



**Class 36 Induction  
and Events**

# **Virtual International Program**



## ***Panelists***

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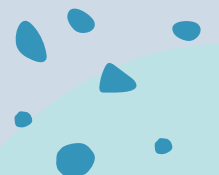
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# ***The United States***

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# ***The Different Conceptions of “Equity”***

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United States Bankruptcy Courts operate under various conceptions of “equity”

There are at least three:

1. The recognition of an exception to a general rule.
2. A moral reading of the law.
3. The doctrines and remedies developed in the English courts of equity, especially the Court of Chancery.

Take them out of order

# ***The doctrines and remedies English courts of equity***

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**Ability to determine (allow) creditor claims taking into account non-bankruptcy doctrines originating in equity**

11 USC § 502(b)(1):

the court, after notice and a hearing, shall determine the amount of such claim and shall allow such claim in such amount, *except to the extent* that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . . .

**Defenses Included :** Fraud, Mistake, Duress

**Remedies Incorporated:** Injunctions and Marshaling

# ***A moral reading of the law***

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## **Section 510(c) and Equitable Subordination**

the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim

## **Section 552(b) and the “Equities of the Case”**

A “security interest extends to [the] proceeds, products, offspring, or profits [of a security interest] . . . to the extent provided by [a] security agreement and by applicable nonbankruptcy law, *except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.*”

## **Section 502(j) and the “Equities of the Case”**

“A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case.”

# ***The recognition of an exception to a general rule***

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## **Obvious Uses of Equity to Create Exceptions: Correcting Court-Induced Errors**

Correcting clerical errors on the docket

## **Tolerable Uses of Equity to Create Exceptions: Fashioning Better Remedies for Existing Rights**

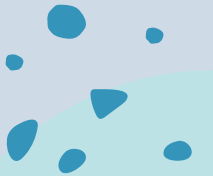
Creating separate procedures for payment of professionals

## **Debatable Uses of Equity to Create Exceptions: New Rights**

Creating judicial exceptions to allowance of claims, such as recharacterizing debt claims as equity interests

***Mexico***

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# ***Mexico: Background***

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- Mexico is a civil law country. Per the Political Constitution of the United Mexican States (Constitución Política de los Estados Unidos Mexicanos) (the “Constitution”), Mexican courts have to abide by, first and foremost but not exclusively, the text of the statutes or their juridical interpretation.
- Contracts are not drafted in such a degree of detail in Mexico as they are in the United States of America or Canada. Our centuries-old civil law tradition permits, and even encourages, briefness over extensiveness. In construing contracts, our tradition emphasizes the importance of principles such as good faith, usage and the intent of the parties.
- The Commercial Code (1889) and the Civil Code (1932) (replaced for federal matters by the Federal Civil Code since 2000), continue to be the undisputed bedrock of private relations in this country. One key reason for this is that they are based on principles, not solely on specific rules.
- These statutes are also important for the interpretation of the Commercial Insolvency Law (Ley de Concursos Mercantiles) (“LCM”).

# ***Mexico: Principles of Law and Good Faith***

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- In Mexico, certain concepts are so widely accepted that they become, with time, authoritative tenets. These concepts are known as “general principles of law.” Most of these principles are centuries-old and therefore they are frequently enunciated in Latin, although there is also a Spanish translation for each such principle. General principles of law are seldom incorporated in a single provision of a statute. Rather, they reflect a general philosophy of law which can be found in various provisions of a statute.
- The Constitution, the Commercial Code and the Federal Civil Code recognize the validity and application of the general principles of law. Thus, pursuant to article 14, 4th para. of the Constitution:

“As regards disputes of a civil nature, the final judgment shall be in accordance with the letter or the juridical interpretation of the law, and in the absence thereof [the final judgment] shall be based upon the general principles of law”. (Text in brackets added to enhance the clarity of the translation).

# ***Mexico: Principles of Law and Good Faith***

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- Article 1324 of the Commercial Code, which applies to disputes involving commercial parties, states that:

“Every judgement must be based upon the law, and if neither the natural sense nor the spirit thereof provide [guidance to] resolve the controversy, the general principles of law shall be attended to, taking into consideration all the circumstances of the case”. (Text in brackets added to enhance the clarity of the translation).

- Finally, article 19 of the Federal Civil Code states that:

“Judicial controversies of a civil nature must be resolved pursuant to the letter of the law or its juridical interpretation. In the absence of a law [statute], they shall be resolved pursuant to the general principles of law”. (Text in brackets added to enhance the clarity of the translation).

## ***Mexico: Principles of Law and Good Faith***

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- The Mexican courts recognize and use general principles of law in decisions that require the interpretation of contracts. It is essential to take into account, inter alia, the provisions of articles 1796, in fine, 1839, and 1851 of the Federal Civil Code.
- One can draw important conclusions from the foregoing. In the first place, usage and good faith are implicit elements of a contract. They apply to any and all contracts, whether extensively negotiated or entered into as “customary trade”.
- Secondly, in Mexico certain obligations can be read into a contract, even if not expressly set forth therein. The provisions of the General Law of Negotiable Instruments and Credit Transactions (Ley General de Títulos y Operaciones de Crédito) (“LTOC”) and the Federal Civil Code confirm the validity of this principle. Private parties can sometimes prevent such obligations from applying to a contract, provided a specific waiver in respect thereof is inserted therein.
- Third, where words are contrary to the evident intent of the signatories to a contract, the intent of the signatories will prevail over the actual text of the contract. Fourth, in order for a waiver of rights to be valid, it must be expressed in clear and precise terms.

## ***Mexico: Usages and Customs***

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- Even in Mexico, a country where statutes are the primary source of rights and obligations, usages are implicit to all contracts. In spite of the fact that our system is not based on the common law, usages are also a direct and independent source of rights and obligations in commercial matters in Mexico under, inter alia, the following statutes: (i) the LTOC, which incorporates “banking and mercantile usages”; the Banking Law, which incorporates “banking and mercantile usages and practices”; and the SML, which incorporates “securities markets and mercantile usages.”

# ***Mexico: Authority of Bankruptcy Courts***

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- The Commercial Insolvency Law or “LCM” became effective in May 2000. As regards the procedural aspects of the LCM, one must keep in mind its article 1, pursuant to which its provisions are considered of “public interest”.
- For decades, Mexico had no special bankruptcy courts. Only district courts had jurisdiction over insolvency proceedings. The 2014 amendments to the Organic Law of the Federal Judiciary (Ley Orgánica del Poder Judicial de la Federación) established that all reorganization proceedings must be conducted by the commercial district courts. On March 4, 2022, however, the Plenary of the Federal Judiciary Council (Pleno del Consejo de la Judicatura Federal) created via General Accord (Acuerdo General) 4/2022 two courts specializing in insolvency cases. They are based in Mexico City and have jurisdiction throughout the country.
- The Federal Institute of Insolvency Specialists (Instituto Federal de Especialistas de Concursos Mercantiles) (“IFECOM”) was created to, inter alia, supervise services provided by insolvency examiners, conciliators and trustees, who must in turn support the role of the courts in reorganization (concurso mercantil) and bankruptcy (quiebra) proceedings, with a view to “alleviate the task of the judge in reorganization proceedings... without depriving the court of its primary function”, namely that of administering legal justice. The judge is the “rector of the insolvency proceedings”.

## ***Mexico: Authority of the Bankruptcy Courts***

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- As regards the procedural aspects of the LCM, one must also keep in mind its article 7:

**“Article 7o.-** The judge is in charge of the reorganization proceedings and shall have the broadest authority to give effect to the provisions hereof, on the understanding that, unless this Law shall expressly authorize him/her to do so, he/she shall have no authority to modify any period or term set forth herein. In the absence of act of God or force majeure, lack of observance by the judge or the Institute of their obligations within the periods set forth herein shall give rise to liability...” (Emphasis added).

## ***Mexico: Conclusions***

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- The Mexican district courts are bound to use their interpretation abilities to decide on the cases that are properly brought for their resolution. But they do not have powers to apply rules of equity where justice would be better served if individualized, such that they do not have broad authority to modify creditor-debtor relationships, even within the confines of the LCM, even to balance equities.
- In front of an express statutory provision, the Mexican courts must apply the mandate of the applicable provision, which is positive law, regardless of the result. This is especially true concerning the procedural rights and obligations of the parties to commercial reorganization proceedings (concurso mercantil). Examples of this include the definition of litigation claims, remedies and the time to bring them or exercise them, the authority of the claimants' representatives and estoppel, the statute of limitations and laches.



## ***Mexico: Conclusions***

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- For an excellent discussion of the subject, see A. Markell, Bruce, *Courting Equity in Bankruptcy*, presented on March 6, 2025, American College of Bankruptcy, Virtual International Program, International Committee. For example, as explained by A. Markell, Bruce, “Upon commencement of a case, an estate is created. So says section 541(a). That estate, in turn, is comprised of “all legal or equitable interests of the debtor in property.” (Footnotes omitted). Compare with article 4 of the LCM:

“Article 4o.- For purposes of this Law, the following terms shall have the meaning ascribed to them herein below: ...

V. Estate, that portion of the Merchant’s assets that is the subject of a reorganization proceedings, integrated by its assets and rights, with the exception of those expressly excluded in the terms hereof, and subject to execution for the benefit of the Recognized Creditors and others with a right thereupon, and...” Note that there is no mention about “equitable interests”.

## ***Mexico: Conclusions***

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- See Amparo en Revisión 82/2017. Octavo Tribunal Colegiado en Materia Civil del Primer Circuito. Ficrea, S.A. de C.V. S.F.P., 7 de junio de 2017. Unanimidad de votos. Ponente: Abraham S. Marcos Valdés. Citing article 16 of the Constitution, which contains the so-called “principle of legality”, confirms that “the authority of an insolvency Judge can only follow those ordinarily conferred upon any tribunal to resolve the corresponding legal problems... as all authorities are bound by the principle of legality, pursuant to which their actions must be limited by the mandates of the law and cannot incorporate greater authority than that which is permitted by the law...[as any interpretation to the contrary of article 7 of the LCM]... would give rise to an arbitrary decision...” (Text in brackets added to enhance the clarity of the translation).

See also article 16, 1st para. of the Constitution, which establishes that:

“Nobody may be harassed in his/her person, family, domicile, papers or possessions, unless in compliance of an order issued in writing by a competent court, substantiated by legal grounds and reasoning the subject matter of the proceedings...”

## ***Mexico: Conclusions***

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- In this respect, the reasoning by the court that is cited in fn. 11 of A. Markell, Bruce, regarding *Stuart v. Hines*, 33 Iowa 60, 70 (1871) (“The act being summary in its nature, and in derogation of the common law, must receive a strict construction, and cannot be enlarged so as to include cases not provided for.”), would not apply in Mexico. *Dura lex sed lex*.
- In order to be valid, the existence of “equity interests” would have to be contemplated by the LCM or any of its suppletory statutes which are listed in its article 8, namely the Commercial Code, Commercial Laws, special and general commercial usages, the Federal Code of Civil Procedure and/or the Federal Civil Code. There is no mention about “equity interests” (or a similar concept) in any of the foregoing.
- This conclusion is supported by, inter alia, the Federal Code of Civil Procedure, the LCM and Mexican case law.

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***Germany***



# Germany: Are Bankruptcy Courts Proper Courts?

**Art. 92 German Constitution:** “The judicial power shall be vested in the judges; it shall be exercised by the [...] courts.”)

Bankruptcy Courts: Sec. 2 and 3 Insolvency Code (InsO) – a specialized bench at the municipal courts

- ✓ “Bankruptcy remedies were creatures of statute”
- ✓ “Bankruptcy judges can make binding rulings on core matters such as motions related to the scope and effect of the discharge” or the confirmation of a plan
- ❖ “Bankruptcy judges were given the power to ‘hear,’ but *not determine* [...] so-called “related” matters.”
- Are German bankruptcy courts proper courts as defined in Art. 92 GG
  - Traditionally, the bankruptcy process was understood as an administrative process in the hands of court officials (not judges)
  - Today, the process is commonly understood as a court procedure to assess claims and distribute value → a civil procedure

# Germany: “Equity” in German (Private) Law?

***“A moral reading of the law” and “the recognition of an exception to a general rule.”***

Sec. 242 Civil Code (BGB): Rights shall only be exercised in good faith and as expected by your peers (*“Treu und Glauben”*)

- ✓The court may prohibit the enforcement of obligations or rights in bad faith
- ✓The court may construe a broad text of a statutory rule narrowly in order to bring it in line with the original purpose
- ✓The court is able to extend the application of a rule beyond its wording in order to achieve its original purpose (analogy)

## ➤Limits to consider the “Equities of the Case”

–The express consideration of the legislator, especially in bankruptcy legislation

–*Example:* Are holders of a security interest in a license of the debtor stayed from enforcing their right pursuant to sec. 166(2) InsO? Yes, provided that the encumbered license is a “claim.” Since the legislator insisted on a narrow protection of the estate, the courts refused to expand the application of the stay beyond “claims” to other encumbered rights (BGH, 27.10.2022).

- ✓German bankruptcy courts’ *“exercise of equity powers in bankruptcy cases is limited by the text of the Code”*.

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## ***The Netherlands***



# Courts in the Netherlands

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- There are no specialised bankruptcy courts in the Netherlands. Insolvency matters are in first instance dealt with by the insolvency sections of the district courts (*rechtbanken*)
- In WHOA matters there is a flying squad of judges who join the local courts when dealing with WHOA cases.
- There is no distinction between equity and law. The courts apply the same standards to all cases.



# ***Courts in the Netherlands: Standards of Interpretation and Construction***

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Although the wording of a contract is leading, especially in commercial contracts between professional parties, the courts have considerable discretionary powers.

- **Construction of contracts:**

The meaning of contractual provisions does not depend solely on the exact wording of contractual provisions but also on the meaning which the parties in the given circumstances should attribute to those provisions and on what they could reasonably expect from each other in the given circumstances (Haviltex-judgment 13 -3- 1981)

- **Influence of reasonableness and fairness:**

The debtor and the creditor are under the obligation to act vis-à-vis each other in conformity with the requirements of reasonableness and fairness. A statutory or contractual rule does not apply to the extent this would be unacceptable under standards of reasonableness and fairness (Art. 6:2 DCC).

# ***Courts in the Netherlands: Standards of Interpretation and Construction***

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## **Mitigation of damages**

The court can mitigate a statutory obligation to pay damages if awarding full compensation would result in unacceptable consequences, taking into account the circumstances, including the nature of the liability, the legal relationship between the parties and their financial position (Article 6: 109(1) DCC)

There are many statutory provisions in which the court is instructed to balance the interests of the parties or apply standards of reasonableness and fairness (usually phrased as a rule directed at the parties).

# ***The Netherlands: Insolvency Proceedings***

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Traditionally the outcome of insolvency proceedings was perceived as rather mechanical. The position of the parties is frozen at the outset in order to ascertain a certain outcome. Thus contract law is fairly flexible, insolvency law is fairly strict.

# ***The Netherlands: Insolvency Proceedings***

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In bankruptcy (liquidation) and reorganization proceedings a supervisory judge is appointed. The sj supervises or advises the trustee or administrator.

- Article 69 DBA provides that the sj can give orders to the trustee. The standard for such orders is both a test of legality and efficacy.
- The court can take measures in the interests of the creditors (Art. 225 DBA).

In WHOA proceedings the court can lift the absolute priority rule if there is a reasonable ground for the deviation and the creditor or shareholder concerned is not prejudiced thereby (Art. 384(4)(b) DBA).

# ***Contact Us***

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