

THE POSITION OF THE CREDITOR IN THE NEW SPANISH BANKRUPTCY SYSTEM

The 26th of September 2022 the new Spanish Bankruptcy Law will come into force. One of the main aspects of the new regulation is that it grants a new role to creditors within the bankruptcy procedure, which they did not have until now. This article aims to inform of this new role to foreign companies with credits against Spanish companies in bankruptcy.

There are two new tools that reflect this creditor's new role: (i) The possibility of appointing an expert or a bankruptcy administrator at different times and (ii) the possibility of actively intervening in the qualification section by filing a lawsuit, causing the procedure to continue regardless of the insolvency administrator's report.

- Appointment of an expert in restructuring

Within Book II of the new bankruptcy text, arts. 672, 673 et seq., contemplate the possibility that creditors representing more than 50% of the liabilities that could be affected by the restructuring plan request the appointment of a restructuring expert. This expert will assist the debtor and the creditors in the negotiations and in the preparation of the restructuring plan. The appointment of the expert is mandatory for the Judge, and it will be the person designated by the requesting creditor, something quite new in the Spanish system. The expert's remuneration will be assumed by the creditor, unless the plan agrees otherwise. The expert must meet the established requirements of knowledge and experience. If, instead of 50%, the creditors reach only 35% of the affected liabilities, they can address a request for the appointment of an expert and the Judge will decide after hearing the debtor.

- Appointment of an insolvency administrator in proceedings without assets

Art. 37 contemplates the appointment of a bankruptcy administrator in the cases of proceedings without assets, at the request of creditors at least representing 5% of the liabilities. In these cases, the designated insolvency administrator will issue a report assessing whether there are indications that may allow the exercise of reinstatement or liability actions against the directors of the bankrupt company. Unlike what we have seen above, the rule does not say whether the bankruptcy administrator will be appointed by the creditor, although it does establish that the creditor will bear the cost.

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- Appointment of an expert or bankruptcy administrator in special procedures for micro-enterprises

The Bankruptcy Law sets up a new special procedure for micro-enterprises, which are defined as those with less than 700,000 Euros of turnover or 350,000 Euros of liabilities, and with less than 10 employees. This special procedure is expected to be carried out without a bankruptcy administrator. Although the law establishes the possibility that the creditors request the appointment of an expert or a bankruptcy administrator at different times:

- A first moment is for the exercise of rescission and liability actions (Arts. 695 and 696). For both types of actions, creditors must represent at least 20% of the total liability. And if there is already an expert or bankruptcy administrator appointed, the creditors with 10% of the liabilities may exercise these actions in a subsidiary manner.
- A second moment is in the continuation phase. Arts. 702 and 704 provide that creditors may request the appointment of a mediator or a restructuring expert. The mediator will have the sole purpose of advising on the negotiation of a continuation plan between the debtor and the creditors. This mediation will have a maximum duration of ten days. The restructuring expert, on the other hand, implies an intervention or substitution of the debtor's power of representation. It may propose a continuation plan, issue technical opinions on aspects that affect creditors, and mediate between the debtor and its creditors.
- A third moment within the special procedures for micro-enterprises in which the request of an administrator by the creditors is foreseen is in the liquidation phase (art. 713). In this case, it may propose a liquidation plan, issue technical opinions on the valuation of assets or the productive unit, and disposition powers to liquidate the assets.
- And another moment in which the request for the appointment of an expert is contemplated is in art. 714, for the purpose of valuing the company or production unit in cases where its sale or transmission is intended.

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As a general rule, the compensation of the insolvency expert or administrator will be assumed by the applicant, be it the creditor or the debtor itself.

- Intervention of the creditor in the qualification section

The other new aspect that we must highlight is the additional intervention that the creditor has in the liability section. With the previous regulation, the creditor could only appear in the liability section but nothing else. Instead, with the new regulation, creditors with more than 5% of the liabilities or a credit higher than one million euros, can file a lawsuit, regardless of whether the bankruptcy administrator does so (art. 449).

Also, in the special procedure for micro-enterprises, creditors with at least 10% of the liabilities can request the opening of the liability section. If the debtor has committed a serious inaccuracy in any of the submission forms, then the 10% limit does not apply. Creditors can also make allegations. But if the insolvency administrator classifies the insolvency in his report as fortuitous and no public creditor says otherwise, then the qualification section will be closed (art. 716).

This new role that creditors have in the bankruptcy proceedings is very positive, since until now they were mere passive spectators. With the new regulation, they will be able to request the appointment of experts and actively intervene at different times, although the drawback is that, as a general rule, they must assume the cost of these professionals. But it can be a very interesting option for certain creditors, since they will be able to designate an expert or insolvency administrator of their trust (assuming the cost) in the insolvency proceedings, which may represent an important change with respect to the current procedure.

On the other hand, we also find very positive the power granted to creditors to be the ones who promote and drive the liability section by filing a lawsuit. The problem is that this does not apply to the special procedure for micro-enterprises, in which the creditors will depend on the position of the bankruptcy administrator, because if the bankruptcy administrator considers that the bankruptcy is fortuitous the liability section will be closed as before. We also value positively the disappearance of the Public Prosecutor's Office in the liability section.

If your company is the creditor of a Spanish company in bankruptcy, we can advise you on the different options you have to try to recover your credit.

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