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Panel Discussion: A Comparison of Ley de Quiebras y Suspension de Pagos with the New Ley de Concursos Mercantiles

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PANEL DISCUSSION: A COMPARISON OF *LEY DE QUIEBRAS Y SUSPENSIÓN DE PAGOS* WITH THE NEW *LEY DE CONCURSOS MERCANTILES*

MODERATOR: MICHAEL L. OWEN, ESQ.*

Panelists: Prof. Nathalie Martin, Orlando Loera, Douglas Doetsch, Esq., Lic. Jose Maria Abascal, Lic. Luis Manuel Méjan, Stephen Kargman, Anthony McCarthy

OWEN: We are going to lead off with a panel discussion following up on the presentations on the *Ley de Concursos Mercantiles* (Business Reorganization Law)¹. We have the great honor of adding two additional people to our panel who did not give presentations. One of them is Mr. Orlando Loera. In addition, we have with us Mr. Steve Kargman. We are delighted to have these two additions to our panel, and as indicated earlier, we wanted to start off with some questions amongst ourselves and then we are going to follow up with about a half-hour of questions from the audience. I would like to lead off with a question for Professor Natalie Martin. You read down a list, at the end of your presentation, a list of the elements of Chapter 11 bankruptcy law in the United States that almost is a list of all of the evils of the suspension of payments procedure that used to exist in Mexico. My query to you is: if our system in the United States has all of those evils, why does it work?

MARTIN: I did not think I was really necessarily talking about all the evils. However, it is maybe a little evil to have a case going on for six or seven years. So, I think the question that I am being asked is, why is it that if we do not have these extra protections that have now been provided in the new, revised Mexican insolvency law, why does the United States system work? The main reason is that in the United States we have a tremendous amount of secured debt. There are very few, because you can now get almost anything as collateral for a loan and very few debtors have a lot of unencumbered assets in the United States. So how does this make our cases move more swiftly? What you generally see is that you have a secured creditor in a case that is very powerful and has a security interest in most of the assets. So the case is filed and it starts on its merry path. Of course the judge wants the case to do well, so it is allowed to survive for a while. But you always have the secured creditor, the extremely well protected secured creditor under American law in the background getting ready to move to lift the stay, either because the collateral values are diminishing or because the case is going on too long and there is no possibility of a successful rehabilitation. It is really, for the most part, one of the main reasons why our cases move along so quickly. There is normally a very active and well-protected secured creditor who can exercise its rights and move the case along.

LOERA: Mr. Owen, the beauty of Article 9 of the Uniform Commercial Code and its lack in Mexico is noteworthy.

OWEN: Sure.

DOETSCH: I want to ask a follow-up question for Prof. Martin on United States bankruptcy law and what makes things move along. We do have something that no

* A summary of the background of each participant in this panel follows on the last page of the discussion.

1. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federacion, Article 1, *et seq.* May 12, 2000.

one has mentioned yet today in United States bankruptcy law, which is somewhat analogous to the time period that is built into the new *Ley de Concursos Mercantiles* (Business Reorganization Law) which are exclusive, limited periods for the debtor to present its plan, although they are often not adhered to.

MARTIN: What the code says is that the debtor, and the debtor only has—and I'm talking about the merchants, obviously, under Mexican law—has the exclusive right to file a plan for a 180 days following the petition.² So that means for six months, only the debtor can file a reorganization plan, and that keeps everyone else at bay. Now, what actually Mr. Doetsch just asked me, isn't that a time limit? That seven or eight-year case mentioned in my presentation, it actually happens to be a very large asbestos manufacturer in the United States. We actually were able to maintain exclusivity for the seven years. That means nobody—if the code says 180 days, this one really is operating in the breach. It says you cannot continue to maintain that exclusive right to file a reorganization plan more than 180 days except for costs. Which, in my own experience, is that in the beginning they rubber-stamp that and say, "well, of course you need the exclusive right to file a plan for longer than six months." Then they just enter an order extending it, and it just can go on in that sort of status quo mode for a long, long time. So it is really not adhered to very carefully.

OWEN: It seems also that one of the real reasons is the recognition of credit process. Here in Mexico, under the suspension of payments, the recognition of credit process is the element that most frequently was used to drag it out for years and years. Prof. Martin, could you give just a brief summary of how that differs in the United States?

MARTIN: The process is very different. One of the main things that the revision in Mexico has done is to take the emphasis off of all of these claims resolution process that can drag out endlessly and put the emphasis on the plan process instead. That is very similar to what is done in the United States. Because the theory is, who cares? The claims resolution process in the United States is actually done at the end. The theory is: you are not going to pay all these claims anyway. You will pay some percentage on them, but in terms of where your time is best spent, it is better to just go ahead, get in there, figure out how you are going to get the company out of bankruptcy, and you will have them file their claims towards the end of that process and adjudicate them then. So there is a difference, as I understand the current or even the new reorganization law. In the beginning of the case, it is anticipated that you are going to be doing the claims process along with the conciliation process. In the United States, it is done afterwards, and you could say, "how can you propose a plan if you don't know how much the claims are?" But actually, you just sort of guess at that.

ABASCAL: The reason is because we needed the claims there and whatever their preference is, that must be settled before the agreement is agreed upon in order to proceed with the reorganization. So what we did was to de-judicialize the problem and convert it in what it really must be, that is, an assessment by the accountants of the books and documents of the debtor, with the documents provided

2. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federacion, Article 145, May 12, 2000.

by the creditors that want to do that. In a very short period of time, the conciliator must produce a provisional list and that list is published by the judge and the creditors have about ten days. But the terms are very short to make observations and then the conciliator has around another ten days to make a final list, and then the judge issues the judgment. So that must be done within a period of 90 to 120 days. No judicial procedures are in there. After the judgment establishing the amounts and preference of the credits is in place, then whoever is not happy with it can appeal. In the appeal procedure you can have the whole procedure, but that does not interrupt the continuation of the procedure.

MARTIN: And try to get them both done simultaneously.

ABASCAL: Yes. And we are pretty sure that it is going to work.

MARTIN: Yes, it sounds like a good idea if you can do it. The only down side would be, obviously, because the law has been changed, but just not putting a lot of energy and effort into the claims process itself, truncating the system which we have done as well in the United States.

OWEN: We ought to address the issue that many of the Mexican companies, not banks, but Mexican companies feel that the *Ley de Concursos Mercantiles* is strongly creditor oriented. There is considerable concern out there among Mexican companies as to how this could be abused by creditors against them, especially the criminal provisions. This question is addressed to Lic. Méjan and Lic. Abascal. Mr. McCarthy and Mr. Loera should feel free to join in, because it is an important issue.

MÉJAN: Thank you, Mr. Owen. As for the first part of the question, the new law being mainly weighted to the creditor's position, that is a common saying among a lot of people in Mexico. However, that is not a proper characterization. It is not true. The main feature in the new law is the concept of enterprise, the concept of the merchant. What the law tried to achieve is to provide that all enterprises could deal with the problems they have. Maybe the old *Ley de Quiebras y Suspensión de Pagos* (Bankruptcy Law and Suspension of Payments)³ stayed more in favor of the creditors. If you see all the provisions of the old law, and even if you read what we call the *Exposición de Motivos* (Legislative History), which is the explanation that the legislator puts at the beginning of the law, you will find that the old law was focused mainly in favor of the creditors. Now, the new law is not focused on the creditors' side, and one of the proofs of this is that in the elaboration of the draft and within the process of drafting the law, a lot of entrepreneurs participated enthusiastically. All the professional organizations of businesses and entrepreneurs pushed very hard to get this law enacted. They did a tremendous amount of lobbying of the representatives and the senators. So at the highest levels, entrepreneurs in Mexico pushed in this way. They were doing so because they thought that this was a very good law for enterprises. The second part of the question, the criminal treatment of the law, is a very good subject. According to the old law, a lot of crimes could be committed under the provisions of law. It was almost automatic that when the owner of a business, a merchant, or an enterprise filed bankruptcy, criminal charges would follow. That was why at first a lot of merchants did not file for voluntary reorganization or bankruptcy. They were afraid

3. Bankruptcy Law and Suspension of Payments (*Ley de Quiebras y Suspensión de Pagos*), Diario Oficial de la Federación, April 20, 1943.

that they would be put in jail. That does not exist any more. The new law provides just three types of crimes, and those three are very logical ones. The merchant who commits fraud in his accounting and the creditor who files a bankruptcy petition forging credit are two examples of when criminal charges are now appropriate.⁴ The old stigma that entering into bankruptcy is equal to committing a crime does not exist any more.

ABASCAL: I would like to add something. First, and the Commission was very clear that the subject matter of the insolvency law is not a tension between creditor and debtor, but the maximization of the value of the enterprise. In the insolvency law, the problem between a creditor and a debtor is a secondary problem. So that was the main approach. And there are many instances in which the creditors are prevented from abusing their position. There is now a tremendous push towards conciliation or a quick liquidation. Because of that now, they do not need to rely on criminal proceedings. And we considered that if Mexico gets a good law and it is well enforced, then credit would flow more efficiently. Of course, there is always this issue of perspective. When those who were making a profit from the corruption that developed under the old law saw that all these judiciary procedures were just erased, and that they were not going to be able to maneuver, they said, "Come on now, it's not going to be possible to delay the meeting of creditors, and this is to the detriment of the debtors." I say that is exactly what we wanted to avoid. It is not suggested that there was a balance. From that perspective, now the law is more open to creditors. But the only thing that the law did was to create the balance. Regarding criminal prosecution, the reason that creditors file criminal complaints is because they knew that they had little power in civil proceedings under the old bankruptcy law. Now creditors are not going to need criminal complaints. On the other hand, this law only describes the crimes, but doesn't enter into the proceedings of how to pursue them, which was one of the big problems in criminal law in Mexico before. Finally, we made a distinction predicated on a very famous United States case. The distinction is between the possibilities of the debtor getting an agreement solving its insolvency problems and continuing to be pursued for his or her criminal acts. So now the insolvency proceeding is just an insolvency proceeding related to the insolvency and the maximization of the value of the going concern. The criminal prosecution is a separate matter. The example was the O.J. Simpson case, in which he was acquitted in the criminal court but held liable in the civil court. We use this reasoning to say that these are two very different issues.

OWEN: Am I correct, Lic. Abascal, what you are saying is that if AHMSA refiled under the *Ley de Concursos Mercantiles* (Business Reorganization Law) then Xavier Autrey and Jorge Ancira would not have to worry about Banco de Bajío, is that right?

ABASCAL: First of all, the whole issue would be already settled, as it would be in liquidation. First you have the previous period of negotiation with creditors without legal action. Then the prejudgment period, then the conciliation period, and that allows the case to last more than a year. If you cannot get an agreement in one year, then the whole thing is ruined and you need to go to bankruptcy. They will not

4. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federacion, Articles 271-277, May 12, 2000.

be worried because Banco de Bajío perhaps would not have taken the position of going to criminal court.

LOERA: Mr. Owen, you segued perfectly to the only comment I have. That is, to admit that this law is favorable to creditors to the disadvantage of the company is incorrect. But it may be to the disadvantage of shareholders. That is a subtle point. The long battles and suspension of payments have not necessarily been to the benefit of the companies, but they have been to the benefit of specific shareholders in those companies. In several cases, an agreement could have been reached had it not been for the "extortion" of the shareholders, who will simply not allow the legal process to culminate in a restructuring unless it is executed. This new law, in its emphasis on conciliation and resolution, as opposed to the previous law, is much better, and over that short period of time, mitigates the negative impact or influence that shareholders can have on a going concern. Bankers hate bankruptcies. We lose money, a lot more money than we should. A company is rarely taken to bankruptcy. What we are after is a solution of a going concern.

OWEN: Thank you very much. Mr. Kargman?

KARGMAN: Just to follow up on Mr. Loera's comment, unfortunately we get involved in restructurings not just in Mexico but also in different parts of the world, such as Asia, especially in the wake of the financial crisis. So some of the problems that we have seen in Mexico are seen all over the world. To follow up on Mr. Loera's observation, one of the phenomenon we constantly confront is the phenomenon of the controlling shareholder and how you can reach a deal in a restructuring where the company is controlled by a powerful set of family interests with great financial and political influence in a given society. This poses great hurdles for the creditors. And the foreign creditors, such as ourselves, we were talking about the new law and how it is supposed to level the playing field. In most of these markets, there is not a level playing field for the creditors, especially foreign creditors. As we have found in the case that has been discussed at great length here, these cases do drag on for a period of time. The creditors really need to be well organized and have a well functioning steering committee. In AHMSA we are fortunate that we have had very good leadership and a compact steering committee membership. But the creditors also need to roll up their sleeves, understand the local law, the limits it places on their ability to make a recovery in a particular case, and they have to really start to think creatively, strategically, and in light of the fact that a lot of time lapses in these cases. In AHMSA we have been sitting there for two years or more. We have cases in Thailand and in Indonesia that go on seemingly forever. The creditors really need to establish time lines, or milestones, to try to move the process forward and to keep an eye on whether the debtor is cooperating in good faith or not. If it is not, then the creditors should establish what alternative courses of action they will take. In many of these emerging markets, the laws that the creditors are facing really are very unfavorable to their interests. So, the creditors have to figure out how to manage the process, how to move it forward in a strategic sort of way, if they ever hope to achieve success in these cases.

OWEN: Thank you very much. Lic. Méjan?

MÉJAN: Those problems with shareholders in this situation will always be present. With or without a new law, it is a common situation. That was one of the comments I wanted to make. The second one is, this steering committee or creditors committee, however it is called throughout the world, was eliminated in the Mexican

law. The reason for that was that this creditors committee was one of the major problems and obstacles to reach an agreement and a solution within an insolvency problem, whether it was a *suspensión de pagos* (suspension of payments) or a *quiebra* (insolvency), whether it was a voluntary filing or an involuntary one. The logic behind the creditors committee or the creditors meeting was that each one of those creditors were fighting not against the debtor but against each other. So if there were ten creditors sitting at the table, each one of them was facing nine enemies. An agreement was very difficult for them to reach and that was convenient for the debtor, because time was going on and on. As the debts were frozen in the beginning of the process, inflation and time were taking care of his debt. That was why the Mexican law eliminated the creditors committee. I am not trying to say that the creditors have no rights any more. They do have rights. They can appoint an intervener. They can act for themselves within the trial, the procedures. They can conduct all the meetings they want to. But the process of recognizing and filing the credits in order to determine the position of each of them, that was just described by Lic. Abascal, is done mainly by the specialist who has the access to the accounting books and all the filings. The last remark is in regards to the mention of the countries in Asia: Thailand, Korea, and Indonesia. All those countries are following more or less the same pattern that Mexico has followed. Actually, Mexico had as an example to follow what was happening in those countries, because all the new focus on insolvency matters was pushed or favored by the World Bank. The World Bank has caused tremendous and interesting changes all over the world. So all the new legislation produced all over the world is following more or less in the same pattern.

OWEN: Lic. Abascal has a brief comment and then we are going to open up to questions from the audience.

ABASCAL: Just to complete Lic. Méjan's comments, yes, the *Junta de Acredidores* (Creditor's Committee), as it was known, disappeared. But there is always the possibility of the creditors to appoint an intervener⁵, and if they have ten (10) percent, each ten (10) percent can appoint one.⁶ The function of this new intervener, although the name is the same, is different from the one in the old law because now their purpose is to negotiate with the conciliator. So we can have the conciliator and the intervener or interveners going into a negotiation. The third point is, the way the law is structured, the debtor is not ousted, but continues to manage under the surveillance of the conciliator.⁷ The conciliator has the possibility of advising the judge that there is lack of cooperation and to impose a tighter regime, even to dispossess management and to take over the company⁸, to dispossess the debtor, or to inform before the period that there is no one to negotiate with or is not collaborating. In this situation, the conciliation efforts could be useless and doing this may advance the liquidation period. After a short procedure the judge can even declare bankruptcy before the time has elapsed.

5. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federación, Article 37, May 12, 2000.

6. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federación, Article 63, May 12, 2000.

7. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federación, Article 75, May 12, 2000.

8. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federación, Article 81, May 12, 2000.

MARTIN: Lic. Abascal? I know that the creditors committee idea is gone, but these people that you said could be appointed by the creditors, the intervener or some people call it the conservator, depending on which translation you are using, don't the creditors that hire those people have to pay for their fees now?

ABASCAL: Yes.

MARTIN: So, in that sense, this is not fully creditor oriented. There is an area right here where the estate used to be picking up the tab and now that cost is falling onto the creditors themselves.

OWEN: That is a good observation. Are there any questions from the audience?

ROGERS: My name is John Rogers. I work for Strasburger & Price in Mexico City. I have three quick questions. One is on the automatic stay, or the stay that is not so automatic, and the fact that pending lawsuits are not affected by the stay.⁹ My question is: it seems that there is going to be a natural tension between those lawsuits, which may drag on and on, and the limited time frame that you have for resolving the bankruptcy process. Secondly, with respect to the constitutional issue, to what extent is that a real threat, do you feel, to the viability of the system under the new law, and, finally, for the lenders, to what extent has the adoption of the new law encouraged you to make new loans?

ABASCAL: I will answer the first question, regarding the stay. The stay is possible from the beginning of the proceedings, since the filing of the reorganization, but it is not automatic. When the visitor makes a first assessment of the debtor's situation, the visitor can advise the judge to prepare a stay. They will have the automatic stay after the *concurso* (reorganization) judgment and opening of the conciliator period. What we saw was that we needed to stop the execution, to prevent the execution of judgments or orders to sell goods or whatever. But we were not going to allow [the automatic stay]. The conciliation did not justify suspending any litigation, so you can go with your litigation until the end, and then you have a judgment that cannot be executed. So that was the philosophy; to stay execution in order not to disburse or cannibalize the enterprise, but to allow whoever wishes to continue with the arbitration, the judicial proceedings or whatever, to go on until the judgment was measured to be enforced on the assets. Then the stay functions.

MÉJAN: As for the constitutional problem, a couple of weeks after I was appointed as the Director General of the Institute¹⁰, I was introduced to a lawyer who asked me, "So you are the new Director. Are you prepared to face all the constitutional challenges that are going to come pouring down as the rain?" And I said yes, because we had already studied all the possible problems. One year after, I can tell you that we have not had any of these constitutional challenges. Mexicans and mainly Mexican lawyers are very keen to litigate on constitutional matters, as we have this constitutional trial, the *amparo* (constitutional challenge). But so far we have not had any. We have identified in an academic way, several of the issues that were deemed to be a potential constitutional problems. We have developed some research around them, and we are ready to face whatever future challenge

9. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federacion, Article 84, May 12, 2000.

10. Federal Institute of Business Reorganization Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles*)

arises. This is not going to be a big problem. The threat of the constitutional challenges was a matter of great concern. Creditors, and mainly foreign creditors, that is one of the main concerns that a foreign creditor, could have is: what if I start one of those new procedures and then a constitutional challenge comes out and I have to spend the same period of time I used to spend with the old law? This is a real concern to creditors. I am confident that this problem is not going to exist. Not absolutely, because we are going to face one of those constitutional challenges, but not anytime soon.

McCARTHY: Basically, the two modifications, that is *Ley de Concursos Mercantiles* and the modifications to various laws that govern guarantees, what they pursue precisely is an incentive for the banks to increase or offer credit in Mexico. What we have found out is that credit has not grown in real terms in Mexico, but it is not for reasons that would be attributable to the laws. There are very separate reasons for that. The one thing that has happened is that the trend is reversing, so if you consider the initial spirit of the law, it is obtaining the objective. Over time it will obtain it, for loan growth on much better terms. Now, if you combine the *Ley de Garantias* (Secured Transaction Law),¹¹ generically speaking, and the *Ley de Concursos Mercantiles* (Business Reorganization Law), what they have done is as Lic. Abascal mentioned a few minutes ago. If we think about it, we are facing a crisis in Mexico. To get a sense of things, we have had more than a hundred cases transferred from the line to our work out unit, and the effects of this is very interesting. Clearly, with the new *Ley de Concursos Mercantiles* (Business Reorganization Law), the debtor, before even considering going to file for bankruptcy is now focusing on preserving value. And preserving value is value for everybody. And for us we have a couple of ratios that have been very interesting. Before the *Ley de Concursos Mercantiles* was enacted, we typically were settling most of the restructures through *finiquitos* or payments in kind. Today that ratio is totally reversed and we are actually seeing many more restructures. That is to say, we are just restructuring the debt, probably taking additional guarantees, and so on. And typically what that is doing is preserving value of the companies, because when you go through a liquidation process, that is the end of that value. And the second issue, or ratio that would indicate to you that these two modifications are really paying off is that when you get a case in to work out and you turn it around, that is an asset turnover ratio. Before the modifications took place, typically of a hundred cases that would come into a work-out group, we could turn around in a year between twenty-seven (27) percent to thirty (30) percent. With the ratios right now, we are closer to the fifty (50) percent range. So what it will tell you is that our losses derived from work-outs are now lower and consequently the need to reserve will be lower and our ability to lend will be increased.

LOERA: Mr. Owen, just let me comment on behalf of the international banks. First of all, the new law has not had an impact on whether we will lend any more or less. It is too new a law. We are waiting to see it tested in the Supreme Court. We do think that there will be constitutional challenges of consequence, and we are very interested in how those will play. Third, there are generally among bankers a

11. *Decreto Reforman Ley General de Títulos y Operaciones de Créditos del Código de Comercio y de la Ley de Instituciones de Crédito*, Diario Oficial de la Federación, May 23, 2000.

reluctance to take those measures. Bankers tend to be not very hard. They would much rather work for a mutually acceptable solution. Ironically, there is a risk that the combination of the two laws may have a negative effect on new loans in that the preferences given to secured lenders are so significant and every debtor only has so much security to give. As banks are loath to be subordinate to secured lenders, there may be less of a willingness to lend in a subordinated position to a debtor who has already given all of their security to bankers who have read very closely the new laws. That will play out; bankers will inevitably make stupid loans again, and find a way of rationalizing subordination. But our experience is that in subordination you are very prejudiced, and these laws simply give too much of a benefit to the secured creditor. That is something to keep an eye out for.

MÉJAN: I just want to add one fact to the constitutional issue. Within the drafting team of the law, two former Justices were working, so they were precisely in charge of taking care of constitutional problems in the drafting of law.

OWEN: Are there more questions?

PETERSON: My name is Titus Peterson, from Denver, Colorado. Does the judge have equitable powers to create *fideicomisos*, or trusts, in a situation where those are the primary assets that the debtor and the creditor want access to?

MÉJAN: Building trusts, or *fideicomisos*, as we call it in Mexico, selling the enterprise as a whole, restructuring, or whatever solution can be reached is going to be adopted. The judge has no initiative in this respect. These different solutions must arise from the creditors and the merchant. Who is in charge to encourage or to push one of those solutions is precisely the conciliator, the mediator in this conciliation period. Even in the liquidation process, if an agreement could not be reached, one way to dispose of the enterprise could be putting all the assets in a trust, selling it as a whole, or selling the shares, the stock of the enterprise. It is up to the creditors and the merchant, or if it is in the liquidation period, it is up to the trustee, to the receiver.

STEPHENSON: My name is John Stephenson, from Dallas, Texas. If a secured creditor has security over or guarantee over approximately fifty (50) to sixty (60) percent of the assets of a company, can that secured lender be forced to restructure its debt so that the enterprise can continue even if it remains secured, but on payment terms that are different than what it had, or is it able to go ahead and foreclose on its assets?

MÉJAN: The process or the system of the cram-down in our law is complicated. It is one of those that have produced a lot of discussion about whether the drafting commission reached the adequate solution. In one case, as you point out, he is going to be the leader in the decisions. With that kind of percentage you are mentioning, it will be really difficult to be forced to do anything he does not want to. Because, in the system of reaching an agreement, the creditors must act without a large difference. So, whether there is a secured creditor or not, he is going to have the authority to control the most important part of the negotiation.

DOETSCH: Let me ask a follow up question to that. What if the secured creditor in Mr. Stephenson's question has twenty (20) percent? How will the cram-down work?

McCARTHY: There is an article here, which is 160,¹² and you need one individual with security. If he does not subscribe to the *convenio* (agreement), he does not have to subscribe to it. So, what he can do is either realize on the asset or be paid against his debt. So basically your question, Mr. Doetsch, is can you hold up the whole thing? Yes, unless he settles in that manner.

LOERA: And it would appear that that is an inconsistency with the general spirit of the new law. Indeed, any secured creditor, for whatever amount, even if ninety (90) percent of secured creditors agree to the deal, that one or two secured creditors can say "No," and by Article 160 they need to be paid within thirty (30) days of the lifting or the *convenio* (agreement), and that is going to complicate matters.

OWEN: Yes, a question right here?

AIZA: My name is Carlos Aiza, from Mexico City. The position of a secured creditor that holds through a trustee has the equivalent of a security interest through a *fideicomiso de garantía* (a guarantee trust agreement) under the concept that the trustee holds legal title to the assets. The question under the new law is whether the assets that are held by the trustee are consolidated into the estate of the insolvent entity and therefore subject to the proceeding, or whether they would not be consolidated into that estate and would be subject to separate arrangement between that creditor and the trustee or potential extra-judicial sale on the part of the trustee.

ABASCAL: According to a strict reading of the law, it is out. That is one of the things that should be revisited. Also this issue regarding Article 160, those are points in which I would say I was defeated because the problem was always under the table. A secured creditor would be secure with the opening of the bakery, because he could always destroy the whole thing. But the prevailing view was that the best thing to do was to perform the contract as agreed and if a creditor has security, he has the right to his security. And regarding this issue, there are some issues that are not very clearly addressed. One is the *fideicomiso de garantía*, the guaranteed trust. Another is the financing. Another is the sale with retention of title. And then the committee was very technical. They said, "He has property and he is the owner and that is it." I do not think that is a good solution.

OWEN: This will have to be the last question.

MARTIN: That question that you just asked is the question that I had after reading all of this and the new secured transactions law. I am a little bit confused now because we have these new and improved ways to create and perfect security interests. We are going to hear about those in a minute. But if this original trust idea is going to be the solution to keeping assets out of bankruptcy estates, I am not sure how much these new, improved systems are going to be used.

OWEN: We have to bring it to a close now. We can all agree that we have had tremendous presentations by the members of our panel and we are all most appreciative.

12. Business Reorganization Law (*Ley de Concursos Mercantiles*), Diario Oficial de la Federación, Article 160, May 12, 2000.

SUMMARY BIOGRAPHIES

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