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# Cross-Border Insolvency and Structural Reform in a Global Economy

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## I. Introduction

In 2000, the world continued to see the increasing globalization of international economies and the growing presence of computers and automation. Automation has become pervasive in all aspects of the modern world, not only by processing more and more information at ever growing speeds, but also by bringing all corners of the world closer together into an electronic community. Yet, the dichotomy between the global haves and have-nots could not be starker. While the developed world experiments with using the Internet for, among other things, an electronic mall, many developing countries, still recovering from recent financial crises brought by war or government mismanagement, are simply trying to survive. With the goal of encouraging foreign investment, certain countries are reforming their commercial laws to make them compatible with those of the developed world. The world's focus (and reliance) on the United States' lengthy economic expansion and preoccupation with the dot.com bubble has taken the spotlight away from the efforts of those countries. This article attempts to highlight the progress that has been made.

Drawing upon our committee's diverse interests, this year's article represents a true team effort. In Section II, Jeff Carruth summarizes noteworthy U.S. cases. In Section III, John A. Barrett, Jr. reports on the United Nations Commission on International Trade Law (UNCITRAL) Receivables Convention. In Section IV, Darío U. Oscós Coria provides an excerpt from his ABA presentation regarding Mexico's enactment of a new bankruptcy law. In Sections V and VI, Anthony M. Vassallo reports on the progress of insolvency initiatives

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worldwide, as well as the United States' lack of progress in achieving bankruptcy reform. Finally, in Section VII, Paula Garzon provides updates on website resources for researching international insolvency law issues.

## II. U.S. Cases of Interest to International Practitioners

American courts continued to address the fallout from the 1997-1998 Financial Crisis during 2000.<sup>1</sup> As demonstrated by *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*,<sup>2</sup> and *Parex Bank v. Russian Savings Bank*,<sup>3</sup> a nation's efforts to curtail the precipitous decline in its foreign currency reserves can have dramatic consequences for creditors. The following summaries track noteworthy cases in the collection and bankruptcy areas that were reported during 2000.

### A. FINANCIAL CRISIS FALLOUT

In *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*,<sup>4</sup> a construction company entered into an Indenture Agreement and executed a series of notes and security agreements to finance the company's toll road projects in China. The company (through subsidiaries) had entered into a joint venture for each toll road project with a Chinese partner.<sup>5</sup> Under the parties' agreements, the Chinese partners were obligated to cover any deficiency between a fixed rate of return for the company and the income actually generated.<sup>6</sup> The fixed rate of return was sufficient to cover the interest payments due under the notes.<sup>7</sup>

After the company signed the Indenture and the notes, the Chinese government issued new regulations restricting the payment of guarantees provided by Chinese entities to foreign lenders.<sup>8</sup> The regulations were in response to China's dwindling foreign exchange reserve in the wake of the 1997-1998 Financial Crisis.<sup>9</sup> Now, approval by the State Administration of Foreign Exchange was required before making any guaranty payments.<sup>10</sup> These regulations effectively cut off the company from receiving any of the payments to guaranty its fixed rate of return, and the income from the toll roads was insufficient to service the bank debt.<sup>11</sup>

1. See Paula E. Garzon et al., *Cross-Border Insolvency and Structural Reform in a Global Economy*, 34 INT'L LAW. 533 (2000).

2. See *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 86 F. Supp. 2d 244 (S.D.N.Y. 2000).

3. See *Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d 415 (S.D.N.Y. 2000).

4. See *Chase Manhattan Bank*, 86 F. Supp. 2d at 246-47.

5. See *id.*

6. See *id.* at 250.

7. See *id.*

8. See *id.* at 251. The plaintiff bank sought to exclude evidence of the new government regulations because the defendant only presented newspaper accounts of the regulation. The actual notice was a confidential government document not available to the parties. The court allowed the newspaper descriptions under Federal Rule of Evidence 807. See *id.* at 254. Cf. *LNC Investments, Inc. v. Banco Central De Nicar.*, 228 F.3d 423 (2d Cir. 2000).

9. See *Chase Manhattan Bank*, 86 F. Supp. 2d at 251.

10. See *id.*

11. See *id.* at 252.

Not surprisingly, the company defaulted after failing to remit any note payments other than the first one due, and the lender sued on several causes of action including breach of contract and replevin.<sup>12</sup> The company defended these claims under the doctrine of impossibility of performance, arguing that the change of Chinese policy excused its defaults under this doctrine.<sup>13</sup> The court denied the defense, concluding that the Indenture cut off the impossibility defense because the Indenture defined changes in government regulations to constitute an event of default.<sup>14</sup> The Indenture language at issue here was identical to the corresponding Model Debenture Indenture Provision (§ 501), a provision intended to defeat force majeure excuses for defaults.<sup>15</sup> Aside from the Indenture, the court ruled that impossibility did not excuse defaults. Under New York law, financial difficulty, even when imposed by government regulation, does not render performance impossible.<sup>16</sup>

The adequacy of a foreign court in the pre-judgment context was at issue in *Parex Bank v. Russian Savings Bank*.<sup>17</sup> A Latvian bank sued a Russian bank—the majority shareholder of which was the Central Bank of the Russian Federation—in U.S. federal district court for the balance owed to the Latvian bank under nondeliverable forward exchange contracts involving the exchange of rubles for fixed amounts of dollars.<sup>18</sup> The Russian bank moved to dismiss the complaint on several grounds including forum non conveniens, arguing that the dispute should be heard in Russia.<sup>19</sup> The forum non conveniens inquiry began with a determination whether the alleged convenient forum (Russia) would be an adequate alternative forum in which to adjudicate the dispute.<sup>20</sup> Russia would be an adequate alternative forum if the Russian bank is subject to service of process there and the forum permits a satisfactory remedy.<sup>21</sup> The parties agreed that the Russian bank was subject to service of process in Russia, but the Latvian bank disagreed that the court with appropriate jurisdiction—the Moscow City Arbitration Court—permitted a satisfactory remedy.<sup>22</sup> The court rejected the Latvian bank's arguments that it could not obtain a satisfactory remedy in Russia because Russian courts (1) would have been biased against a Latvian party and (2) failed to provide sufficient procedural safeguards.<sup>23</sup> On the other hand, the Latvian bank further argued that Russian courts did not recognize the validity of the nondeliverable forward exchange contracts.<sup>24</sup> The Latvian bank showed that Russian courts considered the nondeliverable forward exchange contracts to be unenforceable gambling contracts not cognizable under applicable Russian law.<sup>25</sup> “[T]he alternate forum must at least allow liti-

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12. *See id.* at 249-50.

13. *See id.* at 247.

14. *See id.* at 255.

15. *See id.* at 256. The court also rejected the company's attempt to distinguish between an “occurrence of default” and an “excuse of default” under the Indenture. Under the company's logic, the Indenture language that defined whether a default had occurred did not mean the same language that prohibited using the same default-causing event as an excuse. *See id.*

16. *See id.* at 259. The Indenture provided that New York law would apply to the Indenture and the Note. *See id.* at 247, n.1.

17. *See Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d 415, 418-19 (S.D.N.Y. 2000).

18. *See id.*

19. *See id.* at 422-23.

20. *See id.* at 423.

21. *See id.*

22. *See id.*

23. *See id.* at 423-25.

24. *See id.* at 423.

25. *See id.* at 426.

gation of a claim arising out of the disputed transaction.<sup>26</sup> Consequently, Russia was not a satisfactory forum, and the court denied the Russian bank's motion to dismiss for forum non conveniens.<sup>27</sup>

#### B. ENFORCEMENT OF JUDGMENTS

In *Society of Lloyd's v. Ashenden*,<sup>28</sup> Lloyd's sought to enforce judgments entered in an English court against American members of the insurance syndicate under the Uniform Foreign Money-Judgments Recognition Act (UFMJRA)<sup>29</sup> as enacted in Illinois. The members attacked Lloyd's post-judgment discovery and execution against the member's assets, arguing that the English judgments had denied them due process of law.<sup>30</sup> Thus, the members argued, Lloyd's could not enforce the judgments under the UFMJRA.<sup>31</sup> The court easily concluded that the English system was compatible with the requirements of due process of law.<sup>32</sup> Moreover, the UFMJRA does not require duplication of American procedural safeguards, but only that the foreign system be "fundamentally fair" and not offensive to basic fairness.<sup>33</sup>

The court likewise struck down the members' arguments that due process should be measured in terms of a particular proceeding's adherence to American ideas of due process.<sup>34</sup> Neither the UFMJRA nor the facts underlying the judgments supported this approach. First, the UFMJRA favors a streamlined approach over a "retail approach" of examining individual proceedings, and individual proceedings need not conform exactly to American due process.<sup>35</sup> Second, the members claimed that two clauses in Lloyd's reinsurance contracts with the members (regarding (1) Lloyd's determination of the amount of an assessment for reinsurance as conclusive, and (2) a prohibition against set offs as counterclaims) violated the members' due process rights.<sup>36</sup> The members became bound to the clauses after Lloyd's (under its by-laws) appointed agents for the members who had dissented from the reinsurance plan to execute reinsurance contracts on behalf of the members.<sup>37</sup> According to the court, the clauses did not violate international due process and were not imposed by any court.<sup>38</sup> The key determination was the fairness of the English proceeding in ruling the actions valid under the contract between Lloyd's and the members instead of fairness of Lloyd's actions under the contract.<sup>39</sup>

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26. *Id.*

27. *See id.* at 427.

28. *See Society of Lloyd's v. Ashenden*, 233 F.3d 473, 475 (7th Cir. 2000).

29. *See* Uniform Foreign Money-Judgments Recognition Act, 735 ILL. COMP. STAT. ANN. 5/12-618 (West 2000).

30. *See Society of Lloyd's*, 233 F.3d at 476.

31. *Id.* The UFMJRA denies enforcement of an alien judgment if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the due process of law." *Id.*, citing 735 ILL. COMP. STAT. 5/122-621.

32. *See Society of Lloyd's*, 283 F.3d at 476.

33. *See id.* at 477. The court denominates the type of due process due under the UFMJRA as "the international concept of due process." *Id.*

34. *See id.*

35. *Id.* at 478.

36. *See id.*

37. *See id.* at 478-79.

38. *See id.* at 479.

39. *See id.*

*In re Hashim*<sup>40</sup> suggests a case-by-case examination of whether to enforce a foreign judgment in jurisdictions not covered by the UFMJRA. The court of appeals ruled a bankruptcy court erred when it rejected an unliquidated claim for attorneys' fees and costs award in an English judgment.<sup>41</sup> Applying Arizona judgment recognition law as found in the Restatement (Second) of Conflicts of Laws, the court determined the English court's judgment deserved recognition in light of the fact that the debtors did not claim the English proceeding failed to afford them the opportunity for a full and fair trial, a court of competent jurisdiction, regular proceedings, due citation, voluntary appearance of the defendant, or the absence of bias, prejudice, or fraud.<sup>42</sup>

In *Bridgeway Corp. v. Citibank*,<sup>43</sup> a U.S. court found that obtaining a judgment in a country with a judicial system identical to that of the United States does not guarantee a U.S. court will recognize the judgment. In this case, the court defeated a creditor's attempt to enforce a Liberian judgment in the United States against an American bank, finding that although on paper Liberia had a judicial system inherited from the United States, the system had broken down during a protracted civil war, a fact the parties acknowledged.<sup>44</sup> Thus, there was no guarantee that the proper safeguards had been taken to ensure that the judgment deserved recognition.

In *LNC Investments, Inc. v. Republic of Nicaragua*,<sup>45</sup> an investor purchased a series of notes issued by the Republic of Nicaragua and eventually reduced the notes to judgment. The investor then sought to execute against assets of Banco Central de Nicaragua, Nicaragua's Central Bank, held by the Federal Reserve Bank of New York.<sup>46</sup> The Central Bank moved to quash the execution on grounds that the Central Bank is a corporate entity separate and distinct from the Republic of Nicaragua.<sup>47</sup> The investor contended Nicaragua waived the immunity of its Central Bank in the loan agreements.<sup>48</sup> The court found that the waiver argument fell short because the loan agreements only provided for a jurisdictional waiver over the Central Bank and did not address the substantive issue of whether Central Bank assets would be responsible for the state's debts.<sup>49</sup> The court also refused to find that the Central Bank was an agent of Nicaragua.<sup>50</sup>

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40. See *In re Hashim*, 213 F.3d 1169 (9th Cir. 2000).

41. See *id.* at 1173. Between the time of the bankruptcy court proceeding and the court of appeals' decision, the English court fixed the claim for an amount substantially less than the creditors estimated on their proofs of claim. See *id.* at 1171.

42. See *id.* at 1171-72.

43. See *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 137 (2d Cir. 2000).

44. See *id.* at 137-38. The creditor objected to the district court's reliance on the U.S. State Department County Reports for Liberia for evidence. The court of appeals approved the use of the County Reports under Federal Rule of Evidence 803(8)(C). See *id.* at 143.

45. See *LNC Inv., Inc. v. The Republic of Nicar.*, 115 F. Supp.2d 358, 360-61 (S.D.N.Y. 2000), *aff'd sub nom.* *LNC Inv., Inc. v. Banco Central De Nicaragua*, 228 F.3d 423 (2d Cir. 2000) (per curiam).

46. See *id.* at 361.

47. See *id.*

48. See *id.*

49. See *id.* at 362.

50. See *id.* at 365. The district court refused to admit into evidence under Federal Rule of Evidence 807 statements made by a Central Bank official that only the Republic of Nicaragua would benefit if the execution were thwarted. See *id.* at 366.

## C. COLLECTION OF CONTRACTUAL OBLIGATIONS

In *Zappia Middle East Construction Co. Ltd. v. Emirate of Abu Dhabi*,<sup>51</sup> the Emirate hired a contractor to build several public works projects. After the Emirate refused to pay the contractor, the contractor opened a credit line with a local bank to remain solvent.<sup>52</sup> After the contractor exhausted its line of credit, the bank insisted that the contractor enter into a sort of receivership.<sup>53</sup> Another entity was hired to complete the public works projects and liquidate the contractor's equipment.<sup>54</sup> Meanwhile, the local bank merged with the Abu Dhabi Commercial Bank, a wholly owned subsidiary of a bank entirely owned by the Emirate.<sup>55</sup> The contractor sued in federal district court for payment of the public works contracts and damages for expropriation of the contractor's assets.<sup>56</sup>

The court of appeals affirmed the district court's dismissal of the case for the contractor's failure to allege facts to bring its claims within the expropriation exception of the Foreign Sovereign Immunities Act (FSIA).<sup>57</sup> As the Abu Dhabi Commercial Bank was only the successor-in-interest to the local bank and was not shown to have lost its separateness from the state, the contractor could not sustain jurisdiction under FSIA.<sup>58</sup> Moreover, the court ruled that the breach of a commercial contract alone did not constitute expropriation.<sup>59</sup>

In *Betterroads Asphalt Corp. v. U.S.*,<sup>60</sup> the court denied an unpaid public works contractor's request to order the United States to cut off aid to a debtor nation because, inter alia, the contractor lacked standing to seek enforcement of the Helms Amendment.<sup>61</sup> The court found the notion that the debtor nation would pay the contractor following the suspension of aid was too speculative to support the plaintiff's standing, and any ruling would infringe upon presidential discretion to suspend aid under that Act.<sup>62</sup>

## D. BANKRUPTCY LITIGATION

In *In the Matter of Thornhill Global Deposit Fund, Ltd.*,<sup>63</sup> the court ruled that funds transferred to establish an escrow fund pursuant to a Massachusetts court order were property of a Bahamian bankruptcy estate. Pre-petition, the state court had issued an injunction requiring the debtor to deposit U.S.\$3 million into an account held *jointly* by the parties' attorneys pursuant to an escrow agreement.<sup>64</sup> The debtor deposited the funds into its own attorneys' client account and commenced negotiations with the plaintiff regarding an escrow agreement.<sup>65</sup>

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51. See *Zappia Middle East Constr. Co. Ltd. v. The Emirate of Abu Dhabi*, 215 F.3d 247, 249 (2d Cir. 2000).

52. See *id.*

53. See *id.* at 249-50.

54. See *id.* at 250.

55. See *id.* at 249.

56. See *id.* at 250.

57. See *id.*

58. See *id.* at 252.

59. See *id.*

60. See *Betterroads Asphalt Corp. v. United States*, 106 F. Supp. 2d 262, 264-66 (D. P. R. 2000).

61. 22 U.S.C. § 2370(a) (2001).

62. See *Betterroads*, 106 F. Supp. 2d at 268.

63. See *In the Matter of Thornhill Global Deposit Fund, Ltd.*, 245 B.R. 1, 13 (Bankr. D. Mass. 2000).

64. See *id.* at 5.

65. See *id.*

After the debtor's Bahamian liquidators filed an ancillary proceeding pursuant to 11 U.S.C. § 304, the liquidators won an adjudication that the deposit was property of the Bahamian bankruptcy estate and not part of any escrow.<sup>66</sup> The court ruled that because the debtor and investor had not followed the terms of the state court order for establishing an escrow, the debtor's transfer of funds to its counsel did not create an escrow deposit under Massachusetts law, nor would the court infer an escrow agreement by the parties' negotiations.<sup>67</sup> Consequently, the U.S.\$3 million belonged to the Bahamian bankruptcy estate.<sup>68</sup>

In *Vesta Fire Insurance Corp. v. New Cap Reinsurance Corp., Ltd.*,<sup>69</sup> a contract between an American insurer and an Australian reinsurer contained a clause requiring arbitration proceedings of any disputes to be held in Alabama. After the insurer demanded arbitration to recover reinsurance payments, the arbitral panel ordered the reinsurer to provide pre-hearing security of U.S.\$12.5 million, a demand that the reinsurer could not meet.<sup>70</sup> An administrator was appointed in Australia for the reinsurer, thereby staying all proceedings under Australian law.<sup>71</sup> After the administrator petitioned under 11 U.S.C. § 304 for a stay of all legal proceedings in the United States, the insurer sought exemption from the stay to proceed with arbitration.<sup>72</sup> The bankruptcy court denied the insurer's request.<sup>73</sup>

In weighing whether the contractual arbitration clause ought to prevail over the Section 304 injunction, the district court reasoned that defending the arbitration would consume estate assets, while the payment of U.S.\$12.5 million would transform the insurer from an unsecured to a secured creditor, thus improving the insurer's position.<sup>74</sup> Ultimately, in affirming the lower court, the district court decided that the policies of the Bankruptcy Code—the equitable, orderly, and systematic disposition of the debtor's assets—trumped any arguments for allowing the arbitration to proceed.<sup>75</sup>

*In re MMG LLC*<sup>76</sup> stands in contrast to *Vesta*. The foreign representatives from a Cayman Islands proceeding sought the usual 11 U.S.C. § 304 protections to stay litigation pending in the United States.<sup>77</sup> Pre-petition, the debtor's former founding shareholder had won a preliminary arbitration award against the debtor.<sup>78</sup> The court granted the Section 304 injunction against all litigation with the express exception that the shareholder could continue the arbitration proceedings under the relevant shareholder agreement in order to liquidate his claim.<sup>79</sup> As the shareholder's proceeding would not cause irreparable harm to the estate because of the limited number of disputed shareholder claims, there was no need to apply

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66. *See id.* at 3, 15.

67. *See id.* at 12.

68. *See id.* at 13.

69. *See Vesta Fire Ins. Corp. v. New Cap Reinsurance Corp., Ltd.*, 244 B.R. 209, 211 (S.D.N.Y. 2000) *aff'd sub nom. In re McKenna*, 238 F.3d 186 (2d Cir. 2001) (per curiam).

70. *See Vesta*, 244 B.R. at 211-12.

71. *See id.* at 212.

72. *See id.*

73. *See id.* at 212, 221.

74. *See id.*

75. *See id.* at 217, *citing* *Cunard Steamship Co., Ltd. v. Salen Reefer Servs. A.B.*, 773 F.2d 452 (2d Cir. 1985).

76. *In re MMG LLC*, 256 B.R. 544 (Bankr. S.D.N.Y. 2000).

77. *See id.* at 548-49.

78. *See id.* at 547.

79. *See id.* at 555.

the Section 304 injunction so tightly. Nonetheless, the court precluded the shareholder from enforcing his claim absent further court order.<sup>80</sup>

In *In re Griffin Trading Co.*,<sup>81</sup> an unsecured creditor of a Chapter 7 debtor commodities broker argued that English law, instead of U.S. law, should apply to transactions executed in the debtor's London office. English law placed the claims of the debtor's general unsecured creditors on par with the debtor's customers. In contrast, U.S. law gave customers' claims a super priority.<sup>82</sup> Although the debtor's customers had consented to the application of English law in their trading agreement with the debtor, the subject clause only applied to construction of the agreement and not the entire extent of the broker-customer relationship.<sup>83</sup> The application of U.S. law was appropriate since a U.S. corporation had filed for relief under the U.S. Bankruptcy Code.<sup>84</sup> The movant unsecured-creditor ultimately prevailed when the court struck down the regulation that resulted in the application of all estate property to the customers' shortfalls to the complete detriment of unsecured parties.<sup>85</sup>

In *In re I.G. Services, Ltd.*,<sup>86</sup> the bankruptcy court refused, on motion by an American newspaper, to withdraw orders allowing foreign (primarily Mexican) creditors to withhold their names from proofs of claims. The creditors had shown to the court's satisfaction that they could be subject to violence and possible death if their identities were revealed.<sup>87</sup>

### III. Convention on Assignment of Receivables in International Trade

In December 2000, the Working Group on International Contract Practices of the United Nations Commission on International Trade Law (UNCITRAL) completed its review and commentary on the draft Convention on Assignment of Receivables in International Trade. Having finished its review, the draft has been submitted for final adoption at UNCITRAL's next session, in June and July 2001.

If adopted, the convention will apply to assignments of international receivables and to international assignments of receivables, if the assignor is located in a contracting state at the time the contract of assignment is concluded. The convention will also apply to subsequent assignments of such receivables as well as to subsequent assignments, provided any prior assignment is governed by the convention. However, the convention excludes assignments made to individuals for personal purposes, assignments made by the delivery of a negotiable instrument, and those made in connection with the transfer of the business out of which the receivable arose.

Many of the rights are what one would expect from this area of law. Assignments can be performed in various ways, including in bulk. Contractual limits on assignments do not limit the effectiveness of an assignment, but the convention does not affect one's liability

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80. *See id.*

81. *See In re Griffin Trading Co.*, 245 B.R. 291, 293-95 (Bankr. N.D. Ill. 2000).

82. *See id.* at 294-95.

83. *See id.* at 303.

84. *See id.* at 306.

85. *See id.* at 306-19. This case also provides an excellent description of the basic mechanics of commodities trading. *See id.* at 295-300.

86. *See In re I.G. Serv. Ltd.*, 244 B.R. 377, 379-82 (Bankr. W.D. Tex. 2000).

87. *See id.* at 380.

for breach of such limitations. Agreed to terms and usage will apply, as will a usage that is widely known in international trade.

Article 24 introduces the important proposition that the location of the assignor determines the governing law concerning the right and priority of the assignee in the receivable and proceeds therefrom with regard to competing claimants. Exceptions include bank deposits and investment securities (held through a securities intermediary), which use the law of the state where the bank or intermediary is located; and other money and negotiable instruments, which use the law of the state where the money or instrument is located. However, Article 25 allows disregard of the assignor's state law on public policy grounds, and permits preferential rights in insolvency proceedings commenced outside the assignor's state to be given priority over rights of an assignee. Article 26 sets forth certain special rules for proceeds of receivables.

This general theme—of looking to the assignor's location—is continued throughout the convention as the fundamental consideration in determining various parties' rights. Although this may lead to a lack of uniform standards being applied to receivables, it provides a consistent and predictable framework from which creditors work. As such, the convention, if adopted, represents a major step forward in assisting international finance.<sup>88</sup>

#### IV. Mexico's Adoption of the Model Law and Enactment of the New Law on Commercial Insolvency<sup>89</sup>

On May 12, 2000, by an overwhelming vote in its congress, Mexico enacted a new insolvency law, Law on Commercial Insolvency (*Ley de Concursos Mercantiles*) (LCI), abrogating the former Law on Suspension of Payments and Bankruptcy published in 1943. The latter remains in effect to govern bankruptcy proceedings initiated before LCI went into effect May 15, 2000.

Besides assisting businesses under financial duress, the legislation is intended to stimulate the credit market by enabling Mexican banks to recover their loans more easily when debtors run into financial difficulties. This, in turn, the Mexican government hopes, should encourage financial institutions to lend and invest in Mexico. The new law consolidates bankruptcy procedures and creates a new body, the Federal Institute of Mercantile Insolvency Experts, to decide legal battles between debtors and creditors.<sup>90</sup>

The statute's goals include to

- (a) Preserve and rehabilitate the ongoing concern or liquidate the estate, and maximize asset value and provide for an equitable distribution;
- (b) Create a legal regime that favors restructuring within a set period of time;
- (c) Enable interested parties to participate constructively and foster consensual resolutions among debtors and creditors;

88. The draft convention is contained (for Articles 1-17) in UNCITRAL Document #A/CN.9/470, which can be found, with commentary, at <http://www.uncitral.org/english/sessions/unc/unc-33/acn9-470.pdf>, and (for articles 18-41) in UNCITRAL Document #A/CN.9/486, which can be found, with commentary, at <http://www.uncitral.org/english/sessions/unc/unc-34/486.pdf>.

89. This section is adapted from Darío U. Oscós Coria, *The New Mexican Law On Commercial Insolvency, Ley De Concursos Mercantiles*, presented to the ABA International Section, Washington, D.C. (April 25-28, 2001).

90. See Latin Lawyer, available at <http://www.latinlawyer.com/mexico/news.htm> (visited April 4, 2001).

- (d) Assure certainty and predictability as to the time frame and final outcome of the insolvency proceeding as a whole;
- (e) Respect the terms and conditions of preexisting contractual obligations;
- (f) Simplify proof of claims recognition process;
- (g) Respect secured creditors' rights and regarding unsecured creditors, fix their claims to the inflation rate in Mexico;
- (h) Prevent and punish criminal bankruptcies; and
- (i) Provide for international insolvency cooperation, incorporating, as local law, the UNCITRAL Model Law.

#### A. HIGHLIGHTS OF PRINCIPAL PROVISIONS<sup>91</sup>

- *Who May Be a Debtor?* Merchants, commercial and business corporations, and banks. The LCI excludes insurance and bonding companies, reinsurance companies, and small merchants (i.e., persons with liabilities of no more than five hundred thousand Unidades de Inversion (UDI). As of March 1, 2001, the rate of the UDI toward the peso was \$2.94.
- *Jurisdiction.* Federal jurisdiction exclusively; local courts have no jurisdiction to hear insolvency disputes.
- *Federal Institute of Insolvency Mercantile Experts.* The LCI creates this Institute to organize, manage and appoint visitors, conciliators and trustees. The Institute is an auxiliary entity of the Federal Judiciary Board with technical and operative autonomy.
- *Initiation of Proceeding.* The petition requesting the judicial declaration of commercial insolvency (*declaracion de concurso mercantil*) may be initiated voluntarily by a debtor, involuntarily by a creditor, or by the Attorney General. The petition must be filed before a federal district court having jurisdiction over the debtor's domicile.
- *Conciliation Phase.* The conciliation phase is intended to facilitate a reorganization plan. During conciliation, a debtor remains in possession of the assets and may continue operating the business in its ordinary course; debtor is relieved from paying its obligations and additional interest stops accruing on obligations, except for obligations secured by mortgages, pledges or special collateral; claims against debtor are stayed. However, certain debts are exempt from this stay, including wages of the two last years and alimony; court actions and arbitration instituted by or against debtor are not joined to the insolvency proceeding.
- The conciliation phase has a limited period of 185 calendar days as of the last publication of the order for relief. An extension of up to ninety days may be granted upon request of the conciliator or creditors representing two-thirds of the recognized claims. An additional extension may be granted upon request of debtor and creditors representing 90 percent of the recognized claims.
- *Claims Fixed in UDI.* Debts denominated in pesos or foreign currency as well as all claims shall be denominated in UDI at the equivalent rate of exchange prevailing at the time the order for relief is entered.

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91. Due to space constraints, only a brief summary of the LCI can be presented here.

## B. EFFECTS OF COMMERCIAL INSOLVENCY DECLARATION

- *Bankruptcy Estate Creation.* Once the court issues a commercial insolvency declaration, all assets of the debtor become part of the bankruptcy estate and are administered by the debtor. The debtor may continue to operate the business in its normal course, upon approval of the court, and sales of assets in the normal course of business do not need the further approval of the court. All assets of the debtor, wherever located, will be handled through the Mexican court, even though there may be difficulties in enforcing orders of a Mexican court covering assets located outside of Mexico.
- *Claims Enjoined.* Generally, all claims against the bankruptcy estate are stayed. Set-off rights no longer exist for creditors, with a few specifically delineated exceptions. Attachment of assets of the debtor for payment of an unsecured debt will not be effective.
- *Exemptions.* Creditors may petition the court to exempt assets from the bankruptcy estate including property that has not been fully paid for by the bankrupt, property subject to an installment sales arrangement, and property held by the debtor in deposit, lease, trust, or similar circumstances pursuant to which the debtor does not possess title to the property.
- *Matured Debts Stop Interest.* All obligations of the debtor are considered matured and interest stops accruing on obligations except for those secured by a mortgage.
- *Preexisting Obligations.* All preexisting claims become due and have to be fixed in UDIs to determine their amount. Preexisting contractual obligations are performed as agreed upon by the parties, except for special provisions under the LCI.
- *Suspension of Executory Contracts.* A debtor shall perform its obligations under its executory contracts unless opposed by the conciliator.
- *Review of Fraudulent or Preferential Acts.* The Mexican court will review certain transactions occurring prior to the commercial insolvency declaration and invalidate fraudulent and preferential transfers. The LCI prescribes a 270-calendar-day review period. The review period may be longer upon certain circumstances by court order.
- *Stay of Actions.* Enforcement and foreclosure of tax claims are stayed, as are the enforcement of wage claims, except for those wages earned in the two prior years and labor indemnifications of the prior year. Arbitration and judicial proceedings, being prosecuted between debtor and third parties, are not joined to the insolvency proceeding. The LCI honors agreements of choice of jurisdiction and dispute resolutions agreed upon by the parties before the insolvency procedure.

## C. CREDITORS AND CLASSES OF CREDITORS

- The court classifies and prioritizes the claims. Claims are evaluated in terms of both their validity and their priority. Claims that have been recognized by final judgment in a prior commercial proceeding (such as a foreclosure of a mortgage) are recognized by the bankruptcy proceeding without re-examination by the judge except as to the potential priority of the claim.
- *Foreign Creditors.* Whether secured or unsecured, they will not be treated differently from Mexican creditors to the extent that under Mexican law their claims are enforceable.
- *Super Priority Creditors.*
  1. Employees of the bankrupt with wage claims for the two years prior to the commercial insolvency declaration.

2. Contractual credits for the administration of the estate assets.
  3. Credits related to ordinary expenses for the security, maintenance, and administration of estate assets.
  4. Credits related to court costs or out of court costs that benefit the estate.
  5. Fees and expenses of the visitor, conciliator, and trustee, subject to court approval.
- *Secured and Mortgage Creditors.* Creditors holding a lien on assets of the debtor enjoy a priority over other creditors to the extent of the proceeds available from the security.
  - *Tax Claims.* Claims made by the federal or local taxing authorities.
  - *Creditors with Special Privilege.* Unsecured creditors who by statute have some form of special privilege or preferential right.
  - *Trade and Other General Unsecured Creditors.*
  - *No Discharge.* If payment is not made in full on the amount recognized, creditors keep their rights against debtor for the outstanding balance of the claim.

#### D. MEXICAN ADOPTION OF UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

- The LCI incorporates in Title XII generally the UNCITRAL Model Law on Cross-Border Insolvency as domestic law.

### V. UNCITRAL Model Law and U.S. Bankruptcy Reform

In May 1997, UNCITRAL adopted the final text of the Model Law on Cross-Border Insolvency (Model Law).<sup>92</sup> The Model Law was intended not to harmonize bankruptcy laws but to provide a framework to deal with issues that result upon a cross-border insolvency. The issues addressed, among others, include: (1) access for a foreign representative to the courts of any state (State) that has enacted the Model Law; (2) determining whether a foreign insolvency should be recognized by the State and what the consequences of such recognition are; (3) permitting courts of countries involved in the cross-border insolvency to cooperate more fully; (4) authorizing foreign representatives to seek assistance in another State; (5) providing for jurisdiction and other rules of cooperation; and (6) providing rules for coordination of remedies.<sup>93</sup> Because it is a model law, as opposed to a treaty, the text of the law must be incorporated into the domestic law of the enacting country.<sup>94</sup>

In the United States, the text of the Model Law has been proposed as a new chapter, Chapter 15, to the Bankruptcy Code. Currently, the U.S. Senate and House of Representatives have each passed their own bankruptcy reform legislation. The bills containing these changes (among others) are the Bankruptcy Reform Act of 2001 (the Senate bill) and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 (House of Representatives bill),<sup>95</sup>

92. The United Nations has provided UNCITRAL with its own website: <http://www.uncitral.org>.

93. See *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, U.N. Comm'n on Int'l Law, U.N. GAOR, 30th Sess., ¶ 3, U.N. Doc. A/CN.9/442 (1997), available at <http://www.uncitral.org/en-index.htm>.

94. In addition, the enacting state does not have to notify the United Nations or any other state of the enactment of the law. See *id.* ¶ 11.

95. The Senate version is S. 220, and the House of Representatives version is H.R. 333. For more information on the status of these bills (or any other Congressional bill), the Library of Congress has an online legislative tracking service. See <http://thomas.loc.gov> (visited Feb. 22, 2001).

currently pending in the U.S. Congress.<sup>96</sup> Both bills now go to conference. After committee members from both the Senate and House are chosen, they will attempt to reconcile the differences between the two bills, present a committee report to both houses for their vote, and if passed, submit the report to the President for his signature or veto. There is no time limit as to how long the bills may remain in conference.

Although 2000 again showed little progress regarding adoption of the Model Law and bankruptcy reform in the United States, activity continued in other countries to overhaul or implement bankruptcy laws especially as part of the process of obtaining financing from the International Monetary Fund (IMF). During 2000, the focus of such activity centered around many of the “breakway” former Russian states, which are trying to open their markets and unshackle business enterprises from the constraints of prior government control.

## VI. Insolvency Law Initiatives

The following is a list of countries that, at the IMF’s direction, have amended their bankruptcy laws or have committed to do so in the near term.<sup>97</sup>

### A. BULGARIA (LETTERS OF INTENT<sup>98</sup> DATED MARCH 9, 2000 AND AUGUST 18, 2000)

March 18, 2000: An amendment to the Commercial Code that simplifies and accelerates bankruptcy procedures passed first reading in parliament, and judges have been receiving training on bankruptcy matters. By the end of June 2000, the newly established unit under the Council of Ministers should be fully operational and setting requirements for the selection, removal, and supervision of liquidators for state-owned enterprises.<sup>99</sup>

August 18, 2000: Following the completion of public debate and a review by the European Integration committee of parliament, Bulgaria expects a proposed amendment to the Commercial Code to simplify and accelerate bankruptcy procedures to pass second reading in parliament by September 2000.<sup>100</sup>

### B. SOUTH KOREA (LETTER OF INTENT DATED JULY 12, 2000)

Thanks to amendments to the Bankruptcy, Composition and Reorganization Laws South Korea adopted in December 1999, the following changes were made: (1) requiring the court to rule on a reorganization or composition petition within one month; (2) imposing

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96. Previous attempts since 1998 at implementing bankruptcy reform have failed because of the continuing disputes over proposed amendments geared to tightening the requirements for individuals seeking bankruptcy protection. Actual comment (or debate) regarding the proposed Chapter 15 has been sparse. The Bankruptcy Reform Commission unanimously supports enacting the proposed Chapter 15. Some parties have suggested that if bankruptcy reform fails again this year, then Chapter 15 should be enacted as a stand-alone bill.

97. A citation to each country’s Letter of Intent on the IMF website is provided at the end of each section.

98. Letters of Intent are prepared by the member country and directed to the IMF. They describe the policies that a country intends to implement in the context of its request for financial support from the IMF. Copies of the letters are made available on the IMF website by agreement with the member country as a service to users of the IMF website.

99. See *Bulgaria Letter of Intent* (March 9, 2000), available at <http://www.imf.org/external/NP/LOI/2000/bgr/01/index.htm>.

100. See *Bulgaria Letter of Intent* (August 18, 2000), available at <http://www.imf.org/external/NP/LOI/2000/bgr/02/INDEX.HTM>.

mandatory liquidation where reorganization is unsuccessful; (3) reducing the proportion of creditors required to approve a reorganization plan; (4) strengthening the right of avoidance of preferential transfers; and (5) permitting merger and divestiture as part of the reorganization process. The government intends to seek further modernization and harmonization of the laws for bankruptcy, composition, and reorganization based on the recommendations of the review of the insolvency system supported by the World Bank Technical Assistance Loan, including possibly introducing "pre-packaged" reorganization procedures under the Corporate Reorganization Law.<sup>101</sup>

#### C. LITHUANIA (LETTER OF INTENT DATED DECEMBER 13, 2000)

One of the key objectives of the new government is to substantially improve the business environment in Lithuania. In that regard, a comprehensive plan of actions to resolve the problems of insolvent companies has been approved. By December 2000, Seimas is expected to approve the revised Company Bankruptcy and Company Restructuring Laws.<sup>102</sup>

#### D. MACEDONIA (LETTER OF INTENT DATED NOVEMBER 15, 2000)

The government is trying to improve corporate financial discipline and to allow the banking system to improve its asset quality by strengthening the legislative framework for creditors' and shareholders' rights. In July 2000, Macedonia amended the Bankruptcy Law with a view to: (1) simplify and accelerate bankruptcy and collateral foreclosure proceedings; and (2) close loopholes currently open to debtors to delay creditor actions. By early 2001, the government intends to submit a new legislation for parliamentary approval that will enable secured creditors, on the default by a debtor, to preserve or enhance collateral for sale and to sell collateral in any commercially reasonable manner without intervention by a court.<sup>103</sup>

#### E. REPUBLIC OF MOLDOVA (LETTER OF INTENT DATED NOVEMBER 30, 2000)

For 2001, the Republic intends to amend its bankruptcy laws to accelerate the reorganization/liquidation process. An amended law is expected to be submitted to parliament by February 15, 2001 with the goal of obtaining approval by May 1, 2001. The government hopes that the amendment will contribute to financial discipline, reduce tax arrears, and promote efficiency and growth.<sup>104</sup>

### VII. Online Resource Guide

The World Wide Web continues to grow as a resource for legal practitioners. In addition, the rise of Internet related liquidations and bankruptcies require that attorneys understand

101. See *South Korea Letter of Intent* (July 12, 2000), available at <http://www.imf.org/external/NP/LOI/2000/kor/01/INDEX.HTM>.

102. See *Lithuania Letter of Intent* (December 13, 2000), available at <http://www.imf.org/external/NP/LOI/2000/ltu/02/INDEX.HTM>.

103. See *Macedonia Letter of Intent* (November 15, 2000), available at <http://www.imf.org/external/NP/LOI/2000/mkd/01/INDEX.HTM>.

104. See *Republic of Moldova Letter of Intent* (November 30, 2000), available at <http://www.imf.org/external/NP/LOI/2000/mda/01/INDEX.HTM>.

e-commerce business and the associated technologies. The following is a sample of online resources<sup>105</sup> that can be used to: (1) update and track legal issues of interest of the bankruptcy practitioner, and (2) track e-business and technology trends.

#### A. CASE INFORMATION

##### 1. *Supreme Court*

- Supreme Court Cases (Official Site) <<http://www.supremecourtus.gov>>
- Supreme Court Decisions (Historical unofficial text of opinions from 1937-1975) <[http://www.access.gpo.gov/su\\_docs/supcrt/index.html](http://www.access.gpo.gov/su_docs/supcrt/index.html)>
- Online Sources of Opinions <<http://www.supremecourtus.gov/opinions/obtainopinions.pdf>>

##### 2. *Federal Courts*

- Federal Courts including Bankruptcy Court websites (Federal Judiciary Homepage) <<http://www.uscourts.gov/allinks.html>>

##### 3. *State Courts*

- Courts.net <<http://www.courts.net>>
- National Center for State Courts <[www.ncsc.dni.us](http://www.ncsc.dni.us)>

#### B. GENERAL RESOURCES

- American Bar Association <<http://www.abanet.org>>
- American Society of International Law <<http://www.asil.org>>
- Findlaw <<http://www.findlaw.com>>
- Hieros Gamos <<http://www.hg.org>>
- World Wide Web Virtual Library: Law <<http://www.law.indiana.edu/law/v-lib/lawindex.html>>

#### C. INSOLVENCY SPECIFIC SITES

- United States Bankruptcy Code (Cornell Law School) <<http://www.law.cornell.edu/uscode/11>>
- American Bankruptcy Institute <<http://www.abiworld.org>>
- National Bankruptcy websites <<http://www.washlaw.edu/bankrupt/ntlsites/ntlsites.htm>>
- Australasia Legal Information Institute <<http://www.austlii.edu.au>>

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105. The websites listed herein are a sample of the many resources available on the Internet. At the time of this writing each of these sites was available. However, sites do change and are taken down; therefore, it is possible that by publication date or anytime thereafter, a website may not be available or may have moved. Inclusion or exclusion of a website does not constitute a recommendation or an endorsement of the site by the American Bar Association, The International Creditors' Rights and Bankruptcy Committee or by the individual authors, and the foregoing parties are not responsible for the content of any website or the accuracy of, or omission of, any material on any website. Each person must make his/her own independent assessment as to the site, including without limitation, an assessment as to the accuracy of the information contained therein.

- Canadian Bankruptcy Law Centre <<http://wwlia.org/~wwlia/ca-bankr.htm>>
- Russia (and other transition states) <<http://www.gtz.de/lexinfosys/>>
- UK Bankruptcy & Insolvency website <<http://www.insolvency.co.uk>>
- World Bank Insolvency Database (Canada, Romania, United States) <[http://www.worldbank.org/legal/legps\\_bank/Insolvency/index.html](http://www.worldbank.org/legal/legps_bank/Insolvency/index.html)>

#### D. LAW SCHOOL INTERNATIONAL LAW COLLECTIONS

- Cornell Law School <<http://www.law.cornell.edu/world/>>
- Harvard Law School <[http://www.law.harvard.edu/library/ref/ils\\_ref/annotated/index.htm](http://www.law.harvard.edu/library/ref/ils_ref/annotated/index.htm)>
- New York University School of Law <[http://www.law.nyu.edu/library/foreign\\_intl/](http://www.law.nyu.edu/library/foreign_intl/)>
- University of Southern California <<http://www.usc.edu/dept/law-lib/legal/intlaw.html>>
- Washburn University School of Law <<http://www.washlaw.edu/forint/forintmain.html>>

#### E. INTERNATIONAL ORGANIZATIONS

- Bank for International Settlements <<http://www.bis.org>>
- European Union <<http://europa.eu.int>>
- International Monetary Fund <<http://www.imf.org>>
- Organisation for Economic Co-operation and Development <<http://www.oecd.org>>
- United Nations <<http://www.un.org>>
- World Bank Group <<http://www.worldbank.org/>>
- World Trade Organization <<http://www.wto.org>>

#### F. INTERNATIONAL NEWS RESOURCES

- BBC World Service <<http://www.bbc.co.uk/worldservice/index.shtml>>
- CNN <<http://www.cnn.com>>
- Newspapers Online <<http://www.newspapers.com/country.htm>>
- Paperboy <<http://www.thepaperboy.com/>>