ALLEN & OVERY

The amendment of the insolvency regime: initial thoughts

A general overview of the Law amending the Recast Insolvency Act | September 2022

Content

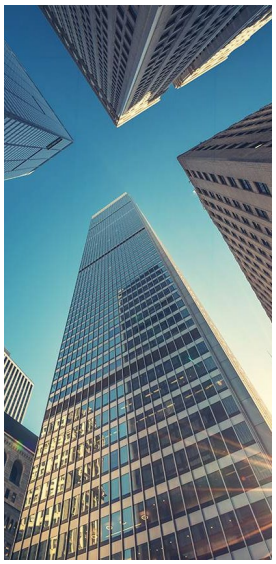
Introduction

Today, 6 September 2022, the Law 16/2022 amending the Recast Insolvency Law (**RIL**) has been published on the Spanish Official Gazette (**BOE**). In general terms, the Law will enter into force on 26 September, that is, within 20 days after the publication.

By virtue of the Law, the Spanish legislator completes a deep structural reform of the Spanish pre-insolvency and insolvency system. It also completes the transposition of EU Directive 2019/1023, of the European Parliament and of the Council, of 20 June 2019 (the so-called EU Insolvencies and Restructuring Directive).

Main amendments of the Law

1. Severe adaptation of the pre-insolvency instruments: the communication of the opening negotiations with creditors and new restructuring plans.
2. Measures to speed-up the insolvency proceeding, making it more flexible and increasing efficiency and their chances of success.
3. Specific regime for micro-enterprises.
4. Review of the international insolvency proceeding.



The Law, completes a **severe adaptation of the pre-insolvency instruments**, replacing the old refinancing agreements them with a new instrument, **'restructuring plans'**. The introduction of this new figure aims to favour these processes by encouraging the earlier restructuring of companies in financial difficulties (by introducing the concept of 'likelihood of insolvency' (*probabilidad de insolvencia*)) and, in turn, expanding the range of resources to which the debtor and creditors take advantage of when looking for the viability of the company. Thus, the Law broadens the scope of available measures to asset and equity restructuring measures or the implementation of any operational change necessary for the successful completion of the restructuring.

Additionally, the reform also includes some **measures aimed at making these processes more flexible and increasing efficiency and their chances of success**. Examples of this can be found, among others, in the creation of a new figure, the 'restructuring expert', the specification of the debt to be restructured, the creation of 'classes of creditors' and the possibility of cramming-down dissident classes of creditors commonly used under English Schemes (cross-class cram-down). That possibility was already included in the Restructuring Directive itself, at it affects also the shareholders, who may be dragged in certain circumstances for the first time. In this way, the Law grants a significant number of tools to the debtor, which used to be only available in an insolvency scenario, and at the same time that it confers greater power to creditors when it comes to granting business viability, even against the shareholders' will.

The Law also contains another key section focused on **updating and increasing the efficiency of Spanish insolvency proceedings**. There are multiple measures introduced, which addressed at speeding up the process, simplifying tasks and actions and allowing insolvency phases to overlap in order to avoid that the delay in processing insolvencies reduces the chances of approving a composition agreement for those companies that are viable. For the first time in Spain, the figure of the pre-pack administration is regulated, in which our judges and magistrates have worked so hard to save viable productive units. In addition, it simplifies the liquidation procedure, so that the value of the assets to be disposed of is protected in order to obtain a greater recovery from creditors when viability is no longer possible, or does not create any surplus value.

The Law also introduces some improvements aimed at debtors that fit within the **concept of microenterprise** (*microempresa*) and, on the other hand, reshapes a **more effective second chance mechanism**.

Finally, it has to be highlighted that the Additional Provisions of the Law **regulate the management and impact of insolvency in the credit arising from guarantees granted by the Instituto de Crédito Oficial** (**ICO**) under certain financing lines approved to relieve the effects of the Covid-19 crisis and the impact of the conflict in Ukraine. With these measures as well as with the chances of refinancing or acting on the guaranteed financing (and the corresponding guarantees), the Government intends to regulate these guarantees in an insolvency scenario under a restructuring plan or a composition proposal. Undoubtedly, the special regime approved for these guarantees will create debate in the coming months and will particularly condition future restructuring processes.

In short, we are facing an ambitious reform that builds a path to a new stage in the Spanish restructuring and insolvency arena. Amendments that have been introduced are even deeper than those that were introduced back in 2020 with the approval of the Recast Insolvency Law or, previously, in 2014 and 2015, with these successive reforms approved by the legislator to mitigate the effects of the financial crisis. Undoubtedly, on top of opening a window for new challenges and opportunities, companies, financial agents and law firms will be forced to make a considerable effort to update themselves and adapt to this new regime. It is maybe missed a bolder approach from the legislator when dealing with public credit, which will not be affected by the restructuring plans, and maintains special protection after the reform that will make many restructuring processes more difficult .

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The new Pre-insolvency Regime

Pre-insolvency Law continues to be structured in two fundamental areas consisting of: (i) the communication of the opening of negotiations with creditors as a safe scenario or stable platform for such conversations; and (ii) the new restructuring plans.

The communication of the opening negotiations with creditors

There is a first development consisting on the anticipation of **the moment when the debtor can apply for the communication of the opening negotiations with creditors** (the old communication of article 5bis of the former Insolvency Law (**IL**) or article 583 of the RIL). To do this, a stage prior to imminent insolvency (which is now clarified to take takes place when it is not possible to comply with the obligations required within a period of three months) is introduced, which is defined as 'likelihood of insolvency' when it is objectively foreseeable that the debtor will not be able to regularly comply with the obligations that are going to become due and payable in the following two years. It is a fairly flexible definition, since the justification of what may happen in a period of two years will always entail the realization of a series of assumptions.

This new scenario or pre-insolvency platform becomes much more regulated, and certain tools that were only provided for insolvency situations are also granted. In this sense, the communication opening negotiations with creditors, which until now was a relatively brief document, is now regulated in detail:

- The communication may be filed both when negotiations for the adoption of a restructuring plan have begun, but also when it is intended to undertake these immediately. It will be necessary for the debtor to be in likelihood of, imminent or current insolvency (in the latter case, provided that no mandatory insolvency proceeding has been requested).

- The Law develops the **mandatory content** that the communication must include, which seems as a briefer filing for insolvency, so, among others, it will be necessary to detail:

the reasons that justify the communication;	goods, rights and contracts necessary for the continuation of the business activity;	creditors with whom conversations have been initiated (or there is an intention to initiate them) and provide a list of their credits;
enforcement proceedings that continue against the necessary assets and which the debtor seeks to suspend;	any circumstance that may affect the development or eventual success of the negotiations;	guarantees of the group that are intended to be affected by the communication,
assets, liabilities, turnover and number of employees of the debtor;	if applicable, details for the appointment of a restructuring expert.	

In addition, in those cases where the debtor intends to extend certain restructuring measures to public law claims, additional criteria must be met.

- The **effects of this communication** are also regulated in greater detail, and filing of the communication will not imply that the debtor will no longer have capacity over the corporate assets (even when a restructuring expert is appointed). It neither implies, by itself, the acceleration of claims, or the suspension, modification or early termination of contracts (the validity of the so-called *ipso facto* clauses was unregulated in a pre-insolvency scenario). In addition, debt enforcement proceedings may not be initiated on assets necessary for the continuation of the business activity and those ongoing must be suspended. As an exceptional measure, and being a novelty of great relevance for the success of some restructuring processes, this suspension may also prevent the enforcement of corporate guarantees or *in rem* security provided by other group companies when the debtor can evidence that the enforcement could cause the insolvency of the guarantor and of the debtor itself.

  With regard to **security interests over the debtor's essential assets** (with the exception of financial guarantees), the judicial or notarial enforcement could be initiated but, once the procedure has been

commenced, it will be immediately suspended. In certain cases, the suspension could also be extended to public law creditors. Likewise, an appeal for review may be filed against the decree of the Court clerk (*Letrado de la Administración de Justicia*) that determines which are the assets essential for the debtor's activity.

- As regards **the duration of the protection provided by the communication**, initially, the scheme previously provided would continue to apply (three months plus one additional month to file for insolvency) is maintained. However, the possibility of extending the first 3-month period for a period of up to another three successive months is contemplated, provided that it is supported by creditors representing more than 50% of the liabilities affected by the restructuring (so that the total duration of the protection could eventually raise to 3+3+1 months).
- While the communication remains in force (including the eventual extension), the duty to file for insolvency is suspended, and insolvency petitions submitted by creditors will be interrupted. During the same period, the duty to agree the corporate winding up (*disolución*) due to the existence of losses that reduce the net equity below 50% of the issued share capital is also suspended. Furthermore, even if the debtor requests voluntary bankruptcy during the term of a negotiation communication, the restructuring expert (if appointed) or the creditors representing more than 50% of the liabilities that may be affected by the restructuring may suspend the request if they prove the existence of a restructuring plan that could be approved.
- Contracts that are declared necessary for business continuity may not be subject to modification, suspension, resolution or termination, and therefore have similar protection to the necessary assets within three months from the communication, extendable to another three months.

The new restructuring plans

New **restructuring plans** come to replace former restructuring agreements.

Its content is broaden and more flexible, so it would be possible not only to modify outstanding liabilities (including, aside from financial liabilities other types of creditors), but also assets or the net equity, debt for asset swaps and even any necessary operational changes.

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

1. a description of the proposed operational and financial restructuring measures;
2. an explanation as to why restructuring measures are needed;
3. a description of the consequences of the plan on employment; and
4. some guidelines of the required conditions for the success of the plan and the reasons why it may support the viability of the company and avoid an eventual insolvency.

As to the p**ossibilities to amend outstanding liabilities of the debtor, restructuring plans also allow multiple options**. It will be possible to amend maturity dates or the amount of principal or interest (including the application of debt write-offs), the conversion into profit-participating or subordinated loans, capital instruments or any other similar instrument, the modification of security interests or corporate guarantees, the replacement of the principal debtor or, eventually, the applicable law to the relevant credit. These effects may be extended to most types of credits– with the exception of credits derived from non-contractual civil liability and labour credits (except those of senior management) -, including contingent or conditional credits. As far as public law credits, stays of payments of up to twelve months could be obtained. Likewise, the possibility of regulating the so-called "debt impact perimeter" (*perímetro de afectación*) through objective and justified criteria it is expressly regulated and subject to judicial control. In this way, the parties will be able to determine which debts are affected and which are not.

For contracts subscribed by the debtor, the general principle is that contracts would remain in force and continue to apply in accordance to their original terms so that the mere judicial sanction of the plan - except for derivative contracts subject to the Royal Decree-law 5/2005 - cannot be used to amend or terminate those agreements. However, the plan may eventually contemplate the amendment or termination of agreements (including senior management contracts) when this measure is necessary for the successful completion of the restructuring and to prevent the insolvency. In that scenario, the resulting credits may be affected by the plan. Any discrepancy that arises in this regard must be discussed before the Judge approving the plan by filing an incidental claim (*incidente concursal*).

One of the main novelties is the introduction of the English institution of the **creation of classes of creditors**. To this end, the formation of a class must attend to the existence of a common interest of its members. It will be understood that there is a common interest among a group of credits when they would receive the same ranking in an eventual insolvency. That being said, credits with the same ranking could be split up into separate classes as long as there is a reasonable justification for doing so. In any case, secured credits and public law credits will constitute separate classes. Lastly, and for the purposes of providing legal certainty and more security to the process, the debtor and creditors representing more than 50% of the affected liabilities may request the judicial confirmation of the correct formation of classes prior to requesting the judicial sanction of the plan. This measure will allow greater flexibility when approving measures for different groups, going even beyond the regulation of the scheme of arrangement, since it allows in certain circumstances cross-class cram-down.

Majorities required for the approval of the plan also undergo material changes with respect to the statutory thresholds previously provided. A single percentage is established - 66.66% - for the approval of the plan by each class of creditors but that figure builds up to 75% when the class in question is made up of secured claims. Those percentages will also be applicable so that it can be understood that a group of syndicated creditors have voted in favour of the plan (unless the syndication agreement establishes a lower majority, in which case this majority would be applicable). Otherwise, votes of syndicated creditors will be taken into account on an individual basis.

Restructuring plans may be imposed to the debtor and suspend requests for insolvency filed by the debtor. To do so, it would be necessary that either the restructuring expert (if appointed) or creditors holding more than 50% of the affected liabilities so request.

Some good news referred to the judicial sanction of plans

Plans must be judicially sanctioned (homologados) in those cases were the parties intend to (i) cram-down dissenting creditors or shareholders; (ii) protect interim financing[1], new financing[2] and acts carried out in the context of the plan against claw-back actions; (iii) recognize the interim financing or the new financing certain preferences in terms of payment; or (iv) the termination of contracts with reciprocal pending obligations in the interest of the restructuring.

Statutory requirements to obtain the judicial sanction of a plan are redefined as follows:

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

b) The plan has to be approved by (i) all classes of creditors and the shareholders; or (ii) a simple majority of classes provided that at least one of these classes includes claims with general privilege (*créditos con privilegio general*) or secured claims (*créditos con privilegio especial*) in an eventual insolvency; or (iii) at least one class that can reasonably be presumed to have received some payment after a valuation of the debtor as an on-going company (the so-called creditors *in the money*). However, once the other requirements have been met, the plan may be approved, even if it has not been approved by the shareholders, if the company is in a situation of current or imminent insolvency. This is an important amendment, since for the first time the power of the shareholders is equivalent with that of the creditors in order to decide on the viability of a company.

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

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

Regarding the judicial sanction procedure, the previous system is, in broad terms, maintained

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

Secured creditors that have voted against the plan and belong to a class where the favourable vote is lower than the dissenting vote will have the right to initiate the enforcement of their security interests once month has elapsed from the publication of the judicial sanction in the Public Insolvency Registry. However, the plan may provide for the substitution of the relevant enforcement right by the option to collect the relevant claim in cash within a period of up to 120 days. In addition, with regard to third-party guarantees, the main development is the possibility that the effects of the plan may be extended to these guarantees (even when the guarantor is not subject to the restructuring plan), when the execution of the guarantee could cause the insolvency of the guarantor and the debtor.

> "For the first time the power of the shareholders is equivalent with that of the creditors in order to decide on the viability of a company."

1 Considered as the financing granted that was reasonable and immediately necessary, either to ensure the continuity of the debtor's activity during the negotiations until the approval of the plan, or to preserve or improve the value of the company as a whole or one or several units productive at the start date of the negotiations.

2 Considered as the financing provided for in the restructuring plan and that is necessary for the fulfilment of the plan.

The Law also reviews the process for challenging the judicial sanction of the plan. A challenge system is established primarily, without suspensive effects and without the possibility of subsequent appeal, before the Regional Court (*Audiencia Provincial*) within the following 15 days after the publication of the judicial sanction order. Additionally, grounds for challenge are developed as follows:

Breach of the communication, content and formalities that the plan has to meet.

That the creation of classes of creditors or the approval of the plan have not been made in accordance with the Law.

That the debtor is not insolvent or, at least, is not in a situation of likelihood of insolvency.

That the plan does not offer a reasonable perspective of avoiding the insolvency or securing the viability of the debtor.

That claims held by the challenging creditor have not received the same treatment as other creditors of the same class.

That the reduction in the value of claims is greater than the required one to secure the viability of the debtor (in this respect a material development is that in those cases where claims have been assigned to third parties, the acquisition price of the relevant claims would be taken into account).

That the plan does not meet the ‘superior interest of creditors’ test. It will be understood that the test is not complied when claims receive a worse treatment than the one that they would receive in a liquidation of the debtor’s assets on an individual basis or as a productive unit.

For those plans that have not been approved by all classes of creditors, the following additional challenge grounds are available to dissenting creditors:

a) That the plan has not been approved by the required class or classes of creditors.

b) That expected recovery for a class of creditors is going to be higher than the value of its claims.

c) That one class of creditors is going to receive a less favourable treatment than the one that would be applied to a class of creditors with the same ranking in an insolvency scenario.

d) That a class of creditors will receive a value less than the amount of its credits if a class of lower ranking or the shareholders will receive any payment. However, this condition may be breached when this is necessary to ensure the viability of the debtor and provided that credits of the affected creditors are not impaired for no reason.

When the plan provides for the termination of agreements, the affected party may also challenge the judicial sanction when it considers that (i) contractual termination is not necessary to secure the successful outcome of the restructuring; or (ii) the compensation contemplated in favour of the affected party is not adequate.

As a general rule, if the challenge against the judicial sanction of a restructuring plan is upheld, this will only benefit the challenging creditor. However, in those cases where the reason for upholding the challenge is based on the fact that the required statutory majorities have not been obtained or on an incorrect formation of classes of creditors, the judgement revoking the approval of the plan will affect all creditors.

Alternatively, the Law also contemplates a new *ex-ante* challenge mechanism of restructuring plans where the parties seeking the judicial sanction of the restructuring plan may, prior to the judicial sanction of the plan, object to it before the Commercial Court.

The **claw-back protection regime of sanctioned plans** is also developed and described in greater detail. The general protection will be obtained provided that credits affected by the plan represent at least 50% of the total liabilities and will cover (i) acts or transactions that are reasonable and immediately necessary for the success of the negotiations or the execution of the plan; and (ii) the interim financing and the new financing (in the event that these have been provided by persons especially related to the debtor, affected credits must exceed 60% of the total liabilities for the protection to be applicable). If the required majority of 50% is not reached but, at least, the plan has been judicially sanctioned, relative presumptions of damage to the insolvency would not be applicable.

Finally, another important amendment that the Law provides refers to the effects of an eventual breach of the approved restructuring plan, since, it this case, it may not be possible to ask for the termination of the plan or the reversal of its effects unless the plan itself provides otherwise.

The Restructuring Expert

For the first time, the Law provides for a Restructuring Expert, who could be appointed once negotiations with creditors have started:

a) at the request of the debtor;

b) at the request of creditors representing more than 50% of the debts that could be affected by the restructuring plan;

c) by the judge himself when he considers it necessary to safeguard the interest of the creditors affected by the suspension of singular enforcements or an extension of the suspension;

d) when the effects of a restructuring plan are going to be extended to a class of creditors or shareholders that had not voted in favour of the plan; and

e) at the request of the creditors that represent more than 35% of the debts that could be affected by the restructuring plan – but in the latter case, unlike the previous ones, the appointment is optional for the judge

based on the circumstances of the case, granting a previous term of allegations to the debtor- (a "*special assumption*" in the words of the Law).

The expert will play a relevant role throughout the restructuring process. It will assist the debtor and the creditors in the negotiations and in the preparation of the restructuring plan, as well as the Court with the issuance of the relevant reports. In addition, their intervention will be necessary throughout the restructuring process, such as, for example, when determining the need to suspend executions on unnecessary assets, informing about the possibility of extending the initial term of three months of the pre-insolvency, or, value the company as on-going entity if the cross-class cram-down is necessary, in order to determine the creditors that according to the rank of claims would reach said value (creditors in the money).

The appointment will be made by the judge by means of an order – *Auto* and the designation and identity of the expert must be recorded in the Spanish Insolvency Registry.

The expert must be the person who, meeting the conditions established in the Law (a series of subjective conditions are contemplated to be meet by the natural or legal person who is appointed expert and the potential incompatibilities and prohibitions) is proposed by the debtor or creditors in their request. In other words, it seems that the possibility of the Judge being the one to choose is blocked, even in the event that the first candidate does not meet the aforementioned conditions, the judge must ask the proposer to present a list of three potential candidates.

Likewise, it regulates the possibility of challenging the appointment by whoever has a legitimate interest and the possibility of substituting the expert appointed at the request of the debtor or a minority of creditors by creditors representing more than 50% of the debts that could be affected by the restructuring plan.

Finally, the statute of the independent expert is regulated, in particular, the duties to exercise the position with the diligence of a professional specialized in restructuring and with independence and impartiality, incurring in civil liability for infractions of the aforementioned duties.

Amendments to the insolvency proceeding

In addition to the complete amendment of the regulation of the pre-insolvency, a profound reform of the Spanish insolvency law is carried out, following the content of the Directive, so that these proceedings are processed quickly and efficiently. As stated in the Law, procedural issues have prevailed to date in the processing of insolvency proceedings over which is really essential in insolvency: "*the rapid and effective treatment of the crisis situation.*"

For this, the main novelty of insolvency proceeding is its streamlining. In the first place, it will not wait to have definitive list of creditors to move on to the next phase; quite the contrary, the different parts of the insolvency proceeding will overlap, in search of a faster solution.

(i) the creation of the figure of **insolvencies without insolvency estate** (*concurso sin masa*);
(ii) the adjustment of the **duration of insolvency** proceedings, allowing phases to overlap and accelerating the processing of actions;
(iii) the application of a new term **for claw-back actions**;
(iv) the legislative validation of what is commonly known as **insolvency pre-pack**;
(v) the redefinition of the **creditors' composition**;
(vi) the **disappearance of liquidation plans**;
(vii)) the eventual **reactivation of enforcement rights** of secured creditors in certain scenarios of liquidation proceedings;
(viii) a new **qualification** section (*sección de calificación*); y
(ix) the adjustment of the regime for the conclusion of the insolvency due to the **lack of available assets** (*conclusión de concurso por insuficiencia de masa*).

Insolvency proceedings without insolvency estate (*concurso sin masa*) are defined as those where, from the insolvency submission itself, it is possible to determine: the lack of assets to be attached, that encumbrances and charges on assets exceeds their market value, that the cost of selling the assets is clearly disproportionate or that the unencumbered assets value is lower than the foreseeable cost of the procedure. In these cases, once the insolvency has been announced in the Spanish Official Gazette and the Spanish Insolvency Registry, those creditors who represent at least 5% of the liabilities of the debtor are entitled to request (fees on them) the appointment of an insolvency administrator to issue a report on the indications and chances of success of eventual claw-back actions, liability actions or that the insolvency proceedings are qualified as guilty (*culpable*).

In the event that, after filing the report in question, the existence of the said indications is appreciated, a complementary order will be issued in order to carry on with a full processing of the insolvency. In addition, the insolvency administrator must exercise the corresponding actions within a period of two months from the presentation of his report. If he does not do so, creditors who have requested the appointment may file those actions in his place.

On the other hand, the reform is aimed at **adjusting the duration of the insolvency**. As a general rule, the expected duration of proceedings is set at 12 months, with the common phase lasting for six months and the composition or liquidation phases lasting another six months each. However, these terms may be extended taking into account the circumstances of the case.

Within the following 15 days after the filing of the insolvency administrator report, the Court clerk will end up the common phase and will order the opening of the liquidation phase in the event that no composition proposal has been presented (which determines also a reduction of the maximum term for the preparation and filing of composition proposals).

Measures aimed at speeding up the application for insolvency are also introduced in order to promote an early search for solutions to the insolvency. Thus, the concept of 'imminent insolvency' is defined as those situations where the debtor anticipates that, within a period of three months, it will not be able to regularly meet its payment obligations when due.

The **claw-back period** is also redefined and extended. The reference point for the determination of the 2-year claw-back period is moved to the time when an insolvency petition is filed - not the opening of the insolvency itself- and also cover the period between the insolvency request and the subsequent declaration.

A new claw-back period' is also added covering acts completed during the two years prior to the filing of a pre-insolvency communication on the existence of - or the intention to initiate - negotiations to reach a restructuring plan as well as those carried out from that date until the eventual opening of the insolvency, provided that (i) a restructuring plan has not been approved or if the approved plan has not been judicially sanctioned; and (ii) the insolvency has been opened within the following year after the expiration of the effects of the communication (or its extension).

And also another claw-back period for those cases were the opening of the liquidation is agreed following the approval of a composition with creditors and covering the two years prior to the filing of a request for a declaration of breach of the composition or, in the event of inability to comply with the composition, from the date when a request for the opening of the liquidation is filed.

With regard to **sales of productive units**, very relevant developments are contemplated. In first place, the insolvency judge becomes the only one having jurisdiction to declare the assumption of undertakings (*sucesión de empresa*) and to define the assets, liabilities and labour relations that comprise the said unit.

However, the most remarkable development is the definitive legislative validation of **the insolvency pre-pack** based on the former early liquidation system (*liquidación anticipada*) or the filing of an insolvency petition together with a liquidation proposal and offer for the sale of a productive unit. The debtor may submit, together with the filing for insolvency and provided that he simultaneously publishes the said offer on the insolvency liquidation portal of the Public Insolvency Registry, a binding written proposal for the acquisition of one or more of its productive units. For this mechanism to be applicable, it is necessary that the bidder for the productive unit assumes the continuation or resumption of the business activity for a minimum period of two[3] years. In this scenario, together with the insolvency declaration, a period of 15 days will be granted for (i) the filing of comments to the sale and alternative binding proposals by creditors or interested third parties; and (ii) the insolvency administrator to issue a report on the offer submitted. If several proposals are submitted, an additional improvement process will be held among all bidders.

In support or as a preliminary step to carrying out this type of sales process, a new “expert to collect offers for the acquisition of the productive unit” is also included. The appointment of this expert may be requested by the debtor to the competent Court for the declaration of insolvency. The role of this expert will be to collect bids for the acquisition of one or more productive units. Those people meeting the required conditions to be appointed as insolvency administrator or restructuring experts may be also appointed as these experts. In terms of which offer should be accepted, the Law gives great discretion to the Judge, who must attend to the interest of the insolvency in a broad way, including the continuity of the company and the jobs, among others.

Material developments are also included regarding the **composition with creditors**. A single regime is created where advance proposals for a composition and oral processing disappear (which also determines the disappearance of the creditors' meeting). Instead, the regime will be based solely on and ordinary proposal which would be processed in writing. The relevant process will be led by the insolvency administrator who will be the one determining the result of the voting process. Proposals must be submitted within 15 days from the filing of the insolvency administration report at the latest.

Among other amendments we would also need to note that:

- the stay period for ordinary claims (in terms of years) will be converted into quarterly waiting periods for subordinated claims (with a maximum total stay period for all creditors of 10 years and without prejudice to the effects that the exercise of election process may produce);
- the application of a composition providing for a worse result than the one that the creditor could obtain through its hypothetical liquidation participation (*cuota hipotética de liquidación*) is introduced as a reason for objecting to the approval of the composition proposal; and
- it settles the possibility to apply for the amendment of an approved composition, only once and after two years of its term have elapsed, whenever there is a risk of non-compliance with the approved agreement and the modification is essential to ensure the viability of the company.

With regard to the **liquidation phase**, the Spanish legislator has sought a simplification and acceleration of the process. Thus, liquidation plans based on the initiative of the insolvency administrator disappear and are

[3] The 2-year period is set out in article 224 septies, which regulates the pre-pack proceeding. However, it has to be highlighted that in article 224 bis, which regulates the offer for the sale and acquisition of productive unit filed along with the filing for insolvency, a 3-year term is provided.

replaced by the general and special rules of liquidation. The general rules are summarized in the group rule (preference for joint disposal over individual disposal of assets), the electronic auction rule (preference for electronic auction of assets that have a valuation greater than 5% of the total debtor's assets) and the award of mortgaged or pledged assets in the event of a lack of bidders rule (possibility for the secured creditor to request the award of assets on the basis of the rules of the Spanish Law on Civil Proceedings or that the award is ordered when the valuation of the secured assets is less than debt). Separately, the special rules could be set by the Judge based on the characteristics and composition of the insolvency estate and may be modified or left without effect at any time (including by decision of a simple majority of the total admitted liabilities or a simple majority of ordinary creditors). The establishment and determination of the special rules may only be subject to reconsideration appeal (*recurso de reposición*).

Lastly, it is contemplated that, in the event that one year has elapsed since the opening of the liquidation, the sale of encumbered assets charged in favour of secured claims has not taken place, **secured creditors' right to seek the enforcement of the relevant security interest would be reactivated**.

A deep reshape and fostering of the **qualification section** (*sección de calificación*) is also carried out. In first place, the opening of the section is brought forward to the conclusion of the common phase and it must be opened in all insolvency proceedings (not only in those cases where an onerous composition is approved or the liquidation of the debtor is agreed). In addition, creditors acquire a much more prominent role to the detriment of the Public Prosecutor. Thus, creditors holding at least 10% of the liabilities or are holders of credits greater than 1 million euros are granted the ability to present their own reasoned and documented qualification report (with a proposal for guilty declaration) and promote, by themselves, the qualification process. As a consequence, the Public Prosecutor adopts a more residual position and only in the event that the qualification reports reveal the possible commission of a crime that cannot be prosecuted solely at the request of the aggrieved party, the prosecutor will receive the reports in order to initiate (when appropriate) the relevant criminal actions. Likewise, the possibility of negotiating and reaching a settlement agreement with respect to the economic consequences of the qualification is recognized (although all the parties to the proceedings would be allowed to provide comments). Finally, the award on the legal costs of the qualification section is also adjusted. If the judgment rejects the request for guilty declaration at the request of the insolvency administrator, it will not be ordered to pay the costs unless there is recklessness in the petition of the insolvency declaration. However, if the judgment accepts the guilty declaration, it will not order persons affected by the qualification to pay costs incurred by those entitled to defend the qualification of the insolvency as guilty.

> "A strong incentive to complete the liquidation as soon as possible will be that secured creditors' right to seek the enforcement of the relevant security interest or assets would be reactivated."

Additionally, one of the last relevant amendments included by the Spanish legislator relates to the development of the regime for **the conclusion of the insolvency due to the lack of available assets to settle claims against the estate**. In these cases, from the date when the lack of available assets is communicated, claims becoming due after the filing of the communication claims that are essential for the liquidation will be settled on a priority basis. The salaries accrued after the opening of the liquidation, liquidator fees and amounts owed from the opening of the liquidation for rents of leased properties that are necessary to store or preserve the assets of the debtor would be considered necessary to complete the liquidation Creditors against the estate are vested with legal standing to ask the insolvency administrator to confirm whether the insolvency estate is sufficient to settle super privileged claims accrued and, if the insolvency administrator fails to respond, creditors may ask for the support of the Insolvency Judge to get a formal response.

A final consideration: insolvency regime of the ICO guarantees

The Eighth Additional Provision of the Law includes the applicable regime for pre-insolvency and insolvency to ICO guarantees granted as a result of the Covid-19 crisis and or within the framework of the National Response Plan to the economic and social consequences of the war in Ukraine.

It is established that:

- Credits arising under ICO guarantees will be considered financial credits and not public claims.
- Credits arising from ICO guarantees will be ranked, at least, as ordinary credits (they could have a higher ranking if they are secured by other guarantees).
- Financial entities will be in charge, on behalf of the State (even in case of subrogation), of: (i) the representation of the credits; and (ii) the filing of communications and the exercise of voting rights or claims that were appropriate for the recognition and payment of the credits.
- The insolvency declaration (and regardless the guarantee has been executed/paid) will produce, for the sole purpose of its intervention in the insolvency, the subrogation of the Ministry of Economic Affairs and Digital Transformation for the principal amounts guaranteed.
- A list of specific restrictions is established on the content of restructuring plans, continuation or proposed agreements that may affect ICO credits, which may not be imposed such as:

the change of the applicable law;

the change of debtor, without prejudice that a third party assumes the payment obligation without releasing that debtor;

the modification or discharge of the guarantees that they have; o

the conversion of credits into shares or social participations, in participating credits or loans or in any other credit with characteristics or ranking different from those of the original credit.

- The prior authorization of the Collection Department of the State Tax Administration Agency is required to vote in favour of the restructuring plans in order to grant deferrals, instalments and reductions of the amounts claimed or recognized. The absence of the said authorization will produce the lack of effects of the plan or agreement before the Ministry.
- Finally, with respect to continuation plans or composition agreement proposals, the rule refers to the General Budgetary Law (authorization is also required, the signing of agreements is allowed, the establishment of unique payment conditions and the possible compensation of credits, under certain conditions).

In this way, and taking into account that there are a large number of companies that have resorted to the ICO lines, there is a significant slowdown in the processes, which will invite to assess the non-affectation of these liabilities or, even, their inclusion as an independent class with the possibility of cram-down if the requirements for it are met.

Contact Information

Javier Castresana
Partner – Madrid
Tel +34 91 782 9814
javier.castresana@allenovery.com

Álvaro Pastrana
Senior Associate– Madrid
Tel +34 91 782 98 55
alvaro.pastrana@allenovery.com

Lara Ruiz
Associate – Madrid
Tel +34 91 782 99 59
lara.ruiz@allenovery.com

Óscar Guinea
Associate – Madrid
Tel +34 91 782 9887
oscar.guinea@allenovery.com

Teresa Hermosilla
Associate – Madrid
Tel +34 91 782 9737
teresa.hermosilla@allenovery.com

Madrid

Allen & Overy
Serrano 73
Madrid
28006

Tel +34 (0)91 782 98 00
Fax +34 (0)91 782 98 99

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