



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

THE QUEST FOR COORDINATION OF PROCEEDINGS IN CROSS BORDER INSOLVENCY CASES

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Report for Spain

Tiziana Di Ciommo

General Reporters

Giuseppe Scotti
Studio Macchi di Cellere Gangemi
Milano, Italy
g.scotti@macchi-gangemi.com

Héctor Sbert
Lawants
Barcelona, Spain
hector.sbert@lawants.com

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1. Do you have the notion in you legal system of main insolvency proceedings. Is this notion procedural or substantial? Is this notion purely international or also domestic?

The Spanish legal system has the notion of “main” insolvency proceedings. So the international competence to declare and deal with the insolvency proceedings is based on the place of location of the centre of the main interests of the debtor, with the insolvency declared on that basis having “main” nature, notwithstanding it being possible to establish other “secondary” insolvency proceedings in the countries in which the debtor has establishments.

So then, according to the Act 22/2003, dated 9TH July, on insolvency (Official State Gazette, number 164, dated 10th July 2003) the competence to declare and deal with the insolvency lies with the mercantile Court of Law in whose territory the debtor has the centre of his main interests. If the debtor has his domicile in Spain and such domicile does not coincide with the centre of his main interests, the Mercantile Court of Law in whose territory the domicile is situated shall also be competent, at petitioner’s creditor choice.

The centre of main interests shall be understood as the place where the debtor usually performs the management of those interests. In the case of a legal person, the centre of its main interests is presumed to be at the place where the registered office is located.

The effects of this insolvency, which shall be considered the “main insolvency proceedings” from an international perspective, shall have a universal scope, including all the assets of the debtor, whether they are located within or without Spain.

2. Do you know the notion of secondary insolvency proceedings? Is this notion purely international or also domestic?

According to the aforementioned Insolvency Act, if the centre of main interests is not in Spanish territory, but the debtor has an establishment there, the Mercantile Court of Law in whose territory is located shall be competent and, if there are several, where any of them is situated, at petitioner’s choice.

An establishment is understood as any place of the operations at which the debtor carries out a non-transitory economic activity with human means and good.

The effect of this insolvency, which in international scope shall be considered a “secondary insolvency”, shall be limited to the assets of debtor, whether or not they are vested for his activity, that are located in Spain.

3. Are the material effects of the main proceedings halted when secondary proceedings elsewhere are opened? Please specify, if this is not the case, whether or not the law of the State in which main proceedings are opened shall affect certain rights of third parties or have effect in certain contractual relations, e.g. labour contracts.

The effects of the Spanish insolvency proceedings, which shall be considered the “main insolvency proceedings” from an international perspective, shall have a universal scope, including all the assets of the debtor, whether they are located within or without Spain.

In the event of insolvency proceedings being commenced upon assets located in a foreign state, the rules of co-ordination foreseen in the Chapter III of the Title IX of the aforementioned Insolvency Act.

Without prejudice to the provisions contained in the Articles of the aforementioned Insolvency Act, Spanish Law shall determine the cases and effects of insolvency proceedings declared open in Spain, as well as the furtherance and conclusion thereof, but:

- ✓ The effects of insolvency proceedings on the rights in rem of a creditor or third party in respect of properties, goods or rights of any kind whatsoever belonging to the debtor, including collections of assets as a whole which change from time to time, which are situated in the territory of Spain at the time the insolvency proceedings are declared open, shall be governed exclusively by Spanish Law.
- ✓ The effects of the insolvency proceedings on the rights of the debtor in immoveable goods, a ship or aircraft subject to registration in a public register shall be determined by the law of the State under the authority of which the register is kept.
- ✓ The effects of the insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the state within the territory of which the immoveable property is situated.
- ✓ The effects of the insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the State applicable to the contract.
- ✓ The effects of the insolvency proceedings on the declaratory trials pending in relation to goods or rights pertaining to the estate shall be governed exclusively by the law of the State in which there are being conducted.

4. Shall the creditors have the right to lodge claims in any of the insolvency proceedings (main and secondary)?

According to the aforementioned Insolvency Act, once insolvency proceedings are declared open, the insolvency administrator shall inform known creditors whose habitual residence, domicile, or seat is located abroad, if these are found recorded in the books and documents of the debtor, or if recorded in the proceedings for any other reason.

The information shall include identification of the proceedings, the date of the order declaring the insolvency proceedings open, the main or secondary nature of insolvency, the personal circumstances of the debtor, the effects on the powers of administration and disposal with regard to his assets, summoning of creditors, including secured ones, the term to lodge claims with the insolvency administrators and the postal address of the Court.

The information shall be provided in writing and sent individually, except if the Court provides any other means that it deems more appropriate given the circumstances of the case.

So then, creditors who have their usual residence, domicile, or registered office abroad shall lodge with insolvency administrators their claims as set forth in the Article 85 of the Spanish Insolvency Act.

All creditors may lodge their claims in the main or secondary proceedings open in Spain, regardless of them also having been lodged in insolvency proceedings open abroad.

Finally, creditors with their usual residence, domicile or registered address abroad shall lodge their claims in Spain, or another official language of the Autonomous Community where the insolvency Court has its seat. If they were to do so in another language, the insolvency administrators may subsequently require a translation into Spanish.

5. Are the dividends in all proceedings pooled? In other words, are dividends obtained in proceeding X deducted from dividends to be obtained in other proceedings?

According to the Spanish legislation, to the extent allowed by the law applicable to the foreign insolvency proceedings, his administrator or representative may inform in the insolvency proceedings declared in Spain and, pursuant to the provisions established in the Spanish Insolvency Act, of the claims recognized in the former. Under the same conditions the administrator or representative shall be empowered to participate in the insolvency proceedings on behalf of the creditors whose claims he has notified.

The insolvency administrators in insolvency proceedings declared in Spain may lodge the claims recognized on the definitive list of creditors in foreign insolvency proceedings, whether main or secondary, as long as this is allowed by the law applicable to those proceedings. Under the same conditions, the insolvency

administrators, or person appointed by them, shall be empowered to participate in those proceedings in behalf of the creditors whose claims they have lodged.

So then, a creditor who obtains partial payment of his claim in foreign insolvency proceedings may not demand any additional payment in the insolvency proceedings declared open in Spain until the remaining creditors of the same class and rank have obtained an equivalent percentage to that sum.

6. If by liquidation of assets in any secondary proceedings it is possible to meet all claims, shall the liquidator transfer any remaining assets to the liquidator in the main proceedings?

On condition of reciprocity, the assets remaining on conclusion of secondary insolvency proceedings shall be made available to the administrator or representative of the main foreign proceedings recognized in Spain. The insolvency administrators of the main insolvency proceedings declared in Spain shall demand the same treatment in any other proceedings open abroad.

7. Does the so-called “dominance” of the main proceedings creates a leading role for the liquidator, appointed in the main proceedings, to coordinate all insolvency proceedings pending against the same debtor?

The insolvency administrators in insolvency proceedings declared in Spain and the administrator or representative of foreign insolvency proceedings related to the same debtor that are recognized in Spain shall be subject to a duty of reciprocal co-operation in the exercise of their functions, under the supervision of the respective competent Courts or authorities. Refusal to co-operate by the administrator or representative, or the foreign court or authority, shall release the relevant Spanish bodies of that duty.

Co-operation may consist, in particular, of:

- ✓ Exchange of information that may be useful to the other proceedings, without prejudice to the obligatory respect of the rules with regard to secrecy or confidential of the data that are the object of the information, or protected in any other way.
- ✓ Co-ordination of the administrator and control or supervision of the goods and activities of the debtor.
- ✓ Approval and application of arrangements related to co-ordination of the proceedings by the competent courts or authorities.
- ✓ The insolvency administrators in the secondary insolvency proceedings declared open in Spain must allow the administrator or representative in the main foreign proceedings to submit proposals in a timely manner for

composition, winding-up plans or any other means of realization of properties, goods and rights of the estate for payment of the claims.

- ✓ The insolvency administrators in the main insolvency proceedings declared in Spain shall demand the same treatment in any other proceedings opened abroad.

8. How do you think the above mentioned issues have been tackled y the new EU Regulation on Transnational Insolvency? If yes, in which way defective or useful?

On 20 May 2015 the European Parliament approved the new European Insolvency Regulation (EIR) in the text adopted by the Council at first reading on 12 March. The Regulation has been published on the Official Journal of the European Union of 5 June 2015, as Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings.

The primary aim of the revision was to improve the operation of the EIR with a view to ensuring a smooth functioning of the internal market and its resilience in economic crises, having regard to national insolvency laws and to the case law of the ECJ on the “old” Insolvency Regulation, i.e. Regulation No 1346/2000

In short, the revised text: (a) extends the EIR’s scope to proceedings aimed at giving the debtor a “second chance”; (b) strengthens the current jurisdictional framework in terms of certainty and clarity; (c) improves the coordination among insolvency proceedings opened in respect of the same debtor and strikes a better balance between efficient insolvency administration and protection of local creditors; (d) reinforces the publicity of the proceedings by compelling Member States to provide for insolvency registers and by providing for the interconnection of national registers; (e) deals with the management of multiple insolvency proceedings relating to groups of companies.

The new EIR will enter into force following its publication in the Official Journal, but the bulk of its provisions will only apply in 2017.

9. How do you think the above mentioned issues have been tackled by the UNCITRAL Model Law on Cross-Border Insolvency? If yes, in which way defective or useful?

The UNCITRAL Model Law on Cross-Border Insolvency, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency.

The Model Law reflects practices in cross-border insolvency matters that are characteristic of modern, efficient insolvency systems. Thus, the States enacting the Model Law would be introducing useful additions and improvements in national insolvency regimes designed to resolve problems arising in cross-border insolvency cases. By adopting legislation based upon the Model Law, States recognize that certain laws relating to insolvency may have to be or might have been amended in order to meet internationally recognized standards.

However, the Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways and facilitate and promote a uniform approach to cross-border insolvency.

So then it would be necessary: Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State; permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter; providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State; etc.

10. Are there other salient aspects of the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency that are key to answer the need and quest for coordination in cross borders insolvency proceedings?

11. Are there other devices that the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency should have regulated or adopted to enhance further coordination in cross borders insolvency proceedings?

It's really difficult to answer the last two questions due to the fact that to answer correctly is necessary to make a thorough study not only of the insolvency institutions but also the context in which these will have to operate.

Perhaps the most important thing is to provide mechanisms that help entrepreneurs escape from insolvency situations in order to avoid the opening statement of insolvency proceedings.

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