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Expedited Restructurings in the U.S. and Select Latin American and Caribbean Jurisdictions

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After providing a brief overview of pre-packaged and pre-negotiated Chapter 11 plans in the United States, this article discusses the procedures available for implementing expedited restructurings under the laws of Argentina, Brazil, Mexico, Peru, and the Dominican Republic.

Speed often matters in the restructuring process. The longer an entity languishes in an in-court insolvency proceeding, the greater the costs (*e.g.*, payment of professional fees) and the greater the risk of disrup-

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tion to the debtor's business. In the United States, the use of Chapter 11 to implement expedited restructurings has been commonplace since the early 1990s. Pre-packaged and pre-negotiated Chapter 11 plans are routinely confirmed by U.S. bankruptcy courts, often permitting a debtor to restructure its debts and emerge from bankruptcy in as little as 30 days from the date of the bankruptcy filing. While the United States has a well-developed body of jurisprudence and experience concerning pre-packaged and pre-negotiated plans, expedited restructurings in Latin American jurisdictions have been far less frequent. That said, over the last several years, a number of Latin American jurisdictions have enacted insolvency laws that provide for more expedited restructurings when compared to traditional bankruptcy proceedings. These processes have proven to be powerful tools for Latin American companies looking to restructure their international financial debt, particularly where local laws provide less favorable outcomes and restructuring under Chapter 11 is not possible or practical due to limited contacts with the U.S. and/or significant numbers of local creditors that are not subject to the jurisdiction of U.S. courts.[1] After providing a brief overview of pre-packaged and pre-negotiated plans in the United States, this article will discuss the procedures available for implementing expedited restructurings under the laws of five selected Latin American and Caribbean jurisdictions:

- Argentina;
- Brazil;
- Mexico;
- Peru; and
- the Dominican Republic.

The article will also highlight certain key differences between those procedures and U.S. pre-packaged and pre-negotiated plans.

UNITED STATES

For distressed companies that either reside in the United States, or have a domicile, place of business or property in the United States, the option of pursuing a Chapter 11 plan through a pre-packaged or pre-negotiated bankruptcy case provides a compromise path between an out-of-court consensual restructuring and a "free-fall" Chapter 11 filing, in which a debtor initiates a Chapter 11 case without agreement from creditors on the form or parameters of a restructuring plan. A pre-packaged or pre-negotiated Chapter 11 case is most attractive for overleveraged companies with concentrated creditor groups looking to clean up their balance sheets, but less so for companies that require a significant degree of operational restructuring. The nature and timeline of pre-packaged or pre-negotiated Chapter 11 plans may not allow debtors the time necessary to use the various tools available under the U.S. Bankruptcy Code (the "Bankruptcy Code") to complete comprehensive operational restructurings. Indeed, companies that are in need of an operational restructuring are generally poor candidates for a pre-packaged or pre-negotiated Chapter 11 plan precisely because such restructurings often involve contentious and costly legal skirmishes with stakeholders who seek to avoid the financial loss that such adjustments seek to allocate to them.

The global financial crisis during 2008 and 2009 has prompted an uptick in the use of pre-packaged and pre-negotiated Chapter 11 cases, including a number of notable examples such as:

- MGM, the film company;
- Charter Communications, a cable company;
- CIT Group, a financial company; and
- Simmons, the mattress manufacturer.[2]

Additionally, while not technically pre-packaged or pre-negotiated Chapter 11 cases, the expedited Section 363 sales of Chrysler and GM provide other examples of noteworthy high profile restructurings during the financial crisis that allowed large companies to avoid liquidation, while in the process eliminating billions of dollars of existing liabilities.[3]

Pre-packaged and pre-negotiated plans are not just available to U.S. debtors. Over the years, foreign debtors that are either domiciled or have a place or business or property in the U.S., including those based in Latin America, have utilized such processes as a means to effect their restructurings, including:

- Apex Silver Mines, a Bolivian silver miner;
- Empresa Electrica del Norte ("EDELNOR"), a Chilean power company;
- Chivor SA ESP, a Colombian power company;
- Satélites Mexicanos ("SatMex"), a Mexican communications company; and
- IUSA, a Mexican copper and electrical products manufacturer.[4]

Notwithstanding the use of Chapter 11 by some Latin American companies, Chapter 11 is unlikely to be a feasible alternative to reorganize a Latin American company that has a significant amount of local creditors not subject to U.S. jurisdiction if such creditors do not consent to the restructuring.

Benefits/Risks and Challenges of Pre-packaged/Pre-negotiated Cases

The principal benefits of executing a restructuring through a pre-packaged or pre-negotiated Chapter 11 case as compared to a free-fall Chapter 11 case are speed, momentum and the ability to maintain control over the process. A true pre-packaged plan, in which a debtor solicits and receives formal acceptances to a plan prior to filing its petition, is generally confirmed between 30 and 60 days from the filing of the bankruptcy case, assuming no strong opposition from creditors. A pre-negotiated plan, in which a debtor negotiates plan support agreements with key creditor groups but does not solicit acceptances on a plan until after its petition is filed, is generally confirmed between 60 and 120 days after a bankruptcy filing, assuming no strong opposition from creditors. In contrast, free-fall Chapter 11 cases usually take a year or longer to reach resolution. By shortening the duration of a Chapter 11 proceeding, debtors generally have an easier time maintaining market confidence among customers, vendors[5] and regulators, and controlling professional fees and other administrative costs associated with bankruptcy. Ancillary benefits to the shortened duration include potentially reducing the prospect of litigation from dissenting creditors and equity holders and the fact that creditor committees and other creditor groups are less likely to organize, which often adds cost and delay to the restructuring process.

As compared to an out-of-court restructuring, the main benefit of a pre-packaged or pre-negotiated plan is the ability to use the Bankruptcy Code to bind dissenting classes of creditors. Court confirmation of a plan also mitigates the risk that claims will arise from an out-of-court workout, including possible fraudulent transfer, preference or other claims. Further, Chapter 11 plans typically provide for releases of claims of the debtor against the debtor's directors and officers and those contributing value to the debtors' reorganization. Additionally, under some circumstances, it may be possible for Chapter 11 plans to release claims of third parties against a debtor's officers and directors and other third parties. Likewise, in certain cases, U.S. courts have stayed actions against a debtor's non-debtor subsidiaries located in other jurisdictions that had issued guarantees of the debtors' obligations.[6]

While the aforementioned benefits are well documented, the strategy of restructuring by way of a pre-packaged or pre-negotiated plan also exposes a debtor to a number of risks and unique challenges. Because pre-packaged or pre-negotiated plans require a debtor to engage in contentious negotiations with key creditor groups prior to seeking court protection and receiving the protective shield of the automatic stay, the company may be susceptible to involuntary bankruptcy filings or attachment actions by creditors who do not support a proposed restructuring, particularly in cases where a company has defaulted on certain obligations prior to initiating negotiations. Additionally, if a debtor is seeking to impair more than one class of creditors or equity holders, negotiations with disparate creditor groups can be quite complex, protracted and involve the incurrence of significant professional fees. Further, a company may ultimately determine that it has no choice but to file a free-fall Chapter 11 case after first attempting to build consensus among classes with disparate interests. Moreover, soliciting votes on a Chapter 11 plan prior to filing a Chapter 11 petition may raise thorny securities law issues. The Securities and Exchange Commission has taken the position that the exemption under Section 1145 of the Bankruptcy Code from registration requirements under U.S. federal securities laws does not apply to solicitations of votes on Chapter 11 plans undertaken prior to a bankruptcy filing. Given this uncertainty, debtors often look to non-bankruptcy exemptions from the registration requirements under U.S. securities laws in connection with pre-bankruptcy solicitations of votes on Chapter 11 plans. Finally, companies restructuring by way of a pre-packaged or pre-negotiated proceeding also bear the risk that a bankruptcy court will not approve the disclosure statement accompanying the plan, refuse to count votes if it finds that the votes were solicited in bad faith or determine that the way classes of claimants were divided was improper.

Certain Key Legal Requirements for Approval of Pre-packaged and Pre-negotiated Plans

To confirm a Chapter 11 plan, regardless of type, the proponent of a plan must satisfy a number of procedural and substantive requirements under the U.S. Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Certain key requirements include: (1) each impaired voting class of creditors must accept the plan by a vote of at least two-thirds in amount, and more than one-half in number, of allowed claims voting on the plan and (2) impaired creditors that do not vote to accept the plan must always receive at least as much under the Chapter 11 plan as they would receive in a liquidation pursuant to Chapter 7 of the Bankruptcy Code (the so-called "best interests test"). However, so long as a single impaired class of creditors votes to accept the plan (excluding insiders or affiliates), the plan may be confirmed over the votes of other impaired classes (who are "crammed down") so long as (a) the plan does not discriminate unfairly and (b) the plan is "fair and equitable" (e.g., for unsecured claims, the plan does not violate the "absolute priority rule" and no class of creditors is paid more than it is owed) with respect to each dissenting impaired class. It is worth noting that because of the absolute priority rule, if equity is not entirely extinguished (often the case in a pre-packaged plan), a debtor will likely need all other impaired creditor classes to vote in favor of a plan in order to confirm the plan (unless all claims of such classes will be paid in full).

ARGENTINA

In May 2002, Argentina was searching for a way out of a macroeconomic and political crisis. After the resignation of two presidents amidst widespread rioting, the default on Argentina's public debt and the abandonment of the 1-to-1 peso-dollar parity that had been in place since 1993, Argentine private companies struggled to stay afloat. Economic and political instability prevented many Argentine companies from rolling over short-term financing, and the rapid devaluation of the peso meant that nearly all Argentine companies struggled to make debt service payments.

Many Argentine companies looked to the *Ley de Concursos y Quiebras*, or the "Bankruptcy and Liquidation Law," to deal with their financial difficulties. However, given that the Bankruptcy and Liquidation Law was focused on in-court reorganization and liquidation proceedings, the capacity of the Argentine judicial system to handle bankruptcy proceedings for the entire economy was questionable at best.

Spurred by the crisis and encouraged by the International Monetary Fund ("IMF") and international creditors, Argentina's legislature reacted quickly, passing Law 25,589 in 2002. Among other changes, Law 25,589 amended a little used part of the Bankruptcy and Liquidation Law that addressed a procedure known as the *acuerdo preventivo extrajudicial* or "APE." The APE was previously overlooked by debtors and creditors because, among other things, the Bankruptcy and Liquidation Law permitted the restructuring only of claims of creditors that agreed to the APE and did not bind hold-outs. This gave hold-outs significant power to extract concessions or disrupt a reorganization process and debtors little incentive to use the procedure.

Under the amended APE procedure, the role of courts was limited to ensuring that: (i) companies disclosed certain baseline financial information regarding the extent of their assets and liabilities, (ii) the "required majorities" had agreed to the APE, and (iii) certain procedural matters had been complied with. Subsequently, courts have interpreted that the judge also has the power to reject the APE if it does not meet certain basic fairness standards.[7] The amended APE procedure did not require debtors to seek a declaration of insolvency to use the APE and avoided operational disruption by leaving existing management in charge of a debtor while it negotiated with creditors, as well as during the court confirmation proceeding.

The new APE regime was well received by debtors and creditors alike, and several companies — including Telecom Argentina, Autopistas del Sol, Cablevision and Transener — successfully restructured their indebtedness through the use, or threatened use, of an APE in the years immediately following the amendment of the APE procedure. Since the Argentine financial crisis, the APE has continued to play an important role in debt restructuring. Several companies, including Multicanal, Acindar, and CTI Holdings have used APEs to restructure their debt, and many others (TGN, Metrogas, Autopistas del Sol) have held out the possibility of an APE-driven restructuring to bring creditors to the table in other out-of-court work-outs.

How the APE Works

On its face, the APE procedure is quite straightforward and is similar in some respects to a pre-packaged Chapter 11 proceeding in the U.S. Even though the APE appears relatively simple on its face, there are a number of confusing issues and traps for the unwary.

APE proceedings can be divided into three different stages:

In the first "Negotiation and Solicitation" stage, the debtor begins working on a restructuring plan, often by engaging with its unsecured financial creditors. Because the Bankruptcy and Liquidation Law requires a debtor to pay secured creditors the full value of their security unless they agree otherwise, secured creditors do not ordinarily participate in the APE process unless, and only to the extent that, their debt becomes unsecured (for example, because they have waived their rights under the security, or because they are under-secured). In contrast, there is no formal barrier to secured creditors participating in a pre-packaged or pre-negotiated plan in the United States, except that secured creditors whose claims are unimpaired under a Chapter 11 plan will be deemed to have accepted the plan and cannot vote on the plan. Another important feature of the APE is the ability of a debtor to classify and offer different consideration to different types of creditors, much like in the United States.

Once a restructuring plan is agreed upon, the plan is documented in an agreement that forms the basis of the APE. The debtor then solicits the agreement of its creditors to the APE. In the case of bank loans and similar debt, a debtor will usually engage directly with creditors and creditors will sign the APE directly. In the case of bond debt, a debtor frequently conducts a consent solicitation where the debtor asks bondholders to vote in favor of the APE. The consent solicitation is often paired with an exchange offer; in several cases, a debtor has specified that if a specified percentage of creditors accept the restructuring plan, the plan will be implemented voluntarily through the exchange offer in an out-of-court process rather than through the APE. If, however, a lower percentage of creditors accept the restructuring plan, the plan will be implemented through the APE (provided that it has been supported by the requisite majorities of creditors, as discussed below).[8] During the negotiation and solicitation stage, a debtor remains vulnerable to lawsuits and attachments, as the Bankruptcy and Liquidation Law offers no protection to debtors until an APE is filed and the court issues the formal order to publish the required notice or formal bankruptcy proceedings are initiated. As a result, speed in negotiating and soliciting agreements on a restructuring plan can be an important factor in whether a debtor is able to successfully restructure using an APE.

In order to present an APE to an Argentine bankruptcy court for approval, the APE must have been executed by (or on behalf of) a "required majority" of creditors, which the Bankruptcy and Liquidation Law specifies as a majority of the number of creditors, and creditors holding two-thirds of the amount of unsecured debt outstanding. The meaning of this requirement has proven to be one of the biggest points of controversy regarding the APE procedure. The Bankruptcy and Liquidation Law is somewhat vague as to the procedure for counting the "number" of creditors where a bond is held of record by one holder (such as a depository or custodian) but is indirectly or beneficially held by many participants. Courts have interpreted the Bankruptcy and Liquidation Law to require a bondholders meeting to be held, and unless unanimity among bondholders is reached, the indenture trustee for bondholders will be deemed to have voted (on behalf of bondholders) one vote in favor of approving a plan and one vote against the plan. In comparison, in Chapter 11 plans, each beneficial holder of a bond is counted as a separate creditor for voting purposes. In addition, if a restructuring plan provides for varying treatment of different "classes" of unsecured debt, it is unclear whether a class that fails to approve the restructuring plan by a "required majority" can be crammed down by a "required majority" of the overall amount of unsecured debt (in the United States, the law is clearer that a Chapter 11 plan may be crammed down on dissenting classes if certain conditions are satisfied). Although the APE remains an important option for distressed debtors in Argentina, concerns about prolonged litigation to resolve these issues have led to concerns about the efficiency of the APE in recent years.

The second "Court Approval" stage begins after a debtor has proposed and documented a restructuring plan and obtained the agreement of the "required majority" of creditors. The debtor then files the plan with an Argentine bankruptcy court, along with a schedule of its assets and liabilities, a list of its creditors, and various other schedules and certifications. The debtor is also required to publish notice of the APE in a newspaper of general circulation for five days. Once the APE is filed with a court, and the court issues an order approving the publication of notice, all pending lawsuits against the debtor are stayed.

The filing of the APE also begins a 10-day period for creditors to file objections to the APE. Objections to an APE can only be based on four grounds:

(1) the required majority of unsecured creditors has not agreed to the APE;

(2) the disclosure materials filed by the debtor along with the APE are inaccurate;

(3) the substantive terms of the APE are fraudulent, contravene public order or unreasonably discriminate against certain creditors;[9] or

(4) the debtor has not complied with certain ministerial requirements in connection with the filing of the APE.

If the 10-day period passes and no objections are received, and the court has not otherwise determined that the substantive terms are fraudulent, contravene public order or are unreasonably discriminatory, the APE will be approved. If objections are raised, the Bankruptcy and Liquidation Law provides for a 10-day period for the debtor and the objecting party to file evidence and a 10-day period to resolve the objections. In practice, once an objection is raised to an APE, it can often take months to resolve, as these 10-day objection periods are repeatedly extended. Nevertheless, many debtors and creditors find that APE proceedings are substantially faster and more efficient than a traditional bankruptcy proceeding in Argentina.

If the court approves the APE, the third "Implementation" stage begins. In a simple restructuring plan, the debtor simply exchanges existing debt as provided in the APE. However, if a debtor has offered more than one option to creditors — for example, different types of debt, or different mixes of debt and equity — the debtor must first allow non-consenting creditors (creditors who did not agree to the APE during the negotiation and solicitation phase) to choose among any remaining options.

BRAZIL

Despite the overall health of the Brazilian economy, the Brazilian courts saw a significant increase in the number of bankruptcy petitions filed during the recent financial crisis. These filings were due in large part to the sharp reduction in international demand for certain Brazilian products and the severe liquidity crunch affecting the Brazilian and international financial markets during this period, factors which targeted certain segments of the Brazilian economy — such as agriculture, manufacturing and consumer products — with particular force. The large number of bankruptcy filings arising from the global economic crisis presented Brazil with the first real test of the Bankruptcy and Restructuring Law No. 11,101/05 (*Lei de Falência e Recuperação de Empresas*) (the "New Bankruptcy Law").

The New Bankruptcy Law came into effect in 2005 following more than a decade of discussion and debate. With an eye towards remedying the frequently inefficient, cumbersome and creditor-unfriendly proceedings under Brazil's former insolvency rules, the New Bankruptcy Law was designed to streamline the insolvency proceedings of Brazil's former bankruptcy law, level the playing field between debtors and their creditors, and provide a flexible, modern framework of rules and procedures organized around a central purpose: the preservation of the value of a given business as a going concern. In line with these goals, the New Bankruptcy Law includes both an in-court insolvency procedure, *recuperação judicial,* and a pre-packaged insolvency procedure, *recuperação extrajudicial*.

In-Court *Recuperação Judicial*

The New Bankruptcy Law's improvement of *recuperação judicial* was clear: during the global economic crisis, Brazilian bankruptcy courts approved restructuring plans that provided for, among other measures:

- debt haircuts;
- restructured interest rates;
- grace periods and modified repayment schedules;
- equity sales;
- protections for creditors in the event of a post-petition change of control;[10]
- debt-for-equity swaps;
- capital injections;
- court-supervised asset sales and leasing transactions for the purpose of raising working capital;
- the sharing of collateral between pre- and post-petition creditors; and
- debtor in possession financing with super-priority in the event of a subsequent liquidation.

Although conventional in the United States and many other jurisdictions, the restructuring solutions mentioned above were not available for in-court insolvency proceedings in Brazil prior to the adoption of the New Bankruptcy Law.

Experiences with the New Bankruptcy Law also highlighted a number of significant issues with *recuperação judicial*. These issues are best illustrated by the recent restructuring of the Brazilian beef processor Independência S.A., which was the largest and most complex restructuring carried out in Brazil during the financial crisis, and one of the three largest bankruptcies ever filed in Brazil. Among other obstacles common to complex bankruptcies in Brazil, the Independência restructuring was plagued by numerous procedural hurdles in the *recuperação judicial* proceedings that prevented individual creditors from influencing the restructuring process and protecting their interests; the exclusion of certain types of debt such as foreign exchange advance contracts (*Adiantamentos sobre Contratos de Câmbio,* or "ACC") from the restructuring process;[11] a lack of transparency with respect to the debtor's operations and financial condition; and inefficiency within the Brazilian legal system itself, including with respect to the creation and perfection of security interests granted to exit lenders and holders of the company's restructured debt.[12]

Pre-Packaged *Recuperação Extrajudicial*

However, despite Brazil's successes (and notwithstanding the flaws) with *recuperação judicial* proceedings in the recent financial crisis, the pre-packaged *recuperação extrajudicial* procedure was largely unused during this period. The main reason that *recuperação extrajudicial* was unused is that it lacks many of the primary advantages of the *recuperação judicial* proceeding, while retaining nearly all of its disadvantages. In many ways, the *recuperação extrajudicial* procedure largely follows the same path as the APE procedure in Argentina: a debtor first negotiates, and then solicits acceptance of a *recuperação extrajudicial* plan. In Brazil, the thresholds for acceptance of a *recuperação extrajudicial* are higher than those in Argentina: a *recuperação extrajudicial* plan must be accepted by all creditors or, in the case of cram-down, by more than 60 percent in amount of each class of impaired creditors subject to the plan. If the plan is approved, a bankruptcy court will review the plan to ensure that it is viable and that the documentary filings (e.g. financial statements and list of creditors) comply with the applicable legal requirements. With the blessing of the bankruptcy court, the *recuperação extrajudicial* plan will then be binding on minority dissenting creditors subject to the plan.

However, the *recuperação extrajudicial* proceeding offers a number of substantive disadvantages when compared to the in-court *recuperação judicial* proceeding. For example, unlike the filing of a *recuperação judicial* petition, the filing of a *recuperação extrajudicial* plan by a debtor does not result in an automatic stay,[13] and as a result, the debtor remains vulnerable to attachment proceedings while a bankruptcy court reviews the plan. Further, labor claims, which in Brazil are often significant, cannot be resolved in a *recuperação extrajudicial* proceeding, whereas they can be discharged in a *recuperação judicial* proceeding. In addition, a *recuperação extrajudicial* plan cannot grant super-priority status to lenders that provide post-petition debtor-in-possession ("DIP") in proceeding (whereas super-priority status is granted to DIP lenders in a *recuperação judicial* proceeding). Without the certainty provided by super-priority status, lenders have little incentive to provide the funding that will enable a debtor to continue to operate its business during the course of a prepackaged reorganization process, and therefore, DIP financing is virtually unavailable for debtors using the *recuperação extrajudicial* proceeding. Also, only an in-court *recuperação judicial* proceeding may provide for asset sales free of encumbrances and without successor liability for the debtor's obligations (including tax and labor obligations).

In addition to the substantive disadvantages provided by a *recuperação extrajudicial* proceeding, *recuperação extrajudicial* offers no significant advantages as compared to a *recuperação judicial* process. While *recuperação extrajudicial* proceedings contemplate negotiations prior to a court filing, the requirement of court review and approval of a *recuperação extrajudicial* means that debtors may gain little in the way of time or cost savings. Perhaps more significantly, neither procedure allows a debtor to bind certain classes of creditors such as holders of tax, lease, or ACC liabilities or claims secured by a chattel mortgage, even though these claims often comprise a significant portion of the debtor's liabilities. Holders of these claims are not subject to either a *recuperação judicial* or a *recuperação extrajudicial* proceeding and may therefore proceed against the debtor in the Brazilian courts to attach or foreclose on assets notwithstanding the pending reorganization proceeding. The leverage this provides creditors who benefit from these types of obligations and the resulting uncertainty it creates for the debtor and other creditors is one of the largest impediments to an orderly restructuring in Brazil. A debtor's vulnerability to the demands of these protected creditors often makes it difficult to deal with other secured and unsecured creditors, let alone operate its business. These limitations on the effectiveness of restructuring procedures in Brazil, and in particular, on the *recuperação extrajudicial,* will need to be addressed in light of the growing importance of the Brazilian export economy in global markets.

MEXICO

Over the past few years, Mexico has been hard hit by the global recession and ensuing market volatility. The result? In 2010, Mexican companies utilized the Mexican insolvency law more than ever before, making Mexico the most active restructuring market in Latin America. The willingness of large listed companies to undergo court-supervised restructuring procedures suggests a shift in perception regarding the risks of entering into a *concurso mercantil*, or insolvency proceeding, in Mexico. Compared to its Latin American neighbors, experience with Mexico's *concurso mercantil* regime has stood out positively in recent years: the average duration for a restructuring proceeding is shorter and creditors' average recovery is higher. However, the average cost of a restructuring proceeding in Mexico is also higher than its neighbors.

The *Ley de Concurso Mercantiles*, or the "Concurso Law," is just a little over 10 years old. Drawing heavily on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency, the Concurso Law provides the legal means for a commercial debtor and its creditors to restructure the debtor's obligations under state supervision. The first step, *the inspection phase*, actually occurs prior to the declaration of *concurso mercantil* by a court. The purpose of the inspection phase is to determine whether or not the debtor meets the requirements to be declared in *concurso*. An IFECOM[14] specialist is appointed as an overseer (*visitador)* to analyze the company's financial position and advise the court as to whether the debtor meets these requirements. In order to file a voluntary *concurso mercantil* proceeding, a debtor (i) must be in general default of its payment obligations with two creditors *and* (ii) (x) must have debts which are past due by more than 30 days and which represent collectively at least 35 percent of the debtor's debts *or* (y) must lack sufficient assets to satisfy at least 80 percent of its debts that are past due on the day the petition is filed. If the debtor meets these requirements, the court will issue a *concurso* recognition order, in which case a *concurso mercantil* proceeding will begin.[15]

In a standard in-court *concurso mercantil*, there are two subsequent stages: (i) *the reorganization phase*, during which a court-appointed mediator (*conciliador*) makes proposals to the judge to recognize or reject claims against the company and, together with the debtor and its court-recognized creditors, seeks an agreement on the restructuring of the debtor's debt with a view towards preserving the existence of the company and its operations; and (ii) *the liquidation phase*, which follows an unsuccessful reorganization phase and during which a court-appointed receiver liquidates the debtor and repays creditors from any proceeds, with the goal of maximizing the return to creditors on the sale of the debtor's assets. A standard in-court *concurso mercantil* process can be lengthy, as the reorganization phase alone has an initial term of 185 days with up to two 90-day extensions. In the past, companies and creditors alike had been very hesitant to use the Concurso Law, expressing concerns over the possibility of delays from the company being declared in *concurso*, a lack of precedent, the uncertainty of outcomes under the law and the length of proceedings.

In response to certain of these and other concerns, the Concurso Law was amended in December 2007 to include a new expedited restructuring procedure, or "pre-pack," resembling the pre-packaged restructuring procedures available in the U.S. and other jurisdictions. The goal of this new expedited restructuring procedure is to allow a debtor that has already agreed on a restructuring plan with a significant portion of its creditors to move through the *concurso mercantil* procedure more quickly. A debtor can request and initiate a pre-pack if it has obtained the agreement of at least 40 percent of all its creditors before filing for court protection. This expedited procedure is, in theory, supposed to take as little as three to four months and provide both the debtor and the creditor with a higher level of certainty concerning the outcome of the procedure than a standard *concur-*

so mercantil. However, recent transactions have shown that the expedited procedure is, in practice, likely to take approximately four to six months, longer if the procedure is challenged.

Although a new pre-pack *concurso mercantil* procedure was introduced in 2007, it was not tested until 2010. Since then, several companies, including Controladora Comercial Mexicana ("CCM"), Grupo Iusacell, and Metrofinanciera have successfully used the expedited restructuring procedure to restructure their debts and others have threatened or tried to use it as leverage in their negotiations with creditors. While some debtors have fared better than others, their experiences demonstrate that while a pre-pack plan may theoretically result in a more certain and quicker trajectory through the bankruptcy process, it is not without its own challenges. In particular, many points in the law are unclear, which may result in lengthy and expensive procedures and heated negotiations with creditors. Metrofinanciera was the first company to use a pre-pack *concurso mercantil* procedure and emerged from *concurso mercantil* in June 2010, approximately one year after filing. CCM, a Mexican supermarket operator that defaulted on its debt obligations in late 2008, was the first listed company to make use of the new expedited restructuring procedure. CCM's filing for a pre-pack *concurso mercantil* came after months of tense negotiations with its creditors and was backed by 98 percent of its creditors. The company emerged from the *concurso mercantil* proceeding on November 24, 2010. The restructuring closed on December 10, 2010, approximately five months from the date of the pre-pack filing. CCM's restructuring marks the first time that a debtor with significant exposure on derivative contracts has successfully emerged from a pre-pack *concurso mercantil* proceeding and the second-ever pre-pack *concurso mercantil* proceeding completed in Mexico. Given the recent uncertainty over the enforceability of derivative obligations under Mexican law, many market observers viewed the successful restructuring of CCM's derivative obligations as a milestone. Group Iusacell and its subsidiary Grupo Iusacell Celular also successfully completed a pre-pack *concurso mercantil* proceeding in 2011, and the time between the filing and the closing was approximately four months.

Other recent filings, however, have been anything but smooth. For example, Vitro, a Mexican glass manufacturer, has faced significant litigation with respect to its pre-pack plan both in Mexico and in the U.S., which has exposed important questions as to the treatment of intercompany debt in a *concurso mercantil* proceeding. In particular, some noteholders who opposed Vitro's proposed plan initiated attachment proceedings in New York state court, while other noteholders filed involuntary bankruptcy proceedings against Vitro in a U.S. bankruptcy court and an indenture trustee of two series of outstanding notes initiated a collection action in New York state court. These same parties have challenged Vitro at each step in the process in Mexico (including the recent filing of a fraudulent conveyance proceeding against Vitro), as well as in its Chapter 15 case (a U.S. bankruptcy case through which a foreign debtor may seek recognition of a foreign proceeding under the Bankruptcy Code).[16]

How Does a Mexican Pre-pack Work?

Debtors begin by negotiating a plan with their creditors in the hopes of obtaining the requisite approval of creditors holding 40 percent of the debt to file a Mexican pre-pack. Once filed and accepted, the court will streamline certain legal requirements applicable to standard insolvency proceedings. For example, in a pre-pack, the court will not appoint a *visitador* to review the status of the company and its debts, thereby effectively eliminating the inspection phase, which tends to be a lengthy process. Despite this procedural benefit, the debtor must still prove to the court that it has or will imminently meet the requirements for *concurso mercantil*.

Once a pre-pack filing has been accepted and the list of claims has been recognized, the court must decide whether or not to approve the plan submitted by the debtor. While the plan must generally be consistent with the aims of the Concurso Law and Mexican public policy, the main hurdle to overcome in seeking approval of a pre-pack restructuring plan is obtaining the vote of a majority of the outstanding amount of unsecured debt *and* the outstanding amount of secured debt held by creditors who choose to participate in the plan. Once this vote is obtained, a debtor must also overcome any attempts by creditors to veto the pre-pack restructuring plan, which will occur upon the negative vote of a majority of unsecured creditors, either in number or in amount of unsecured debt. It should be noted that the majority threshold necessary to secure approval of the plan is the same whether the plan sought to be approved is a pre-pack or a plan developed in the course of a standard *concurso mercantil* proceeding. However, just as in the United States where creditors who are not impaired are not entitled to vote and are deemed to accept a Chapter 11 plan, in a Mexican pre-pack, secured creditors whose debt will be repaid in full through the proposed plan are deemed to accept the plan, regardless of how they may have actually voted. As such, it becomes easier for a company to meet the majority threshold should it provide for full repayment of its secured creditors.

Unlike in the U.S. context, there are many administrative formalities which must be addressed before a judge accepts a pre-pack *concurso mercantil* petition. A creditor must, for example, meet rather onerous evidentiary standards when proving ownership of its claim in court. In situations where debt is held by a depositary or through custodians like in the case of bonds, the process of proving ownership can be quite lengthy since depositary, record and beneficial holdings must be proved while complying with formalities like notarization and apostille certificates. It is important to note that in order to provide certificates of ownership, some clearing agencies (like DTC and Euroclear) may require the securities to be blocked, rendering them essentially illiquid for the period of the *concurso mercantil* proceeding.

While there is a prescribed period for creditors to object to a pre-pack plan in Mexico, unless a dissenting creditor presents a meritorious argument, the plan will likely be approved by the court as a *convenio concursal* or "*convenio.*" Once approved, the *convenio* is given legal effect and will bind (a) the debtor, (b) unsecured creditors, whether or not they have agreed to the plan, and (c) secured creditors that (i) consent to the plan or (ii) are paid the full value of their secured claims (i.e. the value of their collateral). However, secured creditors that have not consented to the plan and that have not been paid the full value of their secured claims may initiate or continue proceedings to foreclose upon the collateral securing their claims.

Creditors should be aware that pre-pack *concurso mercantil* proceedings may entail other important differences from a standard bankruptcy proceeding in the U.S. One of these important distinctions is the differing interpretations of the absolute priority rule. In the United States, unsecured creditors generally may not be crammed down without the debtor's equity being completely wiped out. In contrast, in Mexico, creditors may be subject to a cram-down while the value of the equity remains unimpaired. As a result, controlling shareholders in Mexico may be more likely to view a pre-pack *concurso mercantil* as a feasible strategy given that they will have a better chance of maintaining the value of their equity.

Another important characteristic distinguishing pre-pack Mexican restructurings from similar U.S. proceedings lies in the ability, under the Concurso Law, of a company to use intercompany claims to meet the 40 percent threshold required to file and approve a pre-pack *concurso mercantil* plan. In the United States, intercompany claims cannot serve as the accepting class in order for a plan to be crammed down on dissenting classes of creditors. The use of intercompany claims to initiate a pre-pack *concurso mercantil* proceeding was recently upheld by a Mexican court in the controversial case of Vitro's restructuring, in which the company's pre-pack *concurso mercantil* proceeding was only able to be admitted through the counting of intercompany claims to reach the required threshold for creditor consents.

As discussed, 2010 and the beginning of 2011 saw more *concurso mercantil* proceedings than ever before and this high level of reliance on the Concurso Law is expected to continue. The Concurso Law will continue to be tested, and the Mexican judges interpreting it will continue to grapple with its nuances, hopefully producing a result in which restructuring proceedings efficiently assist distressed companies and increase the value of recovery for creditors.

PERU

Unlike Argentina's insolvency regime, which was adopted in the crucible of the 2002 crisis, and the Mexico and Brazil regimes, which were tested in the recent financial crisis, Peru's insolvency law, the *Ley General de Sistema Concursal*, or General Bankruptcy System Law, was adopted in 2002 after 10 years of legal reforms that took during the course of the 1990s, around the time when El Niño triggered insolvencies of a number of fishing companies and right before Peru experienced some of the most explosive growth seen in Latin America. Two other factors set Peru apart from its Latin American peers: first, Peru's legal framework does not contemplate a pre-packaged plan of reorganization of the type that exists under U.S. law. However, the option of a pre-negotiated plan is available under Peruvian law. While this means that votes on the plan are not solicited prior to the commencement of an insolvency proceeding, therefore offering less certainty to debtors and creditors, this plan can be voted on relatively quickly once submitted. Second, Peru's pre-negotiated reorganization process is not overseen by a court. Rather, it is subject to oversight by an administrative authority — the National Institute for Competition and Protection of Intellectual Property (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual*, or "INDECOPI") — and the role of the court is limited to certain exceptional circumstances where the administrative procedures have been exhausted.

In order to use Peru's debt restructuring procedures, eligible debtors must be domiciled in Peru, and Peruvian law excludes government agencies, private pension fund administrators, financial and insurance companies and autonomous estates (*patrimonios autonomos*) from the general bankruptcy regime. There are two debt restructuring procedures available to eligible debtors under the General Bankruptcy System Law. The first procedure is a preventive, or pre-negotiated, insolvency proceeding, which is intended only to facilitate the refinancing of all of the debtor's obligations as a whole. This procedure can be initiated only upon the debtor's request and differs from an ordinary insolvency proceeding in that control of the debtor is not shifted to the creditors, which offers the potential benefit of an expedited procedure. The second procedure is an ordinary insolvency proceeding, which can be initiated by the debtor or its creditors, and may result in a reorganization or a liquidation proceeding, depending on the outcome of a meeting of creditors. This procedure, unlike the preventive insolvency proceeding, only concludes when all the claims filed by the creditors are extinguished or when the debtor has been fully liquidated.

Preventive Insolvency Proceedings

In order to commence a preventive insolvency proceeding in Peru, a debtor must show that (i) less than one-third of its total debt is due and remains unpaid for a period longer than 30 days and (ii) its losses (after deducting reserves) do not exceed more than one-third of its stated capital. A preventive insolvency proceeding does not trigger an automatic moratorium on the debtor's debt payments; however, a debtor can petition for a moratorium from the court. [17]

If the INDECOPI accepts a preventive insolvency proceeding, a debtor will present a debt restructuring plan (*Acuerdo Global de Refinanciación,* or "AGR").[18] This plan will contemplate the restructuring of the debtor's obligations, and dissenting creditors may be crammed down. However, one of the limitations of a preventive proceeding is that the AGR may only provide for the cram-down of creditors with respect to the terms of repayment (tenor, pricing, interest and collaterals), but not with respect to the value of their claims, which effectively means that haircuts must take the form of reduced net present value as opposed to a reduced face amount of the claims.

In order to vote on an AGR, a creditor must timely file a proof of claim with INDECOPI, and the claim has to be recognized, which is ordinarily a simple procedure. However, some uncertainty exists with respect to certain types of claims — for example, although recent amendments to Peruvian law authorize the early termination and close-out netting of derivatives, this is only in the case of insolvent Peruvian banks, insurance and reinsurance companies. The law is unclear as to how the derivative obligations of other debtors would be treated.

Voting on the AGR is conducted at a creditors' meeting composed of all creditors who have timely filed a proof of claim and whose claims have been duly recognized. In Peru, voting dynamics by secured creditors are often different than in other jurisdictions, as security interests are often disregarded in liquidation proceedings and secured creditors do not benefit from absolute priority or special voting rights with respect to their claims — in fact secured claims are paid through liquidation with the proceeds from the debtor's foreclosure only after labor and social security claims are satisfied.[19] Further, under an AGR, 30 percent of a debtor's post-insolvency cash flow must be directed to pay labor claims. As a result, secured creditors are often too incentivized to vote for AGRs that provide greater certainty as to treatment of their claims, even if the AGR does not provide for payment in full. In addition, minority creditors (*i.e.*, those holding less than 10 percent of the claims) have the right to challenge resolutions that are approved at the creditors' meeting on the basis that they are excessively prejudicial to minority creditors' interests.

In a first vote, an AGR must be approved by two-thirds of all recognized claims. However, if a quorum is not reached on the first vote, a second vote is held in which the AGR must be approved by more than two-thirds of the claims represented at the creditors' meeting. The AGR must be approved within 60 business days from the date that the creditors' meeting agrees to the debtor's reorganization.

If the AGR is not approved, creditors: (i) may continue to exercise their legal rights to collect on their claims; (ii) may terminate the preventive insolvency proceeding and, (iii) assuming that the debtor has requested a moratorium on its debt payments,[20] may file an ordinary insolvency proceeding and subsequently vote at the creditors' meeting to have the debtor liquidate. INDECOPI's records suggest that liquidations are extremely common once ordinary insolvency proceedings have been initiated; in 2010, only five out of 138 decisions taken at creditors' meetings resulted in reorganization proceedings and 133 decisions led to liquidation proceedings.

From a debtor's perspective, a preventive insolvency proceeding is preferable to an ordinary insolvency proceeding because the ability of creditors to control a debtor once it enters an ordinary insolvency proceeding is a central component of the Peruvian bankruptcy regime. Once a debtor is subject to an ordinary insolvency proceeding, creditors have broad powers over the debtor, including exercising certain powers that otherwise belong to shareholders, such as deciding whether the debtor will go through reorganization or liquidation, approving the reorganization or liquidation plan and ratifying the debtor's retention of professionals. Although the debtor remains in possession and control of its business and assets during the reorganization process, Peruvian law contemplates a significant degree of control by the creditors over the management of the debtor, allowing creditors to designate auditors to oversee the debtor's compliance with the reorganization or liquidation plan and report on the debtor's status and projections. In addition, creditors decide at the creditors' meeting whether: (i) the debtor's management will remain in office, (ii) the debtor will be managed by an independent manager registered with the Peruvian bankruptcy commission, or (iii) the debtor will be managed by a mix of debtor's management team and new officers appointed by the creditors' meeting. While, in contrast to U.S. bankruptcy law, statutory creditor committees are not provided for under Peruvian law, the creditors' meeting permits all valid claimholders to participate in decisions with respect to the debtor.

Conquerors Rather than Creditors?

One unique feature of Peruvian law is that it allows for the conversion of creditors' claims, other than tax claims, into capital on a *pro rata* basis if approved by more than two-thirds of the creditors.[21] This means that the bankruptcy system is often used to take over a debtor. Based on this provision, creditors effectively function as equity holders after a debtor has entered an ordinary insolvency proceeding and can approve transactions such as mergers and spin-offs, while the original equity holders retain very limited rights (*e.g.*, preemptive rights). In fact, many debtors that emerge from reorganization proceedings in Peru have done so as a result of certain creditors taking over the company, rather than through the approval of a reorganization plan by a broad group of creditors. The fact that Peruvian bankruptcy legislation does not provide for a true pre-pack (*i.e.*, the AGR is not voted prior to the commencement of a preventive insolvency proceeding) enables creditors to retain the option of gaining control of the debtor post-filing because creditors are not bound to a specific plan. Further, Peruvian law permits the trading of claims once the bankruptcy process — either preventive or ordinary insolvency proceedings — has begun, which is commonly how certain creditors increase their stake in the debtor and position themselves to obtain control over the bankruptcy process. The successful takeover of a Peruvian fishmeal producer Austral Group in 2004 illustrates the use of the Peruvian bankruptcy process by international strategic buyers to acquire control of a debtor. Although Austral Group and its creditors agreed on an AGR in 2000, strategic buyers began a hostile takeover in 2003. The buyers acquired the interests of several creditors and shareholders, ultimately obtaining a waiver of events of default under the AGR and of shareholders' preemptive rights and achieving a full subscription to a capital increase in order to control a substantial majority of the debtor's equity without needing to file an ordinary insolvency proceeding.

In light of Peru's strong economic performance since the General Insolvency System Law has been adopted, the pre-negotiated restructuring procedure remains relatively untested. However, the recent bankruptcy filing of Doe Run Peru indicates that the Peruvian bankruptcy process continues to be seen as an option for distressed companies. The financial difficulties facing Doe Run Peru resulted from government-imposed environmental penalties with respect to their smelter in La Oroya, as well as the financial crisis and its effects on metal prices in late 2008. Discussions with strategic partners with respect to a potential recapitalization have been reported during the course of Doe Run Peru's bankruptcy process; however, disagreements among affiliated and unaffiliated creditor groups have impeded a successful exit from the restructuring process.

DOMINICAN REPUBLIC

Insolvency procedures in the Dominican Republic tend towards the traditional and the conservative — no surprise given that the *Codigo de Comercio* (the "Commercial Code," which contains the substantive and procedural law applicable to insolvency) was last amended in 1956. Unlike the United States, Argentina, Brazil, Mexico, and Peru, the Dominican Republic's Commercial Code is focused almost entirely on liquidation (*quiebra*). Before filing for *quiebra* in the Dominican Republic, creditors have limited remedies to obtain payment of their debts, and companies in financial distress are limited in their ability to reorganize instead of liquidate.

Pre-Conciliation Creditor Remedies

Under the existing Commercial Code, prior to the commencement of a conciliation proceeding (which is the precursor to a *quiebra* filing), a secured creditor may have a legal right to foreclose on a mortgage or pledge, but in practice, the foreclosure procedure is cumbersome, and can take in excess of 12 months. In addition, foreclosed property cannot be sold in a private sale, and instead must be sold in a public auction, and secured creditors cannot take pledged property in satisfaction of their claim. Because of the difficulties in seeking pre-*quiebra* foreclosure, many secured creditors resort to seeking *ex parte* orders of attachment and garnishment, which are also available to unsecured creditors. According to some Dominican practitioners, requests for these orders are granted frequently by judges.

In addition to civil remedies, creditors can also request prosecutors to open a criminal case against a debtor, its directors and officers if fraud has been committed, or if directors or officers have "carelessly" performed their duties or concealed assets.

Conciliation Process

While creditors are seeking *ex parte* attachment and garnishment orders against a distressed debtor, the existing Commercial Code provides a debtor with only one remedy prior to filing for *quiebra*: prior to filing, a debtor must undergo a mandatory "conciliation" process with the Chamber of Commerce and Production. The conciliation process can be initiated either by a debtor that is not generally paying its debts, or a creditor that has filed suit, obtained a judgment for payment of its debt or served a "demand for payment" on the debtor. The conciliation process does not result in an automatic stay being imposed, and creditors can continue to obtain judgments and attach assets and obtain garnishments from the debtor. However, once a request for conciliation is filed, the debtor can no longer incur additional debt other than in the course of ordinary business.

Once a request for conciliation is filed, all of the debtor's unsecured creditors are notified that a conciliation process has been initiated and of the date of a settlement meeting, which is chaired by a representative of the Ministry of State for Industry and Commerce and the president and secretary general of the Chamber of Commerce and Production. Secured creditors are only permitted to participate at the settlement meeting if they have waived their security interest. At the settlement meeting, the debtor can propose a settlement plan for all of its unsecured debt, but the settlement must contemplate the payment of 50 percent of the total amount owed within two years of the date of the settlement. In addition, any secured claims not paid in full from their collateral will survive the approval of a settlement plan. Any settlement plan proposed by the debtor must be approved by two-thirds of claims that are accepted at the settlement meeting, and any claim that is not challenged by a majority of the creditors at the settlement meeting is deemed accepted. Given the requirement that a plan require all debt to be paid within two years and the two-third approval requirement, the conciliation process is not widely used in the Dominican Republic.

Quiebra

If a settlement meeting is held but no settlement plan is accepted, then a debtor is required to file for liquidation, or *quiebra*, within three days of the date on which it ceases to pay its debts. *Quiebra* proceedings can also be initiated by creditors following the conciliation process, or by the court. Once a *quiebra* proceeding is initiated, the court determines, based on information submitted by the debtor and creditors, whether the debtor can pay its debts as they come due. If a debtor is able to pay debts as they come due, the *quiebra* filing is discharged. If a court concludes that a debtor is unable to continue paying its debts, the court enters a judgment of *quiebra* against the debtor. When the *quiebra* judgment is entered, the debtor loses the power to possess, manage and dispose of its property, a receiver is appointed (with the consent of a majority in number of creditors), all of the debtor's obligations are accelerated and interest on unsecured claims ceases to accrue.[22] In addition, upon a judgment of *quiebra*, an automatic stay is imposed, and secured creditors can foreclose on collateral only through the receiver.[23]

A receiver can, with the consent of 75 percent of the creditors, continue operating a debtor's business for short periods of time until liquidation, and is also empowered to assume management of the company or retain current management and act in a supervisory role. Notably, a receiver is permitted to incur DIP financing for a debtor while it continues to operate, absent objections from the court and creditors.

Upon entry and publication of the *quiebra* judgment, creditors have 20 days (35 days in the case of U.S. creditors) to file proofs of claim, and all claims must be verified by the receiver. Claims in respect of debt issued without consideration, or certain payments of unaccelerated debt up to 10 days prior to a "record date" determined by the court cannot be verified. Once verified, creditors[24] are called to a meeting to consider whether to enter into a settlement plan. A settlement plan can be approved by a majority in number and 75 percent in amount of claims (excluding secured claims). Dissenting creditors are provided with the opportunity to object to the settlement plan, which must be reviewed by a judge to determine whether the debtor acted fraudulently. Once approved by the court, a settlement plan is binding on all creditors; however, as with conciliation-stage settlement plans, secured claims must be paid in full from their collateral; otherwise, they will survive the plan. In practice, relatively few settlement plans are approved given the high voting threshold.

If no settlement plan is approved, the court will proceed with the liquidation of a debtor's assets and payment of creditors. Employee salary, tax, legal and rent claims are paid first, and often consume a large portion of a debtor's estate in the Dominican Republic. Secured claims are paid second from collateral, and unsecured creditors are paid third. In accordance with the Commercial Code, no distribution can be made to creditors in the Dominican Republic unless reserves have been set aside for the payment of foreign creditors.

Reforms

A proposal to reform insolvency laws in the Dominican Republic has been under consideration by the legislature in the past few years, although it has not yet been approved. The reform proposal would create a two-track insolvency system, with one track focused on reorganization and another track on liquidation. In addition, the reform would update and modernize insolvency procedures, many of which date to 1845. Finally, the reform would provide specialized procedures for cross-border insolvency.

CONCLUSION

Compared with the pre-packaged or pre-negotiated insolvency processes in Argentina, Brazil, Mexico, and Peru and the mediation process required in the Dominican Republic, the pre-packaged and pre-negotiated Chapter 11 process in the United States offers a number of advantages. One of the most important — and often undervalued — advantages of the United States regime is its age: adopted in 1978, the Chapter 11 process is the most tested procedure of all of the procedures surveyed in this article, and this provides greater certainty and lower risk for debtors that decide to use it. However, Latin American jurisdictions are catching up: history shows that the business community and policymakers are increasing their focus on insolvency regimes. Argentina's long experience with the APE regime has led insolvency practitioners to increase focus on some of the ambiguities and delays that have made the APE procedure less attractive in recent years. Brazil's design of the *recuperação extrajudicial* procedure has led it to be disfavored as compared to in-court restructuring procedures. Mexico has had a few recent successes with the pre-pack *concurso* regime; however, the Vitro case shows that a number of important questions remain. Peru has taken a very different approach to pre-packaged insolvencies, although the preventive insolvency regime there has not been tested much given the strength of Peru's economy. Finally, as the Dominican Republic continues to seek out foreign capital, it is inevitable that it will need to reevaluate its insolvency regime, perhaps adopting some of the pre-packaged or pre-negotiated procedures seen in other Latin American countries.

NOTES

1 For the reasons discussed below, many debtors that would otherwise choose to restructure their debt under local insolvency laws may find that Chapter 11 offers a number of substantive and procedural advantages in the restructuring process.

2 According to BankruptcyData.com, the number of pre-packaged bankruptcies increased by nearly 300 percent in 2009 compared to 2008.

[3] The restructurings of Chrysler and GM were not accomplished through pre-packaged or pre-negotiated Chapter 11 plans of reorganization. Rather, in these cases, bankruptcy courts approved sales of substantially all of the debtors' assets pursuant to Section 363 of the Bankruptcy Code to newly-formed entities (which assumed certain liabilities of the selling entities but not others) following motions filed in the first week of the cases and very short-term debtor-in-possession financing provided by the U.S. government to facilitate the sales. The courts approved such sales over the objections of certain creditors who argued the sales were disguised plans of reorganization that provided certain creditors with preferential treatment in derogation of the Bankruptcy Code's priority scheme. The bankruptcy courts rejected these arguments and found that the sales at issue were necessary because the only alternative would have been the immediate liquidation of both companies. The Chrysler and GM cases may be somewhat unique given the involvement of the U.S. government in facilitating the sales.

[4] Some bankruptcy courts have defined "property" broadly for purposes of determining a debtor's eligibility to commence a bankruptcy case in the U.S. For example, bank accounts holding limited amounts of money and small attorney retainers located in the U.S. have been found sufficient to permit a debtor to file a case in the U.S. Even if an entity is technically eligible to commence a U.S. bankruptcy case, a court in the U.S. may nonetheless exercise its discretion to dismiss the case or abstain from hearing it on the basis that the debtor has insufficient U.S. contacts or due to other considerations.

[5] Trade creditors are often "unimpaired" (e.g., paid in full) under pre-packaged and pre-negotiated plans. Under the Bankruptcy Code, classes of claims that are unimpaired are deemed to have accepted the plan.

[6] A detailed discussion of the use of Chapter 11 to stay actions against non-debtors or release claims of non-debtors against other non-debtors is beyond the scope of this article. However, these issues can be vigorously litigated and, where there is opposition and/or an attempt to impose non-debtor releases on a non-consensual basis, some courts have been hesitant to extend such protections to non-debtors, absent unique circumstances.

[7] Courts in Argentina have also determined that banks and financial institutions are ineligible to restructure through an APE.

[8] From a practical standpoint, one of the biggest sources of delay in obtaining the agreement of bondholders to an APE is the requirement under Argentine law that foreign bondholders that do not appear in person grant a power

of attorney to execute an APE be notarized and receive an apostille or be consularized at an Argentine embassy. Although obtaining an apostille or consularizing a document at an Argentine embassy is a relatively simple and ministerial task, many bondholders are unfamiliar with the process or overlook this requirement altogether, which can mean that a debtor's financial and legal advisors will need to assist in or facilitate compliance with these formalities.

[9] Courts in Argentina have also rejected an APE on the ground that a debtor has "abusively" used the APE process.

[10] This protection is important because the majority of restructurings carried out in Brazil involve privately held companies with a controlling shareholder. Pre-petition creditors often condition their approval of the restructuring plan upon a change of control of the company after its operations have been stabilized.

[11] In addition, debt secured by a chattel mortgage (*alienação fiduciária*) is also excluded from the restructuring process, although this did not pose problems in the Independência restructuring.

[12] Independência emerged from bankruptcy protection in March 2010 under a restructuring plan that halved its indebtedness, provided funds to restart and expand shuttered operations and included significant creditor protections particularly with respect to corporate governance and financial covenants. Nevertheless, Independência S.A. defaulted on the first interest payment owed to its exit lenders in September 2010 and, as of this writing, the company is back in bankruptcy court where it will be liquidated absent a new agreement with its creditors.

[13] In certain cases, courts have used their injunctive powers to grant a stay, but this has been in the form of extraordinary relief for particular circumstances, and is not generally available for debtors.

[14] IFECOM, the Mexican Federal Institute for Bankruptcy Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles*) is an organization, created by the Concurso Law under the branch of the federal judiciary, charged with maintaining the registry of and ensuring the qualifications of court-appointed overseers, mediators and receivers in *concurso mercantil* proceedings.

[15] In order to file an involuntary *concurso mercantil* proceeding against a debtor, creditors must show that both conditions are satisfied, i.e. that the debtor has debts which are past due by more than 30 days and which represent collectively at least 35 percent of the debtor's debts *and* that the debtor does

not have sufficient assets to satisfy at least 80 percent of its debt that is past due on the day the petition is filed.

[16] Though not an attempted pre-pack, another company that has languished under the Concurso Law process is Companía Mexicana de Aviación, S.A. de C.V. ("Mexicana"), formerly Mexico's largest airline. Mexicana filed its Concurso petition in August 2010, and continues, as of this date, to search for a suitable investment and exit strategy from the Concurso process. To facilitate this, the *conciliador* has sought repeated extensions of the "reorganization phase" from the Mexican court in an effort to avoid a mandatory liquidation. By contrast, after gaining support from the requisite number of noteholders, Satélites Mexicanos ("SatMex") recently concluded a fast-paced restructuring of its financial debt obligations through a U.S. pre-pack that was filed on April 6, 2011, confirmed on May 11, 2011 and closed on May 26, 2011.

[17] A debtor cannot file for preventive insolvency proceedings, and must file for ordinary insolvency proceedings if one-third or more of its total debt is due and remains unpaid for a period longer than 30 days or its losses (after deducting reserves) exceed one-third or more of its stated capital. In addition, creditors may initiate an ordinary insolvency proceeding against the debtor if they hold a claim of at least US$60,000 which has been past due for more than 30 days. In an ordinary insolvency proceeding, a debtor may petition for reorganization under an ordinary insolvency proceeding only if a public accountant certifies that its losses do not exceed its stated capital and the debtor presents a viable AGR. If the debtor's losses exceed the stated capital, or its AGR appears unviable, INDECOPI will refer the debtor for liquidation.

[18] Although an AGR may be pre-negotiated with creditors in connection with an anticipated preventive insolvency proceeding filing, it is not necessary to do so, and a preventive insolvency proceeding may be filed prior to entering into negotiations with creditors.

[19] The absence of an absolute priority for secured claims has led many creditors to use bankruptcy-remote collateral trusts in order to hold their security interests. Such collateral trusts protect the security interest from the automatic stay imposed during a bankruptcy proceeding and reduce the potential for mismanagement by debtor.

[20] Under a preventive insolvency proceeding, the stay only applies if solicited by the debtor. The stay is automatic for an ordinary insolvency proceeding.

[21] Claims other than tax claims can also be haircut with a vote of two-thirds of the creditors.

[22] Interest on secured claims continues to accrue only to the extent that the interest would be secured by the collateral.

[23] However, secured creditors can still foreclose on collateral between the initial filing for *quiebra* and the entry of the *quiebra* decision. As with the filing of an APE petition in Argentina, this procedural quirk leaves the debtor at great risk during this interim period, as secured creditors have been made aware of the debtor's financial distress but can still pursue remedies in respect of their collateral.

[24] Secured creditors may only participate to the extent they waive their security interest.