GETTING THE DEAL THROUGH

# Restructuring & Insolvency

## in 45 jurisdictions worldwide

## 2014

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# Restructuring & Insolvency 2014

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# Mexico

**Darío U Oscós Coria and Darío A Oscós Rueda**

Oscós Abogados

## 1 Legislation

What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The Commercial Insolvency Law (LCM), applies to merchants and traders, individual and legal entities, including commercial companies, trusts engaged in business activities, financial institutions, state-owned commercial companies, the estates of deceased merchants, partners of a liability partnership and small merchant debts lower than 400,000 *unidades de inversion* (UDIs, see question 10), subject to written agreement.

The insolvency of non-merchants (individuals, consumers) – *concurso civil* – is governed by the state civil codes and state codes of civil procedure.

Insolvency for insurance, bonding, reinsurance and re-bonding companies is governed by their special laws.

Filing for insolvency is not mandatory.

The conditions for initiating a *concurso mercantil* are that there must be a debtor who is a merchant, individual or legal entity and there has been a failure to make payments generally when due.

Criteria for establishing a general default on payment obligations are:

- failure to meet payment obligations to at least two creditors;
- obligations more than 30 days overdue;
- such overdue obligations represent 35 per cent or more of the total amount of the debtor's obligations as of the petition filing date; and
- the debtor must lack cash assets, as defined by the law, to pay at least 80 per cent of the total debts due as of the petition filing date. Cash assets are:
  - cash on hand and deposits on site;
  - deposits and investments due within 90 days as of the date of the petition being filed;
  - accounts receivable due within 90 days as of the date of the petition being filed; and
  - securities that regularly registered sell-or-buy operations in relevant markets, saleable within 30 banking business days.

## 2 Courts

What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

Federal district courts are the only courts with jurisdiction over commercial insolvency proceedings for merchants. Non-merchants are subject to state and local civil jurisdiction.

Labour credits (see question 3) are included within the total liabilities of the debtor. However, labour creditors are not obliged to join the *concurso mercantil* proceedings (see question 8). Labour credits are, instead, considered under the jurisdiction of the labour courts and are enforced and paid before labour courts rather than joined to federal or state insolvency courts. The same applies to tax credits, which are considered under the jurisdiction of the tax courts.

It should be noted that the Federal Constitution (article 1) was amended on 10 June 2011, to recognise and guarantee human rights granted by the Constitution and international treaties. This amendment commands all authorities to recognise, respect, protect and guarantee human rigths. Thus, pursuant to constitutional articles 1 and 133, all authorities, including the judiciary in all levels (first instance, appeal and constitutional) must enforce human rigths through the operation of law, even without the party's petition and even if there is another conflicting provision. Human rights include, inter alia, not only life, liberty and freedom from discrimination, but also ownership, property, rights and obligations under contracts, due process, the administration of justice, equal treatment and the enforcement of the rule of law.

## 3 Excluded entities and excluded assets

What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

Workers owed labour credits are excluded; such workers are governed by the Federal Labour Law (labour credits are claims by employees and may include unpaid wages and employment indemnity).

Tax claims and claims equivalent to tax claims by the tax authorities (federal, state and municipal), the Mexican Institute of Social Security (IMSS) and the National Workers' Housing Fund Institute (INFONAVIT) are excluded from the general bankruptcy proceedings (*concurso mercantil*, see question 8). 'Claims equivalent to taxes' includes the IMSS and INFONAVIT tax quotas employers must pay that are considered equivalent to taxes. Federal tax credits are governed by the Federal Tax Code and state and municipal tax credits are governed by state tax laws. Labour creditors and tax creditors do not join the bankruptcy proceedings and are paid and liquidated by their labour chambers and tax authorities, respectively.

Tax credits and labour credits are included within the total liabilities of the debtor. Tax credits have priority over unsecured credits and over credits secured by a pledge or mortgage, provided these secured credits were perfected and recorded before the notice to debtor of the tax credits. Tax credits have no priority over labour credits or over alimony for which a lawsuit has been filed before a court.

By law, tax creditors do not join the general bankruptcy proceedings. The law provides that if a debtor is adjudicated in *concurso mercantil*, the court shall notify tax creditors of such adjudication. Enforcement of tax creditors may be stayed by this adjudication, provided tax creditors had been notified of the filing of the *concurso mercantil* petition.

There are assets excluded from execution, attachment and liquidation in bankruptcy such as alimony, child support, recorded homestead (family patrimony), *tierras ejidales* (communal real estate land) and life insurance in the case of an irrevocable appointment of a beneficiary.

### 4 Protection for large financial institutions

Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

There is currently no special regime or legislation to deal with financial difficulties of institutions considered too big to fail. In order, however, to better protect the domestic economy, a set of amendments of the financial and insolvency regulations is in the process of being enacted in federal congress. Amendments have already been approved by the chamber of deputies (in September 2013), and it is expected that Senate will also approve them.

The amendments, in essence, aim to increase the availability of credit and make it cheaper, especially for small and medium-sized businesses. On the other hand, amendments also provide legal tools for the efficient and prompt enforcement of financial regulators powers, liquidation of estate assets and creditors' collection rights.

These legislative amendments are made in a context of four major amendments already in process in the federal congress: education, financial, oil and energy, and tax. New education legislation has already been enacted and is in effect.

In the financial sector, the new banking law will provide for a special insolvency regime, namely a 'banking judicial liquidation'. Proceedings will be for the liquidation of a bank, directed by a federal district court. A trustee will be appointed by the Banking Commission. It is recognised that under the current LCM, the liquidation of a bank in bankruptcy may take up to a decade. Accordingly, in the new regime dilatory practices are overcome to make liquidation faster and more efficient.

### 5 Secured lending and credit (immoveables)

What principal types of security are taken on immoveable (real) property?

The principal types of security over immoveables are mortgages; industrial mortgages; aircraft mortgages; maritime mortgages; train mortgages; guarantee trusts; and purchase and sale contracts with retention of ownership title.

### 6 Secured lending and credit (moveables)

What principal types of security are taken on moveable (personal) property?

The principal types of security over moveables are: ordinary pledges; pledges with debtor's holding possession of pledges; guarantee trusts; bonding guarantees (surety bonds); insurance credits; and stock exchange securities liens. As collateral, the *aval* (joint and several personal guaranty on negotiable instruments, which is equivalent to a co-maker) personal guaranty on obligations and joint and several obligation is common.

### 7 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Attachment on enforcement of final, res judicata judgment has priority in liquidation. Pre-judgment attachments, attachments and judgments regarding unsecured credit lack any priority in liquidation.

The processes are, in general, difficult and time-consuming. Allowed or disallowed claims may be appealed up to the Mexican Supreme Court, which might be costly and takes a long time.

Foreign creditors receive the same treatment as domestic creditors. Proofs of claim must be filed to enforce creditor's rights, to become a recognised creditor and to participate in reorganisation and liquidation.

### 8 Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Insolvency proceedings for merchants are a single, monolithic, compound process, comprising two major stages: conciliation and bankruptcy (liquidation). In conciliation a conciliator is appointed and seeks to establish a reorganisation plan. If no reorganisation plan is agreed, the process is converted into bankruptcy (liquidation). A trustee is appointed for liquidation.

There is also a sub-stage: the audit, wherein an auditor is appointed to inspect the debtor's premises and accounts to confirm that the standard for insolvency is met and reports accordingly to the district court, which may judge the debtor to be in *concurso mercantil* (known as 'adjudication in *concurso mercantil*').

Full insolvency proceedings may be voluntary or involuntary. In a voluntary petition or prepackaged insolvency there is no visit. Only the debtor may voluntarily request a *concurso mercantil* (merchant's insolvency) in the event of bankruptcy and there is no visit. In an involuntary petition a full *concurso mercantil* shall be pursued. Bankruptcy allows for a reorganisation plan.

Liquidation cannot be involuntary. Bankruptcy relief becomes available when the debtor (merchant) requests his or her bankruptcy. Voluntary bankruptcy is adjudicated without full insolvency proceedings (see question 10). For a debtor to be placed in bankruptcy by a creditor (ie, involuntarily) a full *concurso mercantil* shall be pursued. A debtor is declared to be in bankruptcy by the court if a plan is not agreed upon during conciliation proceedings or if the debtor does not cooperate with the plan and the conciliator (see question 10) requests a declaration of bankruptcy.

For requirements and effects, see question 10. Additional relief in bankruptcy is as follows:

- the debtor's incapacity to keep possession of, dispose of and administer assets is declared;
- possession and administration of assets are surrendered to the trustee;
- assets subject to the enforcement of a final judgment regarding obligations prior to the commercial insolvency declaration are excluded;
- debts to the bankrupt entity are not paid and assets shall not be surrendered to it; if debtors default, they are ordered to pay twice the amount defaulted on as a fine;
- a trustee is appointed, who shall take possession of assets and manage them; and
- in the case of an individual debtor, it is presumed that assets of a spouse acquired within two years prior to the suspect period belong to the state (the 'Muciana' assumption).

### 9 Involuntary liquidations

What are the requirements for creditors placing a debtor in involuntary liquidation and what are the effects?

There is no direct involuntary liquidation. There is involuntary *concurso mercantil*, under which, if the debtor and creditors fail to reach a reorganisation plan, the debtor is placed in liquidation. See question 10.

**10 Voluntary reorganisations**

What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

**LCM overview**

The LCM provides one form of insolvency proceedings, *concurso mercantil*, which has two phases:

- conciliation (reorganisation) with the debtor in possession; and
- bankruptcy (liquidation) under the possession and administration of a trustee.

The conciliation phase may last up to 185 calendar days, with two extensions of 90 calendar days each upon the approval of a special majority of recognised creditors (first extension: two-thirds of the total debt creditors; second: 90 per cent of recognised creditors).

If no reorganisation plan is reached during the conciliation, the procedure turns into a bankruptcy (liquidation). Upon declaration of bankruptcy, assets shall be sold at public auction through a bid process. Before conciliation, there is an audit to confirm whether or not the standard for insolvency is met (see question 8).

The Federal Institute of Commercial Insolvency Specialists (IFECOM) is the trustee office and appoints:

- for the audit, an auditor who reports his or her findings accordingly to the district court (see question 8);
- for the conciliation, a conciliator who seeks to establish a reorganisation plan and oversees the debtor-in-possession's administration and follows the allowance claims process. The conciliator receives proof of claims and makes an allowance or disallowance proposal to court in order for it to enter a judgment on the recognition, ranking and preference of claims; and
- in bankruptcy, a trustee who possesses, administers and liquidates the estate's assets and distributes the proceeds. A trustee shall have the same powers as a conciliator in a reorganisation.

A *concurso mercantil* may be voluntary or involuntary; however, there is no direct involuntary bankruptcy (liquidation). Full insolvency proceedings shall be conducted to place the debtor in involuntary bankruptcy. Voluntary bankruptcy (liquidation) is initiated directly upon the debtor's request.

The conditions for initiation are that: the debtor must be a merchant, individual or legal entity; there are two or more creditors; and there has been a failure to make payments generally when due.

Criteria for establishing a general default on payment obligations are:

- failure to meet payment obligations to at least two creditors;
- obligations more than 30 days overdue;
- such overdue obligations represent 35 per cent or more of the total amount of the debtor's obligations as of the petition filing date; and
- the debtor must lack cash assets, as defined by the law, to pay at least 80 per cent of the total debts due as of the petition filing date. Cash assets are:
  - cash on hand and deposits on site;
  - deposits and investments due within 90 days as of the date of the petition being filed;
  - accounts receivable due within 90 days as of the date of the petition being filed; and
  - securities that regularly registered sell-or-buy operations in relevant markets, saleable within 30 banking business days.

A voluntary petition must be signed and include:

- the merchant's full name or corporate name;
- an address for notices;
- corporate and residential addresses;
- addresses of offices, facilities, establishments, plants and warehouses;
- the address of main management;
- financial statements for the past three years, audited if mandatory by law;
- a list of creditors and debtors, stating their names and domiciles, credits past due, secured and unsecured credits, priority, real or personal collateral, credits guaranteeing direct debt or third-party liabilities; and
- an inventory of all assets, immoveables, moveables, securities, merchandise, stock and rights of any nature whatsoever.

Injunctions that may be granted before order for relief enters into effect are:

- attachment of the debtor's assets;
- order of *ne exeat*;
- stay of executions by creditors, seizure and attachments;
- orders restraining the debtor from making payments or selling, conveying or encumbering assets; and
- transferring proceeds or securities to third parties.

*Concurso mercantil* starts when relief is entered, that is to say, when *concurso mercantil* is adjudicated, which creates the bankruptcy estate. Insolvency adjudication creates a special legal situation for the debtor, subject to the LCM.

The procedural effects of the *concurso mercantil* adjudication are as follows:

- opening the conciliation phase, unless the debtor has requested the bankruptcy itself;
- debtor is ordered to surrender its financial statements;
- debtor is ordered to cooperate and allow an auditor (visitor) and conciliator to perform their duties;
- payments are stayed, except those necessary for the ordinary course of business;
- executions and attachments are stayed, except for labour credits (salaries of the past two years);
- suspect period is set;
- summary of the order for relief is published;
- order for relief is recorded in public registries;
- notice is given to creditors to file their claim credits (proof of claims);
- proof of claims process begins; and
- a certified copy of the order of relief is issued upon request.

The substantive effects following declaration of *concurso mercantil* are as follows:

- pre-existing contractual obligations shall be performed as agreed by the parties, except for special provisions under the LCM;
- all pre-existing obligations become due and have to be fixed in UDIs (see below) to determine their amount; and
- matured debts stop accruing interest. All obligations of the debtor are considered matured and interest stops accruing on obligations. However, interest will continue to accrue on obligations secured by a mortgage or a pledge even after the insolvency declarations to the extent of the collateral.

The UDI is a unit subject to inflation adjustments, whose value is announced daily and published in the Daily Gazette of the Federation and major national newspapers.

The LCM regulates the specific pre-existing contractual obligations that may be amended when the order for relief is filed.

Performance of executory, preliminary or final contracts shall be complied with by the debtor, unless there is opposition by the conciliator, as long as it benefits the estate. The conciliator may accept or reject the contract. The other party to the contract may ask the conciliator to reject the contract. If the contract is not rejected, the debtor shall perform or guarantee the contract. If the contract is rejected, or the conciliator does not answer within 20 working days, the other party to the contract may terminate the contract at any time by giving notice to the conciliator.

**11 Involuntary reorganisations**

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

See question 10 for conditions and qualifications.

An involuntary petition shall be signed and include:

- the court where the claim is filed;
- the claimant's full name;
- the defendant merchant's full name or corporate name and domicile, including the locations of offices, facilities, establishments, plants and warehouses;
- facts supporting the petition, stating them in a summary form with clarity and precision;
- legal standing;
- a request to declare the merchant in *concurso mercantil*;
- documentary evidence proving that each petitioner is a creditor;
- a guarantee for the auditor's fees if the petition is successful; and
- documentary evidence to support the claimant's action.

For effects, see question 10.

**12 Mandatory commencement of insolvency proceedings**

Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result?

Commencement of insolvency proceedings is not mandatory in any circumstances under the LCM.

**13 Doing business in reorganisations**

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

The debtor is in possession while in conciliation proceedings and may continue in its ordinary course of business as a going concern. Assets may be used for such ends. The conciliator oversees the management of the debtor.

Creditors that supply goods and services may keep doing so. Post-petition creditors may be paid and have priority against estate assets.

Creditors may supervise the debtor by means of an administrator, who represents and protects creditors' rights and has the authority to supervise the debtor and report to the court accordingly.

The court has full authority to supervise debtors.

**14 Stays of proceedings and moratoria**

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Claims being pursued by the debtor and claims against the debtor before the *concurso mercantil* adjudication shall not be joined to the insolvency proceedings, including arbitration.

Post-insolvency declaration claims, including post arbitration claims, must join the *concurso mercantil*.

Executions are stayed.

The final judgment on pre-insolvency actions shall be recognised by the insolvency court, without review, as to the amount of the claim and its priority. Claims are fixed in UDIs. Credits stop accruing interest, except secured credits up to the value of their collateral. In liquidation, secured creditors may obtain a writ of execution and be paid from the collateral.

**15 Post-filing credit**

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

The LCM provides that a conciliator may approve secured and unsecured loans or credits, with new or substituted collateral, provided that the assets involved are not linked to the debtor's ordinary course of business. Court approval shall be obtained for other assets.

**16 Set-off and netting**

To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Upon issuance of the *concurso mercantil* adjudication, as a general rule, offset rights no longer exist for creditors, although there are specific exceptions (eg, for post-petition creditors).

However, what was intended to be an exception has become the general rule as the law states that, as of the date of the insolvency declaration, any legal act may be set off when a person is a debtor and at the same time a creditor of another entity, even though such debts and credits are not in cash or due yet.

**17 Sale of assets**

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The insolvency regime does not provide for stalking horse bids in sales procedures. Sales are made in court auction sales. The court may authorise other proceedings to optimise sales to benefit the estate.

A creditor may make payment of the purchase price only with court-approved distributions. A creditor may not make payment of such purchase price by reducing the amount of a claim (allowed claim).

**Reorganisation**

During conciliation, the debtor remains in possession of the assets and may continue day-to-day operation of the business. The debtor's limited performance, business and accounting are under the conciliator's supervision.

The conciliator shall decide on the rescission of pending contracts (see question 19).

The conciliator shall, having consulted the administrator (see question 13), approve post-petition financing, the grant or substitution of collateral (with the creditor's approval) and asset transfers that are non-essential to the business; the conciliator shall report to the court accordingly.

The conciliator may perform direct transfers if goods are perishable, will suffer a strong price diminution or will incur a high maintenance cost; the conciliator will report to the court accordingly.

The conciliator and debtor must keep the business as an ongoing concern. However, to benefit the estate, the business may be closed, totally or partially, temporarily or permanently, to prevent the debt increasing or deterioration of the estate.

With court approval, assets may be sold.

While debtor in possession, the conciliator may call meetings of the board of directors, the council, committees or stockholders for corporate decisions.

The debtor may be suspended from administration of the bankruptcy estate, if the conciliator considers it necessary. The conciliator shall administer the estate with the same powers as those given to the trustee in a liquidation.

The power of the board of directors, stockholders' meetings or similar legal entities to decide on the appointment or dismissal of conciliators, directors or managers shall be suspended (stay).

**Liquidation**

Assets shall be sold by public auction. Such sale shall seek the maximum price whether by sale of the entire business, parts of the business or its assets.

Upon the court's approval, assets may be sold in a different process from public auction for a better sale price than would be obtained by public auction.

The trustee may sell assets immediately if they might deteriorate, diminish in value or involve a high cost of maintenance in proportion to their value.

Assets subject to a separation claim may not be sold until dismissal of the final claim.

The sale shall be conducted even if proof of claims is still pending.

It should be noted that LCM prevents the lowering of the value of the assessed assets.

## 18 Intellectual property assets in insolvencies

May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

Opening of insolvency proceedings does not prevent the execution of an IP licence agreement.

The conciliator in reorganisation (conciliation) and trustee in liquidation may oppose execution and may terminate such licences.

A party may ask a conciliator or trustee whether or not it will oppose execution. If there is no response, a licence may be terminated.

## 19 Rejection and disclaimer of contracts in reorganisations

Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party?

The LCM regulates specific pre-existing contractual obligations that may be amended when the order for relief is entered.

Performance of executory, preliminary or final contracts shall be complied with by the debtor, unless there is opposition by the conciliator, as long as it benefits the estate. The conciliator may accept or reject the contract. The other party to the contract may ask the conciliator to reject the contract. If the contract is not rejected, the debtor shall perform or guarantee the contract. If the contract is rejected, or the conciliator does not respond within 20 working days, the other party to the contract may terminate the contract at any time giving notice to the conciliator. When the conciliator is in charge of administration or authorises the debtor to perform contracts, upon payment of the costs the conciliator may prevent assets being separated or claim delivery of assets.

For purchase and sales agreements, to claim delivery of assets, moveable or immoveable, the price shall be paid or a guarantee provided to the seller.

Sellers of goods in transit at the time of the *concurso mercantil* adjudication and not yet delivered to the debtor may oppose delivery, either by modifying the consignment as permitted by law or by materially stopping delivery. Such matters shall be pursued between the seller and debtor in discussions with the conciliator's participation.

A seller of real estate who is declared to be in *concurso mercantil* may deliver real estate upon payment of the price, provided the sale is legally perfected.

A buyer that is declared to be in *concurso mercantil*, upon payment of such price or receiving a guarantee thereof, may enforce delivery of goods. If delivery was made under a sale agreement, the seller may repossess the goods if the sale was not formalised by a public instrument, where provided by law.

If enforcement is decided upon and a purchase and sale agreement was made stating that payment for the goods was payable at a future date, the seller may claim a fulfilment guarantee.

If the claim relates to the sales of goods that are delivered over a period of time and some deliveries have been made, such deliveries shall be paid for. If it is decided to enforce this agreement, the price for the remaining deliveries must be guaranteed to the seller.

If the seller of a moveable asset is declared to be in *concurso mercantil*, if the assets had been identified before adjudication, the buyer may enforce fulfilment of the delivery upon payment for the asset.

A deposit agreement, revolving line of credit agreement, commission agency agreement and mandate agency agreement may not be terminated by adjudication in *concurso mercantil* of any party, unless the conciliator terminates them.

Current accounts, upon *concurso mercantil* adjudication, shall be terminated and shall be liquidated to claim any balance therein, unless the debtor, with the conciliator's approval, is permitted to continue the current accounts.

Securities repurchase agreements shall be terminated upon *concurso mercantil* declaration:

(i) when the purchaser is declared to be in *concurso mercantil*, he or she shall convey to the seller, within 15 working days as of such ruling, securities of the respective kind, upon price reimbursement and payment of a premium;

(ii) when the seller is declared to be in *concurso mercantil*, contracts shall be abandoned as of adjudication and the purchaser may claim payment of the differences in his or her favour as of the adjudication date, by means of a proof of claim, granting the seller adjudicated in *concurso mercantil* the contract price and the purchaser the ownership and securities disposition that are the subject of the securities repurchase agreement; or

(iii) a securities repurchase agreements executed in a reciprocal way between the debtor and its counterparty shall be terminated in advance on the date of *concurso mercantil* adjudication, and shall be offset.

If there is no agreement regarding set-off and liquidation of debt balances, to make the set-off the value of the securities shall be their market value as on the adjudication date. If a verified market value cannot be determined, the conciliator may ask an experienced third party to assess their value. The outstanding balance against the debtor by virtue of their acceleration may be claimed by way of a proof of claim. If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days of the *concurso mercantil* adjudication.

Transactions regarding loans on securities executed by the debtor with collateral in Mexican currency shall be governed like a securities repurchase agreement. Transactions regarding loans on securities executed by the debtor with collateral in securities in Mexican currency shall be governed as provided for under (iii) above regarding the securities repurchase agreements.

Differential agreements or future agreements and derivatives financial transactions that shall terminate after the *concurso mercantil* adjudication, must be terminated in advance of the adjudication. Such contracts and transactions shall be set off under the LCM.

In the case of silence, for the set-off and liquidation of debt balances to make perform set-off, the value of the goods and underlying obligations shall be that of their market value as on the adjudication date. If a verified market value cannot be determined, the conciliator may ask an experienced third party to assess their value.

After the set-off is made, the balance of the debt may be claimed by the creditor by way of a proof of claim (ie, by means of the set-off the debt is accelerated and becomes due and payable). If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days of the *concurso mercantil* adjudication.

For purposes of the LCM, transactions that parties of a contract have made that are bound to the payment of money or the fulfilment of other obligations to supply items or services with a market good or value as will be understood as financial derivatives, as will any agreement that by general regulation is indicated by the Bank of Mexico. It shall be set off and shall be due and payable under the contractual terms or as provided for under the LCM.

As of the date of the *concurso mercantil* adjudication, debts and credits that may be given a monetary value regarding any of the following may be made due and payable under the LCM, even if such debts and credits are not due and payable as of the date of the *concurso mercantil* adjudication:

- framework agreements;
- regulatory agreements;
- specific agreements executed regarding:
  - derivative financial transactions;
  - securities repurchase agreements;
  - transactions of loans on securities;
  - transactions on futures; or
  - any equivalent transaction; or
- any other juridical acts in which one person is a debtor of another and at the same time is a creditor such other entity.

The outstanding balance from the set-off against the debtor may be claimed by way of a proof of claim. If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days as of the *concurso mercantil* adjudication.

A lessor adjudicated in *concurso mercantil* shall not terminate a lease agreement on real estate. A lessee adjudicated in *concurso mercantil* shall not terminate a lease agreement on real estate. Notwithstanding the above, the conciliator may elect to terminate the agreement, in which case the lessor shall be paid the contractual indemnity. If there is no other agreement made, payment of three months of rent for the acceleration must be made.

Service supply agreements of a strictly personal nature shall be binding over the parties and shall not be terminated.

Lump-sum construction contracts shall be terminated upon *concurso mercantil* of any party, unless the party adjudicated in *concurso mercantil*, with the authorisation of the conciliator, agrees to fulfil the contract with the other party.

Insurance entities adjudicated in *concurso mercantil* may not terminate insurance contracts over real estate. In the case of moveables, the insurer may terminate the insurance contract.

If the conciliator fails to notify an insurer that an entity insured by it has been adjudicated in *concurso mercantil* within 30 days of the adjudication, the insurance contract shall be terminated, effective as of such adjudication.

Regarding life insurance contracts or mixed contracts, the debtor, with the conciliator's authorisation, may decide on the assignment of the insurance bond and obtain a reduction of the insured capital, in proportion to the premiums already paid pursuant to calculations that the insurance company has taken into account and considering also the risks covered by it. Likewise, the debtor may make any other transaction that economically benefits the estate.

There are specific requirements for the *concurso mercantil* adjudication of:

- a partner of a general partnership (unlimited liability partnership);
- a partner of a limited responsibility partnership;
- a general partner (unlimited liability partnership) of a limited liability partnership company; or
- a general partner (unlimited liability partnership) of limited liability stock partnership company.

Such partner, in each case, is entitled to request its liquidation as of the last company balance sheet or to continue being a partner to the company, if the conciliator so agrees. However, the remaining partners may instead chose to exercise their right to partially liquidate the company, unless the company's by-laws state otherwise.

### 20 Arbitration processes in insolvency cases

How frequently is arbitration used in insolvency proceedings? What limitations are there on the availability of arbitration in insolvency cases? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

There is no arbitration in insolvency matters. Insolvency, as a mandatory proceeding according to public policy, is under the exclusive federal jurisdiction of the state and not subject to arbitration. Accordingly, disputes arising insolvency cases after they have been opened may not be arbitrated, even if both parties agree to arbitrate the dispute. The LCM provides that late actions must be joined to the *concurso mercantil*. The *concurso mercantil* court may not refer parties to arbitration.

### 21 Successful reorganisations

What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

The LCM favours rehabilitation of the enterprise, and liquidation only takes place when rehabilitation is impossible. A reorganisation plan requires 51 per cent approval of approved creditors.

The conciliation phase is intended to create the best conditions for a reorganisation plan. The LCM does not regulate terms or conditions for the plan, but only sets forth minimum rules to ensure the legality of the plan. The LCM, however, provides mandatory notices and access to information to enable interested parties to exercise and protect their rights. Accordingly, the conciliator may recommend that appraisals and studies be conducted when they are necessary to achieve a reorganisation plan, as would be given to creditors through the court. When the conciliator considers that there is an agreement of 51 per cent of the recognised creditors in the plan, he shall give the plan to the other recognised creditors to give their opinion thereon or to execute the plan.

In order to approve a viable reorganisation plan that favours all or most creditors under the circumstances, the LCM provides mechanisms to protect the rights of minority creditors by giving them most favourable terms under the plan. This thereby avoids unnecessary or burdensome objections by minorities that in fact benefit from the plan.

Only those creditors with accepted claims may agree on the plan. Labour and tax creditors do not execute the plan. To facilitate

approval of the plan, both unsecured and participating secured creditors shall be taken into account for determining the necessary majority.

The reorganisation plan, regarding non-participating creditors holding recognised debt, may only provide extension of time to pay the debt or debt discount or combination of both, provided that terms and conditions are equal to those agreed by at least 30 per cent of creditors holding unsecured allowed claims.

The plan may provide for an increase of capital. Shareholders must be notified in order to exercise first refusal rights. If shareholders do not exercise their rights, the court may approve the capital increase.

Dissenting recognised unsecured creditors holding a simple majority or recognised unsecured creditors holding 50 per cent of the debt may veto the plan proposal. If there are no objections, the plan may be approved by the court. Since the approved plan is binding upon absent and dissenting creditors, the most favourable terms and conditions of the plan shall be allocated to them.

Upon the court's approval of the plan, the insolvency process terminates and parties cease to perform their functions.

The plan shall provide payment for:

- labour creditors (highest priority);
- creditors (administration costs and fees of the insolvency estate) whose claims are secured by assets of the estate;
- claims for burial costs when death is pre-*concurso mercantil*;
- claims for costs of sickness that caused the death of the debtor when death is post-*concurso mercantil*;
- secured creditors with mortgage or pledge;
- claims holding special privilege pursuant to law;
- tax credits; and
- fund for challenged claims and tax credits that have not been determined.

Private agreements between the debtor and any creditor are null and void once relief is granted and the creditor shall lose such rights.

The plan may not release non-debtor parties, such as guarantors. The plan may only bind a debtor and its creditors. However, the liabilities of officers, directors, advisers and lenders may be released in writing by the interested party or parties taking legal action against them.

### 22 Expedited reorganisations

Do procedures exist for expedited reorganisations?

Prepackaged reorganisation is allowed by an agreement of the debtor and creditors holding 40 per cent of the total debt. The debtor and creditors shall execute the petition. In addition to the ordinary requirements for initiating insolvency (see question 10), it is also required that the debtor states under oath that it is already in a state of insolvency and explains why, or states that such insolvency is imminent within 30 working days and states that the creditors signing the petition hold at least 40 per cent of the total debt. A reorganisation plan proposal shall be enclosed with the petition. Full insolvency proceedings shall be followed (*concurso mercantil*) without an audit. In conciliation, a prepackaged plan may be approved by 51 per cent of recognised unsecured creditors and 51 per cent of recognised secured creditors joining the plan. The court must approve the plan whereupon the proceedings end. Protection measures and stays may be requested and granted upon filing of the petition.

### 23 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

No executing recognised creditors may defeat the plan if due process for the plan is not met and if mandatory plan standards are not met. Due process includes access to supporting information and plan viability as well as full knowledge of the plan terms and conditions.

A majority of unsecured creditors whose proofs of claim have been allowed may veto the plan. Unsecured creditors not signing the plan may not object to the plan if they are to be paid in full.

Court approval of a plan may be appealed, without stay. A successful appeal dismissing the plan on legal grounds is sent to court. A new plan may be proposed. Otherwise, the case turns into a liquidation.

A default on the plan by the debtor turns the case into a liquidation.

### 24 Insolvency processes

During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

Meetings may be called by court order with notice by means of personal service, court list publication at the court door, the Daily Gazette of the Federation or newspapers. In general, all such information and documents are available to them, except restricted information and documents protected by legal secrecy and confidentiality.

In addition, upon the request of the administrators, creditors may have access to the debtor and estate information that may affect creditors' rights.

Trustees shall provide administration reports every two months.

Domestic and foreign creditors with known addresses are notified personally of the insolvency opening. All creditors are notified by publication of a notice in the Daily Federal Gazette and a major newspaper. There are no mandatory meetings, although meetings may be held. There are no mandatory committees.

Creditors may request a trustee or administrator to enforce remedies against third parties. Creditors may enforce remedies as an action of subrogation.

### 25 Enforcement of estate's rights

If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

There is an action for subrogation by means of which creditors may enforce claims available to the estate. The fruits of such actions belong to the estate. Creditors are entitled to be reimbursed for their costs. The creditor may enforce its debtor's rights against this latter debtor's debt.

### 26 Creditor representation

What committees can be formed and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

Within the insolvency proceeding, creditors may be represented by interventors who oversee the trustee's performance and may obtain

from the debtor or trustee a review of information that may affect creditors' rights.

Creditors are free to form their own committees and it is a regular practice to form committees outside the insolvency proceeding.

Advisers may be appointed by creditors and costs are funded or borne by them.

### 27 Insolvency of corporate groups

In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

The LCM does not regulate groups of companies. There is no piercing of the corporate veil. The LCM provides that the *concurso mercantil* of holding and subsidiary companies shall be joint, but each company insolvency shall be conducted as a separate filing. The LCM does not provide for these to be combined or consolidated for administrative purposes, nor may their assets and liabilities be pooled for distribution.

Mexican corporate law does not provide for the insolvency of corporate groups. Corporate groups consolidate for tax purposes. Labour law recognises a substitute employer among a group of companies. The Law on Financial Groups provides for financial groups of companies, with joint and several liabilities without consolidation. Regarding groups of companies, assets may not be transferred from an administration in Mexico to another country.

### 28 Claims and appeals

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

There is a written format for proofs of claim that must be attached to either the original or a certified copy of documentary evidence. A certified statement of account and accounting expert opinion may be filed to support the claim. If they are issued abroad, they shall be ratified before a notary public and apostilled. Note that a claim may be signed by an officer of the creditor; however, a valid and enforceable power of attorney may be needed. This format is found at www.ifecom.cjf.gob.mx. Proofs of claim shall be filed before the period for appealing the judgment has expired.

Disallowed claims are announced alongside the judgment of which claims have been allowed. Such dismissed claims may be challenged by appeal. Claims may be transferred, which must be notified to the court. Private agreements between the debtor and any creditor are null and void once relief is granted and the creditor shall lose such rights.

To participate in the discussion, approval, agreement and veto of the plan, creditors must hold approved claims.

### 29 Modifying creditors' rights

May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

Modifying creditors' rights is not provided for under the LCM.

### 30 Priority claims

Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Administration and conservatory claims of the estate have priority over secured creditors. However, these claims have no priority over labour claims and tax claims. Claims on burial when death is pre-insolvency and claims on illness when death is post-insolvency have priority over secured claims.

#### Government

Tax creditors, whether federal, state or municipal, social security credits (IMSS) and INFONAVIT credits have priority. These tax credits have priority over secured creditors, provided such tax credits are determined and notified before the date of the collateral of secured creditors.

#### Non-governmental

Labour credits have super-priority over secured creditors and tax creditors.

### 31 Employment-related liabilities in restructurings

What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

Employment contracts may be terminated upon *concurso mercantil* or bankruptcy adjudication when the court or creditors decide on total closure of the business or reduction of work. Notice must be given to the labour court, which in a special labour proceeding may allow or disallow such termination or reduction. Workers are entitled to receive three months' salary and 12 days' salary per year of employment (seniority bonus). Labour claims on pension funds may be regarded as an indemnity in favour of the workforce and accordingly such claims may have labour-claim priority.

### 32 Pension claims

What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

Labour matters are not subject to LCM jurisdiction even in the context of an insolvency. An employee's labour claim is not joined to a *concurso mercantil*, so remedies for pension-related claims against employers must be asserted before the labour courts. Labour rights and claims are super priority claims, and the court may enforce its judgment over employers' assets, and attach or auction them to satisfy claims.

Actuarial deficiencies in pension assets and unpaid contributions to employee pension plans both give rise to claims that may be asserted before the labour courts.

### 33 Liabilities that survive insolvency proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

Government tax credits and labour credits survive insolvency proceedings and are enforceable, unless otherwise provided by agreements of labour and tax creditors under the plan. An insolvency court may not assert jurisdiction over tax and labour creditors.

In a reorganisation plan, liabilities may survive unless it is agreed that they are fully discharged. There are no dischargable debts.

There is no discharge in liquidation. If payment is not made in full, liabilities survive and creditors may enforce the outstanding balance of the claim.

### 34 Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

Distributions are made in the liquidation phase with proceeds realised from the sale of estate assets. Distribution is made pursuant to a proof of claims judgment. In reorganisations, distribution is made pursuant to the plan.

### 35 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

In general, all fraudulent transactions executed against creditors and the insolvency estate may be set aside.

The LCM defines as felonious those fraudulent acts that cause or aggravate the cessation of payments, as provided by law. These acts may be set aside as well.

Fraudulent transactions performed during the suspect period that may be annulled include:

- gratuitous acts, transactions with no consideration;
- acts and disposals in which the debtor pays an excessive consideration, or receives consideration whose value is lower than the goods or services supplied by its counterparty;
- transactions carried out by the debtor in which conditions or terms were agreed upon that are significantly different from the conditions prevailing in the market in which the transactions were carried out on the date on which they were carried out, in which or the terms differed significantly from trade usage or practices;
- debt remission or write-off;
- payment of obligations not due; and
- discount of debtor's own notes by the debtor, which will be regarded as a prepayment.

Voidance may not be granted if the estate benefits from the payments made to the debtor. If the third party returns whatever it received from the debtor, it may request the recognition of its credits.

Fraudulent acts performed during the suspect period, unless the debtor's counterparty proves its good faith, include:

- creation of guarantees or the increase of any existing guarantees, if the original obligation did not contemplate such guarantee or increase; and
- any payments of debts made in kind, if the later is different from that originally agreed upon or if the agreed-upon consideration was in cash.

All acts performed during the suspect period by the debtor with relatives or related individuals or legal entities may be regarded as fraudulent and voidable.

The LCM has a criminal chapter on fraudulent transactions committed as of the suspect period; however, fulfilling the conditions for prosecution under this law is almost impossible, effectively making debtors immune from prosecution. The LCM in practice creates an incentive for debtors to enter into *concurso mercantil* to avoid the severe criminal liabilities for ordinary fraud.

### 36 Proceedings to annul transactions

Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

Fraudulent or preferential acts may be reviewed and declared void. The LCM prescribes a 270-calendar-day 'suspect period' to be reviewed, counting backwards from the date the order for relief was filed. The review period may be longer in certain circumstances if so ruled by a court order. A request for a longer review period must be filed before the examination of proofs of claim begins. The new retroactive period must be announced by publication in the court's list of orders.

Voidable transactions may be challenged by creditors and the trustee. Voidance actions, like civil or criminal actions, involve lengthy litigation and are often costly.

### 37 Directors and officers

Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

Criminal responsibility shall be borne by the debtor. In the case of a legal entity, such responsibility will be borne by its board of directors, management or liquidators. They may be liable for pre- and post-bankruptcy.

If new management is appointed and they discover felonies or misbehaviour, the new administration shall report it, otherwise its members will become liable.

In the case of tax fraud or tax default, the new management shall report it. Otherwise, they are liable to pay it. In a limited liability partnership, corporate law prevents partners from taking management roles. A default makes them jointly and severally liable towards contracting third parties. The law also provides that general partners are jointly and severally liable for the partnership's business.

Directors and officers involved in fraud are liable. Directors and officers may be liable if, knowing of misbehaviour or felonies regarding former administrators or officers, they do not report it. Default on obligations makes them jointly and severally liable towards contracting third parties. In a limited liability stock partnership, the law provides that general partners are jointly and severally liable for the partnership's business.

### 38 Groups of companies

In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

The LCM does not regulate groups of companies. There is no piercing of the corporate veil. The LCM provides that the *concurso mercantil* of holding and subsidiary companies will be conducted jointly, but each company insolvency will be conducted as a separate filing. The LCM does not provide for these to be combined or consolidated for administrative purposes, nor may their assets and liabilities be pooled for distribution.

Mexican corporate law does not provide for the insolvency of corporate groups, that are consolidated for tax purposes. Labour law recognises a substitute employer among a group of companies. The Law on Financial Groups recognises for financial groups of companies with joint and several liabilities without consolidation. In such groups, assets may not be transferred from an administration proceeding in Mexico to one in another country.

Parent or affiliated corporations may be responsible for the liabilities of subsidiaries or affiliates when they are legally linked by

virtue of a guarantee or a similar obligation to act with respect to the subsidiaries or affiliates. All of them are considered independent legal entities with independent patrimonies. Their being related companies does not make them liable for the liabilities of the others.

### 39 Insider claims

Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

LCM is silent as to insiders and inter-company debts. In practice, courts have rejected recognition of claims by any insiders at all. Other courts have recognised claims by insiders as unsecured creditors and have recognised insiders' rights, as allowed claims, to vote on reorganisation plans. An amendment of the LCM is progressing through the federal congress, which includes provisions regulating insider claims, inter-company debt and voting rights in a reorganisation plan.

### 40 Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Processes for seizure of assets include:
- tax enforcement by attachment or seizure;
- criminal seizure in case of felony;
- labour executions by attachment; and
- seizure by customs authorities.

In all these cases, attached assets may be foreclosed and sold.

### 41 Corporate procedures

Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

The Law on Corporations provides for the private out-of-court corporate dissolution and liquidation of a company. In essence these are very similar: liquidation of assets to pay creditors. If there is any balance remaining it goes to stockholders. Corporate liquidation does not provide for court orders to stay payments and executions. Liquidators may apply for voluntary *concurso mercantil*.

### 42 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Reorganisation concludes with court approval of the plan. Liquidation concludes with the sale of estate assets and payment of creditors' claims up to their sale proceeds. There is a court judgment declaring termination.

**Conditions for termination of insolvency proceedings**

(i) The reorganisation plan may be approved by simple majority of creditors holding allowed claims. In liquidation, the plan must be approved by all of such creditors;
(ii) full payment of recognised claims is made;
(iii) recognised claims are partially paid and there are no estate assets left to liquidate;
(iv) it is proven that the estate assets are not sufficient to pay expenses and fees for the administration of the estate; or
(v) proceeding can be terminated at any time upon request of the debtor and all recognised creditors.

**Reopening of commercial insolvency proceedings**

In the case of (iv) or (v) above, proceedings may be reopened if it is proven that in the two years following termination there are assets to pay at least the expenses and fees for the administration of the estate.

Termination is made upon court judgment.

The LCM does not provide for discharge in liquidation.

### 43 International cases

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Mexico has incorporated the UNCITRAL Model Law on Cross-Border Insolvency. Accordingly, Mexico provides recognition and full cooperation on cross-border insolvency. Foreign creditors are granted equal treatment with domestic creditors. The federal judiciary has granted relief sought in support of the Model Law.

Mexico was the first jurisdiction to recognise two foreign bankruptcy proceedings under the Model Law and grant international insolvency cooperation thereto – the *Xacur* case and the *IFS* case.

Mexico has no international treaty on insolvency, bankruptcy or reorganisation matters. Mexico has executed two treaties on the recognition of foreign judgments that expressly exclude insolvency, reorganisation, bankruptcy and liquidation.

The LCM incorporates the UNCITRAL Model Law in chapter 12. The law defines the following terms:
- 'foreign proceedings' – collective judicial or administrative proceedings in a foreign country, including interim proceedings, under a law relating to insolvency, or adjustment of debt proceedings in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;
- 'main foreign proceedings' – foreign proceedings pursued in the jurisdiction where the debtor's centre of main interest (COMI) is located;
- 'foreign representative' – a person or body, including provisional persons or bodies, empowered in foreign proceedings to administer the reorganisation or liquidation of the debtor's assets and affairs or to act as a representative of foreign proceedings;
- 'foreign court' – a judicial authority or other body with jurisdiction over the control or supervision of foreign proceedings; and
- 'establishment' – any place of operations where the debtor carries out a non-transitory economic activity with employees and goods and services.

Reciprocity is mandatory. International cooperation may be conducted through Mexican courts and Mexican representatives. Foreign courts and foreign representatives may only act through a Mexican court or Mexican representative. Recognition is not automatic. If a debtor has an establishment in Mexico, full insolvency proceedings (*concurso mercantil*) under the LCM shall be conducted. Otherwise, foreign proceedings may be recognised in summary proceedings. In interpreting and applying chapter 12, consideration shall be given to avoiding any violation of the LCM and current prevailing fundamental principles of law in Mexico. Please note that chapter 12 allows the rejection of recognition when there is any violation whatsoever of the LCM or any of such fundamental principles of Mexican law. Thus, chapter 12 mandates, for overwhelming reason, rejection when there is a manifestly violation of public policy. Protection measures (stay of payments or execution) may be granted following the request

**Update and trends**

**New legislation**

In order to improve the domestic economy, important amendments of more than 34 financial laws, including commercial insolvency regulations, are in the process of being enacted in federal congress. Amendments have been already approved by the chamber of deputies (September 2013), and it is expected that the senate will also approve them.

These amendments have taken into account the experience of the 2008/09 international crisis as well as domestic experience to better face and overcome any future situations of systemic financial distress (see question 4).

**LCM**

After 13 years in effect, experience has shown that the LCM's commercial insolvency system has failed, and that Mexico is in urgent need of a modern functional insolvency system. The current major financial amendments reflect this situation and also make major amendments to the LCM.

The amendments are not all of those originally proposed or expected, but they at least aim to improve the commercial insolvency regime. Most of these amendments have been forced by high-profile cases that have shown up many of the LCM's weakness, deficiencies and potential abuses, most notably the *Vitro* and *Mexicana Airlines* cases, which have led to most of these amendments.

The amendments include:

- greater protection of creditors;
- greater transparency of proceedings
- a new civil liability regime for managers and directors of debtor when they have caused patrimonial damages;
- easing of the requirements to obtain an extension of the suspect period in the event of fraud of intercompany transactions; and
- intercompany debt, proof of claim allowance (insiders' debt), third-party non-debtor discharge and intercompany debt voting in the reorganisation plan.

There is a tradition in Mexico of out-of-court settlement of insolvency cases, closure of businesses and runaway litigation in terms of duration and cost. The nationwide aversion to taking insolvency actions through the courts is a symptom of a severe lack of faith in Mexican insolvency system.

The 2013 amendments to the law will hopefully improve the use of the LCM by debtors and creditors facing insolvency.

being filed for recognition. Upon recognition, additional protective measures may be granted. Foreign proceedings shall be recognised as main or non-main proceedings, subject to the debtor's COMI. Chapter 12 shall be interpreted considering its international origin and the need to promote uniformity in its application and good faith observance. Chapter 12 may be applied, unless otherwise provided for under international treaties executed by Mexico, except where there is no international reciprocity. Mexico has not executed any international treaties regarding liquidations or reorganisations or the like.

Chapter 12 aims to provide effective mechanisms for dealing with cases of cross-border insolvency with the following objectives: cooperation between Mexico and foreign courts; increase of legal certainty for trade and investment; fair and efficient administration of cross-border insolvency cases; protection and maximisation of a debtor's assets; and facilitation of the rescue of financially troubled businesses, thereby protecting investments and preserving employment.

Chapter 12 applies where: assistance is sought in Mexico by a foreign court or a foreign representative in connection with foreign proceedings; assistance is sought in a foreign country in connection with a case under Mexican insolvency law; both foreign proceedings and a case under Mexican insolvency law with the same debtor are concurrently pending (parallel proceedings); or creditors, or other interested parties, in a foreign country want to commence or participate in a case under Mexican insolvency law.

Cooperation and communication between Mexican courts and foreign courts and between Mexican representatives and foreign representatives may be direct, without the need for letters rogatory or any other formalities.

**44 Cross-border cooperation**

Does your country's system allow cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts?

As stated above, the LCM incorporates the UNCITRAL Model Law. It recognises court-to-court direct communication. Accordingly, direct cooperation is allowed between domestic courts and foreign courts as well as foreign insolvency administrators in cross-border insolvencies and restructurings. There have been instances between US and Mexican courts. Communications have been in writing in cases such as *Xacur*, *IFS* and *Satmex*.

Mexican courts under chapter 12 of the LCM recognise foreign proceedings, such as those of *Xacur* and *IFS*.

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**45 Cross-border insolvency protocols and joint court hearings**

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

In the *Xacur* and *IFS* cases Mexico had intensive court-to-court communication between the Mexican Fourth Federal District Court for Civil Matters, Honourable Judge Alejandro Villagomez Gordillo, and the US Bankruptcy Courts for the Southern District of Texas, Houston Division, Honourable Judges Karen K Brown and Marvin Isgur.

These cross-border courts and their foreign representatives and professionals have created a legal vehicle in the form of general international cooperation by means of which they can communicate directly to immediately provide for recognition of foreign insolvency proceedings, protective measures, service of process, taking of all kinds of evidence abroad, sale of assets, criminal prosecution and the like. This vehicle harmonises the different legal systems of common law and civil law as well as domestic procedural law and practice. This vehicle has proved to be a very practical, efficient and effective tool, saving time and costs, making cross-border insolvency much more effective at optimising the activities and assets of the going concern for all involved.

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