Analysis of the Mexican Commercial Insolvency Law

MARTÍNEZ
ALGABA
ESTRELLA
DE HARO Y
GALVÁN-DUQUE

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Introduction

On May 12th, 2000, the Commercial Insolvency Law ("CIL") was published in the Mexican Official Daily of the Federation, and it entered into full force and effect the next day. The CIL repealed the 1943 Law Governing Suspension of Payments and Bankruptcy, and repealed or amended, accordingly, all other legal provisions that opposed the provisions of the CIL.

Pursuant to its preface, the CIL has the principal purpose of creating a modern regulatory framework that allows the conservation of companies which pass through financial and economic crisis. To this end, the figure of "conciliation" was created, which has the purpose of procuring that the Merchant and its creditors reach an agreement for the payment of the Merchant's liabilities during a reasonable term. In case that reaching a reorganization agreement is unfeasible, the CIL establishes a procedure for orderly liquidating the assets and rights of the Merchant while attempting to maximize the proceeds of the sale, in order to apply the funds obtained from such liquidation to the payment of the Merchant's liabilities, following a fair order and preference having regard for the differences between the relevant creditors.

The CIL maintains the Judge as the central body and rector of the commercial insolvency proceeding; however, it recognizes that he must be aided in the performance of his functions by specialists in administrative, commercial, industrial, economic and financial aspects, so that the Judge may focus his efforts on strictly legal tasks. In virtue of the foregoing, the CIL creates the Federal Institute of Commercial Insolvency Specialists (widely known for its initials in Spanish as "IFECOM"), as an auxiliary body of the Federal Judiciary Council, whose functions are, inter alia, to authorize and designate the specialists (Visitors, Conciliators and Receivers) who will aid the Judge in the tasks previously referred, as well as to supervise the functions performed by such specialists. According to the indications of the CIL and the General Rules issued to this effect by the IFECOM, these specialists are appointed by means of a random procedure.

This study has the purpose of providing a summary, analytical in some cases, of the most important provisions of the CIL; however, it does not attempt to exhaust the subjects contemplated therein, but which will allow the reader to understand the most important aspects of the commercial insolvency proceeding.

Notwithstanding that, as described hereinbelow, both legal entities as well as individuals that are dedicated to making commerce their daily trade, can be declared to be commercially insolvent, we have focused this study on the insolvency of commercial entities only.

To make it easier to read, we have divided the study into six chapters: the first provides a general overview of the stages of the commercial insolvency process; the next three chapters describe the stages into which the commercial insolvency proceeding is divided, in the fifth chapter we analyze those statutes of the CIL relative to foreign business reorganization, liquidation or insolvency proceedings and the last chapter relates to various different relevant topics in commercial insolvency, as indicated below:

- General Overview of the Stages of Commercial Insolvency
- Preliminary Stage to Determine Insolvency
- Conciliatory Stage
- Bankruptcy Stage
- Foreign Procedures
- Various Relevant Topics

1.- GENERAL OVERVIEW OF THE STAGES OF COMMERCIAL INSOLVENCY

Notwithstanding the fact that Article 2 of the CIL indicates that commercial insolvency consists of two successive stages, called conciliation and bankruptcy, along with other Mexican scholars we have identified three stages described below and which will be later explored in greater depth in the text of this document:

(a) Preliminary Stage to Determine Insolvency. The fundamental purpose of this stage is to determine whether a Merchant is found within the premises contemplated by the CIL to be declared commercially insolvent.

This stage begins with a motion to the Judge, which in judicial terms is called a "petition", to declare a Merchant commercially insolvent, in the understanding that such petition may be filed by the Merchant, its creditors or the District Attorney's Office. It is important to mention that if the Merchant requests to be declared insolvent, the creditors and District Attorney's Office will not be involved in this stage in any way.

In order to determine whether the Merchant meets the requirements to be declared commercially insolvent, during this stage an inspection is made of the financial and economic status of the Merchant, which the CIL calls the "verification visit". This verification visit is performed by a specialist called a "Visitor", who is appointed by the IFECOM.

Based on the opinion submitted by the Visitor, and considering the contents of the petition for the declaration of commercial insolvency, as well as the statements made in this stage by the Merchant, the creditors and the District Attorney's Office (in these last two cases, only to the extent that the insolvency petition has been filed by the creditors or by the District Attorney's Office), the Judge will determine whether the Merchant is declared commercially insolvent or not by means of a ruling passed to this effect.

(b) Conciliatory Stage. If the Merchant is declared commercially insolvent, the conciliatory stage is activated in order for the Merchant and its acknowledged creditors to be in a position to reach an agreement regarding the terms and conditions according to which the Merchant will pay its debts (for purposes of this document, this agreement will be referred to as the "Reorganization Agreement"). As indicated by the CIL, the initial term that the parties have to execute the Reorganization Agreement is one hundred and eighty (180) calendar days, which, under certain circumstances, may be extended by the Judge up to an additional one hundred and eighty (180) days.

The task of procuring that the Merchant and its acknowledged creditors agree on the terms of and execute the Reorganization Agreement is commissioned to a specialist called a Conciliator, who is appointed by the IFECOM. Furthermore, during this stage, the Conciliator must prepare the list of creditors of the Merchant, and determine the amount, order, and level of preference of their credits.

During the conciliatory stage, the Merchant (except in specific cases) will continue to manage its company under the supervision and, in some cases, requiring the explicit authorization, of the Conciliator; however, it will enjoy certain benefits provided by the CIL with the aim of not causing further harm to its financial position. Consequently, for example, during this stage, the payment of the Merchant's credits is suspended, and the seizure or foreclosure of the Merchant's property is prohibited. Notwithstanding the foregoing, the declaration of commercial insolvency will not be grounds to interrupt the payment of labor obligations.

(c) Bankruptcy Stage. To the extent that the Merchant and its acknowledged creditors are unable to execute the Reorganization Agreement during the maximum conciliatory term of one year established by the CIL, the Merchant will be declared bankrupt. At such time, the objective of the procedure shall become to sell all of the assets and rights of the Merchant, in order to apply the proceeds of such sale to the payment of the Merchant's indebtedness.

In contrast to the conciliatory stage, upon declaration of bankruptcy of the Merchant, management is handed over to a specialist, called a Receiver, who is also appointed by the IFECOM.

As mentioned above, the Receiver must sell all of the assets and rights of the Merchant, seeking at all times to maximize their value, and will apply the funds obtained from such sales to the payment of the Merchant's indebtedness, following the order and preference indicated in the CIL.

2.- PRELIMINARY STAGE TO DETERMINE INSOLVENCY

As mentioned above, the fundamental purpose of this stage is to determine whether a Merchant is within the premises described in the CIL in order to be declared commercially insolvent. Consequently, in this section we explain who may be declared insolvent, the cases in which such declaration is admissible, the terms for making the verification visit and other related aspects.

2.1 Persons Subject to Commercial Insolvency. Individuals or legal entities that are Merchants pursuant to the provisions of the Commercial Code may be subject to a commercial insolvency proceeding. Along these lines, in order for an individual to be considered a Merchant, it must be proven that commerce is his normal occupation. In the case of legal entities, all companies and corporations incorporated pursuant to commercial laws (such as "sociedades anónimas"), as well as the branches of foreign companies that perform acts of commerce in Mexico, are considered as Merchants.

Based on the foregoing, the following persons may be subject to a commercial insolvency proceeding:

(a) Individuals whose normal occupation is commerce;

(b) Business corporations, including state-owned companies created as corporations; and

(c) The branches of foreign companies that perform acts of commerce in Mexico; however, in this case, the declaration of commercial insolvency will only encompass the assets and rights that are located and enforceable in Mexico, and the creditors related to transactions performed with such branches.

In addition, the estate of a trust may be subject to a commercial insolvency proceeding if its purpose is to perform business activities. In order to determine whether the estate of a trust is related to the performance of business activities, we have to observe the provisions on this topic of both the Income Tax Law and the Federal Tax Code.

2.2 Exceptions. The insolvency procedure of mutual insurance companies and insurance institution societies, bonding companies, re-bonding companies and re-insurance companies is not only regulated by the CIL, but is also governed by the provisions of their special laws.

2.3 Corporate Groups. In the case of corporate groups, the general rule is that the commercial insolvency of a company that forms part of a corporate group does not necessarily lead to the insolvency of the holding company or that of the other subsidiaries that form a part of such group. The CIL defines holding companies as those that (i) reside in Mexico, (ii) possess more than fifty percent (50%) of the voting stock of controlled companies, even when such ownership is held by means of other companies that in turn are controlled by the same holding company, and (iii) where under no circumstance more than fifty percent (50%) of its voting stock belongs to other companies.

Consequently, in respect of each of the companies that form a part of the corporate group, that is the holding company and the subsidiaries, an individual analysis should be performed to determine which are found in the necessary premises to be declared commercially insolvent. Now, if the commercial insolvency of a holding company or of any of its subsidiaries is requested, the commercial insolvency proceedings of such holding company and its respective subsidiaries will be made cumulative, but will be processed separately, i.e., they will be presided over by the same Judge, but each one will have its own proceeding.

2.4 Presumptions of Commercial Insolvency. The necessary condition in order for a Merchant to be declared commercially insolvent, is that it can be demonstrated that the Merchant has defaulted in the payment of its obligations in a general manner. In order to prove this condition of general non-performance, a payment default to two or more different creditors should exist, and one of the two following conditions should exist, if the insolvency petition is filed by the Merchant, or both the following conditions, if the insolvency petition is filed by the creditors:

(a) That of its matured obligations, those that are at least thirty (30) days overdue represent thirty-five percent (35%) or more of all the obligations of the Merchant to the date on which the insolvency petition is filed; and/or

(b) The Merchant has insufficient assets, of those listed below, in order to satisfy at least eighty percent (80%) of its matured obligations on the date of the petition. The assets that should be considered for the effects established in this paragraph are: (i) cash on hand and on-sight deposits; (ii) deposits and investments with a term less than ninety (90) calendar days following the admittance date of the petition; (iii) clients and accounts receivable whose maturity does not exceed ninety (90) calendar days following the admittance date of the petition; and (iv) securities for which purchase-sale transactions are regularly conducted in the respective markets, which may be sold in a maximum term of thirty (30) banking days, and whose value is known to the date on which the petition is filed.

Irrespective of the foregoing, the CIL indicates several events that constitute the presumption that a Merchant is in a general default of payment of its obligations (for example, the non-existence or insufficiency of assets over which enforcement may be brought in the case of an attachment). In this sense, the Eighth Collegiate Civil Court of the First Circuit of the Mexican Republic[1] has stated that the declaration of commercial insolvency of a Merchant may be validly founded on the existence of one of the presumptions indicated by the CIL, so long as no evidence exists that destroys or contradicts such presumption, such as the proof of absence of the conditions we have described in this section for the admissibility of the declaration of commercial insolvency.

2.5 Judge with Competent Jurisdiction. The Federal District Judge with jurisdiction in the place where the Merchant has its domicile is competent to preside over the commercial insolvency proceeding. The CIL indicates that, in the case of legal entities, domicile should be understood to mean the corporate domicile, and in the event such a domicile is "unreal", then it shall be deemed to be the place where the entity has its main place of business. Pursuant to this idea of an "unreal" corporate domicile, in practice we have observed that several judges have assumed competence in respect of the commercial insolvency proceeding of a Merchant based on its main place of business, irrespective of the fact that it has its corporate domicile elsewhere.[2]

2.6 Persons Authorized to File for Insolvency. Commercial insolvency may be requested by the following persons: the Merchant itself, any creditor or the District Attorney's Office. Additionally, if a Judge, during the processing of a commercial proceeding, observes that a Merchant appears to be within any of the requisite premises to be declared commercially insolvent, or in the event of presumption of a general state of non-performance provided by the CIL, he should proceed to inform the competent tax authorities and the District Attorney's Office by operation of law, so that the latter may request the declaration of commercial insolvency. The tax authorities can only proceed to request the commercial insolvency of a Merchant in their status as creditors.

Notwithstanding the right of creditors to request the commercial insolvency of a Merchant, it is important to point out that if any creditor requests the commercial insolvency of a Merchant and the Judge decides that it is inadmissible, such creditor will be bound to pay the ensuing court costs and expenses, including the fees and expenses of the Visitor.

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[1] Direct injunction 236/2002. Deportiva San Angel, S.A. de C.V. et al . July 3, 2002. Unanimity of Votes.

[2] Commercial Insolvency, in bankruptcy stage, of Gruppo Covarra, S.A. de C.V. and others. Fourth District Court of the State of Morelos.

2.7 Voluntary Dismissal. The Merchant who has petitioned that it be declared commercially insolvent or, if applicable, the creditors who have petitioned such declaration, may voluntarily dismiss their petition or request such dismissal, so long as the explicit consent therefor of all of them exists. The Merchant or the creditors filing the petition will pay all the expenses of the process, including the fees of the Visitor and, where applicable, of the Conciliator.

2.8 Participation of the Creditors in this Stage. If the Merchant requests commercial insolvency, the verification procedure indicated further on, and the ruling by the Judge, if applicable, of the state of commercial insolvency of such Merchant, will be carried out without notification to and, consequently, without any involvement of the creditors. If, to the contrary, it is the creditors or the District Attorney's Office who request commercial insolvency, the Merchant, before the verification visit referred to below is practiced, will be entitled to reply to the respective petition and to offer the evidence permitted by law, for the purpose of challenging the statements made by the creditors and/or the District Attorney's Office in the respective petition.

In this regard, the Supreme Court of Justice of the Nation has passed a ruling to the effect that the lack of legal standing to appeal the ruling that declares a Merchant commercially insolvent or not, when the creditors are not whom request the insolvency of the Merchant, does not infringe on the right to due process of law under Article 14 of the Constitution of the United Mexican States, given that the effects of this ruling do not deprive the creditors of their credit rights [3].

2.9 Verification Visit. For the purposes of determining whether the Merchant is in the requisite premises to be declared commercially insolvent, the Judge will ask the IFECOM to appoint a Visitor, who shall perform a visit on the Merchant. The Visitor, and his assistants, will have access to the books, accounting records, and financial statements of the Merchant, as well as to any other document or electronic means of data storage that contain the financial and accounting position of the Merchant and which are related to the purpose of the visit. Furthermore, the Visitor, and his assistants, may directly examine and inspect goods, merchandise and transactions, and hold interviews with the directors, management, and administrative staff of the Merchant, including its external financial, accounting and legal advisors.

The Merchant and his staff will be bound to cooperate with the Visitor and his assistants. In the case of failing to cooperate, thus hindering the inspection, or failing to provide the Visitor and his assistants with the necessary information for their opinion, at the request of the Visitor, the Judge may impose the coercive measures deemed pertinent, including declaring the Merchant commercially insolvent without the need to complete the verification visit.

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[3] Injunction in review 797/2003. Banca Quadrum, S.A., Institución de Banca Múltiple. May 26, 2004. Unanimity by 4 votes.

The Visitor may ask the Judge during the visit to adopt, alter, or lift prejudgment measures for the purposes of protecting the Estate[4] and the rights of the creditors. The determination of the application of the coercive or prejudgment measures will be left to the discretion of the Judge, who may also adopt them by operation of law. In any case, the prejudgment measures that are issued will be in force until the date on which the admissibility of the commercial insolvency is declared or declined.

These coercive or prejudgment measures consist of the following: (i) the prohibition to make payments of obligations due prior to the date of admittance of the petition of commercial insolvency; (ii) the suspension of any enforcement procedure against the assets and rights of the Merchant; (iii) the prohibition of the Merchant to perform sales or transfers or encumbrances of the principal assets of its enterprise; (iv) the attachment of property; (v) judicial administration; (vi) the prohibition to perform transfers of funds or securities in favor of third parties; (vii) the placing of a house arrest order on the Merchant, for the sole purpose of not allowing it to leave its place of residence without leaving an attorney-in-fact with sufficient instructions and funds; and (viii) any others of a similar nature.

2.10 Visitor's Opinion. The Visitor must submit a well-founded and circumstantiated opinion to the Judge within a term of (15) fifteen calendar days next following the date on which the visit began (such term being extendable for justified cause for an additional period of fifteen 15 calendar days), taking into account the statements contained in the insolvency petition and, where applicable, in the reply, and attaching the verification visit record thereof.

The Merchant, as well as the creditors and the District Attorney's Office (in these last two cases, when the insolvency petition has been filed by the creditors or the District Attorney's Office), will have a term of ten (10) business days in which to submit their allegations in writing regarding the Visitor's opinion.

2.11 Commercial Insolvency Ruling; Notification and Publication. Based on the facts stated in the petition, the evidence offered, the allegations of the parties and the Visitor's opinion, the Judge will determine whether the Merchant is declared commercially insolvent by means of a ruling issued to this effect (the "Commercial Insolvency Ruling"). The Commercial Insolvency Ruling will contain, inter alia, a list of the creditors that the Visitor identified in the books of the Merchant, indicating the amount owed to each of them, without thereby however exhausting the credit acknowledgement, ranking and priority of payment procedure analyzed further on.

4 The CIL defines the Estate as "that part of the Estate of the Merchant who shall be declared in commercial insolvency, which is composed of its assets and rights, with the exception of those that are expressly excluded in terms of this Law, over which the Acknowledged Creditors, and those others having specific rights may enforce their credits."

On the day after the passing of the Commercial Insolvency Ruling, the Judge should personally notify it to the Merchant, the IFECOM, the Visitor, the creditors whose domiciles are known, and to the competent tax authorities, by certified mail or by any other means established in the governing laws. The District Attorney's Office will be notified by official communication. The union representative and, in his absence, the office of the Workers' Rights Protection Agency should be also notified by official communication.

Within the five (5) days next following the appointment, the Conciliator will proceed to request the entry of the Commercial Insolvency Ruling in the Public Registry of Commerce corresponding to the domicile of the Merchant and in any other place where it has an agency or branch or property subject to entry in any public registry, and will publish an extract thereof on two consecutive occasions, in the Mexican Official Daily of the Federation and in one of the newspapers with greatest circulation in the locality where the proceeding is being processed.

2.12 Procedural Exceptions. This study does not attempt to analyze the different incidents, challenges, recourses and procedural rights granted by the CIL to the Merchant, to creditors and to the other parties involved in the commercial bankruptcy proceeding.

In this regard, we believe it is important to point out that, as a general rule, the CIL contemplates that the commercial insolvency proceeding should flow without being suspended as a result of challenges of a procedural nature. Consequently, for example, the CIL indicates that the declaration of a commercial insolvency proceeding will not be suspended due to the filing or processing of recourses against the rulings passed to this effect by the Judge. Notwithstanding the foregoing, a federal judge has in effect granted a temporary restraining order of a verification visit that delayed the procedure of commercial insolvency for several months, which order was later revoked by a resolution of a Collegiate Circuit Court.[5]

Additionally, the CIL contemplates that appeals may be admitted against the ruling that declares the commercial insolvency of a Merchant, without suspending the proceeding. The same rule applies in the case of appeals against the credit acknowledgement, ranking and priority of payment ruling, and in some cases against the ruling that declares a Merchant in bankruptcy.

[5] Injunctions 746/2001-I and 115/2002. Triturados Basálticos y Derivados, S.A. de C.V.. Second Civil and Administrative Unitary Court of the First Circuit.

3.- CONCILIATORY STAGE

During the conciliatory stage, the Conciliator has the mission of procuring that the Merchant and its acknowledged creditors reach an agreement (which in this study we have called the Reorganization Agreement) regarding the terms and conditions according to which the Merchant will pay the acknowledged credits. It is important to point out that this conciliatory stage will not occur if the Merchant requests to be declared in bankruptcy, either at the time of filing its commercial insolvency petition or at any time later.

In addition, during this conciliatory stage, the Conciliator should prepare the list of creditors of the Merchant, and determine the amount, order and level of preference of his credits.

Irrespective of the conciliatory efforts, and save for certain exceptional cases, during this conciliatory stage, the Merchant shall continue with the management of its company, but under the supervision of the Conciliator. During this stage, the Merchant will have certain benefits and rights that are conferred thereon by the CIL for the purpose of not causing further harm to its financial and economic position, and to allow it to reach the Reorganization Agreement under the best possible terms for all parties.

In this Chapter we will firstly examine the different effects resulting at the moment on which a Merchant is declared commercially insolvent, and then we will analyze the conciliation process between the Merchant and its creditors. Consequently, we will divide this Chapter into the following two titles: “Consequences of the Declaration of Commercial Insolvency for the Merchant, the Creditors and Third Parties”; and “Activities Aimed at Conciliation”

“Consequences of the Declaration of Commercial Insolvency for the Merchant, the Creditors and Third Parties”

3.1 Effects of the Declaration of Commercial Insolvency. The declaration of commercial insolvency of a Merchant, as well as the opening of the conciliatory stage, produces diverse effects, including the following:

(a) Suspension of Payments. Suspension of the payments of the debts contracted prior to the date on which the Commercial Insolvency Ruling enters into effect, except for those that are indispensable for the day-to-day operation of the company, regarding which the Merchant should in due time inform the Judge.

The CIL does not describe the treatment that should be given to debts contracted after the date of the Commercial Insolvency Ruling and which are also indispensable for the day-to-day running of the company, however, we consider that these may also be performed with timely notice to the Judge.

Notwithstanding the foregoing, the declaration of commercial insolvency will not be grounds for interrupting the payment of labor, tax, or social security obligations, which should continue to be paid in due course.

(b) Stay of Attachments and Foreclosures. From the moment the Commercial Insolvency Ruling is passed and until the end of the conciliatory stage, no attachment or foreclosure order may be executed against the assets and rights of the Merchant, except for those practiced to secure or pay, as applicable, accrued wages and labor compensation for the period of two (2) years prior to the date of declaration of commercial insolvency, which we have defined further on in this document as “Preferential Labor Credits”.

As of the Commercial Insolvency Ruling and until the conclusion of the term for the conciliatory stage, administrative enforcement proceedings of tax credits will be suspended. Notwithstanding the foregoing, the competent tax authorities may continue the necessary acts for the determination and securing of tax credits against the Merchant. We consider that the power given to the tax authorities to “secure” property after the declaration of commercial insolvency, violates the principles of fairness that should exist between creditors, and that any “securing” performed by the tax authorities to guarantee any credit, cannot give them any privilege over the “secured” asset.

(c) House Arrest. The Commercial Insolvency Ruling will produce the effects of ordering the Merchant not to leave the jurisdiction, and in the case of legal entities, the order will affect the individuals responsible for its management (for example, in the case of business corporations, the members of the Board of Directors), for the sole purpose of not allowing them to leave their place of residence without leaving an attorney-in-fact with sufficient instructions and funds. When the person subject to such order demonstrates he has complied with the foregoing, the Judge will lift the order.

(d) Property Separation. The assets in the possession of the Merchant that can be identified, and whose ownership has not been transferred thereto by any definitive and irrevocable legal means, may be separated by their legitimate owners.

In terms of the CIL, the following assets may be separated, as an example: (i) the real-estate sold to the Merchant, but not paid, when the purchase and sale has not been duly recorded in the corresponding public registry; (ii) the chattels purchased and payable in cash, if the Merchant has not paid the full price at the moment of the declaration of commercial insolvency; and (iii) the chattels or real-estate acquired on credit, if a breach of payment resolution clause has been recorded in the corresponding public registry.

The separation will be conditioned to the satisfaction of the separatist's obligations in respect of the relevant asset.

(e) Management. During the conciliatory stage and subject to the provisions below, the management of the company will correspond to the Merchant. Notwithstanding the foregoing, the Conciliator will supervise the books and all of the operations performed by the Merchant and will decide on the termination of pending contracts and will approve, with the prior opinion of the "Interventors" (persons appointed by creditors with oversight capacity), if any, the contracting of new credits, the establishment or substitution of guaranties and the sale of assets when these are not inherent to the day-to-day running of the Merchant's company.

Furthermore, when applicable to prevent the growth of the liability or deterioration of the Estate, the Conciliator, with the prior opinion of the Interventors, if any, may ask the Judge to order the closing of the company, which may be total or partial, temporary or definitive.

Evidently, the management of the Merchant's company during this conciliatory stage is significantly limited; the Conciliator is even authorized to call the governing bodies of the Merchant (for example, to call the Board of Directors) when he deems it necessary, to submit to them the affairs considered convenient for their consideration and, if applicable, approval.

In case that the Conciliator deems that it is in the best interest of the protection of the Estate, he may ask the Judge to remove the Merchant from the management of its company; provided that, if the removal is approved, the Conciliator will assume, in addition to his own inherent powers, the powers and obligations of management. In this case, and in the case of legal entities declared insolvent, the powers of the bodies that by law or according to the bylaws of the company, are competent to take decisions regarding the directors, administrators or managers, will be suspended.

(f) Proceedings. The actions filed and proceedings processed by the Merchant, and those filed and processed against it, which are pending when the Commercial Insolvency Ruling is passed, and which have a patrimonial content, will not be made cumulative to the commercial insolvency proceedings, but rather will be pursued separately by the Merchant under the supervision of the Conciliator.

(g) Treatment of Credits owed by the Merchant. Regarding credits owed by the Merchant, the general rule is that, as of the moment when the Commercial Insolvency Ruling is passed, these will be declared to have matured. To this effect, the following will apply to the date on which the Commercial Insolvency Ruling is passed:

(1) Credits in Mexican Pesos. The unpaid principal and financial accessories of credits in Mexican Pesos, without collateral, will cease to generate interest and will be converted into so called "UDIS"[6] or Investment Units (UDIs), and credits originally denominated in UDIs will cease to generate interest;

(2) Credits in Foreign Currency. The unpaid principal and financial accessories of credits in foreign currencies, without collateral, irrespective of the place originally agreed to for their payment, will cease to generate interest and will be converted into Mexican Pesos at the exchange rate set generally by the Central Bank of Mexico for the settlement of obligations denominated in a foreign currency payable in the Mexican Republic, provided that such amount will, in turn, be converted into UDIs in the terms of paragraph (1) above; and

(3) Credits with Collateral. Credits with collateral, irrespective of whether their payment has been originally agreed to in the Mexican Republic or abroad, will be maintained in the currency or unit in which they are denominated and will only generate the ordinary interest stipulated in the relevant contracts, for up to the value of the assets that secure them (regarding credits with collateral see exception in section 3.4 (c) of this study).

(4) Tax Credits. Tax credits will be subject to the stipulations of the foregoing paragraphs, as applicable, provided that such tax credits will continue to generate the actualizations, fines and accessories that correspond thereto pursuant to applicable provisions. However, in the event that the Reorganization Agreement is executed, the fines and accessories generated during the conciliatory stage will be cancelled.

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6 Payment obligations that can be settled in local currency, resulting from financial transactions and, in general, those resulting from commercial agreements or other commercial acts, can be denominated in an account unit, which are called Investment Units (also known as "UDIS"), and which value reflects the variations in the National Consumer Price Index. The value in Mexican Pesos in the Investment Units are published every day in the Official Daily of the Federation by the Central Bank of Mexico.

The objectives of converting all credits without collateral into UDIs are the following: firstly to prevent that the debts of the Merchant increase, except to reflect inflation, and secondly , to place all creditors without collateral under equal conditions, by not allowing their credits to accrue interest at different rates and under different conditions.

(h) Set-off. As of the date on which the Commercial Insolvency Ruling is passed, only the following may be set-off: (i) the rights in favor of and obligations against the Merchant under the same operation so long as the same have not been interrupted by virtue of the Commercial Insolvency Ruling; (ii) the rights in favor of and obligations against the Merchant that have become due and payable prior to the Commercial Insolvency Ruling and which set-off is provided for by law; (iii) the rights and obligations derived from repurchase (REPO), securities loan, futures and derivative transactions and similar operations; and (iv) tax credits in favor of and against the Merchant.

(i) Contracts and Obligations. With the exceptions established by the CIL, some of which we have analyzed in this study, the contracts entered into by the Merchant, and any other obligations assumed thereby, continue to be valid in their terms, except when the Conciliator challenges them for being in the best interests of the Estate. Anyone who contracted with the Merchant, will be entitled to request that the Conciliator state whether he opposes the performance of the relevant contract, and if the Conciliator states that he will not oppose it, the Merchant will have to perform or guarantee its performance, and if the Conciliator reports that he will oppose it, or does not give a reply within a term of twenty (20) days, the party contracting with the Merchant may at any time terminate the contract, by notice to the Conciliator.

(j) Repurchase (REPO), Securities Loan, Futures and Derivatives Transactions. The declaration of commercial insolvency will lead to the early termination of repurchase or REPO, securities loan, futures and derivatives and similar transactions; provided that (i) the debts and credits resulting from these transactions should be set-off, (ii) the outstanding balance that may result from the set-off against the Merchant, may be claimed by the corresponding counterpart by means of the acknowledgement of credits procedure, and (iii) in the case of a balance in favor of the Merchant, the counterpart will be bound to pay it to the Conciliator for the benefit of the Estate, within a term not exceeding thirty (30) calendar days, computed from the date of the declaration of commercial insolvency.

(k) Lump Sum Work Contracts. Lump sum work contracts will be deemed terminated by the declaration of commercial insolvency of one of the parties,

unless the Merchant, with the authorization of the Conciliator, agrees to the performance of the contract with the other contracting party.

(l) Partnerships. The declaration of commercial insolvency of a partner in a collective or limited liability partnership, or of the general partner in a simple or equity shares arrangement, will entitle the commercially insolvent partner to request its liquidation according to the last corporate balance sheet, or to continue in the partnership, if the Conciliator gives his consent, so long as the other partners do not prefer to exercise the right of partial liquidation of the partnership, except when provided otherwise in the bylaws.

3.2 Acts in Fraud of Creditors.

(a) Date of Retroaction. The CIL refers to a concept called "date of retroaction", (also known in English as the "suspicious period") for the purpose of defining a period of time, prior to the declaration of commercial insolvency, which may be subject to examination to determine if during such period acts were performed that are, or are presumed to be, acts in fraud of creditors. As a general rule, the date of retroaction will be the two hundred and seventy (270) calendar day prior to the date of the Commercial Insolvency Ruling; however, the Judge, at the request of the Conciliator, of the Interventors or of any creditor, may establish a prior date as the date of retroaction.

(b) Absolute Acts in Fraud of Creditors. Irrespective of the date on which they have been performed (except for the general commercial rule that sets the statute of limitations at ten (10) years), acts in fraud of creditors are those that meet the following requirements: (i) that they were performed prior to the declaration of commercial insolvency, (ii) that through them the creditors were knowingly defrauded, and (iii) that the third party involved in the act was aware of the fraud, provided that, the latter requirement will not be necessary in respect of acts of a gratuitous nature.

(c) Specific Relationship in Acts in Fraud of Creditors. In addition to the provisions of paragraph (b) above, the following are acts in fraud of creditors, so long as they have been performed after the date of retroaction: (i) gratuitous acts; (ii) the acts and sales in which the Merchant pays a price with a clearly higher value or receives a price with a clearly lower value to the considerations offered by its counterpart; (iii) transactions performed by the Merchant in which conditions or terms are established that are significantly different to the prevailing conditions of the market in which they have been performed, on the date of their performance, or from commercial practices and uses; (iv) debt remittances made by the Merchant; (v)

payments of unmatured obligations made by the Merchant; and (vi) the discounting made by the Merchant of its own effects, after the date of retroaction, will all be considered as an advance payment.

As explained, in contrast to the acts mentioned in paragraph (d) below, none of these acts admit the possibility that the interested party can prove its good faith. The foregoing is because the CIL deems that the performance of any of these acts inherently includes the bad faith of the person performing it, both of the Merchant and that of the other parties involved therein.

(d) Presumption of Acts in Fraud of Creditors. The following acts of fraud will be presumed to have been committed against creditors if they are performed, after the date of retroaction, except when the interested party proves its good faith: (i) the granting of guaranties or an increase in existing ones, when the original obligation did not contemplate such guaranty or increase, and (ii) the payment of debts made in kind, when not originally stipulated, or when the agreed price was specified in cash.

Furthermore, in case that the Merchant is a legal entity, the CIL contemplates several other presumptions of acts in fraud of creditors, regarding acts performed by the Merchant as of the date of retroaction with related parties, as in the case of directors, administrators, board members or majority shareholders of the Merchant.

(e) Voidance of Acts in Fraud of Creditors. If it is resolved that an act was performed defrauding creditors, it will be void in respect of the Estate. Notwithstanding the foregoing, if the respective third party were to return what it received from the Merchant, including its proceeds or interest having regard for the time during which it enjoyed the asset or money, the acknowledgement of its credit may be requested.

(f) Third Party Liability. Anyone who in bad faith acquires assets defrauding creditors will be liable to the Estate for the damages and losses caused to it, when the asset has been transferred to a good faith purchaser or has been lost. The same liability falls on anyone who, to evade the effects of the voidance that would cause the defrauding of creditors, has destroyed or hidden the assets relevant thereto.

3.3 Acknowledgement of Credits.

(a) Provisional List. During the conciliatory stage, the Conciliator has the obligation to present a provisional list of credits of the Merchant (the “Provisional List”) to the Judge, which will be prepared taking into account, inter alia, the accounts of the Merchant, the information that the Merchant and its staff provide, the information taken from the Visitor’s opinion and from the requests for acknowledgement of credits filed up to the preparation date of such list. The Conciliator will include those credits that can be determined based on the aforementioned information in the Provisional List, with the quantity, ranking and priority of payment corresponding thereto in accordance with the CIL, even if creditors have not requested the acknowledgement of their credits.

The Conciliator should include in the Provisional List all tax credits notified to the Merchant by the tax authorities, with the indication, where applicable, that such authorities may continue with the corresponding verification procedures. The Conciliator should also include labor credits in the Provisional List.

(b) Requests for Acknowledgement of Credits. Irrespective of the provisions of paragraph (a) above, the creditors may request the acknowledgement of their credits at any of the following times in the proceeding: (i) within twenty (20) calendar days following the date of the last publication of the Commercial Insolvency Ruling; (ii) within the term for filing objections to the Provisional List, that is within five (5) calendar days following the date on which the Judge makes the Provisional List available to the Merchant and creditors according to the commercial insolvency proceeding; and (iii) within the term for filing the appeal to the credit acknowledgement, ranking and priority of payment ruling, that is within nine (9) days following the date on which such ruling enters into effect.

As explained before, if the Conciliator includes the credit of any creditor on the Provisional List, it is not strictly necessary, although it is recommended in order to have standing to act in the commercial insolvency procedure, for such creditor to request the acknowledgement thereof.

The CIL states that, once the period referred to in paragraph (iii) above has elapsed, it is no longer possible to claim the acknowledgement of any credit.

Notwithstanding the foregoing, the CIL establishes that the amount of tax credits may be determined at any time pursuant to applicable provisions. Consequently, this can be construed in the sense that the aforementioned term is not applicable to tax credits.

(c) Credit Acknowledgement, Ranking and Priority of Payment Ruling. After hearing the objections that may be made in writing by the Merchant and the creditors regarding the Provisional List, the Conciliator will prepare and submit the final credit acknowledgement list to the Judge, so that the Judge, taking into account the final list submitted by the Conciliator, as well as all of the documents attached thereto, may issue the Credit Acknowledgement, Ranking and Priority of Payment Ruling.

In accordance with the provisions of the CIL, for the purposes of this document the term "Acknowledged Creditors" will mean those creditors whose credits are acknowledged in the Credit Acknowledgement, Ranking, and Priority of Payment Ruling.

3.4 Credit Ranking and Priority of Payment. The Acknowledged Creditors are classified into ranks, according to the nature of their credits and the CIL contemplates that the payment of these credits is made based on their level of preference. Hereinbelow we explain the order that should be followed for the payment of the Merchant's credits, based on their ranking and certain preferences indicated in the CIL, provided that, no payment may be made of a credit of one rank without previously having liquidated those from the previous ranks, according to the priority established for them:

(a) Creditors or Credits against the Estate. The following are credits against the Estate and will be paid in the order indicated below: (i) accrued wages and labor compensation for the period of two (2) years prior to the date of declaration of commercial insolvency (the "Preferential Labor Credits"); (ii) those contracted for the management of the Estate by the Merchant with the authorization of the Conciliator or Receiver or, where applicable, those contracted by the Conciliator; (iii) those contracted to cover ordinary expenses for the security of the assets of the Estate, its replacement, conservation and administration; (iv) those originating from in or out-of-court procedures for the benefit of the Estate; and (v) the fees of the Visitor, Conciliator and Receiver and the expenses incurred thereby, so long as they were strictly necessary for the performance of their duties and have been duly verified pursuant to the provisions issued by the IFECOM.

The credits against the Estate will have preference over all other credits, however, with regard to credits with collateral or special privilege, only the following credits against the Estate will have preference: (i) the Preferential Labor Credits; (ii) legal fees incurred for the defense or recovery of property subject to guaranty or on which the privilege falls; and (iii) the necessary expenses for the replacement, conservation and sale of such property subject to guaranty or on which the privilege falls.

If the value of the entire Estate that is not subject to a lien is insufficient to pay the full amount of the Preferential Labor Credits, then the guaranteed creditors will contribute, with the amount obtained from the sale of their guaranties, to the payment of the Preferential Labor Credits. This contribution will be made by each secured creditor based on the percentage that the value of his asset subject to a lien represents compared to the value of the other assets subject to a lien.

Evidently, except for the Preferential Labor Credits, the credits against the Estate are assumed after the declaration of commercial insolvency and, from our point of view, the special preference given to them by the CIL, is for the purpose of ensuring that the persons that have credits against the Estate, who contract with the Merchant as of such date, will have preference of payment. This preference will also necessarily allow better conditions for reaching the Reorganization Agreement, by providing facilities for the continuation of the operation of the Merchant's company and the conservation of its assets.

(b) Singularly Privileged Creditors or Credits. These are those indicated as follows, and the following order of preference will be followed among them: (i) the funeral expenses of the Merchant, in case that the commercial insolvency ruling is after his death; and (ii) the creditors for the expenses of the illness that has caused the death of the Merchant in case that the commercial insolvency ruling is after his death.

Clearly, these creditors will only exist to the extent that the Merchant is an individual.

If the value of all of the assets of the Estate that is not subject to a lien is insufficient to pay the singularly privileged credits, then, the guaranteed creditors will contribute, with the amount obtained from the sale of their guaranties, to the payment of such singularly privileged credits. This contribution will be made by each guaranteed creditor based on the percentage that the value of his asset subject to a lien represents compared to the value of the other assets subject to a lien.

If the funds are insufficient to pay the credits of the Singularly Privileged Creditors, the guaranteed creditors will contribute to the payment of these credits based on the percentage represented by the value of the asset subject to guaranty compared to the value of the other assets subject to a lien.

(c) Creditors or Credits with Collateral. The following are creditors with collateral, so long as their guaranties are duly established pursuant to applicable provisions: (i) mortgages; and (ii) those provided with a pledge.

Creditors with collateral will receive the payment of their credits from the proceeds of the assets subject to their liens, with the absolute exclusion of the other creditors, except for the aforementioned exceptions for credits against the Estate and singularly privileged credits; provided that, if two or more creditors share the same guaranty, the order of payment of their credits will be determined based on applicable provisions regarding the registration date of the respective guaranty.

When a creditor with collateral considers that the value of its guaranty is less than the principal amount and accessories of its credit on the date of declaration of commercial insolvency, he may ask the Judge to consider him as a creditor with collateral for the value that the creditor attributes to his lien, and as a common creditor for the balance. The value that the creditor attributes to his lien will be converted into UDIs at its value on the date of declaration of commercial insolvency, notwithstanding the fact that, as explained before, credits with collateral are not converted into UDIs. In this case, the creditor must explicitly waive any surplus between the price obtained after enforcing the guaranty and the value it attributed thereto in favor of the Estate, considering the value of UDIs to the date on which the enforcement takes place.

If any creditor with collateral does not make the aforementioned request, we believe that, if the proceeds obtained from the sale of his guaranty are insufficient to cover his credit, then the unpaid balance should be treated as a common credit.

(d) Tax and Labor Creditors or Credits. Labor credits, other than Preferential Labor Credits, and tax credits, will be paid once the credits against the Estate, the singularly privileged credits and the credits with collateral have been paid, but before credits with special privileges and common credits.

In case that the tax credits have collateral, for the effects of their payment the provisions of paragraph (c) above will be observed for up to the amount of their guaranty value, and any balance will be paid in terms of this paragraph (d).

(e) Creditors or Credits with Special Privileges. Creditors with special privileges are all those that, according to the Commercial Code or by operation of law, have a special privilege or a right of withholding. For example, in terms of the Federal Civil Code, the builder of any movable work is entitled to withhold it until it is paid, and its credit will be preferably paid with the price of such asset.

(f) Common Creditors or Credits. Common creditors are all those that are not considered in the foregoing paragraphs and their common credits will be paid ratably without distinction of the dates of their credits.

3.5 Assignment of Credits. The Acknowledged Creditors are authorized to assign their credits; however, both the assignor-creditor and the assignee acquiring the credit, should notify the respective transfer to the Conciliator, and the Conciliator will make the notification public as follows: (i) if the assignment is performed before the Conciliator has prepared the Provisional List, such assignment will be reported by inserting the relevant data in such Provisional List; and (ii) in all other cases, by means of the court, or the appeals court, if applicable, according to the provisions issued to this effect by the IFECOM.

In our experience, credit assignments can potentially generate the obligation to pay taxes in Mexico, so it is advisable to make a prior analysis in each case, in respect of the fiscal impact that could result from such transactions.

3.6 Interventors. The CIL contemplates the possibility, but not the strict necessity, that any creditor or group of creditors who represent at least ten percent (10%) of the amount of the credits against the Merchant, pursuant to the Provisional List of credits, may ask the Judge to name a Interventor, whose fees will be paid by the person or persons making such request. The Interventor does not have to be a creditor. In general terms, if appointed, the Interventor will represent the interests of the creditors who appointed him or her in all stages of the insolvency proceeding.

3.7 Reorganization Agreement. As explained above, the conciliatory stage has as one of its main purposes to procure that the Merchant and its Acknowledged Creditors reach an agreement regarding the terms and conditions according to which the Merchant will pay its debts (for the purposes of this document, such agreement has been defined as the “Reorganization Agreement”).

Hereinbelow we summarize the most important rules applicable to the Reorganization Agreement:

(a) Term for Execution of the Reorganization Agreement. The initial term that the parties have to accomplish the Reorganization Agreement is one hundred and eighty (180) calendar days. This term may be extended for an additional ninety (90) calendar days, if the Conciliator or the Acknowledged Creditors who represent at least two thirds of the total amount of the acknowledged credits, request it from the Judge, if they believe that the execution of the agreement is eminent. Additionally, the Merchant and ninety percent (90%) of the Acknowledged Creditors may ask the Judge for another additional extension of up to ninety (90) days.

Notwithstanding that the CIL establishes that under no circumstance may the term of the conciliatory stage and its extensions exceed three hundred and sixty-five (365) days, we have observed in various commercial insolvency procedures that the relevant Judges, by motions filed by the Merchants or Conciliators with dilatory objectives, have in fact extended the term that is stipulated by the CIL.[7] Although it is true that the intention of the Judges and his auxiliary bodies may seem justified, we are concerned that this practice may become a matter of generalized abused by Merchants, thus affecting the creditors, and resulting in the same flaws as those of the previous Law Governing Suspension of Payments and Bankruptcy.

(b) Labor and Tax Agreements prior to the execution of the Reorganization Agreement. The Merchant may enter into agreements with his employees so long as they do not increase the extent of the Merchant's existing obligations, or request reductions or authorizations from the tax authorities in the terms of applicable law. The terms of the agreements with his employees and of the resolutions of authorizations or reductions regarding the payment of tax obligations, should be included in the Reorganization Agreement.

(c) Invalid Agreements. Except for the labor and tax agreements entered into by the Merchant as described above, any individual agreements between the Merchant and any of its creditors performed after the declaration of commercial insolvency will be invalid; and furthermore, the creditor that enters into any such agreement will lose its rights in the commercial insolvency.

(d) Capital Increases. In case that the proposed Reorganization Agreement includes a capital increase, the Conciliator should report it to the Judge in order for him or her to notify it to the partners so that they may exercise their right of first refusal within the fifteen (15) calendar days next following their notification. If this right is not exercised during the indicated term, the Judge may otherwise authorize the increase in the capital stock in the terms of the Reorganization Agreement proposed by the Conciliator.

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7 Commercial insolvency, actually in bankruptcy stage, of Gruppo Covarra, S.A. de C.V. and others. Fourth District Court of the State of Morelos. Commercial insolvency of Triturados Basalticos y Derivados, S.A. de C.V. and commercial insolvency of Grupo Tribasa, S.A. de C.V.. First Civil District Court of the Federal District. Commercial insolvency of Refa Mexicana, S.A. de C.V.. Fifth District Court in the Estate of Puebla.

As indicated below, the Reorganization Agreement must be approved by the Merchant. Consequently, all the decisions that are adopted by the Merchant may be controlled at the end by the holders of the majority of the capital stock, so we consider that in order to force a capital increase in the foregoing terms, the approval of at least the partners or shareholders who represent the majority of the capital stock of the Merchant will be required (if the decision to request insolvency is subject to the authority of such body, either by law or according to the bylaws) or of the majority of the members of the managing body (if such decision corresponds thereto by law or according to the bylaws).

(e) Payment of Credits with Privileges. The CIL indicates that the Reorganization Agreement should take into account the payment of credits against the Estate, the singularly privileged credits, and credits with collateral and special privilege that have not executed such Reorganization Agreement.

(f) Execution Quorum for the Validity of the Reorganization Agreement. Article 157 of the CIL governing this subject, indicates that in order for the Reorganization Agreement to be valid, it must be executed by the Merchant and Acknowledged Creditors who represent more than fifty percent (50%) of the sum of: (i) the amount acknowledged payable to all of the common Acknowledged Creditors; and (ii) the amount payable to those Acknowledged Creditors with collateral or a special privilege who execute the Reorganization Agreement. Note that, for purposes of the respective computation, all the common Acknowledged Creditors are computed (irrespective of whether they have signed the Reorganization Agreement or not) and conversely only the Acknowledged Creditors with collateral or special privilege who sign the Reorganization Agreement, are computed.

Consequently this article is unclear; however, we construe that, in order to determine how many Acknowledged Creditors should sign the Reorganization Agreement in order for it to be valid, the following procedure should be followed: (i) firstly, the amount acknowledged to all of the common Acknowledged Creditors should be added together with the amount acknowledged to those Acknowledged Creditors with collateral or special privilege who decide to sign the Reorganization Agreement (the “Minimum Amount”), and (ii) then it should be determined whether the amount of the credits of the common Acknowledged Creditors and those of the Acknowledged Creditors with collateral or special privileges who decide to sign the Reorganization Agreement, represent more than fifty percent (50%) of the Minimum Amount.

Therefore, for example, if the amount acknowledged in respect of all of the common Acknowledged Creditors is $1,000.00 Pesos and the amount acknowledged

in respect of those Acknowledged Creditors with collateral or special privileges who decide to sign the Reorganization Agreement is $2,000.00 Pesos (i.e., in this case the Minimum Amount would be $3,000.00 Pesos), then, in order for the Reorganization Agreement to be valid, it must be signed by common Acknowledged Creditors and Acknowledged Creditors with collateral or special privileges whose acknowledged credits equal at least $1,501.00 Pesos.

Clearly, the participation of the Acknowledged Creditors with collateral or special privileges may help to raise the required majority; however, we should underline the fact that it is not strictly necessary for the Acknowledged Creditors with collateral or special privileges to sign the Reorganization Agreement in order for it to be valid. The foregoing is because under Article 157 of the CIL, if the Reorganization Agreement is only executed by the common Acknowledged Creditors, it must be signed by common Acknowledged Creditors who represent more than fifty percent (50%) of the amount acknowledged to all of the common Acknowledged Creditors. In other words, in our example, common Acknowledged Creditors whose acknowledged credits reach a sum of at least $501.00 Pesos.

If the Reorganization Agreement is approved in the above terms and the requisites set forth in the paragraph (j) are fulfilled, it will be compulsory for all the common Acknowledged Creditors, whether they execute it or not , and will also be obligatory in respect of the Acknowledged Creditors with collateral or special privilege that execute such agreement, but it will not be obligatory in respect of the Acknowledged Creditors holding collateral or special privileges that do not execute the Agreement.

Finally, regarding this subject, it is fundamental to underscore that for the execution of the Reorganization Agreement, the Acknowledged Creditors do not have to meet in order to vote. Consequently, the Conciliator may obtain the consent of each Acknowledged Creditor individually, until the requisite quorum referred to in this section is achieved.

(g) Execution of the Reorganization Agreement by Creditors with Collateral or Special Privileges. The execution of the Reorganization Agreement by the Acknowledged Creditors with collateral or special privileges, does not imply the waiving of their guaranties or privileges, and therefore they will continue to be secured by their guaranties in terms of such Reorganization Agreement.

(h) Labor and Tax Creditors. The creditors of the Preferential Labor Credits do not have to sign the Reorganization Agreement, but those labor creditors

who do not qualify as Preferential Labor Credits, are incumbent to sign the Reorganization Agreement. Nor should the Reorganization Agreement be signed by creditors of tax credits. Notwithstanding the foregoing, the Reorganization Agreement should provide for the payment of labor creditors (both Preferential Labor Credits and others) and of tax creditors in terms of applicable legal provisions, subject in any case to the agreements reached with such creditors in accordance with paragraph (b) above.

(i) Tacit Approval of the Reorganization Agreement by the Common Creditors. The CIL indicates that the Reorganization Agreement will be deemed to have been signed by all the common Acknowledged Creditors, without any challenge thereto being admitted, when the Reorganization Agreement provides for all of the following: (i) the payment of their credits (including some accessories), converted into UDIs at their value on the date of the Commercial Insolvency Ruling, within thirty (30) business days following the approval of the Reorganization Agreement by the Judge; and (ii) the payment, on the dates, for the amounts and in the agreed denomination, of the obligations that, pursuant to the respective contract, are enforceable after approval of the Reorganization Agreement.

In case the Reorganization Agreement contemplates the foregoing provisions, strictly speaking it only requires to be authorized by the Merchant.

(j) Stipulations of the Reorganization Agreement regarding the Common Acknowledged Creditors who do not sign it. The Reorganization Agreement may only stipulate in favor of the common Acknowledged Creditors who do not sign it: (i) a delay in payment, with the capitalization of ordinary interest, with a maximum duration equal to the shortest term assumed by the common Acknowledged Creditors who do sign the Reorganization Agreement and who represent at least thirty percent (30%) of the acknowledged amount corresponding to such ranking; (ii) a reduction of the unpaid principal and accrued interest of their credits, equal to the lowest amount assumed by the common Acknowledged Creditors who do sign the agreement and who represent at least thirty percent (30%) of the acknowledged amount corresponding to such ranking, or (iii) a combination of reduction and delay, so long as the terms are identical to those accepted by at least thirty percent (30%) of the amount acknowledged to the common Acknowledged Creditors who do sign the Reorganization Agreement.

(k) Rights of the Acknowledged Creditors with Collateral who do not sign the Reorganization Agreement. The Acknowledged Creditors with collateral who have not taken part in the Reorganization Agreement, may initiate or continue

with the enforcement of their guaranties, unless the Reorganization Agreement contemplates the payment of their credits in terms of paragraph (i) above, or the payment of the value of their guaranties. In the latter case, any deficit between the amount of their acknowledged debt and the value of their guaranty, will be considered as a common credit.

(l) Currency. Notwithstanding the fact that, the credits, except for those with collateral, are convertible into UDIs on the date of the declaration of commercial insolvency, the Reorganization Agreement may stipulate that the credits remain denominated in the currency, unit of value or denomination in which they were originally established.

(m) Right of Veto of the Common Acknowledged Creditors. The Reorganization Agreement may be vetoed by a simple majority of Common Acknowledged Creditors, or by any number thereof, whose acknowledged credits jointly represent at least fifty percent (50%) of the total amount of the credits acknowledged in respect of such Creditors.

Notwithstanding the foregoing, the veto may not be exercised by those Common Acknowledged Creditors who have not signed the Reorganization Agreement, if it contains the provisions for payment of their credits in terms described in paragraph (i) above.

(n) Final Approval of the Judge. If the Reorganization Agreement meets the requirements indicated in the CIL, it will be approved by the Judge by issuing the respective ruling, and will bind the Merchant, all the Common Acknowledged Creditors, the Acknowledged Creditors with collateral or special privileges who have signed it, and the Acknowledged Creditors with collateral or special privileges for whom the Reorganization Agreement has provided for the payment of their credits in terms described in paragraph (i) above.

(o) Termination of the Commercial Insolvency. The ruling approving the Reorganization Agreement terminates the commercial insolvency and the Conciliator and the Interventors, if any, will cease to perform their functions.

4.- STAGE OF BANKRUPTCY

As above mentioned, if during the conciliatory period the Merchant is unable to execute the Reorganization Agreement with the requisite percentage of Acknowledged Creditors indicated in the CIL, the Merchant will be declared in bankruptcy. In this Chapter we will analyze the different cases in which a Merchant is declared in bankruptcy, the effects that this has on the Merchant's business, the procedure for the sale of his assets and the rights of the Acknowledged Creditors regarding the patrimony of the Merchant.

4.1 Cases of Bankruptcy. The Merchant subject to a commercial insolvency proceeding will be declared in a state of bankruptcy in the following cases:

(a) When the Merchant so requests it at any time, provided that, if the request is made in the petition filed by the Merchant to be declared commercially insolvent, the declaration of bankruptcy will only proceed if the premises indicated in Chapter 2 of this study are satisfied;

(b) When the term for the conciliation and its extensions, if granted, elapses without the Reorganization Agreement having been submitted for the approval of the Judge, in terms provided for in the CIL; or

(c) When the Conciliator requests the declaration of bankruptcy, and the Judge grants it, based on lack of willingness of the Acknowledged Creditors to sign the Reorganization Agreement or the impossibility to do so.

4.2 Bankruptcy Ruling; Notification and Publication. The declaration of bankruptcy of a Merchant will be resolved by a ruling passed to this effect by the Judge (the "Bankruptcy Ruling") that will be notified to the IFECOM in order for it to proceed to appoint the person of the Receiver. Within five (5) days following his appointment, the Receiver will proceed to request the entry of the Bankruptcy Ruling at the Public Registry of Commerce corresponding to the domicile of the Merchant and in all those places where it has an agency, branch or property subject to entry in any public registry, and will publish an extract thereof on two consecutive occasions, in the Mexican Official Daily of the Federation and in one of the newspapers with greatest circulation in the locality where the proceeding is being processed.

4.3 Effects of the Declaration of Bankruptcy. The declaration of bankruptcy of a Merchant produces sundry effects, including those indicated below, provided that, as a general rule, the effects of the declaration of commercial insolvency that we have analyzed in Chapter 3 of this study, also apply to the stage of bankruptcy.

(a) Management. The declaration of bankruptcy will imply the full removal, without the need for any additional court order, of the Merchant in the management of his business, who will then be substituted by the Receiver. For the performance of his functions, the Receiver will have the most extensive powers permitted by law.

The Receiver, in the performance of the management of the Merchant's business, should always act as a diligent administrator as if it were his own business, and will be liable for the losses or damages suffered by the business as a result of his fault or negligence.

(b) Taking of Possession. As of his appointment, the Receiver will commence the procedures necessary to occupy the management of the Merchant's business, taking possession of the assets and rights that form the Estate (including cash on hand) and shall further immediately adopt the measures necessary for its safety and conservation.

The Merchant, his directors, managers and agents will be bound by law to surrender the possession and administration of the assets and rights that form the Estate to the Receiver. Additionally, those persons who hold assets of the Merchant in their possession, except for those that are attached as a result of enforcement of a ruling for the performance of obligations prior to the commercial insolvency, should also surrender such assets to the Receiver.

Within a term of sixty (60) days as from the date on which the Receiver takes possession of the Merchant's business, he should submit to the Judge: (i) an opinion on the state of the Merchant's books; (ii) an inventory of the Merchant's business; and (iii) a balance sheet as of the date on which he shall have assumed the management of the business.

(c) Debtors of the Merchant. As of the declaration of bankruptcy, the debtors of the Merchant will be prohibited from making payments to or surrendering assets to the Merchant thereto without the authorization of the Receiver. Payments made to the Merchant following the declaration of bankruptcy, knowing that the Merchant has been declared in bankruptcy, will not be considered as valid payments. If the payment is made after the last publication of the declaration of bankruptcy in the Mexican Official Daily of the Federation, or if the person making such payment had appeared in the court file of the commercial insolvency, it will be presumed, without admitting any evidence to the contrary, that the payment was made with knowledge of the declaration of bankruptcy.

(d) Sale of Merchandise. During the time that the Receiver performs the operation of the Merchant's business, the sales of merchandise or services related to the line of business of the Merchant will be carried out according to the ordinary course of its business.

(e) Invalidity of Acts. Any acts that the Merchant and its representatives perform, without the written authorization of the Receiver, as of the declaration of bankruptcy, will be invalid.

(f) Obligations of the Merchant. Whenever required by the Receiver, the Merchant must appear before him or her. Taking into account the nature of the information needed by the Receiver, it may require the Merchant to appear in person and not by means of an attorney-in-fact, or indications will be given thereto about which of its directors, managers, employees or agents should appear. For the exercise of the power referred to in this paragraph, the Receiver may request the aid of the Judge, who will pass the coercive measures he deems suitable, that could include the application of fines and warrants of arrest for up to thirty-six hours.

4.4 Sale of Assets. Once the bankruptcy has been declared, the Receiver will proceed to sell the property and rights that form the Estate, procuring to obtain the greatest possible return from their sale. Hereinbelow we explain the principal terms and conditions under which the assets and rights of the Merchant should be sold.

(*a) Sale of the Manufacturing Unit.* The Receiver may sell all of the assets and rights of the Estate as a Business Unit, when he considers that the product of the sale will be maximized in this way and the business will remain as a going concern. If the sale provides for the adjudication of the Merchant's business as a going concern, or for parts thereof that consist of individual business units, the Receiver should notify third parties who have contracts pending performance, related to the business or to the unit subject to sale, advising them that they have a term of ten (10) calendar days, as from the date of the notice, in which to state in writing to the Receiver their desire to terminate their respective contracts. Regarding the contracting parties who are not opposed, their contracts will continue with the successful bidder.

(b) Public Auction. The sale of property should be performed by means of a public auction procedure, except in the exceptional cases indicated further on in this study.

(c) Publication and Contents of the Invitation. The public auctions will be held following an invitation published in one of the newspapers having greatest circulation in the locality where the commercial insolvency proceeding has been brought, on two occasions, separated by a term of three (3) days. Additionally, within three (3) days following the last publication, the Receiver will deliver a copy of the newspapers to the Judge and another copy to the IFECOM, so that the latter may include the publication in its website.

The Invitation should contain: (i) a description of each piece of property to be sold; (ii) the minimum price to be used as a reference to determine the adjudication of the auctioned property, accompanied by a reasonable explanation for such price and, if applicable, the supporting documentation; (iii) the date, time and place proposed for the auction; and (iv) the dates, places and times at which the interested parties may visit or examine the respective property.

(d) Term for the Auction. The auction should be performed within a term not less than ten (10) calendar days nor greater than ninety (90) calendar days as of the date on which the invitation is published for the first time.

(e) Bids. From the date on which the invitation is published to the date immediately prior to the date of the auction, any party interested in taking part may submit a sealed envelope to the Judge containing a bid for the property to be auctioned.

All of the bids or offers should meet, inter alia, the following requirements: (i) provide for payment in cash; (ii) have a minimum validity of forty-five (45) calendar days next following the date of the auction; and (iii) be secured, by means of a deposit or certified check in favor of the court, for a sum equal to ten percent (10%) of the amount of the bid.

In those cases in which it is possible to precisely calculate the amount that would correspond to any Acknowledged Creditor, in payment of its insolvency recovery quota derived from a sale, the respective Acknowledged Creditor will be allowed to use such amount to secure its offer, as if it were cash. In this way, the Acknowledged Creditors are allowed to use the amount of their credits to bid for the assets of the Merchant.

(f) Family and Patrimony Ties. When bids or offers are submitted to the Judge, the bidders or offerors should state, under penalty of perjury, their family or patrimony ties with the Merchant, its directors or other persons directly related to the operations of the Merchant. In the event of Merchants that are legal entities, the

CIL precisely defines those cases in which a patrimony tie exists between the Merchant and third parties, including the holders of the capital stock, directors and persons who are able to bind the Merchant with their signature, among others.

The fact that a person has a family or patrimony tie with the Merchant, its directors or other persons directly related to the operations of the Merchant, does not prevent him from making bids for the acquisition of the Merchant's property; however, once they have been made, no higher bids may be presented nor may he participate in the higher bidding according to the procedure indicated in the following paragraphs.

(g) Procedure for the Auctions; Higher Bids. The Judge or, where applicable, the Court Clerk will chair the auction, observing, inter alia, the following: (i) whoever chairs the auction will open the envelopes containing the bids received before those present, rejecting those that do not meet the requirements indicated in the CIL or which are for a price lower than the minimum indicated in the invitation; (ii) if no valid bid has been received, the auction will be declared abandoned; (iii) whoever chairs the auction will read out loud the amount of each of the admitted bids, expressly mentioning those made by persons who have a family or patrimony tie with the Merchant; (iv) once all of the bids have been read, the person chairing the auction will indicate the highest bid for the property at auction and will ask if any of those present wishes to make a higher bid. If anyone makes a higher bid within a term of fifteen minutes, the auctioneer will once again ask if anyone wants to make a higher bid, and successively until no higher bid is made; and (v) in the event that fifteen minutes pass since the last request for a higher bid and the last bid has not been improved on, the highest bidder will be declared the winner.

(h) Payment of the Price. The full payment of the price of the property being auctioned should be made within ten (10) days following the date on which the auction is held. Otherwise, the bid will be rejected and the auction will be recorded as not having taken place. In this case, the bidder will lose his deposit or the corresponding guaranty will be enforced for the benefit of the Estate.

(i) Sales without Auctions. The Receiver may ask the Judge to authorize the sale of any property of the Estate by means of a procedure other than a public auction, when he deems that a higher value would be obtained in this way.

Furthermore, under his responsibility, the Receiver may proceed with the sale of the property of the Estate, without a public auction, when the property requires immediate sale because it cannot be conserved without deteriorating, or when it is

exposed to a significant fall in price, or which conservation is too costly compared to its value.

(j) Offers After 6 Months Following the Declaration of Bankruptcy. If once a period of six (6) months has passed since the bankruptcy stage was initiated, not all of the assets of the Estate have been sold, any interested party may make an offer to the Judge to purchase any asset from among those left, indicating the offered price, and attaching the respective guaranty. If no opposition exists which is deemed valid by the Judge, from the Merchant, the Acknowledged Creditors or the Interventors, the Judge will order the Receiver to hold a public auction for the sale of such property, indicating the offer received as the minimum price to be used as a reference for the awarding of the auctioned property.

The offer received will be considered as a bid in the auction, and the person who submitted it may not improve it or make a higher bid.

(k) Eviction; Liability. The Receiver will not be liable for eviction by third parties or for the hidden flaws of the asset sold, except when agreed otherwise with the purchaser. The purchaser of all or part of the property of the Estate may not claim the partial or full refund of the price, the reduction thereof or the payment of any liability from the Receiver or from the Acknowledged Creditors.

(l) Property Subject to Collateral. As mentioned before in this study, the Acknowledged Creditors with collateral may exercise their enforcement rights in respect of their guaranties. However, during the first thirty (30) calendar days of the bankruptcy stage, the Receiver may impair the enforcement of an asset subject to a guaranty, when he considers that it is in benefit of the Estate to sell it as part of a set of assets. In this case, the Receiver will make an appraisal of the asset that secures the credit, and based on such appraisal once such asset is sold, the respective Acknowledged Creditor will be paid the amount of its credit, including the interest accrued to the date of its sale, or the amount of the appraisal, whichever is the lesser, and the part of the credit that is not paid, if applicable, will be recorded as a common credit.

When a guaranty is enforced as explained in the foregoing paragraph, the amount with which the creditor should contribute to the payment of the singularly privileged creditors and the credits against the Estate, if applicable, will be deducted from the proceeds of the sale.

4.5 Payment to Acknowledged Creditors. As of the date of the Bankruptcy Ruling, at least every two (2) months, the Receiver will submit a report on the sales made and of the remaining assets to the Judge, as well as a list of creditors who will be paid, and the bankruptcy quota corresponding thereto. In respect of credits that are challenged, the Receiver should reserve the amount of the sums that may correspond thereto.

4.6 Reservation of Creditors' Collection Rights. Once the commercial insolvency has concluded, the creditors that have not obtained the full payment of their credits will individually conserve their rights and actions for the balance against the Merchant.

4.7 Termination of the Commercial Bankruptcy. As mentioned in Chapter 3 of this study, the commercial insolvency of the Merchant ends to the extent that the Reorganization Agreement is executed. Now, in the bankruptcy stage, the Judge will declare the commercial insolvency as concluded in the following cases: (i) if payment in full has been made to the Acknowledged Creditors; (ii) if payment has been made to the Acknowledged Creditors based on the relevant insolvency quota, and no other asset is left to be sold; (iii) if it can be demonstrated that the Estate is insufficient even to cover the credits against the Estate; or (iv) at any time in which the Merchant and all of the Acknowledged Creditors request it.

If the commercial insolvency is terminated by application of subsections (ii) or (iii) above, any Acknowledged Creditor who, within the two (2) years following its termination, proves the existence of assets that are at least sufficient to cover the credits against the Estate, may obtain the reopening of the commercial insolvency; in such case, the commercial insolvency will be resumed from the point at which it was interrupted.

5.- FOREIGN PROCEDURES

The CIL provides several statutes which regulate assistance and interaction between Mexican courts and foreign courts in connection with procedures involving insolvency which are brought in respect of a Mexican Merchant who has an establishment or place of business abroad, and of a foreign Merchant who has an establishment or place of business in Mexico. In this Chapter we shall analyze the several foreign procedures which are acknowledged by our legislation in this matter, and the requirements for acknowledgement thereof by the Mexican courts.

5.1 Definition of a Foreign Procedure. The CIL defines a Foreign Procedure as "a collective procedure, whether judicial or administrative, including provisional procedures, which are followed in a foreign State under the relevant law governing insolvency or bankruptcy of the Merchant, and by virtue of which the assets and businesses of the Merchant fall under the control or supervision of a Foreign Court, for purposes or reorganization or liquidation."

5.2 Classes of Foreign Procedures. Our interpretation of the CIL concludes that there are two classes of Foreign Procedures in these insolvency or bankruptcy procedures: (i) a Principal Foreign Procedure which is defined as that which is brought against a Merchant, in a foreign State, who has its principal place of business in that foreign State, and (ii) a Non-Principal Foreign Procedure which is defined as that which is brought against a Merchant who has its principal place of business in Mexico, but also has an establishment abroad.[8]

Although the CIL does not establish this, we are of the opinion that when a Mexican Judge is requested to acknowledge a Foreign Procedure in connection with a Mexican Merchant, such Foreign Procedure must always be acknowledged as a Non-Principal Foreign Procedure, except in the rare case in which the Mexican Merchant has its principal place of business abroad.

The provisions of the CIL are clear and congruent in the matter of the acknowledgement of a Foreign Procedure in respect of a Mexican Merchant that has a Establishment abroad. For this case, there are provisions that permit the Mexican Judge to work in a coordinated manner with the foreign court in order to have the proper measures adopted with respect to the assets that the Merchant has and the activities that the Mexican Merchant performs in the foreign Establishment.

In the case of the of the acknowledgement of a Foreign Procedure in respect of a foreign Merchant that has an Establishment in Mexico, the CIL states that the rules regarding the "verification visit" have to be observed in order to determine if such foreign Merchant in effect is found to be within the requisite premises of the CIL

[8] The CIL defines the Establishment as " a place of operations in which the Merchant exercises, in a non- transitory manner, an economic activity with human resources and assets and services."

in order to be declared in commercial insolvency and that, if such conditions are present, the Mexican Judge will issue a ruling to declare such foreign Merchant in commercial insolvency, and the procedure of commercial insolvency will be followed in accordance with the provisions that are stated in the CIL and described in this study; provided that, the effects of such declaration of commercial insolvency will be limited to the Establishment of the foreign Merchant that is in the Mexican Republic.

We consider that these provisions do not recognize the fact that a Establishment of a Merchant is not a legal entity different from that of such Merchant, and that therefore, the Establishment has no obligations of its own and owns no assets, and that these are in fact owned by the Merchant. Consequently, there arise many questions that in practice have to be solved by the Mexican Courts, as an example: when the Conciliator performs the "verification visit" in order to determine if the Merchant (or better the Establishment) is within the premises established by the CIL in order to be declared in commercial insolvency, should the Conciliator consider all the obligations assumed and the assets that are owned by the foreign Merchant or only the obligations assumed with respect to the Establishment and the assets that are part of such Establishment?; if the foreign Merchant has been declared in insolvency or in bankruptcy in accordance with the Foreign Procedure which acknowledgement is requested, what is the purpose of performing the "verification visit"?; and could the Conciliator give an opinion that the Merchant (or better the Establishment) does not fulfill the necessary requisites in order to be declared in commercial insolvency, notwithstanding the fact that in the Foreign Procedure the Merchant has been declared in bankruptcy?

5.3 Recognition of Foreign Procedures. In order for a Foreign Procedure to be recognized by the Mexican Courts, a petition must be brought before the Court for the recognition thereof, accompanied respectively by the documents which are described hereinbelow, by the Foreign Representative, who is that person which the CIL defines as the person or body, including someone designated in a provisional manner, who shall have been empowered in the Foreign Procedure to manage the reorganization or liquidation of the assets or business of the Merchant or to act as the representative of the Foreign Procedure:

(a) A copy, certified by the Foreign Court, of the resolution therein declaring the commencement of the Foreign Procedure and the appointment of the Foreign Representative;

(b) A certificate issued by the Foreign Court therein attesting to the existence of the Foreign Procedure and the appointment of the Foreign Representative; or

(c) In the absence of proof pursuant to the foregoing, accompanied by any other evidence admissible to the Court as to the existence of the Foreign Procedure and the appointment of the Foreign Representative.

All requests for recognition must be accompanied by a representation therein indicating that all of the data relevant to the Foreign Procedures brought against the Merchant, which are known to the Foreign Representative, is included. The documents which are presented in a foreign language in support of the request for recognition must be translated into Spanish by an authorized expert.

Equally, in the request for recognition the domicile of the Merchant must be described for the effect of serving process on the Merchant based on the request for recognition.

5.4 Foreign Representative. The Foreign Representative shall have standing to appear directly before the Mexican courts in the procedures relevant to insolvencies which are brought in Mexico. It is important to underscore that the appearance of the Foreign Representative before the Mexican courts does not imply the submission of the Foreign Representative nor that of the assets and businesses of the Merchant brought to the jurisdiction of the Mexican courts.

6.- VARIOUS RELEVANT MATTERS

6.1. Special Insolvencies. The CIL contains special provisions for the event that the Merchant shall render licensed public services, or shall be a credit institution or shall be an auxiliary credit organization. In principle, the insolvency of these organizations shall be governed by the provisions of the CIL, provided that they do not result contrary to the special provisions which shall be applicable to this manner of Merchants.

As an example, in the matter of credit institutions, the insolvency may only be brought by the Institute for the Protection of Bank Savings ("IPAB") or by the National Banking and Securities Commission, and such procedure of insolvency shall by necessity commence in the bankruptcy stage, and therefore there will not exist any possibility of reorganization. Our Firm was appointed by the IPAB to represent and be its legal counsel in the first two commercial insolvency procedures of credit institutions in Mexico. Commercial Insolvency of Banco Unión, S.A., Institución de Banca Múltiple, en liquidación, hoy en quiebra. Twelfth District Court in Civil Matters in the Federal District of Mexico. Commercial Insolvency of Banco Obrero, S.A., Institución de Banca Múltiple, en liquidación, hoy en quiebra. Twelfth District Court in Civil Matters in the Federal District of Mexico. As in all new procedures, in the practice we found several matters that are subject to interpretation, as is the case of whether the IPAB could act both as Receiver and Acknowledged Creditor or if the credits granted by the IPAB to these credit institutions by virtue of the preceding bank rescue program should be ranked as special privileged credits.

In reference to companies that render licensed public services, our Law Firm has also been appointed by several creditors to act as their legal counsel in the commercial insolvency procedure of Satélites Mexicanos, S.A. de C.V. ("Satmex"). As of the date of preparation of this study, the Visitor has submitted his opinion and is awaiting for the Judge to determine if Satmex should or should not be declared in commercial insolvency. Given the nature and activities of this company, in case Satmex is declared in commercial insolvency, we consider that the relevant procedure will constitute an important precedent for the commercial insolvency procedures of companies that render licensed public services, and the provisions relevant to international cooperation in insolvency procedures will come under scrutiny.

6.2. Crimes. The CIL refers to certain crimes related with insolvency, which are briefly described hereinbelow:

(a) Bad Faith Conduct by the Merchant. The Merchant who shall be declared, in a final judgment, subject to insolvency shall be sanctioned with a penalty of one (1) to nine (9) years of prison for any act of bad faith conduct which shall have

caused or aggravated the generalized default incurred by the Merchant in the performance of its obligations. It shall be assumed, except for evidence to the contrary, that the Merchant has caused, or has in bad faith aggravated, the generalized non-performance of its obligations when it shall have carried its accounting in a manner which does not permit the true understanding of its actual financial situation; or shall alter, falsify or destroy the same.

(b) Delivery of Accounting. The Merchant against whom an insolvency procedure shall be brought, shall be sanctioned with a penalty of one (1) to three (3) years of prison when, upon demand of the Judge, the Merchant shall fail to place its accounting before the court within the term that shall have been granted therefore and to the person designated by the court, except in the event that the Merchant can demonstrate that it was impossible to present the same for reasons of force majeure or Acts of God.

(c) Legal Entity Merchants. When the Merchant shall be a legal entity, the criminal responsibility shall fall on the members of the Board of Directors, Administrators, Directors, Managers or Liquidators of the same who shall have authored or participated in the crime.

(d) Penalties Applicable to Creditors. Whomever, acting for itself or by means of another person, shall request in the insolvency procedure the recognition of a non-existing credit or a simulated credit, shall be sanctioned with a penalty of one (1) to nine (9) years of prison.

(e) Voluntary Complaint. The crimes committed in respect of an insolvency procedure shall be persecuted by voluntary complaint; the complaint may be brought by the Merchant or any of the creditors.

(f) Processing of Criminal Procedure. Crimes committed in an insolvency procedure, by the Merchant, by the persons acting on its behalf or by third parties, may be persecuted without awaiting the conclusion of the insolvency procedure and notwithstanding the continuation of the same.

The decisions of the Court before whom the insolvency shall be brought are not binding on criminal jurisdiction.

This study was prepared by Javier Curiel,
a partner of the law firm of “Martinez, Algaba, Estrella, de Haro y Galvan-Duque, S.C.”.

Mexico City
Paseo de los Tamarindos 400-A. Piso 20
Col. Bosques de las Lomas
05120 México, D.F.
Ph. +52 (55) 5258.0202
Fx. +52 (55) 5258.0188/5258.0189
www.maehgd.com
mex@maehgd.com

Monterrey City
Torre Comercial América
Batallón de San Patricio 111-602
Col. Valle Oriente
66269 San Pedro Garza García, N.L.
Ph. +52 (81) 8368.0450
Fx. +52 (81) 8368.0451/8368.0452
www.maehgd.com
mty@maehgd.com

MARTÍNEZ
ALGABA
ESTRELLA
DE HARO Y
GALVÁN-DUQUE