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Restructuring & Insolvency 2020

A practical cross-border insight into restructuring and insolvency law

14th Edition

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1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

Historically, Spain has been a creditor-friendly jurisdiction, in the sense that the law – only in very limited terms – allowed for limitations of the creditors' rights or for any reductions of the debt burden imposed on the creditors. Under such scenario, creditors' rights are fully enforced, no matter the financial condition of the debtor, in terms that, in many cases, ended with the liquidation of the debtors' assets on a "first come, first served" basis. In practical terms, this does not mean that creditors end up recovering their credits in better terms than they would otherwise do, but the fact is that, at least from a legal perspective, the law has been always on the creditors' side.

This scenario has not substantially changed with the passing of the first insolvency legislation in 1922 nor with the enactment, in 2003, of Law 22/2003, as of 9 July, *on Insolvency* (hereinafter "Spanish Insolvency Act" or "SIA"). With the SIA, Spain gained a modern insolvency legal framework, although, so far, in general terms, neither debtors nor creditors have been able to use it in a manner that generates better ratios of credit recovery and fewer winding ups of debtors.

This has several reasons, one of them being the fact that a high number of debtors file for bankruptcy at a very late stage of financial stress, where even liquidity available to pay debts generated after the bankruptcy declaration may be scarce, something that makes recovery much more difficult than at an earlier stage. Nonetheless, other reasons thereto have to do with certain options followed by the legislator, based on the principle that *credits are to be honoured*, such as (i) the high majorities required for the approval of a creditors' agreement (article 124 SIA), (ii) the protections given to creditors with security on debtor's assets, which in practical terms leaves them almost immune to the effects of the bankruptcy proceedings (articles 56 (1) and 155 SIA), and (iii) the fact that senior credits (tax and social security contributions, among others) are excluded from the mandatory effects of a creditors' agreement (article 100 (2) SIA), which means that such credits will not be subject to the pardons and/or delays foreseen in such an agreement. And, last but not least, the technical option followed by the SIA to set forth a unique type of bankruptcy proceedings, though with an alternative development that avoids the winding up (the approval of a creditors' agreement), also plays a role in the bad fate of most of the bankruptcy proceedings held in Spain. Due to the mentioned unique type of bankruptcy proceedings, with long and complex steps, in cases where simple and rapid steps could have made a difference, debtors find themselves in a scenario where, much to the regret of some if not all stakeholders, winding up is the most common outcome.

Therefore, from a legal point of view, Spain is definitely more a creditor- than debtor-friendly jurisdiction. Nonetheless, in practical terms, the insolvency regime may lead to undesired outcomes for the creditors, as the winding up of bankrupt debtors, to which most are fated, tends to generate insufficient proceeds, resulting in most of the credits, notably non-senior ones, being left unpaid. This is actually the most common scenario in the case of small and mid-size companies in the services area, which tend to operate with few easily tradeable assets (real property, machinery, vehicles, etc.) and, as such, generate scarce proceeds at the time of being liquidated via bankruptcy proceedings.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

From a legal perspective, nothing prevents informal work-outs between creditors and debtors who are interested in negotiating an arrangement. If all creditors accept a certain work-out, this agreement would be fully enforceable and there would be no need for the debtor to initiate insolvency proceedings.

Nonetheless, in most situations, with a reasonable number of creditors, it is not easy for a debtor to bring in all its creditors. Therefore, in most cases, only some of the creditors would end up engaging in a work-out, and this is what makes them less used than they could be.

In practice, informal work outs are not used as much as they could be, because creditors (notably, banks and other providers of finance) tend to refuse to engage in these sort of arrangements, as they see them as bearing the risk of being repealed in case the debtor initiates bankruptcy proceedings or, if not for any other reason, because they tend to see them as an undue intent of the debtor to sweeten its obligations under the initial finance agreements, or, in the best case, as an attempt to treat the creditors that participate in the arrangement in terms less favourable than those applied to the holdout creditors. Informal refinancing tends to be accepted by banks when negotiated in advance by smarter debtors who, at the time of the negotiations, are still in good standing.

As for formal restructuring and insolvency proceedings, both are provided by the SIA. The SIA provides two types of formal restructuring: refinancing agreements, under article 71 *bis*, a provision added in 2013; and out-of-court payment arrangements, under articles 231 to 242, all added in 2013.

Pursuant to article 71 *bis* SIA, refinancing agreements are arrangements reached with some of the creditors before the debtor is declared bankrupt by a court, that cannot be turned down by this, in case the debtor is declared bankrupt at a later stage, if they (i) increase the amount of credit available to the debtor, if they refinance the debtor, or (ii) modify or extinguish any of the debtor's debts, (iii) provided that, in any case, such measures are part of a viability plan that allows the continuation of the debtor's activity in the short- and mid-term.

Regarding out-of-court payment arrangements, these can be used by companies only if they are already bankrupt and if their debts and assets do not amount to more than €5 million each (articles 232.2 and 190 SIA). These arrangements need to be managed by an official bankruptcy mediator, appointed either by a notary public or the Companies' Registrar (article 233 SIA). If successful, these arrangements end with an agreement that can include any of the following measures: (i) a delay of no more than 10 years; (ii) an acquaintance; (iii) an assignment to the creditors of the debtor's assets to cover its debts, either in full or partially; (iv) debt-equity swaps, where credits are converted into new equity to be issued by the debtor; or (v) the conversion of such credits in certain types of loans or financial instruments (callable preferred stock, convertible bonds, debt instruments where interest is paid in debtor's shares, junior debt, etc.).

Pursuant to article 5 *bis* SIA, the initiation of negotiations aimed at reaching a refinance agreement or an out-of-court payment arrangement give the debtor a four-month period, during which: (i) no creditor is allowed to request the courts to declare the bankruptcy of the debtor; and (ii) no enforcement of credits against assets used by the debtor in its activities can be initiated or, in case they had already been, will be subject to a stay. If the debtor could not reach, during the said four-month period, any such arrangements that excludes it from the obligation, foreseen in article 5 SIA, to request the court to initiate bankruptcy proceedings, then it is mandatory for the debtor to do so (article 235 SIA).

As for insolvency proceedings, as mentioned before, the SIA rules on a unique type of insolvency proceedings, covering all parts of the same, both in substantive and procedural terms, and ruling on the regime applicable to the receivers.

The use of the insolvency proceedings is much more widespread than that of the informal work-outs and formal restructuring, although not so much as one would think at first, notably in what concerns small and mid-size indebted companies.

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

As a rule, the directors of a company are not liable for the company's debts. Nonetheless, in case this is declared insolvent, within bankruptcy proceedings, they may be liable for the unpaid debts in case they took decisions that are considered, by the court that hears the case, as the cause of debtor's inability to pay its debts or a part thereof, insofar as those decisions lead such court to qualify the bankruptcy as *blameworthy* (article 165 (1), 1st, SIA).

Article 5 (1) SIA provides that the debtor has to file for a bankruptcy process in the two months following the time when it acquires knowledge that it cannot comply with its due obligations, *i.e.*, that its available liquidity is not enough to allow it to comply with its obligations (article 2 (2)).

In the case of companies, the obligation to file for a bankruptcy process lies on the directors of the bankrupt company. Failure by the debtor to comply with this obligation is a ground for the court to qualify the bankruptcy as *blameworthy* under the aforesaid article 165 (1) SIA. In such scenario, those persons (directors, shareholders, etc.) who failed to file for bankruptcy at the time foreseen by the SIA may be deemed personally liable for the unpayable debts of the bankrupt debtor.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?

The most important stakeholders are creditors (creditors in general, employees and public creditors) and employees and landlords, not as creditors but as parties interested in keeping their respective condition of suppliers of labour and offices/land to the debtor in the future.

Creditors play an important role in the sense that, when the debtor does not request its winding up, either at the time of filing for bankruptcy or at a later stage during the bankruptcy proceedings, the survival of the debtor, under a creditors' agreement, will basically depend on their will to approve such an agreement, which will mean, to some of the credits, pardons and/or delays.

When a court declares the bankruptcy of a debtor, this automatically imposes a moratorium or a stay on the enforcement of the creditors' rights. From that point on, their credits will be enforceable under the less favourable terms of a creditors' agreement, in case this comes to be approved, or within the liquidation process, in case it does not.

Therefore, new individual enforcements are never allowed during the bankruptcy proceedings (article 55 (1) SIA), save in case of enforcement of credits secured by assets, which are allowed, though in some cases with a moratorium of one year (article 56 SIA). As for stays on enforcement, pursuant to article 55 SIA, the fact that a debtor is declared bankrupt by a court necessarily determines such stay, though with several exceptions (enforcement of administrative rights and labour credits, provided that the seizure of any of the debtor's assets was ordered before the bankruptcy declaration and if those assets are not necessary for the debtor's business activity).

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

The SIA sets forth that certain transactions entered into by the debtor in the two years before the date when a company initiates an insolvency process can be challenged (article 71), either by the insolvency practitioner ("receiver") or, in case this fails to do it, by any of the creditors (article 72), whenever such transactions can be deemed *detrimental* to the debtor's assets.

Defiance of those transactions in court can lead the court to declare them void, in which case their effects will be repealed (article 73), *e.g.*, in case of a sale of a debtor's asset that is declared void by the court, such asset is to return to the debtor's balance sheet and any monies paid by the buyer are to be returned to the debtor.

Nonetheless, as mentioned before, the transactions entered into by the debtor with the aim of avoiding insolvency can be excluded from any challenges if they meet certain requirements, as is the case of the refinance agreements, carried out under article 71 *bis* SIA, as mentioned in the answer to question 1.2.

3.1 Is it possible to implement an informal work-out in your jurisdiction?

An informal workout between a debtor and its creditors is always possible under Spanish law, if the parties agree to engage in such an arrangement. Once the parties reach an agreement, unless it breaches any mandatory regulations, in principle, this would be enforceable between them.

However, if the debtor does not succeed in convincing all its creditors to accept the terms of the work-out and if the debtor, no matter the existence of such an arrangement, is still unable to comply with its obligations before any holdout creditors, any of the latter may request the court of commerce to declare the debtor in bankruptcy. And if bankruptcy is actually declared, the arrangements reached by the debtor with some of the creditors may be turned down by the court, on request of the receiver or a creditor.

Nonetheless, article 71 *bis* SIA, added in 2011 and modified in 2014, waives the possibility of those arrangements (reached with some of the creditors before the debtor is declared bankrupt by a court), being repealed by the court, if they increase credit available to the debtor or modify or extinguish debts of this, provided that certain other requirements are met and when those measures can be deemed part of a viability plan that forecasts the continuation of the debtor's activity in the short- and mid-term. Provided that some other requirements are also met, the arrangements can be ratified by the court, in which case, they could not be repealed at a later stage, either by the receiver or the creditors (fourth additional provision of the SIA).

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible? To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholders?

The SIA provides for a unique bankruptcy process ("process"), though with two different types, the main and the abridged (articles 183–191 *quater* SIA), whose use does not depend on who files for bankruptcy (the debtor or any of its creditors) but on the complexity of the case. In less complex cases: as a rule to be determined by the court in accordance with the guidelines set forth in article 190 (1) (fewer than 50 creditors, liabilities not exceeding 5 million euros and debtor's assets with an estimated value not exceeding that amount either), the procedure should follow the abridged rite. Nonetheless, the SIA foresees some scenarios where, waiving the regime set forth in the said article 190 (1), the court in charge of the case can opt for the abridged rite (article 190 (2)) and others where it is mandatory to follow such rite (article 190 (3)).

The process begins with a common phase, where the financial situation of the debtor is fully accessed and ends with two reports submitted by the receiver, where it discloses the debtor's assets and their debts at the time of the declaration of bankruptcy, with the grade assigned to them (*first order, senior, ordinary* and/or *junior*) by the receiver.

From this point on, the process can either proceed to the winding up of the debtor or to the negotiation of a creditors' agreement.

In the first case, the debtor will be extinguished, and its assets sold, with a view to use the proceeds of the sales to pay the creditors. This phase begins with the approval of a liquidation plan (where pre-packaged sales may definitely be carried out) and once this is approved, the receiver begins with the sale of the assets. Once the proceeds have been collected, the receiver starts paying the credits in accordance with their grade, from the highest to the lowest. In case the proceeds are not sufficient to pay all credits qualified with the same grade, the receiver will pay them in proportion.

Creditors have a say in the outcome of the process, in the sense that, if the majority of the ordinary creditors, as foreseen in article 124 SIA, does not accept the terms of a creditors' agreement submitted either by some of the creditors or by the debtor, the company will automatically be wound up. Therefore, creditors actually have the power to block any restructuring of the credits and the survival of the debtor.

The debtor also has a say in the process in the sense that it can either request the court to wind it up (article 142 (1) SIA) or submit a draft of a creditors' agreement (article 124 (1) and (2) SIA). However, it cannot avoid the winding up if it fails to convince the required majority of creditors to accept the creditors' agreement submitted to them.

As the decisions to be taken by the debtor under the SIA as a rule, lie in the hands of the debtor's directors or former directors, the debtor's shareholders tend to have very limited input in the process.

The only area in which shareholders can play a significant role is in the case of debt-for-equity swaps, as the issue of new equity is a matter reserved for the shareholders' meeting (article 160 of the Spanish Companies Act). Nonetheless, if the shareholders' meeting refuses to authorise an increase of the share capital within a debt-for-equity swap, this may lead the bankruptcy to be declared by the court as *blameworthy*, and the shareholders voting against the said share capital increase will be deemed liable for the unpaid credits (article 165 (2) SIA).

3.3 What are the criteria for entry into each restructuring procedure?

In its initial version, the SIA foresaw a unique bankruptcy type for the court process. Nonetheless, in 2013, Law 14/2013 added a chapter to the SIA (Title X, with articles 231 to 242), which provides out-of-court formal work-out proceedings, to be managed by a bankruptcy mediator.

Companies can file for this process only in case they (i) meet the requirements foreseen in article 5 (1), in relation to (article 2 (2), and (ii) would qualify for an abridged court process (article 231 (2)), two things that are not required in the case of physical persons. Therefore, in the case of companies, the criteria foreseen by the SIA for court and out-of-court bankruptcy proceedings are the same, *i.e.* a company can initiate these work-out proceedings only if it is already at a stage where it cannot comply with its obligations, not at an earlier stage where it may have reasons to think that it will fail to comply with those obligations in the future.

3.4 Who manages each process? Is there any court involvement?

Bankruptcies declared by a court are managed by the receivers appointed thereto by the court. Receivers are in charge of identifying the assets and liabilities of the debtor, managing the company in certain cases or authorising the decisions taken by the directors in other cases, preparing reports for the court, requesting the court to declare void certain transactions on the ground of damaging the creditors, liquidating the company, requesting the court to declare the bankruptcy as *blameworthy*, etc.

Some of the decisions taken by the receiver can be defied by the creditors or even the debtor before the court of commerce that is hearing the case. The court will rule on the dispute after hearing the other party or parties.

Nonetheless, the most important decisions in the process are up to the court hearing the case, notably the decisions to initiate (articles 14–15 SIA) and terminate the process (article 176 SIA), approve a creditors' agreement (article 127 SIA), wind up the debtor (articles 142 and 143 SIA) and declare the bankruptcy as *fortuitous* or *blameworthy* (article 172 SIA).

Out-of-court payment arrangements are negotiated by a bankruptcy mediator, whose functions cease once they have been approved by the shareholders who accepted to engage in the negotiation. These arrangements in no way require court involvement, save in case one creditor decides to challenge them, in which case it would be up to the court to rule on the dispute (article 239 SIA).

3.5 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

The fact that a debtor is declared bankrupt does not in itself lead to the termination of the contracts in force at the time of the declaration of bankruptcy (article 61 (2) SIA). Any termination or set-off provisions to be applied in case of bankruptcy of one of the parties to an agreement would breach the provision set forth in article 61 (2) SIA and, as such, would be deemed void.

Nonetheless, the receiver, in case the directors of the debtor have been removed, or otherwise the debtor, with the receiver's approval, can request the court to order termination of the agreements if they deem this convenient to the interest of the process. The court will hear the other party to the agreements and in case the parties do not reach a termination agreement, uphold the claim in case it also considers that termination is convenient for the process. This decision is a court ruling just like any other and should be enforceable in the very same terms.

The other party to an agreement in force at the time the debtor is declared bankrupt cannot terminate that agreement on the ground of such declaration. Although the credits generated to such party after the declaration of bankruptcy will be treated as first order credits, *i.e.*, credits excluded from the bankruptcy proceedings and that are to be paid once they become due ("first grade credits"). The risk of unsettlement of this type of credit is small, although in no way non-existent.

3.6 How is each restructuring process funded? Is any protection given to rescue financing?

The funding of any restructuring process depends on the will of the creditors or any third parties to provide funds that allow the debtor to leave the state of insolvency. Funding can be either in the form of a pardon, a delay, a debt-equity swap or fresh credits.

Any fresh credits granted after the declaration of bankruptcy will always be qualified as *first grade*, and as such payable before any other with different grades. Regarding credits granted before such declaration, the SIA sets forth that those granted under the regime foreseen in article 71 *bis* are graded as *senior*.

Rescue finance can also be granted as a condition for the creditors to approve a creditors' agreement. It can be provided either by a third party (a shareholder, existing or new, a bank, etc.) or a creditor. In such scenario, the protection granted to the new funding will be agreed between the rescuer and the creditors, provided that it does not breach the rules on creditors' agreements foreseen by the SIA.

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The SIA provides a unique insolvency procedure, during the course of which the court, under certain circumstances, can order the winding up of the debtor. When, in the end of the so-called "common phase" of this process, the court rules in these terms, then the winding up phase is initiated.

Basically, the winding up of a company consists of two steps: first, when the court orders the winding up, at which point the company immediately ceases to be a legal person with organs and assets and liabilities; and secondly, consists of a liquidation process, where the remaining assets that once belonged to the debtor are sold and the proceeds therefrom used to pay its debts or, in most of the cases, a part thereof.

The liquidation process shall follow the mandatory rules foreseen thereto in the SIA (articles 142–162) and those included in the liquidation plan to be approved by the court under article 148 of this piece of legislation. As a rule, the assets need to be sold in auctions organised by the court, though, in some cases, a direct sale to a certain buyer can be authorised by the court if certain requirements thereto are met. In addition, though the rule is that each asset shall be sold in an independent manner, the SIA provides a subsidiary rule for the sale of business units, under which terms this type of unit should preferably be sold as a whole.

4.2 On what grounds can a company be placed into each winding up procedure?

A bankrupt company can be placed into a winding up process at its own request, at any time during the bankruptcy proceedings (article 142 SIA). In addition, if the creditors do not agree on a creditors' agreement during these proceedings, the same will necessarily end with the winding up of the company (article 143 SIA).

4.3 Who manages each winding up process? Is there any court involvement?

The winding up process consists of two subphases, the first, where a decision to wind up the debtor is taken by the court, and the second, the so-called "liquidation", where the debtor's assets are sold and the proceeds are used to pay the creditors. Whereas the first subphase always lies in the hands of the court upon a request of the debtor or in case of failure to approve a creditors' agreement, the second is managed by the receiver, previously appointed by the court, under the supervision of the court. The receiver will liquidate the assets and pay the creditors in accordance with the rules provided by the SIA (articles 148–162).

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

The ability of the creditors and/or shareholders to influence the winding up process is null. Once the court orders the winding up of the debtor and approves the liquidation plan, all that is left to be done is the sale of the debtor's assets in accordance with such plan and the use of the proceeds to pay the creditors in accordance with each credit's grade. Though the legality of each decision taken by the receiver at this stage can still be defied in court, what is at stake is no longer how the process should evolve in the future but only whether the measures adopted by the receiver to liquidate the company comply with the laws and the liquidation plan.

The rights of the creditors with security on a certain debtor's assets can be enforced at any stage during the process in separate enforcement proceedings or within the process. Their rights will in no way be affected by the winding up, as the proceeds of the sale of the secured asset will be assigned to the secured credit and only the remaining amount, if any, after this settlement, will be available to pay any other credits (article 155 SIA).

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

The decision in itself to wind up a company does not automatically determine the termination of all agreements, although, at the end of the liquidation process, all agreements necessarily terminate, unless an assignment of the same could be worked out before that point.

Nonetheless, while the agreement has not been validly terminated by either of the parties (e.g., on the ground of a breach of its obligations by the other party), it remains in force during the winding up procedure, and this, in itself, is no ground for termination by the other party.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

The ranking of credits follows the rules set forth in the SIA (articles 84 and 89 to 93).

The main distinction is between the credits out of the bankruptcy proceedings ("outs") and those in these proceedings ("ins").

The *outs* are credits of first order, in the sense that they are payable once due and in any case before the *ins* (article 154 (1) SIA). With a few exceptions (certain labour credits, the cost incurred by the debtor with the declaration of bankruptcy claim, etc.), almost all of the *outs* are credits generated after the declaration of bankruptcy (article 84 SIA), and the reason for their priority is the intent to avoid the debtor being banished from engaging in any transaction after its bankruptcy declaration, as the risk of unsettlement for the other party (provider, seller, etc.) would be too high.

As for the *ins*, all credits qualified in these terms are credits due, although unsettled, at the time of the bankruptcy declaration. These credits, if admitted by the receiver in the listing of such credits to be approved in the first phase of the process, will be paid after the *outs*, with the remaining liquidity. In the said listing, the receiver will assign one of the following alternative grades to each of the admitted credits: *senior* (with or without security over the debtor's assets); *ordinary*; or *junior*.

Ordinary credits are *ins* that, pursuant to the SIA, should not be qualified either as *senior* or *junior* (article 89 (3)).

Senior credits will be paid after the *outs* and no ordinary credits are payable until all seniors have been paid in full. Nonetheless, the proceeds from the senior secured credits will be used to pay the creditors secured by them and only in case the senior secured credits have been paid will the remaining proceeds be used to pay non-secured senior credits.

Once all senior credits have been paid in full and there is still liquidity outstanding, this will be used to pay the ordinary ones. And if such liquidity is enough to pay all the ordinary credits and there is still liquidity outstanding, then payment of the juniors will begin.

As mentioned before, if the proceeds available are not sufficient to pay all credits qualified with the same grade, they will be paid in proportion.

4.7 Is it possible for the company to be revived in the future?

Under the Spanish Companies' Act, a decision to wind up a non-bankrupt company would not prevent it from being revived if the shareholders agree (article 370 (1)), although such decision cannot be taken after the termination of the liquidation process. If it were taken thereafter, instead of a revival, the shareholders would have to set up a new company, foreseeably with the same name, though with a different tax number and fully independent, in terms of assets and liabilities, from the wound up company.

Nonetheless, in case of a company engaged in insolvency proceedings, after the court has decided to wind it up, its revival would be possible only in case those proceedings could be terminated on the ground of the full payment of its debts (article 176 (1), 4th, SIA). In such a scenario, though the SIA does not expressly provide so, there is no legal reason why the company could not be revived, and this is the logical outcome of the company if it succeeds in paying all its debts.

5.1 What are the tax risks which might apply to a restructuring or insolvency procedure?

Tax creditors share the risks borne by any creditors, in the sense that, if the debtors' assets are not enough to cover all their liabilities, creditors may face losses.

However, part of the tax credits is graded as senior, something that increases their chances of being paid, if not in full at least in part. This is on the ground that they will be paid before any lower graded credits, but also because, as mentioned before, in case of approval of a creditors' agreement, senior credits are excluded from it, which is something that will eradicate them from any pardon or delay.

From the debtor's perspective, a restructuring or insolvency procedure does not lead to incurring specific tax risks. However, in case the bankruptcy proceedings are qualified as *blameworthy*, the unpaid tax credits will stand, just like any other credits, at the time of determining the bulk of the unpayable credits of the debtor for which certain persons provided by the SIA may be deemed personally liable.

In addition to the above, it is worth bearing in mind that, in case of pardons granted by the creditors in a creditors' agreement, this would generate capital gains in the debtor, which would be taxed in accordance with the corporate tax regulations (article 15 of Law 27/2014, on *Corporate Tax*). Against this, debt-for-equity swaps arranged between the debtor and any of its creditors, in principle, would not have any tax effects, at least in terms of corporate tax (article 17 (2) of the said Law 27/2014, as interpreted by the Tax General Directorate, in its binding resolution V3463-16, passed on 20 July 2016).

6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

A distinction should be made between employees' credits and jobs.

As for employees' credits, the SIA distinguishes between credits for salaries earned in the last 30 days of work before the initiation of the debtor's bankruptcy process and up to the double of the minimum salary, which are subject to the regime provided in article 84 SIA, and any other labour credits. The regime provided in article 84 is the most protective for the creditors, in the sense that it allows payment of the credits to which it applies – the *outs* mentioned in the answer to question 4.6 – before any other credits. Credits covered by the said article 84 are payable once they become due and the said labour credits, provided by its section (1) are so on spot.

Concerning the remaining labour credits, the SIA distinguishes between certain labour credits (salaries and indemnities for labour accidents and/or illnesses), which are deemed senior under article 91, and the remaining ones, which may be ordinary (article 89 (5)) or even junior (article 92).

In terms of jobs, the initiation of a bankruptcy process does not in itself determine the termination of any labour contracts or a change in the terms of these. During the bankruptcy process, those agreements can be either terminated or modified by the debtor's appointed receiver, under the rules foreseen in the labour legislation with the specialties set forth in article 64 SIA. Nonetheless, with some exceptions, the most important labour disputes or issues arising (collective dismissals, amendments or suspension of labour contracts) during the bankruptcy process will not be heard by a labour court but by the court of commerce where such process is pending (article 8 SIA). Any dismissals, amendment or suspension of labour contracts in a number below the figure foreseen in the Spanish Labour Act above which they would be deemed *collective,* would be heard by a labour court.

Whereas, as we have said, the initiation of a bankruptcy process does not in itself determine the termination of any labour contracts, the initiation of a winding up process necessarily leads to the termination of all labour agreements at the end of the liquidation or even before that, save in case the company is revived in terms mentioned in the answer to question 4.7 or in case of a sale of a business unit of the debtor, as provided in labour legislation (article 44 of the Spanish Labour Act). In this last case, if a business unit of the debtor is sold to a third party, the debtor's employees that worked in that unit are automatically assigned to the acquirer and therefore their contracts are not terminated.

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

Article 10 SIA distinguishes between *main* and *territorial* insolvency proceedings, the former being any proceedings initiated in the country where the debtor has its registered office and/or its main place of business, in which case they cover its worldwide assets, and the latter being any proceedings that pertain only to assets owned by the debtor in the territory where such proceedings are pending.

Under the said rules, insolvency proceedings can be initiated in Spain in relation to a company incorporated elsewhere, provided that such company has its main place of business in Spain, in which case the proceedings will be deemed *main*, or, in case it does not, provided that it has assets in this country, in which case such proceedings will be *territorial.*

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

As a rule, insolvency processes that have commenced elsewhere will not be recognised in Spain until the corresponding rulings given in a foreign country obtain *exequatur* when they meet the requirements thereto (article 220 SIA). Nonetheless, in the case of processes initiated in another EU Member State, they would be fully recognised in Spain without any *exequatur*, pursuant to the Regulation (EU) 2015/848, of the European Parliament and the Council, of 20 May 2015, *on insolvency proceedings*.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

Pursuant to EU regulation 2015/848, a company incorporated in Spain can initiate proceedings in other EU jurisdictions, if it has its main place of business in such jurisdiction, in which case those proceedings should be *main* ones, or if it has assets in such jurisdiction, in which case they should be *territorial*. Nonetheless, so far, it is not common practice for Spanish companies to file for bankruptcy in other EU Member States.

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

The SIA provides that any members of a group of companies can file for bankruptcy in a single petition and creditors are also allowed to request the declaration of bankruptcy in the same proceedings of any such members (article 25 SIA).

In addition, during a bankruptcy process, either the debtor or the receiver can also request two or more pending processes be merged into a single one, if those processes pertain to companies that belong to a group (article 25 *bis* SIA).

Regardless, both in case of joint or merged processes under articles 25 and 25 *bis* SIA, respectively, as a rule, neither the assets nor the debts of each of the bankrupt companies can be merged (article 25 *ter* SIA); the only effect of the joint-handling of the cases being that they will be handled in a coordinated manner.

9.1 Are there any other governmental proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

For the time being, no reform of the Spanish corporate rescue and insolvency regime has been announced. Nonetheless, the EU Directive (EU) 2019/1023 of 20 June 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 – the now in-force Directive on restructuring and insolvency – should be transposed by all EU Member States no later than 17 July 2021. Therefore, although the Government has not yet disclosed the draft piece of legislation that needs to be passed for the transposition of the said Directive; this will foreseeably happen in 2020 or in the early months of 2021.

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Established in 2001, SCA LEGAL is an independent Spanish business law firm with offices in Madrid and representative offices in São Paulo (Brazil) and Buenos Aires (Argentina).

The firm counts on a team of lawyers used to work on international transactions involving different sets of laws, flexibility to adapt to clients' needs, a reliable work method, underpinned by a solid body of experience, and a cost/benefit approach.

In the beginning, the firm specialised in commercial and corporate law. Now that its practice has expanded to other areas, its commercial and corporate practice is still one of the most thriving. And, within this, insolvency has been one of most thriving subareas, as the firm has advised, on many occasions, (i) creditors of bankrupt companies, (ii) bankrupt companies, and (iii) directors of bankrupt companies in liability claims filed against them.

In addition, one of the firm's partners has been appointed as a receiver in several bankruptcy cases heard by some of Madrid's Courts of Commerce.

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