

INSOLVENCY SECTION  
INTERNATIONAL BAR ASSOCIATION

**21st Annual Global Insolvency and Restructuring Conference**

***“A Uniform Insolvency Regime – Dream or Reality”***

Panel: Update on the New Mexican Insolvency Legislation

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## UPDATE ON THE NEW MEXICAN INSOLVENCY LEGISLATION

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Most Important Amendments to Mexico's Business Reorganization Act (Ley de Concursos Mercantiles or LCM) since enacted. Effective as of January 13, 2014

Now Creditor's protection is mandatory “... *In addition to preserve enterprises, it is set forth as main purpose creditors' protection and the Estate's protection” (public policy)*

“...To guarantee creditors from the detriment of the estate while debtor in concurso, the court, trustee (conciliator) and parties in interest must subject their acts, at all times, to principles of *effective protection, procedural economy, expeditiousness, publicity and good faith. Art. 1.*

Equip LCM with legal tools to make of it an orderly, effective and efficient insolvency proceeding

# UPDATE ON THE NEW MEXICAN INSOLVENCY LEGISLATION

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Adequate balance between creditor's rights, preservation of debtor's going concern and maximization of the estate assets

Eliminates long-standing bankruptcy law loopholes experienced since its enactment 13 years ago, known as the insolvency lost decade

Most notably, codifies and prevents the process experiences of the well-known Vitro case type

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The legislative history of the amendments acknowledges that the LCM:

*“... lacks some of the most essential features to make the concurso proceedings one in fact effective, efficient and just. This problem may be summarized in two categories: first, creditors’ lack of protection derived from situations that go beyond the scope of current provisions and, second, lack of mechanisms, both, procedural as well as electronic to carry proceedings to an end without affecting the insolvency estate...”*

*“...In fact, Ley de Concursos Mercantiles has not been able to prevent that proceeding last indefinitely, causing an important hurt to the insolvency patrimony. The legal abuses during the proceedings have caused raise of credit price and of other financial vehicles for companies carry on business in the country, and this is the principal concern that this amendment seeks to take care of, keeping the original legislator will to foresee enterprise conservation as the main economical unit and source of employment in our society...”*

## AS EXPECTED, VITRO CASE LEAD TO THE MOST AMBITIOUS AMENDMENTS OF THE LCM

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The amendments provide for the following main comprehensive and guideline features:

### 1. Preliminary provisions.

**a) Creditors protection.** In addition to preserve enterprises, it is set forth as main purpose creditors' protection and the Estate's protection - *public policy*

**b) Proceedings transparency.** It is set forth the principle of most publicity, as well as information access over documents and information, subject to protection of personal data and qualified and confidential information

## 2. Concurso Mercantil Preparation

a) On line (Electronic Signature) as an option to start and pursue the concurso mercantil proceeding

**b) Use of formats of the Instituto de Especialistas de Concursos Mercantiles (Trustee's Office).** Use of formats drafted by the Institute to speed petition filings and other motions during the proceeding

**c) Imminent Insolvency.** Upon inevitability of insolvency standard, Debtor is entitled to access to insolvency stay protection, filing petition within the prior 90 calendar days.

**d) Obligation of Filing Preliminary Reorganisation Plan, Enterprise Preservation Proposal and Debtor's Corporate Insolvency Decision**

**e) Outside Auditor Opinion.** Under certain circumstances, Debtor may file Auditor's opinion as to the general default of payment obligations. In such a case, concurso mercantil may be adjudicated without need of the visit (inspection)

**f) Petition of concurso mercantil at bankruptcy stage by Creditors.**

**g) Termination of bankruptcy by reorganisation plan in bankruptcy stage**

**h) Group of Companies Joint Petition.** A new figure is introduced, joint declaration of concurso mercantil, by means of which Debtor or Creditors may seek concurso mercantil adjudication of two or more enterprises of the same group of companies

### **3. Preliminary Stage of Verification, Conciliation Stage and Bankruptcy Stage**

- a) Post Financing Priority. Provides post financing in favor of debtor, needed to keep the enterprise as an ongoing concern during the concurso mercantil, including constitution of collateral. Post financing, apart from exceptions, shall have payment priority.
- b) Interventors Appointment. Creditors holding 10% of claims may appoint one interventor, being either an individual or legal entity with legal capacity to liaison on behalf of the appointing creditors with debtor, conciliator and trustee, being entitled to access of debtor's information
- c) Duration of Conciliation Stage. Mandatory prohibition to extend reorganization period. Maximum up to 365 calendar days. Upon expiration, bankruptcy adjudication is automatic.
- d) Trustee substitution. Debtor and creditors holding 50% of claims may appoint a trustee not being recorded before the Trustee Office (IFECOM), whether and individual or legal entity
- e) Trustee Appointment in prepackage petition by debtor and creditors

## 5. Reorganisation Plan (Creditors' Agreement)

a) **Mandatory enforcement.** Any Allowed Creditor may request plan mandatory enforcement by means of a summary proceeding (incidente) before the court that adjudicated the concurso mercantil

b) **Amendment.** In case of change of circumstances, that materially affects plan fulfillment it may be amended in order to satisfy the need to preserve the enterprise

## 6. “Intercreditors Debt”

a) **Subordinated Creditors.** New ranking of subordination debt:

- i. Contractual/statutory subordination debt is now recognized by law
- ii. Unsecured intercompany and insiders debt are now ranking mandatory as subordinated debt; except for claims of parent company and individuals that have control over debtor just for claims ranking; exception does not include casting votes for the reorganization plan, fraudulent conveyances, *inter alia*
- iii. late claim filings

**b)** In order to prevent fraudulent conveyance of intercompany indebtedness and to give certainty to investors and creditors that their debt would be paid first before certain intercompany obligations, the reform provides that in case the debtor is a corporation, the following unsecured creditors (statutory insiders) shall be characterized as subordinated in ranking:

- i. Subsidiaries and affiliates of the debtor;
- ii. Director, members of the Board of Directors, and key officers of the debtor, as well as those in its subsidiaries and affiliates
- iii. Corporations with the same managers, members of the Board of Directors or key officers similar to those of the debtor (common management).

In the event the insolvent company is put into liquidation, all of the aforementioned creditors shall receive payment only after senior debt claims are paid in full.

Claims held by controlling individual shareholders and by the holding company of the debtor were excluded from subordination in payment as lawmakers considered that including such claims would impair their ability to obtain financing from lenders.

## **7. Voting of “intercompany” claims**

- a) No crowdown of third party legitimate claims by casting voting of intercompany/insiders debt.
- b) The plan must be agreed by the debtor and creditors representing more than 50 % of the sum of:
  - (i) all the debtor’s unsecured and subordinated claims, plus
  - (ii) all the claims of the debtor’s secured or priority creditors accepting the reorganization plan.
- c) If intercompany claimholders and insiders (including controlling individual shareholders and holding companies) as subordinated creditors, hold at least (jointly or severally) 25% of the total amount of the credits of (i) and (ii) above, in order to become effective, the plan must be accepted by creditors representing at least 50% of such credits, excluding from this amount the claims of the insiders.

The foregoing rule shall not apply when intercompany claimholders and insiders accept the plan as agreed by the rest of the voting claimholders, in which a case the majority 50% rule shall apply

Now the voting of insider/ intercompany claims together with third-party claims is effective for the approval of any reorganization only if at least half of the non-insiders cast their votes in support of the plan.

**8. Subordinated debt and “Subordinated creditors”**. Total or partial extinction of subordinated debt is allowed or other treatment.

a) Creditors’ agreement may provide its extinction, including its subordination or another form of particular treatment.

**9. Colective Actions**. Indenture Trustees and Bondholders. Interaction before

Mexican courts

Filing proof of claims

individually by bondholder - sustraction

Overall proof of claim by indenture trustee representing bondholders

pursue allowed claims, rights, objections and voting rights

Bondholders 'meetings as per indenture, law or LCM binding effects

**10. Regime on “extinction of debts”**

Reorganization Plan and judgment approving it, shall be the only document governing debtor obligations towards his Allowed Creditors

11. **Creditors' agreement needed** on less favorable general plan terms and conditions vgr. subordination, extinction
12. **Creditors' preservation of security**, guaranty, collateral, real - personal
13. Write off, extension of time and any **debt benefit under the plan only links debtor** no third party debtor – joint and several obligors, guarantor co-obligor, security co-maker, unless with creditor's agreement
14. **Dismissal of involuntary petition** – award on legal fees and costs on work legal product assessment
15. **Director and Officer's Liability Regime**  
  
New civil and criminal liability regime for the Debtor's board of directors and key employees in benefit of the Estate, including insiders and relatives. Cases to exclude liability

## **16.Voidance Actions. Fraud of Creditors and “Intercompany” Transactions.**

**Amendment of the suspicious period date.** The burden to prove is more flexible to obtain extension of the suspicious period without need to prove the actual fraud, which is a separate cause of action. Involvement of intercompany/insiders double period of time (540 calendar days).  
Extendable up to 3 years.

**Legal standing to enforce action seeking civil liability (damages) when upon fraudulent transactions (voidance actions).** May enforce liability action (voidance action): (i) fifth part of Allowed Creditors (ii) Allowed Creditors holding 20% of claims (iii) Interventors (iv) the debtor and (v) stockholders holding 25 % of stock

**17. Sale Assets Process**

Restriction on opposition on collateral foreclose. During the first 30 calendar days of the bankruptcy stage, the trustee may only prevent a separate collateral foreclose on assets linked to the ordinary operation of the enterprise when trustee considers that it benefits the Estate by sealing it in conjunction of assets.

**18. Regime of separation of trusts.**

Assets may be separated from the Estate, while in possession of the Debtor, which are affected to a trust, including when Debtor is the trust settlor.

**19. New Specialized Federal Courts**

## **20. Special concursos**

Concessionaires. Powers of Executive are strengthened on the management of enterprises holding concessions adjudicated in concurso mercantil in order to guaranty continuance of the service supply or exploitation of the public asset.

Organisations and persons that perform auxiliary activities of credit. Powers of Banking and Securities Commission are strengthening to carry actions to protect creditors' rights of these organisations being adjudicated in concurso mercantil.

Banks new regime Banking Liquidation Act