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PAVED WITH GOOD INTENTIONS: CREDITORS FACE A NEW ROADBLOCK TO RECOVERY IN MEXICAN BANKRUPTCIES

*Timothy S. Springer**

I. INTRODUCTION

THIS Note discusses how a Mexican debtor recently exploited a legislative loophole to block creditors' road to recovery. In December 2010, Vitro, S.A.B. de C.V. (Vitro or the Company) filed a voluntary *concurso* proceeding—Mexico's equivalent of a Chapter 11 reorganization.¹ Vitro claimed intercompany debts incurred between its parent holding company and controlled subsidiaries as unsecured debts and relied on these claims to overcome objections from third-party bondholders.² While more mature bankruptcy codes prevent this strategy, Vitro presented a matter of first impression for Mexico's relatively young code.³ Moreover, Mexico's civil law system only fueled the procedural chaos.⁴

This Note shows how giving company insiders standing as claimants in Mexican bankruptcies will profoundly affect the flow and cost of capital in Mexico.⁵ Part II of this Note discusses how Mexico's bankruptcy code inadvertently allowed Vitro's strategy, and how its civil law system prevented Mexican judges from correcting the oversight. Part III addresses the events leading up to Vitro's bankruptcy and the Company's steps to gain leverage over unsecured creditors. Finally, Part IV outlines why this case sets a dangerous precedent for unsecured creditors and proposes so-

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1. Press Release, Vitro, S.A.B. de C.V., Vitro Announces Filing of *Concurso* Plan in Mexican Court (Dec. 14, 2010), available at http://www.vitro.com/vitro_corporativo/docs/ingles/101214i.pdf.

2. Thomas Black, *Vitro Creditors May Face Lengthy Legal Fight Over Restructuring*, BLOOMBERG (Dec. 9, 2010, 7:21 AM), <http://www.bloomberg.com/news/2010-12-09/vitro-creditors-may-face-lengthy-legal-fight-over-restructuring.html>.

3. See Joseph Checkler, *Vitro Case Challenges Mexico's 11-Year-Old Restructuring Law*, WALL ST. J. BANKR. BEAT BLOG (June 13, 2011, 5:11 PM), <http://blogs.wsj.com/bankruptcy/2011/06/13/vitro-case-challenges-mexicos-11-year-old-restructuring-law/>; see also *infra* note 23.

4. *Id.*

5. *See id.*

lutions to counteract unfair advantages for debtors in Mexican bankruptcies.

II. MEXICO'S CIVIL LAW SYSTEM AND INSOLVENCY PROCEDURE

Mexico operates under a civil law system, as compared to the common law systems of the United States and Great Britain.⁶ Judges in civil law systems do not interpret, but rather apply the laws as written, collected, and codified by the system's legislative body.⁷ As such, judges in "a civil law system can often do nothing on issues where the law is silent."⁸ Accordingly, civil law judges emphasize the plain meaning of legal provisions and often cannot deviate from a conventionalist interpretation, even if the judge "can point to principles and goals that suggest that the norm is unjust or imperfect."⁹ Unlike judges in a common law system, whose opinions have precedential value, civil law systems do not have the doctrine of *stare decisis*; rather, civil law judges' decisions bind only the parties to the controversy at hand.¹⁰ By nature of the system, judges rely on legislatures and constitutions to enumerate sufficiently specific provisions to govern novel situations presented to the courts.¹¹

Mexico responded to a need for more specific provisions by overhauling its commercial insolvency laws in May 2000.¹² Although this Note is not intended to analyze the specifics of the new law—*Ley de Concursos Mercantiles* (LCM, best translated as the Business Organization Act of 2000)¹³—some brief discussion facilitates an understanding of Vitro's strategic steps.¹⁴

In the aftermath of its 1995 currency crisis, Mexico joined a worldwide movement by legislatures to facilitate corporate restructurings and to modernize bankruptcy laws' content and cross-border insolvency provi-

6. Victor Ferreres Comella, *Commentary: Courts in Latin America and the Constraints of the Civil Law Tradition*, 89 TEX. L. REV. 1967, 1967 (2011).

7. *See id.*

8. Checkler, *supra* note 3.

9. *See Comella, supra* note 6, at 1972.

10. *Id.* at 1967.

11. *See id.* at 1972.

12. Eduardo Martinez, *The New Environment of Insolvency in Mexico*, 17 CONN. J. INT'L L. 75, 75 (2001).

13. Arturo C. Porzecanski, *Corporate Workouts in Mexico: The Good, the Bad, and the Ugly*, ISSUES IN INT'L POLITICAL ECON. (SPECIAL ISSUE) (Center for Strategic & Int'l Studies, Washington D.C.), Apr. 2011, at 1, available at http://csis.org/files/publication/issues201104_CorporateMexico_SpecialIssue1.pdf.

14. For more detailed analysis of Mexico's LCM, *see* Martinez, *supra* note 12, at 75-78; Lina Forero-Niño, Note, *Mexicana Airlines, One of the World's Oldest Airlines, Files for Bankruptcy Protection in Mexico and the United States and Suspends Flights Until Further Notice*, 17 L. & BUS. REV. AM. 361, 366-70 (2011); William F. Govier, *Controladora Comercial Mexicana: A Premature Case Study?*, 28-MAR AM. BANKR. INST. J. 46, 46 (2009). For a discussion comparing differences between LCM and the U.S. Bankruptcy Code, *see* Jonatan Graham-Canedo, *Comparative Analysis of Bankruptcy Legal Provisions From Mexico and the United States: Which Legal System is More Attractive?*, 6 DEPAUL BUS. & COM. L.J. 19, 20-28 (2007).

sions.¹⁵ The United Nations Commission on International Trade Law (UNCITRAL) encouraged many Latin American countries to amend their bankruptcy laws in the first years of the new millennium with its Model Law on Cross-Border Insolvency.¹⁶ LCM's drafters intended to bolster confidence in Mexican businesses and attract new investors to the country.¹⁷ Additionally, LCM's appointment of federal, instead of local, judges indicates the drafters' good intentions to eradicate serious problems with corruption.¹⁸

LCM requires insolvency proceedings of multiple entities within a single enterprise to be conducted together, unlike its predecessor, which separated holding companies from their controlled subsidiaries.¹⁹ Mexican legislators attempted to consolidate these entities for equity purposes to prevent "fraud and favoritism."²⁰ In fact, when initially denying Vitro's *concurso* plan, the trial court recognized this change and noted "that the legislature contemplated the possibility that related companies that have a relationship of subordination might engage in acts of creditor fraud."²¹ But Mexican legislators still did not harmonize insiders' treatment across related statutes when drafting LCM. Mexican tax laws and regulations requiring public corporations to disclose information consider controlling and controlled companies to be the same economic unit for information disclosure purposes.²²

In comparison, the U.S. Bankruptcy Code treats insiders differently in many different situations.²³ For example, the U.S. Bankruptcy Code removes intercompany debt as unsecured claims by offsetting any genuine intercompany liabilities with the related asset on the balance sheet.²⁴ Likewise, at least one class of impaired claims must vote to approve a debtor's reorganization plan without including any acceptance by any

15. Porzecanski, *supra* note 13, at 1.

16. See generally Rodrigo Olivares-Caminal, *Corporate Debt Restructuring in Latin America: New Developments—New Opportunities?*, I.C.C.L.R. 254, 258 (2005), available at <http://www.ifblonline.com/docs/IFBL-Corporate%20Restructuring%20in%20LatAm.pdf>.

17. Martinez, *supra* note 12, at 75. This goal of attracting investment mirrors UNCITRAL's intent. *Id.* See also 11 U.S.C. § 1501(a)(2) (2006) (encouraging greater legal certainty for trade and investment).

18. Martinez, *supra* note 12, at 76. To this end, Vitro exposes another well-intended, but potentially failed goal of LCM. After originally denying the appeal, the Mexican appellate court reversed itself after several high-powered individuals intervened on Vitro's behalf. Porzecanski, *supra* note 13, at 5.

19. Ley de Concursos Mercantiles [LCM] [Bankruptcy Law], as amended, art. 15, Diario Oficial de la Federación [DO], 27 de Diciembre de 2007 (Mex.).

20. Concurso. Judgment on Commercial Bankruptcy with Preexisting Reorganization Plan, United Mexican States Federal Judiciary District Court Number Two For Civil and Labor Matters in the State of Nuevo León, Commercial Bankruptcy 38/2010-VI, Página 49, 67 n.13 (Mex.) (on file with author).

21. *Id.* at 62.

22. *Id.* at 65.

23. See 11 U.S.C. § 101(31)(C)(v) (2006) (defining an "insider" as a "person in control of the debtor"); *id.* § 547(i) (extending the preference period for insiders from ninety days to one year); *id.* § 548(a)(1)(B)(ii)(IV) (providing trustee ability to avoid certain transfers to benefit an insider in fraudulent transfer actions).

24. See Govier, *supra* note 14, at 47.

insider.²⁵

Despite recognizing the Mexican legislature's intention to combine controlled entities, the trial court, as explained in Part III, was likely trying to force a change in the law.²⁶ LCM provides no specific counterpart to the doctrine of equitable subordination,²⁷ which allows a bankruptcy court to change the payment order of claims as equity requires.²⁸ By not dictating a comparable procedure in LCM, Mexican legislators granted insider subsidiaries leave to make claims equally alongside third-party creditors.²⁹

III. VITRO'S DEBTS, DEALINGS, AND DOWNTURN

A. GLASS HOUSE AND FINANCIAL STONES

Vitro began operations in 1909 as a corporation with variable capital under Mexican law.³⁰ As one of the largest glass manufacturers in the world, Vitro produces, promotes, and distributes a range of glass products for the wine, beer, cosmetic, pharmaceutical, food and beverage, automotive, and construction industries.³¹ The Company has distribution centers in eleven countries throughout the Americas and Europe with approximately eighty-five percent of the 17,000 workers living in Mexico.³² In 2003 and 2007, Vitro raised a total of \$1.2 billion through three separate senior unsecured bond indentures (the Old Notes).³³ Vitro and substantially all of its direct and indirect subsidiaries guaranteed the Old Notes.³⁴

The global financial downturn of 2008 depressed sales and adversely affected demand for Vitro's key industries.³⁵ Specifically, the collapse of the automotive and construction markets in the United States crippled two of Vitro's largest customer bases.³⁶ Vitro's sales dropped thirty-three percent in 2009.³⁷ Additionally, Vitro faced significant margin calls from derivative hedge positions strained by fluctuations in interest rates and international currencies.³⁸

25. 11 U.S.C. § 1129(a)(10) (2006).

26. Checkler, *supra* note 3; *see infra* Part III, note 66 and accompanying text.

27. Govier, *supra* note 14, at 47.

28. 11 U.S.C. § 510(c)(1) (2006) (“[T]he court may . . . under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest.”).

29. Govier, *supra* note 14, at 47.

30. Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (Vitro), 455 B.R. 571 (Bankr. N.D. Tex. 2011).

31. Press Release, Vitro, S.A.B. de C.V., *supra* note 1.

32. Vitro, 455 B.R. at 574.

33. *Id.*

34. *Id.*

35. Black, *supra* note 2.

36. *Id.*

37. See Thomas Black, *Vitro's Defaulted Bonds Soaring in Precedent-Setting Case: Mexico Credit*, BLOOMBERG (Apr. 1, 2011, 4:14 PM), <http://www.bloomberg.com/news/2011-04-01/vitro-s-defaulted-bonds-soaring-in-precedent-setting-case-mexico-credit.html>.

38. Vitro, 455 B.R. at 574.

The reduced cash flows and sudden margin calls left Vitro unable to meet all of its financial obligations.³⁹ As a result, Vitro stopped making scheduled interest payments on the Old Notes.⁴⁰ After Vitro failed to make margin calls on its failed derivative hedges, its counter-parties initiated litigation in the Supreme Court of New York demanding payment of \$240.3 million plus interest.⁴¹ By February 2009, Vitro announced plans to restructure its debts.⁴²

The Supreme Court of New York found Vitro and several of its subsidiaries liable in the margin call lawsuits.⁴³ Subsequently, Fintech Investments, Ltd. (Fintech) acquired the derivatives transaction counter-parties' claims against Vitro.⁴⁴ In December 2009, as part of its attempts to restructure, Vitro settled with Fintech by exchanging promissory notes in return for Fintech releasing judgment claims against the Company.⁴⁵ Fintech also agreed to invest \$75 million in the Company "to strengthen Vitro's liquidity."⁴⁶ This single transaction generated approximately \$1.5 billion of intercompany debts between Vitro and its subsidiaries.⁴⁷ Despite the equity infusion, Vitro remained vulnerable to weaknesses in its key industries.⁴⁸

B. VITRO'S CHAOTIC PROCEDURAL PROCESS

Vitro began soliciting creditors' consent in November 2010 for a prepackaged voluntary *concurso* filing.⁴⁹ The company offered bondholders a cash tender or equity exchange with an approximately five percent bonus payment for consent.⁵⁰ A month later, after retiring only \$30 million of claims with its 57.5 cent cash tender offer,⁵¹ the Company extended the acceptance deadline before proceeding with its *concurso* filing.⁵²

Vitro filed its prepackaged petition in Mexico on December 13, 2010,

39. *Id.*

40. *Id.*

41. *See, e.g.*, Complaint at 2, Barclays Bank PLC v. Vitro Envases Norteamérica S.A. de C.V. (No. 600521), 2009 WL 6045772 (N.Y. Sup. Ct. Feb. 18, 2009); Complaint at 5, Deutsche Bank A.G. v. Vitro Envases Norte America, S.A. de C.V. (No. 600612-09), 2009 WL 7233058 (N.Y. Sup. Ct. Feb. 26, 2009).

42. *Vitro*, 455 B.R. at 575.

43. *Id.*

44. *Id.*

45. *Id.*

46. Press Release, Vitro, S.A.B. de C.V., Additional Information on Transaction to Strengthen Vitro's Liquidity (Oct. 19, 2010), http://www.vitro.com/vitro_corporativo/docs/ingles/101019i.pdf.

47. *Vitro*, 455 B.R. at 574.

48. Black, *supra* note 2.

49. *Vitro*, 455 B.R. at 575.

50. Black, *supra* note 2.

51. *Id.*

52. Press Release, Vitro, S.A.B. de C.V., Vitro Announces the Upcoming Filing of its Concurso Plan, the Expiration of its Tender Offer and the Extension of the Expiration Time for its Exchange Offer and Consent Solicitation (Dec. 8, 2010), http://www.vitro.com/vitro_corporativo/docs/ingles/101208i.pdf.

despite virtually unanimous rejection by unsecured creditors.⁵³ To ensure the required forty percent of creditors supporting the plan,⁵⁴ Vitro claimed its substantial intercompany debts were unsecured creditors and included these claims in the forty percent.⁵⁵ Vitro had approximately \$1.7 billion of aggregate third-party debt outstanding on December 31, 2010.⁵⁶ This amount included \$1.2 billion from the Old Notes.⁵⁷ But Vitro also had \$2.022 billion of intercompany debts at this time, including the \$1.5 billion stemming from the Fintech transaction.⁵⁸ Creditors immediately objected to Vitro's insider claims, sparking a heated bout in which the Company, creditor attorneys, financiers, and members of the press traded punches.⁵⁹

Vitro's financial difficulties and bankruptcy filing produced procedural chaos as unsecured creditors sought to secure position and rights to subsidiary assets in the United States.⁶⁰ Before Vitro filed for protection in Mexico, one group of unsecured creditors initiated an involuntary bankruptcy proceeding under Chapter 11 of the U.S. Bankruptcy Code against fifteen Vitro subsidiaries in the Northern District of Texas.⁶¹ Other groups of bondholders filed substantially similar proceedings in the Southern District of New York on December 2 and 9, 2011.⁶² A day after filing in Mexico, Vitro filed a petition in the Southern District of New York and sought to invoke cross-border insolvency protections under Chapter 15 of the U.S. Bankruptcy Code.⁶³ Chapter 15 confers some protections common to domestic filings to foreign debtors, such as the automatic stay.⁶⁴ Thus, Vitro halted adverse actions against its subsidiaries in the involuntary proceedings.⁶⁵

On January 7, 2011, the Fourth District Judge for Civil and Labor Matters in the Mexican State of Nuevo León rejected Vitro's attempts to use insider debts and denied confirmation of the voluntary *concurso* plan.⁶⁶ Because the decision disqualified Mexico as a viable forum for the re-

53. Press Release, Vitro, S.A.B. de C.V., *supra* note 1.

54. LCM, *as amended*, art. 339(II), DO, 12 de Mayo de 2000 (Mex.).

55. Black, *supra* note 2.

56. Vitro, 455 B.R. at 574.

57. *Id.*

58. *Id.*

59. Compare Vitro, S.A.B. de C.V., *supra* note 52 (characterizing claims made by press about the legality of Vitro's proposed restructuring as "baseless") with Black, *supra* note 2 (creditors' attorney suggesting "that a substantial amount of [Vitro's] intercompany debt is bogus").

60. Vitro, 455 B.R. at 575.

61. *Id.*

62. *Id.*

63. *Id.* at 576.

64. 11 U.S.C. § 1520(a)(1) (2006) (applying § 362(1) to stay the commencement or continuation of judicial proceedings against a debtor within the territorial jurisdiction of the United States).

65. *See id.*

66. Concurso. Judgment on Commercial Bankruptcy with Preexisting Reorganization Plan, United Mexican States Federal Judiciary District Court Number Two For Civil and Labor Matters in the State of Nuevo León, Commercial Bankruptcy 38/2010-VI, Página 49, 67 n.13 (Mex.) (on file with author).

structuring, Vitro withdrew its Chapter 15 petitions in the United States while it appealed the trial court's ruling, allowing the involuntary Chapter 11 cases to continue.⁶⁷ After a ninety-day torrent of positioning, an appellate judge in the Second Unitary Court of the Fourth Circuit in Monterrey reversed the trial court on April 11, 2011 and reinstated the pre-packaged plan.⁶⁸ As a result, Vitro filed a new petition for Chapter 15 protection in the Southern District of New York.⁶⁹ In response, the petitioning creditors filed motions to administer the Chapter 11 and 15 cases jointly and to transfer the consolidated case to the Northern District of Texas.⁷⁰

On August 15, 2011, the Fourth District Court for Civil and Labor Matters in the city of Monterrey affirmed the appellate court's ruling by announcing the ranking and priority of claims in the Mexican *concurso* proceedings.⁷¹ The ruling established that Vitro's intercompany claims were equal to other unsecured creditors and therefore Vitro had the right to participate in approving the *concurso* plan.⁷²

IV. VITRO'S DANGEROUS EXAMPLE AND STEPS TO PREVENT MORE ABUSE

A. EFFECTS ON CURRENT LITIGANTS AND THE MEXICAN BUSINESS COMMUNITY

The Mexican appellate court likely honored its civil law system's formalism by allowing the intercompany debts to vote as unsecured creditors.⁷³ LCM does not explicitly prohibit this practice. Moreover, this decision likely did not substantially affect Vitro, its subsidiaries, or most of the senior unsecured bondholders.⁷⁴

Most of the bondholders at the time the Mexican appellate court issued its ruling would profit regardless of the decision.⁷⁵ These investors had bought the securities at a substantial discount following Vitro's default in 2009.⁷⁶ Accordingly, most bondholders were seeking to maximize profits under any recovery scenario.⁷⁷ Vitro estimated its plan would allow un-

67. *Vitro*, 455 B.R. at 576.

68. Press Release, Vitro, S.A.B. de C.V., Vitro Wins Appeal; Begins Its Pre-Packaged Concurso Mercantil Process (Apr. 11, 2011), http://www.vitro.com/vitro_corporativo/docs/ingles/110411i.pdf.

69. Press Release, Vitro, S.A.B. de C.V., Vitro Reports 1Q'11 Increase in Sales and EBITDA (May 2, 2011), http://www.vitro.com/vitro_corporativo/docs/ingles/110503i.pdf

70. *Vitro*, 455 B.R. at 576.

71. Press Release, Vitro, S.A.B. de C.V., Vitro Notified by Monterrey Fourth District Judge Regarding Rules on the Recognition, Grading, and Ranking of the Claims (Aug. 15, 2011), http://www.vitro.com/vitro_corporativo/docs/ingles/110815i.pdf.

72. *Id.*

73. See Comella, *supra* note 6, at 1972.

74. See Black, *supra* note 37.

75. *Id.*

76. *Id.*

77. *Id.*

secured creditors to obtain about a sixty-eight percent recovery.⁷⁸ Even if Vitro's *concurso* filing was only worth some analysts' estimated sixty cents on the dollar, most bondholders would still realize lucrative recoveries.⁷⁹

Despite these reasons appearing to minimize this precedent, Vitro sends a potentially dangerous signal to other debtors seeking leverage. LCM permits ad hoc committees of unsecured creditors, meeting certain requirements, to form and to force debtors into involuntary bankruptcy proceedings, much like in the United States.⁸⁰ Vitro's filing was pre-packaged and voluntary, but now debtors anticipating involuntary bankruptcy filings have a way to circumvent the leverage statutorily granted to the unsecured creditors forcing the involuntary proceedings.

Mexican businesses will suffer if insiders are allowed to force confirmation of *concurso* plans.⁸¹ Recognizing the increased risk of diminished position in restructurings, financial institutions will likely raise risk premiums attached to corporate bond insurance for Mexican companies.⁸² The same institutions may even require that other countries' insolvency laws govern contracts for investment in Mexico.⁸³ An even more drastic result, capital flow into Mexico may decrease sharply as investors seek investments protected by more mature bankruptcy codes.⁸⁴

B. EFFECTS ON RELATED CASES IN THE UNITED STATES AND THE OTHER NAFTA COUNTRIES

Significant economic realities between the NAFTA countries require cooperation to maximize creditor value by simplifying procedural and substantive provisions.⁸⁵ Such substantive and procedural differences between the NAFTA countries would violate UNCITRAL's universalism principle.⁸⁶ This principle promotes continuity and predictability between different courts in the NAFTA countries.⁸⁷ The United States took steps towards harmonizing its bankruptcy procedures with the other NAFTA countries in 2005 by integrating many of UNCITRAL's cross-border insolvency provisions.⁸⁸ Under the new provisions of Chapter 15, U.S. courts must cooperate with Mexican courts in cross-border insol-

78. Black, *supra* note 2.

79. Black, *supra* note 37.

80. Compare LCM, *as amended*, art. 9(I)-(II), DO, 12 de Mayo de 2000 (Mex.) (two or more merchants each with at least thirty-five percent of their claims more than thirty days past due) with 11 U.S.C. § 303(b)(1) (2006) (requiring at least three creditors with non-contingent claims aggregating at least \$14,425).

81. See Porzecanski, *supra* note 13, at 5.

82. *Id.*

83. *Id.*

84. Checkler, *supra* note 3.

85. Emilie Beavers, Note, *Bankruptcy Law Harmonization in the NAFTA Countries: The Case of the United States and Mexico*, 2003 COLUM. BUS. L. REV. 965, 966 (2003).

86. See *id.* at 966 n.1, 967 n.3.

87. See *id.* at 966 n.2, 968 n.4.

88. Graham-Canedo, *supra* note 14, at 20-21 & n.14; see also 11 U.S.C. § 1501 (2011).

vency cases where Mexico is the location/forum of the “foreign main proceeding.”⁸⁹ But by permitting an action prohibited in the United States, Mexico places U.S. courts in difficult legal waters.

In the present case, U.S. courts hearing proceedings related to Vitro’s subsidiaries have to respect Mexico’s classification of Vitro and its subsidiaries as separate.⁹⁰ For example, U.S. bankruptcy judges have discretion to award reasonable attorney’s fees to the alleged debtor after dismissing involuntary petitions.⁹¹ Section 303(i) of the U.S. Bankruptcy Code also allows for punitive damages where the creditor forcing bankruptcy filed in bad faith.⁹² Here, a U.S. bankruptcy court for the Northern District of Texas dismissed several involuntary Chapter 11 cases against Vitro subsidiaries following the Mexican Appellate Court reinstating the *concurso* plan.⁹³ When considering whether the creditors acted in bad faith by initiating the involuntary proceedings, the court would have to consider the parent company and subsidiaries as separate entities.⁹⁴

U.S. bankruptcy courts have authority to refuse to take an action governed under Chapter 15 of the U.S. Bankruptcy Code that would manifestly contradict public policy.⁹⁵ This provision mirrors UNCITRAL Model Law article 6,⁹⁶ but the standard of “manifestly contrary” has consistently been narrowly interpreted by courts around the world to mean violating “the most fundamental policies” of the host nation.⁹⁷ Additionally, domestic bankruptcy judges face pressures from the same economic realities compelling cooperation in cross-border insolvencies. U.S. courts are thus caught in the somewhat awkward position of becoming complicit in wrongs not quite “bad enough” to overcome a high legal standard.

C. STEPS TO CORRECT OVERSIGHT AND PREVENT FUTURE ABUSE

Mexico’s civil law system provides two solutions to prevent these unintended consequences. First, the Mexican legislature created LCM and can amend it.⁹⁸ The Mexican legislature can bar future insider claims by amending article 15 to include such an explicit provision. Less dramati-

89. 11 U.S.C. § 1525 (2006) (“[T]he court shall cooperate to the maximum extent possible with a foreign court . . .”); *see also id.* § 1502(4) (2006) (“‘foreign main proceeding’ means a foreign proceeding pending in the country where the debtor has the center of its main interests”).

90. *See id.* § 1508 (“[T]he court shall . . . promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”)

91. *Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 706-07 (9th Cir. 2004).

92. 11 U.S.C. § 303(i)(2)(B) (2006).

93. *In re Vitro Asset Corp.*, No. 11-32600-hdh-11, 2011 WL 1561025, at *3 (Bankr. N.D. Tex. Apr. 21, 2011) (mem. op.).

94. *See* 11 U.S.C. § 1508 (2006).

95. *Id.* § 1506

96. Model Law of Cross-Border Insolvency of the United Nations Commission on International Trade Law, G.A. Res. 52/158, art. 6, U.N. Doc. A/RES/52/158 (Jan. 30, 1998).

97. *In re Tri-Cont’l Exch. Ltd.*, 349 B.R. 627, 638 (Bankr. E.D. Ca. 2006).

98. Comella, *supra* note 6, at 1970.

cally, the legislature could simply acknowledge the uniform treatment of insiders under LCM as equal to that of Mexico's tax laws and regulations for public corporations for information disclosures.⁹⁹

Mexico's civil law system provides for a second possible solution. Precisely because civil law systems give judges little room for variation, many Latin American countries have created an important tool for interpreting constitutional law: an abstract review of legislation.¹⁰⁰ This procedure allows the legislature to empower a judicial body to review a law for "constitutionality on its face without having to wait for a specific controversy to arise."¹⁰¹ Mexico entrusts its Supreme Court with this responsibility.¹⁰² The Mexican Supreme Court could review whether LCM's failure to provide creditor protections violates the Mexican Constitution. An abstract review would allow the Mexican Supreme Court to reconstruct a statute in compliance with the Mexican Constitution rather than nullifying the provision altogether.¹⁰³ But this procedure may be difficult to initiate, as it requires significant support.¹⁰⁴

In addition to the two potential civil law solutions, parties may have a simpler private solution. Lenders may begin imposing contract requirements that companies will not vote intercompany debts to approve any potential bankruptcy plans.¹⁰⁵ Private contracts allow future parties a simple workaround, but also would require investors to renegotiate existing indentures. Likewise, private law solutions require confidence that Mexican courts will enforce provisions not explicitly supported by statutes. This belief provides the incentive for foreign investment without exorbitant risk premiums.¹⁰⁶ With no judicial support for these contractual provisions, investors may not have adequate leverage with borrowers to contract around the insider loophole.

V. CONCLUSION: FIX IT, AND FIX IT SOON

Vitro's slingshot plan may appear to be only a small stone, but the blow through a tiny gap in LCM's armor may indeed prove to be fatal. Mexico must act quickly to quash the signal Vitro sends to other conglomerate debtors considering *concurso* filings. Otherwise, lenders will raise the cost of capital for Mexican companies enough to stunt the eleven-year

99. See *Concurso*. Judgment on Commercial Bankruptcy with Preexisting Reorganization Plan, United Mexican States Federal Judiciary District Court Number Two For Civil and Labor Matters in the State of Nuevo León, Commercial Bankruptcy 38/2010-VI, Página 49, 67 n.13 (Mex.) (on file with author).

100. Comella, *supra* note 6, at 1968.

101. *Id.*

102. *Id.* at 1969.

103. See *id.* at 1972-73.

104. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 105, Diario oficial de la Federación DO, 5 de Febrero de 1917. Various government officials can trigger reviews. See Comella, *supra* note 6, at 1970.

105. Black, *supra* note 2.

106. See Porzecanski, *supra* note 13, at 5.

momentum following LCM's inception.¹⁰⁷ Without action, Mexico will leave creditors to walk a road to recovery paved with only good intentions.

107. *Id.*; Checkler, *supra* note 3.

Updates

