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"DILIGITE JUSTITIAM QUI JUDICATIS TERRAM." "Ye who judge the earth, give diligent love to justice"

Aggravation of Contractual Terms as Result of Filing of a Concurso Mercantil.

by Carlos Sierra.

In respect to contracts of which a party that files, or is declared to be subject to, an insolvency process in Mexico (*a 'concurso mercantil'*), the Law of Insolvency Proceedings (*'Ley de Concursos Mercantiles'*)¹ deals with the existing contractual relations of the insolvent in Chapter V Title III. This title provides certain rules and guidelines related to the form in which existing contracts shall operate considering the insolvent status of the party that is subject to a *concurso*.

“...the Ley de Concursos Mercantiles is clear to determine that any stipulation contained in a contract that shall have the effect to aggravate the terms of said contracts in prejudice of the merchant as a result of the filing of an application for *concurso mercantil* shall be considered null.”

The intent of the law is to maintain the operations of the merchant while it is protected from the claims and enforcement of the rights of creditors and while a restructure process is conducted. This purpose of course, implies the need to maintain the integrity of existing contracts to the extent that these shall be considered necessary to maintain the continuing operations of the merchant, and to the extent that the obligations of the insolvent thereunder can be met in accordance with the terms of the agreement. The law *a contrario*, does not intend to protect with these provisions the contracts that are breached or in default or that the conciliator shall determine not to be beneficial in the interests of the bankruptcy estate.

In accordance with the above, the *Ley de Concursos Mercantiles* is clear to determine that any stipulation contained in a contract that shall have the effect to aggravate the terms of said contracts in prejudice of the merchant as a result of the filing of an application for *concurso mercantil* shall be considered null.

“Article 87.- It will (considered to) be as not written, save for the exceptions that are expressly established in the law, any contractual stipulation that as result of the filing of an application or suit for a concurso mercantil, or its declaration, (would) establish modifications that aggravate for the Merchant the provisions of the contracts.”

The terms of this article are often misinterpreted as it is believed to state that any agreement reached between the parties to terminate the agreement for breach thereof in the context of a *concurso* shall be considered to be *prima facie* null. The purpose of this provision is twofold however as, first, it attempts to maintain the integrity of agreements by preventing the filing of an application for *concurso mercantil* to constitute an act that per se shall cause the debtor to incur in liability, and, second as it attempts to establish that the exceptions to this rule and the form in which the contractual relationships of the insolvent party will be dealt with during or as result of the *concurso* shall be addressed as provided in the law and not in the form that the parties could have agreed to deal with this in contract.

1.- *Ley de Concursos Mercantiles* published in the Official Journal of the Federation on 12 May 2000, as recently reformed effective 10 January 2014.

In that respect, for example, a stipulation that would intend to establish a penalty against the merchant if it files an application for insolvency would be clearly null. Likewise, any agreement that would say that the merchant would have to pay, for instance, higher rent in a lease agreement if it files for insolvency would be null as well. These are clear examples of a situation in which the contractual obligations of the merchant would become aggravated as a result of the filing made.

The case is not the same however when the stipulation in question would not have the intention to aggravate the contractual terms of the merchant as result of the filing for *concurso mercantil*, but would rather attempt to preserve the rights of the creditor under the agreement, which is a different concept. For instance, a provision in the agreement stating that the filing for *concurso mercantil* would provide the other party the right to terminate the agreement would not fall in the category of a stipulation that would aggravate the contractual terms of the merchant.

The right to terminate the agreement in the context of a *concurso mercantil* is contemplated in the law and constitutes therefore one of the express exceptions to which Article 87 makes reference. This right to terminate is subject to the determination of whether the contractual obligations of the merchant will be performed or not and can be exercised once the conciliator has established that it does not intend to perform under the agreement. Considering this, we cannot say that a provision in a contract that states that the filing for *concurso mercantil* will afford the creditor the right to terminate is null for aggravating the terms of the agreement for the other party. The right to terminate in the context of a *concurso* is subject to the terms of the law but is certainly not a stipulation that cannot be agreed in contract or that in any form should be considered null.

“This right to terminate is subject to the determination of whether the contractual obligations of the merchant will be performed or not and can be exercised once the conciliator has established that it does not intend to perform under the agreement.”

Article 92 of the *Ley de Concursos Mercantiles* states that all preparatory or definitive contracts shall be complied by the Merchant, unless the appointed conciliator (*conciliador*)² in the *concurso* would oppose for the convenience of the interests of the estate. Any party to a contract with the merchant will be entitled to a declaration by the conciliador stating whether he intends to oppose to the compliance by the merchant with the terms of the contract. If the conciliador declares that the merchant will perform, the merchant shall either perform or guarantee its performance. If the conciliador declares that the merchant will oppose, or if he fails to respond within a period of twenty days. The party that entered in contract with the merchant will be free to terminate the agreement at any time after this period.

2.- The conciliador is the Officer appointed by the court upon formal commencement of a *concurso mercantil* to prepare and implement the reorganization plan together with the merchant and to reach an agreement for such purpose with the merchants creditors.

The provisions dealing with the contractual obligations of the merchant are contained in Articles 91 through 111 of the *Ley de Concursos Mercantiles*. The law there provides the rules under which the creditor under these contracts can require the conciliator to determine whether the obligations of the merchant will be performed or not. Various provisions are contained in the law in relation to the different effective contracts that a merchant may have entered into.

“The correct interpretation of Article 87 then should be that the terms of the contract cannot be aggravated as result of an stipulation made in contract when a filing is made for a *concurso mercantil* that states that the creditor would be entitled to terminate the contract as a result of the filing of the application for insolvency proceedings by the merchant.”

The correct interpretation of Article 87 then should be that the terms of the contract cannot be aggravated as result of an stipulation made in contract when a filing is made for a *concurso mercantil* that states that the creditor would be entitled to terminate the contract as a result of the filing of the application for insolvency proceedings by the merchant. As I described in the previous paragraph, the *Ley de Concursos Mercantiles* specifically establishes that the provisions and obligations contained in contracts would continue to apply when the filing for *concurso*, or the declaration thereof shall be made. This means however that the stipulations made in contracts by the parties will be respected and maintained in full force and effect, but only under certain guidelines that are established by the cited law, and only to the extent that the conciliator would determine that the contract will be complied by the merchant.

Furthermore, the reading of Article 87 then, should not be that any agreement reached in contract between the parties in respect to the effects that the filing for a *concurso mercantil* could produce to the contract is null. A stipulation causing the terms of the contract to be aggravated as result of the filing for insolvency would be null, however, as I have explained above, when the stipulated provision would attempt to penalize the merchant as result of such filing, or to make the contract more onerous for the merchant. Any stipulation that states that the contract would terminate, or that the creditor would have a right to terminate the contract as effect of a breach thereof, or as result of such filing, would not be null as such provision would be consistent with the terms of the *Ley de Concursos Mercantiles* that regulate the effect and validity of contracts within a *concurso*. To simply establish the causes under which a contract can terminate for cause is hardly considered an aggravation of its terms. The filing for insolvency when a default has occurred would, and should, always trigger the right of the other party to terminate. In accordance with law, only the cure of such default could prevent the contract from being terminated.

Mexican Senate approves bulk of pending energy legislation.

Mexico's Senate approved the bulk of legislation setting out rules and regulations for President Enrique Peña Nieto's opening of the oil and gas market, the cornerstone of his economic agenda. Peña Nieto hopes that his decision to end a monopoly enjoyed since 1938 by state oil giant Pemex will spur faster economic growth, as well as reverse a decade of declining oil output in Mexico, the world's 10th biggest producer of crude. The legislation passed by the Senate, which also opens up the electricity market, must still be complemented by bills detailing a new energy fiscal regime and a planned wealth fund. *Reuters. 21/07/2014.*

Agua Prieta opens in Sonora.

President Enrique Peña Nieto reiterated his appreciation to the senators for their work on the approval of secondary laws of energy reform, which "give Mexico a positive projection and greater modernity." Inaugurating the wastewater treatment plant opens in Agua Prieta, Sonora, the largest nationally and the third largest at the Latin American level, the president recalled that in the last five days lawmakers had had "very intense days of work that led to the first step in the adoption of high energy legislation." The president said that it is now left to the Chamber of Deputies to analyze, discuss and approve the secondary laws of the energy reform. *The News. 23/07/2014.*

SCT opens train tender process.

The Communications and Transport Secretariat (SCT) has published a pre-invitation to companies in the tendering process for the construction of the high speed train, set to link Mexico City to Querétaro. The Mexico-Querétaro passenger train is the first of its kind in Latin America and will be completed in 2017. The Communications and Transportation Secretariat (SCT), through the general director of railways and multimodal, published the international competitive pre-invitation for the tender of the train's construction which is set to start this year. The secretariat reported that the train will depart from Buenavista Railway Terminal in Mexico City and will connect with Querétaro's city center. The new route will cover a distance of 210 kilometers and the train will reach a speed of 300 kilometers per hour. It also indicated that the project is environmentally friendly as it will avoid the emission of 95,000 tons of CO2. *The News. 28/07/2014.*

PEMEX Labor liabilities could cost Mexicans too much.

With the Mexican structural reforms, the new laws on the energy sector have been controversial to say the least. As PEMEX, Mexico's state owned petroleum company, is set to allow private contracts for the exploration and distribution of gas, the financial structure of the giant has been analyzed, and has dangerously showed more than 153 billion in labor liabilities, plus 500 billion more in labor liabilities from Mexico's Federal Electricity Commission (CFE for its initials in Spanish). The amount represents up to 12 percent of the nation's GDP. The Mexican Congress is now debating who has to settle the debt that the company faces and whether it should be the 118.4 million Mexican taxpayers or the Federal Government Reserves. According to the Federal Government, around 700 billion pesos would be taken from taxpayers, which means that each Mexican citizen would have to pay 5,932 pesos to cover the labor liabilities of the two major state owned companies. *MSN.COM 29/07/2014.*

Mexico and California sign climate and clean energy pact.

The joint working agreement covers carbon pricing, renewable energy and deforestation. Mexico and California have formally agreed to collaborate on climate action in a historic pact just signed. California governor Jerry Brown inked the memorandum of understanding with Mexican environment minister Rodolfo Lacy Tamayo as part of a trade and investment mission to Mexico City. Priorities include developing carbon pricing, curbing deforestation, promoting renewable energy, controlling short-term climate pollutants and cooperating in diplomatic efforts. *Airline Industry Today. 29/07/2014.*

Deputies approve hydrocarbon law which now returns to the Senate.

The Chamber of Deputies approved in general and in particular, the decree issued by the hydrocarbons law and reform of the Foreign Investment Law and Public Private Partnerships. After 19 hours of debate, the full House of Representatives approved in general and in particular, with 310 votes for and 106 against, the first report of secondary legislation on energy, issuing the Hydrocarbons Law and reform laws Foreign Investment; Mining, and Public Private Partnerships. *Fox News. 29/06/2014.*

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Attorney at law by the 'Universidad Nacional Autónoma de México' (UNAM), has coursed post-graduate studies in civil and commercial law at the 'Escuela Libre de Derecho', international law courses imparted by Duke University and the 'Universite Libre de Bruxelles', aviation contracts law at IATA and LLM studies in Air and Space Law at Leiden University in the Netherlands. Mr. Sierra has been a professor of contracts law at UNAM and after being in-house counsel for Mexicana Airlines, he has been in private practice for eighteen years advising lessors and financiers in transactional work related to the leasing and finance of aircraft and the enforcement of their rights during default, liquidation and bankruptcy proceedings. Mr. Sierra has written several articles related to aircraft finance and leasing, the Cape Town Convention and Protocol, repossession of aircraft, aviation law and Mexican commercial law. He is currently vice-chair of the legal advisory panel of the Aviation Working Group, officer of the Aviation Committee of the International Bar Association and member of the international advisory committee of the Leiden Foundation of Air and Space Law. Mr. Sierra is also an instructor for the International Air Transport Association (IATA) on aircraft leasing and acquisitions and has been named by Chambers as the most prominent aviation attorney in Mexico for the past three years.

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