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#### Mexico's Quest for Legislative Transparency

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Mexico has taken a leading role in embracing substantive and procedural standards and objectives set by the international community to reform its insolvency and tax legal systems. A central goal promoted by international organizations, which support such reform efforts, is to encourage transparency in the law. "There can be no substitute for a clear law." <sup>2</sup> The Mexican authors of the following articles appear to suggest that the drafters failed to achieve transparency when drafting the Commercial Insolvency Law <sup>3</sup> and the Income Tax Law. <sup>4</sup> They identify numerous contradictions and ambiguities in each statute, and raise questions about the constitutionality of these laws without suggesting a judicial avenue for resolving the issue.

This author suggests that the real debate presented by the following articles is one of statutory construction, which will need to be decided by the Mexican federal courts hearing cases arising under the Insolvency Law and/or the Tax Law. However, Mexico's civil law system, by its nature, prohibits the exercise of judicial discretion or, in this context, "judicial legislation" to fill in any gap left by Congress. Under the narrow parameters provided by the civil system, the judicial function is limited to applying the laws enacted by Mexico's Congress as constitutional. <sup>5</sup> Accordingly, the Mexican civil law system, which calls for strict application of its codified laws, does not grant courts the flexibility of interpreting statutes "to avoid grave and doubtful constitutional issues if the statute is, in fact, susceptible of two constructions." <sup>6</sup> Mexico's federal courts, are not empowered to decide constitutional issues or even interpret, much less rewrite, the laws enacted by the Mexican Congress. Therefore, the participants and professionals affected by Mexico's new Insolvency Law and the Tax Law will need to look to Congress to resolve the questions at issue. In the meantime, the Mexican courts should look to the plain language, the design and the legislative history of the Insolvency Law and the Tax Law as a whole, to ascertain the intent of Mexico's Congress and make sustainable decisions.

#### Should Federal District Courts Have Exclusive Jurisdiction to Hear Bankruptcy Under Mexico's Act of Commercial Insolvency? <sup>7</sup>

The Dictionary of Mexican Act defines jurisdiction as "the power of an organ of competent authority to recognize or carry out the functions or judicial acts specified by statute." <sup>8</sup> The federal Constitution of the United States of Mexico (the "Constitution") vests upon Congress the specific power to regulate commerce. <sup>9</sup> Further, the Federal Constitution provides that the federal judicial courts shall have original jurisdiction over any cases or controversies arising under a federal Act. <sup>10</sup> Thus, Article 104, section I-A of the Constitution provides, in pertinent part, "the federal courts shall have original jurisdiction over any civil and criminal acts arising under any federal Acts or international treaties ratified by the Mexican State. Further, whenever such cases affect the rights and interests of private parties, the federal and state courts shall have concurrent jurisdiction at the election of the litigants." <sup>11</sup>

Therefore, the Constitution confers upon the federal courts exclusive jurisdiction to hear cases that require the application of a federal Act, and establishes the requirements in determining the concurrent jurisdiction of both federal and state courts to adjudicate the same subject matter where the litigants may resort to either court indifferently.

Upon the enactment of the Law of Commercial Insolvency (the "Act"), <sup>12</sup> it has been suggested that Article 17 of the Act is unconstitutional. Article 17 provides, in pertinent part: "The [federal] District Judge presiding in the district

where the Debtor has his domicile shall have jurisdiction over the Debtor's bankruptcy case." <sup>13</sup> Henceforth the argument that by conferring exclusive jurisdiction to federal district courts over bankruptcy cases, the Act eliminates the concurrent jurisdiction of the state courts in violation of Article 104, section I–A of the Constitution. The jurisdictional conflict arises from the minority view that a bankruptcy case affects only the rights and interests of the debtor and his creditors and, therefore, these cases should be heard by federal judges as well as state judges, at the election of the litigants.

However, bankruptcy cases under the Act affect not only individual debtor–creditor relationships, but also the public interest, which must be protected as a matter of public policy. Article 1 of the Act provides: "There is a public interest to preserve enterprises as "going concerns" and prevent that their inability to service debts as they come due put at risk the viability of such enterprises and others with which they maintain business relationships." <sup>14</sup> Although bankruptcy laws seek to protect the rights and interests of the debtor and his creditors, they must also consider the interest of the State in a manner that benefits the public as stated in Article 1 of the Act. Among the definitions of "public interest" is the one provided by Mexican Professor Rafael I. Martinez Morales: "the public interest embodies collective desire of a society to pursue a particular common benefit or the performance of certain acts, which tend to achieve a national goal that can be served by its legal system." <sup>15</sup>

Another definition has been articulated by Mexican commentator Francisco M. Cornejo Certucha, who defines the "public interest" as "a compilation of pretensions related to the collective needs of a community and protected by the direct and permanent intervention of the State." <sup>16</sup>

The legal mandate heralded in Article 1 of the Act, preserving enterprises as "going concerns" and preventing that their inability to service debts as they come due jeopardize their viability and other enterprises' with which they maintain business relationships, concerns the public interest because the illiquidity of such enterprises affects, not only the survival of the debtor facing financial difficulties, but also all the parties dealing with the debtor, including the debtor's employees, thereby affecting the social and economic fabrics of the nation as specified in the legislative history of the Act.

It is in the public interest to salvage the value of viable enterprises, even through their orderly liquidation, which can result in avoiding prejudice to the affected constituencies. The balancing of various economic and social policies embodied in the bankruptcy Acts can result in a higher distribution to creditors and in the preservation of jobs for the benefit of all affected parties.

### Conclusion

The exclusive jurisdiction of the federal district courts to hear cases and controversies arising under federal Act, such as the Act, is conferred by the Constitution and acts of Congress. The old bankruptcy laws permitted state courts to play a significant role in adjudicating disputes and issues arising in bankruptcy cases; however, since the enactment of the Act, federal district judges have exclusive jurisdiction over bankruptcy cases. The Act precludes the election of an alternative forum or the renunciation of the predetermined forum by the litigants.

Congress knew and considered the existing legal framework and, in fact, sought to minimize changes thereto when drafting the Act. Accordingly, there is no justification for the exercise of concurrent jurisdiction over bankruptcy cases resulting from the old notion that only private rights and interests are impacted by the determination of such cases, inasmuch as bankruptcy cases affect the public interest.

The preservation of enterprises and prevention of their inability to pay their debts as they come due jeopardizing their viability and that of other enterprises having business dealings with the debtor, are matters of public interest to the extent that it is an economic phenomenon that merits the intervention of the State. Public policy requires that there be a tendency to (i) increase the value of viable enterprises and preserve jobs, even if the enterprises remain in the hands of current management, (ii) negotiate a consensual reorganization plan to thereby reintegrate such enterprises to the market and benefit society, or (iii) to facilitate their orderly liquidation to yield their highest value for the benefit of all affected parties including the debtor.

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***Footnote:***

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<sup>2</sup> See Effective Insolvency Systems: Principles and Guidelines (World Bank Consultation Draft), 10–11 (providing discussion in connection with Latin American & Caribbean Insolvency Workshop, Mexico (Oct. 30–31, 2000)). [Back To Text](#)

<sup>3</sup> Ley de Concursos Mercantiles. [Back To Text](#)

<sup>4</sup> Ley de Impuestos Sobre la Renta [Back To Text](#)

<sup>5</sup> By comparison, in the United States the Supreme Court will not determine the constitutionality of legislation unless absolutely necessary to a decision of the case. See Ronald D. Rotunda & John E. Nowak, § 5 Treatise on Constitutional Law—Substance & Procedure, § 23.10 (3d ed., 2002) (citing [Burton v. United States](#), 196 U.S. 283 (1905); [Chicago & G.T.R. Co. v. Wellman](#), 143 U.S. 339 (1892)); see also [Crowell v. Benson](#), 285 U.S. 22 (1932) (stating "when the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that [the Supreme] Court will first ascertain whether a construction of the statute is fairly possible by which the questions may be avoided"). Therefore, "if the Court presumes that a law is constitutional – a presumption that the courts often articulate – then it is reasonable to require that the legislature focus on the law in question, and really mean to enact that which has created the constitutional problem." [5 Treatise on Const. L. § 23.10](#); see also [Blodgett v. Holden](#), 275 U.S. 142 (1927) (stating "an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available"). [Back To Text](#)

<sup>6</sup> See [Seminole Tribe of Florida v. Florida](#), 517 U.S. 44, 57 n. 9 (1996). [Back To Text](#)

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<sup>8</sup> See 2 Inst. of Judicial Investig. U.N.A.M., Dictionary of Mex. Act 167 (1983). [Back To Text](#)

<sup>9</sup> See [Mex. Const., art. 73, § X](#). [Back To Text](#)

<sup>10</sup> See [id., art. 104, § I–A](#). [Back To Text](#)

<sup>11</sup> See [id.](#) [Back To Text](#)

<sup>12</sup> "Ley de Concursos Mercantiles y de reforma al articulo 88 de la Ley Organica del Poder Judicial de la Federacion," D.O., May 12, 2000. [Back To Text](#)

<sup>13</sup> See [id., art. 17](#). [Back To Text](#)

<sup>14</sup> See [id., art. 1](#). [Back To Text](#)

<sup>15</sup> See 3 Legal Dictionary Harla 146 (Harla ed. 1996). [Back To Text](#)

<sup>16</sup> See 5 Inst. of Legal Investig., U.N.A.M., Mex. Legal Dictionary 167 (1984). [Back To Text](#)