

Debtors' Paradise

A dangerous pitfall in Spanish bankruptcy law

This article is a follow-up to part 1 published in *eurofenix* issue 33 Autumn 2008

In March 2008 the author wrote an article on a Spanish bankruptcy case in which a client of his was (and still is) involved, concerning a Spanish company and its liquidators who “took the money and ran”, at least with the money they should have paid to his client. The author initiated legal proceedings against the liquidators in February 2005. By the time of writing the article in March 2008, he was still waiting for one of the many Madrid courts to be declared competent. In October 2008 that was decided by the appeals court of Madrid. Since then, it is now 2012... the competent court, Court number 51 of Madrid, is still “busy” serving the summons to the liquidators. Jan Willem de Haan decided it was time for a new article on Spanish bankruptcy law and practice. This time he will discuss a dangerous pitfall in the actual Spanish bankruptcy law – “Ley Concursal”



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In 2004 the present Spanish bankruptcy law was enacted. That was a major step forward because the situation before 2004 was simply horrible and it was especially surprising now that the Spanish legislator is in general a horribly bad legislator. The Spanish legislators do not follow the idea of a sound Civil Code system but is an expert in making improvised repairs that cover one small area without realising how that affects the rest of all the laws in vigour. Admittedly, there are times when they are more awake than at other times and make the necessary changes to implement new laws, but in general this is an exception. The result is that many areas of law are covered by numerous different laws and not by one integrated part of the Civil or Commercial Code.

Before 2004 the bankruptcy laws were to be found in different sources. One part could be found

in the Commercial Code of 1829, another part in the Commercial Code of 1885, another part in the Act on Suspension of Payments of 1922 and yet another part in the Act on Civil Procedures. At least the bankruptcy law of 2004 unified all these different sources and, it must be said, created a somewhat understandable system. A system however with complete lack of flexibility and full of unnecessary formal requirements, as a result whereof this act in practice is not what the liquidators need if they want to act quickly in case of selling assets or even try to save the business of a bankrupt company.

This article deals with one of the dangerous pitfalls of the Spanish bankruptcy law, especially for foreign creditors, which is the untimely confirmation by a creditor of any debt that a Spanish bankrupt company or person might have to such creditor. Such untimely

confirmation leads to subordination of the debt with the results that the chance of repayment of the debt becomes virtually non-existent.

Article 85 of the Spanish bankruptcy law provides:

Article 85. *Lodging of claims.*

1. Within the term stated in Subparagraph 5 of Paragraph 1 of Article 21, the creditors to the insolvent debtor shall lodge with the insolvency administrators their claims.

(If interested in an English translation of some of the most important Spanish laws, please visit the website of the Spanish Ministry of Justice at www.mjusticia.es).

Referring to article 21 paragraph 1, subparagraph 5

“Article 21. *Order declaring the opening of the insolvency proceedings.*



1. The order declaring the opening of the insolvency proceedings shall contain the following pronouncements.

- 1)
- 2)
- 3)
- 4)
- 5) Calling the creditors to lodge with the insolvency administrators their claims, within the term of one month from that following publication in the Official State Gazette of the order declaring insolvency, as set forth in Article 23;
- 6)
- 7)
- 8)

According to this article any creditor needs to inform the liquidators or receivers of the Spanish bankrupt person or company on the debt of the bankrupt to such creditor within one month as of the publication in the Spanish official State Gazette

(“Boletín Oficial del Estado”) of the court declaration of insolvency of the bankrupt person or company concerned, filing the information as specified in the rest of article 85. This term is final, as has been confirmed in various judgments of Spanish appeal courts.

The sanction of not filing the claim in time is quite severe. The sanction can be found in article 92 paragraph 1 one of the Spanish bankruptcy law:

“Article 92. Subordinated claims.

The following are subordinated claims:

- 1) Claims that, having been lodged late, are included in the list of creditors by the insolvency administrators or that, not having been duly lodged, are included on that list by the Court on resolving on an appeal, except if they are claims whose existence

arises from the documentation of the debtor, that are in any way recorded in the insolvency proceedings or in any other judicial proceedings, or that require inspection action by the Public Administrations to be determined, and in all these cases they shall have the relevant character according to their nature;

.....”

Article 92 paragraph 1 provides that any late filing of any claim, debt or receivable leads to such claim to be subordinated. On the basis of my 20 years experience in Spanish bankruptcies I can assure you that the chances in general that a creditor gets repaid his or her money back are limited. However, if such claim, debt or receivable becomes subordinated these chances are virtually non-existent.





THEY ARE SUPPOSED TO READ THE SPANISH OFFICIAL STATE GAZETTE EVERY DAY TO SEE IF POSSIBLY ONE OF THEIR DEBTORS HAS GONE BANKRUPT



So what are our clients, that is the non-Spanish creditors, supposed to do? Very simple, they are supposed to read the Spanish Official State Gazette (“Boletín Oficial del Estado”) every day to see if possibly one of their debtors has gone bankrupt.

One could hope for some clemency on the basis of article 21 paragraph 4 which reads as follows:

“Article 21. Order declaring the opening of the insolvency proceedings.

- 1)
- 2)
- 3)
- 4) *The insolvency administration shall serve an individual notice, without delay, to each one of the creditors whose identity and domicile are recorded in the*

insolvency proceedings, informing them that they have been declared open and of their duty to lodge their claims in the manner established in Article 85.5)”

One might think that if the individual notice mentioned in this paragraph arrives after the month of article 21 paragraph 1 subparagraph 5, it would give the creditor a second chance to file his claim, debts or receivable without such claim, debt or receivable be declared subordinated.

Unfortunately, the Spanish jurisprudence gives no support for such view. The sentences I studied all confirm the priority of the one-month term as of publication in the Spanish Official State Gazette.

I was about to conclude that the only solution to avoid missing the bankruptcy of any Spanish

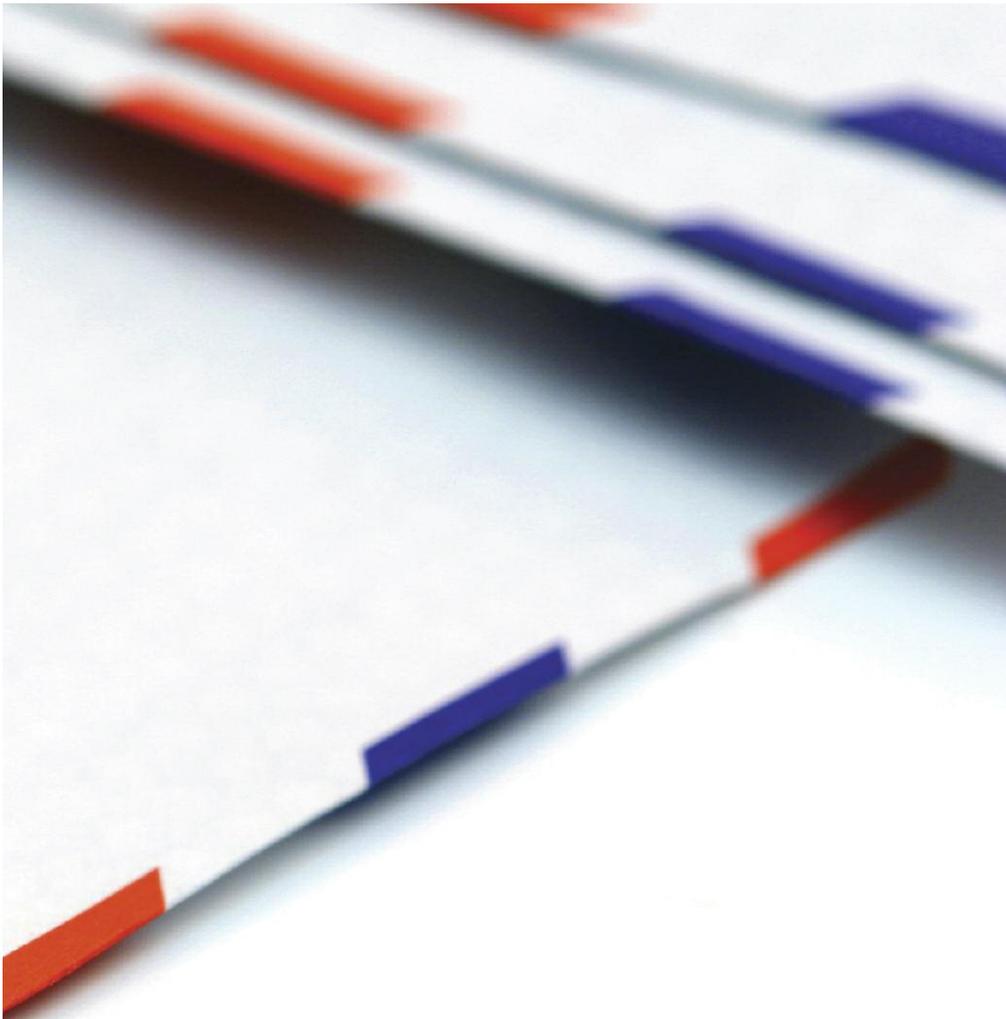
debtor would be, indeed, the daily happy reading of this Spanish official State Gazette when I remembered that there is such a thing as the EU insolvency regulation 1346/2000.

Article 40 paragraph 2 of the EU insolvency regulation provides:

- “1)
- 2) *Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading “Lodgement of claim” in the official language or one of the official languages*



THE INDIVIDUAL NOTICE SHOULD INCLUDE A TIME LIMIT FOR THE LAUNCHING OF THE CLAIM



of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.”

This article makes clear that the individual notice should include a time limit for the launching of the claim and as a result of such provision we can conclude that any individual notice should allow a creditor to lodge his claim, debt or receivable within the time limit put in the individual notice and not within the one month period as of publication in the Spanish official State Gazette.

I was recently reminded of all these absurd problems, all due to an obsolete and crazy judicial tradition in Spain, when my client received a letter in Spanish from

some liquidators inviting my client to lodge his claim. The letter was dated 14 December 2011, sent to my client without any confirmation of receipt, and not by express mail, courier or certified mail, and received by my client on 9 January 2012 and obviously it said nothing about any time limit. The Spanish Postal Services can be very slow. After receiving the letter from my client the same day, I found that the publication in the Spanish Official State Gazette was made on 22 December 2011. We, therefore, according to Spanish rules were still in time to lodge our claim. However, would that not have been the case, I most certainly had to invoke article 40 of the EU insolvency regulation to avoid my clients' claim becoming subordinated, simply because I

rarely experience a Spanish judge invoking by his or her own initiative any European regulation.

Finally the Spanish Ministry of Justice launched a website (www.publicidadconcurzal.es) with a register of all bankruptcy procedures and bankrupt persons or companies. Unfortunately, the bankruptcy referred to above could not be found and the Spanish bankruptcy law does not mention this website as a reliable source of information. Although I definitely applaud this initiative, I am afraid the foreign creditors will have to do with the good old “Boletín Oficial del Estado”.