

THE NEW MEXICAN INSOLVENCY LAW AND THE FEDERAL INSTITUTE OF INSOLVENCY SPECIALISTS (IFECOM): STORIES FROM THE TRENCHES.

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INTRODUCTION. THE MEXICAN INSOLVENCY LAW.

I think that all of you are more or less aware that Mexico changed its insolvency regime six years ago. I guess also that all of you are acquainted with the general scope of our *Ley de Concursos Mercantiles*.

I would like nevertheless to outline the general ideas of the system, just to be sure that we all understand the basis.

Mexican law follows modern tendencies in insolvency that have been proposed by UNCITRAL, World Bank, INSOL, III and all international entities that have been steadily working in this field during the last fifteen years.

The insolvency proceeding in Mexico can be commenced either by the debtor himself or by a creditor. The first step is to determine whether the debtor meets the illiquidity test defined in the statute (at least 35% of the liabilities overdue for more than 30 days and not having liquid assets in an amount equal or superior to 80% of the outstanding liabilities).

Once the *concurso* has been declared, a period called “conciliation” begins. It has the goal of achieving the reorganization of the business. The means to reach said reorganization is through an agreement between debtor and his creditors. This agreement has to be authorized by the judge.

If the parties do not agree on a reorganization plan during the short and fatal period of time granted for this stage (180 days, with possible extensions up to a maximum of one year), bankruptcy is declared and the liquidator (Trustee) must sell the company’s assets and pay creditors.

One of the important features of this new law is the creation of an insolvency regulator: The Instituto Federal de Especialistas de Concursos Mercantiles (IFECOM), which pertains to the Judiciary Power and is accountable for providing the insolvency professionals needed for the proceedings. It also has the obligation of promoting what we call “the new insolvency culture”.

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The full adoption of UNCITRAL's Model Law on cross border insolvency is another very important feature of the new Mexican law. I have provided a paper comparing the Mexican text with both Uncitral's and the USC Chapter 15. You will find those texts very similar between them.

EXPERIENCES ON CROSS BORDER CASES.

Having said that, I would like to make some comments on the few Mexican cases we have had so far involving cross border insolvencies.

First of all, some basic points:

- 1.- We have only had cases involving one foreign country: The United States of America. This is logical, considering that the USA is Mexico's main business counterpart.
- 2.- With only one exception, these cases are still in progress.
- 3.- Several of the parties, counsel and authorities involved are present in this room today.

These two last peculiarities impose on us certain limitation on the freedom to discuss them in this forum. As a matter of fact, the idea is not to discuss the cases themselves, but to draw some general lessons from the experience they represent.

THE CASES ARE:

1. – The Xacur case.

Three individuals were declared bankrupt by a judge in Houston, Tex.

The Trustee filed for recognition of foreign proceeding under the Mexican jurisdiction, and specifically under Title XII of our law (Cross border insolvency).

The judge granted recognition. Collection of the bankrupt individuals' assets has already begun.

There are, in addition, other bankruptcy proceedings involving the corporations where the Xacur brothers used to be shareholders. Those cases can not be tried in the same proceedings as the cross border case, because the legal entities involved have a different legal status, and the law applicable for the former is the old bankruptcy law.

The entire process has been accompanied by heavy litigation that has extended unusually the duration of the cases.

2.- The Durango case

Durango is a company whose main activity is the production of paper. Having been afflicted with illiquidity problems, the company filed for *concurso mercantil*, in order to

reach an agreement with its creditors. The restructuring process was completed under Mexican law, and currently the company is performing well.

In the ancillary proceedings filed by Durango, under section 304 of the US Code, the US Bankruptcy Court entered an order permanently enjoining creditors from petitioning Durango's restructuring in the United States.

3.- The Covarra case

When Covarra, a group of corporations in the textile industry, filed for *concurso*, they were confident that there was a good possibility of reaching an agreement with their creditors, but finally this was not possible. Time elapsed and bankruptcy was declared.

One of the creditors, the owner of a patent whose use had been granted to Covarra, filed several suits in US Courts, seeking relief over different issues related with the use of said patent. The Covarra liquidator requested both a preliminary and permanent injunction in an ancillary proceedings filed under §304 of the Bankruptcy Code.

The US bankruptcy judge ruled that, since a bankruptcy case was going on in Mexico, this was the proper jurisdiction to hear and solve the case, thus granting the preliminary injunction as requested, and enjoining Covarra creditors from commencing or continuing any suit against Covarra and recognizing that only the Mexican court had exclusive jurisdiction in such suits.

The hearing to consider whether the injunction should be made permanent was scheduled for April 26 (the decision is pending)

4.- The IFS case

IFS is a financial corporation who has been declared bankrupted in USA and has filed in Mexico for recognition of a foreign proceeding and international cooperation.

This is the second case of direct application of the Title XII (Cross border insolvency).

The Mexican judge disregarded provisions about direct communications, and ordered that all creditors should be served through the formal old regime (rogatory letters, use of diplomatic means, etcetera).

5.- The Satmex case

Satmex is a Mexican company operating communications through satellites under the granted authority of Mexican government.

Satmex filed for *concurso* voluntarily. At the same time, some creditors filed for a Chapter 11 in the United States. This Chapter 11 was converted into a §304 case, allowing the Mexican proceeding to be the main one.

The agreement reached by debtor and creditors states that a prepackaged chapter 11 has to be filed in order to make the agreement compulsory to all secured creditors and to free the encumbered assets to meet the provision of the agreement reached.

CONCLUSIONS. WHAT WE HAVE NOW.

1.- We have a useful tool. Now that both jurisdictions have practically the same provisions, future cases are bound to be treated with similar criteria. These rules provide debtors and creditors trust and confidence in the proceedings on both sides of the border.

2.- Nonetheless, we face some drawbacks as a result of the different legal systems. This can be more evident on the Mexican side, because our civil law system can be very rigorous and full of formalities. I am not attempting to disqualify our procedural systems, but we do have to realize that in occasions these formalities translate into slow or inefficient procedures if we consider the velocity required by today's business standards . We will have to work on perfecting the operation of the civil law system *vis-à-vis* our new and innovative insolvency system, to make these rules compatible and efficient.

3. - We have now a couple of precedents on the US side that recognize the authority and jurisdiction of Mexican legislation and courts in insolvency cases involving companies with domicile and COMI in Mexico.

4.- We have found that the combination of both systems is not only possible, but an effective way to solve the cases.