Chapter 1

MEXICO

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I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

The past year saw a precipitous decrease in demand and supply in the global economy as a result of the outbreak of the covid-19 pandemic, and Mexico was no exception. Mexico experienced a drop in its 2020 GDP of 8.2 per cent for the year, the sharpest downturn since the 1930s. Indeed, the unpredictable pandemic resulting in inconsistent quarantine orders, business closures, travel restrictions affecting air and surface travel suffocating the otherwise prosperous tourism and hospitality industry, and a significant downturn in manufacturing and exporting output, significantly affected the economy. The lack of fiscal incentives, untimely responses in public health initiatives, including a sluggish vaccination process, controversial economic policies (and what amount to outright attacks on the private sector), clean energy initiatives and continuing rhetoric challenging the very existence of autonomous agencies providing checks and balances for a healthy democracy and economy, unfortunately contributed to a climate of hostility towards free trade and investment.

Many companies faced critical situations. Certain programmes introduced by the Central Bank allowed the financial sector to provide temporary relief to debtors while awaiting a clearer picture of the parameters for longer-term restructuring relief. Neither debtors nor creditors have resorted to the in-court restructuring process known as *concurso mercantil*. As of the first quarter of 2021, the Mexican economy has shown remarkable resilience. Given the notable comeback and growth of the US economy – Mexico is the principal trading partner of the United States, ahead of Canada, China and other countries – recovery has been stronger than initially projected. For 2021, the consensus among leading economists is a rate of economic growth that will surpass 5 per cent, with an expected return to 2019 pre-pandemic levels by early 2023.

Insolvency practice in Mexico continues to focus on out-of-court settlements, favoured for decades by debtors and creditors with exceptional success. That cannot be said regarding formal insolvency proceedings, *concurso mercantil*, which, with few exceptions, has failed to become a reliable tool to implement solutions to preserve companies as ongoing concerns or an efficient instrument to cause orderly, supervised liquidations that may preserve value.

Undoubtedly, the few cases filed in the past 24 months have regrettably reflected the continuing deficiencies in restructurings governed by the Law of Commercial Insolvency of 2000 (as amended, the Concurso Law). Substantial cases continue to stall amid daunting formalities and creative delaying tactics, and a litigious environment fuelled by challenges to the growing practice related to the request and granting of wide-ranging precautionary

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measures, in addition to ever-expanding interpretations of due process and human rights. The mandatory time frame established in the Law is widely ignored, resulting in the destruction of value. Only in exceptional filings that have been made under a pre-packaged plan, pursuant to which the company and a majority of its creditors jointly agree to seek a court protected reorganisation through *concurso*, have cases been resolved and successful restructurings achieved within a period of less than a year.

Entire sectors of the economy (such as businesses relying on discretionary consumption, hospitality, real estate development, construction, tourism, entertainment, payroll lending, aerospace and airlines, among others) and individual companies, have faced financial stress and will resort to restructuring processes. There have been a handful of notable cases in which Mexican corporations have considered turning to the US Bankruptcy Courts for relief through Chapter 11 proceedings, most notably Mexico's flagship airline, Aeromexico, as an instrument to protect the debtor as an ongoing concern, to obtain DIP financing and to seek an orderly organisation, because the requirements are easier to meet and the outcomes are far more foreseeable and transparent than a *concurso mercantil* filing. Nevertheless, one size will certainly not fit all. Cost is a factor, labour must be kept current, and taxes fully paid before a Chapter 11 proceeding is considered. The fact that a foreign proceeding will not be recognised if the debtor has an establishment in Mexico without going through a full *concurso mercantil* must be given considerable attention, among other concerns.

As to the restructuring practice in Mexico, the preference continues to be for out-of-court discussions and procedures. In recent months, the financial sector has resorted to establishing non-mandatory recommendations and guidelines to achieve orderly restructurings through consensus, with principles resembling the renowned London Approach.

Finally, the Supreme Court of Justice, as head of the Federal Judiciary, which has exclusive jurisdiction on insolvency matters, has shown only intermittent interest in attending to the unmistakable regression in *concurso mercantil* proceedings. There is no doubt that companies of all sizes and sectors of the economy, and creditors and stakeholders, may be forced to turn to *concurso* as a last resort to salvage their business continuity as a result of the economic crisis downturn and the prevailing volatility in public policy.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

The Concurso Law was published in May of 2000 and amended in December 2007, with the introduction of the Mexican version of a pre-pack in January 2014 and to a lesser extent in August 2019 and in January 2020. Significant amendments are summarised in Section III.

The following subsections present the principal aspects of the Concurso Law.

i One proceeding

The Concurso Law provides for one sole insolvency proceeding (*concurso mercantil*), encompassing two successive phases: a conciliatory phase of mediation among creditors and debtor (known as the conciliation stage), and a second stage of bankruptcy or liquidation. There is, in fact, a complex preliminary stage: the preparation of the many formal documents to be attached to any petition and the filing thereof, with the objective of getting the case admitted to actually commence the first conciliatory stage. Unfortunately, in material cases this preliminary stage has proven to be a challenging obstacle and takes on average not weeks but months, adding to the uncertainties surrounding *concurso*.

The objective of the conciliatory phase is to conserve the business enterprise as an ongoing concern through a restructuring agreement. On the other hand, the stated purpose of bankruptcy is to liquidate the business. Prior to a debtor being placed in *concurso*, the process includes a preliminary examination proceeding to verify whether the debtor is generally in default. If a pre-pack is filed, such examination is not required. Unfortunately, while the mandatory formats produced by the Federal Institute of Insolvency Specialist (IFECOM, an agency of the Federal Judiciary) are quite simple in their structure, the examination proceeding seems to be misunderstood as an audit of the company, leading to unexpected delays and confusion. It is noted that the initial preliminary proceeding lacks in transparency, and the examination proceeding reports are not made public.

Procedural terms

An important part of the Concurso Law involves measures that were designed to expedite the handling of mechanical aspects of insolvency. Procedural terms in legal proceedings are relatively short, yet, with few exceptions, most courts fail to abide by them.

Provisions in the law as to procedural exceptions in legal proceedings were designed to avoid the automatic suspension of the conciliatory proceeding, as was the case under the prior Law of 1943, yet federal judges continue to apply measures that have, in fact, halted *concurso* proceedings.

The conciliatory stage is designed to be completed in 185 calendar days in the best of cases, although two 90-day extensions may be granted if a qualified majority of creditors so approves. The Concurso Law clearly underlines that in no event may the conciliatory stage be extended beyond 365 days, whereupon bankruptcy and liquidation of assets are, in theory, to begin immediately. In practice, this is not the case. In addition, the potential enforcement of the 365-day time period in complex proceedings – with the threat of immediate liquidation – may lead to unwarranted results.

ii Petition for commercial insolvency

A business enterprise that is generally in default with respect to its payment obligations will be declared commercially insolvent. The debtor, any creditor or, exceptionally, the Office of the Attorney General or the tax authorities may file for insolvency.

The Concurso Law establishes precise rules that determine when a debtor is 'generally in default'. The principal indications or presumptions are the failure by a debtor to comply with its payment obligations in respect of two or more creditors, and the existence of the following two conditions: 35 per cent or more of its liabilities outstanding are 30 days past due; and the debtor fails to have liquid assets and receivables, which are specifically defined, to support at least 80 per cent of its obligations, which are due and payable.

Specific instances, such as insufficiency of assets available for attachment or a payment default with respect to two or more creditors, are considered by the Concurso Law to be facts that by themselves will result in a presumption of insolvency.

In theory, the 2014 amendments allow the debtor to file for *concurso* if it can be anticipated that it will generally be in default with respect to its payment obligations or falling within either of the conditions leading to a presumption of insolvency, as mentioned above, within 90 days of the petition filing. The generally in default requirement, strictly applied by the courts, even with the amendment, is a major pitfall of *concurso* as a tool for financial reorganisation; courts will only admit cases in which the debtor is faced with imminent disaster or its finances are beyond repair.

As to involuntary filings, they have been largely unsuccessful because of the many formalities that must be met. Delaying tactics are commonly resorted to, laying obstacles which result in considerable interruptions to the proceedings.

iii Jurisdiction

The federal courts have jurisdiction over *concursos*, notwithstanding that even this basic principle has been – unsuccessfully – challenged. While it is a fact that district judges are overburdened with constitutional challenges (*amparos*) and have little practice regarding mercantile matters, the selection process, supervision, continued education (other than in insolvency) and preparation of federal judges have been substantially improved in the recent past. Salaries have been materially increased, and there has been a greater impartiality. Nevertheless, the courts have been reluctant to accept insolvency cases given their considerable workload, exacerbated by the temporary closures as a result of the covid-19 pandemic, and in the few major *concurso* cases filed and accepted, the mere size and the thousands, if not millions, of pages involved have made it a huge task to address and preside over these proceedings efficiently.

Experts

The Concurso Law provides for the use and training of experts in the field of insolvency with IFECOM as an entity to coordinate their efforts and provide continuing education.

The specialists who have a role in proceedings under the Concurso Law are:

a the examiner, whose duties are to determine whether the debtor complies with the commencement standards and who participates in the proceeding up to the judge's declaration of insolvency;[2]

b the conciliator, who is appointed in such declaration and who has broad powers to mediate, to take steps to protect the enterprise as an ongoing concern or to immediately begin bankruptcy and who takes on significant responsibilities and in material cases a major role in a *concurso*; and

c the receiver, who may or may not be the conciliator and whose principal function is to proceed with the sale of assets and payment of claims.

The judge also has a principal role, although the function of the conciliator is considerable (including the authority to approve DIP financings).

Those who wish to act as examiner, conciliator or receiver must request IFECOM to register them in the special registry maintained by IFECOM. It is unfortunate that the registry, especially for complex cases, has not been opened for the large accounting or insolvency advisory firms, but only to a limited number of individuals.

There are numerous restrictions prohibiting conflict-of-interest relationships. The appointment procedure is supposedly based on a random, electronic selection from the classes and ranges of experience pertaining to the experts registered with IFECOM, which vary in accordance with the complexity and asset size of the business enterprise.

2 Although the 2014 amendments introduced the possibility of avoiding the 'visitation stage' in pre-packed filings, thus saving weeks of bureaucracy, the author is of the view that there could be a benefit of having an examiner complete the many IFECOM formats that may prove to be advantageous in the ongoing proceeding.

It is relevant to note that a qualified majority of creditors may replace or appoint a professional as conciliator or receiver even if the professional is not registered with IFECOM. In cases involving the insolvency of a company operating under a federal concession, the conciliator may be appointed at the request of the corresponding authority, such as the Ministry of Communications regarding corporations in the telecommunications industry, as was the case with the successful restructurings of Satelites Mexicanos SA de CV. In pre-arranged filings, the debtor and a majority of creditors supporting the pre-pack plan may appoint a conciliator who is not registered with the IFECOM. In both exceptions, the conciliator may be a firm or corporate entity.

Related companies

Insolvency proceedings of two or more related entities are not joined, although controlling and controlled companies' proceedings will be joined, but will be handled in separate records. A petition must be filed individually by each group member. The 2014 amendments introduced provisions to allow for joint petition by multiple group members. This technique was efficiently applied in the *Empresas ICA* case. Mexican courts do not, however, recognise substantive consolidation.

Identification of creditors and declaration of insolvency

The debtor that requests a judgment of declaration of *concurso mercantil* must furnish detailed lists of creditors and debtors, with a description of the nature of the debts. The amendments of 2014 introduced several relevant additions to the petition request: a copy of the corporate resolutions that approved the filing (requiring 'undoubtable shareholder approval'), a proposed reorganisation plan and an enterprise conservation plan, which were intended to include DIP financing terms, to the extent available.

Absent a pre-pack, the day after the judge admits the petition, which in practice may take weeks or months, he or she must send a copy to IFECOM, ordering it to designate an examiner within five days. The judge will order the visit and immediately notify the debtor. The examiner will review the books and records of the debtor and will prepare minutes of the visit, which must also include a list of all creditors in IFECOM formats. The examiner may request that the judge issue precautionary measures needed to preserve the assets of the debtor, although the debtor's counsel usually addresses them upon filing. The examiner will render a report to the judge that will be sent to the debtor and the creditors for their respective comments, if any.

Within a maximum term of 83 days as of the termination of the examination proceeding, the Law provides that the judge must render a judgment of mercantile insolvency, which, among other things, must contain:

a an order to IFECOM to appoint a conciliator;

b a declaration of the opening of the conciliatory stage unless the debtor has requested bankruptcy;

c an order to the debtor to deliver all books and records to the conciliator although management remains in place;

d an order to the debtor to suspend the payment of its pre-petition indebtedness, other than those that are deemed to be essential for the continuation of the business enterprise;

e an order to freeze all asset foreclosure and attachment proceedings; and

f an order to publish a notice to all creditors, so that they may appear in the proceeding, although this requirement (a filing proof of claim) is no longer mandatory.

The extensive participation of the conciliator in the proceedings should also be noted. The conciliator is also responsible for proposing the creditors who should be recognised and is mandated to proceed with notices and publications pursuant to provisions that are very specific as to terms. Formalities are always a major issue and creditors must be aware of tactics delaying the publications that may lead to material postponements and ambiguities.

Effects of a declaration of insolvency

Once the initial judgment declares the debtor in a stage of insolvency or *concurso mercantil*, attachment or foreclosure of assets is suspended during the conciliatory stage, with the sole exception of labour-related obligations. Tax-related attachments or liquidations under specific provisions of the Concurso Law are specifically stayed.

The debtor maintains the administration during the conciliatory stage, although the conciliator may request the court removal of the administration, which is most uncommon. With the express purpose of conserving the enterprise as a going concern within the conciliatory stage, the conciliator is given broad powers to decide on the acceptance or rejection of contracts (within certain parameters), the contracting of new loans – although most litigators insist that the judge must approve – and the sale of non-essential assets. In all cases, the conciliator must report to the court every 72 hours – which is obviously burdensome in major filings – every payment to any supplier or person.

Debts in foreign currency

The Concurso Law attempts to correct prior judicial practice, which converted foreign currency debt to pesos early in the proceeding. The Law establishes provisions that are designed to protect the monetary value of creditor loans. All peso-denominated obligations are converted into inflation-linked units known as UDIs; foreign currency-denominated obligations are converted into pesos at the prevailing rate of exchange on the date the insolvency judgment is rendered and then converted into UDIs. Only claims with a perfected security interest (mortgages or pledges – but not in respect of guarantee trusts) will be maintained in their original currency or unit of account, and will continue to accrue interest, but only to the extent of the value of the collateral.

Fraudulent conveyances

The Concurso Law provides for a general rule as to the period when insolvency is presumed to have begun, which is of 270 calendar days prior to the judgment declaring insolvency (the 'retroactive period'). Nevertheless, upon the reasoned request of the conciliator, the controllers, who may be appointed by the creditors to oversee the process, or any creditor, the judge may determine a longer period (at most, three years). Conveyances that are not arm's-length or commercially sound, and the creation or increase of security interests within the retroactive period will be presumed fraudulent to creditors and will not be recognised. Proving fraudulent conveyances is a complicated task and rarely admitted.

Netting

The general concept of netting is recognised by the Concurso Law, which specifies that netting is mandatory for parties to a transaction recognised by the Law, pursuant to terms agreed upon in the relevant contract, on the date of the declaration of insolvency, in respect of

liabilities and rights arising from master or specific agreements entered into in connection with financial derivative transactions, *reportos* (Mexican law-governed repurchase transactions), securities lending transactions and other equivalent structures.

Mandatory netting is also recognised by the Law as an exception to the 'cherry-picking' powers given to the conciliator (i.e., mandatory netting applies, regardless of whether the conciliator decides to assume or reject the relevant executory contract).

Under the Concurso Law, the effects of a netted transaction are deemed to survive, even if the transaction was netted during the insolvency retroactivity period (as mentioned previously, generally 270 days). This provision constitutes another development that was intended to give financial institutions certainty when netting, on a bona fide basis, financial derivative transactions.

Obviously, as a prerequisite to netting, the Concurso Law accepts the principle of early termination. It establishes that financial derivative transactions and *reportos* transactions, maturing after the date of the declaration of insolvency, shall be deemed terminated precisely on that date.

In connection with financial derivative transactions, the Law provides that, if the relevant agreement does not specify the terms pursuant to which a transaction is to be closed-out and netted, the value of the underlying assets and liabilities is to be determined on the basis of their market value on the date of the declaration of insolvency; if such market value is not available or cannot be demonstrated, the conciliator may request an experienced third party to determine such value.

The general concept of netting reflected in the Concurso Law should be broad enough to encompass transactions such as New York or English law-governed repurchase transactions, securities loan agreements and any other transactions that may be expressed in other currencies. However, the broad terms of the relevant provisions in the Concurso Law, may result in abuses that would seem to go beyond the intent of the drafters of the Law (i.e., creditors claiming that transactions that are not financial derivative transactions, and, therefore, not benefiting from netting provisions, be considered as derivatives, by virtue of the manner through which such transactions were documented). It is also expected that complex derivatives will be challenged as invalid, based on arguments of *ultra vires*, lack of authority, disproportional elements and the like, specifically in times of unforeseen volatility. While such issues have been addressed by US courts (principally in New York) in favour of creditor banks in matters where Mexican companies were plaintiffs, the subject of complex derivatives is far from settled in Mexico.

Restructuring plan; pre-packaged insolvency

A pre-packaged voluntary insolvency must have the support at filing of the debtor and at least 50 per cent of creditors (taking into account all liabilities). In any event, with or without a pre-pack to become effective, a final restructuring plan must be subscribed to by the debtor and recognised creditors representing more than 50 per cent of the sum of the total recognised amount corresponding to unsecured creditors and the total recognised amount corresponding to secured or privileged creditors subscribing the plan. For acceptance, the favourable vote of 75 per cent of third-party unsecured claims if unsecured inter-company claims account for more than 25 per cent of unsecured claims must be obtained. Any such plan, with the validation of the court, would become binding on all creditors and the insolvency proceeding will be considered as final and concluded.

One significant problem with the statute is that there are no provisions allowing qualified majorities to impose a plan on any recalcitrant participant regarding secured creditors, although there are different largely untested theories as to how such imposition may be accomplished.

Key procedural events

The key procedural events, in summary – and only in theory – are as follows (approximate terms for their completion are in parentheses).

Conciliatory stage

a filing;
b acceptance of filing (by day 10);
c appointment of an examiner (by day 21);
d judgment declaring insolvency (by day 80);
e appointment of conciliator (by day 85);
f judgment recognising creditors and establishing preferences (by day 145); and
g restructuring agreement (by day 365); if not, bankruptcy is declared (on day 365, at the latest).

Bankruptcy stage

The bankruptcy or liquidation stage may begin earlier, if requested at any time by the debtor or if the conciliator determines that it will be impossible to reach agreement in respect of a restructuring agreement. Creditors may demand that the *concurso* begin at the bankruptcy stage, but it is extremely unlikely any such demand will prevail. Once the bankruptcy stage is declared, a receiver is appointed, which may be the same person who acted as conciliator (by day five of the declaration); the receiver takes over possession of the enterprise and its management (by day 20); the receiver prepares and delivers liquidation balance sheets and inventories (by day 75); the individual assets or the enterprise as a whole are slated for the sale and notices are sent out to potential bidders (by day 135); asset sales begin (the general rule is to conclude liquidation by day 180); and payment to recognised creditors, subject to the preference of labour and, thereafter, secured creditors and taxing authorities, will begin as soon as practicable. In practice, very few cases have reached this stage, and save for only one case, they have all failed to adhere to the time frames set forth by the Law, missing the mark by many years.

Priority of creditors under the Concurso Law

The Concurso Law establishes the following priorities:

a First, labour claims (salaries, three months of salaries and benefits, 12 days of salary for each year of employment, mandatory profit sharing and proportional benefits) for the previous 24-month period. It is noted that the Social Security Institute Law considers that pending fiscal social security contributions have the same priority as labour claims.
b Second, claims derived from DIP financing and that were incurred during the proceeding to maintain the ordinary course of business, and approved costs and expenses for the conservation of the business as approved by the conciliator or the court.
c Third, creditors secured by mortgages or pledges or which otherwise have a privileged priority recognised as such under commercial law (for example, further to a trust).

d Fourth, further to the Federal Tax Code, federal taxes and duties, although the application of this order of priority has been erratic, since the tax authority cannot be compelled to participate in any insolvency proceeding.

e Fifth, unsecured creditors.

f Sixth, claims of contractually subordinated creditors and related party creditors of the insolvent debtor (intercompany loans).

The above order must be applied on an absolute priority basis. Nevertheless, and although equity should only be considered after all the above claims are satisfied, judicial interpretations of Mexican corporate law require that shareholders must approve any capitalisation of credits further to plan, and in some instances the plan itself, giving shareholders a de facto ultimate veto right and thus, considerable leverage concerning the approval of any plan, although in a bankruptcy or liquidation, equity is placed at the very end of the list of priorities.

Duties of directors

The Concurso Law includes a regime for director liability for all business entities, which could have an impact on the way directors behave in the imminence of insolvency and the way in which these issues are addressed by the courts.

Disinterested directors are protected from liability under 'business judgement' provisions, based on the presumption that directors have acted on an informed, good faith basis, on the belief that the action taken was an adequate alternative, if based upon reliance on management and the advice of the corporation's external auditors or legal and financial advisers.

It is the view of the author that as a legal matter, directors and officers must manage an insolvent company and maximise its value for the benefit of all its stakeholders. The focus should be maximising the value of the enterprise, rather than attempting to maximise recoveries for any constituency in particular.

III RECENT LEGAL DEVELOPMENTS

Material amendments to the Concurso Law were enacted by Congress in 2014. The principal objectives of the reform focused on the goals of a more expedient and efficient procedure, greater transparency and a reasoned intent to formally introduce DIP financing.

The most relevant provisions introduced by Congress were:

a prohibiting the judge from extending the periods set forth in the Concurso Law.

b the procedural consolidation of *concurso mercantil* proceedings of companies that are part of the same corporate group, the concept of which now includes companies that have the capability to make decisions with respect to another company, regardless of the actual shareholdings (it is noted that substantive consolidation is not aloud);

c the ability of a debtor to request the *concurso mercantil* status prior to being generally in default with respect to its payment obligations when such situation is expected to occur inevitably within the following 90 days;

d the possibility of requesting a *concurso mercantil* directly in the stage of bankruptcy (liquidation);

e permitting common representatives to file credit recognition claims on behalf of a group of creditors and the addition of certain rules for the subscription of the debt restructuring agreement in the case of collective credits through their individualisation;

f allowing for the use of standardised forms to voluntary request or involuntary demand *concurso mercantil*;
g the prospect of filing petitions and other communications electronically;
h an emphasis on transparency;
i provisions permitting debtors to obtain DIP financing as necessary to maintain the ongoing business of the company and the essential liquidity during the *concurso*, the financing of which will be considered privileged in ranking (with a preference over all secured creditors) for purposes of the preference of the payment thereof in the event of a liquidation;
j the recognition of subordinated creditors, including inter-company creditors in accordance with certain rules, which, among others, establish that such inter-company creditors will not be allowed to vote for the approval of the debt restructuring agreement when such inter-company creditors represent 25 per cent or more of the total amount of recognised credits, unless such creditors consent to the agreement adopted by the rest of the recognised creditors of the same class; and
k the broadening of the retroactivity period applicable for the review of fraudulent conveyances with respect to transactions entered with inter-company or related creditors (to twice the statutory periods).

i Liabilities of management and the board of directors

To avoid abuses in respect of an insolvent debtor, the amendments to the Concurso Law also included a set of provisions that refer to the potential liability of the debtor's management and relevant employees for damage caused to the debtor company if:

a acting with a conflict of interest;
b favouring one or more shareholders and causing damage to other shareholders;
c obtaining economic benefits for themselves or for others;
d knowingly making, providing, disseminating, publishing or ordering false information;
e ordering or causing the accounting registries, related documentation or conditions in a contract to be altered, modified or destroyed;
f failing to register transactions or causing false information to be registered, or causing non-existent transactions or expenses to be registered, or real transactions or expenses are exaggerated, or otherwise carrying out any act or transaction that is illegal or prohibited by law, causing a damage to the bankrupt debtor and obtaining an economic benefit, directly or indirectly; and
g in general, carrying out any wilful or illegal act or acting with bad faith pursuant to the Concurso Law or other laws.

Although the Concurso Law adopted the business judgment rule contained in the Securities Law applicable to the members of the board of publicly traded companies and allows such directors and relevant employees to obtain insurance, guaranty or bonds to cover the amount of the indemnification for losses and damages caused, except for wilful misconduct, acts of bad faith, the Concurso Law expressly prohibits any agreement, or provisions in the by-laws with respect to any type of consideration, benefit or exemption that may limit, release, substitute or redeem the liabilities of such members of the board and relevant employees of a bankrupt debtor in the event of wilful misconduct or bad faith.

Finally, as part of the 2014 amendments, a bank resolution regime was created and regulated in the Law of Credit Institutions. Such regime is characterised by its celerity, pre-intervention corrective measures by the Institute for Banking Savings Protection, and its effectiveness in reaching an orderly liquidation if required, among other relevant features.

In August of 2019 amendments were passed to clarify that corporations owned by the Mexican government may be eligible to file under the Concurso Law. In this respect, it is emphasised, however, that neither Pemex nor the Federal Electricity Commission (CFE) are corporations. They are productive state-owned enterprises, governed by their own comprehensive legal regimes, and they carry out specific constitutional mandates relating to oil and gas and electricity for the Mexican State. As a matter of Mexican Law, neither may be declared bankrupt or insolvent or be subject to a *concurso*. Specific legislation enacted by the Mexican Congress would be required to judicially restructure or liquidate Pemex or CFE.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

Although the Law allows creditors and debtor companies in a pre-pack concurso to appoint a conciliator who is not a member of IFECOM, understandably IFECOM has been a zealous protector of its oversight responsibility, placing a stringent scrutiny on any such conciliator – and perhaps, even acts of harassment – especially with respect to formalities that seem to go well beyond the Law. There continues to be a marked emphasis on the use of cumbersome IFECOM formats and computer programs, which are not designed for large corporations, causing many delays at all stages of the procedure. The procedure and requirements that have been imposed by prior administrations of the IFECOM regarding the recognition of creditors stress the physical delivery of original documents, which in practice have meant that the conciliator may not rely on the audited financial statements of the company but on empirical evidence of debt, has on occasion led to months of otherwise inexplicable interruptions, notwithstanding that the Law provides otherwise.

In other matters, transparency and efficiency is far from being acceptable. The Federal Judiciary has failed to implement electronic filings of any sort, which leads to a considerable administrative burden on the courts themselves, not to mention a colossal waste of paper and natural resources. Therefore, reviewing all the documents actually filed in any major process is a difficult task, which of course affects the timing of the *concurso* – the 'strict' time periods in the Law have been extended more often than not – and moreover, create a perfect setting for many appalling delaying tactics, which do not merit a serious comment, although their existence is undeniable.

As to DIP financing, Mexican companies, with few exceptions, have not been aided by debtor-in-possession financing from Mexican banks or financial institutional sources, and foreign entities have failed to be persuaded to fund any such facilities until recently, given procedural uncertainties resulting in questions as to preference.

As to the ranking of claims, only registered mortgages and pledges have been given statutory preference on a clearly reliable basis, given a literal reading of the Concurso Law. Creditors holding security rights under trusts or escrows have been recognised in most cases as common creditors only, although they are given the 'privilege' of separating assets in trust from those of the company in question, a concept that makes little sense in view of

the stated objective of the Law: to keep the corporation as an ongoing concern during the workout or conciliatory stage of the *concurso*. Breaking up operating assets is inconsistent with this objective.

While still common and generally recognised, in recent years guarantee trusts involving future contractual flows assigned to creditors have come under attack, yet fortunately have been defended by rulings of the 8th Circuit Collegiate Court.

As to expenses, formal cases have brought about a debate both at IFECOM and among several judges, as to which concepts will be recognised as reimbursable expenses in a *concurso* proceeding. Professional fees, legal and those of financial advisers, have often been considered as substantially onerous and have thus been reduced significantly. In the extreme, the professional fees of a conciliator were turned down by a judge as unnecessary.

As a final comment on significant issues, notwithstanding that the Concurso Law empowers the judge to impose capitalisation of debt as a component of a restructuring plan, it has been held in judicial precedents, that to the extent a capitalisation becomes part of an exit plan, even if voted upon and approved by overwhelming majorities of every class of creditor, shareholders must consent and, therefore, equity does in fact have a veto power over a plan, which is seemingly contrary to the notion of absolute priority.

V INTERNATIONAL

The Concurso Law embraces, only in form, the UNCITRAL Model Law on cross-border insolvency and international judicial cooperation. Mexican courts have only twice in the past 20 years recognised and given judicial assistance to foreign insolvency proceedings (ruling that such proceedings did not contradict Mexican law or general principles of law). The Concurso Law includes substantial changes to the UNCITRAL Model Law that make the process defective as it focuses on channelling procedures through a conciliator, and thus effectively imposes the need to file a full *concurso* proceeding regarding any significant assets in Mexico. Recognition of foreign proceedings in Mexico is for all practical and legal purposes is impossible.

Related to this topic, Mexican companies have frequently filed for protection in the US bankruptcy courts under Chapter 15. Such courts have responded efficiently, recognising the *concurso* as the main proceeding. Unless the conciliator implements an indirect channel of communication between the Mexican judge presiding over the main proceeding and courts outside Mexico, cross-border communication is practically non-existent.

VI FUTURE DEVELOPMENTS

In April 2020, a member of an opposition party submitted in the Senate a bill intended to create an emergency insolvency regime within the Concurso Law related to the declaration of the sanitary emergency due to force majeure generated by the covid-19 pandemic (this is known as the initiative).

The intention of the initiative was to accelerate insolvency proceedings given the extraordinary emergency affecting the commercial, business, and jurisdictional environments resulting from the pandemic. With good reason, the initiative recognised that there are industries and sectors of the economy that practically came to a halt, resulting in significant financial damage.

Concurso has had as its main objective, and as a matter of public interest, to preserve the ongoing concern of companies, and to prevent that a general breach regarding payment obligations, may jeopardise the continuity of commercial entities and of other companies with which they maintain a business relationship (avoid a domino effect).

The initiative aimed to offer any company, irrespective of the size to file for an insolvency proceeding on a fast-track basis, as a tool to keep companies in operation through an expedited procedure that could significantly limit the time and formalities of the process.

The emergency insolvency regime, according to the initiative, however, would apply to the extent 'unforeseen material adverse effects or a force majeure event, or a declaration of emergency, sanitary contingency, or natural disaster, at a regional or national level, aggravates the economic situation of the country or a region, affecting individuals or legal entities', without outlining further details.

Notwithstanding the simplicity it sought, the initiative failed to be discussed or considered. The main reason is that insolvency law reform is at the very bottom of political priorities and continues to be ignored by the Supreme Court of Justice. In addition, it is the view of the author and leading business and banking organisations that the initiative was inconsistent with the rule of law through its failure to include basic legal definitions, leaving debtors and creditors little assurance of legal protection. It left open too many questions regarding the emergency proceeding and its consistency with notions of procedural due process. Furthermore, the attempted removal of several provisions of the Federal Tax Code materially affected the statutory preferences and the collection efforts of the federal tax authorities, which made discussion of the bill improbable.

A meaningful debate as to improvements to *concurso* or to address meaningful recognition procedures either at the Supreme Court or in Congress is not expected to occur any time soon. Consequently, efforts will continue to concentrate on out-of-court restructurings as a means of preserving jobs, conserve value and weather the effects of the economic downturn brought on by the covid-19 pandemic, as well as disruptive policies challenging private investment.

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