

THE CREDITOR'S POSITION IN THE SPANISH INSOLVENCY LAW REFORM PROJECT

The Spanish Insolvency Law Reform Project gives a new role to creditors in the insolvency proceeding that up until now they had not had. Even though these are not the only ones, there are two new possibilities that are to be relevant to the creditor's position:

- 1) The creditor will have to appoint an expert or bankruptcy administrator at different moments.
- 2) The creditor will have the possibility to actively take part in the classification section filing a claim, in such a case the insolvency proceeding will follow without the intervention of the bankruptcy administrator.

■ Appointment of an expert in corporate restructuring

Articles 672, 673, and the following articles of the Spanish Insolvency Law Reform Project contemplate the possibility for creditors that hold over fifty per cent of the company's liabilities and that may be affected by the company restructuring shall request the appointment of an expert in corporate restructuring. The appointment of an expert will be mandatory for the Court, and the expert will be the one appointed by the petitioner creditor. This possibility for the creditor is quite new in our system. The bankruptcy administrator's retribution shall be at the creditor's expense unless another thing is established in the insolvency plan. The expert shall have knowledge and experience. If the creditors do not reach fifty per cent of the company's liabilities, but they still hold thirty-five per cent of the company's liabilities, they shall request the appointment of an expert, and the Court will admit or dismiss such request, after giving the debtor the chance to object to such a request.

■ Appointment of a bankruptcy administrator in insolvency proceedings without assets

Articles 37 *ter* and *quater* of the Spanish Insolvency Law Reform Project, contemplate the appointment of the bankruptcy administrator in insolvency proceedings without assets. In these cases, the appointed bankruptcy administrator shall make a report analysing whether there are possibilities to

BARCELONA

Balmes, 209, planta 2
08006 - Barcelona
+34 93 218 40 00

MADRID

A. Bosch 5, bajo D.
28014 - Madrid
+34 91 037 84 81

www.gimenez-salinas.es

info@gimenez-salinas.es



GBL
Alliance
Opening the World
for your business

exercise reinstatement actions or liability actions against the directors. Different from what we have seen in the earlier point, the Spanish Reform Project does not establish if the creditor can appoint the bankruptcy proceeding. Still, it does establish that the creditor will support the bankruptcy administrator's fees.

■ **Appointment of an expert or bankruptcy administrator in special insolvency proceeding for microenterprises**

The Spanish Insolvency Law Reform Project contemplates a special insolvency proceeding for microenterprises, which are defined as those that have less than 2 million euros of liabilities or volume of business and have less than ten employees. As the memorandum of the Law says, microenterprises represent 94% of Spanish companies. This proceeding is thought to be followed without the need to appoint a bankruptcy administrator; such issue has raised many critics among bankruptcy professionals.

However, the Spanish Reform Project contemplates the possibility for creditors to request the appointment of an expert or a bankruptcy administrator at different moments.

- The first moment in which is possible for the creditor to request the appointment of an expert, or a bankruptcy administrator is when exercising reinstatement actions or liability actions against the directors (arts. 695 and 696). For both actions, the creditors shall represent at least twenty per cent of the company's liabilities. And if a bankruptcy administrator had been already appointed, the creditors that represent a ten per cent of the company's liabilities shall exercise such actions alternatively, in the case that the rest of the creditors shall not exercise such actions.
- A second moment shall be during the continuation phase (*fase de continuación*) of the insolvent company. Articles 702 and 704 foresee that creditors may request the appointment of a mediator or bankruptcy administrator. The mediator will only intervene with the aim to advise in the negotiation of a continuity plan between the debtor and creditors. The mediation will last ten days. The expert in corporate restructuring will intervene or replace, depending on the case, the management

BARCELONA

Balmes, 209, planta 2
08006 - Barcelona
+34 93 218 40 00

MADRID

A. Bosch 5, bajo D.
28014 - Madrid
+34 91 037 84 81

www.gimenez-salinas.es

info@gimenez-salinas.es



GBL
Alliance
Opening the World
for your business

faculties of the debtor. Moreover, the expert shall purpose a continuity plan (*plan de continuación*), and issue technical opinions regarding the matters that affect creditors and mediate between the debtor and the creditors.

- A third moment to request the appointment of a bankruptcy administrator in the special insolvency proceeding for enterprises is during the phase of liquidation (art. 713). In such a case, the bankruptcy administrator shall purpose a plan of liquidation, issue technical opinions regarding the value of the company's assets or the productive unit, and faculties to liquidate the company's assets.
- Another moment to request the appointment of an expert is the one established in article 714, with the aim of evaluating the company or productive unit in those cases when it is intended its sale or transmission.

As a rule, the administrator's retribution shall be at the expense of the petitioner, either the creditor or the debtor itself.

■ The intervention of the creditor in the classification section

The creditor shall have the chance to intervene in the classification section (*sección de calificación*). With the current legal framework, the creditor is only expected to appear in court, given that the creditor's allegations can only influence the report of the bankruptcy administrator or of the district attorney, but such effect is not expected in the classification section.

With the new legal framework, the creditors, besides having the chance of providing information via email, shall as well file a claim if such creditors represent at least a ten per cent of the company's liabilities or own a credit of over a million euros without having to consider the position of the bankruptcy administrator or the district attorney.

In the special insolvency proceeding for microenterprises, creditors with at least ten per cent of the company's liabilities may request the opening of the abridged classification (*calificación abreviada*). If the debtor has committed any kind of inaccuracy on the insolvency application form, then the limit of the ten per cent will not apply. The creditors shall make allegations. But if the bankruptcy

BARCELONA

Balmes, 209, planta 2
08006 - Barcelona
+34 93 218 40 00

MADRID

A. Bosch 5, bajo D.
28014 - Madrid
+34 91 037 84 81

www.gimenez-salinas.es
info@gimenez-salinas.es



GBL
Alliance
Opening the World
for your business

administrator classifies the insolvency as fortuitous, and the creditors do not oppose to such classification, then the classification section will be filed (art. 716).

We value positively the new role that creditors can have in the insolvency proceeding, given that until now they were mere spectators. With the new regulation, creditors shall request the appointment of an expert and take part actively in different moments of the insolvency proceeding. There is however a negative side, as creditors shall have to cover the expenses of the experts' fees, as a general rule. Still, it is positive that creditors shall appoint a trustworthy bankruptcy administrator or expert (covering the expenses) in the insolvency proceedings of its clients, such possibility involves a change regarding the current insolvency proceeding.

On the other hand, we believe is very positive the faculty given to creditors to promote the classification section filing a claim. The problem, however, is that this possibility is only contemplated for insolvency proceedings of big companies, given that in the special insolvency proceeding for microenterprises (that represent 90% of insolvency proceedings) creditors will depend on that the bankruptcy administrator opens the door to classify the insolvency as guilty, as if the bankruptcy administrator classifies the insolvency as fortuitous, then the classification section shall be filed, like it happened until now.

BARCELONA

Balmes, 209, planta 2

08006 - Barcelona

+34 93 218 40 00

MADRID

A. Bosch 5, bajo D.

28014 - Madrid

+34 91 037 84 81

www.gimenez-salinas.es

info@gimenez-salinas.es



GBL
Alliance
Opening the World
for your business