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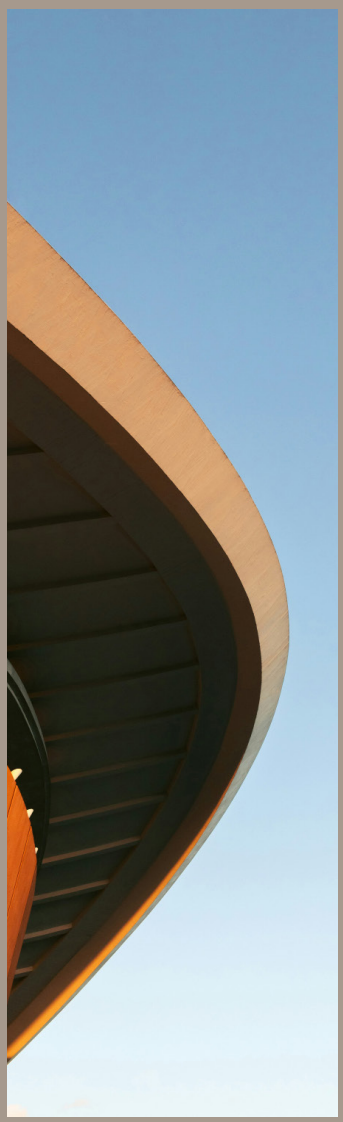

GUIDE TO SPANISH PRE-INSOLVENCY RESTRUCTURINGS

RESTRUCTURING
& SPECIAL SITUATIONS TEAM

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Guide to Spanish Pre-Insolvency Restructurings

01. INTRODUCTION

The current Spanish pre-insolvency restructuring regime is regulated by Royal Legislative Decree 1/2020, of 5 of May, as modified by Law 16/2022, of September 5, for the incorporation into Spanish Law of Directive (EU) 2019/1023 of the European Parliament and of the Council, of June 20, 2019, on preventive restructuring frameworks (as currently drafted, the "**Insolvency Act**").

This guide is based on our experience as legal advisors in many of the most relevant restructurings which have taken place in Spain since the latest insolvency reform implementing the European Directive on preventive restructuring frameworks entered into effect on September 2022.

This analysis is an executive description with a practical approach of the Spanish pre-insolvency restructuring regime and does not purport to be comprehensive[1]. Particular legal advise should be sought before taking any action.

The Spanish pre-insolvency regime is recent and has a limited number of judicial precedents. Accordingly there are still areas of uncertainty and interpretation will be required on a number of issues.

02. MAIN AVAILABLE TOOLS

2.1 The Insolvency Act includes the new tool of the Restructuring Plan (the **"RP"**), which replaces the previous concept of "refinancing agreements". The RP is broadly defined as a plan affecting a company or companies within the same group, which can deal with its/their capital structure (including debt and equity) in order to assure its/their viability for the medium and short term.

2.2 In order to achieve certain effects (mainly the extension of the RP to non-consenting parties, the termination of certain contracts necessary for the continuance of the activity or the protection of interim or new money provided in the framework of an RP) the Insolvency Law foresees a process for an RP to be judicially homologated (the judicial process will be referred as the **"Homologation"**).

1. We have already published some more in deep technical analysis which are available in our Website: [*]

03. WHEN CAN THEY BE USED

3.1 A fully consensual RP can be entered into anytime and there are no significant restrictions or requirements.

3.2 As indicated in 2.2 above, in order to bind parties or get some other benefits an RP should be homologated. An RP can only be homologated in case the debtor is in a situation of "current insolvency", "probability of insolvency" or "imminent insolvency". "Current Insolvency" means, obviously, that the debtor is already unable to regularly pay its obligations as they become due. "Imminent Insolvency" means that the debtor expects that it will not be able to comply with its payment obligations that become due within a period of three (3) months. "Probability of Insolvency" means that the debtor expects that it will not be able to comply with its payment obligations that become due within a period of two (2) years.

3.3 In order for an RP to bind dissident shareholders, which is one of the main novelties of the new legal regime, it should also be homologated and the company should be in Current insolvency or Imminent insolvency.

04.DEBTOR'S PROTECTION DURING THE PROCESS

4.1 In any of the three scenarios described in the previous section, a debtor (or a group of debtors) may notify the competent Court of the existence of (or intention of initiating) negotiations with creditors to agree an RP (the **"585 Filing"**) which could guarantee de viability of the business and, therefore, prevent the initiation of insolvency proceedings.

4.2 Once the 585 Filing has been admitted by the relevant Court, creditors will not be able to initiate (or maintain) enforcement actions against assets of a debtor that are required for the business for a period of three (3) months (plus one additional month to eventually request the declaration of insolvency if an agreement has not been reached). Also during such period the debtor will not be obliged to file for insolvency and any enforcement actions that have been or are initiated prior or after the 585 Filing will be suspended until such 585 Filing expires.

4.3 The 585 Filing will not affect contracts with reciprocal pending obligations and these will not be able to be terminated based on the filing of the 585 Filing or related events.

4.3 The 585 Filing should protect the debtor but can also benefit other companies within the same group if it is evidenced that an enforcement could cause the insolvency of the debtor and such group company.

4.4 The 585 Filing should not affect transactions and/or guarantees protected by Royal Decree 5/2005 on Financial Collateral.

4.5 The 585 Filing can be extended for another three (3) months at the request of the debtor or creditors representing more than 50% of the creditors affected by the RP under negotiation (excluding subordinated creditors). The Judge should terminate the extension of the 585 Filing if requested by the debtor (or Restructuring Expert, if appointed), by creditors representing more than 40% of the credits affected by the proposed RP or because it is evidenced that the extension does not serve the purpose of allowing negotiations to reach an RP.

4.6 Once a 585 Filing is made no other equivalent filing can be made by the same debtor in a period of one (1) year.

05. WHO CAN PROPOSE AN RP

5.1 The initiative of an RP proposal may start from the debtor, the creditors, the shareholders of the debtor or, even, if appointed, the Restructuring Expert in its capabilities as mediator.

5.2 Notwithstanding of the above, the Insolvency Law only attributes legal standing to request the judicial Homologation of the RP to the debtor (or debtors in the case of a group of companies) or the creditors.

5.3 See Section 10 below on required majorities for an RP to be approved and homologated.

06. POSSIBLE CONTENT AND FORMALITIES OF AN RP

6.1 An RP is a quite broad instrument that can affect or modify the composition, terms and conditions or structure of the assets, liabilities and/or equity of a debtor, including sales of assets, business units or of the company as a whole as well as operational changes (ie, corporate or labour restructurings, resolution of contracts in the benefit of the restructuring, etc.).

6.2 An RP can also protect from clawback and privilege new money or interim money provided during the negotiation process.

6.3 An RP should only be proposed to ensure the viability of the debtor, and not for the liquidation of the business.

07. THE RESTRUCTURING EXPERT

7.1 The Restructuring Expert (the **"RE"**) may be appointed at the request of the debtor, of creditors representing more than 50% (or in certain circumstances 35%) of the claims affected by the proposed RP or by the Judge after a 585 Filing.

7.2 The RE is always required when it is intended that the effects of an RP are extended, through an Homologation, to a whole class of dissenting creditors or to the shareholders.

7.3 Creditors representing more than 50% of the affected credits may request the replacement of the RE appointed by the debtor or other creditors.

7.4 The RE operates as a mediator to facilitate the conclusion of an RP as well as a Court appointed agent during all the restructuring process. The RE should be able to provide opinions, reports and other information to the Court as required by the Insolvency Law as well as if so requested by the Court.

08. CLAIMS AFFECTED BY THE RP

8.1 An RP can include fundamentally all claims of a debtor (whether of a financial or commercial nature)[2] other than those resulting from derivatives/financial collateral, tort or employees (other than directives). Public law credits can be affected but with significant restrictions.

8.2 The party proposing an RP has freedom to define the perimeter of the claims to be affected. However, there are some Court precedents that require the proper justification as to why certain claims are left outside of the RP. Claims left outside the perimeter of the RP cannot be affected by the RP.

2. This is another important novelty of the new regime as the previous instrument of the Refinancing Agreements just allowed the restructuring of claims hold by financial creditors.

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8.3 In order to obtain protection from clawback and get the privileges for new or interim money within an RP such RP should affect at least 51% of total liabilities. If new or interim money is to be granted by specially related parties (such as directors or shareholders above certain thresholds) a minimum percentage of 60% of total liabilities (excluding claims of specially related parties) is required to obtain the protection and privileges.

8.4 Contingent claims, litigious claims or claims subject to condition can also be affected by an RP.

09. CLASS FORMATION

9.1 Creditors will vote per classes in an RP. The parties proposing a plan have certain leeway to define classes but should be based on a "common interest" and comply with other requirements provided for in the Law. Commonality of interest is presumed if its consistent with the ranking within an insolvency scenario according to the Insolvency Law. There have been cases where the common interest is based on the ranking contained on an intercreditor agreement rather than pure insolvency ranking.

9.2 Notwithstanding the above, creditors within the same ranking can have a different treatment, but such treatment should be economically equivalent and not prejudice one versus the other. A different treatment within a plan can also justify a different class.

9.3 Secured and unsecured creditors will vote in different classes up to the value of the security. Secured creditors can be joined in one class or differentiate them on reasonable basis. The Insolvency Law also contain certain tool protections in favour of dissenting secured lenders.

9.4 There is no limit to the number of classes being proposed.

10. CONSENTS REQUIRED FOR THE HOMOLOGATION OF AN RP

10.1 Each class will be considered to approve an RP if it is voted in favour by more than 2/3 of the claims in such class if unsecured or 3/4 if secured. This is calculated on the face value of the claim. There is no minimum number or creditors to approve an RP required within a class and there are judicial precedents that have allowed single creditor classes.

10.2 Contractually syndicated claims will be subject to the process and voting rules of the syndication agreement and, if lower than those set forth in the previous paragraph, by its own majorities. In any event, if a contractual majority within a syndicate is reached it will be considered that the whole syndicate votes in favour (the **"Syndicate Drag"**). In the event of Syndicate Drag creditors which are bound to the RP will not be entitled to challenge it. There have been cases where the Syndicate Drag is applied to claims syndicated under an intercreditor agreement.

10.3 There are 3 options to homologate an RP: (i) approved by all classes, (ii) approved by a majority of classes which includes one secured or generally privileged class, or (iii) approved by

one class which is in the money (on a valuation as a going concern). All these possibilities (and particularly the last one) open a wide range of possible strategies for different stakeholders (including shareholders).

11. ISSUES RELATED TO EXISTING EQUITY

11.1 Shareholders do not need to approve the RP in order to homologate it if the debtor is in Current Insolvency or Imminent Insolvency. On the contrary, the shareholders cannot be dragged into a RP in the scenario of mere Probability of Insolvency.

11.2 There are certain formal requirements to be complied with in the event that shareholders are being affected by an RP, including certain rules regarding the corporate decisions.

11.3 Shareholders will be able to challenge the RP based on a number of reasons, described in Section 12 below.

12. POSSIBLE CHALLENGES TO AN RP

12.1 The Insolvency Act provides for different challenging causes depending on the level of approval.

12.2 An RP approved by all classes can be challenged fundamentally based on the following arguments: (i) lack of formalities or requirements or improper class formation, (ii) that the debtor is not in Current, Imminent or Probable Insolvency (the **"Insolvency Test"**); (iii) that the RP does not offer a reasonable viability prospect in the short and medium term (the **"Viability Test"**), (iv) that credits have not been fairly treated with other credits within its class (the **"Intra-class Treatment Test**"), (v) that the amount of the credits have been reduced in an amount higher than what is required to procure the viability (in the event of a secondary trading it is presumed that this is not met if the claim has been purchased at a higher discount) (the **"Minimum Harm Test"**), (vi) if the credits have been impaired in an amount higher than what they would have lost in a liquidation (the **"Creditor's Superior Interest Test"**).

12.3 An RP not approved by all classes can, in addition, be challenged based on the following arguments: (i) improper class approval, (ii) if a class of creditors is going to receive or maintain an instrument with a value which is higher than the amount of its credits (the **"Maximum Instrument Test"**), (iii) that the class of the party challenging is going to receive a worst treatment than other classes within the same ranking (the **"Inter-class Treatment Test"**), (iv) that a class is going to receive instruments with a lower value than its claims if other more junior class (or the shareholders) receives or maintains any value (the **"Absolute Priority Rule Test"**). There is an exception to the Absolute Priority Rule Test when required for the viability of the company and if no unjustified prejudice is suffered by affected creditors.

12.4 An RP not approved by the shareholders may be challenged by such shareholders based on the following arguments: (i) content and formal requirements of the RP, (ii) improper approval, (iii) lack of Current or Imminent Insolvency, (iv) the Viability Test, (v) the Maximum Instrument Test (where the discussion on valuation of the debtor is obviously the key issue).

12.5 Any affected creditor can also challenge based on the argument that any interim or new money provided for in the RP does not comply with the legal requirements, has not been approved by the required majorities or unjustly detriments creditors (the **"Reasonable**

New Money Test"). Any non-affected creditor can challenge an RP based on the Reasonable New Money Test or if the RP is not needed to avoid insolvency and ensure viability (the **"Necessity Test"**).

12.6 If the homologation of an RP is successfully challenged the RP will not be imposed to the challenging creditors only, unless the successful basis for the challenge are the improper class formation or the lack of the required majorities, in which case the plan will become fully ineffective. However, if the plan is challenged as per the Reasonable New Money Test or the Necessity Test the effects will only extend to the protection and ranking of the new money being provided.

13. NEW MONEY IN RESTRUCTURING PROCESSES

13.1 New Money provided within an RP (that is required for the implementation of the RP) or Interim Money provided during the negotiation of the RP (that is required to maintain the value of the business/assets of the debtor or to complete the negotiations of the RP) can obtain a special treatment pursuant to the Insolvency Act. Such treatment includes clawback protection and enhanced ranking.

13.2 Clawback protection for new and interim money can be obtained if the affected debt ratios described in 8.3 above are obtained and the RP is homologated.

13.3 New and interim financing will be considered as 50% specially privileged claim and 50% as a claim against the estate upon a subsequent insolvency of the debtor if the affected debt ratios described in 8.3 above are obtained. New and interim financing can also benefit from security if so agreed.

14. EQUITABLE SUBORDINATION

14.1 The basic principle is that credits of specially related parties are subordinated to ordinary claims. There are a number of specially related parties (the **"PER's"**) but most relevant are shareholders above 10% for companies with non-listed instruments (or 5% if listed) and directors (real or shadow). If subordination is based on equity holdings the claim has to be created by the time the creditor is a shareholder (i.e. if it becomes a shareholder ex post it should not subordinate a prior existing claim).

14.2 In the framework of an RP subordination due to the above can be disapplied in the event the RP is homologated and if the equity is obtained as a consequence of an equitization contained in the homologated RP.

14.3 As regards the subordination of new money provided for in the framework of an homologated RP see Section 8.3 above.

14.4 Subordination of a claim has mainly the following effects: (i) ranking junior to ordinary claims in an insolvency, (ii) potential different class in an homologation, (iii) certain voting restrictions upon an homologation or insolvency, (iv) security granted by the same debtor is ineffective, and (v) no accrual of interest post insolvency.

15. PROCEDURAL STEPS AND OPTIONS

15.1 There are a number of procedural decisions that should be taken in the process and which have significant strategic relevance. See some below.

15.2 The Insolvency Act provides the option

of a prior proceeding being started to confirm the proper definition of classes. This eliminates the option of challenging on such basis later on (being this one of the main angles for discussion/challenge within a homologating process). This should be done before the same Judge as the homologation proceeding.

15.3 The standard homologation process includes a reasonably fast ruling by the homologating judge but an appeal process afterwards with the appellate Court. In this scenario the homologated transaction will be effective, but not firm, until the appeal is finished (which can be a lengthy process). The Insolvency Act allows for a different process whereby challenges are filed before the homologation ruling such that when the ruling is issued it is no longer appealable. In this case the process to obtain the homologation is longer but, once obtained, it is certain.

15.4 As an average, as the final timings would particularly depend on the importance of the matter and fundamentally workload of the Court, we can estimate two-three months to get the Homologation in a fully consensual RP or four to eight months to get the homologation in a non-consensual scenario with challenges (either before the homologating Court or before the Court of Appeal).

15.5 Whether the homologation process includes a hearing or not is dependant on the Judge and his view on the evidence to be produced before him (when valuation is the issue, hearing will necessarily take place for the ratification of the experts reports).

16. INTERNATIONAL ELEMENTS OF AN RP

16.1 If the COMI of a company is in Spain it will be able to benefit from (or suffer) a Spanish homologation process.

16.2 The law applicable to the contracts of the affected debt is irrelevant for the purposes of the Spanish Judge. To what extent the ruling will be recognised in foreign jurisdictions and the extent to which that is relevant (if, for example, assets are located outside of Spain) is a different question and need a case by case analysis.

16.3 Spanish Courts will be able to assume some sort of jurisdiction on foreign group companies in the event: (i) such companies are subsidiaries of the homologated debtor, (ii) certain procedural steps are taken, and (iii) including such subsidiaries in the process is required for achieving or complying with the RP. In such event the homologation of the foreign subsidiary will only extend to the same creditors as those of the primary debtor.

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