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Draft legislative guide on insolvency law

Compilation of comments by Governments

Note by the Secretariat

Addendum

Spain

Comments submitted by Spain on the UNCITRAL draft legislative guide on insolvency law

1. Introduction

The Government of Spain welcomes the speedy conclusion of the Commission's work on a legislative guide on insolvency law, which had been requested at the thirty-third session of the Commission (2000).

It also expresses its satisfaction at the extraordinary quality of the text. It therefore wishes, first, to congratulate the UNCITRAL secretariat for its intense and sustained efforts, and also all the States members and observers, international organizations and professional organizations which have made such an outstanding result possible.

The above remarks are justified because there is a need to update insolvency law in a wide range of geographical regions, which the guide aims to do with an extremely high level of expertise. Indeed, if the recommendations it contains are followed, the level of legal certainty in international trade will grow, with the result that it is easy to foresee an enormous expansion in industrial, commercial and

* Revised dates.

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financial flows in that area, not to mention the beneficial effects for the internal elements of national economies.

The natural outcome of this process—an improved standard of living in all parts of the globe and, in particular, the most disadvantaged regions—is good reason to welcome the recent result of the Commission's work, since the guide is destined to become an important development tool because the legal reliability that sustains it and is advocated by it will increase business exchanges.

Spain recently adopted an Insolvency Law that brings to an end many decades of a disorganized legal regime governing insolvency. The Law, which, as indicated in its Statement of Purpose, is based on the UNCITRAL Model Law on Cross-Border Insolvency, contains the main features of the most innovative insolvency legislation from various European countries and, in some cases, other geographical regions, so it represents another milestone in the improvement and modernization of national legislation in this area.

It was thus inevitable that, in reading the guide, we would compare it with our new national Law. The result of this comparison is highly satisfactory, both because the set of basic issues relating to the insolvency regime is almost the same in both documents and because of the nature of the recommendations.

Our first comment might therefore be to recommend that the UNCITRAL secretariat suggest annexing to the guide some examples of the most recent legislation that develops and complements the legislative directions set out in the guide. Our new Insolvency Law should, of course, appear in such an annex.

It would also make sense for the work carried out in connection with our Insolvency Law, the preliminary discussions about the text among experts and the negotiations within Parliament itself should influence the direction of the only two fundamental comments that might be made about the guide: first, the question of the relations between the insolvency representative and the creditor committee and, second, the section dealing with voluntary restructuring negotiations.

Before broaching a few minor questions relating to these two topics and some other matters of form in the Spanish-language version, we should emphasize the overall relevance of the document both in the general and in the particular, from questions of detail to the broad sweep of the subject matter.

2. Voluntary restructuring negotiations and expedited reorganization proceedings

The main difficulty is how to include such negotiations or proceedings in the legislative guide on insolvency law. The guide does not really deal with the contractual aspect, strictly speaking, but is rather a series of coordinates whereby the participants show their willingness to reduce their freedom of action for the common good of the proceedings.

On the other hand, so-called voluntary restructuring negotiations—and, where the two institutions have elements in common, expedited reorganization proceedings—have, as their name indicates, and as may be seen in the way their fundamental elements and the related recommendations are set forth, more of a contractual or business nature, which, in a sense, does not form part of the traditional scope of insolvency law.

Since the system in question is innovative and useful, it would probably be preferable to detach the relevant section from the main body of the document and include it as an appendix, with a view to drawing legislators' attention to the fact that it would be useful and appropriate to give such a multilateral contractual procedure a more specific form in national regulations so that the harmful effects of a declared insolvency can be anticipated and avoided.

Reflecting on the above comment, on the basis of our new Insolvency Law, leads us to suggest an alternative way of incorporating out-of-court agreements between the debtor and a substantial proportion of its creditors into the legal system of insolvency. This is called "prior agreement proposal" in the Spanish Insolvency Law. Under this formula, the debtor can, at the start of insolvency proceedings, submit a payment plan and, where appropriate, a viability plan, with backing from creditors whose loans amount to more than one fifth of the total declared. Another point in favour of an approach that ensures the continuity of the debtor's business activities is the possibility of prompt agreement by the other creditors and a subsequent favourable court ruling, although the debtor will obviously need the support of its largest creditors.

This achieves all the positive effects of insolvency proceedings, especially that of holding the shares of individual creditors against the debtor's estate and any reorganization of the debtor's activities, with the agreement of the creditors (or at least a substantial proportion of them). It also ensures the transparency of the proceedings, which might otherwise be diminished, and a proper balance of the interests of all those involved. Obviously, however, if the "prior agreement proposal" does not meet with the approval of the majority of the creditors, the insolvency proceedings will have to take their ordinary course.

3. Relations between the insolvency representative and the creditor committee

The guide treats the insolvency representative and the creditor committee as two separate entities. The logic behind such a separation may, however, break down in cases where the creditor committee exercises functions similar to those of the insolvency representative (see paragraphs 466 and 467, in fine).

It may therefore be preferable to broaden the concept of the insolvency representative so that, as a general rule, it would be a body made up of several people, whereas a one-person insolvency representative would be an exceptional arrangement for smaller-scale insolvencies.

We envisage that such a body, containing several members, would include a representative of the creditors (perhaps the unsecured creditors) and two other independent experts (in trade law and business studies). This may facilitate coordination between the creditors and the normal conduct of the tasks entrusted to the insolvency representative.

On the other hand, the form of the creditor committee might interfere with the functions of the insolvency representative and perhaps also with the participation of the creditors in the decision-making process. A further reading of these sections taken together (that relating to the meeting of creditors and that relating to the committee) could result in a reduction in the number of functions entrusted to the committee if those functions were shared between an insolvency administration (the proposed court, particularly where it has creditor representation) and the meeting.

4. Other comments

(a) It might be useful if the glossary contained in the document were set out in two columns, with one containing the Spanish word and the other the English. This would be a way to overcome the inevitable obstacles arising from language differences.

(b) In paragraphs 19 and 20, particularly the latter, it might be useful to indicate sectors that are particularly vulnerable in the context in question and which should be protected: banks, insurance and the securities market. These three sectors could also be mentioned in paragraphs 70 and 71 (as is already the case in paragraph 91).

(c) In the first paragraph of the section entitled "Purpose of legislative provisions", under the recommendations in Part Two, chapter II, section A (Assets constituting the insolvency estate), there is no reference to the debtor's insolvency estate, by contrast with references that may be found in parallel sections, where mention is made of the general framework of the objective or purpose that the legislative provisions should pursue.

(d) In the first line of paragraph 188, the phrase "de si" should read "si".

(e) In the seventh line of paragraph 198, the word "billetes" is used, whereas the English word "assets" should—without checking the translation of the English in other places—be rendered as "activos" or "bienes".

(f) The title of recommendation 44 is still to be translated and could read "venta al margen del curso ordinario de los negocios".

(g) In the third sentence of paragraph 245, the phrase "una segunda clase de prestamistas será aquel" should perhaps be replaced by the phrase "una segunda clase de prestamistas será la de aquel" in order to retain the general meaning of the sentence, although this formulation is somewhat unfortunate.

(h) In paragraph 511, at the beginning of the second sentence, the affirmative "sí" should be replaced by the conditional "si"

(i) In line with the first substantive comment above, it would be useful to reconsider the terms used for expedited reorganization proceedings. More specifically, given the general tone of the document in Spanish, it is surprising that the present indicative ("constituyen") rather than the conditional or future imperfect "pueden constituir", "constituirían", "constituirán", etc. is used in paragraph (a) of the section "Purpose of legislative provisions" in the recommendations following paragraph 565.

(j) In the second line of the Spanish text of paragraph 614, "derechos jurídicos" should read "derechos legales", (legal rights) by contrast with contractual rights.

(k) The first word of recommendation 173 should be "la" instead of "le".