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A BANKING PERSPECTIVE ON THE RECENT AMENDMENTS TO MEXICAN SECURED TRANSACTIONS LAW

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This paper will give a banker's perspective on the recent amendments to Mexico's Secured Transactions laws¹. To begin with, these amendments are not a new law. They are modifications to existing bodies of legislation: like the General Law of Negotiable Instruments, the Commercial Code and the Law of Credit Institutions. The reasons for the changes were to optimize the economic value of loans offered by creditors and to increase the efficiency of collecting on defaulted loans for creditors. The first modification creating *prenda sin transmisión de posesión*, or the floating lien pledge, has worked fine. The second one creating the *fideicomiso de garantía*, or the guarantee trust, is not working according to the numbers. Typically, what banks are doing is extricating much greater coverage against the assets to protect against the volatility of interest rates in Mexico. Therefore they are pursuing the same secured assets but with less money. Conversely, the new regulations now force investors to provision loans, which is clearly not helping to restore credit to the system.

What is Mexico trying to do with the new instruments of the floating lien and the guarantee trust? These are not new instruments, and they are not being used. The new instruments are not increasing legal certainty. This is of particular concern in restructures, where the two instruments are not performing. Additionally, enforcing the loans in a timely and economic manner is not available under these new instruments. Finally, there have been no appreciable reductions in costs. Therefore, none of the objectives the investors and the bankers shared have come out of the new instruments.

This paper will evaluate the use and effectiveness of the new instruments through case studies. The information was obtained from a central database of judicial proceedings from litigation on commercial credit brought since 1997 (*see attached chart*). The evaluation was taken from a packet of 3,800 judgments with an average claim between 500,000 to 5 million pesos. The type of litigation strategy was related to the type product pledged as collateral. This sample of loans is considered middle market, and excludes corporate loans. When the loans were reinstrumented the frequency of adverse judgments shows that the old instruments are still valid and holding.

The study shows that the new instruments are not being used. Instead of the new instruments, sixty-one percent of the 3,800 cases have been questioned in a subsequent event through what is called *juicio ejecutivo mercantil*². The most

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1. Amendments to Secured Financing Laws (*Decreto Reforman Ley General de Títulos de Créditos, del Código Comercial y de la Ley de Instituciones de Crédito*), Diario Oficial de la Federación, May 23, 2000. Please refer to Lic. Aiza's preceding article for an in-depth analysis of the recent amendments and the effects they are having on lawyers.

2. Commercial Executory Action.

recurrent problem occurs when it is necessary to certify the debt, or *certificación de adeudo*. The judge will typically ask what was the principle amount, what was the interest owed, and if there is any moratorium, and so on. When consolidating several portfolios, sometimes systems tend to miscalculate interest, among other problems.

The other problem area is the *falta de personalidad*.³ For example, Banco Promex was stayed or enjoined, for all intents and purposes, on occasions while enforcing a particular loan of that bank. The problems creating a *falta de personalidad* include not having the correct powers, or that they were not transferred to the Bank, so often there would be a problem based on powers. This happened seventy percent of the time in those cases, and an adverse sentence against the creditors only resulted in six percent of the cases.

Twenty percent of the sample was later questioned in special mortgage loan proceedings, or a *Juicio Especial Hipotecario*. The wrong litigation strategy was most likely pursued in these cases. The Bank should not have gone through the *Via Especial Hipotecario*,⁴ but probably up through the *mercantil*, and this typically is by the initiation of the UDIs.⁵ The UDIs can only be used in the *via ejecutivo mercantil* because they are derived from a trust. In this case, the frequency of problems like an improper forum challenge or lack of standing was fifty-three percent, but with adverse judgments only two percent of the time.

The next legal mechanism that is used to is the *convenio judicial*.⁶ The *convenio judicial* is an agreement between the debtor and the creditor and formalized in front of a judge. Now, these cases are not litigated in court, but are rather settled before a judge. The interesting fact is that closing transactions through a *convenio judicial* only had .85 percent of adverse judgments against the creditor. These ratios show that the most ideal instrument to use is a *convenio judicial*.

Finally, the guarantee trust, or *fideicomiso en garantia*, is not performing as it should. The incidence ratio of the 3,800 cases was seven percent, or it was used seven percent of the time. Of those seven percent, there was a nine percent frequency of problems like a nullification charge that the wrong instrument was used, or *acción de nulidad por ilicitud en el objeto*. There were no unfavorable rulings in this particular case up until now. The reason is that most of these cases were settled under the previous laws. The new instruments are not being used because they pose many problems, while the old ones are still performing as they did in the past.

From a creditor's point of view the new instruments have unfortunately played against the lending of credit. The Bankers Association is promoting a totally different approach to promote credit. If the only way to extend credit is via *convenios judiciales*, the judges will be a little bit overloaded.

3. This is comparable to a lack of standing.
4. Special Mortgage Proceeding
5. From "Unidades de Inversion" or Investment Units.
6. Basically, a Judge brokered agreement (*convenio*)

CRITERIOS DE UTILIZACION DE FIGURAS CONTRACTUALES EN LA REESTRUCTURA DE PASIVOS*

• **QUE BUSCAMOS**

- A) CERTEZA JURÍDICA
- B) ECONOMIAS DE TIEMPO EN LOS PROCESOS DE EJECUCIÓN
- C) ABATIMIENTO DE COSTOS

CERTEZA JURÍDICA

Se detalla la probabilidad de riesgo procesal, sus características y su frecuencia

% INTEGRACIÓN DE LA MUESTRA	TIPO DE EJECUCIÓN	PROBLEMA MAS RECURRENTE	% DE FRECUENCIA	% DE SENTENCIAS ADVERSAS
61%	JUICIO EJECUTIVO MERCANTIL	*CERTIFICACIÓN DE ADEUDO	70%	6%
20%	JUICIO ESPECIAL HIPOTECARIO	*FALTA DE PERSONALIDAD *VIA NO IDONEA PARA DEMANDAR	53%	2%
12%	CONVENIO JUDICIAL	* FALTA DE PERSONALIDAD *IMPUGNACION POR LA VALUACIONDE LA GARANTIA	42%	.85%
7%	FIDEICOMISO EN GARANTIA	*IMPUGNACIÓN PLANILLA DE INTERESES ACCIÓN DE NULIDAD POR ILICITUD EN EL OBJETO	9%	NO HAY ANTECEDENTES

- La información fue obtenida del modulo central de procedimientos judiciales de juicios sobre créditos comerciales promovidos desde 1997
- La evaluación se tomó de un paquete de 3,800 juicios con un valor promedio de demanda de entre 500,000 hasta 5 millones de pesos
- Los tipos de juicio cambian sensiblemente por el tipo de producto crediticio
- En el rubro convenio judicial solo se incluyeron los expresamente autorizados como formalización requerida antes de que se iniciara el juicio respectivo y previamente acordados con los clientes

• **DURACIÓN DE PROCESOS DE EJECUCIÓN (PROMEDIO APROXIMADO)**

- A) Juicio Ejecutivo Mercantil: De 30 a 34 meses para obtener sentencia ejecutoria
6 meses para tomar posesión de los bienes ejecutados
- B) Juicio Especial Hipotecario: De 25 a 29 meses para obtener sentencia ejecutoria
6 meses para tomar posesión de los bienes ejecutados
- C) Ejecución del Fideicomiso de Garantía: 4 meses instancia ante la fiduciaria
12 meses para tomar posesión de los bienes ejecutados
- D) Convenio Judicial: De 3 a 6 meses para obtener ejecucion
2 meses para tomar posesión de los bienes ejecutados

• **COSTO DE LOS PROCESOS JUDICIALES**

- A) Juicio Ejecutivo Mercantil: Entre el 5 y el 8 % del valor del lo recuperado
- B) Juicio Especial Hipotecario: Entre el 5 y el 8 % del valor del lo recuperado
- C) Ejecución del Fideicomiso de Garantía: Honorarios Fiduciaria _____
- D) Convenio Judicial: Del 3 al 5 % según el valor de lo ejecutado

* Tomado de la presentación del Lic. Anthony McCarthy por el 10th Annual US-Mexico Conference, 2001.

STANDARDS FOR USING THE CONTRACTUAL DEFINITION IN RESTRUCTURING LIABILITIES*

• WE ARE SEEKING

- A) JUDICIAL PREDICTABILITY
- B) REDUCTION IN TIME OF ENFORCEMENT
- C) REDUCTION OF COSTS

A) JUDICIAL CERTAINTY

Chart shows the probability of procedural risk, its characteristics and its frequency

% OF CASES FROM THE CASE STUDY	TYPE OF LITIGATION	MOST FREQUENT PROBLEMS	% OF PROBLEM	% OF ADVERSE SENTENCES
61%	COMMERCIAL EXECUTIVE LITIGATION	*CERTIFICATION OF THE DEBT	70%	6%
20%	SPECIAL MORTGAGE PROCEEDING	*LACK OF STANDING *IMPROPER FORUM	53%	2%
12%	JUDGE CERTIFIED AGREEMENT	*LACK OF STANDING *REJECTION OF THE LOAN VALUATION	42%	.85%
7%	GUARANTEE TRUST	*REJECTION OF THE CALCULATION OF INTEREST NULLIFICATION ACTION FROM ILLEGALITY OF THE LITIGATION	9%	NO JUDGMENTS AT TIME OF WRITING

- The information was obtained from a central database of judicial proceedings from litigation on commercial credit brought since 1997.
- The chart was taken from a sample of 3,800 judgments with an average amount between 500,000 pesos and 5 million pesos.
- The type of litigation strategy pursued was related to the type of product used as a security interest.
- Under the heading "Judge Certified Agreements," the cases used were expressly authorized with the required formality that prior to the commencement of the litigation, a preliminary hearing must take place between the parties.

B) AVERAGE TIME FOR ENFORCEMENT ON THE LOAN

- A) Commercial Executive Litigation: From 30 to 34 months to obtain an enforceable judgment
Six months to take possession of the goods
- B) Special Mortgage Proceeding: From 25 to 29 months to obtain an enforceable judgment
Six months to take possession of the goods
- C) Guarantee Trust Agreement: Four months petitioning in from of the Trustee
12 months to take possession of the goods
- D) Judge Certified Agreement: Three to Six months to obtain enforcement
Two months to take possession of the goods

C) COST OF THE JUDICIAL PROCEEDINGS

- A) Commercial Executive Litigation: Between five and eight percent of the value of what was recuperated
- B) Special Mortgage Proceeding: Between five and eight percent of the value of what was recuperated
- C) Guarantee Trust Agreement: Trustee's fees _____
- D) Judge Certified Agreement: Between three and five percent of the value of what was recuperated

* Translated by Joshua Myers from the presentation by Lic. Anthony McCarthy at 10th Annual US-Mexico Institute Conference, Guanajuato, GTO, Mex., 2001.