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New insolvency reform on liquidation and arrangements of creditors

On 27 May, the latest round of Spanish insolvency reforms entered into force. The Act 9/2015 of 25 May of urgent measures for insolvency matters ("**the 9/2015 Act"**) that amends the Law 22/2003 of 9 July ("**the Insolvency Act**") was published in the Spanish Official Gazette last 26 May 2015.

The Law 9/2015 serves a number of purposes. Firstly it formally validates Royal Decree-Law 11/2014 of 5 September ("**RDL 11/2014**") that amended certain insolvency provisions on an urgent basis.

Key issues

- Liquidation: New Section 155.5
- Arrangements: New quorum
- Exemption from equitable subordination
- Others:
  - Prohibition on enforcement in the pre-insolvency period
  - Calculation of syndicate liabilities within 71 bis
  - Extension of people liable of negligent insolvency

Secondly, seeking to resolve the uncertainties arising after the various reforms of 2014, it introduces new rules on composition agreements and the liquidation process, as well as further exemptions from subordination.

Finally, the 9/2015 Act also clarifies the extension of the prohibition on enforcement actions by financial lenders during the pre-insolvency period; changes to the calculation of majorities required for the approval of a refinancing agreements under Section 71 bis of the Insolvency Act.

Liquidation

The 9/2015 Act makes a number of changes in the context of liquidation.

The reform creates a new provision (Section 155.5 of the Insolvency Act) stating that creditors with security by way of guarantees will be entitled to receive an amount up to the limit of the original debt or the maximum amount of the secured liability.

This specification, which in principle appears unnecessary according to the usual rules which are applicable to guarantees, became necessary due to the introduction of the requirement to place a "*reasonable*" value on *in rem* guarantees. Pursuant to the reform of RDL 11/2014, it was understood that the value which was attributed to the guarantee was limited to the amount which the secured creditor could collect against the guaranteed asset.

The legislator has now clarified that, if from the realisation of the assets an amount is obtained which exceeds the reasonable value of the guarantee (as established in the Insolvency Receivers' report), the secured creditor will be entitled to receive the excess up to the limit of the original debt or the maximum mortgage-secured liability (whichever is less).

Another of the key changes is the possibility for a liquidator to increase the percentage of the funds he retains in the liquidation in order to meet third parties claims made in the context of the liquidation.

The 9/2015 Act also clarifies the nature of the liquidation rules in Section 149 of the Insolvency Act and provides that Section 155.4 of the Insolvency Act relating to the sale of assets which are subject to a security is mandatory irrespective of the content of the liquidation plan.

In relation to the transfer of business transfers, the purchaser will not succeed the seller in tax-related or social security credits even if the guarantee securing those credits remains.

Arrangements

The 9/2015 Act clarifies that the arrangement of creditors must provide for, at least, a write-off or extension agreement.

It also makes it easier to satisfy the quorum requirements for a creditors' meeting in relation to an arrangement. Before the reforms it was necessary for at least 50% in value of the total amount of ordinary creditors to be present at the meeting, now both ordinary and secured creditors can be taken into account for the purposes of calculating 50% in value of claims (subordinated creditors are not included for these purposes.)

Exemption from equitable subordination

The 9/2015 Act extends the equitable subordination exemption (i.e. exempt from being treated as subordinated creditors in a formal insolvency process). Until now, this exemption only applied to creditors that became shareholders by means of pre-insolvency refinancing agreements. Now the extension also applies to those creditors who have agreed to convert their debts into equity under a composition agreement or arrangement, in both cases even if they also became directors of the insolvent company as a result of said agreements.

In addition, again presumably with the aim of encouraging a rescue culture in Spain, the 9/2015 Act also introduces an assumption, that unless proved to the contrary, creditors who have simply entered into a refinancing agreement, arrangement or extrajudicial payment agreement, would not be considered shadow directors with respect to the obligations assumed by the debtor under the viability plan.

Other amendments

The 9/2015 Act ends a debate caused by the defective wording of Section 5 bis LC, in relation to the prohibition on enforcement action initiated by financial creditors. The reforms now make clear that the prohibition on enforcement applies not only to enforcements using a formal court procedure but also to any self help or out of court enforcement action.

The rule for the calculation of syndicated liabilities (where if 75% of the syndicated liabilities votes in favour it will be understood that all syndicated creditors are parties to the refinancing agreement), which to date only applied to the agreements established in the Fourth Additional Provision, now also expressly refers to the refinancing agreements established in Section 71bis LC.

Finally, the 9/2015 Act extends the stakeholders that can be held liable if the insolvency is considered negligent by the Court. The RDL 11/2014 provided that the insolvency could be declared negligent in case that shareholders unreasonably refused to accept a refinancing agreement providing a debt for equity swap. Now the Insolvency Act specifically provides that shareholders could be held liable in such event.

Inigo Villoria, head of our restructuring and insolvency team in Madrid has the following comments on the new reforms "*On the whole, the changes introduced by the latest reforms are to be welcomed, in particular those aspects which are designed to encourage company rescue over liquidation are very timely given the current economic climate. The changes are also in keeping with many of the recent European insolvency law reform projects.*"

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