

 **LATIN LAWYER**

THE GUIDE TO RESTRUCTURING

THIRD EDITION

Editors

Joy K Gallup and Michael L Fitzgerald



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Published in the United Kingdom by Law Business Research Ltd
by Law Business Research Ltd, London
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
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www.latinlawyer.com

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ISBN 978-1-80449-262-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AlixPartners, LLP

Baker & McKenzie LLP

Bomchil

Corona & Nepote, SC

Creel, García-Cuéllar, Aiza y Enríquez, SC

Del Castillo y Castro Abogados

D'Empaire

Galdino & Coelho, Pimenta, Takemi, Ayoub Advogados

Marval, O'Farrell, Mairal

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

Paul Hastings LLP

Sainz Abogados, SC

Santamarina y Steta, SC

Publisher's Note

Latin Lawyer and LACCA are delighted to publish the third edition of *The Guide to Restructuring*.

Edited by Joy K Gallup and Michael L Fitzgerald of Baker & McKenzie LLP, the Guide brings together leading practitioners from throughout the region and across a variety of disciplines to provide guidance designed to benefit all those advising on restructurings on Latin America.

Restructurings are, by their nature, both international and deeply domestic; while moves to standardise and draw together the legislative framework in the region demonstrate both the benefits and challenges of this trend. Understanding the commonalities, but also the differences, in black letter law and common practice in this area is thus critical. The Guide draws on the expertise of highly sophisticated practitioners to analyse the latest happenings in order to provide readers with the tools that they need. Its aim is to be a valuable resource for insolvency and restructuring advisers of all stripes as they play their part in the complex economic situation facing Latin America today.

We are delighted to have worked with so many leading individuals to produce *The Guide to Restructuring*. This third edition expands on the previous two editions with the addition of chapters on the Mexican Insolvency Law, equity versus debt in Mexican restructurings, the impact of the banking crisis in Mexico, and a broader look at the growing importance of ESG in restructurings.

If you find it useful, you may also be interested in the other Guides in the Latin Lawyer series, including *The Guide to Infrastructure and Energy Investment*, *The Guide to Corporate Crisis Management*, *The Guide to International Arbitration in Latin America*, *The Guide to Mergers & Acquisitions*, *The Guide to Environmental, Social and Corporate Governances* and *The Guide to Corporate Compliance*.

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.

Liz Rutherford-Johnson

Latin Lawyer

London, September 2023

Introduction

Joy K Gallup and Michael L Fitzgerald¹

The aim of this guide is not to summarise the restructuring laws in the region but rather to offer insights 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. In preparing the third edition of this Guide, we continue to note the common themes as well as the jurisdictional differences that affect all the primary debt restructuring practices in Latin America, as well as the economic and political factors that play into restructuring outcomes. Restructuring lawyers and financial advisers often criticise various perceived failings of their respective court systems, or find fault with the applicable laws and regulations of their jurisdiction that might favour equity holders or the debtor versus the creditors, or vice versa, depending on their point of view. On the other hand, many practitioners are proud to highlight recent successes that illustrate the evolving nature of their local bankruptcy and reorganisation regimes and practices. 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 (including evolving global and regional economic and political factors) change.

¹ Joy K Gallup and Michael L Fitzgerald are partners at Baker & McKenzie LLP.

In many countries in Latin America, the bankruptcy laws have tended to provide greater protection to debtors than creditors, but those laws are changing. Because of the roles of the different stakeholders in a bankruptcy proceeding, corporate legal structures and corporate governance issues are key to understanding how reorganisations are carried out in Latin America. 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.

The need for greater efficiency in the process for in-court reorganisations is a common theme that has 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. In Brazil, these new reforms include provisions to accelerate the bankruptcy process, for both reorganisations and liquidations, and to clarify the procedures for DIP financings, 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. The latest set of reforms in Mexico, in 2019, established new courts dedicated to insolvency matters, to help achieve the streamlined timetable mandated under the law for a reorganisation to be accomplished; nevertheless, further improvements are desirable as that streamlined timetable has not been adhered to, owing to litigation and other issues relating to the courts.

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. In Argentina, resolving the sovereign default continues to be one of the most significant factors, with the completion of the restructuring process having an outsized impact on Argentina's economy and the related wave of provincial and corporate debt restructurings, whereas the Venezuela sovereign debt issues continue to dominate that jurisdiction with no resolution in sight. Meanwhile, the most recent wave of restructurings elsewhere in the region has affected banking and non-banking financial institutions, with a concentration of cases in Mexico but many in other jurisdictions as well. Looking forward, the rising costs of borrowing due to inflation and higher interest rates will likely have an impact on a number of credit-intensive industries.

Part I examines recent developments in the restructuring laws and legal systems in Argentina, Brazil and Mexico. The first chapter is a discussion of questions posed by restructuring developments in Argentina, from Tomás M Araya and Martín Torres Girotti of Bomchil, including how well the Acuerdo Preventivo Extrajudicial (APE) is working and certain issues with implementing a restructuring under an APE. The second chapter provides an overview of the reforms adopted by Statute No. 14,112/2020 to the Brazilian bankruptcy laws from Isabel Picot França and Rodrigo Saraiva Porto Garcia of Galdino & Coelho, Pimenta, Takemi, Ayoub Advogados, including a discussion of the benefits of the reforms, particularly in certain cross-border insolvencies, as well as continuing challenges in implementation. Following that is a chapter discussing recent developments in restructurings in Mexico from Thomas S Heather and Christian Dorantes Picazo of Creel, García-Cuéllar, Aiza y Enríquez, SC, including the positive effect of the creation of two specialised federal district courts as well as issues that arose as a result of the covid-19 pandemic.

Part II picks up on the theme of benefits and challenges in determining restructuring outcomes. Pedro A Jimenez of Paul Hastings collaborates with editor Joy K Gallup of Baker McKenzie to explore why the choice of Chapter 11 as an attractive alternative to local filings in cross-border restructurings may be accelerating, including in the recent Latin American airline restructurings. The following chapter, by Fernando del Castillo and Karla Silva of Del Castillo y Castro Abogados, reviews how litigation and other factors affect bankruptcy proceedings in Mexico. Another common theme in Latin American restructurings is addressed by Alejandro Sainz and 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.

In addition, Ricardo Orea, Norma Álvarez and Pablo Ortiz Mena of Santamarina y Steta, SC explore another topic of great current interest in the region and elsewhere: how the emphasis on environmental, social and governance investment criteria is growing and is expected to affect investments and outcomes in distressed situations, particularly in the energy and infrastructure sector.

In Part III, we examine two Latin American sovereign debt restructuring situations, with very different perspectives. First, Roberto E Silva, Jr, Martín Campbell and Agustina M Ranieri of Marval, O’Farrell y Mairal provide 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), as well as the related restructuring of local law bonds and credit facilities with the International Monetary Fund and the Paris Club. 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 IV, our experts take a closer look at a couple of specialised industry case studies. Francisco José Rodríguez Nepote of Corona & Nepote, SC reviews the history of banking crises in Mexico and the legislative responses over time, leading up to more recent bank failures. Marcelo Ricupero, Frederico Kerr Bullamah, Giovanna Campedelli and Bernardo Ferreira Martins da Costa of Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados provide an in-depth analysis of debtor-in-possession financing in Brazil in general and as specifically applied in the well-known judicial reorganisation of the Brazilian telecommunications group Oi. And last but not least, Eric Deichmann and Michael Oestreich of AlixPartners look at the history of the aviation industry and what has been happening during the pandemic to the airlines in the region, including the significant number going through restructurings.

This Guide owes its existence to the tremendous generosity and efforts of so many participants. We are extremely grateful to all our esteemed contributors, and wish to extend our thanks for their time and thoughtfulness in sharing their expertise and their insights on these topics. We are also very grateful for the contributions of our colleagues at Baker McKenzie in assisting in the production of this Guide.

Restructurings are, by their nature, both international and deeply domestic. Understanding the commonalities, but also the differences, in black letter law and common practice in this area is thus critical.

The third edition of *The Guide to Restructuring* – edited by Joy K Gallup and Michael L Fitzgerald of Baker McKenzie – 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 – to help them navigate this complex process.

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ISBN 978-1-80449-262-8