

**THE SECOND COLLOQUIUM FOR THE  
HARMONIZATION OF COMMERCIAL LAW IN THE TRANS-PACIFIC  
REGION: A SUMMARY AND ANALYSIS OF ITS PROCEEDINGS AND  
OF FUTURE STEPS**

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**TABLE OF CONTENTS**

I. INTRODUCTION, THE COLLOQUIA, AND THIS SYMPOSIUM .....	1
A. Background .....	1
B. Topics .....	2
1. Simplified Companies .....	2
2. Secured Transactions (ST) .....	3
3. Electronic Warehouse Receipts (EWRs).....	6
4. Electronic Commerce (EC) .....	11
5. Insolvency and Rehabilitation .....	14
6. “Run-away” and “No Asset” Cases.....	20
7. Conclusions and Suggestions .....	21
8. Corporate Group Insolvency in China.....	22
C. Next Steps and Recommendations .....	23
1. Consensus on Topics and Next Steps.....	23

**I. INTRODUCTION, THE COLLOQUIA, AND THIS SYMPOSIUM\*\***

**A. Background**

In October 2013, the National Law Center for Inter-American Free Trade (NatLaw) and the Universidad Mayor in Santiago, Chile organized the first Trans-Pacific Colloquium on the Harmonization of Commercial Law and Economic Development in Santiago (Chile Colloquium). Commercial law scholars, law practitioners, and government and multi-national institution representatives from Chile, China, Colombia, Costa Rica, Japan, Korea, Mexico, the United States, and Vietnam attended the Chile Colloquium. Its purpose was to agree on an agenda of harmonization of commercial laws and practices to help the economic development of Pacific Rim countries. The laws and practices discussed pertained to simplified companies, moveable property secured transactions, electronic warehouse receipts, and debtor rehabilitation and insolvency. Subsequently, at the

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\*\* The length of the summaries of the presentations and discussion of Colloquium topics in this introduction will vary depending on the presence of articles in the remainder of the Symposium issue that cover the topics of the presentations in greater detail.

request of China's delegation, Trans-Pacific E-commerce law was added as a topic.

The Shanghai University of International Business and Economics School of Law (SUIBE), China's participant, co-hosted with NatLaw and the Universidad Mayor a second colloquium in Shanghai, China on January 8-10, 2015 (Second Pacific Rim Colloquium: Economic Development and Harmonization of Commercial Law [Shanghai Colloquium]). There were 40 participants from the above-mentioned countries. The audience and different panels discussed the aforementioned topics; this report summarizes the presentations by panel members and identifies steps that could pave the way for regional and Trans-Pacific commercial legal harmonization.

## **B. Topics**

### **1. Simplified Companies**

Licenciado Jose Manuel Pliego, Deputy General Director for the Mexican Ministry of Economy, was the moderator of the panel, which included representatives from Chile, China, Colombia, Japan, Mexico, and the World Bank. The panelists discussed the status of simplified companies in their countries and the way forward for a possible United Nations Commission on International Trade Law (UNCITRAL) Model Law and Trans-Pacific law. Latin American participants were of the opinion that the Organization of American States (OAS) should also be considered as a forum for a Western Hemisphere Model Law, especially if the reciprocal or national treatment of the regional simplified companies became an integral part of it. Mr. Pliego proposed a framework for discussions at UNCITRAL and other fora based on a set of core principles inspired by the Colombian Simplified Corporation (*Sociedad por Acciones Simplificada*) (SAS) that he and Michael Dennis, Esq., of the United States delegation to UNCITRAL had proposed to Working Group 1 at UNCITRAL. In addition, it emphasized the need for best accounting and creditworthiness practices. Dobromir Christow, Senior Private Sector Development Specialist for the World Bank, discussed the World Bank's best practices on the formation and registration of Micro-, Small- and Medium- Enterprises (MSMEs), many of which were part of the Colombian draft and Messrs. Pliego and Dennis' framework. Among these practices were: (1) a flexible approach to minimum capital; (2) the standardization of simple forms and procedures; and (3) an optional specific-purpose clause in the articles of incorporation.

In response to this proposal, Professor Dr. Xiaoshan Li of SUIBE discussed features of the 2013 Chinese Corporation Law that were also consistent with Colombia's Model Law and with Messrs Pliego's, Dennis's, and the World Bank's frameworks. Among these features were the simplification of the formation and registration procedures and the elimination of the requirement for minimum capital. Similarly, Professor Tomotaka Fujita of the University of Japan

School of Law, after explaining the main traits of Japanese MSMEs, confirmed that current Japanese law on MSMEs is consistent in significant respects with the core elements of the above framework. The articles prepared by these scholars and government officials discussing the state of their laws and likelihood of uniformity were part of this Symposium.<sup>1</sup>

Other topics discussed by the panel were: (1) the MSMEs's need to rely on suitable accounting reports and statements, and (2) suggested components of a national Trans-Pacific treatment of simplified companies. Boris Rosen, principal of the accounting firm Morrison, Brown, Argiz & Farra (MBAF), one of Florida's leading independent international accounting firms, prepared a set of simplified standard accounting statements and reports for small companies with annual sales in excess of \$300,000 USD. The goal of these statements and reports was to help disclose and monitor relevant data on the borrower's inventory, cash flow, assets and liabilities, and profits and losses. However, for businesses with annual sales below \$300,000 USD, a simpler single-entry movement of cash bookkeeping system was required. In response to questions from the audience, Mr. Rosen provided illustrations on how to make such a system operative. A more detailed account of this presentation is in the appendix of this Symposium.<sup>2</sup>

Professor Clara Szczeranski, Dean of the Faculty of Law at Universidad Mayor in Chile, submitted a written report on the topic of national treatment as a possible feature for the Trans-Pacific Model Simplified Company. Her report pointed to, among other likely sources of such a national treatment, provisions in bilateral investment treaties (BIT). She noted that Chilean court decisions had already granted to BITs the legal status of mandatory law and thus conferred national treatment to the businesses listed as acceptable by BIT signatories. The panelists and other participants regarded national treatment as significant for the growth of MSMEs.

## 2. Secured Transactions (ST)

### a. Chile

Licenciado Rodrigo Novoa Urenda, a board member of NatLaw and Executive Director of NatLaw Chile at the Universidad Mayor, noted that Chile is likely to conclude the modernization of its secured transactions law in the following months and promised to make available the final draft to any interested participants once the draft is forwarded to the Chilean Congress by placing it in NatLaw's database.

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<sup>1</sup> See *infra* § II.

<sup>2</sup> See Boris Rosen, *Best Practices for Accounting Procedures for Micro-, Small- and Medium-Sized Businesses*, 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § VII.

## b. China

Professor, Dr., and Dean Shoubin Ni of the SUIBE School of Law and Emily Yu, Executive Director and head of China's Trade Secrets/Trade Legal Department of JPMorgan Chase Bank discussed the state of Chinese secured transactions law and practice. According to them, security interests that stem from retentions of ownership or reservations of title; financial leases; transfers of mobile goods in guarantee to creditors; pledges of accounts receivable; guaranty trusts; as well as generic "pledges" and "mortgages," are subject to different legal regimes including overlapping and conflicting filings and priorities. Ms. Yu added that banks would surely be able to lend larger amounts at lower interest rates and to a larger number of borrowers (including MSMEs) in China if these uncertainties were removed. Dean Shoubin Ni of SUIBE illustrated some of the serious uncertainties that China's present de-centralized registration system for security interests in personal property is experiencing and which are examined in detail in his article with Feiyu Chen.<sup>3</sup>

As stated in one of their findings, the decentralization of registration authorities also directly reduces the chance for the movable property owner, and in particular for small and medium size enterprises, to find financing in the market. On the one hand, it is not clear who are the registration authorities of the many new types of right in rem; on the other hand, due to the diversity of the types of movable property, decentralized registration actually lowers the credit creation capacity with movable property as collateral.<sup>4</sup>

The readers of this Symposium are fortunate to be able to acquaint themselves with the ongoing difficulties with the registration of security interests in personal property in China as discussed by Shoubin Ni's and Feiyu Chen's article. In the article, they distinguish between enforceability of the loan agreement between lender and borrower, which does not require registration, and the registration of the security interest, whose main purpose is to protect third party actual or potential secured creditors.

In addition to the many problems aptly pointed out by Shoubin Ni and Feiyu Chen, I noticed another problem while discussing a draft of registry regulations being considered by Chinese central bankers in 2007: the draft assumed that one of the functions of one of the proposed personal property security interests registries was to identify the owner of the collateral. This was and is an incorrect assumption. As stated by the heading of § 9-202: "Title to the Collateral Immaterial," this rule is a contemporary reformulation of the wise 12th century maxim, *mobilis non habet sequelam* (mobile goods have no sequel).<sup>5</sup> Accordingly, once an owner voluntarily delivers the possession of movable property to another holder, he or his grantors (as "historical" owners) cannot

<sup>3</sup> See Shoubin Ni & Chen Feiyu, *Movable Property Registration Legislation in China: Status Quo and Improvement*, 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § III.

<sup>4</sup> *Id.*

<sup>5</sup> SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 153 (Cambridge Univ. P 1985) (1895).

recover such a thing from third parties who acquired the movable property in good faith, as stated by NatLaw's 12 Principles of Secured Transactions Law in the Americas.<sup>6</sup> These principles guided the enactment of the OAS Model Law of Secured Transactions of 2002 and its progeny in Latin American and in African countries.

A security interest is a preferential right to possession or control of personal property. As such, it does not require that the debtor who grants the interest have title to the personal property collateral; his right to its possession, even though co-existent with other possessory rights in the same property by other creditors and debtors, will allow the creation of the security interest.

#### c. Colombia

Santiago Renjifo, manager of Colombia's recently implemented Registry of Security Interests (RSI) discussed the reasons for the extraordinary success of Colombia's secured transactions law of August 2013 as reflected in the number and variety of filings of security interests in its RSI. Secured credit at a reasonable rate of interest was mostly unavailable in Colombia for MSMEs prior to the enactment of this law. However, nine months after the implementation of the RSI (period March–December 2014), there were approximately 800,000 new registrations on file covering assets (collateral) such as motor vehicles, accounts receivable, contract rights, crops, mining and industrial equipment, sewing machines, and livestock and fishery products at reasonable rates of interest. An informal survey that I conducted among Colombia's bankers in early 2015 indicated that the volume of loans to MSMEs had doubled since the time of the enactment of the 2013 Colombian secured transactions law.

#### d. Costa Rica

Licenciado and LL.M. Joaquin Picado is the founding partner of the Costa Rican law firm Picado Leon Abogados and of the "Signature Regional Law Firm." As a member and consultant of NatLaw, he participated in the drafting of the recently enacted Costa Rican secured transactions law, to which I was an advisor. Lic. Picado noted that part of the Costa Rican secured transactions law became a victim of a harmful political compromise, which concluded with the adoption of a fragmented legal regime for security interests. Costa Rica excludes automobiles and other vehicles of personal and business use from the application of the new secured transactions law.

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<sup>6</sup> See *NLCIFT 12 Principles of Secured Transactions*, NAT'L L. CTR. FOR INTER-AM. FREE TRADE, <http://www.NatLaw.com/content/nlcift-12-principles-secured-transactions> (last visited Jan. 15, 2015).

## e. Japan

Professor Hiroo Sono of Hokkaido University reported that despite increasing awareness of the importance of commercial secured lending in Japan and despite his own advocacy of the enactment of such a law and unitary system, the Japanese legislature does not seem inclined to do so in the near future. Thus, Japan's law of security interests continues to be fragmented.

## f. Mexico

Licenciada Elsa Ayala, General Director for Business Regulation of Mexico's Ministry of Economy, and Licenciada Diana Muñoz, director of Mexico's Unified National Registry of Security in movable property (RUG), described the success of Mexico's secured transactions law and its registry. The RUG started operations in 2010 as Mexico's single electronic registry for security interests in movable property. It enables the perfection of these security interests (including statutory and judicial liens) by providing notice to third party creditors and purchasers of security interests in the described collateral. Comparative statistics that measured the yearly increases in the volume of filings evidenced a sharp increase in the use of secured lending by Mexican MSMEs. For instance, in October 2009 (prior to the inauguration of the RUG), the number of filed security interests amounted to 13,719, while from October 2010 to 2011, the volume of filings multiplied almost fourfold to 41,190 and by November 30, 2014, the number of filings was 400,283. Of these, at least 20% of these loans were to MSMEs.<sup>7</sup>

### 3. Electronic Warehouse Receipts (EWRs)

## a. EWRs in the United States

I moderated the panel that reviewed EWR laws and practices in African, American, and Asian countries. The first presentation was a videotaped introduction to the law and practice of paper-based and electronic warehouse receipts in United States law by Professor Emeritus Drew Kershen of the University of Oklahoma College of Law. He is one of the principal drafters (Co-Reporter) of Article 7 of the Uniform Commercial Code (U.C.C.) of the United States on bills of lading and warehouse receipts. Because EWRs are used more widely in the sale and financing of agricultural products in the United States than in any other country or region, Professor Kershen's introduction provided the

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<sup>7</sup> Information provided by the Ministry of Economy (on file with NatLaw). See also Isis N. Isunza, *The Impact of Secured Transactions Reforms in Mexico and Colombia*, 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § III.

comparative counterpoint for the following discussions on the regional and individual countries' laws and practices in the Trans-Pacific region and beyond.<sup>8</sup>

#### b. Developing Countries and Regions

Dr. Vassil Zhivkov discussed the laws and practices of selected developing countries and regions. Dr. Zhivkov is an LL.M. graduate and recent recipient of an SJD degree from the James E. Rogers College of Law of the University of Arizona. He relied on empirical and legal findings of his doctoral thesis<sup>9</sup> to arrive at the conclusion that a large number of developing countries, especially those of the civil law tradition, continue to rely on the issuance of two physical (paper-based) documents as both negotiable and non-negotiable warehouse receipts (i.e., certificates of title and pledge bonds). This method of issuance has impeded the negotiation of both instruments and especially of its pledge bonds. In addition, it has contributed to massive fraudulent practices, as was the case recently in China.<sup>10</sup> He also concluded, based on the experiences of developing nations in Africa and Latin America, that the future of the trade and financing of agricultural commodities both nationally and internationally will depend on EWRs.<sup>11</sup>

#### c. Latin America and United States Compared

Licenciado Adalberto Elias is a Mexican and United States lawyer, a J.D. and LL.M. graduate of the James E. Rogers College of Law, and a NatLaw research staff member. He compared United States and Latin American warehousing and the issuance and transfer of paper-based warehouse receipts (WRs) and EWRs; his study became his LL.M. thesis.<sup>12</sup> It proved for the first time how the risks of overlapping and uncertain possessory rights in the same goods covered by these two documents made it necessary to store them in the bank's or the warehouseman's drawer. He concluded that most of the issued WRs remained in the coffers of the initial lending bank or warehouseman.

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<sup>8</sup> See Drew L. Kershen, *Warehouse Receipts in United States Law—Summary for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § IV.

<sup>9</sup> Vassil Zhivkov, *Warehouse Receipts and Warehouse Receipt System—A Road Map for Harmonization the Legislation of the Pacific Rim Countries* (2014) (unpublished SJD dissertation, University of Arizona).

<sup>10</sup> *Id.*; Vassil Zhivkov, *Warehouse Receipts: A Roadmap for the Harmonization of Trans-Pacific Law and Practice*, 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § IV.

<sup>11</sup> *Id.*

<sup>12</sup> Adalberto Elias, *Electronic WR in Latin America, Particularly Mexico* (2012) (unpublished LL.M. thesis, University of Arizona); 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § IV.

d. A Chronological Roadmap of a Cotton Warehouse Transaction in the United States

Ari Pozez, a NatLaw Research Assistant and a second-year student at Tulane University Law School, conducted a field study of the cotton warehousing and negotiation practices on the east coast of the United States as part of his roadmap work-project at NatLaw. His description started with the harvesting of raw cotton by its producer-farmer and continued with the cotton's transportation, ginning, grading, classing, and baling, and subsequently with the issuance of the EWRs that would enable present and future sales of the digitally identified bales of cotton.

As one compares the WR receipt systems described in Zhivkov's and Elias' studies with that of the cotton WRs in United States in Pozez's *Roadmap*, the latter appears as the most cooperative, secure, and efficient system for present and future sales and for the financing of cotton transactions. It also appears as the only system capable of fully supporting the supply and financing of all agricultural commodities to a thriving national and international marketplace. As in the case of cotton, its issuance, recording, and transfer systems were designed for regular participants in agricultural trade. As such, they enter into a "Master" or "Participant's Agreement" that contractually binds, at various stages of the transaction, the farmer-producer-depositor of the cotton to the warehouseman and these parties to the provider of the computer system. This is the system that stores and organizes the data that enables the warehouseman to issue the EWR and also enables its negotiation. This negotiation takes place by means of a transfer of the right of control of the stored goods to one or more recorded holders of the EWR. Yet, because this participating agreement does not involve third parties, such as actual and potential purchasers or secured lenders, it is not suitable for cross-border, "open" transactions.<sup>13</sup>

e. Problems with WRs and EWRs in China

Shanghai University of International Business and Economics Associate Professor Xu Den's presentation highlighted the frequency of fraudulent issuances and transfers of WRs in China and their crippling effect on agricultural financing. Professor Den identified China's contract law (as contrasted with specific statutes or administrative regulations on WRs and EWRs) as the law that governs the issuance and transfer of Chinese WRs. Yet, while WRs do contain contractual stipulations and allocate *in personam* rights and duties to their parties, the most important function of the WR as a marketing and finance instrument is to confer what the NatLaw *12 Principles of Secured Transactions Law* refers to as

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<sup>13</sup> See Ari Pozez, *A Roadmap to Better Understanding the Issuance and Transfer of Negotiable Electronic Warehouse Receipts in the American Cotton Trade*, 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § IV.



“preferential possessory rights.”<sup>14</sup> Additionally, these rights are only partially addressed by contract law and are best addressed by the personal property law of secured lending, which is still far from being fully operative in China as is apparent in Shoubin Ni and Feiyu Chen’s article.<sup>15</sup>

f. Problems with WRs and EWRs in Vietnam

Professor Tien Vinh Nguyen is the head of the International Law Department of the School of Law of Vietnam National University in Hanoi. Despite the major significance of the agricultural sector in Vietnam’s economy, Professor Nguyen stated that Vietnam’s WR law suffers from an incomplete and ineffective legal framework for instruments that in our day amount to nothing less than liquid “agricultural quasi money.” These shortcomings explain the lack of circulation of negotiable WRs in Vietnam. Thus, Professor Tien Vinh concluded that Vietnam’s legal system lacks key substantive and registry law institutions to encourage the merchandising and financing of their agricultural commodities and that Vietnam would be most grateful, if as a result of the Trans-Pacific Colloquium, its law and practice of EWRs could come into fruition.

g. Recommendations: A NatLaw Proposal of a Uniform EWR Prototype

While most participants agreed that a model law governing all the public and private law aspects of EWR law was a laudable goal, it was not a realistic one, at least in the near future. Numerous, often obsolete and conflicting, national public and private laws and regulations would have to be modernized and harmonized prior to the adoption of a model Trans-Pacific law. A more realistic goal is to start the harmonization process by creating a prototype EWR comprised of selected private and public law components. The private law component would consist of the terms and conditions of the contract between the warehouseman and the farmer-producer-bailor peculiar to the trade of the stored agricultural commodity.

Some of these terms and conditions would enable the negotiability of the EWR to *bona fide* holders of the EWR, an enablement share with the public law component. For example, the warehouseman would agree to waive, vis-à-vis the *bona fide* holder of the EWR, those defenses or equities that pertained to his underlying and pre-existing relationships with his employees or agents. Accordingly, the warehouseman could not raise, say, the defense that his employees, agents, or holders of powers of attorney lacked or exceeded their apparent authority and that the description of the goods stored that they entered in the EWR was unauthorized. This term would enable the legal treatment of such

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<sup>14</sup> See NLCIFT 12 Principles of Secured Transactions Law, *supra* note 6.

<sup>15</sup> See Ni & Feiyu, *supra* note 3.

an EWR as a negotiable document of title for purposes of protecting the holder against the raising of the waived defenses. Other terms and conditions common to all the agricultural goods stored would also become part of the EWR, and would be specified in the EWR or be incorporated by reference.

The public law component would have to do with the issuance, transfer, negotiation, and pledge of the EWR by a secure, constantly updated, computerized system. This system must be accessible to regulatory agencies and authorized users and must make possible the traditional features of a negotiable instrument: virtual possession by means of the electronic control by a lawful holder, lack of conditionality, and independence of its promise from underlying transactions and literal interpretation of its terms. In addition, the EWR would insure that the instrument is, as required by the Uniform Commercial Code (U.C.C.) § 7-106(1) unique, identifiable, and unalterable.

Therefore, as part of the public law component of the NatLaw EWR, a set of model registry regulations would create the public or private electronic registry in charge of issuing EWRs and storing the relevant data. Another public law component would be the agreement among the respective national agencies in charge of supervising the issuance and circulation of EWRs to designate those public or private entities that would certify in a reliable, quick and inexpensive manner the presence or absence of key features of the marketability of the stored commodities, i.e., their type, quality, quantity, and other features such as those described in Ari Pozez's *Roadmap* report in this Symposium. Finally, the regulations (or a separate) statute would set forth the rules on perfection and priorities of the security interests in EWRs and the remedies for the breach of contract between the depositors and the warehousemen and for the enforcement of the rights conveyed by the EWR.

#### h. Recent Electronic Warehouse Receipts Developments in Mexico

NatLaw was invited by the Mexican Ministry of Economy (*Secretaría de Economía*) to discuss the conceptual bases and operational pre-requisites for Mexico's adoption of an EWR, as described in the preceding section. NatLaw felt that this development following the Shanghai Colloquium was of sufficient regional and Trans-Pacific interest to include it in this Symposium. An in depth review is described in Lic. Adalberto Elias's article in this Symposium issue.<sup>16</sup>

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<sup>16</sup> 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § IV. The article is a NatLaw report prepared by Lic. Adalberto Elias, Coordinator of EWR research and drafting work at NatLaw. It summarizes the results of a ministerial meeting organized and hosted by the Mexican Ministry of the Economy that involved other ministries and government agencies and also the Mexican Association of Warehouses and the Mexican Bankers' Association. It was held from June 1-4, 2015 in Mexico City.

#### 4. Electronic Commerce (EC)

##### a. Empirical Findings on the Role of an Adequate Regulation of E-Commerce in General

Dr. Ling Zhu is a professor at Long Island University, a graduate of the James E. Rogers College of Law's LL.M. program, and is NatLaw's liaison and coordinator of research projects with SUIBE. His presentation provided a general, rather than region-specific, assessment of the role an adequate legal system plays in the increased usage of EC by businesses and consumers. It was based on a five-year empirical study of the relationship between the widespread adoption of EC practices and the presence of an adequate, supportive legal environment. One of his conclusions was that the presence of an adequate legal system, i.e., one that recognizes and protects standard and best EC practices, and with them, the reasonable expectations of participants, is a precondition for widespread EC usage. However, even after EC is widespread, the quality of the legal regulation is not the direct determinant of the intensity of the EC usage. Professor Zhu's research suggests that sophistication and extensiveness of business use of EC is primarily driven not as much by the quality of the EC regulation as by business needs and business practices as well as by the government's encouragement of those practices. Professor Zhu's presentation<sup>17</sup> at the Second Shanghai Colloquium provided a detailed account of his findings and research methodology.

##### b. China

Dr. Kevin Luo, the General Manager of Microsoft's Asian Research and Development Group, was the moderator of the EC panel. His presentation highlighted the importance of EC to China and provided an introduction to China's EC laws and practices. According to Dr. Luo, EC is important to China not only for domestic retail sales where overall EC transactions between January-June 2014 amounted to around one trillion USD (a 35% increase from the previous year), but also for cross border retail transactions, an area in which purchases by the Chinese people from foreign countries made in a single day last year amounted to \$80 million USD. Dr. Luo mentioned that the UNCITRAL Model Law on Electronic Commerce and Signatures could be considered as one of the main sources of Chinese EC legislation. After pointing out some of the uncertainties that hinder cross-border EC in China, Dr. Luo suggested the topic of choice of law rules applicable to EC disputes as an area that was ripe for

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<sup>17</sup> Ling Zhu, *Does It Matter? Empirical Evidence of Institutional Environment for E-commerce*, Presentation at Second Pacific Rim Colloquium on Economic Development and the Harmonization of Commercial Law, Shanghai, China (Jan. 9, 2015), [www.natlaw.com](http://www.natlaw.com).

uniformity around the world since it is not a politically sensitive topic and could help reduce to a certain extent legal uncertainty in cross border EC transactions.<sup>18</sup>

Professor Jun Feng teaches EC law at SUIBE and is also the Associate President of the WTO Consulting Center for China. Professor Feng examined the interaction between free trade agreements and EC laws and concluded that it provides a fruitful perspective for the future harmonization of EC in particular, and commercial law in general. He provided several illustrations of that interaction and the need for a closer relationship between these two important sources as harmonizers of international commercial law.

According to Professor Fuping Gao, the Director of the EC Law Institute at East China University of Political Science & Law, some of the overall challenges to cross-border EC were China's international trade regime, especially its customs law, as well as the need to cope with national or domestic regulatory issues of other countries when entering into EC cross-border transactions. These observations supported his suggestion that one of the future topics of EC harmonization should include a uniform customs law treatment of EC.

### c. Japan

Professor Naoshi Takasugi, faculty member at Doshisha University College of Law in Kyoto, Japan, a leading Japanese EC scholar, was one of the original organizers of the Trans-Pacific Colloquia. He stressed the economic importance of EC for Asia and the United States. In his opinion, the steady growth of cross-border EC requires transparency and predictability of the applicable law as well as an effective, inexpensive dispute resolution system capable of building consumer confidence in EC, particularly when it comes to business-consumer transactions. Professor Takasugi also focused on limiting unfair commercial conduct in online transactions and protecting the privacy and security of consumers. In his Symposium article, he offered a suggestion on an initial prerequisite for unifying Trans-Pacific EC rules.

For the attainment of unifying rules, however, comparative studies are helpful and necessary. Based on the studies we can identify and distinguish what is different and what is the same in each of the rules. It would be my unexpected pleasure if this paper could make any, even a small, contribution to this goal.<sup>19</sup>

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<sup>18</sup> For a detailed discussion of Dr. Kevin Luo's views, see Kevin Luo, *E-Commerce Laws and Practices in China*, *infra* § V.

<sup>19</sup> See Naoshi Takasugi, *E-Commerce Law and the Prospects for Uniform E-Commerce Rules on the Privacy and Security of Electronic Communications*, 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § V.

d. South Korea

Professor Dr. Kyung Han Sohn is the drafter of some of South Korea's most important EC statutes. He provided an overview of that country's EC legislation and illustrations on how excessive regulation of EC hindered national and cross-border EC sales of goods and services, including some goods that many South Korean consumers were quite keen on acquiring from their Chinese manufacturers.<sup>20</sup> At the same time, Professor Sohn warned the future drafters of a harmonized EC Trans-Pacific law not to get entangled with sensitive political issues such as governmental security versus the privacy concerns of traders. His article contains a terse but thoughtful account of the most important legislative developments on E-Commerce in Korea such as the E-Document & E-Transaction Framework Act, The Digital Signature Act, The Commerce Consumer Protection Act as well as other norms regarding Privacy & Security Protection in E-Commerce. Despite the abundance of EC legislation, perhaps the most abundant among highly technological societies, he is the first to warn against the problems with excessive legislation. Thus, when he compares the U.S. and EU normative approaches to EC privacy and security protection and formulates proposals for the improvement of a Korean and global uniform EC regime, it is advice worthy of being heeded.

e. Chile

Licenciado Juan Pablo Prieto Saldivia, an attorney with the Chilean law firm Saldivia, Contreras, Inalaf, Wurth & Verdugo, expressed a view similar to those expressed by Professors Zhu, Tagazuki, and Sohn on the constructive role of good EC practices. His analysis is particularly significant, however, because, as he pointed out, Chile lacks a unified EC statute and faced with the absence of a general EC law has had to rely on a sectoral "self-regulation" of EC transactions. Thus, Chile has developed a framework for electronic payments based on inter-bank agreements on standard and best practices. In addition, Chile's Chamber of Commerce has developed a Code of Good Practice that is often applied to disputes involving suppliers of goods and services and their EC consumers. As concluded by Mr. Prieto:

The objective of this Code of Good Practice is to serve as a guide to ethical conduct for electronic suppliers, for the benefit of consumers or users who contract with them through the use of electronic systems. To achieve this objective, the code proposes principles and standards to which providers must aim, making the necessary adjustments according to the

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<sup>20</sup> See Kyung Han Sohn, *Privacy and Security Protection under Korean E-Commerce Law and Proposals for Its Improvements*, 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § V.

particularities of their own businesses. This is done in order to install a system of uniform self-regulation in the industry, creating bonds of credibility and trust with consumers, on the basis of legal certainty.

#### f. Colombia

Mr. Renjifo focused on the role of the security of E-communications as one reason for the success of the Colombian secured transactions registry. Once the electronic platform for the Colombian registry was established, the biggest concern was that information coming in or exiting the registry would be stolen by spyware. The drafters of the registry used Colombian E-commerce laws enacted in 1999 and 2008 to draft the rules that applied to the registry's E-communications. Accordingly, the lender/filer assumes responsibility for what is filed in the registry; the Colombian registry only acts as a webmaster. As apparent from Mr. Renjifo's earlier presentation on the success of the secured transactions registry and the unprecedented volume of filings that surpass by far that of any other developing nation, the Colombian approach to the security of E-communication deserves serious attention.

#### g. Recommendations for Future Work

I polled members of the panel and the audience on the most appealing topics of EC uniformity. Most agreed with Professor Sohn's warning to not get entangled with sensitive political issues such as governmental security and traders' privacy concerns. They also agreed with Dr. Luo's suggestion of a uniform choice of law rule for cross-border EC as the starting point for efforts at uniformity and/or harmonization. There was a consensus that the comparative method suggested by Professor Takasugi should be used in the preparatory research for the uniform choice of law topic.

### 5. Insolvency and Rehabilitation

#### a. The United States Bankruptcy Law as a Model for Trans-Pacific Insolvency and Rehabilitation Laws

As will be apparent in Hector Novoa's discussion of Chile's recent bankruptcy law and in the references to United States bankruptcy law by Professor Han Changyin's analysis of Chinese law, U.S. bankruptcy and debtor rehabilitation law have become legislative models for some Trans-Pacific nations. Hence, it was very important for the participants to hear about this law's goals and procedures from Professor Jay Westbrook of the University of Texas School of

Law, one of the United States' and the world's leading bankruptcy law scholars.<sup>21</sup> Professor Westbrook pointed out that the law of bankruptcy is federal in nature and thus is applied by federal courts. On the other hand, the law of commercial transactions is state law but bankruptcy courts are empowered to apply both federal law and state law. One of the reasons for the success of U.S. bankruptcy law is its flexibility as manifest in features such as: (1) bankruptcy procedures are initiated voluntarily by debtors and involuntarily by creditors, although the latter procedure is rare; and (2) unlike what happens in other countries, United States law does not require that a debtor be insolvent in order to open a bankruptcy procedure.

In some cases, the bankruptcy procedure leads to the liquidation of the assets of the insolvent debtor, which is the mission of Chapter 7 of the Bankruptcy Act. In a Chapter 7 procedure, a trustee is appointed to manage the assets of the debtor and ultimately to sell them and distribute the proceeds to creditors. A Chapter 11 procedure, in turn, has two goals: (1) to rescue, or (2) to sell the business as a unit rather than to liquidate it piece by piece as in Chapter 7. In this procedure, the existing management—known as the Debtor in Possession (DIP)—remains in control of the company. From a legal perspective, the DIP stands in the place of a trustee in bankruptcy with the same obligations to creditors. In this reorganization, the DIP proposes a plan to the creditors, obtains court approval for it, and with this plan, attempts to enable the debtor to go back to the market place with a better chance of prospering.

The purpose of this reorganization, then, is to: (1) preserve jobs by keeping the business as a going concern; (2) enable creditors to receive more in a reorganization than they would in a liquidation—and maximize the value of the debtor's assets pursuant to the principle that companies are worth more alive than dead; and (3) allow existing management to retain management of the business because, as a rule, a pre-existing management knows more about its business than an outside party brought in as a trustee.

A Chapter 11 reorganization proceeding has three phases. First, an automatic stay which takes place at the moment of its bankruptcy and freezes all the debtor's assets and holdings throughout the U.S. and sometimes internationally as well. This stay forbids all collection efforts by creditors. In contrast to what happens in other countries, the automatic stay includes the claims of secured creditors, subject to some exceptions. Hence these creditors must also stop their attempts to recover the securing assets at the moment bankruptcy is filed. Second, the debtor must enter into a state of complete financial transparency—he must file all sorts of financial statements in court about his assets, liabilities, recent transactions, and profit and loss statements for several recent years, and so on. Third, by holding off creditors, the automatic stay gives the business debtor a chance to clean up his business, for example, by closing or selling divisions of the business that are losing money or by laying off employees, which is easier to do when the employer is bankrupt. Management has an

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<sup>21</sup> The following summary of this presentation was based on a transcription of Professor Westbrook's video presentation and on notes taken by Lic. Adalberto Elias.

opportunity to negotiate with creditors while the automatic stay keeps those creditors from taking further action. Ordinarily those negotiations will look toward reducing the total amount of the debt to match the debtor's capacity to pay and to give the debtor more time to pay.

#### *i. The Debtor Rehabilitation Plan*

Following the automatic stay negotiations, the debtor will propose a plan of rehabilitation. He must also furnish a disclosure statement about the plan. The disclosure statement has to include extensive financial information, payment schedules on when and how each creditor must be paid, and has to show how the debtor company intends to succeed and make the payments under the plan.

At this point, the creditors will vote on the plan. The vote is by class and each class with some exceptions must approve the plan. Example: three classes of creditors: (1) secured; (2) unsecured bondholders; and (3) unsecured suppliers. Each one of these classes must vote in favor of the plan. The approval must be by a majority of the number of the creditors and also by a majority of two-thirds of the amount of the claims in each class.

If the three classes approve, the plan will go before the court. If the court approves, the debtor will be discharged. This means that the debtor will go back to the market place without having to pay his pre-bankruptcy debts, he will only have to pay the new debts as set forth in the plan.

If the plan is not confirmed, one of two things can happen: (1) dismissal of the case with creditors free to pursue assets in the usual (non-bankruptcy) manner under state law, or (2) if there are assets left to distribute to unsecured creditors, there will be a conversion to Chapter 7 liquidation so those assets can be sold and these creditors can be paid whatever amounts are available.

#### *ii. Recent Trends and Procedures*

The sale of assets under Section 363 of the Bankruptcy Act is a recent trend under American reorganization law. Increasingly, creditors are impatient about the time it takes to go through the rehabilitation plan process and therefore in some cases they try to get the court to agree to a quick sale of the business without having a reorganization plan. This would happen, for example, when the assets of the business are subject to loss because of market conditions. If the sale is not performed quickly, the assets will go down rapidly in value. In this situation, the judge may approve an immediate sale. The sale will be free and clear of all interests other than those of the purchaser, which will likely produce a higher price for the asset.

The second trend is to allow secured creditors to gain more control over their secured assets. The third is the increased number of out-of-court workouts (settlements) because debtors and creditors know from experience what will



happen under Chapter 11. Accordingly, they are often able to avoid the expenses and delays of litigation and obtain pretty much the same deal that probably would have resulted had they gone to court.

Another recent variant is that of debtors seeking an expedited “pre-pack” procedure that involves major creditors who have already agreed to a procedure that will flow faster through the court. A similarly novel procedure is apparent in international bankruptcies where a financially distressed company has assets and operations in several nations and needs trans-national cooperation in locating and adjudicating the fate of assets. For this reason, the United States adopted the United Nations Model Law on Cross-Border Insolvency as Chapter 15 of the Bankruptcy Code. This Chapter allows a trustee or administrator in a foreign bankruptcy procedure and particularly one that is taking place in the home country of the debtor company, to come to the United States to open and file a petition under Chapter 15. This opens up an “ancillary” or supporting procedure to the main procedure that is taking place in the debtor’s home country. This procedure enables U.S. courts to help foreign trustees to find and repossess assets in the United States for distribution to creditors, often through the foreign proceeding. As a rule, U.S. courts are anxious and willing to assist foreign proceedings and have done so since the Model Law was adopted ten years ago.

#### b. Chile’s 2014 Insolvency and Rehabilitation Law

Chile’s new Insolvency and Rehabilitation Law (*Ley No. 20.720*) was enacted on October 9, 2014 (New Chilean Law). Licenciado Hector Novoa, one of Chile’s distinguished international commercial lawyers, provided a helpful analysis of its policies and principal provisions. Lic. Novoa prefaced his presentation by noting that it reflected the views of the Chilean Superintendence of Insolvency (*Superintendencia de Insolvencia y Re-empredimiento*) on the New Chilean Law. Under this law, the Superintendence of Insolvency has the obligation to exercise its new administrative powers which means that Chilean tribunals on insolvency and rehabilitation matters are not as involved with these procedures as in the past, when the adjudication of commercial and civil disputes was exclusively judicial. This may cause some consternation among Chilean “strict law” judges and their admirers because the spirit of this law is to enable administrative authorities to be flexible and equitable when applying the new law.

##### *i. The Old Regime*

Some of the main problems with Chile’s preceding bankruptcy law were that moderate and low-income parties could not afford its procedures. In addition, these procedures were also slow and inefficient and did not include reliable and clear terms and time limits for creditors and debtors to develop their business restructuring plans. Consequently, no adequate incentives existed for debtors and

creditors to promptly initiate insolvency proceedings. In addition, unlike U.S. law, this law did not provide an insolvency procedure for non-merchants and consumers or for “personal,” as contrasted with commercial, insolvencies. Neither did it clarify the status of special highly paid employees as claimants. As a result, only seven percent of financially troubled enterprises in Chile used the official bankruptcy and reorganization system. The vast majority preferred to go out of business informally; thereby, they often operated for a considerable time as de facto bankrupt companies.

*ii. The Main Principles of the New Chilean Insolvency Law*

The main principles of the New Chilean Law are: (1) the setting of time limits for the proceedings; (2) the reliance on specialized bankruptcy tribunals; (3) the creation of effective reorganization procedures; and (4) the protection of the assets of secured creditors and the improvements of the transparency of proceedings, including the ability to follow them online.

The purpose of the reorganization procedure is to create the conditions and incentives to reach a workable agreement for the benefit of viable businesses and their creditors. Accordingly, the agreement cannot be dilatory and should: (1) be concluded in less than four months; (2) allow an automatic 30 days’ stay for the protection of debtors subject to foreclosures or attachments; (3) allow the intervention of a neutral party-observer; (4) allow the reorganization proposal to be divided into classes or categories of creditors; (5) allow secured real and personal property creditors who participate in the reorganization agreement proposal to keep their priorities; (6) provide tax benefits equivalent to those provided for liquidation procedures; and (7) allow out-of-court reorganization agreements. The purpose of the liquidation procedure is to enable a quick and efficient liquidation of non-viable businesses. Accordingly, it must take place in fewer than 12 months in the case of formally established businesses and fewer than seven months in case of individual debtors.

*iii. Consumer Renegotiation Procedures*

This procedure is designed to enable consumer-debtors to renegotiate their debts with all their creditors in a single forum. It can be a voluntary and out-of-court procedure, with the following requirements: (1) the liability involved will need to be at least two or more debts from different obligations that exceed \$3,000 USD (approximately); (2) are due for more than 90 days; and (3) the consumers had not been defendants in a Consumers’ Liquidation Proceedings or any other enforcement proceeding, excluding labor lawsuits. This procedure also grants an automatic 30 days’ stay of executions, attachments and foreclosures and enables the Superintendence of Rehabilitation and Insolvency to act as a facilitator. The

end results should be: (1) that the credits of the renegotiation agreement will be renegotiated, cancelled, or novated according to the reached agreement; (2) that unpaid debts will be discharged; and (3) that relief and rehabilitation will be given to the responsible consumer. It also sets up a statute of limitations of five years for the filing of a new application for renegotiation of claims.

*iv. Cross-Border Insolvency*

Inspired by the same UNCITRAL Model Law on Cross Border Insolvency adopted by the United States, Chile's version contributes to the legal certainty of international trade and investment. The New Chilean Law provides for the cooperation with the foreign courts' adjudication of bankruptcy proceedings, especially when the insolvent debtor resides in the courts' jurisdictions.

c. China

In his enlightening analysis of China's bankruptcy and debtor rehabilitation laws, professor Changyin Han<sup>22</sup> of the Shanghai Jiao Tong University identified geographical trends and changes in the frequencies of bankruptcies across China. Most bankruptcy cases are litigated in the Yangtze River Delta, the Pearl River Delta, or in the developed regions of the southeast coastal area, especially in Zhejiang, Guangdong, and Jiangsu provinces. He also detected a rise in the number of bankruptcies among state-owned and private enterprises in some regions. In these more economically developed areas, the bankruptcy claims against state-owned enterprises appear to have been settled in a manner satisfactory to creditors; however, in the northeast and northwest regions of China, the bankruptcy of state-owned enterprises is still a major concern for secured and unsecured creditors.

The number of reorganization cases is still quite small. Chinese company law includes two kinds of companies, a limited liability company and a joint stock limited company. The joint stock limited company can also be divided into listed and non-listed. He defines a listed company as a joint stock limited company whose issued shares have been approved to be listed and traded on a securities exchange by the State Council or the securities regulatory authority. According to the statistics he compiled, during 2013, only 43 listed companies had filed for reorganization while during the first ten months of 2009, only 80 non-listed companies filed for reorganization in the entire PRC.

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<sup>22</sup> See Changyin Han, *The Practice of Reorganization in China*, 33 ARIZ. J. INT'L & COMP. L. (2016) 1, § VI.

#### 6. “Run-away” and “No Asset” Cases

“Run-away” and “No Asset” cases in which insolvent business owners and executives desert their former places of business are growing in China. For example, from 2003 to 2008, 206 insolvent business owners from the city of Qingdao in Shandong province abandoned their assets. The number of workers affected by their departures was approximately 26,000. Similarly, by the end of October 2011, 228 business owners in the Zhejiang province fled their businesses and nine of them committed suicide.

These failures are connected to the low ratio of assets to liabilities in Chinese bankruptcies. According to the official statistics, of the 11 listed companies, 5 companies’ liabilities exceeded assets by 200%, in another 5 companies, the excess of liabilities over assets ranged between 100-200%; only one company had less than a 100% ratio of liabilities to assets. For those listed companies whose liability to assets ratio was that high, the reason they survived was that China’s stock market adopted an approval system in which the empty shell of listed companies had a special value.

The above statistics appear to support the Chinese debtors’ skepticism on the likelihood of “second” chances under the prevailing Chinese bankruptcy law and practice. In the case of suicidal debtors, the statistics could also indicate how seriously embarrassing commercial failure is to debtors and their families. Professor Han’s research on the absence of investors willing to risk their investments in reorganizing companies by purchasing all of the companies’ significant assets (“crisis” investors) would seem to confirm that the skepticism of reorganizing debtors is well founded. He found the same reluctance among financial institutions that could have provided restructuring loans.

One of the most serious problems he found with sale-of-assets reorganizations was their lack of transparency. This problem was manifest in the reorganization of the Jianghu Ecology Company. In this case, the trustee chose Guangdong Nianhua instead of Zhejiang Nanxi River Company as reorganization investors, although the former’s price was much higher. This also raises the question: What are the criteria for selecting the reorganization investors? Who has the authority to choose investors? So far, the Enterprise Bankruptcy Law has not answered these questions.

Similarly, reorganization lenders are not easy to find in China. Banks are reluctant to lend to insolvent borrowers because they are not certain about the loan applicants ability to repay their debts. A relevant question would be the extent to which Chinese secured transactions laws allow for these lenders to acquire a “super priority” security interest in the assets whose purchase they enabled. Further, while investors could provide operating capital for the restructured debtor during the implementation of the reorganization plan, the acquisition of the operating capital is being negotiated; in this connection, it is equally important to preserve or improve the management of the insolvent enterprise. Professor Han contrasts the dearth of reorganizing capital in China with the many incentives, such as priorities for creditors who finance the cost of management as well as

“super priorities” and “golden priorities” that the U.S. Bankruptcy Code provides and that Professor Westbrook commented upon earlier. Professor Han adds that even though Paragraph 75 of Article 2 of China’s “Enterprise Bankruptcy Law” provides that “during the period of reorganization, if the debtor or the trustee borrows to continue the business’s operations.” Simply put, there are no provisions clarifying the reorganizing loan procedure and its priority vis-à-vis other creditors under present Chinese law.

An additional disincentive is the high tax burden imposed on reorganizing financial enterprises such as banks. In practice, the tax authorities often require the debtor to repay in full the tax credits they may have received if they do not agree with the reorganization plan. In order to solve this problem, many trial or superior courts consult the tax authorities on the need for the refund on a case-by-case basis. So far, this practice has not satisfied the expectations of litigators; the result of these disincentives is that few financial institutions file for bankruptcy in the People’s Republic of China (PRC). Insolvent financial institutions often withdraw from the market through administrative procedures other than bankruptcy. In fact, aside from regulatory agencies, local governments often will be involved in the bailout of problem banks. Similarly, only a few bankruptcies of securities companies including the Guangdong International Trust and Investment Company are resolved through judicial bankruptcy procedures. Suffice it to say, so far, no bank bankruptcy case has been decided under the Enterprise Bankruptcy Act.

### 7. Conclusions and Suggestions

Among the most important factors that affect the reorganization practice in China is the parties’ lack of motivation to file for bankruptcy. Creditors seldom wait for the judicial procedures and seek their recovery of assets on their own and outside of bankruptcy. Debtors fear that nothing will be left with which to operate their business after a liquidation procedure and are also skeptical of renegotiation procedures. Thus, creditors launch the vast majority of China’s companies’ reorganization cases. To these factors, Professor Han added the negative attitude of local governments towards bankruptcies as well as the passive attitudes of the courts. He encouraged the local and national governments to change their attitude toward bankruptcy and start regarding it as a tool to strengthen the viability of the many deserving companies and assured them that this would strengthen the national and local economies. Thus, not only should the local governments adopt a neutral attitude between creditors and debtors, but also stimulate the participation of investors and lenders in reorganization procedures. Similarly, there needs to be an improvement of the judicial role and performance. As long as the judge’s performance evaluation system does not take into consideration the number of court cases, the court’s attitude toward bankruptcy cases will tend to be negative. Finally, the improvement of the performance of China’s Enterprise Bankruptcy Law will require the legislative, administrative and judicial

buttressing of the principle of the debtors' self-management. Debtors should be allowed to manage their own assets and affairs as debtors in possession as done under the U.S. Bankruptcy Law.

#### 8. Corporate Group Insolvency in China

Associate Professor Zhengshan Xie teaches commercial and bankruptcy law at SUIBE and has maintained in his writings that a corporation that enjoys a separate legal personality under Chinese law should be liquidated or rehabilitated individually, not as part of a group of insolvent debtors. This is not the case when an enterprise group (i.e., a group consisting of two or more separate legal corporate entities) goes bankrupt in China. China's Enterprise Bankruptcy Law of 1986 held a similar view. None of these sources provided for group insolvency.

Many Higher People's Courts have objected to the application of consolidated bankruptcy procedures. For example, the Guangdong Higher People's Court stated that the court should order related enterprises with their assets combined to make a clear distinction among their assets when they file for bankruptcy and that the liquidator should be assigned to make a clear distinction among related enterprises whose assets are combined when the creditors of such enterprises file for bankruptcy and that debt consolidated liquidation is not permitted.

The New Enterprise Bankruptcy Law that came into force on June 1, 2007 seemed to embody a contrary trend.<sup>23</sup> Thus, despite these decisions, a dramatic change of the courts' attitudes toward enterprise group insolvencies is now apparent: consolidation of the assets of the consolidated company is now allowed.

Yet, many Higher People's Courts have enacted new judicial guidelines that on the one hand, require trial courts to adhere to the principles of separated insolvency, and on the other, allow the courts to consolidate the assets of the companies that belong to a group in exceptional circumstances. Professor Kozolchyk, the moderator, commented that: The Supreme Court decisions discussed by Professor Zhengshan Xie illustrate an ineffective and uncertain method of judicial decision-making. It is ineffective because it is not only self-contradictory and contributes to what I describe as an "invertebrate" method of rulemaking in which a normative hierarchy is ignored or rendered vague and inconclusive. This method of rulemaking affects not only the certainty of normative hierarchies, but it also encourages contradictory fact-findings, issue identification, and ultimately, inconsistent policies. For example, how could there be a uniform law against predatory raids by holding companies of assets that belong to their subsidiaries if it is unclear what is unacceptable in the raiding

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<sup>23</sup> Enterprise Bankruptcy Law of the People's Republic of China art. 75 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) 2006 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.

practices of holding companies trying to consolidate their assets. Is the intent to maximize the profits of the holding or consolidated company at the expense of the subsidiaries or separate legal entities? And if so, how was this done and what were the specific violations of commercial good faith and best accounting practices?

### **C. Next Steps and Recommendations**

Major differences exist with respect to debtor rehabilitation and insolvency procedures between, on the one hand, the U.S. and Chilean laws compared to Chinese law. Thus, panel participants and polled members of the audience agreed that the time was ripe for an in-depth comparative contextual study of not only statutory, administrative and judicial law but also of the related commercial and financial practices. Only after such a study is concluded, would it be possible to discuss cogently the path toward uniformity or harmonization.

In addition, following the Colloquium and after consulting with Latin American participants, Dr. Kozolchyk suggested that once the results of the first two years or so of the application of Chile's new law became available and they showed good signs of the new law's effectiveness, the time may be ripe for considering using it as a model by other Latin American and Trans-Pacific countries that belonged to the civil law tradition.

#### **1. Consensus on Topics and Next Steps**

Panelists agreed to communicate their support to their respective delegations to UNCITRAL Working Group I with respect to the "Framework for a Simplified Company Model Law for MSMEs" proposed by Messrs. Pliego and Dennis. It was noted that once more Latin American countries adopted close variants of the Colombian law or of its UNCITRAL or OAS versions it would be easier for Asian countries to adopt similar versions. On the topic of secured transactions, it was agreed that the moderator of the panel, Mr. Rodrigo Novoa, would draft and circulate to the panelists a plan for future work on this topic based on the experiences with the Colombian, Costa Rican, and Mexican versions. On the same topic and on a bi-institutional basis, NatLaw and SUIBE agreed to collaborate in the submission of a joint pilot project for a secured transactions law and registry that will enable MSMEs in the Free Trade Zone of Shanghai to apply for lines of credit and other types of secured loans from local or international banks.

On the topic of warehouse receipts, it was agreed that additional field research had to be completed in order to set in motion the drafting of a prototype EWR for selected agricultural goods that could be used among the participating nations. Lic. Adalberto Elias, Esq., and Dr. Boris Kozolchyk accepted an invitation to meet with Mexican governmental agencies and with the association

of warehousemen and bankers on June 3-4, 2015. During this trip they were able to gather important enough information to confirm the feasibility of NatLaw's proposal of a prototype EWR as described above.<sup>24</sup> The next section contains a report on that trip, what was learned and its highly promising recommendations.

On the topic of EC, it was agreed that Dr. Kevin Luo would formulate a recommendation on how to proceed with the drafting of the choice of law rules to govern the application of EC law to Trans-Pacific transactions.



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<sup>24</sup> See *supra* § I(c)(1).