The Restructuring Review

Fifth Edition

Editor
Christopher Mallon

Law Business Research

The Restructuring Review

FIFTH EDITION

Reproduced with permission from Law Business Research Ltd.

This article was first published in The Restructuring Review, 5th edition
(published in September 2012 – editor Christopher Mallon).

For further information please email
Adam.Sargent@lbresearch.com

The Restructuring Review

FIFTH EDITION

Editor
Christopher Mallon

Law Business Research Ltd

The Law Reviews

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette, Katherine Jablonowska

PUBLISHING ASSISTANTS
Robin Andrews, Lucy Brewer

EDITORIAL ASSISTANT
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Caroline Rawson

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2012 Law Business Research Ltd
www.TheLawReviews.co.uk
© Copyright in individual chapters vests with the contributors
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of August 2012, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-43-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ACHOUR & HÁJEK, SRO

ADVOKATFIRMAET HAAVIND AS

AFRIDI & ANGELL

AKINWUNMI & BUSARI LEGAL PRACTITIONERS

ASTREA

BAKER & McKENZIE

BORDEN LADNER GERVAIS LLP

CHARLES ADAMS RITCHIE & DUCKWORTH

DUNDAS & WILSON

GARRIGUES

G GRÖNBERG ADVOKATBYRÅ AB

GÜR LAW FIRM

HEATHER & HEATHER, SC

KING & WOOD MALLESONS

LEONHARDT RECHTSANWÄLTE

MARVAL, O'FARRELL & MAIRAL

MOTIEKA & AUDZEVIČIUS

OGIER

OPF PARTNERS

RØNNE & LUNDGREN LAW FIRM

SALANS

SCHELLENBERG WITTMER

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

WASELIUS & WIST

CONTENTS

Editor's Preface vii
Christopher Mallon

Chapter 1 ARGENTINA.. 1
Ricardo W Beller and Martín Campbell

Chapter 2 BELGIUM 19
Steven De Schrijver and Thomas Daenens

Chapter 3 CANADA 31
Michael J MacNaughton, James H Szumski and Marc Duchesne

Chapter 4 CAYMAN ISLANDS 52
Graham F Ritchie QC, Rebecca Hume and David W Collier

Chapter 5 CHINA.. 62
Zhibin Zheng and Kalley Chen

Chapter 6 CZECH REPUBLIC 74
Daniel Hájek

Chapter 7 DENMARK... 84
Kristian Gustav Andersson

Chapter 8 ENGLAND & WALES 93
Christopher Mallon, Alex R van der Zwaan and Sebastian Way

Chapter 9 FINLAND 120
Lauri Peltola, Tomi Teinilä and Maria Pajuniemi

Chapter 10 FRANCE 132
Caroline Texier and Gabriel Sonier

Chapter 11 GERMANY 143
Christian Köhler-Ma

Chapter 12 GUERNSEY 154
Mathew Newman and Simon Davies

Chapter 13 JAPAN 164
Shinichiro Abe

Chapter 14 LITHUANIA 181
Giedrius Kolesnikovas, Emil Radzihovsky and Beata Kozubovska

Chapter 15 LUXEMBOURG 197
Martine Gerber-Lemaire

Chapter 16 MEXICO 209
Thomas S Heather

Chapter 17 NIGERIA 221
Seyi Akinwunmi

Chapter 18 NORWAY ... 232
Ylva Cornelia Daniëls and Ellen Schult Ulriksen

Chapter 19 SCOTLAND ... 242
David Gibson and Michael Thomson

Chapter 20 SPAIN ... 264
Antonio Fernández, Borja García-Alamán, Adrián Thery and Juan Verdugo

Chapter 21 SWEDEN ... 275
Roland Sundqvist, Lars Wiking and Jonas Kjellén

Chapter 22 SWITZERLAND ... 284
Vincent Jeanneret and Olivier Hari

Chapter 23 TURKEY ... 298
Alp Zerenoglu

Chapter 24 UNITED ARAB EMIRATES ... 308
Bashir Ahmed and James Bowden

Chapter 25 UNITED STATES ... 319
J Eric Ivester

Appendix 1 ABOUT THE AUTHORS ... 338

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS... 358

EDITOR'S PREFACE

I am very pleased to present this fifth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2011/2012, and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years and that are expected to be significant in the future.

Unsurprisingly, the global economy is still struggling to emerge from the worst financial crisis since the Great Depression. The past year has been dominated by uncertainty caused by the economic and sovereign debt crisis in the eurozone, which appears to have had a profoundly unsettling effect on the global economy. We have been reminded powerfully of the impact of excess indebtedness at the governmental, corporate and individual levels, and of the consequences for national balance sheets of the guarantees, whether express or implicit, given by sovereigns to their banking sectors during the financial crisis. The crisis in the eurozone is in many ways a crisis of political leadership and a test of the common bonds within the eurozone as much as an economic crisis, and it is this political angle that has prevented eurozone leaders, until now, from taking the comprehensive and radical action that markets demand to stem the crisis.

In the first half of 2012 global markets have performed badly, and there have been worrying signs of a slowdown in the US and Chinese economies. The performance of these two giant economies was a significant component of the fragile recovery that followed the first phase of the financial crisis, and so a poor outlook in these economies, coupled with the ongoing turmoil in the eurozone, is likely to lead to difficult global economic conditions in the short term. While the picture is continually changing and the only accurate economic prediction that can be made is for more uncertainty in the months ahead, most commentators agree that a significant deleveraging on the individual, corporate and governmental levels is likely to be seen in the coming years and may be an essential prerequisite for a return to stability.

The difficult global economic conditions are widely expected to contribute to a significant increase in restructuring activity in the coming years. As such, this work is becoming ever more relevant and important, in particular because of the international

nature of many corporate restructurings. I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this book, and to our publishers, without whom the completion of this book would not have been possible.

Christopher Mallon
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
August 2012

Chapter 20

SPAIN

Antonio Fernández, Borja García-Alamán, Adrián Thery and Juan Verdugo[1]

I OVERVIEW OF RECENT RESTRUCTURING AND INSOLVENCY ACTIVITY

The past 12 months have seen some major events take place in the Spanish economic landscape. The first was the process to move forward with financial reform, which involved bringing in new legislation to improve the capital stability of Spanish credit institutions and increase public revenues through personal income tax increases. The second was the exponential increase in the interest rate on Spanish public debt, in an international context of bailouts and rescue plans, which have been the cause of uncertainty over some European countries' ability to repay sovereign debt; it is remarkable that the Spanish government has recently requested a €100,000 million loan from the EU to inject into the financial sector. The third is related to the reform of the Spanish insolvency law. Although the law was published in 2004 and partially amended in 2009, after experiencing how the law works and, above all, after seeing how many of Spain's neighbouring countries have more versatile restructuring tools, it became clear that a wider-reaching legal reform was recommendable, which started to take shape in Spain at the end of 2010 and finished with major amendments that generally came into force on 1 January 2012.

This scenario of changes and reforms came in response to macroeconomic data confirming the extent and dimension of what began as a global crisis in the financial markets and is now having a huge impact on economic growth, consumer spending and employment. The downturn's adverse repercussions include pushing up banks' non-performing bank loans and the number of mortgage foreclosures initiated and, of course, the number of formal insolvency proceedings under way in Spain.

1 Antonio Fernández, Borja García-Alamán and Adrián Thery are partners and Juan Verdugo is a senior associate at Garrigues.

The Spanish economy experienced a slight growth in 2011, when GDP was up 0.7 per cent, although in the fourth quarter it suffered a fall to 0.3 per cent. The most likely scenario, according to some studies, is a fall of the GDP to -1.6 per cent in 2012 and -0.4 in 2013. The most conservative estimates place the current account deficit at 8.9 per cent in 2012 and 5.8 per cent in 2013, within the aims of a general deficit reduction also sought by other European countries but still a long distance away from the 3 per cent laid down by the Maastricht Treaty.

Unemployment is running very high, as the figures show. May 2012 saw a 30,113 drop in the number of jobless to 4,714,122, which translated into a 24.30 per cent unemployment rate, slightly above the 2011 year-end figure. According to the European Commission, in the current difficult economic climate, unemployment is expected to keep rising, although at a slower pace, from the current high levels, and it has predicted a 25.1 per cent unemployment rate in 2013.

As was to be expected, high unemployment has dampened consumer spending. According to statistics, household spending in the first half of 2011 was up 1.9 per cent, which was a far cry from the 3.8 per cent average recorded between 1995 and 2007, before the crisis struck. One of the factors that has held back the recovery of consumer spending was the two-point increase in VAT, which had brought down households' buying power.

The slowdown in lending has continued, due both to demand factors (in view of the economic climate at home in Spain and worldwide) and to a tightening of supply conditions, in response to the increase in defaults (the default rate was 8.36 per cent in March 2012 according to the data in the Bank of Spain's Financial Stability Report). This is the highest level since 1995 and has brought the doubtful loan total to €145,000 million. As a result, the number of new mortgages arranged has fallen sharply. The decline in transactions detected in 2010 has spilled over into 2011. In December 2011, for example, only 24,610 mortgages were granted, 37.2 per cent fewer than in 2010. Savings banks had the highest number of mortgages, with a 44.2 per cent share of the total, followed by banks (42.1 per cent).

Many of those loans have had to be foreclosed by their lenders. Foreclosures had fallen by 16.9 per cent year on year in 2010, now nearing the 80,000 mark. A total of 77,854 processes took place in 2010, almost three times the number at the beginning of the crisis according to the data published by the General Council of the Spanish Judiciary.

In the first quarter of 2012, the number of formally insolvent debtors amounted to 2,224, up 21.5 per cent compared with 2011. In 2011 the number of debtors in insolvency proceedings reached 6,755 – a 13.3 per cent increase with regard to 2010. There was a particularly sharp rise in the number of compulsory insolvency proceedings (requested by creditors), which was 14.5 per cent higher than the figure for 2010.[2]

2 According to the most recently available data of the Spanish Survey System (www.ine.es).

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

i Formal insolvency proceedings

For a company in economic and financial difficulty, a formal insolvency proceeding is a powerful corporate restructuring tool, while an arrangement with creditors is one of its key instruments.

Law 22/2003, of 9 July 2003 (the Spanish insolvency law, 'the LC'), contemplates two different scenarios in which a debtor may petition for voluntary formal insolvency:

a where it is unable to regularly pay its debts as they fall due (Article 2.2 LC) – an event of current technical insolvency; or

b where it foresees that it will be unable to meet its existing debts regularly as they fall due (Article 2.3 LC, *in fine*) – an event of imminent technical insolvency.

In both cases, however, the procedure for the debtor to petition for an insolvency order (voluntary insolvency proceeding versus an involuntary insolvency proceeding in which a creditor petitions for the insolvency order) is the same with regard to its phases, the manner in which it is conducted and its length.

Common phase

A voluntary insolvency proceeding commences with the debtor filing a petition for an insolvency order with the competent commercial court. In the case of imminent technical insolvency, the debtor can file its petition at any time, since it is not under an obligation to apply for an insolvency order, unlike in the case of a current technical insolvency.

If, after examining the petition, the judge deems the information to be complete and to constitute sufficient evidence of the debtor's technical insolvency, the judge will make an insolvency order.[3] Pursuant to Articles 85.1 and 21.1.5 of the LC, creditors must notify their claims to the court within a month from the date on which notice of the insolvency order is published. Insolvency order notices are published in BOE, the Spanish Official State Gazette.[4] The brand new public insolvency registry is not yet available online.[5]

The second step after the judge has made an insolvency order is to appoint an insolvency manager (two insolvency managers may be appointed in the case of insolvency proceedings of 'special importance'). After accepting the appointment, the insolvency manager will be responsible for surveying the acts of the insolvent debtor. The insolvency manager is also required to prepare a report containing a detailed analysis of the documentation submitted by the debtor (namely, the inventory and list of creditors) and of its financial statements. Prior to the publication of this report, the insolvency manager will send to the creditors a projection of the inventory and a list of the creditors with the aim of solving any mistakes that he or she might have incurred

3 Article 14.1 LC.

4 The Spanish Official State Gazette is available online at www.boe.es.

5 The former registry at www.publicidadconcursal.es is still working, although it is only available in Spanish.

and avoiding future claims. On publication of said report, each of the creditors has 10 days[6] in which to object to the report if it considers that:

- *a* any asset has been incorrectly included in, or excluded from, the inventory;
- *b* the inventoried asset has not been valued correctly;
- *c* its claim has been incorrectly included or excluded; or
- *d* the recognised amount of its claim is incorrect.

The objection to the report must be made in an ancillary proceeding, the length of which will vary depending on the court's workload (approximately five to 15 months).

If no objection is filed to the insolvency manager's report, or when all objections have been resolved, the insolvency manager will submit final versions of both the inventory and the list of creditors and liabilities. The judge will then make an order to commence the creditors' arrangement phase. Note that, pursuant to the new wording in Article 96.4 LC, if the challenges to the report affect less than 20 per cent of the total value of assets or liabilities in the proceeding, the court will state the immediate ending of the common phase and the opening of the creditors' arrangement phase or the liquidation phase (see below).

Creditors' arrangement phase

A reorganisation plan (proposal for an arrangement) can be filed at different stages depending on the kind of plan.

Advanced proposals ('PACs') can be made any time within the petition for insolvency and the deadline for notification of claims. Ordinary proposals can be filed up until 40 days before the creditors' meeting takes place (in the case of more than 300 creditors, the period for filing an ordinary proposal can be shorter).

A proposal will be accepted when it meets the statutory requirements.[7] After it has been accepted, the insolvency manager will prepare a report evaluating the proposal and any attached payment and feasibility plans. The proposal for an arrangement must be court-approved, and after this has taken place the debtor must comply with it, on the terms and conditions it contains.

Liquidation phase

The LC provides liquidation as an alternative to an arrangement with creditors. This phase will commence automatically if no arrangement is proposed, there is a breach of the arrangement or liquidation is requested directly by the debtor at any time.

According to the recent amendment of the LC, the insolvency manager can also file a direct application for liquidation if the company has ceased operations, and can apply for the termination and dismissal of insolvency proceedings where there are insufficient assets available to pay post-insolvency order claims. In the event of liquidation, the power to manage its business is taken from the debtor and handed over to the insolvency manager, who must prepare a liquidation plan to be approved by the judge. On approval

6 Article 96 LC.

7 Article 114 LC.

of the liquidation plan, all of the debtor's assets are sold off and claims are paid in the order determined in the ranking of creditors.

Insolvency assessment phase

If the debtor fails to come to an arrangement with its creditors, or such arrangement is not fulfilled, it will be forced to liquidate its business and, in a separate phase of the proceeding, the court will assess the debtor's business practices. As a result of this assessment, the debtor's directors may be held personally liable, to the extent of their own assets, for making good any shortfall in the amount of claims collected by the creditors in the liquidation. The assessment phase will also take place if the court approves an arrangement with creditors that establishes, for all creditors or for creditors belonging to one or more classes, a release of more than one-third of the amount of their claims or a deferral of repayment of their claims lasting more than three years.

ii Informal methods to restructure distressed companies

We have already seen the emergence of a clear international trend over recent years towards providing for out-of-court, preventative solutions in local insolvency legislation, thereby endorsing these solutions and setting down the terms for the most problematic aspects associated with them in order to encourage economic operators to use them. Replacing unanimity with a majority vote, staying individual actions for these periods and granting immunity for acts performed by the parties concerned in implementing these arrangements from any subsequent backdating or clawback actions – these are all measures that undoubtedly encourage this type of solution and on which a modern insolvency system, such as the Spanish *concurso* system, should rely.

In fact, 2010 and 2011 saw numerous informal restructuring processes begin outside the heavily overloaded commercial courts. Most involve real estate and manufacturing companies that were suffering from severe cash-flow problems but had not yet defaulted on payments to financial institutions. Some cases, though, involved one-off defaults where the financial institutions, aware of the company's tricky situation, agreed to delay enforcing their claims for a specific time. In such cases, the company will arrange an informal meeting of creditors and explain the situation to them, essentially with the aim of achieving three goals:

a to garner majority support from the financial institutions for the business or disinvestment and refinancing plans (usually drawn up by a consultant with expertise in distressed situations) involving repayment time extensions for anywhere up to three years;

b to stay court actions brought by financial institutions for a sensible length of time while the terms and conditions of the refinancing package are being defined; and

c to obtain a temporary, albeit brief, breathing space from paying interest, something that is necessary in order to avoid completely using up what little cash is left at the company. Together with the above, it is increasingly common in informal restructuring processes for the financial institutions themselves to agree to buy the debtor's assets at a price equal to, or higher than, the most recent valuation of those assets, thereby enabling the company's bank debt to be reduced while, at the same time, making a sale on terms that would be hard to find on the open market.

Some of these goals have been reached with the reform operated by Law 38/2011 of 10 October 2011, which has provided a poor copy of the UK's 'schemes of arrangement' or the French 'accelerated *sauvegarde* proceeding', named as court validation. In this case, when an out-of-court formal refinancing agreement ('ARF') has been signed by 75 per cent of the financial creditors and meets some other legal requirements, its deferral effects can extend to apply to the dissenting financial creditors for up to three years, provided this does not entail a disproportionate sacrifice. Nevertheless, the ARF cannot be extended to apply to creditors holding collaterals *in rem*.

iii Other issues relevant to insolvency and restructuring

Secured claims under the Spanish Insolvency Law

Claims held by banks and other creditors may be secured by mortgages, pledges or other security interests. This kind of security makes them specially preferred (i.e., secured) creditors in the insolvency proceeding, with the effects envisaged in the LC, including mainly the following:

a the right to separate enforcement of their claim, if they commenced foreclosure proceedings before the date of the insolvency order and certain additional requirements were satisfied;

b the right to abstain from any arrangement with creditors – in other words, the right not to be bound by any arrangement approved by the majority of the creditors, unless the secured creditors adhere to it voluntarily – and the ability to exercise the rights ordinarily corresponding to them (in mortgage foreclosure proceedings) if the arrangement has been approved without their participation;

c an advantageous position for collecting their claims in the event of liquidation of the debtor, since the LC provides that a secured claim (such as one secured by a mortgage or pledge) must be paid using the proceeds from the sale of the assets serving as collateral for it; if, however, the value of the collateral is insufficient to cover the amount of the specially preferred claim, the shortfall will be treated as a general unsecured claim; and

d while a moratorium on the payment of interest operates generally as soon as the insolvency order is made, interest will continue to accrue to secured creditors, such as mortgagees or pledgees, provided the value of the collateral is enough to repay their claims; furthermore, while interest owed is generally regarded as a subordinated claim, interest accruing to a mortgagee will rank as a secured claim, up to the value of the collateral.

Duties of directors

As regards the duties of directors of companies in financial difficulty, the debtor has a duty to petition for an insolvency order within two months after the date on which it becomes, or should have become, aware of its technical insolvency, unless the debtor has submitted the communication as per Article 5-bis, in which case he or she has an additional four-month window to either reach a refinancing agreement or file definitely for insolvency. A breach by the debtor of its duty to timely file for insolvency gives rise to a rebuttable presumption of wilful misconduct or gross negligence. In such a case, the insolvency may be held to be fault-based. Furthermore, as a general rule, an insolvency

will be assessed as a fault-based insolvency where there is a finding of wilful misconduct or gross negligence on the part of the debtor or, as the case may be, of its *de facto* or *de jure* legal representatives, directors or liquidators in creating or aggravating the debtor's insolvency.

If the insolvency is assessed as a fault-based insolvency, the judge will direct that the persons concerned be disqualified from managing the assets of another, or from representing or managing any person, for a period ranging from two to 15 years. They will also be ordered to return all assets or rights they may have misappropriated from the debtor's assets or received out of the assets and rights available to creditors, and to provide indemnification for any damage or loss caused. Finally, pursuant to Article 172-bis LC, if the insolvency was assessed because of the commencement of the 'liquidation phase' and the finding is that it was a fault-based insolvency, the *de facto* or *de jure* directors or liquidators or general proxies of the insolvent legal entity (and anyone holding those offices in the two years preceding the date of the insolvency order) could be ordered to pay the creditors in the insolvency proceeding all or part of any shortfall in the settlement of their claims upon liquidation of the insolvent entity's assets and rights.

Clawback actions

The insolvency manager may challenge transactions that could be deemed to have been 'detrimental' to the debtor's interests, if the transactions took place in the two years preceding the insolvency order. The 'detriment' does not refer to the intention of the parties, but to the consequences of the transaction on the debtor's interests.

Some Spanish courts have taken the view that transactions that contravene the principle of *pars conditio creditorum* (equal treatment among all creditors) can be construed as detrimental provided that it can be shown that they prevent, diminish or obstruct the collective satisfaction of the claims of the debtor's creditors.

III NEW LEGISLATION

i Law 38/2011 of 10 October 2011, reforming the Insolvency Act

Law 28/2011 reforming the 2003 LC ('the Insolvency Reform') was published on 11 October 2011. The bulk of the Insolvency Reform entered into force on 1 January 2012, although certain articles have been in force since 12 October 2011. The most important amendments made by the new legislation are as follows:

Pre-insolvency proceedings

In the Insolvency Reform, true pre-insolvency mechanisms made their first appearance in Spanish legislation. As mentioned in Section II, the court must validate an ARF in order to extend the deferral approved by majority to dissenting financial creditors, with two limitations: it cannot, in principle, impose ARF conditions over and above deferral for three years; and ARF conditions cannot be imposed on creditors holding collaterals *in rem*. In addition, new funding provided under an ARF has been allowed a higher ranking in the event of a subsequent insolvency proceeding, since 50 per cent will be classed as a post-insolvency order claim and the remaining 50 per cent will have general preferred status.

Apart from anything else, new Article 5-bis provides that the debtor can communicate to the court a current or imminent technical insolvency in order to negotiate a PAC as well as an ARF.

Preserving the value of the business or assets

The insolvency manager can automatically authorise, without court authorisation, sales of assets that are essential to ensure the viability of the debtor's business or to meet cash needs, and sales of assets that are not necessary for the business. Moreover, the sale of personal property and real estate has been made simpler and will be approved by the court almost automatically if the offered price does not exceed certain discount limits.

Besides, the court can examine a proposal for an arrangement and submit it for approval where the objections to the insolvency manager's report do not affect more than 20 per cent of the assets of liabilities.

With regard to certain actions or proceedings filed by creditors out of the insolvency proceeding, the Insolvency Reform establishes the following effects:

a following a request by the insolvency manager and after hearing the affected creditors, any pre-existing attachments on the assets of the insolvent debtor can be lifted and cancelled if they hinder the continuity of its business (this does not apply to attachments from public authorities);

b an insolvency order automatically stays administrative enforcement proceedings, the only exception being where an official notice of attachment has been issued against certain specific assets that are not necessary for the continuity of the debtor's business;

c an insolvency order stays foreclosure proceedings on collateral and they will only be resumed when the insolvency court finds that the foreclosed assets or rights are not used in or necessary for the business; and

d an insolvency order prevents subcontractors from bringing legal actions against the owner of work performed by the insolvent debtor in order to try and recover the debt owed to them.

Strengthening the arrangement with creditors

The Insolvency Reform permits arrangements that provide for the transfer of assets in payment of debts where the transfer is made to a creditor that had been pledged or mortgaged the asset as collateral, provided that as a result of the transfer the creditor considers it has received full satisfaction of its special preferred claim, or the remainder of the claim is admitted to the insolvency proceeding with the appropriate ranking.

Furthermore, purchasers under financial supervision do not forfeit the right to vote on an arrangement, and claims arising after the approval are regarded as post-insolvency order claims (super-privileged claims) in the event of subsequent liquidation proceedings.

Groups of companies

With regard to groups, the law allows joint insolvency orders and coordinated insolvency proceedings against related companies and companies in the same group (or companies whose assets are intermingled) where there is a single insolvency management structure. Moreover, in exceptional cases, the available assets and pre-insolvency order claims in

single insolvency proceedings for group companies can be consolidated if their assets are intermingled and the ownership of assets and liabilities cannot be unravelled.

The Insolvency Reform has reduced the number of persons with a special relationship, a concept that covers companies in the same group as the debtor and their shareholders in common, but only where these shareholders hold, at least, a significant ownership interest in the capital stock of the debtor.

Measures to expedite proceedings

The law has introduced provisions to expedite proceedings with regard to notification and admission of claims (see Section II.i, *supra*), and measures to encourage and shorten abridged insolvency proceedings; particularly, the insolvency judge is given greater flexibility to choose an abridged proceeding from the outset, or to switch from an ordinary proceeding to an abridged proceeding.

ii Royal Decree-Law 2/2012 of 3 February 2012, on financial industry reform

This Decree-Law includes measures to restructure the Spanish banking industry to enable it to fulfil its role of channelling credit towards the real economy and supporting businesses, employment and consumer spending. Of particular note in connection with restructurings is additional provision 15, which has extended for 2012, for all legal purposes, the exceptions provided in Paragraph 1 of the sole additional provision of Royal Decree-Law 10/2008 of 12 December 2008.

This provision provided exceptions for corporations and limited liability companies meeting the requirements for mandatory capital reduction and dissolution in cases involving impairment losses in respect of property, plant and equipment (mainly from real estate investments). The exceptions give temporary immunity for two years from the rules on mandatory capital reduction and dissolution for companies that have recorded impairment losses in respect of property, plant and equipment. A previous decree (Royal Decree-Law 5/2010) extended these exceptions for a two further tax years, and the recent reform extends them for 2012.

iii Royal Decree-Law 6/2012 of 9 March 2012, on urgent measures to protect low-income mortgage debtors

This Decree-Law contains a package of measures designed to make it simpler for individuals experiencing repayment difficulties to restructure their mortgage debts, and provides mechanisms to make foreclosure proceedings more flexible.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

i Out-of-court restructurings

Banking

From July 2011 to May 2012, the Bank of Spain took over the management of five financial companies (four savings banks and a bank) because of their financial issues: Caja de Ahorros del Mediterráneo, Caixa Catalunya, Unnim (it has been subsequently sold to another bank), NovaCaixaGalicia Banco and Bankia. The orderly restructuring

fund for the banking industry, Fondo de Reestructuración Ordenada Bancaria, decided to inject capital to the value of around €25 billion by subscribing to shares.

Real estate

Metrovacesa completed the refinancing process for its €5.725 billion debt in April 2011, after the British High Court sanctioned its scheme of arrangement. The scheme of arrangement had the support of creditors holding 95.2 per cent of its liabilities. A further 0.2 per cent voted against the arrangement and the remaining percentage (4.6 per cent) abstained, according to the creditor voting information sent to the Spanish Securities Market Commission, CNMV. Under the scheme of arrangement, the real estate company can cut its debt by €1.2 billion (to €4.525 billion) through a debt-for-equity swap and obtaining a five-year tranche for repayment of the principal. This gave the company time to raise cash from rental income on its investment assets and secure its viability. The scheme will, however, strengthen the controlling interest already held by the group of six shareholder banks and savings banks in Metrovacesa.

In February 2012, another company in the industry, ACS, signed a refinancing agreement for a debt up to €9.3 billion with its more than 30 bank creditors. The agreement will allow the company to defer repayment of its various loans until 2015.

ii Insolvency proceedings

Manufacturing

As a result of the building and construction crisis, Puertas Norma, one of the top Spanish door manufacturers (part of the JELD-WEN group but a heavy loss-making unit), was forced to seek insolvency protection in order to benefit from the insolvency legal framework and propose a reorganisation plan. Before the insolvency filing, the hard labour climate prevented the company for a fast out-of-court turnaround, thus threatening and jeopardising the business activity, which was about to cease activities. Filing for insolvency preserved the orders and the manufacturing agreements, thereby avoiding an immediate winding up. A reorganisation plan is currently being negotiated that would entail the sale of the business and an upcoming intensive redundancy process.[8] In spite of a very tough cash-flow situation, the company, which has around 600 workers, cutting-edge technology and an outstanding factory, continues as an ongoing business, honouring its pending agreements and serving products to Spain and other European countries.

Food industry

A group of banks[9] led by Rabobank has successfully petitioned for the compulsory insolvency of Seda Solubles, one of the main coffee producers in Europe, before Commercial Court No. 1 of Palencia. Despite the opposition of the company, the banks' petition was upheld by the judge, and the insolvency was declared on 5 December 2011. The debtor's directors have even been removed from charge and substituted by judicially

8 Garrigues is involved in these negotiations.

9 Advised by Garrigues.

appointed receivers, who have put in place a competitive sale process to have the business of the insolvent company sold to the best bidder, in order to be able to pay the creditors the price perceived. Subsequently, the group of banks granted the first post-petition working capital credit facilities in Spain, which in turn contain similar features to that of US Chapter 11, and specifically a type of 'roll-up' feature.

This is the first compulsory insolvency filed in Spain by a multi-creditor group of banks that in turn became lenders of new money after the insolvency order so as to maintain an ongoing business.

V INTERNATIONAL

The Spanish LC faithfully follows the recommendations of the UNCITRAL Model Law and allows a wide variety of instruments to be used to maximise the opportunities for business reorganisation and overcoming financial difficulties. In fact, the decisions of the Spanish courts are wholly consistent with European Court of Justice case law and with the interpretation being followed by other European courts, especially as regards the concept of 'centre of main interests'.

With regard to insolvency matters, Council Regulation (EC) No. 1,346/2000 of 29 May 2000 on insolvency proceedings[10] will apply to collective insolvency proceedings that entail the partial or total divestment of a debtor and the appointment of a liquidator. Pursuant to this Regulation, any judgment opening insolvency proceedings handed down by a court of a Member State that has jurisdiction according to the Regulation will be recognised in Spain from the time that it becomes effective in the state of the opening of proceedings.[11]

VI FUTURE DEVELOPMENTS

One of the measures applied with the approval of the Insolvency Reform was to require that the insolvency manager subscribe to liability insurance or an equivalent guarantee to be responsible for the damages he or she might cause. Despite this provision, which entered into force on 1 January 2012, it is still pending regulatory development. The same situation applies with the Public Insolvency Registry, whose regulation has not yet been established.

On the other hand, the Insolvency Reform establishes a special regime applicable to the situations of insolvency of sports entities. This regime may be developed in the following months, despite the fact that it is causing big differences among sports entities who are in an insolvency proceeding and those who do not, adulterating the development of competitions.

10 Official Journal, 30 June 2000.

11 Article 16.

Appendix 1

ABOUT THE AUTHORS

ANTONIO FERNÁNDEZ

Garrigues

Antonio Fernández is the partner in charge of the firm's restructuring and insolvency group. As an expert in restructuring and insolvency, Mr Fernández has acted in the most significant bank debt refinancing transactions ever seen in Spain, and has handled cases in some of the highest-profile insolvency proceedings, reaching arrangements with creditors or liquidating distressed companies in an orderly manner. Listed in *Chambers Europe*, *Chambers Global* and *IFLR 1000*, he was recently endorsed as 'Lawyer of the Year' in Spain (*Best Lawyers 2012*).

In the area of refinancing, Mr Fernández and his team acted as advisers in 2010 and 2011 for various real estate and industrial groups in Spain with significant foreign and offshore interests. The total bank debt involved in these deals amounted to over €40 billion.

In the area of insolvency, Mr Fernández has played a pivotal role in key insolvency proceedings, representing debtors with liabilities amounting, in the aggregate, to more than €5 billion. Mr Fernández and his team have also acted on behalf of major creditors in the most high-profile insolvency proceedings, defending their claims and maximising the potential return on their investment or the recovery of amounts due.

A founding member of the Spanish Turnaround Management Association, he is a frequent contributor to *Revista de Derecho Concursal y Paraconcursal* (published by La Ley) and the IBA newsletter.

BORJA GARCÍA-ALAMÁN

Garrigues

Borja García-Alamán is a partner in the restructuring and insolvency group. Based at Garrigues' head office in Madrid, he has a Bachelors degree in law from San Pablo University and a master's degree in corporate and business law from Centro de Estudios Garrigues. Listed in *Chambers Europe* and *Chambers Global*.

He has practised law at Garrigues and provided advice in international insolvency proceedings, corporate restructurings, out-of-court financing and financial debt negotiation proceedings, as well as on matters relating to directors' liability and defence, since 1997 in the field of restructuring and insolvency, litigation and arbitration. His

most recent professional experience has involved providing legal advice on the highest-profile of both creditors' and debtors' interests in a range of scenarios. Mr García-Alamán has amassed a wealth of experience in cross-border insolvency proceedings and advising creditors of distressed companies, as well as pre-insolvency or insolvency debt situations. A founding member of the Turnaround Management Association in Spain and ranked as an 'expert contributor' by the World Bank in *Doing Business 2009*, he regularly contributes to Spanish and international publications dedicated to insolvency matters such as *Revista de Derecho Concursal y Paraconcursal* and Euromoney's *Global Insolvency and Restructuring Review*. Mr García-Alamán is also a frequent speaker on restructuring and insolvency matters at seminars and conferences held at the International Bar Association, Spanish universities and companies. Currently, Mr García-Alamán lectures on the subject of insolvency on the master's course in corporate and business law at Centro de Estudios Garrigues.

ADRIÁN THERY

Garrigues

A partner in the Garrigues restructuring and insolvency group, Adrián Thery has a Bachelors degree in law from San Pablo University, a Masters degree in European Community law and a Masters degree in corporate finance. Mr Thery speaks fluent French and English, and is based at Garrigues' head office in Madrid. Listed in *Chambers Europe* and *Chambers Global*, he has extensive experience in insolvency matters, and provides ongoing advice to distressed companies in the manufacturing (automotive, electronics, etc.), real estate and services industries, and to creditors, particularly banks, of companies that fail to honour their financial commitments. He also advises on all manner of disputes in which one or more of the parties involved is in financial distress. He has advised an array of foreign financial institutions on non-performing loans (valuation of portfolios, recovery, etc.).

Mr Thery has been listed in *Best Lawyers in Spain* since 2009 in the insolvency and reorganisation area and regularly contributes to several of the main specialist Spanish journals and reviews dedicated to insolvency matters (such as *Revista de Derecho de Sociedades*, *Revista de Derecho Concursal y Paraconcursal*, *BNA International Special Report on Corporate Insolvency*, *FT Innovative Lawyers 2009*). He is a founding member in Spain of the Turnaround Management Association, and a Spanish member of the panel of experts for the World Bank publications *Doing Business* and *Closing a Business*. Mr Thery is also a frequent speaker at seminars and conferences held at the Madrid Bar Association (e.g., special courses on insolvency law), the Instituto de Fomento Empresarial, CEOE/CEPYME, ESIC, Centro de Estudios Garrigues, San Pablo University (Masters degree in business insolvency) and at various chambers of commerce and financial institutions.

JUAN VERDUGO

Garrigues

Juan Verdugo is a senior associate in the Garrigues restructuring and insolvency group. A member of the firm since 2001, in 2004 he completed the fourth edition of the specialist course on insolvency law (Madrid Bar Association). Shortly afterwards, he obtained an

associate's degree as an insolvency law practitioner (Faculty of Law, ICADE). Since 2006, he has taught classes as an insolvency fieldwork expert at Madrid University (master of laws in legal practice) and San Pablo University (official diploma in business insolvency).

Mr Verdugo is currently acting in key restructuring cases in Spain and advising main players in major court-based insolvency proceedings. Large insurance companies, real estate and private equity firms regularly ask Mr Verdugo for advice in out-of-court restructurings and cross-border insolvency issues. In insolvency issues dealing with corporate finance and M&A fields, Mr Verdugo has an outstanding reputation. A founding member of the Spanish Chapter of the Turnaround Management Association, he has authored *The European Restructuring and Insolvency Guide* (International Bank for Reconstruction and Development, 2006) and *Insolvency Law Forms: Essential Party Pleadings* (Dykinson, 2009). Late 2010 saw the publication of his contribution to the collective work *Crisis and Insolvency Proceedings: Commentaries on the Insolvency Law*.

Mr Verdugo is listed in *Chambers Europe* and *Chambers Global* as an 'Associate to watch' in the insolvency and restructuring area. Included since 2011 in *Best Lawyers in Spain*, he sits on the World Bank panel of experts for the *Closing a Business* and *Getting Credit* annual reports.

GARRIGUES

Hermosilla, 3
28001 Madrid
Spain
Tel: +34 91 514 52 00
Fax: +34 91 399 24 08
antonio.fernandez.rodriguez@garrigues.com
borja.garcia-alaman@garrigues.com
adrian.thery@garrigues.com
juan.verdugo.garcia@garrigues.com
www.garrigues.com