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Global Restructuring & Insolvency Guide

Chile

Overview

Chile has recently adopted a major reform to restructuring and insolvency, in terms of its regulations, institutions and procedures, by means of the publication of the Law of Insolvency and Re-Entrepreneurship, Law No. 20,720, on January 9, 2014. This law replaces in its entirety the existing Law No. 18,175, which dated back to 1982, and has been subject to several amendments in past years. The new regulation came into force in October 2014.

Introduction

The Law of Insolvency and Re-Entrepreneurship provides for a completely new set of rules for reorganisation and liquidation, including new proceedings, among which the new debt reorganisation proceeding for companies and for individuals is especially noteworthy. Some other important modifications include the utilisation of new auxiliary officers in a bankruptcy or insolvency procedure (trustees or “síndicos” are replaced by liquidators or “liquidadores” and observers or “veedores”, with new powers), and new relevant authorities (the Bankruptcy Superintendence is to be replaced by a new agency, the Superintendence of Insolvency and Re-Entrepreneurship).

Law No. 20.720 establishes new rules for reorganisation and liquidation, eliminating the concept of bankruptcy, with the purpose of making the corresponding procedures simpler, more efficient, more flexible, and shorter, with different sets of rules for individuals and companies. Following are some of the most important features of the new law.

Judicial Reorganisation Procedure for Companies

This new procedure is established in order to increase the possibility of an insolvent company achieving an agreement with its creditors that may allow it to pay its debts, in order to avoid bankruptcy. In the event that this procedure fails, or the agreement is not fulfilled, the general consequence is that a liquidation procedure is triggered against the debtor company.

The reorganisation procedure begins by means of a request by the debtor company to the court. With that request, the company must also make a presentation to the Superintendence in order for it to appoint an observer (“*veedor*”), an officer whose main duty is to promote an arrangement between the debtor company and its creditors for the payment of the debts. The observer is appointed by the Superintendence, taking into consideration the name(s) proposed by the three largest creditors of the debtor company. If those creditors propose different observers, the one proposed by the largest creditor shall be appointed.

Once the observer's nomination has been accepted, the Superintendence will notify the competent court, and the debtor shall submit to the court the following documents:

- A list of all its assets;
- A list of third-party assets given as guaranty in favour of the debtor;
- A list of third-party assets which are in the debtor’s possession;

- Certificates that give account of existing debt and identify the creditors; and
- Debtor's balance sheet.

With this presentation, the court issues the Reorganisation Resolution ("*Resolución de Reorganización*") by means of which the procedure formally begins. The Reorganisation Resolution will contemplate, among other things, the following:

- For a 30-day term, extendable for another 30 or 60 days, the debtor company will be granted Financial Insolvency Protection. During this term, no requests for liquidation may be presented against the debtor, no enforcement proceeding can commence against it (and the ones currently in course are suspended), and the debtor may not be eliminated from public registries in which it is listed as a contractor or service provider. Further, during this term, all contracts entered into by the debtor company will remain in force with the same payment conditions. Hence no early termination or acceleration clauses may be enforced against the debtor based on the starting of a Reorganisation Procedure (if any creditor does so, their credit will lose all preference for payment and will be paid after the payment of the credits to all other creditors, including creditors related to the debtor);
- All existing proceedings against the debtor company will be suspended;
- The debtor will be subject to some interim measures, such as the intervention of the observer; the prohibition to transfer or constitute a lien over its properties or assets (other than those sales or transfers necessary for a normal operation); the prohibition to amend its bylaws, to grant or revoke power of attorney and to register any transfer of shares without the authorisation of the observer;
- The date of the termination of the Financial Insolvency Protection;
- The order for the debtor company to publish and present to the court a proposal of Judicial Reorganisation Agreement;
- The date, place and time of the Creditors' Meeting called to vote on the proposal of Judicial Reorganisation Agreement; and
- The call to all creditors to submit, within 15 days of the notification of the Reorganisation Resolution, the power of attorney of their representatives to vote on the Judicial Reorganisation Agreement.

After the Reorganisation Resolution has been issued, the debtor, with the assistance of the observer, must present its proposal for the Judicial Reorganisation Agreement, which is then subject to analysis in the Creditors' Meeting.

In parallel, within the eight days following the notification of the Reorganisation Resolution, all the creditors of the debtor company must request the court to consider their claims in the proceedings, submitting the documentation proving the existence of their credits ("*Verificación de Créditos*").

Any interested party might object to the existence of the creditors' claims, and the observer will issue a list of all credits accepted. Only creditors included in the observer's list of credits accepted will be able to vote for the Agreement.

Once the Agreement proposal has been notified, the debtor company may not withdraw it without the support of creditors representing 75% of the total amount owed.

The assignees of credits that are assigned less than 30 days prior to the commencement of the Reorganisation Procedure will not be able to vote on the proposal.

Creditors' Meeting

The Creditors' Meeting takes place on the day the Financial Insolvency Protection period expires. The observer must issue a report that addresses the feasibility and legality of the debtor's proposal, as well as the percentage of the claims that may be expected to be recovered by the creditors.

The Creditors' Meeting decides on the proposal of Judicial Reorganisation Agreement presented by the debtor. The quorum to approve it is two-thirds or more of the creditors that attend the meeting, which must comprise at least two-thirds of the total amount owed by the debtor company.

Judicial Reorganisation Agreement

The Judicial Reorganisation Agreement has the purpose of establishing the terms of payment of the debts of the debtor company, and may also establish the restructuring of its assets and liabilities for this purpose. The proposal for the Judicial Reorganisation Agreement may divide creditors into classes or categories (preferred and not preferred categories), and different categories may be offered different payment conditions. The payment conditions shall be the same for all creditors in the same class, except as otherwise accepted by the creditors (with special quorum).

The Judicial Reorganisation Agreement has an effect over all of the creditors of the debtor company, whether they attended the meeting that approved it or not.

The payment of claims from other companies from the same corporate group as the debtor, or other entities or individuals related to the debtor, may be postponed until all of the non-related creditors have been paid in full.

The debtor company is prevented from distributing dividends to its stakeholders prior to paying all the debts included in the Judicial Reorganisation Agreement.

Non-Judicial (Simplified) Reorganisation Procedure for Companies

Any debtor company may request court approval of a Simplified Agreement with its creditors, which does not require the intervention of a court, but only its final approval. With this request, the court issues an order to publish the Simplified Agreement in the Insolvency Bulletin (further referred to below), and the Agreement is then subject to a vote by the creditors. To obtain court approval, the debtor must present the Simplified Agreement executed by creditors whose claims should total at least three-quarters of the total amount owed by the debtor company), and a report from an observer that addresses the feasibility and legality of the Agreement, as well as the percentage of the claims that may be expected to be recovered by the creditors. If the Agreement is approved, it will be binding on all the creditors of the debtor.

Liquidation Procedure

The liquidation of a company may commence upon the request of the debtor itself (Voluntary Liquidation), or of one or more of its creditors (Forced Liquidation).

Voluntary Liquidation

The debtor must present to the court the following documents, among others:

- list of its assets and properties, their location, and the liens that may affect them;
- list of the assets legally excluded from liquidation;
- list of pending court proceedings;
- debt situation, identifying its creditors and the priority of the claims;
- list of all its employees, indicating their function and social security situation; and

- last balance sheet.

The corresponding court will review the debtor's request, designate a liquidator and issue the Liquidation Resolution.

Forced Liquidation

Any creditor may request the liquidation of a debtor company in any of the following situations:

- when the debtor has ceased to comply with an obligation that is evidenced in an executive document (a type of document indicated in the law that evidences a debt, with respect to which a judicial trial is not required for its recognition);
- when the debtor has defaulted under two or more executive documents, evidencing different obligations; two or more enforcing processes have already been initiated with respect to such documents; and the debtor has not presented sufficient assets to cover its debts;
- when the debtor or its representatives have fled the country or gone into hiding, leaving their offices or place of business closed with no one either appointed to manage the business so that the debtor can meet its obligations, or invested with sufficient power to answer new lawsuits.

The request of Forced Liquidation shall specify the motives for the liquidation, include a bank warranty for the equivalent of UTM 100, designate an observer and provide the name of the proposed liquidator.

Upon the preceding presentation, the court will summon the parties to an initial hearing on the fifth day following the notification to the debtor. At that hearing, the debtor shall inform the court with respect to its three creditors with the largest claims. Also, at that hearing the debtor may take any of the following actions:

- provide funds sufficient to cover the claimed debts;
- accept the liquidation request;
- file for the Judicial Reorganisation Procedure (referred to above); or
- legally challenge the validity and legality of the liquidation request.

If the debtor decides to challenge the liquidation request, this will result in a formal trial to determine whether there is a legal basis for the liquidation.

Effects of the Liquidation Resolution

When the request of liquidation has been accepted by the debtor, or when the process of opposition to the liquidation has finished, if that is the case, the court shall issue a Liquidation Resolution, which will address the following matters among others:

- the appointment of a liquidator (subject to confirmation by the creditors);
- the order for courier companies to deliver all the correspondence of the debtor to the liquidator;
- the order to accumulate with the liquidation procedure all the pending judicial proceedings against the debtor;
- the public notice to prevent making payments or delivering goods directly to the debtor, and the order to provide the liquidator with all the corresponding assets and documents of the debtor;

- the order to inform all the domestic creditors of the liquidation, and that they have 30 days to request the approval of their credits against the debtor and to notify all non-domestic creditors; and
- the summoning to the first meeting of creditors, at a specified date and time.

The Liquidation Resolution has the following consequences:

- the debtor is prevented from administering its current assets (i.e. the ones subject to liquidation), which will be administered by the liquidator. All the acts or agreements of the debtor over its assets after the liquidation resolution will be null and void;
- all creditors' rights are fixed at the time of the liquidation declaration. To this effect, debts that have not yet matured will be deemed to have matured upon the declaration of the liquidation ("acceleration of claims");
- any debts of the debtor that were not legally set off against a debt of one of its creditors prior to the declaration of liquidation will be prevented from being set off after the declaration;
- all pending civil procedures against the debtor will be accumulated with the liquidation procedure; all future procedures against the debtor must be presented before the court that is processing the liquidation; and
- all injunctions and preservation measures against the debtor's property are lifted and all enforcement actions suspended, except those arising out of secured claims.

The Liquidator

Upon accepting the appointment in the liquidation, the liquidator shall perform the following acts:

- take all the necessary measures to conserve the property or assets of the debtor that are considered at risk; and
- take control of the debtor's property, company seals, accounting records, documents and other such materials, and elaborate the corresponding inventory.

Determination of the Total Debt

All creditors are required to file evidence of their claims and priorities before the court within 30 days of the liquidation resolution, so that they may be examined by the liquidator and the other creditors. If the claim is not objected to within 10 days, the claim is recognised and the creditor is entitled to attend and vote at the creditors' meetings.

Creditors may also file the claims after the aforementioned period, but they are entitled to receive their proportion of the debt only with respect to future payments by the liquidator (not with respect to past payments).

Creditors' Meeting

The minimum quorum to hold the meeting of creditors is the attendance of one or more creditors representing 25% or more of the total debts of the debtor. The first meeting takes place on the 32nd day after the publication of the liquidation resolution in the Insolvency Bulletin. In that meeting, the liquidator will present the financial situation of the debtor in detail, and the creditors will confirm the appointment of the liquidator.

Liquidation Form and Deadline

In certain cases where the debtor is a small business or the value of its assets is relatively small, the liquidation is performed in a simplified procedure which must not last longer than four months from the

first meeting of creditors. The Superintendence may apply sanctions to the respective liquidator if the deadline mentioned is not met. The term to liquidate the assets in all other cases is decided by the meeting of creditors, and may in no case exceed four months for personal property, and seven months for real property, from the first meeting of creditors.

The real and personal property must be sold at public auction. The sale of securities that are publicly traded in a stock market must be auctioned in that market. A group of assets of the debtor can also be sold as an "Economic Unit", if so agreed by the creditors' meeting, which will also decide on the assets to be considered as part of the Economic Unit and conditions of the sale. The sale of an Economic Unit does not qualify as the sale of an ongoing business. Creditors which represent at least two-thirds of the total debts of the debtor may also decide to sell the complete business of the debtor as a whole.

Continuation of Economic Activities

During the process of liquidation and with the approval of the court, the liquidator, prior to the first meeting of creditors and until the day of the meeting, may continue with the activities of the debtor with the purpose of increasing the expected recovery of the creditors, enforcing pending obligations in favour of the debtor, or enabling a possible selling of assets of the debtor as an Economic Unit. This is known as provisional continuation.

Creditors representing the majority of the total debts of the debtor may also agree that the economic activities of the debtor will be continued. This continuing administration will be performed by the liquidator or other administrator (as decided by the creditors) and may not last longer than a year, which may be extended once for one additional year. This is known as a definite continuation. Once the definitive continuation has been agreed upon by the creditors, only two-thirds of the creditors may terminate the continuation of the economic activities of the debtor.

Payment of Credits

Credits shall be paid in the order and with the preferences and privileges contemplated at the Civil Code and the subordinations agreed by the creditors, maintaining the *par conditio creditorum* (also known as the *pari passu*) principle.

The liquidator shall propose to proceed with payments when there are enough funds available to pay at least 5% of all recognised credits, after the retention of funds sufficient to pay all costs of the liquidation procedure and making the retentions needed to pay the creditors domiciled abroad which have had no time to verify their credits.

Termination of Liquidation

The liquidator submits a final account of the liquidation to the court after the earliest of the following events: the deadline for liquidation is met, all the claims have been paid, or there are no more assets to liquidate. Once this final account is approved by the court, and such approval is published in the Insolvency Bulletin, the debtor recovers the administration over its assets, and all the unpaid debts of the debtor existing prior to the commencement of the liquidation procedure are deemed legally cancelled.

The liquidation procedure may also terminate if a Judicial Reorganisation Procedure is agreed upon by the debtor and two-thirds of the creditors which attend the corresponding meeting, and which represent at least three-quarters of the total debt.

Insolvency Procedures for Individuals

Renegotiation Procedure for Individuals

The new Law No. 20,720 establishes a new Renegotiation Procedure for Individuals, which is a simple procedure to facilitate an agreement between the individual debtor and his creditors, in order to

avoid liquidation. This procedure is commenced by the individual by filing a request to the Superintendence, enclosing all the corresponding information regarding his assets, income, creditors, and debts, as well as a renegotiation proposal. Once the Superintendence declares the admission of the request, all the creditors of the debtor are prevented from requesting a liquidation; all the contracts entered into by the debtor remain in force, with the same payment conditions as before; statutes of limitations are suspended; and interest on debts stops accruing.

This procedure is administered by the Superintendence, which shall summon the meeting of creditors and mediate in order to obtain a renegotiation agreement. If an agreement is not achieved, the debtor and creditors may agree upon a sale procedure for the assets of the debtor. If neither a Renegotiation Agreement ("*Acuerdo de Renegociación*") nor a Sale Agreement ("*Acuerdo de Ejecución*") is possible, all the records shall be submitted to the corresponding court, in order for a liquidation procedure to be initiated.

Liquidation of the Assets of the Individual Debtor

The liquidation procedure for an individual debtor may be commenced by the request of the debtor himself. Alternatively, it may be commenced by the request of one or more creditors, in the event that the debtor has defaulted under two or more executive documents evidencing different obligations, two or more enforcing processes have already been initiated with respect to such documents, and the debtor has not presented sufficient assets to cover its debts. The liquidation will be administered by a liquidator in a procedure similar to that indicated for companies, with some differences indicated in the law.

Revocation of Past Actions by the Debtor that Damage Creditors

Certain actions taken by the debtor during the year prior to the commencement of a renegotiation or liquidation procedure, may be revoked by its creditors, the observer or the liquidator, as they may have damaged the *par conditio creditorum* of the creditors to recover their claims. These actions include the following:

- payments in advance;
- payments made in a manner different from that established in the corresponding agreement;
- mortgages or collateral over the debtor's assets, granted to secure past debts;
- payments made without valuable consideration, and payments to a related company, within two years prior to the commencement of the insolvency procedure;
- in general, agreements with third parties who knew of the financial difficulties of the debtor, and that caused damage to the creditors' position to recover their claims, within two years prior to the commencement of the insolvency procedure; and
- amendment to the debtor company's bylaws, which reduces the debtor's net worth, within six months prior to the commencement of the insolvency procedure.

The statute of limitations to request the revocation of the referred actions is one year from the commencement of the reorganisation or the liquidation procedure.

Transnational Insolvency

Law No. 20,270 includes a complete chapter to create efficient mechanisms to resolve cases of transnational insolvency, based on:

- cooperation between Chilean courts and other administrative agencies involved with insolvency issues and foreign states also involved in transnational insolvency cases;

- safety for commerce and investment;
- just and efficient administration of transnational insolvency and protection of the interests of national and foreign persons involved;
- protection of the debtor's assets; and
- facilitation of the reorganisation of legal entities under financial duress to protect the invested capital and preserve employment.

This chapter applies in the following cases:

- a foreign court or a foreign representative requiring assistance from a Chilean court or other administrative entity involved;
- assistance to another state is requested regarding an insolvency procedure carried on in accordance with Chilean law;
- a single debtor is subject to Chilean insolvency procedure and a foreign insolvency procedure at the same time; and
- foreign creditors or other foreign interested persons want to initiate or be part of a pending insolvency procedure under Chilean law.

Recognition of Foreign Procedures

The representative of a foreign procedure may request the recognition of the procedure from the competent Chilean court. The documentation to be presented to the court shall be duly legalised.

If the foreign procedure fulfils all requirements set forth in Law No. 20,270 and does not affect Chilean public policy, it should be recognised by the Chilean court.

From the time the recognition is requested, the foreign representative shall keep the Chilean court informed of any outstanding developments regarding the foreign procedure and any new foreign procedures initiated against the same debtor. Also, from the moment the recognition is requested, the foreign representative may request, and the Chilean court may grant, some preventive measures to secure the debtor’s assets in Chile.

The recognition by the Chilean court of a principal foreign procedure suspends all new or pending procedures against the debtor and also suspends the right of the debtor to transfer or encumber its assets in Chile.

After the recognition of a foreign procedure, principal or not, the Chilean court, as per a request of the foreign representative, may order other preventive measures, including granting the foreign representative or a third party designated by the court the ability to distribute the debtor’s assets in Chile, keeping enough assets to ensure the interest of the Chilean creditors.

The recognition of the foreign procedure also grants the foreign representative the right to request the revocation of past actions of the debtor in the same manner as cases explained for the regular insolvency procedures in Chile.

Parallel Procedures

Specific rules are included in the case of parallel procedures. These rules depend on whether the Chilean insolvency procedure is initiated after the recognition of the foreign procedure, the foreign procedure recognition is requested with respect to a debtor already under a Chilean insolvency procedure, or several foreign procedure recognitions are requested with respect to the same debtor.

Insolvency Bulletin

All the relevant court and Superintendence resolutions with respect to reorganisation and liquidation procedures are to be published in a new web platform called the “Insolvency Bulletin” (“*Boletín Concursal*”), which will be publicly available, free and administered by the Superintendence.

Conclusion

During 2014, a profound and complete change in the regulation of insolvency in Chile was made. The legal system regarding bankruptcy, applied in Chile for decades, was terminated, and a new system of reorganisation and liquidation came into force with Law No. 20,720, replacing entirely the former regulations. The main purposes of this change was to simplify and shorten the proceedings, and to improve the reorganisation process for companies in order to avoid their liquidation. It is still too soon to give an informed opinion on the virtues or defects of this new reorganisation and liquidation system.

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