LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins Restructuring, Insolvency & Workouts Practice October 24, 2014 | Number 1760

Lawmakers Enact Spanish Insolvency Law

Royal Decree Law 4/2014, intended to promote efficiency in Spanish insolvency proceedings, is officially enacted with some important updates.

The Spanish legislature has finally enacted Royal Decree Law 4/2014 (the March Reform). Now known as Law 17/2014, of 30 September (the Act), the new law implements urgent measures regarding refinancing and restructuring of corporate debt. In addition to formally enacting the March Reform, the Spanish legislature included a few updates that are worth highlighting.

Pre-Insolvency Communication

As we anticipated in our Client Alert[1] dated 18 March 2014, under the March Reform it appeared that the enforcement moratorium attached to the so-called 5bis communication would not apply to out-of-court enforcement actions. However, the Act clarified that the moratorium applies to both court and out-of-court enforcement proceedings, regarding both assets and rights. Therefore, it is now clear that the 5bis communication blocks any sort of enforcement for a period of up to four months, provided that the relevant assets/rights are deemed necessary for the continuity of the debtor's business activities. One question that remains open is who shall determine if the relevant assets/rights are necessary for the continuity of the debtor's business activities.

Homologation of Pre-Insolvency Refinancing Agreements by a Court

As mentioned in our Client Alert[2] dated 18 March 2014, the March Reform introduced the possibility of having the refinancing agreement homologated by a court. This entails, *inter alia*, that the Homologated Refinancing Agreement may not be subject to a claw-back action and, if certain majorities are reached, may impose certain effects on dissenting or non-participating financial creditors.

Prior to the Act, only the insolvent debtor was entitled to request the court's homologation. Following the Act, however, any creditor who has entered into the refinancing agreement is also entitled to request its homologation by the court. This is an interesting opportunity for creditors who want to ensure they are protected against claw-back actions or who are interested in cramming-down other financial creditors.

Insolvency Receivers' Status

The Act includes a more detailed regulation of the insolvency receivers' status. The main highlights are as follows:

(i) Appointment and Removal

Insolvency receivers must be registered with the Public Insolvency Registry (Registro Público Concursal) and must have stated the geographic region where they are going to practice.

In order to be registered with the Public Insolvency Registry, the insolvency receivers must fulfil certain requirements which are yet to be determined by means of implementing regulations. The requirements may be different depending on whether the insolvency is classified as small, medium or large.

Once any insolvency proceedings are initiated and the characteristics of the case at hand have been considered, insolvency receivers shall be chosen in turns from the relevant list in the Public Insolvency Registry. Notwithstanding the foregoing, in the event of very large insolvencies, the court may choose a different insolvency receiver, provided basically that the alternative insolvency receiver is better-suited to deal with those particular proceedings.

Separately, one of the most noteworthy prohibitions is that any person who is personally or professionally related to the insolvent debtor, as well as anyone who has issued an independent expert's report in the context of refinancing agreements, may not be appointed as insolvency receiver for the insolvent debtor to which that person is related or for whom that person issued the report.

In addition, the Act sets forth a detailed list of the tasks that the insolvency receivers must fulfil. The stated tasks are classified into procedural, debtor-related, labour, creditors' rights-related, report and valuation, realization of value, and liquidation and secretarial.

Lastly, the court, either *ex officio* or at the request of any person who is entitled to initiate insolvency proceedings, may remove the insolvency receiver. In particular, it may do so in the event of serious failure by the insolvency receiver to fulfil its tasks and functions, as well as when there are challenges regarding the list of creditors or the inventory that are resolved in favour of the challenging party in a proportion equal to or larger than 20 percent of the insolvent debtor's estate or the list of creditors (though we understand this should be read as "liabilities") set forth in the insolvency receivers' report.

(ii) Remuneration

Insolvency receivers' remuneration is generally paid out of the insolvent debtor's estate and the amount shall be determined using certain tables (*aranceles*), which will be established by means of implementing regulations. These tables will take into account the number of creditors, whether several insolvency proceedings have accumulated and the size of the insolvency (small, medium or large, as set out above).

The following principles shall govern the insolvency receivers' remuneration:

- Exclusivity: The insolvency receivers may only receive the amount resulting from the tables.
- Limitation: The insolvency receivers may not receive any amount in excess of the general maximum amount set forth for the particular insolvency.
- Effectiveness: The insolvency receivers' remuneration shall be guaranteed by means of a remuneration account where all insolvency receivers shall pay certain mandatory contributions on a regular basis.
- Efficiency: The insolvency receivers' remuneration shall accrue on a milestone basis when the receivers fulfil each of their tasks and functions

Insolvency receivers' remuneration may be reduced by the court in the event of (i) failure to fulfil their tasks; (ii) a delay in their tasks that is the receivers' fault; or (iii) poor quality of their work.

The insolvency receivers' work shall be deemed to be of a poor quality if any of the following are true:

- The insolvency receivers have failed to fulfil any information obligation with respect to creditors
- They exceed any deadline by over 50 percent of the given term
- Challenges regarding the list of creditors or the inventory are resolved in favour of the challenging party in a proportion equal to or larger than 10 percent of the insolvent debtor's estate or the liabilities set forth in the insolvency receivers' report. In this last instance, the insolvency receivers' remuneration shall be reduced at least by the same proportion

Conclusion

The March Reform is now officially a law and, in general, the updates introduced by the Act help clarify the applicable regime.

Although we need to wait and see how the courts interpret the insolvency receivers' status provisions, our hope is that they will promote efficiency in Spanish insolvency proceedings. In any case, we look forward to the implementing regulations setting forth the requirements that insolvency receivers must meet in order to practice, as well as the tables (aranceles) governing their remuneration.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Ignacio Pallarés
ignacio.pallares@lw.com
+34.91.791.5019
Madrid

Javier López-Antón
javier.lopez-anton@lw.com
+34.91.791.5016
Madrid

Fernando Colomina
fernando.colomina@lw.com
+34.91.791.5014
Madrid

Isabel Borrero
Isabel.borrero@lw.com
+34 91 791 5032
Madrid

You Might Also Be Interested In

Spanish Insolvency Law Reform Extends to Composition Agreements
Material Reform of the Spanish Insolvency Law

Spanish Insolvency Act Amendment Offers Comfort to Parties in SAREB Transactions

Insolvency and Corporate Reorganization Survey 2014: a Snapshot of Global Restructuring

Mercantile Courts of Catalonia's Conclusions Clarify Aspects of Production Unit Sales

---

Endnotes

[1] Please see section 1 of our Client Alert dated 18 March 2014, available at http://www.lw.com/thoughtLeadership/lw-spanish-insolvency-law-new-reform.

[2] Please see section 5 of our Client Alert dated 18 March 2014, available at http://www.lw.com/thoughtLeadership/lw-spanish-insolvency-law-new-reform.