



Further Amendments to Spanish Insolvency Act Now Effective

On September 5, 2014, Spain enacted urgent measures to facilitate restructurings and avoid the insolvency of companies that, under the previous regime, might have been forced to enter into an insolvency process (“RDI 11/2014”). RDI 11/2014 modifies several provisions of the Spanish Insolvency Act (the “Act”). The objective of the reform is to improve the legal framework that governs voluntary arrangements between creditors and the sale of distressed businesses outside of insolvency by removing obstacles that have previously impeded the successful reorganization of insolvent companies. In addition, RDI 11/2014 establishes rules to deal with the ongoing insolvency proceedings of certain concession holders in relation to Spain’s toll highways (the “Concession Holders”). These measures aim to prevent the Concession Holders from being placed into liquidation.

The principal amendments brought about by RDI 11/2014 include the following.

Approval of Voluntary Arrangements (“*Convenio*”)

Thresholds to Approve Voluntary Arrangements Modified. Approval of a *Convenio* now requires the support of either 50 percent or 65 percent in value

of the nonpreferential unsecured creditors (“*créditos ordinarios*”) (depending on the content of the *Convenio*). However, a *Convenio* may bind dissenting preferential (secured and unsecured) creditors only if it obtains the approvals outlined below.

Thresholds for Syndicated Loans. In connection with the thresholds discussed above, where voting creditors form part of a syndicate, all syndicate members will be deemed to approve the *Convenio* where members holding at least 75 percent in value of the syndicated debt vote in favor of it (unless the provisions of the loan agreement set out a lower threshold).

Thresholds to Bind Unsecured Creditors. A *Convenio* can also bind dissenting unsecured creditors (and secured creditors to the extent of any shortfall in the value of their security; such deficiency claims are deemed unsecured for the purposes of the Act). If a *Convenio* is supported by 50 percent in value of creditors, it may: (i) reschedule payment terms for a period of up to five years; (ii) include a debt write off of up to a maximum of 50 percent of the total unsecured, non-preferential debts; and/or (iii) convert debt into participative (subordinated) loans for an equivalent term (although the latter does not apply in the case of employees or state creditors). If a *Convenio*

is approved by 65 percent in value of creditors, it may also: (i) reschedule payment terms for a period of up to 10 years; (ii) include a debt write-off (without limitation in respect of the amount); (iii) include a debt-for-equity swap; (iv) convert debt in participative (subordinated) loans, for a term of up to 10 years, into convertible bonds, PIK loans, or any other debt instrument with a ranking, maturity, and other characteristics that may differ from the original debt; and/or (v) provide for a sale of the company's business and assets as a going concern.

Where the *Convenio* includes a debt-for-equity swap, the corresponding capital increase will require shareholder approval. However, under the Act, reduced thresholds for approval are required (as distinguished from those contemplated in the Spanish Companies Act): (i) a simple majority for joint stock companies; and (ii) a simple majority for limited liability companies, provided that at least 30 percent of votes in favor must be obtained from quota-shareholders. A resolution is passed by a simple majority if it is approved by members representing a simple majority of the total voting rights of members who (being entitled to do so) vote in person or by proxy on the resolution.

Classes of Preferential Creditors. Secured and unsecured preferential creditors must be divided into the following classes for purposes of approving a *Convenio*: (i) employees; (ii) state creditors (for example, in relation to unpaid taxes); (iii) financial creditors (in respect of any kind of financial indebtedness); and (iv) all other remaining creditors (including, for example, trade creditors).

Thresholds to Bind Preferential Creditors. In order to bind preferential creditors, the 50 percent and 65 percent thresholds referred to above will be increased to 60 percent and 75 percent respectively, which must be met for each class of creditors (following which the *Convenio* will bind all creditors under that class). However, if the thresholds are not met for a particular class, the *Convenio* will not bind the relevant creditors. This will not affect its approval by other classes.

Value of Security. Under Spanish insolvency law, where the value of collateral is insufficient to discharge all secured liabilities, the value of a creditor's security is calculated by

deducting 90 percent of the fair market value of the collateral from the creditor's total secured liabilities. The value of the security may not be less than zero or higher than the value of the corresponding claim. For example, if an asset has a market value of 100 and secures several loans, each also in the amount of 100, the first ranking creditor will be deemed to be secured for 90 and unsecured for 10. All subordinated secured debts (i.e., debts secured with second or subsequent rankings) will be deemed unsecured for the purposes of the Act. The value of 10 is then made available for distribution to unsecured creditors.

Purchasers of Debt Following Insolvency Afforded Voting Rights. Previously, the Act prevented those purchasing debt following the debtor's entry into insolvency proceedings from voting on voluntary arrangements such as a *Convenio*. RDI 11/2014 has removed this restriction unless the purchaser is a related party of the debtor.

Amendment of Voluntary Arrangements Approved under the Old Regulations. Voluntary arrangements approved under the old law that have not been complied with by the debtor within two years of the enactment of RDI 11/2014 will be subject to amendment at the request of either the debtor or creditors representing 30 percent in value of the debtor's total liabilities. While such an amendment will be made pursuant to the rules in RDI 11/2014, the approval thresholds are higher than those that would ordinarily apply pursuant to RDI 11/2014: (i) for those agreements that under RDI 11/2014 would require approval by the holders of 50 percent of the nonpreferential unsecured debts, the amendment threshold is 60 percent; and (ii) for those agreements that under RDI 11/2014 would require approval by the holders of 60 percent of the nonpreferential unsecured debts, the amendment threshold is 75 percent. In addition, the thresholds to bind dissenting preferential creditors are increased to 65 percent and 80 percent of each class respectively. However, state creditors will not be bound by the terms of an amended voluntary arrangement.

Sales of Distressed Businesses on a Going-Concern Basis

RDI 11/2014 sets out new rules aimed at facilitating the sale of companies in an insolvency process:

Transfer of Agreements Required for Continuation of Business. A purchaser will be entitled to require the assignment of agreements that are required for the continuing operation of the company's business (provided that termination of such agreements has not been requested by the relevant counterparty prior to transfer).

Transfer of Licenses and Permits. Similarly, licenses and administrative authorizations will be assigned to a purchaser at its request, provided that: (i) they are required for the continuation of the debtor's business activity; (ii) they form part of the going concern; and (iii) the purchaser will continue to carry on the business from the same premises of the debtor.

Debt-Free Sale. Relevant business and asset sales will be made free of both pre- and post-insolvency debts, with the exception of any employee or social security liabilities of the company.

Rights of Secured Creditors. Similarly, the transfer of the company's assets will be made free of preexisting security interests. Secured creditors will be entitled to receive a pro rata share of the sales proceeds (corresponding with the value of their security). Where the proceeds of sale will be insufficient to discharge the value of the outstanding security, the consent of 75 percent in value of the secured creditors will be required for a debt-free sale to be approved. The court may also, at the purchaser's request, order a transfer of the relevant assets subject to preexisting security interests. This will not require the prior consent of secured creditors, although the court will need to ascertain that the purchaser has the economic means to assume the secured obligations.

Insolvency of Concession Holders

RD1 11/2014 also sets out several measures aimed at preventing the conversion of insolvency proceedings of Concession Holders (which are currently ongoing) into liquidation proceedings.

Procedural Consolidation. All insolvency proceedings of Concession Holders where a *Convenio* proposal has been filed (and to the extent the *Convenio* affects all those

Concession Holders) may be consolidated from a procedural perspective. Certain public bodies in Spain will be entitled to file a separate *Convenio* proposal (creditors may then be able to vote on more than one proposal, although only one can be approved).

Immediate Application of the New Rules. The regulations on procedural consolidation and the approval of voluntary arrangements (as outlined above) will apply to Concession Holders immediately upon RD1 11/2014 entering into force. If, at this time, no *Convenio* has been filed within the relevant statutory time limit, or a *Convenio* proposal has been filed but not yet voted upon, the Concession Holders, their creditors, and the relevant Spanish public bodies will be entitled to file a new proposal governed by the revised rules set out by RD1 11/2014.

Creditors Participating in a Restructuring Agreement ("RA") Under the Act Will Not Be Deemed De Facto Directors on Insolvency. Creditors that have entered into an RA under the Act will not be deemed to be de facto directors in respect of loans made to a creditor pursuant to the terms of an RA.

Entry into Force. RD1 11/2014 entered into force on September 6, 2014, and will be applicable to all insolvency proceedings commenced after that date. However, certain aspects of RD1 11/2014 will also have retroactive effect on insolvency proceedings currently pending on September 6, 2014:

- **Rules governing voluntary arrangements and the treatment of secured creditors** will be applicable to current insolvency proceedings where an insolvency report has not been filed as of September 6, 2014.
- **Rules governing the sale of a company's business** will apply to all current insolvency proceedings where the liquidation stage has not been opened as of September 6, 2014.
- **Rules governing the voting of syndicated loan creditors** will be applicable to all current insolvency proceedings where there has been no voting on a *Convenio* as of September 6, 2014.

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