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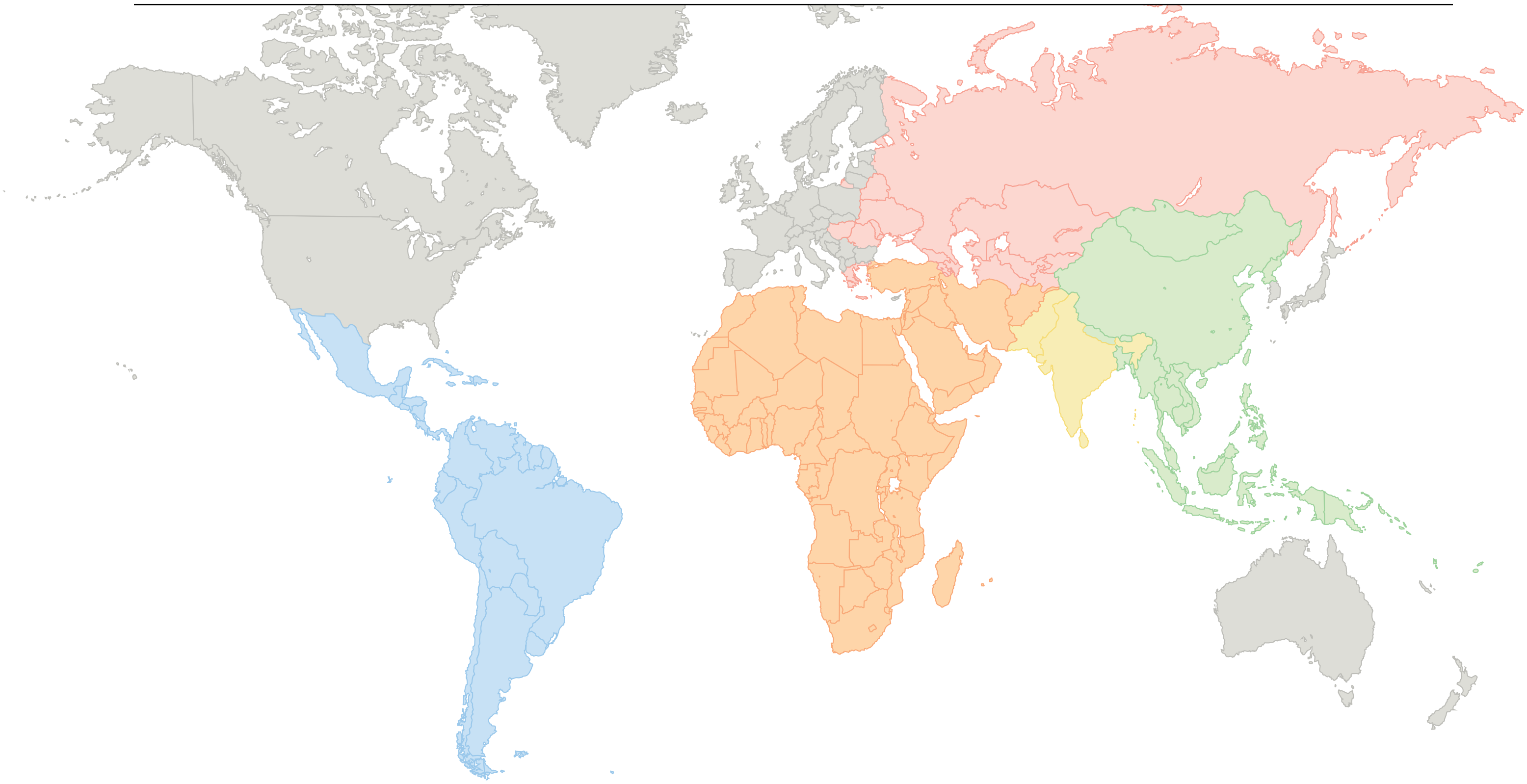

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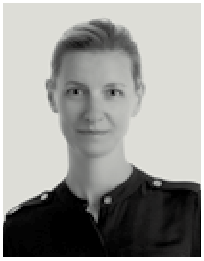


In our letter from Issue No. 2, we noted the risks of a decline in globalization and the challenges posed by elections in the United States and the United Kingdom. Six months later, we find ourselves facing more questions than answers. The United Kingdom's notification on March 29 that it was leaving the European Union appears to have had little immediate impact on emerging markets debt with ties to Europe. Apart from some mostly-ignored requests to allocate money to a border wall, the United States has barely had time to focus on external markets while its political classes are roiled by a scandal involving alleged Russian influence.

Meanwhile, emerging markets seem more preoccupied with local, rather than global, crises. Throughout Latin America, a series of corruption scandals has extended beyond Brazil and touched issuers in Colombia, Peru and Mexico, among other countries. China's credit rating was recently cut and put on negative outlook, raising questions as to a slowdown in Asian markets. In Eastern Europe and Russia, continued focus on the U.S. relationship with Russia, lack of anticipated sanctions easing and oil and other commodity prices seems to be the talk of the day, coupled with a renewed focus on addressing long-standing impaired loan portfolios held by local banks.

This Issue No. 3 of the Journal reflects the introspection that we are seeing in emerging markets. Our first article focuses on the historic underinvestment in infrastructure in Latin America and how that has impacted construction company debt in the region, while our second contribution is a reflection from one of the leading practitioners in Mexico on how far the Ley de Concursos Mercantiles has come – and how far it has still to go. We continue our series of articles on non-performing loan portfolios with contributions from Romania and Hungary, and highlight the local insolvency reforms in Greece that seek to reorient the regime towards business rescue from business liquidation.

Another article takes a fresh look at the use of alternative dispute resolution in insolvency proceedings and asks whether it could be applied more broadly in countries with historical institutional weakness. A contribution from litigators involved in the Argentine sovereign debt dispute revisits the real impact of the pari passu decision that stirred the pot in the sovereign debt market just a few years ago. Finally, colleagues from Paraguay and South Africa explain how insolvency laws work in those jurisdictions.

As always, we encourage your comments and questions and welcome your submissions for Issue No. 4.

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

Latin American Construction Companies' Woes May Not Be Over, Yet

By **BROCK EDGAR** *and* **DEVI RAJANI**

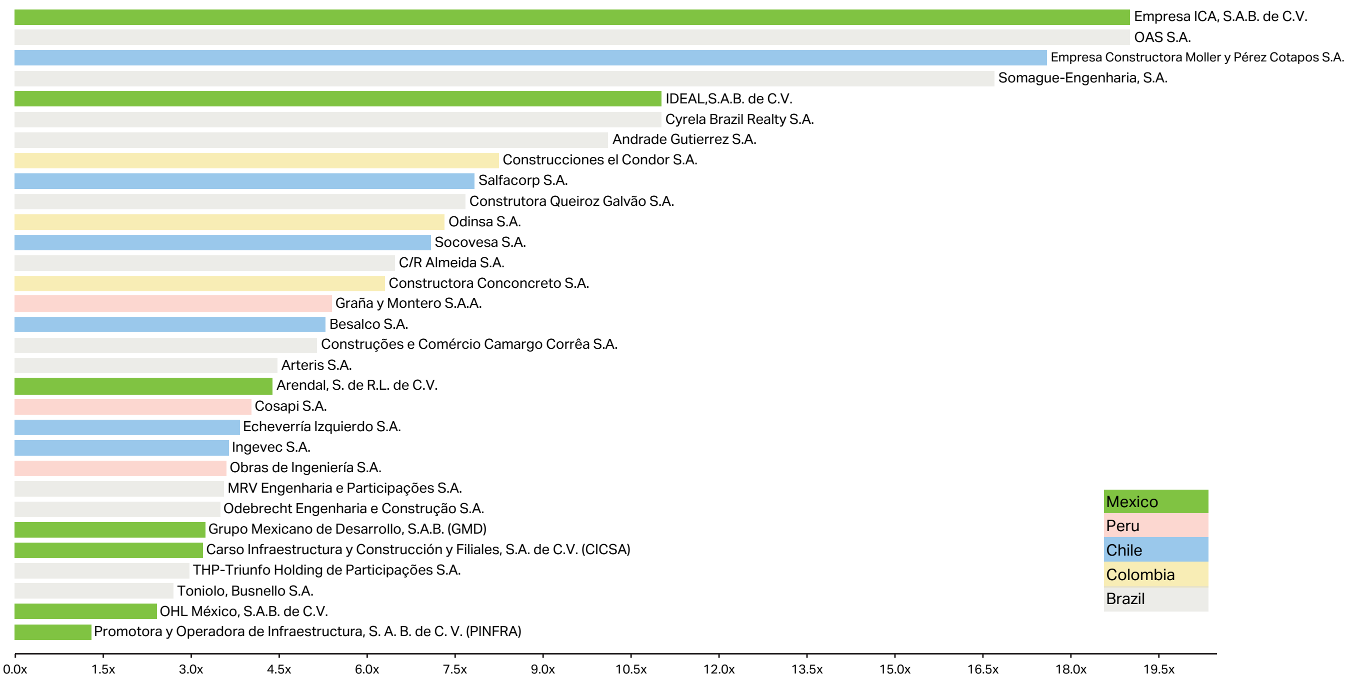
Can Latin American construction companies survive an expected plateau in gross fixed capital formation in a region that so desperately needs infrastructure investment?

In recent years, Latin American construction companies have faced deteriorating cash flows due to overexpansion at home or abroad, limited financing availability due to changing regulations and/or government investigations (i.e., "Lava Jato" in Brazil, also known as the Car Wash Investigation), falling commodity prices (primarily oil) and cutbacks in government spending; all of which have led to over-levered financial positions.

Many regional construction companies have experienced or will likely be going through restructurings. In Mexico, the three largest homebuilders went through restructurings between 2014 and 2016 and one of Mexico's largest engineering and construction companies, Empresas ICA, S.A.B. de C.V., is currently being restructured. Similarly, in a process that has been ongoing since 2015, one of Brazil's largest engineering and construction companies, OAS S.A. is also currently being restructured. Looking ahead, the fallout from Odebrecht's admission of foreign bribery will likely affect its engineering and construction business, as well as its consortium partners throughout Latin America where projects are being cancelled, triggering sureties and bank guarantees.

Against this backdrop, the uncertainty with respect to future economic development makes capital investment decisions difficult. This is even truer today following the election of

Debt/EBITDA for Select Latin American Construction Companies (2015/2016)



Source: FTI Analysis based on latest public information from Capital IQ and company websites. Leverage ratios vary from 2015 to 2016. Odebrecht E&C's leverage is based on a Fitch 2016 estimate.

President Trump in the United States and the potential impact on global trade (particularly for its neighbors to the south), the strengthening dollar, flattish oil prices and the moderating growth outlook for China. For Latin America specifically, economic growth is further restricted by depressed commodity prices in metals and mining (gold, iron ore, copper, etc.). Indeed, although Bloomberg Analyst Consensus Forecasts show flat to modest price increases in these commodities from their troughs in 2015/2016, these prices are still below the prices of 2013, which was a year removed from the peak years of 2011/2012.

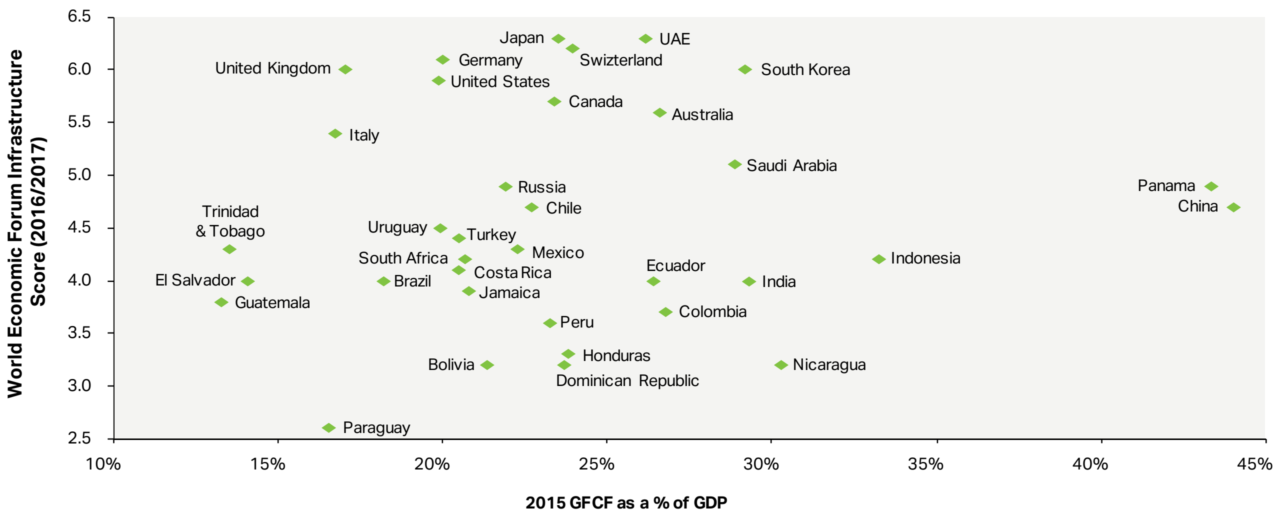
However, uncertainty in gross fixed capital formation ("GFCF") and/or capital investment is not something the region can afford; the lack of investment and infrastructure in the region further deepens the deficit the region faces, impacting economic growth.

The World Economic Forum's Global Competitiveness Report (2016-2017) ranks the infrastructure quality of 138 countries on a scale of 1 to 7 (7 being the best). The highest ranking country in the Latin American region is Panama at #36 (with an infrastructure quality score of 4.9), followed closely by Chile and Uruguay at #44 (4.7) and #47 (4.5), respectively. Panama's ranking is not surprising given that it has one of the highest ratios of GFCF as a percentage of GDP, similar to that of China. However, most of the Latin American region has an infrastructure score under 4.5 which compares unfavorably to the highest score of 6.7 achieved by Hong Kong SAR. Developed economies, such as United States, Canada and Europe generally have scores above 5.50.

Gross fixed capital formation ("GFCF") as defined by the World Bank includes:

- **land improvements (fences, ditches, drains, and so on)**
- **plant, machinery, and equipment purchases**
- **the construction of roads, railways, and the like**

Infrastructure Quality vs. GFCF as a % of GDP



Source: World Economic Forum, "The Global Competitiveness Report 2016–2017", World Bank national accounts data, and OECD National Accounts data files, FTI Analysis

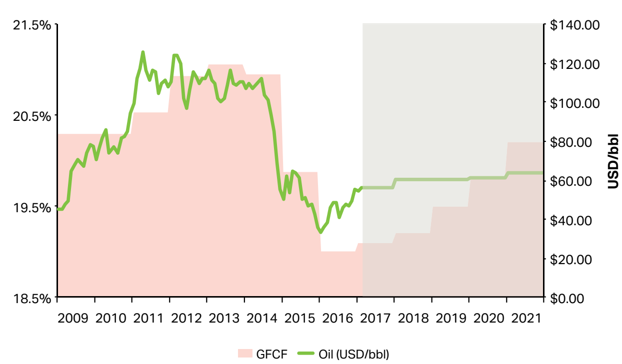
One reasonable conclusion from the somewhat linear trend of the foregoing chart is that Latin American countries seem to be underspending (and/or have historically underspent) on GFCF as a percentage of GDP compared to developed countries with higher scores. For example, Brazil (4.0), the largest economy in Latin America, spends less than 20% of its GDP on GFCF, and Mexico (4.3) fares only slightly better, spending between 20%-25%. Similarly, it appears that Ecuador (4.0), Colombia (3.7) and Nicaragua (3.2) are making heavier investments, presumably trying to compensate for historical underspending in an effort to improve their scores to levels of developed economies. The spending gap is even more apparent when considering that, while developed economies seem to spend around the same GFCF as a percentage of GDP as the average Latin American country, they already have high infrastructure quality, thus requiring less investment towards their infrastructure gap.

Along the same lines, according to the McKinsey Global Institute, Mexico is expected to have a projected infrastructure gap between actual spending and its infrastructure needs of USD 1.1 trillion between 2016 and 2030. Brazil's projected gap over the same period is estimated at USD 0.7 trillion. Indonesia (USD 1.3 trillion), South Africa (USD 1.2 trillion) and Saudi Arabia (USD 0.9 trillion) are expected to have larger infrastructure gaps than Brazil. Yet interestingly enough, both Indonesia and Saudi Arabia spent more in GFCF as a percentage of GDP than Mexico and Brazil in 2015.

It is therefore concerning that GFCF has declined in Latin America since 2014 and is expected to remain at low levels with limited growth over the next few years when there is clearly a need in the region for investment which drives economic growth and prosperity.

The largest drop in GFCF as a percentage of GDP occurred in 2015 and 2016, coinciding with the decline in oil prices. Similarly, the growth in GFCF between 2011 and 2014 seems to have been at least partially driven by oil prices. The outlook for oil is relatively flat over the next few years, and GFCF is expected to grow at a tempered pace, not reaching historical levels that would benefit the region. Will the low rates of GFCF as a percentage of GDP last just 2-3 years as forecasted or will the situation be worse than expected?

Latin America's GFCF (% of GDP) and Oil Prices (Brent)



Source: Bloomberg, World Bank national accounts data and OECD National Accounts data files, Economist Intelligence Unit Forecasts (December 20, 2016), FTI Analysis. Latin America is comprised of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, and Venezuela.

Oil's modest outlook has far reaching implications for Brazil and Mexico's economies. Brazil is already feeling the effect with a decline in royalties, special participations and income tax revenues from oil production. Cash received from royalties declined 25% in 2015 and 29% in 2016, reaching similar levels last seen in 2009. The combined impact in both years is over USD 5 billion in fewer funds received by all three levels of government (federal, state and municipal). This has directly impacted governments that are already cash strapped and/or had committed to projects assuming these sources of funds would continue near historical levels. While oil production in Brazil is increasing, financial crisis has impacted Petrobras' (Brazil's semi-public multinational crown oil corporation) expansion plans and, as such, the pace of exploration has been delayed. Petrobras has calculated that for the next 8 years, the government will lose out on about USD 12 billion of royalties, special participations and income tax.

Odebrecht Engenharia e Construção S.A. (OEC) is the largest engineering and construction company in Latin America

Odebrecht's operations reached far beyond its Brazilian borders and into over 10 Latin American countries during 37 years. These countries included Peru, Colombia, Argentina, Mexico, Ecuador, Dominican Republic, Panama, Guatemala, etc. However, due to the fallout from their admission of guilt regarding foreign bribery in the United States, Brazil and Switzerland, the company is under investigation in several of these Latin American countries and, in certain cases, has been excluded from participating in any other projects while the investigations are ongoing. These investigations may yield additional penalties and fines to the already staggering and historic USD 2.6-3.5 billion penalty it has already agreed to pay. The effects on the company's cash flows will be compounded not only by the financial penalties but also from the restrictions that some foreign governments have applied to the company and the subsequent effects on its backlog, as well as gloomy prospects at home. According to Debtwire's February 2017 OEC tearsheet, 77% of OEC's backlog was located outside of Brazil (56% in Latin America, excluding Brazil).

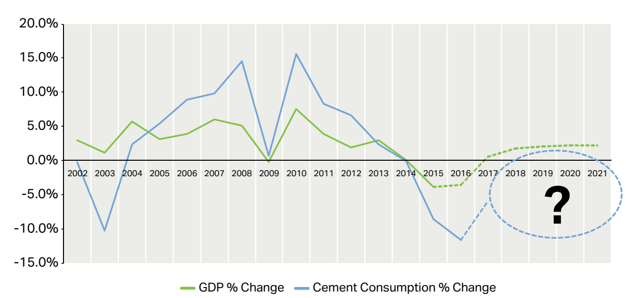
Similarly, Mexico's capital expenditure budget for 2017 has been reduced 23% (in real terms) compared to 2016's approved budget, signaling a large contraction in investment expected by the Mexican Federal Government. Of the decline, about 60% of the reduced budget affects Pemex (Petróleos Mexicanos, Mexico's state owned oil company) directly. So while Mexico has become less dependent on oil revenues to drive economic growth, the effects on government capital expenditures are clear. Pemex's oil production has fallen from over 3 million barrels per day (pre-2007) to just 2 million barrels per day in 2017, the lowest levels since 1980. The cut in oil investments, lower production and low oil prices in Mexico are having their impact on investment. Furthermore, with the current outlook for oil prices, future capital expenditures by the Mexican and Brazilian governments may be limited.

So what's in store for Mexico and Brazil, Latin America's two largest economies? Construction activity is not looking promising in the short term

The Brazilian cement producers' union (SNIC)'s consumption data show the correlation between GDP and cement consumption. Cement consumption is closely correlated to construction activity and economic activity and, hence, to GDP.

Since its peak in 2010, cement consumption has been declining rapidly despite the investment in construction for the 2014 World Cup and the 2016 Summer Olympics. While 2016 appears to be the trough year, the tempered GDP growth forecast does not signal a great improvement for cement consumption in the country.

Brazil:
Percentage GDP Change vs.
Percent Cement Consumption Change

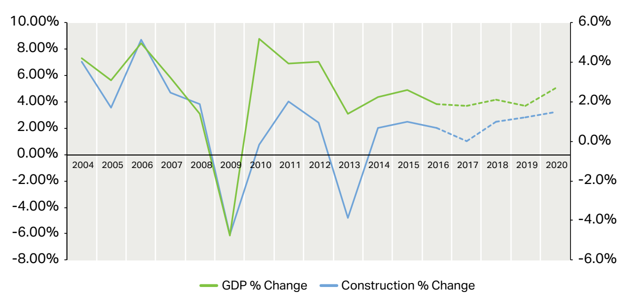


Source: World Bank, Economist Intelligence Unit, Sindicato Nacional da Indústria do Cimento -SNIC and FTI analysis.

The President of the SNIC has recently stated that the consumption of cement in Brazil for 2017 is expected to decrease 5% to 7% from 2016, implying that economic activity and/or construction activity will be subdued in 2017 as well. The Economist Intelligence Unit's (EIU) latest assumptions (February 1, 2017) are consistent with the SNIC, as they expect GDP to have contracted 3.5% in 2016, with 2017's GDP increasing slightly by 0.5%. However, the EIU notes that the weak activity in the fourth quarter of 2016 may further weaken 2017's GDP projection, and that due to a projected growth slowdown in China and the US, GDP growth is not expected to exceed 2% until 2019.

Mexico's construction activity is not expected to fare any better. The CMIC (*Camara Mexicana de Industria de la Construcción*) is expecting a relatively low growth scenario for construction in 2017, of between 0.5% and 1% due to economic uncertainty, and average annual growth of 2.3% in the next few years, when the industry has potential growth of 4% to 5%. Mexico's GDP is expected to grow moderately at just approximately 2% per year through 2019.

**Mexico:
Percentage GDP Change vs.
Percent Construction Change**



Source: INEGI (*Instituto Nacional de Estadística y Geografía*), CMIC (*Camara Mexicana de Industria de la Construcción*) and FTI analysis.

Construction companies in the region have already been negatively impacted by the decrease in GFCF with leverage increases over the period. With the contraction in international construction and the less than stellar prospects at home, many construction companies have already undergone restructurings and/or retreated from international operations, either by choice or necessity (e.g., as the result of exclusions from countries due to foreign bribery and corruption allegations).

While more restructurings in the sector are anticipated in the short term, particularly in Brazil, they provide an opportunity for right-sizing the capital structure and operations of construction companies, allowing for survivors of this turbulent period to be well positioned to capitalize on the vast but more distant opportunities in the region. ■

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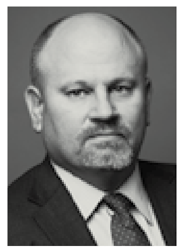


▼ **Brock Edgar** is a senior managing director in FTI Consulting's Corporate Finance practice and head of FTI's Latin American Restructuring Practice, based in Toronto. For the last 19 years, Mr. Edgar has worked exclusively on large multi-national restructuring assignments in Mexico, Caribbean and South America. To date, these assignments have involved the successful restructuring of more than USD 100 billion of indebtedness. Recent major Latin American restructurings include: Oi S.A. (one of Brazil's largest telecom groups), Empresas ICA (one of Latin America's largest construction companies), the three largest homebuilders in Mexico (GEO, Urbi and Homex), OAS S.A. (one of Brazll's largest construction companies), and Automotores Gildemeister (importer and retailer of Hyundai cars). Mr. Edgar is a Chartered Professional Accountant, Chartered Insolvency and Restructuring Professional and a Licensed Trustee in Bankruptcy.

▼ **Devi Rajani** is a managing director in FTI Consulting's Corporate Finance practice and is based in Toronto. Ms. Rajani specializes in advising on debt restructurings in Latin America, having been involved in restructurings totaling over USD 55 billion. Ms. Rajani's experience includes due diligence/business reviews, preparing companies for US Chapter 11 filings, financial modeling including capital structure models, integrated operational models, integrated cash flows, and other financial models used to assist stakeholders in understanding and negotiating complex transactions. She is a Chartered Professional Accountant and a Certified Insolvency and Restructuring Advisor. Ms. Rajani is fluent in English and Spanish.

Testing the Limits and Strengths of Restructurings in Mexico

By FERNANDO DEL CASTILLO

It has been 17 years since "*Ley de Concursos Mercantiles*" ("LCM"), the Mexican insolvency law, was promulgated on May 12, 2000. This paper is a retrospective with my views on the development of the LCM and with it, in great part, the restructuring legal work in Mexico. To this date, the LCM is still subject, alongside the Mexican judicial system, of dire criticism. A good portion of it is well deserved but, by sharing my views and experiences throughout 20 years of practice in the insolvency and bankruptcy field, I have come to conclude that the shortcomings and failures in restructuring processes under the LCM result from lack of expertise and training of professionals in the field, including those who are charged with interpreting and applying the law, and many times from ill-oriented objectives of professionals.

LCM Enactment – Policy Drivers and Early Reception

When the LCM was first enacted back in 2000, the Mexican government had few very clear ideas of its purpose. Mexico had to quickly enter the globalized world following the experience of the NAFTA. Unbeknownst at the time, but eventually not a shock to anybody, the approximately 70 years of single-party rule in Mexico (the *Partido Revolucionario Instiucional*, or PRI) was coming to an end. The younger political class, mostly technocrats who received their education outside of Mexico, realized that a change was needed to hold on to power and swiftly pilot the country into the new millennium.

Both abroad and locally, one of the main objectives for Mexico was to achieve just that: providing certainty to the rule of law and fighting corruption as means of attracting foreign investment and stabilizing the country. This general sentiment eventually ousted the PRI from power few months after the LCM came into effect.

The LCM was clearly aimed at achieving a restructuring and reorganization of a company with the least amount of litigation possible.

In this context, Mexican legislators (also with PRI majority both in congress and the senate) did not take the time to actually discuss the incredible burdens and issues under the outdated insolvency law that preceded the LCM, which only provided for interminable litigation thus laying the grounds for either abuse (most of the time, fraudulent) or liquidation of the debtor.

Naturally, there was also no time to consider all of the factors that would come to affect Mexico's free trade, which included a deep need for international financing because Mexico simply did not have the resources to fund the ambitious projects to modernize the country and how such international financing would end up complicating debt service when liquidity was scarce and the exchange rate between the peso and the US dollar put pressure on the Mexican economy.

So the legislature did what was natural and basically adopted the principles of the UNCITRAL Model Law on Cross-Border Insolvency, with few modifications. This approach had proven successful in other areas of Mexican law and did increase the level of certainty of the restructuring legal framework. In the end, the LCM was clearly aimed at achieving a restructuring and reorganization of a company with the least amount of litigation possible.

The first criticism of the LCM was that it was overly beneficial to financial institutions, namely Mexican banks that, based on Mexican banking regulation, virtually always obtained security for loans. The LCM provides that secured creditors may avoid altogether the insolvency proceeding and, prior to its two subsequent amendments in 2007 and 2014, were not even included in the general stay of enforcement at the beginning of the process.

Secured creditors could enforce their collateral with no risk of seeing their claim impaired by a majority of creditors and could even be unsecured for the unrecovered amount of their claim.

The LCM also included a provision that required any company that entered a "*concurso mercantil*", the Mexican insolvency process equivalent to the U.S. Chapter 11, to either reach a restructuring plan within one year of the commencement of the process, and even then only if it had the support of a substantial majority of creditors, or face liquidation.

So, companies were not necessarily keen to use the *concurso* process given that it took away from them a great deal of control over their future and Mexican banks could not care less on account of their security.

It is no surprise then that the law went unnoticed for a few years and was virtually unused. No more than 70 cases were filed during the first five years of its life. The law remained untested and the legal framework around it could not provide any data as to whether it would end up being a useful tool for the restructuring industry and prove to be up to the test of giving certainty to both ends of the equation.

First Testing and Lessons Learned

One learns to fight by fighting and so, it would all come to change in 2005 when, in a bold move, a Mexican company opted to use the Mexican *concurso* process in lieu of a long negotiated pre-packaged Chapter 11 in the US.

In the beginning, the process was expected to be contested and so it commenced but much to the benefit of the LCM, the parties eventually reached an agreement and agreed to implement the restructuring of the Company within the *concurso* process.

This provided the opportunity to show that the LCM did work and was an effective, and cheaper, tool to do a swift, in-court restructuring of debt that superseded US$1 billion, almost unprecedented in Mexico.

The fact that the company and its creditors were able to achieve a fast restructuring in a court located in Northern Mexico, provided the confidence the LCM needed to be considered in future cases. Also, that the Mexican plan was later recognized under an ancillary proceeding under Section 304 of the U.S. Bankruptcy Code (the predecessor to Chapter 15) gave further confidence to the market that the process would yield a result fair enough to be confirmed abroad, i.e., the international acceptance that was one of the objectives of the law. This success was going to be later put to the test too.

For all of its positive results, including the fact that this case was the example for a section to be included in the first amendment to the LCM in 2007 which provided for a pre-packaged *concurso*, this case also brought about certain concerns and exposed potential weaknesses of the LCM, including: (i) the ability to use under the LCM for a debtor to vote intercompany claims to confirm its own plan; (ii) since the restructuring occurred only at the parent company level, trade debt was not addressed and the question of whether the LCM could be effective to process trade claims remained open and (iii) the lack of ability for creditors to dilute shareholders of the company within the *concurso* process.

Yet, for all of its problems, the case provided grounds for the LCM to be re-utilized and for the first time, discussions around a restructuring of a Mexican company with foreign debt started to include the Mexican process instead of a Chapter 11, which is still true today.

Relevant in this context is the case of Satelites Mexicanos. Similar to the 2005 case discussed here, Satelites Mexicanos was negotiating a restructuring of its bond debt when it decided to file for *concurso*, only to end up going to the United States to finalize it. Notwithstanding the magnitude of the debt at stake, the case was not contested in Mexico and it waltzed through the courts uneventfully, which also helped boost confidence in the Mexican process.

When it's Not the LCM's Fault – The True Reasons behind the Mexicana de Aviación Debacle

That is, until the Mexicana de Aviación case in late 2010. Mexicana de Aviación had been struggling financially for some time. Liquidity was scarce and costs were hurting the company. However, this was hardly their biggest problem. With a strong, long-standing union, their employee debt was increasing and negotiations were going nowhere. The Mexican constitution, marking a century this year, is a social constitution. Labor claims are privileged and preferential to any other claims. Naturally, the LCM had to respect that privilege.

Not to overly simplify the issue but, when the decision was made to put the company and some of their operating subsidiaries in *concurso* with the aim to negotiate and obtain new investors, both the company and the union were not seeing reality; the former by making the decision and the latter by not stopping it through adopting a more flexible position.

Mexican banks did what they were supposed to and enforced their security. In addition, most of the aircraft engines were re-possessed by the lessors and quickly, the case was about employee debt, trade debt and consumers. No investors came about and the employees did not see any money until much later and even then, with a deep discount.

Among the various wrong legal procedural aspects that emerged from this case, including the company obtaining provisional protection that was nowhere to be found in the text of the law, two stood in the spotlight: (i) for reasons chiefly political, although the company did not secure a plan with its unsecured creditors within the permitted time of one year, Mexicana was not forced into liquidation as it was required under the LCM and remained in that status for a few years; (ii) the Supreme Court of Justice "interpreted" a section of the law to categorize consumers, which under the text of the law are unsecured, as privileged creditors. If there was no money to re-pay employees, one can imagine what would happen to the passengers who bought a ticket.

Mexicana never flew again. Very few lucky employees got jobs in other airlines; most of them had to pursue jobs outside the industry. Many never got a new job and ended self-employed. Sadly, some ended in the streets.

However, not one of these issues might be attributed to the LCM. Certainly, a more robust law could have provided grounds to entice investors. Surely, a better classification of creditors would have helped but the bad decision process and wrong interpretation of the law is the responsibility of the people using the law, not the law itself.

Comerci – When the Law Actually Worked

Amidst the wrong impression caused by the Mexicana de Aviación case, the wave of the mortgage crisis in the United States in 2008 hit Mexico hard. There is a saying that when the United States gets a cold, Mexico gets pneumonia. There was not a well-developed mortgage security market in Mexico so the problem did not start there. Back in 2006, Mexico had had its first election after ousting the PRI from the presidency. Very low in popularity, there was a big question as to whether the conservative PAN could get a second term with the left-wing party PRD pushing its way in the polls by the hand of the perceived "populist" Lopez Obrador.

Many big companies hedged against the Mexican Peso, so when the PAN did take the presidency following a legal battle, trust in the country was regained. Coupled with an increase in the oil prices, the Mexican economy became stronger and may of these companies were losing money fast in their hedges and decided to short their positions. When the mortgage crisis weakened the U.S. economy, the Mexican pneumonia came with the plummeting of the Mexican peso. Overnight, these companies saw their debt grow by billions of dollars.

Comercial Mexicana, a large Mexican retail store, entered into a crisis. It attempted to get into *concurso* twice and was rejected both times. This caused the company to pause and commence negotiations with its creditors: (i) Mexican banks; (ii) international banks for the derivatives and (iii) bondholders both in the United States and in Mexico.

Two years of negotiations ensued before all of the parties decided to file for *concurso mercantil*. On the other side of the spectrum from the Mexicana de Aviación case, in this instance negotiations had secured a plan for the company and the majority of its creditors to navigate through *concurso* with significant control over the process and with the aim of implementing a very complex financial restructuring.

A good understanding of the LCM provided the necessary tools to achieve this goal. The company found strength in the fact that Mexico could be the only jurisdiction where a plan could be implemented and found relief in the fact that the shareholders could not be diluted or deprived of their control over the company, a demand quickly made by creditors at the beginning of the negotiations. On the other hand, creditors understood that the LCM would give them the certainty of a process that would treat them fairly and that the company was not going to able to linger in *concurso* for longer than it had to .

This case was registered as a success, together with the Iusacell case which used *concurso* to restructure its bond debt, both in record times, to date still undefeated.

Intercompany Voting – The Infamous "Vitro Issue"

However, three issues were still looming: (i) the fact that until then, no big company had done a contested restructuring in a Mexican *concurso* proceeding; (ii) that only cases of restructuring at the parent level had been tried and, (iii) the recurring matter of a debtor's ability to use intercompany claims to confirm its own restructuring plan.

Although the intercompany claims were actually used to confirm a plan in a hostile environment only a few times, this issue remained in the spotlight for several years and professionals even developed contractual instruments to protect lenders and structure around these provisions (or lack thereof) of the LCM. The Vitro case is probably the most relevant in respect of the ability to use intercompany claims to confirm a debtor's plan. Putting aside the outcome of the Chapter 15 filing where the Mexican plan was not confirmed because it provided for the release of the guarantees without the guarantors being debtors in the *concurso* proceeding, this case triggered the amendment to the LCM which limited the use of intercompany claims to confirm a plan, except when such claims voted with the majority of third party creditors or represented less than 25% of the total amount of claims.

Vitro, a big industrial company north of the country, had been negotiating its debt for some time in the US and when those discussions broke, it decided to commence a *concurso* proceeding in Mexico. A highly contested case, it served the purpose to show that the LCM could also be used to confirm a plan within a reasonable time period (below 9 months) in a litigious scenario. Although not confirmed in the US, the Mexican plan stood its ground in Mexico and paved the road for a negotiated settlement post-*concurso*. Together with the Comercial Mexicana case, it showed the ability of judges to comprehend and process complex claims and plans.

Certain calm succeeded the Vitro case until the housing loan market started to collapse and saw the case of Hipotecaria Su Casita. Although having reached well above the majority required under the LCM to confirm a plan, the majorities requested by the Mexican government to accept the restructuring were not reached and the company had to be put in liquidation. With little litigation, the liquidation process under the LCM got to play its role and produced recoveries above the standard under the prior law.

Mexican Homebuilders – Testing the Limitations of the LCM (and of the Courts Interpreting it)

With the experience gained during the prior 14 years, practitioners considered that a somewhat uniform practice in the insolvency and restructuring market had been achieved for the future. That is, until the homebuilders' financial crises exploded.

Sitting on a considerable volume of land that mostly ended up useless for building low-income housing complexes due to a 360º change in government housing politics and norms, these homebuilders faced the most challenging of the restructuring processes in recent history.

With scarce liquidity that became zero liquidity pretty fast, these companies had debts almost impossible to pay.

All three of these companies, GEO, Homex and Urbi had only one plan to offer: capitalize all debt with significant dilution of the shareholders, only for both creditors (new shareholders) and existing shareholders to see a second dilution when the new investors injected funds to the company to keep it in the business.

In the case of Corporación GEO, this had to be done not only at the parent level but also with 15 other subsidiaries which entailed, among other things, having to process trade and consumer claims numbering in the tens of thousands with virtually no cash.

These three companies had planned on receiving DIP financing during the process relying on a 2014 amendment of the LCM which simplified and clarified the DIP financing rules. Again, through no fault of the LCM, this financing did not happen, mostly because banking regulations made it incredibly cumbersome for banks to lend to bankrupt companies.

In the case of GEO, restructuring plans were all filed on the verge of the deadline and all got approved shortly thereafter.

There are many reasons to consider these cases a success, although it may take some time for that to happen. The LCM met one of its final tests: its ability to do a case with significant amount of trade, financial and consumer debt. It also proved to be a very helpful tool to process tax debt using, for the first time, tax regulations that allow the government to be treated *pari-passu* with unsecured creditors under very specific circumstances.

But when everything seemed glaring, an appellate court using a provision in the liquidation section of the LCM, which application is questionable, reversed the approval of the GEO parent company plan on purely formalistic grounds. Not rejecting the substance or the fairness of the plan, the court held that no approval of a plan could be made if appeals in respect of the claims (recognition and ranking of credits) were pending, notwithstanding that the LCM provides for very specific mechanisms to accommodate changes in the amount of debt recognized.

The controversy around this opinion by the appellate court lies in the fact that it could cause extensive litigation before a plan may be implemented, which is the very problem the LCM intends to avoid. The GEO plan was re-approved three months later with no significant consequence other than increasing legal costs. However, the re-approval did not come in hand with a reversal of the opinion that created the whole issue. It just so happened that the challenges against the recognition of the claims (credits) of GEO were resolved almost simultaneously, thus clearing the way for re-approval of the plan per the appellate court's own criteria.

Although the Mexican courts are not bound by this opinion, there is no assurance that they will not actually follow it in the future.

What Needs to Change?

A new test is in front of everybody concerned with the insolvency and restructuring practice. It is necessary to make the changes that the LCM does need.

Some LCM Amendments Needed:

1. Divide the unsecured creditor class into separate classes (trade/consumer/financial debt)
2. Allow debtor to better operate its business during *concurso* (e.g. participation in public bids)
3. Create specialized bankruptcy courts

One of these amendments should be the possibility to divide the unsecured creditor class into different classes so that trade and consumer debt may have different treatment. Today, the LCM requires that any unsecured creditor that does not support a plan receives the same treatment as the best treatment afforded to the required majorities of unsecured creditors that voted for it. This prevents companies from giving trade and consumer debt treatment akin to its nature that often requires different forms of payment, e.g., payment to consumers in full for social reasons.

Under the current statute, financial debt that does not support a plan would have to be treated *pari passu* with trade and consumer debt. To avoid this, the restructuring plans that are being filed today opt to treat trade and consumer debt in the same way as other financial debt, which is not necessarily an efficient and equal treatment as was seen in the case of GEO.

Among all the experiences and lessons, one stands out clearly: ethics have to be applied across all aspects of the practice to make it what it is supposed and needs to be.

Another important amendment would be to provide better rules so that a company is not frozen by the mere declaration of *concurso*. Albeit the LCM allows a debtor to continue to run its business after the declaration of insolvency, often companies in *concurso* find themselves with vague rules for payments in the ordinary course of business. Another example of better rules for not paralyzing companies in *concurso* is to include provisions that expressly allow them to continue participating in public bids if certain conditions are met.

However, any changes made to the LCM will not mean anything and will not change anything if the courts are not trained in this discipline and special bankruptcy courts are finally created. The most compelling task today is to have specialty courts, the lack of which is due to lack of enough funding for such an institution.

I started this piece by saying I would share my views on the development of the LCM. Among all the experiences and lessons, one stands out clearly: ethics have to be applied across all aspects of the practice to make it what it is supposed and needs to be.

1. Names omitted due to confidentiality commitments.
2. With the exception of Ahmsa, albeit the latter was tried under the prior law and all would agree is hardly a restructuring case, or for praise, or certainty; if anything, Ahmsa is about all that was wrong with insolvency work in Mexico.
3. Under the LCM, a simple majority of over 50% of unsecured creditors, is required to confirm a plan of reorganization.
4. Under the LCM the unsecured class is only one class and treatment may not vary amongst this class.
5. In 2007, the LCM was amended to provide clearer and definite language in the sense that a debtor had to be liquidated if it did not reach a plan within 365 days as of commencement of concurso and made the judges personally liable for going beyond this period.
6. From horizontal sprawl to vertical concentrated development, thus changing the value of the "land banks" held by the homebuilders.
7. In constitutional proceedings known as "amparo".

Fernando Del Castillo is a corporate and litigation lawyer at Santamarina y Steta in Mexico City, with more than 20 years of experience in insolvency, civil and mercantile litigation, as well as commercial arbitration law. Fernando has broad experience in counseling major domestic and foreign companies in arbitration proceedings held in Mexico and abroad in matters that involved civil, commercial, construction, and insurance law, among other areas. Fernando joined Santamarina y Steta in 1993 and became a partner in 2002. He is a member of the International Chamber of Commerce (ICC) and Mexico City Chamber of Commerce (CANACO). He has a law degree from Universidad Nacional Autónoma de México and a masters in Derecho de Empresa from Universidad Panamericana.

NPL Deals In The Spotlight – Romania

By **ALINA STANCU BIRSAN, MIRONA APOSTU** *and* **SANDRA CONSTANTIN**

Although the restructuring of non-performing loans ("**NPL**") was slower in Romania than in other EU member states, NPL deals have been of late among the most interesting and challenging transactions in the Romanian market.

Along with other Central and Eastern Europe ("**CEE**") jurisdictions, Romania has been targeted by foreign investors with appetite for investing in deals aimed to acquire, or finance, the acquisition of NPL portfolios.

The NPL Boom

Prior to 2014, banks and financial institutions operating in Romania employed a relatively wide range of solutions for credit recovery, with rather limited efficiency. However, further to the implementation of new prudential regulations brought by Basel III international standards, as well as other reforms for implementing European Union Directive 2013/36/EU and Regulation 575/2013, the National Bank of Romania ("**NBR**") has started to apply pressure on local banks to dispose of their problematic assets and clean-up their balance sheets.

2014-2015

In 2014 and 2015 several large Romanian NPL deals were executed. These transactions benefitted from a tailwind of increasing foreign investor appetite for acquisitions of NPLs as well as financing of NPL acquisitions. For example, in 2014 Volksbank sold a EUR 490 million portfolio of Swiss franc-denominated mortgage loans to a consortium comprising of Deutsche Bank, Anacap and HIG, while BCR (the largest Romanian bank based on assets) sold to Deutsche Bank and APS two NPL portfolios, one with a value exceeding EUR 220 million and another of EUR 400 million.

Following its emergence in 2014 and early 2015, the Romanian NPL market experienced another active period at the end of 2015 and in the first semester of 2016. During this period, two of the largest deals were completed – Projects Tokyo and URSA. In Project Tokyo, BCR sold to APS, Deutsche Bank and IFC a NPLs portfolio with a nominal value of approx. EUR 1.2 billion. In Project "URSA", Bancpost, ERB Retail Services IFN and a Dutch vehicle of Eurobank sold to a consortium comprising of IFC and Kruk three unsecured, consumer credit-backed NPL portfolios with a nominal value of approx. EUR 597 million, for a total purchase price of approx. EUR 46 million.

2016

NPL acquisitions continued throughout 2016, although the completed deals were in relation to portfolios of lower value (Intesa Sanpaolo sold to APS and AnaCap an approx. EUR 287 million NPL portfolio, Bancpost sold to a consortium of investors a retail NPL portfolio with a nominal value of approx. EUR 170 million and Romanian state-owned CEC Bank sold to Kruk an approx. EUR 70 million NPL portfolio).

The main investors in Romanian NPL portfolios have so far been investment funds and debt collection companies. In fact, following the largest deals of 2015 and 2016, debt collection companies such as Kruk (Poland), Kredyt Inkaso (Poland), APS (the Czech Republic) and EOS (Germany) became the most active players on the Romanian NPL market.

This trend could change however, due to the recent changes in legislation.

Challenges of NPL deals

NPL deals can be extremely complex and challenging transactions. Foreign investors need to carefully consider a multitude of legal, financial and tax matters and pay increased care to the structuring of the transaction so that all the specific regulatory requirements applicable in each relevant jurisdiction are complied with.

As a result, there are certain legal matters which require more attention and in-depth analysis in international NPLs deals than in local deals. Qualification of NPLs as "bad debt" and transfer and enforceability of foreign law governed loans and security interests are just two of the matters that we will present below which are particularly challenging in this type of transaction.

Summary of NPL - Specific Deal Challenges in Romania

NPL Determination	Purchase & Transfer Considerations	Other Regulatory Challenges
Qualification of NPLs as "bad debt" under applicable law – under-performing loans do not necessarily qualify as "bad debt"	GEO 52/2016 introduced new rules for transfers of 'bad debt' to non-regulated entities	Enforcement of security interests for cross-national portfolios
"Bad Debt" portfolio composition – specific determination and transfer rules applicable to retail loans, mortgage retails loans and corporate loans	New regulations for the operation of debt collection companies and distressed investors in Romania	Specific regulations for large transactions, such as approval of the National Bank of Romania or clearance of the Competition Counsel

Qualification of NPLs as "bad debt"

In Romania, performing loans may be acquired only by regulated entities (e.g., credit institutions or non-banking financial institutions). Credit institutions or non-banking financial institutions licensed in EU member states may passport their activities in Romania, either directly or by setting up a local branch, and purchase performing loans or NPLs against Romanian debtors in the same conditions as Romanian regulated entities.

Provided that certain conditions are met (please see Section 2.3 below), loans qualified as loss or "bad debt" may be acquired by non-regulated entities.

Romanian banking regulations provide various criteria for qualifying a loan as "bad debt." For instance, if after applicable grace periods, the loan has been in arrears for at least 91 days (for debtors included by the credit institution in the category of debtors with highest financial performance) or such other period of time determined by the financial performance category in which the debtor is included, or if the enforcement or bankruptcy proceedings are initiated against the relevant debtor.

However, there are specific categories of NPLs where these criteria vary. For example, in respect of credit agreements for real estate property entered into by consumers after 30 September 2016, when the Government Emergency Ordinance 52/2016 ("**GEO 52/2016**") entered in force, a loan is non-performing when the debtor has delays in payment of principal and/or interest of at least 90 days. Therefore, for the purpose of transferring NPLs under GEO 52/2016, the financial performance category in which the debtor was included by the credit institution would no longer be relevant, since the loans can be qualified as non-performing only after 90 days of delay in payment.

Given the hurdles to the designation of loans in Romania a careful assessment of the NPL portfolio is advisable prior to any acquisition in order to determine whether the portfolio comprises (exclusively) of loans qualified as "bad debt", especially as this will likely impact the conclusion on whether the acquiring entity needs to be a regulated one or not.

What is a "Bad Debt"?

1. The qualification of a loan as a "bad debt" is in some ways analogous to a poor credit rating.
2. Under Romanian law, this analysis is dependent on the number of days since the loan has been in arrears and on whether or not enforcement procedures have been commenced against the debtor.
3. The number of days since the loan has been in arrears is set differently for each category of clients depending on their financial performance initially assessed by the bank.
4. A loan of a client included in category A (the highest financial performance) can be qualified as "bad debt" only if the loan is in arrears for more than 91 days.
5. A loan of a client included in a lower category of financial performance can be declared "bad debt" if the loan is in arrears for a minimum of 15 – 90 days.

When is an NPL not entirely an NPL?

The qualification of NPLs as "bad debt" becomes challenging in an international context, as "performing loans" are sometimes sold as NPLs, although these loans were not qualified as "bad debt" according to Romanian legislation and the applicable EU regulations. In some cases, this may be due to the fact that "performing loans" are actually treated by banks as sub-performing or restructured loans in accordance with their internal regulations, but were never officially qualified as "bad debt" and provisioned accordingly.

Another possible reason is that the criteria used in Romania for classifying a loan as "performing" or "non-performing" sometimes differs from those applicable in other jurisdictions. As a result, there may be cases in which certain loans qualified as "non-performing" according to the legislation of another jurisdiction, could in fact be performing if judged from a Romanian law perspective. A practical example of this case is when "non-performing" or "sub-performing" loans are qualified as "bad debt" by the local branch of a foreign bank which is under the general supervision of its home state regulator and applies different rules for qualification of the loans. The exception, however, in relation to the acquisition of "bad debt" by non-regulated entities will only be available if the criteria for the qualification of "non-performing" loans as "bad debt" are met as per the Romanian legislation and the applicable EU regulations.

Therefore, despite the efforts made by the European Banking Authority to harmonize the qualification of non-performing exposures at the level of the EU states through the amendment of EU Regulation 575/2013, this matter remains sensitive and should be treated as such by foreign investors as this may impact on both the licensing requirements of the purchaser, as well as the manner in which the transfer of the NPLs will be structured (e.g., through transfer of receivables or contracts).

Uncertainty from new rules for transferring NPLs

GEO 52/2016 brought some unexpected changes to the applicable legislation dealing with the transfer of "bad debt".

Prior to its entry into force on 30 September 2016, the general rule was that lending activities performed on a "professional basis" (e.g., in broad terms, as a stand-alone economic activity) could be carried out only by regulated entities (such as credit institutions and non-banking financial institutions) and only such entities could acquire loan portfolios.[1] As an exception, loan portfolios qualified as "bad debt" could be transferred to non-regulated entities. GEO 52/2016 repealed the article stating both the rule and the exception which was applicable regardless of whether the relevant loans were corporate or consumer loans, thus raising the question of whether non-regulated entities may still acquire NPL portfolios.

GEO 52/2016 offers an answer in respect of consumer loans portfolios only, stating that they may be transferred only to credit institutions or non-banking financial institutions authorised to grant this type of loans in Romania, or alternatively, to entities authorised to issue securitized debt instruments.[2] By way of exception, receivables deriving from non-performing loans (i.e., loans due for at least 90 days), or in relation to which the creditor declared the acceleration of the loan or initiated enforcement proceedings against the debtor, can be acquired by debt collection entities having their registered seat, branch or a representative office in Romania.

The legal framework remains unclear with respect to the possibility to transfer corporate NPLs to non-regulated entities. In light of the rule that lending activities may be carried-out on a professional basis only by regulated entities, determining whether a purchaser would be regarded as carrying-out a lending activity on a professional basis as a result of the NPL acquisition becomes essential.

As per the law, the NBR is the only authority competent to decide whether an activity is professional lending or not. It has therefore been helpful to see that it has recently taken a stance (albeit only in the form of a press release) and clarified that the acquisition of corporate or retail loan portfolios qualified as "bad debt" according to the applicable regulations, as well as debt collection activities carried out by non-regulated entities, do not represent lending activity on a professional basis.

The position expressed by the NBR leads to a change in the legal assessment that a potential buyer of an NPL portfolio needs to make on whether it needs a regulated vehicle for the acquisition or not. It is not only the non-performing status of the loans that is relevant, but even more so, its work-out approach to it. For example, it could be argued that the acceleration of loans and the commencement of enforcement proceedings against debtors by the purchaser do not represent professional lending activities. However, if after the acquisition of the NPL portfolio the buyer reschedules the loans or continues to collect instalments, interest and other fees on their due dates in accordance with the terms of the loan agreements, then it may be argued that it does carry out professional lending and should therefore be a regulated entity.

The prudent approach given this change in legislation would be for potential buyers to obtain official confirmations from the NBR regarding the possibility for a non-regulated entity to acquire the respective NPL portfolio. This approach is fairly common in Romania when it is not clear whether certain activities represent professional lending activities. The NBR is usually very responsive and an official answer can take up to 30 days to obtain. However, in practice this may not be desirable or achievable due to, for example, time constraints which are particularly relevant in competitive processes.

New rules for debt collection companies
The recent GEO 52/2016 has also introduced new rules for debt collection companies managing retail loan portfolios. For example, they need to have a share capital of at least RON 500,000 (approx. EUR 111,000), register with the Romanian National Authority for Consumer Protection and have their registered seat, a branch or a representative office in Romania.

In principle, these requirements should apply only to debt collection companies, which include distressed purchasers and collection agencies, acquiring consumer loans for real estate property granted after 30 September 2016 and other consumer loans not regulated by GEO 52/2016. However, the new rules are not very clear and in practice, all debt collection companies may in fact be required, for example, to register with the Romanian National Authority for Consumer Protection in order to avoid consumer complaints.

Other challenges

Transfer and enforceability of foreign law governed loans and security interests
It is not uncommon for NPL portfolios sold by Romanian banks or with Romanian debtors to comprise loans and related security interests governed by various laws other than Romanian law or for the governing laws of the loan to differ from that of the security documentation.

The fact that certain loans and/or security interests are governed by different laws may also impact on the approach that the purchaser intends to implement on a post-closing basis. For example, a loan governed by foreign law may prove difficult to enforce directly in Romania without first obtaining in the relevant foreign jurisdiction a court decision against the debtors under the respective foreign law governed loan. To the extent such court decision was issued in a member state of the European Union, the creditor can seek its recognition in Romania under the Regulation (EU) no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, or its enforcement under Regulation (EC) no. 805/2004 creating an European Enforcement Order for uncontested claims. This may delay the enforcement procedures in Romania with the period necessary to obtain the foreign court decision or may even trigger the cancelation in court of enforcement proceedings initiated prior to having obtained the foreign court decision.

Similarly, where a loan is governed by Romanian law and the related security interests are governed by foreign laws, the risk is that the creditor may not be able to commence a direct enforcement of the security interests in the foreign jurisdiction, without first obtaining a court decision in Romania against the debtors under the respective Romanian law governed loan and afterwards seeking the recognition of such court decision in the foreign jurisdiction.

The transfer of certain security interests (e.g., real estate mortgages) governed by Romanian law would typically require authenticated documentation, even if the receivable that they secure is governed by the law of another jurisdiction and could be transferred on the basis of a deed under private signature. This needs to be accounted for in relation to transaction structuring, preparation of the relevant transaction documentation and with regards to notary costs.

Particular challenges may also appear where loans are subject to multiple co-existing sub-participations or syndication rules of international banks. The sub-participation or syndication of certain loan exposures would allow the seller to transfer only its share of the loan and the acquirer may not necessarily control enforcement of the security on its own. Therefore, the purchaser should carefully assess sub-participation and/or syndication rules as these may influence the legal regime applicable to the transfer of the loans, e.g., what part of the loan receivable may be transferred, in what conditions and subject to what restrictions or consents.

Specific regulatory requirements for large NPL deals
Depending on the volume and structure of the NPLs portfolio, other specific challenges can be faced by potential investors. For example, large NPLs deals may trigger regulatory requirements to obtain clearance from the NBR, if the transaction results in a total or a substantial transfer of the patrimony of the respective bank. The law is not clear with respect to the meaning of "substantial transfer of patrimony". Therefore, it may be argued that an NBR authorization may also apply in case of disposal of a large NPLs portfolio when such portfolio represents a substantial part of the assets of the bank. This legal requirement does not apply to the disposal of NPL portfolios by the local branches of foreign credit institutions or other credit institutions incorporated in EU member states which are directly active in the Romanian market, but may still be relevant in such case from the perspective of a buyer, if it is a Romanian bank.

Certain antitrust requirements may also become applicable. In previous cases when notifications have been made to the Romanian Competition Council in relation to the acquisition of NPL portfolios, the authority looked at the relevant markets of the target assets: (i) portfolio of non-performing loans; (ii) portfolio of loans which are not classified as "loss" category (either sub-performing loans or performing loans); and (iii) real estate assets. The geographical relevant market was determined as the Romanian market. As regards the ancillary real estate assets, the geographical relevant market where such assets were located was deemed the local market (the city where the real estate asset is located and its proximities).

According to the Romanian Competition Council, the loans classified as "loss" category will be converted into receivables, leaving the market of finance-banking services and entering the market of debt collection services. If the acquirer is not a credit institution, the market should be determined by reference to the debt collection services and the computation method applicable to a service provider's turnover. The loan portfolio which cannot be classified as "loss" will continue to remain on the market of financial-banking services, on the lending services segment.

An operation will need to be notified to the antitrust authority in Romania, if the following conditions are cumulatively met: (i) the transaction is an economic concentration (there is a long lasting change of control); and (ii) the following turnover thresholds are met: (a) the aggregate turnover of all undertakings involved in the economic concentration (i.e., on the one hand, the acquirer and its group and, on the other hand, the target and its subsidiaries, if any) exceeds EUR 10 million in the last financial year; and (ii) each of at least two of the undertakings concerned achieved a turnover that exceeded EUR 4 million in Romania in the last financial year. From our expertise, simpler transactions carried out between a seller and a recovery agency have not been notified, but they may have been under the above-mentioned threshold.

Transfer of undertaking requirements provided by the Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (TUPE Directive) and related regulations may also become applicable to large NPLs deals and need to be observed depending on the specifics of the NPL transfers. This may be the case when, for example, the NPL portfolio is so large that the seller is in a position to actually transfer a substantial part of its business, together with the relevant employees.

Costs applicable to the transfer of the NPLs portfolio
NPL deals trigger specific costs, such as those related to the transfer of the portfolio of NPLs and the taking of financing security (as the case may be) which in some cases could be quite substantial when the loans are secured by real estate mortgages.

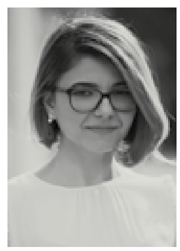
Concerning registration costs, the transfer is not subject to any stamp tax in Romania, transfer taxes or costs, save for administrative cost (e.g., related to the notification of the assigned debtors) and the costs in respect of the registration of the transfer with the Electronic Archive for Movables Security Interests in Romania, the Land Book or other specific registries. If a real estate mortgage or other security right which is subject to registration with the Land Book is being transferred as part of the NPLs portfolio, the transfer agreement must be concluded in an authenticated form and executed in front of a competent Romanian notary public. The authentication costs are sizeable (i.e., 0.3% of the value of the assigned receivables) and are in most cases, an important factor in structuring NPL deals.

Glimpse into the future

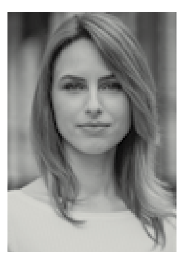
Despite the recent changes in legislation which brought a certain degree of ambiguity, the Romanian market continues to show potential for NPL deals at least for the next couple of years. Some of the largest banks in Romania are still struggling with an NPL rate above 10% and we expect that there will be several transactions in the sector in the coming period. ■

1. Lending operations can be performed in Romania on a professional basis only by regulated entities authorized to perform such operations, and the NBR is the only authority able to decide whether an activity represents lending on a professional basis or not. In principle, when deciding whether an activity qualifies as "professional", NBR takes into consideration certain criteria, including whether the lending activities are performed as stand-alone economic activities.
2. This refers to entities which are governed by specific regulations and which are allowed under Romanian law to issue financial instruments, secured by portfolios of receivables, such as mortgage bonds.

▼ **Alina Stancu Bîrsan** is a partner Alina is heading the Finance & Banking department at the Romanian law firm PeliFilip and has significant experience in the field. Her main practices are Finance & Banking, Mergers and Acquisitions, Energy and Projects. Before joining PeliFilip, Alina worked for five years in the Bucharest and London offices of Linklaters. Alina has been involved in complex finance transactions and has assisted both major international banks (among which J.P. Morgan Securities Plc, Raiffeisen Bank International AG and ING Bank NV) and borrowers in relation to NPL acquisitions, project finance, syndicated loans, club loans, restructuring of financial arrangements and related security packages. Her geographic focus is on Europe and North America. She is a graduate of the University of Bucharest, Faculty of Law and received a Maitrise from College Juridique d'Etudes Europeennes, Universite Paris I, Pantheon Sorbonne.



▼ **Mirona Apostu** is a senior associate at the Romanian law firm PeliFilip. Mirona's main practice areas are banking & capital markets and real estate. She has extensive experience in complex finance transactions and has advised clients, both on the lender's and the borrower's side in relation to, inter alia, development and financing of real estate and wind farm projects, restructuring of financial arrangements and putting into place of security packages in innovative transactional structures, sale of non-performing loan portfolios, as well as by providing complex banking regulatory advice to clients. Her client portfolio includes banks and companies such as: Raiffeisen Bank International AG, ING Bank NV, Citibank Europe plc, Dublin, MKB Bank Zrt, TFB Mortgages Limited etc. Her geographic focus is on Europe and North America. Mirona has a law degree from the University of Bucharest, Faculty of Law.



▼ **Sandra Constantin** is an associate at the Romanian law firm PeliFilip. Sandra is member of the Finance & Banking department at PeliFilip. She has provided advice on a range of banking and finance transactions, both cross-border and local, with a focus on lending, restructuring and acquisition of loan portfolios. Her background also includes advising on compliance matters in the banking, insurance and payment services industries. Sandra's client portfolio includes banks, real estate developers and loan portfolio management companies. Her geographic focus is on Europe and North America. She is has a degree from "Al. I. Cuza" Iasi University, Faculty of Law.

Insolvency Proceedings In Greece After Recent Reforms

By: CATHERINE M. KARATZAS, VASSILIKI SALAKA *and* ANGELIKI S. TSATSI

Recently, reforms regarding insolvency proceedings took place in Greece (the "**Reforms**"), in order to meet the demand for a system which is easier to use and closer to the needs of the market. The need for the Reforms was exacerbated by the financial crisis in Greece, leading to an increased number of businesses in financial distress, which, if not timely and efficiently rescued or liquidated, can create a domino effect to the market, by adversely affecting the creditors, employees, and stakeholders. Moreover, most of the Reforms are in line with European Commission Recommendation 2014/1500 of 12.3.2014 "on a new approach to business failure and insolvency" (hereinafter the "**Recommendation**").

Key Reforms

1. Acceleration and simplification of bankruptcy procedures.
2. *"Second chance"* mechanism for honest and in good faith bankrupt natural persons.
3. Enhancement of pre-bankruptcy rescue mechanisms.

Such Reforms were introduced by virtue of Law 4446/2016 (Government Gazette 240/A/22-12-2016) (the "**Amendment**"), which amended Law 3587/2007 (the Greek Bankruptcy Code). All references to the Greek Bankruptcy Code hereinafter include the newly introduced or amended provisions as in force. The Reforms apply to proceedings initiated after 22.12.2016, while previous proceedings in principle remain governed by Law 3587/2007 as in force before the Amendment. Though several bankruptcy and rehabilitation petitions have been filed since the Amendment, empirical evidence is not yet available from which any conclusions can be drawn with respect to the Reforms.

Main Aspects of the Reforms

a. **The acceleration and simplification of bankruptcy procedures** generally consists of the following amendments:

- Limiting the involvement of the bankruptcy court in the bankruptcy procedure, by transferring many of its duties to the bankruptcy trustee;
- Abolishment of the creditors' committee as one of the participants in the bankruptcy proceedings[1] (a body that, under the previous regime, was proven to stall rather than facilitate the proceedings)[2];
- Adding flexibility to the court with respect to the procedure to be followed as far as "small" bankruptcies[3] are concerned;
- Shortening of certain applicable deadlines, such as (i) the deadline for the convocation of the creditors' meeting, (ii) the deadline for a delayed submission of a creditor's claim and (iii) the deadline for the submission of the reorganization plan and its acceptance;
- Elimination of pre-judgement of the reorganization plan by the court, which prior to the reforms had allowed the court to examine the reorganization plan before the creditors vote on it and to dismiss the plan if (i) its content did not comply with the requirements of the law, (ii) it was obvious that it would not be accepted by the creditors or ratified by the court or (iii) the creditors' claims, as modified by the plan, could not be fulfilled.

b. **Second chance:** In line with the Recommendation, a bankrupt debtor who is a natural person (hereinafter an "**entrepreneur**") who has (i) acted in good faith before and throughout the bankruptcy procedure, (ii) been cooperative with the participants during the bankruptcy, (iii) not fraudulently caused the bankruptcy and (iv) not been convicted for certain crimes, can be fully discharged from any of the creditors' claims which have not been fully satisfied, by virtue of a court decision which is issued following an application by the debtor after the lapse of two years from the declaration of bankruptcy or any time after the completion of bankruptcy. The entrepreneur is in principle discharged if and when a reorganization plan is ratified for the bankrupt business (and upon such ratification), unless such plan provides otherwise (though any debts arising out of fraud or gross negligence are not discharged). The short time period for discharge is an important change, because prior to the amendment, an entrepreneur could be discharged only ten years after the declaration of bankruptcy or if he had paid in full all bankruptcy creditors for the principal and interest of their claims up to the declaration of bankruptcy

   Such second chance is available only once per entrepreneur, subject to a limited exception.[4]

c. **The enhancement of the pre-bankruptcy rescue mechanisms** include:

- No opening of rehabilitation procedures (discussed further below) without a pre-agreed rehabilitation plan already in place ("pre-pack"); thus the courts are not overloaded with petitions that are not probable to succeed and/or aim only at stalling bankruptcy proceedings;
- Creditors with claims above certain thresholds can initiate rehabilitation proceedings (provided that the debtor is already in *a cessation of payments,* i.e. that the debtor is unable to meet overdue financial obligations in a general and permanent way[5]);
- New procedures to deal with non-cooperating shareholders[6];
- Abolishment of the special liquidation procedure[7];
- The debtor can file for bankruptcy even before cessation of payments in the case of contingent insolvency,[8] provided that it simultaneously files a reorganization plan.

General Framework of Bankruptcy proceedings in Greece

Insolvency proceedings in Greece are governed by: (a) the "Greek Bankruptcy Code" and (b) by articles 68-77 of Law 4307/2014 (the "Special Administration Law").

Four types of insolvency proceedings under Greek law

1. *Stricto sensu* bankruptcy-liquidation
2. Pre-bankruptcy rehabilitation proceedings[9]
3. *Stricto sensu* bankruptcy-reorganization plan[10]
4. Special administration proceedings[11]

Insolvency proceedings are applicable either to legal entities organized for an economic purpose or to individuals or other legal entities who are merchants[12].

Bankruptcy-liquidation

BANKRUPTCY DECLARATION

Bankruptcy may be declared only through the issuance of a court decision. Such a decision is possible (a) following the application by either the insolvent debtor or any of its creditor(s) or the public prosecutor (for public interest purposes), when a debtor is unable to meet overdue financial obligations in a general and permanent way (*cessation of payments*), in which case the debtor is obliged to apply for bankruptcy within thirty (30) days from the occurrence of *cessation of payments*; (b) following an application by the debtor, who foresees an imminent inability to fulfill its financial obligations when they become due and payable (threatened cessation of payments); or (c) pursuant to the recent Amendment, following an application of the debtor in case of contingent insolvency. In case of contingent insolvency, the debtor must submit, together with the application for the declaration of bankruptcy, a reorganization plan.

An important determination made by the bankruptcy court is the exact date of cessation of payments, which in the case under (a) above cannot be more than two years before the date of the declaration of bankruptcy and in the cases under (b) and (c) above is on the same day as publication of the court decision declaring bankruptcy, and orders that the estate of the debtor be sealed. The date of cessation of payments is important for determining the *suspect period*, defined as the time period between cessation of payments and declaration of bankruptcy, which is important for the revocation of acts of the debtor and for certain bankruptcy related criminal offenses (including concepts similar to fraudulent conveyances and preferential treatment of creditors). The debtor is declared bankrupt as long as, based on the financial information submitted to the bankruptcy court, its assets are adequate for covering the expenses of the bankruptcy proceedings. In this way proceedings doomed to cause costs instead of fulfilling obligations are avoided.

APPOINTMENT OF TRUSTEE

Upon initiation of the bankruptcy proceedings by the bankruptcy court, a bankruptcy trustee ("*syndikos*") is appointed. The Amendment provides for specific criteria, both affirmative and negative, that must be met for a person to be appointed as bankruptcy trustee. The affirmative criterion is that the person holds a license to act as insolvency administrator. The duties of such a person are regulated and a registry of persons qualified as insolvency administrators is expected to be established soon. Negative criteria regarding the bankruptcy trustee aim at ensuring the trustee's total independence with respect to the debtor. Generally, the bankruptcy trustee must not be a relative of the debtor, contractually related to a person controlling the debtor, or a person controlled by the debtor; moreover, the trustee may not have served as a representative of the debtor or as its legal auditor during the period up to five years back from the time of the bankruptcy application's submission. The extended provisions introduced with the Amendment further prevent the appointment of a person somehow related to the debtor or the management of the bankrupt entity as bankruptcy trustee.

The role of the bankruptcy trustee is key. After the initiation of the bankruptcy proceedings, the estate of the insolvent entity/person is exclusively administered by the bankruptcy trustee[13], although the bankruptcy court may allow, at an initial stage, that the debtor manages its assets together with the bankruptcy trustee (restricted or not by the terms and conditions set by the bankruptcy trustee), if this is more likely to serve creditors' interests. At a later stage the bankruptcy trustee is also obliged to publicly invite the creditors to submit their claims and then verify them.

One important responsibility of the bankruptcy trustee is that it may apply for the revocation of transactions entered into by the debtor in the *suspect period*, and that are deemed detrimental to the debtor's creditors[14]. If a creditor requests the filing of an application by the trustee aiming at the revocation of a transaction within the suspect period in writing and for a specific legal reason and the trustee fails to take any such action within two months from the creditor's request, the creditor may exceptionally file such application itself.

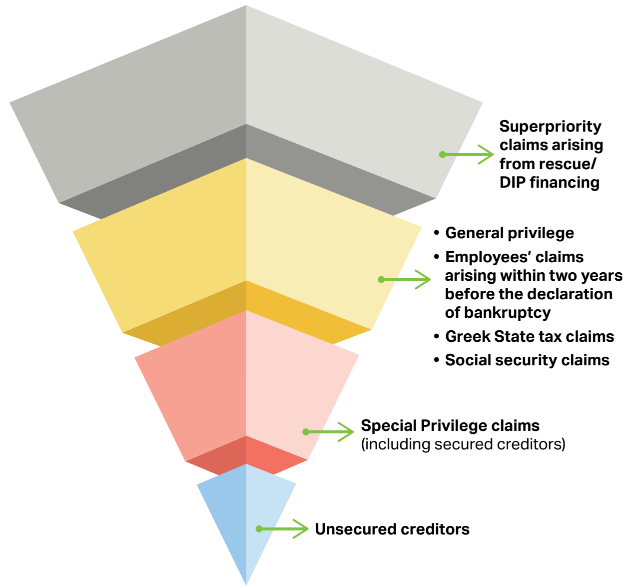
LIQUIDATION PROCEEDINGS

The bankruptcy trustee is also responsible for the liquidation proceedings. Following the finalization of the creditors' claims verification, the liquidation stage starts, to the extent that no reorganization plan has been ratified (see below for more information on the reorganization plan). Liquidation of the debtor's business and assets is initiated by the bankruptcy trustee, while the distribution of the liquidation proceeds takes place in accordance with the applicable rules regarding the ranking of the creditors' claims. Creditors are divided in three categories: (a) those with a general privilege, including claims arising from financing provided for the rescue or preservation of the debtor's business in the context of a rehabilitation or reorganization plan, or during the negotiations for the agreement on a rehabilitation plan (which have a super-privilege) (similar in concept of superpriority claims for DIP lenders in U.S. Chapter 11 proceedings), employees' claims which arose within two years before the declaration of bankruptcy, claims of the Greek State for taxes and claims of social security organizations (the latter in case they arose before the declaration of bankruptcy); (b) those with a special privilege, especially claims secured by virtue of a pledge or mortgage or mortgage prenotation; and (c) unsecured claims. Same category claims are satisfied in the order set forth in the Greek Bankruptcy Code and claims of the exact same ranking are satisfied proportionally. In case of claims belonging to two or three of the above categories, the Greek Bankruptcy Code provides the exact percentage of the liquidation proceeds that is allocated to the claims of each category.

Pre- bankruptcy proceedings- Rehabilitation agreement

The recent Reforms aimed at making rehabilitation agreements easier to reach, simpler and harder to dismiss in court. A huge benefit of reaching a rehabilitation agreement is that the debtor remains operational and is not ousted from the market. Articles 99-106 (f) of the Greek Bankruptcy Code provide for a collective pre-bankruptcy rehabilitation procedure, pursuant to which a rehabilitation agreement is reached either between the debtor and its creditors or between the creditors (in the second case provided that the debtor is already in a status of cessation of payments). The purpose of this is that the debtor satisfies its creditors at least in part, while remaining operational following the ratification of the agreement. It is now no longer possible for the debtor to submit an application for the opening of pre-bankruptcy proceedings without a rehabilitation agreement already in place. Such agreement may provide for, *inter alia*, a haircut of claims, a rescheduling of payments, a debt-to-equity swap, a sale of the debtor's business or specific business divisions or specific assets or a contribution in kind to a société anonyme to be established by the creditors.

Illustrative Liquidation Waterfall Under Greek Law



COURT APPLICATION

The rehabilitation agreement must be ratified by a court decision. Therefore, an application must be submitted to the competent court by (a) the insolvent debtor, provided that it has been agreed to between the debtor and creditors representing 60% of claims, at least 40% of which must be of (to the extent the debtor has any) secured creditors; or (b) creditors representing 60% of claims at least 40% of which must be of (to the extent the debtor has any) secured creditors, regarding the rehabilitation plan agreed between them and provided that the debtor is already in a status of cessation of payments. The agreement must be concluded prior to the opening of the scheme process (in the form of the so called pre-pack). The recent Reforms explicitly included the transfer of the debtor's business (either to a third party, to a company to be established by the creditors or to another company existing or newly established) as one of the possible solutions that may be agreed upon in the rehabilitation agreement.

The hearing date for the ratification of the agreement is set within 2 months from the submission of the application for the ratification. The submission of the application may also be filed even if a petition for the declaration of bankruptcy has already been filed. In such case, the petition for the declaration of bankruptcy is examined by the court only if the latter rejects the ratification of the rehabilitation agreement. In case of a rehabilitation agreement submitted only by the creditors, it is compulsory for them, according to article 104 p. 4 of the Bankruptcy Code, to submit, together with the ratification application, a petition for the declaration of bankruptcy. If the

debtor is in cessation of payments, it submits together with the pre-bankruptcy application, an application for the declaration of bankruptcy.

CONDITIONS TO RATIFICATION

The court will ratify the rehabilitation agreement if the following preconditions are met: (i) the debtor's business is likely to remain viable; (ii) the collective satisfaction of creditors is not impaired (i.e., the creditors will not receive less than what they would have received in a liquidation); (iii) the agreement is not the outcome of willful misconduct or other bad-faith behavior of any of the involved parties and does not contravene any mandatory law provisions, especially competition law ones; (iv) the creditors are treated equally, if of equal ranking; and (v) the debtor provides consent, in the case of an application submitted by the creditors, or fails to argue against any such application within the strict deadlines set by the law.

STAY PERIOD

From the submission of the application for the ratification of the rehabilitation agreement and until the issuance of a relevant court decision, any individual and collective enforcement actions against the debtor are automatically suspended for a maximum period of four (4) months. Such suspension is available only once per debtor. Following the above mentioned 4-month period a moratorium may be imposed following an application to that effect by anyone having a legal interest. For important business or social reasons[15], such moratorium may also be extended in favor of guarantors. Additionally, a moratorium may also be imposed even before the submission of the application for the ratification of the rehabilitation agreement, following an application by the debtor or a creditor provided that the request for pre-application moratorium is accompanied by a written declaration of support signed by creditors representing at least 20% of claims and there is an urgent situation or an imminent danger. Such moratorium is valid until the application for the ratification of the rehabilitation agreement and up to a maximum period of four (4) months[16].

The rehabilitation pre-bankruptcy proceeding has been used a lot in practice in the Greek market. A great number of rehabilitation petitions were unsuccessful and many of them were filed only in order to benefit from the moratorium. On the other hand, there are also a number of successful rehabilitation proceedings.

Notable Greek Rehabilitation Cases

Debtor	Date	Outcome
DIAS S.A.	2014-2016	Agreement provided for, *inter alia*, the transfer of the assets and part of the liabilities of the debtor to another legal entity of the fishery sector, Selonda S.A.
Marinopoulos S.A.	2016-2017	Agreement provided for the haircut of the obligations of the debtor and transfer of part of its assets and liabilities to another retailer (in the supermarkets sector), Sklavenitis S.A.

Bankruptcy-Reorganization Plan

Articles 107 et seq. of the Greek Bankruptcy Code allow the debtor to distribute the estate on the basis of a specific reorganization plan, thus giving an end to the (already opened) bankruptcy procedure and making fulfillment of obligations more likely. The reorganization plan is similar to the rehabilitation plan, with the difference that the former takes place in the context of bankruptcy and the latter before bankruptcy. The reorganization plan may allow the continuation of the debtor's business as a going concern, while the debtor may retain management of its own business under the supervision of the bankruptcy trustee based on the provisions of the plan. The business continuation may give the debtor a last chance to fulfill obligations and find a way to turn viable in the long term, while remaining in the market.

COURT SUBMISSION

The reorganization plan may be submitted to the competent court by the debtor with the application to be declared bankrupt or at any point until three (3) months after the decision declaring bankruptcy. Thanks to the Amendment, submission of a reorganization plan by creditors is now possible. More specifically, creditors representing 60% of claims, with at least 40% of which being claims of (to the extent the debtor has any) secured creditors, along with the application for declaration of bankruptcy, may submit a reorganization plan to the competent court. Upon ratification by the court, the plan is binding upon all creditors of the debtor including any dissenting and non-participating creditors. Thereafter, the bankruptcy proceedings are terminated and, unless otherwise provided in the reorganization plan, the debtor resumes administration of its business, being bound to meet obligations undertaken on the basis of the reorganization plan.

Reorganization plan minimum required content

1. Accurate and complete information on the debtor's financial status.
2. Comparison of the amount expected to be received by creditors on the basis of the reorganization plan against the amount that creditors would be projected to receive in a liquidation proceeding.
3. Measures implemented or proposed to be implemented (e.g., financing, corporate reorganization) in order for the terms of the reorganization plan to be fulfilled.
4. Description of the rights and obligations of each creditor and of the debtor pursuant to the reorganization plan.

REORGANIZATION PLAN CRITERIA

The proposed reorganization plan may provide for any reorganization measure, such as haircut of claims, rescheduling of payments and/or the sale of any of the debtor's business divisions as a going concern. It should be emphasized that following the recent Reforms, it is no longer possible for the competent court to pre-examine the proposed reorganization plan. By eliminating the judicial *a priori* examination, the Amendment excluded the possibility of an *a priori* rejection of any such plan.

Special administration proceedings

Any natural or legal person that is eligible for bankruptcy, has its registered seat (as set forth in its articles of association) or domicile in Greece and is in a cessation of payments, may also utilize special administration proceedings. For this to happen a petition needs to be filed by its creditors representing at least 40% of the total amount of claims, among which at least one creditor is a credit institution[17] or leasing or factoring company which are supervised by the Bank of Greece. The hearing date is set within two (2) months from the filing of the petition, while the decision of the court must be issued within one (1) month after the hearing, thus making special administration proceedings a quick process, to the benefit of everyone involved.

Pending petitions regarding the opening of a rehabilitation process for the debtor or its declaration into bankruptcy are automatically suspended upon filing the special administration petition with the competent court. This means that the opening of a rehabilitation process for the same debtor or the debtor's declaration into bankruptcy is not possible until the acceptance or rejection of the petition for the initiation of special administration proceedings. If accepted, the petition results in a *special administrator* being appointed for a period of twelve (12) months and all individual enforcement actions against the debtor, including the administrative enforcement measures that are available to state authorities, are automatically suspended for as long as the special administration procedure is open. The special administrator proceeds to a public tender (on the basis of the "highest offer price") with regards to the sale of the business assets (either as a whole or by division or any parts thereof), which will then be ratified by the competent court provided that all legal requirements are met. The creditors are expected to submit their claims following a relevant invitation by the special administrator and the sale consideration paid by the purchaser(s) is distributed to such announced creditors according to a ranking list created by the special administrator as described under articles 153-161 of the Greek Bankruptcy Code. The special administrator will decide on whether the liquidation amount is adequate for all the debtor's creditors.

If the administrator is of the view that this amount does not suffice, then the administrator is obliged to file a petition with the bankruptcy court for the debtor to be declared bankrupt.

The special administration procedure expires if the disposal of minimum 90% of the debtor's assets, in terms of accounting value, has not been concluded within twelve (12) months from the publication of the court's decision to open the special administration procedure.

Conclusion

The recent Reforms are an attempt to better protect creditors' interests and maximize the likelihood of fulfillment of obligations, while in parallel enhancing the chances of survival for insolvent businesses. However, such proceedings remain time-consuming when compared to similar proceedings in other jurisdictions, mainly due to the workload of Greek courts. A boost may be given to the procedures upon establishment of the registry of persons qualified as insolvency administrators, which is provided for by the Reforms but is still pending. One has to keep an eye on the Greek market and the solutions opted for by the market players themselves, i.e., debtors and creditors, before providing any final assessments on the Reforms' value. ■

1. The remaining participants are the bankruptcy court, the judge rapporteur, the bankruptcy trustee and the creditors' meeting. Following the Reforms, while the creditors' committee may still be elected , its role is substantially decreased and its main responsibility is to observe the process and acquire information on behalf of the creditors.
2. Prior to the Reforms, the consent or cooperation of the creditors' committee was required in several instances (e.g., in order for the bankruptcy court to give to the bankruptcy trustee permission to sell assets of the estate), and the creditors' committee could object to any settlement reached by the bankruptcy trustee with regards to any claim of or against the debtor. While such powers of the creditors' committee were well-intentioned from a policy perspective, in practice they often led to unhelpful delays.
3. "Small bankruptcies" are bankruptcies with a bankruptcy estate of less than €100,000.
4. Such exception is in the case of a new ratified reorganization plan.
5. Pursuant to Greek case law, the term "general" means that the debtor is unable to meet either all or the most important part of its obligations, or even one obligation if such obligation is important enough. The term "permanent" means that the inability of the debtor to meet its obligations is not due to temporary causes.
6. Under the new procedures, the court can appoint an authorized representative who will participate in the required general meeting of the shareholders of the debtor and vote on behalf of the non cooperating shareholders, as long as such debtors would not collect from the liquidation proceeds in case of bankruptcy (if the debtor is already in a cessation of payments or if the non conclusion of the rehabilitation agreement is anticipated to lead to bankruptcy).
7. Pursuant to the abolished article 106ia of Greek Bankruptcy Code.
8. "Contingent insolvency" is not defined under the Greek Bankruptcy Code, and no court has interpreted the provision to date.
9. Articles 99-106f of the Greek Bankruptcy Code.
10. Article 107 *et seq.* of the Greek Bankruptcy Code.
11. Articles 68-77 of the law Special Administration Law.
12. Pursuant to Greek law, merchants are the individuals or legal entities (such as general or limited partnerships) who engage in commercial transactions as a regular occupation or purpose, as well as the legal entities which are characterized as "merchants" directly by the law (e.g., societés anonymes and limited liability companies).
13. The directors and officers are not engaged in the administration of the debtor following the initiation of the bankruptcy proceedings. However, they have an obligation to cooperate with the bankruptcy trustee and provide information to the latter.
14. In certain ways, the "harmful transactions" framework mirrors that of fraudulent conveyances under the U.S. Bankruptcy Code. For example, transactions considered especially harmful include (i) donations and gratuitous acts in general, as well as those for which the debtor received disproportionately low consideration (similar in concept to constructive fraudulent conveyance under the U.S. Bankruptcy Code, where a debtor receives less than reasonably equivalent value for prepetition transfers or incurrences of obligations) and (ii) acts of the insolvent debtor concluded during a five-year period before the declaration of bankruptcy if the debtor acted with the intention to harm or to benefit certain of its creditors and its counterparties knew that the debtor was acting maliciously (similar in concept to actual fraudulent conveyance under the U.S. Bankruptcy Code, where a debtor makes prepetition transfers or incurs obligations with the "actual intent to hinder, delay, or defraud" its creditors). The Greek Bankruptcy Code also safe-harbors certain transactions, such as those entered into in the ordinary course of business or those for which the debtor received contemporaneous new value.
15. The notion of "important business or social reasons" is interpreted and specified on an ad hoc basis. It has been held in one case by Greek courts that there is an important business reason when the guarantor must be protected in order to be able to provide a new a guarantee in favor of the debtor, so that the latter can be rescued.
16. Before the Reforms, the moratorium usually covered the period from the filing of the rehabilitation petition until the issuance of the court decision opening the rehabilitation procedure, the interim negotiations period and, in case of an agreement, the period between the filing for the ratification of the rehabilitation agreement and the relevant court decision, which was far more extended than four (4) months.
17. Pursuant to Regulation 575/2013, "credit institution" means an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account. Most commercial banks would qualify as credit institutions.

▼ **Catherine M. Karatzas** is a partner in Karatzas & Partners Law Firm in Athens, Greece, where her practice focuses on banking law, securities law, mergers and acquisitions and finance law. She received her LL.B. from the National and Kapodistrian University of Athens and her LL.M. from Columbia University. She is a member of the Athens and New York Bar.

▼ **Vassiliki Salaka** was admitted in 1995 and has been a partner with Karatzas & Partners since 2004. She is active both as a legal consultant and as a litigator and specialises in company, civil (including real estate) and bankruptcy law. She holds an LL.B. from the law school of the National and Kapodistrian University of Athens, and a D.E.A. from the University of Sorbonne in Private International Law.

▼ **Angeliki S. Tsatsi** is a senior associate in Karatzas & Partners Law Firm in Athens, Greece, where her practice focuses on civil law, labor law, litigation, commercial and insolvency law. She received both her LL.B. in Hellenic Law and her LL.M. in Civil Law from the National and Kapodistrian University of Athens.

The Development of the NPL Market in Hungary

By **JOHN FENEMORE, ANDREA SPISÁK** *and* **BALÁZS KÁNTOR**

The problem

After a number of years of anticipation, 2016 saw a number of large non-performing loan portfolio sales in the Hungarian market.

Following the collapse of communism in 1989, Hungary was quick to introduce market reforms. Widespread privatization opened the market to large scale foreign investment. Although Hungary retained the Hungarian forint (HUF) as its national currency, capital controls were gradually lifted throughout the 1990's ending completely with Hungary's accession to the EU on 1 May 2004. Membership of the EU and NATO promised political stability and security and Hungary became highly integrated into the global economy.

As a result of such a high level of integration, Hungary suffered badly during the global economic crisis. Levels of private debt denominated in foreign currencies were particularly high with up to approx. 70% of residential mortgages denominated in foreign currency (90% in Swiss Francs (CHF) and 7% in Euros (EUR)). The Hungarian government's response to the crisis involved a bank levy and a number of measures designed to protect local borrowers. These measures exacerbated the constraints on borrowers' ability to access new finance for their existing indebtedness and left many commercial banks holding large portfolios of distressed debt.

By the end of 2015, non-performing loans in Hungary amounted to EUR 5.1 billion, equivalent to a NPL ratio of 11.7% and a NPL coverage ratio of 69.2%.[1]

A change in approach by the Hungarian authorities, greater focus on the issue by market participants and a welcome upswing in the Hungarian real estate market laid the foundations for significant improvements in this position during 2016.

Hungary's response

The Hungarian National Bank ("MNB"), the central bank and primary banking sector regulator of Hungary, identified distressed debt as a key concern for the Hungarian banking sector and has taken a number of measures to ensure that local banks address this issue. The MNB, with support from the European Bank for Reconstruction and Development ("EBRD"), identified three interlinked areas in which changes could reduce the threats to the Hungarian banking system posed by high levels of NPLs:

1. **Regulatory encouragement** – measures to encourage banks to address the problem of NPLs on their balance sheets (and remove obstacles to them doing so);
2. **Improving tools for resolution of NPLs** – improving the legal environment for the efficient resolution of non-performing loans including reversing measures which impeded the enforcement of security, introducing reforms of insolvency and bankruptcy law and the encouragement of the use of out-of-court resolution mechanisms; and
3. **Creating a market for NPLs** – removing obstacles to the establishment of a liquid market for the trading of NPLs.

Measures to implement such changes have had limited success, but, fortunately a buoyant real estate market has led to an increase in NPL sales and a significant decrease in the NPL portfolios[2] over the last year. Such sales in themselves have increased the experience of market participants and given investors greater guidance as to price, which has further improved the conditions for the development of an NPL market.

The NPL market today

2016 saw a series of high profile portfolio sales, including the sale of remarkable portfolios of commercial mortgage backed loans by CIB Bank Zrt. and Raiffeisen Bank Zrt. and the sale of a high value portfolio of residential mortgage backed loans by Erste Bank Zrt. In addition there have been a number of off-market sales of high profile individual non-performing loans e.g. the sale by MKB Bank of a significant loan to Lone Star, a Texas-based distressed debt specialist.

As of 1 January 2017, MNB passed a general decision prescribing the creation of a systemic risk buffer to credit institutions operating in Hungary and to groups involving a credit institution.

Although a number of banks (e.g. Erste and Raiffeisen) are nearing the end of this process, other banks have yet to fully address their portfolios of distressed debt. We anticipate that some of these loans will come to the market in the near future – either directly or through MARK Zrt. (see below).

Regulatory encouragement

MNB identified non-performing loans (particularly in the real estate and project finance areas) as representing a systemic risk to the Hungarian banking market and informed the Hungarian banks of its intention to address this risk by requiring the banks to maintain an additional systemic risk buffer as part of the minimum capital requirements for banks regulated by MNB. The imposition of such an additional systemic risk buffer is permitted by (i) Section 92 of the Banking Act; (ii) Section 35/A of Act CXXXIX of 2013 on the National Bank of Hungary; (iii) Regulation EU No 575/2013 of the European Parliament and of the Council (CRR); and (iv) Directive 2013/36/EU of the European Parliament and of the Council (CRD IV).

As of 1 January 2017, MNB passed a general decision prescribing the creation of a systemic risk buffer to credit institutions operating in Hungary and to groups involving a credit institution, which are supervised by the MNB on a consolidated basis. In MNB's view, the systemic risk buffer increases the shock-absorbing capacity of the institutions not curtailing their risky exposures on one hand and it may encourage the reduction and cleaning of the stock of risky exposures within a reasonable timeframe on the other hand.

The rate of the systemic risk buffer depends on the ratio of the gross stock of problematic exposures to the domestic Pillar I capital requirement imposed on the credit institution (or on the group subject to consolidated supervision). If this stock exceeds 30 per cent of the capital requirement and is greater than HUF 5 billion, the systemic risk buffer is set at or above 1%, but the systemic risk buffer rate cannot be higher than 2%. The exact rate of the systemic risk buffer is determined by individual MNB decisions annually, based on the information reported by the respective credit institutions (groups).

Improvements in resolution of NPLs

The extent to which NPLs can be efficiently resolved by the originating banks (or by NPL purchasers) is significantly influenced by the legal framework governing the enforcement of security, bankruptcy protection and insolvency.

Changes relating to residential mortgage loans
The Hungarian authorities have taken steps to improve the ability of creditors to resolve non-performing residential mortgage loans, including by reforming the following areas:

— **Extraordinary moratorium**
Following the financial crisis, the Hungarian authorities took a number of measures to mitigate potentially critical effects of loan default on the domestic housing market. These included redenomination of residential mortgage loans into Hungarian forints and an extraordinary moratorium on eviction from residential properties.

Hungarian law imposes a general winter moratorium on eviction from residential properties during the period 1 December and 1 March each year. Following the financial crisis, an extraordinary moratorium on eviction was imposed which prevented eviction from residential properties at any time. The extraordinary moratorium was relaxed in September 2015 and ended on 31 December 2016.

— **Minimum enforcement price**
When removing the extraordinary moratorium, however, the Hungarian government introduced stricter requirements on the price at which a debtor's primary residence can be sold by the secured party. Prior to March 2017, the proceeds of such an enforcement had to be at least 70% of the assessed value of the property, following the change, the proceeds must be at least 100% of the assessed value of the property within the first year and 90% of the estimated value in respect of any subsequent enforcement attempt.[3]

— **Personal bankruptcy**
A new concept of personal debt relief proceeding ("personal bankruptcy") was introduced in Hungary on 1 September 2015. The purpose of personal bankruptcy proceedings is to attempt to reach a composition agreement between debtors (natural persons) and their creditors in order to facilitate their ability to repay debts by, for example, rescheduling repayment instalments. Once such proceedings are commenced, creditors may only enforce their claims within the framework of such proceedings (i.e. enforcement of security cannot take place).

Qualifying Criteria for Personal Bankruptcy

1. **Amount of total debt:** the debtor's aggregate indebtedness (including costs, fees, interest) is between HUF 2 million (approx. EUR 6,500) and HUF 60 million (approx. EUR 195,000).
2. **Debt overdue:** aggregate indebtedness of at least HUF 500,000 (approx. EUR 1,600) has been due and unpaid for at least 90 days.
3. **Debtor acknowledges debt:** at least 80% of the indebtedness is acknowledged or not contested by the debtor.
4. **Debt/Assets Ratio:** the indebtedness exceeds the value of the total assets of the debtor but is less than 200% of the total value of the assets of the debtor.
5. **Consumer Credit:** at least part of the indebtedness relates to consumer credit (including residential mortgage loans).

The act provides for new types of personal bankruptcy proceedings:

— **Voluntary composition agreement**
If the debt includes one or more mortgage loans, the first attempt to reach a composition agreement must be made within the framework of an out-of-court personal bankruptcy. In that case, the procedure is managed by the principal creditor. If the principal creditor is the only creditor (or the other creditors are affiliates of the principal creditor), it must and in all other cases it may engage in this process. If

the principal creditor is not willing to manage the process (and has no obligation to do so), the process is deemed to be unsuccessful. A composition agreement is reached only if all creditors are party to it. If no composition agreement can be reached, the competent court orders the commencement of a judicial personal bankruptcy proceeding.

— **Judicial personal bankruptcy proceedings**
Proceedings can be ordered by the competent court without the consent of creditors. A receiver is appointed to monitor the financial affairs of the debtor. The purpose of the judicial personal bankruptcy proceeding is to reach a composition agreement with the majority of the creditors.

— **Debt repayment proceeding**
If no agreement is reached in the course of the judicial personal bankruptcy proceeding, the court orders a debt repayment proceeding. The receiver, with the involvement of the creditors, prepares a repayment plan setting out the rules and process for selling the debtor's assets, the allocation of the proceeds of sale and the obligations of the stakeholders. The length of the debt repayment proceeding is 5 years, and may be extended by an additional 2 years period.

If the debtor complies with the provisions of the composition agreement/debt repayment plan in all regards and all creditors' claims are recovered at the minimum rate set out under applicable law, the debtor is released from any remaining obligations. The minimum rate of recovery for a secured creditor is the market value of the property (asset) encumbered for its benefit.

Proposed changes relating to commercial loans
Proposals have also been made, with more limited success, to improve the resolution of commercial NPLs:

— **Out of court resolution**
In 2010, the Hungarian Banking Association developed a set of non-binding principles based on the London Approach to aid out of court restructuring in the Hungarian market (the "Budapest Approach"). The Budapest Approach aimed to create principles for the restructuring of debtors facing financial difficulties, the cooperation among stakeholders during such a restructuring and the creation of a code of conduct for creditors. It contemplated, amongst other things, the preference for out-of-court restructuring, the provision of new money, the granting of a standstill period, and the conclusion of an independent business review. In practice, however, the Budapest Approach was not used by market participants for the following reasons:

- it was often felt to be too general to be applied in practice to the practicalities of restructuring in a Hungarian context;
- a significant number of banks did not participate in the elicitation of the Budapest Approach and did not "buy in" to the process; and
- the application of the Budapest Approach has not been endorsed or encouraged by the Hungarian regulator and there has been little incentive for compliance.

EBRD and MNB have been working together to develop improved out of court restructuring guidance to aid restructuring in the Hungarian market, with the intention that such new guidance would be:

- based on the practical experience of a wider group of market participants; and
- issued to market participants by MNB in the form of a non-binding recommendation and with more detail on the corporate restructuring process.

We understand that the draft recommendation has now been finalized and MNB is seeking internal approval for its issuance.

The effectiveness of out of court restructuring measures is, however, dependent on the ability to bring debtors to the table with the prospect of fair, transparent and effective insolvency proceedings if the debtor fails to co-operate.

— **Proposals for reform of the administration and insolvency regime**
Banks have raised the following issues as being problematic in connection with the current administration and bankruptcy regimes in Hungary:

- the current Insolvency Act[4] has not been significantly updated since its issuance in 1991 and many consider it unfit for purpose in a Hungary which has acceded to the EU, faced a financial crisis and seen a growth of a new NPL market;
- they do not provide recognition or protection for new money made available in order to promote a solvent restructuring;
- the administration regime is often used primarily to delay resolution of insolvency rather than to promote a genuine attempt at solvent restructuring;
- there is a lack of transparency and creditor control over the performance by bailiffs and insolvency officers of enforcement and insolvency proceedings;
- bankruptcy proceedings may only be commenced by debtors (and not by creditors); and
- the Hungarian tax authority is unable to vote in support of solvent restructuring and many otherwise viable schemes are unable to proceed without such support.

Although there has been much discussion concerning the reform of Act XLIX of 1991 on Bankruptcy and Liquidation Proceedings, the timing and extent of such a reform is uncertain.

— **Greater transparency on insolvency sales**
On 1 January 2015, the Ministry of National Development established the Electronic Sales System ("EÉR") as an electronic platform for organizing the sale of assets being disposed of in insolvency proceedings. The aim of the EÉR is to provide a more transparent method of selling distressed assets within the insolvency process.

Creating a market for NPLs

MARK ZRT.

In November 2014, the MNB, with technical assistance from the IMF, established MARK Zrt. as an asset manager capable of acquiring NPL assets from Hungarian banks at market prices. A concern for potential sellers was that transactions conducted with MARK Zrt. (owned 100% by the MNB) may be open to challenge on the basis of state aid. In February 2016, the EU Commission provided comfort that the market pricing methodology developed by MARK Zrt. was compliant with EU state aid rules.

Between March and June 2016, a number of Hungarian commercial real estate lenders registered their interest in selling assets to MARK Zrt. and MARK Zrt. began its legal and financial review of the assets being offered. MARK Zrt. aims to offer a market price for the assets offered to it by the Hungarian banks, but the process is voluntary and the Hungarian banks are not required to dispose of the offered assets to MARK Zrt. From the banks perspective, the difficulty with the proposal is that Mark Zrt. makes an all or nothing proposal for the portfolio. Many banks have found that the flexibility of a market sale offers a better overall return than that offered by MARK Zrt.

To date, MARK Zrt. has completed only one portfolio acquisition, but the process of preparing assets for sale to MARK Zrt. has readied Hungarian financial institutions for such sales and a number of portfolio sales to outside investors took place during 2017.

MARK Zrt., along with a number of other Hungarian providers, now also offers servicing and debt management services to international investors interested in investing in Hungarian NPLs.

On 10 April 2017, MNB announced that it will sell MARK Zrt. to a Slovakian professional investor, APS Investment s.r.o. According to MNB, the volume of the NPLs has dropped by 50% and therefore there is no longer a need for the state presence in connection with the operation of MARK Zrt.

Facilitating transfers of loan receivables

Under the Hungarian Civil Code, purchasers of NPLs generally require the consent of the underlying borrowers if they wanted to acquire anything beyond a simple assignment of the client receivables (e.g. to include the contractual position as a whole together with all rights and obligations and ancillary products related thereto). This concept has contrasted with transactions involving investment services and insurance where the law has for many years allowed portfolio transfers based on the approval of the regulator.

In June 2015, the Hungarian Parliament passed a comprehensive package of legislative amendments impacting various pieces of legislation, including Act CCXXXVII on Credit Institutions and Financial Enterprises (the "Banking Act"). The package includes a broad regulatory regime for the transfer of banking portfolios alongside other provisions to address issues arising from the recent bankruptcy of a number of brokerage companies and associated scandals. The amendments entered into force on 7 July 2015 and the new transfer regime has facilitated a number of significant NPL transactions during 2016.

Broad product scope – The new regime under the Banking Act contains two sets of similar (but not identical) rules covering transfers of (i) deposits and payment services products and (ii) credit and leasing products and the purchase of receivables. For credit and leasing products and purchase of receivables, the application of the new regime requires the transfer of a portfolio of at least 20 contracts or that the receivables in question exceed HUF 10 billion (approx. EUR 31.6 million).

Capturing ancillary products and collateral – It is common banking practice that a number of ancillary products are packaged with the main product or that additional services are provided to clients e.g. to enable the client to access the product electronically. In addition, banks take various type of collateral to secure their exposure to clients. To tackle the position of such connected products and collateral, the amended Banking Act also covers the transfer of these to the purchaser as a part of the new regime, albeit with differences depending on the underlying banking product type.

Transfer based on regulatory approval – The principal position of the new regime is that the transfer is completed on the basis of approval of the MNB, the financial regulator, without requiring client consent. Clients must, however, be informed in advance of the proposed transfer (30 or 60 days' notice, depending on the product type), and are given a legal right to terminate their contract at no extra cost to them. Such termination right is intended primarily to address consumer protection issues and is unlikely to be helpful for heavily indebted clients. It must however be taken into account when structuring migration processes as between buyers and sellers of portfolios.

Tax Takeaways for Potential Investors in Hungarian NPL Portfolios

1. **Hungarian Permanent Establishment:** Foreign entities can be subject to Hungarian corporate income tax and local business tax if they have a Hungarian permanent establishment (i.e. the entity has a fixed place of business in Hungary, such as a branch office or similar presence) to which the transaction is related. The assessment of this risk requires a deep factual analysis of the investor's activity regarding the acquisition of the NPL portfolio.

2. **Hungarian Licensed Entity/Branch:** The entity purchasing the NPL portfolio can be subject to bank tax on the basis of the profit/balance sheet total increase due to the portfolio if it is a Hungarian licensed entity or a Hungarian branch of such foreign entity. The actual rate and base of the tax depends on the type of the licensed entity (i.e. whether it is a commercial bank or other financial organization).

3. **Transfer Tax Liability:** The acquisition of collateral, such as real estate or shares in a real estate holding company securing the loans, due to foreclosure or an arrangement between the debtor and the investor can be subject to transfer tax. Various transfer tax exemptions/allowances are available for institutional investors to mitigate their transfer tax liability.

4. **Hungarian Corporate Income Tax:** Capital gains from the sale of shares, acquired as collateral, in a Hungarian real estate holding company can be subject to Hungarian corporate income tax even if the investor is a foreign entity, depending on its jurisdiction of tax residence with such risk being mitigated by planning the exit in advance with carefully choosing the jurisdiction of tax residence or setting up a corporate structure in which the participation exemption provided by the Hungarian corporate income tax law can be applied.

5. **VAT Liability:** The purchase of NPL portfolios should not incur VAT liability in Hungary, however, the Hungarian Tax Authority somewhat restrictively interprets the case law of the Court of Justice of the European Union to this end. Accordingly, there can be scenarios, in particular transactions involving the purchase of other assets (such as real estate), where the risk of VAT liability may not be entirely excluded and should be reviewed.

Issues to consider for investors in Hungarian NPLs

Licensing requirements

In Hungary, the provision of financial services – including the acquisition of loan receivables – requires MNB licensing if conducted in a business-like manner. According to the applicable legislation a financial service is provided in a business-like manner if the following three criteria are met cumulatively: (i) the activity is conducted regularly; (ii) consideration is received; and (iii) the service is provided generally and not only to specified persons or in respect of specific transactions. MNB has taken a particularly strict approach to this issue, reminding Hungarian financial institutions that the acquisition of a single portfolio or the acquisition of two receivables annually can be considered to be made regularly.

Accordingly, any purchaser of NPLs, acting in a business-like manner, must be a financial undertaking or a bank[5] with a lending license (or an equivalent licensed entity regulated in another OECD jurisdiction).

MNB, in both periodical and general reviews of financial institutions, requires licensed Hungarian entities to report to the MNB on any sales of receivables that such entity may make – and requiring any purchaser of such receivables to be licensed or to make a formal declaration that it is not acting in a business-like manner. Fines ranging from approx. EUR 30,000-60,000 have been imposed throughout these investigations several times.

This has proved a disincentive for many international investors, as investments are often made through an investment vehicle and the timeframe for a receivables sale is not usually sufficient to allow a bidder to establish a financial institution prior to knowing whether its bid to acquire the receivables in question has been successful. This gives a clear commercial advantage to investors with an existing regulated presence in the Hungarian market or a partnership with a local financial institution.

Tax

The Hungarian tax environment is very investor-friendly (unless the investor is subject to a sectorial surtax, such as marketing tax or bank tax): the corporate income tax rate being 9% from 1 January 2017, among the lowest in Europe and with no withholding tax being levied on outbound interest or dividend payments.

Concluding Thoughts

Hungarian administration and insolvency proceedings are not transparent. Local knowledge in dealing with borrowers, liquidators and other market participants is key to a successful workout strategy and foreign investors often look to work with a local partner. Thorough due diligence and the development of workable enforcement and workout strategies are key to realizing value and maximizing asset returns in relation to an NPL portfolio transaction. ■

1. Source: http://npl.vienna-initiative.com/countries/hungary/.
2. According to a recent press release of MNB, the volume of non-performing loans has dropped by 50%.
3. Before the property is sold, a court bailiff must establish its appraised value, both vacant and occupied, considering the details of an up-to-date official tax and value certificate – and if so requested by either party, such appraised value can be reviewed by a forensic valuation expert.
4. Act XLIX of 1991 on bankruptcy and liquidation proceedings.
5. In Hungary, banks or financial undertakings (jointly referred to as financial institutions) may provide financial services basically. Financial undertakings may provide a limited number of financial services (e.g. they are not entitled to collect deposits, to provide payment services, to issue e-money, or to provide money exchange services) and are in turn subject to lighter regulatory requirements.

▼ **John Fenemore** is a Partner in the Banking & Finance Group at Lakatos, Köves and Partners in Budapest, Hungary. John is an English qualified banking lawyer with an interest in Central and Eastern Europe and wide experience of cross-border transactions, particularly in the emerging markets. He has expertise in trade finance, margin lending, sovereign and quasi-sovereign lending transactions. Before joining LKT in 2016, John worked in the banking group of Clifford Chance for 14 years. During this time, John was mainly based in Clifford Chance's London banking team but, was seconded to Badea & Asociatii in Bucharest as part of the opening of Clifford Chance's Bucharest office between 2005 and 2010.

▼ **Andrea Spisák** is a Senior Associate in the Banking & Finance Group at Lakatos, Köves and Partners in Budapest, Hungary, who has recently joined the firm. She has developed expertise in banking-finance and capital markets regulatory matters as well as the laws and supervision of the European financial markets at the National Bank of Hungary. Andrea has further acquired knowledge in corporate and commercial financing deals and transactions at a leading global law firm.

▼ **Balázs Kántor** is a Senior Associate, a certified tax advisor and head of the Tax Practice at Lakatos, Köves and Partners. His work experience includes complex analysis of real estate and financial transactions for foreign-based credit institutions and investment businesses; tax law due diligence of investment targets; provision of tax law structuring advice; and tax analysis and structuring of executive benefits packages.

You Have Options: The Use of Alternative Dispute Resolution in Insolvency Proceedings

By **ADAM BRENNEMAN, PAMELA ARCE, PABLO MORI BREGANTE, DAVID SCHWARTZ**

Latin America is once again a volatile region – political uncertainty in both mature and emerging economies, the threat of changes to the terms of trade, commodity prices that have yet to recover and wild swings in foreign exchange rates are just some of the issues that debtors are struggling with. It is no surprise, then, that restructuring activity is beginning to pick up, from the corruption-related work-outs in Brazil to the construction industry slump in Mexico. When debtors in these markets look at how to implement a restructuring, they come across two imperfect and competing options. Debtors can file for bankruptcy locally and bind 100% of their impaired creditors (in most cases), but with this option they will face courts that move slowly, are often unfamiliar with international financing structures and in some cases are susceptible to outside influence. As a second option, debtors can conduct an out-of-court restructuring through an exchange or tender offer, but with this option, they won't be able to bind 100% of creditors and very often will remain in technical default even after a successful transaction.[1]

There is, however, another alternative, which to date remains largely untested in the region: a local bankruptcy proceeding, with some or all of the case handled through arbitration proceedings. With this option, debtors could have the certainty of a full and final resolution of their restructuring, but with the flexibility to use arbitration and mediation procedures that in many circumstances provide for a quicker resolution of the case by arbitrators that are more familiar with the sorts of issues that arise in international financial contracts and that are less susceptible to judicial corruption. This article looks at the option of using arbitration and mediation in bankruptcy proceedings in three jurisdictions where such an option is available – Peru, Chile and the United States – and outlines a modest proposal to expand the use of arbitration and mediation in other jurisdictions that are considering reforms to their bankruptcy laws.

Peru

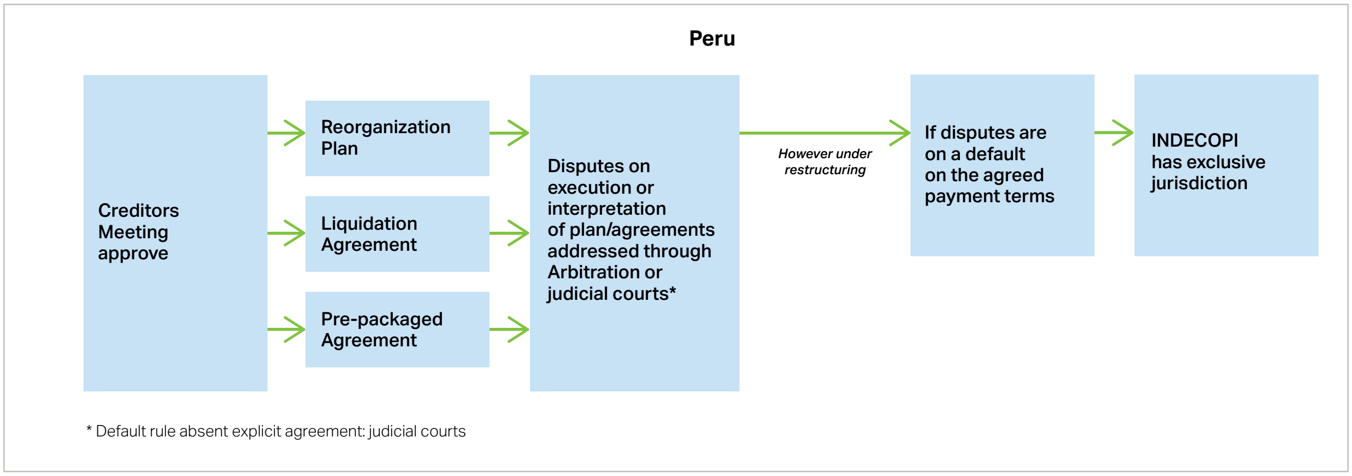
Unlike most jurisdictions in Latin America, where bankruptcy proceedings are handled by judicial courts, Peru employs solely administrative bankruptcy proceedings and judicial courts have limited jurisdiction.[2] All Peruvian bankruptcy proceedings are handled and supervised by a specialized administrative agency, the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* or "INDECOPI"). However, the creditors' committee is empowered to make the principal decisions within the bankruptcy proceeding, such as the approval of the restructuring plan, pre-packaged plan or the liquidation agreement.

Pursuant to Articles 73 and 79 of the General Bankruptcy Law of Peru, one option that creditors have is to decide that all disputes arising from the reorganization plan or liquidation agreement will be subject to arbitration. If the creditors' committee elects to use arbitration, they may select an arbitrator from the location where the bankruptcy proceeding takes place. If the creditors' committee does not elect arbitration, disputes related to a liquidation agreement or restructuring plan will be heard in judicial courts.

Because Article 73 of the General Bankruptcy Law of Peru does not specify or limit the disputes that may be addressed through arbitration, a broad range of situations may qualify. For instance, a conflict related to a new guarantee by a debtor as agreed in a reorganization plan, a controversy arising from a liquidator's default under a liquidation agreement, or any dispute associated with the interpretation of a pre-packaged plan are examples of disputes that may be arbitrated pursuant to Article 73. However, the law does not contemplate the administration of bankruptcy proceedings themselves through arbitration. Thus, under the Peruvian insolvency system, the bankruptcy proceedings themselves, and ancillary matters (such as recognition of credits and ranking of claims) cannot be handled through arbitration.

In addition, INDECOPI has exclusive jurisdiction to determine whether a default under a reorganization plan has occurred, which triggers a liquidation of the debtor. In a binding administrative resolution issued in 2013, INDECOPI stated that because it has a duty to declare the liquidation of the debtor to protect the interest of the creditors in the bankruptcy proceeding, the existence of a default under an ordinary reorganization plan cannot be arbitrated. Consequently, in the Peruvian insolvency system, the ability of creditors to elect arbitration under a restructuring proceeding is limited to controversies that are not related to a default on the payment terms set forth in the plan. However, creditors may be able to elect to have disputes related to defaults under pre-packaged and liquidation agreements resolved through arbitration. With pre-packaged agreements, since the proceeding before INDECOPI is "terminated" with the approval of the plan by the creditors' committee, the jurisdiction of INDECOPI is no longer applicable. Therefore, in the case of any dispute related to the execution of the pre-packaged agreement, including the debtor's default, the creditors or the debtor have the right to choose arbitration as the mechanism for resolution of such disputes. Likewise, for disputes arising from the interpretation or execution of a liquidation agreement there are no limitations on the ability of creditors to choose arbitration.

Another scenario where arbitration might be used in connection with bankruptcy proceedings is a dispute relating to post-petition claims (*créditos post-concursales*). INDECOPI has clarified that post-petition claims will not be subject to a bankruptcy proceeding if (i) claims were generated during the implementation of the liquidation as an ongoing concern, and (ii) claims arise from debts required to keep the debtor's operation as an ongoing concern. Peruvian lawyers José Jiménez and Daniel Gonzáles consider that a new financing of working capital or a post-petition financing granted by suppliers of goods and services should fit within this criteria.[3] This suggests that creditors may choose to use arbitration for disputes arising from this sort of "debtor-in-possession" financing, which may be particularly advantageous for creditors, since under Peruvian law, if a creditor receives an arbitration award, it will receive the payment of that award with priority over all insolvency claims.



Notwithstanding the potential for greater use of arbitration to resolve disputes in connection with insolvency plans in Peru, there is no evidence that creditors have opted into this system so far. Although there do not appear to be any obvious or downsides to the use of arbitration, creditors may simply not choose arbitration because reorganization remains relatively unusual in Peru and thus there are fewer precedents for its use.

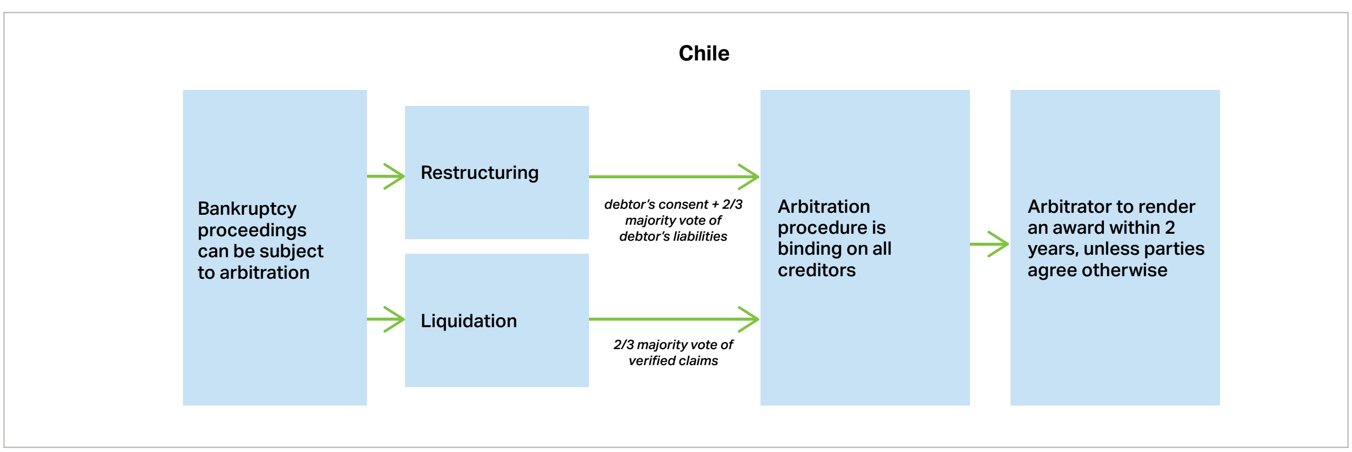
Chile

The new Chilean insolvency law[4] was enacted to promote reorganizations as an alternative to liquidations. Several reforms were introduced to the prior bankruptcy regime with the goal of simplifying and shortening the time frames for reorganization and liquidation proceedings, promoting greater participation by creditors, facilitating the financing of insolvent companies, and creating specialized insolvency courts.

In addition to specialized insolvency courts, Chapter VII of the insolvency law, titled "Insolvency Arbitration" (*Del Arbitraje Concursal*), provides for the possibility to arbitrate both liquidation and reorganization proceedings. In short, arbitration can be chosen by a debtor and its creditors, and the arbitrator's purview is broad enough to include the entire proceeding. In a reorganization proceeding, arbitration can be chosen with the consent of the debtor and two-thirds of the debtor's liabilities.

On the other hand, in a liquidation proceeding, the debtor's consent is not needed, and only a two-thirds majority vote of the verified claims (*Quórum Especial*) is required, to elect arbitration for the proceeding. In both cases, once approved, the arbitration procedure is binding on all creditors, including the non-consenting creditors.

In both reorganization and liquidation proceedings, the sole arbitrator must be chosen by the creditors from a "Roster of Insolvency Arbitrators" prepared by Chile's Insolvency and Reorganization Superintendency, which must approve all arbitrator candidates. In order to qualify, arbitrators are required to have at least 10 years of legal experience and to be well trained in bankruptcy law. Liquidators and Trustees (*Veedores*) are banned from serving as insolvency arbitrators pursuant to the insolvency law. Once the arbitrator accepts this commitment



the arbitrator must render a decision on any matter within a two-year term from his or her designation, unless all parties involved in the arbitration process agree on a different term.

Insolvency arbitrators are entitled to admit any kind of evidence, to have access to all the books and records where the operations, acts, and agreements of the debtor have been registered, and to order evidentiary hearings. Furthermore, arbitrators have the power to analyze all available evidence under the rules of "healthy criticism" (*sana crítica*), with broad powers to consider or not consider all the evidence before them. Finally, an insolvency arbitration decision may be appealed, unless the parties agree otherwise. It is important to mention that although appeals are permitted, appeals on the merits are not possible, and appeals on the process are possible only if the parties to the arbitration have agreed in the arbitration agreement to subject such appeal to other arbitrators.

Despite the adoption of this alternative to the insolvency law, to date liquidation and reorganization proceedings continue to be heard primarily, if not exclusively, by Courts and there are no known insolvency proceedings in Chile involving international creditors that have elected to use arbitration; just as in Peru, it is likely this is a result of the relatively few reorganization cases that have been heard.

United States

In the United States, insolvencies are governed by the Bankruptcy Code, which is generally administered by specialized bankruptcy courts. These courts have jurisdiction over "all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]." 28 U.S.C. § 1334. This language is sweeping and provides bankruptcy courts with jurisdiction over almost all aspects of a bankruptcy proceeding. In general, arbitration, mediation and other forms of alternative dispute resolution may not be used to administer or adjudicate matters that are before a Bankruptcy Court. Despite this broad jurisdiction and power, however, alternative dispute resolution mechanisms, such as mediation and arbitration, have been used in particular circumstances arising in insolvency cases in the United States.

Mediation

In large, complex insolvencies, there may be thousands of claims filed against a debtor. In order to ease the burden on the Bankruptcy Court and to ease the financial strain on the debtor of litigating these claims, the court, pursuant to its broad powers, may require parties to mediate disputes arising in connection with an insolvency. In many cases, parties have questioned the court's power to require such mediation. However, courts have held that ordering mediation is part and parcel of managing the claims filed before the court and is a way of providing a procedural framework for the consensual resolution of claims through streamlined procedures that do not bind participating parties unless they choose to be bound.

In the OSG Shipholding Group insolvency proceeding, for example, over 7,000 claims were filed against the debtor. Among the claims asserted were thousands of asbestos exposure related claims, as well as personal injury claims. Absent consent by all of the parties, the Bankruptcy Court lacked the authority to rule on these types of claims — but at the same time, without settling the claims, OSG would have had a very difficult time emerging from bankruptcy. Certain claimants argued that the court lacked authority to force the parties to mediate. The court, however, found that although it may not have the authority to rule on the merits of the claims (or to force the parties to resolve the claims through the mediation process), it had the authority to require the parties to mediate and attempt to reach a resolution. Ultimately, in the OSG case, this power to force mediation proved useful, as OSG was able to settle many of its claims in a more efficient manner, and it has just recently emerged from bankruptcy.

Arbitration

In the United States, there is a tension between a legal presumption in favor of the enforceability of arbitration agreements and the broad jurisdiction that bankruptcy courts have over all proceedings arising in, under, or related to the Bankruptcy Code. Thus, for example, if a contract dispute arises between a debtor in bankruptcy (also called the "estate") and a third party, and there is a provision of the contract stating that any dispute arising under the contract must be arbitrated, bankruptcy courts often look to four factors to decide whether to enforce an arbitration clause or retain jurisdiction and decide a dispute itself: (1) whether the parties agreed to arbitrate; (2) the scope of the agreements; (3) whether Congress intended the claims to be nonarbitrable; and (4) if some claims are arbitrable, the court must decide whether to stay proceedings pending the outcome of the arbitration.

However, even if the four criteria mentioned above are satisfied, bankruptcy courts may choose to retain jurisdiction (and thus decline to let the parties arbitrate a dispute) for institutional legitimacy reasons such as a desire to uphold the authority of the bankruptcy courts to oversee bankruptcy matters and the right of the debtor to file for bankruptcy. Thus, if the claim to be arbitrated is a claim that arises solely because the debtor is in bankruptcy (so-called "core proceeding"), most courts will not enforce an arbitration clause; this type of proceeding usually takes the form of claims against the estate, the sale of estate assets, and the recovery of assets by the estate, among others. If, however, the claim exists outside of the debtor's bankruptcy (so-called "non-core proceeding"), courts are more likely to enforce the arbitration agreement. These "non-core proceedings" involve, for example, the personal injury claims that were at issue in the OSG case, as well as certain pre-bankruptcy contracts.

For example, in *In re Pisgah Contractors, Inc.*,[5] a contractor in bankruptcy had one major asset, a pre-bankruptcy account receivable. The contract underlying the account receivable included an arbitration clause. If an account receivable was a "core proceeding," the Bankruptcy Court could have decided not to enforce the clause; however, pre-bankruptcy accounts receivable are generally not considered to be core proceedings. Reversing the Bankruptcy Court, the court hearing the appeal held that the Bankruptcy Court had no discretion and should have enforced the arbitration agreement because the account receivable in question was not a core proceeding.

Thus, the United States' approach to the use of arbitration and mediation in bankruptcy proceedings is more akin to that of Peru – although arbitration cannot be used to process an insolvency, it can in many instances be used to resolve disputes that are related to a debtor in bankruptcy or to make a court-supervised bankruptcy process more efficient.

Key Questions When US Courts Decide to Enforce Arbitration Clause

1. Did the parties agree to arbitrate?
2. What is the scope of the arbitration agreement?
3. Did Congress intend the claims to be arbitrable or not?
4. Will the main proceedings be stayed while the arbitration is pending?

A Modest Proposal

Given that arbitration is being increasingly favored by commercial counterparties in international transactions, it is worth considering whether jurisdictions in emerging markets could encourage further use of arbitration in insolvency proceedings. As indicated above, some jurisdictions (such as Peru and the United States) have already taken small steps towards the use of arbitration in ancillary disputes, and at least one jurisdiction (Chile) has permitted the use of arbitration in core bankruptcy matters (although to date there is no evidence that this mechanism has been used). One potential reason for the limited use of arbitration – in addition to those discussed above for each jurisdiction – is that choosing arbitration when (or after) an insolvency is initiated may not be the most opportune time to do so. At that time, creditors and the debtor are suspicious, if not completely hostile to each other, which makes choosing something as material as a forum a complicated process. In addition, choosing arbitration or mediation on a bilateral basis – in contracts or other arrangements – can lead to conflicting jurisdictional claims and a chaotic proceeding.

An alternative would be to amend insolvency laws to permit companies to choose arbitration in their bylaws. In that scenario, the decision to use arbitration would be taken at the outset of a commercial relationship, rather than the end. In addition, the decision would be transparent and available to all creditors who asked for a copy of the company's constitutive documents. Creditors could still play a role in the decision – they could insist on a company amending its bylaws to permit (or not permit) arbitration as the forum for a future insolvency proceeding, much as counterparties choose the governing law and dispute resolution forum for their contract. Some matters would need to be reserved for future agreement – for example, it would likely not be possible for parties to choose the specific arbitrator in advance. However, as in Chile, countries could maintain a roster of insolvency arbitrators and could provide for a mechanism to decide on the arbitrator (if parties are unable to do so) when the insolvency is filed, just as many jurisdictions do with an overseer or bankruptcy trustee.

Advocates in some countries might object that using arbitration – a mechanism typically reserved for sophisticated counterparties – is not appropriate for a bankruptcy that involves employee or trade creditors, who may not be able to afford the sophisticated legal advisors that typically accompany these proceedings. However, many insolvency cases involve impairment only of institutional financial creditors, such as bondholders or banks, and it may be reasonable to limit the use of arbitration if a debtor wishes to impair other creditor classes. Likewise, advocates might object that absent a strong procedural framework, arbitrated insolvencies could drag on indefinitely while the appropriate mechanisms are worked out. However, it should certainly be possible to publish a model insolvency procedure for arbitrators (much in the way that the UNCITRAL model law on cross-border insolvency has served as a template for many countries), and that model could differ by region or country, depending on the nature of local practices. Parties could agree in advance to use (or modify) this model framework for a future insolvency arbitration.

Even with these modifications, the ability to elect arbitration in insolvency proceedings could be a significant improvement to restructurings in emerging markets – it has the potential to result in speedier and more transparent proceedings, higher recoveries and greater certainty as to outcomes. And it would align insolvency regimes with the overall trend towards alternative dispute resolution in commercial markets. Countries involved in insolvency reforms should consider whether this would help their access to credit markets – and creditors should consider whether these reforms would be beneficial to them as well. ■

You Have Options: Takeaways

1. Include insolvency optionality in bylaws
2. Create and maintain a roster of insolvency arbitrators by jurisdiction
3. Form a model insolvency procedure for arbitrators

1. A third option, to file for bankruptcy in a mature market like the United States, Canada or the United Kingdom, is often not viable because of the need to impair local creditors that refuse to participate in an extra-territorial proceeding.
2. Judicial courts in Peru are able to hear challenges by creditors against any final decisions from INDECOPI's administrative tribunal as well as clawback actions, among others.
3. José Jiménez and Daniel Gonzáles, *Is Debtor-In-Possession Financing Even Possible in Peru*, Emerging Markets Restructuring Journal. Issue No. 2 – Fall 2016, 40-45.
4. The Law No. 20.720, Law for Reorganization and Liquidation of Assets for Companies and Individuals (Ley No. 20.720, Ley de Reorganización y Liquidación de Empresas y Personas), has been in force since October, 2014.
5. *In re Pisgah Contractors, Inc.*, 215 B.R. 679 (W.D.N.C. 1995).

▼ **Adam Brenneman** is a partner in the New York office of Cleary Gottlieb Steen & Hamilton. Adam's practice focuses on international corporate and financial transactions including mergers and acquisitions, public-private partnership (PPP) transactions, capital markets, restructuring and financings. His practice is primarily cross-border, focusing on Latin America. Adam was recently recognized as an "Outstanding Young Restructuring Lawyer" by *Turnarounds & Workouts* and is recognized for his work in project finance by *The Legal 500 U.S.* He received a J.D. from the University of Pennsylvania Law School in 2006 and a B.A. from George Washington University in 2002.

▼ **Pamela Arce**'s practice focuses on corporate reorganizations and financial transactions, including financings, bankruptcy and restructuring. She has participated in major insolvency and bankruptcy proceedings in Peru. Pamela was part of the legal counsel team to the debtor in the acquisition and restructuring of over $100 million of debt of Compañía Peruana de Radiodifusión S.A. over an insolvency proceeding under Peruvian Bankruptcy Law. She also was counsel to creditors in the bankruptcy proceeding of the mining company Doe Run. Pamela joined Cleary Gottlieb as an International Lawyer in August 2016 and in May 2017, she returned to Rebaza Alcazar & De Las Casas, a law firm in Lima, Peru.

▼ **Pablo Mori Bregante**'s practice focuses on transnational disputes and international arbitration in Latin America. He has extensive experience advising on mining and oil and gas transactional matters and also on litigation-oriented bankruptcy controversies. Pablo joined Cleary Gottlieb as International Lawyer in August 2016 and in July 2017, he returned as senior associate to Bullard, Falla, Ezcurra, a major arbitration law boutique firm in Peru..

▼ **David Schwartz** is an associate at Cleary Gottlieb Steen & Hamilton LLP in New York. His practice focuses on bankruptcy and litigation. David joined the firm in 2016.

VENEZUELA WATCH

ICSID Committee Strips $1.4 billion From Award to ExxonMobil

By **MIHALIS GOUSGOUNIS** *(mgousgounis@cgsh.com) and* **TANYA MARTINEZ** *(tmartinez@cgsh.com)*

On March 9, 2017 an ICSID committee annulled approximately $1.4 billion in damages from the approximately $1.6 billion award against Venezuela granted to entities owned by ExxonMobil. The original ICSID award had been rendered by an ICSID tribunal in October 2014 pursuant to the Netherlands/Venezuela bilateral investment treaty, ordering compensation mainly for the expropriation of the Cerro Negro and La Ceiba oil projects, which had been nationalized in 2007. Venezuela had filed for annulment of the award in February 2015.

The crux of the dispute centered on the nature and magnitude of the damages arising from the expropriation. Interestingly, the parties were not in dispute as to whether or not expropriation had occurred or whether the expropriation of the oil projects carried with it an obligation by Venezuela to pay compensation. The annulment decision focused on how the damages for the expropriation of the Cerro Negro project in particular had been justified and calculated.

In its annulment submissions, Venezuela argued that the contractual agreements between Exxon and Venezuela related to the Cerro Negro project incorporated a legislatively-enacted limitation of liability clause in the event that certain government actions were taken, also referred to as the "price cap," and that the price cap was ignored by the tribunal in assessing the damages via a discounted cash flow model. Exxon had maintained all along that the price cap was not relevant, as Exxon was bringing a bilateral investment treaty claim and not a contractual claim, with respect to which domestic legislative actions were not applicable.

The ICSID committee found in its annulment decision that, among other things, the tribunal failed to consider the relevance of the price cap when calculating damages, and that such failure was "unsupported by analysis and [was] based on contradictory reasoning," and, thus, annulled approximately $1.4 billion of damages awarded for the Cerro Negro project. The committee did not take a view as to how the price cap could or should have been applied; rather its decision was directed "simply at [the price cap's] *a priori* exclusion" from the calculation of damages. In short, the committee appears to have sided with Venezuela's view that, when assessing damages, the bundle of property rights themselves for which compensation was sought were effectively constituted and circumscribed by the contractual agreements, which in turn incorporated the legislatively enacted price cap, and as such the price cap should have been taken into account.

What happens next?

Within the annulment proceedings, Venezuela made a binding undertaking to promptly pay any part of the award that was not annulled, but it remains to be seen whether Venezuela will in fact follow through with its commitment.

Exxon has already indicated its intention to seek to enforce the remaining non-annulled $188 million of the award (to the extent it is not paid). However, Exxon's enforcement may be frustrated by procedural uncertainty. The District Court for the Southern District of New York confirmed the award before the ICSID committee reduced the amount awarded and had stayed the enforcement proceedings pending an appeal of the confirmed award in the Second Circuit. Shortly after the annulment decision, Exxon asked the District Court to lift the stay of enforcement with respect to the non-annulled portion of the award, but the District Court declined to do so absent guidance from the Second

Circuit given the pendency of Venezuela's appeal. The Second Circuit could potentially, among other things, (a) vacate the $1.4 billion judgment of the District Court confirming the original award on the ground that Venezuela did not receive notice of the actions before the Court entered judgment, and remand for further proceedings, or (b) reject Venezuela's appeal as to notice, but direct the District Court to reduce to $188 million the amount of the judgment to reflect the modification of the award as modified.

Separately, Exxon could initiate a new claim (submitted to a new ICSID tribunal) asking for redetermination of the damages that the ICSID Committee annulled. Such claim, in addition to being limited by the tribunal's finding that any damages awarded for the expropriation of the Cerro Negro project must be offset against the $908 million awarded in a parallel ICC proceeding, could take years to be decided and could also be subject to subsequent annulment proceedings.

Currently there are over 20 pending ICSID cases that have been brought by investors of allegedly nationalized projects against Venezuela in different stages, including a number of multi-billion dollar claims. Each claim is very fact specific and the Exxon annulment will not necessarily affect the other proceedings, but it does underscore the uncertainty and hurdles that such investors have to face on the road to recovery. More broadly, the market has been closely monitoring these ICSID cases, as Venezuela's failure to pay a final/non-appealable judgment over $100MM within 30 days will trigger an event of default under the Venezuela bonds. An ICSID award in and of itself would not constitute a "judgment" for purposes of the bond documentation; such award would have to be turned into a "judgment" in domestic courts and become non-appealable, a time consuming process that is ongoing with respect to some other ICSID awards against Venezuela (e.g., Crystallex, Gold Reserve, OI European Group, etc).

Pari Passu Undone: Game-Changing Decisions for Sovereigns in Distress

By **JAMES M. BLAKEMORE** *and* **MICHAEL J. LOCKMAN**[1]

On December 22, 2016, Judge Griesa of the District Court for the Southern District of New York issued an opinion in *White Hawthorne, LLC v. Republic of Argentina*, heralding a new understanding of the infamous *pari passu* clause: going forward, a sovereign's decision to pay some of its creditors and not others does not, on its own, breach the clause.[2] Around five years had passed since Judge Griesa's first interpretation rattled the global sovereign-debtor community and threatened the accepted understanding of customary international law. *White Hawthorne* ended the so-called "Ratable Payment" interpretation in the Southern District.

Background

Following macroeconomic misfortunes in the early 2000s, the Republic of Argentina entered an economic recession plagued by capital flight, devaluation of the peso, and a loss of investor confidence. Unemployment and poverty surged, dozens died in riots in the streets of Buenos Aires, and Argentina cycled through five presidents in ten days. By the end of 2001, Argentina found itself unable to service its more than $80 billion in debt and still maintain essential government services.

No bankruptcy regime exists for insolvent sovereigns. As a result, Argentina resorted to two voluntary global exchange offers in 2005 and 2010 to restructure its distressed bonds. Although the restructuring was largely successful—Argentina exchanged more than 90% of its outstanding external debt—roughly eight percent of creditors rejected both offers. These holdouts consisted primarily of hedge funds that purchased Argentina's often steeply discounted distressed debt and subsequently demanded full payment of principal and interest. Following the first exchange offer, Argentina responded to these tactics by passing the so-called Lock Law, which prohibited "reopening the swap process established in the [2005 exchange offer] with the holdout creditors."[3]

2005 and 2010 Restructuring

1. More than 90% of debt exchanged
2. Par, quasi-par, and discount bonds (between 25 and 35% of original value)

In 2011, several offshore hedge-fund creditors sought to compel repayment based on a novel reading of a previously overlooked boilerplate provision in Argentina's debt instruments. The contractual clause purported to rank the bonds "*pari passu*," i.e., on equal footing, "without any preference among themselves," and required the "payment obligations of the Republic . . . [to] rank at least equally" with all other present and future unsecured debt.[4] The so-called *pari passu* clause traditionally had been understood to be a covenant of "equal ranking," preventing debtors from changing the *legal* ranking of *pari passu* debt through subordination. The hedge funds put forward a different theory, arguing that the *pari passu* clause compels "equal payment": an insolvent state must pay all of its creditors ratably, or pay none at all.[5]

Judge Griesa ruled in favor of the creditors and entered an order enjoining Argentina from paying the holders of restructured bonds without making simultaneous ratable payments to all holdout creditors.[6] Notably, the injunctions similarly restricted the third-party financial intermediaries that assisted Argentina in servicing the bonds it issued as part of its restructuring.

When the Second Circuit affirmed the interpretation and injunction in 2012,[7] the sovereign debt market was thrown into chaos. Sovereigns scrambled to reassess their external-debt fiscal strategies, lawyers pored over the language of bond documentation, and Argentina's financial intermediaries, charged with processing payments on Argentina's performing debt, sweated the potential consequences of violating the order.

The injunctions raised immediate concerns about the judiciary's power to frustrate sovereign debt restructurings, which have historically been conducted as extrajudicial, voluntary processes. The traditional remedy for sovereign debt default is acceleration or a money judgment. When Argentina waived jurisdictional immunity in its bond documents, it relied on the Foreign Sovereign Immunities Act's regime of limiting enforcement to the attachment of commercial property in the United States. Moreover, it waived its jurisdictional immunity in reliance on the traditionally voluntary nature of sovereign debt dispute resolution and restructurings.[8] The injunctions—entirely absent from the FSIA's approach to enforcement—also infringed upon Argentina's rights under customary international law to be free from foreign tribunal rulings that purport to compel a state to act or not act in a certain manner.

In November 2015, Argentina elected Mauricio Macri as President, whose campaign promises had included proposals to resolve the creditors' claims. Agreements in Principle were signed in February 2016 with a group of creditors holding 85% of the claims brought by creditors with *pari passu* injunctions, and Argentina set terms for a proposal to settle *all* non-time-barred claims. Judge Griesa noted that these changes rendered the injunctions no longer equitable, and lifted them accordingly in March 2016.[9]

Key Provisions of 2016 Agreements in Principle

1. Standard proposal: 150% of each bond's original principal amount
2. Payment of settlement dependent on lifting of all *pari passu* injunctions
3. Bondholders must deliver their bonds against payment
4. Elliot and Aurelius: 75% of full judgments including principal and interest

White Hawthorne

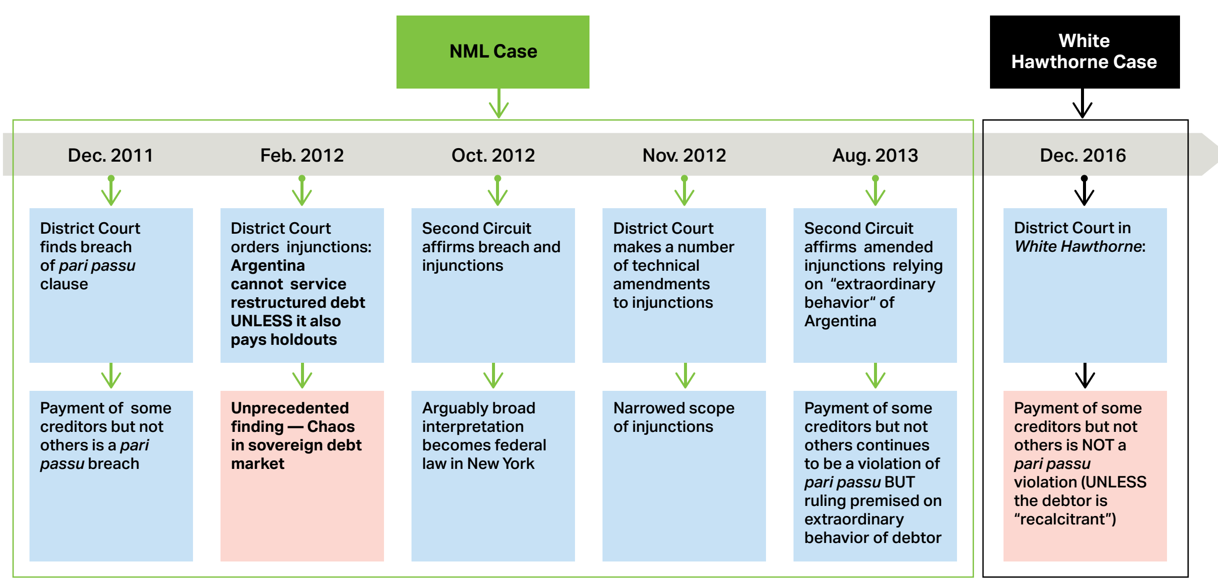
The *White Hawthorne* plaintiffs are a group of hedge funds that filed suit in February 2016 in the Southern District following Argentina's announcement of its global proposal to settle all defaulted debts. Because their holdings were time-barred and thus unacceptable under Argentina's proposal, the plaintiffs brought suit, seeking breach-of-contract damages based on nonpayment of principal and interest, as well as injunctive relief and money damages under the *pari passu* clause.

The plaintiffs argued that Argentina was again in breach of the *pari passu* clause.[10] This time Judge Griesa disagreed, and in so doing, he clarified the nature of Argentina's 2011 breach. The court held that there was no "one element" that resulted in the breach, but rather "a complicated set of circumstances."[11] The court pointed to the "extraordinary conduct," "harmful legislation," and "incendiary statements" of the Kirchner government: "In short, Argentina violated the *pari passu* clause not merely by being a sovereign nation in default, but by being a '*uniquely* recalcitrant debtor.'"[12] From this one can distill *White Hawthorne*'s holding: absent a sovereign's unique recalcitrance, payment to some creditors and not others does not breach the *pari passu* clause.

The *pari passu* clause, in one form or another, is not unique to Argentina's debt, and concern for the effect of Judge Griesa's interpretation has long extended beyond the particular case before him. Unnerved by the court's unprecedented reading, skittish sovereign issuers and other market participants have revised equal treatment provisions to repudiate the district court's interpretation and have added or strengthened collective action clauses.[13] Thus, Judge Griesa's reading of the *pari passu* was fortified against on two fronts: one interpretive and the other practical. On the first front, revised rankings clauses have tended to state that, while the issuer's bonds will rank equally among themselves and certain other debt, equal ranking does not require ratable payments. On the second, collective action clauses have sought to limit the power of holdouts by reducing the number of holders whose consent is required to amend certain key payment terms like the interest rate and principal amount of the bonds.

For debt issued before the *pari passu* decisions, however, whether and to what extent the district court's understanding of Argentina's clause might apply beyond Argentina's debt remained an open question. *NML I* suggested the possibility that dangerous, unexploded ordnance lay strewn throughout numerous outstanding sovereign debt instruments, waiting to be activated.

In its 2013 opinion affirming the district court's amended *pari passu* injunctions, the Second Circuit dismissed these concerns on the grounds that Argentina, in the appellate court's view, was a "uniquely recalcitrant debtor" whose "extraordinary behavior" was unlikely to be repeated by other sovereigns.[14] Still, the *pari passu* clause had, to great effect, become something it was not before, and powerful precedents can be difficult to contain. The series of decisions implementing and affirming the *pari passu* injunctions left unclear precisely which elements of Argentina's conduct sufficed to make it "extraordinary," and sovereigns were left to wonder whether similarly worded clauses in their own debt documents might be refashioned and turned against them.[15]



White Hawthorne has done much to quell anxiety regarding potential fallout from the *NML* rulings. First, the district court deployed an important limiting principle to its interpretation of the *pari passu* clause, applicable regardless of the behavior of the sovereign in question. Payment to other creditors pursuant to a court-approved settlement, the court confirmed, does not violate the *pari passu* clause. The contrary ruling urged by the plaintiffs would have opened the door to a sequence of derailed settlements, in which one holdout wields the clause to prevent payment on bonds and achieve settlement, only to have its own settlement blocked by the next holdout in line. In the district court's view, the *pari passu* clause is constructive rather than destructive, its aim to encourage and enable settlements rather than blow them up. *White Hawthorne* sensibly rejected an application of the *pari passu* clause that would unravel the clause itself.

Second, *White Hawthorne* takes seriously the Second Circuit's view that *NML* was an exceptional case. We now know that the bare decision to pay some creditors and not others, absent other actions on the part of the sovereign, does not violate the *pari passu* clause. Crucially, while Argentina demonstrated its good faith by repealing the Lock Law and other key legislation and signaled its determination to settle with its creditors, it continued to pay and settle with holders of bonds similar to the defaulted bonds on which the *White Hawthorne* plaintiffs brought suit. That such action does not implicate the equal treatment provision significantly curtails *NML*'s precedential value. To quote Judge Griesa's description of Macri's election, *White Hawthorne* "changed everything."

To be sure, *White Hawthorne* is "only" a district court decision. Wary sovereigns might take some comfort, however, in the fact that the Second Circuit's endorsement of the *pari passu* injunctions was circumspect and cabined.[16] Importantly, while the affirmance relied on Argentina's "extraordinary behavior," it left undefined the boundaries and content of that behavior. Favoritism among creditors, for example, was a necessary element, but was it sufficient? In *White Hawthorne*, the district court—the very district court that first gave its imprimatur to what was at the time an unorthodox reading of the *pari passu* clause—answered no.

The decision has dealt a serious blow to creditors who would seek to follow in the hedge funds' footsteps and rouse a dormant equal treatment provision to stymie a sovereign's restructuring efforts in hopes of a windfall. The decision reaffirms that an equal treatment clause is violated in only the rarest of cases—perhaps in only one *sui generis* case. A new Argentina means a disarmed *pari passu* clause, a change that may be the first step in limiting an interpretation of the aberrant facts of a unique case. In the future, judicious sovereigns in default will avoid promulgating lock laws or their kin, and will make clear their willingness to negotiate with their creditors. So long as the offending course of conduct underlying the *pari passu* decisions remains unique to these cases, any *pari passu* clause lurking in the bond documentation of another sovereign is likely to remain inert, regardless of whether the debtor decides to pay one creditor and not another. ■

Pari passu after _White Hawthorne_

1. Argentina no longer breaches the clause by paying some creditors and not others
2. Precedential effect of broad reading of *NML* drastically undermined
3. Sovereigns in default should avoid legislation and public statements signaling unwillingness to negotiate
4. Future cases may build on *White Hawthorne*'s interpretation of the clause

1. James M. Blakemore is an associate at Cleary Gottlieb Steen & Hamilton LLP in New York. Michael J. Lockman is a former litigation associate at Cleary Gottlieb in New York; he left the firm in 2017 to begin a clerkship with the Honorable Jay S. Bybee of the U.S. Court of Appeals for the Ninth Circuit. The views expressed herein are solely those of the authors and do not necessarily reflect those of the firm or its clients. The firm represented the Republic of Argentina in the matters described in the article. The authors would like to thank Carmine D. Boccuzzi for his insightful comments and suggestions.
2. *See generally* White Hawthorne, LLC v. Republic of Argentina, 2016 WL 7441699 (S.D.N.Y. Dec. 22, 2016) ("White Hawthorne").
3. *See* Law No. 26017, art. 2, Feb. 10, 2005, B.O. 30590 (Arg.).
4. *See* Order, NML, 08-cv-06978 at *1 (Dec. 7, 2011); *see* Georges Affaki, Revisiting the Pari Passu Clause, in SOVEREIGN DEBT MANAGEMENT 39, 46 (Rosa M. Lastra & Lee Buchheit eds., 2014).
5. *See* Memorandum of Law in Support of the Renewed Motion of NML Capital, Ltd. for Specific Enforcement of the Equal Treatment Provision at 4–8, NML Capital Ltd. v. Republic of Argentina, 08-cv-06978 (S.D.N.Y. Jan. 6, 2012).
6. Order at 3–4, NML, No. 08–cv–6978 (S.D.N.Y. Feb. 23, 2012).
7. *See generally*, NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012); *see also* Lee C. Buchheit & G. Mitu Gulati, *Restructuring Sovereign Debt after* NML v. Argentina, Cap .Markets L. J. * 2–4 (forthcoming 2017) (describing the Second Circuit's holding in *NML*).
8. *See* Brief for the United States as Amicus Curiae at *6, *NML I*, 2012 WL 6777132 (Dec. 28, 2012).
9. Opinion and Order, NML, No. 08–cv–6978 (S.D.N.Y. Mar. 2, 2016).
10. *See* Plaintiffs' Opposition to the Republic of Argentina's Motion to Dismiss Pursuant to Rule 12(b)(6), White Hawthorne *8 (Aug. 25, 2016) ("The *pari passu* counts seek relief for separate violations of Plaintiffs' distinct contractual rights to be treated without discrimination with regard to the holders of external indebtedness.").
11. White Hawthorne, *supra* note 2, at *5.
12. *Id.* (emphasis in original); *see also* W. Mark C. Weidemaier & Ryan Carl, *Creditors' Remedies, in* SOVEREIGN DEBT MANAGEMENT 139, 148 (Rosa M. Lastra & Lee Buchheit eds., 2014) (describing how Argentina was viewed a "uniquely defiant debtor").

13. *See,* e.g., International Capital Market Association, "ICMA New York and English Law Standard CACs, Pari Passu and Creditor Engagement Provisions" (May 2015), *online at* http://www.icmagroup.org/resources/Sovereign-Debt-Information (last visited Mar. 5, 2017).
14. *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 247 (2d Cir. 2013).
15. *See* Buchheit & Gulati, *supra* note 7, at *2–4 (explaining that the 2012 *NML* decision did not clarify precisely what constellation of elements of recalcitrance were sufficient to constitute breach of the *pari passu* clause, and noting that the court "simply affirm[ed]" the district court's conclusion that Argentina's course of conduct amounted to a breach").
16. "[W]e have not held that a sovereign debtor breaches its *pari passu* clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor's rights. We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA." *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 247 (2d Cir. 2013) (citations omitted).

▼ **James M. Blakemore** is an associate at Cleary Gottlieb Steen & Hamilton LLP in New York. His practice focuses on litigation. James joined the firm in 2013. In 2011, he interned in the chambers of Chief Justice Ricardo Lorenzetti of the Supreme Court of Argentina.

▼ **Michael J. Lockman** is a former litigation associate at Cleary Gottlieb in New York; he left the firm in 2017 to begin a clerkship with the Honorable Jay S. Bybee of the U.S. Court of Appeals for the Ninth Circuit.

DEALNEWS / MULTI-JURISDICTION

Insolvency proceeding of Abengoa's Mexican subsidiary

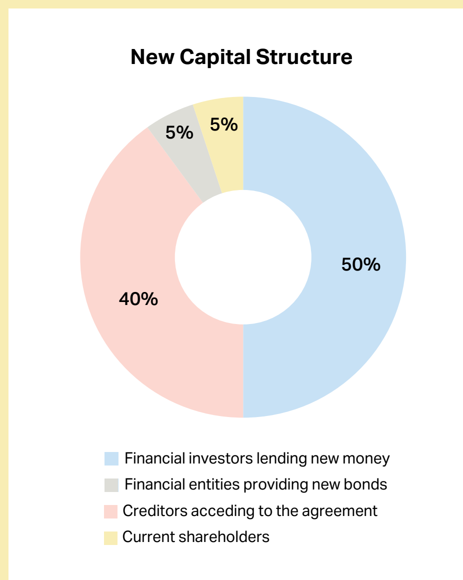
By **LOURDES ELIZONDO**[1]

Overview of Completed Spanish Proceedings

On March 31, 2017, Abengoa, S.A. ("**Abengoa**"), a Seville-based green energy technology-focused conglomerate, concluded its insolvency process in Spain. Abengoa's restructuring included multiple parallel in-court proceedings in the U.S., as well as Brazilian and Mexican proceedings.

Abengoa's restructuring began in November 2015, with the company's pre-insolvency filing with the Spanish securities regulator, upon its failure to attract new investors and lenders and satisfy its liquidity needs. By September 2016, Abengoa made available to creditors its proposed restructuring agreement, which was later revised in February 2017. Abengoa's project debt and corporate financing as of December 31, 2016 was approximately €9.7 billion.

Early in 2017, at the close of its supplemental accession period, during which existing creditors could accede to the restructuring agreement, Abengoa received support from 94% of its financial creditors. As part of the restructuring agreement, Abengoa issued warrants and executed share capital increases in a nominal aggregate amount of approximately €34.8 million, leaving pre-existing shareholders with only 5% of Abengoa's equity post-capital increase. Total financial commitments were €1,170 million of new money and €307 million of new bonds.



	Standard Restructuring Terms	Alternative Restructuring Terms for Acceding Creditors
General	Preexisting debt reduced by 97% of its nominal value.	30% of the nominal value of outstanding debt converted into a new bond or loan (ranked senior or junior depending on whether or not each creditor participates in the new money facilities)
Maturity	Remaining 3%: 10 years	Senior debt: 5.5 years and junior debt: 6 year; with possible extension of up to 2 years.
Annual Coupon	None.	0.25% cash annually plus 1.25% "pay if you can" on an annual basis subject to certain conditions being met; otherwise capitalized and paid at maturity.
Capitalization Option	None.	For remaining 70% of the nominal value of outstanding debt in exchange for 40% of shareholders equity of the new Abengoa to be distributed among existing financial creditors.

Source: Abengoa website at http://www.abengoa.es/web/en/accionistas_y_gobierno_corporativo/financial-restructuring-proposal-viability-plan/preguntas-respuestas/.

As a result of not having the financial support of their parent company, Abengoa's subsidiaries in the U.S. and Brazil filed insolvency proceedings of their own. Abengoa's U.S. subsidiaries and affiliates are currently in the process of their Chapter 11 plan, while the Brazilian subsidiary has creditors' meetings scheduled for May and June of this year in order to approve the restructuring plan of the Brazilian subsidiary.

As for Abengoa, recent local news have reported that the company has hired Boston Consulting as its adviser for the company's new business strategy upon conclusion of Abengoa's refinancing process.

Ongoing Mexican Proceedings

Abemex Involuntary Insolvency
Abengoa's Mexican subsidiary, Abengoa Mexico, S.A. de C.V. ("**Abemex**") defaulted on its Mexican Peso-denominated local short-term bonds in November 2015. On July 25, 2016, the Mexican bankruptcy court accepted creditor Banco Base's request for Abemex's involuntary insolvency.

Challenges to the Insolvency Determination and the "Generalized Insolvency" Principle
Subsequently, the Federal Institute of Specialists in Bankruptcy Procedures (IFECOM) appointed a *visitador* to verify that Abemex had met the two requirements for a bankruptcy declaration: (i) liability in arrears for over 30 days, accounting for at least 35% of the debtor's total liabilities and (ii) debtor having insufficient assets to service 80% of defaulted liabilities. Unlike involuntary Chapter 11 filings, where at least three or more creditors are required, unless there are fewer than 12 creditors, Mexican involuntary insolvency proceedings can be filed in connection with payment defaults under claims of at least two creditors. The appointed *visitador* determined that Abemex should not have been declared bankrupt as it did not meet one of the two requirements since past-due liabilities did not account for at least 35% of the debtor's total liabilities.

On December 16, 2016, the Mexican court ruled in favor of declaring Abemex bankrupt despite the *visitador* reports being binding to such court. The court based its decision on the fact that, under Mexican bankruptcy laws, bankruptcy may also be declared if an assumption of "generalized insolvency" can be proved when the company's assets are not sufficient to service its past due liabilities.

Precautionary Measures
As precautionary measures to protect creditors, the court prohibited Abemex from paying any liabilities

defaulted before July 25, 2016, and selling, transferring or granting as collateral any of its property or assets. Unlike debtor-in-possession financing in the U.S., in Mexico, once precautionary measures are provided to creditors, a debtor may not grant a first priority lien on an encumbered property to secure a new loan.

In January 2017, Banco Base requested an extension of precautionary measures, which would apply to the Abent 3T (A3T) project, a 220-megawatt cogeneration plant in the state of Tabasco in its final phase of construction. Banco Base's request sought to prevent Abengoa from granting the A3T shares as partial collateral of its secured financing, as contemplated by Abengoa's restructuring plan, and to obtain additional assets to cover amounts owed to Mexican creditors. However, the court denied such request by ruling that A3T is owned by a third party, and therefore excluding it from Abemex's insolvency proceeding. Accordingly, Abengoa granted such shares as collateral of its financial restructuring plan.

Creditor List Determinations

On March 17, 2017, two months after the conciliation period began and after having submitted a preliminary list of creditors in mid-February, the conciliator filed a final list of creditors. The conciliator modified the classification of parent Abengoa from subordinated creditor to common creditor in the final list of creditors. Given that Abengoa is a controlling company of Abemex, it falls under an exception of the definition of subordinated creditors pursuant to the Mexican Bankruptcy Law and should be considered a common creditor. Related-party claims are generally classified as subordinated, and when such claims represent 25% or more of the total claims, such subordinated creditors may not cast a vote in the voting to approve the financial restructuring plan. Under such rationale, despite recognizing Abengoa as a common creditor, the conciliator determined that parent Abengoa should be excluded from voting.

On April 11, 2017, the court published the creditors ruling (*sentencia de reconocimiento, graduación y prelación de créditos*)[2], which officially recognized the creditors, by type and amounts owed. This ruling contained some unusual determinations:

— Confirmation of the conciliator's recognition of Abengoa as common creditor (i.e. not subordinated).

— Recognition of Banobras as Abemex's secured creditor. The court concluded that Banobras, that financed the Zapotillo aqueduct project in December 2014, should be included as a creditor because Abemex pledged 40% of its shares in April 2015 to guarantee such financing. The conciliator argued that he had not included Banobras as a creditor since there is no outstanding payment claim under such financing. Nevertheless, the court noted that considering Abemex's obligations as guarantor under such financing are still outstanding, Banobras should be recognized as a creditor.

On April 17, 2017, the bankruptcy court modified the creditor list in order to exclude Deutsche Bank Trust Company Americas as a common creditor, as trustee of certain bond issuances of Abengoa and its subsidiaries, to which Abemex is a guarantor. The court explained that it had mistakenly added Deutsche Bank to the creditor list dated April 11, 2017 and Deutsche Bank's claims should not be recognized considering they could not be accurately quantifiable.

Restructuring Plan Negotiations

In early February 2017, news reports covered Abemex's meetings with local short-term bondholders. Abemex held a meeting with local short-term bondholders and proposed to repay the principal of their defaulted notes in full over a period of 4.5 years. Abemex had previously reached a preliminary restructuring agreement with the majority of its bond creditors in November 2016; however, such agreement was subject to certain conditions, including avoiding bankruptcy. Abemex and the majority of the local bondholders in 13 of the 16 defaulted local short-term bond issuances agreed to a new preliminary restructuring plan, amending the previously agreed plan, and entering into a standstill agreement where they agreed to vote in favor of the plan and to refrain from enforcing remedies. As expected, Banco Base, that filed for Abemex's involuntary insolvency proceeding, rejected the proposed restructuring plan. In order to approve a final restructuring agreement, Abemex will need the approving vote of at least 50% of its common creditors.

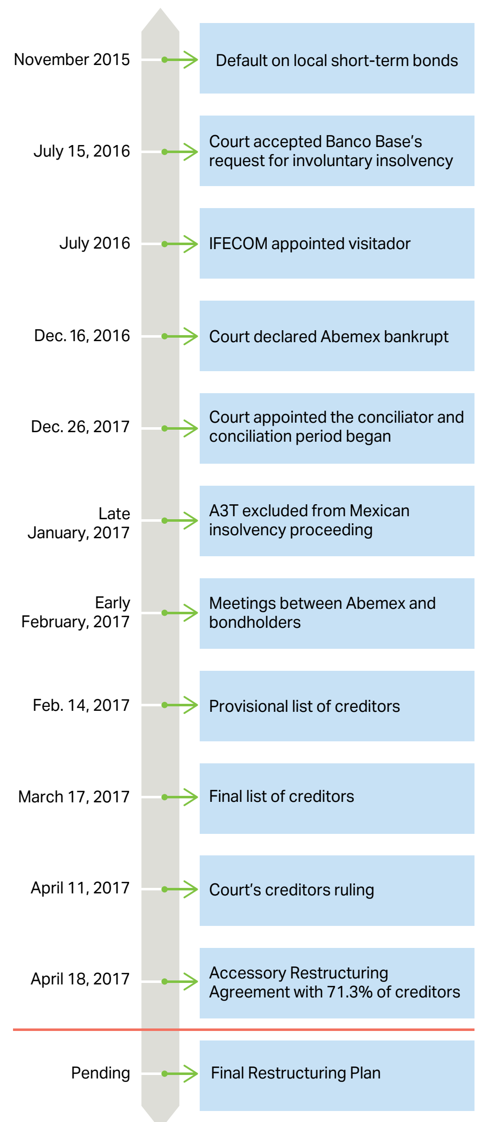
On April 18, 2017, Abemex announced that it had executed an accessory restructuring agreement with 71.3% of its creditors, including bondholders, financial creditors and suppliers. Such percentage excludes intercompany creditors. However, to date it is unknown whether Banco Base approved such agreement. Abemex stated that the accessory restructuring agreement, which provides that all creditors would be treated equally and that the payment of debt would be scheduled from March 2018 through December 2021, will be the base of the final restructuring agreement. Further details of the restructuring plan are not yet publicly available.

Next Steps

Recent news reports have indicated that appeals to the ruling are expected from Abemex and/or its creditors, especially Banco Base challenging, among other things, the recognition of Abengoa as common creditor, which would allow Abengoa's loan to be paid with the same priority as all other common claims, rather than with all subordinated claims. It is uncertain whether the executed accessory restructuring agreement, which sets forth that all creditors will be treated the same, will provide for the payment of both common and subordinated claims with the same priority.

With the creditors ruling, Abemex and its creditors can officially proceed to vote on a final restructuring plan. Abemex will have until the end of the 180-day conciliation period to move forward to such voting, which could be delayed by potential appeals and extensions to the conciliation period. Nevertheless, having secured 71.3% of creditors' votes, Abemex may succeed in obtaining approval of a final restructuring plan, despite Banco Base's lack of support.

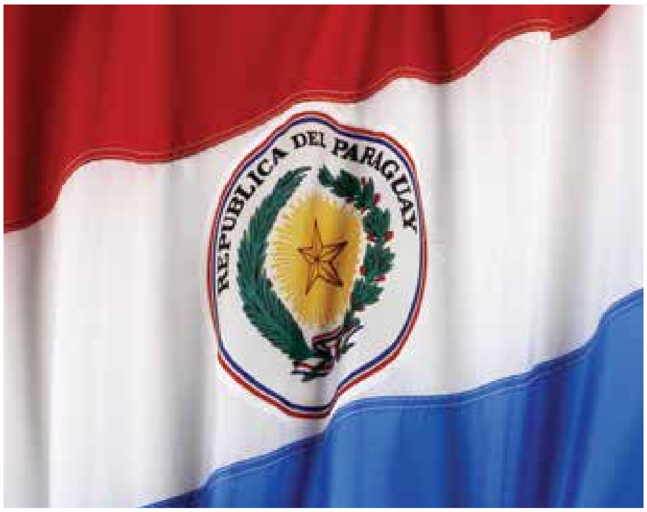
Timeline of the Mexican Proceeding

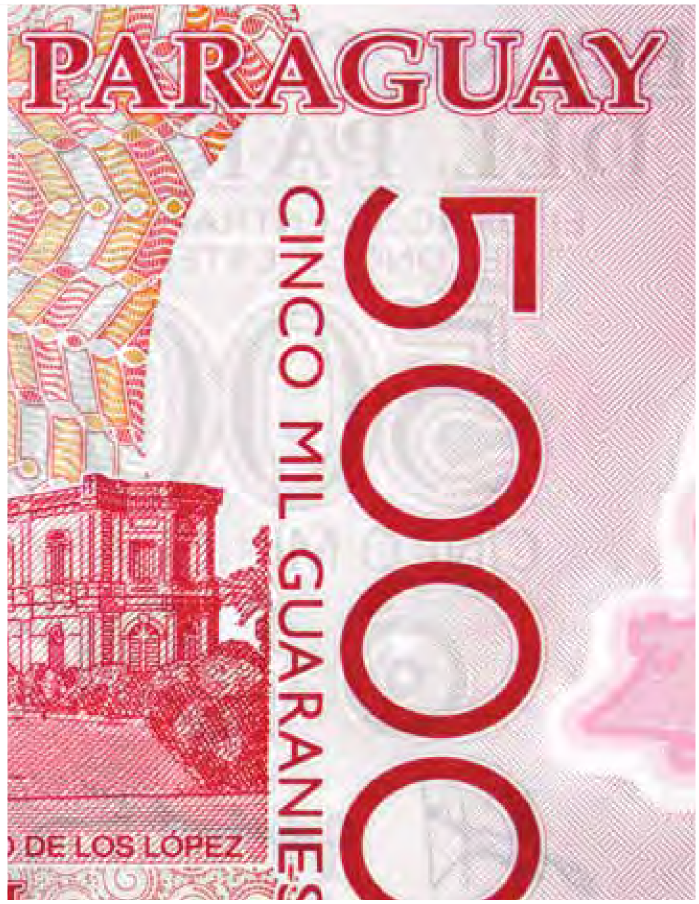


1. Lourdes Elizondo wrote this contribution while an international lawyer at Cleary Gottlieb and at time of publication has returned to Ritch, Mueller, Heather y Nicolau, S.C. as an associate.
2. A copy of such ruling is available at the IFECOM's website: http://www.ifecom.cjf.gob.mx/resources/PDF/detJudiciales/Abengoa/639.pdf

Insolvency of Financial Institutions under the Laws of Paraguay

By **SIGFRIDO GROSS BROWN**





For years, Paraguay's bankruptcy law enacted in 1969 (*Ley de Quiebras 154/69*, or the "Bankruptcy Law") has been the legal framework under which any insolvency situation affecting individuals and private entities has been handled. Other than private contract, there were no other legal avenues at that time to deal with an insolvent entity. The bankruptcy law was drafted and enacted at a time when the Paraguayan economy remained small and there was really no risk of systemic damage by the fallout of insolvencies in a given sector.

However, unexpected and extraordinary situations can expose the underlying limitations that the law may have as well as the limited tools that the law may avail itself of in these situations. This was the case in Paraguay with its financial sector, which had grown into a systemically relevant group of poorly regulated and in many cases badly managed banks and similar financial entities. When a string of banking and financial entities failed simultaneously, the regulator and the courts were ill-prepared to adequately handle the mass failures and the corresponding economic and social implications.

This article analyzes the legal and regulatory framework that was created as a result of the financial crisis resulting from the bank failures from 1995 through 1998. A background of the general bankruptcy legal framework and the banking crisis is given, followed by an analysis of the new financial restructuring laws and regulations, which have been particularly useful measures in the subsequent years of the country's history marked by stable economic growth and its ability to cope with other larger and more developed markets.

Background

The Bankruptcy Law is the current law that regulates the insolvency proceedings of every business activity, whether by segment (i.e., retail, banking, agriculture, industrial, etc.) or by volume or size of the assets involved, with the exception of those relating to Paraguayan public entities and, as mentioned above, financial entities.

The Bankruptcy Law has three main components. The first concerns the process of voluntary insolvency with the objective of obtaining a settlement with creditors through a restructuring of debts (with payment extensions of periods up to four years and a discount on amounts owed to creditors of up to 75% in certain circumstances). A settlement is reached with votes by the required creditors calculated by (i) the number of creditors and (ii) the amount of debt owed to each creditor. The second component refers to the bankruptcy process itself, with rules on (i) the limitations over a debtor's ability to manage and dispose of their assets in general and (ii) the liquidation of assets for the payment to creditors. This process is directed by the bankruptcy judge with the direct participation of a receiver or trustee, who is primarily in charge of supervising the debtor's conduct, inspecting the debtor's mail and documents and approving actions that would impact the debtor's assets and financial condition in general. Finally, the third component consists of specified procedural rules related to the insolvency process, which means the Bankruptcy Law is "self-containing" and does not need to rely on the general Code of Civil Procedure.

The Financial Crisis

In the decades after the enactment of the Bankruptcy Law, the Paraguayan economy in general and certain sectors, such as the financial sector, in particular underwent a significant level of growth and sophistication. However, while regulated, the financial sector suffered from insufficient regulatory oversight that led to a severe economic recession. Starting in 1994, a group of banks, many related through interlocking ownership and management, became insolvent through mismanagement and, in some instances, outright appropriation of clients' funds.

In the decades after the enactment of the Bankruptcy Law, the Paraguayan economy in general and certain sectors, such as the financial sector, in particular underwent a significant level of growth and sophistication.

Both the sector's regulatory authority (*Banco Central de Paraguay*, or the "Central Bank") and the courts did not have the necessary regulatory and legal power and tools to handle the bank runs and insolvencies that followed and led to both an economic and social crisis. This crisis had a steep economic and social cost with many companies closing and people losing their life savings as well as their jobs.

The New Financial Restructuring Framework

As a result of the financial crisis, the Government passed three new laws which had the objectives of (i) properly regulating the Central Bank's constitutional mandate of managing monetary policy and supervising the financial sector (Law 489/95 of the Central Bank), (ii) creating a comprehensive legal framework for the private financial sector (Law 861/96 of Financial Entities) and (iii) granting additional legislative and regulatory powers to the Central Bank to supervise and intervene in an insolvency of financial entities to rapidly ensure either its recovery or winding-up and liquidation (Law 2334/03 which creates the Deposit Guarantee).

At first, Law 861/96 of Financial Entities included specific sections which covered the supervision, intervention and finally liquidation procedures for financial entities. These sections were superseded and abrogated by the newer Law 2334/03, when it was determined that the process of forced liquidation and bankruptcy of unhealthy financial entities required a comprehensive and separate set of legal rules.

The new laws mentioned in the previous section reinforce three key concepts: (i) the supervisory and disciplinary role of the Central Bank over the financial sector, (ii) the scope of what is a financial entity under such supervision and (iii) the interplay between the Bankruptcy Law and the regulatory powers of the Central Bank in the event of insolvency of a financial entity.

By constitutional mandate, the Central Bank is charged with overseeing the country's monetary policy and the financial system. This mandate is developed by Laws 489/95 and 861/96, which give the Central Bank a more comprehensive set of oversight and disciplinary powers over financial entities. The definition of "financial entities" under Law 861/96 is based on the activity of "financial intermediation," requiring that any legal person which receives deposits from the public and lends those funds (combined or not with such legal person's own funds) be licensed by the Central Bank as a financial entity (subject to the satisfaction of various other financial and regulatory requirements).

Finally, Law 2334/03 develops a legal structure that gives the Central Bank wide regulatory powers to oversee financial entities in insolvency or in the proximity thereof. The policy behind this law was to avoid the scenario that had already unfolded with the bankruptcy of several banks which resulted in an economic recession of significant proportions. With the powers granted by the new law, the Central Bank would be up-to-date on the financial situation of each entity and would be endowed with sufficient powers to intervene with respect to those entities signaling distress before any significant damage occurred. The new law also prohibited shareholders and administrators of financial entities from filing for bankruptcy or calling a creditors' committee, superseding the former rule under the Bankruptcy Law. This decision would now be available solely to the Central Bank.

Law 2334/03 is comprised of three main components to protect a distressed financial entity from insolvency: (i) the creation of a Deposit Insurance Guarantee which guarantees deposits for a minimum amount per person, (ii) the creation of a remedial process to regulate financial entities exhibiting signs of financial disorder and (iii) the creation of an orderly process for the winding up, liquidation or bankruptcy of financial entities. This framework ensures that only once all obligations with the Central Bank, depositors and the financial system in general are satisfactorily met, the insolvent financial entity may enter a bankruptcy proceeding.

> **To restore investor confidence and minimize the social impact of a bank failure, Law 2334/03 created the Deposit Insurance Guarantee to cover savings from small depositors.**

The Deposit Insurance Guarantee

To restore investor confidence and minimize the social impact of a bank failure, Law 2334/03 created the Deposit Insurance Guarantee to cover savings from small depositors, which likely would have most if not all their savings covered by this guarantee. The Deposit Insurance Guarantee is a fund created by Law 2334/03 through mandatory and periodic contributions by both public and private financial sectors. The fund is managed by the Central Bank, though it is expressly separated from the Central Bank's balance sheet. The fund's purpose is to protect (at least in part) the savings of the financial system. It provides a guarantee for deposits equivalent to 75 minimum wages (approximately USD 26,600 at the time of this article's publication) per person (including both individuals or entities), regardless of nationality. Each person may receive up to the mentioned limit net any amounts owed by such depositor to the insolvent financial entity.

The guarantee is paid to the depositors of financial entities which have been declared insolvent by the Central Bank pursuant to the resolution process described in section 5 of this article. The guarantee, however, is activated by the Central Bank only as a last recourse, in the event the restructuring or assets sale alternatives of the resolution process may not be implemented or do not sufficiently cover the losses of depositors. If this occurs, the depositors who are repaid with funds disbursed by the Deposit Guaranty benefit from a special privilege over any other creditors over any remaining assets of the insolvent entity.

The Remedial Stage: Initial Central Bank Intervention

As a next step in the management and containment of insolvent financial entities, Law 2334/03 created procedures of moderate intervention (or enhanced supervision), whereby financial entities exhibiting signs of economic distress are subject to additional scrutiny. Upon occurrence of these red flags (described below), such financial entities are obligated to present a regularization plan to the Central Bank that is subject to review and approval by a department within the Central Bank responsible for supervision of financial entities called the Superintendence of Banks (*Superintendencia de Bancos*).

Among others, the law includes the following grounds for a financial entity to either voluntarily initiate a regularization plan or for the Superintendence of Banks to impose one:

1. Insufficient mandatory funds deposit as determined by the Central Bank through regulation (financial entities are obligated to reserve a certain minimum amount of funds which may not be used in its ordinary course of business);
2. Revenue losses in the entities' operations for two consecutive quarters;
3. Failure of meeting the minimum threshold under the solvency index, as determined by the Central Bank through regulation;
4. Requesting funds from the Central Bank as lender of last recourse;
5. Reiterated breach of Central Bank regulations;
6. Remittance of false or fraudulent information to the regulator;
7. Offering rates on deposit which are markedly superior to the market average;
8. External auditors withholding their opinion or issuing a negative one; or
9. The Superintendence of Banks determines that the financial entity poses a risk to the financial system (such a determination to be reasonably supported).

The Regularization Plan
If a regularization plan is necessary, the plan must address the causes that motivated the regularization process, as well as the remedial measures to be undertaken by the financial entity to remedy such causes. Among the measures that may be proposed by the entity are (i) capital increases, (ii) the sale of non-core assets, (iii) a plan of reduction of costs and expenses, (iv) merger or spin-off alternatives, (v) the implementation of external audits, (vi) the suspension of expansion plans in new branches and (vii) a restructuring program of its liabilities.

The plan must be approved no later than five business days by the Superintendence of Banks, which will also determine the milestones and duration of the plan. It will also be tasked with supervising the compliance with the plan by the financial entity. The plan includes a report issued by the Superintendence of Banks to the Board of Directors of the Central Bank, providing its conclusions on the expected results of the implementation of the regularization plan. Based on its report, the Central Bank will decide whether to allow the financial entity to continue operating in the financial system or order the cancellation of the entity's operating license and the winding-down of its business under the "resolution" process.

Aside from the plan, financial entities are also subject to enhanced information reporting obligations. The Superintendence may as well require guarantees (personal or in rem) from the financial entity's shareholders and its board members to secure adequate compliance with the commitments undertaken under the plan.

The "Resolution" or Central Bank Administrative Takeover

The "resolution" process is the mechanism established by Law 2334/03 to wind-up and liquidate a financial entity. Unlike other corporations, financial entities may not call a creditors' committee for an out-of-court debt restructuring or file for an in-court bankruptcy proceeding under the Bankruptcy Law. Only the Board of Directors of the Central Bank may request that a bankruptcy judge declare the financial entity bankrupt after the conclusion of this resolution process.

The Board of Directors of the Central Bank will order the initiation of a resolution process for a financial entity when:

1. The entity's solvency index falls below 50% of the required legal minimum;
2. The regularization plan is either not presented to the Superintendence of Banks or it is not approved;
3. The entity's license to operate in the financial system is permanently revoked by the Central Bank; or
4. Based on the information provided by the Superintendence, the Board of Directors determines that the financial entity is insolvent, i.e., the entity is unable to meet its obligations as they mature.

Effects of the Resolution Process

Removal of Directors and Management
Once the Central Bank orders a resolution process, the Superintendence of Banks will appoint trustees (*interventores*) from the Central Bank to effectively take over the financial

As of the date of this publication, there have been less than three regularization processes executed to completion by the Central Bank.

entity and its management. During the intervention, such trustees will physically take over the offices, management and employees of the financial entity. The legal and managerial powers of the board of directors and those of management of the financial entity are suspended, as are shareholders' rights for the duration of the resolution process.

The powers of the Central Bank's trustees are limited to (i) acts to preserve the assets and business of the financial entity, (ii) collecting payments, as deposit operations (i.e., accepting deposits from the general public) are suspended during this process and (iii) certain acts expressly authorized by the Central Bank.

Identifying the Entity's Assets
The trustees also have the task of identifying the financial entity's assets and generating a new balance sheet of its assets and liabilities from the last balance sheet submitted to the Superintendence. In this new balance sheet, the Central Bank trustees will identify and cancel all pending employment-related and benefits obligations (such as mandatory social security and any private pension or retirement obligations) of the entity to high-level management because the law takes the view that the entity's directors and officers are responsible for the entity's financial insolvency, and as such, they should not be able to extract any other benefits from the entity. The cancellation of these obligations affect only high-level management; other employees are entitled to their legal employment and social security benefits in full.

As required by the Central Bank, the trustees will also prepare a shorter version of the balance sheet described in the previous paragraph. The *balance de exclusion* lists only those assets necessary to complete the resolution process. It will also list the following liabilities (in order of priority): the outstanding deposits entitled to payment under the Deposit Guarantee, cash deposits, public administration entities' deposits, amounts owed to the Central Bank and tax obligations.

Judicial Proceedings and Liens
Law 2334/03 requires that all judicial terms and conditions in proceedings filed by or against the insolvent financial entity be suspended from the initiation of the resolution process until its conclusion. During this period, no liens on the entity's assets will be allowed. The objective of this legal provision is safe guarding the public policy interest of availing the Central Bank of all leeway possible in disposing of assets to satisfy the law's end of terminating the entity's legal existence as efficiently as possible and maximizing the transfer of its business or assets.

Implementation Alternatives of the Resolution Process

The optimal scenario for the Central Bank is to transfer the insolvent entity's business as a going concern to another healthy financial entity. Therefore, the primary alternative resolution mechanism is the transfer of the insolvent entity's assets and liabilities listed on the *balance de exclusion*, which assumes the cancellation of certain liabilities by the Central Bank, to the financial entity that offers the Central Bank the best terms for these items (such terms include the extent to which the successor entity agrees to assume the insolvent entity's business and whether the acquiring entity will decline the assumption of certain obligations or impose additional terms or conditions).

The transfer of such assets and liabilities will be done at no cost to the successor entity. Since under Paraguayan law, contract must have a "cause," which typically would be the purchase price, the cause in this special purchase and sale agreement is the law and the Central Bank's administrative authority. In this scenario, (i) the insolvent entity's clients, deposits and other operations are transferred to the successor entity and (ii) the successor entity maintains the insolvent entity's employees (or as many as the dissolving entity has offered to the Central Bank), but without the obligation of assuming their seniority or necessarily respecting their current salaries (i.e., being able to negotiate their salaries to incorporate them to their structure). The transaction is expressly released from any taxes that would ordinarily apply.

As a second alternative, the Central Bank may (i) order the transfer of depositor's accounts to an interested and acceptable financial entity, (ii) securitize the income generated by the insolvent entity's assets and (iii) sell the corresponding securities. This scenario involves the direct liquidation of the financial entity, with the Deposit Guarantee being the first creditor for any payments it has disbursed to the insolvent entity's depositors.

As of the date of this publication, there have been less than three regularization processes executed to completion by the Central Bank. This highlights the success of the additional regulation and laws that have been enacted, and the satisfactory role in this respect of the Central Bank. The author of this article has advised the Central Bank in one of those regularization processes involving the insolvency of Agrofinanciera Chaco S.A. The interesting fact of the Agrofinanciera Chaco's regularization process was not caused by an insolvency event but, rather, because the entity was unable to continue operating as a result of serious administrative mismanagement. In fact, the entity was solvent and had sufficient assets to pay back all depositors and remaining obligations. However, the entity was not complying with its contractual and regulatory obligations due to a serious disorganization by management. This process in particular was concluded in six months, with the Central Bank ordering (i) the transfer of the *balance de exclusion* to Financiera Río S.A., another financial entity in the market, (ii) the permanent cancellation of the intervened entity's license to operate and (iii) the winding-up and liquidation of Agrofinanciera Chaco.

Legal Effects

Upon implementation of any of the resolution mechanisms described above, the insolvent entity's creditors are barred from claiming a violation of creditor parity or of otherwise attacking the legality of the transfer of assets. The assignment of credits (owed by the insolvent entity) does not require the authorization of the insolvent entity as may be otherwise mandated by law or agreed by way of private contract.

Conclusion of the Resolution Process

Once the resolution process authorized by the Central Bank concludes, the Superintendence of Banks issues a report to the Board of Directors of the Central Bank, detailing all aspects of the process. The Board of Directors will then approve the process undertaken, revoke the insolvent financial entity's operating license (if it has not done so before), order the winding-up of the financial entity and notify the bankruptcy court of the remaining assets and liabilities to finalize the liquidation of any such remaining assets and payment of creditors.

At this time, the bankruptcy proceedings are reinstated, and creditors may continue their claims in-court, but only against the remaining assets of the insolvent entity. This means that the transfer of assets, assignment of debts and any other acts undertaken by order of the Central Bank during a resolution procedure may not be impugned by creditors or any other interested parties.

Scorecard of Paraguay's Current Insolvency Regime

Experience Level: Limited established precedents of successful in-court restructurings or significant cultural resistance to resolution of insolvency through court proceedings

KEY PROCEDURAL ISSUES	
Can bondholders/lenders participate directly (i.e., do they have standing to individually participate in a proceeding or must they act through a trustee/agent as recognized creditor?)	Yes
Involuntary reorganization proceeding that can be initiated by creditors?	No
Can creditors propose a plan?	No, but creditors can vote and counter-propose alternatives to proposals in the debtor's plan in a negotiation
Can a creditor-proposed plan be approved without consent of shareholders?	No
Absolute priority rule?	Yes
Are ex parte proceedings (where only one party participates and the other party is not given prior notice or an opportunity to be heard) permitted?	No
Are corruption / improper influence issues a common occurrence?	Yes
Viable prepackaged proceeding available that can be completed in 3-6 months	No
Secured creditors subject to automatic stay?	No
Creditors have ability to challenge fraudulent or suspect transactions (and there is precedent for doing so)	Yes
Bond required to be posted in case of involuntary filing or challenge to fraudulent/suspect transactions?	No
Labor claims can be addressed through a restructuring proceeding	Yes
Grants super-priority status to DIP Financing?	No
Restructuring plan may be implemented while appeals are pending	Yes
Does the restructuring plan, once approved, bind non-consenting (or abstaining) creditors?	Yes
Does the debtor have the ability to choose which court in which to file the insolvency proceeding (or is it bound to file where its corporate domicile is)?	No
Other significant exclusions from automatic stay?	No
Prevents voting by intercompany debt?	Yes
Strict time limits on completing procedure?	No
Management remains in place during proceeding?	Yes

Conclusion

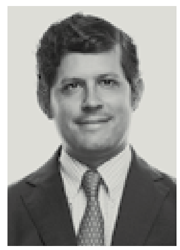
In Paraguay, the banking crisis of the 1990s generated by the collapse of several financial entities and the insufficiency of a legal and administrative framework to deal with this situation prompted the enactment of laws and their corresponding administrative regulation to prevent another collapse of the banking sector.

The new banking laws have strengthened the Central Bank's authority, clarified the obligations of financial entities and created a framework to protect depositors and prevent or manage the insolvency of a financial entity. This process involved the partial abrogation of the Bankruptcy Law, leaving the insolvency and liquidation of financial entities under the sole purview of the Central Bank. However, since the enactment of these new laws, there have been no legal challenges to the additional powers assigned to the Central Bank.

Paraguay's general bankruptcy rules should be improved even further in order to stay ahead of the curve and not only be a reactive tool in the face of a crisis. The continuous growth of Paraguay's financial and economic development and the drive towards industrialization and expansion of commercial and financial consumption has created certain new risks for which the current Bankruptcy Law is unsuited to handle. The weak link among Paraguay's regulatory institutions is the judiciary branch. The greatest shortcomings of the judiciary are the pervasiveness of corruption and the massive delays in the continuation of judicial proceedings (litigation, foreclosures, civil and criminal suits, etc.). In the context of insolvency proceedings, creditors' committees and bankruptcy trials may take years without conclusion. For example, there are cases that have taken more than fifteen years to resolve. These delays only extend the uncertainty for the parties involved and decrease the value of the bankruptcy estate as a result of higher legal costs, defeating the purpose of the in-court debt restructuring or the bankruptcy liquidation.

Clearly, a reform of the Bankruptcy Law is required to address these shortcomings. There are currently proposals from lawmakers to improve the judicial insolvency process, which include among others a more efficient use of the receiver institution and the creation of steering committees to guide the asset management and restructuring negotiation process.

This author believes that Paraguay should avoid the fate of jurisdictions such as Spain, which had to amend its bankruptcy law more than five times in the past five years to manage its financial crisis. To do so, the legal framework should incorporate the possibility of out-of-court restructuring arrangements involving parties outside of the financial sector with the protection of the Bankruptcy Law (as opposed to merely private contracts which may be overturned in bankruptcy court), among other changes to the Bankruptcy Law to make in-court bankruptcy process more efficient. This out-of-court restructuring framework should be available to business or commercial debtors (as opposed to private non-commercial insolvencies), including small- and medium-sized companies (which make up the bulk of the country's entrepreneurial fabric), and would facilitate credit to debtor by granting incentives to banks to provide fresh credit to those companies facing temporary difficulties but with sound business models. This option would reduce the caseload of courts and would be a faster, more convenient alternative to creditors' committee or in-court bankruptcy proceedings, which as described involve lengthy proceedings and higher costs. ■



▼ **Sigfrido Gross Brown** is Partner in the corporate and finance groups of Estudio Jurídico Gross Brown. He rejoined the firm after ten years practicing in the United States and Spain, at firms such as Shearman & Sterling LLP (New York), and Freshfields Bruckhaus Deringer LLP (Barcelona). He has a strong M&A practice, including share and asset purchase, as well as joint ventures. In his role as a senior lawyer for major international firms, Sigfrido has regularly lead teams in cross border transactions both as deal counsel and as local counsel. Sigfrido received his law degree from the Universidad Católica de Asunción in 1999 and his LLM from Harvard Law School in 2001.

PUERTO RICO WATCH

Recent Publications

By **DANIEL J. SOLTMAN** *(dsoltman@cgsh.com)*

For the last decade, the Commonwealth of Puerto Rico has been in the midst of a growing fiscal and humanitarian crisis. GNP growth has been negative nearly every year since FY 2007, and notwithstanding the Commonwealth's efforts, tax revenues have consistently fallen short of projections. Moreover, the Commonwealth and its instrumentalities owe approximately US$73 billion in debt, and Puerto Rico's net public pension liabilities were estimated by some analysts to exceed US$48 billion as of June 30, 2015. In response to the worsening situation in Puerto Rico (and after efforts to implement local Puerto Rican debt restructuring legislation were held unconstitutional by the United States Supreme Court), the United States' legislature enacted the Puerto Rico Oversight, Management and Economic Stability Act ("PROMESA").

Signed into law by Former President Barack Obama on June 30, 2016, PROMESA provides Puerto Rico and its instrumentalities with access to a federal debt restructuring regime—access that was previously unavailable as Puerto Rico is legislatively excluded from the definition of "State" under Chapter 9 of the U.S. Bankruptcy Code, making its various instrumentalities ineligible for the regime. In brief, PROMESA provides two primary debt restructuring options for potential debtors: *first*, a collective action debt restructuring option applicable with respect to bond debt only under Title VI of PROMESA, and *second*, a process under Title III of PROMESA, which closely resembles Chapter 9 of the Bankruptcy Code (albeit with some crucial differences) and allows for a more comprehensive restructuring. In addition to the debt restructuring options, PROMESA also provides for the creation of an Oversight Board, charged most importantly with developing and implementing a Fiscal Plan for the Commonwealth and its instrumentalities designed to ensure the financial health of the island and its residents over the long-term.

In March of 2017, nearly nine months after PROMESA's passage, the Oversight Board certified a Fiscal Plan for the Commonwealth and certain instrumentalities. Other instrumentalities, such as

the Puerto Rico Electric Power Authority (PREPA), will have certified Fiscal Plans separate from the consolidated one that includes the Commonwealth and was approved in March 2017. Shortly thereafter, on May 3, 2017, the Commonwealth filed for a Title III proceeding under PROMESA, and it is expected that many of the Commonwealth's instrumentalities will follow suit. Though not without critics in the press and among various creditor constituencies, certification of the Fiscal Plan and the Commonwealth's Title III filing represent major milestones under PROMESA and hopefully mark the first steps toward economic viability for the Commonwealth and its instrumentalities.

In an effort to encourage discourse with respect to some of the most interesting and complex issues that may arise as the Commonwealth and its instrumentalities progress through the untested PROMESA framework, lawyers from Cleary Gottlieb have published a series of articles on the topic in *Law360*. The articles and authors are listed below, and are linked directly in the electronic version of this issue. We hope that you will find these of interest.

Why Puerto Rico Will Likely Rely On PROMESA Title III
March 1, 2017

by Richard J. Cooper, Luke A. Barefoot, Jessica E. McBride and Antonio J. Pietrantoni

LAW360

Issues To Expect In A Title III Puerto Rico Restructuring
March 8, 2017

by Richard J. Cooper, Luke A. Barefoot, Jessica E. McBride and Antonio J. Pietrantoni

LAW360

What Should Puerto Rico Offer Its Creditors?
March 15, 2017

by Richard J. Cooper, Luke A. Barefoot and Jessica E. McBride

LAW360

Disarming Puerto Rico's Pension Time Bomb
April 19, 2017

by Richard J. Cooper, Luke A. Barefoot, Daniel J. Soltman and Antonio J. Pietrantoni

LAW360

Cleary Gottlieb assisted Puerto Rico and its instrumentalities with their financial challenges prior to the recent change in government, and also was closely involved in the development, drafting and passage of PROMESA.

Overview of the South African Business Rescue Process

By KARABO MOTSHWANE

Chapter 6 of the Companies Act, Act 71 of 2008 ("**New Act**") introduced business rescue to the South African legal system.

New Act

"Business Rescue": proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

1. **A temporary supervision** of the company, and of the management of its affairs, business and property;
2. **A temporary moratorium** on the rights of claimants against the company or in respect of the property in its possession; and
3. **Rescue Plan:** the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.[1]

Accordingly the business rescue proceeding is not only possible in circumstances were there are prospects of rescuing the business, but can also be commenced if there would be a better return for the creditors or shareholders through the proceeding than there would be with an immediate liquidation of the company.

Financial Distress

The test for financial distress under the New Act is a six month forward looking test:

Impending Commercial Insolvency	Impending Factual Insolvency
It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months.	It appears to be reasonably likely that the company will become insolvent (i.e., its liabilities exceed its assets) within the immediately ensuing six months.

Commencement of Business Rescue

Voluntary Business Rescue. A company or close corporation can be placed in business rescue voluntarily by the board of directors adopting and filing a resolution to commence business rescue proceedings and to place the company under the supervision of a business rescue practitioner.[2]

Thereafter, a number of forms and documents would need to be submitted to the companies' office for filing. There are strict time periods that the company must adhere to, once it files its resolution to commence business rescue proceedings.

Compulsory Business Rescue. A formal application can also be made to court by affected persons (creditors, employees, shareholders) to place a company in business rescue. Once the company is placed under business rescue, the order of the court must be provided to all affected persons notifying them of the commencement of business rescue. A voluntary business rescue application cannot be filed if a compulsory business rescue application has been initiated or if liquidation proceedings have already been initiated by or against the company.

A voluntary business rescue commences when the requisite documents are filed with the companies office. A compulsory business rescue, arising following an application made to court, commences once the papers have been lodged with the court.

Duration of Business Rescue

In accordance with the provisions of the New Act, business rescue proceedings are designed to last for a period of 3 months from start to finish. However, in practice, business rescue proceedings are extended from time to time with the support of the majority of creditors and can take anything from 6 months to 3 years, depending on the complexities of the business.

Certain factors may necessitate the continuation of business rescue beyond the 3 month period. These factors include but are not limited to:

- the business rescue practitioner attempting to procure a purchaser for the business or assets;
- the need to obtain regulatory approvals in respect of a plan that has been adopted with the requisite support; and
- the fulfillment of any conditions precedent, following the adoption of a plan, or even a general lack of co-operation from creditors or shareholders.

Extent of Court Involvement in the Business Rescue

Compulsory business rescue applications require the involvement of the courts to a limited degree, whilst voluntary procedures do not. A compulsory business rescue is initiated following an order of the court. Unless there is general litigation pertaining to a business that has been placed under business rescue, other than the initiation of a compulsory business rescue, the court should have no further involvement in the matter.

Management of the Company Whilst in Business Rescue

During business rescue proceedings, the business rescue practitioner has full management control of the company. The directors, though not exonerated from their duties and responsibilities (and corresponding liabilities) are answerable to the business rescue practitioner. Any action taken by a director whilst the company or corporation is in business rescue will require the approval of the business rescue practitioner. If such approval is lacking, the action so taken will be void.

Filing of Claims

In practice, business rescue practitioners compile their own claim forms for the submission of creditors' claims. In other instances, creditors and their legal advisors prepare the necessary claim forms. There is no specific time period within which a business rescue practitioner may receive claims. Typically though, claims are submitted at the first meeting of creditors and can be received up until such time as the business rescue plan is published by the practitioner, for the consideration of all affected persons. The practitioner may, however, determine a date by which all claims must be submitted. In some instances, and following a consideration of the books and accounts of the company, practitioners take into account the position of all creditors, whether or not they prove their claims, when preparing the business rescue plan.

Funding of the Company Whilst in Business Rescue

During business rescue, the company may obtain post-commencement financing which is either new money provided to the company following the commencement of business rescue or services rendered by employees or suppliers of the company for the duration of the business rescue. Post-commencement financings will rank senior to the claims of unsecured creditors, but pari passu secured creditors. Post-commencement lenders may also obtain collateral for their financing, but only over unsecured assets of the company in distress.

Effect of Business rescue on Employees

Employees continue to be employed by the company on the same terms and conditions, unless different terms are agreed upon between the employees and the company or unless changes occur in the ordinary course of attrition. Any retrenchments contemplated by the business rescue practitioner will be subject to South African labour legislation.

Similarly, directors retain their positions. The business rescue practitioner is however empowered to remove from office any person who forms part of the management of the company.

Effect of Business Rescue on Contracts

Generally speaking, contracts concluded with the company (unless they contain an event of default clause, which usually includes the occurrence of business rescue proceedings), prior to the commencement of business rescue, remain extant. The business rescue practitioner may suspend (entirely, partially or conditionally), any agreement to which the company is party, however, the other party to the contract may assert a claim for damages against the company. If the business rescue practitioner wishes to cancel a contract, he or she may only do so unilaterally with the sanction of the court.

Effect of Business Rescue on Shareholders

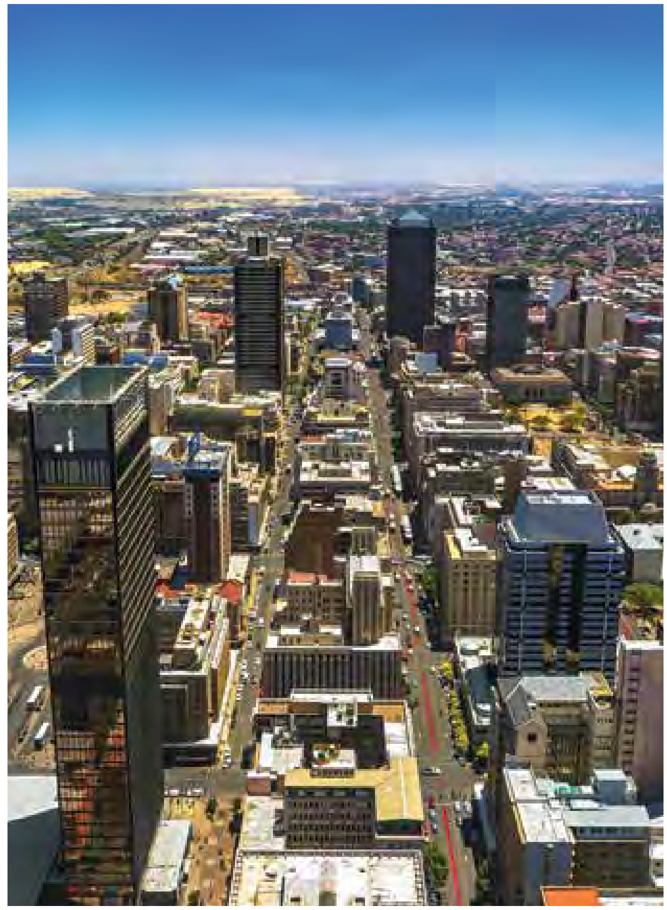
There can be no alteration to the classification or status of a company's issued securities unless this is done (A) in the ordinary course of business, (B) by way of an order of court or (C) in pursuance of the provisions of the business rescue plan. Further, shareholders retain their shareholding in the company, notwithstanding the commencement of business rescue proceedings.

Generally, shareholders are affected by the business rescue process, as investors would generally require some equity in the business. Such instances result in the shareholders' shares being diluted.

Effect of Business Rescue on Creditors

The historic position and claims of creditors are crystallized as of the date of the commencement of business rescue proceedings. Creditors are entitled to submit claims to the business rescue practitioner, but all legal proceedings against the company are subject to a stay, so creditors may not enforce any claims against the company.

The commencement of business rescue proceedings gives rise to the operation of a general moratorium on the rights of creditors to enforce their claims against a company or in respect of property belonging to the company or lawfully in its possession. A creditor may also not continue with enforcement action against a company (i.e., execution of a writ). In certain instances, proceedings may be brought against a company with the written consent of the business rescue practitioner or with the leave of the court. If a claim is subject to a time limit, the claim will not prescribe during the period in which the company is in business rescue. Prescription terms will be suspended.



However, leave of the court or the practitioner's consent is not required if the litigation is about the business rescue itself. For example, one can approach the court directly if the litigation is about the removal of the practitioner in accordance with section 139 of the New Act.

Voidable Transactions

The business rescue provisions in the New Act do not deal specifically with voidable transactions. Instead, they place an obligation on the business rescue practitioner to investigate any voidable transaction, though these are not specified. However, any action taken by a creditor without the approval of the business rescue practitioner will be void.

The Business Rescue Plan

The business rescue process culminates in the preparation of a business rescue plan by the business rescue practitioner. The business rescue practitioner will consult with all affected persons, creditors and the management of the company when preparing the plan. Broadly speaking the plan will set out details relating to the background of the company, any proposal made for the rescue or rehabilitation of the company and any assumptions or conditions upon which the plan is based. The plan will also include how the assets, liabilities, contracts and employees will be treated following the adoption of the plan.

Voting on the Plan

The business rescue practitioner must convene and preside over a meeting of the creditors within 10 business days of the publication of the plan[3]. At this meeting, the plan must be introduced, the employees' representatives must be afforded and opportunity to address all persons at the meeting and a discussion is held on the proposed plan. The practitioner will then procure a vote for the approval of the plan.

A plan will be accepted with the favorable vote of at least 75% of the aggregate recognized claims, of which at least 50% must be third party creditors (i.e. not intercompany claims). If the plan affects the rights of shareholders or securities holders, a separate vote of the shareholders or securities holders affected is procured. A simple majority vote is required for a plan to be supported by shareholders and/or securities holders. If a plan is rejected, affected persons or the practitioner himself can take steps to implement the plan (i.e., apply to court to disregard the vote on a plan or procure a vote from creditors to draft a revised plan) failing which the plan will be held to have been rejected.

In applying to court, the party so applying to court, would essentially be requesting the court to set aside the vote of the creditors or the shareholders as being inappropriate.

Cram Down on Creditors

Once the business rescue plan has been approved, it is binding on all creditors whether or not the creditors were present at the meeting, voted in favor or against the plan or abstained from voting.

The business rescue practitioner must file a notice of substantial implementation of the plan with the companies' office once the plan has been substantially implemented.

Also, if a business rescue plan that is approved by creditors and shareholders, if need be, compromises the claims of creditors, such creditors are not entitled to enforce the remainder of their claims against the company unless the business rescue plan provides otherwise. In such an instance, the company will continue to trade with a "clean bill of health".

Effect on Suretyships

If the company that is in business rescue gave a surety or guarantee to a third party, such party cannot enforce such surety or guarantee against the company in business rescue as a result of the operation of the moratorium. Such a party would need to submit a claim in the business rescue proceedings. However, if a third party stood surety for, or guaranteed the obligations of, the company in business rescue, such third party could be liable for the remainder of the debt that the company is not able to pay, unless the principal claim is discharged. If the principal claim is discharged, the suretyship claim will fall away but the guarantee, provided it is drafted as an independent guarantee, will remain extant.

Termination of business rescue

Business rescue proceedings end when:

— the court sets aside the resolution or order that began the business rescue proceedings or when the court converts business rescue proceedings into liquidation proceedings;

— the business rescue practitioner files a notice of termination of business rescue proceedings with CIPC; and

— business rescue plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the New Act or a business rescue plan has been adopted and the business rescue practitioner has subsequently filed a notice of substantial implementation of the plan.

Status of the Company after the Business Rescue

If a business rescue plan is adopted and implemented in accordance with its terms, the company will continue to trade and will graduate from business rescue. If a plan is rejected, and steps are not taken to implement a revised plan, the practitioner will need to make application to court to place the company in liquidation. A similar result may ensue if the conditions precedent to a plan are not fulfilled.

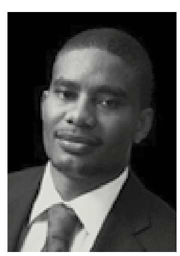
Conclusion

The business rescue process in its initial stages was abused by companies which went into business rescue without prospects of being rescued. These are companies which were candidates for liquidation.

The courts have however passed judgments giving guidance to the use and implementation of the business rescue provisions. That has allowed some stability and a reduction of unsuccessful business rescue proceedings. There has been an increase of successful business rescue cases, including those of On digital Media Proprietary Limited t/a Top TV, South Gold Mine Proprietary Limited, Optimum Coal Mine Proprietary Limited and Meltz Proprietary Limited.

The business rescue process is a great tool in insuring that business salvaged and the employment rate minimised. It is also an opportunity for investors looking at acquiring business at discounted rates. ■

1. As defined in Section 128(1)(b) of the New Act.
2. Section 138 (1) (b) of the New Act provides that a person may be appointed as a business rescue practitioner of a company, only if such person: (i) is a member in good standing of a legal, accounting or business management profession accredited by the Commission; (ii) has been licensed as such by the Commission; (iii) is not subject to an order of probation in terms of section 162 (7); (iv) would not be disqualified from acting as a director of a company; (v) does not have a relationship with the company such as would lead a reasonable and informed third party to conclude that the intergrity, impartiality or objectivity of that person is compromised by the relationship; and (vi) is not related to a person who has a relationship with the company.
3. Pursuant to Section 152 of the New Act.



▼ **Karabo Motshwane** has been a director at Werksmans Attorneys in Johannesburg, focusing on the Dispute Resolution practice since March 2014. His areas of specialisation include dispute resolution, insolvency, business rescue and restructuring. He is also knowledgeable in all areas of commercial litigation; including contractual disputes, corporate law and governance, shareholder and director disputes, arbitration, mediation and alternative dispute resolution. Karabo holds an LLB from the University of South Africa.

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Americas Law Firm of the Year
International Financial Law Review, 2015–2017

Restructuring Deal of the Year
OAS SA
International Financial Law Review, 2017

Tier 1: Bankruptcy
Benchmark Litigation, 2017

Ranked No. 1 in Latin America Restructuring Mandates
Debtwire, Q4 2016

Global Finance Deal of the Year: Private Restructuring: Grand Prize
The Republic of Iceland's private restructuring of Icelandic banks
The American Lawyer, 2016

Russian Law Firm of the Year
International Financial Law Review, 2017, for the fifth consecutive year, and eighth year in total

Africa Deal of the Year and Sukuk Deal of the Year
State of the Côte d'Ivoire CFA150 billion Sovereign Sukuk
Islamic Finance News, 2016

Bankruptcy Practice Group of the Year
Law360, 2014 & 2016

Judicial Restructuring of the Year
(Casas GEO restructuring)
Turnaround Atlas Awards, 2016

Restructuring Team of the Year
International Financial Law Review, 2015–2016

Restructuring Deal of the Year
Corporación GEO; Tonon Bioenergia
International Financial Law Review, 2016

Restructuring Deal of the Year
Overseas Shipholding Group's successful restructuring and exit from Chapter 11 bankruptcy protection
International Financial Law Review, 2015

"A great international franchise undertaking terrific cross-border work."
Chambers Global, 2017

"The people they bring to bear on engagements are some of the most sophisticated people out there who come up with the most creative solutions. They can draw on the wider firm's resources—this is something Cleary does very well."
Chambers USA, 2016

"Cleary Gottlieb Steen & Hamilton LLP's 'restructuring partners are top notch, supported by well-trained, responsive associates'. Its status as premier adviser to foreign governments in sovereign debt matters is highlighted by clients, who single out its cross-border prowess in Latin America deals, for which it has 'by far the deepest and best bench.'"
The Legal 500 US, 2016

Practice Highlights for Cleary Gottlieb

Counsel to participants in various **Latin America restructurings** totaling over **$47 billion in debt** in Q1 2017, more than any other firm.

Counsel to the **World Bank** and the Organisation for the Harmonization of Business Law in Africa (**OHADA**) Permanent Secretariat to lead the group of experts in charge of the reform and modernization of OHADA corporate law. Using our own experience advising private investors in the region, we have worked with various local counsel to evaluate and improve corporate law practice in the **17 member countries**.

Counsel to participants in **over $330 billion** in **capital markets offerings** by Latin American issuers since 2006

Counsel to **Empresas ICA** in the restructuring of over **U.S. $1 billion** of indebtedness, currently the largest debtor assignment in Mexico.

Counsel to the **Walt Disney Company** in a **€1 billion recapitalization** of the Euro Disney Group.

Counsel to **Eurasian Resources Group** in its $5.2 billion parallel track debt restructuring.

Counsel to the **Hellenic Republic** in connection with its bond buy-back, both the **largest-ever bond exchange** and **largest-ever sovereign debt restructuring**.

Counsel to The **Commonwealth of Puerto Rico** with the financial restructuring of U.S**. $73 billion** of indebtedness.

Securities counsel to four of the **five largest Latin American companies** by market capitalization and to more than 20 Latin American foreign private issuers in connection with SEC reporting obligations

Counsel to over **50 sovereigns clients**.

Counsel to The **Republic of Côte d'Ivoire** in its debut Sukuk offering using the Ijara (forward lease) structure.

Counsel to **The Republic of Iraq** in its **$1 billion** international capital markets debut, backed by a full faith and credit guarantee issued by the U.S., acting by and through the U.S. Agency for International Development.

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.

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