

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

Sale of production units

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CMS Guide to the Reform on the Spanish Insolvency Law

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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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The sale of production units

The Reform on the Spanish Insolvency Law once again supports this formula for business continuity and provides it with greater legal certainty.

Confirmation of the jurisdiction of the insolvency judge when selling production units to:

Declare a transfer of undertaking

Outline the assets, liabilities and employment relationships within the production unit.



A report from the Work and Social Security Inspectorate could be requested concerning:

- Employment relationships linked to the production unit.
- Outstanding payments due to the Treasury with regards to those employees

This guide does not deal with the sale of production units in the context of restructuring plans, nor in the special procedure for micro-enterprises. The sale of production units as part of a restructuring plan is analysed in the "CMS Guide to the reform of the Spanish Insolvency Act (I): Pre-insolvency Law".

Pre-pack or sale of production units: What does it involve?

This figure has its origins in Anglo-Saxon and Dutch law and takes shape in Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June, now transposed by the Reform on the Spanish Insolvency Law



Purpose of a Pre-Pack:

To help an insolvent entity to sell off the still-viable production unit in order to avoid its economic and reputational devaluation.

Obtain the best sale price

Keep the fabric of the business running

More debts are paid

More jobs are saved



New features

Request the ruling Court to name an expert to collect third party cash payment offers for one or various production units owned by the petitioner, even if the units are no longer active.

Pre-pack or sale of production units: Requirements to request an expert be appointed

To request the appointment of the expert:

- The debtor must either be insolvent, or likely to be imminently or probably insolvent.
- A viable production unit must exist, even if it has ceased to be active.
- It does not matter what activity is undertaken by the production unit.



The appointment of an expert does not excuse the debtor from the legal obligation to request insolvency proceedings.



Such pre-pack initiatives have received special attention in places such as Madrid, Barcelona, Mallorca or Malaga without having gained a homogenous approach until the Spanish Insolvency Law was updated.



It has been criticised because it was considered that, until the reform, it did not have sufficient means to effectively guarantee respect for the principles of information, publicity, competition and transparency.

Pre-pack or sale of production units: The expert

1 Who appoints the expert?

The ruling judge with jurisdiction to decide over the debtor's insolvency proceedings. The appointment decision will be confidential.

2 Who can be appointed an expert?

Any natural person or legal entity that meets the conditions to be appointed as a restructuring expert or insolvency administrator.

3 What is their mission?

To collate offers from third parties to purchase one or various production units with a cash payment. The judge will decide how long the expert will stay in her or his post.

4 How will the expert be paid?

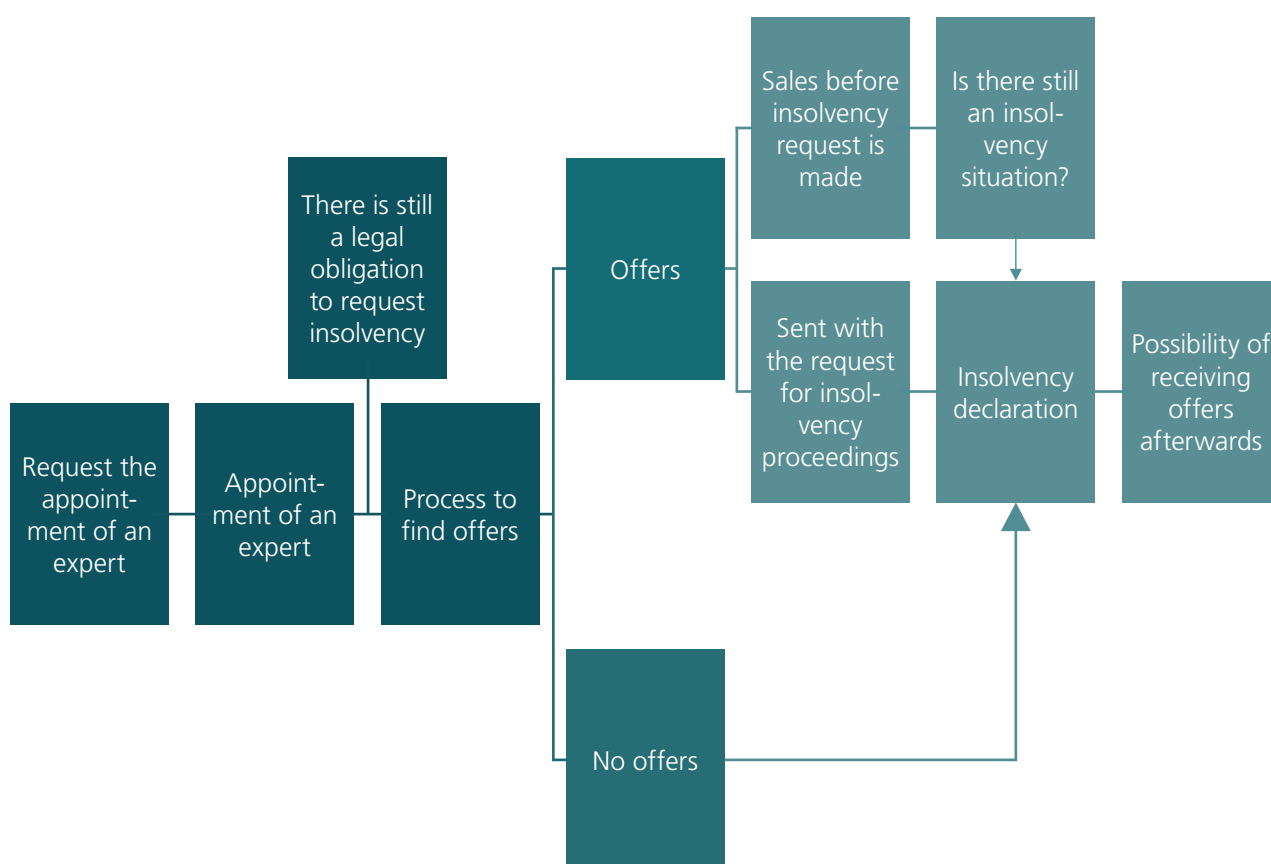
The judge will decide upon payment when making the appointment. The price of the production unit or units will be taken into consideration when deciding upon such remuneration.

Retribution could be partially or wholly tied to the outcome of the sales.

5 Does the appointed expert remain in post after the debtor makes a formal request for insolvency proceedings?

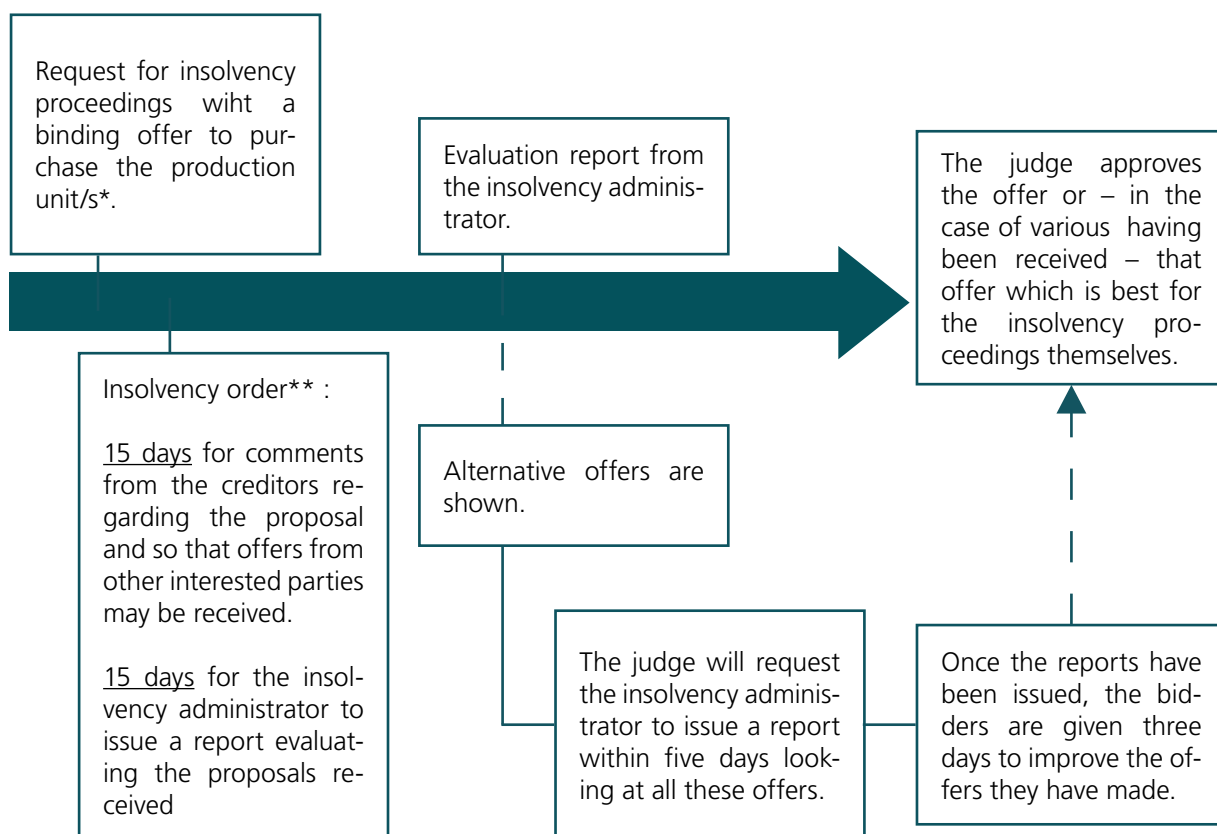
When announcing the insolvency proceedings, the judge (who will be the same one that appointed the expert) can either cancel or reappoint the expert. If the latter, the expert will then become the insolvency administrator

Pre-pack or sale of production units: Possible outcomes



Sale of production units in insolvency proceedings

Processing of the binding offer to purchase the production unit submitted with the application for voluntary insolvency proceedings



Sale at a later date

Once the insolvency proceedings have been declared and until the approval of the agreement or the opening of the liquidation phase, the sale of production units will be carried out **by electronic auction**, unless the judge authorises another way of doing so.

However, at any time during the insolvency proceedings, or when the auction is unsuccessful, the judge may authorize the sale of the production unit to be carried out by **direct sale** or **through a specialised person or entity**.

* The offer may or may not have been drawn up within a prepack context.

** The offer(s) to purchase the production unit(s) will be published on the insolvency liquidation notice board of the Public Insolvency Register on the same day as the publication of the declaration of insolvency in the first section of the said Register.

The acquirer of a production unit, as per the reform of the Spanish insolvency law

The acquirer

- Will take on the obligation to continue or restart the activity of the production unit for a minimum of three years (bids submitted with the tender application) or two years in the case of pre-pack offers.
- If the execution of the approved binding offer is subject to conditions precedent, a sufficient surety or guarantee may be required for the completion of the acquisition if the conditions precedent are fulfilled within the maximum period established for this purpose, or for the reimbursement of the expenses or costs incurred by the bidder in another case.
- It could be a cooperative or a worker-owned company set up by those interested in a transfer of undertaking.
- Cannot act for the debtor.



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