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International Trade and Insolvency Law: Is the UNCITRAL Model Law on Cross-Border Insolvency an Answer for Brazil? (An Economic Analysis of its Benefits on International Trade)

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I. Introduction

The promotion of free international trade and the development of global financial markets have resulted in significant changes to the structure and dynamics of commercial relations in the last three decades. International integration among economies has been a useful tool for achieving economic growth. Consequently, most economies are interdependent, and business has been made among traders located in different jurisdictions.

Investors and enterprises have moved toward new boundaries seeking new markets. Companies have radically changed their structures as a means of maximizing profits. Nowadays multinational companies are a common feature, owning assets and assuming obligations in various countries. As a result, bankruptcy and reorganization proceedings are no longer restricted to the domestic arena.

The conflict between different legal systems has affected parties' rights, creating uncertainty. This effect has happened because national bankruptcy laws have been inadequate in efficiently addressing the necessities required by

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international insolvencies in the new economic arena, increasing transaction costs to all parties. As a response, a model law was designed by UNCITRAL to assist countries in developing harmonic procedural rules of coordination and assistance among jurisdictions in cross-border insolvency cases as a means of producing "[g]reater legal certainty for trade and investment."[1]

In this context, after analyzing the economic role of insolvency law and the rationale of international trade, this paper intends to demonstrate the legal and economic benefits derived from the enactment of the Model Law in insolvencies with an international element, as well as whether the new chapter 15 of the U. S. Bankruptcy Code may result in a better insolvency regime with economic advantages. Finally, this paper will examine the obstacles derived from the lack of rules in Brazil for international insolvency and whether the Model Law might equip Brazil with more efficient tools as a way to create a better legal environment for international trade.

II. International Trade and Insolvency Law

A The Economic Development of International Trade and Insolvency

International commerce between countries has occurred throughout history, especially in the mercantilist period of the fifteenth and sixteenth centuries. Nations initiated trading, seeking new market opportunities. It was just after World War II, however, that the most significant process of globalization arose.[2] Nations realized that promotion of free international trade and the development of a global financial market[3] would be mutually beneficial to economic and social progress.[4] This gave place to the so-called Bretton Woods institutions such as the International Monetary Fund (IMF) and the International Bank for Development and Reconstruction (World Bank).

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[1] United Nations Commission on International Trade Law (UNCITRAL), Model Law on Cross-Border Insolvency, at 2, U.N. Sales No. E.99.V.3 (1999) [hereinafter UNCITRAL Model Law].

[2] **John Braithwaite & Peter Drahos, Global Business Regulation** (2000).

[3] Hal S. Scott, *International Finance: Rule Choices for Global Financial Markets*, in **Research Handbook in International Economic Law** 361, 369 (Andrew T. Guzman & Alan O. Sykes eds., 2007).

[I]t seems clear that better financial systems do increase growth by providing information about possible investments that enable more efficient allocation of capital, by monitoring investments and insisting on high standards of corporate governance, by facilitating the trading, diversification and management of risk, by mobilizing and pooling savings and by easing the exchange of goods and services. *Id.*

[4] **John H. Jackson, William J. Davey & Alan O. Sykes, Jr., Legal Problems of International Economic Relations** (4th ed., 2002).

The implementation of the process of liberalizing trade policies in the late 1980s, driven principally by the IMF and the World Bank, has undergone considerable economic expansion and social advancement in those countries that have been willing to integrate themselves into the world economy. Nations have moved towards free trade and have significantly reduced trade barriers. Based on the economic logic of flow of goods, services, and capital,[5] the international integration between economies has been a useful tool in achieving sustainable economic growth in both developed and developing countries.

This is especially true in the case of Latin American countries such as Brazil, Argentina, and Chile, where financial and trade liberalization has radically changed the economy. Instead of protection measures and import substitution policies maintained by exchange controls, the strategy was adjusted through an open market and by efficient domestic financing played by local financial institutions. The strategy has benefitted local economies with a continuous flow of international investments.[6] Equally, it has created an efficient way to attract new industries, technologies, and transfer of know-how for developing countries.

As a result, most economies are now interdependent and open to trade.[7] The standardization of legal norms and the adoption of conventions such as the UNCITRAL Model Law on Contracts for the International Sale of Goods[8] and the UNIDROIT Principles of International Commercial Contracts[9] by agents and countries integrating into the global marketplace were necessary to produce certainty and predictability in terms of trade operations worldwide. The globalization process has also created economic blocks in almost all

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5 **The Regulation of International Financial Markets** 27 (Rainer Grote & Thilo Marauhn eds., 2006).

In the 1950s, deregulation and liberalisation [sic] began to combine with technological and institutional innovation to breach many of the barriers separating national currencies and monetary systems. In a cumulative process driven by the pressures of domestic and international competition, the range of market opportunities has gradually widened for borrowers and investors alike. The result has been a remarkable growth of capital mobility across political frontiers, reflected in a scale of financial flows unequalled since the glory days of the nineteenth century gold standard. *Id.*

6 Marc Auboin, *The Trade, Debt and Finance Nexus: At the Cross-Roads of Micro – and Macroeconomics* 26 (2004) (WTO Discussion Paper No. 6), *available at* http://www.wto.org/english/res_e/booksp_e/discussion_papers6_e.pdf.

7 **Richard Schaffer, Beverley Earle & Filiberto Agusti, International Business Law and its Environment** 4 (5th ed., 2002).

8 U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 59 (1980).

9 Int’l Inst. for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts, 34 I.L.M. 1067 (1995), *available at* http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf.

regions of the globe, such as the European Economic Area, NAFTA,[10] and Mercosur[11] as a legal means of further integrating various economies and countries as well as improving social standards.

In this context, more than ever, multinational corporations and the financial market have played an important role as major parties in the international economy.[12] Companies are no longer restricted to their local market. In order to become more competitive and maximize profit, companies have become increasingly multinational, with international corporate structures and assets located in other countries, either to achieve new markets for their products or to reduce production costs. These modifications have caused the delocalization of business transactions around the globe.

Similarly, after the collapse of the Bretton Woods system in the early 1970s, a new financial market arose, led by the emergence of new international financial markets outside of the United States and Europe.[13] Since then, financial institutions – mainly large institutional investors such as mutual funds, pension funds, and insurance companies[14] – have looked at different and more profitable markets at an international level,[15] mostly motivated by the issuer's need to raise capital at lower interest levels and facilitated by interest rate differentials as well as by the development of new aggressive financial instruments, particularly investments created by hedge funds.[16]

Nevertheless, these changes are not free of consequences. While the last three decades have significantly improved countries' economies through free and open trade, these changes have caused several episodes of international

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10 North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

11 Treaty Establishing a Common Market (Mercado Común del Sur or MERCOSUR), Mar. 26, 1991, U.N. Doc. No. A/46/155, 30 I.L.M 1041 (1991). This treaty established a common market between Argentina, Brazil, Paraguay, Uruguay, and later Venezuela. Bolivia, Chile, Colombia, Ecuador and Peru currently have associate member status.

12 **Stephan Rammeloo, Corporations in Private International Law** 3 (2001).
It is beyond dispute now that corporations have replaced states as the most important makers of waves in the world's economy. It is also firmly established that with the increasing globalisation [sic] of that economy corporations operate in many cases far beyond the borders of the country that presided over their birth. *Id.*

13 **International Monetary Law: Issues for the New Millennium** (Mario Giovanoli ed., 2000).

14 **Joseph J. Norton, Yearbook of International Financial and Economic Law 1999** (2001).

15 **Hal S. Scott**, **International Finance**: **Transactions**, **Policy**, **and Regulation** 1-2 (13th ed., 2006).
Generally, international finance transactions involve some cross-border activity with respect to a payment, credit or investment, or financial contract. The cross-border aspect of finance can arise from the fact that the activity of the provider and the user of funds may be located in two different countries. A lender can market and transfer funds to a borrower in another country, or the borrower can seek and attain funds from the lender in the lender's country. Id.

16 **Marc I. Steinberg, International Securities Law: A Contemporary and Comparative Analysis (1999)**.

financial crisis in developing nations, adversely affecting various countries, either directly or indirectly, culminating in long-term financial instability. Most of the economic crises were driven mainly by the fragility of the financial sector, high inflation rates, poor banking supervision, and excessive public debt.[17]

In addition to the above, international free trade has also produced a more competitive environment, particularly in local markets in developing nations. For some time now, companies from developing countries have faced competition from foreign multinational enterprises that are establishing new plants and seeking to expand their market overseas with better technologies and products than ever before.

Especially in Latin American countries, the new economic scenario has agitated national business and forced it to redefine company structure. Mergers and acquisitions between local business and multinationals have been used to integrate operations in order to enable companies to grow in local and international markets.[18] But this has often led to reorganizations and bankruptcies with international dimensions, interconnecting various jurisdictions. This effect gave rise to issues such as conflict of laws and has created barriers to the flow of investments between nations. The cross-border issues and the problems faced by companies will be the focus of the next section.

B. Challenges Posed by Cross-Border Insolvency

The consequences of bankruptcy and reorganization cases have changed dramatically in recent decades because they are no longer restricted to the domestic arena. The rise of international commerce has also impacted insolvency laws. As a result of the expansion of international trade, insolvency and the restructuring of multinational corporations often has an international element that directly affects debtor and creditor rights located in various jurisdictions.

In this new international arena, many companies have commercial relations outside their own territories, owning assets and assuming obligations in different countries. As a result, an enterprise that has international commercial relations may face insolvency proceedings or the need to restructure its debt in a foreign country under different legislation, suffering its

[17] Auboin, *supra* note 6.

[18] **Tomás M. Araya & Jacqueline Donaldson, Latest Events on Cross-Border Insolvency in Latin America** (2006), *available at* http://www.iiiglobal.org/international/cross_border/030106_Araya.pdf.

consequences either passively or actively.[19] Basically, this result has been caused by three different factors: (i) each country has its own legal framework to deal with international insolvency; (ii) there is no legal mechanism that can be recognized and enforced in all jurisdictions in which the company maintains business relations; and (iii) the insolvency regimes and procedures are quite different around the world.[20]

Along the same line of thinking, Fletcher states that a range of reasons can cause cross- border insolvency procedures.[21] He argues that trade agents may have had several contracts or interests connected with more than one country and that each state will exercise its own jurisdiction, giving rise to the possibility of simultaneous proceedings.[22]

The problem has always been that each country's private international legal rules have not been successful in dealing with the intricacies of transnational insolvencies and the economic logic of investors because they are only based on rules to manage national insolvencies. Flynn argues that national insolvency laws are not capable of providing efficient solutions in cross border proceedings.[23] Hence, conflicts between national laws normally result in a dissipation of assets and a loss of opportunity to rescue a viable business.

Although, in recent years, the principles of "universality" and "territoriality" adopted by most countries have moved towards a more sophisticated approach through cooperation between countries by means of principles such as a "modified universalism"[24] (applied by U. S. courts) and "cooperative territorialism,"[25] these approaches have not been able to

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19 **The Law of International Insolvencies and Debt Restructurings** INSERT PINCITE OR PAGE NUMER (James R. Silkenat & Charles D. Schmerler eds., 2006) [hereinafter .**Law of International Insolvencies**].

20 M. Natasha Labovitz & Jessica I. Basil, *Corporate Restructuring and Bankruptcy*: *How Will New Chapter 15 Affect Multinational Restructurings?,* **N.Y.L.J.**, July 11, 2005, *available at* http://media.gibsondunn.com/fstore/documents/pubs/7-11-05_NYLJ_Labovitz-Mulitnational_ Restructurings.pdf.

21 **Ian F. Fletcher, Insolvency in Private International Law: National and International Approaches** (1999).

22 *Id.*

23 **Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law** (Look Chan Ho ed., 2006) [hereinafter **UNCITRAL Commentary**].

24 **Paul J. Omar, European Insolvency Law** 27-28 (2004) (stating, "Westbrook offers the view that this principle arose from the practice in the United States of providing for ancillary proceedings whose principal purpose is aid and assistance to another court deemed to be the primary jurisdiction over the (usually corporate) debtor").

25 Lawrence explains that territorialism has changed, becoming more sophisticated, "moving toward cooperative territorialism, which seeks to ameliorate some of the most wasteful features of the grab rule by a measure of judicial cooperation." Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 **Am. Bankr. L. J.** 713, 716 (2005).

efficiently address these issues. The problem is particularly pronounced on issues such as the recognition of foreign insolvency proceedings, cooperation, and access of foreign representatives to local courts.

Under the universality principle, all debtor assets may be used to settle obligations. The ineffectiveness of this principle resides in the fact that all countries involved should cooperate efficiently and apply the same procedures in perfect harmony, giving all parties the same rights. Universalism can only be applied efficiently if other countries recognize this principle through full cooperation. But the harmonization of laws has been difficult to achieve, as every country is reluctant to give up its autonomy to regulate its own insolvency proceedings.[26]

By contrast, the concept of the principle of territoriality is based on the idea that the proceedings will only consider the assets located in the jurisdiction where the bankruptcy was filed. In other words, this approach is considered to be a distinct proceeding from those initiated in other jurisdictions. Therefore, only local assets will be used to satisfy creditors' rights. This principle has suffered severe criticism, as it is limited to assets located in the country where the insolvency proceeding has been filed. Basically, it has three main disadvantages: (i) it may cause multiple and separate proceedings in every jurisdiction where the company owns assets; (ii) it creates difficulties in the reorganization proceedings of those companies that own assets overseas; and (iii) it may cause an inequitable and discriminatory treatment of creditors based on their locations, vis-à-vis the availability of assets in the jurisdiction.[27]

In the absence of uniformity among jurisdictions, countries have applied a third way to minimize these issues. Some countries have entered into bilateral insolvency agreements. But only a few treaties are in place today and this has resulted in more diverse legislation and practice concerning cross-border insolvencies, causing further uncertainty.[28]

In the light of the fact that there is no uniform legal system and only certain countries have appropriate legislative rules to deal with complex cross-border issues, the lack of uniformity is still an open issue, with courts applying a variety of doctrines, creating uncertainty. For example, a "doctrine of comity" has been applied between common law jurisdictions and an exequatur procedure has been applied in civil law jurisdictions to

[26] **Omar**, *supra* note 24.
[27] **Fletcher**, *supra* note 21.
[28] Sandile Khumalo, International Response to the UNCITRAL Model Law on Cross-Border Insolvency (July 2004) (unpublished L.L.M. research paper, Vrije Universiteit), *available at* http://www.iiiglobal.org/organizations/uncitral/Insol_Response.pdf.

recognize foreign judgments and enable foreign parties to enforce property and contract rights.[29] Nevertheless, these techniques have not been effective enough due to the fact that in the case of the exequatur procedure, for example, reciprocal recognition of judgments does not recognize decisions of insolvency and thus courts are restricted to protective measures and enforcing judgments for specific sums of money.[30]

In this sense, issues related to fair treatment of creditors, recognition and enforcement of foreign proceedings, and coordination and cooperation between courts have been constant concerns. Although most countries recognize foreign rights to recover debt, uncertainty about the rank of creditors and unfamiliar procedures remain a severe problem to overseas creditors. Moreover, the inexistence of corporate rescue in some jurisdictions and the multiplicity of different procedures among countries have caused company asset losses and frustrated restructuring proceedings.[31]

These discrepancies cause four main legal and economic effects on the flow of international trade. First, they have created obstacles to the successful restructuring of viable global companies or, in the case of bankruptcy, they have caused delays, fraudulent dissipation of assets, and barriers to debt recovery. Second, the lack of efficient corporate rescue laws in some countries has produced a basis for “forum-shopping”[32] because multinational enterprises that have faced temporary financial crises have submitted themselves to jurisdictions that provide a sophisticated legal framework for the restructuring process. Third, the inexistence of a response to default conditions overseas along with a lack of predictability may act as a disincentive to foreign investment, as well as to the flow of capital to nations that do not contain well-established rules under the new global financial impetus of corporate rescue. Lastly, the diversity of cross-border debtors may give rise to multiple insolvency proceedings in different countries and therefore enhance transaction costs. Hence, this situation creates a high level of uncertainty and unpredictability in commercial relations, causing serious obstacles to international investment.

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[29] **N.Z. Law Comm’n, Report No. 52, Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency?** (1999) [hereinafter **New Zealand Law Report**].

[30] UNCITRAL Model Law, *supra* note 1, at 27.

[31] **Omar**, *supra* note 24.

[32] **Black’s Law Dictionary** 681 (8th ed., 2004) (defining “forum-shopping” as “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard”).

C. The Economic Role of Insolvency Law

From an economic point of view, competition promotes equilibrium by eliminating economically inefficient companies from the market. According to White, this elimination occurs through the legal mechanism of bankruptcy and liquidation proceedings, based on the theory that the resources used by inefficient enterprises should be better invested in other activities to avoid losses of resources and to develop the economy.[33]

Under the actual economic scenario based on credit availability and where the creation of business is essential for the economy, optimal insolvency systems are a vital element for achieving economic growth and financial stability. Because any extension of credit involves risk,[34] the aim of insolvency law[35] is to promote confidence in domestic and foreign creditors in order to attract investment.[36] The UNCITRAL Legislative Guide on Insolvency Law emphasizes this goal, stating that one of the main objectives of insolvency law is "to establish provision of certainty to promote economic stability and growth and avoid the pitfalls of integration of national financial systems with the international financial system."[37]

The global economic system is based on a principal-agent relationship between entrepreneurs[38] (who need investment funds) and investors (who provide the investment funds). Such a correlation produces economic inefficiencies (first, inefficient liquidation may limit credit recoverability and second, continued operation of company with irreversible outstanding instead of rapid liquidation causes further losses). Due to these facts, insolvency law has an important role to play as a mechanism for reducing transaction costs, by providing creditor's remedies and debtor's rights in the cases of business failure.[39]

In order to address this issue efficiently, Berkovitch states that insolvency law has to serve two economic objectives. The first is to reduce the cost of financing by generating manager's incentives for liquidation in cases of

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[33] Michelle J. White, *The Corporate Bankruptcy Decision*, 3 **J. Econ. Persp.** 129 (1989); **International Library of Critical Writings in Economics** 81 (Richard A. Posner & Francesco Parisi eds., 1989).

[34] John Armour, *The Law and Economics of Corporate Insolvency: A Review* (ESRC Ctr. for Bus. Research, University of Cambridge, Working Paper No. 197, 2001).

[35] *Id.*

[36] **World Bank**, **Principles and Guidelines for Effective Insolvency and Creditor Rights Systems** (Apr. 2001) [hereinafter **World Bank Principles**].

[37] UNCITRAL, Legislative Guide on Insolvency Law, U.N. Sales No. E.05.V.10 (2005) [hereinafter UNCITRAL Legislative Guide].

[38] Elazar Berkovitch & Ronen Israel, *Optimal Bankruptcy Laws Across Different Economic Systems*, 12 **Rev. Fin. Stud**. 347, 348 (1999).

[39] *Id.* at 349.

financial failure, so that further capital losses can be avoided whenever liquidation is the most favorable option.[40] This objective is the economic reason why insolvency law always includes a creditor's chapter that enables creditors to liquidate the company if the managers do not liquidate by themselves, allowing the creditors to recover the investment from the firm.[41] Armour states that such credit powers grant debtors ex ante incentive to repay the debt as well as help avoid shareholder expropriation.[42] The second objective of insolvency law is to provide rules to avoid detrimental liquidation by creditors, in economic circumstances where maintaining the business activity results in asset protection and higher valuation of the company.[43] Maximizing asset value and rehabilitation are crucial elements of law as a means to protect a business and its assets against individual creditor actions, permitting the efficient rescue of distressed companies. The debtor's remedies in this case are also important in preventing inefficient liquidation whenever continuation is more valuable for both parties, minimizing the inefficiency of the financing stage.[44]

By providing these rules, insolvency law generates two economic benefits. First, by offering liquidation efficiency and granting the possibility of reaching the entrepreneur's assets, it helps reduce transaction costs.[45] This efficiency[46] results in cheaper money with lower interest rates for project financing because the investors have tools to protect and recover their interests.[47] The second benefit derives from the fact that efficient insolvency law (liquidation and restructuring rules) generates market and creditor confidence.[48] Therefore, because of the reduction investment risk, it helps to reduce the cost of money,[49] promoting incentives for the expansion of credit.[50]

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40 *Id.*

41 *Id.*

42 Armour, *supra* note 34.

43 Berkovitch & Israel, *supra* note 38.

44 *Id.*

45 Ronald H. Coase, *The Relevance of Transaction Costs in the Economic Analysis of Law*, *in* **The Origins of Law and Economics: Essays by the Founding Fathers** 199, 199 (Francisco Parisi & Charles K. Rowley eds., 2005) (stating that transaction costs play a crucial role in determining how rights will be used).

46 **Wulf Alexander Kaal**, **Hedge Fund Regulation by Banking Supervision: A Comparative Institutional Analysis** (2006).

47 **Richard A. Posner, Economic Analysis of Law** 418 (6th ed., 2003).

48 Berkovitch & Israel, *supra* note 38.

49 1 **Richard A. Posner, The Economic Structure of the Law: The Collected Essays of Richard A. Posner** INSERT PAGE NUMBER(S) (Francesco Parisi ed., 2000) (arguing that "rules reduce the cost of organizing and communicating information for use in resolving legal disputes").

50 Armour, *supra* note 34.

Apart from this, efficient rules on bankruptcy are also important to the market economy as a means of administering and avoiding a conflict of interest between creditors, management, and stakeholders. Bliss states that such conflicts can easily result in a depreciation and dismemberment of company assets because creditors would only seek a satisfaction of their own interests, rather than collective concerns.[51] Therefore, it seems clear that efficient coordination of different interests leads to financial and market stability because in the absence of these rules, commercial relations would be a risky activity,[52] affecting the flow of investment among trade agents and nations.

D. The Economic Rationale of International Trade and Insolvency Law

Due to the fact that nowadays, transactions are connected with more than one jurisdiction and that the phenomenon of globalization has increased cross-border insolvencies, the international features of commercial relations have submitted trade agents to different law systems.[53]

When a transaction is national, it is relative easy to deal with. When a transaction or dispute has a connection with more than one jurisdiction, however, the solution is usually decided in different jurisdictions, with each court applying different conflicts of law rules.[54] Particularly in cases of asset securitization and investment, Scott explains that complex issues may arise in cross-border transactions,[55] related to what should be the governing law for a specific deal[56] because it can be very difficult to define which jurisdiction's law applies in cases where contractual relations involve receivables and assets located in many jurisdictions.

Consequently, the possibility of applying different legal systems to the same situation has brought concerns about certainty in international transactions that have connections with more than one jurisdiction.[57] This uncertainty is further complicated by the divergences between common law

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51 Robert R. Bliss, *Multiple Regulators and Insolvency Regimes: Obstacles to Efficient Supervision and Resolution*, *in* **The Structure of Financial Regulation** 142 (David G. Mayes & Geoffrey E. Wood eds., 2007).

52 *Id.*

53 **Ravi C. Tennekoon, The Law & Regulation of International Finance** (1991).

54 **Detlev F. Vagts, William S. Dodge, & Harold Hongju Koh, Transnational Business Problems** (2007).

55 **Scott,** *supra* note 3.

56 *Id.* at 524.

57 **Tennekoon**, *supra* note 53.

and civil law systems. Often, these systems differ significantly on matters of the concept of law,[58] the concept of the role of court, as well as the mode of creating and enforcing contract and property rights.[59]

As enterprises have assumed international structures and, especially in developing countries, have been financed by foreign creditors, this uncertainty has also impacted insolvency proceedings. Although in international business transactions the choice of law can minimize uncertainty, it is not allowed in cases of bankruptcy regimes. Given that in most countries, insolvency regulation is considered public interest law (public policy),[60] jurisdiction over the claims in insolvency matters will be established according to the international private rules of each state. Therefore, the parties are not allowed to choose the applicable law.

Needless to say, from the point of view of lenders and international investors, effective and predictable rules create a better environment for foreign direct investment as they are capable of offering elements to analyze and assess the risks to which a specific transaction may give rise. This preliminary evaluation helps prevent disputes.[61] In this sense, regarding the rules of risk allocation, the procedures and enforcement of creditor's rights are capable of building a better economic environment, especially for foreign creditors who need predictability to increase lending and investing confidence.

On the other hand, from a lender's perspective, predictability in law is also crucial. In the case of business crises, for example, this predictability can provide better information for the managers in deciding more prudently which option to choose, whether a restructuring plan or the liquidation of company. In other words, predictability would give them a better understanding of the legal and economic consequences of each exit plan for the company, allowing the managers to decide on the most appropriate action plan for the firm and the creditors' interests.[62]

Thus, a well-established insolvency regime plays two important economic roles as a means of reducing uncertainty in business transactions. The first is that it is capable of giving all parties (creditors and debtors) subsidies to understand in advance how insolvency proceedings operate. By doing so, the regulation helps to anticipate the consequences that they can

[58] Patrick Del Duca, Alan Feld, & Cristián Valléjo, *U.S. Debt Markets Meet the Emerging Markets: Legal Challenges Faced by Cross Border Lenders*, *in* **Law of International Insolvencies**, *supra* note 19.
[59] *Id.*
[60] **C.M.V. Clarkson & Jonathan Hill, Jaffey on the Conflict of Laws** (2nd ed., 2005).
[61] UNCITRAL Legislative Guide, *supra* note 37.
[62] **World Bank Principles**, *supra* note 36.

reasonably expect from the law.[63] And second, it allows the creditors to estimate more precisely the risks and legal implications of the debtors' default.[64]

In the case of cross-border insolvency, the uncertainty in existence nowadays has been generated on account of the diversity of law regimes applied to the same debtors in cross-border cases. Moreover, national laws have not kept pace with the development of corporate financing and the structuring of multinational corporations required by this new economic environment. Parallel insolvency regimes with little coordination between them have prejudiced creditor and debtor rights, caused procedural delays, resulted in a waste of assets, and acted as a barrier to rescue viable business.[65] Most countries that have been involved in international business have not efficiently addressed their national legal rules in this regard, thus remaining under obsolete conflict of laws. The situation has worsened as insolvency laws have been enacted to solve only domestic insolvencies.

In particular after the financial crises occurring in the 1990s in emerging markets, these weaknesses in terms of insolvency law have been noted by local and foreign investors as well as international institutions such as the World Bank and the United Nations. These problems have discouraged investments and increased the cost of money (transaction costs)[66] for these countries. These problems have been partly caused by the inexistence of risk allocation rules, uncertainty related to the enforcement of contracts and property rights, and the inability to predict risks in transactions. More significantly, though, these problems have been caused by inadequate insolvency systems that could not efficiently deal with restructuring and insolvency procedures as well as barriers to recognizing foreign insolvency proceedings and the enforcement of creditor's rights.[67]

Recently, the cases of companies such as Yukos,[68] which used American bankruptcy law as a defensive measure under chapter 11, and Parmalat,[69]

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[63] Benjamin Klein, Commentary, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 **J. L. & Econ** 309 (1976).

[64] UNCITRAL Legislative Guide, *supra* note 37.

[65] Peter Manning & Robin Henry, *United Kingdom*, *in* **Law of International Insolvencies**, *supra* note 19.

[66] **Kern Alexander, Rahul Dhumale, & John Eatwell, Global Governance of Financial Systems: The International Regulation of Systemic Risk** (2006).

[67] **World Bank Principles**, *supra* note 36.

[68] The Yukos Oil Company was incorporated in Russia. In 2004, Yukos was placed in bankruptcy proceedings in Russia. Facing a financial crisis, Yukos sought protection under chapter 11 of the U.S. Bankruptcy Code in a U.S. court. **Manning & Henry**, *supra* note 65; *see also In re* Yukos Oil Co., 320 B.R. 130 (S.D. Tex. 2004).

[69] Int'l Chamber of Commerce (ICC), Cross-Border Insolvency Laws Needed to Reassure Investors (May 24, 2006), *available at* http://www.iccwbo.org/icchedb/index.html.

which created issues for the company's assets and creditors across the globe, have also revealed the inefficiency of local legal frameworks to deal with cross-border cases.

In most Latin American[70] and Asian countries, these inefficiencies are still prevalent. Although in past years, the insolvency law in these countries has changed towards restructuring distressed companies and out-of-court restructuring alternatives,[71] the current bankruptcy laws are still unable to provide efficient solutions in cross-border cases. The lack of rules on jurisdiction, the lack of recognition of foreign judgments, and the cooperation and assistance among courts have caused concurrent proceedings in diverse courts with the potential application of various systems of law in bankruptcy proceedings. These factors have generated a real "race of creditors" to recover their investment in different jurisdictions.

On the other hand, multinational companies have looked for jurisdictions that can provide better remedies in terms of restructuring procedures such as the United States and England. As a result, higher uncertainty and a significant rise in transaction costs have affected all the parties involved in cross-border procedures.

These legal weaknesses and the globalization of the trade process have put pressure on nations to enact laws in accordance with current needs. Increasingly, countries have realized that these issues create unnecessary legal barriers to the objectives of insolvency law and flow of investment. The need for an international approach to local law is a reality for which countries involved in international commerce can no longer deny. Attention has been given to the necessity of cooperation among courts to accelerate and maximize the liquidation and restructuring procedures as well as to ensure that foreign procedures can be fully recognized in local courts.

A movement towards a further universal approach of recognition and efficient coordination of insolvency procedures is the actual goal of the international community as a means of strengthening predictability and removing the legal limitations that exist today.[72] This goal will work to facilitate and increase credit availability and economic growth.

Because countries differ widely in their legal systems, as well as in their economic and social needs, harmonization has been very difficult. Countries are unwilling to unify their substantive law in this field. Nevertheless, there is

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[70] In Latin America, Colombia and Mexico have already adopted the UNCITRAL Model Law on Cross-Border Insolvency. UNCITRAL Status, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Mar. 3, 2008).

[71] Rodrigo Olivares-Caminal, *Corporate Debt Restructuring in Latin America: New Developments, New Opportunities*, **I.C.C.L.R**. 2005, 16(6), 254-62 (2005).

[72] **New Zealand Law Report,** *supra* note 29.

an urgent need for solutions at a domestic law level that would permit courts to minimize conflicts of laws on insolvency through the adoption of similar procedures as a means of diminishing costs, avoiding proceedings delays, and extending rights protection.[73]

III. The Uncitral Model Law on Cross-Border Insolvency

A. The Nature and Scope of Application of the Model Law

The model law on cross-border insolvency was adopted in May 1997 by the United Nations Commission on International Trade Law[74] as a response to the recent challenges presented on global insolvencies. Obsolete rules have often resulted in inadequate and inharmonious proceedings. Consequently, fraud by debtors on hidden, dissipated assets and the impossibility of business rescue are constant issues that have faced parties involved in international trade.[75]

The Model Law was designed to assist countries with guidelines that establish an effective legal framework for their national insolvency regulations.[76] The main purpose is to promote a better environment for dealing with the practical terms of cross-border situations[77] in a manner that reduces the barriers and delays through advanced cooperation and coordination between courts.

The Model Law does not have the objective of harmonizing the substantive insolvency law of each estate or establishing new procedural laws for adoption nations.[78] In this regard, the law clearly respects the different procedures and substantive law of each State. Instead, the Model Law aims to provide procedural rules especially designed to facilitate the management and development of efficiency in terms of the coordination of international insolvencies through rules on the following: (i) assistance and cooperation between foreign courts (nationals courts will be empowered to communicate directly with foreign courts and representatives); (ii) coordination of concurrent proceedings as a way to speed up the administration of diverse and simultaneous proceedings in different states so that better liquidation and restructuring procedures can reduce the chance of asset dissipation and debtor

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73 UNCITRAL Legislative Guide**,** *supra* note 37.
74 For a history and evolution of the UNCITRAL Model Law, see **Fletcher**, *supra* note 21.
75 **UNCITRAL Commentary,** *supra* note 23.
76 UNCITRAL Legislative Guide**,** *supra* note 37.
77 **Fletcher**, *supra* note 21.
78 UNCITRAL Legislative Guide**,** *supra* note 37.

fraud; (iii) automatic recognition of foreign proceedings by ensuring that international decisions can be enforced without the requirement of reciprocity and delays originated by the discrepancies in procedures existing between civil law and common law traditions; and (iv) granting to the representative expressly designated by the foreign proceeding the right to direct access to the courts of the enacting State.[79]

Therefore, the application of the Model Law is limited to issues or incidents of cross-border insolvencies and assistance between courts, rather than modifying jurisdictional rules on international private law in insolvency matters that are already in place in the enacting State.[80] In this sense, the Model Law covers situations where insolvency proceedings have been opened in the enacting State, and then the enacting State requires cooperation[81] from foreign authorities.

Moreover, the Model Law may apply in situations[82] where the insolvent party has assets in another State or when a representative of foreign procedure seeks to intervene overseas to protect debtors' and creditors' rights.[83] Finally, the Model Law can apply when creditors or any other interested persons from a foreign State seek a start to insolvency proceedings or participate in proceedings taking place in the enacting State.[84]

The Model Law is established to consider two kinds of foreign proceedings: (i) foreign main proceedings and (ii) foreign non-main proceedings.[85] The main foreign procedure means that a proceeding takes place in the State where the debtor has its Centre of Main Interest (COMI).[86] On the other hand, a foreign non-main proceeding under the Model Law means a foreign proceeding other than a main proceeding – basically where the debtor has a commercial establishment or assets.[87] Under the Model Law, both of these proceedings will fully coordinate with courts.

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[79] *Id.*

[80] **Fletcher**, *supra* note 21.

[81] Regarding the benefits and the dangers of court-to-court communication, see William Trower, *Court-to-Court Communication–The Benefits and the Dangers*, 4 **Int'l Corp. Rescue** (2007), *available at* http://www.chasecambria.com/site/journal/article.php?id=245.

[82] *See* UNCITRAL Legislative Guide**,** *supra* note 37 (for scope of application).

[83] **UNCITRAL Commentary,** *supra* note 23.

[84] Khumalo, *supra* note 28.

[85] *See* UNCITRAL Legislative Guide**,** *supra* note 37, at 320.

[86] In 2006, the European Court of Justice ruled in the *Eurofood IFSC* case that the "Centre of Main Interest" (COMI) means the place where the company conducts the administration of its interest on a regular basis in a manner ascertainable by third parties. Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-3813.

[87] UNCITRAL Legislative Guide**,** *supra* note 37, at 320.

Nevertheless, the Model Law has faced some barriers in terms of its wider adoption. Given that the nature of the Model Law is not binding,[88] the United Nations can only recommend to countries its adoption based on the economic and legal advantages that it can bring to domestic legislation. Furthermore, the Model Law merely becomes binding when nations enact their framework into the national law system.

Despite the fact that UNCITRAL recommends full adoption of the Model Law and its interpretation according to the Model Law Guide to Enactment,[89] countries that are willing to adopt it can freely exercise their sovereign rights in order to enact only part of it or modify the Model Law provisions[90] with the purpose of protecting their national interests and applying restrictions (denied recognition of foreign decision) based on public policy exemptions.[91] If the enacting States do not respect the original interpretation of the law terms (defined concepts to be applied) as well as the purposes given by UNCITRAL, and they instead adopt the main cross-border provisions of the Model Law, such action may cause the reverse effect, resulting in more unpredictability with regard to cross-border insolvency cases, as well as jeopardizing the aim of the Model Law.

B. The Benefits and the Economic Advantages of the Model Law

As we have seen, particularly insofar as insolvency matters are concerned, the economic rationale of international investment and credit availability requires efficient mechanisms to enforce creditor's rights. Furthermore, it demands predictability in allowing the parties to foresee as far as possible the legal consequences of entering into business transactions. Finally, certainty in terms of the law permits parties to measure the impact of eventual business failure.

A domestic legal framework that covers these elements is capable of generating investor confidence, reducing transactions costs and, consequently, incentivizing new investments. By granting an efficient legal framework to allocate risks among parties, recovery of investment for foreign creditors and asset value, the law promotes market confidence and incentivizes the flow of foreign investments into the local economy.

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88 UNCITRAL, FAQ-UNCITRAL Texts, http://www.uncitral.org/uncitral/en/uncitral_texts_faq.html (last visited Mar. 3, 2008) (stating that "a model law is created as a suggested pattern for law-makers in national governments to consider adopting as part of their domestic legislation").

89 **UNCITRAL Commentary,** *supra* note 23, at 257.

90 *Id.*

91 *See* **Clarkson & Hill,** *supra* note 60, at 305 (concept of public policy).

The UNCITRAL Model Law has clearly adopted these economic objectives. Based on mechanisms of the automatic recognition of foreign rights and foreign insolvency decisions, assistance, cooperation, and coordination between courts, the law aims to promote greater certainty and fairness for international trade and investment.[92]

The Model Law also has the objective of reducing time and costs to access foreign proceedings through the fair and efficient administration of cross-border insolvency. In order to facilitate the illustration of the economic advantages that it can bring, in theory, to the enacting State, two main groups emerge, one related to the rules of automatic recognition, enforcement, and access of foreign representative to foreign courts and the other related to the rules of cooperation, coordination, and assistance mechanisms in cross-border cases.

The barriers to effective and widespread cooperation and assistance between judges worldwide are derived from a lack of a legislative framework in this regard.[93] The Model Law can fill this gap in order to provide a universal framework. In doing so, it can reduce uncertainty related to it. Thus, the Model Law generates three main economic benefits. First, the time necessary for exchanging information between countries decreases rapidly. Second, it increases the credit recovery efficiency. Third, full cooperation and assistance helps to protect company assets from dissipation and may achieve successful reorganization by granting temporary remedies in the interests of all jurisdictions involved.

On the other hand, the rules of automatic recognition of foreign proceedings and access to foreign representatives enables parties to surpass the legal barriers that exist in terms of dissimilarities in the legal systems (common law and civil law) and the different approaches of each State's international private law system. In doing so, the enactment of Model Law can easily speed up the procedure of recognition, thereby facilitating its enforcement.

As an economic consequence, these mechanisms can significantly reduce the cost of transactions by producing the following: (i) better credit recovery efficiency and fairness to creditors; (ii) a significant decrease in the time needed for recognition and enforcement of foreign decisions; and (iii) efficiency of liquidation and restructuring plans with international features and thus maximization of asset value.

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[92] UNCITRAL Model Law, *supra* note 1, pmbl. (b).
[93] UNCITRAL Legislative Guide, *supra* note 37.

Aware of these legal and economic benefits that the UNCITRAL Model Law can bring in matters of international commerce and the administration of international insolvencies, the United States has enacted the Model Law. In the case of the United States, it has adopted it in the form of the new chapter 15, and this adoption became effective in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act.[94]

IV. The United States Bankruptcy Code and Cross-Border Insolvency

A. Forum Shopping, Ancillary Proceedings and Latin American Companies

The U. S. approach to multinational corporation restructuring has always been flexible and successful. Structured under modern reorganization legislation and court decisions funded on the rule of stare decisis,[95] the United States has been very attractive for distressed companies looking for protective measures.

Historically, U. S. courts have adopted a pragmatic view and extensive jurisdiction to solve the cross-border insolvency challenges. Based on the principle of universalism and bilateral agreements (protocols) among common law countries such as Canada and the United Kingdom,[96] U. S. law has developed a more efficient and predictable environment to deal with cross-border cases when compared to civil law countries systems. The protocols have offered rules about the rights and limitations of each State and parties involved. Moreover, it has improved the management of cultural differences between them, creating a better working relationship.[97] This improvement happened successfully in the Maxwell bankruptcy, which is considered one of the most famous international insolvency cases.[98] In that opportunity, both courts of the United States and the United Kingdom settled

[94] Richard G. Mason, *United States*, *in* **UNCITRAL Commentary,** *supra* note 23.

[95] Posner and Ehrlich state that the courts in the United States do not follow the rule strictly because it would be economically inefficient. It is the reasoning behind the precedent based on the rule of stare decisis. *See* **Posner**, **Economic Structure,** *supra* note 49.

[96] One of the Cross-Border Insolvency Protocol in international restructuring procedures between the United States and the United Kingdom was the *Federal Mogul Corp.* case. *See* Peter Saville & Mike Wellard, *Achieving Success in Transatlantic Restructuring*, 1 **Int'l Corp. Rescue** (2004), *available at* http://www.chasecambria.com/site/journal/article.php?id=106.

[97] *Id*.

[98] John A.E. Pottow, *The Maxwell Case*, *in* **Bankruptcy Law Stories** 222 (Robert Rasmussen ed., 2007).

the famous Maxwell Protocol, which provided clear and fair rules to manage the case relating to all parties located both in the United States and the United Kingdom.[99]

As the success of restructuring procedures depend on which legislation will regulate the proceeding, non-U. S. multinational companies have been using U. S. regulations to achieve their restructuring purposes.[100] Companies that maintain business relations or their creditors in the United States have used the U. S. Bankruptcy Code in two different ways: (i) multinational corporations have sought protective measures and relief under chapter 11 by filling petitions directly in U. S. courts to have protective measures against creditors located in the United States and foreign jurisdictions as well; and (ii) foreign companies have initiated restructuring proceedings in their own jurisdictions. Companies that sought recognition of a pending foreign proceeding in U. S. courts under former section 304 of the Bankruptcy Code used it to relieve themselves from creditors' executions and to permit themselves to perform a restructuring process in their own jurisdiction.[101]

It has been especially true in the case of Latin America, where companies have accessed the U. S. market and have been heavily financed by the United States and other foreign creditors in the form of commercial contracts (such as leasing contracts), U. S. bonds (Yankee bonds) or notes governed by U. S. laws as a means of becoming more competitive or more liquid in the global market.[102] Consequently, Latin American companies have frequently sought debt restructuring plans or recognition of ancillary proceedings in the United States because, normally, the main creditors are located in the United States or have business connected with a U. S. jurisdiction.

Three international restructuring cases with the following companies based in Latin America countries illustrate this situation: (i) the Argentine Television Company, Multicanal S. A. in 2002; (ii) the largest Brazilian airline Varig S. A. (Viação Aérea Rio Grandense); and (iii) the Colombian Airline Avianca S. A. (Aerovias Nacionales de Colômbia) in 2003.[103] In all of these cases, at the time of their financial crises, the companies had foreign creditors located in the United States and the contracts were also governed by U. S. law.

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[99] *Id.*

[100] Anthony J. Smits & Ilia M. O'Hearn, *Multiple Insolvency Forum Shopping*, *in* **Law of International Insolvencies**, *supra* note 19, at 496-500.

[101] Howard Seife, *As Latin American Cross-Border Insolvencies Increase, So Do The Questions of Law*, *in* **The Am. Restructuring & Insolvency Guide** (2004-05), *available at* http://www.chadbourne.com (select "Publications", then "Articles", and scroll down to find title).

[102] Bruce R. Zirinsky, *In re Board of Directors of Multicanal S.A.–US Bankruptcy Court Affirms Availability of Section 304 Relief to Foreign Bond Issuers*, **Preferential Treatment**, Fall 2004, *available at* http://www.cadwalader.com/assets/newsletter/FRDFall04.pdf.

[103] For more about Avianca, see **Araya & Donaldson**, *supra* note 18.

In the Multicanal case,[104] the company had issued several debt contracts governed by New York law (the U. S. Trust Indenture Act) and sought for recognition of the ancillary proceeding under section 304 of the U. S. Bankruptcy Code. As the amount in these contracts represented ninety-seven percent of the company's debt, Multicanal sought a decision in the U. S. Bankruptcy Court for the Southern District of New York to bind all the creditors under the Argentine bankruptcy law to conduct the restructuring process in Argentina. The court recognized that the restructuring proceeding in Argentina (Acuerdo Preventivo Extrajudicial)[105] was a form of insolvency proceeding (similar to pre-package) under section 304 and hence, gave full effect to stop U. S. creditors' actions.[106]

The Brazilian Varig case also sought for recognition of the Brazilian reorganization plan under the ancillary procedure in the United States with the purpose of binding all creditors (the lessor of its aircrafts and its engines) under the restructuring procedure ongoing in Brazil at the time. The New York court granted Varig's motion on the ancillary proceedings for a permanent injunction in the terms decided by the general assembly of Varig's creditors, giving full effect in the United States and elsewhere with U. S. court jurisdiction regarding all the parties.[107] It permitted the airline to perform a better reorganization plan in Brazil without fear of loosing its main aircrafts and suddenly stopping the companies' activities. The company's asset value in this case was protected.

Lastly, in the Avianca case, although the company had its principal place of business and the majority of its creditors in Colombia, the airline filed a restructuring proceeding under chapter 11 of the U. S. Bankruptcy Code, instead of using the Colombian bankruptcy laws. The company based its proceeding on the argument that the Colombian bankruptcy law at the time could not grant effective restructuring proceedings. Because the company had sufficient contact[108] with the U. S. jurisdiction, such as bonds subject to U. S. law and leasing contracts of their aircrafts with creditors located there, the U. S. court exercised jurisdiction.[109]

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[104] Zirinsky, *supra* note 102.

[105] Rodigo Olivares-Caminal, *Expedited Debt Restructuring Under Argentine Law: Acuerdo Preventivo Extrajudicial (APE)*, *in* **Expedited Debt Restructuring: An International Comparative Analysis** 19-53 (Rodrigo Olivares-Caminal ed., 2007).

[106] **Araya & Donaldson**, *supra* note 18.

[107] Otto Eduardo Fonseca & Paulo Penalva Santos, *Varig Recovery–Latest Developments: US Decision and Bankruptcy Court Has Sole Jurisdiction for All Recovery Plan Issues*, **Int'l Case Law Alert** (EIR Conferences, Ltd., London), Aug, 21, 2007, at 8, *available at* http://www.eir-database.com/insolvency-caselaw-alert.php (follow "Insolvency Caselaw Alert").

[108] Avianca had a fleet of thirty-one aircraft and more than dozen spare engines that it leased from lessors located or doing business in the United States. *See* Seife, *supra* note 101.

[109] Araya & Donaldson, *supra* note 18.

These cases have proved that the U. S. courts have been willing to exercise jurisdiction in cross-border cases over companies which have sufficient contact with the United States and have shown that a foreign reorganization proceeding can be recognized under U. S. law with the aim of permitting the rescue of financially distressed companies located overseas. Additionally, these cases have opened a way for Latin American companies that have U. S. creditors to seek restructuring and recognition of reorganization proceedings in U. S. courts. Certainly, this option will increase the number of foreign companies in U. S. courts seeking protective measures, both under ancillary and chapter 11 proceedings. Nevertheless, it is incontestable that this plurality of proceedings generates uncertainty to creditors, enhances the cost to parties, and can result in asset dissipation of companies located overseas.

In response to the importance of centralized and coordinated proceedings, the United States[110] has adopted the UNCITRAL Model Law on Cross-Border Insolvency to improve its procedural domestic regulation under the new chapter 15 of the Bankruptcy Code (Ancillary and Other Cross-Border Cases), changing this situation in some respects.

B. Chapter 15

The new chapter 15 has replaced section 304 of the U. S. Bankruptcy Code, which previously governed the recognition and administration of foreign proceedings in U. S. courts.[111] Basically, the purpose of the former ancillary proceeding was to allow a foreign representative to open limited proceedings to cover assets located in the United States. Chapter 15 aims to harmonize these domestic and foreign proceedings for multinational corporations and encourage cooperation with foreign courts in a more efficient way than did section 304 among the United States courts, trustees, debtors, and overseas judicial authorities.[112]

Essentially, section 1501(b) of chapter 15[113] covers four main situations: (i) where a foreign court or foreign representative seeks the assistance of the

[110] The United Kingdom also enacted the UNCITRAL Model Law in 2006. For information about the scope and application of cross-border insolvency in UK and EU cross-border cases, see **Fletcher**, **Insolvency in Private International Law: Supplement to Second Edition** (2007).

[111] 11 U.S.C. § 1501 (2007).

[112] *New Chapter 15 of Bankruptcy Code Provides More Options for Non-US Debtors*, **Client Alert** (Latham & Watkins), Apr. 29, 2005, *available at* http://www.lw.com/Resources.aspx?page=ClientAlertDetail&publication=1259 [hereinafter *New Chapter 15*].

[113] For recent chapter 15 cases, see Chapter15.com: Ancillary and Other Cross-Border Cases, http://www.chapter15.com (last visited Mar. 3, 2008).

U. S. courts in connection with foreign proceedings; (ii) where a U. S. court seeks the assistance of a foreign court in cases under chapter 11; (iii) where a foreign proceeding and a case under chapter 11 are concurrent; and (iv) where creditors and other interested persons in a foreign country have an interest in requesting the commencement of, or participation in, a case or proceeding under chapter 11 in the United States.

Similarly, chapter 15 of the Model Law is structured on foreign main proceedings and foreign non-main proceedings. Basically, a proceeding under chapter 15 starts with a "petition for recognition" by a foreign representative that must be accompanied by a procedure proof of foreign insolvency proceedings, usually a certificate from an overseas court or other acceptable evidence.[114]

Afterwards, the U. S. court will decide whether the court can recognize the proceeding or not. According to section 1506, the U. S. courts are empowered by law to refuse foreign proceedings if they are against U. S. policy.[115] Moreover, at this stage, the court will determine whether the foreign proceeding will be considered as a foreign main or non-main proceeding under the regulation. The proceeding will be recognized as a main proceeding if the debtor has its COMI[116] in a foreign country.[117] But, if the debtor only has assets overseas or an establishment, it will be classified as a non-main proceeding.

The protective measures to creditors and debtors are available in both foreign main and non- main proceedings, and this is regulated by section 1521. The U. S. Bankruptcy Code grants different remedies to avoid the fraudulent transfer of assets to other jurisdictions as well as to stop any execution against the debtors. These tools serve to guarantee a fair restructuring process and to protect investment recovery. Indeed, chapter 15 has increased the efficiency of such measures by granting automatic protective measures as a direct effect of recognition as compared to the former rules.[118]

The amendments introduced by chapter 15 have not changed the jurisdiction rules at all. The overall U. S. perspective on the conflict of law on bankruptcy matters continues to be the same. Nevertheless, from now on U. S.

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[114] 11 U.S.C. § 1511(b) (2007).

[115] *Id.* § 1506.

[116] Although there is no definition of "Centre of Main Interest" (COMI), the European Court of Justice in the *Eurofood IFSC* case recently held that, for the purposes of EC insolvency regulation, the COMI must be identified and ascertainable by third parties in order to ensure legal certainty and foreseeability regarding the determination of court jurisdiction to open an insolvency proceeding. *See* **UNCITRAL Commentary**, *supra* note 23.

[117] UNCITRAL provides guidance to enacting States for interpreting the meaning of COMI. *See* UNCITRAL Legislative Guide, *supra* note 37.

[118] *See* Elizabeth S. Strong, *United States*, *in* **Law of International Insolvencies**, *supra* note 19.

courts shall have full respect and cooperation to the "maximum extent possible"[119] with the foreign main proceeding taking place overseas, thereby giving maximum protection to assets located in United States.

Even with the changes brought by chapter 15, U. S. courts continue to face obstacles in dealing with the restructuring of multinational corporations that maintain assets spread out over different jurisdictions. This problem is caused by the difficulty of enforcing U. S. restructuring or insolvency decisions on countries that do not recognize the United States as an appropriate forum.[120] Therefore, the enactment of the Model Law by other jurisdictions would be a more efficient way, from the perspective of the United States and other countries, to manage and protect the parties' interests in international insolvencies. The legal efficiencies and economic consequences of the adoption of the Model Law and its result for the United States will be analyzed in the following section.

C. The Economic Role of Chapter 15

Historically, the common law system has been economically characterized as a legal system, which has promoted economic growth by allowing permissive entrepreneurial activity. For this reason, common law has brought efficiency to society as a whole. The strong influence of efficiency logic on court decisions has permitted proficient allocation of resources among trade agents. It has accelerated the maximization of wealth by allowing capital investment to be more profitable to investors.[121]

Under the economic analysis of common law, procedural rules such as chapter 15 are considered as a mechanism specially designed to reduce transaction costs (in this case the cost of bankruptcy proceedings),[122] in that they increase predictability of the legal consequences of using the judicial system to enforce creditor and debtor rights in situations of business failure.[123] Chapter 15 clearly has the intention of promoting greater certainty for trade and investment, reducing proceeding time as well as extending protection to all parties through tools that aim to ensure the following: (i) fair creditor treatment; (ii) facilitation of rescue of distressed companies; (iii) maximization of debtors' assets; and (iv) fair and efficient administration of international insolvency.[124]

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[119] This is one of the main goals of chapter 15.
[120] Labovitz & Basil, *supra* note 20.
[121] **Posner, Economic Analysis**, *supra* note 47.
[122] For a discussion of the excessive costs generated by reorganization proceedings under chapter 11, see Stephen J. Lubben, *The Microeconomics of Chapter 11*, 1 **Int'l Corp. Rescue** (2006), *available at* http://www.chasecambria.com/site/journal/article.php?id=227.
[123] **Posner, Economic Analysis**, *supra* note 47.
[124] § 1501.

The enactment of the UNCITRAL Model Law can result in a more reliable procedural legal framework for ancillary cases, such as the Varig and the Multicanal cases,[125] as the new rules are able to significantly reduce the time required to recognize and enforce foreign decisions and extend protective remedies to make reorganization proceeding successful. For example, a foreign representative can now obtain more immediate temporary measures because under section 304 of the U. S. Bankruptcy Code, this sort of remedy could only be granted if the interested party did not controvert the petition in time.[126] Under chapter 15, however, these measures are granted only upon application of recognition and the request of the interested party.[127]

Apart from this, chapter 15 would also offer automatic recognition of foreign proceedings and full coordination and assistance[128] avoiding the plurality of proceedings among courts. Consequently, the application of chapter 15 at the time of the Multicanal and Varig cases could theoretically have reduced their costs and the uncertainty created by the possibility of conflicting decisions.[129]

In this way, based on the assumption that the rules brought by chapter 15 can enhance predictability by allowing parties to anticipate the effects that they can expect from the law, chapter 15 may reduce the costs of debt financing. Thus, it incentivizes the availability of credit and the flow of investments in two different ways. First, it can attract more foreign investment to the United States as it permits faster recognition of foreign decisions and better cross-border administration. Therefore, there is more efficiency in credit recovery for overseas creditors. Second, it also incentivizes the flow of investment from the United States to other regions of the globe, such as Latin America, which has multinational companies that often need to be financed by creditors located in United States or regulated by U. S. law because this can facilitate the coordination of procedures taking place in the United States and overseas.

Hence, the economic role of chapter 15 in cross-border cases is to establish a better legal environment whereby trade agents can reasonably foresee the risks involved in cross-border cases, identify the tools available for credit recovery of assets situated overseas through coordination among courts, produce certainty, and reduce the cost of money for investments overseas and

[125] For more about Multicanal, see Olivares-Caminal, *supra* note 105, at 42-43.
[126] *New Chapter 15*, *supra* note 112.
[127] *See* 11 U.S.C. §§ 1519-21 (2007).
[128] *See* Trower, *supra* note 81.
[129] *See* Olivares-Caminal, *supra* note 105, at 42-43.

in the United States.[130] Furthermore, the regulation serves to promote a better legal mechanism to achieve successful restructuring procedures of transnational corporations through the maximization of assets value.

The efficiency of credit recovery and greater protection of investments derived from these laws automatically lead to an expansion of credit. Therefore, chapter 15[131] creates legal incentives for investors and lenders to enter into international transactions, helping to generate economic growth.

V. The Brazilian Law and International Insolvency

A. A Brief View of the Brazilian Bankruptcy and Reorganization Law

The new Brazilian Bankruptcy and Reorganization Law came into effect in 2006.[132] This new regulation replaced the former Decree Law 7. 661, which regulated liquidation and rehabilitation procedures. The changes implemented were a result of the lack of an adequate legal framework to deal effectively with restructuring procedures for distressed companies as well as the limitation on credit recovery faced by investors.

Basically, the former law was not able to provide sustainable mechanisms for distressed companies.[133] The old reorganization (concordata) rules suffered with the inexistence of efficient protective measures for debtors seeking restructuring plans, mainly because tax and labor creditors could not be included in the restructuring plan.[134] Consequently, the real possibilities of credit recovery by secured and unsecured investors had limited chances of success because in most of cases, their credits were behind the preferred ones, mainly labor and tax credits. Moreover, the prohibition of private negotiation among parties on judicial procedures and the lack of out-of-court restructuring plans were also

[130] Although there are economic benefits to be derived from the new international insolvency regulation in the United States, today there is also the fear that chapter 15 may reduce U.S. creditors' recoveries from assets located in United States as well as from U.S. subsidiaries under a foreign main proceeding. The discussion is based upon two main facts. First, chapter 15 may increase the credit recovery of foreign creditors at the expense of U.S. creditors. Second, chapter 15 may turn U.S. assets over to a foreign main proceeding even when it can result in a lower credit recovery to the whole procedure. *See* G. Larry Engel, Suggested Clarifications and Reforms for U.S. Chapter 15 and the UNCITRAL Model Law on Cross-Border Insolvency on Which it is Based: The Pragmatic Cynics' Concerns (June 12-13, 2006), *available at* http://www.iiiglobal.org/country/usa/20060620morrison.pdf.

[131] *See* Olivares-Caminal, *supra* note 105, at 42-43.

[132] *See* Lei No. 11.101, de 9 de fevereiro de 2005, D.O.U. de 09.02.05 (Brazil).

[133] Fabio Ulhoa Coelho, **Manual de Direito Comercial** (13th ed., 2002).

[134] Decreto No. 7.661, de 21 de junho de 1945, D.O.U. de 31.07.1945 (Brazil).

considered problems in the old law.[135] These deficiencies were causing the discouragement of credit to the Brazilian companies and barriers to the flow of foreign investments into the Brazilian economy.[136]

Aware of this, the new law introduces the concept of "corporate rescue."[137] The law now aims to create efficient possibilities of reorganizing economically viable firms, permitting judicial and out-of-court plans. Another innovation is that the restructuring plan must be approved by a general assembly of creditors.[138] Additionally, the law has extended protective measures for debtors to avoid premature liquidation, further protecting asset value. On the other hand, in the case of liquidation, the legislation has established a different ranking of payments, placing the secured creditors in a more favorable position to recover their investments. Under the new law, the secured creditors are just behind the labor credits.[139] These modifications were implemented to promote better confidence among investors.

In order to succeed in corporate rescue and protect all the interests involved, apart from an out-of court possibility, the law introduces two main judicial proceedings. The extra-judicial procedure (similar to pre-packaged in United States) and the judicial restructuring procedure named recuperação judicial (similar to the chapter 11 in the United States) are based upon the principle of social function[140] that the company plays in modern society as an entity that has fundamental economic and social value. On the other hand, as a response to investors, the law now offers more power to make decisions to creditors in debt restructuring and has rules designated to maximize asset value, preserve employment and promote protection of creditors' rights. Instead of a proceeding aiming at just credit collection, the law seeks to preserve the business as a whole when it is the most favorable option. All of it has been in place as a manner to promote market confidence and stimulate economic activity in Brazil.[141]

The law seems to have achieved its objectives. The first successful case under the new law was the Parmalat Brasil case, which achieved reorganization through a variety of agreements among the company and creditors.[142] Among

[135] Luiz Fernando Valente-de-Paiva, *Brazil's Two New Mechanisms for Out-of-Court Reorganizations: Homologation of Consensus and Enforcement of Agreement*, *in* **Expedited Debt Restructuring: An International Comparative Analysis** 97-128 (Rodrigo Olivares-Caminal ed., 2007).

[136] **Org. for Econ. Co-operation & Dev. (OECD), Economic Survey of Brazil 2005: Reforming Brazil's Bankruptcy Legislation** (2005), *available at* http://www.oecd.org/dataoecd/12/12/34427462.pdf.

[137] *See* Lei 11.101.

[138] *See id.* ch. 3, § 2, art. 52(V).

[139] *See id.* ch. 5, § 2, art. 83(II).

[140] *See id.* ch. 3, § 1, art. 47.

[141] *See id*.

[142] Rod Smith, *Minister Okays Parmalat Plan for Reorganization*, **Feedstuffs**, July 26, 2004.

others, the company sold some of its assets and made immediate payment at an almost eighty percent discount rather than making an arrangement extending the repayment time.[143] Another relevant case is the Brazilian, family-owned manufacturer of confectionary products, Indústria de Produtos Alimentícios Cory, which also restructured its debt equivalent to $57 million (one-third of it was secured creditors) through judicial reorganization (recuperação judicial) after negotiating with its creditors.[144]

Despite these important modifications towards better insolvency efficiency, Brazil still faced serious barriers to deal with cross-border insolvencies because the new law did not consider the current issues on international insolvency at all. These deficiencies will be analyzed in the next section.

B. The Challenges Faced by Brazil in International Insolvency

Although intense international trade is ongoing, Brazil does not provide an efficient legal framework to deal with cross-border cases. The rules that have been in force are inadequate and outdated in solving the current issues on insolvencies with international features. The main problems faced by Brazil are the following: (i) the impossibility of recognition of foreign proceedings and access to foreign representatives; (ii) the lack of coordination and assistance rules among jurisdictions; (iii) the time required for the recognition of a foreign creditor's rights in exequatur procedures; and (iv) the inefficiency of foreign court or other authority procedural orders (Rogatory Letters) among jurisdictions to protect parties' rights.

As is the case in most of civil law countries, Brazil has adopted the principle of territoriality to exercise jurisdiction.[145] Under this scheme, the Brazilian court will have exclusive authority over companies (included branches and subsidiaries), assets, and any business taking place in Brazil. Thus, the proceeding will only consider the assets located in Brazil and the procedure will be considered distinct from other jurisdictions. Foreign decisions regarding the same assets and debtors will not have any effect in Brazil. Thus, only local assets will respond to the creditors' rights under Brazilian procedure.[146]

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[143] Janis Sarra, *Brazil Modernizes Its Insolvency Law* (INSOL Int'l, London, UK), Feb. 2, 2007, *available at* http://www.insol.org/emailer/february2007_downloads/Brazil_Modernises.doc.

[144] Christopher Andrew Jarvinen, *The Sweet Smell of Success*: *Brazilian Confectioner, Indústria de Produtos Alimentícios Cory, Obtains a Fresh Start Under Brazil's New Bankruptcy and Restructuring Law*, 3 **Int'l Corp. Rescue** 372, 372-73 (2006), *available at* http://www.chasecambria.com/site/journal/article.php?id=70.

[145] *See* Lei 11.101, ch. 1, art. 3.

[146] Thomas Benes Felsberg, Cross-Border Insolvencies and Restructuring in Brazil (Jan. 27, 2003), *available at* http://www.iiiglobal.org/country/brazil/Cross%20Border%20(012703)%202.pdf.

A foreign creditor is entitled to an open insolvency proceeding in Brazil. Nevertheless, this right will only be related to assets located in Brazil, and the law requires a deposit by foreigners for court fees and the total amount of the action (credit amount) to initiate the procedure.[147] Unlike the United States, Brazil does not recognize ancillary proceedings and does not grant access by foreign representatives to Brazilian courts. As a result, in theory, liquidations and restructuring plans in Brazil are decided exclusively by Brazilian courts, without coordination or without consulting any foreign authority. Furthermore, it does not allow the participation of a foreign representative to help coordinate the issues and final decisions of the proceeding. This situation produces multiple procedures in different jurisdictions and can easily affect the fairness of treatment among local and foreign creditors, also creating an obstacle to the administration of the entire insolvency.

Additionally, the approach applied by Brazil causes obstacles to successful reorganization plans because there is no unity. This situation becomes further complicated because Brazil also suffers from a lack of efficient legislation in terms of coordination and assistance issues. Despite the fact that the Rogatory Letter utilized by Brazil does not require a procedure of recognition to be delivered but only a single order (decisão monocrática) from the President of the Superior Tribunal de Justiça (STJ)[148] granting the execution of foreign act,[149] this mechanism has been unable to deliver an efficient exchange of procedural orders between jurisdictions, as normally it takes too long. Besides administrative problems, it also enhances costs and causes difficulties in granting protection in Brazil as well as in executing protective measures from other courts as a form to guarantee foreign creditors' rights.

Although Brazil has ratified the Bustamante Code, whose purpose is to govern automatic recognition and enforcement of bankruptcy procedures, the convention is restricted to signatory states (Latin America countries), excluding the most important Brazilian investor partners such as the United States and European Union (EU) countries.[150] Furthermore, the code has not addressed cooperation and assistance procedures in cases of parallel proceedings in various jurisdictions.[151] Hence, the application of the Bustamante Code has been almost nonexistent because the main flow of investment is from or is legally connected with other jurisdictions, rather than investors being located in the signatory states of the code.

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[147] Wilson Carlos de Godoy, Direito Falimentar Internacional (Jan. 2004), *available at* http://jus2.uol.com.br/doutrina/texto.asp?id=5141.
[148] Resolution No. 9, de 4 de maio de 2005, D.J. de 06.05.2005 (Brazil).
[149] **Irineu Strenger**, **Direito Processual Internacional** (1st ed., 2003).
[150] *See* Felsberg, *supra* note 146, at 5.
[151] *See* **Fletcher**, *supra* note 21.

Brazilian law does not present any restrictions to foreign creditors seeking the recognition and enforcement of their rights in Brazil. Foreign creditors are entitled to the same rights as Brazilian ones.[152] But they need to recognize their rights before enforcing them when their credit is based on foreign credit. As with other civil law countries, the legal way to have a foreign credit right enforceable in Brazil is through the exequatur procedure, which is a procedure at the STJ named Recognition and Enforcement of Foreign Decisions.[153]

The problem has been the time needed for recognition and the complexities existing in the exequatur procedure. This has been inadequate and inefficient in serving the economic dynamic required in modern bankruptcies because it also takes too long to become enforceable, increasing the cost to enforce the credit. Felsberg argues that the complications existing in the exequatur procedure can easily discourage investors seeking credit recovery in Brazil under the actual economic circumstances, as in practical terms, the investors are unwilling to wait for a long time for a final court decision.[154]

In the absence of efficient regulation on international insolvency, Brazilian courts have been obliged to apply a range of different approaches based on the international private rules available and have been forced to create other mechanisms to try to surpass it. The Parmalat Brasil case has shown this effect. Although the Brazilian court had applied the territoriality principle to exercise jurisdiction over all the assets located in Brazil, the international feature presented had forced the Brazilian courts to work very closely with foreign courts, creditors, and competent authorities to coordinate the global company restructuring.[155]

Although international protocols were not made at that moment, the interested parties in Brazil, Italy and the United States established a sort of ad hoc coordination of litigation occurring in each country. Moreover, the creditors' representatives and intervener appointed by the Italian government also coordinated the actions between themselves. Because Parmalat Brasil was the biggest plant of the company in the world and had a strong social relevance,[156] it utilized the restructuring procedure ongoing in Brazil as an

[152] Ordélio Azevedo Sette & Juliano Battella Gotlib, *Brazil*, *in* ***Law of International Insolvencies***, *supra* note 19.

[153] Marco Aurélio Gumieri Valério, Homologação e Execução de Sentença Arbitral Estrangeira no STJ (Feb. 2006), *available at* http://jus2.uol.com.br/doutrina/texto.asp?id=8098.

[154] Felsberg, *supra* note 146, at 11.

[155] *Debate Binacional*, **Consultor Jurídico**, July 31, 2007, *available at* http://conjur.estadao.com.br/static/text/58089,1.

[156] At the time of the Parmalat crisis, the company had eight plants in Brazil; operations in 371 cities; 3,174 direct jobs; 12,696 indirect jobs; 67,750 workers involved in milk production, and 6,300 workers involved in vegetable production. *See* Thomas Benes Felsberg, Parmalat: Tensions in

argument to negotiate a better position with foreign creditors to achieve reorganization in Brazil and elsewhere.[157]

Despite the fact that the restructuring procedure was successful in applying a range of different and unique methods, the Parmalat Brasil case emerged with serious concerns about the lack of specific regulations on cross-border situations in Brazil.[158] Issues related to the impossibility of recognition of foreign proceedings as well as the lack of rules providing coordination, assistance, and cooperation among courts were clearly felt by all the parties involved.

The occurrence of simultaneous proceedings in many jurisdictions such as Italy, Ireland, Brazil, and the United States brought about the issues of possible conflicting decisions and concerns about the applicability of different rules and also how different courts would manage that situation. Despite being under European insolvency law (the EU has adopted the UNCITRAL Model Law), the European Court of Justice settled the COMI in the Eurofood IFSC case (a wholly-owned subsidiary of Parmalat Brasil S. A.),[159] giving jurisdiction of the main proceeding to Irish courts. But this decision could not be recognized under Brazilian law because Brazil had exclusive jurisdiction over Parmalat Brasil (territoriality approach) and also because Brazil does not recognize ancillary proceedings. Therefore, the decision could not be enforced in Brazil at all, and so it was only effective in EU Member States. Hence, a high level of uncertainty was felt on a national and international level by creditors, governments, and employees in relation to the future of the company.

The lack of unity in the proceedings occurring in Europe and Brazil and the litigation of U. S. creditors in New York courts[160] remained a serious concern, principally related to whether the local courts in each country could protect the public and private interests affected and how the restructuring plans would be administered in different jurisdictions, applying diverse laws and procedures.

International Restructurings: The Brazilian Perspective 4 (June 7, 2005), *available at* http://www.iiiglobal.org/country/brazil/070315Felsberg.PDF.

[157] See *id.* at 10.

[158] *See* Felsberg, *supra* note 146.

[159] *See* **Fletcher**, *supra* note 21.

[160] A U.S. court ruled that U.S. creditors could not pursue claims against Parmalat Finaziaria in a New York court but rather they have to litigate in Italy. *U.S. Creditors Get Setback in Parmalat Case*, **Int'l Herald Trib.**, Aug. 31, 2005, *available at* http://www.iht.com/articles/2005/08/30/business/parma.php.

C. The Legal and Economic Benefits of the UNCITRAL Model Law

Commercial law has been recognized as a legal tool designated to regulate business transactions with the purpose of giving inventives for investment and credit. By doing so, commercial law aims to help economic growth. Through the times, courts have realized that economic and social advances cannot be stopped by the application of outdated laws. As a response, court precedents have played an essential role in improving business law as a way to give predictability to trader agents.

Fortunately, Brazilian courts have recognized the economic relevance of commercial law and have started applying rules with flexibility to reach the economic role presented in business law.[161] For example, in the Parmalat Brasil case, the Brazilian court granted the application of the new bankruptcy law, allowing the company to file a reorganization plan before its enactment by the government. Based upon the inefficiency of the former law in terms of delivering restructuring measures and considering the social importance of the company in the national economic scenario, the Brazilian court correctly decided to apply the draft of the new regulation to permit the company's rescue.[162]

Following the U. S. tendency, Brazil has given signals of adopting a more pragmatic view in dealing with commercial cases. Nevertheless, Brazil has been punished by the delays of final court decisions and the delays in introducing modern legislation to address the global market reality. This situation is the case of the bankruptcy law. Recently, Brazil lost an important opportunity to improve its domestic legislation in international insolvency. Although significant modifications occurred on the grounds of corporate rescue, the possibility of out-of-court procedures, and the ranking of secured creditors, the new law did not address cross-border insolvency situations at all.[163]

The lack of legislative tools previously referred to and the intense international trade ongoing in Brazil urgently require the adoption of a modern legal framework to incentivise the flow of investment into Brazil. The current situation causes a high level of uncertainty for foreign creditors as shown in the Parmalat Brasil and Varig cases. The inexistence of a clear legal framework and the application of a variety of techniques are extremely

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[161] **Daniela Ballão Ernlund, Working with Precedents to Develop the Rule of Brazilian Commercial Law in a Worldwide Scenario** 7-8 (Jan. 26-27, 2007), *available at* http://www.law.pitt.edu/academics/programs/cileLLMErnlund.pdf.

[162] *Id*.

[163] Felsberg, *supra* note 146, at 3.

detrimental to foreign investments and the objectives of insolvency proceedings.[164] These issues do not permit investors and lenders to foresee in a clear mode the legal consequences arising from cross-border cases. Therefore, parties entering into international transactions, connected with Brazilian jurisdiction are unable to access adequately the risks involved. Such obstacles discourage investments and enhance the cost of money for Brazil.

Although Brazilian courts have been flexible in trying to solve these issues, the enactment of the Model Law undoubtedly would equip Brazilian domestic legislation with a modern legal framework with which to overcome the obstacles[165] in recognition of foreign procedures. The Model Law's enactment would also help overcome the inexistence of proficient rules to coordinate concurrent proceedings as a means of protecting economically viable businesses and liquidation procedures from the negative economic consequences that are derived from the lack of proficient rules.

The body of rules existent in the Model Law would radically increase the efficiency of the administration of cross-border cases by allowing full cooperation among courts in less time and automatic recognition of foreign procedures. Consequently, the Brazilian system could improve protective measures for both creditors and companies. This system would avoid the limitations as well as the excessive time and cost involved in exequatur procedures, and it would also replace the inefficient system of Rogatory Letters in international insolvency cases.

For example, if the Model Law had been in force at the time of the restructuring process of airline Varig, the company would not have needed to file ancillary procedures in the United States to recognize the Brazilian reorganization proceeding in order to receive protective measures against foreign creditors. The Model Law in this case would have avoided a new procedure in United States. Under the UNCITRAL Model Law, a simple automatic recognition of the procedure occurring in Brazil would stop foreign creditor's action against the company's assets. A unitary procedure, in this case, would have also reduced time and expense. The uncertainty caused by the possibility of conflicting decisions would have also been avoided. Moreover, an immediate automatic recognition and a unitary restructuring proceeding would have helped to avoid the losses suffered by

[164] Jernej Sekolec, *The UNCITRAL Model Law on Cross-Border Insolvency*, *in* **International Bank Insolvencies: A Central Bank Perspective** 337, 337-46 (Mario Giovanoli & Gregor Heinrich, eds., 1999).

[165] Felsberg, *supra* note 146, at 13.

the company in the stock exchange (fall of the share price) and thus could have protected the asset value in a better manner during the first moments of the company's crisis. Furthermore, such measures would have created a better legal environment, which would have established more confidence in the market for creditors and investors located in Brazil and elsewhere since the time the procedure began.

The same is true for the Parmalat Brasil case. The Model Law would have provided automatic recognition of foreign procedures and better tools for full cooperation and assistance among courts and all parties located in Europe and in the United States, rather than distinct procedures in Brazil and unharmonious coordination among parties located in various jurisdictions. Hence, the Model Law could have avoided the economic inefficiencies brought about by concurrent procedures related to the same debtor, further facilitating the management and restructuring of the multinational company as whole. Moreover, the application of the UNCITRAL Model Law establishing a unique and fully coordinated proceeding in this case would have helped restrained the widespread creditors' fear of the collapse of the company in different countries, principally in Brazil and Italy where the company had strong economic activity and social relevance.

The uncertainty caused by the absence of appropriate rules could be radically reduced by the enactment of the Model Law. The adoption of this uniform set of rules, especially designed to harmonize national and international procedures in cross-border cases, can result in a reliable international insolvency legal system in Brazil. This system would prevent companies incorporated in Brazil from seeking to start distinct procedures overseas with the aim of protective measures, as was the case with Varig S. A.

Similarly, enactment of the Model Law would allow foreign procedures to be automatically recognized in Brazil, and the access of foreign representatives would help local courts in dealing with liquidation and restructuring decisions that may affect foreign proceedings. Consequently, in theory, it would establish a better legal environment at a lower cost for trade and investment by granting harmonious procedures, faster and further protection, as well as fair treatment to all parties involved.

It is worth saying that in international trade, a combination of substantive rules with procedural rules of cooperation among courts is crucial for market confidence. As previously mentioned, Brazil formulated their insolvency law, permitting successful corporate rescue. Nevertheless, the inexistence of procedural rules on cross-border cases remains.

The implementation of these sophisticated rules would fill this gap and would supply Brazil with efficient and harmonious tools, attending to the needs of cross-border insolvencies. Therefore, the enactment of the Model Law can confer a more favorable legal environment to attract international investments to Brazil[166] as well as to better protect the investments already existing by increasing economic efficiency and the predictability of trade agents in cases of multinational business failure connected with the country.

VI. Conclusion

The expansion of international trade and the financial market across the globe have posed new challenges for bankruptcy law. The lack of adequate rules in international insolvency has often caused losses for companies and creditors, making it evident that effective rules in cross-border cases are a necessity that can no longer be denied.

The UNCITRAL Model Law was designed with this purpose in mind. It possesses the essential elements to equip countries with adequate legislation to overcome the barriers in domestic regulation towards full cooperation and assistance among courts. Without any interference in substantive legislation, the Model Law is capable of reducing expenses and transaction costs associated with insolvency proceedings by giving predictability to traders through more efficient and harmonious rules.

Despite the fact that Brazil has moved towards an effective corporate rescue approach, Brazil has not yet realized this importance. Brazil still suffers from a lack of adequate legislation with regard to bankruptcy law in dealing with cross-border insolvencies, and it has not addressed the global market reality nor has it been in accordance with its position in the international economic scenario as one of the biggest economies of the world. The recent cases affecting Brazil have showed that international insolvency requires the combination of efficient local rules in insolvency law with modern procedural rules to deal with cross-border features to protect all the interests involved. Nevertheless, Brazil remains immovable in this aspect.

Unlike the United States, which has enacted chapter 15 to encourage cooperation among all the parties involved in a more efficient and predictable way, there is no signal that a similar adoption will happen in Brazil. Without the enactment of the Model Law, Brazil continues to have obsolete and unharmonious rules in cross-border situations. Therefore, the

[166] *Id.*

barriers will persist, negatively affecting multinational companies and creditors, leaving the difficult task to manage it to the courts and the parties.

Although economic strategy and a political scenario are the central keys for country development, a combination of these with predictable and reliable commercial legislation are also crucial for economic and social growth. Thus, the enactment of the Model Law into domestic legislation would certainly be an answer for Brazil to complement its insolvency law. By filling this gap and achieving a deeper international legal harmonization in bankruptcy matters, Brazil can create further incentives and a more favorable legal environment for the availability of credit and attraction of foreign investment into the economy.