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Constitutional Challenges of the Mexican Insolvency Law (Ley de Concursos Mercantiles)

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CONSTITUTIONAL CHALLENGES OF THE MEXICAN INSOLVENCY LAW (*LEY DE CONCURSOS MERCANTILES*)

*Luis Manuel C. Méjan**

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I. CHAPTER 1 – GENERAL SCOPE OF THE ADDRESSED ISSUE

A. INTRODUCTION

RECENTLY, one major case, *Vitro SAB*,¹ has brought to the arena a strong discussion about whether the Insolvency Law in Mexico duly performs the concept of due process of law granted by the Constitution of Mexico. One could look to constitutional concepts in other jurisdictions, but the constitutionality of Mexican law has to be weighed according to the concepts, texts, and decisions rendered in the Mexican system of law.² This paper looks to those sources as it gathers all the issues about constitutionality that have been raised since the bankruptcy law, *Ley de Concursos Mercantiles* (LCM), was enacted.³

B. ENACTMENT OF MEXICAN INSOLVENCY LAW

The Mexican Insolvency Law: *Ley de Concursos Mercantiles*, or LCM, was enacted in Mexico, replacing the former insolvency law,⁴ as a result of several factors arising during the last decade of the twentieth century.⁵ The most important of these was a major financial crisis that took the interest rates, the currency exchange, and inflation to levels above the resources and possibilities of many of the enterprises and natural persons, resulting in defaults and a very close call for the banking industry, such that a rescue program of the banks and the deposits representing the savings of the country had to be implemented.⁶

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1. *Vitro, S.A.B. de C.V. v. ACP Master, Ltd.*, 473 B.R. 117 (Bankr. N.D. Tex. 2012), *aff'd sub nom. In re Vitro S.A.B. de CV*, 2012 WL 5935360 (5th Cir. Nov. 28, 2012).
 2. *Id.* at 124 (stating that “it did not find that a jury trial is absolutely necessary in order to have a fair and impartial verdict”).
 3. *Ley de Concursos Mercantiles* [LCM] [Bankruptcy Law], *as amended*, Diario Oficial de la Federación [DO], 27 de Diciembre de 2007 (Mex.).
 4. *Ley de Quiebras y Suspensión de Pagos* [LQ] [Bankruptcy and Suspension of Payments Law], *as amended*, Diario Oficial de la Federación [DO], 12 de Abril de 1943 (Mex.) was, during its time, a modern statute, but after forty years of being applied with only one amendment, it needed major change.
 5. Luis Manuel C. Méjan, *The Genesis, Structure and Projection of the New Mexican Insolvency Law*, 17 CONN. J. INT'L L. 79, 81-82 (2001).
 6. *Id.* at 81.

Important measures in the structure of the country's legal system were also required. Along with the inception of electronic commerce and digital signatures, credit bureaus were established and regulated to foster trust in credit markets, a new system of bank deposit insurance was put in place, a financial services consumer protection system was instituted, and, of course, a new bankruptcy law had to be considered.⁷

C. THE CONSTITUTIONALITY ISSUE

In 1999, when the LCM was being drafted, the document was presented to several consultants, among them were several former justices—in Mexico, the Supreme Court of Justice covers the function of a constitutional tribunal, meaning that the former justices were experts in constitutional matters—to ensure that the prospected provisions of the new statute abided by the Constitution.⁸ As a matter of fact, the leading senator filing the proposed act was himself a former justice.

Through all the years that the LCM has been in operation, several challenges to its constitutionality have been raised, matters that have been different than those that the law drafters were expecting. For instance, everybody was expecting that the exclusive federal jurisdiction provision would be challenged. As a prophylactic measure, the then Director General of the recently created insolvency regulator, *El Instituto Federal de Especialistas de Concursos Mercantiles* (IFECOM), wrote and published an essay on the matter,⁹ but the issue has never been raised.

The purpose of this paper is to discuss those matters in the LCM for which the constitutionality has been addressed by the constitutional tribunals in Mexico.¹⁰

D. CONSTITUTIONAL REVIEW IN MEXICO

The judicial power in Mexico, for dealing with constitutional matters, is composed of district judges, the so-called *Tribunales Colegiados* (a panel of three magistrates), and the Supreme Court of Justice.¹¹ The Supreme Court of Justice works either in small chambers (*Salas*) formed by five justices, or in a plenary group (with the members of the two *Salas* plus the

7. *Id.*

8. Michael L. Owen et al., Panel Discussion: A Comparison of Ley de Quiebras y Suspensión de Pagos with the New Ley de Concursos Mercantiles, 10 U.S.-MEX. L.J. 85, 93 (2002).

9. Luis Manuel C. Méjan, *Competencia Federal en Materia de Concurso Mercantil* (2001).

10. In order to provide the sources presented in this paper, the relevant LCM provisions are inserted each time they are mentioned. The constitutional provisions and the decisions made by constitutional tribunals will be inserted in footnotes. To understand mentions made to constitutional tribunal decisions, it is important to note that each reference contains both the data necessary to locate the decision, and a secondary reference to the specific case(s) based on which the decision was rendered.

11. Dale Beck Furnish, *Judicial Review in Mexico*, 7 SW. J.L. & TRADE AM. 235, 243 (2000).

Chief Justice, which means eleven justices).¹²

The constitutionality of an act performed by an authority is judged through the so-called *amparo*, which is the action that can be filed by those whose constitutional human rights were infringed upon. Such constitutional review can also be triggered when some high government officials or entities request that the Supreme Court rule on the constitutionality of specific acts described in the law. Finally, the Supreme Court of Justice can decide an issue that has been resolved in a contradictory way by two or more of the *Tribunales Colegiados*.

Precedents established by constitutional tribunals become, in some cases, binding upon lower courts. This is usually the case when the same criteria have been consistently applied in a number of cases.¹³ When a high enough number of cases has not been reached, precedents only serve as a reference, albeit a strong one.¹⁴

E. BINDING PRECEDENTS

So far, more than twelve years after the implementation of the LCM, constitutional tribunals (the Supreme Court of Justice and the *Tribunales Colegiados*), have issued nine decisions that are now binding upon future cases. Two of them are related to the authority invested in the IFECOM to issue regulations covering technical and operative measures. The Court ruled that such authority does not usurp the authority of Congress, nor does it contradict the text of the Constitution.¹⁵ Three other cases do not refer to any constitutional grounds related to human rights but are instead related to procedural issues.¹⁶ Two other cases refer to the pro-

12. Robert M. Kossick, Jr., *Litigation in the United States and Mexico: A Comparative Overview*, 31 U. MIAMI INTER-AM. L. REV. 23, 26-27 (2000).

13. M. C. Mirow, *Marbury in Mexico: Judicial Review's Precocious Southern Migration*, 35 HASTINGS CONST. L.Q. 41, 57-58 (2007).

14. *Id.*

15. Instituto Federal de Especialistas de Concursos Mercantiles. La facultad que le confiere el artículo 311, fracción XIII de la ley relativa, para dictar las reglas técnico-operativas de observancia general, no constituye un acto delegatorio del Congreso de la Unión, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta, Novena Época*, tomo XXIII, Enero de 2006, Tesis 1a./J. 172/2005, Página 393 (Mex.) (Registro No. 176,271) (The power under article 311, section XIII of the law relative to dictate the technical and operational rules of a general is not an act delegatory of Congress' authority); Instituto Federal de Especialistas de Concursos Mercantiles. El Artículo 311, Fracción XIII, de la ley relativa, que lo faculta para dictar reglas técnico-operativas de observancia general, no viola el artículo 100 de la Constitución Federal, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta, Novena Época*, tomo XXIII, Enero de 2006, Tesis 1a./J. 173/2005, Página 368 (Mex.) (Registro No. 176,272) (under article 311, Section XIII, entitling it to make operational rules does not violate article 100 of the Federal Constitution).

16. Concurso Mercantil. Momento en el que los acreedores genéricos del concursado pueden intervenir en el procedimiento respectivo, *Tribunales Colegiados de Circuito* [TCC] [Collegiate Circuit Court], *Semanario Judicial de la Federación y su Gaceta, Novena Época*, tomo XXV, Marzo de 2007, Tesis I.3o.C. J/35, Página 1508 (Mex.) (Registro No. 173075) (Insolvency. Time at which the creditors of the bankruptcy can intervene in the dispute resolution process.); Concurso Mercantil.

tected regime of labor rights, providing employees with assistance in the way they file their requests to the court.¹⁷

The last two cases refer precisely to the matters discussed in this paper because they define the constitutionality of some of the law's provisions, and because they validate the general intent of the LCM, as provided by its own text, to be of public interest, criterion supported by the Supreme Court of Justice.¹⁸ These two decisions will form part of the next chapter.

F. NON-BINDING PRECEDENTS

Out of the total number of decisions rendered by the constitutional tribunals, those referring precisely to challenges to the constitutionality of the Law will also be addressed in the next chapter.

II. CHAPTER 2 – CONSTITUTIONAL ISSUES IN THE MEXICAN BANKRUPTCY LAW

A. DUE PROCESS OF LAW IN MEXICAN PROCEEDINGS

1. *Guaranty of the Auditor's (Visitador) Fees - Article 24*

The LCM provides for the obligation, for one who files a request or demand for an insolvency proceeding, to grant a guarantee to cover the fees of the first of the specialists involved in the proceeding, meaning the *Visitador* (Auditor) who is the insolvency professional in charge of running an “insolvency test” to determine whether or not the debtor meets the requirements to be declared subject to an insolvency proceeding. Ar-

La resolución que decide en definitiva un incidente de acción separatoria constituye una sentencia definitiva, por lo que es impugnabile a través del juicio de amparo directo, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Décima Época, tomo IV, Enero de 2012, Tesis 1a./J. 31/2011 (9a.), Página 2207 (Mex.) (Registro No. 160435) (The resolution ultimately decides incident separatoria action constitutes a final judgment, and it is open to be challenged through the direct *amparo*); *Concursos mercantiles*. La admisión en ambos efectos del recurso de apelación en contra de la sentencia de quiebra no puede extenderse a hipótesis distintas a la prevista legalmente, *Tribunales Colegiados de Circuito [TCC] [Collegiate Circuit Court]*, *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo VIII, Mayo de 2012, Tesis I.4o.C. J/32 (9a.), Página 1579 (Mex.) (Registro No. 160,135) (Admission to both effects of the appeal against the judgment of bankruptcy cannot be extended to different scenarios provided by law).

17. *Suplencia de la queja*. Procede en favor de los trabajadores, aun en un concurso mercantil, porque sus derechos se encuentran protegidos por la constitución y los tratados, *Tribunales Colegiados de Circuito [TCC] [Collegiate Circuit Court]*, *Semanario Judicial de la Federación y su Gaceta*, Décima Época, tomo VIII, Mayo de 2012, Tesis I.7o.C. J/1 (10a.), Página 1740 (Mex.) (Registro No. 2000911) (Replacement of the complaint is appropriate for workers, even in bankruptcy because their rights are protected by the constitution and treaties); *Suplencia de queja*. En tratándose de concurso mercantil y en favor de trabajadores, debe ser absoluta, *Tribunales Colegiados de Circuito [TCC] [Collegiate Circuit Court]*, *Semanario Judicial de la Federación y su Gaceta*, Décima Época, tomo VIII, Mayo de 2012, Tesis I.7o.C. J/1 (10a.), Página 1741 (Mex.) (Registro No. 2000911) (Replacement of complaint. In the case of insolvency and for workers, must be absolute).
18. *Ley de Concursos Mercantiles [LCM] [Bankruptcy Law]*, as amended, art. 1o, *Diario Oficial de la Federación [DO]*, 27 de Diciembre de 2007 (Mex.).

ticle 20 provides that “[a]ny Merchant who believes that he has generally defaulted his obligations in the terms of either of the two events listed in Article 10 of this Act, may file a petition for business reorganization declaration”¹⁹ It further provides that, if the petition is admitted, the offer granting the guarantee, referred to in article 24, must be attached to the petition.²⁰ The petition must be processed pursuant to article 23(II) that provides that “[a]ny demand filed by a creditor must be accompanied by: . . . [t]he offer of granting the guarantee referred to in the following article, in case the demand is admitted”²¹

The purpose of such rule is not exactly to guarantee the *Visitador*'s fee; rather, it is a security requirement to ensure the seriousness of the request or demand. Proof of this is that once the work of the auditor is done, if the court declares the debtor in bankruptcy, the amount of the guarantee must be returned to the party that sponsored the trial.²²

The LCM adds a penalty for those who do not meet this requirement: the admission of the bankruptcy proceeding is cancelled. Under article 24:

If the judge finds no reason to declare improper or any defect in petition or demand for business reorganization, or if the deficiencies ordered in the warning issued by the judge are cured, will accept the petition or demand. The decree admitting the petition or demand shall cease to be in effect if the plaintiff does not guarantee payment of the inspector's fees at the rate of 1500 days the minimum daily wages in the Federal District, within three days following the date on which the decree admitting the petition or demand for processing is notified to him. Such guaranty will be returned to the plaintiff if the judge rejects the petition or demand or issues a judgment declaring the business reorganization.

If the District Attorney files the demand for reorganization, the guaranty referred to in this Article shall not be necessary.²³

On several occasions, the constitutionality of the obligation to secure the *Visitador*'s fees and the resulting annulment of the determination of insolvency due to a failure to secure the fees have been challenged. The First Chamber of the Supreme Court of Justice has addressed the issue twice, rendering conflicting decisions. In its first decision, the Supreme Court did not find that article 24 was unconstitutional because the obligation was that of the creditor who filed the *Concurso* and not of the debtor; therefore, the debtor was not entitled to challenge the constitutionality of the article that establishes the obligation to offer the guarantee.²⁴ In its second decision, the Court further analyzed the matter and

19. *Id.* art. 20.

20. *Id.* art. 20(IV).

21. *Id.* art. 23(II).

22. *See id.* art. 24.

23. *Id.*

24. Concursos mercantiles. El artículo 24 de la ley relativa no causa al demandado agravio personal y directo, por lo que es improcedente el amparo en el que

found that annulling a determination of insolvency is unconstitutional because it denies the right of free access to the justice administration—which must be free of any charges under the Constitution—and because it is not possible to establish such a condition on the judiciary’s ability to act.²⁵ None of those criteria set forth in those two decisions are binding yet; rather, they are only precedents.

2. *Producing Evidence - Articles 26 and 27*

It is necessary to understand that, in the Mexican legal procedural system, evidence is constrained to witnesses, but there is a large variety of ways to produce evidence. Article 26 refers to the chances of the defendant debtor to produce evidence while answering the summons and gives a new chance to the plaintiff to add some evidence in light of what the defendant has answered, whereas article 27 only refers to, as means of evidence, documents and expert opinions. Under article 26:

Once a demand for business reorganization has been admitted, the judge will summon the Merchant and will grant him a nine-day term to file his answer to the complaint. The Merchant must offer, in his answer, such evidence as may be authorized by this Act.

. . .

The day following the date on which the judge receives the answer, he will submit a copy thereof to the plaintiff so that, within three days, the plaintiff make such statements as may benefit his rights and, if proper, make additions to his offer of evidence with such other evidence related to the exceptions opposed by the Merchant.²⁶

According to article 27:

the answer to the demand the documentary evidence and any expert opinions filed in writing shall be admitted. Whoever files an expert opinion must accompany to such opinion the information and documents that establish the expertise and technical knowhow of the corresponding expert. Under no circumstances will the experts be summoned for questioning.

With his answer to the demand, the Merchant may offer, in addition to the evidence to which the preceding paragraph refers, any evidence that may directly disprove the event mentioned in Article 10 of this Act, and the judge may order²⁷

reclama la inconstitucionalidad de ese precepto, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XX, Julio de 2004, Tesis 1a. XCI/ 2004, Página 189 (Mex.) (Registro No. 181179).

25. *Concursos Mercantiles*. El artículo 24 de la ley relativa viola la garantía de acceso a la justicia, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XXVII, Febrero de 2008, Tesis 1a. VI/ 2008, Página 481 (Mex.) (Registro No. 170369) (Article 24 of the act violates access to justice).

26. LCM art. 26.

27. *Id.* art. 27.

Some defendants challenged the constitutionality of the provision, arguing that, if LCM allows only two kinds of evidence and, additionally, the plaintiff has two chances of offering evidence while the defendant only has one, it violates the right to be heard under articles 14 and 16 of the Constitution.²⁸

The constitutional tribunal (the First Chamber of the Supreme Court of Justice) found, on three different occasions, that provisions in LCM's article 26 are not contrary to the spirit of the Constitution; rather, giving to the plaintiff two chances to present evidence contributes to equity because this enables both parties to argue and present evidence in response to what the other party is alleging. The Court also found that even if only two kinds of evidences are referenced in the first paragraph of the article, the second one allows producing any other evidence suitable to what is being alleged.²⁹

3. *Restraint - (Arraigo) - Article 47*

The LCM provides that the debtor, or the principals if the debtor is a legal entity, should be held in confinement during the *Concurso* proceeding, that is, they cannot leave the city where they live unless they appoint a representative who will have the authority to act in the business and affairs of the debtor.

Article 47. The judgment will bring about the Merchant's restraint and, in the case of legal entities, of the parties charged with the administration of such legal entities, only to prevent them from leaving the place of the Domicile without leaving behind any attorney in fact appointed by means of a power of attorney, with sufficient instructions and money to meet expenses. Once the party who has been made subject to a restraining order proves that he complied with the aforesaid requirements, the judge will cancel the restraining order.

28. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 14, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (stating "No law shall be given retroactive effect to the detriment of any person whatsoever. No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act."); *Id.* art. 16 (stating "No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken.").

29. Concursos Mercantiles. El artículo 26 de la ley relativa no viola el principio de equidad procesal, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XXIII, Enero de 2006, Tesis 1a. CLI/2005, Página 715 (Mex.) (Registro No. 176359) (Article 26 of the LCM does not violate the principle of procedural fairness); Concursos Mercantiles. Los artículos 26 y 27 de la ley relativa, no violan las garantías de legalidad y audiencia, pues no limitan el ofrecimiento de pruebas en ese tipo de juicios, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XX, Julio de 2004, Tesis 1a. XCIII/2004, Página 192 (Mex.) (Registro No. 181175) (Articles 26 and 27 of the Act do not violate the guarantees of legality and audience, because they do not restrict the presentation of evidence in such trials).

The restraint set forth in the previous paragraph shall not be applicable in those cases in which the business reorganization had been requested directly by the Merchant.³⁰

This provision has been challenged on the grounds that it represents a violation to the freedom of transit.³¹ The Tribunal has ruled that there is no such violation to the freedom of transit because the law itself allows the administrator to appoint a representative to act on his or her behalf.³² In another decision it was provided that the order of restraint or confinement cannot be stayed during the *amparo* challenging the constitutionality of article 47 because LCM is a public interest law and its provisions must be accomplished as they are.³³ In this way, the administrators of a debtor can be legally restrained to move and abandon the city where they live, even if there is a challenge against such order.

4. Right to Appeal - Article 49

LCM establishes that the filing creditors are allowed to appeal the judgment ordering or denying the business reorganization. Other creditors do not have that possibility because they have not appeared yet in the proceeding.

Article 49. An appeal may be filed against the judgment denying the business reorganization. Such appeal shall stay the business reorganization process. An appeal may be filed against the judgment granting the business reorganization. Such appeal shall not stay the reorganization proceeding unless it is declared valid.

30. LCM art. 47.

31. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 11, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (stating “Everyone has the right to enter and leave the Republic, to travel through its territory and to change his residence without necessity of a letter of security, passport, safe-conduct or any other similar requirement. The exercise of this right shall be subordinated to the powers of the judiciary, in cases of civil or criminal liability, and to those of the administrative authorities insofar as concerns the limitations imposed by the laws regarding emigration, immigration and public health of the country, or in regard to foreigners residing in the country.”).

32. Arraigo. El decretado a los administradores de una sociedad declarada en estado de concurso mercantil o quiebra, no vulnera las garantías de libre tránsito y residencia ni en modo alguno es limitativo de los intereses económicos del comerciante, Tribunales Colegiados de Circuito [TCC] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XIX, Enero de 2004, Tesis I.6o.C.291 C, Página 1453 (Mex.) (Registro No. 182482) (The decree restraint to directors of a company declared to be in state of insolvency or bankruptcy, does not violate the guarantees of free movement and residence or in any way is a threat to the economic interests of merchant).

33. Arraigo Previsto por el artículo 47 de la Ley de Concursos Mercantiles. No procede conceder la suspensión provisional contra la resolución que lo decreta, pues de otorgarse se afectarían disposiciones de orden público e interés social, Tribunales Colegiados de Circuito [TCC] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XX, Agosto de 2004, Tesis IV.3o.C.25 C, Página 1552 (Mex.) (Registro No. 180955) (Restraint is provided by article 47 of the bankruptcy law. It is not possible to grant a stay of the order of restraint because the public policy provisions and interest protected by the law would be affected).

The Merchant, the inspector, the plaintiff creditors and the plaintiff District Attorney may file the appeal.³⁴

In one case, one of those non-plaintiff creditors asked to declare the provision as unconstitutional because it violates the principle of equal treatment under law, a right granted by the Constitution.

Article 1 - In the United Mexican States, every individual will enjoy the guarantees that this Constitution grants, which shall not be restricted or suspended except in the cases and with the conditions under which the same is established.³⁵

The Supreme Court, on two different occasions, found that such provisions were not unconstitutional because the position of those creditors is different from the creditors that filed the *concurso*, so they should be treated differently.³⁶ Additionally, they will have all their rights as creditors during the commencing trial (including filing a proof of claim, for instance).³⁷

As a result, it is clear that the judgment granting the “*concurso mercantil*” is the one that starts the proceeding, and all creditors will be treated equally from that point on.

5. *Objections Made to the Definitive List during the Proof of Claim Proceeding - Articles 127 and 130*

In the proof of claim stage, creditors might file a petition to the conciliator to include their claim in a provisional list. This provisional list is offered to everyone, so each has the opportunity to make objections. Afterwards, the conciliator has to prepare what is called “the definitive list,” which will be presented to the Court in order to prepare and issue the Proof of Claim Order.

34. LCM art. 49.

35. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 1, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

36. Concursos Mercantiles. El artículo 49 de la ley de la materia no viola la garantía de igualdad al legitimar a los acreedores demandantes para interponer recurso de apelación en contra de la sentencia que declara o niega el concurso, y no así a los acreedores no demandantes, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XX, Julio de 2004, Tesis 1a. XCVI/2004, Página 190 (Mex.) (Registro No. 181177) (Article 49 of the relevant law does not violate the guarantee of fairness when it authorizes the plaintiff creditors to file an appeal against the order that declares or denies the insolvency and does not authorize the non-plaintiff creditors).

37. Concursos Mercantiles. El artículo 49 de la ley de la materia no viola la garantía de audiencia al no legitimar a los acreedores no demandantes para interponer recurso de apelación en contra de la sentencia que declara o niega el concurso, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XX, Julio de 2004, Tesis 1a. XCVII/2004, Página 190 (Mex.) (Registro No. 181178) (Article 49 of the relevant law does not violate the guarantee of hearing when it does not authorize the non-plaintiff creditors to file an appeal against the order that declares or denies the insolvency).

Article 127. If in a different proceeding a final and conclusive judgment, labor-related award, standing administrative resolution or arbitration award has been issued prior to the retroactivity date, pursuant to which the existence is declared of a right to collect against the Merchant, the creditor involved must file a certified copy of said resolution with the judge and the conciliator.

The judge must recognize the credit in the terms of said resolutions, by including it in the credit recognition, ranking and preference judgment.³⁸

Article 130. The conciliator shall have a non-extendable ten-day term following the date on which the term to which the preceding Article refers expires, in order to draw up and file with the judge the final credit recognition list which shall prepare based on the provisional credit recognition list as well as the objections that in any case might be filed against it and whereby shall be included, in the approved terms in the *Res judicata* judgment, the credits with regard to it is known the existence of firm and final judgment, including the tax liabilities and labor-related credits, which up to then may have been reported to the Merchant, attending in addition all the applications, if any, filed after the provisional credit list was prepared.

If the conciliator fails to file the final list at the end of the term to which the preceding paragraph refers, the judge will issue such coercive actions as he may deem necessary in that respect and, if the conciliator does not file it within five more days, the judge will ask the Institute to appoint a new conciliator.³⁹

On one occasion, some creditors complained that, because those provisions do not grant the possibility to make objections to the definitive list, the referred articles should be deemed unconstitutional as a denial of due process of law.⁴⁰

The Supreme Court of Justice did not agree with that argument because creditors will have the chance to oppose the judgment rendered by the court based on that list, so they are not defenseless nor denied the opportunity to oppose and argue.⁴¹

With this decision, the procedures outlined by the statute are considered regular and in accordance with the Constitution.

38. LCM art. 127.

39. *Id.* art. 130.

40. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 14, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (stating that “[n]o law shall have retroactive effect to the detriment of anyone. Nobody may be deprived of life, liberty, or of his land, possessions or rights, except by means of judicial proceedings before previously established courts that comply with essential formalities of procedure, and conforming to laws made previously before the case.”).

41. Concursos Mercantiles. Los artículos 127 y 130 de la ley relativa no violan la garantía de audiencia, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta, Novena Época*, tomo XXXII, Noviembre de 2010, Tesis 1a. CXIX/2010, Página 55 (Mex.) (Registro No. 163493) (Articles 127 and 130 of the Act do not violate the right to a hearing).

6. *Time Frame to File a Proof of Claim or to Express Objections to the Provisional List Made by the Conciliador - Article 129*

During the proof of claim process, the *conciliador* is requested to present a provisional list of claims and creditors to the court and to the creditors. Under article 129, creditors have the possibility, for a period of five calendar days, to file a proof of claim⁴² and/or to express objections to the list filed by the *conciliador*,⁴³ attaching to this request all the necessary documents to support the petition.

The general and default rule in the LCM is that all time frame periods should be considered in business days unless other ways are stated by the text of the statute. In this case, the term of calendar days was expressly mentioned.

The Supreme Court of Justice, through its First Chamber, ruled that this term is contrary to the right of “effective access to justice,” as safeguarded under Article 17 of the Constitution, because during non-business days it would be impossible to have access to the court’s docket, and difficult for the creditors to collect all the documents needed to support filing a proof of claim or to object to the way the *conciliador* is considering the claims in the provisional list.⁴⁴

This decision is not binding as it is only a precedent and further arguments might be raised in future cases sustaining that the LCM is very cautious with defining the time frame of the different stages of the proceeding. In one case, *Mexicana*, the judge ruled that all the periods of the reorganization should be taken as business days, despite the text of the law clearly referring to calendar days, arguing that the spirit of the law is in favor of trying to get a reorganization plan approved. The *amparos* filed against this decision should bring new light on this subject.

7. *Right to Object to the Judgment Granting the Proof of Claim - Article 135*

Once the credit recognition, ranking, and preference judgment is rendered, the creditors that consider that such order is against their interests

42. “The creditors may request the recognition of their credits . . . [w]ithin the term granted to object to the provisional list referred to in Article 129 of this Act.” LCM art. 122, frac. II.

43. *Id.* art. 129. Once the *conciliador* submits to the judge the provisional credit list, the judge will make it available to the Merchant and the creditor so that, within a non-extendable five-calendar-day period, they file in writing to the *conciliador*, through the judge, their objections together with any documents they may deem pertinent, which will be made available to the *conciliador* through the judge, the day after the judge receives them.

44. Concursos Mercantiles. El artículo 129 de la ley relativa, al establecer que el término para presentar objeciones a la lista provisional de créditos debe computarse en días naturales, viola el derecho de acceso Efectivo a la Justicia, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo libro VII, Abril de 2012, Tesis 1a. LXVIII/2012 (10a.), Página 860 (Mex.) (Registro No. 2,000,522) (Article 129 of the Law establishes that the term to file objections to provisional list of credits should be counted in calendar days, violates the right of effective access to justice).

are allowed to appeal such order, but this challenge of the decision will not stay the proceeding. Such is the text of article 135 in the LCM.

Article 135. The credit recognition, ranking and preference judgment may be appealed. Such appeal will be accepted only in such manner that it does not stay the reorganization proceeding.⁴⁵

One creditor considered this provision unconstitutional because it denies the opportunity to be heard as stated in article 14 of the Mexican Constitution.⁴⁶

The First Chamber of the Supreme Court denied this allegation considering that article 135 grants the creditor the possibility to object to the judge's decision.⁴⁷

8. *Possibility to Extend the Length of the Reorganization Period - Article 145*

The reorganization must be accomplished within the frame of 185 natural days. There are two possible reasons for an extension: (1) a ninety day extension can be requested by the insolvency professional (the *conciliador*) along with recognized creditors representing two-thirds of the aggregate amount of credits; (2) the law grants the debtor, plus the 90 percent of recognized creditors, the possibility to request an additional extension of ninety days to conclude a Reorganization Plan. Article 145 provides:

The conciliation stage will have a duration of 185 calendar days following the date on which the business reorganization judgment is last published on the Official Gazette of the Federation. The conciliator or the Recognized Creditors representing at least two thirds of the aggregate recognized credits, may ask the judge to approve an extension of up to ninety calendar days following the date on which the term mentioned in the preceding paragraph expires, if they believe that the execution of an agreement is about to take place.

45. LCM art. 135.

46. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 14, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (stating “No law shall have retroactive effect to the detriment of anyone. Nobody may be deprived of life, liberty, or of his land, possessions or rights, except by means of judicial proceedings before previously established courts that comply with essential formalities of procedure, and conforming to laws made previously before the case.”); *id.* art. 16 (stating that “[n]obody can be disturbed in his or her person, family, residence, papers, or possessions, except by virtue of a written order by a competent authority, that is founded in and motivated by legal procedural cause.”).

47. Concursos Mercantiles. El artículo 135 de la ley relativa, al prever un recurso para hacer valer el derecho al reconocimiento como acreedor, no viola la garantía de audiencia, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo libro XXX-III, Febrero de 2011, Tesis 1a. III/2011, Página 610 (Mex.) (Registro No. 162913) (When article 135 of the law provides a remedy to enforce the right to be recognized as a creditor, it does not violate the right to a hearing).

The Merchant and the Recognized Creditors that represent 90% of the total amount of whole credits may ask the judge for an extension of up to ninety calendar days in addition to the extension to which the preceding paragraph refers. Under no circumstances may the conciliation stage and its extension exceed 365 calendar days following the date on which the business reorganization judgment was last published on the Official Gazette of the Federation.⁴⁸

The difference between the first and second extension (*conciliador* or two-thirds of credits in the first one and a debtor plus 90 percent of claims in the second one) was challenged as unconstitutional because it does not provide equal treatment to the debtor. One debtor questioned the provision on whether the debtor should be allowed to request both the first extension and the second one; and that this different treatment supposed a violation of the equal treatment that should be accorded to everybody under the first article of the Constitution.⁴⁹

The First Chamber of the Supreme Court rejected the argument, considering that both extensions differ in scope and procedure. If the first extension were to be requested by the debtor it will be used without justification only for the purpose to lengthen the period of the automatic stay, thus frustrating the goals of the law, while the second extension can be requested only when it is very likely that a reorganization plan is to be reached.⁵⁰

9. *Appeal Against the Termination Order - Article 266*

This article defines who is entitled to appeal the Termination Order, among them the recognized creditors.

Article 266. The business reorganization conclusion judgment may be appealed by the Merchant, any Recognized Creditor and the District Attorney as well as by the inspector, the conciliator or the receiver in the same terms that the business reorganization judgment may be appealed.⁵¹

The article was challenged on the grounds that, because creditors are not granted any participation in making a decision, to conclude the proceeding is denying them the right to justice from the courts as established

48. LCM art. 145.

49. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 1, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (stating “Article 1. In the United Mexican States, every individual will enjoy the guarantees that this Constitution grants, which shall not be restricted or suspended except in the cases and with the conditions under which the same is established.”).

50. Concursos Mercantiles. El artículo 145 de la ley relativa, segundo párrafo, de la ley relativa, no viola la garantía de igualdad, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo libro XXXII, Julio de 2010, Tesis 1a. LXXXIV/2010, Página 250 (Mex.) (Registro No. 164,367) (Article 145, second paragraph, of the Act does not violate the guarantee of equality).*

51. LCM art. 266.

by article 17 of the Constitution.⁵²

The First Chamber of the Supreme Court of Justice found that this provision provides creditors access to the legal system by allowing them the right to appeal. This right, the court reasoned, was enough to meet the threshold obligation of allowing creditors access to courts.⁵³

10. Punitive Damages in Criminal Cases - Article 276

The criminal situations raised in an insolvency situation are to be judged and decided by a criminal court that usually awards damages to the victim of the crime. In the insolvency proceeding, LCM has determined that it is the Bankruptcy Court, not the Criminal Court, that is in charge of defining the amount and how punitive damages will be paid.

Article 276. In the cases of offenses while under business reorganization, the penal judge will not hear the relief of any damage, as such issue will be handled by the business reorganization judge.⁵⁴

In one case, the victim of one of those criminal cases argued the unconstitutionality of such provision on the ground that he was being denied the possibility to request the relief in the manner that the Constitution allows to victims in article 20, section A, I and B, IV.⁵⁵

52. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 17, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (stating that “[a]ll persons have the right to have justice by courts that will be able to give them justice in the time and terms that the laws set, and give them resolutions in a quick, complete, and impartial manner.”).

53. Concursos Mercantiles. El artículo 266 de la ley relativa, segundo párrafo, de la ley relativa, no viola la garantía de igualdad, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo libro XXXIII, Febrero de 2011, Tesis 1a. II/2011, Página 611 (Mex.) (Registro No. 162,912) (Article 266 of the Law does not violate the guarantee of access to Justice).*

54. LCM art. 276.

55. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 20, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (stating that “[i]n all criminal processes, the accused, victim, or person offended against by a crime will have the following guarantees:

A. Of the accused:

I. Immediately when he or she petitions for it, the judge should always grant provisional release under bail, except for crimes which, because of their seriousness, the law expressly prohibits this benefit. In the case of non-serious crimes, upon the application of the Public Ministry, the judge may deny bail, when the accused has been found guilty of a crime classified serious by the law before. The judge may also deny bail when the Public Ministry presents elements that establish that the accused poses, by his or her previous conduct or by the circumstances and characteristics of the crime committed, a risk to the person the crime was committed against, or to society.

The amount and form of bail shall be obtainable by the accused. In circumstances that the law determines, the judicial authority may modify the amount of the bail. To take into account the form and the amount of bail, the judge must take into account the nature, means, and circumstances of the crime, the characteristics of the accused and the possibility of the accused’s complying with his or her obligations resulting from the

The case was indeed more complicated because of a further issue: the debtor in the *Concurso* was a legal entity, and according to the Mexican system, only natural persons are subject to criminal charges, not legal entities. Thus, the perpetrator in this case was the administrator of the Debtor Enterprise. The judge rejected the request for damages. The court reasoned that article 267 of the LCM denied such authority. But, the bankruptcy court took a different view, reasoning that the court had authority over the debtor and not over the principal administrator of the debtor.

The Constitutional Court, then, solved on one hand that article 267 can only apply when the debtor and the criminal are one and the same person, and, in other cases, the regular criminal judge has to resolve the issue. The reason is that it is up to the Bankruptcy Court to decide how much and how all the debtor's liabilities must be met.⁵⁶

B. LABOR CREDITS

1. *Preference of Labor Credits - Article 224, Section I and Article 225, Section I*

Under the Mexican Constitution, the credits owed to the labor force as wages for the last year⁵⁷ have exceptional protection and a super preference in insolvency situations. The LCM increased this protection to wages covering the last two years. The sources of this protection are: (1) Mexican Constitution article 123 (XXIII). "Credits in favor to workers

criminal process, the damages and injuries caused to the victim, as well as the financial sanction which may be imposed on the accused.

The law will determine the serious cases for which the judge may deny bail.

B. Of the victim or person offended against by a crime: . . .

IV. Have damages repaired. In the cases for which it is the originator, the Public Ministry will be obligated to seek repair of the damages, and the judge may not absolve the sentenced of reparations if he or she has served the sentence).

56. *Delitos Concursales*. El artículo 276 de la Ley de Concursos Mercantiles, al disponer que el Juez Penal no conocerá de la reparación del daño, no viola el artículo 20, apartados a, fracción i, y b, fracción iv, de la Constitución General de la República Anterior a la Reforma Publicada en el Diario Oficial de la Federación el 18 de Junio de 2008, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo libro XXX, Agosto de 2009, Tesis 1a. CI/2009, Página 60 (Mex.) (Registro No. 166691) (When article 276 of the Bankruptcy law provides that the criminal judge will not rule about the damage repair, it does not violate Article 20, section I and B, or section IV of the Mexican Constitution as it was previous to the amendment published in the official Journal of Federation on 18 June 2008).
57. The concept of "last year earned credits" has been defined by the constitutional tribunals in the following decision: *Laboral. Créditos laborales preferentes en caso de concurso o quiebra*. Concepto de salarios sueldos devengados en el último año [Preferent wage claims in case of concurso or bankruptcy. Concept of salaries or wages earned in the last year], *Tribunales Colegiados de Circuito [TCC]* [Collegiate Circuit Courts], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo libro XVII, Diciembre de 2003, Tesis 1.6o.T.199 L, Página 1372 (Mex.) (Registro No. 182671).

by salary or wages, or payments earned in the last year, and by indemnifications will have preference over all other debts in the cases of closing or bankruptcy;⁵⁸ and (2) LCM.

Article 224. The following are credits against the Estate and shall be paid in the indicated order and before any of the credits to which Article 217 of this Act refers:

I. Those listed in Article 123, paragraph A, Section XXIII, of the Constitution and its regulating provisions, taking into consideration the wages for the two years preceding the Merchant's business reorganization declaration; . . .⁵⁹

Article 225. The privilege to which the preceding Article refers cannot be made good against creditors with a collateral or special privilege, and only the following have a privilege:

I. The creditors for the items referred to in Article 123, paragraph A, Section XXIII, of the Constitution and its regulating provisions, taking into consideration the wages of the two years preceding the Merchant's business reorganization declaration.⁶⁰

This provision has been challenged as unconstitutional on two occasions. In the first instance, the First Chamber of the Supreme Court upheld the constitutionality of the LCM provision on the grounds that the constitutional protections were only a minimum, so, ordinary laws such as the LCM, could increase labor protection. Next, the Court came the other way around to establish the unconstitutionality of such provisions, reasoning that such extensions of labor credits protection leaves other creditors unprotected, and concluded that this is a violation to the equal justice under law as prescribed by article 1 in the Constitution:

The LCM extends to two years the protection given by the Constitution without any reasonable and objective explanation, violating the equal justice under law protection provided by article 1 in the Constitution, because it damages the equilibrium among the creditors giving to those already protected, additional protection and hurting the rights of the rest of the creditors.⁶¹

Mexican Constitution Article 1. In the United Mexican States, every individual will enjoy the guarantees that this Constitution grants, which shall not be restricted or suspended except in the cases and

58. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 123, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).

59. LCM art. 224.

60. *Id.* art. 225.

61. Concursos mercantiles. Los artículos 224, fracción i y 225, fracción i, de la ley relativa, al establecer la prelación de créditos a favor de los trabajadores por el término de dos años, violan la garantía de igualdad ante la ley, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo libro VI, Marzo de 2012, Tesis 1a. VIII/2012 (9a), Página 271 (Mex.) (Registro No. 160,245) (Articles 224, section I, and 225, section I, of the Act on setting the priority of claims by workers for a two year term, does violate the guarantee of equality before the law).

with the conditions under which the same is established.⁶²

This is only the beginning of the history because we can expect this point to be litigated by either creditors or laborers, waiting to reach the number of cases required to get the criteria binding in the future.

C. CROSS BORDER INSOLVENCY

1. *Adoption of UNCITRAL's Cross Border Insolvency Model Law - Title XII*

Mexico was the second country (Eritrea being the first) to adopt, in May 2000, UNCITRAL's Cross Border Insolvency Model Law, including it in the LCM's Title Twelve. As a matter of fact, the first case to use the rules of this model law was precisely the *Xacur* case, a recognition of a foreign proceeding started in Texas, in the United States.⁶³

In that case the debtor, a bankrupted person, challenged the constitutionality of all of Title Twelve (i.e., the UNCITRAL's Model Law). The claim was that it gave a preference to foreign laws, superseding Mexican law and giving different consideration to foreign and national creditors.⁶⁴

The First Chamber of the Supreme Court of Justice made an analysis of Title Twelve and found that it accomplishes all the constitutional principles and that there was no preference to foreign laws. Rather, article 283 has been held to give priority to Mexican law in cases of conflict between foreign and national laws. Also, the Court found that there is no distinction in treatment to creditors and/or or assets, whether in Mexico or elsewhere.⁶⁵

This ruling is very important because it forms a consolidation of the system created by UNCITRAL and adopted in many other countries (all three NAFTA countries included).

D. DEBTORS' HUMAN RIGHTS

1. *Preference of Consumer Credits - Articles 217 to 225*

Articles 217 to 225 deal with the order and preference of credits within a bankruptcy case. This order has been only altered by one amendment made to the Social Security Law and now by the decision commented in this paragraph.

62. *Id.* art. 1 (stating "[i]n the United Mexican States, every individual will enjoy the guarantees that this Constitution grants, which shall not be restricted or suspended except in the cases and with the conditions under which the same is established.").

63. *Concursos mercantiles. El título décimo segundo de la ley relativa es constitucional al otorgar un trato igualitario a los acreedores nacionales y extranjeros, Primera Sala de la Suprema Corte de Justicia [SCJN] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo libro XXIV, Octubre de 2006, Tesis 1a. CLXIII/2006, Página 276 (Mex.) (Registro No. 174122).*

64. *Id.*

65. *Id.* (title twelve of the law is constitutional because it grants equal treatment to domestic and foreign creditors).

In an airline bankruptcy proceeding, the ticket holders requested the assistance of the special office to protect consumer rights in a kind of collective action: the Procuraduría Federal del Consumidor, who represented them, claimed to be granted a privileged status in order to collect their credits. The Congress even issued an order to the Administration that was vetoed by the President because it represented a disruption of the natural legal order.

In a very unique and unexpected decision made by the *Tribunal Colegiado*, it was established that the credits held by consumers are credits that had to be considered as human rights protected by the Constitution.⁶⁶

With this decision, the credits of those ticket holders should have preference over all others, including secured credits, tax credits, and privileged credits, giving place only to the labor claims.

This is only one precedent, but a very strong one to be taken into account for similar future litigation. Strong litigation must be expected in this field.

E. CONCLUSION

As it is easy to extract out of those decisions rendered by the Constitutional Tribunals in Mexico, the general situation is that the Ley de Concursos Mercantiles is a constitutional safe ground. There have been some decisions, not yet binding, that still pose a threat. We can wait and hope that in the future a level of strong litigation will rise around those topics.

66. Consumidores. Créditos de los, en un concurso mercantil y su prelación; se ubican inmediatamente después de los trabajadores (interpretación de los artículos 217 a 222, 224 fracción i y 225 fracción i de la ley de concursos mercantiles), Tribunales Colegiados de Circuito [TCC] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo libro VIII, Mayo de 2012, Tesis I.7o.C.J/1 (10a.), Página 1820 (Mex.) (Registro No. tesis aislada) (Consumer's credits in an insolvency proceeding are settled immediately after workers (interpreting articles 217 to 225, section 1, of Bankruptcy Law)).

