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PRE-PACKAGED PLANS IN LATIN AMERICA

Prepackaged Debt Restructuring Agreements under Mexican Legislation

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PREPACKAGED DEBT RESTRUCTURING AGREEMENTS UNDER MEXICAN LEGISLATION.

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Mexican Insolvency Law was amended in December 2007 to introduce "Title Fourteenth- Of restructuring proceedings with a previous restructuring plan". This amendment created the possibility for the debtor and a reasonable amount of creditors to initiate insolvency proceedings with the terms of reorganization plan already discussed and agreed upon.

Basically, the idea is to provide a way for the debtor and 40% of the creditors (such percentage must represent the value amount of the credits and not the number of creditors) to file the petition with a basic agreement amongst them, also known as a "prepackaged agreement". Thus, the insolvency proceedings will cover only the reorganization stage (called "conciliation") in the regular way provided by the statute.

The objective of the legislator is to provide a tool that makes it easy for a debtor and its creditors to use the insolvency law to reorganize the business with the certainty that the agreement is going to be reached and without the threat of not being able to do it and consequently going into liquidation.

So far, only one case has reached the Mexican courts showing, as a general observation, that it works and that it is possible to conclude an insolvency proceeding in a short period of time, shorter than the usual standard of a regular proceeding.

Nevertheless it is necessary to recognize that the scheme has some drawbacks coming either from the design itself in the legislative conception and/or from the application made by courts.

Those drawbacks are:

1.- Release of evidence.- Under the law that regulates the prepackaged "concurso", the debtor and the creditors must file the case producing the agreement they have reached.

The debtor is required to produce some evidence based only on its representation. None of the documents and statements made by it should be challenged and the court should accept them.

There are mainly two questions to be addressed by debtor in this situation:

a) The debtor meets or is close to meeting the insolvency requirements set for by the statute (There is in the Mexican Insolvency Law a “test of insolvency” which is necessary to fulfill in order to file for bankruptcy: 35% of the total liabilities should be mature and due and the liquid assets should not be over the 80% of due debts).

b) The amount represented by creditors signing the filing represents at least 40% of the total liabilities.

The problem here has been that the courts are reluctant to accept the sole saying of the debtor (and creditors who sign) and have required complimentary evidence to be satisfied that the requirement is met.

2.- Order of insolvency.- The usual way to start an insolvency proceeding is when the petition is made either by a creditor or by the debtor itself and the court “accepts” the filing. Later on the court is to issue an “order of insolvency” stating that the debtor has legally reached this status and then some legal consequences follow. That is, there are two different actions required from the judge: one is to receive the petition and to agree that the proceedings can start, the second is to issue an “order of insolvency”.

In the prepackaged proceeding these two actions should become only one. Courts again have been reluctant to accept this and they follow the traditional way by splitting their decision in two acts with a considerable amount of time between them. This results in an inconvenient waste of time.

3.- Ancillary measures.- Related directly with the problem referred to in the previous point, is the fact that the standstill necessarily required in this kind of proceeding is granted not immediately, but with a delay that can damage the whole situation. Creditors signing the prepackaged agreement might agree to a standstill, but what about the other creditors?

4.- Binding agreement.- There is no provision ordering that the prepackaged agreement should be binding for those creditors who sign it. Although general law can be applied to consider that the agreement is binding, some clarification in this sense appears to be necessary, because in theory it could be possible for one of the creditors to withdraw from the agreement, damaging the whole situation.

5.- Percentage of credits.- The statute requires that the prepackaged must be signed by creditors representing at least 40% of the debtor's total liabilities. The agreement to be valid must be accepted by more than the 50% of the creditors. However the 100% to which the 40% refers is a different one to the 100% referred by the more than 50%.

For this second figure, tax, labor and some secured creditors are not relevant because their credits are not taken into account to form the total. As a consequence, there is a vast series of combinations to be explored by the debtor in order to be reasonable sure that if it starts a prepackaged "concurso" it is going to be able to gather the necessary percentage to get its reorganization plan adopted.

Those are the problems raised in the only one case we have had so far in Mexico. Our perception of these problems is that it is only a matter of experience and practice. As the tool is used more and more, these problems will be solved by the logical appraisal of the situation as we compare it with the goals that are being sought by the statute.

As one can see, none of the above-mentioned problems precludes the use of the prepackaged "concurso". This is important, the success of the first cases will guaranty that the tool is a good one and that it is going to be used on a larger scale. This is our bet because in Mexico we are convinced that this solution can be the answer for a large number of debtors suffering a lack of liquidity as a result of the crisis.

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