INSOL International

Cross-border Insolvency
A Guide to Select Latin American Insolvency Systems

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Acknowledgement

INSOL International is pleased to present this special report titled “Cross-border Insolvency – A Guide to Select Latin American Insolvency Systems” by Mr. Pedro A. Jimenez of Jones Day, USA.

The objective of this report is to provide key information to foreign practitioners that may consider initiating insolvency proceedings in any one or more of the Latin American countries that are covered.

The report provides information about the legal and judicial framework and in particular the state of domestic insolvency law, and where these exist, the available procedures for the recognition of foreign proceedings and the treatment of foreign creditors. Where applicable, pending reforms to domestic insolvency legislation including plans to adopt the UNCITRAL Model Law on Cross-Border Insolvency is also stated.

In order to prepare this report extensive research was done by our local contributors who also completed an initial survey, and this was initiated and manged by James Pomeroy, Fellow, INSOL International, PwC, Canada. The subsequent research and preparation of this report was done by Pedro Jeminaz of Jones Day, USA.

INSOL International sincerely thanks James Pomeroy for his initial work on the project and Pedro A. Jimenez for preparing this excellent and informative report and bringing this technical project to a conclusion.

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ARGENTINA

Law 24.522 (*Ley de Concursos y Quiebras*, enacted in 1995 and subsequently amended in 2002, 2006 and 2011) governs the manner in which bankruptcy proceedings are conducted in Argentina and the relative rights of debtors and creditors under such proceedings. Insolvency cases under Law 24.522 are generally adjudicated in Argentine Commercial Courts, although specialized bankruptcy courts also exist. Both companies and individuals are eligible to commence an insolvency proceeding under Law 24.522, with the exception of financial and insurance entities that are regulated by more specific laws - Bankruptcy Law 21.526 (enacted 1977) and Bankruptcy Law 20.091 (enacted 1973), respectively. The insolvency of financial institutions is governed by the Central Bank, while the insolvency of insurance companies is administered by Superintendent of Insurance Entities.

1. Legal and judicial framework

Argentine insolvency law outlines three types of court-supervised proceedings available to a company in financial distress: (1) a court supervised reorganization proceeding known as a *concurso preventivo*; (2) an out of court process known as an *acuerdo preventivo extrajudicial* ("APE"); and (3) a *quiebra*, which is a liquidation proceeding.

A priority scheme delineates the preferred status of certain creditors over unsecured creditors. For example, certain claims by employees, mortgages, pledges, and taxes typically enjoy priority over unsecured creditors.

1.1 Concurso preventivo

In a *concurso preventivo*, the debtor presents a request for authority to commence an insolvency proceeding under Law 24.522. If the debtor complies with the requisites outlined in Articles 5 to 12 of Law 24.522, then the judge assigned to the matter must accept the petition. The debtor continues the administration of the business until a trustee or receiver ("Sindico") has been appointed by the court to supervise the process. Once appointed, the Sindico becomes the *de facto* legal representative of the debtor's estate; however, existing management continues to have limited rights to continue to manage the affairs of the debtor. Creditors are required to file proofs of claim with the Sindico, who then is responsible for verifying each claim and providing a report to the court with their position on the validity and amount of each claim (Law 24.522, Article 36). Within ten days from the time the Sindico's report is filed with the court, the judge must enter a decision on the validity and amount of each creditor's claim. The debtor is also permitted to file a report with its position on the amount, priority and validity of each claim.

* The views expressed in this article are the views of the author and not of INSOL International, London.

The Sindico is also responsible for preparing a report on the general health of the debtor, which report is due within thirty days after having presented the report of claims against the debtor (Article 39 of Law 24.522). Within the ten day period following the Sindico's report, both the debtor and creditors whose claims have been recognized may file reports rebutting any conclusions provided by the Sindico and / or setting forth their own opinions on the overall state of the debtor.

Once the court has ruled upon the validity and amount of all claims against the debtor, a 90 day exclusive period begins during which the debtor may propose and negotiate the terms of a restructuring plan with creditors whose claims have been recognized. In order for any restructuring proposal to be binding, the debtor must obtain the support of at least two-thirds of the total amount of the principal debt and one-half in number of all creditors in each class. Failure to secure the required majorities within the 90 day period results in the insolvency proceeding being converted to a liquidation. Creditors have five days after notification of the proposed plan to challenge the same, and both the debtor and the Sindico can then rebut any challenge to the proposed plan. Once the plan has been approved by the required majorities, the judge reviews the terms of the plan before approving the same. If the judge approves the plan, then it is binding on all creditors, including those creditors that voted against the same.

1.2 *Acuerdo preventivo extra-judicial* (APE)

An APE operates much like a prepackaged chapter 11 plan of reorganization. In an APE, the debtor formulates and proposes a restructuring plan to its creditors. Only after having obtained the consent of the requisite majorities of creditors does a debtor then file the plan of reorganization (acuerdo) with the court for its endorsement. The process does not require the appointment of a receiver by the court. Non-consenting creditors have the right to challenge the plan on grounds that the plan contains material omissions or that the debtor misstated the amount of assets or liabilities, or on the basis that the debtor failed to obtain the necessary creditor consents. If the plan complies with the APE provisions, the court can overrule the objection and approve the plan if it sees fit to do so. The timeline of the APE varies based on the volume and the type of debt being restructured.

1.3 *Quiebra*

A quiebra (Title III of Law No 24.522) is similar to a liquidation under chapter 7 of the United States Bankruptcy Code. A quiebra is performed under court control and supervision, with the end goal of monetizing the company's assets and distributing the proceeds among its creditors in accordance with the priority scheme laid out by Law 24.522. The process may be commenced voluntarily by a debtor or involuntarily on the petition of one or more creditors. Once commenced, the court appoints a liquidator to carry out the marshalling and sale of the debtor's assets and to otherwise oversee the liquidation process.

In a quiebra proceeding, a debtor's non-exempt property is collected and converted into cash that is then distributed to the various creditors. Creditors are required to file a proof of claim with the liquidator stating the amount and priority of the creditor's claim. Creditors can also choose to participate in a creditors' committee that is charged with overseeing the liquidation. After the conversion of the debtor's assets, the liquidator is required to file a report that details its actions and proposed distributions to creditors. Both the debtor and its creditors can challenge the liquidator's final report before the court.

2. Recognition of foreign proceedings and treatment of foreign creditors

The recognition and enforcement of foreign insolvency proceedings exist in comity via the Montevideo Treaty of 1889 between Argentina, Uruguay, Paraguay, Bolivia and Peru and the Montevideo Treaty of 1940 between Argentina, Uruguay and Paraguay. A foreign proceeding can be recognized by letters rogatory within 6 months of its request. There is limited precedent for representatives of foreign insolvency estates seeking recognition in Argentina. The 1976 "Panair do Brazil" case is an example in which a trustee appointed in a Brazilian insolvency proceeding sought to liquidate assets in Argentina. The court in Argentina denied the request and found that an Argentine trustee had to be appointed to administer the liquidation of the debtor's Argentine assets.

There are numerous examples of Argentine insolvency proceedings having been recognized abroad, primarily in the United States. A few relevant examples include: Telecom Argentina, Multicanal, Compañía de Alimentos Fargo, Sociedad Commercial del Plata, and Compañía de Inversiones de Energía S.A. (CIESA). All of the above-mentioned cases involved insolvency proceedings in the United States under section 304 or chapter 15 of the United States Bankruptcy Code.

In Argentina, claims of local creditors have priority over the claims of foreign creditors. Additional large-scale restructuring proceedings involving foreign creditors conducted solely in Argentina include: Supercanal, Aguas Argentinas, Metrogas, and Gas Argentina.

3. Pending reforms

The Argentine Congress is considering an amendment to the Civil and Commercial Code that would change some bankruptcy regulation. However, efforts to adopt a law based on the UNCITRAL Model Law on Cross-border Insolvency ("the Model Law") have been unsuccessful.

4. System effectiveness

The Argentine legal system is generally known for delivering quality and integrity of judicial proceedings. The average time of insolvency proceedings is two to three years but in some extreme cases proceedings have lasted for over a decade. Argentina is ranked 83rd in the World Bank "Doing Business Rankings" for resolving insolvency as of 2015 (out of 189 survey countries). According to the data collected by Doing Business, resolution of an insolvency proceeding takes an average of 2.8 years in Argentina and costs 12.0% of the debtor's estate. The average recovery rate is 28.6 cents on the dollar.

BRAZIL

Brazil is the fifth most populous country in the world. Brazil's new and much anticipated bankruptcy law, Law No. 11,101 ("Brazilian Bankruptcy Law"), finally came into effect on February 9, 2005. The new law replaced an outdated law that had governed insolvency and restructuring since 1945. The law is applicable to both companies and individuals. However, Law No. 11,101 is not applicable to government owned companies, mixed-capital companies, financial institutions (private and public), credit unions, consortiums, supplementary social security companies, insurance companies, and capitalization companies. Financial institutions are liquidated in accordance with Law No. 6,024 (enacted 1974).

1. Legal and judicial framework

The Brazilian Bankruptcy Law establishes three primary mechanisms to reorganize or liquidate troubled businesses: (1) forced liquidation, (2) in-court reorganization, and (3) out-of-court reorganization. Jurisdiction over insolvency proceedings is determined by the location that is the center of the main interest (COMI) of the debtor. Certain judicial districts have courts that specialize in bankruptcy (such as in São Paulo), otherwise, the insolvency proceedings are conducted in regular civil courts.

The Brazilian Bankruptcy Law sets forth the following ranking in priority amongst claims: labour claims up to 150 times the prevailing minimum wage for each creditor, claims deriving from accidents at work, secured credits up to the value of the relevant collateral, tax debts, credits with special privileges, credits with general privileges, unsecured credits, contractual penalties, tax penalties and fines deriving from violations of legal provisions, and subordinated credits.

1.1 Forced liquidation

When a business is no longer economically viable, the distressed company or a creditor may request a forced liquidation. The court can also convert a judicial recovery procedure into a liquidation. After the initiation of a liquidation, the debtor and its management team are no longer responsible for carrying out business activities. The court appoints a trustee (or judicial administrator) who collects, disposes of and liquidates the debtor's assets and distributes the proceeds in accordance with the order of priority.

A creditor can request a declaration of the debtor's liquidation if the debtor: (i) fails to pay when due without good cause, the amount represented, provided that the amount is over 40 times the minimum monthly salary; (ii) in the event of collection fails to pay, liquidates assets in a wasteful or fraudulent manner to avoid payment; (iii) defrauds or delays payment; or (iv) transfers assets to a third party without the consent of all creditors and resulting in insufficient assets to settle all claims.

Consent is not required to initiate a liquidation proceeding. When a company is liquidated, the judicial administrator files a final report and requests the court to conclude the case.

1.2 In-court reorganization

Judicial or in-court reorganization (or judicial recovery as it commonly referred to in Brazil) may only be requested by the debtor and not by its creditors. The proceeding may be employed when a business faces financial difficulties, but is still viable and may overcome its financial crisis. The procedure initially prevents liquidation from taking place. The debtor continues to run its business under the supervision of an independent administrator and the court while it arranges to pay its debts to the creditors. If judicial recovery is granted by the court, the debtor will have 60 days to present a plan of reorganization. If no creditor opposes the plan, the debtor is authorized to proceed with its terms.

If there is opposition to the plan by any creditor, then the recovery plan is voted on in a general creditors' meeting by three classes of creditors: (1) labor and labor related creditors, (2) secured creditors and (3) unsecured creditors. The recovery plan must be approved in each class by the majority of creditors present or represented at the general creditors' meeting by number and value. In certain circumstances, the court can approve a recovery plan even if it is only approved by two of the classes of creditors. If approved, the recovery plan is binding on all creditors in all classes. If the recovery plan is not approved, then the debtor is forced into liquidation. Importantly, certain debts, including tax claims, capital or operating leases, and certain bank loans, are not subject to judicial recovery.

In the case of out-of-court and in-court reorganizations, the provisions established by the reorganization plan determine the payment conditions of the various creditors. Hence, it is possible for certain lower priority claims to receive consideration before other higher priority claimants if the plan is approved by the creditors and ratified by the court.

1.3 Out-of-court reorganization

Out-of-court or extra-judicial reorganization is initiated at the request of the debtor and, like in the judicial recovery procedure, the debtor remains in control of the company's administration during the process. In the out-of-court proceeding, the debtor negotiates a pre-packaged plan of reorganization with its creditors. The pre-packaged plan is binding on all creditors once the terms of the negotiation are complete and the plan is supported by creditors representing more than 60 percent of the claims in each class.

Certain debts, including tax claims, capital or operating leases, certain bank loans and labor related claims, are not subject to extra-judicial recovery.

2. Recognition of foreign proceedings and treatment of foreign creditors

The Brazilian courts do not generally recognize or enforce foreign insolvency orders and none of the international accords to which Brazil is a party apply to such orders. In effect, a bankruptcy order against a Brazilian company may only be obtained before the Brazilian court that has jurisdiction over the company.

Brazil is a signatory to the Inter-American Convention on the Extra-territorial Effectiveness of Foreign Judgments and Arbitral Awards (1979), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Inter-American Convention on International Commercial Arbitration (1975).

A foreign proceeding rendering a judgment against a Brazilian debtor can be enforced by the Brazilian courts without reexamination of the merits, provided that the judgment has been ratified by the *Superior Tribunal de Justiça* (the Brazilian Federal Superior Court of Justice). In order for a foreign judgment to be recognized in the courts of Brazil, such judgment must fulfill the following conditions: (1) complies with all the formalities necessary for its enforcement under the laws of the place where it was issued; (2) is rendered by a competent court after proper service of process on the parties; (3) is not subject to an appeal; (4) does not offend Brazilian national sovereignty, public policy or good morals; and (5) is duly authenticated by a competent Brazilian consulate and accompanied by a certified translation into Portuguese (*tradução pública juramentada*). If the procedure is complied with in all respects, recognition or relief of the case can be obtained in about one year. The hiring of local advisors (legal and financial) who can be directly involved in the day-to-day activities of the matter is crucial to the success of an insolvency proceeding in Brazil.

Brazilian law treats local and foreign creditors equally. However, some formal requirements must be followed by foreign creditors to be represented in the proceedings, such as representation by Brazilian legal counsel.

3. Pending reforms

Brazil has not adopted the Model Law. However, a 2011 study was sent from the Public Prosecutor's Office of the State of Sao Paulo to the Ministry of Justice suggesting the adoption of the principles of the Model Law into the Brazilian insolvency legislation.

Additionally, there are other projects being discussed by the National Congress to amend the Brazilian Bankruptcy Law and improve its applicability.

4. System effectiveness

The quality and efficiency of the Brazilian legal system varies according to the city or state where the presiding court is located. However, in general terms, legal proceedings in Brazil are bureaucratic, cumbersome and time consuming. Corruption also remains a major problem at all levels of the judiciary. Brazil is ranked 55th in the World Bank "Doing Business Rankings" for resolving insolvency (out of 189 survey countries). According to data collected by Doing Business, resolution of an insolvency proceeding takes an average of four years in Brazil and costs 12.0% of the debtor's estate. The average recovery rate is 25.8 cents on the dollar.

CHILE

Chile is the third largest recipient of foreign investment in Latin America notwithstanding an insolvency law that was outdated and designed to promote the liquidation, as opposed to reorganization, of Chilean companies. As described in greater detail below, in October 2014, Chile's bankruptcy and insolvency law underwent substantive reform with the passing of Law No. 20.720. One of the principal highlights of the new law is the recognition that reorganization is a more viable alternative to liquidation and more likely to further encourage foreign investment in the country.

1. Legal and judicial framework

The 2014 insolvency law replaced Chile's prior insolvency law, which had been initially enacted in 1982, and subsequently amended in 2005. In addition to the liquidation of a company, the new law creates a framework for two types of restructurings: (1) extra-judicial reorganization and (2) judicial reorganization. While the new law did not create courts dedicated solely to bankruptcy and insolvency matters, the new law attempts to promote a more specialized bankruptcy venue by setting forth that judges with specific experience handling bankruptcy and insolvency matters will have a preference to hear new cases filed under the insolvency law. The *Superintendencia de Insolvencia y Reemprendimiento* governs the administration of insolvency law in Chile. The new law also created two new players in the bankruptcy process – the "Reorganization Supervisor" (or *veedor*) and the "Liquidator" (or *liquidador*) to oversee the process of a reorganization or corporate liquidation, respectively. Both individuals are initially chosen by the court and approved by the company's creditors during an administrative proceeding overseen by the *Superintendencia de Insolvencia y Reemprendimiento*.

1.1 Extra-judicial plan of reorganization

The new law provides an express avenue for the recognition and validity of an extra-judicial reorganization plan, whereby the court approves an extra-judicial reorganization agreement developed outside of the bankruptcy court. In order for an extra-judicial plan to be court-approved, two or more creditors whose claims represent at least 75 percent of the total claims corresponding to their respective classes must accept the plan. While the approval of the plan is being considered, the court stays creditor actions against the debtor, including solicitation of the debtor's forced liquidation. However, during this time, the debtor is also prohibited from disposing of any of its assets, except those that are essential to the debtor's ongoing business activities. After approval, the extra-judicial plan has the same effect as a judicial reorganization plan in that it binds all creditors, regardless of whether they voted to accept the plan.

1.2 Judicial plan of reorganization

Like its name suggests, judicial reorganizations differ from their extra-judicial brethren in that the entire process is subject to oversight by the court. A company works with the Reorganization Supervisor and the company's creditors to formulate a plan of reorganization. In order to be binding, the plan must be approved with a quorum representing 66.6% of the debtor's liabilities and reviewed by the Reorganization Supervisor. Once the debtor has obtained the necessary consents, it can then present the plan to court for approval. Once approved by the court, a plan of reorganization binds all creditor classes covered by the plan, including those creditors that voted against the plan.

2. Recognition of foreign proceedings and treatment of foreign creditors

The new law is also the first in Chile to adopt provisions regarding cross-border insolvency. The new law adopted the Model Law. Article 314 of the new law details the procedure to recognize an insolvency proceeding pending outside of Chile, including compliance with Chilean civil law on the presentation of foreign documents. Meanwhile, Articles 324 through 326 include provisions for the co-operation between the Chilean courts and foreign courts overseeing cross-border and parallel proceedings.

Article 312 of the new law provides that both foreign and domestic creditors have the same rights to commence an involuntary proceeding against a Chilean company. Article 308 of the new law also provides foreign creditors with equal access to the bankruptcy court overseeing the insolvency proceeding as their domestic counterparts, but foreign creditors must employ Chilean counsel to formally appear before the court.

3. Pending reforms

The New CBA was a major reform of existing Chilean bankruptcy and insolvency law. There are no pending reforms to bankruptcy law in Chile.

4. System effectiveness

Given that the new law has been in effect for less than one year, it is difficult to assess the quality of outcome, integrity of process, speed and efficacy of any proceeding under the new law. Moreover, there is insufficient data to analyze in order to determine whether the new law has had its intended effect. During the time period from 9 October 2014 to 31 December 2014, there were only 19 insolvency proceedings filed with the courts in Chile – thirteen liquidations and six reorganizations.

COLOMBIA

Colombia is one of the few Latin American countries to have adopted the Model Law. The Superintendency of Companies has been attributed judicial powers by Article 116 of the Colombian Constitution (1991) to act as a judge and oversee the insolvency process of companies, sole proprietorships, branches of foreign companies, and individual merchants - most of the insolvency cases in Colombia. Law 1116, enacted in 2006, governs insolvency proceedings for companies and individual merchants. Non-merchant insolvency proceedings are regulated by Law 1564, enacted in 2012.

1. Legal and judicial framework

In Colombia, a debtor is declared insolvent when it is unable to satisfy its obligations, or whenever it fails to satisfy two or more obligations representing 10% or more of its total liabilities for over ninety days. Colombian Law 1116 allows for three types insolvency proceedings: (1) reorganization proceedings, (2) out-of-court reorganization agreements validated by an insolvency judge and (3) judicial liquidation.

While a debtor can appoint its legal representative to act on its behalf during the course of a reorganization proceeding, it is often the case that the court will also appoint an insolvency administrator (called a “promoter”) to oversee the insolvency proceeding. In contrast, in a judicial liquidation, the *liquidador* (or liquidator) is appointed by the court to carry out all of the functions necessary to monetize the debtor’s assets and make distributions to creditors. Colombian insolvency law provides a traditional statutory system that prioritizes the payment of labor and tax related claims. There is no special treatment for secured creditors in insolvency proceedings. Secured creditors must intervene in the insolvency proceedings in order to obtain the payment of their claims. Secured creditors are not excluded from the effects of the proceeding and, importantly, are enjoined from enforcing any rights against their collateral during the pendency of the insolvency proceeding.

2. Recognition of foreign proceedings and treatment of foreign creditors

Title III of Law 1116 contains a specific section dealing with cross-border insolvency. Colombia has also executed several international treaties and conventions that are applicable to cross- border insolvency proceedings including: Title X of the Montevideo Treaty on Commercial International Law on Bankruptcies (1889) (regulating relations with Argentina, Bolivia, Paraguay, Peru and Uruguay), the Inter-American Convention on Letters Rogatory, and Protocol on Letters Rogatory, Montevideo (1979 and ratified by Law 27 of 1988) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

Foreign proceedings may obtain recognition in Colombia by filing a court application and presenting all documents required under Law 1116. Nevertheless, Colombian authorities may demand that every supporting document submitted for a petition of recognition be officially translated into Spanish and be duly registered at the appropriate Colombian Consulate before being filed with the Court in Colombia. Under Law 1116 a foreign representative may apply for recognition before the ordinary civil jurisdiction or before the Office of the Superintendent of Companies.

The case of QBEX Electronics Corporation, INC. was the first request for recognition of foreign proceedings under Law 1116 that was based on the Model Law. However, the request was unsuccessful.

Under Law 1116, claims of foreign creditors are treated equally with those of domestic creditors.

3. Pending reforms

Colombia adopted the Model Law in 2006, there are no pending reforms to alter the insolvency regime.

4. System effectiveness

The Colombian legal system is known for delivering quality of judgments based on law, integrity of process and outcome, as well as efficiency. Colombia is ranked fourth within the Latin America & Caribbean region of the World Bank "Doing Business Rankings" for resolving insolvency as of 2014 (out of 29 survey countries) and 30th out of 189 in the world.

COSTA RICA

Costa Rica has the second highest GDP in Central America. The country is also noteworthy for the stability of its government, progressive environmental policies, and abolishing its military in 1949.

1. Legal and judicial framework

Costa Rican insolvency and bankruptcy proceedings are regulated by the *Código Procesal Civil* (Civil Proceedings Code) enacted in 1989. Currently, there is no national authority that governs the administration of insolvency law - nor are there specialized bankruptcy courts. The law is applicable to both companies and individuals. In such proceedings only an independent practitioner appointed by the Court may act as the legal representative of the company undergoing a restructuring.

A debtor wanting to undergo a restructuring can resort to the following processes: a compulsory bankruptcy proceeding, a voluntary liquidation, an in-court corporate rescue procedure or a preventative agreement.

1.1 Compulsory bankruptcy

In Costa Rica, the liquidation of a company's assets may be initiated by a compulsory bankruptcy proceeding when the debtor lacks sufficient assets to satisfy all of its indebtedness. After the issuance of a ruling authorizing the commencement of a liquidation, the legal powers of the directors and officers of the company cease, and the bankruptcy trustee is entrusted with the administration of the debtor as of that moment. The trustee manages the debtor's assets and holds powers of attorney. A liquidation proceeding ends upon payment of all claims or a ratio of the claims, or upon agreement of the creditors. In a corporate bankruptcy or liquidation, claims are ranked in the following priority: privileged claims secured on a given asset, employees' claims, lessors' and lessees' claims, and ordinary claims.

1.2 Voluntary liquidation

A corporate debtor can also pursue a voluntary liquidation procedure approved by shareholders. In a corporate liquidation, the liquidator is the responsible trustee for the management and control of the process. During the process, the liquidator terminates any pending operations of the company, gathers and fulfills the company's obligations and sells the company's assets. The liquidator must then prepare a final liquidation statement and submission that must be discussed and approved by the shareholders. The corresponding portions of company property, after creditors have been paid in full, are delivered to each shareholder.

1.3 Corporate rescue procedures

A corporate rescue procedure can be undertaken by judicial administration and reorganization or by a preventative agreement. If a debtor seeks a judicial administration and reorganization, the process is initiated by a request submitted by the debtor, the creditors or the General Superintendence of Securities in the case of a company that has issued public securities. The petition must include a description of the cause of the financial crisis and the necessary steps to overcome the same. If possible, the court will appoint an *intervenor* to oversee the process. A remedy plan is then submitted for the creditors' approval; and if approved by the creditors, presented to the court for ratification. If the plan is approved, the remedy plan is executed by the debtor's management with the supervision of the *intervenor* and the court. The remedy plan must be fully performed within three years, unless 75 percent or more of the creditors agree to a longer term. If the plan is not approved by the court, then the debtor goes into liquidation.

A debtor must submit its preventative agreement proposal to its creditors. The petition must contain the cause of the crisis and the type of agreement being proposed to deal with same. If the judge decides to admit the request, he or she declares the initiation of the process, appoints an administrator or trustee, summons the creditors, registers the claims and issues precautionary measures. The trustee then submits an opinion about the viability of the proposed agreement. The court then summons the creditors to discuss and vote on the proposed agreement. The agreement is approved by a majority of the creditors representing a minimum two-thirds of all registered claims. If approved by the requisite number and amount of claims, the court can ratify the agreement. However, if the agreement is rejected by the court, then a liquidation proceeding is immediately ordered against the debtor.

2. Recognition of foreign proceedings and treatment of foreign creditors

The Civil Proceedings Code does not contain specific sections relating to cross-border insolvency, and the only process by which a foreign proceeding or orders entered by a foreign court can be recognized is through the process of a letter rogatory, which may take up to 2 to 3 months to process.

Costa Rica's insolvency law does not create any priority for local creditors over foreign creditors.

3. Pending reforms

There are no current efforts to reform the existing law. There are also no known proposals to adopt the Model Law.

4. System effectiveness

The Costa Rican legal system is known for delivering quality of judgments based on law, as well as integrity of process and outcome. However, the speed and efficiency of the proceedings are unpredictable. Costa Rica is ranked 14th within the Latin America & Caribbean region of the World Bank "Doing Business Rankings" for insolvency as of 2014 (out of 29 survey countries) and 89th out of 189 in the world.

GUATEMALA

Guatemala lacks legislation regarding specific substantive rules on insolvency and bankruptcy. However, the Code on Civil and Commercial Procedures ("Guatemalan Civil Code"), *Law Decree No. 107*, enacted on September 9, 1973, regulates all procedural aspects of bankruptcy proceedings. In the World Bank's 2015 Doing Business Report, Guatemala ranked 155 out of 189 countries and insolvency is one of the areas where reform appears to be the most needed.

1. Legal and Judicial framework

According to the Code, both individual and business entities may be subject to liquidations. Excluded from the list of eligible business entities, however, are financial institutions, which are subject to specific regulations. In Guatemala, financial institutions are regulated according to the Law of Banks and Financial Groups, including procedures and rules governing the insolvency of financial institutions.

In Guatemala, civil courts have jurisdiction over bankruptcy cases and the civil judges of the first instance oversee the bankruptcy cases. In order for a declaration of bankruptcy to be issued, one of the following must first take place: (i) creditors reject the restructuring agreement proposed by the debtor during a voluntary insolvency proceeding; (ii) a debtor and its creditors are unable to reach a settlement with regards to the collection of assets and payment of the obligations; or (iii) at least three foreclosure actions are instituted against the debtor and the debtor has no assets with which to pay its remaining obligations.

2. Recognition and enforcement of foreign proceedings

Guatemalan law does not contain specific sections relating to cross-border insolvency, however, the International Private Law Convention ("IPLC"), and the Inter-American Convention on letters rogatory apply to this jurisdiction.

Recognition of a foreign proceeding may be obtained through letters rogatory within approximately one year of request. This estimate is based on recent experience with Bancafe International Bank Ltd, whose foreign representative sought recognition of the company's insolvency proceeding that was pending in Barbados.

3. Pending reforms

There are no known efforts currently in Congress to reform the existing framework. However, there are certain private efforts to promote the adoption of legislation based on the Model Law. The bill is based on more modern and globalized insolvency principles and legislative guidelines provided by the World Bank and UNCITRAL. Nevertheless, the bill is still in the rulemaking process pending notice and comments, and is yet to be introduced to Congress for consideration.

4. System effectiveness

Guatemala's legal system is not known for delivering certainty of outcome, quality of judgments, or efficiency.

MEXICO

Mexico has one of the most active restructuring markets in Latin America, and is a pioneer in recognizing cross-border insolvencies, being one of the few Latin American countries to have adopted the Model Law on Cross-Border Insolvency. Insolvency proceedings in Mexico are governed by the *Ley de Concursos Mercantiles* ("LCM"), first passed in 2000 and most recently amended in 2014. The LCM is available to individuals or legal entities that have failed to make payments when generally due. The law allows for both reorganization and liquidation. Insolvency proceedings of what the LCM refers to as non-merchants, on the other hand, are governed by state civil codes and there exist special laws governing insolvency proceedings for financial institutions, insurance, bonding, reinsurance and re-bonding companies.

1. Legal and judicial framework

Insolvency cases in Mexico are handled by the federal courts in the district where the debtor's principal place of business is located, with help from the *Instituto Federal de Especialistas de Concursos Mercantiles* ("IFECOM"), the national authority responsible for the administration of the insolvency laws. In general, in order for an insolvency case to be brought under the LCM, there must be a determination by a federal district judge, with the aid of the visitador, who is appointed by IFECOM and serves a sort of auditor role at this initial stage of the process, that the debtor meets the eligibility requirements. In order to maintain an insolvency proceeding under the LCM, each debtor must establish that (i) it is a business entity that is not otherwise prohibited from commencing a proceeding under the LCM; (ii) it has two or more creditors; and (iii) it failed to pay its creditors when payment was due. The criteria used by the visitador and the judge assigned to the proceeding to evaluate whether there has been a default on payment obligations are: (i) failure to meet payment obligations of at least two creditors; (ii) payment obligations more than 30 days overdue; (iii) overdue payment obligations represent 35 percent or more of the total amount of the debtor's obligations as of the petition filing date; and (iv) the debtor lacks cash assets to pay at least 80 percent of the total debts due as of the petition filing date. The visitador, who is provided access to the debtor's books and records, is required to prepare and deliver a report with his or her findings to the district court indicating whether the debtor satisfies the insolvency standard set forth above. If the visitador confirms that the requirements are met, then the court may admit the petition and adjudge the debtor to be in *concurso mercantil*.

A proceeding under the LCM has two phases: (i) Conciliation (*conciliación*) and, if no restructuring plan is approved, then (ii) Liquidation (*liquidación*). The declaration of *concurso mercantil* opens the conciliation phase, in which the party known as the conciliator, who is appointed by IFECOM, is responsible for managing the claims recognition and reconciliation process, overseeing the debtor's administration of the business, and acting as a mediator between the debtor and the creditors to formulate a reorganization plan. The conciliation phase may last up to 185 days, and there may be two extensions of 90 days upon approval of a special majority of creditors (two thirds for the first and 90 percent for the second extension). It is important to highlight that during the conciliation stage, the debtor's management remains in place and continues to run the day-to-day operations of the debtor, much like in a chapter 11 case in the United States. At the beginning of the conciliation phase, the debtor is required to provide to the conciliator access to the debtor's books and records. The order adjudging the debtor to be in concurso mercantil also creates a stay of all payments by the debtor, except those necessary for the ordinary course of business, and parties are enjoined from initiating or continuing any actions against the debtor or its assets (other than those associated with labor claims).

In order for a reorganization plan to satisfy the requirements of the LCM, it must be approved by a majority of creditors (more than 50 percent). The LCM sets forth the minimum rules that the reorganization plan must follow, but it does not dictate specific terms or conditions, giving the debtor and its creditors leeway on what matters to cover in the plan. Once the plan has been approved by the requisite number of creditors, the debtor must present the plan to the court for ratification.

If no agreement is reached during the conciliation phase (or the debtor voluntarily abandons its efforts to reorganize), then the insolvency case is converted to a liquidation, and the trustee, also appointed by IFECOM, is tasked with selling the debtor's assets in order to make distributions to the creditors. A trustee is vested with the same powers as a conciliator. Assets are sold by public action and such sales seek the maximum price, whether through a going concern sale or in piecemeal fashion. For a sale to occur outside of a public action, court approval is required. Distributions are then made in accordance with the priority and amount established in the claims recognition process. After distributions are made, the trustee asks for a court judgment declaring termination. The court may grant the judgment declaring termination if (i) full payment of recognized claims is made or (ii) recognized claims are partially paid and there are no assets left to liquidate.

2. Recognition of foreign proceedings and treatment of foreign creditors

Chapter XII of the LCM covers cross-border insolvency and adopts the framework provided by the Model Law. It provides for the recognition of foreign insolvency proceedings and co-operation between domestic and foreign representatives. Further, Chapter XII recognizes direct communications between foreign and domestic courts, without the need for letters rogatory. Foreign proceedings have been recognized by Mexico in cases such as *XACUR* and *IFS* and both these cases involved extensive direct communications between Mexican and U.S. courts. The provisions providing for co-operation between foreign and domestic representatives have shown the ability to lead to more effective, practical results in cross-border insolvency proceedings.

It is important to highlight, however, that co-operation of the Mexican courts is based on the understanding that the Mexican courts will not honor any request that would violate Mexican public policy. As such, foreign creditors should be aware that certain orders or judgments that could be entered into a foreign proceeding, for instance any issues related to claims of Mexican employees, would not be recognized by Mexican courts.

The LCM does not create a priority for domestic creditors over foreign creditors, except for certain classes of tax and labor claims.

3. Pending reforms

The most recent reform of the LCM was published in the Federal Gazette of the Federation on January 10, 2014. High-profile cases such as *Vitro* and *Mexicana Airlines*, which illustrated certain shortcomings of the LCM, gave rise to most of the recent amendments. These amendments were enacted in an effort to further protect creditors' rights and increase the transparency, efficiency, and effectiveness of the insolvency process. Most notably, the 2014 amendments concern filing of petitions when insolvency is imminent, limiting the voting ability of subsidiaries, expanding the responsibility of the managers and board of directors, establishing processes for voting and representation of bondholders, reinforcing deadlines to complete the conciliation phase, and the treatment of fraudulent transactions.

4. System effectiveness

Mexico's system is known for delivering quality of judgments based on the law, as well as handling the proceedings with integrity. Nevertheless, depending on the location of the Mexican court in which the insolvency proceeding is pending, the speed and efficiency of the proceeding may be unpredictable.

PANAMA

Insolvency in Panama is regulated by specific sections of the Commercial Code and the Judicial Code. Articles 1534 to 1648 of the Commercial Code regulate the declaration of bankruptcy of companies or individuals engaged in business activities. Articles 1786 to 1912 of the Judicial Code govern the procedures for filing bankruptcy proceedings before the civil courts. While Panamanian law provides for a liquidation process, it does not provide for a formal reorganization process unless it is a certain regulated industry. There are special regulations for banks, insurance companies, securities companies, trust companies, and co-operative companies that provide for bankruptcy and reorganization.

1. Legal and judicial framework

A debtor commences a voluntary liquidation by filing a petition for bankruptcy before the circuit court in Panama. A Petition for Bankruptcy must be filed by the debtor within two days of defaulting on the payment of an obligation. If the debtor is a company, then the obligation falls on the managing partners, administrators, or directors. When filing for bankruptcy, the debtor must voluntarily turnover all its assets, an inventory of its assets, and the list of its creditors to the court. If a creditor petitions to commence an involuntary bankruptcy, the creditor must be able to prove that its claim is liquid, enforceable, and is a past due commercial obligation. Once the court issues a declaration that a state of bankruptcy exists, the court notifies the Public Registry to refrain from recording any instruments in connection with the debtor.

A Declaration of Bankruptcy has the following effects:

(i) the judge will order the Public Registry to abstain from recording any instruments in connection with the debtor, meaning that the debtor will not be allowed to sell or otherwise dispose of its assets;
(ii) the debtor is prevented from managing its assets and business and the administration of the business will be taken over by a court-appointed administrator;
(iii) interest on debts will cease to accrue unless the claims are secured by mortgages or pledges;
(iv) all civil and commercial debts will be declared immediately due and payable; and
(v) payments and any other transfer or legal transactions undertaken by the debtor after the bankruptcy declaration will be considered null and void.

Once the bankruptcy request is filed, the court (i) issues an order for the deposit of the assets, books, and other documents of the debtor; (ii) appoints an administrator; and (iii) summons all creditors to a General Meeting. The purpose of the General Meeting is to gather every creditor who may have a claim and determine the amount, priority and type of each claim. Creditors have an option to form a special committee composed of three to five creditors to monitor the administration of the bankruptcy, but the function of this committee is purely advisory. In Panama, local secured creditors, particularly those holding land mortgages, as well as certain labor claims, enjoy priority over unsecured creditors.

The court appoints an administrator after the declaration of bankruptcy is filed. The court-appointed administrator is responsible for the management of the debtor's assets, the sale of all assets with the approval of either the general meeting of creditors or the court, and making distributions to creditors. The court-appointed administrator acts on behalf of both the debtor and the creditors in the bankruptcy proceeding.

Panamanian law does not provide for a formal reorganization process. However, the debtor and its creditors are free to negotiate a restructuring agreement to set out how the creditors will be repaid over a period of time. A debtor may propose a restructuring agreement at the General Meeting of Creditors or in court, but only after all claims have been evaluated by the creditors. In order for the agreement to be valid, it must be approved by a majority of creditors holding at least 75 percent of the total claims published and approved by the court. Once the agreement is approved, the court appointed administrator delivers all the assets to the debtor who once again regains control of the business, but the administrator remains responsible for supervising the execution of the agreement. If the agreement is not approved, then the liquidation of the debtor will resume.

2. Recognition of foreign proceedings and treatment of foreign creditors

Panamanian law does not contain specific sections relating to cross-border insolvency and Panama has no treaties pertaining to bankruptcy proceedings in foreign countries. However, a foreign proceeding can obtain recognition by way of letter rogatory or by means of the enforcement of a foreign judgment.

In order for a foreign judgment in an insolvency proceeding to have effect in Panama, it must be enforced through a recognition process before the Supreme Court of Panama. For the foreign judgment to be recognized, the Supreme Court must determine that

(i) the courts of the foreign country would, in similar circumstances, recognize a final judgment of the Panamanian courts;
(ii) the judgment was issued as a consequence of an *in personam* action;
(iii) the judgment was rendered after personal service on the defendant;
(iv) the cause of action upon which the judgment rests does not contravene Panamanian public policy;
(v) the copy of the judgment has been authenticated by a consul of Panama or pursuant to the 1961 Hague Convention; and
(vi) the copy of the final judgment has been translated into Spanish by a licensed translator in Panama. Preventative measures with respects to assets of the debtor located in Panama may be sought through letters rogatory.

3. Pending reforms

There are no known efforts to reform the existing law or to adopt the Model Law.

4. System effectiveness

Given the absence of an express law to foster and permit the reorganization of a troubled business, Panama's insolvency system is uncertain.

PARAGUAY

Paraguay's dedicated insolvency law is the "*Ley de Quiebras, Ley No. 154/69*" which was enacted in 1969. Paraguay's insolvency law contains provisions for reorganization and liquidation. In the World Bank's 2015 Doing Business Report, Paraguay ranks 106 out of 189 economies with respect to the "Ease of Resolving Insolvency".

1. Legal and judicial framework

The insolvency law applies to both individuals and merchants (individuals or legal entities engaged in business activities). In order to be eligible for an insolvency proceeding, the debtor must be insolvent (which the law defines as the default under one or more obligations or other evidence demonstrating the insolvency of the debtor). The reorganization phase of an insolvency proceeding is conducted through a Meeting of the Creditors, while the liquidation phase is conducted through a Declaration of Bankruptcy. A Meeting of the Creditors may only be requested by the debtor; in other words, there is no concept of an involuntary reorganization in Paraguay. A Declaration of Bankruptcy, on the other hand, may be requested by the debtor or a creditor. The Courts of First Instance of the Civil and Commercial Courts have jurisdiction over insolvency proceedings and play an active role in the process.

The purpose of the Declaration of Bankruptcy is to liquidate the assets of the debtor and to settle all outstanding claims against the estate. The purpose of the Meeting of the Creditors is to avoid the Declaration of Bankruptcy by reaching an agreement among all the creditors and the debtor, in which the creditors agree to a reduction in the amount of the outstanding obligations and an extension of the time period for payment of the obligations. The main distinction between the different proceedings is that in the case of the Meeting of the Creditors, the debtor retains the ability to administer and control its assets, even though the court appoints a receiver to oversee the debtor. In the case of a Declaration of Bankruptcy, the debtor loses control of the business and assets on the date the declaration is made and the court appointed receiver is vested with control.

In order for a creditor to request a Declaration of Bankruptcy, the creditor must (i) have a non-contingent obligation, (ii) demonstrate that the debtor has defaulted on one or more non-contingent obligations, or (iii) submit such other evidence as to prove the insolvency of the debtor. If the creditor's claim is based on a default of a contractual obligation, then the creditor must wait at least 10 days from giving notice of the nonpayment of the debt before filing the request for the Declaration of Bankruptcy.

The debtor may appear before the court to apply for either a Meeting of the Creditors or a Declaration of Bankruptcy. It is implicit in a request for a Meeting of the Creditors that the debtor may later need to file a Declaration of Bankruptcy if no agreement is reached. The petition for a Declaration of Bankruptcy must include the following:

(i) a listing of debts, obligations and occurrences that have resulted in insolvency;
(ii) a balance sheet showing the asset holdings of any business owned with an accounting as to those losses and profits made in the 10 days prior to the request for bankruptcy;
(iii) a list of all outstanding creditors and information regarding their domicile, the amount owed to each, the date each loan or obligation matured and any special guarantees or securities that have been made;
(iv) a complete inventory of assets;
(v) in case of commercial partnerships, a list of each of the partners;
(vi) an affidavit attesting to the debtor's agreement to place its business books and records into Court receivership;

(vii) a Certificate issued by the General Registry of Bankruptcies stating whether the debtor has previously requested either a Declaration of Bankruptcy or a Meeting of his Creditors;
(viii) evidence that a partnership has been Registered in the Public Business or Commercial Registry; and
ix) for partnerships and corporations, a power of attorney evidencing the petitioner's authority to file the bankruptcy petition. The court must then decide whether to allow for either the Meeting of the Creditors or the Declaration of Bankruptcy within 25 days after the petition is made.

Generally, the court will allow for a Meeting of the Creditors when it has been requested, except when:

(i) commercial activity has been undertaken that is contrary to the law or to the rules of professional ethics;
(ii) the accounting books and records have not been kept in accordance with the requirements of the law and in accordance with regular standards or professional practice as established for the type of business being considered;
(iii) the debtor has attempted to conceal assets from being recorded or if the debtor in any way misrepresented the location of any assets and in such manner fraudulently increased his liabilities;
(iv) the debtor has been declared bankrupt during the last ten years;
(v) in the case of an individual debtor, the debtor's location is unknown or he is in hiding or is a fugitive from the country; or
(vi) the debtor has failed to fulfill any of the requirements as prescribed in law for the filing of an application for a Meeting of the Creditors.

Any order granting a request for a Meeting of the Creditors must include: (i) the appointment of the Receiver, (ii) the time period for the submission and verification of claims against the debtor, and (iii) the publication of the notice of the Meeting of Creditors by the Public Registry for Bankruptcies. The receiver is tasked with analyzing the debtor's current financial condition, investigating the debtor's books and accounting documents, and supervising the administration of the debtor in the case of a Meeting of the Creditors or managing the debtor in the case of a Declaration of Bankruptcy. During the claims verification period, all creditors must present to the court the credit instruments or affidavits evidencing the amount and type of debt owed. A Meeting of the Creditors includes only those creditors that the court has accepted during the verification period.

At the Meeting of the Creditors, the debtor presents its proposal for restructuring all outstanding debts. If the debtor fails to make such a proposal, then the judge will revoke the grant of the Meeting of the Creditors and declare the debtor to be in bankruptcy. The agreement may allow for up to a 50 percent reduction of the overall debt amount if the repayment period is no longer than two years. If the time allowed for repayment is longer, then the debt may not be reduced by more than 30 percent. The time for repayment may not exceed four years. If the debtor has carried on with regular business activities for at least 20 years without having previously requested a Meeting of the Creditors or a Declaration of Bankruptcy, the reductions in debt may be up to 75 percent, but the repayment period may not exceed four years.

The Meeting of the Creditors takes place within ten days following the approval of the meeting. The Meeting of the Creditors begins with the receiver reading from their report detailing the causes of the debtor's current financial state, the state of the debtor's assets and liabilities, and the receiver's opinion on the debtor's restructuring proposal. Voting during the meeting is done by the unsecured creditors. If a secured creditor decides to vote, then it loses its priority status. In order for a restructuring plan to be approved, two thirds of the present creditors must vote in favor of it, and the creditors present at the meeting must represent at least 75 percent of the total amount of claims allowed by the court.

Creditors that did not appear at the Meeting of the Creditors or who voted against the approval of the restructuring plan have eight days in which to submit their objections to approval of the plan by the court. Any such creditor may oppose approval on the following grounds: (1) the requisite formalities for the Meeting of the Creditors were not satisfied; (2) lack of corporate or voting authority of one or more creditors that voted in favor of the plan; (3) the debtor colluded with one or more creditors on the voting; (4) the debtor has misstated the amount of claims in order to obtain the requisite majority of votes; or (5) the debtor has misstated or shielded its assets. Notwithstanding the failure of any creditor to object to the approval of the restructuring plan, the court must conduct an independent inquiry that the plan does not violate any of the factors set forth above and that the plan does not violate any public policy under Paraguay law.

If the creditors do not approve the restructuring agreement, the court may issue a Declaration of Bankruptcy. If the Declaration of Bankruptcy is issued, the receiver who had been appointed for the Meeting of the Creditors will serve as the receiver in the liquidation phase of the proceeding.

In issuing a Declaration of Bankruptcy (whether after a Meeting of the Creditors or from the onset of the insolvency proceeding), the judge orders (i) that the assets and property of the debtor be kept in trust by the Receiver; (ii) the appointment of the bankruptcy receiver; (iii) a time period for the verification of creditors; and (iv) the publication of the Declaration of Bankruptcy. The verification period in a bankruptcy follows the same procedural steps as that in a Meeting of the Creditors. If the bankruptcy was preceded by an unsuccessful Meeting of the Creditors, then it is unnecessary to have a second verification period. After the verification period, the assets will be sold by an auctioneer appointed by the judge at a public auction.

2. Recognition of foreign proceedings and treatment of foreign creditors

Paraguay's insolvency law contains specific sections relating to cross-border insolvency, and the *Tratado de Montevideo* (1941), is also applicable as a protocol in this jurisdiction. The law establishes that a Declaration of Bankruptcy issued in a foreign country does not displace any rights held by creditors in Paraguay nor annul an agreement that has been reached with the debtor. Further, in Paraguay, local creditors have priority over foreign creditors, and foreign creditors will not collect if there is no money remaining after distribution to local creditors.

The recognition of a foreign proceeding may also be obtained by means of letters rogatory, within approximately 6 months of the request. The Code of Civil Procedures sets out the process by which foreign judgments may gain recognition or enforcement. In order to be enforceable, a foreign judgment must be a properly issued final judgment in its country of origin and a petition must be filed with the Court of First Instance. The Code further details the following requirements for the foreign judgment: (i) there must exist no similar action regarding the same issues before a Paraguayan court; (ii) the party against whom the judgment was issued must be domiciled in Paraguay and have been legally summoned; (iii) the subject matter of the judgment involved an act that is legal in Paraguay; (iv) the provisions of the judgment are not contrary to the laws or public policy of Paraguay; and (v) the judgment must not be incompatible with any other judgment that is issued by a Paraguayan court.

3. Pending reforms

There are no known efforts underway by the Congress to adopt a law based on the Model Law on Cross-Border Insolvency.

4. System effectiveness

According to unofficial and anecdotal sources, the effectiveness of Paraguay's legal system with regards to insolvency proceedings can be unpredictable and the Paraguayan legal system has faced challenges with efficiency.

PERU

In 2002, Peru adopted an insolvency and bankruptcy law called "*Ley 27.809*". The role of creditors is central in Peruvian insolvency law.

1. Legal and judicial framework

Peru's insolvency law allows for involuntary or voluntary liquidation proceedings, as well as for reorganization. The law further regulates two types of proceedings: an ordinary insolvency proceeding and a preventive insolvency proceeding. While an ordinary proceeding may be voluntary or involuntary, a preventive proceeding is solely voluntary. The insolvency law applies to both individuals and legal entities, except the following: (i) entities that are part of the Peruvian state; (ii) private pension funds; (iii) banks, financial institutions, insurance companies, and other entities that are regulated by the General Law of the Financial and Insurance Systems (*Ley 26.702*); and (iv) certain autonomous property such as trusts, mutual funds, and investment funds.

The *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* ("INDECOPI") is the specialized administrative agency that deals with insolvency proceedings. The INDECOPI has two branches: the Insolvency Commission that handles insolvency proceedings and the Tribunal that deals with appeals from the Commission's decisions.

Under an ordinary proceeding, voluntary and involuntary liquidations, as well as reorganizations, are available. For a debtor to initiate a voluntary proceeding, the following requirements must be met: (i) more than a third of its outstanding liabilities must have been due for more than 30 days; or (ii) its accumulated losses minus its retained earnings must exceed one - third of its paid capital. To initiate an insolvency proceeding, the debtor, if it is a corporation, will have to file a petition before INDECOPI and provide a copy of the shareholders' authorization for the commencement of the proceeding and a copy of the last two years' financial statements.

If INDECOPI determines that the debtor meets the requirements for insolvency, then it will declare the insolvency of the debtor and the decision will then be published in the official gazette. This process could take between three to six months. By the release of the publication, an automatic stay is imposed. The date of publication also serves as the bar date. This means that any claim that originated before the bar date, or date of publication, is considered a pre-publication claim and will be subject to the insolvency law. If a creditor has a pre-publication claim, then the creditor must file proof of the claim with INDECOPI in order to be able to participate in the Creditors Meeting and have its claim recognized in the proceeding. One of the primary matters decided upon at the Creditors Meeting is whether the debtor should be allowed to reorganize or whether it should be liquidated.

1.1 Liquidation

If the creditors decide to liquidate, then a liquidator will be appointed at the Creditors Meeting the liquidator will be selected from the list registered with INDECOPI. Creditors will also be asked to approve a liquidation plan for the debtor and decide whether the debtor should be authorized to continue its business during the liquidation. There are no limits on the number of times that a Creditors Meeting can be held. Peruvian law provides that the maximum length of time for a voluntary liquidation is six months, with a possible extension of another six months.

In a liquidation, whether voluntary or involuntary, the liquidator must follow a mandatory order in the payment of claims, which is as follows:

(i) labor claims (including pension claims);
(ii) alimony claims (applicable only when an insolvent individual);
(iii) secured claims, including attachments and seizures;
(iv) tax claims; and
(v) unsecured claims.

Importantly, this ranking of priority is not mandatory in a reorganization or preventive proceeding.

To conclude the liquidation process, the liquidator files a petition before the Public Registry in order to register the extinction of the company. However, if creditors remain unpaid, then the liquidator must file a petition before a civil judge to obtain a judicial bankruptcy declaration, which is then published in the official gazette. After publication, the extinction of the company is registered in the Public Registry.

An involuntary liquidation may also be initiated by an unsecured creditor if the creditor proves that its outstanding unsecured credit exceeds 50 tax units (approximately $68,500) and that this amount has been due for more than 30 days. It should be noted that if a debtor has already initiated a liquidation, then creditors are banned from initiating an insolvency proceeding.

1.2 Reorganization

If the creditors decide to permit the debtor to reorganize, then creditors will be asked to approve a reorganization plan within 60 days from the decision to proceed with a reorganization. Both the decision to reorganize and the reorganization plan must be approved by more than 66.6 percent of the allowed creditor claims (which under the law is defined as those claims that have been accepted and approved by INDECOPI). All creditors whose claims have been approved by INDECOPI are entitled to participate in the Creditors Meeting and their voting participation is determined by the percentage that their claims represent with regard to the total amount of allowed claims.

It is important to note that during the reorganization process, creditors decide whether to allow the debtor’s management to continue operating the business or whether to replace the debtor’s management. In addition to the right to remove existing management, creditors can vote to modify the debtor’s bylaws, designate directors, approve mergers, and any other action necessary for the management of the debtor. The debtor may continue to operate its business during the reorganization only to the extent that creditors authorize the debtor to do so.

There are certain requirements that the reorganization plan must satisfy in order to be approved by INDECOPI. First, it must contain a payment schedule that handles all of the pre-publication claims. Second, the reorganization plan must include a provision stating that at least 30 percent of all funds used to pay claims on an annual basis will be used to pay labor claims. Third, the plan must include projected cash flows, and finally, it must include accounting provision for the payment of contingent claims. INDECOPI is free to declare null any reorganization plan that does not satisfy the legal requirements as detailed above either on its own or based on the objection of creditors representing at least 10 percent of all the allowed claims.

Once the reorganization plan is approved and all the pre-publication claims are paid according to their terms, then INDECOPI grants a decision declaring the formal conclusion of the reorganization proceeding.

1.3 Preventive proceeding

The goal of a preventive proceeding is that it will provide a forum for the debtor to be able to reach a consensual restructuring agreement with its creditors. It is intended to be a fast track proceeding that only a debtor can initiate.

2. Recognition and enforcement of foreign proceedings

The insolvency and bankruptcy law contains specific sections regarding cross-border insolvency proceedings that may be enforced by means of a written request. Provisions concerning international insolvency are also contained in the 1984 Civil Code.

While recognition of a foreign proceeding is available in Peru, a party seeking such recognition must establish that the debtor is not domiciled in Peru and that such debtor maintains assets in Peru. Importantly, however, the jurisdiction of the Peruvian courts will be limited to matters concerning the assets located in Peru. After a Peruvian court grants judicial recognition, then an ancillary insolvency proceeding will be commenced before INDECOPI. It should be noted that while the Insolvency law does not differentiate between domestic and foreign creditors, the 1984 Civil Code establishes a preference for domestic creditors and credits in Peru. Peru has no legal provisions that allow for cross-border cooperation, cross-border insolvency protocols, or joint court hearings.

Peru is a signatory to the following treaties that relate to the recognition of foreign judgments and insolvency: (i) the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards; (ii) the Montevideo Treaty; and (iii) the 1928 Havana Convention (Bustamante Code). If a treaty exists in a particular case, then such a treaty will apply.

3. Pending reforms

In March 2013, INDECOPI published a proposal to amend the Insolvency law, but this proposal has not yet been presented to the Peruvian Congress. There are no known efforts to adopt the UNCITRAL Model Law on Cross-Border Insolvency.

4. System effectiveness

Peru’s legal system is known for delivering quality judgments based on law as well as handling the integrity of proceedings and efficiency in their outcome.

URUGUAY

Uruguay's dedicated insolvency law, *Declaración Judicial del Concurso y Reorganización Empresarial* ("Act No. 18,387"), was enacted in 2008. The purpose of the new law was to expedite the bankruptcy procedure and encourage reorganization. Uruguay is also one of the few Latin American countries that has provisions in its laws for cross-border insolvency, even though Uruguay has not adopted the Model Law. In the World Bank's 2015 Doing Business Report, Uruguay ranks 57th out of 189 countries for its "ease of resolving insolvency."

1. Legal and judicial framework

Act No 18,387 provides for the reorganization and liquidation proceedings of any person or business association domiciled in Uruguay. Two dedicated bankruptcy courts were created by Section 12 of Act No 17,292 passed in 2001. A debtor may file for either liquidation or reorganization, while a creditor may only file for the liquidation of a debtor.

In order for a debtor to be eligible to maintain an insolvency proceeding under Act No. 18,387, the debtor must be insolvent. Under the law, a debtor will be presumed to be insolvent where:

(i) the debtor files for voluntary bankruptcy;
(ii) the debtor is declared insolvent by a competent court;
(iii) the debtor commits fraudulent acts to obtain credit; or
(iv) when the debtor is absent from the administration of a business and does not have the wherewithal to satisfy all payment obligations.

Once a petition for bankruptcy has been filed by a creditor or a debtor, the judge will issue a Declaration of Bankruptcy. The declaration shall include;

(i) Declaration of Bankruptcy of the debtor;
(ii) suspension or limitations on the authority of the debtor to dispose of its assets;
(iii) appointment of a Trustee or Auditor;
(iv) call for the Creditors Meeting; and
(v) publication of the declaration in the Public Registry and Official Diary.

The Trustee or Auditor is to be selected from those university professionals or professional partnerships registered in the Registry of Bankruptcy Auditors and Trustees.

The Declaration of Bankruptcy does not mean that the debtor must cease its business activity, unless the court orders otherwise. The Declaration of Bankruptcy places the following limits on the debtor's ability to dispose of its assets: (i) if the bankruptcy is involuntary, only the Trustee is authorized to sell any assets and (ii) if the bankruptcy is voluntary, a debtor is prohibited from selling assets only where it has been demonstrated that the value of the debtor's assets are insufficient to satisfy all claims against the debtor. In all other cases, the debtor and the Trustee will be co-administrators over the assets.

Once the judge issues a Declaration of Bankruptcy, a verification period for the claims of creditors begins. During the verification period, all creditors wishing to maintain their right to collect from the debtor must present to the court the credit instruments or affidavits showing the amount and type of outstanding debt owed. The Trustee or Auditor is then responsible for compiling a list of creditors and presenting it to the court. Only those claims that the court has accepted through the claims verification process will be authorized to participate in the Creditors Meeting.

A Creditors Meeting must be requested by the debtor and must be approved by the court after a vote of the majority of creditors. The agenda for the Creditors Meeting includes: (i) report of the Trustee or Auditor, (ii) restructuring proposal from the debtor and (iii) appointment of the Committee of Creditors.

The report of the Trustee or Auditor typically includes the following:

(i) the economic and legal history of the debtor and its business activities;
(ii) the state of the debtor's accounts;
(iii) the actions of the Trustee or Auditor taken during the bankruptcy;
(iv) an opinion on the most convenient way to carry out the liquidation if an agreement is not approved; and
(v) the assessment of the liquidation value of the debtor. At the Creditors Meeting, the creditors may also decide to appoint a Committee of the Creditors.

The Committee of Creditors, typically composed of three creditors, plays solely an advisory role in the bankruptcy proceeding.

Before a debtor will be permitted to propose a restructuring agreement at the Creditors Meeting, the debtor must first file the proposed agreement with the court. The proposed agreement must contain a table of financing, a plan of continuation or settlement, and a formula for payment of secured creditors. Voting in the meeting is done by the unsecured creditors. If a secured creditor decides to vote, it loses the status as secured. In order for the agreement to be approved, a majority of the unsecured creditors must vote in favor of it. Depending on the terms of the proposed plan, the law provides various thresholds for what constitutes a majority. For instance, if the proposed agreement seeks a reduction of 50 percent or more of the overall debt and / or a repayment period exceeding ten years, unsecured creditors representing two thirds of the overall debt must approve it. If the proposed agreement consists of the full payment of unsecured creditors in a period not exceeding two years, only 25 percent of the unsecured creditors must vote to approve it. If the agreement is approved, then it shall take effect on the date the court ratifies the same.

The Judge will order the liquidation of a debtor if

(i) the debtor requests the same in its petition for bankruptcy;
(ii) an agreement is not approved at the Creditors Meeting;
(iii) the court does not approve the agreement;
(iv) the agreement is breached; or
(v) if a majority of unsecured creditors vote to liquidate the debtor.

The order of liquidation declares (i) that the assets and property of the debtor be kept in trust by the Trustee or Auditor and (ii) the date of the auction of the bankruptcy estate. The assets of the bankruptcy estate will be sold by an auctioneer appointed by the judge at a public auction. After the sale, the court will make distributions to the creditors.

2. Recognition and enforcement of foreign proceedings

Title XIII of Act 18,387 contains cross-border insolvency provisions, however, it does not apply if Uruguay has bilateral or multi-lateral conventions or treaties signed or ratified with other countries regarding bankruptcy and insolvency. In order for a foreign judgment to be recognized or enforced, it must be submitted to a Uruguayan court following the requirements set forth in section 243 of the Act. Those requirements are as follows:

(i) the judgment must be issued by a competent judge;
(ii) it must be a final judgment;
(iii) the debtor has had the opportunity to defend against the judgment;
(iv) the judgment is not contrary to international public policy; and
(v) the judgment fulfills the other requirements contained in Articles 537-543 of the General Code of Procedure.

These other requirements include that the foreign judgment comply with all formalities and requisites required for the enforceability thereof under the laws of the country where it was issued and that it will not be against Uruguayan public policy principles.
If the Supreme Court decides that the foreign judgment can be enforced, the Supreme Court will then send the foreign judgment to the competent Uruguayan court for its enforcement. At the lower court, and on the grounds of the foreign judgment, the judgment creditor may file a summary action against the debtor, requesting the enforcement of the foreign judgment.

The Uruguayan system has statutory priorities and there are three classes of creditors (secured, ordinary and unsecured). Generally speaking, a foreign creditor is treated the same as a domestic creditor with two important exceptions. First, Uruguayan labor claims enjoy a priority and are paid first from any assets located in Uruguay. Next, Uruguay does observe a principle of reciprocity - the other jurisdiction must treat the claims of Uruguayan creditors equally in that jurisdiction.

It is critical to submit documents that comply with applicable technicalities. Uruguayan courts are very exigent when they analyze foreign documents. Local counsel are typically necessary to deal with these documents.

3. Pending reforms

There are no known efforts to reform the existing law or to adopt the Model Law on Cross-Border Insolvency.

4. System effectiveness

The courts in Uruguay are known for being independent and the new legal system has significantly reduced the time involved in these proceedings. The fact that just a small number of judges deal with these proceedings is important to assure a high degree of predictability.

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