CFA Midwest Chapter
and
Vedder Price
present:

Cross-Border Lending State of the Market with Particular Emphasis on Mexico

Thursday, October 5, 2006

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Cross Border Lending

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Introduction

- Increase in Globalization. Globalization of business has accelerated. More and more lenders are asked to loan to foreign borrowers or loan against the value of foreign borrowers' assets.
- Increase in Complexity. Loans to foreign borrowers or against foreign borrowers' assets create issues related to taxes, security and available remedies.

Organizational Structures

- U.S. Parent with Foreign Subsidiaries. A common organizational structure faced by U.S. lenders is the U.S. parent with foreign subsidiaries. The lender may be asked to fund loans directly to foreign subsidiaries or to include the assets of the foreign subsidiaries in the borrowing base to increase the loans to be made to the U.S. parent.

Organizational Structures, cont'd.

- Foreign Parent with U.S. Subsidiaries. A less common organizational structure faced by U.S. lenders is the foreign parent with a U.S. subsidiary. Here, the lender may be asked to fund the entire operation or be a local funding source for the U.S. subsidiary. Each structure presents complex issues that the lender will need to address.

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Tax Issues

- Tax Issues in Cross Border Deals. Two tax issues that must be addressed in every cross-border transaction are: (1) the U.S. "deemed dividend" rule; and (2) the foreign jurisdiction's withholding tax rules.

IRC Section 956 – The "Deemed Dividend Rule"

- Purpose of Rule. IRC Section 956 was enacted to prevent the deferral by U.S. corporate taxpayers of U.S. income taxes on the income of foreign subsidiaries. U.S. corporate taxpayers indirectly utilize the foreign subsidiaries' un-repatriated earnings by borrowing against the foreign subsidiaries' assets.

IRC Section 956 – The "Deemed Dividend Rule", cont'd.

- Deemed Dividend Triggers. The obligation of a U.S. corporate parent to a lender will trigger a "deemed dividend" if any one of the following three events occurs:
  - 66⅔% or more of the foreign subsidiary's outstanding voting stock is pledged to the U.S. parent's lender;
  - the foreign subsidiary is a guarantor with respect to a loan made to the U.S. parent; or
  - the foreign subsidiary grants a security interest in its assets to secure a loan to the U.S. parent

IRC Section 956 – The "Deemed Dividend Rule", cont'd.

- Tax Consequences of Deemed Distribution. If a deemed distribution is triggered:
  - all of the foreign subsidiary's current and accumulated earnings and profits are immediately subject to U.S. income tax, up to the amount of the U.S. loan obligation; and
  - if the foreign subsidiary's current and accumulated earnings and profits are less than the amount of the U.S. obligation, then all of the foreign subsidiary's future earnings and profits will be subject to the deemed distribution up to the amount of the U.S. loan obligation (after subtracting prior deemed distributions).

IRC Section 956 – The "Deemed Dividend Rule", cont'd.

- Mitigants to Tax Consequences. There are many situations in which the application of IRC Section 956 has no material adverse impact on borrower including:
  - foreign subsidiary has no accumulated earnings and profits and is not expected to have any in the future, or the foreign subsidiary historically repatriates its income to the U.S.;
  - the consolidated tax group has operating losses that reduce or eliminate the deemed distribution;

IRC Section 956 – The "Deemed Dividend Rule", cont'd.

- IRC already requires inclusion of the foreign subsidiary's earnings and profits in the U.S. parent's income prior to repatriation for other reasons;
- U.S. tax credits for taxes paid by the foreign subsidiary in the foreign jurisdiction may largely offset the U.S. tax liability from the deemed dividend; and
- the foreign entity is treated like a partnership for U.S. tax purposes.

IRC Section 956 – The "Deemed Dividend Rule", cont'd.

- The lender should require a detailed analysis of the impact of IRC Section 956 before waiving a pledge of the equity interests in, or a guaranty or asset pledge from, a foreign subsidiary.

Withholding Tax Issues

- Many foreign jurisdictions impose a withholding tax on passive income (e.g., interest, management and administration fees and dividends) paid by a resident of the foreign jurisdiction to a non-resident. The amount of withholding tax imposed may be reduced or eliminated by treaty between the jurisdictions.

Withholding Tax Issues, cont'd.

- Examples.
  - Canada. The treaty between Canada and the U.S. limits the Canadian withholding tax on interest paid by a resident of Canada to a resident of the U.S. to 10%. An exception to the withholding tax requirement is for interest payable by a corporation resident in Canada to an arm's length non-resident lender on an obligation in respect of which no more than 25% of the principal amount must be repaid to the lender within 5 years after the date of issue of the obligation.

Withholding Tax Issues, cont'd.

- Examples.
  - U.K. Pursuant to the treaty between the U.S. and U.K., a U.S. lender, with no permanent establishment in the U.K., is only subject to U.S. taxes on interest income received from a U.K. borrower. As result, U.K. borrowers are not required to withhold taxes from interest payments to U.S. lenders.
  - Mexico. The treaty between the U.S. and Mexico limits the withholding tax on interest paid by a resident of Mexico to a resident bank of the U.S. to 4.9%.

Withholding Tax Issues, cont'd.

- Gross-Up. Most lenders consider any withholding tax liability to be for the account of the borrower. As a result, most loan agreements contain a "gross-up" clause which requires the borrower to compensate the lender for any withholding tax imposed by a foreign jurisdiction.
- Loan Structure. As a result of withholding taxes, a local lending source in the jurisdiction of the foreign subsidiary may be necessary.

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Other Tax Issues

- Tax rules in addition to the deemed dividend and withholding tax rules may apply to a transaction and may have an effect upon the loan structure.
  - Canadian Thin Capitalization Rules. A U.S. lender will sometimes lend to a U.S. corporation, which, in turn, lends the funds to its Canadian subsidiary. Thin capitalization rules under Canadian tax law may affect the Canadian subsidiary's ability to deduct interest on the amount borrowed from the U.S. parent. Generally, the rules prevent Canadian subsidiaries from deducting interest on the portion of loans from a U.S. parent that exceed twice the subsidiary's equity.

Collateral Security

- Uniform Security Scheme Lacking. Many countries do not have a uniform procedure for taking a security interest in tangible and intangible assets sought by secured lenders, such as the Uniform Commercial Code (the "**UCC**") in the U.S. and the Personal Property Security Act (the "**PPSA**") in Canada. Instead, security in many countries is dictated by multiple statutory schemes and common law which are sometimes overlapping and contradictory.

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Collateral Security, cont'd.

- Available Collateral. In the U.S., lenders are accustomed to being able to take a blanket or floating lien over presently existing and hereafter acquired assets of their borrowers to secure current or future debt. This is not the case in many foreign jurisdictions. In some countries, the lender may be able to take a lien over after-acquired property but not with ease (e.g., the account debtors must be specifically identified and notified of the lien), or may only be able to take a pledge over existing assets

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Collateral Security, cont'd.

- Expect Variation. There is large variation from country to country in the scope of assets that may be covered by a lien, whether after-acquired property may be covered by a lien, the priority of preferential creditors that may be repaid ahead of a lender's lien and the procedures relating to the realization on the lender's collateral. The lender must look to and be familiar with the law of the jurisdiction in which the collateral is situated. Hiring competent local counsel is essential.

Scope of UCC

- Foreign Collateral. The UCC provides that the perfection of a nonpossessory security interest in collateral is governed by location of the debtor. This rule does not change depending upon the location of the collateral. However, it would be a mistake for a lender to rely on the UCC as granting it the rights the lender needs in collateral located in or arising from a foreign jurisdiction.

Scope of UCC, cont'd.

- While the perfection rules of the UCC may not differ based upon the collateral's location, the UCC often will not supply the law to determine the perfection and priority of the U.S. lender's lien for collateral located in a foreign jurisdiction. The lender may lose its lien if perfection steps were not taken in the foreign jurisdiction, or obtain a priority that is different than the lender would expect if the UCC applied.

Examples of Available Collateral

- Accounts and Inventory. Some jurisdictions do not have a blanket or floating lien concept. Other jurisdictions make it difficult to take a floating lien on accounts or inventory by limiting the lien to specific assets. Across all jurisdictions there is an enormous variation in the lender's ability to take a lien on accounts and inventory, the priority of that lien and the ease of lender's ability to realize upon the collateral.

Canada

- PPSA Jurisdictions. In Canada, nine out of ten provinces and the three territories have adopted the PPSA. The PPSA resembles the UCC and, in particular, the PPSA recognizes the concept of a floating lien over debtor's existing and after-acquired assets to secure current and future indebtedness.

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Canada, cont'd.

- Quebec. Quebec's personal property security regime is derived from the Civil Code of Quebec ("**CCQ**"). In Quebec, the main security device, the hypothec, allows a lender to obtain a charge on existing and after-acquired movable or immovable property.

United Kingdom

- Fixed vs. Floating Charge. In the U.K. it is possible to take a "fixed charge" or "floating charge" over current and future "book debts". The key distinction is that the fixed charge must restrict the borrower's ability deal with the charged property and, specifically, the borrower must not be able to sell or dispose of the assets without lender's consent. Until the floating charge crystallizes (usually on an event of default), the borrower is free to sell or dispose of the property in the ordinary course of its business.

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United Kingdom, cont'd.

- Priority. The lender would prefer that as much of the borrower's property as possible would be subject to a fixed charge because the floating charge is paid behind a number of claims upon the borrower's insolvency (including (i) administrative claims, (ii) preferential claims including, subject to certain time and amount limitations, debts due to the Inland Revenue, debts due to H.M. Customs & Excise, social security contributions, contributions to occupational pension schemes and debts related to the wages or salaries of employees, and (iii) with respect to a floating charge created after September 15, 2003, unsecured claims up to the value of £600,000).

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United Kingdom, cont'd.

- Control is Required. For the charge to be a fixed charge, the secured party must be able to deny the borrower freedom to deal with the asset (the borrower must cause all book debts to be paid into a blocked account to which the borrower has no access). A "springing control" lockbox and blocked account arrangement would not be sufficient to create a fixed charge over a U.K. book debt. In practice, it may not be possible to take a fixed charge over inventory because the borrower will need the freedom to deal with its inventory in ordinary course of business.

Stock

- Canada. Under the PPSA, a lender may perfect its security interest in shares by taking physical possession of the stock certificates, registering under the PPSA or both.
  - Nova Scotia Unlimited Liability Company. Special rules apply to a pledge of stock of a Nova Scotia unlimited liability company ("**ULC**"). The pledge of shares of a Nova Scotia ULC may result in the lender's liability for obligations of the ULC. This issue may be addressed through appropriate drafting or organizational structuring.

Stock, cont'd.

- U.K. A lender may take security over shares of a private company by taking physical delivery with a blank transfer executed by the borrower.

Bank Accounts

- Canada. In Canada, the PPSA permits a lender to take security over deposit accounts. The PPSA provides that security interests in deposit accounts are perfected by registering a financing statement. In addition, many Canadian banks are familiar with, and will enter into, lockbox and blocked account arrangements.

Bank Accounts, cont'd.

- U.K. A lender may take security over the debt represented by the credit balance in a bank account by charge or assignment. Notice of the charge or assignment must be given to, and confirmations must be received from, depository bank.

Enforcement Issues

- Law of the foreign jurisdiction dictates the types of enforcement actions available to lender. In some jurisdictions, for example, the self-help remedies to which U.S. lenders are accustomed, are not available. A myriad of local laws of the foreign jurisdiction may affect the ability of the lender to realize on its collateral.

Remedies Generally

- Canada.
  - Remedies Outside Insolvency Proceedings. Under both the PPSA and the CCQ the lender may take possession of and sell the collateral and may collect accounts. However, in Quebec, if the borrower does not voluntarily surrender collateral to the secured lender, the lender needs a court order to take possession of the collateral.

Remedies Generally, cont'd.

- Insolvency Proceedings. Canada has two main federal statutes dealing with insolvency, the Companies' Creditors Arrangement Act ("**CCAA**") and the Bankruptcy Insolvency Act ("**BIA**").
  - CCAA. The CCAA applies to Canadian companies and affiliated companies with debts of at least CDN $5,000,000. The CCAA is a very brief statute and vests very broad discretion with the court.
  - BIA. The BIA contains reorganization and liquidation provisions. In contrast to the CCAA, the BIA is a detailed statutory code. Generally, the CCAA is used for larger entities and the BIA is used for smaller entities.

Remedies Generally, cont'd.

- U.K.
  - Remedies Outside Insolvency Proceedings. In a security document that provides for such remedies, a lender holding a fixed charge will usually have a power of sale with respect to fixed charge assets, have the power to appoint a fixed charge receiver to realize the asset on its behalf and will be able to sell the fixed asset by private sale (without court order).

Remedies Generally, cont'd.

- U.K.
  - The holder of a floating charge over all or substantially all of a company's assets created prior to September 15, 2003 is able to enforce its charge by appointing an administrative receiver whose primary duty is to realize the assets subject to the charge for the benefit of the lender. Except in certain circumstances, the holder of floating charge created after September 15, 2003, no longer as the right to appoint an administrative receiver. However, the floating charge holder can appoint an administrator under an efficient out of court route to administration.

Remedies Generally, cont'd.

- Insolvency Procedures. U.K. law generally provides for corporate insolvency in one of three ways: (i) administration (administration is a procedure the primary objective of which is the rescue the company as a going concern under protection against creditor action; administration is roughly analogous to Chapter 11 of the U.S. Bankruptcy Code), (ii) liquidation (there are several types of liquidation available under U.K. law depending upon the circumstances; the two most frequently used types of liquidation, the creditors' voluntary liquidation and compulsory liquidation, are roughly analogous to Chapter 7 of the U.S. Bankruptcy Code) and (iii) company voluntary arrangements and schemes of arrangements (roughly analogous to statutory compositions).

Enforcement Risk Areas

- Fraudulent Transfers/Insolvency Statutes.
  - Canada. In Canada, corporate law related to financial assistance has historically provided the major restrictions on intercompany guarantees. However the financial assistance restrictions have been repealed under certain jurisdictions (including British Columbia, Alberta, Saskatchewan and Ontario) and under under the federal Canada Business Corporations Act making it more difficult to successfully challenge intercompany guaranties for corporations organized under the relevant statutes.

United Kingdom

- In the U.K., guaranties and security may be vulnerable to being set aside if the guarantor/grantor is or is rendered insolvent within certain time periods including:
  - Transactions at an Undervalue. A transaction (such as a guaranty and security grant) is avoidable if it was made within two years prior to the commencement of liquidation or administration for no consideration or significantly less consideration than the value of the transaction, unless the company enters into the transaction in good faith and for the purpose of carrying on its business and at the time there were reasonable grounds for believing that the transaction would benefit the company.

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United Kingdom, cont'd.

- Floating Charge. A floating charge created by an insolvent company in the year (or, in the case of a connected person, two years) prior to insolvency will be invalid, except to the extent of the value of the consideration given to the company by the lender at the time of the creation of the charge.

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Lien Priority; Secret Liens

- Canada. In Canada, a number of statutory claims may "prime" or take priority over a secured creditor. Examples include a debtor's obligation to remit amounts withheld on behalf of the government, and certain of the debtor's obligations to the government. A lender that finances goods that a vendor supplied to the borrower may be at risk if the debtor becomes bankrupt or insolvent within 30 days after receiving the goods. Under the BIA, unpaid vendors may repossess their goods within a period of 30 days after delivery of the goods to purchaser.

Lien Priority; Secret Liens, cont'd.

- U.K. In the U.K., a number of administrative, preferential and, in certain cases, unsecured claims are paid ahead of a floating charge. In addition, U.K. law permits the use of retention of title clauses, which provide that title does not pass to the buyer until the invoice or all debts to that seller have been paid. Unlike the U.S., no filing is required with respect to liens created by title retention clauses. This can mean that inventory which appears to be covered by the lender's lien is not part of the lender's collateral until title passes to the borrower upon payment of the invoice.

Anti-Assignment Provisions

- The UCC generally provides that any term in an agreement between an account debtor and an assignor that prohibits or restricts the creation or enforcement of a security interest in any account is ineffective. Unlike the UCC, most countries disfavor overriding anti-assignability clauses that are usual in business contracts. Thus, the lender party seeking to force the account debtor to pay it might be faced with the defense that it was illegal in the foreign jurisdiction of the borrower to assign to the lender the right to payment from the account debtor.

Other Issues

- General. The lender in a cross-border loan transaction must address a variety of other issues not encountered in a domestic loan transaction.
  - Foreign Judgments. A foreign jurisdiction may be limited to entering judgment in the currency of that jurisdiction. The loan documents should require the borrower to compensate the lender for any loss that may result from changes in the exchange rate between the time the judgment is entered and payment is received in U.S. funds.

Other Issues, cont'd.

- Foreign Currency Loans. In loan transactions in which loans are made in a foreign currency, the U.S. lender will want to set dollar limitations, allow for the unavailability of an agreed upon currency and require the borrower to compensate the lender for increased costs related to the offering of the foreign currency. Additionally, the lender may want to require the borrower to implement currency hedging strategies.

COMMERCIAL LAWS 2006

Creditors Rights

Bankruptcy

Electronic Trade

Since 2000, there have been substantial changes to the Mexican commercial laws, particularly as they relate to:

- Creditors rights,
- Bankruptcy and
- Electronic trade.

I.- CREDITORS RIGHTS

- The creditors rights have been modified since 2000 through various amendments to the:
  - General Law of Negotiable Instruments and Credit Transactions,
  - Commercial Code and
  - Law of Credit Institutions.

- **These amendments had an impact on**

  A) Pledge Security Interests,

  B) Guarantee Trusts and

  C) Collection Procedures

  D) Industrial Mortgages

A) PLEDGE SECURITY INTERESTS

- The pledge without transmission of possession (the “Pledge”) is a security interest granted by a debtor over all kinds of chattel goods and rights (excluding personal use items), in order to guarantee to creditor any debtor’s obligations.

- The pledged items remain in possession of debtor or they may deposited with a ‘general deposit warehouse’.

- The pledged assets may be:
  - Assets currently owned by debtor,
  - Assets later acquired by debtor,
  - Proceeds of the above assets,
  - Assets resulting from a transformation process of the above assets, and/or
  - Any other assets or rights that debtor receives as payment for the conveyance of or as indemnity (in case of damage) for the pledged assets.

- The pledged assets may be determined as:
  - Specific assets or
  - All non-real assets (as a whole) used by debtor to carry out its main activity.
- The guaranteed amount may be determined at execution of the Pledge or at the moment of realization of the Pledge.

- Debtor (unless otherwise agreed) may:
  - Use, combine or transform the pledged items,
  - Receive and use the proceeds of the pledged items in the ordinary course of business, and/or
  - Sell the pledged items (in this case, the security interest is released on the items and a new Pledge is automatically attached to such proceeds).

- The Pledge must be registered with the Public Records in order to be effective against third parties.
- The Pledge now covers not only the past due and regular interests but also the legal interests.
- No other pledge or guarantee may be granted over pledged items under a Pledge (except for Pledges granted to the creditors of the funds that were used to buy certain pledged assets).

- In the event of bankruptcy or reorganization, the guaranteed obligation will be accelerated and the Pledge may be realized.
- The debtor may not transfer a pledged item without the specific authorization of creditor. In the case of breach, the creditor may claim damages.
- The third party that knowingly acquires a pledged item without the consent of the creditor will be considered a bad faith acquirer.

- The non-recourse nature of the Pledge has been eliminated.
- If the pledged items are lost or destroyed, or if their value decreases, then the creditor may request additional guarantee.
- Upon granting the Pledge, the parties must agree on the basis to appoint the expert who will determine the decrease in value of the pledged assets.

- The Pledge agreement must contain:
  - The place where the pledged items will be located,
  - The minimum sale prices of the pledged items,
  - The way of determining the persons to whom the pledged items may be sold,
  - How the proceeds from the sale should be used and
  - The information that must be provided to creditor with respect to sale or transformation.

- If insurance for the replacement value is agreed upon, the debtor will choose the insurance carrier and the creditor will be designated beneficiary up to the amount of the credit.
- The debtor must be in charge of maintenance and proper operation. The creditor will have the right to inspect the pledged assets.
- In the event of loss of value, the assets must be substituted, and the parties shall agree in advance on the experts that will do such valuation.

- Labor credits have preference over Pledges, except for those Pledges created for the benefit of creditors that provided the funds to buy the pledged assets.

- The authorization from the creditor will be required to sell the pledged items to related parties. The creditor will have ten days to answer; otherwise, it will be deemed that creditor approves such sale.

- The statute of limitations is three years counted from the due date of the guaranteed obligation.

- Breach to the restrictions on sale, use or placing of liens on the pledged assets is subject to criminal penalties of up to 12 years of jail.

B) GUARANTEE TRUSTS

- In the guarantee trust (“Guarantee Trust”), Trustor delivers certain assets to a fiduciary, in order to guarantee trustor’s obligations.
- Fiduciary is always a financial institution.
- Fiduciary may also act as beneficiary, when it is also creditor of the guaranteed obligations.

- Fiduciary acquires title to the trust corpus and the respective assets may be used only as instructed by trustor.
- The Guaranty Trust has similar provisions to those of the Pledge (statute of limitations, sanctions to unauthorized use of assets, etc.).
- Two or more parties may be designated beneficiaries and the same Guarantee Trust may guarantee two or more obligations if notified to the fiduciary.

- The term of the trust has been extended to fifty (50) years.
- The entities that may act as fiduciaries have been expanded to include banks, securities firms, insurance and bonding companies, general deposit warehouses and financial entities with limited purpose.
- The provisions for maintenance, reduction of value and contents of this contract are similar to those of the Pledge.

- As in the case of the Pledge, the Guarantee Trust does not have a non-recourse nature.

- Also, the provisions on the Guarantee Trust over personal property in connection with use, disposal of the items, foreclosure, etc., have been made similar to those of the Pledge.

C) COLLECTION PROCEDURES

- Generally, only the jurisdiction of the domicile of the parties, the place of performance of the contract or the location of the assets may be freely agreed in the contract.

- There have been procedural changes in connection with the enforcement of securities, and the serving of defendants who may not be located.

- There have been changes on the basis under which a capital goods loan may be granted.

- If there is no specific agreement, the venue of the domicile of the debtor or of the performance of the contract will be chosen.
- The procedures in connection with collateralized securities now allow title to the securities to be transferred to the creditor. Also, the non-judicial sale of the securities has been amended.
- A procedure to establish the value of the pledged or secured items must be determined since execution of the corresponding agreement.

- The debtor will be required to relinquish possession and the creditor or trustee will become a depositor. If he refuses to do it, then the judicial procedure will apply.

- Guaranty Trusts may contain their own foreclosure procedures.

D) INDUSTRIAL MORTGAGES

- The Industrial Mortgage is a guarantee granted to a Bank over all real and personal property related to certain agrarian, cattle, industrial, commercial or service enterprise, including all related concessions and authorizations, existing cash, accounts receivables and any other elements necessary to carry out the ordinary course of business.

- Creditor Banks must allow disposal of secured assets in the ordinary course of business.
- Creditor Banks may oppose to the disposal of assets if this latter represents a danger to the secured obligations.
- The Industrial Mortgage must be registered in the Public Records' Office.

II.- BANKRUPTCY

- The concept of suspension of payments disappears to be substituted by conciliation.
- There will be general non performance of a merchant if he owes to two or more creditors, at least 35% of his obligations are past due by at least 30 days and the merchant does not have liquid assets to cover at least 80% of his obligations.
- The death of the merchant will give rise to a reorganization. In addition, the unlimited partners will be subject to reorganization if the main business is subject to reorganization.

- Reorganizations of holding companies and subsidiaries are held in the same docket.
- There is a chapter of international cooperation for bankruptcies and organizations abroad or for those in Mexico when international cooperation is required.
- The representative of foreign companies may act in Mexico and the judge must notify them and give them 45 days to appear.

- After the reorganization lawsuit is filed, an inspector is appointed by the Institute which is created for such purposes to verify that the bankruptcy premises are being materialized. The inspector will submit a report to the judge, and the parties may argue with regard to same.

- The resolution that establishes the reorganization will appoint a conciliator.

- The creditors may appoint representatives if they represent at least 10% of the debts.

- Labor credits will continue to be preferential for up to two years of wages.

- Certain assets may be separated from the bankrupted estate by their legitimate owners, or by the sellers if they have not been paid.

- The existing contracts do not terminate due to reorganization, except as provided by law. The credit is determined in UDIs (investment units) at the time the reorganization is filed (even those denominated in non-Mexican currency), except those that are secured, in which case the creditor will designate the value assigned to the secured assets and it will take the risk in the event that the secured assets exceed the amount of the guaranteed obligation.

- The purchase and sale agreements terminate, and the sellers only deliver to the reorganized merchant if they receive payment. They may recover the items only when the contract does not comply with the specific form.

- Leases do not terminate.

- The retroactivity date will be 270 days or a greater period if the judge so resolves it upon request of the conciliator, the creditors or their representatives. As of the retroactivity date, the transactions with related parties may be considered fraudulent.

- The acknowledgment of the credits may be requested within 20 days after the second publication of the resolution in the Federal Official Gazette, within the term for objections of the credits list or within the terms of appeals of the resolution acknowledging credits.

- The request for acknowledgment must be submitted in the specific formats approved by the Institute and shall include the name of creditor, amounts, guaranties and terms, payment preference of the credit and any pending legal procedures.

- The conciliator will submit to the judge a provisional list and the parties will be provided with a copy, after the parties have filed their arguments, a final list will be prepared which will be the basis for the resolution recognizing credits.

- The conciliation stage will last 185 days after the resolution recognizing credits and may be extended for 90 days upon request of the conciliator or 2/3 of the creditors and for an additional 90 days upon request of the merchant and 90% of the creditors.

- The conciliation stage does not establish fixed wait periods or reductions as the old law used to include. The reorganization may imply increase in the capital stock to be subscribed by the creditors. The approval of 50% of the common and special creditors will be required for the reorganization to be approved; however the approval of the creditors that are paid in full in UDIs will not be required. The creditors that do not agree on the term of the reorganization will have at least the same conditions as the other creditors in their payment preference.

- Bankruptcy may take place if the merchant requests it, upon expiration of the conciliation stage or if the conciliator so requests it.
- Bankruptcy resolution will have the disqualification of the merchant to engage in trade, the appointment of the receiver, the delivery of the assets to receiver and the prohibition to make payments to the debtors of the bankrupted and the obligation to deliver assets to him. Such resolution will be published two times in the Federal Official Gazette.

- The assets acquired by the spouse during the two years prior to the bankruptcy will be considered owned by the merchant.

- The assets will be sold in a public auction within 10 to 90 days of the call which auction must contain a description of the assets, minimum price for the purposes of adjudication and the date and place for the auction and to inspect the assets.

- The bids will be submitted in the formats approved by the Institute at least one day in advance of the auction, and they shall provide for payment in cash or through adjudication. All conflicts of interest must be disclosed.

- During the auction, the bids will be opened and the proposals may be increased.

- The receiver may request alternate methods for sale, and the creditors representing 20% of the debt may oppose such methods. Also, direct offers may be submitted if the assets have not been sold in 6 months in which case an auction will take place in which the minimum value will be that of the offer.

- A whole business or its divisions may be sold or adjudicated.

- The receiver may avoid the foreclosure of guaranties by the secured creditors, by paying to the corresponding secured creditors the amount of the guaranty or of the debt, as the case may be.

- Funeral and medical expenses leading to death have special benefits. The fees of inspectors, conciliators and receivers and the expenses for the management of the estate also have preference.

- In the event of bankruptcy of services granted by the government through a concession, the government will propose the appointment of the receiver and conciliator and shall approve the sale or any other agreement.

- The bankruptcy of a Bank may only be requested by the Savings Protection Institute and by the National Banking Commission.

- There are criminal sanctions if the merchant being subject to reorganization makes his situation worse on purpose and for those that simulate a credit.

- The Institute of Specialists on Reorganization is created for the appointment of inspectors, conciliators, receivers and the creation of formats

III.- ELECTRONIC TRADE

- The express consent may be granted through an electronic format, including evidence by public faith officers and evidence in legal procedures.
- The Public Registry of Commerce has been entrusted to the Ministry of Economy that has a centralized data bank and is coordinated with the Mexican States.
- Each corporation or merchant has an electronic file in the Public Registry of Commerce.

- Foreign documents may be registered in Mexico only after they are notarized.
- Foreign corporations must be incorporated in the country of origin and authorized to do business in Mexico for them to be registered in the Public Registry of Commerce.
- Notaries may transmit documents electronically to the Public Registry of Commerce.

- A blanket Mexican Official Standards authorization has been created for the border area which is managed by chambers of industry so that all interested parties may use the Mexican Official Standards.

CFA Midwest Chapter
and
Vedder Price
present:

Cross-Border Lending State of the Market with Particular Emphasis on Mexico

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