INSOL Europe/LexisPSL Joint Project on 'How EU Member States recognise insolvency/restructuring proceedings commenced in third country states'—Spain

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Restructuring & Insolvency analysis: This article looks at how Spain would recognise insolvency or restructuring proceedings commenced in a third country state. In particular, it considers whether the English Part 26 scheme or Part 26A restructuring plan would be recognised in Spain.

Q1. Has your country adopted the UNCITRAL Model law on insolvency?†If not, does it intend to do so in the near future?

No. Despite the fact that the Spanish legislation has not expressly adopted the UNCITRAL Model law (Model Law), it is noteworthy that the Recast Insolvency Act (RIA) contains a number of rules of private international law inspired by those of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (EIR) and of the Model Law itself.

In this respect, the RIA can be considered an all-encompassing text, which in addition to the recognition of foreign proceedings and the co-ordination between them, regulates international jurisdiction and the determination of the applicable law, all in a more ambitious manner than the EIR and the Model Law themselves.

Specifically, the rules contained in the RIA allow for a certain amount of flexibility so that, in the event that it is more efficient to carry out the financial restructuring of a company in a state other than Spain and there is a close link between the company's activity and such state, the effect on business operations in Spain becomes minimal.

Q2. What are your country's private international law provisions for the recognition of insolvency proceedings commenced in countries outside of the EU Member States (ie Third Party†States like the UK)?

The recognition of insolvency proceedings commenced in countries outside of the EU Member States is regulated in Spain in Title III of Book Three of the RIA (Articles 742 to 748 of the RIA).

As the RIA states in its explanatory memorandum, the reason for the postponement of the rules of private international law to the last book of this body of law is that they are applicable both to insolvency proceedings (Book One) and to pre-insolvency proceedings (Book Two). However, it should be noted that the current wording of the RIA only takes into account insolvency proceedings, so that some adaptations are necessary when applying its solutions to pre-insolvency proceedings (eg the RIA's references to the insolvency administrator).

Notwithstanding the above, it must be pointed out that in Spain there is no recognition of insolvency or pre-insolvency proceedings as such, but of the judgments that approve their commencement (Article 742 of the RIA) as well as those issued in the framework of those proceedings, as long as they are founded in the insolvency regulation (Article 744 of the RIA).

Recognition of judgments that approve the commencement of the proceeding

Regarding the judgments that decide the commencement of such insolvency or pre-insolvency proceedings, the Spanish legislator demands their recognition through an exequatur procedure in accordance with the procedural rules provided for Law 29/2015, of 30 July, on international legal co-operation in civil matters (LILC), within which the fulfilment by such judgment of the recognition requirements established in Article 742.1 of the RIA is verified.

The requirements established in Article 742.1 of the RIA for the recognition of the judgments of commencement of the proceedings are mainly the following:

- that the judgment refers to a collective proceeding in which all or a significant part of the creditors of the debtor participate and which is founded on the insolvency of the debtor or on the aim to avoid it. The assets and activities of the debtor must be subject to the control or supervision of a court or of a foreign public authority for the purposes of their reorganisation or liquidation, which would include, in principle, those debtor in possession proceedings. However, proceedings based on Company Law which have not been exclusively conceived for insolvency situations may fall out of the scope established in the above paragraph
- that it is a definitive judgment according to the law of the state of commencement, that is, that it puts an end to the instance, irrespective of whether the judgment is firm and final or not. However, Article 742.4 of the RIA provides for the possibility to suspend the exequatur procedure when the judgment of commencement were subject, in its state of origin, to an ordinary appeal or when the term to appeal had not yet expired
- that the jurisdiction of the court or the authority that has opened the proceeding is based on any of the criteria contemplated in the RIA, for instance, that the centre of main interests or an establishment of the debtor is located in the state of commencement, or in any other reasonable connection of similar nature. Therefore, this requirement would not be met when the only connection with the state of the opening of the proceedings were the submission of agreements to the law of such state. It should also be noted that the nature of the jurisdiction criterion used in the state of origin is relevant in determining whether the foreign proceeding can be recognised as a main insolvency proceedings (where the centre of main interests of the debtor or an equivalent related criterion is located in the state of origin) or as a territorial insolvency proceedings (where an establishment of the debtor or an equivalent related criterion is located in the state of origin). The foregoing is relevant because, while in the first case the effects of the foreign proceeding may reach all of the debtor's assets (including those located in Spain), in the second case the proceeding will only affect the debtor's assets located in the state of commencement
- that the judgment has not been rendered in default of the debtor or, otherwise, that it has been preceded by delivery or service of a writ of summons or equivalent document, in due time and form for opposition
- that the judgment does not contravene the Spanish public order, thus safeguarding the essential principles of the Spanish legal system, both in material and procedural terms. As regards procedural public order, this is comprised by the fundamental rights that govern a due process (ie principles of hearing, contradiction, effectiveness of protection, presentation and practice of evidence, etc). As for the material public order, it is basically embodied in the principle of non-discrimination on the basis of nationality and respect for the right to property. With respect to the first of these principles, an example where it would not be respected would be a ruling imposing a greater economic sacrifice on some creditors simply because of their nationality. As regards the right to property, a violation of this right would occur if the declaration of insolvency were in fact a disguised confiscation or the imposition of an arbitrary or manifestly disproportionate sacrifice on any of the creditors

Recognition of the remaining judgments issued in the proceedings

However, for the rest of the judgments issued in the framework of the insolvency or pre-insolvency proceedings the principle of automatic recognition operates. Such principle allows, among other circumstances, to obtain the incidental recognition before the judicial or extrajudicial authority (eg commercial registrar) before which it is invoked.

Nonetheless, if the exequatur of the judgment of commencement is denied, it will not be possible to automatically recognise the other decisions issued in the framework of the proceedings, and in the absence of an international agreement, the general procedural rules of recognition of foreign decisions contained in LILC and the grounds for refusal of such recognition provided for in the RIA must be applied.

As regards the judgments covered by this principle of automatic recognition, it could be understood that it includes all those judgments other than the judgment of commencement that deal with typically insolvency matters, that is, those in whose resolution a certain authority does not actually act as a judge in charge of settling a dispute but as a simple agent pursuing the collective realisation of the interests of creditors and, in exceptional cases, of other interested parties.

This would include, therefore, resolutions adopted in the framework of foreign pre-insolvency proceedings, such as, for example, the judicial resolution validating a restructuring plan. But, in addition, those resolutions that, as indicated in Article 56 of the RIA, have their origin in actions that derive directly from the insolvency proceedings and are immediately related to the latter, will also be automatically recognised.

In order to proceed with this automatic recognition, Article 744 requires conditions analogous to those required by Article 742 for the recognition of foreign commencement decisions. The only difference lies in the qualification made to the content of Article 742.1.4 of the RIA, as it is now stated that the requirement of prior delivery or notification of the writ of summons or equivalent document will also be required in respect of any person other than the debtor who has been sued in the foreign insolvency proceedings and in relation to the decisions affecting them.

In any case, and despite the admissibility of automatic recognition for judgments other than the judgment of commencement, it should be clear that Spanish legal system differentiates between recognition and enforcement and that, even for judgments other than the judgment of commencement, enforcement is necessarily conditional upon obtaining the declaration of enforceability through the exequatur of the judgment to be enforced.

Q3. Would your country recognise an†English scheme of arrangement†(under Part 26 of the Companies Act 2006 (CA 2006)) or an†English restructuring plan†(under CA 2006, Pt 26A) now post-Brexit and on what basis? (eg Lugano Convention, Hague Convention, Rome I or other private international law rules)

As explained below, the possibility of recognising an English scheme of arrangement or a restructuring plan in Spain is an uncertain issue under Spanish law. Prima facie, the following options may be identified for their recognition in Spain:

RIA

As explained in Q2, in order to recognise the judgment of commencement of insolvency or pre-insolvency proceedings in Spain, it is necessary (i) that it refers to a collective proceeding which is based on the debtor's insolvency or on the purpose to avoid it; (ii) that the debtor's assets and activities must be subject to control or supervision by a foreign court or public authority for the purposes of its reorganisation or liquidation; and (iii) that the jurisdiction of the relevant court that resolved the opening of the proceeding must be based on one of the criteria contained in the RIA; among other requirements.

By virtue of the foregoing, it is questionable whether the scheme of arrangement and the restructuring plan may be recognised in Spain if we take into account the following:

- in both cases, these are procedures based on corporate law (CA 2006) and in the case of the scheme of arrangement it is not designed exclusively for insolvency situations. It should be noted that a restructuring plan could be considered as a proceeding based on the insolvency of the debtor, given that only companies 'facing or likely to face financial difficulties that affect, or may affect, its ability to carry on business as a going concern' may accede to it. Additionally, a recent English court decision has stated that a restructuring plan should be considered as an insolvency proceeding *(Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch))
- these are procedures that may not be collective since they only affect the relevant assets and liabilities that the debtor decides to submit to the scheme of arrangement or to the restructuring plan
- judicial monitoring is limited to the necessary process to achieve the scheme of arrangement or the restructuring plan but it does not globally affect the debtor's estate, and

- territorial jurisdiction of English courts may be based on insufficient criteria, as the fact that the relevant debt to be restructured in the scheme of arrangement or the restructuring plan being subject to English Law is not an equivalent connection to the centre of main interests of the debtor

In any case, it should be noted that regardless of whether the scheme of arrangement and the restructuring plan are included or not in the scope of application of the RIA, what is clear is that if a scheme of arrangement or a restructuring plan are filed in the UK and the centre of main interests of the debtor is located in Spain, they would either not be recognised in Spain or, at the most, would be recognised as a territorial proceeding (i.e. without affecting assets located in Spain).

Rome I Regulation

Given the quasi-contractual nature of the scheme of arrangement and restructuring plans, their recognition in Spain could also be approached through conflict-of-law rules regarding contractual obligations under Rome I Regulation.

However, the aforementioned is not free of uncertainty if we take into account that the cram-down mechanism inherent to schemes of arrangement and the cross-class cram-down of restructuring plans, these do not easily fit in with their alleged contractual nature.

In this regard, the Court of Justice has insisted on numerous occasions that in order for a given obligation to be contractual in nature and thus subject to Rome I Regulation, it must have been freely and voluntarily established between the parties, which is not the case for these cram-down mechanisms (see: *Hazte* Case C-26/91 of June 17, 1992; and *RÈunion* Case C-51/97 dated October 27, 1998).

Lugano Convention

Although the UK applied on 8 April 2020 to rejoin the Lugano Convention as an independent contracting state, such accession will not be possible until all Member States of the Lugano Convention consent, which has not yet happened. To date, only Switzerland has given its formal consent to the accession of the UK.

In any event, in the hypothetical case that all Member States of the Lugano Convention agree to the accession of the UK, it should be noted that bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of application of the Lugano Convention.

In this regard, diverging from the general line that English courts have maintained on not considering schemes of arrangement as insolvency proceedings, a recent English court decision in *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) has declared that a restructuring plan must be considered as an insolvency proceeding. Therefore, a restructuring plan would be excluded from the scope of application of the Lugano Convention, to which it will not be possible to resort in order to recognise a restructuring plan outside the UK.

Hague Convention of 2005

As in the case of the Lugano Convention, bankruptcy arrangements between the insolvent debtor and its creditors and similar matters are excluded from the scope of application of the Hague Convention, which is currently applicable to the UK.

For this reason, the same English court decision referred to above also stated that a restructuring plan cannot be recognised outside the UK under the Hague Convention of 2005 as it falls outside its scope of application due to the fact that it is considered an insolvency proceeding, which may not be the case of the scheme of arrangement depending on its content.

LILC

In the absence of the above alternatives, the only alternative that would remain in order to obtain the referred recognition is through the LILC, whose scope of application is defined in very broad terms. Therefore, it could be attempted to include schemes of arrangement and restructuring plans under its scope.

The recognition regime included in this regulation sets out the need for an exequatur procedure, in which recognition of a scheme of arrangement or the restructuring plan may be denied, among other reasons, if it refers to matters over which the Spanish courts have exclusive jurisdiction or if the relevant jurisdiction of the foreign court does not comply with a 'reasonable connection'.

In this respect, such connection will be considered reasonable when the international jurisdiction of the foreign court is based on criteria similar to those provided for in the Spanish legal system. Therefore, a scheme of arrangement or a restructuring plan would only be recognised in Spain under the LILC if the debtor has its centre of main interests, registered address or an establishment in the UK.

INSOL Europe/LexisNexis table of 'How EU Member States recognise insolvency/restructuring proceedings commenced in third country states'

A table produced by INSOL Europe in partnership with Lexis Nexis (also incorporating information from Lexology Getting The Deal Through) is now available here: INSOL Europe/LexisÆPSL Joint Project on 'How EU Member States recognise insolvency and restructuring proceedings of a third country': consolidated table

We look at how EU Member States would recognise insolvency or restructuring proceedings commenced in a third country, such as the UK (post-Brexit), the US, Japan, Australia or Canada. As always, you should contact local lawyers in the relevant jurisdiction to check the current measures in force.