RESTRUCTURING IN IBERIA AND LATAM

Key restructuring law takeaways in Spain, Portugal, Chile, Colombia, Mexico and Peru

December 2024

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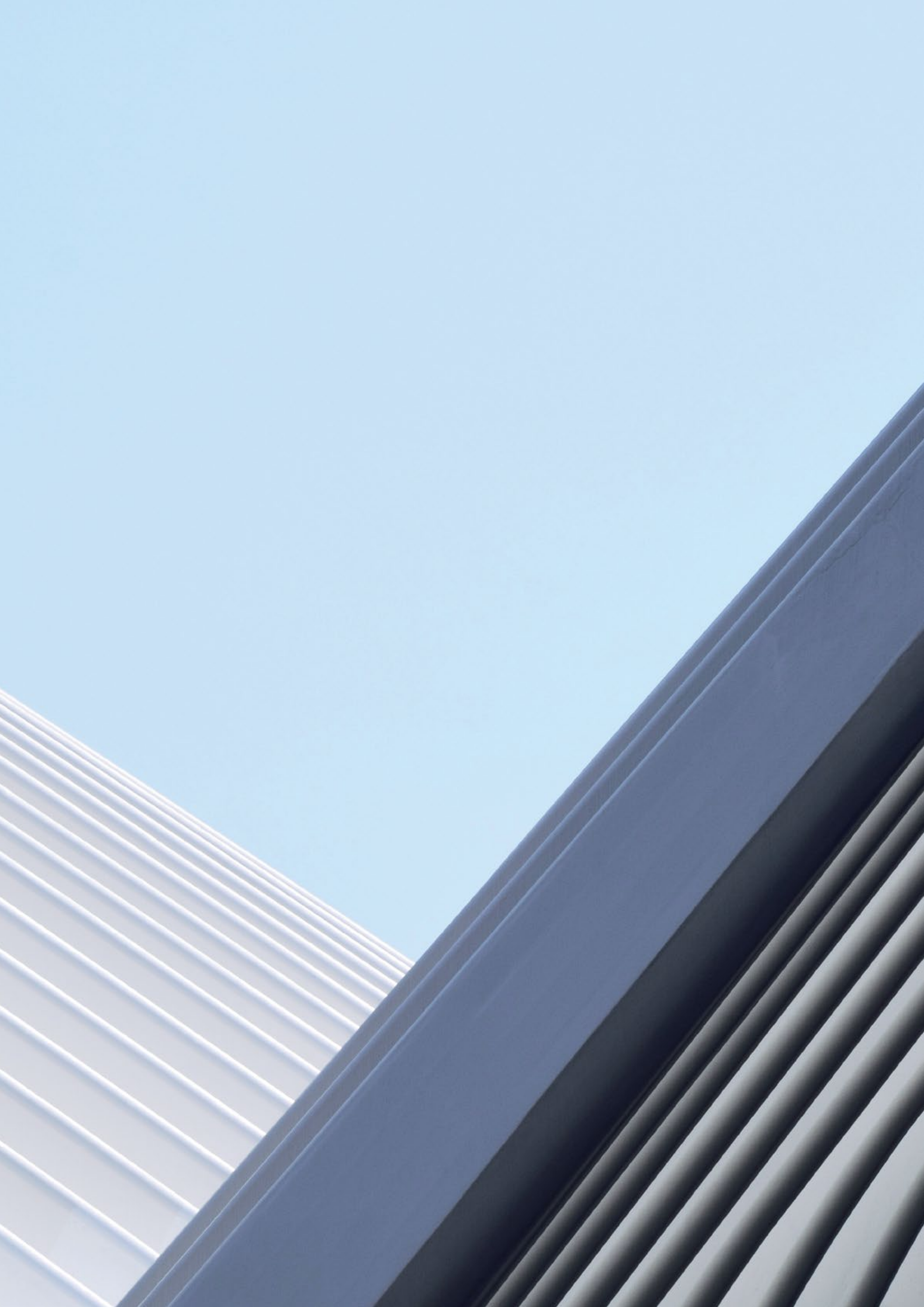


EXECUTIVE SUMMARY

Key takeaways from each jurisdiction

The jurisdictions examined in this document—Spain, Portugal, Chile, Mexico, Colombia and Peru—follow civil law systems with insolvency laws that share some common ground. Debtors and creditors in these jurisdictions face similar challenges when dealing with financial distress scenarios.

Spain and Portugal recently adapted their Bankruptcy Codes to the new EU Directive on Restructurings. The implementation of the Directive in these countries has been a success, based on the number of local restructuring proceedings taking place in both jurisdictions. In Spain, the success has been slightly more significant and two landmark examples are the Celsa and the Codere restructurings. Celsa was the first creditor-led restructuring taking place in Spain that resulted in creditors taking over the steel company after years of distress and restructuring attempts. Codere restructured its capital structure several times under the English scheme of arrangement until the introduction of this reform, which gave the company the tools to do it in Spain. The UK is still an very relevant venue for European companies facing distress, given the predominance of English governed law debt and its combination with the rule in Gibbs. However, with the EU reform, debtors and other stakeholders in the restructuring arena now have more options available in local jurisdictions. In Portugal, the impact of the EU Directive on Restructurings was less significant, but the EU Directive on Restructurings brought some new features, namely regarding protection of new money and classification of creditors.

The situation in the Latin American region is different. In the main jurisdictions, the legal rights of creditors of distressed companies are often based on the statutory classification of their claims, rather than the US approach, where discussions of in-the-money v. out-of-the-money or impairment issues serve as the basis for creditors' rights.

While the trend for European companies, like Portuguese and Spanish ones, to restructure in the UK courts has decreased in the last few years, the trend for companies headquartered in the Latin American region dealing with a distressed situation through Chapter 11 proceedings under the US Bankruptcy Code is increasing. All the jurisdictions analyzed have local proceedings to deal with bankruptcy and reorganization. However, in the Latin American region, some complex restructurings with foreign creditors are still taking place in the US. In each country, there are different drivers leading to a Chapter 11 filing, but there is some shared common ground:

- Access to the US DIP financing market.
- Case law providing legal certainty for the outcome of the restructuring.
- Responsiveness and access to fast proceedings.
- International recognition.
- Possibility to anticipate distress.
- Creditors feeling more comfortable with US proceedings.

In this analysis, we focus on Spain, Portugal, Chile, Mexico, Colombia and Peru, and each of these countries have their own systems and features, but we have put together a comprehensive foreign-investor-friendly analysis that may give a sense of how each of the different systems work in comparison with the US Chapter 11. We have also collected data with our local experts and our New York office to help explain the current market and the difficulties (or opportunities) in each of our jurisdictions.

Chapter 11 comparisons

We summarize below some of the main features of a Chapter 11 crossborder proceedings and highlight whether these tools are available in the local jurisdictions analyzed:

	SPAIN	PORTUGAL	COLOMBIA	CHILE	MEXICO	PERU
RECOGNITION	EU rules on COMITY	EU rules on COMITY	✓	✓	✓	Limited
ABSOLUTE PRIORITY RULE	✓	✓	Limited	Limited	Limited	Limited
ABILITY TO CRAMDOWN EQUITY	✓	✓	X	X	X	X
CREDITOR-LED PLANS	✓	X	X	X	X	✓
DIP FINANCING	Limited	Limited	Limited	Limited	Limited	X
SUBORDINATION	✓	✓	✓	✓	✓	✓
FIDUCIARY DUTIES	No statutory modified rule	No statutory modified rule	No statutory modified rule	No statutory modified rule	No statutory modified rule	No statutory modified rule

SPAIN

Summary of restructuring tools available in Spain

The Texto Refundido de la Ley Concursal is the legal framework for insolvency and pre-insolvency proceedings in Spain. It regulates several processes, including a type of 363 sale process, but has two main types of processes:

- *Concurso*
- *Reestructuración* (a pre-insolvency reorganization process)

The ***concurso*** has been the traditional insolvency tool available under Spanish law. It is a free-fall bankruptcy proceedings that leans towards liquidation unless an agreement is reached with creditors within a certain timeframe. This tool is still being used for Spanish 363 sales (business units sales) and for liquidations, but its use for reorganization purposes is currently very limited.

The incorporation of the European Union Directive on Restructuring into the Spanish *Texto Refundido de la Ley Concursal* has changed the legal framework for distressed companies. It includes a pre-insolvency proceeding—**the Spanish *Plan de Reestructuración***—that allows debtors to reorganize efficiently and creditors to propose plans to restructure distressed companies.

While statutorily there is only one pre-insolvency process (the execution of a restructuring plan and subsequent court approval (*homologación judicial*) of that plan), the process varies depending on the consensus reached in a previous negotiation stage and the need for cramming down non-consenting classes:

Fully consensual restructuring plans

These are restructuring plans where 100% consensus has been reached before seeking court approval. Only impaired creditors need to agree, and that the statute allows to impair only a perimeter of the capital structure, leaving out other creditors based on commercial considerations. This makes it easier to get a high level of agreement and, if properly justified, leaves out claims where there might be a higher level of holdouts (e.g., commercial creditors).

In addition, fully consensual Spanish restructuring plans have also been achieved through more complex methods:

- By using parallel processes (e.g. a scheme of arrangement in the UK) where any dissenting creditors are crammed down in proceedings in a foreign court. Once the holdouts have been crammed down through those foreign court proceedings, the Spanish restructuring plan is filed with full agreement (as the foreign proceedings have compelled the full consent). This is particularly important for capital structures with debt governed by English law, which must go through an English process because of the rule in Gibbs.
- By seeking agreement through consent solicitations in notes, where the necessary thresholds of agreement are reached as specified in the relevant agreements.

Non-consensual restructuring plans:

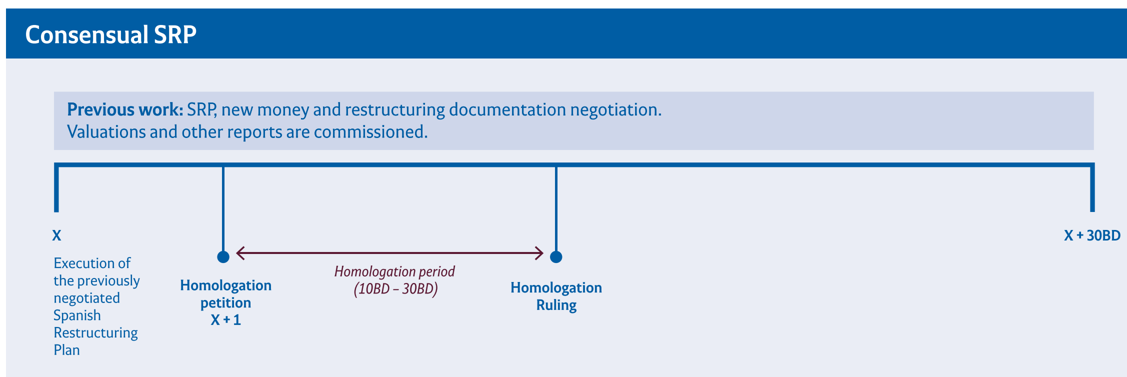
A full free-fall Spanish restructuring plan is rare because it requires a high of support (debtors usually file with the support of creditors representing a majority needed to approve a restructuring plan). However, it is not unusual for a debtor, with the support of an ad hoc group representing a significant majority of the affected debt to enter into a restructuring plan and seek court approval for it.

A restructuring plan can even be approved with just one consenting in-the-money class. In these cases, cross-class cramdown is available if certain strict requirements are met.

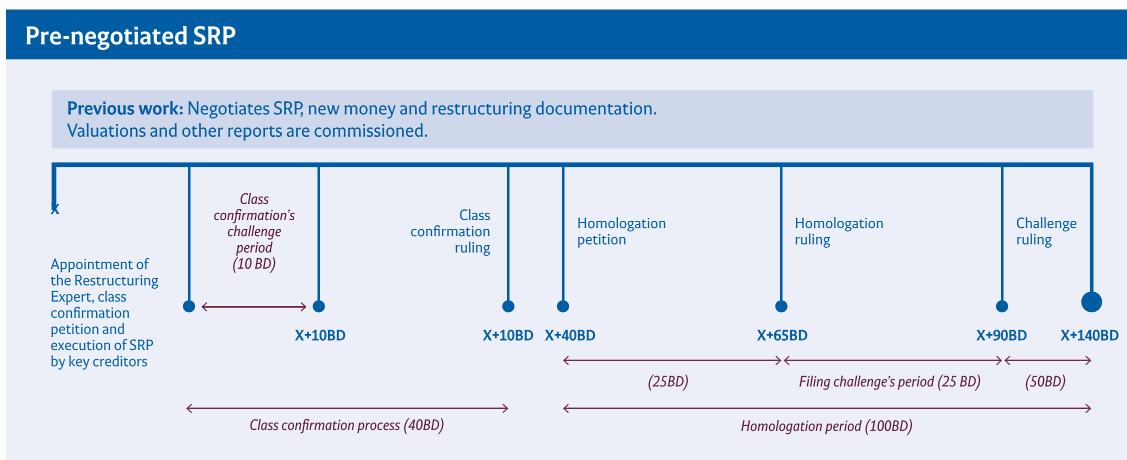
The bar is lower in cases where there is no need for cross-class cramdown or in cases where the majority of classes support the plan.

This document focuses on pre-insolvency tools, as they are currently the methods used most to restructure a Spanish debtor. Below is a summarized timeline of both pre-insolvency processes:

Consensual route



Non-consensual route



What to expect in Spanish proceedings compared to Chapter 11

Entry test

Spanish pre-insolvency tools are available only to debtors who are **(i)** likely to become insolvent; **(ii)** about to become insolvent (within three months) or **(iii)** already insolvent. The new aspect here is the likelihood of insolvency, meaning a Spanish restructuring can be filed if the company could become insolvent within the next two years (likelihood).

Debtor-in-possession

During the proceedings, the company continues to run its operations. However, under the law, the court can appoint a restructuring expert to assist the company and its creditors reach an agreement.

The appointment of an expert is mandatory in certain situations:

- When requested by the debtor.
- When requested by creditors representing more than 50% of the debt affected by the restructuring plan.
- When a stay of individual enforcement is requested and the judge finds it necessary.
- In the event of the cramdown of shareholders.
- In the event of class cramdown/cram up.

Outside of these situations, appointing the restructuring expert is optional. It gives an appearance of neutrality to certain documents and valuations, which the court can consider.

Automatic stay

In addition to the automatic stay that happens when bankruptcy proceedings are filed, there is also a stay for pre-insolvency proceedings in order to facilitate negotiations between stakeholders.

By notifying the court that it has started negotiations with creditors, a company can request this stay. It allows for an automatic stay before filing the homologation petition, with the aim of protecting negotiations with creditors.

The initial stay lasts for three months and can be extended at first by another three months and then by one additional month. This stay prevents creditors from filing a mandatory insolvency petition and can also suspend the debtor's voluntary insolvency petition.

Contracts

It is possible to amend or terminate executory agreements in the interest of the restructuring process.

Compensation arising from the termination or amendment of these agreements may be affected by the restructuring plan.

This is feature introduced recently into the law could lead to more Chapter 15 proceedings in the US in the future due to recognition and enforcement issues for US counterparties.

Class formation

The law provides an open criterion for grouping creditors into different classes based on their "common" interests. Generally, a class is formed by claims with the same insolvency ranking, but there are exceptions based on several criteria.

If a challenge to the approval (*homologación*) of the Spanish restructuring plan is successful due to wrong class formation, the plan becomes ineffective for all creditors.

Exclusivity and creditor led plan

A Spanish restructuring plan can be filed by either debtors or creditors. However, if creditors file a plan and the debtors are only "likely to become insolvent" rather than "actually or imminently insolvent," dissenting shareholders will not be bound by the plan. Creditor-led plans have been successfully tested (e.g., in the *Celsa case*) and the court may relax formal requirements if the debtor is uncooperative.

Cramdown and cram up

The Spanish Insolvency Act allows for the extension of the plan's effects to different classes of creditors (cross-class cramdown), including senior creditors (cross-class cram up) under a Spanish restructuring plan sanctioned by the court (*homologación*).

Under certain conditions, the effects of the *homologación* can also be extended to the debtor and dissenting shareholders. However, this extension of the effects to shareholders is not allowed if the company is only likely to become insolvent (it can be imposed if the company is imminently or already insolvent).

Dissenting creditors have certain safeguards: they must comply with the best-interest creditors test (BIC, understood as the liquidation quota) and the absolute priority rule (APR, subject to exceptions if required for the company's viability and if harm to the affected claims is justified). These safeguards can be challenged.

The cram up of dissenting classes:

- will be approved if the majority of classes vote in favor of the plan, provided that at least one of the accepting classes is a secured class; or
- will be approved if at least one class votes in favor and that class is in-the-money.

DIP financing, recharacterization, equitable subordination and clawback

When new financing is provided or there is a re-take of security , creditors face risks such as recharacterization, subordination and clawback actions.

However, a Spanish restructuring plan approved by the court offers protection for interim financing during the negotiation period and for the new money necessary to comply with the plan.
These protection mechanisms are:

- claw-back protection; and
- insolvency payment waterfall protection (50% administrative expense (*crédito contra la masa*), 50% general privileged credit) if affected claims represent at least 51% of the debtor's total liabilities.

Additionally, new money or interim financing granted by specially related persons (e.g., shareholders or related parties) may benefit from these protections if the affected claims represent more than 60% of the debtor's total liabilities.

Best interest test and absolute priority rule

To protect holdout creditors, the best interest test must be observed, and the absolute priority rule must also be respected (exceptions can be made if necessary for the company's viability and if the harm to affected claims is justified). For the best interest test, the post-restructuring situation is compared to the liquidation quota.

Both rules can only be reviewed later if there is objection or challenge.

Ability to pursue a restructuring under Chapter 11 or a scheme of arrangement

Recognition

In terms of recognizing insolvency proceedings, European countries such as Spain follow Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20, 2015. This regulation aims to prevent forum shopping, stating that it is necessary for the proper functioning of the European Union market to avoid incentives for parties to transfer assets or judicial proceedings from one country to another, for a more favorable outcome. The regulation requires that the main insolvency proceedings must take place in the EU member state where the debtor has the center of its main interests ("COMI").

The center of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. Additionally, there is a presumption that the place of the registered office is located is the center of main interests in the absence of proof to the contrary.

In practice, unless COMI can be evidenced to be somewhere else, recognition of main proceedings such as UK proceedings or Chapter 11 proceedings of Spanish debtors would not be recognized in Spain. To deal with this recognition issue, debtors avoid requesting the recognition of foreign main proceedings. Instead, they set up parallel main proceedings in the local jurisdiction.

Key challenges for successful foreign main proceedings

Effective recognition

One of the main challenges for successfully handling foreign main proceedings of a Spanish debtor is getting them recognized.

To address this, parallel proceedings are usually put in place. This approach has been seen in major cases such as Lecta, a Spanish paper manufacturer. Parallel proceedings are restructurings that involve coordinating foreign main proceedings (usually, an UK proceeding) is put in place in coordination with a Spanish Restructuring Proceeding.

The UK proceedings can achieve the impairment of English law governed debt and the extension of haircuts or other restructuring measure to dissenting creditors of such indebtedness. To ensure that these proceedings are recognized in Spain (especially important after the UK left the European Union), a Spanish restructuring plan that matches the UK plan is put in place and approved by the Spanish courts. This plan not only helps with recognition, but it can also achieve other objectives in connection with new money or interim financing as discussed below.

Director's liability and obligation to file

Regarding directors' liability, Spanish company directors must file for bankruptcy if the company is insolvent within two months from the moment they are aware of such insolvency situation. If they fail to do so, they can be held personally liable.

This obligation to file can put pressure on directors during negotiations with creditors that are trying to avoid a bankruptcy filing in Spain through foreign proceedings. The pre-insolvency stay that can be petitioned to the Spanish judge is a very useful tool in these scenarios as it also stays the obligation to file.

New money: recharacterization, clawback and subordination

When a restructuring involves new funding, interim financing, rolling over debt into new instruments, or converting debt into equity, creditors risk clawback or subordination if the company files for bankruptcy in the near future.

As discussed above, a Spanish Restructuring Plan provides a safe-harbor for carrying-out these transactions if certain majorities are achieved; however, a foreign proceeding would not provide these protections.

However, parallel proceedings can obtain afford these protections. A restructuring carried out in a venue other than Spain that is subsequently mirrored in a Spanish Restructuring Plan can obtain the protections afforded by the Spanish statute and shield the transactions made in the context of the restructuring from future bankruptcy proceedings.

Recent crossborder cases with Spanish debtors

	Year	Brief summary
CODERE	2020	Scheme of arrangement of the Spanish betting company, Codere filed in October 2020. This company has been restructured several time under scheme of arrangements in the UK (the last one is the one referenced in here) but has successfully restructured itself in 2024 through a Spanish Restructuring Plan for the first time.
Haya Real Estate	2022	The Spanish real estate company also restructured its liabilities through an English scheme of arrangement in June 2022. For recognition purposes, the company also filed a Spanish Restructuring Plan and, during its negotiations, filed a request for a stay in Spain.
Lecta	2023	The Spanish paper company filed an English Scheme of Arrangement that included the release of existing senior notes and their replacement with notes with longer maturities. For recognition and protection purposes, the company also filed a Spanish Restructuring Agreement in 2023.

PORTUGAL

Summary of restructuring tools available in Portugal

Under Portuguese law, there are two main types of restructuring processes:

(i) "Special Revitalization Proceedings" ("**PER**"), a judicial route

(ii) "Out-of-Court Recovery Proceedings" ("**RERE**"), an extrajudicial route

In both cases, the debtor must be in a difficult economic situation or in an imminent insolvency situation (but still recoverable).

The PER is a procedure established in the Portuguese Insolvency and Restructuring Companies Code ("**Portuguese Insolvency Code**"), which is partially based on the concept of Chapter 11.

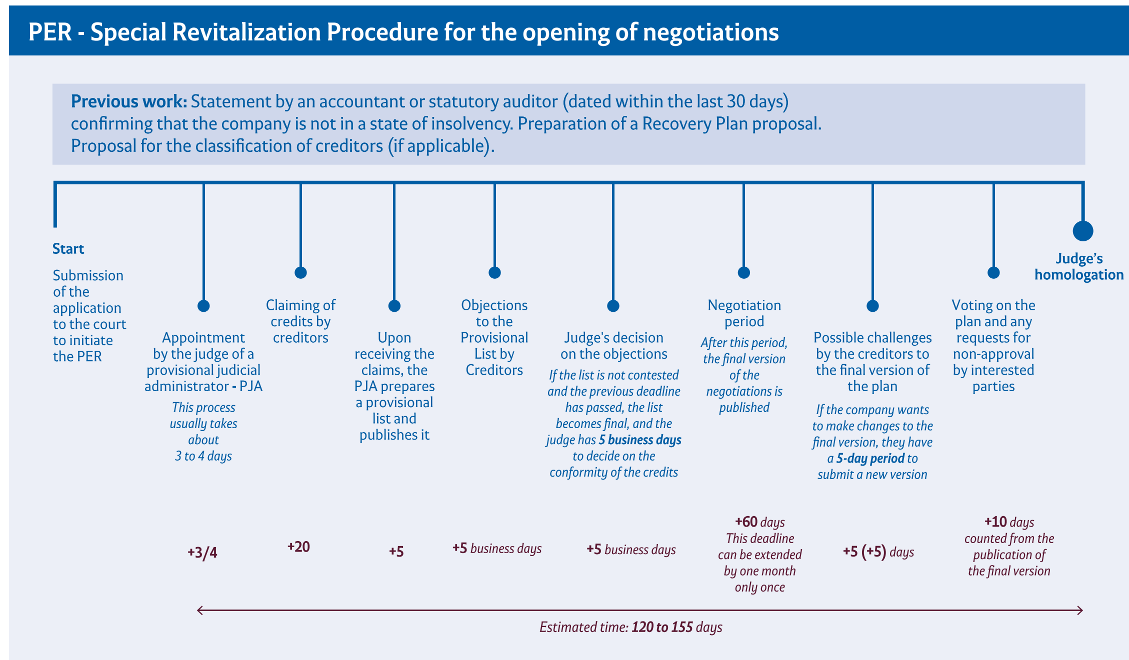
The legislator established two types of PER: one for opening negotiations and the other for approving out-of-court agreements.

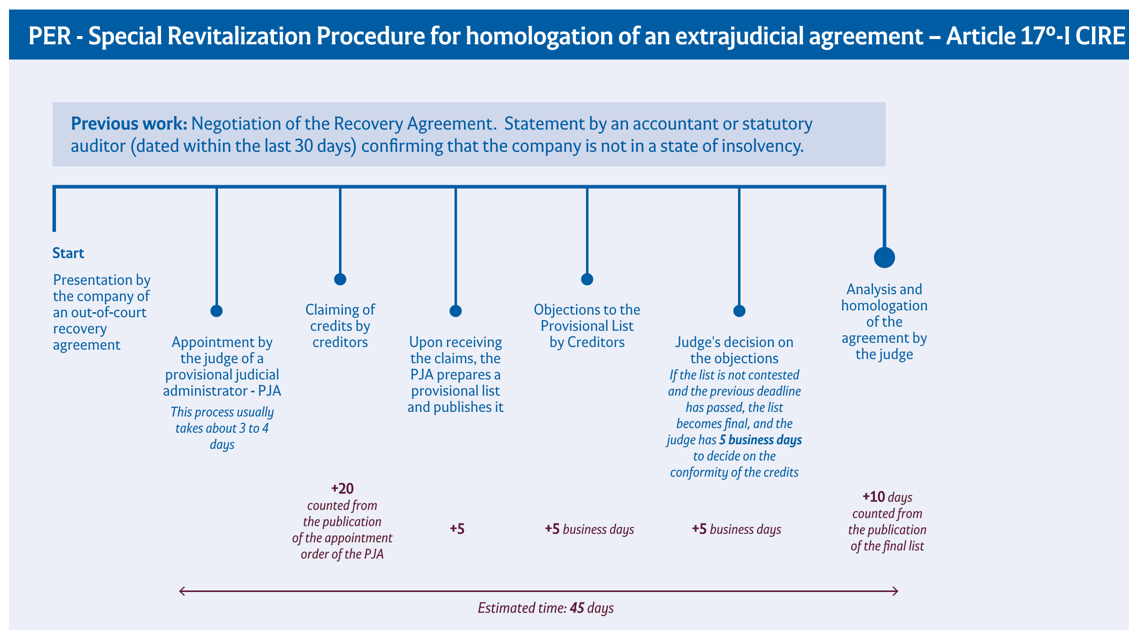
In a PER **for opening of negotiations**, the debtor together with a creditor or creditors who hold, at least, 10% of non-subordinated credits, present an application for the commencement of the PER, together with a proposal for a recovery plan; a judicial administrator is then appointed and all creditors are invited to participate in the ongoing negotiations and must claim their credits within the proceeding; Participants must conclude the negotiation process within two months, that can be extended by one month; Once the negotiations are concluded with the approval of the recovery plan by the creditors, the agreement shall be sent to the court for homologation or refusal, accompanied by the judicial administrator's informed and reasoned opinion as to whether the plan presents reasonable prospects of avoiding the insolvency of the company or ensuring its viability.

Alternatively, the Portuguese Insolvency Code provides a swifter PER process - **for approving an out-of-court agreement**. Here, the debtor has already reached an agreement with the relevant majority of its creditors, which implies the absence of a negotiation process within the PER. Credits are also claimed and recognized in the process. Once there is a definitive list of credits, the judge must appreciate and homologate or refuse the extrajudicial agreement within ten days.

The RERE is an out-of-court procedure without a universal scope. The company and creditors, representing at least 15% of the company's liabilities (non-subordinated), sign a negotiation protocol and deposit it with the Commercial Registry Office. As a voluntary procedure, the debtor can choose which creditors to involve in the negotiations, but all creditors may join the negotiations and approve the restructuring agreement. The negotiations must be completed within three months from when the protocol was filed. The negotiations, the protocol, and the restructuring agreement are generally confidential, but the tax authorities, social security and employees should be informed of the negotiation protocol if they have claims.

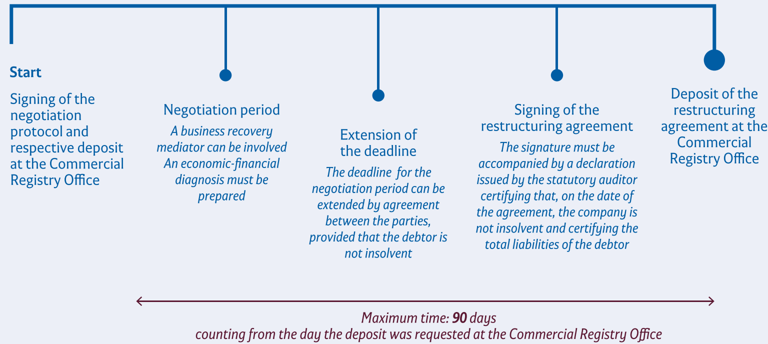
Below is a summarized timeline of both processes:





RERE - Out-of-Court Recovery Proceeding

Previous work: Prior contact with creditors. Preparation of the negotiation protocol. Preparation of detailed liabilities list. Statement by a certified accountant or statutory auditor that the debtor and creditors who wish to subject the negotiations to the RERE represent at least 15% of the debtor's non-subordinated liabilities



What to expect in Portuguese proceedings compared to Chapter 11

Debtor-in-possession

During the restructuring proceedings, the company remains in charge of its operations.

However, in the PER process, a provisional judicial administrator is appointed, who oversees procedural aspects (such as receiving creditor claims), assists the debtor in negotiations with creditors, carries out the company's administration during the proceedings, and must authorize any acts of special relevance to ensure they are invalid.

In the RERE, after filing the negotiation protocol, the debtor should not carry out acts of special relevance, unless they are provided for in the protocol or authorized by all creditors.

Insolvency test and entry test

Eligibility for both PER and RERE depend on the debtor being in a difficult economic situation or facing imminent insolvency, but still having a chance of recovery.

A difficult economic situation is defined in the Portuguese Insolvency Code as when the debtor has serious difficulty complying with its obligations on time, often due to lack of liquidity or difficulty obtaining credit.

Imminent insolvency means there are circumstances that have not yet led to full insolvency, but are likely (with all probability) to lead to full insolvency soon, because the debtor lacks sufficient net and available assets to meet liabilities.

To access the above restructuring tools, the debtor must not be fully insolvent.

Insolvency is defined in the Portuguese Insolvency Code as the debtor's inability to pay debts when they are due (*cash flow test*). For legal entities, insolvency also occurs when the debtor's liabilities clearly exceed its assets according to the applicable accounting criteria (*balance sheet test*).

Automatic stay

In the PER process, from the date the judicial administrator is appointed and for four months, which can be extended by an extra month (the "**Standstill Period**"), the follow rules apply:

- No new enforcement actions can be taken against the debtor for its debts and any ongoing legal actions with these are suspended, except for actions relating to labor claims.
- Any previous insolvency procedures against the debtor (if insolvency has not been declared) and any procedures requesting the debtor's insolvency are also suspended.
- All statute of limitation periods for legal claims against the debtor are suspended.

In the RERE process, once the negotiation protocol is filed with the commercial registry, the following rules apply:

- Insolvency procedures against the debtor are frozen, provided insolvency has not been declared and the procedure has been brought by an adhering creditor.
- Enforcement proceedings brought by the adhering creditors are stopped.

Contracts

Pursuant to the Portuguese Insolvency Code, a clause ascribing to the request for opening of a PER, to the opening of a PER or to the request for (or granting of) extension of the standstill, the effect of a termination condition or the basis for a right to compensation, termination or repudiation of the contract by the counterpart is null and void. There is no such protection against *ipso facto* clauses in respect of the RERE.

In the PER, during the Standstill Period, essential enforceable contracts cannot be suspended, modified or terminated against the debtor's interest based on nonpayment. This includes contracts for essential public services and any recurring contracts necessary to the debtor's business.

In the RERE process, once the negotiation protocol has been filed with the commercial registry, essential service providers cannot stop providing their services given before the filing, even if they are not parties to the negotiation protocol.

Class formation in the PER

The Portuguese Insolvency Code provides, in respect of the PER, for the classification of creditors into different classes (other than the legal criteria of secured, privileged, common, or subordinated) in accordance with the criteria of *existence of sufficient common interests* (for instance, employees, shareholders, banks or financing entities, suppliers and service providers, and public creditors).

This alternative classification is only mandatory for large companies, i.e., companies that employ 250 or more people and have an annual turnover exceeding €50 million or an annual balance sheet total over €43 million.

Exclusivity and creditor led plan

The debtor must be involved in both restructuring proceedings.

A PER is opened at the request of the debtor together with, a creditor or creditors who, not being especially related with the debtor, hold, at least, 10% (which may, in certain cases, be reduced to 5%) of the non-subordinated credits.

For a restructuring agreement under the RERE process, a negotiation protocol must be signed and filed with the commercial registry by the debtor and creditors representing at least 15% of the company's liabilities (non-subordinated).

Cramdown

In the PER, once the court approves the recovery plan, it applies to all creditors, even those that did not take part in the negotiations. This means the cramdown of dissenting creditors. However, the court approval requires meeting several conditions, such as ensuring that creditors in the same class are treated equally and proportionally to their credits, that dissenting classes are treated at least as favorably as any other class of the same level and more favorably of any other class of a lower level, and that creditors are in a better position than they would be in a liquidation scenario if any creditor objects on that basis).

The RERE does not allow for a cramdown of dissenting creditors; it only affects the participating creditors.

DIP financing and clawback or equitable subordination

PER

The Portuguese Insolvency Code provides for protection against claw-back for the guarantees and security agreed between the debtor and its creditors during the PER, which aims to provide the debtor with the necessary financial resources required to continue their business operations.

To protect new funding, creditors who finance the company's activity, during the PER or while implementing a recovery plan, have a priority claim on the insolvent estate of up to 25% of the company's non-subordinated credits on the date of the insolvency declaration, if this declaration occur within two years.

Credits arising from this financing also benefit from a general movable credit privilege, even over the general movable credit privilege granted to the employees, for amounts exceeding 25%. This priority extends to claims arising from financing granted when implementing the recovery plan by shareholders and any other especially related persons (whose claims are typically subordinated).

It is forbidden to challenge by means of avoidance suits ("*impugnação pauliana*") any financing granted during the PER or in the implementation of the recovery plan, as well as to declare them null and void or unenforceable.

DIP Lenders are also protected from any civil, administrative, or criminal liability on the grounds that the financing is detrimental to all creditors, unless the law states otherwise.

RERE

Any fresh money and attached guarantees/security referred to in the RERE restructuring agreement or in the negotiation protocol are also ring-fenced from claw-back actions, provided:

- they are not used by the debtor for the benefit of the financing entity or any especially related entity; and
- a statutory auditor issues a statement declaring that the restructuring agreement covers at least 30% of the debtor's total unsubordinated liabilities, improves the debtor's financial situation and increases the debtor's equity above its share capital.

Ability to pursue a restructuring under Chapter 11 or a scheme of arrangement

Recognition

Portugal, like other European countries, follows Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20, 2015.

This regulation allows Portuguese courts to start insolvency proceedings (or insolvency-type proceedings, such as the PER) if the center of the debtor's main interests, or its registered office, is in Portugal. The center of the debtor's main interests is where the debtor regularly manages its interests, and this is clear to third parties.

Under Portuguese insolvency law, a declaration of insolvency (or insolvency-type proceedings, such as the PER) of a company by a foreign Court that is competent in light of the debtor having in that jurisdiction the center of its main interests will be recognized in Portugal, unless the foreign court's jurisdiction is not founded on any of the criteria set forth in article 7 of the Portuguese Insolvency Code (registered seat of the company, center of its main interests, or equivalent connection) or if the recognition leads to a result that is clearly contrary to the fundamental principles of the Portuguese legal order.

However, should the foreign jurisdiction be situated outside of the EU (where Regulation (EU) 2015/848 would grant automatic recognition), a control procedure is necessary. An application for recognition can therefore be lodged before the competent insolvency Court, at the request, for instance, of the foreign insolvency practitioner, and is mainly of a formal confirmation nature, regarding the requisites set forth in the previous paragraph.If the debtor's COMI is based in Portugal and the Portuguese courts are competent to handle these cases, it would be difficult to recognize the foreign proceedings under the given criteria. In any event, parallel proceedings may be put in place for Portuguese companies, such as implementing the restructuring in Portugal.

Key challenges for successful foreign main proceedings

Director's liability and obligation to file

Under the Portuguese Insolvency Code, directors are obliged to file for insolvency within 30 days from the date they become aware, or should have become aware, of the insolvency situation.

The law assumes that the directors should know if the company is insolvent if it fails to meet its obligations to the tax authorities, social security, employees, or lease contracts for three months.

If directors do not file for insolvency on time, it is assumed (although this can be refuted) that they have committed serious wilful misconduct, which can lead to the insolvency being classified as aggravated or culpable, which could have several consequences for the director.

The PER process removes the director's duty to request insolvency. Likewise, if the debtor becomes insolvent during a RERE process, the time limit to request insolvency only begins after the negotiations end.

However, a foreign procedure does not remove the duty to request insolvency. Unless there is a parallel PER or RERE process in Portugal, this could jeopardize the foreign restructuring process.

New money: recharacterization, clawback and subordination

Under the Portuguese Insolvency Code, the declaration of insolvency gives rise to the automatic claw-back actions of:

- granting security for existing obligations, or others that replace them, within six months before the insolvency proceedings start;
- Giving personal guarantees, sub-guarantees, sureties and credit mandates within six months before insolvency proceedings start, if they do not provide a real benefit the insolvent entity; and
- granting security at the same time as creating secured obligations within 60 days before the insolvency proceedings start.

In addition to such automatic claw-back actions, any actions taken or omitted within the two years before the insolvency proceedings may generally be subject to claw-back if they are harmful to the insolvency or were done in bad faith.

- The PER and RERE provide protection against these claw-back actions.
- The PER also provides extra protections for new money.
- Foreign procedures would not provide these safeguards.

Tax benefits

A recovery plan approved under a PER and a restructuring agreement approved under a RERE (in the latter case, covering credits corresponding, at least, to 30% of the total non-subordinated liabilities of the debtor) benefit from certain tax advantages. The measures agreed upon in the recovery plan/ restructuring agreement, such as debt write-off, debt rescheduling and granting of new security or financing, do not trigger immediate tax liabilities, with net asset variations related thereto not being considered for the tax base and an exemption on stamp duty.

In case the restructuring procedure is made abroad, there is a relevant tax impact of the restructuring measures, given that they would not benefit from the referred specific tax regime provided for in respect of the PER and the RERE.

Effective recognition and parallel proceedings

To successfully implement a restructuring plan for a group of companies that includes companies based in Portugal, it is advisable to implement a parallel restructuring process in Portugal while restructuring proceedings are ongoing in a foreign country. This would also address the other challenges that might arise.

Recent crossborder cases with Portuguese debtors

	Year	Brief summary
Perufish	2022/2023	Restructuring of the debt of Perufish group, a Peruvian fishery, pursuant to an English law restructuring plan under Part 26A of the Companies Act 2006, based on a holding structure involving a Portuguese company.
Efacec Group	2023	In the context of the acquisition of Efacec Group by Mutares (a German-based holding company), filing for out-of-court restructuring (RERE) in Portugal for two companies of Efacec Group (holding subsidiaries in other jurisdictions) for the purposes of restructuring and payment of the existing debt.
Tupperware	2024	Several companies of Tupperware group filed for Chapter 11 in the United States Bankruptcy Court for the District of Delaware. The case is ongoing and the impact on, and restructuring path for, the subsidiaries in Portugal is still unclear.
INAPA	2024	Filing for insolvency of Portuguese paper merchant INAPA and its subsidiary in Germany, with impacts in the activity of other subsidiaries of the group in Portugal (with the Portuguese operational company having filed for restructuring through PER) and other European countries.

CHILE

Summary of restructuring tools available in Chilean proceedings

The *Ley de Insolvencia y Reemprendimiento* is the main law for restructuring in Chile. It regulates several types of insolvency proceedings, including restructuring and liquidation. This chapter focuses on the two restructuring processes:

- *Procedimiento de reorganización concursal* (judicial reorganization process); and
- *Acuerdo de reorganización extrajudicial* (out-of-court reorganization process).

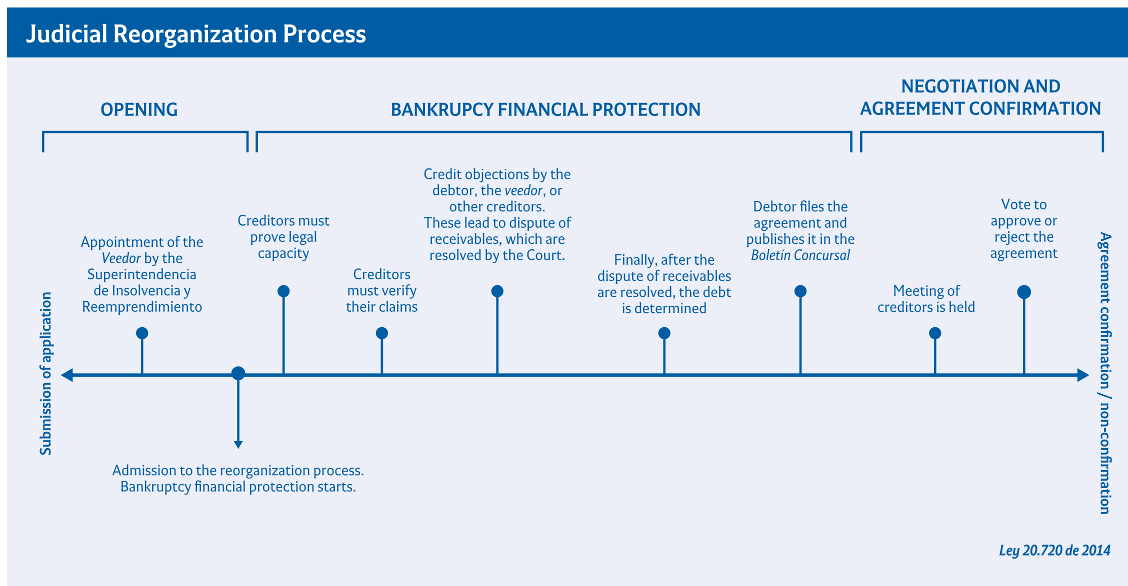
Both processes aim to restructure the liabilities of a debtor in an insolvency situation. While the law allows the start of both processes in case of insolvency, Chilean law does not have mechanisms to control the insolvency status of the petitioner; e.g., denying relief if the petitioner is found not to be insolvent.

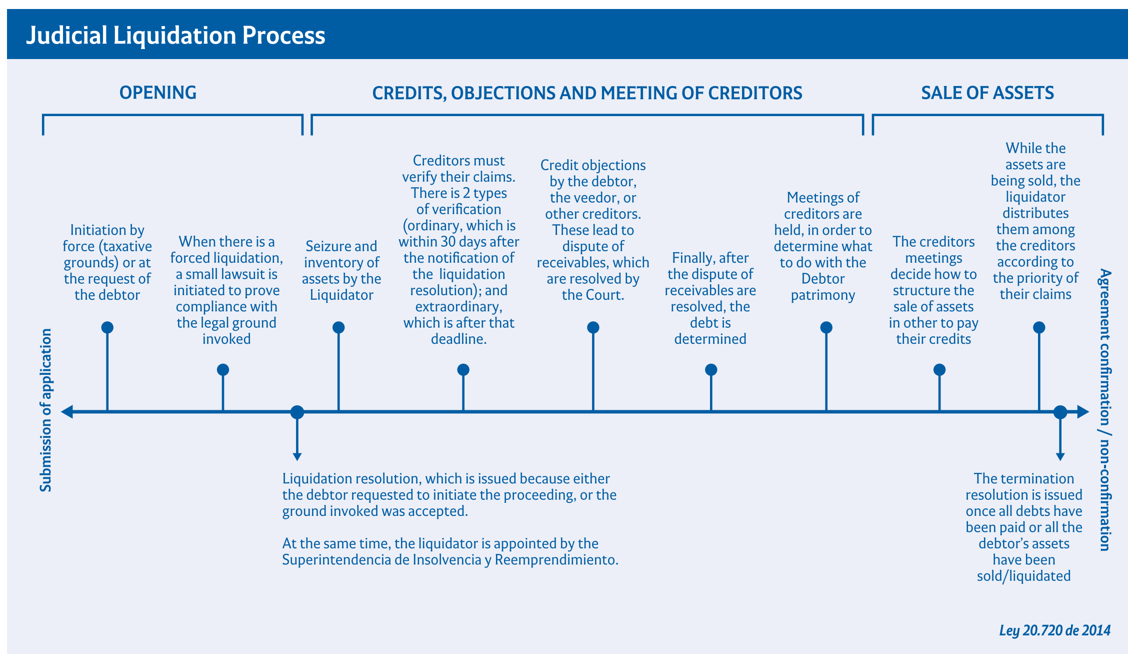
The **judicial reorganization process** is similar to a free-fall Chapter 11 with the main difference that there is a time limit to reach an agreement with creditors. If the agreement has not been reached within the statutory time frame (60 business days with the possibility to be extended with certain level of agreement with creditors up to 180 business days), the court will order the liquidation of the debtor (akin to Chapter 7). In particular, the proceeding does not contemplate any scenario where a debtor may lose the exclusive ability to propose a restructuring plan which in practice means creditors will be forced to choose between the debtor proposed plan or liquidation.

This proceeding has a heavy involvement of the courts in procedural matters, but involvement of the court is much more limited in the review of substantive matters such the terms of DIP Financing, Restructuring Support Agreements, Backstop Commitment Agreements, competitive offers and ultimately the terms and conditions a restructuring plan. Such role is somewhat delegated in veedor as we explain below.

The **out-of-court reorganization process** is a light touch judicial process where the court only steps in to check the majorities to cramdown dissenting creditors. It would be similar to a pre-pack or pre-arranged Chapter 11 where the debtor and the required majority of creditors negotiate a plan and file it with the courts to cramdown the remaining creditors.

Below is a summarized timeline of both processes:





What to expect in Chilean proceedings compared to Chapter 11

Joint administration

While the Chilean law is silent as to group restructurings, a group of companies can be restructured.

However, there are several important points to note:

- The statute **does not provide for a joint restructuring plan**, so each affiliate within a group shall have its own plan.
- The statute **does not provide for joint administration** within a group, so it is possible that a group restructuring is reviewed by different judges (one for each company). The judges should act coordinately, but this feature adds complexity and sometimes deters large corporations and economic groups from filing in Chile. Coordination and consistency can be achieved by including cross conditionality provisions in the different reorganization plans filed by each debtor but risk of discoordination or discrepancies between courts cannot be controlled entirely.

Insolvency test

While the statute provides that only insolvent debtors can file for insolvency, Chilean law does not provide for mechanisms to control the insolvency status of the petitioner. Chilean courts cannot deny a petition for relief under these restructuring proceedings on the grounds that the debtor is not insolvent.

Debtor-in-possession

Debtor-in-possession is the standard for a Chilean restructuring process. However, akin to other Latin-American jurisdiction, Chile follows a modified version of the debtor-in-possession by adding the feature of the *veedor* (an hybrid between a US Trustee and an administrator, but most of the powers remain with the debtors).

The *veedor* is a court-appointed observer or monitor who oversees the restructuring process of a company that has filed for bankruptcy or reorganization under the country's bankruptcy law. Its role is to brokerage agreements between the debtor and the creditors, issue a viability report that has to be filed with the court in order for the plan to be approved and ensure that all parties involved in the process (creditors, shareholders, and the debtor itself) comply with their obligations and duties.

The *veedor* is appointed when the restructuring process is initiated. In the case of an out-of-court reorganization process, the *veedor* can be selected with the agreement of the debtor and its two largest creditors and has a more significant role in verifying certain facts (assessing if the plan is viable, the recovery of creditors in a liquidation scenario and the determination of the claims and its ranking) due to the light intervention of the court.

In addition to the *veedor*, there are other limitations on the debtor-in-possession's administration powers, including the following:

the inability to approve dividends and other distributions to shareholders, the limit to enter into any encumbrances or sale of assets other than in the ordinary course of business or, subject to compliance with certain conditions, assets for less than 20% of the company's assets, and the amendment of the debtors bylaws and powers of attorney while the automatic stay is in place.

Automatic stay

Once the court orders the initiation of the restructuring proceeding and together with the appointment of the *veedor*, the court will also order the initiation of the *protección financiera concursal* period. This *proteccción financiera concursal* is a period where the ability of creditors to initiate enforcement proceedings is stayed (with the notable exception of labor claims that cannot be stayed). In addition to this stay, the *protección financiera concursal* also stays the enforcement of any *ipso facto* clauses in the existing contracts of the company for judicial reorganization processes (not for prepacks) and any *ipso facto* provisions preventing the debtor to contract with the state or state owned entities.

The period of this stay is of 60 business days since the ruling of the court. However, it can be extended initially by 60 more business days (so, a total of 120 business days) if the company requests so with the support of, at least, two creditors holding more than 30% of the total liabilities of the debtor (disenfranchising related parties). At the end of this period, the stay can be extended one more time with the support of, at least, two creditors holding more than 50% of the total liabilities (disenfranchising related parties) to a total of 180 business days. The first and the second extensions could be requested jointly (adding up to a 120 business days extension to the initial period) if the majorities for the second extension are met.

Majorities to approve a restructuring plan

The majorities needed to approve a restructuring plan depend on the type of process:

Bankruptcy reorganization process

To submit a plan for judicial approval, it must be approved by the debtor and, at least, a majority two thirds of the creditors holding two thirds of the claims of each of the classes in the plan.

As per related parties, the Chilean statute provides for its disenfranchisement: related parties cannot vote, and their claims will not be considered when computing the total liabilities for the purposes of voting.

Out-of-court reorganization process

When filing a pre-pack plan, it must be supported by a majority of two or more creditors representing 75% of claims. Related parties are also not allowed to vote in this out-of-court reorganization process.

Contracts

As described above (Automatic stay), the *protección financiera concursal* offers protection against *ipso facto* clauses when the debtor files for a bankruptcy reorganization process. However, this protection only applies to termination due to the bankruptcy; i.e. if there is a failure to make a payment, the counterparty can still terminate the contract. Counterparties breaching this protection will have their claims recharacterized as subordinated. Out-of-court reorganization processes (pre-packs) do not have protections against *ipso facto* clauses.

Chilean law does not provide any mechanism for debtors to confirm or reject executory contracts within a restructuring process.

Class formation

The statute distinguishes between secured and unsecured creditors and make several provisions for disenfranchisement of related parties (parties related to the debtor).

On this basis, the restructuring plan can imply a different treatment for each of the classes, but these classes must be formed based upon the secured, unsecured or subordinated character of the relevant claims.

Exclusivity and creditor led plan

Chilean *Ley de Insolvencia y Reemprendimiento* does not allow permit a reorganization process led by the creditors without the consent of the debtor.

In terms of exclusivity, the debtor retains the exclusivity to file a restructuring plan until the end of the *protección financiera concursal* (stay) period.

Cramdown

The Plan must be approved by all classes. There is no ability of cross-class cram down.

Additionally, the debtor must always approve the plan. The statute does not allow the creditors to approve a plan without the consent of the debtor.

Recharacterization, equitable subordination and clawback

Chilean Ley de Insolvencia y Reemprendimiento allows creditors and the *veedor* in a restructuring process to file for clawback or fraudulent conveyance actions.

The statute distinguishes between two type of transactions that can be subject to a fraudulent conveyance action:

- Presumed fraudulent conveyances:
  - One-year lookback: prepayments, payments made differently from the agreed terms, and new security granted over existing debts.
  - Two-year lookback: transactions without consideration or with related parties.
- Other transactions that can be subject to a fraudulent conveyance action: transactions where the counterparty was aware of the debtor’s financial distress and where the transaction damaged the company’s position or was unfair to other creditors. These actions have a two-year lookback. Also, any changes made to the bylaws in the six months before filing can be revoked if they reduced the debtor’s assets.

Claims held by related parties are subject to subordination. These claims are also disenfranchised for voting purposes.

DIP financing

Ley de Insolvencia y Reemprendimiento does not provide any special privileges for new or interim financing, such as priming liens.

Debtors are prohibited from obtaining new money that exceeds 20% of their assets.

However, this prohibition can be lifted if creditors holding more than 30% of the total liabilities of the debtor (disenfranchising related parties). If the financing is approved by this majority could also enjoy a privilege if the restructuring proceeding ends up in a liquidation of the company.

Other key restructuring considerations

Chilean *Ley de Insolvencia y Reemprendimiento* states that creditors who have acquired their claims within the 30 days before the voting date of the restructuring plan shall not be allowed to vote. Effectively, this results in no secondary market activity in the days previous to the voting.

Ability to pursue a restructuring under Chapter 11. Main issues in a Chapter 11 restructuring of a Chilean debtor

Chile follows the UNCITRAL Model Law and its *Ley de Insolvencia y Reemprendimiento* includes a section on crossborder insolvency. This law allows Chilean courts to recognize foreign insolvency proceedings. Once recognized, the Chilean court can order a stay over any enforcement proceedings in Chile and prevent any transfer or lien on the debtor's assets in the country until the foreign proceedings are finished.

Recognition

In terms of the recognition of a foreign proceeding regarding a debtor domiciled in Chile, the *Ley de Insolvencia y Reemprendimiento* mandates that the corporate domicile should be presumed as the COMI for the debtor. However, this is only a presumption that, if sufficient evidence is presented, can be overcome.

Chilean courts have recognized Chapter 11 as main insolvency proceedings of a Chilean debtor dismissing arguments to the contrary in cases such as Latam Airlines. In our view, the particular circumstances of the Latam Airlines case (industry, effects of the pandemic, and sizeable presence of the company in the United States) do not allow us to conclude that Chilean courts will be deferent in all circumstances.

In major recent cases, such as Mainstream and WOM certain creditors have disputed the ability of Chilean debtors to file for Chapter 11 and the qualification of such debtors as eligible debtors under §109 of the U.S. Bankrupcty Code. In both cases petitioners have chosen to litigate this issue in the Chapter 11 cases and to our knowledge have not brought any legal actions before Chilean courts. Early settlement has prevented US courts from issuing final decisions on this issue in both cases.

Key challenges for a successful Chapter 11

Key challenges for successfully implementing a Chapter 11 plan include the following:

Shareholder preemptive rights

Under Chilean corporate law, any capital increase must be approved by the company's general shareholders meeting. This provision cannot be overridden by a Chapter 11 or a Chilean restructuring plan. This means that any plan that involves the impairment of shares (e.g., a debt-for-equity swap with creditors taking over the company) cannot be done without shareholder approval, even if they are not "in-the-money."

This restriction forces a debtor to offer value or other incentives to get shareholder approval for a plan involving equity increases or equitization of claims. This conflicts with the Chapter 11 absolute priority rule.

Ipso facto clauses and automatic stay

While, as discussed above, recognition to Chapter 11 orders shall be provided, in scenarios where Chapter 11 recognition in Chile is not sought (for strategic reasons), local creditors with no ties to the US may not find the worldwide effects of the US bankruptcy orders compelling enough and seek enforcement of their rights in Chile.

New money: recharacterization, clawback and subordination

Financing provided by certain parties related to the debtor (mainly material direct or indirect shareholders, affiliates and directors) can be subject to subordination in the event of a future local insolvency proceeding. This is particularly relevant for analysis in scenarios where new money is provided as **(i)** related parties would have to consider this subordination and **(ii)** creditors who are taking over shares and participating in the new money may also be impacted.

Furthermore, in a scenario where new money—no matter who is the lender—is provided and the debtor, after a Chapter 11, files for bankruptcy in Chile, the new money transaction will be subject to the clawback and recharacterization limitations explained above.

Governance matters

Chilean law does not have a modified business judgment rule for insolvent companies. Consequently, unlike in the US, directors of Chilean companies must follow Chilean law and will owe their fiduciary duties to shareholders, not creditors, even if the value breaks at the creditors' level.

Additionally, Chilean debtors will usually have a concentrated shareholder base, with one shareholder or shareholder group able to appoint most or all of the board members. While Chilean law has some safeguards to ensure management independence (such as requiring independent board members to approve related party transactions that only allow independent board members to approve such matters), it is recommended that special governance protocols are put in place to ensure independence and transparency throughout the process.

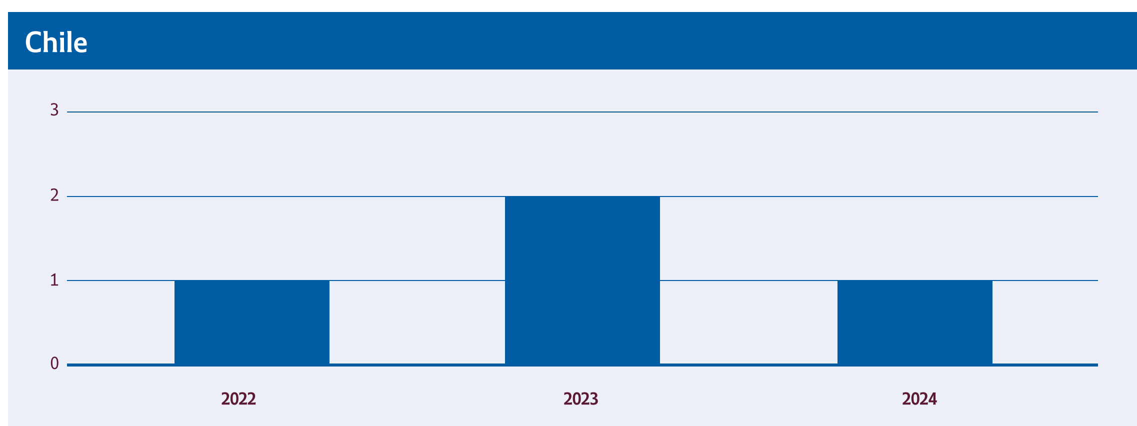
Effective recognition

It is important to scrutinize the list of creditors to make sure that most of the creditors do have ties with the US. It is not uncommon in Chapter 11 cases with foreign debtors to use the critical vendors order to pay in full to creditors with little ties to the US who may be contesting local recognition. Restructurings with many creditors with few or no ties to the US can be frustrated due to the amounts to be paid to these critical vendors.

Recent crossborder cases with Chilean debtors

In recent years, Chile, along with Brazil and Mexico, has been one of the most active countries where debtors based outside the US have filed for Chapter 11 bankruptcy.

The following table shows the number of Chapter 11 filings since 2022:



The table below provides details on the Chilean companies that have filed for Chapter 11 from 2022 to the date of this report:

	Year	Brief summary
LATAM Airlines	2020	Free-fall Chapter 11 filed in the SDNY (*In re Inversiones Latin America Power Ltda. et al.*) on May 26, 2020. The case was closed November 3, 2022, and the sole impaired classes were the senior debt claims and the existing equity. Senior debt claims were rolled over into new senior secured notes and convertible notes.
Condor Inversiones SpA	2022	On August 11, 2023, Condor Inversiones SpA (a subsidiary of Mainstream Renewable Power Limited) and two affiliated debtors filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the SDTx. The Chapter 11 case was filed as a defensive strategy in the context of Mainstream's negotiations with its creditors to restructure the debt. After reaching an agreement, the debtors filed the dismissal notice on November 14, 2023, and the cases were dismissed. The restructure of the debt took place under Chilean, Spanish and Irish law. The case is also referred to as Mainstream or DENEF.
ILAP	2023	Prepacked Chapter 11 filed in the SDNY (In re Inversiones Latin America Power Ltda. et al.) on November 30, 2023. The case was closed on March 5, 2024, and the sole impaired classes were the senior debt claims and the existing equity. Senior debt claims were rolled over into new senior secured notes and convertible notes.
WOM	2024	WOM filed for Chapter 11 on April 1, 2024, in the United States Bankruptcy Court for the District of Delaware (*In re WOM S.A., et al.*). The case is ongoing.

Other major cases in Chile include *In re Corp Group Banking S.A.* (2021), *In re Automotores Gildemeister S.A.* (2021) and *In re Alto Maipo Delaware* (2021).

It is not uncommon for large Chilean companies to try to restructure in foreign jurisdictions. However, major names such as Enjoy S.A. and Nova Austral S.A. have decided to go through reorganization proceedings in Chile. Enjoy also filed for Chapter 15 recognition in the US, while Nova Austral filed foreign proceedings in other countries for its international branches.

MEXICO

Summary of restructuring tools available in Mexico

The Mexican Bankruptcy Act (*Ley de Concursos Mercantiles*) is the statutory framework for bankruptcy proceedings in Mexico. It regulates several processes, including liquidation, but we wish to focus on the two restructuring tools that it offers:

- *Concurso Mercantil* (*concurso* proceedings)
- *Concurso Mercantil con Plan de Reestructura Previo* (*concurso* proceedings with a pre-arranged restructuring plan)

Both processes aim to restructure the liabilities of a debtor who is in an insolvency situation.

Concurso proceedings are a type of restructuring process similar to a free-fall Chapter 11, the main difference being that the scope of these proceedings is not only to pursue a restructuring of the company (*concurso*), but may also include liquidation (*quiebra*) (Chapter 7) if a restructuring agreement (*concurso* agreement) is not reached within a specific timeframe.

Once a concurso petition is filed, an examiner (*visitador*) is appointed by the competent court to determine whether the company is insolvent under the Mexican Bankruptcy Act. This is a preliminary stage that concludes when the *visitador* provides a report to the court. Once the company is declared in concurso by a judicial decision (*Sentencia de Declaración de Concurso Mercantil or Judicial Declaration of Concurso* Proceedings), there are two stages: **(i)** a conciliatory stage (*conciliación*) whose purpose is to preserve the business enterprise as a going concern (in this stage, a creditor list is formed, creditors are recognized and the creditors and the company negotiate a concurso agreement), and **(ii)** a liquidation stage (quiebra) whose purpose is to liquidate the business.

During the conciliatory stage, the creditors and the company have 185 days to reach a concurso agreement. This time limit can be extended: **(i)** for 90 calendar days upon request of the conciliator (*conciliador*) or recognized creditors representing more than 50% of the recognized claims; and **(ii)** for an additional 90 calendar days, upon request of the company and recognized creditors representing at least 75% of the recognized claims. If no concurso agreement is reached within 365 days, the court will open the liquidation stage. In the liquidation stage, a liquidator (*síndico*) will be appointed to sell the assets of the company; however, it should be noted that a concurso agreement can still be reached during this stage.

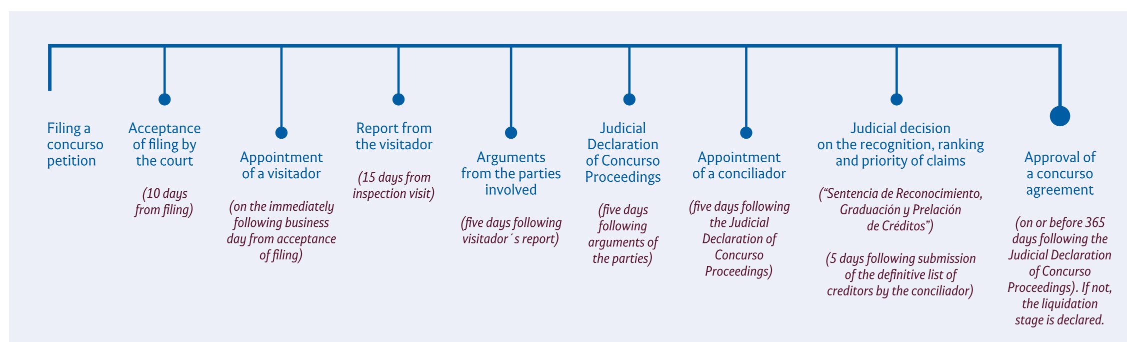
The ***concurso proceedings with a pre-arranged restructuring plan*** are light touch proceedings with less court intervention and in which a significant majority of creditors have pre-negotiated a plan with the company that is filed together with the *concurso* petition. It is similar to a pre-pack or pre-arranged Chapter 11 where the debtor and the required majority of creditors negotiate a plan and file it with the court. To launch these proceedings the following requirements must be met: **(i)** under article 20 of Mexican Bankruptcy Act, financial statements, a list of creditors, and an inventory must be presented, among others; **(ii)** the restructuring plan must be approved by at least 50% of creditors; and **(iii)** the company must declare under oath that it is insolvent under the Mexican Bankruptcy Act, or that insolvency is imminent within a period of 90 days. In this process, no *visitador* is appointed; the process begins with the concurso petition followed by the Judicial Declaration of *Concurso* Proceedings, which marks the beginning of the proceedings.

Below is a summarized timeline of both processes:

Concurso proceedings

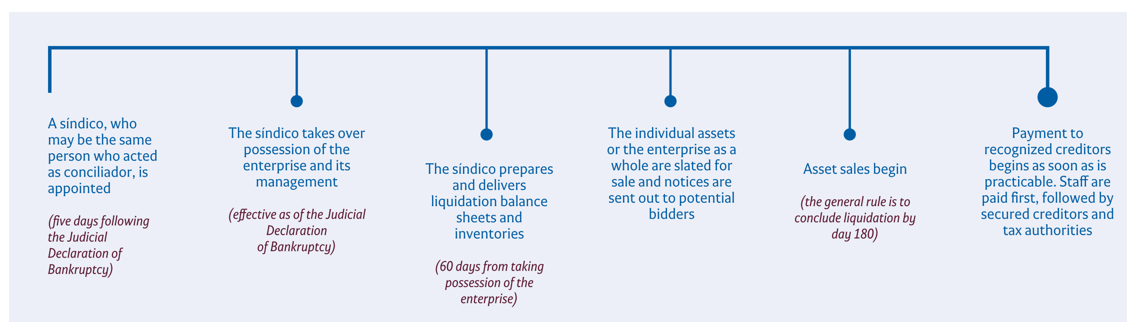
1. Conciliatory stage

The conciliatory stage consists of the following:



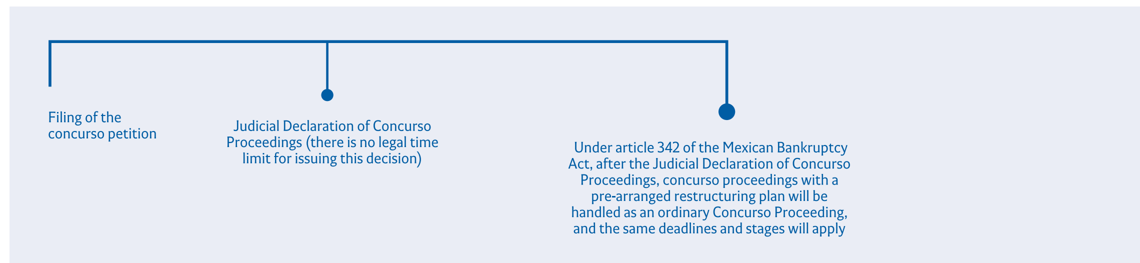
2. Liquidation stage

The liquidation or bankruptcy stage may begin earlier if requested at any time by the Company or if the *conciliador* determines that reaching a *concurso* agreement will be impossible. The liquidation stage is declared by means of a judicial decision declaring the Company bankrupt ("**Judicial Declaration of Bankruptcy**"). Below a timeline of the liquidation stage:



Concurso Proceeding with Pre-Arranged Restructuring Plan

For this type of proceedings, a restructuring agreement (*concurso* agreement) must be reached between the Company and the creditors before filing a *concurso* petition. After this restructuring agreement has been reached, the timeline is as follows:



What to expect in Mexican proceedings compared to Chapter 11

Debtor-in-possession

While Mexico has a debtor-in-possession regime, three individuals play a role in the process: the *visitador* (only in free-falls, not in pre-packs), the *conciliador* and the *síndico* (in all proceedings). The debtor-in-possession regime applies unless the *conciliador* makes a petition to the court requesting the exceptional removal of the directors.

Visitador

The *visitador* is a person, appointed by the court, that determines whether the Company is in an insolvency situation (so the *concurso* petition is not dismissed). Its primary function is to determine whether the debtor meets the insolvency standards under the Mexican Bankruptcy Act to initiate *concurso* proceedings. The *visitador´s* role is crucial in the initial stages of the process, ensuring that the Company´s situation will trigger the commencement of *concurso* proceedings. A *visitador* does not need to be appointed in *concurso* proceedings with a pre-arranged restructuring plan.

Conciliador

The *conciliador* is appointed by the court following the Judicial Declaration of Concurso Proceedings. This specialist has extensive powers to mediate between the Company and creditors and to take measures to, among others, protect the enterprise as a going concern. The *conciliador* assumes significant responsibilities and often plays a major role in *concurso* proceedings, especially in material cases where the stakes are high.

Síndico

The *síndico´s* main function is to manage the sale of the Company´s assets and the payment of claims. This role may be filled by the *conciliador* or another appointed individual. The *síndico´s* responsibilities are critical in the latter stages of the insolvency process, focusing on the liquidation of assets and the equitable distribution of proceeds to creditors.

Insolvency test

A *concurso* petition can only be filed for insolvent companies (or those that are likely to become insolvent within 90 days, as established in the Mexican Bankruptcy Act).

The *concurso* petition can be: **(a)** voluntary, filed by the Company itself; or **(b)** involuntary, filed by any creditor or the Mexican District Attorney (*Ministerio Público*). The Mexican Bankruptcy Act establishes when a Company is insolvent. Under this Act, insolvency occurs when a debtor is "generally in default" of its obligations.

The main indications or presumptions that prove that a Company is "generally in default" of its obligations are: **(i)** the failure by a debtor to comply with its payment obligations in respect of two or more creditors; and **(ii)** the existence of the following two conditions: **(a)** 35% or more of its liabilities outstanding are 30 days past due; and **(b)** the debtor fails to have liquid assets and receivables, which are specifically defined, to support at least 80% of its obligations that are due and payable. The Company may also request to be declared in *concurso* when it considers that the above conditions are imminent (which means that they will occur within the following 90 days of the *concurso* petition).

Only insolvent debtors (or debtors on the verge of insolvency) can access Mexican *concurso* proceedings. This means that the debtor cannot anticipate a restructuring proceeding more than 90 days before it is actually insolvent. The insolvency test is not required for *concurso* proceedings with a pre-arranged restructuring plan.

The *visitador* will check the insolvency status of the Company and, if in fact it is insolvent, the court will issue the Judicial Declaration of *Concurso* Proceedings.

The Mexican Bankruptcy Act provides for some presumptions to assess whether a Company is insolvent. Those presumptions include the following:

- Lack of uncharged of assets
- Payment defaults to more than one creditor or under a reorganization plan.
- Absence of management or closure of the Company.
- Carrying out fictitious practices to avoid fulfilling its obligations.

Automatic stay

The Mexican Bankruptcy Act provides for an automatic stay that prevents the seizure or foreclosure of assets during the conciliatory stage (except certain labor-related attachments). However, the automatic stay does not enter into force with the *concurso* petition but with the Judicial Declaration of *Concurso* Proceedings, which is not issued until the court has verified the insolvency situation of the Company.

The primary purpose of this stay is to protect the Company´s assets and provide a period of stability, allowing for necessary negotiations and financial restructuring to take place.

Majorities to approve a restructuring plan

For a *concurso* agreement to be approved, it requires the vote of the Company and 50% of the sum of: **(i)** the recognized amount for all unsecured and subordinated recognized creditors, plus **(ii)** the recognized amount for those recognized creditors with a security interest or special privilege.

It is important to note that when calculating the 50% necessary to approve the *concurso* agreement, as set out above, the subordinated creditors (as established in article 222 bis, 15 section I and 117 section II of Mexican Bankruptcy Act) that represent at least 25% of the total recognized amount are excluded from the quorum for approving the *concurso* agreement.

As there is cram-down of recognized unsecured creditors, these creditors will be subject to the restructuring plan. However, recognized secured creditors cannot be forced into the agreement and may enforce their guarantees unless the agreement includes payment of their credits or of the value of their guarantees.

For concurso proceedings with a pre-arranged restructuring plan, the *concurso* petition will include the approval of the Company and of a simple majority of all of its creditors.

Contracts

The Company declared in *concurso* must comply any pending agreements (except for the payment of any amounts due before the Judicial Declaration of Bankruptcy was issued), whether preparatory or definitive, unless the *conciliador* objects for the benefit of the insolvency estate. The party contracting with the Company has the right to request the *conciliador´s* decision on whether it will oppose the agreement being fulfilled. If the *conciliador* does not oppose, the Company must comply or guarantee compliance. If the *conciliador* opposes or fails to respond within 20 days, the contracting party may terminate the agreement by notifying the *conciliador*.

However, the Mexican Bankruptcy Act also provides for the automatic acceleration of certain types of agreements, such as derivative transactions maturing due to the filing of *concurso* proceedings.

It should be noted that any contractual provision that worsens the situation of the Company due to the filing of *concurso* proceedings will be considered null, subject to the exceptions expressly established in the Mexican Bankruptcy Act.

Class formation

The Mexican Bankruptcy Act does not provide for class formation in a restructuring plan. However, according to this Act, creditors will be classified into the following categories, according to the nature of their claims:

(i) Singularly privileged creditors (*Acreedores Singularmente Privilegiados*) (“**Singularly Creditors**”)

(ii) Secured creditors (*Acreedores con Garantía Real*) (“**Secured Creditors**”)

(iii) Special privileged creditors (*Acreedores con Privilegio Especial*) (“**Special Creditors**”)

(iv) Subordinated creditors (*Acreedores Subordinados*) (“**Subordinated Creditors**”)

Under the Mexican Bankruptcy Act, other creditors that are not included in these categories are considered common creditors (*Acreedores Comunes*) (“**Common Creditors**”).

The Mexican Bankruptcy Act establishes the following priorities for claims:

1. **Labor Claims:** This includes salaries, three months’ salary and benefits, 12 days’ salary for each year of employment, mandatory profit sharing, and proportional benefits for the previous 12-month period.
2. **DIP Financing and Operational Claims:** Claims derived from debtor-in-possession (DIP) financing and financing incurred during the proceedings to maintain the ordinary course of business, as well as approved costs and expenses to sustain the business, as approved by the *conciliador*.
3. **Secured Creditors:** Creditors secured by mortgages or pledges, or those that otherwise have a privileged priority recognized under commercial law (e.g., under a trust).
4. **Federal Taxes and Duties:** According to the Mexican Federal Tax Code, federal taxes and duties are prioritized, although the application of this order has been inconsistent because the tax authorities cannot be compelled to participate in any insolvency proceedings.
5. **Other Labor Claims:** Any other labor claims that are not covered by point 1 above.
6. **Unsecured Creditors:** These are creditors without any secured interest in the debtor's assets.
7. **Subordinated and Related Party Creditors:** Claims of contractually subordinated creditors and related party creditors of the insolvent debtor (e.g., intercompany loans).

Applying this order of priority is compulsory.

Exclusivity and creditor led plan

The *conciliador* has exclusive authority to submit a *concurso* agreement (except in *concurso* proceedings with a pre-arranged restructuring plan, as the *concurso* agreement is filed together with the *concurso* petition). The *conciliador* may request (or even get unsolicited) proposals from the Company or creditors and will seek for them to reach an agreement under the terms of the Mexican Bankruptcy Act.

Cramdown

Under the Mexican Bankruptcy Act, a *concurso* agreement is considered to be signed by all recognized Common Creditors without any objection being admitted on their part, when the agreement provides the following with respect to their credits: **(i)** payment of the debt due on the date the Judicial Declaration of *Concurso* Proceedings is issued, converted into investment units (Unidades de Inversión) ("**UDIs**"); **(ii)** payment of amounts due under the contract from the date Judicial Declaration of *Concurso* Proceedings is issued until the *concurso* agreement is approved, converted into UDIs; and **(iii)** payment of obligations due from the date the *concurso* agreement is approved, assuming previous payments were made on their respective due dates.

Additionally, recognized Secured Creditors cannot be crammed down. Recognized Secured Creditors that did not execute the *concurso* agreement have the right to initiate or continue the foreclosure of their collateral. However, there are two exceptions to this rule: recognized Secure Creditors do not have his rights if **(i)** the *concurso* agreement includes payment of their credits; or **(ii)** the *concurso* agreement provides for the payment of the value of their collateral.

Recharacterization, equitable subordination and clawback

Claw-back actions are available under the Mexican Bankruptcy Act. According to the Act's provisions, the lookback period is defined as the 270th calendar day before the date the Judicial Declaration of *Concurso* Proceedings is issued. If there are subordinated creditors, regardless of whether the debt was secured or unsecured, this period will be doubled concerning the actions involving those subordinated creditors.

The court, at the request of the *conciliador*, trustee, intervenors, or any creditor, may establish a longer claw-back date, provided it does not exceed three years.

Additionally, all fraudulent acts against creditors (*actos en fraude de acreedores*) will be null against the bankruptcy estate (*masa concursal*).

The following acts are presumed by the Mexican Bankruptcy Act to be fraudulent against creditors:

- Gifts or transactions for no consideration.
- Transactions in non-market prices (both higher prices and lower prices), or in terms different from the market.
- Debt forgiveness.
- Prepayment of obligations before their due date.
- The discount of debtor's payables by the same debtor.

There are also other acts that may be presumed to be fraudulent against creditors if good faith is not proven:

- The granting of new guarantees to secure an existing obligation.
- Payments in kind of the original obligation.
- Agreements with the directors or related parties.

DIP Financing

Mexican bankruptcy law allows the debtor to incur unsecured or secured indebtedness (DIP financing) in the ordinary course of business. This indebtedness must be approved by the *conciliador* or the court, as the case may be, and it provides a priority claim or a lien to a lender on the Company´s unencumbered assets or a second priority claim on encumbered assets (in the latter case, with the approval of the first-lien secured creditors). Debtor-in-possession loans have priority over other claims in the insolvency, except for certain labor, tax, and secured claims.

It is important to emphasize that DIP financing can be a crucial tool for the Company to continue operations during the *concurso* proceedings as it provides the necessary liquidity to cover operational expenses and other immediate obligations. However, the granting of these loans is subject to rigorous scrutiny by the court or the *conciliador*, who must ensure that the terms of the financing are fair and reasonable and do not harm the interests of existing creditors.

Other key restructuring considerations

The Mexican Bankruptcy Act recognizes the general concept of "netting". Netting is mandatory for parties to a transaction recognized by the Bankruptcy Act, under the terms agreed upon in the relevant contract, on the date of the declaration of insolvency, in respect of liabilities and rights arising from master or specific agreements entered into related to financial derivative transactions, repurchase transactions, securities lending transactions and other equivalent structures. Financial derivative transactions maturing after the date of the declaration of insolvency will be considered terminated precisely on that date.

Regarding financial derivative transactions, the Mexican Bankruptcy Act provides that, if the relevant agreement does not specify the terms under which a transaction is to be closed out and netted, the value of the underlying assets and liabilities is to be determined on the basis of their market value on the date of the declaration of insolvency; if the market value is not available or cannot be demonstrated, the *conciliador* may request an experienced third party to determine that value.

The broad concept of "netting" in the Mexican Bankruptcy Act includes transactions under New York or English law, securities loan agreements, and transactions in other currencies.

Ability to pursue a restructuring under Chapter 11. Main issues in a Chapter 11 restructuring of a Mexican debtor

Mexico is a party to the UNCITRAL Model Law and as such the Mexican Bankruptcy Act dedicates a chapter to crossborder cooperation. The statute allows for the recognition of foreign proceedings. For foreign proceedings, Mexican courts can order a stay over any enforcement actions in the country and any transfer or lien over the assets of the debtor in Mexico will be forbidden until the foreign proceedings are concluded.

However, if the non-Mexican debtor has an establishment in Mexico, which is very frequent, initiating recognition proceedings (akin to Chapter 15), requires the filing of full local *concurso* proceedings for that branch, which are administrative proceedings that take time and resources and are not very efficient. This process includes determining the Company as insolvent under the Mexican Bankruptcy Act and a Judicial Declaration of *Concurso* Proceedings. In some cases (e.g., In re Aeroméxico), debtors being restructured under Chapter 11 do not initiate recognition proceedings in Mexico to avoid the need for a Judicial Declaration of *Concurso* Proceedings. However, if certain creditors do not agree with the Chapter 11, they may initiate judicial proceedings in Mexico risking the implementation of the Chapter 11.

Recognition

In the context of recognizing foreign main proceedings for a debtor domiciled in Mexico, the Mexican Bankruptcy Act states that the debtor must have its center of main interests (COMI) in the foreign country (e.g., the United States for Chapter 11 proceedings). According to the Mexican statute, the COMI of a debtor is presumed to be where the company is domiciled, unless proven otherwise. This presumption can be rebutted if sufficient evidence is presented to the contrary.

Key challenges for a successful Chapter 11

The applicability of Mexican laws in the implementation stage of a Chapter 11 plan presents several issues that have to be addressed in advance in the plan:

Shareholder preemptive rights

Under Mexican corporate law, any type of capital increase must be approved by the company's general shareholders' meeting. This requirement cannot be overridden by Chapter 11 proceedings, even if these proceedings are recognized in Mexico. In practice, this means that any plan involving the impairment of shares (for example, a debt-for-equity swap where creditors take over the company) cannot proceed without the approval of the shareholders, even if those shareholders are out-of-the-money.

This preemptive or veto right held by shareholders compels any restructuring plan to either provide shareholders with sufficient incentives to approve the plan or leave their interests unimpaired. This requirement differs from the absolute priority rule under Chapter 11, which typically allows for the impairment of shareholders' interests without their consent.

Ipso facto clauses and automatic stay

The worldwide stay rule under a Chapter 11 tends to be respected by local creditors in Mexico. This stay can be enforced through local recognition proceedings so that a Mexican court can enforce the stay. However, due to the administrative challenges that local recognition proceedings pose, we have seen Chapter 11 proceedings not requesting local recognition. In these cases, debtors rely on the global effect of the worldwide jurisdiction of the US Bankruptcy Court. In instances where the creditors' ties to the US are clear—which tends to be the case in this jurisdiction—the worldwide effects are respected.

New money: recharacterization, clawback and subordination

When structuring DIP financing transactions in a Chapter 11, there are several matters of local law that must be considered. These risks are not much different than when structuring regular financing governed by US law for a Mexican borrower, but they become more material in a distress situation.

Firstly, the subordination risk. This is particularly relevant for analysis in scenarios where new money is provided as **(i)** related parties would have to consider this subordination, and **(ii)** creditors who are taking over shares and participating in the new money may also be impacted. As this is a new provision in the law, certain features such as subordinations due to a secondary acquisition of debt, have not been tested in court.

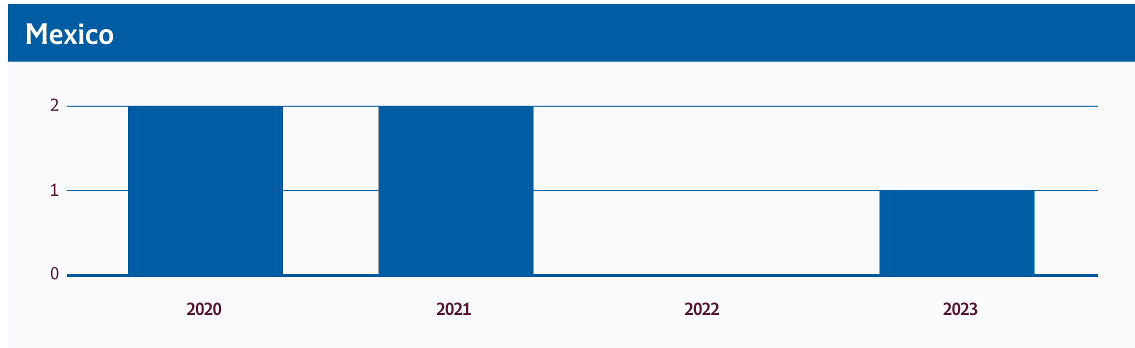
Secondly, there are clawback rules applicable in Mexico as detailed in the previous section and its lookback period ranges from nine months to three years.

Finally, there are other enforcement issues that must be taken into account such as the *amparo* trial. Creditors providing secured DIP financing should be aware that Mexican law allows for a specific form of constitutional trial (named *amparo*) that can be accessed (on certain occasions) even while an enforcement trial is underway. All definitive rulings may be appealed through an *amparo*. In this regard, *amparo* trials tend to be less swift than commercial proceedings.

Recent crossborder cases with Mexican debtors

In the recent years we have seen some Mexican companies filing for Chapter 11 proceedings and some creditors of Mexican debtors using involuntary Chapter 11 proceedings to try to gain leverage in distress situations involving Mexican companies.

The following chart shows the number of Chapter 11 filings of Mexican debtors since 2020:



The following table provides some details on the main Mexican companies that have filed (or whose creditors have filed) for Chapter 11 since 2020 until the date of this report:

	Year	Brief summary
Aeromexico	2020	Free-fall Chapter 11 filed in the SDNY (*In re Grupo Aeroméxico, S.A.B. de C.V.*) on June 30, 2020. The case was closed on December 21, 2022, and it included a $720 million equity injection and $762.5 million DIP financing (senior secured first-lien notes). It also renegotiated the leasing agreements for their aircrafts using the assumption and rejection tools afforded by Chapter 11.
Grupo FAMSA	2020	Grupo FAMSA filed for Chapter 11 proceedings in 2020 with case no. 21-11831 of the SDNY. However, Grupo FAMSA withdrew the petition at a later stage to pursue local proceedings as its Mexican banking license was put into risk.
Alpha Credit	2021	This was another Chapter 11 filed in the US, but this case was filed in the District Court of Delaware (In re Alpha Latam Management LLC et. al.) on August 1, 2021. The case (21-11109) was closed on December 26, 2023, and resulted in Alpha Latam's 363 asset sale to CFG Partners for US$149.5 million.
Grupo Posadas	2021	Pre-pack Chapter 11 proceedings filed in the SDNY by Grupo Posadas (In re Grupo Posadas S.A.B. de C.V., case no. 21-11831) to implement a pre-packaged restructuring plan. This plan reduced Grupo Posadas's debt service obligations and extended the schedule on which its debt matures.
TV Azteca	2023	Involuntary Chapter 11 proceedings filed in the SDNY on March 10, 2023. The petitioning creditors seek repayment of outstanding debt on defaulted unsecured notes. Creditors and TV Azteca were engaged in litigation in both the US and Mexico. In light of the prepetition disputes regarding the Notes, the Bankruptcy Court reasoned that those claims were subject to a bona fide dispute, mandating dismissal of the case.

As we have seen, there have been several restructuring attempts involving Mexican debtors under Chapter 11. Recognition issues have caused some difficulties in these cases. However, large cases involving crossborder operations such as the *Aeroméxico* case have been successful and achieved a *de facto* recognition in this jurisdiction.

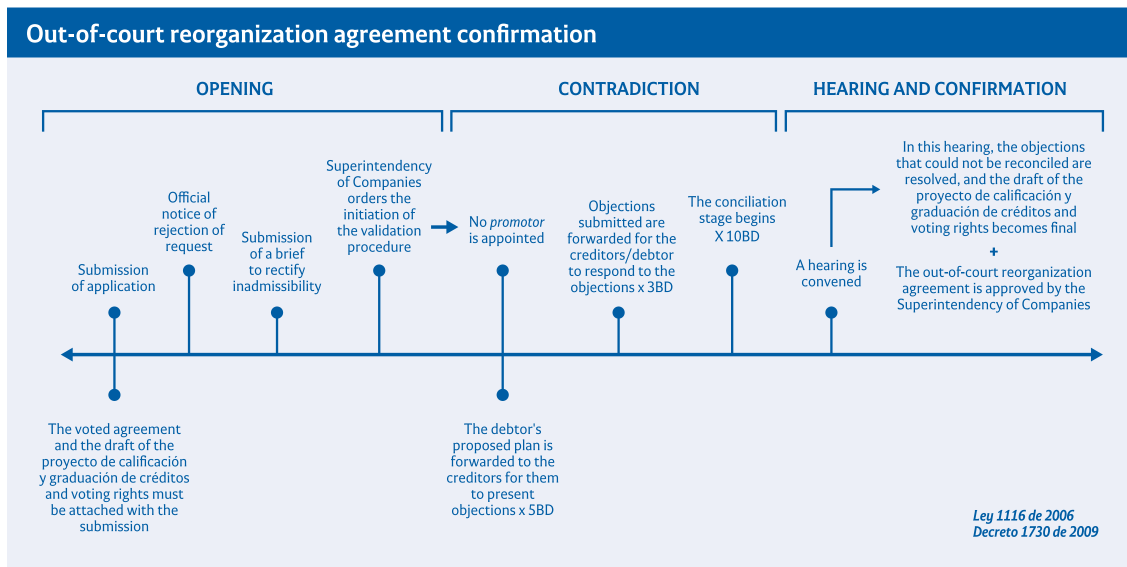
COLOMBIA

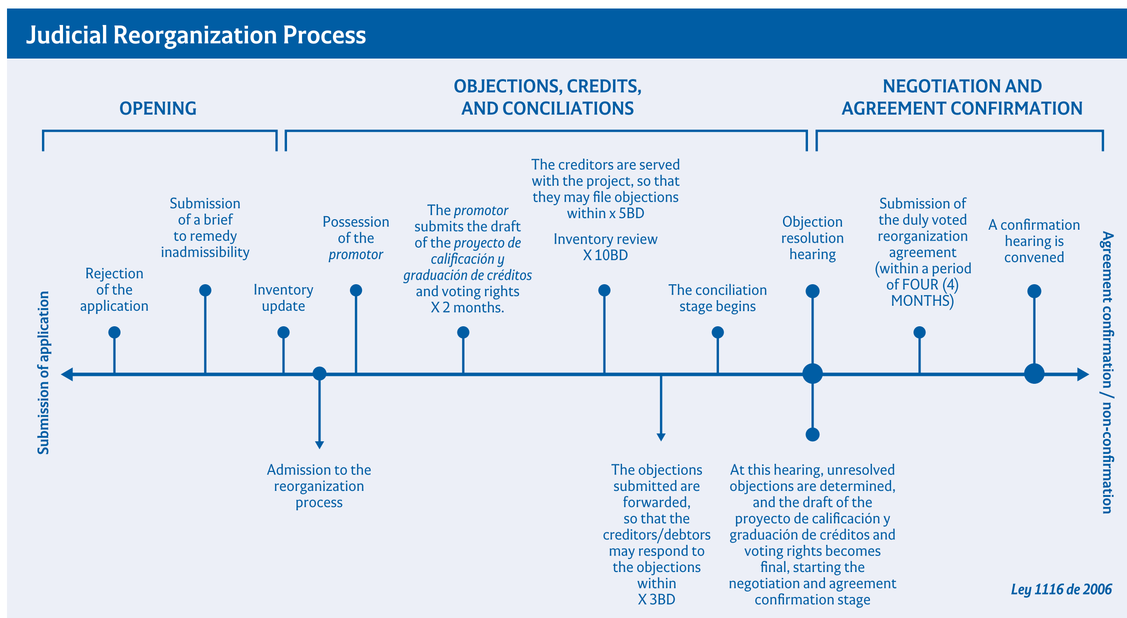
Summary of the restructuring tools available in Colombia

Law *1116/2006* (*Régimen de Insolvencia Empresarial*) is the statutory framework for insolvency proceedings in Colombia, and the Superintendency of Companies is the competent court. It mainly regulates restructuring and judicial liquidation proceedings. Below we focus on the main restructuring tools available for financially distressed entities:

- **Judicial restructuring process (*proceso judicial de reorganización*):** This process is like a free-fall Chapter 11, with the main difference being that in Colombia there are specific timelines for the different stages of the process. After creditors' indebtedness classification before the courts, there is a four-month period to file a restructuring plan (with the possibility of staying this term with certain degree of agreement with creditors). If the parties fail to reach an agreement within the legal term, the debtor will start the liquidation process (akin to Chapter 7). Courts are heavily involved during the judicial restructuring process, which usually takes between 12 and 24 months.
- **Out-of-court restructuring agreement confirmation (*validación judicial de acuerdos extrajudiciales de reorganización*):** This is a lighter proceeding, with the court being less involved, and where the legally required majority of creditors have pre-negotiated a restructuring plan with the debtor, which is filed together with the confirmation. This process is akin to a pre-packaged or pre-arranged Chapter 11, where the debtor and the requisite majority of creditors negotiate a plan and submit it to the court (it usually takes up to six months).

Below is a summarized timeline of both processes:





The main goal of these alternatives is to allow the debtor to continue operating while repaying creditors over time, similar to Chapter 11. In addition, Colombian Law emphasizes the importance of preserving employment and the economic entity. We highlight this because, during 2024, the Colombian Congress approved a new bill that included simplified restructuring processes and additional economic relief alternatives for debtors in crisis, while permanently adopting COVID-19 measures. However, the Colombian President objected to its enactment, citing, among other reasons, the previously emphasized goal.

What to expect in Colombian restructuring proceedings in contrast with Chapter 11

Joint administration

To make governance easier and more effective, and to increase the return rate for creditors, Colombian courts are legally allowed to jointly coordinate and manage two or more company insolvency proceedings from the same business group without compromising the legal identity of each participant. However, this does not imply a substantive consolidation, a measure available in Colombia for certain cases of judicial liquidation of companies within the same business group.

Debtor in possession

Colombia follows a modified version of the debtor in possession by adding the feature of the *promotor*, who, together with the courts, oversees the debtor's actions. The *promotor* is not an administrator of the debtor, although a debtor's legal representative can be appointed as such. The *promotor* usually coordinates and leads the negotiation of the restructuring agreement.

In an out-of-court restructuring agreement validation process, no *promotor* is appointed, as the debtor has already undertaken the necessary negotiation efforts.

Insolvency test

Any of the restructuring processes previously described requires that the debtor be in a state of insolvency (*cesación de pagos*) or imminent insolvency (*incapacidad de pago inminente*) to initiate the process.

The state of insolvency is triggered when the debtor fails to pay two or more obligations owed to two or more creditors for more than 90 days or when it faces at least two enforcement or collection claims filed by two or more creditors. In either case, the cumulative value of the obligations must represent at least 10% of the debtor's total liabilities. The state of imminent insolvency is defined as the situation in which the debtor foresees that it will not be able to fulfill its obligations as they become due in one year or less.

The petitioner must provide evidence of the above, and the court will check the insolvency test, among other factual assumptions set out in the law.

Automatic stay

Colombian Law provides an automatic stay. Admitting the restructuring process prevents the initiation or continuation of any judicial or extrajudicial enforcement and collection actions against the debtor's assets during the course of it. However, if the creditor has joint debtors with respect to a claim, it may pursue payment from the other joint debtors without limitation by the restructuring process.

The automatic stay also offers protection against clauses that prevent or hinder the restructuring process through terminating contracts, accelerating obligations or imposing unfavorable effects on the debtor admitted to the restructuring process. However, this protection is limited exclusively to adverse effects on the debtor due to insolvency clauses. If other provisions are triggered, such as termination due to failure to pay, the counterparty can enforce such provisions. Counterparties that breach this protection will have their claims recharacterized as subordinated (*postergado*) and, if the court deems it necessary, any guarantees granted by the debtor to such non-complying creditors may be cancelled.

Contracts

Like the assumption and rejection mechanism under Chapter 11, Colombian Law provides the possibility of modifying or terminating executory contracts in the interest of the restructuring process, subject to certain requirements and procedures such as previous judicial authorization if renegotiation is not accepted.

Once the restructuring process starts, actions for restitution of financially leased or leased operational assets due to non-payment of rent cannot be initiated or continued. However, in case of failure to pay rent after such date, the counterparty can initiate contract termination proceedings and enforcement and restitution actions.

Class formation

As a rule, Colombian Law follows the legal priority classification, with some specific alternatives for modifying it.

1. **First-class claims:** These are the highest priority claims and mainly include labor-related obligations such as wages, taxes and other fiscal obligations to government entities.
2. **Second-class claims:** They mainly involve obligations secured by shares or pledges over movable property or rights. Holders of these secured credits have preferential rights to the proceeds from the sale of the secured assets.
3. **Third-class claims:** These involve obligations secured by mortgages. Holders of these secured credits have preferential rights to the proceeds from the sale of the secured assets.
4. **Fourth-class claims:** It includes credits that are not secured by specific assets but have a general privilege, such as suppliers' claims for goods and services provided to the debtor.
5. **Fifth-class claims:** These are unsecured credits or ordinary credits that do not fall into the higher priority categories. They include trade credits, loans and other general obligations not specifically classified elsewhere.

This legal priority may be changed if **(i)** it is approved by more than 60% of the eligible votes and aims to facilitate reorganization; **(ii)** it aims to facilitate the purpose of the restructuring agreement;**(iii)** it does not downgrade the class of any creditor but rather improves it for those who provide fresh resources or generally adopt behaviors that contribute to improving the debtor's working capital and recovery; and **(iv)** it does not affect the priority of pension, labor, social security or housing purchaser credits, without prejudice to a creditor expressly accepting the effects of an agreement clause regarding a waivable right, provided that this leads to the recovery of its credit.

Majorities to approve a restructuring plan

Under Colombian law, both restructuring processes (i.e., judicial restructuring and out-of-court restructuring agreement confirmation) can be approved by **(i)** absolute majority (i.e., more than 75% of creditors); or **(ii)** simple majority (i.e., more than 50% of creditors) and a minimum number of voting classes.

For voting purposes, there are five categories of creditors: **(i)** holders of labor claims; **(ii)** public entities; **(iii)** financial institutions, both national and other entities under inspection and supervision of the Financial Superintendence of Colombia, whether private, mixed or public and foreign financial institutions; **(iv)** internal creditors; and **(v)** other external creditors. Partners or shareholders of companies, holders of shares in sole proprietorship, and holders of units in any other type of legal entity are considered internal creditors.

The number of voting classes required for approval under item **(ii)** above depends on the number of recognized voting classes in the restructuring process: **(a)** if there are five recognized voting classes, then a minimum of three must vote favorably; **(b)** if there are three recognized voting classes, then a minimum of two must vote favorably; and **(c)** if there are only two recognized voting classes, then both must vote favorably.

Additional votes may be required where the majority is held by related creditors or those from the same business group.

Furthermore, if a creditor seeks to modify its legal payment priority by providing the debtor with new resources, partially waiving its obligations, granting discounts, or offering special grace periods, it must **(i)** obtain favorable votes from 60% of the external creditors within the concerned voting class (to cram-down the modification in class); or **(ii)** obtain individual consent from each creditor seeking to change the legal priority.

Exclusivity and creditor-led plan

Although creditors play an active role during the negotiation of the restructuring agreement, it is the debtor, with the support of the *promotor* who leads the negotiations. Debtor's consent is always required. All reorganization agreements must include a creditor's committee with participation of internal and external creditors, which will not have administrative or co-administrative functions within the company.

The debtor exclusive window to file a restructuring plan is four months. This can be extended but subject to reaching a certain degree of agreement with creditors. If the parties fail to reach an agreement within the legal term, the debtor must start the liquidation process (akin to Chapter 7).

Cramdown

Colombian Law offers the possibility of intra-class cramdown for unsecured creditors by imposing certain measures included in the plan (such as haircuts and waits) to holdouts. However, there is no cross-class cramdown available, and secured creditors cannot be crammed down. A 60% majority is required for an intra-class cramdown.

Recharacterization, equitable subordination and clawback

Those who provide new resources to the debtor during the restructuring process, or commit to doing so by signing the restructuring agreement, can share priority of obligations to the DIAN (*Dirección de Impuestos y Aduanas Nacionales*) and other tax authorities on a pro rata basis. This priority will be applied even in case of judicial liquidation. For this purpose, each new Colombian peso provided will give priority to one peso of the previous debt, but this priority is not applicable to capitalization of liabilities or the mere continuation of successive contracts.

When new resources are available through capital contributions to the debtor during the process and implementing of the reorganization agreement, such shareholder will also have priority in the reimbursement of their remaining balance over other contributions and up to the amount of the new resources contributed at the time of liquidation.

Creditors who provide the debtor with new resources, partially forgive their obligations, grant discounts, or offer special grace periods may obtain, as consideration, the advantages granted in the agreement to all those who provide the same benefits to the debtor.

Claims held by related parties are subject to subordination (*postergación*).

Clawback actions are available under Colombian Law. The general lookback period for operations performed to the detriment of the debtor's assets is 18 months, but this term can be extended in cases of gratuitous transactions for an additional six-month period. There is a special six-month lookback period for bylaw amendments when they reduce the debtor's assets to the detriment of the creditors or modify the liability regime of the shareholders.

DIP financing

Although Colombian Law does not have special provisions for DIP financing similar to those found in Chapter 11, new loans granted during the ordinary course of the debtor's business by non-creditors under the restructuring process will be deemed administrative expenses, and they will have payment priority over those subject to the restructuring agreement or the judicial liquidation process. If such financing is secured, the debtor must request prior authorization from the Superintendency of Companies during the restructuring process; the same request must be made for financing granted out of the ordinary course of business.

Pursuing restructuring under Chapter 11. Main issues for a Colombian debtor

Recognition

Based on the UNCITRAL Model Law, Law 1116/2006 provides a framework for recognition of main and nonmain foreign insolvency proceedings.

Once recognized, the Colombian courts can order a stay over any enforcement proceedings in the country and prohibit any transfer or lien over the assets of the debtor in Colombia until the foreign proceedings are closed.

Key challenges for a successful Chapter 11

Applying Colombian laws to the implementing stage of a Chapter 11 plan presents several issues that must be addressed in advance:

Shareholder preemptive rights

In Colombia, shareholders generally have preemptive rights for the subscription of new shares. This means that existing shareholders have the first right to purchase new shares before they are offered to external investors, which ensures that shareholders can maintain their proportional ownership in the company. Additionally, any issuing of new shares must be approved by the general shareholders' meeting or the board of directors, as applicable. This approval process is a safeguard to ensure that the interests of the shareholders are considered and protected.

Despite the above, Colombian law allows companies to rule out capital contributions under conditions, proportions and terms different from those provided by law and at a price below the face value of the shares, based on technically recognized valuation processes by independent appraisers.

Directors' liability

Colombian Law does not explicitly establish an obligation for directors or managers to file for a restructuring process; however, it does impose responsibilities and duties that may lead them to proactively act in situations of insolvency. They tend to file for restructuring to fulfill their fiduciary duties and avoid personal liability for the worsening of the company's financial situation.

In Colombia, directors have a continuous duty to monitor the company's compliance with the "ongoing concern assumption" (*hipótesis de negocio en marcha*), which includes assessing solvency criteria. This responsibility requires directors to ensure that the company remains solvent and capable of meeting its obligations as they come due. While this duty leads to proactive management to preserve the company's financial health, it does not explicitly obligate directors to initiate a restructuring process. Instead, they must act in the best interest of the company and its shareholders, taking appropriate measures to address any financial distress that may arise, thereby fulfilling their fiduciary duties without necessarily resorting to formal insolvency proceedings.

Ipso facto clauses and automatic stay

If recognition proceedings in Colombia are not initiated, while recognition of Chapter 11 orders should be provided, local creditors with no ties to the US may not find the worldwide effects of US bankruptcy orders compelling enough, and they may seek local enforcement of their rights in Colombia. This can undermine the effectiveness of the automatic stay provided under Chapter 11.

New money: recharacterization, clawback and subordination

Any new money transaction will be subject to the clawback and recharacterization limitations provided in Law 1116/2006, which includes an 18-month lookback period for transactions performed to the detriment of the debtor's assets.

Governance matters

Directors of Colombian companies have fiduciary duties towards the shareholders, not the creditors, even in insolvency situations. Nevertheless, Law 1116/2006 imposes certain obligations to protect creditors in insolvency situations. The key difference with the "Modified Business Judgment Rule" in the US is that, in Colombia, fiduciary duties do not formally shift towards creditors, but directors must act in a manner that does not harm their interests.

Effective recognition

Some Chapter 11 processes have been effectively recognized in Colombia, and the Superintendence of Companies has actively monitored such processes (e.g., Avianca, LATAM and QBEX).

Under Colombian Law, the recognition of foreign processes such as those carried out under Chapter 11 does not affect the right to request the initiation of proceedings under Colombian insolvency laws or the right to file claims in such proceedings. Parallel processes create the challenge of coordinating among the different authorities and conflicting laws.

Recent crossborder cases with Colombian debtors

The following table provides some details of important Colombian companies that have filed for Chapter 11 since 2020 until the date of this report:

	Year	Brief summary
Avianca Holdings S.A.	2020	In 2020, Avianca Holdings S.A., one of the largest airlines in Latin America, filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York. The filing was a response to the severe financial impact of the COVID-19 pandemic on the airline industry. Avianca's restructuring plan involved significant debt reduction, operational restructuring and securing new financing to support its recovery. The case was complex, involving multiple jurisdictions and a large number of creditors. The restructuring aimed to ensure the airline's long-term sustainability and to maintain its operations across Latin America.
Credivalores S.A.	2024	In 2024, Credivalores, a leading non-bank financial institution in Colombia, filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York. The filing was part of a strategy to restructure its debt and ensure the company's long-term viability. The case involved complex negotiations with creditors, and it aimed to stabilize the company's financial situation while continuing its operations in Colombia. The restructuring plan included measures to address liquidity issues and to reorganize the company's debt structure to make it more sustainable.

PERU

Summary of restructuring tools available in Peru

Peruvian law establishes that all insolvency, bankruptcy and restructuring procedures involving companies or individuals who are Peruvian residents and perform business, will be governed by the *Ley General del Sistema Concursal*, Law No. 27809 (the Peruvian Bankruptcy Act), which is supplemented by the Peruvian Corporate Law, Law No. 26887 (the Peruvian Corporate Act).

Unlike the US system, the Peruvian corporate bankruptcy procedure is mainly administrative and not judicial. Article 3.1 of the Peruvian Bankruptcy Act establishes that all insolvency cases will be handled by an administrative agency of the executive branch, the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI). However, it is worth mentioning that the parties in the bankruptcy procedure (creditor or debtor) are entitled to challenge INDECOPI's resolution in a judicial process.

Also, the Peruvian Bankruptcy Act applies to the insolvency proceedings of debtors domiciled in Peru. Private agreements related to the exclusion of Peruvian law and jurisdiction are not enforceable for insolvency purposes.

In Peru, insolvency proceedings seek to ensure the recovery of credit (pro-creditor position), promoting the efficient recovery of credits by maximizing the debtor's assets and allowing the creditors' board meeting to decide whether to restructure or liquidate the debtor. Unlike other legal frameworks for insolvency, the proceedings are between the debtor and the creditors. Therefore, they are highly privatized and will begin once INDECOPI declares the insolvency by publishing it in the Official Gazette of Peru.

According to the Peruvian Bankruptcy Act, a debtor can be subject to one of the following proceedings:

- *procedimiento concursal ordinario* (**ordinary bankruptcy proceedings**), which can be initiated by the creditors or the debtor itself; and
- *procedimiento concursal preventivo* (**preventive bankruptcy proceedings**), which can only be initiated by the debtor.

Ordinary bankruptcy proceedings, which can be filed either by the debtor or its creditors (initiated voluntary or involuntarily), seek to solve insolvency situations of a debtor either **(a)** through a restructuring process (similar to the one established in Chapter 11), or **(b)** through a liquidation process (similar to the one established in Chapter 7).

Any debtor can request ordinary bankruptcy proceedings voluntarily from INDECOPI when it has losses of more than one third of its paid-in capital or obligations of more than one third of the debtor's total liabilities more than 30 days past due. The debtor must request either the restructuring or liquidation of its business. Note, however, that a debtor is forced to request liquidation if its carried-forward losses minus retained earnings exceed its paid-in capital. Creditors are also allowed to request ordinary bankruptcy proceedings from INDECOPI under certain circumstances.

From the date of publication of the proceedings, all of the debtor's unpaid obligations will be suspended, with no default interest or capitalization of interest (i.e., there is a statutory stay in any enforcement procedure). This suspension continues until the creditors' board meeting approves a restructuring plan or liquidation agreement.

Creditors are authorized to take almost any decision necessary to restructure or to liquidate the debtor in the creditors' board meeting.

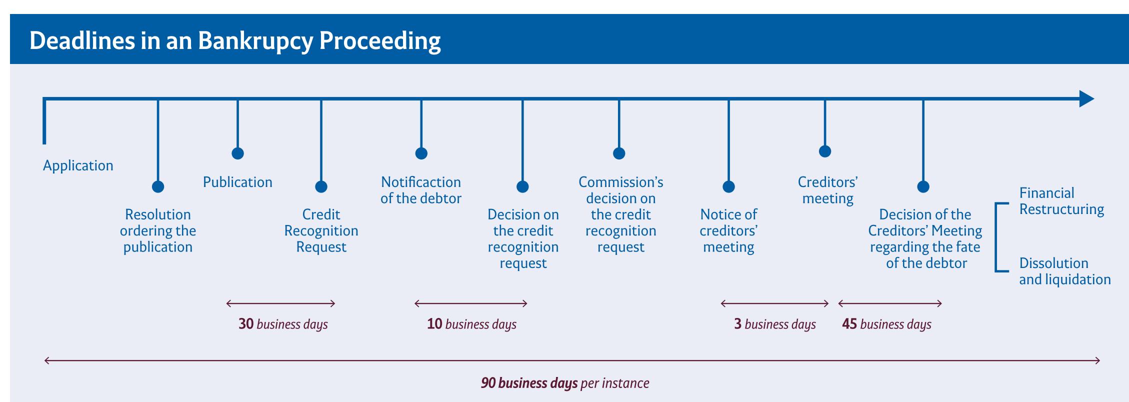
On the other hand, **preventive bankruptcy proceedings** are proceedings that have been established to prevent an insolvent situation. Hence, preventive bankruptcy proceedings can only be initiated by the debtor in situations not covered by ordinary bankruptcy proceedings.

Unlike in ordinary bankruptcy proceedings, in preventive bankruptcy proceedings only the debtor is authorized to manage its business and its governing body is not replaced by the creditors' board meeting.

Under preventive bankruptcy proceedings, there is only one creditors' meeting in which a settlement between the creditors and the debtor (*acuerdo global de refinanciación*) should be approved by a supermajority of creditors. Otherwise, the creditors' meeting could decide to initiate ordinary bankruptcy proceedings with the approval of creditors representing more than 50% of all the verified credits, who are entitled to vote and are present in that board meeting. In this case, INDECOPI will order that the initiation of ordinary bankruptcy proceedings be published. The resolution issued by INDECOPI is unappealable.

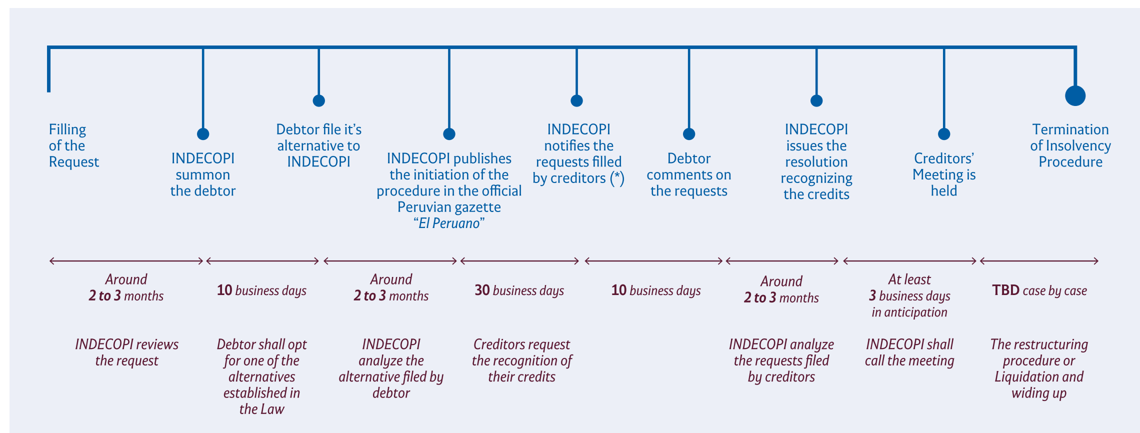
According to the Peruvian Bankruptcy Act, INDECOPI will issue the final resolution to initiate bankruptcy proceedings within 90 business days per instance from the date proceedings are requested. However, in our experience, from the date the creditor submits the request until INDECOPI decides on the recognition of the credits from other creditors who appear in the proceedings, it can take over 12 months, which could be further delayed if the debtor submits objections to the resolutions INDECOPI issues.

Procedure according to the Peruvian Bankruptcy Act



Procedure according to our experience

In our experience, the statutory deadlines illustrated above are not often meet and, in practice, the procedure timeline usually looks like the following chart.



What to expect in Peruvian proceedings compared to Chapter 11

Joint administration

The Peruvian Bankruptcy Act does not provide any rules regarding group restructurings, or any specific rule that makes parent or affiliated companies responsible for the liabilities of its subsidiaries or affiliates. However, a group of companies can be restructured if debtors or creditors include the group of companies in their request to INDECOPI and can prove that each of them meets insolvency test.

Debtor-in-possession

Debtor-in-possession is not necessarily the standard for Peruvian insolvency proceedings. Creditors are authorized to take almost any decision necessary to restructure or to liquidate the debtor in the creditors' board meeting.

Insolvency test

In Peru, the insolvency of a debtor must be duly proven. Therefore, the Peruvian Bankruptcy Act establishes that certain requirements must be met to request the initiation of insolvency proceedings, which must be proven and documented before INDECOPI.

Ordinary bankruptcy proceedings can be requested from INDECOPI by the debtor or its creditors.

If requested by the debtor, the debtor must prove that it has losses of more than one third of its paid-in capital or obligations of more than one third of the debtor's total liabilities more than 30 days past due. Note, however, that a debtor is forced to request liquidation if its carried-forward losses minus retained earnings exceed its paid-in capital. Creditors are also allowed to request the initiation of ordinary bankruptcy proceedings from INDECOPI when their credits exceed certain material thresholds and are more than 30 days past due.

Preventive bankruptcy proceedings can only be requested by the debtor, and the requirements to initiate them are as follows:

- No more than one third of the total obligations are more than 30 calendar days past due.
- After deducting reserves, the debtor must not have accumulated losses of more than one third of the paid-in share capital.

Automatic stay

From the date the initiation of insolvency proceedings is published, all of the debtor's unpaid obligations will be suspended, with no default interest or capitalization of interest. There is a statutory stay in any enforcement proceedings. This suspension continues until the creditors' board meeting approves a restructuring plan, global refinancing agreement or liquidation agreement, which will establish conditions for obligation enforceability and applicable interest rates.

It is important to note that in Peruvian proceedings, it is not possible to lift the automatic stay and allow the sale of collateral in favor of the secured creditor.

Majorities to approve a restructuring plan

The required quorum and majorities in the creditors' board meeting are the following:

	First Call	Second Call
General Quorum	Creditors representing more than 66.6% of the recognized claims.	At least one recognized creditor in attendance.
Quorum and majority in cases where the debtor must request liquidation in the Ordinary Bankruptcy Procedure	The creditors' board meeting may go ahead with at least one recognized creditor in attendance, and agreements will be adopted with the favorable vote of the creditor or creditors attending who represent credits exceeding 50% of the claims.	
Majority to approve the restructuring plan, the liquidation agreement, and the global refinancing agreement, and their modifications, as well as those for which the Peruvian Corporate Act requires qualified majorities	Vote of creditors representing more than 66.6% of the total recognized claims.	Vote of creditors representing more than 66.6% of the total claims represented.
Majority for other agreements	Vote of creditors representing more than 50% of total claims.	Vote of creditors representing more than 50% of total claims represented.

Class formation

Peruvian Bankruptcy Act only provides a mandatory distinction of creditors when it refers to employee claims that have priority over other creditor claims.

In a liquidation process, the statute provides for a payment waterfall prioritizing secured creditors (up to the value of their collateral) ranking tax credits and unsecured creditors as senior.

Additionally, creditors related to the debtor (e.g., shareholders, directors, and affiliated companies) will vote as a separate class in certain cases if the amount of total related claims is more than 50% of the total allowed claims.

Exclusivity and creditor-led plan

According to the Peruvian Bankruptcy Act, it is the debtor's board that proposes the insolvency plan.

A. **Restructuring plan:** Once the continuity of the debtor's activities is agreed upon, the creditors' board meeting must approve the restructuring plan within 60days. The debtor's administration may present more than one restructuring plan proposal to the creditors' board meeting.

B. **Liquidation agreement:** It is presented by the debtor's administration and must be executed by the liquidator.

In preventive bankruptcy proceedings, the creditors' meeting must approve the global refinancing agreement (*Acuerdo Global de Refinanciación*), which will be presented by the debtor's administration (which will be a debtor in possession), and can be approved by the creditors' meeting.

Cramdown

The Peruvian Bankruptcy Act does not foresee the ability to cramdown dissenting holders. Once the relevant claims have been recognized by INDECOPI, these will be paid in full under any plan unless otherwise agreed by impaired creditors.

Recharacterization, equitable subordination and clawback

The Peruvian Bankruptcy Act establishes a lookback period regarding acts carried out before the request to initiate insolvency proceedings.

(a) **Before the insolvency request is submitted:** The judge will declare ineffective and, consequently, unenforceable against the creditors recognized within the insolvency proceedings, the liens, transfers, contracts, and other legal acts, whether gratuitous or onerous, that do not refer to the day-to-day operations of the debtor's, that harm its estate and that have been carried out or entered into by the debtor within the year before the date on which the request to initiate insolvency proceedings.

The disposal acts carried out by any change or modification of the debtor's corporate purpose, made in the previous period, will be evaluated by the judge based on the nature of the respective commercial operation.

(b) **After the insolvency request is submitted:** In the period between of the date the bankruptcy request is submitted and its approval, the judge will declare ineffective the following:

- (i) Any advance payment for unmatured obligations
- (ii) Any payment for matured obligations that is not made according to the agreed form
- (iii) Acts outside the ordinary course
- (iv) Set-offs made between reciprocal obligations
- (v) Liens constituted and transfers made by the debtor with charge to their property
- (vi) Any security granted over the debtor's assets to secure the payment of obligations contracted before this date
- (vii) Other structural changes (mergers, absorptions, or spin-offs) that cause harm to the debtor's asset

DIP financing

The Peruvian Bankruptcy Act does not provide for any type of privileges as to new money or interim financings in terms of priming liens.

New financings must be approved by the debtor's administration and, according to the Peruvian Bankruptcy Act, those financings will not have any special privilege or protection. If after a restructuring process is initiated, the creditors' board meeting calls for liquidation, the post-insolvency financing would be treated as any other claim without any kind of privilege.

Other key restructuring considerations

Obligation to file for bankruptcy: The Peruvian Bankruptcy Act does not provide an obligation to initiate insolvency proceedings. They are generally only initiated voluntarily by the debtor or involuntarily (by the debtor's creditors) in cases where the legal requirements are met as explained above.

Shareholders' right of separation: Despite a debtor being in insolvency proceedings, it is possible for its shareholders to exercise their right of separation granted in the Peruvian Corporate Act. This separation right entails the repayment of the value of the shares. However, this payment can only be made effective after all claims in the relevant restructuring plan have been paid, unless otherwise agreed by the creditors' board meeting. The value of the shares will be determined in accordance with the Peruvian Corporate Act.

Ability to pursue a restructuring under Chapter 11. Main issues in a Chapter 11 restructuring of a Peruvian debtor

Recognition

Peru is not a party to the UNCITRAL Model Law on insolvency.

According to the Peruvian Bankruptcy Act, all debtors domiciled in Peru must file for bankruptcy in Peru.

Akin to Chapter 15, INDECOPI has jurisdiction to handle proceedings in collaboration with companies domiciled abroad with assets in Peru in case the foreign judgment declaring the bankruptcy is recognized through the local proceeding. This jurisdiction will extend exclusively to the assets located in the Peruvian territory.

Recent crossborder cases with Peruvian debtors

As highlighted above, due to the difficulties that Peruvian law imposes on crossborder cases, there is not much case law in this jurisdiction.

We have recently envisaged a structure through Portugal for a Peruvian debtor group—the Perufish Group—which had a very positive outcome. This case is examined in more detail in the Portugal section, but in short, it involved an English law restructuring plan under Part 26A of the Companies Act 2006, based on a holding structure involving a Portuguese company.

RECENT CROSSBORDER CASES

In this section, we provide a brief analysis of some significant recent crossborder cases in the jurisdictions analyzed. Kindly note that we have represented some of the parties in some of the following cases, but we have prepared this section using publicly available information exclusively.

Celsa case

The restructuring plan of Celsa went through several stages, and is a landmark case with relevant doctrine on the new dynamics of pre-insolvency restructuring after the reform approved by Law 16/2022, of September 5.

In this case, the Commercial Court of Barcelona approved the restructuring plan of Grupo Celsa, despite opposition from the shareholders and a dissenting creditor, extending the effects of the plan to all creditors and shareholders, who will lose their shareholding. Issues addressed included the debtor's insolvency, the viability of the plan and the validity of the information presented by the creditors.

The Celsa case was the first creditor-led restructuring in Spain.

Background

After a process that lasted almost a year, on September 4, 2023, the Commercial Court of Barcelona resolved the homologation petition filed by the creditors of Grupo Celsa, in open confrontation with the debtor and its shareholders, who did not participate in preparing the plan nor consented to its approval. The effects of the Spanish homologation of the restructuring plan extended to all affected creditors and to the debtor's shareholders, resulting in the complete loss of their ownership of the group.

The proposing creditors petitioned the court for judicial homologation of the restructuring plan on April 26, 2023, seeking the joint homologation of different companies of Grupo Celsa under article 642 of the Spanish Insolvency Act and through the procedure with prior contradiction.[1] The debtor's shareholders and a dissenting impaired creditor filed motions opposing the petition.

1 This procedure allows the court to preview any challenges to the proposed plan before ruling. While the procedure with previous contradiction takes longer than a regular homologation, the ruling from the first instance court is final and cannot be challenged, giving stakeholders full certainty from the very first ruling.

Specifically, the plan proposed a deep corporate restructuring that included the capitalization of the creditors' claims taking control of the debtor, as well as (i) restructuring the group's existing debt, (ii) a new intercreditor agreement and (iii) changes to the security package.

Opposition

The shareholders opposed the creditor-led petition, alleging various reasons aimed at safeguarding their position in the company. Among the most material reasons were (i) that cramming down and extending the effects to the debtor and the shareholders was illegal, a direct violation of corporate law (this was the first creditor-led plan so it was not tested before); (ii) that the Celsa group was not insolvent; (iii) that the value of the Celsa group was higher than its debt, so the shareholders were in-the-money and could not be crammed down. They also argued that the plan did not ensure the viability of the debtor; there were formal defects in the content, and lack of standing to request the joint restructuring.

Other creditors outside the ad hoc group leading the restructuring petition also opposed the restructuring, alleging almost all the reasons provided in the Spanish Insolvency Act, including, among others, disproportionate sacrifice, lack of parity in class and rank, best interest of the creditors, and the absolute priority rule.

Court's approach to key issues:

Debtor's insolvency

The court found that Celsa was insolvent, after the shareholders and the dissenting creditors questioned its solvency in their opposition motions. Their main argument was that there were numerous pending lawsuits questioning the validity of certain contracts, whose termination in favor of the debtor would substantially affect its economic situation. Thus, they defended its solvency by discounting the total amount of the matured financial debt. They also submitted expert reports by the shareholders confirming the company's solvency and its meeting its current obligations, indicating that no imminent defaults were expected. The judgment dismissed this claim and did not consider that the existence of certain claims should be considered when their validity and enforceability were being disputed in court at the debtor's unilateral will, as this would give the debtor the ability to block legitimate claims by the creditor.

Viability of the Celsa Group after restructuring

The creditors' financial advisor leading the restructuring plan qualified the restructuring plan as adequate to ensure the company's viability in the short and medium term. The shareholders contradicted this viability, presenting counter-expert reports with several arguments criticizing the proposed viability plan. The court stated that the statute does not require a singular detailed business plan but rather that it outline the essential assumptions for the success of the restructuring so accepted the creditors' viability statement.

Valuation of Grupo Celsa as the main battleground

The main issues in this case was the valuation of the debtor, as it was crucial to determine whether shareholders were in-the-money and the creditor-led plan was expropiatory or not.

The shareholders opposed the judicial homologation of the plan, alleging a breach of the reverse rule, i.e., that creditors receive rights, shares or units valued higher than the value of their credits. For the shareholders, the company's valuation was higher than the value proposed in the creditor-led plan, so the debt-for-equity granted the creditors a position that did not correlate with the value of their claim.

The valuation method used by the restructuring expert of the creditors and the different experts involved by dissenting stakeholders was not particularly different, but incorporating and quantifying different data and variables produced extraordinarily different results. The valuation reports presented

by the shareholders were based on financial forecasts and projections prepared by the debtor's officers, while those provided by the creditors and the restructuring expert relied on external market information sources. The judgment gave value to the information from the debtor but not absolute value, as the historical forecasts made by the debtor's management team were inaccurate, with references to the 2017 viability plan (a viability plan filed in a previous restructuring). Additionally, the values in the shareholders' report increased significantly without apparent justification, as did the growth expectations. Therefore, the judge concluded that the debtor's value was overestimated. By contrast, the reports presented by the restructuring expert and the creditors' experts were consistent in terms of data, information sources, choice of variables and time horizons.

Conclusion

The Celsa case was the first one of its kind under Spanish law, and its speedy resolution reassured many foreign investors in Spain that the reforms made to the Spanish Insolvency Law were in the right direction. Creditors were able to take over the debtor in a hostile manner, without its collaboration. This could encourage opportunistic investment in Spain, aimed at taking over a company and provide incentives to the company to anticipate financial distress and begin negotiations with key creditors in an early stage to avoid giving them the opportunity to lead a plan (a company can file for pre-insolvency proceedings if it foresees distress in the next two years, while creditors can only lead a restructuring plan if the company is imminently insolvent, i.e., three months away from default).

Condor Inversiones a/k/a Mainstream

On August 11, 2023 Condor Inversiones SpA (“**Condor Holdco Borrower**”) and Huemul Inversiones SpA (“**Huemul HoldCo Borrower**”) filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (the “**HoldCo Filing**”). Condor Holdco Borrower and Huemul Holdco Borrower were two intermediate holding companies that own the operating holding companies—Cóndor Energía SpA (“**Condor OpCo Borrower**”) and Huemul Energía SpA (“**Huemul OpCo Borrower**”), which, in turn, owned the Cóndor and Huemul Projects, wind and solar power generation facilities in Chile.

Condor OpCo Borrower and Huemul OpCo Borrower had, in turn, filed for restructuring under the Chilean Bankruptcy Law on July 20, 2023, shortly before the HoldCo Filing (the “**Opco Filing**”). The HoldCo Filing would greatly limit the ability of Condor OpCo Borrower and Huemul OpCo Borrower to approve a restructuring plan under the Opco Filing because, under Chilean Law, Cóndor Holdco Borrower and Huemul HoldCo Borrower (debtors under the HoldCo Filing) would have to vote and approve any capital increases in Condor OpCo Borrower and Huemul OpCo Borrower.

The HoldCo Filing was initiated by administrators appointed by mezzanine lenders enforcing a stock pledge governed by Chilean Law that allowed them to exercise their right to remove previous administrators and appoint new ones. The HoldCo Filing argues that relief under Chapter 11 is necessary to stop Mainstream's ongoing actions intended to render worthless the assets of Condor Holdco Borrower and Huemul Holdco Borrower, i.e., the shares in Condor OpCo Borrower and Huemul OpCo Borrower. Mainstream is the indirect parent company of the HoldCo Companies and the Opco Companies. Specifically, the HoldCo Filing argued that Mainstream caused the Condor OpCo Borrower and Huemul OpCo Borrower to equitize all of its intercompany debt and pre-authorize the issuing of trillions of new shares (the “**OpCo Capital Increases**”) that would dilute the Holdco Debtors' (pro forma) equity interest to 0.01%, which would render it worthless.

On August 16, 2023 Mainstream responded by filing a motion to dismiss the Chapter 11 cases arguing that Mainstream remained the only administrator of the HoldCo Companies, and it neither

authorized nor ratified (or would ratify) the *ultra vires* acts conducted by the mezzanine lenders that wrongfully enforced the stock pledge and appointed administrators to the HoldCo Companies. The mezzanine lenders, therefore, had no authority to replace the administrators and, consequently, such administrators had not authority to seek relief under the HoldCo Filing.

Mainstream further argued that:

- The HoldCo Companies were Chilean entities with no nexus to the United States. Chilean courts would not recognize the Chapter 11 cases because the HoldCo Companies have neither their center of main interests nor business operations involving non-transitory economic activity in the United States;
- The Holdco Companies were not eligible debtors under §109 of the Bankruptcy Code. The HoldCo Companies Inversiones were incorporated and did business only in Chile and did not have any property in the United States that would make them eligible to become debtors; and
- The court should dismiss the case under § 1112 of the U.S. Bankruptcy Code because the mezzanine lenders had manufactured jurisdiction by creating an entity in Texas only one week before they initiated the proceedings.

The case was settled on November 2, 2023, including mutual party releases, dismissal of the Chapter 11 cases and implementation of certain restructuring transactions, but it did raise some interesting issues from a crossborder perspective.

Finally, when the case was settled between the parties, Mainstream took action in Spain by filing a local "blessing homologation" aimed at protecting in Spain (and obtaining recognition in the EU) the different restructuring transactions agreed by the parties in the event of a future company distress situation. The Spanish Filing resulted in the co-existence of three main insolvency proceedings governed by three different jurisdictions (Chile, Spain and the United States).

In particular, this case provides an opportunity to review and discuss **(i)** the implication of enforcing stock pledges and exercising step-in rights in stock pledges governed by continental law jurisdictions and potential implications for lenders exercising such rights; **(ii)** use such enforcement and step-in rights to take control of a debtor and file for relief under Chapter 11 (including by setting up property in the United States to qualify as eligible debtor); and **(iii)** the co-existence of parallel main insolvency proceedings in different jurisdictions in multi-layered debt structures.

WOM

Background

On April 1, 2024, WOM S.A. and five of its affiliates each filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. These cases are pending before the Honorable Karen B. Owens, judge for the District of Delaware, and are jointly administered under Case No. 24-10628.

WOM S.A., Multikom S.A., Conect S.A. and WOM Mobile S.A. are entities incorporated under the laws of the Republic of Chile and domiciled in Santiago de Chile. The other two debtors, Kenbourne Invest S.A. and NC Telecom II AS are incorporated and domiciled outside the US (Luxembourg and Norway, respectively).

In the Chapter 11 proceedings, WOM debtors obtained all requested first day relief, including the interim approval of the $210 million DIP financing to be provided by JP Morgan (such DIP unlocking $100

million), an outside lender different from the creditors in the case. Part of the DIP financing will be used, according to the DIP budget, for payments to critical foreign vendors and service providers.

The case is still ongoing in the District Court of Delaware.

Ad hoc group's petition to dismiss the cases

Within WOM's Chapter 11 cases, the ad hoc group of 2024 and 2028 bondholders (the "**AHG**") filed a petition to dismiss the case on April 23, 2024. The AHG argue that WOM has no ties to the US to justify Chapter 11 proceedings and that several WOM creditors will not respect the worldwide stay imposed by initiating the proceedings in the US.

A bankruptcy court has authority to dismiss a case that is not properly brought in the US:

- One source of such authority is § 305(a) of the Bankruptcy Code, which provides that a court may dismiss or suspend all proceedings in a case. WOM's AHG contended that, under § 305(a), the WOM Group had only the barest, most insubstantial connections with the United States, which deprived the court of its ability to exercise essential *in rem* bankruptcy jurisdiction and to enforce the automatic stay, the Bankruptcy Code or any Chapter 11 plan against WOM's creditors and property located in Chile. Additionally, the AHG asserted that Chilean insolvency laws provide a suitable alternative for achieving a fair distribution of the Debtors' assets and a Chilean restructuring. They stated that: **(i)** the interests of creditors would be better served with Chilean restructuring proceedings; **(ii)** the purported worldwide effects of the automatic stay would not be recognized by many of the WOM creditors; and **(iii)** Chile a suitable alternative for achieving a fair distribution of WOM's assets.
- A second argument was that, under § 1112(b) of the Bankruptcy Code, a Chapter 11 can be dismissed in cases of "**(1)** continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; **(2)** inability to effectuate a plan; **(3)** unreasonable delay by the debtor that is prejudicial to creditors ...." AHG argued that WOM's Chapter 11 filing lacked a valid purpose and sought to obtain a tactical litigation advantage and that WOM's filing was not in good faith and should be dismissed for cause under § 1112(b).

An agreement was finally reached between WOM and the AHG, so Judge Owens did not have the chance to discuss this matter. However, this is a good example of how foreign debtors can encounter some difficulties in filing for Chapter 11 and that these strategies should be analyzed in depth.

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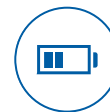
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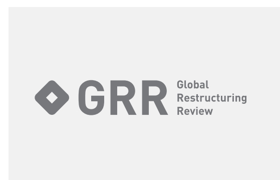

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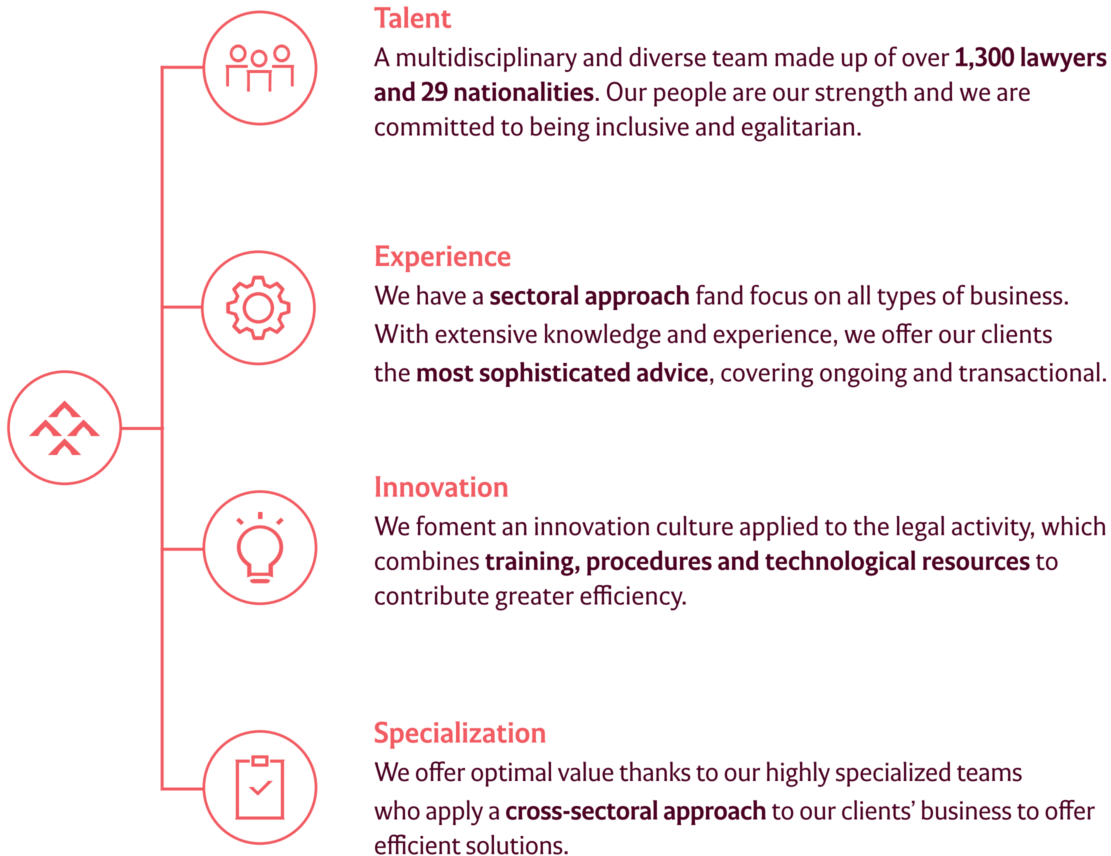

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