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Restructuring Department

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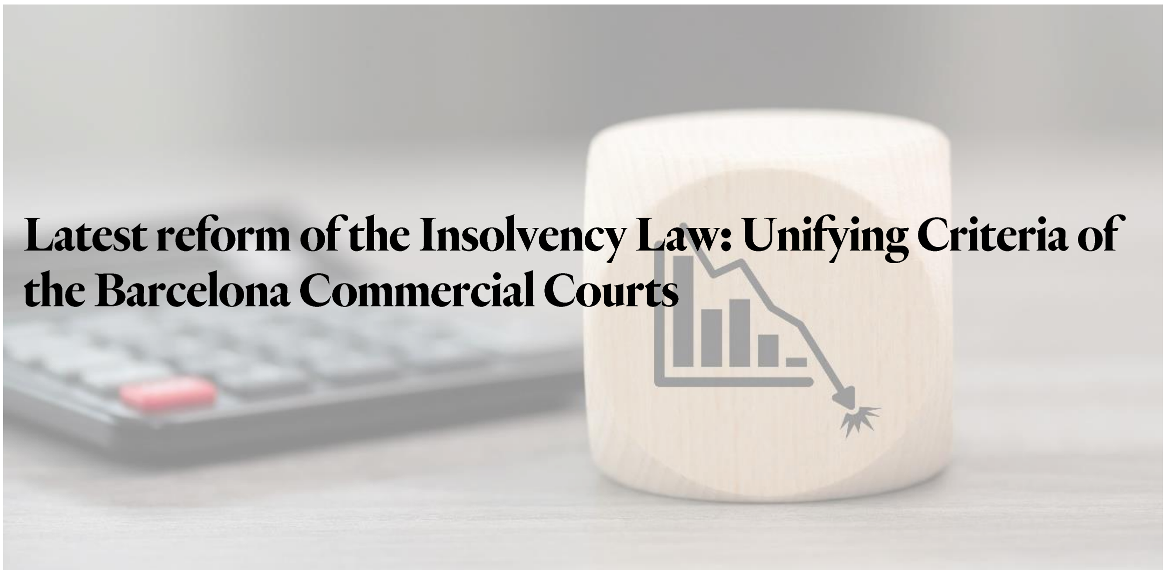

Latest reform of the Insolvency Law: Unifying Criteria of the Barcelona Commercial Courts

On 6 September 2022, the Official State Gazette published Law 16/2022 on the reform of the consolidated text of the Insolvency Law ("TRLC"), which substantially modified our pre-insolvency and insolvency system.

More than a year after its entry into force, and with many practical aspects still to be resolved, many authoritative opinions are calling on the insolvency legislator to reform the aforementioned legal text.

This is mainly due to the fact that 90% of the insolvency proceedings processed in Spain under the new TRLC correspond to procedures involving individuals and without assets, the purpose of which is none other than the exoneration of unsatisfied liabilities.

With this in mind, and with the aim of unifying the criteria of insolvency law in other matters, the Commercial Courts of Barcelona have issued a series of Agreements, focused on five main areas, to homogenise the interpretation of different precepts of the aforementioned legal text.

These criteria concern the following issues:

1) Competitions without mass.

a) Competition of a natural person:

A new form is created. It is also established that, in the case of recurrent attachable income, the possibility of the debtor making a reasonable effort to pay exonerable credits will be assessed.

Until now, the salary was excluded from the assets (even when the salary was higher than the minimum wage that could not be seized).

Well, as a result of the new criteria reached by the Commercial Courts, the debtor will have the possibility of presenting a payment plan to access the provisional exoneration of the unsatisfied liabilities, or, if liquidation is chosen, the Judge may assess the possibility of liquidating the recurring income that is above the unseizable minimum, establishing the monthly liquidation for payment of the exonerable credits during a determined period of time.

b) Microenterprise:

In those cases in which we are dealing with a micro-company in accordance with the provisions of Art. 685 et seq. of the TRLC, with insufficient assets, the procedure provided for in Art. 37 Bis TRLC for insolvency proceedings without assets will be applicable.

The Commercial Courts consider that, in the event that there are employment contracts in force at the time of the filing of the insolvency proceedings, it would be good practice to request the appointment of an insolvency administrator in order to proceed with the termination of the aforementioned contracts and certification for FOGASA.

Failure to do so may be grounds for liability for legal persons under Art. 241 LSC, and for individuals, grounds for refusal of exemption from unsatisfied liabilities under Art. 487.6 TRLC.

c) Additional advertising:

Very relevant is the power of the Commercial Courts to require debtors to provide additional publicity to that provided by the Public Insolvency Register, consisting of sending a communication to creditors informing them of the application for insolvency without assets.

2) Exoneration of unsatisfied liabilities.

It is specified that claims arising from financial leasing contracts will only be waivable on condition that the asset is returned to the creditor.

3) Sale of production units.

The Barcelona Commercial Courts set out a series of general rules for the sale of production units in insolvency proceedings:

a) The production unit may be disposed of by means of a restructuring plan, a microenterprise continuity plan, a pre-pack, the submission of a binding offer together with the application for insolvency proceedings, and, once declared, at the arrangement or liquidation stage.

b) In any of the aforementioned ways, the bidder or acquirer must assume the obligation to continue the activity for a period of two years. Actions in the event of non-compliance with this obligation will be brought before the insolvency judge.

c) The submission of tenders by specially related persons is possible.

4) Pre pack concursal.

The appointment of the supervisory expert will be made by Order and will fall to the person who meets the conditions to be appointed as insolvency administrator. The appointment will be proposed by the debtor himself or, failing that, by the competent judge.

The debtor shall determine the foreseeable duration of the supervisory expert's engagement in his application, although extensions may be requested for good cause.

In the application, the debtor may submit to the judge the remuneration agreed with the supervising expert as well as the time limits of accrual. Failing this, the remuneration shall be proposed by the expert in accordance with the rules of the scale of fees corresponding to the fees for the liquidation phase, calculated by the number of months that he actually performs the duties assigned to him.

As a novelty, the possibility is also introduced for the expert to receive an additional success fee if the price obtained is higher than that estimated at the start. The proportion of this success premium must be "de minimis" so as not to generate a possible conflict of interest.

The amount received by the expert will be deducted from the amount corresponding to his function as Insolvency Administrator if he is finally appointed.

Once the offer to purchase the production unit has been submitted, together with the report issued by the expert, if the latter is favourable, the competent insolvency judge will open the authorisation procedure provided for in Art. 518 TRLC, and no new offers will be admitted.

Likewise, for the purposes of company succession, the criteria established in the CJEU of 28 April 2022 will be followed.

5) Special procedure for micro-enterprises.

It is clarified that the special procedure for micro-companies will be applicable even to those companies that have ceased their activity at the time of filing the application, despite the literal wording of Art. 685 TRLC.

The special micro-enterprise procedure may be filed even if there is only one creditor. However, if no other creditor comes forward within the legally stipulated period, it will be closed.

The period of 20 days granted to creditors to make representations in respect of their claim will start to run with the publication in the Public Register of Bankruptcy.

In the event of failure of the continuation plan, the individual debtor may also apply for discharge of the unsatisfied liability under a payment plan.

Finally, the Barcelona Commercial Courts allow the joint declaration of the insolvency of the non-entrepreneur spouse with the application for the opening of the special procedure of the self-employed micro-entrepreneur spouse.

Since the entry into force of the New Consolidated Text of the Insolvency Act, many questions have arisen, giving rise to the application of different criteria depending on the judicial district in question.

With the aforementioned criteria, the Commercial Courts unify the interpretation of the Insolvency Act in order to provide legal certainty to the procedure, making it clear what their position is.

Although these criteria only apply to the Barcelona Commercial Courts, it is to be expected that they will be extended to other jurisdictions, as has been the case on previous occasions.