



Restructuring and Insolvency

in 57 jurisdictions worldwide

Contributing editor: Bruce Leonard

2009



Published by
GETTING THE DEAL THROUGH
in association with:

Advokaturbüro Dr Dr Batliner & Dr Gasser
 Andreas Neocleous & Co LLC
 Appleby
 Attorneys-at-Law Foigt & Partners/Regija Borenius
 Bell Gully
 Borenius & Kemppinen Attorneys at Law Ltd
 Bowman Giffillan
 Cassels Brock & Blackwell LLP
 Chancery Chambers
 Charles Adams Ritchie & Duckworth
 Djingov, Gouginski, Kyutchukov & Velichkov
 Dundas & Wilson
 Eugene F Collins
 Felsberg e Associados
 Freshfields Bruckhaus Deringer
 Hassans International Law Firm
 Headrick Rizik Alvarez & Fernández
 Herzog, Fox & Neeman
 Hoet Peláez Castillo & Duque Abogados
 Liepa, Skopina/Borenius, Attorneys at Law
 Lipman Karas
 Logos Legal Services
 Luiga Mody Hääl Borenius
 Mayer Brown JSM
 Mourant du Feu & Jeune
 Oostvogels Pfister Feyten, Avocats à la Cour
 Oscós Abogados
 Osei-Ofei Swabi & Co
 Ozannes
 Öztekin & Co
 Patton, Moreno & Asvat
 Paul, Weiss, Rifkind, Wharton & Garrison LLP
 Punuka Attorneys & Solicitors
 Saah and Company
 SCP Miriana Mircov Relicons SPRL
 Setterwalls
 Shearn Delamore & Co
 Shin & Kim
 Walder Wyss & Partners Ltd
 Wardyński & Partners
 Weil, Gotshal & Manges

Panama

Marleni Paolo and Juan Carlos Baquero

Patton, Moreno & Asvat

1 Legislation

What legislation is applicable to bankruptcies and reorganisations?

The Code of Commerce (articles 1534 to 1648) regulates the declaration of bankruptcy of companies or natural persons engaged in business activities and its effects. Bankruptcy proceedings are filed before civil courts according to the provisions in the Judicial Code (articles 1786 to 1912).

2 Excluded entities

What entities are excluded from bankruptcy proceedings and what legislation applies to them?

Ordinary bankruptcy legislation does not apply to the following legal entities, which have special regulations with particular provisions dealing with bankruptcy and reorganisations, as follows:

- banks – Executive Decree No. 2 of 30 April 2008;
- insurance and reinsurance companies – Law 59 of 29 June 1996, Law 60 of 29 July 1996 and Law 63 of 19 September 1996;
- securities companies – regulated by Decree Law 1 of 8 July 1999, which creates the National Securities Commission and rules the securities industry in Panama;
- trust companies – Law 1 of 5 January 1984, ‘by which trust funds in the Republic of Panama are regulated and other dispositions are adopted’; and
- cooperative companies – Law 17 of 1 May 1997, ‘by which the special regime of cooperative companies is established’; its ruling was adopted through Executive Decree 39 of 22 October 1998.

3 Secured lending and credit (immovables)

What are the principal types of security devices that are taken on immovable (real) property?

Mortgages

Regulated in articles 1566 to 1621 of the Civil Code, mortgages are constituted as a security of an obligation and, as a general principle, the immovable property must be owned by the same person constituting the mortgage. Notwithstanding this, it is permitted for third parties to secure a principal obligation mortgaging their own personal property.

Article 1734 of the Judicial Code provides that, in order to foreclose on a mortgage in Panama, the creditor must file ‘executive mortgage proceedings’ before the corresponding circuit court. The complaint must be against the debtor.

The creditor must file the complaint together with the original public deed containing the mortgage, a public registry certificate certifying that the mortgage is in force, whether or not there are any other encumbrances over the same asset and who is the current owner, and an accounting certificate issued by the creditor expressing the total amount owed and interests.

After reviewing the complaint and the required documents, the judge will issue an executive order containing a payment order stating the capital, interest and legal costs owed, and ordering the embargo of the mortgaged property. The embargo is achieved solely by putting notice of this in the Public Registry, unless the creditor requests that the mortgaged asset be deposited with the court through a custodian.

Antichresis

Governed by articles 1622 to 1628 of the Civil Code, antichresis is a real right that enables the creditor to perceive gains from the property with the obligation to apply them to interest payments if any are owed. If there is no interest or if the gains exceed them, the gains will be applied to the capital owed.

Trust

By means of Law No. 1 of 1984, a trust is defined as a legal act whereby a settlor transfers property to a trustee to be administered or disposed of in favour of a beneficiary. The settlor may be a beneficiary of the trust.

A trust may be established over property of any nature, be it present or future, and additional property may be added subsequent to the creation of the trust with the acceptance of the trustee.

Trustees have all the rights and actions incidental to the possession of property but subject to the purpose of the trust and the conditions and obligations imposed thereon by law and the trust deed.

Vessel mortgages

Articles 1512 to 1526 of the Code of Commerce of Panama refer specifically to ship mortgages granted on Panamanian flag vessels. Reference is made therein to the provisions of the Civil Code on mortgages on immovables (real estate) and these provisions apply to the extent that they are not in contradiction with the special provisions of the Code of Commerce.

A ship mortgage may be granted to secure all kinds of lawful obligations, including future obligations, and obligations subject to precedent conditions, for example revolving credit facilities or loan facilities with an option to convert to a different currency during the term of a loan. In addition, the substitution of a debtor does not affect the principal obligation, nor extinguish the mortgage.

The Code of Commerce establishes the right of the mortgagee to take possession and manage the vessel if it is deemed convenient for the protection of credit. Likewise, the Code of Commerce contemplates the right of the mortgagee, if it has been agreed in the mortgage contract, to sell the vessel by private sale in an event of default.

4 Secured lending and credit (moveables)

What are the principal types of security devices that are taken on moveable (personal) property?

Pledge agreement

According to Panamanian law, it is possible to subscribe a pledge agreement over moveable property. A pledge gives the pledgee the right to obtain payment from the value of the property given in pledge with preference over other creditors.

Under the Code of Commerce, parties have the freedom to choose the governing law that will apply to the pledge. Some general characteristics of pledge agreements governed by the laws of Panama are:

- the pledge extends to payment of principal, interests, and conservation and collection expenses;
- in the event of default, and in the absence of an agreement concerning a particular form of disposition, the pledgee may apply for the judicial sale of property given in pledge. If the property given in pledge consists of securities or commercial property publicly quoted, the sale thereof may be made through a broker, with prior notice to the pledgor, at the quoted value on the date of sale;
- the pledge agreement may contain a clause authorising the pledgee to appropriate or take over the property given in pledge in an event of default, namely private sale, but subject to appraisal by two brokers selected by each of the parties, or by a third broker designated by these two in case of disagreement, or by the corresponding judicial authority in absence of the designation thereof; and
- the parties to a pledge agreement must agree the method that will be used to determine the value of goods given in pledge for purposes of a private sale or appropriation thereof to ensure fair value upon application to the amount owed. If no such valuation is agreed upon in the corresponding contract, the parties must appoint appraisers and ultimately it will be decided by a court in the event of disagreement.

Pledge of the shares of a Panamanian company

Corporations and limited share partnerships (*sociedad en comandita por acciones*) are the two legal entities under Panamanian law with a stock capital upon which share pledges may be granted. Under Panamanian law, any natural or legal entity, whether national or foreign, can own and pledge shares held in these Panamanian corporate vehicles.

A pledge agreement in respect of shares of a Panamanian company may be governed by laws other than those of Panama, and a court in Panama would enforce terms in accordance with the laws of the corresponding jurisdiction unless these are contrary to the laws of Panama or in contravention of public policy in Panama.

Under Panamanian law, share pledge agreements should be in writing and shares must be delivered to the pledgee or a third party to be valid and enforceable.

To the extent that the pledge of shares is governed by the laws of Panama, the relevant provisions of the Code of Commerce that apply to pledges in general are applicable.

General pledge of assets (floating charge)

Article 829-A of the Code of Commerce allows a Panamanian company to grant a general pledge of its assets located outside of Panama.

The general pledge of assets as contemplated under the laws of Panama may be granted in public instrument issued in Panama or by private document authenticated by a notary public in the jurisdiction where it is executed and thereafter legalised by a Panamanian consul or by *apostille*. In addition, the general pledge of assets must

be registered at the Public Registry Office in Panama to be valid against third parties.

The general pledge of assets may be governed by a foreign law. In addition, it would only affect assets situated outside Panama and will not enjoy preference over charges made against specific assets.

Mortgages on moveables

The Law on Mortgages on Moveables states that the duration of the mortgage may not exceed four years. An exception to this four-year limit may apply when the mortgage refers to loans or financing given by financial institutions for the development of the industry or for agricultural or agro-industrial projects.

5 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Seizures

To avoid a false or illusory process and to prevent the defendant from moving or transferring the property he or she possesses, the plaintiff could request, before presenting the suit or afterwards, or at any time during the process, the deposit of the assets in the hands of someone appointed by the judge.

Attachments

If the plaintiff has any justified and confirmed information that his or her right is going to be threatened, the plaintiff could request of the judge the application of conservatory or protective measures to provisionally secure the effects of a foreseeing judgment. A bond must be presented alongside the request.

Ordinary proceeding

Any matter not established as to be dealt with through a special process in the Judicial Code will be decided by this method. In an ordinary action the parties have broad opportunities to submit evidence to the court supporting their respective positions, as well as to file motions and submit arguments.

Executive proceedings

These could be established for the compliance with any clear obligation based on written documents issued by the debtor, which should be presented as proof against him or her.

When a creditor holds a pledge or mortgage right, it can start executive proceedings to obtain payment from the value of the property given in pledge or mortgage, with preference over other creditors.

All the above processes are time-consuming.

With respect to foreign creditors, if the parties contracted under a foreign jurisdiction and the credit is legal, it can be executed in Panama. The credit must be first recognised and then executed via *exequatur*.

6 Courts

What courts are involved in the bankruptcy process? Are there restrictions on the matters that the courts may deal with?

A petition for bankruptcy shall be submitted before the circuit court in Panama where the debtor has its commercial domicile. If the debtor does not have a commercial domicile, the declaration of bankruptcy may be requested to the circuit judge wherein the debtor has his or her personal residence. If the debtor has two or more establishments in different places, the circuit judge of any of these shall have stand-

ing to consider the matter.

Upon declaration that a state of bankruptcy exists, the corresponding court should notify the Public Registry that a state of bankruptcy has been declared to put said Registry on notice concerning documents that may be filed for registration and for the corresponding annotation to be made at the referred Registry.

7 Voluntary liquidations

What are the requirements for a debtor to commence a voluntary liquidation of its business? What are the effects of the commencement of the liquidation?

A petition requesting the declaration of bankruptcy must be filed before the court by the debtor himself or herself within two days of defaulting on the payment of an obligation. If the debtor is a company, this obligation corresponds to the managing partners, administrators, directors or liquidators.

The debtor filing for bankruptcy must voluntarily hand over all its assets, and present to the court an inventory of its assets and the list of its creditors.

Once the court declares the state of bankruptcy, it has the following effects on the debtor, *inter alia*:

- the debtor shall not leave the country without a licence from the judge;
- the court must order the seizure (*embargo*) of any assets owned by the debtor;
- the debtor will not be allowed to manage or dispose of its current assets and those acquired while the state of bankruptcy is in force;
- unless the credits are guaranteed with pledge or mortgage, as of the bankruptcy declaration, interest on the bankruptcy estate ceases to accrue;
- all civil and commercial debts of the debtor will be declared immediately due and enforceable as of the date of the bankruptcy declaration with discount of the applicable interest; and
- payments and any other transfer and administration legal transactions undertaken by the debtor after the bankruptcy declaration shall be null and void.

Alternatively, a corporate debtor may approve its dissolution and proceed to liquidate its assets.

8 Involuntary liquidations

What are the requirements for creditors to place a debtor in involuntary liquidation? What are the effects of the commencement of the liquidation?

The declaration of bankruptcy may be requested by a creditor. To this effect a request for bankruptcy must be filed, together with evidence of a credit that is liquid, enforceable and derived from a past due commercial obligation.

Once the bankruptcy request is filed, the court issues an order for the *embargo* and deposit of the assets, the books, and other documents of the debtor; arranges the appointment of an administrator for the meeting of creditors; summons all interested parties to the proceedings within the next 10 days, and summons the creditors to a general meeting. The court order will also determine the date on which the condition of bankruptcy or non-payment started. In the same act, the court will order the debtor to provide complete information about its assets, the state of its debts and the names and addresses of all its creditors.

In this case, the effects on the debtor listed in the previous question will also apply. The payments or any other legal or administrative act executed by the debtor after the declaration of bankruptcy

will be null and void without the need for special declaration.

9 Voluntary reorganisations

What are the requirements for a debtor to commence a financial reorganisation? What are the effects of the commencement of the reorganisation?

Panamanian law does not provide for a formal financial reorganisation process, except for certain regulated industries, such as banks, insurance or securities.

The only reorganisation channel contemplated in the Code of Commerce is the negotiation of an agreement between the debtor and its creditors to set out how the creditors will be repaid over a period of time. In the course of formal bankruptcy court proceedings, but only after credits have been evaluated and recognised by every creditor, a debtor who has not being charged with fraudulent bankruptcy may propose a debt workout agreement to the general meeting of creditors. In order to be accepted, the agreement must be approved for the vast majority of the creditors and not less than two-thirds of the total debt. An agreement accepted by the general meeting of creditors will not be valid until it is published and endorsed by the relevant judge.

Once the agreement is valid and accepted, it will be compulsory for each of the creditors, except for those having a privileged right, unless they have taken part of it. Therefore, the debtor will be reinstated in its rights and actions, without prejudice of the restrictions agreed within the agreement. In this context, the court-appointed administrator shall immediately deliver all the assets to the debtor, but it will still remain responsible for supervising the execution of the agreement.

10 Involuntary reorganisations

What are the requirements for creditors to commence an involuntary reorganisation? What are the effects of the commencement of the reorganisation?

As mentioned above, Panamanian law does not provide for a formal reorganisation or rescue process. The creditors and the debtor are free to make any agreement they deem appropriate. If the agreement is not accepted or the debtor offers no payment plan, the court-appointed administrator shall proceed to sell the assets.

11 Mandatory commencement of insolvency proceedings

Are companies required to commence insolvency proceedings in particular circumstances (to avoid personal liability to directors and officers or otherwise)? In what circumstances must companies do so? If proceedings are not commenced, what liabilities can result?

Under Panama law, a commercial debtor that fails to make payment of a commercial obligation must file in court a declaration of such circumstances signed by it or its representative, within two days of defaulting on the payment of the obligation, to start bankruptcy proceedings. If the debtor is a company, this obligation must be undertaken by the managers, administrators, directors or liquidators.

Articles 1557 and 1558 of the Code of Commerce define the actions taken by the debtor that may qualify the bankruptcy as culpable or fraudulent, respectively, with the responsibility arising thereof.

A declaration of bankruptcy shall be sent by the judge to the Public Ministry to enable a determination of any criminal activity and to the Public Registry to prevent the registration of any documents submitted by the debtor and for an annotation to be made in the book of merchants.

Grounds on which guilt can be established in bankruptcy include,

inter alia, the failure to file a petition requesting a declaration of bankruptcy within the next two days after the obligation is due, as well as the execution of acts that are made null or voidable by law.

Grounds to establish fraud in bankruptcy include, inter alia, the simulation of transfers or losses and expenses or proceedings or obligations that are nonexistent, the payment of debts that are not due or the granting of privileges of preferences to certain creditors over other creditors in similar circumstances.

Persons are deemed to be accomplices to a fraudulent bankruptcy when maliciously assisted to withdraw property of the debtor, either before or after a state of bankruptcy is declared.

Criminal sanctions for a bankruptcy arising from guilt or fraud shall be applied to managers, directors, administrators, or liquidators who personally took steps that the law establishes as grounds for the corresponding charge.

12 Doing business in reorganisations

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use of assets and to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

During bankruptcy and insolvency proceedings, the court-appointed administrator is charged with the management of the assets, including the company's books, the safekeeping and collection of credits, and the sale of all assets with the approval of either the meeting of creditors or the court.

The court-appointed administrator can act on behalf of the debtor throughout the proceedings, but also acts on behalf of the creditors' meetings in all proceedings against the debtor in bankruptcy.

The powers and attributions of the bankruptcy administrator appointed by the court are the following:

- the administrator must undertake an inventory of assets of the debtor;
- manages the assets of the debtor;
- collects and receives all credits and rents and pays the debtor's expenses;
- undertakes the sale of assets of the debtor;
- reviews the titles of credit presented by the creditors and submits said credits to the creditors' meeting for their acknowledgment;
- promotes the creditors' general meeting; and
- renders accounts of its management to the creditors' general meeting.

Once the court declares the bankruptcy, the debtor may not manage or dispose of its current assets and those acquired while the state of bankruptcy is in force.

Any bilateral contracts that have not been totally performed or have been partially performed at the time of the bankruptcy declaration shall be terminated by operation of law. In this case, the other contracting party may only claim and liquidate damages as a creditor of the bankruptcy estate, unless the credit is guaranteed by pledge or mortgage.

In addition, any payments or other legal acts of transfer of title or administration carried out by the bankrupt after the bankruptcy has been declared shall be null and void without any special declaration. This also applies to any payments made to the bankrupt after the bankruptcy declaration has been published.

Notwithstanding the above, as previously stated, if a valid agreement is negotiated between the debtor and the creditors in the course of a formal bankruptcy proceeding, after the agreement is approved by the judge the debtor will be reinstated in its rights and actions, and the court-appointed administrator shall immediately deliver all

the assets to the debtor for its management. In this context, the court-appointed administrator will supervise the execution of the agreement, taking all necessary actions to ensure the compliance of the obligations imposed to the debtor in the agreement.

13 Rejection and disclaimer of contracts in reorganisations

Can a debtor in a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party?

Not applicable.

14 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

Bankruptcy proceedings under Panamanian law aim at distributing the assets of a business among its creditors due to non-payment of one or more liquid commercial obligations. All the estate of the business is bound to pay up the credits that stand against it, and all creditors have a par against the common debtor.

In accordance with article 1801 of the Judicial Code, in emergencies, the judge may order the seizure of assets and take any other precautionary measure for the preservation of property, even before a decision on the declaration of bankruptcy if made.

As soon as the court-appointed administrator has assumed office, or at the latest within 24 hours, he or she will proceed with the formation of the inventory of assets of the bankrupt, with the expressed determination of the value of those assets. As part of the liquidation process, the administrator must seek the sale and delivery of all property, rights and actions at the most advantageous terms with the approval of the creditors or the judge.

In the case of mortgagees or creditors holding a collateral security that have decided to join the meeting of the creditors, the court-appointed administrator has the right to sell the property even though the creditor's claim is not due and outstanding.

15 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by secured and unsecured creditors are imposed by legislation or court order in liquidations and reorganisations? In what circumstances may secured or unsecured creditors obtain relief from such prohibitions?

The process of creditor's contest is universal and all outstanding proceedings at any civil court against the debtor at the time of the declaration of bankruptcy that have begun within the previous four years will be attached to it.

Secured creditors are not compelled to participate in bankruptcy proceedings and may seek to enforce their credits in separate proceedings.

16 Arbitration processes in bankruptcy

How frequently are arbitration procedures used in insolvency proceedings? What limitations are there on the availability of arbitration procedures in insolvency cases? In insolvency proceedings, will the court allow arbitration proceedings to continue after an insolvency case is opened?

The Code of Commerce regulates the bankruptcy of companies or natural persons engaged in business activities and its effects, but there are not specific provisions to regulate insolvency. The declaration of bankruptcy and the administration of the process to pay recognised creditors are undertaken through judicial resolutions and the use of arbitration is not contemplated.

17 Set-off and netting

To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

The Code of Commerce provides for set-off or netting. In this respect, a creditor in a bankruptcy proceeding has the right to present a set-off, even if the credit is not liquid or is not due. Nonetheless, netting is not admissible when the credit was structured or acquired after the suspension of payments, if the creditor had knowledge.

18 Intellectual property assets in insolvencies

May the licensor or owner of the IP terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with an IP licensor or owner to continue to use the IP for the benefit of the estate?

Unless otherwise agreed in the licence agreement, IP rights are not affected by insolvency or bankruptcy proceedings.

19 Post-filing credit

Does your country's insolvency system allow a debtor in a liquidation or reorganisation to obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

Upon the declaration of bankruptcy, all debts will cease to accrue interest, except in the case of debts secured by mortgages or pledges. However, the law does not contemplate an express prohibition for the provision of funds to an insolvent debtor. No statutory priority is given to such loans.

20 Successful reorganisations

What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan create releases in favour of third parties, and, if so, in what circumstances?

As previously stated, ordinary commercial legislation does not provide for a formal financial reorganisation process.

However, the debtor and the creditors may attempt to negotiate an agreement in the course of formal bankruptcy court proceedings, after credits have been evaluated and recognised by the general meeting of creditors. In accordance with article 1883 of the Judicial Code, all requests made by the debtor or any of the creditors to call for a meeting to consider an agreement or payment plan will need to comply with the following requirements to be admitted:

- formulate with clarity and precision the proposals of the agreement;

- include as many copies as there are recognised creditors;
- ensure the payment of the expenses for the convocation of creditors and a meeting, at the judge's satisfaction.

21 Expedited reorganisations

Do procedures exist for expedited reorganisations?

Not applicable.

22 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of the plan not being approved? What happens if there is default by the debtor in performing an approved plan?

In general, it is difficult to reach an agreement among the parties for the termination of the bankruptcy proceedings. In this context, a proposed agreement or payment plan between the debtor and the creditors must be accepted by 75 per cent of the obligations and also approved by the court.

If the proposed plan is not approved, the bankruptcy proceeding will resume its course and those creditors whose claims were issued after the declaration of bankruptcy will be admitted to the estate after verification of their credits. In the case of default by the debtor, the guarantees placed to ensure compliance of the agreement will come into effect in favour of the mass of creditors.

23 Bankruptcy processes

During a bankruptcy case, what notices are given to creditors? What meetings are held? What committees are or can be formed? What powers or responsibilities do these committees have? May creditors initiate proceedings to pursue remedies against third parties?

Once the bankruptcy request is filed, the court will summon all interested parties to the proceedings within the next 10 days and will call for a meeting of all creditors.

The general assembly of creditors gathers together every creditor who may have presented its claim within term, and has the object of establishing the amount and type of each credit. Decisions will be taken by the majority of creditors with a right to vote. Every creditor will have one vote in the assembly, even if it holds more than one credit.

For the examination of foreign credits, it is possible to have a special meeting.

Creditors may designate a special committee formed of three to five of them to monitor the administration of bankruptcy proceedings. The function of this committee is purely advisory.

After the declaration of bankruptcy, the judge will order the Public Registry Office to abstain from recording any instruments in connection with the debtor.

24 Insolvency of corporate groups

In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be combined into one pool for distribution purposes?

Not applicable. Bankruptcy proceedings are individual. Accumulation of cases brought against different companies will only proceed if creditors have liquid and past due commercial claims against both companies as joint debtors.

25 Modifying creditors' rights

May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

It is not possible for the court to change the priority of claims. Creditors' claims are ranked according to the rules of priority contained in the Civil Code, and the judge is bound by them.

26 Enforcement of estate's rights

If the insolvency administrator is without assets to pursue a claim that is available to the estate, are there procedures by which the creditors can pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

Not applicable.

27 Claims and appeals

How is a creditor's claim submitted and what are the applicable time limits? How are claims disallowed and how does a creditor appeal a disallowance? Are there any provisions that deal with the purchase, sale or transfer of claims against the debtor?

Within 10 days following the declaration of bankruptcy, all interested parties must submit their credits and allege any applicable preference or security. Following this period, the court-appointed administrator will present to the judge an inventory and description of all credits claimed, along with the alleged preferences and a reasoned report recommending the acceptance or rejection of each credit. Thereafter, the general assembly of creditors, which comprises those creditors that filed their claims with the court within the specified 10-day period, will evaluate the report reviewing each of the debtor's debts together with the judge, the debtor and the administrator, voting for their approval or rejection. The amount and priority of a claim will be considered recognised and undisputed when the court-appointed administrator has considered it acceptable and the assembly of creditors has approved it.

All credits that are not recognised by the general assembly of creditors will be dealt with by the court-appointed administrator in a separate expedite proceeding before the judge.

28 Priority claims

What are the major governmental and non-governmental privileged and priority claims in liquidations and reorganisations? Which priority and privileged claims have priority over secured creditors?

In a bankruptcy scenario, the pledgee or mortgagee has an added protection (preferred credit) above other unsecured creditors, because: the credits guaranteed with pledge or mortgage may be enforced in a separate proceeding; unless the credits are guaranteed with pledge or mortgage, as of the bankruptcy declaration, the interest on the bankruptcy estate ceases to accrue; and any bilateral contracts that have not been totally performed or have been partially performed at the time of the bankruptcy declaration shall be terminated by operation of law. In this case, the other contracting party may only claim and liquidate damages as creditor of the bankruptcy estate, unless the credit is guaranteed by pledge or mortgage.

Any amounts owed to the National Treasury (including at the municipal level) and the expenses of the bankruptcy estate have preference over all claims, other than:

- credits secured by mortgages or pledges;
- labour obligations duly recognised by the labour authorities; and
- amounts owed to the Social Security Office.

29 Liabilities that survive insolvency proceedings

Do any liabilities of a debtor survive insolvency so that they are enforceable against the debtor after it has reorganised?

Not applicable.

30 Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

In a bankruptcy proceeding, the court-appointed administrator is in charge of the administration of the assets, liquidation of the debtor and distributions to creditors. Within eight days of the sale of all assets, the administrator will prepare a report on the results, specifying the assets sold, the proceeds, expenses incurred, the amounts deposited, the credits that have not been able to be recovered and the ones with outstanding lawsuits, and will submit a proposal for distribution among the creditors. Every time funds that are not assigned to a special privilege become available, the court-appointed administrator may propose an interim dividend.

The debtor's assets are distributed pro rata among all unsecured creditors. Secured creditors are entitled to have their credits liquidated with priority from the proceeds of the property that was pledged or mortgaged.

No creditor is obliged to receive against its will an active debt of the mass in payment of its credit.

31 Transactions that may be annulled

What types of transactions can be annulled or set aside in bankruptcies and what are the grounds? What is the result of a transaction being annulled?

Payments or any other acts with legal effects, being acts of disposition or administration undertaken by a debtor after a declaration of bankruptcy, will be null without the need for a special declaration. The same effects apply to payments made to a debtor who has been declared bankrupt after publication of the declaration of bankruptcy.

Acts or contracts undertaken or made by a bankrupt debtor gratuitously, or those that should be deemed to be gratuitous on account of the excess given over that which the bankrupt debtor has given as an equivalent, shall be null for the benefit of the mass of creditors to the extent that they have been undertaken or executed after a legal state of bankruptcy existed or existed 30 days before the same.

The laws of Panama would generally provide for the setting aside of acts or contracts where there has been fraud or deception, on the understanding that this has been the case where the parties affirm or declare things or facts that are not true, and further in respect of dispositions or transfers, where the beneficiary knew that they were intended to withdraw property from persecution of creditors, and in all cases irrespective of the date of execution and without the possibility of alleging prescriptive periods or time limits or statutes of limitation. The above would also apply to judicial resolutions against a debtor that have been pronounced under malicious circumstances with the intent of prejudicing creditors.

Moreover, any gratuitous acts or contracts carried out or entered into by the bankrupt during the four years preceding the bankruptcy declaration or its retroactive effects, in favour of the bankrupt's spouse, children, parents, brothers or sisters or in-laws.

Bilateral contracts that, at the time of the declaration of bankruptcy, have not been executed or that have been executed in part either by the debtor or the other contracting party, shall be deemed to be rescinded. However, the other contracting party may claim damages as a creditor.

Finally, the granting of a mortgage or pledge or any other act or provision aimed at ensuring credits previously contracted or to give them preference upon other credits, shall also be null and void in the benefit of the mass of creditors, if such acts were carried out after the existence of a legal condition of bankruptcy under article 1545 of the Code of Commerce or in the 30 previous days.

32 Proceedings to annul transactions

Does your country use the concept of a 'suspect period' in determining whether a transaction by an insolvent debtor can be annulled? May voidable transactions be attacked by secured creditors or by unsecured creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or suspension of payments or only in a liquidation?

As set out in article 1581 of the Code of Commerce, acts or contracts undertaken on the day or 30 days before a legal state of bankruptcy was deemed to exist shall be set aside for the benefit of the mass of creditors.

A legal state of bankruptcy would be deemed to exist from the date established by the corresponding court as of consequence of the proceedings, and in absence of a special determination such a state of bankruptcy would be deemed to exist from the date that the application for a declaration of bankruptcy was filed. However, a court would have discretion to vary the date on account of subsequent facts, although such a date may not be more than four years from the date of the sentence that declared the state of bankruptcy.

Also, according to Panama law, any gratuitous acts or contracts carried out or entered into by the bankrupt during the four years preceding the bankruptcy declaration or its retroactive effects, in favour of the bankrupt's spouse, children, parents, brothers or sisters or in-laws, shall be also null and void without any special declaration.

Voidable transactions may be contested by the court-appointed administrator or by any creditor.

33 Directors and officers

Are corporate officers and directors liable for or can they be made to pay obligations owed by their corporations?

As a general principle, officers and directors are not liable or be made to pay for obligations owed by their corporations unless they have incurred such obligations in bad faith or by fraudulent action.

For the liquidation of a company, the shareholders may first adopt the decision to dissolve the company, which shall be recorded with the Public Registry and published in a newspaper in Panama.

After dissolution, the liquidation of assets or winding-up of the activities of the corporation is conducted by the directors, who are responsible for settling all outstanding liabilities and distributing any excess among the shareholders of the corporation. The directors are placed in the position of trustees and, as such, are personally, jointly and severally liable for the proper discharge of their responsibilities in winding up the corporation's affairs before creditors and shareholders. However, their liability is limited to the value of the corporate assets to be liquidated.

34 Duties of directors to creditors prior to bankruptcy

Do corporate directors and officers have any liability for pre-bankruptcy actions by their companies? Can they be made subject to sanctions or penalties for other reasons?

The directors might be subject to penalties for culpable bankruptcy in the case of failing to file a petition for declaration of bankruptcy of the corporation within two days of defaulting on the payment of an obligation.

The directors, who have given their consent for acts such as the preparation of false statements or reports, might be jointly and severally liable to creditors of the company for any resulting damage or harm. In addition, they might be deemed to be accomplices to a fraudulent bankruptcy when they maliciously assisted the withdrawal of property of the debtor, either before or after a state of bankruptcy is declared.

Criminal sanctions for a bankruptcy arising from guilt or fraud shall be applied to managers, directors, administrators, or liquidators who personally took steps that the law establishes as grounds for the corresponding charge.

35 Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Not applicable.

36 Corporate procedures

Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

The dissolution of a Panamanian corporation may be accomplished through two alternative procedures, as follows.

The first procedure is effected thus: if the board of directors of any Panamanian corporation deems it convenient that the corporation be dissolved, it may propose a dissolution agreement by a majority of votes of its members and within the following 10 days shall call, or cause to be called, a meeting of the shareholders with a right to vote, to decide upon the agreement of the board of directors. Shareholders shall approve the dissolution agreement and adopt a resolution in this regard. If, in the shareholders' meeting so called, the holders of the majority of the shares with the right to vote upon the matter adopted the resolution approving the agreement of dissolution and liquidation of the corporation, a copy of said shareholders' agreement shall be issued together with a list of the names and domiciles of the directors and officers of the corporation, certified by the president or vice-president and the secretary of assistant secretary and a treasurer or assistant treasurer.

The alternative procedure may be carried out if all the shareholders with the right to vote in the matter state in writing their consent to the dissolution and liquidation of the company. In this case, neither the meeting of the board of directors nor of the shareholders shall be necessary.

Upon registration of the decision to dissolve the company at the Public Registry, such copy shall be published at least once in a newspaper in Panama. Once such formalities have been complied with, the corporation will be dissolved.

37 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

A request for the declaration of rehabilitation of the debtor can be filed before the court to declare its discharge in order to put an end to the effects of the bankruptcy.

The rehabilitation of the debtor will be declared by the judge that knew of the bankruptcy without request, if the funds obtained from the sale of assets were enough to fully pay the creditors. The rehabilitation of the debtor can also be declared if the debtor has complied with the terms of the plan of payments or any other agreement signed with the creditors.

In the case of fraudulent bankruptcy, the rehabilitation of the

debtor will not proceed. If the debtor was acquitted at a criminal case related to the bankruptcy, the request for the declaration of rehabilitation can be done after five years of the declaration of bankruptcy.

38 UNCITRAL Model Law

Is the adoption of the UNCITRAL Model Law on Cross-Border Insolvency under consideration in your country? If so, what is the present status of this consideration?

At the moment, there are no indications that the adoption of this model is under consideration.

39 International cases

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Foreign judgments on insolvency proceedings will have no effect in Panama, but after receiving the enforcement through a recognition process conducted before the Supreme Court in accordance to the law.

In this regard, according to Panama's law, a final and conclusive judgment of a court in a different jurisdiction would be recognised and enforced in the courts of Panama without the need for any further action by instituting exequatur proceedings in the Supreme Court upon determination by such tribunal that:

- the courts of the judgment country would in similar circumstances recognise a final and conclusive judgment of the courts of Panama;
- the judgment has been issued as a consequence of an action in personam;
- the judgment was rendered after personal service on the defendant;
- the cause of action upon which the judgment was based does not contravene the public policy of Panama;
- the documents evidencing the judgment are in authentic form according to the law of the relevant foreign court and have been duly legalised by a consul of the Republic of Panama or pursuant to the 1961 Hague Convention on the legalisation of documents; and
- a copy of the final judgment has been translated into Spanish by a licensed translator in Panama.

Nonetheless, even before the Supreme Court has granted this recognition, preventive measures with respect to any assets of the debtor located in Panama may be ordered through rogatory letters. If such measures are taken, resident creditors in Panama may initiate separate bankruptcy proceedings in Panama in which they will enjoy a preference over creditors in the foreign bankruptcy proceedings.

In the case of multiple bankruptcies, as defined in the Code of Commerce, the surplus resulting in favour of the debtor in Panama will be made available to foreign creditors.

If the bankrupt has accidentally undertaken acts of commerce in the territory of another nation or if he maintains agencies or branches operating on behalf or under the responsibility of the principal office located in Panama, creditors resident in Panama will concur together with non-residents who have claimed their rights before the court of bankruptcy. For this purpose shall be deemed creditors with residence in Panama, those whose claims must be satisfied in the country, even if the creditors are domiciled abroad.

The classification and ranking of claims will be regulated under Panamanian law.

Panama has no treaties pertaining to bankruptcy proceedings in any other country.

40 Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Not applicable.

41 Pending legislation

Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

Not at present.

Patton, Moreno & Asvat

Marleni Paolo
Juan Carlos Baquero

mpaolo@pmalawyers.com
jbaquero@pmalawyers.com

Capital Plaza Building, 8th floor
Costa del Este Ave. and Roberto Motta Ave
Costa del Este
Panama

Tel: +507 306 9600
Fax: +507 264 8359
www.pmalawyers.com

Panama	Applicable bankruptcy law, reorganisations: liquidations
	Commercial Code of Panama (articles 1534 - 1648)
	Judicial Code of Panama (articles 1786 - 1912)
	Customary kinds of security devices on immoveables
	<ul style="list-style-type: none"> • Mortgages • Antichresis • Trust • Vessel Mortgages
	Customary kinds of security devices on moveables
	<ul style="list-style-type: none"> • Pledge agreement • Pledge of the shares of a Panamanian company • General pledge of assets (floating charge) under Panamanian law • Mortgages on moveables
	Stays of proceedings in reorganisations/liquidations
	All outstanding proceedings at any civil court against the debtor at the time of the declaration of bankruptcy which have begun within the previous four years will be attached to it.
	Duties of the insolvency administrator
	The powers and attributions of the bankruptcy's court-appointed administrator are the following:
	<ul style="list-style-type: none"> • The administrator must undertake an inventory of assets of the debtor • Manages the assets of the debtor • Collects and receives all credits and rents and pays the debtor's expenses • Undertakes the sale of assets of the debtor • Reviews the titles of credit presented by the creditors and submits said credits to the creditors' meeting for their acknowledgment • Promotes the celebration of the creditors' general meeting • Renders accounts of its management to the creditors' general meeting.
	Set-off and post-filing credit
	The Code of Commerce provides for the possibility of set-off or netting.
	Filing claims and appeals
All interested parties have a 10 day-period following the declaration of bankruptcy to submit all credits and allege any applicable preference or security. All credits that are not filed within said period or that are not recognised by the general assembly of creditors will be evaluated in separate expedite proceeding before the judge.	
Priority claims	
In a bankruptcy scenario, credit secured by mortgages or pledges has an added protection (preferred credit) vis-à-vis other unsecured creditors, and even over the following preferred claims:	
<ul style="list-style-type: none"> • Payments to the National Treasury and expenses of the proceedings • Labour obligations duly recognised by the labour authorities • Amounts owed to the Social Security Office 	
Major kinds of voidable transactions	
Payments and any other acts performed by the debtor after the declaration of bankruptcy.	
Transactions made in the four years and 30 days prior to the date of the declaration of bankruptcy.	
Any actions performed by the debtor at any time which are fraudulent or in detriment to the creditors.	

Panama continued	Operating and financing during reorganisations
	The Panamanian legislation does not provide for a formal financial reorganisation process, except in the case of certain regulated industries.
	The only reorganisation channel contemplated in the Panamanian Code of Commerce is the negotiation of an agreement between the debtor and its creditors to set out how the creditors will be repaid over a period of time, in the course of formal bankruptcy court proceedings.
	Once the agreement is valid and accepted, the debtor will be reinstated in its rights and actions, without prejudice of the restrictions agreed within the agreement.
	Requirements for approval of reorganisations
	In order to be accepted, an agreement or payment plan must be approved by 75 percent of all creditors and also by the court.
	Liabilities of directors and officers
	As a general principle, officers and directors are not liable and cannot be required to pay for obligations owed by their corporations unless they have incurred such obligations in bad faith or by fraudulent action.
	After the dissolution of a company is decided by the shareholders, the liquidation of assets or winding up of the activities of the corporation is conducted by the directors, who are responsible for settling all outstanding liabilities and distributing any excess among the shareholders of the corporation. Their liability is limited to the value of the corporate assets to be liquidated.
	Pending legislation
None.	



GETTING THE DEAL THROUGH®



Annual volumes published on:

Air Transport	Mergers & Acquisitions
Anti-Corruption Regulation	Mining
Arbitration	Oil Regulation
Banking Regulation	Patents
Cartel Regulation	Pharmaceutical Antitrust
Construction	Private Antitrust Litigation
Copyright	Private Equity
Corporate Governance	Product Liability
Dispute Resolution	Project Finance
Dominance	Public Procurement
e-Commerce	Real Estate
Electricity Regulation	Restructuring & Insolvency
Environment	Securities Finance
Franchise	Shipping
Gas Regulation	Tax on Inbound Investment
Insurance & Reinsurance	Telecoms and Media
Intellectual Property & Antitrust	Trademarks
Labour & Employment	Vertical Agreements
Merger Control	

**For more information or to
purchase books, please visit:
www.GettingTheDealThrough.com**



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006



The Official Research Partner of
the International Bar Association