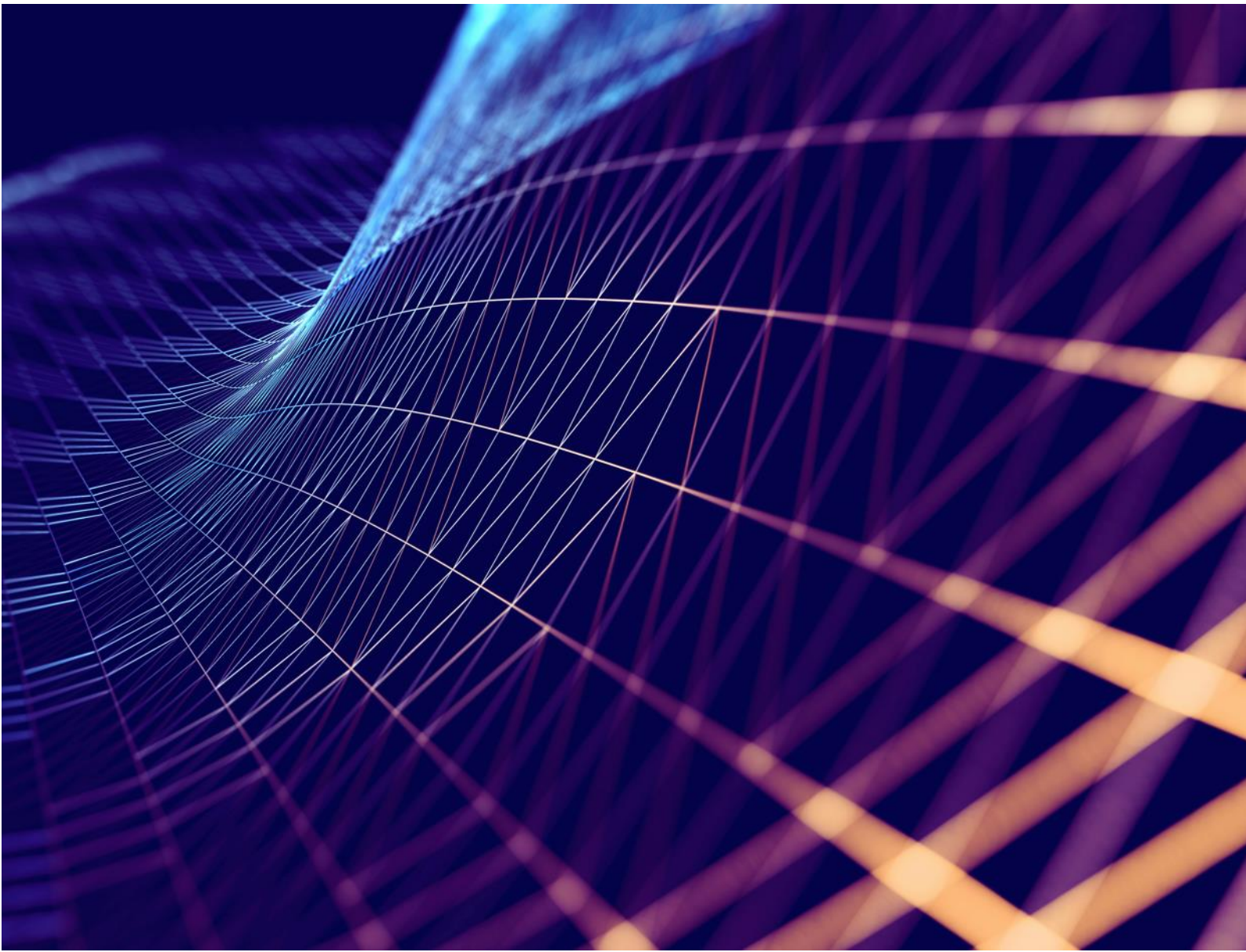
CUATRECASAS

Company restructuring

Assessment of the first year of implementation of the Spanish insolvency reform

November 2023



Introduction

Act 16/2022, of September 5, amending the consolidated text of the Insolvency Act ("Act 16/2022"), entered into force on September 26, 2022. It brought about a complete overhaul of the Spanish insolvency system, particularly with regard to pre-insolvency instruments. The purpose of the reform was to provide a "toolbox" to facilitate pre-insolvency restructuring. Under the new regime, creditors enjoy a more prominent role and benefit from more agile and flexible pre-insolvency instruments—including the possibility of cramming down all types of creditors and the debtor company's shareholders.

One year after the entry into force of Act 16/2022, it is time to take stock. This guide presents the main milestones in the interpretation of the new pre-insolvency restructuring regime in light of the court rulings on certain transactions. We have analyzed 21 restructuring plans, including the main plans negotiated in Spain during this first year of implementation of the reform.

We hope that this work will help interpret the rules and advance the knowledge of restructuring law—which has developed to an outstanding level of sophistication in recent years. The Cuatrecasas team of lawyers specializing in Restructuring, Insolvency and Special Situations will continue to deepen the study and practical application of pre-insolvency instruments in Spain with the firm intention of playing a central role in the development of our pre-insolvency law, as reflected in this guide.

We invite you to follow the evolution of pre-insolvency restructuring law through our annual guides on the main trends and legal issues regarding the negotiation of pre-insolvency restructuring plans.

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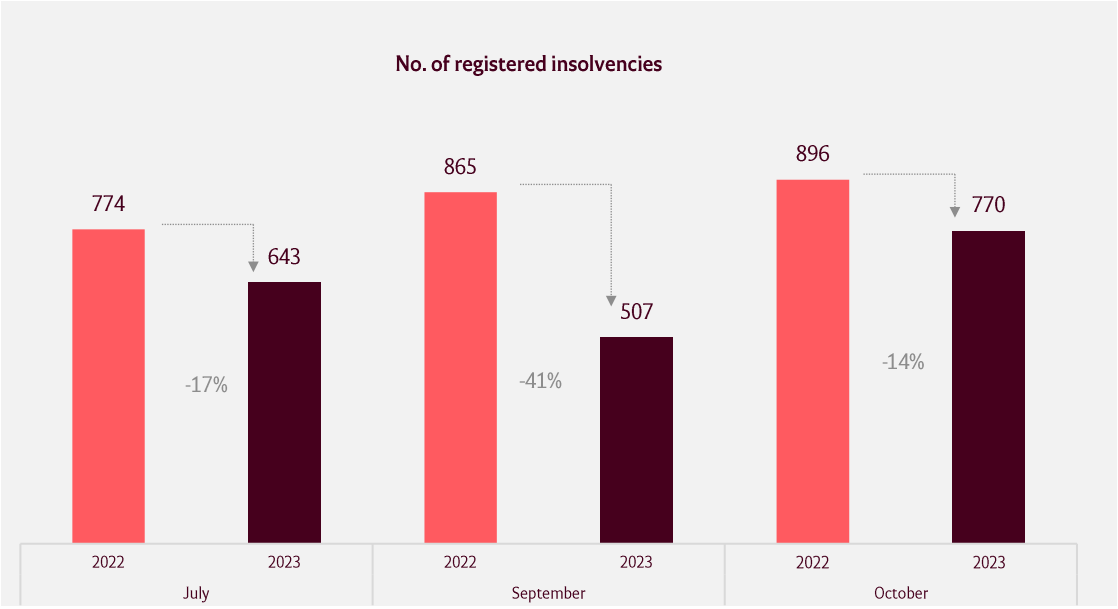
Market overview

According to data provided by Informa D&B, since the transposition of Directive (EU) 2019/1023 on restructuring and insolvency, and with the creation of restructuring plans and special procedures for microenterprises, the volume of insolvencies has fallen as these new procedures have been registered.

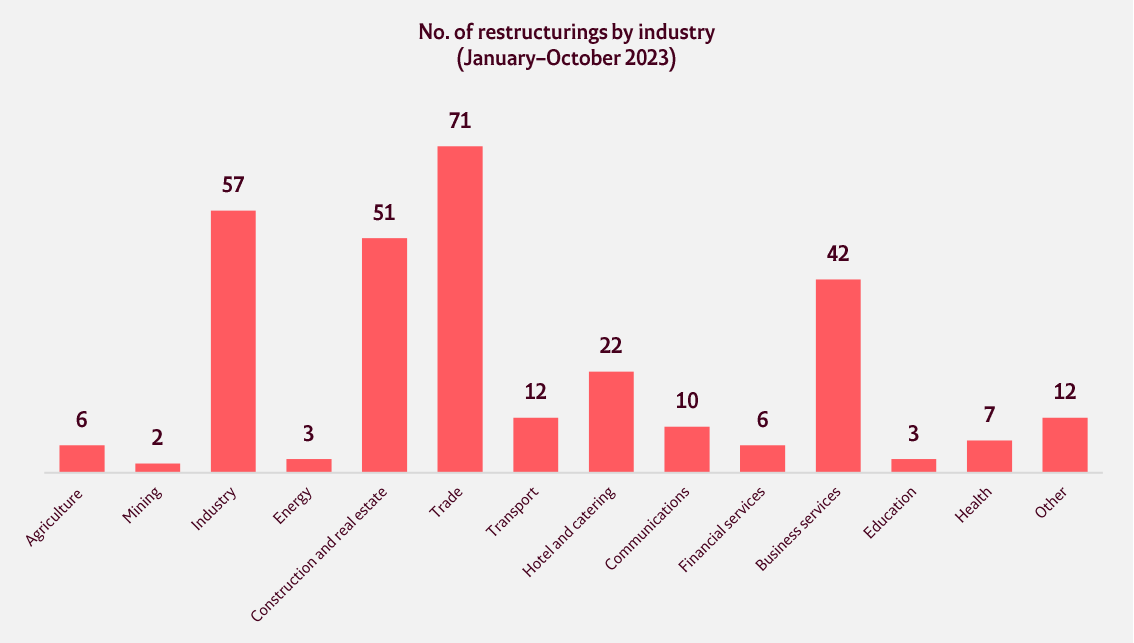
If we compare the data for July 2023 to that registered in July 2022, we can see that insolvencies decreased by 17%; while in September 2023 they decreased 41% over the same month of the previous year. This trend continued in October with a drop of 14%.



	July		September		October	
	2022	2023	2022	2023	2022	2023
Insolvencies	774	643	865	507	896	770
Restructuring plans	–	42	–	31	–	39
Special procedures	–	67	–	49	–	88
Dissolutions	1,790	1,772	1660	1405	2076	2013

In the first 10 months of 2023, Catalonia was the autonomous region with the largest number of insolvencies (1,546) and restructuring plans (78), while Madrid registered the highest figure of special procedures for microenterprises (116). From January to October 2023, business services was the industry that registered the largest drop in insolvency proceedings (-159), ahead of the hotel and catering industry (-111). Commerce was the industry with the most insolvency proceedings of the three types: insolvencies (1,384), restructuring plans (71) and special procedures for microenterprises (78).

With regard to restructuring plans, in addition to the trade industry, a higher incidence was seen in industry (18.8%), construction and real estate (16.8%) and business services (13.8%).



Restructuring plans: main market trends

According to market development data, more than 300 restructuring plans have been carried out in this first year since the entry into force of Act 16/2022. This guide does not seek to collate data on all the plans, but rather to explore issues of interest that have arisen in the most relevant ones. Our purpose is to shed light on the interpretation of the regulatory framework and help advance knowledge.

In the following, we identify market trends based on the analysis of the main restructuring transactions and their interpretation by the courts, clarifying some aspects of the Spanish pre-insolvency restructuring regime. On that basis, we pinpoint and systematize the issues of greatest interest, citing the specific relevant transaction. It should be borne in mind that in some cases where the sanction (*homologación*) of the restructuring plan has been challenged, final interpretation is yet to be determined.

An annex to this guide lists the restructuring plans analyzed, including a reference to the relevant court decision.

Objective grounds underlying restructuring plans

Restructuring plans have been predominantly triggered by current or imminent insolvency, with little recourse to the "likelihood of insolvency".

One of the major modifications of the reform arose from the objective grounds underlying pre-insolvency restructuring plans. Thus, debtors facing a "likelihood of insolvency" can resort to these solutions up to two years before they become insolvent. Furthermore, it is also possible to apply for sanction of a restructuring plan in the event of imminent or current insolvency (art. 584 Act 16/2022).

The approach to and understanding of pre-insolvency restructurings have not changed significantly. So far, only two restructuring plans based on the debtor's "likelihood of insolvency" have been sanctioned, and both are consensual plans (Compañía Horeca de Mallorca and Pharmex). Thus, restructuring plans are still predominantly triggered by situations of imminent or current insolvency.

On the other hand, circumstances (objective grounds) may be different for each debtor affected by a joint restructuring plan submitted for court sanction (as is the case in Haciendas Bio).

Likelihood of insolvency	Imminent insolvency	Current insolvency
Compañía Horeca de Mallorca	Haciendas Bio	Haciendas Bio[1]
Pharmex	Reverté	Iberian Resources
	Single Home	Ezentis
	Telepizza	Xeldist
	Equipos Lagos	Torrejón Salud
	Vilaseca	Das Photonics
	Hedima	Celsa
	Aldesa	
	Ecolumber	
	Pronovias	

Nevertheless, the Celsa case is expected to bring a change in trend, increasing the number of early restructurings so that debtors do not forfeit all power over the process—as intended by the legislature.

Debtor's notification of the opening of negotiations with creditors

Debtors do not always notify the opening of negotiations in the context of restructuring plans.

In practice, debtors do not always inform the competent court of the opening of negotiations to reach a restructuring plan under Act 16/2022 (arts. 585 *et seq.*).

[1] Haciendas Bio is an example of a joint restructuring plan with debtors in different situations (in this case, imminent and current insolvency).

Restructuring plans with notification of the opening of negotiations	Restructuring plans without notification of the opening of negotiations
Das Photonics	Celsa
Single Home	Equipos Lagos
Ezentis	Pronovias
Iberian Resources	Telepizza
Reverté	Torrejón Salud
Transbiaga	Compañía Horeca de Mallorca
Xeldist	Grupo Aldesa
Vilaseca	
Cárnicas Hicor	
Ecolumber	
Haciendas Bio	
Pharmex	

The above clearly suggests that notification is only made where its specific effects are sought, and particularly in cases of current insolvency with risk of realization of assets necessary for the business activity, enforcement of security interests over those assets or termination of contracts necessary for the continuity of the activity due to the debtor's default, or where there is a risk that creditors may file for insolvency proceedings—since the notification of the opening of negotiations neutralizes these risks.

Naturally, the opening of negotiations is not notified when creditors file a restructuring plan without the debtor's consent (Celsa), since only the debtor is entitled to submit that notification (art. 585(1) Act 16/2022). It is worth noting that creditors, despite their lack of standing, may have a specific interest in the effects arising from the notification of the opening of negotiations, e.g., to put a stop to or suspend enforcement proceedings brought by a dissenting creditor regarding those leading the initiative for the plan's approval, not least because once the debtor has notified the opening of negotiations, creditors are entitled to request an extension (art. 607 Act 16/2022) to continue with the ongoing negotiations.

Single Home and the notification of the opening of negotiations: a particular case

In some cases, the notification of the opening of negotiations has served another purpose not initially envisaged by the legislature—e.g., maintaining the surprise effect so that the applicant debtor can keep a step ahead of creditors in the request for sanction of the restructuring plan. Specifically, the notification of the opening of negotiations on a confidential basis, which is not subject to publication in the Spanish public insolvency registry (art. 591 Act 16/2022), has served to extend the confidentiality of other fundamental acts of the process, such as the appointment of the restructuring expert, which should in principle be published (art. 672(3) Act 16/2022). In this case

(Single Home), the secrecy prevented the timely substitution of the expert by the creditors and, ultimately, the possibility for them to prepare a restructuring plan in advance.

The initiative in applying for the sanction of a restructuring plan

While it is normally the debtor who files the restructuring plan, creditor applications may increase in the wake of the Celsa case.

In the overwhelming majority of cases, it is the debtor who applies for sanction of the restructuring plan—which shows that these solutions are generally negotiated with groups of creditors.

However, in some cases, the debtor's application has not been accompanied by negotiations with its main creditors, leading to mixed results:

- In some cases, the debtor has promoted the plan with the consent of subordinate in-the-money creditors, mainly shareholders of the debtor company, without support from the other creditors (Single Home).

- In others, the debtor's application is backed by the majority shareholder-creditor and lacks the consent of the minority shareholder-creditor (Torrejón).

- There are even cases of requests made by the debtor in coordination with the single majority shareholder-creditor, without the consent of the minority non-creditor shareholder (Aldesa).

To date, creditors have rarely applied for sanction of a restructuring plan without consent of the debtor (Celsa).

Competing plans

In Single Home and Transbiaga, the solution has been the *prior in tempore* rule.

There are also cases where both the debtor and the creditors apply for a restructuring plan, resulting in competing plans for the restructuring of the same debtor (Single Home and Transbiaga). In these cases of competing plans, the debtor has forestalled the creditors in applying for the sanction. In the absence of specific regulations, the courts have avoided a joint processing of the plans. Instead, they have suspended approval of the (subsequent) creditors' competing plan while the dispute over the (previous) debtor's plan is resolved, either during the prior adversary proceedings stage (Transbiaga) or through a challenge (Single Home). In the latter case, the court has even pointed out that if the challenge to the sanction of the plan eventually revoked all its effects, the processing of the second plan would not be affected by the temporary prohibition to

request a new sanction for the same debtor until one year has elapsed since the previous request (art. 664 Act 16/2022).

Consensual vs. non-consensual plans

Highly negotiated consensual plans have prevailed.

As regards the degree of consensus between different credit classes formed in restructuring plans, contrary to what might appear from the wide cramdown possibilities under the new regime, most plans are consensual—even for large debtors with significant restructuring. This evidences a high degree of negotiation, considering that these plans are always filed by the debtor.

With respect to non-consensual plans, we draw the following conclusions:

- Most non-consensual restructuring plans are approved by a majority of the classes formed, including at least one class of privileged creditors (art. 639(1) Act 16/2022). This does not always show broad consensus in the approval of the plan, as everything will depend on the strategy in the formation of classes. Thus, in Xeldist the percentage of affected creditors voting in favor was very low, approximately 20%, while in Transbiaga it reached 17%—and in both cases the creation of single-person classes for strategic purposes was disputed.

- Plans approved only by one in-the-money class of creditors (art. 639(2) Act 16/2022) are a minority. In fact, only two restructuring plans have been approved in this way (Single Home, Vilaseca). In these cases, the percentage of these debts to the total liabilities affected is very low (Single Home 12%, Vilaseca 9%).

On the other hand, since it is possible to request joint sanction of joint restructuring plans—concerning different debtors within the same group—, the approval of each of them can be consensual or non-consensual (Haciendas Bio, Ezentis).

Consensual restructuring plan	Non-consensual restructuring plan under art. 639(1) Act 16/2022	Non-consensual restructuring plan under art. 639(2) Act 16/2022
Haciendas Bio	Haciendas Bio[2]	Vilaseca
Equipos Lagos	Celsa	Single Home
Ezentis	Ezentis[3]	
Pronovias	Das Photonics	
Reverté	Iberian Resources	
Telepizza	Xeldist	
Torrejón Salud	Transbiaga	
Hedima		
Compañía Horeca de Mallorca		
Grupo Aldesa		
Pharmex		

Joint restructuring plans

Joint restructuring plans are a widespread practice.

Act 16/2022 provides for joint restructuring plans, so that sanction applications may refer to the individual or single sanction of several debtors within the same corporate group (art. 642 Act 16/2022). In fact, this has been a fairly common practice in the restructuring market in the first year of the insolvency reform.

Joint restructuring plans
Celsa
Ezentis
Pronovias
Reverté
Telepizza
Transbiaga
Hedima
Ecolumber
Haciendas Bio

[2] In Haciendas Bio (joint restructuring plan), some of the plans included in the sanction application were consensual while others were non-consensual.

[3] The Ezentis case is a further example of the previous note.

Article 587 of Act 16/2022 establishes an additional requirement to apply for the sanction of joint restructuring plans—namely a joint notification of the opening of negotiations. This could limit the scope of joint restructuring plans, as such notification is generally not required. The courts have been permissive in allowing sanction applications for joint restructuring plans without the debtor having notified the opening of negotiations (Telepizza, Pronovias, Hedima).

The judicial approach has also been flexible when it was the creditors who applied for sanction of non-consensual restructuring plans. However, this required further justification, since the debtor is the only one entitled to notify the opening of negotiations. In this respect, the only application filed by the creditors without the debtor's consent referred jointly to several companies of the same group. The court approved this joint restructuring based on an extensive interpretation of art. 642 Act 16/2022 (Celsa).

On the other hand, in the context of court-sanctioned joint restructuring plans for multinational groups whose parent company is located in Spain, the extension of jurisdiction of the Spanish courts has been used to seek information on the restructuring of foreign subsidiaries under article 755 Act 16/2022, requiring specifically that (i) the parent company has notified the opening of negotiations or will be affected by the plan; (ii) the foreign subsidiaries that have notified the opening of negotiations have done so on a confidential basis; (iii) the extension of jurisdiction is required to adopt and comply with the plan (Ezentis). As regards the latter requirement, the court interpreted that it was necessary to restructure the foreign subsidiaries to ensure the viability of the other group companies' restructuring, due to the existence of personal guarantees and security *in rem* affecting these companies and their assets.

Moreover, there have also been joint restructuring plans with an international component whereby only the guarantees granted by the (then foreign) companies belonging to the same group have been affected, which allowed the companies themselves to be unaffected by the plan, as provided under art. 652.2 Act 16/2022, as long as enforcing the guarantees would lead to the guarantor's and debtor's insolvency (Telepizza).

Affected creditors and claims

There is an ongoing debate on how creditors and claims are affected by restructuring plans.

The 2022 reform opened the range of claims that could be affected by pre-insolvency restructuring plans. Contrary to pre-insolvency refinancing agreements under the previous regime (which could only affect financial claims), restructuring plans can affect all types of creditors and claims—with few exceptions.

Identifying the claims that will be affected by the restructuring plan is key, both in terms of economic viability and for strategic purposes. The most problematic issue is to justify the exclusion

of certain claims from the restructuring measures provided for in the plan. This will undoubtedly be a hot topic in the future, but few courts have yet addressed it: none in the context of sanction, and only one in response to a challenge to the plan regarding creditor class formation (Xeldist) when analyzing the grounds for challenge.

There is an open-ended list of grounds for excluding certain claims (which must be part of the restructuring plan under art. 633(8) Act 16/2022). Among the most common justifications invoked are interim or new financing (Xeldist), the low amount of the claims (Xeldist and Transbiaga), or that the claims arise from relationships necessary to continue with the activity or for the debtor's viability (Iberian Resources, Telepizza, Reverté, Ecolumber), and even financial reasons (Telepizza).

Unsurprisingly, financial claims play a central role in credits affected by restructuring plans—as was already the case under pre-reform refinancing agreements.

Trade claims

Trade claims are not always affected by restructuring plans—among other reasons, because of the potential negative commercial impact on the restructured company's ordinary business and the evaporation of financing this could entail. However, a specific restructuring plan (Vilaseca) stands out because it revolves around SMEs' trade claims. In fact, it creates an in-the-money class of creditors and imposes the plan on financial and other trade creditors (under art. 639(2) Act 16/2022) with the debtor's consent and coordination.

Restructuring plans affecting trade claims	Restructuring plans not affecting trade claims
Cárnicas Hicor	Alimentos El Arco
Iberian Resources	Haciendas Bio
Ezentis	Reverté
Xeldist	Single Home
Transbiaga	Telepizza
Das Photonics	Torrejón
Vilaseca	Equipos Lagos
Ecolumber	Pronovias
	Aldesa

Public law claims

In contrast, public law claims are not usually affected for the following reasons:

- The tight restrictions placed on the measures that can be imposed by the plan (art. 616(2) and 616(bis) Act 16/2022), which actively discourage their inclusion and generate uncertainty as to the equal treatment of claims within a class.

- The debtors' failure to be up to date with the payment of tax and social security obligations, which prevents them from obtaining the certifications required to affect public law claims (Xeldist).

However, some non-consensual restructuring plans have included public law claims with the purpose of asserting their privilege to obtain sanction under art. 639(1) Act 16/2022—which requires approval by a majority of the classes formed, including at least one class of privileged creditors (Das Photonics, Transbiaga). This has even given rise to a challenge or opposition to their qualification as public law claims.

Restructuring plans affecting public law claims
Alimentos El Arco
Das Photonics
Ezentis
Cárnicas Hicor
Transbiaga

ICO-guaranteed loans affected by restructuring plans

The reluctance to consider that ICO-guaranteed loans could be affected has been overcome. Thus, restructuring plans have included and affected them in the same way as other claims, always subject to the limitations imposed by the 8th additional provision of Act 16/2022. While the first restructuring plans excluded ICO-guaranteed loans due to the uncertainty as to the conditions and consequences of their inclusion (Xeldist[4]), they have been increasingly included and even crammed down (Telepizza, Ezentis). Significantly enough, in certain cases the cramdown has not even been challenged.

[4] Two reasons were given to justify the exclusion of ICO-guaranteed loans in the case of Xeldist: uncertainty as to the negotiation period for adhesion with the Ministry, and doubts as to the guarantee being damaged by the class cramdown.

Restructuring plans affecting ICO loans
Alimentos El Arco
Ezentis
Reverté
Telepizza
Transbiaga
Haciendas Bio

Class formation

Class formation is confirmed as a central element of restructuring plans.

The formation of classes of creditors is also an appropriate basis for the preparation of a restructuring plan and has become a major issue in Spanish insolvency practice. The regime introduced by the reform sets mandatory criteria for this purpose, but, within these restrictions, also it allows a great deal of flexibility.

In general terms, restructuring plans are making use of the flexibility allowed for creditor class formation, but always subject to certain mandatory requirements. The Xeldist case provides a clear example: the court was open to the formation of different classes within the same rank according to the differentiated treatment that the claims were to receive under art. 623(2) Act 16/2022. In any event, the principle of equal treatment within a class must be respected. Any violation of this principle constitutes a separate ground for challenge other than the defective formation of classes of creditors (art. 655(2)(3) vs. art. 654(2) Act 16/2022). The court upheld the challenge based on the former (the violation of the principle of equal treatment) and not on the latter (the defective formation of classes).

Individual classes and single class

The flexibility referred to above has made it possible to form individual classes (i.e., made up of a single creditor). In fact, this has become a widespread practice (Xeldist, Das Photonics, Vilaseca, Ecolumber, Transbiaga), which shows that the formation of classes is a strategic rather than an economic issue.

Furthermore, restructuring plans with a single class of creditors have been sanctioned, thus justifying the extension of effects or the cramdown of dissenting creditors on the grounds of the majority principle (Torrejón Salud, Hedima, Pharmex). The formation of a single class has also been admitted in the context of joint restructuring plans for some of the debtors included in the request for joint sanction (Telepizza).

Combining the two previous options, restructuring plans with a single individual class have also been sanctioned (Aldesa). This raises the question—not resolved by Act 16/2022—as to whether the restructuring plan must always be a collective solution or whether it can be individual.

Subdivision into several classes within the same rank

Claims within the same rank may be subdivided according to several criteria, provided that there are "sufficient grounds" (art. 623(3) Act 16/2022). In practice, this has been done in different ways:

- It is usual to separate ordinary financial and trade claims, as expressly provided for by Act 16/2022—which actually defines financial claims for this purpose.
- In other cases, the subdivision has been made on the basis of differentiated treatment (Xeldist, Reverté, Transbiaga, Haciendas Bio).
- As regards financial claims, the subdivision has revolved around the different debt instrument underlying the claims (Celsa, Reverté).
- Even ICO-guaranteed loans have been divided into separate classes, based on the creditor's particularity and the specific possibilities of these loans being affected (Alimentos El Arco, Reverté).

Subdivision of secured claims

On the other hand, claims secured by rights *in rem* have also been divided into different classes according to the heterogeneity of the encumbered assets or rights, as provided in Act 16/2022 (art. 624). Multiple criteria have been applied:

- In some cases, a simple distinction is made between claims secured by a pledge or a mortgage (Cárnicas Hicor).
- In other cases, the subdivision is between different encumbered assets secured by the same type of security, such as mortgages on built and unbuilt land (Single Home), or on different warehouses (Vilaseca).
- Leasing claims have also been included in a separate class (Xeldist, Alimentos El Arco, Transbiaga), on the same level as secured claims due to their privileged ranking in the insolvency classification.

Prior confirmation of class composition is rare

Finally, the reform provides for the possibility of requesting prior confirmation of the classes of creditors (arts. 625 and 626 Act 16/2022). While this was seen as one of the tools with the greatest practical impact of the new regime, the plans approved so far have not confirmed this expectation (Celsa, Cárnicas Hicor, Alimentos El Arco).

Specifically, prior confirmation of the classes was highly relevant in the plan proposed by the creditors without the consent of the debtor or the debtor's shareholders (Celsa). Indeed, it was a key issue in the preparation of the non-consensual plan to prevent dissenting creditors from opposing its sanction on the grounds of defective class formation.

In other cases, the seemingly high degree of consensus between the debtor and the creditors has led to a prior confirmation of the classes without creditor opposition (Cárnicas Hicor).

The growing importance of the restructuring expert

The figure of the restructuring expert has been one of the most developed issues in practice.

Both before and after the entry into force of the reform, this figure was expected to play an increasingly decisive role, taking up the challenge of Directive 2019/1023.

In any case, the plans analyzed do not always include this figure, most likely because the main functions of the restructuring expert are circumscribed to a specific context where there is a distinct lack of consensus among the classes affected. Particularly, the expert's appointment is necessary in cases where a restructuring plan is promoted by an in-the-money class of creditors (art. 639(2) Act 16/2022). However, experts have also been appointed when not mandatory, such as in cases of non-consensual plans approved by a majority of the classes formed, including at least one class of privileged creditors (art. 639(1) Act 16/2022) (Celsa, Das Photonics, Ezentis, Iberian Resources, Xeldist); and even in cases of consensual plans without dissenting classes (Ezentis, Reverté, Telepizza). This is irrespective of whether the plan is preceded by a notification of the opening of negotiations—which is not required either before or after the appointment of the expert. However, in practice, where an expert has been appointed, there has always been a notification of the opening of negotiations—with only two exceptions (Celsa, Telepizza).

Restructuring plans with expert	Restructuring plans without expert
Celsa	Torrejón Salud
Das Photonics	Hedima
Ezentis	Compañía Horeca de Mallorca
Iberian Resources	Aldesa
Reverté	
Telepizza	
Xeldist	
Vilaseca	
Ecolumber	
Single Home	
Transbiaga	
Haciendas Bio	
Pharmex	

Certain judicial decisions have highlighted the importance of this figure, relying on the information provided and certified by the expert and trusting in its independence regardless of who promoted the appointment (Single Home, Celsa).

Appointment of the restructuring expert

According to practice, among the issues worth underlining on the knowledge acquired regarding restructuring experts, the most important relates to their appointment. There is no specific time for appointing the expert. This appointment can be given before or after filing the request for sanction (as in the Telepizza case). In fact, in some cases it has been the first step (Celsa).

When the restructuring concerns several debtors belonging to the same group of companies (i.e., joint restructuring plans), it is common to request the appointment of the same expert for all of them:

- Either for the joint sanction of different restructuring plans for various debtors, or for a single sanction of a single joint restructuring plan for all of them (art. 672(4) Act 16/2022) (Celsa, Ezentis, Reverté, Telepizza, Ecolumber).

- One case (Telepizza) even involved a situation where the same expert was appointed for a joint restructuring of various debtors within a corporate group, including foreign companies with their COMI in Spain. In these cases, jurisdiction must be assessed.

Even if Act 16/2022 establishes that the appointment and identity of the expert must be registered in the public insolvency registry (art. 672(3) Act 16/2022), sometimes the appointment has been made on a confidential basis by extending the effects of the—also confidential—notification of the opening of negotiations (art. 591 Act 16/2022) (Single Home).

The restructuring expert's functions

The restructuring expert's functions have developed beyond the provisions of Act 16/2022, and further development is expected. So far, restructuring experts have served to:

- endorse interim or new financing requirements—particularly, to certify the affected liabilities to determine whether it is possible to protect interim or new financing against clawback actions (Telepizza, Haciendas Bio);

- issue a report on the company's value as a going concern for plans that do not require the appointment of an expert, i.e., for plans approved by a majority of the classes formed, including at least a class of privileged creditors (art. 639(1) Act 16/2022) (Celsa); and

- perform tasks in the context of consensual plans, including the issuance of reports on the debtor's value or the supervision of corporate transactions to avoid compliance with certain corporate law requirements (Telepizza).

Under a broad interpretation of art. 650(2) Act 16/2022, the expert has been empowered to implement the measures included in the court-sanctioned restructuring plan—both where there is full cooperation from the debtor (Telepizza), and where the lack of cooperation from the debtor, its managers and shareholders jeopardizes the plan's success (Celsa).

Challenge and replacement of the restructuring expert

The expert's role has aroused some controversy among the different actors affected by the plan. It is possible to challenge the appointment (art. 677 Act 16/2022) and replace the expert (art. 678 Act 16/2022). However, replacement is on demand without further assessments (Single Home, Transbiaga). On the other hand, there is little room for challenge if the expert meets the minimum requirements for the position, which are not overly demanding (Celsa).

Restructuring plans involving debt capitalization

Numerous restructuring plans have resorted to debt capitalization.

According to the legislature, debt capitalization is key to fully grasp the scope of restructurings. Indeed, the reform placed significant weight on this measure as a pre-insolvency mechanism. The implications are well known: a dilution of the position of existing shareholders due to the absence of preemptive rights in the capital increase. In the context of a pre-insolvency restructuring, the significance of this mechanism is even greater: it basically aims at a change of control of the debtor company. Moreover, the effect of dilution is more pronounced than in ordinary situations because it excludes the pre-emptive right of shareholders when the capital increase through set-off is part of a so-called "*coup d'accordéon*" (i.e., simultaneous capital reduction and increase) and the company is in current or imminent insolvency (art. 631(4) Act 16/2022).

This mechanism is not recurrent in the sample analyzed, but it has been included in the main restructuring plans and is expected to gain relevance in the future. It should be noted that the consequences of debt capitalization mainly affect the shareholders of the debtor company. It is therefore an imperfect solution from the debtor's perspective, particularly if it entails a change of control. As most of the plans have been filed by the debtor (or with its consent), it is to be expected that the negotiations will not include this measure.

Restructuring plans involving capitalization
Celsa
Das Photonics
Ezentis
Haciendas Bio
Iberian Resources
Pronovias
Telepizza
Grupo Aldesa

Debt capitalization could be more common in restructuring plans filed by the creditors without the debtor's consent, as demonstrated by the only case of this type in Spain—which in fact has resulted in a complete dilution of the existing shareholders after a capital reduction to zero (Celsa). In this case, moreover, the debtor's lack of cooperation greatly simplified the formalities required by corporate law to carry out the "*coup d'accordéon*" transaction (relaxing the requirements of the balance sheet serving as the basis for the capital reduction and the verification by the company's auditor under art. 323 of the Spanish Capital Companies Act).

Interim or new financing

It has been common to negotiate interim and new financing.

Additional financing for companies in crisis plays a complementary role (sometimes essential) in achieving the purpose of the restructuring—i.e., ensuring the company's viability. Without this additional financing, it would be difficult to continue or boost the business activity, either during the negotiations of the restructuring plan (interim financing) or after the restructuring (new financing). The deterioration of the company's value would thus threaten its survival. Due to the potential importance of interim or new financing, Act 16/2022 has established special protection mechanisms for when the insolvency proceedings are finally opened, thus providing incentives to grant that financing.

This is why interim and new financing were expected to play a relevant role. Indeed, many of the restructuring plans analyzed contain one or both. Most of the plans acknowledge the need for both types of financing, but other restructuring plans only refer to one of them.

Restructuring plans only with interim financing	Restructuring plans only with new financing	Restructuring plans with both	Restructuring plans without interim or new financing
Celsa	Reverté	Das Photonics	Torrejón Salud
Iberian Resources	Ecolumber	Equipos Lagos	Aldesa
		Ezentis	
		Pronovias	
		Telepizza	
		Xeldist	
		Compañía Horeca de Mallorca	
		Haciendas Bio	

Protection afforded to interim or new financing requires proof that the percentage of the total liabilities affected by the restructuring plan reaches at least 51% of the debtor's total liabilities (art. 667 Act 16/2022), or more than 60% if the lender is a person especially related to the debtor (art. 668 Act 16/2022). In one case (Equipos Lagos), the court avoided verifying the protective measures in the event of the opening of insolvency proceedings because the percentage of the liabilities affected by the plan had not been accredited. For this purpose, the scope of the restructuring expert's certification (if appointed) could be extended—thus covering not only the sufficiency of the majorities required to approve the plan (art. 634 Act 16/2022), but also the percentage of liabilities affected over the total (Equipos Lagos, Telepizza).

Finally, an issue of great practical importance has surfaced discreetly in some restructuring plans: the possibility that interim financing may be affected. This concerns the determination of the number of classes formed and, if applicable, the inclusion of interim financing in a privileged class

of creditors. Both elements are decisive for the approval of the plan under art. 639(1) Act 16/2022. To our knowledge, interim financing has been affected by only one restructuring plan, which included it within a class of ordinary claims (Das Photonics).

Litigation over restructuring plans

It is still too early to assess the impact of litigation that will be associated with restructuring plans.

We are at a very early stage to assess the impact of legal disputes over restructuring plans. Only one judicial decision has ruled on a challenge to the sanction of a plan brought before the competent provincial court. In fact, it represented a milestone on the limits to restructuring plans. The provincial court partially upheld the challenge brought by dissenting creditors (Xeldist). However, there are pending challenges to the sanction of other restructuring plans (Single Home, Ezentis, Iberian Resources, Torrejón Salud, Das Photonics), which will undoubtedly shed light to better understand the reform

Challenges resolved	Pending challenges
Xeldist	Single Home
	Ezentis
	Iberian Resources
	Torrejón Salud
	Das Photonics

So far, there are not many cases of resorting to prior adversary proceedings under articles 662 and 663 Act 16/2022 (Celsa, Telepizza, Transbiaga), although two major restructurings used this mechanism. In the two cases already resolved, the courts did not alter the content of the plan: in one of them, because the opposition of dissenting shareholders and creditors was not upheld (Celsa); and in the other, directly because no opposition was raised (Telepizza). Resolution of the Transbiaga case is still pending.

ANNEX. Restructuring plans analyzed. Court decision

Transaction	Court decision	Subject matter
Alimentos El Arco	Ruling of commercial court no. 1 Oviedo 106/2023 07.13.2023	Confirmation of classes
Cárnicas Hicor	Ruling of commercial court no. 2 Gijón 34/2023 03.16.2023	Confirmation of classes
Celsa	Ruling of commercial court no. 2 Barcelona 11.29.2022	Appointment of restructuring expert
	Ruling of commercial court no. 2 Barcelona 592/2022 11.29.2022	Dismissal of challenge to appointment of restructuring expert
	Ruling of commercial court no. 2 Barcelona 600/2022 12.02.2022	Confirmation of classes
	Ruling of the Provincial Court of Barcelona 391/2023 06.28.2023	Dismissal of challenge to appointment of restructuring expert
	Ruling of commercial court no. 2 Barcelona 26/2023 09.04.2023	Sanction of the restructuring plan (prior adversary proceedings)
Compañía Horeca de Mallorca	Order of commercial court no. 2 Palma de Mallorca 188/2023 07.05.2023	Sanction of the restructuring plan
Das Photonics	Order of commercial court no. 3 Valencia 05.18.2023	Sanction of the restructuring plan
Ecolumber	Order of commercial court no. 6 Barcelona 07.12.2023	Appointment of restructuring expert
Equipos Lagos	Order of commercial court no. 1 La Coruña 85/2023 06.02.2023	Sanction of the restructuring plan
Ezentis	Order of first instance court no. 1 Seville 366/2023 05.23.2023	Sanction of the restructuring plan
	Order of first instance court no. 1 Seville 415/2023 06.12.2023	Sanction of restructuring plans of foreign subsidiaries
Grupo Aldesa	Order of commercial court no. 12 Madrid 528/2023 09.18.2023	Sanction of the restructuring plan
Haciendas Bio	Order of commercial court no. 2 Badajoz 10.23.2023	Sanction of the restructuring plan
Hedima	Order of commercial court no. 6 Madrid 73/2023 04.17.2023	Sanction of the restructuring plan
Iberian Resources	Order of first instance court no. 1 Cáceres 05.11.2023	Sanction of the restructuring plan
Pharmex	Order of commercial court no. 1 Córdoba 191/2023 09.26.2023	Sanction of the restructuring plan
Pronovias	Order of commercial court no. 9 Barcelona 65/2023 04.20.2023	Sanction of the restructuring plan
Reverté	Order of commercial court no. 11 Barcelona 154/2023 04.12.2023	Sanction of the restructuring plan
Single Home	Order of commercial court no. 5 Madrid 85/2023 04.10.2023	Sanction of the restructuring plan filed by debtor
	Order of commercial court no. 5 Madrid 04.10.2023	Suspension of sanction of the restructuring plan filed by creditors
Telepizza	Ruling of Madrid Commercial Court no. 5 112/2023 05.04.2023	Appointment of restructuring expert
	Order of commercial court no. 5 Madrid 327/2023 09.28.2023	Sanction of the restructuring plan
Torrejón Salud	Order of commercial court no. 13 Madrid 238/2023 05.30.2023	Sanction of the restructuring plan

Transaction	Court decision	Subject matter
Transbiaga	Order of commercial court no. 1 San Sebastián 05.19.2023	Replacement of restructuring expert
	Order of commercial court no. 1 San Sebastián 10.02.2023	Dismissal of appeal requesting an alternative restructuring plan (competitor)
Vilaseca	Order of commercial court no. 10 Barcelona 479/2023 09.15.2023	Sanction of the restructuring plan
Xeldist	Order of commercial court no. 3 189/2022 Pontevedra 12.02.2022	Sanction of the restructuring plan
	Ruling of the Provincial Court no. 1 of Pontevedra 179/2023 04.10.2023	Challenge to restructuring plan upheld

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What do others say about us?

"Proven track record of representing debtors in major refinancing and debt restructuring matters." Chambers, 2023

"Consistently shown not only a deep understanding of the legal aspects of the situation but are also able to understand the commercial strategy." Chambers, 2022

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- Drafting and negotiation of waiver request letters and A&E agreements
- Drafting and negotiation of any kind of restructuring agreements, including restructuring plans, novation agreements, new money financing, intercreditor agreements or security documents
- Court sanction (*homologación*) of restructuring plans
- Advice on any Spanish regulatory aspects, foreign direct investments, tax or directors' liabilities related to restructuring deals

Insolvency

Insolvency law

- Advice to both creditors and debtors in insolvency processes
- Advice to managers and directors on duties and liabilities related to insolvency proceedings in Spain
- Orderly liquidation of companies and restructuring deals approved within insolvency proceedings
- Sophisticated litigation in insolvency and pre-insolvency proceedings (e.g., securities litigation)

Sale of business units

- Advice to creditors, debtors and investors on the sale of business units in the framework of insolvency proceedings
- Advice to creditors on credit bidding strategies and loan-to-own transactions approved in the framework of insolvency proceedings

Special situations

- Advice to creditors on loan-to-own strategies
- Drafting and negotiating unitranche financings, new money agreements, interim financing and bridge loans
- Warrants and convertible bonds
- Financing structures combining preferred equity deals
- Distressed M&A
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