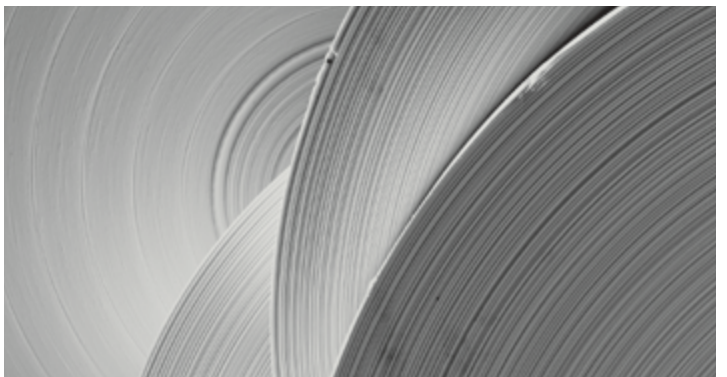


CLEARY GOTTLIB

Emerging Markets Restructuring Journal

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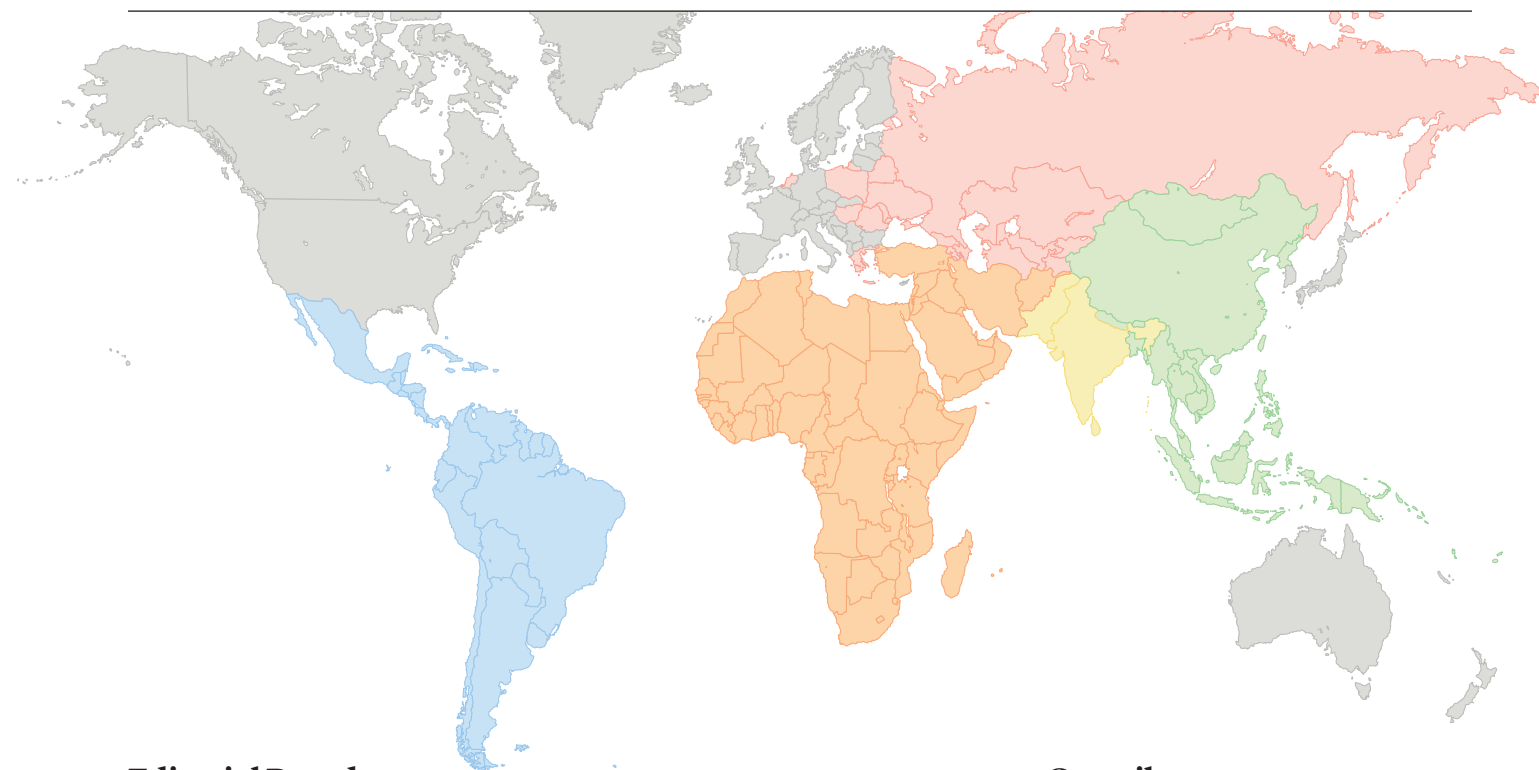
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Letter from the Editors



As we publish the 10th edition of the Emerging Markets Restructuring Journal, we thought it worthwhile to look back and see how the world has changed. Our first issue had extensively covered Brazil, at the time a hot market for restructuring activity – including an article on the then-completed restructuring of OGX, one of the earlier cases to make its way through an RJ proceeding. We had coverage spanning the globe – on schemes of arrangement in Nigeria, the use of English insolvency laws to restructure Russian companies, and new insolvency regimes in India and the UAE.



Some things have changed since 2016. Brazil seems to be turning a corner on corporate insolvencies, having watched many of its top companies wrestle their way through negotiations with creditors. The Indian insolvency reforms are no longer fresh news, but rather have transformed into a vibrant market for the trading of NPLs and corporate debt. (Our article on Indian bankruptcy law which looks back at some of the key developments in the past year.) In 2016, Argentine corporates were focused on tapping markets; by 2020, the markets are tapping back – as we note in our article on key considerations for Argentine creditors, the mood has shifted substantially.



And some things remain the same. The China Fisheries case in Peru, covered in our first issue, is still ongoing. There continues to be a strong interest in the development of insolvency laws in the Middle East as shown in two articles in our 10th issue. Global volatility continues to make insolvency and restructuring regimes relevant on a global level – in this issue, we have two articles on the growing restructuring market in Colombia, an article highlighting insolvency regulation in Uzbekistan, a discussion of challenges facing African sovereign debt, bank rescues in Russia and tax claims in Mexico.



We hope you enjoy this issue, and look forward to checking back in on the state of the world when we publish issue No. 20.

Polina Lyadnova, Adam Brenneman, Sui-Jim Ho, and Denise Filauro

Six Key Considerations for Argentine Creditors

By RICHARD J. COOPER, ADAM J. BRENNEMAN, CARINA S. WALLANCE and NATALIA REZAI



In the wake of Argentina's debt default in 2001 and ensuing banking crisis, the country's insolvency laws underwent several important reforms in the early 2000s and again in 2011. Until then, Argentina's Bankruptcy and Liquidation Law No. 24,552 (*Ley de Concursos y Quiebras*, "LCQ") focused on in-court reorganization and liquidation proceedings, which called into question the Argentine judicial system's ability to effectively and expediently handle bankruptcy proceedings at a time of macroeconomic and political crisis. In response to these shortcomings, and encouraged by the International Monetary Fund and international creditors, in 2002 Argentina amended the LCQ, most notably by amending a previously underutilized part of the LCQ that provided for an out-of-court reorganization proceeding called an *acuerdo preventivo extrajudicial* or "APE".¹

Following the enactment of the 2002 amendment, a handful of Argentine companies that had obtained significant financing

in the international loan and capital markets successfully restructured their debt pursuant to the revamped APE proceedings (and a number of others have used the threat of an APE or an in-court *concurso preventivo* proceeding to successfully consummate an out-of-court restructuring). Today, as Argentine debtors once again encounter challenging macroeconomic conditions, including a significant devaluation of the Argentine peso and high borrowing rates, the LCQ no doubt will once again become a useful tool to deploy and will define the parameters of in-court arrangements intended to address illiquidity and/or insolvency issues.

This article sets forth a brief overview of Argentina's LCQ, followed by a discussion of the various aspects of Argentine insolvency law that creditors and distressed Argentine debtors alike should consider in anticipation of a potential restructuring or liquidation proceeding.

Argentina's Bankruptcy and Liquidation Law

Today, Argentina's insolvency regime is made up of three alternative proceedings: (i) the in-court *concurso preventivo*, (ii) the APE and (iii) liquidation (*quiebra*).

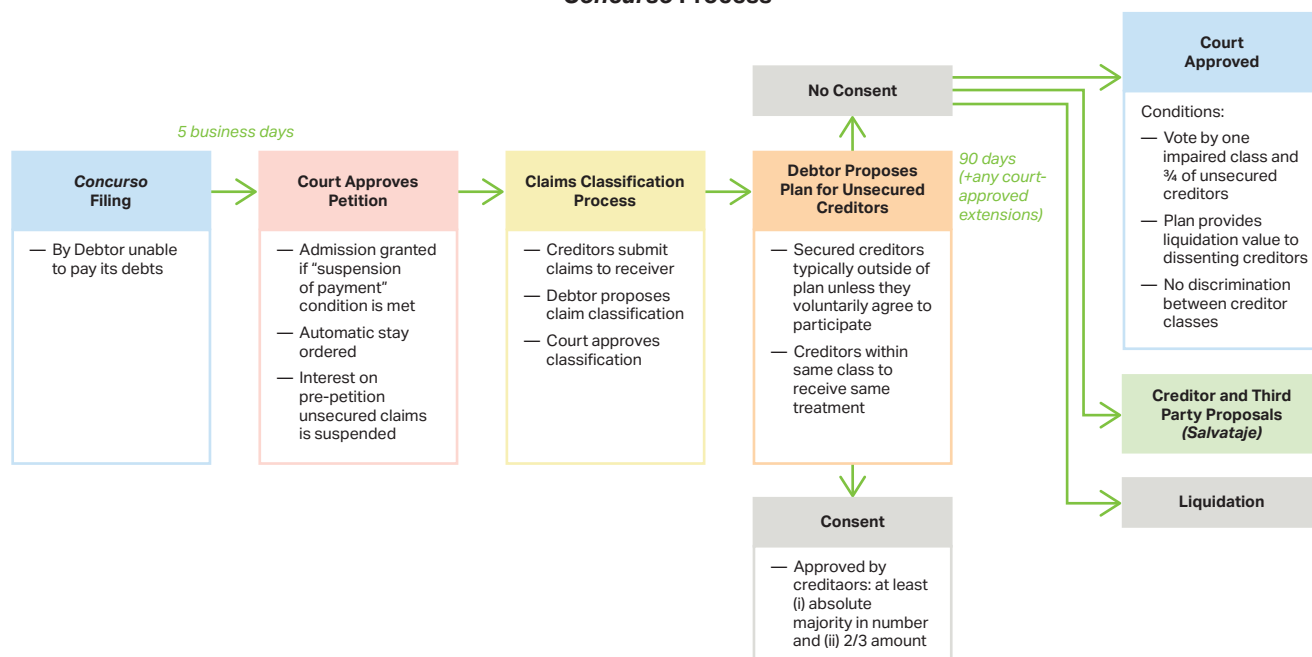
Concurso Preventivo

The in-court *concurso preventivo* is loosely akin to a Chapter 11 proceeding in the United States. A *concurso* proceeding may only be initiated by a debtor that is in a state of "suspension of payment" (*estado de cesación de pagos*) or unable to pay its debts as they come due. Once the debtor has filed for *concurso* and demonstrated to the court that it is in "suspension of payment," the court grants judgment commencing the proceedings. Creditors have fifteen to twenty business days following the debtor's publication of notice to submit their claims to a court-appointed receiver. Upon the court's approval of the register of claims, the debtor may elect to submit its own proposed classification of creditors to the court. Pursuant to the LCQ, such debtor's classification must contain, at a minimum, three classes of claims comprised of secured, unsecured and labor claims (to the extent they exist). All subordinated creditors must be classified together. Beyond these requirements, however, a debtor may propose such other classifications based on the reasonable characteristics of its creditors as it deems appropriate.

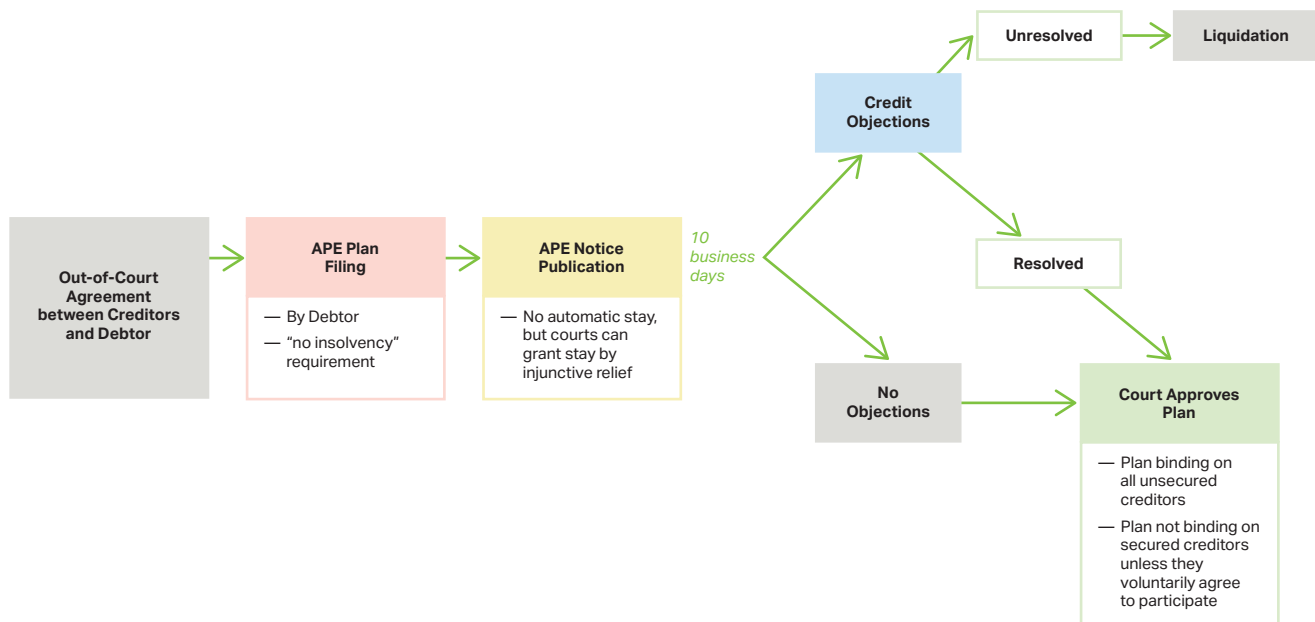
The debtor benefits from a ninety-business day exclusivity period, beginning on the date on which the court approves the debtor's proposed creditor classification, to submit a plan for its unsecured creditors and obtain the consent of the required majority of unsecured creditors.² The ninety-business day period may be extended by a maximum of thirty business days at the court's sole discretion. Although the debtor's plan may offer different terms to each creditor class, creditors *within* the same class must receive the same treatment. To be approved, at least a required majority of creditors must consent to the plan within the exclusivity period. Votes by controlling shareholders are excluded, and only creditors whose claims have been admitted by the court will be able to vote. Once approved by the court, the plan becomes effective and is binding upon all non-consenting creditors. In the event, however, that a debtor fails to consummate a *concurso* proceeding, the debtor or any creditor to whom a debt is due may then initiate *quiebra* proceedings.

As discussed below, secured creditors remain outside the plan unless they voluntarily agree to participate. However, if the court determines that the value of a secured creditor's collateral is less than the value of its claim, the creditor's claim with respect to the shortfall may be treated by the court as unsecured. Therefore, a *concurso* plan may be binding on the unsecured portion of a secured creditor's claim.

Concurso Process



APE Process



During the pendency of the *concurso*, the debtor’s management remains in place and the debtor continues to manage its assets subject to supervision by the court-appointed receiver. Certain material transactions and other actions falling outside the scope of the ordinary course of business, however, are either prohibited or require judicial authorization. Prohibited acts include transfers for no consideration or measures affecting the status of pre-petition creditors. The debtor is also subject to supervision by a creditor’s committee, which is formed by the court. The creditor’s committee originally consists of the debtor’s three largest unsecured creditors and an employee representative. The committee’s composition, however, is updated based on the debtor’s classification of its creditors to include a representative from each class of creditors.

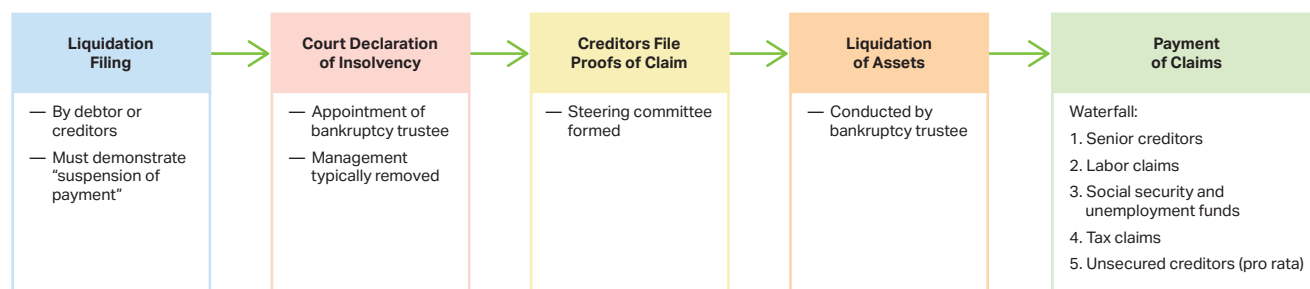
Acuerdo Preventivo Extrajudicial

The APE is an out-of-court voluntary proceeding, somewhat similar to a pre-packaged Chapter 11 filing in the United States. In an APE, the debtor negotiates with and procures the consent from the required majority of its creditors (which, as in the case of a *concurso* proceeding, requires creditors representing at least a majority in number and two-thirds in outstanding amount of the unsecured class) before formally initiating proceedings by filing the APE plan with the court for judicial approval. Commencement of APE proceedings can only be initiated by the debtor and typically requires approval from its board of directors. Unlike in a *concurso*, debtors are not

required to establish or declare themselves insolvent to file an APE, which often helps reduce the extent of disruption to the debtor’s operations; nevertheless, APE proceedings, like other pre-packaged insolvency proceedings, constitute an event of default under customary bankruptcy event of default triggers in the debtor’s debt instruments.³

A notice of the APE proceeding is published once the debtor has filed the restructuring plan with the court. Creditors have ten business days following the publication of the notice to file any objections to the APE, which are limited to objections on the basis that (i) the required majority of creditors has not agreed to the APE, (ii) the disclosure materials filed in connection with the APE are inaccurate, (iii) the substantive terms of the APE are fraudulent, contravene public order or unreasonably discriminate against certain creditors or (iv) the debtor has not complied with certain formal requirements in connection with the filing. The LCQ does not provide clear guidance as to what constitutes “unreasonable discrimination” against creditors; however, Argentine courts have found, for example, that APEs that propose to convert foreign-denominated contracts into peso-denominated obligations, where most of the debtor’s indebtedness was denominated in Argentine pesos, constitutes unreasonable discrimination against creditors. If no creditor objects within the ten-business day period, the LCQ provides for the court’s approval of the APE without conducting substantive review.

Quiebra Process



Courts, however, have interpreted the LCQ to provide that, even if no creditor objections are lodged, judges have the power to reject an APE if it does not meet certain basic fairness standards. Upon the court’s approval, the APE becomes binding on all *unsecured* creditors, including non-consenting unsecured creditors. Like a *concurso* plan, the APE is not binding on secured creditors (other than with respect to the unsecured portion of their claim) unless they expressly agree to its terms.

Quiebra

A *quiebra* or liquidation most closely resembles a Chapter 7 liquidation bankruptcy proceeding in the United States. Unlike the in-court and APE proceedings described above, which can only be initiated by the debtor, a *quiebra* may be initiated by either a debtor found to be in “suspension of payments” or by any of its creditors to whom a debt is due.⁴ In the case of secured creditors, creditors may initiate a *quiebra* when the value of its security is insufficient to cover its claim. Any creditor initiating a *quiebra* proceeding must also evidence to the court that the debtor qualifies as being in “suspension of payments.” Often, a *quiebra* results from a debtor’s failure to successfully consummate a *concurso* proceeding or to restructure through an out-of-court agreement. Debtors may also file for *quiebra* where a debt is made up primarily of secured debt held by a large number of creditors, or where its business is no longer viable.

Unlike in a *concurso*, management is removed upon the court’s declaration of insolvency and a bankruptcy trustee is appointed by the court. Following the trustee’s appointment, all secured and unsecured creditors must file proof of claims with the trustee (subject to certain exceptions, such as labor obligations) and, with limited exceptions, the debtor may no longer dispose of or manage its assets. A steering committee, formed by the bankruptcy trustee and comprised by the various

creditors, is tasked with performing certain management functions during the liquidation proceeding. Although courts have required debtors in *quiebra* to continue their operations in certain cases—e.g., where deemed necessary to protect the creditors’ interests or in the case of public utilities—the primary purpose of the *quiebra* is to liquidate the debtor’s assets.

Under the LCQ, the bankruptcy trustee must carry out auction proceedings within four months following the court’s determination of bankruptcy. In certain cases, courts may extend this period of time by an additional 30 days; in practice, however, the entirety of the auction process typically takes significantly more time. Factors such as the number of creditors, the complexity of the proceedings, challenges raised by the debtor, participation by the Public Ministry, amounts involved and the location and characteristics of assets may affect the amount of time it takes to liquidate a debtor’s assets. Participation by employees may also cause significant delays in *quiebra* proceedings, as reforms to the LCQ in 2011 provided employees greater say over the liquidation process, including the ability of employees to vote in favor of the continuation of the debtor’s business. Auction proceedings may take three forms under the LCQ; in all cases, however, the final distribution of proceeds among creditors whose proof of claim has been sanctioned by the court is made in accordance with the following order of preference: first, to creditors deemed by the court to have statutory seniority over a liquidated asset, which includes secured creditors; second, to certain labor creditors; third, to social security and unemployment fund entities; fourth, to tax authorities; and fifth, to unsecured creditors on a pro rata basis.⁵

Six Key Takeaways and Considerations

1. Are creditor enforcement actions stayed during insolvency proceedings?

Once a bankruptcy case is commenced in the United States, an automatic stay under the bankruptcy code stops all foreclosure actions and lawsuits upon the filing of a Chapter 11 petition. Under the LCQ, debtors benefit from a similar stay as to lawsuits and foreclosure actions. In *concurso* proceedings, the court has five business days following the filing to approve the debtor's eligibility as insolvent under the LCQ. Once approved, the court initiates the proceeding by ordering a stay of all pre-petition monetary unsecured claims and a suspension of the accrual of interest on pre-petition unsecured claims.⁶ In an APE, debtors do not benefit under the LCQ from a stay on claims similar to that in the *concurso* once the court admits the APE filing and publishes the notice of the proceedings; however, it is not uncommon for courts to grant a stay on claims by way of injunctive relief in anticipation of the formal filing of an APE. In the recent restructuring of Industrias Metalurgicas Pescarmona S.A. ("IMPISA"), for example, various bankruptcy requests and executory lawsuits filed against IMPISA in a Buenos Aires commercial court were stayed upon the court's approval of the APE, which was filed in a Mendoza court and publicly announced on August 17, 2017.

Unlike in Chapter 11 proceedings, however, stays in *concurso* and APE proceedings do not extend to secured creditors, who are able to continue to exercise their rights and remedies. Once the *concurso* or an APE is filed, secured creditors seeking to initiate or continue foreclosure proceedings related to their secured claims, such as mortgages and pledges, must file a *pedido* (petition) notifying the court of the relevant proceeding.⁷ Moreover, the LCQ does not distinguish between "essential" and "non-essential" assets. Secured creditors are generally able to foreclose on their validly perfected collateral even when the collateral consists of assets that are deemed "essential" to the debtor's business. The court in a *concurso* may, however, suspend or otherwise enjoin foreclosure of assets subject to a pledge or mortgage by up to 90 days, to protect creditor interests or on grounds of need and urgency for the continuation of the operation of the estate. Courts have extended the suspension beyond the statutory 90-day period where the assets are considered

necessary for the continuity of the operation of the debtor (i.e., where it is the company's single most important asset such that viability of the *concurso* proceeding would be impaired without it). Nonetheless, debtors whose key assets are pledged face a significant risk that their assets could be whittled away during the pendency of their restructuring. Secured creditors, in turn, often hold significant leverage when negotiating with a debtor in those proceedings.

2. Does Argentine insolvency law in an APE impose any limitations on the classification of creditors and content of the APE?

Unlike the *concurso*, which, as discussed above, sets forth minimum classification requirements for creditors, the LCQ affords debtors and creditors wide discretion over the terms of the APE. For example, the debtor is generally free to propose an APE whereby unsecured creditors are classified differently and receive differential treatment, subject only to the judicial doctrine that the classification be reasonable and non-discriminatory. Moreover, the LCQ provides debtors with significant discretion over the content of the APE. Such discretion provides debtors with the flexibility to structure the terms of the APE to reflect, for example, amendments, waivers, deferrals of principal or interest payment, exchanges of instruments, new guarantees and payments in cash or in kind. In addition, APEs may contemplate changes to a debtor's capital structure and composition of the board of directors.

3. What is the consent threshold and how is it satisfied for debt securities?

Subject to the procedures described in the following section, in order for a restructuring plan in a *concurso* or an APE to be approved by the court, it must be approved by creditors representing at least the absolute majority of all unsecured creditors, determined on a per capita basis, and at least two-thirds of the aggregate outstanding principal amount of unsecured debt. In the event there are multiple classes of creditors, the two-thirds requirement applies with respect to each class. The meaning of the headcount requirement has spurred significant litigation (and delays) as to the procedure for counting the number of creditors where the unsecured bonds at issue are held of record by one holder (e.g., a depositary or custodian) but is in turn indirectly or directly beneficially held by multiple participants.

Courts have interpreted the law to require a meeting of the bondholders whereby, unless unanimity is reached among the bondholders, the indenture trustee for such bondholders is deemed to have cast one vote in favor of approving the plan and one vote against the plan. For practical purposes, this means that, unlike in a Chapter 11 proceeding, individual holders of such securities are not counted as separate creditors for voting purposes. Therefore, even if, for example, holders representing 90% of the principal amount of a security held of record by a common depositary voted in favor of a plan and only 10% of holders voted against it, the trustee would be deemed to have cast two votes, one in favor and one against the plan. This method of calculation provides non-consenting bondholders with significant leverage in the restructuring process, as a single vote against an APE in a bondholders' meeting could in theory have the effect of preventing the APE from being approved altogether.

4. Can a restructuring plan be crammed down on dissenting classes?

Unlike in a Chapter 11 proceeding in the United States, debtors in a *concurso* proceeding do not have the ability to cram down a plan against dissenting creditors where the requisite consents are not obtained by the end of the exclusivity period. However, in certain cases, the court may still approve the plan if: (i) the plan was approved by both (a) at least one of the impaired classes of unsecured creditors and (b) unsecured creditors representing at least three-fourths of the aggregate outstanding unsecured claims that voted to confirm the plan, (ii) the plan provides at least liquidation value to dissenting creditors and (iii) the plan does not provide for discriminatory treatment among classes.

In addition, where the debtor is a corporation, limited liability company or cooperative, or is otherwise owned (in part or in whole) by the federal, provincial or municipal government, a debtor's failure to obtain the required majority consent and a court's recalcitrance to approve a plan notwithstanding will not automatically result in a *quiebra*. Instead, pursuant to *salvataje* procedures under the LCQ, creditors and other third parties are permitted, within a very narrow window, to propose a plan, subject to the same consent requirement.⁸ While the creditor or third-party plan does not require debtor consent, debtors maintain the right to propose modifications or alternative plans. Failure to successfully

consummate any such creditor or third-party plan results in a *quiebra*. Although this recourse is available only to the above-mentioned entities and is seldom used, this tool is particularly relevant in the case of an ad hoc group of holders that wishes to put forth its own restructuring plan. By the same token, however, given that there are also no limits on the persons or legal entities that may propose a plan as a third party, creditors should also weigh the risks and benefits associated with a proposal from an unfamiliar third-party constituency.

Salvataje procedures also do not apply to secured creditors. Rather, the LCQ requires that debtors pay secured creditors the full value of their security unless they voluntarily agree otherwise. From a practical perspective, this means that any restructuring plan or APE that purports to touch secured creditors' claims must be approved by unanimous consent of all creditors within the class and/or subcategory of secured creditors, unless a secured creditor opts to renounce 30% or more of their security interest and be treated (with respect to that portion of their claim) as an unsecured creditor. The LCQ defines claims as the principal and interest accrued as of the date the debtor submits its pre-agreed restructuring agreement to the court for judicial approval. It is possible, however, for an unsecured creditor to share a new security interest with an existing security under the proposed restructuring plan or APE; however, in the case of assets, such new security must be permissible under the existing security documents and shall enjoy second priority unless the holders of the existing security provide their consent. The LCQ is silent as to whether unsecured creditors may become secured by obtaining a security on unencumbered assets. Secured creditors, therefore, ordinarily do not participate in *concurso* or APE proceedings, and often have significant leverage over the debtor vis-a-vis unsecured creditors, who are both subject to the stay and *salvataje* procedures.

5. How long do *concurso* and APE proceedings generally take?

In comparison to Argentina's old insolvency regime, the LCQ establishes certain strict deadlines for various phases in the proceedings. For example, once a court issues a judgment initiating *concurso* proceedings, creditors have only fifteen to twenty days (as ordered by the court) to submit their claims. Moreover, in the context of the APE,



the role of courts is limited to ensuring that (i) the debtor discloses certain baseline financial information regarding the extent of the debtor's assets and liabilities, (ii) the required majorities have agreed to the APE, (iii) that certain procedural matters have been complied with and (iv) that objections to an APE are adjudicated.

Notwithstanding the creation of deadlines and limitations on the court's role, in practice, restructuring proceedings in Argentina typically tend to take, on average, two to three years in the case of a *concurso* and one to two years in the case of an APE, namely due to judicial extensions and appeals. For example, although creditors in an APE only have ten days following filing to raise objections and file the requisite evidence, and the debtor has the following ten days to resolve the objection, in practice, it often takes months to resolve objections as courts extend these ten-day periods. In the APEs filed by Multicanal and Sideco Americana, for example, objections filed by third parties, who were ultimately found to lack standing, resulted in significant delays. Court approval for the APE filed by Transportadora del Gas del Norte ("TGN") was similarly delayed on account of objections and ensuing litigation. Faced with changing economic circumstances, TGN withdrew its APE and attempted to file for *concurso*. The court, however, ultimately rejected TGN's request for bankruptcy protection immediately following the company's withdrawal of the APE previously initiated as the LCQ prohibits such filing within a year of the withdrawal if

liquidation petitions (stayed in the context of the APE proceeding) remain pending. Even in the case of IMPSA, whose APE was ultimately successfully approved by the court, it took the company approximately 3-5 years to negotiate with its creditors and eventually obtain court approval.

6. Are there additional stakeholders that could have a significant impact on the outcome of a restructuring?

Creditors should be mindful of the fact that labor claims enjoy beneficial treatment in insolvency proceedings, and receive separate treatment from secured and unsecured creditors under the LCQ. Once a debtor files for insolvency, the court may direct debtors to immediately pay labor claims based on indemnifications, penalties or severance payments, without requiring claimants to file proof of their respective claims. The LCQ also grants employees the right to participate in *concurso* proceedings as members of the creditors' committee.

Under the LCQ, public fees and federal, state and municipal taxes also enjoy special priority. Restructuring plans and APEs, therefore, must exclude the total amount of fees and taxes from the total amount of debt to be restructured as such debt cannot be crammed down on governmental entities. In addition, debtors cannot submit restructuring proposals to the Argentine Tax Authority ("AFIP") or state

and municipal tax authorities, and instead may only choose among government-sponsored “payment plans.” Such plans cannot be modified or challenged. AFIP also participates in restructuring proceedings as a creditor with a priority claim related to the debtor’s mandatory pension payments.

Other than the above-mentioned taxes entities, the LCQ does not explicitly provide for the participation of public entities. However, governmental entities oftentimes play a role in *concurso* or APE proceedings. One such governmental entity is the Argentine social security agency (“ANSES”), which typically only participates in *concurso* or other insolvency proceedings as a creditor in cases in which it has a claim against the debtor in its capacity as an investor or other stakeholder. For all mandatory pension payments, AFIP is a creditor with a priority claim under Argentine Law, regardless of whether ANSES is the final beneficiary of such payments.

Even in insolvency proceedings where the Argentine government is not among the creditor constituencies, it may still play an important role in a company’s debt restructuring efforts. In Argentina, for example, the attorney general has the right on behalf of the *Ministerio Público Fiscal* to intervene in *concurso*, APE or *quiebra* proceedings to ensure adherence to the law. In particular, the attorney general generally intervenes in *concursos* or *quiebras* where a debtor provides a public service in Argentina or where interruption of its services would cause significant disruption to Argentine society or economy.

Conclusion

A number of Argentine companies (particularly in the energy and infrastructure industries) have taken advantage of the revamped *concurso* and APE proceedings to restructure their international obligations. The number is expected to rise as Argentina continues to grapple with economic uncertainty and falling exchange rates. However, there are still numerous challenges inherent in the Argentine restructuring regime, including the fact that only debtors can file for *concurso* and APE proceedings, the lengthy nature of proceedings and the fact that secured creditors holding liens on any significant portion of a debtor’s assets maintain significant leverage. Although APE proceedings offer a comparatively expedited path toward restructuring with a more limited role for the

court, they have a relatively limited track record compared with pre-pack proceedings in other jurisdictions. Moreover, they also do not solve the stigma of insolvency filings that continues to exist in many jurisdictions. Although companies do not need to declare insolvency in order to initiate APE proceedings, distressed debtors often remain reticent to restructure through the LCQ for fear that it could have negative repercussions on the company’s operations, relationship with suppliers, customers and potential future creditors and, where applicable, ability to bid for government contract opportunities. However, the APE at least offers debtors the ability, in the first instance, to use the availability of the proceedings to encourage participation of creditors in an out-of-court restructuring. The challenges and efficacy of Argentine APE proceedings will, no doubt, continue to be tried and tested in the years to come. ■

1. Argentina passed Law No. 25,589, which further amended the LCQ, on May 15, 2002.
2. For a plan to be approved, it must be approved by creditors representing at least a majority in number and two-thirds in outstanding amount of the unsecured class. See Section III below for further discussion.
3. The fact that “insolvency” is not a pre-condition to the filing of an APE does not mean that an insolvent debtor is excluded from using an APE to restructure its financial liabilities. Whether in such a case bankruptcy or insolvency events of default contemplated in concession agreements will be considered triggered is subject to debate, and to our knowledge has not yet been the subject of any judicial determination.
4. Although creditors may foreclose on certain types of security (e.g., certain trusts and pledges) without judicial assistance, under Argentine Law court oversight is generally required in connection with any auction process, including the appointment of an appraiser to determine the fair market value of assets for auction. The method by which courts determine the fair market value varies depending on the type of asset (e.g., securities, real estate or personal property). In the case of securities, for example, a forensic analysis is conducted to determine fair market value.
5. Creditors that enjoy statutory seniority (which may be general or limited to the proceeds of certain assets) are entitled to collect their claims from auction proceedings in accordance with the following order of preference: creditors with claims derived from the conversion, administration and liquidation of assets (e.g., trustee and attorneys’ fees); creditors with a right to withhold a debtor’s assets; creditors with claims derived from the construction or development of a debtor’s assets; creditors with workers’ compensation claims or claims relating to salaries or severance pay; tax creditors; and creditors secured by a mortgage, pledge, guarantee or bond secured by a guarantee.
6. During the five-day period following the filings and preceding the court’s determination of eligibility, debtors remain vulnerable to lawsuits. Depending on the nature of the claims and whether the lawsuit is filed in a different jurisdiction within Argentina or with another court, such claims may be removed from the initial court once the judge presiding over the *concurso* proceedings makes the determination of eligibility.
7. The *pedido* is essentially a notice to the court, as no court approval or other action is required for the secured creditor to proceed with the foreclosure. However, if the secured creditor proceeds with the foreclosure prior to the court’s verification of its respective claim, the secured creditor could be found to be liable to the debtor for damages in connection with the foreclosure.
8. Following a debtor’s failure to consummate a *concurso*, creditors and interested third parties have five days to submit their names to the court’s registry. Once the registry closes, the LCQ provides for thirty days for stakeholders to evaluate and agree upon the value of the company. Once the valuation is complete, creditors and third parties have twenty days to solicit support for their respective plans.



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Insolvency in Colombia: Regulatory Change or Cultural Change?

By CRISTINA GÓMEZ-CLARK and NATALIA CASTILLO



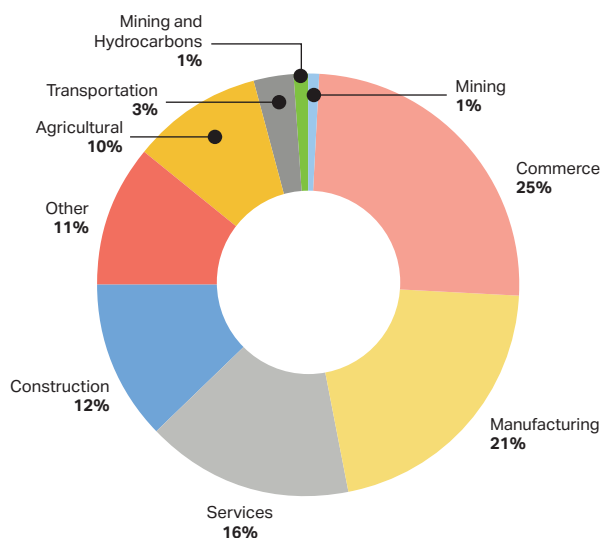
The recent avalanche of businesses seeking insolvency in Colombia, both through restructurings and formal insolvency proceedings, has led the various actors involved in Colombian insolvency processes to ask how to make this process more efficient and ensure that stakeholders receive maximum value. Over the past year, the Superintendence of Companies in Colombia (the “Superintendence”) has led and encouraged discussion on this issue with a view towards transforming its insolvency procedures and generating a cultural change around the process to be further supported by regulatory changes.

The insolvency process in Colombia has evolved significantly over the last 25 years. In 1995, Decree Law 222 was enacted, and subsequently, in 1999, Law 550 was enacted with the purpose of addressing the economic crisis that the country suffered in the late 1990s. Law 550 specifically established an expedited system for

restructuring of debtors. In 2006, Law 1116 was enacted to create a structural framework that would protect creditors while simultaneously safeguarding a company undergoing insolvency as a unit of economic development and source of employment under the criterion of value aggregation (Art. 1). In 2012, Law 1564 was enacted to regulate the insolvency of natural persons. Both corporate and personal insolvency processes in Colombia are administered by the Superintendence.

More than 10 years have passed since the most recent legal change to the insolvency process in Colombia. During this period of time, about 2,400 insolvency agreements have been executed, consisting of 1,100 restructuring agreements and 1,300 settlement agreements. In terms of industries affected, roughly 68% of these insolvencies were concentrated in 4 main sectors: commerce, manufacturing, agriculture and construction.

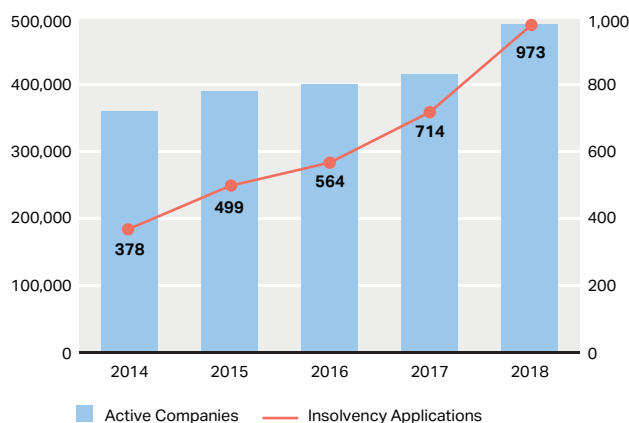
Insolvency Agreements by Sector (2007–July 2019)



Source: Superintendence of Companies, Colombia, author calculations

Most recently, in the last 5 years, there has been a significant growth in the number of companies and individuals that benefit from the insolvency process, as evidenced by the following graph:

Active Companies vs. New Insolvency Applications



Source: Superintendence of Companies, Colombia, author calculations

In 2014, there were 378 insolvency applications submitted to the Superintendence and roughly 360,000 active companies in existence. In 2018, there were 973 insolvency applications submitted and roughly 490,000 active companies in existence. In terms of growth, while the number of active companies grew in the five-year period at an annual average rate of 8%, the insolvency process applications were made at a rate

of 27% per year, a little more than three times the growth rate of active companies. As of the six months ended June 2019, the Superintendence had received 656 insolvency applications, which amounted to 67% of what it received in total during the year 2018.

These trends have created several challenges for the Superintendence. The first one is the need for a separate and expedited mechanism for the insolvency process of natural persons. Insolvency applications by natural persons currently make up 31% of the applications received during the year 2019, but only represented 18% of the total assets of restructurings under the insolvency law during the same period. Despite their lower asset value, insolvency applications by natural persons require the same amount of effort in terms of human resources and time spent on the cases as corporate restructurings, which represent 82% of all assets under restructurings under the insolvency law. In other words, the Superintendence invests the same significant resources in reviewing natural person insolvencies as it does addressing company insolvencies that are, on average, two times larger than those of natural persons. When considering that, on average, 80% of insolvency applications for natural persons are rejected due to defects in the application or because they do not meet the admissibility requirements, it is clear that resources spent on defective natural persons insolvency applications could be better spent by the Superintendence to improve the insolvency process of companies. Under this context, a regulatory change that reduces the pressure on the Superintendence from the natural person insolvency process and maximizes the efficient use of its resources is necessary.

Additionally, with respect to the insolvency process for companies, the new administration of the Superintendence that was appointed by the new government in Colombia at the end of 2018 has expressed the need to transform the insolvency ecosystem from a litigious process to a more transactional process. The aim is for the restructuring and liquidation process to become a timely and efficient solution so as to guarantee the protection of creditors and the recovery and conservation of the company as an unit of economic development, consistent with the objectives of the insolvency law. In this regard, the Superintendence has initiated a two-pronged effort: (1) a cultural change in the different actors facing insolvency, and (2) a regulatory

change to achieve a timely and efficient solution for companies in distress.

With regards to the cultural change, the Superintendence has created a space to discuss and disseminate the need for both debtors and creditors to take appropriate measures to address early insolvency warnings and consider the application for admission in a process of restructuring in a timely manner. The main warning sign for potential insolvency is a decrease in liquidity to meet a company's payment obligations to third parties, such as timely payments to suppliers, the payment of financing obligations or the payment of taxes and payroll. Other early warning signs include a decrease in profit margins and a limitation in access to credit. In the discussions mediated by the Superintendence, it has been argued that, due to cultural customs in Colombia, debtors generally make the decision to begin an insolvency process too late. This is due to lack of knowledge, embarrassment before the industry and stakeholders, fear of losing funding sources or simply due to the optimistic belief that the situation will somehow improve in the short term. In this context, simply acknowledging these factors and providing a space for public discussions on the matter is creating the awareness needed to cause debtors to begin an insolvency process at the appropriate time. Nevertheless, the process for such cultural change takes time and the results can only be seen in the long term.

The Superintendence's second line of effort, a regulatory change, is relatively easier to manage because it is a tangible task for which concrete metrics can be established. In particular, the current administration of the Superintendence has launched several working groups in April of 2019 to establish an intersectional and multidisciplinary dialogue. These working groups were based on the joint efforts and participation of multidisciplinary actors and experts in the insolvency industry and academia, and discussed the current issues and obstacles in insolvency law that require regulatory modification. As a result of these working groups, the Superintendence is now preparing new bills to modify the current regulations, which will be presented to Congress during the next legislative period in 2020. The main issues discussed by these groups were: (i) the development of an investment ecosystem to insolvent companies for the promotion and protection of credit under restructuring

agreements; (ii) the balance in the distribution of voting powers for the approval of a restructuring agreement between the different types of creditors (labor, tax, secured and unsecured, internal and external); (iii) update of the rules for small companies insolvencies and natural persons and (iv) the role of the trustee (*promotor*) and business plans under the restructuring agreements.

Next we will highlight the two main changes that, in the authors' opinion, must be made to the existing regulations: (i) granting of post-filing financing (such as DIP financing) or financing under the restructuring agreements and (ii) the role of the trustee (*promotor*).

Most companies enter into the restructuring process because they face serious liquidity problems that hinder them from meeting their payment obligations to third parties. In these cases, entering a restructuring process through which financial debt is restructured does not necessarily imply that the debtor automatically has sufficient liquidity to continue operating the company. Law 1116 establishes that the credit granted to the debtor by third parties (financial entities or others) after the execution of the restructuring agreement are considered administrative expenses during restructuring and consequently, have priority over any other obligation prior to the application for admission and that is within the framework of the restructuring agreement. Notwithstanding this priority in payment, the regulation applicable to financial institutions in Colombia obliges these entities to rate the debtor in a high risk category, creating a high reserve (between 60 and 100%) of the relevant obligation, which is why local financial institutions have no incentive to grant financing to rescue these companies. To overcome this barrier, a regulatory change is required. On the other hand, given that the insolvency ecosystem has been developing in Colombia and that there is an explicit priority in the regulations to meet the debt service of post-law loans, there is an opportunity for the development of the distressed financing market in Colombia. So far, this has been a local market focused on individual investors who have seen an opportunity to acquire the obligations of debtors at a discount under restructuring agreements with financial institutions and then inject resources to implement the turnaround in the insolvent company. However, most recently, with the aforementioned changes, local parties

have taken an interest in seeking foreign funds specialized in distressed debt to develop the Colombian market. Thus, we are beginning to see an influx of foreign investment toward this type of investment.

Finally, the role of the trustee (*promotor*) in the context of the restructuring process, both in practice and based on the provisions of the law, has been limited to the organization of the company's financial information to establish the votes and the ranking of the creditors for the restructuring agreement. In this context and to the extent that the objective of the insolvency law is the recovery and conservation of the Company as a unit of economic development, the proposal of a more robust role for the trustee (*promotor*) would include expanding its powers to validate the business plan for the insolvent Company, lead the negotiations with creditors and execute the restructuring agreement. The assignment of new functions seeks to align the role of the trustee (*promotor*) to that of a trustee under U.S. Chapter 11, as the party in charge of managing the debtor's assets once the process begins and the judge appoints it. In Colombia, the trustee (*promotor*) can be the same legal representative of the company and is not required to be an independent third party with the necessary expertise to carry out a restructuring agreement. If the role of the trustee (*promotor*) is to be strengthened and its functions expanded within the restructuring process, then ideally the trustee (*promotor*) should be different than the legal representative of the insolvent company. To successfully implement a restructuring process, an independent view of the situation and specialization in distress management are required. If the trustee (*promotor*) is the same person as the legal representative of the insolvent Company, the execution of the restructuring measures are less transparent and the recovery and conservation of the Company as a unit of economic development and generating source of employment, which is the ultimate goal of the restructuring process in accordance with the law, is put at risk. In the authors' opinion, this is definitely a required change in current regulations to ensure the success of the restructuring process. However, once this regulatory change is in effect, the Superintendence and the actors in the insolvency system must work on the cultural change to further develop a market of trustees (*promotores*) with the necessary skills required to manage companies in distress.

The challenges faced by the Superintendence and the actors in the insolvency industry in Colombia are not insignificant. However, the current administration in Colombia has taken an important first step by creating a dialogue about the cultural and regulatory changes that must take place in this industry and developing new opportunities for different actors such as providers of DIP financing and trustees (*promotores*). ■



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Legislation Watch: The New DIFC Insolvency Law

By CHRIS MACBETH, NALIN BAWA and FREDERICK HOWELL



On 13 June 2019, the Dubai International Financial Centre brought into force a new insolvency law, the DIFC Law No. 1/2019, repealing the DIFC Law No.3/2009. The new DIFC law is the latest in a line of recent insolvency law related developments in the Gulf region.¹ These include bankruptcy law reform initiatives in Saudi Arabia, Oman, Bahrain² and ‘onshore’ UAE³. The Abu Dhabi Global Market also adopted its own set of insolvency regulations when it was established in 2015.

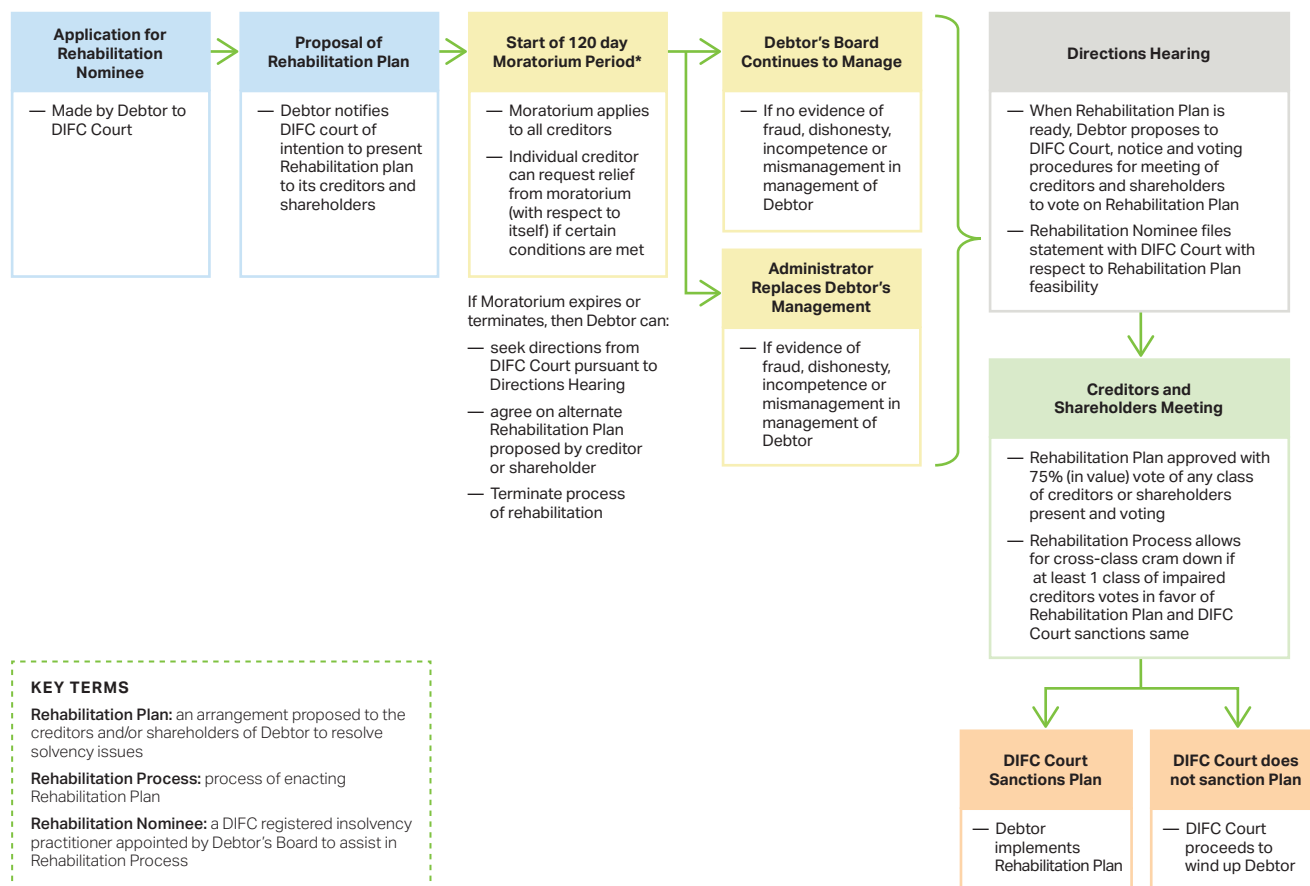
In addition to the drivers to reforms of the insolvency regimes in the GCC region more generally, the DIFC legal update was clearly accelerated by the well-publicized insolvency procedure of the failed Abraaj Group.

Unlike its predecessor regime, the new law provides for an administration process to be carried out, where there is evidence of mismanagement or fraud by the distressed corporate entity (like that seen in the case of the Abraaj Group). The new law seeks to balance “*the needs of all stakeholders in the context of distressed and bankruptcy related situations in DIFC, facilitating a more efficient and effective bankruptcy restructuring regime*”⁴.

It also seeks to add an increased level of transparency and visibility to the likely outcome of insolvency proceedings undertaken in the DIFC. The new law has shifted the objective from punishing failing businesses by liquidating them to supporting the rehabilitation of businesses capable of being saved and maximizing their chances of returning to financial health.

Some of the major changes implemented by the new law, include introduction of a debtor in possession rehabilitation processes, streamlining the winding up procedure and facilitating better cross-border coordination in relation to insolvency proceedings. These are discussed in more detail below.

DIFC — Debtor in Possession Rehabilitation Process



If a DIFC incorporated debtor is or is likely to become unable to pay its debts, and there is a reasonable likelihood of a successful Rehabilitation Plan being reached between the debtor on one hand and its creditors and shareholders on the other, then the debtor can apply to the DIFC Court for the rehabilitation process. The DIFC Court is a court established under the general laws of Dubai and is not a specialized court established pursuant to the provisions of the new law.

Step 1 – Rehabilitation Nominee And Rehabilitation Plan

- An application is made by the debtor to the DIFC Court to appoint one or more Rehabilitation Nominee(s).
- The debtor's board of directors may notify the DIFC Court that they intend to propose a Rehabilitation Plan to the debtor's creditors and shareholders.
- A 120-day Moratorium Period starts immediately from the date the debtor notifies the DIFC Court.

Step 2 – Moratorium Period

Creditors during Moratorium Period

- **Scope:** The Moratorium Period applies to all creditors (whether secured or unsecured) and extends to the debtor and all its assets, wherever they may be located.
- **Restrictions on Creditors:** During the Moratorium Period, the creditors are precluded from exercising any right of set off in respect of any obligation due from the debtor. Further, any contractual provisions relating to termination or modification thereof in the event of insolvency of the debtor cease to have effect during the Moratorium Period.
- **Termination of the Moratorium Period:** An individual creditor, after giving notice to the debtor, can apply to the DIFC Court for grant of relief from the Moratorium Period with respect to itself. The DIFC Court may grant relief to such creditor on such terms and conditions as the court finds equitable. In granting a relief, the DIFC Court will consider whether: (i) there is any imminent irreparable harm to the debtor in the absence of a moratorium in relation to that specific creditor; (ii) the creditor would suffer any significant loss which the debtor cannot compensate the creditor for; and (iii) the balance of harm to the creditor outweighs the interests of the debtor. A creditor can also request the DIFC Court to terminate the Moratorium Period with respect to all creditors for cause (including bad faith). In the latter case (i.e. termination of the Moratorium Period for cause), the DIFC Court can make such consequential orders as it deems fit including taking steps to wind up the debtor or appoint the Administrator.

Debtors during the Moratorium Period

- **Management of the debtor:** The debtor's board of directors will continue its management during the Moratorium Period unless there is evidence of fraud, dishonesty, incompetency or mismanagement.
- **Appointment of the Administrator:** If there is evidence of fraud, dishonesty, incompetence or mismanagement in the management of the debtor, the creditors can request the DIFC Court to appoint an Administrator to replace the debtor's management. (see detailed analysis of the powers and duties of the Administrator in the section entitled "The Administrator" below.)

Other considerations during the Moratorium Period

- **Rescue Finance/DIP Finance:** The DIFC Court can authorize the debtor to obtain additional secured or unsecured financing during the rehabilitation process, provided that the new financing (i) has priority over unsecured existing debt; (ii) is secured over previously unsecured property of the debtor; or (iii) is secured by a junior security interest on debtor's property which is already secured. The DIFC Court can also authorise the debtor to obtain new debt that is secured on a senior or *pari passu* security interest on property that is already secured if (i) the existing security holders are given adequate protections (i.e. an interest that is reasonably sufficient to protect holder of a security interest against diminution in the value of security); or (ii) the consent of the existing security holders is obtained.

- **Pre-emption:** The Moratorium Period will not render any undue debt due and payable. Also, any contrary provision in a contract, or in any applicable law shall be deemed unenforceable for the Moratorium Period. This encourages continued trade by the debtor during the Moratorium Period.

Expiration or Termination of the Moratorium Period

- **Rights of the Debtor:** If the Moratorium Period expires or terminates, the debtor may take any of the following steps: (i) seek directions in accordance with Step 3 below; (ii) agree to an alternative Rehabilitation Plan that may be proposed by any creditor or shareholder of the debtor; or (iii) apply to the DIFC Court to terminate the process of rehabilitation and wind up the debtor.

Step 3 – Directions Hearing

- **Notice and Voting Procedures for the Rehabilitation Plan Meeting:** Once the Rehabilitation Plan is ready for consideration, the debtor (or the Administrator, if appointed) will propose to the DIFC Court notification and voting procedures for a meeting of the creditors and shareholders to vote on the Rehabilitation Plan (the “**Rehabilitation Plan Meeting**”). Such notification and voting procedures essentially propose classification of the secured creditors, unsecured creditors and the shareholders for the purpose of voting in the Rehabilitation Plan Meeting. See Step 4 below regarding quorum and majorities requirements.
- **Directions Hearing:** The DIFC Court will hold a hearing where it may approve or amend the proposed classification and the voting procedures (the “**Directions Hearing**”). The notice for the Directions Hearing is to be sent in writing to all the creditors and the shareholders of debtor where

they shall be given an opportunity to be heard. The creditors and the shareholders of the debtor may challenge the proposed classification of the creditors and the shareholders at the Directions Hearing. At the Directions Hearing, the DIFC Court may also extend the Moratorium Period if the creditors and shareholders require more time to consider the Rehabilitation Plan.

- **Feasibility of the Rehabilitation Plan:** At the Directions Hearing, the Rehabilitation Nominee (or the Administrator, if appointed) is required to file a statement with the DIFC Court that: (i) the Rehabilitation Plan has a reasonable prospect of being approved; (ii) the debtor is likely to have sufficient funds available to it during the Moratorium Period to enable it to carry on its businesses; and (iii) Rehabilitation Plan Meeting should be summoned to consider the proposed Rehabilitation Plan.

Step 4 – Rehabilitation Plan Meeting

— **Notice of the Rehabilitation Plan Meeting:**

The Rehabilitation Plan Meeting takes place in accordance with the voting and notification procedures as agreed/directed by the DIFC Court in Step 3 above. The notice for the Rehabilitation Plan Meeting is to be sent in writing to all the creditors and shareholders of the debtor and should include a copy of the Rehabilitation Plan to be voted upon at the Rehabilitation Plan Meeting. The new law is silent on the quorum related requirements for the Rehabilitation Plan Meeting.

— **Approval of the Rehabilitation Plan:**

The Rehabilitation Plan has to be approved by at least 75% in value (of claims agreed to by the debtor or Administrator or otherwise allowed by the DIFC

Court) of any class of the creditors or shareholders present and voting. The procedure in the new law allows for cross-class cram down, if at least 1 class of impaired creditors votes in favour of the Rehabilitation Plan and the DIFC Court sanctions the Rehabilitation Plan (see Step 5). Unimpaired classes or creditors/shareholders are deemed to have accepted the Rehabilitation Plan and solicitation of votes from such class/creditor/shareholder is not required.

- **Challenge to the Rehabilitation Plan:** Following the vote of each class of creditors and shareholders on the Rehabilitation Plan, any member of the class can challenge the Rehabilitation Plan if they consider, amongst others, that the arrangement is prejudicial or the Rehabilitation Plan is not proposed in good faith.

Step 5 – Sanction Hearing

- **Post Plan Hearing:** The DIFC Court will hold a hearing to consider whether or not to sanction the Rehabilitation Plan.

- **Sanction of the Rehabilitation Plan:** The Rehabilitation Plan will be sanctioned by the DIFC Court if, amongst others, it finds that: (i) the Rehabilitation Plan complies with the applicable provisions of the new law (and is proposed in good faith), and that the arrangement is not unfairly prejudicial to each class of the creditors and shareholders (and the general body of the creditors taken as a whole); (ii) either (a) all classes of creditors and shareholders have voted to accept or are deemed to accept the Rehabilitation Plan; *or* (b) if a class of claims or interests is impaired under the Rehabilitation Plan, then at least one impaired class of creditors has voted to accept the Rehabilitation Plan; (iii) there has been no material violation of the notice and voting procedures approved by the DIFC Court at the Rehabilitation Plan Meeting; (iv) any class of creditors

or shareholders of the debtor voting against the Rehabilitation Plan has received at least as much value as such class would have received in a winding up of the debtor; and (v) no holder of any claim or interest which is junior to the claims of any dissenting class will receive any property under the Rehabilitation Plan on account of such junior claim or interest before the dissenting creditors are paid in full.

- **Binding Nature of the Rehabilitation Plan:** Once sanctioned by the DIFC Court, the Rehabilitation Plan is binding on all persons within such class that have or could have a claim against or interest in the debtor before the date the DIFC Court sanctions the Rehabilitation Plan.
- **No Sanction of the Rehabilitation Plan:** If the Rehabilitation Plan is not sanctioned by the DIFC Court in the Post Plan Hearing, then the DIFC Court will immediately proceed to winding up the debtor.

Winding Up Procedure

Part 6 of the new law streamlines and modernises the existing rules and procedures for the winding up of companies. The procedures to be followed by a liquidator are clarified and the technical aspects of the liquidator's role (such as, for example, the contents of the final report a liquidator must produce when investigating the causes of a debtor's failure) are explained.

The Administrator

Appointment of the Administrator

One of the key aspects of the new law is the introduction of the provisions with respect to the appointment of an independent Administrator to oversee the insolvency proceedings of a debtor. The Administrator is a person who is registered as an insolvency practitioner under the new law.

Application for the appointment of the Administrator can be made by one or more creditors in cases where, during the rehabilitation process, there is evidence of fraud, dishonesty, incompetence or mismanagement. Notice of the application for the appointment of the Administrator must be given to all the creditors of the debtor.

An order for appointment of the Administrator will be made if the DIFC Court is of the view that the debtor is or is likely to become unable to pay its debts, and considers that the appointment of the Administrator is likely to facilitate the approval of the Rehabilitation Plan. The Administrator replaces the management of the debtor and will be given various powers to, amongst other things, investigate the wrong-doing, or propose a Rehabilitation Plan. During the period the court order is in force, all the affairs and property of the debtor are to be managed by the appointed Administrator.

Effect of the Order by the DIFC Court

Once the DIFC Court appoints an Administrator in relation to a debtor, any application with respect to the winding up of that debtor is dismissed and any receiver appointed in respect of all or substantially all of the undertakings of the debtor appointed with respect to such debtor is required to vacate office.

Powers and duties of the Administrator

The Administrator has extensive powers under the new law. Some of the Administrator's key powers include:

- to do all such things as may be necessary for the management of the affairs, business and property of the debtor;
- to remove any director of the debtor;
- to take possession of or collect property of the debtor;
- to sell or otherwise dispose of the property of the debtor;
- to raise or borrow money and grant security therefor over the property of the debtor; and
- to defend or bring any action or other proceeding.

While the Administrator has broad powers as discussed above, it is required to manage the debtor's affairs, business or property in accordance with the orders of the DIFC Court and the Rehabilitation Plan.

Removal of Administrator

As an additional layer of protection available against actions of the Administrator, the creditors and shareholders of the debtor can make an application to the DIFC Court on the ground that the Administrator is carrying on the affairs of the debtor in a manner that is prejudicial to all or some of the creditors or shareholders. The application can only be made by an aggrieved creditor/shareholder of the debtor.

The Administrator can be removed from office at any time by order of the DIFC Court. Further, the Administrator may, in certain scenarios, be required to vacate his office if he ceases to be qualified to act as an insolvency practitioner. When a person ceases to be an Administrator, he is released from his office with immediate effect and is accordingly discharged from all future liability in respect of his actions or omissions in relation to the administration of the debtor and his conduct as the Administrator.

Cross Border Insolvency Proceedings

The new law further assists in cross-border insolvency proceedings. Under the new law, if a foreign company is the subject of insolvency proceedings in the host country, then the court in such country can request that the DIFC Court assists it in gathering and remitting of assets that are maintained by the foreign company in the DIFC.

The new law also fully incorporates the UNCITRAL Model Law on cross border insolvency with certain modifications, which applies where:

- assistance is sought in the DIFC in connection with foreign proceedings;
- assistance is sought in a foreign country in relation to proceedings under the new law;
- foreign proceedings and proceedings under the new law take place concurrently; or
- the creditors or other interested persons in foreign countries are interested in commencing or participating in proceedings under the new law.

Conclusion

With the DIFC bringing its insolvency law more in line with international best practices, investors proposing to make investments in Dubai or the wider region may be more comfortable viewing the DIFC as an appropriate jurisdiction in (or through) which to structure their investments. Insolvency is still associated with business failure in Islamic countries⁵ and it is hoped that the new law will allow for this stigma to subside and for the entrepreneurship to thrive.

Enacting the new DIFC insolvency law as a replacement to a relatively recent (2009) insolvency regime reinforces the DIFC's desire to keep up with the reforms in bankruptcy regimes in other neighbouring jurisdictions and enhances Dubai's image as a business-friendly jurisdiction. ■

1. See Polina Lyadnova, Fatema Al-Arayedh, Maha Alali, Lucinda Smart and Mohamed Taha, "Bankruptcy and Restructuring in the GCC: An Update on Recent Developments," *Emerging Markets Restructuring Journal* Issue No. 9 – Summer 2019.
2. See Buthaina Amin and David Billington, "Legislation Watch: Bahrain's New Bankruptcy Law," *Emerging Markets Restructuring Journal* Issue No. 9 – Summer 2019. Also see Asli Orbay (with inputs from David Billington and others), "Bahrain's bankruptcy law one year on: an untested revolution," *Debtwire* CEEMEA (<https://events.debtwire.com/emerging-markets/bahrains-bankruptcy-law-one-year-on-an-untested-revolution>).
3. See Lawale Ladapo and Mohamed Taha, "The New Bankruptcy Law of the UAE: Towards A More Business-Oriented Bankruptcy Regime," *Emerging Markets Restructuring Journal* Issue No. 4 – Fall 2017.
4. "Dubai International Financial Centre Enacts New Insolvency Law" – DIFC Press Release – 11 June 2019.
5. "Why Have The Islamic Countries Failed To Develop Even With Resources Like Oil, While Countries With No Resources Like Switzerland Have Flourished?" – Forbes Online – 8 January 2013.



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Indian Bankruptcy Regime – 2019 Year in Review

By NALLINI PURI and SURYA KIRAN BANERJEE



The (Indian) Insolvency and Bankruptcy Code, 2016, which overhauled a patchwork of disparate laws and judicial fora to establish a single law and single court system to hear bankruptcy cases promised to effect a much needed clean-up of India's ailing financial system. Banks' balance sheets were stressed with non-performing loans owing to a practice of 'ever-greening' of loan accounts by largely state-owned banks that were either sympathetic to promoter-owned businesses, or beholden to them owing to the absence of effective legal remedies.

As discussed in Issue 8 of the journal, the provisions of the Code departed so fundamentally from the preceding regime that the Code was met with resistance from various quarters, including operational creditors wanting to be treated on par with financial creditors, unsecured creditors who wanted security granted to secured creditors to be partially or completely ignored, and most importantly, the

existing controlling shareholders of defaulting entities who faced the prospect of losing businesses that were in their families for generations.

This article aims to briefly discuss two of the most significant developments in bankruptcy law and practice in India in 2019, setting out the opportunities and challenges that lie ahead.



Essar/ArcelorMittal – A Landmark Judgment

The insolvency of Essar Steel, a large Indian steel producer, involved a number of bidders competing to acquire Essar Steel's plants in India. The 27 month process, significantly longer than the 6-9 month time period prescribed under the Code, exposed a number of lacunae in the Code, resulting in challenges by bidders, dissenting financial creditors, operational creditors and the controlling shareholders of Essar Steel. Several amendments were made to the Code during the process to plug gaps uncovered in the process.

In its long-awaited judgment approving the US\$6 billion acquisition of Essar Steel by ArcelorMittal, the Supreme Court of India in November 2019 upheld key principles of bankruptcy resolution, bringing the Indian bankruptcy regime in line with those of major global economies. The key takeaway is that the court gave legal backing to the commercial realities of financing transactions, and resolved points of law that we expect will materially speed up resolution processes going forward – though the broader issue of overall case timelines, discussed below, remains an issue.

Standard of Review by the Courts – Primacy of the Financial Creditors' Committee

The first point of law that the court resolved is the role of the courts in reviewing resolution plans proposed by the committee of financial creditors that is tasked with controlling the resolution process. The court limited the scope of its review to checking for legal and procedural compliance – including in respect of the requirements that the creditors' committee take into account the desirability of the distressed entity continuing as a going concern, that they attempt to maximize the value of the distressed entity's assets and that they consider

the interests of all stakeholders (including operational creditors) in arriving at the resolution plan. In refusing to undertake a substantive in-depth review of the merits of the commercial decisions made by the committee of creditors, the court has confirmed that the committee of financial creditors does genuinely control the process as contemplated by the Code. The court also included a direction to lower courts to similarly limit their review. This is useful seeing as lower courts have struggled to reconcile the overarching theme of financial creditor control under the Code with what they view as a conflicting requirement of due process as regards the rights of other creditors/stakeholders, resulting in a more detailed judicial review than is commercially expedient.

Creditor Classes

The court rejected the argument that all creditors be treated equally, upholding the rule of priority. The court held that creditors that were not similarly situated were not entitled to receive the same amount or percentage of resolution proceeds. A caveat to this remains in place – dissenting financial creditors and operational creditors must receive at least the amount they would have received in a liquidation of the distressed entity.

The court observed that treating creditors equally would perversely incentivise secured creditors to vote for liquidation, a process in which a strict waterfall would be followed. The court also sought to distinguish between operational and financial creditors with reference to their role in the broader economy, commenting that refusing to respect the primacy of financial creditors would destabilize the banking system and that operational creditors should instead seek to limit their exposure to any particular entity by, for example, agreeing stricter payments or by halting supplies.

The takeaway is that the creditor committee is now largely free to determine the allocation of recovered funds amongst the different classes of creditors and to have regard to the security held by any particular creditor. Given past experience with the Code, we would expect that the question of whether the safeguards have been complied with will be litigated by operational creditors and other stakeholders, resulting in certain delays. The court has sought to limit this possibility by restricting any remedy it can grant in any such litigation to requiring the committee of creditors to revisit the issue.

Maximum Time Period for Resolution

The court struck down the mandatory requirement under the Code, introduced by an amendment in

August 2019, to complete all resolution proceedings within 330 days of filing (including extensions and the time taken in legal proceedings). The court held that the time limit was an unreasonable restriction on the parties' fundamental right to carry on business guaranteed by the Indian constitution. Instead, the court has allowed extensions beyond 330 days to be granted in exceptional cases where, broadly speaking, the timeline could not be met because of delays occasioned by the court itself. While it is correct that a litigant should not be prejudiced due to constraints on the capacity of the courts, the ruling is likely to prolong insolvency proceedings well beyond the 330 day cap absent significant investment in court infrastructure in India. A side note – the delay in the ArcelorMittal/Essar case was largely due to court constraints.

PERFORMANCE TILL DATE

2,542

insolvency proceedings initiated under the Code from 1 December 2016 to 30 September 2019, with a general upward trajectory in the number of new cases initiated each quarter (369 in Q3 of 2019).

116

cases have been withdrawn following settlements with creditors.

Of the 1,497 pending cases,

535

cases have been pending for more than 270 days.

156

cases (14.93% of closed cases) have resulted in approved resolution plans, with financial creditors recovering 41.53% of the value of their claims or 183.9% of the liquidation value of the debtor.

587

cases (56.17% of closed cases) have ended in liquidation orders. The data is skewed as a majority of these cases involved small entities, in respect of which no resolution plan was submitted for the court's consideration.

The average time taken to resolve the 156 resolved cases was

374 days

300 days if the matter ended in liquidation.

Source: Insolvency and Bankruptcy Board of India, Insolvency and Bankruptcy News, Vol 12, p. 14 (July–September 2019).

Insolvency of Financial Services Providers

An important lacuna in the Code was the absence of a framework to resolve distressed situations involving financial services providers such as non-bank finance providers, insurance companies, and pension and mutual funds (or to manage their liquidation if a resolution is not feasible). High-profile distress situations involving IL&FS (a non-bank finance provider) and Dewan Housing Finance Corporation, which saw a lack of coordination amongst creditors and a multiplicity of proceedings, highlighted the issues posed by the absence of a coherent resolution framework for financial services providers. In response, the Indian government introduced temporary rules in November 2019 to govern such situations. The rules are a stop-gap measure until a comprehensive framework is put in place.

Broadly speaking, the rules apply the Code as-is to financial services providers, with some modifications if the distressed entity is a systemically important non-banking finance company. The modifications contemplate a more involved role for the appropriate financial sector regulator. For example, an insolvency resolution process in respect of systemically important non-banking finance companies can only be initiated by India's central bank, the Reserve Bank of India (as opposed to financial or operational creditors). Interestingly, the low payment default threshold for initiating insolvency proceedings remains the same – though in recognition of the systemic importance of the debtor and the fact that the Reserve Bank initiates proceedings, a moratorium becomes available immediately upon the filing of the petition (instead of when it is admitted by the court).

The rules contemplate that the Reserve Bank will influence the administration of the debtor during the resolution process through an administrator proposed by it, who may be assisted by an advisory committee of three or more experts constituted by the Reserve Bank. The Reserve Bank will also play a role in selecting the resolution applicant to whom the restructured business will be transferred – the resolution applicant must demonstrate that it is a 'fit and proper person' that will be able to conduct the business following resolution. The approval of the committee of creditors is still required for a resolution plan to be approved.

Importantly, given a recent court decision failing to distinguish between assets of a financial services provider and those held by it on a pass-through basis, the rules exclude third party assets in the custody of the financial services provider from any moratorium during the pendency of insolvency proceedings. The consent of the Reserve Bank will also be required before voluntary liquidation proceedings are commenced.

While the rules are a step in the right direction, a lot will depend on the contours of the comprehensive framework that replaces the rules, as well as on how it is implemented in practice. The approach of the regulators tasked with overseeing insolvency proceedings relating to financial services providers will be key.

Continuing Gaps in the Legal Framework

As discussed in Issue 8 of the journal, there are gaps in the Code as compared to the bankruptcy regimes in developed economies such as the U.S., the U.K. and the E.U., which lead to uncertainty on how individual cases will be dealt with under the Code.

For instance, a comprehensive framework for cross-border insolvency based on the UNCITRAL Model Law on Cross-Border Insolvency, proposed by the Insolvency Law Committee in October 2018, remains to be notified. The Code currently requires the Indian government to enter into bilateral arrangements with other governments to govern cross-border insolvencies involving the respective jurisdictions. This is administratively cumbersome and difficult to achieve in practice – as a result of which no such arrangements have been entered into till date. This led to complications in the high profile insolvency of Jet Airways, a struggling Indian airline, that was subject to simultaneous Dutch and Indian insolvency proceedings in 2019. The insolvency court glossed over the lack of a binding legal framework by approving a 'Cross-Border Insolvency Protocol', negotiated between the Indian resolution professional appointed under the Code and the Dutch trustee, to govern the mode and extent of cooperation between the two insolvency professionals. As the protocol has no basis in law, it is unclear whether it sets a precedent to govern subsequent cross-border insolvencies. It is likely open to higher courts to refuse to recognize overseas

insolvency proceedings in the absence of enabling Indian law – as the court of first instance did in the case of Jet Airways. Given this uncertainty, it is important for investors looking to invest in Indian debt to game out potential scenarios if the debt is governed by foreign law or if the assets of the debtor against which recourse will be sought in the event of a default are located outside India.

Another gap in the Code is the lack of provisions dealing with group insolvencies. The insolvency regime prescribed by the Code is entity specific and does not contemplate group insolvency scenarios. This came into focus when several Videocon entities were simultaneously subject to insolvency proceedings. On a petition filed by a lender, the court ordered the consolidation of insolvency proceedings relating to 13 Videocon entities on the basis that they had common control, directors, assets and liabilities, creditors and debtors, financing arrangements, and were otherwise interdependent and were in essence a single economic unit. The court noted that these entities were so inextricably linked that a consolidated insolvency process would result in value maximization. The court also noted that a failure to consolidate proceedings would render the possibility of restructuring (or the maximization of value in such restructuring) bleak, which outcome outweighed any downsides of consolidation. Proceedings relating to two other Videocon group entities were not consolidated

despite having common financing arrangements on the basis that their assets and liabilities could be separately identified. The key takeaway is that the precise test applied by the court is unclear. As with cross-border insolvency, the court's approach in the Videocon case is problematic as it is not based on the Code – and therefore remains open to challenge.

The Insolvency and Bankruptcy Board of India has set up a committee to propose amendments to the Code to provide for group insolvencies. The committee has based its proposals on E.U. and U.S. law, but the proposals are preliminary in nature. Of interest to lenders is that, in addition to providing for cooperation between the insolvency professionals of different group entities, the committee has also proposed a consolidation of insolvency proceedings – which may result in the subordination of the claims of creditors of certain group entities. Separately, the provisions relating to group insolvency are not expected to cover cross-border groups – so that may remain an area of uncertainty even after the cross-border and group insolvency rules are notified.

The unavailability of pre-packs under the Code has also resulted in value leakage. Again, the Indian government is looking at this, but is yet to notify the relevant rules. In the interim, banks have been directed by the Reserve Bank of India to enter into inter-creditor agreements to give effect



to restructuring outside of Code proceedings. Subject to certain conditions being met, this can be binding on dissenting creditors.

Opportunities

Perhaps the most significant opportunity in the distressed debt space in India in the coming years has resulted from arguably the biggest setback to the Code. In April 2019, the Supreme Court of India struck down as unduly broad a circular of the Reserve Bank of India that compelled India's largest banks to initiate bankruptcy proceedings against defaulting debtors. The Reserve Bank subsequently issued a revised direction to banks requiring them to resolve distress within a specified timeframe, failing which banks must either refer the account to Code proceedings or make enhanced provisions against the debt on their balance sheets.

Banks, keen to avoid the additional provisioning requirement but reluctant to commence insolvency proceedings owing to the practical difficulties and delays associated with such proceedings, have opted instead to sell their exposure to the debt to third parties. This has led to the creation of a robust secondary market in debt, both in respect of borrowers in the shadow of insolvency and those already subject to Code proceedings. This should be a potential area of interest for investors looking at India.

There also continue to be opportunities for creditors looking to extend interim finance to distressed borrowers. This is because distressed borrowers are likely to find it challenging to obtain funding on commercially acceptable terms from banks (who are discouraged from providing this funding by India's central bank).

Overall, there are several areas in which there is still considerable uncertainty as to what the law is, how it will be applied in particular circumstances and how long the process will take, and investors should therefore exercise caution and obtain appropriate advice before investing. However, the developments in 2019 are encouraging in that they reflect a growing trend of amendments aimed at converging Indian insolvency law with the practice in developed jurisdictions, a trend that will undoubtedly increase the attractiveness of the opportunities in India. ■



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Restructuring Tax Claims in Mexico; Considerations Derived From the Current Government's Tax Policy

By ANDRÉS FERRER



As is the case in most countries, a crucial item to consider when analyzing the different alternatives available to a financially distressed debtor in Mexico is its tax and fiscal situation, especially regarding the existence of any tax or other fiscal claims against it (“**Tax Claims**”).

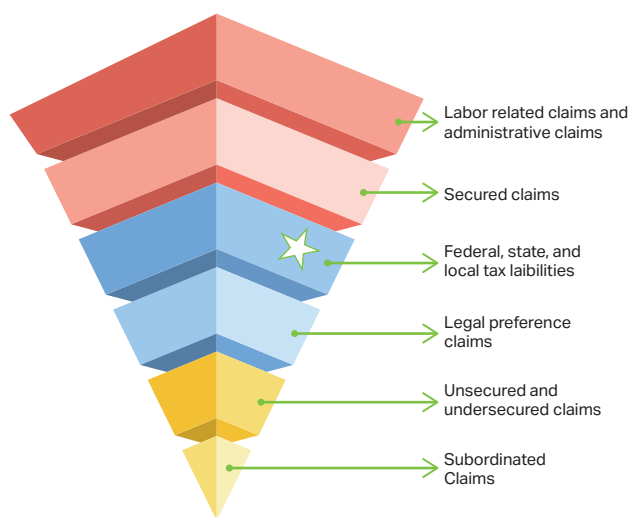
Mexican tax laws expressly provide for certain mechanisms through which Tax Claims may be restructured. Although the legal framework applicable to Tax Claims in the context of restructurings has not been modified, and there are no current bills in Congress seeking to modify it, the current Government’s tax policy—discernable from public statements made by the President and his cabinet, from an executive order issued on May 20, 2019 (described below), and from amendments to tax laws on other topics—may nonetheless pose an important *de facto* obstacle for the

application of debtor-favorable provisions, which could in turn result in significant challenges for insolvencies, restructurings and voluntary work-out efforts in Mexico.

In this article we analyze the challenges that Mexican debtors with significant Tax Claims face when reorganizing. We also outline key considerations that these companies should take into account before deciding to file for an in-court insolvency proceeding.

Main Mechanisms to Restructure Tax Claims in Mexico

Reorganization of Tax Claims, and the ability of a debtor and Mexican tax authorities to broker and attain an agreement, are constrained to what is expressly provided for and authorized by the Mexican Constitution and applicable legislation. Tax Claims have priority over all unsecured, under-secured, non-labor, and non-alimony claims and interests, including pre and post restructuring investors and stockholders.



In practice, it is not uncommon to find financially distressed debtors that need to renegotiate and restructure private and public debt and Tax Claims, and notwithstanding the wide range of restructuring options available, private creditors' willingness to participate in and enact a restructuring plan is often conditioned upon the debtor being able to reorganize its Tax Claims in a manner consistent with the proposed restructuring and the post-restructuring business plan. Acknowledging the importance of in-court and out-of-court restructuring efforts in order to preserve economic, financial and social value, while at the same time seeking to avoid potential abuses against the public treasury, Mexico's tax legislation, and particularly its Federal Fiscal Code (*Código Fiscal de la Federación*) ("CFF" by its Spanish acronym), includes provisions that expressly authorize Mexican tax authorities to sanction and/or undertake certain acts that could result beneficial or useful for a debtor seeking to work-out its indebtedness and continue its business and operations. The CFE also sets strict limits on what Mexican tax authorities can do.

Among those provisions allowing the Mexican tax authorities a scope for action in financial work-outs, two of them call for special consideration by virtue of their relevance and usage in reorganizing Tax Claims

Ordinary Tax Payment Plans

Article 66 of the CFF authorizes Mexican tax authorities to convene with tax debtors and sanction payment plans regarding defaulted Tax Claims under the following general terms and conditions (plans described below are referred to as the "Ordinary Tax Payment Plans").

Debtors can choose between either: (i) a plan deferring payment of the defaulted Tax Claims during up to 12 months (the "Deferral Plans"); or (ii) a plan authorizing payment of the defaulted Tax Claims through up to 36 monthly installments (the "Installment Plans"). Debtors shall file before Mexican tax authorities the corresponding form requesting the authorization of the Ordinary Tax Payment Plan, stating whether they opt for a Deferral Plan or an Installment Plan.

In terms of process, Debtors shall pay, simultaneously to filing the request form, 20% of the outstanding and defaulted Tax Claims, including actualizations, fines and other ancillary charges accrued up to the date of said filing. The differences between the plans are as follows:

Feature	Deferral Plans	Installments Plan
Payment	Bullet	Equal monthly installments
Maturity	12 months (max.)	36 months (max.)
Premium	Deferral fees at final payment approved by Congress	Monthly deferral rate approved by Congress
Initial Advance	20%	20%
Default	Fines and additional fees	Fines and additional fees

Mexican tax authorities are not permitted to implement an Article 66 restructuring over Tax Claims derived from: (i) taxes accrued during the current year at the time of filing or during the last six months prior to a filing; (ii) taxes withheld by a debtor from third parties; and (iii) imports and exports taxes.

Unless exempted by the Mexican tax authorities through regulation, debtors shall provide security over the outstanding 80% of the defaulted Tax Claims plus the deferral fees calculated pursuant to the deferral rated approved by Congress.

In addition, authorization of any Ordinary Tax Payment Plan may be revoked if:

1. security over the outstanding defaulted Tax Claims is not granted, or if said security is eroded or results insufficient and is not incremented or replaced;
2. an in-court restructuring or bankruptcy proceeding is commenced against the debtor; and
3. default of (a) the balloon payment of the outstanding 80% of the Tax Claims under a Deferral Plan; or (b) three or more installments or the last installment under an Installments Plan.

Finally, Article 66 of the CFF allows Mexican tax authorities, as an exception, to convene and sanction payment plans providing different terms and conditions than those applicable to the Ordinary Tax Payment Plans, but solely to the extent that the taxable income generated by a debtor during the last year in which taxable income was generated (prior to the intended Tax Claims reorganization) amounts to 40% or less of the Tax Claims being restructured.

Remittance of Tax Claims (only for in-court restructurings)

Article 146-B of the CFF also allows Mexican Tax authorities to partially remit Tax Claims against debtors following an in-court bankruptcy proceeding followed under Mexican legislation (*concurso mercantil*). Remittances are subject to the following conditions:

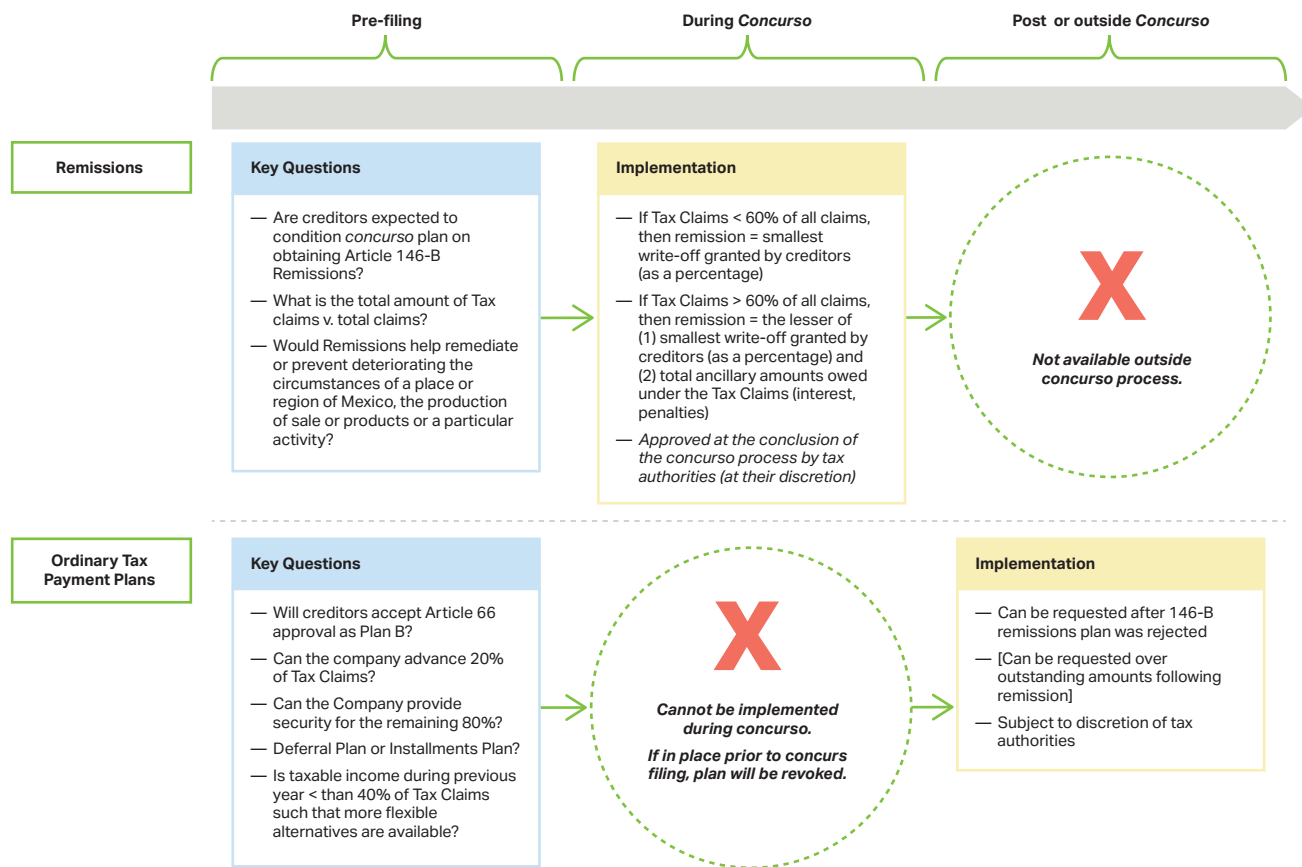
- a. Only Tax Claims which were accrued and defaulted before the date in which said bankruptcy proceeding was initiated may be considered for such purposes.

- b. If the Tax Claims amount to less than 60% of all the claims allowed in the bankruptcy proceeding, the remission shall be equal, in percentage, to the smallest write-off granted by creditors representing at least a 50% of allowed non-fiscal and non-related-party claims.
- c. If the Tax Claims amount to more than 60% of all allowed claims, the remission shall be computed as previously described, but shall be capped to an amount equal to all ancillary amounts derived from the principal Tax Claims. Ancillary amounts include all fines, ordinary and extraordinary enforcement and execution expenses, and any surcharges accrued in connection with the principal Tax Claims.

In terms of timing, authorizations of Article 146-B remissions can only be obtained after the judicial authorization of a restructuring plan and the conclusion of the in-court bankruptcy proceeding, with two important consequences:

1. creditors should negotiate, and will likely insist on including in the restructuring plan to be judicially approved, a provision prescribing the effective approval of such remissions as a condition precedent to the enforceability of the restructuring plan against them; and
2. authorizations of Article 146-B remissions should be considered as administrative and fiscal acts, issued by administrative and tax authorities, subject to administrative and tax law, and obtained after the conclusion of an in-court proceeding (as opposed to judicially approved rulings, issued by a judicial authority, subject to judicial bankruptcy law and obtained within an in-court proceeding).

Although unclear from the text of Article 146-B, Mexican tax authorities consider they are not authorized to grant Article 146-B remissions over Tax Claims derived from taxes withheld by a debtor from third parties.



How both mechanisms work together

These two mechanisms allow Mexican tax authorities to (a) grant a debtor additional time to satisfy its Tax Claims and (b) reduce said Tax Claims consistently with the debtor's restructuring plan, as approved by non-fiscal creditors. The usefulness and importance of these two provisions in financial restructurings are patent.

Furthermore, request of, and denial thereafter, of an Article 146-B remission does not preclude debtors from requesting an Article 66 payment plan. Therefore, debtors and their advisors can prepare, and negotiate with creditors, restructuring plans that provide for an Article 66 payment plan as a fallback option should an Article 146-B remission be denied.

Nonetheless, both mechanisms are discretionary to Mexican tax authorities, which means that their implementation is not warranted. *De facto* circumstances, such as governmental policies, may alter the Mexican tax authorities' willingness (or unwillingness) to make use of the powers granted by Articles 66 and 146-B of the CFF.

We believe that tax policies embraced by Mexico's current Government could pose a challenge to efforts seeking the application of these restructuring mechanisms.

Current Governmental Tax Policy

As part of its political strategy to gain and maintain favor of its voter base, Mexico's current Government, led by Andrés Manuel López Obrador, pledged through its electoral campaign, and has sustained, that he will not increase existing taxes nor create new ones in the short and medium terms. Simultaneously, his Government has adopted several cash-intensive policies and has enacted various onerous, governmentally-funded social programs, such as pensions and stipends for the elderly, youth and unemployed, among others.

As a result, Mexico's legislative and executive branches of Government, both controlled by the governing political party, have turned their attention and efforts to increasing tax collection and restricting and reducing tax remissions and

deductibility. The purpose is to increase the Government's total gross revenues and to balance the public budget. As a result, many legislative and executive orders (*decretos*) seeking to increase tax revenues have been proposed in the past few months, and a number have now been adopted, including:

1. amendments to the CFF, the VAT Law, and the Income Tax Law, to, among others: (a) compel tax payers to inform the Mexican tax authorities of aggressive tax reduction structures; (b) allow Mexican tax authorities, under certain circumstances, to pierce the corporate veil of corporations to collect unpaid taxes or prosecute tax fraud, in order to hold shareholders, managers, liquidators and bankruptcy trustees responsible, under certain circumstances, for defaulted and unpaid Tax Claims; (c) impose a cap on the deductibility of interests incurred by tax payers; (d) impose taxes upon services and products sold in national territory through internet by alien businesses; and (e) authorize the taxation of the overall economic, financial and business consequences of step transactions engineered with the intention of avoiding certain taxes that would otherwise arise if the transaction was not structured in several steps; and
2. an executive order issued by Mexico's President on May 20, 2019 (a) revoking previous executive orders authorizing tax regularization programs, which included certain tax remissions; and (b) through which the executive branch committed to avoid granting total or partial tax remissions, with the only exception being those intending to remediate or prevent deteriorating the circumstances of a place or region of the country, the production or sale of products, or a particular activity, or to remediate catastrophes caused by natural disasters, plagues and epidemics.

Not all of the abovementioned policies are applicable to Tax Claim restructurings; and as of this date, there is no public information available on the application (or absence thereof) of those acts that might be applicable to Tax Claims restructurings. However, in its pursuit to limit abuses by previous Governments together with corporations and businesses, these policy changes seem to restrict the Government official's ability to agree to restructure Tax Claims.

As of this date, Articles 66 and 146-B of the CFF and their corresponding ancillary articles have not been modified, and such proposal has not been included in any formal legislative process. Therefore, both Articles are still in full force and effect, which means that their use by Mexican tax authorities to support restructuring efforts is still legally and formally feasible. Nonetheless, certain special considerations and precautions are in order.

First, although an executive order constitutes an inadequate means to generally restrict powers granted by a law, it can still govern how certain discretionary powers are used in practice. Due to the vague language of the May 20, 2019 executive order, it is unclear whether the President's commitment to avoid granting remissions is strictly limited to remissions that must be granted directly by the President, or if, on the contrary, this commitment considers all remissions to be granted by any member or entity pertaining to the executive branch of Government. Should the latter be the case, it is unclear whether or not the remissions authorized by Article 146-B of the CFF and its ancillary articles should be considered as remissions intending to "remediate or prevent deteriorating the circumstances of a place or region of the country, the production or sale of products, or a particular activity."

In light of such circumstances, and given the discretionary nature of the powers granted by Article 146-B of the CFF and its ancillary articles, it is not unreasonable to expect officers within the Mexican tax authorities to be reluctant to exercise those powers without an express clarification or instruction arising from the higher levels of Government. Thus, even if the May 20, 2019 executive order should turn out not to be a formal constraint to Article 146-B of the CFF and its ancillary articles, its existence could result in a *de facto* obstacle for their application by Mexican tax authorities.

Second, while Mexican tax authorities have not ceased authorizations of Ordinary Tax Payment Plans in terms of Article 66 of the CFF and its ancillary articles, nor any suggestion or evidence of such intent has come to light, the prevailing circumstances invite to caution when assessing the request to, and potential authorization by, the Mexican tax authorities of Ordinary Tax Payment Plan regarding outstandingly sizeable Tax Claims, as often is the case in restructuring processes.

Key Takeaways

Although the Tax Claims restructuring mechanisms previously described – which have been used in several of the most important restructurings in Mexico in the last years – have not been formally modified or revoked, their discretionary nature, the current Government's tax policy and the executive acts issued as of this date might pose a relevant *de facto* threat for their usage. This could, in turn, result in a significant challenges for in-court restructuring and work-out efforts in Mexico.

Debtors with operations and/or assets in Mexico who seek to successfully restructure their debts, especially those analyzing an in-court proceeding, should consider the following:

1. Structure reorganization plans, to the extent possible, (a) to reduce the amount and number of the Tax Claims to be restructured; (b) whose viability is not conditional on successfully obtaining authorization of an Article 146-B remission or an Article 66 Tax Claims payment plan; and (c) providing for an Ordinary Tax Payment Plan under Article 66, at least as a fallback option, given the existing uncertainty of debtors being able to secure remissions under Article 146-B.
2. If an Article 146-B remission or an Article 66 Tax Claims payment plan are to be requested, receive advice and assistance from experts with proven ability to negotiate similar authorizations with the Mexican Government and tax authorities; and
3. Assess the social benefits of the intended restructuring and the social losses that could derive from a failed restructuring so as to provide the Government with strong and measurable arguments to structure any authorization thereto as a social measure. ■



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Can Colombian Trusts Serve as Bankruptcy Remote Vehicles?

By PAOLA GUERRERO and JUAN CARLOS PUENTES



There is a common question raised by creditors undergoing internal credit approval for a financing transaction taking place in Colombia: can we achieve bankruptcy remoteness by way of a trust? Before 2014, the answer was plain and simple as the only trusts that could offer bankruptcy remote features were (1) those acting as issuers of securitizations in the stock exchange market and (2) collateral trusts backstopping the issuance of securities placed through the stock exchange.¹ However, beginning with the 2014 decision in the Campollo S.A. case through the 2018 and 2019 decisions in the Organización Suma S.A.S. case, the Colombian Superintendence of Companies (the “**Bankruptcy Court**”) has issued a line of case law in reorganization proceedings (similar to U.S. Chapter 11 proceedings) that appears to establish certain objective criteria that extend features of bankruptcy remoteness to trusts that act as direct and main borrowers in financing transactions. With respect to liquidation

proceedings (similar to U.S. Chapter 7 proceedings), the case law is less established; however, as of the enactment of Law 1676 of 2013, assets of collateral trusts that are created prior to the initiation of liquidation proceedings are deemed to be excluded from a debtor’s liquidation estate subject to certain limitations. This article briefly describes the “principle of universality” set forth under Law 1116 of 2006 (“**Law 1116**”) and recent case law that addresses the question of whether Colombian trusts can serve as bankruptcy remote vehicles and, therefore, fall outside the scope of such principle of universality.

The principle of universality is one of the corner stones of the Colombian bankruptcy regime as it purports to create in the context of bankruptcy proceedings the necessary bond between the debtor’s assets and its creditors. In light of this principle, the Bankruptcy Court has rendered several rulings

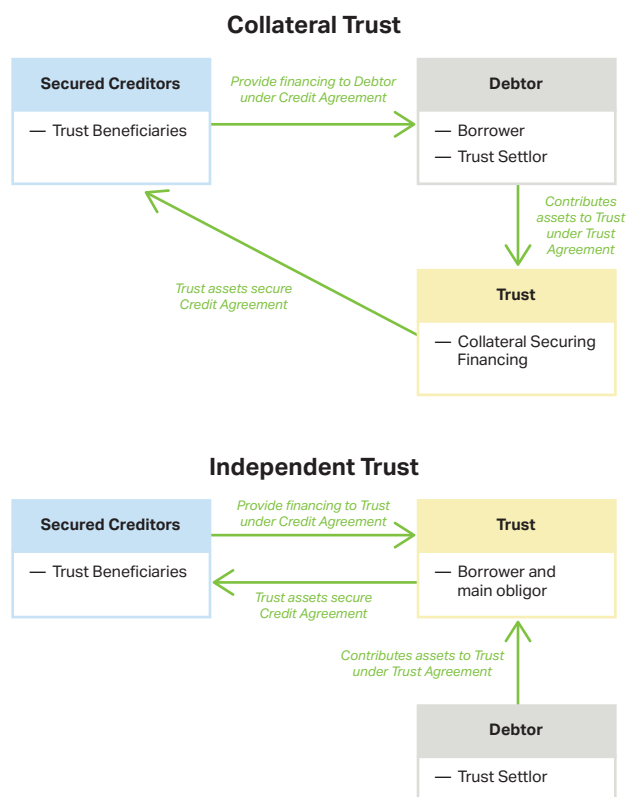
specifying certain rules with respect to trusts that are based on the type of bankruptcy proceeding. Thus, depending on the type of bankruptcy proceeding, the ability of creditors to use trusts as vehicles to bypass the scope of the principal of universality may vary.

The insolvency regime in Colombia is divided into reorganization and judicial liquidation proceedings. The goal of reorganization proceedings is to (1) promote the viability of a business through the restructuring of the debtor's assets and liabilities and (2) stabilize a debtor's existing commercial and credit relations through operational, financial and administrative restructurings. The goal of judicial liquidation proceedings, on the other hand, is to compensate a debtor's creditors in a prompt and orderly fashion through the assignment or sale of the debtor's assets, either by virtue of a direct sale, or private or public auctions.

Trusts in reorganization proceedings

In reorganization proceedings, upon filing of the admission request before the Bankruptcy Court, the debtor's assets become subject to an automatic stay under Article 17 of Law 1116. Pursuant to the automatic stay, a debtor is barred from (1) paying debts that exceed its ordinary course of business or (2) entering into agreements with creditors related to pre-reorganization claims, set-off obligations or the creation or enforcement of any type of security over its assets, in each case without the Bankruptcy Court's prior written approval. Moreover, creditors are prevented from commencing collection actions for pre-reorganization debts, as well as from initiating or continuing any collection proceedings or foreclosing on the debtor's property.

With respect to the application of both the automatic stay and the principle of universality in reorganization proceedings, the Bankruptcy Court has drawn a distinction between two types of trusts. The first is a trust that serves as a security interest in favour of a beneficiary who at the same time is a creditor of the trust settlor ("**Collateral Trusts**"). The second is a trust that holds funds directly transferred to such trust by creditors in connection with a financing transaction; in this context, the trust acts as the direct borrower and main obligor under the financing documents ("**Independent Trusts**").

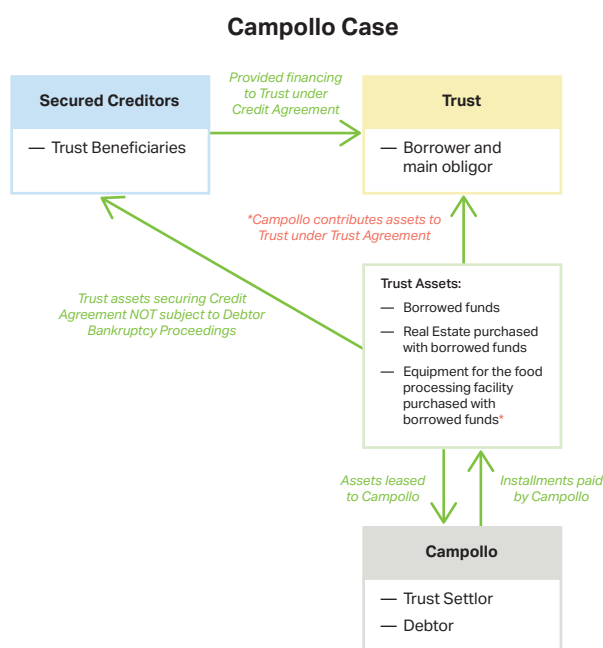


Based on the principle of universality and the rules governing automatic stays, the Bankruptcy Court has limited the effectiveness of Collateral Trusts in the context of reorganization proceedings, preventing the trustee from paying beneficiaries outside the scope of the trust settlor's bankruptcy proceedings. The Bankruptcy Court's rationale for this such action is based on the idea that Collateral Trusts are not entities separate from the insolvent trust settlor; therefore, the Bankruptcy Court considers the assets of the Collateral Trust to be a part of the trust settlor's bankruptcy estate, which is subject to the automatic stay under Law 1116, and the trust beneficiaries to be creditors of the settlor (rather than of the trust itself). As a result, as a general rule, beneficiaries of Collateral Trusts must participate as creditors in the settlor's reorganization proceedings.²

The Bankruptcy Court, however, has recently issued a line of decisions that seemingly creates an exception from the general universality rule for Independent Trusts, such that Independent Trusts are separate from a trust settlor's reorganization proceedings. In each case, the Bankruptcy Court weighed certain factors related to the trust agreement to determine whether the automatic stay and the principle

of universality applied to the trust in question, which included (i) the purpose of the trust agreement, (ii) identity of the trust settlor, (iii) identity of the trust beneficiaries, (iv) the nature of the assets contributed to the trust, and (iv) the nature of the obligations paid by means of the trust (i.e., if the trust was the principal obligor).

The Bankruptcy Court's first ruling in this line of cases was issued in the Campollo S.A. ("**Campollo**") reorganization proceeding.³ In this case, Campollo, as the settlor, set up a trust that served as the borrower in a credit agreement entered into between the trust and certain financial creditors. The trust then used the funds from the credit agreement to purchase real estate to build and develop a food processing facility. The trust then leased the real estate and the food processing facility to Campollo, the settlor, to improve Campollo's channels of distribution and sales capacity. Upon commencement of Campollo's reorganization proceedings, based on automatic stay provisions under Law 1116, Campollo requested that the Bankruptcy Court (i) order the trustee to transfer the trust's funds, both present and future, to the Campollo estate and (ii) prevent the trustee from paying pre-filing debts of Campollo, specifically those in favour of the creditors under the credit agreement.



In reaching its decision, the Bankruptcy Court analysed the purpose of the trust agreement and found that the trust was set up to pay and secure the trust's own obligations,

specifically its obligations under the credit agreement. Consequently, the Bankruptcy Court held that the trust beneficiaries were in fact the financial creditors that extended credit to the trust, and that the following assets belonged to the trust: (i) the funds borrowed by the trust in connection with the credit agreement, (ii) the real estate purchased with the borrowed funds, (iii) the economic rights to the revenues of the Campollo commercial establishments along the Caribbean coast, (iv) the instalments paid by Campollo to the trust in connection with the lease agreement between the trust and Campollo, and (v) the equipment contributed by Campollo to the food processing facility.

Overall, the Bankruptcy Court rejected Campollo's requests and held that the automatic stay under Law 1116 and the principle of universality did not apply to the trust given that the trust's assets were part of the trust's estate and that the trust entered into the credit agreement as the direct and main obligor (*deudor principal*); therefore, the Bankruptcy Court held that the payment waterfall under the trust agreement had to be respected and would not be affected by the settlor's reorganization proceedings. Thus, pursuant to the trust's waterfall, the funds were to be applied first to any trust expenses, second to service the debt of the financial creditors and, finally, with respect to the remaining proceedings, as a distribution to the trust settlor.

The second ruling in this line of cases was issued in the Central Papelera de Colombia S.A.S. ("**Central Papelera**") reorganization proceeding.⁵ In this case, the trust settlor, Central Papelera, set up a trust to obtain the approval of two lines of credit with the bank Banco Colpatria Multibanca Colpatria S.A. ("**Colpatria Multibanca**"), which funds would in turn be used by the trust to: (i) purchase receivables and inventory from the settlor and the settlor's suppliers to sell them to clients, and (ii) perform foreign exchange transactions. Similar to the Campollo case, the trust executed the credit agreement as borrower and received the proceeds directly from the lenders.

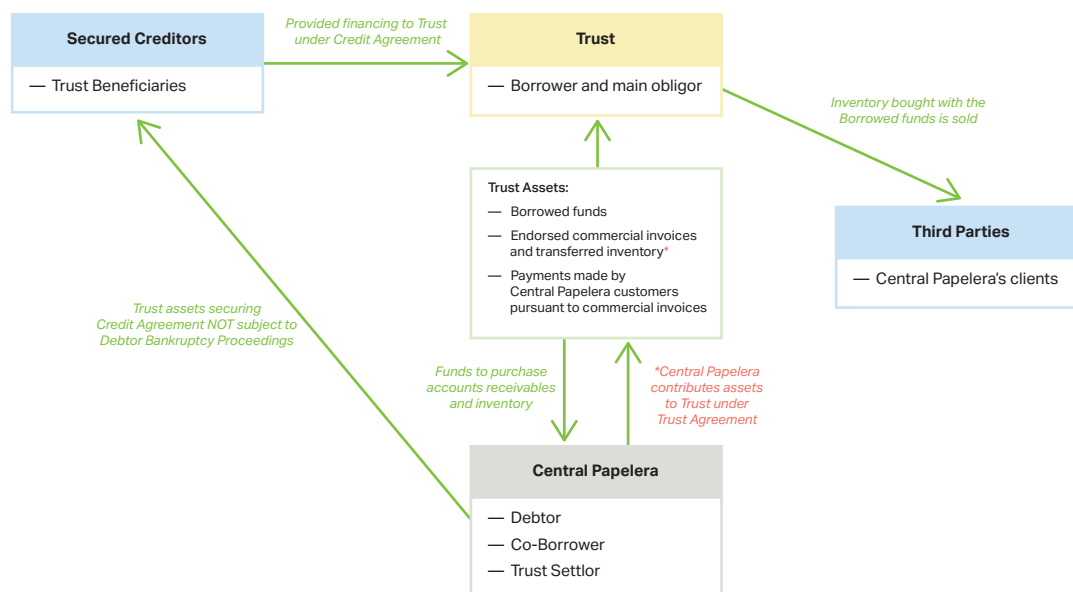
In connection with the transaction, Central Papelera signed a promissory note that imposed an obligation on the company to repay the lines of credit, thereby rendering it a co-obligor (*deudor solidario*). Furthermore, pursuant to the trust agreement, Central Papelera was required to endorse invoices and transfer inventory as contribution to the

trust; therefore, any payments made by Central Papelera's customers were automatically credited to the trust.

Upon commencement of Central Papelera's reorganization proceeding, based on Article 17 of Law 1116, Central Papelera requested that the Bankruptcy Court (i) order the trustee to refrain from making any future payments to

Colpatria Multibanca, (ii) declare ineffective any payments made by the trustee to Colpatria Multibanca after the commencement of Central Papelera's reorganization proceeding, and (iii) order the trustee to transfer all of the trust's assets and funds, both present and future, to Central Papelera's estate.

Central Papelera Case

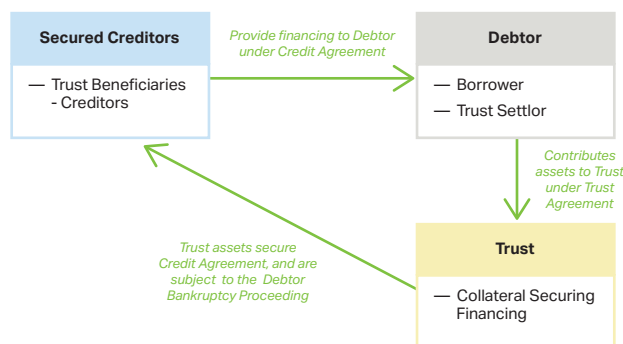


Like in the Campollo case, the Bankruptcy Court analysed the purpose of the trust agreement and held that the trust was set up to pay and secure the trust's obligations in respect of the two credit lines with Colpatria Multibanca. In support of its decision, the Bankruptcy Court highlighted that the trust was registered in the Colombian Registry of Secured Transactions (*Registro Nacional de Garantías Mobiliarias*) as debtor and guarantor of the debt and that the trust received the funds directly from the bank. The Bankruptcy Court found, therefore, that the beneficiary and direct creditor of the trust was Colpatria Multibanca and that the commercial invoices and inventory constituted accounts receivable and were part of the trust's estate since they were contributed by Central Papelera in connection with its obligations as trust settlor under the trust agreement. Based on its findings, the Bankruptcy Court concluded that the principle of universality and automatic stay under Law 1116 did not apply to the trust. Notably, the Bankruptcy Court held that the fact that Central Papelera was a co-debtor under the

lines of credit was not relevant to the analysis, given that Central Papelera's obligations were pursuant to a promissory note, as opposed to the trust agreement, and arose after the execution of the trust agreement.

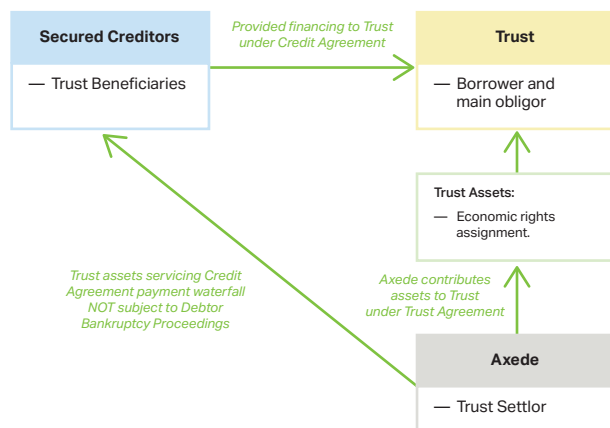
The third ruling in this line of cases was issued in connection with the Axede S.A. ("**Axede**") reorganization proceedings.⁶ This case is particularly interesting as the Bankruptcy Court compared two trusts, one structured as a Collateral Trust and the other as an Independent Trust. Axede, which served as the settlor of each trust, requested the Bankruptcy Court to declare ineffective all payments made by the trustees to the trust beneficiaries in connection with Axede's pre-reorganization debts.

Axede Case - Collateral Trust



In this case, the analysis of the Bankruptcy Court focused on the types of obligations that were being paid by each trust. In its decision, the Bankruptcy Court sustained the rule that trusts set up as Collateral Trusts are intended to pay the trust settlor's debts and, therefore, fall within the scope of the automatic stay and principle of universality. Thus, the Bankruptcy Court held that the trustee of Axede's Collateral Trust was barred from paying debts that Axede accrued prior to the commencement of its reorganization proceedings and ordered the trustee to reimburse trust proceeds that were previously used to pay Axede's pre-reorganization claims.

Axede Case - Independent Trust



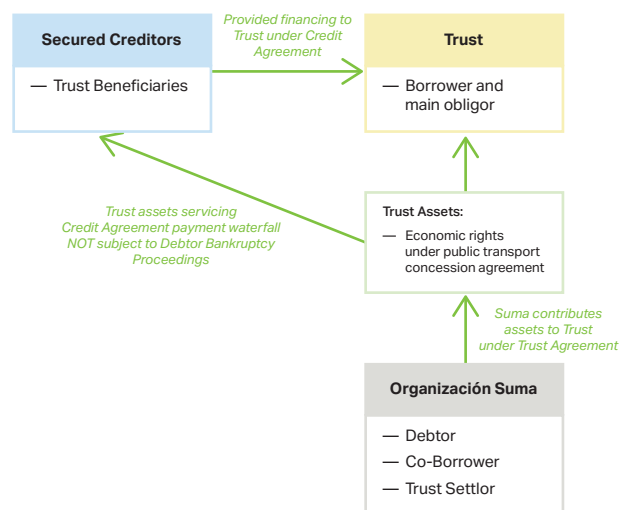
With respect to the second Axede trust, the Bankruptcy Court stated that, given that Independent Trusts act as the direct borrower and main obligor, the obligations paid by the trust are not subject to the automatic stay and principle of universality. The Bankruptcy Court also reiterated its prior holding that the assets of an Independent Trust are part of the trust's estate, not the trust settlor's estate; therefore, if the trust settlor contributes the economic rights of its own

contracts to the trust pursuant to the trust agreement, the income derived from the performance of such contracts is deemed part of the trust's estate. In light of this distinction, the Bankruptcy Court held that the second of Axede's trusts, which was structured as an Independent Trust, was not subject to the automatic stay and principle of universality.

Finally, the latest and most recent decisions in this line of cases were rendered in Organización Suma S.A.S. ("Organización Suma") reorganization proceeding (the "Suma Decisions").⁷ The Suma Decisions confirmed the distinction drawn by the Bankruptcy Court between Collateral Trusts and Independent Trusts. Furthermore, the Suma Decisions represent the first rulings by the Bankruptcy Court that relate to the use of trusts as security interests in the context of a project finance transaction.

In this case, a trust set up by Organización Suma (the "Suma Trust") served as the main obligor under a syndicated loan agreement with two banks, while Organización Suma served as co-obligor under such agreement.⁸ Pursuant to the Suma Trust agreement, Organización Suma transferred to the Suma Trust its economic rights under a concession agreement related to the public transportation system of the city of Bogotá. In addition, the payment waterfall under the Suma Trust agreement provided that the banks' debt was required to be serviced on a weekly basis using 50% of the funds allocated to a specific account under the Suma Trust.

Organización Suma Case





Ultimately, the Bankruptcy Court decided that the automatic stay and principle of universality did not apply to the Suma Trust. In support of its decision, the Bankruptcy Court held that the economic rights under the concession contract were part of the Suma Trust's estate and were no longer owned by Organización Suma, given that Organización Suma contributed them to the Suma Trust. The Bankruptcy Court also held that the contractual relationship between the banks and the Suma Trust, as main obligor, was independent from the relationship between the banks and Organización Suma, as co-obligor; thus, the Bankruptcy Court could not interfere with contractual agreements to which the insolvent trust settlor was not a party. Therefore, the Bankruptcy Court held that the payment waterfall under the Suma Trust could not be modified by virtue of Organización Suma's reorganization proceedings, even if such proceedings related to the provision of public services in Colombia, highlighting that any intervention by the courts could affect the financing of future projects that are essential to Colombia's infrastructure development.

Based on the Bankruptcy Court's decisions in Campollo, Central Papelera, Axede and Organización Suma, we can conclude that where a trust is structured to pay debts that arise in connection with the trust's role as direct and main obligor (*deudor principal*) under certain financing agreements, the trust assets are not automatically dragged into the trust settlor's reorganization proceeding and, therefore, the payment waterfall under the trust agreement has to be respected and

cannot be disregarded merely on account of a trust settlor's reorganization proceedings, provided that the beneficiaries of the trust are being paid in their capacity as direct creditors of the trust (as opposed to merely being creditors of the trust settlor). Underlying this new rule is the distinction drawn by the Bankruptcy Court between a trust settlor's creditors and the trust's direct creditors, and the Bankruptcy Court's emphasis on the notion that the automatic stay is only applicable to assets in possession of the debtor, thereby excluding assets that a debtor has contributed or validly transferred to a trust serving as direct and main obligor. From a practical perspective and based on the above mentioned line of cases, if a trust settlor has transferred assets to an Independent Trust, such assets are no longer considered part of a trust settlor's estate and are therefore shielded from the automatic stay provisions under Law 1116 and the principle of universality.

The case law described above provides valuable insight, from a creditor's perspective, into the Bankruptcy Court's treatment of trusts in connection with reorganization proceedings; namely, the types of trusts that can be used to achieve a degree of bankruptcy remoteness. However, it is important to note that the determination of whether a trust is bankruptcy remote is made by the Bankruptcy Court on a case-by-case basis. In addition, although they may serve as guidelines for future decisions, decisions rendered by the Bankruptcy Court do not necessarily have strict precedential value under Colombian law.

Trusts in judicial liquidation proceedings

A different set of rules applies to trusts in the context of judicial liquidation proceedings. Pursuant to Colombian insolvency law, upon the initiation of liquidation proceedings, all contracts are automatically terminated; therefore, a debtor's assets are effectively pulled into the liquidation proceeding and considered part of a debtor's liquidation estate without consideration of the nature of the trust holding such assets. In other words, it appears that the distinction drawn between Collateral Trusts versus Independent Trusts in the context of reorganization proceedings is not relevant to the determination of bankruptcy remoteness in the context of liquidation proceedings.

Notwithstanding the principles described above, with the enactment of Law 1676 of 2013, it is possible to exclude assets from a liquidation estate through the use of a collateral trust, provided that the trust is registered with the Colombian Registry of Secured Transactions (*Registro Nacional de Garantías Mobiliarias*) (or the applicable registry relevant to the type of asset) before the date of commencement of the liquidation proceeding.⁹ This prerogative¹⁰ was enforced in the Datapoint de Colombia S.A.S. (“**Datapoint**”) judicial liquidation proceeding with some limitations. In this case, the Bankruptcy Court analyzed a trust in which the underlying collateral were economic rights from a contract executed by the settlor. The main issue here was whether the future cashflows derived from the economic rights had to be excluded from the liquidation estate. The relevant consideration to the Bankruptcy Court's decision as to whether to exclude the assets held in the trust was the determination of the time in which the liquidation proceeding was commenced. Indeed, the Bankruptcy Court stated that only assets that are part of the trust at the time of admission of the settlor to liquidation may be excluded. Therefore, assets that are yet to be transferred to the trust as of the date of commencement of the liquidation proceedings, such as the future cashflows derived from economic rights, may not to be excluded from the liquidation estate, meaning that such assets should be distributed among all of the debtor's creditors, without any preference to the secured creditors of the collateral trust.¹¹

The Datapoint case is relevant to creditors because it sets forth a temporal criteria—the admission of the settlor to liquidation—to determine the extent of secured creditors' rights where their security interest is a Collateral Trust in which the underlying collateral are economic rights from a contract executed and performed by the settlor.

Conclusion

In spite of the requirements under Law 1116, based on recent decisions of the Bankruptcy Court, it appears that secured creditors in reorganization proceedings can rely on trusts to a certain extent as bankruptcy remoteness vehicles, provided that the trusts are structured such that they act as direct and main obligors under the relevant financing documentation. In the context of liquidation proceedings, creditors can rely on the temporal parameter set forth by the Bankruptcy Court to determine whether a trust's assets may be excluded from the liquidation estate (provided that such trust is registered with the Colombian Registry of Secured Transactions or the applicable registry relevant to the type of trust asset in question before the date of commencement of the liquidation proceeding).

Despite the case law described above, however, there are certain issues that remain unaddressed by the Bankruptcy Court. For instance, although the rules set forth in Campollo and re-affirmed in the Suma Decisions are applicable to reorganization proceedings, it remains unclear whether such rules regarding bankruptcy remoteness apply to Independent Trusts in the context of judicial liquidation proceedings. Therefore, it remains unclear whether creditors can enforce their collateral (*i.e.*, foreclose on the trust's assets) based on the argument that such assets are not part of the settlor's liquidation estate.

In addition, references in the Suma Decisions to the economic context of the underlying transaction leaves open the question of whether the Suma Decisions are the first of a new line of cases applicable only to project finance transactions¹² or whether, so long as the trust acts as an independent entity, the economic context is not a key factor in determining the applicable treatment of such trust in the context of a settlor's reorganization proceeding. ■

1. Articles 17 and 50 of Law 1116 of 2006.
2. Writ No. 400-004422 of the Colombian Superintendence of Companies in the reorganization proceeding of Panthers Machinery S.A.S. Decision No. 2016-01-105759 of March 22, 2016; Writ No. 400-006617 of the Colombian Superintendence of Companies in the reorganization proceeding of Productos Químicos Panamericanos S.A. Decision No. 2016-01-244309 of April 29, 2016; Writ No. 400-013085 of the Colombian Superintendence of Companies in the reorganization proceeding of Redes y Proyectos de Energía S.A. Decision No. 2018-01-432895 of October 1, 2018.
3. Writ No. 430-004714 of the Colombian Superintendence of Companies in the reorganization proceeding of Campollo S.A. Decision No. 2014-01-154706 of July 4, 2014.
4. In the context of financing transactions, the Bankruptcy Court has held that a trust acting and executing a credit agreement in the capacity of borrower is deemed to be a direct and main obligor. Whenever a trust is solely set up as a collateral trust, but does not execute the credit agreement (and has no rights to the proceeds), the Bankruptcy Court has deemed that such trust has no direct creditors and, therefore, the trust assets are dragged back into the settlor's insolvency estate.
5. Writ No. 400-014007 of the Colombian Superintendence of Companies in the reorganization proceeding of Central Papelera de Colombia S.A.S. Decision No. 2016-01-466059 of September 16, 2016; Writ No. 400-003830 of the Colombian Superintendence of Companies in the reorganization proceeding of Central Papelera de Colombia S.A.S. Decision No. 2017-01-003830 of February 2, 2017.
6. Writ No. 400-011925 of the Colombian Superintendence of Companies in the reorganization proceeding of Axede S.A. Decision No. 2017-01-011925 of August 2, 2017.
7. Writ No. 400-015798 of the Colombian Superintendence of Companies in the reorganization proceeding of Organización Suma S.A.S. Decision No. 2018-01-549145 of December 18, 2018; Writ No. 400-002370 of the Colombian Superintendence of Companies in the reorganization proceeding of Organización Suma S.A.S. Decision No. 2019-01-075629 of March 26, 2019.
8. Suma Trust and Organización Suma signed a promissory note by which they promised as main obligor and co-obligor (*avalista*), respectively, to pay the banks the syndicated loan.
9. Pursuant to Law 1676 of 2013, once the collateral is executed, it must be registered in the Moveable Assets Securities Registry (*Registro de Garantías Mobiliarias*). Registry is commonly made simultaneously or shortly after the relevant financing transaction, before the bankruptcy proceeding is commenced. Additionally, for the enforcement of the security during a bankruptcy proceeding, the secured creditor must register an additional form (*formulario de ejecución*), to be filed with the request of enforcement of the collateral (reorganization proceeding) or the exclusion of the assets (liquidation proceeding).
10. Prior to the enactment of Law 1676 of 2013, pursuant Article 55 of Law 1116 and Article 12 of Decree 1038 of 2009, it was possible to exclude the assets from the liquidation estate provided that they had been contributed to the trust with the purpose of financing the debtor. However, under the current regulation, the contribution for financing purposes requirement was eliminated and the condition to exclude assets from the liquidation estate is the existence of a security agreement duly registered before the relevant registry.
11. Writ No. 400-017527 of 28 December 2015 of the Colombian Superintendence of Companies in the liquidation proceedings of Datapoint de Colombia S.A.S. Decision No. 2015-01-526680 of December 30, 2015; Writ No. 400-005775 of 15 April 2016 of the Superintendence of Companies in the liquidation proceeding of Datapoint de Colombia S.A.S. Decision No. 2016-01-190200 of April 18, 2016.
12. In the Suma Decision, as noted above, the Bankruptcy Court highlighted the importance of taking into consideration the overall objective of reorganization proceedings in Colombia (that is, to maintain the debtor's corporate purpose) and noted that collateral structures agreed upon with creditors in the context of infrastructure project finance transactions must not be disregarded, among others, due to the importance of these types of investments to the development of the country's infrastructure.



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Bank Rescue in Russia: The Tale of PSB and The Brothers Ananyev

By MATTHEW FISHER



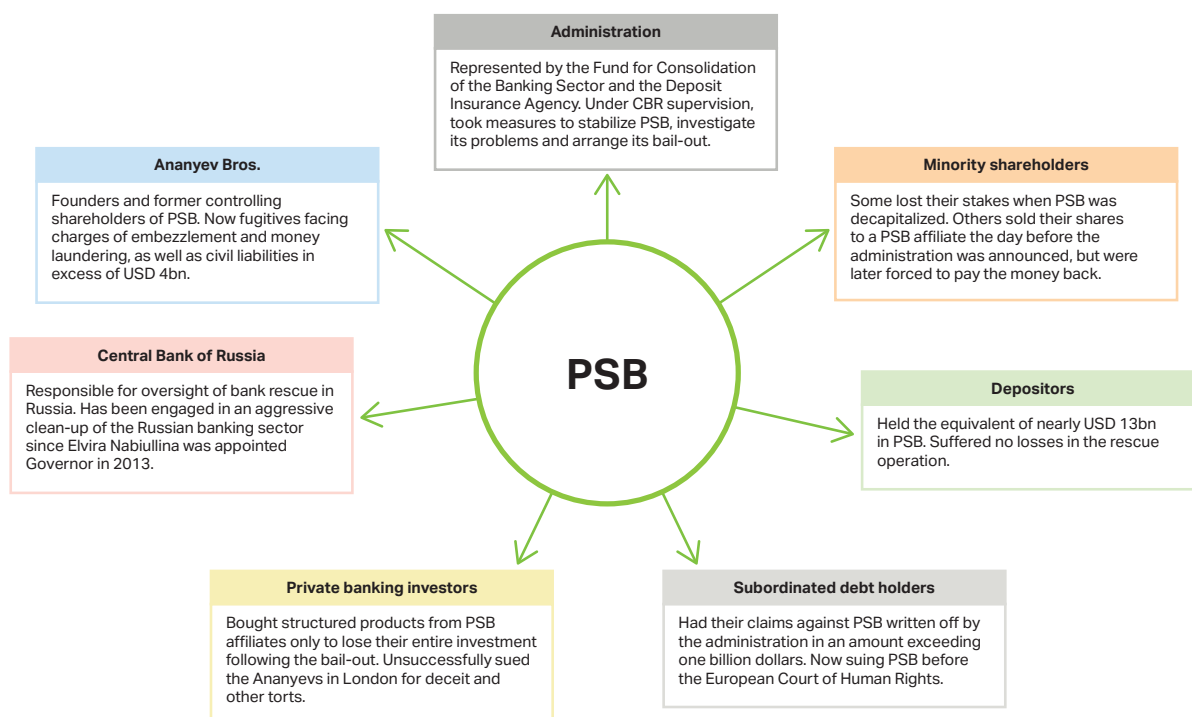
Life in 2012 was good for Aleksey and Dmitry Ananyev. Having flung open the doors to their exquisite collection of Socialist Realist paintings a few months earlier, the brothers – then worth a combined USD 3.8 billion¹ – had their eyes on a public offering of a different type. Promsvyazbank (or PSB), the jewel in the crown of the Ananyevs' business empire and third-largest non-state bank in Russia, finally appeared ready to join the elite, to conduct an initial public offering on the London Stock Exchange.

It was never to be. Things progressively went downhill for PSB, and the Ananyevs' hopes were dashed definitively just five years later. In August 2017, Alfa-Capital analyst Sergei Gavrillov sent his clients a now-infamous list of four banks he considered critically unstable, PSB among them. It turned out he was right: by December 2017, the Central Bank of Russia (CBR) considered PSB dangerously undercapitalized

and required PSB to increase its capital reserves by over RUB 100 billion (USD 1.6 billion). Dmitry Ananyev proposed a plan to do so over three years; the CBR gave him three days. On December 15, 2017, with PSB still undercapitalized, the CBR announced that PSB was to be put into administration² as a precursor to being bailed out and taken into public ownership.

PSB was not the first and not even the largest Russian bank to be bailed out in 2017 (that dubious honour goes to Bank Otkritie, Russia's then second-largest non-state bank, whose bail-out was announced at the end of August that year). Yet, two years on, 'The Tale of PSB and the Brothers Ananyev' bears repeating. Like no other, it illustrates the dynamics of bank bail-outs in Russia: the historical drivers, the dysfunctionality of the previous regime, the serious consequences for key stakeholders, and the market-consolidating effect of the recently revised regime.

Dramatis Personae



Bail-outs have resulted from historical peculiarities of banking in Russia

PSB reached breaking point in 2017. Arguably, however, the die was cast for PSB (and certain other bailed-out banks) many years before, at the very birth of the banking system in modern-day Russia.

The fall of the Soviet Union created a wealth of business opportunities in Russia. However, there was initially a shortage of capital to exploit these opportunities, as the Russian commercial banking system was in its infancy and foreign banks were not yet lending to local businesses. In the absence of regulation, many Russian entrepreneurs solved this problem by opening banks of their own, which they used to channel capital in support of their businesses. The legacy of these so-called ‘pocket banks’ continues to be felt to this day, with a significant number of Russian banks failing to spread their risk across a sufficiently broad range of clients and industries. In some cases, these so-called ‘concentration risks’ are combined with default risk resulting from the overly rapid expansion of loan books. In the most serious cases, these risks have led to government intervention.

PSB is a case in point.

Concentration risks

PSB was founded by the Ananyevs in May 1995 as a pocket bank to provide funding to customers of Technoserv, the Ananyevs’ systems integration business. Although PSB rapidly diversified its business—at its peak serving 2.5 million retail customers, 200,000 SMEs and 10,000 major corporates—it never fully broke with its past as a pocket bank:

— PSB was subject to sector concentration risk.³ In the early days, PSB made loans mainly to businesses in the telecoms sector. By the time of its bail-out, this sector made up only 2% of PSB’s loan portfolio. In the meantime, however, PSB had developed sizeable concentration risks in other sectors, notably real estate. Loans connected to real estate represented 22% of PSB’s loan portfolio by the time of the bail-out. To make matters worse, PSB’s balance sheet somewhat unusually included a speculative portfolio of buildings and land that represented nearly 5% of the bank’s total assets. Worse still, a further 20% of PSB’s loans were made to customers in the trade and oil and gas sectors, which are – like real-estate – dependent on the economic situation in Russia.

— PSB was subject to single-name concentration risk. In less euphemistic terms, PSB made a large proportion of its loans to a small group of borrowers. Specifically, PSB's top-20 borrowers represented one third of PSB's loan portfolio and 307% of its own capital – significantly higher than the Russian average of 226%, itself one of the highest concentration ratios in the world.⁴ To top it off, the CBR discovered that loans to the Ananyevs and their companies represented more than 100% of PSB's own capital.⁵

The correlation between these concentration risks and PSB's origins as a pocket bank does not seem coincidental. The other two major Russian banks bailed out in 2017 also harboured high concentration risks and also began life as pocket banks: Bank Otkritie was originally a captive bank of the ICT Group private equity firm, while B&N Bank was founded to fund other companies within the B&N industrial group.⁶

Default risk

With the need for capital growing ever more acute and in the near-absence of regulation, thousands of small banks were set up in the early 1990s. By the end of 1994, the number of banks in Russia had peaked at 2,439.⁷ What followed was a period of market consolidation, in which the more successful players devoured smaller banks in an effort to win market share and rapidly boost their balance sheets.

PSB was one of the banks pursuing this aggressive expansion strategy. It acquired AvtoVAZbank, Bank Nizhny Novgorod, Pervobank, Volgoprombank, Vozrozhdenie Bank and Yarsotsbank, among others. This shopping spree allowed PSB to grow at a blistering pace. Within three years, PSB was one of Russia's top-100 banks, and between 2001 and 2008, its assets grew at an average rate of 65% per year.⁸ Even in its final years under the Ananyevs, PSB continued to grow rapidly, doubling its assets in the four years to the end of 2016.⁹

This growth came at a cost. Lurching from one acquisition to another left little time to integrate and manage the assets acquired, some of which were of poor quality (see below). This contributed to PSB accumulating a significant portfolio of bad loans. Shortly before the bail-out was announced, 19% of PSB's loan book was overdue or otherwise impaired (compared to 12% among Russian banks on average).¹⁰

Bail-out as a historical likelihood

The high concentration risks and low quality of PSB's loan book can be traced back to PSB's origins as a pocket bank and the rapid consolidation of the Russian banking sector. These risks, when combined with the worsening economic conditions in Russia starting in 2014 and increasingly stringent CBR capital requirements, led to the bail-out of PSB and a number of other banks like it. In this way, the bail-out of PSB demonstrates how the bail-out of Russian banks is often a direct consequence of the traumatic birth of banking in modern Russia.

Bail-outs under the old regime have begotten bail-outs under the revised regime

The bail-out of PSB was necessary, in part, because PSB had participated in the bail-outs of other banks under the credit scheme regime that was favoured prior to 2017.

Russia had no bail-out regime when it was hit by crisis in 1998; after all, Russian banking had then existed for less than seven years in the market economy. Accordingly, although ruinously expensive attempts were made to support the banking sector, millions of Russians were left in misery when swathes of banks collapsed, including Russia's then-largest non-state bank, SBS-Agro. This painful experience prompted the government to put in place Russia's first bailout regime. By 2008, this had evolved into the highly unconventional 'credit scheme'. Instead of the government injecting capital directly into failing banks (the usual practice worldwide), the credit scheme provided for stable banks voluntarily to acquire failing banks in return for cut-rate long-term loans from the government. In theory, by on-lending the cheap government money at a higher interest rate, the stable banks could generate handsome profits that could be used to recapitalize the failing banks.

PSB was a keen participant in this idiosyncratic arrangement: most of the banks it acquired in its haste to expand (see above) were failing banks acquired in the context of the credit scheme. According to the CBR, the financial burden of rescuing failing banks, particularly AvtoVAZbank, was a key driver behind PSB itself failing in 2017.¹¹ What the CBR meant by this is not certain, as it provided no further explanation and documents relating to credit scheme



bail-outs are not a matter of public record. However, the CBR's comments hint that PSB was affected by the moral hazard inherent in the credit scheme.

Moral hazard

The government has an interest in maintaining the stability of the financial system at all costs. Credit scheme participants therefore found that the government could be prevailed upon to provide additional credit or to roll-over existing credit where a failing bank continued to fail after its acquisition under the credit scheme. In addition, some credit scheme participants were able to redirect some of this money to their own businesses. Accordingly, credit scheme participants had little incentive to stabilize the failing banks they had acquired; to do so would bring an end to the cheap government credit, provided at a yearly interest rate of 0.51%.¹²

Safe in the knowledge that the government would foot the bill, some credit scheme participants even transferred bad loans to the failing banks they were supposed to be rescuing. This became a way for credit scheme participants to improve the appearance of their balance sheets, and PSB was reportedly no stranger to the practice.¹³ The loan book

of AvtoVAZbank, for example, swelled to nearly five times its original size within two years of being acquired by PSB, as a result of credit transfers. It appears, therefore, that PSB succumbed to the moral hazard posed by the credit scheme. As a result, PSB found itself financially responsible for an increasingly toxic failing bank, which may well have contributed to PSB's downfall.

Transition to the revised regime

By the mid-2010s, it was clear the credit scheme was in most cases not fit for purpose. An overhaul of the bank rescue regime in June 2017 finally provided the opportunity needed to break with the flawed practice. Since then, direct government intervention has been the favoured mechanism.

The revised regime is governed by the Federal Law on Bankruptcy, chapter IX, section 4.1. The law sets out circumstances indicative of a bank with serious liquidity or capitalization problems. These circumstances are grounds for initiation of the bank rescue regime. In the case of PSB, it was likely a violation of CBR capital adequacy requirements that provided grounds for intervention.

The first step under the revised regime is to put in place a temporary administration, which stabilizes the bank in the short term, investigates the severity of the problem and develops a long-term rescue plan. To facilitate this, the powers of the shareholders, management and executive organs are suspended and almost all decisions at the bank become subject to approval of the administration. The law provides the administration with extensive powers. Among other things, it may:

- access all documents, premises and personnel;
- take measures to preserve assets, including by nullifying unlawful transactions, clawing back management remuneration, or imposing a moratorium on withdrawals and other claims;
- change the shareholder and management structure;
- write off certain debts; and
- apply for criminal investigation where it finds evidence of unlawful behaviour.

In PSB's case, the temporary administration wasted no time getting to work. Within days it had established a bail-out plan, requested a criminal investigation into suspicious pre-administration transactions, and written off PSB's subordinated debts in the amount of USD 1.3 billion, as well as debts owed to management and Ananyev-controlled entities.¹⁴ Interestingly, no moratorium was announced, which reportedly led to depositors withdrawing tens of millions of roubles per minute after the temporary administration was announced.¹⁵ Although denied by the Ananyevs, it has been reported that the brothers were among those making withdrawals. They allegedly withdrew RUB 4.5 billion (USD 70 million) of their savings from the bank, using trolleys to carry off over 140 kilograms of banknotes.¹⁶

Once the temporary administration has prepared the ground, the authorities may take bankruptcy prevention measures. The key measure is the provision of financial aid – the bail-out proper. This is achieved by the authorities subscribing for a new issue of shares from the troubled bank, and is subject to three conditions:

- the bank's subordinated liabilities must be extinguished, along with any debts the bank has to its directors, management or controlling shareholders;
- the bank's share capital must be reduced to match the bank's own funds; and
- the issue of new shares must result in the government holding at least 75% of the voting shares of the bank.

In PSB's case, the temporary administration had already taken care of the first condition. The authorities therefore moved immediately to reduce PSB's capital in mid-January 2018. As PSB's liabilities exceeded its assets (i.e., it had negative own funds), the authorities reduced PSB's share capital to the minimum of one rouble. Finally, in March 2018, the authorities injected RUB 113 billion (USD 1.8 billion) into PSB in return for a 99.99% stake.

Russian non-state banks: hoisted by their own petard

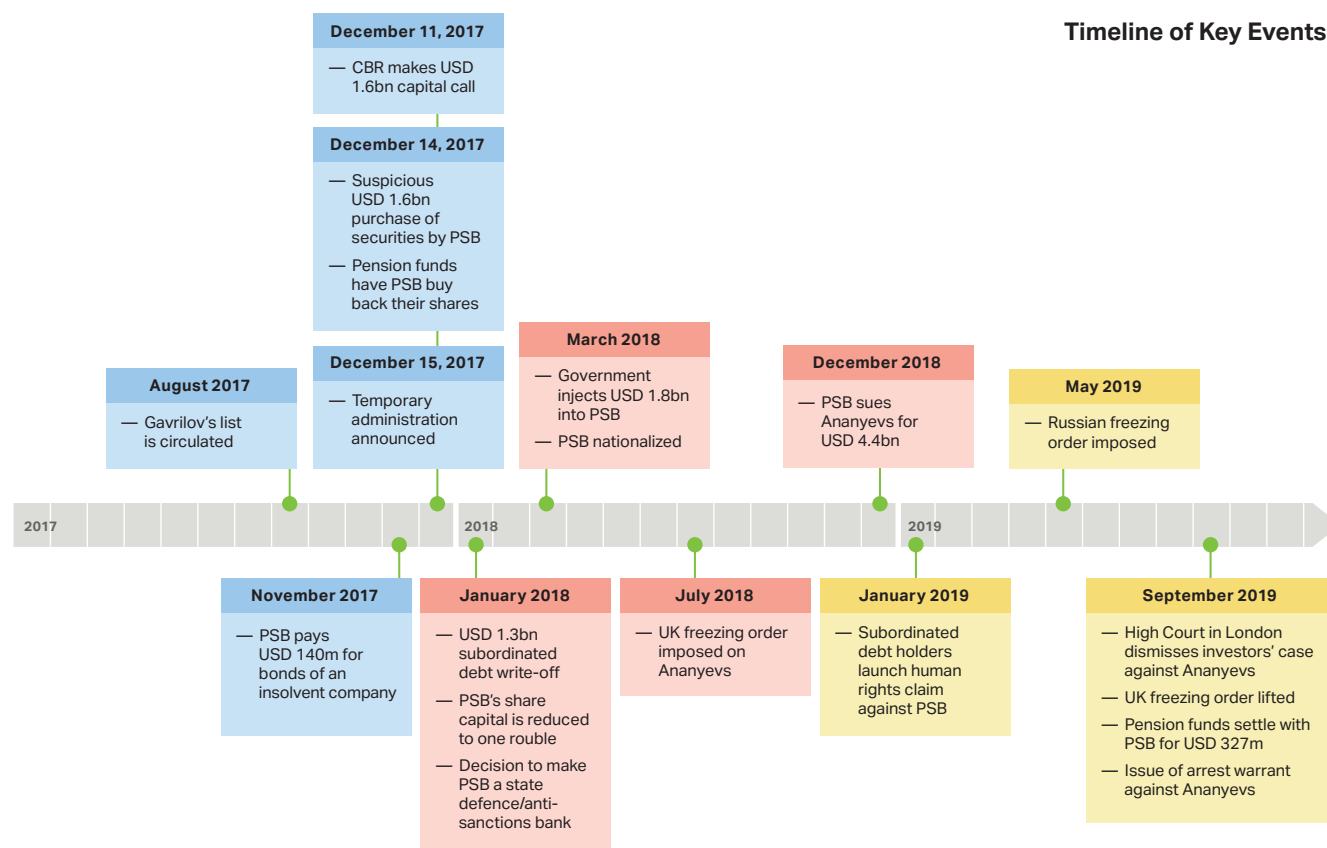
Instead of safeguarding financial stability, the credit scheme merely served to exacerbate the risks inherent in the expansion strategy pursued by privately owned Russian banks. Not only were the likes of PSB, Otkritie and B&N acquiring other banks at reckless speed, but the credit scheme encouraged them to acquire unstable banks and to keep them unstable. Eventually, the instability spread to the credit scheme participants themselves. The irony is that banks like PSB would likely never have needed bailing out had they not participated in the bail-outs of other banks.

Bail-outs have left bank owners and investors in deep water

The purpose of bailing out a bank is to prevent the wider destabilization of the financial sector. On this metric, PSB's bail-out was successful. Depositors did not lose their savings and PSB now functions normally: it meets its obligations to other banks, repays deposits on demand, operates 8,000 ATMs and employs 12,800 people across 299 branches.¹⁷

The Ananyevs and investors in PSB have not fared so well.

Timeline of Key Events

**The Ananyevs**

According to Dmitry Ananyev, the bail-out of PSB was a government conspiracy to gain control of the bank and cow the Russian banking sector at large. He says PSB was solvent and had sufficient liquidity, but smear campaigns orchestrated by the CBR allowed the bank to be “shot and its skin thrown to the [authorities]”.¹⁸

Conspiracy or not, the CBR took control of PSB and its books. They revealed a number of suspicious transactions completed in the run-up to PSB being taken into temporary administration. Among the most concerning allegations were the following:

- The purchase by PSB of securities from Ananyev-linked entities at above-market prices. These transactions, concluded the day before the CBR's intervention, cost PSB RUB 102 billion (USD 1.6 billion).
- The purchase by PSB of bonds issued by its finance subsidiary. PSB funded this purchase by taking out a subordinated loan from its finance subsidiary. The finance subsidiary had funded this loan by issuing the bonds to the market. The effect of this circular scheme in late summer 2017 was that PSB had purchased bonds that would only pay out if PSB repaid the subordinated loan. As the subordinated loan was soon to be written off as part of the bail-out, the bonds were worthless. Still, the purchase price for the bonds represented another RUB 44 billion (USD 688 million) safely beyond the reach of the soon-to-be-appointed administration.
- The purchase by PSB of the bonds of an insolvent company. In November 2017, PSB spent RUB 9 billion (USD 140 million) purchasing the bonds of a company owned by Dmitry Ananyev. The company had filed for insolvency some months earlier, making the bonds practically worthless.



PSB, at the direction of the CBR, is suing the Ananyevs and their associates for RUB 282 billion (USD 4.4 billion) in connection with these dealings and others. While the case is still in progress, PSB has convinced a Moscow court to freeze the Ananyevs' most valuable assets, including their paintings, private jets, apartments and luxury cars.

Worse still for the Ananyevs, an international warrant has been issued for their arrest on charges of grand embezzlement and money laundering under articles 160 and 174 of the Russian Penal Code. The brothers face up to ten years in a penal colony if found guilty.¹⁹

The Ananyevs have gone into hiding. Aleksey Ananyev nonetheless managed to transfer his assets to his wife, while the paintings subject to the freezing order disappeared from the Ananyevs' gallery. In late 2019, a court annulled Aleksey Ananyev's marriage and the paintings (including an oil painting of Alexey Ananyev in the Socialist Realist style) were discovered in a lock-up on the outskirts of Moscow. The brothers' whereabouts, however, remain unknown.²⁰

PSB investors

PSB's bail-out secured a good outcome for depositors, but the bank's shareholders, subordinated debt holders and structured product investors suffered heavy losses.

The shareholders – the Ananyevs, but also the European Bank for Reconstruction and Development and certain other minority shareholders – were wiped out when the authorities reduced PSB's share capital to one rouble. Seeing that the writing was on the wall, a number of private pension funds with significant minority shareholdings in PSB attempted on the eve of the administration announcement to avert financial disaster by effectively having PSB buy their shares back. This gambit was, however, ultimately unsuccessful, as a lawsuit brought by the temporary administration resulted in a settlement agreement requiring the pension funds to pay nearly RUB 21 billion (USD 327 million) in long-term deposits into the bank.²¹

PSB's subordinated debt holders faced a similar fate. They lost the entire amount owed to them when the authorities exercised their power under the Federal Bankruptcy Law to

write off PSB's subordinated debts. Somewhat imaginatively, the erstwhile subordinated debt holders sued Russia in January 2019 before the European Court of Human Rights, claiming that the write-off was a breach of their right to property, for which they were entitled to compensation. The case has yet to be heard.

Even retail investors lost out in the bail-out. In an attempt to see a fractionally greater return on their savings than regular depositors, customers of PSB's private banking arm had ploughed tens of millions of dollars and euros into PSB group structured products in 2017. They allege that PSB marketed the investments as benefitting from the personal guarantee of the Ananyevs. In fact, the products were guaranteed by an intermediate holding company ultimately owned by the Ananyevs. Soon after PSB was put into administration, the issuer of the products, along with its now-insolvent guarantor, defaulted on its obligations to the investors.

A group of around 100 of the out-of-pocket investors, who had together sank approximately USD 80 million into the products, sued the Ananyevs in London for conspiracy, causing loss by unlawful means, misrepresentation and deceit.

While the investors were twice successful in having the Ananyevs' assets in the UK frozen, their claim was ultimately thrown out by the High Court.²² A conspiracy theory attributes this to the Ananyevs being recruited as British intelligence assets.²³ The court provided a more sober explanation: the mere presence of UK companies in the chain of ownership linking the guarantor of the structured products to the Ananyevs was not enough to give the court jurisdiction to rule on the substance of the dispute.

A no-win situation

The Ananyevs have lost their pride and joy, become branded "financial terrorists", and face enormous civil liabilities and serious criminal charges.²⁴ Investors in their business have lost millions. Even the Russian taxpayer ended up spending a total of RUB 243 billion (USD 3.8 billion) on the rescue operation.

As the PSB saga goes to show, there are no winners in a bail-out.

Bail-outs have increased state control over the banking sector

The revised bail-out regime obliges the Russian state to take a controlling stake in any bank to which it provides direct financial support. As PSB and the other banks bailed out in 2017 were among Russia's biggest, their bail-out has effectively nationalized a large portion of the banking sector.

The presence of state-run banking behemoths Sberbank and VTB has always guaranteed the Russian government influence over the banking sector. However, the bail-out and nationalization of PSB and others has increased that influence further still. State-owned banks now account for over 80% of lending to corporates and 70% of lending to individuals.²⁵ By comparison, Alfa-Bank, Russia's largest non-state bank and fifth-largest bank overall, accounts for just 4% of lending.²⁶ State concentration of the banking sector is so acute that even the competition regulator recently commented that the nationalization of banks "pushes [Russia] even further into state capitalism, and a state monopoly over the economy is not democracy – as history well shows..."²⁷

President Putin has sought to calm concerns over state participation in banking, reassuring the population that "nobody is planning on smothering every bank in Russia".²⁸ This tallies with CBR policy, which is to re-privatize bailed-out banks as soon as possible.²⁹ However, it has been over two years since 2017's wave of bail-outs and, if other countries are anything to go by, "as soon as possible" likely implies years more state ownership. For example, it took the British government nearly a decade to return Lloyds Bank to the private sector after its bail-out in 2008.

As for PSB, it will never return to private ownership. In early 2018, PSB's status as a state bank was made permanent as a precursor to the government conferring on it a particularly sensitive mission. PSB is now tasked with providing financing to sanctioned entities and enterprises within Russia's military-industrial complex.

The idea is to reduce the efficacy of US sanctions by ensuring sanctioned persons and persons at risk of being sanctioned have a reliable source of funding. A Russian bank financing a sanctioned person may itself be sanctioned by the United

States. Any person that continues to deal with such a bank can expect to be sanctioned in turn. Russian banks that wish to avoid mass desertion of their customers, creditors, suppliers and other counterparties are therefore forced to eschew sanctioned persons, thereby doing the bidding of the US authorities. PSB, however, is intended to be impervious to this outside pressure: it can operate at a loss indefinitely thanks to state support; it makes loans to companies that are already sanctioned or to defence companies whose sole customer is the Russian government; its operational currency is the rouble; it does not rely on foreign financial infrastructure; and its financial statements and the identity of its directors have been made state secrets.³⁰ At least in theory, imposing sanctions on PSB should have little effect on its lending activities.

While PSB may be the most extreme example, there is no doubt the revised bank bail-out regime has contributed to the creeping control of the Russian state over the banking sector.

A happy ending?

The Tale of PSB and the Brothers Ananyev recounts how banking in Russia has been dogged by its difficult past and forced to retrace its steps in search of a bank rescue regime that works. The journey has been fraught with danger, particularly for ambitious, expanding banks and those that chose to invest in them. The road ahead for the Russian taxpayer and the remaining privately owned banks looks no less treacherous.

The dust is now starting to settle. While the CBR has spent the equivalent of 2.4% of Russia's GDP (RUB 2.5 trillion/USD 39 billion) on financial support for banks since the revised rescue regime was introduced, its intervention does seem effective.³¹ No systemically important Russian bank has been targeted for bail-out since the end of 2017. The financial system appears stable.

Stable does not mean robust, however. The proportion of overdue loans (i.e., NPLs) in the Russian banking sector stubbornly hovers around 10% (compared to 4.5% in other major emerging markets).³² This indicates that even a relatively

modest worsening of economic conditions could spell trouble for Russian banks, which are no doubt keen to reduce their NPL exposure.

Distressed debt investors should not get too excited about this.

For one thing, the NPL market in Russia remains underdeveloped, with political risk and the absence of reliable legal and market infrastructure driving low transaction volumes.

In addition, it appears the very substantial NPLs attributable to PSB, Otkritie, B&N and other bailed-out banks are not for sale anyway. The government has pooled RUB 2 trillion (USD 31.5 billion) of these NPLs into another failed bank – Trust Bank. The idea is to remove the NPLs from the balance sheets of the bailed-out banks and simultaneously put them in the hands of a single 'bad bank', which should be able to realize whatever value is left in the NPLs efficiently. Although Trust sold NPL portfolios worth RUB 26 billion (USD 409 million) in 2018, the head of Trust has recently indicated that the bad bank does not intend to sell any more and will instead manage the NPLs itself: "selling [NPLs] just so someone else can recover something from them and get the money for themselves is not our model".³³

As the government embarks on the long journey of squeezing the last drops out of the substandard assets left behind by PSB and other bailed-out banks, the Russian banking sector would do well to reflect on the events of 2017. The expense and state domination of banking that have resulted from bail-outs raise the question of whether further reform of the bank rescue regime is needed. One possibility would be to have the creditors of a failing bank converted into shareholders of the bank, with the aim of reducing the bank's debt burden sufficiently for it to recover. This so-called 'bail-in' technique involves no injection of public funds nor any acquisition of shares by the state, thereby avoiding the key shortcomings of Russia's present bail-out regime.

If the PSB fiasco can at least start a conversation about the future of bank rescue in Russia, The Tale of PSB and the Brothers Ananyev may yet have a happy ending. ■

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Legal Framework for Insolvencies in Uzbekistan

By NODIR YULDASHEV and MALIKA KHUSHMATOVA



Despite being relatively new, the current bankruptcy law in Uzbekistan (initially adopted in early 1990s) has improved drastically over the last decades. Uzbekistani insolvency regime, that was upgraded significantly throughout the several redrafts of the law, is still undergoing some changes that are being introduced as a part of its ambitious market-oriented economic reforms.

The main document regulating insolvency regime in Uzbekistan is the Law “On Bankruptcy” adopted in May 5, 1994 (the “Bankruptcy Law”). Adoption of the Bankruptcy Law was aimed at setting up a system of insolvency proceedings for legal entities as well as for individual entrepreneurs. Being a former-Soviet country Uzbekistan at that time had close to none historical background of bankruptcy regulations whatsoever. Unsurprisingly this first version of the Bankruptcy Law had failed to work successfully in practice as it did not cover many vital issues that kept arising thought attempts of implementing the bankruptcy proceedings. There were

actually only two cases brought to court during the four-year period of existence of this version.

The evident underdevelopment of the first version of the Bankruptcy Law led to adoption of the second one on August 28, 1998. Compared to the previous one, the updated version expanded the scope of creditors’ rights and also attempted to fill in the procedural gaps of the previous insolvency regime. This resulted in apparent progress of Uzbek bankruptcy law: 439 bankruptcy cases were adjudicated in 1998 alone. Nevertheless, there was a lot left to be desired in terms of organization of state staff responsible for

procedural matters, application of the bankruptcy test and intricacies regarding certain categories of debtors.

The third and the latest version of the Bankruptcy Law (i.e. the Law “On Bankruptcy” No. 474) was adopted on April 24, 2003. It provides for the definition of insolvency and the updated criteria for insolvency, as well as for the order of initiating and conducting of bankruptcy procedures. Furthermore, it sets out the scope of authority for those involved in organizing and holding of bankruptcy proceedings as well as relevant obligations of state bodies. The state bodies authorised to carry on governmental control over insolvency matters in Uzbekistan are the Cabinet of Ministers and the Agency for managing state assets (“Agency”).

Bankruptcy criteria

Pursuant to Article 3 of the Bankruptcy Law, the terms “bankruptcy” and “insolvency” are used interchangeably and are defined as debtor’s incapacity to satisfy its monetary obligations or mandatory payment obligations. In order to be recognized insolvent by the court, a debtor shall meet twofold bankruptcy criteria:

1. Inability to satisfy monetary obligations or mandatory payment obligations owed to creditors or state authorities for a period over 3 calendar months.
2. The aggregate amount of debt owed by the debtor shall exceed 300 basic estimated values (BEV)¹, i.e. approximately US\$ 7,000.

It is important to note that the law does not require bankruptcy criteria to be associated with financial insolvency of a debtor, i.e. absence of any funds and assets to settle all accounts payable. The Bankruptcy Law supported by the latest judicial practice sets forth that any inability of a debtor to pay due to any “practical” reasons may lead to bankruptcy procedure. For instance, one of the precedents evidences that a debtor that owes debt denominated in foreign currency and has the required funds available in local currency to pay such debt, but fails to convert its funds into the necessary foreign currency, may still be found insolvent in Uzbekistani court. Although conversion related issues are no longer treated as a risk in Uzbekistan, judicial practice

The Bankruptcy Law supported by the latest judicial practice sets forth that any inability of a debtor to pay due to any “practical” reasons may lead to bankruptcy procedure.

shows that any practical inability of a debtor to pay may lead to initiation of bankruptcy proceeding that are likely to be supported in courts.

Initiation of bankruptcy proceeding

The bankruptcy proceeding in Uzbekistan can be initiated in the economic courts by the authorized persons as long as the above insolvency criteria are satisfied. The right to file a petition in court for initiation of such proceedings is vested in a debtor, a creditor, a prosecutor and, in case of mandatory payment, tax agency and other state authorities.

Moreover, it should be noted that the Bankruptcy Law, besides the right to initiate proceedings, also imposes an obligation to file a petition on initiation of proceedings to court upon the director of the debtor as soon as the bankruptcy criteria are met. For instance, Article 8 of the Bankruptcy Law obliges a company’s director to file for bankruptcy if payment of one creditor’s debts in full leads to inability of a company to pay another creditor’s debts. In this case, a director of a company must file the bankruptcy lawsuit with an economic court no later than within 1 calendar month from the day this inability became apparent under the debtor’s financial reports. A debtor’s director who failed to fulfill this obligation may be brought to criminal liability since Uzbek law treats such failure as a concealment of bankruptcy. Depending on the circumstances of the case, this violation may lead to a criminal sanction in the form of a fine starting from 150 BEV (i.e. roughly US\$ 3,500) or in the worst case scenario to an imprisonment for up to 3 years.

For a director to be able to bring such petition to court and initiate the proceedings a corporate decision on liquidation of the company shall be made. Such decision is usually adopted via general shareholders meeting (GSM) or by a

sole participant. Depending on the type of a legal entity certain quorum shall be met when adopting such decision (for instance, in case of joint-stock company (“JSC”) more than 75% of vote is required while for the limited liability company (“LLC”) decision on liquidation shall be made unanimously).

All insolvency cases are resolved by the economic court - the state body that has an exclusive competence to hear bankruptcy cases in Uzbekistan. The term for initiation of bankruptcy proceedings usually takes 1 month, but it may be prolonged for an additional month.

Types of bankruptcy procedures

Once the petition by a debtor, a creditor, a prosecutor, a tax agency or other state authority is successfully filed with the economic court, the bankruptcy procedure is deemed initiated.

All procedures are carried out by court receivers (*судебный управляющий*). Depending on the type of procedure, a court receiver would have a different title (e.g. interim receiver, sanation manager, external manager and liquidation manager). The Bankruptcy Law and Decree of the Cabinet of Ministers “On measures to organize the activities of court receivers” No. 765 dated September 12, 2019, set out qualification requirements for a court receiver: a court receiver must have a higher education, at least 2 years of work experience and certification of the Agency etc. Moreover, court receivers must not be biased, i.e. somehow interested in the faith of either a debtor or a creditor. These are the primary factors considered by the economic courts before approving the decision on appointing of court receiver in each bankruptcy procedure. Furthermore, once appointed court receivers are automatically enrolled into professional associations of court receivers.

SUPERVISION	SANATION
<p>Supervision is a temporary procedure implemented by courts on the day a bankruptcy lawsuit was filed to an economic court and is aimed at preservation of company assets.</p> <p>Supervision is the initial stage introduced from the date of acceptance of a petition for bankruptcy by the economic court. For purposes of implementation of this procedure, a temporary manager is nominated by creditors or the Agency and is further approved by the economic court. The manager’s primary duties include the conduct of meeting of creditors and monitoring of company’s assets.</p> <p>It is important to highlight that introduction of supervision does not lead to removal of the director and other management bodies of the company. Its aim is to restrict the exercise of their powers in certain matters that may lead to deterioration of assets (e.g. disposal of property, obtaining/issuing of loans (credits), guarantees, assignment of receivables, transfer of debt etc.).</p> <p>In fact, a supervision procedure is the turning point as a result of which the creditors decide which of the following steps described below should be taken.</p>	<p>Sanation is introduced by the economic court on the basis of a decision of creditors. For the purposes of implementation of the procedure, a rehabilitation manager is appointed by creditors and afterwards is approved by the economic court.</p> <p>The period of sanation shall not exceed 24 months. At this stage, a sanation plan (prepared by the company’s management) is to be approved by the meeting of creditors and a debt repayment schedule is to be approved by the court. The plan provides for the means by which the debtor plans to receive the funds necessary to satisfy the claims of creditors in accordance with the debt repayment schedule.</p> <p>Upon implementation of the means set out in the plan and fulfillment of obligations in accordance with debt repayment schedule, the rehabilitation manager must submit to the economic court a report on the results of these procedures. The court may either approve the report and end the bankruptcy proceedings or refuse to approve the report. The latter would lead to introduction of external management or commencement of a liquidation procedure in respect of the company.</p>

In general, court receivers are entitled to:

- convene a meeting of creditors;
- file a lawsuit and other statements with the court;
- receive remuneration for their services as a court receiver;
- attract other persons on a contractual basis for the ensuring the proper exercise of their powers;
- file an application with the economic court for the early termination of their duties.

In any type of bankruptcy proceedings, court receivers are nominated by either creditors, the Agency or professional associations of court receivers and afterwards are approved and appointed by economic courts. In case the court rejects the proposed nominee, another candidacy should be proposed by the authorized state body or creditors for further approval.

There are 5 types of bankruptcy proceedings in Uzbekistan under the Bankruptcy Law:

1. Supervision
2. Sanation
3. External management
4. Liquidation
5. Amicable agreement

In practice an additional type of bankruptcy proceedings exists which is called “pre-judicial” sanation which is also a financial rehabilitation procedure. Since this procedure is used in respect of state-owned enterprises as well as for the companies financed by the state, it will not be described in detail in this article.

A brief overview for each bankruptcy procedures may be found below.

EXTERNAL MANAGEMENT

Analogous to sanation, external management is also a procedure aimed at rehabilitation of financial status of an insolvent enterprise.

External management is introduced by the economic court on the basis of creditors’ petition or a notice of the state bankruptcy authority. For the purposes of implementation of the procedure, an external manager is appointed by creditors and further approved by the economic court.

External management is introduced for a period of up to 24 months. Nevertheless, the aggregate time period of sanation and external management shall not exceed 36 months. All powers of the director and management bodies of the company are transferred to the external manager. All accounting and other documentation of the debtor is also monitored and controlled by the external manager. Moreover, a moratorium (automatic stay) on satisfying the claims lodged for monetary obligations or mandatory payments is enforced. The moratorium applies to the claims of secured creditors before initiation of external management procedure. There is no explicitly stated period for such moratorium. The term of moratorium depends on the decision of assigned external manager. However, taking into

consideration that the maximum period of external management procedure is 24 months, theoretically moratorium may be prolonged up to this period depending on whether the court approves manager’s application.

An external manager within a month from the moment of appointment must produce an external management plan, which is further submitted for the approval to the meeting of creditors. Such plan shall include the measures required to restore a debtor’s solvency, terms and conditions of implementation of such measures as well as costs and other expenses of the debtor that would be incurred as a result of the implementation of these measures.

Bankruptcy procedure ends after all debts owed to creditors have been repaid and economic court accepts report of the external manager. If no payments to creditors have been made within the external management period or no significant improvement of financial status occurred, the court may decide to commence liquidation procedure.

LIQUIDATION

Liquidation is the final procedure aimed at inventory and collecting of all assets of the debtor for the purposes of liquidating the debtor and payment of all of its outstanding debts to the creditors.

Liquidation is the last resort bankruptcy procedure which is introduced based on the decision of economic court to declare the debtor bankrupt. It can be triggered upon the decision of the economic court after either supervision, sanation and/or external management procedures have been gone through.

For the purposes of implementation of the procedure, a liquidator is appointed by creditors and approved by the economic court. Analogous to an external management a liquidator assumes all the managing powers over the debtor as of the moment of his appointment as well as the ability to control disposal of debtor's property. One of his core responsibilities is preparation of the liquidation plan that should include information on: (i) the financial status of the debtor; (ii) conditions, order of priority and

proportionality of satisfaction of creditors' claims; (iii) inclusion of personnel's interests; (iv) the property to be sold; (v) date, time, place and method of sale of property; (vi) terms of payment for legal expenses, remuneration of the liquidator, experts etc. Before being implemented, a liquidation plan must be approved at the meeting of creditors.

Generally, the term of liquidation proceedings is set in 9 months' time frame and may be prolonged for up to 3 months. As a result of this stage a report is to be prepared by the liquidator and reviewed by the court. Once the report is reviewed and approved, the economic court issues a decision on completion of the liquidation proceeding and obliges the liquidator to submit this decision to the state body performing the registration of legal entities – Center of State Services ("CSS"). From the moment a record of the debtor's liquidation is entered into the CSS's register, the powers of the liquidator are ceased, the liquidation procedure is completed and the company is deemed liquidated.

AMICABLE AGREEMENT

Negotiation and execution of an amicable agreement is considered under Uzbekistan law as a separate insolvency procedure that involves participation of all creditors and the debtor. By means of this procedure the parties involved try to restructure the debt and sign an amicable agreement thus terminating the bankruptcy proceedings.

The duration of decision-making on an amicable agreement is not limited since the agreement may be signed at any stage of any on-going bankruptcy procedure. The decision on execution of such agreement may be made at the meeting of creditors. Execution by more than 50% of creditors of an amicable agreement approved by the court ends any bankruptcy procedure. In case of a deadlock on a decision on an amicable

agreement, a creditor supportive of the amicable agreement (and who voted for its execution) has the right to fulfill the debtor's monetary obligations or mandatory payment obligations with respect to those creditors who voted against the amicable agreement or did not participate in the voting, thus replacing such creditors and augmenting its claims against the debtor.

If the amicable agreement is executed during the liquidation process, the economic court shall make a decision on the approval of the amicable agreement, which states that the decision to declare the debtor bankrupt and to open liquidation is not enforceable.

Creditors

In each bankruptcy procedure, the interests of all creditors are represented by a meeting of creditors (*собрание кредиторов*) and/or a committee of creditors (*комитет кредиторов*) ("Committee"). The Committee is only required in sanation, external management and liquidation procedures. The Committee is responsible for monitoring the actions of a court receiver. However, in case the number of creditors is less than 20, the meeting of creditors may

decide not have the Committee at all and assume the Committee's functions. From the day of commencement of the bankruptcy proceedings in court, all actions against the debtor on behalf of the creditors are carried out via the meeting of creditors or the Committee.

It is important to mention that the recent amendments set out in the Law “On amendment to the bankruptcy law” No. ZRU-594 as of December 13, 2019 introduced drastic changes in the powers of the creditors, notably with new concepts as “classes of creditors” and “homogenous creditors” (*однородные кредиторы*). As per Article 10 of the Bankruptcy Law, homogenous creditors are defined as the group of creditors with uniform requirements to the debtor, each having equal rights in satisfaction of claim over another.

Homogenous creditors are divided in 5 classes which have different voting rights indicated in table below:

No.	Class of creditors	Voting rights
1.	Creditors whose debt is secured by collateral	Voting rights re following matters: — execution of an amicable agreement; — election of the members of Committee; — applying to the economic court with a request for the introduction of sanation or external management and the extension of its term; — petitioning to the economic court with a notice for declaring the debtor bankrupt and initiating liquidation; — approval of the plan of sanation and approval of the debt repayment schedule; — approval of the external management plan
2.	Creditors whose claims against the debtor arise from the supply contract, service contract or compulsory insurance contract and bank credit insurance contract	
3.	Creditors whose claims against the debtor arise from payment of mandatory obligations	Voting rights only regarding matter of the conclusion of a settlement agreement and on the election of members of the Committee
4.	Creditors whose claims arise from (i) obligation to pay remuneration under employment contracts; (ii) enforcement documents requiring the transfer/issue of funds from the accounts to satisfy alimony claims; (iii) obligation to pay remuneration under copyright contracts; and (iv) damage caused to an individual's property as a result of a crime or administrative offense	No voting rights
5.	Holders of the debtor's shares on accrued dividends	No voting rights

All decisions are adopted by simple majority of votes (<50%) of those creditors present at the meeting of creditors. The creditors of each voting group have equal voting rights. At the same time, the “specific weight” of the vote of each creditor is proportional to its share in the total debt owed calculated as of the date of the meeting of creditors.

As a result of these recent amendments to the Bankruptcy Law, representative of the debtor's employees, the court receiver and the representative of the founders (participants) of the debtor have lost their deliberative vote at such meeting of creditors. These persons are entitled to participate in the meeting of creditors and the meetings of the Committee, but without any voting rights.

The creditors of any classes mentioned above are entitled to appeal the decision of the court, the meeting of creditors, the action/inaction of the court receiver as well as his refusal to satisfy the creditor's claims during the bankruptcy procedure.

Hierarchy on satisfaction of creditors' claims

Pursuant to Article 134 of the Law on Bankruptcy, the following hierarchy of claims should be established in debt repayment schedules, applied in all types of bankruptcy procedures:

— Out of turn payments: legal costs, the remuneration of the court manager, current utility and maintenance payments, expenses for insurance of the debtor's property, payments related to debtor's obligations that arose after introduction of bankruptcy procedure, payments to the individuals to

whom the debtor bears responsibility for causing harm to life or health;

— Once all the above out of turn payments have been satisfied, the following order of payments is to be applied:

- claims (certified by payment (executive) documents) on the issuance of wages, recovery of alimony and payment of remuneration under copyright agreements;
- claims regarding mandatory obligations, compulsory insurance, bank loans and bank credit insurance, as well as claims of creditors secured by collateral in part of the debt which was not covered due to insufficient amount received from the sale of pledged property (subject of pledge) and claims not secured by collateral;
- claims of shareholders on the accrued dividends;
- other claims.

The payments under one category of claims can only be made once all payments of previous category were satisfied.

It should be noted that in practice the priority of creditors' claims is based on the "first come, first serve" basis rather than the one indicated above. This is also supported by the Law "On pledge" No. 614-I as of May 1, 1998 that explicitly states that "as soon as the creditor files foreclosure to the pledged property" starts the procedure of enforcement.

Conclusion

Lack of detailed instructions on conducting bankruptcy proceedings, insufficient level of support from court receivers and "everlasting" bureaucracy- and process-related issues have led to substantial reformation of the Uzbek Bankruptcy law. Implementation of this reform was set as one of the primary goals in Uzbekistan last year. The recent amendments introduced to the Bankruptcy Law have high promises to fix the above mentioned issues as they introduced classification of creditors, strengthened the requirements for court receivers and curtailed the periods of each bankruptcy proceeding. Overall the updated version of the Bankruptcy Law delivers more a transparent approach to the rights of creditors and bankruptcy procedure as a whole.

Nevertheless, certain loopholes such as the recognition in Uzbekistan of foreign court decisions in bankruptcy proceedings have not been addressed completely.

Mostly due to the shortage of treaties regulating the issues of insolvency on the international level, there is no other way but to rely on the principle of reciprocity. However, the nature of this principle imposes no obligation upon the courts to follow it. In fact, in such circumstances the court may recognize the decision of a foreign court only in its own discretion. Therefore, it would be advisable to seek international tools available for creditors' protection inputting insolvency matters in bilateral treaties on recognition of foreign judgements. Another solution may to incorporate the UNCITRAL Model Law on Cross-Border Insolvency as of June 30, 1997 into the Uzbek domestic legislation. Adoption of the Model Law would provide the foreign creditors and companies with guarantee on interstate recognition and hereby encourage the inflow of FDI in the country. ■

1. 1 BEV is equal to 223,000 UZS (approximately \$ 24)



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Sovereign Debt Column: Is This Time Different for Sub-Saharan Africa?

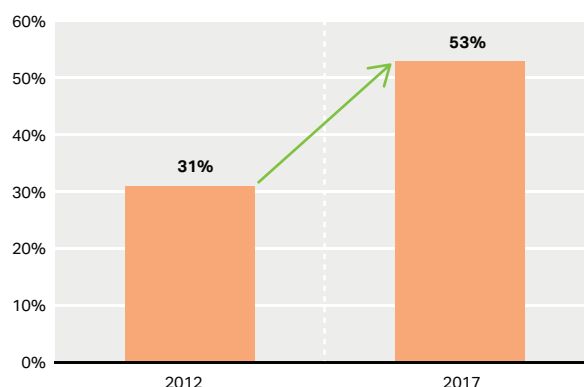
By SUI-JIM HO



On the face of it, sub-Saharan Africa's sovereigns appear once again to be drowning in systemic debt and heading toward a crisis. After a series of relief programmes in the 1990s that culminated in the Multilateral Debt Relief Initiative in 2005, which provided for outright forgiveness of debt owed by a group of 36 low-income countries (with the majority of these countries being African),¹ debt levels have since started to spiral. Today, as many as 16 sub-Saharan African nations are classified by the International Monetary Fund (IMF) as being at high risk of, or already in, debt distress – that's one-third of the countries in sub-Saharan Africa.

There are many reasons why the issues surrounding sub-Saharan African sovereign debt are different this time around. Since 2013, the region's debt has been on the rise, with the median debt ratio as a percentage of GDP increasing from 31% in 2012 to 53% in 2017.²

Africa's Median Debt Ratio as a Percentage of GDP



But before assuming that another crisis is around the corner, it is worth looking at both the reasons for the debt increase and the profile of the debt.

Different debt drivers

Africa's debt levels have increased in part as a result of a policy response to the 2008 global financial crisis and the 2014 terms-of-trade shock. Given the low interest rate environment and significant infrastructure requirements in the region, many African countries have been driven to issue debt to meet their funding needs as government revenues have fallen.⁴ On the supply side, international investors searching for yields have made such debt more freely available to the borrowers.

These drivers of government debt should be seen in the context of general global rises in sovereign borrowing across the board. It would be unfair to admonish sub-Saharan African nations for borrowing increasing amounts of debt when, in fact, we have seen bigger jumps in debt levels in developed economies.

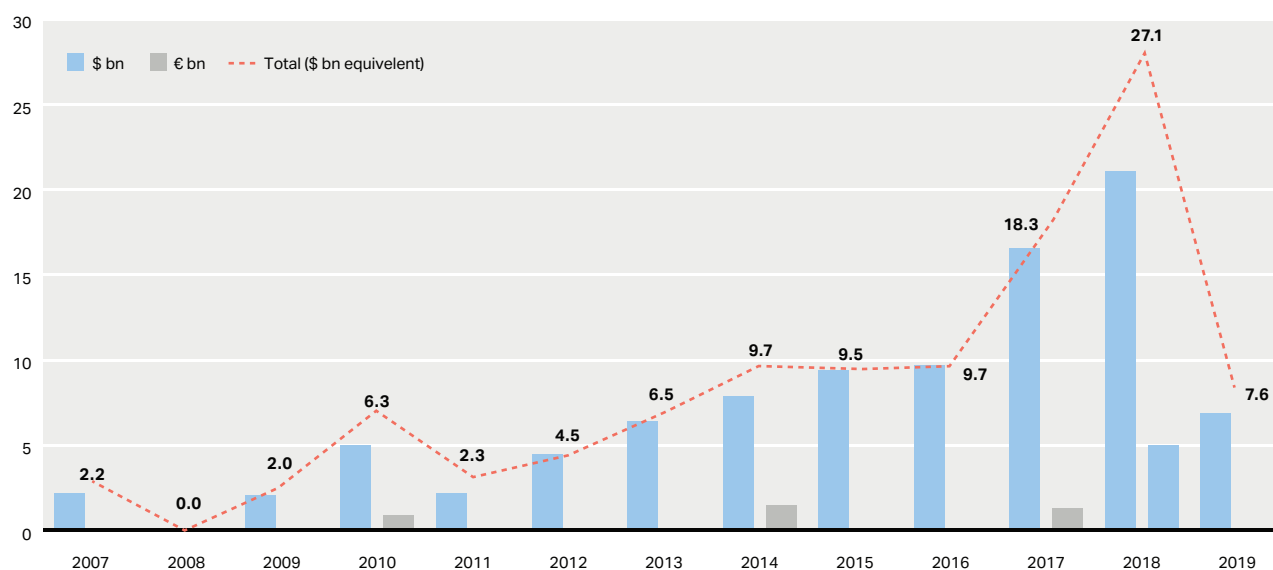
Responsible sovereign borrowing is an important tool for economic development and progress. But too much debt incurred too quickly can create distress, especially against the backdrop of a challenging economic context, the trade war between the US and China, the dependency of some sub-Saharan economies on the export of natural resources, and the likelihood of adverse movements of interest rates.

A new debt profile

There are key differences in the structure of sub-Saharan Africa's debt profile today, most notably as a result of a fall in concessional loans over the past decade and a move towards accessing market-based, non-concessional financing. This debt is more expensive to service, and exposes countries to greater market volatility and factors outside the control of policymakers – including debt rollover risk, interest rate exposure and foreign exchange risk.

Countries are also accessing different types of non-concessional lending: while commercial loans were historically the main source of financing among sub-Saharan African sovereigns, we have seen a shift towards Eurobonds over the last 10 years, with some issuers tapping the market on an annual basis. Africa's Eurobond debt passed the US\$100 billion milestone in March 2019 when Ghana issued US\$2.7 billion, following a record US\$27.1 billion of issuances in 2018 alone.⁴ In 2010, just 10 African countries had issued Eurobonds; today, that figure has more than doubled.

Increase in Africa Eurobond Issuances, 2007–2019⁵



The shift to Eurobonds brings creditor base diversification as well as refinancing risk, as we also see more complex debt structures coming into the region. These range from commodity prepayment transactions secured on natural resources, to securitised instruments supported by guarantees from international financial institutions. Such financing is designed to reduce the interest burden on the issuer, but could prove more difficult to restructure in the event of financial difficulties.

Greater variety of lenders

Africa has attracted an increasingly diverse set of lenders as a result of its natural resources. Chad, for example, signed a deal with the Anglo-Swiss trading giant Glencore in 2014.⁶ Glencore lent Chad's oil company around US\$1.45 billion in exchange for access to oil. The loan was restructured in 2015 but, by the end of 2016, Glencore held 98% of Chad's external commercial debt. In February 2018, the loan was restructured again as the country struggled to meet repayments.

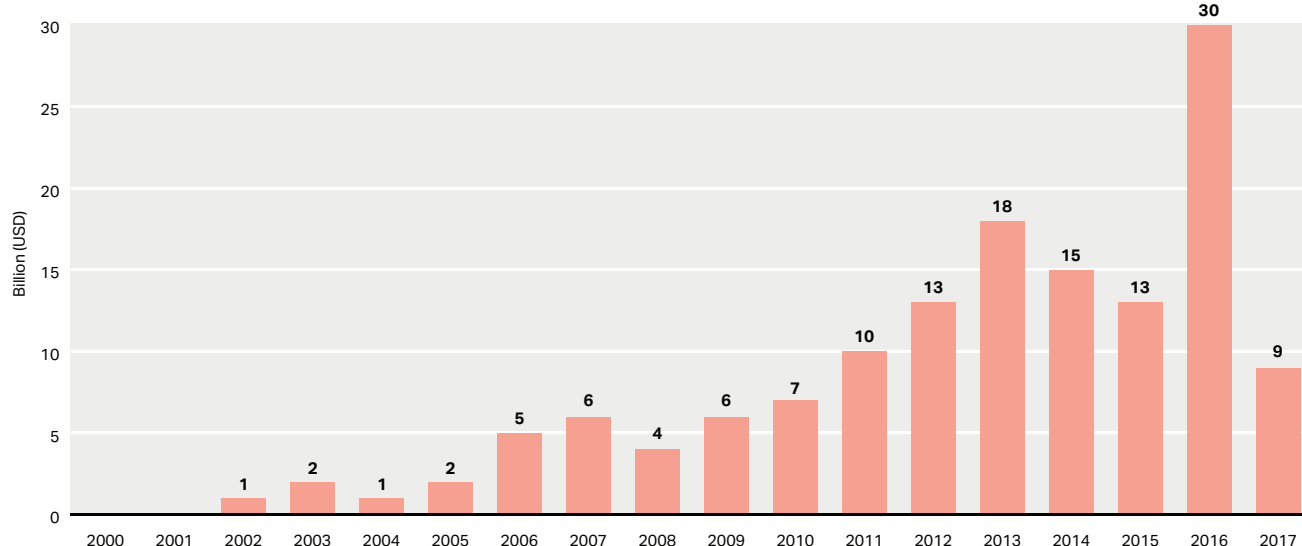
Angola, sub-Saharan Africa's third largest economy, has also run up significant foreign and domestic debt despite being the second largest oil-producing country in Africa. It has become heavily indebted to China, its biggest trading

partner, which has emerged as an increasingly popular lender to sub-Saharan Africa's sovereigns.

A growing proportion of official sector debt in the region is now coming from emerging market lenders from outside the Paris Club of major creditor countries, with China being the largest single creditor nation in sub-Saharan Africa today. This is largely a result of its funding of infrastructure projects as part of the Belt and Road Initiative.

The rise of China has prompted some concerns over the opaque nature of loans and their terms, and how China would react in the event of non-payments. Concerns were heightened at the end of 2017 when China took control of a port in Sri Lanka because the Sri Lankan government had failed to keep up with repayments on Chinese debt. There have also been recent reports in the press that Kenya is at the risk of losing its lucrative Mombasa port to China over unpaid loans.⁷ The Sri Lanka experience appears to be a one-off incident and notwithstanding reports such as the potential seizure of the Mombasa port, China continues to fill the gap and provide much-needed infrastructure financing to the region with multilaterals and Paris Club lenders retreating from lending to sub-Saharan Africa.

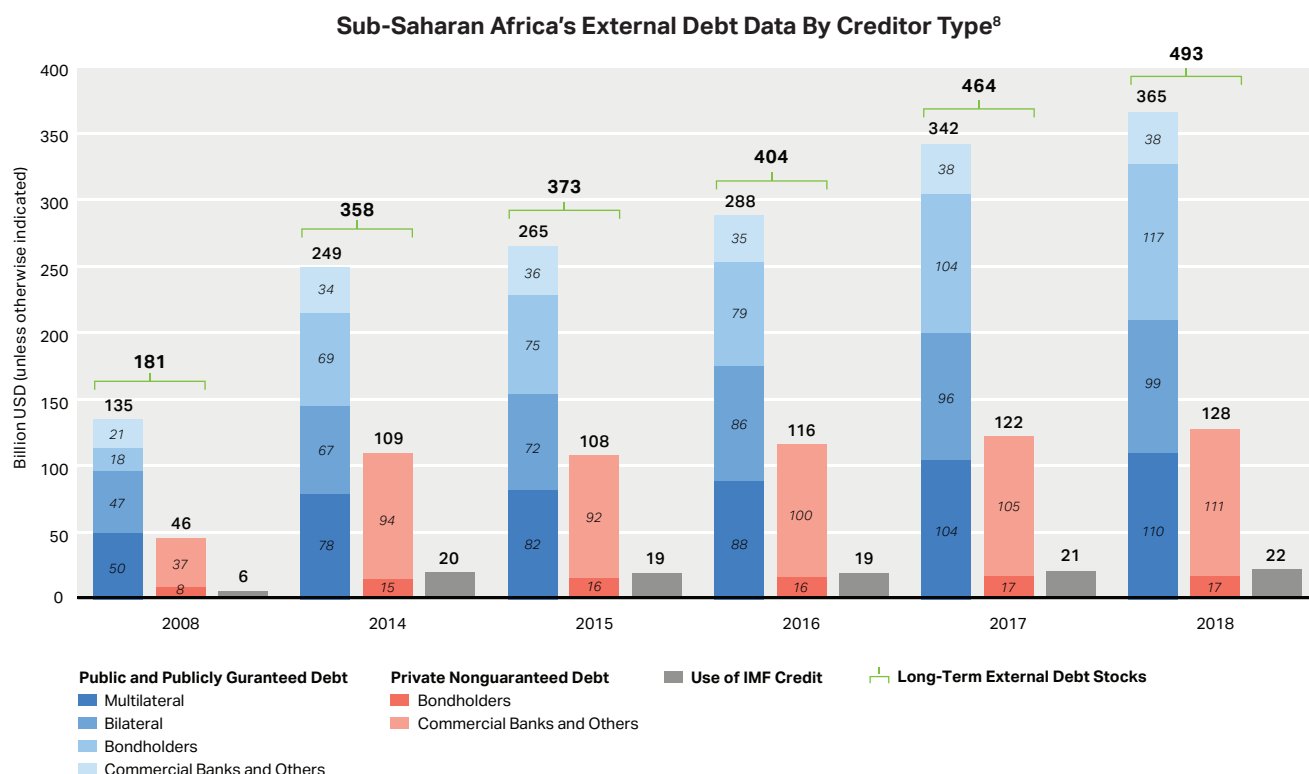
Chinese Loans to Africa, 2000–2017



Source: SAIS China Africa Research Initiative

Advances in sovereign debt technology

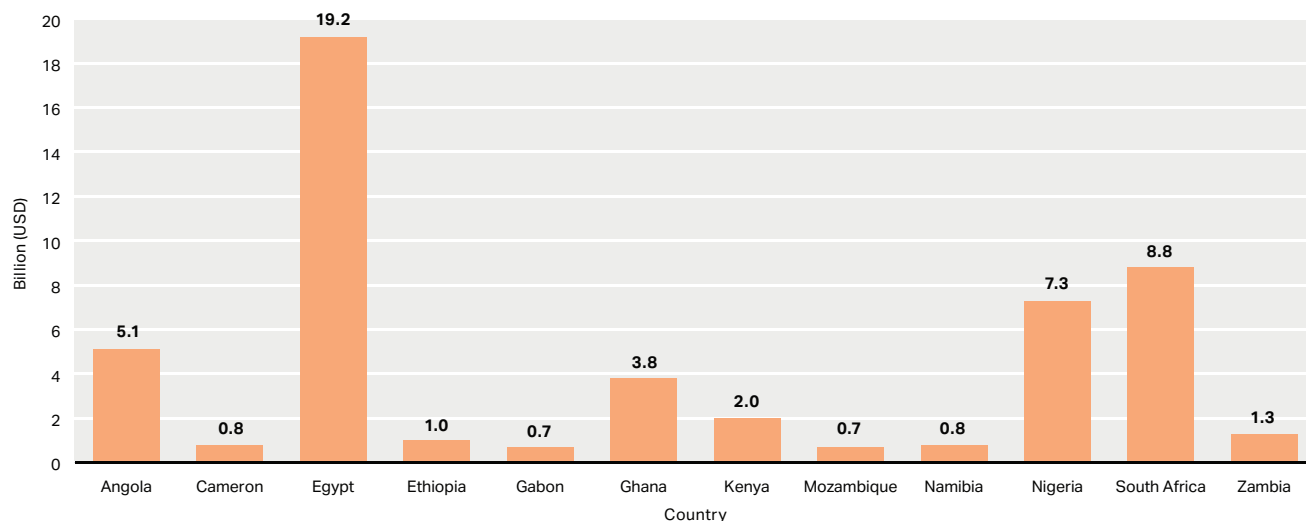
A new debt profile and an increasingly diverse set of lenders will make any future debt restructuring more complex, considering that many developments – such as the rise of Chinese lending – remain relatively untested in a restructuring context. In the event of financial difficulties, some recent developments in sovereign debt technology will mitigate the impact of these new complexities.



For Eurobond debt, an example is the move towards aggregated collective action clauses (CACs). Aggregate CACs allow for multiple series of debt securities to be amended with the consent of a qualified majority of bondholders across all affected series in aggregate. They could make a big difference for those negotiating Eurobond restructurings, given that one of the perennial challenges in restructuring first generation Eurobond debt was that a separate threshold of consent was required for every affected series of bonds – meaning holdout creditors could block the passing of a resolution especially for the smaller issuances.

While some sovereigns have started to implement aggregated CACs in new issuances, this will not necessarily capture outstanding historic bonds that have series-by-series CACs. Zambia, for example, had external debt of around 40 per cent of GDP in 2018, approximately 30% of which was in US\$3 billion of Eurobonds.⁹ The country has issued three series of Eurobonds, but only the most recent series included an aggregated CAC. In effect, should it require a restructuring, Zambia will need to obtain consent on a series-by-series basis for these three bonds.

International Sovereign Bond Issuances Since October 2014



With many sub-Saharan African sovereigns still reliant on bank lending, the question now is how advances in bond contracts can be mirrored in commercial loan agreements, which still generally require unanimous lender consent for changes to money terms, including principal and interest amounts and maturity dates.

In any event, any future debt restructurings in the region will look wholly different to the debt relief initiatives that have gone before, but recent advances in contractual technologies will mitigate some of the complexities of the new era.

Conclusion

Africa's potential for development and growth is vast, and debt is an essential feature to realise this potential. The need for increased sovereign debt is not unique to sub-Saharan African countries, but other factors such as currency depreciation and poor governance potentially make sovereign debt more risky in this region. Although a systemic sovereign debt crisis in African countries may not be imminent, governments and policy-makers need to ensure that they identify weaknesses in their debt policies and practices and should take steps to avoid the risks of a debt crisis. ■

1. <https://www.imf.org/external/np/exr/facts/mdri.htm>
2. <https://www.brookings.edu/research/is-sub-saharan-africa-facing-another-systemic-sovereign-debt-crisis/> and <https://www.brookings.edu/blog/africa-in-focus/2019/04/05/looming-debt-crisis-in-africa-myth-or-reality/>
3. <https://www.un.org/africarenewal/magazine/april-2015/how-healthy-africa%E2%80%99s-sovereign-bond-debt>
4. <https://qz.com/africa/1588751/the-size-of-africas-growing-debt-isnt-its-biggest-problem/>
5. Extracted from <https://www.africanbondmarkets.org/en/news-events/africa-financial-markets-news/article/african-eurobonds-an-evolving-and-now-100-billion-asset-class-158468/>
6. <https://www.independent.co.uk/voices/africa-oil-companies-g20-summit-fix-glencore-debt-chad-a8660606.html>
7. <https://www.hellenicshippingnews.com/china-to-take-over-kenyas-main-port-over-unpaid-huge-chinese-loan/>
8. <https://openknowledge.worldbank.org/bitstream/handle/10986/32382/9781464814617.pdf?sequence=7&isAllowed=y>
9. <https://www.imf.org/external/pubs/ft/dsa/pdf/2015/dsacr15152.pdf>



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MENA WATCH

Reporting on the 2nd Annual Corporate Restructuring Summit

By POLINA LYADNOVA



As Gulf nations seek to recover from the global financial crisis and slump in oil prices, there is increased recognition for the need to introduce modern restructuring tools.

We outlined in our article “*Bankruptcy and Restructuring in the GCC: An Update on Recent Developments*” three GCC states, the United Arab Emirates, Bahrain and Saudi Arabia, who have implemented new laws designed to ensure effective debt restructuring and provide measures to rescue businesses in distress.

These reformed bankruptcy regimes represent a significant cultural shift for the Gulf region and challenge preconceived notions of how corporate difficulties are resolved. They are aimed at promoting an environment in which foreign investment is encouraged, where debtors are provided with greater opportunities to restructure and liquidation processes are simplified to ensure fair treatment of creditors.

The continued commitment towards amending corporate restructuring legislation was evident among the over 200 industry leaders in attendance at the 2nd Annual Corporate Restructuring Summit 2019 (CRS 2019), which was organised by Middle East Global Advisors. Participants at the

two-day summit included prominent banks, corporates, and debt restructuring specialists from across the MENA region, as well as international banks and multi-laterals.

Keynote speech opined on the success of Saudi Arabia’s reforms agenda and the importance of building an international legal environment with independent courts that prioritise company restructuring and rehabilitation. The numerous panels highlighted that while the advent of new legislation is welcomed, further reforms, which ensure adequate disclosure and investor protection and which promote advance planning for potential downturns, are required.

The panel on “*Strategies aimed at effective capital & debt management*” moderated by the Journal’s editor and Cleary’s partner, Polina Lyadnova, again highlighted the shift in the regional approaches – moving towards more proactive business management strategies aimed at future proofing the businesses and overcoming the cultural challenges.

Breaking the pre-conceptions, discussions at the summit were very candid, indicating the region's openness to change being another positive indication of the continued push to improve transparency and trust between stakeholders and provide a more sophisticated and streamlined bankruptcy and restructuring regime in the GCC region.

Further information on the Corporate Restructuring Summit, including keynote speeches, panels and presentations, can be found on www.crs19.com.



▼ **Polina Lyadnova** is a partner at Cleary Gottlieb's London office. Polina's practice focuses on financial transactions, including debt capital markets and debt restructuring, involving emerging markets businesses. Recent representations include Rusal, MATSA, Russian Railways, NKNH and FESCO as well as a number of Middle Eastern sovereign wealth funds.





The Commonwealth of Puerto Rico with the financial restructuring of **\$73 billion** of indebtedness

Puerto Rico

1



Oi in its **\$20 billion** restructuring - the largest private sector restructuring in the history of Latin America.

The restructuring represented an important milestone for the company, as well as for Brazilian capital markets and Brazilian restructuring law

Brazil

2



Eurasian Resources Group in its **\$6.85 billion** debt restructuring, a complex transaction involving parallel negotiations with different banks with bifurcated terms including different security/covenant packages

Kazakhstan

3



An ad hoc group of OGX bondholders in connection with the **multibillion dollar** restructuring of **OGX Petróleo e Gás Participações** and its subsidiaries, including the provision of DIP financing and the renegotiation of the terms of the OSX-3 charter arrangements on behalf of the bondholder committee

Brazil

4



UC Rusal in its **\$5.15 billion** restructuring, including using parallel schemes of arrangement in England and Jersey, and its previous **\$16.8 billion** restructuring, the largest-ever restructuring of a company with main operations in Russia and the CIS

Russia

5



Empresas ICA, S.A.B. de C.V. and its subsidiaries in its **\$3.5 billion** restructuring. The restructuring was the largest insolvency of a Mexican company since 2015.

Mexico

7



An ad hoc group of bondholders of **Odebrecht Oil & Gas**, one of the largest oil and gas service providers in Brazil, in connection with the company's restructuring of **over \$4.8 billion** in debt

Brazil

6



Punjab National Bank, the victim of a **\$2 billion** fraud by international fugitive Nirav Modi, in the U.S. bankruptcy proceeding of Modi's subsidiaries in blocking sale of assets because of tainted sales process and obtaining of Chapter 11 trustee

India

8



An ad hoc group of secured project finance lenders in connection with the **\$1.7 billion** restructuring, recapitalization and reorganization of **Constellation Oil Services Holding S.A.** and its subsidiaries

Brazil

9



Far Eastern Shipping Company plc and its affiliates (**FESCO**) on a comprehensive **\$1 billion** restructuring of their indebtedness under two series of listed US dollar-denominated Eurobonds, Roubledenominated bonds and certain bilateral facilities; the first ever restructuring in Russia with a significant haircut

Russia

10

Our Top 10 Restructuring Deals

EMERGING MARKETS



London



São Paulo



Milan



Rome



Washington, D.C.



Hong Kong



Beijing



Abu Dhabi



Brussels



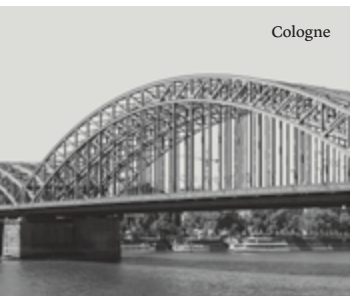
Buenos Aires



Moscow



New York



Frankfurt



Paris



Seoul



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