

Another step on the road to reform Spanish Insolvency Legislation

6 September 2014 saw the publication of Decree-Act 11/2014, on urgent insolvency measures, passed on 5 September. This provision modifies substantial aspects of the Insolvency Act, above all in relation to arrangements with creditors and the sale of productive units.

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Introduction

In March 2014, in the form of a Decree-Act, the Government undertook a root and branch review of mechanisms prior to insolvency (article 5 bis communication and homologation via the Fourth Additional Provision), affecting above all the system of majorities in order to allow dissident creditors to be crammed down, even where they enjoy a special privilege (pledge or mortgage).

As announced, these modifications have now been transferred to creditors' arrangements under insolvency. At the same time, there are further changes related to arrangements, including the allocation of a voting right to purchasers of debt and the possibility to review past arrangements that have been defaulted. The aim of the legislator is still that of making it possible for activity to continue, which requires avoiding insolvencies (for that reason the pre-insolvency mechanisms were regulated) and providing a solution for those it has not been possible to avoid (the objective of the new reform by making arrangements more flexible).

The Decree-Act refers to arrangements and liquidation in particular. It also includes a provision designed to offer a general solution to the insolvencies of toll motorways.

Creditors' arrangements

The reforms affecting arrangements are designed to provide a way out of insolvency.

For this reason, some changes are introduced regarding the content of arrangements, notable among which is the removal of the existing limit of a 50% debt reduction and a 5-year moratorium, which had ceased to be applied in practice. The majority required for approving an arrangement is maintained at a half plus one of the ordinary liabilities for arrangements in which the debt reduction does not exceed 50% or a moratorium of 5 years, and is set at 65% otherwise.

The Government has decided to apply to the realm of insolvencies the treatment of credits with special privileges (i.e., pledges or mortgages) that it already introduced in the earlier reform on pre-insolvency refinancing. The aim is to limit the scope of the *in rem* guarantee to the actual value of the asset in question, which is to be determined in the Receiver's Report, in view of the market value (listed shares), an appraisal by an approved entity (real estate) or an expert opinion (other assets). An adjustment of 10% is to be applied to the resulting value.

The major novelty in terms of arrangements is the division of privileged creditors into four classes: labour, public, financial and others (which includes commercial creditors). The aim of this classification is to establish cram down majorities within each class, to the detriment of dissident creditors, which will be 60% of liabilities in cases involving a debt reduction of up to 50% or a moratorium of up to five years, and 75% otherwise. For example, when a majority of 60% of the guaranteed "financial" liabilities accept a debt reduction of up to 50%, dissident creditors will be bound by it. It is not true, therefore, that this system makes it possible to impose arrangements on the Tax or Social Security Authorities, as had been announced. It would be necessary for a majority of the public creditors to accept the arrangement affecting them, something that is unlikely to occur very often.

One important change which shows the current legislator's different perception of the debt market is the allocation of a voting right in arrangements to the assignee of a credit, except in cases of persons especially related to the debtor. As such, this represents the removal of a restriction that limited the market for insolvent company debt.

Finally, the possibility is offered for companies who breach arrangements that had been approved in the past to request a review of such arrangements. However, this will not be a question of simply requesting it, because the support of 50% or 65% of ordinary liabilities will be required, depending on the content of the arrangement (the latter percentage will apply in the case of a debt reduction of over 50% and a moratorium of over five years).

Liquidation

The reform pays special attention to the sale of productive units in the context of liquidation.

The main new developments in this regard consist of the imposition (on the counterparty) of an automatic subrogation to the contractual position held by the insolvent entity (except in public law contracts) and the acquirer's exemption from liability for debts, except in the case of persons especially related to the debtor. Reference is also made to payment in kind in order to cancel insolvency debt.

Insolvencies of toll motorways

It is no secret that the Spanish government has been looking for a solution to the insolvencies of the toll motorway concessionaire companies for months now. Given that some of them are already at the creditor arrangement stage and that, for the moment, it would seem that the different interested parties (shareholders, creditors and the government, mainly) have been unable to reach an agreement, it has finally been decided to allow the government to present proposals for creditors' agreements in these proceedings, once the court has opened the term for doing so.

Following the submission of the joint proposal, these insolvencies will be accumulated under a single Judge and the approval of the arrangements may be made contingent on approval being granted in all cases.

Financial guarantees and Royal Decree-Act 5/2005

Following the latest reform of the Act, a doubt remained as to whether the suspension of the enforcement of guarantees resulting from the presentation of the article 5 bis communication and request for approval via the Fourth Additional Provision also affects financial guarantees covered by Royal Decree-Act 5/2005 (which implements European Directive 47/2002). The reform confirms the special nature of this provision and, as such, enforcement goes ahead regardless of these circumstances.

Entry into force

The rule contains detailed provisions on its entry into force. In general, it is effective as of publication.

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