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Enterprise Groups Proceedings in Colombia: Decree 1749 of 2011 Adopting UNCITRAL Legislative Guide on Insolvency Law, Part III, Treatment of Enterprise Groups in Insolvency¹

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Colombia has traditionally been a forum willing to adopt the developments of UNCITRAL. A good example is the current insolvency law, which adopted the UNCITRAL Model Law on Cross-Border Insolvency and was deeply influenced by the UNCITRAL Legislative Guide on Insolvency.

The concept of “enterprise groups” was first recognized in Colombia under the Companies Law (Law 222 of 1995). The insolvency regime (Law 1116 of 2006) has specific statutory provisions to govern jurisdictional issues and matters of enterprise groups in insolvency proceedings.

But a comprehensive regulation of the insolvency proceedings of an enterprise group was not made until Decree 1749 of 2011, which adopted the recommendations of UNCITRAL’s Legislative Guide on Insolvency Law, Part III in order to facilitate their treatment, and was made mainly because the insolvency regime of 2006 was tested with a large and complex enterprise group insolvency case and its rules found insufficient to handle it.

The Superintendency of Companies of Colombia had the opportunity to exhibit recent cases developed in application of this legislative framework in the INSOL 2013 Tenth multinational Judicial Colloquium on Insolvency in The Hague, Netherlands.

The Superintendency presented three cases, one of them regarding recognition of a foreign main proceeding of an enterprise group, extending the cross-border recognition of the UNCITRAL Model Law on Cross-Border Insolvency to apply in a “group” situation and two domestic cases regarding intra-group post-commencement financing and the coordination and cooperation between insolvency proceedings of differing nature, specifically where the cooperation took the form of an agreement between two different jurisdictions.

CASE No 1

Court: Superintendency of Companies

Court Reference:420-003520

Decision Date:12-03-2013

Parties: In Re QBEX Electronics Corporation INC, QBEX de

Colombia S.A., Comercializadora de Productos
Tecnológicos de Colombia S.A.

Case Number: 63970

Proceeding: Recognition of foreign main proceeding

This case marked the first recognition of foreign proceedings under Law 1116 of 2006, the Colombian Insolvency Statute which enacted the UNCITRAL Model Law in Cross-Border Insolvency. The application for recognition was submitted by the legal representative of the QBEX Electronics Corporation INC, as the debtor in possession in the Chapter 11 cases brought before the United States Bankruptcy Court, Southern District of Florida (Case No 12-37551-BKC-RAM). The debtor sought an order seeking recognition:

- a) as a foreign representative acting on behalf of QBEX Electronics Corporation INC et al “the group of companies”;
- b) of the foreign proceedings of the group of companies under Title III of Law 1116 of 2006; and
- c) of his entitlement to seek orders from the Superintendency of Companies, which is the Colombian insolvency Court, in aid of the Chapter 11 proceedings of the group of companies in the United States.

QBEX Electronics Corporation INC has its COMI in the United States but QBEX de Colombia S.A., and Comercializadora de Productos Tecnológicos de Colombia S.A. both have their domicile in Colombia.

The Superintendency of Companies held that Title III of Law 1116 of 2006 granted the foreign representative express rights to apply for aid from the Superintendency of Companies in relation to the foreign proceedings. The Superintendency accepted that the debtor in possession was the valid foreign representative of QBEX Electronics Corporation INC et al.

In addition, the Superintendency held that Decree 1749 of 2011 (based on Part III of the UNCITRAL Insolvency Guide), recognized the “enterprise group in insolvency” as a concept², and allowed all members of the group, including the Colombian companies, together to bring their case before the United States Court, avoiding the need to commence parallel proceedings. In other words, the Superintendency considered that the COMI of all members of the enterprise group was located in the United States jurisdiction, despite two having their domicile in Colombia.

The Superintendency considered that the insolvency of

¹ This Paper summarizes the presentation of the Superintendent of Companies Dr. Luis Guillermo Vélez Cabrera, at the Tenth Joint UNCITRAL/World Bank/INSOL Judicial Colloquium, that was held in The Hague on 18-19 May 2013.

² Article 2. Definitions. For the effects of the present decree the following definitions are established 1. Enterprise Groups: the integrated group of individuals, companies, trusts, or entities of whatever nature that participate in economic activities, related to each other through a holding, a subsidiary or a controlling company, or related because the greater part of their equities are owned or administered by the same person or company, be it directly or through other persons or trusts. In the same way, participants that guarantee other participant’s obligations are deemed to be part of an Enterprise Group as well as those that fulfill the grounds described in Article 32 of Law 1116 of 2006.

enterprise groups would be best dealt with by one court, in the interest of promoting international cooperation. It was concluded that the ideal forum for this case was the U.S. Bankruptcy Court, because the Court of that jurisdiction has the capacity of coordinating Chapter 11 proceedings concerning the insolvent QBEX group members in their best interest and of the creditors.

The Superintendency held that the recognition of the foreign main proceedings of QBEX enterprise group was made to promote speed and efficiency of the proceedings, as well as reducing its transaction costs.

On March 14th of 2014 the United States Bankruptcy Court, Southern District of Florida (Case No 12-37551-BKC-RAM) ordered the three related Chapter 11 cases to be converted to a case under Chapter 7.

This case applied Recommendations 239, 240, 241 and 242 from the UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency.

CASE No 2:

Court: Superintendency of Companies

Court Reference: 430-013681 Modified by 430-016709

Decision Date: 05-09-2011 and 13-10-2011

Parties: In Re ENTERPRISE GROUP C.I. AMERICAFLOR LTDA (C.I.AGRICOLA GUACARI LTDA, C.I. CULTIVOS SAN NICOLAS LTDA, C.I. AMERICAFLOR LTDA, C.I. SPLENDOR FLOWERS S.A.S., C.I.SANTA MONICA FLOWERS LTDA, C.I. FLORAMERICA LTDA, C.I.FLORES DE EXPORTACIÓN LTDA, C.I. JARDINES DE COLOMBIA LTDA, C.I. FLORES LAS PALMAS LTDA, C.I. CULTIVOS DEL CARIBE LTDA, C.I. FLORES LA FRAGANCIA LTDA)

Case Number: 32557

Insolvency Proceeding: Reorganization under Law 1116 of 2006

The Superintendency of Companies commenced insolvency proceedings of the enterprise group C.I. Americaflor LTDA and issued a procedural coordination order (430-012259 August 12 of 2011) with respect to 12 enterprise group members that included, among others the following measures:

- a) the appointment of a single insolvency representative (called "the promoter" in Colombian Insolvency Law); and
- b) the coordination of hearings.

The legal representative of C.I. FLORAMERICA LTDA, one of the insolvent enterprise group members, sought an order seeking the authorization of Superintendency of Companies to transfer funds to other insolvency enterprise group members after the commencement of the insolvency proceedings.

The insolvency representative of C.I. AMERICAFLOR LTDA, was favorably disposed to the financial agreement between C.I. FLORAMERICA LTDA and other participants of the group. The purpose of funding was to assure the survival of the companies by paying the post-commencement labor obligations and using the funds as working capital in order to maintain the operation of the companies.

The Superintendency held that the petition complied with the requirements of Decree 1749 of 2011, which provides the legal framework for the authorization of the post-commencement financing between insolvent companies which are members of the same enterprise group.

In addition, the reorganization agreement between C.I. AMERICAFLOR LTDA and its creditors included the financing agreement between the insolvent members of the group, and obtained approval from the creditors and confirmation by the Superintendency of Companies

(430-002612 of February 26 of 2013).

The Superintendency authorized the funding because when it considered its purpose, it found that the funds were destined to assure the survival of the recipient companies.

This case apply Recommendations 211-214 from the UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency.

CASE No 3:

Court: Superintendency of Companies

Court Reference: 400-015955

Decision Date: 16-11-12

Parties: In Re Interbolsa S.A.

Case Number:61002

Insolvency Proceeding: Reorganization proceeding under Law 1116 of 2006

Interbolsa S.A. is a commercial company until recently registered in the Colombian Stock Exchange under supervision of the Financial Superintendency of Colombia, Colombia's financial regulator, which sought an order seeking the commencement of a reorganization proceeding under Article 15 ordinal 3 of Law 1116 of 2006, the Colombian Insolvency Law.

Interbolsa S.A. is the holding company of the Interbolsa enterprise group, comprising companies of different juridical nature both financial and commercial (a broker dealer, an investment management company, and financial services firms among others) having direct presence in Brazil, Colombia, Panamá, British Virgin Islands and the United States.

The Financial Superintendency of Colombia held that the commencement of the insolvency proceeding of Interbolsa Comisionista de Bolsa, one of the financial nature participants of the group, may cause the insolvency of Interbolsa S.A.

The Superintendency of Companies commenced the insolvency proceedings of Interbolsa S.A. and entered into an agreement (2013-01-024734) with the Financial Superintendency of Colombia in order to improve the efficiency of the judicial proceedings.

The agreement enabled the Superintendency of Companies to obtain information about the enterprise group members (insolvent or not) and to facilitate the sharing and disclosure of information.

The Superintendency of Companies considered that the commencement of the reorganization proceeding:

- a) protects the members of the enterprise group in the best interests of the group and the creditors; and
- b) promotes the credit protection and the preservation of the company.

When two or more courts are involved, cooperation between them might include sharing and disclosure of information. According to article 5 of Law 1116 of 2006, the Superintendency of Companies may obtain information, in order to achieve the purpose of paying the creditors.

Conclusion:

Almost three years after its enactment, first experiences with Decree 1749 of 2011 show that this new framework for dealing with the insolvency of enterprise groups is effective. Numerous insolvency proceedings of groups of companies have been undertaken successfully by taking advantage of the new legal tools provided by the recent statute. 🇨🇴