From: Josefina Fernandez McEvoy

Subject: RE: Senate - ML analysis for Canadian Senate

Dear Bruce, pursuant to your request, I reviewed Title XII (Arts. 278 – 310) of Mexico's Business Reorganization Act, which incorporates, virtually verbatim, the UNCITRAL Model Law. There are no material differences between Title XII and the Model Law. I found one significant ambiguity in Article 280 (the Model Law's counterpart is Art. 3)

Article 3 of the Model Law states: "To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail."

Art. 280 of the Mexican Act provides: "The provisions of this Title shall apply when no treaties to which Mexico is a party govern, unless there is no international reciprocity." This may create a debate on statutory construction to determine whether or not Mexico's Title XII requires reciprocity for its application. I believe, however, that this is one of many contradictions and ambiguities found throughout the entire legislation that do not reflect the intent of the drafter. I would construe Article 280 to mean that if Mexico does not have reciprocity with another State under a treaty, then, in that situation, Title XII shall be applied notwithstanding that a treaty addresses the situation. To illustrate my point, you should consider the recent recognition by a Mexican bankruptcy court of an entire foreign proceeding pending in the United States, even though the Unites States has not adopted the Model Law.

Thus, in May 2001, the Chapter 7 trustee of the bankruptcy cases entitled *In re Jacobo Xacur, Felipe Xacur and Jose Maria Xacur* (jointly administered under case no. 96-485380H5-7), pending in the Houston Division of the Southern District of Texas, in his capacity as the Foreign Representative of the debtors (i.e. the person authorized to administer the liquidation of the debtors' bankruptcy estate in the pending foreign proceeding) requested, among other things, that a Mexican bankruptcy court recognize the involuntary Chapter 7 bankruptcy petition filed against the debtors and granted by the U.S. bankruptcy court on August 22, 1997, and assist with the administration and adjudication of the pending U.S. bankruptcy cases. To obtain recognition under Title XII, the Foreign Representative had to file an application for recognition, certified copies of the United States Chapter 7 bankruptcy petition, the U.S. trustee's document appointing the Foreign Representative as the trustee of the estate of the debtors and evidence from the United States court confirming his appointment as the Foreign Representative.

In July 2001, the Federal District Court, Civil Division, for the Fourth Judicial District of Mexico caused 3 consecutive notices, addressed to each debtor, to be published in the Diario Oficial de la Federación, whereby the debtors were directed to answer the Foreign Representative's request for recognition and international cooperation within 30 days in order to avoid the entry of a default judgment against them. On December 19, 2002, even though the bulk of the Xacur brothers' assets are in Mexico, the Mexican bankruptcy court granted the Foreign Representative's petition for recognition of the foreign proceeding pending in the United States and agreed to cooperate in order to facilitate the administration and resolution of the debtors' jointly administered cases in the United States. Accordingly, in the *Xacur* cases the Mexican and the United States courts, as well as the Foreign Representative and the Mexican trustee can communicate directly with each other, subject only to their respective local procedures and notice requirements.

The Mexican court entered an appropriate order on February 7, 2003, which stated, among other things, that the order for relief granted by the U.S. bankruptcy court in 1997 is recognized and is *res judicata*. Further, the Mexican court found that (i) the jointly administered United States cases met the requirements of a "foreign proceeding" under Title XII (i.e. the U.S. cases entailed a collective proceeding, in a foreign state, pursuant to an insolvency statute, in which the property and financial affairs of the debtors are under the control of the foreign court and, in this case, for the purpose of liquidation); (ii) the Foreign Representative had met the simplified proof requirements of Title XII, which avoids time-consuming "legalization" requirements involving consular procedures; and (iii) the request for recognition thus fell within the scope of Title XII and necessitated the cooperation of the court. The court also ruled that the Xacur brothers' assets would be jointly administered in Mexico as well.

The Mexican court applied a "universalist" approach and recognized a single proceeding based in the United States, recognized that the debtors' assets located in Mexico are property of the bankruptcy estate, and that there should be a single administrator, the Foreign Representative, assisted by a local trustee in Mexico, who could recapture the debtors' assets in Mexico for the benefit of all the creditors. The Mexican court also ordered the debtors to file schedules of assets and liabilities and statements of financial affairs in Mexico. Further, in order to protect the debtors' assets and the interests of the creditors, on February 18, 2003, the Mexican court caused a notice to be published in the Diario Oficial de la Federación alerting the general public that enforcement proceedings concerning the assets of the debtors were stayed and no party should pay any obligation to the debtors or deliver any goods to the debtors without the prior knowledge and consent of the Foreign Representative.

From a practical standpoint, Mexico has demonstrated that it is equipped to handle incoming requests for recognition and international cooperation and that it can provide direct access for foreign representatives to its courts without the need to rely on burdensome letters rogatory or other forms of diplomatic or consular communications, which might otherwise be required. Title XII has increased certainty, and fosters transparent, coordinated decisions by the Mexican courts. If applied efficiently and effectively, Title XII should aid the representatives of a debtor's bankruptcy estate to maximize the value of the estate and facilitate the universal restructuring of the enterprise.

Accordingly, Mexico's Business Reorganization Act does NOT require reciprocity in connection with the application oft he Model Law. To do so would contravene the letter and the spirit of the Model Law to the extent it, among other things, (i) would limit the use of Title XII, in this case, since only a handful of countries have adopted the Model Law; (ii) reciprocity would result in inadequate and conflicting legal approaches that would hinder the effective and efficient administration of cross border cases, and threaten the protection and preservation of the assets of the estate against dissipation if the assets in countries that haven't adopted the Model Law couldn't be recover and made part of the global estate; and (iii) would not allow a coordinated international response in cross border cases.

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