



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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Forum shopping and filing insolvency in a global legal world

Insolvency Commission

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National Report of Peru

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1. **Proper place for commencement of insolvency proceedings and centre of main interests.**

a. In your jurisdiction which is the proper place for commencement of insolvency proceedings? Is the applicable law determined separately than the venue?

- Bankruptcy matters in Peru are regulated in the General Bankruptcy Act (Ley 27809 - *Ley General del Sistema Concursal*) and its supplementary and amendment laws (the “Bankruptcy Act”). Bankruptcy proceedings are not handled by a judicial court, but rather carried on by a governmental authority named INDECOPI (*Instituto Nacional de Defensa de la Competencia y Protección de la Propiedad Intelectual*) through its Bankruptcy Proceedings Commission (the “Commission”)
- In Peru, the Commission is competent to handle any bankruptcy proceeding involving debtors domiciled in Peru.

In addition, the Commission is competent to handle bankruptcy proceedings of foreign debtors, provided that the Peruvian courts previously acknowledge the corresponding foreign court decision declaring the commencement of the bankruptcy/insolvency case.

- Competence in bankruptcy proceedings in Peru is determined by the domicile of the debtor. Article 7 of the Bankruptcy Act provides that the domicile of the debtor is the corporate domicile expressly indicated in its corporate bylaws duly recorded in the Public Registry.

Please note that article 20° of the General Corporations Law provides that the corporate domicile is “*the corporate domicile designated in the bylaws, where it develops its main activities or where it has located its management.*” However, it is clear that the current Bankruptcy Act has willingly avoided entering into the discussion of the main activities centre or the location of its management and decided for a clear and simple test: bylaws domicile, duly recorded.

b. Is there in your country a notion or definition of the debtor’s centre of main interests (“COMI”)?

- No, there is not. Current Bankruptcy Act limits the analysis of competence to the corporate domicile indicated in the bylaws and recorded in the Public Registry.

However, please note that our former bankruptcy law (Decree Legislative 845 and its amendments) provided for double criteria in determining the territorial competence, based on either the corporate domicile stated in the bylaws or the *main location of activities*, which is a concept somehow similar to the COMI.

The regulation of the *main location of activities* was not maintained in the current law precisely for problems of “forum shopping” derived from its application.

- c. Which are the factors relevant to the determination of centre of main interests?
 - N.A.
- d. Is this essential in determining the jurisdiction?
 - No.
- e. Are there international or supranational regulations regarding the proper place for commencement of insolvency proceedings and/or the determination of the centre of main interest applicable in your country?
 - No.
- f. Is the debtor’s centre of main interests the place where an insolvency proceeding concerning the debtor is likely to commence? Why or why not?
 - Please refer to our previous answer in (b) above.
- g. Please discuss the issues of timing and procedure with respect to the determination of centre of main interests, including when or if a judicial determination on this issue is required or made?
 - N.A.

2. Movement of the place of registration (or habitual residence) of centre of main interest.

- a. It is possible for the debtor to move its place of registration (or habitual residence) prior or after the commencement of insolvency proceedings? Will such a move affect the decision as to centre of main interests and the determination about the commencement of the proceedings?
 - Prior to commencement of the insolvency proceeding: there is no legal restriction in the Bankruptcy Act so as to move the habitual residence or corporate domicile and duly record such change. Such change will be regarded as valid for purposes of competence matters in bankruptcy according to answer 1(a) above.

Of course, this is an “open door” for illegitimate forum shopping (choosing a different Commission rather than the central Commission in Lima, for example, or forcing creditors to litigate outside its usual place of business, etc.) and the legislator has not regulated “bad faith” scenarios.

- After commencement of the insolvency proceeding: It is not forbidden to change the corporate domicile but it will have no effect with respect to the competence already acquired by the Commission upon the commencement of the case.
- b. Is it possible to move a debtor's centre of main interests prior to commencement of insolvency proceedings?
- Please refer to our answer in (a) above.
- c. Is it possible to move a debtor's centre of main interests between the time of the application for commencement and the actual commencement of those proceedings?
- Please refer to our answer in (a) above.
- d. If there is evidence of such a move in close proximity to the commencement of the commencement, in determining whether to recognize those proceedings, will the court scrutinize more closely such a move?
- Please refer to our answer in (a) above.
- e. Is forum shopping allowed under domestic or supranational law which applies in your jurisdiction?
- Given the current regulation of forum competence in the Bankruptcy Act, there is arguably no space for theoretical forum shopping, as the rule refers to the bylaws domicile recorded in the Public Registry.
 - In other laws (corporate law, civil procedural law, constitutional law), the regulations pertaining forum shopping tend to avoid such possibility under criteria of the place of the corporation's main activities, exclusive competence (real estate, criminal law, others) and specific and objective general competence regulations.
- f. What are factors in your country that may influence a debtor to choose one forum over another, e.g. judges, favorable laws, case law precedent, etc.?
- In general terms (not specifically in insolvency matters), forum shopping has been heavily used in order to seek for most favorable or lenient judges and courts.

- g. Is it possible for a creditor or other party to force or cause a debtor's insolvency proceedings to be moved (rather than dismissed), as a result of a challenge to the debtor's definition of its centre of main interests?
- Given the simplicity of the objective domicile criteria set forth by the Bankruptcy Act, it will be complicated to challenge the applicable forum (bylaws domicile, duly recorded), except for a general nullity action based on the *abuse of rights* argumentation, which is always an uphill and long lasting litigation.

3. Recognition of foreign proceedings, main and secondary proceedings

- a. Is the recognition of foreign proceedings allowed in your country? What are the requirements? Is this recognition affected by the notion of centre of main interests?
- In general terms, foreign judicial decisions can be enforced in Peru subject to an *exequatur* process, where the Peruvian courts shall acknowledge the foreign judicial decision or award, without re-examination of the matters adjudicated upon, provided that such decision complies with the following requirements:
 - (i) the judgment does not resolve matters under the exclusive jurisdiction of Peruvian courts;
 - (ii) such court had jurisdiction under its own private international law rules and under international rules on jurisdiction;
 - (iii) the defendant was served in accordance with the laws of the place where such foreign court sits, was granted a reasonable opportunity to appear before such foreign court, and was guaranteed due process rights;
 - (iv) the judgment has the status of *res judicata* in the jurisdiction of the Court rendering such judgment;
 - (v) there is no pending litigation in the Republic of Peru between the same parties for the same dispute, which shall have been initiated before the commencement of the proceeding that concluded with the foreign judgment;
 - (vi) the judgment is not incompatible with another enforceable judgment unless such foreign judgment was rendered first;
 - (vii) the judgment is not contrary to public order or good morals; and
 - (viii) it is not proven that such foreign courts deny enforcement of Peruvian judgments or engage in a review of the merits thereof.

b. Does your relevant domestic or supranational legislation have the notions of main and secondary proceedings or otherwise distinguish between the concepts?

- Yes. As we have stated, INDECOPI through its Commission is competent with respect to bankruptcy proceedings of foreign individuals or corporations, provided that the Peruvian Courts have acknowledged a foreign court decision declaring the bankruptcy or insolvency of the non-domiciled debtor. In this last case, the competence of INDECOPI is restricted to the debtor's assets located within Peruvian territory.

The Bankruptcy Act follows the territoriality principle, by which the bankruptcy authorities are competent in proceedings involved Peruvian-domiciled debtors. In the case of international insolvency proceedings, Peruvian Law follows the "Secondary Bankruptcy Proceeding" theory, by which a separate insolvency proceeding shall be initiated in Peru once a foreign judicial decision declaring the debtor's bankruptcy (the "main bankruptcy proceeding") is acknowledged by Peruvian courts through an exequatur process.

Therefore, a foreign judicial decision declaring a foreign debtor's bankruptcy is not automatically enforceable in Peru. Such foreign decision will only be enforced in Peru if it is acknowledged through an exequatur process, complying with the requisites set forth in the answer to question 3(a) above.

c. Does your legislation permits secondary proceedings to be opened to run in parallel with the main proceedings? Are the effects of secondary proceedings limited to the assets located in that State where secondary proceedings are opened?

- Yes, please refer to answer to question 3(b) above.

d. Does your jurisdiction allow a challenge to proceedings being designated as secondary? If so, please explain in greater detail.

- No, Peruvian law does not contemplate such a challenge course of action.

4. Abuse of process

a. In your jurisdiction, is a court able to take account of abuse of its processes as a ground to decline recognition?

- A Peruvian Court can refuse to acknowledge a foreign judgment if the same affects due process rights, public order regulations and good morals.

- b. What happens if the applicant falsely claims the centre of main interests to be in a particular State?
- N.A.
- c. Are those issues governed by international or supranational regulations or only by domestic law?
- All bankruptcy matters in Peru are regulated by domestic law.