

**FERNANDO
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SOLICITORS & ABOGADOS

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INSOLVENCY LAW DEPARTMENT

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“Well after the onset of the financial crisis, the UK and other European nations continue to battle persistent problems created or amplified by the downturn. One of these problems is the raising of the insolvency levels of both companies and individuals, especially if said companies and individuals have their assets spread around Europe.

In response to these challenges, our Firm benefits from a team of well experienced dually qualified Solicitors & Spanish Abogados at our London office and supporting offices around Spain to provide efficient, continuous and comprehensive professional service to liquidators, administrators, trustees and official receivers to help them with discovering and securing the debtor’s assets located in Spain.”



Fernando Scornik Gerstein

EC REGULATION ON INSOLVENCY PROCEEDINGS

The Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (“the Regulation”) was adopted by the Council of the European Union on 29 May 2000 and came into force throughout the EU (with the exception of Denmark) on 31 May 2002.

The purpose of the Regulation is to improve the efficiency and effectiveness of cross-border insolvency proceedings within the EU by simplifying or removing formalities concerning the recognition and enforcement of insolvency orders.

The Regulation takes practical effect when the debtor’s “centre of main interests” (commonly referred to as “COMI”) is within the EU and he/she has affairs in other EU countries, i.e. when the debtor has his/her COMI placed in the UK, and he/she also has assets in Spain. Our London office, jointly with the ones established around Spain, provides us with the perfect structure to deal with these cases.

UK INSOLVENCY PROCEEDINGS UNDER THE REGULATION

The courts of the member state within the territory, of which the COMI is situated, shall have jurisdiction to open insolvency proceedings. These proceedings are termed “main proceedings”. In respect of proceedings opened in the UK these are:

- winding up by or subject to the supervision of the court,
- creditors’ voluntary liquidation (where the proceedings have been confirmed by the court),
- administration,
- voluntary arrangements under insolvency legislation and
- bankruptcy or sequestration proceedings.

Our London Office is familiarised with all these proceedings, which are the only ones that have effectiveness throughout other member states of the EU, including Spain, and no parallel proceedings may be opened in another member state, save in the specific and limited circumstances (e.g. “territorial proceedings” and “secondary proceedings”).

TERRITORIAL PROCEEDINGS AND SECONDARY PROCEEDINGS

Where the debtor’s COMI is situated within the territory of a member state, the courts of a different member state have jurisdiction to open proceedings against that debtor only if the debtor possesses an establishment (a physical place of business). Although the wording of the Regulation requires the current possession of an establishment, (not an historical possession) it has been held by case law that if the debtor had an establishment in the past and there were assets left from that activity that should be considered sufficient for the opening of territorial proceedings.

Proceedings of this type opened in advance of main proceedings are known as “territorial proceedings”. The effects of these territorial proceedings are restricted to the assets of the debtor situated in the territory of the state where territorial proceedings are opened.

Where main proceedings have already been opened, it is possible to subsequently open territorial proceedings. These proceedings are known as “secondary proceedings” and must be winding-up proceedings.

When a main proceeding is opened in the UK, we receive assistance from our Spanish offices if territorial proceedings were opened in advance in Spain, or if secondary proceedings are started in Spain once the main proceeding was opened in the UK. Thus, our firm is able to manage both

the proceedings in Spain and in the UK as the London Office is in permanent contact with the Spanish ones.

APPLICABLE LAW TO THE CONDUCT OF THE INSOLVENCY PROCEEDINGS

The basic principle of the Regulation is that the law and the effects of the insolvency proceedings of the member state in which proceedings are opened will apply. Where territorial or secondary proceedings have been opened, the law of the state where the territorial or secondary proceedings are opened takes precedence in those proceedings. The law of the relevant state determines the conditions for the opening of the proceedings, their conduct and their closure.

There are, though, exceptions to this basic rule, e.g. protection of third party purchasers.

RECOGNITION OF INSOLVENCY PROCEEDINGS

The general principle of the Regulation is that any judgement opening insolvency proceedings handed down by a court of a member state is to be recognised in all the other member states from the time that it becomes effective in the state where proceedings are opened.

However, a state may refuse to recognise insolvency proceedings where the effects of recognition would be manifestly contrary to that state's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual (Article 26 of the Regulation).

Once main proceedings have been opened in the state of the debtor's centre of main interests, the insolvency law of that state will automatically apply throughout the rest of the EU, with two exceptions:

- If territorial proceedings are already open, or if secondary proceedings are subsequently opened, then the law of the state where the territorial or secondary proceedings are opened will apply in that state.
- Where special provision is made elsewhere in the Regulation (for example the exceptions for third party purchasers mentioned above – Article 14 of the Regulation).

EFFECTS OF RECOGNITION – POWERS OF THE LIQUIDATOR AND ACTIONS BY CREDITORS

Where main proceedings are opened the liquidator may exercise all the powers conferred on him/her by the law of the state where proceedings are opened, in another member state, so long as no other insolvency proceedings have been opened there, nor any preservation measure to the contrary has been taken there, further to a request for the opening of insolvency proceedings in that state. Liquidators must, when exercising their powers, have regard for the general law of the member state in which action is to be taken. The term liquidator can be taken to include liquidators, administrators, trustees, official receivers, assignees and supervisors of voluntary arrangements in respect of insolvency proceedings opened in the UK.

As soon as insolvency proceedings are opened in a member state, the court of that state having jurisdiction, or a liquidator appointed by such court, is under a duty to inform by individual notice to known creditors who have their habitual residences, domiciles or registered offices in other member states, of the circumstances and rules under which they may lodge claims.

Any creditor who has his/her habitual residence, domicile or registered office in a member state other than the state where proceedings are opened, including the tax authorities and social security authorities of member states, shall have the right to lodge claims in the insolvency proceedings in writing.

RECOGNITION AND ENFORCEMENT OF A JUDGEMENT IN SPAIN

When the debtor's COMI is placed in the UK and he/she has assets in Spain, the following procedure for recognising the UK judgement in Spain shall commence.

Firstly, we have to observe documental formalities, such as a certificate of the UK court (Annex V of the Regulation) and a translation of the relevant documents into Spanish. The effects attributed to the proceedings by the UK court, in which the proceedings were opened, will be then recognized by the relevant Spanish court.

In order for us to act on behalf of the liquidator before the Spanish Courts the liquidator shall grant a Power of Attorney which will allow us to further represent the liquidator's interests in Spain, i.e. to present the enforcement application. Furthermore, we would also need to appoint a *Procurador* in Spain (court assistant) to appear in court.

Once the documental formalities are observed, the liquidator may:

- Apply for the enforcement of the UK resolution.
- Register the UK bankruptcy order before the relevant Spanish Land Registry.
- Register the liquidator's interest before the Spanish Land Registry,
- Auction of the debtor's Spanish assets.
- Obtain an out of court settlement with the debtor.
- Execute other remedies included in the UK judgement, as long as they are not contrary to Spanish public interests (Article 26 of the Regulation).

Our firm is able to deal with all the different possibilities mentioned above since we are registered at the Spanish Land Registry and have immediate access to their data.

OUR LONDON OFFICE

The London office of Fernando Scornik Gerstein Solicitors & Abogados was established in 1985.

We have a team of experienced insolvency lawyers and also the permanent support of our Spanish branches in Madrid, Barcelona, Las Palmas, Playa del Inglés (Gran Canaria) and Los Cristianos (Tenerife).

Our firm also forms part of the Spanish network of Law Firms IURISPAN, which covers most of the major Spanish cities having access to the local know-how that is essential when facing litigation in Spain.

Should you require further information or should you like to make an appointment, please contact london@scornik-gerstein.co.uk or visit our website www.scornik-gerstein.com

DISCLAIMER

We do not intend to render advice on any particular matter but to bring a general description of certain Insolvency Law matters currently in force.

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