

**The Reform of the Spanish Insolvency Law:
Proposal No 101-1 of 23 July 2002**

International Insolvency Law
Prof. Dr. Bob Wessels

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Blanca Manzano López
blancamanzano@hotmail.com
Juliana Reyes Berón
julireyes50@hotmail.com

TABLE OF CONTENTS

- **Introduction**

- **The Proposal for the Reform of the Spanish Insolvency Law**

- **Contrasting the Proposal for a New Spanish Insolvency Law with the EC Regulation No 1346/2000 on Insolvency Proceedings**

- **Contrasting the Proposal for a New Spanish Insolvency Law with the UNCITRAL Model Law**

- **Conclusion**

Introduction

On 23 July 2002, the Spanish parliament issued a proposal for the reform of the Spanish insolvency law. The proposal for the new insolvency law No 101-1 (“the Proposal”) seeks to introduce significant changes of the Spanish insolvency legislation, which is currently composed of rules dispersed amongst many and somewhat archaic laws, with a view to adapting this law to the modern economic reality.

This paper will focus on the analysis of the main provisions of the Spanish proposal for a new insolvency law, especially, those that aim at governing insolvency proceedings with a cross-border element. While analysing these provisions, they shall be contrasted with those laid down by two international instruments on the matter: (i) the EC Regulation No 1346/2000 on Insolvency Proceedings (“the EC Regulation”) and (ii) the UNCITRAL Model Law. To conclude with, the likely improvements of the newly proposed system in dealing with cross-border insolvency proceedings shall be assessed.

I. The Reform of the Spanish Insolvency Legislation

The reform of the Spanish insolvency legislation has been one of the oldest unresolved items on the legislative agenda. The current Spanish legislation on the matter is composed of several rules dispersed among different laws with an absolute lack of coherence. The substantive rules on insolvency have been traditionally structured on a dual basis: the Civil and the Commercial Codes. There is also a distinct regulation with regard to the procedural aspects in a situation of insolvency in the Spanish Law on Civil Procedure. Another factor that adds to the diversity of rules is the distinction between the bankruptcy (“quiebra”) and the creditors’ meeting (“concurso de acreedores”) for merchants’ and non-merchants’ insolvency, respectively. There exist also distinct proceedings, with a preventive or preliminary character, such as the suspension of payments (“suspension de pagos”), the discharge of debts (“quita”) and the stay of payments (“espera”), which in some cases do not have clearly defined boundaries, with rules that tend to overlap and to create confusion. In this regard, the Law on Suspension of Payments was passed on 26 July 1922 for a specific case. The lack of comprehensive reforms thereafter has made of a law intended to serve as a provisional law the central pillar of the Spanish insolvency system.

The objective of the reform is not to break with the long Spanish tradition in the insolvency law field but rather to proceed to a profound adaptation of the system by taking into account the doctrinal national contributions and, especially, the recent supranational instruments created for the unification and harmonisation of the insolvency law¹. The main elements of the reform can be summarised as follows:

- (i) Simultaneous regulation of substantive and procedural matters;
- (ii) Unification of the rules for merchants and non-merchants, as a result of the elimination of the punitive character with regard to the merchants’ insolvency;

¹ Preamble to the Proposal of Spanish Insolvency Law No 101-1. The text in Spanish is available at www.congress.es (last visited on 18 April 2003).

- (iii) Unity of proceedings under the name of “concurso”; the main test is an objective one: the insolvency of the debtor who cannot honour his debts;
- (iv) Simplification of the organic structure of the insolvency administrators: the judge and the judicial administration, who are granted greater competences and a higher degree of discretion;
- (v) Creation of specialised commercial courts;
- (vi) Favourable treatment towards measures aimed at corporate rescue, regarding liquidation as the last resort possible; there is bigger room to the parties’ freedom to contract in order to reach an agreement with the debtor that favours the continuation of businesses;
- (vii) Simplified and flexible procedure; and
- (viii) Introduction of insolvency with a cross-border element.

The Preamble to the Proposal paragraph IX, explains the rationale for introducing new rules with regard to cross-border insolvency proceedings. The current legislation does not provide adequate solutions to the modern global economy, in which the cross-border element has become a common feature. Therefore, the Proposal sets forth new rules with regard to jurisdictional matters and private international law (or conflict of laws). The relationship amongst main and territorial proceedings, their respective effects, the recognition in Spain of proceedings opened in another State as well as of the liquidator or representatives are regulated in the Proposal; all this with a view to facilitating an efficient coordination which results in turn, in a greater deal of legal certainty and economic efficiency. These are the core elements of the Proposal, which shall be analysed, in greater detail in the following sections.

The Proposal takes into account the provisions of the EC Regulation No 1346/2000 on insolvency proceedings, as to simplify the application of both sets of rules where dealing with intra-community insolvency proceedings. However, as we shall see, the system introduced by the Proposal is not limited in scope to proceedings opened within the EU, nor are the effects of the proceedings: The proposed system shall apply to insolvency proceedings outwit the EU, subject to reciprocity. The Proposal is also inspired in the UNCITRAL Model Law, which supposes another step forward as to the harmonisation of the rules applicable to international insolvency situations.

II. Contrasting the Proposal for a New Spanish Insolvency Law with the European Regulation on Insolvency Proceedings

The Proposal provides for universal jurisdiction of the Spanish courts where the debtor’s centre of main interests (the COMI approach) is situated in Spanish territory. The proceedings opened in the State in which the COMI is situated shall have the character of main insolvency proceedings. However, territorial proceedings may be opened in those States in which the debtor possesses an establishment (art. 9 Proposal in line with 3 EC Regulation).

Title IX of the new Spanish insolvency law contains specific provisions with regard to insolvency proceedings with a cross-border element under the heading “Private International Law Rules”. It is divided in four chapters, dealing respectively with the following matters: (i) Chapter I (art. 201) on “Relationships amongst legal systems”, (ii) Chapter II (art. 202-221) on “Applicable Law”—subdivided in three sections, Section 1 on

“Main Proceedings”, Section 2 on “Secondary Proceedings” and Section 3 on “Common Rules to Both Types of Proceedings”–, (iii) Chapter III (art. 222-228) on “Recognition of Foreign Insolvency Proceedings” and (iv) Chapter IV (art. 229-232) on “Coordination of Parallel Insolvency Proceedings”.

II.1 Relationship Amongst Legal Orders

Art. 201 provides for the application of the Spanish Law to insolvency proceedings without excluding the application of the EC Regulation 1346/2000 and other Community or conventional rules on the matter. There is one exception to this general rule: where there is a lack of reciprocity or where the competent authorities of a foreign State systematically infringe their duty of cooperation, Chapters III and IV on recognition of foreign proceedings and coordination of parallel proceedings, respectively, will not apply to the proceedings opened in those States.

II.2 Law Applicable to Main Proceedings

As a general rule, the Spanish law shall govern the opening and effects of the insolvency proceedings (“concurso”) opened in Spain, as well as their conduct and their closure (art. 202 Proposal in line with art. 4 of the EC Regulation). However, there are a series of exceptions to the general rule: The effects of the insolvency on (i) the rights in rem and (ii) reservation of title measures over assets located in another state at the time of the opening of proceedings shall be solely governed by the *lex rei sitae* (art. 203(1) Proposal in line with art. 5 and 7 of the EC Regulation). In a similar fashion, art. 207 (in line with art. 6 EC Regulation) restricts the effect of the opening of the proceedings on the creditor’s right to demand the set-off of their claims where permitted under the law applicable to the insolvent debtor’s claim. The exercise of the above-mentioned rights shall not preclude the corresponding actions for reintegration when appropriate.

The effects of insolvency proceedings on (1) rights of the debtor in immovable property, (2) the rights and obligations of the parties to a payment or settlement system or to a financial market, (3) employment contracts, (4) contracts conferring a right to acquire or make use of immovable property and (5) lawsuits pending shall be governed solely by the law of the State in which the property is situated, by the law applicable to the system or market, by the law applicable to the contracts or by the law of the State in which the lawsuit is pending (arts 204 et seq. Proposal in line with arts 9 et seq. EC Regulation).

The validity of an act of disposal by the debtor, for consideration, of immovable property shall also be governed by the law of the State in which the immovable asset is situated or under the authority of which the register is kept. The rationale for this article is similar as that for art. 14 of EC Regulation, namely, the protection of third-party purchasers.

The exercise of an action for reintegration shall not be carried out where the person who benefited from a detrimental act provides proof that the act is subject to the law of another State that does not allow any means of challenging it (art. 210 Proposal in line with art. 13 EC Regulation).

II.3 Law Applicable to Secondary Proceedings

The opening of foreign main proceedings shall permit the opening of territorial secondary proceedings in Spain without the need to examine the debtor’s insolvency (art. 213 Proposal in line with art. 27 EC Regulation). Any person empowered to request the opening of main insolvency proceedings, namely, the creditors and the debtor himself,

and the liquidator in the main proceedings are empowered to request the opening of such proceedings (art. 214 Proposal in line with art. 29 EC Regulation).

The restrictions of the creditors' rights arising from an agreement reached in the territorial proceedings, such as a discharge of debt or stay of payment shall only have effects in respect of the debtor's assets not covered by those proceedings with the consent of all the interested creditors (art. 215 Proposal in line with art. 34(2) of EC Regulation).

II.4 Common Rules to Main and Secondary Proceedings

As soon as insolvency proceedings are opened, the judicial authorities shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in another State (art. 216(1) Proposal in line with art. 40(1) EC Regulation). The information shall include the identification of the proceedings, date of the opening, main or territorial nature of the proceedings, the debtor's personal circumstances, the extent of the debtor's divestment, the authority empowered to accept the lodgement of claims, including those creditors having a right in rem, the time limits and the postal address of the Court (art. 216(2) Proposal in line with art. 40(2) EC Regulation). It shall furthermore be provided in writing by individual notice (art. 216(3) Proposal in line with art. 40(2) EC Regulation).

The judge may, on its own motion or per the request of an interested party, request that the basic content of the opening judgment be published and/or registered in any State in accordance with the publication and/or registration procedures provided for in that State (art. 217 Proposal in line with arts and 21-22 EC Regulation).

The person honouring the debtor in another State after the opening of the proceedings shall be discharged of his obligation if he was unaware of the opening of the proceedings. It shall be presumed to have been unaware where the obligation was honoured before its publication (art. 218 Proposal in line with art. 24 EC Regulation).

Any creditor may lodge his claim in the Spanish main or territorial proceedings, despite having also lodged his claim in foreign insolvency proceedings, including the tax and social security authorities, which shall be admitted as ordinary creditors (art. 219 Proposal in line with art. 39 EC Regulation).

The information to the creditors shall be provided in Spanish but the form used shall bear the heading "Invitation to lodge a claim. Time limits to be observed", not only in Spanish but also in English and French. Any creditor who has his habitual residence, domicile or registered office in another State shall lodge his claims in Spanish or in the official language of the corresponding autonomous region. However, where he lodges his claims in another language, he may be required to provide a official translation into Spanish (art. 221 Proposal in line with art. 42 EC Regulation).

A creditor who, after the opening of main proceedings in Spain, obtains total or partial satisfaction of his claim on the assets belonging to the debtor situated in another State, in particular, through enforcement, shall return what he has obtained to the estate of the insolvency. However, the rights in rem and reservation of title measures shall be observed (art. 220(1) Proposal in line with art. 20(1) EC Regulation). Where a creditor has obtained partial satisfaction of his claim in the course of foreign insolvency proceedings, may only share in distributions made in the Spanish proceedings where the rest of creditors of the

same ranking and category in these proceedings have obtained an equivalent dividend (art. 220(2) and 231 Proposal in line with art. 20(2) EC Regulation). Where the State in which the assets are situated does not recognise the insolvency proceedings opened in Spain, the judge may authorise the individual execution subject to the above-described rule of imputation.

II.5 Recognition of Foreign Insolvency Proceedings

The opening of foreign insolvency proceedings shall be recognised in Spain through the *exequatur*. Five requirements are to be met according to art. 222(1) Proposal:

- 1) The judgment shall refer to collective insolvency proceedings, which entail the total or partial divestment of the debtor and the appointment of a liquidator in order to proceed to the reorganisation or winding-up (in line with art. 1(1) EC Regulation);
- 2) The judgment shall be final according to the law of the State of the opening of proceedings;
- 3) The jurisdiction of the court or any other competent body shall be based on art. 9(1) or 9(3), which find their equivalent provisions in arts 3(1) and 3(2) EC Regulation, respectively;
- 4) The judgment may not have been taken without the due guarantees for the debtor; and
- 5) The judgement may not be contrary to the Spanish public policy (in line with art. 26 EC Regulation).

The foreign insolvency proceedings shall be recognised as (i) main insolvency proceedings where the centre of the debtor's main interests is situated in that State (in line with art. 3(1) EC Regulation) or as (ii) secondary territorial proceedings where the debtor possesses an establishment (in line with art. 3(2) EC Regulation) or any other reasonable connexion, such as the existence of goods affected to an economic activity. The recognition of foreign main insolvency proceedings shall not prevent the opening of territorial insolvency proceedings in Spain.

The appointment of the liquidator the foreign insolvency proceedings shall be evidenced by a certified copy of the decision appointing him or by a certificate issued by the competent court (art. 223 Proposal in line with art. 19 EC Regulation). As soon as the liquidator's appointment is recognised in Spain, he shall proceed to publish the information in the relevant bulletins and apply for its registration with the corresponding public register (mandatory publication and registration in line with art. 21(2) and 22(2) EC Regulation). The costs of publication and registration shall be regarded as costs of the main proceedings (art. 223 Proposal in line with art. 23 EC Regulation).

Once the foreign main proceedings are recognised, the liquidator may exercise all the powers conferred on him by the law of the State of the opening of the proceedings (art. 223 Proposal in line with art. 18 EC Regulation) as long as they are not incompatible with the effects of the opening of secondary proceedings in Spain, the adoption of preservation measures or with the Spanish public policy. He must also comply with the Spanish law, in particular with the rules for the realisation of assets.

As long as the opening of the main proceedings have been recognised by means of the *exequatur*, other judgments handed down in these proceedings based on insolvency law

shall be recognised without further formalities. Foreign insolvency proceedings shall have the effects provided for in the law of the State of the opening. Judgments providing for enforcement shall be subject to the exequatur (art. 226 Proposal). The same shall apply to judgments ordering preventive measures (art. 228 Proposal).

The requirement of exequatur shall be interpreted as necessary where the judgments have been handed down by courts of States outwit the EU. In the case of Member States, the principle of primacy of community law applies. Thus, the Regulation shall prevail over the national provisions. Automatic recognition without exequatur shall be the rule for intra-Community proceedings.

II.6 Coordination amongst Parallel Insolvency Proceedings

The core issue is the duty of cooperation (art. 229 Proposal in line with art. 31 EC Regulation). If there is no reciprocity with regard to this matter, the Spanish authorities shall be freed from their duty to cooperate. In particular, there must be (i) an exchange of any information that may be relevant to the other proceedings, subject to the rules on data protection and the duty of secrecy, (ii) coordination in the administration of the debtor's assets and activities, and (iii) approval and application by courts of agreements with regard to the coordination of the proceedings. The foreign liquidator in the main proceedings shall be entitled to put forward proposals on the liquidation or any form of realisation of the creditors' rights. He may also lodge in the Spanish proceedings the claims he has already lodged in the foreign proceedings. He shall be empowered to participate in the Spanish proceedings (230 Proposal in line with art. 32 EC Regulation). The remaining assets in secondary proceedings shall be transferred to the main proceedings (art. 232 Proposal in line with art. 35 EC Regulation).

All the above provisions shall apply only where the foreign courts recognise the authority of the Spanish courts and they comply with their obligation to cooperate. If there is no reciprocity, the Spanish courts and liquidators shall be freed from these obligations. The reciprocity condition shall only apply to insolvency proceedings outwit the EU, since the EC Regulation and the principle of mutual trust prevail over domestic rules within the EU².

II.7 Proposal v. EC Regulation

The core issue of the Proposal is that regarding its territorial application. The proposal follows the general lines of the EC Regulation on insolvency proceedings. However, while the EC Regulation only applies where the debtor's centre of main activities is located within the EU³, the proposal extends its scope of application. Not only does the proposal intend to have an intra-Community application but it shall also govern the relationships with non-EU states based on reciprocity. For the EU countries the regulation shall prevail. For States outwit the EU the Spanish law will apply subject to reciprocity. It has been said that "in the absence of reciprocity, only international agreements may achieve co-operation⁴". Since there is no such a global agreement, reciprocity seems the better solution for the time being.

² With the exception of Denmark which opted out.

³ Recital 14 to the Regulation.

⁴ Paul J. Omar, *International Insolvency Review* 2002, pp. 173-200.

III. Contrasting the Proposal for a New Spanish Insolvency Law with the UNCITRAL Model Law

The UNCITRAL Model Law on cross-border insolvency is a set of rules that are meant to guide States in cooperation and coordination between them where there is more than one proceeding concerning the same debtor. The issues related in the Model Law are, among others: to achieve cooperation between courts of different states, a greater legal certainty for investment and trade, to have an effective cross-border insolvency administrator to protect the interest of all those interested and most of all the creditors and to protect and maximize the debtor's assets.

Enacting states are not obliged to implement article by article. States have a wide discretion to modify or avoid certain provisions even though it is highly recommended that States do not modify much to try to achieve a high standard of harmonization between them.

III.1 Purpose and Origin of the UNCITRAL Model Law and the Proposal for a New Spanish Insolvency law 101-1

To be able to compare the UNCITRAL Model Law on cross-border insolvency with the new Proposal it is important to mention briefly the main objectives of the UNCITRAL Model Law and the Proposal.

The UNCITRAL Model Law was designed to assist States to equip their existing insolvency laws with a modern, harmonized and fair framework to address instances of cross-border insolvency more effectively. In no case does the Model Law intend the unification of insolvency law, since it respects other principles and rules pursued by each legislation. It is for this reason that the enacting State may modify or leave out some of its provisions. The UNCITRAL Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State⁵. The core element of the UNCITRAL Model Law is the cross-border cooperation between states. This objective is to enable courts and insolvency administrators from two or more countries to be efficient and achieve optimal results⁶.

We have seen that the Preamble to the Proposal for a new Spanish Insolvency Law explains the reasons for implementing a new law. From this introduction to the new Proposal we can perceive that the Spanish Parliament intends to implement a better legislation with more stable principles and securities. The main objectives of the Proposal are among others to create a principle that gives creditors of the same class equal treatment, eliminating action of bad faith or decisions with unfair solutions created by the abusive position of the courts⁷. The current legislation on the matter has not proven capable of catching bad actions and practices such as fraudulent dissipation of assets or liquidations done without reference to other more advantageous solutions. The preamble to the Proposal states that for the achievement of all the purposes all the supranational instruments meant for the harmonization and unification on law in insolvency issues have

⁵ Guide to enactment of the UNCITRAL Model Law on cross-border Insolvency "Purpose and origin of the Model Law" Page 123 of the Reader paragraph 1 and 2.

⁶ Comment on Chapter IV Cooperation with Foreign Courts and Foreign Representatives. Page 162 Reader paragraph 173.

⁷ Proyecto de ley concursal # 101-1 of July 23 of 2002. Motives for this law. Page 1.

been taken into account. From this statement we can identify that the UNCITRAL Model Law has served as a guidance for the Proposal.

III.2 Scope of Application and Types of Foreign Procedures Covered by the UNCITRAL Model Law and the Proposal for a New Proposal

The UNCITRAL law applies to proceedings that have the character of foreign main proceedings and foreign non-main proceedings; also to out-ward bound requests and in-ward bound request. The first, occurs where the enacting state requires assistance to a foreign court in connection with a foreign procedure and, the second, refers to the opposite situations where a foreign court requires assistance from a court of the enacting state. It also applies in situation where two proceedings are taking place at the same time (concurrent proceedings) and gives the possibility to foreign creditors to commence or participate in an insolvency proceeding opened in the enacting state⁸.

The Proposal does not have a specific article recognizing all the international procedures covered by the law but in its preamble we can find a very important paragraph that refers to the UNCITRAL Model Law and from where it is possible to determine its scope: “Spain will recognize and follow a proceeding taking into consideration where the debtor has his main assets and so declare it the main proceeding”. It also mentions that this fact does not affect the possibility of the opening of any other proceedings in States where the debtor has an establishment⁹.

Art. 9 of the Proposal is the main link with the proceeding covered by the UNCITRAL Model Law. In this article the competent body in Spain to follow a proceeding will be the commercial court of the place where the debtor has his main assets. This article recognizes the importance of the main proceeding. Art. 9(3) also refers to those non-main proceedings where the debtor has an establishment.

There are other articles worth mentioning. Art. 203, concerning the applicable law for some cases of insolvency, recognizes that any proceeding started over goods of a debtor that are located in a foreign country must be followed and concluded under the law of this State. In art. 222(1) it is mentioned that the resolution of a foreign proceeding will be recognized in Spain by the *Exequatur* proceeding. This proceeding must include some requirements: it shall make allusion a collective procedure based on the insolvency of the debtor where all his goods are subject to a foreign law and controlled and administered by the authority or body of the foreign State.

III.3 Effects of the Recognition of a Foreign Proceeding

The most important effect that the UNCITRAL Model Law establishes is that, according to art. 19 and 21, the court may grant interim relief while it is pending a decision of recognition – either as a main or non-main foreign procedure. This effect, which is discretionary, is crucial for the protection of the debtor’s assets and the interests of the creditors¹⁰. The possible ways of relief before recognition are staying execution against the debtor’s assets, entrusting the administration of the debtors assets to a foreign representative, suspending the right to transfer or dispose of any assets of the debtor,

⁸ Scope and application of the Model Law. Reader pages 128 paragraph 22.

⁹ Spanish Insolvency law 101-1 “ Motives for this law” page 10 paragraph XI.

¹⁰ Guide to enactment of the UNCITRAL Model Law on cross-border Insolvency. Reader Page 145 paragraph 137.

providing for the examination of witnesses and any other form of relief the enacting State considers appropriate.

Art. 20 on the other hand includes effects after recognition but these are not discretionary: they just flow automatically from the recognition of the foreign main proceeding. All the consequences envisaged in art. 20 are necessary to allow a fair cross-border insolvency procedure. The effects after recognition of a foreign main proceeding vary somewhat from those stated in art. 19 and 21. Some of them are the staying of commencement or continuation of individual actions concerning the debtor's assets, rights, obligations and liabilities, staying of the execution of the debtors' assets, and the suspension of any right to transfer or dispose of the debtors' assets.

The Proposal refers to the effects of recognition of a foreign proceeding in art. 225(1) where it is mentioned that the recognition of a foreign proceeding in Spain will have the same effects as it has in the foreign State. Paragraph 2 of the same article establishes that any effect of the declaration of a foreign procedure would be limited to the goods and rights, which at the moment of its declaration are located in that State. As we can see the Proposal did not go very deeply in the exact application of this point of the UNCITRAL Model Law. It just left all its effects for the foreign state to be determined as long as they do not go against the Spanish public policy.

III.4 Assistance Between Courts of Different States

The UNCITRAL Model Law seeks for the assistance between court as a method to achieve cooperation and coordination in cross-border insolvency proceedings. The UNCITRAL law in art. 25 authorizes the court of an enacting State to request assistance abroad on behalf of a proceeding taking place in the enacting state

The assistance between courts includes one of the most important objectives of the UNCITRAL Model Law, which is to provide a direct access for foreign representative to the courts of the enacting State. Art. 5 is important because it establishes that the enacting State must mention which body is authorized to act in a foreign State on behalf of proceeding taking place in the enacting State. In other words, the obligation of the enacting State is to mention who is going to act as a foreign representative in a proceeding taking place in another State. There are some important issues related to this objective, which may be found in several provisions such as arts 15, 11, 12, 14, and 24 of the Model Law. The cooperation between courts does not only include simplified proof requirements, mentioned in art. 15 and 24, to facilitate the foreign representative participation in a proceeding taking place in an enacting State. It also includes in art. 11 and 12 the possibility for a foreign representative to commence an insolvency procedure in the enacting State. Under this cooperation principle the courts shall also facilitate according to art. 13 the access of foreign creditors to the courts of the enacting State.

Considering the importance of the assistance between courts in different States the Proposal in its art. 223(2) only imposes one obligation for the recognition of a foreign representative in Spain. He must present an authentic copy of the original of the resolution appointing him as the foreign representative. The only obligation he has after his recognition, according to the Proposal, is the respect for the Spanish law, especially the rules concerning the debtor's rights and the management of the goods. In this regard, art. 214 of the Proposal provides for the possibility for any legitimate person to commence insolvency proceedings against a debtor including the foreign representative of the main

proceeding. But any proceeding that commences in Spain must be conducted and terminated in Spain under the Spanish law.

The creditors also have direct access to make their claims under the proceeding started. The administrative body of the place where the procedure has started must under art. 216 of the Proposal inform all creditors foreign or not about the initiation of the procedure and the communication must also be done individually which is a requirement of the UNCITRAL Model Law (art. 14). Once the creditors have been notified they can present all their claims as mentioned on art. 84 of the Proposal.

III.5 Cross-border Cooperation and Coordination of Concurrent Proceedings

There has always been a lack of cooperation between courts of different jurisdictions. That is why the UNCITRAL Model Law imposes the duty to cooperate as a primary objective for all the enacting States. Art. 25 to 27 of the Model Law are a way of filling a gap of many national jurisdictions by expressly empowering courts to extend their cooperation to matters related in the Model Law¹¹. Art. 27 expressly mentions some ways of cooperation leaving the opportunity to the enacting State to add more. To complete these ways of cooperation the Proposal mentions every way of cooperation as mentioned above, among others: Art. 222, which recognizes the resolution of a proceeding opened in foreign country, art. 223, which recognizes a foreign administrator or representative, and art. 224, which recognizes other resolutions handed down in a foreign procedure.

When two proceeding are taking place concurrently in relation to the same debtor coordination is a very important objective. The authority or the body taking care of the administration, reorganization or liquidation in each State must consider this issue. The Model Law in its arts 28 to 30 deals with coordination between a local proceeding and a foreign proceeding concerning the same debtor. The objective behind these articles is to foster coordinated decisions that can achieve the objectives of both proceedings. Coordination is important because some of the relief granted to either representative by virtue of art. 19 to 21 must be reviewed, modified or even terminated when a new proceeding arises after another. Art. 30 calls for tailoring relief, which is a way to facilitate the coordination of the foreign proceeding because where one of the foreign proceedings is a main foreign proceeding, any relief must be consistent with that main proceeding.

Concerning coordination, when two proceedings are taking place and are related to the same debtor the Proposal mentions, in its Title IX Chapter 4, the coordination between parallel proceedings. Art. 229 imposes the express obligation to cooperate. According to this article if the foreign representative fails to cooperate with a proceeding taking place in Spain the Spanish authorities are freed from this obligation.

The Proposal specifically mentions in art. 229 some ways of cooperation but not as an exhaustive list since making such a list would limit the possibility of real coordination. This list is related to some of the ways mentioned in the UNCITRAL Model Law. There should be cooperation by providing the other authority with any information that can be helpful to the other procedure; there should also be coordination in the administration and supervision of the goods and activities of the debtor. One way of cooperation added by the Proposal and not mentioned in the Model Law is that the local administrator of the

¹¹ Guide to enactment of the UNCITRAL Model Law on cross-border Insolvency. Reader page 131 paragraph 38-40.

proceeding taking place in Spain must admit any proposal made by the foreign representative concerning agreements and plans of liquidation for the payment of credits. It also makes clear that the Spanish authority may claim the same kind of cooperation from the authorities in charge in the foreign State.

Another rule designed to enhance coordination of concurrent proceedings is the one on rate of payment of creditors. Art. 32 of the UNCITRAL Model Law provides that a creditor by lodging his claim in more than one proceeding does not receive more than the proportion of payment obtained by the other creditors of the same class. The Proposal in its art. 231 makes a reference to this rule. It provides that a creditor that has obtained in a foreign proceeding a partial payment of his claim must not expect to obtain in the Spanish proceeding any additional payment until the other creditors from the same class have had obtain the same amount of payment.

III.6 The Spanish Proposal v. the UNCITRAL Model Law

Spain has introduced useful additions and improved its national insolvency regime. The analysed Proposal was designed under the influence of the Model Law, although the Proposal actually goes beyond the scope of the UNCITRAL Model Law adding some issue to the law that complies with its national regime and public policy. Many of these provisions stem from the text of the EC Regulation. Therefore, the provisions of the EC Regulation shall apply to intra-community insolvency proceedings while the Spanish law shall apply when dealing with recognition of judgments handed down by courts of States situated outside the EU and cooperation with non-EU authorities. Since art. 3 of the Model Law has been implemented in art. 201 of the Proposal, the application of the Model Law shall in no way restrict the application of other agreements on the matter – i.e., the EC Regulation.

Conclusion

The proposal for a new Spanish insolvency law supposes a great development, especially if compared with the lack of coherence and dispersion of rules of the current legislation on the matter. The new system aims at introducing a comprehensive set of rules to govern both substantive and procedural issues. It also reflects the growing specialisation of insolvency law¹²; insolvency law is to be subject to an autonomous set of rules, distinct from those provided for in the civil and the commercial codes. The creation of specialised commercial courts is another sign of this phenomenon.

The proposal also introduces a set of provisions dealing with cross-border insolvency proceedings. This set of provisions has taken account of the relevant provisions on the European and International level: the EC Regulation on Insolvency Proceedings and the UNCITRAL Model Law. The Proposal seems to aim at the combination of the provisions of the EC Regulation and the UNCITRAL Model Law. By combining both sets of rules, the Proposal is likely to benefit from the EU and International harmonisation instruments, increasing legal certainty and efficiency in cross-border insolvency proceedings.

While respecting the EC Regulation and other international agreements (art. 3 UNCITRAL and art. 212 Proposal), embracing of the Model Law results in the adoption

¹² Bob Wessels, *Cross-Border Insolvency: Do Judges Break New Grounds?*

of more or less similar laws at a domestic level, which is likely to result in greater degree of compatibility, less jurisdictional problems and more beneficial solutions for the creditors and the debtor himself. If this approach was followed by domestic legislators, it would significantly contribute to the worldwide efficiency and effectiveness of cross-border insolvency proceedings.