GARRIGUES

Guide to restructuring tools and insolvency proceedings

Spain, Portugal and Latin America

November 2020

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The countries on the Iberian Peninsula (Spain and Portugal) and in Latin America that we analyze in this Guide (Brazil, Chile, Colombia, Mexico and Peru) have much in common as regards the origins and evolution of their respective legal systems - also in terms of restructuring and insolvency. The Iberian scientific doctrine on this subject is studied by the operators in Latin America, and the decisions of the competent Latin American organs are also followed with attention from Iberia.

All these countries share a similar mentality as regards the historical approach of their legislators and judges to the phenomenon of insolvency.

Likewise, all these countries are now facing, in a similar way, the trends irradiated by the influential Anglo-Saxon practice: from the introduction of negotiations among creditors increasingly upstream with respect to the opening of bankruptcy proceedings; to the focus of the object of the restructuring on the financial creditors (including the shareholders); to the clear differentiation between company and underlying business, in order to maximize creditors' recovery.

However, the permeability to the aforementioned Anglo-Saxon trends is asymmetric in the different countries and the speed of penetration depends on the particular idiosyncrasies of each of these jurisdictions. In this Guide we intend to reflect the current state of a number of jurisdictions with respect to specific issues of special interest from the perspective of Anglo-Saxon regimes. We will only address the COVID-19 regulations on restructuring and insolvency when we consider them to be of particular interest. For further information on the COVID-19 regulations on Restructuring and Insolvencies by jurisdictions, you can consult here.

Finally, the regions under analysis are not immune to the tendency of corporations with a more sophisticated capital structure to restructure financially in Anglo-Saxon jurisdictions, opening local procedures with the essential purpose of preserving local business and complying with domestic regulations. Therefore, this exercise of approximation to the substantive laws of the region must be completed, when combined with foreign restructuring procedures, with a rigorous analysis from the point of view of private international law.

This Guide does not constitute advice and any specific question should be consulted with our professionals.

Restructuring tools and insolvency proceedings in

Spain

Restructuring tools and insolvency proceedings in Spain

1. Main restructuring and insolvency proceedings and exit routes

The Spanish Insolvency Law sets out various types of restructuring or insolvency legal frameworks.

The first is the ***"concurso de acreedores" or insolvency proceeding***, which is a proceeding that is supervised intensively by a court, and requires the appointment of an insolvency practitioner. This court proceeding allows different solutions: (i) an arrangement with creditors (the equivalent of a reorganization plan in a US Chapter 11); (ii) liquidation: which may be either "unitary" (by selling the business as a going concern, in a mechanism similar to USC Section 363 sales), or fragmented (by selling the debtor's assets on a piecemeal basis); or (iii) removal of the state of insolvency (for example, through a simple payment or consensual refinancing).

The second consists of refinancing or restructuring agreements, which in turn may be ***collective or bilateral refinancing agreements (acuerdos de refinanciación)***. In each case, if they meet the relevant requirements, and without requiring court supervision, those refinancing agreements are *protected against any claw-back action* in the event the refinancing is ultimately unsuccessful and the debtor ends up in an insolvency proceeding. Additionally, if there are dissenting financial creditors, collective refinancing agreements may be submitted for a court sanction procedure (*homologación*). If it meets the applicable requirements (requisite majorities, viability and fairness), the collective refinancing agreement is sanctioned and then *its effects become binding on the dissenting creditors* who did not sign that agreement voluntarily.

The arrangement with creditors allows an ***intra-class cram-down*** mechanism. The court sanction procedure for refinancing agreements allows both intra-class and ***cross-class cram-down*** mechanisms. Neither the arrangement nor the court sanction procedure allow (for the time being) a cram-down of the shareholders (a mechanism that will not exist in Spain until the EU Restructuring Directive No 2019/1023 is transposed). If, however, shareholders are out of the money and frivolously reject a refinancing agreement proposed by creditors, the shareholders could incur *personal liability* in the event of a subsequent insolvency proceeding.

The third restructuring framework is a ***"pre-insolvency" mechanism (the so-called "pre-concurso")***. This is a notice given by the debtor to the court to inform that it is negotiating with its creditors any of the instruments allowed in Spanish law. The benefits of the pre-insolvency mechanism are a moratorium in the following areas, within a four-month period running from the notice: (i) the debtor's directors are no longer legally bound to initiate a voluntary insolvency proceeding, even if the company is in a situation of current insolvency; (ii) no collective enforcement actions against the debtor (i.e. petitions for a mandatory insolvency order) will be admitted for consideration; and (iii) individual enforcement actions against the debtor by the creditors are halted, with the exception of enforcements of public claims.

Lastly, the fourth restructuring framework is an ***out-of-court payment agreement (acuerdos extrajudiciales de pagos)***, although it is conceived for individuals or companies of a reduced size. The restructuring tools available in an out-of-court payment agreement are less powerful than those included in an arrangement or the court sanction procedure for refinancing agreements. For that reason we focus below on the insolvency proceeding and on the court sanction procedure for refinancing agreements, which are the most commonly used legal frameworks in practice. Overall, we will not refer to the extraordinary and temporary measures approved as a result of the COVID-19 health crisis that may have an impact on insolvency matters, which may be found in further detail here.

2. Procedure

Spanish insolvency proceedings may be broken down into two types: voluntary and mandatory.

On the one hand, the Spanish insolvency proceeding can be a ***voluntary*** one ***(concurso voluntario)***, initiated through a petition filed by the debtor itself, in which case it will generally be ordered by the commercial court with jurisdiction, if the debtor provides sufficient evidence of its state of (current or imminent) insolvency, the existence of multiple creditors, and that the debtor's center of main interests falls within the judicial district of the court in question.

Besides, the option of a ***mandatory insolvency proceeding (concurso necesario)*** also exists, which is a proceeding not initiated by the debtor itself, but instead requested as a compulsory mechanism by any of the debtor's creditors. The court cannot issue an insolvency order for a mandatory insolvency proceeding without giving the debtor the opportunity to be heard beforehand, notably in relation to the status of creditor of the applicant, and/or to the existence of a situation of current insolvency. If the petition for a mandatory insolvency proceeding is successful, as a general rule the court replaces the debtor's directors by an insolvency practitioner. Mandatory insolvency proceedings are less common than voluntary insolvency proceedings. In practice, creditors usually seek a mandatory insolvency proceeding where shareholders of the debtor in a state of insolvency are out of the money, there is no separation between ownership and management, and the company is being managed in a way that benefits its shareholders to the detriment of its creditors.

From a ***procedural standpoint***, the insolvency proceeding consists of a first phase, called the common or observation phase, in which the insolvency practitioner diagnoses whether the business is viable or has to be liquidated because, for instance, it is loss-making. In this phase, the insolvency practitioner also prepares an inventory of assets and rights and a list of creditors. All interested parties are allowed to submit pleadings. After the common phase, the arrangement phase and the liquidation phase may be commenced as alternatives or one after the other (although an arrangement phase may not commence after a liquidation phase has commenced).

The goal of the ***arrangement phase*** is to allow the debtor to agree to an arrangement with its creditors, by applying the *majority principle* to enable the adoption of collective agreements. Different majorities are required which may be greater or lesser depending on the particular creditor class affected by the restructuring measures, and depending on the burden that creditors are asked to bear. The judge may call a face-to-face meeting of creditors or elect to process the proposals for an arrangement in writing. If a proposal for an arrangement is confirmed, the judicial phase of the insolvency proceeding is closed and the insolvency practitioner is removed, although he may remain as a mere supervisor of the fulfillment of the arrangement. In the absence of approval of an arrangement with creditors, or of a breach of any such arrangement, the liquidation phase on the debtor is opened.

The aim of the ***liquidation phase*** is to realize the debtor's assets and rights, preferably *in a single unitary liquidation* (that is, by selling its business as a going concern to a third party) and, failing that, *in a piecemeal liquidation* (that is, the business stops operating and employment contracts are terminated). The sale of the business as a going concern is made in a free and clear sale of the company (with certain exceptions for labor and social security debts), generally after a competitive bidding sale process that seeks to emulate, in distressed circumstances, the characteristics of classic M&A sales (USC Section 363 sales). This type of sale of productive units was conceived to be made in the liquidation phase, although it has been brought forward in time to preserve the value of businesses which would otherwise decline during the substantiation of the insolvency process.

Once the value has been realized through the sale of the productive unit, the insolvency process continues with the distribution of the proceeds of the sale among the various interested parties, and any potential action to dispute the distribution is brought within the process. It must be mentioned, however, that the Spanish insolvency proceeding ***does not recognize contractual orders of priority agreed bilaterally between a few classes of creditors***, but instead only recognizes the orders of priority specified in the law, which in turn only allows absolute, but not relative, subordination. The enforcement of relative subordination agreements reached among only a few of the creditors has to be heard by courts with jurisdiction for the agreements concerned, not by the insolvency judge.

Spanish law also expressly provides that a petition for a voluntary insolvency order may be accompanied by a specific proposal for a way out or exit route from the insolvency proceeding, via an arrangement or via

liquidation. Namely, on the one hand, the debtor may together with its petition for an insolvency order directly request the commencement of the liquidation phase and the sale of the productive unit as a going concern to a specified third party, in which case that third party's binding purchase offer must accompany the petition for an insolvency order. This is a similar insolvency mechanism to the *UK's pre-pack administration*. Judges are reluctant, however, to authorize the sale of the company free and clear of debts to the proposed third party if the debtor does not produce a convincing valuation and/or is unable to provide evidence that, before the insolvency proceeding, a proper and transparent competitive bidding process was conducted. Similarly, the law also allows the petition for an insolvency order to be accompanied by an advance proposal for an arrangement with creditors, approved by the relevant majorities of creditors, in a similar way to a US pre-packaged plan. In the two cases mentioned, the insolvency proceeding with a "stapled" proposal for an arrangement or for liquidation is conducted as a short-form proceeding, with lighter procedures and shorter time periods than would ordinarily apply. In this way, debtors are rewarded for bringing the problem to an insolvency proceeding, and also for working out the solution.

Lastly, a court sanction procedure application for refinancing agreements can only be filed with the ***debtor's consent***, because the court will not sanction a refinancing agreement that has not been signed by the debtor (i.e. by its managing body). Creditors are also allowed to apply for a court sanction procedure for a refinancing agreement signed by the debtor, although that is purely a procedural or administrative, not a substantive, option because the court sanction must relate to an agreement (as opposed to a plan). Moreover, as we said before, in Spain, a cram-down of shareholders is not yet allowed, and therefore any potential measures involving debt-for-equity swaps or dilution of the existing shareholders have to be accepted by them.

3. Moratorium and exclusivity

The insolvency order (whether voluntary or mandatory) implies an ***automatic and immediate moratorium*** on individual enforcement actions by creditors.

The only *exceptions* are, in specific cases, enforcements of public claims, or enforcements of collateral consisting of certain types of assets, depending on their nature (i.e. certain types of financial collateral eligible as safe harbor protection) or depending on their role in keeping the debtor's business alive (at the discretion of the insolvency judge).

The moratorium on the enforcement of collateral lasts for a year following the insolvency order as long as the liquidation phase has not commenced. This may be seen therefore as an exclusivity period for the debtor in which to propose an arrangement with creditors that will afford viability to the company and may be approved by the court (if it receives the support of the relevant majorities of creditors) while the creditors are unable to enforce their collateral.

A moratorium within insolvency proceedings also renders inapplicable ***any ipso facto clauses*** (i.e. clauses allowing the debtor's counterparty to terminate the contract simply by reason of the insolvency order). Furthermore, after the insolvency order has been issued, the ***termination and performance regime for contracts*** to which the debtor is a party becomes subject to exceptions to the ordinary civil law regime: they may only be terminated by the insolvency judge, who may decide to do so in the interest of the insolvency proceeding. The insolvency judge also has the power to order that any contracts breached by the debtor remain in force, subject to certain conditions.

On the other hand, the application for a court sanction procedure for a refinancing agreement implies a moratorium on individual enforcement actions by creditors. The moratorium under the pre-insolvency mechanism is also applicable to individual enforcement actions, although not to enforcement actions related to public claims. Neither the application for the court sanction procedure nor the pre-insolvency mechanism affect *ipso facto* clauses, or the ability of the debtor's contractual counterparties to terminate their contracts or suspend their obligations. This last element will probably change when the lawmakers transpose the Restructuring Directive 2019/1023 in Spain.

4. Control and divestment of the debtor

In pre-insolvency mechanisms and the court sanction procedure for refinancing agreements, specific court supervision is required, and does not imply the appointment of an insolvency practitioner: ***the debtor remains in possession***. In practice, however, it is not uncommon for a refinancing arrangement to involve the voluntary appointment by the debtor of a chief restructuring officer, or for a change of control of the debtor to occur as a result of a debt-for-equity swap diluting existing shareholders' interests in the company's capital and their ability to appoint the majority of its board members. In these cases, there is an exception to the automatic legal subordination rule for claims held by persons related to the debtor (such as new shareholders or directors) in the event the refinancing is unsuccessful and ultimately the insolvency proceedings of the company kick off.

In the event of an insolvency order, however, the court appoints an insolvency practitioner. The appointment is usually received by a lawyer or economist, boutique firms providing specialized services of this type or any of the big four firms. With a few exceptions, the court ***chooses the insolvency practitioner.***

The ***divestment regime*** may be to a greater or lesser degree depending on the circumstances. In a mandatory insolvency proceeding, the general rule is that the debtor's managing body is replaced completely by the insolvency practitioner.

In a voluntary insolvency proceeding, however, the general rule is for the debtor's managing body simply to be supervised by the insolvency practitioner. In other words, the managing body retains its ability to decide over operational matters, but cannot validly make payments or acts of disposal without the prior authorization of the insolvency practitioner.

The judge's decision as to whether to keep the debtor simply under supervision or to replace it with the insolvency practitioner usually depends in practice on whether the ground for insolvency is perceived as external and on the ability of the managing body to continue managing the company diligently. This is usually related to whether the insolvency proceeding is voluntary or mandatory.

5. Groups of companies

Spanish insolvency law is targeted at the debtor or commercial company individually considered. In the case of multi-company groups, each individual company that elects any of the restructuring or insolvency frameworks must meet the relevant requirements.

The Spanish Insolvency Law contains a few provisions governing ***groups of companies from a procedural angle***, directed at more efficient management of proceedings affecting all or some of the companies in a single group (option of joining together proceedings before the same court, appointing the same insolvency practitioner for all the insolvent companies in the same group, for example). ***Substantive consolidation*** of assets and liabilities is also allowed (notably, where assets and liabilities are combined), although this mechanism is only used in very exceptional cases.

Lastly, the option does not currently exist in Spain to release third parties, typically the debtor's guarantors or debtors, who are not directly parties to the insolvency proceeding or court sanction procedure; even where those third parties belong to the same group of companies as a significant debtor that is included among the companies subject to the insolvency proceeding. In other words, there is no ***release of third parties***.

6. Commercial and employment contracts

Pre-insolvency mechanisms and the court sanction procedure for refinancing agreements are not frameworks involving extraordinary legal measures with respect to the ordinary civil law provisions on the contracts to which the debtor is a party.

The insolvency proceeding, however, does involve various extraordinary measures in relation to contracts.

Firstly, an insolvency proceeding disables any ***ipso facto clauses***, which allow for the early termination of contracts simply because of the insolvency order. Early termination of a contract by reason of the insolvency is only allowed where the specific legislation on the contracts concerned (agency contracts, for example) expressly so permits.

Secondly, the insolvency judge may ***terminate a contract in the interest of the insolvency proceeding***, subject to certain requirements. The required indemnification has to be determined by the insolvency judge and will have the order of priority of a post-petition claim or administration expense.

Thirdly, the insolvency judge may override a termination event and so ***confirm a contract in the interest of the insolvency proceeding***, as long as the breach is cured.

Fourthly, in the event of a sale to a third party of a productive unit which in order to operate needs certain contracts held by the debtor, the insolvency judge may ***order the compulsory assignment of those contracts to the purchaser***, which does not need the consent of the counterparties to each of the relevant contracts.

Moreover, in relation to a few specific types of contracts (such as lease agreements or credit facility agreements), there are special rules allowing ***judicial reinstatement*** of any contracts that had been terminated in the three months immediately preceding the insolvency order.

Lastly, in relation to ***employment contracts***, the insolvency judge has the jurisdiction to hear applications for their amendment or termination, if they relate to collective actions (as opposed to individual actions by staff other than members of senior management). Where collective layoffs are involved, the insolvency judge has the jurisdiction to terminate employment contracts, and to determine the payable amounts of severance by reference to the debtor's situation.

7. Restructuring plan and proposals to creditors

The ***initiative*** to propose an arrangement (*convenio*) with creditors in an insolvency proceeding lies with both debtor and creditors. Because the cram-down of shareholders does not yet exist in Spanish insolvency proceedings, however, it is not common in practice for creditors to take the initiative. In fact, even if a proposal that comes from the creditors obtains a relevant majority, the debtor still has the prerogative to impose liquidation of the company in any event, and therefore, has a *de facto* veto right to prevent the creditors' proposal being confirmed by the court. The same situation occurs in a court sanction procedure for refinancing agreements: even where the creditors are entitled to apply for the court sanction procedure, that sanction must relate to a refinancing agreement signed by the debtor; meaning that in the absence of the debtor's consent, the judge cannot impose a specific refinancing arrangement on the debtor, or on its shareholders (where there are measures involving debt-for-equity swaps). Indeed, until the Restructuring Directive is implemented, the legislation in Spain does not confer on the judge the ability to cram down shareholders.

In relation to the ***requirements applying to the solicitation and disclosure statement*** to creditors regarding the restructuring plan, these can vary depending on the existing scenario. In the case of a proposal for an arrangement within an insolvency proceeding, the legislation lays down a set of minimum requirements in relation to disclosure, and prevents votes or accessions in relation to a specific arrangement from being obtained until creditors have had access to that information. For refinancing agreements, by contrast, no minimum information package is laid down, which is explained by the fact that the court sanction procedure can only make the effects of refinancing agreements binding on dissenting financial creditors (as opposed to operational or public creditors, with less capacity than financial creditors to bargain for information).

And ***class formation*** may vary again depending on the existing scenario. For an arrangement, the creditor classes are strictly those set out in the law (privileged, ordinary, subordinated, among others), and the claims are placed in each class regardless of relative subordination clauses that they may have agreed among themselves. The protection of creditors takes place through the relevant majorities, and through the need for separate voting where two groups of creditors in a same class receive different types of treatment. The option of cross-class cram-down through the arrangement does not exist, only the option for the majority of claims in one class to bind the dissenting creditors in that same class (an intra-class cram-down mechanism). Therefore, no fairness test is needed in relation to the different treatment among classes because, for an

arrangement to be confirmed, each and every one of them has to have obtained the relevant majority. No priority rule governs recovery among classes.

By contrast, in a court sanction procedure for a refinancing agreement, shareholders do not have such *ex ante* protection through the requirement for majorities by classes of creditors rigorously defined. Only two classes of financial creditors are formed: secured claims and unsecured claims. The required majorities vary depending on the intensity of the burden associated with the restructuring measures required for each creditor class. However, although in the court sanction procedure scenario, cross-class cram-down does exist (secured creditors can cram down unsecured creditors, for example), the protection of shareholders, instead of occurring *ex ante* through majorities that come into play through certain majorities that operate on classes that do not reflect the hierarchy of the different orders of priority, takes place *ex post* through a type of "unfair prejudice" control. Indeed, if the creditors in a class that has been crammed down (without the support of an internal majority for the refinancing) by another class (with internal majority support) consider that the treatment that they have received is unfair (because, for example, the trade-off imposed on them is in their view unnecessary by reference to the viability plan or excessive in comparison with other classes with the same or a lower order of priority), then those creditors may challenge the court sanction. If the challenge is successful following the appropriate adversarial proceeding, the dissenting creditors will be released from any effects under the refinancing agreement.

8. Costs of the proceeding

In an insolvency proceeding, the expense associated with the insolvency practitioner and the debtor's legal advisors are classed as an administrative expense. The insolvency practitioner's fees are a tariff determined by law by reference to the characteristics of the debtor's business. The law does not however state that the costs associated with advice to creditors is also an administrative expense.

In refinancing scenarios, it is common for the expense associated with advice to creditors to be met directly by the debtor or out of any fresh money that is injected by the creditors under the refinancing agreement itself. There is nothing preventing this occurring for any fresh money injected into the insolvency proceeding under an arrangement with creditors.

9. DIP financing

The debtor may obtain fresh money in insolvency proceeding scenarios and in-court sanction procedures for a refinancing agreement.

In actual fact, there are certain types of legal incentives for the injection of fresh money as part of a refinancing, such as ***protection against claw-back actions*** or the ***grant of a higher order of priority*** to such fresh money (a portion of it as a post-petition claim and another portion as a general preferred claim in the event of a later insolvency proceeding; without limiting the special seniority assigned to secured claims).

Fresh money may be secured with collateral in the form of lien-free assets, or with new junior liens on assets already subject to liens. The law does not state, however, that fresh money may be secured by shifting the priority, or giving it a higher order of priority than of existing collateral: in other words, there is no option to obtain fresh money with priming liens. Super-seniority shall therefore be bargained for with preexisting senior secured creditors.

Moreover, if the fresh money is provided directly by ***persons related*** to the debtor, there is the risk of it automatically being classed as a subordinated claim in the event of a later insolvency proceeding of the debtor. COVID-19 regulations have however introduced an exception to the connected parties subordination rule, in order to promote support to distressed companies.

10. Recognition of Spanish insolvency proceedings in the European Union and LATAM countries

The European Union is guided by the European Insolvency Regulation, which contains a number of laws for (i) attribution of international judicial jurisdiction among the member states for various restructuring and insolvency proceedings; (ii) coordination of those proceedings; (iii) cooperation between the courts and insolvency practitioners appointed in main and secondary proceedings; and (iv) determination of the law applicable to a number of considerably important insolvency issues (enforcement of collateral, employment contracts, claw-back actions, among others).

The insolvency proceeding, the pre-insolvency mechanism, and the court sanction procedure for refinancing agreements are all included in the relevant annex to the Regulation. Therefore, the commencement of these proceedings in Spain will (as long as they are public and not reserved or confidential) be recognized in other member states, the member states will not be able successively to commence another competing main proceeding, and will have to recognize the decisions delivered in the Spanish proceeding. The Spanish judge may open insolvency proceedings on companies from other countries and with registered offices in places outside Spain, if the center of main interests of the company concerned is in Spain. The jurisdiction for determining whether the center of main interests of a European company is in Spain lies with the Spanish courts.

With respect to non-EU countries, the Spanish Insolvency Law also contains a number of rules of private international law, which are inspired by the Insolvency Regulation and are much more ambitious than those envisaged in the UNCITRAL Model Law. The rules in the Spanish insolvency law permit a certain amount of flexibility so that, if it is more efficient to carry out the financial restructuring of a company in a country other than Spain and there is a close link between the company's activity and that country, the effect on business operations in Spain is minimal.

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Restructuring tools and insolvency proceedings in

Brazil

Restructuring tools and insolvency proceedings in Brazil[1]

1. Main restructuring and insolvency proceedings

The Brazilian Insolvency Law, Law 11.101/2005[2] sets out three types of restructuring or insolvency proceedings.

The first is the ***out-of-court reorganization***. The aim of this proceeding is to enable the debtor to continue as a going concern and it consists of giving distressed debtors the option of negotiating a reorganization plan without the need for prior court supervision, and for the plan to be submitted later for sanction by the court with jurisdiction. This proceeding is not applicable for tax or labor claims. After it has been sanctioned by the court, the plan binds both the creditors that expressly acceded to it and all the creditors with debts in the same class, provided that the plan had been approved by more than three-fifths of the creditors in the same class (in an intra-class cramdown mechanism). The plan cannot, however, provide for the advance payment of debts or unfavorable treatment for any creditors not falling under it. Outside the terms of the reorganization plan, the company continues with its normal operations. Therefore, from a legal standpoint, a proceeding of this type should not affect the validity of existing contracts.

The second proceeding is a ***court reorganization*** which also seeks to enable debtors to continue as a going concern. In this proceeding, debtors in a distressed position have the option to apply to the court to be able to file a reorganization plan (the equivalent of a US Chapter 11 reorganization plan) which, after it has been approved with the quorums specified in the Brazilian Insolvency Law and sanctioned, is binding on all creditors existing as of the date of the application, including the holders of unmatured claims (in a cross-class cramdown mechanism). After the application has been approved by the judge, the debtor will have 60 days to file the plan. In the same decision the judge appoints the insolvency practitioner, whose main role is to supervise the debtor's activity, because, as a general rule, the debtor continues to manage the company.

A judicial reorganization plan halt the prescription period and suspends all actions and enforcements against the debtor (except for any related to tax) for up to 180 days. At the end of that period, creditors recover their rights to initiate or continue with their actions and enforcements. The plan may envisage a number of different ways to secure recovery for the company, including: granting special time periods and terms for the payment of debts, matured or otherwise; restructuring or change of control of the company; sale of assets, among others. A judicial reorganization may give rise to an insolvency proceeding as a result of the deliberations of creditors at a creditors' meeting, failure to file the plan within the statutory time period, failure to secure approval for the plan, or a breach of the plan.

The third proceeding is the ***insolvency proceeding*** *(falência)*. Unlike the reorganization proceedings discussed above, the goal of this proceeding is not for the debtor to continue operating, instead the liquidation of its assets and the payment of its debts.

As with the judicial reorganization, the insolvency order halt the prescription period, suspends all actions and enforcements against the debtor, and is binding on all the creditors, who are only allowed to exercise their rights over the debtor's assets under the provisions contained in the Brazilian Insolvency Law (*par conditio creditorum*). The managing body is removed from management of the insolvent company, which is taken over by the insolvency practitioner.

The two most commonly used proceedings in Brazil in practice are the judicial reorganization and the insolvency proceeding.

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[1] Prepared by the Brazilian law firm NBF|A.
[2] We must point out that bills aimed at a broad reform of that law are currently undergoing the Brazilian parliamentary process.

2. Procedure

The ***judicial reorganization*** is a ***voluntary proceeding***, in other words, it is initiated with an application to the competent court by the debtor, involving the satisfaction of a number of requirements and the filing of a number of documents required under the Insolvency Law.

From a ***procedural standpoint***, after the court has authorized commencement of the reorganization process: (i) the judge appoints a insolvency practitioner, whose main role is to coordinate the relationship between the debtor and its creditors, supervise the debtor's activities and oversee compliance with the reorganization plan (usually the debtor and its managing body stay involved in operational matters related to the business); (ii) as a general rule, actions and enforcements against the debtor are suspended for up to 180 days; and (iii) the sixty-day period in which the debtor has to file a judicial reorganization plan starts running. In parallel, a claims verification process conducted by the court-appointed insolvency practitioner commences.

After the plan has been filed, creditors have the opportunity to challenge it, in which case, a creditors' meeting must be held to discuss this. The meeting cannot be held later than 150 days after the date of the decision that authorized the commencement of the reorganization proceeding. The reorganization plan has to be approved by every creditor class, with the quorums applicable to each one, as determined in the Brazilian Insolvency Law.

If the plan is approved, the reorganization proceeding itself commences, which, in principle, may last up to two years. Conversely, if the plan is rejected, the judge has to issue an insolvency order on the debtor.

The judge will also be able to issue an insolvency order if the debtor breaches the plan during the judicial reorganization.

The ***insolvency proceeding***, in turn, may be either ***voluntary*** (*autofalência*) or ***involuntary***.

A voluntary insolvency proceeding is initiated through a petition by the debtor, in which case the court will issue an insolvency order if the debtor provides evidence of, and the court confirms, its irreversible state of insolvency, by producing all the documents listed in the Brazilian Insolvency Law.

The debtor's state of insolvency is identified where: (i) its assets are insufficient to meet its liabilities (actual insolvency) or (ii) even though its assets are greater than its liabilities, the debtor does not have sufficient funds available to meet its obligations and as a result is unable meet its obligations as they fall due.

An ***involuntary insolvency proceeding*** is one requested by a creditor, heir or partner/shareholder of the debtor company. As a general rule, an insolvency order will be issued where the debtor: (i) for no significant legal reason, stops paying as they fall due liquid debts higher than 40 minimum salaries (approximately R$ 41,800); (ii) has been the subject of enforcement of any liquid due and payable amount and fails to pay or provide security within the statutory time period; or (iii) carries out any of the activities which the Brazilian Insolvency Law defines as grounds for insolvency (precipitated liquidation of assets, use of fraudulent methods of payment, performance of fraudulent business transactions to defraud creditors, among others).

From a ***procedural standpoint***, if it is considered that the foregoing requirements are met, the insolvency judge approves the application and delivers a judgment with an insolvency order, which will contain a number of rulings relating to the insolvency process, among which it will: (i) order that the debtor file, within 5 days, a list of the names of its creditors, stating the amount, type and classification of their respective claims, in the event that list has not been filed with the petition for an insolvency order, subject to a penalty for disobedience; (ii) order the suspension of all judicial actions or enforcements in progress against the debtor; (iii) prohibit any act of disposal or creation of liens on the debtor's assets; (iv) appoint the insolvency practitioner; (v) determine: (a) the provisional continuation of the debtor's operations, which will be managed by the insolvency practitioner, or (b) closure of its operations/establishments; (vi) require, where applicable, the calling of a general creditors' meeting to create the creditors' committee; (vii) order publication of the official notice containing the full wording of the insolvency order judgment and the list of creditors.

The debtor, through its legal representatives, is required to participate in the insolvency proceeding, or it will run the risk of incurring liability, including criminal liability, and it will have to cooperate throughout the proceeding, by providing all the necessary documents, information and clarifications.

Following publication of the insolvency order, creditors will have 45 days to include their claims, in other words, they must appear in order to be admitted to the insolvency proceeding to be registered as creditors of the debtor company.

In that period the insolvency practitioner will compile a list of the debtor company's assets, even if the debtor is not in possession of them, and their values for subsequent sale. The assets on the list have to be valued within 30 days following their inclusion and the insolvency practitioner has to file with the judge an inventory signed together with the debtor.

After compiling a list of the assets, these will be transferred in the transactions allowed in the Insolvency Law: (i) sale of the company, with the sale of its productive units en bloc; (ii) sale of the company, with the sale of its establishments or productive units separately; (iii) sale en bloc of the assets belonging to the establishments of the debtor company; and (iv) sale of its assets individually.

At the end of that proceeding, the insolvency practitioner has to prepare a report containing the amounts collected and the practitioner's proposal for distributing that amount among the debtor's creditors, with observance of the creditors' legal order of priority. The Brazilian Insolvency Law contains the following order of priority for claims: (i) labor claims or claims relating to occupational accidents up to a limit of 150 minimum wages (R$ 156,750 approximately); (ii) secured claims to the extent of the value of the asset provided as security; (iii) tax claims; (iv) special preferred claims; (v) general preferred claims; (vi) ordinary claims (*quirografários*); (vii) subordinated claims.

Then, the procedure for payment of creditors starts, which ends when all the debtor's liabilities have been paid or the money collected from realizing the assets runs out and the accounts are submitted to the judge by the insolvency practitioner within 30 days running from the last payment made by the debtor to its creditors.

When the challenge period for creditors has ended, the filing and approval of the insolvency practitioner's report have taken place, the insolvency proceeding will be deemed concluded.

3. Moratorium and exclusivity

Both the approval of the application for judicial reorganization and the insolvency order involve an ***automatic and immediate moratorium*** on potential actions and enforcements by creditors.

The judicial reorganization halt the prescription period and suspends actions and enforcements against the debtor for up to 180 days. At the end of that period, creditors recover their rights to initiate or continue with their actions and enforcements. Actions and enforcements of a tax nature fall outside that suspension.

The insolvency order also halt the prescription period, suspends all actions and enforcements against the debtor, and is binding on all creditors, who are only allowed to exercise their rights over the debtor's assets as determined in the Brazilian Insolvency Law (*par conditio creditorum*).

Any actions relating to labor claims that are not recognized spontaneously by the debtor have to be claimed separately by bringing action under labor law. These claims must be handled at the relevant labor court until the amount of the claim owed to the employee is determined, at which point it will be included on the general list of creditors / in the reorganization plan. Employees are allowed to apply to the court hearing the reorganization or insolvency proceeding to make provision for and set aside the amount they consider is owed to them until the amount is determined in a labor proceeding.

4. Control and divestment of the debtor

As a general rule, during the ***judicial reorganization*** the debtor ***retains its powers of management*** of the company, although under the scrutiny of a creditors' committee and the court-appointed insolvency practitioner.

By contrast, in the event of an ***insolvency proceeding***, management of the company pivots away from its shareholders to the ***insolvency practitioner***, including powers to decide the fate of its assets.

The debtor will have the right to scrutinize that management and request any interlocutory orders it considers necessary to protect the debtor's assets. Depending on the circumstances, the insolvency judge may –in the insolvency order– allow the debtor to continue operating its business provisionally to achieve the objectives of the insolvency proceeding.

The ***choice of the insolvency practitioner*** lies with the court and the appointment should preferably be received by a lawyer, economist, administrator, accountant or firms specialized in providing services of this type.

5. Groups of companies

The Brazilian Insolvency Law does not contain provisions on insolvency proceedings on ***groups of companies (business groups)***, and the courts are responsible for making decisions in this respect.

In relation to a ***judicial reorganization*****,** authorization is given for several companies in the same group to apply for this type of reorganization under the general procedural rules (requirements for the creation of a ***co-claimant***), provided that each company electing the reorganization meets the ***relevant statutory requirements***, and among them, it must have been formed at least two years before the time when the petition for reorganization is filed and not participated in any other judicial reorganization in the previous five years. There are discrepancies among the courts over whether a plan needs to be filed for each company or whether a single plan may be filed for all of the companies requesting the reorganization.

Additionally, in relation to ***compulsory insolvency proceedings***, the insolvency order on a group of companies is typically used as a means of protecting creditors and securing payment of the insolvent company's debtors.

Moreover, despite the absence of any express provision in the Insolvency Law, the Brazilian courts have been applying, in specific circumstances, the principle of ***disregard of the legal entity*** as envisaged in the Brazilian Civil Code, with a view to making the effects of the insolvency proceeding binding on other companies in the same group. Under the applicable legislation, disregard of the legal entity applies where there has been abuse of legal personality, characterized by misuse of the corporate purpose or by combining assets.

6. Commercial and employment contracts

Unless the reorganization plan expressly provides otherwise, obligations existing before the ***court reorganization*** will retain their originally stipulated terms and conditions or those provided in the law. Therefore, from a legal standpoint, unless the approved plan affects existing contracts in any way, these ought to remain in force subject to their own terms.

As for employment contracts, the reorganization plan may establish restructuring measures entailing their amendment or termination, together with payment of the relevant amount of severance (because the claim will be after the commencement of the judicial reorganization), and must be approved by at least half of the creditors present at the creditors' meeting. The unions are allowed to represent the workers at that meeting, and companies under judicial reorganization can negotiate collective agreements so that they can successfully secure approval of the plan.

Moreover, the plan cannot contain the following terms: (i) extension of a period for longer than one year for the payment of claims owed under labor legislation or in respect of an occupational accident which had fallen due before the date of the petition for the reorganization; or (ii) a period of more than 30 days for the payment of strictly wage claims that fell due in the three months before the petition for judicial reorganization (up to a limit of five minimum wages per worker).

Otherwise, bilateral contracts are not terminated simply by reason of the insolvency order commencing an ***insolvency proceeding*** and may be performed where the insolvency practitioner so decides if they ***reduce or prevent an increase in the liabilities*** of the estate or are ***necessary for maintaining and preserving its assets***, with the authorization of the creditors' committee. Therefore, in principle the insolvency practitioner is responsible for deciding whether the insolvent company will continue with each of its contracts. If the insolvency practitioner chooses not to allow the contract to be continued, the counterparty will be entitled to indemnification, which will give rise to an unsecured *(quirografario*) claim within the insolvency proceeding.

There is no express provision in the Brazilian Insolvency Law regarding the invalidity of ***ipso facto clauses***, which determine early termination of the contract simply by reason of the petition for judicial reorganization or an insolvency order. The validity of those clauses is questionable legally, however, –indeed many courts reject them in practice– owing to the fact that the main purpose of a judicial reorganization is for the debtor to continue operating and, in an insolvency proceeding, the law expressly grants the insolvency practitioner the power to decide whether the debtor can continue with its signed contracts.

Lastly, in relation to ***employment contracts***, as a general rule, an insolvency order terminates the insolvent company's employment contracts on the ground that they are impossible to perform, and the employees are owed all the stipulated entitlements and payments for individual dismissals. These claims are paid with priority for the workers, before the payment of any other claim within the insolvency proceeding, subject to a limit equal to 150 minimum wages per worker.

7. Restructuring plan and proposals to creditors

The ***initiative*** to propose a judicial reorganization lies with the debtor, which must file the reorganization plan within 60 days running from authorization of the reorganization proceeding by the court with jurisdiction. Consequently, a reorganization proceeding cannot be imposed on debtors without their consent.

The law contains a number of ***requirements applying to solicitation and disclosure statements*** for both the written petition for reorganization filed with the court (e.g. the reasons for the petition, financial statements for the latest three fiscal years, complete list of creditors and employees, list of assets of the shareholders/members, extracts of debtor's bank accounts, list of court proceedings, among others), and for the reorganization plan (e.g. list of the proposals for recovery that the company intends to use, proof of its economic viability –viability plan–, economic and financial report and valuation report on the debtors' assets signed by a legally authorized professional or a specialized firm, among others).

The reorganization plan has to be approved by every ***creditor class***, subject to the following quorums applicable to each one:

(i) Creditors holding labor claims: a simple majority of the creditors present, irrespective of the amounts of their claims;

(ii) Creditors holding secured claims: more than half of the aggregate amount of all claims present at the meeting and, cumulatively, a simple majority of the creditors present;

(iii) Creditors holding special preferred, general preferred, or subordinated unsecured (*quirografarios)* claims: more than half the aggregate value of all claims present at the meeting and, cumulatively, a simple majority of the creditors present;

(iv) Creditors classified as microcompanies: simple majority of the creditors present, irrespective of the amount of their claims.

Creditors whose claims are not affected by the recovery plan are not allowed to vote.

Moreover, the Brazilian Insolvency Law allows the judge to authorize a reorganization on the basis of a plan that has not been approved by the quorums mentioned above, if, at the meeting itself, that plan: (i) was approved by creditors representing more than half the aggregate amount of all claims present at the meeting, irrespective of their classes; (ii) was approved by at least two creditor classes (out of the four existing classes)

or, if there are only two classes, the plan was approved by at least one of them; and (iii) in relation to the class that rejected it, the plan received the favorable vote of at least a third of the respective creditors.

8. Costs of the proceeding

In an insolvency proceeding, the ***costs related to the insolvency practitioner***, and those related to compiling, administering and liquidating the assets and other costs of the process, are treated as administrative expenses, in other words, they are paid before every claim within the insolvency proceeding, including labor claims.

The insolvency practitioner's fees are a tariff determined by law and depend on the following characteristics: (i) debtor's payment capacity; (ii) degree of complexity of the work; and (iii) market rates, with observance at all times of the limit equal to 5% of the amount subject to court reorganization or of the amount obtained from the sale of assets in the case an insolvency proceeding. The law states that 40% of the aggregate amount owed to the insolvency practitioner has to be paid only after he has submitted his final report.

9. DIP financing

The Brazilian Insolvency Law allows the debtor to obtain new money in a judicial reorganization.

Inspired on US bankruptcy law, the Brazilian rules attempted to incentive the injection of fresh money (***DIP financing)*** by determining that the claims arising from the debtor's obligations after the commencement of the judicial reorganization are to be classed as post-petition claims, in other words, they have a higher priority for payment over the other claims in the insolvency proceeding and are allowed to retain that priority even if the judicial reorganization results in an insolvency proceeding.

Moreover, although there are no specific rules in the Brazilian Insolvency Law on the provision of security to creditors in respect of DIP financing, as a general rule, debtors can apply for authorization from the insolvency judge to provide restricted assets as security in these types of transactions.

In practice, however, there are a number of obstacles to DIP financing in Brazil, such as: (i) the delay in obtaining court decisions authorizing the provision of security by the debtor; (ii) regulatory barriers, because, as a general rules, banks have to make provision for the amounts provided to companies in judicial reorganization; (iii) uncertainty over the original framework of the judicial reorganization, for the financing to be treated as post-petition claims; (iv) the risk that certain creditor classes, such as employees or tax authorities, may try to use the funds lent to the debtor to settle their claims; or (vi) the absence of precedents at the Brazilian courts in this respect.

10. Recognition of Brazilian insolvency proceedings in other countries and of other countries' proceedings in Brazil

The Brazilian Insolvency Law chooses a **territorial model,** under which the effects of a judicial reorganization and of an insolvency proceeding only apply within the country.

The law determines in this respect that the Brazilian courts only have jurisdiction for proceedings related to debtors whose main establishment or branch is located in Brazil, and the simultaneous conduct of national and foreign proceedings is not recognized.

Elsewhere, the Brazilian Insolvency Law provides that creditors may file a petition for an insolvency order on a debtor in Brazil if they provide a bond (*caução*), and only grants exemptions in specific circumstances.

Restructuring tools and insolvency proceedings in

Chile

Restructuring tools and insolvency proceedings in Chile

1. Main restructuring and insolvency proceedings

The Chilean Insolvency Law governs the ways in which both individuals and companies facing a position of insolvency can restructure their liabilities, or liquidate their assets. We describe below only those processes that involve companies or legal entities.

The first is a ***reorganization proceeding*** on the debtor company, the aim of which is for the company to submit to its creditors a proposal for restructuring its liabilities, for the purpose of avoiding its definitive insolvency, meeting its financial obligations, and continuing with its business operations.

This proceeding can take two forms: (i) an insolvency reorganization proceeding*;* and (ii) a simplified reorganization proceeding. The main difference between the two lies in the degree of court supervision during the conduct of the process. The first of these is carried out before a court from the start and is subject to a legally defined procedure. The second consists of a direct liability restructuring agreement between the debtor company and its major creditors (which must hold at least 75% of the liabilities), and to be binding on all creditors it must be approved by a court.

These types of proceedings may result in: (i) a court reorganization plan (the equivalent of a reorganization plan under US Chapter 11); or (ii) liquidation, if the plan proposed by the debtor is not approved by its creditors, or is approved but the debtor is unable to fulfill it.

In the negotiation of a court reorganization plan an ***intra-class cramdown*** and a ***cross-class cramdown*** are allowed.

Lastly, these types of proceedings allow an ***insolvency financial protection*** period which grants the company that filed the petition for reorganization a safety period involving suspension –for an initial term of 30 business days, which may be extended for 60 additional business days with the creditors' support– of the rights of creditors to bring enforcement action against the company and terminate contracts, among other effects.

The second group of proceedings is known as ***liquidation of the debtor company*****.** The aim of these proceedings is the sale of the company as a business unit (or sale of the company as a going concern, as in USC Section 363 sales), or on a piecemeal basis.

These proceedings have to be handled by courts and fall into two categories: (i) voluntary, where the company itself applies for its assets to be sold to pay its creditors; and (ii) compulsory, where one or more of its creditors apply for the sale of the company's assets.

2. Procedure

The ***insolvency reorganization proceeding*** starts with an "admissibility" period in which the debtor files with the court a petition for insolvency reorganization, and accompanies that application immediately with a number of background information documents, including a list of all its debts.

If the debtor meets all the requirements laid down in the law, the court commences the insolvency reorganization proceeding, appoints an independent public official, called overseer (*veedor*) –whose main remit is to prompt agreements between the debtor and its creditors–, and also, orders ***insolvency financial protection*** for the debtor over a period of 30 business days.

Chilean law does not allow any challenge mechanisms to prevent the company becoming subject to these types of plans, or require the debtor's state of insolvency to be corroborated.

Later, a ***negotiation period*** is commenced, which coincides with the insolvency financial protection period, during which the debtor prepares its proposal for a court reorganization plan and negotiates with its creditors. The definitive proposal for judicial reorganization has to be filed at least ten days before date on which the creditors' meeting is to be held to approve or reject it.

The ***court reorganization plan*** must be approved at the creditors' meeting mentioned above, by two-thirds of the creditors present at that meeting, and representing at least 66.67% of the debtor's aggregate liabilities. If approved, it becomes mandatory or binding, for both the debtor and for its creditors.

If the proposed plan is rejected, the debtor is allowed to file a new proposal for a plan which must be supported by creditors holding the same percentage as that mentioned above. If the new proposal for a plan does not achieve that support, or if it is rejected, the court hearing and determining the case must commence a liquidation process on the company.

If, however, the plan is approved, its approval is followed by a fulfillment period in which the debtor and its creditors must abide by the terms contained in the reorganization plan. Any discrepancy arising between the debtor or one or more of its creditors over the plan in this period must be aired at the same court that approved it. If that court holds that the debtor has breached the plan, it will commence a liquidation process on the debtor.

The ***simplified reorganization proceeding,*** for its part, consists of the preparation of a private plan between the debtor and its creditors, which must be sanctioned or approved by a court so that its terms may be imposed on the other creditors.

The purpose of plans of this type is the same as for an insolvency reorganization plan: to restructure the liabilities of a company to meet its financial obligations and continue with its business operations.

To secure court sanction of the plan and make the reorganization plan agreed with its creditors binding, the debtor must file the same background information documents as those required for the judicial reorganization plan, together with a viability report issued by an overseer (*veedor*) registered at the Insolvency and Recovery Agency, and a list of all the action brought against it that may have effects on its property.

After this has been completed, a notice advising of the plan is published in a national publication (insolvency gazette). If it is not challenged within 10 days it will be deemed approved. If it is challenged in that period, the court has to decide those challenges. If they are set aside, the simplified insolvency reorganization plan becomes mandatory for the debtor and for its creditors. Otherwise, if a challenge is upheld, liquidation of the debtor will be decreed.

A ***liquidation proceeding*** may be commenced voluntarily by the company or at the request of one or more creditors.

In a ***voluntary liquidation proceeding***, as with a court reorganization process, the court is not authorized to enter into an analysis of the grounds for the application, meaning that it is not allowed to determine or review the actual state of insolvency of the applicant. Therefore, the law requires the debtor to attach a number of background information documents to the petition for liquidation, which will automatically imply that the company is under a liquidation process.

Whereas a ***compulsory liquidation proceeding*** is initiated through a claim by a creditor or a group of creditors, which must be founded on any of the grounds determined in the law: (i) the debtor must have failed to pay an obligation held by the requesting creditor that is recorded in an enforceable instrument; (ii) there must be two or more matured enforceable instruments against the debtor, in respect of various obligations, and the debtor must not have put forward sufficient assets to meet the obligation and its costs; and (iii) the company or its directors are not identifiable or traceable, in addition to having closed their establishments without leaving a mandate-holder with sufficient powers to perform its obligations.

After being served notice of the claim for liquidation, the debtor is able to adopt various measures: (i) pay the debt with the associated interest and costs, and thereby supersede the action and avoid liquidation; (ii)

challenge the liquidation, which will give rise to the commencement of a challenge proceeding; (iii) comply with the claim; and (iv) expressly agree to the judicial reorganization proceeding.

In the first and fourth case, liquidation of the company is avoided, so it can continue with its normal business operations.

In the second case, an adversarial proceeding will commence, to determine whether the legal requirements have been met for the debtor to undergo a liquidation proceeding. In this scenario, if the company loses the ***challenge proceeding***, the process will continue to be carried out; whereas if it wins, the liquidation process will be brought to an end.

In the third case, the process will continue: in other words, all its assets will be realized for the purpose of paying its debts.

3. Moratorium and exclusivity

In a ***judicial reorganization***, the ***insolvency financial protection*** of the debtor prevents the commencement of any liquidation processes against the debtor's property: all enforcement or lease proceedings are stalled and it is prohibited to initiate any new enforcement action against it. There is, however, an exception to this rule: enforcement proceedings originating from labor debts.

Additionally, all contracts and their payment terms and conditions remain in force. For any creditors asserting clauses specifying early termination by reason of insolvency, their claims will be postponed until the payment of all the other creditors.

This financial protection period lasts until approval of the court reorganization plan, or until the end of the period determined by the law (which may be for up to 110 business days) if the plan is not achieved.

In a ***liquidation proceeding***, after the decision placing the debtor in liquidation is delivered, all proceedings in progress against the debtor are joined in the process. Moreover, creditors' rights to initiate individual enforcement actions are suspended, except for secured creditors (mortgages or security interests), who may continue with their individual enforcement actions, if they secure the payment of creditors with a higher priority for payment than themselves.

4. Control and divestment of the debtor

During the ***insolvency reorganization proceeding*** the debtor retains the power to manage its assets, but under supervision of the ***overseer*** (***veedor***), the person supervised by the agency and whose main role consists of enabling the proposal of judicial reorganization plans and safeguarding the rights of creditors.

The debtor, however, has complete management powers: it cannot sell assets that account for more than 20% of its aggregate assets or amend its bylaws. These impediments remain in force until the end of insolvency financial protection period.

In the ***liquidation proceeding,*** by contrast, the debtor company loses the right to manage its assets from the delivery of the decision ordering commencement of the liquidation, and that right passes to the liquidator.

5. Groups of companies

The law only defines proceedings applicable to an individual or company considered individually.

Therefore, it does not envisage any special cases or rules for cases where it is the business group that is subject to an insolvency proceeding. We cannot see any reason preventing a parent company, with other companies under it, from proposing to its shareholders a restructuring of the liabilities of several of its subsidiaries or related companies to strengthen the plan.

The law does, however, lay down specific rules on insolvency proceedings regarding the subordination of payments by the debtor company to its related companies. This implies that in a large majority of cases, related parties will be last in line in the order of priority for payment of the claims they hold against the company under a judicial reorganization or liquidation proceeding.

6. Commercial and employment contracts

In a ***reorganization proceeding,*** the law does not provide for any special effect regarding employment contracts.

As for commercial contracts, the insolvency financial protection decreed in a reorganization proceeding means that commercial contracts and their payment terms remain in force, and they cannot be terminated unilaterally by relying on the commencement of this process (although it does not prevent them from being terminated on other grounds).

Elsewhere, the law does not grant powers enabling judges to decree within a restructuring proceeding the termination of a contract by reference to the loss or benefit it represents for creditors or for the debtor.

In the last phase of the proceeding, however, if creditors approve the proposal for a judicial reorganization plan, every debt forming under that plan will be considered novated, renegotiated, or terminated simply by reason of the approval of the plan, according to the terms it contains.

After the ***liquidation proceeding*** has commenced, the debtor’s employment contracts will be terminated for the sole reason that the debtor has elected or been forced to undergo liquidation.

In principle, all commercial contracts will remain valid, in accordance with the general rules, despite some particular effects regarding some specific contracts provided by law.

Once the liquidation proceeding is finished, any balances not settled during the process, arising from the debtor’s obligations and originated previous to the liquidation, will be seen as extinguished *ipso iure*, either the debtor is an individual or a company.

7. Restructuring plan and proposals to creditors

The ***initiative*** to prepare and file the proposal for a judicial reorganization always o lies with the debtor, assisted by the **overseer (veedor)**, because the creditors are not authorized by the law to propose one specific type of plan or another. What the creditors can do, however, is propose amendments to the plan, after the debtor has submitted its proposal.

In this way, the whole reorganization proceeding is designed so that, during the insolvency financial protection period, the debtor can refine its proposal for a court reorganization plan in line with how its negotiations with creditors unfold. At the end of the time period envisaged in the law, any proposal that the debtor has prepared in this period is voted on by creditors at a hearing held for this purpose before the court hearing the case.

This is when either an intra-class, or cross-class, cramdown of creditors may occur.

It is the creditors, not the judge, who decide whether clauses of this type are allowable, by a majority vote of those holding voting rights in the proceeding. This means that the initiative in relation to this type of proposal – to the detriment of certain creditors – can only come from the debtor, or as a result of amendments proposed by creditors at the meeting called to approve the judicial reorganization plan.

Any dissenting creditors who have lost out can challenge the insolvency reorganization plan, by contending that *“one or more creditors agree with the debtor company to approve the plan, refrain from voting or reject the plan, to obtain an undue advantage over the other creditors*”. If that challenge is upheld, the debtor company would be forced to undergo a liquidation process.

Under the law, the proposal for a reorganization plan may be general (a single proposal for every creditor class) or by classes (the plan varies depending on the creditor class or category).

Approval of the plan requires the affirmative vote of two-thirds (2/3) of the creditors present at the creditors’ meeting called for approval of the plan, and they must also represent at least two-thirds (2/3) of the liabilities with voting rights and, in the exceptional cases specified in the law, the affirmative vote of three-quarters (3/4) of the creditors with voting rights. If the plan is binding on all the creditors, this quorum applies to all of them; otherwise, to the class or classes concerned.

8. Costs of the proceeding

During the *insolvency reorganization proceeding*, costs are paid by the debtor.

In the *liquidation proceeding*, the costs arising from the proceeding are treated as an administrative expense. The cost of the liquidator’s fees is added to the claims and has priority for payment.

In a *compulsory liquidation*, the costs incurred in respect of the liquidator’s fees are settled at the beginning with a sum equal to approximately US$ 3,500, which must be provided for by the requesting creditor at the beginning of the proceeding, and later they are treated as an administrative expense.

9. DIP financing

In an *insolvency reorganization proceeding*, during the insolvency financial protection period, the debtor may request financing in an amount not greater than 20% of its liabilities.

To request financing in an amount above the specified limit, it must have the support of 50% or more of its creditors with voting rights.

The law does not prohibit securing financing by creating a security over unencumbered assets or the proceeds thereof, so that they can be realized. Those liens, however, have a greater legal priority than they would have had ordinarily.

10. Recognition of Chilean proceedings in other countries and of other countries’ proceedings in Chile

The Chilean Insolvency and Recovery Law contains a mechanism for the recognition of foreign insolvency proceedings, commonly known as ***cross-border insolvency***.

This proceeding has the following purposes: (i) cooperation between the courts and other agencies involved in insolvency proceedings in Chile and in the foreign countries; (ii) greater legal certainty for trade and investments; (iii) fair and efficient management of cross-border insolvencies, in a way that protects all national or foreign creditors, and the debtor also; (iv) protection of the debtor’s assets and securing the highest value; and (v) enabling the reorganization of distressed companies.

This recognition proceeding will apply where: (i) a foreign court or agent requests assistance from Chilean courts, insolvency practitioners or other agencies involved in the insolvency proceedings; (ii) insolvency proceedings on the same debtor are being carried out simultaneously in Chile and abroad; (iii) foreign

creditors or other interested parties may apply for the commencement of an insolvency proceeding in Chile, and (iv) where a Chilean court requests assistance from a foreign court.

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Restructuring tools and insolvency proceedings in

Colombia

Restructuring tools and insolvency proceedings in Colombia

1. Main restructuring and insolvency proceedings and exit routes

The insolvency regime in Colombia allows the following types of reorganization proceedings: (i) an ordinary judicial reorganization proceeding; (ii) an "abbreviated" or short-form reorganization process; (iii) out of court reorganization plans; (iv) an emergency negotiation; and (v) a business recovery proceeding. The abbreviated, emergency negotiation and business recovery processes are new proceedings that were created by reason of the economic crisis caused by COVID-19 and which, in principle, will be available for two years.

In a ***court reorganization process***, whether ordinary or abbreviated, the debtor files an application for admission with the insolvency judge, who will preside over the proceeding and supervise all the debtor's actions to ensure the principles of universality and equal treatment of creditors. This process ends with the conclusion of a reorganization plan, which will have to be confirmed by the insolvency judge.

Additionally, debtor and creditors may agree to ***out-of-court reorganization plans***, which will have to be validated (or sanctioned) by the insolvency judge so that they have the same effects as a court reorganization plan and are binding on all the creditors, including any who did not take part in the negotiation (in a *cramdown* mechanism).

As for the ***emergency negotiation*** proceeding, although it is also an out-of-court proceeding, notice of its commencement must be given for the insolvency judge to allow it. The negotiation can last up to three months and any plan that is agreed must be filed with the insolvency judge for confirmation.

Lastly, ***business recovery proceedings*** consist of a negotiation between debtor and creditors before a chamber of commerce mediator from the debtor's jurisdiction. It can also last up to three months and the plan will have to be filed to be sanctioned (validated) by the court to make it binding on the creditors that voted against it or chose not to participate in the mediation.

2. Procedure

In Colombia, the reorganization process is generally ***voluntary,*** initiated through a request by the debtor itself. However, the law allows creditors to request the commencement of the process and, in a few cases, the *Superintendencia de Sociedades* may initiate it by its own decision.

From a procedural standpoint, the ***court reorganization process*** is generally initiated through an application filed by the debtor, accompanied, among other documents, by its financial information, the reasons for which it is insolvent and its proposed business plan to be voted by creditors.

After the application has been admitted, the debtor has to file a report on the classification and ranking of claims, and on voting rights, which will be notified to the creditors for them to submit any objections to it, which will be decided by the judge.

Approval of the plan requires the affirmative vote of an absolute majority of the allowed votes, and, if that majority is below 75% of the votes, the affirmative vote of three categories of creditors will also be required (unless there are only three categories, in which case the affirmative vote of two of them is required). None of these requirements precludes the special majorities required in specific cases.

After the plan has been approved, it will be submitted for confirmation by the insolvency judge. If a plan is not submitted, is not confirmed by the court, or is breached, the court liquidation phase on the debtor commences.

A ***court liquidation*** may be ordinary or "abbreviated" (short-form), depending on the size of the company. When the debtor enters into liquidation, its operations are closed down and employment and commercial contracts cease to be valid. The liquidator sells the debtor's inventoried assets, and submits to the insolvency judge an allocation plan that it has agreed with creditors in relation to the cash received and the assets that have not been sold. If that plan is not approved, the judge delivers an allocation interlocutory order.

In the context of a court liquidation, however, the ***business may be rescued*** by a white knight among its creditors. For this to occur, that creditor has to make an economic bid that is at least equal to the amount needed to pay all claims in the first class, employee severance payments, a normalization of pension liabilities, the administration expenses of the reorganization, the claims of secured creditors and all other claims that are in the money.

Moreover, the liquidator or a number of creditors holding at least 35% of the allowed voting rights may propose the conclusion of a reorganization plan.

Moreover, in ***out-of-court reorganization plans***, notice of the commencement of negotiations needs to be given to creditors, unless it goes ahead simply with the necessary majority for approval of the plan, in which case notice is only needed of the intention to conclude the plan and its terms to enable the filing of objections and comments.

The plan is deemed to be concluded with an absolute majority of the votes and it may be submitted for a court sanction procedure for it to be binding on all creditors. If the plan is not sanctioned, the debtor may attempt a new negotiation or apply for commencement of a reorganization process.

In an ***emergency negotiation*** the debtor has to give notice to the insolvency judge of its intention to commence the negotiation. After the application has been admitted, the negotiation may last up to three months and any plan that is agreed needs to be confirmed by the judge for it to have the same legal effects as a court reorganization plan. In the event the negotiation fails or the plan is not confirmed, the debtor has the chance to attempt this proceeding again within a year.

Lastly, the ***business recovery proceeding*** begins with the filing of an application at the competent Chamber of Commerce. Once this application is admitted, the negotiation will be held before a mediator and will have a maximum duration of three months. The agreement reached may be submitted for court validation before the judge of the bankruptcy proceeding or before a single arbitrator in the event that the parties have entered into an arbitration agreement. In the event the negotiation fails, the debtor will not be able to attempt this proceeding again within one year.

3. Moratorium and exclusivity

The admission of an application for court reorganization or an emergency negotiation implies an ***automatic and immediate moratorium*** on any shares subject to individual enforcement by creditors.

Under out-of-court reorganization proceedings, that moratorium is initiated on commencement of the validation process for the plan and, in business recovery proceedings, it is initiated on notice of the commencement of the proceeding.

An insolvency moratorium also ***renders unenforceable any contractual clauses*** that have the effect of impeding or obstructing the reorganization process (i.e., early termination of contracts, acceleration of obligations, placing of restrictions, among others). Additionally, the ***rules on termination and performance of any contracts*** to which the debtor is party undergo exceptions with respect to the ordinary civil rules, because these may be terminated with the authorization of the insolvency judge.

4. Control and divestment of the debtor

In court reorganization processes, the general rule is that ***the debtor retains management***, although with restricted capacities, mainly, in relation to the ordinary operations of the debtor's business, unless the insolvency judge has given prior authorization. These restrictions also apply in emergency negotiation and business recovery proceedings, although the insolvency judge's authorization is not needed.

The insolvency judge can, however, appoint an ***overseer*** in court reorganization processes where this is justified by the circumstances (i.e. existence of accounting anomalies, breach of legal obligations, among others). The judge also has to do this where a request is made by a number of creditors representing at least 30% of the external liabilities, or by the debtor itself.

5. Groups of companies

The Colombian insolvency regime is targeted at a debtor or commercial company considered individually. That said, in a court reorganization process, the filing by groups of companies of ***joint petitions*** for commencement of the insolvency process is allowed, or ***coordination of the processes*** on two or more of the companies in the group.

Moreover, the insolvency judge may initiate by his own decision an insolvency process on more than one company in a business group where, in the insolvency process on a related company, the economic situation of the parent or controlling company, or a subsidiary causes the related party to stop meeting payments.

The aim of all of this is to enable processes to follow their course and therefore the separate legal identity of each participant must be observed, except in the case of a court liquidation where the insolvency judge may allow the ***consolidation of assets*** in exceptional circumstances.

6. Commercial and employment contracts

The reorganization process involves several extraordinary measures in relation to contracts signed by the debtor.

Firstly, any contractual clauses having the effect of impeding or obstructing the reorganization process become ***unenforceable*** (i.e. early termination of contracts, acceleration of obligations, placing of restrictions, among others).

It is not allowed either to order ***unilateral termination*** of any contract by reason of commencement of the reorganization process. Conversely, breaches of contractual obligations caused after commencement of the process may be pleaded to seek termination of the contract. The debtor may, however, attempt ***renegotiation*** by mutual agreement. Where this is not possible, the debtor may apply for the judge's authorization to terminate the contract.

The insolvency judge is authorized to order the relevant measures to protect and recover the debtor's property, including ***clawback action for contracts*** concluded to the detriment of creditors.

In relation to out-of-court reorganization plans, the extraordinary measures relating to contracts apply from the date of the decision to commence the court sanction process. In court reorganization processes, they apply from the date of admission for consideration.

7. Restructuring plan and proposals to creditors

The ***initiative*** to propose a reorganization plan lies with the debtor, who has to file it with the application for admission in the court reorganization process and, on the basis of that plan, the overseer has to file with the

insolvency judge the reorganization plan approved as stipulated with the affirmative votes of the absolute majority of the allowed votes of creditors.

The requirements laid down for the ***solicitation and disclosure statement*** by creditors on the reorganization plan vary depending on which scenario is involved. In a court reorganization, creditors have access from the beginning to the plan filed by the debtor with the application for admission. For out-of-court reorganization plans, the debtor has to give notice to all the creditors of the commencement of negotiations. If the negotiations go ahead only with the creditors that have the necessary majority to conclude the plan, notice has to be given to the other creditors of the intention to conclude the plan and its terms before it is signed so that they can file their comments and objections.

The ***creditor classes*** are strictly those defined in the law. In the plan, however, the order of priority of claims may be changed subject to certain conditions.

The steps in the emergency and business recovery negotiation allow reorganization plans to be negotiated with one or more categories and they have to be approved with a simple majority of the votes allowed in that category. Under an intra-class cramdown mechanism, however, the plan will be binding on the category concerned although not on other creditors.

On the other hand, the flexibility measures that will be applied in the next two years include, as a financial relief mechanism, the ***discharge of debts*** by virtue of which it will be possible, in the reorganization agreement, to provide the discharge of that part of debts that exceeds the valuation of the debtor as a going concern.

8. Costs of the proceeding

In a reorganization proceeding, the overseer's fees and the expenses associated with the process are treated as an administrative expense.

The overseer's fees are a tariff determined by law by reference to the characteristics of the debtor's business.

9. DIP financing

Among the measures to relax the insolvency regime, which will apply until April 2022, a few ***DIP financing incentives*** were allowed during the negotiation of a reorganization plan, by giving those obligations priority over the others in the reorganization plan, except for the measures related to pension and “quasi-tax” contributions on employees’ earnings. Moreover, the insolvency judge is allowed to give authorization for these claims to be backed with security interests in the debtor’s assets, including assets that are already subject to liens if the claim that had originally been secured has a priming lien. Creditors can file less onerous financing proposals in every case.

In other instances where fresh money is provided directly by ***related parties*** to the debtor, it must be approved by the insolvency judge after the overseer has signed a favorable report on the financing plan and the plan has the affirmative vote of a special majority of creditors. These claims will share the same order of priority as the tax authorities.

10. Recognition of Colombian insolvency proceedings in other countries and other countries’ proceedings in Colombia

The Colombian insolvency regime contains provisions on ***cross-border insolvency***, which are inspired on the UNCITRAL Model Law.

These rules govern matters related to the insolvency of companies that have assets in more than one jurisdiction. Generally, these provisions make the restructuring of a company in a country outside Colombia more efficient, while allowing minimum effect on the operations of the business in Colombia.

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Restructuring tools and insolvency proceedings in

Mexico

Restructuring tools and insolvency proceedings in Mexico

1. Main restructuring and insolvency proceedings and exit routes

The Commercial Insolvencies Law (the "LCM") came into force in Mexico in May 2000, and repealed the defunct Bankruptcies and Suspension of Payments Law, which had governed commercial insolvency proceedings since 1943.

The proceeding for obtaining a ***commercial insolvency order*** commences through a voluntary petition by the trader, or through a claim filed by any creditor or by the public prosecution service[3], where a widespread failure to pay the trader's obligations has occurred: (i) if the trader has breached its payment obligations to two or more different creditors; (ii) if the obligations matured than 30 days earlier and represent at least 35% of all the obligations owed by the trader; and (iii) the trader does not have sufficient assets[4] to meet at least 80% of its matured obligations.

The trader may also file for insolvency if it states that the circumstances described above will occur imminently within the following 90 days.

There are also certain cases in which the judge will presume that a trader has incurred a widespread failure to meet its obligations and will agree to issue the commercial insolvency order. For example, where there are not sufficient assets to be attached due to the breach of an obligation or the failure to pay two or more different creditors, among others.

However, it is possible that prior to the petition or claim for commercial insolvency, the trader and his creditors will negotiate an insolvency arrangement, known in US or British systems as a ***prepackaged plan***.

Under the LCM, for the petition for a commercial insolvency order with a ***prior restructuring plan (restructuring)*** to be admitted, in addition to meeting the requirements specified by the LCM itself for the ordinary proceeding, the petition must be signed by creditors who hold the simple majority of all the claims against the trader, and must also be accompanied by a proposed restructuring plan for the trader's liabilities, duly signed by the creditors representing such claims (who, once the proceeding has been commenced, must be confirmed as recognized creditors).

If the petition for a commercial insolvency order meets the necessary requirements, the judge delivers a judgment making the insolvency order without the need to appoint a "visitor"[5] and, from then onwards, the commercial insolvency proceeding with a restructuring plan will be conducted as an ordinary commercial insolvency proceeding, except that the trader, or the conciliator, must submit for a vote and subsequent judicial approval, the restructuring plan shown with the petition.

Where there is a prior restructuring plan, the trader and the recognized creditors may appoint by mutual agreement an individual or legal entity to act as conciliator, even if the latter does not appear on the register held by the Institute, and may agree directly with him on his fees.

In practice, given the workload of the insolvency courts, judges often reject petitions for insolvency based on technical arguments. Therefore, companies in this situation are often advised to file an insolvency petition only if they have an agreement with their creditors which allows them to file a petition for insolvency with a prior restructuring plan.

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[3] The authority which prosecutes offenses in Mexico (i.e. public prosecutor's office).

[4] Under the LCM, not all the trader's assets will be included in the calculation for these purposes, instead it must be checked that they comply with certain requirements.

[5] A *visitador* or "visitor" is in charge of issuing an opinion on whether the trader actually incurred the circumstances envisaged in the LCM and there is a widespread failure to pay its debts.

Lastly, the purpose of the ***bankruptcy phase*** is the liquidation or sale of the trader's business, of its productive units or of the assets belonging to it for payment of the recognized creditors.

A trader subject to commercial insolvency will be declared bankrupt where: (i) it expressly so requests; (ii) the statutory period for conciliation and, where relevant, any extension, has run; (iii) the conciliator files a petition for a bankruptcy order and the judge grants it; or (iv) where one or more of the trader's creditors file a claim requesting the commercial insolvency proceeding and ask for it directly to be declared bankrupt, in which case the judge will rule in favor of that claim (i.e. a trader's creditors can ask for an insolvency order to be made placing the debtor directly in the bankruptcy phase). If the trader accepts that request, the judge, upon evaluating it, may issue the insolvency order for a proceeding in the bankruptcy phase. Otherwise, if he considers that the legal requirements are not met, he will issue the commercial insolvency order.

2. Procedure

Initially the insolvency judge examines whether the trader is placed in the necessary circumstances defined in the law to be the subject of a commercial insolvency order, through a petition by the trader itself or as a result a claim by a creditor or by the public prosecution service.

The claim or petition must contain the facts which give rise to the petition, the evidence or documents proving them, and the legal grounds for making the petition. A visit must also be made by the visitor appointed by the insolvency judge, to verify the situation described by the trader in its petition.

If the judge decides that the trader is placed in the circumstances mentioned above, he will deliver a judgment issuing a commercial insolvency order on the trader.

That judgment will determine, among other elements: (i) commencement of the conciliation phase (or in a few cases, the bankruptcy phase directly); (ii) an order to the Institute for appointment of the conciliator; (iii) an order to give the conciliator access to books, records and other documents of the business; (iv) an order for the trader to suspend the payment of claims generated prior to the date of the commercial insolvency, except any that are essential for normal business operations; (v) an order to suspend any attachment order against the property and rights of the business; (vi) the clawback period; (vii) notice to the creditors so that they may request recognition of their claims; and (viii) publication of the judgment making the insolvency order in the Official Gazette of the Federation and in a widely circulated daily newspaper in the locality where the proceeding is conducted, as well as the registration of the judgment at the relevant public commercial registry.

During the ***conciliation phase***, the Institute appoints a conciliator under a predetermined random selection procedure (unless there is a prior restructuring plan).

The debtor will remain in charge of the business, unless, for the protection of the insolvency estate, the conciliator makes a request to the judge, in which case the conciliator will take over management powers.

The purpose of the conciliation phase is to reach an agreement with the recognized creditors by signing an agreement, known as an insolvency arrangement (*convenio concursal)*. The conciliator will endeavor to ensure that the trader and its recognized creditors agree to an insolvency arrangement.

This phase lasts for 185 calendar days from the latest publication of the commercial insolvency order in the Official Gazette of the Federation, which may be extended for an additional 90 calendar days where this is requested by 55% of the recognized creditors, and may be extended again for an additional 90 days, where this is requested by 75% of the recognized creditors.

The ***insolvency arrangement*** may allow, in relation to a certain creditor: (i) the option to agree on a full or partial write-off of its claims; (ii) subordination among some of them; or (iii) any particular less favorable treatment than that which is given to the creditors with the same priority generally, where the recognized creditor in question has expressly consented to it. There are, however, minimum requirements and an order of priority established by law (which grants benefits for example to labor or preferred claims), which must be observed for the insolvency arrangement to be valid.

For the insolvency arrangement to be valid, it must be signed by the debtor, and by creditors representing more than 50% of the claims of the ordinary and subordinated recognized creditors, and of the secured or special preferred claims of the recognized creditors who sign that arrangement (i.e. excluding creditors with tax and labor claims, who are not required to sign the insolvency arrangement).

As an exception to this general rule, in 2014 an amendment to the LCM came into force which introduced the concept of subordinated recognized creditors[6]**.** The predecessor of that amendment was the commercial insolvency proceeding on a company which sought to reach the necessary majority for the validity of the insolvency arrangement by including in the calculation the inter-company debt which it owed to several of its subsidiaries. Therefore, if the debtor has subordinated recognized creditors representing more than 25% of the total of the recognized claims, it will be necessary for the insolvency arrangement to be signed by recognized creditors representing at least 50% of the sum of the amounts of the recognized claims, excluding the amount of the claims held by subordinated recognized creditors.

If a favorable insolvency arrangement has been reached in the terms of the LCM when the conciliation period has run, the judge will check that the proposal for an arrangement meets all the legal requirements and does not contravene public policy provisions, in which case, he will issue a ruling approving it, deeming the commercial insolvency proceeding to be concluded. Consequently, the insolvency arrangement and the judgment approving it will constitute the only document governing the obligations held by the trader in relation to the recognized claims.

The conciliation phase may end: (i) with the signature of the insolvency arrangement, in which case the judge will order the conciliator to remove the entries at the registry which were made due to the commercial insolvency proceeding, and the debtor will recover, where applicable, complete management powers over the business; or (ii) with the bankruptcy judgment.

In the ***bankruptcy phase***, the bankruptcy trustee[7] will sell the property and rights which form the insolvency estate. He must obtain the greatest possible proceeds from their sale, by seeking the best terms and the shortest periods for recovery of assets, in view of the commercial characteristics of the transactions and sound practices and commercial customs.

Where keeping the company as a going concern allows greater proceeds to be obtained from the sale of the debtor’s assets, the bankruptcy trustee may keep the business operating.

Any sale of assets which the bankruptcy trustee decides to make has to be carried out through a public auction process in the terms provided in the LCM itself, at which the bidders must meet certain requirements (including a sworn declaration to tell the truth about whether there is any relationship or kinship with the debtor or its directors) and, where applicable, to guarantee the payment committed in their bid.

3. Groups of companies

As a general rule, commercial insolvency proceedings on two or more traders are not joined in a single proceeding, except in the case of companies belonging to a single corporate group.

Traders who form part of a corporate group (or their creditors) may request a joint commercial insolvency order against one or more of the members of that corporate group where at least one of its members meet the requirements specified in the LCM for that purpose, and, additionally, that situation means that one or more of the members of that corporate group are placed in the circumstances requiring a commercial insolvency order.

[6] They are creditors who, in addition to being recognized creditors, are also considered by the LCM as subordinated creditors, which include but are not limited to (i) creditors that have agreed on subordination to the ordinary claims, (ii) companies which control or companies that are controlled by the trader, and (iii) individuals who jointly or separately, directly or indirectly, hold rights which allow them to exercise the voting rights attached to more than 50% of the capital of the trader subject to commercial insolvency, or who have decision-making powers at its meetings, are in a position to appoint the majority of the members of its management, or by any other means, have the power to make the fundamental decisions of the trader subject to commercial insolvency.

[7] The bankruptcy trustee has the same powers and obligations as the conciliator, as well as the responsibility to sell the property and rights, which form the insolvency estate, by seeking to obtain the greatest possible proceeds from their sale.

In this scenario the commercial insolvency claim will be heard in a single proceeding, and a summary record will be kept for every company belonging to the corporate group. The judge may, at his discretion, appoint a single visitor, conciliator or bankruptcy trustee for the insolvency proceeding if he considers it appropriate.

For these purposes, a company will be deemed to belong to the same corporate group where there is a relationship of control determined as follows:

(i) The following are considered companies that have control: those which (a) directly or indirectly hold the voting rights attached to more than fifty per cent of the share capital of another company; (b) have decision-making powers at its meetings; (c) have the ability to appoint the sole director or the majority of the members of the board of directors; or (d) for any other reason, have the power to take the fundamental decisions of a company;

(ii) The following are considered controlled companies: (a) more than fifty per cent of their voting shares are owned directly or indirectly by a controlling company; or (b) a controlling company has the capacity to control, directly or indirectly, the management, strategy or policies of the company either through ownership of shares, or for any other reason.

4. Commercial and employment contracts

A judgment making an insolvency order does not trigger suspension of the payment of the trader's ordinary labor debts. Tax claims will continue to accrue revised amounts, fines and ancillary payments under the applicable provisions. If an insolvency arrangement is reached, fines and ancillary payments will be canceled.

In relation to outstanding payment obligations, any contractual clause which provides, in the event of a claim or petition for insolvency, or an insolvency order, for amendments which make the terms of the contracts less favorable for the trader will be considered not to exist. Outstanding payment obligations will be deemed matured.

The general rule is that outstanding payment obligations will be deemed matured, once the judgment making an insolvency order against the debtor is delivered:

(i) The unpaid principal and ancillary financial payments in national currency, which are unsecured will cease to be subject to interest and will be converted to Investment Units (UDIs)[8];

(ii) The unpaid principal and ancillary financial payments in foreign currency, which are unsecured, will cease to accrue interest and will be converted to the national currency at the exchange rate published by the Mexican Central Bank on the date of such conversion, and will subsequently be converted to UDIs; and

(iii) Secured claims will remain in the currency or unit in which they were agreed and will be subject to the ordinary interest stipulated in the contracts, up to the value of the assets which secure them.

In relation to contracts yet to be performed, during the conciliation phase the business will continue operating, managed by the trader itself or by the conciliator. The commercial insolvency order will not affect the validity of contracts yet to be performed, which must be performed by the debtor if it retains management, or otherwise, by the conciliator. On an exceptional basis, the conciliator may object to the performance of any of these contracts if he considers that it is in the interests of the insolvency estate. In any event, there are specific rules on the performance of certain contracts after the judgment making the insolvency order has been delivered.

The counterparty to a bilateral contract is entitled to request that the conciliator state whether he plans to continue with the performance of its contract, and if so, the counterparty is entitled to request from the conciliator that the debtor provide security for payment of the consideration owed under the contract, or, otherwise, the third party will be entitled to terminate the relevant contract.

[8] Investment units as referred to in the decree published in the Official Gazette of the Federation of the United Mexican States of April 1, 1995.

5. Acts defrauding creditors

In order to protect the debtor's creditors from possible simulated or sham transactions, transactions to defraud creditors or similar matters, the law provides a clawback period in which all acts defrauding creditors which are performed by the trader within that period will be held unenforceable (unless the insolvency estate benefits from the payments received by the debtor, in which case no decision holding them unenforceable may be made).

As a general rule, the clawback period for the review of acts defrauding creditors is 270 calendar days from the date of the judgment making the insolvency order.

For acts which are presumed to defraud creditors and which have been performed by the debtor and subordinated recognized creditors, the period referred to in the previous paragraph will be twice the length, i.e. 540 calendar days from the date of the judgment making the insolvency order.

The law provides a list of acts which, if they are performed within the clawback period, will be presumed –*iuris tantum*– to have been performed to defraud creditors.

Special agreements entered into between the debtor and any of its creditors following the insolvency order will also be void. Any creditor who signs them will forfeit his rights within the insolvency proceeding.

6. Recognition of other countries' insolvency proceedings in Mexico

A debtor with establishments in other countries as well as in Mexico, could have a (main or non-main) foreign insolvency proceeding at the same time in some of those countries.

In the absence of evidence to the contrary, the registered office is presumed to be a trader's center of main interests (COMI). In this respect, if a Mexican company domiciled in Mexico in accordance with its bylaws commences a main foreign proceeding which it seeks to have recognized in Mexico, that debtor will have the burden of proving to the Mexican judge that its COMI is located in that foreign country.

The Mexican courts will recognize a foreign proceeding if: (i) it is conducted abroad under the applicable law on commercial insolvencies, bankruptcy or insolvency; (ii) a foreign representative had requested it and the petition includes certain information and supporting documentation required by the LCM; and (iii) it satisfies the requirements to be considered a main or non-main foreign proceeding.

Once recognition of a foreign main proceeding in Mexico has been granted, the judge must order: (i) the suspension of any enforcement measure against the trader's assets; and (ii) the suspension of any right to transfer or places liens on the trader's assets, or to dispose of those assets in any other way.

Additionally, following the recognition of a foreign proceeding, the foreign representative may request the visitor, conciliator or the bankruptcy trustee to entrust to him or to another person the distribution of the debtor's assets located in Mexico, subject to the limitation that the judge must ensure that the interests of creditors domiciled in Mexico are sufficiently protected.

Unlike the general rule which governs judicial proceedings in Mexico, the judge, visitor, conciliator or the bankruptcy trustee will be authorized to contact the foreign courts and the foreign representative directly, without the need for letters rogatory or other special formalities.

Additionally, where there is a main proceeding and one or more non-main proceedings (one of them in Mexico), the Mexican judge will liaise with the relevant foreign court to verify that the measures adopted in Mexico and abroad are compatible.

Branches of foreign companies in Mexico may be the subject of an insolvency order issued in Mexico. The effects of that order will only be binding on the property and rights located and enforceable in Mexico, and on the creditors in respect of transactions performed with those branches.

7. Proposed reform of the LCM

In recent weeks various efforts have been taking place to reform the LCM to provide access to an emergency regime applicable to commercial insolvency proceedings, which is particularly important due to the special situation created by COVID-19.

Among the proposed initiatives which should be noted is that prepared by the Mexican Bar, *Colegio de Abogados*, A.C., presented by the Institutional Revolutionary Party to the Senate on April 30, 2020.

The purpose of that initiative is to add a new Fifteenth Title, and a new "Commercial Insolvency Proceeding under the emergency regime" (the "**Proposed Reform**")[9], with the following main contents:

(i) It allows a special regime accessible where a fortuitous event or event of force majeure has occurred, or a declaration of emergency, health risk or natural disaster at national or regional level;

(ii) Only debtors who require the insolvency order will have standing to commence this proceeding (i.e. it cannot be invoked by creditors or authorities with powers to petition for the commercial insolvency order);

(iii) The proceedings may be carried out electronically, a printed form is not necessary;

(iv) Where applicable, a special summary format exists to petition for the insolvency order in which, once the petition has been filed, the judge will deliver within 3 business days the judgment making the commercial insolvency order, which will not be appealable;

(v) The emergency regime allows the debtor to obtain loans and finance which are essential to keep the business alive, and to secure the necessary cash flow during the conduct of the commercial insolvency proceeding, in which case the new creditors would have priority for payment;

(vi) The time limits would be considerably reduced as follows:

   a. Two business days to appoint the conciliator;
   b. Fifteen business days for the conciliator to submit to the judge the list of claims against the debtor;
   c. Five business days for the judge to deliver a judgment on recognition, classification and order of priority of claims;
   d. Since no reference is made to the conciliation period, we assume that the time limit is the same;
   e. When placed in the bankruptcy phase, the proceeding will be heard in the same way as the ordinary proceeding.

We must point out that since the Proposed Reform has not yet been decided on or debated at a plenary session of the Senate, at present it is uncertain whether it will be successful, and if so, whether it will be passed in the terms outlined or with amendments.

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[9] The Proposed Reform is available at: https://infosen.senado.gob.mx/sgsp/gaceta/64/2/2020-04-30-1/assets/documentos/Inic_PRI_Sen_Claudia_Anaya_Titulo_Decimo_Ley_Mercantiles.pdf

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Restructuring tools and insolvency proceedings in

Peru

Restructuring tools and insolvency proceedings in Peru

1. Main restructuring and insolvency proceedings and exit routes

Law 27809, The General Law on the Insolvency System, (the "Peruvian Insolvency Law"), defines two types of insolvency proceedings to order a restructuring, a liquidation or refinancing. Insolvency proceedings in Peru are the responsibility of the ***National Institute for the Defense of Competition and the Protection of Intellectual Property***, commonly referred to by its acronym INDECOPI. Therefore, these processes are conducted as administrative and not judicial proceedings[10]. This specialized independent public body started operating in November 1992, established by Decree Law No. 25868.

The first of these proceedings is the ***ordinary proceeding***, also known in the past as the insolvency proceeding. In the course of this proceeding, the creditors meeting in a meeting may elect (after evaluating its viability) one of two possible solutions:

(i) A restructuring of the assets and liabilities of the debtor (equivalent to a reorganization plan in the US Chapter 11), in which case a r***estructuring plan*** is signed; or

(ii) They may elect to approve the liquidation of the debtor if they consider it the most advisable decision for the creditors' interests, in which case a ***liquidation agreement*** is signed. It must be mentioned that liquidation is the only alternative where the debtor's accumulated losses, after deducting reserves, exceed its aggregate paid-up capital stock.

In both cases the purpose of the insolvency proceeding is to offer an efficient path and clear rules in the creditors' decision-making process regarding the fate of the debtor.

The second is the ***preventive proceeding***, having as its purpose to prevent an equity crisis scenario for the debtor. In this proceeding, the creditors' meeting has the ability to decide on the viability or otherwise of a proposed refinancing of obligations drawn up by the debtor as a solution to avoid a breach, in the short term, which could lead to a much more critical situation. If this proposal is approved, the next step is to sign a ***global refinancing agreement*** .

Lastly, on May 11, 2020, ***Legislative Decree 1511***, creating the ***Short-Form Insolvency Refinancing Insolvency Proceeding*** ("***PARC***") was published in a special edition of *El Peruano*, the official gazette.

This new proceeding has emerged in response to the serious liquidity crisis being experienced by many businesses in Peru for meeting their obligations, as part of the measures implemented to tackle the COVID–19 pandemic. The competent authority for short-form insolvency refinancing proceedings, and for all other insolvency proceedings, is the Insolvency Proceedings Commission. The new approach is detailed in section 11 of this Report.

2. Procedure

The body of the INDECOPI in charge of hearing insolvency proceedings is known as the ***Insolvency Proceedings Commission*** (the "Commission").

The Insolvency Proceedings Commission divides these proceedings into four different phases: (i) commencement of the proceeding, (ii) evaluation and publication of the proceeding, (iii) recognition of claims,

[10] Only bankruptcy orders against debtors are dealt with by the courts after the relevant insolvency proceeding.

and (iv) calling and holding of the creditors' meeting. The steps within each of these phases can vary depending on the type of proceeding that is being carried out.

Commencement of the proceeding: In an ***ordinary proceeding,*** the process may be initiated through a petition by the debtor or by the creditors. Where it is initiated through ***a petition by the debtor***, it must be proven that (i) more than one third of the debtor's aggregate debts have been due and unpaid for a period exceeding 30 days, and/or (ii) that the debtor has accumulated losses, after deducting reserves, in an amount greater than one third of the paid-up capital stock.

Where the ordinary proceeding is initiated through ***a request by a creditor***, there must be one or more creditors holding enforceable claims have been due and unpaid for more than 30 days, and which, in aggregate, exceed an amount equal to fifty Tax Units ("UITs") in force on the filing date[11]. This type of proceeding is the most commonly used in practice, due to the fact that in this scenario the debtor's net worth is imminently at risk, and creditors also run the risk of not being able to collect their claims if the debtor's assets are not sufficient.

On the other hand, the ***preventive proceeding*** may only be initiated through a petition by the debtor (a voluntary insolvency proceeding), because the legislation does not provide the option for a creditor to request its commencement –due to the preventive nature of this proceeding–. In addition, any debtor that files a petition for the commencement of a preventive proceeding must prove (i) that its due and unpaid debts for a period exceeding 30 days are less than one third of the total; and (ii) that it does not have accumulated losses, after deducting reserves, in an amount greater than one third of the paid-up capital stock. In other words, that it is not in a situation that requires it to initiate an ordinary proceeding. This proceeding is not usually requested in practice, since, in this scenario, debtors prefer to negotiate directly with their creditors without being subject to insolvency rules.

Evaluation and publication: after the process has commenced and the associated requirements have been confirmed, for either an ordinary or preventive proceeding, an insolvency order is officially made against the debtor. As a consequence of the insolvency order and overseen by the Insolvency Proceedings Commission, the debtor's insolvency position becomes public knowledge by being published for information purposes in *El Peruano*, the official gazette.

This publication also serves as an official notice to the debtor's creditors so that they may appear before the Commission and request recognition of their claims against the debtor or the insolvent party's obligations owed to them.

Recognition of claims: in order to obtain recognition, the creditor must prove to the Commission the origin, existence, amount, legitimacy and ownership of its claims.

Five different classes of claims are recognized: (i) labor claims: debts to employees or former employees, for example; (ii) welfare claims: debts to private managers of pension funds, for example; (iii) commercial claims, which may be secured or unsecured, and consist of claims of suppliers, banks and other financial institutions, for example; (iv) tax claims, which are debts to the National Customs and Tax Authority (SUNAT), local authorities, or other public entities to which taxes are owed, and lastly, (v) support claims, which are existing child or spousal support claims against the debtor (applicable only to individuals).

Any creditors that do not appear at this phase for recognition of claims or that appear afterwards may be recognized as late claims and will not have the right to speak or vote at creditors' assemblies.

Calling and convening the creditors' meeting: lastly, the Commission decides to call and form the creditors' meeting by publishing a notice in *El Peruano*, the official gazette. The notice of the creditors' meeting is addressed to all creditors whose claims have been recognized by the Commission in the phase mentioned above. The place, date and time for holding the meeting must be specified, and it must include the information for the meetings at both first and second call.

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[11] The value of a UIT for 2020 is set at S/ 4,300.00 (four thousand three hundred and 00/100 Soles) which is equivalent to USD 65,152.00 U.S. Dollars at an exchange rate of 3.3.

The creditors' meeting has four main functions: (i) decide on the final fate of the debtor, with the option to elect a restructuring of assets and liabilities or the winding up and liquidation of the debtor; (ii) approve or reject the restructuring plan, liquidation agreement or global refinancing agreement; (iii) appoint an administrator or a liquidator depending on the fate that has been decided for the debtor, and the administrator or liquidator may request the preparation of reports on the restructuring or liquidation processes; and (iv) appoint from among the members of the meeting a special committee, to which all or part of the meeting's powers may be delegated, except for the final decision-making power regarding the fate of the debtor, which belongs exclusively to the creditors' meeting as a whole. The debtor can only attend the creditors' meeting to present its position in relation to the proceeding.

The meeting is presided by a president and a vice-president, elected by the meeting itself at its inaugural meeting.

In ordinary proceedings, if, among the meeting's functions outlined above, it elects the restructuring of the debtor and the capitalization of debts, the meeting can adjust the debtor's assets and liabilities at any time, following an economic audit by auditors registered at INDECOPI.

When the creditors' meeting phase has ended, the preventive proceeding is brought to a close with the creditors' approval of the ***global refinancing agreement***. This agreement has to contain an undertaking by the debtor to pay its creditors, including a payments plan, interest rate and possible security, modifying the original terms of the debts.

In an ordinary proceeding, there are two alternatives:

(i) The first is a ***restructuring of the assets and liabilities*** of the debtor where the creditors' meeting decides to keep the business alive, whereby a restructuring regime comes into operation for a certain period subject to the conditions approved by the meeting. The restructuring is governed by the terms agreed in a ***restructuring plan,*** which usually includes a business plan, by the debtor to discharge all debts, including investment finance arrangements, labor policy, budgets, projected cash flow statements, among others. This decision is usually made by the meeting generally where it is determined that the value of the debtor's business (determined under the discounted cash flow method) is greater than the market value which could be obtained from the sale of its assets, so greater returns are expected with which to pay creditors; and

(ii) The second option is for the creditors' meeting to elect the ***winding up and liquidation*** of the debtor if it considers it is not in the creditors' interests for the debtor to continue with its business operations, subject to exceptions, such as liquidation of the business as a going concern. If this option is chosen, the meeting appoints an individual or legal entity to act as liquidator by signing a ***liquidation agreement*** whereby the debtor's business is closed down and its assets are liquidated. This decision is usually made by the meeting where it is determined that the market value which could be obtained from the sale of the debtor's assets is greater than the value of the debtor's business (calculated under the discounted cash flow method).

In practice, however, the creditors do not usually carry out an in-depth analysis of the debtor's business and normally choose to liquidate it to recover their claims sooner (it is easier to sell and liquidate the assets than to wait for the business to recover) and due to an aversion to risk (a restructuring generally requires a longer period for the debtor to recover financially, with the danger that along the way circumstances may arise that will render the restructuring inviable).

In order to be able to adopt resolutions validly and to give approval to the restructuring plan, the liquidation agreement, or the global refinancing agreement, the affirmative vote is needed, at first call, of creditors who represent claims in an amount exceeding 66.6% of the aggregate amount of claims recognized by the Commission. At second call, resolutions may be adopted with the affirmative vote of creditors that hold an amount exceeding 66.6% of the aggregate amount of the claims present at the meeting.

Finally, where a liquidation is unsuccessful (i.e. where the debtor's liquidated property runs out and it has not been possible to pay all the claims against the debtor), the next step is to request a ***court bankruptcy order*** in a special process heard by a specialized civil judge.

After a bankruptcy order against the debtor has been made by the judge, this situation is notified and published in *El Peruano*, the official gazette, and bad debt certificates are issued to the unpaid creditors concerned.

While in bankruptcy, the debtor will not be able to: (i) create companies or legal entities, in general, or form part of any existing ones; (ii) provide services as director, manager, attorney-in-fact or representative of companies or legal entities; (iii) be a guardian or legal representative of individuals; or (iv) be an insolvency practitioner or liquidator of debtors in the proceedings defined in the Insolvency Law. Bankruptcy ends after the end of a five-year period running from publication of the court decision ordering it.

3. Moratorium and exclusivity

The ***declaration of insolvency*** (for an ordinary proceeding, following a petition by the debtor or third parties, or a preventive proceeding, following a petition by the debtor) involves an ***immediate automatic moratorium*** on individual enforcement actions by creditors, as well as a prohibition of any enforcement of claims by a judicial or administrative authority. Thus, the authority hearing court, arbitration, enforcement or out-of-court sale proceedings against the debtor, is prevented from ordering any precautionary measure affecting the debtor's assets, and if any have already been ordered, is unable to make the attachment (this does not apply to measures which do not affect the debtor's assets such as entries at public registries). In addition, no enforcement (in or out of court) against the debtor's assets serving as security will be allowed, except for debtor's assets provided as security for third parties' obligations. In this last case, the legislation allows enforcement of the security without placing any restrictions. In the same way, any security that has been provided by third parties to secure the debtor subject to the insolvency proceeding may be enforced without any impediment.

On the other hand, the declaration of insolvency of the debtor (published in *El Peruano*, the official gazette) suspends the enforceability of all the debtor's outstanding debts on that date. In this case, no default interest will accrue on that debt, and no interest may be compounded. Any payment obligations which may be affected by the debtor's insolvency are suspended, although obligations of a different nature that are required to be performed regularly are not suspended since they are not affected by that state (i.e. confidentiality obligations, information obligations, among others). In addition, claims which have been assumed after the commencement of the insolvency proceeding (post-insolvency claims) must be paid regularly as they fall due and that suspension of the enforceability of obligations does not apply to them, unless the winding up and liquidation of the debtor is adopted, in which case an attraction of credits arises in the place where those claims become part of the insolvency estate.

That suspension will last until the creditors' meeting approves the restructuring plan, the global refinancing agreement or the liquidation agreement, as applicable, in which the terms and conditions of payment of the claims are established, including the applicable interest rate, which will be enforceable against all creditors included in the insolvency proceeding.

Lastly, the legislation provides that the following will be held unenforceable and, consequently, cannot be enforced against the creditors in the insolvency proceeding: liens, transfers, contracts and all other legal acts falling outside the debtor's normal operations, which are detrimental to its assets and which have been made or entered into by the debtor within a year before the date on which: (i) the petition was filed to elect one of the insolvency proceedings; (ii) the decision issuing a summons was notified to it; or (iii) it was notified of the commencement of winding up and liquidation (clawback period).

Clawback action is handled by the judicial courts in a summary process. This type of action may be brought by: (i) the person or entity that manages the debtor; (ii) the liquidator, or (iii) one or more recognized creditors.

4. Control and divestment of the debtor

In a ***preventive proceeding,*** the debtor's management powers are not seized directly, so ***the debtor retains control over management***, subject to any agreements which have been reached with the creditors' meeting for the global refinancing agreement.

In the ordinary proceeding, however, if the debtor's management powers are seized and ***there is full or partial divestment***, either (i) in the restructuring of assets and liabilities, in which case the meeting can decide the temporary management arrangement for the debtor, among the options of keeping its original management system with the directors and managers that were already appointed, replacing them with a sole administrator (included on a special register held by the Commission) or electing a mixed system which retains part of the original management and persons appointed by the meeting are included to supervise management; or (ii) in the winding up and liquidation of the debtor, in which case the meeting appoints a liquidator (included on a special register held by the Commission) to oversee the management and liquidation of the debtor. When the liquidator has been registered, the functions of the legal representatives and of all the management bodies of the debtor expire, and their functions are taken over by the liquidator until the winding up and liquidation proceeding is concluded.

5. Groups of companies

Peruvian insolvency law is targeted at debtors who are individuals or legal entities, conjugal partnerships and undivided estates, as well as any branch of foreign organizations or companies. That debtor is considered individually for the purposes of the insolvency proceeding. Peruvian legislation does not define any special cases for the making of an insolvency order against more than one company in the same economic group. Therefore, in those cases, every one of the companies that elect any of the restructuring or insolvency mechanisms must meet the relevant requirements on an individual basis.

6. Commercial and employment contracts

The preventive insolvency mechanism does not involve any extraordinary legal measures in relation to the ordinary civil rules on contracts to which the debtor is a party, except for the contractual provisions which the Insolvency Law allows in general for all its proceedings.

As explained above, the main measure related to the debtor's contracts is the suspension of enforcement of all payment obligations owed by the debtor on the date of the order initiating the insolvency proceeding through publication in *El Peruano*, the official gazette.

That suspension does not affect obligations which, due to their nature, formally have to continue to be performed because they are not related to the debtor's payment capacity (i.e. confidentiality obligations, information obligations, etc.). In addition, creditors may terminate any contracts that are in force with the debtor where they expressly stipulate as a termination event the making of an insolvency order against the debtor. That termination, however, cannot trigger any payment because the enforcement of all claims is suspended until approval of the relevant restructuring plan, the Global Refinancing Plan or the Liquidation Agreement, as applicable.

On the other hand, as regards the insolvency proceeding, as we mentioned, a type of clawback action is applicable to protect creditors from acts and contracts which the debtor may enter into for the purpose of causing detriment to its assets and which do not relate to the normal course of its business.

7. Restructuring plan and creditors' proposals

The responsibility for proposing various alternatives for the restructuring plan to the creditors' meeting lies mainly with the debtor's management (which may be mixed management as we mentioned earlier). There is nothing, however, to prevent any creditor at a meeting from proposing a restructuring plan (or certain terms and conditions of such a plan) so that it can be evaluated. In any case, that restructuring plan must contain the mechanisms to carry out the financial and economic restructuring of the debtor and to pay the claims. A Restructuring Plan is generally prepared with regard to the particular features and intrinsic characteristics of the insolvent debtor (i.e. an agribusiness company, a mining company, and so on).

Under the Peruvian Insolvency Law, the restructuring plan must include, *inter alia*, a payments plan encompassing all the debts owed up to the date of notification of the insolvency, regardless of whether or not those debts have been recognized in the proceeding.

In a restructuring scenario no differences apply between classes of creditors by law (as apply in the case of a liquidation, in which the order of priority for payment is defined), instead the terms and conditions of payment negotiated and approved by the creditors' meeting in that plan apply, except for labor claims, in which case the restructuring plan must state that, of the funds allocated to the payment of the claims, at least 30% must be assigned in equal parts to the payment of labor debts. The determination of payment in equal parts means that the right to payment of each labor creditor is determined by reference to the aggregate number of recognized labor creditors.

In addition, after it has been approved, the restructuring plan is binding on the debtor and all its creditors included in the proceeding, even if they have objected to the agreements, have not attended the meeting, or have not duly requested the recognition of their claims (in a cramdown mechanism).

The security provided by third parties for the debtor is not released, unless the creditor benefiting from the security has voted for approval of the Plan or unless the third parties concerned have stipulated release of the security in the event of approval of the Plan.

On the other hand, within the restructuring plan mechanism, the insolvency legislation allows the creditors' meeting to approve the capitalization of credits in relation to the insolvent debtor, in which the preferred subscription right of the original shareholders must be followed. This prevents dilution of those shareholders.

If the restructuring plan is fulfilled satisfactorily, it concludes officially when the debtor's management proves to the Commission that the claims falling under the Plan have been fully paid. Once the conclusion of the debtor's restructuring has been confirmed, the debtor's original management will resume its functions. If the restructuring plan is not fulfilled or is unsuccessful, it will be the responsibility of the Commission and of the creditors' meeting to agree on whether to move on to the winding up and liquidation of the debtor.

8. Costs of the proceeding

In an insolvency proceeding, the insolvency administrative costs collected by INDECOPI are called "charges". The insolvency administrative charges are taxes determined by law by INDECOPI and published on its website[12] as a percentage of a Tax Unit (UIT), set at S/ 4,300[13][14] for the year 2020. These charges vary depending on various factors, such as the type of proceeding, the party that requests the commencement of the proceeding or the aggregate amount of the claims, among others. The responsibility for paying such charges to enable the commencement of the insolvency proceeding before the Commission belongs to the party that files the request.

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[12] https://www.indecopi.gob.pe/web/procedimientos-concursales/tasas

[13] Equal to USD 1,303 U.S. dollars at an exchange rate of 3.3.

In relation to other fees, such as payments to the debtor's new management which may be appointed by the meeting or the payment of the liquidator, as a general rule it is provided that these costs will be paid out of the debtor's assets which are part of the insolvency estate. Therefore, they are included in the restructuring plan or in the Liquidation Plan, as applicable.

Lastly, the law does not provide that the costs associated with advice to creditors are also a post-petition claim. In a global refinancing agreement or in a restructuring plan scenario the inclusion of these items could be negotiated so that they can be paid out of the debtor's assets.

9. DIP financing

In both a preventive insolvency proceeding and an ordinary insolvency proceeding scenario in which the restructuring of assets and liabilities is agreed, the insolvency rules do not prevent the debtor from obtaining fresh money in the course of these processes (DIP Financing), which must be governed by the terms and conditions in the global refinancing agreement or in the restructuring plan, as applicable.

In practice, however, creditors (i.e. commercial suppliers or financial institutions) do not usually provide financing of this type, because there is no specific legislation granting them special treatment in the insolvency context.

Indeed, as the rules stand, financing of that type would be classed a post-insolvency claim which, in principle, should be paid regularly subject to its terms and conditions without being suspended. If, however, the global refinancing agreement or the restructuring plan is not successful and, therefore, the creditors' meeting decides to elect liquidation of the debtor, those claims would become part of the insolvency estate without enjoying any special preference, instead they would be treated as determined by the regular order of priority established by law for cases of liquidation[15]: (i) labor claims; (ii) secured claims; (iii) tax claims; and (iv) all other claims not falling in any of the above categories.

In this situation, for the purposes of arranging DIP Financing providing protection for potential creditors, the particular features of each case must be analyzed to determine whether there is an imminent risk of liquidation of the debtor and to see the composition of creditors and the majorities at the meeting that can approve it, as well as the possibility of negotiation with those actors.

There are, however, various options which can make finance of this type viable, such as the provision of security by third parties (i.e. companies related to the debtor), which is usually required in transactions of this type to secure payment; or commercial agreements with the debtor's strategic partners where those partners directly take on the cost of the finance to carry on the business (i.e. consortiums, joint ventures, among others). The security of third parties to be provided for DIP Financing could also include trusts which isolate the insolvency risk of the owner of the asset, subject to the normal clawback period for contracts of this type.

10. Recognition of Peruvian insolvency proceedings in other countries and of other countries' proceedings in Peru

At present there are no specific rules on cross-border insolvency proceedings providing the guidelines to be followed in these cases. General rules have been included, however, which provide that the Commission is the competent body to hear insolvency proceedings on persons domiciled abroad, if: (i) the Peruvian courts have recognized the foreign judgment making the insolvency order; or (ii) this is provided by Private International Law rules.

In this respect, the recognition of the insolvency order judgment must previously undergo an exequatur proceeding in the judicial courts. It needs to be mentioned additionally that the Commission's jurisdiction only covers the assets of the debtor (domiciled abroad) which are located in Peru.

[15] In the case of individuals, support claims, which are first in the order of priority, are included.

On the other hand, the Commission will have jurisdiction to hear insolvency proceedings against debtors domiciled in the country, even where part of their property and/or rights, which form their assets, are located outside the country. For this purpose, the guidelines in the applicable international rules must be followed.

11. Short-form insolvency refinancing proceeding (PARC)

The purpose of the recent ***Legislative Decree 1511*** is to implement the short-form insolvency refinancing proceeding as a ***completely remote administrative proceeding*** enabling the debtor entities that elect it to sign with their creditors a ***business refinancing plan*** ("***PRE***") quickly and efficiently, for the purpose of restructuring the payment of their debts. Debtors can elect this short-form insolvency refinancing proceeding until December 31, 2020.

The entities qualifying for this new proceeding are: (i) micro and small companies (MYPEs); (ii) medium sized and large companies and associations; and (iii) any other legal entity classified as such by the Insolvency Law ("Eligible Entity"). Individuals, conjugal partnerships and undivided estates do not fall within their scope of application, regardless of whether they carry on a business activity; nor do any of the entities and estates excluded by the Peruvian Insolvency Law.

In order to set the short-form insolvency refinancing proceeding in motion, the eligible entity must request the proceeding on the virtual platform (reception desk) enabled by INDECOPI.

Following admission of the request, the notice of commencement of the short-form insolvency refinancing proceeding will be published in the INDECOPI Insolvency Gazette. Publication of that notice suspends the enforcement of all the applicant debtor's payment obligations until the creditors' meeting approves or rejects the *PRE*.

The commencement of the proceeding does not close down the debtor's business operations, so the enforcement and performance of contracts which involve the use, enjoyment and/or supply of goods and services to the insolvent debtor will not be affected by the order for commencement, in the absence of an express agreement to the contrary of the parties to the contract concerned. In addition, following publication of the commencement of the short-form insolvency refinancing proceeding, any request for commencement of an ordinary insolvency proceeding will be held inadmissible.

Following publication of commencement of the short-form insolvency refinancing proceeding, they will move on to the recognition of claims. Requests for recognition of claims which are filed outside the stipulated period will be declared inadmissible. Recognized creditors are the only creditors that are allowed to be members of the creditors' meeting with the right to speak and vote regarding the decision on approval of the *PRE*. Labor creditors and related creditors have no right to vote at the creditors' meeting.

Following the recognition of claims, the creditors' meeting will be convened, although it does not replace the functions of the shareholders' meeting nor does it have the power to replace the debtor's managing bodies. In other words, there is no divestment of the debtor's management powers. The creditors' meeting is held remotely using electronic media, and must be recorded. The only item on the agenda of the meeting is the approval or rejection of the business refinancing plan, which must be decided with the remote participation of a Notary appointed by the debtor.

The legislation specifies that the *PRE* must contain (i) all the recognized claims, the unrecognized claims and those appearing in the statement of the debtor's financial position, as well as the list of contingent claims; (ii) the treatment and payments plan to implemented for each class of creditors[16]; (iii) the applicable interest rate, if needed; and (iv) upon a prior request by the debtor or by one or more creditors that represent more than 30% of the total of the recognized claims, it must contemplate the appointment of a supervisor to verify compliance with the *PRE*, whose fees must be paid by the debtor or by the creditors that request it. The approval or disapproval of the *PRE* gives rise to the conclusion of the short-form insolvency refinancing

[16] Out of the funds or resources which are allocated for each year to the payment of the claims, at least (i) 40% is assigned in equal parts to the payment of labor debts owed to employees that are first in the order of priority, under Article 42 of the Insolvency Law, and (ii) 10% is assigned in equal parts to the payment of debts to creditors that hold claims under a consumer relationship with the Eligible Entity.

proceeding. Likewise, if the debtor breaches its obligations in the terms established in the *PRE*, the latter will automatically be terminated, without the need for a ruling by the Commission.

It is important to add that banking and financial institutions have no obligation to change to a lower credit rating such as “Normal” or “With a Potential Problem” any debtors that elect the short-form insolvency refinancing proceeding either during this proceeding or, if the PRE is approved, during the fulfillment period of the payments plan it contains.

It should be pointed out that this new legislation does not contain any special provisions applicable to DIP financing for debtors in the context of the *PRE* (subject to supplementary provisions which may be implemented by regulations). Therefore, in principle, the analysis of DIP financing with banking institutions or commercial suppliers indicated in section 9 above of this chapter would be applicable to this new proceeding.

Lastly, on June 8, 2020, the regulations governing that proceeding were published, confirming that it is conducted entirely as an electronic administrative procedure. So, all applications, documents or information which are submitted during the conduct of the short-form insolvency refinancing proceeding are filed electronically. For that reason, the parties concerned must include in the first submission that they file an email address and a contact telephone number, for the purposes of receiving notification of all decisions, requests and administrative acts in the course of the short-form insolvency refinancing proceeding. In addition, the aforementioned regulations include the phases of the short-form insolvency refinancing proceeding, the reporting requirements, as well as the relevant time limits. It should be emphasized that, in the petition for commencement, the debtor must include, among other items, an executive summary in which it clearly explains how its crisis originates from the impact caused by COVID-19.

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Restructuring tools and insolvency proceedings in

Portugal

Restructuring tools and insolvency proceedings in Portugal

1. Main restructuring and insolvency proceedings

Portuguese legislation defines, in addition to the ***insolvency proceeding***, two corporate restructuring proceedings: (i) the ***special revitalization proceeding (PER)***, which is carried out before a court; and (ii) the ***out-of-court business recovery proceeding (RERE)***.

The ***insolvency proceeding*** is a court proceeding involving universal enforcement, because all of the debtor's assets are made available for the purpose of paying its creditors in the manner specified in an insolvency plan (recovery plan) or, where this is not possible, through the liquidation of the debtor's assets and distribution of the proceeds among its creditors.

Following the judgment making the insolvency order, the debtor's entire assets are audited, and come to form a separate estate managed by the insolvency practitioner appointed by the court.

The insolvency proceeding may go down either of two routes, to be decided by the majority of the debtors' creditors assembled at a meeting: (i) the recovery route, through the approval of a recovery plan, or (ii) the liquidation route, in which case the court-appointed insolvency practitioner will be responsible for selling all the debtor's assets so as to pay out of their proceeds, and as far as possible, the claims recognized in the process.

In an insolvency proceeding all the debtor's creditors are called upon to take part in the process in which anyone seeking payment of their claims paid must participate.

The ***special revitalization proceeding (PER)*** is a hybrid urgent proceeding based on the US Chapter 11, involving court supervision at key times of the process but with a strong out-of-court component. Its commencement depends on acceptance by a creditor or creditors holding at least 10% of the non-subordinated claims, in its two options (similar to a traditional or free fall US Chapter 11, and to a pre-negotiated or prearranged US Chapter 11).

The special revitalization proceeding is applicable where companies are in a distressed position or in a position of imminent insolvency, but are likely to recover, and is intended to encourage the negotiation with their creditors of a revitalization agreement for a period of up to three months.

The admission of the petition for commencement of a special revitalization proceeding imposes a moratorium (i) stalling the commencement of any claim for collection of debts against the debtor; and (ii) suspending any court proceedings in progress, with exactly the same subject-matter, for the duration of the negotiations.

The revitalization plan approved by the special majority of the creditors has to be sanctioned by the court to be enforceable, not only for the voting creditors, but also for all the company's creditors, and the *cross-class cramdown* mechanism is permitted.

The ***special revitalization proceeding*** also contains a shorter and quicker (prearranged) option, aimed at securing court sanction for the extrajudicial revitalization agreement.

The court allows the initial petition to be accompanied by an agreement signed by creditors representing the special majority required for the court approval of the revitalization agreement, in a similar was to a US prepackaged plan.

In this option, before the proceeding commences, the debtor signs a recovery agreement with its creditors, which needs to be sanctioned by the court.

Thus, the negotiation between the distressed company and its creditors is conducted outside a proceeding, unlike the negotiations held in the first option, which form part of a judicial process under the supervision of a provisional insolvency practitioner appointed by the court.

Lastly, the ***out-of-court business recovery regime (RERE)*** is a confidential voluntary out-of-court proceeding, targeted at companies in a distressed position or in a position of imminent insolvency, and its commencement depends on the acceptance of a creditor or creditors holding at least 15% of the non-subordinated claims.

The goal of the out-of-court business recovery regime, similarly to the special revitalization proceeding, is to encourage negotiations between a company which is in a difficult financial situation and its creditors, with a view to the approval of a restructuring plan.

The restructuring plan concluded as part of the out-of-court business recovery regime is only binding on the creditors that participated in it after it was filed with the commercial registry. If, however, the out-of-court restructuring agreement is signed by creditors that represent the necessary majorities for the approval of a revitalization plan as part of the special revitalization proceeding, the debtor will be able to commence a special revitalization proceeding with a view to securing court sanction for the restructuring plan, thereby binding all the other creditors, including those that did not participate in the negotiations (cramdown effect).

The filing of the restructuring plan will trigger immediate termination of any declaratory or enforcement proceedings or proceedings for interim relief with the courts which affect claims included in the restructuring plan.

The suspension of judicial proceedings that have already commenced, as well as the prohibition of the commencement of new proceedings for the collection of debts against the debtor, will only occur if it is expressly provided in the negotiation protocol or in the restructuring plan.

2. Procedure

An insolvency proceeding may be voluntary, i.e. requested optionally by the debtor concerned, which must be recognized and confirmed by the competent commercial court, without the need to adduce evidence, up to the third business day following the date of the petition for commencement of the proceeding.

The debtor will be required, however, to petition for an insolvency order by the court within 30 days from the date on which it has become aware of its actual (not imminent) insolvency.

The insolvency order can also be requested (i) by any creditor; (ii) by the public prosecution service, on behalf of public entities, the tax authorities and the social security authorities; and (iii) by the provisional insolvency practitioner appointed as part of the special revitalization proceeding, if the negotiations do not end with the signature of a restructuring agreement and the court-appointed insolvency practitioner considers that the company is in a position of actual insolvency.

If the insolvency proceeding is commenced through a petition by a third party, the debtor will be notified to allow it to file an objection to that petition.

When making the insolvency order the court will appoint an insolvency practitioner who, in principle, will be responsible for management of the debtor’s assets, or the insolvency estate.

From a procedural perspective, the insolvency proceeding is initiated through a petition by the debtor or a third party, after which the court will deliver the insolvency judgment, and a period of between 20 and 30 days commences, as specified in the judgment, in which all the debtor’s creditors may request recognition of their claims.

At the end of that period, the insolvency practitioner must draw up a report with an analysis of the debtor’s accounting records and his analysis of whether or not it is possible for the company to keep operating, to

which he must attach a list with an inventory of the debtor's assets, as well as a provisional list of the recognized creditors.

Following the filing of the insolvency practitioner's report at the court clerk's office, a creditors' meeting has to be held to examine and vote on the report, and to decide which route the proceeding will take: the route of liquidation and closure of the insolvent company, or, alternatively, the route of approval of an insolvency plan and possible recovery (recovery plan).

The proposed ***insolvency plan*** for the debtor may be filed by the debtor, by any creditor, or by the court-appointed insolvency practitioner, and once it has been filed, may give rise to the suspension of the liquidation of the insolvent party's assets. The Portuguese law grants considerable freedom in the definition of the content of the plan, which may contain: (i) a procedure aimed at the liquidation of the insolvency estate and distribution of the proceeds among the creditors; (ii) a recovery agreement (recovery plan); or (iii) the sale of the business to a third party.

The insolvency plan must be governed by the principle of equality of treatment of creditors, subject to certain differences justified for objective reasons. The insolvency plan has to be approved by the creditors at a meeting, for which different, greater or lesser, majorities are required depending on the class of creditors affected by the terms of the plan. Fulfillment of the plan releases the debtor and the legal representatives from all the remaining debts in the insolvency proceeding. On the other hand, a breach of the insolvency plan will carry forfeiture of the effects of the moratorium and of any debt forgiveness arrangements which have been approved.

The insolvency plan, approved by the majority provided by law, will have to be sanctioned by the court to verify whether it contains a provision which inadmissibly affects a third-party right or infringes a mandatory statutory provision.

The purpose of ***liquidation*** of the insolvency estate is: (i) to sell the debtor's property and rights; and (ii) to use the proceeds to pay the debts it owes to third parties. The law establishes a preference for the sale of the business as a whole, unless there is no satisfactory offer or the liquidation or sale of its elements separately is beneficial.

The sale of the business and of its assets will be a free and clear sale, free of all liens and encumbrances.

Portuguese legislation also provides the option for the debtor voluntarily to file a petition for an insolvency order accompanied by a proposed insolvency plan which envisages its recovery, or by the steps to be carried out for the liquidation of its assets.

It does not, however, allow the debtor to file a petition for an insolvency order on it and accompany that petition with a plan that provides for the sale of its business as a going concern (or certain establishments) to a third party that has presented a binding purchase offer, in the form of an insolvency proceeding similar to the UK pre-pack administration.

3. Procedural effects

In a special revitalization proceeding, the ruling appointing the provisional insolvency practitioner: (i) stalls the commencement of actions claiming debts by the creditors; and (ii) for the duration of the negotiations over approval of the plan, there is a suspension of claims for existing debts, which will be extinguished upon the court sanction of the special revitalization plan (provided that the judicially approved revitalization plan does not provide for their continuation).

In addition, following the ruling appointing the provisional insolvency practitioner, any proceedings in which an insolvency order against the debtor has been requested will be suspended, providing that a judgment making such order has not been delivered. Once the revitalization plan has been approved and has received court sanction, these claims will be dismissed.

This will also halt the prescription period, and time bar periods enforceable against the debtor for the duration of the negotiations and until the relevant court decision is delivered.

In the ***insolvency process***, the delivery of the judgment involves the immediate suspension of any enforcement steps or measures initiated by the insolvency creditors against the debtor or against assets in the insolvency estate.

The insolvency order also impedes the filing of new claims for enforcement and the continuation of those already commenced, unless there are several respondents, in which case the proceeding will continue in relation to the other parties.

Any claims for enforcement which have been suspended in the terms mentioned will be dismissed in relation to the insolvent respondent where the insolvency proceeding concludes with the outcome of a final *pro rata* distribution or a declaration of insufficiency of the insolvency estate.

It is possible to join for inclusion in the insolvency proceeding other actions in progress against the debtor or which affect the assets in the insolvency estate, as well as actions relating exclusively to property. For these actions to be joined the insolvency practitioner simply has to request their inclusion and justify the associated interest for the procedure.

In any proceedings in progress which must continue, regardless of whether they are joined to the insolvency procedure, the debtor will be replaced in the proceedings by the insolvency practitioner.

Any arbitration proceedings in which the debtor is a party will continue, even after the insolvency order, although the enforceability of any arbitration agreements, which affect subsequent lawsuits, will be suspended if the subject matter of the lawsuit may affect the value of the insolvency estate.

4. Control and divestment of the debtor

In the special revitalization proceeding the debtor ***retains powers of management***. It may not, however, carry out acts deemed of particular importance without the prior authorization of the provisional court-appointed insolvency practitioner (e.g. sale of the business; transfer of assets necessary for the business to continue operating; transfer of shares in other companies aimed at ensuring the establishment of a lasting relationship with these companies; acquisition of real estate; signature of new contracts with obligations for a lengthy period; assumption of obligations to third parties; grant of security; sale of assets for an amount equal to or greater than €10,000.00 and 10% of the insolvency estate).

In the ***insolvency process***, the ***insolvency practitioner*** will be responsible for carrying out all acts of management of assets in the insolvency estate, by representing the debtor for all purposes in relevant property matters for the insolvency process. The performance of acts of particular importance, however, will depend on the prior consent of a creditors' committee or of the creditors' meeting.

5. Groups of companies

Since in Portugal no mechanism exists providing for a joint petition for insolvency or for a revitalization process on groups of companies, the commencement of the relevant proceeding must be requested for each of the debtor companies.

The only provision in this respect is the option for the judge, by his own decision or on a petition by any of the parties, to appoint a single insolvency practitioner for all the companies that form part of the same group.

If the judge exercises this power, however, in general he also has to appoint another insolvency practitioner whose functions are limited to examining the claims for which recognition is sought.

6. Effects on contracts

In the context of the special revitalization proceeding, for the duration of the negotiations associated with that proceeding, contracts for services which relate to certain essential public services cannot be suspended (e.g. postal services, services for supply of water, electricity, natural gas or liquefied petroleum gases, electronic communications, urban solid waste collection and management and sewage treatment).

In the insolvency proceeding there are different consequences, depending on the type of contract involved.

For bilateral contracts yet to be performed on the date of the insolvency order, the general rule is the suspension of the contract until the insolvency practitioner issues a report in relation to its performance. The insolvency practitioner, advised by the creditors' committee, is responsible for deciding whether the contracts yet to be performed will be enforced or terminated.

As regards purchase agreements with reservation of title, if the debtor is the seller, the other party may demand performance provided that the item has been delivered before the insolvency order. Likewise, in the case of a finance lease agreement, if the debtor is the financial lessor, the other party may demand performance of the contract when the item has already been leased, provided that the relevant lease payments are paid.

If the debtor is the purchaser or financial lessee and is in possession of the item, the period for deciding as to whether the contract is performed cannot end before the meeting examines the report drawn up by the insolvency practitioner as a result of an analysis of the property and the debtor's accounting records.

In the case of a purchase agreement without delivery, if the insolvent party is the seller, the insolvency practitioner cannot refuse delivery. If the insolvent party is the purchaser, the refusal will lead to the recognition of a claim for the seller.

In relation to contracts for a promise to purchase or sell, the insolvency practitioner cannot refuse to allow their performance if they are actually enforceable and the delivery of the item to the promisor purchaser has already occurred. If performance is rejected, a post-petition claim for the other party will be recognized.

In the case of rental agreements, where the insolvent party is the tenant, the contract remains in force, and the insolvency practitioner is entitled to give notice of termination. If the rented property is used as the debtor's residence, the insolvency practitioner cannot terminate it, but must determine the period after which the lessor cannot enforce the right to payments of the rents due.

On the other hand, rental contracts under which the insolvent company is the lessor will remain in force under the terms of the contract or of the legislation which is applicable to them. If the leased property is sold in the course of the insolvency process, the lessee's rights are not extinguished, and will be retained on the general terms in the law.

Regardless of which party is insolvent party in rental contracts, where the leased property has not been delivered before the insolvency order, both the insolvency practitioner and the counterparty may terminate the contract.

Mandate and management contracts, including commission agency contracts, which are not unrelated to the insolvency proceeding, will expire upon the making of an insolvency order against the grantor of the mandate.

In relation to employment contracts, the making of an insolvency order against the employee does not suspend an employment contract. Conversely, if the insolvent party is the employer, the retention of employment contracts will depend on the decision regarding the continuation or termination of the insolvent company's operations.

Any current account contracts to which the debtor is a party end upon the issue of the insolvency order, and the respective accounts are closed.

If the insolvent company belongs to a joint venture, the latter will be terminated upon the insolvency of the associated contracting party. Additional groupings of companies and European economic interest groupings are maintained, and the member that is the subject of the insolvency order is allowed to leave the grouping.

7. Insolvency plan and recovery plan in the special revitalization proceeding

The proposed ***insolvency plan*** is debated and approved at the creditors' meeting called by the judge for this purpose. Only the creditors will have a voting right for the approval or rejection of the proposed insolvency plan. If the proposed insolvency plan receives the affirmative vote of the majority of the creditors provided by law for its approval, it will be deemed to be approved, and the debtor cannot impose a liquidation that is contrary to the provisions of the plan. Once it has been approved, the insolvency plan will require official approval by the judge to take effect.

As with the insolvency plan, only creditors vote on a ***recovery plan*** and, when it has been approved, the debtor cannot stop it coming into force, or even ask the judge to refuse to sanction the plan (unlike the case of the insolvency plan), because in the special revitalization process the debtor always takes on the role of proponent of the recovery plan.

In relation to the influence of the different classes of creditors in the insolvency proceeding and their respective claims on the approval of insolvency plans and recovery plans, Portuguese legislation, in both cases, does not establish many differences in relation to voting according to the class to which they belong.

In both cases, the applicable quorums for convening and decision-making can be formed by creditors belonging to any of the classes (secured or preferred, ordinary and subordinated creditors), and there is only one specific additional requirement in relation to the stipulated quorums for decision-making: the need for the proposal to obtain the approval of more than half of the votes belonging to the claims of the secured or preferred creditors and of the ordinary creditors, without taking abstentions into account.

Thus, depending on the voting rights belonging to the total of each class of creditors in each specific case, cross-class cramdown situations may arise.

The law requires that certain provisions must be included in any insolvency plan or recovery plan, and that they must observe the principle of equality: (i) in the equal treatment of all creditors, excluding differences based on objective reasons; (ii) the need for the consent of the creditor concerned if it provides less favorable treatment than for other creditors in exactly the same situation; and (iii) the invalidity of any agreement which grants advantages to a creditor not included in the insolvency plan or in the recovery plan in return for certain behavior, especially in relation to the exercise of that creditor's voting right.

The judge has to refuse to sanction the insolvency plan or the recovery plan if those provisions or the equality principle have not been observed (so that, in relation to the insolvency plan, the vote on it must not be admitted either if such rules have not been observed). Therefore, it may be said that this will constitute a kind of "fairness test" adapted to the Portuguese legal system.

8. Costs of the proceeding

In the ***insolvency proceeding***, the insolvency practitioner's fees, his expenses and those of the members of the creditors' committee are treated as an administrative expense. The methods for calculating the insolvency practitioner's fees are defined by law. Where, however, the insolvency practitioner is elected by the creditors' meeting, his fees will be as envisaged in the relevant agreement, subject to consent. The potential costs of legal advice to the debtor and to the creditors are not considered by law as post-petition claims.

In the ***special revitalization proceeding*** the provisional court-appointed insolvency practitioner's fees are determined by court decision. Those fees, as well as any expenses which may be incurred by the provisional

court-appointed insolvency practitioner will be the responsibility of the body responsible for the management of finances and property of the Ministry of Justice, insofar as they cannot be paid out of the debtor's property.

Lastly, the costs of legal advice to the creditors are not usually assumed by the debtor.

9. DIP financing

The debtor can obtain fresh money, while involved in an insolvency plan or in a recovery plan.

In the context of an ***insolvency plan***, the legislation does not provide any incentive for the injection of fresh money for the debtor, although certain incentives or benefits may be agreed by the parties in the specific insolvency plan approved, within the limits of the freedom granted to the parties for setting the terms of the insolvency plan (e.g. the provision of collateral for the new claims created in return for the finance).

In the context of a ***recovery plans***, however, the legislation expressly lays down that (i) the security agreed for the creditors must be retained in the new financing provided to the debtor, even if after the special revitalization process has ended, an insolvency order is made against the debtor within a period of two years; and (ii) a general preferred claim with a higher priority than the general preferred claim granted to employees must be created for creditors who in the course of the process finance the debtor by making capital accessible for its revitalization.

Consequently, in both an insolvency plan and a recovery plan, the claims relating to fresh money provided to the debtor may be secured by creating first-ranking security interests in assets free of liens or by providing lower-ranking security interests in assets already subject to liens.

In any event, the law does not provide the option for claims in respect of fresh money to be secured without considering the priority of the existing security (i.e. fresh money cannot be obtained with priming liens).

Finally, if the fresh money is provided by persons specially related to the debtor, the new claim in question is classified as a subordinated claim in a potential future insolvency process or special revitalization process, except where it benefits from general or special priorities, or from legal mortgages, which are not terminated as a result of the insolvency order.

10. Recognition of Portuguese insolvency proceedings in the European Union

In the Member States of the European Union Regulation (EU) 2015/848 of the European Parliament and of the Council, of May 20, 2015, known as the European Insolvency Regulation, applies. This Regulation contains various rules relating to a) the distribution among the courts of the member states of international jurisdiction to hear the different restructuring and insolvency proceedings; b) the coordination of such proceedings; c) cooperation between the courts and the insolvency practitioners appointed in main and secondary proceedings; and d) the determination of the legislation applicable to various issues of particular importance in the area of restructuring and insolvency proceedings (e.g. enforcement of security, employment contracts, judicial proceedings relating to detrimental acts, among others).

The restructuring and insolvency proceedings must be recognized in the other Member States, other equivalent main proceedings may not be commenced in those states, and the decisions issued in those Portuguese proceedings must be recognized. Restructuring and insolvency proceedings may be commenced in the Portuguese courts in relation to debtors who are not Portuguese nationals or have non-Portuguese registered offices/headquarters, if the debtor's center of main interests is situated in Portugal. The jurisdiction to determine whether the debtor's center of main interests is located in Portugal belongs to the Portuguese courts.

In relation to non-EU States, the Insolvency and Business Recovery Code also contains various rules of private international law defining international jurisdiction, and relating to the recognition in Portugal of foreign judicial decisions declaring debtors insolvent.

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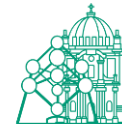

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