Instituto Federal de Especialistas de Concursos Mercantiles (IFECOM)

Manuel C. Mejan Carrer

Follow this and additional works at: http://digitalrepository.unm.edu/usmexlj

Recommended Citation
Available at: http://digitalrepository.unm.edu/usmexlj/vol10/iss1/12
The Mexican Administrator for Insolvency Procedures (IFECOM) was created as a body associated with the Federal Judiciary Council, empowered with technical and operating autonomy, under the Mexican Insolvency Law (Official Gazette, May 12th, 2001).

**GENERAL APPROACH TO THE INSOLVENCY LAW — MAIN GOALS:**

The new legislation is written in accordance with the principles established by the Constitution. Due process of law, right of previous hearing, protection of labor rights, and respect of rights of third parties are all principles present in the new law.

What is most important, and is the main feature of the law, is to keep very clear the goal of preserving the business enterprise, maximizing its social value. That is: what is important in a business is to be a source of employment, revenue, and as a place for self-development and fulfillment.

The Law accepts the principle that assets are better appraised if taken together as a whole unit, instead of being taken individually. It is better for creditors to try to liquidate the assets jointly than on a creditor-by-creditor basis.

This "preserving the social value of businesses" is the core motivation of the whole new law, and explains the ease given to reach extra-judicial agreements, the support to the judiciary on technical matters (accountancy, finance, economics, etc.) provided by the specialists and the simplification of the stages and proceedings.

Embedded within the legislation is the recognition that insolvency is not only a problem among debtors and creditors, it is a social concern because it affects the economics and social life of the country.

One principle guided the drafters of the law. This was give to all involved parties the chance of sharing the same information knowing that the rights that each of them
hold are different from the others. That was the only way to create an ambiance of predictability and transparency in equity both before and after the fact.

This approach of the law encourages entrepreneurs and creditors to build their strategies taking into account its provisions. In this way the law will achieve good results even before it is applied. On the other hand, if there is no alternative but to file for bankruptcy, everybody can be sure that there are clear and simple proceedings established that allow fast and secure relief.

THE PROCEEDINGS OF INSOLVENCY:

This law applies and is aimed at enterprises, whether they are a corporation or sole proprietorship. Some Trusts are included, and in some situations, holding or held companies. Specific provisions are included to deal with the insolvency cases of banks, other minor financial institutions and those enterprises providing a public service under a charter from the government. Insurance and bond companies are excluded provided that their respective legislation already has all the provisions they need in case of bankruptcy.

The new law structures the insolvency process into two major sections: a) the reorganization, where the main purpose is to find a way to keep business in operation by reaching an agreement among all the parties involved, and b) the bankruptcy, where the goal is to liquidate the business fairly by selling, if possible, the business as a unit.

The insolvency process can be summarized as follows:

The first stage is to determine if the insolvency procedure should proceed. In this stage the Specialist, an Auditor, will audit the debtor's data, assets and other pertinent information that will provide the judge, in a standard form, all the information regarding the financial status of the debtor.

The second stage starts once the judge has declared that the insolvency procedure should proceed. In this phase another Specialist, a Conciliator, will professionally support the judge by being impartial towards the debtor and the creditors. He or she will try to achieve an agreement that will be beneficial for all the involved parties. He or she will always act to preserve the value of the assets that might lead to extra-judicial agreements between creditors and debtor.

In the third phase, when the bankruptcy has been declared, a third Specialist, an Official Receiver, will support the parties involved by performing his best to preserve and maximize the value of the assets for the benefit of all the involved parties.

---

This process is shown on the following chart:

![PROCESS Diagram]

WHAT DOES IFECOM STAND FOR?

The main powers of IFECOM (Instituto Federal de Concursos Mercantiles) are: the administration of the Specialists’ System (which includes the selection procedure, registration, updating, training, monitoring of performance, imposition of administrative penalties and appointing specialists for ongoing insolvency trials) and the promotion of the insolvency culture.10

As an insolvency administrator, IFECOM is also accountable for making, supporting and disseminating statistics on business reorganization and judicial matters.11

Because of its insolvency regulator facet, IFECOM has the authority to issue General Rules, obligatory for all parties in the insolvency trial, and General Criteria for the specialists’ selection.12

IFECOM’s every day work is ruled by the principles of professionalism, clarity, equity and predictability. Examples of this are the Institute’s obligation to report to the Supreme Court, the Federal Judiciary Council, and the Federal Congress on the performance of its duties, every six months.13

---

11. See Ibid.
12. See Ibid.
13. See Ibid.
The Institute’s government is entrusted to a Board of Governors, which is accountable, among others, for issuing the Institute’s regulations and General Rules, and determining IFECOM’s administrative structure support. The appointments to the Board were made, in congruency with the new Insolvency Law’s philosophy, with a multidisciplinary vision in mind, covering the fields of administration, accounting, economics, finance and law.

Specialists’ System

The usual functions of the trustee and the bankruptcy practitioner, as known in other jurisdictions, were divided in three different kinds of specialists, who take action according to the stage of the trial: 1) an Auditor who determines whether the financial situation of the enterprise satisfies the law’s requirements to declare the Insolvency Trial opened; 2) a Mediator who tries to achieve an agreement between the merchant and the creditors in order to keep the enterprise operating; and 3) a Trustee who liquidates the enterprise if there is no consensus.

All these people are independent and qualified professionals, who support the Judges’ rulings with a corporate point of view (including support on financial, economic, accountable and business administration matters).

In order to be registered by the Institute, these people shall meet the law’s requirements, especially the one related to the professional expertise. Therefore, IFECOM has the permanent task of scouting among those who, on first sight, demonstrate to have the expertise required to become a Specialist.

Once the interested person contacts the Institute (personally or online), the Institute opens a file and determines whether the expertise demonstrated by the candidate and the ancillary team proposed by him or her is enough to attain the register. If the personal expertise of the candidate is sufficient, the Institute invites this person to an interview with Governors from the Board, in order to achieve a better appraisal of the candidate.

The specialists must satisfy the following profiles, which have been determined and published in the Official Gazette of the Federation, by IFECOM:

**Auditor:** Must have solid knowledge and experience regarding accounting, auditing, costs, analysis and interpretation of financial statements, preferably as responsible upon those activities;

**Mediator:** Must have ample experience in one or several of the following: Financial restructuring and mergers, debt renegotiations, business intercession, management and/or rehabilitation of bankruptcy processes, enterprise liquidations, mergers, joint ventures, valuations and turnovers, rescue or rehabilitation of enterprises;

**Trustee:** Must have had direct experience in bankruptcy processes, enterprise liquidations, mergers, joint ventures, valuations and turnover, rescue or rehabilitation of enterprises.

---

This roster is divided not only into three different types of specialists, but also subdivides the specialists according to their expertise and capability to intervene in insolvency trials involving different sizes of enterprises. This subdivision is into two categories: Category 1 is reserved for those qualified to intervene in an Insolvency Trial involving a high amount of debts; while Category 2 is for the rest of the specialists. Additionally, specialists are grouped in geographic zones according to the cities in which the specialist is authorized to perform.

Besides the specialists’ selection process, their training and updating, there is another very important procedure that IFECOM must conduct when an Insolvency Petition is filed: the specialists’ appointment.

Once the Institute is required by a Federal Judge to designate a specialist for the Insolvency Trial, the first step is to identify in the roster, those specialists who are qualified to intervene in the particular case (because of type, category and geographical zone) and, randomly, select one from among them.\(^{17}\) Afterwards, step two is to communicate the result with the Judge and the selected specialist.

If the appointed specialist should be excused from service\(^{18}\), the Board of Governors will either decide to dismiss or accept the excuse (in the second case a new specialist must be appointed).\(^ {19}\) IFECOM is also accountable for monitoring the specialists’ performance in trial, especially their honoraria and bail.

The remuneration of the specialists is an important subject: what is the best way to pay a quality job if the state cannot afford it? This is one of the issues in which IFECOM has had special care since, according to the Law, it is the Institute’s responsibility to issue General Rules to regulate the specialists’ remuneration. Therefore, IFECOM has tried to find a suitable middle point between these two legitimate claims (profitable business for the specialist and conservation of the failed state).

To achieve this goal, the General Regulation establishes that the Auditor and his ancillary team must charge an hourly fee, while the Mediator, the Trustee and their ancillary teams must charge according to a chart based on minimums and maximums (for recognized debts or sold assets, depending on the trial’s stage), that contemplates a pre-established fee plus a variable percentage.

Thus, the Mediator charges depending on the Merchant’s recognized debts but, since the main purpose of the mediation is to achieve an agreement, the Mediator will only collect full honorary if such goal is reached. Otherwise, the Mediator will only receive 50% of the honorary. The Trustee also charges according to the referred chart, however the honorary in this case is calculated upon the sold assets of the Merchant.

In short, IFECOM is entrusted with the certification of the specialists by selecting, training and updating them, as well as monitoring that their performance meets the Law and General Rules’ standards.

---

The Institute is also accountable for disseminating the Insolvency Culture. This means that insolvency problems are avoided by as many enterprises as possible.\textsuperscript{20}

The existence of entities like IFECOM has demonstrated to be a valuable support for judges in a number of jurisdictions, such as the United Kingdom, Canada, the United States, Chile, Peru, and Colombia. We believe that Mexico will not be the exception because, as we all know, the judges, who are usually overloaded with cases, are not capable of implementing patterns to measure the efficiency with which the insolvency trials are handled. Moreover, the judges are accountable only for their knowledge of law, but cannot be asked to have the skills required to develop and apply a model of efficiency.

Under these circumstances, the Federal Judiciary Council appeared to be the ideal entity for insolvency procedures administration, however, the truth is that this entity did not have at that time the resources needed in order to be empowered with such authority. This is the reason why the Mexican Congress decided to create IFECOM. The Federal Judiciary Council faced almost the same problems in regards to training issues. The Federal Judiciary Institute, the ancillary body associated with the Council that is accountable for the training of the judges, presented a major pitfall for the insolvency training purposes: its scope of authority covers only the legal matters, making impossible for this entity to support judges in other insolvency-related matters (accountancy, finance, business administration). Actually this is one of IFECOM’s main accountabilities as a part of the Insolvency Culture.

IFECOM’s activities related to the diffusion of the Insolvency Culture are developed in four different ways:

1. Internal training -- Takes place everyday among the Institute’s personnel and is accomplished in many different ways, such as research and report preparation.
   Judges’ training – IFECOM has organized meetings with Judges, visits to their courts, and open lines of communication with those who admit an insolvency trial.

2. Specialists’ training – IFECOM remains active with those registered (meetings, updates and news), and very active with those who are appointed to intervene as regulators in an insolvency trial (permanent advice);

3. Public events – IFECOM is invited to national and international forums on insolvency. It can proudly talk about the large number of universities, private firms, professional organizations and entrepreneurial associations that have allowed IFECOM to introduce it’s self and talk about it’s main authorities. Moreover, IFECOM has many times talked about the great efforts made in Mexico to develop a solid insolvency system, in many international forums.

CONCLUSIONS

IFECOM has tried to introduce in the Mexican forum a new focus on insolvency matters, remarking the fact that default is a corporate issue, and the insolvency trial a mechanism designed to provide solutions to it.

\textsuperscript{20} Business Reorganization Law (\textit{Ley de Concursos Mercantiles}), Diario Oficial de la Federacion, Article 1, May 12, 2000.
By trying to change the social view of insolvency, the Institute expects to create confidence among the entrepreneurial community on the insolvency trial. The idea is to offer this kind of proceeding as a useful tool to achieve solutions, to reach an agreement.

In order to achieve this, the Institute has to fight a centennial tradition of stigmatizing the insolvent. After all, filing an insolvency petition is not a crime.
After almost two years of work, the Instituto Federal de Especialistas de Concursos Mercantiles (IFECOM) presents the following statistics:

a) Insolvency trials
Seventy-one (71) merchants (67 corporations and 4 individuals) have filed or have been sued in an insolvency trial. In thirty-three (33) cases, a voluntary petition has been filed, while in thirty-eight (38) cases, the trial has been with a lawsuit.
In six (6) cases, bankruptcy has been declared. In another twenty-three (23) cases, the trial stands at the mediation stage. One petition has been denied and eight (8) cases have formally ended. The rest remain at the audit stage.
About 25,000 million pesos (1,915 million USD, aprox.) are involved in these procedures.

b) Specialists' System
IFECOM has received 380 applications from people interested in becoming a specialist. Registration has been approved in 149 applications. From these 149 approved applications, many specialists are registered in more than one category, accounting for 240 registers total.
Random appointing procedures have been conducted in sixty-four (64) cases, all of them within the terms established in the law.

---

22. This means that we have 240 specialist registers, which are covered by 149 individuals, because many of them have more than one category authorized (eg. Auditor/Mediator/Trustee).