THE RESTRUCTURING REVIEW

Thirteenth Edition

Editor
Dominic McCahill

THE LAWREVIEWS

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THIRTEENTH EDITION

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PREFACE

I am very pleased to present this thirteenth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions that have been prevailing in the global restructuring market in 2020 and to highlight some of the more significant legal and commercial developments and trends during that period.

In particular, I would like to thank Chris Mallon for his editorship of all 12 of the previous editions. Having retired from a long and distinguished career as a restructuring lawyer in private practice, Chris is now a Senior Advisor in the Financial Advisory Group at Lazard, based in London.

2020 began with many market observers expecting a year of overall modest growth for the global economy. Of course, there were political and economic clouds on the horizon, as there usually are, such as the ongoing trade hostilities between the United States and China and the uncertain outcome of the Brexit negotiations between the United Kingdom and the Member States of the EU as the United Kingdom finally withdrew from the EU on 31 January.

However, the world is now in the midst of the covid-19 pandemic. Much of the world is in lockdown or taking tentative steps to emerge from lockdown. While the human cost is paramount, the economic impact has been enormous. This has prompted a huge response from governments and central banks around the world in an effort to support businesses and workers given the unprecedented drop in supply and demand. In some industries, the drop has been precipitous and virtually total. The full extent of the damage is yet to be assessed and the length and trajectory of the road to recovery are uncertain.

One prominent reaction to the crisis has been the emergence of new laws, rules and practices in restructuring, perhaps reflecting the maxim that one should never let a good crisis go to waste. These measures – as can be seen in the following chapters – include not only ones specific to covid-19, but also include broader reform of insolvency and restructuring law. Notwithstanding increasing nationalism in certain parts, the world's economies remain highly connected and interdependent. International, as well as national, efforts will be required to lead towards a full recovery. I hope that *The Restructuring Review* will be a useful guide at a time of evolution for restructuring law and practice internationally.

I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom this would not have been possible.

Dominic McCahill
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
July 2020

Chapter 14

MEXICO

Thomas S Heather[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

In general, restructuring practice in Mexico continues to focus on out-of-court settlements, with a remarkably high rate of success. That cannot be said with regard to 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 12 month period prior to the covid-19 emergency continued to reflect the many continuing deficiencies in restructuring cases governed by the Law of Commercial Insolvency of 2000 (as amended, the Concurso Law). In recent years, relevant cases (those involving claims in excess of US$100 million) have stalled 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 measures', in addition to ever-expanding interpretations of 'due process' and 'human rights', which cause continual delays and a lack of rule of law. The mandatory time frame established in the Concurso Law is widely ignored, resulting in the destruction of value. Only those 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 been resolved and successful restructurings achieved within a period of less than a year.

At the time of writing, the drastic impact of an unprecedented pandemic on the world economy, and on Mexico, coupled with a weakening currency, a deteriorating health system, poorly improvised responses to the emergency and the presentation of deceitful statistics, as well as the continuing, calculated attacks by the current administration on free enterprise, the prior energy reform and private investment, in the context of a startling neglect of the rule of law and an insistence on redirecting public spending to unproductive and highly questionable and environmentally unsustainable large-scale projects, is beginning to have dire effects on the Mexican economy and investor confidence. There is no doubt that the unforeseen pandemic, when added to irresponsible populist policies, will cause an unparalleled recession, unemployment and, ultimately, poverty. Today, supply chains have been severely affected in many sectors, and businesses of all sizes will have to deal with falling revenues and profits , and an economic downturn of gargantuan proportions. Entire sectors of the economy (such as businesses relying on discretionary consumption, hospitality, real estate development,

1 Thomas S Heather is a partner at Ritch, Mueller, Heather y Nicolau, SC. This chapter reflects the opinions of the author and not of the firm.

construction, tourism, entertainment, aerospace and airlines) and individual companies will surely come under financial stress due to the lack of economic growth and a precipitous decrease in demand and supply, especially if the administration fails to provide much-needed fiscal support and responsible policies to encourage confidence and investment.

At present, forecasting and budgeting are objectively impossible. Debtors and creditors (led by a solid, well-capitalised banking system – at least in the immediate foreseeable future) have responsibly turned to constant risk analysis exercises and interim mitigating initiatives, through actions such as the extension of immediate maturities and interest payment relief, in respect of consumer and commercial credits alike. The financial authorities and the Central Bank have supported these efforts through provisional regulatory relief (by granting cautious flexibility on non-performing loan status and preventive reserves), as well as measures to provide liquidity and federal fund rate reductions. Nevertheless, the administration is yet to react to the continuing appeals of the productive sector of Mexico for fiscal backing and credit support to companies of all sizes. Not only have petitions been largely ignored, but the President has vowed not to bail out any private company, no matter the size or importance, while at the same time pouring billions of dollars into the dark well that is Pemex, the government's oil monopoly, in the midst of a major oil oversupply, including the construction of an additional refinery, among other dubious projects.

As to insolvency practice, in the past two decades, the Supreme Court of Justice, as head of the Federal Judiciary, which has exclusive jurisdiction on insolvency matters, has shown only sporadic interest in attending to the evident regression in *concurso mercantil* proceedings. In addition, with honourable exceptions, federal judges continue with their preference for avoiding bankruptcy cases, largely ignoring them or turning them down based purely on formalities. It is essential that the Federal Judiciary react to the unmistakable drawbacks encountered continually in bankruptcy practice. There is no doubt that companies of all sizes and sectors of the economy, and creditors and stakeholders, will be forced to turn to *concurso* as a last resort to salvage their business continuity as a result of the economic crisis looming in the immediate future and the prevailing volatility.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

The Concurso Law was published in May of 2000 and was 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. 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.

ii 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 case, 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.

iii 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 that 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 be generally 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. On the other hand, involuntary filings have been largely unsuccessful because of the many formalities that must be met.

iv 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 in regard to 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 greater impartiality. Nevertheless, the courts have been reluctant to accept insolvency cases given their considerable

workload, among other reasons, and when they have accepted a major matter, the mere size and thousands (if not millions) of pages involved have made it a huge task to address and preside over these proceedings efficiently.

v 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 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 debtor-in-possession (DIP) financing).

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.

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 in regard to corporations in the telecommunications industry, as was the case with the successful restructurings of Satélites Mexicanos SA de CV.

vi Related companies

Insolvency proceedings of two or more 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; nevertheless, the 2014 amendments introduced provisions to allow for a joint petition by multiple group members. This technique was efficiently applied in the *Empresas ICA* case. Mexican courts do not, however, recognise substantive consolidation.

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.

vii 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 a number of relevant additions to the petition request: a copy of the corporate resolutions that approved the filing (interpreted by several courts as requiring shareholder approval), a proposed reorganisation plan and an enterprise conservation plan, which were intended to include DIP financing terms.

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;
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.

viii 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 court removal of the administration, which is must 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 –each and every payment to any supplier or person.

ix Debts in foreign currency

The Concurso Law attempts to correct prior judicial practice, which converted foreign currency debt to pesos early on 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 regard to 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.

x 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 interventors, 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.

xi 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.

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.

xii Restructuring plan; pre-packaged insolvency

A pre-packaged voluntary insolvency must have the support of the 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 to the plan. For acceptance, a favourable vote of 75 per cent of third-party unsecured claims must be obtained if unsecured inter-company claims account for more than 25 per cent of unsecured claims. Any such plan, with the validation of the court, will 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 in regard to secured creditors, although there are different largely untested theories as to how such imposition may be accomplished.

xiii Key procedural events

The key procedural events, in summary – and 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 that 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.

xiv Duties of directors

The Concurso Law includes a regime for director liability for all business entities, which could have an impact on the manner in which 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 on maximising the value of the enterprise, rather than attempting to maximise recoveries for any particular constituency.

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 into with inter-company or related creditors (to twice the statutory periods).

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 to be exaggerated, or otherwise carrying out any act or transaction that is illegal or prohibited by law, causing 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 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, either 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

Recent cases have continued to underline material limitations with regard to *concurso* proceedings. The impact of the pandemic emergency remains to be seen, although there seems to be little hope for improvement in insolvency matters in the near future.

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 stringent scrutiny on any such conciliator – and perhaps, 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 software, 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 IFECOM with regard to the recognition of creditors stress the physical delivery of original documents, which in practice has meant that the conciliator may not rely on the audited financial statements of the company but on empirical evidence of debt, which may lead to months of otherwise inexplicable interruption, notwithstanding that the Law provides otherwise. With the recent appointment of a new director general of IFECOM, practitioners remain hopeful that IFECOM may again become a positive factor to oversee that procedures are fair, transparent and consistent with the *concurso* law.

In other matters, transparency and efficiency are 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. As a consequence, 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 serious comment, although their existence is undeniable.

Mexican companies have not been aided by DIP financing from Mexican banks or institutional sources, and foreign entities have failed to be persuaded to fund any such facilities until recently, given continuing 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. A better view is that such creditors should be recognised as creditors with a stated contractual privilege to specific assets or flow of funds, irrespective of any procedure of separation – a view that is supported by a correct reading of the Law and by the author. While still common and generally recognised, in recent years guarantee trusts involving future contractual flows assigned to creditors have come under attack, but yet have been defended by rulings of the Eighth Circuit Collegiate Court.

Formal cases have brought about a debate both at IFECOM and among a number of judges as to which concepts will actually be recognised as reimbursable expenses in a *concurso* proceeding. Professional fees, legal fees 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.

Among the more alarming points of view generally shared by the litigation bar, is that, to the extent that a capitalisation of debt becomes part of an exit plan, even if voted upon and approved by overwhelming majorities of every class of creditor, shareholders do in fact have a veto power over a plan if they disagree. The author, even though his view is by no means widely accepted, does not share this perspective as it is contrary to the notion of absolute priority, and because the Concurso Law empowers the judge to impose the capitalisation, although most judges are reluctant to do so.

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 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 in regard to any significant assets in Mexico.

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

On 30 April 2020, a major 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 (the Initiative).

The intention of the Initiative is to accelerate insolvency proceedings given the extraordinary emergency affecting the commercial, business, and jurisdictional environments. With good reason, the Initiative recognises that there are industries and sectors of the economy that have practically come 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 a general breach of payment obligations from jeopardising the continuity of commercial entities and of other companies with which they maintain a business relationship.

The Initiative aims to offer any company, irrespective of 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, 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'.

The application of the Emergency Insolvency Regime presented by the Initiative was intended to be available for as long as any such emergency subsists, and up to the following six months.

The main features proposed in the Initiative are:

a a voluntary request by a company, in a format to be designed by IFECOM based solely on a declaration under penalty of perjury, disclosing that it finds itself in a generalised non-compliance situation with its payment obligations, will be sufficient to allow the formal initiation of the insolvency process, without the need for further proof;

b the insolvency procedure may be carried out through email entirely, without the requirement of physical submission (notwithstanding the limitations that affect the Federal Judiciary with regard to technological advances);

c under the Emergency Insolvency Regime, it will not be necessary to verify general non-compliance through an examination;

d the judge will automatically accept the filing, and without the need of summons, will issue a judgment declaring insolvency within three days;

e in the declaration of insolvency under the Emergency Insolvency Regime, which will not admit any appeal, is that the relevant judgment must contain:

- prohibition of the company carrying out any sale or encumbrances of its main assets;
- prohibition on making payments of obligations which became due prior to the date of issuance of the judgment, as well as an order not to proceed against guarantors or joint obligors;
- lifting of asset attachments that may been carried out with regard to the company's bank accounts; and
- prohibition on modifying or revoking administrative concessions and construction agreements that the company considers essential for its business (the Initiative does not distinguish whether this refers to public or private contracts); and

f tax claims will be given the treatment of common unsecured credits, and the resulting insolvency plan will be mandatory to the tax revenue service.

Notwithstanding the simplicity which it seeks, the Initiative is inconsistent with the rule of law by its failure to include basic legal definition, leaving debtors and creditors with little

assurance of legal protection. The Initiative as currently drafted leaves open many questions regarding the emergency proceeding and its consistency with notions of procedurals' due process. Furthermore, the attempted removal of several provisions of the Federal Tax Code would seem to materially affect the statutory preferences and the collection efforts of the federal tax authorities, which will lead to heated debate in Congress.

Finally, the Initiative establishes that the Federal Judiciary Council will designate the district courts 'with experience in insolvency proceedings' in order for them to be designated as those specialised in proceedings under the Emergency Insolvency Regime. However, very few district judges have experience and interest in handling insolvency matters, as previously pointed out. Notwithstanding the above comments, to the extent that the Initiative is discussed in Congress – which is uncertain – it may lead to a potentially meaningful discussion of the many pitfalls existing in Mexican insolvency practice which must be addressed.

Appendix 1

ABOUT THE AUTHORS

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Thomas Heather has more than 40 years of experience in banking, restructuring, and mergers and acquisitions. Prior to returning to his current position, he was a partner at a leading US firm, where he headed the Latin American insolvency and restructuring group. In Mexico and the United States, Mr Heather has published many articles and reviews on legal and financial topics, and has co-authored the treatise *Regulation of Foreign Banks*, among other publications. He is a board member of several leading corporations and Mexico's second-largest bank. Mr Heather is a founding member of the International Insolvency Institute, an international fellow of the American College of Bankruptcy and a former member of the Federal Institute of Insolvency Specialists. He founded the Mexican Mediation Institute. He has acted as a conciliator in 20 cases (including in the *Empresas ICA* case), and as a liquidator or receiver and as foreign representative, in addition to his role as lead counsel in hundreds of consensual restructurings. He has lectured extensively and is a member of the Advisory Board of the Programme on International Financial Institutions of Harvard University.

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