

Mexican Supreme Court rules an important turn in treatment of employee's claims during bankruptcy.

Luis Manuel C. Méjan

Mexico has been a country where employee wage claims have been accorded a super-priority not only in the Bankruptcy Act (Ley de Concursos Mercantiles) but even in the Constitution itself. In addition to this super priority granted by the Constitution and extended by the insolvency statute is necessary to take into account that there is not in Mexico a program (wage guarantee protection fund or insurance) to protect those wages in the case of insolvency.¹ This situation poses a serious concern when creditors, and even debtors themselves, try to make up their minds in considering the use of the insolvency tools.

This concern seems to relax a little after a decision rendered by the Mexican Supreme Court of Justice just last July.

Under Article 123, paragraph A, Section XXIII, of the Mexican Federal Constitution the wages earned by the employees during the last year have an extraordinary protection and are preferent credit against any other.

“XXIII. Credits in favor of the workers for wages or salaries earned in the last year, and for indemnities shall have preference over any other in cases of insolvency or bankruptcy.”

Mexican Insolvency Law (Ley de Concursos Mercantiles) provides that this protection should be extended to the previous two years.

Article 224. The following are credits against the Estate and shall be paid in the indicated order and before any of the credits to which Article 217 of this Act refers:

I. Those listed in Article 123, paragraph A, Section XXIII, of the Constitution and its regulating provisions, taking into consideration the wages for the two years preceding the Merchant's business reorganization declaration;

....

Article 225. The privilege to which the preceding Article refers cannot be made good against creditors with a collateral or special privilege, and only the following have a privilege:

I. The creditors for the items referred to in Article 123, paragraph A, Section XXIII, of the Constitution and its regulating provisions, taking into consideration the wages of the two years preceding the Merchant's business reorganization declaration;

...

¹ See SARRA, JANIS. *Employee and Pension Claims During Company Insolvency*. Thomson Carswell. Toronto, Canada. 2008

Through the life of Mexican Insolvency Law (LCM) the related provisions in the Insolvency Law (LCM) have been object of constitutional challenge, arguing that the text in the statute is clearly opposite to the one in the Constitution.

In one decision rendered by the Supreme Court of Justice, back in 2003, the Court said that setting the salaries for the two years prior to the declaration of bankruptcy of the merchant to have priority over any other claims, does not violate Article 123, section A, paragraph XXIII of the Mexican Constitution, because the express provision of this constitutional provision regarding the priority of workers' claims for wages earned in the last year, is a minimum guarantee for workers, which can validly be extended by Congress when issuing secondary legislation.

Recently, another challenge to these provision was raised in a court of appeals and its decision was appealed to the Supreme Court of Justice who resolved (July 2011), reversing the Court of Appeals decision, that the application of fractions contested causes harm to the appellant and other creditors of the bankrupt because the estate is suffering a significant decline when considering a longer period of payment for labor claims that specified in the Federal Constitution. Thus, the provisions contested result unconstitutional and the only priority that must be given to labor claims is the one granted in the constitutional text (i.e. only one year).

Although this change of criteria is not compulsory for future cases, is a hefty precedent for them and creditors and litigators are bound to use the argumentation in *re amparo directo en revisión 2378/2010* for the cases arising since now on. On the other hand, we can expect also a strong opposition from unions that will try, in next "concurso mercantiles" to reverse the sense of the decision. So we foresee this to be a very important issue in the life of insolvency in Mexico in the months and even years to come.