

MORALES, NOGUERA, VALDIVIESO & BESA

SOCIEDAD CIVIL DE RESPONSABILIDAD LIMITADA

ABOGADOS

Amendments to Chilean Bankruptcy Law: Creditors' Agreements

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Chilean Congress recently approved a bill of law that will amend Law 18,175, the Chilean Bankruptcy Law, regarding agreements between creditors and debtors (the "Bill of Law"). The Bill of Law was also already approved by the Constitutional Court and it will be probably be enacted by the President and be published in the Official Gazette within the next weeks. According to its Transitory Article the Bill of Law will be in force sixty days after said publication.

The Bill of Law constitutes the second of three existing bills of law relating to the amendment of Law No. 18,175 ("Bankruptcy Law").¹ The main purpose of the Bill of Law is to facilitate agreements between debtors and creditors, instead of forcing the liquidation of a company, as the liquidation of a company is many times detrimental to the interests of creditors, workers and the economic system in general.

According to the current Bankruptcy Law, agreements between creditors and debtors can be classified as follows:

- Out-of-court agreements: Before the debtor is declared bankrupt.
- Preventive judicial agreements: Also before the debtor is declared bankrupt.
- Judicial agreements: Once the debtor is declared bankrupt.

In summary the main aspects of the Bill of Law are the following:

- (i) It abrogates certain restrictions to out-of-court agreements contemplated by the Bankruptcy Law.
- (ii) Creditors will be able to request the debtor to propose a creditors' agreement. Currently, they can only request the bankruptcy of the debtor.

¹ The last amendment to Chilean Bankruptcy Law was made by Law No. 20,004 in March of 2005, regarding the Reinforcement of the Transparency in the Private Management of Bankruptcies, Reinforcement in the Functions of the Trustees in Bankruptcy and the Superintendency of Bankruptcies.

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- (iii) It abrogates certain impediments that debtors had to propose agreements to creditors.
- (iv) It extends the right to reiterate proposals that have been rejected or not considered.
- (v) It contemplates arbitration for creditors' agreements.
- (vi) It reduces the causes for annulment of creditors' agreements.

1. Preventive Judicial Agreements.

As mentioned above, when a debtor that exercises a commercial, industrial, mining or farming activity has ceased payment of a commercial obligation, the creditors will be able to request him/her the presentation of a preventive judicial agreement. The debtor will have a period of time to propose the composition agreement, and only if he/she does not make the proposal within that period the judge will declare the bankruptcy.

Currently, the Bankruptcy Law limits the matters that can be subject to a judicial composition. These limitations are eliminated by the Bill of Law, thus extending the subject matter of preventive judicial composition.

The proposals of preventive judicial agreements may include different alternative proposals and the creditors must choose one of them.

In the case of companies that are subject to the supervision and control of the *Superintendency of Securities and Insurance*, the proposal must be presented before an arbitrator. This rule is not applicable to insurance companies.

Debtor can also submit a proposal of a creditors' agreement before an arbitrator if it reaches an agreement in that regard with creditors that hold at least 66% of the debt.

The Bill creates the figure of the "*expert adviser*", whose function is to evaluate the economic, legal, financial and accounting situation of the debtor, so as to propose to the creditors a composition that is more beneficial than the declaration of bankruptcy. The expert adviser is named by the creditor's meeting, after a request by the debtor, and is subject to the control of the Superintendency of Bankruptcy.

Some rights that were exclusive of creditors in a judicial composition, such as the right to vindicate, to terminate and to withhold, are extended to creditors in a preventive judicial composition.

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2. Approval of Creditors' Agreements.

Creditor's agreements (preventive judicial agreements or judicial agreements) will be deemed as approved once they are approved by creditors that hold at least 2/3 of all credits with right to vote, excluding preferred credits that have abstained from voting. Related persons (entities and individuals) will also be excluded. The same quorum is required to amend creditor's agreements.

Pursuant to the Bill of Law creditor's agreements can only be challenged if the debtor has hidden or exaggerated his/her assets.

3. Effects of Creditors' Agreements.

Once judicial creditors agreements are approved, the debtor ceases to be bankrupt, notwithstanding the restrictions that may be imposed by the agreement.

According to the Bill of Law, creditor's agreements can establish a controller who will supervise the books, documents, and operations of the debtor, his expenses and approve payments to creditors.

4. Rejection of Creditors' Agreements.

If creditors' agreements are rejected, new proposals can be submitted without any restriction.

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Should you have any questions or comments on this matter please do not hesitate to contact Paulo Larrain at plarrain@mnvb.cl or (56-2) 472-7000.

Sincerely,

MORALES, NOGUERA, VALDIVIESO & BESA