Current Developments Towards International Insolvencies in Europe*

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I. Introduction

With the Council regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, that came into effect May 31, 2002,[1] the European Union (EU) has introduced a legal framework for dealing with cross-border insolvency proceedings. In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects within the EC, the provisions on jurisdiction, recognition and applicable law in this area are contained in a Regulation, a Community law measure which is binding and directly applicable in Member States. The goals of the Regulation, with 47 articles, are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for coordination of the measures to be taken with regard to the debtor's assets and to avoid forum shopping. The Insolvency Regulation, therefore, provides rules for the international jurisdiction of a court in a Member State for the opening of insolvency proceedings, the (automatic) recognition of these proceedings in other Member States and the powers of the 'liquidator' in the other Member States. The Regulation also deals with important choice of law (or: private international law) provisions. The Regulation is directly applicable in the Member States[2] for all insolvency proceedings opened after 31 May 2002.[3]

In Europe, in the first year after its entry into force, the Insolvency Regulation produced some 20 court decisions. It seems that especially in the UK, the Netherlands and in Germany the Regulation has caused interesting decisions.[4] The area

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1. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, *Official Journal L* 160 of 30 June 2000.
2. Denmark excluded, because it opted out, which is in accordance with its position under the Treaty of Amsterdam.
3. See for a short introduction: Bob Wessels, *European Union Regulation on Insolvency Proceedings: An Introductory Analysis*, published by American Bankruptcy Institute, Fairfax, Va., USA (2003). For some key provisions of the Regulation and their meaning for (future) International Bankruptcy Law in the US, see: Bob Wessels, *The European Union Insolvency Regulation. An Overview with Transatlantic Elaborations, in: 2003 Norton Annual Survey of Bankruptcy Law*, pp. 418–507.
4. See Ian Fletcher, The Challenges of Change: First Experiences of Life under the EC Regulation in the UK (presentation to the Academics' Meeting of Insol International, see note 1) (2004) *Annual Review of Insolvency Law* 431–455, and Bob Wessels, *Anticipation and Application of the EU Insolvency Regulation in the Netherlands* (forthcoming).

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of regulation and legislation has been entered since with two main streams of issues. The first one deals with what art. 1 section 1 EU Insolvency Regulation excluded from its scope, namely the insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings, holding funds or securities for third parties, and collective investment undertakings are excluded from the scope of the Insolvency Regulation. The excluded entities and undertakings are not defined in the Regulation, but by other instruments of EU Community law. 'Insurance undertakings' will be defined according to the description, set out in Directive 2001/17 of the European Parliament and the Council of March 19, 2001, on the reorganisation and winding-up of insurance undertaking,[5] and 'credit institutions' will be covered by the definition of Directive 2001/24 of the European Parliament and the Council of April 4, 2001, on the reorganisation and winding-up of credit institutions.[6] These institutions are excluded from the Insolvency Regulation since they are subject to special arrangements and, to some degree, the national supervisory authorities have extremely wide-ranging powers of intervention. Unlike a Regulation, a Directive will go through a legislative implementation process in each individual EC Member State. The implementation dates are April 20, 2003 (insurance) and May 5, 2004 (credit institutions) respectively. In several proposals for new legislation in individual EC countries, which I will discuss shortly hereunder, the aforementioned Directives are covered too.

Although in the general opinion in Europe the EU Insolvency Regulation is regarded as an enormous step forward in providing a recognisable framework that facilitates interaction and alignment of different insolvency systems throughout the European Community, a major shortcoming is the Regulation's limited territorial scope, see Recital (14) to the Regulation: 'This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community'. Consequently, when the centre of the debtor's interests is located outside the territory of a Member State, the Regulation does not apply, for example, in Norway, Switzerland, Turkey, CIS, or the USA. Also the debtor with only an 'establishment' does not fall within the scope of the Insolvency Regulation. A subsidiary of a company, incorporated in the USA, may nevertheless have its main centre inside the EU. When the presumption of art. 3, section 1, can be rebutted, the Regulation will apply to a debtor incorporated outside the EU Member States having its centre of main interest in the Community, as has been decided e.g. in *BRAC*.[7] On January 14, 2003, Justice Lloyd in London made an administration order in respect of a Delaware company, Brac Rent-A-Car Inc. Lloyd J analysed the said presumption and decided that at the time the petition was heard the debtor actually conducted the administration of his interests and business from the UK, engaged most of its employees there and had its banking relationships in the UK.

5. *Official Journal L* 110 of 20 April 2001.
6. *Official Journal L* 125 of 5 May 2001.
7. The Regulation does, furthermore, not deal with the position of economic groups, consisting of a number of related companies (holding-subsidiary relations), nor with concepts like 'substantive consolidation.'

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Therefore BRAC's centre of main interest was in the UK and the fact that its jurisdiction of incorporation was outside the EU was irrelevant.[8]

Although its territory is limited, EC Member States individually may, however, in their own domestic law presently afford wider reach with international dimensions. Individual Member States may furthermore wish to fill in certain gaps, for example, with regard to recognition of insolvency proceedings and its effects, when opened in Member States but falling beyond the scope of the EU Insolvency Regulations, because, for example, the debtor is located outside the territory of the EC. That same wish may be broader, for example, to provide for domestic legislation on the effects of insolvency proceedings opened outside the EU with regard to a debtor with a centre of main interest outside the EU, to provide for the possibility of opening secondary proceedings—with some territorial limitation—when the debtor has no establishment (but may have just one or more assets), or to provide for certain rules on group- or consolidated insolvency, regardless of mutuality. On an individual basis, a Member State's court may follow the method of application of the EU Insolvency Regulation on non-EU insolvencies by analogy, as suggested at the beginning of 2003 by the Dutch Minister of Justice in the Netherlands. In this country that approach seems possible as its current international insolvency law is quite underdeveloped and the Dutch Supreme Court is leading the way in forming jurisprudence in which central concepts of the Regulation have been taken into account. The Member State may wish to codify an interpretation-rule of this nature, whether or not based on mutuality from another State in question, as it then may wish to enact legislation containing (additional) provisions with regard to cooperation and coordination between liquidators and/or court-to-court communication. I have, however, not seen EU Member States heading generally in this direction, although in Germany in a certain context cross-border court-to-court communication is mandatory, see below.

A next logical step would involve the adaptation of (parts of) the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency.[9] This Model Law of 1997 seeks to set out a way to adapt national insolvency law into one coherent system. Several countries have, in a modified form, adopted the Model Law (e.g. Mexico, South Africa, and Japan) or are in a process of adopting the Model Law, like the USA (draft Chapter 15 US Bankruptcy Code). An example here is Poland.

In October 2003 Poland will to introduce legislation that to a great extend contains the UNCITRAL Model Law. Polish private law has its original roots in German and Napoleontic law. Since 1919 it has been on a project of unification of private law that has led, after WW II, to decrees dealing with family law,

8. *Re BRAC Rent-A-Car International* Inc [2003] EWHC (Ch) 128; [2003] 2 All E.R. 201. See Wessels, *Rechtspersonen met zetel buiten de EU kunnen onderworpen zijn aan een insolventieprocedure in de EU* ('Corporations with a seat outside of the EU can be subject to insolvency proceedings in the EU'), Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR), nr. 6534 (17 mei 2003), p. 403.

9. Leaving aside the general preference for the EC itself to consider enactment of the Model Law for all its Member States, although one may doubt the EC's community authority to carry a proposal of such a nature.

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inheritance law and some general subjects of securities law and the law of obligations. These themes have been substantially revised since 1989.[10] The law of civil procedure has been modernised, although it is recognised that litigation still takes too much time to reach for effective results, as the court system itself (judges, support staff, logistics) are still underway to be brought up to an adequate level. With regard to insolvency law in 1999 two decrees of 1934 have been re-enacted. These contain a German/Austrian modelled insolvency law based on a division between a proceeding aiming at liquidation and a proceeding to reach for a reorganisation, after the approval of a rescue plan. Both decrees have been replaced by a renewed Insolvency Law of February 28, 2003. The pre-WW II system has been abolished and replaced by a Law containing 546 articles, that will come into force October 1, 2003. The Law integrates relevant European regulations and directives and takes into account the greater accent which is placed on rescue of enterprises, in the interest of employment. The Law contains a separate Chapter, dealing with cross-border insolvencies and their consequences with regard to non-EU members. This Chapter draws heavily on the UNCITRAL Modal Law.[11]

Another method recently has been embraced by Germany and Spain, where in its domestic legislation Chapters have been included that enact an autonomous framework for international insolvency law. Given its importance I will deal with its most significant issues. In Annexes 1 and 2 to this article the authentic German and Spanish texts are reproduced.[12]

The EC was not able to devise a single exclusive universal form of insolvency proceedings for the whole of the Community, because of the major diversities in civil law, (insolvency procedural) law and law with regard to securities. It was considered too difficult to implement an universal proceeding without modifying, by the application of the law of the State of the opening of proceedings, pre-existing rights created before the insolvency under the different national laws of the Member States. A group, calling itself 'International Working Group on European Insolvency Law' has concluded that it is remarkable that even the more recent European insolvency laws continue to show substantial differences in underlying policy considerations, both in structure and in content. The Working Group has analysed what it sees as common elements in the insolvency laws of several EU countries and have captured these in the *Principles of European Insolvency Law*, that

10. See for example Kuipers, Poland, in: Kuipers (ed.), *Reinforcement of the Rule of law; final report, Phare Horizontal Programme on Justice and Home Affairs, Nijmegen* (2002), p. 327–385; Radwanski, *Die Entwicklung des privaten Rechtssystems in Poland* ('The Development of Polish Private Law System'), in: Festschrift Franz Bydlinski, Wien (2002), p. 319; Meijknecht, *Het privaatrecht als graadmeter van de politieke veranderingen in Polen* ('Private law as indicator of political change in Poland'), in: Justitiële Verkenningen (forthcoming).

11. Based on information of Paul Meijknecht, who in 1999–2003 acted as Special consultant to the Polish Codification Committee for Civil Law.

12. In Austria a draft of a '*Bundesgesetz über das Internationale Insolvenzrecht*' (international Insolvency Act) has been issued <http://www.justiz.gv.at/gesetzes> or <http://www.parlinkom.gv.at>. The draft takes as a starting point the recognition of opening and legal consequences of the law of the State in which the insolvency proceeding is opened. It furthermore implements the Directives on Credit institutions and Insurance Undertakings in Austria's specific Banking Act and Insurancecompanies Supervision Act (with my thanks to Andreas Klauser, Vienna).

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were presented in Brussels in June, 2003. Here, too, a short introduction to these Principles, of which the text can be found in Annex 3.

A general caveat has to be put in front here, as the author is dealing with languages (German, Spanish) which are not his mother tongue. Furthermore, as a professional rule as a practitioner, I firmly hold that one should not give any advice with regard to foreign law. So I will not do so. It should be noted too, that the translations I provide are my own; no responsibility is accepted for any discrepancies with authentic texts. The modest aim is to make aware of some developments in the field and to encourage further study and discussion.

II. Germany

Although the new Insolvenzordnung in Germany came into being January 1, 1999, its provisions dealing with international insolvency law were incomplete and fragmented. In the nineties a 1992 draft relating to this topic of the Government ('Regierung') was taken out of the overall proposals for renewal of German insolvency law by the German Republic's parliament ('Bundestag') in 1995. The approach was taken to await the introduction of the (now) EU Insolvency Regulation (InsReg).[13] After the entry into force of the EU Regulation only ten months later, on March 20, 2003, the new German international insolvency law took effect.[14] It is an autonomous legal domain, fundamentally based on the EU Regulation's basics and system and inserted as Part XI (International Insolvency Law) in Germany's Insolvenzordnung (InsO). It is divided into three chapters:

— Chapter 1 (General Provisions) § 335–§ 342;
— Chapter 2 (Foreign Insolvency proceedings) § 343–§ 353;
— Chapter 3 (Partial proceeding covering domestic assets) § 354–§ 358.[15]

By introducing an autonomous international insolvency law in an EC country a vital question obviously is the one with regard to the relationship between the scope and content of the EU Insolvency Regulation and Part XI. The former will have priority, but the latter will have significance with relation to Germany's neighbours Denmark and Switzerland (and evidently all other States in the world). Part XI will only apply to insolvency proceedings opened after March 20, 2003. Part XI, furthermore, is presented as to be covering all that is needed to implement aforementioned EU Directives re credit institutions and insurance undertakings.

A central provision is § 335 InsO which contains the general principle that the insolvency proceedings and its effects are subject to, as long as nothing else is provided for, the law of the State in which the proceeding has been opened. The

13. To its genesis: Wimmer, *Frankfurter Kommentar zur Insolvenzordnung* ('Commentary to the German Insolvency Act'), 3. Aufl. 2002 Anh. I Rz 256.

14. See for its text, including a 17 pages Elucidation (all in German language): Deutscher Bundestag, 15. Wahlperiode, Drucksache 15/16 (25.10.2002) <http://www.bmj.bund.de/>.

15. Literature is still scarce, see Habscheid, *Konkurs in den USA und seine Wirkungen in Deutschland (und umgekehrt)* ('Bankruptcy in the USA and its Effects in Germany (and the other way around)'), NZI 5/2003, p. 238; Liersch, *Deutsches Internationales Insolvenzrecht* (German International Insolvency Law), NZI, Heft 6/2003, p. 302.

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opening of an insolvency proceeding in Germany therefore encompasses the worldwide assets of the debtor and the 'liquidator' principally has the power to operate in the whole world. § 335 nevertheless reflects the principle of universality only to a limited extend as in other individual States secondary insolvency proceedings can be opened, including so called isolated partial proceedings ('Partikularverfahren'), to which the assets in that specific State are subjected.[16] A second consequence of § 335 is that the proceedings are subject to the *lex (fori) concursus*, the law of the State in which the insolvency proceeding was opened.[17] The general application of the lex concursus in Part XI is however quite firmly limited with the introduction of other choices of law, either by way of an alternative choice or in the form of a material norm. The German international insolvency law contains alternative choices of law, among other provisions, in § 336 (contracts regarding tangible assets: lex rei sitae), § 337 (employment contracts: in general the law of the State in which the work is done), and § 339 (detrimental acts can be nullified when provided for by the lex concursus, unless the person who allegedly benefits proves that the legal act is subject to another law). A material norm, deviating from the lex concursus, is reflected in § 338 (a creditor's right to set-off is not affected by the lex concursus, where such a set-off is permitted by the law applicable to the insolvent debtor's claim), that heavily draws on the wording of art. 6 EU InsReg.[18] Another material norm is to be found in § 340 (financial markets, pensions, superannuation), where the decisive element is the law of that specific market or the law indicative for pension or annuation-contracts. § 335 is a double-sided conflict-rule in that it results in giving universal effect to German law when an insolvency proceeding is opened in Germany and recognises the effects of foreign law into Germany when a proceeding is opened outside of Germany.

Chapter 2 starts with the main principle with regard to recognition. It states that the opening of a foreign insolvency proceeding[19] is recognised, directly, without any specific formality. This is however not the case (i) when the court that opened the proceeding according to German law does not have jurisdiction,[20] or (ii) recognition would lead to a result which would be manifestly contrary to essential principles of German law ('wesentlichen Grundsätzen des deutschen Rechts'), in particular its fundamental rights.[21] The same rule applies to security measures and decisions during and with regard to closure of a recognised insolvency proceeding.

16. See: Spahlinger, *Insolvenzverfahren bei grenzüberschreitenden Insolvenzen* ('Insolvency Proceedings with regard to Cross-border insolvencies'), Tübingen, 1998, and: Kohlman, *Kooperationsmodelle im internationalen Insolvenzrecht* ('Models of Cooperation in International Insolvency Law'), Bielefeld, 2001, p. 212ff.

17. This is the general approach in art. 4 EU Insolvency Regulation, art. 9 EU Directive 2001/17 and art. 10 EU Directive 2001/24.

18. See for more details Bob Wessels, The Secured Creditor in Cross-border Finance Transactions Under the EU Insolvency Regulation, in: Journal of International Banking Law and Regulation, Volume 18, Issue 3, pp. 135–141.

19. A 'foreign' insolvency proceeding is a proceeding that roughly ('etwa') aims at the same goals as insolvency proceeding according to the Insolvenzordnung. Annexes A and B of the EU Insolvency regulation should be regarded as a guidance.

20. See: Reinhart, *Münchener Kommentar zur Insolvenzordnung* ('Commentary to the German Insolvency Act'), 2003, Art. 102 EGInsO Rz. 302, and: Kolmann, *Kooperationsmodelle im internationalen Insolvenzrecht* ('Models of Cooperation in International Insolvency Law'), Bielefeld, 2001, p. 289ff.

21. See: Kemper, in: Kübler/Prütting (eds.), *Kommentar zur Insolvenzordnung* ('Commentary to the German Insolvency Act'), 1998 Art. 102 EGInsO Rz. 83ff.

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The paragraphs on public announcements and costs (§ 345) reflect art. 21 and 23 EU Insolvency Regulation. The foreign 'liquidator' ('Insolvenzverwalter') shall be evidenced by a certified copy of his appointment and the court may ask for a sworn translation (§ 347). The only reference in the Elucidation to the UNCITRAL Model Law is to be found in § 347(2), in which art. 18 Model Law is encapsulated: the foreign liquidator informs the court of any substantial change in the foreign proceeding and of any other foreign proceeding regarding the same debtor that becomes known to the foreign representative. The German provision does not specify, like art. 18 Model Law, that the foreign liquidator should provide this information 'promptly'.

§ 350 follows the structure of art. 24 EU Insolvency Regulation by providing that where an obligation has been honoured in Germany, although the obligation should have been honoured for the benefit of the liquidator in the foreign proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings. Where such an obligation is honoured before the publication as meant in § 345, the person honouring the obligation shall be presumed unaware. § 350 InsO does not contain a specific provision as art. 24(2), last line, EU Insolvency Regulation with regard of a rebuttable presumption when an obligation is honoured after publication ('the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings'), so this debtor does not carry the burden to give evidence to a negative fact. Third parties' rights in rem in respect to an object ('Gegenstand'), which is situated at the moment of the opening of the foreign proceeding within Germany, and that according to German law results in a claim to separate the object or provides an exclusive right to have a claim met, will not be affected by the opening of the foreign proceeding. In this § 351 (1) one easily recognises art. 5 (1) EU InsReg.

The third Chapter, with five provisions, introduces the possibility of a separate insolvency proceeding to which the assets in Germany are subjected ('Partikularverfahren über das Inlandsvermögen'). The general idea is that the principle of universality is mitigated by introducing some other choices of law (other then the foreign lex concursus) or the possibility of opening secondary insolvency proceedings (a proceeding which presumes the existence of a foreign main proceeding, like the system of the EU Insolvency Regulation). In addition Part XI Insolvenzordnung also permits an independent 'Partikularverfahren'. If a German court does not have jurisdiction with regard to the entirety of the assets of the debtor, a creditor may ask the court to open a special insolvency proceeding with regard to the debtors assets in Germany, provided he possesses in Germany an establishment[22] or other assets ('sonstiges Vermögen'). In the latter case the creditor's request is only admissible when he can bring forward a special interest, for example, when the chances to have his claim met abroad are substantially poor compared to the possible outcome of a proceeding in Germany. It should be noted that the debtor

22. To be interpreted according to art. 2(h) EU InsReg.

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himself cannot request this special proceeding. § 357 contains the duty for the German liquidator to cooperate with his colleague abroad, and to give him the opportunity to submit proposals with regard to the assets located in Germany.

Germany's Part XI Insolvenzordnung represents a comprehensive codification of its international insolvency law. The autonomous German international insolvency law reflects in quite a vast extent the contents of the EU Insolvency Regulation. In its scope it even goes beyond the Regulation's width as issues of reorganisation or winding-up and liquidation of financial institutions would be covered by Part XI. Deviations from the contents of the Regulation were needed there, where the principal foundation of the Insolvency Regulation—community trust—cannot serve as a base for regulating legal relationships towards third countries. Part XI furthermore blends quite smoothly with existing, though rudimentary German international insolvency law of the former art. 102 'Einführungsgesetz Insolvenzordnung', and therefore already in present German literature one can find guidance for interpretation of certain important elements. Part XI will support German practitioners to use their powers in a case the debtors possesses assets outside Germany. Likewise, foreign proceedings will have certain effects in Germany and foreign liquidators should be able to cooperate with a German liquidator that is in charge in a secondary proceeding or in a special proceeding in which only assets of the foreign debtor are at stake. I was however quite surprised that the German legislator has hardly bothered to consider the UNCITRAL Model Law. Part XI therefore lacks any provisions that reflect the core of the Model Law, its section on cross-border communication and cooperation between courts.[23] A barrier to smooth cross-border administration of cases seems to me § 343(1)(i) in which the general rule that the opening of a foreign insolvency proceeding is recognised, directly and without formality is excluded in a case when the court that opened the proceeding according to German law does not have jurisdiction. At first glance it is uncertain how broad this exclusion is.[24]

III. Spain

Also in Spain international insolvency developments have left their footsteps. The 'Ley Concursal' of July 9, 2003, Law 22/2003 introduces a Title with over 30 provisions. The Act follows the Spanish Proposal No 101-1 of 23 July 2002[25] and seeks to

23. In the same Act Germany has included some provisions to make German insolvency law compatible with the EU Insolvency Regulation. Rather unique is art. 102 § 4(3) by creating a duty for the German court to communicate with the court in the other Member State, when this court has opened main proceedings. See: Wessels, Realisation of the EU Insolvency Regulation in Germany, France and the Netherlands (forthcoming).

24. I am indebted to Dr K. Wimmer, Ministry of Justice, Germany, for his comments on a draft version of this part of this article.

25. My notes are based on a paper written by my LL.M-students Blanca Manzano López (Spain) and Juliana Reyes Berón (Equador) and on the paper of José María Alonso, Private International Law Aspects of the New Spanish Insolvency Law, presented at International Bar Association (IBA) conference, San Francisco, 14–19 September 2003. This paper will be posted at <http://www.ibanet.org/>. The aformentioned students-paper is posted on the website of International Insolvency Institute (III) at <http://www.iiiglobal.org/>.

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introduce significant changes of the Spanish insolvency legislation, which is currently composed of rules dispersed amongst many, sometimes somewhat ancient laws, with a view to adapting this law, both its domestic and international contents, to the modern economic realities. I only will highlight the international aspects of the Law,[26] the objective of which it is to introduce the recent supranational instruments created for the unification and harmonisation of the insolvency law, especially the EU Insolvency Regulation and UNCITRAL Model Law.[27] Therefore, the Spanish Law sets forth new rules with regard to jurisdictional matters and private international law, deals with the relationship between main and territorial proceedings, their respective effects, the recognition in Spain of proceedings opened in another State and the position of the liquidator or the representative. The general aim is to facilitate an efficient coordination which results in a greater deal of legal certainty and economic efficiency.

Title IX of the new Spanish insolvency law contains specific provisions with regard to insolvency proceedings with a cross-border element under the heading 'Private International Law Rules'. Title IX contains four chapters:

— Chapter 1 (art. 199), 'Relationships amongst legal systems',
— Chapter 2 (art. 200–219), 'Applicable Law'
— Chapter 3 (art. 220–226) 'Recognition of Foreign Insolvency Proceedings',
— Chapter 4 (art. 227–230) 'Coordination of Parallel Insolvency Proceedings'.

The only provision of Chapter 1, art. 199, provides for the application of Title IX to insolvency proceedings without excluding the application of the EC Regulation 1346/2000 and other Community or conventional rules on the matter.[28] It introduces a major exception to this general rule in every case where there is a lack of reciprocity or where the competent authorities of a foreign State systematically infringe their duty of cooperation. In that case Chapters 3 and 4 on recognition of foreign proceedings and coordination of parallel proceedings, respectively, will not apply to the proceedings opened in those States.

Chapter 2 introduces as a general rule the principle of universality: Spanish law shall govern the opening and effects of the insolvency proceedings ('concurso') opened in Spain, as well as their conduct and their closure (art. 200 which reflects art. 4 EU InsReg). There are a series of exceptions to this general rule and these exceptions closely mirror the exceptions that art. 5–15 EU InsReg contain to the universal applicability of the lex concursus. In its continuing provision with regard to the opening of secondary proceedings and the law applicable to this type of proceedings, the duty to inform known creditors, rules on publication are very heavily based on its equivalents in the EU Insolvency Regulation. Art. 214 and onwards

26. For the proposals that contain a domestic nature, see: Gomez-Acebo and Lopez, in: Insol World–Third Quarter 2003, p. 19. The Law 22/2003 will become effective one year after its publication (9 July 2003).

27. Preamble to the Proposal of Spanish Insolvency Law No 101-1. The text in Spanish is available at <http://www.congreso.es/>. See for the final text <http://www.globalinsolvency.com/>.

28. International jurisdiction is vested in art. 10 of the Spanish Insolvency Law, which reflects the 'centre of main business'-approach of art. 3 EU Insolvency Regulation.

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contain provision with regard to providing information to foreign creditors, publications and registrations, which mirror the ones from the Regulation.

Chapter 3 starts off with an important provision (art. 220). The opening of foreign insolvency proceedings shall be recognised in Spain through the *exequatur* proceedings, for which five requirements have to be met: (i) the foreign judgment shall refer to collective insolvency proceedings, which entail the total or partial divestment of the debtor (the definition seems broader than the one of art. 1(1) InsReg, also encompassing debtor-in-possession proceedings); (ii) this judgment shall be a final, not a provisional decision, according to the law of the State of the opening of proceedings; (iii) the jurisdiction of the court or any other competent body shall be based on the Spanish law provisions, which find their equivalents in the jurisdiction-provisions of art. 3(1) and 3(2) EU InsReg, respectively; (iv) the judgment has been made with due procedural guarantees for the debtor; and (v) the judgement may not be contrary to the Spanish public policy, which is in line with art. 26 EC Regulation (although without the word 'manifestly'). The requirement of exequatur shall be interpreted as necessary where the judgments have been handed down by courts of States from outside the EU. Additional resolutions or decisions coming from the court of the opening of the insolvency proceedings do not require an exequatur. In the case of EU Member States, the principle of primacy of the general rule of automatic recognition without any further formality applies. The foreign insolvency proceedings shall be recognised as main insolvency proceedings where the centre of the debtor's main interests is situated in that State or as secondary territorial proceedings where the debtor possesses an establishment (in line with art. 3(2) EC Regulation) or any other reasonable equivalent connexion, such as the existence of goods affected to an economic activity ('. . . una connexion razonable equivalente, como la presencia de bienes afectos a una activicad económica'). The recognition of foreign main insolvency proceedings shall not prevent the opening of territorial insolvency proceedings in Spain.

Chapter 4 contains the duty of cooperation between liquidators. If there is no reciprocity with regard to this matter, the Spanish authorities shall be freed from their duty to cooperate. In particular, there must be (i) an exchange of any information that may be relevant to the other proceedings, subject to the rules on data protection and the duty of secrecy; (ii) coordination in the administration of the debtor's assets and activities; and (iii) approval and application by courts of agreements with regard to the coordination of the proceedings. Here one recognises some parts of art. 27 UNCITRAL Model Law. The foreign liquidator in the main proceedings shall be entitled to put forward proposals on the liquidation or any form of realisation of the creditors' rights, he may also lodge in the Spanish proceedings the claims he has already lodged in the foreign proceedings, he is empowered to participate in the Spanish proceedings and he can claim any remaining assets in secondary proceedings to be transferred to the main proceedings. These provisions carry all the paint of the EU InsReg.

In section XI of the Preamble of the new Spanish Insolvency Law an explanation is given for the introduction on the part on international insolvency law.

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Spanish Parliament intends to implement a better legislation with more stable principles, that gives creditors of the same class equal treatment, eliminating action of bad faith or decisions with unfair solutions created by the abusive position of the courts. From the statements one can conclude inspiration has been taken from the UNCITRAL Model Law. The Spanish Proposal, at first glance, introduces an important set of provisions dealing with cross-border insolvency proceedings. It is evident that has taken account of the relevant provisions of the European Insolvency Regulation. The private international law provisions are inspired by the Regulation, where the method of recognition seems to be based on the UNCITRAL Model Law, as far as compatible with the EU Regulation. In its approach of extrapolation of the contents of the EU Insolvency Regulation into the relationship with non-EU members Spain follows the same path as Germany. This is true too for its form, where both countries have created a single regulatory framework for all international insolvency cases, rather than creating in their respective Acts two separate sets of rules. In my opinion this is an approach that is to be welcomed.

Given the position where Spain comes from, Title IX may be judged as a significant contribution to the worldwide efficiency and effectiveness of cross-border insolvency proceedings. It is subject to further study where in the new Spanish 'Ley Concursal' specific Model Law provisions can be found.[29]

IV. Principles of European Insolvency Law

As introduced earlier a group, calling itself 'International Working Group on European Insolvency Law', has been drawing up Principles of European Insolvency Law. The Working Group was founded in 1999 and consists of an academic group of 15 professionals, originating from ten EU countries.[30] The Group has studied the question how the differences in domestic insolvency systems can be reconciled with the ongoing economic intergration of Europe, especially where the activities of companies that transgress national borders are regulated by European legislation. It considers that the development of a European market requires (i) an understanding of the differences between legal systems; (ii) a move towards uniformity in legal terminology and concepts; and (iii) the avoidance of diversity resulting from a lack of knowledge about other European jurisdictions. Although the idea of establishing in the short term a single universal insolvency proceeding for the entire EU may seem elusive, the Working Group concluded that this does not mean that national insolvency laws do not share common characteristics.

These common elements were captured in the *Principles of European Insolvency Law*, that were presented in Brussels in June, 2003. The *Principles* are the result of looking beyond these differences in structure, scope, concepts and formulation.

29. I am indebted to Professor Miguel Virgós (Catholic University, Madrid) for his comments on a draft version of this part of this article.

30. Belgium, Denmark, England, France, Germany, Italy, Luxembourg, The Netherlands, Scotland, Spain. EU-Member States Austria, Finland, Greece, Portugal and Sweden are not represented.

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The Working Group presents the *Principles* as '. . . the *essence* of insolvency proceedings in Europe as they reflect, on a more abstract level, the common characteristics of the insolvency laws of the European Member States.' The other aim of the *Principles* is to provide a foundation for greater harmonisation.

The Working Group developed 14 Principles which deal with the following topics:

1— Insolvency proceedings
2— Institutions and participants
3— Effects of the opening of the proceeding
4— Management of the assets
5— Obligations incurred by, and fees of, the administrator
6— Treatment of contracts
7— Position of employees
8— Reversal of juridical acts
9— Security rights and set-off
10— Submission and admission of insolvency claims
11— Reorganisation
12— Liquidation
13— Closure of the proceeding
14— Debtor in possession

The *Principles* are followed by a General Commentary[31] which starts with a brief introduction to the problem, followed by an explanation of the Principle itself. The Commentary does not provide exhaustive comparative reflections, but references the various approaches and solutions of national insolvency law systems. It also indicates where these systems substantially deviate from a particular Principle and refers, where appropriate, to the EU Insolvency Regulation.[32] The *Principles* focus mainly on business insolvency, do not deal with insolvency proceedings concerning for example, insurance undertakings and credit institutions, do not address voluntary debtor-creditor-arrangements ('workouts') outside insolvency law, do not include obligatory information systems which have been set up in some countries and do not address the issue of liability of directors and shareholders, as these grounds of liability can vary substantially from country to country.

The Commentary is followed by ten National Reports. These reports are all structured in the same general manner and contain information on the most important types of insolvency proceedings, the players (institutions and participants involved in the proceedings), the protective effect of insolvency proceedings, the position of creditors and other important issues such as the reversal of juridical acts, set-off, the effect of insolvency on existing contracts and the adoption, contents and effects of reorganisation plans and compositions. These National Reports are written with admirable oversight and clarity. The *Principles*, with its Commentary and the National Reports, serve two other aims. They will enable lawyers with

31. Written by Professors McBryde (Scotland) and Flessner (Germany).
32. The EU Insolvency Regulation has chosen—not unquestionably—to refer to the 'liquidator' as the person who administers or liquidates assets. The Principles use the term 'administrator'.

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different national backgrounds to better understand the existing systems of insolvency law in Europe.[33] With the coming into effect of the EU Insolvency Regulation there clearly is a need to better understand the insolvency laws of the Member States. It is unfortunate that the publication[34] lacks reports from Austria, Greece, Finland, Portugal and Sweden.

The Working Group also aims to provide working material for further study, which could result in proposals for legislation on a supranational level and—in the shorter term—provide support in the efforts to modernise national insolvency laws by serving as a European framework. This goal could be extended to other European countries that may join the EU in the coming years. The *Principles*, although limited in scope and limited in countries concerned, are a valuable first attempt to tackle an area of (international trade) law which is of great commercial importance. After several decades of discussion and studying of differences many would have thought that common foundations in Europe in this domain would never be revealed. As a modest attempt for some design in the present European insolvency hodgepodge the Working Group has taken the realistic approach not providing model provisions for a national legislation, as currently is underway in the project of UNCITRAL's *Legislative Guide on Insolvency Law.* On the other hand the Group does not shy away to mention the C-word in that it refers to a 'European Insolvency Code'. It recognises that the *Principles* do not try to reflect the ideal rules for such a Code, but the Group is firm in its belief that the *Principles* identify the areas of conformity and divergence and will thus be helpful when a Code could be developed. In the much shorter term the *Principles*, its Commentary and the National Reports provide scholars and practitioners with a much needed *catalogue raisonné*, bringing to the surface common foundations, policies and effects in constituent parts of Europe's insolvency law.

V. **Conclusion**

The years 2002 and 2003 can be seen as a very fruitful period for the development of international insolvency law. The EU Insolvency Regulation came into being, and its first applications in courts come to the surface, major legislative developments can be noted in Germany and Spain, in Austria and in Poland. Where most of these legislative developments take notice of the UNCITRAL Model Law, I have not seen evidence yet that the aforementioned countries themselves have expressly coordinated their approaches to the issue of codifying international insolvency law provisions. Within the context of the EU a main driver that has led to the EU Insolvency Regulation has been the idea that insolvency of undertakings

33. In this aim one can recognise the result of the approach chosen by American Law Institute (ALI) to describe, although much more extensively, the Bankruptcy Laws of Canada, Mexico and USA, in: Transnational Insolvency: Cooperation Among the NAFTA Countries, Juris Publishing, Inc., Huntington, NY, 2003 (4 Volumes).

34. W. W. McBryde, A. Flessner and S. C. J. J. Kortmann (eds.), Principles of European Insolvency Law, Series Law of Business and Finance, Volume 4, Kluwer Legal Publishers, Deventer, The Netherlands, 2003; ISBN 90 130 0597 7.

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whose activities have more and more cross-border effects also affects the proper functioning of the internal market. Therefore a Community measure was needed that required coordination of the measures to be taken regarding an insolvent debtor's assets. This important principle is not limited to the territory of the EC. I am concerned that time will come that some of the countries mentioned will regret not having aligned their (proposed) measures with regard to cross-border insolvencies which involve interests of non-EU countries.

Annex 1

Drucksache 15/16-6-Deutscher Bundestag-15. Wahlperiode (25-10-2002)

Insolvenzordnung, Elfter Teil (Internationales Insolvenzrecht)

Erster Abschnitt
Allgemeine Vorschriften

§ 335 Grundsatz
Das Insolvenzverfahren und seine Wirkungen unterliegen, soweit nichts anderes bestimmt ist, dem Recht des Staats, in dem das Verfahren eröffnet worden ist.

§ 336 Vertrag über einen unbeweglichen Gegenstand
Die Wirkungen des Insolvenzverfahrens auf einen Vertrag, der ein dingliches Recht an einem unbeweglichen Gegenstand oder ein Recht zur Nutzung eines unbeweglichen Gegenstandes betrifft, unterliegen dem Recht des Staats, in dem der Gegenstand belegen ist. Bei einem im Schiffsregister, Schiffsbauregister oder Register für Pfandrechte an Luftfahrzeugen eingetragenen Gegenstand ist das Recht des Staats maßgebend, unter dessen Aufsicht das Register geführt wird.

§ 337 Arbeitsverhältnis
Die Wirkungen des Insolvenzverfahrens auf ein Arbeitsverhältnis unterliegen dem Recht, das nach dem Einführungsgesetz zum Bürgerlichen Gesetzbuch für das Arbeitsverhältnis maßgebend ist.

§ 338 Aufrechnung
Das Recht eines Insolvenzgläubigers zur Aufrechnung wird von der Eröffnung des Insolvenzverfahrens nicht berührt, wenn er nach dem für die Forderung des Schuldners maßgebenden Recht zur Zeit der Eröffnung des Insolvenzverfahrens zur Aufrechnung berechtigt ist.

§ 339 Insolvenzanfechtung
Eine Rechtshandlung kann angefochten werden, wenn die Voraussetzungen der Insolvenzanfechtung nach dem Recht des Staats der Verfahrenseröffnung erfüllt sind, es sei denn, der Anfechtungsgegner weist nach, dass für die Rechtshandlung das Recht eines anderen Staats maßgebend und die Rechtshandlung nach diesem Recht in keiner Weise angreifbar ist.

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§ 340 Organisierte Märkte. Pensionsgeschäfte
(1) Die Wirkungen des Insolvenzverfahrens auf die Rechte und Pflichten der Teilnehmer an einem organisierten Markt nach § 2 Abs. 5 des Wertpapierhandelsgesetzes unterliegen dem Recht des Staats, das für diesen Markt gilt.
(2) Die Wirkungen des Insolvenzverfahrens auf Pensionsgeschäfte im Sinne des § 340b des Handelsgesetzbuchs sowie auf Schuldumwandlungsverträge und Aufrechnungsvereinbarungen unterliegen dem Recht des Staats, das für diese Verträge maßgebend ist.
(3) Für die Teilnehmer an einem System im Sinne von § 96 Abs. 2 Satz 2 oder Satz 3 gilt Absatz 1 entsprechend.

§ 341 Ausübung von Gläubigerrechten
(1) Jeder Gläubiger kann seine Forderungen im Hauptinsolvenzverfahren und in jedem Sekundärinsolvenzverfahren anmelden.
(2) Der Insolvenzverwalter ist berechtigt, eine in dem Verfahren, für das er bestellt ist, angemeldete Forderung in einem anderen Insolvenzverfahren über das Vermögen des Schuldners anzumelden. Das Recht des Gläubigers, die Anmeldung abzulehnen oder zurückzunehmen, bleibt unberührt.
(3) Der Verwalter gilt als bevollmächtigt, das Stimm-recht aus einer Forderung, die in dem Verfahren, für das er bestellt ist, angemeldet worden ist, in einem anderen Insolvenzverfahren über das Vermögen des Schuldners auszuüben, sofern der Gläubiger keine anderweitige Bestimmung trifft.

§ 342 Herausgabepflicht. Anrechnung
(1) Erlangt ein Insolvenzgläubiger durch Zwangsvollstreckung, durch eine Leistung des Schuldners oder in sonstiger Weise etwas auf Kosten der Insolvenzmasse aus dem Vermögen, das nicht im Staat der Verfahrenseröffnung belegen ist, so hat er das Erlangte dem Insolvenzverwalter herauszugeben. Die Vorschriften über die Rechtsfolgen einer ungerechtfertigten Bereicherung gelten entsprechend.
(2) Der Insolvenzgläubiger darf behalten, was er in einem Insolvenzverfahren erlangt hat, das in einem anderen Staat eröffnet worden ist. Er wird jedoch bei den Verteilungen erst berücksichtigt, wenn die übrigen Gläubiger mit ihm gleichgestellt sind.
(3) Der Insolvenzgläubiger hat auf Verlangen des Insolvenzverwalters Auskunft über das Erlangte zu geben.

Zweiter Abschnitt
Ausländisches Insolvenzverfahren

§ 343 Anerkennung
(1) Die Eröffnung eines ausländischen Insolvenzverfahrens wird anerkannt. Dies gilt nicht,
1. wenn die Gerichte des Staats der Verfahrenseröffnung nach deutschem Recht nicht zuständig sind;
2. soweit die Anerkennung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist, insbesondere soweit sie mit den Grundrechten unvereinbar ist.

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(2) Absatz 1 gilt entsprechend für Sicherungsmaßnahmen, die nach dem Antrag auf Eröffnung des Insolvenzverfahrens getroffen werden, sowie für Entscheidungen, die zur Durchführung oder Beendigung des anerkannten Insolvenzverfahrens ergangen sind.

§ 344 Sicherungsmaßnahmen
(1) Wurde im Ausland vor Eröffnung eines Hauptinsolvenzverfahrens ein vorläufiger Verwalter bestellt, so kann auf seinen Antrag das zuständige Insolvenzgericht die Maßnahmen nach § 21 anordnen, die zur Sicherung des von einem inländischen Sekundärinsolvenzverfahren erfassten Vermögens erforderlich erscheinen.
(2) Gegen den Beschluss steht auch dem vorläufigen Verwalter die sofortige Beschwerde zu.

§ 345 Öffentliche Bekanntmachung
(1) Sind die Voraussetzungen für die Anerkennung der Verfahrenseröffnung gegeben, so hat das Insolvenzgericht auf Antrag des ausländischen Insolvenzverwalters den wesentlichen Inhalt der Entscheidung über die Verfahrenseröffnung und der Entscheidung über die Bestellung des Insolvenzverwalters im Inland bekannt zu machen. § 9 Abs. 1 und 2 und § 30 Abs. 1 gelten entsprechend.
Ist die Eröffnung des Insolvenzverfahrens bekannt gemacht worden, so ist die Beendigung in gleicher Weise bekannt zu machen.
(2) Hat der Schuldner im Inland eine Niederlassung, so erfolgt die öffentliche Bekanntmachung von Amts wegen. Der Insolvenzverwalter oder ein ständiger Vertreter nach § 13e Abs. 2 Satz 4 Nr. 3 des Handelsgesetzbuchs unterrichtet das nach § 348 Abs. 1 zuständige Insolvenzgericht.
(3) Der Antrag ist nur zulässig, wenn glaubhaft gemacht wird, dass die tatsächlichen Voraussetzungen für die Anerkennung der Verfahrenseröffnung vorliegen. Dem Verwalter ist eine Ausfertigung des Beschlusses, durch den die Bekanntmachung angeordnet wird, zu erteilen. Gegen die Entscheidung des Insolvenzgerichts, mit der die öffentliche Bekanntmachung abgelehnt wird, steht dem ausländischen Verwalter die sofortige Beschwerde zu.

§ 346 Grundbuch
(1) Wird durch die Verfahrenseröffnung oder durch Anordnung von Sicherungsmaßnahmen nach § 343 Abs. 2 oder § 344 Abs. 1 die Verfügungsbefugnis des Schuldners eingeschränkt, so hat das Insolvenzgericht auf Antrag des ausländischen Insolvenzverwalters das Grundbuchamt zu ersuchen, die Eröffnung des Insolvenzverfahrens und die Art der Einschränkung der Verfügungsbefugnis des Schuldners in das Grundbuch einzutragen:
1. bei Grundstücken, als deren Eigentümer der Schuldner eingetragen ist;
2. bei den für den Schuldner eingetragenen Rechten an Grundstücken und an eingetragenen Rechten, wenn nach der Art des Rechts und den Umständen zu befürchten ist, dass ohne die Eintragung die Insolvenzgläubiger benachteiligt würden.

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(2) Der Antrag nach Absatz 1 ist nur zulässig, wenn glaubhaft gemacht wird, dass die tatsächlichen Voraussetzungen für die Anerkennung der Verfahrenseröffnung vorliegen. Gegen die Entscheidung des Insolvenzgerichts steht dem ausländischen Verwalter die sofortige Beschwerde zu. Für die Löschung der Eintragung gilt § 32 Abs. 3 Satz 1 entsprechend.
(3) Für die Eintragung der Verfahrenseröffnung in das Schiffsregister, das Schiffsbauregister und das Register für Pfandrechte an Luftfahrzeugen gelten die Absätze 1 und 2 entsprechend.

§ 347 Nachweis der Verwalterbestellung. Unterrichtung des Gerichts
(1) Der ausländische Insolvenzverwalter weist seine Bestellung durch eine beglaubigte Abschrift der Entscheidung, durch die er bestellt worden ist, oder durch eine andere von der zuständigen Stelle ausgestellte Bescheinigung nach. Das Insolvenzgericht kann eine Übersetzung verlangen, die von einer hierzu im Staat der Verfahrenseröffnung befugten Person zu beglaubigen ist.
(2) Der ausländische Insolvenzverwalter, der einen Antrag nach den §§ 344 bis 346 gestellt hat, unterrichtet das Insolvenzgericht über alle wesentlichen Änderungen in dem ausländischen Verfahren und über alle ihm bekannten weiteren ausländischen Insolvenzverfahren über das Vermögen des Schuldners.

§ 348 Zuständiges Insolvenzgericht
(1) Für die Entscheidungen nach den §§ 344 bis 346 ist ausschließlich das Insolvenzgericht zuständig, in dessen Bezirk die Niederlassung oder, wenn eine Niederlassung fehlt, Vermögen des Schuldners belegen ist. § 3 Abs. 2 gilt entsprechend.
(2) Die Landesregierungen werden ermächtigt, zur sachdienlichen Förderung oder schnelleren Erledigung der Verfahren durch Rechtsverordnung die Entscheidungen nach den §§ 344 bis 346 für die Bezirke mehrerer Insolvenzgerichte einem von diesen zuzuweisen. Die Landesregierungen können die Ermächtigungen auf die Landesjustizverwaltungen übertragen.
(3) Die Länder können vereinbaren, dass die Entscheidungen nach den §§ 344 bis 346 für mehrere Länder den Gerichten eines Landes zugewiesen werden. Geht ein Antrag nach den §§ 344 bis 346 bei einem unzuständigen Gericht ein, so leitet dieses den Antrag unverzüglich an das zuständige Gericht weiter und unterrichtet hierüber den Antragsteller.

§ 349 Verfügungen über unbewegliche Gegenstände
(1) Hat der Schuldner über einen Gegenstand der Insolvenzmasse, der im Inland im Grundbuch, Schiffsregister, Schiffsbauregister oder Register für Pfandrechte an Luftfahrzeugen eingetragen ist, oder über ein Recht an einem solchen Gegenstand verfügt, so sind die §§ 878, 892, 893 des Bürgerlichen Gesetzbuchs, § 3 Abs. 3, §§ 16, 17 des Gesetzes über Rechte an eingetragenen Schiffen und Schiffsbauwerken und § 5 Abs. 3, §§ 16, 17 des Gesetzes über Rechte an Luftfahrzeugen anzuwenden.
(2) Ist zur Sicherung eines Anspruchs im Inland eine Vormerkung im Grundbuch, Schiffsregister, Schiffsbauregister oder Register für Pfandrechte an Luftfahrzeugen eingetragen, so bleibt § 106 unberührt.

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§ 350 Leistung an den Schuldner
Ist im Inland zur Erfüllung einer Verbindlichkeit an den Schuldner geleistet worden, obwohl die Verbindlichkeit zur Insolvenzmasse des ausländischen Insolvenzverfahrens zu erfüllen war, so wird der Leistende befreit, wenn er zur Zeit der Leistung die Eröffnung des Verfahrens nicht kannte. Hat er vor der öffentlichen Bekanntmachung nach § 345 geleistet, so wird vermutet, dass er die Eröffnung nicht kannte.

§ 351 Dingliche Rechte
(1) Das Recht eines Dritten an einem Gegenstand der Insolvenzmasse, der zur Zeit der Eröffnung des ausländischen Insolvenzverfahrens im Inland belegen war, und das nach inländischem Recht einen Anspruch auf Aussonderung oder auf abgesonderte Befriedigung gewährt, wird von der Eröffnung des ausländischen Insolvenzverfahrens nicht berührt.
(2) Die Wirkungen des ausländischen Insolvenzverfahrens auf Rechte des Schuldners an unbeweglichen Gegenständen, die im Inland belegen sind, bestimmen sich nach deutschem Recht.

§ 352 Unterbrechung und Aufnahme eines Rechtsstreits
(1) Durch die Eröffnung des ausländischen Insolvenzverfahrens wird ein Rechtsstreit unterbrochen, der zur Zeit der Eröffnung anhängig ist und die Insolvenzmasse betrifft. Die Unterbrechung dauert an, bis der Rechtsstreit von einer Person aufgenommen wird, die nach dem Recht des Staats der Verfahrenseröffnung zur Fortführung des Rechtsstreits berechtigt ist, oder bis das Insolvenzverfahren beendet ist.
(2) Absatz 1 gilt entsprechend, wenn die Verwaltungs- und Verfügungsbefugnis über das Vermögen des Schuldners durch die Anordnung von Sicherungsmaßnahmen nach § 343 Abs. 2 auf einen vorläufigen Insolvenzverwalter übergeht.

§ 353 Vollstreckbarkeit ausländischer Entscheidungen
(1) Aus einer Entscheidung, die in dem ausländischen Insolvenzverfahren ergeht, findet die Zwangsvollstreckung nur statt, wenn ihre Zulässigkeit durch ein Vollstreckungsurteil ausgesprochen ist. § 722 Abs. 2 und § 723 Abs. 1 der Zivilprozessordnung gelten entsprechend.
(2) Für die in § 343 Abs. 2 genannten Sicherungsmaßnahmen gilt Absatz 1 entsprechend.

Dritter Abschnitt
Partikularverfahren über das Inlandsvermögen

§ 354 Voraussetzungen des Partikularverfahrens
(1) Ist die Zuständigkeit eines deutschen Gerichts zur Eröffnung eines Insolvenzverfahrens über das gesamte Vermögen des Schuldners nicht gegeben, hat der Schuldner jedoch im Inland eine Niederlassung oder sonstiges Vermögen, so ist auf Antrag eines Gläubigers ein besonderes Insolvenzverfahren über das inländische Vermögen des Schuldners (Partikularverfahren) zulässig.

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(2) Hat der Schuldner im Inland keine Niederlassung, so ist der Antrag eines Gläubigers auf Eröffnung eines Partikularverfahrens nur zulässig, wenn dieser ein besonderes Interesse an der Eröffnung des Verfahrens hat, insbesondere, wenn er in einem ausländischen Verfahren voraussichtlich erheblich schlechter stehen wird als in einem inländischen Verfahren. Das besondere Interesse ist vom Antragsteller glaubhaft zu machen.
(3) Für das Verfahren ist ausschließlich das Insolvenzgericht zuständig, in dessen Bezirk die Niederlassung oder, wenn eine Niederlassung fehlt, Vermögen des Schuldners belegen ist. § 3 Abs. 2 gilt entsprechend.

§ 355 Restschuldbefreiung. Insolvenzplan
(1) Im Partikularverfahren sind die Vorschriften über die Restschuldbefreiung nicht anzuwenden.
(2) Ein Insolvenzplan, in dem eine Stundung, ein Erlass oder sonstige Einschränkungen der Rechte der Gläubiger vorgesehen sind, kann in diesem Verfahren nur bestätigt werden, wenn alle betroffenen Gläubiger dem Plan zugestimmt haben.

§ 356 Sekundärinsolvenzverfahren
(1) Die Anerkennung eines ausländischen Hauptinsolvenzverfahrens schließt ein Sekundärinsolvenzverfahren über das inländische Vermögen nicht aus. Für das Sekundärinsolvenzverfahren gelten ergänzend die §§ 357 und 358.
(2) Zum Antrag auf Eröffnung des Sekundärinsolvenzverfahrens ist auch der ausländische Insolvenzverwalter berechtigt.
(3) Das Verfahren wird eröffnet, ohne dass ein Eröffnungsgrund festgestellt werden muss.

§ 357 Zusammenarbeit der Insolvenzverwalter
(1) Der Insolvenzverwalter hat dem ausländischen Verwalter unverzüglich alle Umstände mitzuteilen, die für die Durchführung des ausländischen Verfahrens Bedeutung haben können. Er hat dem ausländischen Verwalter Gelegenheit zu geben, Vorschläge für die Verwertung oder sonstige Verwendung des inländische Vermögens zu unterbreiten.
(2) Der ausländische Verwalter ist berechtigt, an den Gläubigerversammlungen teilzunehmen.
(3) Ein Insolvenzplan ist dem ausländischen Verwalter zur Stellungnahme zuzuleiten. Der ausländische Verwalter ist berechtigt, selbst einen Plan vorzulegen. § 218 Abs. 1 Satz 2 und Satz 3 gilt entsprechend.

§358 Überschuss bei der Schlussverteilung
Können bei der Schlussverteilung im Sekundärinsolvenzverfahren alle Forderungen in voller Höhe berichtigt werden, so hat der Insolvenzverwalter einen verbleibenden Überschuss dem ausländischen Verwalter des Hauptinsolvenzverfahrens herauszugeben.

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Annex 2

Espagña: Ley Concursal, de 9 July 2003 (nr. 22/2003).

TÍTULO IX
De las normas de Derecho Internacional Privado

CAPÍTULO 1

Aspectos generales

Artículo 199. De las relaciones entre ordenamientos.
Las normas de este Título se aplicarán sin perjuicio de lo establecido en el Reglamento (CE) 1346/2000 sobre procedimientos de insolvencia y demás normas comunitarias o convencionales que regulen la materia.
A falta de reciprocidad o cuando se produzca una falta sistemática a la cooperación por las autoridades de un Estado extranjero, no se aplicarán, respecto de los procedimientos seguidos en dicho Estado, los capí-tulos 3 y 4 de este Titulo.

CAPÍTULO 2

De la Ley aplicable

SECCIÓN 1.ª DEL PROCEDIMIENTO PRINCIPAL

Artículo 200. Regla general.
Sin perjuicio de lo dispuesto en los artículos siguientes, la Ley española determinará los presupuestos y efectos del concurso declarado en España, su desarrollo y su conclusión.

Artículo 201. Derechos reales y reservas de dominio.
1. Los efectos del concurso sobre derechos reales de un acreedor o de un tercero que recaigan en bienes o derechos de cualquier clase pertenecientes al deudor, comprendidos los conjuntos de bienes cuya composición pueda variar en el tiempo, y que en el momento de declaración del concurso se encuentren en el territo-rio de otro Estado se regirán exclusivamente por Ley de éste.
La misma regla se aplicaŕ a los derechos del ven-dedor respecto de los bienes vendidos al concursado con reserva de dominio.
2. La declaración de concurso del vendedor de un bien con reserva de dominio que ya haya sido entrega-do y que al momento de la declaración se encuentre en el territorio de otro Estado no constituye, por sí sola, causa de resolución ni de rescisión de la venta y no impedirá al comprador la adquisición de su propiedad.
3. Lo dispuesto en los apartados anteriores se entiende sin perjuicio de las acciones de reintegración que, en su caso, procedan.

Artículo 202. Derechos del deudor sometidos a registro.
Los efectos del concurso sobre derechos del deudor que recaigan en bienes inmuebles, buques o aeronaves sujetos a inscripción en Registro público se acomodarán a lo dispuesto en la Ley del Estado bajo cuya autoridad se lleve el Registro.

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Artículo 203. Terceros adquirentes.
La validez de los actos de disposición a título oneroso del deudor sobre bienes inmuebles o sobre buques o aeronaves que estén sujetos a inscripción en Registro püblico, realizados con posterioridad a la declaración de concurso, se regirán, respectivamente, por la Ley del Estado en cuyo territorio se encuentre el bien immueble o por la de aquél bajo cuya autoridad se lleve el Regis-tro de buques o aeronaves.

Artículo 204. Derechos sobre valores y sistemas de pagos y mercados financieros.
Los efectos del concurso sobre derechos que recaigan en valores negociables representados mediante anotaciones en cuenta se regirán por la Ley del Estado del registro donde dichos valores estuvieren anotados. Esta norma comprende cualquier registro de valores legalmente reconocido, incluidos los llevados por enti-dades financieras sujetas a supervisión legal.
Sin perjuicio de lo dispuesto en el artículo 201, los efectos del concurso sobre los derechos y obligaciones de los participantes en un sistema de pago o compensación o en un mercado financiero se regirán exclusiva-mente por la Ley del Estado aplicable a dicho sistema o mercado.

Artículo 205. Compensación.
1. La declaración de concurso no afectará al derecho de un acreedor a compensar su crédito cuando la Ley que rija el crédito recíproco del concursado lo permita en situaciones de insolvencia.
2. Lo dispuesto en el apartado anterior se entiende sin perjuicio de las acciones de reintegración que, en su caso, procedan.

Artículo 206. Contratos sobre inmuebles.
Los efectos del concurso sobre los contratos que tengan por objeto la atribución de un derecho al uso o a la adquisición de un bien inmueble se regirán exclusivamente por la Ley del Estado donde se halle.

Artículo 207. Contratos de trabajo.
Los efectos del concurso sobre el contrato de trabajo y sobre las relaciones laborales se regirán exclusiva-mente por la ley del Estado aplicable al contrato.

Artículo 208. Acciones de reintegración.
No procederá el ejercicio de acciones de impugnación al amparo de esta Ley cuando el beneficiado por el acto perjudicial para la masa activa pruebe que dicho acto esta sujeto a la Ley de otro Estado que no permite en ningún caso su impugnación.

Artículo 209. Juicios declarativos pendientes.
Los efectos del concurso sobre los juicios declarativos pendientes que se refieran a un bien o a un derecho de la masa se regirán exclusivamente por la Ley del Estado en el que estén en curso.

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SECCIÓN 2.ª DEL PROCEDIMIENTO TERRITORIAL

Artículo 210. Regla general.
Excepto en lo previsto en esta Sección, el concurso territorial se regirá por las mismas normas que el con-curso principal.

Artículo 211. Presupuestos del concurso.
El reconocimiento de un procedimiento extranjero principal permitirá abrir en España un concurso territo-rial sin necesidad de examinar la insolvencia del deudor.

Artículo 212. Legitimación.
Podrá solicitar la declaración de un concurso territorial:
1.° Cualquier persona legitimada para solicitar la declaración de concurso con arreglo a la presente Ley.
2.° El representante del procedimiento extranjero principal.

Artículo 213. Alcance de un convenio con los acree-dores.
Las limitaciones de los derechos de los acreedores derivadas de un convenio aprobado en el concurso terri-torial, tales como la quita y la espera, sólo producirán efectos con respecto a los bienes del deudor no comprendidos en este concurso si hay conformidad de todos los acreedores interesados.

SECCIÓN 3.ª DE LAS REGLAS COMUNES A AMBOS TIPOS DE PROCEDIMIENTOS

Artículo 214. Información a los acreedores en el extranjero.
1. Declarado el concurso, la administración judicial informará sin demora a los acreedores conocidos que tengan su residencia habitual, domicilio o sede en el extranjero, si así resultare de los libros y documentos del deudor o por cualquier otra razón constare en el concurso.
2. La información comprenderá la identificación del procedimiento, la fecha del auto de declaración, el caŕcter principal o territorial del concurso, las circunstancias personales del deudor, los efectos acordados sobre las facultades de administración y disposición respecto de su patrimonio, el llamamiento a los acreedores, incluso a aquellos garantizados con derecho real, el plazo para la comunicación de los créditos a la administración judicial y la dirección postal del Juzgado.
3. La información se realizará por escrito y mediante envío individualizado, salvo que el Juez disponga cualquier otra forma por estimarla más adecuada a las circunstancias del caso.

Artículo 215. Publicidad y registro en el extranjero.
1. El Juez, de oficio o a instancia de interesado, podrá acordar que se publique el contenido esencial del auto de declaración del concurso en cualquier Estado extranjero donde convenga a los intereses del concurso, con arreglo a las modalidades de publicación previstas en dicho Estado para los procedimientos de insolvencia.

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2. La administración judicial podrá solicitar la publicidad registral en el extranjero del auto de declaración y de otros actos del procedimiento cuando así convenga a los intereses del concurso.

Artículo 216. Pago al concursado en el extranjero.
1. El pago hecho al concursado en el extranjero por un deudor con residencia habitual, domicilio o sede en el extranjero sólo liberará a quien lo hiciere ignorando la apertura del concurso en España.
2. Salvo prueba en contrario, se presumirá que ignoraba la existencia, del procedimiento quien realizó el pago antes de haberse dado a la apertura del concur-so la publicidad a que se refiere el párrafo primero del artículo anterior.

Artículo 217. Comunicación de créditos.
1. Los acreedores que tengan su residencia habitual, domicilio o sede en el extranjero comunicarán sus créditos a la administración judicial conforme a lo dis-puesto en el artículo 82.
2. Todo acreedor podrá comunicar su crédito en el procedimiento principal o territorial abierto en España, con independencia de que también lo haya presentado en un procedimiento de insolvencia abierto en el extranjero. Esta regla incluye, sujetos a condición de reciprocidad, los créditos tributarios y de la seguridad social de otros Estados, que en este caso serán admitidos como créditos ordinarios.

Artículo 218. Restitución e imputación.
1. El acreedor que, tras la apertura de un concurso principal en España, obtuviera un pago total o parcial de su crédito con cargo a bienes del deudor situados en el extranjero o por la realización o ejecución de los mismos deberá restituir a la masa lo que hubiera obtenido, sin perjuicio de lo dispuesto en el artículo 201.
En el caso de que dicho pago se obtuviera en un procedimiento de insolvencia abierto en el extranjero, se aplicará la regla de imputación de pagos del artículo 229.
2. Cuando el Estado donde se hallaren los bienes no reconociera el concurso declarado en España o las dificultades de localización y realización de esos bienes así lo justificaren, el Juez podrá autorizar a los acreedores a instar en el extranjero la ejecución individual, con aplicación, en todo caso, de la regla de imputación prevista en el artículo 231.

Artículo 219. Lenguas.
1. La información prevista en el artículo 214 se dará en castellano, pero en el encabezamiento de su texto figurarán también en inglés y francés los terminus 'Convocatoria para la presentación de créditos. Plazos aplicables'.
2. Los acreedores con residencia habitual, domicilio o sede en el extranjero presentarán el escrito de comunicación de sus créditos en lengua castellana o en otra oficial propia de la Comunidad Autónoma en la que tenga su sede el Juez del concurso. Si lo hicieren en lengua distinta, la administración judicial podrá exigir posteriormente una traducción al castellano.

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CAPÍTULO 3
Del reconocimiento de procedimientos extranjeros de insolvencia

Artículo 220. Reconocimiento de la resolución de apertura.
1. Las resoluciones extranjeras que declaren la apertura de un procedimiento de insolvencia se reconocerán en España mediante el procedimiento de *exequatur* regulado en la Ley de Enjuiciamiento Civil, si reúnen los requisitos siguientes:
1.° Que la resolución se refiera a un procedimiento colectivo fundado en la insolvencia del deudor, en virtud del cual sus bienes y actividades queden sujetos al control o a la supervisión de un tribunal o una autori-dad extranjera a los efectos de su reorganización o liquidación.
2.° Que la resolución sea definitiva según la Ley del Estado de apertura.
3.° Que la competencia del tribunal o de la autoridad que haya abierto el procedimiento de insolvencia esté basada en alguno de los criterios contenidos en el artículo 7 de esta Ley o en una conexión razonable de naturaleza equivalente.
4.° Que la resolución no haya sido pronunciada en rebeldía del deudor o, en otro caso, que haya sido precedida de entrega o notificación de cédula de emplazamiento o documento equivalente, en forma y con tiempo suficiente para oponerse.
5.° Que la resolución no sea contraria al orden público español.
2. El procedimiento de insolvencia extranjero se reconocerá:
1.° Como procedimiento extranjero principal, si se está tramitando en el Estado donde el deudor tenga el centro de sus intereses principales.
2.° Como procedimiento extranjero territorial, si se está tramitando en un Estado donde el deudor tenga un establecimiento o con cuyo territorio exista una conexión razonable de naturaleza equivalente, como la presencia de bienes afectos a una actividad económica.
3. El reconocimiento de un procedimiento extranjero principal no impedirá la apertura en España de un concurso territorial.
4. Podrá suspenderse la tramitación del *exequatur* cuando la resolución de apertura del procedimiento de insolvencia hubiera sido objeto, en su Estado de origen, de un recurso ordinario o cuando el plazo para interponerlo no hubiera expirado.
5. Lo dispuesto en este artículo no impedirá la modificación o revocación del reconocimiento si se demostrase la alteración relevante o la desaparición de los motivos por los que se otorga.

Artículo 221. Administrador o representante extranjero.
1. Tendrá la condición de administrador o representante del procedimiento extranjero la persona u órgano, incluso designado a título provisional, que esté facultado para administrar o supervisar la reorganización o la liquidación de los bienes o actividades del deudor o para actuar como representante del procedimiento.
2. El nombramiento del administrador o representante se acreditará mediante copia autenticada del original de la resolución por la que se le designe o mediante certificado expedido por el tribunal o la autoridad competente, con los requisitos necesarios para hacer fe en España.

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3. Una vez reconocido un procedimiento extranjero principal, el administrador o representante estará obligado a:
1.° Dar al procedimiento una publicidad equivalente a la ordenada en el artículo 20 de esta Ley, cuando el deudor tenga un establecimiento en España.
2.° Solicitar de los Registros públicos correspondientes las inscripciones que procedan conforme al artículo 21 de esta Ley.
Los gastos ocasionados por las medidas de publicidad y registro serán satisfechos por el administrador o representante con cargo al procedimiento principal.
4. Una vez reconocido un procedimiento extranjero principal, su administrador o representante podrá ejercer las facultades que le correspondan conforme a la Ley del Estado de apertura, salvo que resulten incompatibles con los efectos de un concurso territorial declarado en España o con las medidas cautelares adoptadas en virtud de una solicitud de concurso y, en todo caso, cuando su contenido sea contrario al orden público.
En el ejercicio de sus facultades, el administrador o representante deberá respetar la Ley española, en particular en lo que respecta a las modalidades de realización de los bienes y derechos del deudor.

Artículo 222. Reconocimiento de otras resoluciones.
1. Una vez obtenido el *exequatur* de la resolución de apertura, cualquier otra resolución dictada en ese procedimiento de insolvencia y que tenga su fundamento en la legislación concursal se reconocerá en España sin necesidad de procedimiento alguno, siempre que reúna los requisitos previstos en el artículo 220.
El requisito de la previa entrega o notificación de cédula de emplazamiento o documento equivalente será exigible, además, respecto de cualquier persona distinta del deudor que hubiera sido demandada en el procedimiento extranjero de insolvencia y en relación con las resoluciones que le afecten.
2. En caso de oposición al reconocimiento, cualquier persona interesada podrá solicitar que éste sea declarado a título principal por el procedimiento de *exequatur* regulado en la Ley de Enjuiciamiento Civil.
Si el reconocimiento de la resolución extranjera se invocare como cuestión incidental en un proceso en curso, será competente para resolver la cuestión el Juez o tribunal que conozca del fondo del asunto.

Artículo 223. Efectos del reconocimiento
1. Salvo en los supuestos previstos en los artículos 201 a 209, las resoluciones extranjeras reconocidas producirán en España los efectos que les atrribuya la Ley del Estado de apertura del procedimiento.
2. Los efectos de un procedimiento territorial extranjero se limitarán a los bienes y derechos que en el momento de su declaración estén situados en el Estado de apertura.
3. En el caso de declaración de un concurso territorial en España, los efectos del procedimiento extranjero se regirán por lo dispuesto en el capítulo 4 de este Título.

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Artículo 224. Ejecución.
Las resoluciones extranjeras que tengan carácter ejecutoria según la Ley del Estado de apertura del procedimiento en el que se hubieren dictado necesitarán previo *exequatur* para su ejecución en España.

Artículo 225. Cumplimiento a favor del deudor.
1. El pago hecho en España a un deudor sometido a procedimiento de insolvencia abierto en otro Estado y conforme al cual deberá hacerse al administrador o representante en él designado sólo liberará a quien lo hiciere ignorando la existencia del procedimiento.
2. Salvo prueba en contrario, se presumirá que ignoraba la existencia del procedimiento quien realizó el pago antes de haberse dado a la apertura del procedimiento de insolvencia extranjero la publicidad ordenada en el apartado 3 del artículo 221.

Artículo 226. Medidas cautelares.
1. Las medidas cautelares adoptadas antes de la apertura de un procedimiento principal de insolvencia en el extranjero por el tribunal competente para abrirlo podrán ser reconocidas y ejecutadas en España previo el correspondiente *exequatur*.
2. Antes del reconocimiento de un procedimiento extranjero de insolvencia y a instancia de su administrador o representante, podrán adoptarse conforme a la Ley española medidas cautelares, incluidas las siguientes:
1.ª Paralizar cualquier medida de ejecución contra bienes y derechos dol deudor.
2.ª Encomendar al administrador o representante extranjero, o a la persona que se designe al adoptar la medida, la administración o la realización de aquellos bienes o derechos situados en España que, por su naturaleza o por circunstancias concurrentes, sean perecederos, susceptibles de sufrir grave deterioro o de disminuir considerablemente su valor.
3.ª Suspender el ejercicio de las facultades de disposición, enajenación y gravamen de bienes y derechos del deudor.
Si la solicitud de medidas cautelares hubiere precedido a la de reconocimiento de la resolución de apertura del procedimiento de insolvencia, la resolución que las adopte condicionará su subsistencia a la presentación de esta última solicitud en el plazo de veinte días.

CAPÍTULO 4

De la coordinación entre procedimientos paralelos de insolvencia

Artículo 227. Obligaciones de cooperación.
1. Sin perjuicio del respeto de las normas aplicables en cada uno de los procedimientos, la administra-ciónjudicial del concurso declarado en España y el administrador o representante de un procedimiento extranjero de insolvencia relativo al mismo deudor y reconocido en España están sometidos a un deber de cooperación recíproca en el ejercicio de sus funciones, bajo la supervisión de sus respectivos Jueces, tribunals o autoridades competentes. La negativa a cooperar por parte del

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administrador o representante, o del tribunal o autoridad extranjeros, liberará de este deber a los correspondientes órganos españoles.
2. La cooperación podrá consistir, en particular, en:
1.° El intercambio, por cualquier medio que se considere oportuno, de informaciones que puedan ser útiles para el otro procedimiento, sin perjuicio del obligado respeto de las normas que amparen el secreto o la confidencialidad de los datos objeto de la información o que de cualquier modo los protejan.
En todo caso, existirá la obligación de informar de cualquier cambio relevante en la situación del procedimiento respectivo, incluido el nombramiento del administrador o representante, y de la apertura en otro Estado de un procedimiento de insolvencia respecto del mismo deudor.
2.° La coordinación de la administración y del control o supervisión de los bienes y actividades del deudor.
3.° La aprobación y aplicación por los tribunales o autoridades competentes de acuerdos relativos a la coordinación de los procedimientos.
3. La administración judicial del concurso territorial declarado en España deberá permitir al administrador o representante del procedimiento extranjero principal la presentación, en tiempo oportuno, de propuestas de convenio, de planes de liquidación o de cualquier otra forma de realización de bienes y derechos de la masa activa o de pago de los créditos.
La administración judicial del concurso principal declarado en España reclamará iguales medidas en cualquier otro procedimiento abierto en el extranjero.

Artículo 228. Ejercicio de los derechos de los acreedores.
1. En la medida que así lo permita la Ley applicable al procedimiento extranjero de insolvencia, su administrador o representante podrá comunicar en el concurso declarado en España, y conforme a lo establecido en esta Ley, los créditos reconocidos en aquél. Bajo las mismas condiciones, el administrador o representante estará facultado para participar en el concurso en nombre de los acreedores cuyos créditos hubiera comunicado.
2. La administración judicial de un concurso declarado en España podrá presentar en un procedimiento extranjero de insolvencia, principal o territorial, los créditos reconocidos en la lista definitiva de acree-dores, siempre que así lo permita la Ley aplicable a ese procedimiento. Bajo las mismas condiciones estará facultada la administración judicial, o la persona que ella designe, para participar en aquel procedimiento en nombre de los acreedores cuyos créditos hubiere presentado.

Artículo 229. Regla de pago.
El acreedor que obtenga en un procedimiento extranjero de insolvencia pago parcial de su crédito no podrá pretender en el concurso declarado en España ningún pago adicional hasta que los restantes acreedores de la misma clase y rango hayan obtenido en éste una cantidad porcentualmente equivalente.

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Artículo 230. Excedente del activo del procedimiento territorial.
A condición de reciprocidad, el activo remanente a la conclusión de un concurso o procedimiento territorial se pondrá a disposición del administrador o representante del procedimiento extranjero principal reconocido en España. La administración judicial del concurso principal declarado en España reclamará igual medida en cualquier otro procedimiento abierto en el extranjero.
(. . .)

Annex 3

PRINCIPLES OF EUROPEAN INSOLVENCY LAW
(Source: W.W. McBryde, A. Flessner and S.C.J.J. Kortmann (eds.), Principles of European Insolvency Law, Series Law of Business and Finance, Volume 4, Kluwer Legal Publishers, Deventer, The Netherlands, 2003; ISBN 90 130 0597 7).

§ 1 **Insolvency proceeding**

§ 1.1
In an insolvency proceeding ('proceeding') the assets of an insolvent debtor are collected and converted into money to be distributed among the creditors ('liquidation'), or the liabilities of an insolvent debtor are restructured in order to re-establish the debtor's ability to meet liabilities ('reorganisation'). The proceeding can be a combination of liquidation and reorganisation.

§ 1.2
A proceeding can be opened when the debtor is unable or is likely to become unable to par debts as they become due.

§ 1.3
The debtor or a creditor or a public authority can apply for the opening of the proceeding.

§ 1.4
Appropriate publicity must be given to the proceeding.

§ 2 **Institutions and participants**

§ 2.1
The proceeding is opened and supervised by the court. The law may provide that, when the debtor is a legal person, the proceeding can be opened by a formal declaration of the debtor.

§ 2.2
An administrator is appointed in order to carry out the liquidation or the reorganisation. The administrator must be independent and must act impartially.

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§ 2.3
The debtor is under a duty to co-operate with the court and the administrator. If the debtor is a partnership, a company or other legal entity, this duty applies to its managing partners or directors.

§ 2.4
The creditors' collective interests may be represented by a meeting of creditors, a creditors' committee or a creditors' representative.

§ 3 **Effects of the opening of the proceeding**

§ 3.1
Assets belonging to the debtor at the time of the opening of the proceeding and assets acquired thereafter are included in the proceeding. When the debtor is a natural person certain as sets are excluded from the proceeding.

§ 3.2
Upon the opening of the proceeding the powers to manage and dispose of the assets are transferred to the administrator.

§ 3.3
A claim against the debtor existing at the time of the opening of the proceeding ('insolvency claim') can be pursued only through submission and admission under the conditions of the proceeding, without prejudice to security rights and rights of set-off.

§ 3.4
Upon the opening of the proceeding a creditor with an insolvency claim cannot improve that creditor's position to the detriment of other creditors.

§ 3.5
Between the filing of the application and the opening of the proceeding, the court can take interim measures to preserve the debtor's assets.

§ 4 **Management of the assets**

§ 4.1
The administrator collects and manages the debtor's assets.

§ 4.2
Management actions of major importance may be subject to the consent of the court or the creditors.

§ 5 **Obligations incurred by, and fees of, the administrator**

§ 5.1
Obligations incurred by the administrator during the proceeding and the administrator's fees are to be funded from the debtor's assets and satisfied as they fall due, in priority to insolvency claims. If the assets are not sufficient to satisfy these obligations and fees, they are satisfied according to their ranking.

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§ 6 **Treatment of contracts**

§ 6.1
The opening of the proceeding does not automatically terminate a contract to which the debtor is a party.

§ 6.2
The other party cannot enforce performance by the administrator.

§ 6.3
If the administrator demands performance of a contract which at the time of the opening of the proceeding neither party has fully performed, the debtor's obligations arising out of the contract must be satisfied as they fall due and in priority to insolvency claims.

If the administrator has decided not to perform such a contract, any claim of the other party based on non-performance of the contract is an insolvency claim.

The other party can demand that the administrator decides within a reasonable time whether to adopt the contract or not.

§ 7 **Position of employees**

§ 7.1
The administrator or the employee may terminate a contract of employment following special rules.

§ 7.2
An employee has a preferential ranking in respect of certain insolvency claims for wages and other sums due under the contract of employment or arising from its termination.

§ 7.3
A public fund is available to meet certain insolvency claims of employees for wages and other sums due under the contract of employment or arising from its termination. If the public fund pays the employee, it is subrogated in the rights of the employee.

§ 7.4
If the enterprise of the debtor, or any part of it, is transferred, the contracts of employment are automatically transferred to the purchaser of the enterprise.

§ 8 **Reversal of juridical acts**

§ 8.1
A juridical act unfairly detrimental to the creditors performed by the debtor within a certain period of time before the opening of the proceeding, is subject to reversal. The administrator can recover or seek annulment of any benefit which has been obtained from the debtor.

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§ 8.2
Juridical acts subject to reversal include:
a) A transaction with the intent of defrauding creditors;
b) A transaction for inadequate countervalue;
c) A transaction with a creditor for which no enforceable obligation existed;
d) A transaction with a creditor after the filing of the insolvency application or in a situation of imminent insolvency;
e) The creation of a security right to secure a pre-existing obligation.

§ 9 **Security rights and set-off**

§ 9.1
A security right continues to exist after the opening of the proceeding. Enforcement may be subject to special rules.

§ 9.2
An asset subject to a security right is realised by the administrator or the secured creditor. The secured creditor is entitled to the proceeds of such asset, up to the amount of the secured claim and subject to the rights of creditors with higher ranking claims.

§ 9.3
The opening of the proceeding does not prevent set-off.

§ 10 **Submission and admission of insolvency claims**

§ 10.1
Creditors must be informed of the time and place for submission of claims, the authority where claims must be submitted and whether secured claims must be submitted.

§ 10.2
A claim is submitted by a notification indicating the amount and nature of the claim and stating whether a preference or security right is invoked.

§ 10.3
An insolvency claim can be disputed by the administrator.

A disputed insolvency claim is admitted if and to the extent that the dispute is decided in favour of the creditor.

Pending the dispute, a disputed insolvency claim can be admitted conditionally.

§ 10.4
An unmatured insolvency claim is admitted for its discounted value.

An illiquid insolvency claim is admitted for its assessed value.

A conditional insolvency claim is admitted for its discounted value or conditionally for its full amount.

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A non-monetary insolvency claim is converted into a monetary claim for its assessed value.

§ 10.5
A secured insolvency claim is admitted to the extent that it cannot be satisfied from the proceeds of the assets subject to the security right.

§ 11 **Reorganisation**

§ 11.1
In a reorganisation, the liabilities of the debtor are restructured on the basis of a reorganisation plan, stating the extent and the manner of such restructuring. A reorganisation plan may include further measures.

§ 11.2
A reorganisation plan can be presented by the debtor or the administrator.

§ 11.3
A reorganisation plan is approved or rejected by a vote of the persons affected by it, or by the court.

The approval of the reorganisation plan by a vote of the persons affected by it may be subject to:
a) quorum requirement;
b) the requirement of a qualified majority;
c) the persons affected by the reorganisation plan voting in separate categories;
d) certain categories of affected persons having blocking votes.

A reorganisation plan approved by a vote of the persons affected by it needs the confirmation of the court.

§ 11.4
The confirmed reorganisation plan binds all persons affected by it, including persons who have not agreed and creditors who have not submitted their claims.

§ 11.5
The reorganisation plan does not affect the rights of creditors against third parties.

§ 12 **Liquidation**

§ 12.1
If and to the extent that there is no reorganisation the administrator converts the debtor's assets into money and distributes it among the creditors. The assets can be realised separately or together, whether or not as a going concern.

§ 12.2
Creditors with insolvency claims have an equal right to be paid in proportion to and in accordance with the ranking of their claims. They are entitled to a distribution only if higher ranking insolvency claims can be satisfied to their full amount admitted.

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§ 13 **Closure of the proceeding**

§ 13.1
In a reorganisation, the proceeding is closed either upon the confirmation of the reorganisation plan or upon its performance.

In a liquidation, the proceeding is closed after the realisation of all the debtor's assets and the distribution of the proceeds.

The proceeding is closed if there are insufficient assets to fund the proceeding.

§ 13.2
The debtor, if a natural person, may be discharged from debts remaining after liquidation. The discharge does not affect the rights of creditors against third parties.

When the debtor is a legal person it will cease to exist following the closure of the liquidation.

§ 13.3
Assets discovered after the closure of a liquidation may give rise to a further liquidation.

§ 14 **Debtor in possession**

§ 14.1
The debtor may, subject to supervision, be allowed to manage and dispose of the assets. In this case the proceeding follows the Principles of §§ 1–13, except to the extent that they presuppose an administrator.

§ 14.2
In §§ 4.1, 5.1, 6.3, 7.1 and 10.3 references to the administrator are to be read as references to the debtor.

§ 14.3
The debtor does not have the power of the administrator to obtain reversal of a juridical act.

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