Restructuring & Insolvency

Contributing editors
Catherine Balmond and Katharina Crinson

2019

GETTING THE DEAL THROUGH

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Restructuring & Insolvency 2019

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Restructuring & Insolvency*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Japan and Korea.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Catherine Balmond and Katharina Crinson of Freshfields Bruckhaus Deringer, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
November 2018

Mexico

Darío U Oscós Coria and Darío A Oscós Rueda

Oscós Abogados

General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The Commercial Insolvency Law (LCM), amended as of 11 January 2014, applies to merchants and traders, individual and legal entities, including commercial companies, trusts engaged in business activities, state-owned commercial companies, the estates of deceased merchants, partners of a liability partnership and small merchant debts lower than 400,000 unidades de inversion (UDI: a unit subject to inflation adjustments, whose value is announced daily and published in the Daily Gazette of the Federation and major national newspapers), subject to written agreement.

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

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

Filing for insolvency is not mandatory.

2 Excluded entities and excluded assets

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

Workers-owed labour credits are excluded; such workers are governed by the Federal Labour Law (labour credits are claims by employees and may include unpaid wages and employment indemnity). Tax claims and claims equivalent to tax claims by the tax authorities (federal, state and municipal), the Mexican Institute of Social Security (IMSS) and the National Workers' Housing Fund Institute (INFONAVIT) are excluded from the general bankruptcy proceedings (see question 9). 'Claims equivalent to taxes' includes the IMSS and INFONAVIT tax quotas employers and employees must pay that are considered equivalent to taxes. Federal tax credits are governed by the Federal Tax Code and state and municipal tax credits are governed by state tax laws. Labour creditors and tax creditors do not join the bankruptcy proceedings and are paid and liquidated by their labour chambers and tax authorities, respectively.

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

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

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

3 Public enterprises

What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

The general bankruptcy proceedings govern the insolvency of a government-owned enterprise, when the government-owned enterprise is incorporated as a commercial corporation or, when by virtue of law, the commercial law shall govern the government-owned enterprise, as in the case of the newly productive enterprises Petroleos Mexicanos and Comisión Federal de Electricidad. For remedies to creditors of insolvent public enterprises, please refer to those discussed herein.

Consideration of the bill or act of incorporation and by-laws of a government-owned enterprise shall be taken into account for special regulations thereto and the applicability of a different insolvency regime, including, in some instances, the federal or state general insolvency proceedings.

Special public domain regulations on government-owned assets regime shall be considered as well, as they may not be subject to attachment, seizure or judicial auction sale. Creditors of insolvent public enterprises have as remedies the due process rights to claim, pursue and be paid based upon their priority, in accordance with the provisions governing the insolvency proceeding.

Consideration shall also be given to public budget regulations for the payment of debts owed by a government-owned enterprise.

4 Protection for large financial institutions

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

Under the new financial regime, the banking law provides for an autonomous, independent and special insolvency regime called 'judicial banking liquidation', in addition to the administrative control regulations. Such proceedings will be the federal district court-directed liquidation of a bank, and the trustee will be appointed by the Banking Commission. Accordingly, the amendments to the banking law, in the administrative regulation, give greater powers to the financial regulators and provide additional tools for the control, investigation, overview, preventive and protective measures, requirements, sanctions, etc, over banks and financial institutions, aimed at more efficiently preventing and remedying situations of financial distress.

On the other hand, amendments also provide legal tools for the efficient and prompt enforcement of financial regulators' powers, liquidation of estate assets and creditors' collection rights. It is recognised that under the current LCM, the liquidation of a bank in bankruptcy may take up to a decade. Accordingly, in the new regime dilatory practices are overcome to make liquidation faster and more efficient.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Federal district courts are the only courts with jurisdiction over commercial insolvency proceedings for merchants. Non-merchants are subject to state and local civil jurisdiction. The judiciary will set up specialised federal district courts dealing with insolvency matters.

The rights to appeal are to challenge a court order seeking its amendment or reversal based upon an appellant's opinion that the court order is unlawful. An appellant has an automatic right to appeal. Under the Commercial Insolvency Statute, there is no stay of the court order under appeal. There are just a few court orders that may be appealed, such as the judgment adjudicating debtor in *concurso mercantil* (see question 6), the judgment on the recognition, ranking and priority of claims and the judgment adjudicating the debtor in bankruptcy. There is an extraordinary remedy, namely amparo action, by means of which decisions of the appeal may be further challenged before a constitutional court. In the insolvency proceedings, most court orders may be challenged by a remedy, namely revocation, which is decided by the same court presiding over the insolvency proceeding.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

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

The general insolvency proceedings for merchants are a single, monolithic, compound process, namely *concurso mercantile*, comprising two major stages: conciliation (reorganisation) and bankruptcy (liquidation).

In conciliation, a conciliator is appointed and seeks to establish a reorganisation plan. If no reorganisation plan is agreed, the process, by operation of law, is converted into bankruptcy (liquidation). A trustee is appointed for liquidation.

There is also a sub-stage: the visit, wherein a visitor is appointed to inspect the debtor's premises and accounts to confirm that the standard for insolvency is met and reports accordingly to the district court, which may judge the debtor to be in general insolvency proceedings.

Full insolvency proceedings may be voluntary or involuntary. In a voluntary petition or prepackaged insolvency there is no visit. In an involuntary petition a visit shall be conducted to confirm the insolvency standard is met. The debtor may voluntarily request general insolvency proceedings (merchant's insolvency) in the event of bankruptcy, for which there is no visit. Involuntary petition at the stage of bankruptcy is allowed if the debtor does not oppose it; otherwise, full insolvency proceedings shall be pursued. In involuntary bankruptcy a visit shall be conducted. Bankruptcy allows for a reorganisation plan. Bankruptcy relief becomes available when the debtor (merchant) requests his or her bankruptcy.

Voluntary bankruptcy is adjudicated without full insolvency proceedings (see question 11) and in involuntary bankruptcy when the debtor does not oppose it. For a debtor to be placed in bankruptcy by a creditor (ie, involuntarily) full insolvency proceedings shall be pursued from the stage of conciliation, including the visit, unless the debtor agrees to its bankruptcy. A debtor is declared to be in bankruptcy by the court if a plan is not agreed upon during conciliation proceedings or if the debtor does not cooperate with the plan and the conciliator (see question 11) requests a declaration of bankruptcy.

In order to adjudicate a debtor in general insolvency proceedings, insolvency standards and law requirements shall be met, whether voluntary or involuntary and whether petition is to be opened as of the conciliation or bankruptcy stage. The general insolvency proceedings adjudication determines the respective stage. The effects of the respective stage are provided by this declaration and by law.

For requirements and effects, see question 11. Additional relief in bankruptcy is as follows:

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

7 Voluntary reorganisations

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

LCM overview

The LCM provides one form of insolvency proceedings that has two phases: conciliation (reorganisation) with the debtor in possession; and bankruptcy (liquidation) under the possession and administration of a trustee.

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

If no reorganisation plan is reached during the conciliation, the procedure turns into a bankruptcy (liquidation). Upon declaration of bankruptcy, assets shall be sold at public auction through a bid process. Before conciliation, there is a visit to confirm whether or not the standard for insolvency is met (see question 9).

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

- for the visit, a visitor who reports his or her findings accordingly to the district court (see question 9) whether the insolvency standard is met or not;
- for the conciliation, a conciliator who seeks to establish a reorganisation plan and oversees the debtor-in-possession's administration and follows the allowance claims process. The conciliator receives proof of claims and makes an allowance or disallowance proposal to court in order for it to enter a judgment on the recognition, ranking and preference of claims; and
- in bankruptcy, a trustee who possesses, administers and liquidates the estate's assets and distributes the proceeds. A trustee shall have the same powers as a conciliator in a reorganisation.

Insolvency proceedings may be voluntary or involuntary at the stage of conciliation; however, involuntary bankruptcy (liquidation) is allowed if the debtor does not oppose it. If the debtor opposes involuntary bankruptcy, conciliation proceedings are opened. Accordingly, full insolvency proceedings shall be conducted to place the debtor in involuntary bankruptcy after conciliation is exhausted. Voluntary bankruptcy (liquidation) is initiated directly upon the debtor's request.

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

Criteria for establishing a general default on payment obligations are:

- failure to meet payment obligations to at least two creditors;
- obligations more than 30 days overdue;
- such overdue obligations represent 35 per cent or more of the total amount of the debtor's obligations as of the petition filing date; and
- the debtor must lack cash assets, as defined by the law, to pay at least 80 per cent of the total debts due as of the petition filing date.

Cash assets are:

- cash on hand and deposits on site;
- deposits and investments due within 90 days as of the date of the petition being filed;
- accounts receivable due within 90 days as of the date of the petition being filed; and
- securities that regularly registered sell-or-buy operations in relevant markets, saleable within 30 banking business days.

The debtor may file a petition when it is imminent that the debtor will be under the insolvency standard in the ninety days following the petition filing (imminent insolvency). The LCM provides for the use of standard forms issued by the Mexican Trustee's Office to speed petition filings and other motions during the proceedings. A voluntary petition must be signed and include:

- the merchant's full name or corporate name;
- an address for notices;
- corporate and residential addresses;
- addresses of offices, facilities, establishments, plants and warehouses;
- the address of main management;
- financial statements for the past three years, audited if mandatory by law;
- a list of creditors and debtors, stating their names and domiciles, credits past due, secured and unsecured credits, priority, real or personal collateral, credits guaranteeing direct debt or third-party liabilities;
- an inventory of all assets, immovables, movables, securities, merchandise, stock and rights of any nature whatsoever;
- a description of legal actions to which the debtor is a party, stating the parties, identification of the proceedings, type and status;
- in the case of legal entities, the corporate decisions needed to file for general insolvency proceedings pursuant to the by-laws taken by the board of directors or the respective corporate office with legal standing for such decisions. The document must clearly show the intention of the partners or stockholders on such decision;
- the preliminary reorganisation plan offer to creditors; and
- the preliminary enterprise preservation plan.

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

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

General insolvency proceedings start when relief is entered, that is to say, when general insolvency proceedings are adjudicated, which creates the bankruptcy estate. Insolvency adjudication creates a special legal situation for the debtor, subject to the LCM.

The procedural effects of the general insolvency proceedings adjudication are as follows:

- opening the conciliation phase, unless the debtor has requested the bankruptcy itself or a creditor has requested it without the debtor's opposition;
- debtor is ordered to surrender its financial statements;
- debtor is ordered to cooperate and allow a visitor (auditor) and conciliator to perform their duties;
- payments are stayed, except those necessary for the ordinary course of business;
- executions and attachments are stayed, except for labour credits (salaries of the past two years);
- suspect period is set;
- summary of the order for relief is published;
- order for relief is recorded in public registries;
- notice is given to creditors to file their claim credits (proof of claims);
- proof of claims process begins; and
- a certified copy of the order of relief is issued upon request.

The substantive effects following declaration of general insolvency proceedings are as follows:

- payments are stayed, except those necessary during the ordinary course of business;
- pre-existing contractual obligations shall be performed as agreed by the parties, except for special provisions under the LCM;
- all pre-existing obligations become due and have to be fixed in UDIs to determine their amount; and
- matured debts stop accruing interest. All obligations of the debtor are considered matured and interest stops accruing on obligations. However, interest will continue to accrue on obligations secured by a mortgage or a pledge even after the insolvency declarations to the extent of the collateral:
- general insolvency proceedings adjudication does not bind and lacks effect towards third-party debtors such as guarantors; and
- 2014 amendments make clear that assets that are settled under business trust are not comprised within the estate and may be separated while in the possession of the debtor, including when the debtor is the settlor.

The LCM regulates the specific pre-existing contractual obligations that may be amended when the order for relief is entered. Performance of executory, preliminary or final contracts shall be complied with by the debtor, unless there is opposition by the conciliator, as long as it benefits the estate. The conciliator may accept or reject the contract. The other party to the contract may ask the conciliator to reject the contract. If the contract is not rejected, the debtor shall perform or guarantee the contract. If the contract is rejected, or the conciliator does not answer within 20 working days, the other party to the contract may terminate the contract at any time by giving notice to the conciliator.

8 Successful reorganisations

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

The LCM favours rehabilitation of the enterprise, and liquidation only takes place when rehabilitation is impossible. A reorganisation plan requires a simple majority of more than 50 per cent approval of approved creditors.

The conciliation phase is intended to create the best conditions for a reorganisation plan. The LCM does not regulate terms or conditions for the plan, but only sets forth minimum rules to ensure the legality of the plan. The LCM, however, provides mandatory notices and access to information to enable interested parties to exercise and protect their rights. Accordingly, the conciliator may recommend that appraisals and studies be conducted when they are necessary to achieve a reorganisation plan, as would be given to creditors through the court. When the conciliator considers that there is an agreement of a simple majority of more than 50 per cent of the recognised creditors in the plan, he or she shall give the plan to the other recognised creditors to give their opinion thereon or to execute the plan.

In order to approve a viable reorganisation plan that favours all or most creditors under the circumstances, the LCM provides mechanisms to protect the rights of minority creditors by giving them most favourable terms under the plan. This thereby avoids unnecessary or burdensome objections by minorities that in fact benefit from the plan. Only those creditors with accepted claims may agree on the plan. Labour and tax creditors do not execute the plan. To facilitate approval of the plan, unsecured, subordinated and participating secured creditors shall be taken into account for determining the necessary majority. The reorganisation plan, regarding non-participating creditors holding recognised debt, may only provide extension of time to pay the debt or debt discount or combination of both, provided that terms and conditions are equal to those agreed by at least 30 per cent of creditors holding unsecured allowed claims.

The plan may provide for an increase of capital. Shareholders must be notified to exercise first refusal rights. If shareholders do not exercise their rights, the court may approve the capital increase. Dissenting recognised unsecured creditors holding a simple majority or recognised unsecured creditors holding 50 per cent of the debt may veto the plan proposal. If there are no objections, the plan may be approved by the court. Because the approved plan is binding upon absent and dissenting creditors, the most favourable terms and conditions of the plan shall be allocated to them.

The plan shall be approved by more than 50 per cent of allowed creditors (unsecured, subordinated and secured) executing the plan.

Upon the court's approval of the plan, the insolvency process terminates and parties cease to perform their functions. The plan shall provide payment for:

- labour creditors (highest priority);

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

Private agreements between the debtor and any creditor are null and void once relief is granted and the creditor shall lose such rights. The plan may not release non-debtor parties, such as guarantors. The plan may only bind a debtor and its creditors. However, the liabilities of officers, directors, advisers and lenders may be released in writing by the interested party or parties taking legal action against them. The approved plan binds debtor, all creditors holding subordinated allowed claims, creditors holding secured allowed claims, who executed the plan or creditors holding secured allowed claims for whom the plan provides for full payment as of the general insolvency proceedings adjudication.

For voting of intercompany claims, see question 43.

Mandatory enforcement of the restructuring plan

Any allowed creditor may request the mandatory enforcement of the restructuring plan by means of a summary proceeding before the court that adjudicated the commercial insolvency.

Amendment of the plan

In the case of a change of circumstances that materially affects the fulfilment of the plan, it may be amended in order to satisfy the need to preserve the enterprise.

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

See question 11 for conditions and qualifications. An involuntary petition shall be signed and include:

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

The procedural effects of the general insolvency proceedings adjudication are as follows:

- opening the conciliation phase, unless the debtor has requested the bankruptcy itself or a creditor has requested it without the debtor's opposition;
- debtor is ordered to surrender its financial statements;
- debtor is ordered to cooperate and allow an auditor (visitor) and conciliator to perform their duties;
- payments are stayed, except those necessary for the ordinary course of business;
- executions and attachments are stayed, except for labour credits (salaries of the past two years);
- suspect period is set;
- summary of the order for relief is published;
- order for relief is recorded in public registries;
- notice is given to creditors to file their claim credits (proof of claims);
- proof of claims process begins; and
- a certified copy of the order of relief is issued upon request.

The substantive effects following declaration of general insolvency proceedings are as follows:

- payments are stayed, except those necessary during the ordinary course of business;
- pre-existing contractual obligations shall be performed as agreed by the parties, except for special provisions under the LCM;
- all pre-existing obligations become due and have to be fixed in UDIs to determine their amount; and
- matured debts stop accruing interest. All obligations of the debtor are considered matured and interest stops accruing on obligations.

However, interest will continue to accrue on obligations secured by a mortgage or a pledge even after the insolvency declarations to the extent of the collateral:

- general insolvency proceedings adjudication does not bind and lacks effect towards third-party debtors such as guarantors; and
- 2014 amendments make clear that assets that are settled under business trust are not comprised within the estate and may be separated while in the possession of the debtor, including when the debtor is the settlor.

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

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

Once the proceeding is opened there are no material differences to proceedings opened voluntarily.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

An involuntary reorganisation shall meet the same requirements, shall be signed and include:

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

Once the proceeding is opened there are no material differences to proceedings opened voluntarily.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

A pre-packaged reorganisation is allowed by agreement between the debtor and creditors holding a simple majority of more than 50 per cent of the total debt. The debtor and creditors will execute the petition. It is required that the debtor states under oath that it is already in a state of insolvency and explains why, or states that such insolvency is imminent within 90 working days and that the creditors signing the petition hold at least a simple majority of more than 50 per cent of the total debt. The proposed reorganisation plan must be enclosed with the petition. A full insolvency proceeding will be followed without an audit.

Protection measures and stays may be requested and granted upon filing of the petition. The court must approve the plan, whereupon the proceeding ends.

A reorganisation plan may not provide for release of liabilities owed by third parties who are not part of the debtor group. The LCM prevents third-party debtors remaining liable.

12 Unsuccessful reorganisations

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

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

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

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

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

13 Corporate procedures

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

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

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

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

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

Reopening of commercial insolvency proceedings

In the case of (iv) or (v) above, proceedings may be reopened if it is proven that in the two years following termination there are assets to pay at least the expenses and fees for the administration of the estate. Termination is made upon court judgment. The LCM does not provide for discharge in liquidation.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

The conditions for initiating general insolvency proceedings (*concurso mercantil* for merchants) are that there must be a debtor who is a merchant, individual or legal entity and there has been a failure to make payments generally when due. Criteria for establishing a general default on payment obligations are:

- failure to meet payment obligations to at least two creditors;
- obligations more than 30 days overdue;
- such overdue obligations represent 35 per cent or more of the total amount of the debtor's obligations as of the petition filing date; and
- the debtor must lack cash assets, as defined by the law, to pay at least 80 per cent of the total debts due as of the petition filing date.

Cash assets are:

- cash on hand and deposits on site;
- deposits and investments due within 90 days as of the date of the petition being filed;
- accounts receivable due within 90 days as of the date of the petition being filed; and
- securities that regularly registered sell-or-buy operations in relevant markets, saleable within 30 banking business days.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Filing for insolvency is not mandatory.

Commencement of insolvency proceedings is not mandatory in any circumstances under the LCM. However, while the debtor is insolvent, as the insolvency standard is provided by the LCM, directors, key officers and officers may be liable to pay damages in favour of the debtor based upon their unlawful acts causing damages to the debtor. The LCM provides for a direct legal action that may be enforced by the debtor or stockholders holding 25 per cent of the social capital of the debtor. This action may be brought pre and post-petition. This strong damages action is independent from the voidance action available as a remedy following general insolvency proceedings adjudication. This action is also independent from a criminal liability upon general insolvency proceedings adjudication.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Directors and officers will be held personally jointly and severally liable for acts of wrongdoing. The time-bar on such action is five years. Because most acts of wrongdoing tend to be executed while insolvent or in the suspect period, to avoid personal liability it is advisable to file for insolvency proceedings when insolvency is imminent, and especially when already insolvent.

In pre-petition, if a company carries on business while insolvent, directors and officers committing wrongdoing might be liable to indemnify damages to the debtor and may have criminal responsibility pursuant to criminal laws other than the LCM.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Criminal responsibility shall be borne by the debtor. In the case of a legal entity, such responsibility will be borne by its board of directors, management or liquidators. They may be liable for pre and post-bankruptcy. If new management is appointed and they discover felonies or misbehaviour, the new administration shall report it, otherwise its members will become liable.

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

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

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

No, the duties that directors owe to the corporation continue to be the same. They do not shift to the creditors. If an insolvency or reorganisation proceeding is likely to happen and it is an ongoing concern, the directors should manage the corporation as debtor in possession under the overview of the conciliator.

In case of a liquidation, the corporation in liquidation is administered by a trustee (liquidator).

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

After liquidation proceedings are commenced by, or against, their corporation, directors and officers cease to have powers. A trustee (liquidator) is appointed and is vested with powers to carry out the liquidation of the corporation's assets.

After reorganisation is commenced by, or against, their corporation, directors and officers have limited powers to carry on ordinary business as a going concern during conciliation, under the overview of the conciliator.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

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

Claims being pursued by the debtor and claims against the debtor before the general insolvency proceedings adjudication shall not be joined to the insolvency proceedings, including arbitration. Post-insolvency declaration claims, including post arbitration claims, shall not join the general insolvency proceedings. Post-insolvency claims shall be overviewed by the conciliator. Executions are stayed.

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

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

The debtor is in possession while in conciliation proceedings and may continue in its ordinary course of business as a going concern. Assets may be used for such ends. The conciliator oversees the management of the debtor. In liquidation the insolvency estate is managed by a trustee in possession as liquidator.

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

Creditors may supervise the debtor, in conciliation and liquidation, by means of an interventor, who represents and protects creditors' rights and has the authority to supervise the debtor as well as to obtain information and documents from the debtor and report to the court accordingly. The court has full authority to supervise and rule on debtors' business activities.

23 Post-filing credit

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

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

24 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

Reorganisation

The conciliator may perform asset transfers that are non-essential to the business. The conciliator may perform direct transfers if goods are perishable, will suffer a strong price diminution or will incur a high maintenance cost.

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

Assets not linked for the carrying on of the business as a going concern and sales that benefit the estate may be sold by the conciliator, provided that sales of assets rules under the LCM are followed. With court approval, assets may be sold including secured assets with creditors' agreement. The conciliator will report to the court accordingly.

Liquidation

Value optimisation, best conditions under the circumstances (characteristics of the commercial transactions, prevailing practices and uses, assets location, time and conditions of the transaction as well as diminution of management costs) and shortest period of time shall be sought for the collection. Assets shall be sold by public auction. Such sale shall seek the maximum price whether by sale of the entire business, parts of the business or its assets. Upon the court's approval, assets may be sold in a different process from public auction for a better sale price than would be obtained by public auction.

The trustee may sell assets immediately if they might deteriorate, diminish in value or involve a high cost of maintenance in proportion to their value. To maximise the sale price, the entire business of the debtor may be sold as an ongoing concern. If not, assests may be sold in packages to facilitate the sale. Executory contracts joint to assets subject to a sale may be conveyed to the new purchaser unless the contractor opposes thereto.

The bid shall indicate the minimum price, which is equivalent to stalking horse bids. Credit bidding in sales is permitted for creditors holding the specific right to receive a dividend for a sale.

Securities and stock may be sold without applying the Securities Law regarding securities offers. Assets subject to a separation claim may not be sold until dismissal of the final claim. The sale shall be conducted even if proof of claims is still pending. It should be noted that the LCM prevents the lowering of the value of the assessed assets.

For assets not sold after six months of liquidation have started, any interested purchaser may file before the court an offer to buy any remaining assets quoting the purchase price. If there is no opposition, the court shall conduct the auction sale. The offeror may not increase the offer price.

During the first 30 calendar days of the bankruptcy stage, the trustee may only prevent a separate collateral foreclose on assets linked to the ordinary operation of the enterprise when the trustee considers that it benefits the estate by sealing it in conjunction of assets. Secured creditors may obtain a writ of execution and be paid from the collateral.

In general, the sale shall be free and clear of claims, unless otherwise agreed. Sales should be as an asset as is. However, the LCM provides that the trustee shall have no liability whatsoever in case of a claim from a third-party preferential rights or assets hidden defects. The LCM also provides that the trustee and allowed creditors having received estate payments shall not reimburse part or full price, diminution thereto or any indemnity whatsoever.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The insolvency regime does not provide for stalking horse bids in sales procedures. Sales are made in court auction sales. The court may authorise other proceedings to optimise sales to benefit the estate. A creditor may make payment of the purchase price only with court-approved distributions. A creditor may not make payment of such purchase price by reducing the amount of a claim (allowed claim). The court may not allow an assessing credit bid as creditors may pay with court-approved distributions. The assignee of the original secured creditor, provided assignment is summoned to court, has legal standing to participate in the bid as successor of the original secured creditor.

26 Rejection and disclaimer of contracts

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

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

If a debtor breaches the contract after the insolvency case is opened, the conciliator may enforce legal action seeking mandatory contract fulfilment or termination thereto – in either case with payment of damages.

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

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

A seller of real estate who is declared to be in general insolvency proceedings may deliver real estate upon payment of the price, provided the sale is legally perfected. A buyer that is declared to be in general insolvency proceedings, upon payment of such price or receiving a guarantee thereof, may enforce delivery of goods. If delivery was made under a sale agreement, the seller may repossess the goods if the sale was not formalised by a public instrument, where provided by law.

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

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

If the seller of a movable asset is declared to be in general insolvency proceedings, if the assets had been identified before adjudication, the buyer may enforce fulfilment of the delivery upon payment for the asset.

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

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

Securities repurchase agreements shall be terminated upon general insolvency proceedings declaration:

(i) when the purchaser is declared to be in general insolvency proceedings, he or she shall convey to the seller, within 15 working days as of such ruling, securities of the respective kind, upon price reimbursement and payment of a premium;
(ii) when the seller is declared to be in general insolvency proceedings, contracts shall be abandoned as of adjudication and the purchaser may claim payment of the differences in his or her favour as of the adjudication date, by means of a proof of claim, granting the seller adjudicated in general insolvency proceedings the contract price and the purchaser the ownership and securities disposition that are the subject of the securities repurchase agreement; or
(iii) a securities repurchase agreement executed in a reciprocal way between the debtor and its counterparty shall be terminated in advance on the date of general insolvency proceedings adjudication, and shall be offset.

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

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

Differential agreements or future agreements and derivatives' financial transactions that shall terminate after the general insolvency proceedings adjudication must be terminated in advance of the adjudication. Such contracts and transactions shall be set off under the LCM. In the case of silence, for the set-off and liquidation of debt balances to perform set-off, the value of the goods and underlying obligations shall be that of their market value as on the adjudication date. If a verified market value cannot be determined, the conciliator may ask an experienced third party to assess their value. After the set-off is made, the balance of the debt may be claimed by the creditor by way of a proof of claim (ie, by means of the set-off the debt is accelerated and becomes due and payable). If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days of the general insolvency proceedings adjudication.

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

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

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

The outstanding balance from the set-off against the debtor may be claimed by way of a proof of claim. If there is a balance in favour of the debtor, the counterparty shall deliver such balance to the estate within 30 calendar days as of the general insolvency proceedings adjudication. A lessor adjudicated in general insolvency proceedings shall not terminate a lease agreement on real estate. A lessee adjudicated in general insolvency proceedings shall not terminate a lease agreement on real estate. Notwithstanding the above, the conciliator may elect to terminate the agreement, in which case the lessor shall be paid the contractual indemnity. If there is no other agreement made, payment of three months of rent for the acceleration must be made.

Service supply agreements of a strictly personal nature shall be binding over the parties and shall not be terminated. Lump-sum construction contracts shall be terminated upon general insolvency proceedings of any party, unless the party adjudicated in general insolvency proceedings, with the authorisation of the conciliator, agrees to fulfil the contract with the other party.

Insurance entities adjudicated in general insolvency proceedings may not terminate insurance contracts over real estate. In the case of movables, the insurer may terminate the insurance contract.

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

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

There are specific requirements for the general insolvency proceedings adjudication of:

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

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

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

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

The conciliator in reorganisation (conciliation) and trustee in liquidation may oppose execution and may terminate such licences. A party may ask a conciliator or trustee whether or not it will oppose execution. If there is no response, a licence may be terminated.

28 Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

The Federal Law on Personal Information Protection in Possession of Private Persons, enacted on 5 July 2010, provides for the protection and privacy of personal information or customer data. It, generally, prevents use or transfer of personal information and customer data without the owner's agreement. However, if the owner does not expressly oppose the privacy notice of the person to whom it is given, it is assumed that the owner tacitly agrees that his or her personal data may be used or transferred as it is provided for under the privacy notice. In insolvency proceedings, personal information and customer data may be used or transferred as long as it is within the scope of the privacy notice. There are some exceptions under some circumstances to use or release this information or these data under this Law.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

There is no arbitration in insolvency matters. Insolvency, as a mandatory proceeding according to public policy, is under the exclusive federal jurisdiction of the state and not subject to arbitration. Accordingly, disputes arising in insolvency cases after they have been opened may not be arbitrated, even if both parties agree to arbitrate the dispute.

The LCM provides that late actions shall not be joined to the general insolvency proceedings. The general insolvency proceedings court may not refer parties to arbitration. In theory, pre-petition insolvency cases may be subject to arbitration if all creditors and the debtor agree on the arbitration. The LCM is silent as to arbitration processes in insolvency cases. It is desirable that the LCM provides for arbitration.

Creditor remedies

30 Creditors' enforcement

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

Processes for seizure of assets include:

- tax enforcement by attachment or seizure;
- criminal seizure in case of felony;
- labour executions by attachment; and
- seizure by customs authorities.

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

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Attachment on enforcement of final, res judicata judgment has priority in liquidation. Pre-judgment attachments, attachments and judgments regarding unsecured credit lack any priority in liquidation. The processes are, in general, difficult and time-consuming. Allowed or disallowed claims may be appealed up to the Mexican Supreme Court, which might be costly and takes a long time. Foreign creditors receive the same treatment as domestic creditors. Proofs of claim must be filed to enforce creditors' rights, to become a recognised creditor and to participate in reorganisation and liquidation.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

Adjudication and relief shall be noticed to creditors. Foreign creditors are served in their foreign domicile. Adjudication is noticed by means of publication in the daily gazette of the federation and major newspapers. Domestic and foreign creditors with known addresses are notified personally of the insolvency opening. All creditors are notified by publication of a notice in the daily federal gazette and a major newspaper.

There are no mandatory meetings, although meetings may be held.

There are no mandatory committees. In general, all such information and documents are available to creditors, except restricted information and documents protected by legal secrecy and confidentiality.

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

Trustees shall provide court and interventors' reports every two months. Reports may be objected by interventors and creditors. After hearing the liquidator, the court rules accordingly.

33 Creditor representation

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

Within the insolvency proceeding, creditors may be represented by interventors who oversee the trustee's performance and may obtain from the debtor or trustee a review of information that may affect creditors' rights.

Creditors are free to form their own committees and it is a regular practice to form committees outside the insolvency proceeding. Advisers may be appointed by creditors and costs are funded or borne by them.

34 Enforcement of estate's rights

If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

The LCM is silent regarding creditors' ability to pursue the estate's remedies in case the liquidator has no assets to pursue a claim. In such a case, creditors may request the trustee or interventor to enforce remedies against third parties or fund the estate. If the trustee or interventor fails to enforce estate's remedies, by general procedural law standing, creditors may enforce these remedies. It is an action by means of which creditors may enforce or pursue claims available to the estate upon the estate's lack of assets to enforce or pursue such remedies. The fruits of such actions belong to the estate. Creditors are entitled to be reimbursed for their costs. The creditor may enforce its debtors' rights against this latter debtors' debt.

Such estate's remedies, as estate's assets, may be assigned to a third party upon notice to and court approval.

35 Claims

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

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

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

To participate in the discussion, approval, agreement and veto of the plan, creditors must hold approved claims. A claim acquired at a discount may be enforced for its full face value. Acquisition shall be notified to court, debtor, conciliator and trustee. Interest that accrued after the opening of an insolvency case may not be claimed by a creditor except on secured claims up to the collateral value. Claims for contigent or unliquidated amounts shall be determined by final judgment rendered by a court outside the general insolvency proceedings.

36 Set-off and netting

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

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

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

Securities repurchase agreements shall be terminated upon general insolvency proceedings declaration:

(i) when the purchaser is declared to be in general insolvency proceedings, he or she shall convey to the seller, within 15 working days as of such ruling, securities of the respective kind, upon price reimbursement and payment of a premium;
(ii) when the seller is declared to be in general insolvency proceedings, contracts shall be abandoned as of adjudication and the purchaser may claim payment of the differences in his or her favour as of the adjudication date, by means of a proof of claim, granting the seller adjudicated in general insolvency proceedings the contract price and the purchaser the ownership and securities disposition that are the subject of the securities repurchase agreement; or
(iii) a securities repurchase agreemens executed in a reciprocal way between the debtor and its counterparty shall be terminated in advance on the date of general insolvency proceedings adjudication, and shall be offset.

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

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

Differential agreements or future agreements and derivatives financial transactions that shall terminate after the general insolvency proceedings adjudication must be terminated in advance of the adjudication.

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

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

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

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

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

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

37 Modifying creditors' rights

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

Modifying creditors' rights is not provided for under the LCM. The court may not change the rank (priority) of a creditor's claim.

38 Priority claims

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

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

Government

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

Non-governmental

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

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

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

40 Pension claims

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

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

Actuarial deficiencies in pension assets and unpaid contributions to employee pension plans both give rise to claims that may be asserted before the labour courts. In practice, under insolvency context, the debtor seeks settlement with the labour creditors or union.

41 Environmental problems and liabilities

Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Environmental problems and liabilities are dealt by the official agencies and special laws thereto. The debtor is directly responsible for controlling the environmental problem and for remediating the damage caused. Official environmental agencies make an overview of the problem and then instruct the debtor to control the environmental problem and remediate the damage caused. Federal congress may also participate. The insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, and third parties may be liable for environmental responsibility, including indemnity for damages.

The estate shall face the environmental indemnity liability and make fund reserves thereto.

42 Liabilities that survive insolvency or reorganisation proceedings

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

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

In a reorganisation plan, liabilities may survive unless it is agreed that they are fully discharged. There are no dischargeable debts. There is no discharge in liquidation. If payment is not made in full, liabilities survive and creditors may enforce the outstanding balance of the claim.

43 Distributions

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

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

Security

44 Secured lending and credit (immovables)

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

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

45 Secured lending and credit (movables)

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

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

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

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

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

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

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

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

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

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

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

The LCM prescribes a 270-calendar-day 'suspect period' to be reviewed, counting backwards from the date the order for relief was made. This term may be doubled in the case of related subordinated creditors (intercompany or insiders' debt). A request for a longer review period of up to three years must be led before the judgment on recognition, ranking and priority is entered. The burden to prove is more flexible to obtain extension of the suspicious period without need to prove the actual fraud, which is a separate cause of action. The new retroactive period must be announced by publication in the court's list of orders and in the Official Gazette of the Federation.

Legal standing to enforce action seeking civil liability (damages) when upon fraudulent transactions (voidance actions) may be brought by: one-fifth or more of the allowed creditors; allowed creditors that jointly represent 20 per cent of the total allowed credits; receivers (interventor); the debtor; and shareholders holding 25 per cent of the debtor's shares. The time-bar on damages actions is five years.

In the context of an insolvency proceeding, the LCM now provides a regime of strict civil and criminal liability for the debtor, the debtor's general director, sole administrator, board of directors, legal representatives and key employees, including insiders and relatives when causing damages in regard to the facts and circumstances provided by the LCM. Damages shall be to the benefit of the estate. Civil liability is joint and several and is independent from criminal liability, which may be from three to 12 years' imprisonment.

The result of a transaction being anulled is that parties shall return to each other what was received upon the transaction set aside.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

As a reaction to the well-known *Vitro* case, the 2014 amendments of the LCM now provide for 'intercreditors debt' (subordinated debt) providing for a new ranking of creditors holding subordinated debt, namely subordinated creditors, that may by created by:

- contractual agreement or provided by statute law;
- the unsecured intercompany and insiders' debt; except for claims of a parent company and individuals that only have control over the debtor for claims ranking. This exception does not include, inter alia, casting votes for the reorganisation plan or fraudulent conveyances; and
- late-claim filings.

In order to prevent fraudulent conveyance of intercompany indebtedness and to give certainty to investors and creditors that their debt would be paid first before certain intercompany obligations, the 2014 amendment provides that in case the debtor is a corporation, the following unsecured creditors (statutory insiders) shall be characterised as subordinated in ranking:

(i) subsidiaries and affiliates of the debtor;
(ii) the director, members of the board of directors and key officers of the debtor, as well as those of its subsidiaries and affiliates; and
(iii) corporations with the same managers, members of the board of directors or key officers similar to those of the debtor (commonality of management).

In the event the insolvent company is put into liquidation, all of the aforementioned creditors shall receive payment only after senior debt claims are paid in full. Claims held by controlling individual shareholders and by the holding company of the debtor were excluded from subordination in payment as lawmakers considered that including such claims would impair their ability to obtain financing from lenders.

Voting of 'inter-company' claims

In an inter-company claim, there may be no cramdown of legitimate third-party claims on the basis of an inter-company or insider-debt casting vote. The plan must be agreed by the debtor; creditors representing more than 50 per cent of the sum of all the debtor's unsecured and subordinated claims; and creditors representing more than 50 per cent of the debtor's secured or priority creditors.

Further, if inter-company claim holders and insiders (including controlling individual shareholders and holding companies) as subordinated creditors, hold at least (jointly or severally) 25 per cent of the total amount of the credits of (i) and (ii), above, then to become effective, the plan must be accepted by creditors representing at least 50 per cent of such credits, excluding from this amount the claims of the insiders.

This rule will not apply when inter-company claim holders and insiders accept the plan as agreed by the rest of the voting claim holders, in which case the simple majority rule applies.

Now, the voting of insider or inter-company claims together with third-party claims will only be sufficient to approve a reorganisation if at least half of the non-insiders vote in favour of the plan.

Subordinated debt and 'subordinated creditors'

Creditors' agreements may provide for the total or partial extinction of subordinated debt or other type of treatment thereto, including its subordination or another form of particular treatment.

Interaction before the Mexican courts of indenture trustees and bondholders

Proof of claims may be filed individually by a bondholder, which will be subtracted from the overall proof of claim filed by an indenture trustee representing bondholders. Each bondholder as well as the trustee is entitled to pursue allowed claims, rights, objections and voting rights.

Bondholders' meetings shall be conducted as provided under the indenture agreement, the law governing the indenture or by the LCM; the decisions of bondholders' meetings will have a binding effect.

The extinction of debts

The restructuring plan and the judgment approving it shall be the only document governing the debtor's obligations towards allowed creditors.

Groups of companies

48 Groups of companies

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

The LCM now regulates groups of companies, and there is no piercing of the corporate veil. The LCM provides that the insolvency proceeding of holding and subsidiary companies will be joint in the same commercial insolvency proceeding, but each company's insolvency will be conducted in a separate court docket file. The LCM does not provide for these to be combined or consolidated for administrative purposes, nor may their assets or liabilities be pooled for distribution. However, creditors or debtors of the same group of companies may file for joint commercial insolvency insofar as one or more of the enterprises of the same group of companies meet the insolvency standard. The court may appoint the same visitor, conciliator or trustee, should it benefit the proceedings.

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

Parent or affiliated corporations may be responsible for the liabilities of subsidiaries or affiliates when they are legally linked by virtue of a guarantee or a similar obligation to act with respect to the subsidiaries or affiliates. All of them are considered independent legal entities with independent patrimonies. Their being related companies does not make them liable for the liabilities of the others.

A court may not order a distribution of group company assets pro rata without regard to the assets of the individual corporate entities involved, as the estates do not merge and are not pooled.

Separation action may be enforced to recover assets or rights belonging to the debtor's estate.

The LCM provides for the insolvency of groups of companies, subsidiaries or affiliates being of a Mexican nationality as well as branches with centre of main interest (COMI) or establishment in Mexico, regarding their assets and transactions in Mexico as well as the assets belonging to their estate located abroad, for which the respective international insolvency cooperation shall be sought.

49 Combining parent and subsidiary proceedings

In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

The LCM now regulates groups of companies, and there is no piercing of the corporate veil. The LCM provides that the insolvency proceeding of holding and subsidiary companies will be joint in the same commercial insolvency proceeding, but each company's insolvency will be conducted in a separate court docket file. The LCM does not provide for these to be combined or consolidated for administrative purposes, nor may their assets or liabilities be pooled for distribution. However, creditors or debtors of the same group of companies may file for joint commercial insolvency as far as one or more of the enterprises of the same group of companies meet the insolvency standard. The court may appoint the same visitor, conciliator or trustee, should it benefit the proceedings.

Mexican corporate law does not provide for the insolvency of corporate groups. Corporate groups consolidate for tax purposes. Labour law recognises a substitute employer among a group of companies.

The Law on Financial Groups provides for financial groups of companies, with joint and several liabilities without consolidation. Regarding groups of companies, assets may not be transferred from an administration in Mexico to another country.

International cases

50 Recognition of foreign judgments

Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Foreign judgments or orders are recognised in Mexico that are not related to insolvency, bankruptcy or liquidation matters, provided the general standard for exequatur (homologation) under Mexican law and international treaties, of which Mexico is a party, is met. Mexico lacks any treaty on international insolvency matters whatsoever. Mexico is a party of the following international treaties that expressly exclude from their scope insolvency matters: the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (article 1(5)) and the Hague Convention on Choice of Court Agreements (article 2(2)e). Also, insolvency matters are excluded from the scope of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Mexico's interpretation statement No. 2) and from the Inter-American Convention in the International Sphere for the Extraterritorial Validity of Foreign Judgements (article 6(e)).

As of the enactment of the LCM, foreign insolvency judgments and related insolvency judgments fall within the scope of the UNCITRAL Cross-Border Insolvency Model Law, incorporated by Mexico, as domestic law, since 2002. This model law provides the legal regime that applies and governs the recognition and enforcement of foreign insolvency proceedings, insolvency and related foreign judgments and orders. This new regime of the model law excludes the application and governance of the general exequatur standard for the recognition and enforcement of foreign judgments and orders.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

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

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

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

The LCM incorporates the UNCITRAL Model Law in Chapter 12. The law defines the following terms:

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

Reciprocity is mandatory. International cooperation may be conducted through Mexican courts and Mexican representatives. Foreign courts and foreign representatives may only act through a Mexican court or Mexican representative. Recognition is not automatic. If a debtor has an establishment in Mexico, full insolvency proceedings (general insolvency proceedings) under the LCM shall be conducted. Otherwise, foreign proceedings may be recognised in summary proceedings. In interpreting and applying Chapter 12, consideration shall be given to avoiding any violation of the LCM and current prevailing fundamental principles of law in Mexico. Please note that Chapter 12 allows the rejection of recognition when there is any violation whatsoever of the LCM or any of such fundamental principles of Mexican law. Thus, Chapter 12 mandates, for overwhelming reason, rejection when there is a manifestly violation of public policy. Protection measures (stay of payments or execution) may be granted following the request being filed for recognition. Upon recognition, additional protective measures may be granted. Foreign proceedings shall be recognised as main or non-main proceedings, subject to the debtor's COMI. Chapter 12 shall be interpreted considering its international origin and the need to promote uniformity in its application and good faith observance. Chapter 12 may be applied, unless otherwise provided for under international treaties executed by Mexico, except where there is no international reciprocity.

Mexico has not executed any international treaties regarding liquidations or reorganisations or the like.

Chapter 12 aims to provide effective mechanisms for dealing with cases of cross-border insolvency with the following objectives:

- cooperation between Mexico and foreign courts;
- increase of legal certainty for trade and investment;
- fair and efficient administration of cross-border insolvency cases;
- protection and maximisation of a debtor's assets; and
- facilitation of the rescue of financially troubled businesses, thereby protecting investments and preserving employment.

Chapter 12 applies where:

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

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

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Foreign creditors are granted equal treatment with domestic creditors. The federal judiciary has granted relief sought in support of the Model Law.

Reciprocity is mandatory. International cooperation may be conducted through Mexican courts and Mexican representatives. Foreign courts and foreign representatives may only act through a Mexican court or Mexican representative. Recognition is not automatic. If a debtor has an establishment in Mexico, full insolvency proceedings (general insolvency proceedings) under the LCM shall be conducted. Otherwise, foreign proceedings may be recognised in summary proceedings. In interpreting and applying Chapter 12, consideration shall be given to avoiding any violation of the LCM and current prevailing fundamental principles of law in Mexico. Please note that Chapter 12 allows the rejection of recognition when there is any violation whatsoever of the LCM or any of such fundamental principles of Mexican law. Thus, Chapter 12 mandates, for overwhelming reason, rejection when there is a manifest violation of public policy. Protection measures (stay of payments or execution) may be granted following the request being filed for recognition. Upon recognition, additional protective measures may be granted. Foreign proceedings shall be recognised as main or non-main proceedings, subject to the debtor's COMI. Chapter 12 shall be interpreted considering its international origin and the need to promote uniformity in its application and good faith observance. Chapter 12 may be applied, unless otherwise provided for under international treaties executed by Mexico, except where there is no international reciprocity.

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- creditors, or other interested parties, in a foreign country want to commence or participate in a case under Mexican insolvency law.

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

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Inbound perspective

When a foreign proceeding of a foreign company or group company has been recognised in Mexico, based upon the fact that there are assets in Mexico belonging to the same company or group company, such assets may be transferred to the main administration, provided debtors' rights and creditors' rights in Mexico are fully protected or paid, for instance creditors' legal actions, labour and tax claims. In the *Xacur* case for instance, regarding estate assets located in Mexico, after recognition of the main proceeding, the Mexican court authorised transfer of assets to the foreign bankruptcy court presiding the main proceeding. In turn, Mexican assets were marketing worldwide by the foreign representative and sold before the foreign main bankruptcy court. Distributions were made by the foreign main bankruptcy court.

In the case of a foreign company or group company with COMI abroad, but with establishment in Mexico, the main foreign proceeding may be recognised in Mexico provided a plenary *concurso mercantil* regarding the establishment in Mexico is opened. In this latter case, transfer of assets may be made, provided debtors' rights and creditors rights in Mexico are fully protected or paid.

Outbound perspective

In case the COMI, the establishment or the court jurisdiction of a company or group company is in Mexico, as main proceeding, if the debtors' rights and creditors rights are fully protected or paid, assets may be transferred to a foreign jurisdiction.

54 COMI

What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The COMI of a debtor company is determined by the domicile it has registered in the commerce registry, where it has its main administration or main facilities and offices (headquarters).

In the case of corporate groups, when a petition has already been filed regarding a holding or subsidiary member of the same corporate group, the new petition shall be joint to the district court where the first was filed.

55 Cross-border cooperation

Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

As stated above, the LCM incorporates generally the UNCITRAL Model Law on Cross-Border Insolvency. It provides for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings. It recognises court-to-court direct communication.

Accordingly, direct cooperation is allowed between domestic courts and foreign courts as well as foreign insolvency administrators in crossborder insolvencies and restructurings. There have been instances between US and Mexican courts. Communications have been in writing in cases such as *Xacur*, *IFS* and *Satmex*.

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

Mexican courts have rejected recognition of a main foreign proceeding and to cooperate in cases whereby the debtor is not a merchant and therefore the UNCITRAL Model Law does not apply. In such a case, recognition of non-merchants, individuals or consumers shall be brought before state courts and state laws as insolvency proceedings for merchants.

56 Cross-border insolvency protocols and joint court hearings

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

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

The *Xacur* case and the *IFS* case have established several precedents (case law) in Mexican jurisprudence regarding the UNCITRAL Model Law on Cross-Border Insolvency, which is also applicable worldwide in foreign jurisdictions.

The most significant of these precedents, which may be found in the Semanario Judicial de la Federación, are the following:

- Direct amparo 98/2003, Direct *amparo* 97/2003 and Direct *amparo* 96/2003 of 13 March 2003, regarding a foreign bankruptcy proceeding and the recognition and declaration of international cooperation. A judgment that recognises and grants international cooperation may be revoked.
- *Amparo in revisión* 282/2003, *amparo in revisión* 283/2003 and *amparo in revisión* 289/2003 of 5 September 2003, regarding a foreign bankruptcy proceeding and the recognition and declaration of international cooperation. Indirect amparo may not be allowed against an order that decides a revocation remedy, derived from a decision entered in a judgment enforcement that recognises it, as it is not the last decision in this stage.
- *Amparo in revisión* 1588/2005 of 26 October 2005, regarding a commercial insolvency. Chapter 12 of the LCM is constitutional because it grants equal treatment to foreign and domestic creditors.
- *Amparo in revisión* 361/2004 of 27 October 2006, regarding the LCM. Standards for the recognition of foreign proceedings in Mexico.
- *Amparo in revisión* 361/2004 of 27 October 2006. International treaties only bind the states that are a party to the treaty.

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

MEXICO

Applicable insolvency law, reorganisations: liquidations
Ley de Concursos Mercantiles.
Customary kinds of security devices on immovables
Mortgage and guaranty trust.
Customary kinds of security devices on movables
Pledge, aval (securities personal guaranty), personal guaranty, bonding guaranty, letter of credit, guaranty trust.
Stays of proceedings in reorganisations/liquidations
Upon adjudication.
Duties of the insolvency administrator
In conciliation seek reorganisation plan. In liquidation liquidate assets and pay creditors.
Set-off and post-filing credit
Only for financial transactions, as exception of no set-off rule.
Creditor claims and appeals
To participate creditors shall file timely proof of claims and held allowed claims. Appeals v adjudication declaration, allow and disallow claims judgment, reorganisation plan approval. No stay in appeal.
Priority claims
Labour, tax, management, mortgage, pledge, special privilege, unsecured, subordinated.
Major kinds of voidable transactions
Those falling in the suspicious period 270 calendar days prior to adjudication or longer period regarding related parties.
Operating and financing during reorganisations
Post-financing is allowed with collateral.
International cooperation and communication
Uncitral Model Law on Cross-Border Insolvency is fully incorporated in Mexico.
Liabilities of directors and officers
Civil and criminal. May be a cause of a voidance actions.
Pending legislation
No.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
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Tax on Inbound Investment
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Trade & Customs
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