Global Restructuring and Insolvency Guide - Venezuela

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

Please select a topic from the menu.

*This content was last reviewed around October 2021.*

# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Moratorium**

Yes.

**Bankruptcy**

Yes.

## What is the nature of the insolvency process?

**Moratorium**

A moratorium is a benefit that a court may grant to commercial companies and individual merchants whose assets exceed their liabilities but are unable to pay their debts at maturity due to an excusable lack of liquidity.

The objective of the moratorium proceeding is to grant the debtor a term not exceeding 12 months to satisfy its creditors. The court may extend the original term for an additional term of up to 12 months under certain circumstances. In practice, some courts have extended the term of the moratorium even longer than the period expressly contemplated by the Commercial Code. If during the term of the moratorium proceeding the debtor is unable to satisfy all of its creditors or is unable to reach a settlement with the latter, the debtor will automatically become subject to bankruptcy proceedings.

**Bankruptcy**

Unlike moratorium, bankruptcy is neither protection nor a benefit. In the ordinary course of events, bankruptcy leads to the liquidation of the bankrupt estate by the trustee or receiver appointed by the bankruptcy court.

Bankruptcy may be one of three kinds:

Fortuitous, if arising from fortuitous circumstances or force majeure

Negligent, if caused by the negligence or imprudence of the bankrupt

Fraudulent, if arising from fraudulent conduct of the bankrupt

In case of negligent or fraudulent bankruptcy, the bankrupt is subject to the criminal sanctions provided for in the Venezuelan Criminal Code.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Moratorium**

A moratorium is available to those debtors whose assets exceed their liabilities (i.e., who are not insolvent) but cannot pay their debts at maturity due to a lack of liquidity.

In order to be eligible for a moratorium, the debtor must show that the lack of liquidity is excusable or caused by unforeseen events.

**Bankruptcy**

Bankruptcy is a proceeding applicable to commercial companies and individual merchants that are insolvent. This has been generally interpreted to mean that commercial companies or individual merchants are generally unable to pay their debts at maturity and do not meet the requirements to apply for a moratorium.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Moratorium**

No.

**Bankruptcy**

No.

## Is restructuring of both secured and unsecured claims possible?

**Moratorium**

No. The order of privileges must be followed.

**Bankruptcy**

No. The order of privileges must be followed.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Moratorium**

Creditors only

**Bankruptcy**

Creditors only

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Moratorium**

No. However, any approvals will be subject to the specific provisions of the Articles of Incorporation/By-Laws or those imposed by the court (if any).

**Bankruptcy**

No. However, any approvals will be subject to the specific provisions of the Articles of Incorporation/By-Laws or those imposed by the court (if any).

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Moratorium**

No. However, any approvals will be subject to the specific provisions of the Articles of Incorporation/By-Laws or those imposed by the court (if any).

**Bankruptcy**

No. However, any approvals will be subject to the specific provisions of the Articles of Incorporation/By-Laws or those imposed by the court (if any).

# Commencing the Process

## Who can commence?

**Moratorium**

A moratorium is commenced by the debtor's petition only. The debtor must file the petition before a competent court.

**Bankruptcy**

Under Venezuelan law, bankruptcy may be initiated by:

The debtor. Directors of commercial companies that become insolvent must file for a bankruptcy proceeding within three days after the date of suspension of payments (i.e., the date on which the company generally becomes unable to pay its debts at maturity).

One or more creditors

A court denying or revoking a petition for a moratorium or declaring the expiration of the term of the moratorium

## Is shareholder's consent required to commence proceeding?

**Moratorium**

No. It is not a legal requirement to obtain consent from a company's board of directors or shareholders prior to filing any insolvency proceedings available in Venezuela. However, a corporate resolution could be required if established in the Articles of Incorporation/By-Laws.

**Bankruptcy**

No. It is not a legal requirement to obtain consent from a company's board of directors or shareholders prior to filing any insolvency proceedings available in Venezuela. However, a corporate resolution could be required if established in the Articles of Incorporation/By-Laws.

## Is there an ability to consolidate group estates?

**Moratorium**

Yes, only contractually.

**Bankruptcy**

Yes, only contractually.

## Is there any court involvement?

**Moratorium**

Yes. As mentioned above, the debtor must file the petition before a competent court.

**Bankruptcy**

Yes.

## Who manages the debtor?

**Moratorium**

Generally, debtors continue to operate and administer their day-to-day business within the scope of the plan for liquidating outstanding debts. Nevertheless, the court imposes several restrictions on the debtor in respect of the management and disposition of its assets. The debtor must obtain prior approval of the court to sell, pledge, mortgage, borrow money, compromise, collect receivables, make payments or perform any other acts that are necessary for purposes of liquidating its assets and satisfying its creditors. The debtor is also subject to supervision by the creditors' committee. In addition, under certain exceptional circumstances, the court may also completely deprive the debtor of its business management.

While the moratorium request is being resolved, the individual merchant or company can only perform simple detail operations.

**Bankruptcy**

The creditors administer the debtor's assets and businesses. The company is completely deprived of its capacity to manage its assets.

## What is level of disclosure of process to voting creditors?

**Moratorium**

There are no levels of disclosure established in Venezuelan law. However, they may be subject to the specific provisions of the Articles of Incorporation/By-laws (if any).

**Bankruptcy**

There are no levels of disclosure established in Venezuelan law. However, they may be subject to the specific provisions of the Articles of Incorporation/By-laws (if any).

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Moratorium**

The following regulated entities domiciled in Venezuela are subject to special insolvency regimes, which are beyond the scope of this guide:

Insurance commercial companies authorized by the Office of the Superintendent of the Insurance Activity (SUDEASEG) to perform insurance activities in Venezuela

Securities intermediaries authorized by the Office of the National Superintendent of Securities (SNV) to perform securities intermediation activities in Venezuela

Banks and financial institutions authorized by the Office of the Superintendent of Banking Sector Entities (Superintendent of Banks) to perform banking activities in Venezuela

Public companies

**Bankruptcy**

The following regulated entities domiciled in Venezuela are subject to special insolvency regimes, which are beyond the scope of this guide:

Insurance commercial companies authorized by the Office of the Superintendent of the Insurance Activity (SUDEASEG) to perform insurance activities in Venezuela

Securities intermediaries authorized by the Office of the National Superintendent of Securities (SNV) to perform securities intermediation activities in Venezuela

Banks and financial institutions authorized by the Office of the Superintendent of Banking Sector Entities (Superintendent of Banks) to perform banking activities in Venezuela

Public companies

## How long does it generally take for a creditor to commence the procedure?

**Moratorium**

N/A

A moratorium is commenced by the debtor's petition only. The debtor must file the petition before a competent court.

**Bankruptcy**

It is not possible to determine how long it would take to commence this procedure.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Moratorium**

Yes. However, the debtor must obtain prior approval of the court to sell, pledge, mortgage, borrow money, compromise, collect receivables, make payments or perform any other acts that are necessary for purposes of liquidating its assets and satisfying its creditors. The debtor is also subject to supervision by the creditors' committee.

**Bankruptcy**

No. The company is completely deprived of its capacity to manage its assets.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Moratorium**

One of the main consequences of a moratorium is that debts contracted prior to the moratorium mature by operation of law and become due.

Additionally, nonprivileged debts contracted before the declaration of the moratorium are subject to stay, and creditors are not entitled to sue for collection of their credits. Conversely, privileged debts and secured debts before the declaration of the moratorium are not subject to stay, and secured creditors are entitled to sue for collection and may foreclose on the collateral during the moratorium.

Because of the moratorium, debts are automatically accelerated with respect to the debtor, but automatic acceleration does not apply to co-obligors. Creditors whose actions against the debtor are subject to stay may freely collect their mature receivables from the debtor's co-obligors if the co-obligor is jointly and severally liable with the debtor.

Debts contracted after the declaration of the moratorium are not subject to stay if they have been authorized by the moratorium court and the creditors' committee.

**Bankruptcy**

The mandatory stay in cases of bankruptcy is the same as in the moratorium. In addition, from the date of the bankruptcy decree, interest ceases accruing to unsecured creditors and creditors grandfathered by a civil law general privilege but continues accruing in favor of secured creditors.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Moratorium**

This is not regulated in Venezuelan law. This will be subject to the specific provisions of the Articles of Incorporation/By-Laws (if any).

**Bankruptcy**

This is not regulated in Venezuelan law. This will be subject to the specific provisions of the Articles of Incorporation/By-Laws (if any).

## Can procedure be used to implement a debt-to-equity swap?

**Moratorium**

Yes. It may be agreed upon contractually.

**Bankruptcy**

Yes. It may be agreed upon contractually.

## Are third party releases available?

**Moratorium**

N/A

**Bankruptcy**

N/A

## Are the proceedings recognised abroad?

**Moratorium**

From a Venezuelan legal standpoint, the general rule is that in order to be enforceable in Venezuela, foreign awards, as judgments rendered by foreign courts, must be recognized in Venezuela through a procedure known as exequatur. The exequatur procedure is activated through a motion filed with the Supreme Court requesting the recognition of a foreign judgment. The petition must comply with the requirements of a complaint under Venezuelan law and must be attached to the judgment or award.

For a Venezuelan proceeding to be recognized abroad, it will depend on the existence of a treaty (e.g., Bustamante Code). In the absence of a treaty, this will depend on the corresponding legislation of each jurisdiction.

**Bankruptcy**

From a Venezuelan legal standpoint, the general rule is that in order to be enforceable in Venezuela, foreign awards, as judgments rendered by foreign courts, must be recognized in Venezuela through a procedure known as exequatur. The exequatur procedure is activated through a motion filed with the Supreme Court requesting the recognition of a foreign judgment. The petition must comply with the requirements of a complaint under Venezuelan law and must be attached to the judgment or award.

For a Venezuelan proceeding to be recognized abroad, it will depend on the existence of a treaty (e.g., Bustamante Code). In the absence of a treaty, this will depend on the corresponding legislation of each jurisdiction.

## Has the UNCITRAL Model Law been adopted?

**Moratorium**

No.

**Bankruptcy**

No.

## Can a debtor continue to carry on business during insolvency proceedings?

**Moratorium**

As a general rule, debtors continue to operate and administer their day-to-day business within the scope of the plan for liquidating outstanding debts. Nevertheless, the court imposes several restrictions on the debtor in respect of the management and disposition of its assets. The debtor must obtain prior approval of the court to sell, pledge, mortgage, borrow money, compromise, collect receivables, make payments or perform any other acts that are necessary for purposes of liquidating its assets and satisfying its creditors. The debtor is also subject to supervision by the creditors' committee. In addition, under certain exceptional circumstances, the debtor may also be completely deprived by the court of its business management.

While the moratorium request is being resolved, the individual merchant or company can only perform simple detail operations.

**Bankruptcy**

In a bankruptcy proceeding, the creditors, though the receivers, administer the bankrupt estate. The debtor is completely deprived of its capacity to manage its assets. In the ordinary course of events, bankruptcy proceedings lead to the liquidation of the bankrupt estate by a receiver appointed by the bankruptcy court. In bankruptcy proceedings, however, the bankrupt corporation could continue in existence only if, prior to the beginning of the liquidation of the bankrupt estate, at least three-fourths of the number of the creditors attending the creditors' meeting that hold claims representing three-fourths of the total amount of the bankrupt's debts reach an agreement to terminate the bankruptcy proceeding and to allow the debtor to continue operations under the terms and conditions set forth in the settlement agreement.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Moratorium**

Under Venezuelan law, directors have no specific liability for failing to file accounts or other corporate maintenance requirements but an only civil liability. A director is liable to the company for damages resulting from a breach by the director of the terms and conditions of that contract (Civil Code, Arts. 1264, 1689). The terms and conditions of the director-company relationship are those specifically provided in the company's Articles of Incorporation/By-Laws, as well as those arising from specific statutory provisions. The Commercial Code also imposes certain affirmative duties and specific restraints on corporate directors in the conduct of the company's affairs. It appears that the purposes underlying these provisions of the law are (i) to assure proper shareholder supervision and control over the conduct of corporate affairs and (ii) to protect third parties in their dealings with the company. Directors who fail to perform required duties or who act counter to specific restraints imposed by law are liable to the company for any losses suffered as a result of such directors' misconduct (Commercial Code, Arts. 243, 266(4)). As set forth in Articles 1270 and 1692 of the Civil Code, corporate directors, as parties to a contract of mandate, must exercise the degree of diligence in the conduct of corporate affairs that a "good father of a family" would exercise in the conduct of the family's affairs. Therefore, it would be a potential liability if the breach of these duties by the directors leads to damages for the company.

Based on the foregoing, the directors or officers should perform their duties as prescribed by the court and pursuant to the powers conferred upon them by the company's Articles of Incorporation/By-Laws. If the directors attempt to exercise unauthorized powers, they will be civilly and criminally liable.

**Bankruptcy**

Under Venezuelan law, directors have no specific liability for failing to file accounts or other corporate maintenance requirements, only civil liability. A director is liable to the company for damages resulting from a breach by the director of the terms and conditions of that contract (Civil Code, Arts. 1264, 1689). The terms and conditions of the director-company relationship are those specifically provided in the company's Articles of Incorporation/By-Laws, as well as those arising from specific statutory provisions. The Commercial Code also imposes certain affirmative duties and specific restraints on corporate directors in the conduct of the company's affairs. It appears that the purposes underlying these provisions of the law are (i) to assure proper shareholder supervision and control over the conduct of corporate affairs and (ii) to protect third parties in their dealings with the company. Directors who fail to perform required duties or who act counter to specific restraints imposed by law are liable to the company for any losses suffered as a result of such directors' misconduct (Commercial Code, Arts. 243, 266(4)). As set forth in Articles 1270 and 1692 of the Civil Code, corporate directors, as parties to a contract of mandate, must exercise the degree of diligence in the conduct of corporate affairs that a "good father of a family" would exercise in the conduct of the family's affairs. Therefore, it would be a potential liability if the breach of these duties by the directors leads to damages for the company.

## What is the order of priority of claims?

**Moratorium**

Because the moratorium is designed to assist the company in reaching an amicable arrangement with the creditors, it does not necessarily involve the liquidation of the assets of the debtor and the distribution of the proceeds thereof pursuant to rules of priorities. Nonetheless, if assets are liquidated, the distribution of the proceeds follows the order of priorities and privileges applicable in case of bankruptcy.

As we said before, nonprivileged debts contracted before the declaration of the moratorium is subject to a stay in a moratorium proceeding. However, the stay does not apply to nonprivileged debts contracted after the declaration of a moratorium that has been authorized by the moratorium court and the creditors' committee. Privileged debts and secured debts are not subject to a stay, provided that the secured or privileged creditors do not affirmatively vote for granting the moratorium. Privileged and nonprivileged debts that were not due prior to the declaration of moratorium mature by operation of law and became due and payable as of the date thereof. Therefore, not being subject to the automatic stay, privileged creditors are entitled to sue for collection of their claims.

**Bankruptcy**

The proceeds of the liquidation of the debtor's personal property must be distributed among creditors in the following order of priority:

Creditors holding tax claims and para-fiscal contributions up to certain statutory limits

Creditors holding labor claims up to certain statutory limits

Creditors holding claims for legal expenses incurred during the proceedings to preserve the property for the benefit of all creditors

Creditors holding security interests in specific collateral

Creditors with claims that enjoy special civil law privileges or liens on personal property by operation of law, e.g., liens on personal property in possession of the creditor for any amounts due in connection with the construction, maintenance and improvement of such personal property

Creditors that are unsecured

The proceeds of the liquidation of the debtor's real property must be distributed among creditors in the following order of priority:

Creditors holding claims that enjoy a special civil law privilege or a lien on specific real property by operation of law, e.g., expenses incurred for the benefit of all creditors in the attachment, deposit or judicial sale of the property, taxes for the current and preceding year and registration fees and inheritance taxes

Claims secured by a mortgage with respect to specific mortgaged property

Creditors hold labor claims, including past-due salaries, severance benefits, and other credits arising from an employment relationship

Creditors with claims that enjoy special civil law privileges or liens on personal property by operation of law

Creditors that are unsecured

Upon the liquidation of the debtor's assets, the proceeds thereof must be distributed pursuant to the order of priorities set forth above. Each category of priorities must be fully satisfied before the proceeds of the liquidation may be used for the payment of subsequent categories. However, creditors with priority over specific collateral and who are not fully satisfied with the proceeds of such specific collateral participate in the distribution of the proceeds of other assets of the debtor (with respect to their deficiency claims) as unsecured creditors.

Within the same category of priorities, the proceeds of the liquidation, if insufficient to fully satisfy such category, will be distributed pro rata among the creditors in proportion to the amount of their claims.

## Do pension liabilities have any priority over other unsecured claims?

**Moratorium**

Yes, since pension liabilities are labor-related, the order of priorities mentioned above will apply.

**Bankruptcy**

Yes, since pension liabilities are labor-related, the order of priorities mentioned above will apply.

## Is it possible to challenge prior transactions?

**Moratorium**

Yes. Venezuelan commentators refer to prior transactions as the "suspicious period," which precedes the final declaration of bankruptcy (i.e., the term between the cessation of payments and the bankruptcy declaration).

**Bankruptcy**

Yes. Venezuelan commentators refer to prior transactions as the "suspicious period," which precedes the final declaration of bankruptcy (i.e., the term between the cessation of payments and the bankruptcy declaration).

©Copyright © 2024 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion**: All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites. **Attorney Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction or copying of the Content on this Site without express written authorization is strictly prohibited.