

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

September 2016 • Vol. XXXV, No. 9 • The Essential Resource for Today's Busy Insolvency Professional

Fixing Our Infrastructure May Require Fixing the Bankruptcy Code

page 12

By Lisa S. Gretchko and Mark A. Bogdanowicz

On the Inside

Is 13 the Lucky Number for Student
Loan Debtors? *page 20*

By Deborah B. Langehennig and Daniel A. Hatoum

Inside the "Brexit Bubble":
What's Next for the U.K.? *page 32*

By Graham Bushby and Ian G. Williams

Winter Leadership Conference
Schedule of Events *page 42*



Latin America Update

By Ji Hun Kim, Jaime R. Guerra González and Ricardo Silverbauer Carvallo¹

A Primer on Mexico's Ley de Concursos Mercantiles



Coordinating Editor
Ji Hun Kim
Willkie Farr & Gallagher
LLP; New York



Jaime R. Guerra González
Guerra González
y Asociados SC
Mexico City



Ricardo Silverbauer Carvallo
Guerra González
y Asociados SC
Mexico City

Ji Hun Kim is an associate in Willkie Farr & Gallagher LLP's New York office. Jaime Guerra González and Ricardo Silverbauer Carvallo are senior partners of Guerra González y Asociados SC in Mexico City.

Globalization of the economy, the integration of business operations, trade and finance, the increased interconnected nature of our world, the growth of multinational enterprises operating in different countries, and the continuation of a depressed global financial climate have contributed to an increase in cross-border insolvencies. As a result, countries have prioritized the need to update and improve their bankruptcy laws to adjust to this reality.

Mexico is no exception. In 2000, the Mexican Federal Congress passed its current insolvency law, *Ley de Concursos Mercantiles* (the “*Concursos*”).² In 2007 and 2014, Mexico also enacted new amendments to eliminate certain bankruptcy law loopholes that had undermined its consideration as a safe jurisdiction for the reorganization of an enterprise in financial distress. This article provides cross-border insolvency practitioners with an overview of the key features of the *Concursos*.

Background

The *Concursos* became effective on May 12, 2000, when it replaced the *Ley de Quiebras y Suspensión de Pagos*, which had been in place in Mexico since 1943.³ The primary reason for the adoption of the *Concursos* was Mexico's adoption of the Model Law. As more Mexican companies entered the international marketplace and Mexico's economy opened to foreign companies through numerous free-trade agreements, the Mexican government understood the need to enact a new set of bankruptcy laws to meet this reality. The *Concursos* focuses on the reorganization of a debtor⁴ and involves the appointment of court officials to assist in that process. Only if reorganization fails does the debtor enter into liquidation.

- 1 The views expressed in this article are merely the views of the authors and do not represent the views of their firms (or any associated clients).
- 2 This law governs cross-border insolvency cases, and its provisions incorporate the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency (“Model Law”), *Concursos* of May 12, 2000, as amended.
- 3 As previously noted, in 2007 and 2014, certain amendments to the *Concursos* were made, including (among other things) the following: (1) an express restriction on the presiding judge from extending any statutory time periods; (2) a more straightforward debtor-in-possession (DIP) financing mechanism (including the priority status of the DIP lenders' claims); (3) allowance of the debtor and holders of at least half of recognized claims in replacing the *conciliator* (defined herein); (4) introducing the concept of a statutory “subordinated creditor”; (5) a debtor's ability to file for insolvency even if not insolvent as long as insolvency is inevitable within 90 days (as evidenced by the debtor's balance sheet or an inability to generally pay its debt); (6) creditors' ability to request the direct liquidation of the debtor; and (7) the concept of director and officer liability.
- 4 Article 1 of the *Concursos* provides that it is a public policy law aimed at regulating business reorganizations. It is in the public's interest to preserve companies and prevent the generalized default of payment obligations that jeopardize the continuation of companies and the parties that have business relationships with them.

Overview of the Concursos Eligibility to File

A *Concursos* proceeding may be commenced by the debtor,⁵ a creditor or the attorney general. A debtor may commence a voluntary reorganization proceeding if (1) a payment default has occurred with respect to the claims of at least two creditors and (2) payments are past due for more than 30 days and represent 35 percent or more of all the debtor's payment obligations as of the date of the filing, or (3) the debtor does not have liquid assets to pay at least 80 percent of its past-due obligations as of the date of the filing.⁶ A creditor or the attorney general can file an involuntary reorganization proceeding, but only if all three of these conditions are satisfied. If a creditor commences an involuntary proceeding and is unable to demonstrate that all three conditions have been met, it must pay all attorneys' fees and expenses incurred by the debtor.

Stages of the Concursos

There are three stages of a *Concursos* proceeding: (1) the bankruptcy trial (*declaración de concurso*); (2) the reorganization (or the “*conciliación*”); and (3) if no reorganization is implemented or feasible, the liquidation.

Bankruptcy Trial. Cases are commenced by the filing of a request for bankruptcy for the purposes of reorganization (as opposed to liquidation). At the same time as of the filing of this request, the presiding judge (which is a federal district judge at the debtor's domicile or principal place of business) will notify the *Instituto Federal de Especialistas de Concursos Mercantiles* (IFECOM)⁷ and request the appointment of an auditor. A petition for bankruptcy begins an auditing process in which the auditor performs an analysis of the debtor's books and records to determine whether the company is eligible for reorganization.⁸

After considering the facts of the case, claims made by parties-in-interest (including creditors

5 Under the *Concursos*, “merchants” are eligible to file for reorganization and are defined as (1) persons with the legal capacity to engage in commerce, (2) corporations incorporated in accordance with commercial laws and (3) foreign corporations and their agencies or branches that engage in commerce in Mexico.

6 See Articles 9 and 10 of the *Concursos*.

7 IFECOM is an arm of the judicial branch of the Mexican federal government. It maintains the rosters of approved specialists who assist the presiding judge with *Concursos* proceedings.

8 Such eligibility requirements include, among other things, whether the debtor has defaulted on its payment obligations and has liquid assets to make necessary payments. See Article 10 of the *Concursos*.

continued on page 68