Global Restructuring and Insolvency Guide - Colombia

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# Initial Considerations

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

**Reorganization process**

In general, yes, non-bankruptcy law regulates the creation of securities.

In the context of the reorganization process, you can neither take new securities nor cancel or enforce the securities granted by the debtor before the reorganization proceedings unless otherwise provided in the reorganization agreement or authorized by the bankruptcy court (art. 17, L. 1116/06).

**Liquidation process**

In the context of the liquidation process, it is generally difficult for the debtor to constitute securities because the sole purpose of a liquidation impedes the company's development of its corporate purpose. Theoretically, it is possible only if the security is necessary for the immediate liquidation of the debtor. Otherwise, the act of granting such security shall be deemed ineffective (art. 48 L. 1116/06).

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

Once a request for admission into an emergency negotiation of debts or expedited recovery proceedings is filed, you cannot take, cancel or enforce securities unless otherwise provided in the reorganization agreement or authorized by the bankruptcy court (art. 17, L. 1116/06).

## What is the nature of the insolvency process?

**Reorganization process**

A court process leading to the reorganization of the debtor's assets and liabilities in order to avoid its liquidation

**Liquidation process**

A court process is leading to the sale of the debtor's assets, payment of its debts, and ultimate dissolution of the debtor

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

There are three alternatives:

Expedited proceedings before the bankruptcy court

Emergency negotiation of debts: an out-of-court scenario for negotiation of debts with creditors

Expedited recovery proceedings conducted by a mediator before the Colombian Chambers of Commerce

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

**Reorganization process**

The debtor must either be in default of two or more obligations with two or more creditors for more than 90 days or be sued as a defendant in two or more collection actions.In both cases, the obligations shall amount to no less than 10% of the debtor's absolute liabilities.

Also, if the debtor faces foreseeable and imminent bankruptcy (incapacidad de pago inminente), either due to harsh market conditions or internal constraints that impede the company's normal functioning, it can file for reorganization (art. 9, L. 1116/06).

**Liquidation process**

There is no solvency requirement.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

The same requirements as for the reorganization process apply.

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

**Reorganization process**

No. Debtors who carry out permanent businesses in Colombian territory are eligible to file for reorganization. Local branches of foreign entities are also eligible (art. 2, L. 1116/06).

Overseas insolvencies: Local ancillary proceedings can be commenced for assets located in Colombia because of the prior commencement of main proceedings in a foreign jurisdiction. "Main foreign proceedings" are defined as the proceedings carried out in the jurisdiction where the debtor has its COMI (art. 87, L. 1116/06).

**Liquidation process**

No. Debtors who carry out permanent businesses in Colombian territory are eligible to file for liquidation. Local branches of foreign entities are also eligible (art. 2, L. 1116/06).

Overseas insolvencies: Local ancillary proceedings can be commenced for assets located in Colombia because of the prior commencement of main proceedings in a foreign jurisdiction. "Main foreign proceedings" are defined as the proceedings carried out in the jurisdiction where the debtor has its COMI (art. 87, L. 1116/06).

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

The rules of the reorganization process provided in Law 1116/06 apply.

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

**Reorganization process**

Yes. Reorganization proceedings are flexible, allowing the restructuring of both secured and unsecured claims. Assets that are not necessary for the economic activity of the debtor may be excluded from the reorganization if subject to a security interest.

**Liquidation process**

No. The liquidation of a company is a process that does not allow for the restructuring of secured and unsecured claims.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

Yes. Reorganization proceedings are flexible, allowing the restructuring of both secured and unsecured claims.

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

**Reorganization process**

Yes. The claims of creditors and shareholders are put into separate classes for purposes of voting and treatment under the plan.

Categories of creditors to obtain majorities: Insolvency law provides five categories of creditors: (1) labor creditors; (2) public and social security institutions; (3) financial institutions; (4) internal creditors (shareholders); and (5) all the other external creditors. As a general rule, to obtain approval for the reorganization agreement, the debtor must obtain the absolute majority of voting rights (more than 50%) of at least three of the five categories.

Classification of creditors for statutory payment order: See "What is the order of priority of claims?"

**Liquidation process**

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Categories of creditors to obtain majorities: Insolvency law provides five categories of creditors: (1) labor creditors; (2) public and social security institutions; (3) financial institutions; (4) internal creditors (shareholders); and (5) all the other external creditors. As a general rule, to obtain approval for the reorganization agreement, the debtor must obtain the absolute majority of voting rights (more than 50%) of at least three of the five categories.

Classification of creditors for statutory payment order: See "What is the order of priority of claims?"

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

Yes. The same categories of creditors of the general bankruptcy rules as apply for a reorganization also apply under this emergency regime.

However, under an emergency negotiation of debts, the debtor may negotiate and reach an agreement with only one or with various categories of creditors (art. 8, para. 3, Decree 560/20).

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

**Reorganization process**

No. Approval of a reorganization agreement requires an absolute majority of admitted votes coming from at least three different categories of creditors established in article 31 of Law 1116.

Shareholders are entitled to vote on a plan. Voting rights of shareholders are computed as follows: (1) the result of subtracting in-kind earnings and net worth appreciation from the total net worth (2) is multiplied by the shareholding interest. If net worth is negative, each shareholder shall be assigned one vote.

**Liquidation process**

No. Majority rules applicable to the approval of a reorganization agreement apply to an adjudication/assignment agreement.

Shareholders are entitled to vote on a plan. Voting rights of shareholders are computed as follows: (1) the result of subtracting in-kind earnings and net worth appreciation from the total net worth (2) is multiplied by the shareholding interest. If net worth is negative, each shareholder shall be assigned one vote.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

No, unless there is a debt-to-equity swap.

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

**Reorganization process**

Yes. A reorganization agreement approved by an absolute majority of voting rights is also binding for minority dissenting creditors.

**Liquidation process**

Yes. An adjudication/assignment agreement approved by an absolute majority of voting rights is also binding for minority dissenting creditors.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

In an emergency negotiation of debts, the reorganization plan shall be exclusively binding on those creditors pertaining to the categories of creditors subject to negotiation.

In expedited recovery proceedings, the debtor may submit the reorganization plan for approval by the Bankruptcy Court, which if approved would be binding to minority dissenting creditors.

# Commencing the Process

## Who can commence?

**Reorganization process**

The debtor, the Superintendence of Companies in charge of supervising the debtor, or any creditor whose credit has been unfulfilled, when the debtor is in default of two or more obligations with two or more creditors for more than 90 days or been sued as a defendant in two or more collection actions

The debtor or a number of external non-debtor related creditors, when the debtor faces foreseeable and imminent bankruptcy.

A foreign representative of a foreign insolvency proceeding

**Liquidation process**

The debtor

The authority in charge of supervising the debtor

The Superintendence of Companies

Jointly, the debtor and a number of external non-debtor related creditors representing at least 50% of the debtor's external liabilities

A foreign representative of a foreign insolvency proceeding

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

The debtor in the case of an emergency negotiation of debts

In the case of expedited recovery proceedings, all the subjects entitled to commence a reorganization according to Law 1116/2006

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

**Reorganization process**

No. However, the debtor's direct filing may be subject to standard bylaws' requirements on board or shareholder majority.

**Liquidation process**

No.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

No. However, the debtor's direct filing may be subject to standard bylaws' requirements on board or shareholder majority.

## Is there an ability to consolidate group estates?

**Reorganization process**

No. Special rules apply to the reorganization of business groups to ensure coordination between the proceedings commenced against each group member.

**Liquidation process**

Yes, and only where there is a business group. Business groups for bankruptcy purposes are defined as an integrated set of individuals, companies, trusts, or entities of any other nature that are involved in economic activities, linked or related to each other by the fact of being controlled or subordinated, or because most of their capital is owned or under the administration of the same individual or legal entity.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

The rules of the reorganization process provided in Law 1116/06 apply.

## Is there any court involvement?

**Reorganization process**

Yes. The court verifies objective thresholds or decides on insolvency relief on the grounds of imminent insolvency. During all stages of insolvency proceedings, the court is empowered to resolve disputes between the bankruptcy manager and creditors regarding issues arising within a bankruptcy case (e.g., clawback actions, complaints on actions/inaction of the bankruptcy manager, objections to the project of classification of claims and interests, approval of a selling order, etc.).

After initiation of the proceedings, the court takes a supervising function. The court's approval is required for certain actions, including the disposal of certain assets and the ratification of the reorganization agreement approved by the majority of creditors.

**Liquidation process**

Yes. The court verifies objective thresholds or grounds for admission and decides on the other grounds for liquidation.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

Yes, to confirm the reorganization plan reached between creditors and the debtor.

## Who manages the debtor?

**Reorganization process**

The debtor's management retains its powers, subject to the limitations imposed by law and by the bankruptcy court. The court appoints a promoter (promotor) who will be entrusted with the duty of helping the insolvent company reach an agreement with its creditors to restructure its debts.

**Liquidation process**

An appointed insolvency liquidator (agente liquidador).

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

The debtor's management retains its powers. In the emergency negotiation, general insolvency restrictions on operations apply (art. 17 of Law 1116 and article 8 of Decree 560)

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

**Reorganization process**

High. Once the debtor is admitted to reorganization, the Superintendence of Companies publishes on its webpage the financial information attached by the debtor to its filing for admission, specifically the inventory of assets and the project of classification of claims and interests. The Superintendence of Companies summons all creditors to submit any objections to this financial information. Creditors may follow up on the status of the proceedings via the webpage of the Superintendence of Companies or the Superintendence of Companies' offices.

During the negotiation and performance of the reorganization plan, the debtor must make available to its creditors quarterly reports on its financial situation, including its financial statements.

**Liquidation process**

High. Once the company is admitted to liquidation, the Superintendence of Companies publishes on its webpage and on the webpage of the debtor a notice of the commencement of the process for ten days. All the creditors have 20 days to submit their credit to the insolvency liquidator following those ten days. Based on the credits submitted, the insolvency liquidator will elaborate and deliver to the Superintendence of Companies the project of classification of claims and interests for its ratification. This project will contain the voting rights of each creditor in the negotiation of a potential agreement over the adjudication/assignment of the debtor's available assets.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

High. General insolvency rules on the publication of the debtor's financial information, creditors' claims and interests and voting rights shall apply by default.

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

**Reorganization process**

The insolvency regime provided in Law 1116 of 2006 applies to all types of debtors, except for those entities listed in article 3, which will be subject to specific rules. Those entities are as follows:

Specific health institutions

Financial institutions

Stock market entities

Utilities

Territorial entities and decentralized entities

**Liquidation process**

The insolvency regime provided in Law 1116 of 2006 applies to all types of debtors, except for those entities listed in article 3, which will be subject to specific rules. Those entities are as follows:

Specific health institutions

Financial institutions

Stock market entities

Utilities

Territorial entities and decentralized entities

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

Institutions covered by article 3 of Law 1116 may apply for expedited recovery proceedings.

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

**Reorganization process**

This would depend on various factors, such as the amount of the debt, previous negotiations conducted with the debtor, and the nature of the relationship with the debtor.

**Liquidation process**

N/A

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

N/A

# Effect of Process

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

**Reorganization process**

Commonly, the debtor remains in possession with a continuation of incumbent management unless agreed otherwise in the reorganization agreement. The law imposes certain limitations on the management of the debtor regarding certain operations (such as granting of new securities) as of the date of the request for admission.

**Liquidation process**

No. The Superintendence of Companies appoints an insolvency liquidator (agente liquidador) that will be entrusted with the administration and management of the debtor, and that will take the protective actions deemed necessary to prevent the deterioration or destruction of any of the assets, and the assignment of them according to the agreement reached with creditors or to the legal rules provided in Law 1116.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

The debtor remains in possession with continuation of incumbent management.

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

**Reorganization process**

Creditors will not be entitled to carry out collection proceedings against the debtor to collect the debts incurred prior to the debtor's admission into the reorganization proceeding.

In addition, with the filing for reorganization, and unless otherwise authorized by the Superintendence of Companies, the debtor is precluded from: making any amendments to its bylaws; granting or enforcing any collateral over its own assets, including trusts; making offsets, payments, waivers or settlements of its debts; and any act of disposal of title over assets of its estate other than acts in the ordinary course of business of the company.

It is forbidden for creditors to declare the unilateral termination of contracts due to the debtor's filing for or admission to a reorganization.

A moratorium usually has territorial effects. In some cases, the debtor may apply for recognition of the local proceeding in foreign courts, subject to each foreign law.

**Liquidation process**

All the collection proceedings commenced against the debtor shall be referred to the bankruptcy court for their inclusion as credits in the process of classification of claims and interests and are subject to the adjudication/assignment plan reached between the debtor and its creditors and to the statutory payment order.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

In an emergency negotiation**:** General insolvency rules on moratorium apply for emergency negotiation and to expedite recovery, with some exceptions:

The bankruptcy court has no power to lift precautionary measures enforced against the debtor under existing individual collection proceedings filed by creditors.

The bankruptcy court has no power to issue any type of instruction regarding any trust constituted by the debtor as security.

The bankruptcy court has no power to prevent creditors' unilateral termination of contracts.

At its sole discretion, the debtor may postpone payment of any administrative expense from the date of commencement of the negotiation without being in default of such obligation.

In expedited recovery proceedings: General insolvency rules apply, except those related precautionary measures.

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

**Reorganization process**

Yes. There are mechanisms to have superpriority when financing a debtor in reorganization.

The best way to achieve such superpriority would be by court approval or as part of the reorganization plan.

Superpriority is unlikely to trump labor and tax claims.

**Liquidation process**

No.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

New mechanisms for financing with superpriority are included, even over fiscal credits. Some of them include secured or unsecured refinancing of a debtor under a reorganization proceeding (art. 5 of D. 560), debt-to-equity swaps (art. 4 of D. 560), and issuance of risk bonds (art. 4 of D.560).

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

**Reorganization process**

Yes, depending on the terms of the agreed reorganization plan. This may also require shareholders' consent. The debt-to-equity swap requires the individual consent of the respective creditor.

**Liquidation process**

N/A

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

Yes, depending on the terms of the agreed reorganization plan. This may also require shareholders' consent. The debt-to-equity swap requires the individual consent of the respective creditor.

## Are third party releases available?

**Reorganization process**

Colombian law does not embody the concept of 'third-party releases.'

Under article 70 of Law 1116, if at the time of initiation of the reorganization proceeding, a creditor has collectively sued the debtor and third parties (guarantors, sureties, insurance companies, etc.) in a collection proceeding, such creditor can withdraw the suit against those third parties and opt to pursue its credit within the reorganization proceeding. In such a case, enforced precautionary measures over the assets of the third parties will be released.

**Liquidation process**

N/A

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

The rules of the reorganization process provided in Law 1116/06 apply.

## Are the proceedings recognised abroad?

**Reorganization process**

It depends on the specific rules of each jurisdiction where the Colombian proceedings are seeking to be recognized. Countries that have adopted the UNCITRAL Model Law on Insolvency are more likely to recognize Colombian insolvency proceedings.

**Liquidation process**

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**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

N/A, since they are not judicial proceedings.

## Has the UNCITRAL Model Law been adopted?

**Reorganization process**

Yes

**Liquidation process**

Yes

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

N/A

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

**Reorganization process**

Yes

**Liquidation process**

No

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

Yes

# Other Factors

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

**Reorganization process**

Directors or administrators of the insolvent company may be jointly and severally liable for any loss caused to other creditors due to a breach of trading restrictions enshrined in article 17 of Law 1116 (e.g., granting of new securities, payments made to satisfy certain creditors and other acts of disposal of title made after the date of filing for reorganization in aggravation of the financial situation of the debtor or at the cost of creditors' interests).

If the estate of the debtor is diminished or deteriorated due to willful misconduct or fault of its administrators, shareholders, statutory auditors or employees, they will be civilly liable for payment of the debtor's unpaid external liabilities.

There are also corporate regulations that require directors to inform the shareholders when certain possible causes for the dissolution of the company occur (e.g., reduction of net equity below 50% of the issued share capital). Failure to inform such dissolution grounds may make directors liable for any loss caused to shareholders or third parties (e.g., creditors) for operations concluded after the date of such dissolution grounds.

**Liquidation process**

From the date of admission into liquidation, the debtor, its administrators, directors or controlling entities shall not dispose of any of the debtor's assets at the risk of being imposed economic sanctions by the Superintendence of Companies (art. 50.11, L. 1116/06).

If the estate of the debtor is diminished or deteriorated due to willful misconduct or fault of its administrators, shareholders, statutory auditors or employees, they will be civilly liable for payment of the debtor's unpaid external liabilities.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

The rules of the reorganization process provided in Law 1116/06 apply.

## What is the order of priority of claims?

**Reorganization process**

The statutory payment order is as follows: (i) post-admission debts (i.e., administrative expenses); labor and tax debts; (ii) debts secured with a pledge; (iii) debts secured with a mortgage; (iv) debts with strategic suppliers, and (v) other debts.

Under articles 50, 51 and 52 of Law 1676 of 2013, creditors who constituted guarantees (i.e., security interests) over the debtor's moveable assets can enforce the guarantees to obtain payment of their credits, even if the debtor is admitted into reorganization if assets are not necessary for the development of the economic activity of the debtor. If the debtor enters into liquidation proceedings, and the guarantees over the debtor's assets are registered, the guaranteed goods can be excluded from the group of liquidated assets in order to pay the debt, as long as there are no outstanding pension claims.

**Liquidation process**

Same as in reorganization.

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

General statutory payment order of Law 1116 applies.

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

**Reorganization process**

Yes. Pension liabilities have first priority over all other kinds of creditors.

The insolvent debtor must comply with its pension liabilities during the entire reorganization process and the performance of the reorganization plan at the risk of going into liquidation if it does not.

**Liquidation process**

Yes

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

Yes. The insolvent debtor must comply with its pension liabilities during the entire negotiation or expedite recovery.

## Is it possible to challenge prior transactions?

**Reorganization process**

Clawback actions may proceed in case it is proved: (i) that any payment was made with the purpose of affecting a debtor's creditor(s) or altering the statutory payment order; (ii) that the remaining assets of the debtor are not enough to cover the debtor's liabilities; and (iii) that the debtor's counterparty to the transaction being clawed-back did not act in good faith when receiving such payment.

Gratuitous agreements (e.g., a gift) and an amendment to the debtor's bylaws may also be subject to clawback actions.

The look-back period is between six and 18 months, depending on the type of transaction.

**Liquidation process**

N/A

**COVID-19 emergency negotiation of debts or expedited recovery proceedings**

The rules of the reorganization process provided in Law 1116/06 apply.

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