CLEARY GOTTLIEB

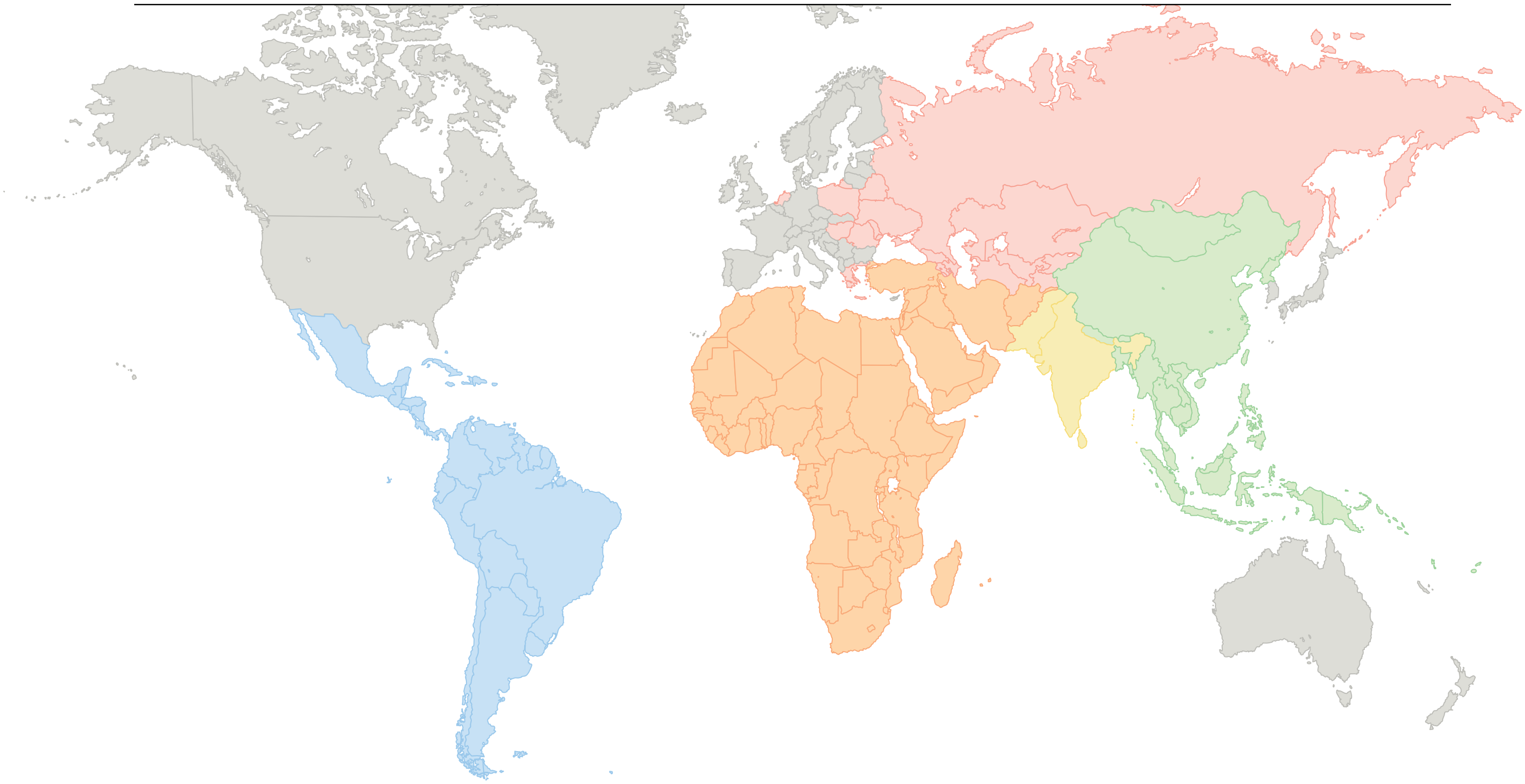
# Emerging Markets Restructuring Journal

Issue No. 7 — Summer 2018


BITCOIN
IOTA


Index ▲1.56

# In This Issue



## Editorial Board



## Contributors

**GLOBALSOURCE PARTNERS – CARACAS**

**Ruth Krivoy**

**HEADRICK RIZIK ÁLVAREZ & FERNÁNDEZ**

**Mary Fernández**
**Melba Alcántara**

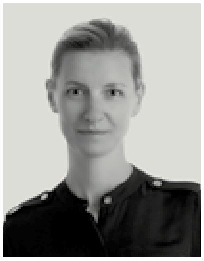
**PÉREZ-LLORCA – MADRID & NEW YORK**

**Ander Valverde**
**Beatriz Montes**
**Mercedes Tulla**

**CLEARY GOTTLIEB**

**Polina Lyadnova,** London
**James Brady,** London
**Ekaterina Dorokhova,** Moscow
**Isa A. Julson Barahona,** New York
**Jonathan Mendes de Oliveira,** São Paulo
**Mohamed Taha,** London
**Hannah Whitney,** London

# Letter from the Editors



2018 has so far proved a difficult year for emerging markets. As the strengthening dollar and tightening financial conditions globally expose long-held fragilities, the appetite of typical emerging markets' investors has dampened in favour of perceived greater certainty and protection elsewhere.

A key theme that emerged from this issue is the importance of good governance in attracting and retaining investment and encouraging growth. Our first article offers a history lesson of policy done badly, with an examination of Venezuela's current economic and debt situation, a consideration of how it came about and the pre-conditions for a successful turnaround. Contrastingly, we then turn to Senegal, which has traditionally been one of the most economically stable and foreign investment friendly countries in Africa. As the country grows and its developmental needs evolve and as it seeks to broaden its sources of financing outside familiar lending frameworks, Senegal will be reliant on the efforts of its policymakers to provide answers as to how its sovereign debt may be restructured.

Two of our articles deal with legislative developments to create a more business-friendly environment and entice otherwise cautious investors. Egypt's new bankruptcy law is a welcome change to its 20-year old predecessor regime, and should ease the process of restructuring for companies and creditors alike. Similarly, the new insolvency law enacted in the Dominican Republic positions it to compete with other jurisdictions that promote economic growth through modern and transparent business regulations.

Returning to a developed market which has long been a safe haven for foreign investors: the UK's legacy of investor protection is having repercussions on the emerging markets, as the recent case of *Re OJSC International Bank of Azerbaijan* demonstrates. This case reaffirmed the long-established (and some would argue long out-dated) Gibbs Rule that, absent consent, English law-governed debt may not be discharged in foreign restructuring proceedings.

Finally, as we continue to make sense of the brave new world emerging markets find themselves in, we have several articles on how new technologies and innovations, and existing but rarely utilized proceedings, are disrupting and impacting upon the insolvency and restructuring space. As our study of Russian recent case law explores, legislators and regulators face the difficult task of how to categorise and regulate cryptocurrencies whilst ensuring their jurisdictions remain favourable for crypto-related investment and projects. In Mexico, the restructuring of ICA took place partly through an innovative rescue financing plan that allowed ICA to continue to bid for construction projects during its restructuring, and in Brazil we examine how extrajudicial reorganization, a seldom used proceeding available under Brazilian bankruptcy law, was an effective and expedited instrument for the cross-border restructuring of Odebrecht Oil & Gas. As these articles make clear, while one foot remains firmly planted in present turbulent circumstances, the other is cautiously stepping towards the future.

We hope you enjoy this issue.

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

# Venezuela: In a Hole, and Still Digging

*By* **RUTH KRIVOY**



## Introduction

Venezuela is not doing well. In the midst of a deep economic depression, the government has become increasingly authoritarian, militarized, and illegitimate. This is the result of two decades of economic mismanagement and a hunger to remain in power at any cost. With access to extremely high yet volatile oil income, the government opted for short-sighted macroeconomic populism over long-term responsible management. Key institutions were dismantled and basic principles of public administration thrown out the window. The public sector became a machine for distributing oil rents to cronies and political supporters. Fiscal and monetary anarchy ensued. Meanwhile, expropriations, over-regulation and weak rule of law scared away investment and destroyed the private sector's productive capacity.

Today, oil production and the rest of the economy have collapsed. By the end of this year, the economy will have shrunk by more than 50 per cent over five years. Inflation will reach almost 2 million per cent. The balance of payments has a gaping hole that Venezuela has neither the requisite foreign currency nor the needed access to financial markets to plug.

Things do not look good in the short term, either. Nicolás Maduro was reelected in a sham election on May 20, and his government is neither willing nor able to implement a stabilization program. Any such program would require drastic legal and policy changes that would hurt the interest groups that support him and—in the short term, at least—his political base. A Maduro government at best would carry out partial reforms that will act as Band-Aids. Moreover, the country has stopped servicing its debt, and formal restructuring of Republic and PDVSA debt worth over USD150 billion will begin soon. Yet the Maduro regime has neither the credibility nor the ability to negotiate an orderly default. Moreover, under current U.S. sanctions, several officials in the Maduro government lack the legal standing to negotiate, and the wave of sanctions and diplomatic pressures unleashed by the elections are bound to further constrain the government's room to maneuver.

The situation will prove unsustainable. Something will have to give; there will be regime change. There is no telling how or when it will take place, or who will end up in power. We know only that, to exit the crisis, any new government will need the political capital and skill set to reform key institutions and carry out corrective measures apt to cause short-term pain, as well as political and financial support from the international community.

The rest of this article details Venezuela's current situation and how it came about. We focus on Venezuela's oil industry, balance of payments and external debt crises and explain why Venezuela has used up all its lifelines—debt restructuring is inevitable.

We conclude by laying out pre-conditions for a successful turnaround.

## More dependent on oil, but production is slipping

Ever since commercial oil drilling began early in the 20th century, Venezuela has built its policy framework on its oil industry. Reforms to open up the sector in the late 1990s provided lasting benefits, taking output to its 2008 peak of 3.2 million barrels a day. By then, however, the non oil industry was struggling under *chavismo*. As the domestic non-oil production shrank, Venezuela's economy became increasingly dependent on imports and on the oil revenue needed to purchase them.

**Despite its dependence on oil, the Chávez regime gradually reversed earlier reforms and eroded the oil industry's long-term productive capacity.**

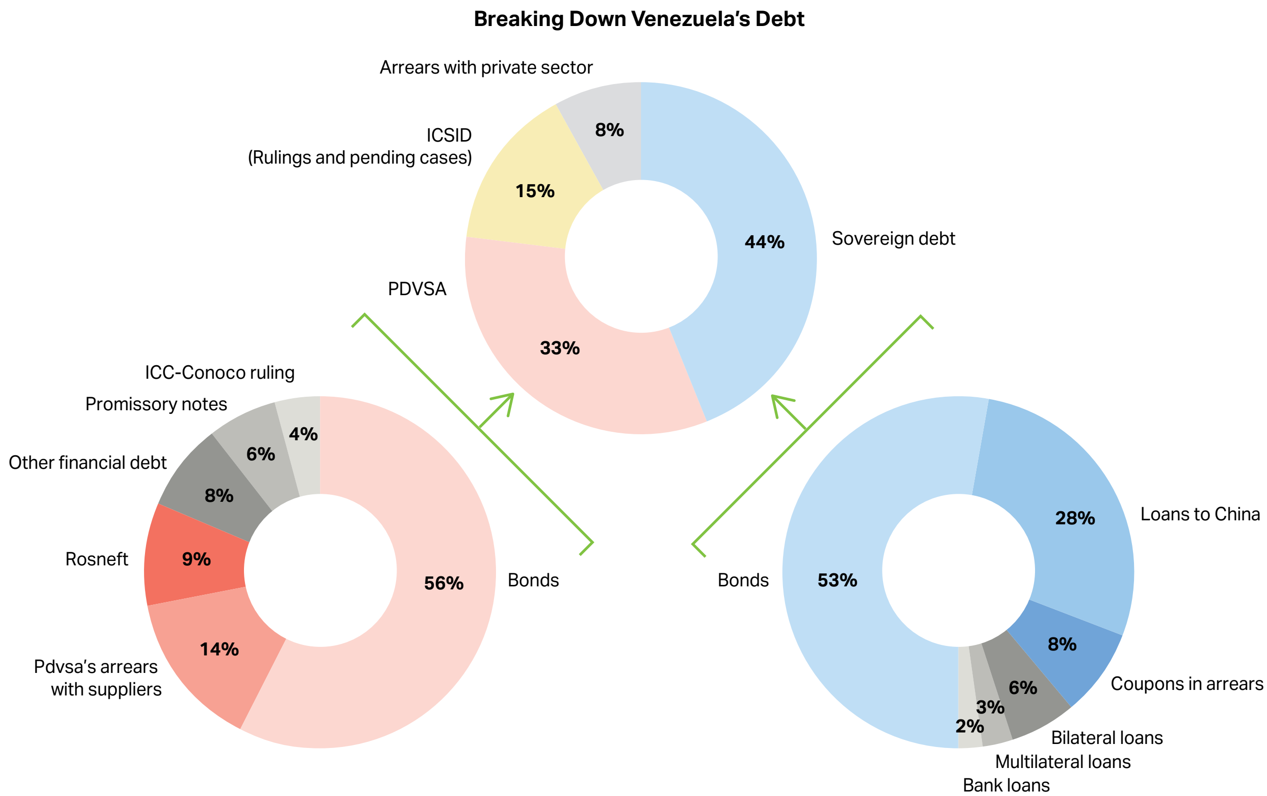
Despite its dependence on oil, the Chávez regime gradually reversed earlier reforms and eroded the oil industry's long-term productive capacity. Petróleos de Venezuela, S.A. (PDVSA), the state-owned oil company, was hit especially hard during the 2002–2003 political crisis, when over 20,000 well-trained professionals were fired and substitutes were hired based on their political loyalty rather than technical expertise. A decade later, operational capacity and investment were down, contractors and suppliers were not being paid, and business relations between PDVSA and its private partners were strained. Oil output began to fall in earnest. In recent months, U.S. sanctions and Maduro's firing of PDVSA's top executives (replacing them with military loyalists) have thrown even more sand in PDVSA's gears. Oil output now stands at a paltry 1.5 million barrels a day and heads toward 1 million next year. We expect no recovery in the foreseeable future.

## A balance of payments crisis years in the making

Venezuela's balance of payments has been precarious for years but is now in full-blown crisis, owing to plunging oil revenue, low foreign assets and the lack of external sources of financing. Export revenue, hit by falling prices and output, fell 70 per cent from 2014 to 2016. The government responded by cutting imports by 75 per cent in that same period.

Non-oil imports per capita are now at historic minimums. Even without adjusting for chronic over-invoicing provoked by currency controls, imports per capita amounted to merely USD362 in 2016 and USD245 in 2017, down from USD1,450 in 2013.

Despite low imports, now stable at around USD11-12 billion, the foreign exchange deficit has widened; we project a USD1.4 billion deficit this year, even assuming that neither the government nor PDVSA service their debt (except the PDVSA 8.5% 2020 bond which is secured by 50.1 per cent of Citgo Holding). By any definition, the government is in default. Overdue bond coupon payments since October 2017 add up to USD4.5 billion. Litigation might begin soon.




## No more lifelines from China or Russia

For years, China and Russia were important sources of funding for Venezuela. Not anymore. They both appear wary of elevating their exposure to a country with a collapsed economy, minimal government management capacity, and little to show for large sums of money already loaned. And they, too, deem a regime change to be inevitable. If they decide to put any money into the country it will most likely go to the joint ventures in which they partner with PDVSA, not to fund the balance of payment gap.

China made its first big loan to Venezuela in 2007, financing Chávez's government as part of its global oil-for-loans strategy. Over eight years, it lent Venezuela around USD60 billion through a system of revolving credits for specific projects and imposed increasingly strict control over the use of proceeds of such loans. China stopped making new loans in 2015, and outstanding debt owed to China has remained under USD20 billion since then. Venezuela has sent several emissaries to China to secure new funding, but they have all come back empty-handed. And last January, China's Development Bank decided not to renew a USD1.5 billion line of credit for PDVSA.

While it stopped lending new money, China did help by easing the terms of repayment and allowing loans earmarked for projects to be used to purchase imports from China. Until recently, we assumed that China had awarded a two-year grace period for amortizations of its loans to Venezuela and that it would renew this period in mid-2018 (we've been forced to make assumptions because both governments have been cagey about these deals). We recently learned, however, that the grace period was only 18 months (expiring last November), that such grace period did not cover the Large-Volume Long-Term loan, and that it was not renewed. This means that Venezuela will owe USD5.3 billion in amortization payments and USD8.4 billion in total debt service to China this year.

> China and Russia appear wary of elevating their exposure to a country with a collapsed economy, minimal government management capacity, and little to show for large sums of money already loaned.

At today's prices, Venezuela can cover debt service to China by sending about 428,000 barrels per day. Shipments to China barely exceed that amount—they remain at about 500 million barrels per day and generate some free cash after debt service. This money is deposited in the account that Venezuela's development bank (Bandes) has in the China Development Bank and to which Venezuela's government has access.[1]

Reliable information on loans from Russia is scarcer still. We estimate total outstanding debt at USD7.6 billion (the Venezuelan government owes USD3.1 billion and PDVSA USD4.5 billion). Major financing from Russia began in 2006, when Chávez bought USD11.0 billion worth of Russian arms for credit. After partial repayment of this loan, outstanding debt in November 2017 was USD3.1 billion, which was restructured for ten years, with minimal payments in the first six years "to help Venezuela meet its obligations with other creditors" according to the Russian Ministry of Finance. Venezuela also appears to owe Rosneft, Russia's state-owed oil company, USD4.5 billion through PDVSA, including USD3.0 billion outstanding for a USD6.0 billion loan made in earlier years and a USD1.5 billion loan made in 2016 and guaranteed with a 49.9 per cent stake in Citgo, a U.S. oil company owned by the Venezuelan government. Despite grand declarations and glad smiles from Russian officials, we see no desire to lend Venezuela any more money.

## Debt restructuring looms near

We estimate Venezuela's outstanding external debt at USD154 billion, consisting mainly of Republic and PDVSA bonds and money owed to China and Russia.

Most of Venezuela's bond debt owes to careless borrowing to sustain a controlled currency regime with multiple exchange rates. From 2003 to 2012, the government and PDVSA issued USD52 billion in dollar-denominated bonds payable in bolivars to keep the national currency strongly overvalued. Businesses and individuals seeking to send assets abroad but having few means of doing so bought these bonds with bolivars and sold them in the international market to obtain foreign exchange. Global markets gobbled up the high-yield bonds. With oil prices high and international liquidity abundant, investors were nonchalant, while the Venezuelan government made poor policy choices, weakened its institutions, hid fiscal and capital account data and neglected its oil industry.

When restructuring talks inevitably begin, bond holders will show up at the table with over USD70 billion[2] in overdue claims. PDVSA's contractors and suppliers are owed at least USD7 billion in overdue payments and hold USD3 billion worth of promissory notes. Rulings and pending cases at the International Center for Settlement of Investment Disputes add up to about USD22 billion. A wide array of multinational and Venezuelan companies claim they are owed USD13 billion in foreign exchange disbursements not honored by the government for imports brought to the country and sold at prices set by the government. Total debt at stake will add up to at least USD154 billion, or 1,275 per cent of GDP.

That is a large sum to negotiate with a diverse group of creditors. The silver lining is that tallying up the debt will be less difficult this time than it was in the 1980s, when many small and medium financial institutions operating in the United States, Europe and Asia had freely lent money to Venezuelan public sector entities. In this round, because external debt was issued only by the Republic and PDVSA, and Venezuela has been unable to issue any new bonds for several years, it will be easier to track.

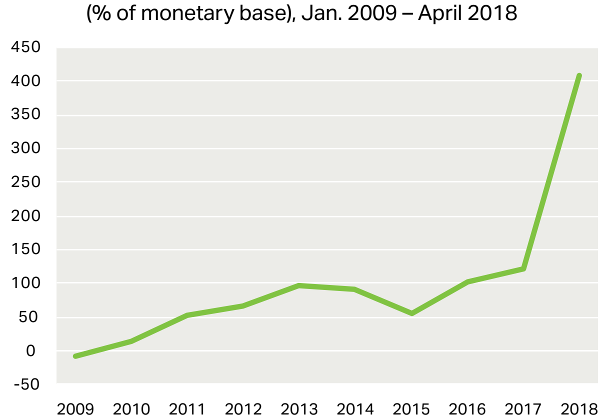
## Bad policy, bad outcomes

Declining oil output and the exhaustion of external assets and foreign borrowing opportunities dragged down imports and created shortages. Other bad policies made matters worse. Stifling government controls and corruption have left the non-oil economy in a deep depression since 2014, exacerbating shortages. And fiscal disorder has led to reckless monetary expansion since at least 2009, when, overburdened by social spending and fiscal obligations, PDVSA began to rely on the Venezuelan central bank credit to cover its bolivar-denominated operating expenses and fiscal contributions.

Shortages and out-of-control monetary expansion have caused inflation to soar. Venezuela officially entered hyperinflation territory in the fourth quarter of 2017, when prices rose by 200 per cent year-on-year. We expect inflation to reach almost 2 million per cent this year.

With the economy shrinking and money becoming practically worthless, purchasing power has plunged.

**Financing to public enterprises**
(% of monetary base), Jan. 2009 – April 2018




Source: Central Bank of Venezuela, Síntesis Financiera.

**Money Supply and Monetary Base**
(year-on-year % change), Dec. 2009 – Jul. 2018

| | Money supply | Monetary base |
|---|---|---|
| 2009 | 14.3 | 16.7 |
| 2010 | 19.1 | 26.1 |
| 2011 | 50.6 | 40.4 |
| 2012 | 61.0 | 55.3 |
| 2013 | 69.7 | 64.2 |
| 2014 | 64.0 | 68.5 |
| 2015 | 100.7 | 107.7 |
| 2016 | 159.2 | 248.8 |
| 2017 | 1,123.7 | 1,485.0 |
| 2018* | 9,455.6 | 9,027.5 |

* Through July 13, 2018.
Source: Central Bank of Venezuela, Síntesis Financiera.

**Venezuela officially entered hyperinflation territory in the fourth quarter of 2017, when prices rose by 200 per cent year-on-year.**

| | CPI | Real minimum wage index, eop | Minimum wage | |
|---|---|---|---|---|
| | Year-on-Year % Change | (100=2000) | Bs | USD @ PPP |
| 2004 | 19.2 | 104.3 | 321 | 170 |
| 2005 | 14.4 | 113.5 | 405 | 191 |
| 2006 | 17.0 | 126.3 | 512 | 220 |
| 2007 | 22.5 | 127.7 | 615 | 245 |
| 2008 | 31.9 | 127.3 | 799 | 251 |
| 2009 | 26.9 | 120.2 | 959 | 238 |
| 2010 | 27.4 | 119.7 | 1,224 | 253 |
| 2011 | 29.0 | 120.1 | 1,548 | 576 |
| 2012 | 20.1 | 131.1 | 2,048 | 496 |
| 2013 | 56.1 | 135.4 | 2,973 | 281 |
| 2014 | 68.5 | 135.0 | 4,889 | 277 |
| 2015 | 269 | 104.0 | 9,648 | 177 |
| 2016 | 472 | 59.8 | 27,092 | 96 |
| 2017 | 2,803 | 27.9 | 177,507 | 25 |
| 2018 | 1,984,414 | 13.2 | 880,795,780 | 3 |

PPP: Purchasing Power Parity proxy
Source: Central Bank of Venezuela, Official Gazettes, Síntesis Financiera

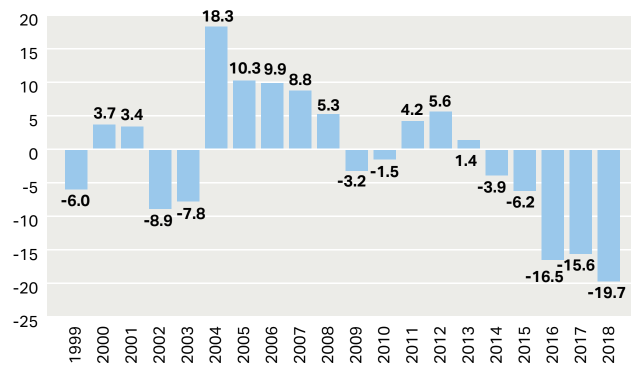
## The risk of new international sanctions

Despite widespread international rejection of Venezuela's electoral process, Maduro pushed forward with the May 20 snap presidential election. New rounds of sanctions may go as far as limiting oil trade between the United States and Venezuela even though the collapse in oil production make it less likely.

Venezuela's exports to the United States are profitable, thanks to low transportation costs and fast payment cycles. The government has nonetheless sought to reduce dependence by redirecting oil exports to China and India, though results so far have been trivial. If and when it achieves meaningful oil export diversification, those two countries appear as its main alternative destination.

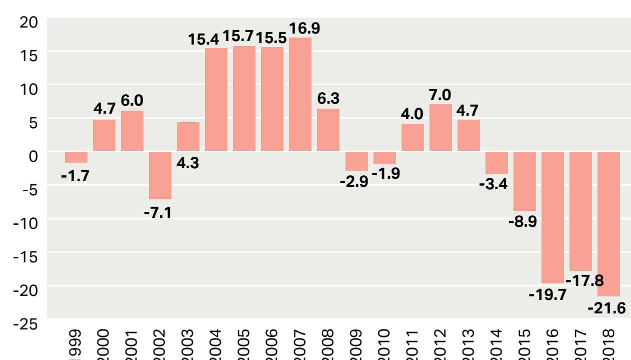
Exports to the United States make up 39 per cent of total oil shipments. With no constraints on its oil trade from sanctions, we project that Venezuela's exports to that country will fall to USD8.0 billion in 2018 from USD11.5 billion in 2017, with volumes falling to 410 from 674 thousand barrels per day.

**GDP**
Year-on-year % change




Source: Central Bank of Venezuela, Síntesis Financiera

**Private Consumption**
Year-on-year % change




Source: Central Bank of Venezuela, Síntesis Financiera

## What is needed to escape the crisis

Even though Maduro won reelection on May 20, his victory failed to convince anyone either at home or abroad. Turnout was low, rules were blatantly unfair, and the international community is rejecting the entire process. More importantly, he has overseen one of the worst economic and political crises in Venezuela's history. Even hitherto cohesive ruling coalitions come under strain in such circumstances. We do not know how or exactly when it will happen, but we do expect a change of government in the medium term.

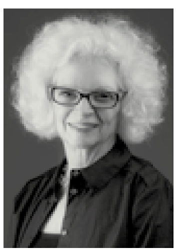
To succeed in leading Venezuela out of its crisis, a new government must be committed to change and have the political capital to carry out tough measures to stabilize the economy and reignite growth and to address the humanitarian crisis. It must be capable of managing a diverse coalition for the common good and promoting a national dialogue to construct a shared, long-term vision for Venezuela.

This will require legal reforms to restore property rights and foster investor confidence. Three Venezuelan institutions, especially, need bolstering: the judicial system, PDVSA and the central bank—the first to restore rule of law, the second to feed the country, the third to restore confidence in Venezuela's currency.

Finally, Venezuela will need cash. A stabilization program will require at least USD50–60 billion to import food and material to alleviate our country's humanitarian crisis, revive domestic production, jumpstart oil production and recapitalize the financial system. Foreign debt restructuring will be part of this process.

All of this will require strong international support. ■

1. More precisely, Venezuela has access to the money in this account as long as it maintains a minimum balance equivalent to three months of debt service plus 30 per cent.
2. Approximate amount at the time of publication.



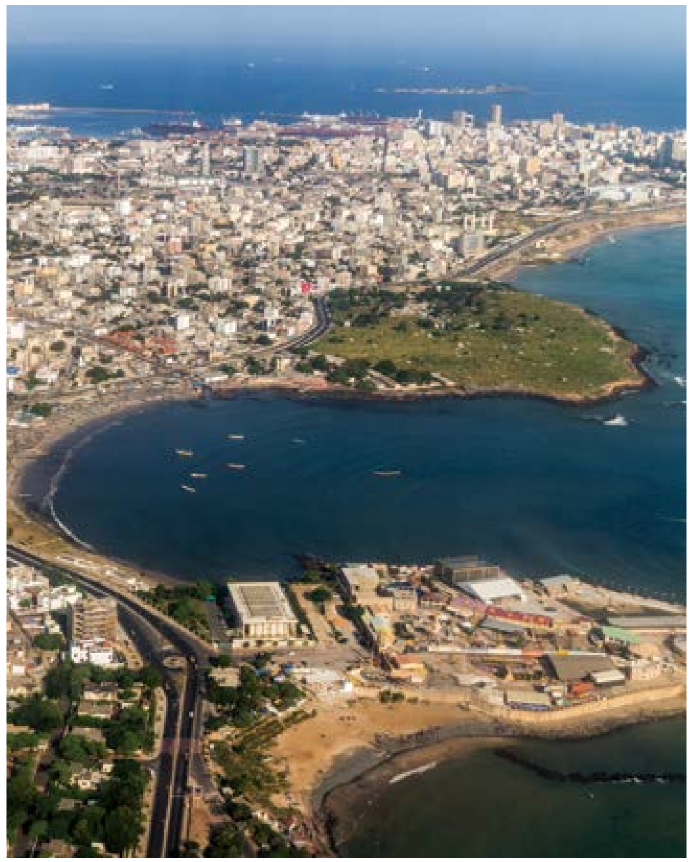
▼ **Ruth Krivoy** is the President of Síntesis Financiera Caracas, C.A., a Caracas-based consulting firm. She is also a founding member of GlobalSource Partners, a global network of independent emerging market economists, serves on the company's Advisory Board and is its local partner in Venezuela.

Ms. Krivoy provides independent, in-depth insights into Venezuela's political, macroeconomic, financial, monetary and fiscal dynamics for a candid assessment of short- and long-term risks and opportunities, including around Venezuela's foreign debt obligations. Her intimate knowledge of politics and policy in Venezuela — informed by her career at the Central Bank of Venezuela, where she served as President in the early 1990s, the first woman appointed to this position — ensures a nuanced perspective that is unconstrained by corporate or political considerations. Clients include financial services firms, global commercial banks, multinational corporations, and multilateral institutions.

Ms. Krivoy holds a degree in economics from Universidad Central de Venezuela, where she graduated summa cum laude. She has authored papers on monetary, financial and regulatory topics, as well as the book Collapse: The Venezuelan Banking Crisis of 1994.

# An Emerging Senegal: Safeguards for Promoting Investment in African Sovereign Debt

*By* **ANDER VALVERDE, BEATRIZ MONTES** *and* **MERCEDES TULLA**



A traditionally stable economic and political environment, together with favorable regimes for business and transport activities, make Senegal one of Africa's exemplary democracies and one of the African countries which most strongly promotes foreign investment, thereby attracting more and more global investors.

On June 24, 2015, the Senegalese government approved the "*Plan Sénégal Émergent*" (ESP), which includes a series of economic amendments and structural reforms designed to attract foreign investment and increase private investment. In particular, the ESP contains amendments aimed at fostering growth in the energy, education, agriculture and transportation sectors.

All told, the ESP includes 27 priority projects and 17 economic reforms intended to reinforce the enabling environment for private sector investment. Among these various reforms, the authors highlight here the one contained in Senegal's Investment Code, which apply to investments over XOF 100 million (mainly production, processing, industrial, tourism, agricultural and complex trade civil code) and provide basic guarantees for equal treatment of foreign investors and repatriation of profit and capital as follows:

1. Tax incentives include a three-year exemption on customs duties for capital goods imports and VAT exemption on production and purchase of local products and services.
2. Exemption from the Minimum Personal Income Tax and from the Business License Tax is granted to investors that use local resources for at least 65 per cent of their total inputs within a fiscal year.
3. Companies located in less industrialized areas of Senegal benefit from exemption of the lump-sum payroll tax of three per cent, with the exemption running from five to 12 years, depending on the location of the investment.
4. Several reforms to make it easier for investors to acquire and register property, maximizing procedures and reducing associated costs for property registration, were carried out. As stated previously, Senegal's Investment Code includes guarantees for equal treatment of foreign investors, including the right to acquire and dispose of property.

Relatedly, the authors have observed an increasing interest in Senegal from Spanish investors, especially from those that have been granted export credit in connection with exports to Senegal in project finance transactions, as well as those that have directly financed the Senegalese government (0.10% of Spanish exports are destined for Senegal, and Spain is the top importer of Senegalese exports in the EU). In addition, one of the major reasons for growing Spanish investment in Senegal is the country's favorable geographic position, given Senegal's proximity to continental Spain and the Canary Islands.

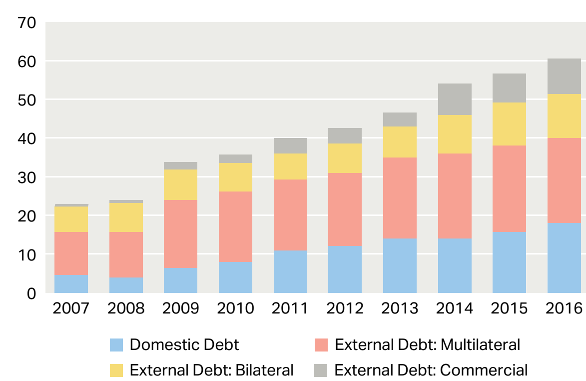
The Senegalese government's measures aimed at attracting foreign investment and the subsequent increase in Senegal's public debt levels raise important questions as to whether and how the country's debt may be restructured in the future. Upon examination of the changing makeup of Senegal's creditor constituencies and the debt restructuring mechanisms used in the past, the authors believe that Senegal may need to find new and different avenues for debt relief in the coming years.

## Senegal's Creditors

Historically, African countries, and Senegal in particular, have mostly borrowed from multilateral institutions—primarily the World Bank, the African Development Bank (AFDB) and the International Monetary Fund (IMF)—and, to a lesser extent, from bilateral lenders belonging to the Paris Club. The Paris Club, formed in 1956, is an informal group of creditor governments from major industrialized countries that meets with debtor countries in Paris on a monthly basis in order to agree to the terms and conditions of the potential restructuring of their debts.

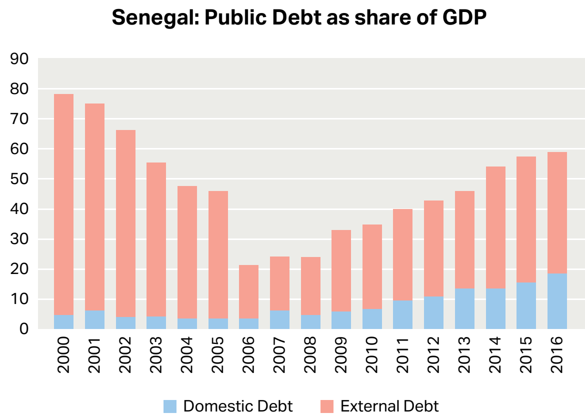
As reflected in the table below, even though the majority of Senegal's external debt is still owed to multilateral institutions, the percentage of multilateral debt relative to other types has decreased over the last decade, while bilateral debt levels have largely remained stable. The reason for this is that recently, loans extended by the World Bank, the AFDB and the IMF have been too small or restrictive in comparison with the country's demand (i.e., either not sufficient to fund many of the big infrastructure projects or subject to strict borrowing limits), which has resulted in the World Bank, the AFDB and the IMF being unable to provide the volume (or kind) of financing that Senegal needs. Additionally, indebtedness owed by Senegal to certain non-Paris Club creditors is increasing. The rise in these new debts, owed to individual creditors who are not included in the Paris Club, has reduced the importance of the Paris Club creditors.

**Figure 1: Senegal: Public Debt, 2007–16**
(Per cent of GDP)




Source: Table published by IMF in 2017

Over roughly the same period during which Senegal has become less reliant on multilateral institutions and Paris Club members, public debt levels and borrowing costs in Senegal have been increasing. Senegal's ratio of public debt over GDP increased from 20.9% in 2006 to 59.3% in 2016.




Source: Table published by IMF in 2017

## Debt Restructuring

As discussed above, although Senegal has historically borrowed heavily from multilateral institutions and, to a lesser extent, from bilateral lenders belonging to the Paris Club, due to Senegal's new and evolving financing needs, debts owed to non-Paris Club individual creditors have been increasing.

Senegal's wide variety of creditors in recent years and its external debt burden has meant that investors' attention has been drawn to the way in which Senegal's debt has been restructured on several occasions in the past so as to evaluate potential future restructuring alternatives.

*First*, in 1996, the IMF and the World Bank, as the largest creditors of most countries, introduced the HIPC Initiative (Heavily Indebted Poor Countries) "*with the aim of ensuring that no poor country faces a debt burden it cannot manage*".[1]

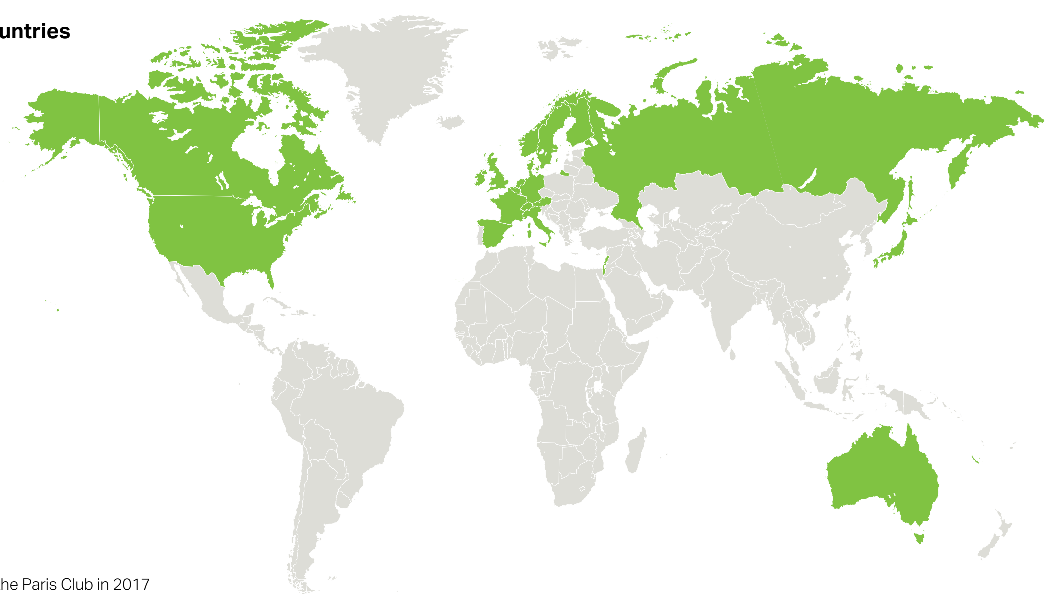
Under the HIPC Initiative, if a country wished to qualify for debt relief, it had to comply with certain economic and structural reform programs and poverty reduction strategies. Initially, debt relief was conditional on countries opening up their economies and reducing the state's role in the economy (e.g., dismantling of government-owned monopolies).

As low-income countries required greater levels of debt relief, in late 2005, a new programme, the Multilateral Debt Relief Initiative (MDRI) (which provided full debt relief to countries that successfully complied with the HIPC Initiative requirements) was approved. Against this backdrop, in June 2005, the IMF, the International Development Association of the World Bank and the African Development Fund agreed to write off 100% of their debt claims on all countries that had reached, or will eventually reach, the completion point under the enhanced HIPC Initiative. Consequently, as of January 2006, twenty countries, including Senegal, were eligible for immediate MDRI relief.

*Second*, in addition to the HIPC Initiative and the MDRI, the Paris Club also worked closely with the IMF and the World Bank regarding debt relief. For many years, the Paris Club has been an important place for Senegal in terms of restructuring sovereign debt owed to bilateral creditors. It was the top forum for Senegal to restructure its sovereign debt, which it did on several occasions (in 1981, 1982, 1983, 1985, 1986, 1987, 1989, 1990, 1991, 1994, 1995, 1998, 2000 and 2004).

Senegal's last debt restructuring with the Paris Club took place on 9 June 2004. By the end of 2002, Senegal's total public debt amounted to approximately USD2,538 million in net present value, while the debt owed to Paris Club creditors amounted to approximately USD586 million in net present value. In

The 20 Paris Club Countries



Source: Graphic published by the Paris Club in 2017 the 2004 restructuring, and given Senegal's commitment to carrying out the economic and structural reforms previously proposed by the HIPC Initiative, the Paris Club members agreed to write off USD94 million in net present value terms, relying on Senegal's commitment to continue modernizing its economy in a manner consistent with the HIPC Initiative. Additionally, most creditors belonging to the Paris Club also committed to granting additional debt relief to Senegal on a bilateral basis.

The HIPC Initiative and MDRI are nearly complete, with 36 countries (including Senegal, as noted above) having reached the completion point under the HIPC Initiative. However, since Senegal's last debt restructuring, the composition of its creditors has changed. As a result of the rise in bilateral lending by entities other than multilateral institutions and Paris Club members (most significantly China, Kuwait, Brazil, Russia, India and South Africa), the importance of the Paris Club as it exists today as the chosen forum for Senegal's debt restructuring has been significantly reduced.

The emergence of these new bilateral lenders in Senegal's borrowing arrangements raises some doubts regarding the mechanisms which will be used in the future by these non-Paris Club countries when facing future defaults in view of the need to restructure Senegal's debt. Perhaps these new bilateral creditors will join the Paris Club, widening the club's membership, or they could build a separate international club governed by their own rules.

CIGI papers from 2014 regarding African perspectives on sovereign debt restructuring expressed concern about the *"uncoordinated, protracted and ultimately costly sovereign debt restructurings on the African continent. The lack of contemporary framework for restructuring debt owed to the multilaterals is one worry; another is the absence of adequate rules and procedures for restructuring private held sovereign bonds"*.

In view of the foregoing, it seems clear to the authors that (i) the debts written off under the HIPC Initiative and MDRI were one-off, which means that these lenders are unlikely to settle future sovereign debt crises in the same manner, and (ii) the new composition of Senegal's creditors implies that the importance of the Paris Club will be reduced and that a new mechanism for debt restructuring in Senegal will emerge.

**Overview: Senegal Debt Relief Committed and Delivered by Paris Club Official Bilateral Creditors**
(USD (millions), in year-end 2015 present value terms)

| HIPC Initiative Assistance Committed | HIPC Initiative Assistance Provided | Debt Relief Beyond HIPC Initiative Provided | Total Debt Relief Provided | Deb Relief Provided to Debt Relief Committed (%) |
|---|---|---|---|---|
| 179.8 | 179.8 | 442.7 | 622.5 | 346.2 |

Based on table published by IMF in 2017

## Emerging Senegal Plan

In light of the above, and given Senegal's economic growth during the past years, Senegal's government approved the ESP in 2015. The ESP, a strategic plan designed by Senegal's government in cooperation with the World Bank, establishes the framework for Senegal's mid- and long-term economic and social policy, which can be summarized in one phrase: "*An emerging Senegal in 2035, providing a cohesive society under the rule of law*".[2]

**Strategic Goals of the Emerging Senegal Plan**

The strategic goals of the Emerging Senegal Plan, which is being carried out through private investment, are based on three pillars:

1. Prompting a structural transformation of Senegal's economy (i.e., the automation of administrative procedures, setting up of incentives and simplified tax and legal devices, and promoting high impact investments, among other initiatives);
2. Improvement to the well-being of the population; and
3. Promoting good governance practices by reinforcing security, stability, governance, protection of rights and liberties and the consolidation of the rule of law.

The aim of Senegal's government is for Senegal to improve its ranking (147th out of 190 countries) in the 2017 Doing Business report issued by the World Bank, which will significantly increase Senegal's attractiveness in the eyes of investors.

In December 2017, the Executive Board of the IMF completed the fifth review of Senegal's economic performance and highlighted that "*Senegal's macroeconomic situation is stable. [...] the outlook for the Senegalese economy remains on the whole positive [...].*"[3] Additionally, several measures contemplated by the ESP have improved and will continue to improve the well-being of Senegal's population. Such measures include:

**Key measures implemented (or to be implemented) by the ESP aimed at improving the well-being of Senegal's population**

— Public infrastructure projects have made Senegal´s rural regions, where more than 70 per cent of Senegal's population lives, more connected both digitally and physically.

— Dakar's citizens no longer experience the water and power cuts that threaten many cities in West Africa.

— Development of the agricultural sector has included important measures to promote better utilization of water (more land is being irrigated allowing the planting of basic food such as rice) and improved seed quality.

— Senegal is building a new city near the airport called "Diamniadio", with special economic zones, a free-trade area, a tech city, research centres and a medical campus.

— Adoption of a regulation prior to the IMF's Executive Board's sixth review, making it possible for medium-sized enterprises to file and pay taxes online in 2018.

In light of these statements, it would be easy to conclude that performance under the ESP has been broadly positive. Yet Senegal still faces great problems as it seeks to improve the living standard of the nearly half of its population who live below the poverty line, which means that further efforts under the ESP are needed.

## Conclusion

Senegal's strategic geographical position, its steady and increasingly competitive economic and political environment, along with its latest taxation amendments to promote business and transport activities, make Senegal an attractive opportunity for foreign investors looking for new countries in which to maximize their investments. However, Senegal's variety of lenders and increasing reliance on bilateral financing outside of historically familiar frameworks raise the question of how its sovereign debt may be restructured going forward.

Traditionally, there have always been suitable mechanisms for dealing with defaults and restructuring in an orderly, timely and fair manner (such as the HIPC Initiative, the MDRI and the Paris Club). Up to now, Senegal has mostly borrowed from multilateral creditors and, to a lesser extent, from bilateral creditors belonging to the Paris Club. However, even though multilateral lenders are still Senegal's largest creditors, due to the country's vastly growing and evolving developmental needs, multilateral lenders are losing significance. The proportion of bilateral lenders is increasing as compared to multilateral lenders, which translates to a growing increase in non-Paris Club member lenders.

Finally, the Senegalese government's clear and firm commitment to break with the past and drive Senegal towards a new developmental trajectory and the modernization of its economy through the execution of the ESP is evidence of the commitment to turn Senegal into an emerging country by 2035. Only time will tell, but it would not be surprising for Senegal to start coming under international investors' spotlight, particularly because of its opportunities in the context of the privatization of public companies, new infrastructure, the agricultural sector and investment in technology. ■

1. IMF: *"Debt Relief Under the Heavily Indebted Poor Countries (HIPE) Initiative"*. IMF Factsheet. March 8, 2018.
2. African Development Fund: "*Senegal Local Development Reform Support Programme - Phase I*". OSGE Department. August 2016.
3. Anecdotally, Senegal's recent issuance of Eurobonds in the amount of USD1,100 million with a reasonable interest rate of 6.5%, suggests increasing confidence of global markets in the Senegalese economy.

**Ander Valverde** is a partner in the Banking and Finance practice at the Madrid office of Pérez-Llorca.

Ander has extensive experience in advising Spanish and international clients on all types of financings, including acquisition finance, corporate finance, margin loans to investors and private banking clients, project finance, real estate finance and asset finance. He also takes part in refinancings, debt restructurings and special situation transactions.

Ander also advises on debt issuances and leads the direct lending practice at the firm where he advises the main debt funds operating in Spain on various types of financings such as senior, mezzanine and single-tranche financings.

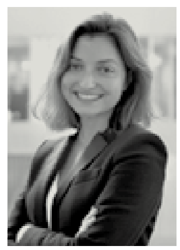
Ander has been a member of the Madrid Bar Association since 2006 and the New York State Bar Association since 2013. Ander has a Law degree from Comillas Pontifical University ICADE (Madrid) and an LL.M from the New York University School of Law (NYU).

Ander has been ranked by various legal directories, such as *Chambers Europe* for Banking & Finance (Up and Coming). He is also listed by *Best Lawyers®* for Project Finance and Development Practice.

**Beatriz Montes** is a senior associate on the Corporate team at the New York office of Pérez-Llorca.

Beatriz's practice focuses on advising Spanish and foreign clients on all types of corporate transactions, and in particular, on high profile mergers and acquisitions, formation and dissolution of joint ventures, capital markets transactions, corporate restructuring processes and private equity deals.

Beatriz is a member of the Madrid Bar Association since 2012 and obtained a Law degree and a Business Administration and Management degree at the Comillas Pontifical University ICADE (Madrid). Beatriz has also joined an exchange programme in the EM-LYON Business School.



**Mercedes Tulla** is an associate in the Banking and Finance practice at the Madrid office of Pérez-Llorca.

Mercedes is experienced in advising private and listed companies on all types of financings. She has also been involved in a number of corporate and debt restructurings.

Mercedes is a member of the Madrid Bar Association since 2016. She has studied Law and Public Administration and Management at the University of Seville, obtained a Joint Masters degree in Business Law and Access to the Legal Practice at the University of Navarra and joined an exchange programme in Denmark at Aarhus University.

LEGISLATION WATCH / EGYPT

# Egypt's New Bankruptcy Law: A Step Forward in the Business Legislative Reform Process

*By* **MOHAMED TAHA**

In February 2018, Egypt issued the Restructuring, Preventive Composition and Bankruptcy Law No. 11 of 2018 (the "**Bankruptcy Law**"), which came into effect on March 19, 2018. The Bankruptcy Law replaced Chapter 5 of the Trade Law No. 17 of 1997, which governed the bankruptcy process in Egypt for almost 20 years.

The Bankruptcy Law is a significant step in the ongoing business-oriented legislative reform in Egypt, which resulted in the enactment of a new investment law in 2017, and in 2018, the most comprehensive amendments to the capital markets law to date.[1] The adoption of the Bankruptcy Law in Egypt also follows a series of business-oriented legislative reforms of the bankruptcy regimes in several Middle Eastern countries, such as the adoption of a new bankruptcy law in the United Arab Emirates in 2016[2] and a new bankruptcy law in the Kingdom of Saudi Arabia in 2018.

The Bankruptcy Law is not comprehensive in its reforms, however, as it applies to commercial companies and traders but does not apply to non-merchant individuals, who continue to be subject to the insolvency provisions under the Civil Code No. 131 of 1948. The Bankruptcy Law also does not apply to state-owned companies, which remain subject to the Public Companies Law No. 203 of 1991.

The Bankruptcy Law regulates three schemes that a debtor undergoing financial difficulties can resort to: restructuring, preventive composition and bankruptcy.

## Restructuring

The Bankruptcy Law sets out a restructuring framework aimed at assisting a debtor facing financial difficulty to reorganize its financial position through, among other things, asset reevaluation, debt restructuring, capital increase, increasing cash inflows, minimizing cash outflows and managerial restructuring.

An application for restructuring can be made only by a debtor (or the successors of a deceased debtor) that has been carrying on a business continuously for two years and, in the case of corporate debtors, is not in liquidation. The restructuring application cannot be made by a bankrupt debtor or a debtor subject to ongoing preventive composition proceedings.

The application, which must include a proposed restructuring plan, will be considered by a court-constituted restructuring committee, which will prepare a report regarding the feasibility of the proposed restructuring plan. Once approved by the court, the plan becomes binding on the debtor and on the signing creditors. The Bankruptcy Law does not require the restructuring plan to be approved by a minimum threshold of the creditors, but it will only bind the creditors who approved it. The approval of the restructuring plan imposes a moratorium on all enforcement claims by the signing creditors against the debtor as well as any claims regarding the restructuring plan. This moratorium will be lifted once the restructuring plan is fully implemented or judicially terminated.

## Preventive Composition

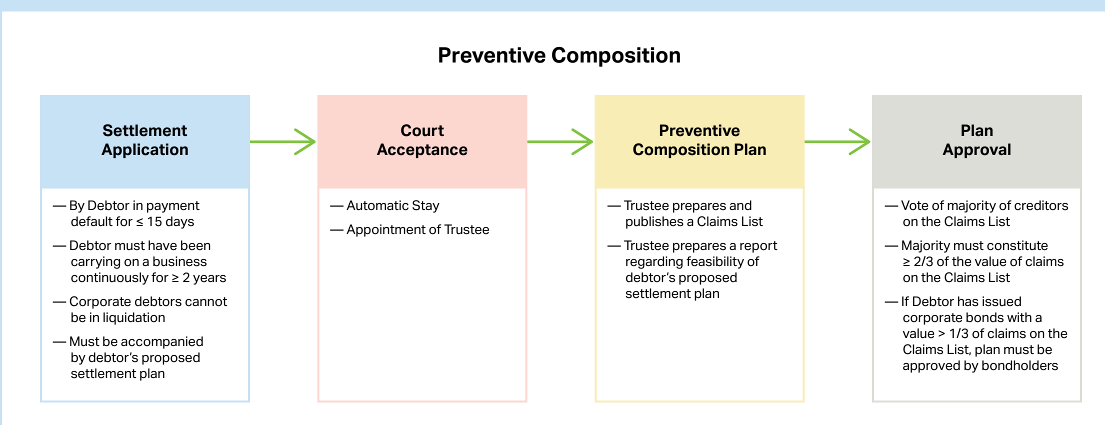
Preventive composition as applied in the Bankruptcy Law is similar to voluntary arrangement schemes under English law. The scheme under the Bankruptcy Law allows a solvent debtor to avoid a liquidation proceeding by agreeing with its creditors to a court-approved settlement plan pursuant to which it will repay all or part of its outstanding debts. The preventive composition application can be filed by any debtor undergoing financial difficulty, provided that such debtor did not commit fraud or gross misconduct. If the debtor has already stopped paying its debts, the preventive composition application must be made within 15 days of such last payment. As is the case for the application for restructuring, the applicant for preventive composition must have been carrying on a business continuously for at least two years and, in the case of corporate debtors, not be in liquidation. The application for preventive composition must be accompanied by the debtor's proposed settlement plan.

If the court accepts the debtor's application for preventive composition, it will appoint one or more trustees to supervise the settlement process. Following the court approval of the preventive composition application, the debtor can continue to manage its business under the supervision of the trustee, but any gratuitous transaction entered into by the debtor will not be enforceable against its creditors. The approval of the preventive composition application also imposes a moratorium on all claims and enforcement measures against the debtor, but claims and enforcement measures initiated by the debtor will continue with the trustee enjoined as a party thereto.

The Bankruptcy Law states that the approval of the preventive composition application shall not result in the acceleration of any of the debtor's loans. It is still unclear to what extent the parties would be able to contract out of this rule and adhere to the prevailing market practice, which generally considers a restructuring of the borrower's debts to be an event of default under financing agreements.[3]

The trustee is required to publish the decision approving the preventive composition application in a daily newspaper. All creditors, including secured creditors, must submit to the trustee original documents supporting their debts. The trustee must then prepare a list of claims against the debtor and publish it in a daily newspaper (the "**Claims List**"). The court will decide on any appeal by an interested party against the Claims List.

Following the determination of the Claims List, after considering any appeals, the court shall convene a meeting comprising the debtor and all the creditors whose claims have been included in the Claims List to review the settlement plan. The trustee shall then prepare a report comprising, among other things, his or her opinion regarding the feasibility of the settlement plan proposed by the debtor. While there is no quorom requirement,



the settlement plan can only be approved by creditors whose claims equal at least two-thirds of the value of claims included in the Claims List; provided that if the settlement plan is proposed by a company that has issued corporate bonds or sukuk with a value exceeding one-third of the claims included in the Claims List, the settlement plan must be approved by the relevant body representing the bondholders or the sukukholders. Secured creditors can only vote on the proposed settlement plan if they waive (and thus forfeit) their security, and such waiver will be conditional on the approval of the settlement plan. Following the approval of the settlement plan in the creditors' meeting, the court will consider the ratification of the plan after deciding on any objections made by the interested parties. Once ratified by the court, the settlement plan will become binding on all the debtor's creditors. The court can only ratify the settlement plan after it has been approved by the creditors' vote.

## Bankruptcy

Similar to the previous bankruptcy regime, the Bankruptcy Law adopts a cash flow test to determine bankruptcy, whereby a debtor would be declared bankrupt if it fails to pay its commercial obligations when they fall due as a result of financial difficulties. An application for bankruptcy can be filed by any creditor, the public prosecution or the debtor itself. However, a fully secured creditor cannot file for a debtor's bankruptcy unless the value of its collateral is lower than the outstanding debt.

If the court declares the debtor bankrupt, it will determine the date from which the debtor stopped paying its debts (the "**Repayment Failure Date**") and appoint a trustee to manage the debtor's assets and financial affairs during the bankruptcy process. Between the Repayment Failure Date and date the debtor is declared bankrupt, no gifts, prepayments of debts, repayments on terms different from those in the debt agreement, or grants of security given by the debtor will be enforceable against the creditors.

Once declared bankrupt, the debtor loses capacity to manage its financial affairs or to dispose of any of its assets. However, a bankrupt debtor may, with approval of the court, start a new business using capital that is not subject to the bankruptcy proceedings, in which case any debts arising from the new business will have priority over other claims in relation to the assets of the new business.

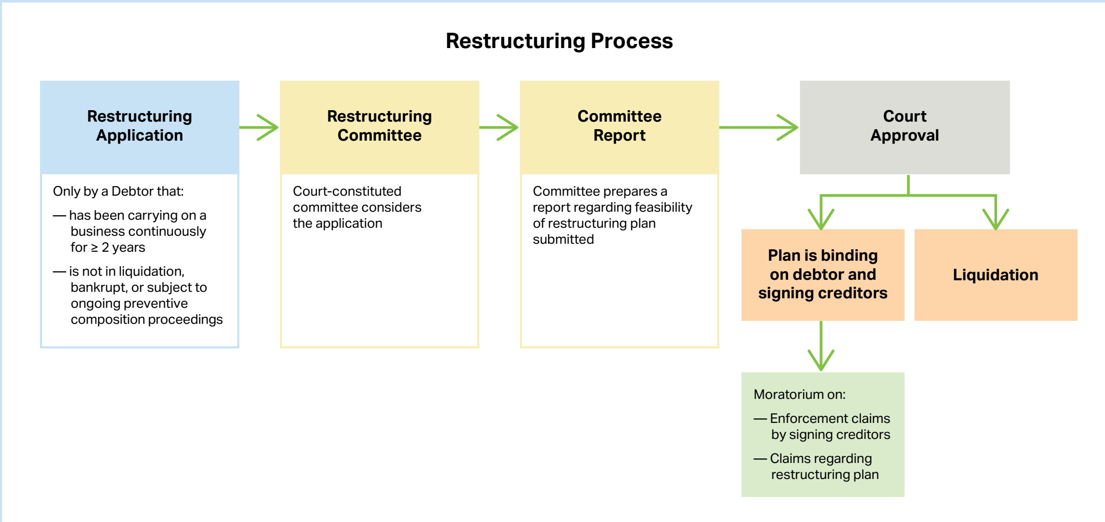
Following the bankruptcy decision, the unsecured creditors will not be able to initiate proceedings against the debtor, but the secured creditors can initiate or continue claims against the trustee. The bankruptcy decision will also accelerate all future financial obligations of the debtor, whether such obligations are secured or unsecured.

The court may, at its initiative or upon a request from any interested party, mediate between the debtor and the creditors to reach a settlement. The settlement will only be effective if approved by all creditors (excluding the secured creditors who have not waived their security).

A bankrupt debtor will be automatically discharged from bankruptcy three years after the date of the termination of the bankruptcy proceedings.

**Directors' Liability**

The Bankruptcy Law provides for civil and administrative liabilities for the directors of a bankrupt company in certain cases. If the directors are found to have acted with gross misconduct that resulted in the company's bankruptcy, such directors may be deprived of their political rights and be disqualified from assuming certain positions, such as companies' board membership. In addition, if the assets of the bankrupt company are insufficient to satisfy at least 20% of the company's debts, the court may oblige the directors personally to repay some or all of the company's debts unless the directors can establish that they exercised the care of a prudent person when running the company.




## Outlook

While the new Bankruptcy Law has not yet been tested and the appetite for its novelty has yet to be assessed, it provides a much anticipated shift from the 20-year-old predecessor regime, which was in need of an update to reflect a changing market and a shift toward a more business-friendly approach. This new regime should also ease the process of restructuring for companies and creditors alike as it supports businesses that are not yet in bankruptcy but facing financial difficulties, and involves the court in the settlement process among a debtor and its creditors. As such, observers hope that the new Bankruptcy Law contributes to the ease and attractiveness of doing business in Egypt after several years of economic downturn.

The Bankruptcy Law still does not provide for cram down capabilities with respect to classes of creditors that constitute more than one third of the debts owed by the debtor company. Nonetheless, the series of business-oriented legislative reforms coming out of the country provides an enticing environment for companies looking for a friendly market within which to begin, and continue to do, business. ■

1. For more details on the amendments to the Egyptian capital markets law, please refer to Cleary Gottlieb's memorandum, *Egyptian Parliament Approves Amendments to Capital Markets Law, Opens the Door for Sukuk Issuance*, March 7, 2018, available at https://www.clearygottlieb.com/-/media/files/alert-memos-2018/egyptian-parliament-approves-amendments-to-capital-markets-law-opens-the-door-for-sukuk-issuance.pdf.
2. For more details on the new UAE bankruptcy law, please 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), available at https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/publications/emrj-summer-2017-issue-4/the-new-bankruptcy-law-of-the-uae--towards-a-more-businessoriented-bankruptcy-regime-updated-9-19-17.pdf.
3. For example, Clause 22.5(e) of the LMA Standard Form Single Currency Term Facility Agreement for Developing Market Jurisdictions states that the borrower will be deemed in default if any member of its group "by reason of actual or anticipated financial difficulties, commences negotiations with one or more of its creditors...with a view to rescheduling any of its indebtedness."

▼ **Mohamed Taha** is an associate based in Cleary Gottlieb's London office. Mohamed's practice focuses on mergers and acquisitions, capital markets, and general corporate practice. Mohamed joined the firm in 2014.

Before joining Cleary Gottlieb, Mohamed worked with a leading Egyptian firm for two years, where he advised on various cross-border transactions. Mohamed has authored and published many papers in internationally recognized journals. Mohamed received his Master in Law degree from the Georgetown University Law Center and his diploma in law and bachelor's degree from the Cairo University, Faculty of Law.

# Cryptocurrencies in Insolvency: Evasive Reality

*By* **POLINA LYADNOVA, EKATERINA DOROKHOVA** *and* **HANNAH WHITNEY**


Heated debates on the legal nature and preferred regulatory regime for cryptocurrencies have been continuing for years now. The legal status and treatment of cryptocurrencies varies across different jurisdictions, from categorisation as a means of payment (Japan and Sweden) or asset (Canada and Israel), to a complete ban (Iceland and Nigeria). In this article inspired by a recent Russian court case (later appealed and effectively reversed), we consider the current legal situation and outlook for cryptocurrencies in both Russia and the UK, which, more broadly, may reveal interesting and important differences between the approaches towards cryptocurrencies in civil law and common law jurisdictions.

## Russia

Despite a positive outlook, the formal legal status of cryptocurrencies in Russia is at present uncertain, with no legislative guidance and little settled case law on the matter (except for case law on the treatment of internet resources disseminating information on cryptocurrencies, its purchase and possible use). Against this backdrop, a recent bankruptcy case before by the Moscow Arbitrazh Court[1] (*Tsarkov's case*) captured plenty of attention in the legal community. In this case, an insolvency officer argued that the contents of Mr. Tsarkov's (the debtor's) cryptocurrency wallet should be included in the insolvency estate as an asset, and suggested that exclusion of cryptocurrencies from the insolvency estate would infringe creditors' rights, as it would decrease the size of the insolvency estate.

The court dismissed the insolvency officer's claim, stressing that the legal status of cryptocurrency in Russia remained unclear, pending the relevant changes to legislation expected by July 1, 2018.[2] Although the court acknowledged that operations with cryptocurrencies by Russian persons are not prohibited under Russian law, it concluded that cryptocurrencies do not have the legal status of an asset and that transactions involving cryptocurrencies are unenforceable in Russia.

One line of the court's argumentation related to the anonymity of cryptocurrencies. As a practical matter, it is hard (not to say impossible) to identify the owner of a cryptocurrency. Even though, in the case at hand, it should not have raised any concerns,[3] the discussion indeed highlighted a potential problem where the debtor does not voluntarily provide this information and question arises as to how this information in practice could be traced.

The court took note of the core features of a cryptocurrency: the absence of a "controlling centre" for the issue and circulation of cryptocurrencies, as well as the anonymous nature of issuance and circulation of cryptocurrencies, which prevents identification of the owner. The court noted that the absence of a "controlling centre" results in an inability to contest or cancel an unauthorised transaction. The court further explained that lack of centralisation means that no person guarantees the purchasing capacity of the cryptocurrency. Furthermore, as a consequence of the anonymous nature of the issuance and circulation of cryptocurrencies, holders of cryptocurrencies may get involved, either intentionally or unintentionally, with illegal activities (in particular, money laundering and financing of terrorism).[4] None of these features, however, necessarily mean that a cryptocurrency cannot be recognised as an asset.

The decision of the court of first instance in Tsarkov's case was heavily criticised in the legal community for a number of reasons, above all for the court's failure to draw any analogy between cryptocurrencies and assets. Indeed, it seemed that the court was unwilling to take any responsibility for giving legal status to cryptocurrencies before the amendments to the Civil Code of the Russian Federation[5] (the "**Amendments**") and/or the draft law "On Digital Financial Assets"[6] (the "**Draft Law**"), both of which were approved in the first reading on 22 May 2018, have been adopted by the State Duma.

| Country | Treatment of Cryptocurrencies |
|---|---|
| Japan | Means of payment |
| Philippines | Means of payment |
| Sweden | Means of payment |
| New Zealand | Payment system |
| Argentina | Money (but not legal currency) |
| Australia | Money |
| Germany | Unit of account and private money |
| Brazil | Asset |
| Canada | Asset |
| Finland | Asset |
| Israel | Asset |
| Mexico | Asset |
| The Netherlands | Asset |
| Norway | Asset |
| Pakistan | Commodity |
| The United States | Commodity, security, currency/form of money, asset (depending on the regulator, legal regime and particular crypto) |
| The United Kingdom | No settled approach |
| Bolivia | Banned |
| Ecuador | Banned |
| Iceland | Banned |
| Nigeria | Banned |
| Romania | Banned |
| Vietnam | Banned |

The Amendments and the Draft Law were introduced pursuant to President Putin's instructions of 21 October 2017 No. Pr-2132.[7] The Amendments specifically provide that cryptocurrencies will be recognised as "other assets", thus officially granting tokens and cryptocurrencies the status of objects of civil rights and confirming their negotiability and enforceability. Furthermore, the Amendments introduce the terms "digital money" and "digital rights," which refer to cryptocurrencies and tokens, respectively. Although digital money is not, in general, recognised as a legal means of payment, it was suggested that, in certain cases and circumstances "determined by the law," they could be, assuming the relevant legislation is adopted in the future. Under the Draft Law, it will also become possible to exchange cryptocurrencies into roubles or a foreign currency through an exchange, broker, dealer or person providing securities' management services.

**Tsarkov Case**

| Moscow Arbitrazh Court | Arbitrazh Court of Appeals |
|---|---|
| **Cryptocurrencies are not legal assets and cannot form part of a debtor's bankruptcy estate.**<br>**No "controlling center"**<br>— Inability to contest unauthorized transaction<br>— No guarantee of purchasing capacity<br>**Anonymous nature**<br>— Holders risk of getting involved in illegal activities | **Cryptocurrencies are legal assets and can form part of a debtor's bankruptcy estate.**<br>— Russian Civil Code definition of "other assets" can be interpreted broadly<br>— Russian legislation on digital financing assets is upcoming<br>— If an asset has economic value to creditors it should be included in the bankruptcy estate |

Thus, if the Amendments and/or the Draft Law are adopted (which, as noted above, was expected to happen by July 1, 2018), the question whether cryptocurrencies can be included in an insolvency estate should finally be resolved (although this would of course only be possible where there is a technical possibility of identifying the owner and making a compulsory record of change of ownership). In Tsarkov's case, the court of first instance, however, did not take any account of the intended status of cryptocurrencies under the legislative changes discussed above in reaching its decision.

The court's decision appeared to go against the main objective of the last stage in an insolvency process, which is to increase the insolvency estate and maximise recovery by the creditors. Therefore, the decision, if it had not been successfully appealed, could have created a dangerous precedent, opening up possibilities for unscrupulous debtors to keep potentially significant assets in cryptocurrencies out of the creditors' reach.

Two months later, the court of appeals reversed the decision of the court of first instance in Tsarkov's case[8] and ordered the debtor to make the password for the cryptocurrency wallet available to the insolvency officer. The court of appeals disagreed with virtually every aspect of the initial decision, including the status of cryptocurrencies, the economic effect of the decision and evidence of ownership of the cryptocurrency wallet by the debtor, in particular noting the following:

1. the term "other assets" used in the Civil Code to define the objects of civil rights should be interpreted broadly given current developments in the economy and information technology. The court of appeals thus concluded that cryptocurrencies should be qualified as "other assets";
2. legal analogy and principles of fairness, reasonableness and equity should have been applied by the court of first instance in determining the legal status of cryptocurrencies;
3. the Amendments (which, if adopted, will grant cryptocurrencies the status of assets) are currently under review by the Russian parliament;
4. no assets that have economic value to the creditors should be excluded from the insolvency estate, unless such possibility is expressly indicated in the law. In the event that such assets are excluded from the insolvency estate otherwise than as provided for by the law, creditors are deprived of their right to receive maximum recovery in the course of the insolvency process; and
5. the fact that the debtor was the legal owner of the cryptocurrency wallet was confirmed by the record of website inspection executed by a notary, as well as the debtor's own statements.

Therefore, although Russian case law on cryptocurrencies is scarce, these recent developments may indicate that the Russian courts (at least higher instances) are willing to align their practices with the Amendments and/or the Draft Law. If these drafts are adopted, cryptocurrencies will finally gain a footing in the Russian legal framework with the status of an asset, which will allow insolvency officers to include the contents of the cryptocurrency wallet in the insolvency estate. The Amendments also made clear that the legislators may in the foreseeable future even go so far as to provide for instances where cryptocurrencies may be used as a means of exchange.

## The United Kingdom

In the UK, there is, at present, no case law on the legal status of cryptocurrencies; given the nature of the common law legal system, the courts may, in any event, be reluctant to set precedent before the legislative intervention of Parliament on this issue. To that end, in February 2018, the UK Parliamentary Treasury Committee launched an inquiry into cryptocurrencies to consider how they should be classified and regulated. Meanwhile, the Governor of the Bank of England, Mark Carney, has expressed the view that cryptocurrencies do not currently meet any of the usual definitions of a currency, and it is not clear the extent to which they will ever become effective media of exchange.

In the legal academic community, there has been some debate on whether cryptocurrencies should be treated as assets or currencies, although it is noted that this may depend on the specifics of the cryptocurrency in question. For instance, while cryptocurrencies that have economic value and can be freely traded and transferred are arguably likely to be treated as property at common law,[9] it has been argued that virtual currencies that have become a medium of exchange and are commonly accepted as payment for goods could, from a legal perspective, be viewed as money.[10]

There is also no consistent, settled approach to the treatment of cryptocurrencies across the different areas of law. For capital gains tax purposes, there is a two-part test to determine whether a cryptocurrency is an asset, which may or may not be applicable in a particular context. The European Court of Justice, in the case of *Skatteverket v Hedqvist* (2015), which concerned the VAT treatment of Bitcoin for the purposes of the Principal VAT Directive,[11] held that Bitcoin could not be characterised as "tangible property" within the meaning of Article 14 of the Directive, given that the virtual currency had no purpose other than to be a means of payment, just like traditional currencies. In a probate context, cryptocurrencies are defined as (digital) 'property interests' and are considered part of a deceased person's estate. In divorce cases, despite the absence of case law on digital assets, it is becoming commonplace to inquire about digital assets as part of the discovery process.

While there is not (yet) any formal framework in the UK for the treatment of cryptocurrencies in the insolvency context specifically, it is apparent that there are a number of important practical challenges facing insolvency practitioners, such as recoverability (given the supranational and anonymised nature of cryptocurrencies) or valuation (given the potential volatility in price).[12]

The European Union is also grappling with this question and has announced that it will decide how to address the issue of cryptocurrencies later this year or in early 2019.[13] A recent ESMA report acknowledged that this area contained many uncertainties, not least in the field of insolvency law, which will need to be addressed in due course.[14]

In conclusion, as the use of cryptocurrencies in a variety of business (and other) contexts becomes more widespread, it is clear that legislators and regulators will play a crucial role in the months and years ahead, and countries face very real challenges and questions on how to categorise and regulate cryptocurrencies against the backdrop of a globalised world in which restrictions on the issue and circulation of cryptocurrencies in certain jurisdictions could simply result in the transfer of projects and investments into more favourable jurisdictions.

1. Decision of the Moscow Arbitrazh Court in case No. A40-124668/17-71-160 F dated March 5, 2018.
2. As of publication of this article, the Draft Law and Amendment have not been adopted yet.
3. Though, in the case at hand, the cryptocurrency wallet did not require any identification of the wallet owner, as the debtor specifically acknowledged ownership of the wallet and even provided the court with notarised screenshots of the wallet with a balance (in practice, ownership of an email box would be proven in the same manner—that is, by submitting notarised screenshots to the court—and the Russian courts are known to have accepted such evidence in the past).


4. The court pointed out that Article 27 of Federal Law No. 86-FZ "On the Central Bank of the Russian Federation" imposes a ban on issuing any currency other than Russian rouble or equivalent thereof on the territory of the Russian Federation, and cited some of the positions of the Central Bank suggesting, in particular, that operations with cryptocurrencies are of speculative nature and bear a significant risk of loss of value, as well as other risks associated with cryptocurrency fluctuation and the maintenance of records of rights attached to cryptocurrency.
5. Draft law on amendments to part one, two and three of the Civil Code of the Russian Federation, http://sozd.parliament.gov.ru/bill/424632-7.
6. Draft law "On Digital Financial Assets", http://sozd.parliament.gov.ru/bill/419059-7.
7. List of instructions given by President Putin as a result of the meeting on 10 October 2017 on the use of the digital technologies in the financial sector, http://kremlin.ru/acts/assignments/orders/55899.
8. Decision of the Ninth Arbitrazh Court of Appeals No. 9AP-16416/18 in case No. A40-124668/17, dated May 15, 2018.
9. *Journal of International Banking & Financial Law*, 2016, Volume 31, Issue 10, November, "The legal aspect of virtual currencies" – (2016) 10 JIBFL 569.
10. F*inancial Markets Law Committee*, July 2016, "Discussion paper on Issues of Legal Uncertainty Arising in the Context of Virtual Currencies", http://www.fmlc.org/uploads/2/6/5/8/26584807/virtual_currencies_paper_-_edited_january_2017.pdf.
11. EU Directive 2006/112.
12. Several of these issues are well illustrated by the ongoing liquidation proceedings of the Mt. Gox Bitcoin exchange in Japan.
13. "EU says stands ready to regulate crypto-currencies" (February 2018), https://www.reuters.com/article/us-crypto-currencies-eu/eu-says-stands-ready-to-regulate-crypto-currencies-idUSKCN1GA1Q3.
14. ESMA Report, February 2018, "The Distributed Ledger Technology Applied to Securities Markets", https://www.esma.europa.eu/press-news/esma-news/esma-assesses-dlt%E2%80%99s-potential-and-interactions-eu-rules.

▼ **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, particularly in Russia and the CIS. Polina also has experience in other cross-border transactions involving Russian businesses. Recent representations include Rosneft, Rusal, Iberian Minerals, TPG, FESCO and Sistema. Polina received a law degree with highest honours from the Moscow State Institute of International Relations (MGIMO) in 2003 and LL.M. in Banking and Finance degree with merits from King's College, University of London in 2007.

▼ **Ekaterina Dorokhova** is an associate at Cleary Gottlieb's Moscow office. Ekaterina's practice focuses on financial transactions, including debt capital markets, debt restructuring and insolvency. Ekaterina also has experience in mergers and acquisitions, joint ventures, and other corporate and regulatory matters, including antitrust and foreign investments law matters. Ekaterina received an LL.B. and an LL.M., both with highest honours, from the Moscow State Institute of International Relations (MGIMO) in 2011 and 2013, respectively.

▼ **Hannah Whitney** is a trainee at Cleary Gottlieb's London office. Hannah is currently working in the finance team, having completed six months in the capital markets team. Hannah graduated with first-class honours from Oxford University in 2014 and spent a year studying at Harvard University, before completing her legal studies at University of Law, London in 2017.

CASE STUDY / BRAZIL

# Odebrecht Oil & Gas and the Use of Brazilian Extrajudicial Reorganization in Cross-Border Restructurings

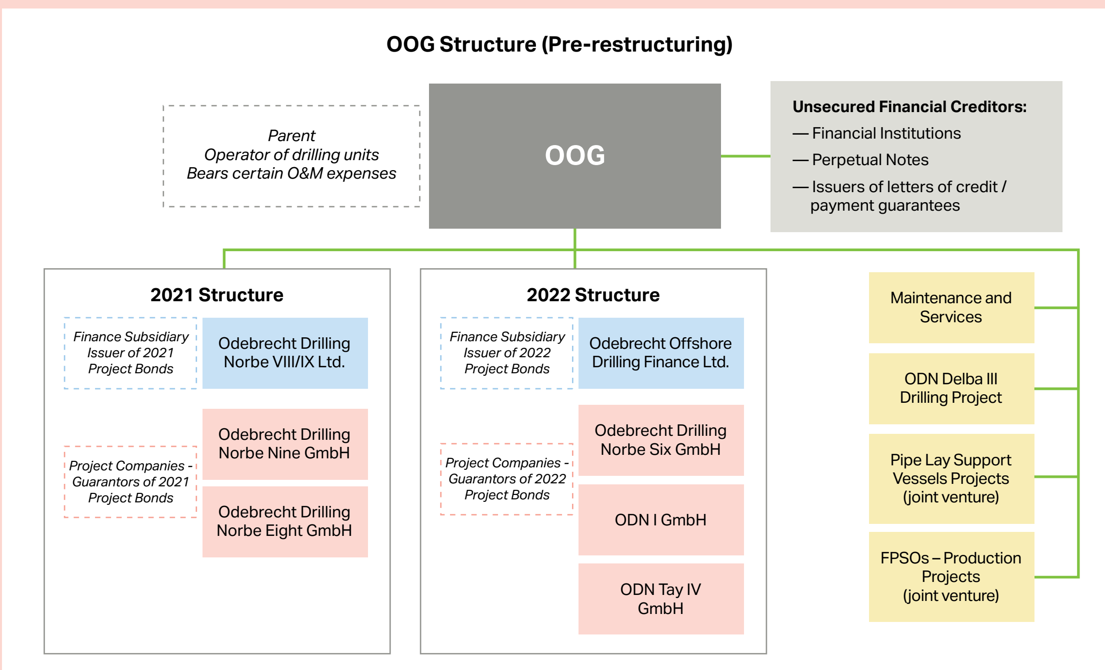
*By* **JONATHAN MENDES DE OLIVEIRA**

In December 2017, Odebrecht Óleo e Gás S.A. (OOG)[1] successfully concluded a debt restructuring of approximately USD5 billion, the largest ever Brazilian extrajudicial reorganization (*recuperação extrajudicial*). This deal illustrates how extrajudicial reorganization, a rarely used proceeding available under Brazilian bankruptcy law, can be an effective and expeditious instrument for cross-border restructurings of Brazilian entities, with minimal disruption to the debtors' activities.[2]

## OOG Restructuring

OOG is the oil and gas arm of the Brazilian conglomerate Odebrecht. From 2006 through 2015, OOG, directly or through special purpose vehicles or joint ventures, obtained a number of long-term contracts with the Brazilian state-owned oil company, Petrobras, including seven drilling contracts, two production contracts and other specialized services contracts.

These ventures were funded on a project finance basis, with syndicated loans and two series of project bonds. The project bonds were issued to finance six drilling units (each drilling unit is a drillship or a drilling rig): the 2021 notes[3] financed two drilling units (Norbe VIII and Norbe IX drillships) and the 2022 notes[4] financed four drilling units (ODN I and ODN II drillships, and Norbe VI and Tay IV drilling rigs). For each drilling project, a project company (an offshore special purposed vehicle controlled



by OOG) acquired or contracted the construction of a drilling unit and chartered it to Petrobras pursuant to a charter agreement, while OOG operated the drilling unit pursuant to a separate services agreement with Petrobras. Each series of project bonds was issued by a finance subsidiary, guaranteed by the applicable project companies and secured by substantially all of the assets of the project companies, including mortgages on the relevant drilling units. The project bonds were not guaranteed by OOG or other companies in the Odebrecht group.

**OOG Situation**

The first signs of distress appeared in the second half of 2015, when Petrobras terminated the contracts for the Tay IV drilling rig, which served as collateral for the 2022 notes, due purportedly to operational issues. This termination occurred at a time of declining oil prices, which made the redeployment of the asset virtually impossible.

The termination of Tay IV agreements constituted an event of default under the 2022 notes, but it was soon evident that the problems were not limited to the 2022 notes. Although OOG did not guarantee the project bonds, OOG undertook to bear all the operating and maintenance (O&M) expenses for each drilling unit in excess of certain caps established in the financing documents. Also, the cap structure was established in U.S. dollars, and the agreements provided that, for purposes of calculating OOG's obligations to pay O&M expenses, certain O&M expenses incurred in Brazilian *reais* were to be converted into U.S. dollar at a fixed exchange rate of two Brazilian *reais* for one U.S. dollar. As a result of this feature, the continuous depreciation experienced by the Brazilian currency following the date of issuance of the project bonds had the practical effect of significantly increasing the cash contributions required from OOG.

This credit support, initially established to secure investment grade rating for the project bonds, ended up strangling OOG, as the projects' actual O&M expenditures proved to be significantly higher than the caps contemplated in the agreements, particularly in the projects financed by the 2021 notes. To finance these expenses and other obligations, OOG had to incur a significant amount of debt (more than USD1.1 billion), including bilateral loans with Brazilian banks and perpetual bonds, in addition to the debt incurred at the project level. At the same time, the Odebrecht group became involved in operation Car Wash (*Lava Jato*), the massive investigation into corruption and money laundering in Brazil, which closed access to credit for certain Odebrecht group companies, and caused Petrobras, the sole customer of OOG, to temporarily prevent the awarding of new contracts to OOG.

In May 2017, when OOG filed for extrajudicial reorganization, it had defaulted under the perpetual notes and other unsecured debt at the OOG level. For over a year, the majority of the holders of the 2021 notes and the 2022 notes granted temporary and limited waivers under the bond documentation to permit the payment of O&M expenditures above the caps with cash generated from the charter agreements, relieving OOG from its funding obligations. These waivers provided liquidity and permitted OOG to continue performing its obligations under the ongoing services agreements with Petrobras, while negotiations over a comprehensive restructuring ensued. Although the issuers of the project bonds were current with their principal and interest payments under the 2021 and 2022 notes until the date of filing, a payment default under the project bonds was inevitable.

**The Deal**

After a long negotiation with different creditor groups, OOG reached an agreement with more than 60% of its unsecured financial creditors at the OOG level (financial institutions, perpetual bondholders, banks and insurance companies that issued certain letters of credit and payment guarantees to support the 2021 notes and the 2022 notes) and of the holders of each series of project bonds (2021 and 2022 notes). Upon confirmation of the plan by the Brazilian court, the deal became binding and enforceable against all creditors within these categories. Other stakeholders, in particular customers, suppliers, service providers, employees, joint venture partners and creditors of other projects were left unimpaired by the restructuring.

**Key Restructuring Terms**

- **Financial claims exchanged for participating titles.** The unsecured financial claims at the OOG level were exchanged for participating titles, a hybrid security that provides creditors with participation in the equity value and distributions of OOG.
- **No haircut under the project bonds; dual tranche structure to adjust the repayment profile to the revenues of existing and future contracts.** Each series of project bonds was exchanged for two new series of bonds (tranche 1 and tranche 2), both secured by the same collateral package as the original notes. Tranche 1 was modeled to be repaid with revenues deriving from existing contracts, while tranche 2 is expected to be repaid with the revenues from new contracts to be obtained upon completion of the existing ones.
- **Preservation of the operator.** A successful restructuring of OOG was key to an effective restructuring of the project bonds, as OOG was the operator of all the drilling units, and a collapse of the operator would have likely resulted in further contract terminations and operational issues. To ensure the financial soundness of the operator of the drilling units, the project bondholders released OOG from its obligations to fund operating and capital expenditures (in exchange for such release, the project bondholders received participating titles). Also, to provide the appropriate incentives for the operation of the drilling units, the project companies were required to pay, subject to the terms of accounts waterfall in the project bonds, a quarterly management fee and an annual incentive fee to OOG. The management fee is subject to deductions based on the operational performance of the operator and the incentive fee is subject to the achievement of certain performance targets, based on a pre-approved annual budget for each drilling unit.
- **Collective action and creditor representative.** One of the key challenges in financing long-term infrastructure projects with bonds is obtaining waivers and consents from creditors, when flexibility is required. The indentures for the new project bonds provided for a creditor representative, an individual jointly appointed by the bondholders and OOG, who will be in charge of, among other things, approving, on behalf of the bondholders, new charter and services agreements, upon expiration or termination of the existing ones, and the annual budget for each project.

## Extrajudicial Reorganization Process

The restructuring deal was implemented through an extrajudicial reorganization, filed on May 23, 2017, and confirmed by the fourth commercial court in the city of Rio de Janeiro on October 19, 2017. On December 12, 2017, in a Chapter 15 proceeding, the U.S. bankruptcy court for the Southern District of New York recognized and granted comity to the confirmation order issued by the Brazilian court.

Extrajudicial reorganization is a simple and relatively quick bankruptcy proceeding, especially when compared to judicial reorganization, the main restructuring instrument under Brazilian bankruptcy law. In an extrajudicial reorganization, a restructuring plan must be validly executed and delivered, prior to a court filing, by the debtors and creditors representing at least 60% (the statutory threshold) of the total amount of each category of claims being restructured. Other categories of claims cannot be impaired by the restructuring.[5] As such, subject to public disclosure obligations and cleansing obligations under confidentiality agreements with creditors, negotiations with creditors can be structured to minimize ongoing disclosure that can harm the relationship with customers, suppliers and employees.

Brazilian law does not provide for an automatic stay of the claims against the debtors upon filing for extrajudicial reorganization, but such relief

| Terms | Tranche 1 Notes | Tranche 2 Notes |
|---|---|---|
| Maturity | — Same year as original bonds (i.e. 2021 or 2022). | — 2026. |
| Interest Payments | — Mandatory interest payments in cash. | — Until the full repayment of the tranche 1 notes: payment of interest in cash, if available, or in kind.<br>— After full repayment of tranche 1 notes: mandatory payments of interest in cash. |
| Amortization | — Mandatory amortization pursuant to a schedule set forth in the documentation; plus<br>— 100% of quarterly excess cash flow. | — No amortization until full repayment of tranche 1 notes.<br>— After the full repayment of tranche 1 notes: (i) 100% of quarterly excess cash flow to amortize tranche 2 notes until all drilling units are redeployed and (ii) 90% of quarterly excess cash flow to amortize tranche 2 notes after all drilling units are redeployed. |
| Collateral | Same as original bonds | |
| Ranking | — Senior secured notes. | — Senior secured notes, but contractually subordinated to tranche 1 notes; holders of the tranche 1 notes have control over the collateral until full repayment of the tranche 1 notes. |

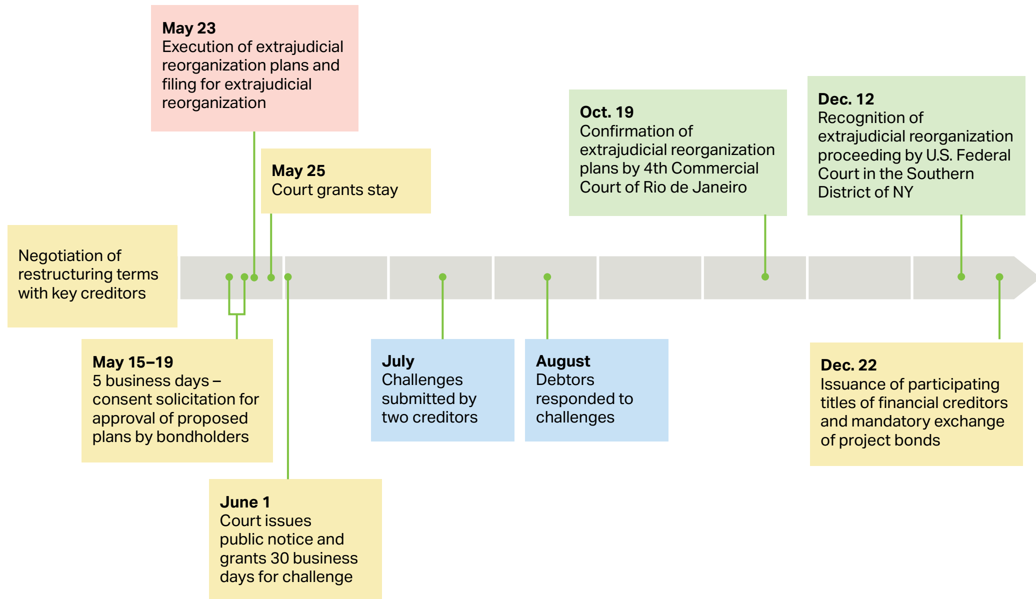
can be requested by debtors. Upon filing, the court grants 30 days for creditors to challenge the plan and five days for debtors to respond to any challenge. The court must decide on any challenges and on the confirmation on the plan. The grounds for challenges and judicial review are limited to compliance with applicable law and other limited matters specified in the Brazilian bankruptcy law. Upon confirmation by the court, dissenting creditors are crammed down, and the plan becomes binding on all creditors of the category of claims being restructured. Creditors within the same category must be treated equally, and the plan cannot offer terms that are more favorable to creditors that expressly supported the plan. Dissenting parties may appeal the confirmation decision, but such appeal does not typically stay the effectiveness of the plan. There is no appointment of a judicial administrator to oversee the debtors' management. The failure to obtain confirmation of an extrajudicial reorganization plan does not result in the liquidation of the debtors, which may be the case in a judicial reorganization

## Extrajudicial Reorganization as a Tool to Minimize Disruptions to the Debtors' Activities

The use of an extrajudicial reorganization was a determining factor in the successful restructuring of OOG. One of the key considerations in this deal was the need to preserve the existing contracts and to permit the debtors to continue performing their obligations and generating revenues under these contracts. Any further contract cancellation by the sole customer, or other issues stemming from the restructuring that could significantly impact OOG's performance on the ongoing projects (such as strikes, suspension of operations or other operational issues) could have impaired creditors' recovery prospects and OOG's existence as a going concern.

In an extrajudicial reorganization, the law provides flexibility in the establishment and delimitation of the categories of claims being restructured,[6] and the statutory majority of 60% of each of these categories must approve the plan. In OOG's restructuring, the three categories of claims were:

OOG Extrajudicial Reorganization Timeline (2017)




2021 notes, 2022 notes and unsecured financial claims at the OOG level. This was an important tool to avoid disruption of the debtors' activities. A filing for judicial reorganization would have unnecessarily brought multiple other stakeholders to the negotiation table and raised concerns with the sole customer, suppliers, service providers, joint venture partners and project financing creditors in other OOG projects.

## Extrajudicial Reorganization as an Effective Mechanism to Restructure International Bonds

Extrajudicial reorganization can be an effective mechanism to overcome the unanimous or supra-majority requirements for amending bonds governed by New York law. U.S. bankruptcy courts have consistently recognized that Brazilian insolvency proceedings (judicial reorganizations and extrajudicial reorganizations) are not contrary to U.S. public policy, as they provide the required minimum due process protections and do not otherwise violate basic U.S. law public policy principles. Therefore, plans validly approved pursuant to Brazilian restructuring proceedings are typically recognized and deemed enforceable in the United States.

In OOG's restructuring, despite the preservation of the principal and interest rate on the 2021 and 2022 notes, the extrajudicial reorganization plans provided for a mandatory exchange of the project bonds for new notes with different amortization schedules and interest payment terms. These changes, among others contemplated in the plans, were subject to unanimous bondholder approval pursuant to the terms of the bond indentures, which were governed by New York law.[7] As part of the extrajudicial reorganization, each series of project bonds was deemed a separate category of claims, and these changes were approved by at least 60% of the holders of each series and confirmed by the Brazilian court.

This was not the first time that an extrajudicial reorganization was used as means to restructure international bonds. In 2016, USJ Açúcar e Álcool

S.A., a Brazilian sugar and ethanol producer, sought to restructure its unsecured bonds, issued under an indenture governed by New York law. The debtor proposed to exchange its unsecured bonds for newly issued secured bonds, in the face amount of 75% of the unsecured bonds, conditioned upon acceptance of 90% of the bondholders. However, if the exchange offer did not obtain a participation of 90% in the exchange offer, but obtained more than 60%, the debtor would file for extrajudicial reorganization and seek confirmation from the court, cramming down the dissenting bondholders. So, as a condition for a valid tender of the bonds in the exchange offer, bondholders were required to sign the documentation approving an extrajudicial reorganization plan attached to the exchange offer memorandum. Eventually, the debtor obtained the necessary participation and successfully concluded the exchange offer, and the filing for extrajudicial reorganization was not necessary.[8]

In 2014, Lupatech obtained approval by 85% of the holders of its 9.875% unsecured perpetual bonds and implemented the exchange for new notes in the face value of 15% of the restructured notes and the right to subscribe for American depositary receipts representing one common share of the company. Although the transaction was successful from a legal perspective, the debtor failed to make payments on the restructured bonds and eventually filed for judicial reorganization in 2015.

### Other Lessons Learned from OOG

OOG's restructuring clarified other important aspects of the extrajudicial reorganization process, and brought important lessons for future restructurings:

— **Brazilian courts recognize jurisdiction over foreign subsidiaries of a Brazilian debtor in the context of extrajudicial reorganization.** The court accepted jurisdiction over ten offshore entities controlled by OOG, applying to an extrajudicial reorganization the same center of main interest (COMI) principle previously recognized by Brazilian courts in connection with judicial reorganizations.

— **There may be a stay, but it is not automatic.** In contrast with a filing for judicial reorganization, the filing for extrajudicial reorganization (or the acceptance of such filing by the court) does not result in an automatic stay of the claims against the debtors. In OOG's case, the court confirmed the understanding that, upon request of the debtors, the court can grant a stay of the claims of the categories being restructured, after a compliant plan has been filed with the courts.

— **Narrow grounds for challenges and judicial revision.** Dissenting creditors have narrow grounds to challenge an extrajudicial reorganization plan. The decision that confirmed OOG's extrajudicial reorganization plans mentioned that the economic terms of the plans are irrelevant for purposes of court approval, and that the judicial review is limited to the legality of the plans. Under Brazilian bankruptcy law, the grounds for challenging an extrajudicial reorganization plan are: (i) failure to obtain approval by the statutory majority, (ii) certain concerted actions to defraud creditors, (iii) breach of law, or (iv) other actions that under Brazilian law could authorize creditors to file for involuntary bankruptcy of debtors.

— **Simple approval process.** An extrajudicial reorganization plan at its inception has a contractual nature, and must be validly executed and delivered by creditors representing the 60% statutory majority before filing. This may be challenging in cases where creditors are widespread international bondholders; Brazilian law is generally formalistic, particularly when foreign parties are involved, and an overcomplicated process not in line with international practices could jeopardize the approval by the 60% statutory majority. In OOG's case, the mechanism for approval by the bondholders was simple and straightforward, successfully avoiding the long and painful process of individualization of claims typically followed in connection with Brazilian judicial reorganizations. The record holder of the bonds, Cede & Co., the nominee of DTC, issued an omnibus proxy to the DTC participants, who in turn received approval instructions from the beneficial owners of the notes. Each DTC participant gave a formal voting instruction and power of attorney to an information agent, who validly executed and delivered the extrajudicial reorganization plans on behalf of holders representing more than 60% of each series of bonds. This approval process was accepted by the Brazilian court.

— **No suspensory effect of appeals.** The decision that confirms an extrajudicial reorganization plan is subject to appeal to the state court of appeals (in OOG's case, the court of appeals of the state of Rio de Janeiro). This type of appeal does not automatically stay the effectiveness of the plan, and therefore does not prevent implementation. The court of appeals may, however, grant a suspensory effect, subject to the satisfaction of the grounds for such injunctive relief under Brazilian law. In OOG, the court of appeals of Rio de Janeiro rejected a request for suspensory effect in connection the appeals filed by two creditors, confirming that the grant of such suspensory effect is an exceptional measure. This mitigates the risks of interminable appeals in the Brazilian legal system.

— **Chapter 15 Recognition and Enforcement.** The U.S. federal bankruptcy court for the Southern District of New York recognized the Brazilian extrajudicial reorganization as the foreign main proceeding for OOG and all other debtors. This decision confirms a trend of recognition of Brazilian proceedings and the understanding that plans duly approved by Brazilian courts are not manifestly contrary to U.S. public policy.[9] The U.S. court gave full force and effect to the Brazilian proceeding and granted the appropriate relief for implementation and enforcement of the plans in the United States.

## Conclusion

Extrajudicial reorganization can be an effective and expedited restructuring tool for the cross-border debt restructurings of Brazilian entities or entities whose center of main interest is Brazil. The proceeding provides less opportunities for litigious creditors and can be used to bind minority dissenting creditors. It may not be used to restructure all types of claims, or where a stay of litigation is necessary during negotiations, but, under the right conditions, the extrajudicial reorganization can be an elegant and efficient instrument that allows for the restructuring of bonds governed by New York law, without the need for a long and complex judicial proceeding in Brazil that oftentimes destroys value for all constituents and disrupts the debtor's activities. ■

1. After the completion of its debt restructuring, OOG was rebranded and is now named Ocyan S.A.
2. Cleary Gottlieb represented the ad-hoc group of holders of the two series of project bonds that negotiated with the debtors the terms and conditions for the restructuring of such project bonds, prior to the filing for extrajudicial reorganization.
3. 6.35% senior secured notes due 2021, issued by Odebrecht Drilling Norbe VIII/IX Ltd. and guaranteed by Odebrecht Drilling Norbe Eight GmbH and Odebrecht Drilling Norbe Nine GmbH.
4. 6.75% and 6.625% senior secured notes due 2022, issued by Odebrecht Offshore Drilling Finance Ltd. and guaranteed by ODN I GmbH, Odebrecht Drilling Norbe Six GmbH and ODN Tay IV GmbH.
5. Consistent with a judicial reorganization, tax claims, claims involving fiduciary ownership or fiduciary liens, advances for export agreements (*adiantamento de contrato de câmbio*) and other similar claims referred to in the Brazilian bankruptcy law are not subject to extrajudicial reorganization. In contrast with a judicial reorganization, labor claims cannot be restructured in an extrajudicial reorganization.
6. An extrajudicial reorganization plan may follow the broad categories under the judicial reorganization rules (secured, unsecured, small claims), or may follow different criteria, such as suppliers, bank lenders, bondholders, etc.

7. The U.S. Trust Indenture Act of 1939 (TIA) does not permit amendments of certain key payment and related terms in a bond indenture qualified under the TIA without unanimous approval of the bondholders. A similar rule is typically reproduced in New York-law governed indentures that are not qualified under the TIA, as was the case for the indenture for the project bonds.
8. Cleary Gottlieb represented the dealer managers in connection with USJ's exchange offer and consent solicitation for extrajudicial reorganization.
9. U.S. bankruptcy courts have granted recognition to a number of Brazilian proceedings in Chapter 15. Most cases were uncontested, but in connection with the restructurings of Grupo Rede, OAS and Oi S.A., U.S. bankruptcy courts addressed specific challenges of dissatisfied creditor groups and held that the plans were not manifestly contrary to U.S. public policy and that substantive matters must be discussed before Brazilian courts.

**Jonathan Mendes de Oliveira** is an associate based in Cleary Gottlieb's São Paulo office. Jonathan's practice focuses on corporate and financial transactions, especially cross-border restructurings, capital markets and mergers and acquisitions. Jonathan joined the firm in 2011. From January 2016 to July 2018 he was resident in Cleary Gottlieb's New York office.

Jonathan received his LL.M. degree from Columbia Law School and his LL.B. from the Universidade de São Paulo.

# Investor Protections in England: the Non-Recognition of the Foreign Discharge of English Law-Governed Debt

*By* **JAMES BRADY**


For more than 200 years, investors have relied on the fact that a debt governed by English law cannot be discharged in a foreign insolvency proceeding. This longstanding principle of English law, known as the *Gibbs Rule*[1], provides an obvious advantage to creditors with English law-governed debt: certainty in knowing that that a foreign insolvency process cannot be used to subvert their rights, and their access to the debtor's assets, in England. So long as such creditors do not submit to jurisdiction of the foreign proceeding, they will not be treated by English law as being bound by any such foreign proceeding, even if bound in the foreign jurisdiction as a matter of applicable foreign law.[2]

**The Gibbs Rule—Slowly Eroding or Here to Stay?**

- Historically, creditors holding English law-governed debt have long taken comfort in the Gibbs Rule, an English law principle providing that, absent consent, English law-governed debt may not be discharged in foreign restructuring proceedings.
- Notwithstanding increasing academic criticism that the Gibbs Rule is outdated and impractical, English courts recently affirmed its application in cross-border restructurings.

Notwithstanding its longstanding application by English courts, there is an obvious tension between the Gibbs Rule and core insolvency principles that elevate insolvency laws over contractual rights, such as the parties' choice of English law to govern their contract. However, despite recent academic attacks on the rationale underpinning the Gibbs Rule, recent case law in England suggests that it will remain intact, at least in the immediate future.

## The Argument Against the Gibbs Rule

A number of commentators have, in recent years, criticised the Gibbs Rule and suggested that it should no longer apply. These commentators have suggested that the Gibbs Rule is inconsistent with the broader principles of recognition of foreign insolvency proceedings underpinning the Model Law on Cross-Border Insolvency and the Cross-Border Insolvency Regulations 2006 (CBIR) that are based on the Model Law and intended to facilitate effective cross-border reorganisations.

The most frequent criticism levelled at the Gibbs Rule is that it is inconsistent and contradictory for English law to provide that an English proceeding may extinguish a foreign law governed debt, but not to recognise that a foreign proceeding may extinguish an English law-governed debt. One commentator, Professor Ian Fletcher, has written that the Gibbs Rule "*should be consigned to history*", and suggested that the possibility of a foreign insolvency process concerning a party with an established connection to that jurisdiction is within the reasonable expectation of the contracting parties, and may provide a ground for the discharge of the liability to take place under the applicable law.[3]

| Arguments For The Gibbs Rule | Arguments Against The Gibbs Rule |
| --- | --- |
| — The Gibbs Rule remains binding precedent in England.<br>— The Gibbs Rule embodies the preservation of contractually bargained for English law rights. | — The Gibbs Rule is inconsistent with key principles (i) elevating insolvency laws over contractual relationships and (ii) that currently govern cross-border restructurings.<br>— Foreign courts should not be barred from extinguishing English law debt where English courts are not barred from extinguishing foreign law debt. |

However, notwithstanding the academic criticism, the English courts have repeatedly applied the Gibbs Rule, affirmatively declining various invitations to reject or modify it. A recent decision in *Re OJSC International Bank of Azerbaijan*[4] has reaffirmed the English courts' commitment to the Gibbs Rule.

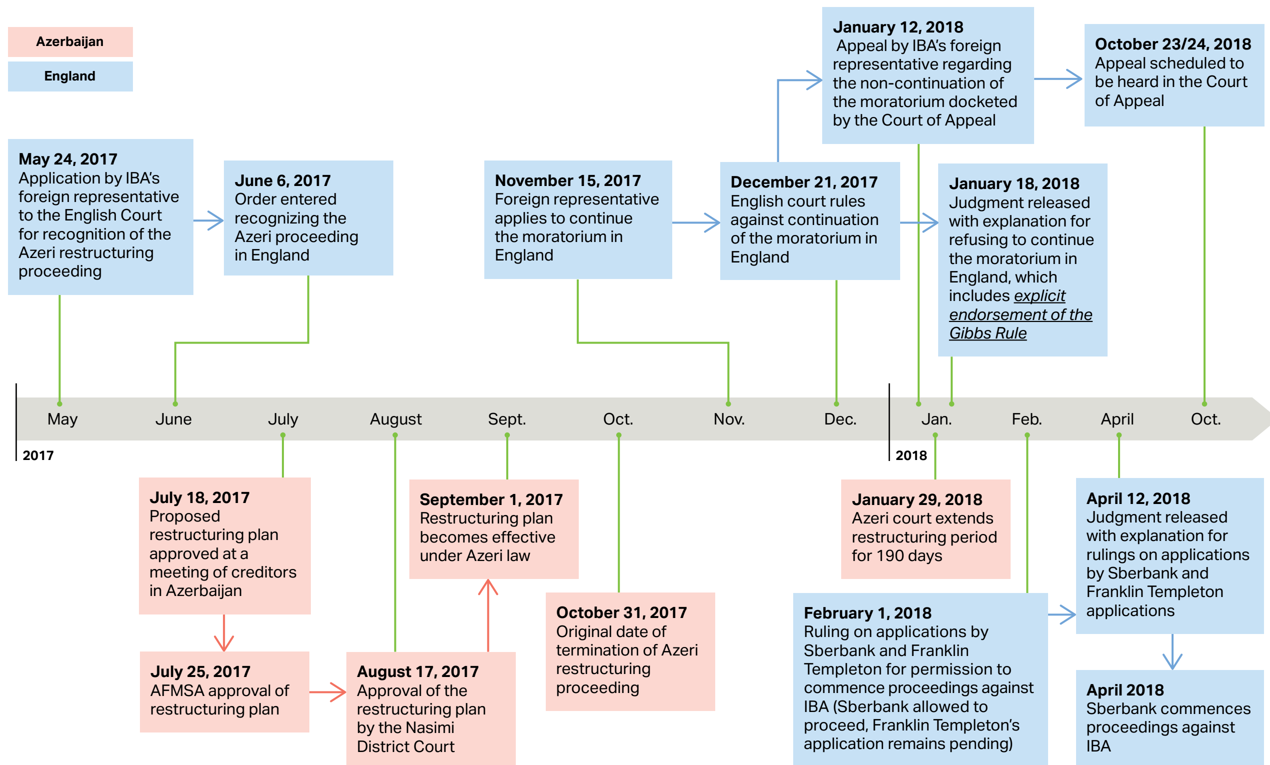
## The Decision in Re OJSC International Bank of Azerbaijan

By early 2017, OJSC International Bank of Azerbaijan (IBA) had fallen into financial difficulties and entered into a restructuring process under Azeri law to restructure its debts. IBA, through its foreign representative, applied to the English court to have the proceeding recognised in England as a foreign main proceeding under the CBIR and obtained an order recognising the proceedings and imposing a moratorium on actions against IBA by its creditors. In Azerbaijan, the restructuring plan was then approved in a creditors' meeting and by the Azeri court, and became binding under Azeri law on all creditors.

**IBA's Restructuring in the United States**

- IBA's restructuring, and foreign recognition of it, has not been without controversy. In the United States, a group of creditors objected to a Chapter 15 petition seeking recognition of the Azeri proceeding on the basis that it did not meet the "minimum standard of procedural and substantive fairness" required by Chapter 15 and failed to provide meaningful protections, particularly for non-Azeri creditors.
- Although Chapter 15 recognition was granted, the U.S. court did not rule on the merits of the objections in connection with IBA's petition for recognition.[5]
- Although the creditors that objected to recognition preserved their substantive objections for the time when IBA sought enforcement of its plan in the U.S. (which occurred in December 2017-January 2018), they did not ultimately re-raise such objections, and, consequently, the Chapter 15 court never ruled on the merits.

Timeline of IBA Proceedings




In the English proceedings, IBA applied to continue the moratorium in England indefinitely, beyond the termination of the Azeri restructuring proceedings, in order to permanently insulate itself from creditor actions in England. Two creditors holding English law debt who had not voted or participated in any way in the creditors' meeting to approve the Azeri process, Sberbank (a lender under a USD20 million facility agreement) and Franklin Templeton (beneficial owner of USD500 million in notes issued by IBA), made cross-applications for permission to bring claims against IBA.

In its application for a continuation of the moratorium, IBA conceded that the Gibbs Rule is binding at the High Court level in England, but argued that "*[the court] should not be afraid to depart from it*" in order to give effect to the Azeri process.[6] Recognising the Gibbs Rule was binding on the Court, the IBA relied on academic articles that advocated for the continuation of the moratorium, potentially indefinitely, so as to subvert the perceived threat of creditors with English law governed debts undermining foreign reorganisations.[7] So as to avoid forcing the court to overtly disobey established precedent, the IBA described such relief as a "procedural solution", rather than a substantive departure from the Gibbs Rule.

However, IBA's so-called "*procedural solution*" was rejected by the Judge, Mr. Justice Hildyard. The Court determined that, in substance, IBA was seeking permanently to restrain the creditors from exercising their English law rights, so as to modify their English law contractual rights to be no greater than those that they have under Azeri insolvency law. The Court held that such an approach was not permissible under the Model Law and the CBIR, and that it had no power to affect the creditors' English law rights by means of procedural relief which had the effect of, and had been designed to, limit their rights to those they would have under Azeri law.

The Judge also cast doubt on the criticisms of the Gibbs Rule, saying (*obiter*) that the principle itself is "*based on an entirely logical approach when considering the contractual rights of parties which have especially selected English law to govern their relationship*" and that, in the case of a reorganisation (as opposed to a bankruptcy or insolvency), the "*strength of the overriding argument [for departing from the Gibbs Rule] is much more debatable*".

Notably, the Judge also identified as a relevant factor that IBA had not sought to implement a parallel scheme of arrangement in England that would have been binding on creditors with English law rights if approved, which he described as the "*usual course*". The Judge rejected the contention that a parallel scheme could be expensive and time-consuming, saying "*[the Gibbs Rule] is one of the protections which a creditor has by virtue of the selection of English law to govern its debts. I do not see why a different, lesser, standard of protection would 'adequately protect' such a creditor in such circumstances*".[8]

## Subsequent Developments

As a result of the Judge's refusal to allow the IBA's application to continue the moratorium, the applications by Sberbank and Franklin Templeton to commence proceedings against IBA appeared to be of lesser importance, since the Azeri restructuring process was due to end with no possibility of an extension under Azeri law as it then stood, and the English moratorium would in turn terminate by operation of law. The Judge therefore did not rule on the creditors' applications.

However, the Azerbaijan Parliament subsequently approved an amendment to Azeri restructuring law that allowed the Azeri court to extend the period of the restructuring on the mutual request of IBA and the Azeri financial market supervisory authority (AFMSA) for up to 180 days, and with no limit on the number of extensions.[9] This amendment and subsequent continuation of the Azeri proceeding resulted in the continuing effect of the moratorium in England that was granted as a result of the recognition of the Azeri restructuring, where such moratorium otherwise would have expired upon the closing of the Azeri restructuring. In response to the Azeri law amendment and extended moratorium, Sberbank and Franklin Templeton both revived their applications to bring proceedings: Sberbank seeking permission to commence litigation and Franklin Templeton to commence arbitration.

In opposing Sberbank's and Franklin Templeton's applications, IBA argued that allowing the creditors to commence proceedings would risk prejudicing its appeal against the Court's first judgment (filed in January 2018) and that preventing the creditors from commencing proceedings was an appropriate means of preserving the status quo pending the appeal.

As to the Court's general powers, the Judge accepted that there was a risk of the appeal being rendered moot, but was prepared to allow the creditors to proceed if undertakings were given that the creditors would not proceed to judgment (in Sberbank's case) or a final award (in Franklin Templeton's case). Sberbank was willing to give such an undertaking, and the author understands that it recently commenced proceedings against IBA.[10] Franklin Templeton's position was more complex because, as a noteholder, its claims were to be pursued through arbitration by the trustee, and Franklin Templeton was not in a position to bind other noteholders to an undertaking. The Judge said that he was "*not presently persuaded*" that an undertaking from Franklin Templeton to stay an arbitration before an award was rendered was enforceable, and as a consequence, the Judge allowed Franklin Templeton and IBA further time to make representations on the appropriate course of action.

## The Future of the Gibbs Rule

The Court's decision on the Gibbs Rule remains subject to IBA's pending appeal, and as the judgment recognises, it would ultimately be only the Supreme Court (or Parliament)[11] that could overturn the Gibbs Rule.

While many commentators have criticised the Gibbs Rule, the decision in *Re OJSC International Bank of Azerbaijan* brings the interplay between reorganisations and English law rights into sharp focus: Mr. Justice Hildyard was far from convinced that the Gibbs Rule has no role to play in a restructuring scenario, and the abolition of the Gibbs Rule would undoubtedly weaken the attraction of English law for emerging markets transactions and diminish the protections afforded to creditors under English law. At this stage, the Gibbs Rule remains, and should still be, a relevant consideration for creditors opting for English law.

The case is also a useful reminder that a creditor seeking to rely on its English law rights must not submit to the foreign process, by filing a proof of debt for example, since submission will subject the creditor to the outcome of the foreign process. ■

1. The rule takes its name from the decision of the Court of Appeal in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Méteaux (1890) LR 25 QBD 399*.
2. Where a creditor does submit to the foreign proceeding they will be treated as bound by it, on the basis that they have accepted that the law governing the foreign proceeding will determine their rights.
3. Fletcher, *Insolvency in Private International Law*, 2nd ed, at para 2.217.
4. [2018] EWHC 59 (Ch).
5. See Elena Lobo and Daniel Soltman, Azeri Restructuring Could Test Limits of Chapter 15 Foreign Plan Enforcement, Emerging Markets Restructuring Journal (Issue 5).
6. *Re OJSC International Bank of Azerbaijan* at [68]. In its argument, IBA stressed principles of universalism, whereby principles of insolvency law are given primacy over bargained-for contractual rights.
7. Professor Philip Smart, *Cross-Border Restructurings and English Debts* (2009) International Corporate Rescue (Volume 6).
8. *Re OJSC International Bank of Azerbaijan* at [158(5)].
9. Section 57-11.6 of the Azeri Law on Banks.
10. Sberbank issued a Claim Form against IBA in April 2018.
11. IBA's appeal is scheduled to be heard before the Court of Appeal in October 2018 with a decision likely sometime in early 2019. Further appeals to the Supreme Court could take an additional 12-18 months.

▼ **James Brady** is an associate in Cleary Gottlieb's London office, and his practice focuses on litigation and dispute resolution.

He has a broad practice including particular experience with litigation involving insolvency or restructuring situations, commercial disputes and investigations by regulatory and other law enforcement authorities, including the UK Financial Conduct Authority, the Prudential Regulation Authority and the Serious Fraud Office. He is a co-author of the UK chapter of the Global Investigations Reviews Securities and Related Investigations 'Know- How' Guide.

James has been recognised as an 'associate to watch' in the Banking Litigation rankings in *Chambers UK*, where he was described as "attracting praise for his impressive attention to detail" and as being "very intelligent, hard-working and understands the law extremely well".

James joined Cleary Gottlieb in 2014 having previously worked at another international law firm in London and Dubai from 2008 to 2014.

DEAL NEWS / MEXICO

# Empresas ICA: Building a Path Forward

*By* **ISA A. JULSON BARAHONA**

On March 5, 2018, Empresas ICA S.A.B. de C.V. (ICA), the largest Mexican construction company, and several of its subsidiaries emerged from its concurso mercantil proceedings, concluding a year-long process of negotiations with creditors. Through these proceedings, ICA restructured over USD3.5 billion of indebtedness through a pre-packaged restructuring plan (*plan de reestructura previa*), including over USD1.2 billion of international bonds, becoming the largest insolvency of a Mexican company since 2015.

In 2015, cuts to infrastructure spending by the Mexican government, along with high leverage levels and the devaluation of the peso against the dollar, reduced ICA's available liquidity. By November 2015, facing increasing liquidity constraints, ICA decided it was necessary to stop making payments on its unsecured financial indebtedness, including three series of outstanding notes, in order to protect its ongoing construction contracts and concession agreements. In 2015 and 2016, ICA defaulted on nearly USD60 million in interest payments on these notes, leading to cross-defaults on its other long-term debt.

## Corporate Reorganization

Following these defaults, ICA began implementing initiatives to save costs and reorganize its corporate structure. To reduce overhead costs, ICA relocated its headquarters and limited its spending on outsourcing services and leasing machinery. In addition, as part of the corporate reorganization, ICA formed a wholly-owned subsidiary called ICA Tenedora, S.A. de C.V. (ICATEN), which become the direct holder of a number of ICA's key assets and a guarantor of ICA's three series of outstanding notes.

## Rescue Financing

On June 16, 2016, investment fund Fintech Europe committed to provide ICA with USD215 million in rescue financing through a convertible loan. In lieu of repayment, Fintech's rescue financing provided Fintech several options to receive equity interests in ICA or certain of its subsidiaries. After ICATEN was incorporated, the rescue financing was amended to include shares of ICATEN in these options. Fintech has until the third anniversary of the loan, or June 16, 2019, to exercise these options. The initial tranche of the financing was disbursed prior to the commencement of ICA's *concurso mercantil* proceedings, and the disbursement of the second tranche was approved by the Mexican conciliator overseeing ICA's restructuring. The entire facility was recognized as a credit in ICA's *concurso mercantil*.

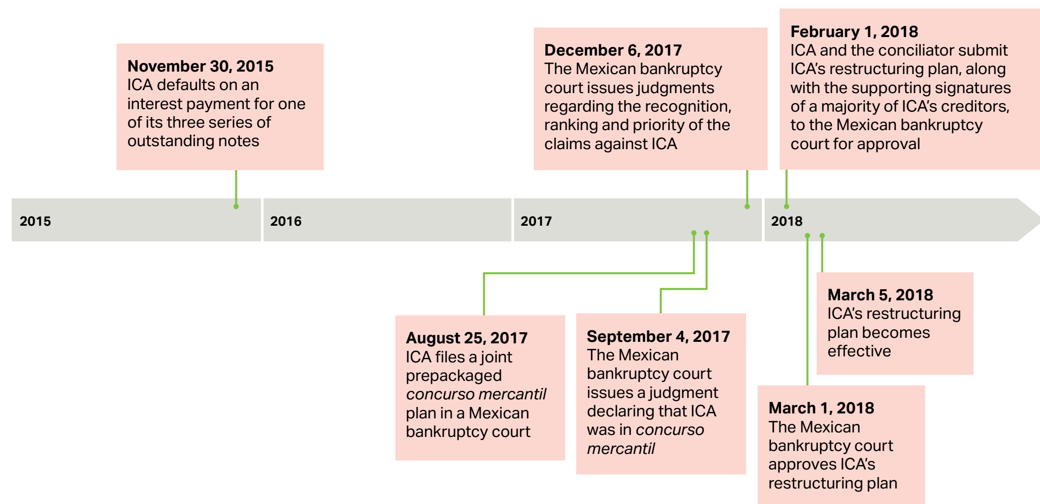
With the aid of the rescue financing from Fintech, ICA was able to participate in the bidding process for projects related to the New Mexico City International Airport and was awarded projects to construct the foundation, terminal building and electrical distribution network.

## Concurso Proceedings

**Timeline of ICA's *Concurso Mercantil* Proceedings**

On August 25, 2017, ICA filed a joint pre-packaged restructuring plan with the support of Fintech, ICA's largest creditor. The restructuring plan also included four of ICA's intermediate holding company subsidiaries, which was important for ICA in order to avoid interrupting any of its

**Timeline of ICA's *Concurso Mercantil* Proceedings**




operating subsidiaries' ongoing construction projects. The Mexican bankruptcy court issued a judgment declaring ICA in *concurso mercantil* on September 4, 2017, and on December 6, 2017, the Mexican bankruptcy court issued its judgment recognizing over Ps.38 billion of unsecured claims. The restructuring plan provided for the payment of this debt with 99.99% of the common shares of ICATEN (prior to any dilution through the exercise of the conversion features of the rescue financing). In order to support ICA's continuing operations, the restructuring plan also granted ICA the option to implement a management incentive plan worth up to 10.00% of ICATEN's equity, which would dilute the interests of ICA's new shareholders.

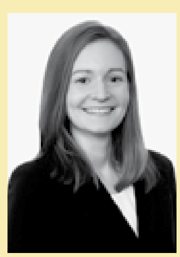
Having obtained the support of the majority of creditors of each of the entities involved in the *concurso mercantil* proceedings, ICA and the conciliator submitted ICA's restructuring plan to the Mexican bankruptcy court for approval on February 1, 2018. The Mexican bankruptcy court approved the plan on March 1, 2018, and it became effective on March 5, 2018. ■

**Key Takeaways**

— Largest international restructuring of a Mexican company since 2015

— Innovative rescue financing provided, despite constraints on DIP financing in Mexico

— Implementation of restructuring through *concurso mercantil* proceedings took just seven months



▼ **Isa A. Julson Barahona** is an associate in Cleary Gottlieb's New York office. Isa's practice focuses on corporate and financial transactions, with a particular emphasis on Latin America. Isa joined the firm in 2016.

# Recent Developments in Dominican Insolvency Proceedings

*By* **MARY FERNÁNDEZ** *and* **MELBA ALCÁNTARA**


As of February 7, 2017, insolvency proceedings in the Dominican Republic are governed by the New Insolvency Law No. 141-15 on Restructuring and Liquidation of Companies and Businesspersons (the "**New Insolvency Law**").[1] The New Insolvency Law and the related Regulation[2] replace the old insolvency regime, which was outdated, obsolete[3] and only provided for the liquidation of the debtor. The New Insolvency Law, in contrast, provides for the possibility of a debtor's reorganization—a welcome change that should be a value-enhancing development for debtors and creditors alike.

During the first year following the New Insolvency Law coming into effect, 17 cases have been initiated. Although many were dismissed on the grounds that they were not properly filed (e.g., failure to meet the procedural filing requirements or filing made solely to avoid paying taxes), investors would be wise to watch closely. Two ongoing cases in particular, Caribbean Recycling S.R.L. and Pan Am World Airways Dominicana, S.A., may serve to determine the ability of the New Insolvency Law to handle larger restructurings with complex aspects typical of international restructurings. Specifically, the restructuring of Caribbean Recycling may be the first to include debtor-in-possession (DIP) financing. Pan Am World, on the other hand, will test the New Insolvency Law's ability to handle a more complex restructuring, as this debtor has more than 200 creditors and nearly USD40 million in liabilities. We will discuss those two test cases in more detail later on.

The remainder of this article is divided into four parts: (1) a brief overview of the New Insolvency Law, (2) highlights of some of its more unique features, (3) an overview of restructuring proceedings that have been commenced under the New Insolvency Law and (4) a brief conclusion and the authors' views on the future.

## Overview

The New Insolvency Law contemplates two different proceedings: the reorganization of entities or businesspersons experiencing temporary financial difficulties, and the liquidation of insolvent entities incapable of carrying on business.

### Who May Be a Debtor

Potential debtors under the New Insolvency Law include Dominican or foreign incorporated companies (or individual businesspersons) with their domicile or continuous presence in the Dominican Republic. Although seemingly broad at first glance, notably, the New Insolvency Law excludes a number of entities, including (i) state-controlled entities, (ii) companies participating in the electric sector, (iii) financial intermediaries, (iv) securities intermediaries, (v) investment fund managers, (vi) centralized securities depositories, (vii) stock exchanges, (viii) securitization companies and (ix) any other entity considered to be a stock market participant, with the exception of publicly-traded companies and companies governed by the Securities Market Law (as amended).[4]

| Who May Be A Debtor | Who May Not Be A Debtor |
|---|---|
| — Dominican or foreign-incorporated companies (or individual business persons) with a domicile or continuous presence in the Dominican Republic | — State-controlled entities<br>— Companies in the electric sector<br>— Stock market participants (except for publicly traded companies and companies governed by the Securities Market Law (as amended) |

### Commencing a Proceeding

A proceeding is commenced through a written petition to the court by either the debtor or its creditors where one or more of the following conditions are met.

**Conditions for Debtor to Become Subject to a Restructuring (Whether Voluntary or Involuntary)**

- Failure to pay claims regarded as certain, due and payable under Dominican law for a period of more than 90 days, after formal notice to pay;
- Debtor's current liabilities exceed the current assets for a period of more than six months;
- Failure to pay withheld taxes to the tax authorities for a period of more than six fiscal quotas;
- Failure to pay two consecutive salaries to employees on the corresponding payment date, subject to certain exceptions;
- Closure of the business is ordered because of the absence of the administrators, as well as the transfer–partial or total–of its assets to a third party for distribution to all or some creditors;
- Use of deceitful or fraudulent practices, criminal association, breach of trust, falsehood, simulation or fraud to default creditors;
- Notification to creditors of the suspension of payments by the debtor, or of the intent to do so;
- Commencement of a foreign insolvency proceeding in the jurisdiction of the debtor's parent company or of its main place of business;
- Foreclosure of more than 50% of the debtor's total assets; or,
- Decisions or sentence-enforcement procedures that may affect more than 50% of the debtor's total assets.

**Voluntary Restructuring**
The New Insolvency Law provides the possibility for the debtor to request the initiation of a voluntary insolvency proceeding. The restructuring petition submitted by the debtor must be accompanied by (i) a report explaining the debtor's economic condition and justifying the need for restructuring, (ii) a list of all creditors and the status of all claims and liabilities, (iii) the debtor's financial statements for the last three fiscal years, (iv) an authorization by the debtor's management approving the restructuring petition and certain other documentation.

Within 120 days after the appointment of the Conciliator (discussed below), the proposed restructuring plan must be presented to the creditors for approval or rejection. There are no voting classes. Each creditor has the right to one vote for every 1% (or portion higher than 0.5%) of the total registered or recognized debt which it validly holds.[5] Decisions are made with 60% approval as measured based on creditors actually casting votes.[6] An approved restructuring plan is binding on all non-consenting creditors, except for those whose claims are privileged or secured. In the event that the creditors reject the proposal, the liquidation of the debtor may follow. However, if approved, the restructuring plan must be presented to the court for verification and approval.

**Involuntary Restructuring**
If the debtor is facing any of the situations that qualify it to initiate a reorganization process (see above), any creditor who is owed the equivalent of 50 monthly minimum wages or more (approximately USD13,190.00) may petition the court for the debtor's restructuring.

The restructuring petition filed by creditors, together with all the documents presented to the court in support of the involuntary petition, must be noticed to the debtor.

**Post-Filing Process**
Once the petition for restructuring is filed, the court has an obligation to appoint a Verifier, who will have the duty to verify the debtor's financial situation and inform the court thereof. The Verifier may be assisted by experts and has ample powers to obtain information about the debtor's estate. Following the verification process, if the restructuring petition is accepted by the court, then notice thereof must be provided to the debtor and the creditors.

The court will then appoint a Conciliator, whose principal role is to mediate between the debtor and its creditors in order to reach a restructuring agreement. Upon appointment of the Conciliator, the conciliation and negotiation process is initiated. The New Insolvency Law calls for the ordinary functioning of the debtor and the business during the conciliation phase. Thus, during this process, the management of the assets continues to be handled by the debtor but remains subject to supervision by the Conciliator.

The New Insolvency Law also provides mechanisms for the participation by interested parties in the restructuring process. During the review of the restructuring petition and for as long as the restructuring process is ongoing, the creditors have the right to appoint an advisor to collectively represent them during the insolvency process.[7] Creditors holding publicly traded debt securities can also separately appoint an advisor. Likewise, the employees of the debtor may also separately appoint an advisor.

**Key Players in Dominican Restructurings Other Than the Debtor and its Creditors**

— **Verifier**—appointed immediately after a restructuring petition is received by the court, the Verifier's role is to review the debtor's financial condition and report to the court on the same.

— **Conciliator**—appointed after a restructuring request has been formally accepted by the court, the Conciliator's principal role is to mediate negotiations between the debtor and its creditors in order to reach a restructuring agreement.

— **Creditors' Advisor**—appointed at the election of a debtor's creditors, the Creditors' Advisor can represent creditors generally and advise the debtor as to their collective interests.

— **Representative of Publicly Issued Securities**—appointed as the election of creditors holding publicly traded debt securities, the Representative of Publicly Issued Securities can represent holders of public debt and advise the debtor as to their collective interests.

— **Employees' Advisor**—appointed at the election of a debtor's employees, the Employees' Advisor can represent labor creditors and advise the debtor as to their collective interests.

Upon initiation of the conciliation and negotiation process, all judicial, administrative or arbitral decisions that affect the assets of the debtor and any enforcement or eviction regarding the debtor's property (real or intangible) are stayed until the reorganization is approved. However, certain obligations are not subject to a stay, such as labor and social security obligations and payments made in the ordinary course of business. Moreover, if the proceeding ultimately converts into a liquidation (see below), then the stay ceases to be in effect.

**The Restructuring Plan**

As noted above, once a restructuring petition is accepted by the court, a Conciliator shall be appointed in order to help broker a restructuring plan.[8]

The restructuring plan, which must be presented by the Conciliator to the court within 120 days from the Conciliator's appointment (subject to a potential 60-day extension) must contain, at least: (i) the debtor's background; (ii) a summary of the restructuring plan, with a clear description of its main characteristics; (iii) information concerning the financial situation of the debtor; (iv) non-financial information of the debtor that may impact its future activity; (v) a description of the future operations of the debtor and the effects of the restructuring; (vi) potential financing needs and the costs related to the proceedings; and (vii) a payment plan for the debtor's liabilities and the debtor's business plan for at least the following five years.[9]

If the restructuring plan is approved by the creditors, it must be presented to the court for verification and subsequent approval. In determining whether to approve the plan, the court will consider, *inter alia*, the propriety of terminating existing contracts, issuing new debt, the collateralization of new obligations and the potential sale of assets outside of the ordinary course.[10] Once approved by the court, the Conciliator shall oversee compliance with the plan.

Reorganization cases are formally concluded with the consummation of the reorganization plan. However, if the restructuring plan is not approved by the judge or has been rejected by creditors, judicial liquidation of the debtor may follow.[11]

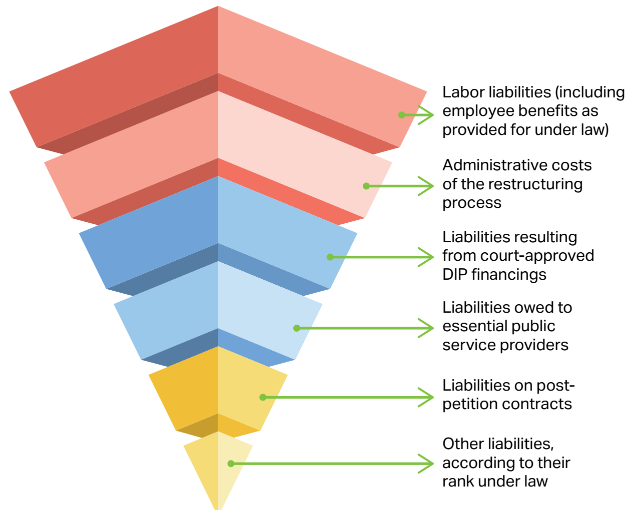
**Liquidation**

The new insolvency framework establishes that the Verifier, at the beginning of the restructuring process, and the Conciliator, during the negotiation phase, may recommend the immediate liquidation of the debtor under specific circumstances, including where the debtor is uncooperative or if the restructuring is not feasible. The judicial liquidation of the debtor may also be requested by the Conciliator, any recognized creditor or by decision of the majority of creditors in the event of non-compliance with the terms of an approved restructuring plan. A debtor may also request its judicial liquidation voluntarily at any time during the proceedings.

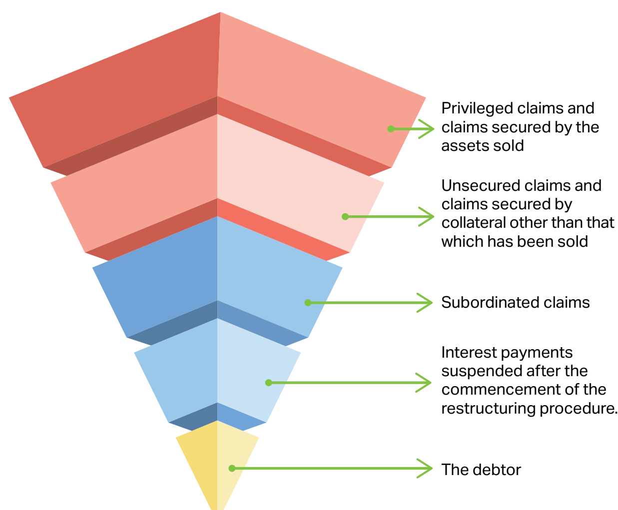
The notice of the judgment that orders a judicial liquidation entails the immediate loss by the debtor of its right to manage and dispose of its property until the judicial liquidation process has concluded. The court must designate a Liquidator, who will act as the administrator of the liquidation process and assume all management functions and rights of the debtor. During the judicial liquidation process, the rights and actions of the debtor are exercised by the Liquidator.

**Priorities**

Although under certain circumstances creditors can agree to different treatment, the New Insolvency Law provides for the following priority scheme, which prioritizes labor creditors over all others.




Additionally, in the case of an asset sale, the New Insolvency Law and corresponding Regulation provide that distributions will be made on a *pro-rata* basis to creditors according to the following priorities:



## Key Features of the New Insolvency Law

In addition to the core features of the New Insolvency Law discussed above, the New Insolvency Law also includes a number of features designed to facilitate successful reorganizations, including on an expedited basis.

**Pre-pack Agreements**
The New Insolvency Law provides for pre-pack arrangements, which may be presented by the debtor to the court in connection with a voluntary restructuring petition where the debtor has reached a restructuring agreement with a group of creditors whose claims represent 60% of the debtor's total liabilities prior to the filing of a petition.[12]

Notably, the Regulation accompanying the New Insolvency Law establishes the possibility of reaching an agreement with one or with several categories of creditors, including (i) local and foreign financial entities; (ii) bondholders; (iii) providers or suppliers; (iv) labor liabilities; (v) state entities; and (vi) other creditors. Different actions and stipulations may be agreed for each class.[13]

As with the restructuring process discussed above, the debtor and its management continue functioning normally during the approval process of the pre-pack agreement. Thus, the management of the debtor's assets continues to be handled by the debtor but remains subject to supervision.

The proposed pre-pack agreement may also be accompanied by a proposal for appointment of a specific Conciliator, which shall be confirmed by the court, provided that the plan is accepted. This Conciliator has the same attributes and obligations of a Conciliator designated in a voluntary or involuntary restructuring process. The approval of the pre-pack agreement shall be notified to the debtor and the creditors and will produce the same legal effects as a restructuring plan.

**DIP Financing**
The New Insolvency Law establishes that debts incurred post-petition have a higher priority in relation to all other secured and unsecured claims of the debtor, with the exception of tax claims, employee claims and claims resulting from the payment of the restructuring process, which are entitled to a higher priority status.

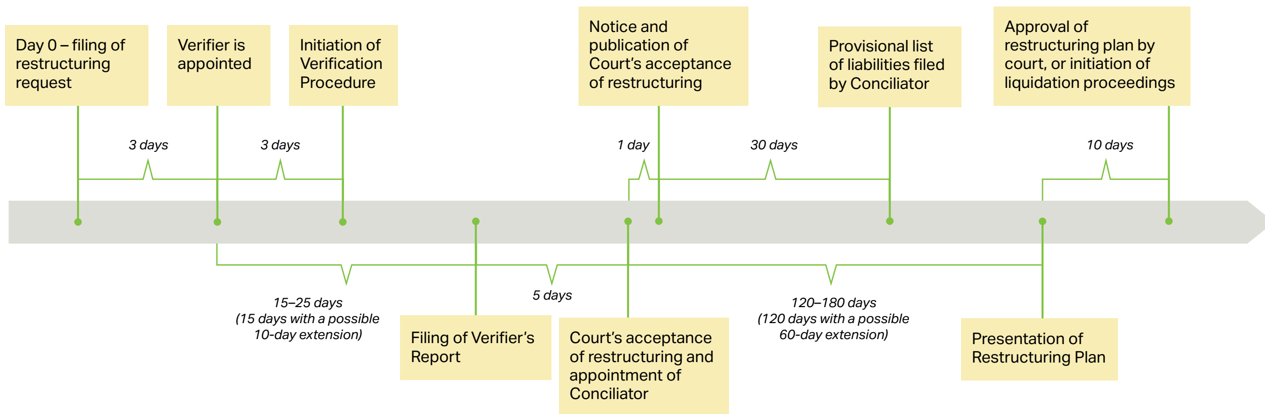
In addition, the New Insolvency Law also includes the concept of post-petition DIP financing and establishes a priority for its payment. New financing must have the approval of the court and the petition presented by the Conciliator may be objected to by creditors or other parties in interest. The approval of new collateral in connection with DIP financing may also be authorized by the court, although the court will likely ask

to hear from the Creditors' Advisor before approving such arrangements.[14] Notably, while the court can approve the pledging of new collateral, the court may not grant a DIP lender a senior lien on already encumbered property. Instead, if existing collateral is pledged, new liens on the collateral will be junior to existing liens and such pledge can only occur with the approval of existing lienholders.

**New Specialized Restructuring Courts**
Importantly, the New Insolvency Law creates new specialized courts with special jurisdiction to hear restructuring and judicial liquidation proceedings, which will consist of courts of first instance and of appeal (collectively, the "**Restructuring and Liquidation Courts**"). However, until the new jurisdiction takes effect (which may be some time given budgetary constraints), the Council of the Judiciary Branch has authorized two lower civil and commercial courts and two courts of appeals (in Santo Domingo, the capital city, and in Santiago, the second largest city in the country) to hear cases filed under the New Insolvency Law.[15]

The Restructuring and Liquidation Courts will be competent to hear all actions related to a restructuring plan, as well any other judicial or extrajudicial action linked to the debtor. The Restructuring and Liquidation Courts will also be competent to hear all possible measures to preserve the debtor's assets, including petitions for precautionary measures and protective actions. The only litigation related to the debtor that remains

**Indicative Timeline: Key Milestones and Deadlines in Dominican Restructuring Proceedings**




generally outside the purview of the Restructuring and Liquidation Courts is civil or criminal actions for non-compliance with the New Insolvency Law, which shall remain under the jurisdiction of the ordinary courts.

**Arbitration**
Consistent with the worldwide trend toward preferring arbitration, under the New Insolvency Law, any controversy arising during a restructuring procedure or derived from the execution of the restructuring plan may be subject to resolution before institutional or *ad hoc* arbitration. However, administrative actions related to the restructuring process, as well as all actions related to the liquidation, remain within the exclusive jurisdiction of the Restructuring and Liquidation Courts. If an arbitration is initiated, it will not be a cause for the suspension of the restructuring process.

**Cross Border Insolvency Framework**
In a particularly noteworthy effort to modernize the Dominican insolvency framework, the New Insolvency Law also sets forth a legal framework applicable to cross-border insolvency proceedings, developed in accordance with the United Nations Model Law on Cross-Border Insolvency (the "**UNCITRAL Model Law**").

Consistent with other jurisdictions where the UNCITRAL Model Law has been implemented, the New Insolvency Law provides that foreign creditors have the same rights and can rely on the same remedies available to local creditors, and it contemplates the possibility of processing local and foreign insolvency proceedings simultaneously, where the local court shall collaborate and coordinate its actions with those in the foreign proceeding.

After the recognition of a foreign main insolvency proceeding, a local restructuring procedure can only be initiated if the debtor owns assets located in the Dominican Republic. The effects of said procedure are limited to the assets located in the Dominican territory, as well as any other assets that pursuant to the New Insolvency Law shall be administered in accordance with the same.

As a practical matter, the addition of a cross-border insolvency framework opens up the possibility that debtors in the Dominican Republic that are Chapter 11-eligible in the U.S. could effectuate a comprehensive restructuring by pairing a Chapter 11 proceeding with a local proceeding in the Dominican Republic, the latter of which would function much like a Chapter 15 proceeding in the U.S.

**Claw-back Period and Null Transactions**
Under the New Insolvency Law, transactions made within a period of 2 years prior to the filing date of the reorganization petition may be clawed back where the court deems that they constitute an unjustified diversion of assets or are detrimental to creditors (similar in concept to a fraudulent transfer under U.S. law). The annulment action may be brought by any creditor or the Conciliator.

Although evidence may be presented to the contrary, the New Insolvency Law also expressly declares several transactions to be per se null and void based on a presumed detriment to the estate, such as (i) the cancellation or partial or total relief of debt by the debtor; (ii) transfers of assets free of charge or at a price below market value; (iii) transfers of property in favor of creditors which result in the payment of a higher amount to that received as a result of the liquidation; (iv) when the intended consideration is worth less than the obligation performed, or vice versa; (v) payments of obligations not yet due; and (vi) transactions with related entities or companies where the debtor or any of the creditors serve as an administrator or are part of the administrating body, represent (jointly or separately) at least 51% of the subscribed and paid-in capital, hold decisive power at the shareholder assemblies or are in the position to name the majority of the members of the governing body.

**Expedited Restructuring Procedure**

Separate from the provisions allowing for a prepackaged restructuring, the New Insolvency Law establishes a special expedited procedure for restructuring when the total liabilities of the debtor do not exceed DOP10 million (approximately USD202,500.00). This expedited procedure cuts by half all applicable deadlines. Under the expedited procedure, the appointment of the Creditor's Advisor and of Auxiliaries for the Conciliator will not be applicable, and the minimum liability required by the Law for the filing of a restructuring petition is at least 15 minimum wages (equivalent to approximately USD3,960.00).

## Empirical Overview and Case Studies

Despite criticism by many stakeholders of its extremely short deadlines and the perceived excessive powers allocated to the court, after its enactment, the New Insolvency Law should serve as a beacon of encouragement for investors, local and foreign, and has significantly improved the conditions for negotiations between debtors with their creditors and the prospects of successful restructurings. A year and a half after the entry into force of the New Insolvency Law and its accompanying Regulation, we can say that the courts and the officials appointed pursuant to the New Insolvency Law are taking its implementation very seriously and the same is progressing, albeit encountering certain obstacles which will be resolved as judges gain more experience and confidence in the procedure.[16] Additionally, sector-specific regulations are still in the process of being harmonized with the provisions of the New Insolvency Law.

As of July, 2018, 17 restructuring petitions have been filed, most of which were voluntary petitions filed by small-scale businesspersons to avoid the fulfillment of overdue liabilities. However, only three petitions have been accepted by the court; all other restructuring petitions have been rejected for failure to comply with the requirements set forth by the New Insolvency Law.

Although small in number, the ongoing restructuring proceedings are worth following and should provide some insight into the New Insolvency Law's capability for handling complex restructurings. For example, Caribbean Recycling's restructuring[17] was commenced on an involuntary basis following a petition from a creditor bank, notwithstanding the appointed Verifier's statement expressing doubts about the debtor's ability to successfully effectuate a restructuring. The judge decided to open a restructuring procedure and a Conciliator has been designated. Market rumors indicate that the judge's preference to pursue a restructuring may have opened a door for a possible DIP financing to restore the company's viability. The process is still ongoing.

The most high profile restructuring commenced to date is of PAWA, a local aviation company with more than 220 creditors and whose total debt amounts to an estimated nearly USD40 million. In this case, the court deemed the appointment of a Verifier unnecessary and immediately approved the restructuring petition, understanding that there was no need to inquire further into the debtor's financial condition. A brief case study for PAWA follows.

**Case Study: Pan Am World Airways Dominicana, S.A.**

- Although PAWA had been facing financial difficulties for over a year, its February 2018 voluntary restructuring petition was driven primarily by (i) the announcement by the Dominican Airports Consortium of the XXI Century of the suspension of services provided to PAWA Dominicana and (ii) the suspension of PAWA's operations by the Dominican Institute of Civil Aviation (IDAC).
- At the time of its filing, PAWA had more than 200 creditors and nearly USD40 million in liabilities.
- Although the court readily accepted PAWA's case and determined that there was no need to make a further inquiry into PAWA's financial state, the case has received widespread criticism from specialists which emphasized that an earlier filing would have avoided significant deterioration to the debtor's financial state.
- PAWA's restructuring remains ongoing, and in parallel, the Civil Aviation Board and IDAC jointly filed a criminal lawsuit against PAWA, alleging prepetition fraudulent transfers in connection with the nonpayment of aeronautical and airport fees.
- PAWA's restructuring will be an important test for the New Insolvency Law and its ability to handle a complex, multi-faceted restructuring involving hundreds of creditors (including governmental creditors) with disparate interests.

## Conclusion

The insolvency framework embodied in the New Insolvency Law has positioned the Dominican Republic to compete with other jurisdictions that promote economic growth through the establishment of modern and transparent business regulations. This New Insolvency Law will help preserve and even create incentives for existing as well as new jobs, and may serve as an incentive for foreign investors to come to the Dominican Republic with confidence that in the event of financial difficulties, their investment will be subject to a fair, effective and predictable reorganization procedure.

The authors also predict that pre-pack agreements will be widely used by Dominican debtors and creditors, since they significantly improve the conditions for an amicable negotiation of the terms of the plan, and significantly reduce the costs and timeframes involved in the restructuring proceeding.

Nonetheless, based on the restructuring petitions filed before the courts to date, the authors agree that for the purpose of achieving a successful reorganization and optimizing the solutions set forth by the New Insolvency Law, it is critical that both creditors and debtors increase their diligence levels for the purpose of identifying indicators associated with a potential insolvency, in order to avoid the need to request the reorganization of the debtor once it is too late. ■

1. Signed into law on August 7, 2015.
2. Regulation for the Application of Law No. 141-15, enacted by Decree No. 20-17 issued by the Executive Branch on February 13, 2017.
3. The old insolvency regime dated back to 1956 and was grounded in the Napoleonic Code.
4. Law No. 249-17 on the Securities Market of the Dominican Republic, dated December 19, 2017.
5. However, with the exception of the case where there is only one creditor, one registered or recognized creditor cannot hold more than 50% of the votes, regardless of the size of its claim.
6. The quorum for creditor's meetings is the number of creditors which represent more than 50% of the total liabilities (registered or recognized) with a right to vote.
7. As with plan approval, the Creditors' Advisor may be appointed with the support of 60% of voting creditors.
8. A highlight of the new restructuring framework is the existence of effective tools for obtaining the information required for an appropriate evaluation of the debtor's situation and devising a successful plan. Additionally, debtors are provided with substantial flexibility in structuring plans, and the New Insolvency Law contemplates the possibility of effectuating a restructuring plan through the constitution of a trust formed in accordance to the provisions of Law No. 189 on the Development of the Mortgage Market and Trusts in the Dominican Republic.
9. Although the New Insolvency Law generally allows debtors to effectuate a comprehensive restructuring, it also provides that certain assets are excluded from the restructuring, including, *inter alia*, those in which third parties, rather than the debtor, have a beneficial interest (e.g., tax withholdings that while in possession of the debtor, must be remitted elsewhere as a matter of law).
10. If the restructuring plan is not proposed by the debtor, the debtor's approval is required as well (in the case of corporations, the plan shall be approved by the debtor's competent governing body).
11. If the plan is not approved by the requisite majority of the creditors, the Conciliator may recommend the liquidation of the debtor to the Court (or, time permitting, propose a new, revised plan to the creditors). Moreover, if the parties do not reach a restructuring agreement within 120 days from the Conciliator's appointment (subject to a 60-day extension), the Conciliator shall submit to the Court the termination of the restructuring process and request the judicial liquidation of the debtor.
12. The approval of the Representative of Publicly Issued Securities is also required, if applicable.
13. Pre-pack agreements that include all creditors must be approved by a group of creditors whose claims represent at least 60% of the total liabilities of the debtor. Pre-pack agreements that restructure debt of one or several categories of creditors must be approved by a majority whose claims represent at least 60% of the total liabilities of that category. The approval of a pre-pack agreement produces the same legal effects as a restructuring plan. However, pre-pack agreements that restructure debt of one or several categories of creditors do not affect creditors of other categories.
14. While it has no direct role in restructuring proceedings, the Monetary and Financial Administration, pursuant to a mandate under the New Insolvency Law, has adopted regulatory measures to, *inter alia*, ensure that the credit ratings of the debtor and its operations are not adversely impacted by new contingencies or provisions that are unforeseen at the time a restructuring petition has been filed. The adoption of these regulatory measures promotes DIP financing and was integral to gaining the support of the banks for the New Insolvency Law, since it effectively lowers the amount that financial institutions are required to reserve when making DIP loans by protecting against swift and unexpected credit downgrades.
15. Act No. 44-2016, dated December 7, 2016.
16. Given the recent enactment of the New Insolvency Law, several difficulties have been overcome by the court in its implementation. In the first two restructuring petitions filed, the court was forced to create *ad hoc* lists of professionals referred by the Institute of Certified Public Accountants for the purpose of selecting the Verifiers and Conciliators that would be appointed to such cases, given that the lists of registered officials had not been created by the competent entity.
17. *BHD v. Caribbean Recycling, S.R.L.*, Court of First Instance of Restructuring and Liquidation of the National District, Resolution No. 974-2017-SCON-00002, File No. 974-2017-ECON-00002 (August 9, 2017). Restructuring petition filed on August 2, 2017.

**Mary Fernández** is a founding partner at Headrick Rizik Alvarez & Fernández. She serves as counsel to national and international clients in matters of foreign investment, corporate law, banking and international finance, negotiation and execution of contracts involving public or private entities, franchising and distribution relations; structuring and implementation of real estate and tourist projects, restructuring and insolvency, intellectual property and alternative dispute resolution methods, including litigation.

Mary also actively participates in the drafting and revision of bills and regulations, including the current laws regarding intellectual property and commercial arbitration, and actively participated in the drafting of the New Insolvency Law.

**Melba Alcántara** is an associate at Headrick Rizik Alvarez & Fernández. She was admitted to professional practice in 2011, and her practice is focused in the areas of business law, tax law and intellectual property. Melba has co-authored and collaborated on a number of publications, including the Insolvency and Restructuring guides published by *Chambers*, *Latin Lawyer* and *Getting the Deal Through*.

Counsel to an ad hoc group of secured project finance lenders in connection with the **$1.7 billion** potential restructuring, recapitalization and reorganization of **QGOG Constellation S.A.** and its subsidiaries.

**Debt and Equity-Linked Team of the Year**
*IFLR Americas Awards, 2018*

Counsel to 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.

**Debt and Equity-Linked Deal of the Year (Kyobo Life Insurance's subordinated capital securities offering)**
*IFLR Asia Awards, 2018*

**Top 5 Firm**
*Global Restructuring Review's GRR 30, 2017*

Counsel to long-time client **Corporación Nacional del Cobre de Chile** (**CODELCO**), a Chilean state-owned company and the world's largest copper producer, in a **$600 million** Regulation S offering of 4.85 per cent notes due 2048 listed in the Taipei Exchange.

Counsel to the **Republic of Indonesia** in a **€1.0 billion** and **$1.0 billion** U.S. SEC-registered offering, listed on the Singapore Exchange Securities Trading Limited and the Frankfurt Stock Exchange.

**Restructuring Deal of the Year (Odebrecht Óleo e Gás' debt reorganization)**
*Latin Lawyer and IFLR, 2018*

Counsel to the underwriters in the initial public offering of the ordinary shares of Aktiaselts TALLINNA SADAM, the **Port of Tallinn**, and listing on the Baltic Main List of the Nasdaq Tallinn Stock Exchange.

# Practice Highlights

Counsel to **SMP Ltd**, a leading polysilicon manufacturer based in Korea, in connection with its request for Chapter 15 recognition of its Korean insolvency proceedings, as well as its adversary proceeding against SunEdison, Inc.

**International Law Firm of the Year**
*ALB Korea Law Awards, 2017*

Counsel to long-time client **The Province of Buenos Aires** in its global offering of **ARS30 billion** notes due 2025, which consisted of an offering to the public in Argentina and a Rule 144A/Regulation S offering outside of Argentina.

**Leading Firm for Finance: Restructuring (Including Bankruptcy): Corporate**
*The Legal 500 U.S., 2018*

**Debt and Equity-Linked Deal of the Year (Bancolombia's Basel III subordinated notes offering)**
*IFLR Americas Awards, 2018*

Counsel to investors in **Venezuela** and/or PDVSA debt and multinational companies with exposure to Venezuela on various legal aspects and implications of a potential Venezuela/PDVSA default or related to restructuring/liability management transactions by Venezuela and/or PDVSA.

**Russia Deal of the Year (The Far Eastern Shipping Company's restructuring)**
*CEE Legal Matters Awards, 2018*

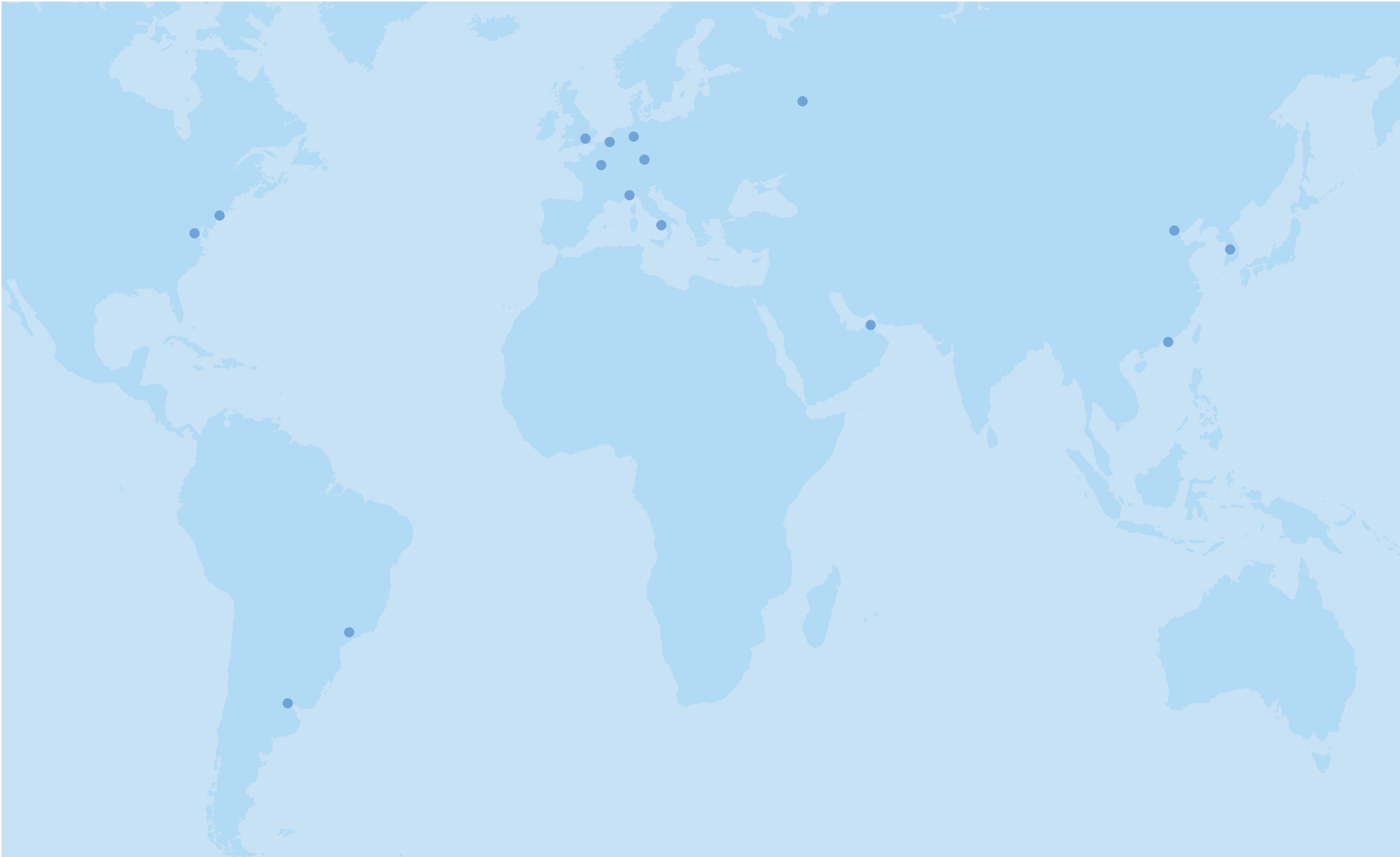
Counsel to UC RUSAL in its **$5.15 billion** restructuring and its previous **$16.8 billion** restructuring, the largest-ever restructuring of a company with main operations in Russia and the CIS.

**Leading Firm for Restructuring/Insolvency**
*Chambers Global, 2018*

**Top Global Firm**
*Law360's "Global 20" List of Preeminent Global Law Firms, 2011–2018 (Every year since the list's inception)*

Counsel to **Sovcomflot**, the largest shipping group in Russia, in a **$150 million** reopening of its **$750 million** Eurobond issued in 2016, on which Cleary Gottlieb also advised Sovcomflot, bringing the total outstanding amount of the Eurobond to **$900 million**.

**Global Elite Firm**
*Legal Business' "Global 100," 2003–2017 (Every year since the list's inception)*



## CLEARY GOTTLIEB STEEN & HAMILTON LLP

Founded in 1946 by lawyers committed to legal excellence, internationalism, and diversity, Cleary Gottlieb Steen & Hamilton LLP is a leading international law firm with approximately 1,200 lawyers around the world. The firm has 16 closely integrated offices in New York, Washington, D.C., Paris, Brussels, London, Moscow, Frankfurt, Cologne, Rome, Milan, Hong Kong, Beijing, Buenos Aires, São Paulo, Abu Dhabi, and Seoul.

Under the rules of certain jurisdictions, this publication may constitute Attorney Advertising. Prior results do not guarantee a similar outcome. Throughout this brochure, “Cleary Gottlieb” and the “firm” refer to Cleary Gottlieb Steen & Hamilton LLP and its affiliated entities in certain jurisdictions, and the term “offices” includes offices of those affiliated entities.

The articles appearing in this publication are for general information purposes only and are not intended as legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed in this publication. Opinions expressed by external contributors do not necessarily reflect the views of Cleary Gottlieb. Reproduction of any content contained within this publication without prior written consent is strictly prohibited.

18.0531.04_080618