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# THE RESTRUCTURING REVIEW

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NINTH EDITION

EDITOR  
CHRISTOPHER MALLON

LAW BUSINESS RESEARCH

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Ninth Edition

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CHRISTOPHER MALLON

LAW BUSINESS RESEARCH LTD

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Gideon Robertson

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Nick Barette

BUSINESS DEVELOPMENT MANAGER  
Thomas Lee

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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

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ISBN 978-1-910813-22-5

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

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# ACKNOWLEDGEMENTS

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The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AFRIDI & ANGELL

AKINWUNMI & BUSARI LEGAL PRACTITIONERS

BÄR & KARRER AG

CLIFFORD CHANCE

DE PARDIEU BROCAS MAFFEI AARPI

DHIR & DHIR ASSOCIATES

GARRIGUES

GILBERT + TOBIN

GÖRG PARTNERSCHAFT VON RECHTSANWÄLTEN MBB

GRIMALDI STUDIO LEGALE

HARNEY WESTWOOD & RIEGELS

HUTABARAT, HALIM & REKAN

INDEPENDENT ADVISORY (PTY) LIMITED

KVALE ADVOKATFIRMA DA

LINKLATERS LLP

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MAYER BROWN JSM

NAGASHIMA OHNO & TSUNEMATSU

RITCH, MUELLER, HEATHER Y NICOLAU, SC

ROSCHIER ADVOKATBYRÅ AB

SARANTITIS LAW FIRM

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

STRELIA

TOZZINIFREIRE ADVOGADOS

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

WOLF THEISS ATTORNEYS-AT-LAW

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# EDITOR'S PREFACE

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I am very pleased to present this ninth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2016, with a view to the coming year, and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

Recent years have seen considerable drama unfold in the economic and political spheres and it seems that 2016 is proving remarkable even by these standards. Restructuring and insolvency practitioners based in the United Kingdom have of course been preoccupied by the implications of the vote to leave the European Union, which are discussed in more detail in the England & Wales chapter of this volume. The realignment of British politics and policy presaged by Brexit appear to form part of a wider trend in the advanced democracies for the reassertion of national and popular politics after a long period of affluent apathy. In the wider world, the continuing turmoil in the Middle East and the adoption of an ever more assertive posture by China suggest prolonged uncertainty and the further overturning in the future of long-held assumptions in politics and diplomacy.

Given the context, anyone claiming to be able to predict clearly the future of the global economy cannot be believed. All we can say for certain is that anything can happen.

A further factor to note is the continued employment of unorthodox monetary policy by many central banks. At the time of writing the previous edition of the *Restructuring Review*, many commentators were predicting the end of the current policy mix of ultra-low (or in some cases negative) interest rates and monetary laxity in the months to come, with potentially grave results for many over-leveraged businesses. The renewed uncertainty prevailing at the time of writing this ninth edition suggests that the historically unprecedented monetary policy approach of previous years may in fact be set to continue for some time, and a reversion to the pre-crisis world seems ever further away.

While, of course, no credible predictions as to the consequences of the above factors for insolvency and restructuring activity are possible, past experience has taught us that where

there is uncertainty and stress there is a healthy restructuring market. As such, this work continues to be relevant and important, in particular, as a result of the international nature of many corporate restructurings.

I would like to extend my gratitude to the contributors from some of the world's leading law firms who have given such valuable support and cooperation in the preparation of this work, and to our publishers, without whom this work would not have been possible.

**Christopher Mallon**

Skadden, Arps, Slate, Meagher & Flom (UK) LLP  
London  
August 2016

## Chapter 24

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# SPAIN

*Borja García-Alamán, Adrián They and Juan Verdugo<sup>1</sup>*

### I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The number of insolvency proceedings declared in Spain has decreased sharply since the last quarter of 2013, in parallel with the stabilisation of the Spanish economy and its return to growth scenarios. According to the latest available statistics, the number of insolvency proceedings declared in the first quarter of 2016 has fallen by 27.6 per cent from the same period of the previous year, reaching 1,171 insolvency proceedings.

According to the latest available statistics, the vast majority of formal insolvency proceedings (*concurso*) commenced in Spain end with the liquidation of the company (around 92.7 per cent), which is due basically to companies in difficulty petitioning for insolvency when it is already too late – in other words, when they have a critical cash-flow shortage and their regular defaults on payments to creditors have brought their operations practically to a standstill. What is known as the ‘*concurso* stigma’, which prevents managers filing a petition for insolvency proceedings until there is no other alternative and, in most cases, it is too late, remains in the entrepreneurship culture of Spain.

Furthermore, recent statistics of the first quarter of 2016 show that only one-third of the companies affected by unpaid salaries (those in which public organisms have had to cover part of the salaries) have applied for an insolvency proceeding. This asymmetry shows that it is likely that more insolvency proceedings should have been initiated and that Spanish companies are still reluctant to apply for them.

Faced with this scenario, and seeking to prevent insolvency proceedings being the only restructuring option available to companies, in 2013, 2014 and 2015 the government introduced sweeping and innovative reforms with the goal of driving solutions that would help companies avoid formal insolvency proceedings and choose out-of-court restructurings or restructurings with less court involvement.

Some of the key instruments of those reforms were Law 14/2013 to support entrepreneurs and their internationalisation; Royal Decree-Law 4/2014, of 7 March (RDL

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1 Borja García-Alamán, Adrián They and Juan Verdugo are partners at Garrigues.

4/2014) adopting urgent measures on business debt refinancing and restructuring; and Law 17/2014, of 30 September adopting urgent measures on business debt refinancing and restructuring. These reforms improved pre-insolvency business restructuring mechanisms (refinancing agreements and what are known as ‘out-of-court payment agreements’), the stated aims of which are to avoid the problems that insolvency proceedings wreak, while driving the recovery of business to the maximum extent possible.

The latest available statistics confirm that, despite the decrease in the number of formal insolvency proceedings, there has been an important increase in what are known as Spanish schemes of arrangement, which are out-of-court refinancing agreements that allow the imposition of cramdowns, deferrals and other measures to dissenting creditors (see Section II.ii, *infra*). In the first quarter of 2016, the number of Spanish schemes of arrangement approved has increased by 30 per cent compared with the same period of the previous year, and 80 per cent of all Spanish schemes of arrangement approved since its introduction (in 2011) have taken place in the last two years.

The mechanism of Spanish schemes of arrangement is progressively consolidating as a result of an increase of its practice, including some renowned Spanish companies that have applied for it.

Following the 2014 reform of the legislation on refinancing agreements and Spanish schemes of arrangement, a number of companies have successfully refinanced their debts in the past year, such as Eroski (€2.51 billion), Realia (€802 million), Quabit (€240 million), Bodybell (€200 million), Aliwin Plus (€186 million), Lípidos Santiga (€170 million), Imaginarium (€37 million), Someva (€22 million) and Atalayas (€20 million).

Furthermore, Royal Decree-Law 11/2014 of 5 September (RDL 11/2014) added further facilities to the purchase of credits, as purchasers will keep the voting rights of the acquired credits. There has been a particular flurry of activity in the acquisition of non-performing loan portfolios by foreign funds in the past few years, with Caixabank being one of the most active sellers in the latest months, with: Project Tourmalet, a portfolio of problematic credits with a face value of €800 million collateralised with real estate developments (some of them finished and some ongoing), purchased by Blackstone in July 2015; Project More, a portfolio of non-performing loans with a face value of €700 million related to consumer and SME lending, purchased by Cerberus in September 2015; and Project Atalaya, a portfolio of €900 million collateralised with real estate developments, purchased by TPG and Goldman Sachs in December 2015. Other active sellers were Abanca, with a sale of €1.383 billion of unsecured non-performing loans to EOS Spain in June 2016, and Sabadell, with the Auster project, that included €800 million of unsecured non-performing loans, and the Chloe project, that included €800 million of non-performing loans and shares related to real estate properties and was purchased by Sankaty in December 2015.

There are also other important non-performing loan portfolios currently on sale offered by several financial entities, for example, Cajamar, with the Baracoa portfolio (€800 million in collateralised non-performing loans); Bankia, with the Wind II and Babieca portfolios (€800 million and €700 million of collateralised non-performing loans); SAREB, with the Silk, Macarena and Vega portfolios (€1 billion, €410 million and €180 million of collateralised non-performing loans); Sabadell, with the Normandy and Corus portfolios (€1.7 billion on collateralised non-performing loans and €800 million on consumer lending) and others, such as Ibercaja and BMN.

The huge concern regarding the need for proper restructuring mechanisms has led to six reforms of the Insolvency Act from 2014 to the time of writing. Additionally, the

government has promoted the Fénix project (formerly the Midas project), an agreement of the most important Spanish banks, aimed at saving high leveraged but viable companies through debt capitalisation and other restructuring measures. Despite some initial disagreements, the Fénix project was launched in April 2015, not through a single vehicle but through case-by-case vehicles. By the time of writing, Fénix Project has helped the restructuring of three companies (GAM, Bodegas Chivite and Condesa) with a total restructured debt of €600 million, and has projects to include two more companies in the following months.

Constrained bank lending in recent years fuelled the appearance of other types of lenders engaging in direct lending mechanisms. Several debt funds have recently appeared on the scene, including the Iberian private debt fund, launched by Arcano and Munizich with up to €500 million, Aria Capital, a joint venture of Afi and Renta 4 with up to €200 million; AlterAlia, a debt fund of Nmas1 with up to €150 million; and Trea Capital with up to €100 million. Nevertheless, the reduction on banking interest rates this past year has impacted 'shadow banking' activity, which has reduced the volume of operations. Nevertheless, it is remarkable that the number of operations has increased significantly since last year.

## II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

### i In-court restructurings (*concurso* and *preconcurso*)

For a company in economic and financial difficulty, a formal insolvency proceeding (*concurso*) is a powerful corporate restructuring tool, and an arrangement with creditors is one of its key instruments. The Spanish Insolvency Law of 9 July 2003 (LC) contemplates two different scenarios in which a debtor can petition for its voluntary formal insolvency: where it is unable to regularly meet its debts as they fall due (Article 2.2 LC) (an event of actual technical insolvency); or where it foresees that it will be unable to meet its existing debts regularly as they fall due (Article 2.3 LC, *in fine*) (an event of imminent technical insolvency).

The formal insolvency of a company does not necessarily lead to the formal insolvency of the other companies in its group, although any of the debtors, their insolvency managers or their creditors can request that the various proceedings be handled by a single court and the same insolvency manager, to make them easier to coordinate and save on costs.

#### *Pre-insolvency scenario (preconcurso)*

A debtor may seek insolvency protection under Article 5 *bis* of the LC (*preconcurso*) when negotiating a refinancing agreement (for a further explanation of refinancing agreements, see Section II.ii, *infra*) or an advanced proposal for a creditors' arrangement (early restructuring plan or PAC). A debtor who notifies the commercial court that it has commenced negotiations with its creditors will be granted a four-month period in which it has no duty to petition for insolvency and is protected against petitions for compulsory insolvency proceedings.

RDL 4/2014 has introduced the stay of enforcement action to this insolvency protection mechanism, under which proceedings can be halted temporarily for up to four months from the filing of the *preconcurso* notice. Law 9/2015 of May 25, also amended it, and as result, this stay applies to any court enforcements against the debtor's assets that are needed for the continuity of its business activities; it also halts any enforced collection proceedings regarding rights, and any out-of-court enforcement regarding assets or rights that may prove necessary for the continuity of its activities. As a prior requirement to prevent the commencement of enforcements or stay any that might be in progress, the debtor must

indicate any enforcement procedures that are being conducted against its assets, and which of these procedures concern assets it considers to be necessary for the continuity of its professional or trading activity. If 51 per cent of the financial claims have undertaken not to start or continue with individual enforcement action against the debtor while negotiating (stand-still agreement), that undertaking will be binding on all creditors holding financial claims; this means that, although it will not prevent secured creditors from bringing action against the debtor's property, such undertaking means that any proceedings may be halted after they have started.

### *Concurso common phase*

A voluntary insolvency proceeding commences with the debtor filing a petition for an insolvency order. The Insolvency Law obliges directors to petition for an insolvency order when the company is in actual technical insolvency. In the event of imminent technical insolvency, the debtor can file its petition at any time, since it is not under obligation to do so.

If, after examining the petition, the judge deems the information to be complete and to constitute sufficient evidence of the debtor's technical insolvency, the judge will make an insolvency order. Creditors must notify their claims to the court within one month of the date on which notice of the insolvency order is published. Insolvency order notices are published in the Spanish Official State Gazette (BOE) and on the Insolvency Register, which has been available online since March 2014.<sup>2</sup>

When it makes an insolvency order, the commercial court will also appoint an insolvency manager who will be responsible for vetting the acts of the insolvent debtor as a *concurso* is a pure debtor-in-possession procedure (apart from exceptional cases in which management is removed by the court, likewise when the liquidation phase starts); and for drafting a report containing a detailed analysis of the documentation submitted by the debtor (the inventory and list of creditors) and of its financial statements. On publication of the report, each creditor has 10 days in which to object to it. Objections to the report must be made in an ancillary proceeding.

If no objection is made against the insolvency manager's report, or if all the objections have been judged and decided, the insolvency manager will submit final versions of both the inventory and the list of creditors and liabilities. The judge will then make an order to commence the creditors' arrangement phase. All in all, and to speed up the process, where the objections to the report affect less than 20 per cent of the total value of assets or liabilities, the court may rule that the common phase be immediately concluded and that the creditors' arrangement phase or the liquidation phase (see below) be commenced.

### *Concurso creditors' arrangement phase*

A proposal for an arrangement or restructuring plan can be filed at different stages of the *concurso*. PACs can be made any time from the petition for insolvency to the deadline for notification of claims. Ordinary proposals can be filed with the court up to 40 days prior to the creditors' meeting taking place.

The advanced or ordinary proposals for a restructuring plan must first be assessed by the court (to check their compliance with all the legal requirements), and also by the insolvency manager.

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2 [www.publicidadconcurstal.es](http://www.publicidadconcurstal.es).



Ordinary claims are entitled to vote and will be bound by the decision of the majority of the voting claims, whether or not they vote or abstain. Subordinated claims cannot vote, but are bound by the restructuring plan. Finally, secured claims have the right to vote, and if they do so, they will be counted as unsecured claims only for the purpose of computing the majorities. Additionally, dissenting secured creditors can be subject to cramdown when a certain majority of secured creditors of the same class is met.

The restructuring plan can include any of the following proposals:

- a* soft restructurings:
  - write-off not exceeding 50 per cent of the claims;
  - stays of up to five years; or
  - the conversion of claims into profit-tied loans (PPLs) for a term of the same length; or
- b* hard restructurings:
  - write-off exceeding 50 per cent of the claims;
  - stays of up to 10 years;
  - the conversion of claims into PPLs or other re-profiling of the claims for a term of the same length;
  - transfers of assets and rights to the creditors in payment of their claims, provided that these assets and rights are not necessary for the continuity of the debtor's business and their fair value is equal to, or lower than, the claim being discharged, without prejudice to the rules governing the transfers of assets guaranteeing secured claims;
  - payment-in-kind to the creditor that holds a security over the relevant asset, or a third party appointed by said creditor, provided that the secured claim is fully settled or that the outstanding amount of the claim ranks as an unsecured claim; or
  - the sale of all or part of the debtor's business to a third party, who will have to assume, under the terms agreed in the restructuring plan, the obligation to continue with the business activity of the debtor.

The restructuring plan will include a detailed repayment schedule and a viability plan if repayment is based on the debtor's future cash flow. However, the restructuring plan will not include any form of global liquidation of the debtor's assets (with some exceptions), will entail a change in the ranking of claims and will be subject to conditions as to its validity.

The approval of a restructuring plan requires the following majorities:

- a* for ordinary claims, the amount of the secured claims that exceeds the value of the collaterals and subordinated claims:
  - soft restructurings: at least 50 per cent of the voting claims; or
  - hard restructurings: at least 65 per cent of the voting claims;
- b* for the amount of the secured claims that does not exceed the value of the collaterals, the same measures will be applied to dissenting secured claims if the restructuring plan is backed by the following majorities:
  - soft restructurings: creditors holding at least 60 per cent of the aggregate value of the collaterals of the same class; or
  - hard restructurings: creditors holding at least 75 per cent of the aggregate value of the collaterals of the same class; and

- c* claims with a general privilege will also be subject to the restructuring plan if they adhere to it or if it is backed by the following majorities within each class:
- soft restructurings: at least 60 per cent of the claims with a general privilege of the same class; or
  - hard restructurings: at least 75 per cent of the claims with a general privilege of the same class.

Preferred creditors are divided into four categories or classes that are relevant to determine if a certain majority is met in order to approve a restructuring plan. These classes of preferred creditors are employment law creditors, public creditors, financial creditors and other creditors.

The restructuring plan must be court-approved, after which, if there is a breach of the plan, the court will commence an ancillary proceeding to evidence that breach and, if the breach is demonstrated, may order that insolvency proceedings be resumed for the purpose of liquidating the company.

Nevertheless, if the breach of the plan took place prior to May 2017, the debtor or creditors that represent at least a 30 per cent of total existing claims can propose a modification of an approved restructuring plan (if its breach has not been declared by the court at the time of the petition). The required majorities to approve such modification are the following:

- a* soft restructurings:
- at least 60 per cent of the ordinary claims; or
  - at least 65 per cent of the privileged claims; and
- b* hard restructurings:
- at least 75 per cent of the ordinary claims; or
  - at least 80 per cent of the privileged claims.

### *Concurso liquidation phase*

The liquidation phase will commence automatically if no arrangement is proposed, if there is a breach of an arrangement or where liquidation is applied for directly by the debtor at any time.

In the event of liquidation, the power to manage its business passes to the insolvency manager, who must prepare a liquidation plan to be approved by the judge. On approval of the liquidation plan, all of the debtor's assets will be sold off and claims paid to the creditors in the statutory order of priority.

Under the LC, claims are classified as follows:

- a* post-insolvency order claims or claims against the insolvent debtor's assets are paid out of the insolvent debtor's assets, normally as they fall due and ahead of pre-insolvency order claims; or
- b* claims arising before the date of the insolvency order (pre-insolvency order claims) falling into one of the following categories:
- secured claims: claims secured by a specific asset or right;
  - generally preferred claims: claims paid ahead of ordinary claims but not secured by any collateral. Some generally preferred claims are for other amounts to be paid to the tax and social security authorities (up to 50 per cent of the aggregate total);
  - ordinary claims: claims that are not secured, generally preferred or subordinated. Such claims rank *pari passu* and are paid *pro rata*; and

- subordinated claims: claims whose holders are not entitled to vote on proposals in a restructuring plan. Such claims forfeit any security interest created to secure the claim. If a restructuring plan is approved, the holders of subordinated claims will (normally) be subject to the same write-offs and deferrals as ordinary creditors. Some subordinated claims are contractually subordinated to all other claims, claims for interest unless secured or claims by persons who are 'specially related' to the debtor (with some exceptions).

The following creditors will be considered 'specially related' to the corporate debtor:

- a* shareholders owning at least 10 per cent of the capital of the company when the claim arose (5 per cent if the debtor is a listed company), but their claims will not be subordinated if they arise from trading activities rather than from financing arrangements;
- b* *de facto* or *de jure* directors, liquidators, persons to whom the debtor has granted a general power of attorney and persons who have held such office in the two years immediately preceding the insolvency order;<sup>3</sup> or
- c* entities belonging to the debtor's group and its common shareholders, if they meet the conditions under (a).

#### *Concurso assessment phase*

The court will assess the debtor's business practices (the assessment phase) if no restructuring plan is approved; if the restructuring plan provides for all creditors a release of more than one-third of the amount of their claims, or a deferral of more than three years; or if the approved restructuring plan is not fulfilled and the debtor is forced to liquidate its business.

An insolvency will be considered fault-based where there is a finding of wilful misconduct or gross negligence on the part of the debtor or, should the case arise, of its *de facto* or *de jure* legal representatives, directors, liquidators or general attorneys-in-fact in creating or aggravating the debtor's technical insolvency. As a result of this assessment in a liquidation scenario, the debtor's *de jure* or *de facto* directors may be held personally liable to the extent of their own assets.

#### *Other issues related to in-court restructurings*

##### *Preserving the value of the business or assets*

At any time during the insolvency proceedings, the insolvency manager can directly authorise, without court approval, sales of assets that are essential to ensure the viability of the debtor's business or to meet cash needs, as well as sales of assets that are not necessary to the business. Any sales of personal property or real estate that do not meet those conditions will be approved by the court almost automatically if the price offered does not exceed certain discounted limits.

The commencement of insolvency proceedings has the following positive effects on the debtor's assets:

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<sup>3</sup> The LC does not allow any creditors who have exchanged all or part of their claims for equity within a refinancing agreement (thus avoiding subordination in relation to the debt exchanged for equity) to be put in the 'specially related' class.

- a* any pre-existing attachments on the debtor's assets can be lifted and cancelled if they hinder the continuity of the debtor's business;
- b* administrative enforcement proceedings are generally stayed;
- c* foreclosure proceedings will be stayed and may only resume if the court finds that the collateral is not necessary for the business; and
- d* subcontractors are barred from bringing legal action against the owner of the work performed by the debtor.

#### *Secured claims under the LC*

Claims held by banks and other creditors may be secured by mortgages, pledges or other security interests, which will grant the creditors a specially preferred (i.e., secured) status with the effects envisaged in the LC, including:

- a* the right to separate enforcement of their claim, if they commenced foreclosure proceedings before the date of the insolvency order and certain additional requirements were satisfied;
- b* priority for collecting their claims in the event of the debtor's liquidation; and
- c* while a moratorium on the payment of interest operates generally as soon as the insolvency order is made, interest will continue to accrue for secured creditors, such as mortgagees or pledgees, provided that the value of the collateral is sufficient to repay their claims.

#### **ii Out-of-court restructurings**

##### *Spanish schemes of arrangement*

Since the publication of RDL 4/2014, there have been two main reforms of the Spanish Insolvency Act that have affected the regulation of the Spanish schemes of arrangement: Law 17/2014 of 30 September and Law 9/2015 of 25 May.

As a result of these reforms, the current regulation of Spanish schemes of arrangement is characterised by the following issues.

All types of financial claims may qualify, even those held by parties not subject to financial supervision (funds, direct lenders). Although Spanish schemes of arrangement cannot be made to bind creditors holding commercial and public law claims, commercial creditors may decide to be bound by them voluntarily.

The provisions on 'Spanish schemes' allow not just deferrals to be made binding on financial claims (even those properly secured), but also write-offs, debt-equity swaps, debt-for-PPL conversions and also transfers of assets for payments in kind, all subject to the majorities obtained and the 'fair value' of the collateral if the debtor seeks for them to be binding on dissenting or non-participating secured creditors. Put concisely:

- a* these refinancing agreements (which must be approved by the court) must have been signed by 51 per cent of the financial claims. This 51 per cent majority only secures clawback protection, but is not enough to make them binding on non-participating or dissenting creditors. Public law claims will not be included among the financial claims;
- b* as regards the binding itself, where a majority of at least 60 per cent of the financial claims is obtained, the court will make binding any deferrals up to five years and conversions of debt into PPLs for the same term. These binding effects only apply to unsecured financial claims or secured financial claims not covered by the 'fair value'

- of the collateral. If, however, the majority is above a threshold of 65 per cent of the secured financial claims, any such deferrals and conversions will be made binding on secured financial claims even if they are fully covered by the collateral's 'fair value';
- c* if there is a majority of 75 per cent of the financial claims, the court will make binding deferrals up to 10 years, haircuts without limits, conversion of debt into PPLs up to the same term, debt-equity swaps without limits (or the equivalent write-off if the creditor objects) and, finally, transfers of assets in or for debt payment (payment in kind). Again, these effects will only be binding on unsecured financial claims or secured financial claims not covered by the 'fair value' of the collateral unless a threshold of 80 per cent of financial secured claims is met, in which case those effects will be compulsory for dissenting or non-participating financial claims regardless of whether they are fully covered by the collateral's 'fair value';
  - d* in the case of syndicated debt, whenever 75 per cent of the syndicated debt supports a refinancing agreement, all syndicated lenders will be deemed to support it;
  - e* claims from persons especially related to the debtor or those from commercial creditors that voluntarily adhere to the refinancing agreement will not be taken into account when calculating the above majorities, although they might be affected by the refinancing agreement; and
  - f* secured claims will be treated as unsecured claims on their amount exceeding the value of the collaterals. The value of the collaterals will be equivalent to the fair value of the relevant asset; less 10 per cent of the fair value; less the amount of those claims secured with liens on the relevant asset that are senior to the incumbent claim at hand.

#### *Other refinancing agreements*

Apart from 'special' refinancing agreements, which address debt-restructuring solutions for financial claims, there is another regime for any 'general' refinancing agreements dealing with all outstanding debt, regardless of its financial or commercial origin. Article 71 *bis* of the Spanish Insolvency Act sets up two kinds of 'general' refinancing agreements, which can be either multilateral or bilateral. Multilateral refinancing agreements are adopted by three-fifths of the unsecured creditors and made in response to a viability plan. To calculate the majority of three-fifths, it is presumed that in the agreements subject to a regime of syndication, all creditors subject to this agreement will subscribe the refinancing agreement if a majority of 75 per cent affected by the regime of syndication vote in favour of the agreement, unless the rules governing the syndication establish a lower majority. Bilateral separate agreements ('safe harbour' agreements) are those meeting a number of financial requirements that make them clearly beneficial to the debtor's net worth position. None of these 'general' refinancing agreements can be made binding on dissenting or non-participating creditors; they are just intended to gain clawback protection.

### **III RECENT LEGAL DEVELOPMENTS**

#### **i Business debt refinancing and restructuring measures**

Beyond the relevant amendments introduced in the LC during 2014 (especially on refinancing agreements and the binding nature of their terms on dissenting creditors, restructuring plans and their effects on secured creditors, and liquidation), there have been some important reforms during 2015 that have also affected the insolvency legal framework.

Specifically:

- a* Royal Decree-Law 1/2015 of 27 February (on the mechanism of second opportunity, reduction of financial burden and other social measures) modified the extrajudicial payment agreements, an out-of-court proceeding introduced in 2013 for indebted individuals and small companies, to make it operative as an alternative to regular insolvency proceedings.
- b* Law 9/2015 (on urgent insolvency-related measures) transferred to the LC the wording of previous reforms, which made fundamental amendments in relation to the classification of claims, the terms of creditors' arrangements, the majorities needed for approval and the transfer of production units in an insolvency proceeding. This Law authorised the government to prepare and approve a revised LC to consolidate and harmonise the amendments added in the successive reforms of the LC (2009, 2011 and 2014, principally).
- c* Law 25/2015, of 28 July (on the mechanism of second opportunity, reduction of financial burden and other social measures) transferred to the Insolvency Law the wording of RDL 1/2015 with further modifications, such as the restriction of insolvency managers' fees and some improvements in the mechanism of redemption of defaulted debts.
- d* Law 40/2015 of 1 October (on the Public Sector Legal Regime) clarified the treatment of pledges over future claims in an insolvency proceeding as a matter of special interest in Spain because of its impact on the insolvency procedures of multiple toll roads, in which pledges were granted over the potential compensations that could be borne by the Spanish government. The amendment clarified that specially preferred status will be conferred on claims secured with pledges over future claims, provided that the following requirements are met before the insolvency proceeding:
  - the future claims arise from contracts that were concluded prior to the insolvency order;
  - the pledge must have been recorded in a public deed or, in the case of a security interest (i.e., without transfer of possession), the security interest must have been registered at the competent public registry; and
  - any pledged claims derived from the termination of contracts for the concession of public works or the management of public services must secure debts relating to the concession or the contract, following authorisation from the contracting authority.

#### **IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES**

##### **i Insolvency proceedings of TP Ferro**

The insolvency proceedings of TP Ferro were the first insolvency proceedings opened in Spain in relation to cross-border infrastructure (i.e., the high-speed railway line between Spain and France). The low traffic of the railway led TP Ferro to enter into pre-insolvency proceedings in March 2015 and formal insolvency proceedings (*concurso*) in September 2015. The total assets of TP Ferro amount to €453 million, and the total liabilities amount to €560 million.

**ii Refinancing of Aliwin**

Aliwin Plus SL is a company operating in the renewable energies sector, specifically in solar energy projects. In March 2016, it succeeded in restructuring its financial debt (€180 million) and securing court approval of the refinancing agreement, with the extension of its effects to dissenting creditors. The innovative refinancing agreement extended the term of the syndicated loan by much more than the 10 years provided for in Spanish law, made a retroactive extension of its effects to dissenting creditors and was homologated by the court, despite no collateral being appraised, as Spanish law requires, given the majority of the creditors (syndicated loan) that approved the refinancing plan.

**iii Insolvency litigation: Delforca case**

Delforca is a company whose main activity was the exploitation of its real estate and financial capital assets, whose insolvency was mainly caused by a proceeding related to an interest rate swap. *Delforca* has been one of the most relevant insolvency cases carried out in Spain with regard to its extraordinary complex litigation and strong innovative approaches. The *Delforca* case is also a leading case regarding the relation between insolvency and arbitration laws. In this sense, within the procedure the Appellate Court clarified that arbitral proceedings are on course from the request for arbitration, regardless of whether concrete petitions are settled at that moment. Therefore, the opening of the insolvency proceedings of a party cannot suspend arbitral proceedings in which such party is involved and that shall continue until its finalisation.

**V INTERNATIONAL**

On 25 May 2015, the European Parliament approved the Recast Regulation on Insolvency,<sup>4</sup> which includes a deep reform on the European Insolvency Regulation.<sup>5</sup> Some of its main features are the modification of the rules on the centre of main interests, with some mechanisms to prevent forum shopping; the creation of a European Insolvency Registry; the possibility to reach creditor agreements in secondary proceedings that does not necessarily entail liquidation; and the introduction of a new chapter on international cooperation in insolvency proceedings of a group of companies. The Recast Regulation on Insolvency will enter into force on 26 May 2017.

A proposal of a new EU Directive on restructuring and insolvencies is expected in the coming months. The background of this proposal has been the Consultation of the European Commission of 3 March 2016, on an effective insolvency framework within the EU.

**VI FUTURE DEVELOPMENTS**

The most recent reforms, aimed at helping highly leveraged companies to restructure their debt, are focused on the simplification and effectiveness of out-of-court agreements, as well

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4 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

5 Regulation 1346/2000 on insolvency proceedings.

as on the flexibility of insolvency proceedings. Thus, it is expected that future reforms on restructuring will further aim to help the restructuring of Spanish companies, some of which have been highly damaged during this long period of financial crisis.

Following the latest modifications of the Insolvency Act, the eighth additional provision of Law 9/2015 of 25 May enables the government to elaborate a recast text of the Insolvency Act within the next 12 months (this has not taken place yet). Possible areas of reform might be the regulation regarding the extinction and Registry cancellation of companies after the opening of the liquidation phase of the insolvency proceedings, the possibility of a liquidation in the insolvency proceedings when there is only one creditor, or the regulation regarding the director's obligation in the period prior to the insolvency, following the latest recommendations of UNCITRAL.

Additionally, the change of the paradigm from in-court to out-of-court restructuring proceedings may drive future changes to clarify some aspects of out-of-court agreements regimes, specifically Spanish schemes of arrangement.

Finally, as mentioned in Section V, *supra*, a proposal of a new Directive from the European Union on restructuring and insolvencies is expected soon.



## Appendix 1

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# ABOUT THE AUTHORS

### **BORJA GARCÍA-ALAMÁN**

#### *Garrigues*

Borja García-Alamán is a partner in the firm's restructuring and insolvency group. Based at Garrigues' head office in Madrid, he holds a bachelor's degree in law from CEU San Pablo University and a master's degree in corporate and business law from Centro de Estudios Garrigues. He has been a partner at the firm since 2008, where he has spent over 19 years practising in the area of out-of-court restructuring processes in their widest sense (workouts, debt refinancing, distressed situations and acquisitions, operations and turnarounds), as well as in insolvency and pre-insolvency scenarios and related court proceedings.

He specialises in providing advice on business distress situations to debtors (in situations of actual or imminent technical insolvency) as well as creditors (defending their claims or interests in a disputed contract in which the other party is or could be affected by insolvency). In this regard, Mr García-Alamán has a wealth of experience in preparing and petitioning for insolvency, having participated in many of the highest-profile insolvency proceedings conducted in Spain, often with a cross-border dimension. A significant proportion of his advisory work regularly focuses on directors' liability, and on analysing the resistance to and risks of transactions (potentially) featuring an insolvency component. He is also regularly involved in negotiating and preparing refinancing agreements.

His career has for years been singled out for praise in the most prestigious international directories, such as *Chambers Global*, *IFLR1000*, *The Legal 500* and *Best Lawyers*. He is a regular speaker on courses and conferences on insolvency law and, *inter alia*, he has taught that subject on the business law master's degree offered by Centro de Estudios Garrigues since 2009. Mr García-Alamán is a member of the Madrid Bar Association and a founding member of the Turnaround Management Association in Spain. He has acted as an expert contributor for the World Bank on 'Doing Business' since 2009.

## ADRIÁN THERY

### *Garrigues*

Adrián Thery is part of Garrigues' restructuring and insolvency department. He advises debtor companies, credit institutions and distressed investors on out-of-court refinancings and restructurings, as well as on in-court insolvency proceedings, both domestic and cross-border. His in-depth knowledge of the different idiosyncrasies at stake enables him to anticipate the incentives, deterrents and strategies the different parties may look for in each case, as well as find the potential leverage that might ultimately lead to collaborative solutions.

He has secured approval of eight advanced restructuring plans. Two of these have been singled out for praise at a European level at the *Financial Times* Innovative Lawyers Awards in the 2009 edition ('Industrial lease in an insolvency') and the 2011 edition ('Accelerating a company-saving approval').

Additionally, the 2013 FT Innovative Lawyers Awards acknowledged his contribution in a leading case in Spain, consisting of 'arguing that a US law applied to Spanish insolvency proceedings, allowing bankruptcy judges to assign contracts in bankruptcy sales'.

In 2013, acting as the attorney of two companies subject to insolvency proceedings that were to be merged through their respective restructuring plans, he petitioned and obtained for the first time in Spain from a commercial court (Madrid) the exclusion of the individual right of opposition that corporate law generally grants to creditors. In practice, this precedent enables classic restructuring tools (haircuts, deferrals and conversions) to be combined in Spanish restructuring plans with other sophisticated tools such as corporate structural modifications.

He has been singled out by *Chambers and Partners* in the 'Restructuring and insolvency' category (from 2011 to 2016), *Best Lawyers* in Spain in the 'Insolvency and reorganisation' category (from 2009 to 2016), *IFLR1000* in the 'restructuring and insolvency' category (2012 and 2016) and *Who's Who Legal* in the insolvency and restructuring category (2015).

In December 2015, Adrián was appointed as a member of the Group of Experts established to assist the European Commission in the preparation of a potential legislative proposal containing minimum standards for a harmonised restructuring and insolvency law in the European Union.

He has a degree in law (CEU San Pablo University), a master's degree in EU law (CEU San Pablo University) and a master's degree in business and finance (Centro de Estudios Garrigues).

## JUAN VERDUGO

### *Garrigues*

Juan Verdugo is a partner in the restructuring and insolvency department. He manages some of the most high-profile insolvency proceedings in Spain, defending the interests of industrial companies, financial institutions, investment banks, insurers, property developers, construction companies, private equity firms and hedge funds.

He has amassed a wealth of experience in refinancing distressed businesses, the purchase and valuation of consumer and mortgage loan portfolios (NPLs), the acquisition of debt from banking syndicates (distressed trading), the purchase of companies or assets subject to insolvency proceedings and defending clients in asset clawback actions. Also worth noting is his experience in the area of cross-border insolvencies and in advising foreign investors on bids to acquire a controlling stake in distressed companies (loan-to-own). Since 2008, Mr Verdugo has regularly featured in the main international legal directories (*IFLR1000*,

*Chambers and Partners*), which have stated that his clients regard him as ‘a talented young lawyer who already displays exceptional judgment’ (*Chambers Europe* 2011) and ‘a valued member’ of the restructuring team (*Chambers Global Guide* 2012). Since 2011 he has featured in the *Best Lawyers* guide for insolvency and reorganisation practice. More recently, clients have lauded his ‘strong leadership skills and ability to handle complex deals’, focusing on his ability to ‘fight for the client and [...] making a name for himself’ (*Chambers Global Guide* 2013). *Chambers Global Guide* 2014 again endorsed Mr Verdugo as ‘up and coming’ in restructuring and insolvency, gathering positive feedback from clients who reveal that he is ‘communicative, and has helped in a way that not many lawyers do. He really lays down the legal landscape for us to understand’.

Mr Verdugo is a founding member of the Spanish Chapter of the Turnaround Management Association. He also sits on the World Bank Panel of Experts for the annual reports on ‘Closing a Business and Getting Credit’.

## **GARRIGUES**

Hermosilla 3

28001 Madrid

Spain

Tel: +34 91 514 52 00

Fax: +34 91 399 24 08

borja.garcia-alaman@garrigues.com

adrian.thery@garrigues.com

juan.verdugo.garcia@garrigues.com

www.garrigues.com