INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 4F Guidance Text

Colombia

2023 / 2024

CONTENTS

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IN INTERNATIONAL INSOLVENCY LAW

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN COLOMBIA

Welcome to **Module 4F**, dealing with international insolvency law in **Colombia**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of insolvency law in Colombia;
- a relatively detailed overview of Colombia's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Colombia.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2023**. Please consult the Foundation Certificate in International Insolvency Law website for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2023 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in Colombia:

- the background and historical development of insolvency law in Colombia;
- the various pieces of primary and secondary legislation governing Colombian insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in Colombia; and
- the rules relating to the recognition of foreign judgments in Colombia.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Colombian insolvency law; and
- be able to answer questions based on a set of facts relating to Colombian insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO COLOMBIA

The Republic of Colombia is a democratic republic located in the north of South America. Prior to its independence in 1819, it was a Spanish colony. The current political structure comprises three independent branches: the executive headed by the President, the legislative represented by the Congress of the Republic, and the judiciary, divided into three main jurisdictions. Each jurisdiction has a specialised high court, namely the Supreme Court of Justice, the Council of State and the Constitutional Court. These courts are the courts of final instance in the ordinary, administrative and constitutional jurisdictions, respectively. Colombia is deemed to be a civil law jurisdiction.[1]

From an economic standpoint, Colombia is an upper middle-income country and is the fourth largest Latin American economy with a gross domestic product (GDP) of USD16 077 per capita. Its economy is heavily dependent on exports of commodities such as oil, coffee, coal and flowers. Colombia has a population of nearly 50 million people. It is the only country in South America with two seacoasts (Pacific and Caribbean), which provides tactical shipping advantages in today's global market. Colombia has signed free trade agreements and bilateral investment treaties with leading economies such as the United States, the European Union, the United Kingdom, South Korea and Israel, among others. It is also a member of the United Nations, the World Trade Organization, and the Organisation for Economic Cooperation and Development. At a regional level, Colombia is a member of the Pacific Alliance, Mercosur, and the Andean Community of Nations.

[1] L A Nagle, "Evolution of the Colombian Judiciary and the Constitutional Court", *Ind Int'l & Comp L Rev* (1995) 6 at 59, available at https://mckinneylaw.iu.edu/iiclr/pdf/vol6p59.pdf.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

Colombia is a civil law jurisdiction with its roots in Roman law and has been influenced by European civil law jurisdictions like France, Spain, and Italy,[2] and to a lesser extent by the common law of the United States.[3] Its legal system is mainly based on written laws such as codes and acts. The role of case law is limited to specific cases. However, since the enactment of a new Constitution in 1991, previous High Court rulings have become important as a reference for other judges. Moreover, interpretations set forth in such rulings can be as important as the written law. In fact, the *ratio decidendi* of the High Court's rulings is binding on both the higher courts and lower courts.[4] The main commercial laws are the Civil Code and the Commercial Code. In insolvency matters, the Law 1116 of 2006 (Law 1116) is the main source of law.

The origin of Colombian insolvency law is rooted in the Napoleonic Code (although it has been modified somewhat), which determines the current applicable ranking of claims in insolvency proceedings. The first modern insolvency regime emerged in the mid-20th century through Decree 750 of 1940, but this regime only entailed a liquidation proceeding.[5] In 1969, Decree 2264 of 1969 created the first restructuring regulation. These two regimes (liquidation and restructuring) were amended on a number of occasions in 1971, 1989 and 1995 to create a regime with specific procedural rules, aimed at the preservation of viable companies.[6] In 1999, Law 550 of 1999 created a temporary and semi-judicial insolvency regime to address an economic crisis, which temporary regime was aimed at being more favourable towards debtors.

In 2006, the Congress enacted Law 1116, which is the cornerstone of the current Colombian insolvency law. Law 1116 aimed to overcome the difficulties experienced with preceding laws. It was influenced by the previous insolvency laws, the work of international organisations and case law from the higher courts.[7] It also incorporates the international experience from UNCITRAL's Insolvency Working Group, primarily the Legislative Guide on Insolvency Law and

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2 A Ramirez "An Introduction to Colombian Governmental Institutions and Primary Legal Sources" *Hauser Global Law School Program, New York University School of Law*. Available at https://www.nyulawglobal.org/globalex/Colombia.html.

3 P J Eder "The impact of the Common Law on Latin América" *U. Miami L. Rev* (1949) 4, 435. Available at https://core.ac.uk/download/pdf/214389361.pdf; and A F León-Baquero "La expansión del common law norteamericano en el ámbito del derecho de los negocios" *Blog de Derecho de los Negocios. Universidad Externado de Colombia* (2019). Available at https://dernegocios.uexternado.edu.co/la-expansion-del-common-law-norteamericano-en-el-ambito-del-derecho-de-los-negocios/.

4 Colombian Constitutional Court. Rulings SU-354 of 2017, SU-241 of 2015, T-620 of 2013, T-760A of 2011, T-100 of 2010, T-468 of 2003, among others; and D López-Medina "El derecho de los jueces: obligatoriedad del precedente constitucional, análisis de sentencias y líneas jurisprudenciales y teoría del derecho judicial", *Legis* (2006).

5 L G Velez-Cabrera "Una breve historia del derecho concursal moderno en Colombia", *Revista Superintedencia de Sociedades* (2011) 1, 4-9. Available at https://www.supersociedades.gov.co/imagenes/cominicaciones/Oficio_%20Nuevo_%20libro.pdf.

6 S Sotomonte "Intermitencias del Régimen Concursal Colombiano", *Revista Actualidad Concursal* (2019) 1, 7-9. Available at https://www.derechoconcursal.org/images/noticias/1-numero-Revista-Actualidad-Concursal.pdf.

7 J J Rodríguez-Espitia "Aproximación al derecho concursal colombiano", *Revista E-Mercatoria* (2007) 6(2), 25-28. Available at https://revistas.uexternado.edu.co/index.php/emerca/article/view/2064/2838.

the Model Law on Cross-Border Insolvency. In fact, the latter was almost entirely incorporated into Law 1116. This incorporation brought about a transplant of foreign concepts from common law jurisdictions, such as the rejection of contracts. Finally, Law 1116 was influenced by constitutional case law and includes rules to protect certain persons like pensioners and workers.[8]

In 2020, the Congress enacted several temporary insolvency decrees to address the economic crisis created by the Covid-19 pandemic. These decrees incorporated more flexibility into the insolvency proceedings, created special proceedings for small businesses and two out-of-court reorganisation proceedings. It also established financial relief measures for debtors, and introduced measures to expedite the duration of the proceedings.

Colombia has specialised insolvency regimes for entities such as financial institutions, public utilities and health institutions because of the public interest involved in their activities. These special proceedings will not be addressed in this guidance text.

4.2 Institutional framework

4.2.1 Insolvency Court structure

The Insolvency Division (*Delegatura*) of the government agency entitled Superintendence of Companies, is the Colombian insolvency court (the Insolvency Court). Although the Insolvency Division is part of the executive branch and not part of the judicial branch, the Constitution grants judicial powers to the Insolvency Division to act as an insolvency court given the technical nature of the bankruptcy system. This Insolvency Court has specialised judges in insolvency to promote efficiency and high-quality rulings, which in turn fosters predictability and certainty.

In certain cases, such as with the insolvency of a natural person merchant, non-profit organisations and trusts, the circuit civil judges have jurisdiction to pursue the insolvency proceedings.

4.2.2 Efficiency of the court system and enforcement of rights

4.2.2.1 Insolvency proceedings

The enforcement of rights is more efficient within an insolvency proceeding than in individual execution, as the Insolvency Court can conduct highly complex proceedings for a period ranging from six months to two years. This is due to a number of factors, such as:

(i) the specialisation of the judges;

(ii) a more efficient structure that ranges from the internal division of work to technical infrastructure like digital dockets; and

[8] *Ibid*.

(iii) the existence of simplified procedural rules that are reflected in:

- shorter terms for procedural stages;
- the limitation of valid evidence to documents; and
- the fact that in insolvency matters decisions are not subject to appeal.

Nonetheless, the Insolvency Court has limited jurisdiction over some disputes between the parties (such as contractual disputes that must be decided by a judge or an arbitration tribunal that has jurisdiction over the contract).[9] Furthermore, some decisions may only be challenged on exceptional grounds, such as the violation of fundamental rights like the right to due process. In the latter case, a District Tribunal, the Supreme Court of Justice and even the Constitutional Court may review the decision to ensure that there are no violations of fundamental rights.

4.2.2.2 Commercial disputes

Commercial disputes are litigated before the Civil Courts, which are supposed to be impartial and independent. However, a significant challenge surrounding the enforcement of rights is the duration of civil proceedings, since courts generally have a heavy workload. Thus, even though the judicial enforcement of rights outside of insolvency has improved over the years, it is still not efficient due to the ineffective judiciary structure. Whenever there is a dispute regarding the extent or existence of a right, creditors must initiate declarative proceedings. However, it may take from four to eight years for the higher court to hand down a definitive ruling. For the duration of a debt-collection proceeding where the basis for the claim is not open to dispute because a creditor holds proof of a claim that is clear, express and already due (such as a promissory note), it is shorter but still long. On average, a debt-collection proceeding may take from one to four years. Throughout debt-collection proceedings, creditors can apply for interim measures like the attachment or seizure of the debtor's assets, to prevent the debtor from selling or donating its assets and to preserve the efficacy of a pending judgment.

In terms of the Law of Security Interests over Movable Assets, also known as Law 1676 of 2013, the parties can agree to allow a secured creditor to take possession of encumbered assets or to institute a specific foreclosure procedure. Although out-of-court or private enforcement mechanisms with regard to security interest have been in force for several years already, these provisions are still being interpreted by courts in order to ascertain the meaning in certain instances. Therefore, the system is not absolutely reliable.

4.2.3 Regulator

There is no insolvency regulator in Colombia. Insolvency regulations are issued either by the Congress or the executive branch. However, the executive branch has limited competence,

[9] The jurisdiction is not transferred to the bankruptcy judge, as described below. The Circuit Civil judges, District Tribunals, Supreme Court of Justice and arbitration tribunal resolve disputes regarding enforceability, existence, validity and efficacy of contracts, following a different proceeding, in which the collection of claims will be subject to a different proceeding.

since it can only enact: (i) decrees that are of a legislative nature during a state of emergency for social, economic or environmental reasons, or (ii) regulatory decrees dealing with technical points of insolvency laws.

Self-Assessment Exercise 1

Question 1

What are the factors that make the Insolvency Court more efficient than Civil Courts?

Question 2

Does Colombia have both liquidation and restructuring insolvency proceedings?

Question 3

Are the Insolvency Division and the Circuit Civil judges competent to act as insolvency judges for all the bankruptcy cases?

Question 4

Can the Insolvency Court declare the debtor's civil liability for a traffic accident?

Question 5

True or False? The Insolvency Court legislate on technical aspects of the regime considering that it is a specialised court.

Question 6

True or False? The constitution supersedes the insolvency regime.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

5.1 Overview of security interests

There are various types of security interests under Colombian law, as explained below:

5.1.1 Mortgage

A mortgage is a type of contract in terms of which an owner (mortgagor) pledges his title to property (mainly real estate) to a creditor (mortgagee) to secure the repayment of a debt. The main purpose of the mortgaged property is to serve as collateral to secure the payment of the debt upon the debtor's default, thus limiting the creditor's risk.

The debtor can create a mortgage over the following assets: (i) real estate, (ii) aircraft and (iii) ships.

A mortgage has the following characteristics:

(1) the mortgagor retains title and possession of the real estate;

(2) the debtor can grant a mortgage to secure either his own or a third-party's obligations;

(3) it is possible for a debtor to grant multiple mortgages with different priority over the same real estate, in which case the secured creditors are paid on a first-registered, first-served basis;

(4) provided that the mortgage is properly recorded, it allows the mortgagee to enforce the collateral even if debtor has transferred it to a third party; and

(5) the mortgage can be open or closed depending on whether it is granted to secure all the obligations in favour of a creditor or specific and limited obligations.

To be effective against third parties, the mortgage must be recorded in a public deed in the Real Estate Registry (*Oficina de Registro de Instrumentos Públicos*) of the place where the real estate is located.

The mortgagor can only enforce the collateral by means of a judicial proceeding. Thus, the court's authorisation is required. Any provision in a mortgage agreement entitling the creditor to claim or acquire ownership of the asset directly is expressly prohibited by law. The creditor is paid from the proceeds of a public judicial auction of the mortgaged real estate. If the auction is unsuccessful, the real estate is transferred to the creditor.

5.1.2 General regime for security interests over moveable assets (garantías mobiliarias)

There is no unified definition of a security interest. The relevant law is the Law of Security Interest over Movable Assets (Law 1676 of 2013). This law follows a functional approach whereby both

present and future movable assets can be used as collateral. Therefore, a security interest can be created by any means, such as pledge, floating charge, trusts, conditional assignments, tittle retention clauses, and the like. The main purpose of the encumbered assets is to serve as collateral to secure the debt upon the debtor's default, thus limiting a creditor's risk.

Any assets that can be moved from one location to another and that has economic value (including intangibles such as trademarks, patents, shares, obligations, rights, etcetera) may be subject to a lien. Nevertheless, certain movable assets can only be used as security by means of a special regime. Such assets, like aircraft objects, securities and vessels or ships, are excluded from the scope of Law 1676.

Security interests over movable assets have the following characteristics:

(1) In order to constitute a valid security interest over a movable asset, the security agreement must be in writing;

(2) This relevant document must include, *inter alia*, information identifying the guarantor, the debtor, the creditor, and the particulars of the secured obligations, as well as the asset and the secured value;

(3) Generally, while the security interest is perfected upon execution of the security agreement in writing, registration in the National Registry for Security Interest over Movable Assets (*Registro Nacional de Garantías Mobiliarias*) is required to ensure: (i) enforceability *vis-à-vis* third parties, and (ii) priority rights with respect to other creditors of the guarantor in a foreclosure or insolvency proceeding; and

(4) As mentioned above, a security interest is a broad concept that comprises various contractual agreements over movable assets. The following are most relevant:

   (a) Pledge *(prenda)*: a contract by which a party grants a security interest to secure an obligation and assure that the debtor will repay the obligation. A pledge can be executed either with or without transferring physical possession of the encumbered assets to the creditor. However, when the pledge is a non-possessory pledge, it shall be registered in the National Registry for Security Interest over Movable Assets, which registration will provide priority and enforceability against third parties; and

   (b) Floating charge (*garantía mobiliaria sobre establecimiento de comercio*): a security in respect of business premises that creates an open lien over a group of assets. It is usually granted over interchangeable or circulating asset, like inventory or receivables.

Security interests granted under Law 1676 must be recorded in the National Registry for Security Interest over Movable Assets, administered by the National Association of Chambers of Commerce. The amendments, extensions, and cancelations of security interests are also recorded in this registry. The purpose of registration is to give publicity to secured transactions over movable assets. The failure to register a security interest does not affect its validity.

However, the recording of the security interest is important, as it provides the secured creditor with priority and enforceability against third parties. Security rights over certain assets, like vehicles and shares, must be recorded in additional registries.

Parties can agree to the following private mechanisms to facilitate the enforcement of security interests in respect of movable assets:

(a) direct payment: the creditor gets paid by receiving transfer of ownership and physical possession of the collateral without the need to follow a court procedure. This option is only available if it is established in the agreement; and

(b) special enforcement proceeding: it takes place before a notary public or a Chamber of Commerce and it is supposedly faster than judicial foreclosure because the debtor can only raise specific defences. Alternatively, the parties can agree to a specific enforcement mechanism that must be followed upon the debtor's default. Usually in complex transactions like project finance structures, the financing documents will stipulate a mechanism through which to select an investment bank that must value the encumbered assets; the process through which the private sale of the assets must be conducted; and the secured creditor's rights to take title and possession of the encumbered assets in the event that the sale cannot take place. This option is only available if it is established in the agreement.

If the parties did not agree to a private enforcement mechanism, they can use the judicial foreclosure process whereby the encumbered assets will be publicly auctioned, and the proceeds of the sale used to pay the secured creditors.

5.1.3 Collateral trust

The collateral trust (*fiducia en garantía*) is a form of security whereby a settlor transfers an asset to a trust in order to guarantee obligations in favour of a beneficiary. More specifically, the settlor conveys the ownership of assets to a trust administered by a trustee. The settlor irrevocably authorises the trustee to proceed with the private sale of the contributed assets to pay the beneficiary with the proceeds of the sale without initiating a judicial proceeding, provided that an objective condition (usually the non-performance of an obligation) established in the trust agreement is met. Alternatively, the trust assets can be transferred directly to the beneficiary. This kind of trust may result in a more predictable enforcement mechanism than a pledge or a mortgage. Both real estate and movable assets may be provided in trust as collateral.

Collateral trust has the following characteristics:

(1) the trustee must be a legal entity supervised by the Colombian Financial Superintendence;

(2) the trustee charges a management fee throughout the term of the trust;

(3) the trust is not a separate legal entity but rather it is an estate created by the trust agreement and represented by the trustee;

(4) the trust agreement is regarded as creating a security interest under Law 1676 (*garantía mobiliaria*);

(5) the trustee is bound to strictly follow the instructions established in the trust agreement;

(6) the trust agreement allows flexibility for the parties. The trustee and the settlor can agree on the degree of control that the settlor may retain over the contributed assets, and when and on what conditions that control may shift to the beneficiary; and

(7) upon an event of default, the beneficiary shall be allowed to instruct the trustee in all matters regarding the trust and the contributed assets, including the sale / foreclosure of the assets in accordance with the trust agreement.

The trust agreement must be recorded in the National Registry for Security Interest over Movable Assets and when the asset is real estate, it must also be recorded in the Real Estate Registry.

The enforcement mechanisms of the trust must be contractually agreed upon in the trust agreement. In large transactions, parties to trust agreements generally agree on foreclosure mechanisms that include special foreclosure proceedings consisting of private sale processes conducted by independent investment banks and payment-in-kind mechanisms whenever the trust assets cannot be sold via the special foreclosure proceeding. To the extent that assets remain in the trust after payment in full of all secured obligations, title to the remaining assets will revert to the settlor.

5.2 Security interests in an insolvency proceeding

Upon the debtor's insolvency, all encumbered assets are subject to the insolvency proceeding and all secured creditors must participate. However, secured creditors have special enforcement rights with regard to their collateral depending on the type of asset and the type of proceeding, provided that their security interest is properly recorded in the National Registry for Security Interest over Movable Assets. Although, in principle, these special rights are restricted to security interests in movable assets, it is possible to extend them to mortgages, provided that the mortgage agreement is properly recorded in the Real Estate Registry.

5.2.1 Restructuring proceedings

In restructuring proceedings, secured creditors are entitled to enforce their collateral at an early stage of the proceeding (that is, after the hearing to rule on the objections) provided that the assets are not deemed necessary for the continuation of the debtor's business (*bienes necesarios*). Otherwise, the collateral cannot be enforced, but the secured creditor will have the right to request a preferential payment after the confirmation of the reorganisation agreement (that is, a payment not bound by the terms of the reorganisation agreement and that must be made to the secured creditor with priority over any other unsecured claims).

However, this preferential payment cannot be construed as a right to receive immediate payment. Instead, the Insolvency Court may authorise the: (1) sale or the appropriation of the encumbered assets in favour of the secured creditor, (2) negotiation of the terms of payment of the obligation by the parties, considering the financial capacity of the debtor, or (3) reestablishment of the payment conditions set forth in the loan agreement. It is worth noting that according to Ruling C-145 of 2018,[10] prior to the assignment of the encumbered asset to the secured creditor, the judge must verify that child support obligations and labour and employment claims[11] are fulfilled or will be fulfilled from the unencumbered remaining assets.

Both the exclusion of assets unnecessary for the debtor's business development and the preferential payment of secured claims, are limited by the Constitutional Court's Ruling C-145 of 2018. The Constitutional Court held that these measures are contingent upon there being sufficient assets to pay child support obligations, pension claims and labour claims (including salaries and other claims accrued in terms of an employment contract).

5.2.2 Liquidation proceedings

Encumbered assets (subject to secured claims) are subject to liquidation proceedings. Nonetheless, creditors are allowed to request the exclusion of certain encumbered assets from the debtor's estate, regardless of the necessity of the assets. This exclusion is only valid if the encumbered asset's value:

(i) exceeds the value of the secured obligation, in which event the asset must be sold. The secured creditor will have a priority claim to the proceeds; or

(ii) is less that the value of the secured obligation, in which event the asset can be transferred to the secured creditor.

The exclusion of encumbered assets in liquidation proceedings is also limited by the Constitutional Court's Ruling C-145 of 2018. The Constitutional Court held that the exclusion is contingent upon there being sufficient assets to pay child support obligations, pension claims and labour claims (including salaries and other claims accrued in terms of an employment contract).

5.3 Personal security

There are three main mechanisms of personal security: joint liability, several liability and a surety bond. Personal security granted by third parties is not affected by insolvency proceedings, since

[10] Colombian Constitutional Court. Ruling C-145 of 2018, available at https://www.corteconstitucional.gov.co/relatoria/2018/C-145-18.htm.

[11] The child support obligations include health, housing, food, education, clothing, recreation, etcetera. On the other hand, the employment claims cover salaries and other claims accrued in terms of an employment contract. Colombian Constitutional Court. Ruling C-145 of 2018, available at https://www.corteconstitucional.gov.co/relatoria/2018/C-145-18.htm.

the co-obligor and the guarantor are third parties in respect of a debtor's insolvency proceedings. The following should be noted in respect of:

(i) joint liability: each co-obligor is responsible for paying the total amount of the debt;

(ii) several liability: each co-obligor is only responsible to pay its proportion of the debt; and

(iii) a surety bond: the surety or guarantor is responsible for paying a sum of money to the creditor if the obligor fails to comply with the main obligation.

Self-Assessment Exercise 2

Question 1

May a secured creditor whose claim is secured by a non-necessary asset foreclose the collateral after the debtor is admitted to a reorganisation proceeding pursuant to the Law 1116 of 2006?

Question 2

Can an electronically created undertaking to provide a security interest be recorded and be valid?

Question 3

True or False? Secured creditors have special enforcement rights, and therefore they do not participate in the insolvency proceeding.

Question 4

What is the main legal opposability requirement for a mortgage to be effective against third parties?

Question 5

At which stage of the reorganisation proceeding can foreclosure of the encumbered assets necessary for the continuation of the debtor's business take place?

Question 6

True or False? The secured creditors have absolute priority over all claims.

Question 7

True or False? Pursuant to Law 1676 pf 2013 vessels are moveable assets, and are thus subject of the Law of Security Interest over Movable Assets.

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General

6.1.1 Colombian insolvency regimes

6.1.1.1 Corporate insolvency

Law 1116 is the main source of corporate insolvency law although it is not the only source. Law 1116 establishes a subjective factor by which to determine the entities subject to the insolvency regime, as well as those excluded from it. It applies to private and mixed-ownership entities such as corporations; foundations; natural persons that qualify as merchants; and legal entities that conduct permanent business operations in Colombia, including branch offices of foreign companies and trusts. Insolvency proceedings pertaining to non-merchant individuals are governed by the provisions contained in the Colombian General Procedural Code and Decree 1069 of 2015. Similarly, financial institutions, state-owned companies and public utility companies are expressly excluded from this regime.

Law 1116 regulates reorganisation proceedings, judicial liquidation proceedings and cross-border insolvency proceedings. Several decrees issued by the executive branch also expand on specific topics broadly regulated by the law, such as insolvency of corporate groups, and the duties and obligations of liquidators and promoters. Certain other statutes also supplement Law 1116, such as Law 1676, the Civil Code, the Commercial Code and the General Code of Procedure.

The regime under Law 1116 is usually deemed a balanced regime that aims to protect the business, the employees and the creditors. This regime entails a judicial proceeding and therefore contains procedural stages that must be strictly complied with.

More recently, to address the Covid-19 pandemic, the government issued two decrees: Decree 560 and Decree 772 of 2020. Decree 560 established an extra-judicial reorganisation proceeding to expedite the duration of the reorganisation and the negotiation of the reorganisation agreement. Decree 772 created summary and simplified reorganisation and liquidation proceedings for small and medium-sized enterprises (SMEs).

6.1.1.2 Consumer bankruptcy

The insolvency of natural persons not engaged in business activities is governed by the General Code of Procedure that establishes a special regulation and proceedings for non-merchant individuals. This proceeding is addressed below in paragraph 6.2.

6.1.1.3 Intervention proceedings

Certain entities, such as some state-owned corporations, financial institutions and public utilities, have a special insolvency regime due to the importance of their activities for society and the public interest. These types of proceedings are generally referred to as intervention proceedings.

The government surveillance agencies usually initiate an intervention proceeding whenever the entity cannot duly pay its obligations, or when the entity is incapable of rendering the public service with the continuity and quality required by law. Once the surveillance agency commences the proceedings, it will take two to four months to decide whether the entity can keep performing its corporate purpose and overcome the problems that caused the intervention. If the entity is viable, the agency will appoint a trustee to design and implement a rescue plan within the next two years to assure the optimal provision of the public service. Otherwise, the surveillance agency will liquidate the entity and sell its assets to pay the creditors.

6.2 Personal / consumer bankruptcy

6.2.1 Introduction

Consumer bankruptcy is governed by the General Code of Procedure. In this regard, the General Code of Procedure now contains three types of proceedings, namely: (i) debt negotiation proceedings, (ii) liquidation proceedings, and (iii) the validation of private agreements.

6.2.2 Objectives of the proceedings

Debt negotiation proceedings aim to provide debtors with the possibility to renegotiate their indebtedness with their creditors, where liquidation proceedings aim to liquidate the debtor's estate and distribute the proceeds of the debtor's assets between the creditors to pay the outstanding debts, while also granting a straight discharge to the debtor.

The aim of the validation of private agreements is to validate a private agreement between the debtor and two or more creditors that represent at least 60% of the debtor's liabilities, and extend its binding effect to the remaining creditors.

6.2.3 Scope of application

The scope of application of the consumer bankruptcy proceedings is restricted to non-merchant individuals. The General Code of Procedure does not define the extent to which an individual is

considered a non-merchant. It only provides that natural persons who control a commercial company or form part of a group of companies[12] are subject to the corporate insolvency law of the Law 1116. In Colombia, control of company occurs when more than 50% of the company's capital belongs to the same entity; or someone holds the decisive majorities at the shareholders' meeting or on the board of directors; or by means of a contract that implies dominance over the other company.[13]

However, the Commercial Code establishes that certain actions are not of a commercial nature, such as the acquisition of goods or services for own consumption; the sale of a piece of art; the sale of harvest or cattle by farmers or stockbreeders; or the transformation of these goods if it is done without commercial purposes, and the provision of services inherent to liberal professions.[14] In other words, the consumer bankruptcy proceeding is for individuals that do not perform commercial activities on a regular basis. The distinction between merchant and non-merchant individuals causes certain complexities in Colombia regarding access to the system.

6.2.4 Compulsory insolvency

There is not an obligation to enter formal insolvency in specified circumstances. However, a debtor will be subject to individual enforcement and collection proceedings commenced by the debtor's creditors as the debtor will not enjoy the protection provided by the automatic stay.

6.2.5 Competent Insolvency Court

6.2.5.1 Debt negotiation proceedings and the validation of private agreements proceedings

These two proceedings are not court-driven, but rather by private mediators. This promotes a more informal, shorter, and less costly proceeding. Furthermore, by limiting the role of the court (which in these cases is the Municipal Civil Court of the place where the debtor is domiciled) in solving any legal disputes arising from the proceedings, the law recognises the economic nature of the insolvency proceeding. As one author explains, judges are experts in legal matters but may lack the knowledge to understand the economic rationale of the insolvency proceedings:

> "Court-driven proceedings are more formal, lengthier and more expensive. The parties usually must hire a lawyer in addition to the court fees that some countries charge. Moreover, judges are experts in applying and interpreting the law, but not necessarily in negotiating with creditors. As well, judges may lack knowledge in finance, accounting, and many other subjects required for a successful restructuring agreement. Although insolvency involves legal issues, it is an economic problem that may only be solved through negotiations dealing with the following issues: value of the debtors' existing assets, the income the

[12] Decree 1074 of 2015 brings up this improper concept of corporate law, which includes the notions of control and that most of the capital is owned or managed by an entity.

[13] Congress of the Republic. Law 222, 20 December 1995. Colombia. Available at http://www.secretariasenado.gov.co/senado/.

[14] Liberal professions are defined as activities in which the intellect predominates (such as the lawyers, accountants, economists, physicians, etcetera) and there is not a required special license to exercise such activities in a specific place.

debtors may have in the future, the amount of the debtors' existing obligations, the liens encumbering the debtors' assets, and the parties' expectations. Issues on which most judges are not exactly experts."[15]

6.2.5.2 Liquidation proceedings

Contrary to debt negotiation proceedings, liquidation proceedings are court-driven. If parties fail to reach a restructuring agreement during the debt negotiation proceedings, the insolvency case is referred to the Municipal Civil Court (with jurisdiction in the area where the debtor is domiciled) to open a liquidation proceeding.

6.2.6 Officeholders in consumer bankruptcy proceedings

6.2.6.1 Mediator

The mediator is the main officeholder in: (i) debt negotiation proceedings, and (ii) the validation of a private agreements.

Mediators should have the following qualifications:

(1) Mediators must be registered in mediation centres authorised by the Ministry of Justice;

(2) The mediator must be a professional and have at least an undergraduate or graduate degree in economics, business administration, law, industrial engineering, accounting or related areas;

(3) The mediator must have been certified by an insolvency programme approved by the Ministry of Justice. The initial course must be for at least 120 hours, plus another 40 hours every two years to renew the licence; and

(4) Promoters for the corporate insolvency regime under Law 1116 and Notaries Public can also be eligible to act as mediators.

The mediation centre or a notary public, whichever is applicable, must appoint a mediator within three working days following the debtor's filing. In the case of a notary public, the mediator is automatically appointed if the notary public does not appoint a mediator within the three working days following the debtor's filing.

The mediator must accept the appointment within two business days after being notified by the mediation centre. Failure to do so will lead to being excluded from the mediators list. The mediator cannot reject the appointment unless he has a conflict of interests.

[15] J J Rodríguez-Espitia, "Aproximación al derecho concursal colombiano", Revista E-Mercatoria (2007) 6(2), 25-28. Available at https://revistas.uexternado.edu.co/index.php/emerca/article/view/2064/2838.

The mediator is a neutral third person that is required to have the knowledge and skill to administer insolvency proceedings. Specifically, the mediator must have experience in negotiations with creditors and in coming up with solutions to over-indebtedness. The functions of the mediator include:

(1) verifying that the debtor meets the threshold to be admitted to a debt negotiation proceeding or to a validation of private agreement proceeding;

(2) requesting additional information from the debtor and creditors to better understand the debtor's financial situation or to assure that the mandatory information and documents have been filed;

(3) notifying the creditors about the status and nature of the proceeding and summon them to the relevant procedural stages;

(4) reviewing the debtor's financial situation and the amount of the claims to determine the disposable income and, therefore, the amounts and frequency of the payments. The mediator must also make proposals of a legal and financial nature to facilitate the execution of the restructuring agreement;

(5) drawing up a preliminary ranking of creditors based on the information provided by the debtor;

(6) fostering the settlement of objections, observations and any other dispute that arises during the proceedings by making settlement proposals to the parties;

(7) reviewing the restructuring agreement to ensure that it observes all the legal requirements in order to be valid and effective;

(8) recording the minutes of the hearings carried out during the proceedings; and

(9) ensuring that the debtor's and creditors' minimum rights are protected.

6.2.6.2 Liquidator

The liquidator is the main officeholder in liquidation proceedings, and is appointed by the Municipal Civil Court. The liquidator must have slightly higher qualifications than a mediator, and the liquidator is also usually a person other than the mediator. The following is relevant in relation to the liquidator's qualifications, namely that the liquidator must:

(1) be registered as a C-category liquidator at the Superintendence of Companies;[16]

[16] The categories are designated as per quantity of the debtor's assets. Thus, there are three categories: A, B and C. Pursuant to article 36 of Decree 2642 of 2022, the C-category is from 0 to 263 130.20 taxable value units (TVUs); the B-category from more than 263 130.20 up to 1 184 085.90 TVUs; and the A-category is from more than 1 184

(2) pass an insolvency examination set by the Superintendence of Companies. The liquidator must also pass another examination every two years;

(3) be a professional and have at least an undergraduate or graduate degree in economics, business administration, law, industrial engineering, accounting or related areas. Additionally, the liquidator must have at least five years of experience in his field;

(4) have been certified by an insolvency programme of at least 160 hours of lectures approved by the Superintendence of Companies; and

(5) have specific experience that can be certified by various forms of experience namely when the individual has:

(a) been a civil judge or insolvency judge for at least one and a half years;

(b) acted in at least two insolvency proceedings as an officeholder;

(c) acted as the clerk of a promoter or a liquidator in four insolvency proceedings;

(d) acted as a liquidator in four voluntary liquidations; or

(e) acted as a senior manager in companies for at least five years.

The liquidator has the following functions, namely:

(1) notifying the creditors and the debtor's spouse of the commencement of the liquidation;

(2) updating the inventory of assets and its appraisal submitted by the debtor for the debt negotiation proceeding;

(3) acting as mediator to settle disputes that arise during the liquidation (such as, objections to claims or observations regarding the allocation agreement);

(4) receiving payments on the debtor's behalf;

(5) drafting an interim allocation agreement;

(6) delivering the assets assigned to creditors; and

(7) issuing of quarterly reports to the Municipal Civil Court and the creditors regarding the:

085.90 TVUs. This measure allows adjusting the values and is calculated based on the accumulated variation of the Consumer Price Index (CPI) for average income. The TVU for 2023 is $42.412 Colombian pesos, which is equivalent to USD9.13.

(a) status of the liquidation proceeding;

(b) status of debtor's assets;

(c) status of the payment of administrative expenses;

(d) cost of custody of assets; and

(e) sale of perishable or deteriorated assets.

6.2.7 Threshold for entering into bankruptcy

6.2.7.1 Debt negotiation proceedings

A debtor may only file for a debt negotiation proceeding if he is insolvent, which is defined as: (i) having two or more obligations overdue for at least 90 days to two or more creditors, or (ii) being sued in at least two debt collection proceedings. In both cases, the debt involved must be at least 50% of the debtor's total indebtedness. This threshold seems problematic as it may hamper the debtor's recovery as the minimum debt amount is deemed excessively high:

> "The fact that in Colombia individuals may only file if value of their overdue obligations is at least equal to 50% of their total indebtedness has a similar effect as establishing a minimum debt amount. All debtors that fail to comply with their obligations have to wait until their overdue obligations reach half of their total indebtedness. Henceforth, debtors may have to endure their creditors' pressure for a long time. By the time this requirement is met, it may be more difficult for debtors to renegotiate their indebtedness. Their income and assets may have decreased, but their indebtedness increased."[17]

In a similar fashion, the author has suggested that the objective approach may be replaced by a subjective analysis of the debtor:

> "Another issue that should be considered, is the fact that debtors may only file for the proceeding when they are insolvent. 50% or more of their total indebtedness must be due and payable or they must have at least two enforcement actions against their assets. The question is if the percentage established by the law is too high. If consumers are allowed to file before they reach those levels, they may be able to agree on a repayment plan that covers all principal amounts and maybe even some interest. The proceeding may only help to lower some interest rates, or to extend the repayment term of certain debt. Review of the financial condition by the trustee or the mediator should be

[17] *Ibid*.

enough to identify an imminent insolvency or repayment problems, which may be alleviated before they get more severe."[18]

6.2.7.2 Liquidation proceedings

The debtor can enter into a liquidation proceeding on either of the following grounds, namely that the:

(i) parties failed to execute a restructuring agreement within the 60 days established for the debt negotiation proceeding;

(ii) Municipal Civil Court declared the non-cured restructuring agreement null and void;

(iii) failure to cure the breach of the restructuring agreement;

(iv) debtor defaulted on the payment of the obligations as set forth in the reformed restructuring agreement; or

(v) debtor defaulted on the payment of administrative expenses.

6.2.7.3 Validation of private agreements

To initiate the validation procedure, the law only requires a declaration by the debtor regarding the possibility of becoming insolvent in the next 120 days. Furthermore, the insolvency must be caused by the loss of a job, the dissolution of a marriage or similar union,[19] or any similar circumstances.

6.2.8 Standing

Only the debtor has standing to file for a debt negotiation proceeding. In fact, creditors are not entitled to file the petition at all. Neither the debtor nor the creditors have standing to file for a liquidation proceeding. A liquidation proceeding against the debtor is only possible after the failure of the debt negotiation proceeding. The validation of a private agreement can be initiated by a debtor who has previously executed a private agreement with two or more creditors that represent more than 60% of the debtor's total indebtedness.

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[18] R Rojas-Vertiz, *Is There Consumer Bankruptcy in Latin America? The Cases of Colombia, Brazil and Peru* (2017). Available at https://ssrn.com/abstract=2996808.

[19] In Colombia, legislation provides consequences similar to those of marriage (such as the patrimonial effects) to couples who have lived together for more than two years, and it is thus possible to dissolve the patrimonial partnership created during the co-habitation.

6.2.9 Stages of the proceedings

6.2.9.1 Debt negotiation proceeding

The debtor files for bankruptcy before a Mediation Centre or a notary public. In the filing brief, the debtor must include, among others, a / an:

(a) report explaining the causes that led the debtor to insolvency;

(b) complete list of creditors ordered as per the statutory ranking of claims and specifying the amount of their claim;

(c) inventory of assets;

(d) debt renegotiation proposal; and

(e) declaration or certificate of the debtor's income.

The Mediation Centre or a notary public appoints a mediator to review the debtor's application. If it is denied, the debtor can amend the application within five days. When the mediator admits the debtor's request, the following effects are triggered:

(1) Automatic stay: An automatic stay is triggered. The only exceptions are alimony obligations and enforcement proceedings against third party guarantors. The stay on enforcement actions provided by the law is also convenient for the success of the proceedings, as it constrains creditors from filing their claims and forces them to appear at the hearings to try to reach a restructuring agreement. The stay on all enforcement proceedings against the debtor will remain for as long as the repayment plan is in effect. This means that upon the approval of the restructuring agreement, the collection and repossession proceedings against the debtor will continue to be suspended until the fulfilment of the restructuring agreement is verified;

(2) Suspension of utility services: Utility services cannot be suspended or must be re-established if they had been suspended previously due to delinquent obligations;

(3) Interruption of the statute of limitation: The statute of limitation of collection actions against the debtor is interrupted;

(4) Negotiation period: A period of 60 days (that may be extended to 90 days) starts to run for the debtor and his creditors to negotiate the pre-admission claims. Should the debtor and creditors agree, an additional period of 30 days may be granted. Setting a maximum time for the proceeding has both advantages and disadvantages:

> "Setting forth a time limit assures the parties an expedite process and saves expenses. However, the time limit may impact negatively the renegotiations; as

> timing is preferred to a possible successful agreement. Unfortunately, there is no available information on the length of renegotiation proceedings in Colombia, so it is not possible to assess if the deadline established by the law may be one of the factors causing a lower approval of repayment plans."[20]

(5) Limited contractual capacity: The debtor cannot grant guarantees of any kind, incur new debt or execute transactions that exceed the cost of his subsistence expenses, without the approval of creditors that represent at least 51% of the debtor's total indebtedness. Transactions that violate this prohibition are deemed null and void;

(6) Exclusion of administrative expenses: The administrative expenses will not be subject to the debt negotiation proceeding and must be paid with priority; and
(7) Protection of the debtor's family: Amounts needed by the debtor and his family for subsistence shall have payment priority and will not be subject to the repayment plan of the restructuring agreement.

The mediator informs the creditors included in the list of creditors submitted by the debtor about the commencement of the debt negotiation proceedings. The mediator also notifies the judges that are administering collection proceedings against the debtor to suspend their respective proceedings.

The mediator summons the parties to a debt negotiation hearing. In this hearing:

(1) The mediator informs the creditors about the nature, amount and ranking of their claims, and inquires if they agree therewith or if there is a discrepancy regarding the recognition of their own and / or another creditor's claims;

(2) The mediator shall encourage the settlement of the discrepancies in line with the purpose and principles of the insolvency regime;

(3) If discrepancies are not resolved in the debt negotiation hearing, the:

(a) mediator will suspend the hearing for 10 days and will give five additional days for creditors to file their objections and their supporting evidence. For creditors to be successful, they must prove the existence, nature, maturity and amount of their claims with documentary evidence;

(b) debtor and the remainder of the creditors can respond to the objections and submit the documentary evidence they deem applicable;

(c) mediator sends a docket with the objections and responses to the Municipal Civil Court. The court will rule on the objections and its decision will not be subject to appeal; and

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[20] R Rojas-Vertiz, *Is There Consumer Bankruptcy in Latin America? The Cases of Colombia, Brazil and Peru* (2017). Available at https://ssrn.com/abstract=2996808.

(d) Municipal Civil Court reverts the docket with its judgment to the mediator who will resume the debt negotiation hearing;

(4) Should the discrepancies be settled, creditors will analyse the debtor's debt negotiation proposal. For this purpose, the debtor shall explain his proposal to the creditors, who can make observations regarding the proposal. The mediator will then propose an agreement between the parties by making proposals based on the debtor's plan and the creditors' observations. The parties must reach an agreement before the end of the 60-day term established for the duration of the proceeding. The following is relevant in this regard, namely that the:

(i) debtor and two or more creditors holding claims exceeding 50% of debtor's total indebtedness must approve the restructuring agreement. Thus, even if creditors holding 49% of the value of all claims against the debtor reject a proposed payment plan, the plan is nonetheless imposed on these dissenters if creditors holding a majority of the value of claims approve the plan;

(ii) votes for each creditor is equivalent to the principal amount of their claims. Interest and penalties are not taken into account;

(iii) restructuring agreement must include all pre-admission debts. This means that to be valid and effective, the restructuring agreement must encompass all of the debtor's creditors, but it need not be approved by all creditors;

(iv) restructuring agreement must abide by the statutory ranking of claims;

(v) maximum term for the payment of pre-admission debts is five years. However, the repayment plan may be longer if any obligation subject to the restructuring was originally payable over a longer term, or if creditors representing more than 60% of the debtor's total indebtedness vote for a longer term;

(vi) payment of interest may be written-off if parties agree to it;

(vii) agreement can include payment-in-kind provisions, but the relevant creditor must expressly accept it;

(viii) restructuring agreement may include the disposal of the debtors' assets subject to enforcement actions. However, in the case of assets burdened with security interests, the secured creditors must agree to the disposal; and

(ix) replacement or downgrade of the encumbered asset requires the consent of the secured creditor.

(5) Once approved with the necessary majorities, the restructuring agreement is binding on all creditors, even the dissenting ones.

The debt negotiation proceeding has been criticised because it incentivises debtors to prefer the liquidation procedure, since a straight discharge is provided in the latter proceeding:

> "Now, even though the drafting of the law gives the idea that approval of the plan relies entirely on the will of creditors, the truth is that given that discharge is only provided in the liquidation proceeding, debtors have a strong incentive to go to liquidation. Indeed, as the debtors' consent is required for the approval of the repayment plan, in the event debtors have no assets or very little assets, they have a strong incentive not to give their consent to any proposal for a repayment plan to go to liquidation and avoid having to pay anything. No future value is involved, as they do not have to assign any future income and get to keep all assets acquired after the opening of the liquidation proceeding."[21]

As the discharge only applies if the parties do not reach an agreement during the debt negotiation proceeding, it gives a strong incentive for creditors to renegotiate their claims during the debt negotiation proceeding:

> "Therefore, the threat of the straight discharge places a strong pressure on creditors to reach any agreement that would allow them to recover a little more than what they would receive with distribution of existing assets; as entering into an agreement would allow creditors to reach debtors' future assets and income.
>
> Straight discharge places more pressure on creditors when (i) debtors have no assets, (ii) debtors have few assets with little value, or (iii) applicable law provides for a generous exemption. For example, if applicable law exempts debtors' homestead. As in such cases debtors, either have nothing to lose or keep their more important assets. In these scenarios creditors will be more interested than debtors to reach an agreement, and may be willing to give up more. The interest in reaching an agreement is shifted to debtors when they have valuable assets or they are not able to keep their homestead."[22]

Creditors can challenge the legal validity of the restructuring agreement on the following grounds, namely that it:

(i) contains clauses that violate the statutory ranking of claims;

(ii) does not abide by the *pari passu* principle;

(iii) does not include the payment of all pre-admission claims; or

(iv) includes a clause that violates the law or the Constitution.

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21 R Rojas-Vertiz, *Is There Consumer Bankruptcy in Latin America? The Cases of Colombia, Brazil and Peru* (2017). Available at https://ssrn.com/abstract=2996808.

22 *Ibid*.

In order to make use of challenge proceedings, the following procedure needs to be followed:

(i) Dissenting creditors must challenge the agreement during the debt negotiation hearing;

(ii) Creditors must justify the grounds for and file the evidence that supports the challenge within five days after the conclusion of the hearing;

(iii) The debtor and the remainder of the creditors can respond to the challenge and submit any evidence that they deem relevant; and

(iv) The mediator will then send a docket with the challenge and the responses to the Municipal Civil Court, which will rule on the challenge:

- If the Municipal Civil Court upholds the challenge, it will give 10 days to the mediator to correct the restructuring agreement. If it is corrected, the Municipal Civil Court will review the amendment and confirm the restructuring agreement. If it is not corrected, the mediator will inform the Municipal Civil Court. The latter will then commence a liquidation proceeding; or

- If the Municipal Civil Court denies the challenge, it will return the docket to the mediator so that the performance of the restructuring agreement can begin.

The debtor performs the restructuring agreement and the mediator verifies the due performance thereof. The following should be noted in this regard:

(a) When the debtor completes the repayment plan, he may request the mediator to verify the fulfilment, attaching the relevant evidence;

(b) The mediator will then corroborate the evidence of payment submitted by the debtor;

(c) The mediator must notify the creditors in order to grant them the opportunity to oppose;

(d) If the creditors do not oppose, the mediator shall issue a certificate of completion, notice of which must be given to the judges to terminate any ongoing collection actions against the debtor or third-party guarantors;

(e) If the debtor successfully completes the restructuring agreement, all of the claims encompassed within the repayment plan are considered fully satisfied, and no further enforcement may be pursued on those claims against the debtor, co-obligors or guarantors; and

(f) The debtor can only file again for this proceeding after a term of five years has elapsed.

Should the debtor default on the payments set forth in the restructuring agreement:

(a) the creditors or the debtor shall inform the mediator and explain the default;

(b) the mediator will summon the parties to a hearing to assess the default and explore, only once, the possibility of reforming the restructuring agreement;

(c) and there is a dispute regarding the existence of the default, the Municipal Civil Court will resolve it and its decision will not be subject to appeal:

(i) if the Municipal Civil Court determines that there is no default, the debtor must continue performing the restructuring agreement; or

(ii) if the Municipal Civil Court finds that there has been a default, it will order the mediator to explore the possibility of reforming the restructuring agreement;

(d) and if during the hearing the debtor and at least 25% of the creditors that represent outstanding pre-admission claims agree to reform the restructuring agreement, the amendment will be binding for all the creditors; and

(e) and should the restructuring agreement be not reformed during the hearing or should the debtor default on the reformed restructuring agreement, the mediator will inform the Municipal Civil Court for it to commence a liquidation proceeding.

6.2.9.2 Liquidation proceeding

The Municipal Civil Court declares the commencement of the liquidation proceeding and appoints a liquidator, who is not necessarily the same person as the mediator of the debt negotiation proceeding. This has been criticised for making the liquidation proceeding inefficient:

> "Then, the benefits previously discussed of having an expert mediator in charge of the renegotiation proceeding disappear when the law requires a different person to act as liquidator. If the mediator gets paid for carrying the proceeding, and already knows the value of the state and the value of the claims, it is much easier for the mediator to prepare the proposal for distribution to creditors, especially if according to the law, the person in charge of the liquidation proceeding does not have to sell the assets and distribute proceeds, but only to prepare an adjudication proposal and deliver the assets to creditors. Hence, the appointment of a different person as a liquidator seems an expensive and unnecessary step that aggravates the financial condition of many debtors."[23]

The liquidator shall serve by notice the court's writ to the creditors involved in the previous debt negotiation proceeding and to the debtor's spouse or *de facto* spouse. The liquidator must also

[23] *Ibid*.

publish a notice in a newspaper of national circulation to inform the remaining creditors. Finally, the writ that declares the commencement of the liquidation proceeding must be recorded in a Registry for the Service of Judicial Proceedings and remain so published for 15 days.

Upon the commencement of liquidation proceedings, the following effects are imposed on the debtor:

(1) automatic stay: the automatic stay prevents the debtor from paying pre-admission claims, including by means of payments-in-kind, settlements, withdrawals, and termination of judicial proceedings. Any payment that does not abide by the automatic stay is void. The only exception is the payment of alimony due to the constitutional hierarchy of this type of right;

(2) limited contractual capacity: the debtor loses the capacity to dispose of assets owned at the time of the commencement of the liquidation proceeding;

(3) acceleration of obligations: all obligations that arose before the beginning of the liquidation proceeding will become due and payable and will be subject to the liquidation proceeding;

(4) forum of attraction: all collection proceedings against the debtor are referred to the Municipal Civil Court in charge of the liquidation proceedings;

(5) exclusion of certain assets: the debtor's assets at the time of the commencement of the liquidation proceeding, with the exception of certain assets,[24] will form part of the liquidated estate and be used exclusively to repay pre-liquidation obligations. Consequently, assets acquired after the liquidation can only be pursued by creditors for administrative expenses of the liquidation proceeding;

(6) termination of employment contracts: liquidation terminates employment contracts in which the debtor is the employer, with the corresponding compensation for the employee aor unpaid salaries, vacations and severance; and

(7) recognition of creditors: creditors that were recognised during the debt negotiation proceeding will be ranked in the same class and for the same amount.

Creditors that failed to appear in the debt negotiation proceeding may still become involved in the liquidation proceeding by filing their claims along with the corresponding evidence within 20 days after publication of the opening notice in the newspaper. Once the 20-day term has elapsed, the Municipal Civil Court will serve the briefs filed by new creditors on the debtor and the other creditors, after which they will have five days to file their objections against the new claims. The new creditors will have a five-day term to respond to the objections filed by the debtor and creditors against the recognition of obligations that were not included during the

[24] Assets and property of the spouse or *de facto* spouse, non-seizable family estate, protected family home, and other non-seizable assets.

debt negotiation proceeding. The Municipal Civil Court will then rule on the objections against the new claims.

In the event that there are any objections against the inventory of assets and their appraisal:

(1) the inventory and appraisals updated as of the date of the commencement of the liquidation proceeding, will serve at the Municipal Civil Court for 10 days;

(2) can object to the inventory and appraisal and submit their own appraisal if they deem it convenient;

(3) the debtor and the remainder of the creditors can respond to the objections and file the evidence that they deem convenient; and

(4) the Municipal Civil Court will rule on the objections and will determine the definitive inventory and the value of the debtor's assets.

After ruling on all the objections and setting forth the total obligations to be repaid and the total assets to be distributed to creditors, the Municipal Civil Court will order the liquidator to draft a projection of the allocation of assets within the next 10 days, or summon the parties to an allocation hearing within the next 20 days.

At any time before the allocation hearing, two or more creditors that represent at least 50% of the debtor's total indebtedness can agree with the debtor to the execution of a restructuring agreement that complies with the requirements of the debt negotiation proceedings. The Municipal Civil Court will then rule on the lawfulness of the restructuring agreement. Should the Municipal Civil Court approve the restructuring agreement, it will order the suspension of the liquidation for the term necessary to perform the agreement. Should the Municipal Civil Court deny the approval of the restructuring agreement, the liquidation will resume.

At the allocation hearing, the Municipal Civil Court entertains the creditors' observations to the projection of the allocation of assets. The Municipal Civil Court issues a decision in which it decides on the manner in which the claims will be paid with the debtor's assets, including cash. This decision must observe the statutory ranking of claims and abide by the *pari passu* principle by assigning assets of the same nature and quality pro-rata to the creditors of the same class to the maximum extent possible. The order of the assignment of asset is the following: (i) cash, (ii) real estate, (iii) tangible movable assets, and (iv) intangible movable assets.

The Municipal Civil Court must prefer an assignment *en bloc* if the nature of the assets allows it. Otherwise, the assets can be assigned individually by trying to ensure the highest value possible. The following should be noted in this regard:

(a) the Municipal Civil Court may assign the assets to all creditors or jointly to groups of creditors;

(b) creditors can reject the assignment of assets to them, which assets will then be distributed to the remaining creditors according to the statutory ranking of claims; and

(c) the debtor will retain ownership of the assets that cannot be assigned to creditors.

The debtor will be discharged from all outstanding obligations existing before the opening of the liquidation proceeding upon surrendering his existing assets to creditors. A relevant characteristic of this discharge is that it is immediate and unconditional. Therefore, it does not entail any provision for payments from the debtor's future income. The aforementioned approach may be explained by the emphasis that the law places on the voluntary settlement of disputes and the obligation that a debtor should be advised by a mediator to structure a repayment plan before entering into a liquidation proceeding. However, the consensus seems to be that the straight discharge in liquidation may hamper the full potential of the Colombian consumer bankruptcy regime:

> "Perhaps this is part of a larger strategy that dovetails with the law's emphasis on voluntary conciliation. As noted above, the Colombian regime requires debtors to seek assistance from conciliation centers (or other sources) for negotiating settlement arrangements with creditors before seeking coercive relief in the form of a discharge. But the law indirectly pressures creditors to accept whatever payment the debtor reasonably has to offer from his or her future income, since if creditors reject that, they are likely to receive little or nothing of value from the debtor's meagre present assets. Most personal insolvency cases around the world reveal little or no value in the debtor's present assets. By refusing to allow creditors to access debtors' future income in the liquidation and discharge process, the Colombian law may have struck on an ingenious strategy for leveraging greater voluntary payment agreements in the first stage of insolvency proceedings."[25]

The discharge will not apply if:

(i) during the debt negotiation proceeding or the liquidation proceeding the Municipal Civil Court finds that the debtor omitted to disclose assets or claims, or concealed or simulated debts;

(ii) clawback actions are successful; or

(iii) the claim stems from alimony obligations.

The discharge is a straight discharge. Therefore, no future value is involved, since it excludes future income and after-acquired assets.

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[25] J J Kilborn, "Reflections of the World Bank's report on the treatment of the insolvency of natural persons in the newest consumer bankruptcy laws: Colombia, Italy, Ireland", *Pace Int'l L Rev* (2015) *27*, 306. Available at https://repository.law.uic.edu/cgi/viewcontent.cgi?article=1596&context=facpubs.

Some final aspects to note include the following:

(1) Delivery of the assets: the liquidator must give possession of the assigned assets to the relevant creditors within the next 30 days following the discharge;

(2) Accountability report: the liquidator must submit an accountability report, which can be subject to observations from the parties. This report must include a list of the discharged obligations; and

(3) Future prohibition: the debtor is prevented from filing a new liquidation proceeding for 10 years upon the conclusion of the liquidation proceeding.

6.2.9.3 Validation of private agreement

The debtor must file a petition to validate a private agreement before a Mediation Centre or a notary public. The petition must include all the documents required for the debt negotiation proceeding.

The Mediation Centre or a notary public will appoint a mediator who will review the application, including the debtor's information relating to assets, liabilities and the repayment plan contained in the private agreement submitted and signed by the debtor and the creditors. The mediator will then admit the debtor's application. However, the admission of the debtor's application does not trigger the: (i) automatic stay, (ii) prohibition of suspension of domiciliary public utilities (such as water, lights, etcetera), or (iii) interruption of the statute of limitations. These effects are only triggered upon the validation of the private agreement.

The mediator must notify the remainder of the creditors and inform them of the amount of their claims and the repayment plan included in the private agreement.

A hearing to consider the repayment plan must be held within 20 days after the commencement of the proceeding. During the hearing, the creditors that did not execute the private agreement can file objections related to the amount, nature or priority of their claims. The procedural stages to resolve the objections are the same as in the debt negotiation proceeding and thus, the Municipal Civil Court shall rule on the objections. The creditors that executed the private agreement with the debtor cannot file objections but may respond to the objections filed by the other creditors.

The mediator must confirm that the private agreement observes the same legal requirements established for the restructuring agreement under the debt negotiation proceeding.

During the hearing, the creditors that did not execute the private agreement can make observations against the validity of the private agreement. Any dispute in this regard shall be resolved by the Municipal Civil Court following the same procedural stages as in the debt negotiation proceeding. Once the Municipal Civil Court rules on the objections and observations, the parties must implement the necessary changes, if any. Afterwards, the mediator will validate the private agreement and it will be binding on all the creditors, including

the absent and dissident ones. In the event that the Municipal Civil Court determines that the private agreement does not meet the requirements, the debtor will not be able to institute a new validation of a private agreement proceeding for 60 days, but can apply for a debt negotiation proceeding.

6.2.10 Alternatives to formal bankruptcy

The debtor can execute individual voluntary arrangements, such as workout agreements with his main creditors to renegotiate the terms of obligations in default. However, these types of agreements are only binding on the parties that executed them. Furthermore, the debtor will not enjoy of the protection of an automatic stay.

6.2.11 Executory contracts

There are no specific provisions for executory contracts in the laws pertaining to any of the consumer bankruptcy proceedings. However, these contracts are affected by certain rules:

(a) In debt negotiation proceedings:
   (i) creditors are prevented from initiating collection proceedings against the debtor for obligations accrued before the commencement of the debt negotiation proceeding; and

   (ii) the payment of obligations that stem from executory contracts and that accrued before the commencement of the debt negotiation proceeding is subject to the terms of the restructuring agreement. If the repayment plan is successfully completed by the debtor, all of these obligations are considered fully satisfied, and no further enforcement may be pursued on those claims against the debtor.

(b) In the liquidation proceeding, the obligations that stem from executory contracts and that accrued before the commencement of the liquidation proceeding are discharged. However, creditors can enforce the obligations accrued after the liquidation against assets acquired after the commencement of the liquidation proceeding.

The following should be noted in respect of certain specific contracts:

(a) Employment contracts: in liquidation proceedings, all employment contracts in which the debtor is the employer are terminated. The corresponding compensation payable to employees (such as unpaid salaries, benefits, health insurance, disability and workers compensation, paid vacations, performance bonuses, wrongful termination damages, etcetera) will be obligations subject to the liquidation proceeding, and therefore employees must file their claims and the supporting documents before the liquidator, and their obligations will be paid in accordance with the allocation agreement;

(b) Essential contracts:

(i) in debt negotiation proceedings: the suspension of public utility services is forbidden if it is based on the default of an obligation accrued before the commencement of the debt negotiation proceeding. If the suspension occurred before the commencement of the proceeding, the services must be re-established; and

(ii) in liquidation proceedings: if the public utility company has suspended the services due to the debtor's default of an obligation accrued after the commencement of the debt negotiation proceeding, the company is not obliged to re-establish the services. Nevertheless, the debtor may request the reconnection of the utilities, provided that all the balances and reinstatement or reconnection expenses incurred after the commencement of the liquidation are paid in full; and

(c) Financial contracts: please refer to the treatment of derivative transactions below in the corporate rescue proceedings section.[26]

6.2.12 Clawback provisions

In any of the consumer bankruptcy proceedings, the following transactions can be subject to clawback actions:

(i) acts by which the debtor disposes of his rights over assets: these include unilateral transactions, creation of security interests, and in general every act that entails the transfer, disposal, limitation or division of ownership of the debtor's assets that represent more than 10% of the value of the insolvent estate and that have been executed within 18 months prior to the commencement of the insolvency proceeding. In this scenario, the plaintiff must also prove damages caused to the creditors and that the third party knew or should have known about the critical financial situation of the debtor;

(ii) gratuitous transactions: every gratuitous act executed within the 24 months prior to the commencement of the debt negotiation proceeding and that had caused damage to creditors; and

(iii) transactions between spouses or *de facto* spouses: any of these transactions that were executed within the 24 months prior to the commencement of the debt negotiation proceeding, and has caused damage to creditors.

Only creditors of obligations accrued before the commencement of the relevant proceeding have standing to file clawback actions. The clawback actions only benefit the creditors recognised within the relevant insolvency proceeding, and should the court uphold the clawback action, the plaintiff is entitled to a reward equivalent to 10% of the recovered value.

The clawback action only can be filed while the insolvency proceeding is underway.

[26] See para 6.4.14.2 below.

The competent authority to rule on the merits of the clawback action is the same Municipal Civil Court that is competent to rule on objections and challenges to the restructuring agreement, and to administer the liquidation proceeding. The case will be decided in terms of a summary verbal proceeding.

6.2.13 Exempt property

Certain types of assets do not form part of the debtor's insolvent estate:

(a) Certain income that stems from wages and social security payments;

(b) Personal belongings such as a television, personal computer, mobile phone and household appliances;

(c) Certain assets such as assets necessary for the subsistence of the debtor and his family, and those necessary for the debtor's work;

(d) Non-sizeable family real estate: This applies to real estate that cannot be seized as it enjoys special protection as being indispensable for the debtor's family, who is the beneficiary of the protection. Only the mortgagee that financed the construction, acquisition, improvement or subdivision of the real estate is entitled to request the seizure of the protected real estate. In order to be protected, the real estate must meet specific requirements to be protected:
   (1) the cadastral value cannot exceed 250 minimum wages, which is equivalent to USD 63,335 as of 2021;

   (2) the real estate must not be seized or mortgaged at the time when the protection is granted;

   (3) the protection must be created through a public deed before a notary public;

   (4) the protection must be recorded in the Real Estate Registry;

   (5) the debtor must be the sole owner of the real estate at the time when the protection is granted; and

   (6) to sell or grant a mortgage on the real estate, the protection must be lifted; and

(e) Protected family home: this is a mechanism to protect the family home by excluding it from the assets that can be seized, and it is set up in favour of the spouse or the *de facto* spouse. This also limits the owner's rights as the spouse's consent is necessary to sell or encumber the real estate.

   (i) There are two exceptions to the protection of the family home, namely when:

(1) prior to the set-up of the protection, the real estate has been mortgaged; and

(2) a mortgage is executed on the real estate to secure loans for the acquisition, construction or improvement of the real estate.

(ii) The following requirements need to be met in order to fall outside of the debtor's insolvent estate, namely that the:

(1) real estate must be used as a residential home;

(2) beneficiary of the protection must be the spouse or the *de facto* spouse of the owner; and

(3) protection must be recorded in the Real Estate Registry.

6.2.14 Ranking of creditors

Colombian legislation establishes a ranking for creditors within the reorganisation or liquidation process. The Colombian Civil Code establishes the preference and order in which creditors must be paid, namely that the:

(a) first class corresponds to employment-related obligations and tax obligations;

(b) second class includes creditors who have a claim secured with a pledge;

(c) third class includes creditors who hold a claim secured with a mortgage;

(d) fourth class includes other tax-related obligations and strategic suppliers of the business; and

(e) the fifth class includes all other creditors who hold unsecured claims that do not have any privilege.

Self-Assessment Exercise 3

Question 1

What protection is there for the debtor's family in respect of the restructuring agreement?

Question 2

In which class of claims do the penalties derived from tax obligations fall?

Question 3

True or False? Non-essential executory contracts are not terminated as of the initiation of the debt negotiation proceedings.

Question 4

True or False? The claw-back action may be initiated after the liquidation proceeding has been completed.

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

6.3 Corporate liquidation

6.3.1 Introduction

In Colombia there are three liquidation proceedings: judicial liquidation, liquidation by allocation and simplified liquidation. These three proceedings are conducted before the Insolvency Court or the circuit civil judge, as it may applicable, and, as mentioned above, a liquidator is appointed as an officeholder. There is also an out-of-court liquidation, namely voluntary liquidation, but this is a private liquidation instead of a judicial proceeding.

6.3.2 Objectives of the proceedings

In general, liquidation proceedings aim to liquidate the debtor's assets in a prompt and orderly manner in order to pay the creditors' claims with a view of increasing the value of the assets to the maximum extent possible. However, there are certain differences between the proceedings:

(a) Judicial liquidation: This is the standard proceeding amongst the liquidation proceedings. The aim is to sell the debtor's assets to pay the creditors either with the proceeds of the sale or by allocating to them the assets that could not be sold;

(b) Liquidation by allocation: This is different from judicial liquidation as its main objective is not the sale of the debtor's assets but instead assigning them directly to creditors as payment-in-kind based on an allocation agreement voted by creditors. Alternatively, in the event that the creditors fail to reach an agreement, the Insolvency Court will decide on the allocation of assets; and

(c) Simplified liquidation: This is a liquidation proceeding for SMEs. The government created it as a provisional proceeding to address the effects of the Covid-19 pandemic on companies. It was designed as an expedited liquidation proceeding with shorter legal timeframes and fewer procedural stages. In principle, as in the liquidation by allocation,

assets are assigned to creditors, but the assignment of assets is done directly by the Insolvency Court and creditors do not vote on an allocation agreement.

6.3.3 Legal sources

The liquidation proceedings have different legal sources. Both judicial liquidation and liquidation by allocation are regulated by Law 1116, and simplified liquidation is regulated by Decree 772 of 2020 (Decree 772). As mentioned previously, the Colombian government enacted Decree 772 to provisionally address the effects of the Covid-19 pandemic.

6.3.4 Scope of the liquidation proceedings

Liquidation proceedings are applicable to private and mixed-ownership entities such as corporations; foundations; natural persons that qualify as merchants; and legal entities that conduct permanent business operations in Colombia, including branch offices of foreign companies and trusts. However, there are some differences between judicial liquidation and simplified liquidation:

(a) Judicial liquidation: As per Decree 772, from 3 June 2020 to 31 December 2023, only debtors that have assets valued above 5 000 minimum wages (approximately USD 1 200 000) can file for judicial liquidation. In principle, after 31 December 2023, this restriction will not be applicable, and any debtor will be able to apply for judicial liquidation;

(b) Liquidation by allocation: As per Decree 772, from 15 April 2020 to 31 December 2023, liquidation by allocation is suspended. A debtor that in normal circumstances would have entered into liquidation by allocation will instead enter into a judicial liquidation or simplified liquidation, as the case may be. Nonetheless, the suspension does not apply to ongoing liquidation by allocation proceedings; and

(c) Simplified liquidation: As per Decree 772, from 3 June 2020 to 31 December 2023, debtors that have assets valued below 5 000 minimum wages (approximately USD 1 200 000) can only file for simplified liquidation. In principle, after 31 December 2023, this proceeding will not be available for debtors.

6.3.5 Threshold for entering into liquidation proceedings

Under Law 1116, a debtor can enter into a liquidation proceeding directly or indirectly as consequence of the failure of a restructuring proceeding. Law 1116 establishes several grounds on which the debtor may enter into a liquidation proceeding. In addition to the grounds listed below, the debtor must meet the default on payments standard explained below.[27]

Under a judicial liquidation it must be distinguished between direct access and consequential access:

[27] See para 6.4.5 below.

(i) Direct access:

(1) As a result of the debtor's request: Under this ground the debtor's request must evidence a default-in-payments situation;

(2) As a result of the abandonment of debtor's business: Although the law does not define an abandonment of business, the Insolvency Court has established certain indicators. For instance, the closure of the debtor's offices; the debtor's failure to respond to requirements from oversight authorities; the absence of the debtor's management; when the debtor does not perform its corporate object; when the debtor does not renew its commercial registration before the Chamber of Commerce; when the debtor does not keep a record of its accounts as per the accounting standards; and so forth; and

(3) As a result of the debtor's critical financial situation: This ground is triggered when an oversight agency assesses the debtor's financial situation and concludes that it is so critical that the best strategy to address the debtor's crisis is the commencement of a liquidation proceeding. Usually, this ground requires not only a default on payments but a serious and critical financial situation that justifies an *ex-officio* liquidation.

(ii) Consequential access:

(1) As a result of the debtor's contempt of court in a reorganisation proceeding: This ground is triggered when creditors request the commencement of the debtor's reorganisation proceeding or the summary reorganisation but the debtor fails to provide the necessary financial documentation and information;

(2) As a result of the debtor's failure to update the project of claims and voting rights: This ground is triggered when, after debtor's admission to a reorganisation proceeding or summary reorganisation, the debtor fails to update the project of claims and voting rights as requested by the Insolvency Court in the admission writ;

(3) As a result of the debtor's failure to make monthly pension payments, compulsory withholding of funds in favour of tax authorities, payroll deductions to workers, or contributions to the social security system: This ground is triggered when in a restructuring proceeding the debtor has not made monthly pension payments, compulsory withholding of funds in favour of tax authorities, payroll deductions to workers, or contributions to the social security system, by the time the Insolvency Court has to review the lawfulness of the reorganisation agreement. The Insolvency Court may give the debtor a maximum of three months to cure the default;

(4) As a result of the debtor's failure to pay administrative expenses: This ground is triggered when, in a restructuring proceeding, the debtor defaults on material administrative expenses. This evidences the fact that his business is non-viable. This occurs when the Insolvency Court evidences a pattern of continuous default on

administrative expenses or when the defaulted administrative expenses are material due to their importance for the debtor's business or due to its size; and

(5) As a result of the debtor's breach of the reorganisation agreement: This ground is triggered when the Insolvency Court rules that the debtor breached the reorganisation agreement since the debtor could not agree to a reform of the reorganisation agreement to cure the breach.

The only ground to enter into a liquidation by allocation is when the reorganisation agreement in a reorganisation proceeding is not confirmed and validated by the Insolvency Court.

A debtor can be admitted to a simplified liquidation on the same grounds as for judicial liquidation and also when, in a reorganisation proceeding or an summary reorganisation, the reorganisation agreement is not confirmed and validated by the Insolvency Court.

6.3.6 Standing

The debtor, the Insolvency Court, debtor's oversight agencies, and the foreign representative have standing to request or initiate liquidation proceedings as follows:

(a) Debtor: The debtor at his convenience can file for a judicial or simplified liquidation before the Insolvency Court provided that it meets the default on payment test.[28] According to the Commercial Code, commercial companies are obliged to report the default on payments of their ordinary obligations before the competent court;

(b) Debtor's oversight authority: The debtor's oversight authority has standing to request the Insolvency Court to commence the debtor's judicial or simplified liquidation when it has evidenced a precarious debtor's situation and considers that the most suitable alternative to mitigate the crisis and its negative effects on creditors is the commencement of a judicial liquidation or a simplified liquidation, as the case may be;

(c) Insolvency Court: The Insolvency Court can *ex-officio* commence a debtor's judicial or simplified liquidation on the following grounds: (i) when the debtor files for a restructuring proceeding and based on the information submitted, the Insolvency Court deems that the debtor's business is not viable (thus, the debtor is not fit for a restructuring proceeding), (ii) when the debtor defaults on payments of administrative expenses, or (iii) when the debtor fails to update the project of claims and voting rights after his admission to a reorganisation or summary reorganisation proceeding; and

(d) Foreign representative: A foreign representative appointed in a foreign insolvency proceeding can request the commencement of a liquidation proceeding provided that it proves that the debtor meets the default on payments test.

[28] See the discussion in para 6.4.5 below.

6.3.7 Stages of the liquidation proceeding

6.3.7.1 Judicial liquidation

The Insolvency Court will admit the debtor to a judicial liquidation and appoint a liquidator, and thereafter publish a notice informing the creditors about the commencement of the proceeding, which notice will be available for 10 days.

From the day after the notification is removed, creditors have 20 days to file their claims and the supporting documents before the liquidator. This procedural burden also applies to creditors of administrative expenses accrued after the commencement of the restructuring proceeding. In the event that the judicial liquidation is commenced due to the breach of a reorganisation agreement, the creditors recognised during the restructuring proceeding do not have to file a proof of their claims as they will be automatically recognised on the same terms.

Based on the claims submitted by the creditors and the debtor's account books, the liquidator will draft a provisional project of claims and voting rights and prepare a provisional inventory of assets. Thereafter creditors have five days to file objections against the provisional project of claims and voting rights based on the incorrect recognition of the ranking or amount of their claims. Similarly, creditors have 10 days to object to the provisional inventory of assets. The resolution of the objections follows the same procedural stages as in the reorganisation proceeding.

The Insolvency Court will summon the parties to a hearing to rule on the objections against the provisional project of claims and voting rights, and the inventory of assets.

The liquidator will have two months to sell the debtor's assets for not less than the value registered in the inventory of assets. The assets that could not be sold will be assigned to creditors based on the allocation agreement executed between the creditors and the liquidator. The allocation agreement must be agreed and executed in a term of no longer than 30 days. The Insolvency Court will summon a hearing to rule on the lawfulness of the allocation agreement. Upon approval, the allocation agreement will be binding on the liquidator and the creditors.

Should the creditors fail to execute the allocation agreement, or the Insolvency Court denies its confirmation, the Insolvency Court itself will within the following 15 days decide on the manner of distribution and assignment of the assets to the creditors as per the criteria established in Law 1116.[29] The creditors have five days to reject the assignment of assets. In that event, the rejected assets will be assigned to the remaining creditors as per the statutory ranking of claims.[30]

The writ that approves the allocation agreement or that allocates the assets, must be recorded in the Commercial Registry. Upon the recording of the writ, the legal entity of the debtor is extinguished.

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[29] Law 1116, Art 58.

[30] See the ranking of creditors in para 6.2.14 above.

The liquidator shall deliver the assets to the creditors in accordance with the allocation agreement or the Insolvency Court's ruling, as applicable, within the following 30 days and the liquidator must submit an accountability report that must include a detailed description of the activities conducted by him during the liquidation proceeding and evidence of the payments made to creditors. Creditors may object to the report, and the Insolvency Court will rule on such objections.

6.3.7.2 Liquidation by allocation

The Insolvency Court issues a writ stating that the reorganisation agreement was either denied or not submitted within the four months set forth in Law 1116. Accordingly, the Insolvency Court will order the commencement of the liquidation by allocation, and appoint a liquidator.

The liquidator must update the projection of administrative expenses and prepare a provisional inventory of assets. The creditors recognised during the reorganisation proceeding will automatically be recognised on the same terms. The creditors have three days to object to the projection of administrative expenses and the provisional inventory of assets. The adversarial procedure to resolve the objections is the same as in the reorganisation proceeding.

The Insolvency Court will summon the parties to a hearing to rule on the objections against the projection of administrative expenses and the provisional inventory of assets. After the Insolvency Court's ruling, the creditors and the liquidator have 30 days to execute an allocation agreement. The Insolvency Court will then summon the parties to a hearing to rule on the lawfulness of the allocation agreement. Should the parties fail to execute the allocation agreement, the Insolvency Court itself will within the following 15 days decide on the way of distribution and assignment of the assets to the creditors as per the criteria established in Law 1116.

The remaining stages are the same as in the judicial liquidation proceeding discussed above.

6.3.7.3 Simplified liquidation

As mentioned above, simplified liquidation is a simple and shorter version of judicial liquidation. Therefore, in general terms, the procedural stages are similar. Nonetheless, there are certain differences:

(i) the legal timeframe for creditors to file their claims after the notice of commencement is removed is 10 days instead of 20 days;

(ii) the legal timeframe for creditors to object to the provisional inventory of assets is five days instead of 10 days;

(iii) the legal term for creditors to request the exclusion of assets from the debtor's estate is one month instead of six months;

(iv) the Insolvency Court, at its discretion, may rule on objections through a writ and without summoning the parties to a hearing;

(v) there is no negotiation of an allocation agreement. The assets that the liquidator cannot sell will be assigned directly by the Insolvency Court based on the allocation suggested by the liquidator;

(vi) creditors can object to the appraisal of the assets by submitting purchase offers for a higher price; and

(vii) the timeframe for the transfer of the assigned assets to the creditors is within 20 days instead of 30 days, after the writ that approves the allocation agreement or that allocates the assets.

6.3.8 Effects of the commencement of liquidation proceedings

Liquidation proceedings all have similar legal effects. However, simplified liquidation has certain specific effects (discussed below).

The following are the effects that are common to all liquidation proceedings:

(i) Automatic stay: an automatic stay is triggered. Thus, debtor is prevented from disposing of assets or paying pre-admission debts. Accordingly, creditors cannot initiate collection proceedings against the debtor to enforce pre-admission claims. The ongoing collection proceedings shall be redirected to the Insolvency Court and must be treated the same as in the reorganisation proceeding;

(ii) Termination of agreements: all contracts, including trust agreements, employment contracts, executory performance agreements and continuing performance agreements, are terminated except for those that are: (i) necessary to preserve the debtor's assets or (ii) are directly related to the liquidation of its business and affairs. Contracts relating to the provision of public utilities are usually deemed essential to preserve the value of debtor's business, and they are not terminated;

(iii) Limited contractual capacity: the debtor is dissolved as a legal entity and henceforth may not engage in transactions that further its company purposes. From that moment on, the debtor is required to engage only in activities directly related to the liquidation and winding-up of the business, including actions to preserve and protect its assets. Any transaction that breaches this prohibition is null, void and ineffective *ipso iure*;

(iv) Removal of management and social bodies: The management is replaced with the liquidator. Social bodies, like the general shareholders assembly, cease with their functions;.

(v) Imposition of interim measures on the debtor's assets: The Insolvency Court imposes interim measures on all the assets to prevent their disposal; and

(vi) Acceleration of obligations: pending and future obligations become due and payable as of the commencement of the proceeding. The acceleration has no effect against co-obligors.

6.3.9 Corporate rescue in liquidation proceedings

The liquidator or creditors that represent at least 35% of the voting rights may propose the execution of a reorganisation agreement. The proposal can be made after the hearing to rule on the objections. The Insolvency Court will summon a hearing to validate the reorganisation agreement provided that it complies with the statutory requirements.

6.3.10 Alternatives to formal liquidation

Companies can commence with voluntary liquidation proceedings. Voluntary liquidation is a private liquidation with extremely limited court intervention and has as purpose the sale of assets or their allocation to pay the creditors as per the statutory ranking of claims. Voluntary liquidation is carried out by a liquidator appointed by the general shareholders assembly or alternatively by the Superintendence of Companies. The voluntary liquidation has some similarities with liquidation proceedings. For instance, at the commencement of voluntary liquidation, (which usually occurs after a decision of the general shareholders assembly), the contractual capacity of the debtor is restricted to transactions aimed to wind-up the legal entity. However, effects like the automatic stay, the cease of functions of social bodies, or the automatic termination of agreements are not triggered by the commencement of voluntary liquidation.

6.3.11 Appointment of officeholders

The Insolvency Court appoints a liquidator using a process aimed at finding the most suitable candidate from a list of liquidators created by the Superintendence of Companies.

An automated computer programme selects several candidates from the list of liquidators based on several factors such as the location of the debtor, the location of the candidate, the value of assets involved in the proceeding, the sector of the economy in which the debtor operates, the number of proceedings in which the candidate is acting as liquidator, the academic background and professional experience of the candidate, the experience of the candidate acting as liquidator, and the technical and administrative infrastructure that the candidate has available.

Afterwards, an internal committee in the Superintendence of Companies headed by the Superintendent of Companies chooses a candidate from the pool of candidates selected by the automated system. The committee acts as a second filter in the selection process, and it bases its decision on factors similar to those used by the automated programme.

In exceptional circumstances, the Superintendent of Companies may suggest a specific individual even if this individual is not included in the list of liquidators, provided that any of the

following situations occur: the (i) insolvency of the debtor may have a significant negative impact on the public economic order, or (ii) debtor is experiencing a critical situation of legal order.[31]

Finally, the Insolvency Court formally appoints the candidate as liquidator. The candidate must accept the appointment as it is mandatory, but the candidate must disclose any situation that may impede the acceptance of the appointment (such as conflict of interests). For the acceptance of the appointment, the liquidator must purchase an insurance policy to insure its liability and the compliance of its legal obligations. The Insolvency Court determines the amount of the policy based on the debtor's activity and the value of the assets.

At any time during the proceedings, creditors that represent at least of 60% of the votes can request the Insolvency Court to replace the appointed liquidator. The substitute is selected through the same process as mentioned above.

6.3.12 Proof of claims

As in restructuring proceedings, documentary evidence is the only permissible way to prove claims in liquidation proceedings. Creditors in essence have to prove three facts: the existence, amount and priority of their claims.

However, the procedural burdens differ depending on the type of liquidation proceeding. One main difference is when the liquidation proceeding is preceded by a restructuring proceeding in which the Insolvency Court has already ruled on the objections against the projection of claims and voting rights and the inventory of assets, like in liquidation by allocation or when judicial or simplified liquidation is commenced due to a breach of the reorganisation agreement. In these cases, the creditors do not have the burden of filing their claims during the liquidation proceeding as they will be recognised for the same amount and in the same priority as in the restructuring proceeding. Creditors that failed to prove their claim in the restructuring proceeding will be deemed postponed creditors of the restructuring proceeding should they file their claims in the liquidation proceeding.

Conversely, when the liquidation proceeding is an autonomous proceeding or when it is preceded by a restructuring proceeding in which the Insolvency Court has not ruled on the objections, the creditors must file their claims within the timeframe provided for in the law for the specific liquidation proceeding. This burden also applies to the administrative expenses of restructuring proceedings when the restructuring proceeding turns into a liquidation proceeding because the administrative expenses had not been previously ranked. Thus, these administrative expenses must be ranked as claims in the liquidation proceedings.

After the claims are filed, the liquidator will prepare a provisional projection of claims and voting rights and a provisional inventory of assets based on the evidence filed by the creditors as well

[31] Superintendence of Companies. OFICIO 220-036756, 24 April 2019: "is established whenever, in the Superintendency's judgment, in a given context of circumstances of time, manner and place, there is evidence of conduct, omissions or abnormalities coming from the company or third parties, which seriously affect its legal process in general". Available at https://tesauro.supersociedades.gov.co/jsonviewer/a03TEoIBIlrnnHGSxNXh.

as the debtor's financial statements. If a claim is not recognised, the liquidator must justify the reason. Then, the provisional projection of claims and voting rights and the inventory of assets are provided to creditors who may object to it and file additional evidence if they deem that they are not properly recognised. The liquidator will have the opportunity to respond to the objections. Finally, the Insolvency Court will rule on the objections based on the evidence and pleadings filed by the creditors and the liquidator.

6.3.13 Clawback actions

The provisions are the same as that in corporate rescue proceedings.[32] The only difference is that clawback actions in liquidation proceedings have an additional requirement to succeed: the plaintiff must prove that the debtor's assets are insufficient to pay its liabilities. Otherwise, there is no damage to the creditors.

6.3.14 Directors' liability

Pursuant to Article 82 of Law 1116, if the debtor's equity is reduced as a result of wilful misconduct or negligent conduct attributable to the directors, they shall bear secondary liability for the payment of the outstanding debts of the company. Such liability will arise only to the extent that the assets of the company are insufficient to pay the creditors. Negligence will be presumed if the conduct of the directors is found to be in breach of the law or the company's by-laws. Nevertheless, directors will not be liable for decisions they did not approve or of which they were not aware. Finally, any clause that intends to exonerate the shareholders, administrators, fiscal auditors and employees of the foregoing responsibilities or that limits these responsibilities to the value of the bonds posted to perform their responsibilities, will be ineffective *ipso iure*.

In addition to the liability regime described above, the Insolvency Court may also impose fines and sanctions consisting of the banning of the director from engaging in any business for up to 10 years if it appears that, among others, the (i) company was used to defraud the creditors, (ii) business was fraudulently driven into insolvency, (iii) director unjustifiably breached the reorganisation plan, (iv) director speculated with respect to the creditors' claims to purchase them at a discount, (v) director participated in simulated acts or altered the financial records, or (vi) director waived a right or action without reasonable cause.

6.3.15 Parent company liability

According to Article 61 of Law 1116, when the debtor's insolvency originated or was caused by the actions of the parent company or the controlling shareholder, they may be held secondarily liable for the remaining obligations that cannot be paid from the debtor's assets, provided that the actions were beneficial to them or their subsidiaries, but detrimental to the debtor's interests. There is a rebuttable presumption pursuant to which the insolvency of the debtor is deemed to have been caused by the parent company or controlling shareholder. For purposes

[32] See para 6.4.15 below.

of rebutting this presumption, the parent company or controlling shareholder will be required to prove conclusively that the insolvency of the debtor occurred for different reasons.

6.3.16 Ranking of claims

In general terms, the ranking of claims is the same as in restructuring proceedings. The only differences are that the: (i) statutory ranking of claims cannot be modified as per Article 41 of Law 1116 as this possibility is limited to restructuring proceedings only, and (ii) interest accrued on past due obligations is deemed to be postponed claims.

In liquidation proceedings, there is a debate regarding the situation where the shareholders financed the debtor company before it entered into a liquidation proceeding and the debtor had granted a security interest in favour of its shareholders as in principle the shareholders are postponed creditors. However, the Insolvency Court held that the priority given to secured creditors applies even to shareholders. Therefore, when secured creditors are not shareholders, they are not postponed creditors.

6.3.17 Insolvency of a group of companies

The concept of a group of companies was first recognised in Colombia under the Companies Law (Law 222 of 1995). Law 1116 contains specific provisions to govern jurisdictional issues and matters pertaining to groups of companies in insolvency proceedings. However, a comprehensive regulation of the insolvency proceedings of an enterprise group was not promulgated until Decree 1749 of 2011, which adopted the recommendations of UNCITRAL's Legislative Guide on Insolvency Law, Part III in order to facilitate insolvency proceedings of an enterprise group, and was promulgated mainly because the insolvency regime of 2006 was not fit to handle insolvency cases pertaining to large and complex groups of companies. Decree 1749 established a new special insolvency regime regarding groups of companies, which are understood as the entire set of individuals, legal entities, trust assets, or entities of any other nature that are involved in economic activities linked or related to each other by their holdings, parent or subsidiary companies, or because the vast majority of their capital belongs or is under the administration of the same legal entities or individuals, whether acting directly, through others or through trusts.

Each member of the group of companies retains its legal capacity and autonomy and each insolvency proceeding can be carried out separately. Thus, each company can enter into the type of proceeding that is most suitable for its financial situation. Nevertheless, under Decree 1749, insolvency proceedings of companies that are part of the same group with respect to various debtors or companies of the same group can be jointly conducted for reasons of speed, efficiency and reduced of costs. The joint conduction of insolvency proceedings is known as coordination. Coordination measures may include designating a single and common officeholder (that is, the promoter); the coordination of hearings; the coordination of the objections; exchanging and disclosing information relating to one or more participants in the same group of companies; the joint appraisal of assets; the coordination of negotiation rounds with creditors for the execution of the reorganisation agreement; and ordering the sale of the assets *en bloc* or as a productive unit, among others. These measures are not put in place

automatically, since the Insolvency Court must specify the scope of the coordination on a case-by-case basis.

When it comes to financing between members of the same group of companies, the Insolvency Court must ensure an equitable distribution of costs among all the participants of the group of companies that may be affected by the benefits and damages that may arise from the provision of resources after the commencement of an insolvency proceeding. Decree 1749 also regulates the possibility that an insolvent company finances or facilitates the financing of another insolvent member of the same group of companies either by providing fresh resources or by securing or guaranteeing a loan. These transactions shall be aimed to ensure the survival of the borrower company or to increase or preserve the value of its estate. In these cases, the relevant officeholder must recommend the transaction, a majority of creditors must not object to the transaction, and the Insolvency Court must grant a prior authorisation for its execution. The lender company will enjoy the priority established in Article 41 and the funds provided will not be deemed as postponed claims in the event of a liquidation proceeding of the borrower company. Nevertheless, these benefits cease should the funds be used for a different purpose.

For claw-back actions in the context of the insolvency of a group of companies, Decree 1749 sets forth factors that must be taken into account to determine if the transaction is impeachable: (i) the purpose of the transaction, (ii) whether the transaction has contributed to the commercial and financial performance of the group of companies as a whole, (iii) whether as a result of the transaction, the members of the group of companies obtained any advantage that would not normally be granted to a debtor's unrelated parties, (iv) the transactions executed and performed between the members of the group of companies, the reciprocal considerations, including employment contracts and settlements, (v) the manner in which the transaction was performed, (vi) the date in which the transaction was executed, (vii) the impossibility of identifying the real beneficiaries of the transaction, (vii) the structure of the companies involved, (viii) the account activity between companies of the same group, (ix) the date of incorporation of the companies involved in the transaction, and (x) the purchase and sale value of the traded assets.

In addition to the rules described above (which are also applicable to corporate rescue proceedings),[33] there is an additional consequence that is solely available in liquidation proceedings, namely consolidation. This entails the possibility that the Insolvency Court may order the pooling of assets and liabilities of the members of the group of companies. Consolidation is an exceptional measure that can only be put in place when: (i) the assets and liabilities of the members of the group of companies are so intermingled that it would not be possible to separate the ownership of the assets and obligations without incurring an unjustified expense or delay, or (ii) a member of the group of companies was involved in fraudulent or illegitimate activities that frustrate the object of the proceeding and where the consolidation of patrimonies is essential to remedy such activities.

[33] See para 6.4.17 below.

The parties with standing to request a consolidation are any insolvent member of the group of companies, the liquidator or any creditor. The Insolvency Court may also make an *ex officio* order for a consolidation.

A consolidation will have the following effects: (i) the assets and liabilities of the members of the group of companies subject to the consolidation become part of a single liquidation estate, (ii) obligations between the members of the group are terminated, (iii) the Insolvency Court must appoint a liquidator for the consolidated estate, (iv) claims against the members of the group of companies affected by such an order are deemed as claims in relation to a single estate, and (v) the payment of claims follows the order established in the statutory ranking of claims.

Decree 1749 does not include any provisions regarding the possibility of consolidation of assets and liabilities among the members of an international group of companies. The provisions regarding co-operation between foreign and local authorities are limited to the exchange of information and administration, and supervision of the member assets.

6.3.18 The roles of the stakeholders in corporate insolvency proceedings

6.3.18.1 The Insolvency Court

The Insolvency Court in corporate insolvency proceedings has competence to rule on the following matters:

(i) the debtor's admission to the insolvency proceedings;

(ii) lifting the stay to perform transactions outside its ordinary course of business or make payments of pre-admission claims;

(iii) sanctions for the violation of the automatic stay;

(iv) disputes on the ranking and amount of the claims against the debtor;

(v) granting authorisations to the secured credit/ors to enforce their rights to the encumbered assets;

(vi) confirmation of the reorganisation agreement and the allocation agreement;

(vii) clawback actions;

(viii) *ipso-facto* clauses;

(ix) rejection of contracts;

(x) the breach of the reorganisation agreement and the conversion to a liquidation proceeding due to the failure of the reorganisation proceeding;

(xi) the validity of agreements executed by the liquidator; and

(xii) in general, the Insolvency Court has all the necessary powers to conduct proceeding to fulfil the purposes of the insolvency regime.

6.3.18.2 Management

Management plays an important role in corporate insolvency proceedings:

(i) in reorganisation proceedings, management usually maintains control of the company. Nevertheless, management is removed *ipso iure* as per Law 1116 upon the commencement of the liquidation proceeding and is replaced by a liquidator appointed by the Insolvency Court; and

(ii) among others, the debtor's management performs the following functions, namely that it:

(1) usually files the bankruptcy admission petition before the Insolvency Court;

(2) is the only party with standing to request authorisation from the Insolvency Court to lift the automatic stay; and

(3) can request the Insolvency Court to reject contracts.

6.3.18.3 Creditors

The creditors play an active role during the reorganisation and liquidation proceedings as they have important rights within the proceedings, namely that they:

(i) can file objections in respect of the ranking and the amount of the obligations, and the voting rights recognised by the debtor. They may also settle their objections with the debtor;

(ii) can report violations of the automatic stay and request the imposition of sanctions against the debtor and the creditor involved;

(iii) can they vote on the relevant agreement as follows: (a) in restructuring proceedings the creditors can vote on the reorganisation agreement and negotiate its content with the debtor, namely the payment terms, the restriction on the debtor's contractual capacity and the debtor's disclosure obligations, and (b) in liquidation proceedings the creditors can vote on the allocation agreement and negotiate its content with the liquidator, namely to define how the debtor's assets will be assigned to creditors;

(iv) can make binding offers to the liquidator to acquire assets from the debtor in liquidation proceedings;

(v) can monitor the debtor's fulfilment of the reorganisation agreement in restructuring proceedings;

(vi) can report breaches of the reorganisation agreement; and

(vii) have standing to request the involuntary commencement of reorganisation proceeding.

6.3.18.4 Shareholders

Shareholders have an important role in corporate insolvency proceedings. Among others, they have the following rights, namely that:

(i) they can vote on the reorganisation agreement;

(ii) they are deemed as one of the five categories of creditors that can vote on the reorganisation agreement; and

(iii) their votes are, in principle, equivalent to their respective portion of the debtor's equity. However, if the debtor's equity is negative, each shareholder will be entitled to one vote.

6.3.18.5 Officers of the Insolvency Court

The Insolvency Court appoints officers to perform ancillary but highly relevant activities in certain insolvency proceedings.

Promoter

A promoter is appointed in some restructuring proceedings and is the debtor's legal representative. However, in exceptional circumstances, the Insolvency Court may appoint a different person from a pre-established list. To appoint an external promoter, the Insolvency Court must take into account the importance of the company for the national economy, the amount of the liabilities, the number of creditors, the cross-border nature of the debtor's business, the existence of anomalies in the debtor's accounts, and the violation of legal obligations by the debtor. In any case, the external promoter is not the debtor's co-administrator.
The promoter has the following main functions, namely to:

(a) participate in the negotiation, analysis, diagnostic and preparation of the reorganisation agreement;

(b) participate in the issuance and diffusion of the debtor's financial, administrative, accounting and legal information;

(c) update the projection of claims and voting rights that is filed by the debtor in his admission request as of the date in which the debtor is admitted to the reorganisation proceeding;

(d) submit reports before the Insolvency Court about the status of the different stages of the reorganisation proceeding;

(e) recommend the payment of the small claims in order for the debtor to be able to proceed to pay them;

(f) serve as a conciliator between the parties to resolve disputes regarding the ranking and amount of the claims subject to the proceeding;

(g) file clawback actions against transactions executed by the debtor and its creditors;

(h) analyse the convenience of the financing proposals between companies of the same group of companies;

(i) liaise with the foreign representative and foreign courts in cross-border insolvency proceedings;

(j) ensure that the enforcement of collateral is made in the best interest of the reorganisation proceeding's objectives; and

(k) advise the Insolvency Court regarding the approval for the substitution of deteriorated collateral in favour of the secured creditors.

Liquidator

The Insolvency Court must appoint a liquidator in the liquidation proceedings from a pre-established list.

The liquidator has the following main functions, namely to:

(a) manage the debtor company from the commencement of the liquidation proceeding;

(b) execute all the necessary contracts to preserve the value of assets and to reconstitute the liquidated estate;

(c) update the projection of claims and voting rights, review the filing of creditors' claims, and respond to creditors' objections;

(d) prepare the inventory and the appraisal of the debtor's assets;

(e) repossess the debtor's assets in possession of third parties;

(f) sell the debtor's assets and collect the proceeds to pay the creditors;

(g) foster the negotiation of the allocation agreement;

(h) submit reports to the Insolvency Court and the creditors on the liquidation proceeding, for example, on the actions and measures taken during the proceeding, the claims and objections filed by the creditors, the sale of assets, the negotiation of the allocation agreement, among others; and

(i) file clawback actions against transactions executed by the debtor and its creditors.

The liquidator has a special liability regime. On the one hand, as the liquidator acts as debtor's legal representative, he is subject to the liability regime of directors and officers. Thus, the liquidator has the fiduciary duties of loyalty and care. On the other hand, since the liquidator is an officeholder as well, he is liable under the ordinary liability regime for his acts and omissions and for those of his supporting staff.

Self-Assessment Exercise 4

Question 1

True or False? The timeframe of the simplified liquidation proceeding is shorter than those applicable to ordinary judicial liquidation proceedings.

Question 2

Which is the main consequence at the beginning of the voluntary liquidation in relation to the debtor's capacity?

Question 3

True or False? The liquidator is appointed by the general shareholders assembly in a judicial liquidation.

Question 4

How do creditors prove claims in liquidation proceedings? Is it different from the reorganisation proceedings?

Question 5

True or False? The statutory ranking of claims can be modified in liquidation proceedings.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.4 Corporate rescue

6.4.1 Introduction

In Colombia there are five types of restructuring proceedings namely the reorganisation proceeding, the summary reorganisation, the emergency negotiation of a reorganisation agreement (ENRA), the business recovery, and the judicial validation of a private restructuring agreement (judicial validation).

6.4.2 Objectives of the proceedings

These restructuring proceedings seek to preserve sustainable businesses and normalise businesses' commercial and financial relationships through an operational, administrative and general restructuring. However, there are certain differences between the five restructuring proceedings:

(a) Reorganisation proceeding: The reorganisation proceeding is the standard proceeding. It aims to preserve the company and normalise the debtor's business;

(b) Summary reorganisation proceeding: This is a provisional restructuring proceeding for SMEs. It was enacted as a provisional proceeding to address the effects of the Covid-19 pandemic as SMEs represent approximately 90% of the companies in Colombia. The government considered the public policy recommendations from the World Bank and Working Group V of UNCITRAL to design an expedited and flexible restructuring proceeding with shorter legal terms and less procedural stages;

(c) ENRA: This is a provisional restructuring proceeding characterised by the direct and flexible negotiation of a reorganisation agreement between the debtor and its creditors for a maximum term of three months. In this proceeding, the intervention of the Insolvency Court is limited to rule only on the objections against and the confirmation of the reorganisation agreement;

(d) Business recovery proceeding: This is a provisional restructuring proceeding created as an alternative proceeding to reduce the workload of the Insolvency Court by harnessing the coverage, technical infrastructure and experience of chambers of commerce in alternative dispute resolution. This proceeding is characterised by the intervention of a mediator appointed by the Chamber of Commerce in the negotiation of a private reorganisation agreement and by the creation of an environment that fosters negotiation between the debtor and its creditors through the imposition of an automatic stay. The negotiations pertaining to the private reorganisation agreement must be concluded within a maximum period of three months and it will be only binding on the debtor and creditors that voted in its favour. The debtor also has the option to request the extension of the effects of the private agreement to include dissenting and absent creditors. In such a case, both the resolution of the objections and the confirmation of the agreement will be subject to judicial or arbitral ruling. As the Chamber of Commerce, which is a private institution, is responsible for conducting an important part of the proceeding, the business recovery proceeding is

not gratuitous, and the debtor must pay the administration fees, the mediator's fees and eventually the arbitrator's fees; and

(e) Judicial validation: This proceeding provides the possibility for the debtor to enter into an out-of-court reorganisation agreement with a number of creditors that represent at least the majority required by Law 1116 to enter into a reorganisation agreement. In such a case, the parties may request the Insolvency Court to validate the agreement to extend its effects to include dissenting and absent creditors.

6.4.3 Legal sources

The restructuring proceedings are regulated by different legal sources:

(a) Reorganisation proceeding and judicial validation: Both the reorganisation proceeding and the judicial validation are regulated by Law 1116, which as mentioned before, is the main legal source of insolvency proceedings;

(b) ENRA and the business recovery proceeding: the ENRA is regulated by Decree 560 of 2020 (Decree 560). As mentioned before,[34] the Colombian government enacted Decree 560 to provisionally address the effects of the Covid-19 pandemic on companies; and

(c) Summary reorganisation proceeding: the summary reorganisation proceeding is regulated by Decree 772 of 2020 (Decree 772). As mentioned before, the Colombian government enacted Decree 772 to provisionally address the effects of the Covid-19 pandemic on SMEs.

6.4.4 Scope of the restructuring proceedings

All the restructuring proceedings, except the business recovery proceeding, are applicable to private and mixed-ownership entities such as corporations; foundations; natural persons that qualify as merchants; and legal entities that conduct permanent business operations in Colombia, including branch offices of foreign companies and trusts. However, there are some differences between the reorganisation and the summary reorganisation proceedings.

(a) Reorganisation proceeding: As per Decree 772, from 3 June 2020 to 31 December 2023, debtors affected by the Covid-19 pandemic that have assets valued at more than 5,000 minimum wages (approximately USD 1 200 000) can only utilise the reorganisation proceeding;

(b) Summary reorganisation proceeding: As per Decree 772, from 3 June 2020 to 31 December 2023, debtors that have assets valued at less than 5,000 minimum wages (approximately USD 1 200 000) can only file for summary reorganisation;

(c) ENRA: As per Decree 560, from 16 April 2020 to 31 December 2023, debtors that have been affected by the Covid-19 pandemic may file for an ENRA. Also, the debtor may choose

[34] See para 6.1.1 above.

to negotiate a reorganisation agreement with a specific category of creditors instead of negotiating with all the creditors. For instance, the debtor may choose to negotiate only with its employees or with financial institutions; and

(d) Business recovery proceeding: This proceeding is different from the other restructuring proceedings. Its scope is broader as entities excluded from the Law 1116 regime can nonetheless apply for business recovery proceedings provided that they are not subject to a special restructuring regime. As with the ENRA, the debtor may choose to negotiate a reorganisation agreement with a specific category of creditors instead of negotiating with all of them.

6.4.5 Threshold for entering into restructuring proceedings

Law 1116 establishes two grounds on which a debtor may enter into a restructuring proceeding. The first one is the default on payments standard, which is the: (i) default on two or more obligations of two or more creditors for more than 90 days, or (ii) commencement of two or more collection proceedings against the debtor. In either case, the amount due must not be less than 10% of the total external liabilities recorded in the debtor's financial statements.

The second ground is known as the imminent payment inability standard, which is the situation where there are circumstances in the debtor's relevant market, or within the debtor's organisation or business structure, that materially affect, or could reasonably materially affect, the ordinary payment of the debtor's short-term obligations (those obligations with a maturity date equal to or less than one year). It is important to highlight that although in principle the two standards apply to a reorganisation proceeding, due to the Covid-19 pandemic, the Colombian government decided to suspend the imminent payment inability standard as a ground for admission into the reorganisation proceeding until 31 December 2023.

6.4.6 Standing

Standing to request the commencement of a restructuring proceeding depends on the type of proceeding.

In reorganisation and summary reorganisation proceedings, the debtor, the creditors, the debtor's oversight agency, and a foreign representative of a foreign insolvency proceeding all have standing to request commencement. However, Law 1116 restricts the standing depending on the ground that gives rise to the proceeding:

(i) When the ground is the default on payments standard: When relying on this ground, only the debtor, one or more creditors, a foreign representative of a cross-border insolvency proceeding, or the oversight agency may request the commencement of these proceedings. In the case of the creditors, not all creditors have standing, as it is restricted to creditors of overdue obligations. Upon the submission of the commencement request by the creditors or the oversight agency, the Insolvency Court will order the debtor to file his financial information to verify that the default on payments standard is met; and

(ii) When the ground is the imminent payment inability standard: When relying on this ground, only the debtor or two or more creditors un-related to the debtor or his shareholders or a foreign representative of a cross-border insolvency proceeding may request the commencement of these proceedings. Nonetheless, currently this option is suspended until 31 December 2023 to avoid a flood of applications due to the effects of the Covid-19 pandemic on business.

In ENRA and business recovery proceedings in which private negotiations play an important role due to their deregulated nature, only the debtor has standing to request their commencement.

In a judicial validation, either the debtor or the creditor that had executed the private agreement has standing to request the commencement of the judicial validation under either the default on payments, or the imminent payment inability standard.

6.4.7 Compulsory restructuring

According to the Commercial Code, the directors of commercial companies as well as merchant individuals have the obligation to file an insolvency proceeding when a company has two or more obligations overdue for more than 90 days, representing at least 10% of its debts. However, this duty is suspended until 31 December 2023 where the cause of the cessation of payments is a direct consequence of Covid-19, in order to avoid a flood of applications that could add too much pressure to the Insolvency Court's workload.

6.4.8 Procedural stages of the restructuring proceedings

6.4.8.1 Reorganisation proceeding

(i) Debtor's admission: The Insolvency Court admits the debtor to a reorganisation proceeding and appoints a promoter;

(ii) Publicity notice: The Insolvency Court publishes a notice informing the creditors about the commencement of the proceeding. The notice must be posted to the debtor's domicile and to the debtor's offices;

(iii) Preparation of provisional projection of claims and voting rights: Within the next two months, the promoter must prepare a provisional projection of claims and voting rights as of the date of admission based on the debtor's financial information and on the evidence that creditors present to him;

(iv) Service of the provisional project of claims and voting rights: The Insolvency Court serves the provisional projection of claims and voting rights to creditors and debtor. For the next five days, they may file objections with the corresponding documentary evidence. They may object to the projection of claims on the following grounds: the (a) existence of a claim, (b) amount of a claim, (c) priority of a claim, and (d) voting rights allocated to creditors and shareholders;

(v) Service of the inventory of assets: The Insolvency Court serves the provisional inventory of assets filed by the debtor on the secured creditors. For the next 10 days, the secured creditors may object the inventory on the following three grounds: the (a) existence of a security interest, (b) value of the encumbered asset, or (c) classification of the assets as necessary for the debtor's business;

(vi) Service of the objections: The Insolvency Court serves the objections to the debtor and the creditors. For the next three days, they may respond to the objections and file the documentary evidence they deem convenient;

(vii) Settlement of the objections: Law 1116 gives the parties 10 days to settle the objections. The Insolvency Court will decide on the objections that are not settled;

(viii) Hearing to rule on the objections: The Insolvency Court will summon a hearing to rule on the objections against the provisional projection of claims and voting rights and the inventory of assets. Once the objections are decided, the projection of claims and voting rights and the inventory of assets become definitive;

(ix) Negotiation of the reorganisation agreement: Upon a decision being handed down on the objections, a term of four months will commence for the debtor to reach a reorganisation agreement. The reorganisation agreement must be approved by at least a majority of the votes recognised in the projection of claims and voting rights; and

(x) Hearing to rule on the confirmation of the reorganisation agreement: The Insolvency Court will summon a hearing to rule on the confirmation of the agreement. The following procedural stages depend on the Insolvency Court's decision:

(1) Approval of the reorganisation agreement: If the reorganisation agreement is approved, the debtor and all the creditors are bound by its content. In the event that the debtor breaches the reorganisation agreement, the creditors shall notify the Insolvency Court, which after validating the existence of the breach will summon the parties to a hearing to rule on the breach of the reorganisation agreement. If the breach is not cured or if the reorganisation agreement is not amended, the Insolvency Court will declare the failure of the reorganisation proceeding and order the commencement of a judicial liquidation or simplified liquidation, whichever is applicable;[35] and

(2) Rejection of the reorganisation *agreement*: If the reorganisation agreement is not approved, the Insolvency Court will order the commencement of a liquidation by allocation proceeding.[36] However, as the liquidation by allocation is suspended until 31 December 2023, the Insolvency Court will instead order the commencement of a judicial liquidation or a simplified liquidation, whichever is applicable.

[35] See para 6.3 above in this regard.
[36] *Ibid*.

6.4.8.2 Summary reorganisation proceeding

As mentioned above, the summary reorganisation proceeding is a simple, flexible and expedited version of the reorganisation proceeding. Although the procedural stages are generally similar to the ones of the reorganisation proceeding, there are certain differences that are listed below:

(i) Shorter term for the preparation of the provisional project of claims and voting rights: The legal term for the promoter to file the provisional projection of claims and voting rights is 15 days as of the admission date, instead of the two months that the Insolvency Court gives in a reorganisation proceeding;

(ii) Creation of a settlement meeting: A new stage for the settlement of objections is created. This stage is known as "the settlement meeting". At this meeting, the Insolvency Court acts as conciliator and suggests settlement proposals with the purpose of leaving the minimum number of unresolved objections. Additionally, during this meeting, the promoter must circulate the business plan and a proposal of the reorganisation agreement, both based on the debtor's cash flow projections. This meeting is scheduled after the commencement of the proceeding and must take place within three months after the debtor is admitted to the procedure.

(iii) A flexible term to file objections: The term in which to file objections is five days before to the settlement meeting, and may be filed once the promoter files the provisional projection of claims and voting rights and the inventory of assets. The Insolvency Court does not serve the objections on the parties as they will be publicly available in the docket of the proceeding. Accordingly, there is not a specific stage to file the responses to the objections. However, the debtor or any other interested creditor may respond to the objections at any time until the fifth day prior to the settlement meeting; and

(iv) Unified hearing: There is only a single hearing in which the Insolvency Court rules on both the objections and the confirmation of the reorganisation agreement. This hearing is scheduled at the commencement of the proceeding. Thus, the debtor already should have negotiated the reorganisation agreement by the time that the hearing takes place.

6.4.8.3 ENRA

(i) Debtor's admission: The Insolvency Court will admit the debtor to an ENRA. The debtor must notify his creditors of the commencement of the proceeding;

(ii) Negotiation of the reorganisation and objections: Upon the debtor's admission a three-month term starts to run for the following, namely the:
   (1) creditors may file objections against the projection of claims and voting rights and the inventory of assets filed by the debtor in his application brief;

   (2) debtor and interested creditors may respond to the objections within the same term; and

(3) debtor must negotiate a reorganisation agreement with the creditors.

(iii) Unified hearing: After the thee-month term has lapsed, the Insolvency Court will summon a hearing to rule on both the objections and the confirmation of the reorganisation agreement. The creditors that object must attend the hearing and plead their case before the Insolvency Court, otherwise the objection is regarded as waived.

(1) Approval of the reorganisation agreement: Should the Insolvency Court confirm the reorganisation agreement, it will be binding on the debtor and creditors subject to the proceeding. A breach of the agreement has the same effects as with the breach of the agreement in a reorganisation proceeding; and

(2) Rejection of the reorganisation agreement: If the Insolvency Court denies the confirmation of the reorganisation agreement or if it is not submitted for confirmation, the debtor will not be able to file again for an ENRA or a business recovery proceeding within the following year. However, the debtor will be able to file for the remaining restructuring proceedings or the liquidation proceedings, as the case may be. This means that the failure of the ENRA does not necessarily entail the debtor's liquidation.

6.4.8.4 Business recovery proceeding

(i) Debtor's application: The debtor must apply to the Chamber of Commerce of the area in which the debtor is domiciled;

(ii) Payment of fees: The debtor must pay the administration fees and the mediator's fees to the Chamber of Commerce;

(iii) Appointment of the mediator: The Chamber of Commerce appoints the mediator;

(iv) Commencement of the proceeding: The Chambers of Commerce issues a writ declaring the commencement of the proceeding upon which a three-month term for the negotiation of the private agreement begins to run;

(v) Notification of the proceeding: The debtor shall notify the creditors of the commencement of the proceeding by email and by posting a notice in his offices. Also, the Chamber of Commerce will order the recording of the writ in the Commercial Registry;

(vi) Preparation of the provisional projection of claims and update of the private reorganisation agreement: The mediator will analyse the debtor's financial information and may request clarifications and additional documents to assist him in preparing: an (a) updated version of the projection of claims and voting rights, and (b) updated version of the private reorganisation agreement;

(vii) Service of the projection of claims and voting rights: The debtor will serve the updated projection of claims and voting rights and the proposal for the private reorganisation agreement on the creditors;

(viii) Objections to the projection of claims and voting rights and observations on the proposal of the reorganisation agreement: The creditors may file objections against the updated projection of claims and voting rights and make observations on the lawfulness of the proposed private reorganisation agreement;

(ix) Settlement of the objections and observations: The mediator may hold meetings with the parties to amicably resolve the objections and observations;

(x) Voting on the reorganisation agreement: The private reorganisation agreement is put to the creditors' vote;

(xi) Certification of the votes: The mediator certifies that the private reorganisation agreement meets the minimum voting threshold and from then on, the agreement is only binding on the debtor and the creditors that voted in its favour:

(1) Should the private reorganisation agreement not meet the voting threshold, the mediator will declare the failure of business recovery proceeding. The effect of this is the same as the that for the failure of the ENRA; and

(2) If the debtor breaches the private reorganisation agreement, neither a hearing to rule on the breach nor a liquidation proceeding will be triggered, as would the case with an agreement validated by the Insolvency Court.

(xii)Validation of the reorganisation agreement: The debtor has the option to require the extension of the effects of the private agreement on dissenting and absent creditors through the judicial or arbitral validation of the private reorganisation agreement;

(xiii) Admission to the validation stage: The Insolvency Court, the circuit civil judge or the arbitrator, as may be applicable, admits the debtor to the validation of the agreement stage;

(xiv) Objections and observations by dissenting creditors: The creditors that voted against or did not vote on the private reorganisation agreement have 10 days to file (a) objections against the projection of claims and voting rights, and (b) observations against the private reorganisation agreement;

(xv)Settlement of the objections: The mediator must give his best effort to pursue the amicable settlement of the objections and observations for a term of 10 days. Once this time has elapsed, the mediator shall inform the creditors of the outcome of his efforts; and

(xvi) *Hearing to rule on the objections and observations*:

(1) The Insolvency Court, the circuit civil judge or the arbitrator shall request the debtor's response to the objections and summon the parties to a hearing to rule on the objections and observations. Creditors must attend the hearing otherwise their objections are deemed to be waived; and

(2) The Insolvency Court, the circuit civil judge or the arbitrator may confirm or deny the validation of the private reorganisation agreement:

(a) Upon its validation, the private reorganisation agreement will be binding on the debtor and all the creditors. A breach of the private agreement will have the same effect as a breach of a reorganisation agreement in a reorganisation proceeding; and

(b) Should the validation of the agreement be denied, it will continue to be binding on the debtor and the creditors that voted in its favour.

6.4.8.5 Judicial validation

(i) Negotiation of the private reorganisation agreement: The debtor and its creditors may negotiate a private reorganisation agreement at any time. The negotiations shall be publicly announced and all creditors should be notified at least five days before the filing for the reorganisation agreement validation before the Insolvency Court;

(ii) Application for the judicial validation: The debtor or two or more creditors can file a petition before the Insolvency Court requesting the validation of the private reorganisation agreement;

(iii) Service of the provisional projection of claims and voting rights and inventory of assets: The Insolvency Court will serve the private reorganisation agreement, the project of claims and voting rights, and the Inventory of assets on the creditors that did not vote or voted against the reorganisation agreement, for five and 10 days respectively;

(iv) During these terms, the dissenting and absent creditors may file objections to the project of claims and voting rights, and the inventory of assets and comments on the private reorganisation agreement: Dissenting and absent creditors as well as any other interested creditors may respond to the objections and comments for three days. The parties may settle the objections at any time before the hearing to rule on the objections and the confirmation of the reorganisation agreement; and

(v) Hearing to rule on the objections and the validation of the reorganisation agreement: The Insolvency Court shall summon the parties to the hearing to rule on the outstanding objections and the confirmation of the private reorganisation agreement. The validation of the agreement will entail an analysis of the following requirements: that (a) it has been approved in accordance with the majorities required by law, (b) negotiations were open and had sufficient publicity, (c) all creditors of the same class have the same rights, and (d) it is not abusive but subject to the rule of law:

(1) Upon validation by the Insolvency Court, the private reorganisation agreement will be binding on the debtor and all its creditors. A breach of the agreement will follow the same stages set forth for the reorganisation proceeding, which means that the breach may result in the debtor's liquidation; or

(2) Should the validation of the agreement be denied, it will continue to be binding on the debtor and the creditors that voted in its favour.

6.4.9 Effects of the commencement of restructuring proceedings

In general, all of the restructuring proceedings have the same effects, although the application of these effects may be different in particular proceedings.

6.4.9.1 Limited contractual capacity

The debtor's social bodies (such as the general shareholders assembly) continue to operate but their functions are limited by the general rule contemplated in Law 1116. Therefore, as of the date of filing the application for admission to the restructuring proceedings, the debtor is banned from making disposals of assets or conducting operations that do not correspond to its ordinary course of business, unless the Insolvency Court authorises it to do so. These operations and transactions include but are not limited to: (i) amending of by-laws, (ii) granting or enforcing security interests over the debtor's assets (including collateral trusts), (iii) paying or offsetting outstanding obligations, (iv) entering into arrangements or settlements regarding any outstanding obligations, (v) unilaterally terminating ongoing judicial proceedings, and (vi) accepting claims when acting as defendant.

The failure to comply with the above-mentioned limitations may result in: (i) the removal of the officers and directors that were involved in the restricted transaction, who may also be held jointly and severally liable for any damage suffered by the debtor, the shareholders and / or their creditors, (ii) the imposition of fines of up to 200 monthly legal minimum wages upon the debtor, its officers and directors and / or any creditors involved in the restricted transaction until the operation is reversed, and (iii) penalising a creditor, whenever a creditor is involved in the restricted transaction, by paying its claim only once all other obligations have been paid. Upon debtors' admission to the restructuring proceeding, if creditors or debtors perform any restricted transactions or operations these will be deemed ineffective *ipso iure* (that is, without the need for a declaration by a court of law).

There are exceptions to the debtor's limited contractual capacity. The main exception is that the debtor can request authorisation from the Insolvency Court to pay creditors based on the urgency, necessity and convenience of the operation or transaction. Performance of the operation is regarded as a necessity if not performing will negatively impact the fulfilment of the objectives of the restructuring proceeding. Urgency entails that the operation must be executed or performed immediately and cannot be postponed until the reorganisation agreement is executed. Convenience entails that the execution and performance of the operation will benefit the objectives of the restructuring proceeding. In general, the question is whether the transaction will leverage the debtor's resources or facilitate the fulfilment of the debtor's corporate purpose without affecting the creditors' repayment expectations. Therefore, transactions and operations in which the benefits outweigh the costs, for instance when they are aimed to improve working capital and cash flow or sustain the debtor's supply chain, shall be authorised. The second exception is the payment of small claims. Under this exception, the

debtor may request authorisation from the Insolvency Court to pay claims that in total do not exceed 5% of the debtor's liabilities.

Another exception is the transactions of trusts set up by the debtor to act as issuers of securitisations in the stock market and the transactions of collateral trusts backstopping the issuance of securities on the stock exchange.

6.4.9.2 Automatic stay

Upon the debtor's admission to the restructuring proceeding, creditors of pre-admission claims cannot commence new collection proceedings against the debtor. Likewise, any ongoing proceedings will be merged with the restructuring proceeding. The Insolvency Court will rule on any defences raised by the debtor within the collection proceeding during the hearing to rule on the objections. The interim measures ordered in the collection proceeding will become subject to the Insolvency Court's jurisdiction. Thus, they may be lifted upon the debtor's request based on the urgency, necessity and / or convenience criteria.

The automatic stay does not extend to the enforcement of administrative expenses, as they shall be paid when they are due.

6.4.9.3 Prohibition of unilateral termination of contracts

Creditors cannot unilaterally terminate contracts on the ground of the commencement of the debtor's restructuring proceeding. Thus, only breaches of obligations that occurred after commencement can be grounds for the termination of a contract.

6.4.9.4 Prohibition of the enforcement of clauses that hamper access to reorganisation proceedings

Contractual provisions intended to obstruct, directly or indirectly, the reorganisation of a debtor, such as early termination clauses or acceleration clauses that are activated upon commencement of the restructuring proceeding and, in general, any other provisions intended to preclude the debtor from being subject to a restructuring proceeding are deemed to be void or ineffective *ipso jure*. If a creditor attempts to enforce any of the provisions mentioned above, the payment of its claims may be legally postponed until all other claims have been paid. Furthermore, the Insolvency Court may order the cancellation of all the security interests granted by the debtor or third parties to secure such a creditor's claims if the Insolvency Court deems it necessary to achieve the purpose of the proceedings.

6.4.9.5 Renegotiation and termination of contracts

The debtor can request the renegotiation and eventual termination of continuing performance under executory contracts. Executory contracts are contracts concerning a series of sales of products and / or services, under which the obligations to supply and / or purchase are spread over time, and which obligations are uncompleted upon the opening of proceedings. Indeed, a debtor admitted to a restructuring proceeding may request the renegotiation of executory contracts, but if the renegotiation with the creditor fails, the debtor may request authorisation

from the Insolvency Court to terminate the contract. To terminate a continuing performance contract, the debtor has to prove that (i) the termination is overall more convenient than the continuation of the contract (taking into account the fines or penalties to be paid for early termination), and (ii) the conditions of the contract are excessively burdensome as compared to the conditions of similar agreements in the market.

6.4.10 Appointment of officeholders

The process to appoint a promoter is *mutatis mutandis* the same as the process described for the appointment of the liquidator.[37]

6.4.11 Debtor-in-possession financing

Law 1116 establishes that the financing granted to the debtor by third parties (financial entities or others) during the restructuring proceeding or after the execution of the reorganisation agreement is considered as an administrative expense. Consequently, such financing is not subject to the reorganisation agreement and enjoys a higher priority than pre-admission claims in restructuring proceedings. In addition, Law 1116 includes roll-up provisions, under which any lender that provides new funds to the debtor is allowed to upgrade the priority of his pre-admission claims to the one designated for Colombian taxing authorities, on a peso-for-peso conversion basis (that is, 1 new COP (Colombian peso) will roll-up 1 pre-admission COP).

Decree 560 created some additional incentives for debtor-in-possession (DIP) financing such as allowing debtors with the Insolvency Court's prior leave to obtain new financing by granting first-priority security interests over unencumbered assets or a subordinate lien on previously encumbered assets. For this purpose, the debtor must prove that it is otherwise unable to obtain financing without granting security interests to potential lenders.

To promote economic efficiency, the Decree 560 allows creditors to submit their own or third-party financing proposals with most favourable terms to the debtor. Should the Insolvency Court find that the alternative proposal is more favourable, the debtor may opt to accept it or adjust his original proposal to equivalent terms. However, if the debtor refuses to choose between these two options, the Insolvency Court shall reject the financing authorisation.

Finally, the compliance and due performance of the loan agreement is a requirement for the confirmation of the reorganisation agreement.

6.4.12 Proof of claims

In restructuring proceedings, the creditors in principle do not have the burden of proof of their claims as it is assumed that the debtor has the duty of rank and recognises all the claims, according to the financial statements. This duty is reinforced by the imposition on the debtor's directors, accountants and statutory auditor of joint and severally liability for damages that creditors may suffer. This liability is triggered when despite being aware of the existence of a

[37] See para 6.3.11 above in this regard.

claim that is not recorded on the debtor's account books, any of these subjects refuses to include or report it to be included in the project of claims and voting rights.

Nonetheless, in the event that a claim or a security interest is not duly recognised in the project of claims and voting rights or in the inventory of assets, the creditors have the burden to object and file the documentary support that proves the existence and amount of the claim. Failure to do so entails that the claim will be postponed and can only be paid after other claims have been paid in full, unless these remaining creditors consent to the recognition and inclusion of the claim in the project of claims and voting rights.

In insolvency proceedings, the only admissible evidence is documentary evidence. This type of evidence must be used to prove the existence, amount and priority of a claim.

6.4.13 Reorganisation agreement

The reorganisation agreement must include a payment plan covering at least the principal amounts of the claims recognised in the project of claims and voting rights. The payment plan must observe the statutory ranking of claims (that is, all the fourth-class creditors shall be paid before the fifth-class creditors are paid) and treat creditors of the same class equally. Additionally, the reorganisation agreement must include the following chapters or annexes:

(i) Corporate governance and transparency: This chapter regulates related party transactions, the distribution of dividends, the use of cashflow and assets unrelated to the debtor's business activity, accounting activity and the disclosure of financial information, amongst other corporate government provisions;

(ii) Creditors' committee: This chapter regulates the composition of the creditors' committee, its functions, the quorum and voting rules; and

(iii) Business plan: This annex shall include the course of action for the financing, organisational and operative restructuring to address the causes of the debtor's insolvency.

The Insolvency Court cannot validate the agreement if the debtor owes outstanding amounts to tax authorities, discounts to employees and compulsory social security payments. Similarly, if the debtor incurred DIP financing, it must comply with the repayment obligations under that loan agreement.

The creditors have voting rights equivalent to the principal amount of their claims. The only exception is secured creditors as in order to calculate the voting rights, the principal and the interest must be taken into account (up to the value of the encumbered asset). Internal creditors (shareholders) have voting rights equivalent to their respective portion of the debtor's equity. However, if debtor's equity is in the negative, each shareholder will be entitled to one vote.

The law requires an affirmative vote by a simple majority (more than 50%) of the internal or external creditors of the debtor company, which must also represent a simple majority of the admissible votes. Moreover, these votes must include creditors from at least three of the creditor

categories provided by the law (that is, labour creditors; public entities and social security institutions; financial institutions and other entities subject to the supervision of the Financial Authority; internal creditors (that is, shareholders); and other external creditors). However, if the reorganisation agreement is voted in by more than the 75% of the votes, there is no need to fulfil the requirement regarding the different classes of creditors. In the event that internal creditors or corporate-related creditors represent the majority required by law, the additional vote of creditors representing 25% of the remaining votes will be required. In proceedings like the ENRA and the business recovery proceeding, where it is possible to negotiate a reorganisation agreement with one or more categories of creditors, each category subject to the proceeding must vote in favour of it. A category votes favourably on the reorganisation agreement when more than 50% of the category's votes to approve the plan.

Upon the Insolvency Court's approval, the reorganisation agreement becomes binding on the debtor and all the creditors subject to the proceeding, including absent and dissenting creditors. The only exception is secured creditors who can exercise their preferential payment right or enforce their collateral. However, secured creditors can voluntarily subject themselves to the reorganisation agreement.

6.4.14 Contracts in the context of restructuring proceedings

6.4.14.1 Essential contracts

Utilities providers cannot suspend or terminate the provision of utilities based on the default in payment of pre-admission utility bills. If the utilities were suspended, the utility providers must re-establish them immediately upon the debtor's filing for the restructuring proceeding, under the penalties of liability for damages to the debtor and the postponement of their claim.

6.4.14.2 Derivatives contracts

Creditors under registered cross-border over the counter (OTC) transactions are able to early terminate, net-out and enforce collateral, without requiring prior approval from the Insolvency Court or having to go through the ordinary insolvency proceeding. For this purpose, these creditors must file a registry in accordance with Section 74 of Law 1328, which is regulated by Decree 4765 of 2011 (which indicates who may file, how to comply with and where such filing must be made), in order to benefit from the exemption to include derivatives transactions in the insolvency regime.

6.4.15 Clawback actions

Articles 74 and 75 of Law 1116 govern the clawback actions that can be used to revoke (*acción revocatoria*) or recharacterise (*acción de simulación*) acts performed by the debtor before the commencement of an insolvency proceeding (either reorganisation or judicial liquidation) and which adversely affect the creditors or the priority of claims. Clawback actions seek to restore the debtor's estate if it was adversely affected due to actions performed prior to the commencement of the insolvency proceeding.

Article 74 of Law 1116 introduced two types of clawback actions. The first type is aimed at revoking any act performed by the debtor before the commencement of the insolvency proceeding and which caused or aggravated the insolvency. The second type is aimed at recharacterising a simulated transaction executed by the debtor to conceal a fraudulent act.

The following are the procedural requirements that need to be met for clawback actions:

(i) The action must be filed no more than six months after the Insolvency Court approved the project of claims and voting rights;

(ii) It must be filed either by a creditor of a claim accrued prior to the performance of the act subject to the clawback action; the promoter or the liquidator. The Insolvency Court may initiate it *ex officio* when the suspicious transaction is a gratuitous act or a payment-in-kind; and

(iii) The suspicious transaction must have been performed within the clawback period prior to the commencement of the proceeding. Depending on the type of transaction, the period varies. For acts where the debtor disposed of rights over assets,[38] the period is 18 months; for gratuitous acts, it is 24 months; and for the amendment of by-laws, it is six months.

The substantial requirements to be met are the following:

(i) The transaction must have harmed any of the creditors or affected the priority of claims; and

(ii) For transactions where the debtor disposed of rights over assets, it is additionally required that the third party involved did not demonstrate good faith in the execution of the transaction. Good faith is understood as having knowledgeable of the precarious financial condition of the debtor or the imminence thereof, after conducting a diligent review of debtor's financial health. However, even if the creditor was aware of or should have known about the precarious financial condition of the debtor, the Insolvency Court will assess the terms and conditions under which the transaction was executed and performed. Particularly, the Insolvency Court will determine the intentions of the debtor and creditor, any additional legal or business relationships between the parties, and the circumstances that surrounded the execution and performance of the transaction. Should the analysis of the criteria indicate that the debtor's decision to execute and perform the transaction was reasonable, in good faith and correct, the Insolvency Court will not revoke the transaction.

6.4.16 Ranking of claims

In insolvency proceedings the claims are generally classified as pre-admission claims and administrative expenses depending on the dates they accrued. The pre-admission claims are all the obligations accrued prior to the commencement of the insolvency proceeding, which begins

[38] Any act that results in the transfer or conveyance of property, including the transfer of assets to a collateral trust, the payment of a pre-admission obligations, granting or cancelling a lien, and the execution of lease agreements or bailment contracts with the effect of obstructing the insolvency proceeding.

when the Insolvency Court issues the debtor's admission writ. Such claims will be subject to the insolvency proceeding and will be paid in the order set forth in the statutory ranking of claims and in accordance with the terms of the reorganisation agreement in restructuring proceedings. The administrative expenses are the obligations accrued after the commencement of the insolvency proceeding and must be paid in priority over pre-admission claims.

However, as per Article 41 of Law 1116, the priority of claims under Colombian law may be changed to the extent that the following conditions are met:

(i) Creditors representing no less than the 60% of the votes approve the modification;

(ii) The modification aims to facilitate the debtor's recovery;

(iii) The modification does not downgrade the class to which other claims belong, but rather upgrades the class or priority of the creditors contributing funds to the debtor or that in general undertake conduct aimed at improving the working capital and the recovery of the debtor; and

(iv) The modification shall not affect labour and other employment-related claims, unless the affected creditors of these claims expressly consent to it.

6.4.17 Restructuring in a group of companies

The principles in this regard are similar to the liquidation of a group of companies, which have been discussed above.[39]

Self-Assessment Exercise 5

Question 1

True or False? In the ENRA the debtor may choose to negotiate a reorganisation agreement with a specific category.

Question 2

Which aspects of the project of graduation and qualification of claims and voting rights may be objected to?

Question 3

True or False? f the reorganisation agreement is not approved, the Insolvency Court will order the commencement of a liquidation by allocation proceeding.

[39] See the discussion in para 6.3.17 above.

Question 4

What is the purpose of the settlement meeting in the summary reorganisation proceeding?

Question 5

True or False? Summary Reorganisation Proceeding and ENRA have unified hearings in which the Insolvency Court rules on both the objections and the confirmation of the reorganisation plan.

Question 6

True or False? Summary reorganisation proceeding and ENRA have the same consequences if the Insolvency Court denies the confirmation of the reorganisation agreement.

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW

7.1 Introduction

Chapter III of Law 1116 regulates cross-border insolvency. This chapter incorporated the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) into Colombian law. The Colombian cross-border insolvency regime has the same purposes that are mentioned in the preamble to the Model Law. Similarly, the scope of application is the same as the one set forth in Article 1 of the Model Law.

The most relevant court cases thus far have been: (i) the *Interbolsa S.A.* case in 2011,[40] which involved the Luxembourger and Brazilian jurisdictions; (ii) *The Stanford Trust Company Limited* case in 2013,[41] which involved the Antigua Barbuda, United States and English jurisdictions and was related to the scandal of Stanford International Bank Limited; (iii) the *Pacific Exploration & Petroleum* case in 2016,[42] which involved the United States and Canadian jurisdictions; and most recently (iv) the *Latam Airlines* case in 2020,[43] which involved the United States, Chilean and Cayman Island jurisdictions.

[40] Superintendence of Companies, Insolvency Court. Order 400-015955, 16 November 2012.
[41] Superintendence of Companies, Insolvency Court. Order 2013-01-457020, 22 November 2013.
[42] Superintendence of Companies, Insolvency Court. Order 2016-01-252310, 4 May 2013.
[43] Superintendence of Companies, Insolvency Court. Order 2020-01-229848, 5 June 2020.

7.2 Competent authorities

The competent authorities to conduct and administer cross-border insolvency proceedings are the Insolvency Court and the Civil Circuit Court. The promoter and the liquidator, as applicable, are the officeholders in charge of assisting the competent authorities.

7.3 Limitations to the scope of application

Chapter III of Law 1116 applies only to private and mixed-ownership entities such as corporations; foundations; natural persons that qualify as merchants; and legal entities that conduct permanent business operations in Colombia, including branch offices of foreign companies and trusts. For the excluded entities, the coordination and collaboration between courts must be performed through letters rogatory, which contain a request from a foreign Insolvency Court to execute an order and the tools set forth in international treaties.

Pursuant to Article 91 of Law 1116, which mirrors the Article 6 of the Model Law, public policy is also a ground upon which to disregard the application of Chapter III. The Insolvency Court in the *Latam Airlines* case held that the applicable standard is the international public policy and not the local public policy, since the interpretation criteria set forth in Article 8 of the Model Law require courts to take into account the international nature of the Model Law. This is important as the concept of local public policy is broader than the international public policy, which is more restrictive. While domestic public policy is based on local and distinctive fundamental notions of morality and justice derived from the legal and political culture of a nation, international public policy is accepted by the international community.

In the *Latam Airline* case, the Insolvency Court applied the definition of international public policy that the Colombian Supreme Court of Justice uses to review the recognition of foreign awards. This definition states that the international public policy comprehends only basic or fundamental principles of the institutions, for example: the prohibition of the abuse of rights, good faith, the impartiality of the foreign court, and respect for due process.

7.4 The foreign representative

Under Chapter III of Law 1116, the foreign representative has identical capacities to the ones set forth in the Model Law. Therefore, he has standing to: (i) request the commencement of a local insolvency proceeding provided that the local requirements are met, (ii) request the recognition of a foreign proceeding, (iii) participate in a local proceeding under Law 1116 regarding the debtor upon the recognition of the foreign proceeding, and (iv) initiate clawback actions as per Law 1116 without the necessity of commencing with a local proceeding.

In Colombia, both the promoter and the liquidator have standing to act as foreign representatives of local proceedings in foreign jurisdictions.

7.5 The foreign creditors

Under Chapter III of Law 1116, as in Article 12 of the Model Law, foreign creditors enjoy the same rights as local creditors regarding the commencement of and participation in a local proceeding without prejudice of the local statutory ranking of claims. Article 14 of the Model Law was adopted with certain limitations in Article 99 of the Law 1116, as it does not include specific following provisions.

Firstly, it does not give the power to the Insolvency Court to order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known. However, given the wide extent of the powers of the Insolvency Court, it is possible that it gives that order *ex officio* if it deems it convenient. Furthermore, Law 1116 establishes mechanisms to promote the publicity of the proceedings such as the publication of a notice on the debtor's website and in its offices regarding the commencement of the local proceedings. Secondly, it does not regulate the form in which the notification shall be made to foreign creditors. Therefore, is not required that the notification be individual or that it includes the information mentioned in point 3 of Article 14 of the Model Law.

7.6 Jurisdiction and applicable law

Chapter III follows the mixed approach to cross-border insolvency of the Model Law instead of choosing a universal or territorial approach. Therefore, in a cross-border insolvency in Colombia there will be a main proceeding commenced in the debtor's centre of main interests (COMI) and ancillary or parallel proceedings in other jurisdictions in which the debtor is incorporated or has assets. In the mixed approach, all the creditors, either local or foreign, have the chance to participate. In terms of applicable law, Chapter III includes the same wording as Article 10 of the Model Law. Thus, the foreign representative's application pursuant to Chapter III of Law 1116 does not subject him and the debtor's assets and affairs located or conducted abroad to the Insolvency Court's jurisdiction for any purpose other than such application.

7.7 Recognition of a foreign proceeding and relief

The application requirements are the same as set forth in the Chapter III of the Model Law, but the Insolvency Court may request that official or public documents are legalised and apostilled. Accordingly, the presumption regarding the authenticity of the documents of Article 16 of the Model Law does not apply.

The relief that may be granted is the same as that established under Article 19 of the Model Law. However, the relief must comply with the standards of Colombian law to grant injunctions namely the *prima facie* existence of a right; the necessity of the relief; the proportionality of the relief; and the effectiveness of the relief.

Chapter III of the Model Law does not include the effect mentioned in Article 20(1)(a) or the one mentioned in paragraph 3 of the Model Law. Therefore, actions initiated before an arbitral tribunal and in general declarative proceedings are not stayed in Colombia. The relief measures regarding the stay of execution against the debtor's assets and the suspension of the debtor's

right to transfer, encumber or dispose were included. Any violation of this suspension entails that the acts are void and that the Insolvency Court may impose successive fines on the parties involved until the revocation of the transaction.

Finally, it should be noted that Article 105 of Law 1116, which mirrors Article 20 of the Model Law, includes an additional effect that is not regulated in the Model Law. The effect is that the recognition of a foreign insolvency proceeding of the parent company of a branch incorporated in Colombia, entails the commencement of a local insolvency proceeding of the branch. However, the Insolvency Court has held that that this effect is not automatic as parties must first prove that the branch meets the default of payments standard.

The relief that may be granted upon application is the same as that mentioned in Article 21 of the Model Law, except for the exclusion of the stay to arbitral and declarative proceedings.

7.8 Co-operation with foreign courts and foreign representatives

The cooperation rules and forms are similar to those of Chapter IV of the Model Law. The Insolvency Court in the *Stanford Trust Company Limited* case held, in a controversial decision, that Law 1116 required reciprocity from the state in which the foreign proceeding is being carried out. This means that the foreign state must have adopted or otherwise implemented the Model Law.

7.9 Concurrent proceedings

The rules to conduct and coordinate concurrent cross-border insolvency proceedings are similar to those in Chapter V of the Model Law. The only exception is that Chapter III of Law 1116 does not include a provision similar to Article 31 of the Model Law. Thus, in local proceedings there is not a presumption of insolvency of the debtor based on the recognition of a foreign main proceeding.

7.10 Cross border operation in cases of insolvency of groups of companies

In the context of cross-border insolvency proceedings of a group of companies, Decree 1749 sets forth certain rules for cooperation between courts, officeholders and trustees to facilitate the coordination of the insolvency proceedings carried out in different jurisdictions. This is with the view of determining the conditions and legal safeguards applicable to the cooperation process in order to protect parties' rights and the authority and independence of the Courts. Decree 1749 obliges the Insolvency Court to cooperate to the maximum extent possible with foreign courts and foreign representatives, either directly or through the promoter or the liquidator, as the case may be.

For this purpose, the Insolvency Court can: (i) communicate directly with the foreign courts or foreign representatives to collect information or request their direct assistance in respect of the local or foreign proceeding that involves members of the same group of companies, and (ii) conduct hearings in coordination with a foreign court as per procedural rules determined between the courts. As to the communication referred to in (i) above, Decree 1749 establishes

minimum conditions for the communications, such as that they: (a) must abide by the public policy of the involved jurisdictions and respect the parties' rights, especially the confidentiality of the information, (b) shall be served on the interested parties, (c) do not entail a waiver of the Insolvency Court's competence, nor constitute a ruling on the merits of issues subject the Insolvency Court's competence, nor a waiver of the parties' rights, nor a modification or nullity of rulings issued by the Insolvency Court.

Similarly, the cooperation between officeholders and foreign courts and foreign representatives may consist of: (i) exchange or disclosure of information, (ii) the execution of agreements to coordinate the insolvency proceedings of the companies, (iii) the coordinated administration and supervision of the assets and businesses of the companies, (iv) the coordination of the financing between companies, the preservation of assets and their disposal, the filing of clawback actions, the filing and recognition of claims, the payment of claims, and the participation in hearings, and (v) the coordination of the negotiation of reorganisation or allocation agreements.

7.11 Relevant cases

One of the most recent and relevant proceeding is the *Latam Airlines* case. This case consolidates almost all the case law of the Insolvency Court regarding cross-border insolvency proceedings and creates new precedents. During this case, the Insolvency Court decided on the following topics:

(a) Competence of the Insolvency Court to recognise main foreign proceedings: The Insolvency Court clarified that its competence to recognise proceedings is limited to assess measures ordered by the court of the main proceeding that have implications in Colombia using the international public policy standard;

(b) Competence of the Insolvency Court regarding assets located in Colombia in the recognition of main foreign proceedings: In this case, the Insolvency Court held that the decisions in the main foreign proceeding regarding assets located in Colombia must be reviewed not only under the law applicable to the foreign proceeding but also under Colombian law. Therefore, the Insolvency Court applied the Colombian insolvency law, specifically the rules for authorising transactions outside of the debtor's ordinary course of business, to review a petition regarding the authorisation to execute a security interests in an aircraft engine located in Colombia and in the shares of local subsidiaries;

(c) Effects of local insolvency proceedings as relief: The Insolvency Court held that the effects of local insolvency proceedings can be granted as additional relief upon the recognition of a foreign proceeding. In this case, the Insolvency Court granted as relief the effects related to: (i) the prohibition of imposition of restrictions or sanctions on the debtor on the basis of the non-payment of obligations accrued before the commencement of the foreign insolvency proceeding, and (ii) the prohibition of unilateral termination of contracts on the basis of the commencement of a foreign insolvency proceeding; and

(d) Coordination measures: The Insolvency Court approved a "Court-to-Court Communications" protocol, which included a process for working with courts in New York, Chile and the Cayman Islands. The Insolvency Court held that the protocol was aligned with the purposes of the Model Law. Moreover, the protocol respects the autonomy and jurisdiction of each court but at the same time fosters the international cooperation among them. As per the protocol, the courts may communicate directly and carry out joint hearings and the debtors shall submit periodic reports regarding the status of the proceedings. In this case, the protocol was based on the American Law Institute and the International Insolvency Institute Guidelines for court-to-court communications.[44]

Self-Assessment Exercise 6

Question 1

In Colombia, is the liquidator entitled to act as foreign representative of local proceedings in foreign jurisdictions?

Question 2

True or False? Reciprocity means that the foreign state must have incorporated the Model Law.

Question 3

According to the Latam Airlines case, were the decisions in the main foreign proceeding regarding assets located in Colombia reviewed under Colombian law?

Question 4

True or False? The Insolvency Court can conduct hearings in co-ordination with a foreign court as per procedural rules determined between the courts.

Question 5

True or False? The recognition of a foreign insolvency proceeding of the parent company of a branch incorporated in Colombia automatically entails the commencement of a local insolvency proceeding of the branch.

[44] Available at https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf.

Question 6

True or False? Foreign creditors are equal to local creditors with respect to the commencement of and participation in a local proceeding, but local creditors have priority of payment over the foreign creditors.

Question 7

True or False? The foreign representative has standing to initiate clawback actions as per Law 1116 without commencing a local insolvency proceeding.

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS

8.1 Introduction

The recognition of foreign judgments and arbitration awards is regulated by applicable treaties. For example, as Colombia ratified the International Centre for Settlement of Investment Disputes (ICSID) Convention, it is under the obligation to recognise and enforce ICSID awards as if they were final judgments of local courts. In the absence of a treaty, in Colombia foreign judgments or awards are recognised based on the reciprocity between the foreign court and the Colombian courts. However, to be enforced, the foreign judgments and awards shall undergo a recognition proceeding named *exequatur*. The *exequatur* rules do not provide for a re-examination of the merits of the original claim. Once the foreign judgment or award is recognised, the interested party may enforce it through collection proceedings before Colombian courts. The *exequatur* proceeding is different depending on the type of decision. In general, the *exequatur* proceeding for foreign awards is more flexible than the one established for foreign judgments.

8.2 Requirements for the recognition of foreign judgments

The Supreme Court of Justice will recognise and enforce a foreign judgment provided that the judgment meets the following requirements as set forth in Articles 605 to 607 of Law 1564 of 2012:

(a) Existence of a treaty or reciprocity: A treaty or convention must be in force between Colombia and the state where the ruling was issued relating to the recognition and enforcement of foreign judgments. In the absence of a treaty or convention, the applicant must prove that there is reciprocity in the recognition of foreign judgments between the courts of the relevant jurisdiction and the Colombian courts. Thus, the applicant must prove that the courts of the state in which the foreign judgment was rendered would recognize and enforce Colombian judgments;

(b) The object of the judgment is not related to:

(i) *in rem rights on assets located in Colombia*: The foreign judgment does not refer to *in rem* rights vested in assets located in Colombia at the time of the commencement of the proceedings in the foreign court that issued the judgment; and

(ii) *matters reserved to exclusive jurisdiction*: The foreign judgment does not refer to a matter that is reserved under the exclusive jurisdiction of Colombian courts.

(c) Public policy: The foreign judgment does not contravene or conflict with Colombian international public policy;

(d) Final judgment: The foreign judgment is final (that is, not subject to appeal or challenges) pursuant to the applicable law of the state in which it was issued;

(e) Is *res judicata*: No proceedings shall be pending in Colombia with respect to the same cause of action or no final judgment has been rendered in any proceeding in Colombia on the same subject matter and between the same parties;

(f) Respect of due process: The foreign judgment must have observed the rules regarding the service of process and the defendant must have been given a reasonable opportunity to defend, pursuant to the applicable law of the state in which the foreign judgment was rendered; and

(g) Copy of the foreign judgment: The applicant must provide a legalised copy of the foreign judgment and an official translation thereof in Spanish.

8.3 Procedural stages for the recognition of foreign judgments

Upon the submission of the recognition petition, the Supreme Court of Justice must serve the petition on the defendant. The defendant may respond to the petition within the following five days. Once this period elapses, the Supreme Court of Justice will summon the parties to a hearing in which the evidence requested by the parties is collected. The court hears the closing arguments of the parties, and issues a final ruling.

8.4 Requirements for the recognition of foreign awards

Under Law 1563 of 2012, arbitral awards are deemed domestic awards should they be issued by an arbitral tribunal with a seat in Colombia. Therefore, domestic awards can be issued during domestic or international arbitration proceedings. Domestic awards do not require recognition by the *exequatur* proceedings as they are enforceable as local court rulings. However, if the parties to an international arbitration proceeding decide to exclude the possibility of an annulment procedure, the award must be recognised before being enforced. On the contrary, an arbitral award is deemed foreign if the tribunal that issues it is seated overseas.

The recognition of a foreign arbitral award may be refused on the grounds set forth in Article 112 of Law 1563 of 2012, which mirrors the grounds for refusal in Article V of the New York Convention. Furthermore, the recognition will be denied if the applicant fails to provide a duly apostilled copy of the foreign award and a translation thereof in Spanish.

8.5 Procedural stages for the recognition of foreign awards

Upon the submission of the recognition petition, the Supreme Court of Justice, or the Council of State if a public entity or an entity conducting administrative duties is party to the arbitration, must serve the petition on the defendant. The defendant may respond to the petition within the following 10 days. Once this period elapses, the competent court will render a final ruling on the recognition within the next 20 days.

8.5.1 Relevant case law

(a) International public policy: The Supreme Court of Justice has held that the relevant public policy standard is not the local but rather international. Therefore, the violation of local imperative law does not necessarily affect the recognition of a foreign judgment or award. For instance, although choice-of-law clauses are banned from contracts performed in Colombia, the selection of a foreign law will not be a ground for refusal;[45]

(b) Restrictive approach: The Supreme Court of Justice has held that the *exequatur* proceeding is not designed as an appellate tier in respect of the decisions rendered by foreign courts. Thus, the Supreme Court of Justice must limit the review to the grounds for refusal, which have to be interpreted restrictively;[46] and

(c) Interim awards: The Supreme Court of Justice has held that although there is not an official definition of the term "award", any decision rendered by an arbitral tribunal should be recognised if it resolves in a definitive manner any issue relating to a dispute. Consequently, interim awards can be recognised but procedural orders and other types of resolutions of a procedural nature cannot be recognised.[47]

Self-Assessment Exercise 7

Question 1

What proceeding is necessary to enforce the foreign judgments (which is different to judgements related to insolvency proceedings and arbitral awards)?

[45] Supreme Court of Justice. Ruling SC-84532016 of 24 June 2016.
[46] Supreme Court of Justice. Ruling SC-124672016 of 7 September 2016; Ruling SC-001-2019 of 15 January 2019.
[47] Supreme Court of Justice. Ruling SC-84532016 of 24 June 2016.

Question 2

True or False? The Insolvency Court recognises a foreign insolvency proceeding following rules set forth in Articles 605 to 607 of Law 1564 of 2012.

Question 3

True or False? The Supreme Court of Justice may recognise a foreign judgment without the official translation into Spanish, if the court comprehends the foreign language.

Question 4

True or False? The foreign judgment may refer to a matter that is reserved under the exclusive jurisdiction of Colombian courts

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

9. INSOLVENCY LAW REFORM

It is likely that the provisional proceedings created to address the Covid-19 pandemic (that is, the ENRA, the business recovery proceeding, the summary reorganisation and the simplified liquidation) will become permanent as these proceedings have been successful in expediting the duration of the proceedings.

10. USEFUL INFORMATION

- https://www.supersociedades.gov.co/SitePages/Inicio.aspx
- Superintendencia de Sociedades. Libro de Jurisprudencia Concursal, 2015: https://www.supersociedades.gov.co/documents/58444/2586571/jurisprudencia_concursal.pdf
- Superintendencia de Sociedades. Libro de Jurisprudencia Concursal, 2016: https://www.supersociedades.gov.co/documents/58444/2586571/Libro_Jurisprudencia_Concursal_II-2016.pdf
- Superintendencia de Sociedades. Libro de Jurisprudencia Concursal, 2016 (3): https://www.supersociedades.gov.co/documents/58444/2586571/Libro_Jurisprudencia_Concursal_III-2016.pdf

- Law 1116 of 2006:

  http://www.secretariasenado.gov.co/senado/basedoc/ley_1116_2006.html

- Law 1429 of 2010:
  https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=41060

- Decree 560 of 2020:
  https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=113637

- Decree 772 of 2020:
  https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=127362

- Decree 1074 of 2015:
  https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=76608

- Law 1564 of 2012 or General Procedural Code:
  https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=48425

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Question 1

What are the factors that make the Insolvency Court more efficient than Civil Courts?

Question 2

Does Colombia have both liquidation and restructuring insolvency proceedings?

Question 3

Are the Insolvency Division and the Circuit Civil Judges competent to act as insolvency judges for all the bankruptcy cases?

Question 4

Can the insolvency court declare the debtor's civil liability for a traffic accident?

Question 5

True or False? The Insolvency Court legislate on technical aspects of the regime considering that it is a specialised court.

Question 6

True or False? The constitution supersedes the insolvency regime.

Commentary and Feedback on Self-Assessment Exercise 1

Question 1

The Insolvency Court has specialised judges in insolvency for each kind of proceeding.

Question 2

+

No, it did not. Law 1116 is still the main source.

Question 3

Yes, they are competent.

Question 4

No, it cannot. Creditors must initiate declarative proceedings because the dispute is regarding the extent or existence of a right.

Question 5

No, the tutela action only can be pursued in case of a fundamental right violation.

Question 6

False.

Question 7

True.

Self-Assessment Exercise 2

Question 1

May a secured creditor whose claim is secured by a non-necessary asset foreclose the collateral after the debtor is admitted to a reorganisation proceeding pursuant to the Law 1116 of 2006?

Question 2

Can an electronically created undertaking to provide a security interest be recorded and be valid?

Question 3

True or False? Secured creditors have special enforcement rights, and therefore they do not participate in the insolvency proceeding.

Question 4

What is the main legal opposability requirement for a mortgage to be effective against third parties?

Question 5

At which stage of the reorganisation proceeding can foreclosure of the encumbered assets necessary for the continuation of the debtor's business take place?

Question 6

True or False? The secured creditors have absolute priority over all claims.

Question 7

True or False? Pursuant to Law 1676 pf 2013 vessels are moveable assets, and are thus subject of the Law of Security Interest over Movable Assets.

Commentary and Feedback on Self-Assessment 2

Question 1

Yes. Pursuant to Article 50 of Law 1676 of 2013, creditors who have collateral over non-necessary assets for the development of the debtor's business may enforce the lien from the very beginning of the reorganisation proceeding.

Question 2

No, it is not deemed valid. Pursuant to Law 1676, the collateral agreement must be in writing.

Question 3

False. Articles 50, 51 and 52 of Law 1676 of 2013 establish the rights that creditors may exercise during the insolvency proceeding.

Question 4

The mortgage must be recorded in a public deed in the Real Estate Registry of the place where the real estate is located.

Question 5

Pursuant to Article 50 of Law 1676 of 2013, after the confirmation of the reorganisation agreement if the creditor voted against that agreement.

Question 6

False. Pursuant to Ruling C-145 of 2018 issued by the Constitutional Court of Colombia, the judge has to verify that the debtor's assets are sufficient to pay child support obligations and salary and benefit obligations arising from the employment contract, otherwise the encumbered assets will be used to firstly pay these obligations and then the secured claims.

Question 7

False. Vessels are excluded from the application of Law 1676 of 2013.

Self-Assessment Exercise 3

Question 1

What protection is there for the debtor's family in respect of the restructuring agreement?

Question 2

In which class of claims do the penalties derived from tax obligations fall?

Question 3

True or False? Non-essential executory contracts are not terminated as of the initiation of the debt negotiation proceedings.

Question 4

True or False? The claw-back action may be brought after the liquidation procedure has been completed.

Commentary and Feedback on Self-Assessment Exercise 3

Question 1

Those creditors have payment priority and will not be subject to the restructuring agreement.

Question 2

In the fifth class.

Question 3

True. Pursuant to Articles 16 and 21 of Law 1116 of 2006, creditors may not terminate a contract due to the initiation of an insolvency proceeding.

Question 4

False. Pursuant to Articles 74 and 75 of Law 1116 of 2006, the request for revocation and simulation actions may be filed by any of the creditors, the promotor or the liquidator within six months following the date on which the qualification and graduation of credits and voting rights becomes final.

Self-Assessment Exercise 4

Question 1

True or False? The timeframe of the simplified liquidation proceeding is shorter than those applicable to ordinary judicial liquidation proceedings.

Question 2

Which is the main consequence at the beginning of the voluntary liquidation in relation to the debtor's capacity?

Question 3

True or False? The liquidator is appointed by the general shareholders assembly in a judicial liquidation.

Question 4

How do creditors prove claims in liquidation proceedings? Is it different from the reorganisation proceedings?

Question 5

True or False? The statutory ranking of claims can be modified in liquidation proceedings.

Commentary and Feedback on Self-Assessment Exercise 4

Question 1

True, pursuant to Decree 772 of 2020.

Question 2

The contractual capacity of the debtor is restricted to transactions aimed to wind-up the legal entity**.**

Question 3

False. Pursuant to Article 48.1 of Law 1116 of 2006, the liquidator is appointed by the Insolvency Court.

Question 4

Documentary evidence is the only permissible evidence in insolvency proceedings. The main difference in filing claims in reorganisation and liquidation proceedings is that in the first proceeding it is not mandatory, meanwhile in the judicial liquidation proceeding it is mandatory to file a claim, otherwise the obligation is disregarded.

Question 5

False. The statutory ranking of claims is the same for insolvency proceedings and is established by the Civil Code.

Self-Assessment Exercise 5

Question 1

True or False? In the ENRA the debtor may choose to negotiate a reorganisation agreement with a specific category, therefore, debtor can negotiate with internal creditors.

Question 2

Which aspects of the project of graduation and qualification of claims and voting rights may be objected to?

Question 3

True or False? If the reorganisation agreement is not approved, the Insolvency Court will order the commencement of a liquidation by allocation proceeding.

Question 4

What is the purpose of the settlement meeting in the summary reorganisation proceeding?

Question 5

True or False? Summary reorganisation proceeding and ENRA have unified hearings in which the Insolvency Court rules on both the objections and the confirmation of the reorganisation plan.

Question 6

True or False? Summary reorganisation proceeding and ENRA have the same consequences if the Insolvency Court denies the confirmation of the reorganisation agreement.

Commentary and Feedback on Self-Assessment Exercise 5

Question 1

True. Pursuant to Article 8 of Decree 560 of 2020, a reorganisation agreement negotiated in an ENRA could involve only some categories.

Question 2

Pursuant to Article 26 of Law 116 of 2006, creditors may object the existence of a claim, amount of a claim, priority of a claim, and voting rights allocated to creditors and shareholders.

Question 3

False. Pursuant to Decrees 560 and 772 of 2006 the commencement of new liquidation by allocation proceedings are suspended.

Question 4

Leaving the minimum number of objections unresolved and make the proceeding more efficient.

Question 5

True, pursuant to Article 8 of Decree 560 of 2020 and Article 11 of Decree 772 of 2020.

Question 6

False, in opposition to summary reorganisation proceeding, pursuant to Article 10 of Decree 560 of 2020, if the reorganisation agreement is not confirmed in an ENRA, the only sanction is that the debtor may not pursue again an ENRA admission during the next year following the reorganisation agreement rejection.

Self-Assessment Exercise 6

Question 1

In Colombia, is the liquidator entitled to act as foreign representative of local proceedings in foreign jurisdictions?

Question 2

True or False? Reciprocity means that the foreign state must have incorporated the Model Law.

Question 3

According to the Latam Airlines case, were the decisions in the main foreign proceeding regarding assets located in Colombia reviewed under Colombian law?

Question 4

True or False? The Insolvency Court can conduct hearings in co-ordination with a foreign court as per procedural rules determined between the courts.

Question 5

True or False? The recognition of a foreign insolvency proceeding of the parent company of a branch incorporated in Colombia automatically entails the commencement of a local insolvency proceeding of the branch.

Question 6

True or False? Foreign creditors are equal to local creditors with respect to the commencement of and participation in a local proceeding, but local creditors have priority of payment over the foreign creditors.

Question 7

True or False? The foreign representative has standing to initiate clawback actions as per Law 1116 without commencing a local insolvency proceeding.

Commentary and Feedback on Self-Assessment Exercise 6

Question 1

Yes, the liquidator has standing to act as foreign representative.

Question 2

False.

Question 3

Yes, the Insolvency Court applied the Colombian insolvency law, specifically, the rules for authorising transactions outside of the debtor's ordinary course of business.

Question 4

True.

Question 5

False. Pursuant to Colombian caselaw and paragraph of Article 105 of Law 1116, a local insolvency proceeding will be possible only if the debtor is in cessation of payments.

Question 6

False. The treatment of foreign creditors is equal to local creditors.

Question 7

True, pursuant to Article 108 of Law 1116 of 2006.

Self-Assessment Exercise 7

Question 1

What proceeding is necessary to enforce the foreign judgments (which is different to judgements related to insolvency proceedings and arbitral awards)?

Question 2

True or False? The Insolvency Court recognises a foreign insolvency proceeding following rules set forth in Articles 605 to 607 of Law 1564 of 2012.

Question 3

True or False? The Supreme Court of Justice may recognise a foreign judgment without the official translation into Spanish, if the court comprehends the foreign language.

Question 4

True or False? The foreign judgment may refer to a matter that is reserved under the exclusive jurisdiction of Colombian courts.

Commentary and Feedback on Self-Assessment Exercise 7

Question 1

Pursuant to Article 605 of General Procedural Code, the proceeding for recognition of a foreign judgement is the *exequatur*.

Question 2

False. The Insolvency Court is only competent to recognise a foreign insolvency proceeding under Law 1116 of 2006.

Question 3

False. Pursuant to Article 607 of the General Procedural Code, an official translation is required to file an *exequatur*.

Question 4

False, pursuant to Article 606.4 of the General Procedural Code.

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