

# COMITÉ MARITIME INTERNATIONAL

## International Working Group on Cross-Border Insolvency

### QUESTIONNAIRE

#### SECTION I

#### CROSS-BORDER MARITIME INSOLVENCY ISSUES

##### **RESPONSES ON SPANISH LAW**

*MANUEL ALBA – CARLOS III UNIVERSITY OF MADRID*

##### *Insolvency and bankruptcy*

For framing this Questionnaire in the Spanish legal context, and like in the Italian case, it is convenient to previously make some clarification on the terms employed. In Spanish legal language, the cognate of insolvency, “*insolvencia*”, refers to a debtor’s state of impossibility to regularly honour debt payments. As such, the state of insolvency determines the obligation for the debtor, and the right for its creditors, to file a request for a declaration of bankruptcy (“*concurso*”). Thus, the term *concurso*, which we will translate also here as bankruptcy, refers to a special substantive and procedural regime that temporarily applies to the bankrupt debtor (“*concursado*”) with the aim to either restore its financial equilibrium or realise its assets for paying outstanding debts with the proceeds (winding-up).

#### **Part 1 General Insolvency Principles Applicable to Foreign Creditors**

1. *Has your country adopted any specific rules on cross-border insolvency (such as the UNCITRAL Model Law or any specific domestic, bilateral or multilateral instrument?) Please provide a general description based on the topics discussed in this questionnaire.*

Bankruptcy proceedings are in Spain subject to Act 22/2003, of 9<sup>th</sup> of July, on Bankruptcy (*Ley Concursal* –hereinafter BA), which provides a general framework for bankruptcy of natural and legal persons. Being a EU member State, in Spain applies Council Regulation (EC) no. 1346/2000, of 29<sup>th</sup> of May 2000, on insolvency proceedings.

Regulation 1346/2000, according to its terms, applies to insolvency proceedings taking place in a Member State, whose effects are thereby recognized in other member States under the conditions in essence dictated by Arts. 3, 16 and 17, along with the rest of its provisions.

Spanish BA, on its part, devotes an entire title (Title IX, Arts. 199 to 230) to private international law issues. Title IX is modelled upon the basic scheme of Regulation 1346/2000 and the UNCITRAL Model Law on Cross-Border Insolvency, and it applies where Regulation 1346/2000 does not apply. Matters addressed by Title

IX BA include:

- The general rule that insolvency proceedings opened in Spain are subject to Spanish law.
  - Rules on applicable law to determine the effects of the bankruptcy declaration upon certain rights of the bankrupt debtor, contracts, rights *in rem* of third parties on goods in other States, and foreign judicial proceedings in other States.
  - Types of bankruptcy proceedings relating to the same debtor. The classification relied on by the Spanish BA in this regard also distinguishes between main or principal bankruptcy proceedings and territorial or secondary bankruptcy proceedings.
  - Recognition of foreign bankruptcy proceedings in Spain, and rules applicable to the administrator of foreign bankruptcy proceedings recognized in Spain.
  - Rules for the coordination of parallel bankruptcy proceedings.
2. *Do your laws recognize the standing of a foreign creditor or other person (such as a foreign flag authority of a locally domiciled shipowner or a foreign administrator of insolvency proceedings) to start or oppose an insolvency proceeding in respect of a local ship operator or in respect of assets located locally? If so, describe in detail those rights or restrictions upon such rights of such foreign entities which differ from those of local creditors, insolvency administrators or public authorities.*

In Spain, the declaration of bankruptcy of the debtor may be requested to the competent court by the debtor itself (the debtor is under an obligation to file for bankruptcy within two months following the date in which it became, or should have become aware of its state of insolvency) or by any creditor (see Arts. 2, 3 and 5 Spanish BA). Spanish law does not limit the rights of foreign creditors for the request of the declaration of bankruptcy of a debtor, and therefore the said rules apply regardless of the nationality of the creditor feasibly requesting the declaration of bankruptcy.

In a more specific case, the BA regulates the right to request the declaration of territorial bankruptcy of a foreign debtor. Such request may be done by any creditor (national or foreign creditor, for the rule does not differentiate), under the same conditions as laid down for general (national) bankruptcy proceedings, as well as by the bankruptcy representative/administrator in Spanish territory under foreign principal bankruptcy proceedings (Art. 212 BA). This latter rule, consequently, must not be interpreted, *a contrario*, as restricting the rights of other foreign people or entities as compared to Spanish ones (in fact, the administrator of a foreign bankruptcy estate does not necessarily have to be a foreign person or entity). It rather refers to the bankruptcy representative/administrator of a foreign principal bankruptcy estate in Spanish territory, for expressly including the said right within the general catalogue of rights that Spanish law provides to such representative/administrator (See also Arts. 220 and 221 BA).

Within the scope of application of Regulation 1346/2000, the same rule applies to this situation under Art. 29.

3. *Do your laws have a procedure for supervising the activities in your country of a foreign insolvency administrator?*

The recognition of a foreign bankruptcy representative/administrator in Spain and its powers requires, first, that the foreign bankruptcy proceedings be recognized in Spain (See in general Art. 220 BA) and, second, that the representative/administrator of the foreign bankruptcy state is duly accredited as such in Spain. For the first condition it is necessary to follow the general exequatur procedure and meet other specific conditions. The BA then defines the bankruptcy representative/administrator as the person or entity entitled (under the law applicable to the principal bankruptcy proceedings) to administer or supervise the re-organization or the realisation of the debtor's assets or activities, or generally to act as representative of the estate or the proceedings. The representative/administrator is accredited as such upon presentation of an authenticated copy of the original resolution or decision for its designation, or the certificate issued by the competent court or authority with that purpose, in any case with the formal requirements needed for being effective in Spain.

The foreign bankruptcy representative/administrator is under the obligation to give publicity to the foreign principal proceedings in the same conditions generally laid down for the publicity of national bankruptcy proceedings (see Arts. 23, 24 and 221 BA), and its powers are in general determined according the law of the State where the principal bankruptcy proceedings have been initiated, but in any case subject to the effects of the territorial bankruptcy proceedings initiated in Spain, and to Spanish law (in particular to the rules applicable to the realisation of assets in Spanish territory) and public policy. There is not specific procedure for the supervision of the activities of a foreign bankruptcy representative/administrator in Spanish territory.

The powers of the liquidator under Regulation 1346/2000 (which according to Art. 2, par. b includes a representative or administrator of the insolvent debtor) are regulated in Art. 18 pars. 1 for the representative of the principal insolvency proceedings, and par. 2 for the representative of the secondary insolvency proceedings, and with more limitations. In the former case, the liquidator of the principal insolvency proceedings opened in a Member State may exercise all powers conferred by the law of such State in other Member States.

4. *If an administrator is unwilling to pursue a claim by the insolvent ship operator, can foreign creditors apply to an insolvency tribunal for a transfer of the subject matter of the claim from the estate of the insolvent ship operator to a creditor or group of creditors?*

In national bankruptcy proceedings foreign creditors have the same rights that national creditors. In general terms, Spanish law shows an extreme reluctance to admit the transfer of assets of a bankrupt debtor to a creditor or group of creditors for the payments of its or their debts.

In Spain, the declaration of bankruptcy of a debtor may be classified as "voluntary bankruptcy" ("concurso voluntario") or "necessary bankruptcy" ("concurso necesario"). The classification of voluntary bankruptcy applies when the debtor itself files for bankruptcy, whereas the necessary bankruptcy will take place when the declaration of bankruptcy follows a request with that purpose made by a creditor (see in general Art. 22 BA). Among the immediate effects that the declaration of bankruptcy has upon the debtor, the most important ones are probably those relating to its capacity

and powers for administering its own assets, which in any case are limited. In this regard, Spanish BA contemplates two possibilities. First, that the debtor keeps its powers for administering its assets under the supervision of a bankruptcy administration body (“*administración concursal*” – hereinafter BAB) for certain acts, or, second, that the debtor is deprived of its administration powers, and the administration of all assets of the debtor is taken over by the BAB. The BAB is in any case named by the competent court for the declaration of bankruptcy and the conduction of the proceedings (the Commercial Court of the place where the debtor has its principal place of business –which in the case of legal persons is presumed to be the statutory domicile–, or the place of its domicile, if it is within Spanish territory –see Arts. 8 and 10 BA). As a general rule, and although the commercial court may decide otherwise, the debtor will keep its ability to administer its assets (under the supervision of the BAB) in cases of voluntary bankruptcy, whereas the BAB will be transferred all administration powers in cases of necessary bankruptcy.

Within this very basic framework, bankruptcy proceedings may follow two basic courses. On the one hand, a bankruptcy agreement or convention (“*convenio concursal*”) may be reached between the debtor and its creditors (or a certain majority thereof, and following a rather strict procedure) for the compromise or modification of certain debt relationships, in order to restore the financial balance and the solvency of the debtor through performance of the convention. On the other hand, the bankruptcy proceedings may directly head to the winding-up of the assets of the debtor for payment of the outstanding debts (the debtor or creditors under certain conditions may submit to the court a proposal of bankruptcy convention; the liquidation may be requested by the debtor or decided *ex officio* by the court). In any of these cases, the payment of debts is subject to the *par condition creditorum* principle, which is based on the classification of credits/debts for the distribution of the remaining assets (of the proceeds of their realisation).

The classification of claims in this sense made by the BA distinguishes three types: privileged claims, ordinary claims and subordinated claims. Privileged claims are those whose payment or performance is secured by a security right upon immovable or movable goods or rights within the debtor’s assets (in this context, security rights include those perfected by agreement between the owner debtor and the creditor, as well as certain rights stemming from legal provisions without previous agreement). These claims are in turn classified in claims with a special privilege (those whose security refers to one or more specific assets of the debtor) and claims with a general privilege (those whose security refers indeterminately to all the debtor’s assets). Subordinate claims are those whose payment is postponed and subordinated to performance or payment of privileged and ordinary claims, on grounds of certain circumstances (e.g., late claims, the special relationship existing between the creditor and the debtor). Finally, ordinary credits are those that are neither privileged nor subordinated.

The transfer of assets of the debtor for payment of debts is in general forbidden within the substantive and procedural structure of bankruptcy proceedings, in any of its modalities. Thus, for instance, the law expressly states that the bankruptcy convention may not include the transfer of assets for payment of debts (Art. 100.3 BA), and in general realisation of assets must seek the preservation or maximization of their value in order to ensure to the largest possible extent the payment of the remaining debts. There are certain exceptional cases where the transfer of assets in relation to a debt is allowed.

First, goods or rights subject to a security right may be transferred to the debtor as payment in kind, if the court so decides following the proposal made by the BAB or the secured creditor (Art. 155, par. 4 BA). Second, in cases where the owner of a certain good previously in possession of the debtor, cannot retake possession thereof because the good has been transferred to a third party from whom the good may not be retaken, such owner may claim the assignment of the right to the proceeds or the consideration to be paid for such good, if it hasn't been paid yet at the time of the initiation of the bankruptcy proceedings (Art. 81, par. 1 BA). Therefore, the transfer of an asset, be it a good or a right, which is the subject matter of a claim may not be transferred to a creditor as a general principle.

5. *Do your laws permit foreign creditors to apply to a court for supervisory orders if they consider the administrator is acting inefficiently or wrongly? Describe the procedure generally.*

The rights of foreign creditors in the said situation are the same as those conferred in general to any creditors, for the law does not make distinctions. The members of the BAB (or rather the BAB as such) are subject to a set of obligations and liabilities that are in essence equivalent to those of any administrators, and particularly to company directors, but which are owed, not only to the bankrupt debtor, but rather to all creditors. They are under a general duty to diligently and loyally administer the bankrupt debtor's estate (or supervise the debtor's administration) in the interest of the bankruptcy proceedings and of creditors. Their liability is based on the breach of their diligence and fiduciary duties.

As a consequence, creditors may claim to any member of the BAB compensation of the damages caused to the debtor's estate, or for damages directly caused to them, by reason of the breach of their obligations (Art. 36 BA). The law likewise foresees the creditors' right to file an action with the court requesting the removal of the members of the BAB, in case for justified reasons (Art. 37 BA).

6. *Do your laws permit foreign creditors to commence legal proceedings against administrators if they consider the administrator has acted negligently or wrongly?*

See answer to Question 5.

7. *If a foreign creditor or claimant against a ship operator foresees it will suffer a loss or commercial disadvantage because of the appointment of a private receiver or the way the private receiver is acting, does such a foreign claimant have any legal remedies against the receiver, such as applying to a court for supervisory orders or to put the ship operator into bankruptcy?*

Spanish law does not contemplate or regulate the private receiver.

## **Part 2      Subject Matter or Territorial Jurisdiction**

8. *Do your laws permit assertion of insolvency jurisdiction generally over any asset*

*of an insolvent ship operator domiciled in your country, regardless of the location of the asset within or outside your country? Please comment whether this scope of jurisdiction differs between a ship of your country's registry owned by persons domiciled in your country, or a ship of another flag owned by persons domiciled in your country.*

Under Spanish law all assets of the bankrupt debtor are subject to the bankruptcy proceedings and to the jurisdiction of the corresponding competent court, regardless of their location. That includes both a ship registered in the Spanish Maritime Registry (the one relevant for administrative and public law purposes) and in the Spanish Movable Property Registry (the one relevant for property rights and private law purposes) and a ship registered abroad. Assertion of such jurisdiction, for instance, upon a national vessel owned by the debtor, which is situated in foreign territory (or foreign territorial or port waters) may require the recognition of the bankruptcy declaration in a foreign State, in accordance with the procedure applicable under its law.

Spanish law, however and at the substantive level, does expressly provide for some applicable law rules that may find application in the hypotheses foreseen in this question. Thus, the BA states that the effects of the bankruptcy declaration with respect to the debtor's rights upon goods subject to registration in a public registry, such as vessels or aircrafts, "shall accommodate to" the law of the State of registration (Art. 202<sup>1</sup>; see also Art. 11 Regulation 1346/2000). Likewise, the validity of transactions carried out after the declaration of bankruptcy for the disposition of goods subject to registration in a public registry (again, vessels and aircrafts) against consideration will be governed by the law of the State of registration (Art. 203 BA; see also Art. 14 Regulation 1346/2000). This would apply, for instance, in cases where a foreign vessel owned by the Spanish bankrupt debtor is in Spanish territory or jurisdictional waters, or in another State's territory or jurisdictional waters (without prejudice of the requirements that in this case the assertion of jurisdiction by a Spanish court may require).

### **Part 3      Notice to Foreign Creditors**

9. *Do any legal or procedural requirements have to be followed to ensure the insolvent ship operator or the insolvency administrator identifies all known foreign creditors?*

There are no specific obligations for the court or for the BAB for the identification of foreign creditors. See however answer to Question 10 below.

10. *Do your laws require administrators of insolvency proceedings to give notice of the proceedings to foreign creditors? As a general practice, how is such notice*

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<sup>1</sup> The expression between quotes is far from being an example of clarity. Art. 200 BA states with a general character that the effects of a bankruptcy declaration made by Spanish courts shall be determined by Spanish law. Art. 202 therefore provides one of the exceptions, and it is simply and generally interpreted as referring to the law of the State where the goods are registered, in line with Art. 11 of Regulation 1346/2000.

*given to foreign creditors?*

In general terms, according to Spanish law the bankruptcy declaration is subject to certain publicity measures to be provided for by the court seized and in charge of the proceedings. Such measures include the publication of a summary of the bankruptcy declaration in the Official Journal of the State, as well as any other measures deemed appropriate by the court. The information relating to the proceedings must include, among other things, the postal and/or electronic address to which the communication or lodgement of claims must be done. They also include the inscription of the bankruptcy declaration in public registries where the debtor may be registered (persons or entities registries), or where some of its assets may also be registered (namely, public property registries) –see Arts. 23 and 24 BA. The law also sets the duty of the BAB to address individual communications “without delay” to all creditors whose identity and domicile result from the debtor’s books and documentation (Art. 21, par. 4 BA).

Much like Regulation 1346/2000 Art. 40 for creditors in Member States, Spanish law specifically regulates the BAB’s duty to communicate the bankruptcy declaration to foreign creditors (creditors with habitual residence, domicile or seat in foreign territory). Such duty exists only with respect to those creditors whose existence results from the debtor’s books or documentation, or which are otherwise known to the BAB. Unless the court decides otherwise in view of the circumstances, such communication must be individually addressed to each creditor; and it must identify the proceedings, the date of the declaration, the principal or the territorial or secondary character of the proceedings, the limits imposed on the debtor’s powers for administering its assets, a call to creditors to lodge their claims with the BAB and the deadline for doing so, as well as the postal address of the court (Art. 214 BA).

The BA also sets out that the court may decide to give publicity to the bankruptcy proceedings in a foreign State if it is in accordance with the interests of the bankruptcy proceedings. In such case, the means employed for the said purpose will be those in general laid down by the law of such State. Also when it is in line with the interests of the bankruptcy proceedings, the BAB may request to the court that the bankruptcy declaration is registered in the public registries of a foreign State (Art. 215 BA).

*11. Do your laws require administrators of insolvency proceedings to give notice of time bars for filing of claims to foreign creditors? As a general practice, how is such notice given to foreign creditors?*

See answer to Question 10.

*12. If the insolvent business is a shipowner, do your laws require notice of insolvency proceedings to be given to the ship registrar for domestically registered vessels?*

See answer to Question 10. Among the public registries where the declaration of bankruptcy shall be inscribed stand those personal registries where the debtor may be registered (for entrepreneurs, the Mercantile Registry, and, in the case of shipowners or vessel operators, the Public Registry of Maritime Enterprises, held by the General Direction of the Merchant Marine, within the Ministry of Infrastructure –Dirección

*General de la Marina Mercante, Ministerio de Fomento) or the property registries where goods owned by the debtor may be registered (both the public and the private registry of vessels) –See also Art. 22, par. 1 Regulation 1346/2000.*

13. *Do your laws require notice of insolvency proceedings to be given to diplomatic or consular officials of the flag states of foreign registered vessels which are assets of a local insolvent ship operator?*

No.

14. *If a foreign creditor later learns of the existence of insolvency proceedings, is the foreign creditor permitted to file late claims or have a right to claim against any of the assets of the insolvent ship operator which have not yet been distributed to creditors?*

Late claims are regulated in Spanish law regardless of the nationality of the creditor. Namely, late claims may be included by the BAB, or by the court in cases where the list of creditors made by the BAB is challenged, in the list of subordinate claims, unless their existence resulted from the debtor's books or documentation (Arts. 92 and 96 bis BA).

#### **Part 4      Recognition of Foreign Claims**

15. *Please describe the conflict of laws rules for recognition of foreign maritime claims in insolvency proceedings. For example, if the claim is a maritime lien under the law of the place where the claim arose but not in the country where the insolvency proceeding is being conducted, will the insolvency administrator or tribunal recognize the foreign maritime lien?*

For better framing the question in Spanish law it is worth differentiating and referring both to the recognition of maritime claims and to the recognition of possible liens or security rights attached thereto by the law (such as in the case of maritime liens). The recognition of claims or credits in bankruptcy proceedings does not differentiate between national and foreign claims. The existence and validity of a given credit or claim will be determined in accordance to the law applicable to the contract or the obligation concerned, and for that purpose (when the credit is a foreign or international one) the general conflict of law rules (Regulation 593/2008 –Rome I– or Art. 10 Spanish civil code) may apply.

A different question refers to security rights created by the law and feasibly securing certain credits or claims against the bankrupt debtor, such as maritime liens. In Spain, like in other civil law countries, “maritime privileges” (“privilegios marítimos”) are security rights upon the vessel created and regulated by substantive law. As stated in some of the documents circulated within the IWG, one of the particularities of maritime privileges is that they may fall upon the vessel in cases where the debtor of the secured claim is not the owner thereof. That circumstance entails many complexities in bankruptcy proceedings. For the sake of simplicity, we will remain in the hypothesis in

which the bankrupt debtor is both the owner of the vessel and the debtor of all claims secured through the possibly existing maritime privileges and other security rights upon the vessel. It must be taken into account that this question (law applicable to maritime privileges or liens, and determining their recognition as such and their regime) is independent of the law on insolvency. In Spanish national law on insolvency, there is not a specific conflict of laws rule relating to the law applicable to rights *in rem* upon goods within the assets of the bankrupt debtor (as we will point out, there are conflict of laws rules that relate to the law applicable for determining *the effects of the declaration of bankruptcy* on the rights *in rem* of the debtor, as well as on the rights *in rem* of third parties upon the assets of the debtor).

That leads us to the general conflict of laws and the substantive law rules on rights *in rem* affecting vessels that in general terms apply under Spanish legislation. Two rules must be taken into account here. The first one is the conflict of laws rule contained in Art. 10 par. 2 of the Spanish civil code, which states that vessels, as well as all rights perfected upon them, will be subject to the law of the flag State. Second, Spain is since 2004 a party to the 1993 Convention on Maritime Liens and Mortgages (CPH93). The Convention applies to all vessels registered in a State Party to such convention and to all vessels subject to the jurisdiction of the State party. The rule on the scope of application of the convention operates also as a conflict of laws provision and seems to override the national conflict of laws rule.

If we turn to the effects of the bankruptcy declaration with respect to rights *in rem*, both Regulation 1346/2000 and the Spanish BA have provisions of conflicts of laws (the latter being applicable only if the former do not apply). On the one hand, Art. 5 of Regulation 1346/2000 states that the opening of insolvency proceedings will not affect third parties' or creditors' rights *in rem* upon the assets of the debtor that are situated in another Member State (which in the case of vessels will be the State of registration –see Art. 2, par. g), and Art. 11 states that the effects of insolvency proceedings on the debtor's rights on vessels shall be determined under the law of the State of registration. Likewise, and on the other hand, the Spanish BA, in its Art. 201, states that the effects of the bankruptcy declaration with respect to rights *in rem* of third parties or creditors upon the goods of any kind belonging to the debtor and which are situated in a different State will be determined by the law of such State, whereas (as previously stated) Art. 202 specifies that the effects of the bankruptcy declaration on the debtor's rights *in rem* upon vessels will be determined by the law of the State of registration.

If a bankruptcy declaration is issued in Spain, the combination of all the foregoing would imply that:

- If the vessel is registered in Spain, Spanish national rules would apply, and the maritime privileges or security rights upon the vessel that would be recognized (regardless of the applicable law to the contract that the claims stem from) are those mentioned in the CPH93 (with the priority therein stated) and, subordinately (and also with the priority in each case resulting), those stated in the Spanish legislation (including Art. 580 of the Spanish commercial code, which sets the “national” maritime privileges). If we turn to insolvency law, the law applicable to the bankruptcy proceedings would be Spanish law, and the effects of the bankruptcy declaration upon third parties' or creditors' rights *in rem* upon the vessel would fall

under Spanish law as well. The material application and effectiveness of the said rules would in the end depend on the conditions for the assertion of jurisdiction by the commercial court (bankruptcy jurisdiction) in cases in which the vessel is situated in a foreign State.

- If the vessel is registered in a foreign State, and the vessel is registered in a State party to the CPH93 or, not being so registered, the vessel is subject to the Spanish jurisdiction (e.g., is in a Spanish port), the maritime privileges or security rights upon the vessel that would be recognized (regardless of the applicable law to the contract that the claims stem from) are those mentioned in the CPH93 (with the priority therein stated) and, subordinately and by operation of the conflict of laws rule in Art. 10 par. 2 of the Spanish civil code, those stated by the law of the flag State. If we turn to insolvency law, in this case too, the law applicable to the bankruptcy proceedings would be Spanish law, but the effects of the bankruptcy declaration upon third parties' or creditors' rights in rem upon the vessel would be the law of the State of registration, if Regulation 1346/2000 apply, or Spanish law if Art. 201 BA applies (for in these cases we assume that the vessel is in Spanish territory or "civil" jurisdictional waters).

In any case, the law of the place where the credit arose would not apply, unless such application results from the provisions above.

All this being said, and without prejudice of the anecdotal value of such information, many insolvency lawyers in Spain complain that courts, in international situations of such difficulty, tend to simply apply for all purposes the *lex concursus*: Spanish law.

*16. Apart from the characterization and priority of claims, are there any other procedural differences in the handling of claims between those by foreign creditors and those by local creditors? With reference to the types of claims listed in the table, please describe any differences in detail.*

In terms of bankruptcy and procedural law, there are no differences in the treatment given to claims of foreign and local creditors, with one very specific exception. Art. 217 BA states that those creditors whose habitual residence, domicile or seat is in a foreign country may lodge their claims under the same rules applying to local creditors. This applies also (but subject to reciprocity) to public claims (i.e., claims of States, such as tax dues or social security debts), which, however, will be considered ordinary claims (it must be taken into account that the same claims corresponding to the Spanish State are considered privileged claims –Art. 91 BA).

*17. Does your law recognize rights of claims to property rights, sale or enforcement given by foreign law to particular types of creditors, such as, for example, to financial institutions or spouses for their entitlement to business property interests of the other spouse on separation or divorce?*

*18. Is the recognition of foreign arbitral awards for purposes of proof of claim in insolvency proceedings different from the recognition of foreign arbitral awards for general legal purposes? Please explain any differences.*

No.

19. *If the insolvent ship operator is a state-owned enterprise, are there any differences in the rights or procedures available to a foreign creditor under your country's insolvency law?*

No.

## **Part 5      Recognition of Foreign Insolvency Proceedings**

20. *Do your laws permit the administrator of a foreign insolvency proceeding to publish notices of such proceedings in local news media or to communicate directly with local creditors concerning proofs of claim and payment of any recoveries in the insolvency proceedings? If there any legal restrictions on direct handling of claims by foreign administrators, please provide details.*

Once a foreign insolvency declaration is recognized in Spain (under the conditions stated in Art. 220, par. 1 BA), and the representative/administrator of the insolvency proceedings is also accredited as such in the Spanish jurisdiction, it is not simply permitted, but rather obliged to give to such insolvency proceedings the publicity also required for national proceedings (Art. 23 and 24 BA) if the debtor has a branch in Spain (Art. 221, par. 3 BA). It is not expressly stated that the representative/administrator of the bankruptcy proceedings relating to a debtor without a branch office in Spanish territory may publish notices of the proceedings in local media or communicate directly with creditors, but (other than not existing a prohibition to do so) Spanish law states that the representative/administrator will be entitled to all the rights foreseen in the law of the State of origin, provided that they do not contradict Spanish law or public policy –which would mean that the said measures would be allowed at the very least where the law of the State where the insolvency proceedings have been opened so provides.

21. *Will your country's courts recognize a request for the recognition of foreign insolvency proceedings?*

The recognition of foreign insolvency proceedings is addressed both in Regulation 1346/2000 (see Arts. 16 and 17), and in the Spanish BA. In particular, the Spanish BA (Art. 220) subjects the recognition of a foreign insolvency declaration to the general provisions on exequatur (to be found in Arts. 951 to 958 of the Spanish Civil Procedure Act of 1881<sup>2</sup>), with certain additional requirements: that it refers to collective insolvency proceedings that subject the debtor's assets to supervision or control by a foreign court or authority with the purpose to provide for their reorganization or winding-up; that the declaration or resolution is final in the State of origin; that the competence of the court or authority is based on one of the criteria laid down in Spanish

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<sup>2</sup> Most of civil procedure rules are currently contained in the Spanish 1/2000 Civil Procedure Act, but certain specific parts of the 1881 Act remain in force until new legislation is passed on the matters therein addressed.

law or on a similar reasonable connecting factor; that the declaration or resolution has not been issued in the debtor's absence, unless the debtor has been summoned with a reasonable time to enter an appearance with the purpose to contest such decision; and, finally, that the declaration or resolution does not contravene the Spanish public policy. Recognition of a foreign insolvency declaration is also subject in general terms to reciprocity (Art. 199 BA).

22. *Will such a request be recognized if it comes directly from a foreign trustee in bankruptcy, liquidator or administrator, or does the request have to be in the form of a letter of request issued by the foreign bankruptcy tribunal?*

According to Spanish civil procedural law, absent an applicable international treaty and subject to reciprocity, the recognition and enforcement of a foreign judicial decision may be requested by any person with a legitimate interest therein. That includes, in the case of a declaration of insolvency or bankruptcy, the debtor itself, which, in the case of legal persons, would have to act through the representation body designated according to the law of the State where the insolvency proceedings have been initiated (trustee, representative, administrator or liquidator), as long as it is duly accredited as such, complying with the formalities in the country of origin and with the formalities necessary for the effectiveness in Spain of any documentation relied upon.

23. *What legal standards do your country's courts apply for the purpose of recognition of foreign insolvency proceedings? Please provide details.*

See answer to Question 21 above.

24. *Do your laws have a procedure for a request for the recognition by a foreign insolvency administrator or insolvency court of a local insolvency proceeding? Are such requests generally made by the administrator or the insolvency court? Generally describe the procedure.*

There is no specific procedure in Spanish law for the request of the recognition of local bankruptcy proceedings by a foreign insolvency representative/administrator or court.

25. *Can an administrator of insolvency proceedings request the courts of your country for assistance in obtaining recognition of insolvency proceedings of foreign insolvency administrators or foreign courts? Generally describe the procedure.*

There is no specific procedure for this purpose. The obligations of courts that may be relevant in the described context (e.g., issuance of resolutions or certificates) are those laid down with a general character.

26. *Will your courts enforce any compulsory transfer of a contractual obligation*

*involving a vessel formerly owned by an insolvent ship operator, if this contractual obligation affects parties located in your country?*

In principle, a compulsory transfer of a contractual obligation involving a vessel previously owned by the bankrupt vessel operator could be recognized in Spain, even if parties within the Spanish jurisdiction are thereby affected. However, this must be determined according to the general regime for the recognition and enforcement of foreign judicial decisions in Spain (Regulation 44/2001 or the existing bilateral agreements), and for the recognition and enforcement of foreign insolvency proceedings and the subsequent resolutions adopted thereunder. Spanish law, in this last regard states that once the foreign insolvency declaration is recognized in Spain, subsequent resolutions adopted by the corresponding court or authority within such proceedings will be also recognized in Spain without further formal procedure (i.e., without the need to submit to the exequatur procedure), if they have been adopted according to the insolvency law of the State of origin and meet the specific conditions laid down in the BA Art. 220 for the recognition of the foreign declaration of insolvency (see answer to Question 21 in this point). The Spanish BA also clarifies that any interested person may oppose to such recognition, in which case the recognition and enforcement of such a resolution would have to be declared according to the exequatur procedure (Art. 222 BA). Additionally, any executory measures decided by the foreign insolvency court must be in any case submitted to the exequatur procedure (Art. 224 BA).

There are other limits that may apply to, and condition the recognition of a resolution issued under foreign insolvency proceedings in the circumstances specified. First, Art. 221 par. 4 BA states that the effects of foreign principal insolvency proceedings recognized in Spain, and the powers also recognized to its administrator/representative, will be those resulting from the law of the State of origin, unless they are incompatible with the effects of local territorial bankruptcy proceedings. Second, and likewise, Art. 223 par. 2 BA states that the effects of foreign territorial insolvency proceedings will be limited to the assets (goods and rights) situated in the State where such proceedings have been opened. Otherwise, any resolutions taken within foreign insolvency proceedings and recognized in Spain (under the above stated conditions) will have the effects resulting from the law of the State of origin (223, par. 1 BA). See in this regard also Art. 25 Regulation 1346/2000.

This being said, the provisions of the Spanish BA relating to decisions issued under a previously recognized insolvency declaration seem to refer only to those decisions relating to relationships between the foreign debtor and the local creditors, or to the rights of the foreign debtor with respect to goods or persons in Spain. The recognition and enforcement of a decision such as the one described in this question would probably be sought by the transferee of such an obligation or contract (be it the purchaser of the vessel or not), and to that extent submitted to the “general” rules on recognition and enforcement of foreign judicial decisions.

27. *Does your legal system have a procedure for the coordination of concurrent insolvency proceedings involving maritime assets insolvent ship operators or creditors in your country and abroad? Is this procedure set out in laws or regulations or has it been developed through practice of insolvency tribunals? Please provide details including any generally used precedent forms of*

*procedural orders.*

Spanish law only provides for rules on the coordination of parallel or concurring (i.e., relating to the same debtor) insolvency or bankruptcy proceedings in general terms (i.e., not referring specifically to maritime debtors), and for the coordination of local principal bankruptcy proceedings and foreign territorial insolvency proceedings recognized in Spain and vice versa (i.e., local territorial and foreign principal insolvency proceedings). In this regard, Art. 227 BA sets out a duty for the BAB of the local bankruptcy and the representative/administrator of the foreign proceedings to mutually cooperate in the performance of their respective functions, and under the supervision of their respective courts or authorities. Cooperation may in particular include: the exchange of information within the limits of imperative rules, the obligation to communicate to each other any relevant change in the circumstances, coordination efforts in the administration, supervision or control of the debtor's activities and assets, and the approval and application by the respective courts of any agreements for the coordination of proceedings.

It must be also taken into account that the foreign representative/administrator must be allowed to file proposals of bankruptcy convention or winding-up agreements (as well as any other proposals for the realisations of the debtor's goods permitted by the law) in the conditions generally applicable; and the Spanish BAB may require a similar treatment in the foreign proceedings (227, par. that 3 BA).

Rules on cooperation for the coordination of parallel insolvency proceedings are also found in Art. 31 Regulation 1346/2000.

28. *Is your country a party to any bilateral or multilateral agreements for the coordination of multi country insolvency proceedings or the recognition of foreign insolvency proceedings? Please list such agreements.*

Spain is not party to any treaty specifically addressing the coordination of multi country insolvency proceedings or for the recognition of foreign insolvency proceedings. Matters relating to cross-border insolvency, as well as on international jurisdiction and recognition of judicial decisions on civil and commercial matters fall under the EU competency. All bilateral agreements previously concluded by Spain that address recognition and enforcement of judicial decisions exclude insolvency or bankruptcy proceedings, except the 1898 treaty between Spain and Switzerland on recognition and enforcement of judicial decisions on civil and commercial matters.

## **Part 6      Need for Reform**

29. *Have any provisions of your insolvency law created legal uncertainty or difficulties in the administration of cross-border maritime insolvencies? Please refer to any legal commentary or case law.*

With all frankness, and after several consultations, the list of provisions creating uncertainty, particularly in cross-border situations, is too long to be included as an

answer to this question. It must be pointed out that difficulties in this sense arise, not only (and maybe even not so much) from particular legal provisions, but also from the lack of specialization and training of some of our judges and, very much, of bankruptcy administrators.

## SECTION II

### GENERAL MARITIME INSOLVENCY ISSUES

#### **Part 7 General Insolvency Issues Applicable to Ship Operators and Maritime Property**

30. *Are ships registered in your country or ship operators incorporated in your country subject to insolvency laws of general application or do your laws provide for specific rules relating to the administration of the businesses of insolvent ship operators?*

Ships registered in Spain are subject to the effects of insolvency law like any other assets. Ship operators' bankruptcy is also subject to the general law on bankruptcy.

31. *If your laws provide for specific rules relating to the administration of the businesses of insolvent ship operators or ships under your registry as distinct from assets of commercial enterprises generally, please provide details of how these rules applying to ships or ship operators differ from general insolvency administration.*

See answer to question 30 above.

32. *Is there a monetary or asset value threshold for the application of various forms of insolvency procedure? For example, is there a form of simplified insolvency administration for ship operators with assets of limited value?*

Spanish law regulates a simplified bankruptcy regime whose application may be decided by the court where certain conditions are met: that the list of creditors presented by the debtor has less than fifty creditors, that the initial estimate of the liabilities do not exceed 5 million euros, and that the initial assets valuation is below 5 million euros (Art. 190 BA). This applies to all kinds of debtors subject to insolvency law.

33. *Do rights to commence insolvency proceedings or insolvency procedures differ if the debtor ship operator is a natural person as distinct from a legal entity? Describe any differences generally.*

In general terms, rights to commence bankruptcy proceedings do not differ from cases where the debtor is a natural person to cases where it is a legal person or entity.

However, in the case of legal persons, in addition to the debtor itself and its creditors, the bankruptcy declaration may be also requested by the partners or members of the company or legal person or entity (debtor) that are personally liable for its debts (Art. 3, par. 3 BA).

34. *If creditors are asserting claims against all or substantially all the assets of an insolvent ship operator, does this result in distinct or additional procedural or legal requirements?*

No.

35. *Are insolvency procedures administered by courts of general jurisdiction, or by specialized courts or tribunals exercising commercial or insolvency jurisdiction?*

Since 2003, all matters relating to bankruptcy fall under the competency of Commercial Courts. Commercial courts form part of the civil jurisdiction, but their competence is restricted to certain matters relating to commercial and entrepreneurial activities, including bankruptcy.

36. *Describe generally the threshold tests set out in your law for the status of insolvency.*

As previously stated, insolvency is conceptualized in Spanish law as the state that justifies the declaration of bankruptcy (Art. 2 BA refers to insolvency as the “objective condition” for the declaration of bankruptcy). The law does not define the state of insolvency in a very precise manner, and simply states that a debtor is in such state if it cannot regularly honour its debt payments (Art. 2, par. 2 BA). If the debtor files for bankruptcy, it has to provide evidence of its state of insolvency. If a creditor requests the bankruptcy declaration, it has to ground it on enough evidence of the fact that an order of arrest or seizure has been issued against the debtor’s assets, with the result that the debtor has not sufficient assets for covering the alleged claim. In this case, the court, after reviewing the documentation proving such circumstance, must issue the declaration of bankruptcy within the next working day. Alternatively, the creditor requesting the bankruptcy declaration may ground its request in one of the following facts:

- the debtor’s general cessation of payments of debt responsibilities,
- the existence of seizure or arrest orders corresponding to pending executions generally affecting the debtor’s assets,
- the concealment of the debtor’s assets or their realisation under market value by the debtor itself, or
- the generalized breach of one or more of the debtor’s responsibilities: tax responsibilities within the three previous months, social security responsibilities within the same period, and responsibilities or obligations deriving from labour contracts or relationships also corresponding to the last three months.

In this case, once one of such circumstance is proved, the court, after opening the

proceedings but prior to the declaration, must request the debtor to enter an appearance if it wishes to contest the declaration, and to submit any proof that the debtor may want to rely upon. For successfully opposing to the bankruptcy declaration, the debtor must disprove the fact relied upon by the requesting creditor or, even if not providing such evidence, must demonstrate that it is actually not in a state of insolvency. If the debtor accepts the request or does not enter an appearance for opposing the declaration within the period set, the court must issue the bankruptcy declaration (See Arts. 3, 7, 15, 18 and 19 BA).

37. *If the threshold tests for insolvency proceedings in your country differ for a foreign ship operator with assets in your country which wishes to begin insolvency proceedings in your country, describe these differences in detail.*

There are no differences.

38. *Do your laws permit a private creditor to obtain a court order to begin insolvency proceedings against a ship operator? If so, describe generally what facts or legal grounds the creditor must show to obtain such an order.*

See answer to question 36 above. The rules therein explained apply to both local and foreign creditors.

39. *Do your laws permit a public authority to obtain a court order or to exercise its own jurisdiction to begin insolvency proceedings against a ship operator other than procedures available to private creditors? If so, describe generally what are the factual or legal grounds for such public authority to begin such insolvency process?*

Public entities may request the declaration of bankruptcy in their capacity as creditors like any other private creditors, but Spanish law does not permit courts or public authorities to initiate insolvency proceedings in the exercise of their powers or jurisdiction; in the case of courts, not even when in the course of judicial proceedings under their jurisdiction it results that a person or entity is in fact in state of insolvency.

Spanish law, however, when in the course of criminal proceedings the state of insolvency of a person or entity becomes known or apparent, does set a duty for the Public Prosecution Ministry to request to the criminal court the communication of such information to the creditors of the insolvent debtor, in order to enable them to request the declaration of bankruptcy if they so wish (Art 4 BA).

40. *Does a ship operator have rights to defend or oppose an insolvency proceeding begun by private creditors or public authorities? If so, describe generally what defences are available.*

See answer to Question 36 above. Once the debtor has timely entered an appearance with the purpose to oppose the declaration of bankruptcy, the court must convene an oral hearing where both the debtor and the requesting creditor may concur and provide for the submission of all admissible evidentiary means and propose

performance of other probative measures that they may wish. In the case of vessel operators, or any other entrepreneur debtor, it must also submit all accounting books and documents prescribed by the law. If the debt upon which the requesting creditor relies upon is due and enforceable, the debtor must deposit the amount due at the disposal of the creditor and at the time of the hearing (or alternatively must provide proof of payment or previous deposit). After having heard both parties, the court must decide on the probative activities and measures to be ordered, and may also interview the parties, their witnesses and experts, after which the court must issue a resolution either declaring the bankruptcy or dismissing the request (See Arts. 18-20 BA).

- 41. Do your laws permit a ship operator to voluntarily begin an insolvency proceeding? If so, describe generally what facts or legal grounds a ship operator must demonstrate to begin voluntary insolvency proceedings.*

See answers to Questions 4 and 36 above. After the bankruptcy declaration application filed by the debtor, the court must issue such declaration if the documentation submitted sufficiently demonstrates its state of insolvency or any of the facts that may also ground the request made by a creditor (art. 14 BA).

- 42. Do creditors or any other persons with a legal standing (such as public authorities, shareholders or employees of a ship operator) have rights to oppose a ship operators' voluntary insolvency proceeding?*

No

*If so, describe generally what classes of persons other than creditors have such legal standing and what grounds of opposition are available.*

- 43. Do your laws provide for a time bar for filing of claims in insolvency proceedings which is different from limitation periods or prescription for commencement of maritime claims generally? If insolvency proceedings have different time bars for filing of claims, are these time bars set out in legislation or are they decided by insolvency administrators or tribunals on a case-by-case basis?*

There is a limited period for lodging claims within bankruptcy proceedings that differs from the general time bar or prescription periods applicable to claims, depending on their nature and origins. Naturally, the purpose of each type of period is different, for the period for filing claims with the BAB in bankruptcy proceedings is laid down as a condition for the inclusion of such claim in the debtor's responsibilities and the list of creditors (with all ensuing consequences), but does not necessarily entail that the claim is not taken into account if it is filed late (see answer to Question 14 above). Claims must be filed with the BAB within one month following the date of the publication of the bankruptcy declaration in the Official Journal of the State (Art. 21, par. 1, no. 5, and Art. 85, par. 1 BA).

- 44. Do your laws permit an insolvency administrator to carry on the ship operator's*

*business for a temporary period in order, for example, to complete voyage or charter party commitments?*

Yes, in general terms when the purpose of the bankruptcy is to conclude a bankruptcy convention in order to restore the financial stability of the debtor (i.e., unless the winding-up is requested by the debtor or decided by the court, in any of the procedural stages where it can or must be so decided), the rules are designed to preserve the debtor's business capability to continue while the proceedings are taking place. This may hypothetically happen when the debtor keeps its administration powers (under the supervision of the BAB) and also in cases in which the BAB takes over the functions of the former debtor's administration. In practice, the declaration of insolvency is a heavy burden and a stigmatizing element that in many cases prevents the continuation of the business regardless of the will and intentions of the debtor and the court. Also, the business of the debtor usually has greater possibilities to continue with normality when the debtor keeps its administration capabilities for the activities that the daily operation of the business precisely requires (i.e., in principle in cases of voluntary bankruptcy).

Be as it may, and within the said context, the BA Art. 61 specifically refers to the effects of the bankruptcy declaration upon contracts still in force with reciprocal obligations for both parties pending performance. That would be the case of non-performed voyage charter-parties (provided that at least part of the obligations of both of the parties have not been performed yet or –arguably– when the voyage has not finished yet) or contracts where the obligations of the parties are sequenced in time and during a determinate or indeterminate period or time, such as time charter-parties or bareboat charter-parties. These contracts are not affected by the declaration of bankruptcy, and the debtor or the BAB (depending on the limitations imposed on the debtor's administration powers) may decide to leave them untouched (and continue with their performance) or request their termination, in any case in accordance with the interests of the bankruptcy proceedings. In this latter case, such request must be addressed to the court, which will then convene both parties to a hearing. If both parties give their consent, the court will declare the contract terminated. In the absence of an agreement between the parties, the court will decide whether to terminate the contract or not, and in case of termination will order any measure that may apply (e.g., restitution of goods, payment of penalties or compensations). This same provision declares null and void any clauses in a contract setting its termination if one of the parties is declared bankrupt. Any obligations to be performed by the debtor, or any disbursements or compensations arising out of its termination, will have priority over any claims (privileged, ordinary and subordinated ones). Such responsibilities (like a few others) are set aside and excluded from the *par condition creditorum* rule in light of their origin and specific purpose.

Other claims of creditors, to the extent that they derive from a contract where only the corresponding debtor's obligations (and not the creditor's obligations) are pending performance, will concur with the rest of claims against the bankrupt debtor in the bankruptcy proceedings.

45. *Do your laws permit an insolvency administrator to disclaim or otherwise set aside future contractual obligations such as charter parties or contracts of affreightment?*

See answer to question 44 above.

46. *Do your laws permit or require an insolvency administrator to compulsorily transfer contractual obligations such as contracts of affreightment or employment agreements with crew from the insolvent ship operator to the purchaser of the vessel from the estate of the insolvent owner?*

Under the Spanish bankruptcy law the realisation of goods must follow a certain procedure that tends to maximize the debtor's assets realisation value. Among other things, such rules generally entail that the sale of all assets must be done in public auction, and only if there are no bidders the court may authorize the direct sale. That includes a set of assets that as a whole may be considered a production unit, such as a vessel. In that sense, Spanish law treats vessels as autonomous production units and as the working place of crewmembers for legal purposes. Insolvency law, in particular, refers to labour law (to the 1980 Workers Statute, *Real Decreto Legislativo 1/1995*, of 24<sup>th</sup> of March) for the determination of the effects that the transfer of an autonomous production unit has on labour contracts of employees in such unit (crewmembers of the vessel, in our case –see Art. 149 BA). The consequence of the foregoing, in brief, is that the transfer of a vessel, or generally a production unit, entails that employment or labour contracts are transferred to the purchaser, but the conditions of such contracts may be modified. Also, in the sale of production units, the BA expressly states that the offers or bids that guarantee the continuation of the production activity and the labour contracts will be prioritized.

The case of contracts of affreightment different, for there are no rules specifically referring to contracts other than labour contracts with the said effect. In practice, however and in spite of the absence of a legal obligation in that regard, a plausible consequence of the transfer of the vessel in operational conditions is that the contract of affreightment or a charter party feasibly in force is maintained by the new owner, as a result of the conditions stated in its offer for the purchase of the vessel. Furthermore, an offer including such a condition should probably be prioritized with respect to other offers, to the extent that the maintenance of the contract (affreightment or charter-party) would favour the interests of the insolvency proceedings and of creditors (the counterparty in the contract would have a credit against the bankrupt debtor if the contract is terminated, which would concur with the rest of credits) and would also guarantee the continuation of the production activity and, consequently, the maintenance of the labour contracts.

## Part 8 Acceleration of Remedies

47. *Do your laws permit a creditor to contract for immediate repayment of an entire debt, such as future obligations under a ship mortgage, if a ship owner becomes insolvent?*

See answer to question 44 above. Art. 61 BA declares null and void a clause in a contract that foresees its anticipated termination, and the anticipated payment of all future instalments, if one of the parties is declared bankrupt. Therefore, no anticipated repayment of the debt may be contracted or agreed between the parties in the contract, prior to or subsequently after the bankruptcy declaration. Claims secured by means of a

mortgage will be privileged claims and the declaration of bankruptcy will not affect the existence or the validity of the mortgage. The creditor in this case, consequently and except with respect to certain exceptional claims (including maritime privileges), will have an expectedly strong priority in the overall list of claims as far as the vessel is concerned. If the vessel is finally sold as a consequence of the realisation of the debtor's assets, such priority will determine the extent to which the claim is covered with the proceeds of the sale of the vessel. If a bankruptcy convention is approved and the debtor continues with its activity, the secured creditors will not be affected by the contents of such convention and therefore, once it has been approved, the vessel may be executed for payment of the debt (but only when it becomes due and enforceable, and if it remains unpaid).

48. *If there are differences in the application of these laws to acceleration remedies by foreign creditors as distinct from local creditors, describe these differences in detail.*

There are no differences.

## **Part 9 Classes of Claims and Creditors**

49. *Do your insolvency laws apply differently to differing types of claims or creditors? Please respond to this question using the attached table. For example, is a bank or financial institution permitted to enforce a ship mortgage by procedures outside of an insolvency which would not be available to a ship mortgagee other than a bank or financial institution?*

No. Spanish insolvency law does provide for such kinds of differences.

50. *Does the existence of an insolvency proceeding under your country's law alter the priority of creditors' claims against a ship owned or operated by an insolvent person? Please respond to this question with reference to the types of claims listed in the attached table.*

In Spanish law, as previously stated, there is a specific regulation on maritime privileged claims that is very similar to the ones found in other civil law countries' legislation, as well as a special regime for ship mortgages contained in Act of 21<sup>st</sup> of August 1893 on Ship Mortgages. Spain is also a party to the CPH93. A parallel and very similar regime is also set for privileged claims in air navigation law, specifically in art. 133 of Act 48/1960 on Air Navigation.

Insolvency law takes into account the existence of all these special claims and their regime, and provides for a mechanism that, in brief, subordinates the application of rules on insolvency to the application of the specific rules and principles on privileged maritime and air claims. According to the general rules on insolvency, the bankruptcy declaration paralyzes any actions or executions of creditors against the debtor, even if they are based on secured claims already due and enforceable. Once the bankruptcy declaration is issued, all such claims remain so paralyzed and are submitted to the *par*

*condition creditorum* rule, at least until a bankruptcy convention is approved or, alternatively, until a period of one year has passed without a bankruptcy convention being approved. Special privileges (i.e., security rights upon specific goods or rights within the assets of the debtor) are recognized, classified and prioritized under the specific insolvency law rules, but even such claims are subordinated to certain “super-privileged” credits (“*créditos contra la masa*”) which are set aside and paid with priority over all other claims (generally speaking, such credits are those that tend to ensure the needs of the bankruptcy proceedings or the continuation of the debtor’s activities, if that is the case, in the needed conditions of minimum certainty for third parties). In this regime it must be taken into account that, unless the rules provide otherwise, claims attaching security rights are recognized as such to the extent that the said insolvency rules so provide. This is especially important as regards security rights exclusively recognized by the law (“legal” security rights), for they remain subject to the contents of the BA as *lex specialis* applicable to bankruptcy situations.

In this context, Art. 76 BA, after including all goods and rights of the debtor within its bankruptcy assets that remain subject to insolvency law (with the purpose to ensure the practical application of all the foregoing), expressly states, in its par. 3, that creditors whose claims are secured with a maritime or air privilege (security right) over the vessel or the aircraft, respectively, have a separation right whose exercise would entail that the vessel or the aircraft, as the case may be, is separated and excluded from the debtors bankruptcy assets, and is realised according to maritime law or air navigation special rules for payment of the specific privileged claims, with the priority therein laid down. If the vessel or the aircraft are so realised and the proceeds exceed the amounts due, the excess will be again included in the bankruptcy assets, with all ensuing consequences. Such separation right must be exercised within a year after the declaration of bankruptcy; otherwise, maritime or air navigation creditors will remain subject to insolvency law rules, and in particular to the classification of claims and the priorities therein stated.

In the case of vessels, and in addition to the ones listed in the CPH93, secured claims under Spanish domestic law include (not listed in their priority sequence): credits of the public administration (public credits), costs deriving from the proceedings for the realisation of the vessel, pilot rights and port taxes, costs deriving from the custody of the vessel until she is sold, the price likewise resulting from the warehousing of the equipment of the vessel, the wages due to the master and the crew corresponding to the latest voyage, the debts contracted by the master of the vessel in the exercise of its rights and powers as set out by the Commercial code for covering the financial needs of the voyage, the part of the price due as a consequence of the last sale of the vessel, of her construction, or of repair works or supplies made to the vessel, amounts due for bottomry, amounts due to cargo claimants as a consequence of the loss, damage or non delivery of the cargo recognized in judicial or arbitral decisions, and, finally, debts secured by a mortgage over a ship (see Art. 580 Com. c.; Arts. 28 to 36 Ship Mortgage Act).

In the case of aircrafts, such claims include: claims of the public administration corresponding to the last and the current fiscal years, salaries of the crew corresponding to the last month, amounts due to the insurers corresponding to the last two years, compensations due for damages to persons or property as set out by the law, and salvage awards (see Art. 133 Air Navigation Act).

51. *If a shipowner commences proceedings to establish a limitation fund under the LLMC Convention or to establish a limitation fund under domestic law, describe the relationship between such fund and any insolvency proceedings involving that shipowner.*

In Spanish law there is no specific rule for the situation described, and definitely the national legislator has not taken into account this problem, which would certainly be one of the issues where both express legislation and harmonization would be needed. Although the effects of a bankruptcy declaration with respect to the limitation fund established by a shipowner under the LLMC (limitation rights for shipowners under domestic rules do not foresee the possibility or the duty to establish a limitation fund) is uncertain, in principle, and in the absence of specific provisions, the rules relating to the rights of third party claimants with respect to the limitation fund established under Art. 11 par. 1 LLMC supersede the rules of insolvency law, at least as long as a third party claimant in a contracting State to the LLMC is involved. This is so because international conventions have a higher rank than national rules according to our Constitution (otherwise, the application of the national insolvency law provisions would prevent Spain from complying with its international obligations under the LLMC). In particular, when the fund consists of a funds deposit, it looks like such funds ought to be excluded from the general bankruptcy assets of the shipowner debtor (if the fund consists of a guarantee provided by a third party, claimants would see paralyzed their claims, and would concur with other creditors in the bankruptcy proceedings without prejudice of their rights as against the third party guarantor).

The case where the debtor has initiated proceedings for the establishment of a limitation fund, but the fund has in fact not been established, is perhaps less uncertain. In such a case, the declaration of bankruptcy would paralyze all actions against the shipowner debtor and the proceedings relating thereto, regardless of their current state, and no rights for the claimants would arise against the fund, to the extent that it hasn't been established yet and the effects set out in Art. 11 par. 1 LLMC would not arise.

*For example, can creditors begin insolvency proceedings if a limitation fund has been established?*

In principle, there is nothing in Spanish domestic rules expressly preventing a creditor involved in a claim in whose proceedings a limitation fund has been established from initiating bankruptcy proceedings. The fact that the shipowner debtor has established a limitation fund does not even have a final effect in this hypothesis. Under the BA, even when the debtor has consigned the amount due at the disposal of the requesting creditor (and the establishment of a limitation fund would be probably recognized such an effect), the latter may ratify its request and if the court finds that there are grounds for the declaration, because the shipowner debtor is in fact insolvent, it must issue the bankruptcy declaration (Art. 19 BA).

*Can an insolvent shipowner establish a limitation fund?*

A bankrupt shipowner may not establish a limitation fund while the bankruptcy proceedings are taking place. This results from the fact that all actions in respect of which such a possibility could be resorted to would be suspended.

## Part 10 Proposals for Reorganization or Compromise

52. *Do your laws permit an insolvent ship operator to make a proposal for the reorganization of its business or compromise of claims in which the ship operator would continue to operate into the future if the proposal is approved?*

Yes, this is the purpose of the bankruptcy convention, which applies in general to bankrupt debtors under insolvency law. A bankruptcy convention precisely consists of a convention that may be submitted by the debtor itself (this is the most common case) or by creditors representing one fifth of the debtor's responsibilities, and which is approved by a majority of ordinary creditors. The convention will foresee the modification of the conditions of the claims, with the aim to restore the financial balance of the debtor and enable it to continue with its activity or business. The BA also foresees the possibility that the debtor initiates negotiations with its creditors for the conclusion of a refinance agreement or the preparation of a proposed bankruptcy convention before the insolvency proceedings are initiated. Such circumstance may be communicated by the debtor to the competent court, which would suspend the debtor's duty to request the bankruptcy declaration. However, within the fourth month after such communication is made, the debtor must request the initiation of bankruptcy proceedings regardless of whether the refinance agreement is concluded, or the proposed bankruptcy convention is finalized, or not (except where a refinance agreement is concluded and it results in the debtor avoiding the state of insolvency). Once the bankruptcy declaration is issued, the submission and approval of a bankruptcy convention is subject to strict substantive and procedural requirements (Arts. 5, 5 bis, 99 *et seq.* BA).

53. *Do your laws permit such proposals to be conducted through private contractual arrangements between an insolvent ship operator and some of its creditors, or do such proposals need to be conducted under supervision of a court or with approval of all identifiable creditors?*

Yes, the said proposals may be conducted privately. The BA to a certain extent recognizes the possibility to conclude refinance agreements privately, without applying for the bankruptcy declaration, and even without the communication referred to in the answer to Question 52 above. It could be even argued that private arrangements may be actually conducted privately and before or after the state of insolvency arises or is immediately expected, under the principle of freedom of contract and without any communication to the competent court. However, such agreements (in any case) would not suspend the duty to request the declaration of bankruptcy of the debtor (and the omission of such request may subsequently result in the declaration of the bankruptcy as negligent, with important consequences for the debtor, or the debtor's directors, regarding liability), and remain exposed to be subsequently declared void under insolvency law rules on detrimental transactions or acts, if the debtor is declared bankrupt. This would be so to the extent that they have been concluded during the two years preceding the bankruptcy declaration, and they may be deemed transactions detrimental to the bankrupt assets and proceedings (e.g., security rights perfected for securing pre-existing obligations –something very common in refinance agreements– would be annulled by the court subsequently seized of the proceedings).

Refinance agreements, as previously indicated, are to a certain extent recognized and preserved by the law, by excluding them from the possibility to be annulled as detrimental transactions, provided certain conditions are met: that the agreement involves creditors representing at least two thirds of the responsibilities of the debtor, that it is backed by an independent expert's opinion (named by the Mercantile Registrar of the place of the debtor's domicile) as reasonably ensuring the survival and viability of the business and the proportionality and reasonable character of security rights created, and that the agreement is formalized in a public (notarized) document (see Art. 71 BA).

54. *If it is lawful to conduct a proposal through private contractual arrangements, are such private contractual arrangements affecting a ship legally binding on other claimants against that ship who have not participated in such private contractual arrangements?*

The recognition of the privately conducted arrangements is in insolvency law essentially limited to their effects on the debtor's duties to apply for bankruptcy (if the debtor's communication to the competent court is done according to what is stated in answer to Question 52 above) and their feasible exclusion of the detrimental transactions regime. Otherwise, they remain subject to the principle of privity of contracts and to the general rules on property and security rights, which are in this context imperative.

55. *If a proposal is required to be conducted under supervision of a court or approval of all known creditors, please provide a general description of the reorganization procedure.*

All proposals for the bankruptcy convention must be supervised by the competent court and accompanied by a report of the BAB, for the convention finally approved will affect rights of ordinary creditors that may have opposed the convention or simply not participated in its approval. The bankruptcy convention proposal may follow two basic and alternative paths. An anticipated bankruptcy convention proposal may be submitted by the debtor, from the date in which the bankruptcy declaration is issued to the last day for the lodgement of credits. Such proposal is then submitted to the BAB, which must issue an opinion report. Both, the proposal and the BAB's opinion, are then put at the disposal of the creditors, which may adhere thereto, or wait till the creditors general assembly for its discussion and vote. Alternatively, and after the period for the lodgement of credits, the debtor may also file an ordinary convention proposal (unless it has previously filed an anticipated convention proposal) for its submission to the creditors general assembly. Creditors representing one fifth of the debtor's responsibilities may also file a proposal, which would be likewise submitted to the creditors general assembly, which must be convened by the court. All the said proposals must also be accompanied by an opinion report of the BAB, and in any case the approval of a convention requires the vote of creditors representing at least half of the debtor's responsibilities.

56. *Are secured creditors of an insolvent shipowner subject to court orders approving a reorganization or compromise?*

Only if they vote in favour of the bankruptcy convention.

57. *Do your laws permit an insolvent ship operator to transfer an insolvency proceeding into a proceeding for reorganization or compromise?*

As stated, insolvency proceedings may be directed to the approval of a bankruptcy convention. Once the liquidation is decided, the proceedings may not be turned into a reorganization or compromise.

## **Part 11 Receiverships**

58. *Does your law permit a private creditor such as a ship mortgagee to take over the business of a ship operator or to sell part or all of its fleet or generally act to recover a debt without needing to commence insolvency proceedings for the benefit of all creditors?*

There is no prohibition for this, but security rights of other creditors must be respected, in case the operation requires the sale of the vessel. However, these sorts of operations, again, remain subject to all consequences of insolvency law rules, if the debtor is subsequently declared bankrupt (specifically to those on detrimental transactions).

59. *Does your law set out minimum requirements which a private receiver of an insolvent shipowner must follow such as giving notice to other registered ship mortgagees, the procedure for sale, etc.*

Since such mechanism is not expressly addressed or regulated by the law, no.