3-1-2002

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Available at: https://digitalrepository.unm.edu/usmexlj/vol10/iss1/15
¿QUÉ ES LA DIFERENCIA?: A COMPARISON OF THE FIRST DAYS OF A BUSINESS REORGANIZATION CASE IN MEXICO AND THE UNITED STATES
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The purpose of this brief paper¹ is to compare Mexico’s new Ley de Concursos Mercantiles (Business Reorganization Law)² with Chapter 11 reorganization. I will only be discussing major differences between the two laws during the early days of a case. Before comparing the current reorganization laws of the United States’ Chapter 11³ and Mexico’s Ley de Concursos Mercantiles⁴, I want to briefly discuss the recent reform processes in the two countries.

Understand that anytime you compare the bankruptcy systems of the United States and Mexico, you are comparing apples to oranges because the two economies are so very different. There is such an incredible amount of debt in the United States’ system, and comparatively little debt in Mexico. The amount of debt that is in the United States economy is mind-boggling.⁵ You may have heard that money makes the world go ‘round, but it may actually be debt that makes the economic world go ‘round. We have recently gone through a very substantial and significant bankruptcy reform process in the United States,⁶ although the new bill has not yet become law. In the United States, the most dramatic reforms have been proposed in the consumer bankruptcy system. These reforms are purportedly needed because of the large increase in consumer bankruptcy filings in the U.S. in recent years.⁷

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1. This paper is based on a 15-minute talk given at the U.S.-Mexico Institute’s Annual Conference in 2000.
5. See Thomas J. Yerbich, Is the Fragile Middle Class About to Shatter, AMER. BKCY. INST. J. 10 (April 2002) (noting that revolving consumer debt and home equity debt is now a shocking 35% of the median annual income, an eight-fold increase from 1980 to 2000).
7. Bankruptcy Law Daily, Aug. 27, 2001. In 2000 there were 1,253,444 bankruptcies in U.S. In first three quarters of 2001 there were 1,126,753 bankruptcies in U.S., an increase of over 19%. Another source claims the increase in bankruptcy filings was actually 21% for 2001, compared to 2000. See American Bankruptcy Institute Web site, http://www.abiworld.org, visited on April 2, 2002.

Part of the reason for this increase in personal bankruptcy filings may have been the news of a new bankruptcy code on the way, that is less generous to consumers. Some people may have felt that they better file now rather than later before the stricter reforms went into effect. The U.S. bankruptcy bill has been stuck in conference committee for several years.
There is far less consumer debt in Mexico and so the reform process in Mexico focused on the merchant, the business bankruptcy world.

Yet as a whole, *Ley de Concursos Mercantiles* (Business Reorganization Law) is far more similar to Chapter 11 than it is different. Both statutes favor the reorganization of companies, in order to save jobs and avoid the economic waste that would occur if a company that could not pay its debts had to just liquidate. This policy of promoting reorganization may even be stronger in Mexico than the U.S., as Article 1 of *Ley de Concursos Mercantiles* itself states, "it is in the public interest to preserve businesses and to prevent a general default in payment from risking their failure and the failure of other businesses with whom they deal". 8

*Ley de Concursos Mercantiles* is unquestionably more similar to Chapter 11 than the old Mexican reorganization law, *Ley de Quiebras y Suspension de Pagos* (Bankruptcy Law and Suspension of Payments)9 primarily because both *Ley de Concursos Mercantiles* and Chapter 11 now focus on the plan or Conciliation stage of the case, rather than the claims process. *Ley de Quiebras y Suspension de Pagos* used to permit the debtor to delay proceedings by spending years determining who was owed what. *Ley de Concursos Mercantiles*, like Chapter 11, now focuses on the reorganization plan process rather than the claims process, which is sensible given that the claims will typically be paid at cents on the dollar anyway and exactly how much is owed to whom is not nearly as critical to the rehabilitation effort as how the debtor will restructure its debts and become financially viable.10

There are two common misconceptions of comparative reorganization law across the U.S.-Mexico border, first that most cases in the United States succeed and most Mexican cases fail, and second that Mexican cases are inefficient and United States’ cases are efficient. I do not believe either of these statements. 11 These are vast overgeneralizations, and, while I am generally a fan of Chapter 11 reorganization, I think it fails too often and too often consumes the firm’s assets. Thus, I ask you to try not to idealize the United States’ system when assessing *Ley de Concursos Mercantiles*. The reforms embodied in *Ley de Concursos Mercantiles* are drastic and may make Mexican reorganization law more friendly to creditors than Chapter 11 in its current form.

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9. Bankruptcy Law and Suspension of Payments (Ley de Quiebras y Suspencion de Pagos), Diario Oficial de la Federacion, April 20, 1943.
10. At this conference, I explained that Chapter 11 debtors very often file a plan of reorganization and even confirm a plan of reorganization, before the exact amount of the claims against it have been determined. Panelists from Mexico felt that this was unlikely to happen in Mexico, and seemed to believe that it would still be necessary to know the exact amount of the claims before proceeding to the plan stage.
11. The truth is that far more Chapter 11 reorganization cases fail than succeed. Some scholars have set success rates at less than 10% and even less for smaller companies. Even if the rates are higher, perhaps in the range of 20-25% success, these are still not fabulous results. I also remain concerned about the high fees and costs of reorganization although they are clearly worth it for companies that emerge from Chapter 11.

Another very common complaint of American lawyers trying to collect debts in Mexico is that Mexican bankruptcy and reorganization laws are too friendly to debtors and too hostile to creditors. For years U.S. attorneys described the predecessor to *Ley de Concursos Mercantiles* (Business Reorganization Law), *Ley de Quiebras y Suspesion de Pagos* (Bankruptcy Law and Suspension of Payments), as heaven for debtors and hell for creditors. Ironically, these same claims have been made by Canadian lawyers about Chapter 11, in comparison to Canadian bankruptcy law. See Sean Dargan, The Emergence of Mechanisms for Cross-Border Insolvencies in Canadian Law, 17 CONN. J. INT’L L. 107, 144 (2001)(describing Chapter 11, from a Canadian creditor’s point of view, as a haven for unscrupulous debtors and a nightmare for collecting creditors).
Now on to the comparison. Assume that we have a company on one side of the border and another on the other. Let's talk about how we get this whole reorganization process started. It is really quite different from day one on each side of the border. The process of initiating a bankruptcy in the United States is quite simple and familiar. You take your two pieces of paper - which take about 30 minutes to fill out - you rush them across the street, and as soon as you hand them to the clerk and have them stamped, there is a very broad, automatic stay granted in favor of the debtor. This stays virtually all collection activities of any kind, and I mean everything—employee claims, labor claims, every lawsuit that is out there, every collection activity that is out there. It is broad-based, that is the whole idea. We want everyone who has done business with the debtor organization to know that all collection efforts must stop, in order to allow reorganization to occur for the collective good.

As you picture this person running across the street to file a petition in the United States, you might assume that the case being filed is a voluntary case, initiated by the debtor in order to take advantage of the broad automatic stay provisions mentioned above, as well as the favorable reorganization provisions found throughout Chapter 11. The assumption that most Chapter 11 cases filed in the United States will be voluntary is almost always a safe one. Less than one-half of one percent of all Chapter 11 cases are involuntary cases.

We could not, however, safely make the same assumption about cases filed under *Ley de Concursos Mercantiles*. To the contrary, we are expecting that most of the

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12. I am not suggesting that months of planning a Chapter 11 case will not vastly improve its likelihood of success. What I am suggesting is that regardless of whether this planning has occurred, it takes very little time and effort to obtain the broad benefits provided by the automatic stay of Section 362 of the Bankruptcy Code.


14. *But see* 11 U.S.C. Section 362(b), which contains a narrow list of suits and creditor claims that are not stay by a Chapter 11 or any other bankruptcy proceeding. The most important of these for corporate or business reorganization cases are suits by governmental units to protect the health and public welfare of citizens. *See id.* Suits of this nature, for example suits to enjoin ongoing environmental hazards, are distinguished from mere suits to collect on a debt, which are stayed for the government just like everyone else.

15. See, e.g., 11 U.S.C. Section 1129(b)(the infamous “cramdown” provision, which allows a Chapter 11 debtor to force a creditor to accept plan treatment to which the creditor objects, as long as the court finds the treatment “fair and equitable”); Section 365 (which allows the debtor to assume or reject an executory contract, and to leave the non-debtor party to the contract in limbo while the debtor is deciding which to do); Sections 1107 and 1008, combined, which allow the debtor-in-possession, rather than a neutral third party, to run the company after the filing); Section 1121(b) (which gives the debtor-in-possession a period of time in which it has the exclusive right to file a plan of reorganization).

cases filed under *Ley de Concursos Mercantiles* will be involuntary cases, because *Ley de Concursos Mercantiles* provides so much more creditor protection than *Ley de Quiebras y Suspencion de Pagos*, the prior Mexican reorganization law.

With this very likely difference in mind, that the cases filed are mostly voluntary in the United States and mostly involuntary in Mexico, creditors and lawyers on both sides of the border should remember the high risks surrounding involuntary filings in the United States. U.S. Bankruptcy Judges have an almost instinctual dislike for involuntary bankruptcy filings, which are often suspected to be grudge matches rather than legitimate collection efforts. This suspicion may be justified, given that it is usually far easier to collect a debt in the United States outside bankruptcy than inside bankruptcy. Thus, when you are in the United States, take extra care to make sure that the grounds for involuntary bankruptcy are met or you could be charged some enormous fees.

Thus, in our first comparison of a case on each side of the border, the United States case is most likely to be a voluntary case and the Mexican case is most likely to be an involuntary case. This is ironic considering that for years U.S. lawyers have complained that Mexican insolvency law is too lenient to debtors and too hard on creditors. It also may reflect the tremendous shift in the degree of creditor protection provided in *Ley de Concursos Mercantiles*, compared to *Ley de Quiebras y Suspencion de Pagos*.

Let’s move to the next step, assessing what the bankruptcy filing accomplishes for debtors and creditor on each side of the border. For this part, let’s assume, perhaps somewhat unrealistically, that there is a merchant in Mexico that has chosen to file a voluntary petition under the new law. Let’s say it is a corporation. It will file its petition and other papers, but will not experience the same sigh of relief that a company filing north of the border would experience. In fact there is no automatic stay at all. Eventually, there will be a stay of sorts but there is nothing automatic about it. Instead the process of entering reorganization proceedings will start with an auditing process where a *visitador*, translated as “examiner” or, literally “visitor”, will perform a visitation visit at the debtor’s place of business.

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17. Under *Ley de Concursos Mercantiles*, Article 5, however, small merchants, defined as those with matured liabilities of less than 400,000 UDI’s (an attempt to designate liabilities in a universal and stable currency value, and defined in *Ley de Concursos Mercantiles*, Article 4(IV)), cannot be forced into reorganization but can instead file only voluntary reorganization cases. See *Business Reorganization Law (Ley de Concursos Mercantiles)*, Diario Oficial de la Federacion, Article 5, May 12, 2000.

18. See *11 U.S.C. Section 303* (setting a very high standard for imposing a bankruptcy on an unwilling person or company and assessing fees for unsuccessful attempts by petitioning creditors).

19. See *11 U.S.C. Section 303(i)(1)(B)* (providing for costs, attorneys fees, actual damages and even punitive damages in some cases, if petitioning creditors file an involuntary case that is later dismissed because the debtor is generally paying its debts as they come due). Maybe I’ve just had bad luck, but every involuntary case I have seen or been involved with has been an expensive disaster for the petitioning creditors.

20. See *Business Reorganization Law (Ley de Concursos Mercantiles)*, Diario Oficial de la Federacion, Article 20, May 12, 2000, (permitting voluntary filings under *Ley de Concursos Mercantiles*).

21. *Id.*

22. *Id.* at Article 40.
for 10-15 days, during which time the visitador will examine the company's books and records to determine if the company is insolvent, among other things. Thereafter the judge will review these findings and determine if this company belongs in bankruptcy—or more accurately, in reorganization.

What will the judge be deciding? The judge is charged with determining if the debtor is insolvent, as that term is defined in Ley de Concursos Mercantiles, and this is insolvency in the "not-paying-your-debts-as-they-come-due" sense, not the balance sheet sense. This form of insolvency is necessary in order to maintain a case under Ley de Concursos Mercantiles. The visitador and the judge are also charged with determining if this company is an appropriate candidate for rehabilitation or should instead immediately go to quiebra, or liquidation. So those are the two things the visitador and judge ultimately are looking for during the visitation period, insolvency and prospects of reorganization. By the time the judge actually sorts this all out, and issues a declaration of insolvency allowing the case to go forward, quite a bit of time has passed, during which time creditors are permitted to continue pursuing their claims.

Thus, the visitador is charged with looking over the books and making sure that the debtor in Mexico is insolvent. Let's think back to United States bankruptcy law for a second. Let's just say that Firestone says, "I am sick of all these lawsuits. I am going to go down and file for bankruptcy." Do we care in United States law if Firestone is insolvent? No, we do not care. If you are a potential Chapter 11 debtor, the reason for your decision to file a Chapter 11 case is irrelevant, and totally up to you. You can do it for strategic reasons; you can do it to increase your market share; you can do it because you are Macy's Department Store and you feel like having a big sale. Insolvency is not required. A person or company can file at any time. In Mexico,

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23. Id. at Articles 29-40.
24. Id. at Article 10.
25. In the United States, we use the word bankruptcy generally, to mean either liquidation or reorganization. In Mexico liquidation is called "quiebra" and reorganization is called "concursos". In Mexico, this distinction is critical. It would be uncommon to use the word bankruptcy unless the speaker indeed meant that the person or company was in liquidation.

Similarly, in Canada, the word "bankruptcy" is used to describe liquidation only and not rehabilitation. I suspect that part of the reason we are not as careful to distinguish between these concepts in U.S. bankruptcy parlance is that there is less stigma surrounding the subject of insolvency and bankruptcy in general. Generally, this distinction may arise because most Americans feel that taking on excessive debt is an amoral act and a fact of life. We also tend to feel, as I say later in this talk, that risk taking is necessary to fuel a robust capitalist economy and that some businesses will necessarily fail if the proper level of risk is taken in the economy as a whole.

26. You would have a very similar time frame in an involuntary case in the U.S. The U.S. company would not get the benefit of the stay right away, and didn't ask for it anyway. But, again, in the U.S., you're not likely to see very many of these involuntary cases.

27. In fact, Macy's has filed for bankruptcy, see, e.g., In re R.H. M A C Y & CO., INC., et al., Reorganized Debtors, Federated Department Stores, Inc. f/k/a R.H. Macy & Co., Inc., 236 B.R. 583 (Bankr. S.D.N.Y. 1999), as have a tremendous number of other department stores, suggesting that retail businesses are particularly suited for chapter 11, as there is little stigma surrounding the subject of insolvency and bankruptcy in general. Generally, this distinction may arise because most Americans feel that taking on excessive debt is an amoral act and a fact of life. We also tend to feel, as I say later in this talk, that risk taking is necessary to fuel a robust capitalist economy and that some businesses will necessarily fail if the proper level of risk is taken in the economy as a whole.

without insolvency in the "not-paying-debts-as-they-come-due sense," you cannot
maintain a case under Ley de Concursos Mercantiles.29

One thing I am unclear about when I read Ley de Concursos Mercantiles is
whether, to maintain a case under Ley de Concursos Mercantiles, the debtor must
actually be unable to pay debts as they come due or just be heading in that
direction.30 The test itself is extremely specific and seems to require detailed
information that creditors are unlikely to have. This is one issue I would ask
lawmakers and reformers in Mexico to study carefully. I would hate to think that
companies in Mexico and their creditors would have to wait so long to file that it
would be too late to do any rehabilitation. 31

Under the current version of Chapter 11, we do not study the businesses' prospects for reorganization as businesses walk through the Chapter 11 door. There is no need to prove a realistic prospect of reorganization, although if the debtor cannot operate at a profit with the help of the automatic stay, it is likely to be a rather short case.32 In Mexico under Ley de Concursos Mercantiles, however, my understanding is that there will be an analysis of reorganization prospects before the insolvency declaration is granted. If the debtor is unlikely to reorganize, the judge can send the case to liquidation.

The stay is thus automatic in the United States upon the filing of the petition and not so automatic in Mexico. 33 Now let's assume that we have a Mexican case in which an insolvency certificate has now been issued.34 A stay goes into effect under Ley de Concursos Mercantiles but it is not nearly as broad as the one issued in the United States.35 Our concept in the United States is that after the filing, it is all for one and one for all. Bankruptcy is a collective process and virtually every creditor will need to ask the court’s approval before pursuing his or her claims or collateral.

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Joseph Bishop, Jr.), this idea never caught on. In fact, the issue of insolvency is not even discussed in the eligibility requirements for Chapter 11 or in the discussions of modern-day Chapter 11 filings. See 11 U.S.C. Section 109; see also Dargan, supra note 6, at 114. (calling the U.S.'s lack of an insolvency requirement for Chapter 11 "rather unique.").

29. See Business Reorganization Law (Ley de Concursos Mercantiles), Diario Oficial de la Federacion, Article 10, May 12, 2000. Article 10(I) states that the debtor must have obligations that have been overdue for at least 30 days and that account for 35% or more of all of Merchant’s payment obligations. Article 10(II) further requires that the Merchant have no assets with which to pay 80% of his outstanding payment obligations, thus injecting an additional standard of an inability to pay given existing assets. See id.


31. See id. I am not suggesting that our system is any better, where you can basically just file any time you want for any reason and immediately stay absolutely and positively any kind of claim. Apparently, the United States is the only country in the world that allows a suspension of payments and stay of collection, regardless of insolvency, making rehabilitation proceedings available to any business that would like to use them. My assumption is that we must have decided on some level that providing this open opportunity would fuel the economy or protect some aspect of the capitalist system.

32. Interestingly, the bankruptcy bill that is now stuck in conference committee does require the U.S. trustee’s office to assess the Chapter 11 debtor’s likelihood of success in the initial stages of the case, and report its findings to the judge.

33. See supra notes 12-14 and 20-26.

34. See Business Reorganization Law (Ley de Concursos Mercantiles), Diario Oficial de la Federacion, Articles 29-37, May 12, 2000.

There are, however, some very significant obligations and claims that are excepted from the stay in Mexico, making it harder to reorganize. The most significant exception to the stay is labor claims. Most of you are probably aware of how extremely strong the labor claims are in Mexico in general. As I understand Ley de Concursos Mercantiles, the holders of at least recent labor claims can continue to pursue their claims, after a merchant enters a proceeding under Ley de Concursos Mercantiles, and can even execute on the assets that are being used to rehabilitate the debtor during the case. This could interfere greatly with rehabilitation efforts.

Now, obviously, merchants know what they need to do in these circumstances. They need to take care of these claims before attempting to rehabilitate. However, these claims can be quite large so that may not be possible.

Additionally, certain tax claims are not stayed, meaning that the government can continue to pursue their collection claims. This one is especially interesting because in the United States, government entities are expected to wait to pursue their claims, along with everyone else. Taxes are treated less favorably under Ley de Concursos Mercantiles than under Ley de Quiebras y Suspencion de Pagos, however. Under Ley de Quiebras y Suspencion de Pagos, taxing authorities could both litigate their claims and also execute on the debtor's assets. Now, under Ley de Concursos Mercantiles, the litigation process can continue, but taxing authorities are not permitted to execute on the debtor's assets during the reorganization case.

Another big exception to the stay under Ley de Concursos Mercantiles is that pending lawsuits—that is suits pending as of the declaration of insolvency—are not stayed. A creditor cannot execute on the judgments obtained in this post-petition litigation, but the creditor-plaintiff is allowed to continue the adjudication process, even though the debtor is in reorganization. Why is this interesting? If you look at why Dow Corning or W. R. Grace or many other big companies filed for bankruptcy, many times they have a tremendous number of suits pending against them and a major goal of the Chapter 11 case is to stay those suits. They want to

36. See Business Reorganization Law (Ley de Concursos Mercantiles), Diario Oficial de la Federacion, Article 65-68, May 12, 2000. Labor claims are slightly less strong than under Ley de Quiebras y Suspencion de Pagos. Now holders of labor claims that are two years old or less can continue to execute on the debtor's assets to satisfy their claims, and holders of older claims can continue their litigation but are stayed from execution. Under Ley de Quiebras y Suspencion de Pagos, all labor claims could execute on the debtor's assets during the case, regardless of their age. Even under Ley de Concursos Mercantiles, however, labor claims can control or destroy a case. See Ley de Concursos Mercantiles Articles 67-68.

37. See Business Reorganization Law (Ley de Concursos Mercantiles), Diario Oficial de la Federacion, Article 65, May 12, 2000. Again, the stay stops attempts to execute by labor holding claims that are more than two years old, but does not affect the claims of the more recent labor claims.

38. See Business Reorganization Law (Ley de Concursos Mercantiles), Diario Oficial de la Federacion, Article 69, May 12, 2000. Tax suits can continue post-filing, although executions are stayed. Under Ley de Quiebras y Suspencion de Pagos, executions were permitted as well.

39. See 11 U.S.C, Section 362 (stating that even government entities must stop all collection efforts, and can only maintain lawsuits against entities in bankruptcy if the issue affects health and public safety, which is interpreted very narrowly).


41. See Business Reorganization Law (Ley de Concursos Mercantiles), Diario Oficial de la Federacion, Article 84, May 12, 2000.

42. See Business Reorganization Law (Ley de Concursos Mercantiles), Diario Oficial de la Federacion, Article 160, May 12, 2000.
have all of those suits merged in one forum, usually the bankruptcy court, because it is more efficient.

Mexican law does not provide this merging opportunity. In fact, there are no separate bankruptcy courts in Mexico, and even if there were, Mexican companies, reorganizing under the *Ley de Concursos Mercantiles*, are required to continue to defend against all pending litigation wherever it happens to be pending. Thus, Mexican law does not include this very big incentive to file a reorganization petition, that of stopping all litigation against the debtor company. It is surprising to me that all of this litigation could be allowed to continue, as the litigation expenses of a company under pressure from multiple suits could eliminate all prospects of reorganization. In any event, continuing litigation against a reorganizing business is permitted under *Ley de Concursos Mercantiles*.

One looming question that remains under *Ley de Concursos Mercantiles* is whether secured creditors are permitted to remove their collateral from the bankruptcy estate once a petition is filed under *Ley de Concursos Mercantiles*. Several conversations at this conference have led me to believe that no one is certain how *Ley de Concursos Mercantiles* affects secured creditors’ rights. Presumably this will need to be sorted out by the courts, since the statute is unclear. Prior to the recent changes in Mexico’s Secured Transactions law, the only real way to get a floating lien, or even a voluntary lien on any personal property in Mexico, was to use a guaranteed trust mechanism. Now there is another method of obtaining such a lien, through a filing system similar to that used in the United States.

However, some people here contend that assets placed in a guaranteed trust will never become part of a merchant’s proceeding under *Ley de Concursos Mercantiles* but will instead remain outside the estate. According to these sources, creditors who are a party to a guaranteed trust are in no way bound by the automatic stay. No one is quite sure if the same is true of security interests perfected through filing. No doubt, if creditors perfected through a guaranteed trust mechanism are not bound by the automatic stay and those using the filing system are bound by the automatic stay, no one will use the filing system. Creditors will continue to rely on the tried and true guaranteed trust.

My bigger concern, of course, is that secured creditors might not be bound by the automatic stay at all. Article 70 of *Ley de Concursos Mercantiles* states that any time a secured creditor has a right to repossess its assets under state law, it can remove and sell its assets from the bankruptcy estate. 43 While another part of the statute seems to provide a mechanism for obtaining relief from the automatic stay, 44 suggesting that the stay does apply, it is unclear when this provision must be used. I am hopeful that what I am hearing and reading is incorrect, and that secured creditors may not take their collateral and sell it at any time, regardless of a merchant’s reorganization prospects. Since the purpose of *Ley de Concursos Mercantiles* is to facilitate reorganization of Mexican merchants, it seems improbable that secured creditors would not be bound by the automatic stay. Such a system would not facilitate reorganization, to say the least. In fact, in cases filed

under Chapter 11 in the United States, the presence of secured creditors in the case often facilitates an efficient resolution of the case, because the possibility of losing the assets to a relief from stay motion is always looming. In the United States, a secured creditor can obtain relief from the automatic stay if its collateral is diminishing in value or the debtor is not making visible progress toward a viable reorganization plan. If the secured creditor obtains relief from the stay, it can remove all of its collateral from the estate and sell it. Needless to say, it would be tremendously hard for any company to reorganize after its working assets were taken in repossession.

Another issue is the stigma of reorganization under Mexican reorganization and liquidation law. When reading the old law and even some parts of the new law, the managers of these rehabilitated companies almost sound like quasi-criminals. In the United States, this is not the case. We consider some bankruptcy or business restructuring to be necessary in society, as a natural consequence of the kind of risk-taking required to fuel a robust capitalist economy. Perhaps the Enron scandal will change that but I do not think so. In the United States, we may feel managers of a Chapter 11 company are incompetent, but we do not automatically assume that they have stolen assets or lined their own pockets at the expense of others. This lack of stigma is a good thing. Continuing stigma about rehabilitation is not good for the economy because, if the rehabilitation process is going to work, you want to get merchants into reorganization and through the process quickly, without fear of societal reprisal.

The final difference I will talk about between cases on each side of the border is the role of the professionals in the respective cases. You have already seen that in Mexico under Ley de Concursos Mercantiles, a visitor or examiner comes to the merchant's place of business and does some evaluation of the financial condition of the debtor merchant for ten or fifteen days. Theoretically, this person will only be involved in the beginning of the case, for the purposes I have already described. Thereafter, if an insolvency declaration is entered, a conciliator is appointed by the Instituto Federal Especialistas de Concursos Mercantiles (Federal Institute of Specialists of Business Reorganization; IFECOM). The role of the conciliator is to act as a mediator between the merchant and creditors, to propose and negotiate a reorganization plan and to run the business if management is displaced. The role is similar in some ways to the role a Chapter 11 trustee plays in a Chapter 11 case, but Chapter 11 trustees are exceedingly rare.

Compare this management style and structure to that of Chapter 11. Who is running the Chapter 11 reorganized company, that has been filed north of the

45. See 11 U.S.C. §362(d)(1), which allows relief from stay if the creditor's position in the collateral is not adequately protected, meaning the collateral is diminishing in value, and (d)(2), which allows relief from the automatic stay if (A) there is no equity in the property and (B) the property is not necessary to an effective reorganization. If no effective reorganization is possible, or probable, given the time that has passed, then 362(d)(2)(B) is met.

46. I also realize that due to Mexican amparo proceedings (Constitutional challenges), no Mexican foreclosure is as quick as those can be accomplished in the United States. See Mexican Constitution, Articles 103, 107.

47. LCM, Article 148. Business Reorganization Law (Ley de Concursos Mercantiles), Diario Oficial de la Federacion, Article 43 (IV), May 12, 2000. The role of the Institute is set forth in detail in Ley de Concursos Mercantiles, Article 311.
border? Who proposes the plan? Who decides what contracts to assume or reject? It is the debtor-in-possession, the managers, the same people, perhaps, that ran the firm into the ground. There is normally no overseeing party, no trustee. This is a significant departure from both the Mexican law and, to the best of my knowledge, all of the reorganization laws all around the world. The United States is the only country that has this non-oversight system as the default system. While our system can lead to some abuses, the reasons for this system are clear. We assume that it is more efficient to continue existing management because of the learning curve, the personal relationships that have been built, and because we have no reason to believe that existing management is comprised of criminals. They may not even be incompetent but may instead find themselves in Chapter 11 due to a one-time event, a recession or, as mentioned before, the result of a strategic decision.

Looking back to *Ley de Concursos Mercantiles*, the conciliator is the key player in the reorganization effort. The conciliator is the one that mediates the plan, proposes the plan and tries to get it approved. In fact, the conciliator can replace management completely. That person can simply tell management, “I’m sorry, you are not improving the situation; I’m going to do this myself” and ask the court to replace management completely and take over that role. This can be done far more easily than one can have a Chapter 11 trustee appointed in a Chapter 11 case. There are some other professionals in a reorganization case in Mexico, with no equivalent in the United States. Unfortunately, the discussion of these people and their respective roles is beyond the scope of this discussion. Suffice it to say that there are far more professionals in a reorganization case under *Ley de Concursos Mercantiles* than under Chapter 11 and I’m concerned about the cost of all these different people in the case. Time will tell if these administrative costs will be prohibitive.

One important and major change in *Ley de Concursos Mercantiles* is the formation of IFECOM. I find it interesting that the Institute’s staff members are trained in business and are charged with helping the court and the merchant to improve the business of the debtor. Our own corollary office in the United States, the United States Trustee’s Office, does not perform the same function, and does not require staff members to have a business background. They are not specifically chosen because of their ability to assist in the rehabilitation process, although this sounds like a very good idea. Overall, I would expect the Institute to be very helpful in the collective rehabilitation efforts of Mexican merchants.

The last thing I will say in comparing the two laws is that now, in Mexico, the conciliation process can only last for 365 days, after the declaration of insolvency has been advertised. This appears to be an absolute deadline. Chapter 11, by

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49. *Id.* at 150.
50. *See id.*
51. *Compare* 11 U.S. C. Section 1104 (which requires either “fraud, dishonesty, incompetence, or gross mismanagement,” or a finding that appointing a trustee is otherwise in the interests of creditors, in order to appoint a Chapter 11 trustee to displace management).
53. *See id.* The statute says that “under no circumstances may the conciliation stage and its extensions
comparison, contains absolutely no time limit during which a Chapter 11 plan must be confirmed. In the United States, under current law, it is possible to keep cases alive under Chapter 11 for six or seven years or more. The point is that Mexico's one-year limitation is a significant departure, both from prior Mexican law and from existing U.S. law. Interestingly, the new revisions to Chapter 11, which are currently in conference committee, do contain a limitation on the amount of time during which a debtor can retain the exclusive right to file a plan of reorganization under Chapter 11, but this time limitation can be extended for cause. I suspect there will never be an absolute time limit for confirming a Chapter 11 reorganization plan in the United States, so again we see ways in which Ley de Concursos Mercantiles may be more creditor-oriented than Chapter 11.

In any event, this is a very brief summary of some of the major differences between Chapter 11 and the new Mexican Ley de Concursos Mercantiles. There are also major differences in the respective plan processes and in the court structures, but those issues will have to be saved for another time. I hope that you found this limited comparison helpful.