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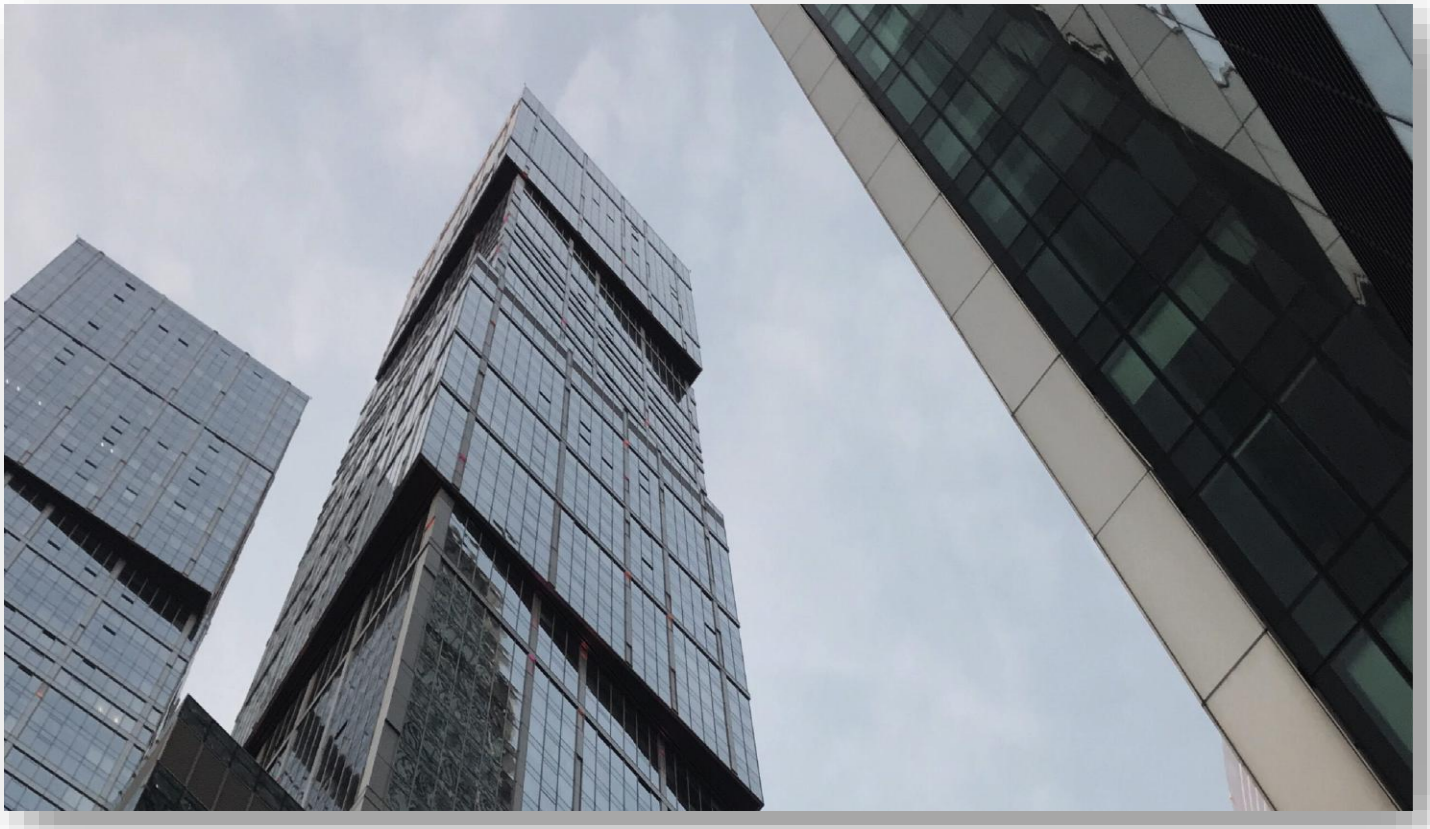

BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS: AN INTERNATIONAL GUIDE

ILN RESTRUCTURING & INSOLVENCY GROUP

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Australia

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER AUSTRALIAN LAW

Companies

Corporate insolvency in Australia mostly involves a company being placed in liquidation or administration.

Companies can be placed in liquidation by:

1. The directors, or
2. A creditor applying to the court, or
3. An oppressed minority shareholder applying to the Court, or
4. The shareholders, or
5. After an administration process, if a scheme of arrangement is not entered into by the company with its creditors.

A liquidator is appointed to control the affairs of the company to recover funds for creditors.

The liquidator will be a private practitioner who will charge fees for his and his firm's work. Those fees are a priority payment before unsecured creditors are paid.

The liquidator needs to be independent. Liquidators that have had a prior association with the company or its directors can be removed.

The voluntary administration process requires the directors to appoint an Administrator to investigate if the company can be saved, most commonly by a sale of assets or a scheme of arrangement with creditors.

When a company is in administration, there is a moratorium that prevents, among other things, the winding-up of the company, secured parties enforcing security interests, landlords taking possession of leased property, and court action cannot commence or proceed.

A scheme of arrangement usually involves shareholders agreeing to provide funds to pay an amount to creditors to avoid the company being placed in liquidation. There is a limited time for a scheme of arrangement to be proposed.

For example, shareholders might advance funds equal to say 50% of amounts owing to creditors.

A scheme of arrangement requires 75% of the value of the creditors, and a majority in number, to agree. Creditors need to be satisfied that the Scheme of arrangement would create a better

return than if the company was placed in liquidation.

The Administrator would usually recommend the scheme of arrangement to creditors if that was the case.

Otherwise, the company will go into liquidation.

The Administrator then becomes the Liquidator.

Liquidators will then take such steps as they can to recover funds for creditors. Those steps often include:

- Asking creditors (including the taxation office) who were paid in the 6 months prior to the liquidation to repay the funds to the liquidator;
- Selling assets;
- Collecting debts, including debts owing by directors or shareholders;
- Recovering uncommercial transactions entered into to defeat the interests of the creditors.

Traps for directors

Liquidators can pursue bad corporate behaviour by directors.

Directors of a company that goes into liquidation can then have a poor credit rating. Banks may then be reluctant to lend to the director or to

any new company, and creditors may be reluctant to extend credit.

If a person is a director of two or more companies that have gone into liquidation, and if the return to creditors was less than 50%, the director can be banned from being a director of a company for 5 years.

If the company was trading and incurring debts when the directors ought to have known the company was insolvent, the directors can be held personally liable for any such debts.

Individuals

Personal insolvency is called bankruptcy in Australia.

A person who is unable to pay his or her debts, can declare themselves bankrupt, or a creditor can apply to the Court to bankrupt an individual, if they have a judgment against them for at least $5,000.

Bankruptcy releases a person from unsecured debts and allows them to make a fresh start.

Bankruptcy normally lasts for 3 years and 1 day. It can be extended for up to 8 years, most commonly if a person's bankruptcy Trustee has reason to believe that the person has not been truthful about their affairs.

When a person becomes bankrupt, a Trustee is appointed. A Trustee is a person who manages your bankruptcy.

A bankrupt person must provide details of their debts, income, and assets to their Trustee.

Your Trustee notifies creditors that you are bankrupt - this prevents unsecured creditors from pursuing the debt.

The trustee can sell certain assets to help pay debts.

A bankrupt may need to make compulsory payments if their income exceeds a set amount.

Bankruptcy is an option, but a person may also try to enter into a personal insolvency agreement, requiring 75% of creditors to agree.

Bankruptcy may have serious consequences and prejudice a person's ability to obtain credit, travel overseas or gain certain employment.

Certain types of professions may be in jeopardy such as a lawyer or a builder.

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER BRAZILIAN LAW

1. **A brief presentation of the bankruptcy/ insolvency/ rehabilitation proceedings of the country and their main differences.**

   The Brazilian Bankruptcy and Reorganization Law (Law No. 11,101/2005) provides companies with financial difficulties the necessary tools to restructure their obligations and operations, allowing the companies in crise to continue as going concerns. This is achieved through rehabilitation and reorganization procedures, which include (a) in-court judicial reorganization (*recuperação judicial*) or (b) out-of-court/prepackaged reorganization (*recuperação extrajudicial*) and liquidation/bankruptcy process (*falência*).

   Judicial reorganization is a court-supervised procedure analogous to Chapter 11 of the U.S. Bankruptcy Code. Judicial Reorganization is designed to facilitate the effective restructuring of viable companies in financial distress. During the stay period of 180 days (extensible once for the same period), the debtor is protected from enforcement actions and may submit, negotiate, and seek creditors approval for a Judicial Reorganization Plan.

   The Judicial Reorganization Plan shall be voted and approved by the majority of creditors (qualified quorum applies) and once approved and ratified by the Court, pre-petition claims subject to the proceeding shall be paid according to the conditions proposed in the Judicial Reorganization Plan. Typically, the debtor and its management continue to operate the business during the judicial reorganization, while a court-appointed trustee oversees the process, verify the fulfillment of the law, audit the numbers and balance sheets of the company, supervise the right of creditors etc., without management powers.

   An extrajudicial reorganization is an out-of-court process, similar to a pre-pack, that restructures a viable company's debt to avoid formal insolvency or judicial reorganization. It involves a contractual agreement between the debtor and creditors (or some of them) to reschedule or modify obligations. Once the agreement is signed, the debtor can request court ratification to extend the terms to all creditors in the same class, provided certain requirements are met.

   Liquidation/Bankruptcy is a court process that involves (i) declaring the debtor insolvent and (ii) dissolving the debtor by selling its assets and distributing the proceeds among creditors according to the payment hierarchy established by law.

2. **(Depending on the type of the proceedings) The protection granted to the debtor against its creditors**.

   The following questions should be addressed for each proceeding, provided by the law of the country:

   i) **What kind of protection is granted?** (e.g. the creditors may not enforce any court decision against the debtor's assets etc.)

      Judicial Reorganization: After the petition for judicial reorganization is granted, a 180-day stay period begins. During this time, creditor actions against the debtor, such as executions and asset seizures, are suspended. This period is intended to provide the debtor with the necessary time to negotiate the Judicial Reorganization Plan.

Note that the stay period does not affect post-petition claims, so new obligations hired by the debtor shall be paid normally by the debtor, under penalty of having new enforcement proceedings/collection claims filed by the creditors and new attachments/seizures over debtor's assets. Also, tax claims are not affected by the stay period, but the Judge of the Judicial Reorganization shall have a kind of priority over the company's assets, so the Judge of a tax claim cannot attach or block assets that could be essentials to the success of the Judicial Reorganization.

The Brazilian Bankruptcy and Reorganization Law explicitly allows for a one-time extension of the 180-day stay period for an additional 180 days, provided the delay in voting on the reorganization plan is not due to the debtor in possession. The stay period may be extended a second time if creditors submit an alternative Judicial Reorganization Plan, as outlined in Article 6, Paragraphs 4 and 4-A, and Article 56, Paragraph 4.

Extrajudicial Reorganization: the 180-day stay period is not a rule in the Extrajudicial Reorganization but can be (i) negotiated with the creditors subject to the Extrajudicial Reorganization and (ii) requested to the Judge in charge of the proceedings. Considering that the Extrajudicial Reorganization achieves only some classes of creditors, so the stay period also achieves only the same classes of creditors.

Liquidation/Bankruptcy: there is no stay period in the Liquidation/Bankruptcy proceeding. Once the Liquidation is declared, all the debtors' assets will be gathered and sold to pay the creditors, according to the priority list.

ii) **What is the extent of the protection?** (e.g. it includes all of the debtor's assets; Is it limited to several assets for which the debtor may ask for protection? Is it at the court's discretion to include any asset? etc.)

Judicial Reorganization: The stay period protection extends to all assets of the company filing for Judicial Reorganization—cash, real estate, equity interests, etc. However, assets pledged as collateral in fiduciary alienation agreements are not protected by the stay period, as creditors with such collateral are not subject to the effects of the judicial reorganization.

Extrajudicial Reorganization: The stay period protection extends to all assets of the company filing for Judicial Reorganization—cash, real estate, equity interests, etc., but only for the creditors that are subject to the effects of the Extrajudicial Reorganization.

Liquidation/Bankruptcy**:** Not applicable.

iii) **By whom it is granted?** (e.g. by a court decision or by injunctions or directly by the law etc.)

The stay period is typically granted by the State Court or by the Court of Appeals if the lower instance has not authorized the processing of Judicial/Extrajudicial Reorganization.

iv) **Does the protection include only the debtor, or may it cover other persons as well** (e.g. guarantors)?

The stay period protection generally applies only to the debtor and the companies that have requested

Judicial/Extrajudicial Reorganization. In Brazil, it is common for guarantors to seek Judicial Reorganization to avoid the enforcement of debts against them.

However, if the guarantor does not request Judicial/Extrajudicial Reorganization, creditors retain all their rights against the guarantors.

v) When is the protection granted? (e.g. in the rehabilitation proceeding in Greece, the debtor may apply before a court for protection of its assets before any agreement has been concluded with its creditors. After the agreement is concluded, different protection applies).

Typically, the stay period protection is granted after the debtor files for Judicial Reorganization, following a decision that authorizes the commencement of proceedings.

However, it is increasingly common for debtors to request an advance of the stay period's effects (injunction), with the Court granting a deadline for the debtor to file for Judicial/Extrajudicial Reorganization and confirm the injunction.

vi) For how long is the protection granted?

180 days, extendable once.

vii) Which creditors are bound by the protection?

All the creditors are subject to the Judicial/Extrajudicial effects.

viii) Any other particularities of the procedures of each country (if any).

Recently, Federal Law No. 14,112/2020 amended the Brazilian Bankruptcy and Reorganization Law and overhauled the 15-year-old legislation. Some of the most relevant changes to the current legislation are the following:

1. Brazil has adopted the UNCITRAL Model Law on Cross-Border Insolvency, adding a specific chapter in the Brazilian Bankruptcy and Reorganization Law to regulate these proceedings.
2. Debtor-in-possession (DIP) financing is now easier, with provisions allowing asset encumbrance and shareholder loans after filing for judicial reorganization.
3. The process of selling assets in judicial reorganization and bankruptcy liquidation is now more efficient, flexible, and legally secure, creating a safer environment for investors.
4. Creditors can now submit competing reorganization plans if certain legal conditions are met.
5. While tax claims remain excluded from judicial reorganization, new provisions aim to resolve such debts and allow the Treasury to negotiate more favorable terms with the debtor.

Bankruptcy liquidation proceedings are now significantly faster, enabling debtors to be discharged from obligations in a much shorter timeframe compared to the lengthy processes currently seen in Brazil.

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER CANADIAN LAW

1. Canada's Political and Legal System

Canada has a federal system of government, subject to its Constitution, which was significantly overhauled in the early 1980's, including the creation and implementation of the 1982 Canadian *Charter of Rights and Freedoms*. Canada places a high value on 'rule of law' concepts in Anglo-American legal traditions. It has both federal and provincial political and legal systems and courts, subject to the common law in various jurisdictions, and civil law in Quebec. The Canadian Parliament is responsible for federal laws, and various provincial legislatures enact local legislation in their jurisdictions. The Province of Quebec implements its Civil Code, largely derived from the French Napoleonic Code and amended over time, in its legislature, called Assemblée nationale du Québec. There are courts with both federal and provincial jurisdiction that make rulings within their jurisdiction, resulting in a general body of common law (with civil law in Quebec), in either official language: English or French, or sometimes in both. Where necessary, the legal principle of 'paramountcy' is applied, whereby federal statutes are intended to prevail over provincial statutes when their terms and application conflict.

2. Canadian Insolvency Regime

Insolvency and bankruptcy laws in Canada are generally of the federal domain. Provincial and regional laws are used to implement and interpret issues falling within this domain. There is no single law or statute governing corporate, commercial, or institutional restructuring, bankruptcy or insolvency issues. Insolvency professionals with standing in insolvency proceedings in Canadian courts are usually either licensed lawyers or accounting professionals, with appropriate accreditation.

There are multiple applicable Canadian insolvency and restructuring statutes, listed below. The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "***BIA***") and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "***CCAA***"), collectively called the "**Acts**") comprise the "main" statutory framework for individual and corporate insolvencies, restructuring, and bankruptcies in Canada. Stays of proceedings are implemented to allow for re-organisations, restructurings, or liquidations to occur in the best interests of stakeholders and in an orderly fashion. Proceedings under the *BIA* and *CCAA* are monitored and regulated by the federally regulated Office of the Superintendent of Bankruptcy, to whom provincial Official Receivers submit their reports.

Applicable statutes in Canada:

i. The *BIA*: This is the main federal statute for personal or 'consumer' bankruptcies. It also has a broader section for both higher net-worth personal bankruptcies and larger corporate and commercial bankruptcy or restructuring opportunities. The *BIA* contains rules for both liquidations or debtor-driven restructurings and reorganisations (generally called 'proposals'), with both creditor remedies (including receiverships), and 'debtor in possession' ("**DIP**") remedies. A statutory priority waterfall for claims against the estate of an insolvent person or entity exists for secured and preferred creditors, thereby implementing rules for dealing with those priority claims in multiple scenarios. DIP proceedings under the *BIA* generally occur in situations in which the debts of the debtor are below CAD5,000,000. The "bankruptcy" provisions of the *BIA* are analogous to Chapter 7 of the U.S.A. *Bankruptcy Code* (the "**Code**"), but have many differences beyond

the scope covered here. The "proposal" provisions of the *BIA* are more analogous to Chapter 11 of the Code.

ii. *The CCAA*: This is the principal federal restructuring and recovery insolvency statute for DIP debtors. In comparison with the analogous *BIA* framework, it is generally more flexible in scope and application. The *CCAA* evolved from a largely unused and very brief statute conceived in the 1930s, but has been extensively used and adapted since that time. In the present day, it is used mainly for the restructuring of large commercial enterprises with aggregate debt owing in excess of CAD5,000,000. While analogous to Chapter 11 of the Code, the *CCAA* differs in many material respects, not the least of which are the generally increased speed and lower costs in most scenarios. The *CCAA* remains a relatively brief statute, and not all aspects of the law applicable in connection with proceedings there under have been codified. It allows for wide powers of judicial discretion which is of utility in quickly changing fact scenarios. Many cases coming within its wide scope have received a considerable display of jurisprudential flexibility and expediency, due to the lack of codified rules and procedures.

iii. The Personal Property Security Act/Civil Code in each Province (collectively, "***PPSAs***"): Each province outside Quebec has enacted statutes relating to property rights in assets and security to partially replace a pre-existing patchwork of common law that preceded them. They also allow for the appointment of receivers both in and out of court. The *PPSAs* contain attachment, perfection, and priority rules in collateral that were initially modelled on the *Uniform Commercial Code* used in US States (collectively, "**UCC**"), but do nevertheless have significant differences. For instance, the *PPSAs* are mainly notice registry systems, and are not title based. There are also differences with UCC Article 9 procedures and accommodation for security interests in cash collateral, and other personal property.

iv. Rules of Court/Rules of Practice ("**Rules**"): These apply in all provinces other than Quebec, and have direct and indirect influences on judgements and rulings regarding enforcement and interpretations under applicable statutes. For instance, where it is found to be 'just or convenient', courts may appoint receivers for interests including secured creditors.

v. The *Winding Up and Restructuring Act* ("***WURA***"): This federal statute has been used infrequently, and is generally for the restructuring and reorganisation or liquidation of specific entities, mainly banks and insurance or trust companies. In the context of more recent financial upheaval in financial markets and financial institutions in Canada and abroad, this legislation may assume a more prominent role than has unfolded in its recent past.

vi. Business Corporation Statutes: These include multiple statutes in both the federal and provincial domains, such as the *Canada Business Corporations Act* ("***CBCA***") and its various provincial counterparts. These are significant because they allow courts to authorise fundamental changes in corporate structure in distressed scenarios. They contribute to balance sheet refreshments through such arrangements where debt can be converted to equity including through implementation of distress preferred share arrangements as may be approved in Canadian insolvency proceedings. These statutes may also be used to effect liquidations in certain circumstances.

3. The Acts: Basics

BIA

Applications for bankruptcy orders may be filed by the debtor, or by his/her/its creditors. When filed by creditors, there can be proceedings contesting the filing, to be heard by the bankruptcy courts. Otherwise, liquidations ensue once the trustee in bankruptcy is appointed under a bankruptcy order and that person is usually an accredited accounting professional. That trustee in bankruptcy acts in the estate, effectively on behalf of the general body of creditors. Secured creditors holding perfected security interests take outside of the bankruptcy estate to the extent of the value of their collateral held, and will file claims in the estate for unpaid residual amounts of debt not recovered from realization of their specific collateral held.

To avoid bankruptcy, proposals may be filed by debtors under notices of intention ("**NOI**"). These are not initially bankruptcy filings. An accountant is engaged as "Proposal Trustee" to oversee and review the affairs of the debtor, and to report to the court in all proceedings. On filing the NOI, the time "starts ticking." Initially, a 30-day stay is granted, and can be extended up to a maximum of six months by the court, to enable the debtor to file a plan. Time is granted to compose a plan, which is distributed to creditors for a vote. For the proposal to be approved, a 'double majority' vote that occurs with approved creditors will be necessary, in which a majority of both creditors by number and total of outstanding debt thresholds must be met to pass the vote. If the creditors approve the plan, court approval is thereafter required. If timelines are not met, or a plan is neither presented nor approved by creditor vote and court approval, then there is an automatic deemed bankruptcy. At that point, the proposal trustee becomes the trustee in bankruptcy, and liquidation ensues.

All asset bankruptcy estates are subject to a 5% levy, payable to the Superintendent in Bankruptcy.

CCAA

Qualified applicants under the *CCAA* are usually applicants being corporate entities who are insolvent, or who have committed an act of bankruptcy under the *BIA*. Total claims against that debtor must exceed CAD5,000,000 before that debtor may commence a *CCAA* filing. Proceedings are initiated by court applications. Filings for 'first day orders' are done by application of the debtor to the applicable court. There may be an initial order implementing a statutory stay of proceedings, but it is granted for a very short period of time and on restricted terms and conditions (colloquially sometimes referred to as the 'skinny order'), in effect for no more than 10 days. The applicants must return to court within that time period with another application for the full form of court orders giving broader protections to the Applicant.

Monitors are appointed upon initial orders being granted and are deemed to be officers of the Court, and as such are the "eyes and ears" of the Court in the proceedings. The debtor's auditors are excluded from being appointed as Monitor. Monitors are ideally positioned to act in the 'best interests of the general body of creditors'. Their views and recommendations are submitted to the courts in formal reports, which are generally given a high degree of factual and professional deference. Once appointed to oversee the *CCAA* estate in the first day orders, Monitors coordinate multiple roles. Those include the review of financial information, filing of statutory reports, review of debtor forecasts and plans, implementation of a sale process, and assisting in the drafting of a Plan of Compromise or Arrangement (**"Plans"**). Plans, once approved by creditors in a double majority vote, must also be sanctioned by a Canadian court.

Plans can include sale processes, such as 'stalking horse' bidding procedures for all or part of the business, assets and operations of the debtor, or a broader group of companies and partnership entities connected to the debtor. They may also include full or partial liquidations of their assets, termination of contracts, key employee retention plans, settlement of debts and charges amounting to a balance sheet restructuring. Monitors interact with officers, directors, and management of the debtor and their counsel. They are also responsible for conducting all statutory proceedings, including any votes of creditors or other stakeholders, outside of the court proceedings.

Assets disposed of in *CCAA* proceedings are not subject to any bankruptcy levies.

Stays of Proceedings

Under the *BIA*, statutory stays of proceedings are initiated on issuance and filing of an order for bankruptcy, or upon filing an NOI. Under the *CCAA*, statutory stays are initiated by the courts in first day orders, and continue under the directions of the court. Stays of proceedings can be implemented for groups of companies domestically, within the ambit of the Canadian courts. For cross border groups, the continuing cooperation of foreign courts is required, with varying results from case to case.

Cross Border Proceedings

Coordination of cross-border proceedings with foreign courts is encouraged and implemented on a regular basis. Canada adopted the UNCITRAL model law on cross border insolvency in 1997, with changes specific to Canada at and after that time. This is incorporated into Canadian law under Part IV of the *CCAA* and Part XIII of the *BIA*, for both recognition of foreign proceedings in Canada and for recognition of the orders of Canadian courts in foreign proceedings. Canadian courts can exercise jurisdiction over non-Canadian entities and assets if the 'centre of main interest', known as **"COMI"**, is in Canada. These always involve questions of fact, and can be hotly contested at the outset of proceedings. *In the Matter of Voyager Digital* recently saw the Ontario Superior Court provide renewed guidance on the determination of COMI in the context of a public company. Cross border cooperation of foreign courts with Canadian courts has occurred in multiple cases, including under Chapter 15 proceedings under the Code.

Officers and Directors

Generally, directors and officers of corporations have statutory duties to act honestly and in good faith with a view to the best interests of the corporation (including under the *CBCA*). Directors of an entity entering proceedings under the Acts must continue to generally act in the general best interests of that debtor. They must exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. Officers have similar duties including remittance obligations to government authorities. While there are duties to 'stakeholders', such as government entities, creditors and employees, there is no specific duty on directors or officers to look after the interests of shareholders. Unlike other jurisdictions, such as Australia, Germany, and France, there are no 'trading while insolvent' liabilities or exposures while the debtor is undergoing a formal restructuring while also operating its business. Remedies sought for breach of such duties, in the absence of fraud, are generally fact-based proceedings, within these general principles.

Additionally, directors should take note that under certain statutory circumstances, directors may be found personally liable for unpaid employee wages and holiday pay, and source deductions for employee income taxes, employment insurance and government pension plan contributions.

4. The Acts: Changing Rules and Features and Updates

In recent years, the Acts were amended to achieve better accountability and transparency in Canadian insolvency proceedings.

Disclosure of Economic Interests

The *CCAA* was amended to allow interested persons to apply for a court order requiring a person to disclose any "economic interest" in the debtor company. An "economic interest" includes a claim, eligible financial contract, an option, a mortgage, charge, lien, other security interest, the consideration paid for any right or interest, or any other prescribed right or interest. The court must consider whether the information sought would enhance the prospects of a compromise or arrangement for the debtor company and whether any interested person would be materially prejudiced by the disclosure.

The purpose of this may be aimed at leveling the playing field in the administration of estates. Possible scenarios where disclosure might be particularly important are (i) where claims are traded at discount values to purchase blocking votes or (ii) where related parties or parties with undisclosed collateral interests bid on assets of the insolvent estate.

Pension Funding and Obligations

To protect the interests of retirees and pensioners, the Acts were amended to require that funds earmarked for registered disability savings plans be added to funds in RRIF plans and RRSPs so that they are exempt from seizure under the *BIA*. The *CBCA* was simultaneously amended to require that directors take into account the financial interests of retirees and pensioners in board deliberations of *CBCA* companies on the eve of insolvency.

Further, in 2023 legislation was passed expanding the super-priority positions afforded to defined benefit pension plans in the course of an employers' insolvency. Importantly, a transition timeframe has been built into this expansion of the super-priority (four years) for defined benefit plans. This will provide existing lenders and employers with some ability to pivot around the new reality but not much and new employers will not have the same transition period.

Director and Officer Compensation Clawbacks

The amendments expose directors to more scrutiny on the eve of insolvency. The courts may "look back" into payments (including termination pay, severance pay, incentive and other benefits) made to directors, officers, and other managing personnel in the year preceding the initial bankruptcy event. If the payments were made when the corporation was insolvent or rendered the corporation insolvent, exceeded the fair market value of the consideration received by the corporation, or were outside the ordinary course of business, the court may issue judgments against the directors personally, as may be appropriate.

Third Party Releases

Court ordered releases within *CCAA* Plans are common in the context of sanction orders. In many cases, it is management and board members who benefit. Directors and officers will usually insist on these in return for avoiding mass resignations during the reorganisation of the insolvent entity.

Procedural Changes

Stays of proceedings will be granted in *CCAA* proceedings if "reasonably necessary" for the continued operations of the debtor companies. The initial stay period was reduced from 30 days to 10 days. As well, other initial relief in first day orders will only be granted if "reasonably necessary." These amendments will help ensure that orders granted at the commencement of

insolvency do not over-reach and are fair to other creditor interests. Certain relief like new funding (DIP financing orders) and pre-baked solicitation proceedings for the sale of assets, which may prejudice stakeholders who had no notice of insolvency proceedings, may now be challenged earlier.

Statutory Duty of Good Faith

In *Bhasin v. Hrynew*, the Supreme Court recognized a general duty of honest performance in contractual dealings which has been broadly applied. Canadian courts must now consider good faith and disclosure of economic interests to enhance their jurisdiction in restructuring matters. Parliamentary debates preceding the amendments suggest that they were intended to protect the public from the effects of high-profile corporate bankruptcies like *Nortel* and *Sears* where many Canadian employees lost their pensions. A statutory duty to act in good faith will now apply to all participants in Canadian insolvency proceedings. Although debtors previously had a duty to act in good faith, the statutory duty now applies to all parties. This amendment is consistent with developments in the common law. In *Century Services Inc v. Canada (Attorney General),* the Supreme Court of Canada stated that "the requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority." A statutory duty of good faith is also consistent with British and American insolvency statutes and will therefore be useful in cross-border proceedings.

No Equitable Subordination in Canada, So Far

The doctrine of equitable subordination is an American legal doctrine that allows a court to subordinate a creditor's claim and ranking in an insolvency proceeding where that creditor has acted badly, in the determination of the court. Canadian courts have resisted its application over an extended period of time in numerous insolvency proceedings. However, it remains as an attractive equitable doctrine to be applied as a potential course of redress. Recent statutory implementation of the duty of good faith in Canada appears to have provided another reason to not apply this doctrine in Canadian proceedings to address the bad behavior of certain creditors. However, this doctrine has not yet been definitively shut off by the highest Canadian courts either, to date.

Reverse Vesting Orders

There have been recent developments in the case law regarding the use of reverse vesting orders (**"RVO"**) as a means of providing court approval to certain transactions to be effected in the context of an insolvency proceeding. Through the use of a reverse vesting order, the court may transfer liabilities or undesired assets "out of" the debtor company and "into" a new company or other available existing subsidiary entity. The impact is to "cleanse" the debtor of problematic assets or liabilities so as to effect a new state of affairs in assistance of the restructuring. This is a "reverse" to the approach of the traditional approval and vesting order wherein the valuable assets are transferred to the court approved buyer with secured interests being vested out.

Of particular in note, in *Harte Gold Corp. Re*, the Ontario Superior Court provided some important new guidance on what questions the court should investigate when asked to approve an RVO: (1) Why is the RVO necessary in this case? (2) Does the RVO structure produce an economic result at least as favourable as any other viable alternative? (3) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? (4) Does the consideration being paid for the debtor's business reflect the importance and value of the licenses and

permits (or other intangible assets) being preserved under the RVO structure?

While still relatively new, Canadian courts have begun to deal with RVOs more frequently. In *Forage Subordinated Debt LP v. Enterra Feed Corporation*, the Alberta Court of King's Bench granted an RVO in the context of a receivership. The Court reaffirmed the use of an RVO as an extraordinary remedy and clarified the Court's authority in granting RVOs for receiverships, which is derived from the interplay of several provincial statutes.

An RVO in a *BIA* receivership was approved for the first time at the appellate level in the 2024 British Columbia Court of Appeal decision *British Columbia v. Peakhill Capital Inc.* The Court emphasized that to determine whether and RVO will be granted, it must fulfill the purpose and object of the statutory scheme. RVOs can therefore be used as a remedy under the *BIA* if they further the *BIA's* objective of maximizing recovery for creditors. Following *Peakhill*, the Supreme Court of British Columbia further defined when RVOs were appropriate under the *BIA* in *Aquilini Development Limited Partnership v. Garibaldi at Squamish Limited Partnership*. The Court found that they are particularly appropriate when there is an absence of a viable alternative to preserve the value of a company's ongoing project in order to maintain the likely economic benefits for the stakeholders of the company.

The framework originally outlined in *Harte Gold Corp. Re,* was applied recently in the Ontario Superior Court in *Xplore Inc. (Re)*. The Court notably established that RVOs can be approved under section 192(4) of the *Canadian Business Corporations Act* rather than strictly the *CCAA* or *BIA* due to the statute's broad and flexible restructuring purpose, similar to that of section 11 of the *CCAA*. Nonetheless, it was emphasized that RVOs should remain an extraordinary remedy.

The first denial of an RVO came from the Ontario Superior Court in *In the Matter of the Companies' Creditors Arrangement Act.* In denying the RVO, the Ontario Superior Court addressed the unfairness to one of the creditors with a security interest in the equipment. It would have been unfair to accept a bid where the equipment would have been transferred to the residual corporation, especially when there was a less prejudicial bid available.

Following this, the British Columbia Superior Court refused to grant an RVO in *PaySlate Inc. (Re).* The court provided guidance on the procedural and substantive requirements for RVO applications. The refusal to grant the RVO was the result of inadequate notice to affected creditors and an insufficient evidentiary record.

Environmental Obligations and Priorities

In 2019, the Supreme Court of Canada released its decision in the case of *Orphan Well Association v Grant Thornton Ltd.*, which held that certain environmental remediation obligations of an insolvent entity can and should be prioritized over and above the rights of secured creditors in the context of a closed oil and gas operation.

More recently, the Alberta Court of Appeal released their decision *in Qualex-Landmark Towers Inc. v. 12-10 Capital Corp*. which saw them reverse the lower court decision that held that private citizens could claim a super-priority of environmental remediation obligations over and above other creditors. The Court of Appeal noted that the lower court judge had acted outside of his authority by using the common law to expand the availability of super-priority claims in a way that was incompatible with the legislation.

Subsequently, the Alberta Court of King's Bench released their decision in *Re Mantle Materials Group Ltd.* The court held that restructuring charges, which would satisfy end-of-life

environmental remediation obligations, have priority over security interests in equipment. While "unrelated assets" should not be used to satisfy end-of-life environmental obligations, equipment is not an unrelated asset. The Court in *Orphan Well Association v. Trident Exploration Corp.* clarified that all assets related to the business of the company in question are "related assets" and can therefore be used to satisfy these obligations.

In *Eye Hill (Rural Municipality) v. Saskatchewan (Energy and Resources)*, the Saskatchewan Court of King's Bench confirmed the application of *Orphan Well Association v. Grant Thorton Ltd.* in Saskatchewan and addressed the priority of unpaid municipal taxes and environmental remediation obligations. Municipalities rank after both the Crown in Right of Canada and the Crown in Right of Any Province, as well as after environmental remediation obligations. Any supposed lien created as a result of municipal taxes does not change the ordering of priorities.

Further developments in the law have demonstrated both an expansion and narrowing of the availability of super-priority claims.

Corporate Attribution Doctrine

When proving misconduct, intention may be a necessary element to prove. However, Corporations lack the requisite mental element. The corporate attribution doctrine addresses this deficiency by attributing the intention of the corporation's "directing mind" to the corporation itself.

In *Aquino v. Bondfield Construction Co.*, the Supreme Court of Canada applied the corporate attribution doctrine in the bankruptcy context and provided important guidance on the doctrine. The corporate attribution doctrine should not be applied strictly, otherwise it would be incompatible with the remedial nature of the *BIA*. Rather, it should be applied purposefully, contextually, and pragmatically. The flexibility associated with its application requires sensitivity to the area of law under which this issue arises, consideration of public policy concerns like corporate responsibility and the public interest, and a wide discretion for a court to choose whether to apply the test or not.

The Court in *Aquino v. Bondfield Construction Co.* specifically touched on public policy concerns by rejecting the fraud and no benefits exceptions in the context of insolvency. The reasoning for this was that applying them would be contrary to Parliament's goals, in that it would render the transfer at undervalue remedy meaningless and deny third-party creditors a statutory remedy. Corporate attribution in the context of insolvency only requires that an individual be a directing mind and be acting within their area of corporate responsibility, even if the corporation did not benefit from fraud carried about by the directing mind.

Scott v. Golden Oaks Enterprises reaffirmed the principles set out in *Aquino v. Bondfield Construction Co.* While the Supreme Court of Canada decided not to apply the corporate attribution doctrine in this decision, they established that it does apply to one-person corporations.

Debtor Rights of Redemption in Receivership

The right of redemption is a helpful remedy for borrowers looking to reclaim property they have an interest in, even after insolvency proceedings have begun. While it is much rarer once a receiver has been appointed, it has nonetheless been applied in this context. In 2024, the Supreme Court of British Columbia addressed this in their decision in *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*. The Court affirmed that the equity of redemption applied in the context of receivership as well as foreclosure, and that the rights to redeem continued until the court approval of sale. This process is flexible, as the courts have the

discretion to afford debtors varying lengths of time to redeem, depending on the circumstances. Speculative or vague refinancing efforts, however, may expose creditors to an increased risk and thus allow the courts to shorten the timeline in which redemption is available in a receivership.

The British Columbia Supreme Court dealt with the same issue more recently in *Institutional Mortgage Capital Canada Inc. v Mortise (Scott Road Residential) Holdings Ltd.* In citing *Haro-Thurlow*, the Court affirmed that there is no requirement for the redemption period to run from the date of the hearing of the petition and that the court should consider the debtors' equity of redemption when potentially appointing a receiver. The BCSC outlined a situation when a redemption period could be reduced in *The Bank of Nova Scotia v. Sidhu*. The Court agreed that a three-month redemption period was more appropriate as it aligned with the respondents' timeline for completing the sale, refinancing transactions and raising further funds.

Debts Surviving Bankruptcy

The *BIA* includes subsections that outline when a claim survives a discharge from bankruptcy, providing exceptions to one of the *BIA*'s general principles of financial rehabilitation. The recent 2024 Supreme Court of Canada decision in *Poonian v. British Columbia (Securities Commission)* clarified certain exemptions regarding administrative penalties and disgorgement orders resulting from fraudulent behaviour.

Under section 178(1)(a), the second factor in determining in whether a debt can survive bankruptcy is that the debt must be imposed by the court. The word "court" does not capture administrative tribunals or regulatory bodies, but rather solely the judiciary. This stands true even if the fine was imposed by a tribunal registered by the court, as it was nonetheless given by an administrative body. As such, the Court in *Poonian* left it open for a discharged bankrupt to be exempt from paying administrative penalties.

Section 178(1)(e) provides that a creditor must establish that there were false pretences or fraudulent misrepresentation, the passing of property or services and there must be a direct link between the debt and the fraud. The Court analyzed these three requirements, affirming that a court order declaring fraud must be obtained and that there must be a loss in property or a delivery of services regardless of whether the property was obtained or retained by the bankrupt. Further, they differentiated between debts directly and indirectly arising from fraud, stating that only debt representing the value of the property or services obtained directly through fraud can be non-dischargeable. As a result, the Supreme Court of Canada in *Poonian* determined that disgorgement could survive bankruptcy whereas administrative penalties could not.

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Chile

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER CHILEAN LAW

I- Introduction

Law N° 20.720 on Reorganization and Liquidation ("The Law") modernized insolvency proceedings in Chile, promoting the rehabilitation (reorganization) of companies and individuals, balancing the interests of both creditors and debtors to renegotiate debts. The Law entered into force in October 2014, and since its first decade of application some minor reforms have been implemented.

Accordingly, one of its principal aims is to encourage the restructuring of debts, as debtors can obtain stays of proceedings and continue trading under the supervision of a trustee. Debtor´s essential suppliers are payable in their original terms and conditions, which facilitates the continuity of business.

The exchange with essential suppliers will be considered a secure credit in case of liquidation.

It is essential for the success of the reorganization that the debtor receives the creditors´ support. The creditors act and vote in creditors´ meetings and the Law protects the principle of equality of creditors (*par conditio creditorum*). However, main creditors have important rights as well, for instance, in appointing the trustee/liquidator and in renewing the period of protection for the debtor.

If the creditors reject the reorganization plan, the debtor goes into liquidation. As a result, the Law considers liquidation as a

last resource and an appropriate proceeding for inviable debtors.

Although some exceptions, insolvency proceedings are submitted before Civil Courts (there are not full-time courts dedicated exclusively to bankruptcy in Chile).

The Law also created the Insolvency and Reorganization Agency ("the Agency"), which inspects the adequate implementation of the insolvency proceedings, controlling the role of trustees and liquidators. There is also a rehabilitation proceeding for individuals which is processed before the Agency. This Agency manages the Insolvency Gazette, where the most important insolvency orders are published.

The next sections will describe the main features of insolvency proceedings in Chile, before analyzing other interesting matters, namely, Chilean rules on restitutionary remedies, insolvency criminal offences and ineligibility of directors, cross-border insolvency, and tax aspects.

II- Insolvency proceedings

1) Reorganization of Companies

a) Judicial Reorganization

The debtor may file a reorganization request to restructure its debt. In doing so, the debtor should submit the following documents:

- A list of all its assets, including a commercial assessment, disclosing their location and whether they are subject to any guarantee.
- A certificate subscribed by an independent auditor with a list of its debts, including the name, address, contact information, and the percentage of every creditor on the debt, expressing who the 3 main creditors are, excluding related creditors.
- Accounting books and accurate financial information.

Likewise, the debtor has to request the Agency the appointment of a trustee (and a substitute trustee). This process is conducted before the Agency with the participation of the 3 main creditors.

Having appointed the trustee, the Court issues the reorganization order, which legal effects are as follows:

- The debtor is granted a 60-day stay of proceedings. This term can be extended for another 60 days with the acquiescence of 2 or more creditors, which represents at least 30% of the debt, excluding related creditors. Similarly, this term can be extended for an additional 60 days if 2 or more creditors, which represent more than 50% of the debt approves the extension, excluding related creditors.
- The reorganization is not ground for early termination of contracts. This means that creditors should comply with contracts entered into with the debtor, otherwise the credits are postponed.
- The debtor is under supervision of the trustee and has several limitations to render new guarantees, sell assets, and modify its articles of association.
- Although the debtor can raise new funds, there are limitations. The new credits cannot exceed the 20% of its debts, unless 30% or more of the creditors accept this, excluding related creditors.
- New financers are paid in the agreed terms and will be secured credits in case of liquidation (similar to the debtor in possession figure).
- The order establishes the date of the creditors´ meeting, where the reorganization plan will be voted.
- The creditors have 15 days from this order to demonstrate before the Court their power of attorney to approve, modify or reject the reorganization plan. This is necessary to participate in the creditor´s meetings.
- Similarly, the creditors can claim their credits within 15 days if they do not agree the amount and category established in the debtor´s list.

The debtor is free to prepare its reorganization plan, considering the foregoing limitations but negotiation is necessary to obtain creditors´ acceptance. The trustee has to submit a report to suggest the approval or rejection of the reorganization plan, at least 3 days before the creditors´ meeting.

In order to succeed, the reorganization plan requires the support of at least 66% of the creditors with right to vote -excluding related creditors-, considering the different categories

(secured, unsecured credits) in which the plan is divided.

b) Out-Of-Court Reorganization

The debtor has the option of reorganizing its debt directly with the support of 2 or more creditors which represent at least 75% of the debt in every category, excluding related creditors. The agreement must be entered into before a notary -or a faith officer-. Nonetheless, once accepted it requires Court´s approval. The Court´s role is to verify that the formalities and mandatory provisions (quorums) are complied with. Moreover, the debtor has to publish the agreement in the Insolvency Gazette. Creditors who might be excluded can oppose the agreement within 10 days from the publication. While the Court´s leave is processed, the debtor is granted stays of proceedings.

2) Liquidation of Companies

a) Voluntary Liquidation

A company may file an application to obtain its own liquidation under an insolvency scenario. The debtor is required to produce the following documents:

- A list of all its assets, including a commercial assessment, disclosing their location and whether they are subject to any guarantee. In the case of real estate or assets registered in public records, certificates are also necessary.
- A list of its debts, including the name, address, contact information of its creditors, stating whether they have secured or unsecured credits.
- A list of the legal proceedings commenced against the debtor.
- A list of its employees.
- Financial information and bank account statements considering a period of 2 years before the liquidation.
- An affidavit on the accuracy of the documents provided to the court.

b) Forced Liquidation

A creditor may file an application to claim the liquidation of its debtor in the following scenarios:

- If the debtor is in breach of an obligation established in a "executive title" (a document which demonstrates an enforceable right that does not require a declaration i.e., a cheque). This ground cannot be invoked against debtor´s guarantors.
- If there are 2 or more debt collection proceedings against the debtor in connection to 2 or more unpaid executive titles, provided that the debtor has not offered enough assets to pay its debts within 4 days after service.
- If the debtor has closed its headquarters/offices and the location of its managers is unknown, provided that the company has not left any representative to respond to claims and its obligations.

The creditor has to submit before the court the same list of documents required for the voluntary liquidation.

Also, interim measures can be granted to freeze debtor´s assets.

The court will call both the creditor and the debtor for a hearing, where the debtor might adopt any of these attitudes:

- Offering enough assets and proposing a term to pay its debts. Have the debtor failed to comply with this term, the debtor goes into liquidation.
- Accepting the creditor´s claim, so that the debtor goes into liquidation.
- Requesting the court to commence a judicial reorganization proceeding.
- Opposing the claim. This leads to a summary proceeding, where the debtor might invoke limited grounds for defense. If the court rejects the opposition, the debtor goes into liquidation.
- In any of these scenarios, the debtor is obliged to disclose the name, address, and contact information of its 3 main creditors. If this information is not provided, the debtor goes into liquidation.

As the effects of the liquidation order are the same in both voluntary and forced liquidation, they will be treated in the next section.

c) Effects of liquidation proceedings

The Agency appoints a liquidator (and a substitute liquidator) with the participation of the 3 main creditors.

Having appointed the liquidator, and provided that the requirements set out above are fulfilled, the court issues the liquidation order.

This order is published in the Insolvency Gazette and obliges to

- Deliver all the debtor´s post to the liquidator.
- Consolidate all the proceedings commenced against the debtor before the court where the liquidation is processed.
- Inform the public that it is forbidden for the debtor to receive any payment, otherwise it will be null and void. This is because the liquidator manages the debtor´s affairs during the process.
- Publish in the Insolvency Gazette that the creditors have the right to claim their credits within 30 days of the publication.
- Serve the order on overseas creditors by the most efficient method.
- Register the order in Public Registers in case of registered assets.
- Determine the date of the first creditor´s meeting.

The main effects of the liquidation order are as follows:

- The liquidator manages the debtor’s assets and affairs during the process.
- As such, the creditor has the power to seize debtor´s assets.

- Stays of proceedings are granted. Thus, the creditors are obliged to claim their credits within the liquidation.
- The debtor can continue its business under certain circumstances.
- All credits against the debtor are duly enforceable, even though they were originally subject to instalments or deadlines.

The Law discharges the debtor from the outstanding debts that cannot be paid after the liquidation of its assets.

3) Renegotiation for individuals

Individuals may file an application for a renegotiation proceeding before the Agency, where they have 2 or more outstanding debts for more than 90 days in connection with 2 or more creditors. It is necessary that the amount of the debt exceeds a threshold (circa USD 3,000).

During the renegotiation of its debt, the debtor is granted stays of proceedings.

4) Summary Reorganization and Liquidation for Micro-entities

Micro-entities and small companies may apply for summary reorganization or voluntary liquidation. The aim is to establish cost-effective alternatives to either renegotiate or liquidate the debts of small-scale enterprises. Individuals also have the option of applying for voluntary summary liquidation.

A creditor is entitled to commence a forced summary liquidation proceeding against a micro-entity or an individual.

There are 2 grounds for forced summary liquidation:

a) If there are 2 or more outstanding debts established in executive titles, provided that 2 or more debt collection proceedings against the debtor have commenced, and the debtor has not offered enough assets to pay its debts within 4 days after service.

b) If the debtor has closed its headquarters/offices and the location of its managers is unknown, provided that the company has not left any representative to respond to claims and its obligations. This ground only applies to micro entities and not to individuals.

The Law also grants the debtor stays of proceedings in the context of summary applications.

III- Restitutionary remedies

The Law provides remedies for creditors and the trustee/liquidator to recover assets/money transferred by the debtor to third parties in prejudice of its creditors in an insolvency scenario. Depending on the ground, these remedies seek the restitution of assets in connection to transfers or contracts entered into by the debtor between 1 and 2 years before the liquidation/reorganization order.

IV- Criminal offences and ineligibility of directors

The Law establishes criminal offences for debtors, where they have entered into contracts to diminish their assets with the clear purpose of damaging their creditors.

Also, there are criminal offences for debtors, where they hide their assets or provide false information to the trustee/liquidator, and where the debtor has not complied with its obligations of maintaining accurate accounting books and financial information 2 years before the liquidation/reorganization order.

Liquidators and trustees might commit criminal offences where they obtain unlawful benefits in insolvency proceedings.

Individuals who have committed insolvency criminal offences are ineligible as directors of companies. This prohibition also applies to individuals who are parties to insolvency proceedings in the capacity as debtor or as administrators or representatives of debtors in insolvency proceedings.

V- Cross-border insolvency

The Law provides a chapter on cross-border insolvency rules, promoting cooperation and recognition of foreign proceedings, protecting the rights of both national and overseas creditors. The law also regulates the effects of parallel proceedings.

VI- Tax aspects

For tax purposes, the liquidator represents the debtor before de Chilean Tax Authority. As such, the liquidator is responsible for handling the debtor´s tax obligations (tax returns, sworn statements, invoice issuance, withholdings, etc.). Regarding tax offenses, the liquidator might be liable if there is participation in fraudulent acts committed during its administration.

During a liquidation proceeding, the Tax Authority may issue a tax assessment on taxes owed by the debtor, without any prior procedure or notice.

Additionally, any amount waived or condoned by a creditor from debts included in a judicial reorganization agreement, is treated, on one hand, as a deductible expense for the creditor, and on the other, as a taxable income for the debtor. However, credits must be at least one year old and independent to any related parties.

Creditors who issued unpaid invoices to debtors may choose to either allocate the VAT paid for such invoices to any taxes due or request its reimbursement. This benefit is also limited to unrelated creditors and debtors.

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Finland

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER FINNISH LAW

In Finland, insolvency legislation provides for two distinct statutory processes: bankruptcy and corporate restructuring, each with separate proceedings. Both proceedings are briefly summarized in this text.

Corporate Restructuring in Finland

The purpose of restructuring is to rehabilitate the viable parts of a business, facilitate their operation, and enable debt adjustment. As is common in other countries, in Finland, voluntary out-of-court corporate restructuring are typically used by large companies. In the SME sector, formal restructuring proceedings based on legal statutes are more popular. This text focuses on formal corporate restructuring proceedings in Finland. In Finland, there are two different statutory corporate restructuring proceedings: the so-called ordinary corporate restructuring proceedings and the early restructuring proceedings. A company that is already insolvent may apply for the ordinary procedure, or the procedure may be initiated if a sufficient number of creditors support the debtor's application. The early restructuring procedure, on the other hand, may be initiated if the debtor is only at risk of insolvency. In both the ordinary and early restructuring procedures, the process is largely identical, and therefore these two types of proceedings are not addressed separately in this text.

Three Steps of the Process

Corporate restructuring in Finland is divided into three steps:

1. Application
2. Restructuring Proceedings
3. Restructuring Programme

1. Application

The corporate restructuring process in Finland begins when the debtor or a creditor files an application for restructuring with a district court. The decision to initiate a corporate restructuring process is made by the district court that has jurisdiction over the debtor's general administration. The court will hear the largest creditors regarding the application, and any objections must be justified with barriers based on the Finnish Restructuring Act.

Under the restructuring proceedings, restructuring debts are defined as those existing on the day the application is filed with the district court. Debts incurred before that date are considered restructuring debts. Once the application has been filed, the company can apply for a court order to protect it from debt collection actions. Initiating debt collection after the debtor has filed for restructuring is generally futile and may result in additional costs for the creditor.

Since corporate restructuring in Finland is legally mandated, the court almost always appoints an administrator to oversee the proceedings. In nearly every case, the appointed administrator is an attorney.

2. Restructuring Proceedings

The administrator's role is to monitor and supervise the debtor's activities during the restructuring proceedings, as well as to audit the debtor's activities prior to the proceedings.

The administrator is responsible for taking action if illegal activities are discovered or if the company starts incurring debts again and is unable to pay debts incurred after the filing of the application. In such cases, the administrator will file an application with the court to terminate the restructuring proceedings.

If it appears that the restructuring proceedings can continue, the administrator prepares a report on the debtor's assets, liabilities, and other obligations, as well as the circumstances affecting the debtor's financial position. This report is sent to all known creditors by the administrator. The report is typically written in Finnish, but the administrator can usually provide a translation or summary in English if needed.

At the end of the proceedings, the administrator prepares a draft of the restructuring programme. This programme is based on the debtor's financial projections. In larger companies, the proceedings and programme may focus on a real business turnaround, including changes in the company's strategy, management etc.

It is common for unsecured debts to be haircutted by tens of percents. Secured debts cannot be reduced. The typical duration for the payment programme is between five to eight years.

The restructuring proceedings conclude with a voting procedure on the proposed restructuring programme. Creditors can either accept or reject the proposed programme in the vote. If the programme receives majority approval in each group of participating creditors, it is approved by the district court.

In Finnish restructuring proceedings debt conversion is rare, so it is common for the company's shareholders to retain full ownership after restructuring. However, an amendment to the Corporate Restructuring Act is pending in Finland, which would allow debt conversion in corporate restructuring proceedings in the future. The date of entry into force of the law is not yet known.

3. Restructuring Programme

The district court appoints a supervisor to monitor the implementation of the restructuring programme. The company is responsible for reporting to the supervisor on the programme's implementation and the company's financial statements.

Once the restructuring programme has been approved, the debtor is required to adhere to the payment schedule outlined in the programme. If the debtor fails to comply with the payment schedule, creditors have the right to request that the district court annul the programme. Upon annulment, creditors regain the right to initiate debt collection.

Creditors should be aware that very rarely do companies fully succeed in implementing the restructuring programme. Unfortunately, most restructuring proceedings fail at some point during the three steps outlined above.

Bankruptcy proceedings in Finland

Bankruptcy proceedings in Finland are initiated when a debtor is unable to meet its financial obligations on time, leading to insolvency. The process can be instigated either by the debtor themselves or by a creditor. In Finland, creditors are not liable to cover the costs of proceedings, other than application fee, if there are no current assets in the bankruptcy estate.

A district court, where the debtor's center of main interest is located, has jurisdiction for making the decision to declare bankruptcy. Once declared, the court appoints an impartial administrator to manage the bankruptcy estate. This administrator, known as "pesänhoitaja" in Finnish, is typically an attorney and plays a crucial role in overseeing the affairs of the debtor and ensuring the fair distribution of assets to creditors. It's essential that the administrator maintains neutrality and effectively communicates with all stakeholders

throughout the process. In Finland, administrators of bankruptcy estates are supervised by the Bankruptcy Ombudsman, and as they are usually attorneys, also by the Finnish Bar Association.

Liquidation

In bankruptcy proceedings, one of the administrator's main duties is to realize and liquidate the assets belonging to the bankruptcy estate. A common method of selling assets nowadays is through online auctions, but in larger bankruptcy estates, it is also common to carry out a sale of business involving the entire business of debtor or part of it. If a buyer purchases a business from a bankruptcy estate, the buyer is not liable for the debtor's obligations that arose before the bankruptcy.

Employees

Employments are usually terminated by the administrator at the beginning of the proceedings. The termination period for employment agreements under bankruptcy proceedings is 14 days. Employees of the bankrupt company have the right to their unpaid salaries and other employment-related costs through Pay Security. The process for Pay Security is usually handled by the bankruptcy estate in cooperation with the authorities.

Creditors meetings

In the bankruptcy estate, decisions concerning the matters of proceedings, such as the liquidation of assets, are usually made by creditors in creditors meetings. Creditors' meetings are convened and facilitated by the administrator, providing creditors with the opportunity to decide on significant matters related to the bankruptcy estate. While attendance at these meetings is not mandatory, it is conventionally advisable to participate to safeguard creditor interests. These meetings are primarily conducted in Finnish, emphasizing the importance of early contact with the administrator or local attorneys for guidance on navigating the meeting. In addition to the creditors' meetings, it is also common for decisions to be made in a more informal procedure where the administrator hears the largest creditors of the estate in written form via email or mail.

Lodgement of claims

Creditors must file lodgement letters of their claims with the administrator by the specified deadline, which is called the lodgement date. The lodgement date is announced to the creditors by the administrator. These claims are then included in the disbursement list, which is subject to approval by the district court. Creditors whose claims are listed in the disbursement list, and which are then approved by the court, receive disbursements from the bankruptcy estate's assets. Failing to lodge a claim by the lodgement date leads to an obligation to pay a lodgement fee or even the loss of the whole claim.

Duration of bankruptcy proceedings

Bankruptcy proceedings in Finland typically last from one and a half year to three years, with various factors such as the complexity of asset liquidation and ongoing court cases potentially extending the duration. Disbursements are usually paid to the creditors at the end of the proceedings, which is important to take into account.

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER FRENCH LAW

Under French law, companies are protected by several procedures to overcome financial difficulties. This legal protection aims to help companies facing financial difficulties and protect the overall business economy from the risks of cascading bankruptcies.

French bankruptcy law is based on the concept of insolvency (Cessation des paiements), which determines the appropriate procedure.

Insolvency, or inability to pay, means that the company does not have enough liquidity to pay its debts. In practice, this is the case when the cashflow of the company is insufficient to cover immediate debts, and its creditors do not want to extend the payment terms.

Also, French bankruptcy law provides a mechanism which protects the creditor of a debtor experiencing financial difficulties without being unable to pay its debts.

We will analyse the procedures of a company facing financial difficulties from the perspective of both the company (**1**) and its creditors (**2**).

1. From the perspective of a company facing difficulties

There are two types of procedures to remedy financial difficulties of companies:

- Prior and confidential procedures (1.1)
- And public and judicial (official) procedures (1.2)

1.1. The prior and confidential procedures

French bankruptcy law provides two preliminaries and optional procedures for renegotiatingthe existing agreements with creditors:

- Ad hoc Mandate (Mandat ad hoc)
- Conciliation.

These procedures are under the control of the president of the court.

The main purpose of these procedures is to quickly renegotiate the debts of the company and keep discussions confidential between the company and its creditors. In this context, the parties are bound by an obligation of confidentiality towards third parties.

The conditions depend on the procedure:

- The Ad Hoc Mandate may be initiated as soon as the company encounter difficulties, but it must not be “Insolvent.”
- The Conciliation procedure can be initiated when the company faces financial difficulties likely to compromise its ability to continue its business. Nonetheless, the company must not have been “Insolvent” for more than 45 days.

An Ad Hoc Representative or a Conciliator (which could be proposed by the company) shall be appointed by the Commercial Court to facilitate negotiations, restructure debts, and amend existing agreements.

The Ad Hoc Representative or the Conciliator has a significant authority and influence in the negotiation of new favourable terms with the company’s creditors. Indeed, these professionals work under the control of the Court, and the risk of bankruptcy is high if no agreement is reached.

The appointment of an Ad Hoc Representative or a Conciliator does

not suspend the payment obligations to creditors.

1.2. The public and judicial procedures

1.2.1. Court Protection of Companies in difficulty

1.2.1.1. Selection of the Procedure

A company in difficulty may initiate one of the following procedures:

- Judicial Safeguard if the company is not insolvent and demonstrates insurmountable financial difficulties,
- Judicial Recovery if the company is insolvent and its situation can be remedied,
- Judicial Liquidation if the company is insolvent and its situation is irreparably compromised.

If the company is insolvent, its legal representative shall submit a request for Judicial Recovery or Judicial Liquidation within 45 days of the Insolvency, otherwise he is liable to personal sanctions.

These three procedures are public and initiated by a published judgment, in contrast to the prior confidential procedures (see §1.1).

1.2.1.2. Initiation of the Judicial Safeguard or the Judicial Recovery procedure

Unless initiating a confidential procedure (see §1.1), the company shall submit a request to initiate a public debt restructuring procedure with its creditors.

Once the Judicial Safeguard or Judicial Recovery has been initiated by the court, the company is protected from its creditors because the payments are suspended.

Thus, legal proceedings for payment are suspended and now focus solely on determining the amount of creditor's claims.

1.2.1.3. Observation Period

A six-month observation period will be initiated to evaluate the company's financial situation. The observation period may be extended twice, up to a maximum of 18 months.

During this period, the court appoints:

- a Judicial Representative, appointed by the court, shall list the company's debts, and represents the collective interests of creditors;
- a Supervising Judge responsible for overseeing the proceedings and settling

certain claims by the company; and

- a Judicial Administrator who supports and assists the company to find solutions.

The Judicial Administrator:

- supervises the company's daily operations, including financial transactions and major decisions (such as employee layoffs, asset sales, etc.). The Judicial Administrator can refuse management from taking actions that would diminish the company's asset value. If the Court requires it, the administrator shall approve any payments initiated by the company; and
- negotiates with creditors to establish a debt restructuring plan.

At any time during the observation period, the court may be requested to approve a debt restructuring plan negotiated with creditors. A typical plan can include both debt rescheduling and debt forgiveness.

The company may also request the Court to approve the sale of the business of the company if a buyer is found. The judicial administrator may also initiate a public sale process for the business of the company with the approval of the company.

If the situation worsens during the observation period and/or if there is no prospect of reaching an agreement with the creditors, the court may decide to convert the Judicial Safeguard or Judicial Recovery procedure into a Judicial Liquidation of the company (see 1.2.2).

1.2.2. Judicial Liquidation

The Judicial Liquidation aims to sell all the company's assets to pay its debts.

The Court will appoint a Liquidator who:

- shall list the company's debts; and
- sell the business or the assets (separately) of the company.

Even during Judicial Liquidation, the Court may order the continuation of business activities for 3 months in special circumstances (such as the time to shut down machines in the industrial sector).

1.2.2.1. The Global Sale of the business of the Company

The Court can decide to sell the business: thus, the court initiates a tender procedure for all assets and employees of the company and try at least to

maintain part of the business activity by the buyer.

The Court receives offers from potential buyers and selects among them, based on three criteria:

- the continuation of activities,
- the preservation all or part of the employees,
- and the repayment of the payable debts.

If no buyer wants to acquire the business of the company, or if the Court rejects all offers, the assets of the company are sold separately.

1.2.2.2. The separate Sale of the Company's Assets

In this case, the profit from the sale of assets is distributed to the creditors of the company, according to priority rules (employees have the highest priority, followed by procedural costs and tax debts, and lastly, unsecured creditors).

2. From the Perspective of Creditors of a Company in difficulty

2.1 The steps to submit a declaration of claim

In case of opening of a public and judicial procedure against a company, any creditor may declare his claim with the Judicial Administrator or the Liquidator.

Moreover, the company shall provide a prior list of creditors to the Judicial Administrator or the Liquidator, so that the latter can contact creditors to declare their claims.

The declaration of claim shall indicate the amount due at the date of the opening judgment and, in the case of future claims, the date of payment.

Creditors shall declare their claims within two months from the publication of the judgment opening the judicial procedure. The declaration delay is extended by two months for foreign companies.

If a creditor does not declare at time, his claim becomes unenforceable, and he is not admitted into the safeguard/recovery plan. In this case, the creditor will not benefit from the sale of assets in the event of liquidation.

Within six months of the publication of the opening judgment, creditors may request from the Supervising Judge to neutralize the foreclosure, in exceptional circumstances, such as lack of information from the judicial administrator.

2.2. Asset recovery

The owner of an asset held by a company (for example under a loan agreement) involved in public and judicial proceedings can request its recovery.

The asset recovery procedure applies in the same manners in all three types of judicial proceedings.

The owner has a period of three months from the publication of the opening judgment to file a request to the judicial administrator or the

liquidator proving ownership of the claimed asset.

The judicial administrator or the liquidator has one month from the receipt of the request to give an answer.

If the judicial administrator or the liquidator does not agree on asset recovery or fails to answer within one month, the owner shall refer to the supervising Judge within one month from the expiration of the answer period, or he will be time-barred.

2.3. Continuation of the ongoing agreements

The Judicial Administrator may force the continuation of the ongoing agreements, at the date of the opening judgment. He does not need the co-contractor's approval.

Furthermore, French law prohibits:

- Any clause providing that the opening of collective proceedings terminates the agreement,
- The forfeiture of the agreement term due to the opening of collective proceedings,
- Any clause providing that the co-contractor may not meet its contractual obligations because of the opening judgment.

First, early termination can be initiated by the Liquidator or the Judicial Administrator in two cases:

- The Liquidator or the Judicial Administrator can terminate the contract when the debtor's obligation is to pay a sum of money. In this case, the termination takes effect as soon as the other party is informed.
- The Liquidator or the Judicial Administrator can request the Supervising Judge to terminate the contract when the debtor's obligation is not to pay a sum of money. In this case, the termination shall be necessary for the liquidation process and must not excessively harm the interests of the other party.

However, the co-contractor can ask the Judicial Administrator whether he intends to force carrying on of the agreement.

Furthermore, the co-contractor can also initiate early termination, if he requests the Judicial Administrator or the Liquidator to decide on the continuation of the contract, and:

- If the Judicial Administrator or the Liquidator does not respond within thirty days from receipt of the request,
- If the Judicial Administrator or the Liquidator replies that the agreement shall not be continued.

If the ongoing contract is continued, the creditor will benefit from priority of payment rank concerning the receivable resulting from the performance of the concerned agreement.

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A&K METAXOPOULOS AND PARTNERS

Bankruptcy, Insolvency & Rehabilitation Proceedings in Greece

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER GREEK LAW

Introduction

In the Greek law there are several types of proceedings addressing the inability of a merchant debtor (either a natural person or a legal entity) to pay its debts. On one hand, there is Bankruptcy, which is focused mainly on the payment of its debts to its creditors, mainly by liquidation of the debtor's assets. On the other hand, there are the so-called pre-bankruptcy proceedings whose main purpose is to maintain the debtor's undertaking by a restructuring of its debts. The pre-bankruptcy proceedings are the Rehabilitation Proceedings and the Out of Court Workout.

Before and during the aforementioned bankruptcy and pre-bankruptcy proceedings, a protection of the debtor's assets may be provided for the purposes of each procedure. As a result, there are restrictions for the debtor regarding the freedom of administration or transfer of its assets and for the creditors regarding the enforcement of their claims on the debtor's assets.

It must be noted that the law 4738/2020 "Restructuring of debts and provision of a second chance and other provisions" has been issued, which abolishes the Bankruptcy Code and the other relevant legislation.

I. The Pre-Bankruptcy Proceedings

A. Rehabilitation

1. The Procedure

The rehabilitation proceedings of art. 31-64 of the L. 4738/2020 have a different purpose than bankruptcy, which is to reach a settlement/ rehabilitation agreement between the debtor and its creditors, so that the undertaking of the debtor will become viable again. Thus, the target of rehabilitation is not the liquidation of the assets, as it is in bankruptcy (the settlement agreement does not necessarily include liquidation).

The goal of the rehabilitation proceedings is to achieve a rehabilitation agreement between the debtor and a minimum required number of its creditors and to submit it to the competent court, along with a business plan. Subsequently, the rehabilitation agreement is validated by the court. So, there is no formal procedure opening of the negotiations with the creditors, only a "pre-packed" agreement between the creditors and the debtor that is submitted to the court for validation. Also, if the debtor is in a "cessation of payments" (in the meaning of the bankruptcy law), the creditors may also agree a rehabilitation agreement even without the debtor's participation.

2. The Protection Granted to the Debtor's Assets in Rehabilitation proceedings

A protection may be granted to the debtor's assets during three different stages: **a)** before concluding the rehabilitation agreement, i.e. during the negotiation between the debtor and its creditors; **b)** at the time that the rehabilitation agreement has been concluded and submitted to the court, but it is not validated yet and **c)** after the validation of the rehabilitation agreement from the court. More specifically:

2.1 The protection before concluding the rehabilitation agreement

2.1.1 The Procedure

Before concluding the rehabilitation agreement and during the negotiation between the debtor and its creditors, no protection is granted to the debtor automatically by the law. However, the debtor or a creditor may apply, only once, to the competent court for protection of the debtor's assets by ordering Provisional Measures, as an

injunction. Prerequisites for such an application are the written declaration of the creditors who represent at least 20% of the total debts that they participate to the negotiations, that an urgency/imminent danger exists and that the application has been uploaded to the Electronic Registry of Solvency. The provisional measures cover the period of the negotiations between the debtor and its creditors in order to achieve a rehabilitation agreement and their purpose is, on one hand, to maintain the undertaking in the view of its rehabilitation and, on the other hand, to achieve "serenity" during the negotiations.

In addition, until the hearing and the issuance of the injunction, the above applicant may apply to the court for a Provisional Order (the provisional order is a "fast track" procedure which takes place usually within several days and there is not a formal hearing. The Judge examines the application, and it is at his/her discretion to order the provisional measures, until the hearing or until the issuance of the injunctions decision). When the hearing of the injunctions takes place, the court may keep the provisional order valid, or it can modify it, or it may revoke it as well.

The provisional measures are valid until submitting to the court the rehabilitation agreement and cannot exceed 4 months from the decision or the provisional order. After that time limit, the provisional measures are void (under some conditions the above period may be extended, only for the suspension of any enforcement of creditor's claims against the debtor, however the total period must not exceed 6 months).

The competent court may revoke or modify the provisional measures at any time either ex officio or following a relevant application by anyone who has a legitimate interest.

2.1.2 The Provisional Measures-the Type of the Protection

The court is not bound by any measures that are mentioned in the application. It has a wide range of options, such as ordering some of the measures asked or even ordering completely different measures at its discretion.

The provisional measures may, indicatively, include the suspension of any enforcement of creditor's claims against the debtor (e.g. by seizure of assets), the prohibition of submitting any civil action against the debtor, the ban of proceeding with injunction against the debtor, the ban of transferring of the real estate property and the business equipment on behalf of the debtor, appointing a sequestrator, banning any termination of contracts, ordering the prolongation of contracts that are to be expired, maintenance of the current jobs in the company etc.

Moreover, for serious reason the court can also decide to apply the protection to the guarantors of the debtor or other co-debtors as well.

The court may also appoint a Special Receiver with the power to undertake the management of the debtor partially or totally (even without the consent of the debtor).

The aforementioned protection may bind all or several of the creditors (depending on the court's decision), including also the State (for taxes etc.). It must be noted that any action on behalf of any person who is bound by the provisional measures (e.g. a creditor), that is in breach of the provisional measures granted, is void.

Furthermore, the provisional measures do not apply regarding some specific types of claims such as the termination of a lease agreement, if the debtor owes at least six-month rents, the financial security agreements of the L. 3301/2004 or when an "important social reason"

occur (e.g. to pay to a creditor an amount which is essential for his and his family survival). The claims of the employees for their wages are not, in principle, affected by the measures, unless the court decides that there is an important reason.

2.2 The protection at the time that the rehabilitation agreement has been concluded and submitted to the Court

2.2.1 The Procedure

At the time that the rehabilitation agreement has been submitted to the court for validation, there are two types of provisional protection. First of all, there is a provisional protection granted to the debtor automatically (i.e. the protection is granted directly by the law, and no court decision is required) and it is limited to the measures that are listed on article 50 of the law 4738/2020 (see below par. 2.2.2). Secondly, an additional, parallel protection (i.e. additional to the measures that apply automatically) may be granted as an injunction with a court decision (and a provisional order), exactly as the above mentioned protection granted before the conclusion of the rehabilitation agreement (see above paras 2.1.1-2.1.2)

The purpose of the provisional protection at this stage is on one hand to keep the business of the debtor running and on the other hand to maintain its property.

2.2.2 The Type of the Protection

The automatic provisional protection granted at this stage, according to article 50 of the law 4738/2020, includes the suspension of any enforcement of creditor's claims against the debtor (e.g. by seizure of assets), the ban of proceeding with injunction against the debtor and the ban (in principle) of transferring of the real estate property and the business equipment on behalf of the debtor. Furthermore, any set-off regarding claims born before the submission to the court is restricted.

It is noted that the time limits regarding creditors' claims and rights against the debtor and the guarantors/co-debtors are sustained.

The above, automatic protection does not affect, inter alia, the rights of the creditors to file lawsuits against the debtor, the right of the debtor to file an application for bankruptcy, the payments on behalf of the debtor to third parties in order to keep its business running and any enforcement of claims for debts that were born after submitting the rehabilitation agreement to the court.

The aforementioned protection is granted only once and for a 4-month period. After the expiration of the 4-month period it is at the court's discretion to provide further protection according to the procedure and the type of protection above mentioned *in paras 2.1.1-2.1.2, or to revoke, modify or prolong the aforementioned protection.*

The automatic protection does not apply to co-debtors and the debtor's guarantors. A provisional protection may apply to them only by a court decision in the procedures mentioned above (paras 2.1.1-2.1.2) (but it is argued that the letters of guarantee are not affected).

For any additional protection to the debtor that may be ordered by a court, see above, par. 2.1.2.

2.3 The protection after the validation of the rehabilitation agreement from the Court

After the validation of the rehabilitation agreement by the court, the agreement binds both the debtor and, in principle, all of its creditors, whose claims are regulated by the agreement, even those who were not part of the agreement or voted for the agreement. However, the creditors whose claims were made

after the validation of the agreement are not bound.

The content of the rehabilitation agreement can be open to the parties, which may include, inter alia, reduction of the debtor's liabilities against its creditors and/or modification of the liabilities of the debtor (such as the time of payment or substitution with an agreement to take part to the debtor's profits) and/or capitalization of liabilities with the issuance of e.g. shares and/or transfer of the debtor's undertaking, and/or transfer of the management of the debtor's undertaking to a third party and/or further funding for the rehabilitation etc.

It must be noted that the claim of a creditor against the co-debtors and the guarantors is in principle limited to the amount that the liability of the debtor has been reduced, according to the validated rehabilitation agreement, unless the creditor does not consent on that (in the latter case, the liabilities of the co-debtors and the guarantors remain intact against the creditor).

B. The Out of Court Workout

1. The Procedure

The Out of Court Workout is a new procedure, established by the L. 4738/2020 (art. 6 et seq) and amended several times. The law excludes some debtors from the eligibility for these proceedings (e.g. financial institutions, insurance companies, debtors whose debts to financial institutions or the State do not exceed €10,000 etc.).

The Out of Court Workout is a procedure done electronically via a special, public electronic platform. The procedure commences when the debtor or some types of creditors (financial institutions, the State, social security funds) file an on-line application via the above platform to the competent Authority appointed by the law, the Special Secretariat for the Administration of Private Debt. With the application the debtor submits several data and documents including a list of its creditors, its assets etc. Subsequently, the creditors who participate may submit a proposal for the restructuring of the debts.

If a restructuring agreement is not concluded within 2 months from the application, or from the time that the creditors declare that they do not wish to submit a restructuring proposal, the procedure is considered fruitless.

2. The Protection

First of all, the filling of the application does not constitute a serious reason for the termination of contracts in force.

Furthermore, from the filling of the application and until the end of the Out of Court Workout, any measure of enforcement of claims on the debtor's movable and immovable assets and claims is sustained automatically by the law. Any relevant action that commences during the above period is void. Any auction scheduled to take place within 3 months from the application and any preparatory action of auction (including the confiscation) by a secured creditor, are not affected.

After the conclusion of the restructuring agreement, the creditors which are bound by it may not proceed with any enforcement proceedings against the debtor and all the pending or not measures of enforcement (either individually or collectively) are sustained during the period of the agreement and under the condition of its performance

II. Bankruptcy

The Bankruptcy is focused on the payment of the debtor's debts to the creditors by the debtor's assets, either by liquidation of them by a public auction or by selling the debtor's undertaking as a whole or partially.

When a debtor is in a constant and general inability of payment of its debts, the debtor or a creditor or, in some instances, the district attorney may apply before the competent court, so that the latter will order the bankruptcy of the debtor. A foreseeable inability of payments can also be sufficient, only when the debtor applies for bankruptcy.

The court examines the case, and it may order for the bankruptcy of the debtor. However, the court may dismiss the application (e.g. when it is submitted in bad faith, e.g. when a creditor submits it for reasons irrelevant with the bankruptcy or when the debtor wants to avoid paying its debts).

If the court accepts the application, it appoints a) a Supervising Judge b) a Bankruptcy Trustee and it orders the debtor's property sealing.

1. Protection after the application for bankruptcy and until the court decision that orders the bankruptcy

After the application for bankruptcy has been submitted, whoever has a legitimate interest may submit before the competent court an application for Provisional Measures. The president of the court may order as an injunction whatever provisional measure he/she estimates as adequate for the maintenance of the assets of the debtor. The purpose of these measures is not to avoid the bankruptcy (as in the pre-bankruptcy proceedings), but it is to avoid any reduction of the assets or of their value, so that the claims of the creditors may be satisfied by the bankruptcy proceedings, when and if the bankruptcy will be decided by the court.

Any ordered provisional measure stops automatically, when the decision of the court that orders the bankruptcy (or dismisses the application) is issued and registered in the Electronic Registry of Solvency.

The Provisional Measures may indicatively include the suspension of any enforcement of creditor's claims against the debtor (e.g. by seizure of assets), the prohibition of submitting any civil action against the debtor, the ban of proceeding with injunction against the debtor, the ban of transferring of the real estate property and the business equipment on behalf of the debtor, appointing a sequistrator, banning any termination of contracts, ordering the prolongation of contracts that are to be expired, maintenance of the current jobs in the company etc.

In principle, the aforementioned suspension of any enforcement of creditor's claims against the debtor does not affect in principle the secured creditors from satisfying their claim from the liquidation of the security (e.g. mortgaged or pledged assets), unless there is an admissible proposal for selling the debtor's undertaking (or its sectors) as a whole.

Furthermore, the provisional measures do not apply regarding some specific types of claims such as the termination of a lease agreement, if the debtor owes at least six-month rents, the financial security agreements of the L. 3301/2004 or the rights of the assignee in case of an assignment of a claim.

2. Protection after the court declares the bankruptcy

The "protection" mentioned in the present paragraph constitutes consequences of the declaration of bankruptcy for the debtor and the creditors. Some of the consequences are the following:

-After the decision of the court that declares the bankruptcy, the debtor may not in principle administrate or transfer its property/assets-Bankruptcy Estate- (this does not include any property/assets acquired by the debtor, after the bankruptcy is declared, unless it is interest

and other periodic benefits, as well as ancillary claims or rights, even if they are born or developed after the declaration of bankruptcy, if they come from a contract or right existing before the bankruptcy was declared). The administration passes to the Bankruptcy Trustee.

-The creditors may seek to be paid off in principle only through the Bankruptcy Estate. From the declaration of bankruptcy, any measures such as enforcement of creditor's claims against the debtor, any civil action against the debtor, any appeal, are banned to commence or it they already took place they are suspended automatically.

However, the creditors, whose claims are secured by an asset of the debtor (e.g. a mortgage) are paid by the liquidation of this specific asset (unless they resign from the security, so they may be able to be satisfied by the whole of the bankruptcy estate, with the rest of the creditors). The aforementioned suspension of measures of enforcement, in principle, does not apply to the secured creditors regarding these specific assets for a period of 9 months from the declaration of bankruptcy. There are some exceptions, such as when the asset is an important for the debtor's undertaking if the undertaking or a sector of it is to be sold as a whole.

-From the declaration of bankruptcy, the creditors' claims do not produce interest.

-The pending contracts in principle, after the declaration of bankruptcy they are terminated the 60th day from the declaration of bankruptcy. However, the Bankruptcy Trustee may elect to terminate them before the above date or to continue the pending contracts. If the decision that declares the bankruptcy orders to sell the debtor's undertaking (or its sectors) as a whole, the other party of these contracts, within 30 days from the declaration of bankruptcy may impose a reasonable deadline to the Bankruptcy Trustee (which cannot exceed 30 days) in order to elect whether to continue the pending contracts or not. If the Bankruptcy Trustee does not respond timely or he refuses to perform, the other party is entitled a) to terminate the contract and b) to a claim for a compensation for non-performance, satisfied as a bankruptcy creditor.

-In principle, the declaration of bankruptcy does not affect the right of a creditor to a set off against the debtor, if the prerequisites for a set off were born before the declaration of the bankruptcy.

-Anyone who has a right over an asset, which is not owned by the debtor, may ask from the Bankruptcy Trustee its separation from the bankruptcy estate.

-Anyone who delivered goods to the debtor, under specific circumstances, may ask the Bankruptcy Trustee to return them.

-The Bankruptcy Trustee, under several circumstances, is entitled to revoke acts of the debtor, which took place from the time that the debtor stops making payments and until the declaration of the bankruptcy and they are harmful for the interests of the creditors.

Conclusion

As a final remark, the present constitutes only a brief, general outline of the proceedings and the protection of the assets and it is not a legal advice. Obviously, it may not cover all the detailed provisions of the law, as the bankruptcy and pre-bankruptcy proceedings are quite complicated, with many exceptions and provisions are not covered. For any specific situation, a creditor must seek specific legal advice from a qualified lawyer.

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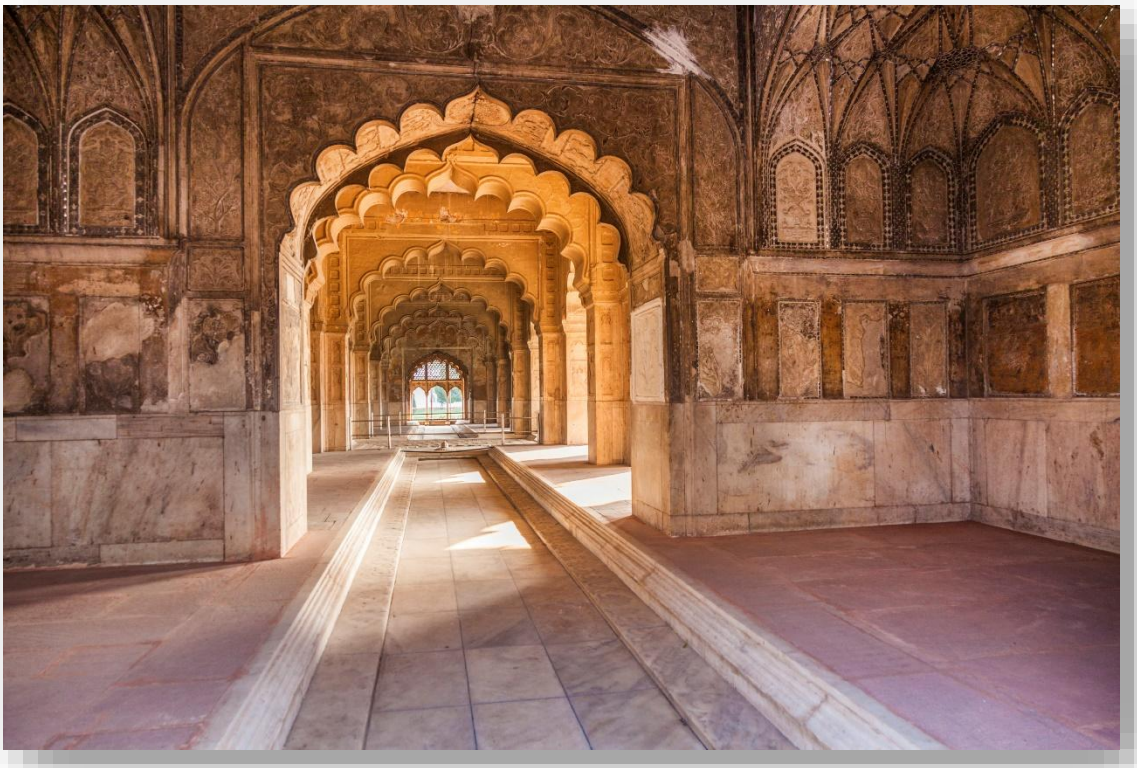

LEXCOUNSEL LAW OFFICES

Bankruptcy, Insolvency & Rehabilitation Proceedings in India

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER INDIAN LAW

The Code:

Introduction of a comprehensive insolvency and bankruptcy law in India is a recent event, with introduction of the Insolvency and Bankruptcy Code, 2016 ("**the Code**") in the year 2016. The Code is oriented to be the umbrella legislation in India for laws relating to insolvency and bankruptcy. At present the Code only governs rehabilitation and liquidation of companies and extends to guarantors.

The Code is administered through the law governing forums such as the National Company Law Tribunals ("**NCLT**") across India, with an appellate tribunal based in New Delhi and Chennai, Tamil Nadu, and the Supreme Court of India having the final jurisdiction.

The Code seeks to introduce many legal concepts as also modify the pre-existing ones. Upon admission of a case against a company under the Code, it prescribes for a mandatory Corporate Insolvency Resolution Process ("**CIRP**") for such company (corporate debtor) within which period all efforts are to be made to revive/rehabilitate the corporate debtor. If the revival efforts fail, the corporate debtor can be put into liquidation, where the available assets are distributed against liability claims, as per the priority specified by the Code, with payments being effected to the Insolvency Resolution Professional ("**IRP**"), the secured and unsecured creditors, workmen, Government, shareholders, etc.

The CIRP can be commenced by the NCLT, upon admission by it of any application presented by any applicant (financial or operational creditor) or the corporate debtor itself with evidence of default by the corporate debtor in relation to a debt of INR 10,000,000 (USD 132,000) or above. In addition:

- if an operational creditor approaches the NCLT – it must have already served a 10-day demand notice onto the corporate debtor and the corporate debtor must have failed to either pay the amount or to disclose a pre-existing bona-fide dispute; or
- if a corporate debtor itself approaches the NCLT – its shareholders must have passed a resolution in such regard with 75% majority.
- It is important to note that the NCLTs, the appellate tribunals and the Supreme Court of India has time and again emphasized and clarified that the sole motive and intention to incorporate the Code is to revive and rehabilitate the functioning of the corporate debtor and the Code is not a forum to recover outstanding debts.

THE CIRP AND LIQUIDATION

Once the NCLT is satisfied that a financial default has been committed by the corporate debtor, it directs commencement therewith of the CIRP, i.e., a 180 days' resolution window for revival of the corporate debtor while confirming appointment of an IRP. Within this 180 days' window (extendable by 90 days), The maximum time within which the CIRP has to be mandatorily completed, including any extension or litigation period, is 330 days. The creditors may either with 66% majority decide to revive the company, as per the resolution plan to be subsequently approved by the NCLT or decide to liquidate the corporate debtor. Failure of the creditors to take a decision also leads to liquidation of the corporate debtor.

With commencement of the CIRP, the powers of management of affairs of the corporate debtor moves to the hands of the IRP, who reports to the committee of creditors, and is also entitled to take all steps to ensure that the business of

the corporate debtor continues as a going concern. The Code also contains provisions governing penalties and punishments for extortionate and improper transactions, both prior to and during the insolvency process and proceedings.

In the process of liquidation, the timelines would depend upon facts and circumstances of each case such as complexity in sale of assets of the company, finalization of liabilities and any disputes related to rejection of any party's claims by the liquidator, any pending legal proceedings, tax disputes, appeals, realization of receivables, etc.

During the course of liquidation of a corporate debtor, a liquidator is also open to compromise or settlement if the same is being recommended by the committee of creditors.

PROTECTION GRANTED TO THE DEBTOR:

The foremost protection that the Code accords to the corporate debtors is the "moratorium" which commences with commencement of the CIRP. The NCLT, while admitting an application of a creditor against a company or an application by the company itself, declares "moratorium."

The "moratorium" continues through the CIRP and puts an embargo on institution or continuation of suits including execution of any judgment, decree or order of any court of law, arbitration panel or any other authority. In addition to this, the moratorium also restricts the transfer, alienation or disposal of any assets or legal right or beneficial interest of the corporate debtor. Also, no action can be taken during the moratorium period to foreclose, recover or enforce any security interest created by the corporate debtor.

The moratorium seeks to provide an atmosphere for revival of the corporate debtor.

The protection under moratorium is granted only qua the property, rights and obligations of the corporate debtor. Irrespective of the moratorium, fresh criminal prosecutions can be lodged, and those lodged earlier can continue, against the corporate debtor as also against its directors/promoters, etc., for any criminal offences.

The benefit of moratorium under the Code is also not available to the guarantors and sureties of the corporate debtor. After the initial conflicts in interpretation, and subsequent observations by the Supreme Court of India, the Code was amended in June 2018 to clarify that no moratorium would apply to the legal actions of recovery against the surety and guarantors of a corporate debtor.

Moratorium also does not apply to the writs as also on the constitutional powers of the Supreme Court and the High Courts. The IRP is expected to appear in, and contest in the best interest of the corporate debtor, all matters which do not fall under moratorium, as also to ensure compliance with all the applicable laws during the CIRP period.

Pre-Packaged Insolvency Resolution Process (PPIRCP):

The Insolvency and Bankruptcy (Amendment) Ordinance, 2021 has introduced a new concept of PPIRCP. PPRICP is a framework provided for resolution of stress of corporate MSMEs (as covered under MSME Act, 2006). Unlike Corporate Insolvency Resolution Process, PPRICP is available to defaults where the default is at least INR 1 million arising between March 25, 2020, to March 24, 2021.

The PRICP is a hybrid process, where pre-initiation phase is largely informal and post-initiation stage is formal. The informality at pre-initiation stage offers flexibility for the corporate

debtors and its creditors to swiftly explore and negotiate the best possible outcome to resolve stress in the business, while the post-initiation is focused on maximization of value and bestows the resolution plan with the statutory protection.

Bankruptcy for Individuals and Partnership firms:

The provisions of the Code concerning insolvency and liquidation of individuals and firms are being brought into effect in a phase-wise manner. The provisions are still in their infancy and will evolve in due course.

Conclusion: The Code has arguably tilted the debtor-creditor balance in favour of the creditor, as one of the consequences of admission of proceedings under the Code is that the erstwhile management of the company is ousted, even if the company is rehabilitated. In cases of small and medium enterprises, the promoters can still lay reclaim the ownership and control of their company, provided they are not declared willful defaulters by the financial institution(s). The pre-packaged insolvency may provide the much-needed respite to the genuine promoters.

Within a short span since its implementation, and despite Coronavirus given business adversities, the Code is proving to be a more effective tool for rehabilitation and liquidation as compared to the winding up provisions of the (Indian) Companies Act and the Sick Industrial Companies Act, 1985, it repealed and replaced.

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INTERNATIONAL LAWYERS NETWORK

EXP LEGAL – ITALIAN AND INTERNATIONAL LAW FIRM

Bankruptcy, Insolvency & Rehabilitation Proceedings in Italy

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER ITALIAN LAW

1. Presentation of the judicial liquidation/ insolvency/ rehabilitation proceedings in Italy and their main characteristics.

The current legislation for judicial liquidation, insolvency and restructuring proceedings has recently been reformed on February 14, 2019. On this date the New Code of Business Crisis and Insolvency has been published in the Official Gazette (Legislative Decree 12 January 2019 No. 14), replacing the Royal Decree n° 267/1942.

The reform was initially to enter into force in its entirety on August 15, 2020, and then due to the pandemic emergency situation, the Law Decree 23 of April 8, 2020, containing "*Urgent provisions to support companies' liquidity and export*" delayed the entry into force, as stated in article 6, to September 1, 2021, has once again been amended. In fact, in the first place, according to the Law Decree no. 118 - converted into the Law of 21 October 2021 n. 147, - the Company Crisis and Insolvency Code should have entered into force on May 16, 2022. After, according to the Legislative Decree no. 83/2022, the entry into force of the Company Crisis and Insolvency Code was set for July 15, 2022. (Legislative Decree no. 14/2019).

On September 13, 2024, the legislative decree n.136 has modified several provisions mainly focusing on the early warning following the EU directive and has entered into force on September 27, 2024. According to the law, the procedures available to debtor and /or to creditors are:

- Judicial liquidation;
- Composition with creditors,
- Restructuring agreements,
- Rescue plans.

The main differences which allow to classify the procedures mentioned above in two macro groups reflect the purpose to which they are directed.

On the one hand, in fact, there are procedures aiming to reorganize the company such as rescue plans, restructuring agreements and composition with creditors where the business continuity is envisaged. They can be used by the entrepreneur in a state of crisis or the phase of a company's business life that puts the prospect the continuation of the business at risk, if however, the rehabilitation is still possible.

On the other hand, there are procedures aimed at the liquidation of the company's assets such as judicial liquidation and the composition with creditors for liquidation purposes, for the company in a state of insolvency or no longer able to regularly meet its obligations.

Therefore, the procedures respond to different needs depending on the financial condition the debtor intends to use them.

In addition to this difference, it is possible to find others always within the two macro-categories.

In particular, the rescue plan, the restructuring agreements, and the composition with creditors with business continuity differ regarding the treatment of creditors. In fact, while an agreement where creditors are not required in the rescue plan, in the restructuring agreements it is foreseen that the non-participating creditors must be paid in full and in the composition with creditors the approval of the proposal submitted by the debtor by so many creditors which are the majority of the

credits admitted to the vote is required.

Furthermore, while in the framework of debt restructuring agreements and the composition with creditors there is the possibility of entering into a so-called tax settlement, i.e., an agreement with qualified creditors for the payment, partial or even deferred, of taxes and related accessories. This possibility is excluded in the rescue plan.

Another difference concerns the control of the judicial authority. In fact, while in the rescue plan there is no provision for judicial review, both in the composition with creditors and in the restructuring agreements, there is the intervention of the judicial authority and in particular , in the restructuring agreements there are minimal procedural aspects and the Court's control but not in the executive phase; in the composition with creditors there is, instead, a keen control of the judicial authority in every phase.

On the other hand, with reference to judicial liquidation and to composition with creditors for liquidation purposes, the most important difference is that while with the composition with creditors, the entrepreneur keeps the administration of his assets and the business under the supervision of the judicial commissioner, with the judicial liquidation the debtor loses the management of the company that is deferred to the insolvency practitioner appointed by the competent Court.

2. The protection granted to the debtor against its creditors.

From this point of view, it is possible to conduct a joint analysis of the procedures, since the protections put in favor of the debtor towards the creditors are almost applicable to all the procedures.

2.1. Irrevocability of deeds, payments and guarantees.

First of all, the provision for which, in the event of subsequent judicial liquidation, the deeds, payments and guarantees put in place in execution of i) rescue plan, ii) restructuring agreement, iii) composition with creditors cannot be subject to claw back action.

Article 67 letter d) and f) of the Royal Decree, in force until September 2021, in fact established that are not subject to the claw back action: *"the deeds, payments and guarantees granted on the debtor's assets if implemented in execution of a plan that appears suitable to allow the reorganization of the debt exposure of the company [...] "and the deeds, payments and guarantees put in place in execution of the composition with creditors [...], as well as the approved agreement pursuant to article 182bis, as well as the deeds, the payments and guarantees legally put in place after the filing of the appeal pursuant to article 161"* The article 67 of royal decree has been replaced from article 165 and following of code of crisis.

2.2. Prohibition to continue or initiate precautionary and executive actions on the debtor's assets.

As a guarantee for the debtor, it is forbidden to continue or to start exercising individual precautionary and executive actions on the debtor's assets.

Preliminarily, it is necessary to clarify what is meant by "*debtor's assets"* and to which creditors the above-mentioned prohibition refers.

With reference to the first aspect, it can be stated that "*debtor's assets*" means

the assets and credits of the entrepreneur admitted to the insolvency proceedings acquired to insolvency estate. Otherwise, assets and rights of a strictly personal nature, maintenance payments, salaries, pensions, wages and what the debtor earns with his/her activity within the limits of what is needed for him/her and his/her family, things that cannot by law be foreclosed, etc.

The property owned by third parties, co-affiliated or with guarantors, directed in some way to guarantee the bankrupt's obligations are also excluded from the application of the prohibition.

With regard instead to the individuals to whom this prohibition refers, it is specified by the rules that the recipients are not only creditors who have accrued pre-judicial liquidation credits, but also creditors who become creditors during the judicial liquidation proceedings and this prohibition does not find the same application in all procedures and does not apply to rescue plans.

In relation to the other proceedings, the effectiveness of this prohibition is regulated differently depending on the procedures and in particular:

i) With reference to restructuring agreements, the suspension of the precautionary and executive actions on the debtor's assets is valid for sixty days from its publication in the Registry of companies;

ii) Regarding composition with creditors, both for liquidation and conservative purposes, this prohibition applies from the date of publication of the appeal in the Registry of companies and until the time the decree approving the composition with creditors becomes final;

iii) Finally, in the event of judicial liquidation, the provision applies from the day of the declaration of judicial liquidation for the entire duration of the judicial liquidation procedure.

2.3. Contracts pending in the composition with creditors.

With reference only to the proceeding of the composition with creditors, the legislator for the debtor's protection has provided the possibility for him/her to ask the Court the authorization to terminate contractual relations if they are still in force, (i.e., not yet fully executed nor by one, or by the other contractor) on the date of submission of the appeal for admission to the composition with creditors. This rule also applies against the will of the performing contractor.

The authorization to the Court can be requested and granted when the suspension or winding up appear necessary or perhaps even only convenient to execute the composition with creditors plan.

As an alternative to winding up, the debtor can also request the possibility of suspending the contract for a period of sixty days, which can be extended only once.

2.4. The Italian procedure for negotiated settlement.

With the changes firstly made by the legislative decree n. 83/2022, and after with legislative decree 136/2024, new

measures suitable to promptly detect the presence of a state of crisis have been made more important, first of all, the new provision of the negotiated settlement of the crisis**.**

This is a new procedure that undoubtedly represents the most significant action in providing a new tool to support companies in difficulties. It is firmly aimed at their rescue and presents the following characteristics. In particular:

i) This procedure can be used by all commercial entrepreneurs, as well as agricultural entrepreneurs – that normally according to previous legislation cannot be adjudicated bankrupt -.

ii) The appointment of an "expert" is required. The presence of this professional aims to facilitate negotiations between the entrepreneur, the creditors, and any other interested parties in order to overcome the condition of equity or economic financial imbalance

The expert must be registered in a dedicated professional register and also have previous experience of at least five years in the field of corporate restructuring and business crisis;

Finally, another essential requirement for access to the procedure is the actual perspective of recovery, which is verified by conducting a test involving a preliminary assessment of the complexity of recovery through the relationship between the entity to the debt to be restructured and the cashflows that could be committed annually to servicing the debt.

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INTERNATIONAL LAWYERS NETWORK

CREEL, GARCÍA-CUELLAR, AIZA Y ENRIQUEZ SC

Bankruptcy, Insolvency & Rehabilitation Proceedings in Mexico

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER MEXICAN LAW

Preface

On 12 May 2000, the Commercial Insolvency Law (the "**CIL**") was published in the Federal Official Gazette, and it entered into full force and effect the next day. This law replaced the 1943 Law governing the Suspension of Payments and Bankruptcy, and all other legal provisions that opposed the provisions of the new CIL.

Pursuant to its preface, the CIL has the principal purpose of creating a modern regulatory framework that allows the conservation of companies undergoing a financial and economic crisis. To this end, the figure of 'conciliation' was created to make sure that the merchant and its creditors reach an agreement for the payment of the merchant's liabilities over a reasonable period. If reaching a reorganization agreement is unfeasible, the CIL establishes a procedure for the orderly liquidation of the merchant's assets and rights while attempting to maximize the proceeds of the sale, applying the funds obtained therefrom to the payment of the merchant's liabilities, following a fair order and preference regarding the differences between the relevant creditors.

The CIL maintains the federal judge as the central body and rector of the commercial insolvency proceeding; however, as previously stated, it recognizes that she or he must be aided in the performance of his or her functions by specialists in administrative, commercial, industrial, economic and financial aspects, so that the judge may focus efforts on strictly legal tasks. As a result, the CIL created the Federal Institute of Commercial Insolvency Specialists (widely known for its initials in Spanish as "**IFECOM**"). According to the indications of the CIL and the General Rules issued to this effect by this Institute, specialists are appointed by means of a random procedure.

In 2007, the CIL underwent several reforms, most importantly, the addition of a pre-packed reorganization proceeding, whereby the company and the majority of its creditors may file for a proceeding in which a pre-agreed reorganization agreement is accompanied by an insolvency petition.

In 2014, the government adopted a major banking sector reform (the Financial Reform), which reformed the Commercial Insolvency Law, as well as other legislation. One of the main purposes of the Financial Reform was to eliminate legal gaps in the Commercial Insolvency Law that permitted the courts to interpret the legislation broadly and, on a case-by-case basis.

Furthermore, the Financial Reform also introduced certain provisions regulating inter-company debts to determine whether the company is to be declared commercially insolvent or be approved for a reorganization agreement between the company and its creditors.

On August 9, 2019, the CIL was amended to incorporate provisions that would allow majority state-owned companies to request to be declared commercially insolvent or in bankruptcy.

Additionally, on March 4, 2022, an order issued by the Council of the Federal Judicature was published in the Federal Official Gazette, stating the creation of two new Federal Courts specialized in attending insolvency proceedings governed by the CIL[1]. Therefore, starting March 7, 2022, the First and Second District Courts,

[1] The above-mentioned reform has not yet been included in the CIL, which currently states that all commercial insolvency proceedings are conducted before Federal District Judges, located across the Country, and which are appointed based on the domicile of the relevant Merchant.

specialized in insolvency matters, assumed jurisdiction to hear insolvency and bankruptcy matters, including those proceedings filed since November 16, 2020, which were consequently remitted to said courts.

Moreover, members of the house of representatives are proposing a legislative reform to the CIL, to streamline the insolvency process and allow more proactive measures to safeguard the companies' assets from individual creditors' actions. The amendment will also introduce a new system for small and medium-sized companies, making insolvency proceedings a more viable option for them due to the high associated costs. This reform is still being discussed and has not yet been submitted for legislative approval.

We consider that there is still a need to reform the CIL, given that there are matters that are not properly regulated, such as: (i) the application and duration of injunctive measures; (ii) protection to creditors´ rights; or (iii) conditions that do not adjust to current market practices. This lack of regulation has led to merchants taking advantage to the detriment of creditors' rights.

Having stated the foregoing, we hereby give a brief presentation of key aspects of the commercial insolvency proceeding, as regulated by the CIL, and the protections granted by the CIL to debtors who are declared insolvent.

1.- Merchants - Insolvency Conditions.

Individuals or legal entities that are Merchants pursuant to the provisions of the Commercial Code may be subject to the commercial insolvency proceeding [2]. All commercial insolvency proceedings are conducted before the specialized insolvency Federal District Judges (the "**Insolvency Courts**"), located in Mexico City.

The necessary condition for a Merchant to be declared commercially insolvent is that it can be demonstrated that the Merchant has defaulted on the payment of its obligations in a general manner. In order to prove this condition of general non-performance, a payment default to two or more different creditors should exist, and one of the two following conditions should exist if the insolvency petition is filed by the Merchant, or both conditions if the insolvency petition is filed by the creditors: (i) that of its matured obligations, those that are at least thirty (30) days overdue represent thirty-five percent (35%) or more of all the obligations of the Merchant to the date on which the insolvency petition is filed; and/or (ii) the Merchant has insufficient assets, of those listed below, in order to satisfy at least eighty percent (80%) of its matured obligations on the date the petition is filed. The assets that should be considered for the effects established in this paragraph are: (i) cash on hand and on-sight deposits; (ii) deposits and investments with a term less than ninety (90) calendar days following the date of the petition; (iii) clients and accounts receivable whose maturity does not exceed ninety (90) calendar days following the date of the petition; and (iv) securities for which purchase-sale transactions are regularly conducted in the respective markets, which may be sold in a maximum term of thirty (30) banking days, and whose value is known to the date on which the petition is filed.

If a Merchant has not yet incurred into the provisions beforementioned to be declared

[2] According to the CIL, the following persons may be subject to a commercial insolvency proceeding: (i) Individuals whose normal occupation is commerce; (ii) Business corporations, including state-owned companies created as corporations and companies with majority state participation, when they initiate processes of disincorporation or extinction; and (iii) branches of foreign companies that perform acts of commerce in Mexico; however, in this case, the declaration of commercial insolvency will only encompass the assets and rights that are located and enforceable in Mexico, and the creditors related to transactions entered into with such branches.

commercially insolvent, the CIL allows the Merchant to request so, by stating under oath that it will imminently fall into a generalized non-compliance in the payment of obligations, presumed that any of said situations will inevitably occur within ninety days following the request.

2.- Verification Visit.

To determine whether a Merchant is found within the premises contemplated by the CIL to be declared commercially insolvent, there is a preliminary stage within the insolvency proceeding named the "Visit", in which an inspection is made of the financial and economic status of the Merchant (the "**Verification Visit**") by a specialist called the "Visitor", who is appointed by the IFECOM.

The CIL stipulates that the Verification Visit will have a duration of 15 calendar days, which, at the request of the Visitor, may be extended by the Insolvency Court up to an additional 15 days. Based on the opinion submitted by the Visitor and considering the contents of the petition for the declaration of commercial insolvency, the Insolvency Court will determine whether the Merchant is declared commercially insolvent or not, by means of a ruling passed to this effect.

If the Merchant refuses to facilitate the Visitor the financial information needed for the Verification Visit, the Insolvency Court will apply enforcement measures against the Merchant, giving warning that, if the Merchant's reckless conduct continues, the Merchant will be sanctioned by declaring it commercially insolvent.

3.- Conciliatory Stage.

If the Merchant is declared commercially insolvent by the Insolvency Court, the conciliatory stage will commence in order for the Merchant and its acknowledged creditors to be in a position to reach an agreement regarding the terms and conditions according to which the Merchant will repay its debts (the "**Reorganization Agreement**"). As indicated by the CIL, the initial term that the parties have to reach a Reorganization Agreement is 185 calendar days, which, under certain circumstances, may be extended by the Insolvency Court up to an additional 180 calendar days.

The task of procuring that the Merchant and its acknowledged creditors agree on the terms of, and execute the Reorganization Agreement, is commissioned to a specialist called the "Conciliator", who is appointed by the IFECOM; however, the CIL stipulates that a majority of creditors, with the Merchant´s consent, can appoint the Conciliator.

During this stage, the Conciliator must prepare the list of creditors of the Merchant, and determine the amount, order, and level of preference of their respective credits. During the conciliatory stage, the Merchant (except in specific cases) will continue to manage its company and business under the supervision and, in some cases, requiring the explicit authorization of the Conciliator.

4.- Bankruptcy Stage.

To the extent that the Merchant and its acknowledged creditors are unable to execute the Reorganization Agreement during the maximum conciliatory term of one year established by the CIL or, if the Merchant or its creditors file a bankruptcy petition and it's accepted by the Insolvency Court, the Merchant will be declared in bankruptcy.

At such time, the objective of this stage shall become to sell all the assets and rights of the Merchant, in order to apply the proceeds thereof to the payment of the Merchant's debts, in the order and preference established by the CIL.

In contrast to the conciliatory stage, upon declaration of bankruptcy of the Merchant, management is handed over to a specialist, called the "Receiver", who is also appointed by the IFECOM, whose main objective, as set forth above, is to sell all of the Merchant´s assets to repay its debts, whereas the Conciliator´s objective is to reach a Reorganization Agreement.

Notwithstanding the beforementioned, the CIL stipulates that even in the bankruptcy stage, the Merchant may reach a Reorganization Agreement with its recognized creditors.

5.- Prepackage Plan.

Pursuant to article 339 of the CIL, the Merchant and the majority of his creditors may file for a pre-packaged reorganization proceeding, in which a pre-accorded Reorganization Agreement is accompanied with the insolvency petition, so that once the Merchant is declared commercially insolvent, such Reorganization Agreement is submitted for the Court´s approval.

In a pre-packaged proceeding the Insolvency Court decides whether to declare the Merchant as commercially insolvent, based on the information provided by the Merchant and the majority of his creditors, without the need to perform the Verification Visit. Once the commercial insolvency ruling is issued by the Insolvency Court, the insolvency procedure will be conducted as any other ordinary insolvency procedure.

6.- Protections during Verification Visit.

The Merchant, the Visitor, or any demanding creditor, if such is the case, may request the Insolvency Court during the visit to adopt, alter, or lift injunctive measures for the purposes of protecting the Merchant´s Estate and the rights of the creditors. The determination of the application of the injunctive measures will be left to the discretion of the Insolvency Court, who may also adopt them by operation of law. In any case, the injunctive measures that are issued will be in force until the date on which the Merchant is declared insolvent by the Insolvency Court; however, such measures will be substituted by the injunctive measures set forth in Section 7 below.

These injunctive measures may consist of the following: (i) the prohibition of the Merchant to make payments of obligations due prior to the date of admittance of the petition of commercial insolvency; (ii) the suspension of any enforcement procedure against the assets and rights of the Merchant; (iii) the prohibition of the Merchant to perform sales or transfers or encumbrances of the principal assets of its enterprise; (iv) the prohibition of the any attachment of property; (v) the intervention of the Merchant´s treasury; (vi) the prohibition of the Merchant to perform transfers of funds or securities in favor of third parties; (vii) the placing of a house arrest order on the Merchant, for the sole purpose of not allowing it to leave its place of residence without leaving an attorney-in-fact with sufficient instructions and funds; and (viii) any others of a similar nature.

Notwithstanding the foregoing, it has become a common practice for the Insolvency Courts to extend the beforementioned injunctive measures to the subsidiaries or related companies of the Merchant, no matter whether such entities are subject to a commercial insolvency proceeding. We consider this practice to be against the purposes of the CIL, giving grounds to any affected party to challenge such measures.

7.- Protections after the Insolvency Ruling.

The declaration of commercial insolvency of a Merchant by means of a ruling issued by the Insolvency Court (the "**Insolvency Ruling**"), as well as the opening of the conciliatory stage, produces diverse effects, granting the Merchant

primarily the following protections:

(a) Suspension of Payments. Suspension of payments of the debts contracted prior to the date on which the Insolvency Ruling enters into effect, except for those that are indispensable for the day-to-day operation of the company, regarding which the Merchant should in due time inform the Insolvency Court.

Notwithstanding the foregoing, the declaration of commercial insolvency will not be grounds for interrupting the payment of labor, tax, or social security obligations, which should continue to be paid in due course.

(b) Stay of Attachments and Foreclosures. From the moment the Commercial Insolvency Ruling is passed and until the end of the conciliatory stage, no enforcement, attachment or foreclosure order may be executed against the assets and rights of the Merchant, except for those practiced to secure or pay, as applicable, accrued wages and labor compensation for the period of two (2) years prior to the date of the Insolvency Ruling.

As of the Insolvency Ruling and until the conclusion of the term for the conciliatory stage, administrative enforcement proceedings of tax credits will also be suspended. Notwithstanding the foregoing, the competent tax authorities may continue the necessary acts for the determination and securing tax credits against the Merchant. We consider that the power given to the tax authorities to "secure" property after the Insolvency Ruling, violates the principles of fairness that should exist between creditors, and that any "securing" performed by the tax authorities to guarantee any credit, cannot give them any privilege over the "secured" asset.

(c) Property Separation. The assets in the possession of the Merchant that can be identified, and whose ownership has not been transferred thereto by any definitive and irrevocable legal means, may be separated by their legitimate owners.

In terms of the CIL, the following assets may be separated, as an example: (i) the real-estate sold to the Merchant, but not paid, to the extent the relevant deed has not been duly recorded in the corresponding public registry; (ii) the chattels purchased and payable in cash, if the Merchant has not paid the full price at the moment of the Insolvency Ruling; and (iii) the chattels or real-estate acquired on credit, if a breach of payment resolution clause has been recorded in the corresponding public registry.

(d) Contracts and Obligations. With the exceptions established by the CIL, the contracts entered into by the Merchant, and any other obligations assumed thereby, continue to be valid in their terms, except when the Conciliator challenges them for being in the best interests of the Estate.

Anyone who contracted with the Merchant, will be entitled to request that the Conciliator indicates whether he opposes the performance of the relevant contract, and if the Conciliator express that he will not oppose it, the Merchant will have to perform or guarantee its performance, and if the Conciliator manifests that he will oppose it, or does not give a reply within a term of 20 days, the party contracting with the Merchant may at any time terminate the contract, by notice to the Conciliator.

Once the Insolvency Ruling is issued, the injunctive measures ordered by the Insolvency Court during the visit stage are substituted by the protections granted by such Ruling; provided that: (i) once the Reorganization Agreement is approved pursuant to the provisions stated in the CIL, any protection granted by the Insolvency Court is lifted as the Merchant is no longer considered as commercially insolvent; and (ii) if the Merchant is declared in bankruptcy, then injunctive measures subsist until the Court orders their lift.

8.-Foreign Proceedings.

The CIL contemplates several provisions that regulate assistance and interaction between Mexican courts and foreign courts in connection with procedures involving insolvency that are brought in respect of a Mexican merchant that has an establishment, place of business or assets abroad, and of a foreign merchant that has an establishment, place of business or assets in Mexico.

Our interpretation of the CIL concludes that there are two classes of foreign procedures in these type of insolvency or bankruptcy procedures: (1) a principal foreign procedure, which is defined as that brought against a Merchant, in a foreign state, who has its principal place of business in that foreign state, and (2) a non-principal foreign procedure, defined as one brought against a Merchant that has its principal place of business in Mexico but also has an establishment abroad.

The provisions of the CIL are clear and congruent in the matter of the acknowledgement of a foreign procedure in respect of a Mexican merchant that has an establishment abroad. For this case, there are provisions that permit the Mexican judge to work in a coordinated manner with the foreign Court to have the proper measures adopted with respect to the assets that the merchant has and the activities that the Mexican merchant performs abroad.

In the case of the acknowledgement of a foreign procedure in respect of a foreign merchant that has an establishment in Mexico, the CIL states that the rules regarding the verification visit have to be observed to determine if the foreign merchant is in effect found to be within the requisite premises of the law to be declared commercially insolvent and that, if such conditions are present, the Mexican judge will issue a ruling to declare such foreign Merchant in commercial insolvency, and the procedure of commercial insolvency will be followed in accordance with the provisions that are stated in the CIL; provided that the effects of this declaration of commercial insolvency are to be limited to the establishment of the foreign merchant in Mexico.

For a foreign procedure to be recognized by the Mexican courts, a petition must be brought before the Insolvency Court for the recognition thereof by the foreign representative, who is the person defined by the CIL as the person or body, including someone designated in a provisional manner, who shall have been empowered in the foreign procedure to manage the reorganization or liquidation of the assets or business of the merchant or to act as the representative of the foreign procedure. The appearance of the foreign representative before the Mexican courts does not imply the submission of the foreign representative nor that of the assets and businesses of the merchant brought to the jurisdiction of the Mexican courts.

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INTERNATIONAL LAWYERS NETWORK

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Bankruptcy, Insolvency & Rehabilitation Proceedings in the Netherlands

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER DUTCH LAW

I. Insolvency proceedings in The Netherlands

There are four law-regulated insolvency proceedings in The Netherlands: bankruptcy (*faillissement*), suspensions of payment (*surseance van betaling*), debt adjustment for natural persons (*schuldsanering natuurlijke personen)* and the confirmation of private plans (*homologatie onderhands akkoord (WHOA)*). Since the scope of this paper focusses on corporate entities, the debt adjustment for natural persons will not be discussed here.

All three insolvency procedures discussed in this article are commonly known to be used as restructuring tools. Both by shareholders, management and creditors.

Where a bankruptcy is generally described as a liquidation of the debtor's assets, a suspension of payments is – or at least in theoretically – designed for the continuation of the activities of the corporation after a period of moratorium. In theory, the suspension of payment should be ended after restructuring, after which the debtor can commence his business as usual. In practice a suspension of payments often ends in a bankruptcy after which reorganization will proceed in bankruptcy. The reason for this lies with the absence of certain restructuring rules regarding employees (especially with regard to the transfer of a going concern business) in bankruptcy. Obviously, it should be noted that under Dutch law pursuing a bankruptcy with the sole object to get rid of employees, results in abuse of (bankruptcy) law.

Both bankruptcy and suspension of payment are proceedings in which the debtor loses its power of disposition and capacity in relation to its assets.

Contrary to a bankruptcy procedure or a suspension of payment, the WHOA, also known as the *Dutch Scheme*, is a debtor in possession-procedure. It resembles the American Chapter 11-procedure and the UK Scheme. In recent years, we have seen an increase of the use of the WHOA-procedure in international restructurings.

The WHOA is a pre-insolvency procedure and allows a debtor to restructure its debts and/or costs outside of the above-mentioned formal insolvency procedures and prevent such procedures (and the destruction of capital that comes with it).

The WHOA is a fast and informal procedure meant for companies that are in core profitable but have come into dire straits due to issues of over indebtedness and/or recurring costs. Those companies are enabled by means of debt- and/or cost restructuring to enforce a private plan on their creditors and/or shareholders to prevent the loss in value that occurs in bankruptcy.

The WHOA is quick, flexible, and free of form. It is a debtor-in-possession procedure and has minimum judicial involvement. A WHOA-plan can be enforced on dissenting creditors or shareholders (cram down). Consent of the debtor is required in case of a small or medium enterprise debtor.

Both bankruptcy, suspension of payments and the WHOA are opened by a district court. Bankruptcy can be filed by the debtor itself, requested by a creditor or requested by the public prosecutor for reasons of public interest. Suspension of payments can only be filed by the debtor. A WHOA-procedure can be filed by the debtor, a creditor, a shareholder, the debtor's work council or the debtor's workplace representation.

I. Insolvency officers

When opening a bankruptcy, the district court appoints one or more insolvency administrators (*curator*). These administrators are generally speaking attorneys at law, but there is no legal requirement for this capacity. One sees that the district court will sometimes co-appoint a banker, an accountant, or a real estate agent as an administrator with an attorney.

When opening a suspension of payments, the district court appoints one or more insolvency administrators (*bewindvoerder*). Alongside these insolvency administrators, the district court always appoints one and in exceptional cases two supervisory judge(s) (*rechter-commissaris(sen)*) who is in charge of supervising the insolvency proceeding and the administrator. The aforementioned insolvency officials in a suspension of payment (*bewindvoerder* and *rechter-commissaris*) usually also serve as an insolvency official in bankruptcy (*curator* and *rechter-commissaris)* if a suspension of payments is converted into a bankruptcy.

In a WHOA-procedure, the debtor can propose a private plan to its creditors and shareholders of it can request the appointment of a restructuring expert (*herstructureringsdeskundige*), who can propose such a plan. If the private plan is proposed by the debtor itself, the district court has the possibility to appoint an observer (*observator*). When the WHO-procedure is filed by a creditor, a shareholder, the debtor's work council or the debtor's workplace representation the court will always appoint a restructuring expert who then is entitled to propose the plan to the exclusion of the debtor.

II. Bankruptcy

A bankruptcy can be filed when the debtor is in a situation where he has stopped paying its due and demandable debts.

In bankruptcy, the debtor loses its power of disposition and capacity in relation to its assets as of 0:00 hours of the day on which the court opens a bankruptcy procedure. During the course of the bankruptcy, this right lies exclusively with the administrator. It is also described as a general attachment on the assets of the debtor in favor of its creditors to be settled by the administrator. As a result, by law creditors can only enforce claims on the debtor by lodging their claim with the administrator and have to await the claim verification procedure. Creditors are prohibited from enforcing actions against the debtor's assets and seizures made prior to opening of the bankruptcy cease to exist.

Excluded from this prohibition are secured creditors who either have a right of pledge or a right of mortgage. They are allowed to act as if the bankruptcy does not exist and can enforce those rights against the debtor's secured assets. Also excluded are creditors to the bankruptcy estate (*boedelcrediteuren*). They can enforce their rights on the bankrupt estate.

The supervisory judge, however, can issue a stay period (*afkoelingsperiode*) stipulating that for a stay period not exceeding two months, each right of third parties, including secured creditors and creditors to the bankruptcy estate, to enforce against the debtor's assets or to claim assets under the control of the bankruptcy, can only be exercised with his authorization. The supervisory judge may extend this stay period once for a period of maximum two months.

Pending lawsuits instituted against the debtor before the opening of the bankruptcy that procure the performance of an obligation from the debtor are suspended by operation of law

and will only continue if the obligation is disputed in the verification process.

An important feature of Dutch bankruptcy is the possibility of a restart of (parts of) the debtor's business. Debtor's assets and operations can be (partially) sold by the insolvency administrator to a third party or to management. Such a deal is generally structured as an asset deal where debts and unnecessary contracts (including employment contracts) remain in the bankrupt estate.

III. Suspension of payment

The debtor who expects that he will be unable to continue paying its debts, can be granted a suspension of (moratorium on) payment.

During the suspension of payment, only unsecured and non-preferential creditors are prohibited from enforcing their claim against the debtor's assets. Creditors of secured claims (holders of right of pledge of mortgage) or preferential creditors (such as the Dutch Tax Authority, employees or other creditors whose claim is preferential by law) can ignore the moratorium and can enforce their rights as if there was no moratorium.

As a result of the granting of suspension of payment, as of 0:00 hours of the day on which the court grants suspension of payment, the debtor can only exercise its power of disposition and capacity in relation to its assets with the cooperation or authorization of the administrator. This is where the suspension of payments differs from a debtor in possession proceeding.

Creditors of unsecured and non-preferential claims are prohibited from enforcing actions against the debtor's assets and seizures made prior to the opening of the suspension of payments cease to exist. Additionally, the district court (and not the supervisory judge, as in bankruptcy) can issue a written order (*afkoelingsperiode*) stipulating that, for a stay period not exceeding two months, each right of third parties, including secured and preferential creditors and creditors to the suspension of payment estate, to enforce against the debtor's assets or to claim assets under the control of the bankruptcy can only be exercised with his authorization. The supervisory court may extend this stay period once for a period of maximum two months.

In contrast to a bankruptcy proceeding, pending lawsuits are not automatically suspended.

A restart of the business can be structured during the suspension of payment by a partial sale of the debtor's assets and operations. However, since the debtor is not bankrupt, contractual relationships remain in force, and stakeholders may still exercise certain rights, which can influence the success of a suspension of payment. It is therefore common in suspension of payment procedures to file for bankruptcy to have the possibility to keep unnecessary contracts out of the deal.

IV. WHOA – *the Dutch Scheme*

The WHOA is applicable for companies that are in a situation where it is to be expected that they cannot continue to pay their debts. The procedure can be filed by the debtor itself or by a creditor, a shareholder, the debtor's work council or the debtor's workplace representation. When the WHOA is filed by anyone else than the debtor, a restructuring expert is automatically appointed by the District Court. A restructuring expert can also be requested when the debtor files for a WHOA. This is often done to give the restructuring plan more objectively.

Upon filing, one can choose between a public and a confident variant of the procedure. The public WHOA is listed in Annex A of the Regulation (EU) 2015/848 on Insolvency

Proceedings and has therefore automatic recognition in all EU countries (except Denmark and Ireland).

The debtor or – if appointed – the restructuring expert proposes a private restructuring plan to (all or a subset of all) creditors and shareholders where the rights of these creditors of shareholders will be amended. Rights of employees cannot be amended under the WHOA.

During the WHOA-procedure, the debtor has access to different supportive measures to enable restructuring, such as a suspension of bankruptcy, a stay period, a protection of security for new funding and the possibility to end or alter contracts. Contrary to bankruptcy, but similarly to suspension of payments, the rights of employees are protected, and employment contracts cannot be effected by the plan. The district court can be asked to lift pre- and post judgement attachments and for any other necessary tailor-made measures. The District Court can also be asked at an early stage for binding decisions regarding legal issues (such as voting rights, class placements, etc.) to avoid uncertainties later on the procedure.

Creditors (or certain categories of creditors) are put in classes of similarity and vote within this on the acceptance of the plan. The plan is accepted by a class if 2/3rd-majority of the amount of claims or issued capital of the actual voters have voted in favor of the plan.

No dissenting creditor may receive less value then they would have in a bankruptcy situation (best interest of creditors test). The court can be asked for confirmation of the plan if at least one in-the-money class has voted in favor the plan.

Dissenting classes can be bound (cross class cram down) unless (i) the plan is in breach of the absolute priority rule, (ii) creditors that are small or medium enterprise are not offered an amount in cash that equals 20% of their claim and (iii) the plan lacks a cash exit-possibility for creditors (professional lender excluded).

The voting can take place within a period eight days and electronic voting is allowed. The restructuring plan becomes binding, after confirmation by the court. A confirmation decision by the court takes place within eight to fourteen days after acceptance of the plan and the confirmation cannot be appealed. In theory, the procedure could be completed within a period of three to five weeks.

The WHOA is the ultimate out of court and debtor-in-possession restructuring tool. It can involve the restructuring of contract and future liabilities, of (financial) debts and of shareholders.

In its short existence, The WHOA already has proved to be a quick, flexible and (therefor) very effective tool of reorganization of debts and costs. Not only for large companies, but also for small companies. In order to create a more affordable WHOA for small companies, the court fees for the WHOA have been reduced recently (1 July 2025).

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Portugal

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER PORTUGUESE LAW

I. INTRODUCTION – KEY ASPECTS OF PORTUGUESE LAW – DEFINITION OF INSOLVENCY AND LEGAL FRAMEWORK

Insolvency proceedings consist of a universal enforcement process, with the objective of satisfying creditors in the best possible way in a bankruptcy scenario, either by an insolvency plan based on the recovery of the company via the insolvency assets, or, when this is not possible, by liquidating the debtor's assets and sharing its result among the creditors.

Insolvency proceedings in Portugal are only triggered in the case of a debtor's insolvency, which is defined, in general, as the inability of the debtor to fulfill its obligations as they fall due (cash flow criteria). Aside from this, and in the case of legal entities, the debtor is also considered to be in an insolvency situation when, according to accounting criteria, the liabilities of the debtor clearly exceed its assets (balance sheet criteria).

Under Portuguese Law, the most relevant laws and statutory regimes that apply to the financial restructuring, reorganizations, liquidations, and insolvencies are the following:

- Insolvency and Recovery Code ("*Código da Insolvência e da Recuperação de Empresas*" – hereinafter "CIRE"), approved by the Decree-Law No. 53/2004, dated 18.03.2004 and last amended at 07.11.2024 by the Decree-Law No. 87/2024, on recovery and insolvency judicial proceedings, including the Special Revitalization Proceedings ("*Processo Especial de Revitalização* – hereinafter "PER");
- Civil Code ("*Código Civil*") approved by the Decree-Law No. 47344, dated 25.11.1966 and last amended on 01.04.2025;
- Commercial Companies Code ("*Código das Sociedades Comerciais*"), approved by the Decree-Law No. 262/86, dated 02.09.1986 and last amended on 05.12.2023 on dissolution and liquidation of commercial companies;
- Extra-Judicial Regime for Corporate Recovery ("RERE"), approved by Law no. 8/2018, of March 2nd, providing a specific legal regime for out-of-court recovery agreements;
- Statute of the Insolvency Administrator ("*Estatuto do Administrador de Insolvência*"), approved by the Law No. 22/2013, dated on 26.02.2013 and last amended at 11.01.2022 by the Law No. 9/2022;
- Law of the Companies of Insolvency Administrators ("*Regime Jurídico das Sociedades de Administradores da Insolvência*"), approved by the Decree-Law No. 54/2004, dated 18.03.2004;
- Directive (EU) 2019/1023 of the European Parliament and of the Council, of June 20th, 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt;
- Law No. 9/2022 was published on 11 January 2022. This new law establishes measures to support and speed up corporate restructuring processes and payment agreements. It is the result of the incorporation into Portuguese law of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June

2019 ("Directive (EU) 2019/1023"). Furthermore, it amends the Insolvency and Corporate Recovery Code ("CIRE"), the Companies Code ("CSC"), the Commercial Registration Code, and other related legislation;

- Regulation (EU) 2015/848 of the European Parliament and of the Council, of May 20th, 2015, on insolvency proceedings.

The insolvency proceeding governed by the CIRE may be voluntary or involuntary, as it may commence on the debtor's initiative or on any creditor's initiative. In addition to the insolvency procedure itself, CIRE also provides for two special procedures. The first one is the PER (a voluntary procedure which only applies to companies), considering that only the debtor may submit the request to the court, pursuant to article 17-A of the CIRE. Such request must include a written statement of the debtor and at least one of its creditors, expressing the intention to engage in negotiations leading to its revitalization through the approval of a recovery plan. The second special procedure is the special payment agreement procedure (which may apply to any debtor other than a company). The RERE is also a voluntary proceeding commenced by the debtor's initiative.

II. 1.STATUTORY INSOLVENCY AND LIQUIDATION PROCEEDING

A debtor must request a declaration of insolvency within 30 days after the date of becoming aware of such insolvency, or on the date when he should have been aware thereof. The application must contain a series of mandatory elements and meet several requirements.

Companies that have filed for PER during the period of suspension of enforcement measures provided for in article 17-E, no. 1 and 2 of CIRE and natural persons who are not owners of a company on the date of insolvency are both exempted from the duty to declare insolvency.

When the debtor is the owner of a company, Portuguese law presumes that awareness of the insolvency occurs three months after the general failure to meet debts regarding taxes and social security payment and contributions; debts arising from an employment contract or from the breach or termination of such contract; or rentals for any type of hire, including financial leases; or instalments of the purchase price or loan repayments secured by a mortgage on the debtor's business premises, head office or residence.

Moreover, the declaration of insolvency of a debtor may be requested by the person legally responsible for the debts, by any creditor, even if conditional and whatever the nature of the claim, or by the Public Prosecutor's Office, representing the entities whose interests are legally entrusted to it, when any of the following occur:

1. General suspension of payment of due obligations;
2. Non-compliance with one or more obligations which, due to the sum involved or the circumstances of the non-compliance, demonstrate the debtor's incapacity to promptly satisfy most of its obligations;
3. Abscondment of the owner of the company or the debtor's directors or desertion of the company's registered office or place of main business, related to the debtor's lack of creditworthiness and in the absence of the appointment of a substitute of good standing;
4. Dispersal, abandonment, hurried or destructive liquidation of assets and fictitious constitution of credits;

5. Insufficiency of seizable assets to pay the respective claim in enforcement proceedings brought against the debtor;
6. Non-compliance with obligations set out in an insolvency or payment plan;
7. General non-compliance, in the previous six months, with debts of any of the following types: **i)** tax; **ii)** social security contributions and dues; **iii)** debts arising from an employment contract, or breach or termination of such contract; **iv)** payments for any type of lease, including financial leases, payments of the purchase price or of a loan guaranteed by a mortgage, with respect to the place where the debtor carries out his activity or has his registered office or residence;
8. Should the debtor be a legal person, where it has greater liabilities than assets as shown on the last approved balance sheet or is behind by more than nine months in the approval and filing of accounts, if legally required to do so.

The application submitted by a creditor must include information regarding the nature and amount of the credit, the identification of the debtor's managers (both of fact and law) and its five biggest creditors (not including the applicant), and the debtor's commercial registry certificate. If the applicant is the debtor, then it is important to indicate whether the company's situation of insolvency is current or imminent, and to include documents, such as a list of all known creditors and a clear explanation of the company's activity over the last three years and is also required to include with the initial petition for insolvency, a document identifying the companies with which it is in a control or group relationship under the terms of the CSC or which are considered associated companies, and, if applicable, identifying the processes in which its insolvency is requested or has been declared.

The judicial ruling which then declares the insolvency of the debtor grants creditors – as well as the Public Prosecutor Department – a fixed time limit (maximum 30 days) to claim their credits (including conditional credits) before the Insolvency Administrator (filed online). Creditors must lodge their claim accompanied by various documents and elements that legitimize and ground the claim, such as the origin of the credit and its legal classification (e.g., guaranteed or privileged), and its due date, amount and accrued interest. Creditors who have had their credit acknowledged by a previous judicial decision are not exempt from the duty of claiming it in the insolvency proceeding if they wish to obtain payment within said insolvency proceeding. After said time limited has expired, the Insolvency Administrator will assess whether the credits are to be acknowledged.

The declaration of insolvency is registered in the land, commercial and vehicle register in respect of the assets or rights forming part of the insolvent estate.

Within 15 days of the termination of the time limit for credit claims, the Insolvency Administrator prepares a list of the credits that were legally acknowledged (which is published), as well as the respective terms and conditions of each one (e.g., the identification of the creditor, the nature of the credit, the amount and accrued interests, and the existence of personal or real guarantees, amongst others). In parallel, another list comprising the credits that were not acknowledged, and the respective grounds of justification, must also be drafted and published.

Within ten days of the deadline for the Insolvency Administrator to present these lists, any person with a legal interest can challenge

the acknowledged creditors list. The court will then issue a ruling, in which it decides on the existence and correct classification of the credits. The credits whose verification or graduation requires the production of further evidence will now be provisionally verified and graduated in provisional order, instead of relegating the graduation of all credits to the final judgment when the verification of some of them requires evidentiary steps. The aim is thus to simplify the conduct of the phase of verification of liabilities and graduation of claims.

Despite this, a creditor may still have other claims acknowledged after this period, and may request the separation or restitution of assets, to be considered in the insolvency proceeding, by means of a judicial application against the insolvent estate. The request for the separation or restitution of assets can be filed at any time until the end of the insolvency proceeding. However, the claim for the acknowledgement of credits can only be filed within six months of the judgment declaring the insolvency becoming final.

These credits may be traded amongst creditors and with third parties prior to, or even throughout, the insolvency proceedings, as the only impact that this action has on the claim is the identification of the creditor.

All pending judicial proceedings regarding the insolvency estate assets filed against the debtor or even third parties, which may determine variations in the value of the insolvency estate, and all judicial proceedings with exclusive patrimonial nature filed by the debtor are to be attached to the insolvency proceedings if the Insolvency Administrator so requests. Enforcement proceedings or other measures requested by the insolvency creditors that affect the insolvency estate, as well as arbitration disputes, shall be suspended.

Furthermore, one of the consequences of the declaration of insolvency is the immediate removal of the (debtor) managers' powers of administration over the assets of the insolvency estate and their subsequent transfer to the Insolvency Administrator, who is authorized by law to carry out all transactions in the ordinary course of business of the debtor.

As a rule of thumb, under article 102 of the CIRE, contracts that have been entered between the debtor and a creditor, and that have not yet been completely performed, are suspended until the Insolvency Administrator determines their performance or non-performance. In these cases, the respective creditor is given the opportunity to set a reasonable date before which the Insolvency Administrator must issue a decision. If no decision is made by said date, then Portuguese law presumes that the Insolvency Administrator has decided not to perform the contract.

II. 2. AGGRAVATED/CULPABLE INSOLVENCY

Once a court makes a declaration of insolvency, the insolvency may be deemed to be fortuitous or aggravated/culpable (where insolvency is a result of a willful or gross negligence action of the debtor's or of it's in legal directors within the three years prior to the beginning of insolvency proceeding). The law provides for circumstances where **(i)** insolvency is automatically classified as negligent; and **(ii)** where fraud or gross negligence is presumed.

For the purposes of qualifying the insolvency as culpable, Law no. 9/2022, of 11 January, clarified that the presumption of serious fault of the de jure or de facto administrators of the debtor who are not natural persons who fail to comply with the duty to request the declaration of insolvency or the obligation to prepare, submit to supervision or deposit the annual accounts is limited to the existence of seriously culpable behavior.

It is also provided the peremptory nature of the deadline for the opening of the insolvency filing, allowing, however, its extension (which cannot exceed six months from the beginning of the deadline), upon motivated request of the insolvency administrator or of any interested party.

The suspension of the proceedings in the event of death of one of the proponents affected by the classification of the insolvency is established, opening the door to the deduction of a habilitation incident in the general terms of the civil procedural law.

II. 3. EFFECTS ON DEBTORS

A declaration of insolvency transfers the power to run a company from its directors to an Insolvency Administrator, who becomes the representative of the debtor for all purposes. Management bodies of a debtor may continue to operate (when requested by the debtor, if the insolvency is voluntary, or with the agreement of the creditors), but actions that might be carried out by the debtor that breach any required supervision of the Insolvency Administrator may be declared null and void. A declaration of insolvency implies that all debts of the insolvent become immediately due. Any judicial proceedings involving patrimonial matters, where the final result may affect the value of the insolvent company's estate, are attached to the insolvency proceeding provided that the Insolvency Administrator requests . A declaration of insolvency stays (and may then terminate) any pending enforcement proceedings and creditors cannot initiate new enforcement proceedings against the debtor.

II. 4. EFFECTS ON NATURAL PERSONS

If the debtor is a natural person, at the debtor's request, he may be granted exoneration from insolvency claims which are not fully paid during the insolvency proceedings or in the three years following closure, as provided for in articles 235 to 248 of CIRE.

The exoneration of a natural person's liabilities, if allowed, will require the disposable income earned by a debtor to be assigned to a trustee chosen by the court for the three years following the closure of the insolvency proceedings (assignment period). At the end of each year during the assignment period, the trustee uses the sums received: **a)** to pay outstanding costs of the insolvency proceedings; **b)** to reimburse the body responsible for the financial and property management of the Ministry of Justice for the remuneration and expenses of the insolvency practitioner and the trustee as incurred by that body; **c)** to pay his own remuneration and expenses; **d)** to distribute the remainder among the insolvency creditors pursuant to the provisions laid down on payment to creditors in insolvency proceedings.

On the other hand, the judge is allowed to extend the assignment period, up to a maximum of three years, upon the reasoned request of the debtor, a creditor in the insolvency, the insolvency administrator (if still in office) or the trustee who was charged with supervising the debtor's compliance with its obligations. If the judge concludes that there is a serious likelihood of the debtor's compliance with the obligations imposed on him by law, he shall order an extension.

Provision is made for the possibility of a supervening liquidation, once the liquidation of the insolvent's assets has already been completed and the insolvency proceedings are closed. It will now be possible, during the assignment period, for the trustee to seize and sell assets that were also part of the debtor's assets and, subsequently, to allocate the proceeds of the sale to the creditors, in the same manner as the disposable income.

When the assignment period has ended, the exoneration of the debtor may be granted by the court and in such a case, all insolvency claims which still remain at the date exoneration is granted will be cancelled, including those which have not been lodged or verified. However, the exoneration does not include **a)** maintenance claims; **b)** compensation due for unlawful acts by the debtor which have been claimed as such; **c)** claims for fines and other monetary penalties for crimes or administrative offences; **d)** tax and social security claims.

II. 5. EFFECTS ON CREDITORS

Insolvency proceedings are dynamic and, as a result, there is a lot of information that is constantly being analyzed and put forward to all parties involved – the creditors' right to be provided with a report prepared by the Insolvency Administrator should be noted. This report will be presented at the creditors' general meeting, which will focus on discussing and deciding whether to close or maintain the activity of the establishments comprising the insolvency estate and can empower the Insolvency Administrator to prepare an insolvency plan and determine the suspension of liquidation of the insolvency estate.

To a certain extent, the CIRE is flexible in allowing creditors to opt for the restructuring and maintenance of the company. If the creditors do not approve an insolvency plan or request the Insolvency Administrator to prepare a plan through which the company is to be maintained and the creditors paid, then the proceeding follows in the view of liquidation, and the assets of the insolvency estate will be sold in this framework.

One of the keystones of the CIRE is that creditors must receive equal treatment. There are few exceptions to this rule and those permitted by law abide by the rule that "ordinary credits" are considered equal. On this basis, a distinction is made between guaranteed, privileged, ordinary and subordinated credits:

- Guaranteed credits are those secured by a guarantee in rem. They are paid out of the proceeds of the sale of the secured asset once sale expenses and any amount allocated to credits over the insolvency estate are deducted. If the secured assets are insufficient to pay all debts owed to guaranteed creditors, any remaining debt is included in the common credits.
- Privileged credits are those benefiting from general creditor's privilege (e.g. credits arising from an employment contract) over assets comprised in the insolvent estate. Due to their nature, these credits are paid in a pro rata basis with the proceeds of the unsecured assets and according to its inner ranking. In fact, there are several types of privileged creditors that are ranked differently. As a novelty introduced by Law no. 9/2022, of 11 January, the compensatory credits resulting from the termination of the employment contract by the administrator after the declaration of insolvency of the debtor are qualified as automatic insolvency claims.
- Common creditors can only be paid after creditors who rank in priority to them are paid in full. They are paid in a pro rata basis if the proceeds of the insolvency estate are insufficient to fully satisfy the debt.
- Subordinated creditors rank below common creditors. Redefined by Law no. 9/2022, of 11 January, as the credits held by persons especially related with the debtor, provided that the special relationship existed already at the time of the credit was born (and not acquired), and by those to whom they may have been assigned in the two years prior to the beginning of the insolvency proceedings.

- In addition, there is another special and prioritized category, known as credits against the insolvency estate, which generally arise after the declaration of insolvency (e.g., court fees, the costs and expenses of administration, and claims resulting from obligations incurred under contracts entered by the Insolvency Administrator after the judgment opening insolvency proceeding or that the administrator chooses to perform). These credits are not subject to ranking or acknowledgement and, in principle, must be paid by the Insolvency Administrator when they fall due.

Once the judgment declaring the insolvency has become final and the creditors' meeting for the distribution report has been held, the Insolvency Administrator promptly proceeds with the negotiation and sale of the assets. And has the duty to present, within 10 days of that meeting, a liquidation plan for the sale of the assets, containing defined time goals and a list of the concrete steps to be taken. The failure to present or the seriously culpable failure to comply with the liquidation plan constitutes just cause for the dismissal of the Insolvency Administrator.

The purchasers acquire the assets *f*ree and clear of claims and liabilities. However, the CIRE establishes a set of rights for guaranteed creditors:

- The guaranteed creditor shall be heard regarding the sales mode and shall also be informed about the initial base value or price of the proposed sale to a certain entity. However, the Insolvency Administrator is not bound to accept the secured creditor's position;
- The guaranteed creditor may propose purchasing the asset, either directly or through a third party, for a price higher than the projected sale price or the initial base value. If such proposal is not accepted by the Insolvency Administrator and the asset is sold at a lower price, the Insolvency Administrator is required to guarantee that the guaranteed creditor is in the situation he would be in if the asset had been sold at the proposed price;
- The proceeds of the sale of assets shall revert immediately to the guaranteed creditors, before any payment is made to any other creditor.

Once insolvency proceedings have commenced, transactions that unfairly favor one creditor over the others or any acts that reduce, make it more difficult or impossible, jeopardize or delay payment to the creditors can be set aside by the Insolvency Administrator. Two requirements must be fulfilled: the acts must have been carried out in bad faith (with the knowledge of the debtor's insolvency or of the damage that act could cause) and within the two years prior to the initiation of the insolvency proceedings. The Insolvency Administrator can terminate contracts that fulfil these criteria by means of a registered letter within six months as of the knowledge of their existence. The termination has retroactive effects. The insolvent debtor or the third party which received the communication of termination can challenge it, filling a judicial action within three months after receiving the communication.

One of the biggest novelties of Law no. 9/2022, of 11 January, is the introduction of compulsory partial distribution of amounts to creditors, whenever, cumulatively:

a) The decision declaring the insolvency has become final and the process has continued for liquidation of assets;

b) The time limit for contesting the list of recognized creditors has expired without any contestation having been filed, or, if a

contestation has been filed, the contestation in question has already been decided, whether for lack of response to the contestation or by a court decision which may not be final;

c) The amounts deposited to the order of the insolvent estate are equal to or greater than EUR 10.000,00 and their ownership is not disputed;

d) The process is not in a condition to prepare the final distribution.

Once these conditions are met, the Insolvency Administrator shall prepare and publish the partial distribution list, and the creditors (if any) shall have 15 days to reply to it. At the end of this period, the process is concluded with the judge, who decides on the payments that he considers justified.

III. STATUTORY RESTRUCTING, REHABILITATIONS AND REORGANISATIONS

The PER ("*Processo Especial de Revitalização*") is a special revitalisation proceeding for companies facing a situation of imminent insolvency or economic distress and is not to be used as a substitute for insolvency proceedings. The PER is initiated by a written request subscribed to by the debtor and creditors representing at least 10% of non-subordinated credits (or a lower percentage in certain limited cases), which includes the following:

- A declaration by the company of its ability to recover;
- A joint declaration of the debtor and the abovementioned percentage of creditors expressing the will to engage in negotiations;
- A declaration by a certified accountant attesting that the company is not insolvent;
- Auxiliary documents required in insolvency proceedings (e.g., a list of creditors, pending lawsuits, shareholders, assets and employees, a description of the debtor's activities and annual accounts, management and audit reports and legal certification for the last three years);
- A proposal of recovery plan, with a description of the company's situation in terms of assets, financing and revenue cash flows, and
- Introduced by the Law no. 9/2022, of 11 January, in order to ensure a more equitable treatment of creditors on whom the effective restructuring of companies will depend, companies other than micro, small and medium-sized enterprises will be required to present, with the respective request for submission to the PER, a proposal for the classification of creditors affected by the recovery plan in distinct categories, according to the nature of the respective credits, into guaranteed, privileged, common and subordinated creditors and, among these, reflecting the universe of creditors of the company according to the existence of sufficient common interests, namely:
  i. Workers, without distinction of the type of contract;
  ii. Shareholders;
  iii. Bank entities that have financed the company;
  iv. Suppliers of goods and service providers;
  v. Public creditors.

Upon the receipt of said request, the judge appoints a provisory judicial administrator ("PA"). The court's order is published, formally initiating the PER. Subsequently, within 20 days of said publication, the creditors make their credit claims to the PA. Within five days, the PA

drafts a provisional creditors list, which is published and may be contested in court on the next five business days. Oppositions are decided by the court within the same term, and the definitive list is defined.

Once the definitive list is determined, negotiations between creditors and the debtor shall start and be concluded within a term of two months, which may be extended once for one month.

Being a dejudicialized proceeding, negotiations are organised and supervised by the PA. The court's main role is to decide on the oppositions to the creditors list and to ratify (or refuse to ratify) the recovery plan approved by creditors. Non-ratification occurs if there is any infringement of non-neglectable procedural rules or infringement of material rules (notably, creditors shall be treated equally and creditors' positions shall not, without their consent, be less favourable to the positions they would have in a non-approval scenario). The recovery plan approved by the creditors and ratified by the court is binding for all parties, including creditors that have not claimed credits and creditors that did not participate in the negotiations or voted against the plan.

The plan's approval requires a vote of creditors through three systems of majority formation:

1. Applicable to cases in which there is classification of creditors in distinct categories (large companies): the rule of the favourable vote, in each of the categories of creditors, of more than 2/3 of the total votes cast (abstentions are not considered as such);
2. Applicable to all other cases (micro, small and medium enterprises): rule of approval of the plan which, being voted by creditors whose credits represent at least 1/3 of the credits related to voting rights (abstentions are not considered), obtains the favourable vote of *(i)* more than 2/3 of the total votes issued and *(ii)* more than 50% of the votes issued corresponding to non-subordinated credits related to voting rights;
3. Applicable in all cases (whatever the size of the company): approved the plan that collects cumulatively (without considering abstentions) the favourable vote *(i)* of creditors whose credits represent more than 50% of the total credits related to voting rights and *(ii)* of more than 50% of the votes issued corresponding to non-subordinated credits related to voting rights.

The recovery plan must include the following mandatory information:

i. The parties affected by the plan, designated individually and broken down by classes in general terms or, if applicable, by categories, and the amounts of their respective claims or interests covered by the plan;

ii. The parties, designated and apportioned pursuant to the preceding paragraph, that are not affected by the plan, together with a description of the reasons why the proposed plan does not affect them;

iii. The arrangements for informing and consulting employees' representatives, the position of employees within the undertaking and, where appropriate, the general consequences as regards employment, such as dismissals, temporary reduction of normal working hours or suspension of employment contracts;

iv. Any new funding envisaged and the reasons why such new funding is necessary to implement the plan;

v. A statement of reasons containing a description of the causes and extent of the company's difficulties and explaining why

there is a reasonable prospect that the recovery plan will prevent the company from becoming insolvent and ensure its viability, including the preconditions necessary for the plan's success.

In the judgment of approval or non-approval of the restructuring plan, the judge must necessarily assess:

i. Whether the recovery plan has been approved (i.e., whether the majorities provided for by law have been respected);

ii. If, in the event of classification of creditors in different categories, creditors in the same category are treated equally and in proportion to their claims;

iii. Whether, in the case of classification of creditors into separate classes, the dissenting voting classes of creditors affected receive treatment at least as favourable as that of any other class of the same rank and more favourable than that of any class of lower rank;

iv. That no class of creditors may, under the plan of reorganisation, receive or retain more than the amount corresponding to the totality of their claims;

v. Whether the situation of the creditors under the plan is more favourable than it would be in a scenario of liquidation of the company, if there are requests for non-approval on this ground;

vi. If applicable, that the new financing necessary to implement the restructuring plan does not unfairly harm the interests of the creditors;

vii. Whether the rescue plan holds out reasonable prospects of preventing the insolvency of the company or ensuring its viability.

In the absence of approval of a restructuring plan and when the provisional judicial administrator issues an opinion concluding that the company is insolvent, the company shall have a period of five days to oppose it.

Alternatively, the PER may follow a shorter form, being initiated by the presentation of an extrajudicial recovery agreement (signed by the debtor and creditors representing the majority referred to above for the plan's approval), with all ancillary documents. In such cases, following the PA's appointment and the notification of non-subscriber creditors for oppositions to the provisional creditors list, the judge decides on the plan's ratification in the same terms described above. These shorter proceedings may be concluded (upon the final ratification decision) within two to four months on average. Regular proceedings last around six to eight months.

Ratification (or non-ratification) of the recovery plan may be contested through a single appeal to an appeal court (whose decision is final), based on formal or material grounds. Upon the ratification of the recovery plan, the debtor and all creditors (including non-voting, unknown creditors, creditors that have not claimed or have contingent claims regarding facts that occurred on or prior to the PA's appointment) are bound to its terms.

If the recovery plan is not approved, the PA shall communicate the end of negotiations and give an opinion on whether the company is insolvent. If the company is deemed to be insolvent by the PA, the PER is extinguished, and insolvency proceedings are initiated (three business days). If the PER is extinguished the debtor cannot initiate a new PER for the next two years.

These proceedings are not confidential, being available for consultation by interested parties. The main decisions regarding the proceedings are made public.

After the appointment of the PA, any pending enforcement proceedings filed against the debtor shall be suspended, for a period of four months, extendable by one month, and no further proceedings shall be filed for the same purpose after such date (except for claims related to labour credits). The company shall continue to operate its business, under the PA's supervision. The PA's prior written authorization is required for "acts of special importance", without that approval the transactions have no effect.

IV. OUT OF COURT RESTRUCTURINGS AND CONSENSUAL WORKOUTS

Creditors and debtors favor extrajudicial restructuring proceedings over statutory proceedings because the latter are necessarily prejudicial to the company's image, harming the regular continuation of the business. Moreover, out-of-court proceedings secure greater value for creditors and maximize the recovery of credits. Out of court restructurings may occur within pure informal and dejudicialized negotiations and agreements, or within a proceeding following an Extrajudicial Company's Recovering Regime, set out in Law no. 8/2018, of 2 March, ("RERE"). If the debtor's restructuring inevitably entails the reduction of a debt, then insolvency proceedings or the PER (statutory in-court recovery proceedings) are chosen over out-of-court proceedings.

Simple restructurings are usually concluded within three to four months, and more complex restructurings in eight to 12 months. Creditors do not generally accept any compromise on the suspension or limitation of their rights (e.g., enforcement rights), but, in practice, they refrain from exercising such rights while negotiations are ongoing. Banks generally require full disclosure during negotiations (typically regarding accounts, assets and the business of the debtor). In more complex restructurings, banks sometimes require an audit and a viability plan made by specialized entities. Restructuring agreements typically include solutions such as a restructuring of the payments schedule (periods of grace, extension of repayment dates, decrease of interest rates), a sale of assets, a reduction in activity, and increased compromise by the owners.

Out of court restructuring agreements only bind the signatory parties (they cannot be imposed on non-parties) and cannot modify any rights of non-subscriber creditors or owners. Only PER or insolvency proceedings are binding for all stakeholders, including creditors and owners.

V. MULTINATIONAL CASES

The effects of restructuring or insolvency proceedings opened in an EU Member State are automatically recognized in all other Member States, according to Regulation (EU) 2015/848 (Recast Insolvency Regulation).

However, the CIRE requires foreign judgments to comply with certain formalities before they can be recognized:

- Insolvency has been declared by a foreign court;
- Foreign court's decision is final and binding;
- Decision is adopted by the court where the debtor's center of main interests is located;
- Decision is not illegal under Portuguese law.

Portuguese courts must normally apply the principle of reciprocity when recognizing foreign insolvency decisions.

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INTERNATIONAL LAWYERS NETWORK

PETERKA & PARTNERS

Bankruptcy, Insolvency & Rehabilitation Proceedings in Romania

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER ROMANIAN LAW

1. A brief presentation of the bankruptcy/insolvency/rehabilitation proceedings of the country and their main differences.

Romanian legislation provides two main categories of such procedures:

I. **Insolvency prevention procedures**

I.1. **Restructuring agreement**

A debtor who faces financial difficulties may propose a restructuring agreement, which can be drawn up either by the restructuring administrator or by the debtor, with the assistance of the restructuring administrator. Among others, the restructuring agreement must contain an analysis on the economic situation of the debtor, a list of the claims which will be and not be affected by the reorganization agreement and the proposed restructuring measures which can be either operational, financial or human resources oriented. The agreement will eventually be voted upon by the affected creditor(s), based on the categories in which they fall. The purpose of the restructuring agreement is for the debtor to restructure its activity and to reach an agreement with its creditor(s) regarding the payment of the debts due.

I.2. **Preventive agreement**

If the debtor faces financial difficulties, it can request the court to open a preventive agreement procedure. Creditors may also address such a request, provided they have the debtor's consent. The court appoints an administrator contracted by the debtor, who drafts the restructuring plan or assists the debtor in drafting it. The restructuring plan shall include a reorganization plan for the debtor. If the creditors approve the project, the debtor's activity shall be carried on in accordance with such project, for a period of a maximum of 48 months, with the possibility of extending it for another 12 months. During the first year of the implementation of the restructuring plan, the debtor must reimburse a minimum of 10% of the claims affected by the preventive agreement.

II. **Insolvency procedure**

The insolvency procedure:

- Must be requested by a debtor with debts amounting to a minimum of RON 50,000 (approximately EUR 10,000);
- May be requested by a creditor, having a certain, liquid receivable of a minimum of RON 50,000 (approximately EUR 10,000) that has been due for more than 60 days.

If the court approves the request, depending on the debtor's situation, the procedure may be started in one of the following forms:

II.1. **General procedure**

In such case, the debtor enters an observation period, in which the official receiver analyses if there are any chances for the company to be reorganized. Following this first step, the

debtor may enter one of the following procedures:

(i) Reorganization, in which the debtor's activity is reorganized in accordance with a reorganization plan, approved by the creditors. The plan may provide various measures, such as reducing the debt or rescheduling one or more due debts. The execution on the plan is limited to a period of 3 years, with the possibility of extending it. If the debtor is a legal entity, the execution of the plan is limited to a period of 4 years, instead of 3, with the possibility of extending it, if the initial period of execution was less than 4 years. If the plan is successful, the debtor shall be reintegrated in the commercial circuit, and all debt reductions shall remain final. If the plan fails, the debtor enters the bankruptcy procedure (presented in point (ii) below), in which case the reduction of the debts is no longer valid, the creditors being entitled to recover their entire debt.

(ii) Bankruptcy, in which the debtor's assets are sold and all money obtained is distributed to creditors, in accordance with their priority rank, as indicated in the creditors' list (e.g., secured creditors shall recover before unsecured ones).

II.2. **Simplified procedure**

If the conditions are met, the court approves the request and initiates a simplified procedure, in which case the debtor enters the bankruptcy procedure directly, without going through the observation period, as presented in point II.1 above.

2. (Depending on the type of the proceedings) The protection granted to the debtor against its creditors.

The following questions should be addressed for each proceeding, provided by the law of the country:

i) What kind of protection is granted? (e.g., the creditors may not enforce any court decision against the debtor's assets, etc.)

Restructuring agreement

In addition to the measures negotiated with the creditors and expressly provided in the agreement, the law provides that once the restructuring agreement is confirmed by the court, and during its execution, no affected creditor may trigger an insolvency procedure against the debtor.

Preventive agreement

If a preventive agreement procedure is initiated, all the enforcement procedures against the debtor are suspended by law for a period of 4 months, which may be extended to 12 months from the moment the preventive agreement has started and until the restructuring plan is homologated. As an exception, wage-claim enforcement procedures shall not be suspended by law, but only upon the debtor's request, if certain requirements are met.

Moreover, during the suspension of the enforcement procedures against the debtor, until the homologation of the restructuring plan, all penalties, interest and other expenses related to the debt will also be suspended.

As of the moment the restructuring plan is homologated, the enforcement procedures

regarding the affected claims against the debtor are suspended. The penalties, interest and other expenses related to the debt will be suspended according to the provisions of the restructuring plan.

As a general rule, for the entire duration of such procedure, an insolvency procedure cannot be started against the debtor. However, for procedures started before July 17, 2022, if the debtor requests an extension of the preventive agreement, the creditors who have voted against the prolongation of the preventive agreement, or the creditors who are not part of the preventive agreement procedure, have the right to submit a request for initiation of an insolvency procedure against the debtor. Moreover, the creditors who voted against the afore-mentioned extension have the right to start enforcement procedures against the debtor.

Insolvency procedure

If an insolvency procedure (regardless of the form) is initiated, all the judicial and/or extrajudicial claims, as well as all enforcement procedures against the debtor are suspended. Moreover, creditors cannot start any new such claims or procedures.

Another protection granted to the debtor refers to the suspension of the penalties, interest, and other expenses related to the debt.

ii) What is the extent of the protection? (e.g., Does it include all of the debtor's assets? is it limited to several assets for which the debtor may ask for protection? Is it at the court's discretion to include any asset? Etc.)

Preventive agreement

All the enforcement procedures started before the preventive agreement shall be suspended by law, together with the enforceable titles obtained after the start of the preventive agreement, for a period of 4 months – which can be prolonged to 12 months – since the commencement of the preventive agreement, until the homologation of the restructuring plan. After the homologation of the restructuring plan, the enforcement procedures regarding the affected claims against the debtor will be suspended.

The suspension includes all of the debtor's assets that are being enforced at the date of the preventive agreement.

Insolvency procedure

If an insolvency procedure (regardless of the form) is initiated, all the judicial and/or extrajudicial claims, as well as all enforcement procedures against the debtor are suspended. Moreover, creditors cannot start any new such claims or procedures.

The suspension includes all the debtor's assets that are being enforced and all the judicial/extrajudicial claims filed against the debtor.

In respect to the suspension of the penalties, interest and other expenses related to the debt, from the moment the insolvency procedure is started and until it is finalized, no such expenses are incurred by the debtor.

iii) By whom it is granted? (e.g., by a court decision or by injunctions or directly by the law, etc.)

Preventive agreement

The suspension is granted *de iure* and is only mentioned in the decision.

Insolvency procedure

The suspension is granted *de iure* and it is not necessary to be mentioned in any court decision.

iv) Does the protection include only the debtor, or may it cover other persons as well (e.g., guarantors)?

Preventive agreement

The suspension includes all of the debtor's assets that are being enforced at the date of the preventive agreement. However, such protection is only granted to the debtor and shall not be extended to third parties, such as guarantors.

Insolvency procedure

The suspension includes all of the debtor's assets that are being enforced and all of the judicial/extrajudicial claims filed against the debtor. However, such protection is only granted to the debtor and shall not be extended to third parties, such as guarantors.

v) When is the protection granted? (e.g., in a rehabilitation proceeding in Greece, the debtor may apply before a court for protection of its assets before any agreement has been concluded with its creditors. After the agreement is concluded, different protection applies).

Preventive agreement

The protection is applicable as of the moment the preventive agreement procedure starts until it is finalized.

Insolvency procedure

The protection is applicable from the moment the insolvency procedure is started, until such procedure is finalized.

vi) For how long is the protection granted?

Preventive agreement

The protection is applicable as of the moment the preventive agreement is started, until such procedure is finalized.

Insolvency procedure

The protection is applicable as of the moment the insolvency procedure is started, until such procedure is finalized.

vii) Which creditors are bound by the protection?

Restructuring agreement

All creditors.

Preventive agreement

All creditors.

Insolvency procedure

All creditors.

viii) Any other particularities of the procedures of each country (if any).

The Early Warning procedure

The Early Warning procedure enables professionals to receive automatic alerts from the Romanian tax authorities regarding the non-performance of certain fiscal obligations to the state budget, state social security budget and unemployment insurance budget, as well as relevant information regarding the recovery solutions.

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INTERNATIONAL LAWYERS NETWORK

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Slovakia

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER SLOVAKIAN LAW

Presentation of the preventive restructuring/bankruptcy/restructuring proceedings in the Slovak Republic and their main differences.

In Slovakia, there are several possibilities how to avoid the imminent bankruptcy or insolvency of a debtor and how to proceed.

(1) Increased preventive creditor protection under Commercial Code in a state of crisis

According to the Commercial Code, the Company is in crisis, if it is bankrupt or bankruptcy is imminent, if it is in a period of dissolution after going into liquidation, or and if the **ratio of its own equity to its liabilities is less than 8 to 100**. Whether a company is in crisis depends on the state of its accounts, namely the most recently drawn up annual or extraordinary financial statements.

If a company is in crisis there are several consequences for the company:

- **Prohibition on the return of company's own capital replacing performance if a company is in crisis or if it should enter into a crisis as a result of such performance** (together with accessories and contractual penalties)

  The law defines a company's own capital replacing performance as:

  - a loan or a similar performance for a corresponding economic purpose provided to the company in a state of crisis for a period longer than 60 days;
  - any performance provided to a company before the crisis, whereas the maturity of this performance was postponed or prolonged during the crisis, such as prolongation of maturity of an invoice; or
  - any performance (loan or other performance) provided to the company by the so-called "controlling person" (e.g., member of the statutory body/supervisory board, a person who holds a direct or indirect share representing at least 5% of the company's registered capital or voting rights in the company, silent partner…)
  - any performance (loan or other performance) provided by the company where it is impossible to identify the ultimate beneficial owner

- **Exercise of a creditor's right from the claim secured by a controlling person of the debtor**

  During a crisis, a creditor may satisfy his claim secured by a guarantee, pledge or other security provided by the controlling person without first having to enforce its right against the company. Any different contractual arrangement shall be disregarded. If the creditor was aware of the fact that the company was in crisis, he can satisfy his claim secured by a controlling person only up to the difference between the amount of the claim and the value of the security.

- **Periods for the return of company's own capital replacing performance are suspended during crisis.**

  The value of the performance provided in breach of the prohibition shall be returned to the company. Members of the statutory body who held office at the time performance was provided and those who held office as a member of the statutory body in the period in which the company did

not claim the return of the performance shall be jointly and severally liable for its return against the company and the creditors.

We would like to also draw your attention to the aspect of holding company law which is contained in the Slovak law, on the basis of which the controlling person (i.e. a person who holds a majority of the voting rights either by virtue of ownership of a business share or by virtue of the shareholders agreement) shall be liable to the creditors of the controlled person for damage caused by the bankruptcy of the controlled person, provided that the controlling person's conduct considerably contributed to the bankruptcy of the controlled person. The controlling person shall be released from such liability if they prove that they acted in an informed manner and in good faith that they were acting for the benefit of the controlled person. Unless a different amount of damage is proved, it shall be deemed that the creditor incurred damage to the extent to which their receivable was not satisfied after the termination of the bankruptcy proceedings conducted against the controlled person due to a lack of property, cancellation of the bankruptcy declared against the property of the controlled person due to a lack of property, the termination of execution or similar enforcement proceedings conducted against the controlled person due to a lack of property or the dissolution of the controlled person without a legal successor.

(2) Preventive restructuring proceeding

Since July 2022, the Act No. 111/2022 Coll. on the resolution of impending bankruptcy (the "Act"), has been in force in Slovakia. The Act introduced preventive restructuring and temporary protection of the debtor. This law is a consequence of the transposition of Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

When a debtor (meaning only a legal person) discovers that it is at risk of insolvency in the next 12 calendar months, i.e. that the debtor is more than 90 days late in meeting at least two financial liabilities with more than one creditor, it has an obligation to monitor its financial situation very closely and to take appropriate measures to avert it without undue delay. To assess whether insolvency is imminent, it is important to compare the amount of due monetary liabilities and monetary assets. If the difference is more than 1/10 of the debtor's due monetary liabilities "*coverage gap*" and he will not be able to reverse this situation even within 60 days, the debtor is deemed to have become insolvent, and it should take appropriate precautionary measures. One of the measures the debtor can take is the preventive restructuring proceeding.

For the purposes of determining insolvency, monetary assets are:

a) cash,

b) claims on an account, deposit or other form of deposit in a bank or branch of a foreign bank

c) monetary claims, securities and financial instruments maturing within 30 days, where, in the exercise of professional diligence, their due and punctual fulfilment can reasonably be expected,

d) monetary claims, securities and financial instruments not more than 30 days overdue if, in the exercise of professional diligence,

they can reasonably be expected to be duly settled within 30 days of their due date,

e) cash receivables, securities and financial instruments that are repayable on demand (sight), if it is reasonable in the exercise of professional diligence to expect that they would be duly and punctually discharged if they were called for repayment on the following day.

A debtor may initiate a preventive restructuring proceeding provided that there is a chance of preserving and recovery of its business, it is not yet bankrupt and no execution or other enforcement proceedings have been commenced against the debtor to enforce a pecuniary claim. There are two different types of preventive restructuring – public and non-public.

The basic difference is that in a public preventive restructuring, in principle all monetary liabilities can be dealt with (except those of "unaffected creditors", e.g. small creditor with claim in the amount up to EUR 5,000, persons with an employment claim against the debtor, non-monetary creditor, bankruptcy trustee etc.), and in a non-public preventive restructuring only the claims of licensed creditors can be dealt with (for example subject to the supervision of the National Bank of Slovakia or another similar institution abroad i.e., banks and leasing companies.)

- **Process of Public preventive restructuring**

In order to initiate a public preventive restructuring, the debtor must submit an application to the competent court (according to the debtor's registered seat). If the court has approved a public preventive restructuring, the debtor is entitled to reapply no earlier than two years after the end of the preventive restructuring. The most important condition for the authorisation of the procedure is that the debtor must be a legal person registered in the public sector register ("RPVS") already at the time of the submission of the proposal.

The application shall include the restructuring plan attached with measures of a legal and commercial nature, which are designed to avert the debtor's insolvency and to ensure the viability of the debtor's business. The court shall, without undue delay after the authorisation of a public preventive restructuring appoint a creditors' committee for the debtor. The creditors' committee shall have three or five members and shall in particular have the power to comment on the restructuring plan, to determine the acts of the debtor, except acts which do not materially alter the composition of his assets, liabilities or obligations, which are subject to the approval of the creditors' committee or a designated consultant, and to approve those acts.

Consultant

The formality of the process as well as the legal or economic steps to be taken will normally go beyond the activity and the experience of the business or the company itself requires the professional assistance of a consultant. The list of consultants is published on the website of the Ministry of Economy of the Slovak Republic. The company is obliged to use the services of a consultant (with a few legal exceptions) and may choose more than one adviser of its own choice.

The consultant participates in the preventive restructuring, in particular by continuously assessing the current situation of the company, explaining and answering questions from creditors and other parties regarding the situation of the company and the development trend. The consultant is required to act with professional care, carry liability insurance, and is liable for damages for breach of duty under the Act. Agreements that would exclude such liability are prohibited, and those that would

limit it are also prohibited unless approved by the creditors' committee.

After the preventive public restructuring has been authorised, the consultant shall be replaced by an appointed trustee if the debtor or a majority of the creditors so propose or if the debtor is granted temporary protection.

Temporary protection

Together with the application for authorisation of a public preventive restructuring, the debtor may also apply for *"temporary protection"*, which provides time and material space for effective restructuring, this institute is also regulated by the Act. The court may grant the debtor a temporary protection for a period of three months. If the creditors so agree the court shall extend temporary protection for a further three months; the total duration of temporary protection granted may not exceed 6 months.

The creditors who must agree with the granting of the temporary protection are:

- majority of creditors, calculated according to the amount of their outstanding claims; or
- at least 20 % of all creditors, calculated according to the amount of their outstanding claims, and in the concept plan the partial remission of the claim or the recognition of its partial unenforceability does not exceed 20% of any creditor's claim and the deferral of repayment of any claim does not exceed one year.

For the purposes of determining the amount of the claims, the interim accounts which the debtor is required to draw up for that purpose as at a date not more than 60 days have elapsed at the time of the application shall be taken into account, the consents of the creditors of the related claims shall not be taken into account.

The debtor is obliged to limit his activities to acts during the temporary protection, which do not materially alter the composition of his assets, liabilities or obligations (other acts only with the consent of the creditors' committee).

Effects of temporary protection:

a) **active bankruptcy immunity -** The debtor is not obliged to file for bankruptcy proceeding during the temporary protection; this is without prejudice to the information obligation of the debtor's statutory body to inform the court, creditors on the bankruptcy.

b) **passive insolvency immunity -** During the period of temporary protection, the debtor cannot be declared bankrupt or restructured, the proceedings are suspended

c) **relative execution immunity** - no enforcement proceedings can be brought against the debtor (except for statutory claims)

d) **priority of the satisfaction of new and unrelated liabilities** (does not apply to claims of the debtor's employees from employment relations)

e) **temporary impossibility to exercise security rights related to the property of debtor** (does not apply to claims of the debtor's employees from employment relations)

f) **prohibition of set off a related-party claim against the debtor** (related claims of debtor's statutory body, proxy, a person who has a qualifying holding in a legal person - debtor), this equally applies to unilateral set-off or set-off based on an agreement with the debtor.

g) **restriction on change of content and termination of contractual relations -** In case of a default of the debtor which

occurred before temporary protection was granted, the creditor may not (over the duration of the temporary protection) terminate the contract, withdraw from the contract, refuse performance under the contract nor change the content of the rights or obligations under the contract (the exception is a performance by the other party which is not to be used in connection with the ordinary course of the debtor's business)

h) **impossibility to terminate the debtor's financing -** The financing agreed between the creditor and the debtor prior to the providing of a temporary protection cannot be terminated during the temporary protection due to the debtor's failure to comply with the terms of the financial ratios. The debtor cannot draw on the financing agreed before the temporary protection was granted without the approval of the creditors' committee.

i) **suspending of time limits** - The time limits for exercising rights against the debtor, including the time limits for exercising claims arising from contestable legal acts, shall not run during the period of temporary protection.

With consent of the creditors' committee, the debtor may accept crisis financing for the purpose of ensuring the proper operation of its business during the temporary protection period. Such financing shall be deemed to be funds provided up to a maximum of to the extent of six months of the debtor's average monthly operating costs for the preceding calendar year and it may only be used for the purpose of ensuring the proper functioning of the debtor's business during temporary protection.

Obligation to provide information

The debtor's statutory body is obliged to inform the court, the trustee, the creditors' committee and the creditors who gave their consent with granting of temporary protection, and the protection has been granted, without delay in writing of the debtor's bankruptcy occurring during the public preventive restructuring. A debtor may continue a preventive public restructuring even after bankruptcy has occurred.

If the statutory body fails to comply with this obligation, the legal fiction of contractual penalty in the amount of EUR 12,500 and liability for damages against the creditors under the provisions of the Bankruptcy Act arises. Non-payment of this penalty leads to being listed in the Register for Disqualifications, which means that the breaching person cannot be appointed as a statutory body (or its member), member of a supervisory body, branch director or a proxy for a period of three years.

Restructuring plan

The restructuring plan consists of an introductory part with the identification of the debtor, the trustee and the court, a descriptive part and a binding part.

The descriptive part shall include, in addition to the characteristics of the debtor and its financial situation, the expected rate of satisfaction of each of the creditors concerned in the best alternative scenario and the proposed rate of satisfaction of each of the creditors concerned, and a justification of the reasonable prospects of the public plan to avert imminent insolvency and ensure the viability of the debtor's business and an identification of the necessary preconditions for the achievement of that objective.

The binding part shall include a description of how the debtor's property, business or part of the debtor's business is to be disposed of, whether transferred or encumbered or

unencumbered, a description of how new shares are to be issued by the debtor or the person involved, how current shares or new shares are to be disposed of if current shares are to be transferred or unencumbered or new shares are to be issued, the name of the entity providing the new financing to the debtor or the person involved, the terms and conditions of the new financing, and any other agreed-upon details of the new financing.

The contents of the restructuring plan are measures of economic and legal nature, which are intended to avert the debtor's insolvency and to ensure the viability of the debtor's business. Such measures are in particular:

- the restructuring of the debtor's obligations towards the creditors concerned, in particular the postponement or partial remission of their repayment, their security or the modification of their security or their satisfaction otherwise than in cash,
- the restructuring of the debtor's assets, in particular the sale, transfer or encumbrance of the debtor's property, undertaking or part of an undertaking, or the lifting of an encumbrance on the debtor's assets,
- a restructuring of the debtor's capital structure, in particular the sale, transfer or issue of new shares, the amendment of the memorandum, articles of association or other similar documents or the addition to the debtor's capital, or the same measures in the case of a connected person,
- restructuring of the human resources of the debtor's business, in particular the creation or termination of an employment relationship, a change in the terms and conditions of employment or in the conditions of employment,
- restructuring of the management and control of the debtor, in particular the appointment, removal or replacement of a statutory body or a member thereof or of a supervisory body or a member thereof,
- other restructuring measures aimed at averting insolvency and ensuring the viability of the undertaking,
- financing of the restructuring measures.

After the authorisation of a public preventive restructuring, the debtor shall, within 70 days, convene a meeting to approve the restructuring plan, which shall be attended by all creditors claiming to be concerned (i.e. any creditor whose claim arose approximately two months before the filing of the application or the shareholder).

A restructuring plan is approved by the concerned creditors if:

each group of secured creditors has voted in favour of the public plan,

a) in each group of unsecured creditors, at least a three-quarters majority of the voting creditors in that group, calculated on the basis of the number of claims, have voted in favour of the public plan,

b) in each group of unsecured creditors, a majority of creditors with claims exceeding 1 % of the number of claims of the voting creditors in that group, calculated on the basis of the one vote per creditor rule, have voted in favour of the adoption of the public plan,

c) in each group of creditors with related claims and subordinated creditors, a supermajority of the voting creditors in that group, counted according to the number of claims, voted in favour of the adoption of the public plan,

d) in each group of shareholders, a majority of a majority of the shareholders voted in favour of the adoption of the public plan.

If any of the groups does not approve the restructuring plan, the debtor is entitled to seek in a petition for confirmation of a plan by the court, to substitute the consent of the group by a court order.

If the court confirms a restructuring plan, the debtor's statutory body shall enforce the plan and shall refrain from any action that may frustrate or impede the orderly or timely implementation of the plan.

For greater certainty that the debtor will follow the restructuring plan, the plan may specify that a **supervisory administration** is put in place for the duration of its implementation. The purpose of the supervisory administration is to supervise and control the debtor's business activities in order to ensure that the plan will be accomplished. Only a person registered in the list of trustees may be appointed as a supervisory trustee. The notification of commencement and of termination of the supervisory administration shall be published in the Commercial Journal.

(3) Restructuring and Bankruptcy proceedings

According to the Bankruptcy and Restructuring Act No. 7/2005 Coll. there are 2 forms of bankruptcy:

- **Insolvency** - the debtor is more than 90 days late in meeting at least 2 (two) financial liabilities with more than one creditor (in preventive restructuring proceeding when bankruptcy is imminent, the criterion of imminent insolvency is taken into account),
- **Indebtedness -** An indebted person is one who is required to keep accounts, has more than one creditor and the value of his liabilities exceeds the value of his assets.

If the entrepreneur (legal person) finds out that it is bankrupt according to the above criteria, it may decide for formal **restructuring proceedings** and entrust the restructuring trustee with the preparation of a restructuring opinion to determine whether the restructuring requirements and conditions are fulfilled, if not the entrepreneur must file an application for **bankruptcy proceedings**.

The restructuring administrator may recommend **restructuring proceedings** of the debtor if it is reasonable to assume that at least a substantial part of the business of the debtor's business is maintained, and in the case of restructuring proceedings, it is reasonable to assume that the debtor's creditors are more satisfied than in the case of bankruptcy. Restructuring proceedings are a legally and strictly defined process, which is aimed at rescuing a debtor, where the debtor agrees with all creditors to settle their claims and maintains the next operation of the debtor's business including employment, even after the restructuring has ended.

A debtor who is a legal person is obliged to file an application for **bankruptcy proceedings** within 30 days of becoming aware or, with due diligence, could have become aware of its bankruptcy (both in the case of insolvency and in the case of indebtedness). This obligation on behalf of the debtor is equally for a statutory body or a member of the statutory body of the debtor, the liquidator of the debtor and the legal representative of the debtor.

If the statutory body fails to comply with this obligation, the legal fiction of contractual penalty in the amount of EUR 12,500 and liability for damages against the creditors arises. Unless a different amount of damage is proved, the creditor shall be presumed to have suffered damage to the extent that the creditor's claim has not been satisfied after the bankruptcy proceedings have been discontinued for lack of the debtor's assets, the bankruptcy declared on the debtor's assets has been annulled for lack of

assets, or the execution or similar enforcement proceedings against the debtor have been discontinued for lack of assets. A penalty must be enforced by the bankruptcy trustee against a person who has breached his/her obligation to file a bankruptcy petition on behalf of the bankrupt company in due time. Failing to pay the fine carries the same consequences as we have described for breaches of the information obligation in the public preventive restructuring proceedings.

The creditor is also entitled to file a bankruptcy petition if it can reasonably assume the insolvency of its debtor or if the debtor is presumed to be bankrupt due to the publication of a notice in the Commercial Bulletin (e.g. a notice of dissolution of a company, notice of termination of the enforcement proceeding).

In contrast to preventive restructuring proceedings, both the restructuring proceedings and bankruptcy proceedings resolves all of the debtor's claims. Both processes are strict and formal, which require the full cooperation of the debtor itself. For your information, the restructuring process lasts in Slovakia, in general, for one year; bankruptcy usually lasts even several years. In Slovakia, restructuring proceedings used to be unsuccessful, the process does not lead to the debtor's recovery, generally many companies move to bankruptcy, it only prolongs the time and narrows the creditors' satisfaction rate.

The protection of the debtor in both proceedings cover the debtor itself and its assets before all its creditors. Each submitted claim shall be examined by the trustee and compared with the debtor's accounting and list of obligations. In both proceedings, the protection of the debtor lasts during the entire process till its ending by court decisions.

Bankruptcy proceedings as the only one of the mentioned forms of proceedings means the de facto termination of the activity of the legal entity, since after the scope of the application is fulfilled, the deletion from the Commercial register occurs.

Bankruptcy trustee

The conditions and functions of the bankruptcy trustee are regulated by special Act No. 8/2005 Coll. on bankruptcy trustees, which also determines the requirements for the person of the bankruptcy trustee, who will be able to be appointed in particularly difficult bankruptcy or restructuring proceedings.

Only a person who is professionally qualified, has had at least three years of professional practice in law or economics and has passed a trusteeship examination may be a trustee. The trustee has the power of supervision over the debtor, the duty of information to the court and creditors, the duty to examine the debtor's acts and the duty to draw up a written report to be sent to the court.

This overview is for information purposes only.

Under no account can it be considered as either a legal opinion or advice on how to proceed in particular cases or on how to assess them. If you need any further information on the issues covered by this overview, please contact Ms. Kristína Ňaňková (nankova@peterkapartners.sk) or Ms. Nicole Šrolová (srolova@peterkapartners.sk).

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Bankruptcy, Insolvency & Rehabilitation Proceedings in Spain

ILN RESTRUCTURING & INSOLVENCY GROUP

KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER SPANISH LAW

I. INTRODUCTION -REGULATION OF INSOLVENCY OF COMPANIES AND INDIVIDUALS.

We believe that the opportunity to present this article comes at a perfect time as an important reform of insolvency regulation has recently entered into force in Spain.

This regulation is contained in a single text, Royal Legislative Decree 1/2020, of May 5, which approves the revised text of the Insolvency Law ("**TRLC**") which was amended by Law 16/2022, of September 5.

The aim, as stated in the preamble, is to preserve business and the underlying employment, for which purpose the law distinguishes between the insolvency proceeding per se, and what it calls pre-bankruptcy proceeding, which allows the insolvency situation to be dealt without the need to become immersed in the judicial procedure what are the insolvency proceedings.

It should also be noted that after three years of application of the amended referred (by Law 16/2022), the introduction of pre-bankruptcy proceeding has achieved the desired objective of saving profitable companies with financial difficulties by approving debt restructuring plans with their creditors, mostly financial creditors, and avoiding bankruptcy proceedings.

Before going into the most relevant aspects of the regulation, we must take into account that the last reform referred to above has introduced a specific procedure for the so-called "Micro-companies", which are those companies or individuals that, because they comply with certain parameters, the law understands that they must be subject to a special procedure due to their smaller size, reduced in terms of time and costs.

Having said the above, in the following sections we will first analyze the general procedure, applicable to all individuals and legal entities that are not considered as "Micro-companies", including the so-called pre-bankruptcy law.

We will refer later to the most relevant aspects of this regulation in relation to individuals.

And, finally, we will analyze the special procedure contemplated for "Micro-companies".

II. OF THE GENERAL INSOLVENCY PROCEEDING

The insolvency proceeding is regulated by a system of phases, with a first phase called "Common Phase" (Fase Común), and two subsequent phases depending on whether the debtor is viable or not. If the debtor is viable, it will enter the so-called "Agreement Phase" (Fase de Convenio), and if not, the "Liquidation Phase" (Fase de Liquidación).

Likewise, in parallel with the processing of the previous phases, the Law regulates the so-called "qualification of the insolvency proceedings", the purpose of which focuses on analysing whether the insolvency situation has been caused or aggravated as a result of the guilty or negligent actions of the directors.

Regarding pre-bankruptcy law, we will see the so-called "Restructuring Plans".

II.1. Commencement of the insolvency proceeding: declaration of insolvency and effects.

<u>II.1.1. Initiation of the procedure.</u>

From a subjective point of view, any legal

entity or individual that is not included within the concept of "Micro-companies" may file for insolvency proceeding, with the sole exception of entities belonging to the territorial organization of the State, public bodies and entities.

From an objective point of view, only one condition will be required: that the debtor is in a "situation of insolvency", understood as the impossibility of regularly complying with its obligations. However, also the debtor may file for insolvency proceeding not only when such default occurs at the time of filing for insolvency proceeding (current insolvency), but also when the debtor foresees that the default will occur within the following three months (imminent insolvency).

The insolvency proceeding begins with the filing of a lawsuit for insolvency before the Commercial Court of the province where the debtor has the main centre of management and administration of the company.

The lawsuit may be filed by the debtor itself, in which case we will be dealing with voluntary insolvency proceedings, or by the creditors, in which case we will be dealing with necessary insolvency proceedings. The most relevant consequence between the two cases is that, as a general rule, in the case of voluntary insolvency proceedings, the administrative body will be maintained, whereas if insolvency proceedings are filed by the debtor, they will be dismissed and replaced by the Receiver. However, as we have said, this is not an imperative consequence.

Certain legal and financial documents must be attached to the lawsuit, the most relevant of which are as follows:

- The so-called "Legal and Economic Report" in which the debtor must justify its insolvency situation; describe the legal and economic background; identify the administrative body and partners; express the causes of the insolvency; and whether or not it considers the insolvency to be viable;
- A "List of Creditors" in which the debtor shall duly identify each of its creditors, contact details available to him and the specific debt owed and its status;
- An "Inventory of assets and rights" of which it is the owner with the identification, location and value attributed to each of them.

II.1.2. Declaration of the insolvency proceeding.

The insolvency proceeding shall be declared by means of an order issued by the Commercial Court, which shall contain, among others, the following pronouncements:

- The appointment of a Receiver to manage the proceeding:
- The commencement of the "Common Phase", as well as, in the event that the debtor has requested it in the lawsuit for insolvency proceedings, the simultaneous commencement of the "Liquidation Phase"
- An appeal to creditors to communicate their credits.

II.1.3. Effects of the insolvency proceeding.

The main effects of the declaration of the insolvency are produced by legal imperative, and are the following:

- The paralysis of any judicial or extrajudicial execution against the debtor's assets, except for labor executions, public law credits and

secured credits, provided that they are directed against assets or rights that are not necessary for the continuity of the debtor's activity and;

- The suspension of the accrual of any kind of interest, except ordinary interest on mortgage loans and up to the amount of the guarantee

The determination of whether or not the asset or right subject to execution is necessary for the continuity of the debtor's activity is the exclusive competence of the insolvency judge, and only once such declaration of unnecessary nature has been obtained may the execution continue, and only with respect to the three types of credits indicated in the preceding paragraph. For the rest of the credits, the impossibility to initiate executions is absolute.

Having said this, the declaration of insolvency of the principal debtor does not prevent the initiation of claims/enforcement against third party guarantors.

II.2. Processing of the insolvency proceeding.

As mentioned in the introduction, the procedure is structured and developed in three phases, the Common Phase, the Agreement Phase and the Liquidation Phase

Without prejudice to the foregoing, for organisational purposes of the procedure, it should be noted that the insolvency proceeding is divided into six sections within which all the procedure are integrated. Thus, the proceedings pertaining to the common phase are included in Sections 1, 3 and 4, and those relating to the Agreement Phase and Liquidation Phase in Section 5.

Having established the above, in the following points we will first analyze the most relevant aspects of each of the three phases, as it is through them that the bulk of the procedure is carried out, referring finally to section 6, known as "Qualification Section", as this is a very relevant aspect of the procedure whose regulation is outside the three phases mentioned above.

II.2.1. Common Phase: This is the first phase of the insolvency proceeding and its essential objective is to determine the debtor's situation, for which the Receiver must draw up a report containing the following elements:

- An analysis of the "Legal and Economic Report" submitted by the debtor with the lawsuit asking for its insolvency proceeding;
- A statement of the state of the debtor's accounts;
- An explanation of the main decisions and actions taken by the Receiver itself.
- A reasoned statement of the debtor's assets and any other elements that may be relevant to the proceedings.

The report must also be accompanied by an Inventory and a List of Creditors drawn up by the Receiver itself. The List of Creditors will include a classification of the creditors' claims according to their characteristics, which will determine their collection preference and their rights within the Agreement or Liquidation Phase.

Finally, in the case of a company, a valuation must be provided for the company as a whole and for each of the production units that make up the company, both in the hypothesis of continuity of activity and in liquidation.

Once the report has been issued by the Receiver, the creditors and the debtor

himself may object to both the Inventory and the List of Creditors if they do not agree with what is reflected in either of these documents.

In the event that no objections are filed or once those filed have been resolved, the Receiver will make the Inventory and the List of Creditors definitive, which may no longer be subject to variations.

II.2.2. Agreement Phase: The purpose of this phase is to process a payment proposal to creditors.

The proposal may be made either by the debtor or by all the creditors representing one fifth of the debtor's assets.

The filing of the proposal may be formalized at any time from the filing of the insolvency lawsuit and up to 15 days after the presentation of its report by the Receiver.

As for the content of the proposed arrangement, it must include proposals for a debt reduction, a waiting period, or both, as well as the conversion of credits into shares in the bankrupt company or the transfer of assets in payment of debts.

Together with the agreement proposal, a Viability Plan must be presented, specifying the resources with which the payments will be met, which must also be reflected in a Payment Plan that will be provided with the agreement proposal.

The proposed arrangement must be evaluated by the Receiver before being submitted to the creditors for approval at the relevant creditors' meeting.

Depending on the content of the proposal, its approval will require the adhesion (by electronic means) of the majority of the credits or up to 65% of the ordinary credits.

Once the creditors have voted in favour of the arrangement proposal, the judge will review compliance with the corresponding formalities and requirements and, if such compliance is verified, will issue a judgement of approval.

The judgement approving the agreement will entail the cessation of the effects of the insolvency proceeding and the dismissal of the Receiver, which will only be authorized to continue with the processing of any incidents that may be pending and to process the section on the qualification of the insolvency proceeding, which we will refer to later.

II.2.3. Liquidation Phase: Although the objective of this phase is to achieve the liquidation of the debtor's assets with the greatest possible degree of satisfaction for creditors, the truth is that the trend in recent years has been to sacrifice this objective in favour of any operation that allows the business activity and employment to be maintained, which is achieved through the creation of viable production units within the insolvent company.

The opening of the Liquidation Phase may be initiated at the same time as the insolvency proceedings are declared, if the debtor so requests in its claim, and it is then processed simultaneously with the Common Phase, or subsequently when an agreement is not approved or the approved agreement is not complied with. In addition, the debtor may request liquidation at any time, and the Receiver may also do so in the event of total or partial cessation of the company´s activity.

The opening of the Liquidation Phase will entail the dismissal of the company directors, who will be replaced by the Receiver.

Liquidation operations shall be subject to the general rules established by the TRLC, unless the Judge in the insolvency proceeding may establish special rules after hearing the

Receiver,

The general rules of liquidation give priority to the sale of all establishments and production units as a whole and through electronic auction.

In addition, every three months the Receiver must submit a report on the state of the liquidation.

Once the liquidation has been completed, the Receiver must submit a final report with the result of the liquidation and a rendering account of its actuations, together with a request for the termination of the insolvency proceeding.

If the rendering accounts of the Receiver are approved, the judge will issue an order terminating the insolvency proceedings.

II.3 Pre-bankruptcy law. The Restructuring Plan.

The way that the TRLC contemplates saving the insolvency without the need to file for insolvency lawsuit consists of reaching and approving a Debt Restructuring Plan.

This may or may not be preceded by a communication to the Court of the commencement of negotiations with the creditors.

From the moment this communication is made, which may be reserved, two effects will take place:

- The period of three months to try to reach the restructuring plan will begin;
- During the same period, no execution may be initiated or continued on the assets and rights necessary for the continuity of the debtor's activity.

If such an agreement is not reached, the debtor must file for insolvency proceedings within the following month.

Focusing on the Restructuring Plan, its essential notes are the following:

- Its purpose is to modify the composition of the debtor's assets and liabilities or equity;
- It contemplates the possibility of appointing a restructuring expert;
- Extends its affectations to creditors who do not vote in favor of the plan;
- It may affect any type of credit, although with special provisions with respect to public law and secured claims;
- The credits will be grouped by classes according to their insolvency rank and specific characteristics;
- The Plan will be considered approved if more than two thirds of the credits corresponding to each class of credits vote in favor of the Plan;

The Plan must be judicially approved if it is intended to extend its effects to creditors who have not voted in its favor; if it is intended to terminate contracts in the interest of restructuring; or if it is intended to protect any transaction carried out under the Plan (financing granted, etc.) from possible rescission.

During the three years that Law 16/2022 has been in force, introducing restructuring plans, it is worth noting that many Spanish companies have resorted to this method of debt refinancing/restructuring as it is a much quicker process than insolvency proceedings, which, like any judicial procedure, require certain formalities and, above all, much longer deadlines, with the disadvantages that this entails for a company in difficulties.

Likewise, the configuration of restructuring plans through the conformation of classes of credits based on broad and flexible classification criteria, although always based on objective and justified criteria, allows companies room for maneuver to configure these classes of credits in such a way that they can manage to approve restructuring plans and carry forward dissenting liabilities with small percentages of adhered liabilities.

Thus, restructuring plans have been approved with extension of effects to all affected liabilities with adhesion percentages of less than 10% of total liabilities.

Although during these three years of the law's application, few restructuring plans have failed at the first-instance level, it has been the higher courts that have corrected certain abuses, such as the artificial configuration of classes by the debtor the case law has confirmed the criteria applied by the commercial courts, since there is not much room for interpretation of the wording of the rule and it is quite clear that the intended purpose of saving companies with high indebtedness, but which are economically viable and profitable, is being achieved.

II.4. The qualification section.

The purpose of the qualification section is to determine whether the insolvency situation was generated or aggravated by the willful or culpable conduct of its directors, ghost directors or general directors

The qualification phase will be opened at the end of the common phase.

For an insolvency to be classified as guilty, the Spanish Insolvency Law (LC) requires that there has been an aggravation of the willful and / or culpable insolvency of the Debtor, establishing two types of factual assumptions: (i) assumptions that, if concur, determine guilt of the bankruptcy without the need to prove that insolvency was caused or aggravated as a result (called "iure et de iure" assumption) where no proof to the contrary is admissible); (ii) and assumptions that, although they concur, must cause or aggravate the insolvency ("iuris tantum" assumption) and where contrary evidence is permissible. Likewise, the consequences that for the affected persons may derive from the characterization of the contest as guilty are several, from the disqualification to manage assets and rights, to the liability to cover the deficit of assets not satisfied in the insolvency proceeding.

III.INSOLVENCY PROCEEDING OF NATURAL PERSONS

Although there is nothing to prevent natural persons from using the insolvency proceeding referred to in the previous sections, with the necessary differences derived from their status as natural persons (documentation to be provided, shorter processing time, etc.), the fact is that the only reason for individuals to initiate it is that through it they can get their debts discharged.

This is the so-called "Benefit of Exoneration of Unsatisfied Liabilities" ("BEPI"), which is the essential differentiating element in the regulation of the insolvency of natural persons with respect to legal persons, since the latter will not have the option of obtaining such exoneration insofar as, as legal persons, they only are able to approve an agreement and thus continue with their activity, or they are liquidated and extinguished.

Having established the above, in order for a natural person to achieve BEPI the following is required

a) By means of a debt payment plan. This means of exoneration does not require the prior liquidation of the debtor's assets or;

b) When after the liquidation of the debtor's assets there is a continuing insufficiency of assets to satisfy the debts.

In both cases, in order to obtain the BEPI, a series of subjective requirements are established for the personal debtor that focus on his consideration as a debtor in good faith, i.e., not having been declared bankrupt, not having been convicted of crimes against assets, public finances, or against workers in the previous ten years;

In any case, certain credits are not exonerable, among others, those of public law with a limit of up to 10,000€, the credits for alimony, or the expenses and costs for the processing of the bankruptcy.

IV. SPECIAL PROCEDURE FOR MICRO-COMPANIES.

This is the first time that a specific and exclusive regulation for a certain type of company, the so-called micro-companies, has been introduced in the insolvency regulations.

The reason for contemplating this special regulation now is twofold, on the one hand, because most companies that go into insolvency proceedings end up in liquidation, and on the other hand, because the Spanish productive composition is made up of a high percentage of companies that meet the parameters of Micro-companies, which makes it necessary to give them a specific treatment with respect to the rest of the insolvency proceedings in order to reduce the costs of the procedure and its duration in view of the smaller size and complexity of these companies.

The aim is that if a company is viable, the agreement can be approved as soon as possible, and if it is not, it can be liquidated as soon as possible.

Having said the above, the defining parameters of a micro-companies are to have less than 10 employees and a turnover of less than Eur. 700,000 euros or liabilities of less than Eur. 350,000, all according to the annual accounts corresponding to the last fiscal year.

Entering the procedure, any company or individual that meets the parameters indicated in the previous paragraph and is in current, imminent (three months) or probable insolvency (forecast of up to two years) may request the insolvency proceeding, which will be processed through this special procedure.

As mentioned above, this procedure is characterized by the streamlining of procedures by providing for appearances to be made by telematic presence (hearings, appearances, declarations) and acts of communication by electronic means and using forms. However, as a counterbalance to this streamlining of formalities, the submission of seriously inaccurate information or documentation is considered as a cause of guilty insolvency.

As with the general procedure, the Micro-company procedure may or may not be preceded by a negotiation period to try to reach an agreement with your creditors. This period will have a maximum and non-extendable duration of three months after which, without having reached an agreement, the insolvency proceeding must be filed provided that you are in actual insolvency (not if it is imminent or probable).

The main effects of the negotiation period are the suspension of judicial or extrajudicial executions of the assets and rights necessary to continue the activity, except with respect to

public creditors, and the impossibility for creditors to file for insolvency proceeding.

The special procedure for micro-enterprises can be processed in two ways:

a) As a continuation procedure, for which it will be necessary to approve a Continuation Plan that must be approved by the creditors, which must be homologated in order to affect public law claims, with certain exceptions.

In addition, with the application for the Continuation Plan, it is possible to request, among other measures, the suspension of the foreclosure of credits with real or public guarantee on the assets or rights necessary to continue the activity for a maximum period of three months.

b) As a liquidation proceeding, which will be opened at the request of the debtor, when the continuation plan is not approved, homologated or not complied with and, very importantly, if the debtor is not up to date with its tax or Social Security obligations accrued after the opening of the insolvency proceeding.

Also in the liquidation proceedings, certain measures may be requested, the most important of which is the suspension of the execution of secured claims on the assets or rights necessary to continue the activity for a maximum period of three months.

The liquidation will be carried out through the electronic platform system and cannot last more than three months, extendable for an additional month.

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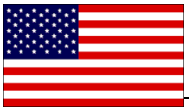

BANKRUPTCY PROCEEDINGS IN THE UNITED STATES

General Overview of the Primary Protection Granted to a Debtor Under the United States Bankruptcy Code

The United States Bankruptcy Code, through its various chapters, governs bankruptcy and reorganization for individuals, corporations, limited liability companies, partnerships, farmers, and municipalities in the United States of America. The Bankruptcy Code is federal law, and it applies in all States of the United States. There are no separate "bankruptcy" laws in the individual States. Most States have their own insolvency, receivership, and assignment-for-the-benefit-of-creditors laws, but they are not as widely used.

Upon the filing of a bankruptcy petition by or against a person or entity (the "Debtor"), section 362 of the Bankruptcy Code automatically creates an injunction ("Automatic Stay") that enjoins all creditors and other parties from commencing or continuing any actions against Debtor to enforce claims and obligations that arose prior to the filing of the bankruptcy petition. The Automatic Stay also enjoins action against the property of the Debtor's estate.

The reach of the Automatic Stay is very broad, and violations of the Automatic Stay may subject the violator to sanctions by the Bankruptcy Court. However, with limited exceptions, the Automatic Stay does not protect persons or entities related to the Debtors who are not debtors themselves, unless the Bankruptcy Court, upon Motion, extends the Automatic Stay to apply to a specific non-Debtor person or entity. The Automatic Stay applies in all bankruptcy cases, unless modified or lifted by the Bankruptcy Court, upon Motion.