

Prosecution of Crimes under the Mexican Commercial Insolvency Act

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In May of 2000, President Ernesto Zedillo's administration enacted the Mexican Commercial Insolvency Act (CIA)³ establishing three basic criminal conduct including: (i) the intended aggravation of the generalized breach of payment obligations;⁴ (ii) the failure to file accounting information within the term established by the district court; and (iii) the request for the acknowledgement of an inexistent or simulated credit. It is important to note that such white collar crimes are special crimes under the CIA and do not substitute in any way the rest of the economic felonies that can be prosecuted and punished under the Mexican Federal Criminal Code or any Mexican State Criminal⁵ Code, such as fraud, robbery, false declarations before a court or money laundering, if committed during or prior to an insolvency proceeding.

The Intended Aggravation of the Generalized Breach of Payment Obligations⁶

Such a crime has three elements that must be met under article 271 of the CIA:

- (i) *An intended act to perform the crime*; that is, gross negligence would not be considered an acceptable basis to prosecute such a crime—

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³ The CIA follows the UNCITRAL Law model.

⁴ It is important to note that article 11 of the CIA almost reproduces the contents of article 2 of the former law (*Ley de Quiebras y Suspensión de Pagos*), the Bankruptcy and Payments Suspension Law, under which “the generalized breach of payment obligations is deemed to take place when: (i) Nonexistence or lack of enough attachable assets; (ii) the lack of payment to two or more creditors; (iii) the occultation or hiding of the merchant without appointing an attorney-in-fact authorized to comply with all its obligations; (iv) the closing of the company's facilities; (v) incur in fraudulent, ruinous, false actions or the breach of payment of the obligations; (vi) the breach of the assumed obligations under the insolvency agreement; and (vii) any other events of similar nature.”

⁵ Unlike the United States, in Mexico all crimes are not subject to construance by analogy, that is, the conduct described in each article of a Criminal Code by the Congress shall be construed by its text and is therefore not permissible to punish similar conducts or substitute an event or element.

⁶ In terms of article 10 of the CIA, a generalized breach of the payment of a merchant's obligations happens when such payment obligations are due to two or more creditors and (i) such obligations are 30 days due and represent 35 percent or more of all the obligations of a merchant, and (ii) the merchant involved has no assets as to secure, at least 80 percent of the due obligations.

- negligent conduct may give raise to the insolvency or bankruptcy proceeding, but not to a crime;
- (ii) *The generalized breach of payment of the obligations.* Per legal mandate, a generalized breach of payment of the obligations is presumed to have taken place when the accounting information is carried out in such a way that its real financial situation may be concealed, altered, falsified or destroyed. That is, a criminal action may be available when the accounting information is carried out in such a way as to deceive any creditor or authority.
 - (iii) The cause-effect of the intent to perform the crime, with the result in deceiving the creditors by means of a false bookkeeping.

The Failure to File the Accounting Information within the Term Established by the District Court

In terms of articles 29, 31, 32, 33, 34, 35 and 36 of the CIA, a merchant subject to a commercial insolvency proceeding must provide all the accounting, financial and other documentation decreed by the insolvency court to the *Visitador*⁷ at the moment the visit takes place—either at the company’s facility or at another place within five days after the visit is decreed by the district court. If, during the visit, the entity subject to an insolvency proceeding hides, does not provide the documentation subject to review or refrains from providing it to the *Visitador*, the court can declare an immediate insolvency proceeding and may also require the public prosecutor to initiate a criminal action against the entity subject to the insolvency proceeding in terms of article 272 of the CIA.

The Request of the Acknowledgement of an Inexistent or Simulated Credit

This crime affects the rest of the creditors by simulating a preference, priority or better right in an insolvency proceeding among the rest of the creditors, and can be punished by up to nine years’ imprisonment.

Crimes under the CIA are federal felonies and are prosecuted by the Federal General Attorney, who will request indemnification for the damages and losses in favor of the victims as part of the criminal penalty. However, under the CIA, the prosecution of the damages and prejudices is the duty of the circuit court and not of the general attorney. Because criminal liability to a corporation entails the dissolution and liquidation of the corporation, plus the payment of the damages and losses, the criminal liability, according to the terms of article 273 of the CIA, will be suffered by the members of the board of directors, directors, managers and liquidators, whether they participate directly as authors of the crime or as persons that concealed the crime.

⁷ A *Visitador* is a private agent appointed by the government by the IFECOM (*Instituto de Especialistas en Concursos Mercantiles*) or Mexican Agency of Specialists in Mercantile Insolvency Proceedings, which is a branch of the Mexican Judicial Power with technical and operational independent powers, whose main function is to appoint receivers, *visitadores* and mediators.

All crimes covered by the CIA are prosecuted at the request of the offended party. Under Mexican law, crimes may be prosecuted in two basic ways:

- (i) By official duty, that is, it doesn't need to be requested by the offended party to prosecute such crimes—nor will the pardon of the offended party excuse such a crime. Homicide and drug smuggling, for example, are crimes prosecuted by official duty.
- (ii) On the other hand, the crimes prosecuted under the CIA require the consent of the offended party to initiate the criminal prosecution. Therefore, such crimes can be extinguished if the offended party grants a pardon. A Federal Criminal Court has the sole authority to resolve the crime and the criminal liability. Criminal actions can be prosecuted even if the insolvency proceeding is not terminated pursuant to article 277 of the CIA.

(to be continued...)