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**Global Supply Chain**

This BNA Insights article by Patrick Mears and Michal Barlowski looks at global supply chains, which dominate the landscape of international trade in goods and show no sign of decreasing. In certain manufacturing industries these chains are very fragile, the authors say, and their disruption may cause production to halt unexpectedly, causing members of the chain to suffer substantial economic losses. When selecting members for a global supply chain, purchasing departments and in-house counsel for originators of the chain must proceed carefully and carefully weigh risks involved under the laws of the countries to be involved in the chain, according to the authors. The authors look at two hypothetical situations—in Mexico and Germany/Poland—for a U.S. lawyer representing a supply chain member in its efforts to terminate supply contracts with a defaulting foreign chain member.

# Global Supply Chains in Cross-Border Troubled Supplier Situations: Considerations for Counsel in Advising Affected GSC Members

By Patrick Mears and Michal Barlowski

### I. Global Supply Chains: What Are They, When Did They Develop and How Do They Function?

## Definition and Characteristics of Global Supply Chains

The term ''supply chain'' has been defined as ''an entire network of entities, directly or indirectly interlinked and interdependent in serving the same customer or customers.'' Members of a supply chain typically include vendors that supply raw material, suppliers that convert raw material into intermediates and final products, warehouses that store the intermediates and final products, distributors that deliver the final products to retailers and retailers that sell or lease the finished products to end users.

*Patrick Mears is a retired partner of and of counsel to Barnes & Thornburg, a national law firm with 11 offices in the U.S. He can be reached at patrick.mears@btlaw.com.*

*Michal Barlowski heads Wardynski and Partners' restructuring and insolvency practice, and was a senior partner for 15 years. He can be reached at michal.barlowski@wardynski.com.pl.*

Global supply chains (GSCs) are ubiquitous in the global economy and comprise a substantial portion of international trade. The U.S. Chamber of Commerce recently calculated that 56 percent of global trade involves intermediate products that are produced and traded via GSCs, indicating the extent of their reach in the global economy.

The recent academic literature on GSCs identifies two important developments relating to the recent growth in GSCs. First, the chains in existence are primarily regional groupings of companies. Richard Baldwin demonstrates in a recent article that regional supply chains dominate in three ''regional blocks,'' labeled by him as ''Factory Asia,'' ''Factory North America'' and ''Factory Europe.'' These groupings feature chain leaders or ''hubs'': Japan in Asia, the U.S. in North America and Germany in Europe. Second, the recent surge in regional trade agreements and their ''depth'' stimulates

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the proliferation of ''vertically specialized trade'' or supply chain trade.

In addition, three concepts have been identified as basic to supply chains. The first concept is ''importing to produce.'' This concept encompasses the importation or other acquisition of ''intermediates''—raw materials that will be processed or parts that will be integrated into components or modules for inclusion into final products.

The second is ''importing to export,'' which is integral to ''global'' supply chains that function across national borders. This process typically involves the incorporation of ''foreign intermediaries'' used to produce goods that are thereafter exported to other countries for further incorporation and/or assembly into final products.

The third and final concept is ''value-added trade,'' which involves determinations of the final sale values of products. Such values equal (i) the cost of intermediate inputs, domestic and imported, and the direct domestic value added prior to export; and (ii) the sum of value added domestically and abroad in the product's sector and all sectors that provide intermediates for incorporation into the final product.

### A. Operation of GSCs: The Example of the Automotive Global Supply Chain

The archetypical global supply chain is the automotive supply chain, which was first conceived and developed by the ''Detroit Three'' OEMs, viz., Ford Motor Co., General Motors Corp. and Chrysler Corp, shortly after the production line assembly of motor vehicles was instituted by Henry Ford. This supply chain now girdles the globe, with tools, molds and dies along with automotive parts, components and modules being fabricated in more than one country for final assembly, distribution and ultimate sale of motor vehicles to consumers in most nations.

One central element of this GSC is the ''just-in-time'' inventory method, where just enough parts and components are physically present in assembly facilities to finish a certain number of modules or end products during a defined period of time before additional inventory shipments are received. The former practice of building and maintaining substantial ''inventory banks'' of parts and components has been essentially abandoned by OEMs as being too expensive.

Another critical feature of the automotive GSC is the common use of ''sole source'' supply contracts. These contracts are entered into by either (i) the OEMs with ''Tier One'' suppliers to produce and deliver components and modules to OEMs for final assembly; or by (ii) Tier One or lower-tiered suppliers with other suppliers. Sole source suppliers act as the only source for components necessary to produce a particular model of motor vehicle, thereby causing the ''just-in-time″ inventory method to be at risk in the event of a catastrophic event, e.g., the Fukushima nuclear reactor meltdowns and the extensive flooding in Thailand, both of which occurred in 2011 and severely disrupted GSCs.

More commonly, disruptions of the automotive GSC are caused by the financial distress of a sole-source supplier, who is unwilling or unable to deliver a sufficient number of parts on a timely basis to the assembler, thereby causing a shutdown of automotive production lines up the chain. These shutdowns can cause substantial financial losses to other chain members, especially if the shutdowns continue for a prolonged period of time.

**In light of the foregoing risks of supply chain disruption in the automotive GSC and other chains, it is critically important that an OEM, in the first instance select financially stable and reliable suppliers to form its supply chain and to analyze carefully the relevant laws of the countries in which the suppliers' facilities are located.**

In light of the foregoing risks of supply chain disruption in the automotive GSC and other chains, it is critically important that an OEM in the first instance select financially stable and reliable suppliers to form its supply chain and to analyze carefully the relevant laws of the countries in which the suppliers' facilities are located to ensure, as much as possible, that the parts and components necessary for final assembly of the manufactured products may be obtained on a prompt and uninterrupted basis so as to avoid production line shutdowns.

Because sole source supplier contracts are often used in GSC industries, it may be extremely difficult not only to obtain timely deliveries of product from a teetering supplier but also to terminate the supply contract and resource the work to another, more reliable and stable supplier.

For instance, the laws of the supplier's home country may not permit a prompt termination of the contract and resourcing and, even if they do, the courts of that country may resist granting that relief for any number of reasons, e.g., protection of local industry and labor rights and court incompetence or corruption. In the event that the troubled supplier becomes the subject of an insolvency case in its home country, applicable insolvency laws may delay or even prohibit contract termination during the course of the case without first engaging in lengthy legal proceedings involving all of the supplier's stakeholders, e.g., employees, equity holders, and secured and unsecured creditors.

Finally, even if contract termination and resourcing is possible, the proposed new supplier will often be required to establish, after extensive testing of its production equipment, whether the parts produced on those machines will meet the tolerances and other specifications required by higher-tiered suppliers and the OEM.

## II. GSCs and International Trade

### A. Evaluating Risks to Global Supply Chains Arising From the Financial Distress or Insolvency of a Chain Member

When determining whether to include a foreign supplier in a GSC, the entity responsible for establishing

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the chain (or for determining whether to admit a new foreign member to the chain) should consider a number of factors related to the ease of doing business in the new country.

These factors typically include import and export regulations and procedures (e.g., the number of documents necessary to import into and export from the country, the time involved to accomplish the same and the amount of any tariffs involved), the state of the country's infrastructure and logistics, national and local taxation, the labor market and labor laws, the existence of free trade agreements between the subject country and the nation or nations that are primary participants and beneficiaries of the GSC, and the existence of political and judicial corruption or incompetence.

When creating a supply chain or adding a member to the chain from a new country, the entity doing so should also evaluate (i) its ability to enforce contracts against a defaulting member under the new country's laws; and also (ii) its power to terminate and resource supply contracts in the context of a supplier's insolvency proceeding to insure an uninterrupted supply of goods during the pendency of that case.

Alternatively, chain members should ascertain whether they are able, under the laws of the proposed new chain member's country, to secure a continuing supply of necessary components in the defaulting supplier's insolvency case in order to avoid a shutdown of production lines.

This information may be obtained by the supply chain originator from legal counsel in the proposed country. In doing so, the originator and its counsel should select the firm or lawyer with care to make certain that its advice is precise, reliable and thorough.

Another potential (and, perhaps, initial) source of this information is the ''Doing Business'' reports of the World Bank, which has been collecting and analyzing information for these reports and publishing them annually since 2004. These reports rank countries on the overall ''ease of doing business'' and detail the various categories that contribute to overall national rankings (e.g., ''Paying Taxes'' and ''Protecting Investors''). Two of these categories are especially relevant to GSC members, especially those in industries that employ ''just in time'' inventory methods and sole-source supply contracts: ''Enforcing Contracts'' and ''Resolving Insolvency.''

Subcategories of Enforcing Contracts include (i) the number of procedures necessary to obtain final relief in the subject country; (ii) the average time necessary to obtain such relief; and (iii) the average cost of obtaining this relief, as measured by a percentage of the claim amount.

Some subcategories of ''Resolving Insolvency'' are (i) the average time for concluding an insolvency proceeding in the subject country; (ii) the average cost of commencing and maintaining the proceeding to closure, measured as a percentage of the insolvency estate's value; and (iii) the average recovery rate experienced by creditors.

In obtaining legal advice from lawyers in the subject country and in analyzing information such as that contained in the World Bank's Doing Business reports, a GSC originator and other chain members should be able to measure and weigh the risk involved in admitting to the chain a member from a new country.

## B. International Initiatives for Insolvency Law Reform to Facilitate International Trade

### 1. The Model Law of Cross Border Insolvency

The first recent international initiative to reform national insolvency laws for the express purpose of facilitating international trade emerged in the mid-1990s, when the United Nations Commission on International Trade Law (UNCITRAL) proposed the Model Law on Cross-Border Insolvency (the Model Law). This statute contains rules to coordinate in an efficient and predictable manner cross-border insolvency cases, viz., cases involving the same debtor or related debtors pending in two or more nations.

For example, the Model Law permits a bankruptcy administrator appointed in one jurisdiction to commence a secondary proceeding in another nation to aid a previously commenced, ''main proceeding'' and to grant standing in the secondary case to the insolvency administrator appointed in the prior proceeding. Prior to the Model Law, there were few, if any, international conventions regulating cross-border insolvency cases to which the major trading nations subscribed.

The Model Law was adopted by the UN General Assembly in 1997 and, since then, has been incorporated into the national laws of twenty-one states. Major trading nations that have adopted the Model Law include Mexico (2000), the U.S. (2005), Poland (2003), Japan (2000), Canada (2005), the United Kingdom (2006) and the Republic of Korea (2006), all of which have substantial national automotive industries.

### 2. The European Insolvency Regulation and the European Commission's Recommendation on Reform of National Insolvency Laws

The European Insolvency Regulation (EIR) was adopted by the European Union in May 2000 by Council Regulation (EC) No. 1346/2000 and became effective and binding in May 2002 upon all members of the EU except for Denmark. The EIR, like the Model Law, prescribes procedures for coordination of cross-border, ''collective'' insolvency cases commenced in two or more states of the EU.

The EIR's third recital states the policy underlying the Regulation with precision: ''The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by [European] Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.''

In connection with its required 10-year review of the EIR begun in 2012, the European Commission proposed a series of changes to the EIR to facilitate reorganizations of cross-border cases including (i) recognizing pre-insolvency proceedings as ''collective'' insolvency cases, (ii) proposing rules for cases involving members of company ''groups,'' and (iii) abolishing the requirement that all secondary proceedings be ''winding up'' or liquidation proceedings.

This European Commission proposal is presently being considered for adoption in negotiations between the European Parliament and the European Council, with a decision expected soon.

Perhaps more important than the EC's proposed revisions to the EIR is the Recommendation of the EC issued on March 12, 2014, which recommended that EU members take steps where necessary to reform their national insolvency laws to satisfy the following five "principles" of insolvency legislation:

- facilitating the restructuring of businesses "at an early stage, before commencing formal insolvency proceedings, and without lengthy or costly procedures to help limit recourse to liquidation";

- authorizing debtors to restructure in the absence of formal court proceedings;

- permitting debtors to seek a temporary stay of creditor enforcement actions for an initial period of four months up to a maximum of 12 months to allow debtors to adopt a restructuring plan during the stay period;

- facilitating the process for the adoption of restructuring plans to increase the chances of debtor rehabilitation; and

- permitting the granting of a discharge by no later than three years after an insolvency proceeding is commenced.

This recommendation seeks to stimulate the harmonization of national insolvency laws of EU states to expand the reach of what has been labeled as the "rescue and recovery culture" of the EU. Once 18 months elapse after the issuance of the recommendation, the EC will "assess the state of play. . .to evaluate whether further measures to strengthen the horizontal approach on insolvency are needed."

The recommendation does not specify what these "further measures" might be but certainly include the EC's issuance of a directive to member states on this topic.

### III. Analyzing Non-Payment and Other Insolvency Risks to GSCs Under Foreign Law to Determine Whether to Trade With Suppliers Established in Foreign Countries.

## A. Description of Decisional Calculus by Purchasing Departments and In-House Counsel

We start from the premise that two of the World Bank's "Doing Business" factors—"Enforcing Contracts" and "Resolving Insolvency"—should be of major importance to supply chain members, particularly to those involved in automotive supply chains.

Disruptions of GSCs caused by an inability of chain members quickly to terminate long-term supply contracts with defaulting suppliers, to recover from such a supplier dies and tools necessary for production of parts and to resource production will likely cause chain members to incur substantial financial losses that will only be abated upon such termination, recovery and resourcing.

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In analyzing the national legal system of a potential chain member prior to its admission to the GSC, the purchasing department of a member and its legal counsel should consider carefully the following factors:

### 1. Terminating Contracts and Obtaining Other Related Relief in the Absence of a Defaulting Chain Member's Insolvency Proceeding

- What courts in the foreign state entertain and adjudicate actions to terminate the long-term supply contract and to recover tools and dies from a defaulting supplier?

- Do these courts and their judges possess independence and integrity or is there a history of corruption attached to these courts?

- Will these courts require mediation or arbitration of the dispute prior to trial? If so, what is the anticipated duration of these proceedings? Upon entry of a final arbitration award, will that award be confirmed by a court judgment that can be enforced against the defaulting supplier?

- What documents and other information must a plaintiff present to the court to support a claim for contract termination and repossession of tools and dies, e.g., copies of the contract documents, demand/termination letter, and the estimated value of tools and dies? Must these documents be accompanied by a translation into the language of the nation where the court is situated?

- What are the costs and other requirements necessary to commence such an action?

- May the action be heard on written submissions (e.g., affidavits of the parties) or will the court require testimony of witnesses and introduction of documentary evidence? Is the procedural device of summary judgment available in such an action?

- Will the litigation be decided by a judge or a jury?

- What are the requirements, if any, to seek and obtain a mandatory injunction compelling the defaulting supplier to return tools and dies to the plaintiff?

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■ What appeal rights does the losing party have, if any? What are the requirements for an appeal? How long does such an appeal normally take?

■ How long does this entire procedure take from start to finish and what steps are required to reach this end?

■ Who enforces a judgment rendered in your client's favor and how does that enforcement occur? How long will it take to recover the tools and dies necessary to a successful resourcing of production to a new supplier?

■ What costs are recoverable against the defaulting supplier in the event that your client prevails in the action?

■ Are there any other features of the relevant law of the foreign nation that would help or hinder your client's progress in such litigation?

## 2. Terminating Contracts and Obtaining Other Related Relief in the Context of an Insolvency Proceeding of a Defaulting Supplier

The following is a series of issues concerning the general nature of insolvency law and procedure for supply chain members to address when evaluating whether to add a new member in another country:

■ What courts in the foreign state will have jurisdiction over an insolvency proceeding commenced by or against a defaulting chain member?

■ Do these courts and their judges possess integrity or is there a history of corruption attached to these courts? Do these judges have specialized knowledge of the nation's insolvency laws?

■ Does your client have standing before this court to pursue claims for (i) termination of its long-term supply contract with the defaulting supplier, (ii) recovery of tools and dies, and (iii) resourcing of production to an alternative supplier? Are there any special requirements that your client must fulfill before your client will be granted such standing, for example, the nomination of a local agent/judicial representative?

■ Does the insolvency law of the foreign nation permit only liquidation of business debtors or does it also permit their reorganization?

■ Will your client have standing to seek a dismissal of a reorganization proceeding commenced by a defaulting chain member or its conversion to a liquidating proceeding? If so, what must your client prove in order to obtain such relief?

■ Does applicable insolvency law prohibit the enforcement of contractual clauses providing for termination of executory contracts upon the insolvency of the defaulting supplier or the commencement of an insolvency proceeding by that supplier?

■ Does applicable insolvency law permit the debtor to assume an executory contract and assign that contract to a third party? Does the nondebtor party to the contract have standing before the court to object to any such proposed assumption and assignment and, if so, what are the grounds for such an objection?

■ Does applicable insolvency law permit the debtor or its insolvency administrator to assert clawback claims arising from your client's long-term supply contract, e.g., claims for avoidance and recovery of preferences and fraudulent transfers?

■ Does the commencement of an insolvency proceeding by or against the defaulting supplier prohibit the invocation of an arbitration clause in the supply contract? If an arbitration proceeding is pending at the time the insolvency proceeding is commenced, does an automatic stay or other injunction halt the progress of the arbitration?

■ If your client elects to seek termination of the contract and related relief, what documents and other information are necessary to commence such an action or proceeding? Is it possible to obtain expedited relief from the insolvency court and, if so, what needs to be done to secure that relief?

■ Will the insolvency court require a trial of the merits of such an action or proceeding? If so, will the court require testimony of witnesses and submission of other evidence?

■ What appeal rights do the parties have upon the entry of an adverse judgment? If the defaulting supplier loses at trial, is it possible for your client to enforce its rights to terminate the contract and recover its property in the possession of the supplier pending the supplier's appeal? If so, would the court be likely to impose any conditions on such relief pending the outcome of the appeal?

■ What is the anticipated duration of such an insolvency proceeding from beginning to end?

■ Are there any provisions in the nation's insolvency law that would either benefit your client or hinder the exercise of its rights in the defaulting supplier's insolvency proceeding?

## 3. Obtaining a Continuing Supply of Components From a Defaulting Supplier in the Context of its Insolvency Proceeding

The following is a series of issues concerning the ability of a supply chain member to obtain continuing supply of goods from a foreign supplier in an insolvency proceeding in its home country:

■ Upon the commencement of an insolvency proceeding against the defaulting supplier, is it possible for the nondefaulting chain members to obtain the entry of an order by the insolvency court authorizing the debtor to continue performing under its long-term supply contracts with other chain members to create an inventory bank to enable the chain to continue functioning in the absence of a production line shutdown?

■ If the answer to the above question is "yes," are there any conditions that the insolvency court normally imposes upon the other chain members in connection with such an order, e.g., imposing price increases under the supply contracts for the benefit of the debtor and its bankruptcy estate and requiring the debtor's customers in the chain to pay their accounts receivable to the debtor on an accelerated basis?

■ Does the insolvency law in the debtor's case permit post-petition financing of the debtor and, if so, under what conditions? This option could be critical to the debtor's customers in the GSC in the event that there was no other source of financing to enable the debtor to continue operating its business and to establish an inventory bank to hedge against the debtor's possible future shutdown.

Upon considering these factors and weighing them and also after examining other relevant factors, e.g., the state of the nation's infrastructure, the amount of tariffs payable upon the export of intermediate goods up the supply chain, etc., your client should be in a position to make an informed judgment on whether or not to admit the proposed new supplier into its global supply chain.

This is an analysis that should be rigorously applied in these circumstances to protect against future losses resulting from a stoppage of production in the GSC due to a supplier's default.

## B. United States/Mexico Hypothetical and Application of Proposed Decisional Calculus Model

### 1. Commencement of Litigation in Mexican Courts

A lawyer in the U.S. representing a supply chain member in its efforts to terminate supply contracts with a defaulting, Mexican chain member and recovering tools and dies in that member's possession should feel reasonably comfortable in pursuing these claims in Mexican federal or state court, both of which have concurrent jurisdiction over these claims.

Nonetheless, a party with a justiciable claim in a commercial dispute will typically elect to commence an action in a Mexican federal district court, where the action will be tried by a single judge. Mexican courts will generally enforce choice of law clauses in commercial contracts unless that enforcement will violate Mexican public policy. Although the Mexican courts in the past have experienced problems with efficiencies and have had their integrity questioned, recent governmental reforms are changing this situation for the better.

Arbitration of commercial disputes is encouraged at an early stage in these cases but generally will not be ordered by the courts absent an agreement of the parties.

There is no jury trial right in Mexican courts in commercial disputes and, in general, no pretrial discovery is permitted in these actions although a party may be ordered by the court to produce documents relating to the action prior to trial.

Preliminary and final injunctions may be ordered by Mexican courts in this type of litigation, especially if they are necessary to maintain the status quo pending final resolution.

Witnesses will give oral testimony relevant to the issues involved at trial and the parties may present expert testimony there. Limited cross-examination of witnesses is permitted at trial.

Appeals from a decision of a federal district court are taken by the losing party to the federal court of appeals.

The World Bank' ''Doing Business'' report on Mexico for 2015 notes that actions commenced in Mexican courts in commercial disputes will typically require approximately 400 days from start to finish. This number compares favorably with the 370-day average for similar litigation in the U.S. The average number of procedures in a Mexican action are 37 compared to 32 in the U.S. The World Bank estimates that the average cost of completing these actions, measured by a percentage of the plaintiff's claims, is 31 percent compared to 22.9 percent in the U.S.

### 2. Seeking Similar Relief in a Mexican Insolvency Case

A U.S. lawyer representing a supply chain member in connection with a defaulting Mexican chain member may also determine that Mexican insolvency law governing commercial entities (i.e., ''merchants'') compares favorably to U.S. bankruptcy and reorganization law. Mexican business reorganization law is governed by the Ley de Concursos Mercantales (LCM), which became effective on May 12, 2000, and was thereafter amended in 2007 and 2014. The Mexican federal courts have exclusive jurisdiction over these proceedings. The LCM permits a commercial debtor to liquidate its assets through a court-appointed trustee or to seek reorganization pursuant to a plan negotiated by a ''Conciliator,'' an experienced insolvency professional appointed by the Mexican national insolvency service, IFECOM.

Upon the entry of an order for relief by the Mexican court, an automatic stay similar to that under section 362 of the United States Bankruptcy Code will be imposed, prohibiting the commencement and continuation of all collection activities against the debtor and its property. The Conciliator will then attempt to negotiate with the debtor's creditors the terms of a reorganization plan, which may provide for the sale of the debtor's business as a going concern or for its ''bootstrap'' reorganization. If the Conciliator is successful in these negotiations and believes that a sufficient number of creditors will vote in favor of the plan, the Conciliator will submit the written plan to creditors for comment or execution.

The 2014 amendments to the LCM impose a strict time limit of one year on the Conciliation phase of the case, measured from the time the date of the official publication of the concurso notice. Upon failure to obtain confirmation of the plan during this period, the court will appoint a trustee to liquidate the debtor's assets. If the required number of creditors approve the plan and the plan satisfies statutory confirmation standards, the insolvency court will confirm the plan unless the court determines that the plan is inconsistent with Mexican public policy. During the Conciliation period, the Mexican debtor must perform its obligations to nondebtor parties to executory contracts, which category includes long-term supply contracts, unless the Conciliator rejects the contract.

The nondebtor party to such a contract may request the Conciliator to decide whether or not to reject the contract. If the Conciliator advises the inquiring creditor that he or she will reject the contract or does not respond to the request, the non-debtor party may proceed to terminate the contract by giving notice of termination to the Conciliator.

Nondebtor parties to supply chain contracts with the Mexican debtor may agree to provide post-petition financing during the Conciliation phase to the debtor to enable it to continue production and delivery of components and thereby insure the continued operation of production lines during the pendency of the concurso proceeding. These loans made by the supply chain

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members to the debtor may be secured by liens in unencumbered assets and may also be granted a priority administrative claim for priority repayment in the proceeding. The 2014 amendments to the LCM streamlined the process of this financing in concurso proceedings.

Finally, the World Bank's ''Doing Business'' report on Mexico for 2015 gives it relatively high marks under the category of ''Resolving Insolvency.'' The average time for completion of an insolvency case in Mexico is 1.8 years compared to 1.5 years in the U.S. The cost of these proceedings in Mexico, as measured by a percentage of the value of a debtor's estate, averages 18 percent, whereas this figure in the U.S. is 7 percent. The average recovery rate for creditors, measured by a percentage of creditors' claims, is 68.1 percent compared to 81.5 percent in the U.S.

## C. Germany/Poland Hypothetical and Application of Proposed Decisional Calculus Model

### 1. Commencement of Litigation in Polish Courts

A German lawyer representing a supply chain member with a registered office in Germany will have a fairly comfortable position when initiating a dispute before a court in Poland while seeking to obtain a judgement confirming the termination of a supply contract with a defaulting Polish chain member and recovering tools and dies in that member's possession. Unless an arbitration clause has been included in the supply contract, the German lawyer will need to ascertain if and which of the Polish common courts will have jurisdiction to handle the dispute.

The German lawyer will first need to put the Polish supplier on notice and demand voluntary payment of damages resulting from a breach of contract and its termination for fault plus a return of tools and dies, failure of which will result in litigation. Upon the lapse of the deadline set in the letter for payment and return of goods, the lawyer should seek an injunction where he would need to substantiate that a return of the tools and dies would be endangered by passage of time involving litigation. He would need to seek an injunction with a statement of claim and a reinstatement of possession at the earliest two weeks before filing the claim. The proceedings before the Polish courts can end before a court of first instance but in most cases would be appealed by the losing party. A final judgment will be enforced by a bailiff during enforcement proceedings. Cassation proceedings before the Polish Supreme Court are sometimes possible.

### 2. Seeking Similar Relief in a Polish Insolvency Case

The situation will change, however, if the Polish supplier becomes insolvent and as result of his motion or creditor's motion he is declared bankrupt. Such filing will usually result in the intermediate imposition of an injunction (usually by nomination of a court supervisor) against the Polish supplier until a ruling on the merits is issued.

Bankruptcy court judgments are issued by three professional judges. In the worst case scenario, the court will declare a liquidation bankruptcy of the Polish supplier, after which he will no longer be in possession of his assets. The court will nominate a liquidator (receiver) to take possession of the bankrupt's property and will attempt to sell the business either in one piece—as a going concern—or piece by piece if the first objective cannot be achieved. Any judicial proceedings previously commenced against the Polish supplier will either be stayed or terminated.

Upon the occurrence of these events, the German lawyer in our hypothetical will need to do two things: first, file a claim for payment of damages due to termination of the contract and, second, file an application to regain possession of the tools and dies asserting that they do not constitute part of the bankruptcy estate (assuming that the receiver will not want to return them voluntarily). Since the claim for damages will be an unsecured claim, it will rank in the fourth (or next to last) priority for the purpose of distributing proceeds from the sale of the bankruptcy estate. Consequently, the likelihood of the German company's claim being satisfied will be slim.

Second, the German company should apply for the tools and dies to be exempted from the bankruptcy estate, In doing so, the German lawyer will need to establish that his client is the sole owner of the tools and dies and that their possession has been transferred to the Polish supplier. Evidence that the tools and dies are in the actual possession of the bankrupt at the time of submission of the claim should also be tendered to the court. The German lawyer needs to act swiftly as under the current Polish Bankruptcy and Recovery law, there is a risk that the receiver may sell the tools and dies and the German supplier would only obtain monetary satisfaction of its claim in an amount reflecting the sale price of the tools and dies.

To avoid such a situation, whenever transferring possession of tooling to a counterparty prior to the transferee's insolvency, one should make certain beforehand that the transferred assets are recorded in the Polish supplier's books with reference to the appropriate contract signed, so as to make it crystal clear that such assets are owned by a third party. On certain occasions, tooling may and should be marked with inscriptions containing information on its ownership.

Depending on the commercial situation and the willingness of the German supply chain member as well as the production capabilities of the Polish bankrupt, in some situations it may make more sense to reinstate the agreement or enter into a new one with the receiver who will typically take a different commercial approach than the directors of the bankrupt supplier. This approach permits (i) a ''catch up'' of unperformed production; (ii) the completion of work in process; and (iii) addressing the current and future needs of the German party.

It is worth noting that a receiver is legally entitled to run the business for three months after the declaration of bankruptcy and that time may, and often is, extended to account for any plans related to the sale of the bankrupt business as a going concern, so as to maintain its market value. Thus, production of parts could and, in many cases, should be maintained until the closing of a sale of the business as a going concern, where either the contract originally signed with the receiver could be continued or, if terminated, a new contract with the purchaser of the bankrupt business could be executed. Positive scenarios with a ''win-win'' situation for all parties involved are feasible but this requires significant coordination and true dedication including the support of courts, which must be commercially savvy.

**IV. Conclusion** Trade involving global supply chains dominates the landscape of international trade in goods and shows no sign of decreasing. Nevertheless, at least in certain manufacturing industries such as automotive, these chains are very fragile and their disruption may cause production to halt unexpectedly, thereby causing members oft he chain to suffer substantial economic losses.

In selecting members for a GSC, purchasing departments and in-house counsel for originators of the chain must proceed carefully and carefully weigh risks involved under the laws of the countries to be involved in the chain concerning (i) supply contract termination and recovery of essential tools and dies, (ii) resourcing work to alternate suppliers upon a chain member's default, and (iii) insuring a continuing supply of parts inside and outside of an insolvency proceeding.

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*The World Bank's ''Doing Business'' reports can be accessed at http://www.doingbusiness.org/.*

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