

Insolvency practitioners' legal status and remuneration in the European Countries

by Jan Willem de Haan



This article intends to deal with the questions as raised during the discussions on the subject at the Warsaw INSOL Europe conference in May 2006. The article was written with the help of Judge Enrique Grande of the Commercial Court nº 1 of Barcelona who was interviewed for the occasion and reviewed the article. However, the opinions expressed in the article are not necessarily his opinion.

I will use the abbreviation "IP" when referring to the insolvency practitioner and the term "Insolvent" when referring to the debtor who was granted protection under the insolvency laws.

Spanish insolvency legislation past and present: "Ley Concursal"

The present Spanish insolvency legislation is laid down in the "Ley Concursal" (hereinafter "LC") also known as Act nº 22 of July 9, 2003 which came into force September 1, 2004.

The LC replaced and unified a rather disperse, obsolete and confusing legislation such as:

1. Act of 26 July 1922 known as the suspension of payment act ("Ley de Suspensión de Pagos" or "LSP"). This 24 articles act was drafted as a provisional law for a specific bankruptcy case in Barcelona and had many shortcomings.
2. Book IV of the Commercial Code of 1829 ("CC1829") which dealt with bankruptcies;
3. The articles 376, 870 through 941 of the Commercial Code of 1885 ("CC1985") also dealing with bankruptcies;
4. The articles of title XII and title XXIII of Book 2 of the Spanish Act on Civil Proceedings of 1881 ("Ley de Enjuiciamiento Civil" or "LEC1881"). That part, known as "concurso de acreedores" was not abolished in 2001 at the enactment of the new Spanish Act on Civil Proceedings of 2001 ("LEC2001") awaiting the enactment of the LC in 2004. The "concurso de acreedores" regulation referred to insolvencies of private individuals.
5. Many others such as four other acts (see the only derogatory disposition of the LC mentioning all abolished regulations).

For the sake of briefness I will not enter into the issue of access to the profession of IP or regulations of appointment under the former laws.

Where remuneration is concerned the legislation certainly needed an update. In suspension of payment / moratorium of debt proceedings, the LSP in its article 7 provided that the remuneration of the IP¹ would be settled by the judge and not exceed 100 ptas. (1 € = 166 ptas.). In practice the remuneration was mostly determined between IP and Insolvent.

¹ In this case Insolvency Practitioner exclusively means those persons appointed by the Spanish court as trustee in the insolvency proceedings or "concurso". In suspension of payment / moratorium of debt proceedings, they were called "interventores judiciales".

In case of bankruptcy, art. 1078 of Book IV of the CC1829 provided the following remuneration scheme for the IP's²:

- 0,5% over all collected debts;
- 2% over the sale of floating assets;
- 1% over the sale of fixed assets;

Pros and cons of the new insolvency laws

The merit of the LC is to have unified the insolvency legislation in Spain. The LC also introduced commercial courts allowing appointment of judges specialised in insolvency practice. This will undoubtedly increase the quality of jurisprudence in the field as so far there were no judges specialised in insolvencies. Another merit is that the Spanish legislator has really tried to be exhaustive and foresee all possible scenarios, all according to Roman law tradition. Insolvency practice however requires many times improvisation, quick decisionmaking and acting on the basis of the specific facts of the case. I dare to say that I am not sure whether the LC gives the IP's and judges involved the necessary flexibility to act quickly and expeditiously. The terminology has been simplified as well. The insolvency procedure is named "Concurso" which includes suspension of payment ("suspensión de pagos"), bankruptcy ("quiebra") and meeting of creditors ("concurso de acreedores"). I will use the word "Concurso" for the Spanish insolvency proceedings.

The LC has certainly peculiar provisions. I will just mention one. All creditors have to file proof of their claim within 30 days after being summoned thereto on the risk of their claim being declared "subordinated" to other debts of the same rank. No distinction is made between Spanish and foreign creditors. For foreign creditors such term is too short and therefore this provision seems unfair for those creditors unfamiliar with Spanish legal practice. Additionally if a creditor does not inform on his claim or receivable or does so after the most important procedural acts within the bankruptcy proceedings have taken place, his claim will not be taken into account at all.

Access to the profession

Article 27 of the LC provides that as a general rule three IP's are appointed in a Concurso, a lawyer and an accountant both with at least five years experience and finally a creditor. In case the creditor is a company, the creditor will have to appoint another accountant who will act as IP. In case the creditor is a natural person, he is allowed to act as the third IP. The professional organisations or associations of which the accountants and lawyers are members will draft lists of persons available for appointment as IP. Such list will include extensive information on both experience and education in the insolvency field of the IP concerned.

Judge Grande confirmed that the commercial courts closely look at experience. Education is difficult to judge as there is no harmonized education model for IP's. Most professional organisations do periodically organize courses which can be attended. The professors of these courses are many times the judges of the commercial courts (who decide on appointment).

Art. 28 LC deals with conflict of interest. That is a fairly clear cut article. The bottom line is that no IP can have any relation with the Insolvent.

Nor the law nor the commercial courts require liability insurance. I specifically asked Judge Grande about this. He said that it is not a legal requirement to have a liability insurance and therefore not an issue. Even in practice, it is not considered an issue. In my experience as IP under the former insolvency laws, it was impossible to get a liability insurance for work done as IP. I asked Xavier Davalos of Iurisegur, which is the insurance broker of the Barcelona Bar association and I was happily surprised to learn that AIG now actually offers such liability insurance. AIG, it must be said, is according to the knowledge of Xavier Davalos and my knowledge, the company in Spain offering highest coverage to lawyers for professional liability.

² This scheme was applicable to the IP's appointed by the creditors, the so-called "síndicos". In Spanish bankruptcies, after declaring bankruptcy the court would first appoint two IP's, a "comisario" and a "depositario" who had, among other things, the task to prepare a creditors' meeting for appointment of the "síndicos". After appointment of the "síndicos" the "depositario" would disappear and the "comisario" reduce his tasks.

Remuneration

General principles of remuneration.

As seen above with the remuneration of the IP's under the former insolvency laws, Spain does not have a tradition of charging fees per time spent. Instead, a tradition exists of charging fees that are a percentage of the financial interest of the case, of the court proceedings or of the transaction concerned. There seems to be some change though. The latest regulation (2005) on calculations of fees for legal practitioners by the Bar Association of Barcelona³ provides that:

1. The agreement between the client and the attorney prevails;
2. Subsequently for non court proceedings an hourly rate on the basis of the financial interest is recommended according to Schedule I:

Schedule I

	Basis		Accumulated
Until	€ 10.000,--		€ 150 p.h.
Until	€ 50.000,--	0,15%	€ 210 p.h.
Until	€ 100.000,--	0,10%	€ 260 p.h.
Until	€ 500.000,--	0,04%	€ 400 p.h.
Until	€ 1.000.000,--	0,02%	€ 500 p.h.
Until	€ 2.000.000,--	0,01%	€ 600 p.h.
Excess		0,01%	

p.h. stands for per hour

3. In case of court proceedings, the fixed fee is based on the kind of procedure, the financial interest and the activities performed within the procedure according to Schedule II⁴:

Schedule II

Financial interest case in € until										
	F. 1	A.	F. 2	A.	F. 3	A.	F. 4	A.	F. 5	A.
3.000	10%	300	15%	450	20%	600	30%	900	40%	1200
20.000	8%	1660	12%	2490	15%	3150	20%	4300	22%	4940
50.000	7%	3760	9%	5190	11%	6450	15%	8800	17%	10040
100.000	4%	5760	5%	7690	8%	10450	10%	13800	11%	15540
300.000	2%	9760	2,50%	12690	4%	18450	7%	27800	8%	31540
600.000	1%	12760	1%	15690	2%	24450	5%	42800	5,50%	48040
1.500.000	0,50%	17260	0,75%	22440	1,50%	37950	3%	69800	3,25%	77290
Excess	0,25%		0,30%		0,50%		0,60%		0,75%	

³ The entire regulation can be found at their website at www.icab.es.

⁴ These amounts, if calculated correctly, equal together with the fees of the "procurator" and other expenses justified during the proceedings, the cost of proceedings to which the losing party will be ordered to pay provided that the procedure is lost on all accounts. Under Spanish rules the losing party is only ordered to pay legal proceedings costs if the procedure is lost on all accounts.

F. stands for factor and A. for accumulated meaning the accumulated fees. Depending on the kind of proceedings a different factor is applied. For instance, for main civil proceedings Factor 4 is applied.

Royal decree 1860 of September 6, 2004 (“RD1860”).

Art. 34 of the LC orders the Spanish legislator to draft legislation by Royal Decree that provides for the remuneration system of the Spanish IP’s. Art. 34.2 uses the term “arancel” which can be translated as “tariff” and subsequently the system of remuneration would not differ from the former bankruptcy laws.

Article 1.1 of RD1860 provides that the remuneration of the IP’s will be paid out of the assets of the Insolvent applying the tariffs as specified in RD1860. This leads to the first important conclusion that if there are no assets, there will be no remuneration. Judge Enrique Grande of Commercial Court nº 1 in Barcelona confirmed that in today’s insolvency practice, IP’s might very well have to solve several insolvencies without getting paid. It is the intention of the judges however to compensate these IP’s by appointing them to insolvency procedures where there are assets and they do get paid. Judge Grande confirmed to me that it is not an easy task to satisfy all IP’s as the judges have to use two criteria when appointing IP’s.

In order to avoid any impression of favoritism, the judge needs to appoint the IP’s by simply following the sequence of candidates on the list of official candidates for appointment as IP.

He also needs to make sure that those IP’s that have not received any remuneration in one or various occasions, get appointed as IP’s of insolvencies where do they get paid which implies abandoning the sequence of the list.

As said above a lawyer, an accountant and a creditor are appointed as IP in the Concurso. Interestingly article 2.2 of the RD1860 provides that if that creditor acts as IP, his remuneration as a non-professional IP will be half of that of the other (professional) IP’s.

Article 3 RD1860 limits the remuneration of the IP’s to the tariffs of the RD1860 with the sole exception of travelling expenses. The IP who is accountant will not receive any remuneration for drafting and auditing the annual accounts which he is obliged to do. Article 3.3 RD1860 provides that the lawyer IP will not receive any payment for appealing resolutions of the insolvency procedure judge. The question is whether the lawyer IP will receive payment according to his Bar rules for other proceedings he does such as debt collecting on top on the tariffs as determined in RD1860⁵.

As schedule III and IV are shown the basis of the calculation of the tariffs being the remuneration of the IP’s:

Schedule III

Assets (until euros)	Amount remuneration	Remainder assets (until euros)	Percentage applicable to rest of assets
0	0	500.000	0,600
500.000	3.000	500.000	0,500
1.000.000	5.500	9.000.000	0,400
10.000.000	41.500	40.000.000	0,300
50.000.000	161.500	50.000.000	0,200
100.000.000	261.500	400.000.000	0,100
500.000.000	661.500	500.000.000	0,050
1.000.000.000	911.500	Exceeding	0,025

⁵ Nor the LC nor the RD1860 explicitly deals with this question. None of these regulations forbid the lawyer IP to act as lawyer in legal proceedings to, for instance, collect debts from debtors of the Insolvent. In case the lawyer IP wins a case for the Insolvent on all accounts, the debtor will be ordered to pay the costs of the procedure which include the legal fees as determined by Bar Associations. These legal fees are considered a direct claim of the lawyer against the debtor and would therefore come on top of the “tariffs”.

Schedule IV

Liabilities (until euros)	Amount remuneration	Remainder liabilities (until euros)	Percentage applicable to rest of liabilities
0	0	500.000	0,300
500.000	1.500	500.000	0,200
1.000.000	2.500	9.000.000	0,100
10.000.000	11.500	40.000.000	0,050
50.000.000	31.500	50.000.000	0,025
100.000.000	44.000	400.000.000	0,012
500.000.000	92.000	500.000.000	0,006
1.000.000.000	122.000	Exceeding	0,003

Article 4 RD1860 provides for the two basic rules for calculating the remuneration. If the Insolvent and the IP's have joint signatory authorization, the remuneration of each IP⁶ during the "common phase" of the insolvency procedure is equal to the result of applying Schedule III and IV to subsequently the assets and liabilities of the Insolvent. As an example, if the assets of the Insolvent are valued at € 1.000.000,-- and the liabilities at € 800.000,--, each IP would receive € 5.100,-- (€ 3.000,-- + € 1.500,-- + € 600,--) not including travel expenses. These amounts will be increased with 50% if the IP's had to assume full authority stripping the Insolvent of any authority during the common phase.

RD1860 includes a number of adjustments and exceptions, for instance if later on the amount of assets and liability is adjusted or if only one IP is appointed. In the latter case the tariff can be increased with an amount between 5% to 25%. If the activities of the Insolvent have stopped the tariff will be reduced by 25%⁷.

Article 6 allows the increase of the tariff laid down in the articles 4 and 5, by 5% for fulfilment of each of the following conditions:

- A difference of more than 25% in the assets or liabilities between the value given by the Insolvent and the finally approved value of the assets.
- In case more than 25% of the assets with a total value exceeding € 10.000.000,-- are located outside Spain
- If there are more than 1000 creditors.
- If there are more than 250 workers.
- If proceedings are pending that affect labour relations.
- If the Insolvent has more than 10 plants located in more than 3 provinces.
- If the shares of the Insolvent are publicly traded.
- If the Insolvent is a bank or an insurance company.

Article 7 allows a 25% increase of the tariff if an early settlement is reached.

After the common phase of the Concurso has ended, the procedure continues either with a settlement among the creditors or with liquidation and distribution of the assets. In case of

⁶ Although important, it goes beyond the scope of this article to define what activities are exactly included in the "common phase" or "fase común" of the LC. The LC provides for two possible outcomes of the insolvency procedure, a settlement ("convenio") or liquidation of assets ("liquidación"). In very broad terms, the common phase ends when either the phase for reaching settlement or going into liquidation begins.

⁷ See articles 4.5 and 5 RD1860.

settlement, the remuneration of the IP's equals monthly payments of 10% of the tariffs agreed during the common phase until settlement is reached. The same tariff calculation applies in case of liquidation but with a limit of six months. After six months, it will be 5% per month. Additionally, each of the IP's is entitled to a remuneration equalling 1% over the increase in value of the assets because as a result of collection proceedings or activities.

Finally the additional provision of the LC rules that the Spanish legislator will review the system after some time to analyse whether adjustments must be made.

Tasks of the IP's

In order to give an idea of the work to be performed by the IP's and whether these tariffs seem adequate, I summarize their main tasks as provided for in the LC:

- Represent and manage the enterprise of the Insolvent;
- Continuation and/or initiation of litigation including those to recover assets;
- Investigate and draft report on the state of the Insolvent including balance sheet, list of creditors, actions undertaken by IP's, causes for insolvency, etc.
- Drafting of the list of creditors what requires contacting all creditors;
- Investigate and analyse possible personal liabilities of directors of Insolvent;
- Conclude whether to continue the enterprise of the Insolvent or liquidate.

Evaluation of RD1860 and the system of the remuneration

In my opinion the Spanish legislator has lost a fantastic opportunity to introduce a system of remuneration for the IP's that is reasonable and fair. Hence, the consequence will be that the quality of the work of the IP's will not be guaranteed and/or those professionals that have the quality, knowhow and experience will not be interested in becoming appointed as IP leaving the work to less well-prepared colleagues.

My specific comments and remarks are as follows:

- The remuneration has to be paid from the assets. If there are no assets and this is mostly the case in Spanish practice, then there is no payment⁸. That means that every IP when appointed IP is obliged to take the risk of not getting paid whereas he cannot know upfront how much work needs to be done increasing his risk of having to dedicate a lot of time without payment. As a result, good professionals that already make a good living, will be less interested in taking on this work leaving it to less experienced colleagues.
- The system of fixed tariffs of the LC does not take into consideration how much time is dedicated by the IP's. That could imply that the IP's (who have to make a living) will dedicate minimal efforts to the work they have to perform, such as going after assets (debt collecting), assessing liabilities of the directors for bad management, etc.
- Art. 176.1.4 LC may offer some solution as it enables the IP's to apply for shelving of the insolvency procedure if there are no assets. It remains to be seen how this article will be interpreted in practice. It mentions non-existence of assets but what happens in case of a very small amount assets? More important is the question what work needs to be done to come to the conclusion that there are no assets. The following subsections of the same article (art. 176.3 and 176.4 LC) make it clear that the IP's must proof that there is absolutely no way to recover assets. That will not be easy.
- If there is no expectation of any recovering and thus payment, it is very unlikely that the IP's will continue to carry out necessary investigations where the assets have gone and/or if any personal liability of the directors exists despite a legal obligation thereto. These investigations are necessary and even if there are no assets, funds should be made available

⁸ See the report of September 20, 2006 discussed hereunder. The report confirms in its introduction that the remuneration system is inadequate and many IP's are considering not taking on new appointments as a result.

to allow the IP's to investigate possible embezzlement of assets, bad management, personal liabilities etc., as is the case in other EU-countries⁹.

- A 1% fee over assets recovered is a very low amount of money. In case the Spanish legislator would want to give effective incentives to the trustees to work on a contingency fee basis, it should increase that percentage considerably.
- With reference to Schedule III and IV in my view even if there are assets, the remuneration is still to be considered low. The assets of the Insolvent will in the majority of cases not exceed € 1.000.000,--. With liabilities of the same amount the remuneration would amount to € 8.000,--. For an hourly rate of € 200,--, that would be 40 hours of work, which is very little¹⁰. Even in case of larger amounts of assets/liabilities, which will be exceptional in Spain, the amount of remuneration does not seem to increase more in proportion to the work that will have to be done, hence the problem stills exists. However, I admit that the only way to determine whether the remuneration is fair, is by investigating in due course a number cases and comparing time dedicated and remuneration received.

Report of December 20, 2006 on the position of IP's following introduction of the LC and the RD1860.

Judge Grande gave me a copy of this report. *The Barcelona Bar Association* ("Colegio de Abogados de Barcelona"), the *Association of CPA's of Catalonia* ("Colegio de Censores Jurados de Cuentas de Cataluña"), the *Association of Economists of Catalonia* ("Colegio de Economistas de Cataluña") and the *Association of Business Graduates of Barcelona* ("Colegio Oficial de Titulados Mercantiles y Empresariales de Barcelona") issued a joint report with the abovementioned date evaluating two years of enactment of the LC. The associations come to the following conclusions in relation to the remuneration of the IP's:

- The system of remuneration of Spanish IP's is inadequate. In many insolvencies there are no assets and subsequently no payment can be made. A system of remuneration should be introduced that considers the tasks that in any insolvency should be carried out and which system should not be dependent on the amount of assets (available) and liabilities.
- The report proposes a legislative change, introducing a minimum remuneration of € 4.000,-- per IP. The report also proposes to assure payment that the Insolvent will be obliged to deposit with the court, within five days after the court resolution to declare Concurso, the amount the IP's will be entitled to as remuneration on the basis of the assets and liabilities that the Insolvent declares in his request for insolvency protection.

Conclusion

Any insolvency practice requires an appropriate and fair remuneration system for IP's in order to guarantee that their work is not only done by well-prepared and experienced IP's but also carried out diligently. RD1860 does not guarantee such fair remuneration nor does it offer the necessary flexibility required for the Spanish judges to adapt or adjust the remuneration according to the circumstances of the insolvency case.

The IP's who accept appointment take the risk that in case there are no assets he/she still has to do a lot of work. The possibility to request for shelving of the insolvency proceedings in case there are no assets, seems to limit such risk but it remains to be seen how that possibility will work out in practice. I am convinced that a lot of at least experienced IP's are not willing to take such risk and the report of September 20, 2006 seems to confirm that.

But even if there are assets, the remuneration according to the tariffs of RD1860 is too low. In case of assets and liabilities totalling € 2.000.000,-- a total remuneration per IP of € 8.000,-- would be paid. Even in case the exceptions apply which allow to increase this amount, it can never be an appropriate remuneration for the work that the IP's need to carry out. You then also have to take into account that the remuneration would have to compensate for earlier insolvencies where no payment was received.

⁹ At least in The Netherlands exists a system whereby the court can make funds available to the IP if certain dealings and transactions need to be investigated.

¹⁰ See the tasks of the IP's to get an idea whether such amount seems fair.

If my own case may serve as an example. I have not yet opted for application to be included in the list of candidates of the Barcelona Bar Association for lawyer IP's simply because I consider the risk of a lot of work and no payment too big. I hope that the Spanish legislator in the future will introduce a fair and appropriate remuneration system and I also hope this article is a contribution thereto.

Jan Willem de Haan, Barcelona February 2007