

DEBTORS ' PARADISE A TALE OF SPANISH (UN)JUSTICE

by Jan Willem de Haan



Most published articles deal with general tendencies and legislative changes but hardly ever with real life stories that show serious deficiencies of legal systems that cry for improvement and reform.

This article describes an existing and still ongoing case of a bankrupt Spanish company and its liquidators who "took the money and ran" at least the money they should have paid to my client. The case is not an exception to the rule. In today's Spain these cases still occur, at least in my practice they do. It turns out that even if there are sufficient assets to pay back a large part of the debts to the creditors, it is still very difficult for a creditor to get his money.

In order to show that nothing is invented, I obtained permission from my client Egidius Janssen B.V. to publish all data of the case.

The creditor Egidius Janssen and debtor Redondo

In May 1999 Briefhouder- en Metaalwarenfabrikant Egidius Janssen N.V., ("EJA N.V.") a Dutch manufacturer of office appliances claimed its receivable of NLG 406.614,89 (EUR 184.573,25) from its longstanding Spanish reseller, Redondo Hermanos Papel, S.A. ("Redondo") in Madrid, Spain.

As summons letters did not lead to payment, EJA N.V. started legal proceedings against Redondo in the court of Roermond, The Netherlands, in October 1999. The court of Roermond had jurisdiction on the basis of 1968 Brussels Treaty and the 1980 Vienna Convention.

The citation was served with great difficulty on Redondo. EU-regulation 1348/2000 which has improved service within Europe, was not yet in force and service still needed to be done on the basis of 1965 The Hague Convention.

Just as the proceedings in Roermond were to start, EJA N.V. went bankrupt. Some activities were to be continued in a new company by the name Egidius Janssen B.V. ("Egidius") hence the procedure could not be continued despite all the effort to get the citation served to Redondo.

Egidius continued recovery of the debt. By april 2001 the notarial deed of transfer of the receivable to Egidius was served to Redondo with a letter claiming payment. No payment was received.

Bankruptcy of Redondo

Soon after Egidius received a letter from a ms. Isabel Lluch Valenzuela, identifying herself as the judicial commissioner (in Spanish "Comisario") of Redondo, in the bankruptcy proceedings of Redondo under number 781/2000 with Court in First Instance number 51 ("Juzgado de Primera Instancia" hereinafter "Court 51") of Madrid. The letter was a citation for the meeting on July 20, 2001 to appoint the trustees which under the former laws was done by the creditors.

On July 19, 2001 Egidius joined the bankruptcy procedure filing proof of its claim as required by Spanish law. The next day instead of appointment of trustees, a settlement agreement was reached between Redondo and its creditors. This was not surprising as 80% of the debts of Redondo were owed to the Spanish company Unipapel, S.A. Such position allowed Unipapel to impose any agreement.

Settlement and appointment of liquidators

The moment was surprising. Settlement agreements in bankruptcy proceedings could only be reached after examination of the debts, hence after appointment of the trustees, because it was the task of the trustees to examine the claims. The settlement was therefore flawed.

The settlement agreement contained a very remarkable provision: The assets would be liquidated and paid to the creditors. However, the commission of liquidators was only allowed to sell assets in case with such sale at least 25% of the debts of the creditors could be paid. The settlement agreement did not clarify what would happen if the proceeds would be less than 25%.

The following companies and persons were appointed as liquidators: Unipapel, S.A.; Juan Antonio Rodríguez Rodríguez-Vila; Juan Antonio Morán Huete; Eutimio Martínez Suárez; Fernando Suárez Lozano. Most of them lawyers in Madrid.

Despite being flawed, Court 51 ratified the settlement agreement by judgment of October 31, 2001. Court 51 based its ratification on the articles 932, 935 and 937 of the Spanish Commercial Code of 1885 which provisions have now been derogated by the new bankruptcy law ("Ley Concursal") of 2004. These derogated articles are included in the chapter on bankruptcies of public railway and utility companies.

The settlement agreement should have been based on article 898 of the Spanish Commercial Code of 1885 that provided that in any state of the proceedings, but after the procedure of examination of the debts, the bankrupt and its creditors can reach a settlement agreement. The logic is simple. For a fair voting on a settlement agreement, the identity and debt of the creditors must be examined. The amount of the debt determines the weight of the vote.

Egidius had no reason to appeal the judgment, as Egidius expected the commission of liquidators ("the Liquidators") to sell the assets, render accounts and to distribute the proceeds among the creditors.

The Liquidators did something completely different. They sent a letter to each creditor summoning them to file proof of their debts between 10 and 14 December 2001 with the Liquidators.

Invoking the articles 1.111 and 1.112 of the Commercial Code of 1829 (and not of 1885), the Liquidators argued that late or non-filing of such proof would lead to elimination of the debt on the creditors' list.

This was remarkable. Before the Ley Concursal 2004 entered into force, Spain had two different regulations on bankruptcy coexisting and overlapping each other. These were the remainders of the Commercial Code of 1829 and of the Commercial Code of 1885. In 1885, the Spanish legislator simply "forgot" to repeal the Commercial Code of 1829.

This is not uncommon in Spain. The Spanish legislator has still not started to make a coherent codification system. Laws are made on specific subjects without properly fitting them into a codification system, causing great confusion.

The reference to the articles 1.111 and 1.112 of the Commercial Code of 1829 would imply that the examination of the debts by the Liquidators was based on the 1829 Code and not on the 1885 Code.

The result is the same. Article 898 of the 1885 Code is a copy of article 1.137 of the 1829 Code and provides that settlement is possible only after examination of the debts. The letter of the Liquidators had no legal basis. Besides, even under the settlement agreement the Liquidators had no powers to review the debts. They could only modify or eliminate debts after payment would have been made.

Request for information from the Liquidators

The bankruptcy had materially ended with the judgment of October 31, 2001. Egidius therefore wrote letters in January and February 2002 to the Liquidators inquiring about payment since no notices were obtained.

The Liquidators replied by letter of February 18, 2002 that since Egidius had not filed any proof of her claim or at least not in the period 10-14 December 2001, the claim of Egidius was thrown out. Nothing was said about the possible payments to other creditors.

This forced Egidius to send a new letter dated April 3, 2002 with the following content:

- a) the debt of Egidius was already acknowledged by the Comisario;
- b) Egidius had filed proof of its' claim on July 19, 2001 in the bankruptcy proceedings;

- c) the requirement to do a new filing of proof of debts in the day period 10-14 december 2001 had no basis in the law;
- d) the Liquidators had no powers to throw out a claim;
- e) the Liquidators had not rendered accounts whereas rumours suggested that important assets had been sold;
- f) summons to the Liquidators to acknowledge the claim of Egidius and to render accounts on the sale of assets.

As a result, one of the Liquidators, Eutimio Martínez, contacted by telephone asking proof of the debt. Despite the fact that this evidence was in the court file since July 19, 2001 it was sent again to him on April 29, 2002. After that, no more news is received.

Investigation in the real property register

An investigation in the Spanish real property register carried out in October, 2002 showed that the Liquidators sold the real properties of Redondo on November 28, 2001 for € 8.023.511,59.

The register also showed that from the € 8.023.511,59 the amount of € 1.871.048,31 was available for payment to common creditors whereas the total debt of the common creditors was fixed at € 3.029.094,64. As a result, the creditors should at least receive 61% of their debts as payment. This was the much needed proof that assets had been sold and that the creditors should have received payment.

This information is public and can be found in the property register number 15 of Madrid, with registration number 3.810 of the property ("número de finca 3.810"), seventh inscription.

Egidius moved on to investigate and requested Court 51 the list of creditors of Redondo in order to calculate the amount each creditors would have been entitled to and to assure that the amount of the register was right. Court 51 refused to give such list of creditors to Egidius. The file was in the archives.

On December 17, 2002 a letter is sent to the Comisario Isabel Lluch inquiring about the sale of the real estate of Redondo and payment to the creditors especially now that proof was obtained that payment had to be done.

Meeting with the Liquidators

She called mr. Eutimio Martínez who then called Egidius on January 30, 2003 offering acknowledgement of the debt and payment of 25% of such debt. To further discuss the issue, he proposed a meeting in Madrid on February 5, 2003.

Egidius accepted the meeting although there was no reason for such meeting. The Liquidators had to render accounts and pay. Egidius had no hope that the meeting would solve anything and she was right. The Liquidators only confirmed their offer of acknowledgement and payment of 25% of the claim. No rendering of accounts but only a promise to do so (which was never fulfilled).

After that a phonecall was made to the Liquidators and on April 3, 2003 a letter was sent to them but no answer. On July 9, 2003 a letter was sent to the Comisario asking to press the Liquidators for the needed answers. Egidius got one phonecall back from the Comisario: she did not manage to speak to the Liquidators.

Legal action against the Liquidators

By now it was clear that Egidius was not getting anywhere without legal action against the Liquidators. It took some effort to convince Egidius of legal action. The behaviour of the Liquidators could only be explained through a seriously flawed legal system, hence would legal action make sense?.

There were many legal issues to be solved but the most important one was the question on the competent court. The issue at hand seemed to be an incident in the bankruptcy procedure making Court 51 competent. But Court 51 would probably consider the bankruptcy file closed so any action against the Liquidators would then be a new and independent procedure. Egidius decided to not argue competence of Court 51.

Egidius initiated legal proceedings on February 7, 2005 by filing her summons against the Liquidators with the courts of Madrid. Egidius claimed:

- a. Acknowledgement of the debt of Egidius;
- b. Rendering of accounts by the Liquidators on the sale of Redondo's assets and payment of the amounts Egidius is entitled to;
- c. Indemnity from the Liquidators for damage incurred.

According to the Spanish judicial system, it is the office of the dean of the court ("el Decanato") that takes care of assignment of each new procedure. In fact, the Spanish judicial system provides that within a court every judge has his or her own independent court indicated with a number. In big towns there can be up to 80 civil judges each having his or her own little court. The courts rotate so that the new cases that enter the court go to the next court in number unless there is a reason to assign a case to a specific court.

As Egidius did not argue competence of Court 51 upfront, the Decanato assigned the new case to Court number 67 of first instance of Madrid.

Court 67 accepted the initial assignment and continued proceedings by ordering service of the summons to the defendants. As service in Spain is done by the courts, this led to all kinds of problems. Two of the members of the Liquidators did not live in the court district and two others could simply not be found. Service was finally carried out to all Liquidators on June 5, 2005.

The Liquidators then filed a writ arguing lack of jurisdiction of Court 67. The Liquidators argued that the newly created (under the "Ley Concursal 2004") commercial and bankruptcy courts had jurisdiction and alternatively, Court 51.

No competent court to be found

It took Court 67 ten months until April 11, 2006 to declare itself not competent in favour of Court 51 on doubtful arguments. A request by Egidius to Court 67 to directly send the procedure to Court 51 was denied. The argument was that such remission was only done in the case of a territorial non-competence and not in case of a so called objective or functional competence. The initial summons had to go through the Decanato again with the request to assign the case to Court 51. So much for smoothening procedures!

Egidius decided not to appeal the decision of Court 67. The appeal procedure, would take at least two years and it would not solve the jurisdiction issue as confirmation of the sentence of Court 67 by the Appeals Court would still not guarantee the competence of Court 51.

Egidius preferred to file again with the Decanato asking for assignment to Court 51 although it was likely that Court 51 would also declare itself not competent.

The summons writ was filed again on March 21, 2007 at the "Decanato" of the courts of Madrid with the specific request to send the case to Court 51. No notices were received until September 17, 2007. Then a resolution of the Decanato was received reflecting what occurred since March 21, 2007:

- a. On March 22, 2007 the summons was sent to Court 51;
- b. On April 23, 2007 Court 51 returned the summons claim to the Decanato requesting to send the summons to the newly created commercial courts;
- c. By agreement 2211/07 the Decanato agreed to send the summons to the commercial courts;
- d. By resolution of July 9, 2007, commercial court number 2 returned the summons to the Decanato arguing that the summons must be sent to Court 51 as it is directed to that court;
- e. New resolution of the Decanato 2423/2007 ordering to send the summons again to Court 51;
- f. Court 51 again sent the summons to the Decanato arguing it is not competent to try the case.

No surprise that by resolution of September 17, 2007, the Decanato reconfirmed for the third time that the case should be tried by Court 51.

Finally, on November 12, 2007 Court 51 issued a resolution served to claimant Egidius arguing its lack of competence but inviting Egidius and the Public Ministry to come forward with arguments for

competence of Court 51. Egidius had already argued competence of Court 51 in her summons writ but filed her arguments again. Court 51 ruled by resolution of January 10, 2008 that it had no jurisdiction and ordered return of the summons to the Decanato.

Spanish law does not provide for appeal against such resolutions as the issue of (all) courts declaring themselves incompetent is an internal matter. It are the courts themselves that must ex officio initiate proceedings to have their common superior court declare who is competent.

As Court 51 did not do that, the Decanato summoned Court 51 to issue such a resolution that at least appeal could be filed by Egidius and to have the procedure initiated to decide on which court is competent.

Court 51 decided accordingly by resolution of February 21, 2008 to declare lack of jurisdiction but allowing Egidius if it did not agree, to file an appeal (despite the fact that Spanish law does not provide for such an appeal). Egidius filed the appeal by February 29, 2008 requesting a solution for the jurisdiction question. The calculation of Egidius is that it will take at least a year for the appeals court will decide.

SPANISH (UN)JUSTICE

There is much more to be told here. Egidius found out that the real property of Redondo was soon after converted in housing complexes making much more profit than the price it was sold for. Egidius is convinced there would have been enough money to pay 100% of the debts.

If one reads this story, it is not surprising that in Spanish bankruptcy procedures, Spanish creditors never fight for their money. They have no faith in their judicial system concerning bankruptcies whatsoever and I cannot blame them.

Af far as my experience is concerned, this case is symptomatic and representative for Spanish bankruptcies under the old laws. There is just no way that you can force these liquidators to do what they have to do. It is sad but true. I have sincere doubts whether Egidius will ever see some money or justice.

I am not yet in a position to say that the new "Ley Concursal 2004" has improved things, it probably has but as long as these cases exist, it is hard to be optimistic.

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