Chapter 1

MEXICO

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I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

Without doubt, restructuring practice in Mexico regarding corporations with assets, liabilities or a combination thereof of a significant size (taking US$200 million as a benchmark) has historically focused principally on consensual out-of-court restructurings, with considerable success. Bankers, corporate officers, controlling shareholders, and restructuring professionals have for years embraced a preference for negotiations aimed at allowing creditors and debtor corporations to form a considered view of the best way forward for a business in financial difficulties. The objective has been to preserve and maximise value – for all stakeholders – by reaching a consensus, allowing corporations to survive through a restructuring that may be possible (perhaps not resulting in the 'best outcome' but, moreover, in one that is possible).

Nevertheless, as a growing number of Mexican corporations have turned to the domestic and, more substantively, international capital markets for their financing under Mexican public debt or in the US further to Rule 144A or Regulation S facilities, troubled debtors in default have found it challenging, to say the least, to establish consensual out-of-court restructuring. Indeed, as bonds become tradeable assets in the secondary markets and holders of these instruments become widespread, upon the occurrence of a financial challenge, or a restatement of financial statements, or if a coupon is missed, high-yield investors and distressed debt funds usually come into play and enter at different values from par investors and thus, perspectives, added to the complexity of a restructuring process.

In Mexico, an alternative to a consensus is an insolvency proceeding known as *concurso mercantil*, which has proven in recent years to be unreliable and unpredictable in its results, with only a handful of notable exceptions. It is generally a perilous alternative for any large corporations and has been far from successful. Loss of value for all stakeholders – mainly bondholder creditors – has been undeniably substantial.

In the few material cases filed in the past 24 months, the courts have been reluctant to even accept filing for admissions and, even in the most pressing of situations, average well over six months to formally declare a company under the protection of the Law of Commercial Insolvency 2000 (as amended, hereinafter the Concurso Law). Cases continue to stall amid daunting formalities and extraordinary delaying tactics in an unorthodox litigious environment and perplexing interpretations expanding the concepts of violations of due process and human rights. The result has been that the otherwise 'mandatory' time

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frames established in the law have been widely ignored, with the exception of filings made under a pre-packaged plan, pursuant to which the company and a majority of its creditors jointly agree to seek a court protected organisation.

It is therefore understandable that a number of Mexican corporations have in the recent past turned to the US Bankruptcy Courts for relief through Chapter 11 proceedings as an alternative to protect debtors as ongoing concerns, coupled with the added feature of accessing debtor-in-possession (DIP) financing and ultimately seeking an orderly reorganisation. Although Chapter 11 may not be generally available as a viable instrument to reorganise a Mexican corporation, formal requirements are easier to address and the outcomes are more foreseeable and transparent than those for a *concurso mercantil*. However, costs (legal and financial advisory fees) tend to be significant, labour must be kept current and the company must be in tax compliance with its Mexican fiscal obligations (mainly with its withholding tax obligations, such as VAT remittances, payroll taxes and social security payments). In addition, an undeniable fact to consider is that a foreign proceeding will not be recognised by Mexican courts if a debtor has an establishment in Mexico without going through the wearisome process of a full *concurso mercantil*.

In the context of more recent out-of-court restructurings, guidelines set forth in instruments developed through principles resembling the renowned London Approach and those found in the Insolvency and Creditor Rights Standard of the Financial Stability Board continue to be resorted to, including an informal protocol advanced by the Mexican Association of Banks. However, revising what many believe to be an inadequate legal insolvency framework or undertaking efforts to establish more robust functioning of commercial courts, on the one hand, and the development of other formal guidelines, practices, procedures and regulations for out-of-court restructuring, on the other, have not seemed to be a priority for any branch of the Mexican government.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

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

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

i One proceeding

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

The objective of the conciliatory phase is to conserve the business enterprise as an ongoing concern through a restructuring agreement. On the other hand, the stated purpose of bankruptcy is to liquidate the business. Prior to a debtor being placed in *concurso*, the process includes a preliminary examination proceeding to verify whether the debtor is generally in

default. If a pre-pack is filed, such an examination is not required. Unfortunately, although 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 being an audit of the company, leading to delays. The initial preliminary proceeding lacks transparency and the examination proceeding reports are not made public.

Procedural terms

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

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

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

ii Petition for commercial insolvency

A business enterprise that is generally in default in respect of 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 in respect of two or more creditors, are considered by the Concurso Law to be facts that by themselves will result in a presumption of insolvency.

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

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

iii Jurisdiction

The federal courts have jurisdiction over *concursos*, notwithstanding that even this basic principle has been – unsuccessfully – challenged. Although it is a fact that district judges are overburdened with constitutional challenges (*amparos*) and have little practice regarding mercantile matters, the selection process, supervision, continued education (other than in insolvency) and preparation of federal judges have been substantially improved in the recent past. Although salaries were materially increased, and there has been a greater impartiality, the current administration has slashed health- and insurance-related benefits and cut other allowable expenses. Recently, courts have been reluctant to accept insolvency cases given their considerable workload, exacerbated by budget cuts, temporary closures as a result of the covid-19 pandemic and, in the few major *concurso* cases filed and accepted, the sheer size of them, which have made it a huge task to address and preside over these proceedings efficiently. The very recent creation of two specialised Federal Bankruptcy Courts could lead to an improvement.

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 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] the conciliator, who is appointed in such a declaration and who has broad powers to mediate, to take steps to protect the enterprise as an ongoing concern, or to immediately begin bankruptcy and who takes on significant responsibilities and in material cases a major role in a *concurso*; and the receiver, who may or may not be the conciliator and whose principal function is to proceed with the sale of assets and payment of claims.

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

Those who wish to act as examiner, conciliator or receiver must request IFECOM to register them in its special registry. It is unfortunate that the registry, especially for complex cases, is not available 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.

It is relevant to note that a qualified majority of creditors may replace or appoint a professional as conciliator or receiver even if the professional is not registered with IFECOM. In cases involving the insolvency of a company operating under a federal concession, the conciliator may be appointed at the request of the corresponding authority, such as the Ministry of Communications regarding corporations in the telecommunications industry.

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 in having an examiner complete the many IFECOM formats necearry to process a *concurso mercantil* that may prove to be advantageous in the ongoing proceeding.

In pre-arranged filings, the debtor and a majority of creditors supporting the pre-pack plan may appoint a conciliator who is not registered with the IFECOM. In both exceptions, the conciliator may be a firm or corporate entity.

Related companies

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

Identification of creditors and declaration of insolvency

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

Absent a pre-pack, the day after the judge admits the petition, which in practice might take weeks or months, they 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 Concurso Law provides that the judge must render a judgment of mercantile insolvency, which, among other things, must contain:

a an order to IFECOM to appoint a conciliator;
b a declaration of the opening of the conciliatory stage unless the debtor has requested bankruptcy;
c an order to the debtor to deliver all books and records to the conciliator, although management remains in place;
d an order to the debtor to suspend the payment of its pre-petition indebtedness, other than those that are deemed to be essential for the continuation of the business enterprise;
e an order to freeze all asset foreclosure and attachment proceedings; and
f an order to publish a notice to all creditors so that they may appear in the proceeding, although this requirement (a filing proof of claim) is no longer mandatory.

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

Effects of a declaration of insolvency

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

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

Debts in foreign currency

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

Fraudulent conveyances

The Concurso Law provides for a general rule as to the period when insolvency is presumed to have begun, which is 270 calendar days prior to the judgment declaring insolvency (the 'retroactive period'). Nevertheless, upon the reasoned request of the conciliator, the controllers, who may be appointed by the creditors to oversee the process, or any creditor, the judge may determine a longer period (at most three years). Conveyances that are not arm's length or commercially sound and the creation or increase of security interests within the retroactive period will be presumed fraudulent to creditors and will not be recognised. Proving fraudulent conveyances is a complicated task and rarely admitted. It is noted that there are no judicial precedents as to the application of these provisions.

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

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

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

In connection with financial derivative transactions, the Concurso 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 a market value is not available or cannot be demonstrated, the conciliator may request an experienced third party to determine such a 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 Concurso Law (i.e., creditors claiming that transactions that are not financial derivative transactions and therefore not benefiting from netting provisions should 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 and disproportional elements and the like, specifically in times of unforeseen volatility. Although such issues have been addressed by US courts (principally in New York) in favour of creditor banks in matters whereby Mexican companies were plaintiffs, the subject of complex derivatives is far from settled in Mexico.

Restructuring plan: pre-packaged insolvency

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

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

Key procedural events

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

Conciliatory stage

The conciliatory stage consists of:

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, who 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 is practicable. In practice, very few cases have reached this stage, and except for only one case, they have all failed to adhere to the time frames set forth by the Concurso Law, missing the mark by many years.

Priority of creditors under the Concurso Law

The Concurso Law establishes the following priorities:

a labour claims (salaries, three months of salaries and benefits, 12 days of salary for each year of employment, mandatory profit sharing and proportional benefits) for the previous 24-month period: it is noted that the Social Security Institute Law considers that pending fiscal social security contributions have the same priority as labour claims;
b claims derived from DIP financing and those that were incurred during the proceeding to maintain the ordinary course of business, and approved costs and expenses for the conservation of the business as approved by the conciliator or the court;
c creditors secured by mortgages or pledges or that otherwise have a privileged priority recognised as such under commercial law (e.g., further to a trust);
d further to the Federal Tax Code, federal taxes and duties, although the application of this order of priority has been erratic because the tax authority cannot be compelled to participate in any insolvency proceeding;
e unsecured creditors; and

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

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

Duties of directors

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

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

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

III RECENT LEGAL DEVELOPMENTS

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

The most relevant provisions introduced by Congress are as follows:

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 in respect of another company, regardless of the actual shareholdings (it is noted that substantive consolidation is not allowed);

c the ability of a debtor to request the *concurso mercantil* status prior to being generally in default in respect of its payment obligations when such a 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 in respect of transactions entered with inter-company or related creditors (to twice the statutory periods).

Liabilities of management and the board of directors

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

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, causing non-existent transactions or expenses to be registered, exaggerating real transactions or expenses, or otherwise carrying out any act or transaction that is illegal or prohibited by law, causing a damage to the bankrupt debtor and obtaining an economic benefit, directly or indirectly; and

g 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 judgement 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 or acts of bad faith, the Concurso Law expressly prohibits any agreement or provisions in the by-laws in respect of 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 a regime is characterised by its celerity, pre-intervention corrective measures by the Institute for Banking Savings Protection and 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) is a corporation. They are productive state-owned enterprises, governed by their own comprehensive legal regimes, and they carry out specific constitutional mandates relating to oil and gas and electricity for the Mexican state. As a matter of Mexican law, neither may be declared bankrupt or insolvent or be subject to a *concurso*. Specific legislation enacted by the Mexican Congress would be required to judicially restructure or liquidate Pemex or CFE.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

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

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

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

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

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

V INTERNATIONAL

The Concurso Law embraces, only in form, the UNCITRAL Model Law on cross-border insolvency and international judicial cooperation. Mexican courts have only twice in the past 20 years recognised and given judicial assistance to foreign insolvency proceedings (ruling that such proceedings did not contradict Mexican law or general principles of law). The Concurso Law includes substantial changes to the UNCITRAL Model Law that make the process defective as it focuses on channelling procedures through a conciliator, and thus

effectively imposes the need to file a full *concurso* proceeding regarding any significant assets in Mexico. Recognition of foreign proceedings in Mexico, for all practical and legal purposes, is impossible.

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

VI FUTURE DEVELOPMENTS

In late 2020, a bill intended to create an emergency insolvency regime within the Concurso Law was unsuccessfully introduced in the Senate. The bill recognised that admission into *concurso* is a time-consuming exercise riddled with procedural complexity. It intended to offer any company, irrespective of its size, to file for insolvency protection on a fast-track basis, as a tool to keep debtors as ongoing concerns, by significantly reducing formalities and providing support to debtors under 'unforeseen material adverse effects or a *force majeure* event, a declaration of emergency, sanitary contingency or a natural disaster'. The initiative failed to make its way to the floor or even be considered for debate. It has been the only attempt to revise the Concurso Law in the recent past. Whether or not this initiative will be revived in the future is yet to be seen.

A more relevant development is that the judiciary, through its Federal Judiciary Council, in February 2022, issued a mandatory resolution pursuant to which the First and Second District Courts with exclusive jurisdiction in *concurso mercantil* were created. The two specialised insolvency district courts initiated their activities in March 2022. Simply by making reference to the instruction that all filings pending admission made between November 2020 and March 2022 had to be remitted to the specialised courts, it is evident that the Federal Judiciary Council has finally accepted that courts were not abiding by the 'mandatory' time periods established in the Concurso Law.

Not surprisingly, there were only a limited number of filings pending admission nationwide from November 2020 to March 2022, which basically means that the newly created courts are not overburdened in volume or complexity of cases. In particular, the First District Court for *concurso mercantil* is starting out with timely and transparent rulings. Better days for *concurso mercantil* may well be on the horizon.

In addition, the IFECOM published a long-overdue code of ethics applicable to all of its registered examiners, conciliators and receivers, underscoring five principles: impartiality, professionalism, excellence, confidentiality and honesty.

The dire need for a meaningful debate as to potential improvements to the Concurso Law seems to be gaining modest momentum. Nevertheless, whether or not further progress can actually be made in light of the evident *concurso* pitfalls existing today, especially through legislative action in Congress, remains very much in doubt, as the ruling populist party has been preoccupied principally, if not exclusively, with ensuring its control of government now and for the foreseeable future to perpetuate its totalitarian nationalistic rhetoric.

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Thomas S Heather is a graduate of the Escuela Libre de Derecho School of Law and pursued business studies at the National University of Mexico and obtained an LLM from the University of Texas at Austin.

Mr Heather joined Creel in 2021 as senior of counsel. His consolidation of a multidisciplinary career of more than 40 years has positioned him as a leader in his areas of practice and at the forefront of Mexican insolvencies and as a prominent consultant in best corporate practices. He is also known as a top-tier international arbitrator.

He currently serves on the board of directors of several leading public corporations and chairs several audit and corporate governance committees. He was invited in 2020 to act as an independent member of the audit committee of the Central Bank of Mexico.

Mr Heather has earned several professional recognitions. He is a founding member of the International Insolvency Institute and co-founder and chair of the Mexican Institute of Mediation, and he headed the Financial Law Committee of the Mexican Bar Association. He is an international Fellow of the American College of Bankruptcy and a member of the Mexican Academy of Arbitration and Best Practices Committee of the Business Coordinating Council. He has also participated in the advisory council of Harvard University's international financial institutions programme.

Mr Heather has been a delegate at UNCITRAL, participating in international conferences and seminars on multinational insolvency issues. He has published more than a hundred articles and has co-authored several treatises.

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