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NEW REFORM OF THE INSOLVENCY ACT

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INTRODUCTION

Act 9/2015 (**"Act 9/2015"**), which came into force on May 27, 2015, derives from Royal Decree-Law 11/2014, of September 5[1] (**"Royal Decree-Law 11/2014"**), which was validated by the Spanish parliament and later processed as a draft law. This regulation introduced significant reforms in the Insolvency Act regarding composition agreements and insolvency liquidation to facilitate the continuity of financially viable companies. Among other changes, it (i) extended some regulations concerning refinancing agreements to the composition agreement; (ii) established the possibility of extending certain effects of the agreement to privileged creditors, even under public law; and (iii) introduced measures to facilitate the transfer of production units of the insolvent company, including rules for labour and social security issues. Our legal flash on Royal Decree-Law 11/2004 is available at this link: Legal Flash - Amendment to the Insolvency Law by Royal Decree-Law 11/2014.

Act 9/2015 introduces significant amendments to several articles of the Insolvency Act concerning refinancing agreements, the composition agreement, liquidation, the classification of the insolvency proceedings, and the transitional system established under Royal Decree-Law 11/2014.[2]

Below are the most noteworthy new developments introduced by Act 9/2015.

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[1] Royal Decree-Law 11/2004 of September 5, on urgent measures regarding insolvency proceedings.

[2] Thus, amendments to articles 75, 90, 93, 94, 100, 104, 122, 123, 124, 134, 140 and 149 of the Insolvency Act will apply to ongoing insolvency proceedings in which the final text of the bankruptcy administration's report has not been submitted; article 96 of the Insolvency Act will apply to proceedings in which the period to challenge the inventory and the list of creditors has not yet started; articles 116, 121 and 167 of the Insolvency Act will apply to ongoing proceedings in which a proposal for a composition agreement has not been yet voted on; articles 164, 165 and 172 of the Insolvency Act, to ongoing proceedings in which section six has not been yet constituted; articles 43, 146 bis, 148, 152, 191 and 191 of the Insolvency Act, to ongoing proceedings in which the liquidation stage has not yet started; and article 155 of the Insolvency Act, to ongoing proceedings.

Moreover, Transitional Provision 3, regulating the transitional system for composition agreements, has also been reformed. Thus, while an amendment to a composition agreement is being processed under this provision (that is, when the composition agreement is breached within two years after this act comes into effect, and at least 30% of the total claims, calculated on the basis of the final text of the bankruptcy administration's report, had requested its modification in compliance with the measures introduced by the new regulation), no creditor can request that the composition agreement be declared to have been breached, and the claims already made will be suspended. A procedure is also established for debtors and creditors to object to the valuation in the final text. Finally, if the request for modification is denied, the composition agreement will be declare to have been breached.

AMENDMENTS REGARDING REFINANCING AGREEMENTS

Notification of the start of negotiations

Act 9/2015 introduces significant new developments in the text of article 5 bis (notification of the start of negotiations with creditors, known as "pre-insolvency") related to the halting of enforcement. Market operators had repeatedly requested regulatory development of these proceedings due to the many contradictions generated by their implementation. The new text of this article finally sheds light on the following matters under debate:

(i) The notification sent by the debtor to the court must indicate the executive proceedings held against its assets, specifying those involving assets that the debtor considers necessary for the continuity of its professional or business activity.

(ii) The judge that is competent to rule on the insolvency proceedings will settle any disputes resulting from the necessary or unnecessary nature of an asset.

(iii) The judge ruling on the enforcement will suspend its processing by submitting the resolution from the secretary of the court that is competent to rule on the insolvency proceedings.

(iv) In the case of enforcements requested by financial creditors, the halting will also affect court enforcements and extrajudicial enforcements regarding any other assets or rights belonging to the debtor, provided that document support is provided certifying that at least 51% of the financial liabilities have supported the start of negotiations for the refinancing agreement.

In our view, the reformed text does not settle the debate on the deadline for the halting of enforcements (whether three or four months).

This new system will apply to the negotiation of ongoing agreements and any other negotiations in which three months have not elapsed since their notification to the court.

Refinancing agreements and court approval

Act 9/2015 eliminates the section in Additional Provision 4 of the Insolvency Act (related to the court-sanctioned refinancing agreements) that established that the 75% rule[3] in syndication agreements would be understood "when calculating the majorities required for court approval of a refinancing agreement and the extension of its effects to non-participating or dissident creditors." Furthermore, the syndication rule is also introduced for refinancing agreements that seek protection against rescissory action via article 71.6 of the Insolvency Act, and will apply when calculating the majority required, i.e., three-fifths of the claims.

The other two new developments in Additional Provision 4 refer to establishing the value of collateral: (i) this value cannot exceed the value of the maximum mortgage or pledge liability agreed, bearing in mind that the only requirement until now was that it could not exceed the value of the claim; and (ii) a report from an independent expert is not required for cash, current accounts, electronic money, or fixed-term deposits.

AMENDMENTS REGARDING COMPOSITION AGREEMENTS

Besides correcting the wording of several regulations to facilitate understanding, Act 9/2015 includes the following new developments regarding composition agreements.

Content of the composition agreement

The wording of Royal Decree-Law 11/2014 gave rise to doubts regarding its interpretation, specifically about the minimum content of the composition

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[3] The text now reads as follows: "In the case of agreements subject to a syndication system or arrangement, all creditors subject to these agreement will be understood to sign the refinancing agreement when those representing at least 75% of the claims affected by the syndication agreement vote for it, unless the syndication regulations establish a smaller majority, in which case the latter will apply."

The extension of effects to the creditors of syndicated agreements that did not vote for the refinancing has been subject to debate, giving rise to two interpretations: (i) the first interpretation holds that it is sufficient that 75% of the syndicate has voted for the accession or signing of the refinancing agreement for the extension of effects to dissidents; and (ii) the second holds that it is also necessary that the majorities established in Additional Provision 4 of the Insolvency Law are reached for dissident creditors in the syndicate to be affected by the refinancing agreement.

In our view, the removal of the section specified does not settle this debate.

agreement and the alternative proposals. Act 9/2015 clarifies this, specifying in article 100.2 of the Insolvency Act that the composition agreement proposal must always include debt relief or debt moratoriums, which may include alternative or additional proposals for all or some of the creditors or types of creditor, except public creditors.

Quorum for the creation of the creditors' meeting and calculation of majorities

A substantial amendment has been introduced regarding the quorum for the creation of the creditors' meeting, as privileged creditors that may be affected by the composition agreement are included when calculating the quorum. Thus, the creditors' meeting will be considered to have been validly created even if half of the ordinary claims have not attended, provided that creditors representing at least half of the claims that may be affected by the composition agreement attend, excluding subordinate creditors (article 116.4 of the Insolvency Act).

As regards majorities required for the approval of the composition agreement, Act 9/2015 establishes that privileged creditors that voted for the proposal will be considered included in the ordinary claims for purposes of calculation of majorities. If these majorities are not reached, the agreement will be rejected.

In line with the foregoing, it eliminates the section of article 123.1 of the Insolvency Act stating that attendance of the meeting would not affect the calculation of the quorum, or entail that it would be subject to the effects of the agreement approved.

AMENDMENTS REGARDING LIQUIDATION

Act 9/2015 establishes a generic reference to the system established in articles 146 bis and 149 of the Insolvency Act regarding cases for the business or production units stipulated in the common stage (article 43 of the Insolvency Act) and in the summary procedure (articles 191 and 191 ter of the Insolvency Act).

Moreover, the liquidation rules in article 149 of the Insolvency Act (i) clarify that they are only rules supplementing those in section 1,[4] which apply when a liquidation plan is not approved or when the transaction in question is not envisaged; (ii) allow the judge to award the assets to the offer at a lower price when it does not differ by more than 15% (previously 10%) from the rest, and guarantees to a greater extent the continuity of the company and its employees employment, and the creditors' satisfaction; and (iii) in the case of tax and social security credits, exclude the acquirer's subrogation, even when the guarantee persists.

As regards the sale of assets and rights related to claims with special privileges, a new paragraph was added to article 155.4 of the Insolvency Act that allows privileged creditors to receive the amount obtained in the realization. This amount must not exceed that of the original debt. The rest will correspond to the insolvency estate, if any.

Finally, regarding the possibility that the insolvency judge decrees the retention of part of the insolvency assets to cover future challenges envisaged in Royal Decree-Law 11/2014, this retention has been increased to 15% of the results of each of the disposal of the assets and rights that constitute the insolvency estate or the cash payments made with charge to them.

AMENDMENTS REGARDING THE CLASSIFICATION OF THE INSOLVENCY PROCEEDINGS

Most amendments in Act 9/2015 regarding the classification of insolvency proceedings involve technical improvements. However, two new developments have been included with these changes in the wording and its structure. First, article 164 of the Insolvency Act, establishing the classification as culpable of an insolvency when willful misconduct or gross negligence have generated or worsened the insolvency, now includes a reference to the shareholders' involvement in this generation or worsening in the case envisaged in article 165.2 of the Insolvency Act. Second, article 165 of the Insolvency Act has been amended in two points: (i) the presumption of culpable insolvency associated with non-attendance of the creditors' meeting now requires that attendance of the meeting should have been crucial for the acceptance of the composition

[4] These rules refer to the disposal of production units in liquidation, and liquidation transactions entailing a substantial change of the collective work conditions.

agreement; and (ii) the *iuris tantum* presumption of culpable insolvency is extended to out-of-court agreements for payment when the frustration of the agreement is due to the shareholders' or receivers' refusal on no reasonable grounds to capitalize the credits or securities, or convertible instruments as established in the agreement (this rule already existed for refinancing agreements).

TELEMATIC COMMUNICATIONS AND PUBLIC INSOLVENCY REGISTRY

To speed up access to specific insolvency procedures, Act 9/2015 makes it mandatory to notify the creditors with a known email address of any information pertaining to the agreement and the receivership report and any challenges against it. The rule also envisages the publication of specific information in the Public Insolvency Registry.[5]

[5] Among others, notification to the debtor and the creditors that have reported their claim, informing them of the draft inventory and the list of creditors, and requests for rectification or complement, challenges against the list of creditors and the inventory, and information on companies in liquidation proceedings, as well as any other information required to facilitate the disposal of all the establishments and operation or production units.