

Uruguay

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According to Uruguayan insolvency legislation, execution procedures available to creditors of corporations and other businesses have similar general features. They all involve a specially regulated complex procedure, through which creditors seek global execution of the debtor's assets with a view to equitable distribution.

Bankruptcy and judicial liquidation proceedings present multiple problems for both debtor and creditors. This is mainly because of procedural delays and high costs which can involve a large portion of the debtor's property. In addition, sale through foreclosure does not always result in a good price. Finally, the company is dispossessed of all its property and cannot remain in business. Unsecured creditors are the only creditors affected by these proceedings. Their claims will eventually be satisfied through the proportional distribution of the debtor's property after priority claims have been satisfied.

Nevertheless, there are formulae available for businesses that are unable to fulfil their monetary obligations to avoid either a declaration of bankruptcy or a filing for judicial liquidation. These are basically the conclusion of a precautionary agreement with creditors or a moratorium (a procedure applicable only to corporations). In the case of a judicial precautionary agreement, a provisional moratorium is granted to the debtor, which prevents unsecured creditors from executing any court orders they may have obtained against the debtor.

I. The legal framework and the effectiveness of court processes/legal remedies

1.1 Describe the nature and the effectiveness of the following:

(a) Debt recovery remedies where the debtor has no security

Actions to collect unsecured debts depend on the type of debt itself.

The most common solution is an ordinary court proceeding, where the creditor must prove the existence and amount of the debt, that it has fallen due and payable and the debtor's default (ie, failure to pay the debt), at such time and in such manner as prescribed by law. On average, such proceedings take at least two years to conclude.

However, when the debt is legally documented and the document states the debtor's liability for a due and payable sum, the creditor may resort to an executory process to facilitate and accelerate payment collection.

The executory process is a summary procedure which, as prescribed by law, should take considerably less time than ordinary court proceedings.

If the creditor's executory instrument is a security (eg, a cheque, bill of exchange or promissory note), the law establishes a special procedure limiting the scope of any exceptions filed by the defendant.

(b) The enforcement of security

The law distinguishes between real property security (normally a mortgage or encumbrance over specific property) and personal security (guaranteed by a third party).

Where real estate constitutes security, it may be a mortgage (if it affects real estate) or a pledge (if it affects chattels). In both cases, the parties may waive executory proceedings when they furnish security, so that security is realised upon the debtor's default. The creditor is then entitled to request directly through judicial channels the sale through foreclosure of mortgaged or pledged property to satisfy the debt.

Regarding pledged property, the law provides that by executing a pledge the parties agree that, upon the debtor's default, the creditor may seek out-of-court foreclosure of the pledged property.

Finally, with reference to personal security, the law provides for no execution procedure other than the execution of the principal debtor's debt.

(c) Corporate bankruptcy/liquidation processes

Creditors of insolvent businesses have similar execution procedures available to them: bankruptcy proceedings for unincorporated businesses and judicial liquidation for corporations. These all involve a specially regulated and complex judicial procedure through which creditors may seek global execution of the debtor's assets with a view to equitable distribution.

The proceeds from these procedures affect only ordinary creditors whose debts have not been secured by encumbrance or attachment over the debtor's estate and are not by law considered priority creditors in the collective execution.

Certain prerequisites must be met for these to proceed, the most important of which is a state of default (ie, failure of the company to pay its business liabilities (bankruptcy) or corporate liabilities (judicial liquidation)).

These proceedings present multiple problems for both the debtor and the creditors, mainly because of the procedural delays and high costs which can substantially reduce the debtor's estate.

(d) Formal corporate rescue processes

Two basic options are available to businesses to avoid either a declaration of bankruptcy or a filing for judicial liquidation: the conclusion of a precautionary agreement with creditors or a

moratorium (which applies only to corporations).

A precautionary agreement with creditors is a deal reached between the debtor and a certain majority of unsecured creditors, where by a form of payment of pre-existing obligations is agreed upon (involving partial acquittal, extensions of time or both) to avoid a declaration of bankruptcy or judicial liquidation. The agreement is binding on all unsecured creditors, including those which did not vote in favour of solutions agreed upon in the precautionary agreement. Any such agreement does not affect creditors secured with real property or pledge; nor does it affect labour creditors, whose claims have the authority of *res judicata*, or preferred creditors.

There are various types of precautionary agreement.

For unincorporated businesses, there are two different types: a judicial precautionary agreement and an out-of-court precautionary agreement.

The main difference lies in the procedure for approving the agreement proposal. In a judicial precautionary agreement, the company appears before the judge (with no previous negotiations made or conditions agreed with creditors) and submits a proposal in compliance with all legal requirements, in order to obtain the creditors' approval in a creditors' meeting. In an out-of-court precautionary agreement, the agreement proposal has already been negotiated between the creditors and the debtor and is submitted to the judge for approval.

The agreement proposal must comply with certain prerequisites:

- Any proposed partial acquittal of claims cannot be higher than 50 per cent;
- Any proposed extension of time cannot be longer than 18 months;
- The debtor must secure the performance of obligations established in the agreement; and
- The agreement proposal must be approved by a certain majority of the debtor's unsecured creditors.

Other types of agreement include judicial and out-of-court precautionary agreements with creditors of corporations, which are generally similar to the judicial and out-of-court precautionary agreements applicable to unincorporated businesses (with the provisos that the agreement cannot be ratified if there is a presumption of fraud against the debtor, and no minimum payment, no maximum term and no security are required).

The law also provides for a private agreement with creditors in which, if there is no opposition by a creditor to the terms of the agreement, no judicial proceedings are necessary, but the agreement must be duly notarised by a notary public. The disadvantage of this provision is that no benefit of provisional moratorium is granted and therefore claims can be executed in executory proceedings against the debtor.

Lastly, and with reference to corporations only, the law provides a moratorium in cases where the company cannot fulfil its obligations due to unpredictable accidents, provided that the company shows evidence of sufficient funds to pay its creditors in full at the end of a certain term.

(e) Informal corporate rescue procedures

The debtor and its creditors can agree on whatever processes they consider suitable.

The disadvantage of these types of private agreement is that they have no binding effect on creditors that choose not to subscribe to them, which may therefore proceed with their own actions to satisfy their claims, including foreclosure of company property and even bankruptcy proceedings or judicial liquidation.

1.2 What are the formal processes to effect a liquidation of the company's assets?

Foreclosure at public auction is the usual way to resolve bankruptcy proceedings and judicial liquidation. Once claims have been verified, the receiver liquidates company property at a public auction.

Another form of asset liquidation (used as a precautionary measure to avoid bankruptcy or judicial liquidation) is a liquidation agreement, under which the debtor's property is liquidated privately by an executor appointed jointly by the debtor and a given majority of creditors.

1.3 What is the effect on debt collection and the enforcement of security of:

(a) An adjudication of corporate bankruptcy/liquidation?

Ordinary creditors are the only creditors affected by insolvency proceedings. Their claims shall eventually be satisfied through the proportional distribution of the debtor's property, once priority claims and preferred creditors have been satisfied.

Bankruptcy or judicial liquidation has the following effect on the claims of ordinary creditors:

- the irrevocable freeze of their rights up until the day before judgment is rendered;
- the suspension of individual claims against the debtor;
- the immediate payment of claims, whether or not these have become due and payable; and
- the suspension of interest payments.

Creditors whose debts are secured by mortgages or pledges are not affected by these proceedings and can execute their claims against such property until their total claims are satisfied.

Finally, in relation to personal securities, bankruptcy and judicial liquidation proceedings are not applicable to guarantors. If a guarantee-secured debtor becomes insolvent, the guarantee agreement is not affected in its terms or arrangements.

(b) The commencement of a formal corporate rescue process?

Only unsecured or ordinary creditors are affected by precautionary agreement procedures. Thus, creditors not affected by agreement solutions can satisfy their claims at any time and execute securities given by the debtor in favour of such claims.

With reference to creditors affected by the agreement solution, and in the case of judicial and out-of-court precautionary agreement with creditors, upon the initial order of assented proceedings, the judge grants the debtor a provisional moratorium.

Once the agreement has been judicially ratified, the partial acquittals or extensions of time consequently granted in favour of the debtor become binding upon all unsecured creditors, regardless of whether they have agreed to be bound.

During the term of a moratorium of corporations, payments to creditors are postponed, including the debtor's obligation to pay its personal creditors.

(c) The initiation of an informal corporate rescue process?

When the debtor enters into informal agreements with creditors, the effect of such agreement over debt repayments or execution of securities shall depend upon the specific solutions agreed by the parties.

Such agreements are binding only on creditors which consent thereto; creditors not affected by such agreements may take all actions deemed relevant to recover their debts or execute existing securities.

1.4 Are insolvency procedures started in another jurisdiction in respect of a corporation incorporated in your jurisdiction recognised? In particular, what would be the impact of US bankruptcy proceedings being commenced?

There are no express regulations dealing with this issue under Uruguayan law. However, by applying solutions provided in international treaties subscribed to by Uruguay, it may be inferred that insolvency proceedings must be filed in the country where the business has its legal domicile.

Therefore, a company incorporated under Uruguayan law could be subject to a bankruptcy judgment or insolvency proceedings abroad, since this depends on the specific provisions contained in the law of the country where such proceedings are initially filed.

There are no special legally binding treaties between Uruguay and the United States; therefore, the general solution described above applies.

1.5 In what circumstances would the directors or officers of a company in financial difficulties face potential liability for continuing to trade? In practice, are any such provisions actually enforced?

Company officers and directors must hold office in a good, substantial and businesslike manner. In the case of corporations, directors are responsible for damages caused, directly or indirectly, by failing to meet this standard by violating the law, exercising undue influence or committing serious negligence or a crime.

In cases of bankruptcy or judicial liquidation, directors are liable for acts or omissions by company management leading to insolvency and default, and for omissions in filing for bankruptcy or judicial liquidation or in carrying out an agreement at the correct time which results in excessive harm to the company.

In addition to the civil liability mentioned above, directors may be liable for criminal charges similar to those facing an individual who causes his or her own insolvency through fraud.

2. What are the advantages and disadvantages of triggering a formal insolvency or corporate rescue procedure?

The main advantage of formal proceedings in insolvency situations or financial hardship is the manner in which such procedures affect the company's unsecured creditors.

Nevertheless, all formal proceedings provided for by law (with some exceptions, such as a private agreement with no opposition by creditors) have the disadvantage of involving slow, complex and costly judicial proceedings.

3. What are the practical options for out-of-court restructuring?

In principle, the debtor is free to enter into agreements with its creditors to overcome financial hardship, with no need to resort to judicial or legal proceedings.

The main disadvantage of such private agreements is the lack of binding effect. The only exception to the foregoing is a private agreement, provided that there is no opposition by creditors.

4. What is the effect on the management of a company of:

4.1 An adjudication of corporate bankruptcy/liquidation?

In both bankruptcy and judicial liquidation the company's administrative body is maintained, but only to represent the company in defending its interests and those of its partners or shareholders. However, bankruptcy or judicial liquidation is grounds for terminating the company.

The key player in bankruptcy or judicial liquidation proceedings is the receiver. From the time when the bankruptcy or judicial liquidation judgment is issued, the receiver has overriding responsibility for the company's assets and claims, their conservation and their subsequent execution. The administration of corporate property and the management of business become the responsibility of the receivers.

4.2 The commencement of a formal corporate rescue process?

In the case of judicial and out-of-court precautionary agreements, and as consequence of the commencement of judicial proceedings, the debtor remains in business and administers its property, but is subject to certain limitations.

An executor, accountant or two reporting creditors (depending on the type of precautionary agreement) are appointed (by the creditors or by the judge) in order to supervise company business.

4.3 The initiation of an informal corporate rescue process?

In the case of private agreements between debtor and creditors, the law does not provide for changes to or restrictions on the administration and management bodies of the debtor.

5. Parties in interest/key players

5.1 Who is responsible for the ‘case management control and administration of a corporate bankruptcy/liquidation, a formal rescue and an informal rescue?’

(a) Corporate bankruptcy/liquidation

Uruguayan law provides for the appointment of two provisional and two confirmed receivers to act in the judicial liquidation of corporations, and of one receiver in the event of bankruptcy.

Once a judicial liquidation or bankruptcy judgment has been formally rendered, the company remains in business with the sole purpose of completing the insolvency process and achieving equitable distribution among creditors. Therefore, the receivers are in charge of the daily management of the company, which remains in business only to complete liquidation.

The provisional receivers determine the corporate assets and liabilities and hold and preserve the assets until their realisation. The confirmed receivers carry out the actual realisation of the assets of the debtor and the subsequent payments to creditors.

(b) Formal rescue

Corporations can agree precautionary arrangements (either judicial or out of court) with creditors. In such agreements, directors and managers continue to be involved in the management of the company, but are subject to certain controls and supervision.

(c) Informal rescue

In a private agreement between the debtor and creditors, which differs from precautionary agreements with creditors and moratoriums of corporations, the company continues to be managed by the people who usually carry out such duties.

5.2 Who is responsible for preparing the restructuring plan in a formal or informal rescue?

The answer to this question varies depending on the regulations governing insolvency proceedings in foreign countries.

5.3 Who are the key players? What are their roles and responsibilities?

Unincorporated businesses seeking to reach a precautionary agreement with creditors, whether judicially or out of court and through a private agreement or a liquidation agreement, draft a scheme of arrangement, the contents of which may or may not have previously been discussed with some creditors in order to assess the chances of obtaining approval from the majority of creditors as required by law.

The decision to file an agreement does not fall within the duties of the management of the company and must therefore be approved by a majority of the debtor’s business partners.

6. What financial information is available to creditors?

In the judicial liquidation of a corporation or the bankruptcy of unincorporated businesses, the information available to company creditors includes:

- an explanatory report on insolvency;
- the general balance sheet, profit and loss statement and assets and liabilities statement;
- an estimated property inventory; and
- a list of creditors, stating the nature and amount of claims.

As regards the different agreements with creditors provided for by the law, the creditors have access to the relevant information to facilitate a decision on whether to approve the proposed scheme of arrangement, including:

- an explanatory report for default of payment or a bad state of business;
- a detailed statement of assets and liabilities;
- the company books and proof of registration of the company;
- the names, capacity and liabilities of the partners for corporate debts;
- the assets and liabilities statement of partners with personal liability for corporate debts; and
- the proposed scheme of arrangement.

In relation to informal rescue processes, and due

to their private nature, it is up to the debtor to decide what information is available to the creditors.

7. Common questions

7.1 Funding and the priority given to new money

(a) If an insolvent corporation requires urgent working capital funding, what difficulties are likely to be encountered in the provision of such funding?

There are no regulatory limitations on companies looking to access funding, provided that they do so prior to the declaration of bankruptcy or judicial liquidation.

Funding difficulties will typically be of a practical nature due to the inherent risks in funding an insolvent company with a restricted repayment capacity.

(b) Are lenders providing new money, or debtor-in-possession financing, given any statutory priority?

Partners, shareholders and third parties funding an insolvent company have no legal privileges. This notwithstanding, privileges can eventually be granted by means of agreements.

7.2 Ranking of creditors

In what order are creditors paid in a corporate bankruptcy/liquidation?

As mentioned above, preferred creditors (mortgages and pledges) are unaffected by bankruptcy or liquidation proceedings. Labour creditors whose claims have been judicially acknowledged are in the same privileged situation.

In bankruptcy and liquidation proceedings, once all the remaining assets are realised, not all creditors are in an equal position. Claims are satisfied according to the priority order established by law.

Claims of general creditors are satisfied in proportion to the amount of the claim from the remaining property, regardless of date.

7.3 Avoidance of antecedent transactions

Are there any legal provisions that might operate to invalidate the creation of security, the disposal of an asset or the payment of a creditor by a company in financial difficulties?

Acts performed and contracts entered into by the

insolvent company after the commencement of bankruptcy or judicial liquidation proceedings are deemed invalid with reference to the creditors.

However, some acts and contracts prior to the bankruptcy or judicial liquidation judgment may be affected if they were executed by fraud and in prejudice to creditors' interests.

In the case of a company that has concluded a precautionary judicial or out-of-court agreement with creditors, a liquidation agreement or a moratorium, it cannot sell or mortgage its real property, pledge chattels or acquire any new liabilities without prior court authorisation.

7.4 'Cram-downs'

What is the position of both unsecured and secured creditors that vote against, do not agree with or do not consent to either a formal or informal rescue plan?

Mortgage creditors and pledge creditors are not included in agreement proceedings or a moratorium. Therefore, if they choose to vote, whether against or in favour of the same, they lose their preferential rights regarding the collection of their claims.

As regards unsecured creditors, anything agreed in proceedings is binding on all creditors, including those that voted against the agreed solutions or did not vote.

Finally, informal agreements entered into by the debtor and its creditors bind only subscribing creditors and have no effect over the creditors that were not party to the agreements.

7.5 Creditor protection

What action can creditors take if they are not satisfied with the conduct of either a formal rescue procedure or a corporate bankruptcy/liquidation?

The general principles of agreements with creditors, moratorium and bankruptcy or judicial liquidation have binding effect on all unsecured creditors. This notwithstanding, they can be opposed (according to certain conditions established by law).

For example, as regards precautionary agreements with creditors, ratification can be opposed if the debtor altered its assets, fraudulently obtained creditor approval to the agreement or concealed assets or the amount of assets or liabilities.