

Spanish insolvency law reform: Fit for purpose?



Earlier this year, the Spanish Council of Ministers published a draft insolvency law reform bill, intended to implement the Directive on Restructuring and Insolvency.

A statutory public consultation was opened in the summer, enabling the author to make comments, keeping in mind the track record of the 22/2003 Insolvency Law, enacted almost twenty years ago, and substantially amended by the 30/2011 Law and other texts, most of which have not met the intended targets. This failure is evidenced by the fact that the Law has been amended more than twenty-five times (other than COVID-19 related measures), often following pressure by interest groups.

These comments take into account the insolvency officer (IOH) principles established by the European Bank for Reconstruction and Development (EBRD) revised in March 2021. The 30/2011 Act also provided for the necessity to regulate the tasks and duties of insolvency administrators. However, requests by professional associations in Spain for the enactment of provisions to create a professional and specialized body of insolvency administrators, so as to increase the efficiency of the procedures, have been unsuccessful.

Firstly, the EBRD principles define the IOH as any professional involved in reorganisation or liquidation processes. The concept of reorganisation is construed in the broadest sense, including early action, pre-pack solutions and insolvency proceedings. In defining liquidation, the EBRD provides for intervention oriented towards liquidation of assets and payment of debts. Clearly, there

are no differences between the EBRD's definition of restructuring experts and the role of insolvency administrators.

The EBRD has also listed twelve principles for an effective regulatory and professional framework. The third of these requires independence and impartiality to balance the interests of stakeholders. This and the 9th principle also refer to remuneration paid out of the insolvent company's assets. Of note is that where remuneration originates from other sources or the IOH is appointed by an interest group, there is a risk to independence, as the appointing party often tries to influence the professional, regardless of the general interests of the procedure, even by promoting actions complicating and lengthening proceedings.

These are commonplace situations nowadays and will be enhanced by the proposed draft. The expected economic and financial consequences, both from the general restructuring procedure and the special microenterprise procedure, are a reduction of financing under preferential commercial conditions. Increasingly, suppliers will request advance payment or payment upon delivery. The likely consequence will be that creditor remedies available in cases of non-payment will be reduced, because the draft text renders it impossible to start recovery procedures before a court or enforce court judgements or resolutions.

Further remarks may also be made, the first dealing with the classification stage (*sección de calificación*). Conduct of this stage lies with the insolvency administrators; it is always a source of conflict and often extends the duration of proceedings. This stage should be

subject to the public prosecutor's competence, who would assess, relying on insolvency administrators' reports, their conclusions to prevent matters becoming "bargaining chips". There is awareness that biased interpretations of accounting irregularities or the quantification of the aggravation of the insolvency may unnecessarily complicate the procedure.

Secondly, dealing with the intervention of the Tax Agency, the Social Security and Companies' Registries in the early detection of insolvency, the first two are usually creditors. As creditors are the ones to decide, before doing business, whether a potential counterparty is in a difficult financial situation, it would be useful to grant private individuals access to information gathered by administrative bodies on unpaid or outstanding debts, payment deferrals and annual accounts. The 6th additional provision of the draft, which imposes free, unpaid work, deserves a separate comment, particularly as to whether it complies with the Spanish Constitution.

In the author's view, as it stands, the draft law will not meet, once again, the intended targets, mainly because steering economic life via legal provisions is difficult. ■



LUIS MARTÍN
Partner at Abencys
Reestructuraciones, Spain



The EBRD principles define the IOH as any professional involved in reorganisation or liquidation processes

