CHADBOURNE
& PARKE LLP

# GUIDE TO MEXICAN BANKRUPTCY LAW

CHADBOURNE & PARKE LLP

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## I. OVERVIEW

This guide is a summary of the major provisions of Mexican bankruptcy law, which is formally known as the *Ley de Concursos Mercantiles* (the "LCM"). The LCM became effective on May 12, 2000 and replaced the *Ley de Quiebras y Suspensión de Pagos* (the "LQSP"), which had been in force in Mexico since 1943. The general consensus among practitioners is that the LCM is a significant improvement over the LQSP and provides for a transparent and orderly process to address claims against a debtor in Mexico.

In this guide, you will find:

- a brief discussion of the LQSP;
- a description of the basic bankruptcy process under the LCM, the requirements for filing and the main participants in the proceeding; and
- a breakdown of a typical case into its three phases: the reorganization trial, the conciliation and the bankruptcy.

This guide also addresses the recent amendments to the LCM that were enacted in late December 2007 and briefly discusses selected practice issues that are frequently raised by bankruptcy practitioners.

## II. THE FORMER LAW: THE LQSP

The former law, the LQSP, reflected an adversarial approach to debt recovery focused on liquidation rather than reorganization. In general, under the former law, there were two alternatives: (1) Suspension of Payments (*Suspensión de Pagos*), or (2) a "liquidation" (*Quiebra*).

Under the LQSP, only a debtor could begin a proceeding by requesting a Suspension of Payments and there was no concept of an involuntary proceeding. A debtor's request for a Suspension of Payments was accompanied by a proposed plan to pay claims similar to a plan of reorganization under Chapter 11 of the United States Bankruptcy Code. A plan under the LQSP could only be implemented if creditors approved it. If the debtor failed to reach an agreement with its creditors to restructure or satisfy outstanding debt, the judge appointed to oversee the Suspension of Payments would declare the debtor bankrupt and begin the "preventive agreement" (*Convenio Preventivo*) stage of the process. There was no time limit for the debtor to reach an agreement with creditors and, accordingly, cases could remain unresolved for years. During the Suspension of Payments phase, creditors could not seek to enforce their claims and interest ceased to accrue on claims.

Each case commenced under the LQSP was assigned to a local or federal judge which, in most of the cases and depending on the State were the case was brought, was selected by a lottery system from a pool of judges. Under the LQSP, a bankruptcy judge was responsible for, among other things, administering all of the debtor's assets and summoning creditors for meetings. The judge had broad discretion and powers to coordinate both the Suspension of Payments, the preventive agreement stage and, ultimately, if no preventive agreement was reached, the liquidation process.

In order to assist the judge in the process, the Chamber of Commerce to which the debtor belonged acted as a Trustee. In addition, a creditors' committee was appointed to represent the interests of creditors and monitor the Trustee and the administration of the company.

Under the LQSP, the Trustee, had significant power and could appoint one or more delegates to assist in the administration of the case. In general, the Trustee's role was to take possession of the debtor and its assets, take an inventory of the estate, prepare the provisional list of creditors, collect receivables, file a report on possible claims of the estate (e.g., preferences, and fraudulent conveyances) and make a determination for the judge as to whether it was possible for the debtor to continue as a going concern. The Trustee could also negotiate an agreement among creditors and bind the debtor to such an agreement.

Upon the commencement of the Suspension of Payments phase or shortly thereafter, the judge presiding over the case would convene the "Creditors Assembly" (*Junta de Acreedores*). Only creditors whose claims had been approved by the Trustee and a committee of creditors were allowed to attend. The purpose of the Creditors Assembly was to review each claim from the list prepared by the Trustee, before submitting that list to the judge for a decision whether to recognize the claim in the judge's Order of Recognition, Ranking and Preference of Claims.

The LQSP was significantly flawed for several reasons. First, the proceedings were extremely slow and lengthy because all contested claims were consolidated and heard by the same judge. Second, the judge was responsible for making *all* of the debtor's decisions, including financial decisions, many of which the judge was unqualified to make, even after consultation with the Trustee. Third, and most significantly, debtors had an incentive to continue a Suspension of Payments for as long as possible, while competitors were required to continue paying all of their debts, thereby creating a competitive advantage for debtors.

## III. THE NEW LAW: LCM

Paving the way for enactment of the LCM were the substantial social and economic changes in Mexico since enactment of the LQSP in 1943. Mexican companies entered the international marketplace and began to list on stock exchanges abroad in the intervening 58 years. Moreover, Mexico's economy opened to foreign companies through entry into numerous free trade agreements (e.g., NAFTA). As a result, the LQSP simply became too antiquated to deal with Mexico's modern reality and the expectations of institutional investors. The LQSP did not allow efficient reorganization of profitable businesses and artificially propped up loss-making enterprises at the expense of the public and otherwise healthy competitors. In addition, Mexican authorities began to realize the importance of business in sustaining Mexico's economy and recognized the need to safeguard these businesses from outright liquidation.

Recognizing the deficiencies in the LQSP, in November 1999 a group of senators proposed the LCM. After a few modifications by the House of Representatives in April 2000, the LCM became effective upon being published in the Federal Official Gazette (*Diario Oficial de la Federación* or "DOF") on May 12, 2000.

In a shift away from the old adversarial system embodied in the LQSP, the LCM is designed to foster cooperation and agreement. Whereas under the LQSP the inevitable result was either a lengthy Suspension of Payments or liquidation, the LCM focuses more on reorganization and involves court-appointed officials in that process from the beginning. Only if this process -- called the "Conciliation" (*Conciliación*) -- fails does the debtor enter into liquidation.

Under the LQSP, each case was assigned to a local or federal judge that in most cases was not specialized in or even familiar with bankruptcy matters. Under the LCM, each case is assigned to a federal judge, but in contrast with the procedure under the LQSP, this judge will be assisted by specialists appointed by the Federal Institute of Reorganization Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles* ("IFECOM")), which was created for the sole purpose of guiding civil judges through the bankruptcy process.

In general, a case under the LCM has three phases: (i) "Bankruptcy Trial" (*Juicio de Concurso*); (ii) "Reorganization" and, if no Reorganization is implemented, (iii) "Liquidation." A civil judge (with guidance from specialists appointed by IFECOM) oversees these three phases from the beginning.

## IV. OVERVIEW OF LCM PROCEDURE

### A. Eligibility to File

A case under the LCM may be commenced by (i) the debtor, (ii) a creditor or (iii) the Attorney General (*Ministerio Público)*. Under the LCM, a debtor is deemed to have "generally defaulted on its payment obligations" if:

(1) a payment default has occurred with respect to the claims of at least two creditors;

(2) payments are past due for more than 30 days and represent 35% or more of all the debtor's payment obligations as of the date of the filing; and/or

(3) the debtor does not have liquid assets (e.g., cash deposits, short-term securities, and accounts receivable) to pay at least 80% of the obligations past due as of the date of the filing.

A debtor may commence a voluntary reorganization proceeding under the LCM if it satisfies condition (1) and either (2) or (3). A creditor, whether unsecured or privileged, or the Attorney General can file an involuntary reorganization proceeding under the LCM only if *all three* conditions are satisfied. Nevertheless, if a creditor commences an involuntary proceeding and is unable to demonstrate that all three conditions have been fulfilled, it must pay all attorneys' fees and other expenses incurred by the debtor in accordance with the court's discretionary ruling.

Under the LCM, eligibility is presumed when the debtor does not have sufficient assets to attach after a default, there are no persons with authority present, or where the court determines that the debtor is fraudulently conveying its assets to avoid the payment of obligations.

In general, foreign companies may not be subject to bankruptcy proceedings in Mexico. The LCM, however, does allow for the reorganization of branches and subsidiaries of foreign companies. The LCM also permits the recognition of foreign proceedings under "Titulo XII," which like Chapter 15 of the U.S. Bankruptcy Code is based on the UNCITRAL Model Law on Cross-Border Insolvency. Indeed, Mexico was one of the first countries to adopt the Model Law.

### B. Venue

A proceeding under the LCM must be initiated before the civil judge where the debtor is domiciled (*i.e.,* where it operates). Typically, a company's domicile is stated in its articles of incorporation (*estatutos*).

### C. Parties

***The Debtor***

Under the LCM, "merchants" are eligible to file for reorganization. Article 3 of the Commercial Code defines merchants as: (i) persons with legal capacity to engage in commerce; (ii) corporations incorporated in accordance with the commercial laws; and (iii) foreign corporations, and their agencies or branches that engage in commerce within a Mexican territory. In addition, a trust whose main purpose is the conduct or facilitation of business may also be eligible for reorganization. The partners of general partnerships and general partners of limited partnerships can also be subject to reorganization proceedings. Limited partners of a limited partnership cannot be forced into a bankruptcy of the partnership.

Special provisions govern the reorganization of public service companies, such as banks and other financial institutions or bonded warehouses. While these special provisions are beyond the scope of this guide, the agency responsible for overseeing such public service companies has the right to commence a case and to direct IFECOM to appoint the specialists ordinarily appointed in IFECOM's discretion. For example, the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) has commenced cases against *Arbitraje Casa de Cambio S.A. de C.V.* and *Crédito y Ahorro del Noreste, Sociedad de Ahorro y Préstamo*.

As in the United States, insurance companies are also subject to special insolvency laws (*Ley General de Instituciones y Sociedades Mutualistas de Seguros ("LGISMS")*) and may not file under the LCM. For example, only the Finance Ministry (*Secretaría de Hacienda y Crédito Público*) can request the reorganization of an insurance company, and neither the insurance company itself or any of its creditor cans commence a reorganization proceeding.

The reorganization proceedings of affiliated companies are generally consolidated for administrative purposes and share the same index number. Thus, all pleadings related to consolidated cases are stored in the courthouse in binders under the same index number.

***Creditors***

Creditors must file proofs of claim using the form provided by IFECOM. Only "recognized" creditors may participate in plan negotiations. Recognized creditors are those listed in the Order of Recognition, Ranking and Preference of Claims, discussed below.

***Judge***

A case under the LCM will be assigned to a district judge, which is a federal judge, at the debtor's domicile or where its principal place of business is located and this judge oversees the reorganization and bankruptcy proceedings. Unlike in the United States, there are no special bankruptcy courts in Mexico. IFECOM, however, trains and appoints specialists to assist the judge throughout the process.

***IFECOM***

IFECOM is an arm of the judicial branch of the federal government. Its role is similar to that of the Office of United States Trustee in the United States. IFECOM maintains lists of people approved to act as specialists -- Auditors, Conciliators or Trustees -- in reorganization proceedings. IFECOM sets the fees to be paid to specialists and monitors their work. IFECOM also provides continuing education to specialists, judges and lawyers, publishes statistics on proceedings, issues rules and forms, and acts as mediator between a debtor and its creditors when asked. Recent amendments to the LCM (enacted in December 2007) have increased IFECOM's powers by allowing it to, among other things, respond directly to questions posed by judicial authorities.

Under the LCM, potential debtors can mediate disputes with its creditors through IFECOM before filing for bankruptcy. Likewise, any creditor with a claim against a debtor may also seek mediation through IFECOM.

***Specialists (Especialistas)***

There are three types of specialists in bankruptcy proceedings under the LCM:

- **Auditor**. After a district judge has approved a valid request for reorganization, the judge gives notice to IFECOM, which then appoints an "Auditor" (*visitador*) to review the debtor's books to determine whether the debtor is eligible for reorganization.
- **Conciliator**. The Conciliator (*conciliador*) is appointed by IFECOM after a district judge gives notice that the conciliation phase of the proceeding has begun. The Conciliator acts as mediator between the debtor and its creditors and is responsible for preparing a reorganization plan. In addition, the Conciliator monitors the administration of the company and presents the list of creditors to the judge. The Conciliator may also be

authorized to operate the business under certain circumstances, much like an operating trustee in the United States.

- **Trustee**. The Trustee (*síndico*) is appointed in the same manner as the other two specialists when the judge gives notice to IFECOM that the liquidation phase has begun. The Trustee is entrusted with selling the assets of the estate in the event conciliation fails and the case proceeds to liquidation. It is not uncommon for the Trustee to be the same person designated as Conciliator.

Prior to the recent amendments of December 2007, the fees of the specialists were paid from the debtor's estate. Such fees were entitled to a priority, but were only paid after labor claims. Indeed, specialists had to initiate ancillary proceedings (*Incidente de liquidación de honorarios*) by which they filed a report detailing the hourly activities performed by the specialists and their assistants. The parties then had the opportunity to object to the report, after which the judge determined the amount to be paid.

Now, specialists are paid an hourly fee based on schedules prepared by IFECOM. Payment of the specialists fees and expenses are provided for in the reorganization plan as ordinary company expenses. If a reorganization proceeding winds up in liquidation, the specialist's fees and expenses are paid from the estate at the end of the liquidation proceeding.

Specialists in Mexican proceedings must be bonded to guarantee their performance in an amount determined by IFECOM. To date, according to IFECOM, no claims have ever been filed against specialists by any party and, as a result, their bonds have never been called upon.

In addition, specialists are required to keep information they obtain during their tenure confidential and are liable for any damages caused by unlawful disclosure.

#### *Controllers*

Controllers (*Interventores*) represent the interests of creditors in a proceeding under the LCM and act much like an official committee of unsecured creditors in a United States bankruptcy case. They act as "watchdogs" and oversee the Conciliator and the Trustee to ensure they perform their duties properly. A Controller may be appointed by the court only upon the request of a creditor or group of creditors representing at least ten percent of the total amount of the debtor's indebtedness. Accordingly, there may be up to ten Controllers.

Controllers have the authority to request information from the Conciliator relating to the debtor and the management of its business. Their fees are paid by the appointing creditor or group of creditors, which reflects a significant departure from the United States system, where the fees of creditors' committee and their professional advisors are paid by the debtor's estate.

## D. The Three Phases of the LCM

The process under the LCM involves three stages: the bankruptcy trial; the conciliation; and if no reorganization is implemented, the liquidation. In the first stage (*juicio de concurso*), the district judge, with the aid of the Auditor, reviews whether the eligibility requirements are met by the debtor, and issues the Order for Relief or denies the request. In the second "conciliation" phase (*conciliación*), the Conciliator must determine who the creditors are and acts as a mediator between the debtor and its creditors in order to formulate a reorganization plan. Finally, if no plan is reached and the case proceeds to a liquidation, the Trustee must sell the assets and pay creditors. Each of these phases is described in more detail below.

## Phase 1: Bankruptcy Trial

***Commencement***

Cases under the LCM are commenced by the filing of a claim or a request for bankruptcy *(concurso)* for the purpose of reorganization. The debtor itself, any creditor, or the Attorney General can file a claim, which is similar to a complaint commencing a lawsuit in the United States If a creditor commences the case, it files a *Demanda*; in a voluntary case, the debtor files a *Solicitud*.

Unlike in the United States, where most cases are filed by debtors, nearly half of all proceedings in Mexico are commenced by creditors. When a creditor commences a proceeding, it must include proof of its claim and whatever documents are necessary to determine whether the debtor is eligible for relief. Again, unlike in the United States, where a contested involuntary petition may involve a lengthy trial with live testimony, the reorganization trial under the LCM is conducted entirely through pleadings, except in unusual circumstances.

As part of its request to commence a proceeding, a creditor may seek preliminary relief aimed at avoiding disrupting the debtor. Unlike in the United States where the automatic stay arises upon the filing of the petition with the court, there is no moratorium enjoining creditors from taking actions against the debtor in Mexico until an Order for Relief is entered. Thus, a creditor may ask for a temporary restraining order preventing collection efforts against the debtor until the court determines whether the debtor is eligible for bankruptcy.

After the request for bankruptcy is filed, the judge presiding over the case will direct that process be served on creditors and/or the debtor, depending on who commenced the case. Service of process, unlike in the United States, must be completed by a court clerk (as opposed to any private individual). Typically, process is served in one or two days. Once served with process, the creditor and/or debtor then has nine days to respond and the commencing party has three days to file a rebuttal. If more than documents (*i.e.,* testimony and/or an expert report) are required, then the judge will establish an evidentiary process that cannot last longer than 30 days.

It is interesting to note that when the LCM was first enacted, a creditor seeking involuntary reorganization had to post a bond with the court. In October 2006, however, the Supreme Court declared that requiring creditors to post a bond to initiate reorganization proceedings was unconstitutional, ruling that justice should be "free of charge."

***Eligibility Review by the Auditor***

Simultaneously with the filing of the claim or request for bankruptcy, the judge will notify IFECOM and request the appointment of an Auditor. A petition for bankruptcy filed under the LCM initiates an "auditing" process in which the Auditor performs an "eligibility review" of the debtor's books and records to determine if the company is eligible for reorganization, including whether the debtor is insolvent. Once the answer to the petition is filed, the Auditor will begin its eligibility review, which is completed upon the filing of a final report. If the Auditor determines that the debtor has generally defaulted on its payment obligations within the meaning of the LCM, the district judge will issue an "Order for Relief." In the final report, the Auditor may also suggest, and the judge may order, certain protective measures. The final report must be issued no later than 15 days after the answer is filed, although the judge may grant the Auditor one 15-day extension under exceptional circumstances. If a debtor refuses to cooperate with the Auditor's eligibility review, the Auditor may ask the judge to enter an Order for Relief.

***Order for Relief***

Once the Auditor's final report has been filed, creditors, the debtor, and the Attorney General are allowed to review it and file any request for modification and submit any evidence they deem appropriate within ten days. Within five days after the last request, the judge decides whether entry of an Order for Relief is appropriate. The judge is not bound by the Auditor's final report and there have been instances where the debtor convinced a judge that its liquid assets were sufficient to pay debts and that an Order for Relief should not be entered.

The effects of the Order for Relief are:

- IFECOM is instructed to appoint a Conciliator, who takes possession of the debtor's books and records.
- Known creditors are served with the Order for Relief and unknown creditors are notified by publication by the Conciliator in a newspaper and the DOF.
- The debtor is ordered to cease all payments of its debts, except those necessary for regular operation of the company. This reflects a difference from the United States system, where a debtor cannot pay without bankruptcy court approval any debts that arose prior to commencement of the case, even those debts owing to vendors deemed critical to the debtor's on-going operations necessary to run the company. The value of claims against the debtor will be addressed as discussed in Section VII below.
- Much like in a United States case, entry of an Order for Relief automatically stays all collection efforts by creditors (but not necessarily all lawsuits).

Prior to the recent amendments of December 2007, the Order for Relief also prevented the debtor, or in the case of a corporation, those in charge of the corporation, from leaving the jurisdiction without designating a person with authority to act on behalf of the debtor. Now, if a debtor requests its own reorganization, the Order for Relief may not prevent the debtor or its managers from leaving the jurisdiction.

Regardless of the Auditor's final report, the judge may declare the debtor not eligible for reorganization and refuse to enter an Order for Relief. In that case, the requesting party originally seeking an order will be required to pay the fees and expenses incurred during the process. Only the debtor, the Auditor, the creditors that commenced the process or the Attorney General may appeal denial of an Order for Relief.

## Phase 2: Conciliation

***General***

The purpose of conciliation is to preserve the company's operations while the parties attempt to negotiate and draft a consensual reorganization plan. The Conciliator facilitates this process.

***Timing/Procedure***

The conciliation period lasts 185 days and may be extended for two 90-day periods under exceptional circumstances. The Conciliator *or* the creditors representing two-thirds of the amount of the recognized claims may request the first 90-day extension if they reasonably believe a reorganization plan is achievable. The second 90-day extension must be sought by both the debtor *and* 90% of recognized creditors. In no event may the conciliation last more than 365 days.

During the conciliation phase, the Conciliator must publish notice of the deadline by which creditors must file proofs of their claims (*i.e.*, the bar date). Notice must be published in the DOF and in a local newspaper of the place where the proceeding is pending. The Conciliator is also charged with processing and reviewing proofs of claim and serving as a mediator between the debtor and its creditors, as well as with the actual drafting and the submission of lists of creditors and the reorganization plan. The Conciliator must also file a progress report every two months setting forth the work it has performed and the results of its efforts to facilitate a reorganization plan.

#### *Reorganization Plan*

Once the Court publishes the list of recognized claims, the Conciliator is required to attempt to reach an agreement with the debtor and holders of recognized claims on a plan of reorganization. If the Conciliator believes that the debtor and a majority of holders of recognized claims support a plan of reorganization for the debtor, it must circulate the plan to all holders of recognized claims. Such holders will have ten business days to comment on the plan.

#### *Plan*

The plan must provide for the payment of the following:

- ***Qualified labor claims***. Salaries earned within the two year period prior to the entry of the Order for Relief, plus any severance pay;
- ***Claims related to the administration of the estate***. Expenses incurred in the administration of the proceeding including attorneys' fees;
- ***Specialists' fees and expenses***. The fees and expenses charged by the Auditor, Conciliator, Trustee and their assistants in the performance of their duties;
- ***Singularly privileged creditors.*** Funeral expenses and medical expenses incurred with respect to illness leading to death, when the debtor is a natural person;
- ***Secured creditors.*** Creditors with a mortgage, pledge or other security agreement covering property of the debtor. Under Mexican law, security interests must be properly registered or they will be avoided. Secured creditors' claims are satisfied out of the collateral to the extent of the collateral's value. If the claim is greater than the value of the collateral, the resulting deficiency claim is considered an unsecured claim;
- ***Labor and unsecured tax claims.*** Claims that do not fall into any of the previous categories, (i.e., unsecured tax claims or labor claims which are not qualified labor claims);
- ***Creditors with a special privilege.*** Certain creditors have a special statutory privilege and have a "right to withhold."[1] These creditors have rights that are similar to those of secured creditors; and
- ***General unsecured creditors***. Finally, any creditor that does not fit into one of the foregoing categories is considered an unsecured creditor. Unsecured creditors come last in line and are paid only if all senior classes of creditors are paid in full.

A reorganization plan may provide for the sale of the debtor as an ongoing business.

If the plan provides for an increase in capital stock, the Conciliator must give notice to existing shareholders so they can exercise any preemptive rights they may have. If existing shareholders waive such preemptive rights, any person, including the claim holders may participate in the capital stock increase. As part of the reorganization plan, the claim holders and the debtor can agree to capitalize debt.

#### *Approval of the Reorganization Plan by the Creditors*

If the Conciliator believes that enough creditors will vote in favor of the plan, he will submit it to the holders of recognized claims for a ten-day period so that they may comment on or execute it.

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[1] The following are examples of right to withhold. A buyer under an installment contract has a right to withhold payment of the price if the possession of the purchased good is threatened. A debtor has a right to withhold payment to a creditor if the creditor's claim has been attached by a third party and notice was given to the debtor. A hotel has a right to withhold the luggage of a guest that left without paying.

The Conciliator must attach to the plan a clear summary of its terms. Both the proposed plan and the summary must be submitted using the form provided by IFECOM.

In order for a plan to be approved by the court, it must be agreed to by (i) the debtor and (ii) holders of recognized claims holding more than 50% of the sum of (a) the total recognized amount of unsecured claims, and (b) the amount of the secured claims and claims having a special privilege under Mexican law that undersign the plan.

On the other hand, a plan would not be approved if it is rejected (*vetado*) by a simple majority of recognized unsecured creditors, or by any number of them whose claims equal or exceed 50% of the total amount of recognized unsecured claims.

In general, a plan will be deemed accepted by all unsecured claim holders if it provides for the payment of the entire amount of their claims, converted into UDIs.[2]

With respect to creditors that do not agree to the terms of the plan, the plan must provide for minimum protections with respect to the discount and payment period of claims. In particular, the LCM provides that a dissenting creditor should be treated no worse than any 30% of the recognized unsecured creditors that did sign the plan. It remains to be seen, however, how a court will ensure these protections.

Within seven days after the expiration of the ten-day period, the Conciliator must submit the plan to the judge, signed by the debtor and by the required majority of recognized claim holders. The judge then must make the plan and the summary available to all recognized claim holders for five days, so that they may file any objections.

***Order Approving the Reorganization Plan***

Following the comment and objection period, the district judge may confirm the plan if it meets all of the requirements of the LCM. Further, the district judge may refuse to approve the plan if it is inconsistent with public policy.

Upon approval of the reorganization plan, the bankruptcy proceeding ends. The parties involved in the proceeding are relieved of their duties and the Conciliator must cancel any registration made on the public registers of the Order for Relief. The debtor, holders of recognized claims, the Attorney General or the Conciliator may challenge the reorganization plan on the basis that it has not satisfied all of the requirements of the LCM.

Barring a successful appeal, an approved reorganization plan binds the debtor and all recognized creditors, even those who rejected the plan, provided that the plan sets forth: (a) payment of the debt for the amount due on the date of the Order for Relief converted to UDIs, (b) payment of all amounts that became due in accordance with the agreement from the date of the Order for Relief to the date of approval of the reorganization plan, and (c) payment of the obligations that become due after the approval of the reorganization plan.

***Dissenting creditors***

Any recognized holder of a secured claim that did not approve of the reorganization plan may commence or continue to foreclose on the collateral securing the claim, unless the plan provides for the repayment of their claims, or the payment of the value of their collateral. If the amount to be

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[2] UDIs are *Unidades de Inversion,* a measuring unit of constant value. Starting in April 1995, the Central Bank (*Banco de México*) publishes the value of the UDI for each day of the month in the DOF. The UDI's value increases or decreases depending on Mexican inflation rates.

paid for the value of the collateral does not satisfy the entire claim, the deficiency will be treated as an unsecured claim.[3]

***Discretion of the Judge***

Under the LCM, the district judge controls the bankruptcy proceeding but the judge's discretion is limited to approval or disapproval of the reorganization plan filed by the Conciliator and signed by the necessary majority of the claim holders. The judge may not unilaterally modify the plan.

## Phase 3: Liquidation

A debtor may be put into liquidation (i) upon its request, (ii) if a reorganization plan is not approved within the 365-day conciliation period, or (iii) if the Conciliator determines that a consensual plan is impossible. Before the recent amendments to the LCM of December 2007, once the liquidation phase began, a case could never return to conciliation. Now, however, the LCM allows a debtor and its creditors to negotiate a plan even after the liquidation phase has begun, provided that the approval of all creditors is needed to implement such a plan or terminate the proceedings.

***Order for Liquidation***

The Order for Liquidation suspends the legal capacity of the debtor to manage its business, including disposing of assets or performing under contracts. In a liquidation, IFECOM will either appoint a Trustee or ask the Conciliator to act as Trustee with power to manage the debtor's assets.

The Trustee must register the Order for Liquidation and publish a summary of it in the DOF and in a newspaper of the place where the proceeding is pending. The debtor, any recognized creditor, or the Conciliator may appeal the Order for Liquidation within nine days after notice is given.

Sixty days after taking control of the debtor's business, the Trustee must file a report on the state of the debtor's books, an inventory list, and a balance sheet listing all assets up to the date of the appointment.

In a liquidation, all of the assets of the estate must be turned over to the Trustee and the debtor is prohibited from making any payments or delivering any goods without the Trustee's authorization. Likewise, any entity that makes a payment to the debtor without the Trustee's consent risks having to pay twice.

***Liquidation of the Estate/Auction Procedures***

Once the Order for Liquidation is entered, the Trustee must sell the debtor's assets for the highest price possible. The Trustee may consider selling the estate as an ongoing business or may sell assets individually.

Although the Trustee may ask the district judge to establish different procedures, a Trustee will generally sell the assets of the estate at a public auction. The notice for the auction must be published at least twice in a newspaper of the place where the proceeding is pending. The notice must contain the details of the auction, including when and where it will be held, a detailed description of the assets being sold, any minimum bids and/or bidding increments, as well as information concerning pre-auction inspection of the assets. The Trustee must send a copy of the

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[3] The law suggests that the holder of such a deficiency claim would retain the right to initiate a collection proceeding against the debtor for the unsatisfied balance if, at the end of the reorganization and liquidation proceeding, such claim has not been fully satisfied. We are not aware whether any such proceeding has ever been instituted and it is unclear how a court would resolve such a proceeding.

notice to IFECOM for publication on IFECOM's website. The auction must take place not less than 10 days and not more than 90 days after publication of the first notice.

Any person that is interested in bidding at an auction must file a bid in the specified format in a sealed envelope with the district court presiding over the auction. Typically, the bid must be accompanied by a certified check or bond that guarantees payment of the bid amount. Any person that is "related" to the debtor may present a written bid, but may not otherwise participate at the auction. A creditor is generally not a related entity and may bid and participate at an auction. The LCM considers the following entities to be "related": (i) family members of the debtor's or members of the board of directors or officers of the debtor; (ii) a member of the board of directors of the debtor; (iii) shareholders holding at least 5% of the outstanding stock of the debtor; or (iv) controlling shareholders of any corporation holding at least 5% of shares of the debtor.

At the designated time for the auction, the judge presiding over the case will open the sealed envelopes and reveal the details of each bid. Bidders will then have the opportunity to improve their bids, which will continue until the highest bidder is declared. When the auction is finished, the judge will order the sale of the assets to the winning bidder, who will have ten days to pay the bid amount, in cash. If no bids are received, the judge will declare the auction abandoned.

In general, creditors are paid out of the auction proceeds, subject to payment of certain expenses described below, in the order set forth in Section IV.D above (under "Phase 2: Conciliation", subsection "Plan"). Creditors with security interests in the assets being auctioned are paid out of the collateral, subject only to the payment of qualified labor claims. No payments will be made to one class of creditors until the class above it has been fully satisfied in accordance with the priority set forth in the Order of Recognition, Ranking and Preference of Claims. If there are not enough assets to satisfy all claims in a class, there will be a pro rata distribution to the holders of claims within that class.

The Trustee must report to the Court on its progress in liquidating the estate every two months. If any claims have been challenged, the Trustee must reserve the amounts that would satisfy the challenged claim.

## V. ADMINISTRATION OF THE COMPANY DURING PROCEEDINGS

After the filing of a claim or request for bankruptcy and pending approval by the district judge that the debtor is eligible for relief, the operations of the debtor continue unaffected by the request for such a determination. Once appointed, the Auditor can request restraining orders. These restraining orders may include: (i) a stay of any enforcement proceeding with respect to the debtor's property; (ii) a prohibition against the payment of pre-petition debts; (iii) a prohibition against the leveraging of any assets; (iv) the attachment or seizure of the debtor's assets; (v) the appointment of a person to control the debtor's cash; and (vi) an order preventing the debtor (if a natural person) or the managers of the debtor from leaving the jurisdiction.

Once the district judge rules that the debtor is eligible for reorganization, and the debtor moves into the conciliation stage, the debtor (or its management) usually remains in control of its operations under the supervision of the Conciliator and the Controller (if one was appointed). If the Conciliator believes that the continuation of existing management is not in the best interests of the estate and its creditors, it may request removal of management and may be authorized to assume responsibility for managing the debtor. The LCM does not list specific grounds for removal, although the statute is broad and leaves the decision to the discretion of the judge and the Conciliator.

If reorganization is not possible or the case otherwise proceeds to liquidation, the executive officers of the debtor are removed and the Trustee is appointed with the broadest possible powers to run the debtor's business. The Trustee must initiate the process in order to take possession of the debtor's assets promptly after appointment and must do everything to maintain and secure such assets, including establishing a bank account controlled by the Trustee. If the Trustee decides to operate the business while in liquidation, it may do so in the same way that the debtor did before the reorganization.

## VI. THE BANKRUPTCY ESTATE

Much like in the United States, once the Order for Relief has been entered, an estate is created. To determine the liabilities of the estate, all debts are treated as automatically accelerated and any non-pecuniary obligations will be assigned a value. After the Order for Relief is entered, and until the conciliation phase of the proceeding is complete, no order of attachment or auction of the estate's assets may be entered or enforced.

### A. Separation of Assets

Where the debtor holds easily identified assets that belong to another party, those assets may be separated from the estate. The following assets are considered easily identified and may be separated from the estate: any property held by the debtor that is subject to a possessory claim; and assets in possession of the debtor as bailee, trustee, consignee, etc. Property of the estate held by third parties (other than secured creditors) must be turned over to the Trustee.

In Mexico, many financing transactions involve the creation of a trust (*fideicomiso*) into which a debtor's assets are transferred for the benefit of the creditors in that financing. Under those circumstances, the debtor's assets are legally outside the scope of the debtor's estate. However, because the debtor's assets remain on the debtor's books for accounting and tax purposes, the bankruptcy of the debtor could result in challenges to the conveyance by third parties based on discrepancy and favorable treatment of certain creditors. Indeed, parties involved in such trusts should consider whether a court could conclude that a conveyance to such a trust is a fraudulent transfer or preference.

### B. Executory Contracts

The general rule is that executory contracts must be honored by the debtor, unless the Conciliator rejects the contract. Even if the debtor or its management remains in control of the business, the Conciliator is empowered to accept or reject executory contracts, incur new indebtedness, substitute collateral and sell assets outside the regular course of business. If the Conciliator decides to terminate a lease under which the debtor is the lessee, the lessor is entitled to three months' rent.

A non-debtor party to a contract may ask the Conciliator to decide if it will reject the contract. If the Conciliator responds that it will not, then the debtor must honor the contract. If the Conciliator states that it will reject the contract, or does not respond, the non-debtor party to the contract may terminate it by giving notice to the Conciliator.

The LCM provides certain protections to sale contracts. Specifically, a seller is not bound to deliver the goods or the real estate if the price has not been paid or a guarantee that it will be paid has not been provided. Moreover, in the case of movable property that has not been paid for, when the debtor/buyer commences a bankruptcy case prior to the delivery of goods, the seller may refuse to deliver unless the purchase price has been paid in full.

Notwithstanding the general rule, the following contracts are automatically terminated on the date the Order for Relief is issued: agreements to repurchase stock, stock loan agreements, and agreements regarding futures, or financial derivative operations that become due after the Order for Relief. Construction agreements (*obra a precio alzado*) will be also automatically terminated by the bankruptcy of one of the parties, unless the parties and the Conciliator agree to assume it.

### C. Stay of Proceedings

In the United States, the filing of a bankruptcy petition results in an automatic stay that enjoins the commencement or continuation of most actions for the collection of claims and enforcement of liens against the debtor or its estate. In Mexico, the Order for Relief (and not the petition) results in a similar stay. Once the Order for Relief is entered in Mexico, no foreclosure proceeding may be commenced or continued and no attachment may take place. Creditors holding "labor claims" against the debtor, however, may continue to pursue those claims even after the Order for Relief is entered, and labor tribunals may order the attachment of assets to satisfy the last two years of salaries and certain other employment-related obligations. Similarly, tax authorities may attach assets to secure their claims, even after entry of the Order for Relief.

In a creditor-initiated case, the creditor seeking entry of an Order for Relief may also seek from the court protective measures against the debtor, such as an order preventing the debtor's managers and directors from leaving the domicile or prohibiting the seizure of debtor's assets. The Auditor can also seek, prior to the Order for Relief, orders protecting the estate, including orders prohibiting payment of debts, staying attachment or foreclosure proceedings, or preventing further encumbrances.

### D. Pending Litigation

All litigation initiated by or against the debtor that is still pending when the Order for Relief is entered *will not* be consolidated with the bankruptcy proceeding. The debtor may continue such litigation with the Conciliator's approval. The continuance is subject, however, to the Conciliator's supervision and right to take over the litigation.

### E. Effect on Pre-Petition Security Interests

Under United States bankruptcy law, property acquired by the debtor after the filing of a bankruptcy petition is generally not subject to liens resulting from prepetition security agreements. There is no similar provision in the LCM and pre-petition liens may extend to property acquired by the debtor after the Order for Relief has been entered.

## VII. DETERMINATION OF CLAIMS AND DISTRIBUTION

### A. Introduction

As discussed above, in order to determine the amount of claims against the debtor, all debts are accelerated and, if the claims are subject to a condition precedent, the condition is considered satisfied. If necessary, claims are converted to present value and obligations that are not expressed by the payment of money are assigned a monetary value.

All unsecured claims cease to accrue interest and are converted into UDIs as of the date of the Order for Relief, provided that an unsecured claim denominated in foreign currency is first converted to pesos and then to UDIs. Claims denominated in UDIs are protected against Mexican inflation.

In general, a secured claim will remain denominated in the original currency or unit of measure and will continue to accrue interest to the extent the collateral is sufficient to satisfy the secured claim. A plan under the LCM may provide for distributions in other currencies.

## B. Filing of claims

A creditor with a claim against a debtor has three opportunities to file a proof of claim: (i) within 20 days following the date of the publication of the Order for Relief; (ii) within five days of the filing of a provisional list of creditors by the Conciliator; or (iii) within nine days of issuance of the Order of Recognition, Ranking and Preference of Claims. Failure to file a proof of claim prior to these deadlines, or to otherwise ensure that a claim is identified on the Order of Recognition, Ranking and Preference of Claims, results in the permanent loss of the claim. Foreign creditors have 45 calendar days to file their proof of claim after process is served. Process can be served by courier and does not require Letters Rogatory or other formalities.

Proofs of claim must contain the same basic information required in a United States proceeding, including the name and address of the creditor, the amount of the claim, a description of any collateral, as well as a description of the claim generally (e.g., the types of documents and the relationship that gives rise to the claim). The proof of claim must also state whether the claim is entitled to preferential or priority status. It must be filed using the form approved by IFECOM and must be accompanied by any original documents (or copies certified by a notary public).[4]

## C. Provisional List

After the first deadline to file proofs of claim, the Conciliator is required to submit to the court a provisional list of claims against the debtor using the information gathered from the debtor, the data included in the Auditor's report, and filed proofs of claims. The filing of the provisional list commences a five-day period for creditors and other interested parties in interest to file objections to the claims on the provisional list, including the validity of, or the proposed amount or priority assigned to, the claims.

## D. Final List and Order of Recognition, Ranking and Preference of Claims

Once the five-day period to object to the provisional list has elapsed, the court sends copies of all objections received to the Conciliator, who then has up to ten business days in which to revise the provisional list of claims based upon the objections and to prepare the proposed final list of claims for submission to the court. Once the proposed final list is submitted, the district judge decides whether to accept the list and, if so, enters an order declaring the final list received from the Conciliator as the list of "recognized claims" against the debtor. That order is called the Order of Recognition, Ranking and Preference of Claims. The final list will rank the claims in priority set forth in Section IV.D above (under "Phase 2:Conciliation", subsection "Plan").

The debtor, any creditor (regardless of whether it has participated in the proceedings), the Controller, the Conciliator, the Trustee or the Attorney General may appeal the Order of Recognition, Ranking, and Preference of Claims within nine days of its entry. If a creditor did not file a claim, it has an opportunity to do so no later than nine days after the final list of creditors is published.

Tax liabilities can be determined at any time. The Conciliator, when drafting the provisional list of creditors, must include all tax liabilities. Tax claims continue to accrue fines and related charges. If a reorganization plan is reached in the conciliation phase, the fines accrued during the conciliation proceeding might be disallowed.

[4] All forms created by IFECOM can be found at www.ifecom.cjf.gob.mx

### E. Setoff

After the date on which the Order for Relief is entered, only the following claims may be set off:

- any rights in favor of and obligations owed by the debtor arising out of the same transaction, unless the transaction is terminated by operation of law as a result of the Order for Relief;
- any rights in favor of and obligations owed by the debtor that became due before the Order for Relief, where the setoff is authorized under applicable law; and
- any tax refunds to and tax claims payable by the debtor.

## VIII. SELECTED PRACTICE ISSUES

### A. Use, Sale or Lease of Property of the Estate in the Ordinary Course of Business.

While the debtor generally remains in control of the company, the Conciliator supervises the accounting and operations of the debtor. The Conciliator, in consultation with any Controllers, must consent to the execution of any loan agreement or the sale of assets outside of the ordinary course of business. The Conciliator may not sell assets outside the ordinary course of business. The Conciliator must inform the district judge of any new loans or the sale of property. Creditors and the Attorney General may object.

### B. Use of Cash Collateral.

Under the LCM, after an Order for Liquidation has been entered, the Trustee must file a report every two months identifying the assets that were sold and a list of the claim holders that will be paid. No express reference is made to cash collateral, but it is understood that the Trustee may use cash collateral to maintain the company while deciding whether to sell it as a whole or to liquidate it piecemeal.

During a reorganization, cash may be used to pay administrative expenses incurred in the ordinary course of business. During liquidation, however, administrative expenses will only be paid if the Trustee is considering selling the corporation as a whole instead of selling the assets separately. If the latter, no administrative expenses may be paid.

### C. DIP Financing.

In the U.S., a debtor-in-possession may fund its operations through post-petition financing, which is generally known as "DIP Financing." DIP Financing may provide for credit secured by a first priority lien on any encumbered property, after a showing of inability to obtain credit otherwise and adequate protection for the secured creditor whose lien is being primed.

In Mexico, a debtor may similarly fund its operations through post-petition financing. Under Mexican law, a new lender, however, cannot be secured by a priming lien on encumbered property. Rather, the new lender will generally be granted a lien that ranks at the same level of the debtor's pre-bankruptcy lender, subject to one exception; a new lender will be entitled to a senior priming lien to the extent its funds are used to fund the administration of the bankruptcy case.

### D. Prenegotiated Plans.

The U.S. Bankruptcy Code permits a debtor to solicit votes on a chapter 11 plan prior to the filing of a bankruptcy petition or approval of its disclosure statement. Such a plan is generally referred to as a prepackaged plan. Through a "lockup agreement," the votes solicited prior to the bankruptcy filing are binding on creditors during the bankruptcy case. In addition, the prepackaged plan process has the advantage of being relatively quick and inexpensive. A prepackaged plan can generally become effective 45 to 60 days after the bankruptcy 11 case is commenced.

Before the recent amendments to the LCM (enacted in December 2007), a reorganization plan could not be filed at the same time as the petition for relief. In other words, there was no provision for "pre-packaged" plans. Interested parties, however, were free to negotiate outside of the proceeding at all times and the reorganization plan could be filed as soon as the Order of Recognition, Ranking and Preference of Claims was entered.

The recently passed amendments, however, include a new Title XIV which allows a debtor to file, simultaneously with its petition, a prenegotiated plan of reorganization signed by creditors holding at least 40% of its total debt. Under those circumstances, (i) the judge will issue an Order for Relief without the appointment of an Auditor, thereby expediting the effectiveness of the stay enjoining creditors' actions, and (ii) the Conciliator must consider the prenegotiated plan before negotiating any other plan. However, under the LCM, the votes solicited and obtained prior to the bankruptcy filing will not be binding and the debtor will be required to re-solicit the votes during the bankruptcy, which is a significant difference from the U.S. process. Thus, while "prenegotiated plans" are possible under the LCM, "pre-packaged plans" are not.

### E. Equitable Subordination.

Under the doctrine of equitable subordination, a U.S. bankruptcy court may subordinate a claim to the claims of those injured by the conduct of the holder of the claim being subordinated. The doctrine empowers the bankruptcy court to consider whether the conduct of the creditor is sufficiently egregious to justify subordinating the claim of that creditor to the claims of some or all other creditors.

No similar concept exists under the LCM. Generally, Mexican corporate law provides that creditors must be paid in full prior to any distribution to shareholders. The General Law of Mercantile Companies (*Ley General de Sociedades Mercantiles*) provides that in liquidation, the Trustees shall pay all debts of the company before distributing anything to shareholders. Under Mexican law, a creditor's claim cannot be subordinated by a court. Where a creditor's conduct has injured other creditors, there are other possible remedies under the Mexican civil and penal codes.

### F. Fraudulent Conveyances.

A fraudulent conveyance under the LCM is any transfer by the debtor designed to defraud its creditors if the transferee had knowledge of the fraudulent purpose, or if the transfer was made at no cost to the transferee much like the absence of "reasonably equivalent value" rule under United States law. The LCM lists transactions that are presumed to be fraudulent conveyances, including insider transactions with board members, family members, shareholders or affiliates and subsidiaries. Moreover, a fraudulent conveyance is presumed to take place when the debtor pays off a loan that was not yet due, the debtor increases the collateral for a loan or when a loan is repaid in kind, when it was originally payable in cash. Although fraudulent transfers are characterized as criminal, an action to avoid a fraudulent conveyance may be brought by the Conciliator or a creditor. Given that fraud is difficult to prove, fraudulent conveyance actions are rarely successful in Mexico. Indeed, it is not uncommon for shareholders of companies to transfer company assets to themselves or third parties without much risk of liability. This is a reoccurring cause of concern for foreign creditors in Mexican proceedings.

### G. Preference Avoidance.

Under the LCM, certain transfers may be avoided as preferential. In general, avoidance as a preference under Mexican law requires a finding of fraudulent intent. Under the LCM, the issuance of the Order for Relief effectively sets a "look-back" period of 270 calendar days before the entry of the Order for Relief during which suspect transfers may have occurred. However, the Conciliator, the Controller or any creditor can request the court to fix a longer look-back period in appropriate circumstances. The LCM is not clear, however, about who has standing to request the avoidance of a preferential transfer.

### H. Substantive Consolidation.

The LCM provides that the proceedings of two or more debtors shall not be consolidated, except as specifically provided therein. Although the LCM allows proceedings of affiliated companies to be consolidated, the "consolidated" proceedings must be conducted separately. Mexican courts have generally interpreted this to mean that the assets and liabilities of affiliated companies cannot be combined. Accordingly, the concept of substantive consolidation as it is applied by the United States courts is not a remedy or judicial power that is available in Mexico.

### I. Treatment of Financial Contracts.

Certain financial contracts, such as swap agreements, forward contracts, securities contracts, and repurchase agreements, are subject to special treatment under the United States Bankruptcy Code and, in particular, are exempt from the automatic stay, the limitation against set offs, and the prohibition of so-called ipso facto clauses. Accordingly, upon a bankruptcy filing in the United States, the non-debtor counterparty may exercise its right to set off or terminate such financial contracts notwithstanding the automatic stay. Under Mexican law, financial contracts are treated like any other contract and are not entitled to any special treatment.

### J. Director and Officer Liability.

The officers and directors of an insolvent debtor may be subject to certain liabilities after the Order for Relief has been entered. Before a Conciliator has been appointed by IFECOM, the debtor, its directors and executive officers are considered custodians of the debtor's assets. Directors can be held criminally liable if they do not comply with the judge's order to turn over the books to the person appointed by the judge, or if they enter into any transactions that increase the liabilities of the debtor.

Appendix

## SPANISH – ENGLISH TERMS

| | |
|---|---|
| Acreedor | Creditor |
| Acreedores Comunes | Unsecured Creditors |
| Acreedores con Garantía Real | Secured Creditors |
| Comerciante | Debtor |
| Compensación | Setoff/Recoupment |
| Conciliador | Conciliator |
| Concurso | Bankruptcy |
| Contratos Pendientes | Executory Contracts |
| Convenio | Reorganization Plan |
| Convenio Aprobado por el Juez | Plan Confirmed by the judge |
| Crédito | Claim |
| Diario Oficial de la Federación | Federal Official Gazette |
| Espera | Grace period |
| Fideicomiso | Trust |
| Interventor | Controller |
| Juez de Distrito | District judge |
| Ley de Concursos Mercantiles | Mexican Bankruptcy Law |
| Ley de Quiebras y Suspensión de Pagos | Law of Bankruptcy and Suspension of Payments |
| Lista Definitiva | Final List |
| Lista Provisional | Provisional List |
| Masa | Estate |
| Ministerio Público | Attorney General |
| Quiebra | Liquidation phase of the bankruptcy |
| Sentencia de Concurso | Order for Relief |
| Sentencia de Quiebra | Order for Liquidation |
| Sentencia de Reconocimiento, Graduación y Prelación de Créditos | Order of Recognition, Ranking and Preference of Claims |
| Síndico | Trustee |
| Unidades de Inversion | UDI |
| Visita | Eligibility Review |
| Visitador | Auditor |

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