



# ICLG

The International Comparative Legal Guide to:

## Corporate Recovery & Insolvency 2018

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A practical cross-border insight into corporate recovery and insolvency work

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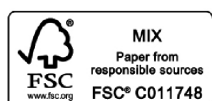
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# Spain

Antonia Magdaleno Carmona



Julián Chamizo Renau



SUE Abogados, S.L.P.

## 1 Overview

### 1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

The Spanish jurisdiction used to be a creditor-friendly jurisdiction, regarding the aim of the latest Act on Insolvency. However, during the recent economic crisis, the Spanish Act on Insolvency was modified several times, making it even more creditor-friendly, especially regarding natural person insolvency cases.

### 1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

When a company is in an insolvency situation, it may arrange an agreement with all of its creditors, thus allowing it to carry on its economic activity, but this requires the consent of all or most of the main creditors.

This agreement may be “informal”, regarding that it may be reached by the debtor with his creditors without the need of declaring a formal insolvency proceeding before the trade courts. This kind of agreement may be also approved by the court, which gives them more legal security.

However, the current situation of most of the bankrupt companies did not allow even to fulfil the terms of an agreement acceptable by their creditors, so the most used in practice are the formal insolvency proceeding before the trade court.

## 2 Key Issues to Consider When the Company is in Financial Difficulties

### 2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

When a company in financial difficulties may not (or foresees that it will not) be able to pay its debts due to a lack of treasury, managers have to start the legal proceeding to declare the company officially bankrupt before the competent trade court. Before this legal proceeding, the company may communicate to the court that it is trying to reach an agreement with its creditors and get four months where the agreement

may be reached or not, and before that period ends, if the agreement is not possible, the company (the managers) have to submit a claim asking to declare itself in an insolvency proceeding.

If the deadlines are not fulfilled and the company (the managers) do not apply for the insolvency proceeding in time, the managers may incur in liability. This consequence and its effects may vary from case to case and it is decided in a specific part of the insolvency proceeding. In that part of the proceeding it may be taken into account if the managers of the company have missed to fulfil other legal obligations.

### 2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction?

The bankruptcy court proceeding may be also started by any creditor. There are not any special restrictions. In order to submit, the action is needed to prove the insolvency situation of the company and that the claimant is an actual creditor.

For rental contracts and similar to those where there are obligations for both parties in the contract, in the case where the creditor wants to terminate the agreement, the court may decide to keep it in force if it is necessary for the activity of the company, but all the credits have to be paid.

### 2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

Those transactions entered into by a company in the two previous years before it is declared officially by a court in a bankruptcy proceeding are those with a higher risk of challenge by special action specifically ruled at the Spanish Act 22/2003, dated 9<sup>th</sup> July, on Insolvency (Spanish Act on Insolvency). However, the transactions from the four previous years may be also challenged by a civil action (*actio pauliana*).

Certain transactions may not be challenged if they fulfil all the requirements ruled at the Spanish Act on Insolvency, if:

- The transactions belong to the professional activity of the company and are carried on in normal terms.
- The transactions are ruled by special laws of payment systems, compensations, securities and derivative instruments.

- Warranties are issued for public credits and those issued ensure payments of the guaranteed salary fund.
- The refinancing agreements with the conditions set forth in article 71 *bis* from the Spanish Act on Insolvency.

### 3 Restructuring Options

#### 3.1 Is it possible to implement an informal work-out in your jurisdiction?

An agreement between debtor and its creditors may be subscribed before in the terms abovementioned, in order to reduce the debt or settle new terms of payment. However, once the legal proceeding is declared by the trade court, the company has to follow all the steps and terms set forth in the Spanish Act on Insolvency.

#### 3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders?

The insolvency proceeding may end with an agreement with creditors (propositions for write-down of debts or moratorium of payments, or both may be accumulated and also debt-for-equity swaps) or winding up the company. During the court proceeding, a part of the company, certain assets, may be sold with a court authorisation. Before this authorisation is rendered by the court, stakeholders can do allegations/objections before the court. Shareholders of the bankrupt company have almost no option, however, creditors decide in the creditors meeting if they accept the proposed agreement or the winding up of the company. Creditors with *in rem* securities may execute them after a certain deadline.

It is possible for the debtor to reach an agreement with the financial creditors where a minimum quorum is required – at least 51% of financial creditors – that with certain conditions, will be binding for the other financial creditors.

#### 3.3 What are the criteria for entry into each restructuring procedure?

The debtor has to be a natural person or a private legal person, in a current or foreseeable insolvent situation with at least two or more creditors. A lying heritage may be also in a restructuring procedure except state organisations, public organisms and other public legal entities.

#### 3.4 Who manages each process? Is there any court involvement?

The proceeding is managed by the Insolvency Administration appointed by the judge. The court may render authorisations for special sales of assets, process the amendment of collective working conditions, collective relocations, collective suspensions or dismissals of contracts, celebration of creditors' meeting and certain auctions of assets.

#### 3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Existing contracts remain enforced when the restructuring proceeding starts. They may be terminated expressly or the other part – different to the debtor – will be obliged to perform its obligations. However, some kind of contracts or obligations that were assumed by the debtor and had to be performed before the proceeding was started, may not be enforceable.

If a part of the company or the company as a whole is transferred, the contracts referring to the part transferred will be in force being the debtor changed by the acquirer unless the contracts are terminated if it is specified that the acquirer does not want them, as set forth in article 146 of the Spanish Act on Insolvency.

#### 3.6 How is each restructuring process funded? Is any protection given to rescue financing?

The cost of the Insolvency Administration is paid by the debtor, regarding that these fees are born after the insolvency proceeding is started and they have to be paid with the current treasury of the company. There is no protection system in force yet, so in some cases, the fees are not paid. The payment and the quantification of the fees is regulated in the Royal Decree 1860/2004, dated 6<sup>th</sup> September.

### 4 Insolvency Procedures

#### 4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The debtor itself can decide to wind up the company from the beginning of the proceeding or it can be wound up if a creditors' agreement is not approved.

Once the winding up of the company is accepted by the court, it will declare the suspension of exercise of the rights of management and disposal of his estate that will be managed completely by the Insolvency Administration.

After this, the Insolvency Administration shall provide the court a plan to dispose of the properties, goods and rights forming the aggregate assets. After its approval, assets, goods and rights from the debtor will be sold in order to pay creditors.

If the company has no assets, the same court that declares the opening of the insolvency proceeding may itself declare its closing and the wind up of the company if certain circumstances are met.

#### 4.2 On what grounds can a company be placed into each winding up procedure?

The company may be wound up if the creditors' agreement is not approved, if it is decided by itself, and/or if it has no assets.

#### 4.3 Who manages each winding up process? Is there any court involvement?

The winding up process is managed by the Insolvency Administration and the court approves the winding up plan. After this, the winding up operations are carried on by the Insolvency Administration with regard to the approved winding up plan.

The court authorises certain sales (when privileged creditors are involved) and process the amendment of collective working conditions, collective relocations, collective suspensions or dismissals of labour contracts.

#### **4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?**

When the winding up phase is opened, the Insolvency Administration has to provide the winding up plan to the court, where the parties may make remarks or proposals of amendment.

Shareholders rarely have any chance to influence in the winding up process.

Creditors with secured credits may execute their warranties – mortgage loans – once a year elapses from the opening of the insolvency proceeding without the winding up having commenced.

Other creditors whose right is born after the insolvency proceeding is declared, may ask for the payment of their credits if they are not paid in time.

The insolvency administration has to render a report about the winding up operations every three months.

#### **4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?**

Existing contracts are kept in force during the winding up until they are terminated or subrogated by other parties.

If a contract is not necessary for the debtor, it may be terminated by a specific procedure in order to avoid raising the debt of the company.

If some assets from the company or a part of it is transferred, and there are contracts relating to this assets, they may be kept in force with the acquirer of those.

#### **4.6 What is the ranking of claims in each procedure, including the costs of the procedure?**

There is no specific ranking of claims. It will depend on the number of creditors and assets of the bankrupt company. The “bigger” it is, the more claims can be submitted.

#### **4.7 Is it possible for the company to be revived in the future?**

If the insolvency proceeding has ended, the company is technically “closed”. The proceeding may be re-opened if new assets or rights that may be used to pay credits appear, and after paying them, it is closed again. However, that does not mean that the company is revived.

However, sometimes a big part of the company keeps working and its assets are acquired by another company that also owns his brands or trademarks, but this does not mean technically that the company is revived.

## **5 Tax**

### **5.1 What are the tax risks which might apply to a restructuring or insolvency procedure?**

If the insolvency proceeding is not applied in time or certain

rules are breached, managers may be found liable for company’s debts, including tax and social security debts. On the other hand, when part of the company or the whole assets are sold and there are working contracts in force, the acquirer will be liable for social security debts.

## **6 Employees**

### **6.1 What is the effect of each restructuring or insolvency procedure on employees?**

Working contracts are enforced until they are subrogated by an acquirer or dismissed. If the company or part of it is transferred, as well as the related working contracts to those parts.

On the other hand, sometimes it is necessary to implement proceedings for material amendment of collective working conditions, collective relocations, suspension, collective dismissal or reduction of the working day in order to reduce expenses.

## **7 Cross-Border Issues**

### **7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?**

They may be, in the case where the debtor has the centre of his main interest in Spain.

If a company is incorporated in another state, but their main assets are in Spain, Spanish courts will be competent to declare the insolvency proceeding.

### **7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?**

There may be the possibility of an insolvency proceeding commenced elsewhere, and the competence may be in dispute and declared the competence of Spanish courts if it is declared that the centre of his main interest is in Spain.

### **7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?**

Most of the Spanish companies only have domestic establishments, so it is not common for the companies to enter into insolvency proceedings in other jurisdictions.

However, in some cases where a group of companies goes bankrupt and the subsidiaries are in foreign countries, the subsidiaries enter into insolvency proceedings in other jurisdictions.

## **8 Groups**

### **8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?**

Generally, the insolvency of a group of companies is controlled by the same insolvency administration or there is a coordination among

them. When a group of companies is declared bankrupt, they may be declared so within the same court procedure, each company situation is treated separately but in coordination with the others. In rare cases, the group of company insolvency proceeding is treated as it would be a single legal unit.

## 9 Reform

### 9.1 Have there been any proposals or developments in your jurisdiction regarding the use of technology or reducing the involvement of the courts in the laws of your jurisdiction, which are intended to make insolvency processes more streamlined and efficient?

Currently it is established at the Spanish Insolvency Act that a major part of the communications between creditors and the Insolvency

administration have to be made via e-mail, but there isn't any proposal or development regarding the use of technology or reducing the involvement of the courts in the laws.

### 9.2 Are there any other governmental proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

During the last year there have been several amendments to the Insolvency Act, but currently there are no other proposals.



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