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Law 25/2015, of July 28, 2015, on the second chance mechanism, reducing the financial burden and other measures of a social nature (originating from Royal Decree-Law 1/2015, of February 27, 2015)

Law 25/2015, of July 28, 2015, on the second chance mechanism, reducing the financial burden and other measures of a social nature, was published in the Official State Gazette on July 29, 2015 and came into force the following day.

This new legislation consolidates in the Insolvency Law (*Ley Concursal* or "**LC**"), following some amendments, the new legislation ushered in by Royal Decree-Law 1/2015, of February 27, 2015 ("**RDL 1/2015**") concerning out-of-court payment agreements and the new rules on debt relief for individual debtors, known as the "second chance" mechanism.

In addition, the passage through parliament of RDL 1/2015 allowed some new changes to be added, such as the fee protection account for insolvency managers, limits on the remuneration of insolvency managers and the introduction of greater flexibility to a number of elements of the second chance mechanism.

Lastly, the creation of the "insolvency gauge" is confirmed. This is an IT application which can be accessed confidentially and for free on the website of the Ministry of the Economy and Competitiveness. The "insolvency gauge" enables any interested party to ascertain whether their personal financial position makes them eligible to make use of measures such as the "second chance" mechanism or a personal debt restructuring.

Below is a summary of the matters that have undergone reform (second chance mechanism, remuneration of insolvency managers and out-of-court payment agreements) and the current status of each.

1. "Second chance" mechanism or debt relief (new Article 178 *bis* LC)

The debt relief or "second chance" mechanism for individual debtors applies where the insolvency proceeding has ended with liquidation (where there are unpaid debts) or due to there being insufficient assets available to creditors. This is an exception to the general rule laid down in article 178.2 LC, which provides that the liability of an individual will continue to exist after the end of the insolvency proceeding. Under the "second chance" mechanism, and subject to certain conditions, an individual debtor is temporarily relieved of their obligation to continue to meet unpaid debts.

The main components of the "second chance" mechanism are as follows:

1.1 Requirements to qualify for a "second chance"

Three requirements must be fulfilled to qualify for temporary debt relief:

1. The debtor must be an individual.

2. The insolvency proceeding on the debtor must have ended, either because the liquidation phase came to an end or because there were insufficient assets available to creditors.

3. The debtor must act in good faith, which will be the case if:

   (a) the insolvency proceeding was not held to be fault-based, except in certain exceptional circumstances;

   (b) the debtor has not been convicted, in a non-appealable judgment, of certain crimes;

   (c) the debtor has previously tried to conclude an out-of-court payment agreement;

   (d) alternatively, any of the following conditions has been met:

      (i) the post-insolvency order claims, preferred claims and 25% of the unsecured claims have been paid in full (unless, in the case of unsecured claims, the debtor has previously tried to reach an out-of-court payment agreement);

      (ii) the individual debtor must meet the following requirements: (a) agree to comply with a payment plan ("**Payment Plan**") for the payment of debts not subject to relief within a period of 5 years; (b) have cooperated with the insolvency court and the insolvency manager; (c) not have benefitted from the same relief or "second chance" in the preceding 10 years; (d) not have refused an offer of employment commensurate with his professional skills in the 4 years preceding the insolvency order (this condition does not apply in the year following the entry into force of the Law); and (e) accept that the fact that he has benefited from a "second chance" will be made public on the Public Insolvency Register for a period of 5 years (access to this section of the Register is restricted to persons with a legitimate interest).

1.2 Steps to be taken to secure a "second chance"

Three steps must be taken to secure a "second chance":

1. *Application*: filed by the individual debtor within the time limit normally set by the court for all creditors before bringing the insolvency proceeding to an end.

2. *Submissions by the insolvency manager and creditors*: if the debtor applies for a "second chance", the insolvency manager and creditors may file submissions within a period of 5 days to express their consent to the debtor's application or state, if applicable, that none of the requirements have been met (see section 1.1).

3. *Grant of a "second chance"*: if there are no objections or the insolvency manager and the creditors that have appeared in the proceeding consent, the court will grant the debtor – *on a provisional and temporary basis* – the benefit of debt relief. The benefit is provisional because it may be withdrawn under certain circumstances (see section 1.4).

1.3 Effects of the "second chance"

1.3.1 Effects on individual debtors

The effects and scope of debt relief vary broadly according to whether or not the debtor has paid, through the liquidation of his assets, the claims specified in the Law and for the requisite amount, namely:

(a) If he has paid all post-insolvency order claims, all preferred claims and, at least, 25% of the unsecured claims, the debtor will be relieved *temporarily* of the obligation to pay the other unpaid debts.

(b) If the debtor was unable to pay the above claims out of the proceeds of the liquidation of his assets, but agrees to comply with a Payment Plan and meets the other requirements (see section 1.1, 3 d (ii)), the debtor will be granted temporary relief from all unsecured and subordinated pre-insolvency order claims that are outstanding not including public law claims (which may be deferred or split into installments) and claims for support payments. As regards specially preferred claims, any of these claims which could not be paid as a result of enforcing the security will be subject to relief (unless it falls within a category other than unsecured or subordinated claims).

1.3.2 Effects on debts subject to relief

The holders of claims subject to the debt relief may not commence any type of legal action against the assets of the insolvent debtor in an attempt to collect their claims.

1.3.3 Effects on debts not subject to relief

(a) *Public law claims*: these claims may only be deferred or split into installments, depending on which option the various public authorities choose to grant to the debtor. The deferral and/or splitting into installments of payments will be governed by the specific legislation on debts of this type.

(b) *Non-accrual of interest*: debts not subject to relief cannot accrue interest while the "second chance" is in force.

(c) *Deferral for 5 years*: debts not subject to relief must be paid off within 5 years after securing the "second chance", unless they mature on a later date.

(d) *Use of sureties or guarantors*: debt relief also applies to the spouse of the insolvent debtor if the couple is subject to a community property matrimonial arrangement or another type of joint property arrangement. The liability of joint and several obligors, sureties and guarantors in respect of the debts subject to relief is unaffected, however.

1.4 Withdrawal of the "second chance"

Any creditor may apply for the withdrawal of this benefit if, in the 5 years after it was granted, any of the debtor's revenues, assets or rights which were concealed come to light, or if, in the period of performance of the Payment Plan, the debtor breaches any of the conditions on which the benefit was granted, breaches the Payment Plan for debts not subject to relief, or experiences a substantial improvement in his economic position (solely as a result of inheritance, donations or gambling).

Upon withdrawal of the "second chance" creditors will be able to continue with their legal action against the debtor in order to enforce claims not subject to relief or unpaid claims. In this connection, the Law confers special status on the final list of creditors of the individual debtor, to the point where the inclusion of the creditor's claim on that list amounts to a non-appealable judgment containing a finding of liability.

1.5 Definitive debt relief

Once the period set for performance of the Payment Plan has elapsed (maximum of 5 years), and if the "second chance" was not withdrawn in that period, an individual debtor may apply to the court that conducted the insolvency proceeding for an order acknowledging that the debt relief is *permanent and irrevocable*.

Depending on the circumstances of the case, however, and after the court has heard the creditors, an individual debtor may be granted permanent relief if, despite not performing the Payment Plan in full, he has made a "substantial effort" to perform it, provided it can be evidenced that the debtor allocated to the performance of the Plan in the 5-year period at least half of any income received that was not unattachable (or one quarter of that income in specific cases of "especially vulnerable debtors" within the meaning of article 3.1, letters (a) and (b), of Royal-Decree Law 6/2012, of March 9, 2012, on urgent measures to protect low income mortgage debtors).

1.6 Transitional arrangements for application of the "second chance" mechanism

The statutory regime enabling individuals to benefit from a "second chance" will apply to all individual debtors subject to ongoing insolvency proceedings (that is, all proceedings that have not concluded). As regards insolvency proceedings that have already concluded before the entry into force of the Law (because the liquidation phase has come to an end or due to there being insufficient assets available to creditors), debtors may benefit from the new provisions on the debt relief system if, for whatever reason, they find themselves subject to another insolvency proceeding, whether of voluntary or necessary.

2. Amendments to the remuneration of insolvency managers

The Law further defines the new rules on the remuneration of insolvency managers which were introduced by Law 17/2014, of September 30, 2014, on urgent business debt refinancing and restructuring measures. These new rules on the remuneration of insolvency managers have yet to be implemented by regulations, which is why they have not yet entered into force. The Law also contains more detailed rules on the "fee protection account" (a mechanism to secure payment of the remuneration owed to insolvency managers appointed in insolvency proceedings without funds).

The main new changes brought in are as follows:

2.1 Limits on the remuneration of insolvency managers

(a) *Remuneration cap*: the cap on remuneration will whichever is lower of either: (i) 4% of the assets available to creditors or (ii) €1,500,000.

(b) *Exceptions to the cap*: the court may, on a reasoned basis and after hearing the parties, approve a higher amount of remuneration where, owing to the complexity of the insolvency proceeding, the costs assumed by the insolvency managers justify such an increase. Under no circumstances may the revised amount exceed 50% of the cap.

(c) *Reduction of the initial amount of remuneration set*: a breach of his obligations by the insolvency manager, a delay in the performance of obligations or unsatisfactory quality of the work performed are all grounds for the court to reduce the fees, in the absence of proof to the contrary. Specifically, a reduction will take place if the insolvency manager breaches any disclosure obligation to creditors, if the statutory time limits are exceeded by more than 50% or if action to contest the inventory or the list of creditors is decided in favor of the complainant in a proportion that is equal to or higher than 10% of the provisional post- or pre-insolvency order claims.

(d) *New remuneration methods*: the Law makes it clear that under the new remuneration system, which has yet to be implemented, the remuneration of insolvency managers will be determined on the basis of the nature of the insolvency proceeding, the number of creditors and the joinder, or otherwise, of insolvency proceedings.

2.2 Fee protection account: establishment and contributions

The purpose of this mechanism is to ensure that the insolvency managers appointed in insolvency proceedings with insufficient assets receive a minimum amount of remuneration. The fee protection account (the "**Account**") falls under the responsibility of the Ministry of Justice and will be managed by the court clerks at the commercial courts, who will be the only ones with authorization to withdraw funds.

The Account will receive the mandatory contributions from the insolvency managers appointed in insolvency proceedings, out of specific percentages of the remuneration they actually receive, that is:

1. Between €2,565 and €50,000: 2.5%;

2. Between €50,001 and €500,000: 5%;

3. Above €500,000: 10%.

The obligation to make payments into the Account does not apply to insolvency managers whose remuneration is lower than €2,565 for the entire insolvency proceeding or who are entitled to be reimbursed out of the Account.

The rules on distributing the funds held in the Account will be laid down by regulations. At present, the Law provides that the maximum amount that may be received out of the Account in respect of an insolvency proceeding will be the difference between the remuneration received and the remuneration that would apply in accordance with the fee scale (after deduction of the amounts required to be paid into the Account). In addition, an annual limit is placed on the amount that may be collected from the Account by each insolvency manager, which will be the result of dividing all the sums paid into the Account in that year (plus, where

appropriate, the unallocated amounts from previous years) by the number of insolvency managers entitled to receive sums from the Account.

2.3 Transitional arrangements for the remuneration of insolvency managers

Until the legislation implementing the new insolvency manager remuneration system has been approved, their remuneration will be determined in the same way as at present (according to Royal Decree 1860/2004, of September 6, 2004, which makes the calculation by reference to the amount of the assets and liabilities in the insolvency proceeding and applies a scale with specific corrections depending on the complexity of the proceeding).

Following the entry into force of the Law, however, the following rules will apply:

1. *Limits on increases due to the complexity of the insolvency proceeding*: increases may not exceed 15% of the initial remuneration for medium-sized insolvency proceedings, or 25% in proceedings classified as large;

2. *Elimination of monthly remuneration in protracted liquidations*: monthly remuneration is eliminated from the thirteenth week of the liquidation phase, unless the court – on a reasoned basis and after hearing the parties – decides to extend that remuneration. In all cases, extensions will be on a quarterly basis and may not exceed 6 months in total.

3. Amendments to out-of-court payment agreements and special features of "consecutive insolvency proceedings"

The Law consolidates in the LC the amendments brought in by RDL 1/2015 on out-of-court payment agreements. It does not make any significant amendments, except in relation to technical issues and one issue relating to the remuneration of insolvency mediators. The rules on out-of-court payment agreements therefore remain unchanged.

The most important elements of the out-of-court payment agreement system are as follows:

3.1 Debtors who may benefit from an out-of-court payment agreement

The following debtors may propose an out-of-court payment agreement (*acuerdo extrajudicial de pagos* or "**AEP**"):

1. Individual debtors satisfying the following conditions:

   (a) They are in a position of current or imminent technical insolvency.

   (b) Initial estimates of their liabilities do not exceed €5 million.

2. Legal entity debtors satisfying the following conditions:

   (a) They are in a position of technical insolvency.

(b) If an insolvency order has been made, the insolvency is not considered to be particularly complex within the meaning of article 190 LC.

(c) They must have sufficient assets to comply with the AEP.

AEPs are not available to:

1. anyone convicted of specific crimes, within a 10-year time limit;

2. anyone who, in the preceding 5 years, reached an AEP, secured court approval of a refinancing agreement or was the subject of an insolvency order;

3. anyone who is negotiating a refinancing agreement with their creditors or whose petition for insolvency has been admitted for consideration; or

4. insurers and reinsurers.

3.2 How to apply for an AEP

Applications for the commencement of an AEP proceeding may be sent to:

1. a notary for the debtor's place of domicile, in the case of individuals;

2. the commercial registry for the debtor's place of domicile, in the case of traders or legal entities that may be registered at the commercial registry;

3. the Official Chambers of Commerce, Industry, Services and Shipping if they have taken on mediation activities under their specific regulations, and the Official Chamber of Commerce, Industry, Services and Shipping of Spain, in the case of legal entities and individual traders.

The debtor must submit the application on a standard form (this form will not, however, come into force until the order of the Ministry of Justice containing it has been approved). The application must be accompanied by the following documents:

1. Inventory of the assets and rights held by the debtor, as well as the debtor's envisaged regular income.

2. List of creditors which must include a list of the contracts in force and expected monthly outgoings. The list must also identify the holders of loans or public law claims and those for which collateral has been provided, even though they might not be affected by the agreement.

A serious inaccuracy in any of the above documents may result in any subsequent insolvency proceeding being classified as fault-based.

3.3 Appointment and remuneration of "insolvency mediators"

Insolvency mediators will be appointed in sequential order from the official list from the Register of Mediators and Mediation Institutions of the Ministry of Justice.

On their remuneration, the Law lays down temporary rules until the definitive rules on remuneration are approved by regulations. Under the temporary system, the remuneration base is calculated by applying the stipulated percentages for the calculation of the fee scale of insolvency managers to the assets and liabilities of the debtor. Different reductions according to the type of debtor involved will be applied to that base: (a) 70% if the debtor is an individual not engaged in any economic activity; (b) 50% in the case of individual traders; and (c) 30% if the debtor is a company. If the out-of-court payment agreement is approved, supplementary remuneration equal to 0.25% of the debtor's assets will be applied.

3.4 Convening of creditors to a meeting

Within 10 days of being appointed, the insolvency mediator will take the following steps:

1. Check the data and documents submitted by the debtor and optionally request additional data and documents or rectification of the existing ones;

2. Verify the existence and amount of the claims;

3. Convene the debtor and creditors to a meeting which must be held within 2 months after acceptance. The call notice must state the place, date and time of the meeting, specify that the purpose of the meeting is to reach an AEP and give the names of the creditors.

3.5 Effects of commencing an AEP proceeding

1. *Oversight of the debtor's asset-related powers*: the debtor is banned from performing any act of administration or disposition that goes beyond the acts and transactions within the debtor's ordinary business.

2. *Ban or halting of enforcement proceedings in respect of unsecured claims*: it is prohibited for enforcement proceedings in respect of unsecured claims to be commenced or continued for 3 months. The enforcement of secured claims may be commenced or continued insofar as the security does not involve assets that are necessary for the continuity of the debtor's business or his main residence.

3. *Par conditio creditorum*: creditors are prohibited from carrying out any act aimed at improving their position with respect to the debtor.

4. *Non-accrual of Interest*: interest stops accruing on the claims involved.

5. *Restrictions on the making of an insolvency order*: no insolvency order may be handed made on a debtor who is negotiating an AEP in the 4-month period provided for in Article 5 *bis*.5 LC.

3.6 Terms of an AEP

At least 20 calendar days before the meeting with creditors, the insolvency mediator must send to the creditors, with the debtor's consent, a proposal for an AEP containing any of the following measures:

1. Deferrals of up to 10 years;

2. Reductions without any restrictions;

3. Transfers of assets or rights in payment or for payment, provided that they are not necessary for the continuity of the debtor's professional or business activities and their "fair value", calculated in accordance with Article 94.2 LC, is equal to or lower than the claim to be discharged. If it is higher, the debtor must be paid the difference. If assets provided as collateral are involved, article 155 LC will be applied;

4. Conversions of debt into equity, if the majorities set out in paragraph 3.ii) 3 of additional provision 4 of the LC are met (known as "Spanish schemes of arrangement");

5. Conversions of debt into participating loans, convertible debentures or subordinated loans, into loans with interest convertible into equity or into any other financial instrument with a different priority for payment, maturity or characteristics to those of the original debt.

The proposal must be accompanied by a payment plan with a breakdown of the funds needed for its performance and a viability plan.

Creditors may submit alternative proposals or amendments to the initial proposal within 10 days. If, before the end of that period, creditors representing the majority of the claims that may be affected by the AEP decide not to continue with the negotiations and the debtor is in a position of current or imminent technical insolvency, the insolvency mediator must petition for an insolvency order immediately.

3.7 Meeting with the creditors

The creditors who have been called to the meeting are required to attend unless they have consented or objected within the 10 calendar days before the meeting. Failure by a creditor to attend without good reason will cause the subordination of the claims held by that creditor in any subsequent insolvency proceeding, except for the claims secured by in rem guarantees.

The payment plan and viability plan may be altered at the meeting provided that no alteration is made to the payment conditions for the creditors who approved the AEP in advance and did not attend the meeting.

3.8 Majorities required for approval of an AEP

The following majorities (calculated by reference to the sum total of all the liabilities that may be affected) are required in order for an AEP to be deemed to be approved:

1. If the AEP is approved by creditors holding 60% of the liabilities, it may contain:

   - Deferrals not exceeding 5 years;
   - Reductions not exceeding 25%;
   - Conversions of debt into participating loans for a term not exceeding 5 years.

2. If the AEP is approved by creditors holding 75% of the liabilities, it may contain:

   - Deferrals of between 5 and 10 years;
   - Reductions exceeding 25%;

- Conversions of debt into shares in the debtor company or into participating loans for a term not exceeding 10 years;

- Transfers of assets or rights in or for payment.

If the agreement is accepted, it must be recorded in a public deed immediately and will be protected against clawback action in any subsequent insolvency proceeding. If the agreement is not accepted and the debtor remains in a position of technical insolvency, the insolvency mediator will be required to petition for an insolvency order.

3.9 Binding nature of AEPs on creditors, including secured creditors

AEPs are binding on:

1. The debtor;

2. Unsecured creditors and secured creditors in respect of the portion of their claims that exceeds the value of the security interest;

3. Secured creditors in respect of the portion of their claims that does not exceed the value of the security interest if they voted in favor or if the following majorities were reached, in percentages representing proportion the value of the accepting security interests bears to the total value of the security interests granted:

   - 65% for deferrals not exceeding 5 years, reductions not exceeding 25% or conversions of debt into participating loans for the same term.

   - 80% for deferrals of between 5 and 10 years, reductions exceeding 25%, conversions of debt into participating loans for a term not exceeding 10 years and transfers of assets or rights in payment or for payment of debts.

Under no circumstances will public law claims be affected by AEPs.

3.10 Contesting AEPs

An AEP may be contested by any creditors who were not called to attend the meeting (see section 3.9) or who did not vote for it or who expressed their opposition to it before the meeting.

The grounds for contesting AEPs are defined and are as follows:

1. Failure to obtain the required majorities, by including in the computation any creditors who should have attended but were not called to attend;

2. Exceeding the stipulated thresholds for deferrals, reductions and other measures in the AEPs;

3. Existence of a "disproportionate trade-off".

3.11 Effects of AEPs on creditors

1. Halting of enforcement proceedings against the debtor in respect of debts pre-dating notification of the commencement of the AEP proceeding.

2. Deferral, remission or discharge of claims in accordance with the covenanted terms and conditions.

3. Any creditors who are affected by an AEP, but who did not accept it or who expressed their disagreement with it, will retain their rights as against any joint and several obligors with the debtor and as against the debtor's sureties or guarantors.

4. Any creditors who have signed an AEP will retain, or otherwise, their rights as against other obligors, sureties or guarantors according to the terms covenanted with them.

3.12 Performance and nonperformance of AEPs

Performance of the AEP will be reviewed by the insolvency mediator. If the AEP is performed in full, a notary will record that fact in a notarial certificate which will be published on the Public Insolvency Register. If the AEP is not performed, the mediator must petition for an insolvency order.

3.13 Special features of "consecutive insolvency proceedings"

A "consecutive insolvency proceeding" is when an insolvency order is handed down by a court upon a petition lodged by the insolvency mediator, the debtor or the creditors because reaching an AEP has proved impossible or because of the nonperformance or rendering void of an AEP.

"Consecutive insolvency proceedings" are governed by the rules on *abbreviated* insolvency proceedings, subject to certain special provisions, most notably:

1. Applications submitted by the debtor or insolvency mediator: must be accompanied by an advance proposal for an arrangement or a liquidation plan;

2. Applications filed by mediators: in addition to the documents referred to above, the application must also be accompanied by the report under Article 75 LC (provisional report by the insolvency manager) and, where the insolvency proceeding is on an individual, it must adopt a view as to whether the requirements for debt relief are met and, where appropriate, on the commencement of the assessment section;

3. Applications filed by creditors: the debtor may file an advance proposal for an arrangement or a liquidation plan within 15 days of the insolvency order being handed down;

4. Unless there is a good reason for not doing so, the insolvency mediator will be appointed as the insolvency manager. He will not receive any additional remuneration under this heading;

5. Automatic commencement of the liquidation phase of the insolvency proceeding if the debtor or insolvency mediator applies for liquidation, as well as if the advance proposal for an arrangement is not admitted for consideration, is not filed, is not approved or is breached;

6. If the insolvency proceeding is on an individual and the insolvency is ultimately assessed as being fortuitous, the court will grant the debtor a "second chance" (see section 1), provided that the statutory requirements are met (see section 1.1)

3.14 Special features of AEPs for individuals who are not traders

A number of special provisions apply to AEPs for individuals who are not traders, notably:

1. *Essentially notarial procedure:* the application must be filed with a notary at the debtor's place of domicile. The notary will notify the court with jurisdiction to conduct the insolvency proceeding of the commencement of the AEP proceeding. The notary will move negotiations forward between the debtor and the creditors and may appoint an insolvency mediator if considered appropriate or if the debtor so requests. The notarial or registration steps taken in connection with the appointment of the mediator will not entail any costs for the debtor;

2. *Call notice for the creditors' meeting*: the period for verifying the existence and amount of the claims and for convening the meeting with creditors will be 15 days from the date on which the notary receives notice of the application, or 10 days from the date on which the mediator accepts his appointment. The meeting must take place within 30 days of the call notice;

3. *Specific and restricted terms in AEPs*: they may only contain deferrals not exceeding 10 years, reductions and/or transfers of assets or rights in payment or for payment;

4. *Sending of AEPs to creditors*: AEPs must be sent at least 15 days before the meeting date. Creditors may submit alternative proposals or amendments in the 10 days after receiving the AEPs;

5. *Ban on or halting of enforcement proceedings on unsecured debts:* can only remain in force for 2 months from the date on which the commencement of negotiations is notified to the court (unless, before the end of that period, the AEP is adopted or rejected or an insolvency order is handed down);

6. *Obligation to petition for a "consecutive insolvency proceeding"*: if, after the end of two months, the notary or, if appropriate, the insolvency mediator considers that it is not possible to reach an AEP, he must petition for an insolvency order within the following 10 days;

7. *"Consecutive insolvency proceedings" and liquidation*: in the case of "consecutive insolvency proceedings", the court will commence the liquidation phase directly.

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