

CMS Guide to the Reform  
of the Spanish Insolvency  
Law (I)

**Pre-Insolvency Law**

CMS Albiñana & Suárez de Lezo

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# CMS Guide to the Reform on the Spanish Insolvency Law

## ***Insolvency Team***

### ***CMS Albiñana & Suárez de Lezo***

With the publication of law 16/2022 on the 6th of September 2022, Spain put an end to a thorough review of insolvency law, hereby transposing European Directive (EU) 2019/1023 (dated 20th June 2019) on preventive restructuring frameworks, on discharge of debt and disqualifications, and on improved procedures for restructuring, insolvency and discharging debt.

The task was, undoubtedly, not an easy one. It faced no fewer than 607 amendments as a Draft Bill on its journey through Congress, and more than 250 in the Senate.

Of the numerous updates (published in 170 pages of the Official State Gazette) affecting all the regulations in force up to now, we would like to begin by highlighting the new pre-insolvency regulations, particularly restructuring plans as one of the key aspects of the reform.

Secondly, the new legislation introduces numerous procedural innovations in the insolvency proceedings. These amendments are intended to make insolvency proceedings more effective and efficient, although the implications of some of these could also be relevant in terms of the liability of directors, and therefore merit special consideration.

From this new reform package, we would like to highlight the changes affecting the agreement (*convenio*), the removal of liquidation plans as we know them, new regulations concerning immediately payable debts and expenses, insolvency proceedings without or with insufficient assets, as well as those affecting the qualification phase, the role and legal status of the insolvency administrators, and the waiver of unsatisfied liabilities. What's more, in a bid to offer greater legal certainty to those involved in insolvency proceedings, the reform has introduced a simpler appeals system as well as the removal of the so-called 'deferred appeal', which has also been quite problematic to apply.

In line with the principles governing the reform, a new Third Book has been added which focuses on special insolvency proceedings for micro-enterprises, characterized and governed by the principle of maximum procedural simplification.

Thirdly, the regulation of the sale of production units should also be highlighted, both at an early stage, giving this the status of insolvency "pre-pack", and furthermore as an integral part of the restructuring plans, such as during the processing of the insolvency proceedings, which in the past

was widely applied and allowed preservative solutions to be found to many situations.

Finally, it is also important to highlight exactly when the reform comes into effect.

On the one hand, the new regulations on the special insolvency procedure for micro-enterprises is relegated to enter into force on 1 January 2023, with the exception of the rules on appointing an insolvency administrator, which is subject to further legislative development that should have been approved in April 2015 yet is still pending. Consequently, micro-enterprises that can no longer count on the protection of the insolvency moratorium will also be unable to make use of the special system in place within the new regulations for the next 4 months.

The rest of the reform came into force twenty days after its publication, i.e., it became valid on 26th September 2022, notwithstanding the fact that some regulations, such as those affecting the insolvency administration, statistics or the public Register still have to be developed, which means that the full application of this reform will necessarily be staggered.

To ease understanding and provide a practical scope of this reform, in the following pages we have tried our best to offer the reader the key facts on this important reform divided into three sections:

- The first one is on pre-insolvency and innovative restructuring plans.
- The second concerns insolvency proceedings.
- And the third deals with the sale of production units.

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# Pre-insolvency Law

## Includes

- Notice to open negotiations with creditors.
- Restructuring plans.

## Affected entities

- Any incorporated entity or individual carrying out a professional activity or running a business
  - Exclusions:
    - Insurance or reinsurance companies.
    - Credit institutions.
    - Investment firms or collective investment entities.
    - Central counterparties.
    - Central securities depositories.
    - Public entities.
    - Micro-enterprises.

## Situation

- **Likelihood of insolvency:**

When it is expected that the debtor will not be able to meet its obligations due within the next two years if a restructuring plan is not implemented.
- **Imminent insolvency:**

When it is likely that the debtor will not be able to meet their obligations due within the next three months.
- **Current insolvency:**

When enforceable obligations can no longer be met.

# Notice to open negotiations with creditors

The debtor, whether an incorporated entity or an individual (through their administrative body) if they are

- Currently insolvent, prior to the processing of the request for insolvency proceedings; or
- imminently insolvent; or
- Likely to become insolvent

may notify the courts with exclusive jurisdiction to hear the insolvency proceedings of the negotiations with their creditors, or the intention to start them immediately, and agree on a restructuring plan.



**Once the notice has been made, no further notices can be submitted by the same debtor for one year.**



# Notice to open negotiations with creditors.

## Details to include in the communication

- 1** The reasons that give rise to the notice should be included, and a reference to the current status (no proof is required at this stage).
- 2** The legal basis giving the court jurisdiction to assess the notice.
- 3** The list of creditors with whom negotiations have begun (or are scheduled to do so), the amount owed to each creditor, as well as the total amount.
  - If there are creditors that are specially related to the debtor, as per the requirements set in the insolvency act (*persona especialmente relacionada con el concursado*), they must be specified.
  - If there are any debts that are governed by public law (*créditos de derecho público*), their accrual date must be stated. If the restructuring plan is to affect debts governed by public law, the debtor must prove that they are up to date with all of their tax and Social Security obligations, by presenting the court with the certificates issued by the Spanish Tax Office and the Social Security Treasury, or a declaration from the debtor stating they are up to date on all obligations.
- 4** Any existing or future circumstances that could affect the development or successful outcome of the negotiations.
- 5**
  - The activities carried out,
  - the value of assets and liabilities,
  - the company's turnover
  - the number of employees registered with the company at the end of the previous tax year
- 6** Assets or rights deemed necessary to ensure the continued running of the business.
  - If the enforcement of seizure is being pursued against these assets, the proceedings in progress must be stated in the notice.
  - If it's a member of a group of companies, the guarantees issued by other companies of said group and that will be affected must be specified in the notice.
- 7** Contracts necessary to ensure the continued running of the business or professional activity.
- 8** The debtor's request for the appointment of a restructuring expert (where appropriate).
- 9** The request for the notice to be considered private (where appropriate).

# Notice to open negotiations with creditors.



## Processing

### Notice meets requirements

The Court Clerk will issue a decree within two days, considering the notice to have been filed correctly, ordering it to be published on the Public Insolvency Register, unless it has been requested to remain private.

### Notice does not meet requirements

The applicant will be given two days to remedy any points raised.

### Content of the decree

The decree will include:

- the identity of the debtor(s) who made the notice;
- the grounds that justify the international and territorial jurisdiction of the addressed court, and whether it coincides with the location of the debtor's interests or one of their establishments.
- the date of the notice and of the decision as to whether it is considered to have been filed correctly or not;
- the total amount in liabilities as stated in the notice;
- whether a restructuring expert has been appointed and their identification; and
- the enforcement proceedings in progress on assets or rights that are necessary to ensure the continued running of the debtor's trade or business, as well as any third-party guarantees that are to be affected by the notice.

### Challenging the decree

(i) Within 5 days: an appeal for judicial review on the following grounds:

1. The debtor submitted a notice in the previous year;
2. That the assets or rights against which enforcement is being pursued are not necessary to ensure the continued running of the debtor's business or professional activity;
3. That the effects of the notice should not extend to certain guarantees issued by third parties.

(ii) Within 10 days: Procedural defence (declinatoria) due to a lack of international or territorial jurisdiction.

# Notice to open negotiations with creditors.

## Repercussions

### Repercussions on the debtor's legal standing

The notice will have no effect on the debtor's power to freely dispose of their assets and rights, even if a restructuring expert is appointed by the judge.

### Repercussions on the credits

- The notice opening negotiations with creditors will **not give rise to early debt maturity** of any claims, and any **contractual clauses** that provide for this are **ineffective**.
- The notice opening negotiations with creditors will not prevent a creditor who is secured by a third party to satisfy the debt from enforcing such guarantee if the secured claim has matured, and the notice would not be enforceable against the creditor.

Exception:

- Guarantees provided by companies within the group.
- If it is proven that such enforcement may bring about insolvency for the guarantor and the debtor.

### Repercussions on contracts

- The notice alone will **not affect contracts with pending reciprocal obligations**, and **clauses** that provide for their suspension, amendment or (early) termination **will be ineffective**.
- For contracts that are necessary to ensure the continued running of the debtor's business or professional activity, **it would not be possible** to suspend performance of said obligations or to amend or terminate the contract **for non-performance that occurred before the notice was issued**, for as long as the effects of the notice over actions and enforcements are maintained.

Specific situations:

- The notice will not affect the possible early maturity or termination of netting agreements under Royal Decree-Law 5/2005.
- Contracts for the supply of goods, services or energy that are necessary to ensure the continued running of the debtor's business or professional activity may not be subject to early termination, unless they have been negotiated in organised markets and can therefore be replaced at any time for their market value.



# Notice to open negotiations with creditors.

## Repercussions

### Repercussions on enforcement measures and proceedings

**Until three months** have elapsed from the date the notice is submitted, creditors **cannot initiate judicial or out-of-court enforcements on assets or rights that are considered necessary** to ensure the continued running of the debtor's business or professional activity. Any measures currently being processed will be suspended.

- Court-approved extensions:



At the debtor's request and with the restructuring expert's blessing (if appointed), the judge may extend this ban on pursuing judicial or out-of-court enforcements or suspending those already initiated regarding **all or part of the debtor's assets, against one or several individual creditors or classes of creditors**, when this is necessary to ensure the success of the negotiations during the extension.

Enforcement of in rem guarantees:

- The holders of in rem guarantee rights, even for third-party debt when the debtor is a company within the same group as the one who issued the notice, may initiate judicial or out-of-court enforcements on the encumbered assets or rights.
- If the guarantee relates to assets or rights that are necessary to ensure the continued running of the debtor's business or professional activity→, once the enforcement proceedings have started, the judge will **suspend the proceedings** for three months counting from the date the notice was issued.
- If it is an out-of-court enforcement, the suspension will be ordered by the judge to whom the notice was submitted.
- The notice will not prevent the enforcement of the financial guarantee subject to Royal Decree-Law 5/2005.

Public authority creditors:

- If the enforcement is over assets or rights that are necessary to ensure the continued running of the debtor's business or professional activity, once the enforcement proceedings have started, it may be suspended by the judge hearing the proceedings, **but only at the execution or disposal stage**.
- If it is an out-of-court enforcement, the suspension may be ordered by the judge to whom the notice was submitted, but only at the execution or disposal stage.

Exclusion:



- The prohibition to initiate enforcements or their suspension once they have already started will in no case apply to debts that cannot legally be affected by the restructuring plan.

# Notice to open negotiations with creditors.

## Extensions

Legal standing	The debtor or creditors that represent over fifty per cent of liabilities which, at the time the extension request is made, may be affected by the restructuring plan, by deducing the amount of debt that, in the event of insolvency proceedings, would be considered subordinate debt.
Term	Up to an additional three months.
Lifting the extension	<ol style="list-style-type: none"><li>1. Upon request by the debtor or restructuring expert (if appointed);</li><li>2. Upon request by creditors that represent at least forty percent of liabilities that, at the time the request is made, may be affected by the restructuring plan, by deducing the amount of debt that, in the event of insolvency proceedings, would be considered subordinate debt; or</li><li>3. Upon request by any creditor, who must prove that the extension of the effects of the notice no longer enables negotiations on the restructuring plan.</li></ol>
Exclusions	Any creditor may request to be excluded from the extension if this situation could lead to any harm, such as insolvency or a significant reduction in the value of their credit's guarantee. They may also request to be excluded if the suspension or stay of enforcements only affects necessary property and/or rights and, at the time the exclusion is requested, they are no longer enforceable.



If a restructuring plan is not agreed, an application for insolvency proceedings must be submitted within one month, unless the debtor is not currently insolvent.

# Restructuring plans

## What are they?

Restructuring plans aim to change the breakdown, terms and conditions or structure of the debtor's assets and liabilities or equity, including transfers of assets, production units or the entire company, as well as any necessary operational changes.

## Objective scope

Restructuring plans may provide for an extension of their effects vis-à-vis:

1. creditors or classes of creditors holding affected claims who have not voted in favour of the plan.
2. Shareholders who have not approved the plan.

Restructuring plans may also aim to:

- Protect:
  1. Interim financing and the new financing provided for therein, as well as recognising payment preferences.
  2. the actions, operations or transactions carried out within a restructuring plan from the general rules of clawback actions.
- Rescission of contracts in the interest of restructuring.



# Restructuring plans

## Content

- 1** Identity of the debtor.
- 2** Identity of the expert in charge of the restructuring (if appointed).

The appointment of the restructuring expert will take place when requested by the debtor, or by the creditors, subject to certain conditions. Their role is to assist during the negotiations, as well as in drawing up the plan and, where necessary, submitting certain reports to the judge. They are appointed by the court.
- 3** A description of the financial situation concerning the debtor and any employees, and a description of the causes and extent of the debtor's difficulties.
- 4** The debtor's assets and liabilities at the time the restructuring plan is entered into.
- 5** The creditors whose claims are affected by the plan, identified individually or by class, stating the amount as well as applicable interest and the class they belong to.

In the event that the restructuring plan is intended to affect debts that are governed by public law, proof must be provided of being up to date with all tax and Social Security obligations, by presenting the court with the certificates issued by the Spanish Tax Office and the Social Security Treasury.
- 6** If the plan affects the rights of shareholders, the nominal value of their shares or units.

If the company finds itself in a state of current or imminent insolvency, the shareholders will have no pre-emptive rights on new shares, particularly if the plan provides for a reduction in share capital to zero or below the statutory minimum and a simultaneous capital increase.
- 7** The creditors or shareholders who are unaffected by the plan, listed individually or described by class, as well as the reasons why they are not affected.

# Restructuring plans

## Content

- 8** Contracts containing pending obligations, where appropriate, that are to be terminated under the plan.
- Contracts necessary to ensure the continued running of the debtor's business or professional activity may not be suspended, modified, or be subject to (early) termination merely because the restructuring plan entails a change of company control.
- Specific situations:
    - This does not apply to contractual netting agreements subject to Royal Decree-Law 5/2005.
    - Contracts for the supply of goods, services or energy necessary to ensure the continued running of the debtor's business or professional activity may not be subject to early termination of any kind, unless they have been negotiated in organised markets and can therefore be replaced at any time at their market value.
- 9** Derivatives, if any, that may need to be subject to early termination or cancellation to successfully complete the restructuring.
- 10** Contracts with executive directors and senior management that may need to be suspended or terminated for the successful completion of the restructuring.
- 11** The proposed operational restructuring measures, their duration, and estimated cash flows, as well as financial debt restructuring measures, including new and interim financing foreseen in the restructuring plan, reasoning why it is necessary and, where appropriate, the overall impact on employment, such as redundancies, agreements on reducing working hours, etc.
- 12** A statement on the necessary conditions for the restructuring plan to succeed and why it offers reasonable expectations to ensure the company's survival or viability in the short and mid-term and avoid the debtor's insolvency.
- 13** Any measures regarding information and consultation with employees (that have been taken or are expected to), in accordance with applicable employment law, including financial information on the restructuring plan, as well as those regarding operational restructuring measures.

# Restructuring plans

## Affected debt



Credits whose terms or conditions are to be amended under the restructuring plan, in particular:

- a change in the date they become due;
- amended principal or interest;
- conversion into equity and/or a subordinate claim;
- shares or stocks, or any other instrument that differs from the original credit;
- amendment or termination of the guarantee, whether personal or in rem, which secures the credit;
- a change of debtor; or
- any changes to the credit's applicable law.

For the purposes of converting credit into shares, with or without a premium, the credits to be set off are considered liquid, payable and due.

If the plan provides for a structural change, the affected creditors have no right to object.

## Non-affected debt




- Maintenance payments arising from family, kinship, or marriage.
- Credits arising from tort liability.
- Credits arising from employment, but not including senior management positions.
- Future credits arising from derivatives that remain outstanding.

Financial guarantees governed by Royal Decree-Law 5/2005 of 11 March 2005 will not be affected by a restructuring plan under any circumstances.

# Restructuring plans

## Rights of debts that are governed by public law

 Only the date in which they are due can be affected. They must be paid in full by the following deadlines:

1. Twelve months from the date of the order approving the restructuring plan, as a general rule.
2. Six months from the date of the order approving the restructuring plan if a deferral or instalment scheme was previously granted on the debt.

In any case, any debts that are governed by public law must be fully paid within a -maximum period of 18 months from the date the notice to open negotiations was issued.

The debts in the restructuring plan must be under two years old, calculated from the date of accrual.

## Employment issues



Any modification or termination of the employment relationship that takes place in the context of the restructuring plan will be carried out following applicable employment law, including the rules on employee information and consultation.



# Restructuring plans

## Forming classes of credits

### General criteria:

- There is a common interest among the members of each class: credits of equal rank determined by the order of payment in the insolvency proceedings.
- Within each rank, considering:
  - If it is a financial or non-financial credit. Financial credits include:
    1. Those arising from credit or loan agreements, irrespective of the status of the holder.
    2. Those owned by financial institutions, whether or not they are subject to prudential regulation, and irrespective of where the credit originated, including (where appropriate) insurers for credit insurance or surety insurance.
    3. Those arising from similar contracts, such as financial leases or financing operations for goods sold with a retention of title, guarantees or counter-guarantees, factoring and confirming.
    4. Financial credits arising from commercial transactions, whether or not deferred, assigned to a financial institution.
  - Any possible conflicts of interest creditors who belong to different classes may have, or
  - How credits will be affected by the restructuring plan.

### Special criteria:

- If the creditors are small or medium-sized companies and the restructuring plan involves giving up over fifty per cent of their claim, they must form a separate class.
- Credits secured by an in rem guarantee right over the debtor's assets will constitute a single class unless the mix of assets or rights justifies separating them into two or more classes.
- Debts that are governed by public law will constitute a separate class (among classes with the same insolvency rank).



# Restructuring plans

## Approval of restructuring plans

### 1. Optional phase: Judicial confirmation of creditor classes

#### Legal standing

The debtor and creditors who represent over fifty percent of the liabilities affected by the restructuring plan.

#### Judge

The judge who has jurisdiction to hear the plan's approval.

#### Application

Proof that the communication concerning the proposed creation of class/es has been duly delivered to the affected parties where such communication had been notified.

#### Publication

The order accepting the application for processing will be published in the Public Insolvency Register.

#### Objection

Creditors who may be affected by the requested class creation may submit a letter expressing their objection within ten days of the publication of the order.

#### Ruling

The judge will issue a ruling within five days after the objection deadline has elapsed. If the applicant's proposed classes have been confirmed, the creation of such classes cannot be invoked as grounds for challenging or opposing the judicial approval of the plan.

#### Appeal

The ruling may not be appealed.

# Restructuring plans

## Approval of restructuring plans

### 2. Notice of the restructuring plan to all creditors whose claims may be affected

#### 3. Vote:

- All creditors whose credits may be affected have voting rights.
- Creditors will vote grouped by class.
- Each credit is calculated at the principal amount plus interest and surcharges due up to the date the plan is executed in a public deed.
- Credit agreements: only the part available at the time the plan is executed in a public deed will be taken into account.
- Credits in different currencies will be determined in euros at the official exchange rate on the date the plan was executed in a public deed.
- Contingent or disputed credits, or those subject to a condition precedent, will be determined at their maximum amount, unless a lower amount has been set in the restructuring plan.
- For credits secured by an in rem guarantee, where the value of the guarantee is less than the value of the secured obligation, the excess credit will be considered unsecured.
- For credits secured by a third-party guarantee (either personal or in rem), the principal creditor is entitled to exercise the right to vote.
- For credits linked by a syndication agreement, the contractual agreements on procedure and exercise of voting rights are to be respected.

# Restructuring plans

## Approval of restructuring plans

### 4. Majorities for approval for each class or group:

- Votes in favour of over two thirds of the amount of liabilities in that class.
- Class of secured credits: votes in favour of three quarters of the amount of the liabilities in that class
- Credits linked by a syndication agreement:
  - Applying the lower majority: provided for in the syndication agreement itself or the general majority for a credit class.
  - Vote in favour of the required majority: accepting the syndicated credits in full.
  - Vote in favour below the required majority: vote counted individually unless they form a single class.

### 5. Shareholder's decision

#### General rule

What's foreseen in the applicable legal provisions will apply.

#### Particularities for limited liability companies

- Term between when the General Meeting is convened and when it takes place: 10 days.
  - Companies with shares accepted to be traded on a regulated market: 21 days.
- A request may be submitted to the courts to obtain the judge's approval of the restructuring plan along with the judicial approval request.
- Agenda: Strictly limited to the approval or rejection of the plan
- Failure to convene, constitute or approve within 10 or 21 days of the application for approval = Plan rejected by the shareholders.
- Quorum and majorities: simple majority, reinforced majorities do NOT apply.
- Challenging the decision: only through the approved channels and within the deadline to challenge or object to the approval.

# Restructuring plans

## Approval of restructuring plans

### 6. Execution

In a public deed by its signatories, and will include:

- the certification of the restructuring expert, if appointed; or
- the certification issued by the auditor,

to determine if the required majorities to approve the plan are sufficient.

Attached as an annex:

- Certificates issued by the governing body of the trading venue or –secondary market concerned–, for guarantees on listed securities;
- or by an authorised appraisal company registered in the special register of the Bank of Spain, for real estate property.

# Judicial approval

## Requirements

- 1** That the debtor is currently, or is likely to become, insolvent and the plan offers reasonable expectations to ensure the company's viability in the short and mid-term and avoid the debtor's insolvency.
- 2** That it complies with the requirements regarding formalities and content.
- 3** That it has been approved by:
  - If the debtor is an individual, the approval of the restructuring plan requires the debtor's approval.
  - If the debtor is an incorporated entity:
    - the approval of the restructuring plan requires approval by the shareholders who are liable for the company's debts.
    - if the plan contains measures that require a shareholders' meeting agreement, the -plan can be passed even if it has not been approved by the shareholders if the -company is currently, or is likely to immediately become, insolvent.
  - All credit classes, or, where appropriate, by:
    - A simple majority of the classes, provided that at least one of them belongs to a class that would have been considered as holding credit with special privileges or general privileges during an insolvency proceedings; or
    - At least one class that, according to the credit ranking, can be reasonable presumed to have received some sort of payment following an assessment of the debtor. In this case, the approval of the plan requires the application to be accompanied by a report drafted by the restructuring expert on the debtor's value as a running company.
- 4** That credits within the same class are treated equally.
- 5** General principle of contract preservation
  - The approval of a restructuring plan alone will not affect contracts with reciprocal pending obligations.
  - In particular, contractual clauses that give the power to suspend or modify the obligations or effects of the contract to the other party will not be considered valid, as well as those giving the option to terminate the contract solely due to the application for approval or processing, the judicial approval of the plan or any other similar circumstance or that is directly related to the above.

# Judicial approval

## Approval procedure

### Jurisdiction

Mercantile court with jurisdiction to declare the insolvency proceedings.

### Application

By the debtor or any creditor affected, signed by a solicitor and a court representative (*procurador*), accompanied by a copy of the deed in which the plan was outlined, along with the certifications, or report, as the case may be.

### Jurisdiction check

- If there is no applicable jurisdiction: the applicant and the Public Prosecutor's Office are informed by Court order (subject to appeal).
- If applicable to the jurisdiction addressed: an order is sent accepting proceedings.

### Effects of the order

Prohibition to initiate judicial or out-of-court executions and stay of those already initiated.

### Publication

The order will be published in the Public Insolvency Register.



**The right to be heard (*audi alteram partem*) can be requested beforehand**

The applicant may request that, prior to the approval of the restructuring plan by the court, the concerned parties have the chance to object. The aim is to anticipate the subsequent challenge of the judicial approval order.

# Judicial approval

## Approval procedure

### Procedural defence

To be submitted within ten days from when the order is published.

### Approval

Through a judicial order within fifteen days from when the order is published, containing:

- Identification of creditors secured through in rem guarantee rights and that voted against the plan and belonged to a class that had not approved it.
- Decision concerning whether the stay of debt enforcement proceedings is to be lifted for claims not affected by the restructuring plan, as well as the termination of the remaining enforcement proceedings.
- Ensure that the transactions provided for in the restructuring plan are lawful.
- Verification that any new means of financing does not unfairly jeopardize the creditors' interests, and that it meets the requirements and majorities required for protection against clawback actions if any subsequent insolvency proceedings took place

Publication: The order will be published in the Public Insolvency Register. Effectiveness: Immediate, even if the order is not final.

The approval order is sufficient to register the amendments to the articles of association contained in the restructuring plan in the Mercantile Register.



No further application for approval may be made for the same debtor for at least one year from the date of the previous application.

# Judicial approval

## Special rules

- **Enforcement actions that can be registered and operational restructuring measures:** to be carried out in accordance with applicable law.
- **Subsidiary legal standing:** When the plan foresees measures that require a shareholders' meeting agreement and no such agreement has been reached, the decision would correspond to the company's directors or - if they don't reach an agreement either – to a person requested by any of the legitimate creditors duly chosen by the judge. In turn, they will have the necessary powers to carry out enforcement measures, as well as to make any amendments to the articles of association.
- Holders of in rem guarantee rights who have voted against the plan and belong to a class in which the number of votes in favour was less than the dissenting vote will have the right to request the enforcement of the encumbered assets or rights within one month of the publication of the approval order in the Public Insolvency Register, unless the plan has provided them to be substituted for a cash payment subject to certain conditions
- **Third-party guarantees:**
  - If they voted against: They retain their rights towards third parties.
  - If they have voted in favour: As was agreed in the legal engagement.
  - Group of companies: Guarantees granted can be affected if their enforcement may cause the insolvency of the guarantor and the debtor.



# Judicial approval

## Challenge to the approval order

Jurisdiction

Court of Appeal (*Audiencia Provincial*).

Term

Within fifteen days of the publication of the approval order in the Public Insolvency Register.

Grounds for the challenge

**(i) Challenge to the order approving the plan for all credit classes:**

The affected credit holders who did not vote in favour of the approved restructuring plan for all credit classes may challenge the order on the following grounds:

1. The requirements regarding the notice, such as content or formalities, have not been met.
2. The creditors classes formation and the approval of the plan does not comply with applicable law.
3. The debtor is not currently insolvent, nor are they likely to be.
4. The plan does not offer reasonable expectations on the company's viability in the short and mid-term and to avoid the debtor's insolvency.
5. Their credits have not been treated equally compared with other credits in the same class.
6. The decrease in the value of their credits is more than required to ensure the viability of the company.
  - In the case of an assignment of credits, this will not be considered the case if the challenging creditor acquired the credit at a discount higher than the decrease in value.

# Judicial approval

## Challenge to the approval order

### Grounds for the challenge

7. The plan is not in the creditors' best interest. This is considered when, in accordance with the restructuring plan, the credits are deemed to be worth less than they would be in the event of winding-up of the debtor's assets, either individually or as a production unit.
8. That the debtor has failed to comply with their obligation to be up to date with all tax and Social Security obligations.

#### **(ii) Challenge to the order of the unapproved plan for all credit classes:**

- A) An order approving a restructuring plan that has not been approved by all credit classes may be challenged on the grounds set out in (i) above by creditors who did not vote in favour of the plan, whether or not they belong to a class that has approved the plan.
- B) An order approving a restructuring plan that has not been approved by all credit classes may be challenged by affected credit holders who did not vote in favour of the plan and belong to a class that also did not approve it, on the following grounds:
  1. That it has not been approved by the required class or classes.
  2. A credit class is to hold or receive rights or shares according to the plan, with a value exceeding the amount of their credits.
  3. That the class to which the contesting creditor(s) belongs will be treated less favourably than any other class of equal rank.
  4. That the class to which the challenging creditor(s) belongs will hold or receive rights or shares with a value below the amount of their credits if a lower ranking class or shareholders are to receive any payment or retain any rights or shares from the debtor under the restructuring plan

Exception: The approval of the restructuring plan may be confirmed, even when this condition is not met, if it is indispensable to ensure the company's viability and the concerned creditor's debts are not unreasonably jeopardized.

5. In the event that the plan affects debts governed by public law, that the debtor has failed to comply with their obligation to be

# Judicial approval

## Impugnación del auto de homologación

### Motivos de impugnación

up to date with all tax and Social Security obligations.

#### **(iii) Challenging the order of a plan not approved by the shareholders:**

If the shareholders of the debtor company have not approved the restructuring plan, they may challenge the approval order on any of the following grounds:

1. The plan does not meet the requirements regarding content and formalities.
2. It has not been approved in accordance with applicable law.
3. The debtor is not currently or imminently insolvent.
4. The plan does not offer reasonable expectations for avoiding the debtor's insolvency or ensuring viability in the short and mid-term.
5. That, as a result of the implementation of the plan, a class of affected creditors will receive rights or shares, with a value exceeding the amount of their credits.

#### **(iv) Challenging contract termination:**

If the order approving the restructuring plan has agreed on the termination of a contract containing pending obligations, the affected party may challenge such termination on any of the following grounds:

1. That the termination is not necessary to ensure the successful completion of the restructuring and to prevent insolvency.
2. The compensation provided for in the plan for early termination of the contract is inadequate.

#### **(v) Challenges with limited effects:**

Any affected creditor that did not vote in favour of the restructuring plan may challenge or object to the approval of the plan on any of the following grounds:

1. That the necessary majorities to protect interim or new funding are not in place.

# Judicial approval

## Challenge to the approval order

### Grounds for the challenge

2. That the interim or new financing, or foreseen actions, business and operations for the plan, do not comply with legal requirements.
3. That the interim or new financing, or foreseen actions, business and operations for the plan unfairly affect creditors' interests.

Any creditor unaffected by the restructuring plan may challenge the approval on the above grounds as well as if the plan is unnecessary to avoid insolvency and ensure the company's viability in the short and mid-term.

### Processing

- All challenges will be processed jointly through the insolvency proceedings (without suspension).
- The mercantile court will be requested to order the proceedings.
- The debtor and creditors involved have fifteen days to object.

# Judicial approval

## Challenge to the approval order

### Ruling

- The judgement cannot be appealed.
- If the decision is upheld:
  - it will declare the non-extension of the plan, but only against the person who has challenged it; and,
  - if its effects cannot be reversed, the appellant will be entitled to compensation for damages
- **Exception:** If the challenge is based on the lack of necessary majorities or because the classes were not correctly formed, the judgement will declare the plan ineffective.
- In limited-impact challenges, the upholding of the challenge shall have the only consequence that in insolvency events, interim financing, new financing and acts, transactions or business carried out under the plan shall be subject to the rules on.
- The judgement will not jeopardize the rights acquired by third parties in good faith in accordance with applicable mortgage legislation.



# Judicial approval

## Protection against clawback actions

**In the event of subsequent insolvency proceedings, if the credits affected by a previously approved restructuring plan represent at least fifty-one per cent of liabilities, they cannot be terminated, unless it is proven that creditors were defrauded:**

- 1.** Operations that are reasonable and immediately necessary to ensure successful negotiations with creditors, provided that they have been expressly identified as such in the plan itself. As a minimum, the following must be included:
  - The payment of fees and costs connected to the negotiation, adoption or confirmation of a restructuring plan.
  - The payment of professional consultancy fees and costs in close connection with the restructuring.
  - Salary payments for work already carried out.
  - Any other payments made in the course of the debtor's business or profession.
- 2.** Interim and new financing, including those granted by persons specially related as per the requirements from the Insolvency Act (if the credits, excluding those held by such persons, represent more than sixty per cent of the total liabilities):
  - Financing granted by a non-creditor or by a pre-existing creditor is considered interim financing -if, at the time it was granted, it was reasonable and necessary to preserve the company's business or value, or that of its production units.
  - Financing granted by a non-creditor or an existing creditor is considered new financing if, as foreseen in the restructuring plan, it's necessary to implement said plan.
- 3.** Actions, business or operations that are reasonably and immediately necessary to implement the plan.

# Judicial approval

## Non-compliance with restructuring plans

Once approved, the termination of the restructuring plan may not be requested due to non-compliance, nor due to the lack of novation or cancellation of the affected credits, unless the plan itself provides otherwise, except for debts that are governed by public law with regards to such credits.

If non-compliance with the plan leads to insolvency, any person entitled to do so may request insolvency proceedings.



# Our contacts



**Juan Ignacio Fernández Aguado**

Lead Partner, Restructuring and  
Insolvency Law

**T** +34 91 451 92 91

**E** [juanignacio.fernandez@cms-asl.com](mailto:juanignacio.fernandez@cms-asl.com)



**Elisa Martín Moreno**

Senior Associate | Restructuring &  
Insolvency Law

**T** +34 91 451 93 38

**E** [elisa.martin@cms-asl.com](mailto:elisa.martin@cms-asl.com)



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