Global Restructuring and Insolvency Guide - Spain

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*This content was last reviewed around October 2021.*

**Remark:** Spain is a member of the European Union. Please refer to the section "European Union" under Quick Links below to learn more about the implications with respect to the European rules that apply in the field of restructuring and insolvency. However, the European Restructuring Directive has not been implemented yet. The Spanish government has approved a preliminary Insolvency draft bill that contains the Directive guidelines. The new Insolvency Act is expected to come into force during the first quarter of 2022. In the meantime, the Recast Text of the Insolvency Act approved on 5 May 2020 is in force (TRLC).

# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Pre-insolvency proceedings**

The relevant debt restructuring agreement may contemplate the granting of security.

Please note that this granting of security may be subject to clawback within later insolvency proceedings if it is considered to have damaged the debtor's assets. In particular, there is a presumption that such damage exists when collateral is granted as security for obligations that had originated previously.

Clawback will not apply if the debt restructuring agreement contemplating the granting of such security complies with certain requirements, as explained below.

Security over accounts receivable could be taken.

**Insolvency proceedings**

It is rare that creditors are granted new security within the insolvency proceedings since these proceedings aim to protect debtor's assets and ensure payment to all creditors to the maximum extent possible. Please note that approval by the insolvency receivers would be required for any such new security. If the debtor's directors no longer manage the company (as a result of a creditor filing for insolvency or of the opening of the liquidation phase), it would be on the insolvency receiver to directly decide on any such granting of security.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Security over assets could be taken, including accounts receivable.

## What is the nature of the insolvency process?

**Pre-insolvency proceedings**

The process, formerly set out in article 5 bis and currently regulated in article 583 TRLC, is used as an alternative to filing for insolvency in order to gain up to an extra four months to negotiate: (1) a debt restructuring agreement (which is aimed at avoiding filing for insolvency); (2) an out-of-court agreement (acuerdo extrajudicial de pagos), which is only available for certain companies; or (3) the agreement by certain majorities of creditors to an anticipated proposal for a composition agreement.

The process consists of a formal notice (comunicación) to the competent court acknowledging the insolvency and making a reference to the existence of the negotiations for achieving any of the agreements or adhesions referred to above.

**Insolvency proceedings**

The court process leads to: (1) an order of the court for the liquidation and ultimate dissolution of the debtor (liquidación) or (2) a composition agreement with the creditors (convenio de acreedores).

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

An out-of-court process is used to restructure a viable company's debt to avoid a formal insolvency process, provided that the assets and liabilities of the company do not exceed certain thresholds (EUR 5 million) and with fewer than 50 employees. This is achieved through the negotiation of a "payment plan" with creditors.

The debtor must request the appointment of an insolvency mediator (mediador concursal) and be approved by the competent commercial registry or, in certain cases, a public notary.

The mediator will summon the creditors to a meeting to discuss the terms of an out-of-court agreement*.*

This process is also used by debtors, natural persons, as a first step to obtain what is commonly named "second chance."

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Pre-insolvency proceedings**

The debtor must currently or imminently be cash flow insolvent.

**Insolvency proceedings**

The debtor must currently or imminently be cash flow insolvent.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

The debtor must currently or imminently be cash flow insolvent.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Pre-insolvency proceedings**

Yes, although it is presumed that the center of the company's main interests is at the place of its registered office.

**Insolvency proceedings**

Yes, although it is presumed that the center of the company's main interests is at the place of its registered office

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Yes, although it is presumed that the center of the company's main interests is at the place of its registered office

## Is restructuring of both secured and unsecured claims possible?

**Pre-insolvency proceedings**

Yes. Secured and unsecured debts may be written down or postponed under the agreement that the creditors may ultimately enter into.

**Insolvency proceedings**

**Composition agreement**: Yes. Secured and unsecured debts may be written down or postponed.

**Liquidation**: Not a restructuring process. Creditors' claims (both secured and unsecured) are dealt with according to their ranking and value.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Yes. Secured and unsecured debts may be written down or postponed.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Pre-insolvency proceedings**

Not initially. However, according to the Recast Text of the Insolvency Law, which is still currently in force, some shareholders could be considered persons particularly related to the debtor. In this case, its claims will be classified as subordinated claims and they will not count for the percentage needed to adopt a collective restructuring agreement.

**Insolvency proceedings**

Not for the fact of being claims of creditors or claims of shareholders.

**Composition agreemen**t: There are different classes of claims. Only ordinary and general privilege claims will be able to vote.

**Liquidation**: N/A

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

There is no classification of claims so there is no separation

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Pre-insolvency proceedings**

No shareholder approval is required for starting the process. However, shareholders' approvals may be necessary for certain actions included in the restructuring agreement.

If the shareholder is considered a person particularly related to the debtor, their claims will not count for the percentage needed to adopt a collective restructuring agreement.

**Insolvency proceedings**

No shareholder vote is required for starting the process unless the insolvency is filed when the insolvency is merely imminent (and not current). For legal entities, the competent entity to decide on filing the insolvency petition is the board of directors or the directors.

However, approval by a shareholder may be necessary for certain actions included in the composition agreement.

Claims of shareholders considered particularly related to the debtor shall have no right to join the composition proposal or to vote at the creditors' meeting.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

No shareholder vote is required for starting the process.

If the shareholders have claims, they are entitled to vote the out-of-court agreement.

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Pre-insolvency proceedings**

Yes. Regardless of whether or not a notice under current Article 583 is filed, a restructuring agreement executed before any insolvency proceeding begins is binding on dissenting creditors if: (1) the required creditor majorities are obtained and (2) provided that the relevant court "homologates" the agreement and dismisses any opposition that the creditors may file.

The majorities required in order to make the agreement binding on nonsecured creditors are: (a) creditors representing at least 60% of financial claims, for any arrangement that provides for a stay of up to five years or the conversion of debt into equity loans with maturity of up to five years; or (b) creditors representing at least 75% of financial claims, for any arrangement that provides for a stay of five to 10 years; the conversion of debt into equity loans with maturity of five to 10 years, the conversion of debt into equity, or any other analogous financial instrument; or a dation in payment (i.e., transferring the relevant asset — usually granted as security — to the creditor in payment of its claim).

The majorities required in order to make the agreement binding on secured creditors are: (i) creditors holding securities that represent at least 65% of the value of the total securities of the debtor, for any arrangement of the type described in (a) above or (ii) creditors holding securities that represent at least 80% of the value of the total securities of the debtor, for any arrangement of the type described in (b) above.

**Insolvency proceedings**

**Composition agreements**: Yes. The agreement will bind all unsecured and subordinated creditors if the court approves it. Secured creditors will also be bound if the required majorities are met.

**Liquidation**: N/A

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Yes. Nonsecured creditors affected by the content of the agreement (other than those holding public claims) will be bound if the necessary majorities approve it. Secured creditors will also be bound if the required majorities are met.

# Commencing the Process

## Who can commence?

**Pre-insolvency proceedings**

Debtor

**Insolvency proceedings**

(1) Debtor; (2) any creditor(s); and (3) Insolvency Mediator if the Insolvency Mediation proceedings has failed

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Debtor

## Is shareholder's consent required to commence proceeding?

**Pre-insolvency proceedings**

No. However, board authorization is required for filing the communication for opening the negotiations.

**Insolvency proceedings**

No, unless the filing for insolvency is made when the insolvency is merely imminent (not current). The competent entity to decide on filing for insolvency petition is the board of directors.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

No. However, board authorization is required for filing the communication.

## Is there an ability to consolidate group estates?

**Pre-insolvency proceedings**

N/A

**Insolvency proceedings**

No. Insolvency proceedings of group companies can be handled jointly by the same court (and the same insolvency receivers), but the estates and liabilities are not consolidated (with the rare exception of those cases where the assets are totally commingled with no possibility to allocate them to a certain group company).

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

N/A

## Is there any court involvement?

**Pre-insolvency proceedings**

Limited court involvement.

A commercial court "accepts" or acknowledges the filing of the notice. There is no further intervention by the court, it does not supervise the negotiations by the debtor and its creditors. There is no obligation to inform the court on whether or not an agreement has been reached with the creditors.

**Insolvency proceedings**

Heightened court involvement.

The process is supervised by the commercial court (specializing in bankruptcies), which decides on a variety of matters within the proceedings (criminal issues excluded).

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Limited court involvement.

The commercial court competent for a future insolvency proceeding is informed of the beginning of these proceedings. There is no further intervention.

## Who manages the debtor?

**Pre-insolvency proceedings**

Debtor management retains its powers. No receivers are appointed.

**Insolvency proceedings**

The commercial court appoints an insolvency receiver that will supervise and control the process; the court's approval will be required for any payments or significant actions and decisions. However, the debtor's directors retain their powers unless the court orders their substitution by the insolvency receiver. This replacement generally occurs when a creditor has filed for insolvency. In addition, directors will, in any case, step down once the liquidation phase starts (as the insolvency receiver will then assume all liquidation functions).

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Debtor management retains its powers. If the agreement is approved, the mediator will supervise that it is duly complied with by the debtor

## What is level of disclosure of process to voting creditors?

**Pre-insolvency proceedings**

The filing of any of these proceedings (article 583 TRLC) may be kept confidential, if so requested by the debtor thus the creditors that the debtor does not directly contact may not be aware of the negotiations.

**Insolvency proceedings**

The debtor makes a preliminary disclosure upon filing for insolvency. The court's formal declaration of insolvency is published in the Official Gazette (Boletín Oficial del Estado). All creditors that have formally appeared within the proceedings will receive notice of all submissions made and all court decisions taken within the proceedings. In addition, appearing creditors will get a copy of the report drafted by the insolvency receiver with certain details on the debtor's history, its accounting and the reasons for the insolvency, as well as certain considerations on the proceedings.

Creditors entitled to vote for a composition agreement (convenio de acreedores) will have access to the proposal filed by the debtor and the payment schedule and viability plan attached thereto.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

The mediator shall summon all creditors listed by the debtor or who appear in other documents available to the mediator to a meeting.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Pre-insolvency proceedings**

N/A

**Insolvency proceedings**

The Insolvency Act applies to all types of debtors. In any case, there are certain types of debtors, such as financial entities, insurance companies or investment services companies, which are subject to their specific legislation (this is listed in the Second Additional Provision — Disposición Adicional Segunda *—* of the Insolvency Act).

For instance, financial entities are also subject to the insolvency law provisions included in, among others, Act 41/1999 (dated 12 November 1999), Act 6/2005 (dated 22 April 2005), or Act 11/2015 (dated 18 June 2015).

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

N/A

## How long does it generally take for a creditor to commence the procedure?

**Pre-insolvency proceedings**

N/A

**Insolvency proceedings**

There is no specific time (the time depends on the Court). Once the creditor has filed the petition, the judge will check its competence and the existence of facts for the instigation of the insolvency petition.

Depending on the insolvency-revealing facts provided by the creditor, the judge will declare the procedure opened directly or will give the debtor a five-day period to reject the petition. There will be a hearing

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

N/A

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Pre-insolvency proceedings**

Yes.

**Insolvency proceedings**

**Voluntary proceedings**(concurso voluntario,i.e., the debtor filed for insolvency): Yes, generally the debtor's management retains their powers, which are exercised under the supervision of the insolvency receiver. Once the liquidation phase starts, the insolvency receiver will replace the directors.

**Involuntary (or mandatory) proceedings** (concurso necesarioi.e., the creditor filed for insolvency): No. A court-appointed receiver replaces the debtor's management.

In voluntary and involuntary proceedings, court authorization may be necessary for certain sales of assets or transactions outside the ordinary course of business.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Yes, subject to certain restrictions. In particular, directors will refrain from carrying out any transaction that cannot be considered ordinary for the relevant type of business.

If the agreement is approved, the mediator will supervise that it is duly complied with by the debtor

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Pre-insolvency proceedings**

Filing what is called "5-bis notice" (currently regulated in article 583 TRLC) prevents the start or continuation of (i) enforcement proceedings relating to assets required in the ordinary course of the business; and (ii) any enforcement proceedings relating to financial claims, provided that the creditors holding at least 51% of the total financial claims have agreed to negotiate a restructuring agreement and not to take any enforcement action. It also prevents the continuation of any foreclosure proceedings relating to assets necessary for the business. The assessment on whether or not an asset is necessary for the business is carried out by the court, before which the old 5-bis notice is filed.

**Insolvency proceedings**

After the commencement of insolvency proceedings, no enforcement proceedings can be started against the debtor's assets and those previously started will be stayed. Only certain enforcements relating to some public and labor claims can continue, provided that the relevant attached assets are not necessary for the debtor's business.

Secured creditors are entitled to start or continue the relevant foreclosure proceedings: (1) at any time during insolvency proceedings, provided that the relevant security is not necessary for the debtor's business or activity; (2) only after one year following the declaration of insolvency; or, if earlier, once a composition agreement has been approved by the court (and does not prevent the enforcement of the security) or once the liquidation phase has started.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

In the event a "5-bis notice" is filed, the same stays referred to in the first column will apply.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Pre-insolvency proceedings**

Yes.

**Priority**: 50% superpriority (i.e., the claims would be against the estate) for "new money" provided under a restructuring agreement of the type of those protected from clawback. The remaining 50% would be granted preferential treatment among pre-bankruptcy claims (crédito con privilegio general).

Any new money provided after the insolvency proceedings formally start would be granted superpriority.

**Insolvency proceedings**

Yes.

**Priority**: 50% superpriority (i.e., the claims would be against the estate) for "new money" provided under a restructuring agreement of the type of those protected from clawback. The remaining 50% would be granted preferential treatment among pre-bankruptcy claims (crédito con privilegio general).

Any new money provided after the insolvency proceedings formally start would be granted superpriority.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

N/A

## Can procedure be used to implement a debt-to-equity swap?

**Pre-insolvency proceedings**

Yes. Restructuring plans may contemplate debt-to-equity swaps.

**Insolvency proceedings**

**Composition Agreement**: Yes, in accordance with the terms of this agreement.

**Liquidation**: N/A

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Yes, in accordance with the terms of the agreement.

## Are third party releases available?

**Pre-insolvency proceedings**

Yes, the debtor's management can release third parties in accordance with the terms of the restructuring plan.

**Insolvency proceedings**

Where the debtor's management keeps its powers, the debtor may release third parties from obligations with the consent of the insolvency receiver.

Where the insolvency receiver has replaced the directors, they will directly adopt the relevant decision. In certain cases, court authorization may also be required.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Yes, the debtor's management can release third parties in accordance with the terms of the agreement.

## Are the proceedings recognised abroad?

**Pre-insolvency proceedings**

Yes, in accordance with the European Insolvency Regulation (EIR), the domestically adopted version of UNCITRAL, or other applicable conflicts of laws principles and/or treaties for other countries.

**Insolvency proceedings**

Yes.

## Has the UNCITRAL Model Law been adopted?

**Pre-insolvency proceedings**

Not recognized as the "main" proceedings under UNCITRAL as it is an out-of-court process.

**Insolvency proceedings**

Yes.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Not recognized as the "main" proceedings under UNCITRAL as it is an out-of-court process.

## Can a debtor continue to carry on business during insolvency proceedings?

**Pre-insolvency proceedings**

Filing the 5-bis notice does not affect the continuity of business by the debtor.

**Insolvency proceedings**

The Insolvency Act actually aims at the continuity of the debtor's business, not only in a composition agreement scenario but also in the case of liquidation. In particular, it encourages the sale of the whole business or business units of the debtor in order to transfer such business as a whole to the extent possible. However, and as it has been previously said, once the liquidation is opened or in mandatory insolvency proceedings, the debtor's management is replaced by court-appointed receivers.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

This process does not affect the continuity of business by the debtor.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Pre-insolvency proceedings**

Yes. Wrongful and/or insolvent trading restrictions apply.

**Who can be liable**: Directors

**Requirements**: Debtor must be insolvent (either currently or imminently).

**Liability**: Late filing of the notice (it will be filed within two months from the date on which the debtor cannot regularly meet its due and payable obligations) or late filing for insolvency, if negotiations for a restructuring agreement fail

**Insolvency proceedings**

Yes. Wrongful and/or insolvent trading restrictions apply.

**Who can be liable**: Directors, de facto directors and "shadow" directors, including those who held these positions in the two years prior to the declaration of insolvency

**Requirements**: Insolvency will be fraudulent when it was caused or worsened as a result of the directors' malicious intent or serious negligence. Some legal presumptions may apply (some of which cannot be rebutted).

**Effect of liability**: Disqualification from being a director from two to 15 years; loss of any rights against the debtor as creditor; and order to compensate any damages caused. In case of liquidation, the court can also declare the relevant directors personally liable for all or part of the debtor's outstanding debts.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

Yes, in the event the agreement is not reached and the debtor (or the relevant mediator) files for insolvency. Directors' liability provisions apply.

## What is the order of priority of claims?

**Pre-insolvency proceedings**

N/A

**Insolvency proceedings**

In a liquidation scenario, the order of distribution is as follows:

**Claims against the debtor's estate** (créditos contra la masa): Employment claims corresponding to the 30 days preceding the start of the insolvency proceedings, up to a cap, 50% of claims corresponding to fresh money injected as per certain restructuring agreements, and claims arising after the declaration of insolvency relating to the insolvency proceedings or the continuation of the business

**Secured claims** (créditos con privilegio especial): Paid with the proceeds obtained through the sale of the relevant security

**Privileged claims** (créditos con privilegio general): Including employee and public claims up to certain caps and percentages, claims to correspond to fresh money injected as per certain restructuring agreements that have not been classified as claims against the estate, or 50% of the claims held by the creditor that filed for insolvency, if applicable

**Unsecured or ordinary claims**(créditos ordinarios)

**Subordinated claims** (créditos subordinados): Claims held by directors or shareholders holding over 5% for listed companies, or 10% for nonlisted companies, of the share capital, intragroup loans, fines, interest and claims not reported in time that are not reflected in the debtor's accounting or documents

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

N/A

## Do pension liabilities have any priority over other unsecured claims?

**Pre-insolvency proceedings**

N/A

**Insolvency proceedings**

Pension liabilities rank above ordinary unsecured claims in any distribution, up to certain caps.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

N/A

## Is it possible to challenge prior transactions?

**Pre-insolvency proceedings**

N/A

**Insolvency proceedings**

**Relevant period**: Two years prior to declaration of insolvency

**Requirements**: Transactions may be clawed back or rescinded if (a) detrimental to the debtor's assets; or (b) they breach pari passu rules (i.e., the principle according to which all unsecured creditors will be treated equally, which is subject to a case-by-case court analysis).

There are certain presumptions on the existence of detriment to the debtor's assets, some of which are not subject to rebuttal.

**Insolvency mediation (Acuerdo Extrajudicial de Pagos)**

N/A

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