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RESTRUCTURING REVIEW 2023

The Americas Restructuring Review is one of GRR's popular regional reviews series. It delivers insight and thought leadership from 43 pre-eminent regional names. This edition covers Bermuda, Brazil, the British Virgin Islands, the Cayman Islands, the wider Caribbean, Chile, the Dominican Republic, the European Union, Mexico and the United States and tackles topics such as trends in DIP financing and *Gibbs*.

Edited by Richard J Cooper and Lisa M Schweitzer

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Preface

Welcome to *The Americas Restructuring Review 2023*, one of Global Restructuring Review's annual, yearbook-style reports.

Global Restructuring Review, for any new visitors, is the online home for international restructuring specialists everywhere, telling them all they need to know about everything that matters in their chosen professional niche.

Throughout the year, the GRR editorial team writes daily news about cross-border developments, surveys and longer reads; organises the liveliest events (under our GRR Live banner); and curates a series of innovative tools and know-how products, such as our GRR recognitions dataset. In addition, assisted by external contributors, we publish a set of comprehensive regional reviews that delve deeper into developments than the exigencies of journalism allow.

The Americas Restructuring Review, which you are reading, is one such review. As its name suggests, it delivers insight and thought leadership from 43 pre-eminent practitioners from both American continents.

At 188 pages and 13 chapters, it's part retrospective, part primer, part crystal ball. All contributors are vetted for their standing and knowledge before being invited to take part and their contributions are all supported by abundant footnotes and relevant statistics.

This edition covers Bermuda, Brazil, the British Virgin Islands, the Cayman Islands, the wider Caribbean, Chile, the Dominican Republic, the European Union, Mexico and the United States.

As always with these annual reviews, a close read yields many gems. With interest rates and inflation around the world soaring, and the pandemic still looming large in the immediate past, that's especially true; this book has seldom been so timely. Among the nuggets mentally filed away by this reader:

- Bermuda is experiencing a race to the courthouse, post-pandemic;
- Brazilian football clubs now have their own bespoke insolvency law;
- the Cayman Islands has used *Luckin Coffee* wisely – as inspiration for sensible changes (see the excellent case study on p. 59);
- Mexico now has specialist bankruptcy courts; and
- Chile is on the point of another insolvency reform (the last one was in 2014).

There is also a fantastic series of chapters on developments in the United States and the European Union, including on a topic we haven't covered previously in this review: navigating the *Gibbs* rule.

Plus much, much more. We hope you enjoy *The Americas Restructuring Review*. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalrestructuringreview.com.

My thanks to all of our authors, and to Richard J Cooper and GRR editorial board member Lisa M Schweitzer, this review's editors, for steering us so well.

David Samuels
Publisher, Global Restructuring Review
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Dominican Republic

Fabio Guzmán Saladín and Pamela Benzán Arbaje

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In summary

This article discusses the challenges and updates in the application of the Dominican Republic restructuring and insolvency law, which came into force in February 2017. Since the law has been in force, the courts have developed criteria with regard to different topics that have raised questions, such as payment of officers' fees and process expenses. Furthermore, important criteria have recently been established in relation to the scope of the jurisdiction of the courts and their ability to suspend decisions rendered by other courts during the insolvency proceeding whenever such decisions affect the assets of the debtor. Likewise, certain contradictions between norms have been addressed, such as Law 189-11 on trusts that incorporated an abbreviated foreclosure procedure clarity has been provided on the effects of the law and the scope of the stay of proceedings conceived by it.

Discussion points

- Conflict between legal instruments solved by courts in relation to stay of proceedings, suspension of adjudication decision in foreclosure procedure and jurisdiction of labour courts
- Misuse of writ of protection for registration of credits
- Challenges of restructurings through trusts
- Criteria for payment of officers' fees

Referenced in this article

- Restructuring Law 141-15
- Executive Decree No. 20-17
- Reorganisation of Arconim Constructora, SA
- Reorganisation and liquidation of Transporte Duluc (Tradulca), SA Servicios Petroleros, SA and AMG, SA

Introduction

Law 141-15 governs insolvencies and restructuring proceedings in the Dominican Republic. The Law was enacted in August 2015, but only entered into effect on 7 February 2017, after an 18-month transitory period. Furthermore, the rules of application of Law 141-15 were signed into law by Executive Decree No. 20-17 on 13 February 2017.

The Dominican insolvency regulation has only been in force for five and a half years. Nevertheless, creditors and debtors are opting to make use of the country's restructuring statute to protect their credits or assets, and filings increased during covid-19 pandemic.

To provide an illustration of insolvency practice in the Dominican Republic to date, we refer to statistics provided by the courts and the processes published by the restructuring and liquidation courts on their website. Since the entry into force of the law in 2017:

- more than 56 restructuring cases have been dismissed by the court;
- there are currently seven local active cases and one foreign insolvency recognition procedure;
- only one judicial liquidation proceeding successfully concluded after the execution of the liquidation plan (*Trevigalante*); and
- only two companies ((Arconim and Munne) obtained approval from the creditors and the court for their reorganisation plan, Arconim being the first.

During the covid-19 pandemic, more than 25 restructuring requests and one foreign insolvency recognition proceeding request were submitted to the courts.

The authors' firm is participating or has participated in five of the seven active cases as per the local insolvency legislation. This article describes the main issues experienced by the authors in this area during the past 12 months.

Conflict between legal instruments solved by the court

Law 141-15 and its rules of application have been questioned by practitioners and judges for their loopholes, which have caused a lot of uncertainty and contradictions between decisions of different courts. The restructuring courts have used their special jurisdictional powers and relied upon comparative law and jurisprudence to try to fill those voids in the law and establish criteria and precedents to clarify those contradictions and provide legal certainty to the proceedings. Below, we will briefly discuss some of the criteria set by the courts when faced by contradictions between norms.

In relation to stay of proceedings

In the restructuring proceeding of the business group composed of Transporte Duluc (Tradulca), SA, Servicios Petroleros, SA and AMG, SA, one of the debtors of the company executed a pledge over two of the trucks of the company after the commencement of the restructuring proceeding. The trustee in this case filed a claim for restitution for or return of the trucks as assets of the proceedings, which was rejected by the court since the execution was performed before the decision was subject to the publicity measures stipulated by law (publication for three consecutive days in a national newspaper and in the web page of the insolvency court and at the corresponding chamber of commerce).

In that regard, there are certain contradictions between the law and the application norm. On one hand, article 54 of Law 141-15 states that the restructuring request means an independent and automatic stay in proceedings that suspends all judicial, administrative or arbitral proceedings that affect the assets of the debtor; suspends any enforcement or eviction procedures regarding the debtor's movable and immovable property; and freezes calculation of interest under loans and other credit documents, among other things, until the restructuring plan is approved or the judicial liquidation is ordered. This stay of proceedings will continue throughout the negotiation and conciliation process and will be lifted with the approval of the reorganisation plan or with the judgment that orders the initiation of the judicial liquidation process. On another hand, article 72 of the articles of the application norm clarifies that the suspensive effects contemplated in article 54 of Law 141-15 apply from the publication of the resolution of acceptance of the restructuring request.

Under normal circumstances, the law has superiority over the application norm; however, considering the nature of the dilemma, the court established that, according to international accepted doctrine and legal precedent, the provisions of the application norm are the ones to be taken into consideration when determining the exact moment of application of the stay of the proceedings. Also, the court's decision added that the publication of the decision is made once the appointed officer accepts its mandate, thus considering that in the case then at hand the execution of the pledge was completed on the same day the trustee accepted its appointment and 16 days before the decision was published in the local newspaper, the stay of the proceedings was not applicable, hence the trucks at issue in that case could not be returned to become assets subject to the proceedings.

The court's ruling is logical, legal and well motivated; however, it relies on the timely publication of the decision that orders the beginning of the restructuring process (one business day after the acceptance of the appointment by the trustee) to avoid seizure of assets via foreclosures that could affect the list of assets. In this case, the decision was published eight business days after acceptance by the trustee.

Suspension of adjudication decision in foreclosure procedure

Another conflict occurred regarding the application of the stay of proceedings in the foreclosure procedures that begin before the restructuring request is filed. The legal provisions that were in conflict in this scenario were Law 141-15 and Trust Law 189-11. Both laws are special laws with mandatory provisions that cannot be waived by the parties. The conflict was generated when some questioned whether the restructuring law would prevail over the trust law when a foreclosure is initiated before a restructuring request is even filed or accepted, since Law 189-11 envisions an expedited procedure for foreclosure with very limited possibilities for appeal or counterclaim, with nullity claim before the Supreme Court of Justice being the only available resource to attack a foreclosure adjudication decision. Furthermore, the wording of article 54 of Law 141-15 produced more uncertainty as it expressly excludes from the application of the stay of proceedings those processes where there is an foreclosure judgment, as long as the criteria for the nullity of transactions provided for in Law 141-15 does not apply.

In the restructuring proceeding of the business group composed of Transporte Duluc (Tradulca), SA, Servicios Petroleros, SA and AMG, SA, a foreclosure proceeding under Law 189-11 was initiated by a secured creditor before the commencement of the restructuring procedure. Even when the creditor was well aware of the stay proceedings applicable by Law 141-15, it continued with the process until the public auction, resulting in the adjudication of the real estate in favour of a third party. The trustee filed an urgent injunction claim to suspend the execution of the decision, which, after multiple counterclaims filed by the secured creditor and the adjudicated party, was accepted by the court.

In its decision, the court established several very important criteria such as:

- it reinforced the jurisdictional unity of insolvency courts when it established that an insolvency court is the competent court to rule on a claim seeking the suspension of execution of the foreclosure judgment that involves a property owned by a debtor involved in an insolvency procedure, since it has exclusive jurisdiction to rule on not only the restructuring and liquidation procedures themselves, but also any judicial or extrajudicial action related to the debtor and its assets, including injuction and constitutional claims; and
- it confirmed the hierarchy of insolvency law over trust law, considering the specialty of the matter as well as chronological order (Law 141-15 was enacted after Law 189-11).

The creditor and adjudicated party filed an appeal questioning, among other things:

- if the restructuring court had jurisdiction to suspend the execution of an adjudication decision;

- if the trustee complied with Law 141-15, since it did not file a stay of foreclosure proceeding before the adjudication decision was rendered by the court; and
- if Law 141-15 prevails in a foreclosure under Law 189-11.

On 22 December 2021, the Court of Appeals of the National District issued Decision No. 026-02-2021-SCIV-00764, which rejected the appeal and ratified the decision of the court of first instance. The decision addressed the questions of the appellants and set out an important precedent in relation to the jurisdictional unity of Law 141-15. First, it ratified the position that the restructuring and liquidation courts have jurisdiction to rule on any claim referring to the assets of the debtor, including the suspension of a foreclosure proceeding, if the proceeding is ongoing or is initiated after the restructuring request has been approved.

Furthermore, the Court of Appeals upheld that when a debtor is subject to an insolvency proceeding under Law 141-15, the law and jurisdiction prevails over any other, including Law 189-11, thus, the restriction on appeals and time frames established in that law are not applicable.

Also, it clarified an important question regarding the interpretation of article 23 of Law 141-15. This article indicates that after the commencement of a restructuring proceeding, any creditor, officer of the court or any third party that has a legitimate interest in the proceedings that has knowledge of any ongoing judicial or extrajudicial proceeding that affects the assets of the debtor can request a stay of proceedings through the restructuring court. Many creditors were misinterpreting this article and claiming that the stay of proceedings conceived in article 54 of Law 141-15 was not automatic and had to be requested so that it would suspend any decision. However, the Court of Appeals indicated that it was not a condition precedent for the stay of proceedings of article 54 to apply, especially when the trustee, as officer of the court, was not part of the foreclosure proceeding when it initiated. It also noted that the creditor could not continue with a foreclosure after being aware of the commencement of the insolvency proceeding and the automatic stay of proceedings, especially when that creditor participated in the insolvency proceeding and submitted the registration of its credit to the trustee.

Finally, is important to highlight that, according to article 181 of Law No. 141-15, upon initiation of the liquidation procedure and prior admission of their claims, creditors with lien, mortgage or the tax administration may execute their individual rights if the liquidator fails to initiate the liquidation procedure within a period of 45 business days after the definitive list of credits has been certified by the court.

Jurisdiction of labour courts

Another important challenge in the development of insolvency jurisprudence and practice in the Dominican Republic has been the resistance of some specialised jurisdictional courts, particularly labour courts, to recognise the preference of Law 141-15 during insolvency proceedings, as well as the universal and excluding jurisdiction of the insolvency courts in relation to the assets of the debtor.

Labour courts routinely misinterpret or even ignore the application of Law 141-15. This resulted in multiple instances where labour creditors filed precautionary and executory measures before the labour courts, which were granted despite the stay of proceedings caused by Law 141-15. In their reasoning, among other things, the labour courts indicated that a restructuring court of first instance could not suspend the decision of a labour court of appeals because it violated the judicial order. In the same line of reasoning, it established that the Labour Code, like Law 141-15, is a mandatory law and should prevail for the protection of the labour creditors due to the specialisation of the norm doctrine.

The authors of this article, acting as trustee and auxiliary expert, respectively, filed an injunction suit to obtain suspension of the decisions of the labour courts that ordered precautionary and executive measures over the assets of debtors based on the application of the automatic stay of proceedings.

The restructuring court stated that the labour courts retained jurisdiction to rule on labour claims, which decisions would be taken into consideration for the registration of the labour credits in the insolvency process. However, the labour court could not order any kind of precautionary or executive measure over the debtor's assets in relation to a labour claims, since the jurisdictional authority over those claims was reserved to the restructuring court.

We are still waiting for the opinion of the court of appeals to confirm if the criteria will be upheld.

Challenges of restructuring through trusts

Another challenge that we have faced in the enforcement of the law is when the restructuring is performed through the incorporation of a trust. Even though the law expressly contemplates this possibility it does not regulate the special procedures for the incorporation of the trust that should be followed to guarantee the protection of the creditors rights, the principles of the law and rules of payments established in it, as well as the celerity and transparency that this process requires. In practice, the only restructuring through a trust that has been approved so far is the *Arconim* case, which was approved more than one year ago. Despite the efforts of the debtor and the trustee, and multiple requests, it has been impossible to complete the incorporation of the trust, mainly due to the illegal obstacles established by the tax authority.

This is a very important issue that should be addressed in future modifications of the law so that the procedure and requirements are clear, and to avoid the application of discretionary powers by the tax authority in their requirements, which are only aimed at securing and benefiting the payment of the tax credits, in total violation of the principles of Law 141-15.

Misuse of writ of protection for registration of credits

As per Dominican insolvency legislation, the creditors must declare to the trustee all the credits they hold against the debtor that were originated before the beginning of the insolvency proceedings. This must be done within 30 working days of the publication of the decision ordering the reorganisation of the company, on the web page of the court and in a national newspaper. After that period, the trustee must present to the court a provisional list of existing creditors within 30 additional working days. After filing the report, the court will publish a provisional list of the recognised creditors in a newspaper, and will notify the creditors and the debtor. The court must also decide on the registration of unliquidated credits, based on the information provided by the accounts of the debtor and the creditors, even in cases where the creditors have not requested recognition of the credit. The unliquidated credits are taken into consideration for the reserves of the liquidation process and are not paid until the credits are liquidated. The creditors can begin proceedings to liquidate the amounts owed for the registration of their credits.

All credits not declared in this period may become part of the restructuring process through a late declaration process. The costs involved in such process will be borne by the creditor, except when the delay is caused by an act of God or fortuitous event, which must be demonstrated to the court. On the other hand, the secured creditors who were not informed about the commencement of the proceedings or the designation of the trustee may declare their credits at any time. A lack of declaration within the time frames conceived in the law will result in the disallowance of the creditors's claims in the distributions provided for in the restructuring plan unless the court orders otherwise.

Since this procedure entails that creditors who do not register their credits before the trustees on time will be left out of the distributions of the restructuring plan, non-registered creditors have been trying to pursue the registration of their credits by misusing writs of protection.

Writs of protection are conceived for the protection of constitutional rights; however, we have seen multiple writs of protection filed in the *Arconim* case by non-registered creditors who argue, among other things, that being left out of the restructuring plan violates their constitutional property right and directly argue the unconstitutionality of Law 141-15. Since the restructuring court has jurisdiction to rule on these kinds of claims, all the writs of protection

submitted so far have been dismissed, considering that there is no violation of any constitutional right as no violation can be verified due to the claimants non-compliance with the due process established in the law for the registration of their credits. The court also established that being left out of the restructuring plan does not affect their rights of collection as they can pursue the collection of their credits after the execution of the restructuring plan is completed or in the case of a liquidation. This position of the court brings a lot of judicial certainty to the process as it guarantees that non-registered creditors cannot affect the process by misusing writ of protections as has happened in other jurisdictions such as Colombia. The creditors have appealed the decisions of the restructuring courts before the constitutional court and we are still waiting for the ruling, which we hope will reaffirm the criteria established by the restructuring court.

Criteria for payment of insolvency officer's fees

In the Dominican legislation, creditors cannot request the involuntary liquidation of the debtor before attempting a restructuring. On the contrary, debtors may initiate a voluntary liquidation and there are no material differences to proceedings opened involuntarily.

Nevertheless, even when this is a possibility, most cases prone to liquidation start with a restructuring attempt from the debtor. This fact ultimately causes the court to appoint several officials, hence creating an important financial burden and privileged (priority) claims resulting from the fees of the officers involved. For instance, in some cases, the debtor requests a restructuring but the court designates a verifier before appointing a trustee and, upon the impossibility of a restructuring, appoints a liquidator. This results in fees that are owed and a privileged claim is automatically generated for three different officers.

Regardless, even when the claim for the fees of the officers is considered privileged, and thus is of higher priority for collection and payment that are only preceded by labour liabilities, most professionals listed as potential officers for restructuring and liquidation proceedings are extremely disappointed in how some courts are treating the payment of their fees and expenses. Some even have asked to be removed from the officer's registration lists used by the courts to appoint the officials for the insolvency procedures.

Originally, the problem resided in the fact that most courts did not allow advance payments of officers' fees and expenses, so all the officers involved in insolvency proceedings had to bear all of the expenses incurred, including the fees for bailiffs required for subpoenas, expendable materials, fuel, travel expenses, as well as fees for their auxiliaries and the hours incurred by them in the insolvency work without having any certainty as to if, or when, they will get paid. The scenario started to change for trustees and liquidators after several requests of advance partial payment of fees from officers under quite different

circumstances, which were accepted by the courts by applying a purposive approach when interpreting the law.

In that sense, the courts established that an advance payment based on a provisional estimation of trustee fees is possible even when the law provides that the trustee fees are determined when the restructuring plan is approved and certified, or when the restructuring plan is terminated. The court understood that the fact that the fees cannot be liquidated in advance does not prohibit the court from making an advance payment on a provisional basis, considering the range indicated in the law for the payment of the trustee fees, which must be calculated and fixed based on 1 per cent to 3 per cent of the value of the total assets of the debtor.[1,2]

However, there has been an underlying problem for the payment of the verifier's fees, since local law establishes that the verifier is the person designated by the court to verify, dictate and inform the court of the financial situation of the debtor following the initial request for restructuring. Its designation is not mandatory, as the law establishes that whenever the court is provided with sufficient documents or information to evidence the imminent or actual insolvency and financial situation of the debtor, it can skip the designation of the verifier and directly appoint a trustee to begin the negotiation and conciliation phase of the process. Conversely, whenever these elements are not provided to the court with the initial request, the report of the officer confirming the financial situation of the debtor and the viability of a restructuring procedure is a precondition for a restructuring request to be approved.

The law establishes that a provisional estimation of the verifier's fees must be performed by the court when appointing the verifier, while the final liquidation of the verifier fees is performed once its work is completed and a decision on the original request is rendered by the court. As per the moment of payment of the verifier's fees, the law is not clear as it only indicates that all officer's fees have a privilege for payment and must be paid before any other debt, except labour debts. However, it does not specifically establish when they must be paid. In practice, their payment has been performed late in the process after the liquidation or restructuring plan has been approved and executed. This situation caused all verifiers to reject their designation and even ask for removal of the officers' list.

To remedy this, the court developed the criteria that the verifiers fees should be paid as soon as their participation in the process was concluded and five days after the decision of the court on the admissibility or dismissal of the request was

1 Seventh Chamber of the Civil and Commercial Chamber of the Court of First instance of the Judicial Department of Santiago acting as Court of Restructuring and Liquidation of First instance. Order No. 975-2019-TREE-00004, File No. 975-2019-EREE-00001, 7 August 2019.

2 Tenth Chamber of the Civil and Commercial Chamber of the Court of First instance of the Judicial Department of the National District acting as Court of Restructuring and Liquidation of First instance. Order No. 1532-2019-SAUT-00029, File No. 1532-2019-EREE-00005, 12 November 2019.

notified to the claimant. The court used compared doctrine and jurisprudence, specifically from Spain, to indicate that the priority granted to the verifier's fees are based on the role they play in the process and that they must be paid outside the restructuring or liquidation procedure, before the distribution and payment is performed within the execution of a restructuring or liquidation procedure. This was a very wise decision to guarantee the participation of the verifiers in these procedures.

Furthermore, the court in the *Munne* case accepted the request of the trustee to order the advance payment of a proportion of the fees that would correspond to the officer during the execution of the restructuring plan. This precedent is very beneficial and brings to light the officers who have been resigning from cases and requesting to withdraw from the officers' registry based on the uncertainty of payment of their fees caused by past decisions and the current legal framework, which does not establish a procedure or protection for the officers for the payment of their fees, other than the privilege conceived in the law.

Considering all of these challenges, some attorneys are working on the draft of a bill to modify the rules of application of Law 141-15 in relation to the payment of officers' fees. A review (the Observatory of Mercantile Restructuring of the Dominican Republic) of the Dominican Federation of Chambers of Commerce is also working with the judiciary and the restructuring courts to make improvements to the law and provide training to judges in different areas of insolvency law.

In conclusion, there are multiple issues to be addressed by the insolvency courts of the Dominican Republic; however, considering the very limited period in which the law has been valid, it is too soon to discuss established criteria for any specific problems that have arisen so far.

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Fabio Guzmán Saladín is co-chair of the corporate practice of Guzmán Ariza. He has represented a wide range of domestic and international companies in mergers and acquisitions, banking, finance and project finance. He also focuses his practice on the areas of corporate bankruptcy, cross-border insolvency, financial investigation and asset recovery. He has represented several multinationals in complex bidding negotiations and government contracts in the country. Fabio is the leading attorney in the first major bankruptcy and restructuring case in the Dominican Republic, where he handles 90 per cent of all the restructuring procedures in the country. He has participated both as trustee and as attorney

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Pamela Benzán Arbaje provides legal assistance to Guzmán Ariza's clients in business transactions and financing. Her main practice areas are corporate and business, restructuring and bankruptcy, mergers and acquisitions, project finance, banking, capital markets and foreign investment. She has extensive experience with distressed companies, corporate restructurings, corporate bankruptcy, cross-border insolvency, financial investigation and asset recovery and has assisted local and international clients in restructuring and judicial liquidations procedures in the Dominican Republic as per the local insolvency legislation, having an active participation in 90 per cent of the cases in the country, both as an ancillary expert of the trustee and attorney of the debtor or main creditors. Due to her expertise, she was recently appointed by the Federation of Chambers of Commerce of the Dominican Republic as coordinator of the Observatory of Mercantile Restructuring of the Dominican Republic and is also working with the restructuring committee of said Federation in the preparation of a bill to modify the current restructuring legislation.

Founded in 1927, Guzmán Ariza is the largest law firm in the Dominican Republic, with seven offices strategically located to serve clients in every major business centre in the country. The firm's multilingual and multinational staff is equipped to assist international clients across a wide variety of practice areas.

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