REFORMS TO SPANISH INSOLVENCY LAW - HERBERT SMITH FREEHILLS

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Category: Restructurings

Act 9/2015, of 25 May, regarding urgent measures on insolvency, entered into force in Spain on 27 May, 2015, thus concluding the process of giving Royal Decree Law 11/2014, of 5 September, the status of an Act. That Royal Decree Law, approved in September 2014, made considerable

changes to the former Spanish Insolvency Act 22/2003, of 9 July (the "Insolvency Act").

During the process to convert the regulation into an Act, a series of additional modifications were made that yet again changed several aspects of the legal regime established in the Insolvency Act.

Significant changes made by Act 9/2015 include the clarification of the scope of the rule for the valuation of special privileges under security within the context of the insolvency proceedings (article 155.5).

In practice, this rule – which was first included last September – meant that the value of the privileged claim generated by security would be limited to 9/10 of the fair value of the asset attached to the security; unanimous interpretation in this regard was that the limitation applied to and had an impact on the creditor in all aspects of the insolvency proceedings.



It has been clarified that, from now on, the valuation of the privilege will no longer entail a limit for the beneficiary to receive the full value obtained from transferring the asset up to the full satisfaction of the original secured debt. In other words, the limitation of the privileged credit to 9/10 of the fair value of the asset attached to the security will now only be relevant from the standpoint of granting the beneficiary of the security rights to vote on proposals of arrangement in respect of one or another class of creditors.

From the perspective of proceedings that are already underway, the modification will apply to all insolvency proceedings that are on-going when Act 9/2015 enters into force.

In the context of schemes of arrangement, Additional Provision 4 clarifies that dissident creditors within a syndicate will be understood to be signatories of the refinancing agreement for all intents and purposes and not only for the purposes of calculating the majorities, when it has been approved by 75 per cent of the syndicated debt (or a lower majority, if any, when so established in the respective agreement).

While all the syndicated debt is deemed to be in favour of the refinancing if the majority supports the agreement, it was previously unclear whether this was only a rule for the purpose of calculating the debt or a drag-along mechanism. Under the new provisions, the legislator has decided on the latter option.

From the perspective of the creditors' arrangement (articles 116 and 124), privileged debt that votes in favour of the proposal of arrangement will be understood to be part of the ordinary debt for the following purposes:

1- calculating the majority of the ordinary debt voting in favour of the proposals of arrangement submitted; and

2- calculating the quorum necessary for it to be understood that the creditors' meeting voting on proposals of arrangement has been validly assembled.

The aim of this change is to avoid situations in which – in the context of insolvency proceedings with

a large amount of privileged debt and little ordinary debt – the approval of an arrangement supported by a majority of the privileged debt is blocked as a result of not obtaining the favourable vote of the ordinary debt.

From the perspective of applying this modification to proceedings that are already underway, the modification described in paragraph (1.) above will apply to all insolvency proceedings in which the insolvency administrators' final report has not been approved, whereas the modification described in paragraph (2.) above will apply to all insolvency proceedings in which a vote has not yet been made with regard to the proposal of arrangement.

An obligation is imposed on the debtor to include in its application for pre-insolvency – under article 5 bis – a list of the on-going enforcement and the encumbered assets that are, in its opinion, necessary for the performance of its business.

An adversarial process is also provided whereby, if anyone wishes to question whether or not the asset is necessary for the debtor's business, they will be able to argue their case before the insolvency judge.

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