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# CREATION AND IMPLEMENTATION OF THE LEY DE CONCURSOS MERCANTILES

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Last year, the new *Ley de Concursos Mercantiles* (Business Reorganization Law)<sup>1</sup> was presented to the public. The committee that authored the new law anticipated what would happen with the law, and there is nothing surprising about what has happened with it. During the drafting of the law, in the *Secretaria de la Hacienda* (The Ministry of Finance)<sup>2</sup> there was a young economist who was very clever, although he had no experience litigating bankruptcy cases. After much argument about a particular provision that establishes when a debtor is deemed to be insolvent<sup>3</sup>, he got his proposed provision inserted into the law. The draft of the new law moved through several steps for consultations and then went to the Congress. Although that provision remained in the law, the Congress amended the provision.

After the adoption of the law, he and I spoke and he said, "I'm very sad because they destroyed my provision with such terrible amendments."

I said, "You remember, you destroyed my draft because you introduced the provision. But let me tell you, I'm happy that neither you nor I got what we wanted. I am happy that we have a law which is the result of compromise of all the interested parties, making it the best law."

The new *Ley de Concursos Mercantiles* is exactly that, a compromise. The following are positive results in the new law. First, is the establishment of the *Instituto Federal de Especialistas de Concursos Mercantiles* (Federal Institute of Business Reorganization Specialists)<sup>4</sup>, or the "Institute", as it is called. The Institute, headed by Lic. Luis Méjan, was established exactly the way the Commission intended. No one participant in the forum of the old *Ley de Quiebras*

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1. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federación, Article 1, *et seq*, May 12, 2000.

2. Secretaria Hacienda y Credito Publico, (visited April 10, 2002) <[www.shcp.gob.mx/](http://www.shcp.gob.mx/)>

3. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federación, Article 10, May 12, 2000.

4. Federal Institute of Bankruptcy Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles*), (visited on April 10, 2002) <[www.ifecom.cgf.gob.mx](http://www.ifecom.cgf.gob.mx)>

y *Suspension de Pagos* (Bankruptcy and Suspension of Payments Law) controlled the process by which a company or individual was reorganized. Now, a group of people with a wide range of abilities participates in the process, including accountants, economists, lawyers, and a former bankruptcy judge. That is exactly what was needed in order to take care of the most important issues in any bankruptcy. The specialists control several phases of a bankruptcy. A specialist performs an audit of the debtor and determines the financial status of the debtor. Another specialist will mediate between the debtor and creditor to try to reach a settlement. Finally, another will handle any liquidation of assets or reorganization.

So now we have the Institute of the Specialists. It has been very active. They published the *Criterios de Selección y Actualización de Especialistas* (Standards for Registration and Updating of the Specialists)<sup>5</sup> and also the rules for the same purpose published by the *Consejo de la Judicatura Federal* (Federal Judicial Counsel)<sup>6</sup>. This Institute has many specialists registered as investigators, conciliators, or trustees. They have several levels of qualification, and they are geographically distributed in the territory of Mexico. The Institute has published a clearly written and well organized web page<sup>7</sup> full of information with relevant legal texts and rules; the files of proceedings; and the enforcement of the new legislation; the summary of relevant information; the names, levels and geographical jurisdiction of the registered specialists; and miscellaneous information.

Another positive aspect of the new legislation is that we no longer have the *Suspension de Pagos* (Suspension of Payments). This cannot be done anymore. The only cases with suspension of payments that remain are those under the old law.

There are some criticisms of the new law. The commission that drafted the law discussed all of the criticisms of the new legislation, so they were expected. None of the criticisms are unexpected or unheard of, except for one, which will be discussed later.

In order to introduce these criticisms, I will note a paragraph from Machiavelli:

“It is worthwhile to remember that nothing is more difficult to plan, success more dubious, more difficult to manage, than to create a new system. He who initiates it has the enmity of all who benefit from the old institution and only mild support from those who will benefit from the new system. The doubts of those benefiting from the new system arise from fear that the old law favors their enemies and from the general skepticism of mankind toward an innovation until experience demonstrates its value in practice.”

That is what has happened with the new law. The old class of litigators, who where used to the old law have criticized it since its inception and have continued to do so. They did exactly the same when Mexico adopted the model law on arbitration, and now they are very happy with it. They said that there are some problems on constitutionality. I am unaware of any *amparos* (Constitutional challenges) against the law. But, those are to be expected.

5. Federal Institute of Bankruptcy Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles*), (visited on April 10, 2002) <[www.ifecom.cjf.gob.mx/leyes\\_reglamentos/criterios\\_seleccion.asp](http://www.ifecom.cjf.gob.mx/leyes_reglamentos/criterios_seleccion.asp)>

6. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federación, Article 311, May 12, 2000.

7. Federal Institute of Bankruptcy Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles*), (visited on April 10, 2002) <[www.ifecom.cjf.gob.mx](http://www.ifecom.cjf.gob.mx)>

Critics say that the new bankruptcy law is too complex and impractical, and that there are very few bankruptcy claims now. Of course, they do not recognize that this is because there are no claims for suspension of payments under the new law. Under the old law, there were not more claims per year on average than under this new law. According to the report by the Institute, twelve cases have been filed. Four were terminated for different causes, such as withdrawal by the petitioner or lack of deposit of the Inspector fees, which may result from settlement by the parties. One is in the prejudgment period. One case is in the conciliation period. Two cases are in the bankruptcy period with a Trustee in charge.

In Mexico, not only because of the complexity and newness of this law, but also because of a general distrust of the old law, we tend to avoid insolvency proceedings. In the history of the old law, from 1943 to now, there were about 400 cases filed. Thus, twelve cases filed this year is not a small number. There are some other reasons that justify this tendency. In the period of the old law, the Mexican economy was not very strongly developed. A lesser-developed economy does not have many insolvency proceedings. Therefore it is expected that in the future, this law is going to be relied upon more often as time passes and the Mexican economy grows. The tendency for bankruptcies is going to increase. Not as much as in the United States, because the United States has a bankruptcy procedure for every kind of situation: physical persons as well as commercial traders. So the spectrum of the insolvency proceedings in the United States is wider than the spectrum in Mexico. As this law is better known, it will be more appreciated. It is going to be of great benefit for Mexico.

#### *Further Amendments to the Ley de Concursos Mercantiles:*

There is a tendency in the new laws that have been adopted in several countries to provide for review and amendment in three, four, or five years after adoption. That happened in France and in Germany, among other countries. There is no such provision in the Mexican law, but it is the understanding that the same will occur in Mexico. After two or three years of experience, some amendments will be required. One of the amendments that will be required in the future is to the debtor insolvency provision, referred to at the beginning of these comments. This provision<sup>8</sup> establishes when a debtor is deemed to be insolvent based on objective factors that any person can see. The next provision<sup>9</sup>, which substantially weakens the law, established a lot of criteria to determine if the debtor must be put in insolvency. This data depends on the accounting of the debtor, which the creditor does not know. In Mexico there is no pre-trial discovery, which would permit the creditor to better understand the financial circumstances of the debtor before commencing a bankruptcy proceeding. The creditor who files a petition to declare a debtor bankrupt must now act more or less in a blind situation.

That per se is not tremendous problem. The tremendous problem is that there is another provision that establishes that if the petitioner does not succeed, then he or

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8. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federacion, Article 10, May 12, 2000.

9. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federacion, Article 11, May 12, 2000.

she must pay the cost of the procedure and the fees of the Inspector<sup>10</sup>. So whoever files the petition of *concurso* (reorganization) is somehow making a guess and somehow risking some money. The cost, according to the law, is four percent of the amount in dispute. One way to see it is to say, “ I’m going to risk four percent. I’m earning 12 percent interest so this year I’m going to risk earning only eight percent.” This is a big problem. There are other issues that should be reviewed very soon in order to find ways to improve this new law.

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10. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federacion, Article 48, May 12, 2000.