Main aspects of reforms to Mexican Business Insolvency Law (Jan 2014)

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ABSTRACT

This article contains a summary of the Mexican Business Insolvency Law proceeding, and describes the main aspects of the reforms published on January 2014.

KEY WORDS

Bankruptcy
Concurso mercantil
Business reorganizations
Mexican insolvency law

Introduction.

Mexican Business Insolvency Law was amended on January 2014. The reform involved over 70 articles, out of 342. However, most of the amendments only redrafted certain details and changed terms, which are not very relevant in considering the overall proceeding. Therefore, this article will focus only on the main aspects of the reform, but to make it friendlier to the readers, will start by summarizing the Mexican Business Insolvency Law proceeding.

1. The Proceeding

1.1. General Aspects

The Mexican Business Insolvency Law (*Ley de Concursos Mercantiles*) (hereafter the "Law") is a federal law in effect in Mexico since May 2000. It has been amended twice, on December 2007 and on January 2014. It only applies to individuals and companies that ordinarily carry out business activities (*comerciantes*), including business corporations. It is the only law regulating insolvency proceedings for business corporations in Mexico.

The Law regulates only one proceeding, which is court-driven and requires the participation of independent professionals appointed by the Federal Institute of Experts in Business Insolvency (*Instituto Federal de Especialistas de Concursos Mercantiles)* (hereafter the "Institute"). The Institute forms part of the judicial branch

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of the government and was created to support the judges on the administrative matters dealing with insolvency cases.

The proceeding has 3 (three) stages. The first stage is addressed to determine if the debtor should be declared insolvent. The second stage has a limited time of 365 days -one (1) year- and is addressed to reach a reorganization of the debtor, and the third stage is bankruptcy, which takes place if stage 2 (two) is not successful in reorganizing the debtor.

Stage one is not optional. Stage two must be followed unless the debtor requests the court, or consents,[2] to skip the reorganization stage to go directly to bankruptcy.

1.2. The First Stage or "Pre-Stage" of the Proceeding

The first stage is also known as the "pre-stage" of the proceeding. It starts with the filing of the insolvency claim and terminates with a judgment, which may either declare the debtor insolvent and subject to the proceeding (*en concurso mercantil*), or may resolve that the debtor does not meet the requirements to be declared insolvent under the Law, in which case, the proceeding would be terminated.

The insolvency claim may be filed by the debtor, by a creditor or by the attorney general. If filed by the debtor, it is an insolvency request. The debtor requests the court to be declared insolvent and attaches to the filing copies of his financial statements, a preliminary list of his creditors, debts and assets. Upon receipt of the filing, the court requests the Institute to appoint an independent professional called "visitor" (*visitador*) to verify the debtor meets the financial test required by the Law to be declared insolvent.

Under the Law, the following financial test must be met to be declared insolvent (in *concurso mercantil*):

(1) To have overdue obligations to 2 (two) or more different creditors, and

(2) To have had 35% (thirty five percent) or more of its obligations overdue for at least 30 (thirty) days, or

[2] This is one the amendments published on January 2014. Before, only the debtor could request to skip the reorganization stage. The reforms allows creditors to do so, however, subject to debtor's consent.

(3) Lack of liquidity[3] to repay at least 80% (eighty percent) of its obligations due on the date on which the insolvency petition is filed.

The audit to be performed by the visitor is made within the premises of the debtor. The visitor should have access to the financial and accounting information of the debtor, and may request access to verify the existence and conditions of the debtor's assets. The visit finishes with the report the visitor files with the court informing if the debtor meets the financial test required to be declared in *concurso mercantil*. If the debtor meets the financial test, the court must issue a judgment declaring the debtor in *concurso mercantil* and opening the second stage of the proceeding. If the debtor does not meet the financial test, the court must issue a judgment providing that the debtor is not insolvent and closing the proceeding.

During this stage of the proceeding, no special measures take place, unless any of the parties requests the court to order special measures, which are usually granted. For instance, a creditor or the debtor may request the court to order a stay immediately after the filing on the grounds that there are strong possibilities that a creditor segregates assets from the debtor. In such case, the court will usually order the measures requested within the following couple of days.

1.3. The Reorganization Stage of the Proceeding

The reorganization stage of the proceeding begins with the judgment declaring the debtor in *concurso mercantil*. Upon the issuance of such judgment:

(1) A stay on all enforcement proceedings on assets of the debtor takes place, including proceedings in favor of secured creditors, but <u>excluding</u> enforcement proceedings to collect wages and indemnities in favor of the debtor's employees;[4]

(2) The debtor must suspend the payment of obligations acquired before the judgment, not deemed necessary for the ordinary course of business of the company;[5]

[3] The term "liquidity" is used only for purposes of this paper. Instead, the Law provides a list of the assets which the debtor must have in an amount at least equal to 80% of its due obligations. Such list basically refers to cash, investments, deposits and securities available in no longer than a 90-day period.

[4] The 2014 reform included a possibility for secured creditors to enforce security interest during the reorganization period, which shall be explained afterwards.

[5] The 2014 reform has expressly exclude DIP Financing, as shall be explained later on.

(3) Except for secured debts up to the value of their collateral, all other debts cease to accrue interest;

(4) The amount of each debt is frozen and, if denominated in a foreign currency, is exchanged to Pesos and then to UDIS[6];

(5) A “look back” period is set, starting on the date of the judgment and going back 270 (two hundred and seventy) days, during which, transactions made to prefer a creditor can be void;

(6) The court requests the Institute the appointment of an insolvency professional called “conciliator” to be in charge of the reorganization stage.

During the reorganization stage, the debtor remains in the management of the company, with the surveillance of the conciliator. Notwithstanding the foregoing, the conciliator is entitled to request the court the removal of the debtor from the management of the company if he/she believes it is convenient to protect the estate.

The conciliator has 2 (two) main roles (in addition to the surveillance of the debtor’s management): to carry out the proceeding for the acknowledgement and classification of the claims and to negotiate with the parties a restructuring agreement. The conciliator must complete both tasks in no longer than 365 (three hundred and sixty five) calendar days. The Law provides for an initial term of 185 (one hundred and eighty five) days, which may be extended for 2 (two) periods of 90 (ninety) days each at the request of the parties. The 2014 reforms made it clear that such term cannot be extended any longer. Therefore, if on the day the relevant term expires, no restructuring agreement executed by the parties has been filed with the court, the judge must declare the debtor bankrupt.

The compulsory term for the reorganization period is the result of the experience had with the old Mexican insolvency law. Under the old law, debtors would request the court an order to suspend their payments, which the court would usually grant. However, the suspension of payments had no term, so it could take many years, and in many cases, more than a decade, for the creditors to get a judgment to declare the debtor bankrupt. As a result, to avoid the foregoing, the Law provides for a non-flexible compulsory term of one-year, which has proved to be insufficient for large cases.

[6] UDIS is a monetary unit which value is indexed to inflation in Mexico.

For the acknowledgement and classification of the debts, the conciliator must notify each creditor of the insolvency judgment and review the acknowledgement requests filed by the creditors. In the performance of his task, the conciliator must verify that each claim is legal and binding, and must rank the claims in accordance with the priorities provided by the Law. The conciliator prepares a list with the names of the creditors, amount of the claim and priority. The list may be challenged by the debtor and the creditors. The final list is approved by the court in a judgment called the "Judgment of Acknowledgement of Claims", which becomes the basis for the voting proceeding during the restructuring agreement or the payment to creditors in bankruptcy.

As to the terms of the reorganization agreement, the Law is open, it does not impose restrictions or limitations, <u>except</u> for the term to reach an agreement – the 365 day period referred to- and the percentage of debt acknowledged in the proceeding required for its approval.

For the reorganization agreement to be valid and binding, the Law provides a formula. Originally, it required that the agreement be approved by <u>the debtor</u> and either (i) unsecured creditors representing a majority[7] of the debt acknowledged to all unsecured creditors in the proceeding, or (ii) by creditors representing a majority of the debt acknowledged to all unsecured creditors plus the debt acknowledged to the secured creditor that approved the agreement.

Therefore, the Law did not provide a special rule for subordinated creditors, inter-company creditors or for different classes of unsecured creditors. They were given the same treatment as other creditors and grouped in the same class; then, if they had no security interest or special privilege, they would be deemed a regular unsecured creditor; if the opposite, they would be deemed a secured creditor. Consequently, inter-company creditors used to vote pari passu with all other creditors and receive equal treatment unless the inter-company creditors would agree to less favorable terms voluntarily.

The 2014 reforms introduced the concept of subordinated creditors. However, it was introduced in a complex way, which will be explained in the second part of this paper.

The restructuring agreement can be vetoed, and therefore, not become effective (i) if creditors holding over 50% (fifty percent) of the claims oppose to the plan approved by greater than 50% (fifty percent) of the debt, or (ii) if one or more unsecured creditors holding together at least 50% (fifty percent) of the debt acknowledged to unsecured creditors oppose to the restructuring plan.

[7] For these purposes, a "majority" means more than 50% (fifty percent).

A validly approved agreement binds all unsecured creditors. The consent of the debtor is always required, therefore, no exceptions are allowed. Secured creditors which did not approve the agreement are not bound by it and may continue with the enforcement proceedings of their collateral, unless the agreement provides their full payment within the following 30 (thirty) business days.

1.4. The Look Back Period

The Law provides for a "look back" period, during which the following transactions may be invalidated:

- Gratuitous transactions;
- Transactions at an undervalue;
- Transactions not made in arms' length basis;
- Waivers of debts made by the debtor;
- Payments of obligations before their maturity date;
- Discounts made by the debtor.

Additionally, there is a **presumption** that the following transactions are made in fraud of creditors, unless the debtor proves good faith:

(1) To create new security interests or to increase any existing security interests if the original obligation did not contemplate the foregoing;

(2) Payments made with assets other than money if such form of payment was not originally agreed (*dación en pago*);

(3) Transactions made with persons which would be considered subordinated creditors.

1.5. Bankruptcy

If no reorganization agreement was reached, the judge must issue a judgment declaring the debtor bankrupt, which terminates the reorganization stage, starts the last stage of the proceeding called bankruptcy, and replaces the conciliator with a liquidating trustee. The court requests the Institute in the judgment to appoint a liquidating trustee to be in charge of the bankruptcy process. If the conciliator is also registered with the Institute to perform as liquidating trustee, the conciliator will usually be confirmed as liquidating trustee.

The liquidating trustee has the main role to sell the assets of the estate to pay off the creditors in the order and manner set forth in the Judgment of Acknowledgement of Claims.

Under the Law, bankruptcy does not have a term. The liquidating trustee must provide the court a status report every 2 (two) months. Liquidation continues until no assets are left. If the liquidating trustee runs out of assets before he has finished paying off the creditors, the bankruptcy proceeding may be temporarily closed until the debtor receives more assets. Creditors keep their right to request the continuation of the bankruptcy proceeding every time the debtor receives new assets until their claims are extinguished by the statute of limitations.

The opening of the bankruptcy stage and the appointment of the liquidating trustee has the following effects:

(1) Removes the debtor from the management of the company and suspends the ability of the debtor to perform legal acts on behalf of the company, therefore, any legal acts performed by the debtor after bankruptcy are declared invalid;

(2) The administration of the debtor's assets is turned over to the liquidating trustee, who may elect to continue or discontinue the debtor's business pending final liquidation, and has full authority to manage the business and dispose of the debtor's assets;

(3) Third parties having possession of the debtors' assets are ordered to deliver such assets to the liquidating trustee and to make payments only to the liquidating trustee. Payments made to the debtor cause double payment obligations.

1.6. Rankings and Priorities in Bankruptcy

The Law provides the following rankings and priorities to pay off the creditors' claims in bankruptcy:

(1) Debts for wages and indemnities in favor of employees accruing during the year prior to the judgment declaring the debtor in *concurso mercantil* have first priority –the Law used to extend employees' first priority to wages and indemnities accruing during the 2 years prior to the judgment, the 2014 reforms reduced the term to 1 year following a judgment issued by the Supreme Court-;

(2) Expenses incurred in the management, preservation, custody and sale of the pool of assets; after such expenses are paid, expenses incurred in the litigation of assets of the estate, if any, and after such expenses are paid, the fees of the independent professionals appointed by the Institute. The 2014 reforms incorporated in this ranking repayment of DIP Financing, as will be further explained;

(3) Secured creditors, on the understanding that secured creditors must only contribute to the expenses mentioned in paragraph (2) above to the extent such expenses were incurred strictly in connection with their collateral;

(4) Labor debts other than those described on number 1 above and debts in favor of tax authorities;

(5) Creditors with special privileges, other than secured creditors;

(6) Unsecured creditors.

In the event the assets of the estate, other than collateral in favor of secured creditors, are not sufficient to pay the labor debts listed in number 1 above, the liquidating trustee is entitled to use the proceeds of sale of the collateral in favor of secured creditors to pay the debts listed in number 1 above, passing over to secured creditors only the remaining proceeds.

2. Main Aspects of the 2014 Reform

As provided above, the Mexican Business Insolvency Law was amended on January 2014. The reform involved primarily the following aspects:

- **2.1.** No flexibility of the Reorganization Term.
- **2.2.** Provisions on imminent insolvency.
- **2.3.** Debtor-in-Possesion (DIP) Financing.
- **2.4.** Subordinated creditors.
  - **2.4.1.** Subordinated creditors for purposes of the "Look Back" Period.
  - **2.4.2.** Voting rights of subordinated creditors for purposes of approving the reorganization agreement.
  - **2.4.3.** Rule applicable to subordinated creditors in connection with ranking and payment priorities in bankruptcy.
- **2.5.** Special provision regarding third party releases.
- **2.6.** Collective debt: creditors holding securities.
- **2.7.** Sale of assets / Enforcement of collateral.
- **2.8.** Responsibility of board members and relevant employees.

Each of the foregoing aspects will be explained in the following pages.

2.1 No flexibility of the Reorganization Term.

As provided in the previous sections, the Law provides for a compulsory reorganization term. Reorganization must be performed during a term of 185 (one hundred and eighty five) days, which may be extended for 2 (two) periods of 90 (ninety) days each, at the request of the parties (article 145).

The reform made it clear that such term **cannot** be extended by judges.

2.2. Imminent Insolvency.

As provided also in the previous section, the Law requires the debtor to meet a financial test to be declared insolvent (in *concurso mercantil*). Originally, the debtor could only be declared insolvent if met the test on the date of the insolvency filing.

The reform allows a debtor to file for insolvency even if it does not meet the test on the date of the filing, if it states under oath, that it is **imminent** that it will meet the test. For such purposes, it is deemed that the insolvency is imminent if the test is met within the following 90 days (Article 90 bis).

2.3. Debtor-in-Possesion (DIP) Financing.

The Law did not regulate specifically DIP Financing; therefore, problems could arise to obtain repayment if other creditors opposed. To avoid the foregoing, the reform included a specific provision in that respect.

The debtor may request the judge authorization to hire immediate financing since the insolvency petition is filed, or immediately after its admission by the court, on the grounds that it is necessary to continue the ordinary course of business and to obtain the liquidity required for the insolvency proceeding. The judge may authorize collateral to secure the financing.

After hearing the visitor's opinion –the insolvency professional that participates on that stage of the insolvency proceeding-, the judge must resolve on the authorization requested, stating the financing guidelines, including its regular payment during the insolvency proceeding, considering its preferential payment in terms of article 224.

The 2014 reform included repayment of DIP Financing immediately after repayment to employees, which have first priority under the Law; on the understanding that priority would be lost if hired in terms other than those approved by the judge or authorized by the conciliator, or upon a judgment stating that the financing was hired in fraud of creditors and damaged the pool of assets.

2.4. Subordinated Creditors.

As previously stated, the Law used to treat inter-company creditors the same way as any other creditor. Consequently, inter-company creditors voted pari passu with all other creditors and received equal treatment unless the inter-company creditors agree to less favorable terms voluntarily.

That made it possible for the “Vitro” group of companies to obtain the voting quorum required by the Law for the approval of their restructuring agreement, with the votes of inter-company creditors, releasing third party guarantees.

To avoid the foregoing, the reforms introduced the concept of “subordinated creditors”, which include inter-company creditors. However, instead of incorporating a plain and clear rule, forbidding inter-company creditors to vote, the reform introduced several complicated rules, providing for a different treatment, depending on the stage of the proceeding and the purpose of the provision, as follows.

2.4.1. Subordinated creditors for purposes of the Look Back Period.

As set forth before, a “look back” period is set, starting on the date of the judgment and going back 270 (two hundred and seventy) days, during which, transactions made to prefer a creditor can be void. However, if subordinated creditors are involved (secured or unsecured), the “look back” period duplicates to 540 days (Article 112).

The judge, upon request, may set forth the “look back” period further back, however, **the reforms established a limit of 3 years**; so it is not possible to look at any transactions made before such period of 3 years.

For purposes of the “look back” period, the following are deemed subordinated creditors:

- All companies conforming a group, including the holding company, either secured or unsecured;
- Individuals that, directly or indirectly (a) hold voting shares representing more than 50% of the capital stock of the debtor declared in *concurso mercantil* or its related entities, (b) can make decisions in their shareholders’ meetings, (c) can appoint the majority of the members of their boards of directors, (d) or by any other means have authority to make the important decisions in those companies.
- The manager, members of the board or relevant employees of the company declared in *concurso mercantil* or its related entities –general manager or decision-making employees (article 270 bis)-, or relatives of the foregoing (article 117, subsection I);
- Companies which have the same individuals –as the company declared insolvent- as managers, members of the board or relevant employees (article 117, subsection III).

Then, when these persons are involved, the "look back" period is of 540 days, and can go up to 3 years.

2.4.2. Voting rights of subordinated creditors for purposes of approving the reorganization agreement.

After the reform, the Law provides for the reorganization agreement to be valid and binding, that it be approved by the debtor and creditors representing more than 50% (fifty percent) of the debt acknowledged in the proceeding to (i) all unsecured and **subordinated creditors**, and (ii) secured creditors or creditors with special privilege that subscribe the agreement, if any.

The reform introduced a special rule involving subordinated creditors, as follows: "If there are subordinated creditors that represent 25% or more of the total debt required to approve the agreement, then, the amount of the debt acknowledged to subordinated creditors shall be excluded from such amount."

Accordingly, in such event, the agreement shall be valid and binding only if approved by the debtor and creditors representing more than 50% (fifty percent) of the debt acknowledged in the proceeding to (i) all unsecured –other than subordinated creditors-, and (ii) secured creditors or creditors with special privilege that subscribe the agreement, if any. In this case, subordinated creditors cannot vote the restructuring agreement.

The foregoing means that if subordinated creditors represent less than 25% of the total debt, they can vote the agreement and receive the same treatment as other creditors. The special rule only takes place when their debt equals 25% or more or the total debt acknowledged in the proceeding.

The restructuring agreement can be vetoed, and therefore, not become effective if unsecured creditors, that did not subscribe the agreement, holding over 50% (fifty percent) of the total debt acknowledged to unsecured creditors oppose to the restructuring plan, unless, it is agreed that they be paid in full (article 163).

A validly approved agreement binds the debtor and all unsecured and subordinated creditors, as well as, secured creditors and creditors with special privilege that subscribed it, or creditors with respect to which it was agreed to be paid in full (article 165).

The consent of the debtor continues to be always required. No exceptions are allowed.

Secured creditors that did not approve the agreement are not bound by it and may continue with the enforcement proceedings of their collateral, unless the agreement provides their full payment within the following 30 (thirty) business days.

2.4.3. Rule applicable to subordinated creditors in connection with ranking and payment priorities in bankruptcy.

According to article 222 Bis, for purposes of ranking and payment priorities in bankruptcy, the following are considered subordinated creditors:

- All creditors that voluntarily agree to subordinate their collecting rights after unsecured creditors;
- All companies conforming a group, which have **unsecured debt, excepting the holding company and individuals set forth below** (articles 15, subsection II, 117,subsection IV, and 222 bis, subsection II);
- The manager, members of the board or relevant employees of the company declared in *concurso mercantil* or its related entities –general manager or decision-making employees (article 270 bis)-, or relatives of the foregoing (article 117, subsection I);
- Companies which have the same individuals –as the company declared insolvent- as managers, members of the board or relevant employees (article 117, subsection III).

Therefore, the following are NOT considered subordinated creditors for purposes of ranking and payment priorities in bankruptcy:

- Holding companies,
- Companies conforming a group, which have **secured debt** and/or
- Individuals that, directly or indirectly, (a) hold voting shares representing more than 50% of the capital stock of the debtor declared in *concurso mercantil* or its related entities, (b) can make decisions in their shareholders' meetings, (c) can appoint the majority of the members of their board of managers, (d) or by any other means have authority to make the important decisions in those companies.

Article 15 describes how to identify a group of companies, as follows:

- It is a holding company, such that directly or indirectly (a) holds ownership of shares representing voting rights in 50% or more of the capital stock of another company (hereafter, the "subsidiary"), (b) can make decisions in the subsidiary's shareholders meetings, (c) can appoint the majority of the members of the subsidiary's board of directors, (d) or by any other means has authority to make the important decisions in the subsidiary.
- Are deemed subsidiaries, such companies in which voting shares representing more than 50% of their capital stock are owned, either directly, indirectly or both, by a holding company. For such purposes, indirect ownership takes place when a company is controlled by other companies which are at the same time controlled by the same holding company. Also will be deemed subsidiaries, the companies in which another company has the ability to direct the management, strategy or its main policies, either by

ownership of the majority of its capital stock, by agreement or by any other means.

Article 15 Bis provides that companies conforming a group may request simultaneously to be declared insolvent (in *concurso mercantil*). Proceedings must be followed separately, pools of assets should not be commingled, but the same insolvency professionals may be appointed to be in charge of the group of companies, and every step should be taken accordingly, to avoid contradictory decisions. The insolvency claim may also be filed by a creditor.

To be declared insolvent it is enough that one of the members of the group meets the financial test set forth in the law, which should cause the insolvency of the other members.

2.5. Special provision regarding third party releases.

The restructuring agreement terminates the insolvency proceeding, and it shall be considered thereafter **the only valid and binding document** regarding the debtors' obligations acknowledged in the proceeding (article 166).

Also, to avoid repeating the circumstances that took place in the Vitro case, the reform incorporated in article 166 the following: "All provisions regarding payment term extensions, discounts, waivers or any other benefit contained in the restructuring agreement in favor of the debtor **shall only be effective against the debtor, and not against third party obligors**, except with the creditor's consent."

The addition is important, and may be raised to discussion by the Mexican courts, as the most common personal guarantee granted under Mexican law is called a "fianza". According to its nature, it is ancillary to a main obligation. Henceforth, if the main obligation is extinguished, the personal guarantee extinguishes automatically.

2.6. Collective debt: creditors holding securities.

The Law did not contain any provision regarding collective debt, which caused difficulties when ascertaining the rights of securities' holders. As a result, the reform introduced several rules addressed to regulate the rights of collective creditors.

New article 161 Bis provides that legal representation of creditors holding securities should follow the rules specified in the issuance documents. If no such rules were incorporated, then, they may agree on a mechanism to vote the restructuring agreement, or subject to the following rules:

- They should appoint a common representative, to act on their behalf during the proceeding. In such case it will suffice that the common representative files a petition for acknowledgement of all creditors;

- When the common representative finds out a draft restructuring agreement has been proposed, it must call for a holders' meeting to be held within the next 15 days, for the creditors to decide if to approve or reject the restructuring plan. The call must be published in the Official Gazette of Mexico and in one of the major newspapers of the debtor's domicile at least 10 days in advance;
- The meeting shall be valid only if holders of 75% of the issuance amount is represented, and the decision is voted by the majority of the represented amount;
- The common representative shall be the only person authorized to communicate to the insolvency professionals or the judge the decision made by the holders' meeting, and if approved, he/she shall sign the agreement and bind the holders;
- In the event the call is not made or the necessary quorum to hold the meeting is not met, then, each holder may appear individually at the proceeding to inform if it approves or not the restructuring plan, and to sign it, if that may be the case;
- Individual actions by the holders shall not be effective if the common representative is acting on their behalf, or if the individual action is not compatible with a decision made by a holders' meeting.

2.7. Sale of assets / Enforcement of collateral.

The reform provides in article 75 that the conciliator may sell –during the proceeding- the assets that are not necessary for the company's ordinary course of business without requesting the judge's authorization.

On the contrary, **creditors holding collateral on assets of the debtor do need the court's approval to enforce their security interests**, as the law provides that such enforcement can only take place on assets that are not strictly necessary for the company's ordinary course of business, according to the judge's opinion -after hearing the conciliator-.

This article should be read together with articles 65 and 68 of the law, which state that upon the issuance of the *concurso mercantil* judgment, a stay on all enforcement proceedings on assets of the debtor takes place, including proceedings in favor of secured creditors, but only excluding enforcement proceedings to collect wages and indemnities in favor of the debtor's employees. As labor debts have priority under Mexican law, in the event the pool of assets is not enough to repay employees, enforcement of security interests in favor of secured creditors may be ordered to pay employees, the exceeding amount, if any, should be registered with first priority in favor of the affected secured creditor.

2.8. Responsibility of board members and relevant employees.

The reform also introduced a new chapter regulating the responsibility of the members of the board of directors, the general manager or employees with decision-making authority, if they incur in any of the following:

- Vote in the board meeting or make decisions having a conflict of interest;
- Intentionally favor a shareholder or a group of shareholders, causing damage to the rest;
- If, without a legitimate cause, they obtain an economic benefit for them or for third parties, including a shareholder or a group of shareholders;
- If they generate or communicate false information, with knowledge;
- If they order or cause that debtor's transactions are not registered or registries to be altered;
- Allow that false information is incorporated in the debtor's accounting;
- Destroy or modify the systems, accounting registries or support documents;
- Alter the terms or conditions of the debtors' balances, agreements or transactions;
- In general, perform illegal actions with willful misconduct or bad faith.

The responsibility will be excluded if good faith is proved, if they acted following the law and the debtors' corporate documents, if they made their decisions following information obtained by relevant employees, external auditors or independent experts with credibility, have selected the option or strategy they deemed more appropriate, or complied with the shareholders' meetings minutes, to the extent they were legal.

However, this remedy is only available to the insolvent company and its shareholders; except when it involves fraud of creditors, in which case, a fifth part of the creditors acknowledged as such in the Judgment of Acknowledgement of Claims, creditors representing 20% of the total debt, and/or surveyors appointed by creditors may file a claim for damages against the members of the board of directors and relevant employees (article 113 bis).

Before the reform, the Law did not regulate any type of responsibility of the Board members, or employees with decision-making authority.