LATIN LAWYER REFERENCE RESTRUCTURING 2020

Peru

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LATIN LAWYER
INSIGHT

Actions prior to a formal proceeding

1 What duties do directors, officers or controlling shareholders of a company owe creditors or other third parties if the company is insolvent or in financial difficulties, or has negative net worth? Is there a standard of care towards third parties? In what circumstances can directors, officers or controlling shareholders be found civilly or criminally liable for continuing to operate a company in financial difficulties? In practice, are such liabilities commonly enforced?

Section 176 of the Corporation Act provides that the board of directors must call a shareholders' meeting to resolve insolvency situations when the finances of the company warrant such situation. In fact, section 176 says that the board has to call for a shareholders' meeting when an insolvency situation could be presumed by the board based on information accessible to it.

If the shareholders do not take decisions to resolve the insolvency of the corporation (eg, make capital contributions), the board of directors has the duty to call a creditors' meeting to explain the financial situation of the company, and if necessary, file for an insolvency proceeding.

Notably, directors are liable for any damages to creditors based on (i) gross negligence, (ii) wilful misconduct, (iii) abuse of authority or (iv) decisions or acts made against the law or the by-laws of the corporation. Thus, creditors are entitled to sue the directors if any damages arise from the insolvency situation of the company, provided such directors acted within any of the aforementioned situations.

It is important also to consider that under section 424 of the Corporation Act, if the company has accumulated net losses exceeding two-thirds of the share capital, such company will legally be considered as an "irregular corporation", and hence the board of directors and management will be personally liable for all contracts and new debts assumed by the company when they become irregular.

In the case of fraudulent transfers (eg, transference of relevant fixed asset by minimum price) or fraudulent acts (eg, manipulating the balance sheet), directors and management may be scrutinised under criminal investigations by competent criminal courts.

Save for extreme cases, according to our experience, it is not common for creditors to initiate judicial actions (civil or criminal) against officers, directors and controlling shareholders.

2 What actions are available to creditors (secured or unsecured) prior to a formal insolvency proceeding to recover on a defaulted loan or obligation of a debtor? Are there any expedited formal proceedings?

Once a debt becomes due, the creditor has the right to initiate judicial actions to recover his credit, including the right to request for precautionary measures in order to secure payment of his debt (eg, injunctions). If the debt was secured, the creditor has the right to foreclose on the collateral (either by means of a private sale or through an auction administered by a judge, depending on the collateral granted by the debtor).

In our experience, judicial precautionary measures are usually granted rapidly; however, the actual judicial proceeding for collecting the debt usually is not as rapid (more than a year).

3 Can a creditor that has secured debt foreclose on the collateral or sell collateral in a private sale? If so, what rules exist to ensure the sale or foreclosure generates the maximum amount of sales proceeds possible? Can lenders take possession or control of the underlying collateral? Do insolvency proceedings stay the ability of secured creditors to foreclose on collateral of the debtor? Are there any accelerated procedures available for secured creditors, and if so, under what circumstances can they be used?

Before the filing of an insolvency proceeding, a creditor can foreclose on the collateral through a private sale if the collateral is movable property. The Chattel Law allows for a creditor to foreclose on collateral through a private sale provided that certain minimum requirements are met (see below). Moreover, it allows for a creditor to acquire ownership of the collateral to cancel the secured debt, provided certain minimum requirements are met. For these purposes, the Chattel Law dictates the foreclosure of the collateral through a private sale cannot be made for a value lower than two-thirds of the base value agreed upon the parties on the pledge agreement.

Mortgages over real estate property can only be foreclosed through an auction in a judicial proceeding, which usually takes longer than a private sale and can be more expensive. To avoid these problems, parties usually incorporate a trust estate to which the debtor transfers the real property for the benefit of the secured creditor. So, if there is a default on the debt, the creditor is entitled to foreclose on the trust estate through a private or public sale conducted by the trustee appointed in the trust agreement. In these cases there are no rules ensuring that maximum value is obtained; nevertheless, most trust agreements incorporate these types of rules (eg, that the initial value to be offered in the private sale is no lower than the commercial value as determined by a recent appraisal, mandatory publications in newspapers, etc).

The Chattel Law allows creditors to seize collateral for the purposes of foreclosing on it; nevertheless, if the use of force is needed, the creditor must request police intervention.

The Insolvency Law establishes an automatic stay preventing creditors from foreclosing on collateral granted by the debtor once an insolvency proceeding has been formally initiated (eg, once the insolvency proceeding is published on the official web page "Insolvency Bulletin" administered by INDECOPI)). The automatic stay does not prevent creditors from foreclosing on collateral granted by third parties nor does such stay affect foreclosure of trust estates conformed by assets of the debtor. Also, the Banking Law dictates that "warrants" granted to Peruvian financial entities over non-fixed assets could be foreclosure by the creditor even if the debtor is under an insolvency proceeding.

Pursuant to the Chattel Law (applicable to security interests created over movable property), a creditor can foreclose on the collateral before the secured obligation is due, if such creditor reasonably believes the collateral is not duly preserved or maintained, or if there are any other circumstances that lead such creditor to believe that foreclosure would be impossible in the future.In our experience this in an exceptional mechanism rarely used.

4 Can creditors that have equity as collateral take control of a debtor by exercising voting rights attached to pledged shares?

Creditors can take control of a debtor by exercising voting rights attached to pledge shares only if the applicable pledge agreement allows for it. In our experience, this is a provision usually enforced in default scenarios and not before.

In most cases, shares as collateral are assigned in trust to a trust estate, and in such case the trustee is entitled to exercise the voting rights of the shares under the instructions of the creditors and upon an event of default, with the sole purpose of facilitate foreclosure of the collateral.

5 Can secured creditors credit-bid their debt in a sale of a debtor's assets, outside or within a formal insolvency proceeding? If so, what procedures or limitations apply?

Creditors have no legal restrictions or limitations to transfer their credits to any third party even if the debtor is under an insolvency proceeding. Only tax creditors are forbidden from selling or transferring their credits.

6 Are there legal or regulatory concerns that secured creditors should consider in connection with a sale or foreclosure?

Secured creditors must bear in mind that, according to the Peruvian legal system, in a liquidation scenario labour and pension funds credits have priority over other kind of the debtor's credits, including secured and tax credits. Therefore, if a debtor undergoing a liquidation proceeding has labour creditors, it is possible that they could participate in the foreclosure procedure in order to collect their credits prior to the secured credits with the proceeds of the said foreclosure. Nevertheless, it is important to note that if an asset that was posted as collateral to secure the claim of a specific creditor is sold in a liquidation proceeding in order to pay labour claims, the secured creditor whose collateral was sold will benefit "pro-rata" from the proceeds coming from the sale of all the assets securing the rest of secured creditors in the liquidation proceeding.

Also, if a sale or foreclosure involves shares or substantially all of the assets of a company, an antitrust filing may apply depending on the identity of the buyer and size of the business involved.

Likewise, please note that – per section 71 of the Constitution – foreigners cannot own, either directly or indirectly, property located within 50km of the border.

Formal proceedings

7 What types of insolvency proceedings are available in your jurisdiction? Are different insolvency proceedings available for individuals and companies? Is there any distinction made between "preventive" insolvency proceedings and "actual" insolvency proceedings?

According to the Insolvency Law, there are two types of insolvency proceedings: the "preventive insolvency proceeding" and the "ordinary insolvency proceeding". Both insolvency proceedings are available for individuals and companies, as long as the debtor (individual or company) is involved in a commercial activity. The preventive insolvency proceeding is requested by the debtor when a crisis situation is probable in the near future and, in such scenario, the debtor initiates such proceeding to restructure the debt unpaid in order to react in advance to an insolvency scenario; the ordinary insolvency proceeding can be initiated by the debtor or by a creditor or creditors when the debtor is already undergoing an insolvency situation, and this proceeding is initiated to restructure the debt unpaid or liquidate the assets of the debtor. The preventive insolvency proceeding can be filed by the debtor only.

To file for an ordinary insolvency proceeding, the debtor requires to have more than one-third of its liabilities overdue for a period of 30 days or more, or accumulated net losses for more than one-third of its share capital. Instead, to file for a preventive insolvency proceeding, the debtor cannot be in any of the aforementioned situations (otherwise the debtor can file for an ordinary insolvency proceeding only).

Creditors with debts amounting more than 50 Tax Units – approximately US$64,000 – which are overdue for more than 30 days can also file an ordinary insolvency proceeding. Creditors can file for an ordinary proceeding even if they are secured creditors; moreover, our insolvency laws do not require a creditor to foreclose on the collateral as a prerequisite for initiating this type of proceeding.

To sum up, we believe the two most important differences between both types of proceedings are: (i) in a preventive proceeding, the debtor does not lose control over the management of its business; in an ordinary insolvency proceeding, the shareholders' meeting of the debtor is replaced for all purposes for the creditors' meeting, and, therefore, the creditors' meeting has, among others, the right to change management, and (ii) in the preventive insolvency proceeding the debtor can elect whether or not to suspend the enforceability of its liabilities (they usually do request this benefit); in the ordinary insolvency proceeding, that suspension is not optional and all liabilities become non-enforceable upon publication of the insolvency filing.

8 May government-owned entities, states or municipalities file for an insolvency proceeding in your jurisdiction? If so, are there special rules or a separate regime that applies to such entities?

The Insolvency Law is not applicable to estate entities, such as public agencies and other entities subject to public law.

9 On what grounds may or must a debtor be placed into an insolvency proceeding? Who may do this? What are the grounds for a voluntary proceeding? If an involuntary proceeding is filed, must a bond be posted or is there any risk of liability to the creditor or creditors who filed the action?

There are two situations in which the debtor can file an Ordinary Insolvency Proceeding:

- More than one-third of the debtor's total obligations are due and unpaid for a period of 30 calendar days.
- The debtor has accumulated losses, net of reserves, which are higher than the third part of the capital stock.

The ordinary insolvency proceeding can also be initiated by one or more creditors whose debts are overdue for more than 30 days for an amount exceeding 50 Tax Units (US$62,000 approximately).

In the case of an involuntary proceeding, it is not necessary for the creditor or creditors requesting the initiation of an insolvency proceeding to post any kind of bond. There is no risk of liability to the creditor or creditors who filed the action, unless there is evidence of fraud.

10 What effect, if any, does a filing have on a subsidiary or affiliate of the debtor? Are there any actions the debtor, the subsidiary or the affiliate can take to limit such effects? Are there any grounds for procedurally and substantively consolidating insolvency proceedings involving related parties? If a debtor organised under the laws of your jurisdiction entered into local insolvency proceedings, could the debtor's foreign affiliates be included in the local filing?

The filing does not have any direct effect on a subsidiary or affiliate of the debtor as our insolvency laws do not regulate the insolvency of business conglomerates but of stand-alone entities only (although the equity owned by the insolvent debtor in those subsidiaries or affiliates is subject to the limitations derived from the insolvency proceeding – as the rest of the debtor's state). The Insolvency Law is applicable only to debtors domiciled in Peru, even in those cases where the debtor's assets are located outside Peru. Also, Peruvian law does not allow debtors domiciled in Peru to choose a different insolvency law.

11 What notifications and meetings are required after a debtor has been placed in an insolvency proceeding? Do the insolvency laws recognise bondholders under an indenture? What must they show to prove their ownership interest in the underlying debt?

The insolvency proceeding is formally initiated when the administrative insolvency authority makes public the institution of the proceeding through publication on the official web page Insolvency Bulletin administered by INDECOPI. Creditors, including bondholders or any other type of creditor (including contingent creditors), have 30 business days thereof to voluntarily file for the verification of their claims (capital, interest and expenses). Those creditors who verify their claims within the applicable deadlines will be entitled to participate and vote in the creditors' meetings to be held in the insolvency proceeding. As a general rule, creditor must provide supporting documentation to prove the existence, validity, origin and amount of their claims (eg, contracts or purchase orders, bills, accounting information relating to the receivables, etc).

Bondholders' claims may be recognised in an insolvency proceeding, but each bondholder has to file for the verification of its respective claims.

In both types of insolvency proceedings an ordinary meeting is installed to decide on the following:

- appointing the creditors' meeting authorities (presidnet and vice president);
- decision about the debtor's destiny, whether the restructuring of the debtor or its liquidation;
- decision about the debtor's administration regimen when restructuring or appointment of a liquidator; and
- approval of a restructuring plan or the liquidation agreement.

In a preventive proceeding, a single creditor's meeting is held to appoint the creditors' representatives and to decide on the approval of the applicable refinancing agreement. If the creditors' meeting does not approve the refinancing agreement, the creditors have to decide whether to initiate an ordinary proceeding with respect to the debtor.

12 How are contingent creditors dealt with? Are inter-company or affiliate claims treated differently from other creditor claims in terms of recovery or voting? If so, has this been challenged and with what result? Are there special rules for certain contracts or debt instruments?

Contingent creditors verified as such by the Insolvency Authority can participate in the creditors' meetings, but have no right to vote until the contingency has been settled. Under a restructuring scenario, cashflow provisions have to be considered for contingent creditors in the restructuring plan.

The Insolvency Law establishes criteria for the Insolvency Authority to decide whether a creditor is related to the debtor or not. These criteria are not based only on an equity ownership analysis.

A creditor is regarded as a "related creditor" when the insolvency authority believes there is a "proximity of interests" between such creditor and the debtor debtor (eg, members of a joint venture or consortium). Peruvian law relies on a more flexible concept of related creditor for preventing that a creditor – who controls or is related to the debtor (by means of equity or otherwise) – holding a majority of the verified claims of the insolvency proceeding would seek to take decisions that may be inconsistent with the purpose of the insolvency: to maximise the credit recovery for the creditors affected by the debtor's insolvency.

Once a creditor is qualified as a "related creditor" two consequences arise: (i) the standard for scrutinising and reviewing the claim filed by such creditors is higher than for those non-related creditors (ie, the insolvency authority will have to set a higher standard to define the validity, existence, amount and enforceability of the claim) and (ii) if the "related creditors" hold more than 50 per cent of the verified claims in the proceeding, the relevant decisions to be taken in the creditors' meeting (destiny of the debtor (restructuring v liquidation) and the approval of the restructuring or liquidation plan, as applicable) have to be approved by the majority of both the related and non-related creditors, given that such approval has to be obtained in a separate creditors' meeting (one for the related creditor and another for non-related creditors).

There are no provisions in the Insolvency Law to subordinate payments due to related creditors.

There are no special rules for verifying claims under financial contracts or debt instruments (eg, derivatives, real estate leases, government contracts, letters of credit). Nevertheless, there is a "fast track" to verify non-related claims that are represented in securities (eg, promissory notes); indeed, Peruvian Insolvency Law dictates that – for verifying claims represented in securities – the creditor has to submit the corresponding security title only.

13 What effect does the commencement of an insolvency proceeding have on the debtor and its operations? Is there an automatic stay that prevents third parties from acting against the debtor? Can a debtor terminate or reject contracts to which it is a party?

The Insolvency Law rules clearly state that all parties in the insolvency proceedings have to adjust their conducts to the rules of good faith, truthfulness, and comply the rules of the insolvency proceedings. According to the Insolvency Law, as of the date of the notice's publication announcing the debtor's insolvency, the following effects are triggered:

- all the liabilities of the debtor (whether matured or not) are no longer enforceable until a decision with regards to the destiny of the debtor is taken by the relevant creditors' meeting, therefore, any penalty due to late payment is no longer applicable; and
- an automatic stay becomes effective preventing any type of foreclosure on the assets of the debtor. The automatic stay does not prevent creditors from foreclosing on collateral granted by third parties to secure the debtor's liabilities.

Debtors undergoing insolvency proceedings shall continue to conduct their activities within the ordinary course of business only. Therefore, termination of the contracts is allowed when such termination may be regarded within the ordinary course of the business of the debtor. On this point, it should be borne in mind that some contracts do include as a termination clause the fact that any of the counterparties become insolvent, in which case the solvent party has the right to terminate the agreement.

14 In what circumstances could transactions entered into before an insolvency proceeding be challenged? How far does the clawback period extend? Who can bring such challenges and who bears the burden of proof? How frequently are such challenges made and upheld?

Under the Insolvency Law, a transaction can be void if such transaction: (i) qualifies as an operation made outside of the ordinary course of business of the debtor, (ii) diminishes the debtor's estate, and (iii) is made within 12 months before the institution of an insolvency proceeding such transaction may be declared void and ineffective vis-à-vis the creditors of the insolvency proceeding.

Clawback actions can be brought to the judiciary by any verified creditor in the proceeding, the person in charge of the debtor's administration or the debtor's liquidator. The claimant bears the burden to proof that the transaction is voidable (ie, that the transaction meets the criteria described above).

Creditors usually do not use clawback actions mostly for two reasons: (i) because they are costly and take about two years to obtain a decision; and (ii) because the clawback actions benefit all creditors in the proceeding, and not only to the creditor who filed the clawback action (ie, the creditor who assumed all the costs of the judiciary process), thereby creating a free rider problem.

Also, once an insolvency proceeding is formally initiated, creditor can also bring clawback actions with respect to certain specific actions (eg, prepayment of liabilities, set-offs, spin-offs or mergers, among others) if they are performed within the date the proceeding is initiated and the date the creditors' meeting ratifies the existing management or appoints new management of the debtor. In these cases, creditors do not need to prove that the transaction diminishes the debtor's estate.

15 How are secured creditors treated in an insolvency proceeding? How do they protect their collateral, particularly liquid assets? Can they seek remedies? Must their approval be obtained to use or dispose of their collateral? Do liens on receivables, revenues or cash flow continue with respect to such collateral after a debtor's insolvency filing has been accepted by a court, or are they cut off as of the date of the filing or acceptance? If they are not cut off, may the debtor use that cash collateral and, if so, must it provide any protection to the secured creditors?

Secured creditors have priority over taxes and non-secured creditors with regards to the proceeds coming from the collateral granted to secure their credit. This preference is not as strong as in other jurisdictions, as labour and pension funds claims have a super-priority over any other claims, including secured creditors.

To qualify as a secured creditor, such creditor must hold a fully perfected security interest attached to the collateral (ie, filed and registered in the relevant Public Registry) by the time the insolvency proceeding is formally initiated.

Secured creditors do not have any specific actions to protect their collateral; nevertheless, they can propose protective measures to protect their collateral – based on the maximisation of the foreclosure value or other similar benefits to the mass of creditors – which would have to be approved by the relevant creditors' meeting.

The creditors' meeting does not require specific approval from the secured creditor in order to use or dispose of their collateral (other than having the relevant majority in the creditors' meeting).

Secured creditors are paid with the proceedings coming from the foreclosure of their collateral; such foreclosure is conducted by the liquidator appointed by the creditors' meeting, and within the rules set forth in the insolvency proceeding. As discussed above, such proceeds can be used to pay labour, pension funds or alimony claims, which rank higher than secured claims, in which case secured creditors are paid pro-rated within the same priority.

16 How are unsecured creditors treated? How are equity holders treated? May an equity holder recover prior to creditors being paid in full?

In a restructuring scenario, verified unsecured creditors are treated as any other creditor and they get paid per the rules of the restructuring plan approved by the creditors' meeting. Although in restructuring scenarios the treatment of the claims is pretty much decided by the creditors' meeting, the Insolvency Law does include some rules to protect certain claims (eg, if the plan includes a sale of fixed assets, labour and pension claims have a preference over the proceeds coming therefrom).

Things are different in a liquidation scenario: verified unsecured creditors rank fifth (and last) in priority to recover their claims. Although this is a very important distinction, please bear in mind that there are no differences in participation or voting rights based on whether a creditor is secured or not. In both scenarios (restructuring and liquidation) creditors who filed their claims within the applicable deadline are paid before those creditors who did not.

Equity holders do not participate nor vote in the creditors' meeting. They do have certain protective rights, mostly related to anti-dilution rights. This is required because under the Insolvency Law the creditors' meeting can decide to convert certain claims into equity and, in such scenario, equity holders have the right to contribute with cash to pay off such debts for avoiding the dilution in their share capital. There is no scenario under which an equity-holder may recover his or her equity prior to creditors (verified and non-verified) being paid in full.

17 What is the effect of an insolvency proceeding on current and retired employees?

In a liquidation scenario, verified labour and pension claims rank first in priority to recover their claims.

In a restructuring scenario, the Insolvency Law provides that at least 30 per cent of the cash flow used annually to pay verified claims must be assigned to pay verified labour and pension claims.

The Insolvency Law does not make a distinction between current and retired employees; they all can participate in the insolvency proceeding with the same rights, provided they hold a valid and enforceable claim against the debtor.

18 Do directors or officers of companies in insolvency proceedings suffer any consequences?

Directors or officers of companies in insolvency proceedings do not suffer any consequences unless fraud or other similar allegations are brought.

19 How do the various types of claims rank in an insolvency proceeding? Do some claims automatically have higher priority? May claimants with lower priority receive consideration under a reorganisation plan even though claimants with higher priority are not paid in full?

Priority rule excludes from payment those ranked lower in favour of those ranked higher, while the claims recognised within the same priority ranking participate pari passu with respect to the funds assigned to such ranking (except for secured creditors, who have priority (once labour and pension claims are paid in full) with respect to the proceeds coming from the sale of their collateral). Please note that this general rule does not apply to the case described in our answer to question ??? (ie, when an asset posted as collateral to secure a specific claim is foreclosed to pay labour and pension claims, in which case the creditor whose collateral was sold will benefit "pro rata" from the proceedings coming from the sale of all the assets securing the rest of secured claims).

In a liquidation scenario, the Insolvency Law ranks the priority order as follows:

First: Labour and pension liabilities.
Second: Alimony credits (applicable to bankruptcy of individuals only).
Third: Credits secured with assets of the debtor (mortgages, security interest on moveable property, warrants) or secured due to the attachment of precautionary measures over the debtor's assets.
Fourth: Tax credits and health social security credits.
Fifth: Unsecured credits or secured credits in the portion that exceeds the value of the applicable collateral.

20 Are local creditors treated differently from foreign creditors in practice? What laws exist to prevent such disparate treatment? What factors contribute to how effectively those laws are applied?

Local creditors and foreign creditors are treated equally, the Constitution prevents disparate treatment. If the Peruvian authorities do not treat foreign creditors equally, the latter can initiate a constitutional action before the Constitutional Court to claim protection for their rights. Nevertheless, see question 32.

21 What level of creditor support is needed to approve a reorganisation plan? Can secured creditors and other priority claim holders that do not approve a reorganisation proposal be "crammed down"? Are there any substantive criteria that a plan must satisfy? Must hearings take place or documents be distributed?

For the creditors' meeting to be installed at first call for approving a reorganisation plan, the presence of creditor representing more than 66.6 per cent of the verified claims is required. If the creditors' meeting is not installed at first call, a second call will be made, on which the creditors' meeting will be installed without requiring a minimum attendance.

For purposes of approving a reorganisation plan, the vote of more than 66.6 per cent of the total of verified claims is required if the creditors' meeting is held on first call. On second call, the vote of more than 66.6 per cent of the verified claims attending the meeting is required.

Once the reorganisation plan is approved, the plan becomes enforceable against any creditor, including those who voted against the plan or did not vote at all.

There are no substantive criteria that a reorganisation plan must meet, although there are a few mandatory rules seeking to protect labour and pension claims (eg, at least a 30 per cent of the cash flows used annually to pay verified claims has to be assigned for payment of labour and pension). Also, the reorganisation plan must include all the debtor's obligations and schedule the payment of the recognised credits before the unrecognised credits; additionally, the reorganisation plan must provide for reserve funds to pay for contingent claims, as the case may be.

All the information and documentation necessary for the creditors' meeting should be available for the creditors in the Insolvency Authority office at least three days before the first meeting call.

22 May creditors trade their claims during the course of a reorganisation? What impact, if any, will it have on voting for a plan?

Yes, creditor may transfer their claims during the course of a reorganisation. Such transfer must be notified to the Insolvency Authority.

Based on our experience, this feature of Peruvian law may be used to acquire control over the debtor through the acquisition of a significant claim, which would allow the transferee to vote for converting its claim into equity afterwards.

It is important to point out that the criteria for a creditor to be related to a debtor is not given to the credit but to the creditor, so that if the related creditor transfers its credit's rights to an unrelated third party, when the Insolvency Authority recognises the new credit's debtor, it won't attribute to it the related creditor status.

23 What kind of court supervision is there in each type of insolvency proceeding? Are the judges that supervise and administer the process specialised? Is a trustee or receiver (or other court-appointed officer) appointed to supervise the debtor or can the debtor continue to control operations during the insolvency proceeding? May a debtor company or its creditors select or influence the selection of the trustee, receiver or other court-appointed officer? Can creditors form creditors' committees? What formal role do creditors (or creditors' committees) play in the process? Do insolvency proceedings permit competing reorganisation plans? Are the judges that supervise and administer the process specialised? Does a debtor company or its creditors have any power to select or influence the selection of the trustee, receiver or other court-appointed officer?

In Peru, insolvency proceedings are in charge of an administrative authority, not judicial.

The Commission of Insolvency of the National Institute for Defence of Competition and Protection of Intellectual Property (INDECOPI) is the legal entity in charge of insolvency proceedings. The Commission is the first administrative instance and it is in charge of deciding whether filings made by debtors or creditors comply with the requirements set forth by law to initiate an insolvency proceeding.

The second administrative instance is the Tribunal of Insolvency Proceedings, in charge of reviewing the decisions made by the Commission, generally as consequence of an appeal.

All the decisions during the insolvency proceeding are adopted by the creditors meeting as INDECOPI is in charge of supervising and monitoring the proceeding only (eg, INDECOPI evaluates if the decisions taken by the creditors' meeting comply with the applicable legal requirements, but it does not evaluate whether the decision is suitable or not). Consequently, INDECOPI does not have any right to appoint or change management, liquidators or receivers of the debtor; those faculties are reserved for the creditors' meeting only. The creditors' meeting can appoint special committees, as well as regulate the faculties of such committees, although such situation is rare in our experience.

There are certain specific issues (eg, clawback actions) that are not decided by INDECOPI but rather by the judiciary. In such cases, the relevant decision is submitted to a commercial judge and the proceeding continues pending such decision. There are no specialist insolvency courts within the judiciary.

24 May a debtor obtain financing while in insolvency? Will the lender enjoy special rights or preferences for providing DIP financing? Can a DIP lender 'prime' or come ahead of an existing lien? What difficulties typically arise in obtaining such funding or any required approval thereof?

According to the Insolvency Law, liabilities assumed by the debtor after the beginning of the insolvency proceeding qualify as post-insolvency claims and are not subject to the automatic stay (ie, post-insolvency claims should be paid when due pursuant to their terms).

Because the insolvency system is administrative and not judicial, no judge is in charge of the proceeding and the administrative court does not have the capacity to approve or reject a DIP financing.

New money does not have any priority rule protection, and even the post-insolvency claims can be impaired if the creditors' meeting rejects the reorganisation plan and decide to liquidate the company. In such a scenario, post-insolvency claims are drawn to the mass of creditors under the liquidation proceeding and will rank fifth and last in the priority order.

The insolvency system does not promote this kind of reorganisation procedures, where new money can receive a special treatment in terms of priority. This is why in the past 10 years it has become very uncommon to use the administrative process for restructuring purposes. Commencing an insolvency procedure is the most common way to achieve liquidation, and sell assets to pay creditors according to the priority rules.

Workouts always give the debtor an idea of the correct path to reorganise, but we must bear in mind that the administrative procedure always has negative commercial impacts on the debtor's business and, since DIP financing has no preferential treatment, creditors have no incentive to inject new money into the debtor.

25 If a debtor company has issued debt securities, does your jurisdiction's insolvency or securities law provide for any exemptions from registration of those securities under applicable securities law?

The Insolvency Law and Peruvian securities law do not provide for any exemptions from registration a debt security issued by the debtor company.

26 May creditors offset debts owed to them by the debtor in an insolvency proceeding? Does this require court approval? Can creditors recover the expense of participating in the process? How?

Since the initiation of the insolvency proceeding and as an effect of the automatic stay, offset of claims are not allowed. Thus, creditors may offset debts owed to them by the debtor in an insolvency proceeding with the approval of the creditors' meeting only.

The Insolvency Law does not have provisions related to the recovering of the expenses incurred by the creditors for participating in the process; in our experience, such expenses are not recovered by creditors.

27 If a debtor company has tax losses prior to a reorganisation, will it retain and be able to use such losses after it emerges from the reorganisation?

Peruvian law does not let companies to transfer its tax losses to other companies in a reorganisation.

On the other hand, after a reorganisation plan is completed, the acquirer company can only use its losses going forward to offset its own income in an amount that does not exceed the value of the fixed assets it had prior to the reorganisation. If there are losses left over, these are lost.

28 What happens at the end of an insolvency proceeding? If there is a discharge of prior claims, is it permanent or subject to any conditions subsequent?

Debtors can file for a new preventive insolvency proceeding once 12 months have passed from the termination of the former preventive insolvency proceeding.

A debtor can file for a new ordinary insolvency proceeding if such debtor has successfully undergone a reorganisation under an ordinary insolvency proceeding and all payments were made when due within such reorganisation.

29 How long do restructurings last? Is there a formal deadline?

There is not a formal deadline for a restructuring proceeding. The deadline of the restructuring will depend on the debtor obligations and the payment terms agreed by the creditors' meeting.

In our experience, restructurings under a preventive proceeding last approximately one year since the publication of the proceeding and until the installation of the creditors' meeting. Please note that in such creditor meeting the creditors will vote to whether approve or reject the restructuring plan presented by the debtor.

30 Is there an expedited or summary proceeding available to obtain court approval of an out-of-court restructuring plan? If so, what types of claims and creditors may participate and how does the process work? Are out-of-court proceedings commonly used and what are the primary benefits and drawbacks?

Under the Insolvency Law, there is no available a summary proceeding to obtain a court or administrative approval an out-of-court restructuring plan.

Out-of-court restructuring plans usually take the form of syndicated loans or individual agreements with similar terms and conditions and usually only with financing creditors. Out-of-court restructuring plans do not require any type of governmental prior approval.

Tax claims have their own rules to refinance their claims, subject to some legal limitations regarding the terms and conditions.

Additional considerations

31 Does the government tend to play an active role in insolvency proceedings? What factors determine this?

In our opinion, government does not tend to play an active role in insolvency proceedings because Peruvian insolvency regulation does not foresee the government participation during those proceedings, leaving to the creditors the responsibility of the agreements adopted to recover their credits in the best possible way. Nevertheless, we have seen certain specific and extraordinary cases in which the government has played a more active role due to its participation as the main creditor in the insolvency proceeding (eg, the Doe Run liquidation proceeding and the restructuring of relevant soccer clubs in Peru), and usually because of the presence of certain factors relating to public interest and/or to avoid public unrest.

Recently, a Technical Prosecution Bureau has been formed. Such bureau is in charge of supervising (on a closer basis) all the restructuring proceedings in order to sanction (eg, imposing fines) any creditors, administrators and liquidators who do not comply with the Peruvian Insolvency Law.

32 How are extraterritorial bankruptcy or insolvency proceedings recognised? Could a bankruptcy or insolvency judgment abroad substantially delay an insolvency proceeding in your jurisdiction? Does your jurisdiction contemplate ancillary or parallel insolvency proceedings with respect to a foreign proceeding? If a company organised under the laws of your jurisdiction (or whose principal place of business is in your jurisdiction) entered into extraterritorial bankruptcy or insolvency proceedings, would those proceedings be recognised in your jurisdiction?

According to Peruvian law, the Commission of Insolvency Proceedings is competent to acknowledge the insolvency of debtors domiciled abroad, provided that the corresponding Peruvian relevant judicial authorities have recognised the foreign ruling issued by the relevant foreign competent authority, or if the rules of Private International Law explicitly mandate so. In that regard, the foreign ruling must first obtain recognition of the Peruvian judiciary by means of an exequatur, which may take a significant amount of time.

Once the foreign ruling is recognised, the Peruvian authorities are in charge of foreclosing on the debtor's assets located in Peru for purposes of paying off local creditors and transferring any remaining funds to the foreign insolvency authority.

Finally, the insolvency of debtors domiciled in Peru is subject to the Insolvency Law only, without admitting any agreement to the contrary. The Insolvency Law does not allow for parallel or secondary insolvency proceedings.

33 How frequently do debtor companies reorganise and emerge from bankruptcy as opposed to liquidation? What factors determine this?

According to INDECOPI published statistics less than 10 per cent of the companies that begin an insolvency proceeding emerge from bankruptcy.

The main reason is that new money does not have any priority rule protection and may be incorporated to the liquidation proceedings without any priority (see question 24).

In our experience, what a debtor must do in a financial distress situation is to try to retain as much cash as possible and call for a private creditors' meeting to try to achieve a consensual standstill agreement. If hostile creditors decide to foreclosure the debtor and try to put a lien over strategic assets, the debtor must file for an insolvency proceeding and secure the approval of the reorganisation plan by two thirds of the pre-bankruptcy verified claims.

34 What is the appeal process for an insolvency proceeding in your jurisdiction and what effect do appeals have on approved plans? How long do appeals take to resolve?

The second administrative instance is the Tribunal of Insolvency Proceedings; in charge of resolve the appeals filed against the Commission of Insolvency Proceedings decisions within a maximum period of 90 business days.

The appeals must be supported in issues of law or a different evidence interpretation.

The filing of an appeal does not suspend the effects of the contested decision unless the Tribunal considers that there are enough reasons to suspend the effects until a final decision is issued.

The debtor or creditors that represent at least 10 per cent of the verified claims may challenge decisions taken by the creditors' meeting. The Commission of Insolvency Proceedings resolves the objection within a maximum period of 90 business days. The filing of an objection does not suspend the effects of the creditors' meeting agreement unless the Commission considers that there are enough reasons to suspend the effects until a final decision is issued. In that case, the debtor or the creditors that filed the objection must provide a guarantee for possible damages.

35 Are there any common techniques that debtors use to manipulate or control insolvency proceedings? Have any of these techniques been challenged, and if so, what was the result?

In our experience, a common technique used by debtors is to reach agreements with a percentage of verified creditors in the proceeding in order to hold indirectly a majority of the voting rights in the creditors' meeting. Usually, these creditors vote in coordination with the debtor in order to get preferential payments terms in the relevant reorganisation plan (which is prepared by the debtor). Also, such preferential payment terms may be offered by the shareholders of the debtor or other companies with the same economic group. It should be noted that the other creditors have the right to object such preferential payment terms by arguing that they are abusive.

36 What impact, if any, has the ongoing volatility in the global credit markets and rise in corporate restructurings had on your jurisdiction's insolvency regime? Are any amendments to your jurisdiction's insolvency laws envisaged? If so, which problems are such amendments intended to address and how?

We consider that the insolvency system does not currently have any significant impact in credit markets owing to the predictability of the Insolvency Law application and the consequences of being involved in any kind of insolvency proceeding.

We assume lenders will know liquidations are the main outcome of the insolvency regime, therefore they can anticipate that situation by taking all possible legal and financial measures to prevent and avoid the insolvency of their borrowers (such as having better collaterals – trusts, financial leasing or third parties guarantees – and negotiating out-of-court refinancing).

Nevertheless, in April 2019, INDECOPI published a proposal to amend the Peruvian Insolvency Law. We believe this proposal aimed to adjust certain features of our law that impacted negatively in our insolvency regime. To our opinion, the most important changes proposed by INDECOPI are the following: (i) to grant DIP financing the second rank in liquidations proceedings (the "super-priority" granted to DIP financing in other countries cannot be reflected in our laws because labour and pension claims have a super-priority granted by the Peruvian Constitution); (ii) to increase the claw-back period from 12 to 24 months before an insolvency proceeding is formally instituted; and (iii) to regulate cross border insolvencies. Finally, in our opinion, the liquidation of companies under insolvency proceedings is the rule, and restructurings the exception, probably due to the lack of a priority protection rule for new money investors; in other words, it is complex and difficult for lenders to finance the current operations and investments of an insolvent company knowing that the risk of losing new money is actually high.

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José Antonio Jiménez holds a master's degree (LLM) from the University of Toronto, Canada. Graduated with a master's with a specialisation in corporate law from the University of Lima. He has a postgraduate in tax law from the University of Lima. He also has a degree in corporate management and business organisation from ESAN, where he graduated first in his class. He is a graduate lawyer from Universidad Católica de Santa María (Arequipa), where he graduated with honours. He has been a professor of bankruptcy law at the Pontificia Universidad Católica del Perú Law School, professor of financial law at Universidad Peruana de Ciencias Aplicadas Business School and of the Programme of Corporate Law of San Francisco Xavier University, Arequipa. José has more than 19 years of experience in private restructurings and insolvency and liquidations proceedings, and also experience in relevant corporate reorganisations.

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Daniel is a partner at Rebaza, Alcázar & De las Casas in its bankruptcy and restructuring practice area, as well as in the corporate & M&A practice.

He is graduate lawyer, magna cum laude, from Pontificia Universidad Católica del Perú (PUCP). Holds a master's degree in law (LLM) from The University of Chicago. He holds a certificate in energy law from PUCP, and a certificate in M&A from Georgetown University Law Center.

He was an international associate at the New York office of Cleary, Gottlieb, Steen & Hamilton LLP (2013–2014), where he focused his practice on domestic and foreign mergers and acquisitions and securities transactions.

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He specialises in corporate reorganisations and bankruptcy restructuring in the construction and industrial markets. He has been involved in the latest most relevant private restructurings in Peru.

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Marcia is a senior associate at Rebaza, Alcázar & De las Casas in the bankruptcy and restructuring practice area.

She is a graduate lawyer, magna cum laude, from the University of Lima and holds a master's degree in intellectual property and competition law from Pontificia Universidad Católica del Perú, 2015.

Her practice is focused on advising companies on matters of insolvency and corporate restructuring in relation to the Peruvian Bankruptcy Law, followed before the National Institute for the Defence of Competition and Protection of Intellectual Property.

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Sofia is an associate at Rebaza, Alcázar & De las Casas in the bankruptcy and restructuring practice area. She is a graduate lawyer from the University of Lima with a degree in corporate law. Her practice is focused in reorganisation counselling to national and international corporations and entities. She also counsels corporations in intellectual property matters.

Sofia carried out her pre-professional practices in the corporate area of the company San Fernando SA and in the corporate reorganisation and bankruptcy area of Rebaza, Alcázar & De las Casas.

During her university stage she studied, as an exchange student, law and philosophy at the University of Tilburg (Netherlands).

Rebaza, Alcázar & De Las Casas

Our firm was established in 2004 and after more than 14 successful years of sustained growth, is currently one of the top firms in the Peruvian market. We have built up a full-service firm, adding to our premier transactional practice, a number of highly specialised legal areas.

Our bankruptcy and restructuring team has worked together more than 18 years participating in the most significant corporate bankruptcy procedures in the past decade in Peru.

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