The Restructuring Review of the Americas 2019

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A Global Restructuring Review Special Report

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Global Restructuring Review is a leading source of news and insight on cross-border restructuring and insolvency law and practice, read by international lawyers, insolvency practitioners and accountants, judges, corporate counsel, investors and academics.

We deliver on-point daily news, surveys and features that give our subscribers the most readable updates and analysis of all the cross-border developments that matter, allowing them to stay on top of their game even more so than they already are.

In the past couple of years, we have published exclusive interviews with bankruptcy judges around the world, unearthed nuggets from court hearings that other news services missed, released several original surveys – including on the experiences of female professionals working in restructuring – and features such as a comparative study looking at current restructuring strategies in the retail sector. Our newly introduced Worked Out series, profiling key jurisdictions around the world, has so far published profiles on Singapore, Ukraine and Delaware, with the Cayman Islands, Hong Kong and China still to come. Our book-length *Art of the Ad Hoc* guide gathers the wisdom and perspectives of some of the leading practitioners in the area of ad hoc committees in restructurings.

Complementing our news and magazine coverage, *The Restructuring Review of the Americas* provides exclusive thought leadership, direct from pre-eminent practitioners. The *Review* gathers the expertise of 19 leading figures from 12 different firms in eight jurisdictions. Contributors are vetted for international standing and knowledge of complex issues before being approached.

In this volume we have expanded our coverage in the United States. In addition to an overview of Chapter 11 of the US Bankruptcy Code, our expert panel also reviews hedge fund and private equity fund participation and some of the investment strategies that funds continue to adopt to maximise their returns. Chapter 15 is discussed in two chapters: first, a full review of Chapter 15 as a tool providing effective mechanisms for dealing with cross-border insolvency cases and looking at whether it remains a welcoming destination for foreign debtors; second, a look at the limits of Chapter 15 with specific consideration to the high burden parties must overcome to invoke section 1506 of the Bankruptcy Code, which allows courts to refuse to take action on public policy grounds.

Furthermore, our panel provides an overview of the bankruptcy law in Argentina and considers criticisms made against Brazil's restructuring legislation and the proposed amendments suggested in May 2018 to revamp corporate restructuring in the country. We also review the broad and flexible restructuring options available in Canada; offshore restructuring in the Bahamas; and the Concurso Law in Mexico, explaining why it has not provided a feasible and efficient restructuring procedure for companies in financial distress. Additionally, our experts in Chile consider the flaws of the local regime, while our panel in Venezuela assesses the current regime, which lacks a statutory concept of insolvency, in the face of widespread economic instability.

The *Review* is annual and will expand with each edition. If you have a suggestion for a topic to cover or would just like to find out how to contribute please contact mahnaz.arta@globalrestructuringreview.com.

GRR would like to thank all our contributors for their time and effort.

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Mexico

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Mexico has a relatively young insolvency regime, with few *concursos* having been brought to court and not much case law. The Concurso Law was enacted on 12 May 2000 and has had two important amendments (in 2007 and 2014). It regulates the only commercial insolvency proceeding available in Mexico, which is known as *concurso mercantil* (concurso). Since 2000, close to 700 insolvency proceedings have been filed[1] (approximately 40 per year) – a very modest figure with Mexico's economy being the 11th largest in the world.[2]

As the numbers reflect, most restructurings in Mexico are non-statutory out-of-court workouts. In the almost two decades of the Concurso Law regime, Mexican businesses have not embraced concurso as a means to resolve financial distress. The following factors contribute to this:

- excess of legal recourses available to challenge concurso court decisions;
- lack of specialisation from courts, which means a lack of clear jurisprudence;
- lack of a true and efficient debtor-in-possession (DIP) financing regime; and
- little transparency in the proceedings.

Any corporation, state commercial entity, individual with business activities[3] and trusts dedicated to business activities may be declared in concurso,[4] provided that the insolvency test of the Concurso Law is met. The concurso must be filed before a federal district court, which will be in charge of the proceeding, with the aid of different insolvency experts (visitor, conciliator and receiver) appointed by the Federal Institute of Specialists for Insolvency Procedures (IFECOM), an institute that serves as a quasi-judicial officer with certain responsibilities in the concurso proceedings. The Concurso Law defines the person declared in concurso as the debtor.

There is a general commercial insolvency proceeding and four different kinds of special concurso proceedings:

- the concurso with a 'pre-pack' or pre-filing restructuring plan;[5]
- the concurso of debtors that provide public services by virtue of a concession;
- the concurso of financial entities; and
- the concurso of auxiliary credit organisations.

These special concursos can also be subject to the regulation of a specific law (eg, the Financial Entities Law).

The concurso proceeding is divided into three stages, although the Concurso Law only clearly identifies two (conciliation and liquidation). There is one previous stage (the concurso declaration stage) and two main stages: the conciliation stage, which has the purpose of restructuring and preserving the company by means of a settlement agreement between the creditors and the debtor; and the liquidation stage, which has the purpose of liquidating the company's assets in order to pay creditors.

Concurso stages

Concurso declaration stage

The concurso declaration stage starts with the concurso petition filed either by the debtor (who is not obliged to file for concurso), a creditor or the Federal Attorney General's Office. The filing party may submit arguments and evidence to prove the insolvency standards provided under the Concurso Law are met. Afterwards, the court opens up a visit stage. In the visit stage, a visitor is appointed to analyse the company's books and records. The visitor then has the task of making a report for the court establishing whether the company meets the insolvency standards (under Mexican law, 'general default of the company's payment obligations') in order for the court to declare the company to be in concurso.

The Concurso Law considers that a company is in general default of its payment obligations if it is in default regarding two or more creditors and meets the following requirements:

- out of the company's overdue obligations, the obligations that have matured for at least 30 days must represent 35 per cent or more of all of the company's obligations; or
- the company shall not have enough liquid assets and receivables[6] to support at least 80 per cent of its total overdue obligations.

When the insolvent company is the petitioning party, meeting only one requirement is sufficient. To file for concurso, the insolvent company must have approval from the relevant corporate body, and must file a preliminary plan and a settlement proposal, among other requirements. When a creditor or the Federal Attorney General's Office are the filing parties, both of the requirements mentioned above have to be met.

The Concurso Law provides different scenarios where insolvency (ie, 'general default of the company's obligations') is assumed. Examples of these situations are lack of assets for attachment or a payment default with respect to two or more creditors. Under these situations, the burden of proof is shifted to the debtor, to demonstrate that the insolvency standards are not met.

The debtor can also file for an imminent insolvency concurso when it presumes that within the next 90 days it will fall into general default of its payment obligations, in accordance with the requirements explained above.

Furthermore, after the *Vitro* case, which involved a big controversy over the way to take into account inter-company debt, the concurso proceedings of corporate groups were incorporated into the law with the 2014 amendment. This concurso can be filed when the insolvency of one company causes the insolvency of other companies in the group. These proceedings are heard by the same court, but they are handled separately and there is no substantive consolidation.

After the visit, the court shall issue a judgment on whether the company meets the insolvency standards. After this judgment the debtor enters either the conciliation stage or the liquidation stage. In the judgment, the court shall issue an automatic stay. Furthermore, the court may issue any injunction it deems appropriate, including the automatic stay, at any moment in the proceedings (including the court order in which the claim is admitted).

Conciliation

In the conciliation stage, a conciliator shall be appointed. The conciliator is appointed by IFECOM, and his or her task is to oversee the debtor's ordinary business operations, determine which credits shall be recognised and to try to reach a settlement agreement between the debtor and its creditors.

In order to reach a concurso settlement agreement, which is the main goal of the conciliation stage, the settlement has to be signed by the debtor and the creditors whose credit represents more than 50 per cent of:

- the total amount of common (unsecured) and subordinated creditors; and
- the total amount of secured creditors and special privileged creditors that sign the settlement agreement.

If the subordinated credits represent at least 25 per cent of the amounts mentioned above, those credits shall be excluded from said amounts.

As discussed further below, apart from tax credits and 'other employee credits', any creditor can participate in the settlement agreement. However, only the common creditors can be crammed down. The cramdown provisions establish that the terms of the debt with non-consenting common creditors shall only be modified regarding the payment date (extension of time to pay) and the amount of the debt (debt discount), provided that:

- 30 per cent of the creditors of the same class sign the settlement agreement; and
- the conditions for non-consenting creditors are equal or more beneficial than the ones for the signing common creditors.

The settlement agreement can be vetoed by 50 per cent of the common creditors that did not sign the settlement agreement.

The conciliation stage may only last for 180 days, with the possibility of two 90-day extensions (360 days in total). The first extension shall be requested by the conciliator or 50 per cent of the recognised creditors. The second extension shall be requested by the debtor and at least 75 per cent of the recognised creditors. After this period has elapsed, if no settlement agreement is reached, the court will open the liquidation stage.

Liquidation

In the liquidation stage, a receiver is appointed. Upon the appointment of the receiver, the debtor's administration is handed over to the receiver. The mandate of the receiver is to liquidate all of the debtor's assets and to pay its creditors. However, the Concurso Law provides that the debtor and its creditors can still reach a settlement agreement in the liquidation stage.

The sale of the debtor's assets can be done either by the sale of the business as an ongoing concern or by selling individual or different groups of assets.

In order to preserve the value of the debtor's assets, and sell the business as an ongoing concern, the receiver can continue running the company for as long as he or she deems appropriate.

The sale of assets or the transfer of the business as an ongoing concern must be done by either a public bidding or a court-approved alternative proceeding. Unfortunately, these liquidation proceedings are not very effective and sometimes the assets cannot be sold owing to procedural obstacles allowed under Mexican law by means of constitutional challenges (*amparo* proceedings)[7] of court orders to liquidate assets. The receiver can only avoid these proceedings in order to sell individual assets when he or she considers and later justifies to the court the urgency of selling said assets and the benefit for the estate – this naturally implies a high level of subjectivity and courts in Mexico, not being specialised concurso courts, do not always understand business reasons justifying such a sale.

If not all of the assets have been sold six months from the date the liquidation was commenced, any person may file an offer to buy any asset, whose sale will later be submitted to a public bidding.

Creditors in the concurso proceedings

One of the main tasks of the conciliator in the concurso is the recognition of credits, which is done based on the books and records of the debtor and the credit recognition requests filed by the debtor's creditors. After the concurso declaration stage, any creditor shall put the conciliator on notice of its claim by filing the corresponding evidence justifying its debt holding. Afterwards, the conciliator is obliged to file a provisional list of credits with the court (which can be objected by the creditors regarding their ranking or the amount recognised), and later a final list of credits. When the final list of credits has been filed, the court has to issue the recognition, priority and ranking judgment. The debtor, any creditor, the intervenors (creditor-appointed supervisors charged with overseeing the conciliator or the receiver's conduct and the debtor's management during the proceedings), the conciliator, the receiver and the Attorney General's Office may appeal this judgment and eventually file an *amparo* constitutional review proceeding.[8]

The Concurso Law provides three opportunities during the procedure for the creditors to request the recognition of any claim:

- 20 days after the decision on whether the debtor meets the insolvency standards is published;
- in the period available to object to the provisional credits list; and
- in the period the creditors can appeal the credit recognition judgment.

Afterwards, no creditor will be allowed to request the recognition or object to the ranking or amount of any claim.

Regarding bondholders or any other type of collective creditors, the Concurso Law establishes that a common representative can file for credit recognition and represent the interests of the collective creditors in the concurso proceedings. However, each of the individual creditors shall be able to file for the recognition of its credit and act independently. For the concurso settlement agreement, the Concurso Law provides that the collective creditors shall agree a voting mechanism or convene a meeting where at least 75 per cent of the credits are represented, in order to determine the way that the collective credit will vote as a whole.

The Concurso Law does not expressly state who is entitled to act as a representative of a group of creditors in case the common representative was not appointed. The only provisions regulating representatives of collective creditors can be found in different statutes, the General Law of Negotiable Instruments and Credit Transactions, regarding bonds issued by companies, and in the Securities Market Law for instruments and trusts governed by the Securities Market Law.

In order to reach a settlement agreement and to determine the moment when a creditor shall be paid, the Concurso Law foresees different kinds of creditors, each with a different ranking. The ranking established by the Concurso Law is the following:

- employee credits for last year's salary and severance;[9]
- secured credits;
- special privileged credits (credits that are granted a special privilege by another Mexican law – for example, social security credits and credits of a carrier);
- credits for the benefit and conservation of the debtor's estate;
- other employee credits and tax credits;
- common (unsecured) credits; and
- subordinated credits (debtor's related parties' credits).

Each of the credits shall be paid pari passu according with the ranking stated above, either by a settlement agreement or in liquidation.

As mentioned in the 'Conciliation' section, only common (unsecured) creditors may be crammed down in the settlement agreement and the settlement has to be signed by the debtor and the creditors whose credit represents more than 50 per cent of:

- the total amount of common and subordinated creditors (if they represent less than 25 per cent of the signing parties); and
- the total amount of secured creditors and special privilege creditors that sign the settlement agreement.

DIP management during the proceedings

In the conciliation stage, the Concurso Law provides that the administration will, in principle, remain within the debtor (as a DIP), with the conciliator overseeing operations. If the debtor is removed from the company's management, the conciliator will be responsible for its management. In the liquidation stage, the company's management always passes to the receiver.

Regarding the operation of the company, in the concurso declaration stage and conciliation stage, the company keeps operating in the ordinary course of business. Apart from the ordinary course of business, the debtor cannot enter new agreements or obtain additional loans without the consent of the conciliator and the court.

However, in the liquidation stage the company will only remain in operation if the receiver considers it convenient to sell the estate or the business itself as an ongoing concern.

To oversee the correct performance of the conciliator or receiver's duties as well as the management of the debtor during the concurso proceedings, the creditors that represent at least 10 per cent of the recognised credits can appoint an intervenor.

Lastly, the company's management and other parties can be liable for damages caused to the debtor's estate. Moreover, management may also be criminally liable if it fraudulently aggravated the insolvency situation of the company or if it was responsible for certain other conduct sanctioned under the Concurso Law.

Contracts

At the outset of the conciliation stage, the conciliator shall decide which agreements will continue to be executed and which agreements shall be terminated.

The contractual counterparties have the right to request the conciliator to declare whether he or she will oppose the execution of a certain contract. If the conciliator responds that he or she will not oppose to the execution of such contract, the contract shall be executed or guaranteed by the debtor. Conversely, if the conciliator opposes or does not respond in 20 days, the contract may be terminated at any time.

If the debtor fails to perform any contract, the counterparty may request its termination through an ancillary proceeding.

In the liquidation stage, when the business is transferred by the sale of the business as an ongoing concern, the receiver has to notify the counterparties of the existing agreements so they can express whether they intend to continue with the corresponding contracts. If they do not respond within 10 days, the contracts will continue in execution.

Finally, the Concurso Law expressly provides that any clause that may aggravate the debtor's contractual terms and conditions as a consequence of filing for an insolvency petition against the debtor, shall be void.

Goods in possession but not owned by the debtor

Third parties that are owners of certain goods that are in the debtor's possession but not owned by the debtor shall ask the court for their 'separation'. The following requirements must be met: the goods must be in the debtor's possession; the goods must be identifiable; the property of the goods cannot have been transferred by a definite and irrevocable legal title; and the third party requesting the separation must be the legitimate titleholder.

Cross-border insolvency

The Concurso Law sets the terms, requirements and conditions of the recognition of foreign bankruptcy proceedings by Mexican courts. These rules are based on the UNCITRAL Model Law on Cross-Border Insolvency.

As is provided under the UNCITRAL Model Law, the Concurso Law only recognises two different foreign bankruptcy proceedings:

- foreign main proceeding: a proceeding taking place in the state where the debtor has its centre of main interests (COMI); and
- foreign non-main proceeding: a proceeding taking place in a state where the debtor has an establishment (but not its COMI).

Further developments of the Concurso Law – critics

One of the main issues with the Concurso Law has been the lack of uniform court interpretations and specialisation in concurso proceedings. The federal district courts are not specialised in concurso proceedings, or commercial proceedings in general (even though the creation of specialised commercial courts has already been ordered).[10] Federal district courts that hear concurso proceedings also have jurisdiction of other subject matters such as *amparo*, civil and commercial proceedings, and in some cases, depending on the territoriality, even criminal administrative and employment proceedings. It is a significant challenge for these generalist courts to have a clear grasp of the complexities involved in insolvency proceedings. Moreover, there are, on average, only 40 concurso proceedings a year. Hence, the chances of courts developing a solid concurso practice is remote for the simple reason that there are not many concurso proceedings. Owing to these factors, many judges are not familiar with the concurso regulation, which has caused a lot of diverging court interpretations and an unclear application of the law.

In addition to the lack of uniform court interpretations, other deterrents for the effective application of the Concurso Law have been the abundant available recourses for creditors and third parties to challenge concurso court decisions, as well as the excessive formalities of Mexican law, which can sometimes hinder the effectiveness of the proceeding and its goal to restructure the distressed company.

Another relevant issue, where Mexican legislation is noticeably behind compared to other jurisdictions, relates to DIP financing. Even though DIP financing is regulated in the Concurso Law, in practice there has been little to no DIP financing in concurso proceedings to help rescue distressed companies. Understandably, lacking alternatives to obtain additional financing, companies in concurso find it challenging to restructure their finances. This is mainly because the Concurso Law does not grant super-priority to DIP lenders over secured creditors and other protected classes, such as employees. On top of this, perhaps the greatest obstacle to a DIP financing market is the Mexican banking laws, which provide different barriers and disincentives when lending to distressed or insolvent companies; namely, demanding almost 1:1 reserves for any dollar granted in DIP loans, thus making it very expensive and unattractive for financial institutions to grant these types of loans when taking into account that they will not receive super-priority and the risk of not getting repaid will be high.

Conclusion

For a regime that has lasted almost two decades, the Concurso Law has not presented a feasible and efficient alternative for companies in financial distress to restructure their debt. Moreover, the myriad resources (mainly by means of *amparo* constitutional reviews) available to

creditors and third parties to challenge concurso court decisions make it extremely difficult for concurso courts to move forward with expeditious rulings to restructure businesses. In line with this is the need for specialised commercial courts. Federal district courts hear *amparo* cases that concern human rights protection – these courts, as constitutional courts, regard themselves as gatekeepers of citizens' human rights; they seldom have a deep understanding of the financial issues that are the main drivers behind business operations.

Lastly, IFECOM should allow global corporations to be appointed as conciliators to guide a company through its concurso proceedings. Believing that sole individuals can address large concursos whose effects may even spread beyond Mexican borders is naïve and irresponsible. However, IFECOM does not recommend appointing a conciliator who is not a member of IFECOM – this departs seriously from business reality.

Notes

1 IFECOM, https://www.ifecom.cjf.gob.mx/applications/aspx/reporte.aspx?op=1&fiSemIni=1&fiSemFin=37&fiSemestreC=1&fiAnioC=2000.

2 IMF, GDP, current prices, https://www.imf.org/external/datamapper/PPPGDP@WEO/OEMDC/ADVEC/WEOWORLD.

3 Individuals that do not carry out business activities are not subject to the Concurso Law. Civil insolvency proceedings are regulated by each of the state's Civil Codes. However, civil insolvencies (as opposed to commercial ones) are regulated deficiently and in practice are seldom used.

4 The only exception to said rule is when the debtor's total obligations are less than 2.3 million pesos. However, the debtor can expressly subject itself to the Concurso Law provisions.

5 The concurso with a pre-filing restructuring plan has to be filed with a restructuring plan pre-approved by the debtor and the creditors that represent more than 50 per cent of all of the debts. The main purpose of said concurso is to avoid the concurso declaration stage and the appointment of a visitor. After the concurso judgment, the proceeding continues as an ordinary concurso, where the restructuring plan will have to be judicially approved with the percentages foreseen for an ordinary concurso proceeding.

6 Liquid assets are defined by the Concurso Law as cash or deposits, deposits and investments payable within 90 days after filing for concurso, accounts receivable payable within 90 days after filing for concurso and securities of which sale and purchase are regularly carried out in the relevant markets and can be realised within a maximum of 30 days.

7 See footnote 8.

8 The *amparo* proceedings are a type of constitutional review available for the protection of constitutional rights. There are two types of *amparo* proceedings: direct *amparo*, which is a one-instance proceeding against final and definitive resolutions; and indirect *amparo*, which is a two-instance proceeding against any other 'act of authority' (a Mexican term of art), if certain requirements are met. Mexican jurisprudence has determined that the recognition, priority and ranking judgment must be considered the final and definitive resolution for the purpose of the *amparo* proceeding (see Jurisprudence 1a./J. 78/2001 of the First Chamber of the Supreme Court of Justice, with the identification number 188077, and the isolated ruling II.2o.C.488 C of the Second Collegiate Civil Court of the Second Circuit, with the identification number 179363). Any other judgment and certain acts in the concurso proceeding can be reviewed by indirect *amparo*, after the ordinary remedies have been exhausted.

9 According to the Mexican Constitution and the Concurso Law, the employees shall take no part in the concurso proceeding and the injunctions issued in the concurso proceeding shall not be applicable to them regarding their credits for their last year salary and severance (see, isolated ruling: 1a. VIII/2012 (9a.) of the First Chamber of the Supreme Court of Justice, with the identification number 160245).

10 Article 53-bis of the Organisational Law of the Federal Judicial Branch.

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Diego Sierra is a partner of Von Wobeser y Sierra, SC. He heads the bankruptcy and restructuring and anticorruption practices in tandem with his active commercial litigation. He has been involved in the most important and complex insolvency proceedings in Mexico during the past few years, which have had international relevance, and has advised and provided legal strategies to several companies in matters related to restructuring and bankruptcy proceedings.

Some of his work includes representing several creditors of Grupo Senda and five of the most important creditors of Oceanografía in their respective bankruptcy proceedings. Additionally, Diego Sierra is currently involved in several national and transnational bankruptcy and restructuring proceedings.

Diego Sierra is a graduate from the Escuela Libre de Derecho where he graduated with honours and was president of the student council in 2006–2007. He holds a master of laws degree (LLM) and a certificate in business administration with honours from Northwestern University School of Law and Kellogg School of Management in Chicago (2011). He was an international visiting attorney at Skadden, Arps, Slate, Meagher & Flom LLP, in New York (2011–2012). Diego Sierra is admitted to practise in New York. He has been recognised as one of the top Mexican bankruptcy and restructuring practitioners by *Chambers and Partners*, *Who's Who Legal* and *The Legal 500*, and is co-chair of the insolvency committee (2017–2019) of the Mexican Bar Association.

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Founded in 1986, Von Wobeser y Sierra, SC (VWyS) has a team of foreign and Mexican lawyers with international backgrounds who have handled the most complex and ground-breaking matters that are transforming the business landscape in Mexico and Latin America. VWyS is one of the foremost law firms for leading multinational and domestic clients that offers integrated legal solutions and unparalled expertise advising in the establishment, operation and expansion of commercial interests in Mexico and Latin America.

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