INSOL INTERNATIONAL

# FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

## Module 6G Guidance Text

## Spain

## 2023 / 2024

INSOL INTERNATIONAL
FOUNDATION CERTIFICATE
IN INTERNATIONAL INSOLVENCY LAW

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## 1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN SPAIN

Welcome to **Module 6G**, dealing with international insolvency law in **Spain**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of insolvency law in Spain;
- a relatively detailed overview of Spain's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Spain.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2024**. Please consult the Foundation Certificate in International Insolvency Law website for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2024 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law.

## 2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in Spain:

- the background and historical development of insolvency law in Spain;
- the various pieces of primary and secondary legislation governing Spanish insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in Spain;
- the rules relating to the recognition of foreign judgments in Spain.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Spanish insolvency law; and
- be able to answer questions based on a set of facts relating to Spanish insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

## 3. AN INTRODUCTION TO SPAIN

The Kingdom of Spain is located in the Iberian Peninsula (in southwestern Europe), bordering the Mediterranean Sea, the North Atlantic Ocean, the Bay of Biscay and the Pyrenees Mountains. The Spanish territory includes two sets of islands: the Canary Islands (which are one of the four North Atlantic archipelagos that make up Macaronesia, together with Azores, Madeira and Cabo Verde) and the Balearic Islands. Moreover, Spain controls a number of territories in northern Morocco.[1]

Administratively, Spain is divided into 17 autonomous communities (*comunidades autónomas*)[2] and two autonomous cities (*ciudades autónomas*).[3] The distribution of the population is considerably heterogeneous: with the notable exceptions of Madrid, Seville, and Zaragoza, the largest urban agglomeration is found along the Mediterranean and Atlantic coasts. In contrast, numerous smaller cities are spread throughout the interior, reflecting Spain's agrarian heritage.

After the fall of the Roman Empire in the fifth century, the Iberian Peninsula was characterised by a variety of independent kingdoms prior to the Muslim occupation that began in the early eighth century and lasted for nearly seven centuries. The small Christian redoubts of the north began the reconquest almost immediately, culminating in the seizure of Granada in 1492. This event completed the unification of several kingdoms and is traditionally considered as the forging of present-day Spain.

Spain has been a member of the European Union (EU) since 1986. It has a civil law legal system with regional variations, although the national insolvency regulation is uniform and applies homogenously.

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1 Including the enclaves of Ceuta and Melilla, and the islands of Peñón de Vélez de la Gomera, Peñón de Alhucemas and Islas Chafarinas.

2 Andalucía, Aragón, Asturias, Canary Islands, Cantabria, Castilla-La Mancha, Castilla-León, Catalonia, Valencian Community, Extremadura, Galicia, Balearic Islands, La Rioja, Madrid, Murcia, Navarra and the Basque Country.

3 The autonomous cities of Ceuta and Melilla plus three small islands of Islas Chafarinas, Peñón de Alhucemas and Peñón de Vélez de la Gomera, administered directly by the Spanish central government, are all along the coast of Morocco and are collectively referred to as Places of Sovereignty (*Plazas de Soberanía*).

Spain is the fourth-largest economy within the EU and occupies the 14th place in the Worlddata rankings.[4] Most of Spain's exports and imports are made to other EU countries, including France, Germany, Italy and Portugal. Outside of the EU, Spain's main customers are Latin America, Asia (specifically Japan and China), Africa (specifically Morocco, Algeria and Egypt) and the United States of America. The main products exported are pork, olive oil and citrus fruits. However, as in the economies of all European countries, Spain's tertiary or service sector is the greatest contributor to the gross domestic product (GDP). In Spain, the tertiary sector relies heavily on tourism, and France is the only country in the world that surpasses Spain in the number of foreign tourists that it receives.

Spain is part of the euro zone and as a result its monetary policy is controlled by the European Central Bank.

## 4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

### 4.1 Legal system

After more than 100 years of a system that combined a classic 19th century Commercial Code liquidation procedure (*quiebra*) with a reorganisation procedure (*suspensión de pagos*) enacted temporarily to avoid the liquidation of the Banco de Barcelona in the early 20th century, Spain passed the Insolvency Law of 2003 (the Insolvency Law), a relatively modern law that came into force in September 2004. This new system, influenced by the German *Insolvenzordnung,* was partially the result of a number of failed previous attempts at reform.[5] Due to the failure of the previous system (that was hardly ever used), the Spanish legislator has a duty to file, which duty is triggered by illiquidity, with a view to ensure a widespread use of the new procedure (*concurso de acreedores*).

However, shortly after its publication and as a result of the economic crisis,[6] the Insolvency Law was subject to multiple reforms and amendments that substantially altered the original postulates on which it was based.[7] These profound reforms not only constituted an obvious

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4 https://www.worlddata.info/europe/spain/economy.php.

5 Before the enactment of the Insolvency Act of 2003, full insolvency drafts to enact a new system were produced in 1959, 1983, 1996, 2000 and 2002. The initial version of the Insolvency Act of 2003 was directly influenced by the texts of 1996, 2000 and 2002. It can be said that, to a certain extent, the Insolvency Law of 2003, before the amendments, suffered from heavy "path dependency" of legal texts that were never in force.

6 I Tirado, "Scheming against the Schemes: A New Framework to Deal with Business Financial Distress in Spain", *ECFR* (2018) 516-552. The arrival of the American financial crisis to the European banking system caught Spain at the peak of a real estate bubble. Spanish banks were over-indebted and unable to refinance their debts. Banks drastically cut the financing to the real estate sector and hundreds of companies, directly or indirectly related to the real estate market, were forced to file for insolvency. Courts were faced with thousands of cases and had to apply an almost brand-new law, with insufficient support from the still underdeveloped insolvency profession (they had to incorporate new concepts they had little experience in / understanding of), and all of that with a relatively poor infrastructure. The almost immediate result was a poorly functioning insolvency system, unable to preserve value, with all but a handful of cases ending in piece-meal liquidation.

7 These amendments were made by Royal Decree-Law 3/2009 of 27 March 2009, regarding urgent measures on tax, financial and insolvency matters due to the evolution of the economic situation; Act 38/2011 of 10 October 2011, that amends the Insolvency Act; Royal Decree Law 6/2012 of 9 March 2012, regarding urgent measures on the protection of mortgage debtors with no economic resources; Act 1/2013 of 14 May 2013, regarding measures

obstacle to regulatory stability but were also the channel for the inclusion of new institutions and new solutions. Together with formal insolvency proceedings, pre-insolvency institutions were introduced, with the purpose of seeking preventive solutions to insolvency or alternatives to insolvency through refinancing and out-of-court payment agreements. In addition, fundamental modifications were made, aimed at achieving certain objectives or guided by the need to adapt the insolvency proceedings to special debtors.[8]

Nevertheless, the un-coordinated accumulation of reforms composed an unstable legal text – difficult to read and interpret – making it necessary to enact a revised text. A special committee (chaired by Professor Ángel Rojo) was created in 2015, with powers to regularise, clarify and harmonise the Insolvency Law. The resulting product is the Recast Insolvency Act (RIA or the Recast Insolvency Act), which came into force in September 2020.

In September 2022, the Recast Insolvency Act was amended[9] in order to incorporate the regulatory content of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks.

The Recast Insolvency Act is divided into four books: the first one is dedicated to insolvency proceedings (*concurso de acreedores*), the second to pre-insolvency law (*preconcurso*), the third envisages a special procedure for microenterprises (*procedimiento especial para microempresas*) and the fourth contains the provisions of private international law.

## 4.2 Institutional framework

### *4.2.1 Overview*

For judicial purposes, the Spanish State is territorially organised into districts, provinces and autonomous communities, over which the courts of first instance (*Juzgados de Primera Instancia*), courts of instruction (*Juzgados de Instrucción*), criminal courts (*Juzgados de lo Penal*), commercial courts (*Juzgados de lo Mercantil*), contentious-administrative courts (*Juzgados de lo Contencioso-Administrativo*), labour courts (*Juzgados de lo Social*), penitentiary surveillance courts (*Juzgados de Vigilancia Penitenciaria*), juvenile courts (*Juzgados de Menores*), the Provincial Courts (*Audiencias Provinciales*) and the High Courts of Justice (*Tribunales Superiores de Justicia*) exercise their jurisdictional functions. The National High Court (*Audiencia Nacional*) and the Supreme Court (*Tribunal Supremo*) exercise judicial functions throughout all Spanish territory.

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to strengthen the protection of mortgage debtors, debt restructuring and social rental; Royal Decree Law 14/2013 of 27 September 2013, regarding urgent measures for the adaption of the Spanish law to EU regulation on the supervision and solvency of financial institutions; Royal Decree Law 4/2014 of 7 March 2014, regarding urgent measures on the refinancing and restructuring of business debt; Royal Decree Law 11/2014 of 5 September 2014, regarding urgent insolvency matters; and Royal Decree Law 1/2015 of 27 February 2015, regarding the fresh start mechanism, reduction of financial burden and other social measures.

[8] Amongst others, the following modifications were made: the criterion of the reasonable value of the asset on which the guarantee had been constituted as a limit to the special privilege of the secured credit, the right of the debtor to request the opening of liquidation at any time, the regime for insolvency proceedings without sufficient assets to cover the costs of the proceedings, as well as discharge provisions for individuals.

[9] By virtue of Act 16/2022 of 5 September 2022, amending the Recast Insolvency Act.

The court system that deals with insolvency is composed of commercial courts (which hold exclusive jurisdiction over insolvency matters), Provincial Courts (as courts of appeal) and the Supreme Court (the highest judicial body in all jurisdictions).

Commercial courts are relatively new to the Spanish judicial system. They were created in 2003 within the civil jurisdictional order simultaneously with the enactment of the Insolvency Act.[10] The creation of commercial courts was due to the need to have magistrates with sufficient knowledge to deal with complex insolvency matters. They are, therefore, specialised courts within the civil jurisdictional order.[11]

This specialisation is however only guaranteed in the lower courts and does not occur in the superior courts. While the Provincial Courts of Appeal normally have a specialised section for commercial matters (for instance, Section 28 of the Provincial Court of Appeal of Madrid and Section 15 of the Provincial Court of Appeal of Barcelona), said specialisation is no longer present in the Supreme Court, since all civil and commercial matters are ruled on by the First Chamber (*Sala Primera*).

In general terms, the Spanish court system is regarded as inefficient in the context of the enforcement of debtor and creditor rights, both inside and outside of insolvency. The main cause for the inefficiency, however, does not refer to regulatory reasons. The inefficiency (and hence, the main flaw of the system) in fact lies with its implementation. Proceedings take too long and are excessively costly due to an inadequate institutional framework. The institutional side of the formal Spanish insolvency system is composed of the insolvency administrators (on whom most of the tasks and duties of the proceedings fall) and the courts. There are problems with both:[12]

(a) in relation to the insolvency administrators, the Spanish market has a sufficiently large pool of specialised professionals. The insolvency administration system in Spain has in fact improved significantly over the last few years. It used to be a closed system dominated by a few and with very limited professionalisation. On the contrary, the profession is nowadays very well established, the technical level is considerably higher and transparency has improved (although there is still much room for further improvement). At present, Spain lacks a system of self-regulated organisations, but there are professional associations with codes of conduct and disciplinary procedures in case of malpractice. In any case, the system is still in need of further development, given that the activity of insolvency administrators is still not adequately regulated: the system of judicial appointment gave rise to controversy and has been replaced by a system of automatic appointment from a list (although the latter has not yet entered into force, pending the necessary regulatory development). The new system is likely to further impede professionalisation, as it has reduced the incentives for the

[10] Organic Law 8/2003 of 9 July 2003, for the insolvency reform.

[11] The promotion to the category of Magistrate specialising in commercial matters takes place by means of a selective process governed by the principles of equality, merit and capacity. The ultimate purpose is to assess the degree of professional qualification required for the exercise of jurisdictional functions in commercial matters. The tests are held approximately every two years.

[12] I Tirado, "Scheming against the Schemes: A New Framework to Deal with Business Financial Distress in Spain", *ECFR* (2018) 516-552.

"best" insolvency administrators. On the other hand, the remuneration system is flawed, as it implies (i) excessive fees in the largest cases, (ii) incentives to artificially lengthen the procedure in order to extend the receipt of monthly fees, (iii) no solution for cases in which there are no or insufficient fees to cover the fees of the insolvency administrator (a situation that generates passivity and lack of interest), and (iv) mechanisms to implement an effective liability of the insolvency administrators are ineffective. All this generates uncertainty and lack of confidence in the system; and

(b) with respect to the judicial system, the problem – the most pressing, at least – is the lack of an adequate infrastructure. One of the most positive changes of the Insolvency Law was the creation of specialised courts (the commercial courts), competent to hear insolvency cases. The technical level of the judges has increased significantly and a good reputation has been created around them. Certainly, the creation of the commercial courts has led to the emergence of a body of highly qualified and technically prepared judges, whose decisions are even cited by name, as is common in common-law systems (something that in Spain, where nobody knew the names of the judges, was unimaginable before).

The problem regarding the courts is not the judges who run them, nor is it the number of judges available (which, in fact, has increased in recent years). The real problem regarding the courts lies in the scarce resources that the system allocates to them. The archives are not digitised (or at least not completely), and the computer system is outdated and insufficient to handle large amounts of documentation. Courts are flooded with paper, administrative staff is insufficient, and the buildings lack sufficient rooms for oral hearings, resulting in massive delays in the processing of proceedings. Judges have to deal with hundreds of cases with virtually no support. The situation is worsened by the fact that the system, despite reforms, is still excessively rigid and procedural. The machinery is slow, burdensome and unable to cope with the amount of work that it has. The direct consequence hereof is that the procedures take too long, which drastically reduces a company's chances of rescue.

Apart from the judicial framework depicted above, Spain does not have an insolvency regulator and neither has its creation been planned for so far.

### *4.2.2 The scope of the jurisdiction of commercial courts in insolvency matters*

Commercial courts have jurisdiction to hear any matters arising in the insolvency context and, for the sake of procedural unity, various matters belonging to different orders (such as civil, contentious-administrative or labour matters), that are considered to be of special importance in relation to the debtor's assets. However, in addition to actual insolvency matters, a heterogeneous set of additional matters is attributed to commercial courts – an attribution that was intended to be justified by the need of advancement in the process of specialisation in these material areas. Thus, commercial courts also hear other non-insolvency matters within the civil jurisdiction.[13]

[13] Organic Law on the Judiciary, arts 86 *bis* (for non-insolvency matters) and 86 *ter* (for insolvency matters).

Commercial courts have exclusive jurisdiction in respect of the following insolvency matters:[14] (i) civil actions with a patrimonial claim that are directed against the assets of the debtor (with the exception of those exercised in proceedings on capacity, filiation, marriage and minors),[15] (ii) employment actions aimed at the collective termination, modification or suspension of employment contracts in which the debtor is the employer and those relating to the suspension or termination of senior management contracts,[16] (iii) enforcement actions in respect of the assets and rights of the debtor,[17] (iv) actions relating to precautionary measures or injunctions affecting the assets of the debtor,[18] (v) actions exercised in relation to free legal aid, and (vi) actions against the partners (that is, to request the payment of corporate debts when partners are subsidiarily liable for the debts of the debtor company).

Finally, in the international sphere, the jurisdiction of commercial courts "only includes the knowledge of those actions that have their legal basis in insolvency law and have an immediate relationship with the insolvency". Thus, as a general rule, the principle of *vis attractive concursus* that attributes Spanish commercial courts a universal knowledge of all matters that may have application with respect to the assets of the debtor[19] is not maintained at an international level (see the Recast Insolvency Regulation 848/2015).

**Self-Assessment Exercise 1**

**Question 1**

Provide an overview of the main strengths and weaknesses of the Spanish judicial system in respect of insolvency, and comment on their effects on the outcome of insolvency proceedings.

**For commentary and feedback on self-assessment exercise 1, please see APPENDIX A**

## 5. SECURITY

### 5.1 Real security

The concept of "real security" is not defined in the Spanish legal system. The Recast Insolvency Act refers to this concept but does not define it and neither does it delimit which rights or situations it includes. Neither the Civil Code nor the Civil Procedure Act uses this concept, as they only contain references to the broader category of "rights *in rem*", or "real actions".

14 RIA, arts 52 *et seq*, in relation to art 86 *ter* of the Organic Law on the Judiciary.
15 *Idem*, art 54.
16 *Idem*, art 53.
17 Regardless of the court or administrative authority that ordered the enforcement.
18 Including those adopted in arbitration proceedings.
19 RIA, art 56.

In general, real security is a special cause of preference of conventional origin. By virtue of a contract, the security interest is incorporated as an accessory to the main relationship. However, the Recast Insolvency Act also recognises special preferences to real security of legal origin, such as, for example, legal mortgages.

Real security enjoys what has been labelled as an "enhanced *erga omnes* effectiveness", which directly or indirectly subjects the collateral (regardless of its holder) to the performance of the obligation wherefor it has been created. This is imposed on third parties, both on the holders of the encumbered asset by any title subsequent to the creation of the security, and on the holders of other subsequent security rights over the same asset.

Within insolvency proceedings, secured creditors not only enjoy a material privilege for the collection of their claims, but also have a procedural privilege consisting of the right to separate enforcement. If the secured obligation is defaulted upon maturity, the secured creditor may proceed with the realisation of the collateral to obtain payment or satisfaction of its claim with the price obtained up to the secured amount in preference to any other creditor.

The Recast Insolvency Act seems to adopt the expression "real security" in a broad or improper sense, comprising any security interest over a specific thing with *erga omnes* effectiveness, and not only those that attribute their holder a right of realisation of the collateral (pledge, mortgage and antichresis). Thus, together with the "creditors with a security interest over assets of the debtor" (privilege *ex iure crediti*), the Recast Insolvency Act extends the enforcement regime of security interests to actions aimed at recovering certain assets (resolutory condition, reservation of ownership or financial lease) on the basis of the title held over such assets (separation *ex iure domini*).

### 5.2 Personal security

Personal guarantees mean that not only the debtor is liable *vis-à-vis* the creditor, but also third parties who guarantee the fulfilment of the obligation. The basic forms of personal guarantees are surety bonds (*fianzas*), sureties (*avales*) and joint and several liability (*responsabilidad solidaria*) functioning as a personal security.

The payment of personally secured claims within formal insolvency proceedings is subject to a series of specialties:

(a) on the one hand, the guarantor (the holder of the return claim against the debtor) cannot be satisfied until the secured claim has been paid in full, in which case the guarantor will replace the principal creditor. If the guarantor has only partially satisfied the secured claim prior to the commencement of the proceedings, the creditor will be entitled to collection but only up to the total amount of the claim;[20] and

(b) on the other hand, if a claim has been recognised in two or more insolvency proceedings of debtors who are joint and severally liable, the creditor may not obtain (in all of the

[20] RIA, art 437.

insolvency proceedings) an amount greater than the amount of the claim, and the co-debtor who has made a partial payment may not be reimbursed for the payment made in the insolvency proceedings of his co-debtors until the creditor has been fully satisfied. In order to make the application of these rules possible and to coordinate the insolvency proceedings, the insolvency administration may withhold the payments to personally secured creditors until they submit a certificate of what has been received in the insolvency proceedings of the other joint debtors.[21]

**Self-Assessment Exercise 2**

**Question 1**

Explain why secured creditors have both a material and a procedural privilege when it comes to the collection of their claims within insolvency proceedings.

**For commentary and feedback on self-assessment exercise 2, please see APPENDIX A**

## 6. INSOLVENCY SYSTEM

### 6.1 General

After a long-standing tradition of a plurality of procedures, applicable according to the characteristics and the nature of the distressed debtor, the insolvency reform of 2003 completely overhauled the *status quo* and created one unified procedure (*concurso de acreedores*), regulated by one legal instrument (currently, the Recast Insolvency Act). The Spanish insolvency system is unitary in a tripartite way.

Firstly, it is subjectively unitary in that it applies to both natural persons and legal entities, so long as they have legal personality, regardless whether they are professional debtors (sole entrepreneurs or companies) or private individuals. Thus, the Recast Insolvency Act regulates the insolvency of corporations, partnerships (civil and commercial), foundations, associations and consumers; and it expressly establishes the possibility of declaring the insolvency of hereditary estates, even though they do not have legal personality (it constitutes a legal exception to the rule). There is no special treatment for large insolvencies concerning large debtors, and practice shows that the law does not adapt well to cases with a large number of creditors. Conversely, the system includes a special procedure for distressed microenterprises.[22]

Secondly, it is legally unitary, since both substantive and procedural matters are regulated in the same Act (the Recast Insolvency Act), which in detail covers the entire procedure, in its different

[21] *Idem*, art 438.

[22] *Idem*, arts 685 to 720.

stages. Moreover, there is a specific section that regulates the different types of appeals against decisions of the judge and the insolvency representatives, and creates a specific type of simplified procedure to solve internal disputes within the insolvency proceedings (*incidente concursal*).[23] These specific procedural regulations attempt to strike a balance between the need to protect the rights of the parties that have (allegedly) been damaged and those of the rest of the participants, who will benefit from a quick and efficient solution to the debtor's distress. This is achieved (in theory) by providing the parties with wide powers to challenge decisions, but by means of a procedure that foresees brief periods of time to act and which, as a rule, does not suspend the continuation of the general insolvency procedure. The Recast Insolvency Act includes a general, residual referral to the general Code of Civil Procedure for all procedural matters not provided for in the insolvency law.

Finally, it is functionally unitary, because all exits (reorganisation or liquidation) are possible within the framework of the same procedure and are regulated under the same law. In this regard, the Recast Insolvency Act followed the path set by the German *Insolvenzordnung* of 1994.[24]

The basis of the insolvency system is, in general terms, regarded as being creditor-friendly. Under Spanish law, the primary function of insolvency proceedings is the so-called "solving function". This means that the purpose of insolvency proceedings is to solve the crisis by satisfying creditors in the most efficient way possible, either by means of an insolvency plan (*convenio concursal*) or by liquidating the debtor's assets and rights and paying the creditors with the proceeds obtained (*liquidación concursal*). However, insolvency proceedings are also the instrument provided by law to decide whether insolvent companies can be preserved (in this sense, the proceedings have a "preservation function"), by means of the appropriate reorganisation or even by transferring them to third parties, or whether they must be expelled from the market due to their inefficiency. In this sense, the solving function is intended to foster the continuation of the debtor's professional or business activity, but provided that such continuity does not entail a lesser satisfaction of creditors. For example, the judge, at the request of the insolvency administration, should order the closing of all the offices, establishments or operations owned by the debtor whenever they are making a loss. Between the "interest of the proceedings" (*interés del concurso*), understood essentially as the interest of the creditors as a whole, and the "interest of the debtor" in the continuity of the activity, the law, without hesitation, gives priority to the former. Precisely because of the primacy of the solving function, the law prevents the insolvency proceeding from continuing (once it has been declared) when such satisfaction becomes impossible, by ordering the judge to issue an order for the conclusion of the proceeding due to insufficiency of the assets to satisfy the cost of the proceeding (the so-called "claims against the estate", *créditos contra la masa*).

Finally, insolvency proceedings also fulfil a function of repression of the debtor (in the case that the debtor is a natural person) or of its directors (in the case that it is a corporation) whose conduct generated or aggravated the state of insolvency. This function of repression (civil, not

[23] *Idem*, arts 532 *et seq*.

[24] The main reason behind this was to avoid the confusion that previously existed under the Spanish insolvency system, thereby generating a more efficient framework for distressed businesses, whose transaction costs would be diminished by one regulation capable of staving off legal uncertainty.

criminal) is performed through the so-called "qualification section" (*sección de calificación*), which necessarily ends with the qualification of the insolvency proceeding as fortuitous or as guilty.

In certain cases, however, the repressive function can simultaneously fulfil a solving function, and even favour the preservation of the business by its transfer to a third party. This is the case where the qualification section is formed as a consequence of the opening of the liquidation stage and the insolvency is classified as guilty, since in such cases (and only in such cases) the judge has the power to condemn the directors of the debtor legal entity whose conduct has caused or aggravated the insolvency, to pay, in whole or in part, the unpaid claims (that is, the deficit). In these cases, the secondary function contributes to the primary function of the insolvency proceeding: while punishing the conduct of those who have generated or aggravated the insolvency through fraud or gross negligence, the qualification makes it possible to increase the degree of satisfaction of the creditors.

## 6.2 Personal / consumer bankruptcy

### *6.2.1 The formal system for entering bankruptcy*

There are multiple gateways for entering bankruptcy. Insolvency proceedings can be opened by the court upon the request of either the debtor or of any of its creditors. In the case of creditors' petitions, there is no minimum number of creditors or a minimum amount of claims to file for insolvency. Plurality of creditors is not a legal requirement for the opening of insolvency proceedings, although the law states that, if the existence of a sole creditor is confirmed after the presentation of the final list of creditors, then the proceedings ought to conclude.[25] Insolvency is regarded as a market-based private solution and it cannot be declared ex officio by the court. No law specifically empowers the public prosecutor to file for the insolvency of a debtor, even though it can legally intervene in insolvency proceedings already open (that is, in the stage where director liability and disqualification is ascertained). No other stakeholders can petition for insolvency: individual shareholders, workers, public authorities and regulators have no standing to request the opening of the proceedings (unless they are also creditors of the insolvent debtor).

The path of the opening of insolvency proceedings and its legal consequences are different depending on the petitioner. The law tries to foster early entry into the proceedings by distressed debtors by setting a speedier and wider path for those who file for their own insolvency and, as a rule, by leaving the debtor in possession.[26] On the other hand, creditors

[25] RIA, art 465.2.

[26] One of the endemic problems of Spanish insolvency practice was that formal insolvency proceedings were opened too late, when the company was grossly insolvent and there was nothing to rescue. There was a perfect vicious circle: businesses saw insolvency as a last resort; they filed too late, when there could be no value saved and procedures turned into piecemeal liquidations or 'self-perpetuating', vale-destructive reorganisations; and this buttressed an image of the system as inefficient, only accessed by doomed debtors, which hampered the spontaneous generation of an "insolvency culture". This explains why the Recast Insolvency Act is full of incentives for the debtor to file as soon as possible. There is a duty to file; the debtor's own petition keeps the debtor in possession; and non-compliance with the duty to file serves as a rebuttable presumption of the guilty nature of the insolvency.

must prove the debtor's insolvency by proving a certain closed list of facts, and the debtor is given the chance to oppose. If the creditor succeeds, the debtor will normally lose control of the business. In case of concurring petitions, time will be the only factor; the first petition will stand, independently of who had filed it.

The existence of sufficient assets to cover the expenses of the procedure is not a condition for the commencement of the proceedings, thus allowing said commencement even in the event that the: (i) debtor lacks any seizable rights or assets, (ii) cost of realising the debtor's assets and rights is manifestly disproportionate to their foreseeable market value, (iii) unencumbered assets and rights are worth less than the foreseeable cost of the proceedings or (iv) existing liens and encumbrances on the debtor's assets and rights exceed their market value.[27] If the application for the commencement of insolvency proceedings and the accompanying documents show that the debtor is in any of these situations, the court will declare said commencement merely stating the liabilities resulting from the documentation and calling upon the creditor or creditors representing at least 5% of those liabilities to request the appointment of an insolvency administrator. If no application for the appointment of the insolvency administrator is made, the natural person debtor may request the discharge of the unsatisfied liabilities. If the appointment of the insolvency administrator is requested, the court will proceed with the appointment so that the appointed administrator issues a reasoned and documented report on whether or not there is sufficient evidence of (i) potential avoidance actions to be exercised, (ii) potential liability actions against the administrators of the insolvent company, or (iii) the potential classification of the insolvency as guilty. If sufficient evidence is found in respect of any of the above, the court will issue a complementary order so as to continue the proceedings.

### *6.2.2 Debtor petitions*

The debtor has both the right and the duty to file for its own insolvency. The petition must be accompanied by (i) a memorandum describing the economic and legal history of the business over the previous three years, an explanation and a justification of the economic and / or financial distress that supports the petition to open the proceedings, (ii) a list of assets and a list of creditors, and (iii) the accounts and financial statements of the previous three years, with the audit reports (in the event that auditing is compulsory for the particular debtor), among other documents. The possibility for joint petitions (for example, for the members of a group of companies) is expressly admitted.

Debtors, unlike creditors or third parties, can petition for insolvency when they are insolvent (current insolvency) or on the verge of insolvency (imminent insolvency). There is only a duty to file when the business is in actual insolvency. The effects triggered by the opening of insolvency proceedings are the same in both cases. Debtors can use any means to prove their insolvency and they are not confined to proving a closed list of facts. The path to insolvency is easier for a debtor than it is for creditors. Both need to prove insolvency, and the law does not specifically state that the judicial examination of the facts alleged by the debtor can be more lenient than what needs to be proved by creditors. However, there are three reasons to explain the speedier path for a debtor: the (i) legally declared aim to attract insolvent businesses to the insolvency

[27] RIA, art 37 bis.

proceedings as soon as possible, (ii) inexistence of an automatic, ad hoc procedure for creditors and third parties to oppose the debtor's petition, and (iii) commonsense rule that dictates that no debtor would file for its own insolvency unless necessary (and unless they are actually insolvent, for they cannot stand to gain from it).

The threshold for entering bankruptcy when the debtor files the petition is either current insolvency (which triggers the duty to file) or imminent insolvency (which merely triggers the ability to do so):

(a) Current insolvency: To be declared insolvent, the debtor must be "unable to regularly comply with its due obligations". The obligations need not be pecuniary in nature, so being unable to pay debts as they fall due is only one, albeit paradigmatic, sign of insolvency. The inability to comply must have certain permanency (a momentary difficulty to pay debts is no reflection of insolvency). The cause for the inability to meet due obligations is irrelevant. Although it is hardly ever the case, a debtor with fewer assets than liabilities may not be insolvent in the meaning of the Recast Insolvency Act, because it has sufficient cash to keep paying debts as they become due, or because it still has access to finance by third parties. Conversely, a debtor with more assets than liabilities may well be insolvent if the assets are illiquid and cannot be used as collateral for new money that will allow the debtor to settle due debts. A debtor is insolvent if it can pay some debts as they fall due, but not all; the not-merely-momentarily inability to pay one single debt is sufficient to be regarded as insolvent. The debtor that can generally only pay its due debts with delay is also to be regarded as insolvent under the law (again, a momentary shortage of cash does not amount to insolvency). The law expressly refers to "regular" compliance. In light hereof, if a debtor pays its due debts and liabilities, but does so using "irregular means" (that is, sale of assets at undervalue, finance at high interest rates, etcetera), it ought to be considered insolvent even though it is temporarily able to meet its due obligations; and

(b) Imminent insolvency: This concept is defined in the law as a situation whereby "the debtor foresees that he will not be able to satisfy regularly and punctually his obligations within the following three months".[28] Again, the debtor's prognosis must be made having regard to the prospective inability to meet obligations (lack of liquidity or impossibility to obtain it), not the insufficiency of assets to meet liabilities. The inability to pay on time and according to regular means will occur in the future, as debts fall due. It involves an objective valuation of probability. It cannot be just a possibility; it has to be more likely than not.

### *6.2.3 Creditor and third-party petitions*

Creditors, whatever the nature of their claim, have the right (not the duty) to file for the debtor's insolvency. As an exception that is envisaged to prevent the strategic use of insolvency proceedings, the law denies standing to file for insolvency to creditors that have voluntarily acquired a claim against the debtor in the previous six months (as a stand-alone operation). The petitioning creditor must remain a creditor throughout the procedure that leads to the declaration of insolvency, or the claim will be rejected. Insolvency can be filed by one or more

[28] *Idem*, art 2.3.

creditors, independently or jointly. If a creditor files when another creditor had already filed, the court will accumulate the second petition to the procedure and will regard this creditor as a party to the proceedings. The petition may concern one debtor or several debtors (in the cases where joint petitions are admissible).

The application of the creditor must include the origin, nature, amount, dates and situation of the claim. It is not necessary that the claim be due to file for insolvency. The petition must be presented together with all of the documents that prove the claim and all its circumstances. The creditor must prove the insolvency of the debtor, as described above for the debtor's petition (inability to comply with the obligations as they fall due). However, unlike in the case of the debtor, creditors (and third parties with standing to petition) cannot prove insolvency by any means; they must prove that the debtor is in one of the situations described by the law, which form a closed list. The proof of one of these circumstances only creates a presumption of insolvency which can be rebutted by the debtor.

In order to create the presumption that the debtor cannot meet his obligations as they fall due (insolvency), creditors must prove one of the following circumstances, which individually indicate the existence of a qualified or aggravated insolvency: (i) general cessation of payments to the debtor's creditors, (ii) seizure, for pending foreclosures and executions, of the debtor's assets in general, (iii) ruinous or rushed liquidation of assets, (iv) concealment of assets, and (v) default on debts to tax authorities, social security institutions or workers' claims for wages (and assimilated concepts), during the three months prior to the filing. Depending on the circumstance that serves as ground for the petition for commencement, the proceedings will be either automatically opened (scenarios (i) to (iii) above) or a brief preliminary procedure will take place to ascertain insolvency (scenarios (iv) and (v) above).[29]

### *6.2.4 Procedural aspects*

As stated above, formal insolvency proceedings are particularly complex and knowledge in respect thereof is attributed to specialised courts, being the commercial courts.[30]

Insolvency proceedings are always initiated at the request of a party: either the debtor (in which case we refer to "voluntary bankruptcy", *concurso voluntario*), or any of the other entitled parties, namely creditors (in which case the bankruptcy is labeled as "necessary", *concurso necesario*).[31]

The insolvency procedure is divided into stages or phases. There is one mandatory stage that must be present in each procedure (called the "common stage" or *fase común*), which can be followed by the reorganisation stage (*fase de convenio*) or the liquidation stage (*fase de*

[29] The debtor is given five days to obtain possession of the petition and the documents attached to it and oppose or accept the insolvency. If the debtor opposes the declaration of insolvency, 10 days after the receipt of the opposition a public trial is convened where the facts are examined and arguments of the parties is heard. The debtor may contradict the facts alleged by the creditors or, despite accepting them, attempt to prove solvency. The judge will decide within the three days following the full submission of proofs whether the debtor is to be declared insolvent or not. The final decision may be appealed, but it will not suspend the effects triggered by the opening of insolvency proceedings.

[30] RIA, art 44.

[31] *Idem*, art 29.

*liquidación*). The nature of the procedure favours the opening of a reorganisation stage, as it will automatically be opened unless the debtor has filed for the winding-up of assets (something that may be done from the very application to open insolvency proceedings). A fourth possible scenario (and one of the most common scenarios in practice) is a procedure that undergoes three stages: the common stage is followed by a reorganisation in which no insolvency plan is agreed upon (or one is agreed upon but later defaulted), and liquidation is then declared. Likewise, the liquidation stage can be opened from the very first moment: the debtor can request the opening of the liquidation "at any time" in the request for the declaration of insolvency.[32] In short, and in contrast to other proceedings which follow a straight course, bankruptcy proceedings in Spain present several "lines of progress".

Herewith a discussion of the various stages:

(a) The common stage is a merely instrumental one, aimed at collecting, processing, analysing and presenting all the relevant information to the parties, as well as determining the exact content and valuation of the insolvent estate and the composition of the body of creditors. This first stage, common to all procedures, is meant to be relatively brief. The insolvency representative must draw up a report in which all the assets and liabilities are determined within two months from the moment that the representative accepted the appointment, although the judge may (under exceptional circumstances) extend the time for delivery if certain circumstances are met. Once the report has been made public and duly notified to the parties, the debtor and all creditors have 10 days to challenge both the composition and / or valuation of the assets or the list of creditors (the amount or the ranking of the claims), and an abbreviated process is available for every challenge.

(b) The reorganisation stage is aimed at the approval of an insolvency plan (*convenio*). The plan is an agreement between the debtor and its creditors that is theoretically regarded as a contract (private parties freely agreeing to a modification of subjective rights (the object of the contract)) with a view to reorganising the business and minimising the loss generated by insolvency (the cause of the contract). This contract is of a special nature as the content is legally limited, the effects are applicable to non-voting / opposing creditors, and there is a need for judicial confirmation. The plan can be proposed either by the debtor or by creditors whose claims add up to a minimum of 20% of the debt admitted in the procedure. While the plan is quite flexible as to the possibilities of restructuring the business, it cannot include the liquidation of the business as it must continue to operate (although the sale of part of the business as a going concern to a third party is possible). The Recast Insolvency Act does not envisage the celebration of a creditors' meeting for debating and approving the plan. In contrast, said approval will take place through a system of written adhesions.[33] If no plan is approved, liquidation is automatically declared; if a plan is approved, the execution of the plan starts, the insolvency procedure is "suspended" (it only ends with the full execution of the plan) and all the effects on the debtor and its creditors are lifted. The new rules for the continuation of the business will be set by the plan. If the plan is fully

[32] *Idem*, art 530.1.
[33] *Idem*, art 351.

executed, all claims will be cancelled (as they have been paid in full or partially, as agreed in the plan).

(c) The liquidation stage of the debtor is declared if no insolvency plan is approved, or if the debtor defaults in its execution, or if the debtor requests liquidation at any time from the beginning to the end of the common stage. The opening of the liquidation stage may also take place ex officio by the judge or be requested by the insolvency representative or by a creditor, provided that the required circumstances are met. The law regards this stage as residual – an exit to the debtor's insolvency that should only be reached where negotiated agreements have fallen through. The aim of the liquidation stage is to wind-up the insolvent estate and, in the case of legal entities, to extinguish their legal personality and cancel their entry in the registry of legal entities. In the Spanish black letter law, liquidation is not to be confused with piecemeal sale of the assets. The law has a strong drive towards aggregate liquidation, thus favouring the sale of as much of the business as a going concern as possible. However, in most cases in practice, liquidation consists of an auction-based sell-off of the individual assets, which is value destructive. This stage rests almost entirely on the shoulders of the insolvency representative, who must mandatorily take possession of the business and is competent to conduct the sale of the assets. Once the liquidation of a company has been completed, it formally ceases to exist, and all claims are cancelled. In the case of natural persons, once all the assets have been liquidated and the procedure is formally closed, the general rule is that outstanding claims remain and creditors are free to individually seize any property that the debtor may acquire in the future. However, since 2015 natural persons can obtain the "fresh start" benefit if the required conditions are met. In this case, the outstanding claims are cancelled.

### *6.2.5 The insolvency administration*

#### *6.2.5.1 Concept, nature and functions*

The complexity of the insolvency proceedings and the plurality of interests at stake determine that, together with the insolvency judge, there must be a specific body that constitutes the central figure of insolvency proceedings. In Spanish law this is called the insolvency administration (*administración concursal*). The insolvency administration assists or represents the debtor whose patrimonial faculties are limited,[34] it has the power to exercise avoidance actions,[35] and it performs decisive tasks in all stages of the proceedings. The insolvency administration has the following powers and role to play:

(a) during the common stage of the proceedings, the insolvency administration must issue the central report,[36] draw-up the inventory of the assets[37] and draw up the list of creditors;[38]

[34] *Idem*, arts 106 *et seq*.
[35] *Idem*, arts 109 and 231.
[36] *Idem*, arts 290 *et seq*.
[37] *Idem*, arts 198 *et seq*.
[38] *Idem*, arts 285 *et seq*.

(b) when the solution to the crisis is an insolvency plan, an evaluation of its content must be carried out,[39] although the judicial approval of the plan will determine the termination of the insolvency administrators, without prejudice to the functions that the law or the plan itself may entrust to them;[40]

(c) when the solution is the liquidation of the debtor's estate, insolvency administrators must carry out the liquidation operations[41] and the payment of the credits, with the preparation of the corresponding reports,[42] until the conclusion of the insolvency proceeding; and

(d) when the qualification section is formed, the insolvency administration is entrusted with issuing a report on the relevant facts for qualifying the insolvency either as guilty or as fortuitous.[43]

The legal nature of the insolvency administration has given rise to controversy, mainly due to the fact that it simultaneously represents or assists the debtor, its creditors and the insolvency proceeding itself. The insolvency administration is, quite simply, an insolvency body whose existence is functionally justified (that is, in terms of the functions it performs within the proceedings). The insolvency administrators are, therefore, something very different from what their name suggests: they are not always "administrators" of the insolvency assets, as sometimes they only intervene in respect of the acts of the debtor, and their function is not limited to administering the insolvency assets.

The insolvency administration can (and in some cases, must) have recourse to external collaborators. Naturally, it is possible for the insolvency administration to count on the collaboration of its own staff and to continue to count on the help of the debtor's staff.[44] Furthermore, for the specific purpose of assisting the insolvency administration, the appointment of delegated assistants (*auxiliaries delegados*), whose remuneration must be paid by the insolvency administration itself,[45] is provided for when the complexity of the insolvency proceedings so requires. In addition, a special case of collaboration is that of independent experts in charge of estimating the value of assets and the viability of the litigation in progress and of potential avoidance actions.[46]

*6.2.5.2 The appointment of insolvency practitioners*

The appointment of the insolvency administration is a particularly complex matter, both in terms of who can be appointed and in terms of the appointment system of the court. With regard to the requirements that must be met by the members of the insolvency administration, three categories are usually identified: (i) civil servants, (ii) professionals (that is, specialists in

[39] *Idem*, arts 347 *et seq*.
[40] *Idem*, art 395.
[41] *Idem*, arts 421 *et seq*.
[42] *Idem*, art 424.
[43] *Idem*, art 448.
[44] *Idem*, art 75.2.
[45] *Idem*, arts 75 *et seq*.
[46] *Idem*, art 203.

insolvency or, at least, in matters related to insolvency, such as lawyers, business graduates, economists and auditors), and (iii) creditors. The Recast Insolvency Act has not opted for any of these but instead provides for an (excessively) complex system, that depends on the features of the debtor and on the complexity of the insolvency proceedings.

In general, the system provides for the appointment of a single insolvency administrator (that is, an insolvency administration made up of a single member, who may be a natural or legal person).[47] However, as opposed to the single insolvency administration system, a dual insolvency administration is established in those insolvency proceedings in which the public interest justifies the appointment of two members.[48] On the other hand, in related or joint insolvency proceedings (that is, those referring to companies of the same group), a single insolvency administrator may be appointed, when appropriate.

Only natural or legal persons who are registered as such in the Public Insolvency Register may be appointed as insolvency administrators, and only individuals or legal entities that meet the corresponding requirements may apply for said registration in the Public Insolvency Register. The specific requirements have not yet been determined, as the regulatory development of the new system is still pending (and has been since 2014). However, these requirements may perhaps refer to the qualifications required, the experience to be accredited and the completion or passing of specific tests or courses.[49] Nevertheless, until the regulatory development of the rule takes place, the position of insolvency administrator may be held by: (i) a practising lawyer with five years of effective professional experience and accredited specialised training in insolvency law, (ii) an economist or account auditor with five years of professional experience, with demonstrable specialisation in bankruptcy law, or (iii) a legal entity comprising of at least a practising lawyer and an economist or account auditor.[50]

For the purposes of the appointment of the insolvency administrator, it is foreseen that the future regulation will distinguish between small, medium and large insolvency proceedings, and that the appointment of the insolvency administrator will be made in the order that the individuals or legal entities appear in the Public Insolvency Register.[51] However, the regulation opens a window for judicial discretion since, in large insolvency proceedings, the judge may appoint an insolvency administrator other than the one that is next on the list, provided that this administrator's profile is better suited to the characteristics of the insolvency proceedings at hand.[52]

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47 *Idem*, art 57.

48 *Idem*, art 58. In those cases, the insolvency judge, *ex officio* or at the request of a public creditor, may appoint as a second insolvency administrator a public administration creditor or a public law entity creditor linked to or dependent on it.

49 *Idem*, art 61.

50 In those cases, the legal entity will have to provide the identity of the natural person (a professional in the legal or economic field) who will represent it.

51 The first appointment from the list will be made by means of a drawing of lots.

52 RIA, art 62.2.

The rules relating to the appointment include a wide range of incompatibilities and prohibitions,[53] which also constitute grounds for disqualification[54] and, if applicable, for removal.[55] The following may not hold the position of insolvency administrator, namely those who: (i) cannot be directors of public limited companies or limited liability companies, (ii) have rendered any kind of professional services in the last three years to the debtor or to persons specially related to it,[56] including all those who had shared with the debtor the exercise of professional activities of any nature, (iii) are the directors or administrators of the debtor or of a creditor representing more than 10% of the insolvency estate, and (iv) are specially related to any person who has rendered any kind of professional services in the last three years to the debtor or to persons specially related to the latter.[57]

*6.2.5.3 Fiduciary duties, remuneration and liability of the insolvency administrators*

The law imposes specific duties of diligence and loyalty on insolvency administrators and delegated assistants, by requiring them to perform their duties *diligently* in the most efficient manner for the interests of the proceedings, and *independently* with regard to the debtor (and its shareholders and directors) and the creditors.[58] When the insolvency administration is formed by two members a joint administration is established, although the court may attribute individualised competencies to any of the insolvency administrators and resolve their discrepancies in the event of disagreement. The insolvency administrator is subject to the control of the insolvency court, who, at any time, may require the administrator to provide specific information or report on any matter.[59]

The entrustment of multiple functions and the submission of insolvency administrators to a rigorous liability regime means that there is a need for remuneration that compensates the administrator for the effort and risks inherent to the position, and that reinforces the independence of the body of insolvency administrators.[60] The remuneration of the insolvency administrators is determined by tariffs and takes into account the number of creditors, the existence of joint insolvency proceedings, the size of the insolvency proceedings and the functions actually performed by the insolvency administration. Likewise, the law specifies four rules to which the remuneration must necessarily conform:

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53 *Idem*, arts 64 and 65.

54 *Idem*, art 73.

55 *Idem*, arts 100 *et seq*.

56 *Idem*, art 65.4: including the restructuring expert.

57 In the event that there are sufficient persons available on the list, persons who have been appointed as insolvency administrators by the same court in three insolvency proceedings within the previous two years may not be appointed as insolvency administrators. Neither those who have been removed from this position within the previous three years, nor those who are disqualified by application of the bankruptcy law (eg by final judgment of disapproval of accounts in a previous bankruptcy (RIA, art 480) or as a result of the guilty qualification of a bankruptcy in which they have been affected persons (RIA, art 455.2-2.º)) may be appointed as insolvency administrators, and may also not be appointed by the legal entity when the latter has been appointed as insolvency administrator.

58 RIA, art 80.

59 *Idem*, art 82.

60 *Idem*, arts 84 *et seq*.

(a) Exclusivity: insolvency administrators may only receive the amounts resulting from the application of the tariff for their intervention in the proceedings;

(b) Limitation: the insolvency administrators may not be remunerated above a maximum amount although the judge, after hearing the parties, may approve a remuneration that exceeds the maximum limit when the complexity of the proceedings and the costs assumed by the insolvency administrators so justifies. The excess of the remuneration finally agreed may however in no case exceed 50% of the maximum limit;

(c) Duration of the proceedings: as an incentive for the fast resolution of the proceedings, the law foresees certain adjustments in the remuneration depending on the duration .of the common stage, the insolvency plan or the liquidation stage, in the sense that, the longer the duration, the lower the retribution;[61] and

(d) Efficiency: the remuneration will accrue as the insolvency administration fulfils the functions provided for in the regulation. In this way, the initial fixed remuneration may be reduced by the court on a reasoned basis in the event of a failure by the insolvency administration to comply with its obligations, a delay in compliance or the deficient quality of the administrator's work. Specifically, if the delay exceeds a period of more than half of the term to be observed the court will reduce the remuneration, unless there are objective circumstances that justify the delay or if the administrator's conduct has been diligent in the fulfilment of the other functions. On the other hand, the quality of the work is considered to be deficient when challenges to the inventory or the list of creditors are resolved in favour of the plaintiffs in a proportion equal to, or greater than, 15% of the value of the provisional inventory, or of the amount of the provisional list of creditors originally presented by the insolvency administration. In the latter case, the court will reduce the remuneration, at least in the same proportion as the modification, unless there are objective circumstances that justify the initial valuation or that the conduct of the administrator has been diligent in the fulfilment of his other functions.

However, until the regulatory development of the abovementioned rules takes place and the new tariff of the insolvency administrator is drawn-up, the remuneration of the body will be set by the insolvency court, in accordance with the tariff still in force.[62] For these purposes, it must be taken into account that, at any stage of the insolvency proceedings, the court, *ex officio* or at the request of the debtor or any creditor, may modify the fixed remuneration, if it is justified.[63]

The right to the remuneration constitutes a credit against the estate (*crédito contra la masa*), so that the remuneration will be paid at the time it is accrued.[64]

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[61] *Idem*, art 86.1-3.º. If the common phase exceeds six months, the reorganisation phase exceeds six months or the winding-up phase exceeds eight months, the remuneration of the insolvency administration approved for this phase shall be reduced by 50%, unless the court finds that there are objective circumstances that justify such a delay or that the administrator has been diligent in the performance of his other duties.

[62] Insolvency Act in its wording prior to Law 17/2014 of 30 September, and Royal Decree 1860/2004 of 6 September, which establishes the tariff of rights of the insolvency administrators.

[63] See the judgment of the Spanish Supreme Court of 5 July 2016.

[64] RIA, art 245.2. Also see the judgments of the Spanish Supreme Court of 8 June 2016 (1871/2014 and 128/2014), 25 October 2016; 8 March, 19 July and 16 October 2017; and 21 May 2018.

The insolvency administrators are subject to a specific liability regime for the damages caused to the insolvent estate, the debtor, the creditors or third parties.[65] The liability action will expire four years after the plaintiff became aware of the damage or harm and, in any case, after the insolvency administrator has ceased to hold office.

In addition to this system of liability for damages the law provides that, whenever it is justified, the judge may, *ex officio* or at the request of any of the persons entitled to request the declaration of insolvency or even the insolvency administration itself, remove any of the members of the administration from office or revoke the appointment of the delegated assistants.[66] In the event of removal and in any other case of termination occurring during the proceedings, the judge will immediately proceed to make a new appointment.[67] The function of the insolvency administrator will also end with the judicial approval of an insolvency plan[68] and with the conclusion of the insolvency proceedings. Whatever the cause, the termination will entail the duty to render accounts.[69]

### *6.2.6 The status of the debtor upon entering formal insolvency*

#### *6.2.6.1 General considerations*

*T*he following should be noted in respect of the effects that the commencement of insolvency proceedings has on the debtor, namely that from:

(a) an objective perspective, the effects can refer to the fundamental rights and freedoms of the debtor and / or to its patrimonial faculties. While the latter always occur (since insolvency proceedings always have a certain effect on the patrimonial faculties of the debtor), the former depends on the concrete circumstances of the case and on whether an interference of the debtor's fundamental rights and freedoms is deemed necessary; and

(b) a subjective perspective, the effects vary depending on whether the debtor is a natural person or a legal entity.[70]

The commencement of insolvency proceedings in respect of a natural person gives rise to a right to alimony, provided that the insolvent estate can afford it. The alimony is limited to the debtor, the debtor's spouse or partner and children under their authority.[71]

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[65] *Idem*, arts 94 *et seq*. See the judgment of the Spanish Supreme Court of 11 November 2013.
[66] *Idem*, art 100.
[67] *Idem*, art 101.
[68] *Idem*, arts 395 (although with many nuances / modifications).
[69] *Idem*, arts 478 *et seq*.
[70] What follows is a discussion on natural persons exclusively. The effects of the commencement of insolvency proceedings over corporations are dealt with under paras 6.3 and 6.5.
[71] *Idem*, art 123.

*6.2.6.2 Limitations on fundamental rights and freedoms*

In order to ensure compliance with all of the duties that the insolvency proceedings impose on the debtor, the judge may agree to limit some of the debtor's fundamental rights and freedoms. The purpose hereof is to facilitate the development of the insolvency proceedings. Therefore, the restrictive measures can only be ordered when they are essential for the achievement of this objective and in line with the requirements and limits set by the doctrine of the Constitutional Court. The degree of compliance with the duties of collaboration should also be taken into account.

The limitation of fundamental rights can affect both natural persons and corporations, although some restrictions (such as house arrest) can only affect the former.

The measures that can be ordered may include the following, namely the:

(a) interception of communications, which constitutes a limitation of the fundamental right to secrecy of communications.[72] In that case, the secrecy of the contents that are not applicable to the insolvency proceedings ought to be guaranteed and this measure shall not be adopted for purely speculative purposes;

(b) establishment of a duty of residence, which can even lead to house arrest, intended to guarantee the availability of persons for the benefit of the insolvency administration and the insolvency court; and

(c) entry and search of dwellings or offices when the debtor denies access. This restriction must be based on rational *indicia* of the existence of documents of interest for the insolvency proceedings which have not been disclosed or voluntarily provided by the debtor.

*6.2.6.3 Limitations on the patrimonial faculties of the debtor*

The commencement of insolvency proceedings necessarily limits the debtor's powers of administration and disposition in respect of the insolvent estate.

The limitation of the patrimonial faculties is aimed at the protection of the interests of the creditors and is not intended to punish the debtor, nor does it constitute an incapacitation.
The legislator has opted for a flexible configuration of these consequences, so that the commencement of insolvency proceedings will not always produce the same patrimonial effects. In some cases, the debtor will only be subject to intervention, which means that in the exercise of the powers of administration and disposition of the assets, the authorisation or conformity of the insolvency administration will be needed. In other cases, the exercise of the powers of administration and disposition of the assets will be suspended, which means that the debtor will be replaced by the insolvency administration, who will then be responsible for the exercise of such powers.

[72] Spanish Constitution, art 18.3.

In principle, the decision to intervene or to suspend is made depending on the application for the commencement of insolvency proceedings. If the insolvency proceedings are voluntary (if they follow a petition from the debtor), the debtor will retain the powers of administration and disposition of the assets, but the exercise of these powers will be subject to the intervention of the insolvency administration. In contrast, if the insolvency proceedings are necessary (if they follow from a creditor's petition), the powers of administration and disposition of the assets will be suspended, and the insolvency administration will replace the debtor in the exercise of these powers.

However, the court may alter the aforementioned rule and order the suspension in voluntary insolvency proceedings and the mere intervention in necessary insolvency proceedings, either in the order declaring the insolvency proceedings or subsequently, at the request of the insolvency administration and after hearing the debtor. Any deviation from the rule will have to be justified by the risks that can be avoided and by the advantages that can be obtained.

The operations carried out by the debtor in contravention of the patrimonial limitations can be voided (if deemed detrimental) or confirmed if they are favourable.

Apart from the commencement of the proceedings, two other procedural moments ought to be taken into consideration:

(a) once an insolvency plan has been approved by the court, the limitation of the patrimonial faculties will be replaced by the limitations or prohibitions established in the plan itself (if any), and the same will happen with the specific effects on the natural and legal person, although the duties of collaboration of the debtor will be maintained in any case;[73] and

(b) the opening of the liquidation stage will necessarily entail the suspension of the patrimonial faculties of the debtor and the extinction of the right to alimony (unless it is essential for the care of minimum needs).

*6.2.6.4 The continuation of the business activity and the duties of the debtor*

Irrespective of the limitations imposed on the debtor, the commencement of insolvency proceedings will not automatically interrupt its business activity. However, depending on the circumstances, the insolvency court may order the cessation of the business activity or the closure of establishments and offices.[74]

During the insolvency proceedings, the exercise of the business activity will correspond to the insolvency administration in the case of suspension, and to the debtor itself in the case of intervention. However, until the insolvency administration accepts its appointment, the debtor may carry out any operations which are essential for the continuation of its business activity, provided that these operations are in line with normal market conditions.[75] Once the insolvency administration accepts the appointment and the debtor has been merely intervened, and in

[73] *Idem*, art 394.
[74] *Idem*, arts 111.1 and 114.1.
[75] *Idem*, art 111.2 (in relation to art 28.3).

order to facilitate the continuation of the activity, the insolvency administration may grant a general authorisation to carry out the ordinary business operations.[76] In case of suspension of the powers of administration and disposition of the debtor, the insolvency administration will adopt the necessary measures for the continuation of the business activity.[77]

The general effects of the commencement of insolvency proceedings on the debtor are completed with the imposition of general duties of information, appearance, and collaboration with the insolvency court and with the insolvency administration in everything necessary or convenient for the interest of the proceedings.[78] Failure to comply with these duties is punishable within the qualification section, since the concurrence of fraud or gross negligence will be presumed and might result in the qualification of the insolvency as guilty.[79]

### *6.2.7 The process for the proof of claims by creditors*

As a general rule, for claims to be recognised they must be disclosed in the proceedings. To this end, once the proceedings commence, the insolvency administration must make certain communications to the creditors without delay:

(a) an individualised communication, by electronic means if possible, to each of the creditors whose identity and contact information are available, informing them of the commencement of the insolvency proceedings and of their duty to communicate their claims in the form and within the legally established term;[80]

(b) another communication to the State Agency of the Tax Administration and to the General Treasury of the Social Security, whether or not there is evidence of their status as creditors;[81] and

(c) if applicable, another communication to the representatives of the workers, so that they may appear in the proceedings.[82]

The purpose of the communication of claims is their recognition by the insolvency administration. This communication, which must be made by creditors, must be presented within the month following the publication of the order declaring the insolvency in the Official State Gazette.[83] The content of the communication must include the creditor's identity and the information relating to the claim.[84]

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76 *Idem*, art 112.
77 *Idem*, art 113.
78 *Idem*, art 135.
79 *Idem*, art 444.2.°.
80 *Idem*, art 252.
81 *Idem*, art 253.
82 *Idem*, art 254.
83 *Idem*, art 255 (in relation to art 28.1-5.°).
84 The law regulates the particular case of simultaneous insolvency proceedings of joint debtors, in which the creditor may communicate the claim in all insolvency proceedings (RIA, art 258.1), although as the sum of the amount received in the different insolvency proceedings cannot exceed the total amount of the claim (RIA, art

The recognition of the claim by the insolvency administration will determine its inclusion or exclusion from the list of creditors.[85] In this sense, the insolvency administrator must take into account not only the notifications of claims expressly made by creditors themselves, but also the claims that result from the books and documents of the debtor or that, for any other reason, appear in the insolvency proceedings. Additionally, the claims deriving from an arbitral award or a judgment, secured by collateral registered in a public registry, those that are included in an enforceable document, those recognised by an administrative certification, and the claims of the workers whose existence and amount result from the insolvency proceeding, will necessarily be included in the list of creditors.[86] However, this compulsory recognition of claims does not prevent the insolvency administration from initiating the corresponding proceedings in case of fraud or doubts regarding their existence and validity.[87]

### *6.2.8 Preferential and priority claims*

#### *6.2.8.1 Insolvency claims versus claims against the estate*

The Spanish Insolvency system differentiates between insolvency claims (*créditos concursales*) and claims against the estate (*créditos contra la masa*). The former are claims that originated before the opening of the insolvency proceedings and are subject to a strict hierarchical order of payment; the latter are mostly claims arising after the opening of insolvency proceedings that are payable as they fall due. In order to add legal certainty and, to some extent, control the number of these "insolvency-free" claims, the law includes a descriptive list. However, conspicuously and as an exception, the Recast Insolvency Act uses the concept to insert a priority for the payment of creditors with labour claims for the 30 days preceding the opening of insolvency proceedings (with the cap of twice the minimum salary).

Procedural costs and new debts incurred in the administration of the business or the assets are legally regarded as claims against the estate. Procedural costs include the costs generated by the institutional setting and the development of the procedure itself: remuneration of insolvency representatives and, under certain circumstances, other professionals hired by them; the costs of publicity, notifications and registration; the costs of the debtor's legal representation and counselling, etcetera. The main bulk of the costs of the proceedings is to be found in the administration of the business. The continuation of the business generates new debts, but also new revenue, and the activity is executed or controlled by the insolvency representatives and by the court, which apply a mere cost-benefit analysis that will lead them to stop the business activity when continuously trading at a loss or when there is foreseeably no future gain in a going-concern sale. Although there is no express provision in the law, the combined application of general civil law with the insolvency law should be enough to render insolvency

438.1), the creditor is required to state in each proceeding whether the communication of the claim has been made or is going to be made in the other insolvency proceedings (RIA, art 258.2).

85 RIA, art 259./

86 *Idem*, art 260.1. Also see the judgment of the Spanish Supreme Court of 15 March 2017.

87 *Idem*, art 260.2.

representatives liable for damages against creditors whose claims arose when the former knew (or ought to have known) that they would not be paid.[88]

Claims against the estate (whatever their nature and whatever the moment of the insolvency proceedings) are due to be paid when they fall due, although the insolvency representative is entitled to alter this rule whenever it may be more convenient for the sake of the proceedings. If there is no voluntary payment by the debtor or the insolvency representatives, the creditor can sue the estate (*rectius*, the debtor) in the insolvency court. However, no executions can be levied for unpaid claims against the estate until an insolvency plan is approved.[89]

*6.2.8.2 The order of payment of insolvency claims*

Insolvency claims can be divided into the following categories:

(a) claims with special preference (secured claims);[90]

(b) claims with general preference (those that ought to be satisfied in a preferential manner, but are not backed-up by specific collateral);[91]

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88 I Tirado, "Scheming against the Schemes: A New Framework to Deal with Business Financial Distress in Spain", (2018). 516-552.

89 RIA, art 248.

90 Although the categories of "secured creditors" and "creditors with special preference" are theoretically different (as the former refers to certain enforcement prerogatives, while the later refers to the ranking and priority of the secured claims) and do not necessarily occur coincidentally, the Spanish judicial practice has generally understood that, for insolvency purposes, the enforcement prerogatives attributed to secured creditors should be understood as applying to those with special preference. In this sense, the secured claims that fall within the category of "specially privileged" are claims: (i) secured with a voluntary or legal mortgage, either over moveable or immoveable assets, or lien on mortgaged or pledged assets, (ii) secured with an antichresis, on the yield of the immoveable assets encumbered, (iii) for manufacturing purposes on the goods manufactured, including those of employees on objects prepared by them whilst they are the property of, or are in the possession of, the insolvent debtor, (iv) for financial leases or purchase by instalment contracts of moveable or immoveable assets, in favour of the lessors or sellers and, when appropriate, the financers, on assets leased with reservation of ownership, with prohibition on disposal or with a termination condition in the event of failure to pay, (v) guaranteed with security represented by account entries (*anotaciones en cuenta*), on the encumbered securities, (vi) guaranteed with a pledge constituted in a public document, on the pledged goods or rights that are in the possession of the creditor or a third party, and (vii) for secured bondholders.

91 RIA, art 280 provides that the list of preferential claims includes (taxatively): (i) the credits for salaries that do not have a special privilege (in the amount resulting from multiplying three times the minimum interprofessional salary by the number of days of salary pending payment); the indemnities derived from the termination of contracts (in the amount corresponding to the legal minimum calculated on a basis that does not exceed three times the minimum interprofessional salary); the indemnities derived from the termination of contracts (in the amount corresponding to the legal minimum calculated on a basis that does not exceed three times the minimum interprofessional salary); the compensations derived from accidents at work and occupational diseases accrued prior to the declaration of insolvency; the capital costs of social security for which the insolvent party is legally responsible; and the surcharges on the benefits for non-compliance with the obligations in the area of occupational health accrued prior to the declaration of insolvency, (ii) the amounts corresponding to tax and social security withholdings owed by the debtor, (iii) the claims of natural persons derived from non-dependent personal work and those corresponding to the authors for the assignment of the rights of exploitation of their intellectual property, accrued during the six months prior to the declaration of bankruptcy, (iv) tax claims, social security claims and other public law claims that do not have other privileges. With respect to the aforementioned public claims, the general privilege shall only reach 50% of their amount, deducting from the basis for the calculation of the

(c) ordinary claims; and

(d) subordinated claims.

The payment of claims with special preference will always be preferential over the assets and rights affected, whether they are executed inside or outside the insolvency proceedings.[92] This preference will prevail not only with regard to the other insolvency claims, but also with regard to the claims against the estate.[93] In the event that several security rights concur over the same asset, payments shall be made in accordance with the time priority that results from the compliance with the requirements and formalities provided for in the corresponding regulation for each security. In other words, priority will be given to the claim whose collateral was firstly constituted with all the due formalities according to the corresponding specific regulation.[94] Were there to be a surplus (a remainder over the value of the secured claim), it would return to the insolvent estate. If the secured claim is not fully satisfied, the unpaid part will be recognised in the insolvency proceeding as a claim with the corresponding classification (normally, ordinary or subordinated).

Once the claims with special preference have been paid, claims with general preference will be satisfied. Thereafter, the payment of ordinary claims will proceed[95] and finally (only if the remainder of claims have been duly satisfied) subordinated claims will be paid,[96] according to the statutory ranking.

It should be noted that under the Spanish insolvency framework, the subordination of claims is automatic and will merely depend on the concurrence of certain circumstances (which, per se, are deemed sufficient to motivate the diminishment of the ranking).[97]

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percentage the claims with special privilege, the claims with general privilege and the subordinated claims, (v) the claims for tort liability and the claims for civil liability derived from the crime against the Public Treasury and against the General Treasury of the Social Security, (vi) 50% of the claims arising from interim financing or new financing granted under a homologated restructuring plan where the claims affected by that plan represent at least 51% of the total liabilities. In the event that the financing has been granted by persons especially related to the debtor, the claims affected by the plan must represent more than 60% of the total liabilities in order to calculate this majority; and (vii) the claims held by the creditor at the request of whom the insolvency proceedings have been declared, excluding those of a subordinate nature, up to 50% of their amount.

92 RIA, art 430.1 (in relation to art 270).

93 *Idem*, art 244.

94 *Idem*, art 431.

95 *Idem*, art 433.1 provides that: "Payment of ordinary claims will be made after payment of claims against the estate and privileged claims".

96 *Idem*, art 435.1 provides that: "Subordinated claims will not be paid until ordinary claims have been fully satisfied".

97 As a general rule (some exceptions are foreseen in article 281.2 of the RIA), the following claims are automatically subordinated, namely claims: (i) that are extemporaneously communicated, with certain exceptions (claims of forced recognition, etc), (ii) of subordinate character by contractual agreement, (iii) for surcharges and interests of any class, except those corresponding to secured claims and covered by the corresponding security, (iv) for fines and other pecuniary sanctions, (v) owed to any of the persons especially related to the debtor (according to arts 282 and 283 of the RIA), (vi) owed to a counterparty that acted in bad faith in an act declared void by virtue of an avoidance action, and (vii) owed to a counterpart in contracts with reciprocal obligations, when the creditor repeatedly obstructs the fulfilment of the contract to the detriment of the interest of the insolvency proceedings.

### *6.2.9 Post-commencement finance*

Post-commencement financing is possible in any form under Spanish insolvency law.[98] Financial loans or credit by suppliers are regarded as claims against the estate and will be paid as they fall due. To enter into these types of contracts, the debtor and / or insolvency representative must respect the general system of effects on the debtor after the declaration of insolvency. In short, in the case of credit conferred by suppliers under day-to-day trading relationships, the consent of the insolvency representative is necessary and sufficient (the consent can be given "generally", for a certain type of agreement and need not be given for each case). The same can be stated for financing facilities given by banks directly linked with the day-to-day business of the debtor. If, however, a financial institution gives a loan that due to its nature or quantity cannot be regarded as inherent to the ordinary course of business, the consent of the insolvency representative will need to be compounded with the authorisation of the judge. For all these operations, new security can be agreed over free property – thus on the surplus value of collateral and on assets that have not yet been encumbered by security. The only way priority can be granted to a post-commencement creditor over existing security granted prior to the opening of insolvency proceedings is with the concurrent agreement of the creditor secured by that collateral.

### *6.2.10 The insolvency plan (***convenio concursal***)*

#### *6.2.10.1 Content*

The reorganisation plan can be defined as a legal transaction based on an agreement between the insolvent debtor and the majority of its creditors that is approved by the insolvency judge, and whose purpose is the satisfaction of the creditors by means of the corresponding rescheduling and write-offs of claims. It is a complex operation in which it is necessary to distinguish the processing and the execution of the agreement. The processing of the reorganisation plan includes the conclusion of the agreement between the debtor and its creditors (as in any contract: proposal and acceptance), but also the necessary judicial approval. The execution of the agreement includes both the determination of its effects and the regime of its compliance or non-compliance.

The content of the insolvency plan is subject to mandatory rules. It is possible to differentiate between general rules (referred to the necessary content, the optional content and the prohibited content) and special rules (regarding specific contents, such as insolvency plans that entail the assumption of the activity and the debt by a third party and proposals with alternative content). The general rules are as follows:

(a) necessary content: the insolvency plan must necessarily contain re-schedulings and / or write-offs. Although no limits are established for the scope of the write-offs, the re-schedulings may not exceed ten years;[99]

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[98] See I Tirado, "Scheming against the Schemes: A New Framework to Deal with Business Financial Distress in Spain", *ECFR* (2018) 516-552.

[99] RIA, art 317.1.

(b) prohibited content: the insolvency plan may never modify the amounts of the claims or their classification, nor may it consist of the liquidation of the debtor's estate.[100] With regard to public claims, the plan may never entail a change in the applicable law, a change in the debtor's person, the modification of collateral, or the conversion into equity. Additionally, the insolvency plan shall not be subject to any kind of condition;[101] and

(c) optional content: insolvency plans may contain, for all or some creditors or for certain classes of creditors (with the exception of public creditors), as many additional contents as the proposer consider appropriate, with no limitations other than those provided for by the law.[102] Optional contents of the proposal may include, among others, the prohibition or the limitation of the debtor's powers of administration and disposition over the insolvent estate, or the attribution of certain functions to the insolvency administration.[103]

Special provisions refer to specific reorganisation proposals such as the: (i) so-called proposals with assumption, which consist of the transfer of productive units to a third party who will commit to continue with the activity and pay all or some of the insolvency claims,[104] and (ii) proposals with alternative content in which, in addition to the necessary content, the proposal contains certain alternatives for all or some claims or classes of claims (such as debt-equity swaps), so that the creditors may opt for any of the alternatives within a certain period of time.[105]

Whatever its content, the proposal must be made in writing and signed by the debtor or by all of the proposing creditors. If applicable, it must also be signed by third parties providing guarantees or financing.[106] In addition, it must always be accompanied by a payment plan[107] and, in the event of continuation of the professional or business activity by the debtor itself, it must also be accompanied by a viability plan which will specify the necessary resources, the conditions for obtaining them and the possible commitments of third parties.

*6.2.10.2 The processing of the insolvency plan*

The processing of the plan begins with the presentation of the proposal, which must be admitted by the judge and evaluated by the insolvency administration before being accepted by the creditors through the system of adhesions (the meeting of creditors has been suppressed in the latest amendment to the Recast Insolvency Act). However, in order for the agreement to become effective and be complied with, judicial approval is required.

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[100] *Idem*, art 318.
[101] *Idem*, art 319 however provides that in the case of related insolvency proceedings, the proposal submitted by one of the insolvent parties may be conditioned on the effectiveness of an agreement with a specific content in one or more other insolvency proceedings.
[102] *Idem*, art 317.2.
[103] *Idem*, art 322.
[104] *Idem*, art 324 (in relation to arts 215 to 225).
[105] The alternative applicable to creditors who do not exercise their power of choice must be indicated in the insolvency plan.
[106] RIA, art 316.
[107] *Idem*, art 331.

*Presentation of the proposal*

The proposal may be presented both by the debtor and by creditors that represent at least 20% of the claims.[108] If no proposal is presented (or, despite having been presented, is not admitted for processing), the liquidation phase will be opened *ex officio*.[109]

*Evaluation of the proposal*

The judge must analyse whether the proposal or proposals presented comply with the statutory requirements and, consequently, admit or reject it. When the proposal foresees the transfer of productive units with the assumption by the acquirer of the commitment to continue with the activity, the prior hearing of the workers' representatives will be necessary. If the proposal is admitted, the judge will order that it be sent to the insolvency administration so that it may be evaluated within a non-extendable period of 10 days. The evaluation, which will refer to the content of the proposal in relation to the payment plan and, if applicable, the viability plan, must express the favourable or unfavourable judgment of the insolvency administrator.[110]

*Acceptance of the proposal by creditors*

The proposed plan must be accepted by creditors collectively by means of the system of adhesions. In the event of more than one proposal, creditors may adhere either to only one or to several (or even all) of them. In that case, each creditor may determine the order in which the adherence is to be computed. If a creditor fails to indicate said order, the legal order of verification of the proposals will apply. Creditors may oppose any proposal with the same requirements and within the same time limits as those established for adhesions.[111] However, subordinated creditors and persons especially related to the debtor who acquired their claim after the declaration of insolvency do not have the right to adhere.[112] With regard to the majorities required for the acceptance of the plan, the attribution of the right to join is a reflection of the ranking of claims.

Claims against the estate, which must be satisfied at their respective due dates at any stage of the proceedings, do not have this right. Subordinated creditors and persons especially related to the debtor who acquired their claims after the declaration of insolvency also do not have this right.[113] Privileged creditors hold a special position, traditionally labelled as the "right of abstention" and which precisely reflects the privilege that they enjoy: they are not affected by the plan and may immediately collect their claims unless they voluntarily decide to be bound by the plan by adhering thereto. However, even if they dissent, they can be subject to a cramdown by certain majorities of creditors of the same class.[114]

[108] *Idem*, art 315.1.
[109] *Idem*, art 340.
[110] *Idem*, art 348.
[111] *Idem*, art 351.2.
[112] *Idem*, art 352.
[113] *Idem*, art 352.1.
[114] *Idem*, art 397.

The majorities required for the approval of the plan depend on its content:

(a) if the proposal consists of the full payment of the ordinary claim with a waiting period of no more than three years or their immediate payment with a write-off of less than 20%, a simple majority will be sufficient (that is, that the claims of creditors who adhered to the plan are greater than the claims of creditors who have opposed it);[115]

(b) if the proposal contains (i) write-offs equal to or less than 50% of the claims, (ii) postponements (whether of principal or interest, or of any other amount owed) not exceeding five years, or (iii) debt-equity swaps, the adhesion of 50% of the ordinary claims will be required;[116] and

(c) when the proposed plan (or any of the alternatives that it contains) has other content, the approval of 65% of the ordinary claims will be required.[117]

For these purposes, the law considers that ordinary claims should be understood as the sum of the ordinary claims and the privileged claims (special or general) that adhered to the proposal.[118] If the proposal grants special treatment to certain claims or classes of claims, in addition to the corresponding majority, the adhesion of the claims not affected by the special treatment will be required.[119]

*Judicial approval of the reorganisation plan*

Once the proposal has been accepted by creditors, it must be submitted to the court for approval.[120] The court will *ex officio* reject the plan accepted by the creditors in case of infringement of the rules governing the content of the proposal or the approval procedure. The judge may never modify the content of the plan submitted for approval, although the judge may correct material or calculation errors and, when necessary, establish the correct interpretation of the clauses of the plan.[121]

The insolvency plan has effects from the date of its judicial approval.[122] From that moment (that is, from the effectiveness of the agreement) all the effects of the declaration of insolvency will cease and will be replaced by those that, if applicable, are established in the plan itself (for example regarding the debtor's powers of action and the rights of the creditors).[123] However, the duties of collaboration and information are maintained until the conclusion of the insolvency

[115] *Idem*, art 376.1.
[116] *Idem*, art 376.2.
[117] *Idem*, art 376.3.
[118] *Idem*, art 377.
[119] *Idem*, art 378.
[120] *Idem*, art 381.
[121] *Idem*, art 388.
[122] *Idem*, art 393 provides that unless the court, due to the content of the plan, agrees to totally or partially delay its the effectiveness until the date on which the approval becomes final.
[123] *Idem*, art 321 (in relation to art 394.1). See the judgments of the Spanish Supreme Court of 8 April 2016, 3 May and 25 September 2017.

proceedings,[124] since the insolvency proceedings will not end until the agreement has been fully complied with.[125] The agreement will be binding on the debtor and on the creditors affected even if, for any reason, they have not been recognised in the insolvency proceedings.[126]

Both the debtor, ordinary and subordinated creditors will be bound by the effects of the plan. The subordinated creditors will be affected by the same write-offs as ordinary creditors, but with a longer postponement, since the waiting periods of the subordinated creditors will be calculated differently.[127] Both ordinary and subordinated claims will be extinguished in the part affected by the write-offs and their enforceability will be postponed for the waiting period foreseen in the plan.[128] Creditors with privileged claims will only be bound by the content of the plan if they have authored the proposal or if they adhered thereto.[129] Dissenting privileged creditors may in any event be bound by the plan when the required majorities concur within each class.[130]

The insolvency plan does not affect the claims against the estate which are subsequent to the commencement of the insolvency proceedings and must be paid on their maturity. In contrast, the claims granted to the debtor in order to finance the viability plan are subject to the insolvency plan and bound by its content.[131]

### *6.2.11 The treatment of executory contracts*

#### *6.2.11.1 General rules*

As a general rule, the commencement of insolvency proceedings is not a cause for early termination of contracts.[132] This rule is also in accordance with the rule that expressly establishes the continuation of the business activity of the debtor despite said commencement.[133] In order for the insolvency proceedings not to interrupt the business activity of the debtor, it is necessary to maintain contracts (especially those that are necessary for, or related to, the business activity). The law highlights this functional link of the contracts to the activity when, in the event of the sale of the company within the insolvency proceedings, it foresees the subrogation of the acquirer

[124] *Idem*, art 135 (in relation to art 394.2).
[125] *Idem*, art 465-3.°.
[126] *Idem*, art 396.1.
[127] *Idem*, art 396.
[128] *Idem*, art 398.
[129] *Idem*, art 397.1.
[130] *Idem*, art 287 (in relation to art 397.2). Such majorities will have to be calculated within the same class of preferred creditors (whether they are labour, public, financial or other preferred creditors), and require 60%, in the case of a proposal consisting of the full payment of the claims within a term not exceeding three years or the immediate payment of overdue claims with a reduction of less than 20%; or contains reductions equal to or less than half of the amount of the credit and waivers, whether of principal, interest or any other amount owed, with a term not exceeding five years, or includes, in the case of creditors other than public or labour creditors, the conversion of debt into participating loans during the same term. When the plan has other content, the majority must be 75% of the amount of the privileged claims of the same class.
[131] *Idem*, art 332.2.
[132] *Idem*, art 156.
[133] *Idem*, art 111.

in the contracts related to the business activity without the need for the consent of the counterparty.[134]

Furthermore, in order to guarantee the effectiveness of this general principle of validity of contracts, the law provides for the ineffectiveness of any contractual clauses that establish (in favour of either of the contracting parties) the power to terminate the contract, entail the automatic termination of the contract for the sole reason of the commencement of insolvency proceedings, or the opening of the liquidation stage.[135]

However, given that the greatest conflicts arise in contracts with reciprocal obligations, when it comes to establishing the fate of the claims arising from the contract or the possibility of exercising the contractual powers of the parties, the rule differentiates according to whether the contract is pending performance only by one contracting party (either the debtor or the party *in bonis*) or by both contracting parties. In the case of contracts pending performance by only one of the parties (for example unilateral contracts, in which only one contracting party is obliged, or bilateral contracts when one party has fully performed its obligations and only the other party has pending performance, in whole or in part, of its obligations), the claim corresponding to the debtor will be included, as appropriate, in the assets or liabilities of the insolvency proceedings.[136] When the outstanding obligation is to be performed by the party *in bonis*, the corresponding claim in favour of the debtor will form part of the insolvent estate as an asset. In contrast, when the outstanding obligation is to be performed by the debtor, the corresponding claim will have to be recognised, classified and, if applicable, satisfied within the insolvency proceedings. If the contract is pending performance by both parties (for example, in the case of contracts with reciprocal obligations), the claims in favour of the party *in bonis* will benefit from a preferential treatment, as they will be classified as "claims against the estate" (*créditos contra la masa*) and paid with priority. However, the party *in bonis* may be sanctioned with the subordination of its claim in case such party repeatedly obstructs the performance of the contract.[137]

#### *6.2.11.2 Termination of executory contracts*

As explained above, after the commencement of insolvency proceedings the contract is still in force and both parties must perform the agreed obligations. However, there are two situations in which the contract can be terminated during the insolvency proceedings: the termination for non-compliance and the termination in the interest of the proceedings.

The termination for non-compliance is due to a breach of contract, although its application within the insolvency proceedings is subject to substantive and procedural specialties. From a substantive point of view, the law distinguishes between situations of default before and after the commencement of the proceedings. While the termination for a breach subsequent to the declaration of insolvency may be exercised in any event,[138] the termination for a breach prior to

[134] *Idem*, art 222.1.
[135] *Idem*, art 156.
[136] *Idem*, art 157.
[137] *Idem*, art 281.1-7.º.
[138] *Idem*, art 161. Also see the judgments of the Spanish Supreme Court of 9, 15, 16, 24 and 25 July 2013.

the declaration of insolvency may only be exercised if the contract is of successive tract (continual performance).[139] On the other hand, from a procedural point of view, the termination action must be brought before the insolvency court and will be substantiated within the insolvency proceedings. However, even in case of breach, the court, taking into account the interests of the insolvency proceedings, may prevent the termination and order that the contract is fully complied with, with the benefits due or to be performed by the debtor being charged to the estate (that is, as preferential claims).[140] This might be the case, for example, with essential contracts (such as those relating to the provision of water, electricity and communication services).

The termination in the interest of the proceedings can occur even if there is no cause for termination.[141] The debtor or the insolvency administration may request from the insolvency court the termination of any contract with reciprocal obligations when said termination is deemed necessary or convenient for the interest of the proceedings. The party *in bonis* will be heard in order to try and reach an agreement as to the termination and its effects. If no agreement is reached, the court will decide on the termination and also on the indemnifying consequences for the party *in bonis*, which will have the consideration of ordinary bankruptcy claims.

#### *6.2.11.3 The treatment of specific types of contracts*

*Employment contracts*

Once insolvency proceedings have been declared, collective labour measures aimed at the substantial modification of working conditions, transfer, dismissal, suspension of contracts or the reduction of working hours for economic, technical, organisational or production reasons must be processed in accordance with the special rules set forth in the Recast Insolvency Act. Labour legislation will apply only to the extent that the insolvency regulation does not contain any special provision.[142]

These special rules are completed with the effects on (i) the contracts of senior managers and officers, which give the insolvency administration, on its own initiative or at the request of the

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[139] *Idem*, art 160. Also see the judgment of the Spanish Supreme Court of 11 October 2011.

[140] *Idem*, art 164. Also see the judgments of the Spanish Supreme Court of 21 March 2012, 22 July 2014 and 24 February 2015.

[141] *Idem*, art 165.3.

[142] *Idem*, art 169. When the collective labour measures have already been initiated before the declaration of bankruptcy, the bankrupt employer must immediately inform the bankruptcy judge, with different situations arising: if in the three days following the communication an agreement has not been reached or the business decision has not been notified, the appearance of the entitled parties (bankrupt party, bankruptcy administration and workers through their legal representatives) will be requested in order to decide whether or not to continue with the processing of the collective measures in accordance with the special bankruptcy rules, maintaining the validity of the practical actions. If at the date of the declaration of insolvency an agreement has already been reached or the business decision has been notified, the insolvency administration will be responsible for the execution of the measures adopted; and if, at the date of the declaration of insolvency, the agreement or the business decision has been challenged before the labour courts, the procedure will continue in that jurisdiction until the corresponding resolution is final (*Idem*, art 170).

debtor, the power to terminate or suspend these contracts,[143] and (ii) collective bargaining agreements, which limit the possibility of modifying the employment conditions to those matters in which it is admissible under labour legislation (that in any case requires the agreement of the workers' representatives).[144]

*Contracts with public administrations*

Finally, administrative contracts between the debtor and public administrations will be governed by the provisions of their special legislation.[145] Consequently, in contrast to the general rules depicted above, the commencement of insolvency proceedings will be a cause for termination of the contracts between the debtor and the public sector.[146]

Despite this right to termination, the public administration (not the debtor) is allowed to continue with the contract "if reasons of public interest so advise, provided that the contractor provides sufficient additional guarantees for its performance".[147]

On another hand, the assignment of the contract to a third party is permitted, provided that the debtor meets certain requirements, without the need for a minimum performance or exploitation that is ordinarily requested for such assignment.[148]

### *6.2.12 Clawback provisions*

Clawback provisions are aimed at eliminating the detrimental effects of certain actions that the debtor carried out in the period between the beginning of the debtor's crisis and the date of the application for the commencement of the insolvency proceedings – two moments that do not usually coincide in time. Two different mechanisms may be exercised:

(a) general rescission actions that proceed in accordance with general law and are aimed at challenging the debtor's acts that took place prior to the date of the declaration of bankruptcy, in accordance with the material or substantive requirements for the exercise of such actions (for example, actions of nullity, annulment, rescission or revocation provided for in civil law), although from a procedural perspective, these actions will be exercised before the insolvency court;[149] and

(b) the insolvency rescissory action (*acción rescisoria concursal*), a special technique which allows the avoidance of the operations that are detrimental to the insolvent estate when they have been carried out in the two years prior to the application for the commencement of the insolvency proceedings, even if there was no fraudulent intent.[150]

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[143] *Idem*, art 186.
[144] *Idem*, art 189.
[145] *Idem*, art 190.
[146] Public Procurement Act, art 211.1-b).
[147] *Idem*, art 212.5. See the judgments of the Spanish Supreme Court of 15 December 2016 and 9 May 2017.
[148] *Idem*, art 214.2-b).
[149] RIA, art 238.
[150] *Idem*, art 226.

The insolvency rescissory action will therefore proceed irrespective of whether the debtor was insolvent or not when the transaction to be set aside (voided) was conducted. The intention of the debtor and its counterparty in carrying out the act is also irrelevant. For the insolvency rescission action to succeed, only two elements need to be proved: (i) that the act or contract was performed within the two years immediately prior to the application for the commencement of insolvency proceedings, and (ii) that damage was caused to the insolvent estate. The Spanish Supreme Court has defined said damage as "an unjustified patrimonial sacrifice from the perspective of the expectations of collection of the insolvency creditors."[151]

The law has tried to facilitate the proof of the damage by means of two types of presumptions, namely:

(a) non-rebuttable presumptions for those cases in which the existence of an economic harm is inherent to the operation (for example, donations or payments of claims whose maturity had not yet been reached); and

(b) rebuttable presumptions, according to which the damage is presumed unless proven otherwise (for instance, all the operations in which the counterparties are especially related to the debtor,[152] or the creation of security interests in favour of pre-existing obligations).[153]

If the facts do not fall within any of the presumptions, then the damage will need specific proof.[154]

There are several categories of operations that can however not be subject to the insolvency rescissory action, namely:[155]

(a) ordinary operations of the business activity of the debtor, provided that they were carried out under normal conditions;

(b) guarantees constituted in favour of public claims;

(c) payment, clearing and settlement operations for securities and derivative instruments;

(d) resolution measures of credit institutions and investment services companies; and

(e) restructuring plans and their implementation acts, provided that they are homologated by the court and meet certain legal requirements.[156]

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[151] See the judgments of the Spanish Supreme Court of 16 September and 27 October 2010, 12 April and 8 November 2012, 5 April 2016, 6 and 7 March, 11 and 26 April and 10, 18, 21, 24 and 30 May, and 21 June 2018.
[152] RIA, art 228-1.º (in relation to arts 282 and 283).
[153] *Idem*, art 228-2.º.
[154] *Idem*, art 229.
[155] *Idem*, art 230.
[156] See para 6.2.16 below.

A special insolvency rescission regime is foreseen with respect to financial securities[157] and netting agreements,[158] which may only be voided when they have been made "to the detriment of creditors", a formula that must be considered equivalent to that of "detriment to the insolvent estate". The special legislation on the mortgage market goes even further and establishes that mortgages can only be voided in the evet of fraud.[159]

Both the insolvency rescission action and the other actions challenging the debtor's operations must be brought before the insolvency court. The legal standing for the exercise of both actions is attributed to the insolvency administration.[160] These actions may however be subsidiarily exercised by creditors.[161]

### *6.2.13 Discharge provisions*

If the insolvency proceedings conclude due to the (i) revocation of the declaration, (ii) full compliance with the insolvency plan, (iii) full payment of all the claims, (iv) insolvent party's solvency or (v) withdrawal or waiver of all the creditors; the purpose of the insolvency proceeding will have been fulfilled. In contrast, if the proceedings end by liquidation (without full payment of the claims) or due to the insufficiency of the insolvent estate to cover the costs of the proceedings, the fate of unpaid claims will depend on the debtor:

(a) if the debtor is a corporation, the conclusion of the insolvency proceedings will determine the extinction and cancellation of the unpaid claims,[162] without prejudice to the eventual reopening of the insolvency proceeding if new assets are found;[163] or

(b) in contrast, if the debtor is an individual, the general rules determine that the debtor will continue to be liable for the unsatisfied claims.

However, the regulation contemplates the possibility for the debtor as an individual to be released from unpaid claims through the exoneration of unsatisfied liabilities (*exoneración del pasivo insatisfecho*, EPI).[164]

Following the latest reform, the Spanish legal system has adopted a system of debt-discharge in which any natural person, whether an entrepreneur or not and as long as they meet the standard of good faith on which this system is based, can exonerate all their debts (except those which are considered legally non-exonerable due to being exceptional and due to their special nature).

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[157] Royal Decree-Law 5/2005, of 11 March, on urgent reforms to boost productivity and improve public procurement, art 15.5.
[158] *Idem*, art 16.3.
[159] Mortgage Market Act, art 10.
[160] RIA, art 231.
[161] *Idem*, art 232. Provided that they had previously written to the insolvency administration requesting the exercise of any action.
[162] *Idem*, art 485.
[163] *Idem*, arts 503 *et seq*.
[164] *Idem*, arts 486 *et seq*.

Discharge mechanisms are only offered to debtors who have been declared bankrupt. On the other hand, in order to benefit from the exoneration, the debtor is not required to have unsuccessfully attempted a pre-insolvency solution, as this could result in unjustified discrimination between different types of debtors and, furthermore, it does not seem to benefit either the debtor, his creditors or the economy in general if the debtor proposes a pre-insolvency solution in those cases in which he is completely convinced of the impossibility of reaching an agreement with a sufficient majority of his creditors. In short, natural persons who are in actual or imminent insolvency must resort to insolvency proceedings in order to benefit from the exoneration, but without the need to waste time or incur the cost of attempting a pre-insolvency solution in whose success they do not have confidence.

The general rule is that any natural person (whether an entrepreneur or not) may apply for debt exoneration provided that this natural person is a debtor in good faith.[165] In line with the recommendations of international organisations, the existence of good faith is determined by reference to certain objective conducts that are listed exhaustively. Thus, the debtor will not be able to obtain the exoneration of unsatisfied liabilities if:[166]

- in the 10 years prior to the application for discharge, the debtor has been sentenced by final judgment to imprisonment for crimes against property, against the socio-economic order, false documentation, against the Treasury and Social Security or against workers' rights; all provided that the sentence for the crime is equal to or greater than three years (unless, on the date of submission of the application for discharge, the criminal liability had been extinguished and the criminal record expunged);

- in the 10 years prior to the application for exoneration, the debtor has been sanctioned by a final administrative decision for very serious tax, social security or social order offences (unless, on the date of submission of the application for exoneration, their liability has been fully paid);

- the insolvency proceedings have been declared guilty;[167]

- in the 10 years prior to the application for exoneration, the debtor has been declared an affected person in guilty insolvency proceedings of a third party (unless on the date of submission of the application for exoneration the debtor had fully satisfied his liability);

- the debtor failed to comply with the duty to co-operate with and provide information to the insolvency judge and the insolvency administration; and

- the debtor has provided false or misleading information or behaved recklessly or negligently when contracting debt or discharging their obligations, even if this has not led to the qualification of the insolvency as guilty. In order to determine the existence of this

[165] *Idem*, art 486.
[166] *Idem*, art 487.
[167] However, if the insolvency proceedings have been declared guilty solely because the debtor failed to comply with the duty to timely apply for the declaration of insolvency proceedings, the court may take into account the circumstances in which the delay occurred.

circumstance, the judge must assess: (a) the financial information provided by the debtor to the creditor prior to the granting of the loan for the purposes of assessing his solvency, (b) the debtor's social and professional level (c,) the personal circumstances of the over-indebtedness, and (d) in the case of entrepreneurs, whether the debtor used early warning tools made available to him by the State.

In addition to the above exceptions, the rule also provides for certain prohibitions in order to prevent debtors from resorting too frequently to the debt discharge mechanism.[168]

The discharge of unsatisfied liabilities extends to all unsatisfied debts, whether in bankruptcy or against the assets. However, a number of notable exceptions are provided for.[169] These exceptions are based, in some cases, on the special relevance of their satisfaction (such as claims for alimony, public law claims (whose exoneration is subject to limits) and claims arising from criminal offences or claims due to non-contractual liability)). In other cases, the exception is justified by the synergies or negative externalities that could result from the exoneration of certain types of debts: the exoneration of claims for legal costs or expenses arising from the processing of the exoneration itself could discourage certain third parties from collaborating with the debtor in this objective (for example, lawyers). In the same way, the exoneration of debts with security interests would unjustifiably undermine one of the essential elements of access to credit and, therefore, of the proper functioning of modern economies.

The discharge does not affect the rights of creditors against guarantors, insurers, non-debtor mortgagors or those who, by legal or contractual provision, are obliged to satisfy all or part of the discharged debt, who may not invoke in their advantage the discharge of the unsatisfied debt obtained by the debtor.[170]

There are two types of exoneration:

- exoneration with a payment plan;[171] and
- exoneration with the liquidation of the debtor's assets.[172]

These two modalities are interchangeable, in the sense that the debtor who has obtained a provisional discharge with a payment plan may at any time withdraw therefrom and apply for a discharge with the liquidation of his assets.[173]

### *6.2.14 Alternatives to formal bankruptcy*

The Spanish insolvency system envisages two autonomous but functionally linked alternatives to formal bankruptcy (commonly known as pre-insolvency mechanisms or *preconcurso*): (i) the communication of the opening of negotiations with creditors (which, among other effects,

[168] RIA, art 488.
[169] *Idem*, art 489.1.
[170] *Idem*, art 492.1.
[171] *Idem*, arts 495 to 500 *bis*.
[172] *Idem*, art 501 to 502.
[173] *Idem*, art 500 *bis*.

triggers a moratorium or stay)[174] and (ii) restructuring plans.[175] Although the purpose of the communication is to facilitate the negotiation and adoption of a restructuring plan by temporarily suspending individual enforcements, both alternatives are independent: a restructuring plan can be approved and confirmed by the court judicial without the prior communication of the opening of negotiations with creditors and *vice versa*.

Both the communication of the opening of negotiations with creditors and the restructuring plans share subjective and objective requirements:

- Subjectively, any person, whether natural or legal, carrying on a business or professional activity can resort to pre-insolvency proceedings.[176] Since the purpose of pre-insolvency proceedings is the rescue of viable businesses, its use is restricted to those who carry out a business or professional activity (irrespective of whether they are natural or legal persons). Financial companies (insurance companies, credit institutions, investment services companies, central counterparty or central depository institutions), public bodies and microenterprises are excluded from the scope of application of these pre-insolvency mechanisms; and

- Objectively, pre-insolvency proceedings can be used whenever the debtor is in a state of probable insolvency, imminent insolvency or current insolvency.[177] These three states are ordered sequentially: the probability of insolvency is a state prior to imminent insolvency and imminent insolvency is a state prior to current insolvency. A debtor who is in a state of probable insolvency cannot apply for the commencement of insolvency proceedings (*concurso de acreedores*) but can make use of the mechanisms that make up pre-insolvency law. Conversely, the restructuring of companies that are insolvent can only be performed provided that an application for insolvency proceedings has not yet been admitted for processing, as said admission precludes the recourse to pre-insolvency proceedings. The probability of insolvency occurs "[...] when it is objectively foreseeable that, if a restructuring plan is not reached, the debtor will not be able to regularly meet its obligations falling due in the next two years".[178] Regarding the transit to the following stage (imminent insolvency), a debtor becomes imminently insolvent when it is expected that it will not be able to regularly meet its maturing obligations within the next three months.

#### *6.2.14.1 Communication of the opening of negotiations with creditors*

When a debtor is close to insolvency, each individual creditor has an incentive to enforce his claim on the debtor's assets before the others do. And if, as is usually the case, the individual enforcements fall on assets that are necessary for the continuation of the debtor's business or

[174] *Idem*, arts 585 to 613. The explanations provided here mostly follow F Garcimartín, *El derecho preconcursal. La comunicación de apertura de negociaciones* in A Menéndez and Á Rojo (eds), *Lecciones de Derecho Mercantil*, vol II (20th ed, Cizur Menor (Navarra), Thomson Reuters – Aranzadi, 2022).

[175] RIA, arts 614 to 671. The explanations provided here mostly follow F Garcimartín, *El derecho preconcursal. La comunicación de apertura de negociaciones* in A Menéndez and Á Rojo (eds), *Lecciones de Derecho Mercantil*, vol II (20th ed, Cizur Menor (Navarra), Thomson Reuters – Aranzadi, 2022).

[176] RIA, art 583.

[177] *Idem*, art 584.1.

[178] *Idem*, art 584.2.

professional activity, this competition to be first can lead to insolvency to the detriment of the common or collective interest of all the creditors. The purpose of the communication is to avoid this type of behaviour, and thus allow for the peaceful negotiation and approval of a restructuring plan.

*Filing of the communication*

The purpose of the communication is to inform the competent court that the debtor has started, or intends to start, immediate negotiations with its creditors in order to reach a restructuring plan that will enable it to solve its financial problems and continue its business activity.

The communication must be submitted by the debtor, not by the creditors. If the debtor is a legal entity, the competence to do so lies with its administrative body. The option of filing a joint communication is also provided for, especially in the event that it covers several companies within a group, which makes perfect sense as it is foreseeable that the negotiations will also be carried out jointly for all of them.[179]

Once the communication has been filed, its effects are automatic and judicial control is limited to two aspects: its formal content (in particular the annexed information)[180] and the jurisdiction of the court before which it has been filed. In this regard, the jurisdiction to receive the communication corresponds to the court that would have been competent to open the insolvency proceedings.[181] The communication is published in the Public Register of Insolvency (*Registro Público Concursal*), although in order to avoid the reputational damage that this could have for the debtor and its business, the debtor may request that the communication be kept "reserved".

*Effects*

The communication does not limit or restrict the debtor's powers of administration and disposal of its assets.[182] In general, and in line with this principle of minimum intervention, in the pre-insolvency phase there is no suspension or intervention of any kind in respect of the debtor's powers to administer and dispose of its assets and rights, nor in respect of the functioning of the bodies of the debtor as a legal entity.

Regarding the effects of the communication on claims and contracts, neither does it entail the early maturity of claims nor the termination of executory contracts.[183] Moreover, the law renders ineffective any contractual clauses that may contradict the above (the so-called *ipso facto* clauses).

As far as collateral given by third parties is concerned, in principle the communication only protects the debtor and his assets, not third parties who may have guaranteed the debtor's

[179] *Idem*, art 587.
[180] *Idem*, art 586 and 588.
[181] *Idem*, art 585.1.
[182] *Idem*, art 594.1.
[183] *Idem*, art 595 and 597 to 598.

liabilities, for example, a guarantor or a non-debtor mortgagor. Therefore, the notice does not prevent a creditor who enjoys the guarantee of a third party from taking action against the latter to satisfy his claim.[184] That is to say, the communication, by itself, will not prevent the creditor who has personal or *in rem* security from a third party for the satisfaction of his claim from enforcing it if the secured claim has matured and is not satisfied. However, there is an exception to this general rule for groups of companies, as it is possible that, upon request from the debtor, the stay also applies to the personal or real guarantees provided by other companies of the same group, provided that the enforcement of the guarantee could precipitate the insolvency of the guaranteeing company and of the debtor, with the consequent frustration of the negotiations.[185]

Irrespective of the above, the main effect of the communication is the stay of enforcement actions over the assets of the debtor that are necessary for the continuation of his activities. This effect is automatic and it prevents both the commencement of new enforcement actions[186] and the continuation of those already commenced.[187] In principle, the stay of individual enforcement actions only applies to assets necessary for the continuation of the debtor's business or professional activity.

When the enforcement relates to collateral, a modification is introduced to the above-depicted regime.[188] If the collateral consists of non-necessary assets, then enforcement is not stopped under any circumstances. If, on the other hand, it consists of necessary assets, then enforcement may be commenced, but will be immediately suspended. The justification for this rule is that it allows the enforcing secured creditor to enjoy a separate right of enforcement in the event of subsequent insolvency proceedings and does little harm to the continuity of the debtor's activity since the enforcement is suspended.

Other important effects of the communication are that it suspends the debtor's duty to apply for insolvency[189] and it suspends the application for insolvency filed by creditors.[190] It also suspends the duty to promote the dissolution of the company due to qualified losses.[191]

The effects of the communication last for a period of three months,[192] although it is possible to request an extension for three more months.[193] Such an extension may be relevant in complex negotiations that involve many and heterogeneous creditors (and shareholders). However, the extension is not automatic, as it is not granted at the simple request of the debtor but must be requested with the support of creditors representing more than 50% of the liabilities that could be affected by the restructuring plan.

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184 *Idem*, art 596.1.
185 *Idem*, art 596.3.
186 *Idem*, art 600.
187 *Idem*, art 601.
188 *Idem*, art 603.1.
189 *Idem*, art 611, which grants the debtor an additional month in addition to the three months to file the application if negotiations have failed and the debtor is in a situation of actual insolvency.
190 *Idem*, art 610.
191 *Idem*, art 613.
192 *Idem*, art 600.
193 *Idem*, art 607.

*6.2.14.2 Restructuring plans*

*General considerations*

Following the EU Directive 2019/1023 on preventive restructuring frameworks,[194] the Recast Insolvency Act uses the term "restructuring plans" instead of "refinancing agreements" or "out-of-court payment agreements" (which were the terms used prior to the transposition of the Directive). The term "restructuring plans" expresses better the current model, as restructuring is no longer necessarily the result of an agreement between the debtor and the creditors, but rather the result of a collective negotiation and decision-making process, based on the majority rule, whose content may be agreed by a single class of creditors and imposed on the others, including the debtor's shareholders.

Restructuring plans can have diverse contents and include virtually any measures affecting both liabilities and assets, and can even include the sale of parts or even the whole company (so-called liquidation plans).[195]

The process devised by the Spanish legislator can be divided into four stages:

- firstly, the identification of the claims that are going to be affected by the restructuring plan (the so-called restructuring perimeter);
- secondly, the division of the aforementioned claims into classes according to their rank and nature;
- thirdly, the voting of the plan within each class; and
- finally, provided that the necessary majorities have been reached, the request for the judicial homologation of the plan.

It is important to note that, once the plan has been voted on within each class, two scenarios can be distinguished, namely that the plan has:

- obtained the necessary majorities in each and every class (that is to say, that all classes agree with the proposal) (consensual plans); or
- not obtained the necessary majorities in each and every class, in other words that one or more classes have voted against the plan (non-consensual plans).

The conditions for the judicial homologation of the plan are different in each of these scenarios.

[194] 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).

[195] RIA, art 614.

*Affected claims*

Affected claims are those which, in accordance with the plan, are to undergo a change in their terms or conditions, irrespective of whether their actual value is also altered (that is, even if the net present value of the new claim or instrument that the creditor is to receive as a result of the restructuring plan is the same as that of the original claim).

In principle, the procedure is potentially universal: all claims can be affected by the plan. The only exceptions to this principle of universality of the liabilities that can be affected are labour claims, alimony claims and non-contractual claims.[196] Public claims can be affected, but only by means of the postponement of their maturity date and provided that the debtor is up to date with his obligations to the Treasury and the Social Security.[197]

However, this universality (unlike what happens in insolvency proceedings) is merely potential. All claims can be affected by the plan, but no "perimeter of affectation" is legally required or imposed. In other words, it is not required that all the credits susceptible of being affected be affected, nor that a specific volume be affected. It is therefore a "selective restructuring model": it is the interested parties who, depending on the needs of each case and the negotiating dynamics, must decide the "restructuring perimeter".

*Executory Contracts*

The preservation of contractual relationships is often fundamental for the continuity of the business. For this reason, executory contracts follow the same regime envisaged for the communication of the negotiations with creditors: the restructuring plan will not affect executory contracts. Any contractual clauses that provide for their termination by the mere approval of a plan or circumstances directly related to it (the so-called *ipso facto* clauses) are declared ineffective.[198]

Similar to what happens in insolvency proceedings (where executory contracts can be terminated in the interest of the proceedings), the plan may envisage the termination of executory contracts "in the interest of the restructuring". This possibility affects any contract with pending reciprocal obligations, including derivative contracts and senior management contracts,[199] and may entail some relief for the debtor regarding contracts whose performance is particularly burdensome (in the sense that they could jeopardise the successful completion of the restructuring and end up leading to insolvency proceedings). In any case, the counterparty will be entitled to compensation for the damage caused by the termination, although said compensation may be affected by the plan.[200]

[196] *Idem*, art 616.2.
[197] *Idem*, arts 616.2 and 616 *bis*.
[198] *Idem*, art 618.1.
[199] *Idem*, art 620.
[200] *Idem*, art 620.1-4.

*Class formation*

The affected claims ought to be divided into classes in order to proceed with the approval of the plan.[201] This division seeks to ensure the proper functioning of the majority rule, which requires a certain homogeneity or community of interests within each class in order to legitimise its application as a decision-making mechanism and the consequent reduction of judicial control.

The Recast Insolvency Act includes certain guidelines or criteria for the formation of classes:

(a) A general clause (taken from the European Directive), according to which the formation of classes must take into account the existence of a common interest determined with objective criteria among the corresponding creditors.[202] This idea of a "community of interests" is determined according to objective parameters is the general principle.

(b) On this basis, the law states that the main criterion for class-formation must be the insolvency rank: claims with different insolvency ranks must be separated into different classes.[203]

(c) In addition, it is possible for claims of the same rank to be separated into different classes when sufficient reasons justify it.[204] The law points out some of the criteria on which this justification may be based: the financial or non-financial nature of the claims;[205] the way in which they are going to be affected by the plan; and in particular that the creditors are small or medium-sized companies that may be particularly harmed by the restructuring plan. Secured claims can also be divided in different classes on the basis of the heterogeneity of the collateral.[206]

The correct formation of the classes can either be controlled *ex post* (at the stage of the judicial approval of the plan) or prior to such approval, provided that the debtor or a majority of creditors representing at least 50% of the liabilities to be affected request so.[207]

*Approval of the plan by the creditors and the shareholders*

Once the classes of creditors have been formed, the plan shall be subject to approval by each class. Unlike what happens in other legal systems, the Spanish pre-insolvency regime does not

[201] *Idem*, art 622.
[202] *Idem*, art 623.1.
[203] *Idem*, art 623.2.
[204] *Idem*, art 623.3.
[205] A fairly extensive list of what is to be understood as financial liabilities is included, combining two criteria: the cause of the debt (financing) or its ownership (financial institution). RIA, art 623.4.
[206] RIA, art 624.
[207] *Idem*, arts 625 and 626. This option could be useful for cases in which, during the negotiation phase of the plan, a specific disparity of criteria arises between the parties regarding the classes that are to be formed and it is preferable to clear up the doubts without the need to wait until the end of the whole process, with the risk that this entails. The advantage, if this remedy is used, is that the formation of classes can no longer be a reason for challenging or opposing the plan at the homologation stage. RIA, art 626.4.

envisage any formal or regulated procedure as to how the vote on the plan should proceed. Consequently, the procedure will normally be organised and conducted by the debtor.

The plan will be approved by each class of creditors when it has been accepted by the required majority. This majority varies depending on whether the claims are secured or unsecured. In the latter case, the plan will be deemed approved if more than 66.6% of the claims included in that class vote in favour.[208] The majority is increased to 75% for secured claims.[209] The approval of the plan being an informal procedure (with no external supervision or control over the information given to creditors, the period granted to vote or the manner of doing so), the aforementioned majorities are calculated over the total claims included in each class, and not over the actual votes.

Regarding the approval of the plan by the shareholders, the law allows them to vote on the restructuring plan in accordance with corporate rules,[210] but with certain procedural specialities meant to facilitate the approval of the plan, mainly in terms of announcement, agenda or required majorities of the shareholders' meeting.[211]

Once the plan has been voted by each class of claims (and, where applicable, by the shareholders' meeting of the debtor company), two scenarios arise:

- it may happen, on the one hand, that the plan has been voted upon favourably by the necessary majorities in all classes of claims (and, where applicable, by the shareholders' meeting). The approved plan will be labeled as a consensual plan; or

- on the contrary, it is also possible that the plan has not obtained the necessary majorities in one or more classes (and, where applicable, in the shareholders' meeting). The plan will be then labeled as a non-consensual plan.

The conditions that must be met in each case in order to obtain the judicial homologation of the plan (and thus extend its effects to dissenting creditors within each class or to entire classes) are different.

*Consensual plans*

In consensual plans, the extension of the effects of the plan to dissenting (or simply passive, non-voting) creditors within each class is a pure "horizontal" cram-down, by virtue of which the majority of each class imposes the plan on the minority. The conditions that must be met for the judicial homologation of the consensual plan (and thus for the effectiveness of this horizontal cram-down) are the following:[212]

[208] *Idem*, art. 629.1.
[209] *Idem*, art 629.2.
[210] *Idem*, art 631. 1.
[211] *Idem*, art 631.2. Specifically, any quorums or reinforced majorities provided for in the company's bylaws are ineffective when it comes to the approval of a restructuring plan.
[212] *Idem*, art 638.

(a) the debtor is either likely to become insolvent, imminently or currently insolvent, and the plan offers a reasonable prospect of avoiding insolvency and ensuring the viability of the company in the short and medium term;

(b) the legal requirements of minimum content and form of the plan;[213]

(c) the rules on class formation and necessary majorities;

(d) all claims within the same class receive equal treatment;

(e) the plan has been notified to all affected creditors;[214] and

(f) the plan respects the minimum economic value of the rights of the dissenting creditors. This minimum economic content is broken down into three aspects: (i) the sacrifice of their claims must not be manifestly disproportionate to what is necessary to ensure the viability of the company,[215] (ii) creditors within each class must receive equal treatment, and (iii) the plan must pass the "best interest of creditors" test.[216]

Regarding the extension of the plan to minority shareholders, if the shareholders' meeting decision is favourable to the plan, its imposition on dissenting minority shareholders is understood to be based on corporate law rules.

*Non-consensual plans*

Under additional conditions, the judicial homologation and extension of the effects of a restructuring plan that has not been approved by all classes of creditors (and, where applicable, by the shareholders of the corporate debtor) is also possible. This is labeled as "cross-class cram-down" and colloquially as "vertical cram-down".

Except for the requirement of their approval by all classes, non-consensual plans must meet the general conditions depicted in the previous section (a situation of insolvency must concur, the plan must offer a reasonable prospect of avoiding insolvency and ensuring business viability, it must contain the minimum legal content, all affected creditors must have been notified, the classes must have been correctly formed, the claims within the same class must be treated equally and the plan must pass the "best interest of creditors" test).

The fundamental difference is that non-consensual restructuring plans can be judicially homologated even against the will of one or more classes. In this regard, it is sufficient that the plan has been approved by a simple majority of classes, at least one of which being a class of privileged claims. If such a majority is not achieved, it would then suffice that one class has voted in favour, provided that it is a class that would receive any payment, in accordance with the

[213] *Idem*, arts 633 and 634.
[214] *Idem*, art 627.
[215] *Idem*, art 654.5.
[216] *Idem*, art 654.6.

bankruptcy ranks, taking into account the value of the debtor as a going concern.[217] That is to say, the plan must have been approved by at least one class of affected creditors which is "in the money".

In addition, in non-consensual plans the so-called absolute priority rule must be respected.[218] This rule has a dual content, expressed in the principle that "no one may collect more than what is owed to him, nor less than what he deserves". This means that no class of affected creditors:

- should receive, as a result of the implementation of the restructuring plan, rights or shares with a net present value higher than the amount of their claims; and

- is to receive under the restructuring plan, "less than what it deserves". This requirement has a two-fold dimension. On the one hand, no dissenting class should be treated less favourably than any other class of the same rank (including, in principle, those that are not affected). On the other hand, no dissenting class should receive, as a result of the restructuring plan, claims, shares or participations with a present value lower than the amount of its claims if a lower ranking class is receiving any payment under the plan.

However, the Recast Insolvency Act has introduced a modification to mitigate the rigidity of the absolute priority rule, as it envisages that some value may be reserved to one or more lower ranking classes of claims, or even to the shareholders, if this is "indispensable to ensure the viability of the company" and does not unreasonably prejudice the rights of the affected classes of creditors who have voted against the plan.[219] This exception to the absolute priority rule is meant to keep shareholders in the company in case their intangible contributions prove valuable, or to maintain certain contracts for the supply of goods or services that are indispensable for the company's viability. In the case of a small company, the plan cannot be imposed against the will of the debtor and its shareholders.

Non-consensual plans can also be imposed on the shareholders of the debtor company. However, for this to happen, the insolvency must be actual or imminent: the mere likelihood of insolvency is not sufficient to impose the plan against the will of the shareholders. Moreover, under no circumstances can the plan be imposed: (i) on the debtor as a natural person, (ii) against the will of the shareholders legally liable for the company's debts,[220] or (iii) on small companies.[221]

*Judicial homologation*

The judicial homologation of the plan will be necessary for the: (i) extension of its effects to dissenting creditors or classes of creditors or to shareholders, (ii) obtention of a special protection in subsequent insolvency proceedings (in particular in terms of collection preferences for new financing or interim financing or against avoidance actions), and (iii)

[217] *Idem*, art 639.
[218] *Idem*, art 655.2.4.
[219] *Idem*, art 655.3.
[220] *Idem*, art 640.
[221] *Idem*, art 684.2.

termination of executory contracts in the interest of the restructuring against the will of the counterparty.[222]

The homologation procedure responds to the principle of minimum judicial intervention and tries to be as agile and abbreviated as possible. The regime of application and admission to proceedings is quite similar to the one established for the communication of the opening of negotiations with creditors.[223] However, unlike the latter, the application for the homologation of the plan may be made by any affected creditor who has voted in favour thereof,[224] and the application for the judicial homologation entails the suspension of any enforcement action over the debtor's assets, without distinguishing between necessary and non-necessary for the continuation of the business.[225]

The judicial control over the application for homologation is very limited. Unless it is clear that the plan does not meet the legal requirements, the court decision will be favourable to the homologation.

*Protection and privileges in the event of bankruptcy*

It is possible that, despite the plan, the debtor ends up in bankruptcy proceedings and that the "new financing" awarded in the context of the restructuring plan ends up benefiting previous creditors. In order to avoid this situation and protect creditors who have assumed the risk of refinancing the business at its most delicate moment, a double protection is established:

- on the one hand, protection is granted to the operations envisaged in the restructuring plan against avoidance actions; and

- on the other hand, certain privileges are granted to the financing that was granted in order to allow for the negotiation and implementation of the plan.

This legal protection is subject to two conditions: (i) the plan having been judicially homologated and (ii) a certain proportion of affected claims.[226] If these conditions are met, interim financing (awarded for the negotiation of the plan), and new financing (awarded for the implementation of the plan) are protected from avoidance actions and also enjoy a collection preference in the event of subsequent insolvency proceedings.[227]

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[222] *Idem*, art 635.
[223] See *supra*.
[224] RIA, art 643.
[225] *Idem*, art 644.1 *in fine*.
[226] *Idem*, art 671.1 and 2.
[227] Specifically, the claims arising from the new financing and the interim financing recognised in the restructuring plan will be classified as a claim against the insolvency estate for 50% and as a claim with general privilege for the other 50%. RIA, arts 242 and 280.

*The restructuring expert*

The Directive on preventive restructuring frameworks requires the compulsory appointment of a restructuring expert in certain cases. The Spanish legislator has chosen not to go beyond the minimum requirements set forth in the Directive. The regulation is rather sparse: in fact, the Recast Insolvency Act merely establishes: (i) the rules for the appointment of the expert (specifically, the cases in which this appointment is necessary),[228] (ii) who is entitled to request said appointment, and (iii) the required qualifications, incompatibilities and prohibitions to occupy this position.[229]

The design of this figure, within the different models allowed by the Directive, is closer to the figure of a mediator who facilitates the negotiation between the parties, helps debtors with little experience or knowledge in restructuring, and eventually facilitates judicial decisions when a dispute arises between the parties. Its most relevant material function is perhaps the responsibility to prepare a report on the going concern value of the company in case of non-consensual plans. The restructuring expert never intervenes or supervises the debtor's powers of administration and disposal of assets.

### *6.2.15 Liability of directors / officers*

#### *6.2.15.1 The qualification of the insolvency as guilty*

The law provides that an insolvency may be qualified as fortuitous or guilty, although it only sets forth the conditions to occur for the latter.

According to the general clause, the insolvency will be guilty in case of fraud or gross negligence in the generation or aggravation of the state of insolvency. The misconduct may be of the debtor or its legal representatives, and, in the case of a legal entity, of its directors. Therefore, two elements are required: an objective element (the generation or aggravation of the debtor's state of insolvency), and a subjective element (intent or gross negligence).

In order to ease the application of the general clause, the law establishes a system of presumptions.

*Non rebuttable presumptions*

The mere occurrence of any of these facts necessarily determines the qualification of the insolvency as guilty, as they satisfy both the objective and the subjective elements.[230] The facts are the following: (i) the subtraction of all or part of the debtor's assets to the detriment of its creditors or the performance of acts that delay, hinder or prevent the effectiveness of a seizure in any kind of enforcement procedure, (ii) the fraudulent exit of assets from the debtor's estate

[228] In relation to the need for the appointment of a restructuring expert, the general rule is that, apart from two exceptional cases, the appointment of the expert is not necessary unless the debtor or a majority of creditors request it.
[229] RIA, arts 672 to 678.
[230] *Idem*, art 443.

in the two years prior to the declaration of bankruptcy, (iii) the performance, prior to the date of the declaration of bankruptcy, of legal acts of simulation of a fictitious patrimonial situation, (iv) acts of falsehood or serious inaccuracy in any of the documents attached to the application for the declaration of bankruptcy or presented during the proceedings, (v) substantial non-compliance with accounting duties, the keeping of double accounts or the commission of an irregularity that is relevant to the understanding of the debtor's financial situation, and (vi) the fact that the opening of the liquidation has been ordered ex officio by the judge in the event of non-compliance with the insolvency plan due to causes attributable to the debtor.

*Rebuttable presumptions*

These satisfy only the subjective element needed for the insolvency to be qualified as guilty (intent or gross negligence). The presumptions refer to non-compliance with legally imposed duties,[231] such as the duty to: (i) file for insolvency, (ii) collaborate with the court and the insolvency administration, (iii) provide the necessary or convenient information for the interest of the insolvency proceedings, (iv) attend (personally or by proxy) the creditors' meeting, and (v) prepare annual accounts, submit them to audit or deposit them in the Commercial Registry in any of the last three fiscal years prior to the commencement of insolvency proceedings.

### *6.2.15.2 Procedural aspects*

The qualification of the insolvency proceeding is destined to civilly sanction those conducts of the debtor (or its legal representatives or directors) that may have caused or aggravated the state of insolvency. The qualification of the insolvency only has civil effects, as it is independent of the criminal proceedings that may be instituted in respect of the same acts.[232]

The formation of the qualification section is necessary in every insolvency proceeding.[233] During the period provided for the communication of claims,[234] any creditor or third party may send by e-mail to the insolvency administration whatever it considers relevant to support the qualification of the insolvency proceedings as guilty (together with the pertinent documents).[235]

The insolvency administration is obliged to submit to the insolvency judge a reasoned and documented report on the facts it considers relevant and formulate a proposal for the qualification of the insolvency. When the insolvency administration proposes the qualification of the insolvency as:

- guilty, the report will have the structure of a statement of claim, identifying both the persons to be affected by the qualification and those considered accomplices, justifying the cause for the qualification, and the determination of the damages and losses that, where applicable, have been caused to the insolvency estate; and

[231] *Idem*, art 444.
[232] *Idem*, art 462.
[233] *Idem*, art 446.
[234] *Idem*, arts 28.1-4.° and 255.
[235] *Idem*, art 447.

- fortuitous and no creditor has submitted a qualification report, the judge will order the closure of the qualification section.[236]

Within a period of 10 days following the submission of the insolvency administrator's qualification report, the creditors who have made allegations for the qualification of insolvency as guilty and represent at least 5% of the liabilities or are holders of claims whose amount is greater than one million euros, may also submit a reasoned and documented report on the relevant facts for the qualification of the insolvency as guilty.[237]

*6.2.15.3 Effects of the qualification as guilty*

The effects of the guilty qualification of the insolvency fall, above all, on the debtor. However, when the debtor necessarily acts through other persons (legal representatives, administrators, liquidators, etcetera), the consequences of the qualification will fall on other persons, who will therefore be "affected by the qualification". In addition, some effects of the qualification will extend, if applicable, to third parties considered as accomplices, so the judgment must also declare which persons deserve this consideration. The concept of "persons affected by the qualification" does not coincide with that of "persons especially related to the insolvent party",[238] although it may well be the case that some parties meet this dual condition.

The qualification of a subject as an accomplice requires the concurrence of a double requirement, namely that the: (i) cooperation or collaboration in the performance of acts that are the basis for the qualification of the insolvency as guilty, and (ii) cooperation or collaboration was conducted with intent or gross negligence.[239] The independence of the qualification with respect to criminal law determines that the insolvency notion of complicity extends to conduct other than strict cooperation (that is, concealment). It is also possible for the conduct to merit the corresponding criminal reproach irrespective of the provisions of the insolvency rule. Thus, it may happen that, despite being classified as an accomplice within the insolvency proceedings, the third party is criminally convicted as the perpetrator.

The personal and patrimonial effects of the guilty insolvency are the following:

(a) the disqualification of the persons affected by the qualification to administer the assets of others for a period of two to 15 years, to represent any person during the same period, and to engage in commerce. However, the insolvency plan may exceptionally allow the disqualified person to continue at the head of the insolvent company.[240] The seriousness of the facts and the amount of the damage will be taken into account in order to determine the duration of the disqualification. The directors of the legal entity that are disqualified will cease to hold their positions and if the cessation prevents the functioning of the body, the

[236] *Idem*, art 450.6.
[237] *Idem*, art 449.
[238] *Idem*, arts 282 and 283.
[239] See the judgment of the Spanish Supreme Court of 27 January 2016.
[240] RIA, art 455.2-2.° *in fine*.

insolvency administration will call a meeting or assembly of partners for the appointment of their replacements;[241]

(b) the loss of any right that the persons affected by the qualification or accomplices may have as creditors;[242]

(c) the obligation to return the assets that the persons affected by the qualification or accomplices unduly obtained from the debtor's estate;[243]

(d) the obligation to compensate for the damages caused;[244] and

(e) if the insolvency proceedings end up in liquidation and are qualified as guilty, all or some of the persons affected by the qualification may be held liable to cover the deficit, totally or partially.[245] A deficit will exist when the value of the assets according to the inventory of the insolvency administration is lower than the sum of the claims recognised in the list of creditors.

The insolvency administration, the creditors who have submitted a qualification report and the persons who could be affected by the qualification may reach a settlement agreement in respect of the economic effects of the qualification. However, the effectiveness of this settlement depends on the approval of the insolvency judge.[246]

**Self-Assessment Exercise 3**

**Question 1**

Which are the three functions of insolvency proceedings under Spanish law? Are they equally relevant?

**Question 2**

Define the four types of insolvency that is relevant in the Spanish insolvency framework, and describe how they serve as thresholds for entering into the different proceedings.

**Question 3**

Are the plurality of creditors and the sufficiency of assets to cover the expenses of the proceedings requirements for their commencement?

[241] *Idem*, art 459.
[242] *Idem*, art 455.2-3.°.
[243] *Idem*, arts 455.2-4.°.
[244] *Idem*, arts 455.2-5.°. Also see the judgment of the Spanish Supreme Court of 6 March 2019.
[245] *Idem*, arts 456 and 702.
[246] *Idem*, art 451 *bis*.

**Question 4**

Please explain the differences between voluntary and necessary insolvency proceedings and how the legislator has tried to provide incentives for the former.

**Question 5**

Describe how the rules governing the remuneration of insolvency practitioners incentivise the fast resolution of the proceedings.

**Question 6**

Please explain on what grounds the scope of the limitation of the patrimonial faculties of the debtor depends.

**Question 7**

Explain the treatment of the so-called ipso facto clauses in executory contracts, both in insolvency and in pre-insolvency scenarios.

**Question 8**

Describe the different types of cram-down available in the Spanish pre-insolvency tools and the requirements that must be met for their effectiveness.

**Question 9**

Which creditors have the right not to adhere to a reorganisation plan?

**Question 10**

Do claims against the estate have a higher priority in the Spanish insolvency framework?

**For commentary and feedback on self-assessment exercise 3, please see APPENDIX A**

## 6.3 Corporate liquidation

### *6.3.1 Introduction*

No special regime for corporate insolvency exists in Spain. There is only one kind of insolvency proceeding (*concurso de acreedores*) and it is applicable to all debtors: natural as well as legal persons. Hence, for the most part reference can be made to the material covered under

paragraph 6.2. Under this paragraph 6.3, only aspects relating to corporate liquidation that were not covered above will be dealt with.

### *6.3.2 Commencement of proceedings*

As explained above (see *supra* paragraphs 6.2.1, 6.2.2 and 6.2.3), the opening of insolvency proceedings requires an application from either the debtor or a creditor. In the case of corporate insolvency, there is one exception to this general rule, as the commencement of the proceedings can also be requested by the debtor's shareholders, partners or other owners legally liable for the company's debts may also file for the insolvency of the company, and the same rules applicable to creditors concerning the petition and the effects of the declaration of insolvency apply to their petition.

In the case of legal entities, the decision to petition lies with the management. In the case of actual insolvency, a previous decision by the owners of the legal entity (meeting of shareholders or partners, etcetera) is unnecessary; a provision in the articles of association including the need for the management to obtain the owner's approval is ineffective; and an express decision by the owners prohibiting the management to file for insolvency of the insolvent entity does not waive the duty of the management, and the latter's petition will bind the debtor. The rule is different in case of imminent insolvency, where there is no duty to file (only the possibility). In this case, the general distribution of powers between the different organs of the entity, be it legal or derived from the articles of association, applies, and management may need to obtain the members' consent before filing. There is no legal provision that envisages a previous approval or even consultation with any body representative of the employees of the business.

### *6.3.3 Procedural aspects*

What is said above at paragraph 6.2.4 is equally applicable here.

### *6.3.4 The insolvency administration*

What is said above at paragraph 6.2.6 is equally applicable here.

### *6.3.5 The status of the debtor upon entering formal insolvency*

The commencement of insolvency proceedings over a legal entity does not determine its extinction and does not even require its dissolution and liquidation. Consequently, the insolvent legal entity will maintain the same organisational structure that it had before the commencement of the proceedings, irrespective of the effects that the intervention or the suspension of the exercise of the powers of administration and disposition of the assets may have on its functioning.[247]

[247] *Idem*, art 126. Also see the judgment of the Spanish Supreme Court of 24 April 2012.

When the insolvent debtor is a corporation, the limitations on the patrimonial faculties of the debtor will apply to its organs.[248] Naturally, the limitation of the patrimonial powers of the legal entity affects both the shareholders' meeting and the board of directors. Since the insolvency administration will have the right to attend and speak at the meetings of these bodies, it must be summoned in the same manner and with the same advance notice as the that of their members. The rule unnecessarily clarifies that the decisions with patrimonial content or direct relevance for the insolvency proceedings will not be effective without the authorisation or confirmation of the insolvency administration.[249]

On another hand, if the debtor is a corporation, the limitations on fundamental rights and freedoms may also apply to all or some of its administrators or liquidators.

With regard to operations with third parties, in case of intervention, the directors of the insolvent corporation maintain the powers of administration and disposition of the assets, although they will be subject to the authorisation of the insolvency administration. In case of suspension, the powers of administration and disposition will be assigned to the insolvency administration. The representation of the insolvent corporation within the insolvency proceedings will however correspond to its directors, even during the liquidation stage.[250]

On the other hand, the insolvency court may reduce the remuneration of the directors for their duties, in view of the content and complexity of their functions and the importance of the assets.[251]

The commencement of insolvency proceedings does not entail any modification to the rights and obligations of shareholders / partners. However, the legal standing for any actions that might proceed against them will correspond to the insolvency administration[252] and shall be exercised exclusively before the insolvency court.[253] Similarly, once the insolvency proceedings have been declared, only the insolvency administration can bring a liability action against the former or current directors for damages caused to the company.[254] Again, the action shall be exclusively brought before the insolvency court.[255]

Under Spanish law, the commencement of insolvency proceedings of a legal entity does not *per se* entail the commencement of insolvency proceedings over the partners who are personally, unlimitedly, jointly and severally liable for corporate debts. Insolvency proceedings over the partners will only proceed provided that they are indeed insolvent (the insolvency of the legal entity is not automatically extended to personally liable partners, unlike in other jurisdictions). However, during the insolvency proceedings only the insolvency administration will be entitled

[248] RIA, art 126.
[249] *Idem*, art 127.
[250] *Idem*, art 129.
[251] *Idem*, art 130.
[252] *Idem*, art 131.
[253] *Idem*, art 52-6.ª.
[254] *Idem*, art 132.
[255] *Idem*, arts 52-7.ª and 8.ª.

to bring the action against the partners who are personally liable for the debts of the company accrued prior to the declaration of insolvency.[256]

The law expressly envisages the possibility to adopt precautionary measures (such as the seizure of personal assets of the directors of the bankrupt company) in order to ensure that, were the insolvency to be qualified as guilty, the corresponding patrimonial effects (such as the obligation to cover the deficit) are adequately dealt with.[257]

As regard the continuation of the business activity of the debtor, what is said above at paragraph 6.2.7.4 is equally applicable here.

Finally, it should be borne in mind that the opening of the liquidation stage will necessarily entail the dissolution of the insolvent legal entity.[258]

### *6.3.6 The process for the proof of claims by creditors*

What is said above at paragraph 6.2.8 is equally applicable here.

### *6.3.7 Preferential and priority claims*

What is said above at paragraph 6.2.9 is equally applicable here.

### *6.3.8 Post-commencement finance*

What is said above at paragraph 6.2.10 is equally applicable here.

### *6.3.9 The treatment of executory contracts*

What is said above at paragraph 6.2.12 is equally applicable here.

### *6.3.10 Clawback provisions*

What is said above at paragraph 6.2.13 is equally applicable here.

### *6.3.11 Alternatives to formal bankruptcy*

What is said above at paragraph 6.2.16 is equally applicable here.

### *6.3.12 Liability of directors / officers*

What is said above at paragraph 6.2.17 is equally applicable here.

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[256] *Idem*, art 131.1.
[257] *Idem*, art 133.
[258] *Idem*, art 413.

### *6.3.13 Groups of companies*

The insolvency of several companies of the same group is subject to a voluntary special regime which consists of co-ordinated proceedings. In this sense, the different proceedings can be accumulated, either from their commencement (with the filing of a joint petition for insolvency)[259] or at a later stage.[260] The accumulation of the proceedings necessarily entails the concentration of judicial competences (that is, the same court will hold competence) but does not mean that the different insolvencies will be dealt with unitarily. The assets and liabilities of the different group members will remain separated, and each proceeding, despite being co-ordinated with the others, will follow its own path and can end differently (for example, the insolvency of the parent company may well end in a reorganisation, while the insolvencies of the subsidiaries can conclude with their winding-up).

Apart from the concentration of judicial competences (which is a necessary effect of the accumulation of the proceedings), the special regime foreseen for groups of companies also allows for the appointment of the same insolvency administrator to manage the different proceedings,[261] as well as for the co-ordination of the different insolvency plans approved within each proceeding.[262]

Although the mere co-ordination of the proceedings is the general rule, the law exceptionally envisages the substantive consolidation of the different debtor's assets and liabilities. The substantive consolidation can exclusively be ordered provided that the different estates are so intermingled that it is not possible to delimitate the correct owners of the assets and liabilities without incurring an unjustified delays or costs.[263]

Incidentally, pre-insolvency mechanisms can also be jointly used by different companies belonging to the same group (for instance, through the submission of a joint communication of the opening of negotiations with creditors or through the approval of a joint restructuring plan).

**Self-Assessment Exercise 4**

**Question 1**

Describe how group insolvencies are dealt with in the Spanish insolvency system.

**Question 2**

Please explain the main differences between the effects of the commencement of insolvency proceedings over natural persons and over corporations.

[259] *Idem*, arts 38 *et sub*.
[260] *Idem*, art 41.
[261] *Idem*, art 59.
[262] *Idem*, art 319.2.
[263] *Idem*, art 43.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

## 6.4 Receivership

Spanish law has no applicable provisions relating to receivership.

## 6.5 Corporate rescue

### *6.5.1 Introduction*

Spanish insolvency law contains no specialised procedures for corporate rescue. Instead, corporate rescue is achieved through the standard insolvency proceedings. Therefore, most of what has been described above (in paragraphs 6.2 and 6.3) regarding consumer bankruptcy and company liquidation also applies here. Under this heading, only aspects that directly relate to corporate rescue and which have not been covered in the previous paragraphs will be discussed. On this regard, corporate rescue in insolvency proceedings must be distinguished from pre-insolvency rescue through the alternatives depicted in paragraph 6.2.16 (which are available for entrepreneurs of all kinds, no matter whether they are natural persons or legal entities).

### *6.5.2 Informal creditor workouts*

There are no rules or regulations regarding informal creditor workouts in Spain.

### *6.5.3 Commencement of rescue proceedings*

The available avenues for entering insolvency proceedings have already been explained above under paragraphs 6.2.1, 6.2.2 and 6.2.3.

### *6.5.4 Mechanisms for conversion from corporate rescue to liquidation*

What is said above at paragraph 6.2.4 is equally applicable here. Both corporate rescue and liquidation can be achieved through standard insolvency proceedings. If the rescue is not successful, then the company is liquidated within the same proceeding.

### *6.5.5 The insolvency administration*

What is said above at paragraph 6.2.6 is equally applicable here.

### *6.5.6 The status of the debtor upon entering rescue insolvency proceedings*

As regard the continuation of the business activity of the debtor, what is said above at paragraphs 6.3.5 and 6.2.7.4 is equally applicable here.

### *6.5.7 The process for the proof of claims by creditors*

What is said above at paragraph 6.2.8 is equally applicable here.

### *6.5.8 Preferential and priority claims*

What is said above at paragraph 6.2.9 is equally applicable here.

### *6.5.9 Post-commencement finance*

What is said above at paragraph 6.2.10 is equally applicable here.

### *6.5.10 The insolvency plan (***convenio concursal***)*

It is relevant to note that an insolvency plan is also available in proceedings over the estate of a natural person. Therefore, what is said above at paragraph 6.2.11 is equally applicable here, taking into account that, if the debtor is a legal entity, the insolvency plan may also envisage mergers, spin-offs or the assignment of assets and liabilities.[264]

### *6.5.11 The treatment of executory contracts*

What is said above at paragraph 6.2.12 is equally applicable here.

### *6.5.12 Clawback provisions*

What is said above at paragraph 6.2.13 is equally applicable here.

### *6.5.13 Alternatives to formal bankruptcy*

What is said above at paragraph 6.2.16 is equally applicable here.

### *6.5.14 Liability of directors / officers*

What is said above at paragraph 6.2.17 is equally applicable here.

### *6.5.15 Groups of companies*

What is said above at paragraph 6.3.14 is equally applicable here.

[264] *Idem*, art 317.3.

## 6.6. The special procedure for microenterprises

### *6.6.1 Introduction*

The third book of the Recast Insolvency Act provides for a special procedure to resolve the crises of microenterprises.[265] The establishment of a special procedure is justified by the unique characteristics of microenterprises, which are the absolute majority and an essential part of the productive framework. Microenterprises are characterised by their high volatility and enormous turnover. Hence the importance of implementing a system that increases the possibilities of continuity for viable companies and offers effective and efficient exit instruments for companies that do not have added value, so that the resources used by these companies are freed up and can be allocated to more efficient uses.

The key features of the special procedure for microenterprises are the following:

- Firstly, the special procedure for microenterprises aims to reduce the costs of the procedure, eliminating all unnecessary formalities and reducing the participation of professionals and institutions to those cases in which they fulfil an essential function, or whose cost is voluntarily assumed by the parties.

- Secondly, a structural procedural simplification is articulated, based on the following essential pillars:[266] (a) the replacement of the traditional system of filing paper pleadings with the court by the delivery of standardised electronic forms, predetermined, accessible online, free of charge, and sent telematically (which means that the intervention of the lawyer and solicitor is not compulsory, except in relation to the debtor,[267] (b) the possibility of the special proceedings taking place in parallel (unlike insolvency proceedings, which take place in a linear manner with consecutive stages), (c) the provision for the intervention of the judge only in relation to the adoption of the most relevant decisions of the proceedings or when there is a contentious issue between the parties, (d) the resolution of incidents by a written procedure (with some exceptions), (e) the holding of virtual hearings by telematic means, when the oral participation of the parties or experts is necessary, (f) as a general rule, the holding of virtual hearings by telematic means, when the oral participation of the parties or of experts is necessary, (f) the possibility, as a general rule, and unless expressly provided otherwise, for the judge to orally give a decision at the end of the hearing, and (g) the fact that, unless expressly provided otherwise, no appeal may be lodged against orders and judgments issued in the special procedure.

- Thirdly, the special procedure for microenterprises stands out for its modular nature. Traditionally, insolvency law entails a number of automatic effects that have costs mainly for creditors. The special procedure allows the parties to request its application only if they so wish: this is the case, for example, with the stay of execution on secured assets and the appointment of professionals. Thus, the involvement of professionals (mediator, insolvency

[265] *Idem*, arts 685 to 720. A more detailed description of the special procedure can be found in M Flores, "El procedimiento de insolvencia especial para microempresas: una visión general", *Diario La Ley*, No 10169, 2022.
[266] RIA, art 687.
[267] *Idem*, art 687.6.

practitioner, restructuring expert, lawyer or solicitor) is required only for the performance of certain functions (such as, if legal advice on the qualification of the proceedings is required) or when requested by the parties and at their own expense.[268]

- Fourthly, the special procedure has a unitary nature: microenterprises do not have access to insolvency proceedings or restructuring plans (although the regulation of both institutions is supplementary applicable, with the necessary adaptations, to the special procedure.[269] Thus, the objective assumption of the special procedure is broad and its use is permitted when the microenterprise is likely to become insolvent (pre-bankruptcy situation), or there is imminent insolvency or current insolvency (bankruptcy situation). Individual entrepreneurs, in addition to having access to the special procedure (if they are microenterprises), can also have access to the second chance procedure.

- Finally, the procedure is essentially based on the proactivity of the parties. Thus, the adoption of specific measures or access to certain information must be requested by the interested parties, in order to avoid unnecessary costs.

### *6.6.2 Scope of application*

Subjectively, the special procedure for microenterprises is applicable to debtors who are natural or legal persons carrying out a business or professional activity and who meet the following characteristics,[270] namely having (i) employed an average of less than 10 employees during the year prior to the application, and (ii) an annual turnover of less than EUR 700,000 or liabilities of less than EUR 350,000 according to the last accounts closed in the financial year prior to the filing of the application. If the entity is part of a group, the criteria are computed on a consolidated basis.

Objectively, the special procedure is applicable to microenterprises that are in a state of probable insolvency, imminent insolvency or current insolvency.[271] Exceptionally, the special procedure of liquidation without transfer of the going concern requires the existence of actual or imminent insolvency, if requested by the debtor, or actual insolvency, if requested by parties other than the debtor.[272]

### *6.6.3 Modalities*

The special proceedings for microenterprises can be conducted as continuation proceedings or as winding-up proceedings. The applicant may elect which modality to make use of, with certain exceptions.[273] In the event that the applicant is a creditor or a partner, at the start of the proceedings the debtor has the power to modify the itinerary in the following terms: if a continuation proceeding was requested, the debtor may impose liquidation provided that it is

[268] *Idem*, arts 701 to 704 for continuation proceedings and arts 712 to 715 for liquidation proceedings.
[269] *Idem*, art 689.
[270] *Idem*, art 685.
[271] *Idem*, art 686.1.
[272] *Idem*, art 686.3.
[273] *Idem*, art 693.

in a situation of current insolvency;[274] and if winding-up proceedings were requested, the debtor may initiate continuation proceedings.[275] Moreover, once continuation proceedings have commenced, creditors whose claims represent more than half of the liabilities may, at any time and without further justification, force the conversion of the continuation proceedings into liquidation proceedings, provided that the debtor is insolvent at that moment.[276] Similarly, once the continuation proceedings have begun, creditors whose claims represent 25% of the liabilities may, at any time, request the conversion of a continuation proceeding into a liquidation proceeding, provided that, objectively, there is no possibility of the continuation of the activity in the short and medium term.[277] On another hand, if at least 75% of the claims correspond to public creditors, the special procedure can only be processed as a liquidation procedure.[278] Finally, only insolvent debtors can access the liquidation procedure, as corporate and commercial law already offers ways for the liquidation of solvent companies. In any case, individual entrepreneurs can access the second chance procedure from either of the two routes, either liquidation or continuation.

In turn, the liquidation procedure can be with or without transfer of the going concern.[279] Again, the applicant may choose between the two types of procedures, with the following exceptions: (i) liquidation without transfer of the going concern requires the existence of actual or imminent insolvency, if requested by the debtor, or actual insolvency, if requested by parties other than the debtor,[280] and (ii) it is understood that the liquidation proceedings are carried out without transfer of the going concern when so determined by the debtor in the application for the commencement of the liquidation, when this is apparent from the content of the liquidation plan or when so determined by the judge following the allegations made to the liquidation plan by the creditors.[281]

### *6.6.4 Continuation proceedings*

The continuation procedure for microenterprises allows the debtor and his creditors to reach an agreed solution to the insolvency, irrespective of the debtor's financial situation (that is, it is irrelevant whether the debtor is in actual or imminent insolvency or is likely to become insolvent). The initiative to submit the plan lies with both the debtor and the creditors, although the debtor's proposal takes precedence in the event that several proposals are submitted. The contents of the plan are very flexible, with the exception of certain measures that are forbidden only in relation to public law claims.[282]

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[274] *Idem*, art 691 *quinquies* 1-2.
[275] *Idem*, art 691 *quinquies* 1-3.
[276] *Idem*, art 693.2.
[277] *Idem*, art 693.3.
[278] *Idem*, art. 686.4.
[279] *Idem*, art 685.5.
[280] *Idem*, art 686. 3.
[281] *Idem*, art 694 ter.1.
[282] The plan may not include the following: (i) change of applicable law, (ii) change of debtor (without prejudice to a third party assuming the payment obligation without releasing that debtor), (iii) modification or extinction of the guarantees that they have, and (iv) conversion of the credit into shares or company shares, into a participative credit or loan or into an instrument with characteristics or rank different from those of the original one. The plan may also not include reductions or delays in respect of the percentages of the social security contributions payable

The procedure for approval, allegations and voting on the continuation plan is exclusively in writing.[283] This procedure merges two procedural steps that have traditionally been carried out separately and successively: the determination of the claims and the casting of the vote (and, therefore, the approval or rejection) of the plan. Once the plan has been submitted, the debtor, the creditors and the restructuring expert may raise objections to any element of the plan, including the amount, characteristics and nature of the claims affected by the plan. Failure by a creditor to make representations in relation to the amount, characteristics and nature of its claim, or the class to which it has been assigned, will be understood as tacit acceptance and will prevent subsequent challenge.[284]

Once the pleadings period has elapsed, the plan is put to the vote, which is carried out by means of the official standard form or by any telematic means enabled by the court. The vote will be taken for all those credits that are affected by the continuation plan. As a rule, the plan may affect all claims, including contingent and conditional claims. There are, however, some exceptions, such as tort claims, labour claims, etcetera.[285]

There are three aspects in which the approval of the continuation plan differs from the general regime due to the special characteristics of microenterprises. Firstly, it is understood that the creditor who does not cast a vote does so in favour of the plan ("silence means consent").[286] The aim of this particularity is to encourage the participation of creditors, especially larger creditors, who are not infrequently reluctant to participate in smaller proceedings. Secondly, the percentages required for the plan to be deemed approved are lower,[287] since it will be sufficient for the majority of the liabilities corresponding to a class to vote in favour for the plan to be deemed approved by that class (as opposed to the two-thirds generally required for restructuring plans).[288] This measure seeks to favour this type of agreement, preserving, in any event, broad majorities. Thirdly, for valid approval, the debtor and, where applicable, the shareholders of the debtor company who are legally liable for the company's debts must give their consent to the plan proposed by the creditors. When the plan contains measures that affect the political or economic rights of the debtor company's shareholders, their agreement will also be required.[289]

Otherwise, the plan will be considered approved when it has been approved by all classes of claims or at least by a: (i) simple majority of the classes, provided that at least one of them is a class of claims with special or general privilege, or (ii) class which, according to the classification of claims in the insolvency proceedings, may reasonably be presumed to have received any payment following an assessment of the debtor as a going concern.[290]

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by the company for common contingencies, or the percentages of the workers' contribution relating to common contingencies or accidents at work and occupational illnesses. See RIA, art 698.6.

283 RIA, art 697 *quinquies* 1.

284 *Idem*, art 697 *quinquies* 4.

285 *Idem*, art 698.3.

286 *Idem*, art 698.8.

287 *Idem*, art 698.9.

288 *Idem*, art 629.1.

289 *Idem*, art 698.1.

290 *Idem*, art 698.10.

The system of judicial confirmation of the continuation plan also differs from restructuring plans. In the case of the special procedure, if neither the debtor nor the creditors request express approval, this will automatically take place tacitly.[291]

The special procedure for microenterprises provides for preferential treatment for interim financing granted to the debtor during the negotiation period or, in the absence thereof, during the three months prior to the opening of the special procedure, as well as for new financing granted for the implementation of the continuation plan, provided that, in both cases, the plan has been approved.[292] The preference is that 50% of the amount will be considered as a credit against the mass and the remaining 50% will be considered as a general privileged credit.[293]

### *6.6.5 Winding-up proceedings*

The special winding-up procedure is designed to provide microenterprises with a simple, quick and flexible instrument to enable them to bring to an orderly end a business project that, for one reason or another, has not been successful. The liquidation will be opened at the request of the debtor or the creditors, although the objective presupposition varies: the debtor may request liquidation in the event of imminent or current insolvency, but the creditors, on the other hand, may only request it when the debtor is in a situation of current insolvency.[294] The opening of liquidation proceedings will also proceed in the event of frustration of the continuation plan (that is, when a plan has not been approved, when the approved plan has not been homologated by the court or, having been approved, has not been complied with by the debtor), provided that, in these cases of frustration, the debtor is in a situation of current insolvency.

The liquidation plan is the centerpiece of the liquidation process. Unlike what happens in insolvency proceedings (where there is a report from the insolvency administration in which the rights of the parties are established and the essential elements of the procedure are contained), in the case of microenterprises there is no common phase, nor a report from the insolvency administration, but everything is developed, for procedural economy, in the same phase.

The liquidation plan in the special procedure is flexible and informal. The plan must set out, with reasons, the times and form envisaged for the liquidation of the assets, individually for each asset or category of generic assets.[295] As a general rule, whenever possible, the company or a productive unit in operation will be sold as a whole; and the sale of the assets will take place, unless there are justified and sufficiently explained exceptions, through the liquidation platform. Indeed, in the special procedure, liquidation operations are carried out, as a general rule,

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[291] *Idem*, art 698 *bis* 2. However, tacit approval is not possible when the approval of the plan has been obtained with a majority of the liabilities whose vote has been considered positive due to the absence of a vote. In such cases, express approval will be the only option, as it is not appropriate for a continuation plan to be approved by a minority of creditors due to the lack of interest of the majority without the judge carrying out an additional control on the merits. Express approval is also compulsory when public claims are included in the continuation plan. See RIA, art 698 *bis* 3.

[292] *Idem*, art 698 *quinquies*.

[293] *Idem*, arts 242.1-18 and 280.6.

[294] *Idem*, art 705.

[295] *Idem*, art 707.3.

through an electronic platform system (the electronic platform for the liquidation of assets) and additionally through a specialised entity, unless duly justified according to objective criteria. The liquidation platform is an electronic public portal, free of charge and universally accessible, which includes a catalogue of assets that are added through communication by the debtors or by the insolvency administrators following the opening of a special liquidation procedure. In this way, the liquidation platform contains the assets of all the special liquidation proceedings of microenterprises in liquidation. A catalogue of assets is created, organised by category, according to commercial criteria, and can be sold individually or in batches. The sale of assets is carried out both through direct sales (by external access to the clients' catalogue) and through periodic electronic auctions. The platform not only contributes to speeding up the sale of assets, but also reduces the cost of liquidation, significantly increases transparency, and contributes to significantly reducing the workload of the judicial system.

An ambitious timeline is envisaged for the execution of the liquidation operations, as they may not last longer than three months, extendable at the request of the debtor or the insolvency administration for an additional month.[296]

### *6.6.6 Notification of the opening of negotiations*

Any microenterprise may notify (by electronic means using a standard form) the court of the opening of negotiations with creditors with a view to agreeing a continuation plan or a liquidation with the transfer of a going concern within the framework of a special procedure, provided that it is likely to become insolvent, imminently insolvent or currently insolvent.[297] The legal regime is the ordinary one, with certain special features (such as, that the effects of the notice of commencement of negotiations cannot be extended).[298]

### *6.6.7 Effects of the commencement of the special procedure*

The effects of the opening of the special procedure can be divided into several categories. On the one hand, there are the general effects of the special procedure,[299] which are those that occur in any case, regardless of whether same is processed as a continuation or liquidation procedure. To the above effects are added, depending on the type of procedure chosen, either the effects of the opening of the continuation procedure or those derived from the opening of the liquidation procedure, which in turn vary depending on whether or not there is the possibility of transferring the company in operation.[300]

The general effects occur with the opening of the special procedure and continue until its conclusion. The opening of the special proceedings has effects on the debtor, on the creditors and on the contracts. In relation to the debtor, although the general rule is that the debtor's powers of administration and disposal of its assets remain intact, the latter may only be used to carry out acts of disposal aimed at the continuation of its business or professional activity,

[296] *Idem*, art 708.4.
[297] *Idem*, art 690.
[298] *Idem*, art 690.3-3.ª.
[299] *Idem*, art 694.
[300] *Idem*, arts 694 *bis* and *ter*.

provided that they are in line with normal market conditions.[301] Moreover, as a sign of the modular nature of the procedure, the powers of administration and disposal may be subject to limitations if expressly requested.[302]

As regards creditors, as a general rule, the commencement of the special procedure stays judicial or extrajudicial enforcement of the debtor's assets and rights, regardless of whether or not enforcement had already begun at the time of the application and regardless of the status of the claim or the creditor.[303] In the case of assets and rights subject to a security interest, the stay only occurs when this is expressly requested by the debtor and the legal requirements for this are met.[304] Nor will the enforcement of claims that are not affected by the continuation plan be suspended (thus, in the case of public claims, the enforcement of claims that are classified as privileged in accordance with the general rules will not be suspended, nor, in any event, of the percentages of the social security contributions payable by the company for common contingencies and professional contingencies or the percentages of the employee's contribution that refer to common contingencies or accidents at work and occupational illnesses).

In relation to executory contracts, the initiation of the special procedure does not, in itself, affect contracts with reciprocal obligations pending fulfilment. In particular, contractual clauses providing for the suspension, modification, resolution or early termination of the contract on the mere ground of the filing of the application for commencement or its admission for processing, the application for general or singular suspension of actions and enforcement proceedings or any other circumstance analogous or directly related to the above[305] will be deemed not to have been put in place.

### *6.6.8 The qualification section*

The special procedure for the liquidation of microenterprises includes the regulation of an abbreviated qualification section. There are several differences from the insolvency proceedings. Firstly, the qualification can only be opened in the case of liquidation of the microenterprise, but not in the case of the fulfilment of a special continuation plan. This does not mean that unlawful conduct on the part of the debtor or persons who could have been affected by the qualification is left without any procedural remedy, but simply that it must be dealt with in the appropriate instance (that is, in civil or criminal liability proceedings). Another important difference is that it is not compulsory to open a qualification phase after the conclusion of the liquidation in the special procedure. Thus, the bankruptcy administration (if it has been appointed), creditors representing at least 10% of the total liabilities, or the shareholders personally liable for the company's debts are entitled to request the opening of the qualification phase. Any creditor, irrespective of its size and nature, is also recognised as

[301] *Idem*, art 694.1.
[302] *Idem*, art 703 for the continuation procedure and art 713 for the liquidation procedure.
[303] *Idem*, art 694.4.
[304] *Idem*, art 701 for continuation proceedings and art 712 for liquidation proceedings.
[305] *Idem*, art 694 *bis* 2.

having legal standing when there has been an objective concealment or falsification of the information provided during the special procedure.[306]

**Self-Assessment Exercise 5**

**Question 1**

Why is the special procedure for microenterprises considered "modular" and what are its advantages?

**For commentary and feedback on self-assessment exercise 5, please see APPENDIX A**

## 7. CROSS-BORDER INSOLVENCY LAW

The two essential instruments that regulate cross-border insolvencies are the European Insolvency Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 (EIR), and the Recast Insolvency Act (Third Book).[307] The European Insolvency Regulation will apply with respect to debtors whose COMI is within the EU (with the exception of Denmark), and the Recast Insolvency Act will apply whenever the COMI is outside the EU (for example, the United Kingdom).

### 7.1 Main insolvency proceedings in Spain

Main insolvency proceedings are those affecting all of the debtor's assets, irrespective of their location, and to which any creditor may concur. Main insolvency proceedings will be opened in Spain provided that the debtor's COMI is located there.[308] The COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In order to ease the determination of the COMI, the EIR provides for a set of rebuttable presumptions, which also intend to avoid possible fraudulent forum shopping.[309]

In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. This presumption shall only apply if the registered office has not been moved to another member state within the three-month period prior to the request for the opening of insolvency proceedings.[310]

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[306] *Idem*, art 716.1.

[307] Following the considerations made by Á Espiniella, "Los concursos transfronterizos", in *Campuzano-Sanjuán* (dirs), *El Derecho de la Insolvencia* (3rd ed, Valencia [Tirant lo Blanch], 2018) at 1129-1155.

[308] EIR, art 3.1.

[309] Judgment of the European Union Court of Justice (EUCJ) of 17 January 2006, C-1/04, *Staubitz-Schreiber*.

[310] If the moving of the registered office has not occurred in the prior three months, then the presumption is fully applicable, although its intensity may vary depending on the time passed by until the petition for insolvency. See judgment of the EUCJ of 20 October 2011, C-396/09, *Interedil c. Fallimento Interedil e Intesa*.

In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. This presumption shall only apply if the individual's principal place of business has not been moved to another member state within the three-month period prior to the request for the opening of insolvency proceedings. In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another member state within the six-month period prior to the request for the opening of insolvency proceedings.

As far as groups of companies are concerned, the presumption of the registered office is rebutted when the company is habitually managed and recognisable by third parties from another member state.[311] Such presumption is only rebutted, therefore, if there are objective elements that can be verified by creditors and contracting parties and that allow establishing that the real situation does not coincide with the one apparently reflected by the location of the registered office. On the contrary, neither the nationality nor the habitual residence of the directors is relevant elements, nor should their virtual participation in the management of the company be taken into account (since, even if said virtual participation is conducted from another member state, it would be unrecognisable to third parties and therefore irrelevant).

The international jurisdiction of the courts of the opening member state extends to any matter which has its basis in insolvency law and has an immediate connection with the insolvency proceedings.[312] Two prerequisites therefore exist, namely that from a (i) substantive perspective, the action ought to be grounded on insolvency law, and (ii) procedural perspective, the action ought to be linked to the insolvency proceedings.

In the absence of one of the two requirements (for example, the link to the insolvency proceedings is missing as the insolvency administration assigned the claims to a third party), the European Insolvency Regulation will no longer apply.[313] In practice, a good test to determine whether a bankruptcy matter is involved is to assess whether the action brought can only be brought during the existence of the bankruptcy (that is, neither before its opening, nor after its conclusion).[314] In any case, the international jurisdiction of the courts of the opening member state undoubtedly extends to: (i) the development and conclusion of the proceedings (the appointment of the insolvency administrators, the recognition of claims, the decision to open the liquidation or reorganisation stages, the judicial approval of the insolvency plan or of the liquidation plan, etcetera), (ii) avoidance actions,[315] (iii) insolvency liability actions against the

[311] Judgment of the EUCJ of 2 May 2006, C-341/04, *Eurofood IFSC*.

[312] At a European level, see art 6.1 of the EIR and judgment of the EUCJ of 22 February 1979, Case 133/78, *Gourdain vs. Nadler*. The doctrine is applicable even if the defendant is domiciled in a third state, according to the judgment of the EUCJ of 16 January 2014, Case C-328/12, *Schmid v Hertel*, and judgment of the EUCJ of 4 December 2014, Case C-295/13, *H v H.K*. At a Spanish level, see article 56 of the RIA.

[313] Judgment of the EUCJ of 19 April 2012, C-213/10, *F-Tex SIA v Jadecloud Vilma*.

[314] See, however, another debatable interpretation in the judgment of the EUCJ of 4 December 2014, C-295/13, *H v H.K*, emphasising that a material insolvency situation would suffice, even if insolvency proceedings have not been opened.

[315] Judgments of the EUCJ of 12 February 2009, C-339/07, *C. Seagon v Deko Marty Belgium*, and of 16 January 2014, C-328/12, *Schmid v Hertel*.

directors (the qualification section),[316] and (iv) actions referring to contracts to which the debtor is a party, provided that the actions are based on insolvency law.[317]

The jurisdiction thus delimited appears to be exclusive of any other jurisdiction,[318] without prejudice to the competence of any court, where no insolvency proceedings are pending or planned, to adopt precautionary measures if so provided by its own law in relation to assets or persons located in its territory.[319]

The applicable law shall be that of the member state in whose territory the insolvency proceedings have been opened (*lex fori concursus*).[320] Therefore, if the main insolvency proceedings are opened in Spain, the Recast Insolvency Act will apply, amongst other issues, in respect of the: (i) determination of the state of insolvency, (ii) debtors subject to insolvency proceedings, (iii) status of insolvency administrators,[321] (iv) assets that form part of the estate, (v) effects of the insolvency proceedings on contracts to which the debtor is a party and on individual enforcement actions, (vi) presentation, examination and recognition of claims, (vii) distribution of the proceeds from the realisation of assets, (viii) ranking and priority of claims, (ix) conditions and effects of the conclusion of the insolvency proceedings, whether by liquidation or by an insolvency plan, and (x) rights of creditors after the conclusion of the insolvency proceedings.

The application of the law of the forum has, however, some exceptions, where the conflict rules may refer to national laws of other member states:

(a) extra-insolvency preliminary issues may arise that are not governed by the governing law of the insolvency proceedings (for example, the ownership of assets or the validity of debt instruments). The general rules of private international law shall apply;

(b) special conflict rules include that the effects of the insolvency proceedings on: (i) the contracts relating to real estate are governed by the law of their location,[322] (ii) the rights and obligations of the participants in a payment or clearing system or in a financial market,

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316 Judgment of the EUCJ of 4 December 2014, C-295/13, *H v H.K.*; CJEU (6th) 10.12.2015, Case C-594/14, *S. Kornhaas v T. Dithmar*. However, the international jurisdiction of the courts of the opening state would not extend to actions for non-payment of wages. See judgment of the EUCJ of 21 January 2010, C-444/07, *MG Probud*.

317 However, the international jurisdiction of the courts of the opening state would not extend to actions for breach of contract not based on insolvency law (see judgment of the EUCJ of 4 December 4 September 2014, C-157/13, *Nickel & Goedner Spedition v Kintra UAB*). In this regard, the Recast EIR clearly states the competence of the main insolvency judge to terminate or modify contracts on immovable property located in other member states, as a consequence of the main insolvency proceedings (Recast EIR, art 11). On the contrary, the general rule according to which the court of the main insolvency proceedings has jurisdiction to determine the effects of the proceedings on contracts finds an exception in relation to employment contracts linked to a particular establishment or branch of the debtor. It will be the courts of the state where such establishment or branch is located that will have jurisdiction to determine the effects of the main insolvency proceedings on these contracts (Recast EIR, art 13.2).

318 Judgment of the EUCJ of 12 February 2009, C-339/07, *C. Seagon v Deko Marty Belgium*.

319 EIR, art 52 and RIA, art 54.

320 EIR, art 7 and RIA, art 722.

321 Judgment of the Spanish Supreme Court of 7 September 2012.

322 EIR, art 11 and RIA, art 723.1.

are subject to the law of such system or market;[323] (iii) employment contracts (their continuation, suspension or termination) are governed by the governing law of such contract,[324] (iv) real estate, ships or aircrafts are subject to the law of their registration,[325] (v) acquisitions of immovable property by third parties before the commencement of insolvency proceedings are subject to the law of the location of the real estate or to the law of the registry,[326] and (vi) judicial or arbitration proceedings are governed by the law of the state in which these proceedings are pending;[327]

(c) alternative conflict rules: the possibility of setting-off insolvency claims is governed by the law of the forum,[328] but will not affect a creditor's right to set-off if the law governing the claim establishes so;[329] and

(d) cumulative conflict rules: the law of the forum also governs avoidance / clawback provisions,[330] although the affected counterpart can allege that such operation is not voidable under its own governing law.[331]

Both the European and the Spanish regulations provide for a series of material rules, applicable independently of the provisions of the national law to which the conflict rule could refer:

(a) the commencement of insolvency proceedings shall not affect the rights *in rem* of a creditor or third party over assets of the debtor that are not located in the state where the proceedings are opened;[332]

(b) the insolvency of the buyer of a property will not affect the seller's rights based on a reservation of ownership,[333] just as the insolvency of the seller will not result in the termination or rescission of the sale;[334]

(c) payments made erroneously by a third party in favour of the debtor, and not of the insolvency administration, are valid if the former was unaware of the insolvency situation.[335]

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[323] EIR, art 12 and RIA, art 726.
[324] EIR, art 13 and RIA, art 729.
[325] EIR, art 14 and RIA, art 724.
[326] EIR, art 17 and RIA, art 725.
[327] EIR, art 18 and RIA, art 731.
[328] EIR, art 7.2.(d).
[329] EIR, art 9 and RIA, art 727.
[330] EIR, art 7.2.(m).
[331] EIR, art 16 and RIA, art 730; judgments of the EUCJ of 16 April 2015, C-557/13, *Lutz v Bäuerle*; and of 15 October 2015, C-310/14, *Nike v Sportland*.
[332] EIR, art 8.
[333] EIR, art 10.1.
[334] EIR, art 10.2 and RIA, art 723.2. Note that the immunity of these rights is guaranteed, regardless of the provisions of national law. There are, however, three exceptions. Firstly, the immunity disappears if secondary proceedings are opened in the state where the assets are located (see judgment of the EUCJ of 21 January 2010, C-444/07, *MG Probud*). Secondly, the immunity of the rights *in rem* and of the rights of the reserving seller in the buyer's insolvency proceedings does not apply to assets located in third states, in which case the law of the location of the asset shall apply (judgments of the EUCJ of 5 July 2012, C-527/10, *ERSTE Bank Hungary Nyrt. v Állam and others*). Thirdly, immunity does not prevent the exercise of an avoidance action in case of fraud.
[335] EIR, art 31 and RIA, art 737.

The ignorance of the payer is presumed when the bankruptcy has not been the subject of publicity in the state of enforcement;[336] and

(d) a restitution duty exists with regard to what has been collected by a creditor over to assets located abroad, either by a payment or by judicial execution.[337] However, if the insolvency proceeding opened in Spain is not recognised abroad or in case of difficulties in locating and realising assets, the insolvency judge may authorise creditors to request individual enforcement abroad.[338] Then, the creditor who obtained a partial payment of its credit by this authorisation, would not obtain from the insolvency proceedings declared in Spain any additional payment until the creditors of its class and rank had obtained an equivalent percentage of payment.

Finally, along with these material rules on substantive issues, there are also material rules on the administration of the insolvency proceedings:

(a) information to creditors: an individualised note informing of the opening of the insolvency proceedings must to be sent to known creditors who have their habitual residence, domicile or registered office in other states.[339] Under the European Insolvency Regulation, this notice shall be sent in the official Spanish language or another language accepted by Spain that can be presumed to be more appropriate for foreign creditors, with a heading in all official languages of the EU.[340] In terms of the Recast Insolvency Act, this notice shall be sent in Spanish with a heading in English and French;[341] and

(b) communication of claims: creditors have the right to submit their claims in writing.[342] This right also refers to tax and social security authorities, although the Recast Insolvency Act specifies that there must be reciprocity with the foreign country and that, in such case, these claims are admitted as ordinary claims.[343]

## 7.2 Secondary proceedings in Spain

Along with main insolvency proceedings, territorial proceedings may be opened in those states where an establishment of the debtor exists. An establishment shall mean any place of operations where the debtor carries out on a non-transitory basis (or has carried out in the three months prior to filing for main insolvency proceedings) an economic activity with workforce and

[336] However, the European Union Court of Justice has understood that this release is not applicable to payments made to a third party beneficiary by order of the debtor (judgment of the EUCJ of 19 September 2013, C-251/12, *Van Buggenhout and Van Mierop v Banque Internationale à Luxembourg*).
[337] EIR, art 23.1 and RIA, art 741.1.
[338] RIA, art 741.2.
[339] EIR, art 54 and RIA, art 738 envisage a standardised form.
[340] RIA, art 54.
[341] *Idem*, art 219.
[342] EIR, arts 53 and 55 create a standard form with a heading in all EU languages, which can be used for the submission of claims without prejudice to translation into Spanish or another equally accepted official language. Also see article 739 of RIA what also allow the submission in a foreign language and subsequent translation.
[343] RIA, art 739.2.II.

assets[344] (for example a branch, an office or a retail outlet). The mere holding of goods, the conclusion of contracts in a state, the participation in an international fair or the existence of a postal address do not constitute an establishment.[345] Subsidiaries or controlled companies cannot be considered as establishments, since they are independent legal entities, with their own assets and with an autonomous administration of their interests.

Secondary insolvency proceedings will only affect the assets located in such state.[346] They also affect the contracts and pending litigation related to those assets or to the establishment located in the forum. Any creditor of the debtor can communicate its claim[347] and in this context, the limitations of creditors' rights deriving from an insolvency plan approved within the secondary insolvency proceedings (reschedulings and write-offs) only affect assets located therein, unless all creditors agree to extend the effects of the plan to other assets.[348]

The location of assets is essential in order to determine whether they are affected by secondary insolvency proceedings:[349]

(a) tangible assets are located in the state in which they are physically found;

(b) registrable assets and rights are located in the state under whose authority the registration is kept, taking into account that a EU trademark, a European patent with unitary effect or a similar asset cannot be ascribed to a territorial contest as they are transnational;[350]

(c) copyrights are located in the member state where their holder has his habitual residence or registered office;

(d) claims in favour of the debtor are located in the state of the debtor's COMI;[351]

(e) registered shares are located in the member state where the issuing company has its registered office;

(f) financial instruments recorded in an account or in a register kept by an intermediary are located where such register or account is kept; and

(g) cash held in the account of a credit institution is understood to be located in the member state indicated in the IBAN (International Bank Account Number) of the account.

The location of the assets is determined at the time of the opening of secondary insolvency proceedings (that is, from the time the declaratory decision, provisional or final, takes effect),[352]

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344 EIR, art 2(10) and RIA, art 49.
345 Judgment of the EUCJ of 20 October 2011, C-396/09, *Interedil v Fallimento Interedil and Intesa*.
346 EIR, art 3.2 and RIA, art 49.
347 EIR, arts 45 and 53, and RIA, art 739.2.
348 EIR, arts 20.2 and 47.2, and RIA, art 735.
349 EIR, art 2.9, and judgment of the EUCJ of 11 June 2015, C-649/13, *Nortel Networks SA*.
350 EIR, art 15, although the European patent without unitary effect is located in the state for which it has been granted.
351 Judgment of the EUCJ of 21 January 2010, C-444/07, *MG Probud*.
352 EIR, art 2.8.

it being advisable that this decision be backdated to the time of filing for insolvency proceedings. This gives rise to a practical disadvantage: as long as the opening of secondary insolvency proceedings has not been requested, the administrators of the main insolvency proceedings can exercise their rights abroad, take possession of the assets and move them to the member state of opening.[353]

In principle, unless expressly mentioned in the European Insolvency Regulation or the Recast Insolvency Act, secondary insolvency proceedings are governed by the same rules as the main insolvency proceedings. As far as jurisdiction is concerned, the *vis attractiva concursus* applies in secondary insolvency proceedings in the same way as in main insolvency proceedings, as long as it concerns issues related to its scope of application: contracts linked to the secondary establishment or assets located in the member state of opening.[354] Regarding the applicable law, secondary proceedings are also governed by the law of the state of commencement. Material rules relating to post-bankruptcy collections will apply if they are related to claims belonging to the territorial bankrupt estate, even if they are paid abroad. Substantive rules on the administration of the insolvency proceedings, related to the information of the creditors and the communication of claims, are applicable. It should be noted that any creditor may participate in secondary insolvency proceedings. However, the substantive rules on the protection of rights *in rem* and reservation of title do not apply, since the assets are no longer located in another member state. Likewise, the conflict rules applicable to the main insolvency proceeding also apply in secondary insolvency proceedings. In practice, sometimes the governing law of the insolvency proceeding and the law to which the exceptional conflict rule refers will coincide. Such would be the case where reference is made to the law of the place where the assets are situated in its different modalities. On other occasions, there will not necessarily be such a coincidence, as may be the case with the law applicable to employment contracts, set-off, avoidance actions or pending proceedings.

Secondary insolvency proceedings can be opened:

(a) after a main insolvency proceeding has been declared, in which case the examination of the debtor's insolvency will not be necessary.[355] In the original wording of Regulation (EC) Number 1346/2000 it had to be liquidation proceedings, an aspect that has changed with the new recast text approved by Regulation (EU) 2015/848, as there must be congruence between the types of main and secondary proceedings, as well as protection for local creditors;[356] or

(b) without the prior declaration of a main insolvency proceeding.[357] These so-called independent proceedings may be aimed at both the reorganisation and the liquidation of the establishment located in the forum and, for their opening, it is required to assess the state of insolvency of the debtor. When the debtor has its COMI in the EU, the European

[353] Judgment of the EUCJ of 21 January 2010, C-444/07, *MG Probud*.
[354] Judgment of the EUCJ of 11 June 2015, C-649/13, *Nortel Networks SA*.
[355] EIR, art 34 and RIA, art 733.
[356] EIR, art 38.4.
[357] EIR, art 3.4 and RIA, art 47.2.

Insolvency Regulation is more restrictive and makes the opening of an independent insolvency proceeding subject to the existence of one of the following two conditions:

- impossibility of opening a main insolvency proceeding in the member state of the COMI,[358] for example when the law of the member state where the main insolvency proceeding could potentially be opened prevents such opening, as the debtor does not have the status of a trader, unlike what is provided for by the governing law of the territorial insolvency proceeding. Secondly, when the governing law of the main insolvency proceeding does not allow its opening with respect to public entities, a possibility that is contemplated by the governing law of the territorial insolvency proceeding;[359] or

- instigation of the proceedings by local creditors or authorities.[360]

**Self-Assessment Exercise 6**

**Question 1**

Please describe the circumstances under which main insolvency proceedings can be opened in Spain over different members of the same group, despite having their registered offices in other member states.

**Question 2**

What is the scope of the international jurisdiction power of the courts of the opening member state?

**For commentary and feedback on self-assessment exercise 6, please see APPENDIX A**

## 8. RECOGNITION OF FOREIGN JUDGMENTS

The recognition of foreign judgments depends on whether the country of origin is part to the Recast European Insolvency Regulation (Recast EIR)[361] or not. In other words, the system varies depending on whether the country of origin is an EU member or not.

[358] EIR, art 3(4)(a).
[359] Judgment of the EUCJ of 17 November 2011, C-112/10, *Procureur Generaal v Zaza Retail*.
[360] EIR, art 3(4)(b).
[361] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings.

## 8.1 Recognition within the EU

According to the Recast EIR, any judgment concerning the opening, conduct and closure of insolvency proceedings which fall within its scope, or handed down by a court of a member state in direct connection with such insolvency proceedings, will automatically be recognised in Spain. Therefore, they will produce the same effects as under the law of the member state of opening with no further formalities required.[362]

The automatic recognition derives directly from the principle of mutual trust between member states,[363] which explains that the grounds for non-recognition are reduced to a minimum (since the refusal of recognition may solely be based on an evident infringement of public policy).[364] The principle of mutual trust also justifies that Spanish courts are not entitled to control the merits of the case or the jurisdiction of the foreign court.

There are two conditions for a foreign judgment to be automatically recognised: firstly, that the insolvency proceedings are included in Annexure A of the Recast EIR; and secondly, that the foreign court has jurisdiction according to the location of the COMI.[365]

As per the enforcement of these automatically recognised judgments, it shall proceed in accordance with articles 39 to 44 and 47 to 57 of the Brussels I Recast. In short, they shall be enforceable in the other member states without any declaration of enforceability being required.

## 8.2 Recognition outside of the EU

The recognition of a judgment from a third country (non-EU countries, such as the United Kingdom) will necessarily proceed through the supplementary regime of the Recast Insolvency Act. Contrary to the Recast Insolvency Act's automatic recognition,[366] it establishes a mixed model, depending on the nature of the judgment to be recognised. In this sense, the recognition of the opening judgment must proceed through an *exequatur*,[367] while further judgments issued in those proceedings will be automatically recognised.[368]

Once the opening judgment has been recognised, the foreign insolvency practitioner may exercise the powers granted to him pursuant to the member state of opening, with some limitations.[369] Moreover, with some exceptions,[370] foreign resolutions that are recognised shall in Spain take the effects that they are attributed by the law of the state where the proceedings were commenced.[371]

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362 EIR, arts 19, 20 and 32.
363 *Idem*, Recital 65.
364 *Idem*, art 33.
365 *Idem*, art 3.1.
366 RIA, arts 19, 20 and 32.
367 *Idem*, art 742.
368 *Idem*, art 744.
369 *Idem*, art 743.
370 *Idem*, arts 723 to 731.
371 *Idem*, art 745.

As set out above, the key element is the recognition of the opening judgment. This recognition is subject to a number of conditions:[372] some refer to the nature of the foreign insolvency proceedings; others apply to the judgment itself, to the competence of the foreign court and to the rights of the debtor. The closing condition requires that the judgment is not contrary to Spanish public order.

- The first set of conditions refer to the nature of the foreign insolvency proceedings. For these proceedings to be recognised, they ought to be collective (that is, implying the participation of all creditors, which means that selective proceedings would not be eligible for recognition); based on the insolvency of the debtor; by whose virtue his assets and activities are subject to control or supervision by a court or a foreign authority; and for the purposes of the reorganisation or winding-up.

- The second condition applies to the opening judgment whose recognition is at stake, since it would need to be final. Therefore, an interim order would not be eligible for recognition.

- The third condition deals with the competence of the foreign court, as it must be based either on: (i) the debtor's COMI,[373] (ii) the existence of an establishment in the opening country,[374] or (iii) a "reasonably related connection of an equivalent nature" (that is, other connections that are similar to the ones established by the Recast Insolvency Act and that acknowledge the proximity of the debtor to the opening state). This requirement evidently hardens the recognition in Spain of foreign insolvency judgments. While the Recast EIR does not permit that Spanish courts control the jurisdiction of the foreign court that issued the judgment, the Recast Insolvency Act permits that the recognition is refused when the jurisdiction of the foreign court is not based on one of the criteria listed in articles 45 and 49 of the Recast Insolvency Act or on a "reasonably related connection of an equivalent nature". In other words, this condition opens the door to the refusal of recognition if the debtor does not have its COMI (or an establishment) in the country of origin. It should be noted, however, that Spanish law does not provide any example of what these "reasonably related connections" might be. Nevertheless, it seems safe enough to say that the location of the registered office would fall within the definition. Other criteria (such as the location of significant assets, or the fact that debt is governed by certain law) would not suffice as grounds for foreign courts getting jurisdiction, and hence the recognition of the opening judgment in Spain might be considerably problematic.

- The fourth condition refers to the rights of the debtor, in the sense that the judgment must not have been handed down in contempt of court by the debtor (and, if this were so, it should have been preceded by service or notice of the summons or equivalent document, in due form and with enough advance notice to oppose it).

- Finally, the fifth condition requires the judgment not to be contrary to Spanish public order. For instance, insolvency proceedings that discriminate amongst creditors depending on their nationality would not meet this requirement.

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[372] *Idem*, art 742.
[373] *Idem*, art 45.1.
[374] *Idem*, art 49.

The above conditions are required for the mere recognition of the opening judgment of the foreign insolvency proceedings. Once this opening judgment is recognised in Spain, any other judgments that are issued on those proceedings would be recognised automatically. However, were any of these judgments to be enforced in Spain (for example, an order imposing personal liability upon the company's former director), then a new *exequatur* would be necessary.[375]

Finally, the whole system is based on reciprocity. The provisions on recognition, enforcement and cooperation could stop being applicable if the third country were to systematically refuse to recognise Spanish judgments and / or to cooperate with Spanish proceedings.[376]

**Self-Assessment Exercise 7**

**Question 1**

In which sense has Brexit hardened the recognition and enforcement of insolvency-related judgments from the United Kingdom (UK) in Spain?

**For commentary and feedback on self-assessment exercise 7, please see APPENDIX A**

## 9. INSOLVENCY LAW REFORM

Currently, there are no reform proposals in the pipeline. That being said, if the "Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law" made public on 7 December 2022 were to be approved, its transposition would entail major amendments to the Spanish insolvency system, especially with regard to avoidance actions (as the proposed system is diametrically opposed to the Spanish one, based exclusively on the existence of harm for the debtor's estate) and creditors' committees (which are currently non-existent).

## 10. USEFUL INFORMATION

- The Spanish Insolvency Regulation can be downloaded here. Unfortunately, no updated English version exists at this time.

- The Insolvency Public Registry (with information on debtors, insolvency administrators and pre-insolvency proceedings) can be accessed here.

[375] *Idem*, art 746.
[376] *Idem*, art 721.2.

## APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

**Self-Assessment Exercise 1**

**Question 1**

Provide an overview of the main strengths and weaknesses of the Spanish judicial system in respect of insolvency, and comment on their effects on the outcome of insolvency proceedings.

**Commentary and Feedback on Self-Assessment Exercise 1**

**Question 1**

The main strength of the Spanish judicial system as far as insolvency is concerned is the specialisation of commercial courts. However, despite the high technical level and the good reputation of the judges, the system lacks an adequate infrastructure (insufficient material and digital resources). The direct consequence is that the procedures takes too long, which drastically reduces a company's chances of rescue.

**Self-Assessment Exercise 2**

**Question 1**

Explain why secured creditors have both a material and a procedural privilege when it comes to the collection of their claims within insolvency proceedings.

**Commentary and Feedback on Self-Assessment 2**

**Question 1**

Secured creditors enjoy a material privilege for the collection of their claims because, if the secured obligation is defaulted upon maturity, the secured creditor may proceed with the realisation of the collateral to obtain payment or satisfaction of its claim with the price obtained up to the secured amount in preference to any other creditor. The procedural privilege consists of the right to separate enforcement.

**Self-Assessment Exercise 3**

**Question 1**

Which are the three functions of insolvency proceedings under Spanish law? Are they equally relevant?

**Question 2**

Define the four types of insolvency that is relevant in the Spanish insolvency framework, and describe how they serve as thresholds for entering into the different proceedings.

**Question 3**

Are the plurality of creditors and the sufficiency of assets to cover the expenses of the proceedings requirements for their commencement**?**

**Question 4**

Please explain the differences between voluntary and necessary insolvency proceedings and how the legislator has tried to provide incentives for the former.

**Question 5**

Describe how the rules governing the remuneration of insolvency practitioners incentivise the fast resolution of the proceedings.

**Question 6**

Please explain on what grounds the scope of the limitation of the patrimonial faculties of the debtor depends.

**Question 7**

Explain the treatment of the so-called ipso facto clauses in executory contracts, both in insolvency and in pre-insolvency scenarios.

**Question 8**

Describe the different types of cram-down available in the Spanish pre-insolvency tools and the requirements that must be met for their effectiveness.

**Question 9**

Which creditors have the right not to adhere to a reorganisation plan?

**Question 10**

Do claims against the estate have a higher priority in the Spanish insolvency framework?

**Commentary and Feedback on Self-Assessment Exercise 3**

**Question 1**

Under Spanish law, the primary function of insolvency proceedings is the so-called "solving function": the purpose of insolvency proceedings is to solve the crisis by satisfying creditors in the most efficient way possible. However, insolvency proceedings are also the instrument provided by law to decide whether insolvent companies can be preserved (in this sense, they have a "preservation function"), by means of the appropriate reorganisation or even by transferring them to third parties, or whether they must be expelled from the market due to their inefficiency. In this sense, the solving function is intended to foster the continuation of the debtor's professional or business activity, but provided that such continuity does not entail a lesser satisfaction of creditors. Finally, insolvency proceedings also fulfil a function of repression of the debtor (in the event that he is a natural person) or of its directors (in the event that it is a corporation) whose conduct generated or aggravated the state of insolvency (the so called "repressive function").

The solving function holds primacy over the other two: in case of a conflict between the solving function and the preservation function, the former ought to prevail. For example, the judge, at the request of the insolvency administration, should order the closing of all the offices, establishments or operations owned by the debtor whenever they are loss-making. Additionally, in certain cases, the repressive function can simultaneously fulfil a solving function, and even favour the preservation of the business by its transfer to a third party. This is the case when the qualification section is formed as a consequence of the opening of the liquidation stage and the insolvency is classified as guilty, since in such cases (and only in such cases) the judge has the power to condemn the directors of the debtor legal entity whose conduct has caused or aggravated the insolvency, to cover, in whole or in part, the unpaid claims (that is, the deficit). In these cases, the secondary function contributes to the primary function of the insolvency proceeding: while punishing the conduct of those who have generated or aggravated the insolvency through fraud or gross negligence, the qualification makes it possible to increase the degree of satisfaction of the creditors.

**Question 2**

The Recast Insolvency Act distinguishes between (i) current insolvency, (ii) imminent insolvency, (iii) aggravated insolvency and (iv) likelihood of insolvency. Debtors, unlike creditors or third parties, can petition for insolvency when they are insolvent (current insolvency) or on the verge of insolvency (imminent insolvency). There is only a duty to file when the business is in actual insolvency.

"Currently insolvency" means a debtor who is unable to regularly comply with its due obligations. The inability to comply must have certain stability (a momentary difficulty to pay debts is no reflection of insolvency). The cause for the inability to meet due obligations is irrelevant. Although it is hardly ever the case, a debtor with fewer assets than liabilities may not be insolvent in the meaning of the Recast Insolvency Act, because it has enough cash to keep paying debts as they become due or because it still has access to finance by third parties. Conversely, a debtor with more assets than liabilities may well be insolvent if the assets are illiquid and cannot be used as collateral for new money that will allow the debtor to settle due debts. A debtor is insolvent if it can pay some debts as they fall due, but not all; the not merely momentarily inability to pay one single debt is enough to be regarded as insolvent. The debtor that can generally only pay its due debts with delay is also to be regarded as insolvent under the law (again, a momentary shortage of cash does not amount to insolvency). The law expressly refers to "regular" compliance. In the light of this, if a company pays its due debts and liabilities, but does so using "irregular means" (that is, sale of assets at undervalue, finance at high interest rates, etcetera), it ought to be considered insolvent even though it is temporarily able to meet its due obligations.

A debtor is "imminently insolvent" when he foresees that he will not be able to satisfy regularly and punctually his obligations within the following three months. Here again, the debtor's prognosis must be made having regard to the prospective inability to meet obligations (lack of liquidity or impossibility to obtain it), not the insufficiency of assets to meet liabilities. The inability to pay on time and according to regular means will occur in the future, as debts fall due. It involves an objective valuation of probability. It cannot be just a possibility; it has to be more likely than not.

Aggravated insolvency is the threshold for creditor petitions. The law foresees a number of situations that enable to presume that the debtor cannot meet his obligations as they fall due and individually indicate the existence of a qualified or aggravated insolvency: (i) general cessation of payments to the debtor's creditors, (ii) seizure, for pending foreclosures and executions, of the generality of the debtor's assets, (iii) ruinous or rushed liquidation of assets, (iv) concealment of assets, and (v) default on debts to tax authorities, social security institutions or workers' claims for wages (and assimilated concepts), during the three months prior to the filing.

Finally, likelihood of insolvency (or probability of insolvency) is a threshold only for pre-insolvency mechanisms and it occurs when it is objectively foreseeable that, if a restructuring plan is not reached, the debtor will not be able to regularly meet its obligations falling due in the next two years.

**Question 3**

Plurality of creditors is not a legal requirement for the opening of insolvency proceedings, although the law states that, if the existence of a sole creditor is confirmed after the presentation of the final list of creditors, then the proceedings ought to conclude.

Identically, the existence of sufficient assets to cover the expenses of the procedure is not a condition for the commencement of the proceedings. However, a special opening regime applies, as the full commencement will only proceed in case there is sufficient evidence of (i) potential avoidance actions to be exercised, (ii) potential liability actions against the administrators of the insolvent company, or (iii) the potential classification of the insolvency as guilty. In order to determine whether sufficient evidence exists, the law envisages a preliminary procedure in which any creditor or creditors representing at least 5% of those liabilities to request the appointment of an insolvency administrator.

**Question 4**

Insolvency proceedings are voluntary if they follow a petition from the debtor. In contrast, they are necessary if they follow from a creditor's petition. The law tries to foster voluntary entry into the proceedings of distressed companies by setting a speedier and wider path for debtors who file for their own insolvency and by, as a rule, leaving the debtor in possession. Moreover, failure to comply with the two-months duty to file enables to presume the existence of a guilty insolvency.

**Question 5**

Two different sets of rules aim at providing incentives for the fast resolution of the proceedings. First of all, as an incentive for the fast resolution of the proceedings, the law foresees certain adjustments in the remuneration depending on the duration of the common stage, the insolvency plan or the liquidation stage, in the sense that, the longer the duration, the lower the retribution. Secondly, the remuneration will accrue as the insolvency administration fulfils its functions.

**Question 6**

As a general rule, the limitation of the patrimonial faculties of the debtor depends on whether the proceedings are voluntary or necessary. If the insolvency proceedings are voluntary, the debtor will retain the powers of administration and disposition of the assets, but the exercise of these powers will be subject to the intervention of the insolvency administration. In contrast, if the insolvency proceedings are necessary, the powers of administration and disposition of the assets will be suspended, and the insolvency administration will replace the debtor in the exercise of these powers.

However, the court may alter the aforementioned rule and order the suspension in voluntary insolvency proceedings and the mere intervention in necessary insolvency proceedings, either in the order declaring the insolvency proceedings or subsequently, at the request of the insolvency administration and after hearing the debtor. Any deviation from the rule will have to be justified by the risks that can be avoided and by the advantages that can be obtained.

**Question 7**

The law renders ineffective any contractual clauses that foresee the termination or executory contracts in case of commencement of insolvency proceedings, the filing of a communication of negotiation with creditors or the approval of a restructuring plan.

**Question 8**

By virtue of horizontal cram-down, the majority of each class imposes the plan on the minority. The conditions that must be met for the effectiveness of this horizontal cram-down are the following: (i) the debtor is either likely to become insolvent, imminently or currently insolvent, and the plan offers a reasonable prospect of avoiding insolvency and ensuring the viability of the company in the short and medium term, (ii) the legal requirements of minimum content and form of the plan are met, (iii) the rules on class formation and necessary majorities have been respected, (iv) all claims within the same class receive equal treatment, (v) the plan has been notified to all affected creditors, and (vi) the plan respects the minimum economic value of the rights of the dissenting creditors. This minimum economic content is broken down into three aspects: the sacrifice of their claims must not be manifestly disproportionate to what is necessary to ensure the viability of the company; creditors within each class must receive equal treatment; and the plan must pass the “best interest of creditors” test.

By virtue of a vertical cram-down (or "cross-class cram-down"), the plan can be imposed on dissenting classes. The general conditions for horizontal cram-down must concur. In addition, it is necessary that the plan has been approved by a simple majority of classes, at least one of which being a class of privileged claims. If such a majority is not achieved, it would then suffice that one class has voted in favour, provided that it is a class that would receive any payment, in accordance with the bankruptcy ranks, taking into account the value of the debtor as a going concern. That is to say, the plan must have been approved by at least one class of affected creditors which is "in the money". In addition, compliance with the so-called "absolute priority rule" is requested.

**Question 9**

Claims against the estate, which must be satisfied at their respective due dates at any stage of the proceedings, do not have this right. Neither do subordinated creditors and persons especially related to the debtor who acquired their claims after the declaration of insolvency.

**Question 10**

In principle, the higher priority would belong to claims against the estate, which must be satisfied at their respective due dates at any stage of the proceedings. However, the payment of claims with special preference (that is, secured claims) will always be preferential over the assets and rights affected, whether they are executed inside or outside the insolvency proceedings. This preference will prevail not only with regard to the other insolvency claims, but also with regard to the claims against the estate.

**Self-Assessment Exercise 4**

**Question 1**

Describe how group insolvencies are dealt with in the Spanish insolvency system.

**Question 2**

Please explain the main differences between the effects of the commencement of insolvency proceedings over natural persons and over corporations.

**Commentary and Feedback on Self-Assessment Exercise 4**

**Question 1**

The insolvency of several companies of the same group is subject to a voluntary special regime which consists of co-ordinated proceedings, either from their commencement (with the filing of a joint petition for insolvency) or at a later stage, through the concentration of judicial competences, the appointment of the same insolvency administrator or the co-ordination of the different insolvency plans. Substantive consolidation of the different debtor's assets and liabilities is only exceptionally possible in case of asset intermingling. The co-ordination is also possible in pre-insolvency mechanisms, through the submission of a joint communication of the opening of negotiations with creditors or through the approval of a joint restructuring plan.

**Question 2**

When the insolvent debtor is a corporation, the limitations on the patrimonial faculties of the debtor will apply to its organs. In case of intervention, the directors of the insolvent corporation maintain the powers of administration and disposition of the assets, although they will be subject to the authorisation of the insolvency administration. In case of suspension, the powers of administration and disposition will be assigned to the insolvency administration. The commencement of insolvency proceedings does not entail any modification to the rights and obligations of shareholders / partners. On another hand, if the debtor is a corporation, the limitations on fundamental rights and freedoms may also apply to all or some of its administrators or liquidators.

**Self-Assessment Exercise 5**

**Question 1**

Why is the special procedure for microenterprises considered "modular" and what are its advantages?

**Commentary and Feedback on Self-Assessment Exercise 5**

**Question 1**

The special procedure allows the parties to request a number of effects (or "modules") only if they so wish (for example, the stay of execution on secured assets and the appointment of an insolvency practitioner). This helps to reduce the costs and the duration of the proceedings, as well as to increase its effectiveness (since no pointless measures are automatically undertaken).

**Self-Assessment Exercise 6**

**Question 1**

Please describe the circumstances under which main insolvency proceedings can be opened in Spain over different members of the same group, despite having their registered offices in other member states.

**Question 2**

What is the scope of the international jurisdiction power of the courts of the opening member state?

**Commentary and Feedback on Self-Assessment Exercise 6**

**Question 1**

Main insolvency proceedings can be opened in Spain over different members of the same group when they are habitually managed in Spain, irrespective of where their registered offices are located. However, for this to happen, it is necessary to have objective elements that can be verified by creditors and contracting parties. Neither the nationality nor the habitual residence of the directors is a relevant element, nor should their virtual participation in the management of the company be taken into account (since, even if said virtual participation is conducted from another member state, it would be unrecognisable to third parties and therefore irrelevant).

**Question 2**

The courts of the opening member state have jurisdiction over any matter which has its basis in insolvency law and has an immediate connection with the insolvency proceedings. From a substantive perspective, the action ought to be grounded on insolvency law, and from a procedural perspective, the action ought to be linked to the insolvency proceedings.

**Self-Assessment Exercise 7**

**Question 1**

In which sense has Brexit hardened the recognition and enforcement of insolvency-related judgments from the United Kingdom (UK) in Spain?

**Commentary and Feedback on Self-Assessment Exercise 7**

**Question 1**

Said recognition is no longer automatic, since it requires an *exequatur* before the competent Spanish Court. Hence, the recognition of UK insolvency proceedings in Spain is now more time-consuming and expensive. Moreover, the level of uncertainty has increased. Indeed, the recognition entails more risks, as it is impossible to ascertain in advance the rigour of the competent court when applying the conditions that the Spanish Insolvency Law requires for recognition to be granted. In particular, UK proceedings might not be recognised if Spanish courts consider that the jurisdiction of UK courts is based on criteria that are not equivalent to the Spanish ones (COMI, an establishment, or the registered office).

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