

Ep.84 - Redefining privilege for tort and public claims in Latin America

Intro Music: INSOL international, in conjunction with the Early Researcher Academics Committee, presents INSOL talks.

Kenneth Gharney (KG) (00.22): Hello and welcome to another episode of INSOL Talks on the topic *Redefining Privilege for Torts and Public Claims in Latin America*. I am Kenneth Gharney, a member of the INSOL Early Research Academics Committee and lecturer at the School of Law, University of Ghana. Today, my guest is Paul Noboa Velasco of the Universidad San Francisco de Quito in Ecuador. Paul won the first prize for the INSOL ERA Workshop presentations held earlier this year in May 2026 in London. This episode is an opportunity to bring Paul's winning presentation to a wider audience, both academic and non-academic. Welcome, Paul.

Paul Noboa Velasco (PNV) (01.11): Thank you Kenneth. It's great to be here. And thank you to the INSOL ERA committee for the invitation. I am really glad to have the chance to share this work with your audience.

KG (01.21): Great. Perhaps we should start, first things first. What motivated your decision to participate in the INSOL ERA workshop, and how did you find the experience both at the workshop and after the workshop?

PNV (01.37): Okay, thank you for the question and to responded. What motivated me was the chance to test ideas that our academic group at Universidad San Francisco de Quito has been developing on insolvency law, and to do so before an international community of scholars and practitioners. So insolvency is a field where Latin American voices are not usually heard, so the workshop felt like an adequate platform to bring a regional perspective into a global conversation. And the experience was fantastic. Better than I expected. To begin with, it was held in London, one of my favourite cities, and also the presentations were really strong. The feedback was really generous and it was great to meet other early researcher academics analysing similar problems from completely different angles. Also, winning the prize was a lovely surprise, and it kind of confirmed that the questions we were asking in Ecuador matter well beyond our country.

KG (02.34): Great, great. I would like to remind our listeners that the title of your presentation at the ERA Workshop, which is also the title of this episode of INSOL talks is *Redefining Privilege for Tort and Public Claims in Latin America*. What is the precise thesis of your presentation?

PNV (03.54): Okay, thanks for the question, Kenneth. And the main idea is pretty simple. Insolvency law shouldn't treat all creditors exactly the same, but it also shouldn't hand out priority just because that's how things have always been done. Priority should be earned and it should be based on two things. First, how exposed the creditor is, and second, whether they had any real chance to protect themselves before the insolvency situation happened. In that way, you can get two conclusions. First, employees and tort victims really do deserve preferential treatment because they cannot protect themselves in advance and they can end up really harmed.

And second, the most surprising one, in my opinion, the priority we traditionally give public creditors, like the tax authorities, for example, doesn't really hold up. And I think it should be reconsidered or at least reduced. These ideas come out of a book of insolvency law developed by the Ibero-American Institute for Law and Finance, edited by Aurelio Martinez and Adolfo Rouillon, which looks at how Latin American jurisdictions should regulate creditor rights, both from a legal and a functional perspective. And I'll be happy to discuss these during the interview as well.

KG (04.05): Great. Because you tend to come from a perspective of employees and public creditors, my first question to you would be, why would say employees and public creditors – why would they be typically privileged under insolvency law? And because you're coming with a Latin American perspective. Are they generally treated the same across Latin America?

PNV (04.32): Okay, that's a really good question. And both employees and public creditors have priority for very different reasons. For example, let's begin with employees. Employees get protection because they are in a much weaker position. When someone takes a job, for example, they usually don't know how much about, don't know much about the company's finances, and they rarely have the bargaining power to negotiate guarantees or more adequate conditions so they can protect themselves ahead of time. And this is the reason why the law responds by granting them priority.

In Ecuador, for example, labour claims even rank above secured creditors. And there is also a strong social side to this protection. Wages are often the only income a family has, so if you don't protect them, the damage spreads well beyond the individual employee. And now focusing on public creditors such as tax authorities. For example. In many jurisdictions, public creditors are also granted priority status and. The traditional justification for this treatment usually relies on arguments related to the public interest, as well as the idea that public creditors can negotiate the conditions of their claim in the same way as private creditors can.

However, from our perspective, these arguments are not sufficiently convincing to justify such a preferential position, and I'll be happy to discuss this later on. And now to finalize my answer. There is no single approach across Latin America, so protecting employees is fairly common. But the exact ranking, the scope and how public creditors are handled change quite a bit from one country to the next.

KG (06.14): Thank you for that. I can I can, for example, understand the, the unique treatment of employees within Ecuadorian law. If I would share a perspective, Ghanaian law also interestingly, um ranks employees above secured creditors in that same statement. But to follow up on what you, uh, the dynamic you bring about, whether it is justified to privilege public creditors, uh, do you think the privilege which is often giving public creditors is that peculiar to developing economies like Ecuador or and Ghana. And does it make sense to privilege public creditors say in more advanced economies do.

PNV (07.00): Okay, from my perspective, there are several reasons why the priority of public creditors may be problematic. First, it reduces the recovery available to ordinary creditors. This can create a chain effect where some of these creditors may themselves become insolvent due to their exposure. Second, at least in our jurisdictions, public creditors already enjoy significant advantage in comparison to private creditors. For example, they have typically, a have better access to information. They have more resources and a stronger legal enforcement mechanisms.

And also, it is worth mentioning that the state has the unique ability to define the legal framework governing its claims, including taxes, interest rates, and enforcement proceedings. And finally, I would also argue that states have broader access to financing, such as taxation powers and access to capital markets, which private creditors, especially small and medium sized enterprises, do not have.

For all of these reasons, we argue that, at least under our perspective and insider jurisdictions, the preferential treatment of public creditors is not justified and may even be inconvenient. And instead, public creditors should be treated in the same way as private creditors, or at least their priority should be significantly reduced. This would allow, from our perspective, for a more balanced distribution of losses, improve the recovery of ordinary creditors, and reduce the risk of additional insolvencies. And in the long term, we consider that this approach could also benefit the public sector itself by supporting economic activity and increasing future tax revenues. So to sum up, I do not think that it is justified to grant priority to public claims during insolvency proceedings.

KG (08.45): Okay. So I understand your argument against, you know, the general priority of public creditors. And, uh, one of the main criticisms against removing the priority of creditors, public creditors, is that the state steps in to recover claims sometimes tied to environmental remediation, etc., etc.. Would the treatment of public creditors or public claims as ordinary unprivileged claims, would that not be risky? And particularly for those industries that can create widespread environmental harm, could it not create incentives for companies to take on more irresponsible

activities or activities that harm nature? Knowing that, you know, those claims would eventually rank lower? What do you say?

PNV (09.39): I get your point. And that's a really a fair concern. And it's one I get asked a lot. But in Ecuador's case, there is something that changes the whole picture. It is worth mentioning that with the 2008 Constitution, Ecuador became the first country in the planet to grant legal personhood to the nature. And that has a very concrete consequence here. Claims tied to environmental remediation aren't really public claims at all in my country. Instead, nature itself becomes an independent creditor, one that can take part in insolvency proceedings on its own, in its own right.

So at least from an Ecuadorian perspective, redefining the priority of public creditors wouldn't touch the rights of nature because they see it in a different category altogether. In my view, the priority of nature's claims should be absolutely be kept, but as a preferential, not contractual creditor in the same group as tort victims rather than as a public creditor. And that actually fits the framework perfectly.

Nature never negotiated anything with a debtor company, for example. It can't protect itself in advance and the potential harm it faces is enormous. So the incentive concern is real. And that's exactly why keeping this priority matters. If a company knows it will have to cover the cost of the environmental harm it causes, it has a strong incentive to act carefully. So to sum up, we can eliminate the priority of public creditors and still protect the nature, because in Ecuador, nature has a separate legal personality. And I think that this is really an innovation that we have implemented here.

KG (11.16): It is very interesting to hear about the treatment of nature as having its own personhood. That's quite a very interesting concept for someone like me witnessing or hearing this for the first time. You also talk about the treatment of tort creditors within the scope of insolvency. Perhaps I'm curious and our listeners are from other parts of the world would also be curious. What's the nature of the treatment of tort victims generally? And is there, is that uniform, is there uniform treatment across Latin America?

PNV (11.56): Uh, no, not at all. There's not a uniform treatment across Latin America. And this is actually one of the areas that has been left the most underdeveloped in the region. Most of our systems were built around contractual and institutional creditors, so tort victims often don't have a clear, protected place in the ranking. A few jurisdictions elsewhere do give them priority. Spain is a good example. But across Latin America, their priority is often just missing. And that's exactly why I think it needs fixing.

Tort victims are a special case. Their claims don't come from a contract. They come from harmful events like an accident or environmental damage, for example. So they never chose to get involved with the debtor company. And because of that, they had no chance to negotiate anything in advance. And they often don't have insurance or any public compensation schemes to support themselves. So giving them priority makes sense on vulnerability grounds. And it also helps with moral hazard because if a company knows it will have to cover the harm it causes, it has a real incentive to be more careful.

That is more important in riskier industries like construction, transportation, or anything with an environmental footprint. So to sum up, there is not a uniform treatment of tort victim creditors in insolvency across Latin America. And I think that this is one of the points that should be addressed in our jurisdictions.

KG (13.26): Okay. Thanks for sharing the perspective. And just in discussing how the tort victim creditors should be treated in insolvency, you say that the priority should depend on vulnerability. What is the meaning and scope of this test of vulnerability. And is it capable of uniform interpretation at all?

PNV (13.49): Mhm. Right. That's a really good question. And I want to be clear here. When I say vulnerability, I don't mean it in a vague feel sorry for them way. I mean, something more concrete, a

creditor's inability to protect himself before insolvency arises, plus how badly he would be hurt if no one protects him. So it really comes down to two scenarios. The first one is could the creditor protect himself. Did he have the information enough bargaining power or the resources to negotiate the conditions of his claims? And the second is how bad is the damage if the claim goes unpaid?

Having this into consideration, employees score higher on both, because they can't negotiate protections, and wages are often all they have got. Tort victims score even higher because they never chose to deal with the debtor in the first place. Public creditors, on the other hand, scored very low because the estate is honestly one of the best positioned creditors out there.

Now, can this concept have a uniform interpretation? The two questions: Could a creditor protect himself and how much harm he faces work in any jurisdictions? But the answer in a given case depends on local realities, like whether a country has a strong social safety nets or a working compensation scheme. So the principle travels well, even if the fine tuning is local. And I actually think that's the strength because it gives regulators a starting point for reform while still respecting the differences that can be found across jurisdictions.

KG (15.24): Thank you, Paul, for sharing your thoughts on the vulnerability question, which you've just answered. Especially also because you, you, you're sharing these thoughts because you first presented them at the INSOL ERA workshop. I'd like to ask your views about the process for applying to participate in the INSOL ERA workshop, and what advice you have for early researcher academics who wish to submit abstracts in the future, and maybe tips for presentations, particularly for persons for whom English isn't a first language.

PNV (16.07): Okay, that's a really good question, Kenneth. Thank you for asking that. And first of all, I would recommend everyone, everybody that is interested in participating in these events to review the social media accounts of the INSOL ERA committee, where they are always promoting all the events and all the conferences that would be organized in the future. So that's actually how I realized that this workshop was going to be held in London this year, and that is the main reason why I applied.

It also caught my attention because as an early researcher academic, I am super interested in developing these discussions in Ecuador because unfortunately, insolvency law is not as well discussed as it should be here in, in, in my jurisdiction. So a word of advice to any early researcher academic that wants to be part of this is just to, to, to try and to give it a go, just to analyse all the potential that you can have by expanding your networking and by sharing your, your perspective with people from all around the world, from different backgrounds, it's a really enriching experience. And I would definitely encourage everybody that is interested in fostering and promoting insolvency law both locally, regionally, and also internationally to be part of this community.

KG (17.32): Great. Thank you so much for your time, Paul, and thank you to our listeners who have stayed with us on this edition of ENSO talks.

PNV (17.41): Okay. Thank you, Kenneth, and thanks, everyone for listening. I have really enjoyed this interview and I hope to see you in person soon.

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