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Bank credits in the face of bankruptcy.
A historical view

GERARDO MANUEL RAMÍREZ ORNELAS

Historical analysis of the privilege that bankers had in bankruptcy proceedings and how the *ratio legis* that supported such regulation is still present in the bankruptcy and insolvency proceedings in force in our country. (e.g. bankruptcy law, financial law, history of Mexican law).

PREAMBLE

Banking institutions in our country have had since their beginning an operation consistent with the social, political and economic situation of Mexico during the last century and up to the present. Suffice it to recall the origins of banking in Mexico, where there was no multiple banking scheme, but rather specialized banking, which operated under a regime of concessions since banking activities were considered at that time as part of the public service of the State. Subsequently, with the amendments to the General Law on Credit Institutions and Auxiliary Organizations (*Ley General de Instituciones de Crédito y Organizaciones Auxiliares*) of 1975, banking in Mexico evolved to give the same credit institution the opportunity to provide all banking and credit services, that is, it allowed the creation of multiple banks.[1] Neither can we forget the banking "nationalization" of September 1, 1982 by Presidential Decree of José López Portillo, a product of the serious economic and political conditions of the country, who decided to expropriate the credit institutions and their assets to convert them into entities of the public administration. A decade later, as a consequence of the economic amendments of President Carlos Salinas de Gortari, the state-owned banks were privatized to give way to the formation of the financial groups that operate in our country today.[2]

As can be noted, in a period of a little more than 100 years, banking in Mexico has undergone transcendental modifications, which in one way or another have contributed to the existence and conformation of the current financial system. In order to understand it, it is necessary to know the historical background of the banking system that governs our country today, since this allows us to better understand the reasons why these institutions are currently conformed in such a way and, more importantly, to understand the conditions of their functioning. The regulations governing banking institutions are very extensive, practically impossible to cover, so we have chosen a very particular aspect of banking operations, which in my opinion, exemplifies the historical evolution of the system and which also converges with other legal issues of interest; and that is precisely the regulation of bank credits in the event of bankruptcy and insolvency proceedings.

Based on the background presented above, in this article I analyze the historical evolution of credit in the light of bankruptcy proceedings, a subject that seems interesting to us, since along with the development of banking in Mexico, the regulation of this legal institution underwent transcendental

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[1] Francisco Borja Martínez. "Amendments to the General Law on Credit Institutions and Auxiliary Organizations " (*"Reformas a la Ley General de Instituciones de Crédito y Organizaciones Auxiliares"*) in Universidad Iberoamericana's Law Department Annual Report, No. 11, July 1979, pp. 209-215.

[2] Eduardo Turrent, "Synthetic History of Banking in Mexico." (*"Historia Sintética de la Banca en México"*) article published by the Mexican Central Bank (*Banco de México*) at: http://www.banxico.org.mx/sistema-financiero/material-educativo/basico/%7BFFF17467-8ED6-2AB2-1B3B-ACCESC2AF0E6%7D.pdf, pp 1-3.

changes, which at the time had important legal repercussions whose ideas permeate even to the present day. It should be noted that from the end of the 19th century until the 1979 amendments to the then General Law on Credit Institutions and Auxiliary Organizations , credit institutions enjoyed a privilege in bankruptcy proceedings that initially provided for the non-accumulation of lawsuits against the bankrupt debtor and that ultimately, before its repeal, even allowed the execution and individual and autonomous collection of the bankruptcy proceeding. This regulation was the subject of political and legal debates that gave rise at the time to law amendment projects, jurisprudence criteria issued by the Mexican Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*) and profound doctrinal and academic discussions. A few years before the nationalization of the banking system, the privilege was repealed and was no longer restored, leaving bank credits on a par with any other type of credits before the insolvency proceeding or, if applicable, the bankruptcy of the common debtor. We will then try to apply precisely the position of the bank credit as a privilege against the bankruptcy estate, where the discussions and debates that such privilege originated at the time until its repeal, and the consequences and circumstances that currently prevail in the bankruptcy law in force, will be exposed.

Since this article will analyze bank credits in bankruptcy as a privilege of credit institutions, before entering into the topic at hand, it is necessary to answer the following basic questions: What is a bank privilege? What is its legal nature? Banking privilege is understood as the grace, prerogative or exemption granted by the State, through its legislative manifestation, to credit institutions.[3] That is, the banking privilege is that special regime created by law that makes such credit institutions enjoy a special regulation, which is not applicable to any other type of person or company of a private nature. Although it is not expressly mentioned in the law, it is understood that the reason for the existence of such privileges lies in the circumstances that the banking activity ultimately concerns the interests of the community, for which reason such liberalities do not constitute *per se* a personal privilege to benefit the credit institutions, but a benefit to society. Likewise, it was argued at the time that banking privileges arose as a necessity for credit institutions due to the fact that they are subject to a series of limitations by virtue of legal regulations that in any other type of private enterprise would be considered as depriving them of their freedoms.[4]

In relation to the legal nature of the banking privileges, it is necessary to distinguish whether we are talking about the period prior to the nationalization of the banks or whether we are talking about the period after the nationalization. This is so, because if we talk about the period prior to the nationalization, the banking and credit service was considered a public service provided for in article 28 of the Constitution, while in the period after the banking nationalization, the banking and credit service ceased to be considered a public service. For the purposes of this paper we are concerned with the legal nature of the banking privilege prior to nationalization, that is, seen from the perspective that all financial services constituted a

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[3] " Conrado Arredondo Vilchis, "The Privileges of Credit Institutions." (*"Los Privilegios de las Instituciones de Crédito"*), Edited by Banco Mexicano Somex, S.A., 1980, p. 5.

[4] Idem, p. 5; Our courts have also ruled in this regard. See the Judicial Journal of the Federation (*Semanario Judicial de la Federación*), Sixth Period, Mexico, 1917-1985, Part One, p. 169, which contains the isolated ruling issued by the Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*) under the title "INSTITUTIONS OF CREDIT AND AUXILIARY ORGANIZATIONS, THE PRIVILEGES GRANTED TO THEM BY ARTICLE 109 OF THE NEW GENERAL LAW OF THE SUBJECT, SO THAT THEIR DIRECT OR DISCOUNT CREDITS DO NOT ENTER INTO INSOLVENCY, BANKRUPTCY OR SUSPENSION OF PAYMENTS, DO NOT INFRINGE ARTICLE 13 OF THE FEDERAL CONSTITUTION". This ruling supports the constitutionality of the privilege of bank credits in the face of the debtor's bankruptcy under the argument that credit institutions do not enjoy the same freedoms as other creditors. Later in this article this criterion will be analyzed in depth.

public service granted to private parties, since during this period the banking credit privilege was in force in the face of the debtor's bankruptcy. To justify this, the jurists of the time pointed out that the nature of banking privileges was understood as an integral part of the concession title, which consisted of the power granted by the State to certain corporations so that, by complying with certain requirements, they could act as intermediaries of money and credit.[5] That is, the catalog of banking privileges -including the bankruptcy privilege- was understood as part of the concession itself, which constituted the source and justification for the existence of the privilege.

I. HISTORICAL DEVELOPMENT

In this chapter, the historical development of the legal regulation of bank credits in bankruptcy proceedings, from its beginnings until the General Law on Credit Institutions and Auxiliary Organizations of 1941, will be presented.

A. BANK CREDIT IN BANKRUPTCY IN THE NINETEENTH CENTURY

During the first part of the nineteenth century there was no formal banking and credit system in our country and this type of services operated with its own uses and customs. It was not until the Commercial Code (*Código de Comercio*), which came into force in 1884, that a general formal legal regime applicable to credit institutions in our country was established.[6] It is precisely within this first legislation that we find the first historical antecedent of the banking privilege analyzed in this research work. Article 1507 of the Commercial Code of 1884 stated that all pending lawsuits must be joined to the bankruptcy lawsuits, with the exception, among others, of those lawsuits whose purpose was the auction of assets to cover credits of banks and credit institutions. This provision was incorporated *verbatim* into Article 983 of the Commercial Code (*Código de Comercio*) promulgated in 1889, which in its relevant part reads as follows:[7]

> Article 983. All lawsuits pending against the bankrupt shall be joined to the bankruptcy proceedings, except for the following:
>
> [...].
>
> III. Those which have as their object auctions to pay debts of banks or credit institutions.

As can be seen from the aforementioned legal precept, since 1884 no lawsuit whose purpose was to demand credits from banks or credit institutions was cumulative to the universal bankruptcy proceedings. Note that the legal precept does not make any distinction whatsoever, but includes any debt regardless of the nature of the same against any credit institution. Notwithstanding the foregoing, it should be noted that the fact that they did not accrue to the bankruptcy did not mean that at the time of payment of such bank credits the special privilege would subsist. Once the lawsuits were concluded by a final judgment, the execution and collection of such credits had to be subject to the ordinary priority and payment procedures established by the Commercial Code (*Código de Comercio*) for any creditor. Along with these provisions,

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[5] Conrado Arredondo Vilchis, op. cit., note 3, p. 7.

[6] Eduardo Turrent, op. cit., note 2 pp. 1-3.

[7] Decree published in the Federal Official Gazette of the Federation (*Diario Oficial de la Federación*) on September 15, 1889, Miguel Acosta Romero, “Banking Law Overview of the Mexican Financial System” *("Derecho Bancario Panorama del Sistema Financiero Mexicano"*), Porrúa Publishing House , Mexico, 1978, p. 219.

in 1897 the first Credit Institutions Law (*Ley de Instituciones de Crédito*) was issued, which in its article 104 established that: *"The insolvency proceedings do not in any case prevent the Banks from exercising the rights granted to them by this law"*, in accordance with the precepts of the Commercial Code analyzed above.[8]

This privilege was of great importance, since it implied that any bank credit received special treatment in bankruptcy proceedings with respect to common creditors; however, during that period it was not a provision that was applied due to the small number of bankruptcies, nor was it a provision that led to important theoretical discussions. No direct source was found that could shed light on the origin of that [*sic*] provision or the reasons why the legislator of that [*sic*] time introduced it. Although the direct origin of the sources on which the legislators relied to incorporate said legal precept is unknown, it is possible to understand the reasons for its existence by virtue of the historical period in which the country was at that time. In fact, during the enactment of the Commercial Codes of 1884 and 1889, the country was during the historical period known as the "*Porfiriato*", which was characterized by the economic and free market amendments that were established by President Porfirio Diaz in the country, favoring foreign investment and trying to adopt in the country the economic systems of European countries, allowing the entry of important foreign capitals to the Nation. It would not seem strange that, as it is done today, in order to attract foreign capital and investors, protectionist investment provisions were enacted at that time, such as the banking privilege of credits in the face of bankruptcy, in order to achieve such objectives. Likewise, it is possible that during that time the credit institutions operating some de facto and others through special decrees issued by local governments and authorities in the country, including the one known today as *Banco Nacional de México*, could have contributed to pressure the Mexican State of that time to grant them privileges of that nature.[9]

B. BANK CREDIT IN THE PERIOD PRIOR TO THE BANKRUPTCY AND PAYMENTS SUSPENSION LAW (*LEY DE QUIEBRAS Y SUSPENSIÓN DE PAGOS*) OF 1943

At the beginning of the twentieth century and until the amendments to the Credit Institutions Law (*Ley de Instituciones de Crédito*) published in 1932, there were no substantial changes in the regulation of bank credits in bankruptcy proceedings. It was with the June 29, 1932 amendments to the Credit Institutions Law, specifically Article 32, that a provision concerning the subject under study was introduced. Article 32 of such law provided as follows

> Article 32. The interdiction or death of the debtor shall not suspend the enforceability of credits arising from credit or banking operations made by credit institutions. The insolvency proceedings will not prevent in any case the exercise of the rights granted by this law and the respective lawsuits will not be joined to the insolvency proceedings.[10]

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[8] Luis René Martinez Souvervielle Rivera, *The Bank Credit Privilege and the Bankruptcy Judgment* (*El Privilegio de los Créditos Bancarios y el Juicio de Quiebra*), Professional Thesis, Escuela Libre de Derecho, Mexico, 1965, pp. 17-19.

[9] Since the middle of the 19th century credit institutions have existed in the country by means of particular decrees of the governments of various states and special decrees. However, the uniformity of financial legislation in our country did not occur until the end of the 11th century with the Commercial Codes of 1884 and 1887 and the Credit Institutions Law of 1889. For more information on this subject see Eduardo Turrent, op. cit, note .2 pp. 1-3.

[10] Federal Official Gazette of the Federation, published June 29, 1932, Luis René Martínez Souvervielle Rivera, op. cit., note 8 p. 19.23.

As can be observed, these amendments reiterated the unconditional privilege of banks to be able to demand the collection of their credits from debtors in bankruptcy through an autonomous lawsuit without the need to resort to the universal procedure for their execution, thus breaking one of the pillars that supported bankruptcy law: the principle of attraction or accumulation of individual lawsuits.

C. THE GENERAL LAW ON CREDIT INSTITUTIONS AND AUXILIARY ORGANIZATIONS OF 1941

We continue with the historical development of bank credit in the face of bankruptcy in our country. The banking privilege analyzed was rendered ineffective with the repeal of the Credit Institutions Law of 1932, to give way to a new General Law on Credit Institutions and Auxiliary Organizations enacted in 1941. The banking privilege in question was transferred to article 109 of said legal order. In fact, by means of a decree published on May 31, 1941 in the General Official Gazette of the Federation (*Diario Oficial de la Federación*), the General Credit Institutions Law and Auxiliary Credit Organizations was issued, repealing the previous law on the matter. As mentioned above, the right of banks to collect their credits from the bankrupt party without the need to resort to bankruptcy proceedings was incorporated into this new law in Article 109, which states as follows:

> Article 109. The interdiction or death of the debtor shall not suspend the enforceability of claims arising from transactions entered into by credit institutions and auxiliary organizations. Actions arising from credits in favor of credit institutions and auxiliary organizations arising from direct or discount operations shall not be cumulative to the insolvency, bankruptcy or liquidation proceedings, provided that the operation has not been carried out within the suspicious period of the bankruptcy and the action in case of discount is directed directly against the discounting party and against the debtor.

A novel aspect of this amendment was the subjection of the privilege of banks to bring their lawsuits to collect credits separately without the need to resort to bankruptcy proceedings to two novel limitations: (*i*) it may do so provided that the transactions were not granted during the period of suspicion or retroaction, with the purpose of sanctioning acts entered into in fraud of creditors and (*ii*) that they are direct transactions or discounts and that these legal actions are directed directly against the discounter and against the debtor and not against his successors in title or other third parties; guarantors, endorsers or bondsmen.

These novel limitations did not cause much commotion for the bankers of that time, since it should be remembered that article 983 of the then Commercial Code provided for the privilege of not accumulating bank credits, without making any distinction, a situation which, however, did not last long, since said benefit contained in the commercial legislation was suppressed with the enactment of the Bankruptcy and Payments Suspension Law (*Ley de Quiebras y Suspensión de Pagos*) in 1943, which will be analyzed in the following chapter.

The suppression of Article 983 of the Commercial Code and the new Bankruptcy and Payments Suspension Law, mentioned in the Preamble of this research work, which at the time caused important debates in both the political and legal spheres[11], the intervention of our highest courts, including the Mexican Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*) of that time, together with the doctrinal research of prominent jurists of that time, constitute the main purpose of this research.

[11] Miguel Acosta Romero, op. cit. note 7, pp. 216-230

Before proceeding to the next chapter, in order to assist the reader in understanding the amendments to the legal regime of bank credit in bankruptcy, the following synoptic table is included:

Name of the Law	Year of the Amendment	Content of the Amendment
Commercial	1884	Article 1507, which established the non-accumulation of the claims of credit institutions to the bankruptcy proceedings.
General Credit Institutions Law	1887	Article 104, which established the non-affectation of the rights granted by such law to credit institutions in bankruptcy proceedings.
Commercial Code	1889	Article 983 which established the non-accumulation of the claims of the credit institutions to the insolvency proceedings.
General Credit Institutions Law	1932	Article 32, which provided for (*i*) the non-affectation of the rights of credit institutions provided by law in connection with insolvency proceedings and (*ii*) the non-accumulation of bank credits and credit operations to the insolvency proceedings.
General Law on Credit Institutions and Auxiliary Organizations	1941	Article 109, which provided for the non-accumulation of credits arising from transactions entered into by credit institutions and auxiliary organizations, whether direct or discount transactions, provided that (*i*) the transactions have not been carried out during the suspect period and (*ii*) the action in the case of discounts is directed directly against the discounting party and against the debtor in the case of discount transactions.

Name of the Law	Year of the Amendment	Content of the Amendment
Bankruptcy and Payments Suspension Law	1943	Article 126 eliminated the mention that bank credits are exempt from accruing to the bankruptcy proceedings.

General Law on Credit Institutions and Auxiliary Organizations	1949	Article 109 was amended to establish (*i*) the non-accumulation of claims arising from transactions with credit institutions and auxiliary organizations; (*ii*) it eliminated the condition that for the non-accumulation to be applicable, the bank claims must be prior to the suspect period and in case of discounts they must necessarily be directed against the discounting party and against the debtor; and (*iii*) it provided for the possibility of individual and separate execution of bank claims through the transfer and auction of assets before or after the insolvency proceeding.
General Law on Credit Institutions and Auxiliary Organizations	1978	Article 109 was amended, eliminating the legal provisions that established the non-accumulation and individual execution of bank credits in insolvency proceedings.

II. THE BANKING PRIVILEGE UNDER BANKRUPTCY AND RECEIVERSHIP LAW

A. THE BANKRUPTCY AND SUSPENSION OF PAYMENTS LAW

By means of a decree published in the General Official Gazette of the Federation on April 20, 1943, the provisions contained in the Commercial Code of 1889 relating to Bankruptcy were repealed and replaced by a special law. In relation to our subject of investigation, it should be noted that this law eliminated the express mention of the procedural privilege granted to the banks, consisting of the non-accumulation of the credits they had against the bankrupt merchant in the bankruptcy proceedings. To this effect, Article 983 of the Commercial Code was deleted together with the entire special chapter contained until then in the Commercial Code, to give way to Article 126 of the Bankruptcy and Suspension of Payments Law, in which the aforementioned bank privilege was no longer included. The precept of the new bankruptcy legislation established.[12]

> Article 126. All lawsuits pending against the bankrupt shall be joined to the bankruptcy proceedings, except for the following, without prejudice to the provisions of Article 122 and of the precepts that attribute to the trustee the realization of all the assets:
>
> I. Those in which the final judgment of first instance has already been pronounced and notified.
>
> II. Those deriving from mortgage or pledge credits.

It is worth noting that the commission that drafted the Bankruptcy and Payments Suspension Law discussed at length whether or not the bankers' privilege should be maintained and reached the unanimous conclusion that there was no reason of any kind to maintain this privilege, which had an explanation at the time when the incipient Mexican banking system required strong legal protection, which would be

[12] Bankruptcy and Payments Suspension Law published in the Federal Official Gazette of the Federation on April 20, 1943.

inexplicable at that time when the credit institutions were firmly rooted in the country and economically consolidated.[13] This does not sound strange if one takes into consideration that the new Bankruptcy and Payments Suspension Law represented a radical change of ideology with respect to the Commercial Code, since following the currents of the Italian mercantilists, the predominant value to be protected became the public interest over the autonomy of the individual creditors, which the previous Commercial Code considered to be the primordial value.[14] In this sense, if with the Bankruptcy and Payments Suspension Law the legal value protected was substantially transformed from protecting the rights of creditors to giving priority to the public interest, especially the preservation of companies through the very novel institution of the suspension of payments, it is understandable that privileges such as the one that bank credits had in particular have been suppressed.

This situation, as will be explained in depth, caused the country's bankers to pressure the Powers of the Union to recover their privilege, which they eventually achieved in 1949, through the amendment of Article 109 of the General Law of Institutions and Auxiliary Organizations.

B. 1949 AMENDMENT TO ARTICLE 109 OF THE GENERAL LAW ON CREDIT INSTITUTIONS AND AUXILIARY ORGANIZATIONS

As stated above, in 1943 the new Bankruptcy and Payments Suspension Law was published, which repealed the chapter on "Bankruptcies" of the Code of Commerce, in order to establish a new regulation on the protection and insolvency of debtors.[15] As mentioned above, the Bankruptcy and Payments Suspension Law cancelled the privilege of bank credits not to be joined to the moratorium process, which caused the credit institutions to demand an amendment to Article 109 of the General Credit Institutions Law and Auxiliary Credit Organizations, which they eventually obtained.[16] By means of a amendment published in 1949, article 109 was amended to read as follows:

> Art. 109. Interdiction or death of the debtor shall not suspend the enforceability of claims arising from transactions entered into by credit institutions and auxiliary organizations.
>
> Actions arising from credits in favor of credit institutions or auxiliary organizations, whether arising from direct or discount operations, will not be cumulative to the insolvency, bankruptcy or suspension of payments proceedings.
>
> The actions derived from such credits may be exercised before or after the reorganization, bankruptcy or suspension of payments; the related lawsuits will not be suspended due to such

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[13] Joaquín Rodríguez Rodríguez, *Bankruptcy and Payments Suspension Law, Concordances, Annotations, Statement of Motives, Bibliography and Index,* 13th ed, Porrúa Publishing House, Mexico, 1996, p. 112.

[14] In this regard, see my professional thesis entitled "The Organs of the Bankruptcy Process". In that work, I highlighted the fact that the Commercial Code represented a position characterized by the total autonomy of creditors, derived from the consideration that the exclusive purpose of bankruptcy lies in the realization of the *par conditio creditorum*. In contrast, the Bankruptcy Proceedings Law completely inverted the hierarchy of the bankruptcy bodies, in consideration of the public interest considered as predominant in this Law, highlighting the role played by the Judge, as the guardian of this collective interest. Gerardo Ramírez Ornelas. Los órganos del Proceso de Quiebra, Professional Thesis, Escuela Libre de Derecho, Mexico, 1981, p. 9, 77-78.

[15] Supra, Chap. III, Section A.

[16] Luis René Martinez Souvervielle Rivera, *op. cit*., nota 8, p. 21-23.

procedures nor will they be cumulative, and in such lawsuits the seized assets may be seized and auctioned and with their proceeds, payment of the respective credits may be made.

This amendment substantially broadened the privilege that bankers had enjoyed up to that time, since it not only reiterated the privilege they already had consisting of the non-accumulation of the lawsuits they had against the bankrupt debtor to the bankruptcy proceedings, it also stated that the banks could also collect their claims through the sale and auction of the assets individually and separately either before or after the insolvency proceeding, which implied authorizing the banks to individually enforce their claims without the need to go through the recognition, ranking, priority and payment instances of the bankruptcy proceedings.

The 1949 amendment to Article 109 of the General Law on Credit Institutions and Auxiliary Organizations gave rise to a legal dispute as it openly contradicts the spirit and essence of the recent Bankruptcy and Payments Suspension Law: (*i*) it substitutes the realization of assets within the universal procedure for an individual execution and (*ii*) it eliminates the limitation to the privilege that was held in the case of credits contracted during the suspect period,[17] which brought as a consequence the existence of a privilege or jurisdiction for bank credits that allowed them to collect their credits in bankruptcy; an advantage that was criticized by certain social sectors of the time, especially by the chambers of commerce and industry, as well as by the promoters, lawyers, accountants, financiers, etc., of the principles of public interest included in the Bankruptcy and Payments Suspension Law.

The expert Acosta Romero comments that public opinion began to know this regulation as the "bankers' privilege" that favors their enrichment and that it is a triumph of financial capitalism to the detriment of the people.[18] This resulted in discussions in Congress, the intervention of the Mexican Supreme Court of Justice, several articles by important jurists and even professional theses. In the end, this discontent was taken advantage of by the opposition party at the time, that is, the *Partido Acción Nacional*, which at the time presented the law initiative that ended up repealing the privilege contained in Article 109, considering that it constituted a privilege that broke with the principle of equality of the parties.[19] The following is a description of certain legal aspects that were discussed at that time in relation to the constitutionality of said legal precept.

C. CONSTITUTIONALITY OF ARTICLE 109 OF THE GENERAL LAW ON CREDIT INSTITUTIONS AND AUXILIARY ORGANIZATIONS. POSITION OF THE MEXICAN SUPREME COURT OF JUSTICE 9

One of the main legal arguments asserted against Article 109 of the General Law on Credit Institutions and Auxiliary Organizations was that the manner in which such provision regulated bank credits in bankruptcy constituted a special privilege that violated the principle of "*par conditio creditorum*", according to which equal treatment must be given to all creditors of a similar nature of the bankrupt merchant, thus violating the guarantee of equality set forth in Article 13 of the Constitution. The proponents of this theory asserted that a privilege of this nature for bank credits constituted a special privilege, which violated the most basic

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[17] José Luis Zambrano R,. *Personal Rights and Article 109 of the General Law on Credit Institutions and Auxiliary Organizations*, Professional Thesis, Escuela Libre de Derecho Mexico, 1959, p. 42-51.

[18] Miguel Acosta Romero, *op, cit*., note ,7 p. 217.

[19] Miguel Acosta Romero, *New Banking Law, Panorama of the Mexican Financial System*, 6th. ed. Publishing House, Mexico, p. 475.

principles governing bankruptcy matters, and also in clear violation of the individual guarantees of the other creditors who did not enjoy such privileges and were therefore in an unequal situation. Some jurists of the time, such as Mantilla Molina, argued that this privilege only existed in Mexico and that countries of similar culture did not grant a similar privilege.[20] Even the unconstitutionality of the legal precept was argued by jurists of the time through the collaboration of various professional theses. I am proud to point out that some of these professional theses were written by young lawyers who graduated from our School, which provide very interesting arguments.

For example, the professional thesis prepared by the then student of the Escuela José Luis Zambrano R. entitled "Personal Privileges and Article 109 of the General Law on Credit Institutions and Auxiliary Organizations in 1959, attacked the legality of the privilege analyzed, pointing out that in the assumption that banks needed liquidity to protect the saving public, an argument that is persistently used by the proponents of the amendments to article 109, this *per se* does not make this privilege [*sic*] constitutional.[21] Likewise, he argued by means of a clear exposition, the supposed unconstitutionality of the special privileges created by said law, which, being *intuitu personae* and not real or material, turn out to be unconstitutional from his point of view. Another example is the professional thesis elaborated by the lawyer graduated from the School Luis René Martínez Souvervielle Rivera entitled "Privilege of the Banking Credits and the Bankruptcy Trial" which in addition to defending the unconstitutionality of the referred legal precept on the grounds that such regulation created prohibited special privileges, argues that those who defend the legality of the article by pointing out that it constitutes a guarantee to protect the interest of the saving public are mistaken, because in the best of cases such regulation would be a guarantee that is not necessary since the law itself contains other mechanisms to guarantee the liquidity and solvency of the banks provided for in Article 8, Section XII, which states that in the event that a bank loses more than half of its capital stock, the shareholders must make the necessary contributions to replace the loss or else the authorization to operate will be revoked.[22]

On the other hand, the credit institutions and various academic sectors defended the constitutionality of this provision, pointing out that the rationale and justification for the existence of the privilege was the need of the credit institutions to have liquidity, which at the end of the day is for the benefit of the general public, and not for the benefit of the banks' shareholders. The Ministry of Finance and Public Credit even argued that the public interest protected by Article 109 of the General Law on Credit Institutions and Auxiliary Organizations is of a higher category than that protected by the Bankruptcy and Suspension of Payments Law, since at the end of the day it was about protecting the general public that had its savings deposited in the credit institutions.[23]

Among those who defend this position, it is worth mentioning Miguel Acosta Romero, who in the first two editions of his book on Banking Law, builds a strong defense of the legality and constitutionality

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[20] Roberto Mantilla Molina, "Background of the Undue Bank Privilege in Bankruptcy", Article in *Revista Jurídica Veracruzana*, Organ of the Superior Court of Justice (*Tribunal Superior de Justicia*) of the State of Veracruz, No. 3, Jalapa, Veracruz, May-June, 1966, quoted by Miguel Acosta Romero, op. cit., note 7, p. 220,

[21] José Luis Zambrano R., *op. cit*, note 17, p. 41-51.

[22] Luis René Martínez Souvervielle Rivera, *op. cit*. Note 8, p. 27-36

[23] José Luis Zambrano R. *op. cit*., 17, p. 45

of the precept.[24] He points out that absolute equality before the law is illusory. He argues that it is illogical to establish a situation of equals between people who have different legal situations, such as banks. He comments that the principle of "*par conditio creditorum*" is an illusion because the Bankruptcy and Payments Suspension Law itself does not strictly treat all creditors as equal, since although all creditors are equal in principle, it classifies them in different categories. On the other hand, he points out that it is incorrect that special jurisdictions prohibited by the Constitution are created with the article in question, since what the Constitution referred to was the prohibition of the existence of special courts made up of members of the same class, which does not occur in the case under study, since it is the same ordinary civil courts that hear this type of lawsuits.

Finally, in the second edition of his book, he presented an economic study to defend banking privilege from the criticism launched by various academics to the effect that it only favors bankers, refuting this assertion by using statistical numbers which he used to point out that more than 90% of the capital of the banks is owned by the saving public and that the protection is therefore justified because at the end of the day it is the resources of the public that are at stake in these proceedings, thus proving, according to the famous jurist, that the injustice spoken of by certain treatises does not exist. The author even cited as an example of the risk that credit institutions run when they lose their liquidity, the cases that occurred in Germany and at the time in Argentina, where due to the bankruptcy of various credit institutions, many depositors were left without their savings.[25]

The constitutionality of Article 109 of the General Law on Credit Institutions and Auxiliary Organizations was also discussed. It should be noted that the Mexican Supreme Court of Justice ruled in favor of the constitutionality of the provision. In fact, on February 7, 1963, upon hearing amparo in review 1509/59, filed by Luis Ceballos Sánchez (Bankruptcy) and co-appellee, the Mexican Supreme Court of Justice issued an isolated criterion in the sense that article 109 of the Credit Institutions Law did not violate article 13 of the Constitution.[26]

The Mexican Supreme Court of Justice upheld the constitutionality of the controversial provision under the following reasoning: (*i*) it is inaccurate that article 109 of the law of the subject matter constitutes a personal privilege contrary to the principle of equality, because said article is a general and abstract provision that applies to all credit institutions equally, and in consideration not of the person of each one of those institutions but of the objective nature of the same and their operation; (*ii*) the legal justification and legitimacy of the precept protecting bank credits lies in the fact that credit institutions are not in the same circumstances as other creditors, which, unlike the latter, are free to agree on the interest and maturity of their credits and the disposition of their assets, while on the contrary, credit institutions have several limitations imposed by the regulations of the banking activity itself, to fix and modify interest rates, as well as to charge commissions and other items; (*iii*) it would be absurd and illogical that on the one hand, the law obliges banks to have liquidity and on the other hand, it would apply provisions that prevent them from guaranteeing such liquidity.

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[24] Miguel Acosta Romero, op. cit. note 7, p. 216-230, Miguel Acosta Romero " Banking Law Panorama of the Mexican Financial System", 2nd. ed. Porrúa Publishing House. Mexico, 1983, pp. 245 - 249.

[25] *Ibidem*, p. 245.

[26] Judicial Journal of the Federation (*Semanario Judicial de la Federación*), Sixth Period, Mexico, 1917-1985, Part One, p. 169

In the decision where the Court pronounces on the banking privilege, which was derived from the report of Justice Felipe Tena Ramírez, the Court analyzes a constitutional and a historical aspect to justify the legality of the banking privilege in question. The decision begins by pointing out that Article 13 of our Constitution prohibits "undue" privileges or advantages, and it is based on this notion to decide that although it is true that the banking privilege is an advantage, it is not undue but is justified by the nature and purpose of the banking and credit activities provided by the credit institutions, which, when applied equally to all, does not infringe the guarantee of equality before the law provided for in Article 13 of the Constitution. In order to justify such reasoning, the Supreme Court carried out a historical and constitutional study on the origin of such fundamental guarantee provided in article 13 of the Constitution, which prohibits the existence of special jurisdictions, analyzing the Constitution of the United States of America, the postulates of the French Revolution, the previous Constitutions in force in our country and the historical circumstances that gave rise to the issuance of the individual guarantee of equality before the law. Likewise, he made a legal philosophical analysis on the concept and differences of equality and legal equality, citing legal philosophers such as Locke, Rousseau, Montesquieu, among others. Based on this idea, the Constitutional Court proceeded to analyze the current legislation applicable to credit institutions, including the genesis of the privilege and how it evolved along with the Mexican financial system, concluding with a pragmatic analysis of the situation of banks in the country and their current needs.[27]

As a comment in relation to the decision, I consider that the seriousness with which the subject was approached and the completeness with which it is written, prove that the decision of the Supreme Court was not partial and unsupported in favor of the bankers, as certain authors of the time pointed out, but on the contrary, it was the result of a serious and deep study on the subject; independently that the evolution of legal science today would have hardly allowed such a constitutional decision.

D. REPEAL OF ARTICLE 109 OF THE GENERAL CREDIT INSTITUTIONS LAW AUXILIARY ORGANIZATIONS

Notwithstanding the fact that the H. Mexican Supreme Court of Justice at the time sustained - in a non-binding isolated thesis - the constitutionality of the legal precept, through a legislative amendment sponsored by the Federal Executive branch, the privilege contained in Article 109 of the General Law on Credit Institutions and Auxiliary Organizations, which granted bank credits a preferential and special status in bankruptcy proceedings, was repealed, this was done through amendments to the General Law on Credit Institutions and Auxiliary Organizations published in the Official Gazette of the Federation on December 26, 1978, so that Article 109 would read as follows:[28]

> Article 109. The interdiction or death of the debtor shall not suspend the enforceability of credits arising from transactions entered into by credit institutions and auxiliary organizations.

Curiously enough, the initiative that ended up repealing the legal precept that has been analyzed was presented by the Partido Acción Nacional, which stated in its explanatory memorandum that the reason

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[27] Ruling of February 7, 1963 issued by the Plenary of the Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*) that resolved the amparo lawsuit in review 1509/59, p. 8-75.

[28] Amendments to the Law of Auxiliary Institutions and Organizations (*Ley General de Instituciones de Crédito y Organizaciones Auxiliares*), published in the Official Gazette of the Federation (*Diario Oficial de la Federación*) on December 27, 1978.

for the repeal of said precept was that "The legal right that is protected by reason of the repeal is the constitutional principle of the legal equality of all the creditors of the bankrupt party, therefore, the aforementioned unconstitutional privilege granted to the credit institutions must be repealed, in order to remain in full force and effect the mandate of general accumulation of all bankruptcy proceedings, as established in Articles 123 and 127 of the Bankruptcy and Payments Suspension Law.[29] The foregoing is interesting, because even though, as we have seen, the Mexican Supreme Court of Justice had ruled that the privilege analyzed was constitutional, the initiative of the then opposing party insisted that it be repealed because it was contrary to our Magna Carta. In reality, the PAN (*Partido Acción Nacional*) initiative was a presidential maneuver - José López Portillo had been Secretary of the Treasury - to avoid certain political commitments made with the bankers and to show a supposed distribution of forces in the Mexican Congress.

Years later, the decrees issued on the occasion of the banking nationalization repealed the Credit Institutions Law and Auxiliary Credit Organizations, which was replaced by the Regulatory Laws of the Public Banking and Credit Service (*Ley Reglamentaria del Servicio Público de Banca y Crédito*), which did not include such privilege.[30] Still at that time, it was discussed in the courts whether the credit institutions enjoyed the privilege previously granted to the banks in terms of article 109 for those credits prior to 1979; however, of course, the courts of that time resolved that such privilege did not apply since it was not provided for in the law in force.[31] An interesting point in this regard is that the tenth transitory article of the Regulatory Laws of the Public Banking and Credit Service established that Banco Obrero, S.A. and foreign capital banks would continue to operate under the previous regulation, in clear violation in our opinion of the guarantee of equality provided in article 13 of the Constitution. However, since these credit institutions were still governed by the General Law on Credit Institutions and Auxiliary Organizations of 1941, they could still have invoked the application of the banking privilege provided in Article 109 of the Credit Institutions Law, of course only for those credits prior to the amendments of 1979. In practice, this did not happen.[32] Later, on the occasion of the bank privatization in the nineties, the current Credit Institutions Law was issued, which did not contemplate such privilege either.

Therefore, as of the suspension of bank privilege published in 1979, the only law applicable to bank credits was the Bankruptcy and Payments Suspension Law and they were treated as any other creditor of their grade and preference.

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[29] Edition of the General Law on Credit Institutions and Auxiliary Organizations, by Financiera Nacional Azucarera, SA, pp. 513 to 526, cited by Miguel Acosta Romero, op. cit., note 24, pp. 245-246.

[30] Decree establishing the Nationalization of Private Banking published in the Official Gazette of the Federation on September 1 and 2, 1982; Regulatory Law of the.
Public Banking and Credit Service published in the Official Gazette of the Federation on December 31, 1982 and the Second Regulatory Law of the Public Banking and Credit Service published by decree in the Official Gazette of the Federation on January 14, 1985.

[31] See Judicial Journal of the Federation (*Semanario Judicial de la Federación*), Mexico, Seventh Period, Report 1987, Second Part, thesis 268, .p 198, which contains the isolated thesis under the heading "BANKRUPTCY OR SUSPENSION OF PAYMENTS, LAWSUITS OF NATIONAL CREDIT COMPANIES LACK THE PRIVILEGE OF NOT CONCURRING.

[32] The Regulatory Law of the Public Banking and Credit Service established in its Tenth Transitory Article the following: Article Tenth. Banco Obrero, S.A. and the branches in Mexico of foreign banks that have a concession from the Federal Government will continue to be governed by the provisions under which they have been operating.

III. REGULATION OF BANK CREDITS UNDER THE BANKRUPTCY LAW

In this chapter, I will discuss the current regulation of bank credits in the bankruptcy and bankruptcy stages, which is provided for in the Bankruptcy Law, which superseded the Bankruptcy and Payments Suspension Law, and the main effects of this new legislation.

A. ABROGATION OF THE BANKRUPTCY AND PAYMENTS SUSPENSION LAW (*LEY DE QUIEBRAS Y SUSPENSIÓN DE PAGOS*)

During the time that the Bankruptcy and Payments Suspension Law was in force, it evolved mainly in its procedural aspects, the abuses of which nullified the effectiveness of its substantive content. It was widely criticized that during its validity, the provisions of said law allowed that through procedural maneuvers of the parties in conflict, the insolvency proceedings were prolonged.[33] What was most criticized was the regulation of the suspension of payments, which in practice allowed the Merchant subject to the suspension of payments procedure to stop paying its creditors for an indefinite period of time, prolonged and without any justification, which for banks and other institutional creditors constituted an important damage; a situation that worsened with the economic crisis suffered by the country in 1994 and 1995, which originated an important number of bankruptcies, which could not be effectively dealt with under the Bankruptcy and Payments Suspension.[34] In this practical evolution, the disappearance of the banking privilege and the abusive exercise of the process deficiently regulated in the Bankruptcy and Payments Suspension Law particularly harmed banking, financial and securities institutions in the collection of their credits and execution of guarantees.

As a result of the foregoing, several proposals to amendment the aforementioned law emerged in the seventies. In 1968, Roberto Mantilla Molina and Jorge Barrera Graf directed a draft bill for a new Bankruptcy Law, aimed at addressing the different problems derived from the suspension of payments; in 1987, the then legislator Salvador Rocha Díaz prepared a bill for a Support, Rehabilitation and Bankruptcy Law (*Ley de Apoyo, Rehabilitación y Quiebra*); in 1994, the then Chamber of Deputies submitted for consideration a bill for a Law for the Rehabilitation and Bankruptcy of Commercial Businessmen (*Ley de Rehabilitación y Quiebras de Empresarios Mercantiles*).[35] Finally, it was decided that the elaboration of a new legal system was necessary, since the Bankruptcy and Payments Suspension Law (*Ley de Quiebras y Suspensión de Pagos*) would require so many amendments that incorporating all of them in practice would create confusion.[36] Thus, after 57 years, on May 12, 2000, the Bankruptcy Proceedings Law (*Ley de Concursos Mercantiles*) was published in the Official Gazette of the Federation, which is the legislation that currently governs bankruptcy and insolvency in our country. This new law produced important changes in the matter, such as: (*i*) the suspension of payments is eliminated and is substituted by a conciliation stage; (*ii*) the Federal Institute of Commercial Bankruptcy Specialists (*Instituto Federal de Especialistas de Concursos Mercantiles*) is created under the Federal Judiciary Council (*Consejo de la Judicatura Federal*) to assist the judge in the bankruptcy and insolvency proceedings; (*iii*) the procedural times are limited; (*iv*)

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[33] Luis Fernando Sanromán Martínez, *Commercial Insolvency Proceedings*, Porrúa Publishing House, Mexico, 2010, .p 9.

[34] Statement of Motives of the Bankruptcy Proceedings Law, published in the Official Gazette of the Federation on May 12, 2000.

[35] Elvia Arcelia Quintana Adriano, *Commercial Insolvency Proceedings*, Doctrine, Law and Jurisprudence, Porrúa Publishing House, Mexico, 2003, pp. 5-6.

[36] *Idem.*

the obligation to file for bankruptcy and insolvency proceedings is eliminated; and (*v*) the obligation to file for bankruptcy and insolvency proceedings is eliminated; (*vi*) the obligation to accumulate all pending lawsuits against the bankrupt Merchant to the bankruptcy proceeding is eliminated; (*vii*) the creditors' meeting is eliminated; (*viii*) a simplified and expedited procedure was introduced with the least possible formalities for the recognition and grading of credits; (*ix*) the means of challenge are significantly reduced, losing their suspensive and dilatory effect on the main proceeding; among others.

B. BANK CREDITS IN THE BANKRUPTCY PROCEEDINGS LAW

In fact, the enactment of the Bankruptcy Proceedings Law as the legal system that governs bankruptcy and insolvency proceedings in our country was due to a strong foreign influence, its design and drafting was based on the UNCITRAL Model Law and other exotic influences. Like the Bankruptcy and Payments Suspension Law, this law excludes the privilege enjoyed by credit institutions in bankruptcy and suspension of payments proceedings, as provided in Article 109 of the General Law on Credit Institutions and Auxiliary Organizations. Notwithstanding the foregoing, there are certain legal provisions in the Bankruptcy Proceedings Law that apply to bank credits. In this part of this paper, I intend to present a general description of the aforementioned regulation.

The first thing that must be pointed out with respect to the treatment of claims -including bank claims- in bankruptcy proceedings is that it is contained in the Seventh Section, which regulates the disposition of assets, credit grading and payment of creditors recognized in the bankruptcy stage. This has been criticized by some experts, since the ranking of credits has important legal consequences not only in the bankruptcy proceedings but also in the conciliation stage.[37] Within said Seventh Section, Article 217 of the Bankruptcy Proceedings Law classifies the claims against the bankrupt Merchant based on the nature of the claim, not in consideration of the person who is the holder of the claim. The foregoing is set forth in Article 217, which provides:

> Article 217. Creditors shall be classified in the following degrees, according to the nature of the credits:
> I Singularly privileged creditors;
> II. I. Creditors with security interest; II;
> III. Creditors with special privilege; and
> IV. Common creditors.

The aforementioned credits are not the only ones regulated by the Bankruptcy Proceedings Law. Article 224 of such law establishes the "credits against the estate", which must be paid in advance of any other credit. These credits are those of labor origin, referred to in section XXIII, paragraph A of article 123 of the Constitution, corresponding to the salaries of the last two years prior to the insolvency judgment, those contracted for the administration of the estate with the authorization of the conciliator or trustee or by the conciliator himself, the expenses for the conservation of the assets of the estate and those arising from judicial and extrajudicial proceedings for the benefit of the estate. Pursuant to the Bankruptcy Proceedings Law, claims will be paid in the following order: (*i*) claims against the estate, except for secured claims; (*ii*) singularly privileged creditors; (*iii*) secured creditors and special privileged creditors; and (iv) common creditors. If there are labor credits other than those referred to in Article 224 of the Law and tax credits,

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[37] Luis Fernando Sanromán Martínez, *op. cit*., note 33, p. 149.

these will be paid [*sic*] after the singularly privileged credits and the credits with security interest have been covered, but before the credits with special privilege.

It is also important to point out that, contrary to what was established in the Bankruptcy and Payments Suspension Law, in terms of Article 84 of the Bankruptcy Proceedings Law, the pending lawsuits for the collection of credits -including bank credits- against the bankrupt Merchant will not be joined to the insolvency proceeding, but will be followed separately under the supervision of the conciliator. Thus, under the new Law, the non-accumulation of prior lawsuits became a general rule, and although it is true that individual lawsuits for the collection of credits do not accrue, such circumstance does not exempt the creditors from their procedural burden of requesting the recognition of their credits in compliance with the formalities established by law, in order to be recognized as an integral part of the mass of creditors and, if applicable, to vote the agreement that puts an end to the Conciliation stage or to proceed to the collection of their credit through the execution of the assets of the mass in the event that an agreement is not reached and the Merchant is declared bankrupt.

For the purposes of this paper, I will only analyze claims against the estate, secured claims, claims with special privilege and common claims, since it is within these categories that bank claims are necessarily found.

1. CLAIMS AGAINST THE ESTATE

These credits are analyzed because sometimes bank credits acquire such nature, when the conciliator, once the insolvency judgment has been issued, contracts bank credits against the estate in order to conserve, capitalize and/or make the Merchant's business viable. Likewise, secured bank credits may be converted into credits against the estate, in the event that their guarantees are executed by the labor authority for the payment of workers' salaries and the substitution of guarantees by a bond is not possible, as provided in Article 68 of the Bankruptcy Proceedings Law. As a general rule, these credits have a payment privilege over any other credit except for secured creditors. In this case, the privilege may only be invoked with respect to (*i*) credits for the items referred to in section XXIII, paragraph A, of Article 123 of the Mexican Constitution; (*ii*) litigation expenses incurred in the defense or recovery of the secured or privileged assets; and (*iii*) expenses necessary for the repair, conservation and sale thereof, in accordance with Article 225 of the Bankruptcy Proceedings Law.

2. SECURED CREDITORS

Pursuant to Article 219 of the Bankruptcy Proceedings Law, secured creditors are mortgage and pledge creditors, provided that the collateral is legally constituted. These credits, in most cases, are those granted by credit institutions, so that the current insolvency regulations once again establish a privilege for banks. Secured creditors are paid their claims with the proceeds of the assets assigned to the collateral, to the absolute exclusion of privileged creditors and common creditors. If there are several secured claims, they will be paid in relation to the date of their registration. These credits acquire a special regulation and enjoy special rights that other creditors lack. The first of these is that in accordance with the provisions of Article 89, Section III of the Bankruptcy Proceedings Law, after the insolvency judgment is rendered, secured claims will be maintained in the currency in which they were originally issued and will continue to accrue ordinary interest up to the amount of the value of the collateral. The aforementioned legal provision reads as follows:

Article 89. As of the date on which the merchant insolvency proceeding judgment is rendered:

[...]
III. Secured credits, regardless of whether it was initially agreed that their payment would be in the Mexican Republic or abroad, will be maintained in the currency or unit in which they are denominated and will only accrue the ordinary interest stipulated in the contracts, up to the value of the assets that guarantee them.
[...].

There are other exclusive rights of secured creditors, among which are the following: (*i*) in terms of Article 68 of the Law, secured creditors enjoy a priority with respect to the collection of workers' wages, which consists of the fact that when a labor authority orders the enforcement of the secured asset, the conciliator may request the conciliator to substitute such asset for a bond. If this is not possible, the conciliator will register as a credit against the estate -thereby assuming absolute preference for its collection in relation to any other credit- in favor of the secured creditor in question: (*ii*) secured creditors that have not participated in the agreement terminating the conciliation stage, may initiate or continue the enforcement of their collateral, unless the agreement contemplates the full payment of their claims or the payment of the value of their collateral, this in accordance with the provisions of article 221 of the Law analyzed; (*iii*) in accordance with Article 225, they enjoy a special preference for the collection of their credits over tax and labor credits other than workers' wages up to the amount of the guarantee, over credits with special privilege and of course over common credits, and even in some cases, over credits against the estate.

In addition to the foregoing, it is important to mention that there is a special regulation applicable to secured creditors in legal systems other than the Bankruptcy Proceedings Law, such as Article 351 of the Law of Negotiable Instruments and Credit Transactions, which states that in the event of insolvency of the debtor, the assets subject to the pledge without transfer of possession that exist in the estate may be executed by the pledgee before the insolvency judge, who must decree, without further action, the requested execution. The aforementioned legal provision of the Law of Negotiable Instruments and Credit Transactions states:

Article 351. In the event of insolvency or bankruptcy of the debtor, the assets subject to pledge without transfer of possession that exist in the estate, may be executed by the pledgee, by means of the action that corresponds in accordance with the law of the matter, before the insolvency judge, who shall decree, without further proceeding, the execution requested.

It is worth mentioning that although the special regulation applicable to secured credits analyzed is not exclusive or exclusive to the credits of credit institutions, it is more than evident that such special regulation is designed primarily to protect the credits granted by such institutions, since in almost all cases banks are the ones that commonly grant this type of credits, and consequently, such entities are the ones that participate in commercial bankruptcy proceedings in such capacity. Of course, there are few cases in which a secured credit corresponds to an ordinary merchant; but this was sufficient to avoid a banking privilege such as the one repealed in the General Law on Credit Institutions and Auxiliary Organizations. Thus, the existence of a number of special privileges granted to this type of creditors -which are commonly banks- is noted, from which it is concluded that although not expressly, the Bankruptcy Proceedings Law is inclined to protect the interests of credit institutions in this type of proceedings, and thus balance the rights and prospects of recovery for bank credits. Judges and litigators will take care of unbalancing the rights of creditor-debtors once again.

3. CREDITS WITH SPECIAL PRIVILEGE

Pursuant to Article 220 of the Bankruptcy Proceedings Law, special privileged creditors are those that according to the Commercial Code or other law have a special privilege or a right of retention, such as the creditor with a duly constituted fiduciary guarantee or the trustee who has the right to retain the thing entrusted to him for the execution of the mandate until he guarantees the reimbursement of his expenses, etc., which also acquire a special privilege and priority over the common ones.[38] As to their priority, they will be collected in the same terms as secured creditors up to the amount of their guarantee, unless there are tax and labor credits other than wages. In this case, secured creditors will be covered first, followed by tax and labor claims, and then by the special privilege claims discussed herein. For the purposes of our analysis, the bank credits with special privilege are those secured in a trust by means of which certain assets or rights are assigned to an autonomous estate, different from the Merchant's estate, the proceeds of which are applied preferentially to the payment of the bank credit. However, the Bankruptcy Proceedings Law missed the opportunity to correctly regulate the rights of the creditor with a trust guarantee, since it did not even specifically mention them as such, copying the repealed Bankruptcy and Payments Suspension Law by granting it the right to be separated from the estate, pursuant to Article 71 paragraph VII of the Bankruptcy Proceedings Law. Of course, there is no impediment for banks to be considered as creditors with special privilege for operations other than trusts, as long as such institutions are placed in the cases established by the special laws to grant a lien or special privilege.

4. COMMON CREDITORS

The common creditors are located in the last degree of the priority of creditors contemplated by the Bankruptcy Proceedings Law. For this reason, the collection of their claims against the assets of the bankrupt Merchant proceeds until all preferred creditors have been covered, in accordance with Articles 217 and 223 of the Law. With respect to the common creditors, there is a provision of the law that was undoubtedly established by the legislator for the protection of the particular interest of the banks. I am referring to Section I of Article 89 of the Bankruptcy Proceedings Law, which establishes that all debts of the Merchant once the judgment declaring the Merchant in bankruptcy is pronounced will cease to generate interest, and will be converted into Investment Units or UDIS (*Unidades de Inversión*). The provision under analysis here is literally worded as follows:

> Article 89. As of the date on which the bankruptcy judgment is rendered:
>
> I. The unpaid principal and financial accessories of credits in local currency, without collateral, will cease to accrue interest and will be converted to Investment Units (*UDIS*) using the equivalence of such units published by Banco de México. Loans originally denominated in Investment Units (*UDIS*) will cease to accrue interest;
>
> [...].

This provision makes an important change with respect to the Bankruptcy and Payments Suspension Law by maintaining a real value of the existing liabilities of the bankrupt, since although interest is no longer accrued, by converting the liabilities into Investment Units (*UDIS*), the value of the credit remains updated. This is an important change with respect to the Bankruptcy and Payments Suspension Law, which in its superseded article 128, section II, provided that [...], *The debts of the bankrupt shall cease*

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[38] *Judicial Journal of the Federation*, Mexico, Ninth Period, vol. XIX, thesis: 1.14°.C.22 C. .p 1473, *Reports of the Mexican Supreme Court of Justice of Justice of Justice (suprema Corte de Justicia de la Nación)*, Fifth Period. Inf. 1932, p. 356

to accrue interest against the estate [...]. In effect, at the time, the provision of the Bankruptcy and Payments Suspension Law mentioned above affected credit institutions since they had to pay high interest rates to their investors, without being able to charge any interest to delinquent customers who were in suspension of payments, thus causing a significant detriment to financial institutions.[39] Thus, by means of this new provision, creditors in general and banks in particular, have the possibility of collecting their credits at an updated real value, thus protecting their liquidity, and ultimately safeguarding the savings of the general public. But more importantly, it prevents the abuses in which certain common debtors used to engage under the abrogated Bankruptcy and Payments Suspension Law to impose unjustified reductions on their creditors from the outset.

By way of conclusion, it can be seen from the analyzed regulations that although the Bankruptcy Proceedings Law does not expressly include or establish a special, exclusive or privative regulation for bank credits, there are several provisions in the law that have the purpose of protecting bank creditors and giving special treatment to their credits that are regularly granted through real or fiduciary guarantees by credit institutions, granting them in these cases a privileged regime as compared to common creditors. Of course, there are many bank credits granted through a handshake agreement that succumb to the merchant's insolvency and eventually become uncollectible.

CONCLUSIONS

In 1999, during a tour abroad, then President Zedillo boasted before bankers and financiers of the first world about the solvency of the Mexican financial system, but to his surprise, most of them refuted the fact that a Mexican debtor for more than 2 billion dollars was protected by a civil judge in Monclova, applying -at the debtor's whim- an obsolete legislation that after almost 60 years in force – Bankruptcy and Payments Suspension Law – did not correspond to reality. Upon his return to Mexico, President Zedillo instructed and succeeded in enacting the Bankruptcy Proceedings Law.

Although the banking privilege enjoyed by bank credits in bankruptcy proceedings was repealed, we wanted to show how [*sic*] the *ratio legis* that justified the existence of such privilege has transcended to our days, where currently a kind of privilege prevails for bank credits in bankruptcy proceedings. In fact, today there are institutions such as the Institute for the Protection of Bank Savings (*Instituto para la Protección del Ahorro Bancario*), various provisions in the current Credit Institutions Law and regulations issued by the financial authorities of our country whose purpose of existence is to guarantee the liquidity of credit institutions. And of course, the reason for this is not to protect the banks or their shareholders, but to protect the saving public. This same conviction, as we have seen, underlay the bank insolvency privilege provided for in the amended Article 109 of the General Law on Credit Institutions and Auxiliary Organizations, and although one may or may not agree with the constitutionality of such privilege, I consider that the purpose pursued by the rule and its existence was justified by the underlying public interest, which consisted in protecting the saving public. This tendency is observed in the current regulation of the Bankruptcy Proceedings Law – which fortunately grants privileges or privileges to bank credits –, through a modern regulation of the insolvency proceeding, the suppression of opportunities to indefinitely postpone an insolvency proceeding, the balanced application of the insolvency principles in relation to graduation and priority, the protection of secured and privileged credits and other provisions such as the conversion to Investment Units (*UDIS*) of the common insolvency liabilities, on the occasion of the

[39] Aldo Casasa Araujo, et al., *Annotated Bankruptcy Proceedings Law*, Porrúa Publishing House, Mexico, 2010, p. 137-138.

judgment of the insolvency proceeding; precepts that demonstrate the care taken by the legislator to protect creditors in general and credit institutions in particular, against the protectionist excesses of the Merchant, under the abrogated Bankruptcy and Payments Suspension Law to the detriment of the financial and banking system, of its effectiveness in credit recovery, improper and obsolete in legal systems that claim to be modern.

Today, the Bankruptcy Proceedings Law is being debated in practice, whether to twist itself towards the vices and corruptness of the repealed Bankruptcy and Payments Suspension Law or to define itself as a true instrument for the restructuring and reorganization of failed merchants or those in default of payment. The supposed infallibility of the Federal Judicial Branch will be put to the test.