

Brooklyn Journal of International Law

Volume 23

Issue 1

Symposium:

Bankruptcy in the Global Village

Article 1

9-1-1997

Introduction

Barry L. Zaretsky

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Barry L. Zaretsky, *Introduction*, 23 Brook. J. Int'l L. 1 (1997).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol23/iss1/1>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

SYMPOSIUM

BANKRUPTCY IN THE GLOBAL VILLAGE

INTRODUCTION

*Barry L. Zaretsky**

Bankruptcy and insolvency laws are essential components of a market economy, enabling entrepreneurs to take risks and providing a mechanism for treating creditors equitably if a venture fails. As cross-border economic activity has increased dramatically, so have questions about reconciling the various systems for dealing with business failure. When an enterprise operates in several different countries, its failure will implicate the laws of each interested country and require a means of liquidating or rehabilitating the company consistent with the laws of each jurisdiction.

In this symposium, seven prominent authors address many of the difficult issues presented by international insolvencies. Each article is adapted from comments made at a symposium held at Brooklyn Law School on September 19, 1996. The symposium was co-sponsored by the *Brooklyn Journal of International Law*, the Centre for Commercial Law Studies at the Queen Mary & Westfield College of the University of London, and the Brooklyn Law School Center for the Study of International Business Law. A counterpart sympo-

* Professor of Law, Brooklyn Law School.

sium will be held at Queen Mary & Westfield College, University of London, on June 19, 1997.

The increasingly common instances of cross-border insolvencies have led to various international initiatives seeking to provide procedures for determining the applicable law in these cases. For example, in their article entitled *The American Law Institute NAFTA Insolvency Project*, Professors Jay Westbrook and Jacob Ziegel explain that the recent North American Free Trade Agreement has led Canadian, Mexican, and U.S. representatives, under the aegis of the American Law Institute (ALI), to seek greater understanding of the insolvency law of each jurisdiction, and to begin to establish procedures for dealing with cross-border insolvencies in North America.

Professors Westbrook and Ziegel describe some of the significant legal and economic differences among the three NAFTA countries. Differences flow from the fact that Mexico has a civil law system while Canada and the United States have common law systems.¹ There are also significant differences in the economies of the three countries. Moreover, there are divergent "cultures" of insolvency law. A preference for reorganization in the U.S. bankruptcy system is reflected frequently in statements and actions of United States legislators and judges. That preference is not nearly as strong in the Canadian and Mexican cultures. Finally, there are different approaches to technical, but important, legal issues that would need to be reconciled in order to facilitate cross-border insolvency matters. For example, Professors Westbrook and Ziegel point out that different approaches to secured credit and to bankruptcy priorities may pose significant difficulties in attempts to harmonize the systems. They conclude, however, that the ALI project, involving only the three NAFTA countries, presents a unique opportunity for private sector law reform that may lead the way to the reconciliation of different bankruptcy systems throughout the world.

As NAFTA has fostered the ALI's attempt to reconcile the insolvency systems of the United States, Canada, and Mexico, the greater economic integration sought by the European Union (EU) has led to the development of a final text of an EU

1. In addition, Louisiana (United States) and Québec (Canada) have strong civil law traditions, even within the common law structure of the federal systems of the United States and Canada.

Insolvency Convention. Professor Ian Fletcher, in his article entitled *The European Union Convention on Insolvency Proceedings: An Overview and Comment, with U.S. Interest in Mind*, describes this important draft Convention and its likely effect within and beyond the European Union. Professor Fletcher explains that the Convention, which will likely be adopted in the near future, attempts to provide a mechanism for determining jurisdiction over insolvency proceedings commenced in a member country. It also provides choice of law rules that would determine the law applicable to an insolvency proceeding and to related matters, such as various property rights and priorities. Moreover, it resolves issues concerning the recognition in one jurisdiction of proceedings commenced in another contracting jurisdiction, and the standing of liquidators or officers in proceedings commenced in other contracting jurisdictions. The Convention also contains provisions for the opening of secondary insolvency proceedings, as well as provisions entitling creditors to obtain information about pending proceedings and to file claims in the proceedings. Professor Fletcher describes and analyzes these provisions, as well as others that will assist greatly in the reconciliation of the very different insolvency systems among the members of the European Union.

Building on Professor Fletcher's work, Mr. Nick Segal discusses in greater detail the choice of law provisions in the EU Convention. In his article, *The Choice of Law Provisions in the European Union Convention on Insolvency Proceedings*, Mr. Segal explains that these provisions in particular are crucial to the goal of giving universal, Community-wide effect to proceedings that have been opened in a contracting state, while preserving for other states certain issues for which the extraterritorial effect of proceedings would be inappropriate.

The ALI and EU projects must reconcile very different approaches to insolvency law. In the United States, there is a strong preference for attempting to reorganize failed enterprises to enable them to continue to operate. Although some in the United States have questioned this preference,² it seems clear that current law reform efforts, including those of the National

2. See, e.g., Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1078 (1992) (advocating repeal of Chapter 11).

Bankruptcy Reform Commission, are aimed primarily at fine-tuning a system that is viewed generally as serving appropriate goals, rather than revamping the system to de-emphasize substantially the goal of successful reorganization.

In other countries, a rescue culture is not nearly so firmly entrenched. As Mr. Gabriel Moss states in his article, *Comparative Bankruptcy Cultures: Rescue or Liquidation? Comparison of Trends in National Law—England*, the English approach tends to be considerably less debtor oriented than the U.S. approach. For example, under United States bankruptcy law a debtor normally is able to remain in possession of the business while reorganizing. To the contrary, in England the managers of an insolvent enterprise are typically replaced by a licensed "insolvency practitioner." Nevertheless, Mr. Moss explains, English law has recognized that in some cases it may be preferable to maintain a business as a going concern rather than liquidating it in a piecemeal fashion. He describes various mechanisms that have been developed to accomplish this result.

In *Comparison of Trends in National Law: The Pacific Rim*, Mr. Ron Harmer explores the concepts of liquidation and rescue, and suggests that in practice the two concepts may have more similarity than first appears. He explains that liquidation may be piecemeal, in which case a business is broken up, but it may also involve sale of an ongoing business intact. Similarly, if rescue is viewed as preservation of the business as a going concern, rather than preservation of the positions of managers, shareholders or even creditors, then rescue may look much like liquidation.

Mr. Harmer describes marked differences in the insolvency regimes and the experiences among the countries of the Pacific Rim. Australia, which recently revised its insolvency laws, has developed an apparently successful system under which saving the business and maximizing creditor returns are of primary importance, but under which a debtor company may, in an appropriate case, have the opportunity to restructure and reorganize itself. Japan, on the other hand, has not revised its system in many years, perhaps in part because the system is little used. Mr. Harmer speculates that this may have much to do with Japanese society and culture, under which it is more likely that parties will informally work out financial difficulties than resort to a formal insolvency system. Similarly, in China

and Vietnam, the insolvency systems are not well developed and seem to be little used. In those countries, this appears to be attributable mainly to the existence of what remain primarily government-centered command economies. Mr. Harmer suggests that until these countries reform their underlying economic and social systems, use of the types of insolvency law concepts that have been employed in more developed and more market-centered economic systems will be difficult.

Finally, in his Commentary entitled *Market Conformity of Insolvency Proceedings: Policy Issues of the German Insolvency Law*, Dr. Manfred Balz describes the philosophy of the new German approach to business insolvency. He explains that Germany has rejected what it views as the heavily pro-debtor, pro-reorganization bias of United States bankruptcy law in favor of a system with no normative preference for reorganization over liquidation. Instead, he maintains that the new German system is intended to permit rescue, or reorganization, when such a goal is favored by and in the interest of creditors, but to permit liquidation, either as a going concern or piecemeal, when that course of action is preferable.

This timely symposium features the views of some of the world's leading experts—all of whom are central figures in insolvency law unification and the administration of insolvency law in their countries—on the current unification efforts and the differing approaches to reorganization or liquidation of failed enterprises. The *Brooklyn Journal of International Law* can be proud to provide its readership with these timely and provocative presentations.

