NATIONAL REPORT

—SPAIN—

Draft of September 30, 2018

Table of contents

INTRODUCTION

After more than 100 years with a system that combined a classic XIX century Commercial Code liquidation procedure (*Quiebra*) with a reorganization procedure (*Suspensión de Pagos*) enacted temporarily to avoid the liquidation of the *Banco de Barcelona* in the early XX century, Spain passed a relatively modern Insolvency Law in 2003, which came into force in September 2004. The system, partially the result of a number of failed previous attempts of reform[1], partially influenced by the German *Insolvenzordnung,* offered several possibilities to restructure the debt, all of which were to be conducted —totally or partially— in Court. A victim of the failure of a previous system that was hardly ever used, the Spanish legislator included a duty to file, triggered by illiquidity, with a view to ensure a widespread use of the new procedure (*Concurso de Acreedores*).

The arrival of the American financial crisis to the European banking system caught Spain at the peak of a real estate bubble and Spanish banks 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 to apply an almost brand-new law, with insufficient support from the still underdeveloped insolvency profession, incorporating new concepts they had little experience with/understanding of, and all of that with a relatively poor infrastructure[2]. 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.

In this context, the Spanish legislator went on a reforming spree: from 2009 to 2015, Spain modified its Insolvency Law 8 times, 5 of which including major amendments[3]. While the reforms affected different parts of the Law, the most important ones concerned, directly or indirectly, out-of-court solutions: a period of time to negotiate agreements was created, then expanded and its effects strengthened (art. 5 bis); protection from avoidance actions was introduced for restructuring agreements that met certain requirements (art. 71

---

[1] Before the Insolvency Law of 2003 (*Ley 22/2003, de 9 de Julio, Concursal*) (hereinforth "the insolvency Law" or "IL"), full insolvency drafts to enact a new system were produced in 1959, 1983, 1996, 2000 and 2002. The Initial version of the Insolvency Law was directly influenced by the texts of 1996, 2000 and 2002. It can be said that, to a certain extent, the IL, before the amendments, suffered from heavy "path dependency" of legal texts that were never in force.

[2] An overview of the problems of Spain´s insolvency system at the time of commencement and during the financial crisis can be read at the consecutive IMF´s Article IV reports on Spain. These can be accessed at https://www.imf.org/external/country/esp/.

[3] 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 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.

bis); and two types of out-of-court collective proceedings were created. The result is a complex but relatively comprehensive list of options to tackle the distress of financially troubled businesses. A choice menu for market participants to select the option that best accommodates their interests. Instead of one, flexible solution, the Spanish system offers a number of pre-defined paths to restructure viable businesses.

In 2016, the Spanish Government formed a commission[4] with the assignment of drafting a consolidated version of the Insolvency Act. The purpose was to get rid of the many imperfections that the current version of the Law accumulated and that derived from the intermittent and rushed amendments that the Insolvency Act had endured during the last years, which had caused internal contradictions and interpretative uncertainty. The assignment to draft a consolidated version was granted in ample terms, but the nature of the task implied that no major amendments could be performed. The consolidated text first draft was circulated in March 2017, but its further processing is uncertain after the change in the government that has occurred in June 2018.

PROCEEDINGS

The available proceedings for debt restructuring can be divided in two main categories: on the one hand, court proceedings (*formal*), and, on the other, out-of-court proceedings (*informal or semi-formal*).

The following figures summarize the different options:

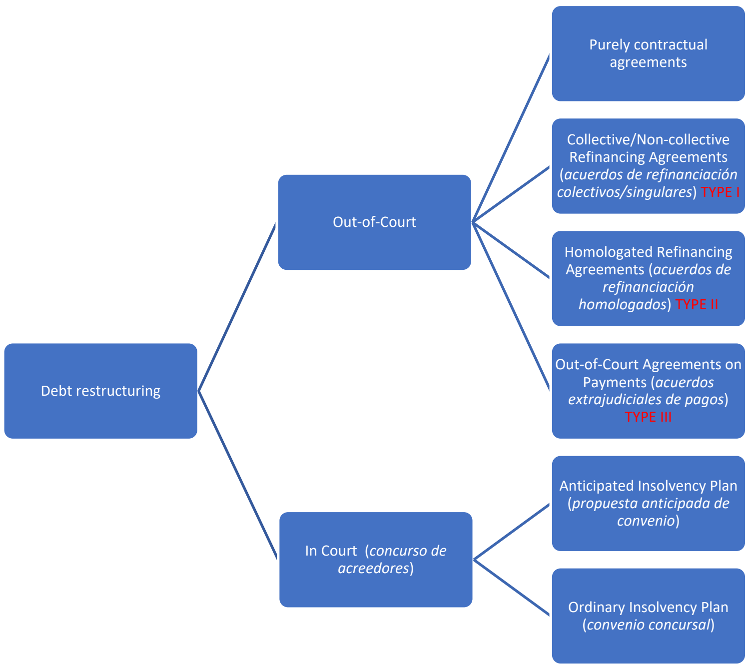


Fig. I: Insolvency proceedings under the Spanish legal framework

[4] The Special Commission included University Professors and Insolvency Judges, under the presidency of Prof. Ángel Rojo (Universidad Autónoma de Madrid).

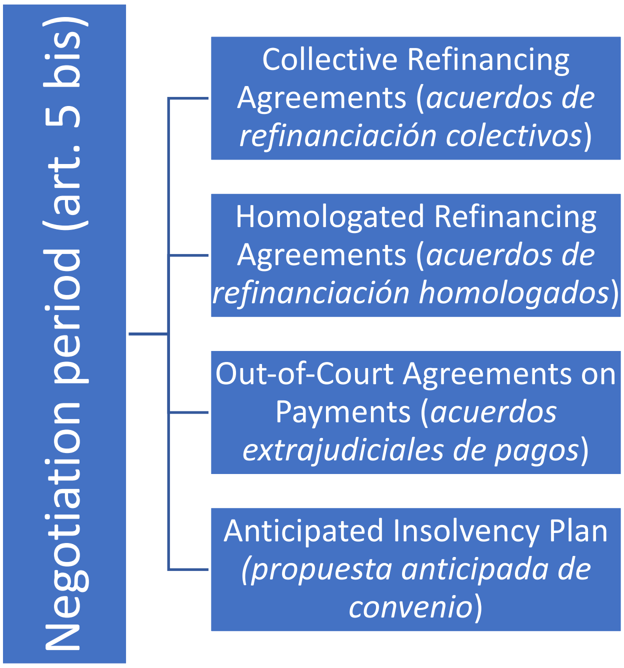


Fig. II: Proceedings supported by the negotiation period

COURT PROCEEDINGS

Types of insolvency proceedings available to general business debtors and their main characteristics

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 (the Insolvency Act 2003). The Spanish in-court insolvency system is unitary in a tripartite way:

First, it is *subjectively unitary* in that it applies to both natural persons and legal entities, so long as they have legal personality, disregarding whether they are professional debtors (sole entrepreneurs, companies) or private individuals. Thus, the Insolvency Act regulated the insolvency of corporations, partnerships (civil and commercial), foundations, associations and consumers; 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 large number of creditors[5]. Conversely, the system includes a

[5] In two years, two cases had an aggregate of almost half a million creditors: Forum Filatélico, AFINSA and Air Madrid Líneas Aéreas. The first two cases were of large financial investment conglomerates, and the third one was an airline. These three procedures, all at the commercial courts of Madrid, created a backlog that adversely affected the entire system.

special treatment for less complicated —normally smaller— cases: when the debtor is a natural or a legal entity with less than €5m in debt or fewer than 50 creditors or a relatively small business size (assets worth less than €5m), an abbreviated mode of insolvency may apply if the judge so decides (*procedimiento concursal abreviado*). The abbreviated insolvency procedure includes briefer periods of time for the different procedural stages, and only one insolvency representative is appointed. This is the procedure applied to almost all personal insolvencies and to a number of small and medium enterprises (SMEs).

Second, it is *legally unitary*, since both substantive and procedural matters are regulated in the same —insolvency— law. The Law covers in detail the entire procedure, in its different stages. Moreover, there is specific section that regulates the different types of appeal 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*)[6]. 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 giving the parties 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 Insolvency Law includes a general, residual referral to the general Code of Civil Procedure for all procedural matters not covered in the insolvency law.

Finally, it *is functionally unitary*, because all exits (reorganization or liquidation) are possible within the framework of the same procedure and are regulated under the same law. In this regard, the Spanish Insolvency Act followed the path set by the German *Insolvenzordnung* of 1994[7].

The conditions for the commencement of insolvency proceedings

Commencement requirements

Insolvency proceedings can be opened by the court as the request of the debtor and its creditors. There is one exception to this general rule. Insolvency can also be filed by the debtor's partners who are personally liable for the company's debts. In the case of a creditor's petition, there is no minimum number of them or a minimum amount of claims to file for insolvency. Plurality of creditors is not a legal requirement for the opening of insolvency proceedings. 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 (i.e. in the stage where director liability and disqualification is ascertained). No other stakeholders can petition for insolvency;

[6] Article 192 *et sequ*. IA

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

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 the legal consequences are different depending on the petitioner. The law tries to foster early 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[8]. On the other side, creditors must prove the debtor's insolvency by means of 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 filed it. Until the 2011 reform, the law did not require either that there be sufficient assets to cover the expenses generated by the procedure. The lack of assets was treated as a reason to terminate the insolvency proceedings (art. 176), not to deny its opening. The Law 38/2011 has changed this, opting for an awkward combination: the opening of proceedings followed by an automatic termination (within the same judicial decision) whenever the judge considers it evident that there are neither sufficient assets to cover the costs and expenses of the procedure, nor does it seem probable that there can be a swelling of the assets of the estate through avoidance actions or the liability of directors (art. 176 bis).

Debtor petitions: The debtor has both the right (art. 3) and the duty (art. 5) to file for its own insolvency. The petition must be accompanied (art. 6) by (1) 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; (2) a list of assets and a list of creditors; (3) the accounts and financial statements of the previous three years, with the audit reports (in case 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 (art. 25).

Debtors, unlike creditors or third parties, can petition for insolvency when they are insolvent (actual 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; 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 with creditors. However, there are three reasons to explain the speedier path for a debtor: the legally declared aim to attract

[8] 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; 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 2003 Insolvency Act is full of incentives for the debtor to file as soon as possible. There is a duty to file (art. 5); the debtor's own petition keeps the debtor in possession (art. 40); and the approval of a reorganization plan with a write-off of less than one-third and a rescheduling of payments of less than three years will not allow the opening of a procedure to assess the liability of directors.

insolvent businesses to the insolvency proceedings as soon as possible; the inexistence of an automatic, ad hoc, procedure for creditors and third parties to oppose the debtor's petition; and the 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).

Actual insolvency: To be declared insolvent, the debtor must be 'unable to regularly comply with its due obligations' (art. 2.2). The obligations need not be pecuniary ones, 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 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 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 (art. 2.2), In the light of this, if a company pays its due debts and liabilities, but does so using 'irregular means' (i.e., sale of assets at undervalue, finance at high interest rates, etc.), it ought to be considered insolvent even though it is temporarily able to meet its due obligations.

Imminent insolvency: The concept is broadly defined in the law as a situation whereby 'the debtor foresees that he will not be able to satisfy regularly and punctually his obligations (art. 2.3). 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. The law has intentionally left open the time range. There is no clear case law on the subject, although there is judicial and academic consensus, based both on literal and teleological interpretation, that the imminence refers to a short-term period (one or two months falls undoubtedly within the scope of the rule).

In case of legal entities, the decision to petition lies with the management. In case of actual insolvency, a previous decision by the owners of the legal entity (meeting of shareholders or partners, etc.) is unnecessary; a provision in the articles of association including the need for the management to get the owner's approval is ineffective; 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 get the members' consent before filing. There is no legal provision that envisages a previous approval or even consultation with any body representative of the business's workers.

Once the judges receives the petition from the debtor with all legal requirements in place, the judge will order the opening of insolvency proceedings without further action (art. 14). No preliminary procedure is established. This decision can be challenged, but it will not suspend the effects of the declaration of insolvency.

Creditor and third-party petitions: Creditors, whatever the nature of their claim, have the right (not the duty) to file for their 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). Shareholders, partners or other owners legally liable for the debts of the debtor 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. 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 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 her as a party to the proceedings (art. 15). The petition may concern one debtor or several debtors (in the cases where joint petitions are admissible, art. 25).

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. It is not necessary to prove that there are more creditors. The petition must be presented together with all the documents that prove the claim and all its circumstances. The creditor must prove the insolvency of the debtor, in the sense 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 in 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. The regulation of the opening of insolvency proceedings following a petition by creditors is not always internally coherent. While the legislator seeks to incentivize the filing by giving priority to the creditor that successfully files for insolvency, the creditor risks having to pay the costs of the procedure if the insolvency is not declared, despite his having proved one of the situations that create the presumption on insolvency. The law states that the unsuccessful petition by the debtor will make him liable for the costs unless the judge considers that the case was 'seriously doubtful' (art. 20). Fortunately, courts are not making a strict interpretation of the rule and only in rare cases are creditors that have proved one of the facts envisaged by art. 2 made liable.

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 (art. 2.4): (1) general cessation of payments to the debtor's creditors; (2) seizure, for pending foreclosures and executions, of the generality of the debtor's assets; (3) ruinous or rushed liquidation of assets; (4) concealment of assets; (5) 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. A petition by creditors (or a third party) triggers a brief preliminary procedure to ascertain insolvency. The debtor is given five days to obtain possession of the petition and the documents attached to it and oppose or accept his 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 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 (unless the judge decides otherwise, see arts. 15-20). There is no doubt that this preliminary procedure is in compliance with art. 6 of the European Convention on Human Rights.

Non-petition clauses are valid but only partially enforceable. As was stated, debtors can file for insolvency based on actual or imminent insolvency. In the former case, there is a legal duty to petition (that concerns directors in case of legal entities). This duty is designed to protect the business's present creditors as well as the market (future creditors), and it can therefore not be excluded by the debtor vis-á-vis a particular creditor. The effectiveness of the non-petition clause concerning the debtor is thus limited to the cases of imminent insolvency. On the other hand, a creditor's petition in violation of a non-petition clause can be rejected by the judge without further consideration given to the existence of a situation of insolvency, as long as no other creditors (not party to the restrictive clause) sustain the claim. This rule would apply also in cases of non-petition agreements (i.e. when the debtor has agreed and executed all obligations precisely to avoid insolvency vis-á-vis the petitioning creditor).

Although the Law does not sustain the abusive use of legal rights, filing an insolvency petition would not be considered as such. A grim perspective of recovery is not enough to deny a creditor all interest in his debtor's insolvency. The judge's examination of the facts carried out after a petition for insolvency is not the adequate procedural stage to ascertain the facts that would lead to the rejection based on the abusive exercise of rights. In any case, the success of the petition would demonstrate the debtor's insolvency, and therefore the entire system would benefit from the creditor's action.

Liability for not filing in good time or filing too early

Debtors have a duty to file for insolvency when they know or are deemed to know that they are insolvent (i.e. unable to comply with their obligations, art. 5). The time to file the petition is two months from the moment insolvency was ascertained (or ought to have been so). The period can only be suspended for three months if the debtor formally communicates to the court that negotiations have begun with creditors in order to agree on an insolvency plan, an ordinary refinancing agreement, an homologated refinancing agreement or an out-of-court agreement on payments (art. 5 bis).

In case of legal entities, the duty falls on the management (CEO, board of directors, and generally speaking those that have general powers of administration) and it cannot be waived by the members of the entity. The duty is applicable to the liquidators of a company under company law. Once they realize or ought to have realized that the assets are insufficient to pay all of the company's debts, the period of two months starts to run.

The failure to file in due time bears only civil consequences: no criminal offence is attached to it. In case the debtor is in liquidation or an insolvency plan is approved with a write-off of more than one-third or a stay beyond three years, there will be a formal procedure aimed at establishing liability and disqualification of the debtor and its management. In order for liability or sanctions to be determined, insolvency proceedings must be rated 'culpable' (*culpable*) by the judge, which, according to the Law (art. 164), should happen whenever 'in the generation or the aggravation of the state of insolvency, the debtor —or, in the case of legal entities, his legal or de facto directors— had observed willful misconduct or acted with gross negligence'. The Law creates a presumption that the debtor or the directors have willfully or negligently caused or worsened the insolvency when they failed to petition in due time (art. 165). The presumption is rebuttable (*iuris tantum)*, and the affected persons may try to prove that the delay occurred in good faith and to protect the interests of the business and, therefore, of its creditors. The debtor and the management of a legal entity may be disqualified, and they can be made liable for the debts that remain unpaid after the liquidation of the assets (art. 172 bis).

The Law does not have special provisions regulating liability for premature insolvency filings. Liability against the debtor for early petition would have to be founded on general private law, either breach of good faith in contract or tortious liability, although both situations seem rather remote, unless the debtor has forged documents or used false information to obtain the declaration of insolvency. Creditors can be made liable to compensate the costs of the procedure and damages if their petition causes reputational damage. However this is not a rule for early filing, but in general for unsuccessful petitions by creditors.

Costs and funding of the proceedings

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, to control the number of these 'insolvency-free' claims, the Law includes a descriptive list. However, conspicuously and as an exception, the 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 top of two minimum salaries).

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, etc. 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 representatives liable in damages against creditors whose claims arose when the former knew (or ought to have known) that they would not be paid.

Claims against the estate (whatever their nature, 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 (art. 84.3). 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, the liquidation phase is opened or a year has passed since the opening of the proceedings (art. 84.4)[9].

The person who files for insolvency cannot be orders to make a down-payment on the future costs of the proceedings. Of it is a creditor that petitions and he requests cautionary measures over the debtor, he can be asked to set up a deposit for possible damages in case the state of insolvency is not proved and the proceedings are never started.

Post-commencement financing is possible in any form under Spanish insolvency law. 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 an operation inherent to the ordinary course of business, the consent of the insolvency representative will need to be compounded with the authorization 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 the collateral.

There are no state funds available to finance particular actions of the insolvency administrator. Avoidance actions and actions leading to the liability and disqualification of directors are carried out by the insolvency representative, in case s/he has legal background. When the appointed professional is not a lawyer, one will need to be hired and paid out of the insolvency estate (claim against the estate). If it is necessary, funds could be borrowed from a third party, but it is most uncommon and the insolvency representative would first need to obtain approval from the court.

[9] Recently, the Spanish Supreme Court has limited the possibilities to levy an execution for unpaid claims against the estate to the approval of an insolvency plan, despite the literal terms of the Insolvency Act.

Publicity of filing and commencement of insolvency proceedings

The request to open insolvency proceedings is not subject to any publicity. If the petition comes from creditors or third parties, the debtor is notified and provided with access to the documents purporting to prove insolvency. These documents are in court publicly available for any interested stakeholder. The judicial order opening insolvency proceedings is widely publicized. An abstract of the notice must be urgently published in the official national gazette (*Boletín Oficial del Estado*). The judge at her discretion can enhance the publicity and order the publication by oither means, both public or private (for example, by publishing the notice in one of the most commonly read daily newspaper in the place where the debtor has its center of main interests, and, if the debtor has establishments and centers of economic or financial activity in different locations, the order will normally be published there as well).

The declaration of insolvency is published in the Insolvency Public Register (*Registro Público Concursal*), an online register organized and maintained by the official professional body of registrars (*Colegio de Registradores de la Propiedad, Mercantiles y de Bienes Muebles de Españ*a), under the responsibility of the Ministry of Justice, where the most relevant decisions concerning insolvency proceedings are made open and accessible at no cost[10].

Finally, there is a legal obligation to notify all known creditors individually. Insolvency representatives must formally ('as soon as possible') communicate the opening of insolvency proceedings, their own appointment as insolvency representatives, the information concerning the addressee's claims (as recorded in the debtor's files) and warn them that they have one month to file their claims in the court. The reach and effectiveness of this legal duty will depend on the level of formality of the debtor, for this individual notification will be made based essentially on the records kept by the debtor and the list of creditors that is brought to the proceedings along with the petition.

The opening of the proceedings, its effects on the debtor's powers to manage the business and the appointment of the insolvency representatives must be registered in the Civil Registry, if the debtor is a physical person, and the Company's Registry (or any other similar registry) if it is a legal entity. The information must also be registered in all the registers of assets and rights (Real Estate Registry, *Registro de la Propiedad Inmobiliaria*; Registry of Movable Property, *Registro de Bienes Muebles*; Registry of Intellectual Property, *Registro de la Oficina Española de Patentes y Marcas*; etc.). Once the opening of proceedings and the rest of the information is incorporated into the registries of assets and rights, no seizures or other type of procedural measures requested by creditors over the insolvent's property can be registered without the authorization of the judge.

The representatives of Spanish insolvency proceedings have a duty to personally communicate the opening of the procedure to each foreign creditor without delay. The communication must include the type of proceedings, the effects on the debtor, the time to file claims and other relevant facts. The insolvency judge, ex officio or by request of an interested party, may order the publication of the decision to open insolvency proceedings in any foreign country where she considers it would be in the interest of the

[10] The website is <*www.publicidadconcursal.es*>.

procedure to do so, following the rules established in the relevant country for the publicity of insolvency. In a similar manner, the insolvency representatives may request the registration of the opening of the proceedings or any other relevant act of the procedure on foreign registries. Where the foreign proceedings are the main insolvency proceedings, the foreign insolvency representative has a duty to meet the requirements of publicity of the Insolvency Law when there is an establishment of the debtor in Spain.

Stages of the insolvency procedure

The insolvency procedure is divided into stages or phases. There is one mandatory stage that must be present in each procedure (called 'common stage' or *fase común*), which can be followed by the reorganization stage (*fase de convenio*) or the liquidation stage (*fase de liquidación*). The inertia of the procedure favours the opening of a reorganization stage, for it will automatically 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 all three stages: the common stage is followed by a reorganization, in which no insolvency plan is agreed (or one is agreed but later defaulted) and liquidation is then declared.

The common stage

The common stage is a merely instrumental one, aimed at collecting, processing, analyzing and presenting all the relevant information to the parties, as well as determining the exact content and valuation of the insolvency 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 s/he accepted the appointment, although the judge may —exceptionally— extend the time for delivery if certain circumstances are met (art. 74.2). 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. Until the 2011 reform, the common stage would not end until all claims had been resolved. However, the new amendments to the Law (art. 96) establish that, so long as the appeals relate to no more than 20 per cent of the estate or of the total amount of claims, the judge may order the end of the common stage and the commencement of the reorganization or liquidation phases, as the case may be (adopting precautionary measures to safeguard the rights of the parties, if necessary).

The reorganization stage

The reorganization 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 —consenting— to a modification of subjective rights —the object of the contract— with a view to reorganizing the business and minimizing the loss generated by insolvency —the cause of the contract), though this contract is of special nature (content legally limited, effects applicable to non-voting/opposing creditors, need for judicial confirmation). The plan can be either proposed by the debtor or by creditors whose claims add up to a minimum of 20 per cent of the debt admitted in the procedure, and while it is quite flexible as to the possibilities of restructuring of the business, it cannot include the liquidation of the business, which must continue to operate (though the sale of part of the business as a going concern to a third party is possible) (art. 100). The development of this stage is simple. There is a period to submit proposals of insolvency plans; the judge summons a meeting of creditors which must take place within two months from the moment the reorganization procedure was opened (if proposals had been formally presented during the common stage, to be debated and approved in the reorganization stage) or three months in case a proposal was presented only in the reorganization stage (proposals can be formulated up to 40 days before the meeting of creditors); and the decision will be adopted at the meeting. In 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 of 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 executed, all claims will be cancelled (because they have been paid in full or partially, as agreed in the plan).

Pre-packaged plans

The Spanish insolvency system includes a type of pre-packaged procedure, called *convenio anticipado* (arts. 104 t o110). Either together with the debtor's petition to open the insolvency proceedings or immediately after the procedure is declared and the common stage started, a proposed insolvency plan can be presented, together with the written agreement of at least 20 per cent of the total claims. The procedural steps to approve the plan take place in parallel with the development of the common stage: creditors prove their claims; the insolvency representative writes his/hers general report, analyzing the causes of the debtor's distress and determining the insolvency estate and the list of creditors; the insolvency representative will also write an assessment of any proposal submitted; and a period for adoption of the plan starts. Once the list of claims has been established, the percentage of claims that have adopted the plan will determine its approval (or its rejection) and the procedure will continue accordingly. If the anticipated plan is approved, the same rules apply as for an ordinary insolvency plan (suspension of effects, commencement of execution of the plan); if it is not, then the reorganization stage is opened, unless the debtor requests to proceed directly to liquidation.

The liquidation stage

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 liquidation of the debtor is declared. The opening of the liquidation stage may also happen ex officio by the judge, or be requested by the insolvency representative or by a creditor, provided that the required circumstances are met (art. 142). 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 insolvency estate and, in 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 (arts. 148.1 and 149.1-1.ª). However, in most cases in practice, liquidation consists of an auction-based sell-off of the individual assets, which is value destructive. The stage rests almost entirely on the shoulders of the insolvency representative. They must mandatorily take possession of the business and are competent to conduct the sale of the assets, normally by means of a liquidation plan. The law includes a number of rules directed at the speedy liquidation of the estate, such as brief periods of time to draw up and execute the liquidation plan (the entire stage should be finished within one year, or the insolvency representative may be judicially replaced and lose all right to remuneration accrued)[11]. In some cases, the liquidation stage does not end with the complete sell-off of all the assets. It is followed by a procedure aimed at the determination of possible liability (and sanctions) of the directors and/or owners of the business, as well as of third parties (*sección de calificación*). 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 (art. 178 bis).

The simultaneous opening & closing of the proceedings

The existence of sufficient assets to cover the costs of the proceedings is not a prerequisite for their opening. However, the Law establishes that the proceedings shall be concluded whenever it is discovered that the assets of the estate are insufficient to cover the costs associated with the procedure. In addition to the lack of sufficient assets, it is also necessary that no other funding can be found (for example, through the use of avoidance actions or third-party liability).

When the lack of assets is evident since the very beginning of the proceedings, then it is possible to simultaneously open and close them, in what has been labelled as an 'express procedure' (*concurso exprés*, art. 176 bis).

Possible exits for the insolvency proceedings

As a result of the previously depicted legal scenario, there are three possible exits for the insolvency proceedings: an "anticipated insolvency plan" (*convenio anticipado*); an –ordinary- "insolvency plan" (*convenio concursal*); or a liquidation, which can take place through a sale of the business –or business units- as a going concern or on a break up basis. The Law expressly declares its preference for the plan (in any of its modes), and, when not possible, for a going concern liquidation. Following the steps of the German *Insolvenzordnung,* formal insolvency proceedings feature a unitary approach: every procedure has a common stage, in which the relevant information on the business, its creditors and the causes of insolvency is collected, analyzed and presented to creditors, so they can make an informed decision on the destiny of the business; the procedure follows with the opening of either a reorganization stage, aimed at the approval of a plan, or a liquidation. In every case insolvency proceedings are based on actual or imminent insolvency, an insolvency representative is always appointed, a rigid procedure is applicable and the entire process is conducted in Court. Any comparison with the schemes

[11] Articles 152 and 153 IA.

of arrangement of the UK would seem too far-fetched (rather, they would be more similar to an *administration* or to *winding up* proceedings.

This is also true of the “anticipated insolvency plan” exit. This type of insolvency plan was designed as a pre-packaged plan [12], that would be negotiated out of court but quickly plunged in formal insolvency proceedings through an expedited path, to make it binding on all creditors and safe from avoidance actions. The debtor may present the plan with the petition to open insolvency proceedings or in a short period thereafter, together with the formal support of creditors representing 20% or more of the total debt; and the procedure leading to its approval by creditors takes place within the initial, “common stage”. But that is as far as the specialty goes. For virtually every other aspect, the “anticipated insolvency plan” is a full, in-court solution, with all the negative consequences of formal procedures. The procedural terms envisaged in the law are hardly ever complied with, proceedings take too long and liquidation looms as a threat that scares both debtors and creditors alike. It is no surprise that this solution has been successfully implemented in very few occasions[13].

Formal insolvency proceedings: Basic data and reasons for its results

In order to understand the legislative creation and design, as well as the use of out of court proceedings in Spain, it is essential to have an understanding of their alternative: formal insolvency proceedings (*concurso de acreedores*). It is the mainly the failure of the latter, that explains and justifies the very existence of the former.

The figure below shows an overview of the evolution of the use of formal insolvency proceedings in Spain, almost from the beginning of the current system. The graph shows a slow start in the use of insolvency proceedings, and a sharp increase since 2008, year in which the effects of the financial crisis started to kick in. At its peak (2013), the number of insolvency cases reached 9937, to start a relatively rapid decrease in the following years. Even considering the deep economic crisis suffered by the country, and the legal inclusion of stern measures to foster the use of the system (ie, a duty to file the breach of which would entail personal liability for company directors), Spain´s in court insolvency system shows low numbers compared to other advanced economies[14].

---

[12] This type of plan has a hybrid nature, between contractual out of court solutions and in court proceedings. For the concept of hybrid proceedings, and the different typology, see J.M. GARRIDO, *Out of Court Debt Restructuring. World Bank Studies,* The World Bank, Washington DC, 2012, available at http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-8983-6.

[13] For example, out of 5746 ongoing insolvency proceedings, only 19 anticipated plans were proposed; in 2014 the number was 16 out of 7280; although higher in the previous two years (113 out of 9937 proceedings; 134 out of 9071), the numbers still reflect a very low use of the mechanism (source: National Institute of Statistics (INE), available at www.ine.es). The time of completion of insolvency proceedings with anticipated plan is too long and in any case not respectful of the time sequence envisaged in the Law. For example, in 2015, the proceedings where an anticipated plan was passed, had taken 408 days until approval, as compared to 544 days for ordinary insolvency plan proceedings: source “Anuario Concursal” of the Spanish Official Body of Registrars 2015: http://www.registradores.org/portal-estadistico-registral/estadisticas-mercantiles/estadistica-concursal/, pg. 78.

[14] Vid. the higher numbers of the United Kingdom (94.594 cases, including companies and personal, in 2015; source: the Insolvency Service: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495531/Q4_2015_statistics_release_-_web.pdf); France (41.474 new insolvency proceedings opened only in the first 9 months of 2016 (source Insol Europe: at https://www.insol-europe.org/technical-content/national-insolvency-statistics-france; or Germany (19.035 new businesses in Insolvency during 2015 -101.852 including individuals, both

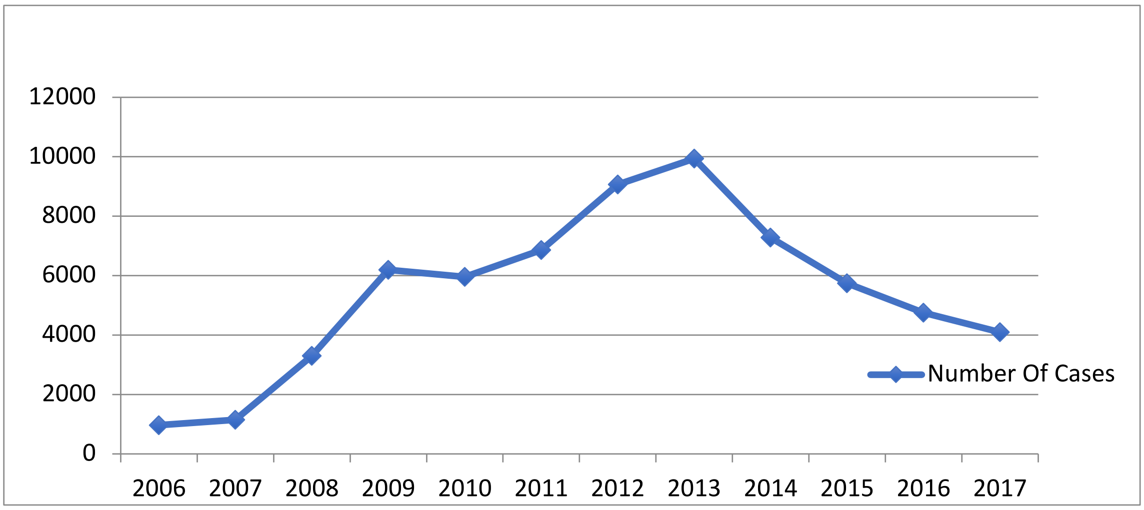


Fig. III: Total number of formal insolvency cases (source: INE)

The reasons for the relatively scarce use of the system are diverse. One first reason is socio-economic: the stigma generally associated with insolvency proceedings. Indeed, the traditional *personal stigma* associated with insolvency has no doubt been a factor relevant to explain the low use of the system in Spain, especially in the initial years. An element that is often present in most societies —and that constitutes a hurdle for most systems across Europe and beyond— had special intensity in Spain, a country where a punitive insolvency framework from the XIX century had been in place until 2004 [15]. The reluctance to use insolvency proceedings was also based on its very poor perception by the market. For decades, insolvencies mostly ended with value-destructive, piece-meal liquidations. The modernization of the legal framework takes time to settle in the realm of insolvency, and the market does not yet seem to perceive formal insolvency proceedings as an efficient instrument to preserve value. And there are good reasons for it. Numbers show that the current system takes too long and the recovery rate of creditors is low [16].

professional/entrepreneurs and consumers-; source: D-Statis), all countries that did not undergo a crisis or not as severe as the Spanish crisis.

[15] The old system provided for a number of automatic personal sanctions of the insolvent debtor: disqualification from the conduction of entrepreneurial activities, prohibitions to act as directors of companies, to be tutor, to access public service, etc. All of these sanctions were an automatic –and, in almost all cases, perpetual- consequence of the commencement of proceedings.

[16] The low use of the system may also be explained by the existence of more efficient debt collection mechanisms, especially for secured creditors (see M. GARCIA POSADA/J. MORA SANGUINETTI, "Are there alternatives to bankruptcy? An analysis of small business distress in Spain", Bank of Spain, available at http://rd.springer.com/article/10.1007%2Fs13209-014-0109-7.

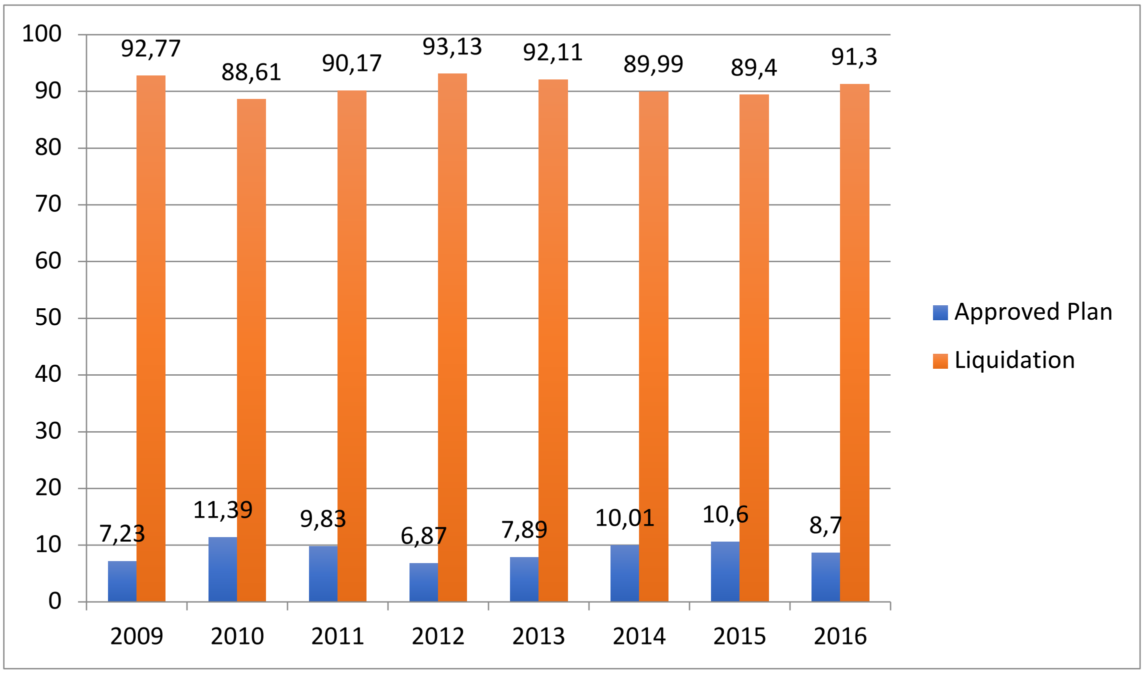


Fig. IV: Exit to formal insolvency proceedings (source: INE)

The figure above shows that the vast majority of proceedings end in liquidation. The section in blue (an average of 8,81% of all insolvency cases in the past 5 years) refers to approved insolvency plans, including both ordinary and anticipated plans. Data also shows that the likelihood of the procedure ending with an insolvency plan increases with the size of the debtor [17]. The percentage of recovery for participating creditors was 50,56% in 2014, 51,68% in 2015 and 46,2% in 2016[18]. Unfortunately —and somewhat surprisingly— there exists no data as to the percentage of recovery in liquidation. Perhaps the most deluding characteristic of the system is its slowness. The law includes two types of proceedings: abbreviated and ordinary, depending on the size of the debtor or the amount of debt. The former includes shorter procedural time lapses and is supposed to be quicker and less costly. The vast majority of proceedings are abbreviated (88,5% in 2015).

[17] In 2015, the size of the legal entities that were able to reach an agreement with creditors within formal insolvency proceedings had an average size three times larger than the average of those that were wound up (vid. "Anuario Concursal 2015", Registrars, pg. 29).

[18] Source of the data: "Anuario 2016", "Anuario 2015" and "Anuario 2014", Registradores, op. cit.. It must be noted that such percentage is relatively high, provided that priority creditors and secured creditors (for the part of the claim secured by collateral) are not bound by the insolvency plan, and, therefore, it can be presumed that a high percentage of them will be paid in full. However, the situation is worse than it seems at first sight. The percentage of recovery is in the area of 50% because, until the reform of the Insolvency Law of 2015, ordinary insolvency plans could only include a write down of the debt of up to 50% of the nominal value of the claims (in other words, 50% is the maximum relief that debtors were allowed to agree to if liquidation was to be avoided). Further, the number refers to the nominal write down, and does not take into consideration the rescheduling of the debt (up to 5 years, until 2015, up to 10 years, now), so the percentage does not incorporate the discount of the amounts as a consequence of the delay in paying. And, most importantly, the data concerns approved plans, not implemented plans. To the best of our knowledge, there exists no data on the percentage of insolvency plans that have been fully implemented. In any case, considering the existing data on liquidations commenced following a failure of the implementation of the insolvency plan, the number of failed plans is relatively high.

Times are, however, slow in both types. For example, in 2015: (i) the average time for anticipated insolvency plans to be passed, counting from the beginning of the procedure, was 408 days, in case of abbreviated proceedings, and —unexpectedly— 367 days for ordinary proceedings; the procedure leading up to the approval of ordinary plans took an average of 544 days, in abbreviated proceedings, and 701 for ordinary proceedings; but the real problem lies with liquidations, where the time (just for the liquidation stage, not counting the common stage) stretched out to 485 days for abbreviated and 448 for ordinary proceedings in 2015 [19].

The current malfunctioning of the system is possibly due to a few errors of the legal design, but mostly to the deficiencies of the institutional framework.

Although the Insolvency Law has improved substantially with the reforms, some salient problems still exist. This is not the place to dwell on formal insolvency proceedings, but it is worth only mentioning the most relevant shortcomings [20]: (i) there exist breaches of the absolute priority rule, perhaps the most relevant being the ability of the debtor (ie, shareholders) to block the passing of a plan, even if the company is balance sheet insolvent; (ii) the law includes a convoluted class voting system, in which the different classes are not set by economic value but rather by "nature" of the debt (financial, labour, public, other creditors), where public creditors are thus protected and where there exists no cram down rule; (iii) the regulation of the effects of the opening of proceedings on executory contracts runs against international standards [21] by conferring the highest priority (administrative claim: *deuda de la masa*) to the counterclaim of the party *in bonis* of a disclaimed contract; and (iv) the 2015 reform, rightly, included the automatic transfer of contracts in case of sale of the business as a going concern, but it also made it mandatory for the acquirer of the business to assume the outstanding labour debt, hampering going concern liquidations and altering the hierarchy of priorities envisaged in the law.

These shortcomings of the Law help understand the system´s lack of perception as an adequate market instrument to restructure viable businesses by the market, but they are not the cause for its inefficiency. The main source of inefficiency and hence the main problem of the system lies with its implementation. Proceedings take too long and are too costly, due to an inadequate institutional framework.

---

[19] The average duration of the "common stage" in 2015 was 308 days for abbreviated and 377 for ordinary proceedings. In 2014, the numbers were quite similar: 366 and 379 days (source "Anuario 2015", Registradores, op. cit.).

Since the 2011 reform, it is possible to run the liquidation of the debtor during the common stage. This expedient liquidation is the solution for roughly ¼ of cases: 27,1% in 2015; 26,7% in 2014; 27% in 2013; and 21% in 2012.

[20] For a summary of the main deficiencies of the system, see C. De Long/M. Saiyid/ M. Balz/I. Tirado, "Spain´s Insolvency Regime: Reforms and Impact", *IMF Country Report*, Selected Issues, No. 15/233, 2015; and C. De Long/ M. Balz/I. Tirado, "Strengthening the Insolvency Framework for Spanish SMEs", *IMF Country Report*, Selected Issues No. 14/193. 2014.

[21] See Principle C9 of the World Bank Insolvency and Creditors´ Rights Principles (available at http://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights), based on the Recommendations of UNCITRAL´s Legislative Guide (available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html).

The institutional side of Spain´s formal insolvency system is composed of insolvency practitioners (*administradores concursales*), on whose shoulders rest most the tasks and duties of the procedure, and the Court. There are problems with both.

The Spanish market counts on a sufficiently deep market of specialized professionals to implement the system [22], but their activity is not properly regulated: the system of judicial appointment gave rise to controversy and has been substituted by an automatic appointment from a list which ensures that professionalization will cease to develop; the system of remuneration is flawed, with an excessive pay in the larger cases, an incentive to artificially lengthen proceedings in order to extend the perception of monthly retribution, and, specially, with no solution for cases where there are little or no assets even to pay the fees of the professional (a situation that generates passivity and lack of interest); and the mechanisms to implement the accountability of insolvency representatives are ineffective. All this generates uncertainty and lack of trust in the system by stakeholders.

Concerning the Court system, the problem —the most acute problem— is one of lack of adequate infrastructure. One of the most positive changes of the Insolvency Law of 2003 was the creation of specialized courts (*Juzgados de lo Mercantil*), competent to decide commercially related cases. The technical level of the judges has increased significantly, and a good reputation has been created [23]. The problem of the Courts is not the judges that run them, not even the amount of judges available (which has been increased in the past years), but rather the lack of means of the system. Files are not digitalized, and the IT system is old fashioned and insufficient to handle great amounts of documentation. Courts are engulfed with papers and documents; there is not enough administrative staff; and the buildings don't have enough rooms to hold oral hearings, causing massive delays as a consequence thereof. Judges have to face hundreds of cases with no support, since there is no system of clerks in Spain´s procedural practice. The situation is made worse by a law that designs a system that is —still, despite the amendments— excessively rigid and procedural. The machinery is slow and cumbersome, and it cannot deal with the amount of work it has. Procedures last too long and this hampers the chances of rescue of the business.

OUT-OF-COURT PROCEEDINGS

The foregoing depicts a formal insolvency system that stakeholders try to avoid. The legislator, aware of its malfunctioning, has tried to alleviate the backlog of cases by creating the disparate out-of-court proceedings. In the following paragraphs we shall briefly describe the use of the out-of-court solutions. In order to read the data correctly, two elements need to be borne in mind: firstly, there is no data available concerning

[22] The system of insolvency representatives in Spain has improved significantly in recent years. Previously a closed system handled by a few, with limited professionalization, the profession is now well established, the technical level much higher, and transparency has improved (although there is still plenty of room for further improvement). Spain has not yet created a system of self regulatory organizations, but there are professional bodies, with codes of conduct and disciplinary procedures in case of malpractice. The system still is in need of further development.

[23] The creation of commercial courts has generated a body of highly skilled, technically prepared judges, whose decisions are now even quoted with the name of the judge (something unimaginable before, where no one knew the name of judges), as is common in Common Law systems.

purely contractual agreements or refinancing agreements Type I (i.e., agreements that are protected from avoidance actions provided that certain requirements are met), which, according to our interviews, are the most commonly used; secondly, refinancing agreements Type II (judicially homologated) and out-of-court agreements on payments (OCAPs, Type III) have been created recently (only in 2015, in their current design), and therefore the data available only reaches out to a few years and only reflects the use of the system, but there is no data as to the efficacy of the agreements (since the vast majority of them should still be in the stage of implementation).

For the sake of clarity, we have divided them into two groups:

- Purely contractual agreements (non-regulated), and
- Regulated agreements, which include:
    - Ordinary Refinancing Agreements (*Acuerdos de Refinanciación*) [Type I], which can be either collective or non-collective;
    - Homologated Refinancing Agreements (*Acuerdos de Refinanciación Homologados)* [Type II];
    - Out-of-Court Agreements on Payments (*Acuerdos Extrajudiciales de Pagos*) [Type III].

Purely contractual agreements

The restructuring may be worked through a contractual agreement with one or more creditors. The debtor is free to pursue this path at any time and to seek a restructuring that is tailored to its needs. The advantages of this solution are many: flexibility in the negotiation, absence —or limited— reputational damage, no institutional cost and a design of the agreement only limited by the general legal framework. In Spain, both the regulation of contracts (generally, in the Civil Code), Company Law and the banking regulatory framework conform an adequate enabling set of rules for a contractual restructuring of a troubled debtor. In practice, these agreements are common, so long as the debtor finds itself at the early stages of financial distress.

However, there are limits to its use. The most evident limit is time: Spain´s Insolvency Law (art. 5) includes a duty to file for formal proceedings within two months from the onset of the state of insolvency (i.e., cash flow or balance sheet test insolvency). This means that purely contractual solutions are no longer an option as insolvency gets near, since, otherwise, the debtor finds itself in a very poor bargaining position and the time to negotiate is very short[24]. Further, purely contractual solutions face the usual disadvantages of non-collective solutions to a collective action problem. The Civil Code (art. 1257) enshrines the principle of privity of contract, and as a consequence only those creditors participating in the agreement will be bound by it.

Since the entry into force of the current Insolvency Law, and until its first round of reforms, contractual agreements were the only out-of-court solution. Given the poor reputation that formal insolvency proceedings had earned for themselves during decades of value-destructive practice, it was relatively common for debtors to bilaterally try to

[24] The two months to file for insolvency (ie, to negotiate an agreement) would run from the moment the debtor knew, or should have known, that she was insolvent.

reschedule the debt and for creditors to agree with a view to avoid going to court. However, certain peculiar characteristics of Spain´s insolvency system, coupled with a stern judicial interpretation of the Law in the initial years, jeopardized out of court restructuring practice. Two elements of Spain´s Insolvency Law influenced the *ex ante* behavior of creditors: on the one hand, the risk of subordination of those creditors who had entered into restructuring operations that would be found detrimental to the estate or to creditors (preference) and avoided in a subsequent insolvency procedure; on the other, the risk of being found "accomplice" of the debtor for having caused —or aggravated— the situation of insolvency as a consequence of a contractual out-of-court agreement that had proved unsuccessful. Although the latter was very exceptional, even in the "rough" initial years of judicial interpretation (when both debtors and creditors open to negotiate were seen as all but suspicious of colluding), the successful avoidance of restructuring agreements constituted a very real risk [25], and creditors (i.e.., financial creditors) were often reluctant to negotiate deals, especially in cases where they already enjoyed some kind of security right. The main reaction of the legislator, in the 2009 and 2011 reforms, was to create a system of protection of out of court agreements whenever certain requirements were met[26].

Regulated out-of-court restructuring agreements

The reforms to the Insolvency Law of 2013, 2014 and 2015 introduced to the Spanish system a new set of out of court solutions to the financial distress of business [27]. Two of the solutions are open to any debtor, and one is designed to tackle the financially troubled small and medium enterprises (SME).

All of these three agreements may benefit from a preparatory stage, which has been labeled as "negotiation period" or generally as "article 5 bis moratorium" (vid., supra, Fig. II). If the debtor is insolvent, and with a view to suspend the time to mandatorily file for insolvency, the debtor may communicate the Court that negotiations have been commenced to reach any of the three types of collective out of court proceedings described in this section, or even to negotiate an in-court anticipated insolvency plan. This communication is a formal requirement, and there is only a superficial control that the legal requirements are met[28]. From that moment on, the debtor has three months to

---

[25] Following a landmark decision by the First Commercial Court of Madrid (Case Spirito Santo).

[26] A thorough analysis of the different legal instruments created to protect restructuring operations from ex post avoidance actions can be read in the works of Professor J. PULGAR, who successfully imported the Italian expression of "protective shields" to describe the legal effect. On this regard, see J. PULGAR, "Estrategias preconcursales y refinanciaciones de deuda: escudos protectores en el marco del RDL 3/2009", in A. Alonso/J. Pulgar (dirs.), *Implicaciones Financieras de la Ley Concursal,* Madrid (La Ley) 2009, pp. 49 et seq.; and "Preconcursalidad y acuerdos de refinanciación", in *Revista de Derecho Concursal y Paraconcursal* nbr. 14 (2011) pgs. 25 et seq.

[27] Spain got ahead of the European Commission. When EC Recommendation on a New Approach to Business Failure and Insolvency of 12 March 2014 was passed, Spain had already implemented a number of measures aimed at achieving the result sought by the said recommendation. The Spanish reform was not directly related to the financial assistance provided by the European Stability Mechanism for the recapitalization of Spanish Banks. Even if this assistance was channeled through a Memorandum of Understanding that included a number of measures that were not directly related to the financial sector, insolvency law was not a direct target. However, it did have an indirect relationship. In part, the reform would seem to follow –slowly, dragging the feet- the recommendations of the IMF´s Article IV Consultations (see the recommendations on Spain for 2012-2015, available at https://www.imf.org/external/country/esp/).

[28] There is no analysis of the merits of the petition, and the judge does not need to see evidence of the debtor´s insolvency. The Judge must, however, check that the COMI is in its jurisdiction, because the

negotiate the agreement, after which, in the absence of agreement, insolvency must be filed within one more month (unless, obviously, the business is not insolvent)[29]. During the negotiation period, no foreclosure or executions can take place over the assets and rights of the debtor, with the exception of those used as collateral in favour of a secured creditor that are not necessary for the continuation of the business activity. This temporary stay does not affect public creditors, who can freely seize assets and freeze accounts[30]. During the moratorium, no creditor may successfully file for the debtor´s insolvency either.

In 2014, the legislator took a step further to incentivize the use of refinancing agreements (Types I and II) by softening the regulatory framework of banks. Credits that have been subject to a refinancing agreement may be re-classified as "risk normal" in so far as there are objective elements that deem the payment of the amounts owed under the agreement as probable[31]. The rule is very "generous", since it expressly states that, in order to assess the increased probability of repayment, the write-downs and additional time to repay have to be taken into consideration; and, more importantly —and also more controversially—, the reclassification may be executed from the very moment of formalization of the refinancing agreement: there is no need to wait a prudential period of implementation to lower the risk in the bank´s balance sheet. The importance of this measure cannot be overestimated in a country where the banking system has recently undergone a severe crisis.

The Spanish system of out-of-court solution to business financial distress does not include one complete solution: none of the type of proceedings available can be used by all debtors, bind all creditors or produce all possible results (reorganization, liquidation). Type I collective refinancing agreements simply protect agreements from avoidance;

---

negotiation period of art. 5 bis IL is included in Annex A of the Recast EU Insolvency Proceedings as one of the types of Insolvency Proceedings existing in Spain.

[29] This is the literal and more widely supported interpretation of article 5 bis. However, there are authors that contend that after the 3 months the —insolvent— debtor must petition for the opening of formal insolvency proceedings immediately (or else become subject to the consequences for the infringement of the duty to file).

[30] The exclusion of public creditors from the moratorium is another step in the path initiated by the legislator to overprotect public creditors since the onset of the financial crisis. With the –erroneous- view that repayment of public claims ahead of private creditors protects the public interest, Spain has slowly amended the original version of the Law, reasonable in its initial version, to place public claims ahead of the rest (using the financial crisis, and the need to increase the revenues of the State, as alibi). And it has done so by providing public claims with a procedural privilege: essentially, by leaving them untouched in all types of out of court agreements. The consequence of this is, naturally, that the restructuring effort is borne by private creditors, while public claims are paid in full. It also hampers the successful completion of an out of court agreement, since public claims are only classified as 50% ordinary and 50% generally privileged in the hierarchy of claims within ordinary insolvency proceedings. If the amount outstanding is large enough, private creditors may be better off inside formal proceedings.

Practice shows that the most hazardous measure of all happens at the onset of the "negotiation period". Once a debtor gives notice of the commencement of negotiations, the Tax Agency is notified by the Court. Since it is not subject to the moratorium, the public claimant avails itself of the period to seize assets and get *de facto* priority over receivables and other rights of the debtor, endangering the continuation of the business and the restructuring agreement as a consequence thereof. Fortunately, this is not always the case. Sometimes the tax authorities simply use the threat to reach a bilateral agreement whereby the main bulk of the debt is rescheduled, against the payment of an initial lump sum and the provision of additional security/guarantees.

[31] The regulation is contained in the Additional Rule 1 of the Royal Legislative Decree 4/2014 and developed by the Bank of Spain in its Regulation (*circular)* 4/2014, of 18th March 2014.

Type II are aimed only to restructure the financial debt; and Type III is a procedure limited to the smaller businesses. All elements considered, of the three, Type II (homologated refinancing agreements) would constitute the closest to a general out-of-court procedure to deal with business failure: it can be used before or in a state of insolvency, the content of the agreement is open and flexible, it implies very little court intervention and no necessary insolvency representative involved, and, no less importantly, it is proving a useful tool at least for the medium to upper section of the market.

Regulated proceedings Type I: 'Ordinary' Refinancing Agreements (Acuerdos de Refinanciación)

Ordinary Refinancing Agreements[32] are purely conducted and implemented out of court, with no formal institutional involvement (i.e., no insolvency representative or mediator is appointed). They can be reached by any type of debtor with any type of creditor (although some restrictions apply to public creditors), and there is no express requirement that the debtor be insolvent or even imminently insolvent.

Ordinary Refinancing Agreements can be either *collective* (art. 71bis.1) or *non-collective* (art. 71bis.2) [33].

With regard to the first category (*collective refinancing agreements*), the Law promotes them by offering protection in two different stages: first, as described above, during formal negotiations; second, once approved, if the debtor falls insolvent the agreement is sheltered from avoidance actions. In order for the refinancing agreement to benefit from the protection against avoidance actions, a number of requirements must be met. In short, the Law requires one material and three procedural requirements (art. 71bis.1.b). The mandatory material content of the agreement consists of a "significant increase of the funds available" or the rescheduling or writing down of the debts, measures that must be linked with a business viability plans that allows for the continuation of the activity in the short and mid-terms. The procedural requirements are the following: (a) 3/5 of the total claims support the agreement (all creditors of a syndicated loan will be deemed to support the agreement if creditors representing 75% of the loan have voted for it; and loans provided by companies of the same group are excluded); (b) an auditor (the one of the company or one appointed ad hoc if there was not one in office) certifies that the required majority has been reached; (c) the agreement and all necessary documents have been notarized.

As per the second category (*non-collective refinancing agreements*), they are protected from ex post avoidance actions, but may not benefit from the protection during formal negotiations. In order to be protected against avoidance actions, these agreements needs to comply *all* of the following requirements: (i) the proportion between the assets and liabilities must be increased; (ii) following the agreement, the working capital has to be

---

[32] Hereinforth, "Refinancing agreements" or "Type I agreements".

[33] For a detailed description and analysis of these procedures, see the thorough work of Professor J. PULGAR, *Preconcursalidad y Reestructuración Empresarial,* Madrid (La Ley/Wolters Kluwer) 2016, 2nd ed., passim. For more recent analysis, focused on type II of collective refinancing agreements, see also F. AZOFRA, *La Homologación Judicial de Acuerdos de Refinanciación,* Madrid (Reus) 2016.

positive[34]; (iii) the value of the security rights created in favour of the participating creditors does not exceed 90% of the value of the debt outstanding with the said creditors; (iv) the proportion of security rights to debt held by the participating creditors is not increased as a consequence of the agreement; (v) the interest rate applicable to the debts following the restructuring operation has not increased more than 33% of the previous interest rate; and (vi) the agreement, including a justification of the measures adopted, is formalized by public deed before a notary public. As it will evident to the reader, the law offers protection to agreements whose content is so obviously positive for the debtor (and non-participating creditors) that there is no reason to keep it on the line, subject to the risk of a future annulment[35].

As stated above, since those agreements are not subject to any confirmation by the court, and as there is no specific registry for them, ***no quantitative data is available regarding their use***.

Regulated collective proceedings Type II: Homologated Refinancing Agreements (Acuerdo de Refinanciación Homologado)

General considerations

The Homologated Refinancing Agreements[36] are refinancing agreements between the debtor and its "financial creditors", not including commercial or tax creditors. Type II agreements are, essentially, a Type I refinancing agreement that is made binding on non-participating/dissenting creditors, even on those holding security rights, following confirmation by the Court that certain requirements have been met. No insolvency representative is appointed and the Court intervention is limited to the decision on the commencement of the negotiation period (if formally notified to the Court, something which is not mandatory) and to the confirmation of the plan. Apart from the enhanced efficacy vis-à-vis creditors, the Law also envisages a stay of executions during the period that lapses from the petition to confirm the plan and the issuance of the decision, and absolute protection from *ex post* avoidance actions. Although these agreements are open to all kinds of creditors, practice shows that they are mainly used by mid to large businesses. In fact, this mechanism has been used in a number of high profile cases in the past two years.

The data available about homologated refinancing agreements is very scarce: during 2015 (the first full year of availability of these agreements), 94 agreements were successfully

[34] Article 71bis.2 literally states that the liquid assets (*activo corriente o circulante)* are equal or higher than short term liabilities (*pasivo circulante)*.

[35] But it is questionable whether this new protection is anything more than an attempt to generate additional certainty to the financial creditors with a view to fostering out of court agreements. In reality, it would seem difficult to see how an agreement of the type described in the Law could ever be avoided in a subsequent insolvency, under the law existing before the reform, since no damage to the estate or detriment to creditors would seem to likely arise.

[36] Hereinforth, "Homologated refinancing agreements", "Type II Agreements" or "HRA".

homologated by the Courts; in 2016, the trend has kept steady, with 72 judicially confirmed agreements by 31 October (last date we have found data available) [37].

On the face of it, numbers would seem low. However, most of the cases concern medium to large companies, including some very large multinational groups, active in dozens of countries. Although a purely gross numeric comparison with the number of formal insolvencies offers a scarce use of the agreement (less than 2% in 2015), a comparison of the added value of the assets and liabilities involved in homologated agreements compared to those pertaining to formally insolvent companies, gives the out of court procedure a much higher relevance. The perception on the use of the system would also seem to be positive, for the upper tier of the market: although there are complaints, the procedure is considered a much preferred alternative to formal insolvency proceedings. Allegedly, homologated refinancing agreements would be preferred over formal insolvency proceedings by most —if not all— medium sized to large companies/groups, as well as by their financial creditors (although the conviction is less strong for the latter: specially those with security rights)[38].

Homologated refinancing agreements can be a stand-alone procedure. This will happen when the debtor and a group of financial creditors conduct negotiations aimed at the restructuring of the business and the financial debt in a private, often confidential manner. Once the agreement has been reached, what initially was a purely-contractual agreement may be protected from ex post avoidance actions and made binding on non-participating/dissenting financial creditors by requesting the confirmation of the agreement before the Court that would be competent to open the insolvency proceedings of the debtor. But most often, this is not how the story goes. Debtors usually try to seek a solution to liquidity tensions on their own (through their own plan, seeking alternative means of financing), and are recurrently reluctant to show their weakness to their financial creditors. Only when it is too late, or when no alternatives have been found, debtors start renegotiating with their standing financial creditors. At that time, down the road, the debtor is likely to be already in a financial situation of liquidity stress, bordering –if not fully in- the terrain of the duty to file for insolvency (art. 5 IL). In this case, debtors initiate or intensify contacts with their financial creditors, but are simultaneously forced to resort to the preparatory "negotiation period" ex art. 5 bis IL in order to avoid breaching the duty to file and stave off the risk of personal liability in case of insolvency [39]. In most

---

[37] Source: the Official Gazette (*Boletín Oficial del Estado*, available at www.boe.es), and the Professional Body of Economists of Spain, available at http://www.economistas.es/Contenido/refor/Datorefor/ANALISIS%20ACUERDOS%20DE%20REFINANCIACION%20HOMOLOGADOS%20HASTA%20OCTUBRE%20Y%20COMPARATIVA%202015%20Y%202014.pdf.

[38] The assertions in the text stem from a number of interviews with top lawyers from a number of high profile firms in Madrid and with banks and other stakeholders conducted recently in the context of the European Commission´s Research Project entitled "*Contractualized distress resolution in the shadow of the law: Effective judicial review and oversight of insolvency and pre-insolvency proceedings*", of which the author is Principal Researcher for the UAM (the project includes also the Università di Firenze and the Humboldt University of Berlin). The results and the data collected will be made available during the first half of 2017.

[39] The "negotiation period" has a set date of finalization. This paves the way for strategic behavior of the negotiating parties. Most commonly, the interest of the debtor and its creditors will be aligned in trying to avoid formal insolvency proceedings, so it becomes a matter of who stands to lose out more from the failure of the out of court solution. This will depend on many elements: the amount of debt that may not be affected by the agreement, the type of security held by financial institutions, etc. It is not uncommon that the debtor´s

cases, thus, homologated refinancing agreements are the subsequent stage of a "negotiation period" where the negotiations have been conducted under the umbrella of the law, and the debtor has been shielded from executions and insolvency petitions [40].

Procedure and participating creditors

The petition to homologate a refinancing agreement may be presented by the debtor (which would normally be the case) or by any of the participating creditors. Together with the formal request, the petitioner must submit the complete refinancing agreement, a certification of the auditor that the relevant majorities of votes have been met and the reports that have been issued by independent experts (or indeed any other documentation that is regarded as relevant for the homologation of the agreement).

The petition must be presented in the Court that would be competent to open formal insolvency proceedings. The competence is legally assigned to the Commercial Court of the location where the COMI is (art. 10 IL), although if both the COMI and the domicile are in Spain, but in different locations, the petitioning creditor may choose either of the two places. The Court will register and "admit" the petition (*admission a trámite*), which automatically entails the stay of all executions over the debtor´s property (AD 4 para 6)[41]. The IL expressly states that the decision must be channeled through an "urgent procedure" and be issued within 15 days from the date of the petition. The Judge in charge of the Court will need to be satisfied that all the requirements included in AD 4 are complied with: not only the required majorities, but also the inclusion of measures that reasonably ensure the viability of the business activity in the short and midterm[42].

This type of agreement is aimed only at the restructuring of the financial debt. By "financial debt" (*pasivo financiero*) the Law understands *"[t]he holders of financial claims, independently of whether they are supervised or not*". This is to be interpreted as including all loans and claims where money or another instrument convertible into money

main card will be the threat of avoidance of previous transactions with banks, which can only be made valid in formal insolvency proceedings.

[40] As a general rule, the decision to commence the negotiation period is sent by the Court to the Registry for its publication in the Registry of Insolvency Decisions, and it is therefore made public, with all the detrimental consequences this may have to the reputation of the debtor. This may be especially problematic in situations –not uncommon- where the debtor has not stopped paying its commercial creditors and has not restructured its size or dismissed employees. The "peace" of the ongoing operations of the business, so important for the value of the business itself (and hence for its creditors) may be jeopardize. In light of this, the Spanish IL allows the debtor to request the confidentiality of the negotiation period, which would, then, not be subject to open publicity. Practice shows, however, by the time the debtor files an art. 5 bis period, much has already been done (renegotiations/delays with suppliers, reduction of staff, etc.) or that some debtors are too big for the confidentiality to be kept, so there is little need for the confidentiality.

[41] The express mention of the moratorium of executions is necessary, since, even in those cases where the request to homologate an agreement follows a "negotiation period", this preparatory stage ends precisely with the said request. In any case, and although it is subject to interpretation, the stay of executions triggered by the petition to habilitate the refinancing agreement will not bind public creditors, (who were not bound during the negotiation period and who would not be bound by the homologated agreement).

[42] In order to analyze the compliance with the viability requirement, the Judge will count on all the supporting documents, including -and most importantly- the reports of the independent experts not only on the viability plan, but also on the valuation of the assets (if applicable). The importance of this initial control, however, cannot be underestimated, since this issue cannot be revised later through an appeal against the homologation of the refinancing agreement.

was lent to the debtor [43], with the exception of creditors that hold "*labour claims, claims originated in commercial transactions and claims subject to public law*" (4 DA. 1, para 3 IL). This means that it is the activity, not the person that conducts it that matters: if an employee or a supplier lent money outside their own professional or commercial activity, the debt could be part of the refinancing agreement. The law allows employees or commercial creditors to be bound by the agreement if the voluntarily decide to, but their claims would not count for the formation of the majority of the vote [44]. Naturally, the holders of bonds, obligations or any other type of debt securities are included in the concept. Claims held by SAREB are also included, since they are mainly acquired from financial institutions and were financial debts at origin [45]. Further, the law expressly excludes from the counting of the votes those creditors that are considered "specially related" to the debtor. These related creditors may, however, be bound by the agreement [46].

The lack of clarity as to which creditors can be bound by the agreement is a negative characteristic of the system. In some cases, Courts are overly restrictive and endanger the success of the operation. For example, guarantees may have to be left out of the agreement, making the refinancing operation of certain debtors all but useless: think of an industrial company, or a company which exploits concession rights, the financing of which is often designed with guarantees for large amounts. The system would greatly benefit from a clearer determination of the affected creditors; or, perhaps, it would benefit from an enhancement of the kind of affected creditors.

In any case, practice shows that viable debtors conduct negotiations in parallel with those creditors that cannot be subject to a homologated refinancing agreement. A restructuring of the employment contracts or a reduction of the number of employees will be negotiated

[43] Naturally, funds and other entities that have acquired ex post financial debt from banks are also included in the scope of the homologated refinancing agreement. It is dubious, though, that all claims become "financial debts" for the mere fact that they have been acquired by a financial institution (bank or non-bank financial institution), for example, through a factoring agreement.

[44] The AD 4 expressly forbids public creditors from being part of the agreement. They could not bind themselves to it, even if they considered it positive for their own expectations of repayment. This stern rule means, in practice, that public creditors would have to negotiate a parallel, bilateral agreement, that would be subject to the regulation –and the restrictions- of public law. It is also noteworthy that 4 AD does not refer to "tax claims" or generally to the claims of public creditors, but rather to the claims subject to administrative law. This would seem to leave out, for example, claims against the debtor held by a public entity that originates in the latter´s participation in the market. Publicly owned financial institutions aimed at financing certain activities of special value or the SME sector have been bound by refinancing agreements (for example, the Official Institute of Credit of Spain, or its Catalan counterpart).

[45] The expression SAREB stands for *Sociedad de Gestión de Activos procedentes de la Reestructuración Bancaria.* It is Spain´s bad bank, the company that holds the "bad assets" (mainly NPLs of the real estate sector) acquired from troubled financial institutions. The SAREB has been most active in restructuring agreements in Spain in recent years (both in and out of court).

[46] It is not uncommon that specially related parties, such as company directors or entities of the same group bind themselves to the agreement, independently of the nature and the origin of their claim. This is unsurprising, since these creditors are treated as subordinated creditors in case of insolvency (and therefore are bound to receive a worse treatment in the formal in court alternative to the refinancing agreement). The law determines who "specially related" persons are (art. 93): in the case of legal persons, it includes company directors, shareholders with more than 10% of the shares (or 5% if the debtor is listed in the stock exchange), companies of the same group, etc. For more detail on specially related parties and generally on the subordination of claims in Spain, see I. TIRADO, "Ranking and Priority of Creditors. Spain", in D. Faber/N. Vermunt/J. Kilborn/T. Richter/I. Tirado, *Ranking and Priority of Creditors, ICIL Series,* Oxford University Press, 2016.

separately, subject to labour law; or certain key commercial creditors will redesign their relationship with the debtor as the refinancing agreement is being agreed and implemented with financial creditors.

The content of the agreement

The plan must provide a "significant increase of the funds available" [47] or the rescheduling or writing down of the debts (or a combination of any of the foregoing), linked with a business viability plans that allows for the continuation of the activity in the short and mid-terms [48]. Generally, the Law pre-determines the results of the agreement, but not the operations that will lead to the result. As a matter of principle, the debtor and the relevant creditors are free to design the content of the business restructuring measures to be included in the viability plan of the refinancing agreement. The insolvency law includes no express limits, beyond the limit of 10 years in the rescheduling of the debt (like in formal, in court proceedings). This may be achieved by any restructuring measure, of the debt or of the assets of the debtor that the parties consider adequate for the viability of the business. The limits are set by company law, general private or public law (ie, whenever public contracts or concession rights are affected) and by the general tenets of the insolvency law. However, the freedom of content is not so evident when it comes to the effects on financial claims in case they are to be imposed on dissenting creditors. In the relatively scarce practice, some Courts have adopted an open interpretation (ie, no express limits by the law mean no limits by the parties), but some others have made an strict interpretation, according to which only a refinancing of the debt, in the terms expressly regulated in AD 4.2 and 3, are allowed. This latter interpretation would not accept a change in the applicable law or in the debtor (substitution by a newly created ad hoc entity, or a third party acquirer, or another group company). This creates uncertainty and undermines the usefulness of the instrument [49].

The Insolvency Law conceives homologated refinancing agreements as a possible mechanism of distressed business transfer. In a stern and rather unique manner, the Insolvency Law empowers creditors over shareholders by punishing the latter in case a debt for equity swap fails and the company ends in formal insolvency proceedings. Formal insolvency proceedings ending in liquidation or with the approval of a plan considerably detrimental to creditors will end with the opening of a stage where the debtor or its directors may be held liable or sanctioned (*sección de calificación*). The liability or sanctions will be established whenever the debtor (or its directors) have been found guilty

---

[47] The expression "significant increase" was left open on purpose, to allow the judge to appreciate all the circumstances of the case. There are, however, decisions that have quantified the increase: an early decision of the Court of Appeals of Barcelona of 6 Feb 2009 considered that the increase would need to reach at least 20%. The Lead Judge of the Court, Ignacio Sancho, is now at the Supreme Court.

[48] The expression short and midterm are also undefined. The interpreter cannot convincingly link the content with the use of short/long term of accounting rules, since the expression "midterm" does not exist in the accounting regulation. Some authors have argued that the minimum period of time of viability of the business should be one year (see, for example, F. AZOFRA, *La homologación, op.cit.,* pg. 58). In our opinion, 12 months can be taken as the definition of short term (as accounting rules do), but this would not be enough, since the law (AD 4.1 and 71 bis.1 IL) refers to the viability in the short *and* medium term. The expression is unfortunate because the reference to short term is unnecessary. The minimum time would need to be determined taking all circumstances into consideration, with no pre-defined, minimum time beyond a year.

[49] In this point, too, the homologated agreements seem less flexible and useful than the schemes of arrangement.

of causing or aggravating the insolvency of the debtor. The Law includes a number of situations the occurrence of which will trigger the presumption of culpability. One of these presumptions concerns the behavior of directors and shareholders during the negotiation of a refinancing agreement (of any of the three types). In accordance with article 165.2, the culpability will follow (*iuris tantum*) "(…) when shareholders or directors had rejected, without a justified cause, a capitalization of claims or the issuance of convertible securities, and such rejection had caused the frustration of a refinancing agreement (…)" [50]. In other words, those shareholders that do not agree to the dilution of their ownership rights over the debtor will risk their own personal liability if things go wrong. The law tries to soften the strictness of the rule by stating that culpability will only ensue if the refinancing agreement had expressly recognized a right of preferential acquisition in favour of former shareholders, in case creditors (ie, new shareholders) purport to transfer of the shares in a later moment.

And yet, this "bail-in" rule might seem a bit excessive in the case of homologated refinancing agreement. This type of agreement does not require insolvency; and, even if it did, Spanish insolvency law considers a failure to pass the cash flow test as a situation of insolvency for the purposes of the duty to file. In light of this, a debtor may be solvent, or be undergoing a situation of illiquidity, and shareholders may be forced to relinquish their property to avoid personal liability. This is, actually, a mechanism that very closely resembles the liquidation of the company through the transfer of the going concern, in which the loss is borne by shareholders [51].

The approval of the agreement

The Law requires different majorities depending on the effects sought and on the content of the agreement. It must be noted that the majorities are based purely on the value of the claims, there being no headcount requirement. There is also no voting by classes within the different financial creditors [52]. The literal reading of the Law would seem to indicate that, in case of groups, the majorities need to be reached only in each of the companies participating in the agreement.

The AD 4 includes a number of additional rules concerning the participation and the voting of agreements. A first one, conspicuous for its originality, regards syndicated loans (including club loans or generally loans provided by a number of lenders with an agreement that regulates the inter-creditor relationship): independently of the way the loan regulates the formation of majorities or the inner effects of decisions, all creditors will be deemed to have voted in favour of a refinancing agreement when claims representing 75% of the syndicated/club loan have supported it [53]. A second rule –or

---

[50] The article goes on to state that "[*T]o these effects, the capitalization of debts will be deemed reasonable when it was deemed so by an independent expert (…)".*

[51] A kind of rescue of the business, not of the business owners: see, already for the German law in the early 1990s, M. BALZ, "*Sanierung von Unternehmen oder von Unternehmensträgern?",* Cologne (RWS) 1986, *passim.*

[52] The formation of majorities is, thus, different to the rules envisaged for the schemes of arrangement. The Spanish system is much more rigid and makes it difficult to reach a bespoke solution that adapts to the needs of the case. Another element that might push creditors to force a move towards England or Wales.

[53] There is no doubt that this rule alone applies to the effect of shielding the agreement from avoidance actions, but it is unclear whether additional majorities are necessary to bind dissenting or non-participating

rather, set of rules- concerns the definition of secured creditor for the sake of the voting. A creditor with a security right will be regarded a secured creditor for 90% of the "reasonable value" of the collateral. The law also provides guidance as to what constitutes "reasonable value", depending on the type of asset or right that is used as collateral [54].

The homologation will only achieve an –absolute- protection against avoidance actions when 51% of financial creditors have voted in favour [55] [56]. In order to bind non-participating or dissenting creditors, higher majorities are required. They increase as the content of the agreements gets more detrimental to creditors, as well as with the involvement of secured creditors:

- Creditors without a security right (or secured creditors for the portion of the credit not backed by collateral) will be bound: (i) by an agreement that foresees a rescheduling of the claims for less than 5 years (or their substitution by subordinated credits with equal maturity), if 60% of financial claims vote in favour; (ii) the required majority will be raised to 75% if (a) the maturities are rolled over for more than five but less than 10 years; (b) a write down of the debt (principal or interests) is included; (c) the claims are capitalized; (d) there is a substitution of the original claims by subordinated debt or convertible securities; or (e) assets or rights are transferred to creditors as payment of their debts [57].

---

creditors: it is arguable that the dissenting creditor part of a syndicated agreement will only be bound in case the majorities included in AD 4. 3 are met.

[54] In short, the rules are the following (AD 4.2 IL): (i) if the collateral consists of securities listed in an organized market, the average value of the security in the 3 months previous to the opening of the negotiation period (or, if no negotiation period is opened, the *dies a quo* will be the petition to homologate the agreement; (ii) in case of immovable assets, the value will need to be determined by a publicly certified appraiser of immovable property (*sociedad de tasación*); (iii) in case of other assets, the value will be determined by an independent expert. The special valuation mentioned in (ii) or (iii) will generally not be necessary when an independent expert had already conducted a valuation within the 6 months previous to the opening of the negotiation, or when the assets consist of cash, current accounts, electronic money or term deposits of money.

[55] In order to get protection from avoidance actions, the agreement must include the mandatory content (considerable increase of credit, viability in the short-midterm) and, like type I refinancing agreements, the following formal requirements: the certification that the required majority has been reached and the formalization of the agreement and all necessary documents before a public notary (AD 4.1 and 71 bis.1 IL).

[56] There is no additional requirement that the majority is also reached at a consolidated group level. This is, however, not a clear matter. Authors are divided. The requirement of both majorities has been argued, with powerful reasons, by Prof. F. LEON, in "La reforma de los acuerdos de refinanciación preconcursales", in A. Rojo/A. Campuzano, *Estudios Jurídicos en Homenaje al Profesor Emilio Beltran,* Valencia (Tirant) 2015, t. II, pg. 1343 et seq., especially at p. 1350. A number of judicial decisions (first instance) have also supported this alternative view.

[57] The satisfaction of the claims of financial creditors with the transfer of assets or the assignment of rights is a possibility that has its limits. It cannot be used to cover a full liquidation of the business. Such a refinancing agreement would run against the very essence of the out of court solutions as designed in Spain, and would directly contradict the legal requirement that the agreement be based on a viability plan that ensures the continuation of the business at least in the short and midterms (AD 4.1 and art. 71bis.1). In line with this opinion, see F. AZOFRA, *La Homologación,* op. cit., pg. 69, fn. 37. Cfr. A. CARRASCO, "Impugnabilidad cocnursal de los acuerdos de refinanciación del RD Ley 4/2014", in *Análisis Gómez-Acebo y Pombo,* March 2014, available at http://www.gomezacebo-pombo.com/media/k2/attachments/impugnabilidad-concursal-de-los-acuerdos-de-refinanciacion-tras-el-rd-ley-4-2014.pdf.

- Creditors with a security right will be bound by majorities of 65% or 80% of financial claims when the agreement foresees a content that mirrors (i) or (ii) above, as the case may be.

The binding effect on dissenting or non-participating financial creditors included in the agreement knows no exception [58]. Even if the restructured claims have been previously included as collateral of a securitization, the holders of the bonds/securities do not need to consent to the restructuring. This seems especially relevant in a jurisdiction where holders of mortgage-backed securities have received special protection in case of insolvency proceedings for decades [59].

The opposition to the judicial homologation of the agreement

The decision of the Court to confirm the refinancing agreement may be challenged by non-participating or dissenting creditors, affected by the agreement. The opposition must be filed within 15 days from the moment the agreement was made public in the Registry of insolvency decisions or in the official gazette, whatever happens last. The legal grounds to contest the agreement are limited to: (a) the breach of the majorities required by the Law; or (b) proof that the agreement imposes a "disproportionate sacrifice" to the creditor.

Conspicuously, the objective viability of the plan cannot be subject to appeal. This is clearly a conscious policy decision of the legislator, who deems the viability of the plan sufficiently proved by the endorsement of such high percentages of financial creditors (60-80%, depending on the case). The decision is, on the face of it, arguable. While all rules that add certainty and speed to the process are to be commended, it is undeniable that minority financial creditors –and even non-financial creditors, whose chances of repayment will undoubtedly be affected by an agreement that may restructure the business itself, not only the claims- will be unprotected. In this, the Spanish solution also over-protects majority creditors, as was the case with the possible sanctions for non-approving a debt for equity swap. A very different approach to the judicial protection conferred upon minority creditors by the "fairness test" in the schemes of arrangement.

The Law does not provide any guidance as to what constitutes a "disproportionate sacrifice". The expression, however, does provide guidance: the agreement ought to be "proportionate", and the proportionality must be read in a manner consistent with the finality of the homologated refinancing agreement. In light of this, it would seem reasonable for a creditor to successfully challenge an agreement that includes sacrifices that are not necessary for the short to midterm viability of the business. Dissenting creditors should be bound to assume the minimum sacrifice necessary for the business to be successfully restructured, but not beyond that. More complex is the question if the unjustified sacrifice should not only be gauged in absolute terms but also in relative ones. This could happen in case homogenous financial creditors suffer the consequences of the agreement with different intensity (for example, if they had security over assets with

---

[58] This does not mean that dissenting or non-participating creditors need to be included in the agreement. Nothing prevents the debtor and the majority creditors to exclude certain financial creditors from the content of the agreement if they voluntarily so decide (so long as leaving them out does not hamper the viability of the debtor).

[59] Vid. art. 14 of the Law 2/1981 of 25 March, that regulates the mortgage market.

different level of liquidity, or the maturity of the claims of the dissenting creditor was disparate to those voting in favour). In practice, it has also been alleged as disproportionate sacrifice when the inter-creditor hierarchy has not been respected. For example, senior creditors may be made to suffer the same effects on their claims as mezzanine creditors, since the AD 4 makes no treats all financial creditors alike, with he only difference of secured vs unsecured claimants. Finally, authors have claimed that a "best interest" type of test should draw the line of acceptable sacrifice. This cannot be accepted. A first reason is that Spanish Insolvency Law does not include a liquidation or best interest test within formal insolvency proceedings, and if the legislator –no doubt, mistakenly- has excluded it in cases of non-secured creditors in formal insolvencies, even less so should it want it in out of court proceedings concerning secured claims. Otherwise, secured creditors fully covered by the value of the collateral could never be forced by an agreement that did not provide for a 100% repayment of their debt. This is so because Spanish Insolvency Law protects secured creditors with absolute priority over the proceeds of the collateral in liquidation proceedings. The application of a rule that does not exist would, then, defeat the purpose of a rule that exists, and that provides no exception for fully secured creditors.

Regulated collective proceedings Type III: Out of Court Agreements on Payments (Acuerdo Extrajudicial de Pagos)

Hereinforth also "Type III Agreements" or "OCAP". This full out of court procedure is designed for insolvent —and only insolvent— SMEs [60]. Its introduction in the 2013 reform sought to provide a solution to distressed small businesses outside the Court system, then already struggling with a backlog of cases. It consists of a relative nimble procedure, with limited paperwork required and the use of pre-designed templates, channeled through the Commercial Registry and Chambers of Commerce [61], with the intervention of insolvency professionals labeled "mediators" (*mediador concursal*) but whose role stretches well beyond mere mediation. The initiative is assigned only to the debtor, who triggers the commencement of the procedure by requesting from the Commercial Registry of its domicile or an authorized Chamber of Commerce to appoint a mediator. Once checked that all formal requirements are complied with, a mediator is appointed from a list, in pre-established order. The appointor will notify the Court of the commencement of the negotiation period and a stay of executions will commence, with the same scope and time as already described for refinancing agreements Type I and II. The mediator will check the documents submitted by the debtor and contact creditors, summoning them to a meeting within 2 months from the appointment. All creditors are involved in this procedure, with the exception of public creditors. The mediator will draft a plan, agree it with the debtor and share it with creditors ahead of the meeting. The content of the plan is open and flexible, although the majorities required increase with the hardship of the plan. If passed, the agreement binds also non-participating and dissenting

[60] The debtor may be a sole entrepreneur or a legal entity with an estimated debt of less tan 5 million euro (art. 231 IL).

[61] Individual debtors who are not entrepreneurs will trigger the procedure through a Notary Public that may also act as mediator.

creditors, including secured creditors[62], and the agreement cannot be avoided in a subsequent insolvency.

As it was stated above, these are proceedings designed to tackle the distress of SME. The access is limited to insolvent debtors, and therefore it is an alternative to formal insolvency rather than a mechanism of early prevention. Its aim is to free the court system from the smaller cases, by creating a streamlined procedure conducted by professional "mediators" and channeled through semi-public bodies, currently less burdened with work than courts.

The numbers that are available refer only to 2014, 2015 and 2016 and show the following[63]: (i) there were very few petitions of legal entities (47 cases open in total -12 before the reform, after and until 2016, 17 in 2016), while the petitions for natural persons reached 1748); (ii) the entities were of small size (in 2014, the average value of assets of the debtors was of 377.632 euro, 783.815 euro in 2015 and 321.991 euro in 2016; the average amount of debts in 2016 was in the tune of 231.278 euro, with 92,9% of the debtors owing less than 1 million euro, and 7,1% between 1 and 2,5 million; and with a small volume of business (in 2016 no debtor undergoing this type of procedure had a business volume higher than 2,5 million euro); and (iii) the financial situation of the debtors at the moment in which they filed to use the system during 2014, 2015 and 2016 was highly deteriorated, in fact worse than the average financial distress of formal insolvency proceedings.

The very scarce use of Type III agreements is probably explained by a combination of a flawed design with a lack of insufficient dissemination amongst the owners and directors of the smaller businesses. The design fails specially in two elements: firstly, it leaves out public creditors (ie, tax claims), which cannot be bound by the agreement, in a sector where public claims often constitute the most relevant outstanding liability, rendering the procedure useless. In fact, the treatment of public claims within formal insolvency proceedings is more favourable to the debtor, since at least 50% of the tax claims are treated as merely unsecured claims, and default interests as subordinated. In light of this, smaller debtors have an incentive to use formal insolvency proceedings instead of its out-of-court alternative. Secondly, the system of majorities envisaged in the procedure is too stark. Having to reach such high voting thresholds constitutes a disincentive to debtors.

---

[62] The Law tackles the passivity of creditors, common in the insolvency of SMEs, in a stern fashion: those creditors that have been notified and have not attended the meeting or otherwise supported or rejected the plan expressly will suffer the subordination of their claims in case of subsequent insolvency proceedings (art. 237 IL).

[63] The sources are the "Anuario 2016", "Anuario 2015" and "Anuario 2014", Registradores, op.cit., pgs.124 et seq; and the Registry of Insolvency Decisions (*Registro de Resoluciones Concursales*), an open, public registry run by the Official Body of Property and Commercial Registrars (Colegio Oficial de Registradores de la Propiedad y Mercantiles). The website is https://www.publicidadconcursal.es.

Although this type of out of court procedure was introduced in 2013, the Ministry of Justice did not take the steps necessary for its implementation (among other, the publication of a list of mediators) until April 2014. The institutional system was not fully operative until October 2014 (vid. the analysis of the Professional Body of Economists of Spain, available at: http://www.economistas.es/Contenido/REFor/ActualidadREFOR/CONCLUSIONES%20REFOR%20POR%20CCAA%20Y%20PROVINCIAS%20%20SOBRE%20MEDIACION.pdf). The activity during those initial times and the rest of 2014 is almost irrelevant. The data provided only refers to legal entities. In 2014 and 2015, 42 individual entrepreneurs filed for a Type III agreement, and in 2015 the number increased to 396.

JUDICIAL FRAMEWORK

Traditionally, the Spanish insolvency system only had two main actors: the Insolvency Judge (*juez del concurso*) and the Insolvency Practitioners (*administradores concursales*). However, the financial crisis beginning 2008 exposed the excessive rigidity of such a system, in which the Court played a decisive role. This is why in the out-of-court agreement on payments (OCAP), created in 2013, the central role is played by the Insolvency Mediator. Other actors that intervene or may do so in the in-court and/or out-of-court insolvency proceedings are the debtor's Barrister-At-Law and Solicitor, the Delegate Assistants of the Insolvency Practitioners, the Notary Public, the Business Registrar, the Independent Experts, the Court Clerk and the Public Prosecutor.

The following paragraphs will be devoted to the analysis of the main functions of said actors, with special emphasis in their role both in formal and semi-formal insolvency proceedings.

The insolvency Judge

The Mercantile Courts of Law (Organic Act on the Judiciary Art. 86 bis and ter) are a one-person specialised body within the Civil Jurisdiction that was created in 2003, to deal exclusively with a specific set of commercial subjects, including insolvency proceedings. To date, there are up to 64 out of the 88 initially planned Mercantile Courts throughout the entire Spanish territory.

Main functions of the Insolvency Judge

In formal insolvency proceedings

According to Insolvency Act Articles 8 and 10.1, the competence to declare and deal with the insolvency lies with the Mercantile Court of Law in whose territory the debtor has the centre of his main interests. If the debtor has his domicile in Spain and such domicile does not coincide with the centre of his main interests, the Mercantile Court of Law in whose territory the domicile is situated shall also be competent, at the petitioner's creditor choice. To this respect, the centre of main interests shall be understood as the place where the debtor usually performs the management of those interests, in a form recognisable by third parties. In the case of a legal person, the centre of its main interests is presumed to be at the place where the registered office is located. In either case, it is stated that any changes of registered office performed in the six months preceding the petition for insolvency shall be ineffective for these purposes.

It must be noted that the Mercantile Judge's jurisdiction is exclusive and excludes others in the following domains (Ins. Act Art. 8): (*i*) civil actions with an economic impact lodged against the insolvent debtor's aggregate assets with the exception of those exercised in proceedings on capacity, filiation, marriage and minors; (*ii*) labour actions intended for collective extinction, amendment or suspension of employment contracts in which the employer is the insolvent debtor, as well as suspension or extinction of top management contracts; (*iii*) enforcement on properties, goods and rights pertaining to the insolvent debtor's aggregate assets, whatever the authority that may have ordered them; (*iv*) all preservation measures that affect the insolvent debtor's aggregate assets; (*v*) legal actions directed at claiming company debts lodged against partners who are liable subordinately for the claims of the company subject to insolvency proceedings; and (*vi*) legal actions directed at claiming civil liability against company directors or liquidators, de jure or de facto, and the auditors of the company subject to insolvency proceedings, for damages caused to the insolvent debtor.

In addition, the Mercantile Judge's jurisdiction is extended to all the prejudicial civil, the administrative or labour matters directly related to the insolvency or whose resolution is necessary for proper performance of the insolvency proceedings (Ins. Act Art. 9).

Functions of the Insolvency Court within the insolvency proceedings are many and varied. One sort criterion may be distinguishing the different functions accordingly to the various phases in which the proceedings is normally divided, *i.e.* the common procedural phase, the composition phase, the winding-up phase and the classification section (or Section Six).

Functions during the common procedural phase of the insolvency proceedings

The so-called 'common procedural phase' is an initial phase (Ins. Act Title IV), in which the value of the aggregate assets or liabilities of the insolvency proceedings is calculated. This phase lasts from the hand down of the order declaring the insolvency proceedings open, until the presentation of the definitive texts of the inventory and the list of creditors. During this phase, the Insolvency Court has the following main functions:

1. *Declaration of insolvency proceedings*. The insolvency proceedings can only be opened at the request of a legitimated person (*i.e.* the debtor himself, the creditors or an insolvency mediator), not being possible for the Insolvency Court to open it on its own motion. The Court must also resolve all motions that eventually challenge the declaration of insolvency proceedings (Ins. Act Art. 14.2). Once the insolvency proceedings are opened, or the petition for a declaration opening the insolvency proceedings is admitted, the Court shall order formation of Section One ('common procedural phase'), which shall be headed by the petition (Ins. Act Art. 16.1).
2. *Appointment of Insolvency Practitioners and delegate assistants. Remuneration, liability and severance of the Insolvency Practitioners.* Power to appoint the Insolvency Practitioners lies with the Insolvency Court. The Insolvency Court may also give its authorization to the Insolvency Practitioners to delegate certain duties upon the assistants it may propose in the terms legally established (Ins. Act Art. 31.2). In addition, the Court is also competent to set the amount of the remuneration of the Insolvency Practitioners, as well as the terms within which it shall be paid (Ins. Act Art. 34.2), being able, at any stage of the proceedings, to amend the remuneration set, on its own motion or at the request of the debtor or of any creditor, if any fair cause concurs (Ins. Act Art. 37.1). Finally, the Insolvency Court is competent to hear and decide the liability actions against the Insolvency Practitioners (Ins. Act Art. 36.2) and when a just cause concurs, may server them from office, on its own motion or at the request of any of the persons legitimated to petition for a declaration opening the insolvency proceedings, or any of the other Insolvency Practitioners (Ins. Act Art. 37.1).

3. *Changes in the effects on the rights of management and disposal of the debtor over his aggregate assets*. The general rule is that in the event of voluntary insolvency, the debtor conserves the rights of management and disposal of his aggregate assets, and the exercise whereof is subject to intervention by the Insolvency Practitioners, via their authorisation or approval, whereas in the case of compulsory insolvency, exercise by the debtor of the rights of management and disposal of his assets is suspended, being substituted therein by the Insolvency Practitioners (Ins. Act Art. 40.1 and 2). Nevertheless, on petition by the Insolvency Practitioners and having heard the insolvent debtor, the Court may resolve at any time by order to impose change in the situations of intervention or suspension of rights of the debtor over his aggregate assets (Ins. Act Art. 40.4).

4. *Authorisation to dispose of or encumber assets and rights forming part of the aggregate assets*. Until judicial approval of the composition is secured or the winding-up is commenced, the properties, goods and rights forming the aggregate assets may not be disposed of or encumbered without approval by the Court, though some exceptions are legally provided (Ins. Act Art. 43.2).

5. *Debtor's professional or business activity ceasing*. A declaration opening the insolvency proceedings does not interrupt continuation of the professional or business activity performed by the debtor. However, the Court, at the request of the Insolvency Practitioners and after hearing of the debtor and the representatives of the employees at the company, may issue an order to close all or part of the offices, establishments or operations held by the debtor, as well as, when he performs a business activity, the total or partial cessation or suspension thereof (Ins. Act Art. 44.4).

6. *Changes in the remuneration of the office of director of the legal person debtor and seizure of assets and rights of its de facto and de jure directors and liquidators and of the shareholder or shareholders personally liable for the debts of the company*. Should the office of director of the legal person be remunerated, the Court hearing the insolvency proceedings may resolve to put an end to such remuneration or to reduce it, considering the content and complexity of the management functions and the assets of the insolvent debtor (Ins. Act Art. 48.4). In addition, from the declaration of insolvency proceedings of the legal person, the Court, at its own motion, or on a reasoned request by the Insolvency Practitioners, may rule, as a preventive measure, seizure of assets and rights of its de facto and de jure directors and liquidators, of general proxies and of those who have had such status in the two years prior to the date of that declaration, when in view of the evidence gathered there are grounds to believe that there is a possibility that in the ruling classifying the insolvency the persons affected by the seizure shall be condemned to cover the deficit resulting from liquidation (Ins. Act Art. 48 ter.1). Likewise, during processing the insolvency proceedings of the company, the Court, on its own motion, or on the basis of a reasoned petition by the Insolvency Practitioners, may order the seizure of assets and rights of the shareholder or shareholders personally liable for the debts of the company prior to the declaration of insolvency proceedings, in the amount deemed sufficient, when the proceedings show there is a grounded possibility that the

aggregate assets would be insufficient to cover all the debts, being empowered, at the request of the party concerned, to decide substitution of the seizure with a bank bond (Ins. Act Art. 48 ter.2).

7. *Authorisation to desist, withdraw, either fully or partially, from the lawsuit or to reach a compromise therein*. In the case of suspension of the debtor's rights of management and disposal, the Insolvency Practitioners, within the scope of their powers, substitutes him in ongoing judicial proceedings, although they shall need the authorisation of the insolvency Court to desist, withdraw, either fully or partially, from the lawsuit or to reach a compromise therein (Ins. Act Art. 51.2).

8. *Raising and cancelation of the seizures imposed*. Once the insolvency proceedings are declared open, singular, judicial or extrajudicial enforcements in process are suspended from the date of the declaration opening the insolvency proceedings, and the Court, at the request of the Insolvency Practitioners and after hearing of the creditors affected, may resolve to raise and cancel the seizures imposed, when their maintenance severely hinders continuity of the professional or business activity of the insolvent debtor (Ins. Act Art. 55.3).

9. *Functions with regard to contracts with reciprocal obligations*. The declaration opening the insolvency proceedings, alone, does not affect the validity of contracts with reciprocal obligations pending fulfilment, both by the insolvent debtor or the other party (Ins. Act Art. 61.1). Notwithstanding this, the Insolvency Practitioners, in the case of suspension, or the insolvent debtor in the case of intervention, may request rescission of the contract if they deem it convenient to the interests of the insolvency proceedings. In case of disagreement between the parties, the Court shall decide on the termination, ordering, when appropriate, the appropriate restitutions, and set-off that shall be paid from the aggregate assets (Ins. Act Art. 61.2).

   Furthermore, the declaration opening the insolvency proceedings does neither affect the right to terminate contracts with reciprocal obligations pending fulfilment, due to subsequent breach by any of the parties (Ins. Act Art. 62.1). Nevertheless, although there may be a cause for termination, the Court, considering the interests of the insolvency proceedings, may resolve fulfilment of the contract, the services due or that should be performed by the insolvent debtor being drawn from the aggregate assets (Ins. Act Art. 62.2).

Functions during the composition phase of the insolvency proceedings

In the Spanish system, the insolvency proceedings may end in two different ways: through a composition between debtor and creditors or through the winding-up of the assets and activities of the debtor. The aim of a composition is to achieve the settlement of the maximum number of claims against the debtor throughout propositions for write-down of debts or moratorium of payment, or both accumulated. In a standard insolvency proceedings, the composition phase (Ins. Act Title V Chapter I) follows the common procedural phase and begins with the Court hanging down an order commanding the creditors' meeting to be summoned (Ins. Act Art. 111). However, with the intent to reduce costs and give certain debtors a faster solution to his insolvency, the Insolvency Act allows, under certain circumstances, a composition to be negotiated in anticipation, during the common procedural phase (Ins. Act Arts. 104 to 110). In either case, the Insolvency Court plays an important role therein:

1. *Functions with regard to an early composition proposal*. In this scenario, the Court has, inter alia, the following functions:
    a) *Admission to consideration of the proposal*. The Court shall resolve by order on the admission to consideration of an early proposal of composition. In order for a proposal to be admitted to consideration it must be accompanied by adhesions by creditors of any kind, provided in the manner legally established and whose claims exceed one fifth of the liabilities presented by the debtor. When the proposal is submitted with the actual petition for voluntary insolvency, it shall suffice for the adhesions to amount to one tenth of the same liabilities (Ins. Act Art. 106.1).
    b) *Approval of the composition*. If the legally established majority were obtained, the Court, in the five days following expiry of the term for opposition to the judicial approval of the composition, shall hand down a ruling of approval, except if opposition to the composition has been formulated or the composition is rejected on its own motion by the Court (Ins. Act Art. 109.2).
    c) *Maintenance or amendment of unapproved proposals*. If approval of the composition is not appropriate, the Court shall without delay require the debtor to declare, within a term of three days, whether he maintains the early composition proposal for submission thereof to the creditors' meeting, or whether he wishes to petition for winding-up. In the composition phase, the debtor may maintain or amend the early composition proposal or formulate a new one (Ins. Act Art. 110.1).
2. *Functions with regard to the ordinary processing of a composition proposal*. In this different scenario, the Court has, among others, the following functions:
    a) *Opening of the composition phase and calling the Creditors' Meeting*. If the insolvent debtor has not applied for winding-up and an early composition proposal has not been approved or maintained pursuant, the Court shall hand down an order putting an end to the common phase of the insolvency proceedings, opening the composition phase and commanding the creditors' meeting to be summoned (Ins. Act Art. 111.1 and 2).
    b) *Admission to consideration of the proposal*. The Court shall verify whether the proposed composition submitted by the debtor or creditors holding claims aggregating at least twenty per cent of the ordinary liabilities of the insolvency proceedings fulfils the conditions of time, form and content legally established, and decide therefore the admission to consideration of the proposal or its rejection (Ins. Act Art. 114). If no proposal for composition has been submitted within the legal term, or if none of the proposals has been admitted to consideration, the Court, on its own motion, shall resolve opening the winding-up phase (Ins. Act Arts. 114.3 and 143.1.1º).

c) *Chairing the Creditors' Meeting*. The general rule is that the Court chairs the Creditors' Meeting, though, exceptionally, it may also be chaired by the member of the Insolvency Practitioners appointed by him (Ins. Act Art. 116.3).

d) *Approval of the composition*. Once the legally required majority set for the proposal is reached, the accepted composition shall be submitted to the Court for approval thereof. To this end, the Insolvency Act lays dawn, in the first place, that the Court shall reject, on its own motion, the composition accepted by the meeting, if the it were to appreciate that any of the rules legally established on the content of the composition has been breached, concerning the form and content of the adhesions, the written processing or on constituting the meeting or the holding thereof (Ins. Act Art. 131.1). Secondly, the Insolvency Acts states that opposition to judicial approval of the composition may be lodged within the term of ten days from the day following the date on which the Court Clerk verified that the adhesions presented reached the legal majority for acceptance of the composition, in the case of the early proposal or written proceedings, or from the date of conclusion of the meeting, should a proposal of composition be accepted thereat (Ins. Act Art. 128). In the latter case, the Court shall resolve by a ruling what he considers appropriate (Ins. Act Art. 129.3). And once the term of opposition has elapsed without any opposition being raised, the Court shall hand down a ruling approving the composition accepted by the meeting, unless the Court shall reject it on its own motion (Ins. Act Art. 130).

e) *Declaration of fulfilment of the composition and of conclusion of the insolvency proceedings*. The debtor shall deliver the insolvency Court, once he deems the composition to be completely fulfilled, the relevant report with the adequate evidence and shall petition for judicial declaration of fulfilment. Once fifteen days have elapsed from their availability, if the Court deems the composition to have been fulfilled, it shall declare so by order, which shall be given the same publicity as the approval thereof (Ins. Act Art. 139). Once the order declaring fulfilment is final and the term for actions to declare infringement has expired, or, when appropriate, those lodged are rejected by a final judicial resolution, the Court shall hand down an order of conclusion of the insolvency proceedings (Ins. Act Art. 141)

Functions during the winding-up phase of the insolvency proceedings

The *winding-up* is a phase in the insolvency proceedings intended to dispose debtor's goods and rights in order to settle the claims against him in the order legally established. This phase must necessarily be opened whenever a composition is not approved or an approved composition is not completely fulfilled. Throughout this third phase, the Insolvency Court deals, among others, with the following functions:

1. *Opening of the winding-up phase*. The debtor may petition for winding-up at any moment (Ins. Act Art. 142.1 II). Exceptionally, in the case of the professional or business activity ceasing, the Insolvency Practitioners may apply for the winding-up

phase to be opened (Ins. Act Arts. 44 and 142.3). But, apart from that, the winding-up phase shall necessarily be opened when no composition is approved or the approved composition is not satisfactorily approved (Ins. Act Art. 143).

2. *Separated disposal of units producing goods or services.* Generally, the set of the establishments, operations and any other units producing goods or services belonging to the debtor shall be disposed of as a whole. However, following a report by the Insolvency Practitioners, the Court may order to divide them up first, or to dispose of all the component elements or only some of them individually if he deems it more convenient to the interests of the insolvency proceedings (Ins. Act Art. 149.1.1[a]).

3. *Severance of the Insolvency Practitioners due to undue prolongation of the winding-up.* When one year has elapsed from opening the winding-up phase without conclusion thereof, any party concerned may petition the insolvency Court for severance of the Insolvency Practitioners and appointment of new ones. The Court, having heard the Insolvency Practitioners, shall resolve severance if there is no cause to justify the delay and shall proceed to appoint those who are to replace them (Ins. Act Art. 153).

4. *Settlement of ordinary claims in advance*. As a general rule, payment of the ordinary claims shall be performed against the aggregate assets that remain once the claims against the estate and the preferential ones have been paid (Ins. Act Art. 157.1 I). Nevertheless, in exceptional cases, the Court, at the request of the Insolvency Practitioners may authorise settlement of ordinary claims in advance when it deems payment of the claims against the aggregate assets and the preferential ones to be sufficiently covered (Ins. Act Art. 157.1 II).

Functions during the classification of the insolvency proceedings

Whenever an approved composition proves to be particularly burdensome to the creditors (*i.e.* when the composition establishes, for all the creditors or for those of one or several classes, a write-down of more than one third of the credits, or a moratorium of over three years) or when the insolvency proceedings finishes with the liquidation of the aggregate assets, the *classification section* (Ins. Act Title VI) shall be opened. This phase is intended to punish those conducts of the debtor himself, his legal representatives, his partners or even third parties that may have generated or aggravated the insolvency. During this phase the Insolvency Court has, among others, the following functions:

1. *Formation of Section Six*. When it is appropriate to form the Section Six (or Classification Section), the Court shall order so in the same judicial resolution by which the composition or winding-up plan is approved, or the winding-up is ordered according to the supplementary legal provisions (Ins. Act Art. 167.1).

2. *Classification ruling*. The ruling shall declare the insolvency as fortuitous or tortious. In the latter case, the Court shall state the cause or causes on which the classification is based. In addition, the ruling classifying the insolvency as tortious shall also contain a series of pronouncements mentioned in Insolvency Act Article 172.2: (*i*) determination of the persons affected by the classification, as well as when

appropriate, those who are declared accomplices; (*ii*) barring of persons affected by the classification to administer the assets of others for a period of two to fifteen years, as well as to represent any person during the same period; and (*iii*) the loss of any right that the persons affected by the classification, or declared accomplices had as insolvency creditors or to the estate, and the order to return the assets or rights that may have been unduly obtained from the assets of the debtor, or that may have received from the aggregate assets, as well as compensating the damages and losses caused. Finally, ruling that classifies the insolvency as tortious shall also condemn the accomplices who do not have creditor status to compensate the damages and losses caused (Ins. Act Art. 172.3).

Functions in semi-formal proceedings

Although the functions of the Insolvency Court were traditionally restricted to within the insolvency proceedings, nowadays it also plays a key role in some of the preinsolvency proceedings laid down by the Insolvency Act:

1. *Notification of negotiations*. Insolvency Act Article 5 bis envisages the possibility for the debtor who is in a situation of insolvency to notify the Court that is competent to issue a declaration of opening its insolvency proceedings of initiation of negotiations to reach a refinancing composition, an out of court payment agreement or to obtain adhesions to an advanced proposal of composition. From presentation of the communication, the insolvency court must reject any petition for judicial or extrajudicial foreclosures on assets or rights that may be necessary to continue the professional or corporate activity of the debtor.

2. *Homologation of refinancing agreements*. Insolvency Act Additional Provision Four provides for the possibility of a refinancing agreement to be judicially homologated, as long as it complies with the following requisites: (*i*) that it has been signed by creditors who represent at least 51 per cent of the financial liabilities; (*ii*) that a certification by the accounts auditor to the debtor has been issued regarding the sufficiency of the liabilities established to adopt the composition; and (*iii*) that the composition has been formalized in a public instrument.

   The judicial homologation produces two main effects: on the one hand, a homologated refinancing agreement may not be revoked in a consecutive insolvency proceeding; and, on the other hand, its effects may be extended to the ordinary and subordinated creditors who have not voted in favour, as long as it has been agreed by the legally established majorities.

   The competence to decide that homologation lies with the Mercantile Court that, where appropriate, is competent to declare the insolvency proceedings open (Ins. Act Ad. Prov. 4ª.5, in relation to Ins. Act Art. 10). The Court shall examine the petition for homologation and shall grant it as long as the agreement complies with the aforementioned requisites.

   The Insolvency Court is also competent to hear and deal with the challenges to the judicial homologation that creditors holding financial liabilities affected by the judicial homologation who have not signed the homologation agreement, or who have expressed their disapproval thereof, may file within fifteen days following the publication of the ruling approving the homologation (Ins. Act Ad. Disp. 4ª.7).

The Insolvency Practitioners

Together with the Insolvency Court, the Insolvency Practitioners are the most important body of the insolvency proceedings. Their main function is to assist and represent the debtor, whose rights of management and disposal over his aggregate assets may have been intervened or suspended as a consequence of the declaration opening of the insolvency proceedings. However, as will be shown below, the Insolvency Act attributes the Practitioners many other tasks.

Composition, appointment and remuneration of the Insolvency Practitioners

In view of the requisites that the Insolvency Practitioners shall fulfil, this body may meet one of these models: the *administrative* one, in which the Insolvency Practitioners must be Administration officials; the *professional* one, in which this role is played by specialists in insolvency proceedings, such as solicitors, economists, or mercantile graduates or accounts; and, finally, the so-called *creditor* model, where the Insolvency Practitioners are the creditors themselves or the persons designated by them.

The Spanish Insolvency Act in force does not, actually, follow any of these three models, but combines elements of every of them, establishing a complex regimen that varies according to the characteristics of the debtor and the complexity of the insolvency proceedings. In this regard, the Insolvency Act establishes a *general rule* with some *exceptions*.

1. As a *general rule*, a *single* Insolvency Practitioner shall administer the insolvency, and only natural or legal persons who are registered in Section Four of the Public Insolvency Register and who have declared they are available to perform the tasks of Insolvency Practitioner within the scope of the territorial competence of the court of the insolvency proceedings may be appointed. This person shall also meet a series of requirements referred to required qualifications, to an experience to be proven and to sitting or passing specific tests or courses (Ins. Act Art. 27). However, these requirements are still pending regulatory development.

   Until the development regulation is adopted, the Insolvency Practitioner shall be a solicitor with five years effective professional experience, who has evidenced specialised training in Insolvency Law, or an economist, mercantile graduate or accounts auditor with five years effective professional experience, with proven specialisation in the field of insolvency proceedings (Ins. Act 2003 Art. 27). A legal person may also be appointed, formed by at least one practising lawyer and one economist, mercantile graduate or accounts auditor, and that guarantees the due independence and dedication to performance of the established duties of the insolvency administrator. In the latter case, on accepting office, the legal person shall notify the identity of the natural person who is to represent it to perform the duties of its office (Ins. Act Art. 30.1).

For the purposes of appointing Insolvency Practitioners, a regulatory distinction is planned between small, medium or large-scale insolvency proceedings. In the first two cases, appointment of the Insolvency Practitioner shall befall the natural or legal person on the list of Section Four of the Public Insolvency Register obtained by correlative rotation and who, fulfilling the conditions established in the preceding Sections, has declared, at the time of requesting inscription on that register, or thereafter, that he wishes to act within the scope of territorial competence of the court appointing him, and it has to be noted that first appointment from the list shall be performed by draw. Notwithstanding this, in large scale insolvency proceedings, the Court may perform a reasoned appointment of an Insolvency Practitioner other than the one assigned by correlative rotation whose alternative receiver profile it deems to be better suited to the characteristics of the insolvency proceedings (Ins. Act Art. 27.5).

2. Nevertheless, there are some *exceptions* to this general rule:

   a) In the case of insolvency proceedings affecting a *credit institution*, the Court shall appoint the Insolvency Practitioner from among those proposed by the Fund for Orderly Bank Restructuring (FROB). However, until the development regulation of this norm is adopted, the proposition shall come from the Deposit Guarantee Fund. The Court shall also appoint practitioners from among those proposed by the National Stock Exchange Commission in the case of entities respectively subject to its supervision, or that by the Insurance Compensation Consortium, in the case of insurance undertakings (Ins. Act Art. 27.6).

   b) In the case of *related insolvency proceedings*, the competent Court to hear such may appoint, to the extent where possible, a sole Insolvency Practitioner, appointing delegate assistants, and in case of *accumulation of insolvency proceedings* already declared, the appointment may befall one of the already existing Insolvency Practitioners (Ins. Act Art. 27.8).

   c) In the case of *consecutive insolvency proceedings* (*i.e.* those declared at the request of the insolvency mediator, of the debtor or of creditors due to impossibility of complying with an out of court payment agreement or due to breach thereof), except for just cause, the Court shall appoint the Insolvency Mediator of the insolvency proceedings (Ins. Act Art. 242).

   d) Finally, in insolvency proceedings where there is a *case of public interest* to justify such, the Court hearing the insolvency proceedings, on its own motion or at the request of a creditor with public status, may appoint a creditor Public Administration or a creditor Public Law entity, linked to or dependent on it, as a second Insolvency Practitioner. In this case, the creditor Public Administration or entity related to it may renounce such an appointment (Ins. Act Art. 27.7).

As for the Insolvency Practitioners' *remuneration*, it shall be determined pursuant to a tariff that shall be approved by the enacting regulations that shall take into account the number of creditors, the accumulation of the insolvency proceedings and the scale of the insolvency proceedings according to the classification considered for the purpose of appointing the Insolvency Practitioners. And, in any case, according to Insolvency Act Article 34, that tariff must necessarily fulfil the following rules:

1. *Exclusivity*. The Insolvency Practitioners may only receive the sums arising from application of the tariff for their intervention.
2. *Limitation*. The remuneration of the Insolvency Practitioners may not exceed the highest of the following amounts: a 4 percent of the debtor's assets; or one million five hundred thousand euro. Notwithstanding this, the Court may, having heard the parties, reasonably approve a higher remuneration, when due to the complexity of the insolvency, the costs faced by the practitioners so requires, but in no case may it exceed the 50 percent of the aforementioned limit.
3. *Effectiveness*. In insolvency proceedings in which the aggregate assets is insufficient, payment of a minimum remuneration established in the implementing regulations shall be secured by means of a tariff security account that shall be covered by mandatory provisions by Insolvency Practitioners. These provisions shall be deducted from the remunerations effectively obtained by the Insolvency Practitioners in insolvency proceedings in which they act, using the percentage determined by the implementing regulations.
4. *Efficiency*. Remuneration of the Insolvency Practitioners shall be accrued as they complete their duties. The remuneration initially set may be reduced by the Court for reasoned cause due to failure to fulfil the obligations of the Insolvency Practitioners or due to delay caused by the Insolvency Practitioners in fulfilment of their obligations, or due to deficient quality of their work.

Main functions of the Insolvency Practitioners

The Insolvency Practitioners perform all their functions in the frame of an insolvency proceedings. Insolvency Act Article 33, as amended by Act 17/2014 dated 30th September, contains a very detailed list of these functions which may be classified considering the different phases of the insolvency proceedings.

Functions during the common procedural phase of the insolvency proceedings

During the common procedural phase of the insolvency proceedings, the Insolvency Practitioners deal, inter alia, with the following functions:

1. *Exercise of the rights of management and disposal of the debtor*. As a general rule, in the event of voluntary insolvency, the debtor shall conserve the rights of management and disposal of his aggregate assets, the exercise whereof shall be subject to *intervention* by the Insolvency Practitioners, via their authorisation or approval (Ins. Act Art. 40.1). Rather, in the case of compulsory insolvency, exercise by the debtor of the rights of management and disposal of his assets shall be suspended, being substituted therein by the Insolvency Practitioners (Ins. Act Art. 40.2).

On the other hand, the declaration opening the insolvency proceedings does not interrupt continuation of the professional or business activity performed by the debtor. Thus, in the event of intervention, the debtor may continue his activity and in order to facilitate so, the Insolvency Practitioner may determine the acts or operations inherent to the business or trade of that activity that, according to their nature or amount, are deemed authorised in general terms (Ins. Act Art. 44.1 and 2).

It also has to be noted that, in accordance with the principle of conservation of the aggregate assets (Ins. Act Art. 43), until judicial approval of the composition is secured or the winding-up is commenced, the properties, goods and rights forming the aggregate assets may not be disposed of or encumbered without approval by the Court. However, this rule does not include: (*i*) acts of disposal that the Insolvency Practitioners consider indispensable to secure the feasibility of the business or the cash flow needs required for the continuity of the insolvency proceedings; (*ii*) acts of disposal of assets that are not necessary for continuity of the activity when offers are presented that materially coincide with the value they have been given on the inventory; (*iii*) acts of disposal inherent to continuation of the professional or business activity by the debtor; and (*iv*) conveyance of productive units of assets or services belonging to the insolvent debtor, that must comply with special regulations.

2. *Drawing up and submitting the debtor's annual accounts to audit*. In the case of intervention, the legal obligation subsists for the directors to draw up and submit their annual accounts to audit, under supervision by the Insolvency Practitioners (Ins. Act Art. 46.1). In the case of suspension, those powers shall are the remit of the Insolvency Practitioners (Ins. Act Art. 46.3).

3. *Exercise of liability actions of the insolvent legal persons against their directors, auditors or liquidators*. In accordance with Insolvency Act Article 48 quater, once insolvency proceedings have been declared, it shall be exclusively the remit of the Insolvency Practitioners to exercise liability actions of the insolvent legal persons against their directors, auditors or liquidators. Similarly, during processing of the insolvency proceedings of the company, it shall be the exclusive remit of the Insolvency Practitioners to take action against the shareholder or shareholders personally liable for its debts prior to declaration of insolvency proceedings (Ins. Act Art. 48 bis).

4. *Exercise of actions to revoke and others of contestation to reintegrate the aggregate assets* (Ins. Act Arts. 71 and following). As a matter of principle, legitimacy to exercise actions to revoke and others of contestation are the remit of the Insolvency Practitioners. There are no exceptions to this rule when it comes to the challenge of refinancing resolutions of Article 71 bis. Nevertheless, in all other cases, creditors who have applied in writing to exercise any action, stating the specific action they aim to contest or revoke, and the grounds to do so, are entitled to exercise this if the Insolvency Practitioners do not do so within the two months following their demand for them to do so (Ins. Act Art. 72.1).

5. *Functions with regard to contracts entered into by the debtor*. The declaration opening the insolvency proceedings, alone, does not affect the validity of contracts with reciprocal obligations pending fulfilment, both by the insolvent debtor or the

other party. However, the Insolvency Practitioners may request rescission of the contract if they deem it convenient to the interests of the insolvency proceedings (Ins. Act Art. 61.2). Similarly, they may also petition the Insolvency Court for material amendment of the working conditions and collective extinction or suspension of employment contracts when the insolvent debtor is an employer, accordingly to Insolvency Act Article 64. Likewise, the Insolvency Practitioners at their own initiative or at the request of the insolvent debtor, may reinstate the loan contracts and others of credit in his favour (Ins. Act Art. 68), and may stop eviction actions exercised against the debtor prior to insolvency proceedings being declared open, as well as rehabilitating the life of the contract up to the very moment of effectively evicting the debtor (Ins. Act Art. 70).

6. *Functions of a procedural nature*. The suspension or intervention of asset related rights also affects ongoing judicial proceedings to which the debtor is a party. In this respect, it is necessary to draw a distinction between judicial proceedings in course at the moment of declaring the insolvency proceedings and the exercise of new actions. In the first scenario, and in the case of suspension of the debtor's rights of management and disposal, the Insolvency Practitioners, within the scope of their powers, shall substitute him in ongoing judicial proceedings, although they shall need the authorisation of the insolvency Court to desist, withdraw, either fully or partially, from the lawsuit or to reach a compromise therein. In the event of intervention, the debtor shall conserve the capacity to act in trial, although he shall require authorisation by the Insolvency Practitioners to fully or partially desist or withdraw from a lawsuit or reach a compromise thereon when the matter of litigation may affect his aggregate assets (Ins. Act Art. 51). In the second scenario, and in case of suspension of the debtor's rights of management and disposal, the Insolvency Practitioners shall be entitled to exercise actions of a non-personal nature; whilst in the case of intervention, the debtor shall retain the capacity to act in court, but shall require the approval of the Insolvency Practitioners to file lawsuits or appeals that may affect his aggregate assets (Ins. Act Art. 54).

7. *Drafting of the report to which the Insolvency Act Articles 74 and following refer*. The most important function of the Insolvency Practitioners during the common procedural phase is to draft a report that shall contain, among others, the following issues: (*i*) inventory of the aggregate assets; (*ii*) list of creditors; (*iii*) when appropriate, the writ of appraisal of the compositions proposed and the winding-up plan; and (*iv*) the evaluation of the business overall and of the production units that form it, under the hypothesis of continuity of the operations and winding-up. The report shall conclude with the reasoned explanation by the Insolvency Practitioners of the financial situation of the debtor and all data and circumstances that may be relevant for the subsequent processing of the insolvency proceedings (Ins. Act Art. 75)

   As a general rule, the term to submit the Insolvency Practitioners' report is two months, from the date on which acceptance of two of these takes place. However, under some circumstances, this term may be extended by the Court (Ins. Act Art. 74).

Functions during the composition phase of the insolvency proceedings

During the composition phase of the insolvency proceedings the Insolvency Practitioners perform, inter alia, the following tasks:

1. *Appraisal of the compositions proposed*. The Insolvency Practitioners shall evaluate the content of the composition proposal (be it an early or an ordinary proposal) according to the payment scheme and, when appropriate, the feasibility plan accompanying it (Ins. Act Arts. 107.1 and 115.1).
2. *Attending to the Creditors' Meeting*. Under the ordinary process of the composition, the proposal shall be accepted by the majority of the creditors, joined together in a Meeting. All creditors on the list of those included in the definitive text of the list are entitled to attend the meeting, but the Insolvency Practitioners are bound to do so, under penalty of losing of the remuneration set and returning the sums received to the estate (Ins. Act Art. 117.1). However, failure to appear of the Insolvency Practitioners shall not lead to suspension of the meeting, except if the Court were to decide otherwise, in which case the Court Clerk shall set the date for resumption thereof (Ins. Act Art. 117.3).
3. *Opposing to judicial approval of the composition*. The Insolvency Practitioner may lodge opposition to the judicial approval of the composition already approved by the Creditors' Meeting based on one or more reasons set out in Insolvency Act Article 128.

Functions during the winding-up phase of the insolvency proceedings

During this phase, the Insolvency Act attributes quite many functions to the Insolvency Practitioners, of which the most important are the following:

1. *Substitution of the rights of administration and disposal of the assets of the debtor*. The status of the insolvent debtor during the winding-up phase shall be that of suspension of exercise of the rights of management and disposal of his estate, so that he shall be substituted therein by the Insolvency Practitioners (Ins. Act Art. 145.1 in relation to Art. 40.2).
2. *Submitting a winding-up plan to the Court*. The Insolvency Practitioners shall provide the Court a plan to dispose of the properties, goods and rights forming the aggregate assets of the insolvency proceedings that, whenever feasible, shall consider disposal as a unit of the set of the establishments, exploitations and any other goods and services forming production units of the insolvent debtor, or any of them. That plan shall be produced within fifteen days following serving notice on the Insolvency Practitioners of the resolution to open the winding-up phase, although if the complexity of the insolvency proceedings so warrants, the Court, at the request of the Insolvency Practitioners, may agree to extend that term for a further period of the same duration (Ins. Act Art. 148).

3. *Submitting periodical winding-up reports to the Court*. Every three months, as of opening the winding-up phase, the Insolvency Practitioners shall submit to the insolvency Court a report on the status of the operations, which shall detail and quantify the claims against the estate which have become due and are pending payment, indicating the maturity dates thereof (Ins. Act Art. 152).
4. *Carrying out the liquidation operations*. The most important function of the Insolvency Practitioners during the winding-up phase is to dispose of the assets and rights of the debtor, in accordance with the rules established in Insolvency Act Articles 149 and 150, in order to pay the insolvency claims in the order established in Articles 154 and following.
5. *Granting approval to the petition by the debtor to obtain the benefit of exoneration of the liabilities unpaid*. Following the entry into force of the so-called 'Second Chance Act' (Act 25/2015, dated 28th July), the natural person debtor may obtain the benefit of exoneration of the liabilities unpaid under the terms established in Insolvency Act Article 178 bis, once the insolvency proceedings are concluded by winding-up or insufficiency of the aggregate assets. To this end, the debtor shall submit his petition for exoneration of the unsettled liabilities before the Court hearing the insolvency proceedings within the term for hearing granted to him. The Court Clerk shall notify the Insolvency Practitioners of the petition by the debtor, for a term of five days, in order for him to allege what he may deem appropriate in relation to granting the benefit.

Functions during the winding-up phase of the insolvency proceedings

At this stage of the insolvency proceedings, the Insolvency Practitioners must *provide the Court a reasoned, documented report on the relevant facts to classify the insolvency*, with a proposal for resolution, within the fifteen days following the expiry of the terms aforesaid for the parties concerned to appear (Ins. Act Art. 169). Although this report is not subject to any mandatory form, in current forensic practice it usually addresses the form of a civil claim. Accordingly, the Insolvency Practitioners shall provide all the relevant facts, state the identity of the persons the classification should affect and those who are to be considered accomplices, explaining the reasons, as well as determining the damages and losses that, if appropriate, have been caused by those persons.

The Insolvency Mediator

Act 14/2013, of 27th September, on support for the entrepreneurs and their internationalization, introduced a new Title X in the Insolvency Act, in which were first regulated in Spain the so-called *out of court payment agreements*. These are a new bargaining tool, aimed to approve a payment scheme that shall be laid before the Registrar or Notary Public, and that shall be fostered by the Insolvency Mediator. The latter may be defined as a neutral third party that carries out functions of conciliation and bargaining between the debtor and the creditors, in accordance with a legally established process.

Appointment and retribution of the Insolvency Mediator

The *appointment* of an insolvency mediator shall befall a natural or legal person, sequentially assigned from among those included on the official list that shall be published on the relevant web site of the Official State Gazette, which shall be supplied by the Register of Mediators and Mediation Institutions of the Ministry of Justice (Ins. Act Art. 233.1).

The Insolvency Mediator shall necessarily be registered on the Register of Mediators and must fulfil the conditions to act as Insolvency Practitioner and those established for mediators pursuant to Act 5/2012, of 6th July, on mediation in civil and mercantile matters. Under the last-mentioned provision, may act as mediators natural persons who are in full exercise of their civil rights as long as this is not prevented by the legislation to which they may be subject in the practice of their profession (Art. 11.1). In addition, a mediator shall hold an official university degree or a higher vocational education qualification and have specific training to carry out mediation, acquired by completing one or several specific courses taught by duly accredited institutions, which shall be valid to perform mediation activities anywhere nationwide (Art. 11.2). Finally, a mediator shall take out an insurance policy or an equivalent guarantee to cover the civil liability arising from his action in the disputes in which he intervenes (Art. 11.3). For their part, legal persons devoted to mediation shall be professional firms, or any other foreseen under the Law that fulfil the requisites legally established to perform carry out mediation.

The Mediator shall be appointed by the Registrar or Notary Public who has been requested to do so by the debtor. When the application has been addressed to an Official Chamber of Commerce, Industry, Services and Navigation, or to the Official Chamber of Commerce, Industry, Services and Navigation of Spain, the Chamber itself shall undertake the mediation functions, and shall appoint a commission in charge of mediation, which shall include at least one Insolvency Practitioner. Once the insolvency mediator accepts the office, the Business Registrar, the Notary Public or the Official Chamber of Commerce, Industry, Services and Navigation shall report the fact by means of certification or copy sent to the competent public registers of assets to be recorded by preventive annotation on the relevant register sheet, as well as to the Civil Register, and to other relevant public registers, and shall notify the competent insolvency Court of the negotiations of its own motion, and shall order publication thereof on the 'Public Insolvency Register'. (Ins. Act Art. 233.3). Finally, in the case of insurers, the designated mediator shall be the Insurance Compensation Consortium (Ins. Act Art. 233.5).

With regards to the Mediator's *retribution*, the Insolvency Act Additional Provision Eight states that rules established, or that may be established in the future for remuneration of Insolvency Practitioners, shall also apply to remuneration of the Insolvency Mediators.

Main functions of the Insolvency Mediator

Unlike in the case of the Insolvency Practitioners, the Insolvency Mediator perform all his functions in the frame of pre-insolvency proceedings. Among the most important of these functions are the following:

1. *Summoning creditors*. In the ten days following acceptance of office, the Insolvency Mediator shall verify the data and the documentation provided by the debtor, being authorised to require him to complement or correct them, or call on him to correct the errors there may be. Within that same term, he shall check the existence and amount of the claims and shall summon the debtor and the creditors who are recorded on the list submitted by the debtor, or whose existence is known by any other means, to a meeting that shall be held within the two months following acceptance, in the area where the debtor has his domicile (Ins. Act Art. 234.1).
2. *Drafting a payment scheme*. As soon as possible, and in any event at least twenty calendar days prior to the date foreseen to hold the meeting, the insolvency mediator shall send the creditors a proposed out of court payment agreement on claims pending payment on the date of the petition. That scheme may include a series of measures set forth in Insolvency Act Article 236.1, but in no case may the proposal consist of overall winding-up of the assets of the debtor to settle his debts, nor may it alter the order of preference of claims legally established, except if the creditors displaced specifically consent thereto. In addition, proposal shall include a payment plan with detail of the resources foreseen for its fulfilment and a feasibility plan that shall contain a proposal for regular fulfilment of new obligations, including, where appropriate, setting a sum for maintenance of the debtor and his family, and a plan to continue the professional or business activity carried out (Ins. Act Art. 236.2).
3. *Supervising of the fulfilment of the payment scheme*. Should the proposal of a payment agreement be accepted by the creditors with the majorities set forth in Insolvency Act Article 238, it shall be recorded in a public deed. From that moment on, the Insolvency Mediator shall supervise the fulfilment of the payment scheme (Ins. Act Art. 241).
4. *Petition for a declaration opening the insolvency proceedings*. The Insolvency Mediator shall request a declaration opening the insolvency proceedings in the following two cases: if the proposal is not accepted and the debtor were to remain insolvent (Ins. Act Art. 238.3); and if the out of court payment agreement is violated (Ins. Act Art. 241.3). In either case, the petition must be accompanied by a report similar to that of the Insolvency Practitioner (Ins. Act Art. 75), in which he may allege what he may deem appropriate in relation to granting the natural person debtor the benefit of exoneration of the liabilities unpaid (Ins. Act Art. 178 bis) and in relation to the opening of the classification phase.
5. *Appointment as Insolvency Practitioner*. In case the opening of the insolvency proceedings is the consequence of the impossibility of complying with an out of court payment agreement or a of breach thereof, the Court, except for just cause, shall appoint Insolvency Practitioner the Insolvency Mediator of the insolvency proceedings in the order declaring the insolvency proceedings open, who may not receive more remuneration from this that has been established in the out of court mediation proceedings (Ins. Act Art. 242.2.2ª).

Other actors that may intervene in the (pre)insolvency proceedings

Those described above are the most important bodies in the preinsolvency and insolvency proceedings that are regulated by the Spanish Law. Nevertheless, there are other secondary actors that shall or may intervene in such proceedings.

The Debtor's Barrister-at-Law and Solicitor

During the insolvency proceedings, the debtor may act assisted by a Barrister-at-Law and represented by a Solicitor (Law 1/2000, dated 7th January, on Civil Procedure Art. 31). The only exception to this general rule regards payment agreements, which due to its out-of-court character do not require the intervention of Barrister nor Solicitor. It must be taken into account that pursuant to Insolvency Act Article 84.2.2º, expenses caused by the attendance and representation of the insolvent are considered claims against the estate, so the Insolvency Practitioners shall deduct the properties, goods and rights required from the aggregate assets to pay them (Ins. Act Art. 154).

Delegate Assistants of the Insolvency Practitioners

When the complexity of the insolvency so requires, the Insolvency Practitioner may petition the Court for authorisation to delegate certain duties, including those related to continuation of the activity of the debtor, upon the assistants he may propose, stating the criteria to establish their remuneration (Ins. Act Art. 31.1). The regime of incapacities, incompatibilities, prohibition, disqualification, and liability established for Insolvency Practitioners and their representatives is also applicable to the delegate assistants (Ins. Act Art. 31.3).

The Notary Public

S/he plays also an important role in the preinsolvency proceedings. In this regard, it has to be noted that to benefit from the irrevocability stated in Insolvency Act Article 172 bis and Additional Provision four, refinancing agreements shall be formalised in a public instrument. And, on the other hand, in the case of debtors who are not entrepreneurs nor registerable entities, the application for appointment of an Insolvency Mediator shall be submitted to the Notary Public of the domicile of the debtor (Ins. Act Arts. 232.3 and 233.2).

The Business Registrar

S/he shall be in charge of appointing the Insolvency Mediator when the debtor is an entrepreneur or a registerable entity (Ins. Act Arts. 232.3 and 233.2). In addition, the Registrar, if one does not already exist, shall also appoint the auditor that may verify the sufficiency of the liabilities established to adopt a refinancing agreement [Ins. Act Art. 71 bis(b), n. 2º]. And, finally, the Registrar shall appoint the Independent Expert to report on whether the legally established requisites are met for the refinancing agreements to be irrevocable, when so requested by the debtor or the creditors (Ins. Act Art. 71 bis.4 par. 2).

The Independent Experts

Both the debtor as well as the creditors may request appointment of an Independent Expert to report on the fair and achievable nature of the feasibility plan that may be approved with the refinancing agreement, on the proportionality of the collateral according to normal market conditions at the moment of signing the composition (Ins. Act Art. 71 bis.4 par. 1). Moreover, an Independent Expert shall state the fair value of the collateral constituted to assure the claims that have special preference [Ins. Act Art. 94.5(c) and Ad. Prov. 4ª.2(c)].

The Court Clerk

S/he is a public official that acts as a driving force of the insolvency proceedings and also acts as public recorder. His main function is to verify whether the adhesions presented to a proposal of composition reach the legally required majority, and proclaim the result by decree (Ins. Act Arts. 109 and 115 bis). The Court Clerk shall also be the acting secretary at the Creditors' Meeting (Ins. Act Art. 116.3) and shall draw up the minutes of the meeting (Ins. Act Art. 126).

The Public Prosecutor

S/he plays a limited role in the insolvency proceedings, since in no case can he apply for a declaration opening the proceedings. However, when, in actions over offences against property and against the social and economic order, indicative evidence points to a state of insolvency of any presumed party who is criminally liable and of the existence of a plurality of creditors, the Public Prosecutor shall call on the Court hearing the case to serve notice of the facts on the Mercantile Court with territorial competence to hear and determine the insolvency of the debtor, to the relevant ends, in case insolvency proceedings are under way with regard to thereto. Similarly, the Public Prosecutor shall call on the Court hearing the case to serve notice on those facts to the creditors whose identity is ascertained in the ongoing criminal investigations, in order that, if appropriate, they may petition for a declaration opening the insolvency proceedings or exercise the actions to which they are entitled (Ins. Act Art. 4). In addition, when the classification section is formed, the Public Prosecutor shall provide the Court a reasoned, documented report on the relevant facts to classify the insolvency, with a proposal for resolution that shall be attached to the one drafted by the Insolvency Practitioner.

DATA COLLECTION

Methodology

The collection of data has been conducted both in a qualitative and in a quantitative way.

Qualitative data has been collected through a methodology consisting of in-depth interviews (with a duration of approximately 2 hours each). The interviewees were lawyers (both large law firms involved in Spain´s largest restructuring proceedings and medium/small law firms, specialized in SMEs); banks; distressed-debt funds; insolvency practitioners; consultancy firms and judges (first instance Commercial Judges, Judges of the Court of Appeals and Supreme Court Judges).

Quantitative data has been gathered by analyzing the content of a sample of the Homologated Refinancing Agreements that have been approved in Spain up to December 2017. The sample was formed by approximately 70 consolidated agreements. Since the majority of them were group agreements, had we broken them up into the individual agreements affecting every member of the group, the sample of revised agreements would be in the tune of 400, essentially all agreements homologated up to December 2017. The agreements have substantial geographic diversity, although for obvious reasons most agreements are clustered in Madrid, Barcelona and Seville. It should be borne in mind, however, that some of the revised files were incomplete. Indeed, the documentation to which we had access was not homogeneous, and this has led to considerable gaps in the information processed. In fact, in some cases we have had full access to the documents; in others we have only been able to examine the application or the homologation order. Thus, not all data were available for all the agreements.

The data concerning special out-of-court agreements for MSMEs (OCAPs) has been extracted from the insolvency registry (*Registro de Resoluciones Concursales*), the reports drafted by the public Registrar (*Registradores de la Propiedad y Mercantiles*) and the National Statistical Institute.

Results from the data collection

Results from the interviews with lawyers advising smaller businesses

Regarding the background issues, and as per the interviews that were conducted with lawyers advising smaller businesses, it would appear that, in the vast majority of cases, the main problem with (M)SMEs is that *debtors seek legal advice too late*. The general opinion regarding the causes for the delay in seeking specialised legal advice is that the problem does not lie in the legal framework (which actually tries to incentivise the adoption of early solutions to the crisis), but in the context and motivation of debtors. Indeed, the interviewed lawyers have identified several causes for this delay. Firstly, there is an insufficient dissemination of these tools amongst the owners and directors of the smaller businesses. Small debtors lack insolvency culture, in the sense that the different mechanisms that the legal system offers remain mostly unfamiliar to them. On this regard, contractualised solutions are particularly unknown. Secondly, formal proceedings (*concurso de acreedores*) are seen as "black holes" that swallow businesses and that should, consequently, be avoided under any circumstances. It should be noted that, in (M)SMEs, the prevailing intention is to safeguard the business and the associated jobs, since normally the employees are members of the same family. Thirdly, two different attitudes are particularly common in small debtors and tend to delay any insolvency-related decision. The first one consists basically of denial of the critical situation that may be affecting the business (the 'ostrich syndrome'). The second attitude that endangers the use of preventive solutions is the belief that, sooner or later, the crisis shall pass. Fourthly, debtors tend to avoid the use of specific tools to remedy insolvency due to the reputational stigma that is usually linked to them. Finally, the late resource to specific solutions usually derives from inadequate advice from the internal/external legal advisors, who lack specific training in insolvency.

As per the above considerations, contractualised mechanisms have proven of little use for smaller debtors, since it is normally too late for their adoption and the design does not allow them to achieve a true debt restructuring.

On another hand, the problems regarding contractualised mechanisms for SMEs are mainly caused by the *lack of collaboration of the two principal groups of creditors*:

financial institutions and public creditors. With regard to the negotiations with *financial creditors*, however, the observations that follow were stated by lawyers and rejected by banks. According to lawyers, banks are not proactive in refinancing SMEs, and often refuse to negotiate. If negotiations finally manage to start, the immediate reaction of banks is to require collateral or additional guarantees. The rescheduling of the debt is the most common measure, but the practice of ever-greening has also been detected regarding SMEs. The behaviour of banks (that sometimes obstruct a contractualised solution) may be influenced by the regulatory framework (especially the obligation to provision the debts), and also by the slow decision-making process inside them. It transpires form the interviews that, unlike with larger entities, the possibility to “reclassify” a loan after an agreement has been reached (following the 2015 reform) does not foster proactive participation by banks in the restructuring of MSMEs.

Another recurrent complaint regards the *Public Sector*, whose voracity sometimes makes no negotiation possible. Normally, a Public Sector seizure is the event that triggers the fact that SMEs seek specific legal advice in insolvency. In contrast, negotiations with commercial creditors and employees are normally easy, as they bear the insolvency situation with resignation.

As a general conclusion, the legal framework regarding the insolvency of SMEs is technically unsatisfactory but is headed in the right direction. Homologated Refinancing Agreements are not used for this type of businesses. Apart from the flaws in the legal design that were discussed above, OCAPs have turned somewhat useless due to three different facts: they are used too late; the mediators lack the necessary training; and creditors (mainly the most important ones, i.e. the Public Sector and financial institutions) generally show a passive attitude.

Results from the interviews with lawyers advising medium and larger businesses

For larger debtors, pure contractual agreements are relatively common at very early stages. The bigger the business, the more common. The financial structure of the company bears significant influence in the chosen tool.

Among the factors which influence the outcome of restructuring/refinancing proceedings, lawyers point out that family structure matters, as well as the percentage of free-float (if the company is listed).

As per the instruments that are preferably used to refinance medium and large companies, OCAPs are never used (since most clients are out of range). Purely contractual refinancing agreements (Type I) used to be very common but have now been replaced by HRA in order to obtain more protection in larger deals. Indeed, HRA are generally highly regarded, as a flexible, inexpensive, and relatively efficient mechanism for out-of-court restructurings. Larger cases at earlier stage use it as stand-alone solution. Majority of cases following the “negotiation period” (art. 5 bis IL)

It is a common feeling among the interviewed lawyers that formal insolvency proceedings are to be avoided at almost all costs (although there are certain exceptions when the insolvency tools —such as avoidance actions— are truly needed). The reasons that justify the rejection of formal proceedings are many: (i) the need to avoid reputational damage; (ii) the loss of control over the process that formal proceedings do entail; (iii) the lack of predictability that is normally associated to these proceedings; and (iv) the slow pace of the Court system. It should be noted that, while some interviewees have complained about IPs, few complaints have been made regarding the technical skills of the Judges.

The regulatory framework appears to be very relevant with regard to refinancing larger companies, in the sense that negotiations are easier when the debts are provisioned and that they are fostered by the re-classification rule.

Different behaviors can be identified, depending on the creditor. While distressed debt funds play a key role in the Spanish market, it appears that banks are more keen on negotiations than funds. Moreover, several differences exist between national and foreign banks, the main one being that the former are more inclined towards refinancing than the latter. Funds often complain about the not-economically rational decisions made by national banks.

Analysis of the Homologated Refinancing Agreements

We have sampled 70 "consolidated" agreements[64]. The majority of agreements are group agreements. We have not broken up the general group agreement into the agreements affecting every member of the corporate group. If we had, the number would be in the tune of 400, essentially all agreements homologated up to March 2018 [65].

On the face of it, numbers would seem low. However, most of the cases concern medium to large companies, including some very large multinational groups, active in dozens of countries. Although a purely gross numeric comparison with the number of formal insolvencies offers a scarce use of the agreement (less than 2% in 2016), a comparison of the added value of the assets and liabilities involved in homologated agreements compared to those pertaining to formally insolvent companies, gives the out-of-court procedure a much higher relevance. The perception on the use of the system would also seem to be positive, for the upper tier of the market: although there are complaints, the procedure is considered ***a much preferred alternative to formal insolvency proceedings.*** Allegedly, HRAs would be preferred over formal insolvency proceedings by most —if not all— medium sized to large companies/groups, as well as by their financial creditors (although the conviction is less strong for the latter: especially those with security rights).

General data regarding the agreements

Geographically, most agreements have been confirmed by the Commercial Courts of Madrid and Barcelona. Other relevant cities include Seville, Bilbao, Alicante, Málaga, Murcia, Pontevedra or Santander.

[64] The analysis only includes refinancing agreements adopted in 2014 and after; the reason is that, previously, the regulation of the agreement differed so largely that a joint analysis would not seem possible. Counting back from 2012, the agreements would be almost 150, and the total number of companies covered over 580.

[65] For example, from 5 June 2012 to 8 April 2017, the Commercial Courts of Barcelona had confirmed (homologated) 38 refinancing agreements, which involved 227 companies.

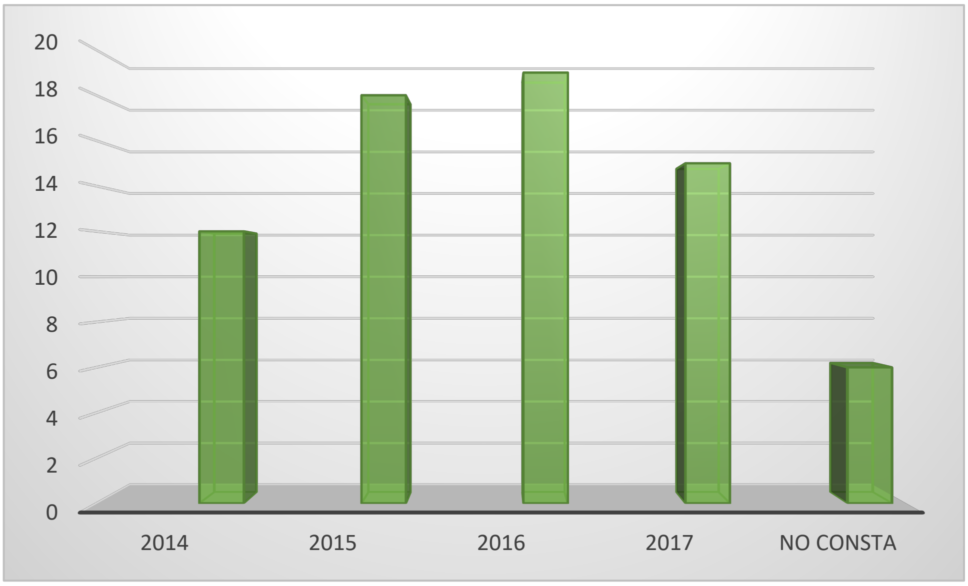


Fig. V: Date of the agreement

2014	12
2015	18
2016	19
2017	15
N/A	6

Most of the homologated agreements studied date from 2015-2016. The date refers to the moment when the agreement was entered into (not the confirmation date by the court). It should be borne in mind that the current version of the HRA was implemented in 2015 (hence the agreements reached in 2014 are only partially relevant, and that also explains the short time-range analysed). The most intensive use of the instrument took place immediately following its introduction. In 2015 and 2016 there are a number of highly relevant group agreements. This is an indication that the reform —i.e., the design of the HRA— was, in part, tailor-made to avoid declaring formal insolvency proceedings (*concurso de acreedores*) of a number of large debtors, deemed key to the recovery of the economy. This also explains the behaviour of some creditors, in particular Spanish banks, who were instrumental in approving the HRAs of those highly relevant debtors. In 2017 there is a decrease in the number of HRAs, which has continued in 2018 (according to the provisional data in our hands). The lower use seems to be more linked with the general improvement of the economy (and the return to positive growth rates of the real estate sector), not so much with flaws of the legal design or the institutional setting.

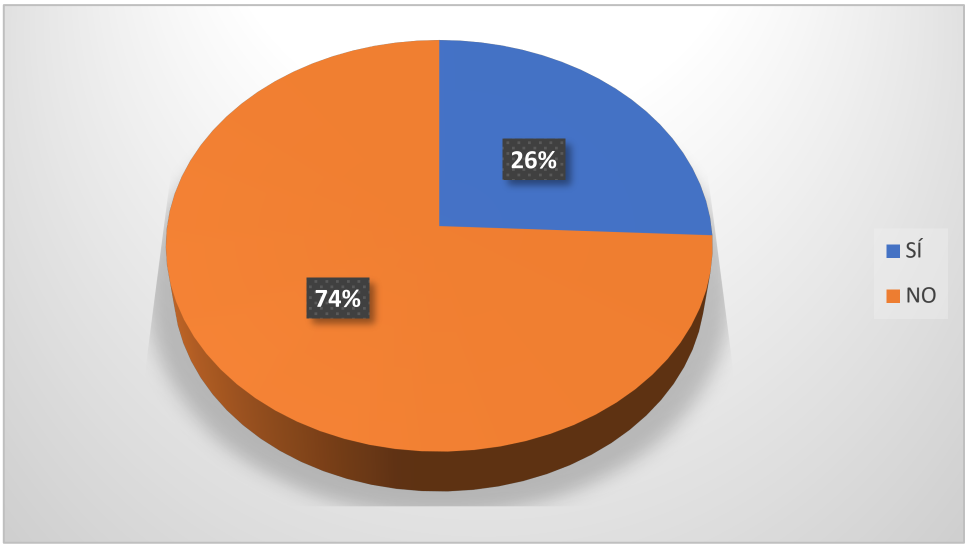


Fig. VI: Consecutive refinancings

	YES	NO	TOTAL
Second refinancing	18	52	70

The percentage of **consecutive refinancing agreements** is approx 1 to 3. When it has happened, on average, approx. 2 years have passed between one refinancing and the next one. It must be noted that numbers may, in reality, be higher: we have not been able to capture purely contractual or all Type I and II refinancing agreements that took place before an HRA. Since, by definition, these agreements need no court intervention, obtaining the data has proven extremely difficult.

As to the content of consecutive refinancing agreements, mostly consist of revisions of financial covenants (in order to ease their fulfilment by the debtors) and a revision of the payment conditions (grace periods, new interest rates, etc.).

The **average period** between one refinancing and another is two years. In general, these several refinances in a relatively short period of time demonstrate the good relationship between the parties involved and their willingness and proclivity towards the agreement.

With regard to the **contents** of the second (or successive) refinancing, usually there are a review of the financial covenants (in order to facilitate compliance with the ratios for the debtor); positive or negative obligations are eliminated or added; new repayment conditions are set (new grace periods, interest rate revisions, etc.). In most cases, the successive refinancing seeks to novate the prior refinancing agreement, in view of the concurrence of new circumstances (on the debtor's side, mainly). In one of the cases studied, however, the reason for the second refinancing was the emersion of the possibility to sell 100% of the shares of company group to a third party. As this company was a guarantor in the first refinancing, it was necessary to negotiate a second agreement to adapt the financial instruments (and, in addition, it was a good opportunity to early repay part of the debt).

Regarding the **specific incidences of the successive refinancing**, in one of the cases studied, the second refinancing did not respect the one-year term established in Additional

Provision 4th of the Insolvency Law (section 12). However, such a prohibition is waived by Transitional Provision 2nd of Law 9/2015, which allows the submission of a new judicial homologation application without observing that term. Interestingly, in this case 100% of the financial liabilities signed the agreement. If the aforementioned transitional regime had not been applicable, the second refinancing would not have been possible, despite having the support of all the financial creditors. This should lead, perhaps, to reconsider the convenience to temporarily limiting the access to the homologation of agreements mechanism (especially in those cases in which there is no dissent, and the second, third or fourth refinancing has the support of the debtor and of all financial creditors).

General data regarding the debtor

The **sectors** in which the debtors involved in the agreements studied operate are heterogeneous, in accordance to the following breakdown:

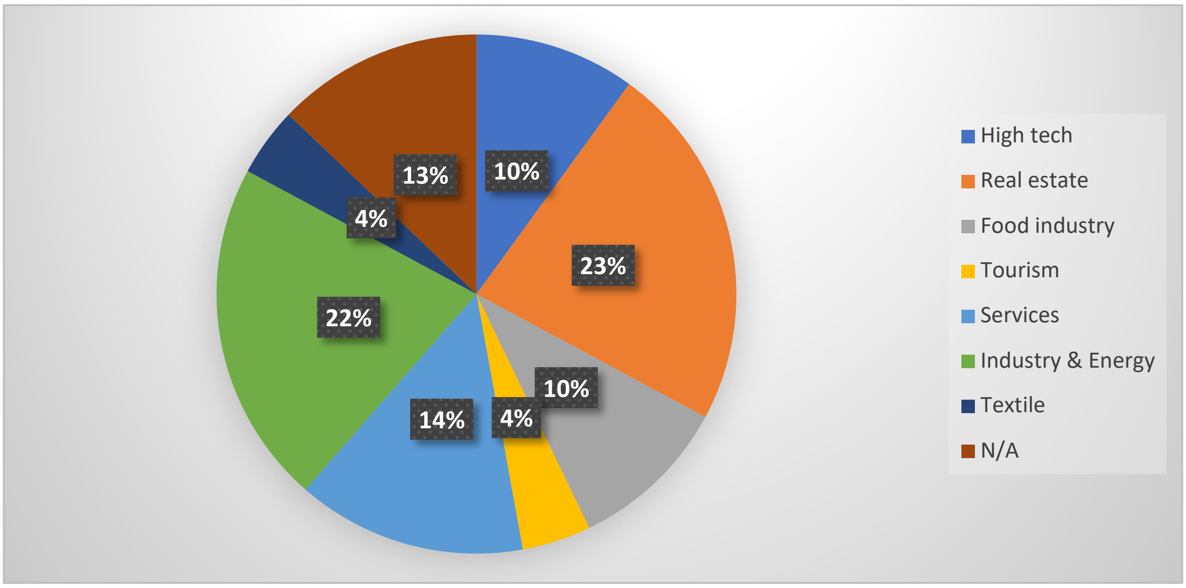


Fig. VII: Sector

Technology	7	10%
Real estate	16	23%
Food	7	10%
Tourism	3	4%
Services	10	14%
Industry and Energy	15	22%
Textile	3	4%
N/A	9	13%
Total	70	100%

Although many of the debtors using HRA are medium to large size debtors, less than 3% of the debtors are listed in the stock exchange or in any other organised secondary market. Real estate and industrial/renewable energy companies together add to almost half of all HRAs. If the numbers were broken up into separate companies, the percentage of these two sectors would be signficantly increased since some of the largest group HRAs belong in these sectors.

Previous proceedings of corporate restructuring would not seem to be frequent: we have identified 1 merger and 3 operations of capital increase. In other words, company law remedies do not seem to be a useful tool in the times before a company/group starts negotiating a refinancing agreement.

More than half of the agreements studied (54%) are **group agreements**, meaning those through which a plurality of companies within the same group is refinanced. There are also agreements of companies belonging to a group, whereby only the liabilities of one of them are refinanced (such cases have not been considered as group agreements, but as individual agreements). When interpreting this data, it is necessary to remember that the broad majority of the agreements studied were approved in Madrid or Barcelona. This implies an obvious bias in favor of the **overrepresentation** of group agreements, as the competent court for homologation is the one where the center of main interests of the parent company is located (by analogical application of article 25 bis.3 Insolvency Law).

> In any case, the high incidence of group agreements is still striking, since the fourth additional provision does not expressly contemplate them (even though, there is an almost unanimous consensus in practice, because of their analogy with collective group agreements, art. 71 bis Insolvency Law).

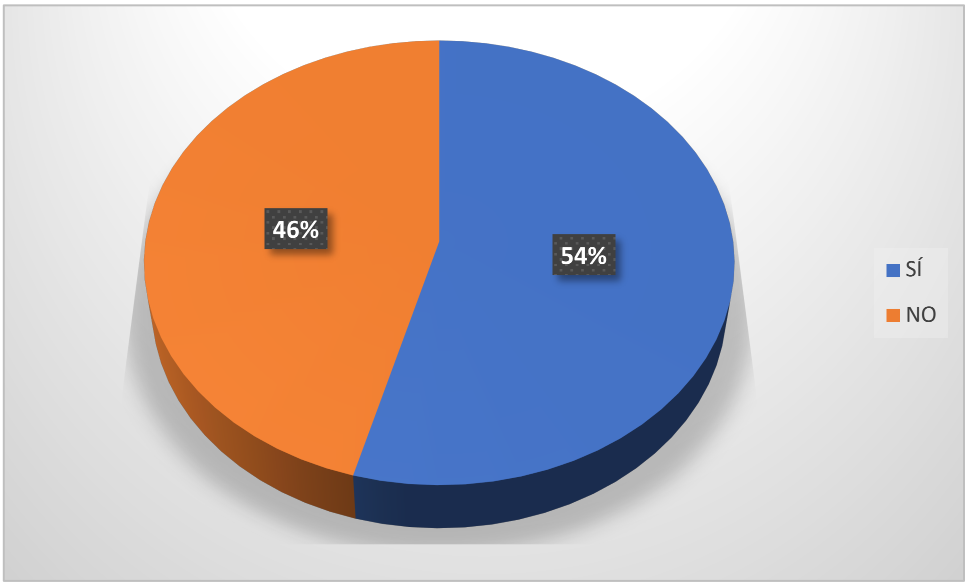


Fig. VIII: Group agreements

	YES	NO	TOTAL
Group agreements	38	32	70

Data regarding the negotiation of the agreement

To our surprise, the petition of art. 5 bis IA (i.e., a stay against executions and the opening of formal insolvency proceedings) in order to negotiate a HRA seems scarcely used. Art. 5 bis is more likely to be used, the smaller the debtor (group of debtors). This may be due to three reasons: (i) on the one hand, because these smaller debtors tend to start negotiating later, when the degree of deterioration of the financial state of the business is higher; (ii) on the other, because they are likely to have a lower likelihood of survival, and hence creditors adopt a more aggressive behaviour towards their restructuring attempts; and (iii) the bigger the debtor, the larger share of adhering creditors (with supporting majorities that may go up to 100%), whose complicity may turn the communication (i.e., the stay it entails) useless.

From the interviews, we gathered that the formal stay is not used in the larger entities/groups because: (i) it may have a reputational cost and endanger the continuation of the business in ordinary conditions (ie, there is no trust in the confidentiality of art. 5bis); (ii) there is little to gain from it in many cases, since negotations will take place at an earlier stage (in part due to stricter covenants in banking contracts, which act as an early action trigger), the negotiation takes place between sophisticated, repeat players that do not stand to gain much from breaking off the restructuring process. However, on the face of it, data on stand-still agreements would seem to lead to a different conclusion.

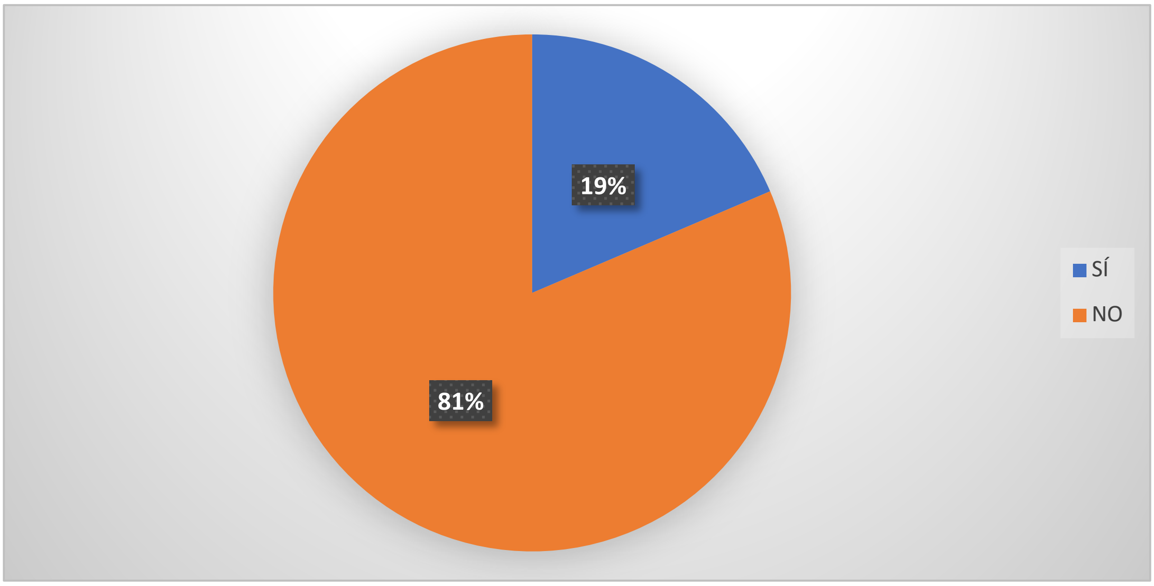


Fig. IX: Communication of the beginning of negotiations

	YES	NO	TOTAL
Prior communication of negotiations	13	57	70

An *inter-party standstill agreement* (between the debtor and the creditors, without its communication to the court) would seem to take place only in 14% of cases. However, the number is misleading. It only shows stand-stills that have been mentioned in the HRA. Reference is, of course, not compulsory. We think that the conclusion deriving from the interviews is more reliable.

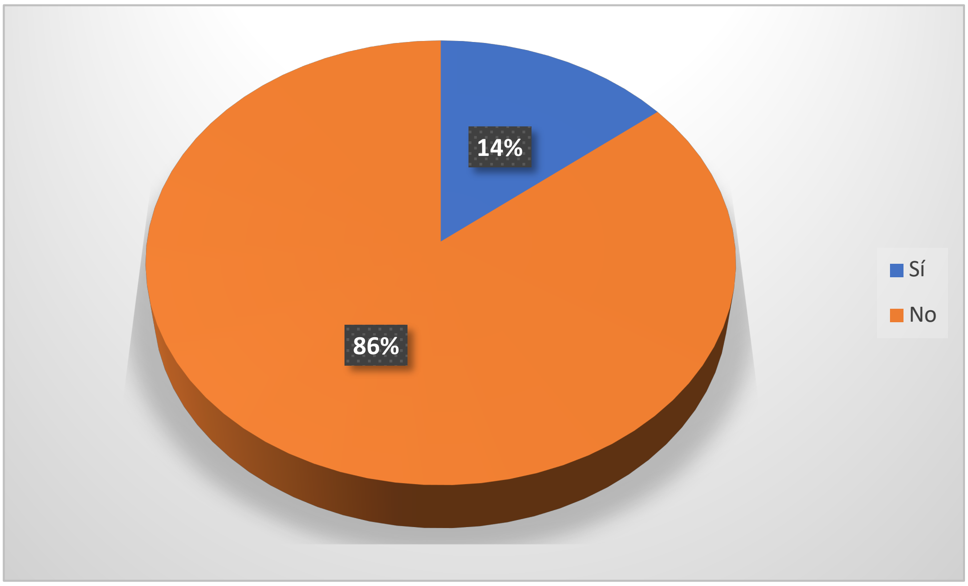


Fig. X: Inter parties standstill agreement

.

	YES	NO	TOTAL
Standstill private agreement	10	60	70

With regard to the duration of the negotiations and time of confirmation from petition, the data were not available for all the cases. However, as per the analysed HRA and the interviews, it would seem that the *time until an agreement is reached* would approximately go from a minimum of 2 months; to a maximum of 18 months (average 8 months; standard deviation 5 months). With regard to the *time between filing the petition for homologation/confirmation and the confirmation by the court*, the minimum would be 1 week and the maximum would go up to 12 months (average 2,5 months; standard deviation 1,5 months).

Data on the creditors

Regarding the volume of the refinanced debt[66] by means of an HRA, not a sole agreement refinances less than 1 million euros. This is consistent with the information that was

[66] The figures refer to the refinanced financial debt, not the total debt nor the total financial debt. In the case of a group agreement, the total of the refinanced financial debt is recorded for all the companies involved,

gathered through the interviews, showing that Type II agreements are not used by smaller debtors (even though no explicit limitation exists for its use by SMEs).

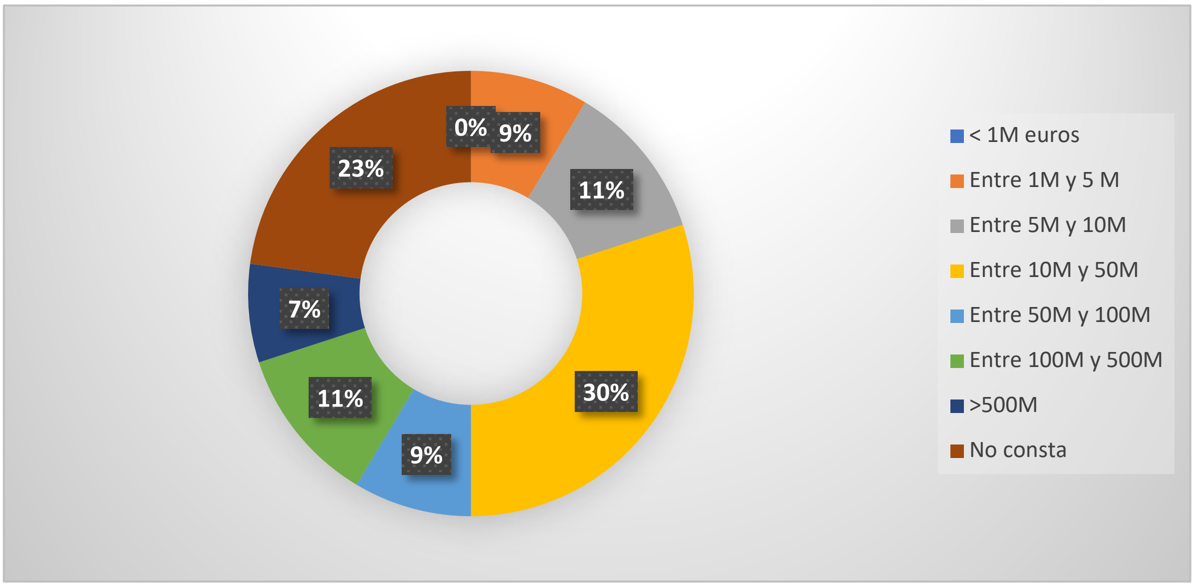


Fig. XI: Volume of the refinanced debt

< 1M euros	0	0%
Between 1M y 5 M	6	9%
Between 5M y 10M	8	11%
Between 10M y 50M	21	30%
Between 50M y 100M	6	9%
Between 100M y 500M	8	11%
>500M	5	7%
N/A	16	23%

and it is only computed once. The financial liabilities of specially related persons (in accordance with the provisions of additional provision 4th Insolvency Law) are not included.

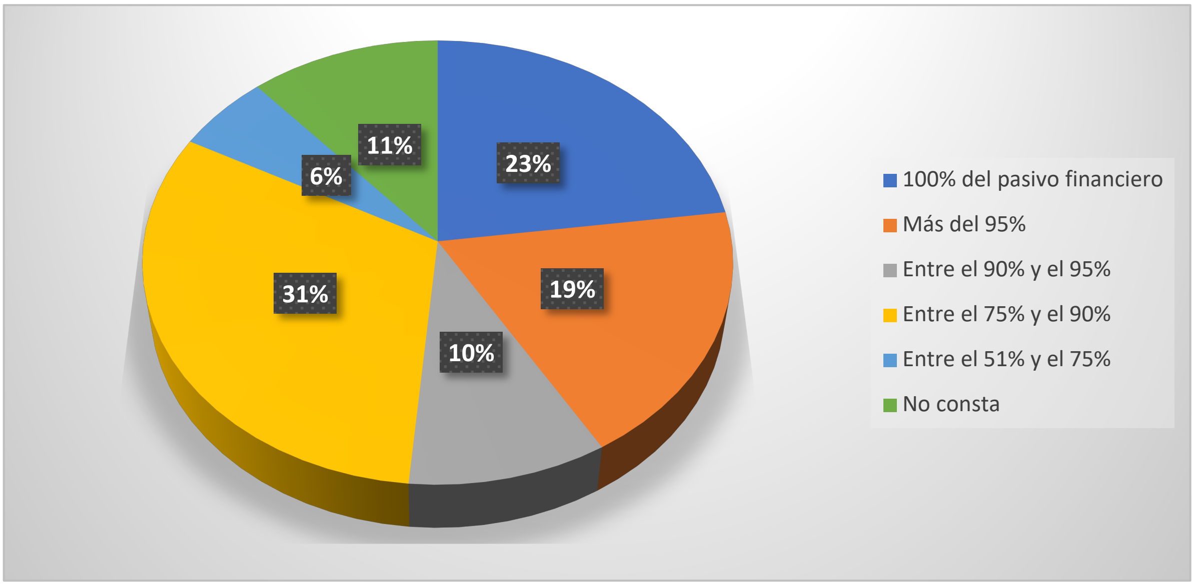


Fig. XII: Majorities obtained (adhering creditors)

100% of financial liabilities	16	23%
More than 95%	13	19%
Between 90% and 95%	7	10%
Between 75% and 90%	22	31%
Between 51% and 75%	4	6%
N/A	8	11%
TOTAL	68	100%

A noteworthy fact is that more than half of the HRA are adopted with the consent of more than 90% of financial creditors, and almost 1 in 4 reaches full consensus among them (with a majority that goes up to 100%). Regarding this information, it should be noted that: (i) in group agreements, only the consolidated majority has been taken into account; (ii) the claims held by closely-related parties have not been taken into account (as set forth by DA 4ª); and (iii) there is a special rule for syndicated loans, according to which all lenders are deemed to adhere if at least 75% of them do.

Even though the Insolvency Law expressly states that some of the non-financial creditors may adhere to the homologated agreement (with the exception of public creditors, whose participation is forbidden), this only happened in one case.

With regard to the cramdown on dissenting or non participating creditors, on the face of it, the percentage of cases where the plan has been forced on dissenting creditors can be seen as relatively low, specially considering that the possibility of extending the agreement to holdout creditors is the main advantage of court-confirmed agreements (as compared to Type I refinancing agreements).

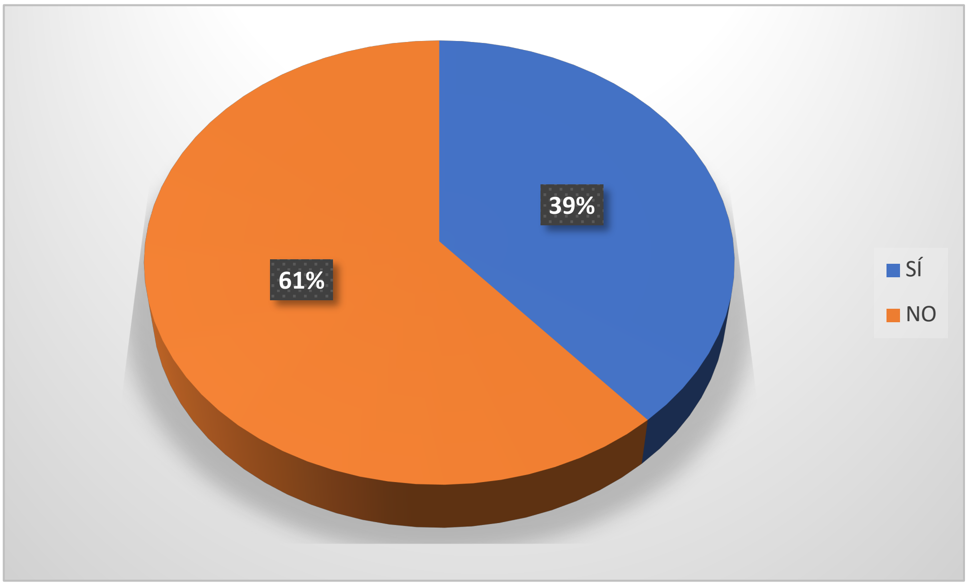


Fig. XIII: Petition for a cramdown

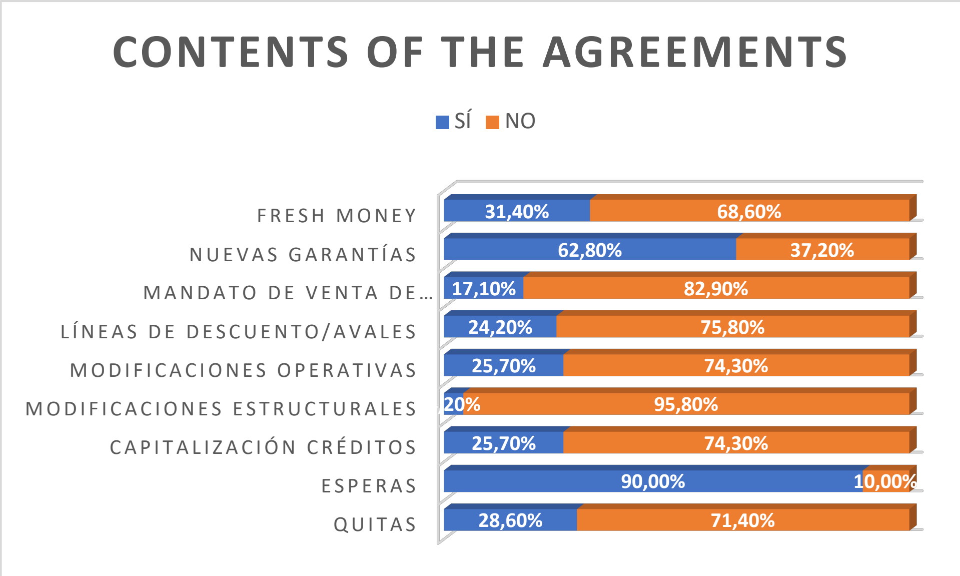
	YES	NO	TOTAL
Petition for a cramdown	27	43	70

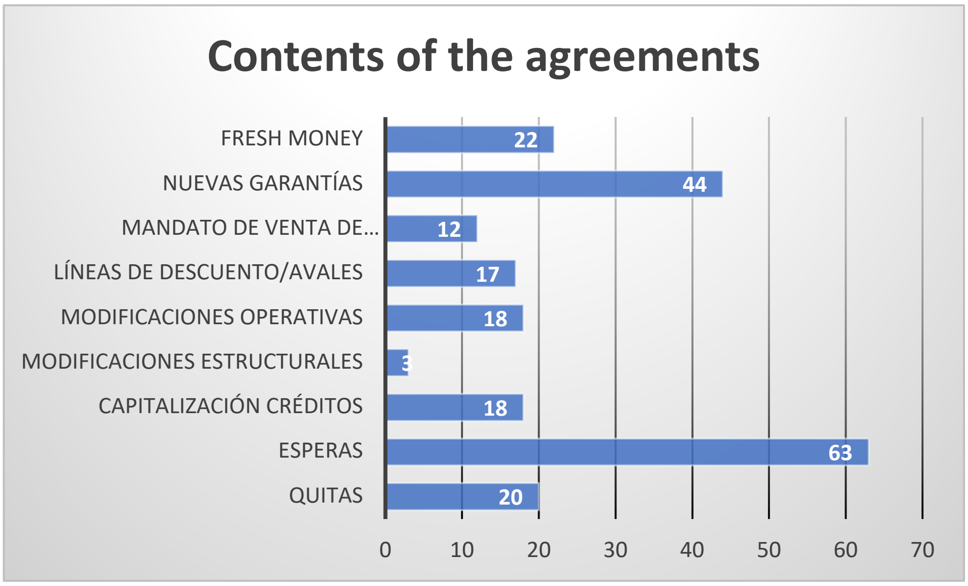
When requested, the cramdown has been granted in 100% of the cases. In some of the reviewed files, however, the cramdown was not granted, but the rejection was due to minor procedural mistakes (v.gr. lack of identification of the dissenting creditors). The effects whose extension is requested are diverse, but mainly consist of postponements of the debt, modifications in the interest rates, debt-to-equity swaps, the maintenance of factoring and credit lines, and write-offs. Some effects (such as the maintenance of credit lines) are extended to dissenting creditors on the basis of a broad concept of «extension» held by the court.

In 3 cases, the originally dissenting creditors finally adhered to the agreement during the procedure.

Finally, the confirmation has been challenged by dissenting creditors only in 4 cases (two cases due to disproportionate sacrifice of the creditors and two cases due to the non fulfilment of the conditions requested for confirmation). Out of the two cases alleging disproportionate sacrifice, one has been ruled against the plan (Abengoa). This has put the effectiveness of the agreement on the line. Renegotiations of the payment plan are being conducted with the majority creditors.

Data on the contents of the agreements





Figs. XIII and XIV: Contents of the agreements

Clarifications:

- **By fresh money** we mean the contribution of new financing to the debtor. This category does not include the (frequent) cases in which the new financing is provided under the condition that it is compulsorily allocated to the cancellation of pre-existing debts with the provider of the new financing (since these cases actually constitute postponements of the debt).
- **New guarantees** include both the provision of new collateral and the extension or novation of the existing one.
- The **asset sale mandate** or disinvestment obligation refers to the measures contemplated in relation to sales of assets or productive units.
- Regarding the **discount lines (factoring, confirming)**, they include both the creation of new lines and renewal, maintenance, modification or extension of existing ones.
- **Operational modifications** include operations of corporate restructuring in a broad sense (such as dismissals or substantial changes in working conditions, start of new business activities or abandonment of others, etc.).
- As for **structural modifications**, we refer to mergers, splits, transformations and other similar corporate procedures.
- The category of **capitalization of credits** also includes the capitalizations which appear in the agreement as a mere option for financial creditors.
- By **postponement** we mean any delay in the enforceability of the obligations or extension of their maturity date.
- By **write-off** we mean any relief or forgiveness (total or partial) of the refinanced debt.

Concerning the material content of HRAs, the following are the elements/clauses most frequently included:

- **Early acceleration clause**: the introduction of early acceleration clauses is very common. The events that trigger the early maturity vary, although some appear more frequently. From the most to the least frequent:
    - Default. In particular, the breach of the debtor's reporting obligations, or any falsehood or inaccuracy in the information provided by the debtor.
    - In group agreements, cross-default.
    - The change in the legal context.
    - A capital increase in the debtor company.
    - A change of control in the debtor company.
    - The disruption of the market.
    - The cessation of the activity of the debtor.
    - Seizures on the debtor's assets.
    - The payment of dividends in the debtor company.
    - The debtor's cash surplus.
    - The declaration of bankruptcy or insolvency of the debtor.
    - The alteration of the bases on which the refinancing is granted.
    - The expropriation of the debtor's assets.
    - A voluntary early cancellation.

- **Agreements under condition**: the effectiveness of the agreement is often conditioned to its confirmation by the court. In several cases, the condition is the submission of the application for confirmation (for which a specific period is granted: 15 days or a month, usually), rather than the confirmation itself. This is due to the fact that the date of the confirmation is beyond the control of the parties (in fact, in some cases, it is clear that the refinancing nearly failed because the confirmation took an excessive amount of time and the agreement had to be novated, given the material impossibility to obtain a confirmation by the court in no more than 4 months from the submission of the application). However, despite being the most frequent condition, it is not the only one:

    - In 10 cases, the agreement was conditioned to the obtention of a majority that would allow the extension of effects, or to the actual extension of effects to dissident creditors. Alternatively, the agreement can be conditioned to the obtention of a certain percentage of accessions (no less than 90%, for example).
    - In just one case, the agreement was conditioned to the publication of the confirmation order in the Official Bulletin of the State (*Boletín Oficial del Estado, BOE*).
    - In another case, the condition was twofold: the confirmation of the agreement and the extension of its effects to dissident creditors.
    - In some cases (depending on its content), the agreement was subject to the effective obtention of the necessary permits and authorizations for its execution, such as the permits granted by partners or shareholders, public administrations or third-parties (banks, for instance). For example, in one case, the agreement is conditioned to its acceptance by the governing bodies of a foreign company that would assume the non-sustainable debt.
    - When the agreement contemplates a certain statutory modification (eg, a capital increase), its success is usually conditioned to its execution.
    - In some cases, the agreement was conditioned to the capitalization of certain credits (for example, of equity loans granted by the partners).
    - There are also cases in which the agreement is conditioned to the satisfaction of accrued interests, commissions and fees (for example, from the advisors of financial institutions). In one case, the agreement was conditioned to the payment of a certain portion of the debt to financial entities.

- A common clause is the one that establishes the **independence between the financial institutions**, so that each entity and each instrument are independent in terms of rights and obligations. No financial entity responds for the breach of the others. Emphasis is placed on the bilateral nature of relations despite the agreement, in the sense that, in terms of liability, each financial institutio0n maintains a bilateral relationship with the debtor.

- However, despite the independence between financial institutions, it is relatively frequent (approximately 12 cases) that they agree to **regulate their collective**

behavior regarding certain issues. The agreements analyzed show different possibilities.

- It is possible that certain changes —normally, the ones regarding the main elements of the agreement— require a qualified majority or even unanimity of creditors (for example, the modification of the guarantees, the alteration of the repayment schedule, etc.). It is also possible for a single creditor to grant a specific waiver on a specific issue (i.e., to grant temporary waivers of fulfilment). It is understood that the purpose is to preserve the agreement despite the existence of momentary difficulties in its fulfilment.
- In any case, waivers are frequently limited, in the sense that they cannot affect all the contents of the agreements, since some of them require the majority or unanimity of creditors. Among the prohibited or qualified waivers (ie, those that refer to certain matters and therefore require the unanimous or majority agreement of financial institutions) are those related to breaches of the payment obligations, modifications of the amount of debts, modifications of the repayment schedule, collateral, etc.
- Another possibility is that any decision affecting the refinancing must be taken by a **qualified majority** of the signing creditors (eg, two-thirds of the outstanding debt). In such cases, the agreement by an enhanced majority of the financial entities bounds the minority.
- It is also possible that **a majority rule is imposed** in order for financial institutions to make a decision, **except for certain agreements for which unanimity is required** (modifications affecting the principal, etc.).

- **Affirmative covenants**: the most frequent are those concerning the provision of information and fulfillment of certain financial parameters.

  - **Information covenants**: the most common positive obligations refer to the provision of information, as well as accurate and complete documentation to creditors. That provision is usually periodic (half-yearly or quarterly, in most cases) and, although it may be generic, it usually refers to the fulfilment of the viability plan (or to the existence of any risk or contingency that may affect it), the disinvestment plan (if any) or the financial situation of the debtor (including the communication of any relevant event). In this regard, it usually includes the obligation to provide accounting records (individual and consolidated), or updated valuations of the assets. Occasionally, the agreement also includes the obligation of reporting on the amount of both the outstanding and the repaid debt, on the fulfilment of financial covenants, or on the indebtedness situation outside the agreement (the commencement of negotiations with other creditors, any seizure that may be initiated, etc.).

  - **Financial covenants**: frequently, the agreement establishes objectives regarding certain ratios or financial parameters, for example: Net Financial Debt/EBITDA (overall leverage, most frequent ratio); EBITDA/Financial Costs; Net Financial Debt/Own Funds; Net Financial Debt/Outstanding Liabilities; Long-term debt/EBITDA; debt service coverage; maximum amount of investments in capital assets (CAPEX, capital expenditures) (very frequent too)[67]; minimum level of own funds; the maximum amount of annual R&D investments; Current Debt/Net Income; Senior Debt/EBITDA; Net interest coverage (ratio Cash Flow/Total Net Financial Costs), etc.

In some cases, the minimum/maximum thresholds do not vary. In other cases, they are gradually modified, with annual revisions (upwards or downwards, depending on the ratio or the parameter). Sometimes (although rarely), the agreement establishes some maximum authorized deviations in relation to the fixed thresholds. Occasionally, the agreement foresees some guidelines to be followed by the debtor in case a deviation occurs (for example, if after 5 years the debt-to-equity ratio exceeds a certain threshold, the debtor commits to increase its equity so that the debt-to-equity ratio returns to the maximum allowed).

When financial covenants are established, their fulfilment is usually mandatory until all the refinanced debt is fully repaid (i.e., until the agreement is completely fulfilled). Occasionally, however, the fulfilment of these financial covenants is only mandatory during the first years.

- **Business covenants**: in some cases, the agreement establishes objectives regarding certain business parameters (annual aggregate production, annual activated portfolio, minimum sales, maximum lease amount paid annually, the outturn of the year/sales ratio, etc.). In general, objectives vary progressively, with annual reviews.

- **Other covenants**: apart from the ones listed above, agreements also may include one or more of the following affirmative covenants:

  - Obligation **to fulfill in good faith and diligently the refinancing agreement**, as well as other commercial rules.
  - Obligation to devote certain funds (obtained through new financing or not) **to the cancellation of specific claims**.
  - Obligation to make certain **statutory changes**, primarily capital increases and capital reductions.
  - Obligation to make **changes in the corporate structure** of the group.
  - Obligation to perform **individual actions**, specified with greater or lesser detail (for example, that he leases a certain farm with a minimum fee but sufficient to satisfy the payments due under a loan).
  - **Obligation to make changes in the company's management:** in one case, there is a professionalization plan based on the incorporation of independent directors in the board, the collegial decision-making and the participation of the general and financial management in making certain decisions. In another case, the appointment of a new board of directors (consisting of 2 executives and 7 independents) is required.
  - Obligation to endow a certain **reserve account**.

[67] In one case, several covenants related to CAPEX are set (for example, CAPEX replacement, CAPEX I + D + i, CAPEX exceptional office change, etc.).

- **Negative covenants**: in some cases, they are absolute, whereas, in others, the possibility of obtaining a consensual waiver (by majority or by unanimity) of the financial entities does exist.

  - **Negative financial covenants:** the most frequent is the obligation not to incur in any kind of new financial debt (sometimes this is softened, and the company is allowed to contract working capital debts, or to acquire machinery with certain quantitative limits, etc.). **Prohibitions to grant new personal guarantees**, collateral or other charges (in general, to perform any action that worsens the financial situation) are also common. The prohibition to grant new securities is usually applied to both own and third party obligations.
  - Prohibition to **make capital reductions or treasury stock transactions,** or any action that involves a return of funds to the shareholders.
  - It is frequent to prohibit the **payment of dividends** (occasionally, the interdiction is total, whereas, in other cases, some exceptions are allowed).
  - Prohibition **to modify the statutes** or to make **structural corporate modifications (mergers, etc.).**
  - Prohibition to sign **contracts that enhance the credit position of third parties** that do not subscribe the agreement**.**
  - Prohibition to **open new bank accounts** (unless these are necessary for the execution of the agreement).
  - Prohibition **to grant loans** or provide any kind of financing**.**
  - Prohibition **to dispose of fixed assets** (generally, interdiction of performing sales of assets that do not derive from the ordinary business of the debtor).
  - Prohibition **to carry out commercial operations with third parties in conditions which are different from the usual market ones**.
  - Prohibition for the debtor **to assign or transfer rights or obligations derived from the agreement**, although this prohibition may commonly be waived with the consent (by majority or unanimous, depending on the case) of the financial entities.
  - Prohibition for the debtor **to modify the board of directors** (occasionally, this prohibition is waived with the consent of the majority of the financial entities). In some cases, this prohibition affects only some members of the board (e.g., the prohibition to dismiss the chairman of the board of directors) and is temporarily limited (within a year, for example).
  - Prohibition to **invest in CAPEX** beyond the established limits.
  - Prohibition **to apply for voluntary bankruptcy**.
  - Prohibition to **sell assets included in the disinvestment plan** for lower price than the minimum fixed for it (unless it is authorized by the majority of the financial institutions).
  - Prohibition **to acquire shares or equity-like instruments** of any company.
  - Prohibition to **acquire new assets,** except those necessary for the ordinary course of business.
  - Prohibition **to change the business activity.**

- **Obligations imposed on the shareholders of the debtor company:** less frequently, homologated refinancing agreements impose obligations (affirmative or negative) on the debtor's shareholders or partners. In particular:
  - Obligation **to vote against or in favor of certain agreements** (structural modifications, dissolution of the funded company, non-authorization of certain charges, etc.).
  - Prohibition **to transfer (direct or indirect) their shares**. This obligation usually affects only the majority partners or reference partners.
  - Obligation **to exercise their political rights**.
  - Obligation **to adopt the necessary agreements to carry out the plan** (for example, in terms of divestments, capital increases or reductions, etc.).
  - In another case, **certain types of conduct** are imposed to shareholders, such as the obligation to disinvest or to report any breach.
  - Obligation **to subordinate their debt** with the funded one.
  - In one case, in which the partners had previously contributed with funds in the form of equity loans, the obligation **to extend the due date** of the contracts is imposed.

- **Specific clauses in group agreements:** the main clauses detected in the refinancing agreements of one or several companies belonging to a group are listed below.

  - **Assumption of the debts** of a group company by another group company (usually the parent, but not always). This assumption can be cumulative or releasing.
  - Establishment of the **joint liability** of all or part of the group in relation to the fulfilment of the agreement.
  - **Subordination of the intra-group debt** (as would happen in an eventual bankruptcy process).
  - Solvent group companies (i.e., those whose debt is not refinanced through the agreement) are often involved as **guarantors of the operation**.
  - In one case, the signatory financial institutions (100% of the financial liability) authorize in the agreement the **dissolution and liquidation of one of the companies of the group**, under the condition that another group company be subrogated to its debit position. This is a particularly interesting issue because, in general, it is understood that group refinancing must ensure the survival of all the participating companies.
  - In one case, new money is provided to one of the group companies so that, in turn, it **shares the amount through equity loans with the other companies**.
  - In one case, the agreement is signed by all the group companies, but **the application for homologation is submitted only by the parent company** (which was the one who had previously submitted the communication of Article 5 bis).
  - In one case, during the homologation process, as a result of a **merger by acquisition**, one of the group's companies absorbed the other and

remained as the only debtor under the agreement. This structural modification was not part of the agreement, but occurred on its periphery.

- **Clauses regarding interests:** it is usual **to review the interest rates downwards,** in order to reduce financing costs.
    - In some cases, the interest rates are reduced, but their **progressive annual increase is simultaneously agreed** (for example, Euribor + 1% the first year, Euribor + 1.25% the second year, Euribor + 1.5% the third year, etc.).
    - In two cases, **a non-pure or mixed zero clause** is introduced in the agreement, that is, the negative Euribor is equaled to zero.
    - In some cases, the reduction of interest rates **is subject to the condition** that, if certain financial parameters suffer a favorable progression for the debtor, the interest rate will not be reduced.
    - Similarly, some agreements also provide that certain tranches of debt only accrue interest if certain economic boom conditions are met.
    - The introduction of **grace periods** in relation to the accrual of interest is very frequent.
    - In several cases, there is an agreement about the **capitalization of interest** accrued and to be paid.

- **Clauses regarding commissions:** commonly, the commissions (opening, advance, etc.) are on behalf of the debtor. Seldomly, its distribution among all creditors is based on their participation in the agreement.

- **Clauses regarding expenses and taxes:** most of the analyzed agreements contemplate that all taxes and expenses (produced by the preparation, conclusion, fulfillment and modification of the agreement) are **to be paid by the refinanced debtor.** This includes the expenses derived from the negotiations, the advisors' fees, the expenses derived from the execution of the agreement, the costs derived from the publicity of the agreement, the account movements costs, the appraisals and all the taxes.

- **Clauses that contemplate postponements**: the overwhelmingly more frequent content of the refinancing agreements examined is the postponement of the due date. Indeed, approximately 90% of the agreements contemplate some type of payment deferment, which is generally materialized through a modification of the repayment schedule. In other cases, the previous loans are canceled and replaced by new ones, with a new repayment schedule. On occasion, the capital ratio to be repaid is reduced according to the forecast of income. Periods of grace (on the principal or on the interests) are very common.
  In some agreements, the degree of sophistication is greater, and the maturity of a debt tranche is subject to compliance with a particular condition (eg, that the NFD/ EBITDA ratio is below a certain threshold).
  The duration of the postponement varies. The minimum observed is 6 months and the maximum —quite frequent— is 10 years (the maximum allowed by the Spanish Insolvency Law in case of extension of effects to dissident creditors).

- **Clauses that include write-offs:** the clauses that contemplate write-off are rare. In most of the cases, they refer to **quantitatively insignificant amounts**.
    - The most common is a **total or partial write-off of interests** (typically, interests on late payment), and are configured as waivers on these amounts.
    - Only exceptionally **a write-off of significant amount** (over 50%) is imposed.
    - In several cases, the write-off **is conditioned** to the performance of a certain deed by the debtor (for example, if the debtor pays a certain percentage of the debt with a financial institution, the latter grants a deduction in return for the remaining amount).

- **Clauses regarding the establishment of guarantees:** new collateral (as well as the novation, ratification or extension of the previous one) is also frequent.
    - The most common guarantee is the **mortgage** (real estate, chattel, on a business establishment or floating).
    - They are also very frequent **pledges** on claims (present or future), pledges on shares or pledges on the balance of bank accounts.
    - Regarding **personal guarantees**: in the case of groups, it is common that other group companies guarantee the obligations contained in the agreement. It is also common that personal guarantees are granted by the debtor's shareholders or administrators (commonly, joint guarantees payable on first demand).
    - In groups, we detected cases (although rare) in which mortgages are constituted **on the assets of other (solvent) companies of the group**.
    - **In one case, the refinancing agreement foresees the course of action in case of enforcement of the guarantees:** if, through the enforcement, an amount higher than the guaranteed claim is obtained, the surplus will firstly be used to pay the costs and expenses derived from the enforcement. Secondly, if there is still a remaining, it will be devoted to the full payment of all secured claims, in proportion to the participation of each financial institution to the overall outstanding secured obligations. On the other hand, if the obtained amount is less than the guaranteed obligations, the payment will be distributed pro rata among all the creditors (in proportion to their participation in the overall secured obligations).

- **Clauses regarding debt-to-equity swaps:** the mandatory capitalization of debt is very rare, and when it occurs, it is limited to one tranche of the debt (4 cases).

    - In most of the agreements providing credit capitalization, it is conceived as a **mere option**, whose exercise depends on the occurrence of **certain circumstances**. The option to capitalize the debt in case of default is often foreseen, although the conditions usually vary among debt tranches (for example, the capitalization may be possible in the event of default of two or more repayment installments of tranche A of debt, but in case of default of a single repayment installment of tranche B on its maturity date). Sometimes, the capitalization is available in case of unfulfillment of certain covenants (for example, in the event of a negative deviation of 40% of the EBITDA established in the business plan), in case of early

termination or when there certain circumstances are met (for example, when it is necessary in order to restore an eventual and potential asset imbalance).
    - It may also happen that debt-to-equity swaps are limited **to certain claims** (for example, for the equity loans between the funded company and its shareholders).
    - On occasion, the possibility of capitalizing the debt is subject to **a grace period** from the signing of the agreement.
    - In some cases, the agreement provides the **details** of the capitalization (for example, that it will be done by the face value of the claims plus the accrued and unpaid interest, etc.).

- **Conversion of debt into equity loans:** the conversion of credits into equity loans is also a frequent option (10 cases out of 70). In a few occasions, it is made clear that it is made to avoid incurring in grounds for dissolution (article 363.1.e] Corporate Law).

- **Clauses regarding new money:** the provision of fresh money only appears in a third of the analyzed cases.
    - The **main purpose** is to provide additional cash for current needs and thus to ensure the immediate functionality of the debtor. In one of the cases, the new money had as its sole objective the payment of tax claims.
    - **The new money may be provided in different ways,** for example through new factoring lines (or through the expansion of the existing ones), by new credit lines (or through the expansion of the existing ones) or through syndicated or bilateral loans.
    - In several cases, new loans are granted to the debtor with the specific instruction that s/he **cancels certain debt owed to the grantor of the new funding**. These operations constitute, in fact, novations of the debt and involve postponements, hence they have not been registered as new money grants.
    - Commonly, the new financing is granted by some of the **debtor's shareholders** (in the form of equity loans, especially, and sometimes with the commitment to capitalize the debt within a certain period).

- **Clauses regarding business operational modifications:** we understand those related to the operability of the company, in a broad sense. In general, all measures aim to **improve profit margins**. However, in relation to operational modifications, it must be taken into account that **the fact that they do not appear in the agreement does not mean that they have not or will not be carried out**.
    - Most of the operational modifications detected (in 14 out of 70 cases) refer to **staff readjustments** to adapt the workforce to the new market conditions and reduce costs (including the realization of layoffs, the variability of salaries —to increase productivity—, the relocation of staff and the establishment of a staff incentive plan towards the achievement of common objectives). These readjustments are not always reductions or cuts: indeed, in 4 cases (out of 67), they imply an increase in the workforce, through the hire of new personnel (also top experienced

managers who can open new markets) and/or the creation of specific job positions for the tasks arising from the new business plan. In those cases, the staff costs suffered considerable increases. In one case, the negotiation of a new collective agreement is foreseen in the refinancing agreement.

- **Changes** in top management positions, advisors or the hiring of a new CFO are also relatively frequent.
- In some cases, the **exit from certain markets** (for example, some countries) is foreseen in order to maintain the activity only in the places where the conditions are favorable (with wide profit margins) and stable. Simultaneously, some agreements contain the correlative dropping of businesses with low revenue volumes or negative EBITDA. Another option is the focus on large projects and the **profit of good market trends** in some segments of activity. In some cases, the obtention of a better profit margin is achieved through the **internationalization of part of the business**. Occasionally, an activity **growth** is agreed upon (thanks to the acquisition of new assets or the creation of specialized areas in specific sectors).
- A quite frequent modification is the closing of offices and the **transfer of headquarters** to reduce the cost of rents through **savings in logistics**. Similarly, sometimes there is a reduction in energy costs, trips, supplies or advertising expenses.
- In several cases, the agreements contain **plans that aim to the reduction of costs and optimization of central resources**. These usually include a new functional organization chart, the control and reduction of costs and the improvement of efficiency in the productive activity. For example, in one case, a problem of production overcapacity in a debtor's industrial site is detected. The solution consists of centralizing all the production in another site, increasing profitability and reducing costs.
- Among the **improvements in the productive process**, it is sometimes agreed to promote the outsourcing of services (or replace the outsourced services providers), the improvement of web tools, digitalization, investments in Business Intelligence or reengineering of the productive process.
- Occasionally, the agreement foresees the implementation of a **new business strategy**, which may include the provision of new services or the launching of new products, the improvement of the internet presence or the strengthening of the corporate and brand image.
- Regarding **suppliers**, some cases provide the regularization and planning of their payments, the unification of suppliers, the increase of the average payment period with the most significant suppliers or the review of all contracts in order to negotiate their decrease.
- Regarding the income policy, remotely the agreements foresee **changes in the collection frequency** (v.gr. that it is done weekly instead of monthly).

- **Clauses regarding factoring or confirming:** their extension (i.e., a quantitative increase in the limits), their renewal or maintenance are generally agreed upon, but in some cases they are reduced. Sometimes pre-existing lines are canceled, and new lines are granted.

- Occasionally, the refinancing agreements also provide for the novation or extension of **leasing contracts**.

- **Debt loan:** the conversion of short-term credit facilities (factoring, confirming) into long-term loans is a frequent option (it appears in 9 cases out of 70).

- The **bilateralization of initially syndicated loans** is also relatively common (it appears in 5 cases out of 70).

- Another option is the conversion of debt into **loans with bullet payments**, which have a single repayment installment of the principal at the end of the loan (i.e., the postponement of the principal until the final maturity of the loan). The purpose of this change in the payment terms is to facilitate the repayment of the loan, since the debtor has more flexibility (it appears in 7 cases out of 70).

- **Clauses regarding means of payment:** although they are not excessively frequent, sometimes the agreements include clauses regarding the means which may be used to discharge the obligations contracted under the agreement.
    - In two cases, the agreement expressly admits **offsetting** as a mean of payment.
    - In two cases, the agreement expressly admits that the creditors accept a **datio pro soluto** or **datio pro solvendo**.
    - Occasionally, the agreement includes clauses in the **method of payment** (time, currency, no need for a prior requirement, etc.).

- **Clauses admitting early repayment:** some agreements admit the possibility or contain the obligation to repay all or part of the debt in advance.
    - **Voluntary early repayment:** in one case, the agreement admits the early repayment of debt, provided that it covers a minimum amount.
    - **Mandatory early repayment:** in three cases, the agreement establishes a number of circumstances which trigger the obligation to early repay the debt, partially or totally. The circumstances foreseen as causes of **partial** mandatory early repayment are the transfer of non-fixed assets, the change of control in the debtor company, the collection of insurance payments, the expropriation of assets, the collection of subsidies, increases of capital, the granting of financing by shareholders or specially related persons, the excess of cash (surplus cash flow exceeding the forecasts of the viability plan). On the other hand, **total** mandatory early repayments are usually foreseen in cases of change in the legal context or market disruption.

- **Clauses relating to the disinvestment or sale of assets:** the disinvestment or asset sale mandates are not very frequent (they appear in a total of 12 cases out of 70). The agreement may contemplate not only the affected assets (normally, non-operating assets and/or assets that are not essential for the proper functioning of the business), but also the procedure to carry the sale out, the period in which it must be done, and the destiny of the product of the sale. For example, in one case, a competitive joint sale process for certain assets is envisaged. In another case, with regard to the sale of shares a regime is imposed, under which certain standards must be met in the third party's offer (reference equity value), except for specific periods in which the price will be determined by an independent expert.

- **Clauses that contemplate sale or purchase options:** they are not particularly frequent. Options of sale are granted to the debtor, while purchasing options can be in favor of financial institutions or third parties and involve assets of the debtor company or part of its capital.
    - In one case, financial institutions grant an option of sale to the debtor over the shares of another company.
    - In another case, a purchasing option over assets in favor of a third party is contemplated, as well as the consequences of its exercise (for example, in case the option to purchase is exercised, the debtor must allocate the amount obtained to the advanced repayment of the refinanced debt).

- **Creation of a steering committee:** in two cases (out of 70) the refinancing agreement establishes a body formed by some of the signing financial institutions in order to control the fulfilment of the agreement, among other functions.

- **Debt assignments:** occasionally, the agreement expressly provides for the possibility for financial institutions to transfer their position in the agreement to a third party (predetermined or not).
    - In two cases, the transfer of a large part of the debt owned by financial entities constitutes the essential content of the agreement. In these agreements, a third party is subrogated in the creditor position. In one of the cases, the collateral associated with the assigned loans was cancelled, and a clause of exemption of responsibility for the assignors was introduced in the agreement, so that they could be held liable for the subsequent qualification of the assigned debt or for the insolvency of the debtor company. In the other case, the effectiveness of the assignment of debt is subject to compliance with certain information and diligence conditions, as well as the commitment by the investor to finance the debtor through a loan.
    - In another case, a third company acquires certain claims that several financial institutions had against the debtor, with the ultimate purpose of converting all those credits into capital. The entire operation depends on the application of the exception provided in the art. 8, Royal Decree 1066/2007, of takeover bids (so that the obligation to launch a takeover bid for 100% of the debtor's share capital is not required). The application of this exception was expressly requested in the homologation application.

- **Entry and exit of shareholders:** agreements that expressly contemplate changes in the ownership of the debtor company are infrequent.

- In one case, the agreement foresees a purchase option in favor of financial institutions for 30% of the debtor company capital (we do not have sufficient data to say whether such participation represented a majority or not).
- In another case, all shareholders were literally “expected to leave” (without further information in the file).

- **“Repercussion of the reduction of profitability” clause:** quite frequently, the agreement contains a clause ensuring the investment of the refinancing entities, through the provision that any change in their profitability (by an increase of the costs or a reduction of the income) will be transferred to the debtors. As per this clause, the debtors assume the impact that any change of circumstances may have on the profitability of the refinancing operation for the financial institutions (listed in ten cases out of 70).

- **Sudden breach of mandatory rules:** in some cases, the agreement establishes an exoneration of liability for the banks in case a sudden and unexpected change in the applicable law makes the agreement illegal. Normally, the clause also imposes the necessary adaption of the agreement to the new legal regime.

- **Clause regarding “adverse material changes”:** occasionally, the agreement is conditioned to the non-ocurrence of any event or circumstance that adversely affects the financial situation, business or assets of the insolvent company and that blocks it from fulfilling its obligations, or that produces the ineffectiveness of any financial instrument.

- **Proportionality clause:** some agreements provide that all the amounts received by the financial entities under the agreement must be proportional to their participation in the restructuring.

- **“No modification of instruments” clause**: some agreements forbid any modifications that entail altering the priority of claims and, in general, that worsen the contractual status of any of the financial institutions.

- **Mark-to-market clause:** the refinanced debtor expressly agrees that the valuation method applied to the assets is the market value criterion.

- **Clauses regarding the disruption of the market**: these clauses establish a liability exemption in cases of disruption of the market and other prerogatives in favor of financial institutions.

- **Clauses regarding bonds:** in only three cases the agreement provides for a specific treatment for the issued bonds. In the rest of the agreements, there is no evidence that the debtor had resorted to issuing bonds to finance itself.
  - In one case (FCC), the agreement foresees suggesting the general meeting of bondholders a restructuring consisting in the extension of the maturity date, the review of the interest rates and the modification of the exchange rate to convert bonds in shares.

- In another case, the dissident bondholders are requested to capitalize 75% of their debt, so that they become shareholders of the debtor. The maturity date of the non-capitalized part is simoultaneously postponed.
- In another case, the agreement plans the issuance of new bonds (subject to the laws of the State of New York), in order to be given to creditors in proportion to their claims.

- **Agreements providing different refinancing options for financial creditors:** two of the agreements contemplate several options for creditors (each one has different features in terms of extension of the maturity date, interest rates review, grace period for interests, the possibility of capitalizing the debt, etc.). Each creditor can choose one of the refinancing options for each claim. The choice must be pure and simple, and a default option is established.

- **Agreements that foresee structural modifications:** structural modifications are a highly unusual content of the agreement, and mostly consist of mergers (there are no splits, transformations, global assignments of assets and liabilities, etc.). In one of the cases, the structural modification (a merger by acquisition) occurs while the application for the homologation of the agreement was being processed, but without being part of its explicit content.

Data on incidents during the homologation process

- In one case, the debtor requests that the proceedings are kept **confidential**. The court denied the petition because the Additional Provision 4th does not contemplate the confidentiality of the homologation process (unlike the moratorium period, which may be kept confidential). The court considered that the public nature of the proceedings must be the general rule is, and that "confidenciality is unnecessary because the agreement is already a reality when it reaches the court".
- The debtor shall not request a **generic and preventive request for a stay**: on the contrary, the debtor must communicate to the court the corresponding records of the seizures whose suspension is requested.
- In one case, the homologation request was submitted (and obtained) when the company **was declared bankrupt**. The insolvency practitioner and the court considered that the homologation proceedings were null and void. At the time of declaring the nullity of the proceedings, the court insisted on the incompatibility that exists between the homologation of a refinancing agreement (with a remarkable pre-insolvency nature) and bankruptcy proceedings. Indeed, the purpose of the agreement is precisely to avoid insolvency. Hence, the homologation of a refinancing agreement makes no sense if formal insolvency proceedings have already been declared.
- In several cases, an application for the homologation of the novation of a **prior agreement** was submitted (a first refinancing). The court rejected it, indicating that the correct course of action was a new homologation of the successive agreement.

- In a **group agreement**, there is a discrepancy in the certification of the auditor, since the required majorities were not met in relation to one of the companies of the group. The issue was solved through the non-homologation of the agreement in relation to that company.
- There are several cases in which one of the creditors requested **his exclusion from the list of signatories of the agreement** (in which he had initially been included). His claim was estimated.
- In one case, a financial creditor requests the non-extension of effects to certain claims, due to their **commercial (non-financial) nature**.
- In three cases, the petition for homologation **did not adequately specify the dissenting entities**, which prevented the judge from extending the effects of the agreement.
- In one case, the **extension of effects** was requested by a motion for clarification (the debtor did not request it in the homologation application because they believed it would be granted *ex officio*).
- In one case, the agreement entailed several supplementary contracts (mortgage novation, pledge, granting new financing) which were essential. The homologation order did not mention them, and clarification was requested in order to obtain the homologation of those agreements.
- In some cases, clarifications of the homologation order are requested, either because the homologation order forgets to extend the effects or because it does not extend the effects to the dissenting entities.
- In one case, an appeal is filed against the homologation order since the agreement **did not have a feasibility plan**. As a result, the proceedings were declared void.
- In one case, while the application for homologation was being processed, several seizures were initiated by dissenting financial creditors (there is no further information).

SUMMARY OF FINDINGS AND COMMENTS

General conclusions

- For medium and large companies and enterprise groups, **out of court solutions are a much-preferred solution over formal insolvency proceedings**. According to the unanimous view of stakeholders, formal insolvency proceedings would only be triggered when (i) debtors (ie, shareholders) reject the possibility of entering into a negotiation; (ii) when legal restructuring tools, that only exist in insolvency (avoidance actions, disclaimer of onerous contracts), are deemed necessary to rescue the business; or (iii) when the only solution is a liquidation and shareholders are not willing to collaborate.

It is noteworthy that: concerning (i), creditors have no legal way to force an out of court plan in Spain, and the possibility of making shareholders liable in case they unreasonably reject an agreement with a debt for equity swap seems not to be working; concerning (iii), in Spain a liquidation of the business out of court is not possible, including forcing a sale of the business as a going concern. In this regard, going concern sales are incentivised within formal proceedings my means of enabling rules, such as the automatic transfer of contracts or licenses.

- The **main reasons for the unanimous preference of out of court proceedings** over in-court proceedings are the following: (i) the loss of control over the restructuring procedure experienced inside formal proceedings; (ii) the lack of predictability in terms of time (procedures tend to last too long, and it is never possible to know when a plan may be passed or implemented) and outcome; and (iii) reputational damage.

The reason (i) is true for all types of enterprises, although with special intensity in case of large entities (which are the ones with the higher likelihood of restructuring as well as those with a higher degree of sophistication, hence with the ability to rescue the business when deemed viable). Medium and small businesses also fear the loss of control, but it is more directly related to the loss of the management, and it is often linked with these businesses as family run businesses. Motive (ii) is perhaps the biggest problem of the system, and it is essentially an institutional issue.

- The negotiation period (art. 5 bis) is used often and is perceived as a useful tool. We have not been able to access relevant data concerning the final outcome of negotiation periods, and hence we cannot establish the extent to which it is used merely to procrastinate. Interviews reflect the following: (i) the use of the negotiation period is more frequent the smaller the business; (ii) there is not a strong concern with the negotiation period being abused; (iii) there are only moderate complaints concerning the automatic stay triggered by art. 5 bis; (iv) there is a widespread concern about public creditors not being affected by the stay of art. 5 bis.

Concerning (i), the trend seems to be linked with the delay in reacting to distress and lack of sophistication; regarding (ii), the low perception of abuse and the limited distress caused by the automatic stay seem to be linked with the relative brevity of the period (3 months) and the automatic lifting of the effects when the period ends (ie, it does not depend on action taken by the court, and hence delays are not frequent); concerning (iv), we are arguably before one of the most important shortcomings of the Spanish system: the creation of a procedural privilege for public creditors, which is not mirrored by their situation in the hierarchy of claims within formal proceedings, and which severely undermines the chances of reaching out of court workouts.

- The amendments to the banking regulatory framework bore a very positive effect and fostered refinancing agreements. The possibility to reclassify loans following the conclusion of a refinancing agreement incentive banks´ to restructure and to have a more collaborative behaviour in their management of NPLs.

This rule has now been substituted by a more conservative, bank-centered rule, in line with EBA´s recommendations. The implementation of special rules in times of financial crisis worked in Spain and makes sense generally (see the World Bank´s ICR Principles, p. B5).

Specific conclusions on non-regulated and regulated refinancing agreements (except HRA)

- **Purely contractual refinancing agreements** are common in bilateral negotiations between banks and medium to small sized debtors at an early stage, and they tend to have a limited scope (often, simply a rescheduling). On the other side of the spectrum, these agreements also take place in the relatively rare cases of very early action by a large corporate group: this will be the case when the distress is still far in time and the agreement needs neither protection from ex post avoidance nor binding a high majority of creditors. The survey shows that bank covenants are useful in the early identification of the situation and the need to act. The larger the business, the more willing to engage in non-aggressive negotiations by banks.

- **Regulated ordinary refinancing agreements**, which are protected from ex post avoidance when 51% or more of the total value of claims support it, **are common in practice**. Since there is no court or IP involvement, we have not any hard data. Our assertion on the high frequency of its use is derived from the interviews, especially those with banks and lawyers of recurrent creditors. The larger the company, the more likely that the refinancing agreement will be taken to court for confirmation (becoming an HRA), since -allegedly- it increases certainty for creditors. This seems thus to be the realm of medium companies, with enough non-public debt to form majorities. Smaller businesses, that tend to have larger portions of public debt, resort more often to purely contractual, bilateral restructurings, mostly in the form of mere debt rescheduling.

- Regulated refinancing agreements that become protected from ex post avoidance without the need to reach a previous majority vote are **not used in Spain**. We have not been able to identify one single case, and interviewed stakeholders have never seen or used one. The institution is not used because its requirements (ie, the specific content of the agreement) are too strict.

Specific conclusions on HRAs

- HRA have proven useful to restructure large and very large debtors, and it has been mostly used in the case of corporate groups. Creditors regard this procedure as the best possible solution in the current framework. The main reasons for the largest creditors are:

- (i) creditors can keep control of the solution;
- (ii) there is an easy environment, with repeat players (both concerning creditors and their lawyers) and a high level of sophistication;
- (iii) it is perceived as much less costly and efficient than formal proceedings
- (iv) the legal framework is considered relatively appropriate

- The real rate of success remains to be seen, although it remains quite high until March 2018. For the time being, already a few HRA agreements have been breached and formal insolvency proceedings opened (see esp. the case of Isolux). However, these unsuccessful cases are below 5% of all refinancing agreements. Yet, for most proceedings, it is too early to claim success, since implementation has only started.

- The main problem of the system is that it is insufficiently regulated. It is unclear ex ante which clauses are going to be enforced and which may be considered as illegal by the judge. This creates legal uncertainty and limits the ability of the parties to reach bespoke restructuring agreements. Numbers, however, do not seem to support this fear. In any case, the following are still undefined parts of the regulation:

- **There is controversy concerning the subjective scope of the HRAs.** In particular, it remains unclear whether contingent liabilities (guarantees, sureties) may take part in the agreement and whether the HRA has effect on them.

- **The cram down rule in syndicated loans is still unclear.** It is argued by some that the rule according to which a vote of 75% of the claims of a syndicated loan is worth 100% of the votes of the syndicate does not mean that a 75% vote crams down the rest of the members of the syndicate.

- **It remains unclear if and to what extent judges must make an analysis on the merits before a homologation takes place.** In particular, it is unclear if the judge must be persuaded that the requirements of art. 71bis IA are met by the agreement (sufficient increase in the credit provided to the debtor to allow for the continuation of the business in the mid term, with a business plan that ensures viability).

- **There is no definition of what constitutes a "disproportionate sacrifice", and hence users complain about the uncertainty this creates on the tenure of the HRAs.** There seems to be consensus that a best interest test should be deemed to apply.

- **The effects of the successful challenge of a homologation are uncertain.** The controversy exists in situations when the success of the appeal is based on the "disproportinate sacrifice" rule. It is unclear if the appeal has only effects on the plaintiff or also on all other equivalent creditors. This poses the problem of the viability of the plan, generally, after part of the creditors have been excluded from it.

- The threat of personal liability on directors/shareholders in case of frustration of an HRA with a debt for equity swap is not pereceived as very influential in the process leading to the agreement. Surprising as it may be, the parties (both debtors and creditors) agree on this.

- Most litigation is started by hedge funds and foreign banks. There are wide complaints about the "parrochial" behaviour of national banks.

- The adequacy of HRAs as a restructuring tool decreases with the size of the business/group. This is in part because smaller businesses, often family owned/run, tend to procrastinate; also because smaller businesses are more often financed through fixed charges and the incentives of financial institutions to assume new risk is lower; another problem is that the creditor structure of smaller debtors changes, and non-financial creditors gain weight (non-financial creditors are excluded from HRAs).

The design of HRAs is positively valued because it provides the parties with a flexible scenario, where large debtors and sophisticated, repeat creditors have the possibility to control the restructuring procedure. There is no apetite to increase the stakeholders involved, including commercial creditors or enployees. The lack of a proper system of classes is a problem, but the relative small circle of participants and the high techincal level of advisors make up for the said shortcoming. Generally, stakeholders involved in HRAs are happy with an ex post control, and would not want more intense court intervention, especially in an earlier moment. Minority -although also sophisticated creditors: mainly funds- disagree, and consider the system biased agains minority creditors. In our opinion, an adequate system of classes, with a relaive priority rule and a best interest of creditors test would tackle the main problems of the system. A more *clear definition of some aspects of the regulation would also add a necessary legal certainty. There are also problems of valuation.*

Conclusions on special out of court proceedings for MSMEs

- The out of court procedure to deal with financial distress of MSMEs is generally well designed: it is generally inexpensive, templates are provided for participants, a system of mediators is in place, and courts are excluded from intervention.

- This adequate general design could be highly beneficial for Spain´s overburdened court system, currently clogged with cases involving small or very small entities.

- The number of companies that have resorted to this procedure is extremely low. The system is not used. The main reasons identified are the following:

- Public creditors are not involved, and hence small debtors lose interest in using a procedure that cannot bind their main creditor (or one of their main creditors).
- The majorities to reach an agreement are higher than in the case of an insolvency plan within formal insolvency proceedings.
- There is lack of awareness of the procedure and its possible benefits.
- The structure of MSMEs, mostly family businesses, the lack of sophistication of members/owners, who seek advice too late and even identify problems at a very late stage, and the still existing reputational damage prevent debtors from resorting to any procedure. They only file for insolvency when there is no alternative.

Spain needs a comprehensive approach to MSME distress. Creditor passivity could be tackled by the -excessive- rule that subordinates the claims of creditors who, having been duly notified, fail to vote in the out of court procedure; but the rule is not applied since debtors do not use the procedure. There are no specific rules fostering adequate creditor behaviour: in the case of financial creditors, their internal structure is often not well suited to identify and rescue viable businesses; and there are no codes of conduct aimed at preventing the destruction of the going concern value by enforcing on viable businesses. Spain is in need of an early detection system; and a proper system of director liability that does not necessarily link liability with the failure to file for formal proceedings. Efforts need to be to made to undertake a policy of awareness and to disseminate the benefits of engaging in early negotiations and channelling solutions through regulated out of court proceedings. Chambers of commerce, associations of entrepreneurs, etc, would be well suited to fill this gap.