

WHAT ASSETS CAN BE SEPARATED FROM A BANKRUPTCY PROCEDURE IN MEXICO?

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Executive Summary:

- In the Bankruptcy Proceedings, the separation action allows third parties and creditors to recover assets that, although in the possession of the company in bankruptcy, are not part of its estate. It applies to leased, consigned, loaned, or credit-purchased goods with a retention of title.
- The Separation of Assets Incident excludes these goods from the bankruptcy estate if it is proven that the bankrupt trader does not own them. Recent judicial rulings clarify that deposited funds can also be claimed, and judges should not reject these claims without analyzing the merits. Acting quickly and with proper legal advice is crucial to protect the rights over these assets.

When a company you do business with is declared in Commercial Bankruptcy, it is crucial to determine whether there are assets that should be separated from the bankruptcy estate. This allows the exclusion of certain assets from being used to pay creditors when, in reality, they do not form part of the company's estate.

The Action for Separation of Assets is a legal mechanism that allows third parties and recognized creditors to recover assets that, although in the possession of the debtor in a Bankruptcy Procedure, legally remain their property. This procedure is particularly relevant in cases such as leases, consignments, and conditional sales agreements, among others.

Throughout this article, I will explain the Commercial Bankruptcy process, the role of ancillary proceedings, the procedure for separating assets, and recent judicial rulings that clarify what assets may be excluded from the bankruptcy estate.

Commercial Bankruptcy in Mexico

Commercial Bankruptcy is a legal procedure of public interest, regulated by the Commercial Bankruptcy Law ("LCM", for its acronym in Spanish), whose purpose is to preserve the operation of companies and prevent the widespread non-fulfillment of payment obligations from affecting their viability and that of those with whom they have commercial relationships[1].

To balance business continuity with the protection of creditor rights, Commercial Bankruptcy follows the principles of transcendence, procedural economy, efficiency, publicity, and good faith. These principles ensure that the procedure is effective, transparent, and allows for a fair resolution for all parties involved.

This process consists of two consecutive phases[3]:

1. **Conciliation:** Once a company has been declared in Commercial Bankruptcy, the Federal Institute of Commercial Bankruptcy Specialists (“**IFECOM**”)[3] will appoint a Conciliator, who will be responsible for seeking an agreement (“**Bankruptcy Agreement**”) between the company and its creditors that allows for restructuring and payment of recognized debts.

During this stage, the company continues to operate under the supervision of the Conciliator, who acts as an intermediary in negotiations[4]. The goal of Conciliation is to preserve the business of the Merchant through the Bankruptcy Agreement signed with recognized creditors.

2. **Bankruptcy** (Liquidation): If the Bankruptcy Agreement is not signed within the Conciliation stage[5], the company enters the liquidation phase, in which its assets are sold to pay recognized creditors in the order of priority established by law [6].

Ancillary Proceeding in Commercial Bankruptcy

Article 70 of the Commercial Bankruptcy Law.

During the course of a Bankruptcy Procedure, various issues may arise that require specific resolution within the main process. To address these, the LCM provides for the ancillary proceeding, which are auxiliary procedures designed to resolve particular issues without halting the main proceeding.

According to Article 267 of the LCM, Ancillary Proceedings refer to all matters that arise during Commercial Bankruptcy proceedings and do not have a specific established procedure.

Ancillary proceeding play a crucial role in Bankruptcy Procedures, as they allow:

- Resolution of Specific Disputes: Address particular issues that, if not resolved promptly, could hinder or complicate the main proceeding.
- Guaranteeing Rights: Provide parties with a mechanism to enforce their rights and obtain judicial determinations on specific matters.

1. Ensuring Procedural Efficiency: These proceedings do not suspend the main insolvency case, allowing the process to continue without unnecessary delays.

In summary, ancillary proceeding are essential procedural tools within Bankruptcy Procedures, designed to effectively address and resolve various matters that may arise during the process, ensuring the prompt and efficient administration of justice.

The Ancillary Proceeding of Separation of Assets

The Ancillary Proceeding of Separation of Assets is a legal mechanism or motion that allows third parties and recognized creditors to recover assets that, although in possession of the merchant declared in bankruptcy, do not form part of their estate, as their ownership has not been transferred definitively and irrevocably [7].

The primary objective of this motion is to exclude such assets from the bankruptcy estate used to pay creditors, thereby protecting the rights of their legitimate owners.

Common Cases for Action for Separation of Assets

One of the most common cases where action for separation of assets is requested is in the case of leases. When a creditor has leased assets to the merchant and the latter has defaulted on payments, the creditor has the right to recover its assets, as ownership of these was never transferred to the lessee. This scenario is covered by Article 71, Section VI, subsection (a) of the LCM, which allows for the separation of assets in cases of deposit, lease, usufruct, administration, or consignment.

Other common cases include[8]:

- Assets held in deposit or consignment: Those in the merchant's possession as a depositary or consignee.
- Commodatum (loan for use): Assets lent to the merchant for use, without transfer of ownership.

- Assets purchased on credit with reservation of title: Those where ownership is transferred only upon full payment, and such condition is duly registered.
- Listed securities issued in favor of the merchant as payment for third-party sales: Provided it is proven that the obligations derive from them and have not been recorded in a current account between the merchant and their principal.

Requirements and Deadlines to File the Incident

For the Ancillary Proceeding for the Separation of Assets to be admissible, the following requirements must be met:

1. Identifiability of the Assets: The assets must be clearly identifiable and in the merchant's possession at the time of the Commercial Bankruptcy declaration.
2. Absence of Ownership Transfer: The property of the assets must not have been transferred to the merchant through a definitive and irrevocable legal title.

The procedure for filing this process is as follows:

- Filing the Separation Claim: The legitimate owner must submit a claim before the Commercial Bankruptcy judge, complying with the requirements established in Article 267 of the LCM.
- Lack of Opposition: If the merchant, the Conciliator, or the Intervenors do not oppose the claim, the judge will order the separation of the assets outright in favor of the claimant.
- Existence of Opposition: If there is opposition, the separation claim will proceed as an ancillary proceeding, following the procedure set forth by law.

It is important to note that the law does not establish a specific deadline for filing the separation claim; however, it is advisable to do so as soon as possible after the Commercial Bankruptcy declaration, to prevent the assets in question from being used for creditor payments or otherwise disposed of.

The action for separation of assets is a fundamental tool in Commercial Bankruptcy proceedings for protecting assets that do not belong to the bankrupt merchant. Its proper application can make the difference between recovering assets and losing rights over assets that should not be part of the bankruptcy estate.

New Judicial Criterion on the Ancillary Proceeding of Separation of Assets

Recently, courts have issued relevant criterion on action for separation of assets in Commercial Bankruptcy, clarifying in which cases assets can be recovered from the bankruptcy estate.

Funds held in regular deposits may be recovered through the Action for Separation of Assets[9]

The criteria established that money deposited in deposit certificates can be subject to action for separation of assets. In a particular case, the court analyzed whether funds held in a deposit certificate could be reclaimed through this mechanism. Initially, the request was denied on the grounds that money is a fungible good and could not be individually identified.

However, the court determined that this type of money can be recovered through action for separation of assets if it comes from a regular deposit, meaning that the depositor never transferred ownership of the funds to the merchant in bankruptcy. Conversely, if it is an irregular deposit, where the merchant did acquire ownership, action for separation of assets is not applicable, and the depositor would have to claim the money as a creditor.

This criteria is important as it clarifies that not all fungible assets automatically become part of the bankruptcy estate. If a third party can prove that money or goods given to the merchant never ceased to be their property, they have the right to separate and reclaim them.

Judges cannot summarily dismiss an Incidental Proceeding for Separation of Assets based on doubts regarding the validity of the claimed rights[10]

Another criteria established that the validity of the claimed rights in an action for separation of assets is a substantive issue and cannot be used by a judge as grounds to dismiss the claim outright. In a recent case, a judge dismissed an action for separation of assets arguing that the claimant's rights were no longer valid.

However, the court clarified that this type of analysis should take place during the ancillary proceeding and not at the initial stage. Since the validity of rights is a matter of substantive law, it must be examined with evidence during the trial and not preemptively by the judge.

This criteria is important because it guarantees the right of the parties to have their arguments properly analyzed in the process. If a judge dismisses a action for separation of assets outright based on a premature substantive analysis, it violates fundamental principles of due process, such as the right to a hearing and the obligation to decide based on evidence.

Conclusion

The Ancillary Proceeding of Separation of Assets is a key legal tool in Bankruptcy Procedures to safeguard assets that do not belong to the bankrupt merchant's estate. Properly invoking this proceeding can determine whether assets are successfully recovered or improperly included in the bankruptcy estate.

For companies, suppliers, and creditors, it is crucial to understand the circumstances under which the Ancillary Proceeding of Separation of Assets applies, properly document transactions, and act swiftly when a company they have a commercial relationship with enters a Bankruptcy Procedure.

Recent judicial criterion reinforce the importance of this proceeding, further defining the scope of assets eligible for separation and placing clear limits on judicial discretion when assessing such claims. In this sense, having specialized legal advice and a well-defined strategy can make a significant difference in protecting the interests of companies and their creditors.

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ANNEXES



[1] Article 1st of the Commercial Bankruptcy Law.

[2] Article 2 of the Commercial Bankruptcy Law.

[3] IFECOM is an auxiliary body of the Federal Judiciary Council, with technical and operational autonomy, responsible for regulating and overseeing the work of specialists (Visitors, Conciliators, and Trustees) involved in Commercial Bankruptcy proceedings in Mexico. Its primary function is to authorize, register, and appoint specialists who participate in these processes, ensuring that they meet the necessary requirements to perform their duties efficiently and professionally.

[4] Article 3 of the Commercial Bankruptcy Law.

[5] Under the terms of Article 145 of the Commercial Bankruptcy Law, the Conciliation stage in a Commercial Bankruptcy lasts an initial period of 185 calendar days. This term may be extended twice for additional periods of 90 calendar days each, provided that certain requirements established in the Commercial Bankruptcy Law are met. Under no circumstances may the Conciliation stage last more than 365 calendar days (one year).

[6] Article 3 of the Commercial Bankruptcy Law.

[7] Artículo 70 de la Ley de Concursos Mercantiles.

[8] Article 71 of the Commercial Bankruptcy Law.

[9] Collegiate Court, Digital Record 2029863, Eleventh Epoch, Subject(s): Civil, Thesis: I.4o.C.39 C (11a.), Isolated Thesis, Federal Judicial Weekly, Published: Friday, February 7, 2025, "Action for Separation of Assets. In Commercial Bankruptcy, Money Held in Regular Deposits in Deposit Certificates May Be Reclaimed Through This Action (Article 71, Section VII, of the Commercial Bankruptcy Law)." [Detalle - Tesis - 2029863](#)

[10] Collegiate Court, Digital Record 2029864, Eleventh Epoch, Subject(s): Civil, Thesis: I.4o.C.40 C (11a.), Isolated Thesis, Federal Judicial Weekly, Published: Friday, February 7, 2025, "Action for Separation of Assets. The Validity of the Rights Claimed Is a Substantive Issue That Should Not Lead to the Summary Dismissal of the Claim (Legislation Applicable to Mexico City)." [Detalle - Tesis - 2029864](#)