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BSLA

BRITISH SPANISH LAW ASSOCIATION

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DATES FOR YOUR DIARY

15 June 2004
Bilaterals Summer Reception
The Honourable Society
of the Inner Temple

2 December 2004
Bilaterals Reception
The Law Society

Bulletin

A word from the Chairman

First of all, I would like to congratulate those members of the committee who were re-elected at our last general meeting and to welcome the newcomers. I hope with their help we will be able to make the association an even bigger success.

For those who were not able to attend I can report that one of the most important aspects of this year's meeting was the official launching of the Spanish-based mirror association. Their new chairman, Sr. Rocco Caira, presented a report on the incorporation and we discussed ways in which the activities of both associations might best be co-ordinated. The General Meeting was followed by a reception held in the stunning Private Rooms of the Lord Chancellor in the House of Lords. The reception was very successful both in terms of the number and the high profile of the attendees.

Our next social event will take place on 15 June 2004 when we are to host a summer reception jointly with the members of the American, French, German and Italian associations. This Spanish-American-French-German-Italian event will be held in the beautiful surroundings of the Middle Temple. It would be great if we could be represented by a strong contingent. Please use the form below to register for attendance.

Further events are planned throughout the year, and will be advertised closer to the date, but one highlight will be a reception hosted by the Law Society for all the members of the more than 30 bilateral associations currently existing in London. This event is scheduled for 2 December 2004. Mark the date in your diary, since it will be a unique opportunity to network with Lawyers from all over the world in one single evening. We will be in contact with further details in the Autumn.

The more serious side of the Association's work, the lecture programme, is also flourishing, with consistently high-quality papers and discussion, high attendances and very positive feedback. Thanks to all those who have contributed to the success of the lectures, not just the organisers and speakers but the audiences who have made the discussions so constructive.

We are still assessing the response to the questionnaires, which will give us a more accurate idea of the kind of topics our members want to hear more about. We will be following the same structure this year as the one, which proved successful in 2003/4: so that each lecture in English will be followed by its counterpart in Spanish.

We have also arranged for the Autumn a special seminar on both French and Spanish commercial and residential property with our colleagues from the French bilateral. This is in line with one of our most important current initiatives: the pursuit of links with other European bilateral associations and the further development of those links we have already established. Before too long we hope to be putting together a research programme, under the auspices of the European Union, to explore differences in national practices, the problems that arise from those differences, and, where necessary, the possibilities for further co-ordination. Further information in this respect will be soon placed on our web page and we will be grateful for any ideas you may wish to suggest to us.

This research has become both more urgent and more challenging since 1 May with the accession of many new members into the European Union and the gradual integration of new legal communities. The BSLA would like to express its own '*Bienvenido*' to these newest arrivals, and further down the line we look forward to sharing with them our experience of working at the interface between two very different legal systems.

I look forward to seeing you again soon.

Alberto Pérez Cedillo
FERNANDO SCORNIK GERSTEIN

Unsporting Contest

With the Athens Olympic Games approaching **Cristina Garrigues** describes the tactics of ambush marketers

The Olympic Games provides golden opportunities not just for sportsmen and women but also for companies aiming to secure a mass audience by sponsoring events. They give companies the opportunity to promote their brands to a potentially enormous worldwide audience, as well as to benefit in image terms from being associated with the Olympics and the real heroes they create. For sports events organisers, whose aim is to maximise the generation of income, corporate sponsorship is one of the most lucrative sources of revenue together with broadcasting rights, merchandising and, to a much lesser extent, ticket sales.

Sponsorship is a tradition that goes back to Ancient Greece where wealthy Athenians would contribute financially to expenses related to culture, defence, the state and sport in order to make them more accessible to all citizens. In return, the state honoured them by engraving their names on marble tablets. This tribute was a mark of respect, value and high appreciation by the city.

In modern times, corporate sponsorship is a commercial arrangement under which a sponsor pays a sponsorship fee and in return receives certain exclusive rights. In most cases, in addition to the payment of the fee, the sponsor also supplies the sponsored party with its products or services. In return, corporate sponsors expect to have exclusive use of official marks, logos and other designations, be given unique advertising and promotional opportunities, on-site concessions, franchises and product sales, together with the right to describe themselves as official sponsors of the event in their marketing and promotional campaigns. However, without exclusivity the value of sponsorship is diminished.

Companies such as Coca Cola, Samsung, McDonalds, Panasonic, Kodak, Xerox, Swatch and Visa have paid significant amounts of money for their exclusive deals as sponsors of the 2004 Olympic Games in Athens.

Ambush marketing practices

Ambush marketing, sometimes referred to as "parasitic" marketing, is a phrase that describes the actions of companies which seek to associate themselves with a sponsored event without paying the sponsorship fees. Their aim is to give the impression to consumers that they are either sponsors or are somehow connected to the event. While ambush marketing does not occur solely in the sports marketing arena it is most prevalent here, partly because of the potential worldwide audience and the enormous number of followers that global sports events attract.

Ambush marketing is not a recent phenomenon, it has been going on for a long time. In the early days it consisted of merely giving away the ambushers' products as promotional items or providing free trips to the event. However, the tactics used nowadays by ambush marketers to suggest sponsorship involvement have become more sophisticated and cover a wide range, such as the placement of billboards displaying the ambush marketer's name, mark or logo at strategic points – to the despair of the official sponsors.

Legal aspects of ambush marketing

While the unauthorised use of a registered trade mark, logo or slogan, or the copying of any artistic work protected by copyright, or misleading the public by using the description "official sponsors", would constitute clear infringing actions under the intellectual property laws or trade practices of most countries, the legal position of ambush marketing practices is certainly unclear.

The Games provide companies the opportunity to promote their brands to an enormous worldwide audience, as well as to benefit from being associated with the Olympics and the real heroes they create.

Ambush marketing campaigns do not in most cases use third parties' trade marks or designs. Ambush marketers refer to the event and to their own names and products in an ingenious and creative manner, so in most cases they manage to circumvent the law. The situation is not helped by the fact that most countries lack adequate legal provisions to combat ambush marketing

and the laws currently available in most countries to stop ambush marketing are inadequate.

Most jurisdictions still rely on the traditional laws of trade marks, copyright, unfair competition, trade practices and advertising to stop ambush marketers from appropriating some of the exclusivity reserved to official sponsors. These traditional forms of protection are in most cases ineffective against the creativity of ambush marketers who also know the wording of the law and are careful not to trespass it.

As the organiser of the largest sporting event in the world, the International Olympic Committee (IOC) together with the national Olympic Committees and the Olympic Committee of the hosting state, have in recent years worked very closely to protect the position of official sponsors by adopting specific measures to combat ambush marketing.

The 1996 Atlanta Games introduced for the first time a "name and shame" campaign in an attempt to denounce ambush marketing practices. Although this measure managed to create a certain awareness of ambush marketing practices among the public, it failed to stop competitors from ambushing official sponsors. For the next Games the Australian authorities took the ambush marketing issue very seriously and developed and adopted a series of particular measures to combat ambush marketing in the 2000 Sydney Olympics directly.

Following the Australian example, the IOC together with the Greek authorities have implemented additional legislative measures to combat ambush marketing in preparation for the Athens Games.

However, it seems that countries are only adopting specific measures to combat ambush marketing on an *ad hoc* basis, i.e. whenever a country hosts a global event and the event organisers require the hosting country to adopt specific measures to guarantee the integrity of the event and the exclusivity of official sponsors.

Ethical aspects of ambush marketing

Any discussion about ambush marketing raises the question of whether these practices by ingenious advertisers are unethical or just imaginative marketing. The answer, however, seems to depend on whether the response comes from a corporate sponsor, an event organiser, or a marketer.

Corporate sponsors and event organisers obviously regard the piggy-backing of non-sponsoring companies as unethical and claim that it threatens the integrity and future of these events. In particular, corporate sponsors claim that ambush marketing tactics reduce the effectiveness of their promotional efforts and event organisers are concerned that these practices will diminish their ability to retain top-paying sponsors, thus jeopardising their ability to fund these events at all.

On the other hand, ambush marketers argue that it is all fair game, that we live in an open market and that it is up to the official sponsors to promote their sponsorships and brands and the image they want to project to the public.

Ambush marketing has been going on for a long time. However, the tactics used nowadays are more sophisticated and cover a wide range ... to the despair of the official sponsors.

In any case, critics of the current trend of multi-million dollar sponsorship deals in the sporting world argue that the increasing dependency of athletes and event organisers on corporate sponsorship diverts both athletes and the public from the spirit of sport. In very similar ways both official sponsors and ambush marketers use these events to intrude upon the public consciousness to promote their brands, goods and services. The only difference being that only the former has paid for the right to do it and is officially authorised to do so.

Accordingly, it is not possible to draw a clear conclusion as to whether ambush marketing is an ethical marketing tactic or not. In particular when it remains to be seen whether ambush marketing is in fact having as much of a negative impact on sponsors' investment as its critics would have us believe. However, what is clear is that ambush marketing has become, and will continue to be, an irritating fact of life for sports organisers. What is also clear is that the traditional intellectual property laws and trade practices are ineffective against these practices. So if ambush marketing is to be stopped or at least diminished, additional and specific measures need to be adopted.

Cristina Garrigues
Bird & Bird Solicitors

Intellectual Property vs Competition Law

Paul Henty (top) and **John Warchus** describe recent cases where property rights conflicted with fair competition

Can you be required to license your Intellectual Property (IP) to a competitor? Competition law has previously answered: Yes … in exceptional circumstances. Two current cases aim to clarify this controversial aspect of the law further.

IMS Health v NDC

One of the principal activities of IMS Health, an international pharmaceutical company, is the provision of studies on the sale of pharmaceutical products to laboratories. In Germany its studies aggregate and allocate sales data to one of 1860 "bricks" or sub-divisions of German territory. The "1860 brick structure" was produced after extensive consultation with clients of IMS. Subsequently, German courts have held that IMS has copyright in the brick structure.

In 2001, IMS sued NDC in Germany for providing competing studies based on the brick structure. NDC responded that IMS had refused to license the structure, thereby abusing its dominant position under Article 82 (which prevents dominant undertakings from abusing their market strength). NDC also argued that the "brick structure" had become an industry standard due to the demand-side of the market being involved in its creation and that trying to introduce an alternative structure would be impractical and prohibitively expensive, both for NDC and the laboratories.

NDC relied on the earlier Magill case, in which UK and Irish television companies were ordered by the European Court of Justice to license their copyright in programme listings to competitors wishing to produce comprehensive TV guides. IMS countered that, under EC Competition law, a compulsory licence could only be ordered where this was needed for the production of a new and innovative product (as in Magill), or where the refusal would have the effect of excluding all competition in a distinct market (i.e. not the same one as that on which the IP holder used the right.) IMS argued that neither condition was satisfied here.

As the case raised innovative questions of EU Law, the German courts referred these issues to the ECJ for its interpretation. In his opinion, delivered in October 2003, the Advocate General, has suggested that the ECJ judges should find as follows:

- an undertaking holding a dominant position on the market may infringe Article 82 if (i) it refuses to license for no objective reason, (ii) the licensing of the right is required for operating on a market derived from that right and (iii) the consequence of the refusal is the elimination of all competition on the derived market. Furthermore, the product or service sought by the claimant must be new and correspond to the needs of consumers which are not being satisfied.
- in determining whether the brick structure was indispensable to competing with IMS Health, the court should take into account the degree of participation of laboratories in producing the structure, as well as the cost that would be incurred by these laboratories in switching to studies based on alternative brick structures – this approach could help NDC in practice.

The final judgment of the ECJ will also determine a related but separate dispute between IMS and the European Commission, which took action against IMS' refusal to license the 1860 brick structure. In 2001, the Commission fined IMS and ordered it to license the structure to would-be competitors. IMS had the order overturned by the European Court of First Instance and has appealed the rest of the decision to the CFI. Proceedings before the CFI have since been suspended, pending the delivery of the ECJ's judgment on referral from the German court.

Intel Corporation v VIA Technologies

In late 2002, Intel brought proceedings against VIA for, inter alia, infringement of its patents in relation to chipsets. VIA raised several defences, some of which related to the application of Article 82 to the exercise of Intel's rights. Although these defences were thrown out by the High Court at first instance, VIA has appealed on these points, with some initial success, to the Court of Appeal.

At first instance, the judge rejected VIA's "Eurodefences", as they did not satisfy the Magill criteria: (i) preventing the appearance of a new product, or (ii) excluding all competition from a separate market. The Court of Appeal, however, found summarily that exceptional circumstances had not been defined exhaustively in the Magill case, and other situations may also be "exceptional". Accordingly, it held that the appeal should be allowed.

Continued on following page

Preserving the Flow

Begonia Filgueira on the difficulties the Spanish Government faces maintaining water supplies

Spain, like many other countries in the south of Europe, suffers from a water shortage. In the last 50 years increased agricultural exploitation and activities associated with the building and tourism industry have put tremendous pressure on Spain's water resources. Yet Spain depends heavily on those industries. What is Spain to do?

The Spanish Government thought it had found a solution in the form of the Spanish Hydrological Plan (SHP), which was approved as law on 5 July 2001[1]. The SHP aims to transfer 1045 hm^3 of water per year[2] from the Ebro river Basin in the north of Spain to the dry lands of southeastern Spain. The water is destined for agricultural, domestic and industrial use. The estimated cost of the SHP is €22bn to be spent on 900 public water works including reservoirs, dams pipelines and will take over 10 years to complete.

The SHP has caused tremendous public and political controversy at both national and European level. Its future is very much in the balance. The European Commission DG Environment complained about the plan to the Spanish Government even before it was passed as law. Many Spanish political parties opposed the SHP, including the newly elected PSOE.

WWF together with Spanish environmental groups[3] have presented a complaint to the European Commission on the basis that the SHP breaches both community law and principles[4]. It is argued that the SHP runs in the face of the objective of sustainable development because it does not consider that water is a limited resource nor does it address issues such as the reduction of the pollution of waters, nor whether agricultural development should be further encouraged through water subsidies in deserted areas. WWF also argues that the SHP has a detrimental impact on many protected birds and areas, sites of community importance, habitat types and endangered species.

As to the resolution of the controversy, we can only speculate. Commissioner Walstrome recently addressed Parliament on the SHP and stated that many complaints against the SHP were pending with the Commission and that no decision had been made about the legality or funding of the SHP. The newly elected Spanish Government may decide not to support the plan. Only time will tell what will become of the SHP. What is certain is that Spain will need to deal with this and many other environmental problems in the future.

Begonia Filgueira
Gaia Law Ltd

REFERENCES

1 *Ley numero* 10/2001.
2 Equivalent to an average of 33,000 litres per second.
3 Greenpeace Spain, Ecologistas en Accion de Pais Valenciano and Sociedad Espanola de Ornitologia.
4 It is argued that the SHP breaches Articles 2 and 6 of the Treaty on the European Union (consolidated version), the EC Habitats Directive (92/43/EEC), the Environmental Impact Assessment Directive (2001/42/EC) and the Water Framework Directive (200/60?EC).

Intellectual Property

Continued from previous page

Commentary

Although the opinion of an Advocate General in IMS is not binding, ECJ judges will probably follow its findings. If they do so here, the evidential hurdle of "exceptional circumstances" will be set at a fairly high level. Cases will be few and far between where an applicant can satisfy each of the requirements set out by the Advocate General to justify a compulsory licence. Whilst the opinion recognises the need to protect IP, it is significant that the national court has been encouraged to "look behind" IMS' copyright and to consider the way in which the substance of the right has been exercised. In Intel, the Court of Appeal will be bound to apply the final judgment of the ECJ in IMS. At this stage, the opinion will probably provide more comfort to Intel than to VIA.

Postscript: EU Commission v. Microsoft

Shortly before going to press, the EU Commission unveiled its ground-breaking decision against Microsoft. One of the charges against Microsoft is that by limiting the interoperability between Windows and its competitors' servers, Microsoft has unfairly disadvantaged its rivals in the server-market. Apart from imposing record fines (497 million) the Commission has ordered Microsoft to disclose within 120 days "complete and accurate specifications for the protocols" needed for its competitors' server products to compete on a level-playing field with those of Microsoft. The Microsoft decision is reminiscent of that in IMS. The Commission has again been prepared to ensure access to IP that is (allegedly) being used to frustrate the workings of a competitive market. The decision marks the end of Round One in an already lengthy legal fight. In Round Two, Microsoft will appeal to the European Court of First Instance to have the compulsory licence order lifted … something which IMS also did, successfully, in 2001.

John Warchus and Paul Henty,
Shadbolt & Co

Changes to Insolvency Proceedings

Antonio Bravo examines the new legislation

INTRODUCTION

The reform of Spanish insolvency legislation has been considered long overdue by all interested parties, basically for two reasons: First, the present legislation is archaic, with archaic measures such as the Suspension of Payment Law of 1922 or the Commercial Code of 1829, which regulates bankruptcies, rendering it completely inadequate for present needs. Secondly, the dispersion of legislation and the diversity of insolvency proceedings (bankruptcies, suspension of payments, reductions or stays and non-commercial creditor's arrangements), according to the type of insolvency (provisional or final), or on the qualification of the affected party as merchant or non-merchant.

This being the state of affairs, the Official Gazette published on 10 July 2003 Organic Law 8/2003, for the Reform of the Insolvency Proceeding (amending Organic Law on the Judicial Branch) and Law 22/2003 on Insolvency Proceedings, both of 9 July, by virtue of which the long sought judicial proceeding reform is implemented.

By virtue of the Organic Law for the Reform of the Insolvency Proceeding, the consequences of the insolvency proceeding on the debtor's fundamental rights are defined (intervention of correspondence, entry and inspection of premises etc.), and this, in turn, amends the Organic Law on the Judicial Branch creating new Commercial Courts with jurisdiction over all aspects related to insolvencies.

Under the Law on Insolvency Proceedings, the new insolvency proceeding is regulated for both companies and individuals, and the special proceedings for all pleas and motions that may arise within the insolvency proceeding, seeking a flexibility that could frequently be hindered by the insolvency proceeding's own complexity.

In any case, the complexity of the insolvency reform implemented through the above laws, has caused the lawmaker to provide for a *vacatio legis* until it comes in effect on 1 September 2004, with the obvious aim of allowing those parties affected (Judges, lawyers, corporate administrators, etc.), to become acquainted with the new legal scenario. The new legislation amends 37 laws and affects practically all fields of law, making it one of the most important reforms in recent history.

PRINCIPAL CHARACTERISTICS

In broad terms, the principal characteristics of the new insolvency legislation are:

Concentration of Jurisdiction on the Commercial Judge: The new legislation attributes exclusive jurisdiction to the Commercial Courts (of new creation), for all matters related to insolvency proceedings and incidental matters thereof. This will mean that Judges hearing insolvency proceeding will also now hear on other matters that were previously reserved to the jurisdiction of other Courts, such as Labour Courts, in matters of, for example, the closure of all or some business establishments and the resulting termination, suspension or amendment of employment contracts. With this concentration of jurisdictions, an end is put to the absurd situation where the Labour Judge would hear on the workers' lay-offs while the Judge in the insolvency proceeding would have no knowledge thereof, or that the debtor's property could be auctioned in a third Courthouse without the knowledge or supervision of the Insolvency Judge.

Concentration of proceedings: All existent insolvency proceedings to date (bankruptcies, suspension of payments, reductions or stays and non-commercial creditor's arrangements), are suppressed giving rise to a new proceeding generically denominated *concurso* (insolvency proceeding) in which all insolvency scenarios, whether of companies or individuals, are encompassed.

The new legislation intends to ease the insolvency proceeding, reduce judicial stages and terms, and avoid the need for proceedings to extend indefinitely as has unfortunately often occurred. For example, if the insolvency proceeding terminates with the liquidation of the company, all liquidation activities must be concluded within a maximum term of one year.

The insolvency proceeding consists of a first stage – which commences with the declaration of the insolvency and terminates when the insolvency administration produces a report on the debtor's patrimonial situation to which an inventory and list of creditors shall be attached – and a second stage for arrangements or liquidation dependent on what the final solution for the debtor will be.

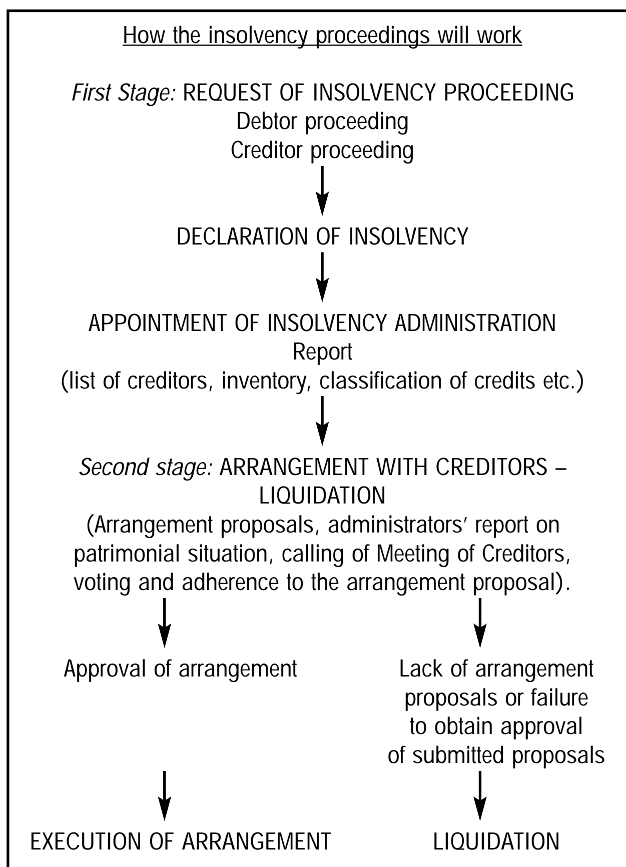
Effects of the insolvency proceeding: The declaration of insolvency, on its own, does not interrupt the exercise of the business activities of the debtor who is charged with the duty of collaborating with the insolvency bodies, surrendering books of account and documents,

providing information as requested and co-operating in the conservation of the assets. If necessary, the Judge may decide on the foreclosure of offices and establishments, and even the total or partial suspension of business activities upon hearing the debtor and the workers' representatives.

The declaration of insolvency freezes creditors' individual actions against the debtor's patrimony for a maximum term of one year while an arrangement is being negotiated or liquidation commenced.

Management bodies of the insolvency proceeding: The new law simplifies the management bodies, limiting them to the Judge and the insolvency administration, whose essential functions are to intervene in the debtor's acts, or substitute him when he has been suspended, and to prepare the "insolvency administration report" to which the inventory of assets, the list of creditors and, as the case may be, the evaluation of submitted arrangement proposals shall be attached.

The insolvency administrators have legal standing to exercise liability actions against administrators and auditors of the debtor entity.



Classification of credits: The credits shall be classified as follows:

1. Operation costs and debts incurred after the declaration of insolvency (credits of the mass), such as credits for wages of the last 30 days worked, not exceeding twice the minimum salary; judicial costs for the insolvency procedure and the debtor's legal representation; credits arising from the professional activity and insolvency discharge, as well as maintenance of the insolvency administration.

2. Especially privileged, privileged and ordinary credits:
   (a) Especially privileged credits on certain goods or rights include mortgage credits, financed credits, including income credits for products, sale credits by instalments or leasing of the goods sold or hired which corresponds to the creditors; securities and pledge bonds.
   (b) Privilege credits, on any goods and rights of the debtor not especially insured, include income credits up to three times the minimum salary and compensations for accident or illness, tax and social security deductions owed by the debtor, credits for personal independent work and royalties; Treasury and social security credits up to 50%; torts and civil liability credits, credits up to 25% not subordinated to the creditor who has applied for the insolvency declaration;
   (c) Ordinary credits are those not included within the privileged or the subordinated credits.

3. Finally, subordinated credits constitute a newly created instrument, which refer to credits that are to be deferred from ordinary credits, due to their late communication, accessory (interests) or punitive (penalty) nature. The holders of such credits do not have the right to vote at the Meeting of Creditors and, in case of payout, they will not be paid until all ordinary credits have been paid in full.

Arrangement with creditors: This is the preferred solution by law for insolvency proceedings. In order to facilitate the reaching of an agreement, it is permissible for the debtor to submit an anticipated arrangement proposal which may be approved by the Judge. If there is no anticipated arrangement proposal, the debtor must submit an arrangement proposal during the proceeding and a Meeting of Creditors shall be convened for its acceptance or refusal. The arrangement proposals may consist of releases or stays or a mixture thereof. In any case, the release may not be in excess of 50% of the principal amount of each credit, nor the stays be longer than five years. The law regulates the majorities required for accepting arrangement proposals which shall be accompanied by a payment schedule and a viability plan when it is intended that the business activity shall continue.

Liquidation: Operates when the creditors do not accept the submitted arrangement proposal or when no proposal is made. The debtor is subject to the suspension of his activities and the insolvency administration shall prepare the liquidation plan and payment to creditors which shall be finalized in a maximum term of one year.

Insolvency qualification: The insolvency shall be qualified as non-fault or negligent. The latter is reserved for those cases where the status of the insolvency is generated or aggravated by the malice or gross

negligence of the debtor or of his legal representatives, administrators or receivers.

International insolvency procedures: The international jurisdiction to declare and hear a request for declaration of insolvency is based on the location of the debtor's main interests. The insolvency declared over those interests will be considered as "principal", without prejudice to other "territorial" insolvencies declared in those countries where the debtor has premises.

The law regulates the relations between principal and territorial proceedings, as well as their respective effects, the recognition by Spain of foreign proceedings and the administrators or representatives involved, in order to establish the best co-ordination possible in favour of legal certainty and economic efficiency in such cases.

NEW LIABILITY REGIME FOR ADMINISTRATORS

The new insolvency legislation establishes new liability scenarios for administrators not provided for in the previous legislation.

In this sense, the new Insolvency Law establishes the obligation of administrators to seek a judicial declaration of insolvency when the company is in an insolvency situation, that is to say, when "it is unable to regularly meet its obligations which become due" (Article 2, LC).

Upon failure to do so and upon a creditor judicially requesting an insolvency declaration, the law provides a presumption in favour of the Judge's insolvency qualification as "negligent insolvency" (as stated above, the insolvency may be qualified as non-fault or negligent), which would entail liability on administrators and liquidators – legal and of fact – to pay insolvency creditors in the amounts not perceived in the liquidation of the company, extending said liability to those persons who were corporate administrators or liquidators within the two years preceding the declaration of insolvency. Additionally, the administrators may also be barred from representing or administering companies for periods ranging from two to fifteen years.

Furthermore, the Insolvency Law contemplates the need to seek the company's dissolution or its insolvency declaration when the corporate losses cause the company's net worth to be reduced to an amount below half of its share capital as long as such share capital is not accordingly increased or reduced. In such cases, the law mandates the calling of a General Shareholders' Meeting within two months so that dissolution, or the request for the commencement of insolvency proceedings, be adopted. If the decision of the General Shareholders' Meeting is contrary to the request of commencement of insolvency proceedings, the administrators shall nonetheless judicially request such commencement within two months of the General Shareholders' Meeting if, in their understanding, the circumstances giving rise to the situation still persist. Failure to do so – that is, failure to call the General Shareholders' Meeting or failure to judicially seek the declaration of insolvency when the decision is contrary to the request of commencement of proceedings – entails joint and several liability with the company for corporate debts.

This new liability regime for administrators will undoubtedly entail a greater degree of attention and care by businessmen when in insolvency situations.

OVERALL EVALUATION

At this moment it is still too soon to evaluate the new insolvency legislation, and its virtues and flaws will be better determined once it comes into effect.

The new legislation intends to avoid the need for proceedings to extend indefinitely as has unfortunately often occurred.

The above stated, a preliminary evaluation permits us to conclude that the new legislation will be beneficial for everybody involved in insolvency matters:

- legal practitioners, since it will provide us with a useful and updated instrument to provide answers to complex crisis situations for companies and multinationals, with numerous employees, acting in a globalized framework;
- the Spanish business community, because the new law is principally aimed at aiding businesses in distress, greatly fostering a creditors' arrangement as the solution to the insolvency and therefore permitting continuity of the business and jobs to the point where it is permitted that an anticipated arrangement proposal be made along with the request for commencement of the insolvency proceeding;
- the workforce of the affected companies, since the new legislation grants sufficient protection to the interests of employees by highlighting the importance given, among other things, to the maintenance of jobs and the privilege granted to the last 30 days salary upon liquidation of the company's assets; and finally
- corporate creditors, since privileged credits are limited, the terms of the insolvency proceeding as a whole are reduced (principally, the liquidation process which cannot extend beyond one year) and, most importantly, since an agreed solution and the continuity of the business, as opposed to liquidation, is fostered, therefore facilitating payback.

Antonio Bravo
Bufete Mullerat

Renvoi and the Settling of Inheritance

Nielson Sanchez Stewart concludes his series of articles on aspects of Spanish Inheritance Law by discussing the sixth Duke of Wellington's Will

As we know, *renvoi* is a type of conflict of law. It occurs when the law of a country refers, for the solution of a particular problem which has international elements, to the law of another country, which in turn refers back either to the law of the first country or to another law. The first type of conflict is called a *renvoi* of first degree and the latter is of second degree.

Spanish law does not accept the *renvoi* of second degree.

There is a problem of *renvoi* in respect of British subjects.

According to Spanish Law, the estate of a person is regulated by his or her national law. This means, for example, that the provisions for the compulsory portions, which are applicable to Spanish citizens, are not applicable to foreigners, even if they are residents in Spain or all their estate is in Spain or they have died in Spain. The right of a person to deal with his assets after his death is regulated by his national law.

However, English law makes a distinction and provides that real estate of the deceased is regulated by the law of the place where the real estate is situated, *lex rei sitae*. However, all other assets (i.e. not real estate) are regulated by the country of domicile of the deceased. This means that if a British subject dies leaving property in Spain, his estate is in principle regulated by his national law – i.e. English Law. But if English Law refers back to the place where this real estate is situated – in this case Spain – we come back to Spanish Law. This is a *renvoi* of first degree which is accepted by Spanish law.

There have been very few court cases over this matter and the first one is, I gather, the most famous sentence of the Chancery Division of the United Kingdom of 5 May 1947, reference Duke Of Wellington, deceased Glentenar *v.* Wellington.

In 1942, the sixth Duke of Wellington passed away. He also held the title of Duke of Ciudad Rodrigo in Spain and he was the owner of several properties in Spain. He had no children and he made two wills. In the first one he bequeathed all his assets in Spain to the heir of the titles of Wellington and Ciudad Rodrigo and in the second will he dealt with all his other assets. However, according to Salic Law, the title of Duke of Wellington should have gone to his uncle, the Spanish title of Duke of Ciudad Rodrigo should have gone to his sister.

The first will was therefore not enforceable, as the Duke had left the same assets to two different people without specifying who was who and the Judge, Mr Wynn Parry, made a distinction between the real estate and the other assets. As the Duke of Wellington was domiciled in England there was no problem with his other assets but only with respect to his real estate.

The Judge sorted out the problem applying as precedents a decision of 1941 in the matter of Jaber Elias Koeia and another *v.* Katrine Bint Kiryes-Nahas. According to that decision the reference to the national law of a deceased made by Spanish law should be read not in respect of the law that the Court would apply to its own nationals who are domiciled in the country with real estate situated there, but rather of the law that the tribunals of the foreign country might apply to the deceased according to his domicile and the situation of the assets.

The judge also referred to two Spanish Court decisions, one of the year 1900 and the other of 1925. These decisions were contradictory. The judge said that, according to his understanding, the Spanish Court would apply the same law to the whole of the estate. Therefore, he considered it would be against Spanish law for the estate of the Duke of Wellington to be regulated partially by Spanish law and partially by English law. He therefore applied only English law.

This decision was confirmed by the Court of Appeal on 9 December 1947.

Since then, there have been two other court decisions: one, of the High Court in Malaga on 18 December 1996, in a situation where a British subject died in Spain leaving real estate there. The court applied Spanish law because the deceased had no other assets anywhere else in the world and so there would be no problem in respect of applying different laws to the same estate.

Another court case of the same year, dated 15 November 1996, this time from the Supreme Court, brought a different solution – the application of English law in order to avoid the application of different laws to the same estate.

Therefore, in principle the estate of a British subject who dies domiciled in Spain, leaving real estate there, can be regulated by Spanish law unless the deceased also leaves assets in the United Kingdom. This will make UK law applicable because of the principle of unity of the estate.

Nielson Sanchez Stewart
SANCHEZ STEWART ABOGADOS

A New Tax Regime for Leasehold Investment

Imma Sallent explains the new general regime for companies

The Royal Decree 2/2003, of 25 April, introduced a new special tax regime for entities willing to lease properties in Spain and, more recently, the Accompanying Law for 2004 has added certain modifications.

This regime is now an interesting option to be considered by the entities dealing with the leasing of properties which, when conducted on the coast, could have special relevance because of the importance of real estate business in this area.

The entities which comply with the requirements to take advantage of this regime can apply for a bonus of 85% of the overall quota corresponding to rent from leaseholds or the transfer of properties. In fact, such a bonus represents an effective rate of 5.25% of Spanish Corporation Tax (*Impuesto sobre Sociedades*), as opposed to the general rate of 35%.

The modifications introduced by the Accompanying Law widen and extend the scope of the application of the regime introduced in April 2003 since they ease the stated requirements. Thus, according to the cited law, in order for a company which has built, promoted or acquired properties to lease or to offer them on lease, to apply for this tax regime, it must comply with the following requirements:

- The exclusive corporate object of the company must be to lease properties in Spanish territory, although it can also invest in business premises and parking spaces, provided that the accounting value of the same is not higher than 20% of the accounting value of the property.
- The number of leased properties or properties offered on lease shall be no less than 10.
- The Leasehold Agreement shall not include the option to purchase.
- The properties shall be leased or offered to lease for at least 15 years.

In the case that the properties are not under government protection or not protected in any way, the following requirements also have to be fulfilled:

- The built surface must not exceed 110m^2, although it can be up to 135m^2, 20% of the total property area. Moreover, the lease can include a maximum of two parking spaces and any annexes located in the same building if rented together with the property.
- For the first five years of the lease, the annual rent must be reviewed applying, at most, the increase of the Consumption Price Index of the 12 previous months reduced by 0.75%.
- The properties must be acquired for their market value within three years of the completion of construction or the overall restoration.

The new regime offers an opportunity to minimise the tax burden of companies investing along the Spanish coastline.

The bonus of 85% shall also be applicable in the case of transfer of such properties, provided that the property is not acquired by the leaseholder, his or her spouse or relative, closest relatives included up to the third degree and that the sum obtained from the transfer is re-invested, within a period of three years, in other properties which comply with the aforementioned requirements.

As a result of the above, it is clear that the new regime can offer an important opportunity to minimise the taxation burden of companies which are currently investing in properties along the Spanish coastline which satisfy the existent lease demands, leading these companies to consider the alternative of adapting their investments to the requirements requested by the regime and, thus, to be able to apply a rate of 5,25% in the Spanish Corporation Tax. To counterbalance this decision, this will imply that companies must consider their profit objectives on a longer term basis than is usual in this type of real estate investment.

Imma Sallent
Jausas

Civil Liability for Oil Pollution

Robert Collins explains who pays and how much

Where damage is suffered as a result of oil pollution various international conventions have been established to provide what has now become a three-tier system of compensation to benefit claimants in the states that contract into these conventions.

The first tier of compensation arises out of the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 1969), which introduced a regime of strict liability on the shipowner. This means that victims of oil pollution do not have to prove fault on the part of the shipowner in order to obtain compensation for contamination damage, reasonable clean-up costs and any further damage caused as a result of the clean-up operation.

However, the CLC 1969 also provided for a limited number of defences that the Shipowner could use to avoid being held strictly liable. These included where the damage was caused by:

- war, insurrection, or an act of god;
- the deliberate act, or failure to act, by a third party with intent to cause damage; or
- the negligence or other wrongful act of a government or other authority responsible for the maintenance of navigational aids.

It is interesting to note in the light of the recent *Prestige* incident that the third defence listed above (Article III 2 (c)) only applies to an act "in the exercise of that function", i.e. the maintenance of navigational aids. So this would cover the situation where an oil tanker runs aground due to failure of coastal lighting, but not the allegations that have been directed at the Spanish Government for alleged negligence in ordering the *Prestige* out to sea and failing to offer a safe port.

The CLC 1969 was followed by the Protocol to International Convention on Civil Liability for Oil Pollution Damage 1976, and the International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC 1992), collectively referred to as "the CLC Conventions".

If the shipowner cannot make use of any of the above defences he will still be able to limit his liability under the CLC Conventions, the present maximum limit (under CLC 1992, amended limits which came into force on 1 November 2003) being 4.51 million Special Drawing Rights (SDR) ($6 million) for ships of 5,000 GT or under, plus 631 SDR ($898) per ton for each additional gross ton up to a maximum of 89.77 million SDR ($128 million*).

It is interesting to note that it has recently been reported in the press that the Spanish Government is proposing to introduce, as part of its national law, rules for ships seeking refuge. These may include a requirement that ships seeking refuge in a Spanish port will not be granted shelter unless they waive their right to limit liability, so that they would be subject to unlimited liability should an incident such as oil pollution occur.

The second tier of compensation is provided by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (the Fund Convention). Recent amendments have raised the amount of compensation available under the second tier to 203 million SDR ($289 million) less the compensation paid under the CLC (first tier). Furthermore, where three states contributing to the Fund receive more than 600 million tonnes of oil per annum, the maximum amount of compensation is raised to 300,740,000 SDR ($428 million).

As of 1 November 2003 the International Oil Pollution Compensation (IOPC) Fund estimated the total losses caused by the *Prestige* incident could reach €1,100 million (US$ 1,368 million).

The London P&I Club, who are the liability insurers for the shipowner, will meet the then existing CLC limit of approximately €22 million ($ 27 million), whilst the second tier of payments will come from the 1992 Fund. According to IOPC figures this will be approximately €171.5 million ($ 217 million)

It has been estimated that the amount of money available under the then existing limit of 135 million SDRs (approximately $ 192 million) will cover less than 15% of the *Prestige* claims. Even taking account of the recently revised limits of compensation available under CLC 92, only about 21% of the *Prestige* claims could have been met.

Against this background the IMO have adopted a further Protocol in May 2003 to create a Supplementary Fund, a third tier of compensation. However, participation in this Protocol is optional and in any case will not come into force until three months after the eighth state has ratified the Protocol, provided that the ratifying states receive a combined total of 450 million tons of oil annually. This would, however, raise the total compensation available for any one incident under the three tiers to 750 million SDR ($1,067 million).

Whist the system provides for a large amount of compensation from the ship owners and international funds it is nevertheless subject to the above limits, which may prove inadequate once the total value of claims becomes evident.

Robert Collins
Hill Taylor Dickinson Solicitors

* NB All $ figures are approximate only.

BSLA at the House of Lords

Following our AGM last April, a reception was held in the Lord Chancellor's magnificent Private Rooms at the House of Lords.

The reception was distinguished not only by the large attendance but also by the high profile and eminence of those who were present.

The BSLA is planning to arrange similar gatherings in future.

■ The BSLA does not assume legal responsibility for any errors or omissions contained in this Bulletin.

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BSLA, Holborn Hall, 193-197 High Holborn, London, WC1V 7BD.

Holborn Hall, 193-197 High Holborn, London, WC1V 7BD
Tel: 020 7404 8400 Fax: 020 7404 8500
E-mail: cedillo@fscornik.co.uk Website: www.BSLA.org.uk

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