The Maximization of an Enterprise’s Value—In the Public Interest: Mexico’s new “Law of Business Organization” and its Interpretation of International Law

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1. Introduction

According to the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law, there is “broad agreement” that an effective and efficient insolvency law should aim to achieve certain “key objectives.” While the drafters of Mexico’s new insolvency law did not yet have access to UNCITRAL’s Legislative Guide, they did have access to similar materials such as the World Bank’s Principles for Effective Insolvency and Creditor Rights Systems, and it has been acknowledged that these Principles were taken into account in the drafting of the new law, (along with models from foreign insolvency laws, many of which have been recently revised). Since these international materials have been created, in part, to encourage the international harmonization of insolvency laws, one might expect that Mexico’s use of the World Bank Principles would result in a new law that is largely consistent with emerging international norms.

Mexico’s new Ley de Concursos Mercantiles (Business Reorganization Law) is indeed a remarkable achievement, and it does reflect both an awareness of modern international
principles, and an innovative application of these principles to Mexico’s own unique needs and socio-economic realities. In its core principles and objectives, however, the new law is not perfectly harmonious with international norms. This is true even of those principles and objectives that seem to have been translated directly from the World Bank Principles.

This paper seeks, first, to isolate a related set of principles and objectives—centered primarily around the “key objective” of maximizing a firm’s assets—to show that while the Mexican legislature may claim to have adopted this as a central objective of the Ley de Concursos Mercantiles, this international standard also appears to have experienced a change in the course of its reception into the Mexican law. The paper next seeks to trace what may have influenced this mistranslation: what led the Mexican lawmakers to receive this concept in a way that is dissonant with emergent international norms—the same norms which institutes such as the World Bank and UNCITRAL seek to standardize? Ultimately, this inquiry will show that while harmonization on the international level can be helpful, it is difficult to predict how individual legal communities will receive standardized international principles. Therefore, as much thought must be spent on guiding how these principles are received and understood, as has already been spent in their drafting and publication.

II. From the Individual to the Public Interest

Upon comparing Mexico’s new insolvency law with the now abrogated Ley de Quiebras y Suspencion de Pagos (Law of Bankruptcy and Suspension of Payments), the lack of any explicit statement of purpose in the old law is striking. The old law’s opening is rather stark: Podrá ser declarado en estado de quiebra, el comerciante que cese en el pago de sus obligaciones. “A merchant who ceases to pay his debts could be declared to be in a state of bankruptcy.”

While it lacks an explicit statement of “key objectives,” however, this first line communicates a great deal about the law it introduces. First, it is a commercial law. It applies specifically to those who are involved in commerce (commerciantes)—i.e., “merchants”—who have ceased to fulfill certain obligations (obligaciones), in the technical meaning of the civil law: duties owed to others pursuant to a contractual relationship. Second, it is a law that recognizes a state of being in “bankruptcy”—an estado de quiebra—that changes the relationship between obligor and obligee, creditor and debtor. Its purpose is implicit: to resolve the relationship established by the law of obligations, once it appears that this relationship cannot resolve itself. The reason: to offer the merchant some legally cognizable alternative for resolving his status as an obligee. It is a law drafted for the individual merchant, and concerned primarily with resolving a legal relationship between debtor and creditor.

Compare this with the first line of the new law: Artículo 1o.—La presente Ley es de interés público y tiene por objeto regular el concurso mercantil. “This law stands in the public interest, and concerns itself generally with commercial cooperation [sc. among creditors].” This law was not drafted for the sake of the individual merchant—indeed, the comerciante is not mentioned at all in article one. Rather, its purpose is to serve the public. Its object is not the resolution of a legal relationship between individual parties—the contractual relationship between obligor and obligee. Rather, its object is to serve the public interest by achieving a concurso—a cooperation—among creditors whose reaction to this failed relationship would otherwise pose a threat to the general public’s commercial
stability.

What is meant by “the public interest”? In short, this means the preservation of commercial enterprises, and in turn, their commercial relationships:

Es de interés público conservar las empresas y evitar que el incumplimiento generalizado de las obligaciones de pago ponga en riesgo la viabilidad de las mismas y de las demás con las que mantenga una relación de negocios.

[It is in the public interest to preserve commercial enterprises, and—in the event of a general default in their payment obligations—to avoid placing at risk both their viability, and the viability of other enterprises with which they may have commercial relationships.]

Thus, in economic terms, the new law seeks to minimize the negative externalities which result when the debtor-creditor relationship enters an impasse.

Most of the key changes that the Mexican legislature made when it abrogated the old law, and enacted the new law, can be traced back to the fundamental differences that appear in these two opening articles. Although Mexico’s new law does reflect an awareness of new approaches to insolvency in other countries, and of the principles being discussed and published in fora such as the World Bank and the United Nations, these principles are ultimately just that—reflections. The substance of the law, which permeates every provision, remains this general premise: that it is in the public interest to preserve commercial enterprises as a whole.

III. The Maximization Of Value

According to both the World Bank’s Principles and UNCITRAL’s Legislative Guide, one of the key objectives of an effective insolvency law should be to maximize the value of an enterprise. This, according to the Mexican Senate, is not only one of the key objectives of the Mexican Ley de Concursos Mercantiles—it is indeed the law’s central objective. According to the “Statement of Purpose” which preceded the new law, “the central objective was clearly discernable: to provide a set of legal norms directed at the maximization of a distressed commercial enterprise.” When the Mexican law, however, ultimately speaks of the same principles as the UNCITRAL and World Bank materials, is their meaning the same? What is the value of an enterprise?

When the UNCITRAL materials speak of the value of an enterprise—that which an insolvency law should seek to maximize—they are clearly speaking of a monetary value: “Participants in insolvency proceedings should have strong incentives to achieve maximum value for assets, as this will facilitate higher distributions to creditors as a whole and reduce the burden of insolvency.” The World Bank Principles are less explicit in their definition of value: “effective insolvency systems should aim to… [m]aximize the value of a firm’s assets and recoveries by creditors.” Nevertheless, the compound “value… and recoveries to creditors” makes it clear enough that what is meant here is a firm’s monetary value.

The Mexican Senate, in contrast, describes the value of an enterprise primarily as a social value. To quote the Senate’s statement in full:

The central objective was clearly discernible: to provide a set of legal norms directed
at the maximization of a distressed commercial enterprise by means of its preservation. This way, the employment of its Human element is preserved; the negative economic impact on society, which would result from the loss of an enterprise that supplies goods and services, is averted; and the entrepreneurial will and effort which this enterprise signified for its owner is revived.\textsuperscript{13}

Subsequent interpretations by legal commentators clarified this statement by stating explicitly that the value of an enterprise is its social value, not its monetary value, in keeping with the spirit of Article 1. As one study from IFECOM states, in order to reach an agreement on the meaning of “the social value of an enterprise”:

The first interpretation that we would need to reject is one that denotes a quantitative value, in monetary terms, of the enterprise’s share capital—that is to say, its value to the shareholders alone. This view is not in the spirit of the Ley de Concursos Mercantiles, which clearly defines itself as being in the public interest, and understands this concept of “the public interest” to mean “the preservation of commercial enterprises” and to look after “their viability.”\textsuperscript{14}

Thus, in the view of the Mexican legislature, a law that would seek to maximize the monetary value of an enterprise—to the exclusion of other social values—is not primarily in the public interest.

What exactly is the “social value of an enterprise” which the Ley de Concursos Mercantiles seeks to maximize? According to IFECOM, the social value of an enterprise arises from a combination of its efficiency, respect for the law, ethics, innovation, competitiveness, the support it brings to the community in which it develops, a respect for workers’ rights, and the necessary returns on its investors’ capital.\textsuperscript{15} A socially responsible—and in turn, valuable—enterprise generates value for its investors while also promoting the people’s welfare, and balances that welfare with its own development.\textsuperscript{16} Consequently, while it is management’s objective to maximize the equity value of an enterprise, the central objective of Mexico’s new insolvency law is to maximize the enterprise’s value to the society that hosts that enterprise. The law accomplishes this function by providing a safety net for the enterprise, lest it collapse and bring with it the collapse of its host community.\textsuperscript{17}

\textbf{IV. The Source Of The Public Interest Principle}

Presumably, the drafters of Mexico’s new insolvency law recognized the principle of “maximization of value” as it was emerging in the global insolvency-related discourse. Indeed, the Senate is quick to seize on this principle as the law’s central objective. At the same time, however, that the drafters consciously selected and translated this standardized principle from international discourse, its meaning seems to have undergone a selective transformation.\textsuperscript{18} Why?

One answer, not difficult to anticipate, is that international norms must filter through a country’s socio-economic realities before they are translated into statute.\textsuperscript{19} Admittedly, good lawmakers draft laws that answer the present needs of their constituents. It is also true, however, that many nations often have similar needs, which do not always prompt similar statutory answers. The lawmaker’s answer depends, to some extent, on how those needs are perceived. Is it this perception, in turn, that influences the lawmaker’s
understanding of international legal norms? If so, then in Mexico’s case, can the lens that filtered this one principle—the “maximization of an enterprise’s value”—be described?

A. Reading History

Many of the world’s modern insolvency laws share a similar genesis. Out of the dust of the Great Depression, the U.S. Congress passed a series of laws that culminated in the Chandler Act of 1938—the basis of today’s Chapter 11 (11. U.S.C.A. §§ 1101 et seq.). More recently, the East Asian Financial Crisis in 1998 led to the upheaval and reform of many domestic insolvency laws, most notably in Japan. Like lilacs out of the dead land, insolvency laws tend to emerge from a crisis.

Mexico is no stranger to crisis. In those years not shaken by nature’s own earthquakes, few events since 1976 have threatened this nation’s trek towards development more than its series of man-made financial crises. Of these, its most recent was arguably its most devastating, and few would question the observation that Mexico’s new insolvency law springs from the dust of the financial crisis of the early 1990s. “A new order was badly needed,” recalls Luis Mejan Carrer, Director General of the Federal Institute of Specialists on Commercial Insolvency. “Mexico, already weak and beaten from the previous crises in the 1970s and 1980s, suffered the worst economic crisis of the last thirty years.” He recalls “a strange culture” that developed “of not honoring liabilities. Some debtors did not pay because they could not afford it; others did not pay because of high interest rates; still others took advantage of the turmoil and stopped paying, just to see what happened.” Regardless of why they stopped paying, all were able to stop because Mexico’s old insolvency law made this tactic possible. The paralysis that soon swept Mexico’s financial market made the need for a new insolvency law painfully obvious.

Even so, what if there had been no crisis? Would lawmakers have drafted a new insolvency law anyway? The 1990s were a period of significant economic reform in Mexico, much of which took place before, and despite, the financial crisis. The crisis itself may have induced Congress to turn its attention to a new insolvency law, but the shape that this law took has its genesis in seeds planted long before. The mere fact that Mexico endured a financial crisis may explain why Congress turned its attention to the passage of a new insolvency law. This mere fact, however, will not aid us in interpreting the new law and in locating the wellsprings of its language. The crisis was the cause but not the inspiration.

Mexico’s financial crisis was a harsh stumble in what has been a long and steady climb toward economic development, not only in Mexico, but throughout the Latin American region. These efforts have shared a common tenor of policies—known as the “Washington Consensus” or, perhaps more commonly, neoliberalismo—that “aimed to liberalize international trade and investment flows” and “privatize and deregulate large state run economies” in Latin America. Among all its neighbors, Mexico is considered by some to have taken this set of reforms the furthest, with a “deep commitment to opening most of its market to international trade through 1994’s North American Free Trade Agreement (NAFTA).” Much of Mexico’s most recent structural and economic reform—the so-called neoliberalismo—stems from this effort to open the country’s market and, in turn, “to make its economy more open to foreign investment, more efficient, and more competitive.”

The crisis—to which some commentators point as the inspiration for Mexico’s new insolvency law—unfolded within this context of structural reform. The exact causes of the
crisis lie tangled in an “interplay of... complex financial, economic, and political factors”: exchange rate misalignment, a sudden tightening of monetary policy, “political shocks” which caused a flight of domestic capital and sudden drainage of foreign reserves. It is clear enough, at least, that these factors were the symptoms of Mexico’s sudden financial growth spurt: a reflex response to the “impressive sum of capital inflows” caused by the financial deregulation—and subsequent drop in inflation—which occurred around the signing of NAFTA in 1992.

So while it is fair to say that Mexico’s financial crisis caused the need for a new insolvency law to become painfully conspicuous to the legislature, it is more important to recognize that the new law—as well as the crisis which expedited its drafting—arose out of this context: a period of significant economic and legal reforms, most of which were aimed at making Mexico’s economy more open, more efficient, and more competitive. More importantly, when Mexican lawmakers turned to the international models available from the World Bank and (albeit, to a lesser extent at that time) from UNCITRAL, it was into this mix of reforms—and the social concerns that accompanied them—that these models and principles were imported. What, then, were these concerns, and how may they have influenced a lawmaker’s reception of international law?

Up to this point, we have attempted to use historical fact to answer this question. As the following section will demonstrate, however, bare facts—though deceptively stable—can also be hopelessly tight-lipped. The story may be accurate, but it does not tell us much. For a story to be meaningful, what is needed is someone to tell it in a meaningful way.

B. Paraphrasing History

Frequently, a group’s narration of its own history can reveal more about that group’s past and present motives than any historical fact could reveal on its own. Indeed, as the narrative becomes more condensed and selective, even more can be inferred about the storyteller—and this is often by design. When the Mexican Senate introduced its new insolvency law to the public by publishing its own “Statement of Purpose,” it began with just this sort of historical paraphrase: a précis of Mexico’s economic history.

The story has an explicit purpose: to provide a justification for the Senate’s decision to draw a clean slate and draft a new law. The general premise of the story is that “[t]he social and economic conditions prevalent in the Mexico of the 1940s have radically transformed.” In the broad strokes that follow, the Senate paints the picture of a nation that was once primarily rural, but that since the 1940s has grown to five times what it once was, and has undergone an industrial revolution that brought about a great migration “from the countryside to the city.” Population growth, industrialization, and urbanization prompted advances in telecommunications and transportation never before imaginable. This, in turn, created a society that is increasingly complex, globalized, and, most importantly, interconnected:

In the past, the majority of commercial enterprises were individually owned and relatively easy to manage. Today, commercial relationships are more complex and subject to a greater number of issues.... The economy, which in the past was primarily regional, gradually integrated itself into a national economy, until it reached a stage where it could insert itself into the global economy.... Chains of supply integrate vertically and horizontally, nationally and internationally, technologically and sector-
This introduction appears to be a synopsis of the past 60 years of Mexico’s economic history, both up to, and including the crucially transformative years of legislative and structural reform that this article has previously discussed.

It is strikingly lacking in detail. One gets the impression that this transformation has happened very fast. There is no mention of NAFTA; no mention of any other specific legislation or neo-liberal reform; not one reference to the financial crisis which, only a few years before, so rocked the foundation of Mexico’s ballooning economy. Instead, in four paragraphs that would fit on a single page, the past 60 years of Mexican history are compressed into this synoptic parable of a once rural, regional, primarily local society that has expanded—quite suddenly—into an increasingly integrated and interdependent economy. True, this may not be what actually happened in Mexico; nevertheless, this is how it felt to those who ultimately drafted the new law.

With this story as our prelude, we arrive at the heart of the matter: “There exists, however, a serious problem, when circumstances arise that cause a businessman to confront, in a sudden and irreversible manner, economic and financial difficulties.” The problem is serious, not because of the danger it poses to the enterprise but because of how that enterprise figures into the story that we have just been told:

The enterprise is an organization known to provide jobs as well as material and intangible goods, and for introducing professional services to the marketplace, with profitable results; this enterprise can be a success—but it can also find itself in grave difficulties that threaten its survival.

The commercial enterprise is now seen for the role it plays in this increasingly interdependent society. Its value is measured by the effect it has on this narrative of rapid and precarious expansion into a national, and more importantly, international economy.

It is in this context that the Mexican Senate redefines bankruptcy, and in turn, determines how it will come to understand the principle of “maximization of value.” In the past, bankruptcy was about the failure of a legal relationship between individual parties; the old law, in turn was focused on the individual merchant and his creditors. This worked fine in a world where Mexico was a country of small, local economies. Today, however, a single enterprise has relationships that extend throughout Mexican society—not only locally but nationally and, indeed, internationally too. Thus, for an enterprise,

bankruptcy is not about the failure to meet one particular obligation; rather, bankruptcy is about a universal failure—a failure that affects all who have a relationship with the enterprise; and that affects, with equal measure, the economic survival of the workers who labored within that enterprise. In this way, the bankruptcy of an enterprise reverberates through the society that surrounds it.

For this reason, the Senate found it necessary to draft a new insolvency law with a wider scope and a focus on the public interest. While the new law’s provisions retain, as their object, the individual relationship between merchant and creditor, their overarching purpose has shifted from the individual to the collective good.
V. THE PRESERVATION OF AN ENTERPRISE

This shift in purpose is reflected in the law’s statutory provisions. Most noticeably, because of its public interest commitment to maximize an enterprise’s social value, Mexico’s new law departs markedly from international guidelines in its approach to balancing liquidation and reorganization. The maximization of value, as the UNCITRAL and World Bank materials understand it, “is closely linked to the balance to be achieved in the insolvency law between liquidation and reorganization.” How one defines the former ultimately determines one’s approach to the latter. For example, since the international standard is to maximize the asset value of an enterprise, and ultimately the return to creditors, the World Bank materials advise that an insolvency law should pursue liquidation “where [it] is likely to produce a greater return to creditors” than reorganization. This approach is a logical extension of the “maximization of value” principle.

In Mexico, neither the old nor the new law provide for this sort of balance between reorganization and liquidation. Under the old law, the default approach was liquidation: a merchant who had suspended payment of debt obligations declared bankruptcy (quiebra), at which point the law’s operations set the path towards liquidating the enterprise. Reorganization was possible at any time between the recognition of claims and the final distribution, provided that debtor and creditors happen to reach an agreement. The Mexican Ley de Concursos Mercantiles, in contrast, approaches insolvency from an entirely different and—in the view of its commentators—”important new angle.” “The law seeks, as it should, to avoid liquidation, and always to pursue the preservation of an enterprise. Its every operation should strive towards this end.”

Liquidation is still available under the new law in three instances: 1) by direct application from the debtor; 2) in the event that a reorganization plan cannot be approved within the strict time-frame provided by the statute; or 3) upon the reorganization representative’s request (the “conciliator”), if he or she believes that the debtor and creditors are unwilling to reach an agreement, or an agreement is impossible to execute. Of these three circumstances, the first is rare, and the second and third only occur in the last resort, after an initial good faith effort to reorganize: “the purpose of the whole law is to preserve the enterprise. First, it seeks to restructure the enterprise, with the aim of preserving it in the merchant’s own hands; if this is not possible, then it seeks to sell the enterprise as a going concern.”

Admittedly, the sale of an enterprise as a going concern is appealing mainly because it maximizes the asset value of an enterprise. As the UNCITRAL materials point out, “[t]his is predicated on the basic economic theory that greater value may be obtained from keeping the essential components of a business together, rather than breaking them up and disposing of them in fragments.” Indeed, while the new Mexican law states that the liquidator should consider the advisability of a sale as a going concern, the law does condition this upon the liquidator’s ability to achieve higher proceeds from the sale. Nevertheless, even this aspect of the new law is described by commentators as characteristic of the law’s preference for preserving the enterprise above all else: “in [liquidation], the one to disappear is the merchant who could not pay his debts; the enterprise continues to exist, although clearly in the hands of a new owner.”

It is interesting to note that in its discussion of the balance between liquidation and reorganization, the UNCITRAL Legislative Guide—published a few years after Mexico’s new law—takes a more nuanced approach than the World Bank, and an approach that could
be seen as sympathetic to the “social value” principle. Although the Guide cautions that reorganization should not leave creditors with less than they would have received through liquidation, it also recognizes that achieving the balance between liquidation and reorganization “may have implications for other social policy considerations, such as encouraging the development of an entrepreneurial class and protecting employment.” Consequently, while it tempers this statement with its concern for creditors’ rights, UNCITRAL does acknowledge the social value that is served by preserving an enterprise: “Insolvency law should include the possibility of reorganization of the debtor as an alternative to liquidation, where creditors would not involuntarily receive less than in liquidation and the value of the debtor to society and to creditors may be maximized by allowing it to continue.”

VI. Other Core Provisions in the Public Interest

Mexico’s new Ley de Concursos Mercantiles dramatically changed the nature of insolvency proceedings in Mexico. Its core provisions offer wide ranging reforms and substantial innovations, many of which can be attributed both to the emergent international discourse on insolvency law and to Mexico’s own social and economic realities. At the same time, however, many of these provisions also adhere—at times quite explicitly—to the new law’s prime objective of preserving the enterprise in the public interest. Although this does not always cause the law’s provisions to differ too greatly from international models, it necessarily affects the overall spirit of the law, and consequently, how courts apply its provisions, and how insolvency representatives engage in their work.

A. Provisional Measures

The UNCITRAL Legislative Guide advises that where an insolvency law does not provide for proceedings to commence upon application—as is the case in Mexico under the new law and the old—the law should provide for “provisional measures that may be ordered between application and commencement to protect both the assets of the debtor that potentially will constitute the insolvency estate and the collective interests of creditors.”

Under the old Mexican insolvency law, however, the provisional measures available to the judge were limited and one-sided, in that they served only to protect creditor interests. The text of the old Ley de Quiebras y Suspensión de Pagos authorized the judge to take “those provisional measures necessary for the protection of the creditors’ interests.” According to the law’s accompanying commentary, these provisional measures were to be determined by the judge but not to exceed those precautionary measures established by procedural legislation. In practice, this was interpreted to mean that the judge was only allowed recourse to two procedural norms which already existed in the Mexican Commercial Code: “arraigo,” an informal sequestration of the debtor, and “secuestro de bienes,” a confiscation of the debtor’s goods.

Mexico’s new insolvency law has addressed these limitations not only by emphasizing the judge’s broad authority to apply any provisional measures that it deems necessary—either by application from the Inspector or ex officio—but also by providing a list of eight examples, the last of which is an open-ended “any analogous measure whatsoever.” These provisions free courts from the limitation of using procedural law as a surrogate, and significantly expand their ability to meet the needs and interests of both creditors and
debtors. Furthermore, unlike the old law, which only allowed for provisional measures to protect creditor interests, the new law also appears to protect a variety of interests by allowing the debtor, as well as creditors and the inspector, to apply for provisional measures.

These new measures may protect the estate in the interest of the debtor, but this appears to have been an unintended consequence. While it may make little difference in actual practice, the law is quite explicit about the rationale for these new provisions: “The judge, at the request of the merchant, or ex officio, shall order any provisional measures that are deemed necessary, so as to avoid placing the enterprise’s viability at risk… or aggravating that risk, in order to protect the public interest to which Article 1 of the present law refers.”

B. IFECOM: The Insolvency Representatives

Perhaps the new law’s most impressive innovation is the creation of an autonomous branch of the Federal Judicial Council; the “Federal Institute of Reorganization Specialists” (IFECOM or Instituto Federal de Especialistas de Concursos Mercantiles). This impartial body of insolvency representatives was directly inspired by the success of similar agencies in the United Kingdom, Canada, Chile, Peru, Colombia, and the U.S. Trustee’s Office. The institute serves an array of scholarly and administrative functions, but its primary role is the appointment of two officers with enormous responsibility: First, the Inspector (Visitador), who immediately after a petition for reorganization is filed, but before commencement, analyzes the debtor’s data—books, records, statements, etc.—to determine the debtor’s liquidity and whether reorganization is appropriate and requests provisional measures from the court if necessary to preserve the value of the estate.

Second, the Conciliator (Condicilador) who, during the reorganization stage, serves as the key player: an impartial party and general factotum who attempts to broker an agreement among all the parties and is charged with, among many things: the preservation of the estate; the recognition and classification of claims; decisions on how to handle preexisting contracts; periodic meetings and reports to the judge; and assembling, wherever necessary, committees of assistants from all relevant financial and legal areas. Given his central role in this stage, the Conciliator has been described by IFECOM as more of a judicial figure—in reality, a judicial auxiliary.

Without question, these representatives are the lawmaker’s solution to some of the most debilitating realities of Mexico’s prior insolvency scheme: rampant corruption, systemic incompetence, and an immobilizing dearth of human resources. It represents a substantial improvement over the Ley de Quiebras y Suspencion de Pagos, under which the judge alone—generally a jurist with no expertise in accounting, finance, or business administration—oversaw the entire process of either liquidation or reorganization.

Just the same, many of the functions that IFECOM’s officers perform can also be explained as serving the new law’s central objective: the preservation of the enterprise, to maximize its social value in the public interest. For example, when it comes to preexisting contracts, the Conciliator is not to “question them a priori” but rather to consider them individually while keeping in mind the interests of the insolvency estate. The Conciliator’s goal in this should be to avoid disturbing, as much as possible, the continuous operation of the enterprise. The influence of IFECOM’s officers in furthering the law’s public interest principle
extends well beyond their responsibilities within an insolvency proceeding. One of the goals in creating IFECOM is to create a specialized niche, a profession that talented individuals will want to join because of its prestige value. It is hoped that this specialization will be viewed as a corporate practice area for those in the accounting, finance, and business spheres and as an admirable one because it concerns itself with protecting commercial stability. While these aspirations are certainly a remedy for the negative stigma previously associated with bankruptcy work (quiebras), there is also the expectation that IFECOM’s officers will increasingly be sought as out-of-court turnaround specialists to whom debtors and creditors can turn if insolvency is anticipated or whenever the parties wish to avoid insolvency proceedings altogether. This expectation is provided for in the law itself: it states that the merchant who faces economic or financial difficulties may resort to IFECOM’s register of professionals to select an out-of-court Conciliator who would act as an “amicable referee” between debtor and creditors. The law thus encourages a trend towards voluntary restructuring, but, while these restructurings proceed outside of the court system, they remain under the aegis of IFECOM. These IFECOM neutrals would become, in other words, a body of turnaround specialists who are still duty-bound to adhere to the central objectives of the insolvency law: to preserve the enterprise in the public interest.

C. The Role of Creditors

The World Bank Principles advise that in the interest of safeguarding creditor interests, a creditors’ committee be formed “as a preferred mechanism” so that creditors may monitor and participate in insolvency proceedings. Under Mexico’s old law, the creditors’ committee played a major role throughout the insolvency proceedings and especially during the verification of claims and plan approval. Despite their prominent role, creditors’ committees were limited by the fact that they could only participate if called upon by the judge. Worse still, differences among creditors led to frequent infighting and a lack of coordination.

Although international models recommend the formation of a creditors’ committee, Mexico’s negative experience with them ultimately caused the Mexican legislature to eliminate this feature of the insolvency law—at least as an official body. Creditors are still free to organize informally, and a group representing at least 10% of the total claims may elect an “Intervenor” (Interventor) who is nominated by the judge to represent their interests. Nevertheless, the legislature found it necessary, consistent with its public interest principle, to subordinate the interests of creditors for the sake of finding a solution to the enterprise’s problems. As one commentator puts it: “having recognized [that the law’s] the fundamental interest is [to find] the solution to the enterprise’s problem, we must also understand that creditors are not the only ones involved.”

D. Jurisdiction

Finally, the new law’s shift in purpose has prompted an overall shift in the law’s jurisdictional scope. Mexican civil procedure recognizes, under Article 104 of the Mexican Constitution, that certain federal laws may attract cases where local issues and concerns predominate; consequently, certain federal laws grant concurrent jurisdiction to both state and federal courts in adjudicating cases under these laws. Thus, while the old insolvency law concerned commercial matters—which Mexican jurisprudence views as
primarily “federal in nature”—it granted concurrent jurisdiction over insolvency proceedings to both federal and state courts. This was consistent with the lawmaker’s vision of insolvency as a primarily local phenomenon: a situation that typically centered on local concerns and the particularities of an individual merchant’s relationship with his creditors.

The new law, in contrast, anticipates that courts will need to consider a wider range of issues, both factual and legal, in fulfilling the public interest policy of Article 1. Given the law’s public interest objectives, courts (as well as their auxiliaries from the Federal Institute of Insolvency Specialists) will need to see beyond the particulars of each individual merchant-creditor relationship; rather, they will need to assess each case in terms of the wider social value that this commercial relationship generates. Thus now that insolvency proceedings are to be conducted primarily in the public interest, it is appropriate that federal courts, rather than state courts, retain exclusive jurisdiction over insolvency proceedings. As the Director General of IFECOM has noted, this shift in jurisdiction is practical just as it is symbolic. Symbolically, by federalizing Mexico’s insolvency law, the legislature has recognized that the preservation of commercial enterprises represents an interest that is superior to the interests of individual creditors and merchants. On a more practical level, however, restricting oversight to the federal judiciary allows for a unification in standards and procedures, so that this new law can be applied on the national level and more effectively in the public interest.

VII. An Ambivalence of Purpose

What this paper calls the “public interest principle” is not unique to Mexico’s insolvency law; indeed, all insolvency laws are public law and, by definition, “in the public interest.” The difference, however, is how Mexico’s law identifies the maximization of economic efficiency with what it calls “the public interest.” According to the Mexican Senate, “the central objective” in drafting the new law “was clearly discernible: to provide a set of legal norms directed at the maximization of a distressed commercial enterprise by means of its preservation.” On its face, this objective does seem clear; indeed, not just clear but clear-cut straight from the same cloth as the World Bank’s Principles and the UNCITRAL Legislative Guide. The trouble, however, lies not in the law’s reception of the words but in their spirit. Clarity fades as the Senate’s “Statement of Purpose” attempts to explicate the principle that it has imported from international discourse.

To assess clarity, one needs to read beyond the bald enunciation of a principle. Note how that principle collects its meaning from text that couches it. Both the World Bank Principles and the UNCITRAL Legislative Guide are clear in stating that the maximization of an enterprise’s value is to be in the best interests of creditors. The World Bank Principles state that “effective insolvency systems should aim to... [m]aximize the value of a firm’s assets and recoveries by creditors.” Similarly, the UNCITRAL materials state that “[p]articipants in insolvency proceedings should have strong incentives to achieve maximum value for assets, as this will facilitate higher distributions to creditors as a whole and reduce the burden of insolvency.” The central objective, clearly stated, is matched to an equally central purpose.

Compared to the certainty and clarity of the international models, the Mexican Senate’s version appears to blur together as it turns to the purpose of maximizing an enterprise’s value:
This way, the employment of its Human element is preserved; the negative economic impact on society, which would result from the loss of an enterprise that supplies goods and services, is averted; and the entrepreneurial will and effort which this enterprise signified for its owner is revived.91

These interests—labor, consumer welfare, and a strong entrepreneurial class—are all worthy interests and worth “maximizing.” Some form of argument exists that each one is consonant with “the public interest.” They are not, however, identical interests, particularly when the enterprise is insolvent and “a range of interests needs to be accommodated.”92 It is at this point that an insolvency law is needed, not only to address and balance these competing interests but, moreover, to provide clarity and certainty about which interests hold priority over others. This in turn “will… enable creditors to clarify priorities, prevent disputes by providing a backdrop against which relative rights and risks can be assessed and help define the limits of any discretion.”93 Admittedly, Mexico’s new insolvency law does specify its priorities in those areas where ordinal priority is unavoidable: labor claims, for example, are given “super priority” status in a liquidation.94 In other provisions, however, where courts or insolvency administrators are asked “to protect the public interest to which Article 1 of the present law refers,”95 there is a lack of clarity—on the law’s face, at least—as to which priorities should be emphasized and what the public interest really is.

The law’s ambiguity stems, in part, from the image which lawmakers have (and illustrate in their “Statement of Purpose”) of Mexico’s economic development: the image of an economy that was just recently so simple, rural, and primarily local but that has suddenly burst open—“vertically and horizontally, nationally and internationally”96—into a precarious and fragile integration of interests; a chain, so to speak, that is only as strong as its weakest link.

This image is only one isolated example of a more general sense of uncertainty among Mexican policy makers about what the state’s role should be in Mexico’s economic development. This unresolved question has pervaded Mexico’s economic policy since its first forays into an open, privatized, and free market. As one commentator notes, Mexico has made great strides in transforming its economy into one where “market principles gradually acquire greater influence” so that “those enterprises which are no longer productive or efficient are forced to disappear.”97 Nevertheless, at the same time that “the Mexican State is transforming itself so as to reduce significantly its control over economic life,” the same political principles that once gave life to Mexico’s protectionist trade policy remain embedded in the Mexican Constitution.98 For example, notion of the “economic stewardship of the State” (Rectoría económica del Estado) remains in full force in Article 25 of the Constitution: “Pursuant to criteria of social equity and productivity, the public sector will be charged with supporting and stimulating enterprises in both the social and private sectors of the economy, subjecting them to the methods that public interest may dictate.”99 The implication, in other words, is that “the government can legally regulate any economic activity whatsoever, imposing any sort of limit to commerce in accordance with its interpretation of ‘the public interest.’”100 The result is an ambivalence of purpose that frustrates the central objectives of any law, or policy, that seeks not only to reform the Mexican economy, but also—and more importantly for our present inquiry—to integrate and harmonize Mexico’s commercial laws with the laws of other nations, and with the legal discourse of international trade.
VIII. Conclusion

The World Bank and UNCITRAL publish their materials with complementary ends in mind. The United Nations General Assembly created UNCITRAL in 1966 as a vehicle by which the UN could play a more active role in removing the obstacles to international trade that are created by disparities in national laws.101 The World Bank plays a supporting role: its Principles “are designed as a broad-spectrum assessment tool to assist countries in their efforts to evaluate and improve core aspects of their commercial law systems.”102 Furthermore, “World Bank staff has collaborated with the UNICITRAL secretariat, working group and experts’ group to ensure alignment between the Bank’s Principles and the recommendations contained in UNCITRAL’s legislative guide on insolvency law.”103 Together, these organizations seek to achieve, in the words of the UN Mandate, “the process of harmonization and unification of the law of international trade.”104

But harmony is elusive. On the one hand, legislative guides are practical tools to effectuate harmonization because their drafters are free to shape ideal principles and provisions rather than negotiate compromises for international agreements that—because of the dynamics of negotiation and compromise—may yield results that fall short of ideal. Instead, states are free to use these neutral documents from the World Bank and UNCITRAL to suit their needs: “they outline core issues that it would be desirable to address… with some recommendations providing specific guidance on how certain legislative provisions might be drafted.”105

These materials, however, are only texts. As such, they are subject to interpretation, just as all texts are. Once you set them free, you have no more control over how they will be read and understood than even this most masterful of writers, who, in the same language as this paper, once bid his newly finished book adieu in this way:

And for ther is so gret diversite

In English and in wryting of oure tonge,

So prey I God that non myswrite the,

Ne the mysmetre106 for defaute of tonge;

And red wherso thow be, or elles songe,

That thow be understonde, God I beseche!107

So great diversity there is indeed—even when people speak the same language. Standardization, be it of language or legal principles, can only achieve so much. As the greatest writers of any language know, to achieve perfect harmony of understanding is terribly difficult, and takes more than perfect drafting. For harmonization of any set of laws to succeed, the real work begins in each individual country—where the carefully drafted models and guides are ultimately read (or “elles songe”)—that they be understood.

Notes


4. Decreto por el que se aprueba la Ley de Concursos Mercantiles reforma el artículo ochenta y ocho de la Ley Orgánica del Poder Judicial de la Federacion, D.O., May 12, 2000 [hereinafter LCM].

5. D.O., April 20, 1943 [hereinafter LQSP]. Quiebra is a vague word but means generally, as the law states, the inability to pay one’s debts. The Diccionario de la Real Academia de la Lengua Española defines it as “a judgment that disqualifies ones with respect to his assets on account of insolvency, and proceeds to liquidate all his good in the interest of all his creditors.” Most French-Spanish dictionaries translate it as “faillite.” See Luis Manuel C. Méjan Carrer, Las Bases de un Derecho Concursal at 2-3, http://www.ifecom.cjf.gob.mx/estudios/DocsRefEstudio/doc_de_ref7.pdf.


7. LCM at art. 1.

8. See UNCITRAL at 10; World Bank Principles at C1.


10. UNCITRAL at 10.


13. “El objetivo central fue fácilmente identificado, Proporcionar la normatividad pertinente para maximizar el valor de una empresa en crisis mediante su conservación, con lo cual se protege el empleo de sus elementos Humanos se evita la repercusión económica negativa a la sociedad, producida por la perdida de una empresa que le proporciona bienes o servicios, y se recupera el esfuerzo empresarial que dicha empresa representó para su titular.” Motivos at 1, http://www.ifecom.cjf.gob.mx/LeyesReglamentos/DocsReferenciaLeyes/doc_de_ref.pdf.


15. See IFECOM—Trabajos Efectuados en el Programa de Estudio de la Ley de Concursos Mercantiles: Vigilancia de la administración en la etapa conciliatoria del concurso mercantil, Henri Bricard et. al.

16. See IFECOM—Trabajos Efectuados en el Programa de Estudio de la Ley de Concursos Mercantiles: Vigilancia de la administración en la etapa conciliatoria del concurso mercantil, Henri Bricard et. al.

17. “[C]uando una empresa entra en crisis su valor social también conlleva el que su fracaso atrae el fracaso de las que le rodean.” IFECOM—Trabajos Efectuados en el Programa de Estudio de la Ley de Concursos Mercantiles: Vigilancia de la administración en la etapa conciliatoria del concurso mercantil, Henri Bricard et. al.


26. See Ramsey, at 1, http://www.cidac.org/vnm/pdf/MexicanCompetitionPolicy.PDF.

27. General Accounting Office, Washington DC, Report to the Chairman, Committee on Banking and Financial


38. “La quiebra de una empresa no trata de un incumplimiento singular y concreto de una obligación, sino de un incumplimiento general, que afecta a todas las que tienen relación con la empresa e igualmente afecta la supervivencia económica de los trabajadores que laboran, en ella, de manera que su quiebra repercute en todo su entorno social.” Motivos at 2, http://www.ifecom.cjf.gob.mx/LeyesReglamentos/DocsReferenciaLeyes/doc_de_ref.pdf.

39. See UNCITRAL at 11; see also World Bank Principles at C1(iii) to (iv).

40. See LQSP at art. 296.


42. “Hay, por último un nuevo ángulo importante. La Ley busca que las empresas no se deban de liquidar, siempre debe buscarse la manutención de la empresa. Todas sus disposiciones van orientadas a tal propósito.” Lic. Luis Maneul C. Méjan Carrer, Beneficios Y Expectativas de la Ley de Concursos Mercantiles, in Ejecutivos de Finanzas (June 2001).

43. See LCM at art. 167, 150.

44. Luis Rivera Campuzano, Por qué era necesaria la nueva Ley de Concursos Mercantiles, (Interview with José María Abascal), el mundo del ABOGADO, August 2000, available at http://www.ifecom.cjf.gob.mx/informacion/articulos/RefsArticulos/doc_de_ref.pdf; see also LCM at art. 150.

45. UNCITRAL at 11.

46. See LCM at art. 197.


48. UNCITRAL at 11.

49. UNCITRAL at 11.

50. UNCITRAL at 90.

51. See LQSP at art. 11.


53. See Código de Comercio 1168 (arraigo), 1193 (secuestro de bienes); see also Salgado, supra n.52.

54. See LCM at arts. 26, 30, 37. The same provisional measures which were available to creditors under the old law are still available pursuant to articles 1168 and 1193 of the Commercial Code.


56. See LCM art. 26.


58. See LCM art. 26.

59. See LCM at art. 54. The institute’s website is available at: http://www.ifecom.cjf.gob.mx.


61. See LCM Ch. IV passim.

62. See LCM at art. 30, 37, 42.

64. See Vigilancia, at 6, http://www.ifecom.cjf.gob.mx/estudios/estudiosDeployLayout_8_1613_5109.html. In the event that a case proceeds to liquidation, a Receiver (Síndico) is appointed, and the law prefers that this be the same person who served as Conciliator. See LCM at art. 170.


71. See LCM at art. 312.

72. See World Bank Principles at C1.

73. See LQSP at arts. 220, 305-307, 310-316, 407


77. See LCM at art. 63.


79. The UNCITRAL materials make no recommendation as to jurisdiction, beyond saying that “it should be clear in the law which courts have jurisdiction for which functions.” UNCITRAL at 43.


81. Constitución Política de los Estados Unidos Mexicanos, art. 104, §I-A, as amended, D.O. February 5, 1917 [hereinafter “Mexican Constitution”]. Although concurrent jurisdiction, as it is known today, dates back to the Mexican Constitution of 1917, the notion that some federal laws may involve cases where local issues predominate dates back to the ratification of the Commercial Code of 1884—Mexico’s first federal law. The introduction of this law prompted the Mexican legislature to approve—on May 29, 1884—a revision to Article 97 of the Mexican Constitution of 1857, to require that state courts should have exclusive jurisdiction over federal law cases where local issues predominate. Thus the notion of concurrent jurisdiction in Article 104, Section I of the Mexican Constitution of 1917 relaxes the stricter division of the former constitution. See José Ovalle Favela, Algunas Cuestiones Procesales de la Ley de Concursos Mercantiles, September 2000, at: http://www.ifecom.cjf.gob.mx/informacion/articulos/RefsArticulos/doc_de_ref1.pdf.


83. See LQSP at art. 13.


89. World Bank Principles at C1 (emphasis added).

90. UNCITRAL at 10 (emphasis added).


92. UNCITRAL at 9.

93. UNCITRAL at 13.

94. See LCM art. 224.

95. See, e.g., LCM art. 26.


99. Mexican Constitution at art. 25: “Bajo criterios de equidad social y productividad se apoyará e impulsará a las
empresas de los sectores social y privado de la economía, sujetándolos a las modalidades que dicte el interés público”

100. Luis Rubio, et al., A La Puerta de la Ley: El Estado de Derecho En Mexico 21 (1994) at 22. For a discussion of how Mexico’s competition policy has suffered from the uncertain role of the state in economic development, see Ramsey, at 1, http://www.cidac.org/vnm/pdf/MexicanCompetitionPolicy.PDF.


104. UN Resolution 2205(XXI), supra n.101.

105. UNCITRAL at 1.

106. That is, “ruin the meter.”