

INSOL WORLD

3RD QUARTER 2015

FOCUS: Europe



The Quarterly Journal of INSOL International

US\$25

The Fresh Start / Benefit of Second Chance in Spain after the Royal Decree 1/2015

By Daniel Rodríguez Ruiz de Villa

ONTIER ESPAÑA

Oviedo, Spain

The Spanish Act on Insolvency of 2003 did not include any system of fresh start for insolvent natural persons: once the Insolvency Proceeding was completed and assets were sold, the debtor continued to be liable to pay the amounts remaining due out of all assets and rights that could be acquired in the future.

The Spanish Act on Support for Entrepreneurs from 2013 introduced the benefit of a second chance and a fresh start for insolvent natural persons. Accordingly, Article 178.2 of the Spanish Act on Insolvency provided for a remission of unpaid debts within the Insolvency Proceeding provided that: i) the Insolvency Proceeding had not been declared tortious; ii) there had not been committed any crime of criminal bankruptcy or any other crime relating to the Insolvency Proceeding; iii) the aggregate assets had been realised to satisfy all the preferential claims and at least 25 percent of the

ordinary claims, had been satisfied; and iv) exceptionally, if the out-of-court composition on payments had been attempted unsuccessfully, it was not necessary to pay any ordinary claims. Upon fulfilment of the referred requirements the benefit of second chance was automatically granted by the judge: the debtor did not have to ask for such benefit, the creditors did not have any right of opposition and the benefit was irreversible.

As a result of the pressures of the International Monetary Fund, the World Bank and the Spanish society in general terms, the Spanish Royal Decree 1/2015 introduced Article 178 *bis* in the Act on Insolvency for a new mechanism of second chance for insolvent natural persons in Spain. After this modification it is necessary that the debtor requests the exoneration of the unpaid liabilities, after the Insolvency Proceeding has concluded with the realisation of all assets.

A debtor who wants to be granted the benefit of second chance has to apply for it in good faith. Such



**Put fuel
in your tank**

Our funding enables legal claims to be investigated and pursued to finality.

All costs of litigation are covered – including insolvency practitioner fees and adverse costs.

We put our money at risk, enabling any existing funds to be paid to creditors as a dividend.

You can read about our track record and financial strength at www.imfbenthamltd.com

**IMF
BENTHAM**
INTERNATIONAL LITIGATION FUNDING

We level the playing field.

good faith should be evidenced by one of the following:

Option A) being payment of a certain proportion of the liabilities, based on the 2013 law with some new features: i) the Insolvency Proceeding has not been declared tortious; ii) the debtor must not have been found guilty of crimes against property, forgery, crimes against Tax Authorities and Social Security or crimes against the rights of employees during the term of 10 years preceding the declaration of insolvency ; iii) the debtor who meets the requirements set forth in Article 231 of the Spanish Act on Insolvency in order to request an out-of-court composition on payments, so its liabilities cannot exceed five million euros of debts, must have tried or reached an out-of-court composition on payments; iv) the debtor who has tried to reach an out-of-court composition on payments must have paid in full the claims against the aggregate assets as well as the preferential claims; v) in the event that the debtor had not tried to reach an out-of-court composition on payments, he shall satisfy, in addition to full payment of claims against the aggregate assets and preferential claims 25 per cent of ordinary claims.

Option B) being a schedule of payments system, a new modification of the legal reform of 2015 which requires the debtor: i) to be subject to a schedule of payments for the next five years following the conclusion of the Insolvency Proceeding; ii) to fulfill its obligations to cooperate in the Insolvency Proceeding with the judge and with the insolvency administration; iii) not to have obtained the benefit of the second chance for the term of ten years prior to the declaration of insolvency; iv) not to have rejected, within the term of four years prior to the declaration of insolvency, a job which could suit the debtor's ability and skills (this requirement shall not be applicable until 1st March 2016); v) to accept the negative publicity of the granting of this benefit in the Insolvency Public Registry for a period of five years after it was granted; and vi) to pay claims against the aggregate assets, preferential claims, claims under Public Law and maintenance allowances.

Once the request has been made by the debtor, the Court sets a hearing for the creditors and for the Insolvency Administration. If there is no opposition, the benefit is granted and the judge declares the conclusion of the Insolvency Proceeding. If there is opposition, the judge of the Insolvency Proceeding rules on whether the benefit is granted or not.

In either of two options described above, the benefit of the debtor's exoneration of debt is provisional. This is a clear difference with Comparative Law such as German or Portuguese Law, because Comparative Law only grants

the benefit of provisional discharge when the debtor assumes a schedule of payments. On the contrary, in Spain for a period of five years the benefit of the second chance can be revoked if any creditor, within the Insolvency Proceeding, claims for such revocation to the Court of the Insolvency Proceeding and shows that the debtor: i) has breached any of the requirements necessary to be granted the benefit of second chance, as described in option A); ii) has breached the schedule of payments of the debts not exonerated; iii) has substantially improved his economic situation, so that he could pay all outstanding debts without prejudice to the satisfaction of maintenance allowances. This is one of the main criticisms against the legal reform, because this requirement can push the exonerated debtor to the informal economy for five years. The requisite improved fortunes of the debtor is completely regardless of the cause: it could be lottery games or labor or business income. It will be quite difficult for creditors to monitor this requirement and, additionally, they will have little motivation for that, although specialist companies are understood to have been appointed by creditors to perform this task at modest cost. Perhaps the reluctance to apply this measure might also be attributed to the outstanding debts that must be paid to obtain the benefit of second chance not being enough to justify it; iv) or it was shown that income, assets or rights have been concealed by the debtor.

Finally, as an exceptional issue, even though the debtor has not complied with the schedule of payments, he can also be exonerated from his liabilities, without having satisfied a minimum amount of his liabilities, where the debtor has spent half of the income (provided the same cannot be seized) which has been received during the schedule of payments to implement the scheduled payments.

So far, the Spanish Parliament is analyzing a Bill which introduces amendments to the legal regime of the benefit of second chance. There is therefore a new opportunity to improve this regime. It is definitely desirable that the benefit of the second chance is definitive, without possibility of withdrawal or with a revocation limited to a shorter period of time. It would also be beneficial to extend the benefit of second chance to guarantors and joint and several debtors.

In any case, the Spanish legislation is moving towards a system of second chance which is useful and creates new ways for natural insolvent persons to be exonerated from their debts. In addition, it should be noted that the Spanish Commercial Courts will surely apply (as they are already beginning to) the regulations so as to facilitate their use. 🌐