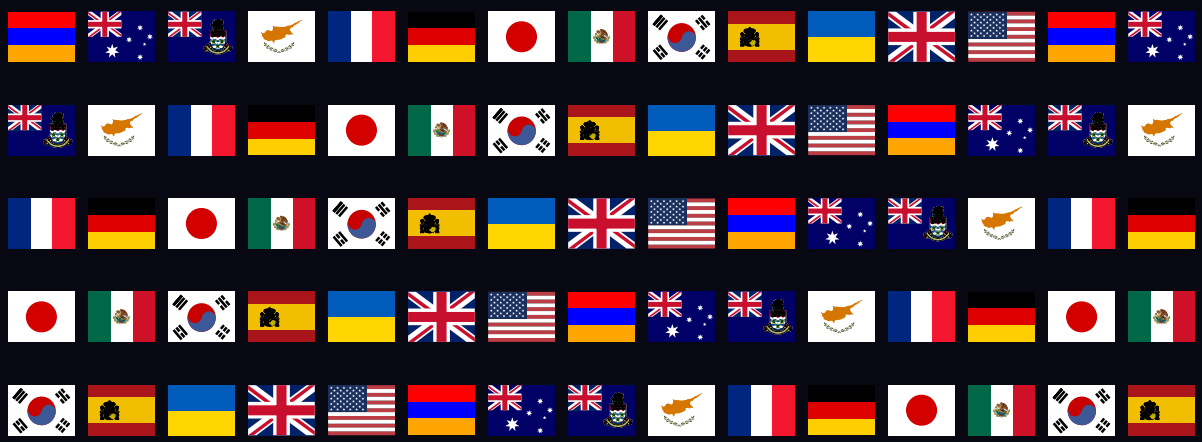
INSOLVENCY LITIGATION

Mexico



LEXOLOGY
Getting The Deal Through

Consulting editor
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Insolvency Litigation

Consulting editors

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Latham & Watkins LLP

Quick reference guide enabling side-by-side comparison of local insights, including into pre-litigation considerations; avoidance actions; claims against directors, officers and shareholders; creditor actions and strategic considerations; pre-insolvency debtor claims; other claims against creditors and debtors; cross-border considerations; remedies and enforcement; settlement and mediation; and recent trends.

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COMMENCING PROCEEDINGS

Litigation climate

How would you describe the general climate surrounding insolvency litigation in your jurisdiction? What are the most common sources of dispute? To what extent is litigation used as a pressure or delay tactic?

The covid-19 pandemic, the economic slowdown in Mexico and certain legislative reforms implemented by the government of President López Obrador, mainly in the field of energy and hydrocarbons, have resulted in many Mexico-based companies, national and international, filing insolvency proceedings in Mexico — and in some cases before courts in the United States (eg, Aeromexico, FAMSA) — to restructure their liabilities and to liquidate their assets for payment to their creditors. According to public information, from June 2020 to May 2021, 97 insolvency proceedings were filed in Mexico, mainly in Mexico City and in the states of Mexico, Quintana Roo and Monterrey.

Normally, an insolvency procedure is used to restructure a company's cap liabilities; however, there have been cases in which it has been used to obtain precautionary measures to prevent seizures of property or enforcement of a judgment (ie, as a delay strategy). Likewise, there have been numerous cases in which the federal courts (which deal exclusively with insolvency procedures) have dismissed insolvency requests or lawsuits due to alleged omissions, primarily to avoid processing the proceedings due to their technical complexity.

Law stated - 17 August 2021

Sources of law

What key sources of law form the basis of claims arising from insolvency? How does the insolvency regime interact with other laws?

The main statute in Mexico for insolvency proceedings is the Insolvency Law (LCM), which expressly enlists the supplementary application of: the Commercial Code ; other commercial statutes, such as the General Business Company Law and the General Negotiable Instruments and Credits Operations Law ; the Federal Code of Civil Procedure ; and the Federal Civil Code . Additionally, the LCM makes reference to some other laws, such as the Mexican Constitution , the Federal Labour Law , the Federal Tax Code and their regulations.

The insolvency regime interacts with other laws in different situations, such as in the ranking of privileged credit, the execution of pending contracts and the liquidation of interests, depending on the nature of the credit.

Law stated - 17 August 2021

Procedure

What procedural rules govern insolvency litigation in your jurisdiction? What common procedural hurdles arise in practice?

The procedural rules that govern insolvency proceedings in Mexico are established in the LCM. If the LCM does not regulate a certain legal stage or concept of the procedure, the Commercial Code or the Federal Code of Civil Procedure will apply.

Some of the hurdles that arise in insolvency proceedings in Mexico are:

- the admission of the insolvency request as some courts are dismissing insolvency claims, under the pretext of

missing formalistic requirements;

- the omission of debtors to pay certain expenses for the continuity of the insolvency proceeding, such as publication of edicts of the declaration of insolvency and its registration in the commercial folio of the debtor in the Commercial Public Registry;
- the excessive time to resolve the appeals against the ranking and priority of creditors Judgment and the restructuring plan approval ruling; and
- the lack of interested parties to acquire the assets of the debtor in the liquidation stage, which extends this stage indefinitely without verifying any payment to the creditors.

Law stated - 17 August 2021

Courts

Which courts hear insolvency claims? How experienced are they with insolvency litigation?

As a rule, the competent courts to hear insolvency proceedings are the federal courts located at debtor's domicile, specifically the domicile of its incorporation; in the absence of such domicile, it is the location of the company's administration (the main seat of business). In the case of corporate groups, regardless of whether they are subsidiaries or holding companies, the competent judge will be the one at the domicile of the holding company or subsidiary that first entered insolvency.

As there are no specialised courts for bankruptcy matters, the federal district courts hear insolvency claims (among other kinds of proceedings). The judges who have the most experience in bankruptcy matters are those from the main cities (Mexico City, Guadalajara and Monterrey).

Law stated - 17 August 2021

Jurisdiction

Through what law do the relevant courts have jurisdiction to hear insolvency claims? Does jurisdiction differ for domestic and cross-border matters?

According to article 17 of the LCM, the competent courts to hear insolvency proceedings are the federal courts located at debtor's domicile, specifically the domicile of its incorporation; in the absence of such domicile, it is the location of the company's administration (the main seat of business), according to article 33 of the Federal Civil Code. In cross-border insolvency cases, specifically in the event of a recognition of a foreign insolvency proceeding, when the debtor has an establishment in Mexico, the competent court will be the court where the establishment is located. If there is no establishment in Mexico, but the debtor owns assets that are located in Mexico, the competent court will be the court where the assets are located.

Law stated - 17 August 2021

Limitation periods

What limitation periods apply to bringing insolvency-related claims? Are there any notable exceptions?

There is no limitation period to bring an insolvency claim. However, once the conciliation stage of the insolvency proceeding is open, the creditors will only have three opportunities to request for recognition of their credit:

- during the 20 calendar days following the publication of the debtor's declaration of insolvency in the Federal Official Gazette;
- during the five-day term for objections to the provisional list of creditors; or
- through an appeal against the ranking and priority of creditors judgment, on the understanding that once the term to challenge the judgment has elapsed, no credit recognition may be requested.

Law stated - 17 August 2021

Interim remedies

What interim remedies are generally available and commonly deployed in insolvency proceedings? How are these used as part of claimants' overall litigation strategy?

The LCM provides, among others, the following precautionary remedies:

- suspension of any payment of debts;
- prohibition to sell or encumber the debtor's principal assets;
- suspension of any seizure of enforcement of a judgment over assets or cash;
- prohibition to transfer resources or stocks to third parties;
- a restraining order on the debtor's administrator from leaving the place where the company is located without appointing a representative with sufficient funds to attend the insolvency proceeding; and
- any other relief of similar nature.

These interim remedies are granted to the debtor at the time of admitting the insolvency request or lawsuit. Such measures are also part of the debtor's declaration of insolvency.

Law stated - 17 August 2021

Evidence

What rules and procedures govern the collection and admissibility of evidence in insolvency litigation? To what extent is expert witness testimony allowed? What common evidential issues should claimants be aware of?

The insolvency proceeding is governed by the rules and procedures contained in the LCM. If this law does not regulate any concept or part of the insolvency proceeding, including requirements and formalities of evidence, the provisions of the Commercial Code and Federal Code of Civil Procedure will be applied.

During the inspection stage of the insolvency proceeding, the debtor or the claimant may exhibit and offer all evidence that they consider appropriate to demonstrate or disaffirm the debtor's insolvency, as applicable.

The debtor may voluntarily request a declaration of insolvency or any creditor may bring a lawsuit for the same. The debtor must attach to its request, as evidence: financial statements; a list of facts that brought the debtor to insolvency; a list of creditors and debtors; a list of assets; and a list of procedures to which the debtor is a party, among other formal requirements. The creditor or creditors must provide all available evidence that demonstrates their status as creditors and the condition of the debtor as insolvent. When answering the lawsuit, the debtor may file all kinds of evidence, including expert opinions in writing, to demonstrate that it is not insolvent. The debtor or demanding creditors must be aware that if their request or lawsuit is denied, they will have to pay legal fees to their counterparty.

Law stated - 17 August 2021

Time frame

What is the typical time frame for insolvency claims?

Inspection stage

The pre-stage of an insolvency proceeding – the visita – may take between two and six months, depending on how fast the court (1) admits the request or the lawsuit, (2) accepts the appointment from the Federal Institute of Bankruptcy Experts (IFECOM) of an accountant specialist (visitador) and (3) sets the date for the inspection at the debtor's office for the review of the accounting records, financial statements and any document or electronic records demonstrating the debtor's financial situation, including the possibility to interview the management and administrative staff of the debtor. The visitador shall render his or her report regarding the financial situation of the debtor within 15 days of the date the inspection started. If there is a justified reason, the visitador may request that the term be extended by another 15 days.

Conciliation stage

Once the court issues the declaration of insolvency, the proceeding will advance to the conciliation stage, where a bankruptcy referee (conciliador) appointed by the IFECOM will aim to restructure the debtor's liabilities and start the recognition of credit procedure.

Bankruptcy or liquidation stage

If the debtor and creditors do not reach a restructuring agreement within a maximum period of one year, the insolvency proceeding will advance to the bankruptcy stage, which provides for liquidation of the debtor's assets by the bankruptcy trustee (síndico) also appointed by the IFECOM. This stage will last until the debtor's assets are totally liquidated.

Law stated - 17 August 2021

Appeals

What are the requirements to appeal insolvency-related judgments? What is the typical time frame for appeals?

The only resolutions that may be challenged through an appeal within the insolvency proceeding are: the declaration of insolvency; the ranking and priority of creditors judgment; the restructuring plan approval ruling; or the bankruptcy declaration. When the LCM does not expressly allow for an appeal, it is possible to file a motion for revocation.

Depending on the resolution, the debtor, creditors (recognised or not), the federal prosecutor and the specialists appointed in the insolvency proceeding may challenge the resolution through an appeal. The appeal must be filed within nine days following the date of issuance of the resolution, expressing the grievances and, if applicable, providing the corresponding evidence. The counterparty may respond to the appeal within nine days following the date of the admittance of the appeal, answering the grievances and offering the corresponding evidence. Once the court of appeal receives the case records, it will open a production of evidence stage for 15 days. If there is no evidence to produce, the court of appeal will grant the parties a 10-day period to express closing arguments. After this period expires, the court of appeal will render its ruling within the following five business days. The ruling for an appeal may be challenged

through a constitutional proceeding (amparo).

Although the terms to resolve appeals are relatively quick, in practice the resolution of appeals can take anywhere between six months and one year, depending on the complexity and volume of appeals, and the workload of the court of appeal.

Law stated - 17 August 2021

Costs and litigation funding

How are costs handled and how are claims funded? Can claimants obtain third-party funding to finance the prosecution of claims?

As a rule, each party funds its own claims. As an exception, in the case of dismissal of a request or lawsuit for declaration of insolvency, the court will require the payment of legal fees, including the fees of the visitador . Creditors are allowed to obtain third-party funding to finance the prosecution of claims, but it is not common practice in Mexico.

The debtor may also obtain credit to keep the company as a going concern and maintain the necessary liquidity during the insolvency proceeding, the terms and conditions of which will be approved by the conciliador and the judge. The person who grants the credit will have a preferential priority over the other creditors; however, this practice has not been successful in Mexico as banking regulations prevent institutions from assuming this kind of risk.

Law stated - 17 August 2021

AVOIDANCE ACTIONS

Fraudulent transfers and undervalue transactions

What are the essential elements of avoidance actions seeking to claw back fraudulent conveyances and transfers? Can actions be brought for transfers without fraudulent intent based on undervalue of the transfer?

Creditors are entitled to challenge fraudulent transactions that occurred before the debtor's insolvency declaration. The Insolvency Law (LCM) provides for a 270-day reach-back period as of the date of the declaration of insolvency (the clawback period). In case of transactions between companies of the same corporate group, the time frame is extended to 540 days prior to the declaration of insolvency. Upon request from the bankruptcy referee (conciliador), the bankruptcy trustee (síndico) or any creditor, the court may extend the clawback period to a maximum of three years, as long as the request is submitted prior to the issuance of the ranking and priority of creditors judgment.

There is an irrebuttable presumption that the following transactions are fraudulent when performed during the clawback period:

- free transactions;
- acts in which the debtor receives in return something of significantly lower value compared to what the counterparty received;
- acts with terms and conditions that do not adequately reflect market circumstances;
- debt forgiveness by the debtor;
- payment of non-matured debts; and
- the discount of the debtor's business assets and negotiable instruments.

Also, there are rebuttable presumptions of fraudulent transactions on the following debtor's acts, when committed

during the clawback period:

- executing or increasing a guarantee when the original act does not call for one;
- paying debts in a different way than provided for in the contracts; and
- executing transactions with its own managers, directors, relevant employees, relatives or companies belonging to the same corporate group.

Law stated - 17 August 2021

Preference and improvement of position

What are the essential elements of avoidance actions seeking to claw back transactions and payments based on preference and improvement of position shortly before insolvency proceedings?

For the nullity of fraudulent acts, it is necessary to demonstrate that:

- the debtor performed an act that is not simply material but legal, as it is subject to being annulled;
- the execution of the act of alienation results in or worsens the debtor's insolvency (so as long as the debtor does not fall in insolvency and the creditors' guarantee is sufficient, the creditors will lack the interest to challenge the legal acts carried out by the debtor, even if they imply a decrease in assets); and
- the execution of the act damages creditors, because if there is no damage the creditor would not have any interest in filing an ancillary proceeding for nullity of the fraudulent act.

In this context, according to the LCM, fraudulent acts are those that the debtor has committed before the declaration of insolvency with fraudulent intention. In addition, if a third party intervened in the act, it is considered fraudulent if the third party had knowledge of the fraud. This last requirement will not be necessary in acts of a free nature.

Law stated - 17 August 2021

Liens and floating charges

What are the essential elements of actions for the avoidance of liens and floating charges on subsequently acquired property?

Mortgages and pledges should be registered in public registries to have effect against third parties. If they are not properly registered, creditors will face the risk of losing their ranking and priority before secured and unsecured creditors of the same class regarding a certain asset. To prevent actions for the avoidance of liens, creditors must confirm that their liens are properly registered before the Registry of Real Estate Property, the Public Commercial Registry or the Secured Transactions Registry.

Law stated - 17 August 2021

Process and resolution of avoidance actions

Through what process are avoidance actions litigated? What procedural issues often arise and how are avoidance actions usually resolved?

Affected creditors can file avoidance actions for the annulment of fraudulent acts through an ancillary motion within the insolvency proceeding. Once the ancillary motion has been filed, the related parties have five days to answer the motion, considering that all related evidence must be exhibited together with the initial motion or the answer to the motion. In such a case, the court shall set a date for a hearing to produce evidence. After the hearing, the court will issue the ancillary judgment within three days. This time frame may be extended depending on the workload of the court. The parties can also challenge the ancillary judgment through an ordinary remedy (motion for revocation), within three days of the issuance of the ancillary judgment, and the ruling that resolves the motion for revocation may be challenged through an amparo (constitutional proceeding) within the following 15 days.

In some cases, it is difficult to locate the third parties that participated in the fraudulent act to notify them of the ancillary motion. Furthermore, when these ancillary motions are resolved ordering the nullity of the fraudulent acts, the parties involved are required to restore things as they were before the fraudulent act; however, in many cases this is not possible because the assets have disappeared or the third parties that participated in the act are also insolvent.

Law stated - 17 August 2021

CLAIMS AGAINST DIRECTORS, OFFICERS AND SHAREHOLDERS

Breach of fiduciary duty

What are the essential elements of a claim for breach of fiduciary duty against directors and officers in the context of corporate insolvency?

Claims for breaching fiduciary duties against directors or officers may be brought within the insolvency proceeding through an ancillary motion. The board members, directors and relevant employees will be responsible for compensating for the damage they caused to debtor, if they led it to insolvency by doing the following: adopting decisions that had a conflict of interest; benefiting a specific group of shareholders; committing bribery; providing false statements; and committing other offences and wrongful actions that affected the debtor financially.

The responsibility to compensate for the damage will be carried jointly and severally between the responsible officials, without prejudice to the criminal responsibility they have incurred, on the understanding that the action may be filed by the debtor or the shareholders representing at least 25 per cent of the voting rights shares. The statute of limitations for filing the responsibility action is five years as of the date on which the liability assumption occurred.

Law stated - 17 August 2021

Protection from liability

To what extent does the law in your jurisdiction protect directors and officers from liability for decisions made in connection with the restructuring or insolvency?

Directors and officers will not incur liability when they cause damage to the debtor derived from the acts, omissions or conduct that they execute or the decisions they adopt, if they act as a bona fide third party and the following exculpatory circumstances apply:

- they comply with the law or the by-laws;
- they take decisions or vote based on information provided by relevant employees, external auditors or independent experts;
- they have selected the most appropriate alternative to the best of their knowledge and belief; and
- they comply with the agreements of the shareholders' meeting, as long as they do not violate the law.

The debtor is prohibited from agreeing or foreseeing in its by-laws any benefits or exclusions of liability that limit, release, substitute or compensate the obligations of the board members, directors and relevant employees. The debtor may only contract insurance, bonds or guarantees that cover the amount of compensation for damage caused, except in the case of illicit fraudulent acts or acts in bad faith.

Law stated - 17 August 2021

Converting credit to equity

Can credit extended by an insider or shareholder be recharacterised as equity? If so, what is the mechanism by which such an action is brought, and what elements are required to prevail?

According to the congressional declaration of purpose of the Insolvency Law (LCM), there is no limitation on the schemes that can be adopted in a restructuring agreement, so it is possible that credit can be converted to equity, as long as the restructuring agreement that establishes such capitalisation (1) applies for all creditors who have the same ranking and priority, (2) is approved by the majority of unsecured creditors and (3) is not contrary to public policy, among other requirements.

There are non-mandatory precedents that consider the credit capitalisation a violation of the fundamental right of free association interpreted in the contrary sense, regarding those creditors who have not voted or have voted against the restructuring agreement that proposes the capitalisation.

Consequently, if the restructuring agreement does not foresee credit capitalisation, the insiders' and shareholders' credit will be maintained in the ranking and priority of subordinated credit.

Law stated - 17 August 2021

Illegal dividends

Can dividends received by shareholders be prosecuted as illegal?

Payments to creditors, including shareholders, must be made in accordance with the order of ranking and priority provided for in the LCM, on the understanding that creditors of a lower rank cannot be paid unless the higher-ranking creditors have been paid in full.

One of the main effects of the declaration of insolvency is the prohibition on making payments of debts prior to the issuance of such declaration, except those that correspond to the debtor's ordinary operation. Therefore, the payment of dividends to shareholders can be prosecuted as illegal through an ancillary motion for annulment, since such payments are not part of the debtor's ordinary operation, and they contravene the effects of the declaration of insolvency.

Law stated - 17 August 2021

Trading while insolvent

How is trading while insolvent treated in your jurisdiction? If actionable, what mechanisms apply and what are the elements of a successful claim?

After the filing of the insolvency request or lawsuit and during the conciliation stage, the administration of the debtor's company will correspond to the debtor, except when the bankruptcy referee (conciliador) requests the court to remove

the debtor from the administration of his or her company for the protection of the bankruptcy estate.

Trading during inspection stage (before declaration of insolvency)

After the filing of the insolvency request or lawsuit and during the inspection stage, the debtor may request the court's authorisation for the immediate contracting of essential credit to maintain the company's ordinary operation and obtain the necessary liquidity to attend the insolvency proceeding, including the authorisation for granting guarantees. The account specialist (visitador) may express any relevant arguments regarding the financing request.

Trading during conciliation stage (after insolvency judgment)

All agreements pending completion must be fulfilled by the debtor, unless the conciliador opposes it for the best interests of the bankruptcy estate. The conciliador will monitor the accounting and all the operations carried out by the debtor during its administration.

Any creditor who has contracted with the debtor has the right to request the conciliador to declare whether he or she will oppose the fulfilment of the contract. If the conciliador states that he or she will not oppose, the debtor must comply or guarantee compliance with the creditor. If the conciliador opposes or does not respond within 20 days, the creditor who contracted with the debtor may at any time terminate the contract by notifying the conciliador thereof.

In fact, the conciliador will decide on the termination of pending contracts and will approve, with the prior opinion of the creditors' representatives, if they exist, the execution of new credit, the constitution or substitution of guarantees and the disposal of assets when they are not related to the ordinary operation. The conciliador must report any of these operations to the court for any creditor's objection, which will be processed as an ancillary proceeding.

Law stated - 17 August 2021

Equitable subordination

Is equitable subordination of shareholder claims allowed? If so, what requirements and mechanisms apply?

The LCM establishes the following as subordinated: creditors who have agreed to subordinate their rights with respect to unsecured creditors; and unsecured credit of the spouse and relatives of the debtor, including unsecured credit of those family members who are shareholders, directors or officers, or have the power to take decisions, as well as unsecured credit of companies of the same corporate group, except for the holding company.

Although the subordinated creditors can vote on the restructuring agreement, when the participation of the subordinated creditors is equal to or greater than 25 per cent of the total debtor's liability, the majority required to approve the restructuring agreement will only be counted with the favourable vote of unsecured creditors and secured creditors.

Law stated - 17 August 2021

Other claims

Are any other claims commonly brought against shareholders, directors and officers in your jurisdiction? If so, what mechanisms are used to raise these claims and what elements are required to prevail?

In addition to actions for the annulment of fraudulent acts incurred by shareholders, as well as the responsibility actions against directors and officers, the LCM provides for criminal offences for acts or omissions incurred by board members, managers or relevant employees. The main grounds of such crimes are:

- voting in the board of directors' meetings or make determinations related to debtor's assets with a conflict of interest;
- favouring certain shareholders to the detriment of the other shareholders;
- generating, disseminating, publishing, providing or ordering false information about the debtor;
- acting intentionally to aggravate the breach of the debtor's obligations (eg, omitting, altering, destroying or falsifying the accounting records); and
- in general terms, carrying out illegal acts or acting in bad faith in accordance with the Insolvency Law or other laws.

Law stated - 17 August 2021

Risk mitigation

How can shareholders and sponsors mitigate the risk that claims against them will be successful, and minimise the accompanying financial burden?

Acts carried out by shareholders, directors, managers or relevant employees in a malicious way or in bad faith, or that form any of the assumptions of liability or fraud against creditors, cannot be mitigated, so the best alternative is to verify through an internal investigation that these events have not occurred. If these acts are confirmed, and depending on the particular case, it may be necessary to reverse the operation to avoid affecting the bankruptcy estate.

Law stated - 17 August 2021

CREDITOR ACTIONS AND STRATEGIC CONSIDERATIONS

Contesting restructuring plans

Can creditors bring actions contesting the restructuring plan? If so, what law governs such actions? What must the creditor show to succeed and what must the debtor show to successfully defend? How are these actions usually resolved?

There are some actions that creditors can take against the restructuring agreement, as outlined below.

Right to veto the agreement

The restructuring agreement may be vetoed without any cause by the unsecured creditors that have not signed the agreement, whose recognised credit jointly represents more than 50 per cent of the total amount of the credit recognised by such creditors. The creditors who comply with this majority must file the motion for veto within five days of the date on which the court made the restructuring agreement available to creditors.

Challenge the agreement

As the restructuring agreement requires the court's approval on non-violation of public policy, as well as on the majority vote of unsecured creditors, subordinated creditors (as long as they do not exceed 25 per cent of the total debt) and, if they agree to sign, secured creditors and privileged creditors, any creditor could file an appeal against the restructuring

agreement approval judgment if it considers that such requirements were not satisfied. This appeal may be resolved by a court of appeals, whose resolution may be also challenged through an amparo (constitutional proceeding). If the challenge is declared well founded, the debtor may file a new restructuring plan if the maximum period of the conciliation stage has not elapsed (if it has, the debtor will be declared bankrupt).

Law stated - 17 August 2021

Winding-up petitions

Do creditors apply for winding-up orders? If so, what law governs these actions? What must the creditor show to succeed and what must the debtor show to successfully defend? How are these actions usually resolved?

Voluntary request of the debtor

The debtor may request that the insolvency proceeding begins directly in the bankruptcy stage (skipping the conciliation stage) derived from the unfeasibility of restructuring the company.

Lawsuit of a creditor

The debtor may be declared directly bankrupt (skipping the conciliation stage) when a creditor has filed an insolvency lawsuit and, when answering the claim, the debtor agrees that the insolvency proceeding should start directly at the bankruptcy stage. If the debtor denies or fails to agree that the insolvency proceeding should begin at the bankruptcy stage, then the proceeding will start at the conciliation stage.

Regardless of whether the debtor agrees to start the insolvency proceeding at the bankruptcy stage, to declare the debtor's insolvency, creditors must demonstrate:

- the debtor has defaulted in its payment obligations with two or more creditors;
- the debtor's defaulted obligations that have been in default for more than 30 days represent at least 35 per cent of all its obligations; and
- the debtor does not have sufficient liquid assets to pay at least 80 per cent of its due and payable obligations on the date of filing the insolvency lawsuit.

Motion from the conciliador

The bankruptcy referee (conciliador) may request the court for early termination of the conciliation stage if he or she considers that the debtor or its creditors are not willing to negotiate a restructuring agreement or that it is impossible to do so. The conciliador 's request will be processed through an ancillary motion.

Law stated - 17 August 2021

Stays of proceedings – scope and exceptions

Does the insolvency regime stay any creditor collection actions? If so, what are the parameters of such a stay? Are there any notable or commonly used exceptions?

All legal actions and lawsuits filed by or against the debtor that are in progress at the time of the declaration of insolvency will not be accumulated to the insolvency proceeding, but will be attended separately by the debtor under

the supervision of the conciliador .

After the declaration of insolvency, other actions and lawsuits may be initiated separately against the debtor, which will be processed before the competent courts under the supervision of the conciliador ; however, the enforcement of embargos or final judgments of any actions will be suspended over the rights and assets of the debtor due to the effects of the insolvency judgment, except for labour claims based on two years' accrued wages, which can continue the enforcement process.

Secured creditors with guarantees on assets that, according to the court and the conciliador 's opinions, are not strictly indispensable for the debtor´s ordinary operation may initiate or continue an enforcement procedure over such guarantees.

Law stated - 17 August 2021

Stays of proceedings – strategy

How do creditors navigate stays in practice? How do stays generally affect their litigation strategy?

Taking into consideration that stays affect claims against the debtor, creditors must change their strategy from filing independent actions to requesting the recognition of their credit within the insolvency proceeding. Another action that creditors can normally use to adjust their strategies is requesting the conciliador to declare whether he or she will oppose the fulfilment of the contract.

Law stated - 17 August 2021

Stays of proceedings – effect on emergence from insolvency

How do stays affect the debtor's emergence from insolvency?

Stays could affect debtors because creditors may not be willing to execute new contracts, or extend them, particularly with regard to those that are required for the ordinary operation of the business. Normally, stays protect debtors and make creditors willing to negotiate a reorganisation plan; however, in some cases the creditors affected by stays do not negotiate – much less support – restructuring plans.

Law stated - 17 August 2021

Subordination and disallowance of creditor claims

Are the courts in your jurisdiction empowered to punish creditors' bad acts or inequitable conduct by pushing their claims down the priority waterfall? Can they void the claims altogether?

If the debtor obtains new credit to maintain the company's ordinary operation or to have liquidity during the insolvency proceeding, without the authorisation of the conciliador or the síndico , or against the court's approval, the creditor will lose its privilege or preference.

Also, creditors that execute private agreements with the debtor will lose all their rights within the insolvency proceeding and the court must declare the nullity of the private agreement.

Law stated - 17 August 2021

Vote designation

Can creditors be disenfranchised based on bad-faith conduct?

Once the declaration of insolvency has been issued, if creditors execute private agreements with the debtor, they will lose all their rights within the insolvency proceeding and the court must declare the nullity of the private agreement.

Law stated - 17 August 2021

PRE-INSOLVENCY DEBTOR CLAIMS

Available claims

To what extent can claims existing before insolvency be pursued against shareholders and their affiliates and agents during an insolvency proceeding – including any contractual, tort and misfeasance claims and claims for the recovery of company property?

If the debtor executes acts to become insolvent, prior to the insolvency proceeding and in separate actions, creditors may claim the nullity of such fraudulent acts, to the effect that, if there has been an alienation of property, the property will be returned by the person who acquired it in bad faith with all its profits. For the annulment of fraudulent acts it must be demonstrated that:

- the debtor performed an act that is not simply material but legal, as it is subject to being annulled;
- the execution of the act of alienation results in or worsens the debtor's insolvency (so as long as the debtor does not fall in insolvency and the creditors' guarantee is sufficient, the creditors will lack the interest to challenge the legal acts carried out by the debtor, even if they imply a decrease in assets); and
- the execution of the act damages creditors, because if there is no damage the creditor would not have any interest in filing an ancillary proceeding for nullity of the fraudulent act.

Also, when the debtor uses the company to carry out abusive or fraudulent acts, or with the intention of avoiding legal or contractual responsibilities, creditors may ask the court to pierce the corporate veil that protects shareholders who brought claims against them, in addition to filing criminal actions against shareholders for fraud.

Law stated - 17 August 2021

Procedure and resolution

What procedural mechanisms and issues should be considered when bringing pre-existing claims? How are they usually resolved?

As a universal proceeding, to restructure or liquidate the debtor's company, the insolvency proceeding considers all the debtor's liabilities.

The Insolvency Law does not limit creditors' access to jurisdiction; thus, they may start judicial actions before competent courts. In this case, depending on the stage, either the bankruptcy referee (the conciliador) or the bankruptcy trustee (the síndico) must monitor all proceedings where the debtor is involved. The obligation to monitor does not oblige the conciliador or the síndico to take on the debtor's defence, except when the síndico decides to do so for reducing expenses.

Law stated - 17 August 2021

Standing and assignment of claims

Who controls the pursuit of pre-insolvency debtor claims? Can creditors or other stakeholders pursue them derivatively if the debtor or trustee refuses to do so?

The debtor controls the pursuit of its own pre-insolvency claims; however, the conciliador during the conciliation stage or the síndico during the liquidation stage must monitor all proceedings against debtors of the debtor, to obtain a favourable ruling that helps to increase the bankruptcy estate.

Courts have wide power to protect the bankruptcy estate in favour of creditors' interests, therefore, in some cases courts have ordered debtors of the debtor to pay due amounts, as well as granting injunctive relief to enforce rulings.

Derivative actions are not common in Mexico, but shareholders or creditors can file such actions according to certain provisions set forth in the Federal Civil Code.

Law stated - 17 August 2021

Risk mitigation for creditors

How can creditors mitigate the risk that pre-insolvency debtor claims and remedies will be successful?

Even though there is no way to assure a creditor of the result of a pre-insolvency debtor claim, once the declaration of insolvency is issued, the conciliador during the conciliation stage or the síndico during the liquidation stage assumes the responsibility and obligation to monitor the debtor's claim; thus, creditors may ask both specialists to further explain the actions they have taken to monitor and guarantee the recovery of the claims. If the conciliador or the síndico fails to monitor the debtor's claims, the creditors may claim compensation for damage caused due to breach of their obligations, in addition to administrative sanctions that may be imposed by the Federal Institute of Bankruptcy Experts, including the withdrawal of their register as bankruptcy experts.

Law stated - 17 August 2021

Minimising costs for creditors

How can creditors reduce the costs of litigation associated with these claims? What procedures are commonly used?

The conciliador or the síndico may monitor the actions taken by the debtor to increase the bankruptcy estate; creditors may request additional information from both experts regarding such actions and, if appropriate, object to the expenses incurred for them.

Law stated - 17 August 2021

OTHER CLAIMS

Other claims against creditors

Are there any other major categories of claims that may be pursued against creditors during insolvency proceedings in your jurisdiction? If so, what are the essential elements of such claims?

If a creditor files a credit recognition request with false information or through criminal simulation, they could be punished with a penalty of one to nine years' imprisonment.

Law stated - 17 August 2021

Other claims against debtors

Are there any other major categories of claims that may be pursued against debtors during insolvency proceedings in your jurisdiction? If so, what are the essential elements of such claims?

The owners of identifiable assets that are in the possession of the debtor and whose property has not been transferred to it by irrevocable legal title, may be separated from the bankruptcy estate.

The assets separation action has the following elements:

- that assets or rights are in the debtor's possession at the time of issuance of the declaration of insolvency;
- such assets or rights must be well determined;
- assets must be identifiable, except for consumables, which are identified by their weight, quality and quantity; and
- the property of such assets or rights has not been transferred to the debtor by legal and irrevocable title.

The assets separation action will be processed alongside the insolvency proceeding through an ancillary motion. Once the separation claim has been filed, if the debtor, the bankruptcy referee (conciliator) and the bankruptcy trustee (síndico) do not oppose, the court will order the separation outright in favour of the plaintiff. In case of opposition, the separation process will continue as an ancillary proceeding.

Assets or rights that are in the following situations, or in any other situations of a similar nature, may be separated from the bankruptcy estate:

- those that can be vindicated;
- real estate properties sold to the debtor whose price has not been fully paid, when the sale has not been duly registered in the corresponding public registry;
- goods or movable property acquired in cash, if the debtor has not paid the full price at the time of the issuance of the insolvency judgment; and
- those that are in debtor's possession as a deposit, lease or usufruct, or that have been received in administration or consignment, as well as for sales commissions or amounts received by the debtor for the sale of goods or assets owned by the separatist and assets whose property have been transferred to a trust, among other cases.

Law stated - 17 August 2021

CROSS-BORDER PROCEEDINGS

Parallel proceedings and international judgments

Are parallel proceedings and international judgments recognised in your jurisdiction? What are the requirements for recognition? Can recognition be challenged? On what grounds?

The Mexican Insolvency Law (LCM) adopted the UNCITRAL Model Law on Cross-Border Insolvency (1997), establishing the procedure for cooperation in international insolvency proceedings, which is applicable when:

- a foreign court or a foreign representative requests assistance in Mexico regarding a foreign insolvency proceeding;
- a Mexican court or any specialist requires assistance in a foreign state regarding a proceeding that is being processed in accordance with the LCM;
- a foreign insolvency proceeding and a Mexican insolvency proceeding are being processed simultaneously with respect to the same debtor; or
- creditors or other interested persons, who are in a foreign state, have an interest in opening or participating in an insolvency proceeding that is being processed in Mexico.

A foreign insolvency proceeding will be recognised by a Mexican court when (1) the requesting party is a foreign representative and (2) the foreign representative exhibits authentic copies of the ruling that opened the foreign insolvency proceeding, together with their official translation into Spanish, as well as of the certificate issued by the foreign court proving the existence of the foreign insolvency procedure and the appointment of the foreign representative, on the understanding that if such documents are not available in the foreign country, any other evidence will be admissible to demonstrate the existence of the foreign insolvency proceeding and the appointment of the foreign representative. Also, the foreign representative must indicate the debtor's domicile for processing the request, which will be processed as an ancillary motion between the foreign representative and the debtor, with the participation, if applicable, of the account specialist (visitador), the bankruptcy referee (conciliador) or the bankruptcy trustee (síndico).

As general provisions of the insolvency proceeding are applicable to the request for recognition of a foreign proceeding, the foreign insolvency proceeding recognition judgment may be challenged through an appeal, whose resolution may also be challenged through an amparo (constitutional proceeding). The grounds of such appeal or amparo depends on the applicable facts – for example, the effects that are intended with the application, objections to the documents exhibited by the foreign representative regarding the existence of the foreign insolvency proceeding or his or her appointment, the determination of which of the two procedures will be considered as the debtor's main insolvency proceeding.

Law stated - 17 August 2021

Judicial cooperation

To what extent if any will there be judicial cooperation with other courts in relation to insolvency proceedings?

The provisions of the International Cooperation Title in the LCM shall apply when there is no provision to the contrary in any treaty to which Mexico is a party, except where there is no international reciprocity. Therefore, the court, the visitador , the conciliador or síndico shall cooperate to the extent possible with the foreign courts and representatives. The court and such specialists will be empowered to communicate directly with the foreign courts or foreign representatives, without the need for letters rogatory or other formalities.

Law stated - 17 August 2021

REMEDIES AND ENFORCEMENT

Remedies for debtors

What legal remedies are broadly available to successful debtor-claimants? Have the courts awarded any notable remedies recently?

From the point of view of asset protection, the debtor may request for provisional measures such as:

- prohibition to sell or encumber the principal debtor's assets;
- suspension of any seizure or judgment enforcement over the debtor's assets;
- prohibition to transfer resources or stocks to third parties;
- a restraining order on the debtor's administrators, so they do not abandon the debtor's domicile without appointing a representative with sufficient funds; and
- any other relief of a similar nature.

In recent bankruptcy proceedings, the courts have extended the effects of precautionary measures to joint obligors.

From the point of view of the ordinary operation, the debtor may terminate early, with conciliador 's approval, those agreements that are not necessary for keeping the business as a going concern, which will help the debtor's restructuring.

Law stated - 17 August 2021

Remedies for creditors

What legal remedies are available to successful creditor-claimants? Have the courts awarded any notable remedies recently?

Creditors that file an insolvency lawsuit may also request precautionary measures, such as the appointment of a judicial administrator on the debtor's bank accounts or assets. Also, the rights to veto and to challenge, through remedies or amparos , the approval of the restructuring agreement provides recognised creditors with an important remedy against the debtor. Finally, creditors may have relatively agile alternatives with respect to certain contracts, as they may request the conciliador to declare whether they will oppose the fulfilment of the corresponding contract.

Law stated - 17 August 2021

Court enforcement mechanisms

What tools are available to the court to enforce its rulings? Are there any jurisdictional limits to the court's enforcement powers?

To enforce its rulings, the court may use, at its sole discretion, any of the following enforcement measures: impose fines; use police force; break doors and remove fastenings of houses or buildings; impose administrative arrest for up to 36 hours; and inform the Attorney General of contempt.

Law stated - 17 August 2021

SETTLEMENT AND MEDIATION

General court approach

Are the courts in your jurisdiction generally amenable to settlements?

As the Insolvency Law's (LCM) main purpose is to keep companies running, the courts are normally more amenable to approve reorganisation plans than to declare debtors bankrupt; however, this depends on the financial situation of the debtor, its business plan and whether its restructuring agreement meets the applicable requirements.

Law stated - 17 August 2021

Timing

When in the course of litigation are settlements most likely to be sought out?

The initial term of the conciliation stage is 185 days after the publication of the declaration of insolvency in the Federal Official Gazette. The initial term may be extended for 90 days through a motion filed by the bankruptcy referee (the conciliador) or creditors representing 50 per cent of the total debt. Prior to expiration of the extended period, the debtor together with creditors representing 75 per cent of the total debt may request for an additional extension of 90 days.

Therefore, the approval of the reorganisation agreement is more likely to happen close to the end of the extension periods of the conciliation stage, otherwise the debtor will be declared bankrupt, and creditors will only be paid with the liquidation of the debtor's assets.

Law stated - 17 August 2021

Court review and approval

How do courts review settlements? What is the legal standard for entry into and approval of a settlement?

The reorganisation agreement will be approved (1) when the court confirms that it does not violate public policy and (2) it is approved by the majority vote of unsecured creditors, subordinated creditors (as long as they do not exceed 25 per cent of the total debt) and, if they agree to sign, secured creditors and privileged creditors, among other requirements.

Law stated - 17 August 2021

Mediation clauses

Will courts enforce mandatory or voluntary mediation clauses in pre-existing contracts?

Taking into consideration that the insolvency proceeding has a universal nature and that any agreement reached in a mediation procedure would be null and void while the insolvency proceeding is still pending, it would not make sense to enforce mediation clauses.

The LCM establishes a pretrial mediation procedure, so that a person is appointed to act as an amiable compositeur between the debtor and its creditors; however, there is no precedent for this mediation procedure being used.

Law stated - 17 August 2021

UPDATE AND TRENDS

Recent developments

What have been the most notable recent developments in insolvency litigation in your jurisdiction, including any key cases and legislative changes?

The Insolvency Law was amended in January 2020, mainly to include state-owned companies in the catalogue of entities that can be declared insolvent or bankrupt; however, the latest, most relevant reforms were those of January 2014, in which the precedents generated in the insolvency proceedings of Mexicana de Aviación and Vitro were

included in the law, among other issues.

Law stated - 17 August 2021

Jurisdictions

Armenia	Concern Dialog Law Firm
Australia	Blackwattle Legal
Cayman Islands	.
Cyprus	Patrikios Pavlou & Associates LLC
France	Latham & Watkins LLP
Germany	Latham & Watkins LLP
Japan	Mori Hamada & Matsumoto
Mexico	Mañón Quintana Abogados
South Korea	Bae, Kim & Lee LLC
Spain	Latham & Watkins LLP
Ukraine	GOLAW
United Kingdom	Latham & Watkins LLP
USA	Latham & Watkins LLP