

Everything you ever wanted to know about new restructuring plans in Spain but never dared to ask

A few months have now passed since the deepest reform of the Insolvency Act was passed in Spain last September 2022. Perspective has now been gained on how courts view the new legal instruments.

In this context, Garrigues' Restructuring & Insolvency team invites its clients and friends to hold 'tête-à-tête' meetings to become acquainted with the radically new landscape and explore how the new instruments would work in practice in potential special situations.

For appointments, please contact [here](#).

You can find below a high-level summary of the brand new instruments the reform has introduced in the Spanish corporate restructuring and insolvency toolkit.

1

New Restructuring Plan

A US Chapter 11-like plan with very light court-involvement and a number of new main features in case it is court-homologated:

1. Fully debtor-in-possession.
2. Ability to cram-down both individual dissenting creditors (intra-class cram-down) and entire dissenting classes (cross-class cram-down) based on the absolute priority rule.
3. Ability to affect both financial and non-financial debt (except public and labor).
4. Ability to wipe-out out-of-the-money junior stakeholders (including shareholders) and to reallocate control rights post-restructuring to the fulcrum class.
5. Deactivation of change of control clauses.
6. Ability to cram-up senior classes (except for certain exit rights established in favor of dissenting secured classes).
7. Ability to demarcate sub-sets of affected creditors.
8. Flexibility as to class formation within applicable bankruptcy rankings, provided an underlying rationale exists.
9. Ability to perform intra-group third party releases.
10. Ability to terminate non-labor contracts and also affect the resulting damages claim.
11. Ability to protect from claw-back actions plan-related acts and contracts (in particular, interim finance and new money security interests).
12. Ability to provide certain super-seniority to new money (although no priming liens strictly speaking).
13. A restructuring expert may be appointed either by the debtor or certain creditors, in order to support stakeholders in the negotiations and/or to provide a provisional valuation of where in the capital structure the enterprise value breaks.
14. Only one right of audience is permitted to dissenters, with no possibility of subsequent appeals. Homologation of the restructuring plan may take place in a matter of weeks and is immediately enforceable.

2

New Prepack

A UK prepack-administration-like proceeding, where the business of the insolvent debtor can be sold as a going-concern, free and clear of debt and liens, upon court authorization, very shortly after the bankruptcy proceedings are opened:

1. Such authorization is prepared up-stream, through a marketing process that is run by the debtor in possession with the supervision of a monitor initially appointed by the court ahead of the bankruptcy opening.
2. Once bankruptcy proper is opened, the monitor will subsequently inform the court about whether such process has been competitive, open and transparent, so that the selected bidder can be deemed as the best available bidder in the market.
3. If the monitor informs in favor of the prepack sale proposed by the debtor, the court will immediately authorize it, provided workers and secured creditors have been heard and other legal formalities have been met.
4. Prepack allows for business-related executory contracts to be (a) either terminated in the interest of the estate and left behind, or (b) compulsorily assigned to the acquirer without the need of the counterparty's consent.
5. Prepack may be combined with labor collective measures in case only certain of the debtor's preexisting businesses are sold, with no risk for the acquirer as to labor contracts unrelated with the precise business that is transferred through the prepack.
6. The court authorization of the prepack sale is not eligible for appeal.

3

New Moratorium

Which can be used as a flanking measure in order to provide a breathing space in relation to a restructuring plan or, in certain cases, a prepack:

1. Individual or collective stay of 3 months (extendable to 6 months), that protects the debtor from creditor enforcement or compulsory bankruptcy petitions.
2. Shields directors of the debtor from wrongful trading and from the duty to file for bankruptcy in capital impairment situations.
3. Deactivation of ipso facto clauses based on restructuring or insolvency events.
4. Ability to force counterparties of the debtor in critical executory contracts to keep performing irrespective of pre-moratorium breaches.

4

Jurisdiction and recognition abroad

The restructuring plan, the prepack and the moratorium are all dealt with in Spain by specialized commercial judges. These instruments fall under the scope of the European Insolvency Regulation, provided that the Spanish court's jurisdiction is COMI-based, i.e. the debtor's center of main interests (COMI) being located in Spain. Where a debtor's COMI is not in located in Spain, Spanish courts may still be competent with respect to that specific debtor based on a dual-track regime, as long as (i) the restructuring plan court-homologation is substantiated as a reserved non-public matter and (ii) the debtor's corporate group holding company is also a party to the Plan proceedings and has its COMI in Spain.