Introduction

With the adoption of the North American Free Trade Agreement ("NAFTA"), trade and investment among Canada, Mexico and the United States has grown dramatically. Since 1994, the total volume of trade between the three NAFTA parties has expanded from $297 billion to $676 billion in 2000, an increase of 128 percent.[1] In NAFTA's first year, foreign direct investment (both outflows and inflows) among the NAFTA parties totaled $16.1 billion. By 1999, those flows had more than doubled to $40.5 billion.

[2]These investments have not all been one way.[3] Certainly, U.S. companies have made enormous investments in Canadian and Mexican companies, with Citibank's recent acquisition of Banamex representing only one impressive example. But Mexican companies also have been purchasers.[4] Increasingly, Canadian, Mexican and U.S. companies conduct business and own assets throughout the NAFTA region. This growth in international business is certain to generate a corresponding growth in the number of international business failures.[5] With these companies conducting business in multiple jurisdictions, their financial distress will create situations where assets and claimants are spread across the continent.

Today, we will both consider what legal rules apply in these situations and how international law accommodates (or fails to accommodate) financial distress. A short answer to this question was recently offered by Robert Rasmussen, Professor of Law at Vanderbilt University, who said quite simply that:

> "There is no international bankruptcy law. No question, there are international insolvencies. Transnational firms, just like domestic ones, often cannot generate sufficient revenue to satisfy their debt obligations. Their financial distress creates a situation where assets and claimants are scattered across more than one country. But there is no international law

> that provides a set of rules for resolving the financial distress of these firms. The absence of any significant free-standing international bankruptcy treaty means that a domestic court confronted with the domestic part of a transnational enterprise has to decide which nation's domestic bankruptcy law will apply to which assets. To the extent that one wants to talk about an 'international bankruptcy law,' it is nothing more than the question of when, as a matter of domestic law, a court will resolve a dispute according to the law of another country rather than its own nation's bankruptcy law. *International bankruptcy law as it currently exists is thus, in reality, domestic bankruptcy law."*[6]

As former U.S. Speaker of the House of Representatives "Tip" O'Neill once said, "all politics is local." The same is true with international insolvency laws: at the core of every international insolvency is the domestic law of the various nations participating in the insolvency.

Core International Insolvency Concepts

What gives a nation the right to participate in the corporate insolvency process? The answer to this question illustrates the several core concepts crucial to a basic understanding of the international insolvency process.

FIND THE FOREIGN ELEMENT

There is a simple, one word answer to the above question – nexus. There are three possible nexuses to a cross-border insolvency which link a sovereign nation to the proceeding – a debtor, its creditors and the debtor's assets. Each nexus raises potential cross-border issues complicating the administration of the debtor's estate. For example, are we dealing with a U.S. debtor that has Canadian creditors? Is a particular Canadian creditor subject to the jurisdiction of the U.S. Bankruptcy Court such that it would be bound by the provisions of the U.S. Bankruptcy Code (such as the automatic stay), as well as orders of the U.S. Bankruptcy Court (such as an order confirming