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Acknowledgement

INSOL International is very pleased to present the 32nd Technical Paper under its Technical Papers Series titled “Financial Institutions Restructuring in Argentina and Latin America” by Roberto E. Silva Jr. and Fernando Daniel Hernández of Marval, O’Farrell & Mairal, Argentina.

Most Latin American countries’ legislation provides for judicial or extra-judicial liquidation of financial institutions, but during recent years many of them have introduced more sophisticated restructuring measures, particularly after the numerous financial crisises that some of these countries had to undergo.

Consequently, these countries introduced protective measures and commenced developing a wide range of tools to preserve the stability and strength of their financial systems. These measures range from bank deposit guarantee funds or insurances, to tools that financial institutions’ may adopt for restructuring.

This paper provides a comprehensive analysis of the Argentine financial institutions’ insolvency regime, along with a description of the regulation of financial institutions’ insolvency in other countries in Latin America.

As this paper highlights, one such measure in place when Argentina entered the last financial system crisis has achieved an extraordinary success, guaranteeing depositors a full recovery in almost all cases, enhancing unsecured creditors’ recovery possibilities and avoiding the need for government bailout.

INSOL International sincerely thanks Roberto E. Silva Jr. and Fernando Daniel Hernández for this detailed analysis and for writing this excellent technical paper.

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Financial Institutions Restructuring in Argentina and Latin America

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I. Introduction

Financial institutions perform a central role in a country's economy and sustainable growth, and the crucial need for a stable and strong financial system has been highlighted during recent years. As in any other business, financial institutions may be subject to individual failure due to mismanagement, market conditions, etc., but these are institutions also exposed to domestic or international financial and economic crisis which may potentially cause the collapse of one or more countries' financial systems.

During the last two decades Latin America has been affected by several domestic and international financial crises.

Mexico

Due to the sudden devaluation of the Mexican Peso in 1994 (the Tequila crisis), the worst effects were felt by the financial sector which caused the collapse of many Mexican banks. The crisis also affected the depreciation of other currencies in Latin America thus affecting those financial systems too. In Argentina, the Tequila crisis caused the loss of central bank reserves, a substantial withdrawal of bank deposits and the transfer of bank deposits from small financial institutions to larger financial institutions (at that time there was no deposits insurance scheme). This in turn caused the failure of many (mainly smaller) banks during 1995.

Brazil

The liquidity problems in Brazil which followed on from the *Plano Real* (the stabilization programme implemented for controlling inflation in Brazil in 1994) caused the failure of three of the seven major Brazilian banks between 1995 and 1996.

Argentina

Due to the crisis of the Argentine Peso in 2001, when the end of more than a decade of parity between the Argentine Peso and the United States Dollar caused a strong devaluation of the Peso and the largest economic crisis in Argentine history.

United States of America

The United States subprime mortgage crisis in 2007 had severe effects not only on the financial system and economy of the United States but also on Latin America and other European countries.

Greece

The Greek Depression in 2009, when a decade of high deficit and the substantial increase in public debt caused the default by Greece on its sovereign debt, continues to affect other countries in the European Union and impact on the Latin American economies.

The potential effects of a systemic crisis of the financial system has led many countries to review their protective measures and develop more sophisticated tools to preserve the stability and strength of their financial systems. These measures range from bank deposit guarantee funds or insurances to sophisticated tools for financial institutions' restructuring aimed at avoiding liquidation or maximizing creditors' recovery in liquidation. In extremely severe cases even these tools and measures may be insufficient and the very last remedy in all such cases may be a bailout programme. In the subprime mortgage crisis, the United States enacted the Emergency Economic Stabilization Act of 2008 which authorised the United States Treasury to spend up to $700 billion to purchase distressed assets and bailout distressed companies and banks to avoid a total collapse.

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

This paper provides a comprehensive analysis of the Argentine financial institutions' insolvency regime, along with a description of the regulation of financial institutions' insolvency in other countries in Latin America.

In general most Latin American countries' legislation provides for judicial or extra-judicial liquidation of financial institutions, but during recent years many of them have introduced more sophisticated restructuring measures.

II. Argentina

A. History and development of the financial institutions insolvency regime

In Argentina financial institutions are governed by the *Ley de Entidades Financieras No 21,526*[1] (as amended) or the Argentine Financial Institutions Law and are subject to the authorization, control and supervision of the *Banco Central de la República Argentina* or the Argentine Central Bank.

During recent years the mechanism for restructuring or liquidating financial institutions has incurred many changes and has been improved in the light of recent experiences.

During the 1980s the Argentine financial institutions' liquidation procedure was conducted by the Argentine Central Bank, as the regulatory authority. However, these administrative liquidations and seizures were lengthy and provoked huge losses to all the financial institutions' creditors who ultimately received very low or non-existent recoveries. Thus, in 1992 Law No 24,144[2] introduced a judicial liquidation procedure for financial institutions which achieved the cram down of the capital structure typical of insolvent liquidations but failed to preserve the value of the institutions' assets.

In 1995, however, in response to the financial system crisis caused by the Tequila Crisis, Argentina passed the *Ley de Seguros de Garantía de los Depósitos Bancarios No 24,485*[3] or the Deposit Guarantee System Law, which created the deposits insurance regime. It also introduced Article 35bis to the Argentine Financial Institutions Law providing for new, more sophisticated restructuring schemes to deal with financial institutions' insolvencies in a more efficient way. These schemes were further improved by Law No 24,627[4], Decree No 214/2002[5], Law No 25,562[6] and Law No 25,780[7] which provide the current regime for the restructuring and liquidation of financial institutions in Argentina.

B. Regularization

A financial institution in an insolvency situation or in violation of the regulations of the Argentine Central Bank on patrimonial and liquidity requirements, among others, must file a regularization plan before the Argentine Central Bank. The Argentine Central Bank may appoint a supervisor with veto powers, request the granting of guarantees or security interests and restrict the distribution of dividends[8].

In order to implement the regularization plan, the Argentine Central Bank could, among other things, waive the application of technical regulations temporarily (including patrimonial and liquidity requirements).

C. Restructuring of financial institutions under Article 35bis of the Argentine Financial Institutions Law

In Argentina a financial institution may not apply for a reorganization proceeding or file a petition for its own bankruptcy under the *Ley de Concursos y Quiebras No 24,522* (as

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1 *Boletín Oficial*, No 23602, 02/14/1977, pg. 3, http://www.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16071/texact.htm.
2 *Boletín Oficial*, No 27498, 10/22/1992, pg. 2, http://www.infoleg.gob.ar/infolegInternet/anexos/0-4999/542/norma.htm.
3 *Boletín Oficial*, No 28125, 04/18/1995, pg. 1, http://www.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16877/norma.htm.
4 *Boletín Oficial*, No 28356, 03/18/1996, pg. 3, http://www.infoleg.gob.ar/infolegInternet/anexos/30000-34999/34694/norma.htm.
5 *Boletín Oficial*, No 29830, 02/04/2002, pg. 1, http://www.infoleg.gob.ar/infolegInternet/anexos/70000-74999/72017/texact.htm.
6 *Boletín Oficial*, No 29834, 02/08/2002, pg. 3, http://www.infoleg.gob.ar/infolegInternet/anexos/70000-74999/72138/norma.htm.
7 *Boletín Oficial*, No 30229, 09/08/2003, pg. 1, http://www.infoleg.gob.ar/infolegInternet/anexos/85000-89999/88245/norma.htm.
8 §34 of the Argentine Financial Institutions Law as amended by Law No 24,144.

amended) or the Argentine Insolvency Law; and may not be adjudicated bankrupt until the Argentine Central Bank first revokes its license[9].

When a financial institution is in insolvency or has liquidity problems, the Argentine Central Bank may (at its sole discretion) determine by a resolution of the absolute majority of its board members, to authorize the financial institution's restructuring prior to revoking its license.

The restructuring may be implemented through any of the following alternatives or any combination thereof (sequentially or simultaneously):

(i) Reduction, increase and transfer of equity, which may include:

(a) the recording of accounting losses against assets to be totally or partially provisioned due to their collectability, performance or liquidity, as determined at the sole discretion of the Argentine Central Bank; the reduction of capital; and / or the allocation of reserves to offset the losses;

(b) the fixing of a term for the increase of the equity and reserves; provided that any new shareholders must first be authorized by the Argentine Central Bank;

(c) the revocation of the authorization of any or all shareholders and the fixing of a term (not shorter than 10 days) for the transfer of such shareholders' shares; and

(d) the sale or the delegation of the sale of the financial institution's equity and the shareholders' equity subscription rights.

(ii) Exclusion, transfer and assignment of assets and liabilities which may include:

(a) the exclusion of assets at the election of the Argentine Central Bank in an amount not exceeding the amount of the excluded liabilities (as described below), including assets secured with mortgage or pledge and subject to judicial enjoining orders; for the purposes of the exclusion, the Argentine Central Bank may create a trust with some or all of the institution's assets against the issuance and delivery of certificates of participation for nominal amounts equal to the assets excluded where the financial institution will be the beneficiary;

(b) the total or partial exclusion of the following liabilities of the financial institution (in partial exclusions following the order of priority and maintaining the equal treatment in each category): (1) credits secured with mortgage or pledge and certain credits like those granted by the deposit insurance fund; (2) certain labour credits; (3) deposits up to AR$50,000; (4) deposits in excess of AR$50,000; (5) credits of the Argentine Central Bank; and (6) liabilities arising out of commercial credit facilities directly affecting the international commerce; and

(c) the authorization of the sale or delegation of the sale of the assets and liabilities excluded to other financial institutions or to financial trusts.

All claims regarding the excluded assets and liabilities will be consolidated before the court deciding the intervention. Except for the foreclosure of mortgages, pledges or certain labour claims, no foreclosure proceedings may be commenced seeking the realization of excluded assets and any foreclosure proceedings pending on such assets will be stayed. In addition, the excluded assets may not be subject to the attachment of any judicial liens and any existing judicial liens or general enjoining orders (*inhibiciones generales*) on such excluded assets will be lifted; provided that any liens attached in connection with certain labour claims will be attached, instead, to the proceeds of the sale or transfer of the excluded assets.

The sale and transfer of the excluded assets is not subject to prior judicial approval and may not be voided *vis - à - vis* the financial institution's creditors even if the institution was insolvent at the time of any such sale or transfer. The financial institution's creditors will

[9] §50 of the Argentine Financial Institutions Law, as amended by Law No 25,780.

not have any claim against the successor on the excluded assets except on assets attached with mortgage or pledge.

(iii) Judicial intervention: to the extent necessary for the implementation of any of the foregoing, the Argentine Central Bank may request judicial intervention in the financial institution with the removal of the institution's managers.

Remarkably, the exclusion of assets and liabilities has been the alternative adopted in all cases.

One characteristic of the Argentine Financial Institutions Law must be brought up at this point. Depositors, although covered by a private mandatory deposit insurance scheme introduced in 1995, are granted priority in payment over any other liability of the financial institution after all credits secured with mortgage or pledge and certain labour claims. However, in an insolvency scenario, by definition the assets are not sufficient to repay every claim and generally are sufficient to repay only a small portion of the institution's deposits. Therefore, the Argentine Central Bank provides for the application of an alternative that better protects the depositors.

In this regard, the key features of almost all the financial institutions' restructurings in Argentina under this alternative during recent years can be summarized as follows:

- Deposits are excluded from the financial institution and transferred to, and assumed by, a "white knight" healthy financial institution.

- All or almost all other assets of the failing financial institution are transferred in trust to a trustee who in turn, issues:

  (i) a senior certificate of participation in an amount equal to the excluded deposits assumed and delivers it to the "white knight" financial institution, and

  (ii) a subordinated certificate of participation in an amount equal to all the assets it holds less the amount of the senior certificate of participation and delivers it to the residual financial institution.

One key point to note is that the assets of the trust are realized by the trustee. Experience has proved that having a trustee (financial institution or professional trustee) realizing the assets of the affected financial institution, rather than a court or administrative liquidator (*i.e.*, the Central Bank), results in enhanced recoveries. While the failing financial institution is eventually liquidated after the Argentine Central Bank revokes its license, its assets receive going concern treatment in the trust (and, eventually, so do most of the institution's employees and branches).

The "white knight" financial institution's balance sheet is increased by an equivalent amount to the assets (the senior certificate of participation backed with the assets transferred in trust) and liabilities (the excluded deposits assumed). The "white knight" financial institution is, thus, offset from a patrimonial point of view. In addition, liquidity is provided to the "white knight" financial institution by the Argentine Central Bank and the deposit insurance fund (which is, again, more efficient as the fund does not have to cover such deposits) thereby minimizing the "white knight" financial institution risk of a run on the assumed excluded deposits and potential illiquidity. This is a "least cost" solution for the deposit insurance fund.

On the other hand, the failing financial institution asset sheet is decreased by an equivalent amounts of assets (the excluded assets transferred to the trustee) and liabilities (the excluded deposits). The failing financial institution's balance sheet consists of certain assets (the subordinated certificate of participation) and liabilities (all remaining liabilities other than the excluded deposits).

The assets of the trust are also matched as the aggregate nominal amount of the senior and subordinated certificate of participations are equal to the amount of the assets transferred in trust.

In a way, the situation is not very different from court liquidations, except that the depositors are satisfied without the need for filing proof of claims (*verificación de créditos*) and the liquidation of the excluded assets takes place out of court, which is far more efficient.

A further point to note is that most of the failing financial institution's employees are rehired by the "white knight" financial institution which is also permitted to open branches in the same places as the failing financial institution. This helps minimize any disturbance to the banking services provided to the customers of the failing institution. Thus, while there is no legal going concern, there is an economic going concern.

An important legal issue is that Article 35bis precludes the applicability of both the fraudulent conveyance and bulk transfer regimes.

It is worth noting that this scheme has achieved an extraordinary success. Depositors have collected in full in almost every case, recoveries for non-preferred creditors have been enhanced and there has been no need for any bail-out by the Argentine Central Bank or taxpayers.

The scheme is based on bankruptcy reorganisation principles, allocating value in accordance with creditors' seniority (as determined by the Argentine Financial Institutions Law) and ensuring that each category of creditors would be better off than in a liquidation procedure under the Argentine Insolvency Law.

The Argentine Supreme Court (court of last resort) had a chance to review the constitutionality of the scheme in a 2002 case[10] where it held that the restructuring provisions of the Argentine Financial Institutions Law prevailed over the provisions of the Argentine Insolvency Law due to the public nature of the Argentine Financial Institutions Law and Argentine Central Bank's related regulations and the peculiar nature and relevance of the banking activity in the whole economy. Such regulations create a system to protect some preferred creditors of the bank in crisis (depositors, mainly).

D. License revocation, judicial liquidation or bankruptcy

Upon the lack of filing of the regularization plan described in II.B, the failure of its implementation or during or after the implementation of any of the restructuring alternatives described in II.C, the Argentine Central Bank may revoke the financial institution's license. Upon such revocation, unless the Argentine Central Bank's revocation resolution includes the order to file a petition for the bankruptcy of the financial institution or the institution's creditors file a petition for bankruptcy after sixty days from the revocation resolution, the financial institution will be subject to a judicial liquidation procedure.

Following the revocation of the license and until the court defines the liquidation procedure any transactions increasing the liabilities of the institution will be null and void and all proceedings in connection thereto will be stayed and the accrual of any interest thereunder will be suspended.

(i) Judicial liquidation[11]

The judicial liquidation will be conducted by a liquidator appointed by the court. Within the forty five days immediately following the appointment, the judicial liquidator will prepare a report and must file a petition for bankruptcy if it determines that the institution is insolvent.

Following, the commencement of the judicial liquidation, save for the foreclosure of mortgages, pledges or certain labour claims, no foreclosure proceedings may be commenced seeking the realization of the assets of the institution; and any judicial liens or general enjoining orders (*inhibiciones generales*) will not affect the sale of the institution's assets provided that such liens will attach to the proceeds of the assets' realization up to the amount of the security.

[10] "*Banco Caseros s/ quiebra s/ Inc. por Cristina Guerrero de Villamea y otros*", Supreme Court of Argentina, April 30, 2002.
[11] §§48 & 49 of the Argentine Financial Institutions Law, as amended by Law No 24,485, No 24,627 and No 25,780.

The provisions of the Argentine Insolvency Law on filing of proofs of claims and on the realization of the institution's assets, plan of distribution and payments to creditors will apply in the judicial liquidation procedure; provided that any payments to the creditors require the prior approval of the court.

The judicial liquidator will determine the aggregate amount of liabilities arising out of the deposits and will verify the deposit instruments. The liabilities of the institution will be satisfied in the following order of priority:

(1) credits secured with mortgage or pledge and certain credits like those granted by the deposit insurance fund;

(2) certain labour credits;

(3) deposits up to AR$50,000;

(4) deposits in excess of AR$50,000; and

(5) liabilities arising out of commercial credit facilities directly affecting international commerce.

Upon completion of the liquidation, the judicial liquidator will prepare and file before the court, a balance sheet and plan of distribution of any remaining funds after deduction of all amounts corresponding to the credits that were not satisfied. The plan may be challenged by the institution's creditors and shareholders' within the following thirty days. Any unclaimed amounts will be held by the court for one year.

After the distribution, the court will declare the judicial liquidation concluded, until when the institution's creditors may file claims up to the amount of the assets not liquidated, funds not distributed or amounts not deposited without prejudice to any individual actions they may have against the institution's shareholders.

All patrimonial claims against the financial institution and its assets will be consolidated before the court of the liquidation.

(ii) Bankruptcy[12]

The financial institution will be adjudicated bankrupt if upon the resolution of revocation the Argentine Central Bank, at its sole discretion, determines that the financial institution may not be restructured and directs the filing of a petition for bankruptcy; the financial institution's creditors file a petition for bankruptcy after sixty days from the revocation resolution; the court conducting the judicial liquidation so determines; or the judicial liquidator so requests at any time during the judicial liquidation.

To the extent that bankruptcy is adjudicated after commencement of the judicial liquidation, then the judicial liquidator will be appointed receiver in the bankruptcy proceedings.

To the extent that prior to the revocation of the license the Argentine Central Bank implemented any of the restructuring alternatives described above all sales, transfers and other actions adopted in connection thereto will not be subject to the Argentine Insolvency Law provisions on fraudulent conveyance. Commencement of the bankruptcy proceedings in no event will affect any restructuring actions pending implementation.

Upon liquidation, the financial institution's remaining credits will be satisfied in the following order of priority:

(1) credits secured with mortgage or pledge and certain credits like those granted by the deposit insurance fund;

(2) certain labour credits;

[12] §§50 through 53 of the Argentine Financial Institutions Law, as amended by Law No 24,485, No 24,627, No 25,562 and No 25,780.

(3) deposits; and

(4) credits of the Argentine Central Bank.

III. Brazil

In Brazil, financial institutions are excluded from the *Lei de Falências No 11,101*[13] or the Brazilian Insolvency Law. Financial institutions' insolvency is governed by the *Lei Do Fortalecimento Do Sistema Financeiro No 6,024*[14] of 1974 or the Brazilian Financial System Strengthening Law or Law No 6,024, which regulates the intervention and extra-judicial liquidation of financial institutions carried out by the *Banco Central do Brasil* (the Brazilian Central Bank); the *Decreto - lei No 2321*[15] or Decree No 2,321 enacted in 1987, which introduced a temporary special management regime (*regime de administração especial temporária*) and the *Lei No 9,447*[16] or Law No 9,447 passed in 1997 (in response to the Brazilian financial crisis between 1995 and 1996), which introduced new restructuring schemes.

In the event of, among others, institution's losses exposing the creditors to risk of loss, upon its own motion (*ex - officio*) or upon request by the institutions' managers, the Brazilian Central Bank may order the intervention of the financial institution by a comptroller appointed by the Brazilian Central Bank (provided that any acts of disposition or burdening of the institution's assets will be subject to the prior authorization of the Brazilian Central Bank) for up to six months, extendable for another six-month period[17].

The intervention will produce the following effects: (i) stay of enforcement proceedings; (ii) suspension of pre-intervention claims' terms; and (iii) un-enforcement of pre-intervention deposits[18]. Within the sixty days immediately following its appointment, the comptroller will prepare and deliver a report including: (a) an analysis concerning the balance sheets, application of funds and the economic and financial situation of the institution; (b) a report of any duly evidenced fraudulent acts or omissions; and (c) the proposal of any kind of measures that deems necessary. Subject to the considerations arising out of the report, the Brazilian Central Bank may: (1) resolve ceasing or continuing the intervention until removal of all irregularities; (2) order the extra-judicial liquidation; or (3) order the financial institution's bankruptcy (when all the institution's assets are not sufficient to cover even half of the value of the unsecured claims, the extra-judicial liquidation is deemed inconvenient, or due to the complexity of the institution's business or seriousness of the institution's infractions)[19].

In addition, the Brazilian Central Bank may order the extra-judicial liquidation of a financial institution:

(i) at its own motion (*ex - officio*) among others, whenever (a) the institution is in financial and economic crisis or upon verification of any of the events for declaring bankruptcy under the Brazilian Insolvency Law; (b) the institution submits losses which exposes its non-privileged creditors to risk of loss; or (c) after revocation of the financial institution's license by the Brazilian Central Bank, the institution fails to begin the ordinary liquidation process during the following ninety days or, when the Brazilian Central Bank considers that the ordinary liquidation process may adversely affect the institution's creditors; or

(ii) at the request of the financial institution's management (to the extent that they are allowed by the institution's by-laws) or the institution's comptroller appointed by the Brazilian Central Bank (if any, as described above)[20].

The extra-judicial liquidation will be conducted by a liquidator appointed by the Brazilian Central Bank with broad management powers, including for reviewing and classifying claims; and the commencement of the extra-judicial liquidation will have the following effects:

(i) automatic stay of claims and enforcement on the financial institution's properties;

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[13] 09/02/2005, http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm.
[14] 03/13/1974, http://www.bcb.gov.br/ingles/6024eng.asp.
[15] 02/25/1987, http://www.bcb.gov.br/ingles/2321eng.asp.
[16] 03/14/1997, http://www.planalto.gov.br/ccivil_03/leis/L9447.htm.
[17] §§2, 4 & 5 of the Law No 6,024.
[18] §6 of the Law No 6,024.
[19] §§11 & 12 of the Law No 6,024.
[20] §15 of the Law No 6,024.

(ii) avoidance of commencement of new claims during the liquidation;

(iii) acceleration of all claims;

(iv) avoidance of punitive interest in unilateral contracts;

(v) avoidance of compensatory interest for as long as all the liabilities are not satisfied;

(vi) interruption of statute of limitations with respect to any obligations assumed by the financial institution; and

(vii) avoidance of monetary corrections or actualizations on any institution's liabilities or pecuniary fines for infractions to criminal or administrative regulations[21].

Upon commencement of the extra-judicial liquidation, the liquidator will state the consolidated balance sheet and an inventory of all assets of the financial institution and within the sixty days following his / her appointment (which term may be extended) will prepare and file before the Brazilian Central Bank the report described above for the comptroller[22]. Upon consideration of the report, the Brazilian Central Bank may resolve to proceed with the extra-judicial liquidation or authorize the petition for the financial institution's bankruptcy provided that the conditions described above for such a petition are met[23].

After the decision to continue with the extra-judicial liquidation is adopted, the liquidator will publish a notice in the *Diario Oficial da União* (federal gazette) and another newspaper of broad circulation in the jurisdiction where the financial institution has its head office and all the institution's creditors (other than depositors or creditors holding bills of exchange accepted by the financial institution) will have to file proof of their claims within the term specified in the notice (which may neither be less than twenty days nor more than forty days). Decisions of the liquidator on the claims filed are appealable before the Brazilian Central Bank. After elapse of the proof of claims period the liquidator will publish a notice in the form described above containing the list of the creditors admitted. Within the following five days, the holders of any claims rejected may file any additional evidence and allegations, after which the liquidator will publish a definitive list of creditors admitted in the form described above. Within the following thirty days, the holders of any claims not admitted may resolve to continue with their claims stayed upon commencement of the extra-judicial liquidation or commence new claims with notice to the liquidator for the reservation of sufficient funds for the satisfaction of such claims (as available)[24].

Whenever the liquidation of the financial institution may have an effect on the public economy, private savings and national security, with the prior express authorization of the Brazilian Central Bank, the liquidator may adopt any special or qualified form of alienation of the financial institution's assets or settle its liabilities, assign assets to third parties, organize or reorganize the financial institution for the general or partial continuance of the institution's business[25].

To the extent appropriate and non-conflicting with the provisions of the Law No 6,024, the provisions of the Brazilian Insolvency Law will apply to the extra-judicial liquidation, for which purpose, the liquidator will be deemed the receiver, and the Brazilian Central Bank, the bankruptcy court[26].

The extra-judicial liquidation ceases:

(i) upon resolution of continuation of the financial institution's activities by the Brazilian Central Bank at the request of interested parties upon submission of due guarantees;

(ii) by transformation into an ordinary liquidation;

(iii) upon filing of the final liquidation report and cancellation of the appropriate public registry; and

[21] §§16 & 18 of the Law No 6,024.
[22] §11of the Law No 6,024.
[23] §21 of the Law No 6,024.
[24] §§22 through 27 of the Law No 6,024.
[25] §31 of the Law No 6,024.
[26] §34 of the Law No 6,024.

(iv) upon declaration of bankruptcy[27].

Without prejudice to the intervention and extra-judicial liquidation regimes described above, in 1987 Decree No 2,321 introduced the *regime de administração especial temporária* (temporary special management regime), through which in the event of the verification of, among others, fraudulent management or any of the events described above allowing the intervention or extra-judicial liquidation of a financial institution, the Brazilian Central Bank may order the temporary special management of the institution by a Directors Council (*Conselho Diretor*) appointed by the Brazilian Central Bank with full powers of management which will replace the financial institution's management and controlling bodies. The financial institution will continue with its normal business and the Brazilian Central Bank will be authorized to use funds of the Monetary Reserve (*Reserva Monetária*) to provide for the economic and financial regularization of the financial institution. The amounts contributed by the Monetary Reserve will be applied to the payment of the institution's liabilities through the assignment of the corresponding claims, rights and actions of the creditors to the Brazilian Central Bank and will be secured with liens on notes, shares, mortgages, etc. granted by the financial institution. Upon the advice of the Directors Council, the Brazilian Central Bank may authorize the transformation, merger or spin - off of the financial institution or the transfer of the institution's controlling stake; provide for the expropriation of the institution's shares; or order the extra-judicial liquidation.

Finally, in 1997 Brazil passed Law No 9,447, pursuant to which upon verification of the existence of any of the events allowing the resolution of the intervention, extra-judicial liquidation or temporary special management regime, the Brazilian Central Bank may opt for adopting any of the following measures in order to preserve the normality of the public economy and to protect the interest of depositors, investors and creditors, without prejudice to the subsequent adoption of any of the foregoing measures (*i.e.* intervention, extra-judicial liquidation or temporary special management regime): (i) the recapitalization of the financial institution; (ii) the transfer of the institution's controlling stake; (iii) the institution's corporate reorganization, including through merger or spin-off[28].

In order to protect the public economy and the interests of depositors and investors, the comptroller, the liquidator or the Directors Council (in each case appointed as described above, if any) may adopt the following measures upon prior and express approval of the Brazilian Central Bank: (i) to transfer assets, rights and liabilities of the financial institution or of its businesses, separately or jointly, to other financial institution or institutions; (ii) to sell or assign assets and rights to third parties and to agree with the assumption of its liabilities by other financial institutions; and (iii) to create or provide for the corporate reorganization of a financial institution or institution to which the assets, rights and liabilities of the financial institution submitted to intervention, extra-judicial liquidation or temporary special management will be transferred, partially or as a whole, in order to permit the general or partial continuity of the distressed financial institution's business[29].

IV. Mexico

In Mexico financial institutions are governed by the *Ley de Instituciones de Crédito*[30] or the Mexican Credit Institutions Law and financial institutions' liquidation were originally governed only by the *Ley de Concursos Mercantiles*[31] or the Mexican Insolvency Law.

However, "*the financial system authorities found that the insolvency procedures of some banks, conducted under such general legislation, are slow, admission of creditors is not diligent and do not provide for efficient means for the recovery of assets that causes the loss of value… Experience showed that liquidations under such legislation may last more than a decade*"[32]. Therefore, in 2014 the Mexican Congress passed a Legislative Decree[33] pursuant to which the Mexican Insolvency Law was amended and incorporated in the Mexican Credit Institutions Law,

[27] §19 of the Law No 6,024.
[28] §5 of the Law No 9,447.
[29] §6 of the Law No 9,447.
[30] *Diario Oficial de la Federación*, 07/18/1990 (last amendment, *Boletín Oficial de la Federación*, 01/10/2014), http://www.cnbv.gob.mx/Normatividad/Ley%20de%20Instituciones%20de%20Cr%C3%A9dito.pdf.
[31] *Diario Oficial de la Federación*, 05/12/2000 (last amendment, *Boletín Oficial de la Federación*, 01/10/2014), http://www.diputados.gob.mx/LeyesBiblio/pdf/29.pdf.
[32] "*Análisis de la Reforma Financiera*", Eduardo Gómez Alcalá, PwC Mexico, Sector Financiero, www.pwc.com/mx/sector-financiero, pg. 15.
[33] *Diario Oficial de la Federación*, 01/10/2014, http://www.dof.gob.mx/nota_detalle.php?codigo=5329408&fecha=10/01/2014.

among others, a process for financial institution's ordinary[34], conventional[35] or judicial[36] liquidation.
Pursuant to the Mexican Insolvency Law (as amended) financial institutions are subject to the Mexican Insolvency Law, except as provided in the Mexican Credit Institutions Law[37], but upon declaration of the financial institution's insolvency under the Mexican Insolvency Law the process will be commenced, in all cases, in liquidation[38].

One of the main new features of the judicial liquidation is the "*incorporation of the loss of equity as an event for the revocation of the license …* [provided that] *the judicial liquidation may also be commenced when the loss of equity occurred after the license revocation*"[39].

Prior to the revocation of its license, Mexican financial institutions that violate the minimum capital requirements may submit a request to the *Comisión Nacional Bancaria y de Valores* (National Banking and Securities Commission or the Mexican Banking Commission) for the application of the *Régimen de Operación Condicionada* or Conditioned Operations Regime; for which purpose the financial institution's shareholders will be required to transfer the institution's shares up to 75% of the institution's aggregate outstanding capital to an irrevocable trust for the benefit of the financial institution's shareholders (in first place) and the *Instituto para la Protección al Ahorro Bancario* or Bank Savings Protection Institute (in second place, in the event the regularization plan described below is rejected, among others), and approve the filing before the Mexican Banking Commission of a regularization plan. Upon completion of the regularization plan and regularization of the minimum capital requirements the trust will be terminated and the shares delivered back to the financial institution's shareholders[40].

In the circumstances described above, among others, and provided the financial institution is not subject to the Conditioned Operations Regime, the Mexican Banking Commission may order the preventive intervention of the financial institution through a comptroller appointed by the Bank Savings Protection Institute[41]. The comptroller will replace the financial institution's managers and shareholders meetings (except where the exercise of the shareholders' rights corresponds to the Bank Savings Protection Institute)[42].

The Mexican Banking Commission may terminate the intervention if

(i) the financial institution begins the dissolution and winding up procedure;

(ii) the Bank Savings Protection Institute has transferred the financial institution's shares held in trust;

(iii) the financial institution is subject to judicial liquidation; or

(iv) the financial institution has regularized all irregularities and infractions[43].

The Mexican Credit Institutions Law provides that upon the economic difficulty or insolvency of a financial institution the Mexican Banking Commission may revoke the financial institution's license and order the liquidation or judicial liquidation of the financial institution except that the *Comité de Estabilidad Bancaria* or Financial Committee of Stability determines that the financial institution may be subject to regularization, in which event the Bank Savings Protection Institute may (i) grant financial aid to the financial institutions subject to the Conditioned Operations Regime through the subscription of financial institution's shares; or (ii) grant financial facilities to the financial institutions that are not subject to the Conditioned Operations Regime or breached the last resort loan granted by the Mexican Central Bank secured with the institution's shares representing 100% of the financial institution's outstanding capital[44].

[34] §§165 through 220 of the Mexican Credit Institutions Law.
[35] §§221 through 224 of the Mexican Credit Institutions Law.
[36] §§225 through 270 of the Mexican Credit Institutions Law.
[37] §§244bis & 245 of the Mexican Insolvency Law.
[38] §249 of the Mexican Insolvency Law.
[39] "*Análisis de la Reforma Financiera*", Eduardo Gómez Alcalá, PwC Mexico, Sector Financiero, www.pwc.com/mx/sector-financiero, pg. 15.
[40] §§29bis 2 and 29bis 4of the Mexican Credit Institutions Law.
[41] §§129 & 130 of the Mexican Credit Institutions Law.
[42] §131 of the Mexican Credit Institutions Law.
[43] §139 of the Mexican Credit Institutions Law.
[44] §§147 & 148 and 151 through 164 of the Mexican Credit Institutions Law.

The ordinary liquidation is conducted by the Banking Savings Protection Institute through any of its employees or attorneys-in-fact as from the date of the revocation of the financial institution's license[45]. For the performance of its duties, the Banking Savings Protection Institute, in its capacity as liquidator, will be the legal representative of the financial institution with full powers to, among others:

(i) collect any credits;

(ii) dispose of the institution's assets;

(iii) satisfy or assign the institution's liabilities;

(iv) pay to the shareholders any balance, if any; and

(iv) grant general or special powers of attorney[46].

The financial institution's liabilities will be paid in the following order of priority:

(a) credits secured with mortgage or pledge, up to the proceeds of the realization of the collateral;

(b) certain labour credits and tax credits;

(c) credits with special statutory preference;

(d) the credits guaranteed by the *Ley de Protección al Ahorro Bancario*[47] or the Banking Savings Protection Law (the Guaranteed Liabilities)[48];

(e) other credits; and

(f) subordinated credits[49].

The Bank Savings Protection Institute will provide the funds for the satisfaction of the Guaranteed Liabilities and will be subrogated to the rights and interests of the holders thereof[50].

In the ordinary liquidation, the Bank Savings Protection Institute may, among others adopt any of the following restructuring alternatives:

- Assign to another financial institution assets and liabilities of the institution (including the Guaranteed Liabilities) directly or through a trust agreement;

- Create, organize and manage a new financial institution and assign and transfer assets and liabilities of the failed financial institution; and

- Adopt any other alternative as it deems appropriate for the purposes of protecting the interests of the investors attending to the circumstances;

provided that the Bank Savings Protection Institute will pay all Guaranteed Liabilities not subject to any of the foregoing alternatives[51].

Upon determination of the Bank Savings Protection Institute that there is an impossibility of implementing or finalizing the liquidation process, after the satisfaction of the Guaranteed Liabilities, the institute will request the immediate cancellation of the financial institution's registration before the Public Registry of Commerce[52].

[45] §167 of the Mexican Credit Institutions Law.
[46] §§167 &169 of the Mexican Credit Institutions Law.
[47] *Diario Oficial de la Federación*, 01/19/1999 (last amendment, *Boletín Oficial de la Federación*, 01/10/2014), http://www.diputados.gob.mx/LeyesBiblio/pdf/62.pdf.
[48] The Guaranteed Liabilities include the deposits, loans and credits up to the maximum amount equal to 400,000 investment units per person (§6 & 11 of the Banking Savings Protection Law).
[49] §180 of the Mexican Credit Institutions Law.
[50] §188 of the Mexican Credit Institutions Law.
[51] §186 of the Mexican Credit Institutions Law.
[52] §220 of the Mexican Credit Institutions Law.

The petition for the judicial liquidation of the financial institution can only be filed by the Bank Savings Protection Institute upon the loss of the financial institution's equity (even prior to, or subsequent to, the financial institution's license revocation)[53]. A financial institution will be deemed to have lost its equity when the institution's assets are not sufficient to satisfy its liabilities[54]. The liquidation will be conducted by the court of the jurisdiction where the financial institution has its domicile[55].

Upon commencement of the judicial liquidation, possession and management of all the financial institution's assets and interests will be assigned to the Bank Savings Protection Institute, who will act as judicial liquidator and, in such capacity will be the legal representative of the financial institution in liquidation; will collect all the institution's liabilities, for which purpose will prepare a special initial financial statement as of the judicial liquidation commencement date; and will conduct the process for the filing of proof of claims[56]. The Guaranteed Liabilities will be deemed admitted for any outstanding balance not paid by the Bank Savings Protection Institute[57].

The claims pending as of, or initiated after, commencement of the judicial liquidation will be heard by the courts of competent jurisdiction and will not be consolidated before the court of the judicial liquidation; provided that the creditors will have to comply with the process for the admission of their claims[58].

The financial institution's liabilities will be paid in the order of priority described for the ordinary liquidation above after satisfaction of the salaries for services rendered during the last year and severance payments[59]; expenses for the administration and conservation of the assets of the financial institution (including the fees of the judicial liquidator); and expenses and fees relating to the actions and claims in connection with the financial institution's assets[60].

The Bank Savings Protection Institute may agree with the financial institution's creditors a different form and method of payment, including through the delivery of assets in payment with the consent of admitted claims amounting to at least 75% of the financial institution's aggregate admitted liabilities, which will be binding to the opposing or non-consenting creditors to the extent under the proposed payment they receive an amount equal or higher than they would receive in the liquidation[61]. In addition, the Bank Savings Protection Institute may adopt any of the restructuring alternatives described above[62].

V. Colombia

In Colombia financial institutions are governed by the *Estatuto Orgánico del Sistema Financiero*[63] or the Colombian Financial System Charter and are excluded from the *Ley de Régimen de Insolvencia No 1,116*[64] or the Colombian Insolvency Law[65].

The Colombian Financial System Charter provides that the *Superintendencia Financiera de Colombia* or Financial Superintendency of Colombia must take immediate possession of the assets and business of a financial institution (with the consent of the *Consejo Asesor* - Advising Committee - with the prior approval of the Ministry of Finance and Public Credit) in the following instances:

- it has suspended its payment obligations;
- its net equity was reduced below the 50% of the financial institution's outstanding capital;
- it is not in compliance with the minimum capital requirements;

[53] §§227 & 226 of the Mexican Credit Institutions Law.
[54] §226 of the Mexican Credit Institutions Law.
[55] §228 of the Mexican Credit Institutions Law.
[56] §§233 through 239 of the Mexican Credit Institutions Law.
[57] §240 of the Mexican Credit Institutions Law.
[58] §251 of the Mexican Credit Institutions Law.
[59] §123 A XXIII of the *Constitución Política de los Estados Unidos Mexicanos* (*Diario Oficial de la Federación*, 02/05/1917 (last amendment, *Boletín Oficial de la Federación*, 07/07/2014), http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm.
[60] §§241, 242 & 243 of the Mexican Credit Institutions Law.
[61] §246 articles III and VI of the Mexican Credit Institutions Law.
[62] §233 & 186 of the Mexican Credit Institutions Law.
[63] https://www.superfinanciera.gov.co/jsp/loader.jsf?lServicio=Publicaciones&lTipo=publicaciones&lFuncion=loadContenidoPublicacion&id=15488.
[64] *Boletín Oficial No 46,494,* 12/27/2006, http://www.secretariasenado.gov.co/senado/basedoc/ley_1116_2006.html.
[65] §3 of the Colombian Insolvency Law.

- it has breached a restructuring plan;
- it has violated an order of the Financial Superintendency of Colombia to exclude its assets and liabilities; or
- it has breached a progressive winding-up program set by the Financial Superintendency of Colombia[66].

The purpose of taking possession will be to determine whether the financial institution must be liquidated, if it can be regularized or if there could be adopted other measures to improve the conditions for the depositors' and creditors' recovery[67]. The taking of possession has the following effects:

(i) the replacement of the managers by a comptroller appointed by the Financial Superintendency of Colombia and the statutory supervisors by a supervisor appointed by the *Fondo de Garantías de Instituciones Financieras* or the Financial Institutions Guarantee Fund or FOGAFIN;

(ii) the avoidance of the registration of the cancellation of any registered liens granted to the financial institution without the prior consent of the comptroller;

(iii) the stay of pending enforcement proceedings and the avoidance of the commencement of new enforcement proceedings on pre-possession claims;

(iv) the lifting of any judicial liens on the financial institution's assets granted prior to the taking of possession;

(v) the suspension of payments on pre-possession claims (if resolved by the Financial Superintendency of Colombia upon taking possession);

(vi) and the subject of all the financial institution's claims (including deposits and secured claims) to the measures adopted during the taking of possession[68].

Within two months (or its extension for additional two months) following the taking of possession, to the extent the Financial Superintendency of Colombia does not order the immediate liquidation of the financial institution, the FOGAFIN will present to the Financial Superintendency of Colombia a plan for the continuation of the financial institution's business or adoption of other measures to improve the conditions for the depositors' and creditors' recovery (without prejudice to any agreements among the creditors and the financial institution)[69].

The liquidation will provoke, along with the effects described above, among others: (i) the dissolution of the financial institution; (ii) the acceleration of all debts of the financial institution; and (iii) the creation of an estate with the financial institution's assets[70].

In 1999, Colombia introduced the following preventive measures prior to the taking of possession for the rescue of financial institutions (*Institutos de Salvamento y Protección de la Confianza Pública*):

(i) special supervision;

(ii) the financial institution's recapitalization;

(iii) the fiduciary administration of the financial institution's assets by another financial institution;

(iv) the transfer of the financial institution's assets and liabilities or transfer of goodwill to another financial institution;

(v) the merger of the financial institution with another financial institution; and

[66] §114 of the Colombian Financial System Charter.
[67] §115 of the Colombian Financial System Charter.
[68] §116(1) of the Colombian Financial System Charter.
[69] §116(2) of the Colombian Financial System Charter.
[70] §117(1) of the Colombian Financial System Charter.

(vi) the formulation of a rescue plan[71].

Further, in 2003 the following additional preventive measures were included[72]: (i) the exclusion of assets and liabilities; and (ii) a progressive winding-up program[73].

Pursuant to the Colombian Financial System Charter, in Colombia the financial institutions will be subject to a *Proceso de Liquidación Forzosa Administrativa* (Administrative Mandatory Liquidation Procedure) which constitutes an insolvency universal procedure aimed at obtaining the prompt liquidation of the financial institution's assets for a rapid payment of the institution's liabilities, guaranteeing the equal treatment among creditors without prejudice to the preferences enjoyed by certain categories of credits[74].

The administrative liquidation will be conducted by a liquidator appointed by the FOGAFIN, who will also appoint a supervisor[75]; provided that at any time the creditors holding at least 75% of the admitted claims (other than those relating to the FOGAFIN) may request the substitution of the liquidator and the appointment of an alternate liquidator[76]. The decisions of the liquidator relating to the admission, rejection, categorization and any other by nature constituting an administrative act, may be challenged before the courts in administrative matters. The administrative acts of the liquidator enjoy the presumption of legality and their challenge will not suspend the administrative liquidation procedure. Any other management and related actions of the liquidator may be challenged before the ordinary courts[77].

The liquidator will keep the custody and manage all the assets of the financial institution included in the liquidation state or not, and will have the following powers, among others:

(i) will be the legal representative of the financial institution;

(ii) manage the liquidation estate;

(iii) procure the protection and conservation of the assets of the estate;

(iv) sell the assets of the estate; and

(v) promote any responsibility actions against the managers and officers of the financial institution.

The liquidator will have to render accounts on an annual basis, at the finalization of the liquidation procedure or at any time at the request of admitted creditors representing at least 50% of the admitted claims[78].

In order to facilitate the control of the liquidator and supervisor, a *Junta de Acreedores* (Creditors Committee) will be created consisting of five members: the three largest creditors and two members appointed by the FOGAFIN. The Creditors Committee will have the following powers, among others: (i) approve the financial statements; and (ii) give advice to the liquidator, upon request[79].

The liquidation estate will comprise all assets present and future of the financial institution, with certain exceptions, including any debt instruments received solely for collection purposes and any moneys received in trust or similar undertakings[80]. In the liquidation, the financial institution's liabilities will be paid in the order of their preference according to general law (§§ 2493 through 2504 of the Colombian Civil Code). The FOGAFIN will be subrogated to the claims of the creditors paid from the deposit insurance or guarantee. Any amounts not claimed in due time by any creditor will be transferred to the FOGAFIN (reserve). After cancellation of all the financial

[71] §113 of the Colombian Financial System Charter (as introduced by Law No 510, August 3, 1999). Diario Oficial 43654 04/08/1999.
[72] §113, articles 11 and 12 (as introduced by §52Law No 795, January 14th, 2003).
[73] §113 of the Colombian Financial System Charter (as introduced by Law No 510, August 3, 1999). Diario Oficial 43654 04/08/1999.[74] §293(1) of the Colombian Financial System Charter.
[74] §293(1) of the Colombian Financial System Charter.
[75] §295(4) of the Colombian Financial System Charter.
[76] §295(5) of the Colombian Financial System Charter.
[77] §295(2) & (3) of the Colombian Financial System Charter.
[78] §§295(9) & (10) & 297 of the Colombian Financial System Charter.
[79] §298 of the Colombian Financial System Charter.
[80] §299 of the Colombian Financial System Charter.

institution's liabilities, expiration of the term for claiming payments and delivery of any amounts to the FOGAFIN, the financial institution's shareholders may appoint a liquidator to continue the liquidation process subject to ordinary liquidation rules[81].

At any time during the liquidation procedure the creditors may be induced to enter into agreements that will be subject, as applicable, to the provisions of the insolvency laws and must be consented to by the absolute majority of creditors admitted representing at least 75% of the aggregate admitted claims. The agreements may include haircuts, sale of assets or any other measure for facilitating the payment of the financial institution's liabilities or regulating the rights of the creditors; provided that the financial institution cannot set-off claims[82].

All credits granted to the shareholders, directors and managers of the financial institution will be accelerated and paid in full. In addition, at any time during the liquidation procedure the liquidator may request that the shareholders make payment of any equity pending payment (including with respect to any equity pending payment transferred during the sixty days immediately prior to the taking of possession on the estate). These claims will be processed under executive proceedings[83].

To the extent, that the assets of the estate are not sufficient to cancel all the financial institution's liabilities the following actions performed by the financial institution during the eighteen months immediately prior to the taking of possession, among others, may be revoked through a revocation action filed before the ordinary courts within the three years immediately following the taking of possession:

(i) payment of debts not due;

(ii) transactions with relatives up to the fourth degree in consanguinity, second degree in affinity and first degree in civil relationship with the directors, managers, advisors and supervisor, or partners of the financial institution;

(iii) gratuitous acts; and

(iv) any other act of disposition or administration with adverse effects on the creditors when the third party has not conducted with good faith and without negligence[84].

VI. Peru

In Peru financial institutions are governed by the *Ley General del Sistema Financiero y del Sistema de Seguros y Orgánica de la Superintendencia de Banca y Seguros No 26,702* or the Peruvian Financial Institutions Law[85].

Any financial institution that makes or incurs any of the following, among others: a reduction of its net equity or capital below the minimum regulatory requirements; a request for financial assistance that, in the opinion of the *Superintendencia de Banca y Seguros* or the Superintendency of Banks, may evidence a structural financial insufficiency on a permanent basis; or request for financial assistance from the *Banco Central de Reserva del Perú* or the Peruvian Central Bank for more than ninety days within the last one hundred and eighty days; will be subject to a supervision regime by the Superintendency of Banks for a period of forty five days extendable for one time for an additional term of forty five days (the Supervision Regime)[86].

During the Supervision Regime the managers of the financial institution will keep control of the financial institution subject to certain limitations; provided that within the seven days following the commencement of the Supervision Regime the financial institution must file a plan of financial recovery satisfactory to the Superintendency of Banks, which must be executed within the seven days following approval by the Superintendency of Banks despite the commencement of its implementation in anticipation of such execution. Notice of the Recovery Plan is given to the Peruvian Central Bank[87].

[81] §300 of the Colombian Financial System Charter.
[82] §301 (1) & (2) of the Colombian Financial System Charter.
[83] §301 (3), (4) & (5) of the Colombian Financial System Charter.
[84] §301 (7) of the Colombian Financial System Charter.
[85] http://www.sbs.gob.pe/repositorioaps/0/0/jer/regu_leygralbancseguro/2013/Ley_26702_24-12-2013.pdf.
[86] §§95 & 96 of the Peruvian Financial Institutions Law.
[87] §§97 & 98 of the Peruvian Financial Institutions Law.

At any time during the Supervision Regime the Superintendency of Banks may, among others, request the shareholders to make additional contributions in cash; provided that if those contributions are not made the shareholders lose their pre-emptive rights and the Superintendency of Banks may obtain those contributions from third parties[88].

During the Supervision Regime the Superintendency of Banks may appoint a controller and among others, the financial institution may not grant or accept trusts, the term of the cash positions may be reduced in the manner stipulated by the Peruvian Central Bank and the Superintendency of Banks may prohibit any transactions deemed to increase the insolvency risk[89].

In the event that, among others, the Superintendency of Banks determines that the financial crisis of the financial institution may not be overcome during the Supervision Regime; or the financial institution failed to comply with the Recovery Plan or suspended payments or lost more than 50% of the equity within the last twelve months, then the Superintendency of Banks will approve the intervention of the financial institution with notice to the Peruvian Central Bank for a period of forty days extendable for one time for an additional term of forty five days. At the end of this period the Superintendency of Banks will issue the resolution dissolving the financial institution and commencing the liquidation procedure and will set the rules and procedure for the liquidation[90].

The liquidation will be conducted by a qualified financial institution appointed through a public bidding under the supervision and control of the Superintendency of Banks. The liquidation procedure must include the possibility of the rehabilitation of the financial institution, which may include the merger or any other form of corporate recovery and may not take more than two years, which may be extended for one time for an identical period by the Superintendency of Banks[91].

Upon commencement of the liquidation procedure the following are prohibited:

(i) the commencement of any judicial or administrative claims seeking the payment of amounts owed by the financial institution;

(ii) the enforcement of any judicial resolutions against the financial institution;

(iii) the granting of securities to secure any indebtedness of the financial institution; and

(iv) the advance of any payments or set-off of debts (except for set-off with other financial institutions, and in connection with derivative transactions).

In addition, the assets of the financial institution may not be subject to precautionary measures and any existing precautionary measures will be automatically lifted[92].

The Peruvian Financial Institutions Law provides for a special order of priority for the payment of the financial institution's liabilities which replaces any other general or special order of priority, as follows[93]:

(i) the fees and expenses of the liquidators and all payments assumed under the ALADI Reciprocal Payments and Credits Agreement that the Peruvian Central Bank could not transfer to other financial institutions;

(ii) labor claims;

(iii) deposits and other liabilities related to the financial intermediation not paid by the *Fondo de Seguro de Depósitos* or the Deposits Guarantee Fund;

(iv) contributions of the Deposits Guarantee Fund and the amounts used for paying the insurance coverage and the claims of the insured parties, the beneficiaries or any reinsurance parties;

[88] §§99 of the Peruvian Financial Institutions Law.
[89] §101 of the Peruvian Financial Institutions Law.
[90] §§103 through 105 of the Peruvian Financial Institutions Law.
[91] §115 of the Peruvian Financial Institutions Law.
[92] §§116 & 117 of the Peruvian Financial Institutions Law.
[93] §117 of the Peruvian Financial Institutions Law.

(v) taxes;

(vi) all other claims in the order of their date of incurrence or, if not available, *pro - rata*;

(vii) legal interest on all the foregoing (which continue to accrue until payment); and

(viii) subordinated debt.

The following assets will be excluded from the liquidation estate:

(i) all social security contributions or other taxes withheld;

(ii) all mortgages as long as all assets and liabilities relating to transactions of financial leasing (which will be transferred to other financial institutions);

(iii) the amounts paid by the Peruvian Central Bank on account of the ALADI Reciprocal Payments and Credits Agreement on behalf of the financial institution;

(iv) the amounts paid for compensating the balance of the clearing house; and

(v) the amounts under any transaction in which the financial institution was acting as an agent (as determined by the Superintendency of Banks) (the Excluded Claims)[94].

All pre-liquidation claims secured with property are enforceable subject to the following conditions: (i) there shall be a separate liquidation procedure for the sale of the collateral; (ii) the proceeds of the sale will be kept separately from the other assets of the estate and will be allocated (a) *pro rata* to the payment of all outstanding amounts on any labor claims or deposits and other claims related to the financial intermediation pending of payment after liquidation of the estate; and (b) to the satisfaction of the secured claims. Any remaining outstanding balance on the secured claims will be paid out from the proceeds of the liquidation of the estate according to their categorization[95].

The Liquidator may sell (in total or part) portfolio of credits to any other financial institution or other third party[96].

To the extent that the financial institution does not have enough liquidity to satisfy the Excluded Claims, after deduction of its fees, the liquidator will apply the first proceeds received to the satisfaction of those Excluded Claims in the order of priority described above[97].

The financial institution's creditors holding at least 30% of the admitted liabilities may file before the Superintendency of Banks a restructuring plan including capital contributions in amounts sufficient for complying with the minimum patrimonial requirements under the Peruvian Financial Institutions Law. The restructuring plan must contemplate the allocation of the required portion of the subordinated debt to off-set the cumulated losses; and any remaining balance to its conversion into equity through the issuance of a new series of shares. The plan must include only contributions or capitalization of liabilities by the private sector[98].

The plan must be approved by the Superintendency of Banks with the prior opinion of the Peruvian Central Bank. To the extent that the Superintendency of Banks deems the plan acceptable, then it will be put to the consideration of the financial institution's creditors, which will be approved with the affirmative vote of the absolute majority of admitted (registered) creditors. There is no need for a meeting of creditors[99].

Upon performance of the contributions or capitalizations the Superintendency of Banks will revoke the dissolution resolution and terminate the liquidation procedure[100].

[94] §118 of the Peruvian Financial Institutions Law.
[95] §119 of the Peruvian Financial Institutions Law.
[96] §121 of the Peruvian Financial Institutions Law.
[97] §123 of the Peruvian Financial Institutions Law.
[98] §124 of the Peruvian Financial Institutions Law.
[99] §§125 & 126 of the Peruvian Financial Institutions Law.
[100] §127 of the Peruvian Financial Institutions Law.

VII. Chile

In Chile financial institutions are governed by the *Ley General de Bancos Decree-Law No 3* or the Chilean Financial Institutions Law[101].

Whenever a Chilean financial institution is in financial distress (*i.e.* the basic capital is less than 3% of the total assets; or the financial institution's net worth is less than 8% of the total assets), and such situation persists after the thirtieth day following the filing of the financial institution's financial statements, then the board of directors must call for a shareholders' meeting to consider the financial institution's preventive recapitalization. If the recapitalization is not approved the financial institution will be restricted from increasing the amount of its loans or making investments except for debt instruments issued by the *Banco Central de Chile* or the Chilean Central Bank[102].

Financial institutions may only be adjudicated bankrupt when they are subject to voluntary liquidation[103]. A financial institution with insolvency problems affecting the punctual payment of its obligations as they become due (*i.e.* the basic capital is less than 2% of the total assets; or the financial institution's net worth is less than 5% of the total assets) must propose a reorganization plan to its creditors (other than preferred creditors and depositors)[104]. The reorganization plan may include:

(i) the total or partial capitalization of claims;

(ii) extension of terms;

(iii) remission; or

(iv) any other lawful method of payment.

The reorganization plan will be subject to the prior authorization of the *Superintendencia de Bancos e Instituciones Financieras* or the Financial Institutions Superintendency, mainly in respect of the need for the remission of debts. Following the formulation of the reorganization plan and until a decision by the affected creditors is adopted, the payment of any claims (other than sight deposits) will not be enforceable against the financial institution[105].

The reorganization plan must be approved by creditors representing the absolute majority of the aggregate of claims entitled to vote. If the reorganization plan is not approved by the required majority of creditors then the financial institution must propose a new plan including the capitalization of the claims entitled to vote *pro rata* in the amount necessary so that the financial institution's proportion between effective net worth and assets weighted by risk is not less than 12%. If the new plan also fails then the Financial Institutions Superintendency will revoke the financial institution's license and order the mandatory liquidation with the prior consent of the Chilean Central Bank. The provisions of the *Ley de Reorganización y Liquidación de Empresas y Personas No 20,720*[106] or the Chilean Insolvency Law do not apply to these plans[107].

In the event of financial institutions subject to the foregoing, the financial institution's mortgage notes portfolio will be transferred to other financial institutions in a bidding process[108].

To the extent the Financial Institutions Superintendency determines that a financial institution is not sufficiently solvent to continue operating, or the protection of the depositors and creditors so mandate, or the financial institution's reorganization plans fail, then the Financial Institutions Superintendency will revoke the financial institution's license and order the financial institution's mandatory liquidation.

The liquidation will be conducted by the Financial Institutions Superintendency or the liquidator appointed by it[109]. Upon declaration of the mandatory liquidation the financial institution's deposits

[101] *Boletín Oficial No 35,944,*12/19/1997 (last amendment, *Ley No 20.818*, 02/18/2015), http://www.leychile.cl/Navegar?idNorma=83135.
[102] §118 of the Chilean Financial Institutions Law.
[103] §120 of the Chilean Financial Institutions Law.
[104] §122 of the Chilean Financial Institutions Law.
[105] §123 of the Chilean Financial Institutions Law.
[106] *Boletín Oficial* 01/09/2014, http://www.leychile.cl/Navegar?idNorma=1058072&idVersion=2014-10-10&r=2.
[107] §§124 & 127 of the Chilean Financial Institutions Law.
[108] §125 of the Chilean Financial Institutions Law.
[109] §130 of the Chilean Financial Institutions Law.

at checking accounts and other sight deposits will be paid against the cash available and / or the amounts deposited by the financial institution with the Chilean Central Bank; provided that if such funds are not sufficient to pay those deposits in full then the liquidator will be able to sell other financial institution's assets. For the purpose of paying these deposits the Chilean Central Bank will provide assistance to the financial institution either by way of credit facilities (that will enjoy preference in payment) or acquisition of the financial institution's assets. The liquidator may also transfer checking accounts and other sight deposits to another financial institution[110].

The liquidator will be required to, among others, prepare a detailed list of all the financial institution's creditors indicating amount, nature and preferences of each claim. Objections to the list may be filed with the Civil Ordinary Court. The final list will constitute the acknowledgment of the credits with the right to receive distributions. After performance of the distribution among the creditors listed, any other creditor with a court judgment acknowledging a pre-liquidation claim will have the right to claim the payment on future distributions but will not be entitled to restitutions from the creditors already paid. No new pre-liquidation claims will be admitted after the lapse of two years from the publication of the liquidation resolution in the *Boletín Oficial* or the Official Gazette[111]. The liquidator will proceed to sell the mortgage notes in the manner described above[112].

Upon commencement of the mandatory liquidation all the enforcements of, or granting of judicial liens or other precautionary measures on, pre-liquidation claims will be stayed[113]; and all claims against the financial institution will be accelerated. The liquidator will apply any available funds to the payment of the liquidation expenses, preferred creditors and distribution *pro rata* among the other creditors; provided that if all the financial institution's obligations cannot be paid in full then they will be satisfied *pro rata* without prejudice to any statutory preferences[114].

The mandatory liquidation will not be applicable in the event that the financial institution failed to comply with its current obligations due to a legal strike by its employees or *force majeure*[115].

Whenever a financial institution is subject to any of the foregoing situations which give rise to a recapitalization or formulation of a reorganization plan[116], it may incur a two-year maximum term loan facility with another financial institution for up to 25% of the financial institution's net worth. This facility may only be repaid if the financial institution has regularized its financial situation; provided that if the facility is not paid during the maximum two - year term, then it must be capitalized[117].

The Chilean federal government guarantees up to 90% of the deposits with a maximum of one hundred and twenty *Unidades de Fomento* (Promotion Units)[118]; provided that the payment under the guarantee is conditioned upon the creditor waiving the right to receive payment of any unpaid balance; provided further that if the creditor rejects the payment of the guarantee then it will keep its rights to receive payment under the reorganization plan of the mandatory liquidation, as applicable[119]. Upon payment of the guarantee the Chilean tax authority will be subrogated by operation of law to the rights of the creditor on the portion of the credit paid[120].

VIII. Uruguay

In Uruguay all financial institutions pursuing financial intermediation activities are governed by the *Decreto - Ley de Intermediación Financiera No 15,322*[121] or the Uruguayan Financial Institutions Law and are subject to the control and supervision of the *Banco Central del Uruguay* or the Uruguayan Central Bank through the *Superintendencia de Servicios Financieros* or the Superintendency of Financial Services created pursuant to Law No 16,696[122].

[110] §132 of the Chilean Financial Institutions Law.
[111] §133 of the Chilean Financial Institutions Law.
[112] §134 of the Chilean Financial Institutions Law and also see § 125 of the Chilean Financial Institutions Law above.
[113] §135 of the Chilean Financial Institutions Law above.
[114] §136 of the Chilean Financial Institutions Law above.
[115] §139 of the Chilean Financial Institutions Law above.
[116] See §§118 & 122 of the Chilean Financial Institutions Law above.
[117] §140 of the Chilean Financial Institutions Law above.
[118] §§144 & 145 of the Chilean Financial Institutions Law above.
[119] §151 of the Chilean Financial Institutions Law above.
[120] §152 of the Chilean Financial Institutions Law above.
[121] Diario Oficial 23/09/1982 No 21,322, http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=15322&Anchor=.
[122] Diario Oficial 17/04/1995 No 24,273, http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=16696&Anchor=.

The Uruguayan financial institutions are excluded from the *Ley de Declaración Judicial del Concurso y Reorganización Empresarial No 18.387*[123] or the Uruguayan Insolvency Law, except in respect of the regulations on the determination of the bankrupt's degree of liability (*calificación de conducta*) of the reorganization proceedings (*concurso*); pursuant to which the insolvency may be willful or involuntary[124].

Among others, the Superintendency of Financial Services will approve the financial institution's financial regularization plans with the opinion of the *Corporación de Protección del Ahorro Bancario* or the Corporation for the Protection of Bank Savings (COPAB) created by Law No 18,401[125] or the Uruguayan Central Bank Charter, in respect of those financial institutions making contributions to the fund managed by the COPAB[126].

All deposits from persons of the private (non-financial) sector are subject to a guarantee under the *Fondo de Garantía de Depósitos Bancarios* or the Bank Deposits Guarantee Fund[127]; which will be paid, up to the maximum guaranteed amount, upon the administrative liquidation of any financial institution to the extent the funds of the Bank Deposits Guarantee Fund were not applied to a Solution Procedure (as defined below). The Bank Deposits Guarantee Fund will be subrogated to the rights, interests and remedies of the depositors paid off. When the maximum amounts paid by the Bank Deposits Guarantee Fund are not sufficient to cover the full amounts of the deposits, upon receipt of payments by the Bank Deposits Guarantee Fund the depositor will be deemed to accept that any remaining outstanding unpaid balance of their deposits will be junior to the re - payment of the amounts advanced by the Bank Deposits Guarantee Fund[128].

When at the discretion of the Uruguayan Central Bank it is deemed that a financial institution has an irreversible and non-curable (through a reorganization or restructuring plan), problem of liquidity, insolvency or governance, then the Board of Directors of the Uruguayan Central Bank will declare the *Proceso de Resolución Bancaria* or Bank Resolution Process This involves the intervention of the financial institution, the replacement of the institution's managers and the suspension of the financial institution's activities. The Bank Resolution Process will be conducted by the COPAB through a *Comisión Interventora* or Intervention Committee conformed by three members appointed by the COPAB. The Intervention Committee must take all measures necessary for the maintenance and conservation of the financial institution and must procure all information necessary for the COPAB to determine the viability of a *Procedimientos de Solución* or Solution Procedure[129].

The Solution Procedure includes all transactions for the exclusion of assets and liabilities of the financial institution; plus the contributions of the Bank Deposits Guarantee Fund; as long as the eventual creation of financial vehicles (*i.e.* trusts and funds of bank recovery) that may be necessary for creating one or more business units that may be transferred to other financial institutions. The acquisition by another financial institution of a business unit of the failed institution implies the eventual assumption of the liabilities (assuming the obligations with the financial institution's depositors for the original deposit amounts or partially, as defined in the procedure) and the reception of the assets from the financial institution and funds from the Bank Deposits Guarantee Fund. In all cases, the amount of the liabilities assumed must not be lesser than the amount of the assets transferred. In addition, the COPAB must promote, to the extent possible, competitive biddings for the election of the acquiring financial institutions. The transfer may be direct, where the acquiring financial institution receives goods, assets and credits against third parties, among others; and indirect, where the acquiring financial institution receives rights and interests on any financial vehicle (like certificates in a trust) formed with the assets of the failed institution[130].

The COPAB must seek a solution that brings to the depositors at least an identical or better position in terms of recovery of their deposits, *vis - à - vis* the liquidation of the financial institution and payment of the banks deposit guarantee[131].

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[123] Diario Oficial 03/11/2008 No 27,603, http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=18387&Anchor=.
[124] §2 of the Uruguayan Insolvency Law.
[125] Diario Oficial 13/11/2008 No 27,611, http://www.parlamento.gub.uy/leyes/AccesoTextoLey.asp?Ley=18401&Anchor=.
[126] §38 of the Law No 16,696, as amended by Law No 18,401 (the Uruguayan Central Bank Charter).
[127] Created by § 45 Law No 17,613, Diario Oficial 12/31/2002 No 26,168.
[128] §§31 and 34 through & 37 of the Law No 18,401 (the Uruguayan Central Bank Charter).
[129] §40 of the Law No 18,401 (the Uruguayan Central Bank Charter).
[130] §41 of the Law No 18,401 (the Uruguayan Central Bank Charter).
[131] §42 of the Law No 18,401 (the Uruguayan Central Bank Charter).

Upon the declaration of the beginning of the Bank Resolution Process by the Uruguayan Central Bank, the COPAB must procure the application of a Solution Procedure within the following one hundred and twenty days since the earlier of the beginning of the Bank Resolution Process or the intervention of the financial institution. If within this term, at the discretion of the COPAB, there is no Solution Procedure available, then the COPAB will propose the liquidation of the financial institution to the Uruguayan Central Bank in order to permit the payment of the guarantee within the statutory terms[132]. In all cases the acquiring financial institutions will only be liable for the obligations derived from the assumption of the failed institution's liabilities as defined in the Solution Procedure[133].

Once the Solution Procedure is finished, the Uruguayan Central Bank will declare the liquidation of the financial institution. The Law No 18,401 gives to the bank deposits and the subrogation rights of the Bank Deposits Guarantee Fund preference in liquidation (bankruptcy) within the first class of general preferred credits[134].

The Uruguayan Central Bank will be the liquidator in an administrative proceeding of a financial institution and its subsidiaries[135]. The administrative liquidation of financial institutions is governed by the *Ley de Fortalecimiento del Sistema Bancario No 17,613* or Law No 17,613, pursuant to which the dissolution and liquidation of financial institutions will be declared by the Uruguayan Central Bank and pursuant to the Law No 18,401, the COPAB will act as liquidator of the administrative liquidation of the financial institutions[136].

The administrative liquidator will, among other things, receive proof of claims, determine the order of preference in payment among admitted claims and the distribution *pro rata* of the funds. In addition, the administrative liquidator will enjoy the broadest management and disposition powers over the assets, claims, rights, interests and obligations of the liquidated financial institution, including for accepting deductions, extension of terms and restructuring of debts[137].

The administrative liquidator may apply the assets and liabilities of the liquidated financial institution to the creation of one or more funds of banking recovery (Bank Recovery Funds) through the assignment and transfer to such fund of the credits of the liquidated financial institution; upon which, the financial institution's creditors will become creditors of such fund. The fund may issue certificates of participation to the fund holders. The estate of the Bank Recovery Funds will not be liable for the debts and obligations of the holders of the certificates of participation, the fund manager or the financial institution[138].

The management of the fund may be delegated to a financial institution upon a fee payable out of the estate. The delegation will include the scope of the manager's authority and powers, which may include the power to accept deductions, extension of terms, restructuring of debts and sale of portfolios of assets and / or liabilities of the estate[139].

In addition, the administrative liquidator may sell the certificates of participation on a portion of the financial institution's estate, including liquid assets and certificates of participation in Bank Recovery Funds. The sales will be performed through competitive bids[140].

For the purposes of assigning and transferring the financial institution's liabilities to another financial institution or a Bank Recovery Fund or segregating them from an existing Bank Recovery Fund, the administrative liquidator, the receiving financial institution or manager of the Bank Recovery Fund may agree on creating categories of creditors formulating proposals for the substitutions of the debtor, deductions, extension of terms, contribution of their credits to a Bank Recovery Fund, capitalization of the credits or any such solutions cumulative. The proposals may be different among the different categories of creditors with equal treatment within the same category and without altering or affecting the general *pro rata* treatment among all creditors. The proposals must receive the favorable opinion of the Superintendency of Financial Services. The proposals will be binding on all creditors of each category upon approval by the creditors holding

[132] §43 of the Law No 18,401 (the Uruguayan Central Bank Charter).
[133] §45 of the Law No 18,401 (the Uruguayan Central Bank Charter).
[134] §§46 & 47 of the Law No 18,401 (the Uruguayan Central Bank Charter).
[135] §41 of the Uruguayan Financial Institutions Law.
[136] §14 of the Law No 17,613 and § 15 of the Law No 18,401 (the Uruguayan Central Bank Charter).
[137] §§14 & 15 of the Law No 17,613.
[138] §16 of the Law No 17,613.
[139] §17 of the Law No 17,613.
[140] §18 of the Law No 17,613.

at least 66% within each category; provided that in respect of the holders of notes the approval will be required by holders of at least a majority of outstanding principal[141].

The resolution of the suspension of the liquidated financial institution's activities will provoke the stay of all proceedings against the financial institution during the suspension[142].

For purposes of the proposals, the administrative liquidator will take in to consideration the legal privileges and preferences of the claims and the equal treatment within each category[143].

[141] §19 of the Law No 17,613.
[142] §20 of the Law No 17,613.
[143] §21 of the Law No 17,613.

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