# THE NEW MEXICAN INSOLVENCY LAW: POLICY JUSTIFICATIONS FOR U.S. ASSISTANCE

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*In general, national insolvency laws in developing countries have failed to keep pace with the rapid expansion in worldwide trade and investment. Such outmoded legislation, lamentably, obstructs the rescue of financially troubled businesses, hinders the impartial and efficient administration of cross-border insolvencies, impedes the protection of the assets of the insolvent debtor against dissipation, and constitutes a disincentive to international investment due to the unpredictability with which cross-border insolvency cases are handled. In the case of Mexico, until recently insolvency issues were governed by an inflexible law enacted in the World War II era. While effective at the time of enactment, this law entitled Ley de Quiebras y Suspensión de Pagos (the "Old Law") seemed to deteriorate as the complexity of financial operations and the phenomena of globalization increased. Accordingly, Mexico found itself legally ill-equipped to adequately handle international insolvency issues.*

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*As a country whose economy depends to a large extent on foreign investment, Mexico decided to promulgate in May 2000 a new insolvency law entitled Ley de Concursos Mercantiles (the "New Law"). By doing so, the Mexican government has undeniably enhanced a legal regime that affects all nations engaged in transactions with Mexico, including the U.S.*

*After describing the major problems with Latin American legal systems in general, the principal flaws with the Old Law that have triggered a multiplicity of problems in Mexico since its inception nearly six decades ago, and the improvements to the Mexican insolvency system generated by the enactment of the New Law, this article sets forth a variety of public policy arguments in favor of U.S. support of the New Law. While recognizing the inherent limitations of a mere legislative modification in a system traditionally resistant to radical change, based on benefits that the New Law could potentially provide Mexico and every country with which it maintains commercial relations -- including the U.S. -- this article concludes that sound public policy dictates U.S. support of this recent initiative.*

## I. INTRODUCTION

> The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws have by and large not kept pace with this trend, and are often ill-equipped to deal with cases that involve cross-border ... approaches that hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation, and hidden maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment.[1]

Until recently, these words were highly applicable to Mexico, a country in which insolvency issues had been governed by an inflexible law enacted in the World War II era. While effective at the time of enactment, this law entitled *Ley de Quiebras y Suspensión de Pagos* (the "Old Law") deteriorated as the complexity of financial operations and the phenomena of globalization increased. Accordingly, like other Latin American countries with bankruptcy regimes predicated on ancient Roman law, Mexico found itself ill-equipped to adequately handle international insolvency issues.

The need to improve international bankruptcy systems is not a new idea. In fact, as early as the 1880s, commentators identified problems arising out of multinational insolvencies.[2] With regard to Latin

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[1] International Monetary Fund Legal Department, *Orderly and Effective Insolvency Procedures* (Aug. 2, 1999), *at* http://www.imf.org/external/pubs/ft/orderly/index.htm (last visited Apr., 2001).

[2] Charles A. Beckham, Jr. & Roberto Fernandez, *Cross Border Insolvency: The Bridge You Never Want to Cross*, NAFTA: L. & BUS. REV. AMS., Winter 1998, at 62. In 1888, John Lowell identified the logistical problem with insolvencies involving parties from diverse nations. He argued, in particular, that "[i]t is obvious that, in the present state of commerce and communication, it would be better in nine cases out of ten that all settlements of insolvent debtors with their creditors should be made in a single proceeding, and generally at a single place; better for the creditors, who would thus share alike, and better for the debtor, because all his creditors would be equally bound by his discharge." *Id.* (citing John Lowell, *Conflict of Laws As Applied to Assignments for Creditors*, 1 HARV. L. REV. 259, 264 (1888)).

America, the nations comprising this region have taken affirmative steps for over a century, adopting agreements that have yielded few positive results.[3] In light of these failed efforts, some experts have proposed the execution of international treaties or a massive harmonization of insolvency laws. Due to a multiplicity of reasons, however, such lofty aspirations appear unfeasible at this time, particularly in the North American Free Trade Agreement ("NAFTA") region. As one observer explains, "[h]armonization of business bankruptcy law in the NAFTA countries is at best a long-range proposition."[4] Aware of the significant impediments to multinational initiatives at this juncture, other legal experts reason that, irrespective of the inherent irony, the only way to progress on a larger scale is to introduce improvements on a national level. In the words of one commentator, "[e]fforts to harmonise the operation of conflicting insolvency systems by treaties have not been notably successful. It remains, then, for individual nations, motivated by the desire to promote international co-operation and to avoid wasteful duplication of effort, to establish unilateral procedures for the recognition of rights arising under foreign bankruptcy statutes."[5] Mexico, a country whose economy relies to a large extent on foreign investment, heeded such advice by promulgating a new insolvency law entitled *Ley de*

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[3] David C. Cook, *Prospects for a North American Bankruptcy Agreement*, 2 SW. J.L. & TRADE AM. 81, 96-97 (Spring 1995). In 1889, six Latin American countries adopted an international commercial pact, the Montevideo Treaty, that contained a chapter on bankruptcy. Later, in 1928, fifteen nations rejected the Montevideo Treaty because it failed to eradicate the discrimination against foreign creditors that it was designed to prevent and adopted the Bustamante Code. According to this author, the "history of international bankruptcy agreements is a bleak story of one failure after another.... The agreements in force do not prevent the unfair treatment of foreign creditors, nor do they unify all proceedings into one forum." *Id.* Consequently, this author argues that NAFTA nations work as a region, adopting the proposed North American Bankruptcy Agreement. *See id.*

[4] Jean Braucher, *Harmonizing the Business Bankruptcy Systems of Developed and Developing Nations: Some Issues*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 473, 473 (1997). This author maintains that harmonization of bankruptcy laws within the NAFTA region is unfeasible in the near future because of distinctions between the member-countries on both economic and political issues, the latter being paramount: "[I]f harmonization is to occur, for example in the NAFTA countries or in Europe, difficult political actions will be necessary; economics will not be destiny by means of the invisible hand...." *Id.* at 475.

[5] Douglass G. Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 INT'L & COMP. L.Q. 729, 729 (1987).

*Concursos Mercantiles* (the "New Law") in May 2000. By doing so, the Mexican government has undeniably enhanced a legal regime that affects all nations engaged in transactions with Mexico, including the U.S.

Although the enactment of the New Law is merely one step in a potentially arduous process,[6] it demonstrates Mexico's eagerness to confront the inevitable challenges associated with opening a country's economy to outsiders. Due to its traditional protectionist policies, Mexico has not been obligated to enact a comprehensive law addressing cross-border insolvency. However, with its increased exposure to foreign investment, Mexico's "need for updated, efficient means for dealing with secured credit and multi-national insolvency is clear."[7]

The U.S. has been willing to assist Mexico with, among other things, economic and judicial reform. The U.S. Department of State, for instance, announced that since such reform "can only strengthen bilateral ties and improve cooperation," the U.S. is prepared to offer appropriate assistance to Mexico "if requested."[8] In light of the intricate relationships within NAFTA and the potential benefits for all nations in this region, adoption of the New Law merits external support, including support from the U.S.

This article proposes justifications for U.S. support of Mexico's new legal initiative. The first section briefly describes the major problems with Latin American legal systems in general, as well as addressing specific difficulties with insolvency regimes in the region. The second section provides a succinct description of the Old Law, followed by a detailed analysis of the principal flaws of the Old Law

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[6] Malcolm Rowat & José Astigarraga, Latin American Insolvency Systems: A Comparative Assessment 1, 7, 65 (World Bank Technical Paper No. 433, 1999) (acknowledging that many elements of a successful judicial reform are inextricably intertwined, the authors explain that "[i]nsolvency reform in a vacuum ... while better than nothing, is incomplete" and "[e]ffective solutions for a business in financial crisis depend on a system, not simply a law.").

[7] John A. Barrett, Jr., *Mexican Insolvency Law*, 7 PACE INT'L L. REV. 431, 462 (1995).

[8] BUREAU OF INTER-AMERICAN AFFAIRS, FACT SHEET: WORKING WITH MEXICO, BUILDING AMERICA'S FUTURE (Apr. 15, 1997), *at* http://www.state.gov/www/regions/wha/work_with_mexico_fs_0497.html (last visited Mar. 5, 2001).

that triggered a multiplicity of problems beginning from its inception nearly six decades ago. Next, in the third section, several aspects of the New Law are evaluated, including initial obstacles to its enactment, the improvements to the Mexican insolvency system, criticisms of certain controversial provisions, and specific examples of the potential effectiveness of the New Law. The fourth section sets forth a variety of public policy arguments in favor of U.S. support of the New Law. While recognizing the inherent limitations of a mere legislative modification in a system traditionally resistant to radical change, this article concludes that sound public policy essentially requires U.S. support of this recent initiative. The New Law could potentially provide benefits to Mexico and every country with which it maintains commercial relations.

## II. DEFICIENCIES IN LATIN AMERICAN LEGAL SYSTEMS

Historically, legal systems in Latin America have been criticized for numerous reasons. For instance, according to one expert, the legal institutions in this region are "too congested, too poor, too corrupt and, in general, too incapable of adequately performing the functions for which they exist."[9] Others suggest that these systems are characterized by uncertainty derived from the ambiguity of the laws and the unpredictable behavior of the judges.[10] Additionally, it is argued that certain problems are endemic of legal systems throughout Latin America, including inadequate resources to support courts and judges, inefficient dispute resolution procedures, political judicial

[9] Guy P. Pfeffermann, The Way Ahead: Economic Reform in Latin America, Address at the Center for Global Energy Studies Second Latin American Conference (Mar. 4, 1998). The speaker, Mr. Pfeffermann, is the chief economist of the International Finance Corporation.

[10] U.S. Ambassador Jeffrey Davidow, The Law and Demands of an Interdependent Economic System: An Assessment, Address at the Georgetown Law Center (Oct. 16, 1998), *at* http://www.usembassy-mexico.gov/et981016Gtwn.html. Davidow explained that some experts argue, "an inefficient legal system is the most important source of underdevelopment in the Third World." *Id.*

appointments and promotional opportunities which result in unsuitable judges, and biased decisions due to external influences.[11] In addition to these shortcomings, observers have identified other problematic areas: a noticeable deprofessionalization due to the appointment of unqualified friends by large political parties, the replacement of judges and officials at the outset of each new presidential administration, the virtual absence of specialized judicial training programs, and a resistance to reforming "archaic legislations which are unfit to adapt to modern times."[12] As a result of these problems, legal systems in Latin America suffer from extremely low public confidence. In fact, surveys reveal widespread dissatisfaction with the legal system in general, as well as specific complaints regarding corruption, trafficking of influences, excessive formalism, inaccessibility, and sluggishness.[13]

These problems have affected all aspects of the legal system, including bankruptcy issues. Nevertheless, with the advent of the modern global economy, Latin American countries have realized that a change, especially with regard to bankruptcy regimes, is necessary. In the words of one author, "[i]n a globalizing economy with acute needs for capital investment, a national government could reasonably conclude that the allocation of rights made years ago by now antiquated bankruptcy laws is not serving the national interest."[14] Other observers concur, explaining that with the spread of globalization and the increasing incidence of international bankruptcies, "[i]t has become apparent that traditional legal doctrines and procedures are inadequate to the task of managing a general

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[11] *Id.*

[12] Linn Hammergren, USAID Ctr. for Democracy and Governance, Fifteen Years of Judicial Reform in Latin America: Where We Are and Why We Haven't Made More Progress (1999), at 14 (unpublished paper, *available at* http://darkwing.uoregon.edu/~caguirre/hammergrenpr.html (last visited Aug. 8, 2000)). The author suggests that, traditionally, the judiciaries in the region have been either manipulated or ignored by the powerful. Consequently, in the absence of a politically or financially influential clientele, the courts have been converted into "nests of secondary vested interests relying on survival strategies that range from intentional irrelevance to abject subservience to the power holders of the day." *Id.*

[13] *Id.*

[14] Rowat & Astigarraga, *supra* note 6, at 45.

default across national borders."[15]

To rectify these problems, many countries, including Mexico, have recently introduced judicial reform. Such changes, according to experts, are imperative to a country's very survival and do not constitute a short-term strategy. On the contrary, it is argued that judicial reform in Latin America "is more than a fad: it is a critical effort indispensable to establishing the rule of law and consolidating the democratic system which is, in turn, fundamental to an efficient market and growth with equity."[16] Specialists with international organizations explain that local leaders are acutely aware of the need to create effective judicial institutions, a situation evidenced by the fact that in virtually every Latin American country, leaders have openly expressed their concern about the importance of strengthening their respective judicial systems.[17] Notwithstanding this preoccupation, the actors dedicated to implementing judicial reform in the region are often frustrated for several reasons. For example, the multiplicity of participants and the bureaucracy involved in introducing significant changes tend to impede the process.[18] Furthermore, irrespective of the official position on legal reformation, the approach to judicial reform in most Latin American countries has traditionally been "mechanistic," adopting measures previously utilized in Europe or the U.S. for isolated problems. This technique, lamentably, has yielded minimal impact because "[n]ew codes when enacted were never fully put into practice [and] compliance with their

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[15] TRANSNATIONAL INSOLVENCY PROJECT: PRINCIPLES OF COOPERATION IN TRANSNATIONAL BANKRUPTCY CASES AMONG MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT 1 (Am. Law Inst., Council Draft, Nov. 24, 1999).

[16] Christina Biebsheimer, *At the Front Line of Judicial Reform*, IDB AMERICA (Jan.-Feb. 1999), *at* http://www.iadb.org/exr/IDB/stories/1998/eng/cont.html.

[17] Thomas Mack McLarty, *Judicial Reform: A Kitchen Table Issue*, IDB AMERICA (Jan.-Feb. 1998), *at* http://iadb.org/exr/IDB/stories/1998/eng/e598d.html.

[18] Paul Constance, *Cleaning Up the Courts - Judicial Independence Called a Key Challenge*, IDB AMERICA (May-June 1998), *at* http://iadb.org/exr/IDB/stories/1998/eng/e598f2.html. According to the author, "[p]oliticians, lawyers and jurists trying to reform Latin America's national judicial systems often voice frustration over how slowly the process is moving forward." *Id.* However, the U.S. Attorney General Janet Reno opines to the contrary, stating that she has been impressed by the "tremendous and enthusiastic commitment to making fundamental, sometimes controversial, changes in legal structures in order to improve the performance, efficiency and basic fairness of judicial systems." *Id.*

mandates was often merely formalistic or symbolic."[19]

Like that of the majority of countries in the region, Mexico's legal system, especially in terms of insolvency proceedings, has undergone serious scrutiny. For example, observers argue that due to the fact that "Mexico's legal system is often inadequate and ineffective at handling complex bankruptcy cases," the majority of debt crises are resolved in an extra-judicial manner. Although such out-of-court arrangements are common in many countries, the results in Mexico have been markedly unjust because of the dominance of powerful Mexican banks.[20] As one experts explains it, "[t]hese banks are often able to exploit the workout process to negotiate favorable terms for themselves, leaving the growing number of foreign investors with little or no recovery."[21] To halt criticisms that would, inter alia, discourage foreign entities and investors from dealing with Mexico, this country's leaders believed it imperative to enact a new insolvency law. In the eyes of one observer, such legislative change was virtually inevitable due to certain factors. It is suggested, in particular, that "[a] more dynamic Mexican economy, immersed in the frenzy of economic globalization, demands a better bankruptcy law.... Nowadays, the country is also constantly influenced, molded and challenged by the influx of foreign creditors and investors, in many instances exposed to very elaborated, refined and fully enforced local bodies of bankruptcy law. These two factors combined are perhaps the most powerful driving forces behind the proposed [New Law]."[22]

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[19] Hammergren, *supra* note 12, at 5.

[20] Kimberly D. Krawiec, *Corporate Debt Restructurings in Mexico: For Foreign Creditors, Insolvency Law Is Only Half the Story*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 481, 481 (1997). This author suggests that a true understanding of a nation's insolvency system may only be accomplished by examining the relevant legislation, as well as the informal methods and customs used locally. *Id.* According to Krawiec, "[t]his is particularly true in Mexico" as a result of the recession in 1994 and the inadequacies of the Old Law. *Id.*

[21] *Id.*

[22] Francisco Romero, The New Proposed Mexican Bankruptcy Law, Paper Presented at the American Bankruptcy Institute 2000 Spring Meeting (Apr. 29, 2000).

## III. BANKRUPTCY IN MEXICO -- THE OLD LAW

Although the focus of this article is the New Law, a brief examination of the Old Law is important for two main reasons. First, the Old Law is still applicable to both bankruptcy cases filed prior to May 2000[23] and to those cases involving merchants with debts lower than approximately $175,000.[24] Second, in order to appreciate the magnitude of the improvements contained in the New Law, it is beneficial to utilize the Old Law as a point of reference. Accordingly, the following section provides a brief description of the major aspects of the Old Law, as well as an analysis of the most significant problems derived from the use of this legal instrument during the last six decades.

### *A. Description of the Old Law*

Enacted in 1943, the Old Law encompasses all merchants (corporate or individual) and has specific provisions for credit institutions, public corporations and insurance companies.[25] The two major insolvency proceedings contemplated in the Old Law are *suspensión de pagos* (Suspension of Payments) and *quiebra* (Bankruptcy). Jurisdiction over these cases is shared by state and federal courts, although neither has a particular expertise in the area of insolvency.

The bankruptcy provisions of the Old Law are similar to those of Chapter 7 of the U.S. Bankruptcy Code, pursuant to which a bankruptcy procedure may be initiated voluntarily by the debtor or

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[23] LEY DE CONCURSOS MERCANTILES [L.C.M.], transitory provision 5 (Mex.).

[24] *Id.* art. 5. This article establishes that "small businesses" shall only be declared insolvent if they voluntarily submit themselves, by means of a written petition, to the New Law. For purposes of the New Law, the term "small business" means those with debts lower than 400,000 Investment Units (approximately U.S. $ 175,000) at the time of application. *Id.*

[25] *Id.* arts. 430-56.

involuntarily by the creditors if the debtor has ceased paying its obligations.[26] If the judge declares the debtor bankrupt after reviewing the proper documentation, such judgment is personally delivered to the debtor, known creditors, and the attorney general. Moreover, in order to inform any unknown interested parties, the declaration is published on multiple occasions in the *Diario Oficial* (Federal Register) and two major newspapers.[27] Thereafter, the judge appoints a *síndico* (trustee) from the Chamber of Commerce and Industry of which the debtor is a member. The duties of such trustee include taking possession of the company and its assets, preparing inventories and balance statements, examining the books and documents of the debtor, establishing a provisional list of creditors, avoiding certain fraudulent or preferential transfers, and submitting a detailed report to the judge.[28] Based on the information provided by the trustee, a bankruptcy may be classified in one of three ways: accidental, culpable, and fraudulent.[29] This categorization is important in determining potential criminal liability.[30]

For their part, the creditors must submit claims to the court within a time frame established by the judge, usually 45 days. Once acknowledged, the creditors convene the creditors meeting, during which, among other things, priority of claims is established and an intervenor is appointed by the court to protect the rights of such

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[26] *Id.* arts. 2(I) and (II). A debtor is presumed bankrupt if there is a general default in the payment of current and outstanding monetary obligations or the assets of the debtor upon which to levy execution are insufficient to cover breach of an obligation or enforcement of a judgment. *Id.*

[27] *Id.* art. 16.

[28] *Id.* art. 46.

[29] *Id.* arts. 92, 93, 96. A bankruptcy is considered "accidental" when the company has been managed properly and encounters misfortune fortuitously or by circumstances beyond the control of the company's management; a bankruptcy is deemed "culpable" when the debtor has caused, increased or worsened the state of nonpayment to creditors due to imprudent acts including excessive personal expenses and disproportionate losses due to securities speculation; a bankruptcy is deemed "fraudulent" if the debtor absconds with all or part of the assets, fraudulently commits acts designed to decrease assets, fails to keep adequate records, or favors a particular creditor by payment, guarantee or preference. *Id.*

[30] *Id.* art. 95. Article 95 establishes 1 to 4 years of prison for a "culpable" bankruptcy, while article 99 requires 5 to 10 years for a "fraudulent" bankruptcy. *Id.*

creditors.[31] Upon declaring bankruptcy, virtually all the debtor's property forms part of the bankruptcy estate. Additionally, the court imposes an automatic stay to prevent creditors from attempting to collect from the debtor. This stay, however, is more limited than the automatic stay provided under the U.S. Bankruptcy Code because certain claims against the debtors may continue, including mortgage foreclosures, and employment and tax claims pending outside the bankruptcy proceeding. Bankruptcy ends when (1) payment to the creditors in whole or in part is made through full liquidation of assets, (2) the court determines that there are insufficient assets to pay the costs of administration, or (3) the creditors reach an agreement.

Similar to Chapter 11 of the U.S. Bankruptcy Code, Suspension of Payments under the Old Law allows the debtor and creditors to reach a "preventive agreement" that suspends the payment of obligations to allow the debtor to regroup while continuing to operate as an ongoing concern. However, unlike under Chapter 11, the Suspension merely creates a period during which the debtor is excused from paying its obligations. The debtor rearranges the time and amount of payment, but is not required to restructure its business operations to be more effective in the future. With a few exceptions, virtually any merchant can apply for a Suspension.[32] The preventive agreement proposed by the debtor must be approved by the creditors and the court, a process which can take between 12 and 36 months. This proposed agreement might include a delay of payments over a three-year period, a discount of claims by up to 60%, and a general suspension of all prior claims against the debtor.[33] Unlike in the Bankruptcy scenario, here the debtor maintains administration of its business under the supervision of a court-appointed trustee, but may not perform acts that increase the company's liabilities or reduce the company's assets beyond its "ordinary management."[34] The conclusion of a Suspension of

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[31] *Id.* art. 60.

[32] *Id.* art. 396. A debtor may not request a Suspension of Payments if (1) it or its directors have been convicted of property or fraud-related crimes, (2) it has defaulted on a prior reorganization plan, (3) it had previously declared bankruptcy and had not rehabilitated itself, (4) it fails to produce all documents required by law, or (5) it is a joint venture. *Id.*

[33] *Id.* art. 403.

[34] *Id.* art. 411.

Payments occurs when the debtor (1) is declared bankrupt, (2) satisfies its debts in accordance with the preventive agreement, or (3) improves its financial condition to the point that it can repay its debts as they become due.[35]

### *B. Major Problematic Aspects of the Old Law*

According to some experts who attempt to minimize the inadequacies of the Old Law, the recent problematic areas of this legislation are not insurmountable because "[c]areful planning can alleviate some of the problems encountered in cross-border insolvency matters [and] the border simply adds a little salsa to the stresses and strains of enforcing rights and collecting debts along the border."[36] This minority viewpoint, however, is clearly outweighed by the shortcomings of the Old Law identified by legal commentators, both in the U.S. and Mexico. As previously stated, since its inception nearly six decades ago, the Old Law has been the target of substantial criticism. In light of this abundant reproach, only the most common concerns regarding the Old Law are examined below.[37]

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[35] The Suspension of Payments may be converted into a Bankruptcy proceeding by the judge if the debtor (1) does not comply with the terms of the preventive agreement, § 401, (2) grants, pledges, or mortgages property of the company, or commits acts that surpass ordinary administration, § 411, (3) the creditors reject the proposed preventive agreement by the requisite majority, § 419, or (4) the judge does not approve the preventive agreement, § 420

[36] Beckham & Fernandez, *supra* note 2, at 73. *See also* Agustín Berdeja-Prieto, *Debt Collection and Business Insolvency: A Review of the Mexican Legal System*, 25 U. MIAMI INTER-AM. L. REV. 227, 250 (1994). While acknowledging some of the problems that have historically plagued the bankruptcy system in Mexico, a handful of experts have defended the adequacy of the Old Law. For instance, in the opinion of Berdeja-Prieto, Mexico's judicial system needs reform to expedite the administration of justice. *Id.* It is reassuring, however, that "*Mexican laws can and will protect collateral before and during insolvency proceedings.* Managing, rather than avoiding, risk must be the goal of lending or investing. *Mexico's system provides the lender and the investor that requisite degree of certainty and meets the standards of the world's advanced legal systems.*" *Id.* (emphasis added).

[37] Press Release, Amnesty International, Mexico: Urgent Need for New Direction and Judicial Reform, AMR 41/04/99 (Mar. 8, 1999) (on file with author). Although this article focuses strictly on the Mexican judicial system as applied to insolvency laws, demands for reform in many areas have been uttered. For example, a recent study by Amnesty

First, creditors believed that under the Old Law they received inadequate protection. As a result, they refused to lend money to risky companies on the verge of bankruptcy that desperately needed the funding in order to prevent total commercial failure. The creditors' distrust of the insolvency legislation created, in essence, a financial Catch-22 that served to undermine the financial system in Mexico. According to representatives of the Mexican Treasury Department, in order to create jobs, merchants need loans. The banks, however, refuse to make loans until they have confidence in the legal system.[38] Similar observations have been made in reports by predominate legal institutions. They explain, in particular, that in Mexico "most cases end in liquidation because the debtor is not considered as a subject of credit by possible lenders. In general terms, lenders do not want to send good money after bad. Even the shareholders prefer not to invest any monies in the bankrupt companies. This is the basis for the saying that in Mexico 'there are wealthy businessmen but poor companies.'"[39] This vicious cycle exacerbated by the inadequacy of the Old Law caused creditors to protect their financial interests to such an extent that it essentially paralyzed business, thereby leading to what some legal experts categorize as "absurdities."[40]

Second, in light of the historic ineffectiveness of the Old Law, debtors tended to intentionally abuse the system to create stronger bargaining positions or deplete assets in a deceitful manner. For

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International titled *Mexico: The Shadow of Impunity* suggests that torture, extrajudicial executions, disappearances, and arbitrary detentions are rampant in this country. Accordingly, the report criticizes the deficiencies in Mexico's legal system for handling, among other things, human rights cases and argues that "[k]ey judicial reforms and a clear change of direction by the Mexican government are urgently needed to avert further worsening of an already critical human rights situation...."

[38] Antonio Castellaños, *La Ley de Concursos Mercantiles haría fluir el crédito a bajo costo*, LA JORNADA (Mex.), Dec. 1999, *at* http://www.jornada.unam.mx/1999/dic99/991206/eco4.html. *See also La Ley de Concursos es equitativa*, LA CRÓNICA (Mex.), Dec. 6, 1999, *at* http://www.cronica.com..mx/cronica/1999/dec/6/ (last visited Mar. 5, 2001).

[39] INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW (Amer. Law. Inst., Council Draft No. 1, Dec. 1, 1997).

[40] Chris Humphrey, *Laws to Enforce a Payment Culture*, 118 LATIN FIN. 32, 32 (2000). In the opinion of Luis Manuel Meján, legal advisor to the Mexican Bankers Association, under the Old Law, "a small business wanting to use new equipment purchased with a loan as a loan guarantee would have to actually leave the machine itself with the bank or a third party. *This was completely absurd.*" *Id.* (emphasis added).

example, according to experts at the World Bank, "[t]he reality seems to be that debtors have been able to use the *suspensión* proceedings to effectively delay creditors, while sapping virtually all value out of the estate. Even secured creditors regularly accept discounts far below the value of their collateral in recognition of the delay and deterioration in value that are likely to ensue if the court process were to play itself out."[41] Likewise, this observation has been made by the Mexican government. Among other problems with the Old Law, the Minister of the Treasury Department has publicly recognized that the debtor is aware of the excessive negotiating power conferred to it pursuant to the Old Law, which leads to flagrant abuses.[42] As a result of this disparity in bargaining power and recurrent abuses, creditors subject to the Old Law commonly opted to resolve their disputes in an extra-judicial manner, thereby relinquishing what little legal protection they may have enjoyed.[43]

The inefficiency of the insolvency system constitutes the third major problem under the Old Law. It is undeniable that resolving a case under the Old Law was extremely slow, usually lasting between three and five years. While beneficial to struggling debtors, such delays were highly detrimental to creditors for numerous reasons. For instance, the delays by the representative in selling the debtor's assets led to diminished values and inconsistency.[44] The inefficacy of the

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[41] Rowat & Astigarraga, *supra* note 6, at 73.

[42] Melchor Sanchez & Maria Isabel, *El proyecto de Ley de Concursos Mercantiles fijará siete meses para reestructurar deudas*, LA CRÓNICA (Mex.), Sept. 29, 1999, *at* http://www.cronica.com.mx/cronica/1999/sep/29/ (last visited July 31, 2000). Along with the potential for abuse by debtors, the Treasury Department also acknowledged additional problems with the Old Law, including (1) limited participation by creditors, (2) failure to recognize and account for significant difference among creditors, (3) excessively administrative and financial discretion granted to the judges, and (4) inadequate supervision of the trustees. *Id.*

[43] Alberto Rocha, *Listo, el Anteproyecto de Ley de Concursos Mercantiles: Rocha Diaz*, EXCELSIOR (Mex.), Oct. 5, 1999, *at* http://www.excelsior.com.mx/9910/991005/nac41.html (last visited July 31, 2000).

[44] Jaime Rene Guerra, *Mexican Insolvency Law: Qué Pasará?*, 7 U.S. MEXICO L.J. 151, 151, 154 (1999) (urging the adoption of specific time constraints under the Old Law, the author explains that while the representatives attempt to sell the debtor's assets as quickly as possible in a bankruptcy procedure, "there are no concrete time-lines in place which thereby allows for a wide range of fluctuation, detracting from any efforts of the courts to develop and attain consistency.").

system was so apparent that, according to a leading Mexican attorney, under the Old Law, the Suspension of Payments was considered "the great *chicana*," which is Mexican slang for malevolent delay tactics used in a legal setting. Pursuant to the Old Law, (1) the procedure could be prolonged for enormous periods of time, (2) no interest accrued on debts during the suspension, and (3) all debts were converted into *pesos* at the start of process, thereby subjecting claims to the volatility of the currency market. As a result of this situation, there was a scarcity of available credit and moribund businesses in Suspension were able to compete at an advantage against solvent and relatively efficient companies.[45] Moreover, creditors often decided to make economically questionable deals with debtors in order to avoid the fierce fluctuations of the *peso*. During inflationary periods, for example, "creditors prefer to make an agreement with the debtor in order to recoup part of their credits in the short term than to wait until the bankruptcy is over."[46]

Fourth, under the Old Law and former presidential administrations, the courts tended to favor failing businesses over creditors, thereby creating a "culture of non-payment."[47] In an attempt to avoid negative repercussions for both debtors and banks, amid the *peso* crisis in Mexico in 1994, the government and private sector introduced a joint program known as *Unidad Coordinadora del Acuerdo Bancario Empresarial* ("Coordinating Unit for the Banking and Business Agreement") whereby the affected parties met to design a mutually satisfactory restructuring of the companies' debts so as to avoid the adverse consequences of either a Bankruptcy or Suspension of Payments.[48] This type of governmental desire to protect the local

[45] José María Abascal, *Mexico: New Commercial Insolvency Law*, 7 INTER-AM. TRADE REP. 1839, 1840 (2000).

[46] KPMG PEAT MARWICK, INTERNATIONAL INSOLVENCY PROCEDURES 231, 233 (1988).

[47] Humphrey, *supra* note 40, at 32. To have a successful bankruptcy regime and economy, one Mexican expert argues that Mexico must eradicate "a culture of non-payment" that originated in *peso* crisis, when interest rates rose and many Mexicans simply stopped paying their loans. *Id.* Under the debilities of the Old Law and other political pressures, the creditors were left virtually unprotected, legally and otherwise: "To their surprise and horror of the banks, the courts sided with the borrowers." *Id.*

[48] INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW, *supra* note 39, at 16.

banks and debtors is common in developing countries.[49] Benevolent intentions notwithstanding, this program served to undermine the already ineffective Old Law. In the opinion of experts from the World Bank, the subsidizing of various entities by the Mexican government created a "rescue culture" that, in effect, dissuaded banks from working within legal boundaries. In other words, "the Mexican banking industry was not too interested in entering into workout agreements with troubled borrowers, because they believe[d] that ultimately the government [would] bail them out."[50]

Corruption, an unfortunate occurrence in many legal systems, constitutes the fifth significant problem encountered with the Old Law.[51] As mentioned above, under the Old Law, the role of trustee was supposed to be assigned to the Chamber of Commerce and Industry to which the debtor belongs or to a bank designated by the Treasury Department. In practice, however, these entities rarely accepted the appointments, which generated "the questionable practice of the debtors trying to influence the choice of *síndico*."[52] Furthermore, when the proceedings were handled by regular state and federal courts instead of specialized bankruptcy tribunals, influence peddling was prosaic. According to a report by one legal institution, it was "common practice to appoint politically well-connected persons to the bench, which immediately -- and adversely -- reflected on the quality and impartiality of the courts' decisions."[53] While experts did not categorize the corruption under the Old Law as overwhelming, it was pervasive in certain areas. As one expert describes it, "[t]he sense is not that organized crime is somehow endemic in the system, but that

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[49] Braucher, *supra* note 4, at 475-76 (explaining that developing nations struggling to promote formation of businesses are particularly concerned about protecting existing companies. Simply stated, "[e]very business preserved is one less that needs to be created. Developed nations in economic crisis are also likely to make the choice to bend over backwards to protect existing enterprises.").

[50] Rowat & Astigarraga, *supra* note 6, at 65.

[51] Craig P. Gaumer, *Policing the Bankruptcy System: An Informal Statistical Analysis of U.S. Bankruptcy Fraud Prosecutions*, AM. BANKR. INST. J., Feb. 2000, at 6, *available at* http://www.abiworld.org/abidata/online/journaltext/00febaffair.html (last visited Aug. 28, 2000).

[52] INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW, *supra* note 39, at 30.

[53] *Id.* at 7.

a core group of players control the field and exact kick-backs and bribes in exchange for favorable treatment." [54]

Sixth, the excessive formalism required under the Old Law led to unfortunate results. For instance, in many cases, a claim could be completely disregarded for failing to comply with one minor procedural formality. According to one study, "[t]he Mexican legal system is extremely formalistic in procedural matters [and] a case may be won or lost for exclusively procedural reasons."[55] Other observers have been less diplomatic in their assessments of the Old Law, labeling it "an attack weapon used by unscrupulous debtors to extract concessions from creditors" and "the worst law that has ever been enacted in the history of Mexico" because, among other things, it is so formalistic that even a technical deficiency or minor defect can adversely affect substantive rights.[56]

Another criticism of the Old Law centers on criminal liability for insolvency matters. As mentioned earlier, "culpable" or "fraudulent" bankruptcy exposes the debtor to monetary sanctions and potential incarceration. This threat of criminal liability under the Old Law spawned two principal negative results. First, although it would be beneficial to all interested parties, few Mexican businesses voluntarily filed Bankruptcy or Suspension of Payment proceedings. This, according to experts, is not surprising because "criminal penalties and jail time often awaited the debtor and its officers."[57] Second, the threat of criminal sanctions thwarted the debtor's desire to cooperate at an early stage at which there was still a possibility of salvaging the struggling business. Aware of a debtor's trepidation and annoyed with the inefficacy of the Old Law, creditors utilized the threat of criminality as a sword. As experts explain it, "[t]o complicate the matter even more, as a result of creditors' frustration with the ineffectiveness of the Mexican insolvency system, creditors are beginning to use the criminal system to pressure debtors, in effect

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[54] Malcolm Rowat, *Reforming Insolvency Systems in Latin America*, THE WORLD BANK GROUP, June 1999, at 2.

[55] INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW, *supra* note 39, at 44.

[56] Rowat & Astigarraga, *supra* note 6, at 65.

[57] Beckam & Fernandez, *supra* note 2, at 58.

criminalizing the bankruptcy remedy."[58] A recent example of the power of potential criminal liability occurred in February 2000 when *Transportes Aéreos Ejecutivos* (TAESA), the third-largest airline in Mexico, declared bankruptcy. Upon such declaration, the court impeded Alberto Abed, the owner of TAESA, from leaving the country until fraud had been ruled out.[59]

Eighth, the Old Law was subjected to criticism for its favoritism of labor-related claims, a bias characteristic of the entire Mexican judicial structure. In the words of commentators, "[t]he Mexican legal system is extremely protective of the rights of workers."[60] According to the Old Law and Article 113 of the Federal Labor Law of Mexico, the salaries for the year immediately preceding the insolvency and severance payments to workers have priority over any creditor. Moreover, these employment claims may proceed even after the bankruptcy petition is filed. This degree of preferential treatment, experts argue, undermines the entire insolvency system because in the past "management has colluded with workers, cutting a deal so that through the use of labor's superiority, management and labor would wind up with assets, shortchanging other creditors."[61] In any insolvency procedure under the Old Law, the role of the workers is pivotal. On one hand, workers can seek legal refuge outside of the bankruptcy proceedings if they oppose the actions of the company, thereby contravening any attempts to reorganize. In other words, "[t]hey will go ahead with their claims through the Labor Court and ... leave all other claimants -- even secured creditors -- with nothing." On the other hand, if the workers support management, they can use the threat of a strike and/or the initiation of a suit in the Labor Courts to force the creditors to negotiate reasonably.[62] In light of the leverage wielded by the Mexican workers under the Old Law, foreign investors

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[58] Rowat & Astigarraga, *supra* note 6, at 68. According to these commentators, under the Old Law, creditors used the criminal justice system to force debtors to arrive at a deal. Such an intimidation technique was quite effective since "one can always find something in the administration of the business that is prosecutable." *Id.* at 74.

[59] Miriam Pineda, *Quiebra TAESA: arraigarán a dueño,* REFORMA (Mex.), May 8, 2000, *at* http://www.reforma.com/nacional/articulo/006880.

[60] Beckham & Fernandez, *supra* note 2, at 56.

[61] Rowat & Astigarraga, *supra* note 6, at 69.

[62] *Id.* at 69-70.

were obligated to act cautiously to avoid driving a local business into insolvency.[63]

Ninth, the repetitiveness of various provisions of the Old Law wasted valuable resources and time. Under the Old Law, shortly after the submission of the debtor's petition, the acknowledgement of the creditors' phase commences. The main purpose of this stage is to accurately assess the amount of claims to which the debtor's estate is subject. Observers contend that this committee should be abolished because the redundancy of its tasks hinders the efficiency of the entire system. This argument is predicated on the fact that Mexican law requires that a merchant maintain updated records of all outstanding debts and current assets. Accordingly, reinitiating discussions about the validity and amount of claims among the creditors amid the insolvency procedure is "redundant and inefficient."[64] Instead of reopening the debate, observers suggest that the problem be eliminated in an anticipatory manner by imposing severe financial penalties on companies that fail to comply with the record-keeping provisions. In the words of one Mexican attorney, "[t]his step, if properly implemented, will undoubtedly save judicial resources and promote overall efficiency."[65]

Yet another problem with the Old Law is that the ambiguity of the provisions permitted abuses and misapplications of the Suspension of Payments mechanism. Such practices left the creditors with two bleak outcomes. In the best scenario, the creditor would receive a drastically reduced amount pursuant to an agreement with a debtor "who would

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[63] Charles A. Beckham & Scott W. Everett, Going South, Again: A Trip to Mexico on Mexico's New Bankruptcy and Insolvency Bus. Are You Going Over a Cliff or Is That a Sandy Beach Ahead?, Paper Presented at the National Conference of Bankruptcy Judges (Oct. 2000). The authors argue that the preferential treatment granted to the workers "places an additional dynamic on any party doing business with substantial assets in Mexico." *Id.* at 26. They advise, in particular, that a party doing business with a Mexican entity must compare the needs for payment versus the danger of forcing a Mexican business into bankruptcy in Mexico. Additionally, "[c]reditors must also hope that other creditors are similarly patient and wise. This ... is especially dangerous to a creditor who holds a lien upon assets located in Mexico." *Id.*

[64] Guerra, *supra* note 44, at 154.

[65] *Id.*

be in no hurry to reach one."[66] In the worst scenario, the creditor would suffer a complete loss over time as a result of (1) the devaluation of the *peso*, (2) a wasteful depletion of the debtor's assets, and/or (3) the non-accrual of interest during the proceeding. In view of these dreary outcomes, commercial creditors restructured agreements regularly to protect their interests, thereby limiting the availability of credit or making it prohibitively expensive. [67] Furthermore, in the absence of clear rules under the Old Law to prevent evasion of debts, the Mexican Bankers Association essentially refused to grant credit that involved any appreciable degree of risk.[68] In the words of one Mexican practitioner, the Old Law was, "in sum, a bad law that damaged the Mexican economy."[69]

According to Mexican jurists, the lack of a feasibility assessment of the debtor's reorganization plan is another weakness of the Old Law. The Suspension mechanism has rarely been successful due mainly to the difficulty of obtaining credit by insolvent businesses. In fact, studies reveal that in the last twenty years, only thirty companies have managed to restructure their insolvent businesses under the Old Law.[70] Based on these statistics, experts recommend that prior to commencing the lengthy suspension procedure, courts should first determine whether the merchant can realistically recuperate. To this end, representatives should conduct multiple economic assessments of

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[65] Abascal, *supra* note 45, at 1840.

[67] John Wilson Molina, The Model Inter-American Law on Secured Transactions, Paper Presented at the Southwest Legal Foundation Conference 41 (June 12, 2000). The author argues that the legal framework throughout Latin America and in Mexico "provides little flexibility to borrowers and lenders and few assurances in case of default. Consequently, creditors offset this risk by approving only low-risk debtors and charging higher interest rates for loans. These structural and procedural shortcomings coupled with outdated bankruptcy law greatly increase the risk to Latin creditors, making credit prohibitively expensive when available." *Id.*

[68] Yolanda Morales, *Carpetazo a las leyes de Quiebras y Garantias*, EL ECONOMISTA (Mex.), Nov. 10, 1999. According to the Mexican Bankers Association, "[i]n Mexico, there is no human or legal power that obligates a deliberately delinquent debtor to pay. There are always 'hiding places' when a good lawyer is involved." *Id.* Thus, until the New Law was enacted, the bankers threatened that they were "not going to loan money until the rules of the game are equitable for both the client that receives the loan and the bank that grants it." *Id*

[69] Abascal, *supra* note 45, at 1841.

[70] Guerra, *supra* note 44, at 154.

the business throughout the procedure in order to analyze the feasibility of rehabilitation. If "rejuvenation is not entirely possible," observers urge courts to expedite the procedure by declaring a bankruptcy.[71]

Finally, under the Old Law, and under previous presidential administrations that were far too intertwined to respect the concept of separation of powers, enforcement mechanisms proved to be ineffective. On this note, a recent World Bank study revealed that even if a judgment was granted under the Old Law, the probability of recovering was minimal due to the government's reluctance to jeopardize its position. In other words, "the executive branch at the state level had refused to lend the police power to execute judgments on account of political concerns over the impact that dispossessing a debtor or executing the judgment would have."[72]

## IV. BANKRUPTCY IN MEXICO -- THE NEW LAW

### *A. Obstacles to Enacting the New Law*

In the beginning, the New Law enjoyed widespread political support. In fact, prognosticators believed that it would be the first bill submitted to Congress with a consensus between the three major Mexican political parties (PAN -- *Partido Unidad Nacional*, PRI -- *Partido Revolucionario Institucional,* and PRD -- *Partido Revolucionario Democrático*),[73] and support from the Mexican Bankers Association along with several Chambers of Commerce.[74]

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[71] *Id.* at 155.

[72] Rowat & Astigarraga, *supra* note 6, at 65.

[73] Maribel Ramirez, *Finalmente ingresa al Congreso la Ley de Concursos Mercantiles*, EL ECONOMISTA (Mex.), Nov. 23, 1999.

[74] Carlos Villaseñor Prado, *Aprobación de la nueva Ley de Concursos Mercantiles: implicaciones para las empresas en general*, CÁMARA MEXICANA DE LA INDUSTRIA DE LA CONSTRUCCIÓN (Mex.), May 5, 2000. *See also* Isabel Becerril, *Fin a la cultura del no pago con la nueva ley mercantil*, EL FINANCIERO (Mex.), Aug. 1, 2000. The Business Council Coordinator of Mexico defended the New Law claiming that it would eliminate the culture of

Unfortunately, the original political unanimity evaporated and two parties, PAN and PRD, retracted their approval, stating that, "[t]he initiative is too extensive and we committed an error by approving it without ample time to review it completely."[75]

In justification of such retraction, several arguments in opposition to the bill were espoused. First, the exclusion of "small businesses" from Article 5 of the initial drafts of the New Law would have left this group virtually unprotected. According to the general secretary of the political party *El Barzón*, excepting small business from the protection of the New Law would "legalize a policy of seizure and within a few months a dismantling of the industrial sector will occur, thereby increasing unemployment even further to the detriment of the national productive sector."[76] Second, some considered the U.S. influence on bankruptcy reform too pervasive.[77] Third, it was unsuccessfully argued that the exclusive federal jurisdiction over insolvency cases (instead of state jurisdiction) violated Article 104 of the Constitution.[78] Fourth, detractors claimed that the New Law was merely "a bad copy of the North American legislation." Finally, the standard by which to declare bankruptcy, "general failure to meet obligations," was considered too broad to be feasible in Mexico.[79] Despite these

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non-payment and provide the economy with the continuity it needs to attract foreign capital. *Id.*

[75] Cristina Martinez, *Irá solo el PRI en la aprobación de la nueva Ley de Quiebras*, EL ECONOMISTA (Mex.), Dec. 1, 1999.

[76] Andrea Becerril & David Carrizales, *Votará el PAN contra la Ley de Concursos Mercantiles*, LA JORNADA (Mex.), Dec., 1999, *at* http://www.jornada.unam.mx/1999/dic99/991205/eco2.html (last visited July 31, 2000).

[77] Gerardo Flores, *Exigencia del TLC, Ley de Consursos Mercantiles*, EL FINANCIERO (Mex.), May 26, 2000. Although never substantiated, one official alleged that a Bank of America representative was present during the formal drafting and discussions of the law. *Id.*

[78] Boletín 715, *Es indispensable analizar la Ley de Quiebras sin premura: Senadores del PAN*, TRIBUNA (Mex.), Dec. 1, 1999, *at* http://www.pansenado.org.mx/Boletines/bole715.html (last visited July 1, 2001). *See also* Luis Santos de la Garza, *Vota el PAN contra la sietemesina Ley de Concursos Mercantiles*, TRIBUNA (Mex.), Dec. 7, 1999; Castro Lozano & Juan de Diós, *Defendemos a las micro, pequeñas, medianas y grandes empresas*, TRIBUNA (Mex.), Dec. 7, 1999.

[79] Carlos Sodi Serret, *Ley de Concursos Mercantiles: Justa Oposición del PAN*, EXCELSIOR (Mex.), Dec. 8, 1999, *at* http://www.excelsior.com.mx/9912/991208/art07.html (last visited Julu 1, 2001). *See also* Juan Antonio García Villa, *Objcciones a la nueva Ley de Concursos Mercantiles*, EL FINANCIERO (Mex.), Dec. 10, 1999, *at* http://www.pansenado.org.mx/articulos/villa96.htm (last visited July 31, 2000); Juan Antonio García Villa, *Monstruosidades*

criticisms, after numerous amendments to the original draft designed to address these initial criticisms, the New Law passed in February 2000.[80]

### *B. Description of the New Law*

Published in Mexican *Diario Oficial* on May 12, 2000, the New Law introduced multiple changes that will, according to many observers, substantially improve the Mexican insolvency system. For instance, the New Law creates the *Instituto Federal de Especialistas de Concursos Mercantiles* (the "Federal Institute of Insolvency Specialists"), a non-judicial body charged with the goal of separating strictly legal tasks from other aspects of an insolvency action.[81] The specialists in this group include the Visitors, Conciliators and Administrators, all of whom are specially chosen for their proven expertise in accounting, management, economics, or finance.[82]

The New Law also introduces a new insolvency mechanism, Conciliation, which complements the traditional Bankruptcy procedure. To prevent prolonged and frivolous litigation, the New

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*jurídicas*, EL FINANCIERO (Mex.), Dec. 17, 1999, *at* http://www.pansenado.org.mx/articulos/villa98.htm (last visited July 31, 2000). The outspoken and hyper-critical senator of PAN stated that "[a]s a human product, nobody can expect that the New Insolvency Law be perfect. No, that would be unfair. However, it is another thing to accept, although reluctantly, that a law plagued by errors, incongruencies and unconstitutional provisions be approved, promulgated and enacted." *See also* Mario Villar Borja, *Ley de Concursos Mercantiles*, LA JORNADA (Mex.), Dec. 22, 1999, *at* http://www.jornada.unam.mx/1999/dic99/991222/orient-vill.htm (last visited July 31, 2000).

[80] Press Bulletin 99/395, Senado de Mexico, Aprobada la Ley de Concursos Mercantiles, (Dec. 7, 1999). Over 40 "last-minute" changes were made prior to the passage of the New Law.

[81] Adolfo Ortega, *Aceleran trámites Ley de Concursos*, REFORMA (Mex.), Apr. 24, 2000, *at* http://www.reforma.com/negocios-y-dinero/articulo/004118/ (last visited Aug. 1, 2000). The enactment of New Law also required amending Article 88 of the *Ley Orgánica* to allow the creation of the Federal Institute of Insolvency Specialists.

[82] Press Bulletin 2000/050, Gobierno de Mexico, Fue Instalado el Instituto Federal de Especialistas de Concursos Mercantiles (June 8, 2000) (on file with author). *See also* Criterios de Selección y Actualización de los Especialistas de Concursos Mercantiles, Diaro Oficial de la Federación (México), July 12, 2000. This regulation sets forth the criteria upon which each of these actors is selected.

Law provides that a Visitor is immediately appointed upon the filing of an insolvency petition. This Visitor, among other things, rapidly assesses the financial situation of the debtor, recommends measures designed to safeguard the business and assets during the procedure, and assists the court in issuing a judgment.[83] Thereafter, provided that a Bankruptcy has not been declared, a period of Conciliation commences. Unlike under the Old Law, this 180-day stage, during which the parties attempt to reach an agreement regarding the reorganization and continuance of the debtor's business, will be stringently enforced to avoid unjust prolongation.[84]

Another improvement under the New Law is that, pursuant to Article 89, the filing of an insolvency petition automatically triggers the valuation of the creditor's credit in terms of *Unidades de Inversión* ("Investment Units"), thereby protecting against currency fluctuations. Introduced in April 1995, after the *peso* crisis that drastically damaged the Mexican economy, the Investment Units are accounting units designed to peg the commercial debts to a stable rate of *peso* inflation.[85]

If no agreement is reached within the Conciliation period, then Bankruptcy is declared. Similar to its predecessor, the New Law provides that during this period the Conciliator is replaced by an Administrator who, among other tasks, assumes control of the debtor's business, gathers all potential assets, distributes the available funds among the creditors, and terminates the business. Such termination can occur in three ways, including (1) payment of all debts, (2) judicial declaration that there are insufficient assets to be sold, and (3) an agreement between the debtor and its creditors.

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[83] Abascal, *supra* note 45, at 1842. According to Abascal, the court relies heavily on the evaluation conducted by the Visitor: "Observing essential rules of due process of law, but restricting unnecessary and time-consuming evidence and having the Visitor's report, the judge issues a judgment." *Id.*

[84] *Id.* One of the goals of the legislators was to minimize delays and to give debtors and creditors predictability regarding the time frame and final outcome of an insolvency proceeding. According to the author, "[t]he means chosen to impede the elapsing of an indeterminate period of time was to establish a definite period for Conciliation that must be strictly observed; and two exceptional, extraordinary periods; but, in any event, the Conciliation period may not be prolonged more than 365 calendar days." *Id.*

[85] Currently, one Investment Unit is equivalent to 2.78 Mexican *pesos* or $.36 U.S. dollars.

A further improvement under the New Law is the incorporation of the UNCITRAL Model Law on Transborder Insolvency (the "Model Law"), a group of procedural rules aimed at facilitating the expeditious and just resolution of insolvency disputes involving parties in multiple countries.[86] The decision to regulate international cooperation in insolvency cases has been enthusiastically embraced. The Old Law did not address this issue, a situation which has "caused enough headaches to foreign creditors in Mexico."[87] From the perspective of a foreign party, the inclusion of the Model Law is beneficial for numerous reasons, including that (1) all foreign representatives are granted standing before the Mexican bankruptcy courts, (2) the filing of a request by a foreign representative does not necessarily subject such representative or the assets of the businesses situated abroad to the jurisdiction of Mexican courts, (3) the rights of all creditors, foreign and Mexican alike, are identical, (4) parallel foreign insolvency proceedings may be recognized, either as principal or secondary, and (5) upon acknowledgment of the foreign proceedings, the Mexican court will introduce appropriate precautionary measures to protect the foreign creditor's interests in Mexico.[88]

### *C. Criticisms of the New Law*

As to be expected with any major legal modification, the New Law has been subjected to criticism on various issues. First, while acknowledging the value in expediting insolvency procedures, opponents claim that the time periods established by the New Law are actually too short. For example, pursuant to Article 50, the parties

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[86] L.C.M. § 278 (Mex.). The UNCITRAL provisions are applicable if (1) a foreign court or representative requests cooperation in Mexico concerning a foreign procedure, (2) a Mexican court requests cooperation in a foreign country with regard to a procedure under the New Law, (3) there exist two distinct procedures involving the same debtor before a foreign court and a Mexican court, or (4) foreign creditors desire to initiate or participate in any of the procedures under the New Law.

[87] Romero, *supra* note 22, at 25.

[88] L.C.M. §§ 286, 287, 290, 292, 298 (Mex.).

have only nine days to submit an appeal, a deadline often difficult to meet in a legal system characterized by endless bureaucratic obstacles.[89] Second, critics have questioned several aspects of the Federal Institute of Insolvency Specialists. Doubts have arisen, for instance, regarding the authority delegated to the Visitors. According to one detractor, the New Law "creates this new officer and grants him/her tremendous power, even though it only intervenes in the trial for a very short period of time. His/her decisions, however, will have a substantial impact in the outcome of trials. This is indeed a dangerous new player that the [New Law] is bringing into the already complex and multi-party bankruptcy trial."[90] Questions have also been directed toward the Visitor's discretionary powers regarding precautionary measures implemented by the judge.[91] Furthermore, since the New Law was enacted such a short time ago, critics claim that the professionalism of the principal agents of the Federal Institute of Insolvency Specialists (the Visitors, Conciliators and Administrators) is still merely speculative, a veritable "question mark."[92] Third, due to its pivotal role in organizing claims and providing a unified voice, the elimination of the creditors' committee has been labeled as one of the "major flaws" of the New Law.[93] In terms of multinational cases, some skeptics argue that the lack of a creditors' committee will generate a disjointed case administration in the sense that creditors in a foreign jurisdiction will be permitted to organize into committees, while creditors participating in a Mexican case may be required to defend their individual interests. To avoid such disparity, observers argue that the Mexican courts must adequately utilize the precautionary measures available under the New

[89] Romero, *supra* note 22, at 11 n.61. In the opinion of Romero, "[o]nce again, the term appears to be short. The parties need to analyze the judgment, prepare their arguments and submit their evidence, all in nine days.... If we take into account that dockets generally take between one and two months to get to the court of appeals, the parties have more time to prepare their briefs. Under the [New Law] everything has to be submitted before the district court, hence the parties have less time to prepare." *Id.*

[90] *Id.* at 5 n.23.

[91] *Id.* at 5 n.25.

[92] Humphrey, *supra* note 40, at 32. *But see* Adolfo Ortega, *Es Tendencia Mundial Apoyo a Concursales*, REFORMA (Mex.), July 14, 2000.

[93] Romero, *supra* note 22, at 4 n.22.

Law. To the contrary, the New Law may simply constitute "a filibuster for Mexican banks that might continue to show their mistrust of the Mexican courts' ability to protect their rights by continuing to restrict the public's access to credit."[94] Fourth, based on historic, sociological, and political reasons, the New Law still favors workers disproportionately.[95] Finally, while recognizing that the New Law represents a substantial improvement over the former system, some observers advocate even more drastic reforms. Otherwise, it is argued, the New Law "will just be another mediocre attempt to deal with insolvencies...."[96]

### *D. Evidence of the New Law's Effectiveness*

Notwithstanding the aforementioned criticisms of isolated provisions, the majority view is that the New Law will substantially improve the insolvency regime in Mexico. The potential effectiveness of the New Law is demonstrated by the sizable number of financially troubled businesses in Mexico that declared bankruptcy prior to May 2000 to seek shelter under the Old Law. For instance, major companies such as *Grupo Azucarero México* and *Transportes Aéreos Ejecutivos* (TAESA) submitted insolvency petitions in early 2000 in light of the expectation of increased rigidity under the New Law.[97]

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[94] Josefina Fernandez McEvoy, *Mexico's New Insolvency Act: Increasing Fairness and Efficiency in the Administration of Domestic and Cross-border Cases (Part I)*, AM. BANKR. INST. J., Aug. 2000, at 15 n.19.

[95] Ignacio Herrera, *Ninguna Norma Debe Aprobarse si Cancela o Daña el Empleo*, EXCELSIOR (Mex.), Dec. 11, 1999, *at* http://www.excelsior.com.mx/9912/991211/nac13.html (last visited Aug. 2, 2000).

[96] Romero, *supra* note 22, at 27.

[97] Miriam Pineda & Héctor Rendón, *Solicita GAM Suspensión de Pagos*, REFORMA (Mex.), May 9, 2000. *See also TAESA Waits Financial Relief*, AIRWISE NEWS, Feb. 12, 2000, *at* http://news.airwise.com/stories/2000/02/950385300.html (last visited Sept. 2, 2000). The third-largest airline in Mexico, Transporte Aéreo Ejecutivo, declared bankruptcy with debts of approximately $400 million and "no new investors in sight." *See also* Miriam Pineda, *Solicita TAESA suspensión de pagos*, REFORMA (Mex.), May 8, 2000, *at* http://www.reforma.com/nacional/articullo/006882/ (last visited Sept. 2, 2000); *Mexican Airline Files Bankruptcy*, AMARILLO GLOBE NEWS, Feb. 22, 2000, *at* http:www.amarillonet.com/stories/022200/bus_airlines.html (last visited Sept. 2, 2000).

Moreover, a multiplicity of bankruptcy practitioners in Mexico and the U.S. have praised the New Law, describing it as "good news for the Mexican business community and Mexico's economic development."[98] Finally, the New Law has been lauded within Mexican legal and political ambits as an instrument that will undoubtedly balance the interests of all the parties involved in the insolvency process.[99]

## V. POLICY REASONS FOR U.S. SUPPORT OF MEXICO

According to experts, an inadequate international insolvency system is detrimental to all parties involved, including, in this case, the U.S. and Mexico. It is argued, in particular, that "[d]ebtors, lenders, workers and other creditors alike get cheated by a dysfunctional system, as do ultimately, the taxpayers who must pay for higher social costs as well as higher credit costs caused by needless loss of value in the national economy."[100] Despite this, observers note that traditionally there has been little cooperation between countries in cross-border cases, "even though under the traditional international insolvency rules *everyone* loses in a multi-national insolvency."[101]

Assuming public policy entails disallowing actions that are contrary to the public good, injurious to the state, or prejudicial to mankind, then logically the converse must be valid. In other words, if the improvement of the Mexican insolvency system were beneficial to, among others, Mexico and the U.S., then sound public policy would dictate that the U.S. support such initiative.

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[98] Abascal, *supra* note 45, at 1840.

[99] Cristina Martinez, *Aprueba el Senado la Ley de Concursos Mercantiles*, EL ECONOMISTA (Mex.), Dec. 8, 1999 (comments made by Rosa Albina Garavito Elías, Senator for the PRD).

[100] Rowat & Astigarraga, *supra* note 6, at 13.

[101] E. Bruce Leonard, *The Way Ahead: Protocols in International Insolvency Cases*, AM. BANKR. INST. J., Dec. 1998, *available at* http.www.abiworld.org/abidata/online/journaltext/98decintol.html (last visited Aug. 28, 2000) (emphasis added).

### *A. Concordance with International and Regional Efforts*

For nearly two decades, national governments, civil organizations, and various external assistance agencies have attempted to assist the reformation of Latin American justice systems. With regard to multinational insolvency issues, notable initiatives have been undertaken by organizations such as the United Nations,[102] International Bar Association,[103] International Monetary Fund,[104] Practicing Law Institute,[105] Inter-American Development Bank,[106] World Bank,[107] Organization of American States,[108] and the American

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[102] Press Release, United Nations, Trade Law Commission Concludes Session, Adopting Model Law on Cross-Border Insolvency L/2831 (June 2, 1997) (on file with author). The United Nations Commission on International Trade Law (UNCITRAL) developed the Model Law on Cross-Border Insolvency. During discussions of this project, the group explained that "[t]he increasing incidence of insolvencies with a cross-border nature reflects the continuing global extension of trade and investment. When a debtor with assets in more than one State becomes bankrupt, *there is an urgent need for cross-border cooperation and coordination* in supervising and administering the debtor's assets and affairs." *Id.* (emphasis added).

[103] Model International Insolvency Cooperation Act (Int'l Bar Ass'n, Third Draft 1988).

[104] Press Release, International Monetary Fund, IMF Completes Mexico Review and Approves U.S. $1.2 Billion Credit, News Brief No. 00/17 (Mar. 17, 2000) (on file with author) (announcing the International Monetary Fund (IMF) recently congratulating Mexico for adhering to economic reforms that, in large part, avoided a turbulent transition to next presidential administration. Also, Eduardo Aninat, Deputy Managing Director of the IMF, praised bankruptcy reform in this country, stating that "[t]he proposed reforms to enhance bankruptcy procedures and enforcement of creditors' rights ... are critical, to strengthening further the banking system and for facilitating financial intermediation in the domestic economy.").

[105] *See, e.g.*, PRACTICING LAW INSTITUTE, INTERNATIONAL BANKRUPTCIES: DEVELOPING PRACTICAL STRATEGIES No. 628 (1992).

[106] Press Release NR-192/95, Inter-American Development Bank, Review of Latin American Judicial Reform to Be Held in Washington (Sept. 21, 1995) (on file with author). *See also* Press Release NR 193/95, Inter-American Development Bank, IDB Organizes Second Conference on Judicial Reform in Latin America (Sept. 26, 1995) (on file with author) (justifying the purpose of the conference, the IDB announced that it "is aware that the international capital flows and commerce are directly related to the existence of a judicial system that is independent, reliable, efficient and accessible."); Eduardo Fernández-Arias & Ricardo Hausmann, Getting It Right: What to Reform in International Financial Markets (Inter-American Dev. Bank, Working Paper No. 428, Aug. 2000). In the context of sovereign debt, the authors propose the formation of the International Bankruptcy Court.

[107] *See, e.g.*, Judicial Reform in Latin America and the Caribbean (World Bank Technical Paper No. 280, Malcom Rowat et al. eds. 1995).

Law Institute.[109] Although experts tend to agree that the Model Law introduced by the United Nations is the most important global development to date, the next logical step seems to be applying and strengthening these concepts on a regional level.[110]

The Transnational Insolvency Project spearheaded by the American Law Institute has the most relevance with regard to the NAFTA countries (Canada, Mexico and the U.S.). Throughout its five-year existence, efforts under this project have focused on developing general principles related to multinational insolvencies that may be applied throughout "this regional family."[111] Some of these general principles include (1) cooperation among the three nations with the goal of maximizing the value of the debtor's worldwide assets, (2) recognition of bankruptcies initiated in one NAFTA country throughout the region, (3) a free exchange of information since "[f]raud by debtors and creditors, or even simple evasion of domestic rules, cannot be prevented in transnational cases without full disclosure between courts and administrators," (4) sharing of value of debtor's assets on a worldwide basis, (5) granting national treatment to all claimants, and (6) making adjustments of distributions to prevent

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[108] Organization of American States, Convocation of the Sixth Inter-American Specialized Conference on Private International Law (June 7, 1996). Among other topics, the leaders at this international workshop recommended that the issue of international bankruptcy be addressed.

[109] E. Bruce Leonard, *The American Law Institute's Transnational Insolvency Project*, AM. BANKR. INST. J., Jan. 2000, *available at* http://www.abiworld.org/abidata/online/journaltext/99decintl.html (last visited Aug. 28, 2000). Started more than five years ago, the ALI insolvency project is predicated on a comparison of the bankruptcy regimes in the U.S., Canada, and Mexico, and establishes a statement of principles and guidelines for cooperation among these three countries in cross-border reorganizations and insolvencies.

[110] TRANSNATIONAL INSOLVENCY PROJECT, *supra* note 15, at 9. The authors of this project stated that "it seems likely that the next stage in the international reform will come at the regional level." *Id.* *See also* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, AM. BANKR. L.J., 1991, at 460 (alluding to the progress in the countries of the European Community, the author opines that "[a]t present the legal treatment of troubled multinationals is primitive and chaotic.... This deplorable situation increases the costs of all transnational business activity, and imposes on claimants against such enterprises serious burdens of expense, delay, and injustice. An amelioration of these difficulties *is essential to the progress of regional economic integration* and to a robust growth in transnational enterprise generally, but the obstacles are complex and intractable." (emphasis added)).

[111] TRANSNATIONAL INSOLVENCY PROJECT, *supra* note 15, at 28.

one creditor from obtaining a disproportionate share of the debtor's assets by using distribution in multiple countries.[112] One of the primary purposes of NAFTA is to promote trade and investment throughout the region, which naturally requires legal predictability in the case of insolvency. In the words of one expert, "[b]usiness decisions would be facilitated greatly if participants in the process knew in advance that transitional loans or multinational transactions ultimately would be subject to predictable administration in the event of insolvency." [113] As explained in detail above, the New Law indubitably provides an improved insolvency regime in Mexico that, among other things, tends to protect the interests of foreign creditors. In particular, in accordance with the principles of the Transnational Insolvency Project, U.S. and Canadian creditors and businesses would enjoy enhanced protection when dealing with insolvency issues arising in Mexico. Consequently, U.S. support of the New Law clearly concords with the goals of both NAFTA and the aforementioned insolvency initiatives applicable at both a regional and global level.

### *B. Protection of U.S. Companies and Investors*

Many U.S. companies such as General Motors, Coca-Cola, Kodak, and Hewlett-Packard have a major presence in Mexico. According to experts, such a notable presence is an indication of investor confidence in the country: "[M]ore and more multinational companies come to the conclusion that this country is a great place for business."[114] This realization, though, is far from novel. In fact, since the introduction of NAFTA in 1994, over $64 billion in direct foreign investment has entered Mexico and experts predict increased interaction in the near future in diverse areas.[115] In complying with its NAFTA

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[112] *Id.*

[113] Perry B. Newman, *When Things Go Wrong: Hazy Insolvency Regimes are Flip Side to Business Success*, NAT'L L.J., Mar. 6, 1995, at C1.

[114] Jim Robinson, *The Top 50 Foreign Companies in Mexico: As Mexico Embraces Free Trade and Puts Fiscal House in Order, More Multinational Companies Pour Into the Country*, BUS. MEXICO, July 1, 2000, at 1.

[115] *Id.* (arguing that "it will come as little surprise that Mexico has overtaken Japan as the

commitments, Mexico has opened new investment opportunities for U.S. entities dealing in energy, railroads, financial services, and telecommunications.[116] Moreover, due to an amendment to the banking law in 1998 that lessened restriction on foreign ownership of Mexican banks, U.S. investors are now able to own a majority interest in such financial institutions.[117] Financial experts argue that such banks will actually help Mexican institutions, leading by example and making better loan decisions.[118]

Despite historic U.S. investment (both direct and indirect) in Mexico, prior to the enactment of the New Law, many experts were openly skeptical about it due to the uncertainty of the insolvency regime in Mexico. In the words of one insolvency practitioner, "many businesses in the United States and Mexico are finding their venture to a foreign land to be an adventure of many perils. They are finding the pitfalls of cross-border insolvency have created a bridge they do not want to cross."[119] Others analogized doing business in Mexico to entering a virtually "impenetrable jungle" characterized by corruption, an absence of sound business management practices, and an intense distrust of Americans.[120] Others, citing the lack of specialized bankruptcy courts, the common use of non-judicial settlements, and the archaic nature of the Old Law, warned that "American interests should not look for much relief in Mexican bankruptcy laws and practices."[121] One of the major problems, it is argued, is that business people and legal practitioners on either side of the U.S.-Mexico border simply misunderstand each other. In terms of business, many over-zealous merchants tried desperately to close a deal, thereby exposing

United States' second-largest trading partner. And, in less than 10 years, Mexico expects to beat out Canada for the coveted role as the United States' number-one trading partner.").

[116] BUREAU OF INTER-AMERICAN AFFAIRS, U.S. DEP'T OF STATE, FACT SHEET: NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) (May 1, 1996), *at* http://www.state.gov/www/regions/wha/unafta.html.

[117] Gil Anav, *Foreign Ownership for Banks*, NAT'L L.J., Apr. 13, 1998, at A14.

[118] Humphrey, *supra* note 40, at 33. Paul Warme, Mexican banking analyst, believes that the majority of Mexican banks currently offer commercial loans without the covenants and strictures common in the U.S. and Europe. Thus, "[t]he influence of the foreign banks will be positive here because they will insist on these sort of things." *Id.*

[119] Beckham & Fernandez, *supra* note 2, at 50.

[120] Alex D. Moglia, *Mexico: Where the Investment Action Is!*, AM. BANKR. INST. J., June 1993, at 1.

[121] *Id.* at 3.

themselves to excessive liability in Mexico.[122] Likewise, U.S. attorneys tended to criticize projects in Mexico because they failed to comprehend the nuances of resolving a dispute within a foreign legal system.[123]

These former attitudes notwithstanding, U.S. investment in Mexico should grow in the early part of this millennium.[124] The New Law will impact many levels of commerce, not simply the most sophisticated entities. As one expert explains it, the issues are significant because U.S. businesses operating in Mexico are beginning to deal with cross-border insolvency issues on a regular basis. Accordingly, "[t]hese aren't issues of major international conglomerates trying to reorganize in multiple jurisdictions; [rather], the issues are more similar to how your client recovers its collateral in Mexico or gets paid when all of the debtors' assets are in Mexico."[125] With such a significant presence in Mexico, U.S. entities and investors will likely seek asset protection in the near future.[126] The New Law,

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[122] Beckham & Fernandez, *supra* note 2, at 53. These experts in cross-border insolvency explain that they repeatedly encounter situations in which a U.S. party doing business in Mexico unsuccessfully tries to conduct a transaction in the same manner as a domestic transaction in the United States. On the other hand, claim the authors, some U.S. parties go too far by completely relaxing their normal standards claiming "it is not the way to do business in Mexico." *Id.*

[123] Gary Taylor, *Mexican Lawyers' Advice: Negotiate, Sí; Litigate, No,* NAT'L L.J., Mar. 18, 1996, at B1. One Texas lawyer with substantial experience in resolving disputes in Mexico explains that, unlike in the U.S., the preference for negotiation over litigation is deeply rooted in the Mexican legal culture. This distinction is described in the following manner: "Here [in the U.S.] you can make the other side pay attention to you [with the threat of litigation], but there you can't make them do anything. You'll find more excuses [for delay or failure to reply, for example] than you can possibly imagine." *Id.* Consequently, U.S. attorneys encounter difficulties when they utilize their assertive, confrontational tactics.

[124] Moglia, *supra* note 120, at 3.

[125] Charles A. Beckham Jr., *Badges? Badges? We Don't Need No Stinking Badges -- Or Do We?,* AM. BANKR. INST. J., Nov. 1998, *available at* http://www.abiworld.org/abidata/online/journaltext/98novintl.html (last visited February 20, 2001).

[126] Barrett, *supra* note 7, at 431, 434 (explaining that 10 years ago, the only reason for legal practitioners to be concerned with insolvency issues in Mexico was "academic curiosity." The U.S. connections with Mexico have dramatically increased, however, since the inception of NAFTA in 1994. With these enhanced connections, suggests the author, it is quite probable that insolvency issues between the U.S. and Mexico will become extremely prevalent: "When coupled with the likely expansion of numerous additional businesses in Mexico, cross border insolvencies involving an entity with assets, a branch, or a subsidiary in

particularly those provisions in Title XII that incorporate the principles developed in the Model Law, will help to ensure the rights of foreign interests in Mexico. The New Law drastically improves the legalities in the event of a multinational insolvency and, according to one author, it "has come a long way to assure foreign investors of the increasing transparency of the Mexican legal system."[127] Other observers suggest that this New Law will actually serve to protect foreign assets by preventing fraud, the incidence of which has been increased by globalization. [128] In view of the pervasiveness of connections between the U.S. and Mexico, logical public policy requires U.S. support of the New Law.

### *C. Fortification of the Mexican Economy*

Due to Mexico's proximity to the U.S., the facets of the relationship between these two nations abound. For example, major issues dealt with on a regular basis include migration, illicit drug activity, environment and natural resources, trade, human rights, and political reform. Moreover, the economies of these two countries are so inextricably linked that the relationship has been described as an "economic partnership for American prosperity."[129] On the basis of this description, it is apparent that the strength of the Mexican economy is of paramount importance to both the U.S. and Mexico, for stability in the latter benefits the NAFTA region in its entirety. A significant portion of the Mexican economy is derived from foreign investment, which is promoted by the increased certainty supplied by

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Mexico will certainly increase in the years to come.").

[127] Robinson, *supra* note 114.

[128] TRANSNATIONAL INSOLVENCY PROJECT, *supra* note 15. According to representatives of Mexico, Canada, and the U.S., "[t]he prevention and undoing of fraud may be even more important on the international level than domestically. The growth of global finance has made it all too easy for debtors and others to engage in fraud. Funds and other assets can be moved around the world very quickly and can be concealed in less-than-scrupulous jurisdictions. Only expeditious international cooperation can detect and prevent fraud on a scale that may otherwise seriously burden the international financial system." *Id.* The New Law symbolizes such cooperation, which will protect foreign assets.

[129] BUREAU OF INTER-AMERICAN AFFAIRS, *supra* note 8.

the enactment of the New Law. [130]

Recent studies analyzing the Mexican economy are positive, suggesting that the economy is growing as a result of sound monetary policy and political stability. [131] The economy should be strengthened even further under the plans of Vicente Fox, the new president of Mexico. Fox is determined to fortify Mexico's economy and its relations with the U.S. According to experts, Fox is highly qualified to accomplish such goals since, unlike previous Mexican presidents who have been everything from "fervent nationalists to bean-counting economists," Fox is "a businessman to the core."[132] From the outset of his presidential campaign, Fox has repeatedly emphasized his goal of bolstering Mexico's economy. In fact, the strength of the economy constituted such a major plank of Fox's political platform that, in the opinion of some observers, Fox actually won the presidential election by "promising to throw Mexico's economic development into overdrive."[133] For their part, it appears that investors throughout the

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[130] Jodi S. Finkel, Judicial Reform in Latin America: Market Economies, Self-Interested Politicians, and Judicial Independence, Paper Presented at the American Political Science Association (Sept. 2-5, 1999). According to one expert, "[i]nternational economic factors have provided a universal demand for judicial reform in emerging-market countries.... The revised judiciary is intended to uphold property rights, enforce business contracts, and facilitate economic transactions. Judicial provision of economic safeguards, it is hoped, *will spur international and domestic private investment.* The new judiciary is intended to be both the symbol for and the provider of a stable and secure business environment." *Id.* (emphasis added). *See also* McLarty, *supra* note 17. This economist explains the direct relationship between legal predictability and foreign investment in the following manner: "The sanctity of contracts is a critical part of any business agreement, and I have seen throughout our hemisphere that countries with the strongest judicial systems attract the greatest amount of both internal and foreign investment." *Id.*

[131] Deborah L. Riner, *Solid Ground: With Elections Looming, AMCHAM's Chief Economist Gives You the Low-Down on the Mexican Economy,* BUS. MEXICO, June 1, 2000, at 28, 29. A report by the Mexican-American Chamber of Commerce indicates that the economy should continue to grow: "There seems to be a broad consensus on the fundamentals of sound economic policy. The political process, which could culminate in the PRI's losing the presidency for the first time since the party's birth in the 1920s, has not derailed the economy or sent the financial markets into turmoil. There's still a lot of ground to cover, but markets and democracy are more strongly rooted in Mexico than ever before." *Id.* at 29.

[132] *Happy Birthday, Señor Fox,* ECONOMIST, July 8-14, 2000, at 31.

[133] Brenda M. Case & Alfredo Corchado, *Fox Tells Texas business leaders he may allow casinos in Mexico,* DALLAS MORNING NEWS, Aug. 26, 2000, *available at* http://dallasnews.com/business/156490_foxgambling_26.html (last visited Aug. 26, 2000).

region have faith in Fox's economic plan.[134]

In order to reach Fox's economic goals, foreign investment in Mexico must increase. Under the former presidential administration, Mexico moved from economic collapse in 1994 to steady growth. The benefits were primarily obtained by large firms linked to the U.S. economy through NAFTA. Fox believes that the economy can grow at 7% annually if foreign direct investment is doubled and small businesses are granted more credit.[135] To achieve this goal, investors must be convinced that there is legal predictability in Mexico in case of an insolvency. Given his years of business experience, Fox undoubtedly comprehends that while financial stability is sufficient to attract foreign capital initially, a solid legal system is imperative to retain such investment amid the ever-increasing international competition for funds.[136] As discussed earlier, the New Law should provide such certainty to creditors, foreign and domestic alike. According to experts at the International Monetary Fund, the New Law, like all insolvency regimes, will play a role far more important than simply a "mechanism for economic trash." In particular, if designed and applied effectively, the New Law "can boost confidence in [the] economy, thereby fostering growth and helping to prevent or resolve financial and economic crises." [137] Other observers concur, arguing that the New Law may have positive repercussions for foreign banks and investors that are anxious to demonstrate their confidence in this legislation and the accompanying changes to the judicial infrastructure. Examples of such faith in the New Law are the recent merger and acquisitions of the three largest Mexican banks by foreign entities, which "reflect improved investor confidence in Mexico's financial market and should revitalize consumer and business lending in Mexico, which have been stagnant since the crisis of 1994."[138]

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[134] *Id.* (explaining that Fox "has excited the North American business community with talk of increasing foreign investment in Mexico from already high levels of $11 billion a year.").

[135] *Happy Birthday, Señor Fox*, *supra* note 132, at 32.

[136] Hammergren, *supra* note 12 (explaining that at an early stage a country may attract foreign investment based solely on stabilization and fiscal balance, but once other countries have achieved these, additional changes are needed to attract capital).

[137] Sean Hagan, *Promoting Orderly and Effective Insolvency Procedures*, FIN. & DEV., Mar. 2000, at 50.

[138] McEvoy, *supra* note 94, at 15 n.19.

Likewise, both businesses and the Mexican government have openly acknowledged the importance of the New Law to reactivating local economies.[139] This opinion is also shared by Mexican bankers who believe that the New Law will open a different panorama in a country that has not enjoyed healthy banking since the *peso* crisis in 1994.[140]

Fox has unequivocally announced his intention of increasing foreign investment, which, in turn, strengthens the Mexican economy. An enlargement of foreign investment, however, will not be feasible absent legal predictability in Mexico, particularly in terms of insolvency. Thus, it is logical that Fox has a vested interest in ensuring that the New Law functions correctly. The fortification of the Mexican economy will undoubtedly benefit all the countries throughout the region, including the U.S.

### *D. Establishment of Regional Leadership*

As explained earlier, legal systems throughout Latin America have been heavily criticized for their shortcomings. Such criticisms have focused on the inadequacies of the insolvency systems in the region. With a population of over 80 million people, an economy that has grown steadily since the *peso* recession in 1994, and its economic

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[139] Norma Patino Villalobos, *La certidumbre reactivariá los créditos a segura*, NOVEDADES (Mex.), Oct. 1, 1999. Former president Ernesto Zedillo announced that "[a]s long as legal security does not exist for financing operations, the credits will not be reactivated." *Id.* *See also* Jaime Contreras Salcedo & Manuel Rojas Cruz, *Con la Ley de Garantías y Concursos Mercantiles, Renacerá el crédito en el País*, EXCELSIOR (Mex.), Jan.14, 2000; *Ley de quiebras afianzará a los bancos de México*, EXCELSIOR FINANCIERA, Apr. 21, 2000, *at* http://www.excelsior.com.mx/0001/000114/nac38.html (last visited Aug. 2, 2000). Financial analysts from JP Morgan predict that the promulgation of the New Law will foment increased foreign investment in Mexico within the next year. *See also* Gabriela Martinez & José Yuste, *Se reactivará el crédito bancario con la Ley de Concursos Mercantiles*, LA CRÓNICA (Mex.), Apr. 27, 2000. The president of the Mexican Bankers Association, Héctor Rangel, described the New Law as an impetus to the economy: "It will serve as the detonator that will allow the bank to retake its role as the motor of the economy." *Id.*

[140] Jaime Hernandez, *Evidencia Vilatela a una banca mexicana incapaz de apuntalar el desarrollo y la competitividad*, EXCELSIOR (Mex.), Apr. 27, 2000. Enrique Vilatela, director of Banco Mexicano de Comercio Exterior, described the devaluation in 1994 as the "Aquilles heel" of Mexico's competitiveness with the North American markets. *Id.*

nexus with the U.S. pursuant to NAFTA, Mexico is one of the strongest and most influential nations in Latin America. As such, any success that Mexico has, particularly in the field of judicial reform, will likely be imitated to varying degrees in the remainder of the hemisphere.

Several Latin American countries have endeavored to improve bankruptcy regimes. For instance, a recent comparative study by the World Bank illustrates that significant reforms have been implemented in Colombia, Venezuela, Argentina, Brazil, etc.[141] However, the impact of such legal reform, both on a local and regional level, have been negligible. Since civil law systems predominate in the region, it is logical to think that leadership by one country in the field of insolvency law reform would have positive ramifications in the rest of the area. In Mexico, true to the campaign promises of President Ernesto Zedillo, the federal judiciary was completely revamped in December 1994.[142] Since then, constantly mindful of its desire to improve the economy by means of foreign investment, Mexico has continuously introduced improvements in its legal system that have served to silence formerly outspoken critics. As one diplomat explains, measures taken by Zedillo have earned the confidence of the world, put Mexico's economy back on the road to long-term growth, and proven wrong "so many in the United States who said the money would never come back."[143] One example of such enhancements is the enactment of the New Law. Upon including Title XII in the New Law, Mexico became the first country to adopt nearly verbatim the principles of international insolvency established in the Model Law. Accordingly, experts have already labeled Mexico a forerunner in this field. It is claimed, specifically, that by being the first country to adopt the Model Law, "Mexico has set a remarkable example for both civil law countries and common law countries in making it possible to facilitate effective cross-border coordination and cooperation in the administration of insolvency cases."[144] In an attempt to emulate this

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[141] Rowat & Astigarraga, *supra* note 6, at 1.

[142] INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW, *supra* note 39.

[143] Warren Christopher, *American Businesses: Removing Barriers and Building Bridges in Mexico*, U.S. DEP'T ST. DISPATCH, May 13, 1996.

[144] Josefina Fernandez McEvoy, *Mexico's New Insolvency Act: Increasing Fairness and*

leader in Latin America, it is likely that other countries will adopt similar provisions thereby providing increased legal predictability in insolvency cases. In light of the benefits that will be derived throughout the hemisphere as a result of Mexico's decision to promulgate the New Law, sound policy requires U.S. support for Mexico's efforts.

### *E. Support for Existing U.S. Foreign Policy*

The final reason for U.S. support of the New Law is that such assistance accords directly with U.S. foreign policy. Far from gestures of altruism, the aid given by the U.S. to Mexico is self-motivated due to the tight interrelationship between the two neighboring countries which, in the words of President Harry S. Truman, have the common purpose of living together in harmony and working together for prosperity on both sides of the border.[145] For instance, approximately 500,000 Americans reside in Mexico, 2,600 U.S. companies operate there, and 60% of foreign direct investment in Mexico originates in the U.S. Mexico is also an important trading partner, with nearly 75% of its imports from the U.S. Furthermore, Mexico's importance in setting American foreign policy has increased in the last few years as a direct result of, among other things, the signing of NAFTA in the 1990s.[146] Based on these facts, the U.S. government has publicly recognized that:

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*Efficiency in the Administration of Domestic and Cross-border Cases (Part II)*, AM. BANKR. INST. J., Feb. 2000, at 23.

[145] Madeleine K. Albright, Remarks at Binational Commission Opening Plenary (May 5, 1997), *at* http://www.secretary.state.gov/www/statements/ (last visited Sept. 22, 2000). Extending the theme introduced by Truman decades ago, the current Secretary of State explained the depth of the relationship between these two nations: "Our agenda is broad because U.S.-Mexican relations are broad. Our border is long; our people visit each other, study with each other, work with each other, conduct business with each other and influence each other every day." *Id.*

[146] *Changing Hats Across the Rio Grande*, ECONOMIST, July 8-14, 2000, at 30. The author also explains that due to the fact that there are approximately 20 million Mexicans in America, this country is becoming "a touchstone of sorts for the United States." *Id.*

> U.S. relations with Mexico are as important as those we have with any other country in the world. A stable, democratic, and prosperous Mexico is fundamental to U.S. national security. How the United States engages this neighbor and international partner now will have a direct effect on the lives and livelihoods of millions of Americans in the years to come.[147]

As has been announced on numerous occasions, U.S. foreign policy involves, among other things, an emphasis on Mexico due to the reciprocal benefits that the U.S. may derive from Mexico. For example, according to representations of U.S. foreign affairs officials, "*to preserve our own* freedom in the United States and our own values; to keep *the U.S.* economically strong and prosperous; to protect *our* citizens from such transnational threats as terrorism, drug trafficking and environmental degradation, we must be fully engaged in promoting democracy and prosperity in this hemisphere, and must maintain a close cooperative relationship with the region."[148] According to the U.S. Department of State, as a result of the stabilization of the Mexican economy and the signing of NAFTA, new opportunities for U.S. exporters and investors have been created, from which numerous mutual benefits will be acquired.[149]

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[147] BUREAU OF INTER-AMERICAN AFFAIRS, *supra* note 8.

[148] Jeffrey Davidow, Address Before the Council of the Americas (Apr. 28, 1997) (emphasis added). *See also* Anne W. Patterson, *U.S. Priorities in the Americas*, DISPATCH, May 20, 1996, at 10.

[149] Bureau of Public Affairs, U.S. Dep't of State, *Fact Sheet: Cooperation With Mexico: In Our National Interest*, DISPATCH, May 20, 1996, at 16 (stating that as the Mexican economy recovers after the *peso* crisis and the recession of 1995, "NAFTA will create important new opportunities for U.S. exporters and investors." Furthermore, this ever-deepening relationship will affect many areas including maintaining democracy, human rights, migration, illicit drugs, export/import, economic, and environment).

## VI. CONCLUSION

In light of the myriad of problems plaguing the Old Law and its overt desire to attract additional foreign investment (direct and indirect), Mexico has taken a drastic step by adopting the New Law which, in essence, will reshape the insolvency regime in Mexico. As demonstrated in this article, the New Law contains substantive and procedural changes that, if appropriately applied, will improve all aspect of insolvencies involving Mexico, including multinational disputes. The effectiveness of this new legislation will depend, in large part, on the ability of the Mexican courts to fairly apply the well-founded provisions of the New Law. In view of the pervasive pessimism among experts regarding the functionality of Mexico's tribunals, this may present a formidable challenge.[150] The effectiveness of the New Law will also be reliant upon the improvement of the legal system as a whole, since, as some observers argue, the most important factor "is establishing a system that is internally consistent and a strong institutional infrastructure that ensures effective implementation."[151]

While the New Law appears sound in theory, the true benefits provided by this recent legislation will not be revealed for many years to come. In fact, local experts claim that the New Law will require at least "three years before anyone can arrive at any concrete conclusions

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[150] Humphrey, *supra* note 40, at 33 (explaining that according to Jorge Marín Santillán, president of CCE, a Mexican business group, the New Law is designed to encourage lending, "but politics and capricious courts remain an obstacle"). *See also* Constance, *supra* note 18. U.S. Supreme Court Justice Stephen Breyer describes the gap between a law and its implementation. "This a problem we all really face ... Systems of law that are clear on paper may confer rights that are valid only on paper unless those rights are enforceable in courts that are fair and efficient and are staffed by well-trained and unbiased judges." *Id.* For instance, according to one local expert, "[w]e can have nearly perfect laws, but if the judiciary doesn't apply them, it would not help us at all." *Id.*

[151] Hagan, *supra* note 137, at 50, 52 (explaining that experience has proven that the existence of a strong institutional infrastructure is more important than the design of an insolvency law. In particular, he explains, "given the complexity and urgency of insolvency proceedings, effective implementation requires judges and administrators who are efficient, ethical, and adequately trained in commercial and financial matters.").

or policy modifications."[152] Other observers, likewise, suggest that adopting progressive provisions regarding multinational insolvencies is simply a "useful starting point for collaboration across borders."[153] On the basis of such opinions, it is apparent that the New Law will require a sizable period during which to develop. In the meantime, based on the potential benefits to all members of NAFTA, as well as the numerous public policy justifications described in this article, the U.S. should offer its full assistance to Mexico in its endeavor.

[152] Humphrey, *supra* note 40, at 32.
[153] Rowat, *supra* note 54, at 4.