Spain

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1 Overview

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*, nor with the restatement of this piece of legislation, recently approved by Royal Legislative Decree 1/2020, already in force (hereinafter "RSIA"). With the now repealed Insolvency Act of 2003 (hereinafter "SIA 2003"), Spain had already gained a modern insolvency legal framework, although, in general terms, neither debtors nor creditors were able to use it in a manner that generated better ratios of credit recovery and fewer winding ups of debtors. In our view, this scenario will not change substantially with the RSIA, at least in the near future.

The purpose of the RSIA may seem at first modest, as the wording of most of its rules is the same as that of the repealed SIA 2003, and on the ground that the legislator failed to seize this opportunity to transpose Directive (EU) 2019/1023, of 20 June 2019, on preventive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, something that would have meant important changes to the SIA 2003. Although the number of articles has almost tripled (from around 250 to more than 750), with a few exceptions, what the 2020 legislator has done is a reorganising of the structure of the Act, by splitting the text of the articles of the SIA 2003 into new shorter articles and clarifying and harmonising the wording of the new articles. Anyway, although we cannot say that the RSIA has brought many truly new rules, the restructuring of the articles of the repealed SIA 2003 has certainly brought with it some positive developments, one of them being certain adjustments made in the wording to take in several case-law solutions upheld in court rulings, from the Supreme Court and several Courts of Appeals, given in the years when the SIA 2003 was in force.

There are several reasons for the aforesaid insolvency scenario, that the insolvency legislation has so far failed to improve, 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 376 RSIA), (ii) the protections given to creditors with security on the debtor's assets, which in practical terms leaves them almost immune to the effects of the bankruptcy proceedings (articles 145–149 RSIA), and (iii) the fact that senior credits (tax and social security contributions, among others) are excluded, to a certain extent, now somehow tighter than under the SIA 2003, from the mandatory effects of a creditors' agreement on which their holders did not vote favourably (article 397 RSIA), 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 RSIA has maintained the technical option followed by the SIA 2003, which consists of providing for a unique type of bankruptcy proceedings, though with an alternative development that avoids a winding up (the approval of a creditors' agreement), which also plays a role in the bad fate of most of the bankruptcy proceedings held in Spain. Due to the abovementioned 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, although, in our opinion, the RSIA has somehow led it to be now slightly more debtor-friendly than before. Nonetheless, in practical terms, the insolvency regime may lead to undesired outcomes for 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 the most common scenario, at least 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 where insolvency legislation can bring in effective solutions.

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 sorts of arrangements, as they see them as bearing the risk of being repealed in case the debtor initiates bankruptcy proceedings. If not for any other reason, they do this 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 RSIA. The RSIA provides two types of formal restructuring: refinancing agreements, under articles 596–630; and out-of-court payment arrangements, under articles 631–694.

Pursuant to article 596 RSIA, refinancing agreements are arrangements including some sort of refinancing that avoid the debtor being declared bankrupt by the court. They may cover all the creditors, so-called "collective agreements", set out in articles 597–603, or some of the creditors, so-called "singular agreements", that were not foreseen in the SIA 2003, set out in articles 604–694. Only collective agreements can be ratified by the court (article 605 (2) RSIA), such approval having the effects of, among others, (i) extending the agreement to creditors that have not approved the refinancing (article 613 (2) RSIA), and (ii) terminating any adjourned singular enforcement of credits against the debtor (article 613 (3) RSIA). For a refinancing agreement to obtain court approval, it must meet several requirements, such as that it (i) is part of a viability plan that allows the continuation of the debtor's activity in the short- and mid-term, (ii) significantly increases the amount of credit available to the debtor, and (iii) has been approved by creditors representing no less than 55 per cent of the debtor's financial liabilities (article 606 RSIA).

Regarding out-of-court payment arrangements, these can be used by debtors already bankrupt or on the verge of being so, provided that their debts and assets do not amount to more than €5 million each or that the number of creditors is fewer than 50 (article 633 RSIA). These arrangements need to be managed by an official bankruptcy mediator, appointed either by a notary public or the Companies' Registrar (articles 631 and 635 RSIA). If successful, these arrangements end up 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 loans or financial instruments (callable preferred stock, convertible bonds, debt instruments where interest is paid in debtor's shares, junior debt, etc.) of a type, seniority and maturity different from those of the debtor's stressed ones (article 667 RSIA).

Pursuant to the RSIA, 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 (article 594); 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 (articles 588–590). If the debtor could not reach, during the said four-month period, any such arrangements that exclude it from the obligation, foreseen in article 5 of the RSIA, to request the court to initiate bankruptcy proceedings, then it is mandatory for the debtor to do so (article 595).

The use of the insolvency proceedings is much more widespread than that of the informal work-outs and formal restructuring, although, in more recent times, the use of informal work-outs and refinancing agreements has been on the increase, notably by highly indebted large and mid-size companies.

2 Key Issues to Consider When the Company is in Financial Difficulties

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 the company is declared insolvent within bankruptcy proceedings, the directors may be liable for the unpaid debts, or a part thereof, in case they took decisions that are considered, by the court that hears the case, as the cause of the debtor's inability to pay its debts or a part thereof, insofar as those decisions lead such court to qualify the bankruptcy as *blameworthy* (articles 441–444, 1st, RSIA).

Article 5 (1) RSIA provides that the debtor must 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 (3) RSIA).

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 444 (1st) RSIA. In such scenario, those persons (directors, shareholders, etc.) who failed to file for bankruptcy at the time foreseen by the RSIA 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 only 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 142 RSIA), save in case of enforcement of credits secured by assets, which are allowed, though in some cases with a moratorium of one year (articles 145–148 RSIA). As for stays on enforcement, pursuant to article 143 of the RSIA, 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 had been 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 RSIA 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 226), either by the insolvency practitioner ("receiver") (article 231) or, in case this fails to do it, by any of the creditors (article 232), 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, *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 (articles 235 and 236 RSIA).

Nonetheless, as mentioned before, the transactions entered 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, either collective or singular, carried out under articles 596 *et seq*. RSIA, as mentioned in the answer to question 1.2.

3 Restructuring Options

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

An informal work-out 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 fails 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, articles 597 and 598 RSIA waive the possibility of collective refinancing 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 (articles 605–608 RSIA).

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 RSIA provides for a unique bankruptcy process ("process"), though with two different types, the main and the abridged (articles 508–521 and 522–531 RSIA, respectively), whose use does not depend on who files for bankruptcy (the debtor or any of its creditors) but on the complexity of the case. Less complex cases are, as a rule, to be handled by the court in accordance with the guidelines set forth in article 522 (1) (fewer than 50 creditors, liabilities not exceeding €5 million and debtor's assets with an estimated value not exceeding that amount either), and so the procedure may follow the abridged rite. The court may also opt for the abridged rite when the debtor comes up with an anticipated proposal of a creditors' agreement or with any of such type of proposal which foresees the assignment of all the debtor's assets and debts (article 522 (2) RSIA). In addition, the RSIA foresees some situations where, waiving the regime set forth in article 522, it is mandatory for the court to follow such rite (article 523).

The process begins with a common phase, where the financial situation of the debtor is fully assessed and two reports are 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 negotiation of a creditors' agreement or to the winding up of the debtor.

In the first case, both debt-for-equity swaps and pre-packaged sales of assets, as well as other business measures (*e.g.*, the closing of a business unit) can be foreseen in a creditors' agreement, if the party that proposes such an agreement deems those measures beneficial to the debtor's financial panorama and its capability to comply with the obligations foreseen in the same.

In the last 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 376 RSIA, 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 a limited power to block any restructuring of the credits and the survival of the debtor. Anyway, small dissenting minorities, below the threshold set out in the said article, are subject to a cram-down by the majority and the troubled 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 406 RSIA) or submit a draft of a creditors' agreement (article 337 RSIA). 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 RSIA, 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, foreseen in work-outs or refinancing agreements, this may lead to the inability to reach such arrangements, as the law does not foresee any sort of cram-down of dissenting shareholders. Such inability would then lead to the obligation of the debtor to file for bankruptcy (article 695 RSIA). Bankruptcy declared under such a scenario should be deemed by the court as *blameworthy*, with the shareholders voting against the said share capital increase bearing the risk of being deemed liable for the unpaid credits, save if the debtor provides sufficient evidence that the bankruptcy was not caused by it (article 700 RSIA).

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

Under the RSIA, the decision to enter into a restructuring procedure always lies in the hands of the debtor. Nonetheless, the requirements that must be met in the case of refinancing agreements are different from those applicable to out-of-court payment arrangements. Contrary to the latter, which can be initiated only when the debtor is insolvent or on the verge of being declared so (article 605 RSIA), a regime quite similar to that applicable to the initiation of bankruptcy proceedings (article 5 (1) in relation to article 2 (2)), a refinancing agreement, can be reached at any time; *i.e.*, not only when the debtor is bankrupt or on the verge of being so, but also at an earlier stage, where it may have reasons to think that, without restructuring, 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 10 and 14 RSIA) and terminate the process (chapter XI, Section 2 of RSIA), approve a creditors' agreement (article 372 (4) RSIA), wind up the debtor (articles 406–409 RSIA) and declare the bankruptcy as *fortuitous* or *blameworthy* (article 455 RSIA).

Out-of-court payment arrangements are negotiated by a bankruptcy mediator, whose functions cease once they have been approved by the shareholders who agreed 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 (articles 687–691 RSIA).

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 (articles 156–158 RSIA). 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 the said articles and, as such, would be deemed void.

Nonetheless, pursuant to article 165 RSIA, 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 case. This decision is a court ruling just like any other and should be enforceable on 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 non-settlement of this type of credit is small, although in no way non-existent.

In addition, the RSIA allows the receiver, either on its own initiative or at the request of the debtor, to reinstate, in favour of the latter, certain financing and lease agreements terminated by the other party on the ground of the breach of the debtor's obligations under the same (articles 166–168).

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.

Fresh credits granted after the declaration of bankruptcy will be qualified as *first grade* (article 242, 8th, RSIA), and as such payable before any others with different grades. Regarding credits granted before such declaration, the RSIA sets forth that those granted under a collective refinancing agreement are graded as *senior* in the amount not qualified as *first grade* (article 280, 6th, RSIA).

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 RSIA.

4 Insolvency Procedures

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

The RSIA provides a unique insolvency procedure, during 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, the winding up phase is initiated.

Basically, the winding up of a company consists of two steps: first, the court orders the winding up, at which point the company immediately ceases to be a legal person with organs and assets and liabilities (article 413 (3)); and secondly, a liquidation process begins, where the remaining assets that once belonged to the debtor are sold and the proceeds therefrom used to pay its debts or, in most cases, a part thereof (articles 414 *et seq.* RSIA).

The liquidation process shall follow the mandatory rules foreseen thereto in the RSIA (articles 406–422) and those included in the liquidation plan to be approved by the court under articles 416 and 417. 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 RSIA provides a subsidiary rule for the sale of business units, under which terms this type of unit should preferably be sold as a whole (article 422 (1)).

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 406 RSIA). 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 409 RSIA).

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

The winding up process consists of two subphases; first, a decision to wind up the debtor is taken by the court, and second, the so-called "liquidation" begins, 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 a failure to approve a creditors' agreement, the second is managed by the receiver, previously appointed by the court and under the supervision of the court. The receiver will liquidate the assets and pay the creditors in accordance with the rules provided by the RSIA (articles 416–440).

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 nil. 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 430 RSIA).

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 (article 156 RSIA, which is applicable to the winding-up phase *ex vi* article 411 of the said body of law), 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 or in the interest of the process), 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 RSIA (article 242).

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 429 RSIA). With a few exceptions (certain labour credits, the cost incurred by the debtor in the declaration of the bankruptcy claim, etc.), almost all of the *outs* are credits generated after the declaration of bankruptcy (article 242 RSIA), 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 non-settlement for the other party (provider, seller, etc.) would be too high. Among the *outs*, set out in article 242, it is worth mentioning here those incurred with (i) the insolvency process, (ii) the defence and representation of the debtor and the receiver, in the interest of the bankrupt person, either in the bankruptcy proceedings or in other proceedings, and (iii) the remuneration of the receiver.

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 RSIA, should not be qualified either as *senior* or *junior* (article 269 (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 unsecured 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 will 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 465 RSIA). In such a scenario, though the RSIA 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 Tax

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 RSIA 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*). In view of 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 Employees

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 RSIA 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 242 RSIA, and any other labour credits. The regime provided in article 242 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 article 242 are first grade credits, payable once they become due, and the said labour credits are among them (1st type of first grade credits).

Concerning the remaining labour credits, the RSIA distinguishes between certain labour credits (salaries and indemnities for labour accidents and/or illnesses), which are deemed senior under article 280, and the remaining ones, which may be ordinary (article 269 (3)) or even junior (article 281).

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 articles 169–185 RSIA, in relation to ordinary labour agreements, and articles 186–188, in relation to senior management labour agreements. 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 53 RSIA). Any dismissals, amendments, or suspension of labour contracts of 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 Cross-Border Issues

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

Articles 45 and 49 RSIA lead to a distinction 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.

According to the RSIA, 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 runs a business in Spain, in which case such proceedings will be deemed *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 742 RSIA). Nonetheless, in the case of processes initiated in another EU Member State, they would be fully recognised in Spain without any *exequatur*, pursuant to 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 the abovementioned EU Regulation 2015/848, a company incorporated in Spain can initiate insolvency proceedings in other EU jurisdictions if it has its main place of business in such jurisdiction, in which case those proceedings should be deemed *main*, or if it runs a business in such jurisdiction, they should be deemed *territorial*. The same would apply to any other jurisdictions in case they provide for the initiation of insolvency proceedings by companies incorporated elsewhere. Nonetheless, so far, it is not common practice for Spanish companies to file for bankruptcy either in other EU Member States or somewhere else.

8 Groups

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 RSIA 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 (articles 38 and 39 RSIA).

In addition, during a bankruptcy process, either the debtor or the receiver can also request that two or more pending processes be merged into a single one, if those processes pertain to companies that belong to a group (article 41 RSIA).

Both in case of joint or merged processes under articles 38, 39 and 41 RSIA, respectively, as a rule, neither the assets nor the liabilities of each of the bankrupt companies can be consolidated (article 42 RSIA); the only effect of the joint handling of the cases being that they will be handled in a coordinated manner. Nonetheless, article 43 RSIA allows for such consolidations under certain exceptional circumstances in which the application of the ordinary regime would lead to higher costs or slower processing.

9 COVID-19

9.1 What, if any, measures have been introduced in response to the COVID-19 pandemic?

With a view to support debtors affected by the economic downturn generated by the sanitary measures passed to curb the COVID-19 epidemic, both the Spanish Parliament and the Government have approved several legislative measures that, in one way or another, temporarily modify or impose a stay on certain provisions of the insolvency legislation, the most important of them being the one that imposes a stay on the obligation of insolvent debtors to file for bankruptcy. An amendment recently passed by Royal Decree-Law 5/2021 has extended the said temporary regime until the end of 2021.

Other – reform proposals

For the time being, no reform of the Spanish corporate rescue and insolvency regime has been announced. Nonetheless, the abovementioned EU Directive (EU) 2019/1023 should be transposed by all EU Member States by no later than 17 July 2021. Therefore, although the Government has not yet even disclosed the draft of the piece of legislation that needs to be passed for the transposition of the said Directive, this will foreseeably happen in the early months of 2021. That piece of legislation will certainly entail an amendment of several provisions of the recently enacted RSIA.

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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 has a team of lawyers that works on international transactions involving different sets of laws, has the flexibility to adapt to clients' needs, and has 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, the commercial and corporate practice is still one of the most thriving. Within this, insolvency has been one of the busiest areas, with the firm advising, on a regular basis, creditors of bankrupt companies, bankrupt companies, and directors of bankrupt companies in liability lawsuits 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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