Accounting

Main Keys to the Reform of Insolvency Law in the Conduct of Insolvency Proceedings

Analysis of the main changes introduced by the amendment to the Insolvency Act that will come into force on 26 September 2022 in the conduct of insolvency proceedings[1].

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1. Introduction

As we have been indicating in previous papers, on 6 September last, the Official Journal of Spain published Act 16/2022, of 5 September, amending the recast version of the Insolvency Act, approved by Royal Legislative Decree 1/2020, of 5 May, for the transposition of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

This is a profound reform of the Spanish insolvency system, taking advantage of the obligatory transposition into Spanish law of Directive (EU) 2019/1023[2], which has had companies and legal operators on tenterhooks since its inception due to the concern

[1] The insolvency amendment will enter into force on 26 September, except for the changes introduced in the Third Book ("Special Proceedings for Microenterprises"), the entry into force of which is postponed to 1 January 2023.

generated by the difficult economic situation that our country is going through just at the time of its passage.

One of the most noteworthy aspects of the reform are the changes made to the insolvency proceedings, with a view to adapting them to the characteristics of the debtor and allowing for a more streamlined process that will enable insolvency proceedings to be completed within a more reasonable period of time.

2. Changes in the conduct of insolvency proceedings

Firstly, it is worth highlighting that, in its attempt to make the insolvency process more efficient, the amendment creates two new regimes that seek to adapt the rules of the insolvency process to small companies, as well as to micro-enterprises.

Thus, the reform creates what it calls the *special regime*, which will apply to natural or legal persons carrying out a business or professional activity, provided that their average number of employees during the financial year prior to the insolvency proceedings does not exceed forty-nine people and their annual turnover does not exceed ten million euros.

On the other hand, the amendment also proposes the inclusion of a *special procedure for micro-enterprises*[3] (or micro-SMEs), which it defines as companies with fewer than ten employees and a turnover of less than seven hundred thousand euros or liabilities of less than three hundred and fifty thousand euros according to the annual accounts for the financial year prior to the filing of the petition for insolvency proceedings.

Both procedures seek to reduce the costs of insolvency proceedings, adapting them to the needs and structures of debtors and eliminating all formalities that are not strictly necessary, to the point of limiting in some cases the participation of professionals who do not fulfil an essential function or whose cost is not assumed voluntarily by the parties.

Secondly, the amendment envisages a series of measures aimed at speeding up the ordinary process (i.e. the one that would correspond to debtors not included in the previous regimes). Among the measures introduced by the amendment, it is worth highlighting the following:

- The maximum duration of the insolvency proceedings is limited to twelve months from the opening of the first section (opening of insolvency proceedings) to the closing of the fifth section (composition/liquidation), without prejudice to the possibility that the judge may order an extension of this period in view of the possible complexity of the insolvency

[2] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt. The deadline for this, after its extension, expired on 17 July 2022.

[3] However, the 19th final provision stipulates that the regime applicable to micro-enterprises will not enter into force until 1 January 2023.

proceedings or justified circumstances that may arise[4].

- The composition proposal must be submitted within 15 days of the submission of the interim report by the insolvency practitioner[5].

- The early composition with creditors and the need to hold a meeting of creditors are abolished, and the system of written acceptance of the current early composition proposal is established.

- The amendment requires the insolvency judge to establish the "special rules for the liquidation" of the debtor's assets, following a report by the insolvency practitioner, in the order opening the liquidation phase, thereby replacing the procedure for approval of the liquidation plan presented by the insolvency practitioner that was in force until now.

- Likewise, the amendment introduces rules that seek to avoid judicial pronouncements (with the consequent delay that this entails) in traditionally conflictive matters. Thus, in the event of insufficiency of the assets available for distribution, the claims that will be considered essential for the preservation and liquidation of the assets available for distribution are specified, thereby eliminating the often-cumbersome process of prior judicial confirmation that was currently required. This includes claims for workers' salaries accrued after the opening of the liquidation phase as long as they continue to provide their services, the remuneration of the insolvency practitioner during the liquidation phase and the amounts owed as of the opening of the liquidation phase in terms of rent for the properties leased for the preservation of property and property rights within the assets available for distribution.

Finally, it should also be noted that the legislator has taken advantage of the amendment to modify the regulation of key aspects of insolvency law, such as the following:

- The characterisation section will be processed in any case, eliminating the exception provided for in the wording of the current article 446 TRLC, which would allow the opening of the section to be avoided if a so-called *non-burdensome* composition was approved[6].

- The amendment gives a more prominent role to creditors in the characterisation section since if they represent at

[4] However, in view of the current overload of the Spanish Companies Courts, it is difficult to believe that these deadlines can be met.

[5] Bearing in mind that the amendment will apply to insolvency proceedings initiated before the entry into force of the same, but whose proposals for composition are submitted after that date, this new rule would mean that the debtor (and, where applicable, the creditors) could be left without the possibility of submitting a proposal for composition, as the maximum period of 15 days imposed by the amendment has already elapsed. In these cases, the option would remain of requesting the insolvency judge to grant an exceptional period of time to the debtor and the creditors who have seen this option eliminated, but whether this option is granted will depend in any case on the will of each court and the situation surrounding the insolvency.

[6] Non-burdensome compositions are understood to be those in which, for all claims or for those of one or more classes or subclasses, a haircut of less than one third of the amount of those claims or a payment deferral of less than three years was established.

least 5% of the liabilities, or if they are holders of claims for more than one million euros, they will also be able to submit a characterisation report and pursue, on their own, the opening of the insolvency proceedings[7].

- On the other hand, the amendment provides that the judgement that rejects the insolvency practitioner's request for the insolvency to be found at/fault will not order it to pay the costs incurred, except in the case of recklessness.

- With regard to avoidance actions, the amendment modifies the starting date of the two-year period of the so-called suspect period to bring it forward.

  Thus, instead of fixing it on the date of the opening of insolvency proceedings, the amendment establishes that (i) acts carried out during the two years prior to the date of the petition for the opening of insolvency proceedings, as well as those carried out between the date of the petition and the opening, may be avoided; and (ii) those carried out during the two years prior to the date of the notification of the commencement of negotiations to reach a Restructuring Plan or those carried out between that date and the date of the opening of insolvency proceedings, provided that a Restructuring Plan has not been approved or, even if approved, has not been approved judicially and the insolvency proceedings have been opened within the year following the expiry of the effects of the notification or its extension.

- With regard to the exoneration of unsatisfied liabilities, the amendment also envisages important new features. Particularly noteworthy is the extension of the exoneration to all insolvency debts and debts against the insolvent estate, except for those which, exceptionally and due to their special nature, are considered legally non-'exonerable' or should be 'exonerable' with certain limitations.

3. Conclusion

Undoubtedly, the new features introduced by the amendment in the conduct of the insolvency process are very relevant and can help to achieve the objective of solving the inefficiencies of the current system, which often prevented companies from reaching truly viable solutions.

In this sense, it remains to be verified whether the Companies Courts are prepared, in terms of material and human resources, to be able to take on the management of insolvency proceedings in such short periods of time. Especially when there is a notable increase in insolvency proceedings.

The changes introduced in the characterisation section are also noteworthy, as it does not seem that the characterisation section was one of the endemic evils of the

[7] This modification implies a profound change from the current system, in which the creditors had a much more residual role that obliged them to always follow the decisions of the insolvency practitioner and the Public Prosecutor's Office. If these two bodies coincided in classifying the insolvency proceedings as no-fault, the characterisation section was closed without referral, and this, even if there were creditors interested in instigating at-fault insolvency proceedings. As a consequence of the appearance of the creditors' characterisation report, the participation of the Public Prosecutor's Office is reduced to cases in which the characterisation reports reveal the existence of an act constituting a crime.

Spanish insolvency proceedings. On this point, the amendment is perhaps disruptive with respect to the strengthening of the pre-insolvency tools, especially because it may interfere in the negotiations that take place in the pre-insolvency phase, as it is perceived by creditors as a powerful negotiating weapon.