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# Editors' Column

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As the year – and decade – draws to an end, the global political and economic picture is far from being rosy or clear. An unpredictable outlook persists in many countries, which means that our clients continue to look for solutions to problems, which, often, are increasingly complex and international in nature. At the same time, many countries over the past decade have been proactive in amending their insolvency laws, as governments strive to make their insolvency frameworks "fit-for-purpose".

The decade has been a positive one for INSOL International, which started as it meant to go on, by looking to the future of its membership; in 2010 by introducing the extremely successful Global Insolvency Practice Course (commonly known as the "Fellowship") and last year by rolling out the Foundation Certificate in International Insolvency Law for younger practitioners. In 2018, INSOL International appointed Julie Hertzberg as president, its first female president, and opened a new office in Singapore to help better cater for the burgeoning Asian restructuring market. The recent Taskforce 2021 initiative reflected INSOL International's constant desire to improve its offering, profile and the benefits it delivers to its membership, including a series of focus groups concentrating on specific areas.

Our focus for this issue of INSOL World is Latin America. After a period of notable socio-economic progress across Latin America, GDP growth has stalled in recent years. Although growth is expected to improve, projections by the Organisation for Economic Co-operation and Development suggest that potential GDP annual growth is 3% lower than previously expected. A vulnerability to slowing global trade and a weakening of capital flows to the region, together with a worldwide financial tightening and ongoing trade tensions between the United States and China, suggest that difficulties may well lie ahead for Latin American countries. If that is in fact the case, it is likely that there will be increases in the workloads of restructuring and insolvency professionals as individuals and corporates seek advice on how best to navigate through financial difficulties faced.

In the meantime, we are in a period during which there is welcome momentum in insolvency law reform - particularly in developing countries, including those in Latin America. Clearly, there is an element of governments vying for "competitive advantage" over neighbouring countries which is borne out in improvements in World Bank "Doing Business" rankings by those countries that have enacted reforms but experience in other jurisdictions shows that amending or introducing legislation is only one piece in the puzzle. It is necessary for local practice and culture to embrace the changes and for practitioners and judges alike to be appropriately experienced and receive the necessary training to ensure they have the right tools for the job.

It is an opportune time, then, to take stock of recent developments in Latin American countries and to look to the future. On that theme, this issue of INSOL World contains an excellent article giving an overview of Brazil's proposed insolvency law reforms, including its enactment of the UNCITRAL Model Law on Cross-Border Insolvency (Judge Daniel Carnio Costa and Professor Pedro F. Teixeira), as well as an article focusing on the proposed clarification of the circumstances in which substantive consolidation can be invoked in Brazil (Sérgio Savi and Pedro Henrique Vieira); an article covering proposals to amend Peru's bankruptcy laws that usefully compares and contrasts the position in Peru with that in Chile and Colombia (Nicolás Tirado, Ignacio Larrain and Alfonso Pérez-Bonany); consideration of some recent developments in the recognition under Chapter 15 of the US Bankruptcy Code of Argentine restructurings (Fernando D. Hernández); a look back at the approach taken in Colombia to the recognition of the Canadian restructuring of the Grupo Pacific in 2016 (Diana Lucía Talero, *Fellow, INSOL International*); an acknowledgement from Guatemala that insolvency law reform is needed but very much on the horizon (Rodrigo Callejas, *Fellow, INSOL International*, Emanuel Callejas, Paola Montenegro

and Juan Andrés Marroquín); an entertaining gallop through the "lights, camera, action" of the legal drama that has been the Oro Negro insolvency, a high-profile multi-jurisdictional legal drama (Jorge J. Sepulveda); an excellent summary of the recent decision of the US Bankruptcy Court in the *Serviços de Petróleo Constellation S.A.* case, which – in recognising the Brazilian reorganisation proceedings of companies in the Constellation oil group under Chapter 15 – concludes that issues relating to COMI and establishment are to be determined on a "per-debtor" basis (Frank Vazquez); and, finally, stepping outside the insolvency sphere but sticking with the Latin American focus, we have an insightful look at Uruguay's enactment of legislation based on UNCITRAL's Model Law on International Commercial Arbitration (Mariana Arena).

In addition, we have an overview of UNCITRAL's new Model Law on Enterprise Group Insolvency which provides an insight into the situations in which the Model Law, once enacted, is likely to be most useful (Irit Mevorach). We receive views from Italy on those provisions of the recently-enacted Code of Business Crisis and Insolvency that have come into force immediately (Giorgio Cherubini and Giovanna Canale). Also – as China's debt burden mounts and its economy slows – we have coverage of the timely INSOL International one-day seminars held in Beijing and Shanghai in mid-October.

Finally, we have a summary of Odwa Ngxingo's Richard Turton Award-winning paper, *Attitudes towards investing capital in restructuring and turnaround situations, and the multiplier effects deriving therefrom*, which serves as a thought-provoking taster for the full-length paper.

We are pleased to report that we have many of the Focus articles available in Spanish or Portuguese (as the case may be), with hyperlinks to the translated (or original language) articles appearing in the footnotes to the articles.

Lastly, Peter and I would like to wish you all a restful and enjoyable festive period with family and friends; a time to be thankful and to reflect on what promises to be a busy period ahead!

Mark Craggs


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***IN THIS ISSUE:*** ***page***

# President's Column

**By Julie Hertzberg**
Alvarez & Marsal
*USA*

In the rush of finishing out another year and moving into 2020, sometimes we forget to stop and take a deep breath to acknowledge all we have accomplished. That is what I would like to do here. This last printed publication of INSOL World marks the end of an era for INSOL International as we go digital in Q1 2020 and signifies the beginning of a new chapter, so to speak, filled with innovation and thought-provoking content.

INSOL has seen tremendous change in the last year: electing its first female president in the organization's history, opening its first satellite office (in Singapore), doing its part to contribute to the go green campaign by planning a green conference for Cape Town 2020, modernizing its website, revitalizing its conference and seminar structure, and laying the foundation for the future leadership of restructuring and insolvency experts.

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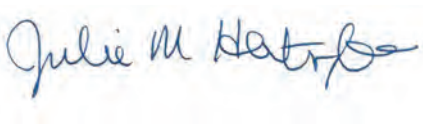
The reality is if we remain static, we are getting further behind with the pace of change happening at cataclysmic rates. I admit, that is something I have had a hard time coming to terms with in my own practice and realize we feel comfort in routine and sameness. However, as we look at the changing political and socio-economic landscape, and the introduction of new or revised insolvency regulation, there simply is no way to ignore the fact that old solutions don't fit new problems. The EU passed its Harmonisation Directive which will require a Chapter 11 reorganisation "debtor in possession" like structure to go into effect no later than July 2021. Singapore and the UAE intend to draft new insolvency and restructuring laws. Israel's new insolvency and rehabilitation law went into effect in September 2019. The entire theme for this INSOL World publication is dedicated to looking at the evolving landscape across all Latin America. Suffice to say, the issues we are debating today are unlikely to be relevant next year at this same time. I would be remiss as a US citizen not to mention that how our upcoming 2020 presidential election will impact all of this is anyone's guess.

Before I close out my remarks so you can read on to enjoy the substantive content of this issue, I would like to mention:

- The Ian Fletcher International Insolvency Moot will take place in London, UK on 7 – 9 February 2020. This has been our largest competition to date. It is not too late to consider judging one of the sessions.
- 2019 has proven to be a busy year in terms of our seminar programme and Q4 saw INSOL hold events in PRC, Hong Kong, Japan and most recently the Bahamas. The overviews of the seminars follow later in the issue. With a full seminar programme being developed for 2020, the next twelve months will look certain to be just as busy as the last.
- It has been a busy end of year for the INSOL Financiers' Group with a fantastic launch event for the Asia Financiers' Group in Hong Kong on 17 October kindly hosted by Allen & Overy. The Group, comprising representatives from banks and alternative investment providers, engaged in a fascinating discussion on the changing face of Asia workouts by our panel of industry experts. This event was followed on 2 December by our annual joint seminar with INSOL Europe's Financiers' Group in London, kindly hosted by NatWest, where we discussed activist stakeholders and changing dynamics in restructuring. The Group looks forward to hosting its next event during INSOL Cape Town 2020.
- Looking at my diary for 2020, I will be attending INSOL's G36 London reception on the 10 February, and look forward to seeing some familiar faces there whilst also meeting some new members. I would encourage those that are able to attend to do so. It's a great opportunity to network and hear interesting speakers discussing topical issues, relevant to our membership. I hope to see you there.

Most importantly, I would like to thank our Editors, Editorial Board and contributors and the staff who make this possible.

Wishing you all a happy and healthy new year and look forward to reporting back in the digital Q1 2020 edition!





# Enactment of the UNCITRAL Model Law on Cross-Border Insolvency and other Insolvency Law Reforms in Brazil[1]

**By Judge Daniel Carnio Costa**
1st Bankruptcy Court of São Paulo (São Paulo State Court)
Brazil

**and**

**Professor Pedro F. Teixeira**
Prima & Butler Advogados
Brazil

Brazil is finally close to enacting the UNCITRAL Model Law on Cross-Border Insolvency, which has long been discussed by legal scholars and practitioners. The theoretical discussion of this proposal – which is important to Brazilian and foreign businesses – began in 2017, when the government took a policy decision that Brazil should become a safer destination for foreign investments as a path to overcoming the country's economic crisis.

In the first instance, the Ministry of Finance created a commission to study and draft a bill of law to introduce wide-ranging amendments to the existing Bankruptcy and Debt Reorganization Law. Among the members was the co-author of this paper, Judge Daniel Carnio Costa.

As a result of the efforts of the commission, a complex and final draft bill was presented to the Ministry of Finance, including a chapter dedicated to cross-border insolvency, based largely on the UNCITRAL Model Law. As the bill progressed through the legislative process, however, the Brazilian tax authorities required a number of changes to be made to the original draft, which detracted in large part from the underlying objectives of insolvency reform. As a consequence of those changes, the draft lost the support of many business sectors, and even certain members of the commission. Nevertheless, the Ministry of Finance submitted the bill for Congress's scrutiny in 2018. Ultimately, due to lack of support and strong resistance from important constituents, the Chamber of Deputies (the lower house) did not move forward with approval of the bill.

In 2019, with a new economic affairs team in place, including Mr. Paulo Guedes as the new Minister of Finance, organizing Brazil's economy and having a more efficient system of business reorganization was considered by the government to be essential. A particular priority in this respect has been the enactment of new rules on cross-border insolvency. For this purpose, the Ministry of Finance created an informal commission to work on a bill that encourages active discussion between key stakeholders and the building of a consensus on the main issues pertaining to cross-border insolvency.

The authors of this article (Judge Daniel Carnio Costa and Professor Pedro F. Teixeira) were members of this new commission, which led to the new bill, PL 10.220/18 (the "Substitute Bill").

During the development of the Substitute Bill, the commission members met with various authorities and players interested in the topic who made valuable contributions. Discussions involved public attorneys of the National Revenue Prosecution Service (PGFN), judges of the Superior Tribunal of Justice (the highest court for non-constitutional matters), judges of specialized business state courts, scholars, lawyers, economists, as well as representatives of relevant national legal and economic organizations, such as the Institute of Lawyers of São Paulo (IASP), Federal Prosecution Office (MPF), National Council of Justice (CNJ), São Paulo State Federation of Industries (Fiesp) and Brazilian Federation of Banks (Febraban).

Deputy Hugo Leal took the lead in the Chamber of Deputies, in introducing the Substitute Bill and pushing it through the legislative process. Certain alterations were made in the course of the process to shorten the text. However, it was a concern throughout to maintain the provisions of the Substitute Bill on which consensus arose, and, pursuant to the amending draft to PL 10.220/18, the following key provisions remain in the Substitute Bill:

### 1. Rebalancing the rights of creditors

- A court-supervised reorganization plan can be proposed by the creditors as well as the debtor.
- Prohibition on distributing profits or dividends during the reorganization proceeding.

### 2. Legal certainty for the debtor and creditors

- Introduction of greater clarity as to what amounts to abusive voting and situations where substantive consolidation is available.
- Measures to address the problem of succession in independent productive units and the sale of assets.

### 3. Tax issues

- First, adjustments are proposed to balance the participation of tax authorities in insolvency cases, such as a solution for tax treatment of haircuts (in court-

[1] For Portuguese version of this article see https://www.insol.org/library/opendownload/1333

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supervised reorganization) and capital gains on sale of assets (in bankruptcy); a more reasonable period to settle tax obligations in installments (120 months); and the more active participation of tax authorities in court-supervised reorganization and bankruptcy proceedings.

- Second, new solutions for tax liabilities are proposed including payment in instalments, whether specifically for reorganization or through a special program. In addition, there is a requirement for closer participation of tax authorities in court-supervised reorganizations, giving them similar treatment to other creditors. Thus, the Substitute Bill proposes the regulation of negotiations with tax authorities to settle obligations, set forth in Article 171 of the National Tax Code (CTN) but these are likely to be moribund at the federal level in view of the lack of follow-on regulations. The ideal solution would be to make tax debts subject to court-supervised reorganization, and thus eligible for compromise under a reorganization plan and voting by the general meeting of creditors.

### 4. Modernization, debureaucratization and speed of the insolvency process

- The revision of certain procedural time limits, to offer greater speed and predictability to creditors.
- Electronic processing, such as for notices/summonses, electronic auctions of assets, the sharing of costs, the advertisement of the end of knock-down prices and giving notice of restrictions on challenges.
- Facilitation of the closing of the proceeding.

### 5. Stronger relevance of the role of bankruptcy (faster liquidation of assets)

- The Substitute Bill also brings important innovations regarding Chapter V, Section X, of the current Bankruptcy and Reorganization Law (Law 11,101/2005), which covers the realization of assets. For example, it allows new modalities of disposal of assets, as long as these are specified in the reorganization plan. With the objective of giving greater speed and credibility to bankruptcy, the disposition of assets will be independent of consolidation of the general group of creditors, can count on the services of third parties and will have to occur within 180 days, without being subject to application of the concept of knock-down price. Speedy bankruptcy allows the company's productive assets to be reutilized with minimum depreciation and loss of value, which is expected to boost productivity and economic growth within Brazil.
- Another important innovation, inspired by PL 10,220/18 and incorporated in the Substitute Bill, is the auctions price: i) on the first call, at the appraised value of the asset; ii) on the second call, within 15 days counted from the first, for 50 percent of the appraised value; and iii) on the third call, within 15 days of the second, for any price, including donation in case a sale proves to be impossible. The introduction of this welcome since, at present, there are cases where the sale process is unduly protracted because the judicial trustee is required to wait for more favorable market conditions in order to sell assets for a price which can be considered "fair".

### 6. Reduction of the waiting period for a fresh-start (prohibition to do business)

- Chapter V, Section XII, of the current Law, which deals with the closing of the bankruptcy proceeding and extinction of the bankrupt's obligations, is updated in the Substitute Bill, to allow faster restart of the business (fresh start), especially by small companies (e.g. sole proprietorships), whose owners will be able to use their individual taxpayer number (CPF) instead of waiting to obtain a new registration as a legal entity to start doing business again. A key element here is the clarification that the term to start the recounting of the statutory limitation period that has been interrupted (set back to zero) corresponds to the date of the final verdict concluding the bankruptcy proceeding, including for tax claims. Crucially, this will allow extinction of tax debts enrolled as actionable, not only of suits to collect delinquent taxes already filed, as is the current position due to omissions in the law as it stands.

### 7. Establishment and regulation of super-priority for financing obtained during court-supervised reorganization (DIP)

- This amendment, to be included in Section IV-A of the current Law, proposes to create a speedy, objective and secure procedure for the debtor to obtain credit with greater ease after filing for court-supervised reorganization. In addition, it is proposed to give super-priority to investors who inject capital after the grant of court-supervised reorganization.

### 8. Regulations on insolvency of business groups/ substantive consolidation

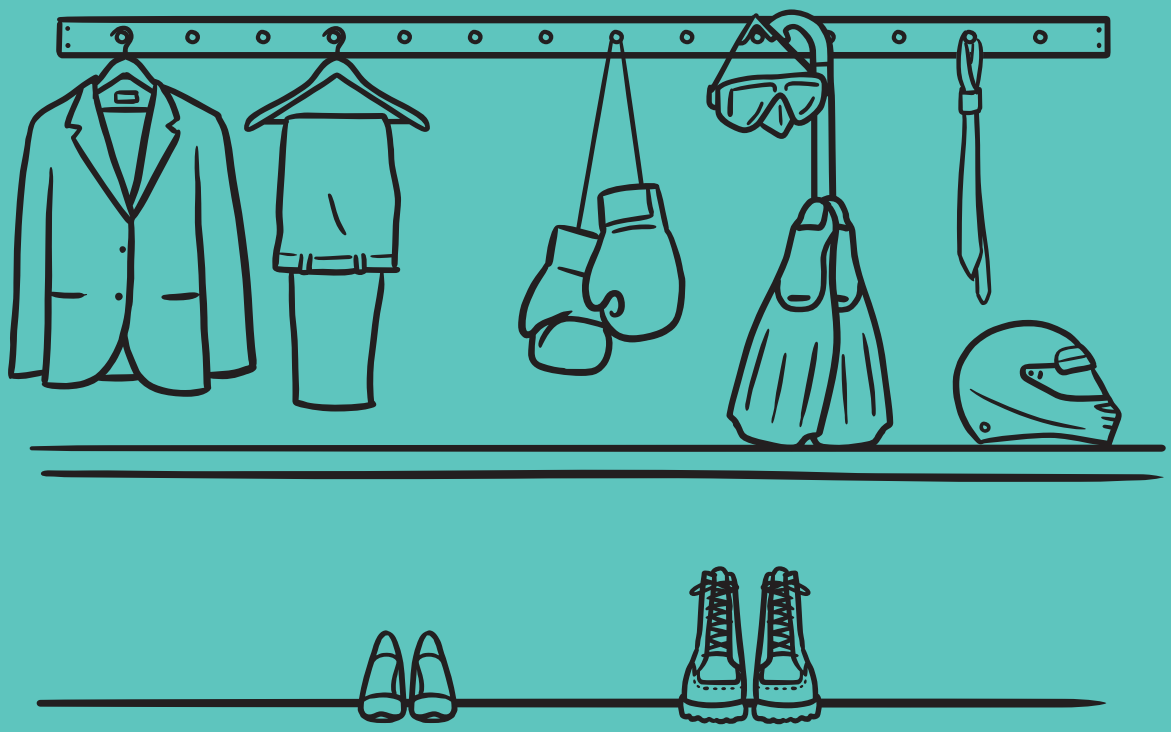
- The Substitute Bill contains another new section, to be included as Section IV-B of the Law, with the purpose of better defining the rules on reorganization and bankruptcy of companies belonging to business groups, including the circumstances in which the judge can order substantive consolidation (when there is commingling of assets of distinct companies). Today the expression substantive consolidation is used broadly and indiscriminately, which arguably weakens the principle of the preservation of separate legal personality. The Substitute Bill will make the judge's decision regarding substantive consolidation more predictable, increasing the legal certainty in contracting between creditors and debtors.

### 9. Prior expert finding (reduction of type II error)

- The objective of a prior expert finding is limited to checking whether, at the time of filing, the company has in place the necessary conditions or ability to generate jobs, taxes, products, services and wealth in general. In other words, the point is to verify if the company, even in its distressed state, is functioning or has the conditions necessary to function, in order to generate those economic and social benefits resulting from business activity. It is important to stress that this procedure is not obligatory and that the objective of the prior finding is not to evaluate the viability of the debtor's business, especially because this consideration rests with the market, represented in the case by the creditors.

### 10. Transnational bankruptcy (UNCITRAL Model Law on Cross-Border Insolvency)

- This subject is addressed in Article 4 of the Substitute Bill, as presented to Congress. The proposal is to definitively incorporate in Law 11,101/2005 a new Chapter VI-A, broken down into Articles 167-A to 167-



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Y, for the purpose of fully regulating cross-border insolvency issues (as per the UNCITRAL Model Law on Cross-Border Insolvency). The Brazilian legal system has never had specific rules covering transnational insolvency, a gap that the Substitute Bill aims to close, by specifying mechanisms for cooperation among courts of different countries in cases of insolvent companies, offering better legal certainty to the parties involved in the proceeding.

These proposed alterations of the law are of the upmost legal and economic importance in Brazil, in the interests of providing more efficient legislation and promoting a level playing-field, transparency and legal certainty for Brazilian and foreign businesses. Moreover, the incorporation of the Model Law will improve the likelihood of foreign investments being made in Brazil, as it will afford greater certainty in the event of the occurrence of a cross-border insolvency, with reference to established international criteria and standards.

Therefore, the Substitute Bill has the goal of giving greater predictability to national and foreign investors in cases of transnational companies, fostering the credit market and the entry of new companies into the Brazilian market. Given that the Substitute Bill is the product of thorough discussions with multiple stakeholder groups, it arguably represents the closest consenus position achievable in the Brazilian market at the present time. It is reasonable to believe that the Bill will not face strong congressional opposition, allowing it to be approved by the Chamber of Deputies and Senate before the end of 2019. If that is the case, it shall most definitely be a win for all Brazilians.

# *The Oro Negro Insolvency: A Multi-jurisdictional Legal Drama*[1]

**By Jorge J. Sepulveda Garcia**
Bufete Garcia Jimeno
Mexico

The Oro Negro case is a multi-jurisdictional movie-like legal battle between Oro Negro and its creditors, which evolved into an intense fight to gain ultimate control of five oil rigs in the Gulf of Mexico – the company's most valuable assets. It began with a Mexican *concurso mercantil* and has led both parties to request or challenge court injunctions in different jurisdictions, to file multi-million legal claims and to begin criminal proceedings.

The actors involved include several bondholders, some of the biggest stakeholders in the oil and gas industry and Mexican pension funds, as well as *Petróleos Mexicanos* (Pemex) – Mexico's State-owned oil and gas company. The case involves an insolvency proceeding under Mexican law, a US Chapter 15 proceeding, an investment arbitration under the North American Free Trade Agreement ("NAFTA") and numerous civil and criminal proceedings in Mexico, Singapore and the US.

## Introduction

Oro Negro is comprised of several companies that owned/had interests in five Oil Rigs and leased them to Pemex, to extract oil in deep waters. The ultimate parent of Oro Negro is Integradora de Servicios Petroleros Oro Negro, S.A.P.I. de C.V., a Mexican holding Company.

Between 2012 and 2015, Oro Negro's Singaporean subsidiary, Oro Negro Drilling Limited, acquired five oil jack-up drilling rigs through five subsidiaries (also Singapore-incorporated companies). To finance the acquisition of the oil rigs, Oro Negro raised capital by issuing bonds through its subsidiary Oro Negro Drilling. The oil rigs were operated by Perforadora Oro Negro, S. de R.L. de C.V.

In 2015 and 2016, due to low international oil prices and Pemex's poor financial situation, Oro Negro was forced to amend its contracts, thereby limiting Oro Negro's revenue. In 2017, there was a further attempt to amend the contracts by the parties, further lowering the daily rates, but these proposed amendments were not in fact executed by Pemex.

## The insolvency and the drama

As a result of these developments, in September 2017 Oro Negro filed for insolvency in Mexico, starting the *concurso mercantil* proceedings. Oro Negro argued that the company had been driven to insolvency by Pemex's burdensome contractual conditions.

The insolvency filing included all of Oro Negro's subsidiaries. The court admitted the *concurso* proceedings of Integradora Oro Negro and Perforadora Oro Negro. However, the bondholders successfully opposed to the *concurso* proceedings of Oro Negro Drilling and the Singaporean subsidiaries.

On October 5 and 11, 2017, the Concurso Court entered several injunctions, ordering Pemex to continue performing under the contracts. These orders were made notwithstanding that, some days previously, Pemex had already given notice of the early termination of the contracts. The Concurso Court gave retroactive effects to its order, but Pemex nonetheless refused to continue making payments in the terms instructed by the court injunction.

Once the *concurso* proceedings began, the bondholders

[1] For Spanish version of this article see https://www.insol.org/library/opendownload/1334

took control of the Singaporean entities that own the oil rigs, under the terms of the bond agreement, and began a series of legal actions to finally obtain possession of the oil rigs. Such actions have been contested with the *concurso* court and are yet to be resolved.

In furtherance of the *concurso* proceedings, in 2018 Oro Negro sought Chapter 15 relief from the United States Bankruptcy Court in the Southern District of New York. This delayed the bondholders from taking over the oil rigs, given that Oro Negro managed to obtain injunctions from the US Bankruptcy Court. Furthermore, in requesting Chapter 15 recognition, Oro Negro sought to obtain discovery from the bondholders – a measure not available under Mexican law. Oro Negro also filed a new lawsuit against the bondholders, again in New York.

Meanwhile, the bondholders persisted with steps to secure control of the oil rigs. The bondholders obtained injunctions in criminal proceedings in Mexico, which led to a series of unheard-of facts, such as the bondholders unsuccessfully trying to take over the oil rigs in a coordinated helicopter operation with the Mexican army and police forces, an effort that Oro Negro's personnel resisted using water cannons and blocking the heliports located on the oil rigs.

In May 2019, the bondholders finally succeeded in obtaining control of the oil rigs. Accepting the argument that Oro Negro was incapable of continuing to maintain the oil rigs and preventing their deterioration, the Concurso Court ordered Oro Negro to hand over the oil rigs to its owners (the Singaporean entities controlled by the bondholders). Furthermore, due to the parties inability to reach an insolvency compromise agreement, in June 2019, the Concurso Court declared Oro Negro's bankruptcy.

Since then, in September 2019, the Concurso Court authorized the bondholders to take the oil rigs from Mexico's national waters.

The legal battle continues. While Oro Negro's bankruptcy has already been declared, there are many insolvency issues yet to be solved and other proceedings still pending, such as the litigation in New York and proceedings before a NAFTA investment arbitration tribunal.

As in certain other insolvency cases, the Oro Negro Chapter 15 proceeding does not lack controversy. The broad jurisdiction of US courts over many international stakeholders make the US an attractive but sometimes controversial forum in which to seek support and additional protection in complex multi-jurisdictional restructuring proceedings, such as this one. The access to discovery in particular can make Chapter 15 a controversial proceeding, given that it provides the parties with procedural opportunities that are not always available in civil law jurisdictions.

The story continues…



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# *Amendments to Peru´s Bankruptcy Law: Regional Panorama on Certain Bankruptcy Issues*[1]

**By Nicolás Tirado, Ignacio Larraín and Alfonso Pérez-Bonany**
Philippi Prietocarrizosa Ferrero DU & Uría
Colombia, Chile and Peru respectively

On April 2019 INDECOPI (Peru´s State-owned administrative agency in charge of insolvency and bankruptcy proceedings in Peru) published a paper setting out potential modifications to the Law N° 27809 (Peru´s Bankruptcy Law). INDECOPI received several comments from interested stakeholders in response and it is expected that INDECOPI will issue a revised version for additional comments. It is proposed that the final bill will enter into Congress by the end of 2019. In this article, we will describe the most important changes to the insolvency regime proposed by INDECOPI, and compare and contrast how equivalent matters are regulated in Colombia and Chile.

## a. Financing an insolvent company

Historically, almost 90% of all companies subject to an insolvency proceeding in Peru have ended up liquidated. One of the causes of this trend is the fact that the law does not contain significant incentives for the banking and capital markets systems to provide insolvent debtors with additional funding. However, obtaining new financing is not a significant problem where the company enters into a reorganization since a Reorganization Plan provides for payment in full of all creditors – financing creditors may even obtain payment terms better than for other creditors. Rather, the problem arises when the company cannot comply with the Reorganization Plan and hence is forced into liquidation, since in that case this additional funding ranks after all other claims.

The proposal from INDECOPI contemplates that all financing advanced to the debtor after its insolvency becomes public should rank second if the company subsequently enters into liquidation, as long as such debt was provided by a commercial bank. According to Peru´s Constitution, only labor-related debt can rank first in a liquidation proceeding. Such priority rule does not apply in reorganization, however, where the order of payment priorities is almost entirely decided by the creditors' meeting and reflected in the terms of the Reorganization Plan.

**Chile:** During the financial protection period (i.e. a period granted by the Chilean Insolvency Act to the debtor submitting to an insolvency reorganization procedure, during which its liquidation may not be requested or declared, and no summary collection proceedings, executions of any kind or restitution in lease lawsuits can be commenced against it), the debtor company may obtain loans to finance its operations, provided that these do not exceed 20% of its liabilities, as shown in the accounting certification used for the appointment of the trustee. Entry into loans that exceed 20% of the debtor liabilities will require the authorization of creditors representing more than 50% of the debtor's liabilities.

If a reorganization agreement is not approved by the creditors and, consequently, the debtor enters into a liquidation procedure, loans made in the financial protection period and loans in respect of foreign trade operations have first-ranking priority (i.e. before labor and tax preferred credits).

**Colombia:** An amendment to the Colombian insolvency law enacted in 2011 introduced an important benefit to debtors, in order to incentivize the advancing of financing by third parties, specifically from existing creditors.

According to this amendment, creditors that (i) grant new economic resources to the debtor company; (ii) partially write off a debt; or (iii) capitalize the debtor company, in order to contribute to the financial situation of the debtor company and its recuperation, will see their claims ranked more favorably, and, in the event the debtor company subsequently enters into liquidation, these new resources will be repaid before any other contributions.

With these benefits, creditors have an incentive to not only negotiate its debt with the debtor company, but also to consider advancing new finance. This preferential condition has been used by debtors to negotiate with banks, who commonly are the creditors with the largest claims, but also the ones with the largest financial resources to help overcome the "working capital squeeze" insolvent companies so often suffer.

The previously mentioned amendment is similar to the recently enacted law in Peru and the applicable regulation in Chile. In conclusion, it appears to be the case that the legislator in Peru understood that obtaining new resources under a reorganization proceeding is critical to the success of the proceeding.

## b. Fraudulent conveyances

Under Peru´s law, all contracts and transfers executed by the debtor before commencement of the insolvency proceeding are valid unless a third party with interest (normally, a creditor or a subsequently-appointed controller or trustee) challenges the act by applying to court on fraudulent-conveyance grounds, seeking the reversal of the transaction in the interests of creditors. In addition, a debtor-in-possession owes a fiduciary duty to the estate so that it can no longer enter into any sort of contracts, or approve transfers or the creation of security.

According to the INDECOPI proposal, contracts and transfers executed before commencement of the insolvency proceeding can be the subject of a challenge before the court where they were entered into or occurred within a period no longer than two years before initiation of the insolvency proceeding, which is an extension of the existing one-year term. In addition, the proposal extends the limitation period for challenging such transfers from the current two-year

[1] For Spanish version of this article see https://www.insol.org/library/opendownload/1335

term to ten-year term. The proposal provides for the making of certain payments to the creditor who obtains a favorable judgment from the court on fraudulent-conveyance grounds if the asset is reinstated or the lien voided by the court. The amount of such payments is equivalent to a percentage of the value of the asset in issue and cannot be greater than 50% of the admitted debt of such creditor in the insolvency proceeding. The rationale behind this system is to create an incentive for creditors to scrutinize the debtor´s business and file a lawsuit to recover an asset or void a transference, in appropriate cases.

**Chile:** The Chilean Insolvency Act explicitly regulates clawbacks, distinguishing between objective and subjective causes of action.

An objective cause clawback enables the challenge of any transaction executed during the year preceding the start of the debtor's insolvency proceeding (unless no harm to creditors is proved) if one or more of the following conditions are met: (i) early payments made by the debtor to a third party; (ii) payments made in due time, but in a different manner than as originally agreed; and (iii) mortgages and pledges granted in the debtor's assets to secure pre-existing debts. If any of these conditions are agreed with a related entity, the applicable clawback period will extend to two years (i.e. an additional year).

Subjective cause clawback enables the challenge of any transaction executed during the two years prior to the beginning of the debtor's insolvency proceeding if: (i) the transaction is executed in bad faith by the non-debtor party (i.e. knowledge of the distressed state of the business of the debtor company); and (ii) the transaction caused harm to creditors[2].

A creditor who obtains a favorable judgment in the clawback action will be entitled to claim up to 10% of the benefit of the court's award. However, the amount payable to the creditor will not exceed the amount of the creditor's admitted claim.

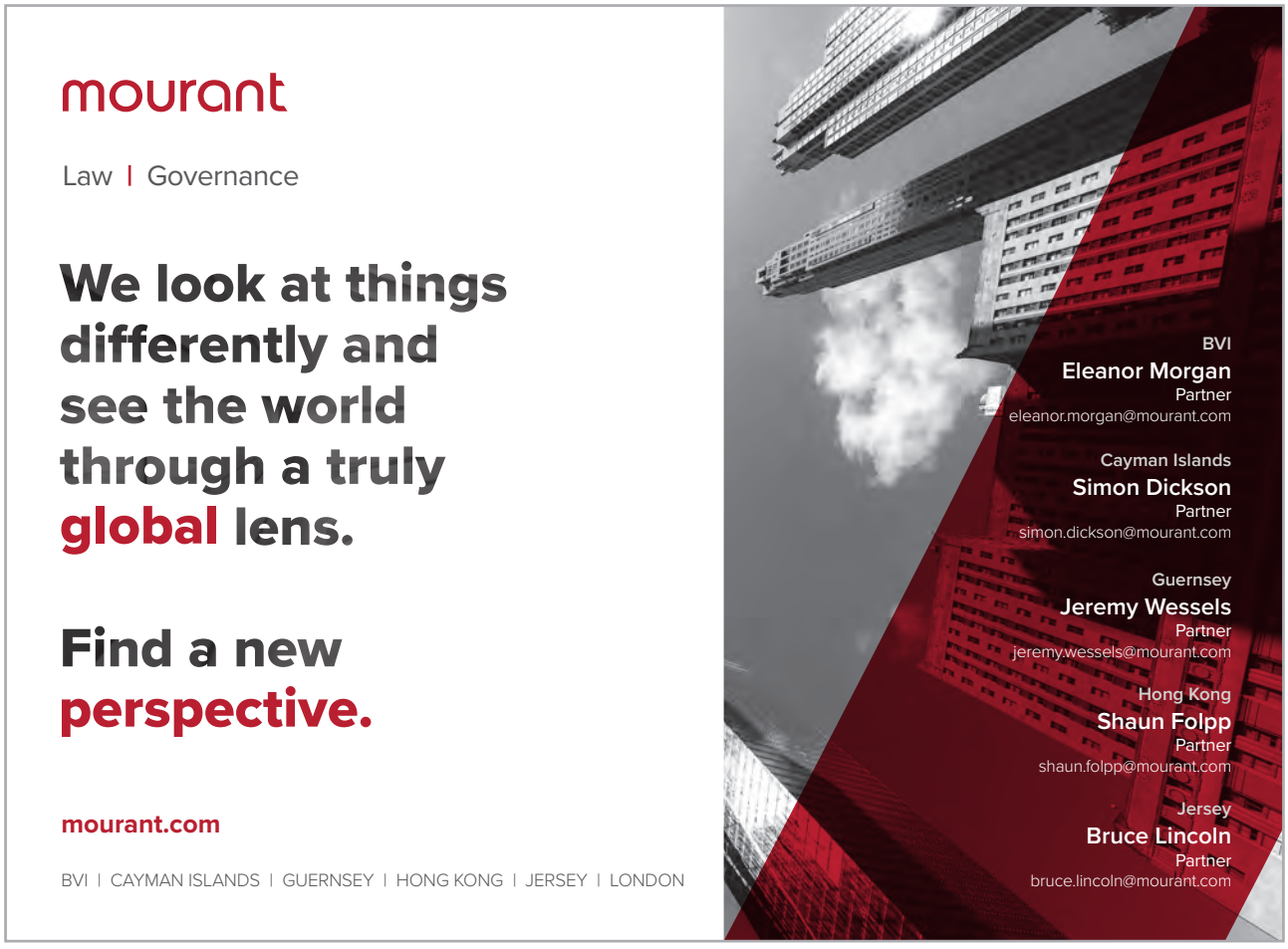
**Colombia:** Colombian insolvency law provides a specific clawback action – "revocation and simulation action"– which may be brought in an insolvency proceeding to challenge transactions that have caused detriment to creditors or have violated the statutory creditor ranking (*orden de prelación de pagos*).

In determining clawback actions in an insolvency proceeding, the Colombian insolvency court (*Superintendencia de Sociedades - Delegatura para Procedimientos de Insolvencia*) will take into consideration the following requirements:

a) The claimant must have standing: The clawback action may be brought by (i) the liquidator (in a liquidation proceeding), (ii) the promoter (in a reorganization proceeding), (iii) the judge (when the challenged transaction was for no consideration), or (iv) the recognized creditors in the insolvency proceedings.

b) The challenged transaction must have caused a detriment to the creditors in the insolvency proceeding and/or violated the statutory creditor ranking. There is a detriment to the creditors if: (i) there are insufficient assets to meet all of the credits recognized in the

[2] For this purpose, harm exists when the stipulations contained in the act or contract are not in accordance with conditions and prices normally prevailing in the market for analogous transactions agreed at a similar date.

proceeding, or (ii) the challenged transaction violated the statutory creditor ranking.

c) The counterparty to the challenged transaction did not act in good faith. The claimant initiating a revocation and simulation action does not have to prove that the counterparty of the challenged transaction acted in bad faith for the action to be successful. However, if such counterparty can prove that it acted in good faith in the challenged transaction, it may undermine the action, and therefore prevent the transaction from being revoked.

The following acts are capable of being subject to a revocation and simulation action:

a) Any act of divestiture, encumbrance or limitation or separation of in rem rights made in a manner that adversely affects the debtor's net worth, as well as any leases or (free-tenancy) agreements that make the insolvency procedure more difficult, if it has taken place within 18 months prior to the initiation of the insolvency proceeding. A revocation action can only succeed in such circumstances where it appears that the purchaser, lessee or tenant did not act in good faith;

b) Any and all gratuitous acts if they have taken place within 24 months prior to initiation of the insolvency proceeding.

c) Amendments to the by-laws agreed upon by the shareholders, whenever they have been registered in the mercantile registry within 6 months prior to the initiation of the insolvency proceeding, whenever debtor's net worth has been diminished as a result thereof with prejudice to creditors, or they have modified the shareholders' liability regime.

Any creditor who obtains a favorable judgment in the clawback procedure will be entitled to claim up to 40% of the commercial value of the asset that is the subject of the clawback action, or of the benefit of such action.

### c. Bankruptcy Controller

The bankruptcy system in Peru does not include a provision by which managers of the insolvent are removed once the proceeding is commenced. On the contrary, managers are fully entitled to run their businesses and can conduct operations as usual – subject to limitations which may be considered to be fraudulent conveyances – until the creditors' meeting is held and decides whether to ratify / remove the administration into a reorganization chapter or appoint a trustee to represent the estate for the purposes of a liquidation.

Experience showed that allowing all insolvents to continue as debtors-in-possession regardless of the future of the estate (i.e. reorganization or liquidation) was problematic since, in certain cases, managers failed to avoid undertaking substantially riskier operations in the interests of saving the company. As a result, by the time the creditors' meeting was assembled in those cases – no less than six months after publication of the insolvency – the financial condition of the company had deteriorated to such a degree that the creditors could only vote for a liquidation. The proposal envisages that alongside the declaration of insolvency, INDECOPI will appoint a bankruptcy controller to represent the interests of the creditors in the debtors´ business. The justification for the appointment of a bankruptcy controller is: i) to require the controller's approval of all contracts and transfers subject to a potential fraudulent-conveyance standard; and, ii) the controller should recommend to the creditors which contracts and transfers executed before commencement of the insolvency proceeding should be ratified / challenged in court.

**Chile:** While the trustee is the natural person in charge of the reorganization procedure, the liquidator is the natural person in charge of the liquidation procedure.

The trustee is appointed by the three main creditors, from a list of trustees held by the Superintendence of Insolvency. The trustee's main goals are to promote agreements between the debtor and its creditors; to facilitate the proposal of judicial reorganization agreements; and to safeguard the interests of creditors, requesting injunctions as appropriate in order to protect the assets of the debtor. The Chilean Insolvency Act provides that the appointment of the trustee has to be made before the initiation of the reorganization procedure; accordingly, there is no risk of a period in which there is no control over the debtor company.

The liquidator is provisionally appointed by the three main creditors, from a list of liquidators held by the Superintendence of Insolvency. After accepting the position, the appointment must be ratified by the first creditors' meeting (constituent meeting). The liquidator's main goal is to sell the assets of the debtor and to promote the payment of the debts of its creditors. The liquidator, irrespective whether or not it is ratified by the creditors' meeting, will be in total control of the debtor company from its appointment and has broad powers to investigate the conduct of its management.

**Colombia:** In a reorganization proceeding, the promoter will be appointed by the Colombian insolvency court, from a list of promoters maintained by the court. However, at any time, the debtor can appoint a different promoter from that list, provided it has the support of a majority of votes of its creditors.

The conduct and success of an insolvency proceeding will depend in large part on the promoter. For example, the promoter is in charge of requesting that the insolvency court orders the lifting of any precautionary measures relating to the debtor's assets.

In the event that a reorganization proceeding fails, the promoter will be appointed as liquidator in the liquidation proceding.

### d. Cross-border insolvency

The INDECOPI proposal advocates the implementation of the UNCITRAL Model Law on Cross-Border Insolvency, which is not yet in force in Peru. Implementation of the Model Law would promote uniformity of approach with key insolvency systems globally that have similarly enacted the Model Law. The Model Law is particular useful when seeking: i) recognition of a foreign insolvency proceeding in local courts (from the perspective of a foreign representative); ii) recognition of a local insolvency proceeding in foreign courts (under enactments of the Model Law in other jurisdictions); and, iii) cooperation among bankruptcy authorities when the same company is subject to insolvency proceedings in two or more jurisdictions.

**Chile:** Cross-border insolvency is explicitly regulated in the Chilean Insolvency Act, including by enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

**Colombia:** Colombian insolvency law also regulates cross-border insolvency by means of the local enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

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# *Recent Developments in Chapter 15 Recognitions of Argentine Cross-Border Restructurings*

**By Fernando D. Hernández**
Marval, O'Farrell & Mairal
Argentina

## Introduction

In the early 2000s Argentina suffered one of its largest and deepest systemic economic and financial crises. A sharp, almost fourfold, depreciation of the Argentine Peso caused the failure of hundreds of companies, many of which were heavily indebted in US Dollars, mainly under New York law-governed law corporate bonds.

Many of those companies were forced to file for restructuring proceedings under the Argentine Bankruptcy Law ("ABL"). In appropriate cases, the recognition of those Argentine restructuring proceedings by the United States Courts, under former Section 304 of the United States Code (11 USC TITLE 11 - BANKRUPTCY) (the "US Bankruptcy Code") (the predecessor of Chapter 15 of the US Bankruptcy Code) often proved to be decisive for the success of Argentine cross-border corporate restructurings.

Since 2001, in dozens of precedents, the US Bankruptcy Court for the Southern District of New York consistently granted recognition, relief and assistance with respect to both Argentine Prepackaged Restructurings and Reorganization Proceedings under both Section 304 and latterly Chapter 15[1].

## Restructuring proceedings

The ABL provides for two restructuring schemes: (a) the out-of-court restructuring agreement (*acuerdo preventivo extrajudicial*) ("**Prepackaged Restructuring**"); and (b) the reorganization proceeding (*concurso preventivo*) (the "**Reorganization Proceeding**").

### (i) Prepackaged Restructurings

A Prepackaged Restructuring is similar to a US prepackaged arrangement. It consists of an agreement entered into between the debtor and some or all its unsecured creditors, which are grouped into one or more categories (classified according to objective criteria), for the purpose of offering all such categories a single restructuring or different restructuring proposals.

Prepackaged Restructurings may be filed before the competent court for endorsement once they have been consented to by unsecured creditors representing within each category the following majorities: (a) more than 50% of the unsecured creditors on a headcount basis, regardless of the principal amount held; and (b) more than 66 $^{2}/_{3}$ of the unsecured claims, in principal amount (the "Required Majorities"). The filing can be made by a debtor that is 'insolvent' (generally unable to regularly satisfy its current liabilities), but also by a debtor that is facing general economic or financial difficulties. Upon endorsement, the Prepackaged Restructuring becomes binding against the unsecured creditors of all categories included, whether or not they have consented to the restructuring.

It is possible for a Prepackaged Restructuring to include secured claims, but restructuring of secured claims requires the consent of all secured creditors.

Upon filing of the petition for endorsement of a Prepackaged Restructuring and verification of the admission requirements, the court will order the publication of notices for five days. Publication of the notices triggers a stay of all pre-petition claims against the debtor (other than claims of secured creditors seeking foreclosure of collateral).

Except as precluded by the general principles of law (e.g. in the case of abusive proposals), the debtor is free to formulate the terms of the restructuring. With certain limited exceptions, the ABL does not provide for a substantive review of the terms of the restructuring.

### (ii) Reorganization Proceedings

Reorganization Proceedings are full plenary proceedings similar to the reorganization procedure regulated under Chapter 11 (11 USC CHAPTER 11 - REORGANIZATION) of the US Bankruptcy Code. In contrast to Prepackaged Restructurings, a petition for a Reorganization Proceeding may only be filed voluntarily by a debtor that is insolvent. If the debtor has undergone a prior reorganization, a petition for a new Reorganization Proceeding may only be filed following the expiry of one year since the court's declaration of the performance of the prior Reorganization Proceeding.

A Reorganization Proceeding may also be commenced

[1] See, among others, *In re Board of Directors of Compañía General de Combustibles S.A., 269 B.R. 104, 107 (Bankr. S.D.N.Y. 2001); In re Board of Directors of Multicanal S.A., 314 B.R. 486 (Bankr. S.D.N.Y. 2004); aff'd and remanded, 331 B.R. 537 (S.D.N.Y. 2005); The Argo Fund Ltd. v. Board of Directors of Telecom Argentina, S.A. (In re Bd. of Dirs. of Telecom Argentina S.A.), No. 06 Civ. 2352 (NRB), 2006 WL 3378687 (S.D.N.Y. Nov. 20, 2006); In re Compañía de Alimentos Fargo, S.A., 376 B.R. 427 (Bankr. S.D.N.Y. 2007); In re Board of Directors of Telecom Arg., 2006 WL 686867, aff'd, Telecom Arg., 528 F.3d 162 (2d Cir. 2008); In re Cablevisión S.A., Case No. 04-15697 (SMB) (Bankr. S.D.N.Y. October 23, 2009); and In re Inversora Eléctrica de Buenos Aires S.A., 560 B.R. 650 (Bankr. S.D.N.Y. 2016).*

through the filing by the debtor of a motion for the conversion of a bankruptcy adjudication resolution (provided that bankruptcy was not adjudicated as consequence of the breach or failure of a Reorganization Proceeding).

Commencement of a Reorganization Proceeding has the following main effects:

(a) a receiver is appointed by the court to supervise the proceeding;

(b) the debtor keeps possession of its assets, but administration of the business is subject to the supervision of the receiver;

(c) all creditors must file proofs of claim with the receiver;

(d) in case of need or urgency, the court may order the temporary suspension of the enforcement of secured credits and precautionary measures on collateral secured with a mortgage or pledge for a period of up to ninety days. Interest accrued during the suspension will have priority status as an administrative expense;

(e) the debtor is banned from entering into any transactions for which no consideration is provided (*a título gratuito*) or which may affect the status of pre-petition claims;

(f) within the ten days following the filing by the receiver of a report on labour claims, the court will authorize the 'prompt payment' of the labour claims without the need for the filing of proofs of claim;

(g) any of the following transactions require the prior authorization of the court, at a hearing at which the receiver and the creditors' committee are present: (a) transactions involving registered property; (b) disposition or lease of goodwill; (c) issuance of secured debentures or bonds; (d) granting of pledges; and (e) any other transaction not within the ordinary course of debtor's business; and

(h) the suspension of the accrual of interest on prepetition unsecured claims. Interest accrued after the Reorganization Proceeding petition on claims secured by a mortgage or pledge are payable only from the proceeds of the enforcement of the collateral.

For the purpose of Reorganization Proceedings, the debtor must classify the creditors in at least three classes: unsecured creditors, labour creditors and secured creditors. However, the debtor may create additional subcategories within each class based on objective criteria. The debtor is able to formulate a reorganization plan (the "Reorganization Plan") including different restructuring proposals for each class and/or subcategory. The debtor enjoys a non-compete/exclusivity period of ninety days, which is extendable up to thirty additional days from the date of the court's resolution admitting the debtor's proposed classification of creditors, during which period the debtor must formulate the Reorganization Plan and obtain the consent of the creditors.

The Reorganization Plan must be consented to by unsecured creditors (excluding those who are also controlling shareholders) representing the Required Majority of unsecured creditors within each class and/or subcategory. Any proposal relating to secured creditors' claims must be approved by the unanimous consent of all creditors within the class and/or subcategory of secured creditors (as the case may be).

Once the Reorganization Plan has been endorsed, and the debtor has adopted measures for its implementation and granted guarantees for the performance of its obligations under the Reorganization Plan to the satisfaction of the court, the court will – at the request of the debtor – issue a resolution declaring the Reorganization Proceeding concluded (the "Conclusion Resolution"). Upon granting of the Conclusion Resolution, the Reorganization Proceeding is finalized, the receiver's performance and duties are terminated, and the limitations on the management of the debtor are released.

Upon tender and/or delivery of all consideration under the Reorganization Plan, and fulfillment of all other obligations of the debtor thereunder, the court will issue a resolution confirming the performance and discharge of the debtor's obligations under the plan (the "Performance Resolution").

## Recent developments in Chapter 15 recognitions of Argentine cross-border restructurings

### (i) Delivery of the consideration under Prepackaged Restructurings and Reorganization Plans

Under Argentine law, Prepackaged Restructurings and Reorganization Plans may include a variety of consideration.

The major portion of the unsecured debt of all largest restructurings in Argentina included New York law-governed securities denominated in United States Dollars issued in global form under an indenture (the "Debt Securities") in the name of a nominee of The Depositary Trust Company ("DTC") (Cede & Co.) as holder of record and deposited with a trustee under an indenture (the "Indenture Trustee"). The Debt Securities are eligible for trading in the DTC Depositary System, and beneficial ownership is held by the beneficiaries through custodians that are, or hold their positions in the Debt Securities through, direct participants in the DTC Depositary System (the "DTC Participants"). Therefore, the only holders of the Debt Securities known to the issuer are the DTC Participants, who hold the positions in their own name or account, or in the name and account of their clients (including custodians holding the positions in the name of their respective clients).

In order to take any action in respect of the DTC

Participant's third parties' positions, the DTC Participants need to receive adequate instructions from the beneficial owners. Due to the characteristics of the custody system, there is invariably a certain portion of beneficial owners in a restructuring scenario that will never give instructions on their positions, and cannot be identified by the issuer, the Indenture Trustee or the DTC Participants (the "Non-consenting Creditors").

Implementation mechanics of the Prepackaged Restructurings and Reorganization Plans depend on the nature of the unsecured claims and the consideration to be delivered under the restructuring agreement or plan.

To the extent the unsecured claims are DTC-eligible and the consideration under the Prepackaged Restructuring or Reorganization Plan consists of cash or other DTC-eligible securities, then the exchange of the securities for the cash or new securities can be performed through the DTC settlement system by the debit of the positions in the debt securities and the credit of the cash or new securities in the DTC accounts and each beneficial owner's custody account.

Consent to the Prepackaged Restructuring or Reorganization Plan by the holders of Debt Securities is in general implemented through a tender process whereby the consenting creditors tender their Debt Securities to an exchange agent, who, upon endorsement of the Prepackaged Restructuring or Reorganization Plan, implements the exchange of the Debt Securities and delivers the consideration under the Prepackaged Restructuring or Reorganization Plan.

However, where consent to the restructuring is not sought through a tender process, then upon endorsement of the Prepackaged Restructuring or Reorganization Plan, each of the beneficial owners will have to instruct their DTC Participant to tender their Debt Securities to receive the consideration under the exchange.

But, in respect of the Non-consenting Creditors, Trustees in general refuse to exchange and cancel their Debt Securities without an order of a US court; and petitions for recognition under Chapter 15 of the US Bankruptcy Code (and, previously, Section 304) sought to enforce such exchange with those Non-consenting Creditors through the DTC settlement system by instructing the Indenture Trustee and to cancel their Debt Securities in full.

Now, where the consideration under the Prepackaged Restructuring or Reorganization Plan includes securities that are not DTC-eligible (e.g. stock registered on the issuer's or other registrar's records) (the "Non-DTC Eligible Securities"), the exchange process cannot be implemented through the DTC settlement system. Beneficial owners must deliver, or cause to be delivered, their Debt Securities with the instructions of the beneficiary in whose name the Non-DTC Eligible Securities must be registered and/or delivered.

Under the ABL, the endorsement of the Prepackaged Restructuring or Reorganization Plan causes the discharge of all pre-petition unsecured claims, pursuant to which the original rights of the unsecured creditors to receive payment under those claims is automatically replaced by operation of law with the right to receive the consideration offered under the restructuring. Further, under Argentine law, the debtor's delivery obligations under the Prepackaged Restructuring or Reorganization Plan are discharged (and the Performance Resolution is granted by the court) with the tender and making available of the consideration under the restructuring for exchange.

The ABL does not provide for a specific limitation period for the tender of the consideration under a Prepackaged Restructuring or Reorganization Plan. Therefore, such statute of limitations is governed by the general provisions of the Argentine Civil and Commercial Code. The generic limitation period is five years, and is computed from the date when the Non-DTC Eligible Securities are first made available to all unsecured creditors.

Upon expiration of the limitation period, all claims of the unsecured creditors that did not tender their Debt Securities in exchange for the consideration under the Prepackaged Restructuring or Reorganization Plan to claim the delivery of the consideration will be barred and those creditors' Debt Securities outstanding cancelled.

However, Trustees have been reluctant to cancel the Debt Securities of those holders absent an order from a US court. In all known precedents of US courts' relief granted under former Section 304 and Chapter 15 of the US Bankruptcy Code, such relief has been sought and granted to avoid actions from creditors before the US courts, to dismiss petitions for reorganization or bankruptcy in the US and/or to enforce the delivery of the consideration under the Prepackaged Restructuring or Reorganization Plan to the Non-consenting Creditors.

**(ii) In *re Supercanal* [2]**

In the recent 'leading' precedent, in *re Supercanal*, the United States Bankruptcy Court for the Southern District of New York granted recognition and relief under Chapter 15 of the US Bankruptcy Code including innovative features.

The company's proposed Reorganization Plan included the exchange of pre-petition Debt Securities for Non-DTC Eligible Securities.

After the reorganization plan was approved and endorsed

[2] *In re Supercanal S.A., Debtor in a Foreign Proceeding.*

by a final resolution of the Argentine court, and the company fulfilled its obligations under the plan and tendered the Non-DTC Eligible Securities, the Argentine court declared the Reorganization Proceeding concluded and the Reorganization Plan satisfied through the issuance of a Conclusion Resolution and Performance Resolution.

Upon tender of the Non-DTC Eligible Securities, the company committed to have them available for a term equal to the limitation period. In order to have the Debt Securities cancelled by the Trustee upon expiration of the limitation period, the company filed a petition for recognition of the Reorganization Proceeding before the United States Bankruptcy Court for the Southern District of New York.

On July 19, 2018, the court granted the Chapter 15 motion and relief requested, ordering, among other things, that, "*[t]he Endorsement Order is hereby recognized, affirmed and effective within the territorial jurisdiction of the United States in all respects, including, without limitation, the discharge of unsecured claims related to the 2005 Notes in exchange for the right to receive consideration under the Reorganization Plan, the 2005 Notes have no further force, effect and the holders have no right to receive any further cash payments on the 2005 Notes. The sole right of the holders thereof is to exchange the 2005 Notes for the Class A Shares... The Debtor and U.S. Intermediaries (including the Trustee) are hereby authorized and directed to take any ministerial actions that may be necessary to consummate the transactions contemplated by the Reorganization Plan, including the cancellation of the 2005 Notes upon expiration of the statute of limitations on June 30, 2022, and after such cancellation, the termination and removal of any remaining 2005 Notes positions reflected on the records of the U.S. Intermediaries (including the Trustee) (including taking all such appropriate actions in respect of the book entry system to give effect to the foregoing)…. Upon expiration of the statute of limitations any remaining 2005 Notes shall be cancelled and, upon completion of the Trustee's duties in connection with the transactions necessary to consummate the Reorganization Plan and the cancellation, termination and removal of the remaining 2005 Notes positions, the Trustee shall be relieved of any further obligations.*"


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# *Substantive Consolidation in Brazil: A Controversial Issue*[1]

**By Sérgio Savi**
**and**
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BMA
Brazil

## Introduction

It is very common these days for two or more companies of a single business group to file a joint petition for judicial reorganization when faced with a financial crisis. In some cases, the intention is to use the same restructuring proceeding to reduce costs and align the various phases of the procedural itinerary ("procedural consolidation"). In others, besides the benefits of a single proceeding, the objective is to treat debtors as if they are one and the same, by unifying assets and liabilities of the companies for purposes of the intended reorganization ("substantive consolidation").

## Procedural and substantive consolidation

Although the Brazilian Reorganization and Bankruptcy Law ("BRBL") does not regulate joint judicial reorganizations filings, the use of procedural consolidation has been allowed without significant questioning, based on subsidiary application of the rules on plurality of plaintiffs set out in the Brazilian Code of Civil Procedure.

In contrast, the theme of substantive consolidation is more controversial in Brazil, and is generally considered an exceptional measure, since its application pre-supposes relaxation of the important rule on entity shielding among the companies belonging to a single business group.

## Mandatory and voluntary substantive consolidation

Based on scholars' classification, substantive consolidation has been permitted in Brazil in two different ways: (i) "mandatory", when the court is tasked with deciding whether or not the assets and liabilities of the different debtors should be unified for purposes of the intended reorganization; and (ii) "voluntary", when the creditors, exercising their commercial judgement, decide to treat the debtors as a single entity for purposes of restructuring.

In Brazil, in the absence of legal rules and consolidated case law, the courts in certain cases have applied to mandatory substantive consolidation the same requirements necessary for the disregard of legal personality ("piercing the corporate veil"), such as commingling of assets and abuse of legal personality (e.g. the Schahin case[3]). In these situations, some courts have decided in favour of substantive consolidation based on the existence of rules on legal entity shielding and separate liability of multiple companies contained in corporate legislation.

On the other hand, however, there are precedents inspired by the UNCITRAL Legislative Guide on Insolvency Law[4], where mandatory substantive consolidation is allowed on the basis that the debtors, among other aspects, prove they are under common control, have provided cross-guarantees, have the same executives or are interdependent in their market operations. In these cases, the justification for mandatory substantive consolidation has not been any impropriety in the way the companies of the business group acted, but the fact that the reorganization of those companies via substantive consolidation was the best way to achieve the primary objective of the BRBL, namely to preserve companies as going concerns (e.g. the Eneva case[5]).

As things stand, the legislative vacuum on the matter causes great legal uncertainty regarding the application of mandatory substantive consolidation in cases of judicial reorganization in Brazil.

Similarly, voluntary substantive consolidation has been allowed in cases where the union of assets and liabilities of the debtors was deemed more efficient to deal with the crisis faced by the business group. As long as the debtors agree, the creditors are delegated with the power to decide on the substantive consolidation at general creditors' meetings, normally one for each company forming the group. In the recent case of the telecommunications giant Oi[6], for example, although the lower court decided to grant the debtors' request for substantive consolidation, the court of appeals reversed the decision and ordered voting of that issue in creditors' meetings for each entity.

It is worth noting that the Brazilian Superior Court of Justice (the highest court for non-constitutional matters, with responsibility for harmonizing interpretation of federal laws) has not yet analyzed the issue in order to set uniform criteria for application of substantive

[1] For Portuguese version of this article see https://www.insol.org/library/opendownload/1336
For Spanish version see https://www.insol.org/library/opendownload/1337

[2] Respectively, partner and senior associate with BMA's Restructuring & Insolvency team.

[3] Schahin Group's Judicial Reorganization involved a group of 28 companies acting in the engineering and oil & gas sectors. The case took place in one of São Paulo State's specialized Bankruptcy Courts (case #1037133-31.2015.8.26.0100).

[4] UNCITRAL – Legislative Guide On Insolvency Law – Part Three: Treatment of enterprise groups in insolvency, item 112, p. 62. See: https://www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf. Accessed in September, 2019.

[5] Eneva Group's Judicial Reorganization involved 2 EBX Group's companies acting in the energy sector. The case took place in one of Rio de Janeiro State's specialized Bankruptcy Courts (case #0474961-48.2014.8.19.0001).

[6] The authors of this article acted as one of Oi's external counsel in the case, which took place in one of Rio de Janeiro State's specialized Bankruptcy Courts (#0203711-65.2016.8.19.0001).

consolidation, whether mandatory or voluntary.

### Amendment of Brazil's Reorganization and Bankruptcy Law

The Brazilian Congress is currently discussing an amendment to the BRBL. The last version of the bill, sent to the Senate in the beginning of September 2019, expressly deals with procedural and substantive consolidation.

With regard to substantive consolidation, the proposal envisages that the court will be able, exceptionally and irrespective of the conduction of a creditors' meeting, to authorize the substantive consolidation of assets and liabilities of a single business group, when there has been interconnection and commingling of assets and liabilities of the debtors, to the point that it is not possible to identify their ownership without expending excessive time or resources.

According to the current text of the bill, at least two of the following requirements would also have to be present in the case: (i) the existence of cross-guarantees; (ii) a relationship of control and/or dependence among the companies; (iii) the identity, total or partial, of the group of executives; or (iv) joint action in the market among the companies. Finally, the bill, if enacted in its current form, would clearly establish that the imposition of substantive consolidation by the court depends on demonstration of the existence of social and economic benefits that justify the application of the doctrine.

### Final thoughts

The bill to amend the BRBL has attracted wide discussion and attention. At present there are no firm indications as to the extent of the final text of the bill, much less a date for its enactment and entry into force.

If the bill is approved by Congress and signed by the President in its current form, the consensus among insolvency practitioners and scholars is that the requirements for mandatory substantive consolidation will not be entirely satisfactory. Nevertheless, if enacted in its present form, the bill will help clarify the application of the substantive consolidation mechanism and bring greater certainty to the doctrine in Brazil. With clear rules on the requirements for application of mandatory substantive consolidation, all stakeholders will be able to evaluate better their commercial relations and make more informed decisions in the restructuring process.

Although the current version of the bill does not expressly mention voluntary substantive consolidation, in principle, there should be no limitation in relation to this modality following enactment of the bill.

Even in circumstances in which the BRBL is not ultimately amended, substantive consolidation will continue to be applied, with the voluntary mode being most frequently invoked. Mandatory substantive consolidation tends to be applied more rarely, especially when courts find impropriety due to commingling of assets and abuse of legal personality among debtors.


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# *Guatemala: The Future of Insolvency and Restructuring*[1]

**By Rodrigo Callejas,**
*Fellow, INSOL International*
**Emanuel Callejas, Paola Montenegro and Juan Andrés Marroquín**
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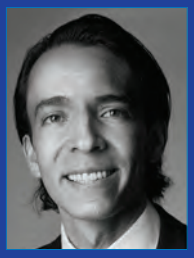

## Where we are now

According to statistics issued by the Commercial Registry of Guatemala, only 90 companies[2] have been dissolved[3] between January 2018 and June 2019, in contrast to 9,228 that were incorporated during the same period.[4] The dissolution of a company is the legal act through which the company suspends its activity and begins its liquidation process so that it may be subsequently extinguished (as a legal person and as a contract).

Is the dissolution of a company a simple or common procedure in Guatemala? No, dissolving a company in Guatemala is complex and infrequent. It involves numerous internal and external procedures, which are set out in the Chapter XI, Section 2 of the Commerce Code, Decree 2-70 of Congress of the Republic of Guatemala, making the process undesirable to companies looking to cease operations and wind up its affairs.

The process first requires that a company's balance sheet be reviewed by the Company to determine its assets and liabilities, following which an Extraordinary General Meeting of Shareholders must be held to decide the dissolution of the Company (in a formal way)[5] and appoint a liquidator. Then, a public dissolution deed on Notarial records must be granted by a Notary, which must contain the appointment of the liquidator. Once the dissolution deed is granted and a liquidator is appointed, notice of these two actions must be made through an electronic publication of the Commercial Registry.[6] The objective is to notify potential creditors or others parties who could be affected by the dissolution. The two main reasons why creditors or third parties could be affected are the existence of either pending credits or unresolved disputes.

If there is no objection to the two notices from any third parties, the liabilities are then paid in the order of priority provided in Article 248 of the Code of Commerce[7]. The Final Balance Sheet is prepared and published in a third legal notice to the public, together with the call to the Shareholders' Meeting to approve the Final Liquidation Balance Sheet.

Each of the three legal notices must be published three times each over a period of 15 days.

The final step in the dissolution process is a request to cancel the corporate registration that must be filed with the Commercial Registry. The dissolution and liquidation procedure for a Company before the Commercial Registry requires a minimum of 6 months and can take as long as 2 years.

## Economic considerations

According to the "Doing Business" guide, the World Bank's global study on the ease of doing business,[8] Guatemala is ranked 156th out of 190 jurisdictions, in terms of dissolution and insolvency procedures. This is worrisome considering that recent economic statistics published by local think tanks, the Central Bank of Guatemala, Superintendence of Tax, and others point to a slowdown with respect to the average growth of the Guatemalan economy during the course of this year.

In addition, according to Libertad y Desarrollo Foundation, exports in real terms decreased 4.3%. On the other hand, Government spending grew 1.7%. In the same line, the Central Bank of Guatemala[9] released its statistics for the Monthly Economic Activity Index as of July 2019 which concluded that there was a 0.4% drop in the economic growth rate compared to the same month of 2018.[10]

As shown in the graph on page 23, the number of dissolutions of companies has been decreasing while new registrations of companies have been increasing during the period from January 2018 to July 2019. Based on the evidence of a drop off in the Guatemalan economy during the same timeframe, the expectation is that the graph should reflect a conversion of the two lines, rather than a diversion.

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1 For Spanish version of this article see https://www.insol.org/library/opendownload/1338

2 This statistic includes solvent and insolvent companies.

3 Article 237 states causes for the dissolution of companies. The effect of the dissolution of companies with commercial nature in Guatemala is the loss of their status as abstract person.

4 Statistics from the Commercial Registry, available at: https://www.registromercantil.gob.gt/webrm/?page_id=89.

5 Commerce Code, Decree 2-70 of Congress of the Republic of Guatemala, article 237.

6 Legal notices of the Commercial Registry, available at: https://edictos.registromercantil.gob.gt.

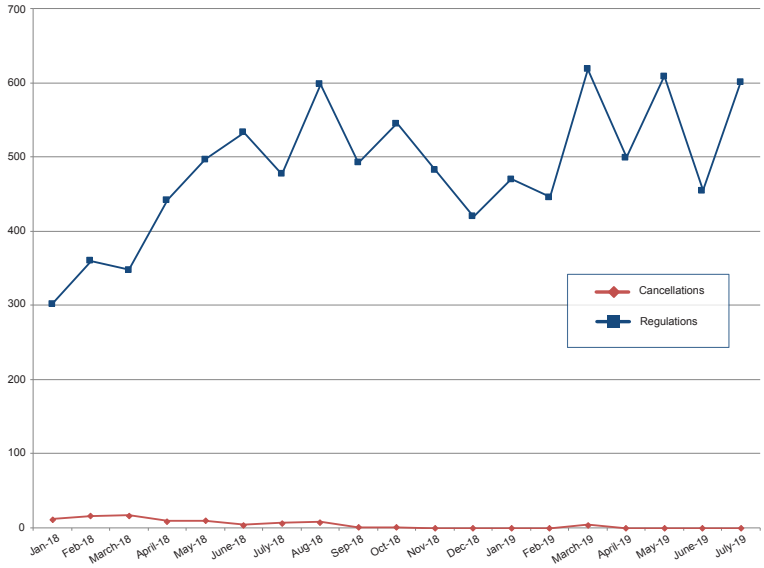
7 Commerce Code, Decree 2-70 of Congress of the Republic of Guatemala. Article 248. Payment order. "*The liquidators shall observe in any event the following payment order: 1. Liquidation expenses; 2. Debts of the company; 3. Contributions of the partners; and 4. Profits*".

8 *Doing Business Statistics*, available at: https://www.doingbusiness.org/en/rankings

9 Guatemala's Central Bank.

10 Economic Activity Monthly Index, available at: https://www.banguat.gob.gt/Publica/IMAE/informe_julio_2019.pdf

**Figure 1 – Corporate registrations and dissolutions, January 2018 to July 2019**




Considering the dissolution procedure presented above, in the face of commercial and/or financial viability concerns, shareholders or partners often prefer to simply cease operations and do not resort to the formal dissolution procedure. The simple cessation of operations may lead to several unintended tax, employment and/or commercial contingencies that could be harmful to Guatemala.

For example, the company can be subject to multiple inspections by the tax administration and it would continue to have the permanent obligation to submit declaration of taxes. In the employment area, if there is a benefit pending towards the employees, the company can be subject to multiple labour lawsuits. All this could also imply personal reputational damages to the shareholders.

## Bankruptcy regulation in Guatemala

Additional to the dissolution process detailed above, voluntary and involuntary bankruptcy proceedings are regulated in the Civil and Commercial Procedural Code; legislation that dates back to 1963. The focus of these proceedings is the liquidation of the business or company with commercial or financial difficulties.

Culturally, bankruptcy is commonly linked to fraud and is often penalized with prison (fraudulent bankruptcy; culpable bankruptcy), following the outdated concept of criminalizing business failures[11]. In contrast, more progressive legal frameworks such as the United States Bankruptcy Code focus on a second opportunity for the debtor in order to preserve the value of the company as a going concern and emerge from the proceeding to the benefit of all stakeholders, such as the tax authorities, employees, service providers, business partners, shareholders, etc.

## Out of court restructuring

The lack of modern local legislation with a focus on preserving value, as well as the current economic context in Guatemala, presents an opportunity for troubled business to restructure their liabilities out of court. As an alternative, any consideration of a bankruptcy application under the current regime requires a thorough assessment and specialization in the governing law and processes, as it could be strategically viable, depending on the specific circumstances.

Following are some practical matters, which in our experience can contribute substantially when considering a commercial out of court restructuring:

- ***Financial and legal diagnosis***
  - How much do I owe? What are my current obligations? Be realistic.
  - To whom do I owe? How could I pay? Be creative.
  - What elements of the business may be exposed to legal actions, by whom and when?
  - Is the business viable in the short, medium and/or long term?
    - What must I change to make it viable? Is there a strategy to survive?
    - Can I sell part/all of the business to a third party to recover value and honor my obligations? Can I offer an interest to a potential strategic partner who may help me restructure the business?
  - What strategies can I implement, in what timeframe and what could be their expected impact?
- ***The importance of communication***
  - In order to agree upon a holistic strategy, communicate the commercial, operational, financial and legal diagnosis to my front line: shareholders, managers, external auditors, legal advisors, and public relations advisors.
  - Once strategy is agreed, reach out to your creditors, in person if possible, and communicate your situation, open a direct communication channel and start creating options.
- ***Implement the strategy***
  - Implementing the strategy requires discipline and patience, be straightforward, available and efficient in addressing the concerns of the different stakeholders in a clear and orderly manner.

Recently, across different industries and through different commercial circumstances, we have been able to use these questions to help clients to align the interests of the different stakeholders, identify common ground, and negotiate win/win solutions. In many circumstances, out-of-court negotiated solutions will be more timely, effective and efficient than litigation.

[11] Criminal Code, Decree 17-73 of Congress of the Republic of Guatemala, Sections 348, 349, 350, 351, 352, 353 and 354.

### The future of insolvency legislation in Guatemala

There is currently an Insolvency bill, filed on May 8th, 2018, at the Congress of the Republic of Guatemala that is being discussed in its second debate by the Economy and Foreign Trade Committee of the Congress of the Republic of Guatemala.[12] The spirit of this bill is to protect employment by avoiding the closure of entities and providing alternatives so that liabilities may be restructured, preserving the going concern value of the company for all stakeholders.

The objectives of this bill, among others, are to:

- Update and consolidate insolvency regulations;
- Facilitate restructuring opportunities;
- Structure a simpler and more efficient process that is:
  - Less formal;
  - Implements the use of electronic tools;
  - Limits the scope for dilatory actions.
- Facilitate asset recovery;
- Limit the possibility of bankruptcy fraud; and
- Regulate cross-border insolvency proceedings.

The bill would provide Guatemala with a modern specialized insolvency regime that would support concepts such as value preservation, asset recovery and restructuring, and that would help shift paradigms by allowing the use of electronic forms and filings, eliminating notices in gazettes, allow oral proceedings, enable shorter deadlines and limited challenges, and address other issues that hinder the current bankruptcy process.

The National Plan for Innovation and Development[13] recently published by President-elect Dr. Giammattei (2020-2024) includes the promotion of an investment-friendly legal framework in Cornerstone 1, «Economy, Competitiveness and Prosperity». Among the bills considered in this plan, the Insolvency and Bankruptcy Law is included as a priority so that the policies and strategic actions adopted to boost investment in Guatemala may be viable. Moving forward with this legislative reform would also support progress in international economic indicators and the profile of Guatemala abroad as a jurisdiction where keeping viable businesses operating is encouraged and creditor rights are duly protected.

### Conclusion

The current bankruptcy and company dissolution processes in Guatemala have proven to be impractical in the modern age of global commerce, which has led to the simple cessation of operations implying multiple contingencies that can affect the company, the shareholders and the country in general.

Additional to the dissolution process, there are voluntary and involuntary bankruptcy proceedings which are also impractical, outdated and commonly linked to fraudulent bankruptcy or culpable bankruptcy that are penalized with prison, according to the Guatemalan Criminal Code.

Fortunately, change is coming with the new insolvency bill being considered for approval. This would update insolvency regulations and it would facilitate restructuring opportunities to the debtor, protecting employment and avoiding the informal closure of entities and the contingencies that this implies.

Meanwhile, an alternative to the current voluntary and involuntary bankruptcy proceedings exists. The mutual out-of-court restructuring process, drawing on the commercial, financial and legal experience specific to each case, can be the pathway to preserving the value of the business to the ultimate benefit of all involved.

[12] Opinion No. 08-2018 of the Economic and Foreign Trade Committee, Bill No. 5446, which decides to approve the Insolvency Law, available at: https://www.congreso.gob.gt/wp-content/plugins/paso-estado-incidencias/includes/uploads/docs/1547157380_Dictamen%205446.pdf.

[13] Innovation and Development National Plan, available at: https://vamosguatemala.com/wp-content/uploads/2019/03/Alejandro_Giammattei_Plan_Nacional_de_Innovacion_y_Desarrollo.pdf

## *US Bankruptcy Court Provides Guidance on the COMI Analysis of Members in a Group*

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The Model Law on Cross-Border Insolvency provides a mechanism for the recognition of a foreign liquidation or reorganization proceeding by a domestic court. Under the Model Law, a court shall generally grant recognition to a foreign proceeding if it is a "foreign main proceeding" or a "foreign nonmain proceeding." A foreign main proceeding is defined as "a foreign proceeding taking place in the State where the debtor has the centre of its main interests" or "COMI." A foreign nonmain proceeding is defined as "a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment," which is defined as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."

Under the Model Law, a corporate debtor's registered

office is presumed to be its COMI, but this presumption is rebuttable. The Model Law does not otherwise define COMI and US courts analyzing a debtor's COMI under the version of the Model Law adopted by the US (i.e., Chapter 15 of the US Bankruptcy Code) have noted that a COMI determination is fact intensive. Moreover, the definition of an "establishment" is amorphous. Consequently, it can be challenging for a court to determine a debtor's COMI or the location of an establishment. Those complexities may multiple when the debtor is a member of a group of companies that is trying to liquidate or reorganize under the laws of a foreign country. The US Bankruptcy Court for the Southern District of New York addressed some of those difficulties when it considered a request for recognition of Brazilian reorganization proceedings under Chapter 15. See *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237 (Bankr. S.D.N.Y. 2019). There, the court concluded that that the COMI and establishment of members of a group should be determined on a per-debtor basis.

## The Constellation companies and Brazilian proceeding

Constellation Oil Services Holding S.A. ("Holding") is the ultimate parent of a group of companies known as the "Constellation Group." Facing financial distress that could be attributed to the cyclical nature of a key component of their operations — the deepwater drilling market — and their depressed revenue resulting from declining oil prices, certain members of the Constellation Group commenced reorganization proceedings ("*recuperação judicial*") in Brazil. The Brazilian court entered an order formally accepting the majority of the members of the group as debtors in Brazil, but dismissed the Brazilian proceedings as to two members that, according to the Brazilian court, were not eligible to be debtors under Brazilian insolvency law. On appeal, the Brazilian Court of Appeals affirmed the dismissal of the two debtors from the Brazilian proceedings.

## The Constellation Chapter 15 case

Ten of the Constellation Debtors, through their foreign representative, filed petitions for recognition of the Brazilian proceedings as foreign main proceedings or foreign nonmain proceedings under Chapter 15 with the United States Bankruptcy Court for the Southern District of New York. A creditor objected to recognition as foreign main proceedings, arguing that the debtors' COMI was located not in Brazil, but in Luxembourg, where Holding, the ultimate parent company, is organized and, among other things, maintains its registered office. As an initial matter, the US bankruptcy court concluded that it did not have to determine whether the Brazilian proceedings should be recognized with respect to the two debtors that the Brazilian courts had dismissed. Ultimately, the US bankruptcy court granted recognition to the Brazilian proceeding of Holding as a foreign nonmain proceeding and as a foreign main proceeding for the seven remaining debtors.

*The US Bankruptcy Court Considered Recognition on a Debtor-by-Debtor Basis*

The US bankruptcy court summarily rejected the objecting creditor's argument and found that, while the debtors are inter-related, the court could not make a "single-top down decision" based on the location of Holding's COMI. According to the bankruptcy court, it has an independent obligation to evaluate each debtor's COMI and/or establishment before granting recognition to a foreign proceeding. Consequently, the court concluded that it must determine the COMI and establishment of each member of the Constellation Group that was a Chapter 15 debtor and not the group as a unit to determine if, and to what extent, it should grant recognition to the Brazilian proceedings.

*Description of COMI and establishment*

The US court distilled the COMI analysis into the following six considerations:

- ***The SphinX Factors,*** which were initially enumerated by a US bankruptcy court in the Chapter 15 case of *In re SPhinX, Ltd.*, 351 B.R. 103, 122 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007): (i) the location of the debtor's headquarters; (ii) the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); (iii) the location of the debtor's primary assets; (iv) the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and (v) the jurisdiction whose law would apply to most disputes.
- ***International Interpretations of COMI,*** including the Model Law and foreign court interpretations; thereof
- ***Third-Party Expectations,*** which can be determined by evaluating "objective evidence" that interested parties had notice that a debtor's COMI was in a particular jurisdiction";
- ***Creditors' Expectations,*** which can be determined by evaluating documents and other information available to creditors that informed them of the nature and risks of their investments (e.g., indentures and offering memoranda);
- ***Principal Place of Business/Nerve Center,*** which while not controlling, may influence a court's determination of a debtor's COMI; and
- ***Additional Considerations,*** which the court noted could vary depending on the nature of a debtor's business and the mobility of its assets.

After explaining the COMI considerations, the US court elaborated on the definition of an establishment under the Model Law and Chapter 15.

*Description of an establishment*

According to the US bankruptcy court, a foreign proceeding lies in a "spectrum" relative to the debtor's location. At one end, a debtor's activities may be centered in the situs of the foreign proceeding, such that a court should recognize the foreign proceeding as a foreign main proceeding. At the other end, the debtor has little, if any, connections to the foreign jurisdiction, such that a court should refuse to recognize the foreign proceeding. "Somewhere between these two extremes are companies that have sufficient non-transitory business connections with the jurisdiction of the proceeding to determine that the proceeding is nonmain."

In elaborating on the definition of a foreign nonmain proceeding, the bankruptcy court discussed an English court's decision to recognize the US bankruptcy case of Videology Ltd., a company with its registered office in England, as a foreign nonmain proceeding. There, the English court was not persuaded that the presumption that England was the debtor's COMI had been rebutted. Instead, it found that Videology, which was part of an international enterprise group, had an establishment in the US in the form of an executive team that it shared with the rest of the group. Accordingly, the English court recognized Videology's US bankruptcy case as a foreign nonmain proceeding. The US bankruptcy court adopted a similar approach in the Constellation Group's Chapter 15 cases.

*Holding's COMI was Luxembourg, but it has an establishment in Brazil*

Applying the above analytical framework, the US bankruptcy court concluded that the evidence did not rebut the presumption that Luxembourg was Holding's COMI. Indeed, Luxembourg was the location of those who managed Holding and its "nerve center." Moreover, the reasonable expectations of interested third parties and creditors based on the evidence presented, including press releases and offering memoranda, was that Holding's COMI was Luxembourg. In addition, the US bankruptcy court concluded that the law governing most of the disputes involving Holding would be Luxembourg law. Because Holding's COMI was Luxembourg, its Brazilian proceeding could not be recognized as a foreign main proceeding under Chapter 15.

The US bankruptcy court further found that Holding had an establishment in Brazil based on the substantial and ongoing business connections of its subsidiaries (and not of Holding itself) in Brazil. According to the bankruptcy court, Holding's "non-transitory ties to Brazil are sufficient to recognize the Brazilian Proceeding as a foreign nonmain proceeding with respect to [Holding]."

*The Offshore debtors' COMI was Brazil*

Six of the seven remaining debtors had registered offices in either the British Virgin Islands or the Cayman Islands. Consequently, their COMI was presumed to be in the offshore jurisdictions and not Brazil. Nevertheless, the bankruptcy court found that there was sufficient evidence to rebut the presumption for each of the six.

Five of the six offshore debtors were very similar in that they were companies that maintained and operated offshore drilling rigs located in Brazil. Consequently, the US bankruptcy court found that Brazilian law would most likely to apply to any disputes involving these operating companies. Moreover, according to the bankruptcy court, the reasonable expectations of their creditors based upon the relevant indentures and loan documents was that any restructuring would occur in Brazil. Finally, the bankruptcy court found that the nerve-center of each of these companies was Brazil, where the day-to-day operations, including the coordination of the drilling operations and investor relations were managed.

The sixth offshore company Constellation Overseas Ltd. was the parent company of four of the six operating companies. As noted by the bankruptcy court, Overseas has no operations or employees, "its limited functions are to own equity in subsidiaries, guarantee debt and centralize certain treasury function to support subsidiaries operating and generating in Brazil." Because it was registered in the British Virgin Island, the COMI of Overseas was presumed to be the BVI. However, the court found that Brazil was Overseas's COMI. According to the bankruptcy court, a subsidiary's COMI is a factor that should be considered where analyzing a parent company's COMI. Here, most of the subsidiaries' assets and operations were located in Brazil. Consequently, Overseas had "significant management, interest, and revenue generation in Brazil." These ties to Brazil combined with the creditors' support for finding COMI in Brazil led the US court to conclude that Brazil was Overseas's COMI.

*The Brazilian debtor's COMI was Brazil*

There was no evidence that the COMI the debtor with a registered office in Brazil was elsewhere. Indeed, no one objected to recognition of the Brazilin debtor's proceeding as a foreign main proceeding. Consequently, the US bankruptcy court found that the Brazilian debtor's COMI was Brazil and recognized its foreign proceeding as a foreign main proceeding.

## Conclusion

A US bankruptcy court's analysis of a debtor's COMI or establishment is fact intensive. In analyzing the COMI of a holding company, a court may consider the activities of its subsidiaries. Here, the activities of Overseas's subsidiaries were sufficient to rebut the presumption that Overseas's COMI was in the BVI. In contrast the activities of Holding's subsidiaries were not sufficient to rebut the Luxembourg COMI presumption, but were sufficient to find an establishment in Brazil.

One of the key factors for a court analyzing a debtor's COMI may be the support of creditors and third parties. In this instance, in addition to being debtors in Brazil, several of the offshore debtors were in "soft touch" provisional liquidation in the British Virgin Islands. As a consequence, the BVI court appointed provisional liquidators to oversee the debtors' restructuring. However, the provisional liquidators did not displace management, which was still responsible for negotiating and implementing the restructuring. In its analysis, the bankruptcy court emphasized that the provisional liquidators and creditors were supportive of the Brazilian proceeding and the Chapter 15 recognition.

Ultimately, the US bankruptcy court granted recognition to the Brazilian Proceeding of each member of the Constellation Group that was a debtor in Brazil and a Chapter 15 debtor. As noted by the bankruptcy court, the distinction between a foreign main proceeding and a foreign nonmain proceeding may be inconsequential. Under Chapter 15 and the Model Law, Holding, "although currently recognized as operating in a foreign nonmain proceeding, may receive nearly identical relief as the relief afforded to the Chapter 15 Debtors whose COMI was determined to be Brazil."

# *Uruguay Makes Significant Progress in International Arbitration: Celebration of the First Anniversary of the Law on International Commercial Arbitration (No. 19.636)*[1]

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On July 3, 2018, the draft of the *"International Commercial Arbitration Law"* was approved in Uruguay (hereinafter, "the Law"). It is inspired by the *"Model Law on International Commercial Arbitration"*, prepared by the United Nations Commission on International Trade Law (UNCITRAL).

Previously, there was no specific legislation in Uruguay dealing with international commercial arbitration, which was a disadvantage when it came to attracting international arbitrations. In that regard, the Message of the Bill of the Executive Power expressed that, with the enactment of this Law, Uruguay would be able to establish itself as a "place of arbitration between foreign parties", but it may also be possible for Uruguayan companies themselves to propose Uruguay as the seat of arbitrations in their international contracts.

In the past, and before the approval of this Law, Uruguay only had a domestic regulation on arbitration, and had ratified the Montevideo International Procedural Law Treaties of 1889 and 1940, the Inter-American Convention on International Commercial Arbitration (Panama 1975), the Inter-American Convention on Extraterritorial Effectiveness of Judgments and Arbitration Awards (Montevideo 1979), the New Convention York on Recognition and Enforcement of Foreign Arbitration Judgments (New York 1958), and the Mercosur International Commercial Arbitration Agreements.

The adoption of this Law was necessary to complement these conventions (in respect of which Uruguay has had a key role, especially under the inter-American and Mercosur frameworks).

The Law is structured in nine chapters containing: (i) general provisions, (ii) the arbitration agreement, (iii) the composition of the arbitral tribunal, (iv) the jurisdiction of the arbitral tribunal, (v) the substantiation of arbitration operations, (vi) the pronouncement of the award and the termination of the proceedings, (vii) the costs of the arbitration, (viii) the challenge of the award, and (ix) the recognition and enforcement of the awards.

The Law regulates many significant aspects of the arbitration procedure. Article 1 refers to the material application (called "territorial scope"), which regulates the material application linked to a territorial connection, thereby introducing the definition of the commerciality criteria within the Law, which is widely received in current international law.

Regarding the *"International"* nature of the arbitration, article 1(3) includes the basic criteria, in: a) providing that the arbitration will be international if *"the parties to an arbitration agreement have, at the time of the conclusion of that agreement, its establishments in different countries"*; and, b) giving relevance to the place of fulfillment of a substantial part of the obligations, as well as to the place with which the object of the dispute has a closer relationship. When any of these places is located outside the country in which the parties have their establishment, the arbitration is considered *"International"*. Thus, the possibility that a national arbitration could become international by the sole will of the parties was ruled out.

The Law also includes the principle of autonomy of the arbitration clause, which is universally recognized for the purposes of arbitration. Likewise, the parties are given the *"freedom to agree on the procedure to be followed by the arbitral tribunal in their proceedings"*, subject to the relevant provisions of the Model Law embodied in the Law.

In addition, the Law establishes the possibility to specify not only national law, but also rules promulgated by international organizations not incorporated into state legal systems.

As for the costs regime, the Law establishes the freedom of the parties to adopt appropriate rules, including, the provision of a subsidiary regime in the event that the parties are unable to reach agreement, inspired by the UNCITRAL Arbitration Rules.

This year marked the first anniversary of the enactment of the Law. The Law represents a great advance for Uruguay in the matter of arbitration and for becoming the seat for international arbitrations.

In this regard, it is worth noting that Uruguay has a very good international reputation in terms of the reliability and transparency of its courts, and the jurisprudence of the courts is respectful of arbitration procedures. Furthermore, Uruguay can now be regarded as a very attractive seat for international arbitrations, especially in Latin America, with the economic benefits that this may bring.

In summary, the approval of the Law represents a great advance for arbitration in Uruguay and achieves alignment of the position in Uruguay with that in many of the main jurisdictions elsewhere in the world for international arbitrations. This Law represents the culmination of several years of active promotion in Uruguay of the study and development of arbitration, from educational institutions through participation in international competitions, congresses and conferences, all driven by a single objective: the growth of arbitration in Uruguay.

For more information about International Commercial Arbitration Law Project see:
https://medios.presidencia.gub.uy/legal/2015/proyectos/09/mrree_495.pdf
http://www.impo.com.uy/bases/leyes-originales/19636-2018

[1] For Spanish version of this article see https://www.insol.org/library/opendownload/1339

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# *The Recognition of the Foreign Insolvency Proceedings of Grupo Pacific in Colombia*[1]

**By Diana Lucía Talero**
*Fellow, INSOL International*
Urdaneta, Vélez, Pearl & Abdallah Abogados
Colombia

In 2006, Colombia adopted a cross-border insolvency regime with the enactment of Law 1116 of 2006. Various decisions have since been handed down applying the Law. Of particular interest are a number of decisions relating to Grupo Pacific in 2016 by the Colombian Companies Superintendence Office (the "Superintendence Office"). The Superintendence Office acts in Colombia as the judge for corporate insolvency-related matters and is the body responsible for applying the cross-border insolvency regime. In the Grupo Pacific case, the Superintendence Office elected to apply the regime in a territorial manner in order to protect the interests of certain local creditors.

In April 2016, the company Pacific Exploration & Production Corporation obtained an initial order from the Ontario Superior Court for protection under the Companies' Creditors Arrangement Act ("CCAA") to allow its restructuring. Following the reporting of certain related information by the company in a press release dated April 19, 2016, the Superintendence Office decided ex officio to protect the assets of Grupo Pacific branches located in Colombia, in the interests of the creditors located in Colombian territory, by issuing a series of pronouncements, including the recognition of the Canadian proceedings, as follows:

| **Decisions of the Superintendence Office/Requests of Grupo Pacific** | **Date** | **Orders of the Superintendence Office** |
|---|---|---|
| Decision 400-000282 | 20-04-16 | This Decision comprises a Caution order requiring that the branches of Grupo Pacific located in Colombia provide notification of any (i) disposal of assets or (ii) news about the insolvency process of the main companies in the group. |
| Request 2016-01-247484 | 2-05-16 | This Request requests recognition of the Canadian proceedings. |
| Decision 400-006872 | 4-05-16 | This Decision requires the provision of information relating to the financial situation of the branches. |
| Decision 400-000416 | 10-06-16 | This Decision (i) orders the recognition in Colombia of the foreign main proceedings under the CCAA of Pacific Exploration & Production Corporation, Meta Petroleum Corporation, Petrominerales Corporation, and Pacific Stratus Energy Colombia Corporation before the Ontario Superior Court; (ii) orders the recognition of the foreign representative PriceWaterhouseCoopers Inc.; (iii) accepts certain proposed guarantee mechanisms consisting in the segregation of a US$50m account to guarantee a minimum recovery for creditors in Colombia in the event of a judicial winding-up process; (iv) orders the submission of weekly cash-flow reports of the foreign representative; (v) contains a Caution order directing the payment of certain creditors (suppliers, taxes, payroll, etc.) up to a total value of US$318m from cash held in bank accounts, trusts, and the collective resources of Grupo Pacific from the operation of branches or deriving from the "*DIP Indenture*" entered into as part of the restructuring arrangements; (vi) orders the registration of the Caution order as a real estate guarantee in the Registry of Real Estate Guarantees; and (vii) orders the submission of a supplementary cash-flow statement containing a payment program for local liabilities. |

[1] For Spanish version of this article see https://www.insol.org/library/opendownload/1340

| Decisions of the Superintendence Office/Requests of Grupo Pacific | Date | Orders of the Superintendence Office |
|---|---|---|
| Request 2016-01-472156 | 20-09-16 | This Request requests the lifting of the caution order. |
| Decision 400-015030 | 30-09-16 | This Decision denies the request for the lifting of the caution order. |
| Request 2016-01-512763/2016-01-512937 | 18-10-16 | This Request requests the replacement of the caution order. |
| Decision 400-016468 | 25-10-16 | This Decision accepts the request for the replacement of the caution order previously ordered and changes it for the affectation of goods (US$39m) via a trust. It lifts the caution order decreed by Decision 400-000416. |

The Superintendence Office approached the question of recognition by considering the application of article 105[2] of Law 1116 of 2006, specifically the paragraph that provides:

"*…The recognition of the foreign insolvency process of a foreign branch in Colombia will result in the opening of the insolvency process thereof in accordance with the Colombian rules in relation to insolvency*."[3]

In recognizing the Canadian proceedings[4], the Superintendence Office held that the opening of insolvency proceedings of branches proceeds only in the event that such branches are assumed to have ceased making payments and does not follow as the effect of the recognition in Colombia of the foreign insolvency proceedings of the owner of the branch.

In addition, in granting recognition, the Superintendence Office, pursuant to article 107 of Law 1116 of 2006 *(Protection of creditors and other interested individuals)*, ordered the caution order as guarantee even though this is not expressly contemplated in or required by the cross-border insolvency regime as a consequence of the recognition of the foreign proceedings. However, the Superintendence Office was of the view that the guarantee was justified as a safeguard in order to ensure "*a minimum recovery for Colombian creditors in the event of a possible judicial winding up process.*"[5]

The Superintendence Office, with the orders issued, prioritized the defense and payment of local creditors (by promoting the interests of suppliers, tax creditors and employees to the status of guaranteed creditors) over the objective of the coordination of proceedings in all relevant jurisdictions in the benefit of all creditors. In so doing, the Superintendence Office disregarded the risk that its orders and stipulations represented for compliance with, and implementation of, the CCAA plan from the perspective of all creditors (i.e. those located in Colombia and abroad). Such an approach clearly represents a territorial approach which disregards the objective of (relative) universality underlying the regime for the recognition of foreign proceedings under the UNCITRAL Model Law on Cross-Border Insolvency.

The Superintendence Office opined that the "possible measures to be granted" and relief available under the cross-border insolvency regime adopted by Law 1116 of 2006 include caution measures for the protection of local creditors without invoking articles 102 (*Measures that may be granted upon the request for the recognition of a foreign process*) and 106 (*Measures that may be granted upon the recognition of a foreign process*) of Law 1116 of 2006 (which do not themselves expressly refer to the measures ordered by the Superintendence Office regarding the assets of the branches).

The CCAA proceedings were also recognized by the US Bankruptcy Court for the Southern District of New York under Chapter 15 of the US Bankruptcy Code.

[2] Law 1116 of 2006. Art. 105. Effects of the recognition of a principal foreign process.
[3] This paragraph does not correspond to any of the provisions contained in the UNCITRAL Model Law of Cross-Border Insolvency but was nonetheless included in the Colombian enactment of the Model Law.
[4] Decision 400-000416
[5] Decision 400-015030

# *UNCITRAL New Model Law on Enterprise Group Insolvency*

**By Irit Mevorach***
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UK

A major gap in the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) of 1997 has been the absence of specific provisions for enterprise groups. The global financial crisis revealed the impact of this gap. When the Lehman Brothers group collapsed in 2008, multiple proceedings were opened around the world and there were limited mechanisms to coordinate solutions. The collapse of Nortel in 2009 further exposed the difficulties in allocating enterprise value among the various subsidiaries and across borders.

A new Model Law on Enterprise Group Insolvency (MLEGI),[1] adopted by UNCITRAL in July 2019, complements the MLCBI as well as the UNCITRAL Legislative Guide Part three.[2] Part three of the Legislative Guide, introduced in 2010, set forth best practice recommendations on the treatment of enterprise groups in insolvency. It proposed that legal systems adopt the doctrines of procedural coordination and (for more exceptional circumstances) substantive consolidation.[3] It also provided certain recommendations concerning the international aspects of enterprise group insolvency.[4] However, especially with regard to international groups, the Guide did not provide a uniform framework.

The new MLEGI is designed as law for uniform adoption with limited modifications. It is tailored for groups and takes account of the diversified nature of group enterprises, contemplating a range of approaches for the resolution of their insolvency. In addition to provisions regarding cooperation and coordination between courts and insolvency representatives,[5] the MLEGI introduces a new concept of a 'group insolvency solution'.[6] Such solution may be a reorganization, sale or liquidation for the group as a whole or for a relevant part thereof that can pre¬serve, protect, realize or enhance value. The group solution would be developed in a 'planning proceeding', which is a main proceeding[7] commenced with respect to an enterprise group member that is likely to be a necessary and integral participant in that group insolvency solution. A group representative is appointed in such proceeding and other group members participate in it for the purpose of developing and implementing a group insolvency solution.

The group representative may seek a range of relief, both in the planning forum[8] and, following an application for recognition, in foreign countries to support the development and implementation of a group insolvency solution.[9] Such relief includes, *inter alia*, a stay on executions, transfers, actions, the entrustment of the administration or realization of local assets to the group representative and the examination of witnesses. Courts in host jurisdictions may also avoid opening (or stay) local proceedings if creditor rights are safeguarded – the MLEGI provides specific measures to minimise the opening of multiple proceedings through the giving of an undertaking concerning the treatment of local claims.[10] These measures can be invoked not only regarding non-main but also (in 'supplemental provisions') to minimise the opening of main proceedings.[11]

The MLEGI may have greater potential to result in optimal outcomes in enterprise group cases compared with the equivalent regime for enterprise groups provided in chapter V of the EIR. Under the EIR the powers of the coordinator are somewhat limited and it is also explicitly prohibited to propose any form of consolidation of proceedings or of insolvency estates.[12] The MLEGI relief provisions are more flexible, they also include 'any additional relief that may be available' under the local law,[13] and as aforementioned, the MLEGI provides mechanisms to minimise multiple proceedings. The MLEGI does require active adoption by countries and this process may take a while. Wide adoption can be encouraged if important economies take the lead. If many countries follow and enact the new regime, it can increase preparedness for future insolvencies and crises. The regime can be specifically useful for large decentralized groups where a mutual COMI of all group members is not readily identified. In such situations, the MLEGI provides the means to plan and to implement a group solution through a concentrated process in a planning forum, supported by the host jurisdictions of group members.

* Professor of International Commercial Law and Co-Director of University of Nottingham Commercial Law Centre. The author participated as a UK delegate and previously as a World Bank delegate at UNCITRAL in the development of the Model Law discussed in this article. All comments made here regarding this instrument are in a personal academic capacity, however, and do not necessarily represent the views of these delegations or of other participants in the Working Group.

1 UNCITRAL Model Law on Enterprise Groups Insolvency (2019); https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlegi_-_advance_pre-published_version_-_e.pdf (advanced copy) ('MLEGI').
2 UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of Enterprise Groups in Insolvency (1 July 2010).
3 Ibid, recommendations 202 et seq, 219 et seq. Additional recommendations deal with post-commencement finance, avoidance transactions in the context of enterprise groups, reorganization of enterprise group members and appointments of single representatives.
4 Ibid, recommendation 239 et seq.
5 MLEGI, art 9 et seq.
6 Ibid., art. 2.
7 Or a proceeding that has been approved by a court with jurisdiction over a main proceeding (ibid).
8 Ibid, art 19 et seq.
9 Ibid, art 21 et seq. The representative may also seek provisional relief (art 22).
10 Ibid, arts 28-31.
11 Ibid, arts 30, 31. See also art 32.
12 EIR, art 72(3).
13 MLEGI, art 20(1)(h), 24(1)(i).

# The Italian Code of Business Crisis

**By Giorgio Cherubini and Giovanna Canale**
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In Italy, restructuring matters have to date been governed by the Royal Decree n°267/1942. However, the current legislation has been the subject of an important revision, since, on January 12, 2019, The Code of Business Crisis and Insolvency (the "Business Crisis Code") was enacted by Legislative Decree n° 14 of, published in the Official Gazette dated February 14, 2019. The Decree implements the Law n° 155 of October 19, 2017[1].

The Legislative decree consists of 391 articles: a code of considerable complexity, the aim of which is, first of all, to allow the timely detection of a crisis that could affect a company, and secondly, to protect the entrepreneurial business during such a crisis.

The Business Crisis Code contains certain provisions that came into force just 30 days after the publication of the Legislative Decree in the Official Gazette, while others will come into force in August 2020.

In this article, we examine only the provisions that came into force immediately, which are the following:

**> Article 356**, which provides for the establishment at the Ministry of Justice of a Register of Experts who will perform, if appointed by the Court, the functions of receiver, judicial commissioner or liquidator, in the procedures provided for in the Business Crisis Code. This provision is intended to ensure that the relevant mandates are assigned to experts of proven experience and integrity.

**> Article 375**, which introduces new provisions in respect of the organizational structure of a company and reformulates the wording of article 2086 of the Italian Civil Code on the management of a company. Regarding directors' liabilities, the new provisions require directors to apply a higher degree of attention in a situation of crisis, in order to help exempt them from the criminal provisions foreseen by the legislator.

**> Article 378**, which introduces changes regarding directors' liabilities as amendments to articles 2476[2] and 2486[3] of the Italian Civil Code.

A new paragraph in article 2476 of the Italian Civil Code introduces a provision by which the directors of limited liability companies can be liable to the company's creditors in circumstances in which the assets of the company are insufficient to satisfy their claims.

The objective of the new provision is to help ensure the directors act more responsibly in carrying out their duties to preserve the company's assets.

Article 2486 of the Italian Civil Code governs the directors' powers in the period between the occurrence of a dissolution and the time at which the assets of the company are delivered to the liquidators.

**> Article 378** of the Business Crisis Code provides that, in the event the liability of directors is established, and absent evidence of an amount being available to compensate the damage caused by the directors' actions, the director must pay an amount equal to the difference between:

a) the net worth of the company at the time the director ceases his/her duties; or

b) the net worth of the company at the date of opening of the judicial liquidation procedure,

and, in either case, the net worth at the time a cause for dissolution occurs.

All costs incurred and to be incurred are deducted from this difference and, if the company's accounting records are missing or its net worth cannot be determined because of irregularities in the records or for other reasons, damages are liquidated in an amount equal to the difference between the company's ascertained assets and liabilities.

**> Article 379** of the Business Crisis Code introduces important changes the effect of which is to extend the circumstances in which the controlling body or the auditor are required to be appointed by limited liability companies.

With regard to the previous wording of Article 2477 of the Italian Civil Code – which prescribes the circumstances in which limited liability companies must appoint a controlling/auditing body – the thresholds of total assets, revenues from sales and services, and average number of employees during the last year are reduced and, according to the new provisions, the appointment of the controlling body or the auditor indicated at article 379 becomes mandatory for companies which have exceeded at least one of the following limits for two consecutive years:

- two million euro of assets;
- two million euro of revenues; and
- ten employees employed during the year.

The objective of these changes is to facilitate the detection and timely management of a crisis.

It will be clear from the above discussion that the purposes underlying the reforms are to help preserve the company as a going concern and to facilitate the taking of affirmative action by companies and their directors at an earlier stage, in order to prevent crisis situations deteriorating into insolvencies.

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1 The contents of which was drafted by the "*Rordorf Commission*", established by the Minister of Justice by a Decree dated October 5 2017.

2 Article 2476 Italian Civil Code: "*The directors are jointly liable towards the company for damages deriving from non-compliance with the duty imposed on them by law and the articles of association for the management of the company. However, the liability does not extend to those who prove to be without fault and, being aware that the act was to be carried out, have expressed their dissent.*
*Shareholders who do not participate in management have the right to receive from the directors up-to-date information about the position of the business and to consult, including through appointed professionals, the company's books and records relating to management of its business.*
*The liability action against the directors is promoted by each shareholder, who may also request, in the event of serious irregularities in the management of the company, that a precautionary order of revocation of the directors be adopted…*
*Unless otherwise provided in the articles of association, the liability action against the directors may be the subject of a waiver or settlement by the company, provided that a majority of the shareholders representing at least two-thirds of the equity vote in favor and provided that members representing at least one-tenth of the equity do not oppose.*
*The provisions of the preceding paragraphs do not prejudice the right to damages of each shareholder or a third party who has been directly damaged by wilful or negligent acts of the directors…" Please note that this is the wording of the article before the reform.*

3 Article 2486 Italian Civil Code - Directors' powers - : "*Upon the occurrence of an event of dissolution and until time of the delivery referred to in Article 2487-bis, the directors maintain the power to manage the company for the sole purpose of maintenance of the integrity and value of the corporate assets.*
*The directors are personally and jointly liable for any damage caused to the company, the shareholders, the creditors of the company and third parties for action or omissions in breach of the provisions of the previous paragraph.*"

# RICHARD TURTON AWARD 2019

*The Richard Turton Award is an annual award providing an educational opportunity for a qualifying participant to attend the INSOL Europe Congress and have a technical paper published. We would like to congratulate this year's award winner* ***Odwa Ngxingo****, ASOC Management Company (Pty) Ltd., South Africa. The summary of his paper is featured below. The full paper, as well as information about this award and papers by previous winners can be found at* ***https://www.insol.org/turton-award****.*

## *Attitudes towards investing capital in restructuring and turnaround situations, and the multiplier effects deriving therefrom*

The 2019 INSOL Europe Congress, convened in Copenhagen, explored practical considerations and intricacies encountered in special situations under the theme (un)necessary restructuring, which spoke to the "(un)fortunate" reality that some businesses may not be worth saving in cases where survival will have a net negative ripple effects on industries and economies in the long run.

It is exciting to observe the development of, and to work in, an environment that advocates for renewed focus, investment, education and positioning of resources towards opportunities in distressed, restructuring and turnaround situations. I am convinced that effective collaboration among insolvency, business recovery, restructuring practitioners, and capital dedicated for distress and special situations can afford a better chance for successful rehabilitation of businesses, preservation of value, recovery of profitability, and the revitalisation of credit markets among others.

The negative ripple effects that poor performance and distress have on economies are undeniable, though in some instance distress and failure become catalysts for dramatic change, making way for innovation and growth; the words of Joseph Schumpeter, the "gale of creative destruction" describe the "process of industrial mutation that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one".

In many ways the preservation of even a single business, can curb and reverse a downward spiral of negative ripple effects, and instead yield significant social returns over and above the potential economic returns. For instance, saving jobs that could have otherwise been lost helps limit or prevent the worsening of dire social consequences as a result of:

- Numerous families losing a source of income; possibly the only income stream in some instances;
- Increase in inequality, debt levels, poverty, tensions within families and communities, crime, homelessness, and erosion of confidence and self-esteem; and
- Negatively impacting the government tax base and therefore the government's ability to fund socio-economic beneficial initiatives.

Distress and failure of businesses, especially those that provide vital products and services, often compromise the state of an economy, contribute to the depletion of efficiencies in financial and commercial markets, and make it hard for big and small enterprises whose ecosystem relies heavily on the distressed company.

While capital investment into special situations is critical, the flow of capital into these situations, especially in emerging markets, has partly been muted by scepticism. Some aspects of the scepticism are well warranted, as some funders have previously been burnt and will be wary of what may appear to be "messy" situations. In the words of Mark Twain "history doesn't repeat itself, but it often rhymes"; in the case of funding distressed businesses, past experiences, especially painful ones, leave a lasting impression, resulting in sticky emotional biases.

Emotional biases inform the nature of attitudes that providers of capital may have towards difficult situations. Among emotional biases prevalent amid capital providers (funders) in distressed situations are the following:

- *Regret-aversion bias* - where people try to avoid the pain of regret associated with bad decisions.
- *Status quo bias* - where people are generally more comfortable keeping things the same than with change and thus do not necessarily look for opportunities where change is beneficial, leading to failure to explore other opportunities.
- *Loss-aversion bias* - supported by several studies suggesting that, psychologically, losses are significantly more powerful than gains.

The presence of these biases and limited exposure to different asset classes and / or investment strategies cause providers of capital to operate within parameters that (i) they may be familiar with, and (ii) mirror those parameters which are followed by those around them. As a result, herding and group thinking trumps exploring new opportunities which could potentially yield higher social and economic returns. Perceptions and thinking around special and distressed situations investing must evolve as an enabler to efficient distressed markets.

Special and turnaround situations present opportunities for impactful and developmental investing potential, as well as investment diversification by virtue of the countercyclical nature of distressed investing. It is worth acknowledging that in some instances the resistance and avoidance of distressed investment opportunities could simply be a factor of limited pools of capital in certain jurisdictions with tight restrictions and little-to-no wiggle room as dictated by investment mandates, where the opportunity cost of any spend and investment needs to be carefully considered within tighter limits, possibly resulting in investors avoiding opportunities that may take a longer time to understand and approve.

It will take a lot more work, time and deep investment into emerging markets such as those in the African continent, to enable a shift in perceptions towards distress and turnaround situations, to enable more capital flow and investment into distressed economies and businesses, as well as enable a catch up with the rest of the world's most developed markets.

Organisations, such as the International Finance Corporation ("IFC") and others, are taking a global view in the way they design and invest in solutions that seek to have a world-wide impact and support the development of viable and sustainable distressed markets even across emerging and underserved markets. The IFC, through its Distressed Asset Recovery Program ("DARP") seeks to promote close collaboration in advancing the development of more efficient financial and distressed asset markets with the following envisaged benefits of well-functioning and vibrant distressed assets market in mind:

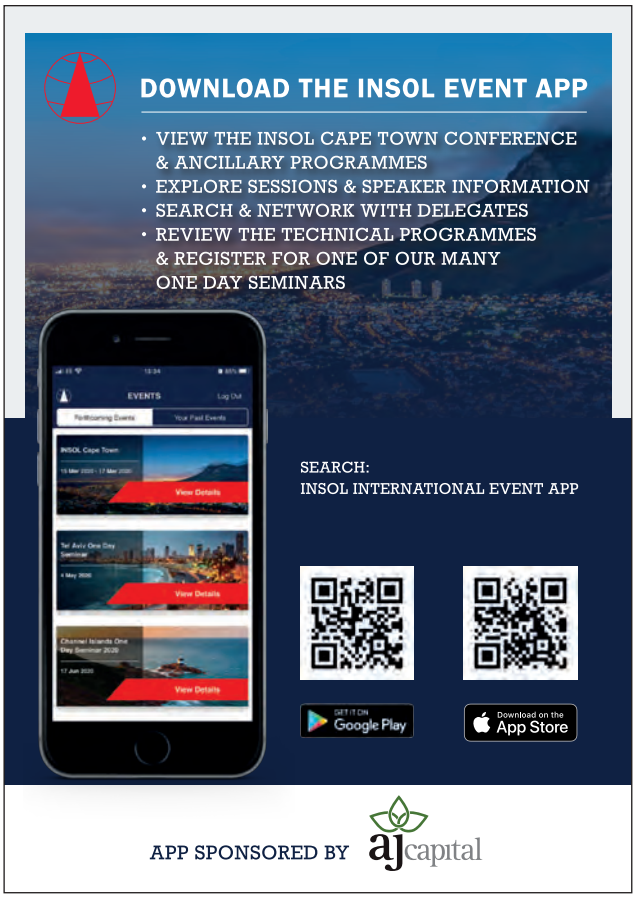
- For **investors**, a distressed assets market provides access to potentially attractive returns and diversification.

- For **banks**, maintaining a high level of non-performing loans ("NPLs") ties up an institution's capital in non-performing assets, putting pressure on long-term profitability and making it harder to absorb future losses and strengthen capital buffers. In addition, large NPL portfolios force banks to retain higher levels of capital, reducing their ability to provide new credit, and particularly rescue credit, which in turn can hinder economic growth as potentially good investments are postponed or abandoned.

- From a **policy** standpoint, a developed distressed assets market provides for an efficient and effective process for cleaning up banks' balance sheets, as it allows for the disposal of NPLs to private investors who bring greater efficiency, expertise, and financing to the workout process. A large volume of NPLs can undermine the reliance on the banking system and erode economic growth.

Colaboration at an international level has become of critical importance, as businesses increasingly develop cross-border networks with exposure across multiple countries simultaneously increasing the risk exposure of banks and other creditors or funders and capital providers. Best practice and learnings shared globally to inform policy and market advancement among local bodies such as the South African Restructuring and Insolvency Practitioners Association ("SARIPA:) and international organisations such as INSOL International will help accelerate the design and implementation of best practices across the African markets.

In the words of Dr Eric Levenstein, "effective corporate rescue procedures promote economic and social stability by preserving the value of assets represented by an insolvent or borderline solvent company (where survival of the company, or its business, as a going concern is likely more profitable than a break-up sale of the company upon liquidation), and by preserving the jobs of employees". Readily available capital and a well-equipped and competent body of insolvency, business recovery and restructuring practitioners precede effective and sustainable change in the restoration of efficiencies and businesses to a place where governance, liquidity and financial controls, operations and human capital, among others are optimised and therefore grow economies and maximise investor returns.



# INSOL PRC One Day Seminars – 14 and 16 October 2019

## Report by Bankruptcy Law and Restructuring Research Center, China University of Political Science and Law

INSOL International one-day seminars were held in Beijing and Shanghai on 14 and 16 October 2019, respectively, with the theme of "cross-border bankruptcy and reorganization". Experts from the field of bankruptcy and reorganization, both domestically and abroad, presented on and discussed three topics: "The latest situation in China"; "Directors' duties and responsibilities"; and "Dealing with bond default-comparison of law and practice".

Seminar Co-Chair Professor Li Shuguang from the Bankruptcy Law and Restructuring Research Center of China University of Political Science and Law, representing the Main Organizing Committee, warmly welcomed the attendees and acknowledged the presence of Judge Liu Guixiang, member of the adjudication committee of the Supreme People's Court. At the commencement of the seminar, Judge Liu delivered a keynote address on "Implementation, reform, and improvement of China's bankruptcy law". Judge Liu discussed how to continuously improve the bankruptcy trial mechanism and guarantee trial efficiency by adhering to rule of law, marketization and overall coordination in the practice of China's bankruptcy law. He also put forward suggestions for improving the incentive and constraint mechanism for initiating bankruptcy proceedings, improving the creditor rights system, and promoting the reorganization-related system through the reform of China's bankruptcy law.

The first session focused on the updated regulations and measures of China's bankruptcy law. Dang Zhe of King & Wood Mallesons chaired the session and gave an overview of the new regulations and measures in China's bankruptcy law legislation, as well as the judiciary. Mr. Dang acknowledged that the legislative functions and values of China's current bankruptcy law were gradually being accepted by society. Professor Li provided a detailed analysis of the importance of the amendment of China's bankruptcy law. Professor Li proposed that in the general context of promoting supply-side reform and improving the business environment, improving the bankruptcy law framework could better reduce production capacity, through making "zombie" enterprises exit the market. Next, Judge Yu Lin from the Supreme People's Court introduced the main contents of the Judicial Interpretation III of the Enterprise Bankruptcy Law. Judge Yu proposed that the Interpretation could promote the implementation of the Bankruptcy Law under the current system framework and improve creditors' satisfaction with the bankruptcy procedures. Finally, Zuo Beiping of the Reanda Accounting Firm discussed the latest developments and prospect in China's bankruptcy practices. Mr. Zuo mentioned that a normalized bankruptcy trial mechanism needed to be established and kept under constant review in view of the increasing number of bankruptcy cases in China. Meanwhile, Mr. Zuo outlined typical problems encountered in current bankruptcy practices by reference to the case of ST Yanhu.

In Shanghai, the first session was chaired by Hao Zhaohui of King & Wood Mallesons, who was joined by Professor Han Changyin from Shanghai Jiao Tong University Law School, James He Dong of Deloitte and Liu Zhengdong of Shanghai Mhp Law Firm. The panel introduced and discussed the latest updates on China's bankruptcy laws.

The second session, chaired by Andrew Koo of EY (*Fellow, INSOL International*) focused mainly on the topics of Foreign Investment Law of China, the necessity and choice of reorganization for international investors and their investment/operation in China, and the impact of the new law on current and future foreign investment. Firstly, an overview of the highlights of the Foreign Investment Law was given by Roger Bischof, of Bonnard Lawson, (*Fellow, INSOL International*), illustrating the expansion of the scope of foreign investment, national treatment, proposal of the negative list, protection of intellectual property and commitment of the government.

Mr. Bischof also highlighted relevant issues involving indirect investment, variable interest entity joint ventures between Chinese natural persons and foreign investors, and issuing concerning the establishment of foreign-invested enterprises that need to be clarified. Secondly, Simon Chen from Chen & Co. outlined the main winding-up methods of foreign-funded enterprises, namely voluntary liquidation, compulsory exit, bankruptcy liquidation, reorganization or settlements and exits in specific fields. Mr. Chen addressed national treatment and competition neutrality in the liquidation of foreign-invested enterprises. Alexander Tang from Stephenson Harwood (*Fellow, INSOL International*) discussed the development of cross-border recognition and assistance in Hong Kong in the context of common law, and considered the appointment of temporary liquidators and the arrangements for cross-border reorganization in Hong Kong. Finally, Gavin Chi Weihong of Tiantong Law Firm addressed the Judicial Interpretation III of the Enterprise Bankruptcy Law. Mr. Chi believed that the Interpretation protects creditors' interests, benefits the optimization of the business environment, protects new money priority, and secures creditors' right to dissent and their "right to know".

The third session was chaired by Viola Jing of Allen & Overy, joined by Jonathan Hatch of Madison Pacific in Hong Kong, James H. M. Sprayregen of Kirkland & Ellis LLP (Past President, INSOL International), Kevin Song of Borrelli Walsh, and Wang Lingqi of Fangda Partners. The session mainly focused on the topics of directors' obligations and responsibilities. Mr. Sprayregen provided an overview of US bankruptcy law and directors' duties and responsibilities, including the duties of loyalty and care. Mr. Sprayregen also discussed the business judgment rule. Jonathan Hatch, who has served on boards of directors of companies in a number of domestic and overseas jurisdictions, shared his experience and insights as a matter of both law and practice. Wang Lingqi mainly discussed the concept of trust liability in China, the problems of bankruptcy transactions and the concept of a shadow director. Kevin Song discussed directors' duties of loyalty and care in China, as well as conflicts of interest-related issues in Chinese companies. Mr. Song expressed the view that, as a practical matter, directors' obligations and responsibilities deserve special attention and clarity as to the parameters of both is needed.

The fourth session, chaired by Professor Li, focused on dealing with bond defaults. This session discussed the impact of bond defaults on systemic risk and the speakers included Professor Li Shuguang, Gao Yanling, general counsel of China bond credit enhancement Investment Co., Ltd., Bing Guan of Freshfields Bruckhaus Deringer, Howard Lam, of Latham & Watkins (*Fellow, INSOL International*) and Ron Thompson of Alvarez & Marsal. Gao Yanling analyzed the phenomenon of bond defaults in China, and expressed the view that rigid payment is inconsistent with the laws of the market. Howard Lam and Ron Thompson addressed international bond defaults. They believed that corporate default would lead to industry default, and cross-default could lead to systemic risk. Mr. Lam and Mr. Thompson also discussed the negative impact of bond defaults on financing by reference to the example of the photovoltaic industry. In their view, only by shoring up the regulatory body and establishing an open and transparent legal framework to protect creditors can we perfect the transaction system of defaulted bonds, improve the efficiency of dealing with bond default, and effectively remedy the interests of bondholders in distressed cases.

At the Shanghai seminar, Professor Li Shuguang was joined by Bing Guan, Howard Lam, She Li from the Shanghai Stock Exchange and Ron Thompson, who compared and analyzed the differences between bond defaults in law and in practice.

Professor Li concluded the seminars and, on behalf of INSOL International, expressed gratitude to all the speakers and attendees, who had contributed so effectively to all the sessions, offering invaluable practical insights.

INSOL International would like to thank the following sponsors for their support:

Fangda Partners, Archer & Greiner PC, Campbells, Jiangsu Letian Law Firm and Latham & Watkins.


# INSOL Hong Kong One Day Seminar – 18 October 2019

## Highlights by Jacqueline Walsh

**Borrelli Walsh**
Hong Kong, Seminar Co-Chair

Following seminars in Shanghai and Beijing, INSOL International ended October at the epicentre with its one day seminar in Hong Kong. Despite Hong Kong facing its 19th week of political protests, the annual seminar in Hong Kong remained of interest to and was well attended by over 186 practitioners. The majority of practitioners were from Hong Kong and Mainland China, but the seminar also heralded international practitioners from Singapore, the UK, USA, India, and Australia.

Julie Hertzberg, President of INSOL International began the day with opening remarks. Liz Bingham, QC then took the floor and explained and addressed "*The Inclusion Dividend*". Practitioners were involved in the lively and thought-provoking conversation including the positive impact of inclusion by an employer and employee, the direct link between increased inclusion and a higher productivity and revenue and how leaders can be effective when developing inclusion in the workplace. The practitioners enjoyed two more sessions focused on the "*US-China Trade War*" and its effect on Asian business and practitioners and a session involving "*Mutual Arrangements and Cross-Border Cooperation*" between Hong Kong and Mainland China. The Honourable Justice Harris led the discussion with the help of Justice Wang Fang of the Shenzhen Bankruptcy Court and focused on the work undertaken by the two courts including the importance of understanding their important and respective roles.

Practitioners ended the morning with time to network over a gourmet lunch prepared at the Four Seasons.

Two sessions filled the afternoon covering the "*New Era of Artificial Intelligence*" which described advanced technology in litigation and banking and the role of people in an ever-changing world. It helped practitioners focus on whether they and their firms were ready for working in an age of advanced technology. The final session focused on "*Hot Topics and Trends in Hong Kong*" and discussed the Hong Kong Legislative Reform and highlights from the recently completed restructuring of Noble.

Practitioners ended the seminar with some informal networking over a drink (or two) at Liberty Exchange.

The day proved to be a very successful event for all attending and demonstrated that Hong Kong and its practitioners are at the epicentre of many current and developing issues facing practitioners in Hong Kong, Mainland China and internationally.

We would once again like to thank our generous sponsors for their support:
Briscoe Wong Advisory, Carey Olsen, Lipman Karas, Tanner De Witt, Harneys, Holman Fenwick Willan, Conyers, Duff & Phelps and Perun Consultants.

# INSOL International Tokyo One Day Seminar – 7 November 2019

**Highlights by Masahiko Chino,** KPMG FAS Co. Ltd.,
Seminar Co-Chair

**Hideyuki Sakai,** Anderson Mori & Tomotsune,
Seminar Co-Chair

**Yoshinobu Nakamura,** KPMG FAS Co. Ltd.,
Sponsorship Co-Chair

INSOL International held its second One Day Seminar in Tokyo at the Grand Prince Hotel, New Takanawa on 7th November 2019, which attracted over 120 delegates in attendance from 14 countries.

### Keynote

The keynote address was presented by Toshihide Endo (Commissioner of Financial Services Agency, Japan) which addressed the current financial market and administration in Japan.

### Cross-border Restructuring from Japan

In this session chaired by Mr Shin-Ichiro Abe, the panellists, who were involved in the well-known bankruptcy of Takata and other big cases, discussed their own experiences and challenges when restructuring such corporate giant. The discussion began with Tomohiro Okawa and Lorraine McGowen sharing the background and timeline of the case, followed by legal perspective discussions including the selection process of law and procedure in each country (Japan and EMEA) and Chapter 11 issues from the US perspective. Piotr Luc and Shoichi Shigeyama completed the panel and covered both the business and financial issues incurred, expressing how difficult it was to coordinate Takata's gigantic OEM network that consist of 57 companies worldwide. The panellists also shared their tips for the effective and smooth insolvency process for such complicated cross-border cases.

### Out of Court Workout Guidelines

The late Dr. Shinjiro Takagi left his pioneering footprint in establishing a guideline in Asian jurisdictions for harmonization of business restructuring procedures. Last year, the Asian Business Law Institute and International Insolvency Institute launched a project to formulate the guideline for in- and out-of-court restructurings involving select Asian jurisdictions. This session, led by the Hideyuki Sakai and consisting of Hon. Mr. Justice Jonathan Harris, Chiyong Rim, Blossom Hing and Debby Sulaiman, introduced the goals and current status of this very

challenging and first in history project from perspectives of Hong Kong, the Republic of Korea, Singapore and Indonesia.

### Alternative Capital Providers in Corporate Restructurings

This session, chaired by Masahiko Chino and consisting of panellists Nobuo Sayama, Masahiko Niimi and Orla McCoy, explored the practice and the evolution of the varied roles of alternative capital providers and how they can tackle such issues and challenges in Japan and Australia. Alternative capital providers such as PE and special funds/financial institution were specifically discussed, to illustrate the current problems in turnaround market and kind of solutions provided by them. Best practice on the restructuring sector and for the economy was also discussed, including DIP finance as well as pre-negotiated/packaged M&As.

### Prepare for the Future: Emerging Hot Topics

In this interactive session led by Yuri Sugano, an international panel provided insights into the cutting-edge developments that impact the restructuring cases such as artificial intelligence and digital disruption. The session began with Christian Toms discussing the necessity of AI technology and shared the trends within the restructuring industry. Brooke Hall-Carney, Debra Grassgreen and Sammy Koo also analyzed how such developments might change future restructuring cases and roles of stakeholders in restructurings, which inspired insolvency professionals how to prepare for the AI revolution.

The seminar was hugely successful, not only to mention the vigorous discussion regarding the prepared agenda, but also the great intercultural interaction between delegates from different countries. Our thanks to the sponsors of the seminar: Anderson Mori & Tomotsune, KPMG FAS Co., Ltd., Abe, Ikubo & Katayama, Deloitte Tohmatsu Financial Advisory LLC, Frontier Management Inc., Gordon Brothers Japan Co., Ltd., Mori Hamada & Matsumoto, Nagashima Ohno & Tsunematsu, Oh-Ebashi LPC & Partners, PwC Advisory LLC, Pwc Japan Group, Nishimura & Asahi and EY.

## INSOL International Academic Group

# INSOL SCHOLAR AWARD

As part of INSOL International's commitment to working more closely with its academic members, INSOL is looking to appoint a scholar every two years for a period of two years. The purpose of the INSOL Scholar Award is to work with a senior scholar on a specific area of research for the benefit of not only the academic members but also for the benefit of INSOL International's general membership.

Applications for the INSOL Scholar Award for 2020/2021 closed on 31 October 2019. There has been huge interest in the Award, reflected by the high number of very strong applications and interesting paper proposals received, making the selection of a Scholar a particularly difficult task for the independent panel appointed for this purpose.

We are delighted to announce that the recipient of the INSOL Scholar Award for 2020/2021 is **Professor Gerard McCormack, University of Leeds, UK,** who will be writing a research paper on *"Priorities and Fairness in Insolvency and Business Restructuring"*.

Gerard is a long-standing member of INSOL International Academic Group and frequent speaker and attendee at INSOL Academic Colloquia. We congratulate Gerry on his appointment and look forward to working with him over the next two years in his capacity as the INSOL Scholar.

# In Memorium: Peter Horrocks

Family, friends and professional colleagues across the world have mourned the passing of former partner, Peter Horrocks, after a short illness. On any measure, Peter was one of the finest restructuring lawyers of his generation. He was a pioneer in the management of complex, cross-border, restructurings and insolvencies who combined an ability to master the most technically challenging of situations with a sound instinct for the business imperatives of the clients and the firm.

Peter Horrocks joined Lovell White and King, one of Hogan Lovells' predecessor firms in 1970. He was elected to the partnership in 1975 at the age of 30. Over the next 23 years, Peter became a key member of the firm's restructuring and insolvency practice. In that time, his cases included acting for the sequestrators (receivers) of the National Union of Mineworkers, during the 1984/85 miners' strike. At the same time Peter was lead partner on the IOS fraud and insolvency, a role that he won when helping to establish one of Lovells first overseas offices in New York. In the course of his work on IOS, Peter formed lifelong friendships with Victor Barnett and John Meek. They worked on the Canadian aspects of the matter. IOS was one of the earliest major international insolvency and asset recovery cases. It was the job in which Peter made his name, both as an international restructuring practitioner and as an innovative lawyer, one who was always willing to think outside the box.

Most notably of all, Peter led the Hogan Lovells team advising the liquidators of the Bank of Credit and Commerce International Group, with all of Luxembourg, the United Kingdom and the Cayman Islands as major theatres of operation. BCCI remains one of the biggest and most complex cross-border insolvencies of all time. At its peak, Peter and his Hogan Lovells colleagues were supporting the Deloitte liquidation team in managing BCCI's operations in sixty jurisdictions. Peter led negotiations or litigation with governments and regulators in all of the US, Luxembourg and the United Kingdom. When the BCCI case concluded in 2013, creditors had been repaid in excess of 90% of the sums due to them – one of the most successful insolvencies of all times.

In addition to his client work, Peter was a cornerstone of the restructuring profession. He was a founder member, with James Lingard and Hamish Anderson of Norton Rose Fulbright and Mark Hyde of Clifford Chance, of the Insolvency Lawyers' Association and played key roles in INSOL (where he was one of the earliest members) and R3. These are respectively the international and United Kingdom educational and lobbying bodies for the restructuring profession. As one of the pioneers in the cross-border insolvency market Peter played a very active role in the early years of INSOL working with the late Stephen Adamson, Ron Harmer and other market leaders of those days.

Peter's colleagues, friends and competitors all speak of him as a man for kings and paupers in equal measure who went about his work without fear or favour. He was as confident, direct and frank when speaking to the ruler of Abu Dhabi as he was thoughtful, kind and empathetic in sharing his time with support staff and junior colleagues. Those who were lucky enough to work with and be mentored by Peter all speak of a man who was a hard task master, utterly loyal but who never pulled his punches.

Woe betide those whom Peter felt were not giving of their best and in so doing, failing to meet his exacting standards. Those who *did* give of their best found in Peter the most loyal and supportive mentor with a wonderful (and sometime wicked) sense of humour! Peter was years ahead of his time in terms of client care, business development and the way in which he could seamlessly run the most complex of matters.

Away from the office, Peter was a devoted family man with a keen interest – and numerous shares in – various thoroughbred race horses. This lifelong interest in the turf dated back to Peter's time as an articled clerk, when successful betting had on occasion met any shortfall between the salary of an articled clerk and his train fares between Epsom and the City of London.

Peter was also for many years captain of his local village cricket club. It was almost certainly no coincidence that the garden of his family home ran right up to the border of the cricket ground. One of Peter's former trainees speaks fondly of being summoned, in the middle of an important client meeting, to attend to a task of even greater significance than the legal business under discussion. Peter – and his clients – needed to know in short order how England was doing in the latest Test Match.

With his passing, the restructuring profession has lost one of its true "greats". The profession and those who knew Peter well have much to be thankful for and we are all the poorer with his passing.

**Joe Bannister**
Hogan Lovells

# Conference Diary

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| **January 2020** | | | | |
| 17 | INSOL International New Delhi One Day Seminar | New Delhi, India | INSOL International | www.insol.org |
| **February 2020** | | | | |
| 3-5 | ABI Caribbean Insolvency Symposium | Puerto Rico | ABI | www.abi.org |
| 5-7 | TMA Distressed Investing Conference | Las Vegas, NE | TMA | www.turnaround.org |
| 7 | CAIRP Annual Review of Insolvency Law Conference | Vancouver, BC | CAIRP | www.cairp.ca |
| 13 | INSOL International Mexico City One Day Seminar | Mexico City, Mexico | INSOL International | www.insol.org |
| 26-28 | ABI VALCON 2020 | Las Vegas, NE | ABI | www.abi.org |
| **March 2020** | | | | |
| 4-5 | NAFER International Conference | Miami, FL | NAFER | www.nafer.org |
| 14-15 | INSOL International Academic Colloquium | Cape Town, SA | INSOL International | www.insol.org |
| 15 | INSOL International Offshore Ancillary Meeting | Cape Town, SA | INSOL International | www.insol.org |
| 15-17 | INSOL International Annual Regional Conference | Cape Town, SA | INSOL International | www.insol.org |
| **May 2020** | | | | |
| 13-15 | R3 Annual Conference | Windsor, UK | R3 | www.r3.org.uk |
| 21-22 | INSOL Europe Easters European Committee Conference | Kiev, Ukraine | INSOL Europe | www.insol-europe.org |
| **June 2020** | | | | |
| 17 | INSOL International Channel Islands One Day Seminar | St. Helier, Jersey | INSOL International | www.insol.org |
| **October 2020** | | | | |
| 1-4 | INSOL Europe Annual Congress | Sorrento, Italy | INSOL Europe | www.insol-europe.org |
| **March 2021** | | | | |
| 14-17 | INSOL International World Quadrennial Congress | San Diego, CA | INSOL International | www.insol.org |

# Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociación Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Associação Portuguesa de Direito da Insolvência e Recuperação
Association of Business Recovery Professionals - R3
Association of Restructuring and Insolvency Experts (Channel Islands)
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Business Recovery Professionals (Mauritius) Ltd
Canadian Association of Insolvency and Restructuring Professionals
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
INSOL Europe
INSOL India
Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
Instituto Brasileiro de Estudos de Recuperação de Empresas
Instituto Iberoamericano de Derecho Concursal
Instituto Iberoamericano de Derecho Concursal – Capitulo Colombiano
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Korean Restructuring and Insolvency Practitioners Association
Law Council of Australia (Business Law Section)
Malaysian Institute of Accountants
Malaysian Institute of Certified Public Accountants
National Association of Federal Equity Receivers
NIVD – Neue Insolvenzverwaltervereinigung Deutschlands e.V.
Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
REFOR-CGE, Register of Insolvency Practitioners within "Consejo General de Economistas, CGE"
Restructuring and Insolvency Specialists Association (Bahamas)
Restructuring and Insolvency Specialists Association of Bermuda
Restructuring Insolvency & Turnaround Association of New Zealand
South African Restructuring and Insolvency Practitioners Association
Turnaround Management Association (INSOL Special Interest Group)
Turnaround Management Association Brasil (TMA Brasil)

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