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Bankruptcy of creditors for breach of obligations

Concurso de acreedores por incumplimiento de obligaciones

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ABSTRACT: This article analyzes the state of insolvency or bankruptcy that may be incurred by those who default or fear default on their obligations. This breach is the source of a new legal situation and an economic and patrimonial state of the debtor, which is declared judicially to organize its creditors legally and preserve the insolvent debtor's assets and later liquidate and distribute them.

Once this situation has been analyzed (which may be fortuitous, guilty or fraudulent), the five types of bankruptcy procedures that Ecuadorian legislation provides are reviewed and differentiated: preventive, preventive for commercial companies, exceptional preventive, voluntary and necessary, highlighting the effects and consequences that each one of them generates for or against the debtor.

Finally, the authors' conclusions regarding this legal institution and its application in the Ecuadorian judicial system will be reviewed.

KEYWORDS: Contract law, civil liability, legal procedure, credit, debts.

RESUMEN: El presente artículo analiza la situación de insolvencia o quiebra en la que pueden incurrir aquellas personas que incumplen o temen incumplir con sus obligaciones de dar, hacer o no hacer. Esta falta o incumplimiento da lugar a una situación jurídica y estado económico y patrimonial del deudor, el cual se declara judicialmente con el fin de organizar legalmente a sus acreedores y así depurar y conservar el patrimonio del deudor insolvente, para posteriormente liquidarlo y repartírselo.

Una vez analizada esta situación (la cual puede ser fortuita, culpable o fraudulenta), por medio de un enfoque descriptivo y del método sistemático, se revisarán y diferenciarán los cinco tipos de procedimientos concursales que nuestra legislación contempla: preventivo, preventivo para sociedades mercantiles, preventivo excepcional, voluntario y el necesario, destacando los efectos y consecuencias que cada uno de ellos genera a favor o en contra del deudor vencido. Este estudio se realizará en base a la doctrina ecuatoriana, peruana y española que sobre el concordato, se ha pronunciado.

Finalmente se revisarán las conclusiones de los autores respecto a esta institución jurídica y su aplicación en nuestro sistema judicial.

PALABRAS CLAVES: Derecho de los contratos, responsabilidad civil, procedimiento legal, crédito, deuda.

INTRODUCTION

The Civil Code (2005) in its article 1561 states that every contract legally entered into is a law for the contracting parties and, therefore, cannot be invalidated except by mutual consent of the parties or for causes established in the law. This provision makes up the basic rule of contractual relationships between people.

However, the contracts that are contracted are not always fulfilled in how they were agreed. In these cases, the law empowers those debtors who foresee an eventual breach to avail them, preventively or voluntarily, of legal mechanisms that facilitate their compliance either through the extension of deadlines (withdraw or wait) or the remission of interest or capital.

Finally, the most common scenario is that it is the creditor who demands the fulfilment of an overdue obligation. In this case, the bankruptcy procedure is necessary and seeks to declare the expired debtor's insolvency or bankruptcy. It is the last resort of the creditor to force his debtor to satisfy the debit or credit.

However, our legislation is not clear when identifying each of the existing bankruptcy procedures, which generates confusion among justice operators. Through this article, we intend to analyze and describe each of the five procedures currently applied in Ecuador, both in their notions and their procedures, which are scattered throughout the legal system, so that the study of this institution in this systematic investigation.

1. OBLIGATIONS TO GIVE, DO OR NOT DO

In the first place, it is essential to remember that an obligation is a "link, tie, link, terms close to each other, when not synonymous, which, when applied to the law, imply a legal relationship" (Hinestrosa, 2007). Then, it is how it can be defined to the obligation as a legal bond between a specific party called the debtor (taxpayer of the relationship) and a specific party called the creditor (active subject of the relationship). Furthermore, the debtor party needs to execute a Determined provision of giving, doing or not doing something in favor of the creditor to be released from the existing legal bond.

Indeed, our legislation establishes that the specific benefits of the obligations can be: 1) Positive: a) Give that

entails the transfer of entire or dismembered property of goods, whether of gender or kind, b) Do as the benefit of service and those whose purpose is the delivery of a thing, as long as such delivery does not imply the mutation of the property and, 2) Refusals or NOT to do that are aimed at abstention from the debtor. (Ospina, 2008, p. 25). Furthermore, these are "generally intuitu personae. This is because the structure of said obligation consists, precisely, in the non-action of a specific subject, reaching said obligation exclusively to that subject " (Castillo, 2014). In this regard, the General Organic Code of Processes (2015) (from now on COGEP or procedural code) states:

> **Art. 366.- Obligations to give a certain kind or body**. In the case of an obligation to give a certain kind or body and the object is in the power of the debtor or third parties, the judge shall issue an order of execution ordering that the debtor deliver it within five days. Unless grounded opposition from the third party, the judge will order that the delivery be made with the intervention of an agent of the National Police, and may even unlock the premises where it is located.
>
> If the true species or body cannot be delivered to the creditor due to legal or material impossibility, the judge, at the request of the creditor, will order that the debtor consign the value of the same at replacement price, as of the date this order is issued.
>
> If the thing is in judicial deposit, the judge will order that the depositary deliver it to the creditor, a provision that will be carried out immediately under the personal responsibility of the depositary.
>
> If the claim has dealt with the material delivery of a real estate, the judge will order that the debtor vacate and make the property available to the creditor, under prevention that if not, the public force will deliver the either to the or the creditor, coercively if necessary, and may even unlock the property. If there are things

in it that are not subject to execution, the release will be carried out, at the risk of the debtor.

Art. 367.- Obligations to give money or goods of gender. In the case of an obligation to give money, the procedure will be in accordance with the provisions of this chapter.

In the case of debt of a specific kind, the judge will issue an order of execution ordering that the defendant, consign the amount of generic goods or deposit the amount of said goods at their current market price on the date it was issued. , under preventions of proceeding to seize sufficient assets in the manner provided by this Code.

The execution proposed for the payment of periodic pensions, for the fulfillment of obligations that had to be satisfied in two or more installments, may include the pensions and obligations that had expired in subsequent periods or terms, even when the judgment had been contracted upon payment of a single pension, or to the one that should have been given or made in one of the terms.

Art. 368.- Obligations to do. In the obligation to do if the creditor requests that it be complied with and this is possible, the judge will indicate the term within which the debtor must do so, under the prevention that if they do not comply with such order, the obligation will be fulfilled at through one or a third party designated by the creditor, at the expense of the executed person, if they have so requested.

If for any reason the fact is not carried out, the execution judge will determine in a hearing convened for that purpose and on the basis of the evidence provided by the parties, the amount of compensation that the debtor must pay. for the breach and will order the respective

collection following the procedure provided for the execution of an obligation to give money.

The execution order will contain the order for the debtor to pay the amounts corresponding to the compensation for damages to which he or she has been sentenced. The order of execution will indicate the sum of money that the debtor must pay, when he has refused to comply with the obligation that is ordered to be fulfilled by a third party, to compensate the latter for what has been done.

If after the term granted by the judge to comply with the obligation, the debtor does not do so, the judge will seize their assets in the manner provided in this Code, in a sufficient value to cover the cost the fulfillment of the obligation by the third party designated by the creditor.

If the fact consists of the granting and signing of an instrument, it will be done by the judge on behalf of the one who must carry it out, this act will be recorded in the process.

Art. 369.- Obligations not to do. If the execution refers to not doing something and if it has already been carried out, the judge will order the reinstatement to the previous state and that the debtor undo what was done, granting a term for the effect, under prevention that, if not done , the creditor will be authorized to undo what has been done at the expense of the debtor and will indicate the amount of money that the debtor must pay for such concept.

In addition, the judge will order the debtor to pay the amounts corresponding to the compensation for damages to which they have been sentenced. If it is not possible to undo what has been done, the defendant will be ordered to consign the amount corresponding

> to the amount of compensation, which will be set at a hearing, in accordance with the procedure provided in the previous article. (art. 366-369)

When the judicial execution of these kinds of obligations is sought, the rules established in Book V of the General Organic Code of Processes must be observed. In this sense, the judge who knows the application for execution, will issue his order of execution which must contain, as established by the procedural norm: 1) The precise identification of the executed person who must comply with the obligation, 2) The determination of the obligation The fulfillment of which is intended, attaching a copy of the liquidation, if applicable and, 3) The order to the executed to pay or fulfill the obligation within a period of five days, under the prevention that failure to do so, will proceed to forced execution .

If the obligations to give a certain kind or body, or gender goods, or to do or not to do, are transformed into monetary obligations, in the cases provided for in Arts. 366 to 369 of the procedural code, and the executed person does not pay or does not resign assets within the term of five days or if the resigned assets are disputed, are not in the possession of the debtor, are located outside the Republic or are insufficient for payment, the insolvency or bankruptcy of the debtor will be presumed and, as a consequence of it, the bankruptcy of creditors will be declared. (COGEP, 2015, art. 416)

> Insolvency presupposes a state or a patrimonial situation of a special nature in which the debtor finds himself, by virtue of which he cannot satisfy his creditors at the moment in which they can demand the fulfillment of his obligations. (Broseta, 1977)

According to Broseta (1977), it is understood that insolvency "presupposes a state or a patrimonial situation of a special nature in which the debtor finds himself, by virtue of which he cannot satisfy his creditors at the moment in which they can demand the fulfillment of his obligations."

In this sense, insolvency (in the case of natural persons) or bankruptcy (in natural persons, merchants or legal persons) is called the exceptional economic and patrimonial status of a person, produced by the lack or impossibility of complying with their obligations, which It is declared judicially in order to legally organize its creditors and thus purify and preserve the assets of the insolvent debtor, to later liquidate and distribute it.

However, for Cuberos (2005) the concept of insolvency has evolved over time, which means that:

> Insolvency has ceased to signify an economic or patrimonial state, to become a whole procedure, that is, that it has undergone a transition, from originally being a patrimonial state, to later become a budget for certain situations and now, more recently , to signify a genre: that of bankruptcy proceedings.

The United Nations Legislative Guide recommends: "Insolvency situations should be addressed and resolved in an orderly, swift and efficient manner with a view to avoiding undue disruption to the debtor's business activities and to minimize the cost of the procedure." (Cited by Méjan, 2010, p. 18)

In accordance with article 417 of the Procedural Code (2015), insolvency or bankruptcy may be: a) Fortuitous when said situation comes from unforeseeable circumstances or force majeure,[1] **b) Guilty**, the one caused by reckless or dissipated behavior of the debtor and; c) Fraudulent that in which malicious acts of the bankrupt occur, to harm creditors. These acts are those described in articles 205 to 208 of the Comprehensive Organic Criminal Code (2014).

Regarding the types of fault, article 29 of the Civil Code (2005) provides:

1 Article 30 of the Civil Code (2005) indicates that force majeure or fortuitous event is called, the unforeseen event that is not possible to resist, such as a shipwreck, an earthquake, the arrest of enemies, the acts of authority exercised by a public official, etc.

> Art. 29.- The law distinguishes three types of fault or neglect:
>
> Serious guilt, gross negligence, canned guilt, is that which consists of not handling the business of others with that care that even negligent and unwise people often use in their own businesses. This guilt, in civil matters, is equivalent to fraud.
>
> Slight guilt, slight carelessness, slight carelessness, is the lack of that diligence and care which men ordinarily employ in their own affairs. Guilt or carelessness, without any other qualification, means slight fault or carelessness. This kind of guilt is opposed to ordinary or medium diligence or care.
>
> The one who must run a business like a good parent is responsible for this kind of guilt.
>
> Guilt or negligible carelessness is the lack of that careful diligence that a wise man employs in the administration of his important business. This kind of guilt is opposed to the utmost diligence or care.
>
> The fraud consists of the positive intention to injure the person or property of another.

Víctor Hugo Castillo (2017) points out that currently the institutions of bankruptcy law are almost uniform in most countries and that, in addition, bankruptcy procedures respond to characteristic notes of the heritage of the French Revolution, whose ideology we have been adopting, hence, liberal law is based on a liberal-capitalist tendency and on an absence or divorce from our own reality. (p. 21).

> The assets included in the bankruptcy proceedings encompass all assets, rights and obligations of the debtor, with the exception of unattachable assets and those expressly excluded by special laws. (Carbonell, 2014)

Now, with respect to bankruptcy, our current legislation contemplates the possibility of initiating 5 kinds of bankruptcy procedures: preventive (which in turn can be for individuals, for commercial companies and exceptional), voluntary and necessary. We will analyze each of them below.

2. PREVENTIVE CONTEST

Professor Manuel Osorio (1986) points out that the preventive bankruptcy is the procedure, based on the existence of a situation of default, by virtue of which the insolvent debtor requests a withdrawal, wait or extension regarding the fulfillment of their debts. Your proposal, to take effect, must be approved by the majorities of creditors that the law provides, based on a number and the value of your credits, and approved by the intervening judge. (p. 190) From the point of view of Peruvian law, it seems to be in this same concept, since it is stated that "in theory, this insolvency procedure encourages an economic reconversion of the bankrupt's assets through a Global Refinancing Agreement of obligations celebrated with all its creditors within a Creditors' Meeting ". (Aguila, 2000)

> The preventive procedure is nothing more than a mechanism to anticipate the crisis that is coming to the debtor. It has been designed for those agents who are not yet in a situation of insolvency, general moratorium or generalized cessation of payments, but who find it convenient to anticipate that situation, before being overwhelmed by their obligations. (Agurto, 2017)

In our procedure, in the request to initiate the bankruptcy, the debtor, in addition to meeting the formal requirements of a lawsuit, will indicate: 1) The events or reasons that have made it impossible for him to fulfill his obligations on the due dates , 2) The detailed list of your creditors, individualized, with the indication of the number of your citizenship card, sole registry of taxpayers or equivalent, the exact address of your domicile, which will include country,

province, canton, town, street, number , intersection, phone numbers, email; as well as the amount owed, the expiration dates and the type of instrumentation of the credits, 3) The detailed and valued status of your assets and liabilities, 4) The waiting time you request, which may not exceed three years and, 5) The payment plan that it proposes with the precise indication of the financing sources, the terms and conditions, including the refinancing to which it aspires. (COGEP, 2015, art. 419)

Once the request is accepted by the competent judge, it will provide that, provisionally, the payments to be made by the debtor be suspended, it will order that the creditors be summoned and it will appoint an auditor of the payroll of the Council of the Judiciary, in order to that verifies the accuracy and veracity of the detailed and valued status of the assets and liabilities, having to report within a maximum term of ten days from the date of appointment and possession. If it is a merchant debtor, he will assume the joint management of the business until the creditors' meeting meets. It is important to highlight the obligation that the judge has, in this kind of concordat, to communicate this request to all creditors in order to avoid inequalities in the collection of their respective obligations.

> One of the pillars on which the bankruptcy system is based is the principle of par conditio creditorum which is based on the intention not to generate inequalities between creditors when a situation of insolvency of their common debtor is presented to them. (Valdivieso, 2013)

On this last point, according to Professor Sánchez Calero (2004, cited by Valdivieso, 2013) an important sector of the doctrine points out that although the principle of equality between creditors should constitute the rule, currently the current legislation has regulated so many cases of Exception that it seems that the principle - foundation of the bankruptcy procedure - has lost its content.

If the auditor's report confirms the information indicated by the applicant and there is no novelty, a hearing will be called in which the creditors' meeting will be held. On the other hand, if from the aforementioned report it appears that there were one or more credits whose expiration occurred before the filing of the bankruptcy request, or that the liability exceeds 120% of the assets, the judge will declare the bankruptcy procedure concluded and will start the voluntary bankruptcy. In the first case, the law punishes the debtor's presumed bad faith for not presenting complete information and, in the second, his excessive recklessness in the conduct of his business.

Furthermore, it is clear from this rule that the request for the bankruptcy proceeds only before the maturity of any of the credits that make up the debtor's liability.

It is important and necessary to point out that when the bankruptcy is requested by the debtor in his capacity as a natural person or merchant, the applicable regulations are those established in the General Organic Code of Processes, while when the debtor is a commercial company, they must apply the rules of the Preventive Bankruptcy Law (2006) and the Application Rules of the referred Law (1999). This is recognized by the final paragraph of article 415 of the Procedural Code.

> **Art. 415.- Preventive competition**. The debtors, whether merchants or non-merchants, may file for bankruptcy in order to avoid bankruptcy. The debtor who has sufficient assets to cover all their debts or permanent income from salaries, income, remittances from abroad, leasehold pensions or other sources of periodic income and foresees the impossibility of making the payments thereof on the dates of their respective maturities, you may go to the judge of your domicile requesting that you initiate the preventive bankruptcy procedure, in order to seek an agreement with your creditors, which allows you to settle your debts within a reasonable period of time, no longer than three years.

> Companies will be subject to the law. (COGEP, 2015, art. 415)

2.1. Preventive bankruptcy in the case of commercial companies

This concordat prevents them from being declared bankrupt while this procedure has not been exhausted and seeks that the debtor and his creditors enter into an agreement or concordat that allows the obligations of the debtor company to be extinguished, thus preserving it.

The subjects are companies incorporated in Ecuador and that are subject to surveillance and control by the Superintendency of Companies; as long as they have: a) An asset greater than US $ 10,515.60 or more than 100 permanent workers and, b) A liability greater than US $ 5,257.80.

In this case, when the request is presented by the debtor, it must comply with a series of requirements and present it within a period of 60 days from the cessation of payments; On the contrary, when the creditor presents it, it is not necessary to comply with any requirement and the content of the request is transferred to the debtor company for a period of 15 days to agree or oppose it. If it is raided, the debtor must present the requirements established by law; if it is opposed or if there is defiance, the process will be declared concluded.

Once the contest is admitted, it is done through a resolution that is notified to the parties and the public through a publication in a newspaper with greater circulation at the company's domicile, this resolution is registered in the corresponding Mercantile Registry and there is no recourse on it.

This resolution, among other things, must contain the term to present the receivables and a term for the holding of the preliminary hearing in which the presented credits will be

verified and the concordat will be discussed. Creditors who do not present the documents to justify the credits within the granted term, cannot participate in the preliminary hearing, nor in the deliberation of the concordat and to exercise actions against the debtor, they must wait until the concordant agreement is fulfilled or that the bankruptcy process has been declared completed.

The admission of this preventive contest generates: a) Suspension of all kinds of judicial processes of a patrimonial nature, in the state in which they are, except those derived from work relationships, b) Suspension of any precautionary measure that has been issued in against the debtor, c) It prevents creditors from initiating legal proceedings of a patrimonial nature or requesting precautionary measures against the debtor's assets, d) It suspends in favor of the bankrupt's creditors, guarantors, guarantors and guarantors, the statute of limitations and expiration of the respective legal actions.

Once the presented credits are qualified, the final deliberations are called, at this point, if the debtor or the creditors that represent 75% of the value of the credits, do not present themselves, the bankruptcy process is declared concluded. On the contrary, if an agreement or concordat is reached, it will be recorded in minutes and approved by resolution with the favorable vote of the creditors representing at least 75% of the value of the credits.

2.2. Exceptional preventive contest

Through the Law of Humanitarian Support to Combat the Health Crisis derived from Covid-19 (2020), the National Assembly incorporated this exceptional concordat which will be valid for 3 years from the publication of the aforementioned law (22 of June 2020).

This bankruptcy is subsidiary and is carried out only after having tried a pre-bankruptcy agreement with its creditors

(also regulated in the aforementioned law) and not having achieved it. In this case, the debtor may present an exceptional judicial request for preventive bankruptcy, accompanying the act of impossibility of mediation and a statement under oath before a notary public, that he will not be able to regularly comply with his due obligations, or that he reasonably foresees that he will not be able to fulfill regularly and punctually with their obligations.

The rule indicates that the judge who admits this procedure, will order the suspension of all proceedings against the debtor and the prohibition of initiating any administrative, judicial, arbitration and even coercive action against the debtor. At the same time, it must summon all its creditors (natural and legal persons, whether public or private) to the corresponding Board.

When referring to various matters on which there would be current or future obligations, the problem lies in the jurisdiction of the judge who is going to hear this exceptional preventive agreement. Note that it includes administrative procedures or judicial processes initiated by State entities. The solution, perhaps, could be in article 240, numeral 2 of the Organic Code of the Judicial Function (2009), which indicates the powers and duties of civil and commercial judges:

> **Art. 240.- ATTRIBUTIONS AND DUTIES**. - The powers and duties of the judges and civil judges are:
>
> **2.**Know and resolve, in the first instance, all matters of patrimonial and commercial matters established in the laws, except those that correspond to know privately other judges and judges. (art. 240.2)

Spanish legislation establishes that bankruptcy has a procedure that is made up of two successive phases: a first, which the Law calls "common phase", basically aimed at determining the active and passive amounts, and a "second phase" alternative content, which may be either the "agreement phase"

or the "liquidation phase" (Campuzano, 2016), something that, apparently, is also intended with this exceptional preventive agreement.

3. VOLUNTARY CONTEST

When the assets or assets of the debtor are not sufficient to cover their obligations, present or future, the debtor may request the judge of his domicile, the beginning of the voluntary bankruptcy. This procedure will also be initiated by order of a judge when the auditor, within the preventive bankruptcy, determines that there were one or more overdue credits before the presentation of the bankruptcy request or that the debtor's liabilities would exceed 120% of their assets, as already mentioned above.

The debtor who voluntarily submits to this contest -or to which he is submitted in the two cases indicated above-, recognizes his state of insolvency, whether current or upcoming, and seeks to make payment agreements with new terms and financing, in order that its main obligations do not continue to generate default interest.

The request to start the voluntary bankruptcy, in addition to the requirements of a lawsuit, must include: 1) A detailed list of all your assets and rights, 2) A statement of debts with an expression of origin, maturity, name and address of each creditor and the account books, if it has them, 3) The titles of active credits and, 4) A memory on the causes of its presentation. If these legal requirements are not fulfilled, the debtor loses the right to, in the future, make observations for the arrangement and improvement of the administration of its assets by the trustee, as well as for the liquidation of assets and liabilities. (COGEP, 2015, art. 439)

7) Order the accumulation of those processes that contain pending obligations of which the bankrupt is a part, since there cannot be two bankruptcy proceedings against the

same person. It should be clarified, on this, that the accumulated processes must have an obligation judicially declared or approved through an enforceable sentence; 8) Provide for the registration in the property registry of the car that orders the formation of the contest and if it is bankruptcy have also registration in the commercial register, 9) Notify the State Attorney General's Office, to carry out the respective investigations regarding the state of the debtor's insolvency and, 10) Prohibit the debtor from being absent from the national territory.

Creditors may oppose the continuation of the voluntary bankruptcy, within a period of 10 days after being summoned. This opposition will be resolved at a hearing, on which creditors may file an appeal with non-suspensive effect, in the event that the first instance judge decides to continue with the development of this contest.

There is only one rule that refers to the creditors' meeting, the wording of which is obscure since it involves the auditor and the trustee in its participation, although the former, according to the law, must be appointed by the judge in the preventive bankruptcy and not in the volunteer, which puts his participation in doubt. Already at the creditors' meeting (COGEP, 2015, art. 427), the auditor's report and the waiting and payment proposal made by the debtor (through the trustee) will be known, which may be accepted or rejected by the creditors who represent the majority vote, taking into account that they will vote by percentages of the claims against the total mass of the liabilities.

If the proposal is accepted, they will negotiate the concordat, in which new terms and financing and other valid agreements may be contemplated that facilitate the solution of the debt. The judge will approve, by means of a sentence, the aforementioned concordat which the debtor must comply with.

However, if the majority decides to reject the proposal, they must justify their opposition, which will be analyzed by the judge and, if found to be unfounded, they will order that

the agreement be approved in the terms of the debtor's request. If the refusal is founded, it will send the application to be filed, after payment of the auditor's fees, which will be borne by the applicant. Both decisions are subject to appeal with non-suspensive effect.

The judge, given the lack of agreement between creditors and debtor, will order: 1) The appraisal of the seized property owned by the bankrupt, 2) That the balance of the bankrupt's assets be known, 3) That, on the day and time indicated, the auction of the seized goods owned by the debtor is carried out and, 4) The grading of credits according to their priority[2].

Once the assets have been auctioned, there are two possible scenarios: If the proceeds of the auctioned assets are enough to pay all the credits, the judge will declare their obligations extinguished and reinstate the debtor. On the contrary, if the proceeds from the auction are not enough to pay all the credits, a new creditors' meeting will be called, in which they will decide whether to remit the balance of the obligation and grant or not a payment certification that will release totally to the debtor for the unpaid balance, lifting all the measures executed against him, rehabilitating him.

Spanish legislation makes a difference between voluntary bankruptcy procedures and the necessary one regarding the processing of the bankruptcy. In this way, it establishes that:

> The bankruptcy will be considered voluntary when the first of the applications submitted would have been that of the debtor himself. In all other cases, the bankruptcy will be considered necessary when, in the three months prior to the date of the debtor's request, another by any legitimized person had been submitted and accepted for processing, even if he had withdrawn, had not appeared or had not been ratified. ". (cited by Pavía, 2018, p. 145)

2 See Arts. 2367 and following of the Civil Code (2005).

4. CONTEST REQUIRED

Finally, when the debtor does not comply with the execution order, does not resign assets or resign disputed assets, which are not in his possession, are located outside the Republic or are insufficient for the payment of the obligation, the creditor may initiate, in against him, the necessary bankruptcy of creditors so that the insolvency or bankruptcy of the debtor is judicially declared.

In order to request the opening of this type of bankruptcy, it is not necessary for the creditor, in the execution phase of the main lawsuit, to verify and prove that the debtor has assets susceptible to seizure, since article 416 only requires that the execution order be has been breached or has been imperfectly fulfilled. Hence, this procedure is a last option to force the debtor to fulfill his obligation.

> The general rule and common sense provide that the only one who knows the true financial situation of a natural or legal person is the debtor himself; with much less possibility the creditor, so it sounds obvious and logical that unlike the other two preventive and voluntary contests, in the necessary the plaintiff is not required, in addition to the formal requirements of any claim, other arguments or documents of which it can legitimately possess, which allow it to reasonably deduce or presume the existence of the objective budget of the necessary bankruptcy, which is the insolvency of the debtor, which is the basis of its claim. (Castillo, 2017, p. 258)

The initial application must comply with the formal requirements of the claim (COGEP, 2015, art. 422) and will be presented to be drawn by a judge other than the one who knows the main process. If it is clear and complete, the competent judge will issue the order to open the necessary bankruptcy in which: 1) He will order that the debtor be summoned at his address and will summon him to the creditors' meeting, 2) He

will require the debtor to present of the documents provided for the request for the voluntary bankruptcy that were analyzed ut supra, 3) It will declare the interdiction of the debtor, 4) It will appoint a trustee who, in addition, will be the custodian of the debtor's assets, if there are any, 5) It will have the embargo of all movable or immovable property, property of the bankrupt, if any, 6) order the annotation of insolvency or bankruptcy,

Note that the debtor may: a) Oppose it for which he must pay the entire debt and, b) File an appeal for bankruptcy, in a period of 10 days. appeal which will only be granted in non-suspensive effect.

Once the debtor complies with what is required in the initial order, the judge will convene the creditors' meeting which will be governed by the rules previously reviewed in the voluntary bankruptcy, that is, the creditors may sign a concordat, remit the debt, granting a payment certificate or they will request that the debtor's state of insolvency or bankruptcy be ratified with all the effects that its interdiction will generate. In this last scenario, the judge will declare the debtor's state of insolvency or bankruptcy and will order that the file be sent to the Public Prosecutor's Office in the event that such state is presumed to have been the result of a fraudulent action by the debtor.

The state of bankruptcy or insolvency will last at least 10 years and only then can the debtor be rehabilitated, provided that the creditors have not promoted the process during that time and that the insolvency or bankruptcy has not been declared fraudulent (COGEP, 2015, art. 430)

It is important and timely to clarify that the necessary bankruptcy rules established by COGEP are applicable to both natural persons, merchants and commercial companies since the Preventive Bankruptcy Law and the Application Rules of the referred Law are applicable only to preventive bankruptcy . Precisely in the case of commercial companies, the duly executed bankruptcy declaration will lead to the dissolution

of the company, in accordance with what is established in the Companies Law (1999, art. 360.2).

CONCLUSIONS

There is no doubt that agreements or contracts are sources of obligations, hence they must be fulfilled in the terms and conditions that the parties have agreed upon. However, our legal system provides for the possibility of eventual faults and breaches and allows such expired or expiring obligations to be restructured, or legally required in the event that the debtor is in default to do so.

Bankruptcy proceedings or concordats are the last possibility that the debtor has to fulfill his obligations. In the 5 types of procedures that were reviewed in this text, the common factor was the existence of obligations whose fulfillment was impossible.

Preventive and voluntary bankruptcies are proposed by the debtor himself and their objective is to request a withdrawal or waiting of the obligation from his creditors, in order to be able to quickly rehabilitate his state of bankruptcy or insolvency. Undoubtedly, the debtors in this type of procedure recognize the existence of the obligation and express their willingness to comply with them in good faith, which is always important in a legal relationship of this nature.

For its part, the necessary bankruptcy evidences the decision of the expired debtor not to comply with a court order for payment, hence the Law allows the application of real and personal enforcement measures which breaks (in part) our system of compliance with civil obligations that It was born with the Poetelia Papyria Law (year 326 or 325 BC) and developed in the mandate of the Emperor Augustus (year 44 BC). However, this is allowed as it is the last possibility of the creditor to satisfy his credit.

Compliance with obligations generates certainty in people's legal relationships, hence our legal system seeks their effective achievement, either through new and exceptional agreements or in a coercive manner.

We hope that this descriptive analysis of several scattered norms in our legislation on the concordat and comparative doctrine, allows a unification of dogmatic concepts and of the different types of bankruptcy proceedings.

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