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Spanish Insolvency Law Amendment: Refinancing Agreements Homologation Majority Rate Lowered to 55 percent

The Spanish Congress has approved important amendments into the so-called Spanish scheme of arrangements, to facilitate Spanish company refinancings.

The approval of Law 14/2013, 27 September on support for entrepreneurs (the New Reform) brings the Spanish Insolvency Law into closer alignment with the UK schemes of agreements which affect Spanish companies facing financial difficulties. By lowering the homologation majority rate to 55 percent, down from 75 percent, the amendments will allow Spanish companies to more easily secure the approvals they need to refinance, rather than file for insolvency. These amendments will also address the problem of Spanish international companies turning to UK schemes of agreements.

Background

The Spanish Insolvency Law initially did not contemplate a procedure similar to the UK schemes of agreements by means of which an agreement approved by the requisite majority of creditors and sanctioned by the court may be imposed to dissenting parties.

Additionally, most refinancing agreements require unanimous consent by the lenders. On the other hand, as the secondary debt market has become increasingly international and liquid, the composition of the syndicate of lenders of many Spanish borrowers has changed and grown substantially. Consequently, Spanish borrowers no longer have a direct and fluent relationship with their pool of lenders.

In light of the above, obtaining the required unanimous consent to implement a refinancing is an increasingly difficult, and sometimes impossible task for Spanish companies. Consequently, heavily backed refinancing agreements could be thwarted by a minority of dissenting creditors, forcing viable Spanish companies with financial difficulties to file for insolvency which could have been avoided with a signed refinancing agreement.

Given this live or die puzzle, in recent years, many notable Spanish companies have found the UK schemes of agreements the only solution.

Previous homologation majority regime

Spanish legislators were aware that these limitations of Spanish Insolvency Law were forcing viable Spanish companies with financial difficulties (and with UK links) to flee from the Spanish Insolvency Law into the UK schemes. Accordingly, Royal Decree Law 38/2011 of 10 October introduced the Spanish equivalent of the UK schemes through the Fourth Additional Provision of the Spanish Insolvency Law (AP4). The AP4, as initially drafted, provided a court approval proceeding (*homologación*) whereby

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refinancing arrangements executed by creditors representing at least 75 percent of the liabilities owed to financial entities and, apparently, by 60 percent of all the liabilities can be judicially approved (homologated by court). And, hence, the maturity extension and moratorium on the enforcement of security interests established therein would be binding on the non-participating or dissenting financial creditors, provided that their claims are not secured.

In practice, the application of AP4 was very limited as (i) generally, the creditors under the relevant refinancing agreement are secured, (ii) the majorities required were quite difficult to obtain, and (iii) only maturity extensions and moratorium on the enforcement of security interests may be imposed to unsecured dissenting creditors.

New homologation approval threshold

The New Reform has lowered the homologation requisite approval rate by the financial entities from 75 percent to 55 percent. Furthermore, the New Reform has eliminated doubts regarding whether or not Spanish companies must obtain additional approval by 60 percent of all the liabilities — the New Reform has clearly stated this additional approval is not required.

Open uncertainties

Prior to the approval of the New Reform, a Barcelona court issued a noteworthy ruling (known as the “Celsa” case) which imposed the maturity extension and the moratorium on the enforcement of security interests onto secured syndicate lenders. The court’s rationale behind this controversial decision was that, as the secured syndicate lenders were “crammed down” and so were not able to unilaterally enforce the security, the court considered that they should not be regarded (for the purposes of the AP4) as secured creditors. Indeed, most of the syndicate facilities set out that the enforcement of their security package should be made by the security agent following the instructions of the majority of lenders, excluding any individual enforcement right.

Although this represent only the first court ruling on this topic, other courts may follow the same rationale (particularly Barcelona’s courts) — especially as the New Reform is silent as to the possibility of not considering secured syndicate lenders as secured parties for the purposes of the AP4.

In addition, which creditors should be considered as “financial entities” for the purposes of AP4 remains unclear. Given these uncertainties, Spanish companies should consider the safest and most conservative interpretation as excluding bondholders and funds.

Conclusion

The New Reform marks a helpful change to Spanish companies, reflecting an understanding of the more globalized nature of entrepreneurial finance. On the other hand, one could argue that, due to the decrease to 55 percent described above, financial entities with interests in Spanish companies may find they have slightly less control over their loans held against Spanish borrowers in distress or insolvent.

While the New Reform addresses a significant weakness in Spanish Insolvency Law, other topics such as the potential cram down of secured creditors and the definition of financial entities remain problematic.

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