The Legal 500 Country Comparative Guides

Peru: Restructuring & Insolvency

This country-specific Q&A provides an overview to restructuring & insolvency laws and regulations that may occur in Peru.

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1. **What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?**

Securities granted over immovable property are governed by the Peruvian Civil Code, Book V, Section 4, and include the mortgage, the antichresis and lien. Securities granted over movable property are governed by Legislative Decree No. 1400 enacting the Regime of Chattel Mortgages (Régimen de Garantía Mobiliaria or RGM) and Peruvian Civil Code by lien.

Immovable Property

Mortgage

A mortgage encumbers a real estate property to secure or guarantee the performance of an obligation. Under a mortgage, the security provider or mortgagor retains ownership of the secured asset; however, the mortgage gives the secured creditor or mortgagee a security interest in the secured asset which gives the mortgagee enforcement, priority, and court-ordered selling rights on the mortgaged asset. A mortgage is indivisible and therefore it encumbers all secured assets. A mortgage may also secure a future or contingent obligation; however, a mortgage cannot be granted over future assets.

Formalities: To perfect a mortgage, a mortgage agreement must be executed as a public deed and be registered in the National Registry of Real Property. In addition, the encumbrance shall be for a specified or specifiable amount, with earlier encumbrances having a higher rank of priority than later ones as shown by their registration dates, unless a creditor waives his priority rank.

Antichresis

The antichresis grants the creditor the right to make a profitable use of the secured property. The antichresis agreement must also be executed as a public deed; failure to do so will render the agreement null and void. The antichresis agreement has to specify the rent to be paid for the secured property and the interest rate agreed. The creditor’s obligations are the same as a tenant’s, except for paying a rent.

Lien

Finally, a lien (derecho de retención) gives the creditor the right to be in possession of the secured property if the credit granted is not sufficiently secured. Ownership is not transferred to the secured party even where the debtor fails to satisfy the secured obligation, and any arrangement providing otherwise is null and void, except for the cases of transfer of the secured asset to the creditor as specified in under RGM. For the lien to be enforced vis-à-

vis third parties, it must be registered in the Registry of Real Property.

Movable Property

A securities granted on personal property (or chattel mortgage) encumbers personal property in order to secure the performance of obligations of any nature, whether present or future, whether determined or determinable, whether conditioned or not. Under a personal property security the secured creditor may or may not be in possession of the secured asset.

Formalities: A chattel mortgage is attached by a security agreement witnessing the will of both parties, which must be executed as a public deed or notarized signatures (whether digital or handwritten, as agreed by the parties). Perfecting a security interest creates a priority that can be opposed to other parties with a security interest in the secured asset. When the secured party is in possession of the secured asset, the possession itself is deemed to perfect his security interest, without prejudice to his right to register it in the Personal Property Security Information System (Sistema Informativo de Garantías Mobiliarias or "SIGM"). When the secured party is not in possession of the secured asset, the security interest is perfected by registering the security agreement with the SIGM.

Immovable and Movable Property

Lien

A lien (derecho de retención) gives the creditor the right to be in possession of the secured property if the credit granted is not sufficiently secured. Ownership is not transferred to the secured party even where the debtor fails to satisfy the secured obligation, and any arrangement providing otherwise is null and void, except for the cases of transfer of the secured asset to the creditor as specified in under RGM. For the lien to be enforced vis-à-vis third parties, it must be registered in the Registry of Real Property, this rule is only applicable for immovable property.

2. **What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?**

In Peru, any security interest, whether on movable or immovable property, may be enforced in court or out of court, as the case may be. However, court proceedings to enforce such securities not only entail to spend lengthy years but also have unpredictable outcomes. Additionally, court proceedings to enforce a security interest can be filed provided that it has been perfected by completing all formalities established by law and that the secured obligation is included in the same document or in any other enforceable deed.

3. **What is the test for insolvency? Is there any obligation on directors or officers of**

the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

In Peru, the Insolvency Act (Ley General del Sistema Concursal) does not expressly define "insolvency". However, to determine whether a company is insolvent, two criteria must be tested:

(i) **Cash Flow Test**: a company is insolvent if the company is unable to pay its debts within a period of time of becoming due and payable; and

(ii) **Balance Sheet Test**: the balance sheet insolvency test is based on the ration total overdue debt to total assets.

In addition, it is not mandatory for the debtor to file an insolvency proceeding. However, pursuant to the Companies Act (Ley General de Sociedades), if half or more of the capital stock has been or is reasonably deemed to have been lost, the Board of Directors must immediately call a general assembly to inform of such loss.

Moreover, if company's assets are not, or are reasonably deemed not to be, sufficient to satisfy its obligations or liabilities, the Board of Directors must immediately call a general assembly to inform of this situation and must meet with the company's creditors within fifteen days of such general assembly and request, if applicable, that the company be declared insolvent.

Furthermore, pursuant to the Companies Act, the company must be wound up and liquidated if the company's net equity has decreased to less than one third of the paid-in capital stock.

4. **What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?**

The Insolvency Act regulates two types of proceedings: the ordinary insolvency proceeding and the preventive insolvency proceeding. Ordinary insolvency proceedings may result in voluntary or involuntary liquidations and restructurings, based on which insolvency proceeding has been filed. Preventive insolvency proceedings can be filed only by the debtor, as it is a voluntary proceeding.

1. **Ordinary Insolvency Proceeding.a. <u>Voluntary Proceeding</u>**A debtor may apply for an insolvency proceeding provided it meets at least one of the following conditions: a) If more than a third of its total liabilities are overdue more than thirty (30) calendar days; or b) If its accumulated losses, net of reserves, exceeds one-third of its paid-in capital stock. The debtor must express whether he is requesting a restructuring of assets or a liquidation proceeding, as the case may be, taking into account the following: a) For a restructuring of assets, the debtor must prove, through a report signed by its legal

representative and certified public accountant, that its accumulated losses, net of reserves, do not exceed the total of its paid-in capital stock. The debtor also must specify the processes and requirements necessary to make its recovery feasible and to present a preliminary projection of its results and cash flow for a period of two (2) years. b) If the condition in paragraph (a) above is not met, the debtor may only request a dissolution and liquidation proceeding, which is so declared upon a resolution declaring the debtor insolvent. If the debtor applies for an ordinary insolvency proceeding under paragraph (a) above, but its accumulated losses, net of reserves, exceed its capital stock, it may only request dissolution and liquidation. In addition, in the particular case of natural persons, at least one of the following conditions must be met: a) If more than 50% of his or her income comes from a business activity developed directly and in his or her own behalf by said natural person; or b) If more than two-thirds of its liabilities originated from such business activity. Civil liability compensations and reparations resulting from the direct conduction of such activities are included for these purposes. The Peruvian insolvency law establishes that persons who do not perform business operations are not eligible to apply for Insolvency, business being understood as "*a regular and autonomous economic activity, in which such factors of production as capital and labour concur, conducted in order to produce goods or provide services*". Accordingly, personal loans are not part of the debtor's liabilities (bankruptcy estate) in an insolvency proceeding, as the Peruvian insolvency law has been devised and enacted for business insolvency rather than for natural persons with or without business. **b. Involuntary Proceeding** For a creditor to initiate an involuntary proceeding, It can also request the beginning of the ordinary proceeding if they can evidence that the debtor owes them unpaid obligations, due for more than thirty (30) calendar days, and for an amount over fifty (50) Tax Units (US$ 64,000 approximately). The Insolvency Act allows creditors to initiate an insolvency proceeding against debtors that have already initiated a liquidation under the Companies Act (Ley General de Sociedades) will be suspended during the time of the insolvency proceeding.

2. **Preventive Insolvency Proceeding.**The goal of a preventive proceeding for the debtor is to reach a consensual restructuring agreement with its creditors. It is intended to be a fast track proceeding that only a debtor can initiate.Preventive insolvency proceedings are intended to prevent financial and/or economic distress. Only the debtor may file a (voluntary) preventive insolvency; for that purpose, the debtor must not meet the conditions established for the ordinary voluntary insolvency proceeding. The creditors will decide whether to approve the Global Refinancing Agreement; if approved, the new payment schedule included in it will also be approved; also, an automatic stay will be triggered if the debtor requires one. ***The role of the insolvency authority and Judicial courts*** On the one hand, Insolvency proceedings in Peru are of administrative nature since 1992; that is, the insolvency authority is not a judge, but rather an organ of a Public Technical Specialized Agency of the Executive Branch, the National Institute for the Defense of Competition and Intellectual Property ("INDECOPI"), which through its Insolvency Commission (the Commission) deals solely with insolvency proceedings. Moreover, in the second instance, the Chamber Specialized in Insolvency Proceedings of INDECOPI's Tribunal solves to the appeals against the Commission. This insolvency authority is competent to hear insolvency proceedings against insolvent debtors

domiciled in Peru, including cases in which part of the debtor's assets and/or rights making up its total estate are found outside Peruvian territory. The Commission has a secondary participation on the development of the insolvency proceeding and on the execution of the decision. Its duty is to assume a supervision role on the process, on the Creditors' Meeting agreements, on the liquidator and on the creditors. The Commission has the legal authority to initiate investigation procedures to determine whether a sanction has to be imposed on a creditor, the debtor or the liquidator. Acts that contravene the Insolvency Act or the Creditors' Meeting agreements are punishable. In addition, during the insolvency proceeding, the Commission is competent to resolve the credits' recognition requests (verification of credits) that could be filed. On the other hand, Judicial courts have participation in the process of liquidation when the value of the estate does not allow full payment of credits. In such case, the liquidator has the obligation of requesting for the debtor's judicial statement of bankruptcy. In addition, the judiciary maintains the attribution to review the decisions of INDECOPI (Commission and Chamber), through the administrative quarrelsome actions. Regarding the assets that integrate the estate, its safekeeping corresponds to the same creditors by means of the clawbacks and actions during the avoidance period, such judicial actions are filed before the civil judge. Finally, the length of time of insolvency procedures will depend on their complexity, on account of the debtor's assets, the total number of creditors, and the company's actual economic situation.

5. **How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?**

   The Insolvency Act gives payment priority to creditors over stakeholders. In a liquidation proceeding, the liquidator is required to pay debts as per the following order of priority:

   First: Labor claims (including pension claims).

   Second: Alimony claims (applicable only when debtor is an individual).

   Third: Secured claims (such as creditors secured by mortgage, pledge, antichresis, warrants, liens, or precautionary measures).

   Fourth: Tax claims.

   Fifth: Non-secured claims.

   This order of priority is not applicable to a restructuring proceeding or to a preventive insolvency proceeding, unless the debtor's assets to be sold or transferred are fixed assets. On the other hand, the Insolvency Act does not allow the bankruptcy authority to subordinate or modify the order of priority on claims vis-à-vis any other creditors.

6. **Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?**

Pursuant to Article 19.1 of the Insolvency Act a judge shall take clawback actions such as the annulment of liens, transfers, agreements and any other legal acts, whether with or without valuable consideration, performed by the debtor if they have not been executed as part of the debtor's ordinary course of business and have impaired the debtor's equity within one (1) year before any of the following: (i) the filing of an insolvency petition by the debtor (voluntary proceeding); or (ii) when INDECOPI notifies debtor about the filing of an insolvency petition by the creditor (involuntary proceeding).

On the other hand, Article 19.3 of the Insolvency Act establishes that any disposal of assets by the debtor within the avoidance period (which starts with the debtor's or the creditor's insolvency petition and ends when the Creditor's Meeting appoints or ratify the administration of the debtor or when the related Liquidation Agreement is approved and executed) will be declared null and void by the judge when it relates to:

a. Any anticipated payment for obligations that are not due, in any form in which it is carried out;

b. Any payment for obligations due not carried out according to the original form negotiated or established in the contract or in the respective title;

c. Acts and contracts for valuable consideration, carried out or celebrated by the insolvent which are not related to the normal development of its activities;

d. Set-offs performed among reciprocal obligations between the debtor and its creditors;

e. Encumbrances and transfers carried out by the insolvent on his property, whether for value or for free;

f. Guarantees granted on property of the debtor within the term previously referred to assure the payment of obligations contracted previously to the commencement;

g. Judicial or out-of-court executions of his property, since the commencement of the procedure; and,

h. Mergers, absorptions or spin-offs that imply a detriment to the patrimony.

Upon the judge's declaration of nullity, the judge shall request the clawback of the assets involved to the debtor's assets or the annulment of liens granted, as the case may be.

Furthermore, the Liquidator i.e. the person or entity who serves as the administrator or liquidator of the debtor's assets, or one or more creditors are entitled to file a legal action.

In addition to that, any third party who has acquired title for valuable consideration from the debtor in good faith and who appears in the appropriate Registry as entitled to grant it, will not be subject to clawback for any operations during the avoidance period, once it has registered such title.

7. **What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?**

The ordinary insolvency proceeding triggers an "automatic stay" which suspends the enforcement of the debtor's obligations and protects the debtor's assets against court, arbitration, or administrative enforcing actions. The automatic stay does not have a maximum effective term; it becomes effective upon publication of the insolvency filing of the debtor in the Insolvency Bulletin of the Bankruptcy Authority (INDECOPI) and its effective term ends when the Creditor's Meeting approves the insolvency instrument (such as a Restructuring Plan, a Global Refinancing Agreement or a Liquidation Agreement). During the automatic stay the debtor's obligations will not accrue any default interest nor will interests be capitalized.

The suspension of the enforcement on the debtor's liabilities, which last throughout the automatic stay, can also exist in the preventive proceeding where the debtor so requests when the insolvency petition was filed.

In addition, an automatic stay does not prevent creditors from enforcing third party assets who had granted real or personal property securities to the debtor, which will legally be considered as granted to the original secured party; moreover, where a branch is under an insolvency proceeding, the non-enforcement of debts does not prevent creditors to file enforcing legal actions against the parent company's assets located in a foreign territory.

During the automatic stay, the authority that is trying the court, arbitration, enforcing, or out-of-court sales proceedings against the debtor may not legally order any precautionary measure affecting the debtor's assets and may not execute any that may have already been ordered. Such prohibition does not include enforcing measures that may be registered or any other that entails the dispossession of the debtor's assets, which may be ordered and executed but may not be subject to enforced execution.

If any precautionary measure entailing dispossession has been filed, the judge will order that it be suspended and that assets involved in the precautionary measure be returned to the liquidator or whoever is administering the debtor's assets. However, precautionary measures

that are subject to registration or those that do not entail the dispossession of the debtor's assets shall not be stayed but may not be subject to enforced execution.

The automatic stay declaration and the suspension for the enforcement of its liabilities can also exist in the preventive proceeding when the debtor so requests when the insolvency petition was filed.

8. **What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and/or is the debtor subject to supervision? What roles do the court and other stakeholders play?**

Ordinary Proceeding

According to the Insolvency Act, the decision of restructuring a company may only be made by the Creditors' Meeting, as the Creditors' Meeting takes over all functions, rights and entitlements from the company's top management; in addition, during restructuring the competence of shareholders, associates, or holders shall be suspended and taken over by the Creditors' Meeting. The meeting may make any joint decisions required to manage and run the debtor's operations during the insolvency proceeding. Debtor's bylaw undergoing restructuring remains effective as long as it does not conflict with the decisions agreed by the Creditors' Meeting or the Insolvency Act.

The Creditors' Meeting must approve the debtor's Restructuring Plan within sixty (60) days of the date on which the debtor's restructuring was decided.

The decision of restructuring the debtor and the approval of the restructuring plan must be approved by more than 66.6 percent of the allowed claims (in the first call of the Creditors' Meeting) or more than 66.6 percent of the allowed claims attending the Creditors' Meeting (in the second call).

However, when there are more than 50% of the recognized creditors of the debtor and these creditors are related to the debtor and the Creditors' Meeting approves the debtor's course of action, that is, either the Restructuring Plan or the Liquidation Agreement (both applicable to the ordinary insolvency proceeding) or the Global Refinancing Agreement (applicable to the preventive insolvency proceeding) as amended, votes will be cast in two separate occasions: (i) in the first call, it must be approved by more than 66.6% votes of creditors recognized as related creditors as well as by more than 66.6% votes of creditors recognized as non-related; or (ii) in the second call, it must be approved by more than 66.6% of votes of the attending creditors of both classes.

The Restructuring Plan shall include a schedule of payments listing all of debtor's debts as of the starting date of the insolvency proceeding (whether recognized or not). Likewise, it must

set out a method for the provision of contingent credits (those who are subject to court, arbitration, or administrative litigation).

In addition, the payment schedule must specify the at least 30% of the funds or moneys allocated each year to the payment of claims will be equally allocated to the payment of first-priority labor and pension claims.

The administration regime in a restructuring of assets may either keep the debtor in possession, or designate a new administration, or adopt a mixed regime (both new and old administration); this will depend on the Creditors' Meeting.

The Restructuring Plan approved by the meeting is binding to the debtor and to all creditors involved in the proceeding, even when they have challenged the joint decisions, have failed to attend the meeting for any reason, or have not timely requested the recognition of their claims.

In addition, as we have mentioned before (see question 4), the Commission has a secondary participation on the development of the insolvency proceeding and on the execution of the decision. Its duty is to assume a supervision role on the process, on the Creditors' Meeting agreements.

When the Commission verifies that all claims have been paid (including allowed or not, according to the Restructuring Plan), the restructuring will culminate.

Preventive Proceeding

The Creditors' Meeting may put off the approval of the Global Refinancing Agreement only once for no more than fifteen (15) days after the first Creditors' Meeting. In this regard, the meeting shall be deemed suspended during the period of time between the date of the first Creditors' Meeting and the new scheduled date.

Just as in the ordinary insolvency proceeding (Restructuring Plan), the decision to approve the Refinancing Global Agreement shall be adopted by more than 66.6 percent of the allowed claims (in the first call of the Creditors' Meeting) or more than 66.6 per cent of the allowed claims attending in the Creditors' Meeting (in the second call).

In addition, the Global Refinancing Agreement shall include a schedule of payments. Moreover, at least 30% of the funds allocated to the payment of claims shall be equally allocated to pay labor claims. The applicable interest rate and the collateral, if any, shall also be specified.

The approval of the Global Refinancing Agreement terminates the preventive insolvency

proceeding.

9. **Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?**

   A debtor can obtain new financing whether or not on secured assets, if so approved by the Creditors' Meeting or by a Restructuring Plan. However, the Insolvency Act does not afford any special priority to creditors granting financing to a debtor under restructuring.

10. **Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?**

    The Insolvency Act provides that the approval of the Restructuring Plan does not release claims against third-party guarantors unless such guarantors have provided for the termination of the guarantee in the guarantor agreement.

11. **Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities to they have? Are they permitted to retain advisers and, if so, how are they funded?**

    It is common for a Creditors' Meeting of a restructuring to constitute a Creditors' Committee and delegate totally or partially its powers under the Insolvency Act to the Committee, except for the decision on the course of action that the debtor should follow (between restructuring and liquidation) and the approval of the Restructuring Plan or the Liquidation Agreement as amended.

    Creditors who are members of the Committee will be fully and jointly accountable to the creditors, shareholders, and third parties for any damages resulting from any joint decisions or actions in breach of the Insolvency Act, bylaw, or those performed with wrongful intent, abuse of power, o gross negligence. In addition, the members of the Committee are responsible, along with those who have preceded them, for any wrongful acts they may have committed if, once known to them, they fail to disclose them in writing to the Creditors' Meeting; in addition, the members of the Committee will not get any payments as wages, salaries, or the like for serving as such.

    The Committee is constituted by four members. The Chair of the Creditors' Meeting shall be also the Chair of the Committee who, in case of absence, resignation or any impediment, may be substituted by the Vice Chair of the Creditors' Meeting. The other three members shall be creditors who represent, to one another and to the Chair, whenever possible, claims from different sources, if any, that are present in the meeting, unless such creditors expressly refuse to be part of the Committee.

    The Chair of the Committee shall inform the Creditors' Meeting, in the subsequent Creditors'

Meeting of the joint decisions and actions adopted and taken to meet the delegation conferred to them. Furthermore, Committee membership may not be delegated to another creditor.

The Committee shall keep a book of minutes, which may be the same as that in which the Creditors' Meeting are recorded, in which it will record its joint decisions, which must be signed by at least three of its members.

In order to hold a Committee's Meeting and to adopt joint decisions, at least three members must be present and vote in favor. In case of a deadlock, the President has a casting vote. The Committee's joint decisions may be revised only by the Creditors' Meeting, but it is the President's duty to submit to the Commission of Insolvency Proceedings, within ten (10) days of the first Committees' Meeting, a copy of the related minutes signed by the attending members.

12. **How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any an ability for either party to disclaim the contract?**

Contracts are governed by the provisions of the Peruvian Civil Code and are based on private autonomy; that is, the parties may freely determine the content of the contract, provided that it does not breach the law. In Insolvency Proceedings, the provisions in the Civil Code apply insofar as the Insolvency Act does not govern them nor does it have a major effect on them.

The parties must continue meeting their obligations under a contract, whose terms and conditions will remain effective. However, there may be a default exception in contracts with reciprocal considerations which should be performed simultaneously, as either party is entitled to suspend its obligation to perform his consideration until the other party satisfies or secures satisfaction of its valuable consideration.

Finally, if a contract allows either of the parties to terminate it on the occurrence of an insolvency proceeding, the termination will take effect; however, this termination clause will have to be expressly provided in the contract pursuant to Article 1430 of the Civil Code.

13. **What conditions apply to the sale of assets/the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?**

In a restructuring proceeding, there are no regulations allowing a purchaser to acquire the debtor's assets "*free and clear*" of claims; in addition, there are no regulations prohibiting the sale of all or part of a debtor's assets.

In contrast, in a liquidation, the purchaser acquires the debtor's assets "*free and clear*" of claims, as the purchase will trigger an automatic clearance of all encumbrances, precautionary measures, and liens attached to the debtor's assets, without requiring a court order or the intervention of a creditor who has a security interest on the asset; in addition, a debtor's assets may be acquired either as a going concern or individually.

Credit bidding is not regulated by the Insolvency Act; however, in a restructuring or liquidation proceeding, a similar method to purchase assets may be applicable. Additionally, the Insolvency Act does not regulate pre-packaged sales.

14. **What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?**

Undergoing an insolvency proceeding does not entail per se any direct legal liability or penalty to shareholders, directors, or managers, which would rather be held responsible based on the diligence or lack thereof with which they have served their positions. In case of negligent conduct on their part, legal actions will be filed against them on a case-by-case basis applying the provisions of the Companies Act; if such negligent conduct or individual acts are not substantiated, their liability will be limited.

It is worth remarking that, pursuant to the Companies Act, directors are accountable, fully and jointly, to the company, its shareholders and third parties for any damages caused by any joint decisions or actions in breach of the law, bylaw, or those performed with wrongful intent, abuse of power, or gross negligence. In addition, directors are jointly liable with the directors who preceded them for any wrongful acts their predecessors may have committed if, once known to them, they fail to disclose such acts in writing to the Shareholders' Meeting. A civil action against the directors does not abate any criminal liability charged against them, if any.

Additionally, the manager is accountable to the company, shareholders and third parties for any damages resulting from his failure to comply with his duties, or from wrongful intent, abuse of power, or gross negligence. The manager is liable, jointly with the members of the Board of Directors, when he takes part in actions that result in the Directors' liability or when, once known to him, he fails to disclose them to the Board of Directors or to the General Shareholders' Meeting. In addition, just as in the case of directors, any civil actions against a manager do not weaken any criminal liability charged with him, if any.

15. **Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?**

Pursuant to the Companies Act, directors and other stakeholders are not released from liability for previous actions and decisions by restructuring or insolvency proceedings, but

they are rather liable in the cases established by the provisions thereof mentioned in question 14 above. Now, once the insolvency proceeding has been started, the Creditors' Meeting will jointly decide on the debtor's administration regime during the restructuring of its assets. For that purpose, it may decide to continue with the same administration regime, or shift to a new one, or to a mix (see question 8). On the other hand, in dissolution and liquidation proceedings, the functions of its legal representative and all managerial functions shall cease and be taken over by the Liquidator.

Finally, in a bankruptcy proceeding, the bankrupt, for as long as it remains as such, may not (a) incorporate companies or, in general, any legal entities, or be part of one already incorporated; (b) serve as director, manager, attorney-in-fact, or representative of companies or, in general, legal entities; (c) be the tutor, curator, or legal representative of natural persons; (d) be administrator or liquidator of debtors in proceedings regulated by law. The condition of bankrupt will have an effective term of five years starting on the date on which a court declared bankruptcy, except for unpaid claims derived from court-ordered damages in favor of the State. The bankrupt status for the above-mentioned representatives starts on the date on which the legal entity he or she represents is declared bankrupt.

16. **Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency been adopted or is it under consideration in your country?**

The Insolvency Act considers foreign insolvency proceedings as *secondary proceedings*, that is, it recognizes a main insolvency proceeding, which is filed with and processed by the Bankruptcy Authority where the debtor is domiciled, and as many secondary insolvency proceedings as countries are where the debtor owns assets or titles under the bankruptcy regulations applicable in those countries by their competent authorities.

To admit these secondary proceedings, it is necessary that foreign judgments be recognized, a process known as *exequatur*. These judgments will be enforced only on debtor's assets located in Peruvian territory.

Where a treaty exists, it will be applied. Peru has signed the following treaties on the matter: the Treaty of Montevideo (1889), the Havana Covenant (1928, a.k.a. Bustamante Code), and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979).

Moreover, the various stages of the secondary insolvency proceeding will be processed in Peru by the Commission of Insolvency Proceedings, such as the publication of insolvency of the debtor in the Official Bulletin of the Peruvian Bankruptcy Authority (INDECOPI), the recognition of creditors' claims, and the Creditors' Meetings.

Finally, the UNCITRAL Model Law on Cross Border Insolvency has not been adopted; as a result, the Peruvian Civil Code and the Insolvency Act are the only applicable legislations on this matter.

17. **Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?**

The Commission of Insolvency Proceedings is the insolvency authority and as such is competent to try the insolvency proceedings of all debtors domiciled in Peru. Such competence includes insolvency proceedings of both natural persons and legal entities domiciled abroad, (i) provided that the Peruvian courts had recognized the foreign judgment declaring insolvency (applying *exequatur*) or (ii) when so provided by the regulations of Private International Law. In both cases, such competence will apply only to a debtor's assets located in the Peruvian territory.

18. **How are groups of companies treated on the restructuring or insolvency of one of more members of that group? Is there scope for cooperation between office holders?**

The Insolvency Act provides that each individual company must meet the requirements to be declared insolvent; accordingly, it is not pertinent to examine insolvency based on groups of companies.

However, there is an exception with Peruvian branches of foreign companies or organizations, as these branches can be declared insolvent under the Insolvency Act and, in addition, the creditors of such branches may file legal actions against the assets of the parent company located in a foreign country.

19. **Is it a debtor or creditor friendly jurisdiction?**

Peru is a debtor-friendly jurisdiction because the requirements to be declared insolvent, especially in the ordinary voluntary insolvency proceeding, are not numerous or hard to achieve. In addition, the start of an insolvency proceeding triggers an automatic stay that allows the debtor in possession of assets to make business decisions as an ongoing concern or to look for an orderly exit from the market, without the urgency to pay overdue debts immediately.

20. **Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?**

The decisions concerning the debtor's course of action and the payment terms are adopted by a qualified majority of creditors; in this regard, if labor creditors constitute a minority, they

will have no major influence or strength in decision making.

However, under specific circumstances the creditors may agree on preserving employees or unions may exercise certain (political) pressure with regard to the preservation of jobs, but is to be examined on a case by case basis.

The Government is not actively involved in restructuring proceedings; however, through the Tax Authority (SUNAT), it plays a major role in restructurings and liquidations, by monitoring the development of these proceedings. Also, when social disruptions arise, the Government fosters dialog among creditors, debtors, and other stakeholders.

21. **What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?**

An insolvency system must be responsive and friendly to distressed debtors. However, the Peruvian insolvency regime has both structural and regulatory shortcomings.

Structural shortcomings include lengthy proceedings, when they should be both short and predictable.

As for the regulatory aspect, the scarce yet unclear regulations on the clawback actions for any operations during the avoidance period make it inefficient and unappealing for creditors to use them, which prevents this process from achieving its goal, that is, to settle, integrate, keep, and appraise the debtor’s assets. Furthermore, not granting payment priority to creditors willing to finance restructuring discourages access to financing sources.

In addition to that, insolvency regulations should be enacted that makes cross border insolvency more efficient seeking to secure equal treatment to both local and foreign creditors (UNCITRAL Model Law); in addition to especial insolvency regulations appropriate for natural persons and small business.