

 **LATIN LAWYER**

THE GUIDE TO RESTRUCTURING

Editors

Joy K Gallup and Michael L Fitzgerald

The Guide to Restructuring

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Publisher's Note

Latin Lawyer is delighted to publish *The Guide to Restructuring*.

Edited by Joy K Gallup and Michael L Fitzgerald of Paul Hastings LLP and containing the knowledge and experience of 25 leading practitioners from throughout the region and across disciplines, it provides guidance that will benefit all practitioners advising on restructurings in Latin America.

Restructurings are by their nature both international and deeply domestic, and moves to standardise and draw together the legislative framework in the region demonstrate the benefits and challenges of this trend. Understanding the commonalities, but also the differences, in both black letter law and common practice around the region is critical. This guide draws on the expertise of highly sophisticated practitioners to draw out these trends and give practitioners the tools they need. Its aim is to be a valuable resource for insolvency and restructuring advisers of all stripes as they play their role in the complex economic situation facing the region today.

We are delighted to have worked with so many leading firms and individuals to produce *The Guide to Restructuring*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Corporate Compliance* and *The Guide to Mergers and Acquisitions*.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Clare Bolton

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<i>Paul Hastings LLP</i>	

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Part 1

Introduction

Introduction

Joy K Gallup and Michael L Fitzgerald¹

Whenever restructuring professionals practising in Latin America gather and compare notes, it is striking to notice the common themes as well as the jurisdictional differences that affect all our practices. Restructuring lawyers and financial advisers often criticise various perceived failings of their respective court systems, or find fault with various legal or regulatory requirements of their jurisdiction that might favour equity holders or the debtor versus the creditors, or vice versa, depending on their point of view. At the same time, restructuring professionals often find themselves borrowing from reorganisation structures and techniques used in other jurisdictions, both for in-court and out-of-court restructurings, since many of these methods can be applied effectively across borders when dealing with Latin American debt restructurings. Being able to adapt from other experiences where there is commonality, while being mindful of the individual differences in each jurisdiction (and, in some cases, each industry), is both the key to a successful restructuring practice and a continuing challenge as circumstances change.

Common issues (for example, the need for greater efficiency in the process for in-court reorganisations) have helped to shape amendments to bankruptcy law over time, such as the most recent ones adopted in Brazil and the prior series of reforms adopted in Mexico. The latest set of reforms in Mexico, in 2014, imposed a streamlined timetable for a reorganisation to be accomplished, although in practice that timing has not been adhered to, owing to litigation and other issues relating to the courts. In Brazil, new reforms similarly include provisions to speed up the bankruptcy process, for both reorganisations and liquidations,

¹ Joy K Gallup and Michael L Fitzgerald are partners at Paul Hastings LLP.

borrowing from the US Chapter 11 playbook, among other sources, to provide greater certainty for creditors and debtors and, in some situations, to help level the playing field between them.

In many countries in Latin America, the bankruptcy laws have tended to provide greater protection to debtors than creditors, but those laws are changing. Corporate legal structures and corporate governance issues are also key in how reorganisations are carried out in Latin America, because of the roles of the different stakeholders in a bankruptcy proceeding. For instance, the statutory pre-emptive rights under corporate law of existing equity holders to approve new equity issuance, or the rights under bankruptcy law to vote on a reorganisation plan, are more protective of equity holders in Mexico than would be the case for a typical Delaware company. Historically, these laws have protected the families that own many of the businesses in Latin American jurisdictions, as the corporate laws make it more difficult for creditors to take over the businesses in debt-for-equity swaps. Nevertheless, there are situations in which the parties are finding ways around the corporate law impediments, through negotiation or otherwise. In other circumstances, companies are using capital markets out-of-court solutions, such as liability management offers, to avoid the complications of in-court procedures, and in some cases companies are taking advantage of the ability to reorganise under the US federal bankruptcy code.

The legal frameworks of each jurisdiction that help to structure the outcomes of bankruptcy and reorganisation proceedings continue to evolve, in some cases becoming more similar in cross-border situations and in others becoming more difficult to reconcile. Some jurisdictions, such as Brazil, have adopted laws based on the UNCITRAL model for recognising foreign insolvency proceedings. This type of reform may become more common with the advent of large multi-jurisdictional proceedings involving assets and creditors with interests in multiple countries trying to accomplish a single comprehensive restructuring with a reorganised debtor (following the debacle of the restructuring of the Brazilian telecommunications giant Oi, for example, which was complicated by litigation regarding the centre of main interest (or COMI) for purposes of the related Chapter 15 proceedings, which has now been clarified in the Brazilian reforms).

Historically, the number of insolvent companies and restructurings has tended to surge through different Latin American jurisdictions in waves, driven by common economic and political factors that undermine certain industries, but sometimes the same factors can bring about very different results. For instance, the Operation Car Wash (*Lava Jato*) anti-corruption investigations in Brazil triggered a number of corporate bankruptcies in Brazil, whereas an anti-corruption scandal in Argentina did not have the same effect. Argentina's biggest issue has been its

sovereign default and the fall-out from that restructuring process. Meanwhile, companies within the oil and gas industry, the homebuilding industry, the sugar and ethanol industries and the fishing industry are among those that have been hit hard in past waves of restructuring across the Latin American region due to economic factors. Currently, the worst-hit companies in multiple jurisdictions are those most affected by the covid-19 pandemic: the airline, retail and hospitality industries, among others.

Much has been written about the effects of covid-19 and the related forced shutdowns of workplaces and the resulting economic issues in Latin America, including the infusion of government support (or lack thereof). Many restructuring professionals initially expected a large wave of bankruptcies to result from these shutdowns, but in many jurisdictions, that wave has not materialised during the past year and a half (except for the particular industries previously mentioned). One reason may be the lack of access to courts in some areas (as is discussed in further detail in one of our chapters), but in addition the decision by many lenders to provide more flexibility to their corporate borrower clients rather than have those loans go into default was probably a large factor in preventing more companies from needing to declare insolvency. The pandemic has had some other unexpected consequences in the restructuring arena as well, such as making certain distressed investments more attractive to buyers because of interest rate and currency developments.

With the covid-19 pandemic in mind, this guide sets out to offer the perspectives of top Latin America-focused restructuring experts on a number of significant topics of current interest that highlight both some of the common themes touched on above and the differences throughout the practice in Latin America. The aim of this guide is not to introduce the restructuring laws in the region but rather to offer an insight into the state of the practice from highly qualified and experienced practitioners in Latin America and the United States who are involved in cross-border restructurings. The range of topics is broad, as might be expected given the complexity of the practice area and the regional differences.

Part 1 examines recent developments in the restructuring laws and legal systems in Brazil and Mexico, as the two largest economies in the region. The first chapter is an overview of the recently adopted reforms (some might say long overdue) to the Brazilian bankruptcy laws from Thomas Benes Felsberg, Fabiana Solano, Clara Moreira Azzoni and Thiago Dias Costa, of Felsberg Avogados, including a discussion of how the new laws provide a welcome innovation for debtor-in-possession financing, and how they are expected to improve the relative position of creditors and impose new challenges on debtors. However, since the new reforms have only been effective since January 2021, the full outcome

of the changes remains to be seen. Following that is a chapter discussing recent developments in restructuring in Mexico from Thomas Heather, of Creel, García-Cuéllar, Aiza y Enriquez, including as a result of the covid-19 pandemic, as well as the outlook for sovereign (or quasi-sovereign) restructurings and suggestions for improvements.

Part 2 picks up on the theme of developments arising from the covid-19 pandemic. Francisco José Rodríguez Nepote, of Corona and Nepote, provides his insight on bankruptcy and other court closures mandated by covid-19 regulations and the effect of those closures on debtors and investors in distressed situations in Mexico. Pedro Jimenez collaborates with editor Joy Gallup to explore why the pandemic may be accelerating the choice of Chapter 11 as an attractive alternative to local filings in cross-border restructurings, including in the ongoing Latin American airline restructurings. Jorge Luis Moreno Félix, Jose Ignacio El-Mir Arnedo, Yazmín Cáceres Lucero and Mario Alberto Rocha García, of PwC México, explain the effects of the pandemic on M&A activity in the region (including distressed M&A), in particular which sectors and countries have been most affected and where there is likely to be the best recovery going forward (focusing on the largest Latin American economies: Brazil, Mexico, Argentina, Chile, Colombia and Peru).

Part 3 focuses on issues that, from an international investor perspective, are more specific to Latin America. A common theme in Latin American restructurings is addressed by Alejandro Sainz and Ana Gabriela Avendaño, of Sainz Abogados, which is the interplay between the equity and debt stakeholders and their relative priorities, focusing on Mexican restructurings based on their extensive experience. Juan Carlos Machorro and his associates Ana Paula Ibarra and Guillermo Moreno, at Santamarina y Steta, explore another topic of great current interest in the region and elsewhere: how the emphasis on ESG investment criteria is growing and is expected to affect investments and outcomes in distressed situations, particularly in the energy and infrastructure sector.

In Part 4, we examine two Latin American sovereign debt restructuring situations, with very different perspectives. First, Fernando Daniel Hernández, of Marval, O'Farrell y Mairal, provides a very useful overview of the lessons learned in Argentina from its previous restructurings triggered by the sovereign default in 2001, and how those lessons were applied in Argentina's most recent restructuring, which was completed in a fraction of the time in 2020 (following the sovereign's ninth default). Next, Fulvio Italiani, Carlos Omaña and Roland Pettersson, of D'Empaire, provide a thoughtful analysis of the ongoing massively complicated debt crisis in Venezuela, with ideas for possible solutions.

Finally, in Part 5, our experts take a closer look at a couple of specialised industry case studies. As mentioned previously, the aviation industry is in dire shape because of the coronavirus pandemic, so we have industry expert Michael B Cox of Seabury Securities providing a detailed analysis of the industry and what has been happening during the pandemic to the airlines in the region, including those going through restructurings. Marcelo Ricupero and his associates Stefano Motta and Mariana Leoni Beserra, of Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados, explore the history of restructurings in the oil and gas industry in Brazil, focusing on the 2018 case regarding Constellation Group in comparison to some of the earlier well-known restructuring proceedings and, coming full circle, tying that experience to the recently adopted reforms to the Brazilian bankruptcy law.

We are very appreciative of all the effort put into this guide by so many people. We are extremely grateful for the insights provided by all our esteemed contributors and wish to extend our thanks for their time and thoughtfulness in sharing their expertise and their views on these topics, and we look forward to their input on future editions. We are also very grateful for the contributions of all our colleagues at Paul Hastings who assisted in the production of this guide.

Published by Latin Lawyer and edited by Joy K Gallup and Michael L Fitzgerald, partners at Paul Hastings LLP, *The Guide to Restructuring* is designed to assist restructuring advisers of all disciplines, and affected companies, as they negotiate complicated restructurings.

This guide delivers specialist insight to our readers across the region – advisers, practitioners, corporate decision makers and court officials – throughout the process.

In preparing this guide, we are grateful for the cooperation and insight of the broad range of participating advisers and practitioners, who have contributed a wealth of knowledge and experience.