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Insolvency

Andorra
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Miguel Cases and Marc Ambrós
Cases & Lacambra

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ANDORRA

Law and Practice

Contributed by:
Miguel Cases and Marc Ambrós
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1. Market Trends and Developments

1.1 The State of the Restructuring Market

The Andorran economy is largely represented by small-to-medium sized companies (around 85% of the market), predominantly under the form of limited liability companies (LLC), 74% of which are single-shareholder LLCs.

The restructuring market in Andorra is driven by the particularities of the jurisdiction. Therefore, it is possible to differentiate between a restructuring market with local creditors and a cross-border restructuring market involving foreign creditors. Although no official statistics are publicly available, the insolvencies announced in the Official Gazette of the Principality of Andorra (BOPA) have revealed two critical moments where the number of insolvency proceedings increased substantially:

- in 2010, as a result of the financial crisis; and
- in 2015, upon the resolution process of one of the Andorran banking entities, which triggered a negative impact on the liquidity of the Andorran financial system.

To the extent that insolvency regulations provide for certain open deadlines, the timeframe of the insolvency proceedings may vary. as the volume of assets of the bankruptcy will determine the term required to form the insolvency estate (*estat de credits*).

Accordingly, the high percentage of small-to-medium sized companies has a significant impact on the restructuring trends, as traditionally only large business groups have had sufficient capacity to negotiate with banks - the predominant players providing financial services in Andorra. An alternative measure available to this type of companies is the sale of a branch of activity.

COVID-19

The Andorran economy has been severely hit by the COVID-19 outbreak, specially the service sector. In this context, the Andorran Government has adopted a package of measures to mitigate the economic impact of the health crisis, including, but not limited to, financial handouts or grace periods.

Notwithstanding this the number of insolvency proceedings during 2020 and 2021 is expected to increase in Andorra.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

The laws and statutory regimes applicable to insolvencies in Andorra are the following:

- Decree on insolvencies and bankruptcies of October 4th, 1969, *Decret en relació a la cessació de pagaments i fallides, del 4 d'octubre de 1969*, (the "Insolvency Decree"), that establishes the statutory regime applicable to the judicial insolvencies and bankruptcy proceedings in Andorra;
- Act 8/2015, of April 2nd on urgent measures to introduce mechanisms for the restructuring and resolution of banking entities, *Llei 8/2015, del 2 d'abril, de mesures urgents per implantar mecanismes de reestructuració i resolució d'entitats bancàries*, (the "Banking Restructuring Act"), based on the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms;
- Act 8/2013, of May 9th, which covers the organisational requirements and operating conditions of operating entities in the Andorran financial system, investor protection, market abuse and financial securities agreements, *Llei 8/2013, del 9 de maig, sobre els requisits organitzatius i les condicions de funcionament de les entitats operatives del sistema financer, la protecció de l'inversor, l'abús de mercat i els acords de garantia financera,* (the "Financial Act") sets the effects of insolvency or bankruptcy proceedings in respect of netting agreements or collateral arrangements;
- Act 12/2017, of June 22nd, on the organisation and supervision of insurance and reinsurance of the Principality of Andorra, *Llei 12/2017, del 22 de juny, d'ordenació i supervisió d'assegurances i reassegurances del Principat d'Andorra*, (the "Insurance Act") provides specific control measures that could be adopted by the Andorran Financial Authority in case of financial hardship;
- Act 9/2005, of February 21st, of the Criminal Code, *Llei 9/2005, del 21 de febrer, qualificada del Codi penal*, (the "Criminal Code") establishes as criminal offence the actions carried out by any debtor leading to a bankruptcy situation in detriment of third parties; and
- Act 7/2020, of May 25th, on exceptional and urgent measures in procedural and administrative matters, due to the emergency health situation caused by the pandemic of SARS-CoV-2, *Llei 7/2020, del 25 de maig, de mesures excepcionals i urgents, en matèria processal i administrativa, per la situació d'emergència sanitària causada per la pandèmia del SARS-CoV-2*, (the "SARS-CoV-2 Act").

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

The Insolvency Decree does not expressly distinguish between voluntary and involuntary proceedings.

Any debtor unable to comply with its payment liabilities is obliged to file an insolvency lawsuit before the Andorran Court. Additionally, any creditor of the company may apply for the initiation of such proceedings. Further, the Andorran Court, of its own initative may proceed to open the relevant insolvency judicial proceedings which may be treated as a judicial settlement proceedings (*arranjament judicial*) or a bankruptcy proceedings (*fallida)*, depending whether the insolvency is capable of being remedied.

2.3 Obligation to Commence Formal Insolvency Proceedings

Obligation to Commence Formal Insolvency Proceedings

Any debtor unable to comply with its payment liabilities is obliged to commence formal insolvency proceedings within the next eight business days.

It should be noted that SARS-CoV-2 Act introduced the exemption to the obligation of commencing formal insolvency proceeding until 31 December 2020.

Liabilities and Penalties

If a company is declared bankrupt by the Andorran Court its directors may also be declared personally in bankruptcy if they acted in bad faith. It is legally presumed that directors act in bad faith if they continue the business regardless of the inability of the company to comply with its payment liabilities, rather than commence an insolvency proceedings.

Furthermore, under the Andorran Companies Act the directors of the company are obliged to compensate the damages caused to the company in the event that insolvency proceedings are not filed within the compulsory period established in the Insolvency Decree.

2.4 Commencing Involuntary Proceedings

According to the Insolvency Decree, any creditor of the company or even the Andorran Court may commence an insolvency proceedings.

Unlike the debtor who is obliged to commence the insolvency proceeding within eight business days, the creditors or the Andorran Court are not obliged to file the proceedings within any special period or circumstances.

2.5 Requirement for Insolvency

The Insolvency Decree establishes that insolvency occurs when a merchant is unable to attend his payments obligations and incurs in a stressed financial situation that cannot be redressed.

Accordingly, insolvency is usually declared when the merchant's liabilities are higher than its assets. The Andorran Court (*Tribunal de Batlles*) takes also into account the specific situation of the debtor, in particular the number of claims filed and the use of fraudulent proceedings to artificially maintain the business.

2.6 Specific Statutory Restructuring and Insolvency Regimes

Banking Entities

The Banking Restructuring Act establishes that a bank is under a restructuring situation when it breaches or could breach the applicable liquidity and solvency regulations in the near future, but it is able to comply again with that regulations by its own means.

In such situation, the bank must give notice to the Andorran Financial Authority (*Autoritat Financera Andorrana* or AFA) in order for it to adopt ex officio measures such as a formal requirement to the bank's management body to draft an action plan to redress the situation; the appointment of a special administrator; or the removal of one or more members of the management body, among others.

In case that the bank could not redress its stressed situation the Andorran Banking Resolution Agency (*Agència Estatal de Resolució d'Entitats Bancàries* or AREB) shall assess whether it has to initiate its resolution procedure.

The resolution process of a bank requires the fulfilment of the following requirements:

- that the bank is not financially viable;
- that it is reasonably unexpected that it could be redressed by measures from private stakeholders; and
- that there are reasons of public interest.

3. Out-of-Court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

Generally, when a debtor is involved in an insolvency proceedings, the company will probably end up in dissolution and liquidation. Therefore, it is preferable to maintain certain economic activity through a process of consensual, non-judicial or other

informal restructuring, in order to preserve the value for stakeholders.

In these circumstances, companies experiencing financial difficulties will be supported by financial lenders, provided that a debt repayment schedule is agreed between the debtor and these lenders, increasing guarantees to support the repayment of the principal of the debt.

Finally, since the Andorran laws do not provide specific regulation of out-of-court workouts and restructurings it has to bear in mind that these agreements may be voided by the claw-back regime established by the Insolvency Decree.

3.2 Consensual Restructuring and Workout Processes

It is a common practice to enter into "standstills" between the creditors and the debtor, which are intended to enable both parties to negotiate a credit agreement in good faith and to prevent creditors from bringing individual actions to enforce the debtor's assets.

The debtor, during the informal and consensual workout/restructuring process, may adopt certain undertakings and obligations such as, inter alia:

- not to distribute dividends or other items of remuneration on the capital of the company;
- not to incur in additional financial indebtedness other than that incurred in the ordinary course of business;
- not to make any transfer of assets; or
- not to modify the working conditions of its key employees.

Accordingly, the information that is generally provided to creditors, committees and other stakeholders during the restructuring process is related, among others to:

- balance sheets;
- accounting information; and
- payment forecasts over the next few years.

Therefore, the changes of contractual priorities, security/lien priorities, equity-holder and intercompany priority rights, as well as the relative positions of competing creditor classes, are subject to the principle of autonomy of will. Consequently, they are freely negotiated by the contractual parties.

3.3 New Money

There are no Andorran legal provisions governing super-priority liens or rights accorded to new-money investors, outside of a statutory or other formal process.

However, depending on the specific restructuring proceeding, the parties can freely agree the injection of new money on a case by case basis, taking into account that under a formal insolvency proceedings the court could apply a claw-back regime up to the last 24 months.

3.4 Duties on Creditors

In accordance with the Andorran case law, restructuring negotiations shall be conducted in good faith, with scrupulous confidentiality and respecting the agreed "standstills" agreements in order to achieve the execution of a settlement agreement.

In addition, creditors must be kept fully informed of the progress of the negotiation as well as the information provided by the debtor for the adoption of the relevant agreements.

3.5 Out-of-Court Financial Restructuring or Workout

Andorran regulations do not provide any mechanisms that permit a majority of lenders to bind dissenting lenders in out-of-court financial restructurings.

However, under the principle of autonomy of will, parties can freely agree terms in the credit agreements allowing certain majorities to bind dissenting lenders, being a very common practice when a restructuring proceeding is being negotiated.

Additionally, due to the lack of legal provisions regarding the informal consensual processes of restructuring, the absence of cram-down features to deal with dissident creditors makes decision-making harder.

4. Secured Creditor Rights, Remedies and Priorities

4.1 Liens/Security

Secured creditors are entitled to take mortgages over real estate. Likewise, they may take pledges over accounts, equity shares, movable property, credit rights and intangible and intellectual property.

The Insolvency Decree establishes a special privileged regime applicable to secured creditors holding mortgages or pledges over the debtor's assets. Therefore, these assets are excluded from the insolvency estate and will be sold to the exclusive benefit of the secured creditors.

4.2 Rights and Remedies

In an informal consensual restructuring proceeding, secured creditors may enforce their liens/security through an agreed specific enforcement procedure. Therefore, outside the insol-

vency proceedings, such rights and remedies may be subject to contractual intercreditor covenants and to the terms freely agreed by the parties.

The Insolvency Decree establishes that unsecured credits must respect the principle of par condicio creditorum.

However, secured creditors who benefit from special privileges, are not bound by the par condicio creditorum principle, since these creditors are not part of the insolvency state, except when the security or guarantee is not sufficient to cover all the credit.

Regarding the possibility of creditors disrupting or blocking judicial proceedings, under the judicial settlement proceeding, dissenting creditors and those who have not participated in the approval of the agreement, may, within eight days of such approval, object to the judicial approval of the agreement.

4.3 Special Procedural Protections and Rights

Secured creditors holding mortgages or pledges over the debtor's assets are entitled to special procedural protection since these assets are excluded from the insolvency estate and are sold under a specific procedure where the amount of the sale granted to the secured creditor.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

Neither the Insolvency Decree nor general civil rules expressly determine the preference and ranking of credits. However, the Decree provides for different classes of secured and unsecured creditors as well as the differences between the preferences and the privileges among them.

Privileges of secured creditors can be special (which applies to specific assets and, in particular, to the proceeds of their sale) or general (which applies to all debtor's assets). In this respect, it should be stressed that such privileges must be strictly interpreted.

General Privilege

As for the general privileges, the Insolvency Decree includes a general privilege derived from the amount owed to employees.

Special Privilege

Secured creditors holding mortgage or pledge over debtor's assets benefit from a special privilege allowing them to receive the proceeds of the sale of these assets out of the insolvency proceedings.

Priority on Payment

The priority on payments following the sale of movable assets is as follows:

- expenses and costs of the bankruptcy administrator;
- assistance granted to the debtor and its relatives;
- privileged creditors; and
- all unsecured creditors in accordance with the percentage of their credit.

However, the priority on payments following the sale of real estate assets is as follows:

- privileged creditors related to these assets;
- mortgagees; and
- all the unsecured creditors.

Consequently, unsecured creditors are ruled by the above-mentioned par condicio creditorum principle, which implies that all creditors stand on an equal basis with respect to the debtor's assets.

5.2 Unsecured Trade Creditors

Unsecured trade creditors are kept whole during the restructuring process according to the par condicio creditorum principle, which refers to the creditors concurring on an equal basis.

In this respect, while single enforcement procedure among creditors is based primarily on chronological priority - known as prior tempore potior iure - universal enforcement procedures like insolvency proceedings are based on a equal treatment established for all creditors, par condicio creditorum.

Therefore, the distribution of the debtor's assets is made in proportion to the creditor's claims, up to the maximum value of the assets, without prejudice to the existence of privileged credits.

5.3 Rights and Remedies for Unsecured Creditors

See **6.1 Statutory Process for a Financial Restructuring/Reorganisation**.

5.4 Pre-judgment Attachments

The insolvency administrator may carry out the required actions to preserve the rights of the debtor against its creditors and is also entitled to adopt all necessary guarantees and to constitute mortgages that have not been required by merchants in a situation of bankruptcy or judicial settlement.

Accordingly, the administrator is entitled to adopt conservative measures in order to ensure compliance with the purpose of the insolvency proceedings.

In addition, on the declaration of the insolvency proceeding, the administrator will constitute a mortgage over all the debtor's assets (present and future).

5.5 Priority Claims in Restructuring and Insolvency Proceedings

Employees and social security claims benefit from a general privilege over the unsecured creditors. However, secured creditors holding mortgages or pledges over the debtor's assets have priority over those general privileges.

6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings

6.1 Statutory Process for a Financial Restructuring/Reorganisation

The Insolvency Decree establishes some general provisions that apply to the composition of the insolvency estate "estat de credits" in both the judicial settlement and bankruptcy proceedings. However, there are differences between both proceedings in terms of:

- the required creditor consents;
- the purposes of both proceedings; and
- the timelines.

In both the bankruptcy and the judicial settlement proceedings, the administrator proceeds with the draw up of the list of creditors and, from there, all creditors -whether privileged or not- shall provide the administrator with proofs of their claims. Thus, the administrator proceeds with the verification and the establishment of the relevant list. Later, the administrator shall draw up an insolvency estate (*estat de crèdits*), proposing, for each credit, its admission or rejection, with the indication of the claims to be considered as privileged, mortgage or bail.

In accordance with the Insolvency Decree, it is mandatory to give essential publicity through press announcements in order allow creditors to be duly informed about the insolvency proceeding. The deadline for the submission of creditor's claims is thirty working days from the date of publication of such announcements. Additionally, the maximum term in favour of the administrator to establish the insolvency estate is three months from the judicial statement, and its status may be consulted and examined by the creditors. After the analysis of potential replies to the rejected claims, the list of creditors will be definitively approved by the Court.

From this point onwards, once the insolvency estate is approved, the differences between the two proceedings set out in the Insolvency Decree are remarkable.

The Judicial Settlement Proceeding

Filing a proposal

In the judicial settlement proceeding, upon the approval of the insolvency estate, the debtor must file the proposal for an arrangement in writing to the Court, which will be provided to the creditors' assembly. Once the insolvency estate is approved, the Court will summon all the creditors appearing in it within the next three days. The debtor must comply with this obligation otherwise the Court will transform the judicial settlement proceeding into a bankruptcy proceeding.

The debtor's proposal for the settlement will be formalised by means of a written statement addressed to the Court. Additionally, the Court will approve such proposal as long as it meets the appropriate conditions, ie, if it specifies the measures deemed appropriate for the recovery of the company's liabilities, defining the amount proposed, the term and the guarantees provided for by the regulations on ordinary claims. Therefore, the details of the claims guaranteed by a privilege must be annexed to such offers.

When proposals are filed, the Court will notify the creditors who hold a special privilege that they are entitled, within a maximum of three months since the judicial settlement is approved, to grant the debtor deferrals or reductions of the debt. Subsequently, the creditors committee "Junta de creditors" shall be constituted when two thirds of the debtor's liabilities are met on first call. If this proportion is not obtained, a second call will be made within no more than 20 days and if this is not obtained either, the procedure will be dismissed. In any case, the aim of this assembly is to obtain the approval of an agreement for the payment of the creditors.

Accepting a proposal

The proposal for a settlement (*proposta de concordat*) will be deemed to be accepted when the creditors representing three fifths of the debtor's liabilities have voted in favour of such proposal. Where there is no acceptance, any creditor's proposal may be submitted for discussion and if it is accepted by a majority of three-fifths of the debtor's liabilities, it will be submitted for the debtor's consent. In these circumstances, the debtor may request the Court to grant him a period of no more than eight days to answer on the acceptance of the proposal. If none of the proposals is accepted, the proceeding becomes a bankruptcy or default proceeding.

Additionally, within eight days from the date of approval of the agreement, dissenting creditors and those who have not attended the meeting may oppose such judicial approval.

The Bankruptcy Proceeding
In the bankruptcy proceeding scenario, the administrator draws up the insolvency estate and carries out the operations required for the settlement of the assets. For this purpose, it is invested with the broadest powers to collect the claims and to sell (at public auction) the debtor's goods and movable property and to take all appropriate actions. However, the administrator requires the authorisation of the Court to carry out such transactions.

Therefore, the administrator must send to the Court a monthly statement of the situation of the proceedings and the latter, on the basis of these reports, will order (if necessary) a distribution among the creditors, fixing an amount to each one, and informing creditors about such distribution.

Once the liquidation has been completed, the creditors will be summoned by the Court. After the conclusion of such assembly, the creditors' union shall be dissolved, recovering their individual exercise of their actions.

The Court will declare the closing when one of the following requirements are met:

- when no further liabilities are due by the debtor; or
- when the administrator is in possession of sufficient funds to settle all the debts.

6.2 Position of the Company

As far as the position of the company during the insolvencies proceedings is concerned, the Insolvency Decree establishes some differences in relation to:

- the effects of the judicial settlement or bankruptcy declaration in the management and disposal of the debtor's assets; and
- the possibilities for the debtor continuing to carry out their activities.

Effects in the Management and Disposal of the Debtor's Assets
In the bankruptcy and in the judicial settlement proceedings, the debtor is restricted in terms of the management and disposal of their assets. However, the consequences of this limitation on the management and disposal of the debtor's assets vary depending on whether the bankruptcy or settlement is declared.

In the bankruptcy proceedings, the debtor is deprived of the administration and disposal of his assets, since the administrator is empowered to exercise, during the bankruptcy proceeding, the debtor's rights and actions concerning their assets.

However, in the settlement proceedings, the assistance of the administrator is required for all acts relating to the management and disposal of the debtor's assets.

Therefore, the consequences of the limitation of the management and disposal of the debtor's assets are less severe for the debtor in the settlement procedure.

Possibilities for the Debtor to Continue with Their Activity
The Insolvency Decree establishes different conditions and possibilities for both the bankruptcy and the judicial settlement proceeding.

In the judicial settlement, the debtor may continue their activity or carry on their business with the authorisation of the Court, as long as the Court deems it appropriate. However, the Court, may withdraw this authorisation discretionally.

On the contrary, in the bankruptcy procedure, the continuation of the debtor's business or activities may be authorised by Court, for:

- liquidation purposes;
- when the public interest is required; or
- when the creditors' interests require it.

This authorisation will be given for renewable periods of three months.

6.3 Roles of Creditors

See **6.1 Statutory Process for a Financial Restructuring/Reorganisation** and **5.1 Differing Rights and Priorities**.

6.4 Claims of Dissenting Creditors

See **6.1 Statutory Process for a Financial Restructuring/Reorganisation** and **4.2 Rights and Remedies**.

6.5 Trading of Claims Against a Company

In an insolvency proceeding scenario, the claims against a company cannot be traded since the Andorran insolvency regulations do not recognise this transaction.

However, in an out-of-court restructuring scenario, when parties are negotiating a refinancing agreement, they are free to negotiate the possibility of the creditors transferring their claims. In this sense, the debtor can only transfer their claims with the prior authorisation of the creditors.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

See **8. International/Cross-Border Issues and Processes**.

6.7 Restrictions on a Company's Use of Its Assets

See **6.2 Position of the Company**.

6.8 Asset Disposition and Related Procedures

The administrator formulates the insolvency estate and carries out the relevant transactions in relation to the execution of the assets.

As a general rule, the purchaser acquires the assets free and clear of claims as the Court rules the release of charges and encumbrances over the debtor's assets. However, if the creditor has a special privilege over the assets, such encumbrances shall be maintained after its execution.

In order to enable them to execute their functions, the Insolvency Decree provides extensive powers to the administrator in order to enforce the claims, sell the debtor's goods, and to execute all kind of actions that may be necessary. However, the administrator requires the authorisation of the Court in order to execute transactional agreement on movable or immovable right.

The creditors can bid for assets being sold as long as they pay the applicable fee to be able to bid and comply with Andorran regulations on public auctions. Since the Insolvency Decree does not prohibit creditors bidding for assets being sold, they can act as a stalking horse in a sale process. Furthermore, all the negotiations prior to the restructuring proceedings are not binding for the insolvency proceeding as the proposed agreement must be approved by the three fifths of the debtor's liabilities.

6.9 Secured Creditor Liens and Security Arrangements

Guarantees and encumbrances cannot be unilaterally released pursuant to such procedure.

6.10 Priority New Money

See **3.3 New Money**.

6.11 Determining the Value of Claims and Creditors

Although the administrator carries out the listing and valuation of the claims, it is generally done by means of balance sheets, accounting information, payment projections over the next few years and other evidentiary documents.

6.12 Restructuring or Reorganisation Agreement

See **6.1 Statutory Process for a Financial Restructuring/Reorganisation**.

6.13 Non-debtor Parties

As a general rule, following such statutory procedure, the liabilities from the non-debtor parties cannot be released. However, in accordance with the autonomy of will principle, non-debtor parties can be released from liabilities by entering into an agreement with the creditors.

6.14 Rights of Set-Off

Creditors may not exercise rights of set-off, offset or netting in a proceeding in accordance with the par condicio creditorum principle.

6.15 Failure to Observe the Terms of Agreements

The agreed restructuring plan can be voided by the Court due to:

- the non-performance of the debtor;
- the discovery of fraud resulting from a simulation of the assets;
- the discovery of fraud resulting from an exaggeration of the liabilities; or
- the conviction of the debtor for fraudulent bankruptcy after the approval of the agreement.

Additionally, it should be noted that non-fraudulent debtors may be rehabilitated, justifying full compliance with the agreement approved by their creditors. Therefore, if the debtor does not observe the terms of the agreed restructuring plan, the fraudulent debtor may not be rehabilitated.

6.16 Existing Equity Owners

The existing equity owners cannot retain any ownership or other property on account since they must comply with the par condicio creditorum principle, and must respect the order of priority of claims established in the Insolvency Decree.

However, they may only retain ownership of those claims that have special privilege.

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

The Insolvency Decree does not distinguish between the involuntary and voluntary proceeding regardless of whether the proceeding has been initiated at the request of the debtor or of the

creditor and is appropriate in respect of any debtor, whether a natural or legal person.

The debtor, any of their creditors and the Court ex-officcio are entitled to request for the declaration of cessation of payments (*declaració de cessació de pagaments*). In all cases, the debtor has the duty to request a declaration of cessation of payments within the eight days from the general cessation of payments.

Initiating Insolvency Proceedings
The insolvency proceeding in Andorra is initiated by the filing of a written request for the declaration of cessation of payments before the Court. The declaration of cessation of payments entails either the bankruptcy (*declaració de cessació de pagaments i fallida*) when the debtor's activity is not viable or the judicial settlement (*declaració de cessació de pagaments i arranjament judicial*) in cases where the debtor's activity is technically viable.

The jurisdiction of the Court is extended to all the prejudicial civil, the administrative or labour jurisdiction directly related to the insolvency proceeding. Consequently, all pre-existing proceedings against the debtor will be suspended.

The Court appoints a judge responsible for monitoring and deciding on the operations and management. In turn, the judge will appoint:

- one to three insolvency administrators; and
- one to three accounting experts or controllers.

Upon the appointment of the administrator by the Court, they may adopt the preservation measures deemed necessary to ensure the integrity of the debtor's assets.

The insolvency administrator is obliged to inform the judge on the development of the viability of the debtor every three months.

Impact of an Insolvency Process
As far as the impact of insolvency process is concerned, the commencement of insolvency proceedings does not generally have an impact on a lender's rights to enforce any security or guarantee, as long as its claims are guaranteed by means of a security – ie, mortgage, pledge (either ordinary as possessory or non-possessory nature of financial collateral arrangement), bonds or special privileges as provided for in insolvency rules – and up to the value of such specific guarantee or security (ie, any amount of the claim exceeding the value of the guarantee will have the nature of an ordinary claim).

There are specific timeframes for enacting the enforcement of a mortgage securing claims (two months from the date of the cessation of payments) by the creditor. For claims secured by pledges, the enforcement is not subject to any specific term and may be immediately executed by the creditor.

Order of Creditors and Special Privileges
In respect of creditors' order, neither the Insolvency Decree nor the general civil rules expressly determine the preference and ranking of credits. According to the insolvency rules and Andorran case law, a distinction is made between special privileges (*privilegis especials*) and general privileges (*privilegis generals*) over movable assets (*béns mobles*) and real estate assets (*béns immobles*). Consequently, creditors would be paid in the following order:

- creditors granted a special privilege over movable assets (pledges along with bonds and certain specific privileges, such as those afforded to the sellers of movable assets);
- creditors granted a special privilege over real estate assets (mortgages and concrete privileges, such as those in favour of architects, real estate asset sellers and real estate asset acquirers to recover the price paid plus legal interests on the termination of the sale agreement);
- creditors granted a general privilege (such as the privilege provided to workers for their salary amounts); and
- the rest of the creditors, pro rata of their respective credits upon verification and admission by the insolvency administration.

In the case of special privileges (ie, claims secured by means of mortgages, pledges, bonds or any other special privilege over movable or real estate assets), creditors are favoured with a segregated enforcement right, which allows the enforcement of the specific guarantee on the creditor's own benefit regardless of the development of the insolvency proceeding(s).

Claims
Once the debtor has been declared insolvent by the Court, the creditors have 30 days to claim their credits before the insolvency administrator. Upon the expiration of the 30-day period, the drawing up of the insolvency state is in progress (ie, analysing the approval or rejection of the relevant credit claims). Once this period ends, they shall be deposited with the Court of First Instance in order to be analysed, and subsequently creditors shall be notified accordingly. If the insolvency administrator does not recognise the credit claim to the insolvency estate, the recommended course of action is to lodge a statement of defence ("*escrit de contesta*") in order to obtain recognition of the credit claim.

Furthermore, Andorran legislation does not provide for an accelerated insolvency proceeding nor for a specific timeframe, unlike other jurisdictions. Therefore, the timeframe of the insolvency proceedings will vary depending on its complexity and the number of credit claims.

The effects of the cessation of payments on the debtor's economic rights will differ from case to case and need to be assessed, namely:

- in the event of judicial settlement, the debtor will maintain the rights of management and disposal of their assets, the exercise whereof which will be subject to the intervention of the insolvency administrators, via their authorisation or approval; and
- in the case of bankruptcy, exercise by the debtor of the rights of management and disposal of their assets will be suspended, by the insolvency administrators.

In respect of the completion of the judicial settlement and bankruptcy proceeding, see **7.3 Organisation of Creditors or Committees**.

7.2 Distressed Disposals

See **6.2 Position of the Company** and **6.8 Asset Disposition and Related Procedures**.

7.3 Organisation of Creditors or Committees

Upon the completion of the insolvency state (*estat de crèdits*) in the judicial settlement, the debtor will submit in writing to the Court its proposal (*concordat*). Failing that, the judicial settlement will become bankruptcy. Within three days of the completion of the insolvency state, the Court will summon all the creditors included in the insolvency state to attend a creditors' assembly (*assemblea*).

The creditors' assembly will be chaired by the Court, assisted by the insolvency administrators and the secretary. Creditors may attend the assembly either in person or through a third party with special power of attorney.

The creditors' committee (*Junta*) is formed when two thirds of the debtor's liabilities are represented. In the event that a meeting stands adjourned because the quorum requirement is not met, a second call will be made on the same terms as the first one, within 20 days. If the second call is also unsuccessful, the procedure will be terminated.

If the proposal for a composition or settlement submitted by the debtor does not meet with the acceptance of the creditors, the proposal submitted by any creditor may be discussed and, if accepted by a majority representing three fifths of the liabilities, it shall be submitted to the debtor's consent. The debtor may ask the Court to be granted a period not exceeding eight days, to deliberate on the proposal submitted. If none of the proposals are accepted, the procedure shall be transformed into bankruptcy.

Whether the bankruptcy or the conversion of the settlement into bankruptcy is declared, the creditors will be constituted in a state of union (*estat d'unió*); the insolvency administrator will proceed with the operations of settlement of the assets and at the same time formulate a statement of claims (*estat de crèdits*). When the settlement and distribution operations have been completed, the creditors shall be summoned by the Court for a final meeting, during which the administrator will give an account, in the presence of the debtor. After this meeting, the creditors' union (*estat d'unió*) will be dissolved as of right and the creditors will recover the individual exercise of their actions.

8. International/Cross-Border Issues and Processes

8.1 Recognition or Relief in Connection with Overseas Proceedings

The Andorran legal framework provides for the recognition or other relief in connection with restructuring or insolvency proceedings in another country but a distinction is made between the judgments (*sentències*) and other rulings.

The judgements (*sentències*) can be recognised in Andorra by means of the exequatur proceeding. The foreign judgment is subject to confirmation by the High Court of Justice of Andorra (*Tribunal Superior de Justícia d'Andorra*) and the approval of the exequatur entails verification by the Civil Chamber of the High Court of Justice (*Sala Civil del Tribunal Superior de Justícia*) of the following requirements pursuant to the foreign judgment:

- the competence of the court that has given the ruling;
- the regular nature of the foreign procedure, including the right to jurisdiction (under the Andorran Constitution);
- the application of the competent law in compliance with Andorran conflict rules;
- conformity with national and international public order; and
- the absence of any fraud from an Andorran legal standpoint.

Other rulings must meet the condition of the reciprocity in all cases.

8.2 Co-ordination in Cross-Border Cases

In cross-border cases, Andorran courts have not entered into protocols or other arrangements with foreign courts to co-ordi-

nate insolvency proceedings. Even in the case of insolvency proceedings brought in a Member State, the provisions established by the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings do not apply in Andorra.

8.3 Rules, Standards and Guidelines

See **2.1 Overview of Laws and Statutory Regimes**.

8.4 Foreign Creditors

Foreign creditors are not dealt with in a different way in proceedings in Andorra in accordance with the principle of equality of treatment.

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

There are the following key figures in insolvency proceedings:

- one to three insolvency administrators appointed by the Court; and
- one to three accounting experts will be appointed as controllers (also from amongst creditors) whose position is voluntary and unpaid.

In all cases, the relatives of the debtor, up to the fourth degree of consanguinity or affinity, cannot be appointed as administrators or controllers.

9.2 Statutory Roles, Rights and Responsibilities of Officers

The rapporteur of the Court (*Ponent Tribunal de Batlles*) will be appointed as the person responsible for monitoring and deciding on the operations and management of the insolvency proceeding. The rapporteur of the Court may freely appoint the administrators or controllers and may also remove them in accordance with their criteria.

The insolvency administrator or insolvency administrators will have the obligation to inform the rapporteur of the Court on the development of the viability of the debtor subject to judicial settlement or bankruptcy, every three months.

The controllers will verify the accounts and assist the rapporteur of the Court supervising the operations of the insolvency administrators. The controllers may also verify the status of the proceeding as well as the revenues obtained and the payments transferred.

9.3 Selection of Officers

See **9.2 Statutory Roles, Rights and Responsibilities of Officers**.

10. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

10.1 Duties of Directors

The debtor has the duty to request a declaration of cessation of payments (*declaració de cessació de pagaments*) within eight days from the date of general cessation of payment, and failing that, the Criminal Code establishes the offence of insolvency providing for penalties of up to three years imprisonment based on the following assumptions:

- the debtor may not conceal their assets or carry out acts of disposition of assets or generate preferential claims with the aim of frustrating in whole or in part the effectiveness of any judicial, extrajudicial or administrative attachment or execution procedure;
- if, in addition, the bankruptcy is caused voluntarily, this bankruptcy shall be considered a criminal offence; and
- if, in respect of the first point, the person who is criminally or civilly liable for any offence that, after its commission and with the aim of avoiding their civil liabilities deriving from it, carries out acts of disposition or agreements that decrease their assets, in order to become totally or partially insolvent, the debtor will be considered the perpetrator.

Anyone who, either personally or as the administrator of a legal entity, is aware of an increase in his debts, or who for any other reason is unable to pay their debts, before the commencement of a bankruptcy proceeding, must be punished by imprisonment of two to five years provided that:

- a distorting picture is provided by the balance sheet;
- distract, for their own benefit, assets intended for the insolvency statement;
- destroys or deteriorates assets that could have been incorporated into the insolvency statement;
- incurs obligations in breach of the duty to act with the diligence of a prudent businessman and loyal representative;
- disposes of property or assets of the company or of itself at a price below the market price established at the time; and
- damages or destroys the books of trade in order to become impossible or difficult to verify outstanding debts.

Besides that, the debtor who restores the assets of the company before the completion of the insolvency proceeding shall be

exempt from punishment, without prejudice to the civil liabilities.

10.2 Direct Fiduciary Breach Claims

On the basis of the Insolvency Decree and Andorran case law, the creditors cannot assert direct fiduciary breach claims against the debtor. Accordingly, all claims should be substantiated before the same Court as the insolvency proceeding.

11. Transfers/Transactions That May Be Set Aside

11.1 Historical Transactions

The main risk areas for lenders upon the insolvency of the borrower, the security provider or the guarantor relate mainly to the enforcement of the financing agreement and the guarantees provided by the security provider and the guarantor. Claw-back risk must also be monitored. Under the claw-back regime established in the Insolvency Decree, the Court is entitled to set aside any transactions of any nature entered into by the borrower within the 24 months prior to the initiation of its insolvency procedure and are considered to be prejudicial to the borrower's insolvency estate, and that:

- fall into any of the following categories:
  (a) transactions carried out through agreements where the borrower's obligations largely exceed those of its counterparty;
  (b) if the total prepayments of non-matured debts are verified; or
  (c) all mortgages or guarantees granted over assets of the borrower after the cessation of payments date for securing pre-existing debts of the insolvent entity; or
- are gratuitous acts done a maximum of six months prior to the date of cessation of payments declared by the Andorran judge.

11.2 Look-Back Period

See **11.1 Historical Transactions**.

11.3 Claims to Set Aside or Annul Transactions

The individual creditors can assert their claims to set aside or annul transactions by means of a civil proceeding substantiated before the same section of the Court of the insolvency proceeding.

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Authors

Miguel Cases is co-managing partner and leads the markets and financial services group of the firm. Qualified to practice both in Spain and the Principality of Andorra, he has extensive experience advising credit institutions and investment services firms, acting regularly as the key legal counsel for major national and international financial institutions, public administrations and public and private investment funds in the structuring of financial transactions, derivatives and financial sector reorganisation M&A deals. Furthermore, his practice extends to special situations and entities in turmoil. He regularly lectures on his subject areas.

Marc Ambrós is a partner at the firm and focuses on corporate and M&A, and markets and financial services. He has extensive experience in corporate and commercial matters. He has advised on mergers, acquisitions, joint ventures, private equity, corporate restructuring and refinancing, representing both Andorran and foreign clients in international transactions with an Andorran side. He also advises companies and foreign financial entities on project and corporate finance issues, and foreign credit institutions and investment services firms on regulatory cross-border matters. He is widely published.

Cases & Lacambra

C/ Manuel Cerqueda i Escaler 3-5
AD 700
Escaldes- Engordany
Principality of Andorra

Tel: +376 728 001
Email: andorra@caseslacambra.com
Web: www.caseslacambra.com

CASES & LACAMBRA

Trends and Developments

Contributed by:
Miguel Cases and Marc Ambrós
Cases & Lacambra see p.18

Introduction
Andorran insolvency practice is facing many challenges in the coming years. Amid the COVID-19 crisis, and in a context of the convergence of the Andorran legal, tax and economic landscape into a level-playing field comparable to other European countries, the current rules and procedures applicable to both de facto and declared insolvency are, in general terms, obsolete.

Insolvency rules must be aligned with certain characteristics of the relevant country or jurisdiction were the economic actors develop their activities but in case of a small and consequently risk-concentrated jurisdiction such as Andorra, this becomes essential.

These rules must take into account the structure and characteristics of the local economy including its players and stakeholders. Further, they must not oppose the general terms of credit granting policy (either national or international). Finally, they must be understood in accordance with the judicial system. In the case of Andorra, it is composed by judges divided into non-specialised sections who interpret laws in accordance with their background and formation, and they are usually influenced by neighbouring jurisdictions systems of law.

The Current Status of Andorran Insolvency
In general terms, Andorran insolvency is at a crossroads where on the one hand there are rules that give enough discretion to quickly resolve, redirect or liquidate insolvency situations with a very comfortable starting grid for creditors. On the other hand, the legal procedures are protracted, and the micro-litigation culture that is ingrained in the legal actors of the jurisdiction tends to smash the competitive advantage that the 1969 Insolvency Decree may hold in respect to other jurisdictions.

Therefore, the development path for Andorran insolvency rules remains a question mark. In a jurisdiction that lacks a system of specific legal recognition of credits, or a legal recognition of pre-insolvency or second chance mechanisms, enhancing the pro-creditor stance of the law would seem an adequate course of action for the legislative powers in the near future.

Furthermore, Andorran merchant culture and society has traditionally backed creditors and been reluctant to promote mechanisms destined to ensure the continuity of failed companies and undertakings. This is specially influenced by the cultural view of the role of the negligent administrator; if they have not showed sound performance in managing their businesses in the past, it is unlikely that they will do better in the future.

Current Status
As a highlight, the 1969 Decree establishes in Andorra an unparalleled general obligation to file a declaration of cessation of payments in a precluded eight business-day period following the occurrence of the general default of payments. A mere default under a single (material) payment has been commonly considered sufficient by case law to declare the cessation of payments.

This traditional mindset of the law that distinguishes situations where the company can be redressed or liquidated (*Fallida*) is based on the classic principles of par conditio creditorum, universality of execution of the debtor's estate and respect to privileged credits (commonly evidenced through valid pledge or mortgage) that benefit from separate execution from the insolvent's estate in a smooth manner. However, there is also a sunny side for protecting the debtor and abusive creditors; the most clear example is the stringent claw-back regime of Andorran laws that can go back up to a 24 month period for suspect transactions in certain circumstances.

The Impact of COVID-19
The insolvency practice of law in Andorra is likely to encounter an increasing complex social and economic situations due to the COVID-19 crisis, which has aggravated and evidenced the need for a deep transformation of the Andorran economy.

Being more specific, since the start of the COVID-19 crisis in March 2020, the Principality of Andorra has produced a multi-level response. Primarily, the enacted measures and regulations in the economic field have had the objective of hibernating certain problems (ie, solvency) while dealing directly with others (ie, liquidity and jobs).

In the first weeks of the pandemic, the liquidity of local companies was the main concern. In response, the government deployed a series of measures including banks granting lines of soft-credits, with a government guarantee, to companies that met certain eligibility criteria.

Along with these helps, temporary employment regulations (ERTOS) were deployed in order to avoid an employment crisis and to facilitate for companies the reduction of dismissal costs and the subsequent liquidity squeeze. On top of that, bridge

loans and credit facilities either backed or unbacked by the soft-credit lines of the government were granted. It will be some time before the outcome and performance of these financings will be seen. Furthermore, these facilities will be studied in the context of future insolvencies.

Furthermore, an eye will have to be kept on new guarantees that have been taken out or extended over assets and/or cash flows during this period, taking into account the overall situation of the debtor. Documental evidence of guarantees, their unreasonableness or their detriment to third parties or creditors are likely to become of increased importance in litigation within insolvency proceedings.

In parallel, Law 7/2020 on exceptional and urgent measures in administrative and procedure matters for the emergency situation caused by the COVID-19 pandemic, establishes that merchants (either natural or legal persons) are not obliged to file a declaration of cessation of payments, and will not incur in liabilities (the extent of this generic reference is uncertain) if they haven't proceed with such filing. This legal provision will be in force until 31 December 2020, and is expected to be a source of potential litigation due to the following facts:

- it is unclear how this provision will affect the date as of it is considered the payments to have ceased (the judge can fix such date up to 18 months prior to the date of admission of the filing or, in certain cases, 24); and
- it can foster fraudsters to use this exceptional period to decapitalise and accelerate fraudulent insolvencies.

This is why a trend in criminal cases (fraud) and asset recovery in the context of insolvency proceedings is likely to occur in the next few years.

Looking Forward

In a medium- to long-term, the following trends are expected:

Bridge loans

Bridge loans and soft loans granted in the middle of the pandemic will tend to be either repaid in full or in part or restructured/refinanced into long term financings. Long-term conversion will likely happen in respect of companies that have been severely affected by the crisis. These financings are likely to be granted by local banks, but for risk concentration and capital requirement factors it is also foreseeable that foreign players (banks or funds) with alternative source of financing and guarantees requirements appear.

If any of these refinancing's become non-performing, the landscape and actors of insolvency proceedings will change substantially, moving from locally driven insolvencies to more internationally driven ones.

Temporary employment regulations

Temporary employment regulations are expected to become dismissals and compromise the liquidity of companies. Accordingly, heavy labour-driven insolvency proceedings are likely to occur.

Increase in insolvency proceedings

A substantial increase of insolvency proceedings with a strict local component were financial liabilities will be mainly be composed by local banks acting as creditors. Although it seems reasonable that extrajudicial settlements will be majority, some cases will end in court. When this stage arrives, it will have to be seen how local judges (*batlles*) who are not specialised in commercial matters, and higher courts, interpret the current laws custom in order to enhance the sustainability of certain companies or projects.

Component insolvency cases

A new trend of international-EU component insolvency cases. In the past years Andorra has slowly but unrepentantly opened its economy to foreign investments. At time of writing, numerous conglomerates (ie, in the leisure and tourism sector) have operating affiliates in Andorra. Likewise, the Andorran holding company has been widely used as an investment vehicle throughout the EU. It is likely that Andorran companies are part of insolvency proceedings.

In this vein, Andorran is not a part of the EU and, therefore, the EU insolvency regulations do not apply. This means that certain key concepts such as principal or secondary proceedings remain untested. Accordingly, insolvency proceedings that are brought into other jurisdictions will have to deal with the Andorran component, taking into account that there is (or there is not) a solvency focus in the form of relevant assets or guarantees. Therefore, it will be necessary to assess whether assets will need to be seized individually, through local enforcement procedures (that will probably need an exequatur in case they are resolved by foreign judicial authorities) or whether local insolvency proceedings need to be filed.

Conclusion

All of these factors are subject to the fact that although there is an increase political sensibility to update the 1969 Decree of Insolvency, at the light of recent legislative changes, including the resources of local courts to quickly adapt to changes, it will take time to implement, both in terms of drafting, approval and mindset. Accordingly, it is expected that the 1969 Decree to survive a substantial part of the changes that the insolvency wave will bring, with some necessary updates likely being enacted by means of urgency.

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Cases & Lacambra

C/ Manuel Cerqueda i Escaler 3-5
AD 700
Escaldes- Engordany
Principality of Andorra

Tel: +376 728 001
Email: andorra@caseslacambra.com
Web: www.caseslacambra.com

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