International
Comparative
Legal Guides

Practical cross-border insights into restructuring & insolvency law

Restructuring & Insolvency 2023

17th Edition

Contributing Editor:
Jat Bains
Macfarlanes LLP

ICLG.com

Industry Chapter

Expert Analysis Chapters

Q&A Chapters

Mexico


Antonio Mañón


Gerardo Quintana-Pineda


Darío Jandette-Fuentes


Alberto Quintana-Pineda

Mañón Quintana Abogados

1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor- to creditor-friendly jurisdictions?

Mexico is a jurisdiction friendlier to debtors than creditors within an insolvency proceeding. Although both creditors and debtors have certain rights and obligations during the proceeding, the main purpose of the Mexican Insolvency Law (*Ley de Concursos Mercantiles*) ("**LCM**") is to keep debtors running and to prevent a general breach of obligations, pursuant to article 1 of such statute.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

Before an insolvency declaration is issued, the merchant is free to execute informal work-outs with its creditors. However, transactions made within 270 days prior to the insolvency declaration are voidable if they constitute acts in fraud of creditors, such as donations, sale or acquisition of assets at disproportionate prices or conditions affecting the debtor, granting securities for obligations that did not originally require them, among others.

Once a federal court has issued an insolvency declaration over a debtor (*Sentencia de Declaración de Concurso Mercantil*), all agreements to be reached by the debtor and the creditors during the conciliation stage of the insolvency proceeding must be sanctioned by the conciliator and/or be part of a general restructuring agreement that is procured by a conciliator who is appointed by the Federal Institute of Insolvency Specialists (IFECOM) within the insolvency proceeding. Agreements directly executed by the debtor and a creditor during the insolvency proceeding will be void and the creditor will lose its rights as provided for in article 154 of the LCM, except in cases that the creditor is the employees.

In practice, both restructuring agreements before and after the commencement of an insolvency proceeding are very common. There are recent cases of out-of-court restructured companies.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

Claims for breach of fiduciary duties against directors and officers can be brought within the insolvency proceeding for the adoption of decisions having a conflict of interests, benefitting a specific group of shareholders, bribes, false statements and some other offences and wrongful actions that economically affect the debtor's company.

Additionally, the LCM provides for certain criminal offences, such as acts with an intentional behaviour aimed to aggravate the breach of the debtor's obligations, e.g. the alteration, destruction, falsification of the accounting records, or simulation of debts.

In Mexico, there is no obligation for a company to file for a restructuring or an insolvency proceeding during financial difficulties, therefore the company can freely file for such a proceeding, but it is not a duty to do so. However, creditors or the attorney general office might request a federal court to open an insolvency proceeding for a debtor, even without the debtor's consent, as long as the debtor is in an insolvency scenario, as defined by the LCM.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?

Main types of shareholders of a debtor company have great influence on the company's decision to file for an insolvency proceeding, since the company must produce the corporate resolutions in which the shareholders approve or show unequivocally their intention for filing for an insolvency proceeding.

Shareholders with or without voting rights, including limited or restricted voting rights, representing 25% or more of the capital stock, may bring actions against directors or board members for damages caused to the company by their actions or omissions.

Regarding lease agreements, the insolvency declaration of a landlord does not terminate a lease, nor does the insolvency declaration of a tenant, but the conciliator of the insolvency proceeding may terminate such a lease in his/her discretion by paying an indemnification to the landlord.

Stay on enforcement is available under the LCM since the filing of the insolvency petition of the debtor or the lawsuit of a creditor. The declaration of insolvency grants an automatic stay on enforcement, which will prevent creditors from collecting debts. Such automatic stay imposes: (i) a prohibition to pay obligations due before the commencement of the insolvency proceeding, excluding those necessary for the ordinary operation of the debtors' business; and (ii) suspension of all enforcement proceedings against the goods, rights and assets of the debtor. The exception is employee-creditors wages claims for two years before filing, which are not subject to the stay. Additionally, as from the issuance of the insolvency declaration, the credits cease to accrue interest and the amounts of the credits are converted into UDIs, which are investment units indexed to inflation for debt restatement purposes, except for secured credits that continue to accrue interest up to the value of their collateral.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

Creditors are entitled to challenge fraudulent transfers that occurred before or after the debtor's insolvency declaration. The LCM provides for a 270-day reach-back period from the insolvency declaration of the debtor, i.e. the claw-back period. In case of transactions between companies that belong to the same corporate group, the timeframe is automatically extended to 540 days before the insolvency declaration. However, upon a well-founded request by the conciliator, the trustee or any creditor, the claw-back period may be extended for up to three years prior to the insolvency declaration.

The following are considered fraudulent transactions when performed during the claw-back period: (i) free transactions; (ii) acts in which the debtor receives in return something of notorious lower value compared to what the counterparty received; (iii) acts with terms and conditions notoriously apart from the ones that rule in the market; (iv) debt cancelation by the debtor; and (v) payment of non-matured debts.

Also, there is a rebuttable presumption of fraudulent transactions on the following debtor's acts when committed during the claw-back period: (i) executing or increasing guarantees when the original obligation does not call for one; (ii) paying debts in a different way than the one provided for by the contracts; and (iii) executing transactions with its own managers, directors, relevant employees, relatives or companies belonging to the same corporation group.

The fraudulent transactions are voidable, and the responsible creditor is liable to the company for damages.

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

Companies are free to implement informal work-outs in Mexico, as long as the restructuring agreements are executed before the insolvency declaration of the debtor and the agreements do not constitute a fraudulent transaction, as explained above.

3.2 What informal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies?

Before an insolvency proceeding, a merchant/debtor is free to renegotiate, refinance or restructure a debt with its creditors. Aside from the LCM, there are no statutes specialised in rescue procedures for distressed companies, so all restructuring agreements are based on the intent of the parties, and the general rules of the commerce and civil codes. After the insolvency declaration, all agreements between the debtor and its creditors have to be approved by the conciliator appointed in the proceeding and be informed to the court.

3.3 Are debt-for-equity swaps and pre-packaged sales possible? In the case of a pre-packaged sale, are there any restrictions on the involvement of connected persons?

Debt-for-equity swaps may be proposed by the conciliator in the proposal of the reorganisation agreement during the insolvency proceeding, and the creditors may vote the approval of such proposal. The LCM does not regulate pre-packaged sales as other countries.

3.4 To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholder?

Prior to the insolvency declaration, creditors and shareholders may threaten the debtor by requesting precautionary measures to seize assets, as well as ordinary or special proceedings against the debtor and/or its assets for the collection of the debt; however, creditors or shareholders cannot block a debtor from filing for an insolvency proceeding, in which case the effects of the stay enforcement could raise attachments or enforcement of judgments against the company's assets.

There are no express measures in the law to cram down dissenting stakeholders, however, related parties to the debtor, (including shareholders) whose claims in the aggregate represent at least 25% of total claims, will be excluded from the simple majority for the approval of a restructuring agreement.

3.5 What are the criteria for entry into each restructuring procedure?

The LCM has objective criteria to consider a debtor for insolvency. A debtor is declared insolvent when it has defaulted its obligations with two or more creditors and, at the date of the filing: (i) such defaulted obligations have been due for more than 30 days, and/or represent 35% or more of all the obligations; and (ii) the debtor does not have sufficient assets that could be promptly liquidated to pay at least 80% of its obligations.

3.6 Who manages each process? Is there any court involvement?

The federal judge is the main director of the insolvency proceeding. Nonetheless, depending on the stage of the insolvency proceeding, the judge will request the IFECOM to appoint a specialist in insolvency proceedings to assist them during the proceeding, or to liquidate the debtor's assets. The insolvency proceeding has two successive stages: (1) a conciliation stage, for which a conciliator is appointed; and (2) a bankruptcy stage, for which a liquidator/trustee is appointed. Also, the proceeding has a pre-stage called the "*visita*", for which the federal government appoints a specialist

called a "*visitador*", whose job is to analyse the debtor's accounting and financial information to determine whether the debtor meets the objective assumptions of an insolvency.

3.7 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

As a rule, the executory contracts remain in effect, so parties are obliged to continue performing outstanding obligations, unless the conciliator deems that the contract affects the bankruptcy estate and terminates the contract. Depending on the contract's subject matter, the LCM might provide for a certain contract to be terminated as a matter of law or grant authority to the conciliator to terminate certain contracts. Set-off is available according to the LCM, once the elements for compensation are met.

3.8 How is each restructuring process funded? Is any protection given to rescue financing?

As a rule, each party funds their own claim. As an exception, in the case of dismissal of a request of insolvency declaration, the Judge will require the payment of judicial expenses, including fees of the accountant from the "*visita*". Claimants could obtain third-party funding to finance the prosecution of claims, through normal credits, but it is not a common practice. DIP financing is permitted under Mexican law, however, it has not been a real option since most of the banks or financial entities have restrictions for lending to companies in insolvency proceedings.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The LCM provides for the stage of bankruptcy within the insolvency proceeding to wind up a company. An insolvency proceeding may be directly open in the bankruptcy stage, instead of the conciliation stage, if the merchant/debtor chooses to do so; or, in the case the proceeding was open in conciliation stage, when the debtor and creditors do not reach a reorganisation plan, the insolvency proceeding will pass to the bankruptcy stage, which provides for the bankruptcy and liquidation of the debtor's assets. This stage will last until the debtor's assets are liquidated.

The Mexican General Business Associations Law provides for an alternative option in which the debtor corporately dissolves the company and liquidates its assets without filing for an insolvency proceeding, which shall provide for the full payment of creditors.

4.2 On what grounds can a company be placed into each winding up procedure?

As mentioned before, an insolvency proceeding may be directly open in the bankruptcy stage, instead of the conciliation stage, if the merchant/debtor chooses to do so; or, in the case the proceeding was open in conciliation stage, when the debtor and creditors do not reach a reorganisation plan, the insolvency proceeding will pass to the bankruptcy stage, which provides for the bankruptcy and liquidation of the debtor's assets. On the other hand, corporate dissolution and liquidation are available when the shareholders agree to do so. If an impossibility to fulfil the object of the company exists, the articles of incorporation cannot be met, or a court orders to do so, such proceeding has to be reported to the Secretary of Economy, and be recorded in the Registry of Commerce.

4.3 Who manages each winding up process? Is there any court involvement?

The insolvency proceeding in a bankruptcy stage is managed by a federal court with support of a specialist liquidator (trustee) appointed by the IFECOM. Corporate dissolution and liquidation are managed by the debtor, whose shareholders will appoint a liquidator for such purpose.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

As noted above, notwithstanding the fact that shareholders have significant influence to initiate insolvency proceedings, there are no provisions granting significant shareholder participation or influence at the bankruptcy stage.

However, if the shareholders are also creditors, then they may exercise the corresponding actions for the recognition of their credits as subordinated creditors, as well as for the separation of assets owned by them and, if applicable, the payment of their credits.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Like in the conciliation stage, the liquidator has the same faculties as the conciliator, and the contracts should be fulfilled by the parties, unless the liquidator terminates the contracts, or the LCM provides for an automatic termination of certain contracts. Set-off is also available in the bankruptcy stage.

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

The LCM provides for the following ranking of claims:

1. Employees credits (salaries for two years previous to the insolvency declaration).
2. Credits regarding essential expenses for the operation of the company and credits for the conservation of the bankruptcy estate, including DIP financing credits.
3. Social security credits.
4. Singularly privileged creditors. If the merchant/debtor is an individual, this includes burial and sickness expenses.
5. Secured creditors.
6. Tax creditors and employee creditors (other than the already mentioned).
7. Special privileged creditors (creditors with a right of retention).
8. Unsecured creditors.
9. Subordinated creditors.

The costs of the procedure are generally deemed as credits for the conservation of the bankruptcy estate.

4.7 Is it possible for the company to be revived in the future?

Once the debtor is declared bankrupt and the trustee has liquidated all the debtor's available assets, the proceeding will be concluded; therefore the trustee's appointment will end and the powers of representation and administration will return to the corporate bodies, in the understanding that the debtor could reactivate its operations. However, those creditors who have not obtained full payment of their credits will individually retain their rights and actions for the remaining balance against the debtor.

Mexican law does not provide for the forgiveness of debts after all assets have been liquidated.

5 Tax

5.1 What are the key tax risks which might apply to a restructuring or insolvency procedure?

Notwithstanding the stays on enforcement, tax authorities have the right to continue with procedural acts tending to quantify and seize the payment of tax credits during the insolvency proceeding, in addition to the fact that the tax authority may order the suspension of the digital seal for the issuance of invoices of the debtor due to non-payment of taxes. Therefore, if the debtor seeks the approval of a restructuring agreement, he must be in compliance with his tax obligations.

Additionally, although tax credits have a priority ranking for payment purposes, there are provisions that allow tax authorities to waive surcharges, and inflation adjustments to support restructuring. However, as they are derived from a constitutional reform that prohibits tax waivers, there is a possibility that these provisions have become unconstitutional.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

Mexico is a jurisdiction with constitutional protections for employees. Within the insolvency proceeding, employee creditors for salaries owed by debtor for two years previous to the insolvency declaration are privileged and have a first rank, which means these creditors are paid before any other creditors and stays on enforcement does not apply to employees' actions for recovering such salaries.

The employees' credits are not subject to the extensions or write-offs provided for in the restructuring agreement, in the understanding that the debtor may enter into agreements with the workers, as long as they do not aggravate the debtor's obligations.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

Yes, foreign companies and their branches legally registered in Mexico may be declared insolvent according with the LCM, if they are domiciled in Mexican territory; on the understanding that the declaration will only include the assets and rights located and enforceable, as the case may be, in the Mexican territory.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

The Mexican Insolvency Law adopted the UNCITRAL Model Law on Cross-Border Insolvency. Therefore, the foreign insolvency proceeding will be recognised, as long as: (i) it is an insolvency proceeding; (ii) the requesting party is the Foreign Representative of the estate; (iii) the foreign representative produces certified copies of the foreign insolvency proceeding; and (iv) the request is filed before the competent Court.

The court and the specialists within the insolvency proceeding must cooperate, as much as possible, with the foreign court and representative. Direct communication, without further formalities, is allowed with the foreign court and representative.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

In recent years, important Mexican companies have chosen to file for bankruptcy in the United States, mainly in the Southern District of New York, despite the Mexican courts having jurisdiction. The main benefit lies in the agility of the company's conservation measures and in the approval of the restructuring, in addition to avoiding the high Mexican litigious culture within the insolvency proceedings.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Companies of the same corporate group can jointly file for an insolvency proceeding to be heard by the same federal court. The federal court will normally open a judicial docket for every company, but it will process all petitions at the same time and the IFECOM will appoint the same "*visitador*", conciliator and trustee for all proceedings.

9 The Future

9.1 What, if any, proposals exist for future changes in restructuring and insolvency rules in your jurisdiction?

During the pandemic, a number of bills were put forward to amend the LCM, mainly with the aim of incorporating a more agile procedure for the restructuring of liabilities, however, none of them were approved by the Federal Congress.

Currently, there is no bill pending, and taking into consideration that the LCM was issued in 2000, there are many areas to be improved on in the Mexican insolvency legislation.

Antonio Mañón is an attorney with more than 15 years of experience in Arbitration, Bankruptcy Law and Civil-Commercial Litigation. He has focused his practice on counselling and representing companies in the automobile industry, as well as banks, financial institutions, and listed companies. He obtained his law degree (J.D. equivalent) from Universidad La Salle in Mexico City, obtained a Specialization Degree on Commercial Law from Escuela Libre de Derecho, and is a candidate to obtain his Master of Laws Degree (LL.M.) on Private Law from Escuela Libre de Derecho and Instituto de Empresa of Madrid. He has a Diploma in International Arbitration from Escuela Libre de Derecho and a Diploma in Bankruptcy Law from the Escuela Libre de Derecho and the Mexican Bar Association. He is a fellow of the Academy of American and International Law of Dallas, Texas, Associate Professor of Insolvency and Bankruptcy of the Master on Private Law from Escuela Libre de Derecho, and is a founding partner of Mañón Quintana Abogados, SC, where he coheads the Bankruptcy and Litigation practices and leads the Arbitration practice.

Mañón Quintana Abogados
Córdoba 42, floor 5-B, Roma Norte
Cuauhtémoc, Mexico City
Mexico

Tel: +52 55 8438 0001
Email: antonio.manon@mqsc.mx
URL: www.mqsc.mx

Gerardo Quintana-Pineda is an attorney with over 15 years of experience in Bankruptcy Law, Civil-Commercial Litigation, and Insurance and Reinsurance. He has focused his practice on counselling and representing banks, financial institutions, and listed companies, as well as insurance companies. He obtained his law degree (J.D. equivalent) from Universidad La Salle in Mexico City and has a Specialization Degree in Amparo proceedings from Universidad Panamericana. He has a Diploma in Insurance from the Escuela Libre de Derecho and a Diploma in Bankruptcy Law from the Escuela Libre de Derecho and the Mexican Bar Association. He is a founding partner of Mañón Quintana Abogados, SC, where he co-heads the Bankruptcy, Litigation and Insurance-Reinsurance practices.

Mañón Quintana Abogados
Córdoba 42, floor 5-B, Roma Norte
Cuauhtémoc, Mexico City
Mexico

Tel: +52 55 8438 0002
Email: gerardo.quintana@mqsc.mx
URL: www.mqsc.mx

Darío Jandette-Fuentes is an attorney with 10 years of experience in Insurance and Reinsurance Litigation, Banking and Finance Litigation, Constitutional and Human Rights Litigation, and Civil-Commercial Litigation, focusing his professional practice in advising and representing companies in the insurance sector, as well as banking and financial institutions. He graduated from Universidad Nacional Autonoma de Mexico (UNAM). He has a Diploma in Insurance and Bonding from the Escuela Libre de Derecho and a Diploma in Bankruptcy Law from the Escuela Libre de Derecho and the Mexican Bar Association. He joined Mañón Quintana Abogados, SC in 2013.

Mañón Quintana Abogados
Córdoba 42, floor 5-B, Roma Norte
Cuauhtémoc, Mexico City
Mexico

Tel: +52 55 8438 0004
Email: dario.jandette@mqsc.mx
URL: www.mqsc.mx

Alberto Quintana-Pineda is an attorney with more than 10 years of experience in Bankruptcy, Insurance and Reinsurance Litigation, Banking and Finance Litigation, Civil-Commercial Litigation and Constitutional and Human Rights Litigation, focusing his professional practice on advising and representing companies in the insurance sector, as well as banking and financial institutions. He graduated from Universidad Iberoamericana in Mexico City (J.D. equivalent), has a Specialization Degree on Constitutional Proceedings (Amparo) from Universidad Panamericana in Mexico City and has a Masters of Law from Northwestern University in Chicago, Illinois. He joined Mañón Quintana Abogados, SC in 2021.

Mañón Quintana Abogados
Córdoba 42, floor 5-B, Roma Norte
Cuauhtémoc, Mexico City
Mexico

Tel: +52 55 8438 0014
Email: alberto.quintana@mqsc.mx
URL: www.mqsc.mx

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: global legal group