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# The Spanish Approach to Corporate Restructuring: A "Pre-packaged Chapter 11"

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**Abstract**

*The implementation in Spain of the EU Directive on restructuring and insolvency (Directive 2019/1023) has been carried out by means of Law 16/2022, of 5 September. This article focuses on the new legal framework applicable to preventive restructuring proceedings. It describes the most significant provisions, their internal relations and the policy decisions that inform them. It also includes some considerations on the changes that are introduced in Book IV on cross-border restructurings.*

## I. Introduction

1. The implementation in Spain of the EU Directive on restructuring and insolvency (Directive 2019/1023) has been carried out by means of Law 16/2022, of 5 September (B.O.E., 6 September 2022), which modifies the Insolvency Act (recast) of 5 May 2020 ("IA"). Along with other significant amendments, this law has introduced a new book establishing a special insolvency procedure for micro-enterprises (Book III) and has completely superseded the content of Book II on preventive restructuring frameworks. The new IA is now composed of four books. Book I contains the rules governing formal, entirely in-court, insolvency proceedings, applicable to all types of debtors except micro-enterprises; it also contains the regime on the second chance for natural persons and the new rules on insolvency pre-packs. Book II deals with preventive restructuring proceedings, applicable to legal and natural persons carrying out a business or professional activity. Book III establishes a special regime for the restructuring or liquidation of micro-enterprises. And a new Book IV has been added, which now contains the rules of Private International Law. This article focuses on the new legal framework applicable to preventive restructuring proceedings, in particular when the debtor is a company.

## II. Preventive restructuring proceedings

### 1. Introduction

2. The new Book II of the IA establishes a comprehensive legal framework for preventive restructuring proceedings. This Book implements Title II of the EU Directive but also includes other elements inspired by the transposition made by other Member States, in particular Germany (see Act on the Advancement of Restructuring and Insolvency Law -*Sanierungs- und Insolvenzfortentwicklungsgesetz, SanInsFoG*- and the Act on the Stabilisation and Restructuring Framework for Businesses -*Unternehmensstabilisierungs- und -restrukturierungsgesetz, StaRUG*-)[1] and the Netherlands (see Act on the Confirmation of Out-of-Court Plans (*Wet Homologatie*

[1] See, *i.a.*, T. Pogoda/C.Thole, "The new German Stabilisation and Restructuring Framework for Business", *EIRJ,* 2021-6, p. 1 *et seq.*.; or D. Skauradszun, "Grundfragen zum StaRUG – Ziele, Rechtsnatur, Rechtfertigung, Schutzinstrumente", *KTS,* 1/2021, p. 1 *et seq.*

EIRJ
European Insolvency and Restructuring Journal

*Onderhands Akkoord,* or WHOA for short).[2, 3] As can be deduced from the explanatory memorandum, the Spanish legislator has been aware of the regulatory competition that exists in this sector, and one of its concerns has been to provide a sound and competitive framework that prevents national companies from having to move to other jurisdictions to carry out a restructuring.[4]

3. The reform of Book II has maintained the two pre-insolvency procedures provided for until now in Spanish Law as two autonomous but functionally linked tools: (i) the communication to the court of the opening of negotiations with creditors (the moratorium) and (ii) the restructuring plans. Although the purpose of the communication is to facilitate the negotiation and adoption of a restructuring plan through a temporary suspension of individual executions, both figures are independent: the judicial approval of a plan can be requested without prior communication and vice versa. As a consequence, both proceedings will be included as independent proceedings in Annex A of the EU Insolvency Regulation (only the so-called confidential moratorium and group restructuring plan, *infra*, will be excluded from this list).

4. As also clarified in the explanatory memorandum, and in keeping with the model of the previous regime, the new legal framework is based on the so-called *“principle of minimum judicial intervention"*. The Spanish legislator is aware that time is of the essence in this context, i.e. a requirement inherent to this type of pre-insolvency situations is to reduce the delays and costs of the procedure, and thus judicial intervention is restricted to what is strictly necessary to protect the rights of the debtor, its shareholders and the affected creditors. In this sense, Spanish preventive restructuring law opts for a "hybrid procedure", in the terminology used in supranational texts[5]: the entire negotiation, convening of classes and voting on the plan takes place out-of-court, through a sort of spontaneous or informal cooperation between the interested parties; and the judge only intervenes at the end, when requested basically in order to extend the effects of a pre-packaged restructuring plan to a dissenting minority or to dissenting classes, and to guarantee certain protection and privileges if the restructuring plan fails and formal insolvency proceedings are eventually opened. This reduction of judicial control is mainly compensated by attributing the decision criterion to the majority of the affected parties. The underlying idea is simple. If a qualified majority of the affected creditors vote in favour of the restructuring, it will very likely be because the business is viable, but such restructuring is necessary to ensure its continuity and is preferable to any other alternative. The judicial supervision is thus reduced to (i) controlling the process of collective will formation, (ii) and verifying that certain rules of distribution of the company’s value have been respected.

5. Two other general characteristics of the new regime are worth mentioning. Firstly, its flexibility: the system is not based on a regulated process with a legal determination of its formalities and successive procedural

[2] See, *i.a.*, T. Bil, “An Overview of the Upcoming Dutch Scheme”, *Insolvency Intelligence*, 33 (2020), p. 99 *et seq.*; R.J. van Galen, “Das Gesetz über die gerechtliche Bestätigung von aussergerechtlichen Plänen“, KTS, 2/2021, p. 225 *et seq.*; R. Warner/M. Veder, “Enterprise Group Restructuring: Dutch Options and United States Enforcement”, *EIRJ,* 2021-7, p. 1 *et seq.*, p. 7-16.

[3] See, on the implementation in other Member States, A. Metalinos/V. Portokallis/S. Potamitis/A. Rokas, “The New Greek Insolvency Framework”, *EIRJ,* 2021-10, p. 1 *et seq.*; A. Wilfinger, “Corporate Restructuring in Austria”, *EIRJ,* 2022-1, p. 1 *et seq.* For a comparative study on the moratorium rules, R. Bork, “Pre-insolvency Moratoria – A Legal Comparison”, *EIRJ,* 2021-9, p. 1 *et seq.*

[4] Spanish scholars have analysed this practise in some detail, see I. Tirado, “Scheming against the Schemes: A New Framework to Deal with Business Financial Distress in Spain” *E.C.F.L.R.*, 15 (2018) p. 516 *et seq.*.; F.J. Garcimartín Alférez, “La eficacia en España de los Schemes of Arrangement ingleses”, *R.D.C.P.* 13 (2010), p. 383 *et seq.*; A. Carrasco Perera, E. Torralba Mendiola, “Schemes of Arrangement ingleses para sociedades españolas: una crítica”, *R.D.C.P.*, 14 (2011), p. 349 y ss; Á.M. Ballesteros Barros, “El reconocimiento en España del scheme of arrangement de Derecho inglés tras el Brexit”, C.D.T., 13 (2021) p. 70 *et seq.*

[5] See, World Bank Group, *Workout in the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes,* 2022, at 2-3.

EIRJ
European Insolvency and Restructuring Journal

stages, but rather on offering the interested parties a series of tools that they can combine according to the needs of each situation. As it is colloquially said, no two restructurings are the same, and therefore the Spanish legislator has simply tried to give a menu of options, a toolkit, so that the parties may choose the ones that best suit their needs. Taking this into account, different degrees of judicial control are established depending on the intensity and severity of the effects that the plan is intended to achieve. And, secondly, it is focused on the debtor's financial structure, i.e. the right-hand side of the balance sheet. Although with some exceptions, the new preventive restructuring framework is mainly *a special regime* aimed at facilitating, through collective bargaining, the reconfiguration of the debtor's financial structure, including group guarantees. That is, it is a special regime aimed at ensuring the *financial viability* of the business. Operational restructurings must, in principle, be carried out under the general rules of civil, commercial, labour or administrative law.

## 2. The moratorium

6. The first restructuring tool provided by Spanish law is the moratorium. The moratorium is triggered by the debtor's communication to the court that it is negotiating or going to negotiate a restructuring plan with its creditors; and its two main effects are (i) the stay of enforcement actions by individual creditors, and (ii) the suspension of the opening of formal insolvency proceedings, including the debtor's legal duty to file for these proceedings.[6] During the moratorium, the debtor remains totally in control of its assets and retains its administrative and disposition capacities (Art. 594);[7] only exceptionally does the law require the appointment of a restructuring expert (the Spanish equivalent to the "practitioner in the field of restructuring"). The moratorium's main function is to facilitate the negotiations of a restructuring plan between the debtor and its creditors while keeping the company in operation and therefore preserving its value as a going concern.

7. To benefit from the moratorium, the law requires that the debtor be in likely, imminent or current insolvency.[8] The term *"likelihood of insolvency"* is defined by a time horizon of 2 years: i.e. it is more likely than not that, if not restructured, the debtor will default on its obligations within the next two years and will thus be forced to file for insolvency.[9] Imminent insolvency, in turn, is defined by a time horizon of 3 months: the debtor is in imminent insolvency if it will not be able to meet the obligations due within the next three months (Art. 2.3). However, the law does not establish an entry control. The effects of the moratorium are granted automatically, i.e. by operation of law, from a mere communication by the debtor to the court that it is negotiating or is going to initiate negotiations of a restructuring plan with its creditors. Abuses would be punishable *ex post* under general tort or insolvency law. Thus, for example, if the moratorium is used to simply delay the opening of insolvency proceedings and this

[6] Under Spanish insolvency law, the debtor who is currently insolvent has the duty to apply for insolvency proceedings within two months (Art. 5 IA).

[7] Moreover, as in German law (see Pogoda/Thole, *loc.cit.*, p. 5) or in Greek law (Metallinos/Portakallis/Potamatis/Rokas, *loc.cit.*, p. 10-11), there is no legal duty-shift: the Spanish legislator has considered that the existing rules on torts, corporate and insolvency law were sufficient to protect creditors' interest in these scenarios. According to these rules, directors may be liable for economically destructive decisions that may aggravate the insolvency of the debtor.

[8] See, for the requisites in this regard in other Member States, see Bork, *loc.cit.*, p. 5

[9] Originally, the Proposal followed the Dutch approach and contained no time limit, merely the probability of insolvency (see Art. 370 WHOA: "*If it can be reasonably assumed that the debtor will no longer be able to pay his debts as they become due …*"). However, during the public consultation, some experts were in favour of including a time limit and the two-year time frame was incorporated into the Government's Draft Bill. The reason was that if the foreseeable default would be beyond two years, it might be difficult to justify the application of the special regime laid down in Book II IA and the consequent interference with individual rights. This implies that any restructuring at a time prior to the two-year period must be carried out under the general rules of civil and commercial law.

EIRJ
European Insolvency and Restructuring Journal

aggravates its economic situation, the company's directors may be ordered to pay the insolvency deficit in accordance with the special insolvency liability regime laid down in Book I of the IA.

8. The stay of individual enforcement actions, which also applies -albeit with certain restrictions- to public creditors (Art. 605), only encompasses assets that are *necessary* for the continuation of the business of the debtor, e.g. not sumptuary assets. It may, however, be extended to other assets, if needed (Art. 600-602).[10] In the case of groups of companies, it may also cover guarantees and security interests given by other members of the debtor's group (Art. 596.3). The new regime, following the EU Directive, also declares *ipso facto* clauses ineffective: executory contracts cannot be terminated, suspended or modified by the communication to the court of the opening of negotiations (Art. 597). Nor can outstanding contracts, which are necessary to keep the debtor's operations, be terminated for breaches that have occurred prior to the communication, but only for subsequent breaches (Art. 598.2). The Law includes an exception for financial contracts, e.g. derivatives, and financial collateral arrangements (Art. 599 and 603.2).

9. As has been said, the effects of the moratorium are granted automatically, i.e. by the mere communication by the debtor, for three months, but may be extended for an additional period of other three months if the debtor has the consent of a majority of creditors and it is necessary to ensure the successful completion of the negotiations (Art. 607).[11] The extension also requires the favourable opinion of the restructuring expert if he or she has been appointed.

10. The Law has introduced a novelty in order to avoid, or at least discourage, opportunistic behaviour by controlling shareholders and managers of large companies. If during the negotiations, the debtor files for insolvency proceedings, a majority of creditors may request a stay of the opening of these proceedings if they submit a restructuring plan, in compliance with the necessary legal requirements, within the following month (Art. 612). This rule makes sense where the plan is to be imposed against the will of the shareholders, and tries to prevent them, at the last moment, from thwarting the negotiations of a restructuring plan that are well underway.

## 3. Restructuring plans

### 3.1. Introduction

11. The main preventive restructuring tool established by Spanish law is the restructuring plan. The negotiation and approval of this plan may be preceded by a moratorium, but this is not always the case. In fact, it is relatively common in practice for the debtor not to request such a moratorium, particularly in the case of large companies where a voluntary standstill agreement with the main financial lenders is sufficient. In any case, irrespective of whether a moratorium has been requested or not, in accordance with the principle of minimum judicial intervention, the negotiation and approval of the plan take place out of court, usually led by the debtor's directors and one or more creditors' committees, spontaneously formed by the main stakeholder. Moreover, the Law does not prescribe or restrict the substantive content of the plan, thus leaving a high degree of flexibility to the interested parties. For example, it may provide for the temporary extension or reduction of debt, a debt-for-equity swap, the sale of assets or a controlled liquidation; in particular, under Spanish law, a liquidating plan is permissible (Art. 614).[12] The

[10] See, for the rules adopted in other States, Bork, *loc.cit.*, p. 7-9

[11] For the duration of the stay in other Member States, see Bork, *loc.cit.*, p. 6.

[12] The EU Directive gives Member States the option to allow for liquidating plans (see Art. 2.1 (1) (the plan may include *"...where so provide under national law, the sale of the business as a going concern"*). Spanish law expressly permits this option. And it makes sense: If creditors can do it indirectly, through a debt-for-equity swap and a subsequent sale of the shares to a third party, why shouldn't they be able to do it directly?

post-restructuring capital structure should be sufficient to ensure the viability of the company, but its specific content is the result of the collective bargaining process. That said, once the plan has been negotiated and approved out of court by the necessary majorities, the Law requires its judicial sanction to extend its effects to dissenting creditors and/or shareholders and to give the measures contained in the plan special protection in subsequent insolvency proceedings if it fails.

12. The structure of these chapters of the Act is very straightforward and seeks to ideally replicate the dynamic of these processes. In the canonical model conceived by the legislator, the dynamics of a process of this nature go through four stages. First, the claims to be affected by the restructuring plan are identified and valued. Next, these claims are separated into classes according to their rank and nature. Third, a vote is taken within each class to see if the necessary majorities are achieved. And finally, once these majorities are reached, judicial approval is requested. Specifically, once the plan has been voted within each class, the Act distinguishes two scenarios: (i) that the plan has obtained the necessary majorities in each of the classes, that is, that all classes agree with the proposal, including the shareholders ("*consensual plans*"); (ii) or that this has not been the case, that is, that there are one or several classes of creditors or, if affected, the shareholders that have voted against it ("*non-consensual plans*"). The Law establishes the conditions in each of these cases so that the plan can be judicially confirmed and, consequently, extend its effects to dissenting creditors within each class, in the first scenario, and also to the dissenting classes and/or shareholders, in the second. The following paragraphs follow this order of exposition.

### 3.2. Affected claims

13. The Law begins by defining what should be understood by claims *affected* by a restructuring plan and their valuation. The concept of affected claims and their valuation is fundamental, since these are the ones that will determine the fate of any restructuring plan: all, but only, claims that are affected must have a voting right weighted by its amount. This legitimizes recourse to the majority rule since political power is attributed precisely to those who, in order to ensure the financial viability of the business, suffer the consequences of their decision and in proportion to the amount of these consequences. Affected claims are those which, in accordance with the plan, are to undergo a modification of their terms or conditions, regardless of whether their real value is also altered; that is, even if the net present value of the new claim or instrument that the creditor is to receive under the restructuring plan is equal to that of the original claim. Specifically, and according to the legal definition, a claim is affected by the plan when it entails the modification of its terms and conditions (term, amount, etc.), the change of debtor, the change of applicable law or its conversion into instruments of another nature and in particular its capitalization, i.e. its conversion into shares or stock (Art. 616.1).

14. In principle, pre-insolvency proceedings are "potentially" universal: all claims may be affected by the plan. The only exceptions are labour liabilities, maintenance obligations and non-contractual claims (Art. 616.2). The Law envisages for the possibility of affecting public claims, but only by means of deferral and provided that the debtor is up to date with its tax and social security obligations (Art. 616.2 III and 616 bis). To avoid possible interpretative doubts, the Law also clarifies that the claims that can be affected include contingent and conditional claims (Art. 616.2).

15. As regards third party guarantees, the plan may not impair them, with the exception of guarantees given by other companies of the debtor's group when their enforcement could jeopardize the restructuring of the business, i.e when there is a correlation between the insolvency risks of the main obligor and the guarantor (Art. 652).[13] If the guarantee is not affected, the plan may naturally affect claims derived from reimbursement actions, i.e. the reimbursement claim of any third party that has satisfied the original creditor (Art. 616.3). Likewise, if the guarantor has not satisfied the main obligation when the plan is approved, any future reimbursement action will be affected on the same terms as the main one.

16. But this universality, unlike what happens in insolvency proceedings, is potential, not required. All credits can be affected by the plan, but the Law does not require or impose any compulsory "perimeter of affected claims". It does not require that all the claims be affected, nor that a certain or minimum volume be affected (with the exceptions that we will see later to give the plan certain insolvency privileges). The Law is based on a "selective restructuring model"[14] and thus understands that it is the interested parties who, depending on the needs of each case and the negotiation dynamics, must decide whether they want to affect the totality of the liabilities that can be affected or only a part of them, and the amount or identity of the latter. This approach is consistent with the principle of flexibility that informs the Act. Naturally, the perimeter of affected claims may not be set in an arbitrary, unreasonable or discriminatory manner, but in accordance with objective criteria established by the legal text.[15] As we will see below, judicial control over how the claims have been separated to form the different classes implies a control over the delimitation of the circle of affected claims, and guarantees that it responds to objective and sufficiently justified criteria.

17. The Law also lays down rules on how the claims must be computed for the purpose of weighing their vote and the consequent "political power" of each creditor when negotiating and approving the plan (Article 617). In addition to the general rule, i.e., each claim will be computed at its nominal value plus overdue interest and surcharges, clarifications are included regarding the computation of secured and contingent claims. In the case of the former, the Act establishes a "bifurcation" of the claim between the part covered by the fair value of the encumbered asset (as determined in accordance with Art. 273, with a 10% discount, see Art. 275), which qualifies as secured, and the part not covered, which qualifies as unsecured.[16] In relation to contingent claims, it leaves their valuation to the sponsors of the plan, but only for this valuation may be affected if they subsequently materialize (Art. 617.4).

### 3.3. Executory contracts

18. The preservation of contractual relations is usually essential to guarantee the continuity of the business. For this reason, and in relation to executory contracts, the rule we saw for the communication is repeated here: the restructuring plan should not affect

[13] See, in Dutch Law, Warner/Veder, *loc.cit.*, p. 13-16, Art. 372 WHOA; in German Law, Secc 2 (4) StaRUG, Pogoda/Thole, *loc.cit.*,p. 8 (*"The restructuring plan may also modify the rights owed to creditors holding restructuring claims under any liability assumed by an affiliate"*).

[14] See, S. Paterson/A. Walters, "Selective Corporate Restructuring Strategy", accessible https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3924225

[15] See also, Secc 8 StaRUG, Pogoda/Thole, *loc.cit.*, p. 9 (*"The statute names some cases in which the selection of affected parties shall generally be deemed appropriate. In particular, this applies to restructuring plans that exclusively adjust financial obligations and respective securities while the claims of consumers as well as small and medium-sized businesses remain unaffected"*)

[16] See also, in German Law, Secc 24 (1) (2) StaRUG, Pogoda/Thole, *loc.cit.*, p. 12; in Dutch Law, Warner/Veder, *loc.cit.*, p. 10 fn 36. In general, Spanish insolvency law establishes a 10% discount on the (market) value of the asset encumbered by the security interest. This may be important if secured creditors exercise the cash out right that, under certain conditions, they are entitled to (*infra*).

contracts with reciprocal obligations pending performance and therefore contractual clauses providing for their modification or termination by the mere approval of a plan or circumstances directly related to it (*"ipso facto clauses"*) are declared ineffective (Art. 618.1). That is, restructuring proceedings should have no impact on outstanding contracts. In addition, a rule is added to facilitate the conversion of debt into equity, i.e. debt-for-equity swaps: in relation to contracts necessary to maintain the continuity of the debtor's business or professional activity, the Act also declares ineffective change of control clauses triggered by that conversion (Art. 618.2).

19. Similar to what happens in bankruptcy proceedings, the Law provides for the power to reject executory contracts in the interest of the restructuring process (see Art. 620). This power applies to contracts whose performance is particularly burdensome for the business, in such a way that they could jeopardize the successful completion of the restructuring and end up leading to insolvency proceedings. It is clarified that the counterparty will be entitled to compensation for the damages that the rejection may cause, without prejudice to the fact that the indemnifying claim may be affected by the plan like any other (Art. 620.2-4).[17]

20. As in the moratorium, financial contracts, e.g. derivatives, and financial collateral arrangements enjoy a privileged regime and thus, for example, in this case *ipso facto* clauses remain valid and effective (Art. 619). However, if the counterparty does not trigger the ipso facto clause and terminate the contract, the Law expressly states that derivatives may also be rejected in the interest of the restructuring of the business and the balance resulting from their valuation may be affected by the plan. This balance must be determined according to the mark-to-market value of the financial instruments, and close-out netting clauses must be respected in any case, i.e. if several derivatives are covered by the same close-out netting clause, cherry picking is not possible: all must be terminated and the amount resulting from these transactions must be determined on a net basis.[18]

### 3.4. Classes

21. Once the claims to be affected by the restructuring plan have been identified, the Act requires that they be divided into classes in order to proceed with the approval of the plan (Art. 622). This separation seeks to ensure the proper functioning of the majority rule, which requires a certain homogeneity or community of interests to legitimize its application as a decision-making mechanism, and the consequent reduction of judicial control. The Law offers certain guidelines for the formation of classes. In the first place, it starts from the general clause, taken from the EU Directive, according to which the formation of classes must take into account the existence of a common interest of the creditors of each class determined in accordance with objective criteria (Art. 623.1). The idea of "community of interests" determined under "objective parameters" is established as the general principle, which gives courts some flexibility in applying the rules set out in the following provisions. In particular, it states that the main (objective) parameter for forming the classes must be the insolvency ranks: claims with different insolvency ranks must be separated into different classes (Art. 623.2). Creditors with different insolvency ranks may have conflicting interests and therefore, including them in the same class distorts the functioning of the majority rule. Additionally, claims with the same rank can be separated into different classes when there are sufficient reasons to justify it (Art. 623.3). And the Law points out

[17] See a similar provision in Article 373 WHOA; conversely, the German StaRUG does not contains this tool, see Pogoda/Thole, *loc.cit.*, p. 19.

[18] The regimen is equivalent to that established in the legal framework applicable to the recovery and resolution of credit institutions and investment firms, see e.g. Directive 2014/59/EU, of 15 May 2014.

EIRJ
European Insolvency and Restructuring Journal

some of the criteria on which this justification may rest, for example, their financial or commercial nature, the existence of conflicts of interest or how the claims are to be affected by the plan. Creditors in need of protection, like SMEs, may also be put in a different class.[19] As regards secured claims, they all form a unique class but the Law envisages an exception on the basis of the heterogeneity of the encumbered assets (Art. 624). The Law adds that public creditors form their own classes, separate from private creditors of the same rank (Art. 624bis). Although it has been discussed during the parliamentary process, relative contractual subrogation agreements (i.e. inter-creditor agreements or ICAs) have not been included as an express criterion for class separation. Naturally, this silence does not mean that these agreements cannot be taken into account, where appropriate.

22. Under the model of selective restructuring that inspires the law, it will be quite common in practice for the restructuring to be focused and even restricted to financial liabilities, since the inclusion of commercial liabilities may harm the future operation of the business. In this case, the Law includes a fairly broad list of what should be understood as financial liabilities, which includes bondholders and commercial claims that have been assigned to a financial institution, e.g. factoring (Art. 623.4).

23. Due to the idiosyncrasy of the Spanish procedure, the correct formation of classes will normally be controlled *ex post*, at the stage of court confirmation or approval of the plan. However, the interested parties (the debtor or creditors representing at least 50% of the liabilities to be affected) have the option of requesting judicial confirmation of the classes prior to such final approval (Arts. 625-626). This option could be useful for those cases in which, during the negotiation phase of the plan, a specific disparity of criteria arises between the parties regarding the classes to be formed and it is preferable to clear up the doubts without the need to wait until the end of the whole process, with the risk that this entails. The advantage, if this option is used, is that the formation of classes can no longer be a reason for challenging or opposing the plan (Art. 626.4).

### 3.5. Approval of the plan by each class of creditors

24. At least conceptually, once the classes of creditors have been formed, the plan has to be approved by each class. Unlike in other legal systems, the Law does not establish any formal or regulated procedure as to how the voting of the plan should proceed. It does not require any formal call for creditors' meetings, nor does it regulate the exercise of voting rights or the confirmation of the results. Consequently, and following the practise in the Spanish restructuring market so far, the procedure will normally be organized and directed by the company's administrative body and by the most relevant creditors, constituted spontaneously in the form of a creditors' committee or committees, depending on the circumstances of each case.

25. All affected creditors have voting rights determined according to the (nominal) amount of their claim (Art. 628.1) The plan will be deemed to be approved by the corresponding class of creditors when it has been accepted by the required majority. Specifically, the Law distinguishes between secured and unsecured claims. In the latter case, the plan will be deemed approved for a class of claims if more than 66.6% of the liabilities included in that class vote in favour (Art. 629.1). Since this is an informal

[19] See also for German Law, Secc 9 StaRUG (within the same rank, separation may attend to the fact thar third party guarantees are being affected or the amount of the claim, see Pogoda/Thole, *loc.cit.*, p. 10); in Austrian Law creditors in need of protection are creditors with claims of less than EUR 10.000, irrespective of their personal condition, see Wilfinger, *loc.cit.,* p. 8; in Dutch law, small business creditors that have a claim based on the delivery of goods or services, or on tort, and are offered less than 20% of the nominal value of their claim are also placed in a different class (see Art. 374 (2) WHOA).

EIRJ
European Insolvency and Restructuring Journal

procedure, where there is no external supervision or control over the information given to the creditors, the period granted to exercise their vote or the manner of doing so, the majority is computed on the total liabilities included in each class, and not only on those who have exercised their right to vote. The majority is increased to 75% in the class of secured creditors (Art. 629.2). The option to require a qualified majority is justified by the significant effect of the plan for dissenting secured creditors, who may be deprived of their individual right of enforcement by a decision of the majority.

### 3.6. Approval of the plan by the shareholders

26. One of the thorniest aspects of the regime established by the Spanish pre-insolvency framework is the treatment of the shareholders when, as usual, the restructuring plan affects their rights; that is, it involves measures such as capital increases, structural modifications (typically, one or several subsidiaries to generate structural preferences or centralized enforcement mechanisms) or disposition of essential assets that, under the general rules of company law, require the agreement of the shareholders' meeting. The starting point is to allow the shareholders to vote on the restructuring plan, but not under the procedural and majority rules applicable to other classes of creditors, but under their own regime. When the plan affects the rights of the shareholders and, specifically, provides for measures which -legally or statutorily - require the agreement of the shareholders' meeting, the shareholders vote in accordance with the rules applicable to the articles of association (Art. 631.1), but with certain specialties, in order to facilitate a favourable decision on the plan (Art. 631.2).

27. This option of the Spanish legislator is better understood if we remember that, unlike creditors, whose "collectivization" is legal, i.e., the creditors are not contractually bound among themselves but are grouped together *ex lege*, the shareholders do have a contractual agreement that binds them. Therefore, it may be reasonable that the decision is made in accordance with the rules governing such agreement, i.e. the company rules applicable to the shareholders' meeting. It is true that the Act does not take this idea to its ultimate consequences, and opts for an intermediate solution: the procedure is simplified, in terms of notice to call the shareholders' meeting, deadlines or agenda, and the majorities are reduced in order to facilitate the decision of the meeting in favour of the plan. Specifically, the ordinary legal quorums and majorities are applied, without any qualified legal or statutory quorums or majorities being applicable. This partial modification of the rules of the articles of association, deactivating reinforced legal or contractual majorities or other conventional obstacles, may be justified for the sake of the external transcendence that the shareholders' meeting agreement may have and specifically for the sake of protecting creditors that may be directly or indirectly affected by the shareholders' decision. The objective is to prevent reinforced majorities or other statutory clauses from hindering the corporate measures envisaged in the restructuring plan.

### 3.7. Consensual plans: the best interest of creditors test

#### 3.7.1 Introduction

28. Once the classes of creditors have been formed and the plan has been voted in each class, including, if applicable, the shareholders' meeting, the Act distinguishes between two scenarios: (i) when the plan has been accepted by all the creditor classes and, if applicable, by the shareholders' meeting, i.e., the necessary majorities have been obtained in each of these groups, or (ii) when this has not been the case. The former are usually known as consensual plans (the result of agreement or consensus among all classes) and the latter as non-consensual

plans. The Act establishes the conditions that must be met in each case to obtain the approval of the plan by the courts and thus extend its effects to dissenting creditors within each class or to entire classes, including the shareholders. This Section analyses the conditions that consensual plans must meet in order to be confirmed by the courts and in the following section those of non-consensual plans.

### 3.7.2. Extension of the plan to dissenting creditors

29. In the first case, the fundamental interest of the promoters of the plan is to extend its effects to dissenting creditors - or simply passive creditors, i.e. those who have not voted - within each class. Specifically, when the plan has been approved by all classes of creditors, it will be sanctioned by the court and its effects will be extended to all affected claims within each class if the following conditions are met (Art. 638): (i) the debtor is in probability of insolvency, imminent or current insolvency, and the plan offers a reasonable prospect of avoiding it and ensuring the viability of the business; (ii) the legal requirements of minimum content (Art. 633) and form of the plan (Art. 634) are satisfied; (iii) the rules of formation of classes and the necessary majorities in all classes have been respected; (iv) all creditors within the same class receive an equal treatment; (v) and the plan has been notified to all affected creditors (see Art. 627). In short, it is a matter of verifying that the circumstances that justify the application of the special rules of pre-insolvency law (risk of insolvency and viability of the business) are present and that the collective will has been well formed. These conditions must be met for the court to initially sanction the plan, although its decision is made on the basis of the documentation submitted by the applicant: it is a *prima facie* control, so to speak (Art. 647.1).

30. In addition to these requirements, the plan must respect a minimum economic content for dissenting creditors. This minimum economic content is broken down into two main aspects: the sacrifice of their claims must not be manifestly disproportionate to ensure the viability of the business, and, in any event, they must receive an instrument with a value at least equivalent to what they would have obtained in a bankruptcy liquidation.

31. In relation to the first aspect, the Law establishes that the plan cannot impose on minority creditors a sacrifice of their claims that is "manifestly greater" than that which is necessary to guarantee the viability of the company (Art. 654.6º).[20] To ensure the legitimacy of this ground and to facilitate the application of the rule, a presumption is introduced to the effect that no such circumstance exists when the challenging creditor has acquired its claim for a price lower than the reduction in value that such claim will suffer under the restructuring plan. In general, the Spanish legislator presumes that the price of claims on the secondary market is a good indicator of their real value.

32. In relation to the second aspect, the Law requires the plan to meet the so-called "best interest of creditors test" (Art. 654.7º). This test attempts to ensure that dissenting creditors within a class will not be worse off as a result of the restructuring plan than they would be under the most likely alternative scenario. The Law refers this most likely alternative scenario to liquidation in insolvency proceedings. This reference is explained by the very definition of the general prerequisite: if, as required by the definition of "probability of insolvency", the most likely alternative to the restructuring plan is the opening of insolvency proceedings, the reference for applying the best interest of creditors test must be the liquidation of the

[20] This condition is not required by the Directive, but is traditional in Spanish pre-insolvency law and is linked to the general principle of prohibition of abuse of majority.

EIRJ
European Insolvency and Restructuring Journal

business in these proceedings. But this liquidation value includes the possible sale of the business as a going concern. In this sense, the hypothetical insolvency liquidation quota is a right of each individual creditor that cannot be prejudiced by majority agreement within its own class. For the purposes of applying the best interest of creditors test, the present value of what the dissenting creditor will receive under the restructuring plan must be compared with the hypothetical liquidation quota also discounted to present value. Thus, for example, if the dissenting creditor succeeds in proving that in a liquidation scenario he would have received 100, the plan must recognize him a claim or equity interest with a minimum value of 100. As mention above, and the rule may be applied by analogy, the price of a claim in the secondary market may be a good indication of its real value, and therefore a useful reference for applying the best interest test.

33. Procedurally, and unlike the other requirements, the manifest disproportionality of the sacrifice and the guarantee of the hypothetical liquidation quota can only be assessed by the court at the request of the dissenting creditor as grounds for challenging the plan, and not by the court on its own motion (*infra*).

### 3.7.3. Extension of the plan to dissenting shareholders

34. As regards shareholders, if the resolution of the meeting is favourable to the plan, it will be qualified as "consensual". From this point on, its imposition on dissenting minority shareholders is understood to be based on company law itself and its applicable regime, with the special rules established by the Insolvency Act. Rather than a "legal extension ", as is the case with creditors, it is a "contractual extension", i.e. under the rules of the company agreement. The minority shareholders may challenge the corporate resolution: (i) either because the procedure or the majorities provided for in Article 631 have not been respected, or (ii) for substantive reasons deriving from company law rules. In relation to the substantive grounds, i.e. relating to the content of the resolution, the typical ground for challenging the shareholders' agreement will be the conflict of the resolution with the corporate interest, typically when the majority imposes an unjustified sacrifice (for example, an unfounded economic dilution or an unreasonable shift of the balance of power in the shareholders' meeting). In any case, the challenge by the minority shareholders to the agreement is procedurally channelled in the context of the procedure for challenging or opposing the judicial sanction of the plan (Art. 631.5º).

### 3.8. Non-consensual plans: the absolute priority rule

#### 3.8.1. General rule

35. The Law also envisages the possibility of sanctioning a restructuring plan that has not been approved by all classes of creditors or by the shareholders when their rights are affected (a "non-consensual plan" or colloquially "cross-class cramdown"). Except for the requirement of class unanimity, these non-consensual plans must comply with the general conditions for their approval that we have seen in the previous section; e.g. the plan must offer a reasonable prospect of avoiding insolvency and ensuring the viability of the business, it must contain the minimum legal content, all affected creditors must have been notified, the classes must have been correctly formed, the claims within the same class must be treated equally, and the plan must satisfy the best interest of creditors test.

36. The fundamental difference is that, in this case, the restructuring plan can be approved even against the consent of one or more classes. It is sufficient that it has been approved by a majority of classes, at least one of which is a class of claims with special or general privilege. Or, failing that, by at least one class of creditors other than the

shareholders and any other class that would have not received any payment or retained any right or interest, applying the bankruptcy ranks, in the case of a valuation of the debtor as a going concern (Art. 639). The application of this rule requires, first of all, verifying whether there is a majority of affected classes that have voted in favour of the plan and whether, among them, there is at least one class that consists of privileged claims, special or general, according to the insolvency ranks. In this case a simple majority is sufficient and it would not be necessary to determine, at least at this stage, the value of the debtor as a going concern. If such a majority is not achieved, it would then be sufficient for a class of creditors to have voted in favour, provided that it is a class that would have received some payment in accordance with the bankruptcy ranks, taking into account the value of the debtor as a going concern. In this case, it is necessary to determine this value. In practice, once the value of the business as a going concern has been determined, the liabilities must be calculated and the classes of creditors identified, according to their bankruptcy ranking, that would have received any payment had the business been sold for that value. At least one of these classes must have voted in favour of the plan. That is, the plan must have been approved by a class of affected creditors that, to borrow the most colloquial language, is "in the money" and typically by the class "where the value breaks" (fulcrum class), which are now the new "residual creditors".

37. Additionally, when the plan has not been approved by all classes of creditors or by the shareholders, the Law requires that the so-called "absolute priority rule" be respected, although it introduces a nuance to mitigate its rigidity (Art. 655.2.4º).[21] In a broad sense, this rule has a double content, expressed in the principle "no class may collect more than what is owed to it, nor less than what it deserves". On the one hand, no class of affected creditors should receive, as a consequence of the implementation of the restructuring plan, credit rights, shares or participations with a net present value higher than the amount of their credits, shares or participations before the plan. In practice, this requires comparing the present value of the "instrument" or "instruments" (the claims, shares or participations) that each class receives under the restructuring plan with the amount of the "instrument" they previously held, and then verifying that the former is not higher than the latter. Otherwise, that class of creditors would be receiving more than they are owed and any other class of creditors that voted against the plan could challenge it.

38. Second, the absolute priority rule requires that no dissenting class of creditors is to receive, under the restructuring plan, "less than it deserves". This requirement has a two-fold dimension. On the one hand, no dissenting class must receive less favorable treatment than any other class of the same rank (including, in principle, those that are not affected). And, on the other hand, it must not receive as a result of the implementation of the restructuring plan credit rights, shares or participations, with a present value lower than the amount that its claims had before the restructuring plan (see, on the determination of the value of claims, *supra* para, 17), if a lower ranking class is receiving any payment or retains any right, share or participation after the plan. Again, it is a question of comparing the present value of the claims and/or shares that class is to receive under the restructuring plan; and, if this is less than the amount of the "instrument" it had before the plan, no class of junior creditors, including shareholders, should receive anything, or retain any rights or interests. Otherwise, it would be receiving less than it deserves.

[21] See also Article 384 WHOA or Sec 27-28 StaRUG, Pogoda/Thole, *loc.cit.*, p. 13 (absolute priority as a general rule, relative priority as an exception). Conversely, Austrian law has opted for the relative priority rule, see Wilfinger, *loc.cit.* p. 9, and Greece as well, see Metallinos/Portokallis/Potamitis/Rokas, *loc.cit.*, p. 6.

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European Insolvency and Restructuring Journal

39. In order to apply this rule, the value of the company in operation, as a going concern, must be taken as a reference, since the aim is to distribute the surplus value associated with the restructuring (i.e. "the restructuring value") among the different classes of creditors. In this sense, while the hypothetical liquidation quota is an individual right of each creditor, the right to participate in the surplus associated with the restructuring, which derives from maintaining the business in operation and restructured outside formal insolvency proceedings, is a class or collective right. It is thus necessary to distinguish well between two valuations: (i) the value of the business if it had been liquidated within insolvency proceedings (including its sale as a going concern, *supra* para. 29), for the purposes of intra-class extension of effects, and applying the best interest of creditors test; (ii) and the valuation of the business as going concern, out of insolvency proceedings (what it is worth under normal market conditions, following a non-forced and competitive process), for the purposes, essentially, of inter-class extension of effects and applying the absolute priority rule.[22] In this sense, the absolute priority rule determines who is entitled to keep the company post-restructuring value, i.e. the classes that are "in the money", if the plan is not consensual.

### 3.8.2. Exception

40. However, in order not to establish an excessively rigid solution, the Law provides that "in exceptional cases", as stated in the Explanatory Memorandum, the plan may depart from the absolute priority rule and leave some value to one or more classes of lower ranking creditors, or even to shareholders, if this is "essential to ensure the viability of the business" and does not unreasonably prejudice the rights of the classes of creditors affected who have voted against the plan (Art. 655.3). In particular, the use of this sort of exception to the absolute priority rule may be deemed indispensable to keep the shareholders in the company for the value or intangible assets they contribute, or to maintain certain contracts for the supply of goods or services that are indispensable for the company's viability, or in the case of a small company insofar as the plan cannot be imposed against the will of the debtor and its partners (*infra*).

### 3.8.3. Special rule for secured creditors

41. The Law introduces special measures for the protection of secured creditors when their class has not approved the plan (Art. 651). In the context of a restructuring plan, secured creditors may be restricted in their right to realize the value of the encumbered asset as a result of the modification of the terms and conditions of the secured claim to the extent that the present value of their claim is respected. Thus, for example, as long as the value of the collateral is retained, they may be obliged to convert a matured loan into a new loan with an extended maturity date and an interest rate sufficient to compensate them for this extension. And these restrictions could be imposed by a decision of a lower-ranking class through cross-class cram-down (what is known as "cross-class cram up"). This entails a serious interference with the economic function of security rights.

42. The Law thus establishes certain measures to strike a balance between, on the one hand, the collective interest in restructuring a business that is viable and, on the other hand, the right of secured creditors to "liquidate" their investment through the realization of the collateral on the initially agreed maturity date of the secured loan. Specifically, and in addition to the reinforced majority for the approval of the plan by this class of creditors (*supra*), this right of

[22] As we have seen, the best interest of creditors test must also take into account the value of the business if it were to be sold as going concern in insolvency proceedings. The difference is that in this case, the discounts that such a sale entail (i.e. the direct and indirect costs of a bankruptcy sale) must be applied.

realization of collateral is maintained unaffected when the plan has not been approved by the class of secured creditors and, in addition, the vote against the plan has been greater than the vote in favour. However, the plan may enervate this right of realization of collateral by giving the dissenting secured creditors the option to receive in cash, within a term not exceeding 120 days, the part of the claim covered by the value of the encumbered asset calculated in accordance with the valuation rules of Book I, including the corresponding discount (=10% of the value of the collateral). Additionally, and if this option has not been provided for and the dissenting creditor chooses to enforce the security, it is clarified how the possible mismatch between (i) the value of the encumbered asset in accordance with those rules, and (ii) the proceeds from the realization of the asset, is resolved. The fact that if the proceeds of enforcement are less than the valuation of the encumbered asset the difference is unsatisfied (see Art. 651.4) is intended to discourage the exercise of this option (i.e. the realization of collateral).

#### 3.8.4. Shareholders

43. As already mentioned, the plan may also be imposed on shareholders as ultimate or residual creditors.[23] However, when it has not been approved by the shareholders' meeting, the insolvency must be actual or imminent.[24] The mere probability of insolvency is not sufficient to impose the plan against the will of the shareholders' meeting. Moreover, under no circumstances can the plan be imposed on natural persons or, if the debtor is a legal entity, against the will of the partners legally liable for the debts of the company (Art. 640). Neither can it be imposed against the will of shareholders of small companies (Art. 684.2). In short, in relation to shareholders, they can only be subject to the plan against their will in the case of medium and large companies, and if the insolvency is imminent or current. If these conditions are met, a debt-for-equity swap (with the exclusion of any preferential rights), a corporate structural modification or a disposal of essential assets may be imposed on them.

44. The Law regulates in a separate provision the challenge of the plan by the shareholders when they, as a group, have not approved the plan, i.e. when their rights are affected against the will of the shareholders' meeting (Art. 656). Specifically, the grounds for challenge are adjusted to their status as residual creditors: apart from the other requirements of form and content, majorities, etc., it is specifically provided that they may challenge it when the creditors are going to receive more than what they are entitled to, i.e. claims and shares or participation rights with a current value higher than the amount of their claims, which implies that they are expropriating shareholders. It is also provided as a ground for objection that the debtor is not in a state of imminent or current insolvency.

### 3.9. Court sanction

45. In order to extend the effects of the restructuring plan to minority creditors within a class or to dissenting classes or shareholders, judicial approval (homologation) is required. The purpose of this approval is to verify that the conditions mentioned in the preceding section are met. Specifically, the Law regulates the conditions and requirements to request the homologation of the plan, the homologation procedure and the way to challenge the court order. This Section of the Law finishes with a provision that prohibits the application for a new homologation until one year has elapsed since the application for homologation of a

[23] See also Article 385 WHOAor Secc 2(3) StaRUG. Curiously, this is not the case in Austria, see Wilfinger, *loc.cit.*, p. 7 (*"If the debtor considers measures under company law necessary, the consent of affected equity holders cannot be replaced"*)

[24] Something similar happens in Greek Law, see Metallinos/Portokallis/Potamitis/Rokas, *loc.cit.*, p. 7 *("No approval of the shareholders' meeting is required ...if the debtor is in status of cessation of payments")*

previous plan (Art. 664). The purpose of this rule is to encourage the parties to design restructuring plans that truly ensure the viability of the business in the short and medium term.[25]

46. The Law lays down two alternative but mutually exclusive ways to channel the oppositions of dissenting creditors and shareholders to the sanction of the plan: the challenge before the appellate court of the homologation order and the opposition prior to such homologation. The Law leaves the proponents of the plan the choice between one or the other. The first option facilitates an almost immediate judicial confirmation of the plan, but always with the risk of its revocation by the Court of Appeal several months later, while the second option delays its judicial confirmation but once reached, it is final.

47. The first option is an *ex parte* homologation, but with the possibility of an appeal before a superior court: the Court of Appeal (Arts. 653-661). This appeal has no suspensive effect. The Law understands that this will be the most common scenario and, consequently, deems it to be applicable unless the applicant opts for the second option. Once the court order confirming the plan has been issued, it is up to the creditors who have not voted in favour of the plan or, as the case may be, to the shareholders to challenge it and prove that the conditions for its homologation are not met. Conceptually, as we already know, the Law thus distinguishes between the requirements for court approval, which must be initially accredited by the applicants, and other grounds or causes for challenging the plan. This distinction is explained by the fact that the EU Directive requires that certain grounds or causes must only be assessed at the request of a party. In principle, the prerequisites or requirements are conditions for the judicial sanction of the plan, although their control is prima facie (*supra*). They mainly concern the justification of the plan and the procedure for the formation of the collective will. And any dissenting creditor may challenge it on the ground that these conditions are not met, for example, that the debtor is not likely to become insolvent; that the plan has not been approved by the corresponding majorities; or that it is not necessary or suitable to prevent the insolvency and ensure the viability of the company.

48. In addition, the Law establishes those causes of challenge which, as required by the Directive, are only subject to judicial control if a dissenting party invokes them. Specifically, these grounds mainly concern the economic content of the plan, and vary depending on whether the plan has been approved by all classes of creditors and, if applicable, by the shareholders, i.e. whether the plan is consensual, or not. In the first case, and in relation to the creditors, the plan can be challenged because the best interest of creditors test has not been respected. In the second case, the plan may also be challenged if the absolute priority rule has been violated. Only creditors that have not voted in favour of the plan have standing to raise such challenge (this also includes creditors that have not voted).

49. The second option provided for by the Law is a prior contradictory hearing, but without the possibility of appeal, i.e. it is resolved in a single instance. If the interested party, i.e. the debtor or the creditors who have requested the court confirmation of the plan, considers it preferable to avoid the uncertainty associated with a possible challenge before the Court of Appeal, it may, by means of a simple statement in the application for approval, request the judge to give the affected parties the opportunity to oppose the approval of the plan prior to its confirmation. For this purpose, a very simple and abbreviated procedure is regulated to file with the court these

[25] Other Member States that have included a similar rule have been stricter, see Wilfinger, *loc.cit.*, p. 3 (*"the procedure is not available for an unlimited number of timer, as 6 pra. 3 (2) Reo prevents the initiation if a restructuring plan or a recovery plan was confirmed less than seven years ago"*).

oppositions and it is clarified that, under this option, the decision that grants or denies the homologation will not be subject to appeal.

### 3.10. Protection and privileges in formal insolvency proceedings

50. No plan can offer an absolute guarantee of the viability of the business and, therefore, it is possible that, despite the plan, the debtor will end up in insolvency proceedings. The fact that these proceedings involve both the previous creditors and those who have financed the restructuring plan, i.e. those who have ultimately assumed the cost of "saving the business" even if it has been unsuccessful, may discourage the approval of these plans. The financing of any business in the vicinity of insolvency, even if the business is viable, has risks and, if insolvency is finally unavoidable, this "new financing" may end up benefiting the previous creditors. Faced with this situation, the Law establishes a double protection: (i) it grants certain privileges to the funding given during the negotiation and implementation of the plan, and (ii) it provides a certain shield to the operations contemplated in the restructuring plan against transaction avoidance actions.

51. This legal protection is conditioned to the plan having been sanctioned by the court and, therefore, meeting the requirements for its approval, as well as to the existence of a certain proportion of affected credits with respect to the total liabilities (Art. 667-668). To the extent that a privileged regime is established as opposed to the general insolvency regime, the Law requires these conditions to justify such privilege: a judicial control and a minimum sacrifice of the creditors. The degree of protection varies according to this sacrifice. The justification for this difference lies in granting more protection to those plans that affect greater liabilities and, therefore, entail a greater sacrifice for creditors in the interest of a higher likelihood of success of the restructuring.

52. The highest degree of protection is granted when the affected claims represent the majority of the debtor's liabilities (Art. 667.1 and 2). In this case, the interim financing and other necessary acts carried out during the negotiation of the plan, and which are recognized in the plan, as well as the new financing and other acts carried out in execution of the plan cannot be rescinded in a subsequent insolvency proceeding unless the insolvency administrator proves that they were carried out in fraud of creditors. A lesser degree of protection is granted to restructuring plans when this proportion of affected credits is not satisfied (Art. 667.3). In this case, the protection is limited to disabling the general presumptions of prejudice, absolute or relative, provided for in Book I.[26] The Law adds a special rule when the interim financing or the new financing has been granted by the partners. In this case, protection is conditional upon the existence of a qualified majority of the credits affected, apart from those of the partners themselves (Art. 668).

53. If the legal conditions for such protection are met, the Law also grants a privilege to creditors of interim financing of the business, necessary during the negotiation of the plan, or of new financing, necessary to implement the plan, in the event of subsequent insolvency proceedings. Specifically, the claims derived from the new and interim financing recognized in the restructuring plan will be classified 50% as a claim against the insolvency estate (administrative expenses) and 50% as an insolvency claim but with general privilege (see Arts. 242 and 280).

[26] The general regime applicable to transaction avoidance actions is based on the establishment of a series of legal presumptions, *iuris tantum* and *iuris et de iure*, of acts detrimental to creditors.

### 3.11. Special rules for small companies

54. Restructuring attempts to maintain the value of the business as a going concern and to save the costs that any bankruptcy liquidation entails. In the case of small businesses, it is unlikely that they have much value as a going concern. This fact, and the relative complexity of pre-insolvency proceedings, explains the exclusion of micro-companies from the framework of Book II of the Act. However, this framework does apply to small companies insofar as, even if they do not have much value as going concern, it may be preferable to submitting them to formal insolvency proceedings. But certain specialties are introduced. Specifically, these specialties apply to natural or legal persons with less than fifty employees and an annual turnover or annual balance sheet not exceeding ten million euros (Art. 682).

55. Fundamentally, the possibility of imposing a restructuring plan that does not have the approval of the debtor's partners is excluded when the debtor is a small company (Art. 684.2). The Spanish legislator presumes that the partners or owners of these companies do not have a merely investment position in the company, but contribute fundamentally with other assets. Moreover, there is a risk that the potential imposition of a restructuring plan could have a counterproductive effect by generating an incentive to file for insolvency proceedings. As a corollary of this idea, the Law excludes the application of the absolute priority rule by allowing the approval of plans that respect a relative priority (Art. 684.4). It is sufficient for the dissenting class or classes of creditors to receive "more favourable" treatment than any lower-ranking class. The absolute priority rule is more difficult to justify when the Law prevents the imposition of the plan to what would be the class of residual creditors: the partners.

### 3.12. Conclusion

56. Preventive restructuring tools were unknown in the original text of the Insolvency Act, but have been progressively incorporated into Spanish law in successive reforms. The new Book II of the Insolvency Act has systematized the whole regime and made it much more efficient, partly due to the requirements of the EU Directive. This regime tries to be as flexible as possible, minimizing procedural costs and leaving the legitimacy of decisions in the hands of the majority. The basic idea underlying this regime, as the legislator itself recognizes in the explanatory memorandum, is very simple: if a qualified majority of creditors, who are the ones who assume (internalize) the consequences of their decision, vote in favour of a restructuring plan, it must be presumed that it is necessary and reasonable. The control of the courts is basically *ex post*, when dissenting stakeholders challenge the appropriateness of the collective decision-making process and/or its substantive outcome. The ultimate aim of the legal design is to ensure this double aspect: the cleanliness of the collective decision procedure and a minimum economic justice of its substantive outcome.

## III. Other new elements

57. Finally, it may be appropriate to refer to one of the novelties introduced in Book IV, which contains the rules of private international law. Following other Member States, the Law has established special rules in order to guarantee the international effectiveness of preventive restructuring proceedings opened in Spain. In particular, these special rules concern two points. Firstly, a rule of international jurisdiction has been introduced for groups of companies. In the case of groups, the application of the general connection criterion, i.e., the debtor company's centre of main interests (COMI), implies that Spanish courts only have jurisdiction over group companies whose centre of main interests is located in Spain.

This same solution is found in the EU Insolvency Regulation (Regulation 2015/848) and is reasonable as a general rule: jurisdiction and applicable law should be determined independently for each company of the same group depending on where its COMI is located. However, it can be very dysfunctional when the aim is to restructure an entire group of companies, with subsidiaries in other States, where there is usually a network of intra-group guarantees provided by the parent company and the subsidiaries, domestic and foreign.[27] The urgency and the need to reduce costs required for any preventive restructuring in times close to insolvency mean that the opening of parallel proceedings in different jurisdictions jeopardizes the objective pursued. Centralizing the entire restructuring process in a single jurisdiction is therefore essential.

58. To meet this practical need, the Law introduces the exceptional possibility of opening confidential proceedings for foreign subsidiaries of parent companies, when the parent company's COMI is located in Spain (see Art. 755). The confidential nature of these proceedings allows them to be outside the Insolvency Regulation and consequently to be opened against companies whose centre of main interests is not located in Spain, but on the other hand prevents them from benefiting from the mutual recognition guaranteed by the EU Regulation. However, the exceptional nature of this solution, and the need not to distort the general rule, explains why its scope has been limited to common creditors of the parent company and the subsidiary or subsidiaries. Moreover and for similar reasons, the Law has opted for a universal application of the Spanish Law for the purposes of the preventive restructuring proceedings opened in Spain, without prejudice to the regime established by the conflict-of-laws rules of the EU Insolvency Regulation (see Art. 754).

[27] See, for a detailed analysis of this problem and the solution adopted by the Dutch legislator, Warner/Veder, *loc.cit., passim*.