PRE-INSOLVENCY REFINANCING UNDER SPANISH RULES - ARAOZ & RUEDA

Posted on 04/01/2011

Category: Corporate

Spain's Insolvency Law was completely overhauled in 2003 producing a much more modern and efficient bankruptcy regime, where the input of the Commercial Courts is essential to the approval of any new creditor agreements.

Nonetheless the scale of the current crisis continues to highlight practical deficiencies in pre-insolvency refinancing procedures, says Iñigo Rodríguez-Sastre, Head of Disputes at Araoz & Rueda in Madrid.

"Further changes to the law in 2009 introduced Article 5.3 by which the debtor can seek a Court Order for a new creditor agreement but the main problem we still face are the limitations of such Orders – new agreements cannot establish debt repayment for longer than 5 years or repayment of less than 50% of the amount owed."

The procedure currently presents the only formal way by which a company may restructure its debt prior to a formal insolvency filing. The Anglo-Saxon concept of 'schemes of arrangement' by which minority creditors can be forced to accept new terms do not exist in Spanish law.

"The ability of a creditor to 'hold out' against the will of the majority can be a very significant issue, and barrier, to agreeing new terms and this is not addressed in any of the new proposed amendments to Spanish insolvency rules," adds Guillermo Yuste, a senior associate in the corporate department.

Under Article 5.3 a debtor company may currently therefore seek to prevent any potential insolvency proceedings for four months while it attempts to negotiate new financing agreements but this does not however mean it can suspend existing debt repayments.

Debtors need therefore to carefully consider the different positions and priorities of their creditors, as well as the relative value and importance of any collateral each may have. Those with a prior claim over tangible assets, such as mortgages, may be very reluctant to lose any value they already have, says Rodríguez-Sastre.

"There is no single formula a company can adopt, so it is fundamental for a company to fully understand the options open to it and that any informal refinancing agreements are carefully thought out and managed. Should a creditor 'jump' and file for informal insolvency instead of agreeing to a 5.3 arrangement then this may inevitably lead to the liquidation of the business."