Harmonization of International Bankruptcy Law: A United States Perspective

Harold S. Burman

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HARMONIZATION OF INTERNATIONAL BANKRUPTCY LAW: A UNITED STATES PERSPECTIVE*

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INTRODUCTION

THE rapid growth in international economic relationships at both company and governmental levels has led to a substantial increase in the number and complexity of cross-border insolvency situations.1 Insolvency proceedings now often affect investment and commercial interests well beyond the state2 in which they take place.3 These economic effects in turn trigger changes in trade patterns as well as creditors' lending and investment decisions. Existing insolvency laws of many states provide conflicting rules on access to proceedings, priori-

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** Mr. Burman is a senior attorney with the Office of the Legal Adviser, Department of State, Washington, D.C., and Executive Director of the Secretary of State's Advisory Committee on Private International Law. The statements or opinions contained herein do not necessarily reflect positions of the Department of State. Mr. Burman received a J.D. from the University of Chicago, concentrating on comparative law, and has been active in various areas of public and private international law at the Department of State. In recent years, Mr. Burman has been involved in a number of international efforts to harmonize commercial and trade law at the United Nations and other organizations.

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2. The term "states" refers to sovereign political entities, including the United States, consistent with international usage.

ties for claimants, protective rights for certain parties, and other related matters, all of which make efficient settlement very difficult, costly, and often disruptive for future commercial activities. The history of international insolvencies indicates that "[d]espite a lack of consensus concerning the most effective means to promote [global] harmonization" of bankruptcy laws, "creditors long have recognized that failure to cooperate in [the resolution of] immediate financial crises will adversely affect the potential for recovery on their claims." From time to time, a number of states have sought to resolve international insolvency problems by entering into treaties that address issues such as jurisdiction over debtors, access for foreign interests, the administration of bankruptcy estates, the transfer of assets from one state to another for distribution, and recognition of degrees. Despite these efforts, "only a limited number of treaties are now in force" and their effect is not substantial in modern terms on either cross-border financing or resolution of insolvency cases. Examples of pre-1940 multilateral treaties include insolvency provisions in the Bustamante Code, in force in part for fifteen Latin American states, and a 1933 bankruptcy convention applicable to five Scandinavian states. Most subsequent efforts, either bilateral or multilateral, have yet to achieve results. The United States itself is not a party to any international agreement on general insolvency matters, and an effort in the late 1970s to negotiate a bilateral treaty to provide single administration for bankruptcy cases involving Canada, a contiguous state and the United States' largest trading partner, failed.

I. INTERNATIONAL EFFORTS TO HARMONIZE COMMERCIAL LAW

The United States' first major step toward international harmonization in the post-World War II era occurred in the 1960s. Following progress on the unification of certain aspects of air transportation and maritime law in the 1950s, the United States in 1964 joined two international organizations which seek to harmonize or unify private law—

5. "Insolvency," "bankruptcy," and similar terms are not used here with the technical meaning they would be given in United States practice, because these terms have different meanings in various legal systems, giving rise to difficulties in the harmonization of international bankruptcy laws.
6. See Gitlin & Flaschen, supra note 1, at 309; Gaa, supra note 4, at 883.
7. Gaa, supra note 4, at 883.
10. For a discussion of some of these treaties, see infra notes 75-86 and accompanying text.
11. See infra note 82 and accompanying text.
the Hague Conference on Private International Law,12 and the International Institute for the Unification of Private Law ("UNIDROIT").13 The United Nations Commission on International Trade Law ("UNCITRAL")14 was formed shortly thereafter in 1967, and the Organization of American States ("OAS") began planning for resumption of its Inter-American Specialized Conferences on Private International Law ("CIDIPs"), the first of which took place in 1975.15 During this period, the American states also achieved substantial unification of domestic commercial law for the first time, resulting in the widespread adoption of the Uniform Commercial Code.16 The United States thereafter sought to unify some aspects of its commercial law with that of other states, in negotiations at UNCITRAL on the law of sales of goods and related statutes of limitation. These efforts were concluded17 for the United States in 1988 when it became a party to the United Nations Convention on Contracts for the International Sale of Goods,18 and in 1994 when it became a party to the companion United Nations Convention on the Limitation Period in the International Sale of Goods.19 In noncommercial but related areas of law, the United States also harmonized certain aspects of international dispute and judicial procedure law in the late 1960s and early 1970s by

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becoming a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,\textsuperscript{20} the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,\textsuperscript{21} and the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{22} The United States also subsequently ratified two comparable conventions prepared by the OAS—the Inter-American Convention on International Commercial Arbitration,\textsuperscript{23} and the Inter-American Convention on Letters Rogatory.\textsuperscript{24}

The failure of the United States and its trading partners during the same period to create a cross-border insolvency system\textsuperscript{25} that promotes efficient and equitable resolution of international problems has been the subject of extensive commentary.\textsuperscript{26} There appears, however, to be a new willingness to resolve cross-border insolvency issues. We can speculate on the reasons for this increased willingness—increasing examples of cross-border judicial cooperation are certainly a factor. International lending institutions have begun to address international insolvency problems as they become subject to increased pressure to underwrite multinational trade and corporate activity. Private commercial lenders are also realizing the extent of their exposure because of lack of predictability as to how security interests laws unwind internationally in the complex maze of debt in a failed business. The economic dislocation caused by interrupted trade patterns, and the loss of

\begin{itemize}
  \item \textsuperscript{24} Done Jan. 30, 1975, 14 I.L.M. 339 (entered into force for the United States August 27, 1988); Protocol Amending the Inter-American Convention on Letters Rogatory, done May 8, 1979, 18 I.L.M. 1238.
  \item \textsuperscript{25} It should be recalled that although the federalization of bankruptcy law under the United States Constitution provided a basis for unification, implementation in large measure was unattainable for over 100 years. More recently, two decades of work by the European Community ("EC") member states culminated in a multilateral treaty that is still subject to ratification, and that in settling for a common denominator, largely avoided earlier hopes of an ambitious harmonization of law. This limited treatment of insolvency law was drafted against a backdrop of unification of a number of other areas of European public law by directive and regulation.
\end{itemize}
going concern value which might have been recoverable, have begun to be recognized as serious problems in an age of multinational corporate operations. The discernable movement in some states toward supporting reorganization as well as liquidation may be providing more common ground. One may also speculate that prior achievements in harmonizing commercial laws may add to a willingness to again seek the grail.\(^{27}\)

In addition, a large number of states are modernizing and/or recreating their legal systems. For example, the former Soviet Union and some states in Eastern Europe, Asia, and Africa have begun to reformulate their commercial, property, and lending laws in an attempt to create legal systems compatible with market economies.\(^{28}\) Such states increasingly cannot access some credit facilities without laws that address property and insolvency concerns. The receipt of disbursements from international lending agencies is at times contingent upon progress in putting such laws into effect. States that are "emerging from socialist or centralized economic systems and embracing more market-oriented economies may be more open to wholesale reforms of their bankruptcy laws" to function effectively in international commerce.\(^{29}\) Endorsement of comprehensive model bankruptcy laws, or, as an interim measure, model laws relating to access and recognition, might achieve significant harmonization of bankruptcy laws in such regions.

II. **DIVERSE INTERESTS AND OBSTACLES TO HARMONIZATION**

The financial collapse of a business that has assets or business interests in two or more states creates diverse needs among several parties.\(^{30}\) The same is true, of course, in noninsolvency actions for debtor relief in states such as the United States, which allow such voluntary

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\(^{27}\) It is probably not entirely coincidental that several international projects have also commenced recently in a closely related area of law—the creation and enforcement of international secured interests and receivables financing, also consigned until recently by traditional wisdom to the impossible list. UNIDROIT is in the early stages of drafting a multilateral convention on international secured interests for mobile equipment. See Study Group for the Preparation of Uniform Rules on International Interests in Mobile Equipment: Drafting Group of the Sub-Committee for the Preparation of a First Draft, UNIDROIT, Draft Articles on a Future UNIDROIT Convention on International Interests in Mobile Equipment (Dec. 19, 1995) (on file with author).

\(^{28}\) It is prudent to remain cautious about the timetable or success of such efforts in relation to predicting commercial risk and lending costs. It may be "unrealistic to expect that simply privatizing Russian enterprises and diminishing the importance of central control will create a modern market economy in Russia." Steve Campbell, Comment, *Brother, Can You spare a Ruble? The Development of Bankruptcy Legislation in the New Russia*, 10 Bankr. Dev. J. 343, 345 (1994).

\(^{29}\) Gaa, *supra* note 4, at 897.

measures, although recognition and enforcement in other jurisdictions is less certain. The parties involved in a cross-border bankruptcy proceeding desire the same outcome as they would seek in a domestic bankruptcy case—namely, reasonable notice, access and participation, predictability of results, enforcement of bankruptcy court judgments by foreign courts, and equitable distribution of estate assets.\textsuperscript{31}

Beyond the common factors, however, the interests of the parties diverge widely. Debtors typically need relief from individual creditors and, when appropriate, the potential for rescue or rehabilitation.\textsuperscript{32} Secured creditors seek recognition and enforcement of their interests, and exclusion of such interests from the general estate.\textsuperscript{33} Unsecured creditors seek to maximize return by preventing exclusion of secured interests, and by beating other unsecured creditors in the race to the courthouse, before a stay may be imposed.\textsuperscript{34} Employees need "an insolvency law system that provides [the] greatest opportunity for survival of continuing employment prospects," or alternatively, enforcement of priority rights for wages and benefits due.\textsuperscript{35} Governments of the states in which the debtor has assets seek to interpose their claims as priority, and thereafter to preserve going concern value so as to encourage capital investment and employment.\textsuperscript{36} Administrators of the insolvency proceeding often seek a reliable, predictable, and efficient framework within which to operate.\textsuperscript{37} Another factor that must be taken into account is the close relationship between economic results and legal solutions in this field; this relationship leads to an important role for corporate accountancy, for which harmonization of international accounting standards is also needed. Differences in the valuation of assets and of going concerns among different states make equitable cross-border distribution difficult. All these factors are compounded when two or more states with distinctly different procedures, priorities, or economic legal goals are involved.\textsuperscript{38}

\begin{enumerate}
\item[31.] See Gaa, \textit{supra} note 4, at 885.
\item[32.] Joint Project, \textit{supra} note 30, ¶ 4.4, at 6.
\item[33.] See id.
\item[34.] See id.
\item[35.] See id.
\item[36.] See id.
\item[37.] Joint Project, \textit{supra} note 30, ¶ 4.4, at 6.
\end{enumerate}
III. Different Approaches to Cross-Border Insolvency

There are three principal approaches to cross-border insolvency situations—the “universalist” approach, the “unity” approach, and the “territoriality” approach. This list is of course a broad generalization, and in practice each approach contains a variety of subsets. In addition, ad hoc coordination between courts and administrators in recent cases shows signs of becoming an independent methodology.

Under the universalist approach, one central forum resolves the financial difficulties of an enterprise, or at least coordinates actions in other jurisdictions in aid of its centralized approach. The universalist approach requires that all or at least the principal “assets and debts of [a distressed] enterprise... be administered through one central proceeding in the ‘home’ country, and [that] courts in all other countries ... act ancillary to and in aid of the home country. Under the universalist approach, one central forum resolves the financial difficulties of an enterprise, or at least coordinates actions in other jurisdictions in aid of its centralized approach. The universalist approach requires that all or at least the principal “assets and debts of [a distressed] enterprise... be administered through one central proceeding in the ‘home’ country, and [that] courts in all other countries ... act ancillary to and in aid of the home country.

Section 304 of the United States Bankruptcy Code represents a dramatic step beyond many other national insolvency laws, “primarily because of its procedural provisions and because it has a legislative history that endorses universalism.” Section 304 “provides that a foreign representative may as a matter of right initiate an ‘ancillary’ case in the United States,” and authorizes American bankruptcy courts to block collection efforts in the United States, turnover property located in the United States to the foreign representative, and dismiss or suspend any United States bankruptcy case that creditors may have initiated against the distressed enterprise.

Professor Westbrook notes, however, that:

“[S]tanding against universalism is [section] 304(c), which gives a shopping list of factors for the court to consider in determining what, if any, relief to give in deference to the [ancillary] foreign proceeding. This section’s enumeration of defenses against deference to [foreign proceedings] was no doubt essential to the adoption of [section] 304 in 1978 ....

40. Westbrook, Theory and Pragmatism, supra note 1, at 461.
41. Id. at 471.
43. While contemplated by §§ 304 and 305 of the United States Bankruptcy Code, there has not yet developed a widespread acceptance of the universalist approach, either as contemplated by the Code or as evidenced in other models. This fact accounts in part for the limited use by foreign commentators and courts of the term “ancillary,” and for the corresponding wider use of the term “secondary,” which often connotes some aspects of the “territorialist” approach, even where a so-called primary or main proceeding is recognized.
Subsection (c)(4) is especially troubling, because it explicitly refers to distribution of proceeds in a way 'substantially in accordance' with [United States] notions.\textsuperscript{46} Thus, § 304 proclaims both universalism and local preference, and leaves it to the courts to find solutions to the section's conflicting policies.\textsuperscript{47} The result is a mix of judicial results.\textsuperscript{48} Other weaknesses of § 304 include the absence of a choice of law rule, and the section's prohibition on United States courts to use an ancillary case to avoid transfers under American law.\textsuperscript{49}

As a practical matter, recognition of primary jurisdiction in one state along with subordinate secondary proceedings in other states may restrain full-blown competing cases. At the same time, the laws in different states often favor different creditors, have different standards for avoidance or other protective measures, and so forth. Unless the secondary jurisdiction is willing to recognize and substantially implement administrative and other orders from the primary jurisdiction, the line between ancillary and secondary proceedings becomes rather blurred. Thus, even while recognizing a foreign main proceeding, courts may be unwilling to accept a resolution that does not provide rights to the creditors in its jurisdiction that are comparable to those provided by local law. Nevertheless, even with the potential for limitations in some cases, the universalist approach sets the stage for cooperative cross-border administration.

The second approach to cross-border insolvency situations is often termed the "unity" approach.\textsuperscript{50} This approach has as its objective the development of a common insolvency regime, which can result in a single administrator of a cross-border proceeding, or a principal administrator which coordinates the actions of other forums.\textsuperscript{51} Under the unity approach, the debtor's assets and business interests are administered under the singular regime.\textsuperscript{52} As a practical matter, this approach could require that the bankruptcy laws of the states involved be similar or identical,\textsuperscript{53} or that each secondary state defer to the in-

\textsuperscript{46} Westbrook, \textit{Theory and Pragmatism}, supra note 1, at 473.


\textsuperscript{48} Id.; see Overseas Inns, S.A. P.A. v. United States, 911 F.2d 1145, 1149-50 (5th Cir. 1990) (refusing to recognize judgment in Luxembourg insolvency proceeding because judgment accorded United States tax claims lower priority than that provided under American law).

\textsuperscript{49} Westbrook, \textit{Theory and Pragmatism}, supra note 1, at 473.

\textsuperscript{50} Joint Project, supra note 30, § 5.1, at 7.

\textsuperscript{51} See id.

\textsuperscript{52} Id.

\textsuperscript{53} Attempts at establishing unitary regimes have failed in some cases even where the states involved have superficially similar legal systems or bankruptcy laws, because superficial similarity may be "deceptive and . . . [may] mask[ ] the complex
solvency laws of the primary state in which the insolvency proceeding is conducted. Alternatively, a unitary regime could be established by agreement of two or more jurisdictions to apply common standards for administration and distribution, either by reciprocal legislation, a treaty applicable to cross-border cases, or an ad hoc agreement if there exists authority to implement such agreement.

States that do not recognize the legitimacy of foreign insolvency proceedings, or recognize them in limited respects and give minimal effect thereto, are said to adhere to the "territoriality" approach. Under this approach, each state asserts the sovereignty of its domestic law, at least with regard to property or parties within its jurisdiction, thus foreclosing or significantly limiting prospects of cooperation with respect to foreign insolvency proceedings. The territoriality approach traditionally is based on various factors, including, among others, protection of local creditors or debtors, protection of local jurisdiction of the courts and/or administrators and trustees, and objections to extraterritorial application of foreign laws and/or recognition of foreign representatives. The territoriality approach often results in multiple cases with a limited mandate to cooperate with another jurisdiction in which there is a case deemed by other states to be the primary case. In actuality, even states which exhibit support of universalism, such as arguably the United States, apply territorial principles as deemed necessary for public purposes. Examples of such application are the traditional reluctance by United States courts to enforce foreign revenue or export violation claims, and the interposition of procedural and substantive problems that must be resolved in an international insolvency case.

54. Id.

55. It has been suggested that parties seeking to establish a unitary regime should adopt a "functional" approach, under which rules are "determined [according to] the nature of the transactions at issue and the economic and social policies ... involved," allowing parties to "examine the legal issues without being [unduly] constrained by prior legal concepts." Id. at 896. Thomas Gaa also suggests that the history of attempts to promote cooperation "demonstrates that success generally occurs only between states [that have] significant commercial relations with each other"; in such circumstances, commercial necessity may help to balance legal differences. Id.

56. Joint Project, supra note 30, ¶ 5.1, at 7.

57. Id.

58. A different situation arises in cases involving competing main cases, in which each state may have both substantial contacts and either creditors or debtors, or both, within their respective jurisdictions.

59. Not all commentators share that view. For example, two commentators noted recently:

Many [United States] courts have adopted a territorial approach to the transnational bankruptcy dilemma. United States creditors oppose transfers of property to foreign courts because these creditors lose control over assets located in the United States and must incur the inconvenience of traveling to pursue their claims abroad.

tion of national or local law-based priorities, such as certain labor claims, mechanics liens, government statutory claims, and setoffs. While territorialist states are less likely to accommodate cross-border cooperation, there is nevertheless some evidence that a number of states previously considered in that category may now be willing to consider a more open system, with some degree of recognition of foreign jurisdictions and representatives.60

IV. JUDICIAL COOPERATION IN CROSS-BORDER INSOLVENCIES

In the absence of a specific treaty or legislative framework, various techniques have been employed in pursuit of judicial cooperation to provide access to local courts by foreign insolvency administrators and recognition of foreign insolvency proceedings.61 In common law jurisdictions, the doctrine of “comity”62 is one such technique, which serves as guidance for courts in considering whether to recognize the acts of other states.63 The flexibility afforded by the doctrine, however, “can [also] lead to unpredictability of results,” and is neither “well-suited to the code-oriented nature of civil law jurisdictions” nor does it provide a basis on which to anticipate recovery risks.64 In civil law states a foreign administrator often must utilize a local civil law and petition the local court to recognize foreign insolvency proceedings through the issuance of an enabling order or “exequatur.”65 The granting of an exequatur provides in some states the right to appoint a local insolvency administrator to control the realization of assets locally, and in other states entitles the foreign administrator to remove transportable assets and distribute them in foreign proceedings.66

The need for cooperation has made the case-by-case judicial approach a de facto norm for resolving the complex procedural and substantive issues involved in international insolvency proceedings, and is

60. See infra notes 75-86 and accompanying text.
62. In In re Maxwell Communication Corp., 170 B.R. 800 (Bankr. S.D.N.Y. 1994), aff’d, 186 B.R. 807 (S.D.N.Y. 1995), one of the recent multinational insolvency proceedings in which the issue of comity was raised, Bankruptcy Judge Brozman referred to the description of comity set forth by the Supreme Court in Hilton v. Guyot, 159 U.S. 113 (1985):

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.

Maxwell, 170 B.R. at 815 n.20 (citing Hilton, 159 U.S. at 163-64).
63. Joint Project, supra note 30, ¶ 5.3, at 8.
64. Id. ¶ 5.3, at 9.
66. See Joint Project, supra note 30, ¶ 5.4, at 9-10.
"a primary source of an evolving ‘international common law of bankruptcy.’" The growing practice of cross-filing to obtain concurrent proceedings in several jurisdictions has resulted in distressed companies or their creditors relying on the courts "to impose ad hoc harmonization on their affairs," and to impose some restraint on conflicting demands of the bankruptcy laws of the countries involved. Cases filed under United States bankruptcy law may reflect this trend.

Progress by the courts in several states in reaching across borders for coordination has been responsible to some degree for support for new efforts to achieve internationally accepted rules that might move cases away from the more traditional territorialism. Solutions developed through this de facto approach could be incorporated into such rules or into treaties or other agreements among major trading partners.

Another closely related aspect of the judicial process should be considered briefly—the recognition and enforceability of orders and judgments. The effectiveness of any international bankruptcy standards or treaties may turn on their ability to increase the predictability that bankruptcy orders or adjudications rendered by a 'competent court' will be recognized. Domestic laws as a matter of course provide jurisdiction when based on a proper finding of an in rem or in personam connection, although the criteria upon which such a finding is made may vary considerably, and may be the basis for denying application of a foreign order or decree. Certain areas of law, however, by purporting to grant jurisdiction to a court on the basis of property or parties outside its territory, may be considered "exorbitant," and could raise doubts as to whether a court acting under such authority would be able to achieve recognition of its actions abroad.

The United States Bankruptcy Code has been construed to grant such authority under § 304, vesting jurisdiction to issue orders affecting the debtor's estate wherever located. From one point of view, this grant of jurisdiction allows for a more universalist approach, supports coordination of actions, allows for the issuance of an automatic stay applicable worldwide by its terms, and limits the flight of overseas assets. While reasonable from the vantage point of the territory es-

67. Gaa, supra note 4, at 899.
68. Id.
posing such a law, § 304 is in many cases rejected by courts or authorities in other states as an unacceptable extension of jurisdiction.\textsuperscript{71}

The United States' recognition of foreign parties' interests in cross-border insolvency proceedings has not always been reciprocated.\textsuperscript{72} Nevertheless, inclusion of a reciprocity requirement in § 304 of the Bankruptcy Code has been resisted.\textsuperscript{73}

V. CURRENT DEVELOPMENTS

Two overlapping trends in recent times have demonstrated an effort to harmonize laws and procedures in transnational bankruptcy cases.\textsuperscript{74} While generalizations of course set the stage for citation of numerous exceptions, these two trends can roughly be characterized as follows: (1) efforts since the 1970s, largely supported by governments, to draft bilateral and multilateral treaties seeking to harmonize insolvency standards or at least establish principles of applicable law; and (2) efforts largely since the 1980s, led primarily by private associations and judicial activism, to establish rules, guidelines, or model laws. Each trend has influenced the other, and together they have created the possibility that real progress is achievable in this field.


\textsuperscript{72} The conflict over the extraterritorial reach of the United States Bankruptcy Code is not confined to distant shores. Recent bankruptcy legislation introduced in 1995 in the Canadian Parliament, while adopting some approaches similar to the Bankruptcy Code, especially those relating to chapter 11, rejects automatic enforcement of stays issued by courts outside Canada, in part because of the purported statutory reach of § 304 over assets located in Canada.

\textsuperscript{73} See Gaa, \textit{supra} note 4, at 891 n.36.

\textsuperscript{74} Westbrook, \textit{Theory and Pragmatism}, \textit{supra} note 1, at 467 & n.33. In some instances, United States courts have refused to enforce foreign judgments without evidence of actual enforcement of American judgments. See Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1005-06 (5th Cir. 1990). A reciprocity rule strictly applied may bring about unintended results; United States courts have generally been more inclined to apply concepts of "comity." \textit{See In re Hourani}, 180 B.R. 58, 64-70 (Bankr. S.D.N.Y. 1995) (discussing the relationship between § 304 and foreign law and procedures, and dismissing petition for turnover of assets in ancillary proceeding based on foreign creditors actions under Jordanian law).

\textsuperscript{74} A detailed review of these developments is beyond the scope of this Article. Thus, such developments will be mentioned here only briefly, along with more detailed comments on a recent effort in which the State Department has been involved. For a convenient survey of recent efforts to harmonize international bankruptcy laws and procedures, see Sidney B. Brooks, Judicial Conference of the United States, Report on Current Programs and Events Concerning International Commercial and Bankruptcy Law (Nov. 16, 1995) (on file with author).
Principal examples of the first category include: the 1982 European Community Draft Bankruptcy Convention ("Brussels Convention"), an ambitious effort that was scaled back in subsequent drafts; the 1990 Council of Europe Convention on Certain International Aspects of Bankruptcy ("COE Convention"), which has not been implemented; and the recent 1995 European Union Convention on Insolvency Proceedings ("EU Convention"), which is subject to ratification and is not yet in force. The COE Convention was a modest approach to cooperation in insolvency cases, reflecting the failure of the more elaborate Brussels Convention to win European support. The COE Convention's greatest advance was that it would have permitted a liquidator appointed in one member state to act in another member state. At the same time, its effect was markedly reduced, apparently as a compromise in part over concerns about granting extraterritorial powers to liquidators, by allowing for "secondary" bankruptcies in each state that controls assets of the debtor. The European Union, following up on the work done on both the Brussels and COE Conventions, completed negotiations in 1995 on a new "Convention on Insolvency Procedures." The 1995 EU Convention reflects the extent to which consensus was achievable at this stage amongst the EU member states, and is as a result somewhat limited, focusing primarily on liquidation procedures. Nevertheless, its completion is in itself an achievement, but at the same time illustrates the difficulties facing harmonization in this field, even among states that have as an incentive growing economic integration.

75. For a review of, and comments on, the Brussels Convention, see The EEC Preliminary Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions, and Similar Proceedings: Report of the Advisory Committee (Kenneth Cork, Chairman, Aug. 1976) (on file with author).

76. For a comprehensive review of these developments through 1993, see Trautman et al., supra note 70, at 573-625. Professor Trautman and his co-authors compare these developments with the "evolving experiment" of § 304 in the United States. This article is essential reading for those seeking to understand the limits reached thus far by our trading partners in Europe, and their implications for what is achievable in a wider international context.

77. Copies of the Brussels Convention, COE Convention, and EU Convention are available from the author at the Office of the Legal Adviser (L/PIL), Department of State, Washington, D.C. 20520.

78. Westbrook, Theory and Pragmatism, supra note 1, at 487.

79. Id.

80. Id. "These secondary proceedings would permit local distribution to priority ('preferential') and secured creditors, and would distribute any surplus to the main bankruptcy. As in [the United States equivalent to secondary] bankruptcies, there [would] rarely be significant surplus after . . . priority claims [were] paid." Id. (footnote omitted).

81. See generally Manfred Balz, Roads Toward World-Wide Minimum Co-Operation in Transborder Insolvencies, in Multi-Discipline/Multinational Colloquium (Apr. 17-19 1994) (on file with author) [hereinafter Vienna Colloquium Papers] (discussing past and possible future approaches to harmonization of international insolvency cases).
In the Americas, prior to completion of the 1982 draft Brussels Convention and following enactment of sections 304 and 305, negotiations were undertaken between Canada and the United States toward a bilateral treaty on bankruptcy matters. This treaty represented an ambitious step toward the single administration of cross-border cases, and included rules governing jurisdiction, transfer of cases, stays, reciprocal recognition, certain priorities, and other matters.\(^2\) The negotiations were abandoned after an impasse over rules for determining which country would qualify as the forum state, which in part reflected the concerns of some industries operating on both sides of the United States-Canada border but subject to various protective laws. It is interesting to speculate on what might have resulted had the negotiation taken place after the United States-Canada Free Trade Agreement ("FTA") was in force.\(^3\) Indeed, following the entry into force of the North Atlantic Free Trade Agreement ("NAFTA"), the American Law Institute ("ALI") has undertaken a project to examine current practices in Canada, Mexico, and the United States in part to determine whether harmonization might be undertaken.\(^4\)

In addition, the OAS might seek to join the list of international bodies considering a draft multilateral treaty. Cross-border insolvency is on the list of possible projects from which the OAS will select two or three projects for the next Inter-American Specialized Conference on Private International Law, which may take place in 1998.\(^5\)

More recently, UNCITRAL has undertaken to draft a model law limited to procedural aspects of cross-border insolvency. While UNCITRAL is a governmental body of the United Nations, the project grows out of and is discussed as part of the second category of modern harmonization efforts.\(^6\) It is of course possible that after the outline of whatever possible consensus becomes clear, delegations at the United Nations may seek to convert the text to a multilateral treaty.

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\(^4\) ALI Advisory Committees have been established in each country and a comprehensive statement of bankruptcy practices will result. See American Law Institute, Transnational Insolvency Project: International Statement of United States Bankruptcy Law 2-3 (Council Draft Nov. 13, 1995) (on file with author) [hereinafter Statement of United States Bankruptcy Law]. The ALI's preliminary objectives include possible model procedures for cross-border cases. See id. at 1.


\(^6\) See infra notes 95-103 and accompanying text.
The principle examples of the second category of current cross-border insolvency projects, based on the work of professional associations and the judiciary, includes the ALI's comprehensive examination of insolvency law and practice in the three NAFTA States,\textsuperscript{87} the International Bar Association's ("IBA") 1988 Model International Insolvency Cooperation Act ("MIICA"), and 1995 Cross-Border Insolvency "Concordat," both of which outline principles for cooperative administration and adjudication.\textsuperscript{88}

Drawing on the precedent of § 304's allowance for cross-border cooperation, MIICA would require an enacting state to recognize and accommodate certain foreign insolvency proceedings, subject to the orders of the recognizing state's courts. MIICA would make a single administration more feasible, and would favor applicable law rules pointing toward the jurisdiction properly exercising supervision over the case.\textsuperscript{89}

The second initiative of the IBA's Committee J was the completion of the Cross-Border Insolvency Concordat ("Concordat").\textsuperscript{90} The

\textsuperscript{87} The ALI's project is at an initial stage, and thus will not be commented upon here in detail. Nonetheless, the ALI's collection of draft statements concerning domestic and international insolvency practice in the three NAFTA states is becoming one of the major surveys of current practice, and will soon be required reading in this field, at least with respect to American practice. See Statement of United States Bankruptcy Law, \textit{supra} note 84; Statement of Candadian Bankruptcy Law, \textit{supra} note 83. The International Statement of Mexican Bankruptcy Law is in progress. For a discussion of bankruptcy practice in Mexico, see John A. Barrett, Jr., \textit{Mexican Insolvency Law}, 7 Pace Int'l L. Rev. 431 (1995).

The final direction that the ALI project will take will be determined only after review of completed studies of each country. In any event, however, the project should promote significant cross-border consultation. Preliminary views expressed at this point indicate that the project should be limited to commercial and legal entities, that neither harmonization of insolvency laws nor a comprehensive treaty are likely to be achievable in the near future, and that the emphasis should be on progress which can be implemented without legislation. See Statement of United States Bankruptcy Law, \textit{supra} note 84, at 2. Also recommended is the drafting of enabling legislation and judicial guidelines.

\textsuperscript{88} See E. Bruce Leonard, \textit{The Committee J Initiatives in Cross-Border Insolvencies and Reorganization} 5-8, 10-12, in Vienna Colloquium Papers, \textit{supra} note 81; see also John A. Barrett, International Bar Association Business Section, Cross-Border Insolvency Developments, Realities and Solutions (1996) (on file with author) (reviewing Committee J's work and related projects).

\textsuperscript{89} See Seldina A. Melnik, \textit{Cross-Border Insolvencies: The United States Perspective—A Primer, reprinted in Dealing With Foreign Workouts and Insolvencies 1993: Practical Strategies for Lenders and Investors} 31 (PLI Com. L. & Prac. Course Handbook Series No. 671, 1993) (providing a commentary on MIICA, together with draft legislation and rules changes necessary to integrate the model act into existing United States bankruptcy law); see also Panuska, \textit{supra} note 1, at 396-400 (discussing MIICA and suggesting that it presents a likely model through which to achieve international insolvency cooperation).

\textsuperscript{90} Committee J—Insolvency and Creditors' Rights, International Bar Association, Cross-Border Insolvency Concordat (Sept. 1995 ed.) (on file with author) [hereinafter Concordat]. John A. Barrett, Chair of Committee J, also serves as a member of the United States delegation to UNCITRAL, which began its work on this project in 1993. Participant countries are listed in Appendix I to the Concordat. Explana-
Concordat was drafted by state teams organized in twenty states, covering both common and civil law states. The Concordat’s “Principles” favor a single administration, and, where appropriate, a “main” proceeding, broader recognition of foreign representatives, access for creditors interests, and coordinated adjudications when multiple cases are in progress. While recognizing local priorities and preferences, as well as the right to permit the satisfaction of secured interests, the Concordat nevertheless seeks to advance beyond prior unification efforts. Principle 8 in particular seeks to limit reflexive application of territorially-based forum law, and instead recognizes the importance of international principles in choice of law analysis.

This approach builds on what may be growing support for the idea that at least among many courts and the insolvency bar, there is emerging an international “practice” which reflects some consensus on the rationalized application of laws to streamline administration in cross-border cases, and to maximize the estate or permit greater protection of going concern value.

Judicial activity in the context of cross-border insolvencies has stimulated a number of reform efforts, coupled with the work of various professional associations. One of the latest projects, undertaken

91. See Concordat, supra note 90.
92. See id. at 5-8. For a comparison of nine “principles” based on British cases involving foreign corporations, see Vincent Meerabux, Commonwealth Caribbean Courts’ Jurisdiction in the Winding Up of Foreign Corporations, 3 J. Transnat’l L. & Pol’y 11 (1994). Mr. Meerabux notes that the application of existing precedent can limit cross-border cooperation. See id. at 20.
93. Principle 8 (of ten Principles) provides in pertinent part:
   A. Each forum should decide the value and allowability of claims filed before it using a choice of law analysis based upon principles of international law. A creditor’s rights to collateral and set-off should also be determined under principles of international law.
   B. Parties are not subject to a forum’s substantive rules unless under applicable principles of international law such parties would be subject to the forum’s substantive laws in a lawsuit on the same transaction in a non-insolvency proceeding. The substantive and voiding laws of the forum have no greater applicability than the laws of any other nation. Concordat, supra note 90, at 7-8.
94. While being cautious with the analogy, this international insolvency “practice” is comparable in some respects to other recent advances toward unification of commercial law at the international level. The most recent OAS Specialized Conference on Private International Law, which completed in March 1994 the Inter-American Convention on the Law Applicable to International Contracts, made notable strides forward by including in the Convention “general principles of international commercial law recognized by international organizations” as one basis upon which to determine the applicable law, and by drawing on business usages commonly recognized in international practice, if not in domestic law. See Harold S. Burman, International Conflict of Laws, The 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990’s, 28 Vand. J. Transnat’l L. 367, 380 (1995).
under the auspices of the United Nations, was the decision of the UN-CITRAL in May 1995 to establish an official Working Group on Insolvency Law. This initiative resulted from collaboration between UNCITRAL and the International Association of Insolvency Practitioners ("INSOL"), under which two joint international colloquia were held in 1994 and 1995 ("Colloquia") to define issues on which there existed sufficient consensus, and to explore the feasibility of undertaking such work at a general international commercial law body of the United Nations General Assembly.

The Colloquia concerned work already underway on draft United Nations rules, and involved judges, governmental officials, insolvency practitioners, lenders, and other interested groups. There was consensus that judicial cooperation is "hindered by [the] disparity or inadequacy of laws" in this area, and that "even in jurisdictions where judges [are] given broad discretionary power, . . . a legislative framework could provide [greater] predictability [for] resolution of cross-border insolvencies." In cross-border insolvency proceedings it is often necessary to clarify conflicting information, keep track of foreign proceedings, obtain explanations of foreign law, and develop insolvency plans and solutions applicable to parties in all jurisdictions.

The Colloquia also focussed on the need for some version of an automatic stay of execution of claims, which "would provide at least a minimum period of time to examine the request of foreign insolvency representative[s] before a liquidation or dismemberment of the insolvent estate."


96. See generally Secretariat Insolvency Report, supra note 61 (describing information presented and conclusions drawn at the 1995 Judicial Colloquium on Cross-Border Insolvency); Vienna Colloquium Papers, supra note 81 (containing information presented at the 1994 UNCITRAL-INSOL Colloquium).

97. UNCITRAL was established by General Assembly Resolution in 1966, and consists of 36 member states. Its meetings include a number of observer states and other international bodies, both governmental and private. UNCITRAL has operated on a technical and non-political basis, and has avoided both political and regional issues common to a number of other United Nations bodies. For an overview of UNCITRAL's work and future agenda, see Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law, U.N. GAOR Comm. on Int'l Trade L., 25th Sess., U.N. Doc. A/ CN.9/SER.D/1 (1992).


99. Id. ¶ 17.

100. Id. ¶ 16. A proposed system of accreditation of insolvency representatives was recommended but not acted upon. See id. ¶ 18.
The recommendations of the Colloquia were then deliberated by UNCITRAL, which is composed of government delegations and which agreed in May 1955 to authorize a Working Group on Insolvency Law ("Working Group") to draft United Nations rules, limited generally to access, recognition, and judicial cooperation. Any consideration of substantive issues, such as priorities, will have to wait for separate authorization by UNCITRAL at a much later stage, if at all. The Working Group has met twice to date, in Vienna and New York, and will meet twice more before bringing the draft rules to UNCITRAL for final consideration at its 1997 Plenary session.

They key issues to be resolved are: whether a foreign proceeding or representative is entitled to recognition; whether such recognition would necessitate a finding of the basis for jurisdiction or statutory authority to act; whether the concept of a main or primary jurisdiction would be accepted; whether interim relief can be sought before recognition; whether a stay or moratorium would be available, or automatic, and what scope it could have; whether the concepts of debtor in possession, as well as voluntary actions not based on actual insolvency, would be included; and whether "national treatment" would be accorded once recognition was granted, or whether greater rights could be exercised or permitted by a forum state if available to a foreign representative in its home state. Finally, it will be necessary to determine the extent to which any minimum standards will be included, which would take precedence over national treatment. The sum total of the answers to these issues will determine whether the proposed United Nations draft law rules have achieved enough to warrant support.

101. These limitations were supported by the United States.
102. The Reports of the Working Group are found in Working Group Report, supra note 95, and another United Nations document that is not yet available. The first report indicates that it discusses the 18th meeting, the second indicates that it reports on the 19th meeting, and so on, which reflects prior meetings of the Working Group on other topics. In practice, the makeup of delegations changes to reflect the topic then assigned.

It is expected that certain cases will be excluded from the draft rules, including the insolvencies of banking and other financial institutions, securities firms, and possibly other businesses which are substantially regulated. This exclusion may extend to certain transactions as well, such as funds transfers and futures transactions, that require clearance and settlement.

If UNCITRAL member states at a later stage decide to convert the rules to treaty form, other issues will need to be decided, including the scope of application—whether the treaty would cover all cases or only those involving two or more states,
VI. Perspectives

As in many specialized fields, insolvency law has been built on particular traditions and is a strong competitor in maintaining its boundaries against incursion by other areas of law. Progress toward harmonization has been more difficult—at least in the past—than many other areas of law. As noted earlier, although federalized in the United States Constitution, the first comprehensive Bankruptcy Code in the United States took about 100 years to achieve, and was not substantially modernized, at least with respect to cross-border matters, for another eighty years.\textsuperscript{104} Progress in other states legal systems has been similarly difficult.

From our vantage point, the continuing American experiment in the late 1970s with sections 304 and 305 opened a path for cross-border cooperation. There has been progress toward harmonization in the 1980s and 1990s, led substantially by nongovernment associations such as the IBA, INSOL, ALI, and others, assisted by the willingness of the courts in many states to consider greater cross-border cooperation. Attempting to achieve limited but key procedural targets such as access and recognition, and foregoing the temptation to deal with so-called substantive issues, provides a platform from which to achieve real progress. Seeking harmonization on such limited basis\textsuperscript{105} is feasible at this time and is worth the required resources, as well as the support of governments that will have to enact or facilitate such measures. As a governmental approach, the multilateral effort at the United Nations is a positive step, with its apparent and necessary reliance on practical economic results and the needs of the insolvency bar. Of course, the strength of the territorial impulse and pressures for protective legislation that can arise in any state cannot be underestimated throughout this quest. By the year 2000 we are likely to have the answer as to whether the “grail” is finally within reach.


\textsuperscript{105} Even while accepting this limitation, views differ of course on the procedural objectives that can be accomplished, and the extent to which the United States can promote various policies given uncertain support from other participating states. See Advisory Committee Study Group on Cross-Border Insolvency, United States Department of State, Discussion Paper (Mar. 16, 1996) (on file with author); Letter from Lawrence Kaiser to the Office of the Legal Adviser (Mar. 16, 1996) (on file with author). Meetings of the Study Group and the Secretary of State’s Advisory Committee on Private International Law are open to the public.