction of any mistakes or inclusion of complementary information until three business days before the date on which filing of the report is expected.

Creditors are entitled to challenge the list of creditors, which will result in a formal court procedure before the same insolvency court (*incidente concursal*).

All debts owed by the insolvent debtor, irrespective of their recognition, are legally included in the liabilities pool (*masa pasiva*), which has practical consequences. For instance, pre-insolvency claims that, for any reason, were not included in the definitive list of creditors may nevertheless be bound by an approved VCA.

10.2 INSOLVENCY CREDITORS AND CREDITORS OF THE INSOLVENCY ESTATE

Before insolvency creditors (*acreedores concursales*) are paid pursuant to the order indicated below, specific creditors, denominated "creditors of the insolvency estate" (*acreedores de la masa*), will have claims against the insolvency estate (*créditos contra la masa*) that will be paid from the insolvency estate. These claims must generally be paid as they fall due and will therefore be deducted from the insolvency estate. As an exception, assets subject to a security interest cannot be affected by claims of creditors of the insolvency estate.

The Insolvency Law contains a closed-ended list of claims against the insolvency estate, which Spanish courts have interpreted restrictively. The most significant are the following:

a) Pre-insolvency claims arising from tort liability that causes death or personal damage, as well as either pre or post-insolvency indemnity claims due to work-related accidents or illness, irrespective of when they are declared. When the damages are insured, the reimbursement, return and subrogation claims that the insurance company holds will rank as an ordinary claim.

b) Wage claims accrued during the past 30 effective working days preceding the declaration of insolvency, provided they do not exceed more than two times the minimum legal wage (*salario mínimo interprofesional*).

c) Legal expenses (*costas*) of the creditors who successfully filed for the debtor's insolvency.

d) Subject to certain exceptions, fees and expenses of the insolvency proceedings, including fees associated with the declaration of insolvency or any other court resolution, as well as fees incurred by the insolvency administrator or the lawyer advising the debtor.

e) Fees of the expert appointed to find offers for the purchase of a business unit (see section 6).

f) Claims arising from obligations lawfully undertaken by the debtor with the approval of the insolvency administrator during the insolvency proceedings (including debtor-in-possession financing).

g) Costs incurred for the continuation of the business following the declaration of insolvency, including post-filing wages and redundancy payments in case of dismissals, until either the VCA is approved by the court or, in any other case, the insolvency proceedings end.

h) Payments arising from agreements with outstanding reciprocal obligations that survive after the declaration of insolvency, and any amounts due as a result of their termination due to a post-insolvency breach (see section 9.2).

i) Claims arising from obligations under applicable law and tort liability incurred after the declaration of insolvency until conclusion of the proceedings, other than those referred in paragraph a) above.

j) Interest if the obligation to return third-party assets and rights are complied with late.

k) Claims arising from reinstating credit or facility agreements (see section 9.3), as well as from releasing security by repaying the specially privileged claim (see section 10.3.1b)).

l) In the event of liquidation, financing provided to the debtor before liquidation had started to comply with a VCA in accordance with a viability plan, including new money provided by persons specially related to the debtor (see section 10.4) insofar as the VCA has identified such party providing the financing and its maximum amount.

m) 50% of interim and new money provided in the context of a Plan (see section 5.6.7), as long as the claims affected by the Plan represent at least 51% of the total liabilities. New and interim money provided by persons specially related to the debtor (see section 10.4) will also rank as a claim against the estate as long as the claims affected by the approved Plan amount to more than 60% of the total liabilities, deducting such specially related parties' claims.

Wages ranking as claims against the insolvency estate must be paid immediately. As a general rule, all other claims against the insolvency estate will be paid as they fall due. The Insolvency Law establishes that if the insolvency administrator expects that the insolvency estate will be sufficient to pay all claims against it, this rule may be modified and the payment of specific claims brought forward. This decision cannot affect claims held by employees or by tax or social security authorities.

Any creditor of the insolvency estate may at any time ask the insolvency administrator to report whether the insolvency estate is not, or is likely not be, sufficient to repay all claims against the estate. Such creditor may seek the court's help if the insolvency administrator does not reply within three business days, or the reply is vague. When the estate is not sufficient to repay all claims against the estate, expenses which are deemed to be key to liquidate the estate shall have priority. Wages accrued after the liquidation phase is opened, the fees of the insolvency administrator during the liquidation phase, and amounts due under real estate lease agreements also accrued after the liquidation phase opened, are legally considered to be key for these purposes, and will be repaid *pari passu.* All other claims against the estate will be paid pursuant to the order provided above, except for salaries and redundancy payments after the declaration of insolvency not exceeding more than three times the minimum legal wage (*salario mínimo interprofesional*), which will be preferred to those referred to in b) above.

Enforcement of claims against the insolvency estate can only commence when a VCA enters into force (see section 8.2.4).

10.3 RANKING OF INSOLVENCY CREDITORS (*CRÉDITOS CONCURSALES*)

10.3.1 Specially privileged claims (*Créditos con Privilegio Especial*)

Specially privileged claims are those that have a right *in rem* over a specific asset or right that they can enforce or attach, – as a general rule and subject to certain conditions – separately from the insolvency proceedings and in priority to other creditors. Accordingly, specially privileged creditors hold a preferential claim in connection with the proceeds of the sale or enforcement of the asset or right affected by their security or right *in rem.*

The definition of specially privileged claims include, among others: (i) those secured by a specific asset or right (e.g. claims secured by a real-estate mortgage, chattel mortgage, possessory pledge, financial collateral, pledge without transfer of possession); (ii) credit rights under financial leases; and (iii) credit rights arising out of sale agreements with a deferred price and a retention-of-title, prohibition-against-disposal or termination clause in the event of payment default.

The security interest must be perfected before the declaration of insolvency and comply with all legal requirements and formalities established to be enforceable vis-à-vis third parties (including, as applicable, execution in a notarial document and performance of any annotations and registrations in the relevant registries).

A longstanding debate existed on the scope of the privilege attached to collateral over future credit rights. In particular, it was debated whether or not the security could extend to credit rights or receivables arising out of agreements and contractual relationships that did not exist at the time of the opening of insolvency proceedings. After several amendments, the current text of the Insolvency Law expressly clarifies this issue. In particular, claims secured with pledges over future credit rights are only considered specially privileged if (a) the future credit rights arise from agreements or relationships established or executed before the declaration of insolvency; and (b) (i) in the case of possessory pledges, the pledge was granted as a notarial document or, (ii) in the case of non-possessory pledges (*prenda sin desplazamiento*), the pledge was registered with the applicable public registry.

Special rules apply if the future credit rights to be pledged arise from the termination of concession agreements or other public-works or service contracts executed with the State or other public entities. Among other requirements, in these cases, the relevant contracting body must expressly approve the pledge and its authorisation will be published in the Spanish Official Gazette or the corresponding regional bulleting.

The Insolvency Law is silent on the potential effects of promissory mortgages or pledges. Taking into account that, under Spanish law, security is only effective when actually perfected in accordance with applicable law, the courts will not recognise any privileges in these cases. Accordingly, these types of undertakings will have little use following the opening of the insolvency proceedings. In addition, security granted near the insolvency of the debtor in compliance with a promissory mortgage or security is likely to be subject to claw-back (see section 11).

Specially privileged claims are paid with preference to other claims from the proceeds obtained from the sale or enforcement of the collateral, including with preference over creditors of the insolvency estate.

The recognition of specially privileged claims in the list of creditors is, for the purposes of a VCA or a Plan, nevertheless limited to the amounts that do not exceed the "value of the collateral", which is calculated pursuant to the following formula, i.e. the Security Value:

Security Value = 90% of "reasonable value" – legally preferred claims

where:

- "*Reasonable value*" is the value determined pursuant to specific rules set forth in the Insolvency Law (see below). The preamble to the Insolvency Law justifies the application of a 10% discount on the reasonable value to determine the Security Value by making reference to the costs of enforcement and loss of value once enforcement proceedings have started. This rule has been largely criticised by practitioners and labelled as an "arbitrary discount".
- "*Legally preferred claims*" are senior-ranking charges and encumbrances (including charges and attachments by operation of law), but do not include mere contractual preferences, such as those agreed in an inter-creditors agreement.

Where security interests exist over multiple assets or rights owned by the debtor, the total amount of the specially privileged claim owed to the secured creditor will be the sum of the Security Value of each separate collateral (without exceeding the value of the claim owed to the creditor). Where several claims hold a security interest over the same collateral *pro rata,* the Security Value of each claim will be determined in accordance with its quota, pursuant to the *pro rata* rules agreed among the creditors in the security documentation. The Security Value can neither be higher than the maximum secured amount under the security agreement nor less than zero.

The reasonable value of the collateral will be determined as follows:

a) Real-estate assets will be valued by means of an appraisal report issued by an approved appraiser registered with a special registry of the Bank of Spain (unless such a report had already been issued in the six months preceding the declaration of insolvency). Special rules apply to finished houses.

b) Securities listed on a regulated market will be valued pursuant to the average weighted price at which they have been traded on one or multiple regulated markets in the quarter preceding the declaration of insolvency, as certified by the entity governing the corresponding official secondary market or regulated market.

c) The value of other assets or rights will be determined pursuant to a report issued by an independent expert on the basis of generally accepted accounting principles and valuation rules for such assets (unless such a report had already been issued in the six months preceding the declaration of insolvency).

The insolvency administrator will pay for these reports.

The Security Value may be modified at any time within the insolvency proceedings when new circumstances substantially affect the reasonable value of the collateral. In that event, new reports will be required (and must be paid for by the affected creditor if it is the only party requesting the change of the Security Value).

The amount of the claim that exceeds the Security Value will be classified according to its characteristics and nature (i.e. as a generally privileged, ordinary or subordinated claim).

Determining the Security Value, and consequently the portion of the claim that is in the money and can be deemed secured, is key for other reasons, including for:

a) determining the classes and majorities that are necessary to approve a Plan (see section 5.4) or a VCA (see 8.2) and ensure that the effects of those refinancing instruments will also be binding in connection with secured claims;

b) entitling the insolvency administrator to release the security by repaying the secured claim up to the Security Value as a claim against the insolvency estate while the suspension of the term for enforcement remains in force (see section 9.5);

c) determining the rights of the secured creditor in the event of the sale of the business as a going concern, including the collateral (see section 6.3.2). If the collateral is sold separately, or the security is enforced, the secured creditor will be entitled to collect the proceeds up to the maximum secured liability under the original debt, even if the Security Value is lower (see section 12.2); and

d) establishing the maximum amount of accrued and unpaid interest that can be recognised in the context of insolvency proceedings (i.e. any pre-insolvency outstanding interest exceeding the Security Value will be deemed a subordinated claim).

10.3.2 Generally privileged claims (*Créditos con Privilegio General*)

Generally privileged claims are those paid from the debtor's assets rather than from an entitlement to any specific asset. Consequently, generally privileged claims are paid after repayment of secured claims, but prior to ordinary claims. They include, among others:

a) Unless they rank as claims against the estate or specially privileged claims, pre-insolvency claims for wages up to a specific amount, severance payments and compensation for the termination of employment agreements up to a specific amount, compensation for work-related accidents or sicknesses and surcharges on amounts owed for the breach of employment-related health-and-safety obligations established before the declaration of insolvency.

b) Claims for amounts relating to unpaid withholding taxes and social-security contributions.

c) Claims for other amounts to be paid to the tax authorities and social-security authorities (up to 50% of the aggregate amount calculated as provided in the Insolvency Law).

d) Claims for tort liability other than those described in section 10.2a), including claims by social-security or tax authorities deriving from criminal offences (*responsabilidad civil derivada de delito*). When the damage is insured, following its reimbursement, the return and subrogation claim that the insurance company holds will rank as an ordinary claim.

e) 50% of interim and new money (see section 5.6.7), as long as the claims affected by the approved Plan represent at least 51% of the total liabilities. New and interim money provided by persons specially related to the debtor (see section 10.4) will also rank as a generally privileged claim as long as the claims affected by the approved Plan represent more than 60% of the total liabilities, deducting such specially related parties' claims.

f) Claims of the creditor that filed the request for insolvency, up to 50% of the aggregate amount of the creditor's unsubordinated claims. It is unclear how the preference should be set when an agent of a syndicated loan, acting on behalf of the remaining creditors, files an insolvency petition. In particular, it is not clear whether the agent should be the only creditor benefiting from this preference, who would in turn distribute any resulting proceeds *pro rata* among the remaining creditors in accordance with the inter-creditors' agreement or sharing clause, or if the preference should benefit each lender on whose behalf the agent acts. Some courts have held that, when the request for insolvency is filed jointly by two or more creditors, the preference should be distributed *pro rata* among those making the request. This is unsurprising given that a general preference is a privilege that should be narrowly construed.

Claims that benefit from a general preference are paid after secured claims (and before ordinary claims) in accordance with the order outlined above. If the assets are insufficient to fully satisfy any of the subclasses listed above, creditors of the same subclass will be paid *pro rata* to the amount of their claims.

10.3.3 Ordinary claims

Ordinary claims (*créditos ordinarios*) are those that are neither expressly privileged nor expressly subordinated.

Ordinary claims rank *pari* passu and are paid *pro rata.*

10.3.4 Subordinated claims

Subordinated claims (*créditos subordinados*) are those paid last and include:

a) Claims that creditors do not lodge with the insolvency administrator on time (see section 10.1). However, claims registered in the debtor's accounts, claims documented in a notarial document granted before a Spanish notary public (which is the norm for financing agreements except for very strong borrowers), or secured claims when the security is registered with a public registry, will not be subordinated for having lodged the claim late. In practice, almost all the claims granted by professional lenders comply with these requirements.

b) Claims that are contractually subordinated to all remaining debts of the debtor. To the extent no detriment is caused to a third party and the debtor has executed the agreement, relative subordination agreements among creditors are recognised and enforceable within the insolvency proceedings. The insolvency administrator will therefore make the repayments in accordance to such subordination agreement. When these conditions were not met, the insolvency administrator will not be bound by the contractual waterfall agreed by the parties and will be entitled to pay all the holders of "ordinary" claims (irrespective of their contractual title) proportionally. Accordingly, senior creditors should ensure that they have an enforceable contractual right (the "turn-over" provision) to request that any amounts received by the purportedly subordinated creditors in excess of what they would have received had they not qualified as ordinary be turned over to senior creditors.

Profit-participating loans (*préstamos participativos*) are expressly included in the list of contractually subordinated claims.

c) Claims for interest accrued before the declaration of insolvency and surcharges, except surcharges and interest in connection with secured claims, and subject to the limit of the Security Value. Claims will not accrue interest after the declaration of insolvency, except for remunerative secured interest subject to the limit of the Security Value.

d) Claims for fines and sanctions.

e) Claims held by persons who are specially related to the debtor (see section 10.4), except for claims held by shareholders or common shareholders who are specially related to the debtor, provided that they arise from contracts other than loans, facility agreements or similar financing arrangements (e.g. commercial relationships, services agreements, asset transfers). The Spanish Supreme Court has held that group companies do not benefit from this exception to subordination.

f) Claims in favour of a creditor as a result of a claw-back action if the court finds that the creditor acted in bad faith (see section 11).

g) Claims arising from either reciprocal obligations or reinstated financing contracts (see section 9.3) if the court finds, based on the report of the insolvency administrator, that the creditor repeatedly obstructed compliance with the contract to the detriment of the insolvency estate (e.g. creditors that refuse to discount receivables under an existing discount facility).

The main consequences of subordination are:

a) Subordinated creditors are paid last, and only if ordinary creditors have been repaid in full. Subordinated creditors are then paid in the order listed above. If assets are insufficient to fully satisfy the claims of any of the subordination subclasses, creditors of the same subclass will be paid *pro rata* to the amount of their claims.

b) Any security interest over assets or rights of the insolvency estate created to secure a subordinated claim will be automatically cancelled, unless the subordinated creditor successfully challenges the classification of its claim, in which case the security interests will only be released when a final judgment that is not subject to appeal is handed down. The Spanish Supreme Court has confirmed that such releases do not affect security interests and guarantees provided by third parties, which will therefore remain in force, notwithstanding the secured or guaranteed claim being subordinated in the debtor's insolvency.

c) Subordinated creditors will not be entitled to vote on a VCA with respect to their subordinated claims. Specially related parties are not entitled to vote a VCA either in respect to those claims ordinary or privileged claims purchased *inter vivos* after the declaration of insolvency.

10.4 SPECIALLY RELATED PARTIES

Claims of legal or natural persons who are specially related to the debtor (*personas especialmente relacionadas*) are subordinated. The Insolvency Law contains an exhaustive list of situations in which a creditor is deemed to be specially related to the debtor. The Spanish Supreme Court has held that the list should be construed restrictively.

The following creditors will be deemed to be specially related to the debtor if the debtor is a legal person (i.e. not a natural person, to whom specific rules apply and which are not addressed in this Guide):

a) *Shareholders holding, directly or indirectly, 10% or more of the debtor's share capital (5% or more if the debtor has securities listed on an official secondary market) at the time the loan was granted or the claim was created.*

   Creditors that become direct or indirect shareholders after the claim was originated (e.g. as a result of a debt-for-equity transaction) will not be subordinated.

   The Insolvency Law attempts to incentivise debt-for-equity transactions by establishing that creditors who have directly or indirectly capitalised their claims pursuant to a VCA or a Plan will not be deemed to be specially related persons in connection with any new money provided in the context of the VCA or Plan providing for the debt-for-equity transaction. This protection will be afforded even when, as a result of the debt-for-equity transaction, the creditor has been appointed director.

b) *Directors, including legal and shadow directors, liquidators and representatives acting under general powers of attorney, and those who have held those positions or roles in the two years immediately preceding the declaration of insolvency.*

   According to case law, in order to classify a claim held by any of these individuals as subordinated it is not necessary for the claim to have been created when the creditor already held the position. Therefore, the ranking of pre-existing claims may be prejudiced if directors or any other individual holding the indicated positions purchase a pre-existing claim or an existing lender subsequently becomes a (legal or shadow) director or manager acting under general powers of attorney. This may therefore result in all claims held by lenders against the debtor being subordinated in the event the lender is considered a shadow director of the debtor, irrespective of when the loan was granted.

   Lenders exercising excessive control over the distressed debtor's activities could face, in exceptional cases, the risk of being subordinated if the court finds that, based on the circumstances, they acted as shadow directors. Due to this risk, the appointment of chief restructuring officers at the request of lenders was in the past not very common in Spain as some lower courts subordinated lenders' claims.

However, this should only apply in extraordinary cases, where the interference in the management of the debtor by the lender exceeds what is considered normal and legally acceptable, thus becoming itself, through repeated actions, a de facto director. The Spanish Supreme Court has consistently ruled a narrow interpretation according to which a shadow director will only exist when: (i) a person performs management tasks legally reserved to directors; (ii) these tasks are performed on a regular basis (and not occasionally); and (iii) the shadow director acts independently, with autonomous decision-making powers.

Furthermore, the Insolvency Law was amended in 2014 to afford further comfort to lenders in this area. In particular, creditors executing a Plan or a VCA will not be deemed shadow directors as a result of the (negative or positive) covenants assumed by the debtor to comply with its viability plan, unless special circumstances justifying the shadow directorship are proven to exist.

In any case, in order to assess this risk properly, it is advisable to carefully review the lenders' monitoring and consent rights under the restructuring agreement.

c) *Entities forming part of the debtor's group, as well as their "common shareholders" meeting the conditions indicated in paragraph (a).*

"Common" shareholders are those who simultaneously hold (i) any stake in the insolvent debtor (i.e. one share is sufficient); and (ii) a stake higher than 10% of any unlisted group company (or 5% of any listed group company) as at the date of the creation of the claim.

The Spanish Supreme Court has held that a group of companies exists when "control" exists (as defined in article 42 of the Spanish Commercial Code), even if the ultimate controlling person is a natural person, and not a legal person, such that consolidated annual accounts do not exist. The Spanish Supreme Court has also held that the circumstances detailed in article 42 are merely examples. Therefore, control may exist in other circumstances, such as through contractual rights.

A claim is subordinated if it was created when the creditor formed part of the debtor's group, even if the creditor no longer forms part of the group at the time the insolvency is declared.

In light of the above circumstances, legal structures by virtue of which lenders intend to lend money and at the same time acquire equity interests in the debtor or parent company, or appoint a director or chief restructuring officer, should be carefully reviewed in order to avoid, or at least mitigate, the risk of subordination. The acquisition of shares upon the enforcement of share pledges may also have consequences in connection with the potential subordination of any outstanding post-enforcement debt, for instance if the enforcing lenders are appointed *de jure* directors of the debtor or classified as shadow directors.

The Insolvency Law also provides that the assignees of a claim assigned by a specially related party to the debtor will be presumed to be a specially related party if the debtor is declared insolvent in the subsequent two years. This legal presumption is rebuttable; however, it remains unclear what evidence would be necessary to avoid subordination. In the opinion of some legal scholars, unknowingly purchasing debt from a related party (e.g. on an official secondary market) should be sufficient to rebut this presumption. Likewise, some legal scholars take the position that debt trades on market terms carried out in good faith between unrelated parties should also allow the acquirer to avoid this classification, even if the debt was acquired from a party who is specially related to the debtor. Unfortunately, to date, there is no conclusive case law on this matter.

11

Claw-back

11 Claw-back

11.1 GENERAL FRAMEWORK

11.1.1 Claw-back of actions detrimental to the insolvency state

Any action carried out or agreement entered into by the debtor in the two years preceding the filing of the insolvency petition, as well as those carried out since such filing until the declaration of insolvency (the "suspect" period), can be rescinded by the court if the action or agreement was "detrimental to the insolvency estate" (*perjudicial para la masa activa*), including in the absence of fraudulent intent.

The same rescission grounds apply in relation to any detrimental action carried out or agreement entered into by the debtor within two years preceding the pre-insolvency filing (see section 4), as well as those carried out since that date up to the declaration of insolvency, even if there has been no fraudulent intent, as long as:

a) the Plan has not been passed or, when passed, has not been approved by the court; and

b) the insolvency is declared within a year of the end of the Pre-Insolvency Period (or the end of its extension when granted – see section 4.4).

The analysis of whether an action, agreement or transaction is detrimental to the insolvency estate must be made on a case-by-case basis.

The Insolvency Law does not define "detrimental". The Spanish Supreme Court has interpreted that a transaction is "detrimental" when it implies an "unjustified sacrifice" to the debtor's estate taken as a whole. If the sacrifice is justified (i.e. the transaction was carried out at market value), the transaction should not, in principle, be considered detrimental to the insolvency estate and should not be rescinded. Similarly, payments of amounts due and payable will generally be deemed justified, unless specific circumstances suggest that they are not (e.g. payment is made at a time when the debtor was already insolvent).

The Insolvency Law establishes a series of presumptions that give some indication as to how a court would rule in specific cases:

a) A transaction will be deemed to be detrimental in all cases if: (i) it is carried out for no consideration; or (ii) it involves the early settlement (by payment or otherwise) of non-secured debts maturing after the declaration of insolvency.

b) A transaction will be presumed to be detrimental but that presumption may be rebutted if the transaction: (i) is carried out in favour of persons specially related to the debtor (see section 10.4); (ii) involves creating guarantees in rem that secure pre-existing debts (or new debts incurred to replace pre-existing ones); or (iii) involves the early settlement (by payment or otherwise) of debts secured with a guarantee in rem maturing after the declaration of insolvency.

Intragroup guarantees (upstream and cross-stream guarantees and security) must be granted cautiously as they may trigger some of the presumptions described above (in particular, those set forth in a) i) and b) i). While guarantees provided by a parent company with respect to obligations of its subsidiary (downstream guarantees) may be considered to be implicitly compensated by the benefits that the guaranteed transaction imply for the subsidiary (and, indirectly, for the parent company), some courts have considered in the past that upstream guarantees and cross-stream guarantees were transactions for no consideration, and therefore, if granted within the two years preceding the insolvency, they should be deemed detrimental with no possibility to provide evidence to the contrary. It is therefore key that creditors prove that the intragroup guarantor received some form of "equivalent compensation" (monetary or otherwise) in exchange for their financial assistance. Recent case law has clarified that upstream and cross-stream guarantees may not be considered gifts, particularly if granted simultaneously with the execution of the facility agreement (*garantías contextuales*). However, this does not mean that they cannot be set aside. On the contrary, the granting guarantees still needs to be justified.

The main difficulty is that in Spain the interest of the group is not always sufficient to justify actions that may be detrimental to the subsidiary (such as the delivery of a guarantee). The Supreme Court has recently ruled that a reasonable balance should be reached between achieving the group goals and acting in the best interest of the subsidiary. Among others, the subsidiary must benefit -directly or indirectly- from the transaction determined as a whole (e.g. by receiving intragroup financing or having access to shareholders´ support). In addition, the Supreme Court has ruled that the acts carried out in the best interest of the group but to the detriment of the subsidiary shall not put the solvency of such subsidiary into jeopardy.

Specific transactions cannot be rescinded: (i) actions taken by a debtor in the ordinary course of business and in normal terms (an exception that Spanish courts interpret restrictively); (ii) the creation of in rem guarantees that secure public claims, as well as acknowledging and repaying public claims that aim to remove or reduce the debtor's criminal liability; and (iii) netting and transfer orders entered into a payment and securities settlement system before the declaration of insolvency. Plans, which include new and interim money, are also protected against claw back (see section 5.6.6).

The detriment caused by any action not falling within any of the above categories will need to be evidenced by the insolvency administrator or the creditor requesting claw back.

11.1.2 Consequences of a successful claw-back action

The consequences of a successful claw-back action will depend on the nature of the rescinded action or transaction:

a) If the rescinded action or transaction created reciprocal obligations for both the debtor and a third party, the court will order the restoration of the object of the transaction, together with all ancillary rights, proceeds and interest. The counterparty's claim against the debtor will be treated as a credit against the estate (*crédito contra la masa*) and will therefore be repaid simultaneously with the restoration of the object to the insolvency estate.

b) If the rescinded action or transaction was carried out unilaterally by the debtor, the court will order the restoration of the asset that was separated from the debtor's estate and the inclusion of the counterparty's claim in the list of creditors (*crédito concursal*), with the ranking applicable to that creditor pursuant to the Insolvency Law (see section 10).

c) If the assets cannot be restored to the debtor's estate, the counterparty must pay a cash amount equivalent to the value of the assets as at the time they were separated from the debtor's estate, plus statutory interest accrued as from that time.

d) If the court finds that the counterparty acted in bad faith, it will order the counterparty to indemnify the debtor for any loss or damage suffered. In addition, the claim held by the counterparty against the debtor (the restitution claim resulting from the claw back in the case of rescission of a bilateral or unilateral transaction) will be subordinated. The mere knowledge of the debtor's insolvency (or its imminence) and the existence of a detriment is not sufficient to conclude that the counterparty acted in bad faith.

11.2 *ACTIO PAULIANA*

Apart from the claw-back action, any creditor (as well as the insolvency administrator in the event the debtor is declared insolvent), may bring an *actio pauliana* (*acción rescisoria pauliana*) to rescind a transaction, provided the transaction was executed fraudulently and the creditor cannot obtain payment of the amounts owed under the relevant contract in any other way.

Although Spanish case law is not entirely consistent, it is broadly accepted that the creditor must evidence that:

a) it holds a claim under a valid contract and the debtor's action to be rescinded occurred after the creditor's claim;

b) the rescinded action is detrimental to the creditor's claim;

c) the act is fraudulent (which, according to legal scholars and case law, must be proved objectively, based on facts);

d) the creditor has no other legal remedy; and

e) the debtor was insolvent when the transaction was carried out.

The existence of fraud is an essential requirement for the *actio pauliana* to succeed. The Spanish Civil Code presumes that the following acts are fraudulent: (a) agreements by virtue of which the debtor transfers assets for no consideration (non-rebuttable presumption) and (b) transfers with consideration carried out by parties who were held to be liable by a court, or whose assets have been subject to attachment (*mandamiento de embargo*) (rebuttable presumption). Payment of non-matured debts made while insolvent may also be rescinded.

According to some Spanish legal scholars, if the *actio pauliana* is upheld, the third party must return the consideration received under the contract in order to satisfy the debt owed to the creditor. If the consideration received by the third party under the contract cannot be returned to the debtor, the third party must indemnify the creditor.

The *actio pauliana* is time-barred four years after the date the fraudulent act was carried out. However, according to case law, the prescription period begins on the date the creditor became aware of the fraudulent act.

12

Sale of the debtor's assets and business units through insolvency

12 Sale of the debtor's assets and business units through insolvency

12.1 GENERAL FRAMEWORK

Any sale or encumbrance of the debtor's assets or rights before the approval of a VCA or the opening of the liquidation phase requires judicial authorisation.

However, the Insolvency Law establishes exceptions to this rule for (a) disposals carried out in the ordinary course of business; and (b) transactions that the insolvency administrator deems essential to satisfy cash needs for the continuation of insolvency proceedings or guarantee the viability of the business. The insolvency administrator must inform the court of any decision taken regarding transactions that fall under these exceptions and justify why these transactions were carried out. Experience reveals that, except for non-controversial transactions carried out in the ordinary course of business, insolvency administrators prefer to submit the transaction to judicial authorisation, which also affords additional protection to the parties involved in the transaction.

Additionally, assets that are not necessary for the debtor's business activities can be sold without judicial authorisation if the insolvency administrator receives an offer that substantially matches the value attributed to such assets in the inventory of assets prepared by the insolvency administrator. Any offer where the difference in value with that indicated in the inventory is less than 10% for real-estate assets, or less than 20% for movable assets, will be considered a substantial match. The insolvency administrator must inform the court of any offer that meets these conditions and justify that the assets are not necessary for the debtor's business activities. The offer will be deemed approved if no higher offer is received within 10 business days.

When the court authorises a sale of an asset within insolvency proceedings (either individually or as part of a business unit), it will order the cancellation of all existing pre-insolvency charges and encumbrances over the asset (including seizures ordered by the Spanish tax or social-security authorities). Special rules apply to sales of secured assets (see section 10.3.1), including debt-for-asset transactions, given that the court may either cancel the collateral (subject to specific requirements), or authorise the transfer of the asset together with the security.

12.2 SELLING ASSETS

Assets subject to a security interest must be sold through a digital judicial auction (*subasta electrónica*), unless the court authorises a different sale process (e.g. out-of-court auction, direct sale).

Experience reveals that judicial auctions following the rules of procedural law are rare and that insolvency administrators instead prefer to organise out-of-court auctions or direct sales. The enforcement of security rights by privileged creditors is subject to the limitations indicated in section 9.5.

The Insolvency Law does not establish how out-of-court auctions should be carried out. The insolvency administrator normally proposes specific rules to the court for authorisation, including the engagement of specialised agents.

Credit-bidding rights are usually granted to the privileged creditor up to the secured amount. This affords the privileged creditor substantial influence and control over the auction.

If requested by the insolvency administrator or the privileged creditor, the court may authorise a direct sale at any time during the insolvency proceedings. If the debtor remains in possession, the debtor's consent is also required.

The sale may be carried out without the cancellation of existing security rights. Thus, the buyer will acquire the debtor´s position under the secured liability which will no longer will be an insolvency claim.

For the judicial authorisation of a sale establishing the cancellation of the existing security rights, the offered price must be (a) payable in cash and (b) higher than the security's reference value for the auction when perfecting the security. If the offered price is lower than that amount, the sale will be authorised by the court if (i) the debtor and the privileged creditor agree and (ii) the price is deemed to be market value pursuant to a recent valuation.

Once the court authorises the sale, the sale's terms and conditions must be published. If a higher bid is filed within the 10 days following the last publication, an auction will be organised among the existing bidders.

Debt-for-asset transactions can be judicially authorised at the request of the privileged creditor or the insolvency administrator (with the privileged creditor's express consent), provided that the secured claim is fully settled. The debtor's consent is also required if it remains in possession of the asset.

Once the liquidation phase starts, the Insolvency Law provides that if the assets to be sold represent individually or as a whole more than 5% of the total inventory value, they must be sold through a digital auction, unless the court decides otherwise when establishing the special liquidation rules (see section 8.3.3).

The Insolvency Law includes some provisions to avoid situations in which the insolvency cannot be completed because assets remain to be sold but there are no interested parties. Where there are no bids in the auction organised within the liquidation phase and the privileged creditor does not exercise the general procedural law right to acquire the asset in exchange for 50% of its claim, the court will directly award the assets to the privileged creditor for their inventory value if such value is less than the secured amount. If the assets' inventory value is higher that the secured amount, a new auction will need to be held without a minimum bid.

Special rules apply when collateral is sold as part of a business unit (see section 6.3.2).

12.3 SELLING A BUSINESS

As indicated in section 6, the framework established by the Insolvency Law for the sale of a business as a going concern is fairly efficient and convenient for buyers. The sale of all or part of the business as a going concern can be carried out at any time during the insolvency proceedings as an independent procedure, as part of a VCA, or even as a way to carry out an accelerated liquidation through the Spanish Pre-Pack.

The Insolvency Law has established that a business (or part of it) must be sold through a digital judicial auction unless the court authorises a different process (e.g. out-of-court auction, direct sale).

If carried out through an auction, the court is entitled to choose a bid that is not the highest bid if (a) the court considers that it offers a better guarantee in connection with the maintenance of the business and its employees and a higher or faster recovery of claims by the creditors; and (b) provided that the economic difference compared to the highest bid does not exceed 15%. Nevertheless, experience reveals that insolvency administrators prefer direct sales governed by rules that the court must pre-authorise. The judicial authorisation of a direct sale is not subject to appeal.

Employee representatives must be heard before making any decision regarding the sale of the business.

13

Negligent insolvency

13 Negligent insolvency

13.1 EVENTS

In ordinary insolvency proceedings, following the end of the common phase, another phase begins to analyse whether the insolvency should be declared negligent (*culpable*) or not (*fortuito*).

An insolvency is considered "negligent" if it was caused or exacerbated by the debtor's wilful misconduct or gross negligence (or that of its directors, including shadow directors, general managers and all persons who performed those functions within the two years preceding the insolvency declaration).

Insolvency is presumed negligent, unless proven otherwise, if the debtor, its legal representatives, directors or liquidators:

a) failed to file for insolvency within the term established in the Insolvency Law (see section 3.1);

b) breached their duty to cooperate with the court and the insolvency administrator, failed to provide them with any information necessary for the insolvency proceedings, or failed to attend the creditors' meeting when their participation was needed to approve a VCA; or

c) failed to issue, audit or deposit, once approved, the annual accounts with the commercial registry for the three fiscal years preceding the declaration of insolvency.

An insolvency will always be declared negligent if:

a) the debtor stripped all or part of its assets to the prejudice of its creditors or carried out any acts that delayed, impaired or impeded the effectiveness of the seizure of the debtor's assets through any type of foreclosure proceedings, whether commenced or foreseeable;

b) the debtor's assets were fraudulently transferred during the two years preceding the commencement of the insolvency proceedings;

c) the debtor carried out acts with the intention of simulating a false net worth;

d) the debtor made material misrepresentations in connection with any of the documents filed with the application for insolvency or during the insolvency proceedings, or filed forged documents;

e) the debtor did not substantially comply with its accounting obligations, had a double-accounting system or committed material accounting irregularities that affected the calculation of its net worth or financial situation; or

f) liquidation was initiated *ex officio* upon a breach of the VCA due to causes attributable to the debtor. In this regard, the Insolvency Law establishes objective criteria to determine whether the breach of the VCA should be considered negligent, as well as some specialities in relation to the court hearing in these cases.

For the above purposes, the insolvency administrator must file an assessment report containing its opinion and the reasons as to whether – and why – the insolvency should be declared negligent. A Public Prosecutor's (*Ministerio Fiscal*) report is no longer required, unless certain criminal offences are suspected.

Creditors who have previously alleged the insolvency to be considered as negligent, by e-mail to the insolvency administrator within the term envisaged to lodge their claims in the insolvency (see section 10.1), and provided that their claims either represent more than 5% of total liabilities or amounts to more than EUR 1 million in accordance to the provisional list of creditors submitted by the insolvency administrator, will be entitled to issue a report corroborating the negligent nature of the insolvency. Such report entails the start of the process to rule on negligence, even if the insolvency administrator considers the insolvency not to be negligent. Therefore, lenders meeting this requirements now have more tools to seek directors' liability in negligent insolvency cases.

If the insolvency administrator considers the insolvency negligent, any creditor or person proving a legitimate interest is entitled to join the process and support the negligence petition.

13.2 CONSEQUENCES. POTENTIAL SETTLEMENT

If the insolvency is declared fraudulent, the court may impose civil sanctions on the directors and liquidators (including shadow directors), general managers and any persons who performed management functions within the two years preceding the commencement of insolvency proceedings, as well as their accomplices.

Sanctions include disqualification from holding similar positions for a term of two to 15 years, loss of rights held against the insolvency estate (monetary claims), orders to return assets improperly received from the debtor, and payment of damages, jointly and severally or otherwise.

If the insolvency is declared negligent and the liquidation phase is opened, those considered liable for the insolvency (excluding accomplices) may also be held personally liable, jointly and severally or otherwise, to pay for the liquidation's "shortfall". A shortfall will exist when the value of the total assets and rights included in the inventory submitted by the insolvency administrator is lower than the value of the total liabilities reflected in the list of creditors. The amount to be paid will be calculated by the court in view of the conduct of each party.

The insolvency administrator, creditors filing a report corroborating the negligent nature of the insolvency, and those persons who may be found liable or accomplices, are entitled to execute a settlement agreement on the economic consequences of the negligent insolvency. Such settlement agreement requires court approval.

13.3 SHAREHOLDERS' LIABILITY

Shareholders are not liable for a company's insolvency unless they hold positions within the company other than as a shareholder (i.e. when they also act as directors or shadow directors). In fact, the Insolvency Law has removed specific exceptional cases in which shareholders could be held liable in connection with their refusal to capitalise claims when this could frustrate the success of the restructuring or refinancing of a company in financial distress. The flipside of the coin is, however, that shareholders (including those holding a controlling stake) can now be dragged to the outcome of a Plan in certain circumstances (see section 5.6.3) and, therefore, the former disincentive rules that tried to avoid hold-out conducts from shareholders are now deemed redundant.

13.4 CRIMINAL-LAW IMPLICATIONS

The Spanish Criminal Code (**"SCC"**) establishes several offences related to insolvency situations: (a) concealment or frustration of the execution assets; (b) criminal insolvency; (c) unlawful favouring of creditors; (d) submission of false documentation in insolvency proceedings; and (e) misappropriation of funds.

As of publication of this Guide there has not been any case law on these criminal offences.

Although these offences are committed by the debtor (or, in some cases, the insolvency administrator), having knowledge of the existence of such offences is also important for creditors as they may be entitled to bring criminal actions against debtors and seek damages in criminal proceedings. Creditors may also, in extraordinary cases, be held criminally liable for these offences if they are deemed to have cooperated with – or induced – the debtor or the insolvency administrator to commit the underlying unlawful conduct.

Although some of the acts punished by these offences are similar to those regulated in the Insolvency Law, criminal courts are not bound by the decisions of an insolvency court (although, in practice, the conclusions reached in insolvency proceedings may influence criminal courts).

13.4.1 Concealment or frustration of the execution of assets

Offences related to the frustration of debt executions mainly consist of two groups of conduct:

a) carrying out an act of disposal or assuming obligations with the intention of avoiding the payment of a creditor or jeopardising its enforcement (the mere failure to comply with obligations due to a lack of assets is not an offence, rather the fact that the debtor knowingly placed itself in that situation to the detriment of its creditors – thus, negligent conducts, such as making risky investments without economic justification or mismanaging assets, falls outside the scope of the offence); and

b) submitting an incomplete or false inventory of assets in the framework of execution proceedings (either judicial or administrative) with the intention of avoiding the payment of the debt, or failing to comply with a judicial or administrative order to produce the list.

13.4.2 Criminal insolvency

Although this offence can be prosecuted even if the debtor has not been declared insolvent, it must be proven that the debtor is not regularly complying with its payment obligations, a situation that falls under the definition of insolvency and that obliges the debtor to file the insolvency petition (see section 3.1).

This offence includes a wide range of conducts that may trigger criminal liability either because they occur within the context of a current or imminent insolvency or because they cause the insolvency itself. These types of conduct, which are considered by the SCC to be "contrary to the duty of care in the management of economic affairs", can be categorised as follows:

a) Actions that reduce a debtor's insolvency estate or pose a risk of economically unjustified capital losses

    (i) Concealing, damaging or destroying goods or assets that form – or should form – part of the debtor's estate upon commencement of the insolvency proceedings.

    (ii) Disposing of the debtor's estate in a manner that is disproportionate to its assets or income and lacks an economic or business justification.

    (iii) Engaging in speculative business transactions without economic justification or due diligence.

    (iv) Falsifying claims with third parties or acknowledging fictitious claims.

    (v) Selling or providing services at a loss without economic justification.

b) Breach of corporate obligations

   (i) Failing to keep accounts, keeping false accounts or irregular bookkeeping that hinders understanding the debtor's real financial situation (including the destruction or alteration of accounting records).

   (ii) Concealing, destroying or altering documents that a company is required to keep, making it difficult to review or evaluate the debtor's actual financial situation.

   (iii) Preparing financial statements or accounts in breach of regulations in such a way as to make the assessment of the debtor's financial situation difficult or impossible, or in a way that breaches the duty to prepare the balance sheet or inventory in a timely manner.

c) Actions or omissions that generally breach the duty of care required in the exercise of the management of financial affairs, resulting in a decrease in the debtor's estate or the concealment of the debtor's real financial situation and that of its business activities.

Moreover, unlike the other offences analysed in this section, criminal insolvency may be punishable in cases of negligence (specific intent to harm the debtor's creditors is therefore not required), which considerably broadens the scope of offences. In fact, the literal wording of the SCC does not significantly differ from specific actions that may lead to negligent insolvency (*concurso culpable*) (see section 13.1) or the application of the claw-back action (see section 11) in civil insolvency proceedings.

This may create paradoxical situations. For instance, a scenario could arise in which the debtor's breach of its duty of care in connection with the management of its economic affairs is not punished in insolvency proceedings given that a favourable VCA has been reached, while that same breach is investigated – and leads to punishments imposed – by a criminal court. This theoretically gives creditors the possibility of claiming damages from debtors (and their directors in the case of companies) by filing a criminal complaint regardless of whether a VCA is reached in the framework of insolvency proceedings. According to the SCC, the civil liability resulting from a conviction for this offence should be included in the debtor's estate managed in the insolvency proceedings.

13.4.3 Unlawful favouring of creditors

This offence primarily consists of the alteration of the ranking of credits once the debtor's insolvency proceedings have commenced.

However, the SCC also allows for the possibility of the commission of the crime even before the debtor's insolvency proceedings start. This can occur when the debtor, in a situation of actual or imminent insolvency, favours any of the creditors and carries out a disposal of assets or generates obligations aimed at satisfying an obligation that is still not due and payable – or providing a guarantee to which the creditor was not entitled – when there is no economic or business justification for those actions.

13.4.4 Submission of false documentation in the insolvency proceedings

The SCC explicitly refers to "knowingly" submitting false documents relating to the debtor's accounts in order to improperly obtain a declaration of insolvency (thus excluding negligent conduct). The crime is committed by the mere act of submitting false documentation (i.e. neither a declaration of insolvency nor detriment to the creditors is required).

13.4.5 Misappropriation of funds

Insolvency administrators may be held criminally liable if they (i) infringe their duties by exceeding their administration powers to the detriment of the insolvency estate or creditors' interests or (ii) alter the legally established ranking of claims.

Although only insolvency administrators may commit this offence, creditors may also be held criminally liable if they acted as abettors, accomplices or instigators (e.g. the creditor that induces the insolvency administrator to alter the ranking of claims to benefit that creditor).

13.4.6 Penalties for these offences

The penalties for the above criminal offences include imprisonment as well as the imposition of fines on the natural persons committing the offence. The severity of the penalties will vary depending on the offence and the specific circumstances of its commission.

Additionally, a legal person may also be held criminally liable if the criminal conduct is committed by any of its directors, employees or any person under its authority, provided that the offence is committed on behalf of the entity and for its direct or indirect benefit (unless a crime-prevention program had been implemented in the entity before the commission of the offence). The penalties that may be imposed on entities include fines and other types of measures such as disqualification from obtaining public subsidies or contracting with the public sector, preventing the entity from conducting business activities and prohibitions against carrying out commercial activities related to the offence committed.

14

Cross-border insolvencies

14 Cross-border insolvencies

The Insolvency Law has introduced a number of novelties in the sphere of cross-border insolvencies, particularly in relation to pre-insolvency petitions and Plans, which are important and will make it easier to recognise and sanction cross-border insolvencies.

14.1 EUROPEAN UNION (EXCEPT DENMARK)

The specific framework for cross-border insolvencies forms part of a broad European framework of European rules on the jurisdiction to handle proceedings in Member States to ensure mutual trust among legal systems, including the automatic recognition of insolvency proceedings in other Member States.

Cross-border insolvencies with a European-Union component are governed by Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (**"European Insolvency Regulation"**), which establishes the jurisdiction to which the insolvency proceedings are subject by reference to the "debtor's centre of main interests" (**"COMI"**) (the **"Main Proceedings"**). Pursuant to the European Insolvency Regulation, the Main Proceedings, once declared, will be automatically recognised by Member States (except Denmark) and thus produce effects in all of them in accordance with the law applicable to the Main Proceedings (although specific exceptions apply under the European Insolvency Regulation).

As a general rule, any European proceedings included in annex A of the European Insolvency Regulation will be automatically recognised in Spain as the Main Proceedings as from the moment they are initiated in accordance with domestic law.

Conversely, the Spanish proceedings that may benefit from the automatic recognition granted by the European Insolvency Regulation in other EU Member States (except Denmark) are exclusively those enumerated in annex A, i.e.:

a) the insolvency proceedings (*concurso*);

b) the procedure to enter into a Plan; and

c) the pre-insolvency filing.

As mentioned in section 5.11.1, the Insolvency Law also determines the "universal scope" of the cross-border effects of the pre-insolvency procedures set forth in (b) and (c) above.

In order to benefit from the European Insolvency Regulation's automatic recognition, the proceedings must have a certain element of publicity. If the pre-insolvency filing or the Plan is confidential, the proceedings might not be automatically recognised, but will be subject to recognition under other international private law instruments according to the domestic law of the other Member States. In this regard, the Insolvency Law follows the lead of other European legislators, such as the Netherlands, in relation to group restructurings and the confidential proceedings requirement (see section 5.11.2).

Even where the debtor's COMI is located outside of Spain, such that the Main Proceedings are not Spanish proceedings, secondary insolvency proceedings may nevertheless be opened in Spain (and governed by the Insolvency Law) if the debtor has an establishment in Spain (the **"Secondary Proceedings"**). Under the European Insolvency Regulation, an "establishment" is a place of operations through which the debtor carries out a "non-transitory economic activity with human means and goods".

Should that be the case, the Secondary Proceedings:

a) will be governed by Spanish law (although specific exceptions under the European Insolvency Regulation may also apply);

b) will only affect assets located in Spain (on the contrary, the Main Proceedings naturally encompass all of the debtor's assets on a worldwide basis);

c) may be opened prior to (and regardless of) the opening of the Main Proceedings, only where either (a) the Main Proceedings cannot be opened in the Member State where the COMI is located under domestic law or (b) the opening of Secondary Proceedings is requested by either (x) a creditor whose claim arises from – or is in connection with – the operation of the Spanish establishment or (y) a public authority that, under Spanish law, has the right to request the opening of insolvency proceedings) and

d) may be opened at the request of the debtor, the insolvency administrator in the Main Proceedings (in case these proceedings have already been opened), or any creditor with registered office or domicile in Spain or otherwise with a claim arising from the operation of the Spanish establishment.

In the Main Proceedings, the insolvency administrator is also entitled to assume the commitment established in the European Insolvency Regulation, instead of filing Secondary Proceedings with respect to the establishment, in order to obtain similar effects (*procedimientos sintéticos*).

14.2 REST OF THE WORLD

With regard to international insolvencies that are not governed by the European Insolvency Regulation, the Insolvency Law contains a private-international-law system that is highly similar to the European Insolvency Regulation in terms of coordination and cooperation rules, although perhaps less time and cost efficient. Therefore, the legal provisions pertaining to the COMI, Main Proceedings, Secondary Proceedings and applicable law are similar to those under the European Insolvency Regulation.

On the one hand, as opposed to the automatic-recognition principle under the European Insolvency Regulation, the framework permits the recognition of international-insolvency rulings through *exequatur* proceedings heard by a Spanish court under the principle of cooperative reciprocity. Foreign pre-insolvency filings and restructuring plans will also be recognised now provided certain equivalency rules to the Spanish proceedings apply (i.e. such equivalence is presumed where the collective procedure intends to restructure the debtor or its business to ensure its viability and avoid insolvency).

Specific logistics are required, as well as knowledge of practicalities to assess whether the foreign non-EU insolvency and pre-insolvency proceedings or restructuring plans will be recognised in Spain. For instance, recognition in Spain of non-EU insolvency judgments recognising the jurisdiction of courts on the basis of criteria that differs from that of the COMI may not be possible. Likewise, as is often the case with respect to the international recognition of judgments, another exception that allows Spanish courts to refuse to recognise an international insolvency ruling, which should also apply to foreign pre-insolvency filings and restructuring plans, is when the ruling, filings or plans would conflict with Spanish public policy. Furthermore, recognition of foreign non-EU insolvency processes, pre-insolvency filings or plans could be denied in Spain on the basis of a breach of the reciprocity principle, i.e. if Spanish proceedings would not be recognised in the foreign country.

An example of this uncertainty is the recognition of UK proceedings in Spain following the UK's exit from the European Union on 31 December 2020. There will undoubtedly be challenges when it comes to seeking recognition of English insolvency and pre-insolvency proceedings, including the English law scheme of arrangement (which has been widely used in recent decades by Spanish restructuring and financing practitioners).

Indeed, cross-border recognition of English scheme of arrangements between EU Member States and the UK may prove far more difficult following Brexit, as the UK judgment in *Gategroup* handed down in February 2021 has proved. In this case, the English courts considered that the so-called "Part 26 A restructuring plan" introduced in June 2020 by the Corporate Insolvency and Governance Act, which is a restructuring proceeding similar to the scheme of arrangement, is an insolvency tool. This means that the Lugano Convention and the Hague Convention will not apply to those plans. This interpretation by the courts of UK may have significant implications for the recognition of UK judgments in EU Member States. Additionally, there could be some debate as to whether the same conclusion could also apply to the English scheme of arrangement.

As at the publication of this Guide, the UK remains a signatory to the Hague Convention, although the Lugano Convention of 30 October 2007 does not apply to the UK, and the UK is facing opposition from the European Commission and specific EU Member States in its bid to join the Lugano Convention until the Council expresses its opinion and informs the Lugano Depositary accordingly. Therefore, the EU Member States are currently not obliged to recognise English insolvency proceedings (previously subject to automatic recognition under the European Insolvency Regulation) or receiverships, schemes of arrangement or restructuring plans (including the new Part 26A restructuring plan). Likewise, the UK will not be obliged to recognise European proceedings. This can imply that running parallel proceedings in separate jurisdictions is now needed to successfully restructure cross-border situations with a UK component, which would undoubtedly make cross borders restructurings more complex and uncertain.

In Spain, and unless an international treaty or specific law is ratified or enters into force in the future, UK refinancing instruments will require recognition in Spain under the *exequatur* process described above, which could potentially be rejected if the COMI of the debtor refinanced under the UK process is not located in the UK, or even due to a lack of reciprocity as a result of the Common Law "Rule in Gibbs" (which could cause a Spanish Scheme of debt governed by UK law to not be recognised in the UK).

In light of the above, some EU/UK pre-insolvency filings, restructurings and insolvencies, as well as submission of facility instruments to the law of England and Wales, will be subject to disruptions and new potential scenarios (whether EU/UK courts might still open parallel proceedings at the request of local creditors, the recognition of specific events of defaults, applying individually for such recognition or the implementation of restructuring plans), which will require market practitioners to plan properly and analyse the domestic legal frameworks and court decisions on a case-by-case basis.

On the other hand, recognition of Spanish insolvency proceedings, pre-insolvency filings or restructuring Plans (e.g. the Spanish Scheme), and how it will affect in case of group restructuring to subsidiaries outside of the European Union, will be subject to the corresponding domestic law. The Insolvency Law establishes that Spanish courts will have jurisdiction over the group's subsidiaries abroad provided the COMI of the group's parent company is located in Spain and the other strict requirements, mentioned in in section 5.11.2 above, are met.

15

Special proceedings for micro-enterprises

15 Special proceedings for micro-enterprises

15.1 BACKGROUND, JUSTIFICATION AND MAIN FEATURES

The Insolvency Law has created a special mandatory procedure for "micro-enterprises" that are in a situation of likely, imminent or actual insolvency.

"Micro-enterprises" are natural or legal persons that carry out a business or professional activity and that, in the year before the special proceedings started: a) employed an average of fewer than ten employees and b) had an annual turnover of less than EUR 750,000 or liabilities of less than EUR 350,000. More than 90% of the Spanish enterprises are considered to be micro-enterprises.

Experience since the Insolvency Law was enacted in 2003 showed that the existing (general) proceedings were subject to excessive procedural rules and were longer and, generally, too expensive and inefficient for this type of debtor. Such was the case, that it was not uncommon for the insolvency proceedings themselves to generate more costs than the insolvent company's residual value.

To overcome this situation, the Insolvency Law has now created *ad hoc* proceedings for this type of debtor. The Insolvency Law projects this special procedure as unique, i.e. it comprehensively regulates all the possible scenarios and solutions available, and it is mandatory for debtors qualifying as micro-enterprises who, consequently, have no access to other bankruptcy solutions or restructuring Plans (even though some of the rules generally applicable pursuant to the Insolvency Law may apply in this case on a supplementary basis).

The Insolvency Law therefore seeks to simplify how the proceedings are handled and to reduce costs by (a) removing unnecessary formalities; (b) limiting the involvement of professionals and institutions to cases where they are actually needed or whose cost the parties voluntarily agree to assume; and (c) allowing parallel procedures, as opposed to distribution in "phases" of the ordinary insolvency proceedings.

From a procedural point of view, the special procedure favours a written approach using standard official forms. If oral hearings are needed, they must be held remotely and on the spot oral rulings are a possibility. The scope to appeal resolutions is also reduced and, where they may be appealed, they will not automatically suspend the proceedings so that they keep progressing (although the court may decide to stay them where appropriate).

Similarly, this special regime leaves a series of measures and effects (called "modules") that would otherwise apply automatically under ordinary insolvency proceedings to the will of the parties, who must expressly request them (e.g. the decision to suspend the enforcement of certain claims; to limit the debtor's powers to manage and dispose of its assets; or ask for a restructuring expert to be appointed).

15.2 PRE-INSOLVENCY PERIOD

The Insolvency Law establishes that, before the special proceedings start, the debtor may notify the court with jurisdiction to declare the insolvency proceedings (which will be the court with jurisdiction to hear the special proceedings) that it has started negotiations with its creditors to try to agree on either a business-continuation plan or a liquidation by selling the business as a going concern.

In general, micro-enterprises' pre-insolvency is subject to the general pre-insolvency regime described in section 4, with the following amendments: (i) the appointment of an expert is not mandatory during the period of negotiations opened at the debtor's request; and (ii) the effects of the communication cannot be extended.

When the Pre-Insolvency Period expires (i.e. after three months), the debtor will have to apply to start the special proceedings within five business days, unless it is not in actual insolvency. If the debtor fails to do so, any applications to open special proceedings that may have been suspended and, where applicable, new applications filed after the three-month negotiation period has elapsed, will be processed within five business days.

15.3 START OF THE SPECIAL PROCEEDINGS

A micro-enterprise in a situation of likely, imminent or actual insolvency can request the start of the special proceedings (i.e. their scope is broader than under the ordinary insolvency proceedings, which require actual or imminent insolvency – see section 7.1). The special proceedings can also be initiated at the request of creditors or shareholders personally liable if the debtor is in a state of actual insolvency.

The start of the special proceedings is requested through a standard electronic form that must be sent to the court with jurisdiction to declare the insolvency proceedings. It must include certain information depending on whether the debtor or another eligible party makes the request.

If the debtor submits the application, the form must include at least, among others, its identification details, a brief explanation of the reasons for applying for the proceedings and the grounds for the request, the type of insolvency alleged, the course of the proceedings sought (i.e. continuation or liquidation proceedings and, if the latter, whether it intends to transfer the business as a going concern), whether additional measures are sought and a detailed breakdown of the existing assets and liabilities.

If any other eligible party submits the application, the form must, at least, identify the applicant and the debtor for whom the special proceedings are requested, provide a brief explanation of the reasons for applying for the proceedings and its grounds, the course of the proceedings sought (continuation or liquidation) and, if applicable, any additional measures sought.

When the applicant is not the debtor, before the special proceedings start, the court will give the debtor some time to file allegations. The debtor may accept the application, oppose it (arguing, for example, that the applicant has no standing or that it is not in actual insolvency) or try to modify the course the applicant proposed (i.e. to require the commencement of liquidation proceedings if the applicant requested continuation proceedings and vice versa).

Even though the debtor can modify the course of the special proceedings at this early stage, the Insolvency Law provides that, if continuation proceedings are finally initiated and the debtor is in actual insolvency, specific creditor majorities can convert the procedure into liquidation proceedings.

The start of the special proceedings are ordered by the court, which, as the case may, will also rule on any additional measures requested. This order will be published in the Public Insolvency Registry, and the debtor must communicate this circumstance to the creditors electronically and give them access to all the documentation submitted.

15.4 WHAT STARTING THE SPECIAL PROCEEDINGS ENTAILS

The effects of the special proceedings vary depending on whether they have been expressly requested in advance. Specifically, some proceedings apply by default while others are expressly requested by the parties. Which type of special proceedings are initiated (continuation, liquidation involving the potential sale of the company as a going concern or liquidation involving no such sale) also has a bearing on these effects.

15.4.1 Automatic effects

Starting special proceedings does not involve the debtor losing its powers to manage and dispose of its assets. The debtor retains possession, although it may only dispose of the assets as and when necessary to continue the business or professional activity in accordance with normal market conditions, except if it is expressly authorised to dispose of them in any other way.

Any judicial or extrajudicial enforcement of the debtor's assets and rights is stayed when special proceedings start, regardless of whether enforcement started before the proceedings were requested and of the status of the claims or creditors. But this stay is not unconditional. On the one hand, it does not affect secured claims, although the debtor may request that it do as an additional measure in certain cases. On the other hand, where a continuation plan is proposed, it does not affect the enforcement of claims that the plan does not cover. Neither does it affect certain public credits, either because they are privileged credits or because of their specific nature (e.g. certain social security contributions).

When continuation proceedings start, the mandatory dissolution due to qualified losses is suspended while they are being processed (see section 3.3). As in ordinary insolvency proceedings, starting continuation proceedings does not, in itself, affect contracts with pending reciprocal obligations (see section 9.2).

The Insolvency Law distinguishes between cases in which a business is to be transferred as a going concern and cases in which it is not:

a) Where it is to be transferred, the Insolvency Law provides a similar rule to that applicable to continuation proceedings. Opening liquidation proceedings in which a going concern will be sold does not affect the contracts that the parties are yet to execute and, similarly, early termination clauses in the event of liquidation will be void and unenforceable while a going concern is to be transferred, provided there has been no breach of contract, before or after the special liquidation proceedings started.

b) If liquidation starts and there is no intention to transfer a going concern, deferred credits mature early and those constituted by other obligations are converted into cash.

The Insolvency Law considers that this applies when the debtor indicates so in the application to start the special proceedings, or when it is clear from the liquidation plan that transferring a going concern is no longer an option, or when the court decides so after the creditors have challenged the liquidation plan.

15.4.2 Additional measures and effects that may be requested in the special continuation proceedings

The Insolvency Law structures the special proceedings as an flexible process. In particular, within the framework of the continuation procedure, debtors or creditors, or both, as the case may be, may request the following measures:

a) Temporary stay (for a maximum of three months) of the enforcement of the assets necessary for the debtor's business activity as a result of the non-payment of a secured claim, regardless of whether enforcement started before the proceedings were requested or of the status of the claim or the creditor (although this would not affect public law creditors).

b) Appoint an insolvency mediator to assist in negotiating the continuation plan, followed by starting a short mediation process (10 days) remotely to try and reach an agreement as quickly as possible;

c) Limit the debtor's powers to manage and dispose of its assets if it is in actual insolvency.

d) Appoint a restructuring expert to control or replace the debtor's management and disposal powers. The debtor and the majority of its creditors may agree on which expert is to be appointed. If they cannot reach an agreement, the court will appoint one. The debtor and its creditors may agree on the expert's remuneration. The party requesting the appointment must pay.

15.4.3 Additional measures and effects that may be requested in the special liquidation proceedings

In special liquidation proceedings, debtors or creditors, or both, as applicable, may request the following additional measures and effects:

a) In those involving transferring a going concern, a temporary stay (for three months that can be extended to four) of enforcement of the assets necessary for the debtor's business activity as a result of the non-payment of a secured claim, regardless of whether enforcement started before the proceedings were requested and of the status of the claim or creditor (again, as with continuation proceedings, this would not affect public law creditors).

b) Appoint an insolvency administrator to assume the debtor's management and disposal powers. The debtor and its creditors may agree on who is to be appointed as insolvency administrator from those registered to this effect in the Spanish Insolvency Register. If they cannot reach an agreement, the court will appoint the insolvency administrator following the rules applicable to ordinary insolvency proceedings. The debtor and its creditors may agree on the insolvency administrator's remuneration, which must be paid by whoever requests the appointment.

c) Appoint an expert to value the company or its business premises. The debtor and its creditors may agree on who is to be appointed and its remuneration. If they cannot agree, the court will decide.

15.5 CONTINUATION PROCEEDINGS

15.5.1 Submitting and processing continuation plans

In the request for the special proceedings, or within 10 business days of the continuation proceedings starting, the debtor or the creditors, or both, may propose continuation plans.

If no proposal is made within this period, the continuation proceedings will automatically become liquidation proceedings, if the debtor is in actual insolvency. Otherwise, if the debtor is in likely or imminent insolvency, the special proceedings will be terminated. Conversely, if more than one proposal is made, the debtor's proposal, if any, will be given priority followed by the creditors' proposals in order of receipt.

The plan must include the minimum content provided by law, including, among other things, a nominal list and the amount of the claims affected; how the plan will affect the claims; how the claims will be grouped in classes; the proposed payment plan; and the guarantees provided.

In general, the continuation plan can apply to any claim, including contingent and conditional claims. However, there are exceptions to this rule, such as certain claims related to family duties, tort damages, certain employment claims, secured public creditor claims and certain social security-related claims.

The plan must treat all claims equally and in uniform way, and no claim may hold or receive, under the plan, payments, rights, shares or participations, the value of which exceeds the amount of the claim.

The parties are free to implement any restructuring measures. Therefore, the continuation plan may include either write-offs or extensions, or both, conversions into participating loans or capitalisations. But this freedom is limited when it comes to public law claims. In connection with public law claims the following changes are not allowed: (i) changing the applicable law; (ii) changing the debtor (although a third party can assume the debtor's payment obligations but not release it from them); (iii) modifying or cancelling the guarantees provided; or (iv) converting the credit into shares or company holdings into participating loans or into an instrument the characteristics or rank of which are different to the original one. In addition, certain social security claims cannot be written off or extended.

Once a continuation plan proposal has been admitted, the debtor must notify the creditors electronically within three business days. If this communication is not made or made late, the proceedings will become liquidation proceedings if the debtor is in actual insolvency.

After this communication, the creditors, the debtor, the shareholders who are personally liable for the debts of the debtor and the restructuring expert (if one is appointed), as the case may be, will have 15 business days to comment on any part of the continuation plan. The amount, characteristics and nature of the claim, or the class to which it has been assigned, will be deemed tacitly accepted and may not be challenged at a later stage if no allegations are made regarding those issues.

Meanwhile, any person who has a claim against the debtor and who has not been included in the list of creditors when applying to start the special continuation proceedings, or in the proposed continuation plan, may request to be included within 20 business days of the start of the special continuation proceedings.

15.5.2 Approving the continuation plan

When the period to submit allegations expires, the continuation plan undergoes a voting period. This voting is carried out remotely and according to how the classes provided in the continuation plan are divided.

Each creditor is entitled to vote for the nominal amount of its claim, calculated as the principal amount plus interest and surcharges. Unlike with Plans, if a creditor does not vote, it is deemed to have voted in favour of the continuation plan.

The continuation plan is approved by a class of affected claims if a simple majority of the liabilities of that class vote in favour of the plan. And, where the class includes secured claims, if two-thirds of the amount of the liabilities of that class vote in favour of the plan.

The continuation plan will be considered approved when it is approved by all the classes of credits or at least by:

a) a simple majority of the classes, provided at least one of them is a class of claims with special or general privilege; or, failing this

b) a class which is “in the money”, that is, a class which according to the classification of claims in the insolvency proceedings, may reasonably be presumed to have received a payment following a valuation of the debtor as a going concern.

The voting process can be initiated in a staggered manner in certain cases, so that creditors do not have to wait until the court has resolved all the challenges brought against other claims in order to vote. This may lead to scenarios in which, while the challenges and requests made by some creditors remain unresolved (and therefore these creditors’ voting rights are suspended), the requirements to approve the continuation plan have already been met; or, on the contrary, it becomes apparent that the approval thresholds will not be met, regardless of what those creditors vote. In these cases, after 15 business days, the court clerk may provisionally approve the continuation plan or confirm that it has been rejected, without having to wait for these provisional challenges to be resolved. Nonetheless, the continuation plan being provisionally approved will under no circumstances allow actions to be taken that may negatively affect the rights of creditors whose claims are pending court resolution.

Unlike Plans (see section 5.6.3), a continuation plan requires the approval of the debtor and the shareholders who are personally liable for its debts. Likewise, if the continuation plan includes measures that affect the shareholders’ voting or economic rights, their consent will also be required.

Once the debtor has approved the continuity plan, creditors and, as applicable, shareholders, the debtor and the affected creditors will have 10 business days to request the court to formally approve the continuation plan. This request can seek either a positive (i.e. to confirm the approval) or negative (i.e. to reject the approval) answer.

If, when that period expires, neither the debtor nor any creditor has requested the court's express approval, the continuation plan will be deemed tacitly approved (unless the majority of claims were considered favourable for failing to vote or the continuation plan includes public claims).

If the court's express approval is requested, the court will forward the application to the other interested parties so that they can file allegations. The court may also summon the parties to an oral hearing. Courts approve continuation plans through an order, which will be published in the Public Insolvency Registry. This ruling may be appealed, but its approval will not be suspended.

If the court does not approve the plan or its approval is successfully appealed, or both, the continuation plan will be deemed unsuccessful. In this scenario, the special liquidation proceedings will start, if the debtor is in actual insolvency, or will be ended if the debtor is not.

15.5.3 Compliance with and breach of the continuation plan

Any creditor who considers that the continuation plan has been breached in relation to its claim may request the court to declare it infringed which, if it does, will have *mutatis mutandis* similar effects to a breach of the VCA under the general insolvency proceedings (see section 8.2.5). Likewise, the continuation plan will be deemed to have been breached, and the liquidation phase will start, in any event when the debtor is not up to date with its tax and social security obligations accrued after the special proceedings start.

If no creditor requests a non-payment declaration, the continuation plan will be considered automatically fulfilled 30 calendar days after the final scheduled payment's due date.

15.6 LIQUIDATION PROCEEDINGS

15.6.1 Opening and conduct of the liquidation proceedings

The special liquidation proceedings are started at the request of the debtor who is in actual or imminent insolvency. They can also be requested by the creditors, or if the continuation plan is breached or not complied with because the debtor is in actual insolvency.

If 75% or more of the debtor's claims are held by public creditors, the special proceedings may only be conducted as liquidation proceedings.

Within 20 business days of the special liquidation proceedings having started the debtor (or, if appointed, the insolvency administrator) must submit a liquidation plan, by filing the corresponding standard form. The debtor (or the insolvency administrator) must notify the creditors of the liquidation plan electronically.

Creditors may, by filing the corresponding standard form, challenge either the amount, characteristics and nature of their claims or the inventory of assets. Claims and inventory items in respect of which no objections are made within the term provided for this purpose are deemed final.

Creditors who have a claim against the debtor that has not been included in the list may apply for them to be listed in the special liquidation proceedings.

The court must resolve all challenges and requests submitted to include new claims, after hearing the debtor (and, if appointed, the insolvency administrator). Depending on the case, the court may summon the parties to an oral hearing. The decision, which must be issued within 15 business days, cannot be appealed.

The liquidation plan must clearly set out and explain when by and how the assets are to be liquidated. In addition, whenever possible, it must seek to transfer as a going concern the business units. For these purposes, the liquidation plan must include the insolvency administrator's valuation of the company or of the business units, if no insolvency administrator has been appointed, by an expert appointed to this end.

The debtor, the creditors and the insolvency administrator, as the case may be, and sometimes the employee representatives, can make observations and proposals to modify the liquidation plan. If they do, the debtor or the insolvency administration, or both, will review them to decide whether they agree with such requests. The debtor or the insolvency administrator must inform the other parties, at the end of this period, that the liquidation plan has been modified or, as the case may be, that it has not.

If the liquidation plan is not modified, or the debtor or the creditors do not agree with the proposed modifications, they may challenge the plan's approval in court. If the plan is not challenged, the court will issue an order to declare the liquidation plan approved, which means that the plan will be directly enforceable. Otherwise, the court will decide on any challenges submitted, for which purpose it may summon the parties to an oral hearing. The decision (which will be final) will state whether the liquidation plan is confirmed or modified.

At any time after the liquidation plan is approved, the debtor or the insolvency administrator may request the court to modify it, as appropriate to pay off more of the claims and do so quicker. This request must specify which rules are to be modified, removed or introduced *ex novo,* as well as the reasons for these proposed changes. The remaining parties (i.e. the debtor, if the insolvency administrator makes the proposal, and the creditors, in any event), will be given time to question or object to the proposal. The court will (definitively) decide on the request and either approve the proposed amendment as is, change it based on any allegations made or reject it outright.

15.6.2 Liquidation process and follow-up reporting

The liquidation process may start even if challenges against the liquidation plan remain unresolved. Similarly, ongoing proceedings to amend the liquidation plan do not suspend the liquidation process, except where the court issues an interim order to the contrary.

The debtor (or, as the case may be, the insolvency administrator) may carry out, immediately those transactions in the liquidation plan that have not been challenged, or that, although challenged, need not be stayed.

The liquidation process must conclude within three months, which may be extended for an additional month. If, due to extraordinary circumstances, certain assets are not expected to be readily available for disposal within that period, the debtor (or the insolvency administrator, as applicable) must inform the court, and propose a specific plan to sell such assets. On a subsidiary basis, individual assets or generic categories of assets must be sold through a specific electronic platform created to this end or, complementary, by a specialised agent. However, other means may be used, if there are objective reasons for doing so.

The debtor (or the insolvency administrator) must submit a monthly status update report. In addition, after all assets have been disposed of and creditors have been paid or, in any event, after the period for the liquidation process to conclude, the debtor (or the insolvency administrator) must draw up a final liquidation report, requesting the proceedings to end.

15.6.3 Special provisions to transfer businesses as a going concern and account receivables

As to transferring business units as a going concern, the general rules applicable to ordinary insolvency proceedings (see sections 6 and 12.3) apply, except for the following special features:

a) They must be sold directly to the third party who offers at least 15% more than the agreed value and the same remaining conditions.

b) The principles of competition and transparency must be respected in any event, so the general terms and conditions and the price fixed in accordance with the valuation must be notified to the creditors and published in the Public Insolvency Registry.

c) They must be sold by auction if they cannot be sold directly.

d) The auction price must not be less than the sum of the value of the debtor's assets and rights included in the inventory.

e) If several offers are made, which differ in terms of how the continuity of the company or business units is to be guaranteed, jobs maintained or debts paid off, the debtor (or the insolvency administrator, if applicable) must submit a report to the court, proposing ways to decide between them.

f) The special regime also provides that the liquidation proceedings petition can include an offer to transfer a business unit as a going concern.

In relation to receivables, the debtor or the insolvency administrator must collect these receivables before the liquidation's three-month period expires. If this is not possible or foreseeable, the debtor (or the insolvency administrator) must liquidate these assets, within that maximum three month-period, either by selling them to a third party, or by assigning them to a third party so that the latter can manage their collection.

15.7 CLAW BACK

In general, the rules on rescission described in section 11 apply.

Creditors and shareholders who are personally liable for the debts of the debtor can provide any relevant information to determine whether there are grounds to rescind. Furthermore, a majority of creditors may decide to appoint a restructuring expert or insolvency administrator to exercise claw-back actions.

If a restructuring expert or insolvency administrator is appointed, certain majorities of creditors may request the former to bring certain claw-back actions. If it does not or fails to respond to the request, the requesting creditors may bring the claw-back action themselves.

In any event, claw-back actions may only be brought if the debtor is in actual insolvency.

Set-offs of claims arising under a current account or working capital facilities carried out in the ordinary course of the debtor's business activity during the three months preceding the commencement of the special proceedings are protected except in the case of fraud.

15.8 PROTECTING INTERIM AND NEW MONEY

If a continuation plan is approved or the business is sold as a going concern, interim financing granted from the start of the pre-insolvency period (or, failing that, three months before the special continuation proceedings start) and new financing granted to implement the plan, will benefit from the protective measures described in section 5.6.7.

15.9 NEGLIGENT INSOLVENCY

The provisions on disqualifying ordinary insolvency proceedings and the effects of judgments to this end (see section 13) also apply to special proceedings.

The insolvency administrator, if appointed, certain majorities of creditors and the shareholders who are personally liable for the debtor's debts may request that the special procedure be declared negligent. This request will be dealt with under an abbreviated procedure.

The main novelty in this area is, however, that the special proceedings introduce a new ground (and presumption) for the debtor's insolvency to be declared negligent:

a) the insolvency is deemed negligent if the debtor provides seriously inaccurate information in the standard forms submitted or their attached documents, or submits false documents;

b) information is deemed seriously inaccurate if the total amount in any financial year, of liabilities or assets or of income or expenses is actually 20% higher or lower than the amount stated in the form, provided it is at least EUR 10,000.

15.10 TERMINATION

In general, the special proceedings will be ended in any of the following cases:

a) the continuation plan is completed;

b) the debtor's assets and rights have been liquidated, the proceeds of the liquidation have been used to pay off debts, and the final liquidation report has been submitted on time and not challenged, or, having been filed, the court has dismissed it;

c) the assets are insufficient to pay off the claims against the insolvency estate (*créditos contra la masa*); or

d) all recognised claims have been repaid in full or claims have been paid off in full by any other means, or all creditors have withdrawn or waived their claims.

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